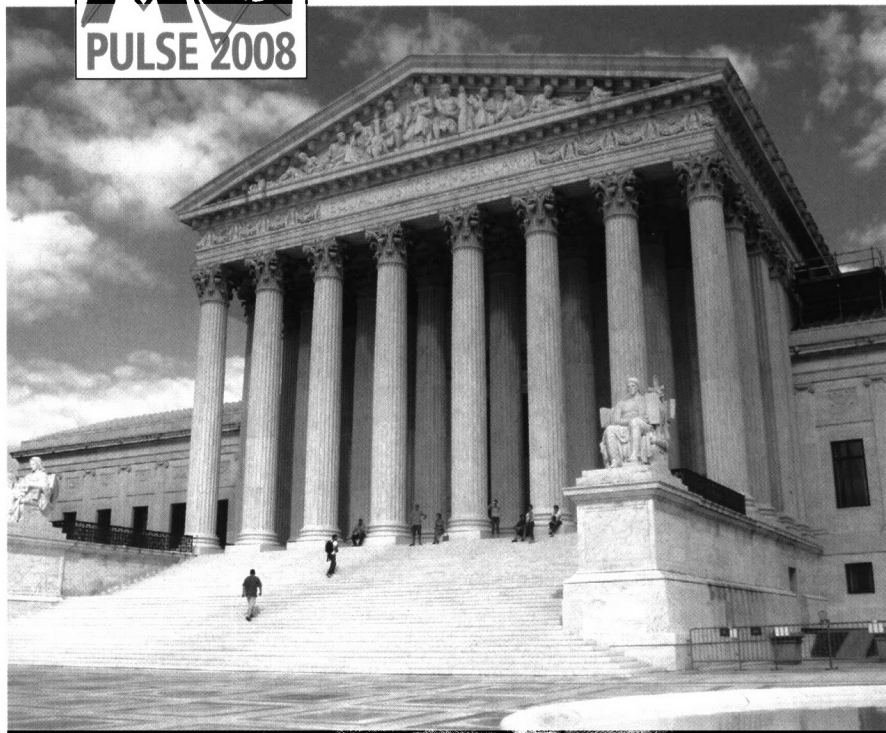


Community Banking



Farm lenders must take care when lending in Indian Country

Supreme Court ruling underscores key issues in framing loan contracts



Let's say that you run a small, independent bank located in the heart of the Dakotas. Your lines of business are as traditional as they are well-defined: loans to local farmers and ranchers as well as farm-related businesses. Like the fortunes of the farmers that you lend to, your bank's profitability depends in part upon the cooperation of Mother Nature, and getting a good price at market.

Unlike some other banks, however, let's say that your institution is located near an Indian reservation. You don't have branches or other facilities like an ATM there. However, you find that your institution is making more loans to farmers and ranchers located on the reservation. They are good customers, and you are eager to do more business with members of the tribe.

Then the inevitable happens: a harsh winter leaves local ranchers reeling. The cold weather makes no distinction between reservation and non-reservation ranching operations, and most lose the majority of their herds to the extreme cold. Some of the ranchers with loans at your bank are in big trouble.

One of your customers, a family-run operation located within the tribal area, is especially hard hit. They cannot repay their loans, so you work with them. You hope to keep their operation afloat. In lieu of foreclosure, the ranchers deed over to your

institution some of the property that is located on the reservation. In exchange, you lease the property back to the ranchers and provide them with additional operating loans. But even this attempt eventually fails, and your bank reluctantly takes steps to evict the ranchers and sell the property.

Desperate, the ranchers sue, alleging that your institution discriminated against them because your bank offered to sell the property to nonmembers of the tribe on terms more favorable than the bank offered to sell to the ranchers, who were tribe members.

The lawsuit is brought in the local tribal court. You and your lawyers are very uncomfortable with this development. There is very little written guidance to help you navigate the tribal judicial system, and the discrimination claim against you is based on unwritten tribal tradition and custom that reflects the tribe's sense of justice, fair play, and decency to others.

The tribal court ultimately rules against you, finding that the bank discriminated against the tribe members.

When banks cross tribal borders

These facts—admittedly in somewhat simplified form—provide the setting for the Supreme Court's controversial 5-4 decision last term in *Plains Commerce Bank v. Long Family Land and Cattle Co.* The case was controversial in the sense that the Court

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FARM LENDERS continues on page 26
COMMUNITY BANKING: PASS THE ASPIRIN begins on page 25

Community Banking

was called upon to address two highly-charged legal issues:

(1) tribal sovereignty and the ability to control matters that affect their lands and the treatment of its citizens, and,

(2) the terms and conditions under which non-Indian banks and other businesses may be expected to resolve disputes arising from their dealings on the reservation.

The majority opinion, written by Chief Justice Roberts, overturned a decision by the Eighth Circuit that held that a tribal court may entertain a discrimination claim over a non-tribe member who regularly conducts business on the reservation. (Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito.)

In reaching its decision, the Court focused on the status of the ownership of the land in question—whether it is owned “in fee simple” (absolute and unencumbered title) by a non-tribe member, or whether it was tribal land.

Beginning with the premise that tribal sovereignty “is of a unique and limited character” which “centers on the land held by the tribe and on tribal members within the reservation,” the majority found that once tribal land is converted into fee simple and conveyed to third parties, the tribe loses absolute and complete jurisdiction over it. (Technically this would be called “plenary jurisdiction.”)

The Court divided, however, over whether the tribal court’s consideration of the discrimination claim was barred by this jurisdictional limitation. The majority ruled that the tribal court lacked the jurisdiction to hear the claim, reasoning that because alleged discrimination “is tied specifically to the sale of the fee land” it must be treated as “an attempt to regulate the terms on which the bank may sell the land it owns.”

Justice Ginsberg (joined by Justices Stevens, Souter, and Breyer) sharply disagreed, writing in her dissenting opinion that the plaintiffs’ case is “at heart” not about “the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals” but rather it is about “the power of the [tribe] to hold non-

members like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.”

Implications of the ruling

The Native American community was understandably disappointed by the result; there had been hopes that the case would provide an opportunity for the Supreme Court to reconsider its views on tribal sovereignty.

For bankers, while the case was a victory, the Court’s ruling provides only a narrow clarification of the scope of tribal court jurisdiction: the majority opinion cautions against reading the decision broadly, given that “[o]nly the discrimination claim is before us and that claim is tied specifically to the sale of the fee land.”

Back in your office at your small, independent bank in the Dakotas, you have a number of new loan applications on your desk. Some are from customers on the reservation. You want to make the loans, but one question remains: How do you deal with the still-lingering issue of tribal versus non-tribal courts should a dispute arise?

Long term, individual institutions and the banking industry as a whole should work with the Native American community and the individual tribes and support their ongoing efforts to modernize the tribal courts and improve the legal and business environment on the reservation. Efforts are under way by tribes in Wisconsin, Montana, and elsewhere to make this happen.

In the short term, the most practical solution is to address the issue in the loan documentation. As recognized by Justice Ginsberg in her dissenting opinion, the bank could have avoided the problem by including such items as forum selection, choice-of-law, or arbitration clauses in its contracts. Indeed, some institutions are finding that agreeing to a private arbiter for the resolution of disputes, such as commercial arbitration, is an effective and practical way to allow both parties to move past what is a potentially charged issue. *BJ*



context.” We referred media calls to the Ohio Bankers League, which was very helpful with their responses. We also referred customers to financial rating websites regarding our financial condition.

We were hurt by news reports that banks didn’t have any money to lend and weren’t making any loans due to the crisis. The TV talk shows were killing us. We still made loans, but our volumes were hurt by the negative press. Overall, it wasn’t nearly as bad as it could have been, however.

Remedy 4

Tom Wolf, president, Platte Valley Bank, North Bend, Neb., \$51.4 million-assets.



This is our most recent ad as regards this mess.

My next ad is going to read, “Not only do we not have any sub-prime loans, we do not have any mortgage loans that are even 30 days past due.” We have served our community for over 117 years and we will continue to serve our friends and customers in the years to come.

Recent events have demonstrated volatility in the financial markets. Please rest assured your bank, **Platte Valley Bank** continues to be extremely well capitalized, financially strong and fundamentally sound.

The safest place for your money is in the bank.

PLATTE VALLEY BANK

606 Main Street • North Bend • 402-652-8222

Monday - Wednesday 8 a.m. - 4 p.m.
Thursday - Friday 8 a.m. - 6 p.m.
Saturday 8 a.m. - Noon

Platte Valley Bank’s recent ad deals with the jitters with plain, direct advice.

Remedy 5



Larry Callais, president and CEO, MC Bank & Trust Co., Morgan City, La., \$244.8 million-assets.

At M C Bank executive officers met with all of our supervisors and other bank officers to bring them up to speed on the state of our bank; the state of banking in Louisiana; and FDIC insurance. We also informed them that they should be able to address FDIC questions, as should their subordinates. We also instructed them that should someone still be uncomfortable with their explanations, that they should direct the questioner to