

**FINANCIAL INSTITUTIONS COMMITTEE
REPORT PREPARED FOR THE DECEMBER 3, 2005, COUNCIL MEETING**

1. Next Scheduled Meeting of the Committee

None scheduled.

2. Council Approval

None.

3. Membership

The Committee has 71 members. Each member receives a notice and agenda of each Committee meeting. We regularly request that Committee members identify women or minority attorneys who might be interested in joining the Committee.

4. Accomplishments Toward Committee Objectives

See item 5 below.

5. Meetings and Programs

The most recent meeting was held on November 10 at the State Bar offices in Lansing. Nine members attended. (See the attached notice and agenda.)

- Richard Lavolette, the Chief Deputy Commissioner of the Office of Financial and Insurance Services ("OFIS"), reported on current developments at OFIS.
- Matt Hanley, Director of Government Relations for the Michigan Bankers Association, reported on the MBA's legislative priorities.
- Jim Breay, of Warner Norcross & Judd LLP, reported on the status of the Crestmark Bank litigation (see below).
- Rodney Martin, also of Warner Norcross & Judd LLP, reported on the implications of the recently-released HMDA data.
- Jim Breay reported on the implications of the Michigan Supreme Court's opinion in *Echelon Homes, LLC v Carter Lumber Company*, 472 Mich 192 (2005) (see below).
- The Committee discussed issues raised by the increasing use of prepaid gift cards and debit cards.

- Jim Breay distributed to each attendee a bound volume of resource materials (see attached Table of Contents).

6. Publications

At each meeting it is generally noted that the Business Law Journal needs articles.

7. Legislative/Judicial/Administrative Developments

- **"Knowledge" means actual knowledge**

A Michigan statute provides that a person who buys, receives or aids in concealing stolen, embezzled, or converted property can be held liable for treble damages if she knew that the property was stolen, embezzled, or converted. In *Echelon Homes, LLC v Carter Lumber Company* (see citation above), the Michigan Supreme Court reversed the Court of Appeals and agreed with the position of the Michigan Bankers Association, as set forth in its *amicus curiae* brief, that a bank or other party cannot be held liable for treble damages for "aiding and abetting" an embezzler unless the bank or other party has actual knowledge of the embezzlement and not merely constructive knowledge. "Constructive" knowledge is knowledge that a person would have acquired by using reasonable care or due diligence.

The issue of a bank's potential liability for treble damages for aiding and abetting an embezzlement may come up where an employee of a customer of the bank has embezzled funds from the customer by transferring to herself funds from the customer's deposit account with the bank, and the customer seeks to hold the bank liable for treble damages on the theory that if the bank had investigated the matter it would have learned of the embezzlement and that it therefore had "constructive" knowledge of it.

The Michigan Supreme Court agreed with the MBA that the statute that imposes treble damages for aiding and abetting an embezzlement requires *actual* knowledge of the embezzlement and not merely *constructive* knowledge.

- **Name of taxpayer/debtor on notice of federal tax lien**

The U.S. Court of Appeals for the Sixth Circuit, reversing the District Court, has held that a filed notice of a federal tax lien was valid even though the IRS placed a taxpayer name on the notice that was sufficiently different from the taxpayer's actual name that a search by the Secretary of State's computer did not disclose the notice, and a bank, in reliance upon the search, extended credit to the taxpayer/debtor.

The debtor's actual name was "Spearing Tool and Manufacturing Co., Inc." The name the IRS placed on the notice of federal tax lien was "Spearing Tool & MFG Company, Inc." The notice was not disclosed by the Secretary of State's

computer search because the search logic did not equate “and” with “&” and did not equate “Manufacturing” with “MFG”.

The bank involved has filed a motion for reconsideration, and Warner Norcross & Judd LLP has filed an *amicus curiae* brief in support of the motion on behalf of the American Bankers Association, the Michigan Bankers Association, the Kentucky Bankers Association, the Ohio Bankers League and the Tennessee Bankers Association. The brief argues that the Sixth Circuit’s decision requires a secured lender to take extensive and unreasonable actions – such as ordering multiple lien searches under all possible variations of a debtor’s name – in order to attempt to uncover hidden government liens.

8. Miscellaneous

None.

BUSINESS LAW SECTION
STATE BAR  **OF MICHIGAN**

October 6, 2005

To: Financial Institutions Committee

A meeting of the Committee will be held from 2:00 p.m. to 4:30 p.m. on Thursday, November 10, 2005, at State Bar headquarters, 306 Townsend Street, Lansing, Michigan, in the Hudson Room. Following is the agenda for the meeting:

- Office of Financial and Insurance Services report – Chief Deputy Commissioner Richard Lavolette
- Michigan Bankers Association report – John Llewellyn, MBA Vice President-Government Relations
- *Crestmark Bank* litigation: Sixth Circuit opinion effectively imposes new requirements when you search for a filed notice of federal tax lien – Jim Breay
- Lies, damn lies and statistics: False conclusions from the new HMDA data – Rodney Martin
- Likely Michigan legislation regulating “payday lending” – Jim Breay
- Michigan Identity Theft Protection Act
- Michigan Social Security Number Privacy Act
- Michigan Medical Records Access Act
- May a single mortgage have more than one mortgagee?
- Treble damages liability for aiding and abetting an embezzler where the customer’s employee transferred funds from the customer’s account to the employee. Does “knew” mean actual knowledge or only constructive knowledge?
- Reports on pending litigation and status of uniform laws - Office of the General Counsel of the American Bankers Association
- Other statutory, regulatory and judicial developments

If you plan to attend the meeting, please inform my secretary, Kristin Williams at (616) 752-2218 (kwilliams@wnj.com).

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