Opinion No. 60-141

August 9, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Howard M. Rosenthal Counsel New Mexico State Banking Department Santa Fe, New Mexico

QUESTION

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May a state or national bank located in New Mexico, after the passage of the Disposition of Unclaimed Property Act (Chapter 132, Laws of 1959; §§ 22-22-1 et seq., N.M.S.A., 1953 Comp. (P.S.)), pass regulations of the bank transferring inactive checking and savings accounts to a dormant ledger and charge service fees on such accounts which will, in time, partially or wholly extinguish the account before it becomes presumed abandoned under the act, and as such, subject to a turnover of custody to the State Treasurer and [Illegible Words] escheat to the State of New Mexico?

CONCLUSION

See analysis.

OPINION

*{*520}* **ANALYSIS**

The New Mexico version of the Uniform Disposition of Unclaimed Property Act, enacted by the 1959 New Mexico Legislature as Chapter 132, Laws of 1959, compiled as §§ 22-22-1 through 29, N.M.S.A., 1953 Comp. (P.S.), provides generally for the holders of personal property, including bank deposits, to turn over custody of such property, after certain legal publication requirements have been met, to the State Treasurer, if no activity has been evidenced in regard to such property by the owners thereof for a period of ten years. Property so held, with no such activity, is "presumed abandoned" and must be reported to the State Treasurer by the holder prior to publication and turnover.

Regarding bank deposits, § 22-22-3 A provides that any demand, savings or matured time deposit held by a banking or financial organization is presumed abandoned unless the owner (depositor) has, within ten years, (1) increased or decreased the amount of the deposit, or presented the passbook or other similar evidence of the deposit for the crediting of interest, (2) corresponded in writing with such banking or financial organization concerning the deposit, or (3) otherwise indicated an interest in the deposit as evidenced by a memorandum on file with such organization. Unless the owner has

acted as set forth above, the holder must report such deposits to the State Treasurer in accordance with § 22-22-12.

You state that certain state and national banks in New Mexico have, since the enactment of the Act, put into effect regulations which allow transfer or checking and savings accounts inactive less than ten years to a "dormant ledger", with an accompanying charge of a service fee upon the account each month even though the depositor has evidenced no activity in connection with his account. This fee may partially or wholly extinguish the account before the ten year period has run or can conceivably extinguish the account before the depositor resumes activity thereon, provided any such activity is resumed before the ten year period has run. You question the validity of such a regulation, despite the fact that nothing in the Act specifically prohibits such a practice.

The terms of the deposit of funds in a checking or savings account in a bank are covered by the contract of deposit between the depositor and the bank, as evidenced by the passbook or signature card signed by the depositor at the time he makes his initial deposit. **Michie, Banks, and Banking,** Chapter 9, § 1. Further, reasonable rules of the bank printed or referred to in a passbook or on a signature card are binding on the depositor. **Polonsky v. Union Federal Savings and Loan Association,** 334 Mass. 697, 138 N.E. 2d 115, 60 A.L.R. 2d 702 (1956); **Brunswick Corporation v. Northwestern National Bank and Trust Co.,** 214 Minn. 370, 8 N.W. 2d 333, 146 A.L.R. 833 (1943); **Jefferson County Bldg. & Loan Ass'n. v. Southern Bank and Trust Co.,** 225 Ala. 25, 142 So. 66 (1932). This is so, even though the depositor has not read such regulations or is illiterate. **Smith v. Republic National Bank & Trust Co.,** 73 S.W. 2d 552, (Tex. Civ. App., 1934).

However, such regulations must not be unreasonable, illegal or opposed to public policy. **Larrus v. First National Bank of San Mateo County,** 122 Cal. App. 2d 884, 266 P. 2d 143 (1954). For instance, it has been held that a bank cannot engage in branch banking contrary to law, even though the regulations of the bank authorize such a practice. **Central Republic Trust Co. v. Evans,** 378 Ill. 58, 37 N.E. 2d 745 (1941). And there is growing authority for the proposition that a bank, by regulation or provision in the deposit contract, cannot contract away liability for failure to heed a stop payment order of its depositor. The cases so holding rule that such a provision is void as against public policy. **Speroff v. First Central Trust Co.,** 149 Ohio St. 415, *{*521}* 79 N.E. 2d 119 (1948); **Calamita v. Tradesmen National Bank,** 135 Conn. 326, 64 A. 2d 46 (1949); **Thomas v. First National Bank of Scranton,** 376 Pa. 181, 101 A. 2d 910 (1954).

In connection with the language of the deposit contract the regulations contained therein are normally drafted by the bank and in the case of any ambiguous language contained therein are to be construed against the bank. **People's Gin Co. v. Canal Bank and Trust Co., et al.,** 168 Miss. 630, 144 So. 858 (1932); **Hajoca Corp. v. Security Trust Co.,** 41 Del. 514, 25 A. 2d 378 (1942). (In the **Hajoca** case the deposit contract was governed by a letter of instructions drafted by the depositor, and the contract was

construed against such depositor.) This is especially true when such regulations are made for the bank's own benefit. **Valley National Bank v. Witter,** 58 Ariz. 491, 121 P. 2d 414 (1942), (holding that such regulations can be "waived" by the bank).

The only New Mexico statute in point is § 48-4-2, N.M.S.A., 1953 Comp., which provides as follows:

"Savings deposits shall be repaid to the depositors under such regulations as the board of directors shall from time to time prescribe. Such regulations shall be printed in depositors pass books; **and no alteration which may at any time be made in the rules and regulations shall in any manner affect the rights of a depositor within the contract period in respect to deposits made previous to such alteration."** (Emphasis supplied).

In our opinion, this section clearly prohibits the practice you have described as to savings accounts in state banks in cases where the now inactive deposit was opened prior to the effective date of the regulations in question. Such a regulation clearly affects the depositor's rights "in respect to deposits made previous to such alteration," since it imposes, ex post facto, a service fee upon the account, which fee may wholly or partially extinguish such account.

In our opinion, national banks in New Mexico are also subject to § 48-4-2. As a Federal District Court said in **Bank of America, N. T. and S.A. v. Lima,** 103 F. Supp. 916 (D.C. Mass. 1952):

"National banks are creatures of the Federal government. National banks are brought into existence under Federal legislation, are instrumentalities of the Federal government and are necessarily subject to the paramount authority of the United States. **Nevertheless, national banks are subject to the laws of a state in respect of their affairs, unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States."** (Emphasis supplied).

See also **First National Bank in St. Louis v. State of Missouri,** 263 U.S. 276, 44 S. Ct. 213, 68 L. ed. 486 (1924); **Anderson National Bank v. Luckett,** 321 U.S. 233, 64 S. Ct. 599, 88 L. ed. 692 (1944); **Roth v. Delano,** 338 U.S. 226, 70 S. Ct. 22, 94 L. ed. 12 (1949).

We have reviewed the Federal statutes and regulations relating to the Federal control over national banks. These statutes and regulations are found in 12 U.S. C.A., §§ 21 through 213 and Title 12, C.F.R. respectively. We find nothing contained therein which, in our opinion, is in conflict with or supersedes § 48-4-2. We conclude that said section does not interfere with nor impair or destroy the efficiency of a national bank in New Mexico nor conflict with the paramount laws of the United States relating to the regulation of national banks. Therefore, our opinion is that national banks in New Mexico must comply with § 48-4-2 relating to savings accounts.

*{*522}* We turn now to the question of whether the bank regulations in question can be enforced against checking accounts in effect prior to the enactment of such regulations. In this connection, nothing in the Uniform Disposition of Unclaimed Property Act prohibits such a practice. In view of this, our opinion is that such regulations are not per se in violation of public policy. In our opinion, these regulations would be a violation of public policy only if they amount to a confiscation of moneys remaining in the checking account so as to deprive the depositor of funds on deposit or keep the State from eventually receiving custody of such deposit. Certainly a bank may put into effect a regulation imposing a reasonable charge to defray reasonable costs incident to the handling of an inactive account. However, such a charge should have a reasonable relation to such cost. If the charge has no reasonable relation to the cost of maintaining a dormant checking account, it would be confiscatory and, in our opinion, against public policy.

In view of our above opinion, we hold that such regulations are not per se in violation of public policy when applied to checking or savings accounts begun after the effective date of such regulations. However, our holding that such regulations cannot be confiscatory is equally applicable to accounts begun after their enactment. We shall not at this time attempt to define what regulations would be considered as confiscatory. This can only be decided as the case may arise.

By: Philip R. Ashby

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