Interstate Consumer Credit Transactions: Recent Developments

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In the Winter 1988 edition of the *Quarterly Report* Jeffrey I. Langer and Jeffrey B. Wood discussed interstate lending by national banks and other federally-insured financial institutions and, in particular, the exportation of interest rates and other credit terms in connection with consumer credit transactions.[1] Langer and Wood compared the most favored lender and exportation rights of national banks, savings institutions insured by the Federal Savings and Loan Insurance Corporation (FSLIC), and state-chartered banks insured by the Federal Deposit Insurance Corporation (FDIC). Since the publication of that article, several court decisions and interpretative letters of federal regulators have been issued. Additionally, briefs have been filed in the continuing litigation between Citibank (South Dakota), N.A. (Citibank) and the Iowa Attorney General (the *Citibank* litigation).[2] These materials contribute to the ongoing discussion of issues and considerations which national banks and other federally-insured financial institutions must analyze and weigh when contemplating interstate consumer lending programs. This article considers issues previously discussed in the work of Langer and Wood and the reader is referred to that article and to the articles cited therein for a more general treatment of issues raised in this article.

I. Most Favored Lender and Exportation Rights of Federally-Insured Savings Institutions

One issue not previously decided in the courts was whether federally-insured savings institutions enjoy most favored lender and exportation rights under section 522 (section 522) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA).[3] In *Gavey Properties/762 v. First Financial Savings & Loan Association,*[4] the United States Court of Appeals for the Fifth Circuit held that federally-insured savings institutions do enjoy such rights. The Fifth Circuit affirmed a trial court ruling which granted summary judgment to an Illinois-chartered savings and loan against a Texas debtor's claim of usury.

Gavey Properties/762 (Gavey), a Texas-based real estate developer, obtained a loan from Illinois-based First Financial Savings and Loan Association (First Financial), to finance the renovation of a Dallas-area apartment project. The note executed by Gavey stated that the parties intended for the laws of the State of Texas and the United States to control the usury limitations of the transaction. The deed of trust which secured the note provided also that the deed of trust was to be made with reference to and was to be construed as a Texas contract governed by the laws of Texas. However, Gavey executed a letter to First Financial affirming that the loan which Gavey was undertaking was intended to be a business loan as outlined in "Chapter 74, section 4, paragraph c" of the Illinois usury law.[5] During the relevant period, the Texas usury limit did not exceed 28%. Because the loan was prepaid through a refinancing transaction, the effective interest rate on the loan exceeded 28%. The trial court and the Fifth Circuit agreed that the Illinois law cited in Gavey's letter was applicable to the transaction. That law contained no interest rate limitation for business loans. Thus, the loan was not usurious and plaintiff's motion for summary judgment was denied.

The Fifth Circuit first reviewed the applicable federal law, stating that First Financial obtained its rate-charging authority from section 522.[6] The court interpreted section 522 to allow a federally-insured savings institution to charge the highest of three possible interest rates: (i) the rate it would be permitted to charge in the absence of section 522; (ii) a rate of not more than 1% in excess of the discount rate

1. Langer and Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Saving Institutions, and FDIC-Insured State Banks,* 42 Consumer Fin. L. *Q. Rep.* 4 (1988) [hereinafter Langer & Wood].

2. Citibank (South Dakota), N.A. v. Miller, No. 88-258-E (S.D. Iowa, filed May 6, 1988) [hereinafter the *Citibank* litigation]; see also Iowa ex rel. Miller v. Citibank (South Dakota), No. CE 029-16973 (Dist. Ct. Polk County, Iowa, filed May 13, 1988) (the state court litigation had been set for trial June 1, 1989, by court Order dated September 15, 1988, but the trial date has been rescheduled for October 23, 1989). The parties have begun settlement negotiations, but significant issues must be resolved. Weiner, *Card Fees Law May Make Iowa Suits Moot,* Am. Banker, June 29, 1989, at 2, col. 1. N date for oral argument on motions for summary judgment pending in the federal case has been set as of the date of this printing. The briefs of Citibank, the Iowa Attorney General, and various *amici curiae* in the *Citibank* litigation are discussed below in Part V. Related cases are also pending: Iowa ex rel. Miller v. United Missouri Bank, U.S.A., No. CE 029-17028 (Dist. Ct. Polk County, Iowa, filed May 31, 1988), and United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa, filed August 1, 1988); and Iowa ex rel. Miller v. United Missouri Bank of Kansas City, N.A., No. CE 029-17029 (Dist. Ct. Polk County, Iowa, filed May 31, 1988), and United Missouri of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa, filed August 1, 1988). Both *United Missouri Bank of Kansas City, N.A.* actions have been stayed pending the outcome of the *Citibank* litigation.

3. Pub. L. 96-221, 94 Stat. 164 (Mar. 31, 1980). Section 522 of DIDMCA states in relevant part:

   (a) If the applicable rate prescribed in this section exceeds the rate an insured institution would be permitted to charge in the absence of this section, such institution may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where such institution is located or at the rate allowed by the laws of the State, territory, or district where such institution is located, whichever may be greater.

   Pub. L. 96-221, § 522, 94 Stat. 165 (Mar. 31, 1980) (codified at 12 U.S.C. § 1730g (1982)) (prior to 1983 amendment).

   The 1983 amendment to section 522 added, after the words "insured institution," "(which, for the purposes of this section shall include a Federal association the deposits of which are insured by the Federal Deposit Insurance Corporation)." Pub. L. 97-457, § 33, 96 Stat. 2511 (Jan. 12, 1983) (codified at 12 U.S.C. § 1730g (Supp. V. 1987)).

4. 845 F.2d 519 (5th Cir. 1988).

5. *See* Ill. Rev. Stat. ch. 74, § 4(c) (Supp. 1980).

6. 845 F.2d at 520.

on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district where the institution is located; or (iii) the rate allowed by the laws of the state, territory or district where the institution is located, *i.e.*, the institution's "home" state.[7] The Fifth Circuit opined that Congress passed sections 521 (section 521), 522 and 523 (section 523) of the DIDMCA in order to assure that borrowers could obtain credit in states with low usury limits and that federally-insured state-chartered institutions would not be competitively disadvantaged by those usury rates.[8] The court noted that absent federal legislation, federally-insured, state-chartered lending institutions would be unable to compete with national banks which were allowed to charge higher rates of interest by federal law.[9] Because the language in sections 521, 522 and 523 is "substantially identical" to that of 12 U.S.C. section 85 (section 85) which governs national banks, the Fifth Circuit opined that federally-insured institutions are granted the same most favored lender status and exportation rights enjoyed by national banks.[10] Because it concluded that a consistent interpretation of section 85 and section 522 is warranted, the Fifth Circuit reasoned that federally-insured savings institutions such as First Financial are permitted to export the favorable interest rates of their home state to other states in the same manner as national banks may export rates.[11]

The court stated that the Federal Home Loan Bank Board (FHLBB) has interpreted section 522 "to harmonize fully with Section 85."[12] The court recognized that the FHLBB regulation interpreting section 522 defines the "applicable rate" as the greater of the most favored lender rate under state law or 1% over the federal reserve discount rate.[13] The court further noted that in a published interpretive letter (the FHLBB letter), the FHLBB General Counsel has advised that a savings institution can export the most favored lender rate of its home state to other states based upon the parallel between sections 522 and 85.[14] The court recognized that to the extent that section 522 is ambiguous, the FHLBB letter is entitled to deference provided that the interpretation is reasonable.[15] While the court believed that the argument for ambiguity in the statutory language was weak, the court found the interpretation expressed in the FHLBB letter to be reasonable.[16]

Gavey argued that section 522 was inapplicable because the initial conditional clause ("if the applicable rate prescribed in this section exceeds the rate an insured institution would be permitted to charge in the absence of this section") was not satisfied.[17] Gavey submitted that the "applicable rate" which First Financial could charge did not exceed the Texas usury rate that First Financial would have been permitted to charge in the absence of section 522. The court believed Gavey's interpretation to be "counterintuitive"[18] but recognized that Gavey's interpretation was arguably adopted in *In re Lawson Square, Inc.*[19]

In *Lawson Square* a loan secured by a first mortgage for the purchase of an Arkansas apartment complex had contained a provision for interest at the 90-day treasury bill rate plus 4%. Arkansas's most favored lender interest rate at the time was the Federal Reserve discount rate plus 5%. The Eighth Circuit found that the loan was not usurious because of section 501 (section 501) of the DIDMCA.[20]

Under section 501, no usury limit was applicable to the loan on the basis of federal preemption, said the Fifth Circuit. The application of section 501 therefore rendered the Eighth Circuit's discussion of section 522 mere dicta.[21] Moreover, the Fifth Circuit observed, the Eighth Circuit was "faced with a considerably different set of facts."[22] The court believed that the Eighth Circuit would not literally apply its interpretation to a situation like *Gavey*.[23] The Fifth Circuit noted that in *Lawson Square* the interest rate the lender could charge in the absence of section 522 was the same as the rate allowed by the state where the lender was located.[24] The court further noted that the Eighth Circuit did not examine the legislative history of the DIDMCA or the FHLBB's regulations because no question of exportation was raised. Thus, *Lawson Square* was distinguishable, and section 522 governed the *Gavey* loan.

Gavey also asserted that section 522 must be interpreted differently than section 85 because the conditional clause con-

7. *Id.* at 520-21.

8. *Id.* at 521. Sections 521 and 523 of the DIDMCA have been codified at 12 U.S.C. §§ 1831d and 1785(g)(1), respectively. Section 521 of DIDMCA states in relevant part:

   > (a) In order to prevent discrimination against State-chartered insured banks, including savings banks and insured mutual savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve and charge on any loan or discount made, or upon any note, bill or exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where such State bank or such insured branch of a foreign bank is located or at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

   Pub. L. 96-221, § 521, 94 Stat. 164 (Mar. 31, 1980). Section 523 of the DIDMCA, respecting credit unions, is nearly identical to section 522 and, like section 522, differs from section 521 only in the absence of the first statement of intent to prevent discrimination found in the above quoted portion of section 521. Section 521 was the first of the three sections dealing with federal preemption of state usury law with respect to "Other Loans" by federally-insured institutions enacted in the DIDMCA.

9. 845 F.2d at 521. *See, e.g.*, 126 Cong. Rec. 6907 (Mar. 27, 1980) (statement of Sen. Bumpers). The legislation to which the court referred was sections 521, 522 and 523 of the DIDMCA.

10. 845 F.2d at 521. Section 85 provides in relevant part:

    > Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.

    12 U.S.C. § 85 (1982). The most favored lender doctrine was first expressed in Tiffany v. National Bank, 85 U.S. (18 Wall.) 409, 411 (1874). The right to export rates under section 85 was clarified by the United States Supreme Court in Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299, 313-20 (1978). *See* Langer & Wood, *supra*, note 1, and Finkelstein, *Most Favored Lender Status for Insured Banks*, 42 Bus. Law. 915, 916 (1987), for a general discussion of these concepts.

11. 845 F.2d at 521.

12. *Id. See* 12 C.F.R. § 570.11(a) (1988).

13. 845 F.2d at 521. *See* 12 C.F.R. § 570.11(a).

14. 845 F.2d at 521. *See* Letter from General Counsel to the Federal Home Loan Bank Board (Aug. 6, 1982), *reprinted in* [Tr. B. 1988-89] Fed. Banking L. Rep. (CCH) para. 82,022.

15. 845 F.2d at 521 (citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984)).

16. 845 F.2d at 522.

17. *See* 12 U.S.C. § 1730g(a).

18. 845 F.2d at 522.

19. 816 F.2d 1236 (8th Cir. 1987).

20. Section 501 of the DIDMCA permanently preempted state usury ceilings on certain first mortgage loans, subject to qualifying state override. Pub. L. 96-221, Title V, 94 Stat. 161 (Mar. 31, 1980) (codified at 12 U.S.C. § 1735f-7).

21. 845 F.2d at 522.

22. *Id.*

23. *Id.*

24. *Id.*

tained in section 522 does not appear in section 85. Gavey asserted that the conditional clause would have no meaning if the "applicable rate" is interpreted to include the rate where the savings institution is located. The Fifth Circuit disagreed. It did not read section 522 to create a different interest ceiling for federally-insured savings institutions but believed that section 522 "can be seen as simply providing a more exacting formulation than § 85 of Congress' intent to aid federally insured financial institutions."[25] The court noted that section 85 does not explicitly provide for the exportation of the interest rate of a national bank's home state to other states in which it does business, but that the United States Supreme Court had construed section 85 to have such an effect in *Marquette National Bank v. First Omaha Service Corporation.*[26] Similarly, the court observed, the conditional clause of section 522 can be seen as allowing a savings and loan to "import" the favorable interest rates of another state when it lends funds to a borrower in that state.[27] The Fifth Circuit asserted that its construction of section 522 fully and accurately conforms section 522 to the most favored lender status of national banks as that status is currently understood.[28]

Finally, the Fifth Circuit rejected Gavey's assertion that the parties had contracted out of section 522 by choosing Texas law. Despite the "inartful" choice of law provisions contained in the documents, the Fifth Circuit held that federal law in the form of section 522 still applies.[29] The Fifth Circuit observed that in *Fidelity Federal Savings and Loan Association v. de la Cuesta,*[30] the United States Supreme Court rejected an attempt to avoid federal due on sale clause regulations by choosing to have the deeds of trust at issue governed by "the law of the jurisdiction where the property was located."[31] In *de la Cuesta*, the Supreme Court held that the "law of the jurisdiction" includes federal as well as state law.[32]

Thus, because federal law in the form of section 522 was applicable to the loan transaction in *Gavey*, notwithstanding choice of law provisions in the loan documents, and because First Financial was located in Illinois and able to avail itself of section 522, First Financial was authorized to charge interest at the rate permitted by Illinois law. Because Illinois law was applicable and contained no relevant limitation, the loan was not usurious, notwithstanding the fact that the rate of interest charged would have exceeded Texas law limitations for business loans.

II. Most Favored Lender Status of Federally-Insured, State-Chartered Banks

In *Vander Weyst v. First State Bank,*[33] decided June 3, 1988, the Supreme Court of Minnesota, *en banc*, affirmed the determinations in four appellate cases that federally-insured, state-chartered banks have most favored lender status under federal law and that federally-insured state banks in Minnesota may charge the same interest rates that Minnesota industrial loan and thrift companies may charge on agricultural loans.[34] The United States Supreme Court has denied a petition for certiorari.[35]

In the four appeals, debtor-farmers sued the respective banks for usury. The plaintiffs contended that section 334.011 of the Minnesota Statutes (section 334.011) regulated the interest rate chargeable on agricultural loans under $100,000 and limited the interest chargeable to not more than 4½% in excess of the applicable federal discount rate.[36] The contested loans provided for interest ranging from 11.85% to 16%, which exceeded the rate specified in section 334.011.

The banks claimed, however, that the DIDMCA granted them most favored lender status[37] and that the most favored lender doctrine authorized them to charge the highest interest rate allowed under Minnesota law to any lender empowered to make agricultural loans. Because Minnesota law authorized industrial loan and thrift companies to make agricultural loans at rates not exceeding 21.75% per annum, the banks argued that pursuant to the most favored lender doctrine, they also could make agricultural loans at rates not exceeding 21.75% per annum. The farmers countered that the DIDMCA does not accord federally-insured state banks most favored lender status, that state law did not permit industrial loan and thrift companies to charge 21.75% interest on agricultural loans, and that, even if banks could charge a 21.75% rate of interest, the banks had failed to comply with other material provisions of state law that regulated loans made by industrial loan and thrift companies, in violation of Minnesota usury laws.[38]

In each of the cases consolidated in *Vander Weyst* the appellate courts held (i) that the DIDMCA permits extension of the most favored lender doctrine to insured state banks; (ii) that under the most favored lender doctrine the banks may charge interest on their agricultural loans at the rate allowed industrial loan and thrift companies in Minnesota; and (iii) that to qualify for most favored lender status, insured state banks need not adhere to the licensing, lending, and loan splitting, and ceiling provisions required for industrial loan and thrift companies. The Minnesota Supreme Court agreed.

The banks submitted that the "rate allowed" language in section 521 of the DIDMCA is the same wording that appears in section 85. In the opinion of the Minnesota Supreme Court, however, the DIDMCA "uses language inviting uncertainty and disagreement."[39] The court suggested that such confusion is not surprising because "usury law, whether federal or state, has become so arcane and impenetrable (as commentators frequently observe) that one yearns to start over with a clean slate."[40] After noting that the FDIC, the FHLBB, the National Credit Union Administration, and the Minnesota Commissioner of Banks had all previously issued inter-

25. *Id.*

26. 845 F.2d at 522. *See Marquette*, 439 U.S. at 313-20.

27. 845 F.2d at 522-23.

28. *Id.* at 523.

29. *Id.*

30. 458 U.S. 141 (1982).

31. 485 F.2d at 523; *see de la Cuesta*, *supra*, 458 U.S. at 157.

32. 458 U.S. at 157.

33. 425 N.W.2d 803 (Minn.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 369 (1988).

34. The four cases consolidated on appeal were VanderWeyst v. First State Bank, 408 N.W.2d 208 (Minn. App. 1987); Walsh v. First State Bank and Heimark v. Norwest bank Montevideo, 409 N.W.2d 5 (Minn. App. 1987); and Bandas v. Citizens State Bank, 412 N.W. 2d 818 (Minn. App. 1987). The *Bandas* case was remanded for further proceedings to determine whether, in fact, the "origination fee" charged constituted interest and to determine a separate Racketeer Influenced and Corrupt Organizations (RICO) Act issue that was left undecided by the appellate court. 425 N.W.2d 811-12.
The Minnesota Supreme Court denied further review in the case of First Bank East v. Bobeldyk, 391 N.W.2d 17 (Minn. App. 1986), in which a Minnesota court of appeals held that the DIDMCA extended most favored lender status to federally-insured state banks. The cases consolidated in *Vander Weyst* all followed the decision in *Bobeldyk*. Because of the continuing litigation, the Minnesota Supreme Court agreed to review the question first raised in *Bobeldyk*. The Minnesota Supreme Court denied rehearing of the consolidated cases on July 5, 1988.

35. VanderWeyst v. First State Bank, No. 88-591, ___ U.S. ___, 109 S.Ct. 369 (1988).

36. Minn. Stat. § 334.011 (1986).

37. *See* 12 U.S.C. § 1831d (section 521 of the DIDMCA).

38. Additionally, in *Bandas*, the farmer claimed that the bank charged 51.52% interest on one particular loan in violation of the Racketeer Influenced and Corrupt Organizations Act.

39. 425 N.W.2d at 806.

40. *Id.*

pretative opinions construing the DIDMCA to give insured institutions most favored lender status, the court concluded that the "rate allowed" clause of section 521 should be construed as granting to federally-insured, state-chartered banks most favored lender status.[41] The court was persuaded that by using the same language in the DIDMCA as appears in section 85, Congress intended to give most favored lender status to insured state banks.[42] Moreover, the court believed that Congress' desire to put insured state banks on an equal footing with their national competitors was clear from a reading of the Congressional Record and the DIDMCA and that such a goal of equality is achievable only if state banks are afforded the same most favored lender status as national banks.[43]

The court was not dissuaded by the clause found only in section 85 which states that "except that where by the laws of any State a different rate is limited for banks organized under State laws, the rates so limited shall be allowed for associations organized or existing in any such State under this chapter" (the exception clause).[44] The farmers argued that the absence of the exception clause from the DIDMCA meant that Congress did not intend to incorporate the most favored lender doctrine into the DIDMCA. The court disagreed. Citing *Northway Lanes v. Hackley Union National Bank & Trust Co.*,[45] the court noted that courts have relied upon the "rate allowed" clause as the source of most favored lender status for national banks since *Tiffany v. National Bank*.[46] In the Minnesota Supreme Court's opinion, the exception clause means that if " 'a different rate is limited,' *i.e.*, if state law provides a higher rate limited only to state banks, that rate, too, is available to the national bank."[47] Thus, the exception clause was omitted from the DIDMCA because it was not needed, the court reasoned.[48] The court observed that the DIDMCA's purpose was "to put insured state banks on a parity with national banks, and to do this it was unnecessary to say—as the 'except' clause in this context would then say—that state banks can charge what state law says they can charge."[49]

Notwithstanding the language of section 521, the farmers argued that the DIDMCA did not extend most favored lender treatment to agricultural loans. The farmers observed that the Public Law version of the DIDMCA addresses business and agricultural loans under Title V, Part B,[50] but the "rate allowed" language is found in Part C which addresses "Other Loans."[51] Further, only Part C was directed to be codified at 12 U.S.C. section 1831d. The court was not persuaded, noting that Part B had a three-year sunset provision and concluding that Parts B and C are not mutually exclusive but more cumulative in effect.[52] Moreover, the court observed, the text codified as 12 U.S.C. section 1831d applies to "any" loan, without distinction.[53] Thus, the Minnesota Supreme Court concluded that most favored lender status is conferred on federally-insured, state-chartered banks and that section 521 may be applied to agricultural loans notwithstanding other provisions of the DIDMCA also governing agricultural loans.[54]

While recognizing the restrictive provisions of section 334.011, the court noted that under the most-favored lender doctrine a federally insured state bank, like a national bank, "may... charge the higher rate of interest allowed under state law to any competing state-licensed or chartered lending institution for the same specified class of loans."[55] The court noted that the competing lending institution ordinarily need not be the same type of lender, but the interest rate used must be for the same class of loan, such as an agricultural loan.[56]

The court rejected the plaintiffs' contention that industrial loan and thrift companies were intended to make only consumer loans. The court observed that nothing in the applicable provisions of Minnesota law limited industrial loan and thrift companies to loans for particular purposes. Thus industrial loan and thrift companies had the right to make agricultural loans, whether or not they in fact exercised such a right.[57]

The relevant provision of Minnesota law governing the authority of industrial loan and thrift companies permitted such companies to extend credit or lend money and to collect and receive charges, as provided by Chapter 334, or "in lieu thereof" to charge, collect and receive interest at the rate of 21.75% per annum.[58] The court construed this provision to mean that industrial loan and thrift companies may make Chapter 334 loans and charge interest as provided in Chapter 334, but that in lieu of the interest allowed by Chapter 334 on such loans, these companies may charge 21.75% interest.[59] The court read the "[n]otwithstanding the provisions of any law to the contrary" language found in section 334.011 to mean that the floating rate of section 334.011 is permitted for agricultural loans even though other provisions of Minnesota law provide for contrary rates.[60] Even if the language in section 334.011 were read to mean that the floating rate for agricultural loans in section 334.011 was the exclusive rate that may be charged on agricultural loans, the court determined, the general provisions of section 53.04 of the Minnesota Statutes (section 53.04), which were enacted subsequently to the specific provisions of section 334.011, exhibited a manifest intent on the part of the legislature to prevail over section 334.011.[61] Therefore, section 53.04 should control.[62] Consequently, the court held, "the floating rate under § 334.011 is not an exclusive rate for agricultural loans for all lenders under state law, but 21.75 percent is available for agricultural loans made by [industrial loan and thrift companies] and, hence, also to insured state banks with most favored lender status."[63]

The court also considered whether a $35,000 loan limit prescribed by the Minnesota Regulated Loan Act was a class determinant with respect to loans for agricultural purposes. The court noted that one must distinguish between the amount of the loan which determines the class and a

41. *Id.*

42. *Id.*

43. *Id.* at 806-07; *see* 12 U.S.C. § 85.

44. 425 N.W. 2d 806 n.2 (citing 12 U.S.C. § 85 (1982)).

45. 464 F.2d 855, 862-63 (6th Cir. 1972) (quoting *Tiffany*, 85 U.S. (18 Wall.) at 412).

46. 425 N.W.2d at 806 n.2.

47. *Id.*

48. *Id.*

49. *Id.* at 806-07 n.2.

50. *See* 94 Stat. at 164.

51. *See* 94 Stat. at 164-68.

52. 425 N.W.2d at 807. *Cf. Lawson Square*, 816 F.2d at 1239 (stating Parts A and C not mutually exclusive).

53. 425 N.W.2d at 807.

54. *Id.*

55. *Id.* (citing 12 C.F.R. § 7.7310(a) (1988)).

56. 425 N.W.2d at 807.

57. *Id.* "Whether, in fact they are actually making agricultural loans is not the test; it is enough for the most favored lender doctrine that the lender has the right to make these loans," the Minnesota Supreme Court said. *Id.* (citing Fisher v. First Nat'l Bank, 548 F.2d 255, 257 (8th Cir. 1977).

58. *See* Minn. Stat. Ann. § 53.04, Sub. 3a(a) (West 1988).

59. 425 N.W.2d at 807.

60. *Id.* (*see* Minn. Stat. Ann. § 334.011 (West 1981)).

61. *Id.*

62. *Id.*

63. *Id.* at 808.

loan amount provision which materially affects the determination of the interest rate.[64] Because the $35,000 limit on loans at 21.75% interest was contained in another chapter of Minnesota's statutory code, the court reasoned, the limitation was not applicable to loans made under the authority of Chapter 53, which contained no loan ceiling.[65] Thus, the court held, the class of loans involved for the purposes of the most favored lender doctrine was defined only by the type of loan involved, *i.e.*, loans for agricultural purposes not by the size of such loan.[66]

The court then addressed the question whether the loans were usurious notwithstanding the permissibility of the interest rate on grounds that the banks allegedly failed to comply with other regulations applicable to loans made by industrial loan and thrift companies. The court noted that under *Evans v. National Bank*[67] the "rate allowed" language of section 85 has been construed to mean that the most favored lender doctrine adopts the state's usury laws "only in so far as they severally fix the rate of interest."[68] Citing 12 C.F.R. section 7.7310 (Interpretive Rule 7.7310), the Minnesota Supreme Court noted that a bank is subject to those provisions of state usury law that are "material to the determination of the interest rate."[69] Although the court recognized that some difference of opinion exists as to the test of materiality, citing *Attorney General v. Equitable Trust Company*,[70] the Minnesota Supreme Court believed that as a general proposition "a provision is material to a determination of the interest rate if it (1) pertains to the manner in which the numerical rate of interest is calculated, or (2) defines the class of loans in such a way (as by size, type of borrower, or maturity) as to affect the borrowed interest rate."[71]

The farmers claimed that the banks' failure to comply with certain provisions governing loan splitting and the charging of attorneys' fees rendered the loans usurious. The trial courts and courts of appeals disagreed, holding that such provisions of state law were not material. The Minnesota Supreme Court also found the regulatory provisions of Minnesota law to be inapplicable, but did so without reaching the question of their materiality to the determination of the interest rate.[72] Because the regulatory provisions identified by the farmers were contained in Chapter 56 and not Chapter 53, the court concluded that the regulatory provisions of Chapter 56 did not apply to the loans made by the banks.[73]

In their petition for certiorari to the United States Supreme Court, the farmers again argued that the DIDMCA did not extend the most favored lender doctrine to state banks and that the lenders failed to satisfy conditions precedent to the application of section 521.[74] The farmers claimed that the Minnesota Supreme Court's ruling conflicted with the United States Court of Appeals for the Eighth Circuit's ruling in *Lawson Square* and with *Marquette*. The farmers argued that the Minnesota Supreme Court's interpretation of section 521 conflicted with the Eighth Circuit's interpretation of section 522 in *Lawson Square*.[75] The farmers asserted that the Minnesota Supreme Court's conclusion that section 521 was applicable regardless of the amount of the permitted rate allowed by state law conflicts with the Eighth Circuit's determination that section 522, a provision "identical" to section 521, requires that the applicable federal rate exceed the permitted rate allowed by state law as a condition precedent to the application of section 522.[76] The farmers asserted that on this federal question the Minnestoa Supreme Court's finding of no condition precedent under section 521 constituted error.[77] The farmers also argued that the court's holding that the most favored lender doctrine was extended to state-chartered, federally-insured banks with the passage of the DIDMCA conflicted with *Marquette* to the extent that the Minnesota court based its decision upon the incorporation of the allowance clause language of section 85 into the DIDMCA. In *Marquette*, the farmers submitted, the Supreme Court reiterated the enabling effect of the exception clause as interpreted by the *Tiffany* court.[78] The exception clause was not incorporated into the DIDMCA. The Minnesota court's holding that the basis for the most favored lender doctrine is the allowance clause, rendering the exception clause superfluous, was thus also asserted as error.[79] Nevertheless, the United States Supreme Court denied certiorari on November 7, 1988.[80]

III. The Effect of a State Override

Federally-insured institutions seeking to export rates under sections 521, 522 or 523 of the DIDMCA should consider the issue of the authority of a state to "opt out" of DIDMCA preemption under the provisions of section 525 of the DIDMCA (section 525).[81] The question of the effect of

64. *Id.* at 807.
65. *Id.* at 808-09.
66. *Id.* at 809.
67. 251 U.S. 108 (1919).
68. *See Evans*, 251 U.S. at 111.
69. 425 N.W.2d at 810-11; *see* 12 C.F.R. § 7.7310.
70. 294 Md. 385, 450 A.2d 1273 (1982).
71. Partain v. First Nat'l Bank, 467 F.2d 167, 173 n.5 (5th Cir. 1972) and 425 N.W.2d at 810 (citing 12 C.F.R. § 7.7310).
72. 425 N.W.2d at 810.
73. *Id.* at 810-11. In the *Bandas* appeal, the additional question was raised whether an origination fee constituted interest so as to make the loan's annualized interest rate 51.52%. The court of appeals had relied upon a definition of interest found in Chapter 56 in finding that the origination fee did constitute interest. Once again, however, the Minnesota Supreme Court found that the cited provision of Chapter 56 was inapplicable to the loan made by the bank. 425 N.W.2d at 811. In the absence of any applicable statutory provision defining interest for purposes of a Chapter 53 loan made in 1984, the Minnesota Supreme Court applied Minnesota common law. The court noted that the general rule in Minnesota was that reasonable expenses incurred by the lender in preparing a loan may be charged to the borrower without making the loan usurious under Minnesota law. 425 N.W.2d at 811 (citing Kroll v. Windsor, 259 Minn. 200, 201, 107 N.W.2d 53, 55 (1960); Hatcher v. Union Trust Co., 174 Minn. 241, 244, 219 N.W. 76, 77-78 (1928); Lassman v. Jacobson, 125 Minn. 218, 218, 219-20, 146 N.W. 350, 351 (1914)). While the trial court had found that the origination fee was for services rendered and thus not interest, nothing in the record before the Minnesota Supreme Court supported the finding, other than an affidavit of a bank officer. Consequently, the Minnesota Supreme Court remanded the issue to the trial court for further proceedings.
74. Petition for Writ of Certiorari, No. 88-591 (U.S. S.Ct., filed Oct. 3, 1988) (hereinafter cited as Petition); *see* 57 U.S.L.W. 3335 (1988).
75. Petition at 6.
76. *Id.*
77. *Id.*
78. *Id.* at 7 (citing *Marquette*, 439 U.S. at 308 n.19).
79. Petition at 7.
80. *VanderWeyst*, No. 88-591, ____ U.S. ____, 109 S.Ct. 369.
81. Section 525 of the DIDMCA provides:

    The amendments made by section 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the amendments made by such sections to apply with respect to loans made in such State, except that such amendment shall apply to a loan made on or after the date such law is adopted or such certification is made if such loan is made pursuant to a commitment to make such loan which was enterd into on or after April 1, 1980, and prior to the date on which such law is adopted or such certification is made.

    Pub. L. 96-221 § 525, 94 Stat. 167 (Mar. 31, 1980) (codified at 12 U.S.C. § 1730g note (1982)).

    The states of Colorado, Iowa, Massachusetts, Maine, Nebraska, North Carolina, Wisconsin and the Commonwealth of Puerto Rico have formally opted out of sections 521 through 523. *See* Colo. Rev. Stat. § 5-13-104 (Supp. 1988); 1980 Iowa Acts ch. 1156, § 32 (not codified); 1981 Mass. Acts ch. 231 § 2 (codified at Mass. Gen. Laws ch. 183, § 63 note; repealed in 1986 Mass. Acts ch. 177); Me. Rev. Stat. Ann. tit. 9A, § 1-110 (Supp. 1988); 1982 Neb. Laws 623, § 2 (codified at Neb. Rev. Stat. § 45-1.104, repealed by amendment in 1988 Neb. Laws 913, § 2); N.C. Gen. Stat. § 24-2.3 (1986); 1981 Wis. Laws ch. 45, § 50 (not codified); and P.R. Laws Ann. tit. 10 § 9981 (Supp. 1988). Because section 525 requires "explicit" expression, the validity of a state's expression of its desire to opt out may be questioned if the state opt-out provision does not specifically name the section of the statute overridden. Whether a state may be permitted to rescind its override provision is unknown. Massachusetts and Nebraska have attempted to rescind their original opt-out legislation. 1986 Mass. Acts ch. 177; 1988 Neb. Laws 913, § 2, Neb. Rev. Stat. § 45-1, 104, as amended. Section 525 contains no time limitation within which states must act to override federal preemption. Consequently, the number of states which have passed opt-out legislation may increase.

state opt-out is primarily a question of interstate rather than intrastate lending and ordinarily arises when a federally-insured institution located in a state which has not opted out (a non-opt-out state) seeks to export the rate of interest permitted by its home state into a state which has effectively opted out of the DIDMCA.[82] The issue is which state's law controls a given transaction. A valid state opt-out clearly prevents any federally-insured institution located in an opt-out state from taking advantage of DIDMCA rate authority. Whether a state override by a borrower's state is effective against a federally-insured institution located in a non-opt-out state is unclear. The proper interpretation of section 525 has yet to be considered by a court. The question of which state's law controls turns on a determination of where the loan is "made."

A. FDIC Letter

In a letter dated June 29, 1988, FDIC Deputy General Counsel Douglas H. Jones rendered an opinion (Jones letter) regarding the meaning of section 525 and the relationship of that section to section 521.[83]

The Jones letter observed that section 521 provides for a preemption of state usury laws by permitting insured state banks to charge a federally-prescribed rate on loans and to export their home state's interest rate, *i.e.*, to charge the highest rate allowed in the state where the bank is located, no matter where the borrower may be located.[84] Section 525, however, authorizes states to countermand the federal preemption of section 521. Counsel for the bank requesting the FDIC opinion suggested that section 525 should be read to be congruent with section 521.[85] Under such an interpretation, the state where the loan is made must be the same as the state where the bank is located, as a matter of law. Thus, only a bank's home state would have any right to countermand federal preemption with respect to loans made by that bank. Jones disagreed.

Jones noted that section 525 uses plain language which differs considerably from that of section 521.[86] He observed that nothing on the face of the statute indicates that the two sections are meant to say the same thing. Moreover, each section has a distinctive legislative history, purpose and rationale. Section 521 was designed to meet the economic objective of enabling state banks to compete with national banks, while section 525, he observed, seeks to preserve principles of federalism. The purpose of section 525 was to enable states to recover authority over matters traditionally committed to state control that section 521 had usurped, according to the letter.

The Jones letter asserted that section 525 should be read in accordance with the plain meaning of the language used.[87] The state in which the loan is "made" has the right of countermand. That state is not necessarily the same state in which the bank is located, nor necessarily the state in which the borrower is located.[88] However, precisely where a loan is "made" for purposes of section 525 is not clear from the face of the statute.

Recognizing that section 525 is a federal statute and requires a single interpretation in order to avoid confusion and disruption in the nation's banking system, the Jones letter rejected any resort to individual state statutory provisions to determine where a loan is "made."[89] Such an analysis would not provide a single federal standard and would not result in the equity or predictability which, Jones believes, was intended when sections 521 and 525 were enacted.[90]

Instead, citing *Marquette*, the Jones letter embraced the position that the determination of where a loan is "made" for purposes of section 525 should be based upon an analysis of the facts surrounding the extension of credit.[91] Consequently, the fact that a particular state has opted out of section 521 should not affect a bank not located in the state unless the loan is "made" in the opt-out state. Further, because a factual analysis is required, an opt-out state should not be able legislatively to extend its reach in order to affect the determination of where a loan is "made," the factual analysis being independent of any law.[92]

Although counsel for the bank which requested the opinion provided certain facts relating to the bank's lending program, Jones declined to analyze the facts presented.[93] He noted that the FDIC was not in a position to determine whether all the facts required to reach a conclusion regarding where a loan by the bank is "made" were presented. A factual analysis suggests the necessity of a loan-by-loan analysis.

While embracing a factual analysis, Jones provided no express direction regarding the precise method of analysis to be undertaken or the relative weight of various factors which may be present in a given situation. Jones appeared to embrace the analysis found in the *Restatement (Second) of Conflicts of Law* sections 187, 188 and 195, when he recognized the validity of the principles enunciated in those sections.

The Jones letter helps to clarify the position of the FDIC with respect to the interpretation of section 525. It makes clear the FDIC's position that a single, federal mode of factual analysis which is independent of state law is required, but fails to provide the details of that analysis. Jones stated only that it is appropriately the role of bank counsel to analyze the relevant facts, in light of the standards suggested by the *Restatement (Second) of Conflicts of Law* sections cited in his letter, and to advise his or her client.

The approach taken by Jones appears sound in consideration of the statute and the broader purposes and policies which he identifies and which the Supreme Court expressed in *Marquette*. The plain language of the statute supports Jones' conclusion. Had Congress intended a different result, the use of the is "made" language would appear pointless. The statute could have been written far more clearly by specifying that the state where the institution is located or the state where the borrower resides could countermand, if either of these standards reflected the Congressional intent.

In order to avoid losing most favored lender or exportation rights, a federally-insured institution should structure its interstate lending program (including the location of operations centers) to avoid having a loan "made" in an opt-out state. This task is made easier if, as Jones suggests, the factual determination of where a loan is "made" cannot be artificially affected by state legislation and if a federal standard is

82. *See generally* Langer & Wood, *supra*, note 1, *passim*. No comparable problem arises in the exportation context for national banks because no similar opt-out provision exists relative to exportation. under section 85.

83. FDIC Letter No. 88-45 from Douglas H. Jones, Deputy Gen. Counsel (June 29, 1988), *reprinted in* [Tr.B. 1988-89] Fed. Banking L. Rep. (CCH) para. 81, 110.

84. *Id.* at 1.

85. *Id.* at 2.

86. *Id.*

87. *Id.* (citing Escondido Mut. Water Co. v. LaJolla Band of Mission Indians, 466 U.S. 765, 772 (1984)).

88. Jones letter *supra* note 83, at 2.

89. *Id.* (citing *Marquette*, 439 U.S. at 312-13, in comparison).

90. Jones letter, *supra* note 83, at 2.

91. *Id.* (citing *Marquette*, 439 U.S. at 311-12).

92. Jones letter, *supra* note 83, at 2.

93. *Id.* at 3.

adopted which recognizes a choice of law stipulation.

B. An Alternative Analysis

Two well-developed rules of statutory construction are that Congress is presumed to (i) know the law and the executive or judicial interpretations given similar terms and (ii) intend that the terms used in previous statutes have the same meaning and interpretations as such terms have been given in similar or analogous statutes.[94] Because the OCC[95] and the Court of Appeals for the District of Columbia Circuit (D.C. Circuit)[96] interpreted a provision similar to the operative provision used in section 525 in an analogous context to mean that a loan "is made" where the loan is approved and funds disbursed, it may be presumed that Congress intended the language employed in section 525 to have the same meaning.

12 U.S.C. section 36 (section 36) limits the situations in which a national banking association may maintain or establish and operate a branch bank. Section 36 defines "branch" to mean "any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State . . . *at which . . . money [is] lent.*"[97] Both the OCC and the D.C. Circuit have interpreted where a loan is made in the branch banking context. The OCC's interpretive ruling which defines where "money [is] lent" under section 36(f) provides:

> Origination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office of the bank does not violate 12 U.S.C. 36 and 81: *Provided,* That the loans are approved and *made* at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.[98]

Pursuant to this rule, the OCC has determined that an office established to solicit loan business ("loan production office" or "LPO"), provide information as to loan rates and terms, interview and counsel applicants regarding loans and aid customers in the completion of loan applications is not the place where the loans are made because the loans are not approved at the LPO nor are the funds disbursed there.[99] Similarly, the District of Columbia Circuit has held that a loan "is made" in the branch banking context where the funds are transferred and interest begins to accrue.[100]

Although the language employed in section 525 is not identical to the language used in section 36, both statutes look to where the loan is made. Because Congress is presumed to have knowledge of the OCC's and the District of Columbia Circuit's interpretations of this similar language, a court interpreting section 525 should follow these interpretations, unless evidence of Congressional intent exists to rebut the presumption that Congress intended similar interpretations of the similar language found in sections 525 and 36. No such evidence is evident in the legislative history surrounding the DIDMCA.

It could be argued that because Congress used different language in sections 521 and 525, it intended the different language to have different meanings. The language used by Congress in section 525, however, previously was construed by judicial and administrative interpretation to have a similar meaning to the language found in section 521. Because Congress is presumed to have known that meaning when it chose to word section 525 as it did, the presumption that Congress intended the language in section 521 and section 525 to have different meanings can be logically rebutted.

Thus, where a loan is made is dependent upon a determination of where money is lent and the loan approved. Consequently, the location of the office of a federally-insured institution at which these functions are performed becomes the critical element in the analysis that a federally-insured institution must undertake when considering the optimal structuring of its interstate lending programs in light of section 525 of the DIDMCA.

IV. The Elusive Concept of "Interest" and the Exportation of Credit Terms

As Langer and Wood discussed, one of the largely unresolved issues regarding federal preemption is the scope of the term "interest" used in section 85 and the various usury preemption provisions of the DIDMCA.[101] The difficulty is created by the multiplicity of dissimilar concepts identified by similar names in the usury laws of the several states. The problem is most acute because Congress arguably has not provided clear statutory definitions for terms, nor explicit direction regarding the proper manner of or the limits to the incorporation of state law.

A. Conflicting State and Federal Definitions

In *Seiter v. Veytia,*[102] the Texas Supreme Court considered the issue of whether federal law, which eliminated interest rate limitations on loans secured by first liens on residential real property through section 501 of the DIDMCA, generally preempts state-imposed interest rate ceilings, in particular, Texas limitations relating to late charges.[103] Under relevant Texas usury law, late charges are a component of "interest."[104] The trial court held that the Texas limitations were preempted in their entirety

94. Courts presume that elected officials know the law and the executive or judicial definition previously given similar terms and further presume that Congress intended those terms to have the meaning given them by the prior executive or judicial interpretation in the statute the court is then charged with construing. United States v. Perini N. River Assocs., 459 U.S. 297, 319-20 (1983); Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979); Blitz v. Donovan, 740 F.2d 1241, 1245 (D.C. Cir. 1984); Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1168 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974). Additionally, when terms are used in different statutes but in an analogous context and in a similar manner, courts will presume that Congress intended the later use of the term to be construed in the same way as its earlier use. NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). Another settled rule of construction is that Congress' use of different language in the same statute implies that Congress meant different things. Moore v. Harris, 623 F.2d 908, 914 (4th Cir. 1980). Compare section 521 which allows banks to charge interest "on any loan" at the rate allowed by the laws of the state where the bank is "located" with section 525 which provides that following proper action by a particular state the DIDMCA amendments will not apply to "loans made in such state."

95. *See* 12 C.F.R. § 7.7380 (1988).

96. *See* Independent Bankers Ass'n v. Smith, 534 F.2d 921 (D.C. Cir. 1976).

97. 12 U.S.C. § 36(f) (1982) (emphasis added).

98. 12 C.F.R. § 7.7380(b) (1988) (emphasis added).

99. *See* OCC Interpretive Letter No. 343 from Peter Liebesman, Asst. Dir., Legal Advisory Services Div. (May 24, 1985), *reprinted in* [Tr. B. 1985-87] Fed. Banking L. Rep. (CCH) para. 85,513; OCC Interpretive Letter from Richard V. Fitzgerald, Asst. Dir., Legal Advisory Servs. Div. (Nov. 7, 1977), *reprinted in* [Tr. B. 1978-79] Fed. Banking L. Rep. (CCH) para. 85,064.

100. Independent Bankers Ass'n, *supra,* 534 F.2d at 947-48 (The court held that "[a] *loan is made* (and 'money lent') when the customer receives funds on which he immediately begins to pay interest. . . . " 534 F.2d at 948 (emphasis added).).

101. *See* Langer & Wood, *supra,* note 1, *passim.*

102. 756 S.W.2d 303 (Tex. 1988), *reh. overr.*

103. Section 501 provides in relevant part:

> The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by a first lien on residential real property, by a first lien on stock in a residential cooperative housing corporation where the loan, mortgage, or advance is used to finance the acquisition of such stock, or by a first lien on a residential manufactured home;
>
> (B) made after March 31, 1980; and
>
> (C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735l-5(b)[with certain qualifications].

Pub. L. 96-221, § 501(a)(1), Title V, 94 Stat. 167 (Mar. 31, 1980) (codified at 12 U.S.C. § 1735f-7 (1982)).

104. *See* Dixon v. Brooks, 604 S.W.2d 330, 333 (Tex. Civ. App. 1980, writ ref'd. n.r.e.); Watson v. Cargill, Inc. Nutrena Division, 573 S.W.2d 35, 42 (Tex. Civ. App. 1978, writ ref'd. n.r.e.).

and granted summary judgment. The Texas court of appeals held that the preemption of usury ceilings under section 501 was not intended to include late charges, reversed the summary judgment ruling, and remanded the case for trial.[105] The Texas Supreme Court affirmed.

The Veytias purchased a home from the Seiters in 1981 and executed two promissory notes and two deeds of trust. The Veytias defaulted on the notes, but the parties were able to reach an agreement modifying the original obligations. The modification agreement included a paragraph providing for late charges of $20.00 each day that any installment was overdue. When the Veytias once again defaulted and the trustee sent a notice of trustee's sale, the Veytias filed suit against the Seiters and the trustee to enjoin the trustee's sale. The suit also sought damages for usurious interest charged by the Seiters based on the late charge provision. The Seiters countered that because of section 501 preemption, the late charge was not usurious.

The Texas Supreme Court considered whether the Texas legislature had opted out of the DIDMCA preemption as is expressly permitted by section 501.[106] After reviewing the relevant Texas statutes and legislative history, the court concluded that Texas had not opted out of section 501 of the DIDMCA.[107] The court then noted that while the DIDMCA makes no mention of late charges, the legislative history to section 501 clearly states that under section 501 Congress intended to preempt only those limitations that are included in the annual percentage rate, and not to preempt state limitations on "prepayment charges, attorneys' fees, *late charges* or similar limitations designed to protect borrowers."[108]

The Seiters argued a different point, however. They claimed that because under Texas law late charges are considered interest, such charges would be a part of the annual percentage rate which Congress intended to preempt. The Seiters thus asserted that the definition of interest or annual percentage rate was a matter of state law, citing *United Federal Savings and Loan Association v. Cage.*[109] The Texas Supreme Court found the Seiters' attempt to impose state law concepts upon federal law to be inappropriate.[110] The court concluded that Congress did not intend for section 501 to preempt late charges which were usurious under Texas law.[111] In this case, state law concepts did not govern the terms of federal legislation. In the absence of such clear direction from the legislative history, it is unclear whether other federal terms would be so narrowly construed. The definition of terms used in a federal statute is a federal question, but, again, confusion often arises when federal and state law are placed side by side.

B. What Role Does State Law Play in Interpreting Federal Statutes?

A recent interpretative letter by Robert B. Serino, Deputy Chief Counsel for Policy for the OCC,[112] was issued in response to a letter from the Office of the Iowa Administrator of the Iowa Consumer Credit Code (Iowa Administrator) advising the OCC of some proposed litigation in Iowa.[113] The letter dealt with the issue of the extent to which federal preemption is dependent on state law concepts or definitions of "interest."

The Iowa Administrator informed the OCC in early 1988 of the determination of the Iowa Attorney General that certain fees and charges provided for in open-end consumer credit card agreements and certain fees and charges provided for in "private label" consumer credit card agreements by Citibank (South Dakota), N.A. and United Missouri Bank of Kansas City, N.A., violated the Iowa Consumer Credit Code. In the open-end credit card agreement context, the fees and charges were late fees, charges for non-sufficient funds (NSF) checks received in payment on consumer credit accounts, and cash advance fees; in the private label credit card context, the fees and charges were late fees, NSF charges, and attorneys' fees payable by the consumer in any lawsuit brought for collection of the consumer credit card account. The Serino letter responded that the law of the state where a national bank is located determines the permissibility of the fees and charges which the bank may seek to impose on Iowa residents, not Iowa law.[114]

Serino noted that the rate of interest that a national bank is permitted to charge on loans is governed by section 85 and the OCC's Interpretative Rule 7.7310.[115] National banks enjoy most favored lender status under *Tiffany* and *Marquette.*[116] Additionally, section 85 incorporates state usury laws to determine the interest rate allowed by the state where the national bank is located.[117] Serino stated that Interpretative Rule 7.7310 reflects prior judicial interpretations of section 85.[118] Further, he noted that Interpretative Rule 7.7310 has never been questioned by any court and has been adopted by at least three courts as the basis for decisions involving the relationship between national banks and state usury laws.[119] The letter observed that the authority given to national banks to charge interest at the rate allowed by the laws of the state where the bank is located is designed to place national banks on an equal footing with the most favored state-chartered lenders in the bank's state of location and to protect national banks from unfriendly state legislation.[120]

The letter determined that because the banks' respective charter addresses and places of business are in South Dakota and Missouri, and they have no branches in Iowa, therefore the banks are presumably located in South Dakota and Missouri for exportation purposes. The OCC therefore opined that the state law which must be considered to determine whether the fees and charges imposed by each bank and its credit card agreements are material to the determination of the interest rate and are consequently exportable to its Iowa customers is the law of South Dakota and

105. *See* Veytia v. Seiter, 740 S.W.2d 64 (Tex. App. 1987).

106. 756 S.W.2d at 305.

107. *Id. See* 12 U.S.C. § 1735f-7 note.

108. *Id.* (quoting S. Rep. 96-368, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 255). After explaining the purpose of the passage of the act was to ease the severity of mortgage crunches at the time through the limited preemption of mortgage ceilings, the Senate Committee report on the House Bill states: "In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges." S. Rep. 96-368, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News at 254-55.

109. 487 So. 2d 171 (La. App. 1986).

110. 756 S.W.2d at 305.

111. *Id.*

112. OCC Interpretive Letter No. 452 from Robert B. Serino, Deputy Chief Counsel (Policy), to Linda Thomas Lowe, Deputy Consumer Credit Code Adm'r and Asst. Att'y Gen., Iowa (Aug. 11, 1988) (Serino letter) *reprinted in* [Tr. B. 1988-89] Fed. Banking L. Rep. (CCH) para. 85,676.

113. *See, supra,* note 2.

114. Serino letter, *supra* note 112, at 2.

115. *Id.*

116. Serino letter, *supra* note 112, at 2 (citing *Tiffany*, 85 U.S. (18 Wall.) 409, and *Marquette*, 439 U.S. 299).

117. *Id.* at 2-3 (citing Daggs v. Phoenix Nat'l Bank, 177 U.S. 549 (1900)).

118. Serino letter, *supra* note 112, at 3.

119. *Id.* (citing United Missouri Bank v. Danforth, 394 F. Supp. 774 (W.D. Mo. 1975); *Equitable Trust*, 294 Md. 385, 450 A.2d 273; and *Northway Lanes*, 464 F.2d 855.

120. Serino letter at 3 (citing *Marquette*, 439 U.S. at 314; First Nat'l Bank v. Nowlin, 509 F.2d 872, 880 (8th Cir. 1975); and Commissioner v. First Nat'l. Bank, 268 Md. 305, 300 A.2d 685 (1973)).