Developments in the Interstate Delivery of Consumer Financial Services

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During the last two years a flurry of suits have been filed and settled, and some are still pending, that raise significant issues affecting the ability of national and state banks, and by implication other federally insured lenders, to engage in interstate consumer credit transactions. These suits include litigation between the Iowa Attorney General and several banks, including Citibank (South Dakota), N.A. ("Citibank"), United Missouri Bank of Kansas City, N.A. ("UMBKC"), United Missouri Bank, U.S.A. ("UMBUSA"), and SafraBank (California) ("SafraBank"),[1] and between the Massachusetts Attorney General and Greenwood Trust Company.[2] Several of the suits involving the Iowa Attorney General have recently been settled, after the filing of briefs on cross-motions for summary judgment.[3] Other developments in this area include an interpretive letter issued by the Office of the Comptroller of the Currency

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1. Citibank (South Dakota), N.A. v. Miller, No. 88-258-E (S.D. Iowa filed May 6, 1988, dismissed per stipulation Nov. 29, 1989) and Iowa *ex rel.* Miller v. Citibank (South Dakota), No. CE 029-16973 (Dist. Ct. Polk County, Iowa filed May 13, 1988, dismissed per stipulation Nov. 29, 1989) (the "*Citibank* litigation"); 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, dismissed per stipulation Feb. 27, 1990) and United Missouri Bank of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation Feb. 27, 1990) (the "*UMBKC* litigation"); Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., No. CE 029-17028 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation June 8, 1990) and United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation June 8, 1990) (the "*UMBUSA* litigation"); and Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990) (the "*SafraBank* litigation").

2. Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989) (the "*Greenwood Trust* litigation"). Mr. Bock is employed by an affiliate of Greenwood Trust Company.

3. *See* cases cited at note 1.

("OCC"),[4] broadly construing the scope of federal preemption under the National Bank Act ("NBA") and the industry reaction to the American Telephone and Telegraph Company ("AT&T") Universal Card. These developments have contributed to the continuing public debate of unresolved legal issues in interstate delivery of consumer financial services.

LITIGATION IN IOWA

The Iowa Attorney General has been actively litigating the interstate consumer credit transactions practices of national and state banks since first filing suit against the First National Bank of Wilmington in Delaware in 1988.[5] These suits, in particular the litigation involving Citibank ("the *Citibank* litigation"), have received public attention because of the important issues raised.[6] The Iowa Attorney General has generally sought the enforcement of the restrictions placed by Iowa law on contractual choice of law provisions, late charges, returned check charges, over-limit charges, attorneys' fees and collection costs provisions, change of terms provisions, and default provisions. The Iowa Attorney General has also challenged the authority of national banks and federally insured, state-chartered banks to rely on federal law and contractual choice of law provisions stipulating that the law of states other than Iowa apply to credit agreements with Iowa residents. All of these suits, with the exception of the litigation involving SafraBank, have been settled.[7]

THE CITIBANK *LITIGATION*

By a Settlement Memorandum agreed to November 29, 1989,[8] Citibank and the Iowa Attorney General settled the federal court action brought by Citibank seeking declaratory and injunctive relief against the exercise of regulatory authority by the Iowa Attorney General over Citibank's MasterCard and Visa credit card agreements and transactions with Iowa residents. The related state court action brought by the Iowa Attorney General was simultaneously settled. Subsequent to the filing of these suits, the OCC issued a written opinion that

4. OCC Interpretive Letter from William B. Glidden, Asst. Dir., Legal Advisory Servs. Div. (Sept. 5, 1989) (unpublished) (the "Glidden Letter").

5. Iowa *ex rel.* Miller v. First Nat'l Bank, No. 88-20 (D. Del. filed Jan. 19, 1988, dismissed per stipulation Apr. 15, 1988). *See also* cases cited at note 1.

6. Twelve *amicus curiae* briefs were filed in the *Citibank* litigation alone, in addition to those of the parties. *See* Tomkies, *Interstate Consumer Credit Transactions: Recent Developments,* 43 Cons. Fin. L.Q. Rep. 152, 163–78 (1989) ("Tomkies"). For a discussion of issues raised by this litigation, *see generally* Tomkies, *supra,* and Langer & Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC Insured Savings Institutions, and FDIC Insured State Banks,* 42 Cons. Fin. L.Q. Rep. 4 (1988) ("Langer & Wood").

7. *See* cases cited at note 1.

8. Settlement Memorandum, Citibank (South Dakota), N.A. v. Miller, No. 88-258-E (S.D. Iowa filed May 6, 1988, dismissed per stipulation Nov. 29, 1989); and State of Iowa *ex rel.* Miller v. Citibank, No. CE 029-16973 (Dist. Ct. Polk County, Iowa filed May 13, 1988, dismissed per stipulation Nov. 29, 1989) ("*Citibank* Settlement Memorandum").

the laws of a national bank's home state control the "interest" a national bank can charge and the "material" fees and terms it can impose,[9] and the Iowa legislature enacted legislation permitting late payment charges, over-limit charges, and nonsufficient funds charges in connection with open-end credit.[10]

In the Settlement Memorandum, Citibank represented, and agreed that until at least September 1, 1992 it would abide by its representations, that it charges Iowa residents no more than $10 for each billing period in which payment is not received within 25 days after the payment due date and no more than $10 for returned checks.[11] Citibank further represented that it neither demands nor authorizes anyone to demand attorneys' fees from Iowa cardholders in connection with collection activities and that it makes changes in terms and provides notices of default in accordance with procedures previously disclosed to the Iowa Attorney General by Citibank.[12] Finally, Citibank agreed that it would remove from credit card agreements entered into with Iowa residents after December 31, 1989 the contractual choice of law provision stipulating that South Dakota law applied to the credit card agreements between Citibank and Iowa residents.[13] The Iowa Attorney General in return agreed not to challenge Citibank's practices set forth in the Settlement Memorandum.[14] The Settlement Memorandum was stipulated to bind the parties only until September 1, 1992 and was made subject to supervening events.[15] The Settlement Memorandum does not constitute an admission by either party.[16]

Notwithstanding Citibank's agreement to remove the contractual choice of law provision from its credit card agreements, the settlement does not resolve the dispute between the parties regarding the applicability of Iowa and South Dakota law to credit card agreements between Citibank and Iowa residents.[17] Citibank continues to maintain that federal and South Dakota law govern its credit card agreements exclusively, while the Iowa Attorney General continues to maintain that the challenged terms are subject to Iowa law.

9. OCC Interpretive Letter No. 452 from Robert B. Serino, Deputy Chief Counsel (Policy), to Linda Thomas Lowe, Deputy Cons. Credit Code Adm'r and Asst. Att'y Gen., Iowa (Aug. 11, 1988), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (Aug. 11, 1986), *discussed in* Tomkies, *supra* note 6, at 159–63.

10. 1989 Iowa Acts 552, approved Apr. 27, 1989, effective July 1, 1989 (expressly authorizing charges in the amount of $10 for payments more than 10 days late, over-limit transactions, and nonsufficient funds checks in connection with certain open-end credit transactions). Citibank charged $10 for payments more than 25 days late and $10 for nonsufficient funds checks. The Iowa legislation has no retroactive effect.

11. *Citibank* Settlement Memorandum at 2.

12. *Id.*; *see* Letter from Curt J. Bernard, Vice President, Citibank, to Richard Cleland, Administrator of the Iowa Consumer Credit Code (Nov. 13, 1989) (unpublished).

13. *Citibank* Settlement Memorandum at 3.

14. *Id.* at 4–5.

15. *Id.* at 3–5.

16. *Id.* at 5.

17. Press Release of Iowa Department of Justice (Nov. 30, 1989).

THE UMBKC *LITIGATION*

Like the *Citibank* litigation, the litigation between the Iowa Attorney General and UMBKC ("the *UMBKC* litigation") principally concerned the fees and charges imposed by an out-of-state national bank on Iowa residents.[18] Unlike the *Citibank* litigation, however, the *UMBKC* litigation involved a private label credit card program.[19] The *UMBKC* litigation was stayed pending the outcome of the *Citibank* litigation.

By a Settlement Memorandum dated February 23, 1990, UMBKC and the Iowa Attorney General settled the *UMBKC* litigation.[20] In the Settlement Memorandum, UMBKC agreed that until December 31, 1992, it would limit charges imposed on Iowa residents to not more than $10 for each billing period in which an "appropriate payment" is not received within 15 days of its due date and $10 for returned checks.[21] UMBKC's credit card agreement terms had previously provided for late payment charges for payments not received within 15 days of the date due in the amount of the lesser of 5% of the past due payment or $15 and, "to the extent allowed by law," returned check charges of $5.[22] UMBKC also agreed in the Settlement Memorandum not to demand, or authorize anyone else to demand, that Iowa cardholders pay attorneys' fees when UMBKC refers the balance of a cardholder's account for collection.[23] UMBKC's credit card agreement terms had previously provided for reasonable attorneys' fees, "as allowed by law," in the event of a collection action.[24] UMBKC further agreed to provide to Iowa cardholders (i) two written notifications of changes in terms that would result in any additional costs or charges to Iowa cardholders, the first of which is to be given at least 90 days prior to the effective date of the change; and (ii) in accordance with procedures detailed in the Settlement Memorandum, notification of cardholders' rights to cure default.[25] Finally, UMBKC agreed to send to each Iowa resident for whom it establishes a credit card account after the date of the Settlement Memorandum a

18. 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, dismissed per stipulation Feb. 29, 1990); United Missouri Bank of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation Feb. 27, 1990).

19. A private label credit card program is a credit card program established by a card issuer for a sponsoring person pursuant to which "private label" cards are issued that may only be used to purchase specified goods or services at specified merchants who agree to honor the card. Commonly, the private label cards prominently display the sponsoring person's name and may be used to make purchases only from the sponsor's establishments.

20. Settlement Memorandum, Iowa *el rel.* Miller v. United Missouri Bank of Kansas City, N.A., No. CE 029-17029 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation Feb. 27, 1990); United Missouri Bank of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation Feb. 27, 1990) ("*UMBKC* Settlement Memorandum").

21. *UMBKC* Settlement Memorandum at 2.

22. *Id.* at Group Exhibit A.

23. *Id.* at 2.

24. *Id.* at Group Exhibit A.

25. *Id.* at 2–5.

special written notice discussing the inapplicability to Iowa residents of the contractual choice of law provisions of UMBKC's credit card agreements which state that Missouri law applies.[26] In addition to providing the special notice, UMBKC agreed that it would not raise the Settlement Memorandum to bar the State of Iowa from appearing as an amicus curiae in court proceedings respecting the issue of whether Iowa law governs the contractual relationship between UMBKC and an Iowa resident who has received the required written notice, or from joining a then-existing judicial proceeding filed by an Iowa resident who did not receive the required written notice. In return for UMBKC's agreements, the Iowa Attorney General agreed not to challenge UMBKC practices that conform to the Settlement Memorandum.[27] The Settlement Memorandum was stipulated to bind the parties until December 31, 1992 and was made subject to supervening events.[28] The Settlement Memorandum does not constitute an admission by either party.[29]

THE UMBUSA *LITIGATION*

Unlike previous litigation involving the Iowa Attorney General, the litigation involving UMBUSA ("the *UMBUSA* litigation") concerned the interstate consumer credit transactions of a federally insured, state-chartered bank, rather than a national bank.[30] Iowa has exercised its right under section 525 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA")[31] to opt out of the federal usury preemption granted federally

26. *Id.* at 3. The special notice, which is to be sent a few days prior to the mailing of the Iowa resident's credit card agreement and credit card, provides that the Iowa Consumer Credit Code states that it is applicable to consumer credit agreements such as the cardholder's credit card agreement with UMBKC and that any contrary contractual choice of law provision is invalid. The notice further states that unless the Iowa law is unconstitutional or is preempted by federal law, the contractual choice of law provision in the credit card agreement specifying that Delaware and federal law shall govern is inapplicable to Iowa residents and is to be considered deleted from the credit card agreement.

27. *Id.* at 6–7.

28. *Id.* at 5–7.

29. *Id.* at 7.

30. Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., No. CE 029-17028 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation June 8, 1990); United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation June 8, 1990).

31. Section 525 of the DIDMCA provides:

> The amendments made by sections 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 amendments 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 entered into on or after April 1, 1980, and prior to the date on which such law is adopted or such certification is made.

insured, state-chartered banks by section 521 of the DIDMCA.[32] Thus, the *UMBUSA* litigation raised unresolved issues regarding the interpretation of section 525 opt-out authority[33] as well as, fundamentally, the right of a federally insured, state-chartered bank to export interest under section 521. UMBUSA, a Delaware-chartered bank, was charging a delinquency charge of the lesser of 5% of the minimum payment due or $15 on payments not received within 15 days, an over-limit charge of $10, and a returned check charge of $7.50 under its credit card agreements. The Iowa Attorney General challenged these charges and certain other practices with respect to Iowa cardholders.

Pub. L. 96-221, § 525, 94 Stat. 132, 167 (1980) (codified at 12 U.S.C.A. § 1730g note (West 1982)).

Iowa has opted out of section 521 pursuant to section 525. 1980 Iowa Acts ch. 1156, § 32 (not codified). In addition to Iowa, the states of Colorado, Massachusetts, Maine, Nebraska, North Carolina, Wisconsin, and the Commonwealth of Puerto Rico formally opted out of sections 521–523 of the DIDMCA, although several states have since repealed their statutes opting out of section 521–523. *See* Colo. Rev. Stat. § 5-13-104 (Supp. 1988); 1981 Mass. Acts ch. 231 § 2 (codified at Mass. Ann. Laws ch. 183 § 63 note (Law. Co-op. 1987), repealed by 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 (1988), 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, § 998(l) (Supp. 1988).

Section 522 of the DIDMCA, which enacted for federally insured savings associations federal usury preemption similar to section 521, was repealed by section 407 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Substantially similar authority was enacted by section 301 of FIRREA. *See* Home Owners' Loan Act of 1933, § 4(g), 12 U.S.C.A. § 1463(g) (West 1989 & Supp. 1990). The opt-out limitation on the authority of federally insured savings associations has thus been removed by FIRREA while preserving federal usury preemption for federally insured savings associations. *See generally* Langer, *FIRREA Removes Opt-Out Limitation on Interest Rate Exportation by Insured Savings Associations,* 44 Cons. Fin. L.Q. Rep. 213 (1990).

32. Section 521 of the DIDMCA has been codified at 12 U.S.C.A. § 1831d (West 1989). Section 521 of DIDMCA, as codified and amended, states in relevant part:

> (a) In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank . . . would be permitted to charge in the absence of this subsection, such State 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 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 State 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. 132, 164 (1980). Section 521 was the first of the three sections enacted in the DIDMCA relating to federal preemption of state usury law with respect to "Other Loans" by federally insured institutions.

33. *See generally* Tomkies, *supra* note 6, at 156–58 (discussing section 525 and FDIC Letter No. 88-45 from Douglas H. Jones, Deputy Gen. Counsel (June 29, 1988), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,110 (June 29, 1988); *see also* Langer & Wood, *supra* note 6, at 22, 27–28.

On June 6, 1990, UMBUSA and the Iowa Attorney General entered into a Settlement Memorandum.[34] Pursuant to the Settlement Memorandum, UMBUSA agreed to limit its late charges to $10 for each billing period in which payment is not received within 15 days of its due date, to limit its over-limit charges to $10, and to limit its returned check charges to $10 per returned instrument. UMBUSA also agreed that it would (i) not demand, or authorize anyone else to demand, that any Iowa cardholder pay debt collectors' fees or attorneys' fees when UMBUSA refers the balance of the Iowa cardholder's account for collection; (ii) provide two written notifications, the first of which is to be sent at least 90 days in advance of the effective date of a change in terms, prior to changing any terms of a credit card agreement with an Iowa resident that would result in any additional costs or charges to the Iowa cardholder; and (iii) provide to Iowa cardholders written notifications of default and of cardholders' right to cure default.

UMBUSA further agreed that it would send to each Iowa resident for whom it establishes a credit card account after the date of the Settlement Memorandum a special written notice discussing the inapplicability to Iowa residents of the contractual choice of law provisions of UMBUSA's credit card agreements which state that Delaware law applies.[35] In addition to providing the special notice, UMBUSA agreed that it would not raise the Settlement Memorandum to bar the State of Iowa from appearing as an amicus curiae in court proceedings respecting the issue of whether Iowa law governs the contractual relationship between UMBUSA and an Iowa resident who has received the required written notice, or from joining a then-existing judicial proceeding filed by an Iowa resident who did not receive the required written notice. UMBUSA agreed to promptly notify its collection counsel regarding the terms of the Settlement Memorandum; to direct such counsel to promptly notify UMBUSA of any court proceedings in which the choice of law issue is raised; and to promptly notify the State of Iowa regarding any such proceedings.

In addition to the changes in fees and charges and practices with respect to Iowa residents, UMBUSA agreed to make an application for, and to take all reasonable actions to obtain, a license under chapter 536A[36] of the Iowa statutes

34. Settlement Memorandum, Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., EC No. 029-17028 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation June 8, 1990); United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation June 8, 1990) ("*UMBUSA* Settlement Memorandum").

35. *UMBUSA* Settlement Memorandum at 3–4. The special notice, which is to be sent a few days prior to the mailing of the Iowa resident's credit card agreement and credit card, provides that the Iowa Consumer Credit Code states that it is applicable to consumer credit agreements such as the cardholder's MasterCard Cardmember Agreement with UMBUSA and that any contrary contractual choice of law provision is invalid. The notice further states that unless the Iowa law is unconstitutional or is preempted by federal law, the contractual choice of law provision in the credit card agreement specifying that Delaware and federal law shall govern is inapplicable to Iowa residents and is to be considered deleted from the credit card agreement. *Id.*

36. Chapter 536A specifically contemplates the licensing of out-of-state lenders to permit such lenders to make "supervised loans," *i.e.*, loans at rates in excess of that permitted by the Iowa interest statute, Iowa Code Ann. §§ 535, 536A (West 1987).

from the Iowa Superintendent of Banking.[37] Finally, UMBUSA agreed to pay certain funds to the Consumer Education Fund of Iowa.

In return for the agreements of UMBUSA, Iowa agreed not to challenge UMBUSA's credit card program. In consideration for UMBUSA's prompt licensure and payment to the Consumer Education Fund, Iowa released and discharged UMBUSA as well as UMBKC—from whom some of the credit card agreements were assigned—from claims, penalties, and causes of action arising out of past or existing credit card agreement provisions or credit card transactions or dealings relating to the fees, charges or practices that were the subject of the litigation. The majority of UMBUSA's agreements terminate May 15, 1993. Unlike the Citibank Settlement Memorandum, however, the terms and provisions of the UMBUSA Settlement Memorandum are binding upon the parties without a general "sunset" date. The Settlement Memorandum does not constitute an admission by either party.[38]

THE SAFRABANK *LITIGATION*

Like the *UMBUSA* litigation, the litigation concerning SafraBank ("the *SafraBank* litigation") involves a state-chartered bank, but unlike previous litigation, the litigation involves precomputed loans, in particular loans to finance precious metals contracts rather than credit card programs.[39] The Iowa Attorney General is seeking injunctive relief against certain unlawful practices of Morgan Whitney Trading Group ("Morgan Whitney") and SafraBank in connection with the solicitation of Iowa residents by telephone for the sale of precious metals contracts. In connection with telephone contacts made by Morgan Whitney, SafraBank, a California-chartered bank, mailed loan contracts and other documents to Iowa residents. The Iowa Attorney General challenged certain contractual provisions in SafraBank's loan documents, including (i) the provisions imposing a delinquency charge of 3% per month on the principal amount due; (ii) the provisions requiring consumers to pay attorneys' fees and costs of collection; (iii) the failure of documents used by SafraBank to include a notice to consumers required by Iowa law and a notice required by Iowa law for negotiable instruments; and (iv) the contractual choice of law provisions stating that the agreements with Iowa residents will be governed by the laws of California.[40] The Iowa Attorney General asserted that

37. In a related Memorandum of Understanding, dated June 6, 1990, UMBUSA and the Superintendent of Banking entered into a binding agreement to deal with certain provisions of Iowa Code chapter 536A that were considered incompatible with, or not applicable to, the operations of an out-of-state open-end credit card issuer such as UMBUSA. The Memorandum of Understanding included provisions for the keeping of records out-of-state and the furnishing of financial information by the parent of UMBUSA in lieu of certain reports by UMBUSA.

38. *UMBUSA* Settlement Memorandum at 11.

39. Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990).

40. First Amended Petition at 8–9, Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990)

the debt incurred by Iowa residents in connection with the precious metals contracts is for consumer purposes and governed by the Iowa Consumer Credit Code ("ICCC")[41] and that the terms of SafraBank's loans violate several provisions of the ICCC.

The Iowa Attorney General's prayer for relief requested (i) temporary and permanent injunctions against SafraBank to prohibit SafraBank from directly or indirectly entering into consumer credit transactions, or engaging in conduct, that violate the ICCC; (ii) the reformation of contracts between Iowa residents and SafraBank to conform with Iowa Code chapter 537 and the rescission of contracts that Iowa residents entered into in violation of chapter 537; (iii) the payment of money to which Iowa residents allegedly have a right of recovery pursuant to Iowa Code chapter 537; and (iv) the imposition of a civil penalty on SafraBank for its alleged repeated and intentional violations of Iowa Code chapter 537.

Requests for summary judgment were filed by both parties.[42]

Brief of SafraBank

In its brief in support of its initial motion for summary judgment, SafraBank challenged the application of the ICCC to the transactions in question.[43] SafraBank challenged the jurisdictional provision of the ICCC[44] as unconstitutional.[45] SafraBank argued that it lacked necessary minimum contacts with Iowa.[46] SafraBank also challenged the Iowa Attorney General's assertion that the transactions between SafraBank and Iowa residents constitute "consumer loans" within the meaning of the ICCC,[47] arguing that the transactions in question are investment loans falling outside the ICCC and thus, as the ICCC does not apply to SafraBank, the Iowa Attorney General fails to state a cause of action.[48] SafraBank asserted that the investors made investments in precious metals for the purpose of making a profit or earning income and not "primarily for a personal, family or household purpose" as required by the ICCC.[49]

(citing Iowa Code Ann. 3104 (West 1987 & Supp. 1990); §§ 537.2507, .3211, .1201(6) (West 1987)).

41. Iowa Code Ann. ch. 537 (West 1987 & Supp. 1990).

42. The Iowa Attorney General's motion for summary judgment was subsequently withdrawn and SafraBank's initial motion for summary judgment was denied on procedural grounds. SafraBank has refiled its request for summary judgment. As of the date this article was written, no date had been set for a hearing on the motion.

43. Brief of SafraBank in Support of Motion For Summary Judgment filed May 3, 1990, Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990) ("*SafraBank* Brief").

44. Iowa Code Ann. § 537.1201 (West 1987).

45. *SafraBank* Brief at 3–6.

46. *Id.*

47. *See* Iowa Code Ann. § 537.1301(14) (West 1987 & Supp. 1990) (definition of "consumer loans").

48. *SafraBank* Brief at 6–7.

49. *Id.* at 7.

SafraBank noted that the federal Truth-in-Lending Act uses language substantially similar to that used by the ICCC to describe consumer transactions,[50] but in addition expressly exempts "credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes."[51] SafraBank argued that a distinction between consumer and commercial purposes on the basis of the profit motive likewise should be applied under the ICCC. SafraBank reasoned that the debts incurred by customers of SafraBank for the purchase of precious metals as investments were not, as matter of law, incurred "primarily for a personal, family or household purpose" within the meaning of the ICCC and thus the ICCC may not be applied.[52]

With respect to the Iowa Attorney General's concerns about the interest charged by SafraBank, SafraBank asserted that because (i) it assesses loan charges in California, (ii) loan payments are submitted to and accepted by SafraBank in California, (iii) the decision to extend credit is made in California, (iv) the loan documents are prepared and issued in California, and (v) SafraBank protects its security interests under the collateralized loans by taking delivery in California of the precious metals purchased by the borrowers, SafraBank's loans are made in California.[53] Consequently, the rate of interest charged by SafraBank on its loans is governed by section 521 of the DIDMCA notwithstanding Iowa's exercise of its right to opt out of federal preemption pursuant to section 525 of the DIDMCA.[54] Even if Iowa law did apply, SafraBank asserted that its practices did not violate the terms of the ICCC.[55]

With respect to the Iowa Attorney General's allegation that SafraBank is making "supervised loans" at interest rates exceeding those allowed by Iowa Code chapter 535, SafraBank asserted that an exception exists in chapter 535 permitting a person to agree to pay any rate of interest if he borrows for a business purpose, expressly including "an investment activity."[56] Because its customers engaged in an investment activity, SafraBank argued that this exception applies and thus the Iowa Attorney General's allegations as to interest rates are "immaterial."[57] SafraBank further asserted that the contracts between it and the borrowers did not violate the ICCC's provisions regarding notice of default and the right to cure default because the borrowers voluntarily surrendered possession of the goods that were collateral for the loans, which collateral

50. *See* 15 U.S.C.A. § 1602(h) (West 1982).

51. *See* 15 U.S.C.A. § 1603(1) (West 1982).

52. *SafraBank* Brief at 13.

53. *Id.* at 16 (citing FDIC Letter No. 88-45 from Douglas H. Jones, Deputy Gen. Counsel (June 29, 1988), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,110 (June 29, 1988) ("Jones letter")). For a discussion of the Jones letter, *see* Tomkies, *supra* note 6, at 157–58.

54. *Id.*; *see supra* notes 27–28.

55. *See* Iowa Code Ann. § 537.5110 (West 1987 & Supp. 1990).

56. *See SafraBank* Brief at 7; *see* Iowa Code Ann. § 535.2(2)(a)(5) (West 1987).

57. *SafraBank* Brief at 18.

SafraBank accepted in full satisfaction of any debt owing on the transactions in default.[58]

As to the Iowa Attorney General's allegation that SafraBank was making precomputed consumer loans and imposing a delinquency charge in excess of that permitted by the ICCC, SafraBank said that it applied a variable rate of interest and therefore could not precompute finance charges. Thus, SafraBank asserted that because the ICCC's limitation on delinquency charges applies only to precomputed consumer credit transactions, it was not in violation of the ICCC.[59] SafraBank further argued that the ICCC renders attorneys' fees provisions merely unenforceable, and contractual choice of law provisions merely invalid, and thus SafraBank's attorneys' fees and California contractual choice of law provisions did not constitute violations of substantive law which would entitle a borrower to any damages.[60] Finally, SafraBank asserted that its variable interest rate notes do not constitute negotiable instruments under the Iowa Uniform Commercial Code because they do not constitute a "promise or order to pay a sum certain" within the meaning of the statute and thus a notice required by the ICCC need not be given for its contracts.[61] SafraBank also disputed any assertion that it had violated the Iowa Consumer Fraud Act[62] because it was not involved in the alleged representations made by Morgan Whitney.[63]

Brief of Iowa Attorney General

In its brief,[64] the Iowa Attorney General argued that the presence of disputed facts and unanswered discovery make summary judgment inappropriate.[65] Moreover, as a matter of substantive law, summary judgment, if given, would be appropriate for Iowa, not SafraBank.[66] The Iowa Attorney General asserted that the ICCC is a constitutional exercise of Iowa's police powers, contending that (i) SafraBank unconditionally waived any right to contest the court's personal jurisdiction; (ii) SafraBank lacked standing to dispute the ICCC's jurisdictional provisions on their face, noting that decisions of the Iowa Supreme Court[67] and Eighth Circuit[68] have upheld the territorial provisions of the ICCC

58. *Id.* at 16–17.

59. *Id.*

60. *Id.* at 19.

61. *Id.*

62. Iowa Code Ann. § 714 (West 1987 & Supp. 1990).

63. *SafraBank* Brief at 20–27.

64. Plaintiff's Memorandum in Support of its Resistance to SafraBank's Motion For Summary Judgment, filed July 11, 1990, Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990) ("Iowa AG Brief").

65. Iowa AG Brief at 1–4.

66. *Id.* at 1.

67. Norton v. Local Loan, 251 N.W.2d 520 (Iowa 1977).

68. Aldens, Inc. v. Iowa *ex rel.* Miller, 610 F.2d 538 (8th Cir. 1979) *cert. denied,* 446 U.S. 919 (1980).

on due process grounds; and (iii) SafraBank's contacts with Iowa do satisfy minimum contacts analysis under due process requirements.[69]

The Iowa Attorney General stated that SafraBank's assertion that the loans are business loans, and thus subject to the rate exception of Iowa Code section 535.2(2)(a)(5), begs the question of the characterization of the loans and the applicability of the ICCC.[70] The Iowa Attorney General reasserted that the transactions in question constitute "consumer loans" within the contemplation of the ICCC and that, in light of the consumer understanding and consumer protection purposes of the ICCC, any ambiguity should be resolved in favor of finding the ICCC applicable to the transactions.[71] The Iowa Attorney General argued that loans for investment purposes do not necessarily fall outside the scope of "consumer loans."[72] The Iowa Attorney General cited the Board of Governors of the Federal Reserve System's ("Federal Reserve Board") Official Commentary to 12 C.F.R. section 226.3(a) as presenting an appropriate mode of analysis for use under the ICCC because of the ICCC's similarity to, and express incorporation of, provisions of the federal Truth-in-Lending regulation.[73] If investment-related transactions were clearly outside the scope of the ICCC, then the ICCC's express exclusion for "transactions in securities or commodities accounts with a broker-dealer registered with the securities exchange commission"[74] would be unnecessary, according to the Iowa Attorney General.[75] The Iowa Attorney General further argued that the facts of the case support the view that the investors were not sophisticated business or professional investors and that the investments, like certificates of deposit and other common income producing accounts, should be considered consumer, rather than business, transactions.[76]

The Iowa Attorney General asserted that SafraBank violated the ICCC by making loans in excess of permitted rates without an Iowa license because the loans were "made in" Iowa within the contemplation of the ICCC's territorial application provision, which the Iowa Attorney General asserted applied in the absence of a preemptive federal mode of analysis regarding the place of the making of a loan for section 525 purposes.[77] The Iowa Attorney General contended that an interpretation that Iowa's opt-out under section 525 only applies to loans made by Iowa-chartered institutions to Iowa residents is unsupported by case law, statutes or regulations, defeats the congressional purpose behind section 525 of permitting states to maintain the opt-out state's usury protections, and violates the fundamental public policy of Iowa of

69. Iowa AG Brief at 5.
70. *Id.* at 33.
71. *Id.* at 11–12.
72. *Id.* at 11–19.
73. *Id.* at 12–14.
74. Iowa Code Ann. § 537.1202(4) (West 1987).
75. Iowa AG Brief at 14–15.
76. *Id.* at 16–18.
77. *Id.* at 19–21, 24.

protecting consumers in consumer credit transactions.[78] The Iowa Attorney General reasoned that section 525 identified three possible locations where a loan may be made: where the bank is located, where the customer resides, or both states if there are significant contacts with both states.[79] The Iowa Attorney General asserted that section 525 makes sense only if applied to all loans made to citizens of an opt-out state.[80] To the extent the congressional intent in enacting section 525 may be uncertain, the Iowa Attorney General asserted that the ambiguity must be construed against the preemption of state law.[81] Even if Iowa law is preempted by section 521 notwithstanding Iowa's opt-out, the Iowa Attorney General claimed that the noninterest terms of SafraBank's loans remain subject to, and violate the provisions of, the ICCC.[82]

The Iowa Attorney General asserted that the voluntary surrender of collateral that may obviate the notice of default required by the ICCC may occur only after default and that there was nothing voluntary in the arrangements in question since the loans were not even finalized until after SafraBank obtained possession.[83] Further, the Iowa Attorney General asserted that any waiver by the customers of statutory rights under the ICCC was invalid.[84] On the question of delinquency charges, the Iowa Attorney General asserted that SafraBank either (i) imposes a charge in excess of that permitted by precomputed loans, if the loans are deemed precomputed under the terms of the ICCC,[85] or (ii) imposes an unauthorized charge in violation of Iowa Code section 537.2501 because delinquency charges are not permitted for non-precomputed loans.[86] The Iowa Attorney General asserted that attorneys' fees provisions are not merely unenforceable but separately actionable for damages and that choice of law provisions similarly are not merely invalid but separately actionable under the ICCC and the Iowa Consumer Fraud Act.[87] Finally, the Iowa Attorney General detailed reasons why SafraBank's benefit from the activities of Morgan Whitney should subject SafraBank to charges of unfair practices under the Iowa Consumer Fraud Act, asserting further that disclaimers in the contract documents do not shield SafraBank.[88]

As of the date this article was prepared, no hearing had been set on SafraBank's refiled motion for summary judgment.

78. *Id.* at 24–27.

79. *Id.* at 25.

80. *Id.* at 26.

81. *Id.* at 28–29 (noting that the principles of federalism require courts to defer to state regulation of areas within the police power of the states absent a clear statement of congressional intent to preempt such laws).

82. *Id.* at 29.

83. *Id.* at 29–31.

84. *Id.* at 32; *see* Iowa Code Ann. § 537.1107(1) (West 1987).

85. *See* Iowa Code Ann. § 537.1301(33) (West 1987 & Supp. 1990).

86. Iowa AG Brief at 33–35.

87. *Id.* at 36–37 (citing Iowa Code § 714.16(2)(a) (1989) of the Consumer Fraud Act).

88. Iowa AG Brief at 37–49.

THE GREENWOOD TRUST *LITIGATION*

In a letter dated October 27, 1989,[89] the Massachusetts Attorney General charged that Greenwood Trust Company's ("Greenwood Trust") practice of charging Massachusetts consumers late fees on its Discover financial services card accounts constituted an unfair and deceptive act or practice in violation of the Massachusetts Consumer Protection Act, and regulations promulgated thereunder,[90] and of Mass. Gen. Laws chapter 140, section 114B.[91] According to the letter, settlement of the matter would require the entry of an appropriate judgment and the payment to Massachusetts of civil penalties and consumer restitution and the costs of the Massachusetts Attorney General's investigation and litigation of the matter, including reasonable attorneys' fees. On November 14, 1989, after meeting with the Massachusetts Attorney General, Greenwood Trust filed suit against the Massachusetts Attorney General.[92]

In its suit, Greenwood Trust is seeking a declaratory judgment that (i) the imposition of late payment charges as set forth in its cardmember agreement is authorized by federal law and the law of Delaware; (ii) Massachusetts law is preempted under the supremacy clause[93] to the extent that Massachusetts law conflicts with federal law and the law of Delaware; (iii) the enforcement by Massachusetts of its proposed prohibition of Greenwood Trust's late payment charge would contravene the Commerce Clause;[94] and (iv) Greenwood Trust's

89. Letter from Ernest V. Sarason, Jr., Assistant Attorney Gen., to Greenwood Trust Co. (Oct. 27, 1989) (unpublished).

90. Section 2 of chapter 93A declares unfair methods of competition and deceptive acts or practices in the conduct of any trade or commerce to be unlawful. Mass. Ann. Laws ch. 93A, § 2 (Law. Co-op. 1985). The Attorney General's regulations promulgated under chapter 93A provide:

> Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of M.G.L. c. 93A, § 2 if:
>
> * * *
>
> (3) It fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection. . . .

Mass. Regs. Code tit. 940, § 3.16 (1986).

91. Section 114B ("section 114B") of chapter 140 provides that "[n]o creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to such an open-end credit plan." Mass. Ann. Laws ch. 140, § 114B (Law. Co-op. 1985 & Supp. 1990). The term "open-end credit plan" means "a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance." *Id.* ch. 140D, § 1. The definition of open-end credit plan is expressly incorporated into section 114B by reference from the Massachusetts Truth-in-Lending Act ("Massachusetts TILA"). The term "creditor" is not defined in section 114B. *Id.* ch. 114B. In briefed arguments, the Massachusetts Attorney General used the definition of creditor found in the Massachusetts TILA. Greenwood Trust contends that the Massachusetts Attorney General's reliance on the definition in the Massachusetts TILA is inappropriate.

92. Greenwood Trust Co. v. Massachusetts, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

93. U.S. Const., art. VI, cl. 2.

94. U.S. Const. art. I, § 8, cl. 3.

conduct in contracting for and collecting the late payment charge pursuant to the cardmember agreement does not constitute an unfair or deceptive practice under Massachusetts law.[95]

Greenwood Trust asserts that as a federally insured bank, it is authorized by federal law to charge interest at the rate allowed by the laws of the state where it is located (i.e., Delaware) pursuant to section 521 of the DIDMCA. Greenwood Trust further asserts that because Delaware law allows interest to be charged at any rate agreed to by the borrower[96] and expressly allows a late payment charge of any amount to be imposed "as interest,"[97] Greenwood Trust's late payment charge is expressly authorized by federal law. Thus, the supremacy clause preempts Massachusetts' laws and threatened actions. Greenwood Trust also contends that Massachusetts' laws and actions are implicitly preempted by federal law because they frustrate the purposes of federal banking laws to the extent that those laws grant Greenwood Trust the right to contract for and receive the late payment charge. Greenwood Trust claims that Massachusetts' efforts to invalidate the late payment charge with respect to Massachusetts residents would, if successful, effectively and substantially restrain interstate commerce involving credit transactions in contravention of the commerce clause without satisfying any compelling state interest. Finally, Greenwood Trust asserts that, regardless of the scope of federal preemption, Delaware law should in any event govern the propriety and extent of the late payment charge provided for in Greenwood Trust's cardholder agreement under applicable choice of law principles. In conclusion, Greenwood Trust asserted that because it is in full compliance of the laws of Delaware and federal banking law with respect to the late payment charge it imposes under the cardmember agreements, its activities in contracting for and collecting the late payment charge should be declared not to violate section 114B or otherwise constitute unfair or deceptive trade practices within the meaning of the Consumer Protection Act.

In its Answer and Counterclaim of December 11, 1989, the Massachusetts Attorney General asserted that all transactions between Greenwood Trust and residents of Massachusetts are entered into in Massachusetts and reiterated the charges set forth in the October 27, 1989 letter to Greenwood Trust.[98]

Cross-motions for summary judgment and briefs in support of those motions were filed by both parties on September 7, 1990.[99] Briefs by each party in

95. Greenwood Trust also requested an order enjoining the Massachusetts Attorney General from seeking to enforce the challenged provisions of Massachusetts law. Greenwood Trust's request was withdrawn following a December 5, 1989, letter in which the Massachusetts Attorney General's office agreed not to seek such an action until after a decision by the federal district court on the parties' cross motions for summary judgment.

96. Del. Code Ann. tit. 5, § 943 (1985 & Supp. 1990).

97. Del. Code Ann. tit. 5, § 950 (1985 & Supp. 1990).

98. Answer and Counterclaim, Greenwood Trust Co. v. Massachusetts, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

99. In addition, *amicus curiae* briefs have been filed in support of Greenwood Trust's Motion for Summary Judgment by (i) MasterCard International, Inc. and Visa U.S.A., Inc., (ii) the