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CERRO GORDO COUNTY, IOWA

IN THE IOWA DISTRICT COURT FOR CERRO GORDO COUNTY

Magistrate Division

CHASE BANK USA, NA,
Plaintiff(s),

DAVID SOLBERG,
Defendant(s),

Docket No. 49326

Ruling and Order

* *

BE IT REMEMBERED this matter came on for trial on February 14, 2011 on Plaintiff's claim for money judgment for alleged breach of a credit card agreement by failing to make payments. Plaintiff appeared by Russell Locke of Chase Bank and was represented by Attorney Christopher Low. Defendant appeared personally and was represented by Attorney Ray Johnson. At the outset of trial Defendant filed a Motion to Dismiss and in the alternative a Motion to Compel Arbitration. The Court continued the matter to allow Plaintiff to file a response to Defendant's motions and noting that since the parties agreed that an arbitration provision was contained in any credit card agreement between the parties it would be a waste of time to proceed to trial at that time. If the Court granted the Motion to Dismiss there would be no need for trial and if the Court denied the Motion to Dismiss it would likely grant the Motion to Compel Arbitration in which case trial would also not be necessary.

Both parties have now submitted arguments on the Defendant's motions. After reviewing the statutes involved and the arguments the Court hereby grants the Defendant's Motion to Dismiss.

RULING

Defendant argues that before Plaintiff can collect debts in Iowa it must register with the Attorney General under Iowa Code §537.6202(1). That section provides in relevant part: "Persons subject to this part shall file notification with the administrator within thirty days after commencing business in this state and, thereafter, on or before January 31 of each year. The notification must state all of the following: *a.* Name of the person. ,....*f.* Address of designated agent upon whom service of process may be made in this state." This notification applies to: "Debt collectors, as defined in section 537.7102, subsection 5, to whose acts, practices, or conduct this chapter applies pursuant to section 537.1201 if the total debt collected by a debt collector in the preceding calendar year exceeds twenty-five thousand

dollars, or if not, if the total debt collected during the current calendar year exceeds twenty-five thousand dollars . . ." The Code exempts state banking institutions licensed under various chapters.

Defendant argues that compliance with this notification requirement, especially the designation of a registered agent for service of process, is critical to his ability to defend in this action. With such a designation he can serve subpoenas for witnesses and documents necessary for his defense. Without a registered agent in Iowa for service of process the Defendant must use a costly and complex means to try to obtain such information. Defendant argues that compliance with this requirement is a prerequisite to Plaintiff filing a claim and that Plaintiff's failure to comply with this code requirement should result in dismissal of the Plaintiff's claim.

Plaintiff argues that the controlling law is found in Iowa Code §490.1501(1),(2) (a) (g)(h)(k) which provides in relevant part: "(1) A foreign corporation shall not transact business in this state until it obtains a certificate of authority from the secretary of state. (2) The following activities, among others, do not constitute transacting business within the meaning of subsection 1: (a) Maintaining, defending, or settling any proceeding. (g) Creating or acquiring indebtedness . . . (h) Securing or collecting debts . . . (k) Transacting business in interstate commerce." Plaintiff argues that Iowa Code §490.1501 thereby exempts it from the notification requirement cited by the Defendant. Plaintiff also argues that there are means under the Rules for Civil Procedure that would allow Defendant to depose opposing witnesses to obtain the information he says he needs to defend this action.

The Court can find no cases where the seeming contradictions between these two statutes have been resolved by the appellate courts. Therefore the Court will rely upon the general rules of statutory construction as set out by the Iowa Supreme Court. The Iowa Supreme Court has stated:

> "Our primary goal in statutory construction is to determine legislative intent. *In re Estate of Thomann,* 649 N.W. 2d 1, 4 (Iowa 2002). When interpreting a statute, we assess the entire statute, not just isolated words or phrases. *State v. Young,* 686 N.W. 2d 182, 184-85 (Iowa 2004). We also presume the legislature included all parts of the statute for a purpose, so we will avoid reading the statute in a way that would make any portion of it redundant or irrelevant. *In re Estate of Thomann,* 649 N.W. 2d at 4. Where a general statute and a special statute are relevant, we will attempt to construe the statutes to give effect to both. *Id.* If we are unable to give effect to both, the provisions of the more specific statute control. *Id. Rojas v. Pine Ridge Farms, L.L.C.,* 779 N.W. 2d 223, 231 (Iowa 2010)

In this particular case, reading the statutes as argued by Plaintiff, effectively makes Iowa Code §537.6202 meaningless. The section already exempts instate debt collectors who are licensed by the various banking statutes. The only entities it could be meant to apply to would be debt collectors such

as foreign banks like the Plaintiff. Because the Court must presume the legislature did not intend to write a meaningless statute, the Plaintiff's argument fails. Furthermore, the statute relied upon by the Plaintiff is of general application to all foreign corporations seeking to do business in the state, except those entities and activities it specifically exempts. It requires compliance with that section in order to do business in Iowa. The statute relied upon by Defendant is specific to debt collectors under the Consumer Credit Code. The notice is not required for a party to do any business in the state but only involves a notification when a party is a debt collector in this state. Again, under the rule of construction, the more specific statute, in this case 537.6202, controls. It is interesting to note that the legislature apparently amended both statutes in 1989. If the legislature truly intended Iowa Code §490.1501 to supersede §537.6202 it could easily have noted that when amending the two sections. It did not, giving further strength to Defendant's argument. Presumably the legislature saw no need to require registration under §490.1501 since very similar information was already to be provided under §537.6202. To require it both places would be duplicative.

As a final comment, the Court finds little merit in Plaintiff's argument that the Defendant can obtain the sought after information through other means than serving a subpoena on the Plaintiff's registered agent, such as deposing witnesses in distant states. This action, like many such claims, is filed in small claims court. The legislature intended that small claims actions be simple and informal proceedings. There is limited discovery, i.e., no interrogatories under Rule 1.509(1) and depositions only upon leave of the court and a showing of just cause under Rule 1.702. However, subpoenas may be issued to compel the attendance of witnesses at a hearing. Iowa Code §631, *Midwest Recovery Services v. Cooper,* 465 NW 2d 855 (Iowa 1991). Without someone to serve the subpoena on, such as a registered agent, that right is effectively meaningless. Requiring a defendant to travel to distant states to do depositions and obtain evidence just to defend himself in a small claim would be contrary to the intent of the small claims procedure. It is disingenuous for the Plaintiff to make such a suggestion when the Court notes that Plaintiff's Counsel routinely does not appear in person in small claims proceedings but instead appears only by documents or by phone because the time and cost of traveling from Des Moines to Mason City would not be cost effective in small claims trials.

The last issue is whether the notification requirement is a violation of the Commerce Clause of the United State Constitution since the Plaintiff is a national bank. The Court finds that the letter of the Comptroller of the Currency cited by the Defendant, as well as federal banking regulations found in 12 CFR §§7.4007(b)(2)(vi) and 7.4008(d)(2)(i) give clear statements that state registration requirements

requiring designation of agents for service of process are not so onerous or burdensome that they are forbidden by the U. S. Constitution. Therefore the Court finds they are permissible and required by Iowa Code §537.6202 before the Plaintiff can proceed with this action. The Court finds that because such notification is mandatory by use of the word "shall" in §537.6202 and is necessary for Defendant to effectively defend himself in the court proceeding. Plaintiff's claim must be dismissed until it has complied with the statute.

The Court enters the following ORDER:

Defendant's Motion to Dismiss is granted and this matter is dismissed without prejudice. Plaintiff must comply with the notification requirements of Iowa Code § 537.6202 before it can proceed in this action. Because the action is dismissed the Court does not reach the alternative motion to compel arbitration. Costs are assessed against the Plaintiff.

Any party aggrieved by this decision may appeal by filing written notice of appeal within 20 days of this decision and paying the requisite costs of appeal.

Dated this 9th day of March, 2011.

Judicial Magistrate

Cerro Gordo County, Iowa

Copies to:

Plaintiff

Defendant

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

September 18, 2008

Interpretive Letter #1103
December 2008
12 USC 92a
12 CFR 9

Subject: Fiduciary Powers of [*Bank*], [*City, State*]

Dear [ ]:

This letter responds to your request dated August 28, 2008, concerning proposed fiduciary activities of [ ] (the "Bank") in the state of North Carolina. You have asked the Office of the Comptroller of the Currency ("OCC") to confirm that the Bank is authorized under federal law to be appointed, and accept any appointment, to act in a fiduciary capacity permitted to state fiduciaries in North Carolina without obtaining any express qualification or otherwise qualifying under North Carolina law. For the reasons set forth in this letter, we confirm that the Bank need not qualify under North Carolina law in order to act as a fiduciary in that state.

Background

The Bank is a national banking association authorized by the OCC to exercise fiduciary powers. The Bank intends to offer and deliver trust and fiduciary services in the state of North Carolina through trust offices that it has established in other states.[1] The Bank does not intend to establish a physical presence in North Carolina in order to conduct these activities. The Bank's home state is [*State*].

North Carolina law provides that "out-of-state trust institutions,"[2] including national banks, may conduct trust business in North Carolina, subject to certain requirements.[3] In particular, out-of-state trust institutions may engage in trust business in North Carolina only if they maintain a

[1] 12 C.F.R. § 9.7(c) expressly authorizes a national bank with fiduciary powers to establish trust offices or trust representative offices in any state.
[2] *See* N.C. Gen. Stat. § 53-301(a)(35).
[3] N.C. Gen. Stat. §§ 53-303(6), 53-303(b).

"trust office" in the state.[4] With respect to out-of-state trust institutions without a physical office in the state, such as the Bank, a "trust office" is defined as the "registered office."[5]

North Carolina law also imposes certain conditions on out-of-state trust institutions seeking to establish a trust office in the state. Before an out-of-state trust institution may establish and maintain the required trust office (and hence before it can engage in fiduciary activities under North Carolina law), it must provide notice to the North Carolina Commissioner of Banks (the "Commissioner").[6] Among other information, the notice must include proof that the institution has obtained from the North Carolina Secretary of State a certificate of authority for a foreign corporation to transact business in North Carolina.[7] The certificate of authority carries an annual report requirement.[8] Once the required notice is provided, the Commissioner may withhold approval of the out-of-state institution's proposed trust office if the Commissioner determines that the institution's home state imposes on "state trust institutions"[9] desiring to maintain trust offices in that home state restrictions "materially greater" than those imposed by North Carolina law.[10]

In addition to the requirements for out-of-state trust institutions described above, North Carolina law requires all banks, including national banks, to obtain a license from the Commissioner before exercising fiduciary powers in the state.[11]

As set out below, pursuant to 12 U.S.C. § 92a and the OCC's regulations at 12 C.F.R. Part 9, the Bank is legally authorized to be appointed, and accept any appointment, to act in a fiduciary capacity permitted for state fiduciaries in North Carolina without obtaining a license or approval of any sort from the state of North Carolina.

Analysis

The Bank's fiduciary powers are governed by federal law and derive from 12 U.S.C. § 92a and Part 9 of the OCC's regulations. Section 92a permits national banks to exercise fiduciary powers

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[4] N.C. Gen. Stat. § 53-314. This section contains both a grandfathering exception and an exception for depository institutions that maintain a branch in North Carolina. The Bank would not qualify for either exception, if the state law were applicable.

[5] N.C. Gen. Stat. § 53-301(a)(54). Under North Carolina law, maintaining a registered office entails having a registered agent in North Carolina whose duty it is to receive and forward any notice, process, or demand that is served on the institution. N.C. Gen. Stat. §§ 53-301(a)(39a); 55D-30.

[6] N.C. Gen. Stat. § 53-317.

[7] N.C. Gen. Stat. §§ 53-317(1), 55-15-01(a).

[8] N.C. Gen. Stat. § 55-16-22(a).

[9] This term is defined to include trust institutions organized under North Carolina law or having their principal offices in North Carolina. *See* N.C. Gen. Stat. § 53-301(47).

[10] N.C. Gen. Stat. §§ 53-315. The Commissioner may also disapprove an out-of-state trust institution's proposed trust office for other reasons. For example, the Commissioner may disapprove if he or she finds that the institution lacks the resources to undertake the proposed expansion without adversely affecting its safety and soundness. N.C. Gen. Stat. § 53-318(b).

[11] N.C. Gen. Stat. § 53-160; N.C. Admin. Code tit. 4, r. 3D.0101. However, the North Carolina statute provides that, unlike other out-of-state trust institutions, national banks are not examined by the Commissioner for licensing purposes. *Id.*

with OCC approval,[12] and directs that the types of fiduciary powers available to a national bank are to be determined by reference to state law. Section 92a(a) provides:

> The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Section 92a(b) provides that whenever state law permits state fiduciaries to exercise any of the eight fiduciary powers set forth in Section 92a(a), a national bank's exercise of those powers is deemed not to be "in contravention of State or local law."

The grant of statutory authority in Section 92a does not limit where a national bank with fiduciary powers may act in a fiduciary capacity. Accordingly, our regulations expressly provide that a national bank may act in a fiduciary capacity in any state, and may establish trust offices or trust representative offices in any state.[13] In addition, Section 92a imposes no limitations on where the bank may market its services, where the bank's fiduciary customers may be located, or where property being administered is located. Once the state in which a national bank is acting in a fiduciary capacity is identified,[14] the fiduciary services may be offered regardless of where the fiduciary customers reside or where property that is being administered is located. Our regulation codifies this authority, stating that while acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to customers in other states.[15] In addition, a national bank may act as fiduciary for relationships that include property located in other states.[16] Our regulations further provide that with the exception of those state laws specifically referenced in Section 92a, any other state laws limiting or establishing preconditions on the exercise of fiduciary powers by a national bank are not applicable to national banks.[17]

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[12] The OCC's regulations prescribe the requirements and procedures for a bank to obtain approval to exercise fiduciary powers. *See* 12 C.F.R. § 5.26 (licensing requirements for fiduciary powers).

[13] 12 C.F.R. § 9.7(a) and (c). For a detailed discussion of the analysis on which § 9.7 is based, *see* 66 Fed. Reg. 34792, 34794-96 (July 2, 2001) (preamble to final rule adopting § 9.7). *See also* OCC Interpretive Letter No. 695 (December 8, 1995) (IL 695) (analyzing national banks' authority to engage in fiduciary activities in multiple states); OCC Interpretive Letter No. 872 (October 28, 1999) (IL 872) (concluding that a national bank in Ohio may solicit and conduct a trust business in California and that state laws that purport to prohibit the bank from engaging in these activities are preempted).

[14] Part 9 of the OCC's regulations clarifies that the state in which a bank acts in a fiduciary capacity for any given fiduciary relationship is the state in which the bank performs the key fiduciary activities of accepting fiduciary appointments, executing documents that create the fiduciary relationship, and making decisions regarding the investment or distribution of fiduciary assets. If these key fiduciary activities take place in more than one state for any given relationship, a bank must designate the state in which it acts in a fiduciary capacity from among those states. 12 C.F.R. § 9.7(d).

[15] 12 C.F.R. § 9.7(b).

[16] *Id.*

[17] 12 C.F.R. § 9.7(e)(2).

North Carolina law purports to require an out-of-state national bank to obtain a certificate of authority from the North Carolina Secretary of State; submit annual reports to keep the certificate current; notify and receive approval from the Commissioner of Banks before engaging in fiduciary activities in North Carolina; and obtain a state license. These requirements would clearly limit or precondition the exercise of the Bank's federally authorized fiduciary powers. The North Carolina law imposing these requirements is preempted for national banks[18] with fiduciary powers because the requirements directly conflict with the powers of national banks to act in a fiduciary capacity granted under federal law by section 92a and the OCC's regulations.[19]

I trust that the foregoing is responsive to your request. Please feel free to contact Jon Mitchell, Attorney, at (202) 874-3828 should you have further questions.

Sincerely,

Signed

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

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[18] However, a requirement to register with the state solely for purposes of service of process would not be preempted. *See, e.g.*, 12 C.F.R. §§ 7.4007(b)(2)(vi), 7.4008(d)(2)(i).

[19] *See Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007) (holding that, under the National Bank Act, a national bank may conduct federally-authorized mortgage lending activities through an operating subsidiary without regard to state licensing regimes). Moreover, the issues discussed herein are essentially identical to issues already resolved by the OCC's Part 9 regulations and prior opinion letters cited herein. Accordingly, the publication requirements of 12 U.S.C. §§ 43(a) and (b) are not applicable. *See* 12 U.S.C. § 43(c)(1)(A).