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John Joyce

that the vehicle itself is defective—either in its performance, construction, components, or materials. Thus, the Government had to demonstrate that the incidents of skidding occurred under circumstances in which, absent a defect, they would not have otherwise occurred. The Court of Appeals held that the consumers were not capable of determining whether the incidents they had experienced would not have occurred otherwise. The court did not hold, however, that consumer-complaint evidence alone could never suffice to demonstrate a defect under the Act. Instead, the court limited its decision to the facts of this case, in which consumer-complaint testimony did not prove a defect.

In addition to the consumer complaints, NHTSA also relied on the *relative* complaint rates for X-cars and for other cars to show that the X-cars were defective. NHTSA claimed the different complaint rates indicated that the X-cars, rather than other factors, were responsible for the skidding. The Court of Appeals rejected this argument because the number of complaints for the model X-cars was probably increased by the excessive publicity surrounding them. According to the court, the film clip which described the X-car was witnessed by approximately 53 million viewers, and follow-up newspaper and television stories added to the public's awareness. As evidence that this publicity affected the complaint rate, the court noted that GM and NHTSA received more complaints during the two weeks following the release of the film clip than they had in the previous 3½ years. Thus, GM was able to explain the high rate of complaints by reference to a factor other than vehicle malfunction. As a result, the skidding experienced by consumers was not linked to any malfunction in GM's model X-cars.

Finally, the Government objected to GM's use of test data to rebut the Government's evidence of a defect. According to the Government, GM could rebut the Government's evidence in only two ways: 1) by showing that any failure in the braking system resulted from gross and unforeseeable owner abuse or neglect; or 2) by showing that any failure in the braking system occurred in non-dangerous situations. The court rejected this contention. Instead, the Court of Appeals held that the test data was relevant to show that the skidding could have been caused by factors other than vehicle malfunction, and that GM's X-car was no more likely to experience skidding than other cars. The court also rejected the Government's claim that the tests used by GM were unrepresentative, and affirmed the trial court's judgment in favor of GM.

Peggy Healy

FEDERALLY INSURED STATE CHARTERED MINNESOTA BANKS MAY CHARGE 21.75 PERCENT INTEREST ON AGRICULTURAL LOANS WITHOUT VIOLATING STATE USURY LAWS

The Minnesota Supreme Court in *Vanderweyst v. First State Bank of Benson*, 425 N.W.2d 803 (1988), held that pursuant to federal law, 12 U.S.C. § 1831d(a) (1982), state chartered, federally insured banks have "most favored lender" status and can charge interest on agricultural loans at the highest rate available to any competing lender under state law. As a result, banks could charge up to 21.75 percent on agricultural loans without violating Minnesota's usury laws.

Federally Insured, State Chartered Banks Have "Most Favored Lender" Status

The Minnesota Supreme Court consolidated four cases for appeal: *Vanderweyst v. First Bank of Benson*, 408 N.W.2d 208 (Minn. App. 1987); *Walsh v. First Bank of Pennock* (and *Heimark v. Norwest Bank Montevideo*), 409 N.W.2d 5 (Minn. App. 1987); and *Bandas v. Citizens State Bank of Silver Lake*, 412 N.W.2d 818 (Minn. App. 1987). In each case, the Minnesota bank charged higher interest rates on agricultural loans than on other loans. The plaintiffs sued the banks for violation of the state usury laws. In three cases, *Vanderweyst*, *Walsh*, and *Heimark*, the actual interest rates ranged from 11.85% to 16%; in *Bandas*, the plaintiff alleged the bank charged 51.52% interest.

The borrowers contended that: (1) the federally insured, state chartered banks do not have "most favored lender" status; therefore, the banks do not have a choice between interest rates under 12 U.S.C. § 1831d(a); and, (2) under Minnesota law, the maximum interest rate that a lending institution can charge on agricultural loans is 4.5% in excess of the prevailing federal discount rate. MINN. STAT. ANN. § 334.011 (West 1981 & Supp. 1988).

The banks responded that pursuant to their "most favored lender" status under federal law, 12 U.S.C. § 1831d(a), they are allowed to charge the highest interest rate permitted by Minnesota law. According to Minnesota law, industrial loan and thrift institutions can charge 21.75% on agricultural loans; consequently, federally insured, state chartered banks are also authorized to charge 21.75% on agricultural loans. MINN. STAT. ANN. § 53.04 (West 1988). In all four cases, the trial

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courts held that because the 21.75% interest rate was allowed by state law, the banks were not guilty of usury. The Minnesota appellate court affirmed and the cases were consolidated on appeal to the state supreme court.

The Minnesota Supreme Court affirmed all four decisions, holding that the Depository Institutions Deregulation and Monetary Control Act of 1980 ("the Deregulation Act"), bestows most favored lender status on federally insured state chartered banks. 12 U.S.C. § 1831d (1982). Interpreting the legislative history, the court determined that Congress intended to give insured state banks the same advantages enjoyed by their national competitors, including the privileges concerning interest rates. Section 1831d(a) of the Deregulation Act specifically allows banks the choice of charging interest at a rate of either "not more than 1 per centum in excess of the discount rate on ninety-day commercial paper...or...the rate allowed by the laws of the State,...where the bank is located, whichever may be greater."

The Highest Rate a Bank May Charge is 21.75 Per Cent

The court next considered what rate banks with most favored status may charge under Minnesota law. The court noted § 334.011 allows a lending institution to charge interest at a rate not more than 4.5% in excess of the federal discount rate on a loan less than $100,000 for business or agricultural purposes. Section 53.04, however, enables industrial loans and thrifts to charge either the rate provided by § 334.011, or instead, 21.75% interest per year.

The court stated that when two statutes are in irreconcilable conflict, the special provision shall prevail over the general, unless the general provision was enacted at a later date and the legislature clearly intended that the general provision shall prevail. Because § 53.04 was enacted later than § 334.011 and had been amended more frequently and more recently than § 334.011, the court concluded that the legislature intended § 53.04, dealing with loans in general, to control over § 334.011, dealing specifically with agricultural loans. Consequently, the floating rate under § 334.011 is not an exclusive rate for agricultural loans for all lenders under Minnesota law. A 21.75% interest rate may be charged by industrial loans and thrifts for agricultural loans. Therefore, federally insured, state banks with "most favored lender" status may also charge 21.75% interest.

Banks did not Violate Minnesota State Usury Laws

The court next addressed whether the loans were in violation of the state usury laws due to the banks' failure to comply with regulations regarding industrial loans and thrifts. The court held that the licensing requirements for an industrial loan and thrift are not material to the determination of the interest rate, and that the most favored lender doctrine only adopts the state's usury laws insofar as they fix the interest rate. The banks are therefore subject to regulations that are material to the determination of the interest rate. A provision is material if: 1) it pertains to the manner in which the numerical rate of interest is calculated; or 2) it defines the class of loans in such a way (as by size, type of borrower, or maturity) as to effect the borrowed interest rate.

The court rejected the borrowers' argument that the statutory prohibitions against loan-splitting and charging attorney fees are material to the determination of the 21.75% interest rate and therefore applicable to the most favored lenders. The court stated that these prohibitions apply only to loans made pursuant to § 56.131. Minn. Stat. Ann. § 56.131 (West 1988). Because the loans made by the most favored lender banks were not made under § 56.131, the prohibitions against loan-splitting and charging attorney fees were not applicable. Consequently, there was no violation of Minnesota usury laws.

Justice Wahl concurred in part and dissented in part. He took issue with the majority's conclusion that federally insured, state chartered banks were authorized to charge 21.75% interest on agricultural loans. Under § 334.011, the legislature had mandated that the maximum interest rate on agricultural loans be no more than 4.5% in excess of the federal discount rate. Justice Wahl disagreed with the majority's interpretation of this section and of § 53.04. When two statutes conflict, Justice Wahl stated that the proper procedure is to give effect to both, if possible, before deciding which provision prevails. Section 53.04 states that industrial loans and thrift companies may make loans with certain ceilings as provided by § 334.011, or in lieu thereof, at the rate of 21.75%. According to Justice Wahl, this provision should be construed to mean that industrial loan and thrift companies generally may charge up to 21.75%, unless § 334.011 specifies a different rate on particular types of loans. Interpreted in this manner, the two statutes are not in conflict.

He concluded that this construction avoids conflict between the two statutes because only one provision would apply to a particular loan. Justice Wahl added that it is highly unlikely that the Minnesota legislature intended § 53.04 to circumvent the reach of § 334.011's interest ceiling on agricultural and business loans. It would be more reasonable to conclude that the legislature desired § 53.04 to require compliance with the rate ceiling in § 334.011 on agricultural loans. Consequently, the highest rate a "most favored lender" state bank could charge pursuant to § 334.011 on agricultural loans would be no more than 4.5% in excess of the federal discount rate.

John Joyce

Editor's Note: On November 7, 1988, the United States Supreme Court denied the petition for writ of certiorari. 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-591).

DISPOSAL OF TOXIC CHEMICALS HELD TO BE AN ABNORMALLY DANGEROUS ACTIVITY MANDATING STRICT LIABILITY

In *T & E Industries v. Safety Light Corp.*, 227 N.J. Super. 228, 546 A.2d 570 (N.J. Super. 1988), a New Jersey appellate court determined the scope of the liability of a manufacturer who disposed of hazardous waste on its former property. The court found the former property owner strictly liable to the successor in title who purchased the property without knowledge of the danger. The court held the resulting damages were proximately caused by the former owner and foreseeability was irrelevant. Further, the former owner could not rely on the doctrine of *caveat emptor* ("let the buyer beware") to avoid liability.

The United States Radium Corporation ("USRC") owned a plant in Orange, New Jersey. Between 1917 and 1926, USRC extracted from carnotite ore radium which was used for various commercial purposes. The processing yielded a solid waste known as "tailings" which were dumped on vacant areas of the property. Both radium and radium tailings are known carcinogens, posing a threat to human health.

In 1926, USRC closed its Orange plant site. The plant remained vacant until it was leased to commercial tenants in the mid-1930s. In 1943, the property was purchased by one former tenant. The purchaser was aware of the radium deposits at the time of purchase but did not regard the condition as dangerous. Consequently, the purchaser made an addition to the plant over the area contaminated with radium tailings. After a succession of owners, the site was sold in 1974 to the plaintiff, T & E Industries ("T & E").

In March of 1979, the New Jersey Department of Environmental Protection ("DEP") voiced concern about the possibility of an excessive level of radiation on T & E's property. Long-term monitoring equipment revealed radium levels sufficient to constitute a health risk. In response to DEP's request for remedial action, T & E hired a health physicist who implemented a variety of safety measures. In addition, T & E conducted independent testing which revealed that an assembly area worker at the plant would be exposed to the maximum statutory level of radioactive material within 3.18 years. It became clear that removing the contaminated soil under and around the building was the only way to render the building safe. When this measure was rejected as too costly, T & E relocated to a new facility.

T & E sued Safety Light Corporation and other successor corporations of USRC for property damages resulting from radium contamination. The complaint alleged absolute liability, nuisance, negligence, misrepresentation and fraud. T & E sought compensatory and punitive damages, as well as reimbursement for the cost of decontaminating its property. USRC was charged with originally dumping the radioactive waste on the property.

The trial court granted T & E's pretrial motion for partial summary judgment, holding that USRC had in fact placed the radium tailings on T & E's property. T & E proceeded to try its case relying on the court's apparent decision that the issue of absolute liability was decided in its favor. However, after T & E presented its evidence the trial court granted USRC's motion to dismiss T & E's absolute liability claims, contrary to its previous order. In addition, the trial court dismissed T & E's claims of fraud, misrepresentation, reckless conduct, and punitive damages, leaving only the negligence claim.

The court instructed the jury to determine, among other things, whether USRC was negligent in its failure to warn T & E of a potential health risk, and whether that negligence was a proximate cause of T & E's damages. The jury found that USRC had been negligent and that this negligence had proximately caused T & E's damages. However, the trial judge granted USRC's motion to set aside the jury verdict on the ground that the doctrine of *caveat emptor* barred T & E's claim.

On appeal, the Superior Court of New Jersey, Appellate Division, noted that "many of today's problems due to toxic waste are a result of yesterday's mistakes... for which yesterday's perpetrators must be held responsible." 546 A.2d at 575. Of the five issues raised by T & E on appeal, the court addressed only the issue of absolute or strict liability. Under traditional tort doctrines,

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