Interstate Consumer Credit Transactions: *Greenwood Trust* and Other Developments

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This article is the third in a series of articles published in the *Quarterly Report* discussing interstate lending in the context of consumer credit transactions.[1] Since publication of the last article in the Summer 1989 edition of the *Quarterly Report*, the litigation between the Iowa Attorney General and Citibank (South Dakota), N.A. ("Citibank"), United Missouri Bank of Kansas City, N.A. ("UMBKC"), and United Missouri Bank, U.S.A. ("UMBUSA"), reported on in that article, has been settled.[2] New litigation has arisen, however, and in a dramatic development, a federal district court in Massachusetts has ruled in *Greenwood Trust Co. v. Massachusetts*[3] that a federally insured, Delaware-chartered bank cannot charge late charges as permitted by Delaware law on credit card transactions with residents of Massachusetts because of a Massachusetts prohibition on late charges, *i.e.*, the bank cannot "export" Delaware late charges to Massachusetts. In Iowa, continuing litigation involving the Iowa Attorney General has raised issues relating to the authority of federally insured, state-chartered banks to export rates and the effect of state opt-out authority.[4] Other developments in this area include a preliminary ruling by a Vermont superior court that loans made by out-of-state lenders who fail to comply with the licensing requirements of Vermont's small loan act (the Licensed Lenders statute) may be unenforceable[5] and an interpretive letter issued by the Office of the Comptroller of the Currency ("OCC")[6] that broadly construes the scope of federal preemption granted national banks.

I. The *Greenwood Trust* Litigation

The court's ruling in *Greenwood Trust* represents the first significant judicial pronouncement on the scope and interplay of federal usury preemption, state law, and choice of law principles in the context of fee exportation.[7] While ruling on the exportation of late charges by a federally insured, state-chartered bank, the court's analysis, if adopted by other courts, could have broader implications, affecting the scope of exportation authority granted to national banks, federally insured savings associations and federally insured credit unions and the exportability of various charges and terms in addition to late charges. The briefs of the parties on cross-motions for summary judgment and the briefs of several *amicus curiae* are discussed below.[8] This case raised many of the same issues and arguments concerning exportation authority that were discussed in the last article with respect to the litigation involving Citibank.[9] Of particular interest here, however, are the arguments made with respect to the foundation of exportation authority for federally insured,

1. *See* Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 Consumer Fin. L.Q. Rep. 152 (1989); 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 Consumer Fin. L.Q. Rep. 4 (1988).

2. *See* 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); 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); 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).

3. 776 F. Supp. 21 (D. Mass. 1991) (Young, J.); *see generally* Bock, Dreher & Tomkies, *Developments in the Interstate Delivery of Consumer Financial Services*, 46 Bus. Law. 1223, 1236-46 (1991) (discussing the briefs of the parties and *amici*).

4. 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) (involving precious metals contracts offered by telephone to Iowa residents by Morgan Whitney Trading Group and the precomputed loans made by SafraBank (California), a California-chartered bank, to finance the precious metals contracts).

5. Pizzagalli Constr. Co. v. H.E.F. Partnership, No. S17056-90 CnC (Sup. Ct. Chittenden County, Vt. Jan. 3, 1991).

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

7. Earlier litigation in Delaware and Iowa involving both national banks and state-chartered banks (other than Greenwood Trust Company) and raising similar issues was settled prior to any adjudication. *See* 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 supra* note 2.

8. The parties filed cross motions for summary judgment with briefs in support thereof on September 7, 1990; briefs in opposition to the other party's motion on October 1, 1990; and briefs in reply and further support of their respective motions on October 12, 1990. Various *amicus curiae* briefs were filed in support of Greenwood Trust by MasterCard International, Inc. and VISA U.S.A., Inc., the American Financial Services Association, the Delaware State Bank Commissioner and Delaware Bankers Association, and the Consumer Bankers Association and in support of Massachusetts by the States of Iowa, Maine, Minnesota, South Carolina, and Wisconsin and the National Association of Consumer Credit Administrators, and the American Conference of Uniform Consumer Credit Code States. *See* Brief of MasterCard International, Inc. and VISA U.S.A., Inc. in Support of Greenwood Trust Company's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); *Amicus Curiae* Brief [filed by the American Financial Services Association] in Support of Greenwood Trust Company's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); *Amicus Curiae* Brief on Behalf of Delaware State Bank Commissioner and Delaware Bankers Association, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); Brief for the Consumer Bankers Association *Amicus Curiae*, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); Brief of *Amicus Curiae* [filed by the States of Iowa, Maine, Minnesota, South Carolina, and Wisconsin and the National Association of Consumer Credit Administrators], Greenwood Trust Co. v. Massachusetts No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); Brief of the American Conference of Uniform Consumer Credit Code States as *Amicus Curiae* in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); Bock, Dreher & Tomkies, *supra* note 3, at 1241-44.

9. *See* Tomkies, *supra* note 1, at 163-78.

state–chartered banks (as it may be distinguishable from the authority for national banks), the proper definition of "interest" in light of the relevant statutes, and the effect of contractual choice-of-law provisions.

A. Background

Greenwood Trust, a federally insured, Delaware–chartered bank, filed suit on November 14, 1989 in federal district court in Massachusetts against the Commonwealth of Massachusetts and the Massachusetts Attorney General ("Attorney General"). The suit was filed in response to the Attorney General's assertions[10] that Greenwood Trust's practice of imposing late payment charges on Massachusetts cardholders with respect to its Discover Card accounts constituted an unfair and deceptive act or practice in violation of the Massachusetts Consumer Protection Act, and regulations promulgated thereunder,[11] and Mass. Gen. L. chapter 140, section 114B ("Section 114B").[12] Greenwood Trust sought judgment that (i) the imposition of late payment charges pursuant to its cardholder agreement was authorized by federal law and the law of Delaware; (ii) Massachusetts law was preempted under the Supremacy Clause of the United States Constitution[13] to the extent that Massachusetts law conflicts with federal law and the law of Delaware; (iii) the enforcement by Massachusetts of its asserted prohibition of Greenwood Trust's late payment charge would contravene the Commerce Clause of the United States Constitution;[14] and (iv) Greenwood Trust's conduct in contracting for and collecting the late payment charge pursuant to the cardholder agreement does not constitute an unfair or deceptive practice under Massachusetts law.[15] The Attorney General filed counter–claims.

B. The Court's Decision

The specific issue in *Greenwood Trust* was whether Greenwood Trust, a federally insured, Delaware–chartered bank, could impose late charges permitted under Delaware law on its Massachusetts Discover Card cardholders when Massachusetts law prohibits such charges. The court restated the primary issue more broadly as a consumer protection issue:

> [M]ay a bank located in a state with permissive consumer lending laws take advantage of those favorable non–interest rate provisions in its own state's laws and "export" them to or impose them upon residents of another state which maintains greater consumer protection for its residents when they borrow in that state?[16]

The court declared that a resolution of this question required consideration of two subsidiary issues: whether Massachusetts usury law is preempted under the Supremacy Clause by section 521 ("Section 521") of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA")[17] and, if not so preempted, whether Massachusetts' "usury" law prohibiting late charges[18] contemplates the regulation of out–of–state credit card issuers.[19] In finding against Greenwood Trust and for the Attorney General, the court held that (i) the provisions of Section 521 do not preempt Massachusetts' prohibition on late charges, (ii) Massachusetts law evidences a fundamental public policy that overrides the contractual provision in the cardholder agreement choosing Delaware law to govern the cardholder agreement, and (iii) the Massachusetts law prohibition against late charges on credit card loans reaches out–of–state credit card issuers.[20] Because the material facts were said by the court to have been stipulated by the parties, the court merely recited certain facts[21] and devoted the majority of its opinion to an analysis of the legal issues.

C. Principal Arguments

1. Federal Preemption

The essence of Greenwood Trust's argument was that (i) 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 and (ii) because Delaware law allows interest to be charged at any rate agreed to by the borrower[22] and allows a late payment charge of any amount to be imposed "as interest,"[23] Greenwood Trust's late payment charge was expressly authorized by federal law.[24] Greenwood Trust further contended that Massachusetts law is implicitly preempted by federal law because it (i) frustrates 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 and (ii) would, if upheld, effectively and substantially restrain interstate commerce involving credit transactions in contravention of the Commerce Clause without satisfying any compelling

10. *See* Letter from Ernest L. Sarason, Jr., Asst. Att'y Gen., Mass., to Greenwood Trust Co. (Oct. 27, 1989) (unpublished).

11. Section 2 of the Consumer Protection Act generally declares unfair methods of competition and deceptive acts or practices in the conduct of any trade or commerce to be unlawful. Mass. Gen. L. ch. 93A, § 2(a) (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, s. 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).

12. Section 114B 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. Gen. L. ch. 140, § 114B (1985 & Supp. 1991). 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 (1981 & Supp. 1991). This definition of open–end credit plan taken from the Massachusetts Truth–in–Lending Act ("Massachusetts TILA") is expressly incorporated by reference into Section 114B. *Id.* ch. 140, § 114B. The term "creditor" as used in § 114B is not defined. *Id.* Two bills introduced in the Massachusetts legislature to address the foregoing prohibitory language died in committee December 31, 1991.

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

14. U.S. Const. art. I, 8, cl. 3.

15. Complaint for Declaratory and Injunctive Relief, Greenwood Trust Co. v. Massachusetts, No. 89–2583–Y (D. Mass. filed Nov. 14, 1989) ("Greenwood Trust Complaint"). Greenwood Trust originally also requested an order enjoining the Attorney General from seeking to enforce the challenged provisions of Massachusetts law. *Id.* Greenwood Trust's request was withdrawn following a December 5, 1989, letter in which the 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.

16. *Greenwood Trust*, 776 F. Supp. at 23 n.3.

17. Pub. L. No. 96–221, § 521, 94 Stat. 132, 164 (1980) (codified at 12 U.S.C. § 1831d). Section 521, as 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.

12 U.S.C.A. § 1831d (West 1989) (emphasis added).

18. Mass. Gen. L. ch. 140, § 114B. See *supra* note 12.

19. *Greenwood Trust*, 776 F. Supp. at 23.

20. *Id.* at 47.

21. *See id.* at 24–25. The court adopted the facts as presented by the Attorney General, stating that Greenwood Trust had failed to make a filing. *Id.* at 25 n.5. In fact, Greenwood Trust attached its Statement of Undisputed Material Facts to its Motion for Summary Judgment filed in accordance with local rules on September 7, 1990. Greenwood Trust Company's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89–2583–Y (D. Mass. filed Nov. 14, 1989).

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

23. *Id.* § 950 (1985 & Supp. 1990).

24. Greenwood Trust Complaint at 5–6; *see also* Memorandum of Law in Support of Greenwood Trust Company's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89–2583–Y (D. Mass. filed Nov. 14, 1989) ("Greenwood Trust Brief") at 2–16.

state interest.[25] In addition, Greenwood Trust argued that Delaware law should govern the propriety and extent of the late payment charge provided for in Greenwood Trust's cardholder agreement under applicable choice of law principles because the cardholder agreement contains a contractual choice of law provision choosing Delaware law.[26] In sum, Greenwood Trust contended that 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 Massachusetts Consumer Protection Act because (i) Greenwood Trust has fully complied with applicable Delaware and federal banking law with respect to the late payment charges and (ii) to the extent Massachusetts law may purport to prohibit the imposition by Greenwood Trust of late charges on Massachusetts consumers, Massachusetts law is preempted.

The Attorney General disputed Greenwood Trust's general position that Section 521 should be read in the same manner as 12 U.S.C. section 85 ("Section 85"),[27] claiming that "critical differences" exist between the National Bank Act ("NBA") and the DIDMCA.[28] The Attorney General asserted that the opt–out provision in section 525 of the DIDMCA ("Section 525")[29] evidences a congressional intent to intrude only narrowly and noted that the DIDMCA fails to address the principle of exportation even though the DIDMCA was enacted two years after *Marquette National Bank v. First of Omaha Service Corp.*[30] The Attorney General argued that these facts stand in contrast to the congressional intent of creating a national banking system under the NBA that may affect interpretations of Section 85.[31] Further, the Attorney General challenged any notion that late payment charges may be "material to the determination of the interest rate" (within the meaning of the OCC's interpretive ruling on the most favored lender doctrine[32]) and thus perhaps be exportable along with, if not as, "interest." The Attorney General argued that the language and legislative history of the DIDMCA leave no room for a broad interpretation of the term "interest" and that the "materiality" concept only makes sense in the context of the classification of loans for purposes of the most favored lender doctrine and thus cannot be used in the exportation context. An approach that permits states the power to determine the scope of federal preemption in the area of consumer credit regulation by means of defining "interest" and "material" to include every conceivable state law provision regulating consumer credit is, the Attorney General asserted, "patently" inconsistent with the limited preemptive approach of the DIDMCA.[33] The Attorney General also disputed Greenwood Trust's allegation that Massachusetts law may violate the Commerce Clause, asserting that the local benefits of the applicable Massachusetts statutes outweigh any burden on interstate commerce or Greenwood Trust.[34]

In disputing Greenwood Trust's reading of Section 521 ;authority, the Attorney General expanded on the argument raised in the litigation involving Citibank that the term "interest rate" is used with precision in the DIDMCA as a reference to a numeric multiplier that is exclusive of late payment charges, rather than as a generic reference to interest in the ordinary sense of compensation for the use of money or damages for its detention.[35] The Attorney General noted that, as an alternative to the rate of interest permitted by the law of the state of the institution's location, Congress provided for a rate of 1% over the discount rate on specified commercial paper.[36] The Attorney General argued that the pure rate (*i.e.*, numeric) character of this alternative rate authority reinforces the conclusion that Congress intended to allow the exportation of state interest rate ceilings only.[37] The Attorney General also argued that a consideration of federal terminology in other federal authorities such as the federal Truth–in–Lending Act,[38] a comparison of the terms of Section 521 to section 501 ("Section 501") of the DIDMCA,[39] and a review of congressional reports related to Section 501[40] lead to the conclusion that the DIDMCA should be construed narrowly and interpreted only within the specific context of the economic circumstances that precipitated its enactment.[41] Further, allowing states to determine whether late payment charges are or are not interest would conflict with congressional intent evidenced by the committee report discussing Section 501,[42] the Attorney General argued.[43] The Attorney General asserted that

25. Greenwood Trust Complaint at 6–7.

26. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("Restatement") §§ 187, 195 (1971). Sections 187 and 195 of the Restatement have been adopted by Massachusetts courts and support the application of Delaware law to the cardholder agreements, Greenwood Trust argued. Greenwood Trust Brief at 17–20.

27. Section 85 contains language substantially similar to Section 521, permitting national banks to charge:

> on any loan . . . *interest at the rate allowed by the laws of the State . . . 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 . . . .

12 U.S.C.A. § 85 (West 1989) (emphasis added); *cf.* Section 521, *supra* note 17, and Section 501, *infra* note 39.

28. *See generally* Memorandum of the Commonwealth of Massachusetts in Support of its Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89–2583–Y (D. Mass. filed Nov. 14, 1989) ("Mass. AG Brief") at 5–9, 8 n.11.

29. 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.

Pub. L. No. 96–221, § 525, 94 Stat. 132, 167 (1980); *see* 12 U.S.C.A. § 1730g note (West 1989).

The states of Colorado, Iowa, Massachusetts, Maine, Nebraska, North Carolina, Wisconsin, and the Commonwealth of Puerto Rico formally opted out of sections 521 through 523 of the DIDMCA, although two states have since repealed their statutes opting out of

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29. *(Continued from previous column)*

sections 521 through 523. *See* Colo. Rev. Stat. § 5–13–104 (Supp. 1990); 1980 Iowa Acts ch. 1156, § 32 (not codified); Me. Rev. Stat. Ann. tit. 9A, § 1–110 (Supp. 1990); 1981 Mass. Acts ch. 231, § 2 (codified at Mass. Gen. L., ch. 183, § 63 note (1987), repealed by 1986 Mass. Acts ch. 177); 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).

30. 439 U.S. 299 (1978) (the landmark case construing the language of Section 85 to provide that a national bank may charge interest at the rate allowed by the state of its location regardless of the law of the state of the borrower's residence).

31. The Attorney General cited National Consumer Law Center, "Usury and Consumer Credit Regulation," § 3.2.2 (1989 Supp.), for a more complete discussion of the perceived differences between the NBA and DIDMCA. *See* Mass. AG Brief at 8 n.11.

32. 12 C.F.R. § 7.7310 (1990). For a general discussion of the most favored lender doctrine, *see* Langer & Wood, *supra* note 1.

33. Mass. AG Brief at 17.

34. *Id.* at 17–20.

35. *See id.* at 6–9, 12–15.

36. *See id.* at 9 n. 12; Section 521, *supra* note 17; *cf.* Section 85, *supra* note 28 (also contains alternative 1% rate).

37. Mass. AG Brief at 9 n. 12.

38. 15 U.S.C. § 1601 *et seq.* The Attorney General asserted that "interest" is narrowly and precisely defined within the federal Truth–in–Lending Act as a component of finance charges and that in that context "interest" cannot reasonably be read to include late payment charges. Mass. AG brief at 12–13.

39. Section 501 states 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 . . . ." Pub. L. No. 96–221, § 501(a)(1), 94 Stat. 161 (1980); *see* 12 U.S.C.A. § 1735f–7a(a)(1) (West 1989).

40. A Senate committee report on the House Bill that, after the addition of the parity provisions (sections 521 through 523), eventually became the DIDMCA states that the purpose of the passage of Section 501 was to ease the severity of mortgage crunches that were prevalent at the time of the bill's consideration through the "limited" preemption of mortgage ceilings. S. Rep. No. 368, 96th Cong., 2d Sess. 18–19, reprinted in 1980 U.S. Code Cong. & Admin. News 236, 254–55. The report further states that "[i]n 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 payment charges or similar limitations designed to protect borrowers." *Id.*

41. *See* Mass. AG Brief at 9–12.

42. *See supra* note 40.

43. Mass. AG Brief at 10.

the general purposes for late payment charges (to deter default and to reimburse lenders for the added, unintended costs of late payment) also take them outside any concept of interest as compensation.[44]

Greenwood Trust countered the Attorney General's analogies, arguing (a) that the federal Truth-in-Lending Act, a disclosure statute, has no relevance, but, if deemed relevant, would nonetheless support Greenwood Trust's position because the distinction between broadly defined finance charges and late payment charges is a classification adopted by the Board of Governors of the Federal Reserve System in its regulations, not a classification imposed by Congress under the Truth-in-Lending Act, and (b) that Section 501 is inapposite because (i) Section 501 and the Senate Report cited by the Attorney General preceded the addition of the rate parity provisions (Sections 521 through 523 of the DIDMCA) to the DIDMCA and (ii) in enacting Section 521 Congress tracked the language of Section 85 substantially verbatim, such that Section 85, not Section 501, is the appropriate reference point for authority on the interpretation of Section 521.[45]

2. Choice-of-Law

In disputing the Attorney General's assertions on the issue of choice-of-law, Greenwood Trust argued that (i) Section 114B, unlike several other Massachusetts consumer credit statutes, has no explicit extraterritorial application language and (ii) applicable choice-of-law principles applied to the present facts support the application of Delaware law. Greenwood Trust noted, *inter alia,* that the existence of late payment charge authority in other Massachusetts statutes supports the view that the prohibition of late payment charges is not a "fundamental" policy of Massachusetts.[46] Greenwood Trust countered the Attorney General's assertion that Greenwood Trust's credit card agreements are contracts subject to the "adhesion contract" exception of the *Restatement (Second) of Conflict of Laws ("Restatement"),* by noting that comment b to section 187 of the *Restatement* states that choice of law provisions usually are respected, even in situations of "take it or leave it" contracts, absent some improper circumstances such as misrepresentation, duress, undue influence or mistake, none of which had been alleged or shown in this case.[47] Moreover, Massachusetts case law does not deny the enforceability of standardized contracts unless unconscionable or in some way fundamentally unfair.[48] Finally, Greenwood Trust argued that Massachusetts could not meet the burden of showing a "materially greater" interest as required by the *Restatement.*[49]

The Attorney General asserted that all transactions between Greenwood Trust and residents of Massachusetts were entered into in Massachusetts.[50] The application of Massachusetts law was appropriate, the Attorney General claimed, because (i) Section 114B applies on its face to all creditors without limitation; (ii) the jurisdictional reach of the Consumer Protection Act indicates that the Massachusetts legislature intended to extend Section 114B as far as permitted under the Consumer Protection Act, that is, to acts in trade or commerce directly or indirectly affecting the people of Massachusetts;[51] and (iii) other choice of law principles, in particular the "adhesion contract" and "fundamental policy" exceptions of the *Restatement,*[52] operate to make Massachusetts law applicable. The Attorney General asserted that Massachusetts' fundamental policy with respect to late payment charges is evidenced by other consumer credit statutes because late payment charges are consistently permitted only where lenders are not permitted additional finance charges or interest.[53] Finally, the Attorney General argued that to determine which state has the more significant relationship to the late charge issue, the court should consider the choice-influencing considerations of section 6(2) of the *Restatement.* The Attorney General asserted that, in this light, Delaware has only an attenuated economic interest, characterizing the situation as a clash between the "economic convenience" of creditors and state protection of consumers.[54]

3. Massachusetts Law

In arguing that Greenwood Trust was a "creditor" within the contemplation of Section 114B,[55] the Attorney General adopted the definition of "creditor" found in the Massachusetts TILA.[56] Greenwood Trust contended that the Attorney General's reliance on the definition in the Massachusetts TILA was inappropriate, citing *Northampton Nat'l Bank v. Attorney General*[57] for the proposition that Section 114B does not define "creditor" by reference to Mass. Gen. L. chapter 140D.[58]

D. The Court's Analysis

1. Preemption Analysis

The court began its analysis of the issues with a consideration of the federal preemption issue. The court presented a history of the DIDMCA and Massachusetts law, attributing the source of the present controversy to "the increasingly unsettled relations among banks, state regulators, and federal authorities over the last decade." Against a background of the historical interplay of state and federal usury and banking law, the court noted that in enacting Section 521, "Congress also recognized the continued importance of state consumer protection laws" by including Section 525, the state opt-out provision.[59] The court's view of the controversy as essentially a clash of state interests rather than a matter of statutory interpretation is evident in the court's characterization of the issues and its citation of commentary.[60]

Taking a narrow view of preemption and the interpretation of Section 521, the court stated that by its "literal terms," Section 521 preempts only "state *interest rates* which conflict with the federal rate permitted" by Section 521.[61] Thus the court found that the "plain meaning" of Section 521 "does *not* evince Congressional intent to preempt state

44. *See id.* at 13-15, 17; *see, e.g.,* 12 U.S.C. § 86a(b)(2) (Supp. VI 1988) (interest defined as "any compensation, however denominated, for a loan").

45. Memorandum of Law in Opposition to Defendants Motion for Summary Judgment in Further Support of Greenwood Trust Company's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989).

46. *Id.*

47. Reply Brief to Defendant's Memorandum in Opposition to Greenwood Trust Company's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989) ("Greenwood Trust Reply Brief").

48. *Id.*

49. *See* Restatement, *supra* note 26, § 187(2)(b).

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

51. *See* Mass. Gen. L. ch. 93A, § 1(b) (1985 & Supp. 1991).

52. *See* Restatement, *supra* note 26, § 187(2)(b).

53. Reply Brief of Defendant, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989).

54. Memorandum of Commonwealth of Massachusetts in Opposition to Greenwood Trust's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989) at 19.

55. *See supra* note 12.

56. Mass. AG Brief at 4 n.6.

57. 8 Mass. App. 809, 812 (1979).

58. Greenwood Trust Brief at 17; Greenwood Trust Reply Brief at 12 n.10.

59. *Greenwood Trust,* 776 F. Supp. at 25.

60. *See, e.g., id.*

61. *Id.* at 27 (emphasis in original).

regulation as to other credit terms apart from interest rates, such as the late charges challenged by Massachusetts."[62]

Starting from a position apparently skeptical of preemption, the court found authorities, including the legislative history of Section 501 (the provision preempting state usury restrictions on certain first mortgage loans), certain post–DIDMCA legislative history,[63] and, although not decided under Section 521, two state supreme court decisions,[64] to be generally supportive[65] of the court's view that the "preemption of credit card regulation" under the DIDMCA is confined to "numerical" interest rates.[66] The court found Congress' accommodation of state usury restrictions through the opt–out mechanism significant as evidence of a congressional intent to preserve state consumer protection laws and to impose only limited preemption under Title V of the DIDMCA.[67] In the state supreme court decisions, the court found support for the rejection of state law to define interest more broadly than Congress intended and for skepticism that Congress intended the DIDMCA to effect more than "a limited intrusion into state substantive regulation of consumer transactions."[68]

The court's understanding of the nature and effect of state opt–out under Section 525 and the relationship of Section 501 of the DIDMCA (which contains a separate state opt–out provision) to other sections in Title V of the DIDMCA is confused, as exhibited by a number of inaccuracies throughout the opinion. For example, the court stated that Massachusetts and fourteen other states have opted out of the DIDMCA as allowed under Section 525, citing 12 U.S.C. section 1730g (which has been repealed).[69] In fact, only seven states and the Commonwealth of Puerto Rico have opted out of Section 521 pursuant to Section 525, two of which (Massachusetts and Nebraska) have opted back in.[70] This confusion might not be significant but for the fact that throughout the court's consideration of the scope of federal preemption under Section 521 and its construction of the purpose and terms of Section 521, the court gives such great weight to the legislative history of Section 501, decisions under Section 501 and the existence of "common" state opt–out authority.[71] The court generally minimizes the parallels between Section 85 and Section 521 and the interpretations of the federal banking agencies under Section 85 and Section 521.

The court specifically considered and rejected the argument that the most favored lender doctrine,[72] the Supreme Court's decision in *Marquette National Bank v. First of Omaha Service Corp.*,[73] and informal FDIC opinions support a broader view of congressional intent to preempt state law.[74] As the court summarized:

> [N]otwithstanding the scattered suggestions in informal administrative interpretations, *Marquette's* discussion of the National Bank Act does not teach a general dynamic of ever–expanding preemption or a Congressional strategy of uniform credit regulation which extends irresistibly to displace all state restrictions on state banks. Nor can preemption by necessity be implied logically from [*Gavey Properties/762 v. First Financial Sav. & Loan Ass'n*],[75] based as it is upon deferential incorporation of FDIC administrative opinions which are themselves contradictory as to the scope of preemption and the breadth of Congressional purpose in enacting [the DIDMCA].[76]

The court finally turned to a consideration of the concept of "interest," which the court recognized as being at the "heart" of the dispute.[77] The court rejected as untenable on the undisputed facts of the case Greenwood Trust's arguments that late charges were either components of finance charges or material to the determination of the rate of interest.[78] In the court's view, the late charges at issue "do not involve the facilitation of credit which undergirds the preemption provision of Title V" of the DIDMCA, but rather reflect "technical default and breach" of the cardholder agreement.[79] The court concluded that "[w]hatever may be the merits of the financial or policy arguments that non–rate provisions are material to the determination of interest rates, Congress regards late charges such as these in a class apart from interest rates generally."[80]

Thus, the court concluded that Greenwood Trust failed to meet its burden of showing federal preemption.[81] Because "[p]rinciples of federalism operate with particular force to preserve traditional spheres of state regulation such as consumer protection through usury laws,"[82] the court found that Massachusetts is entitled to enforce its laws.

62. *Id.* (emphasis in original).

63. *See* 776 F. Supp. at 31. The court cited certain bills to amend the DIDMCA that were passed by the Senate (but not the House) in the early 1980s and that contained provisions expressly exempting late charges from preemption under those bills. *See* S. 730, 98th Cong., 1st Sess., 129 Cong. Rec. S.17045–46 (Nov. 18, 1983); S. 1720, 97th Cong., 1st Sess. (1981).

64. Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913, 702 P.2d 503 (1985), app. dismissed, 475 U.S. 1001 (1986) (cited for the proposition that in enacting the DIDMCA Congress intended only a narrow intrusion into state substantive regulation of consumer transactions); Seiter v. Veytia, 756 S.W.2d 303 (Tex. 1988) (cited for the proposition that state law cannot be used to define interest more broadly than Congress intended).

65. *See Greenwood Trust*, 776 F. Supp. at 29-32.

66. *Id.* at 29.

67. *Id.* at 30.

68. *Id.* at 32.

69. *Id.* at 26. For the repeal of 12 U.S.C. § 1730g, *see* Pub. L. No. 101–73, 407, 103 Stat. 363 (1989). The court also suggested that the several sections of Title V of the DIDMCA share a "common" state opt–out provision and that this shared section permits state opt–out only within three years of April 1, 1980. 776 F. Supp. at 30 (citing

(Continued in next column)

69. *(Continued from previous column)*

12 U.S.C. § 1735f–7 note [sic]). In fact, each subpart (B and C) of Title V has its own unique state opt–out provision. *Compare* Pub. L. No. 96–221, § 501(b) (*see* 12 U.S.C. § 1735–7a note) (Part A, three year opt–out period), *with id.* § 512 (*see* 12 U.S.C. § 86a note) (Part B, three year opt–out period) and *id.* § 525 (*see* 12 U.S.C.A. § 1831d note) (Part C, no limitation on opt–out period).

70. *See supra* note 29. In 1986 Massachusetts reenacted its opt–out provision, but in reenacting its opt out of Sections 501 and 511 of the DIDMCA, Massachusetts did not reenact its express opt out of Section 521. The apparent effect of the 1986 legislative action is the repeal of Massachusetts' opt out of Section 521. The court does not appear to have understood the import of the 1986 action. *See Greenwood Trust*, 776 F. Supp. at 30-31 n.24.

71. In *fact*, Sections 501 and 521 contain substantially different language, serve different purposes, and do not share an identical legislative history. *Compare* the operative language of Section 521 (applicable generally to loans by federally insured state banks), *supra* note 17, *with* Section 501 (applicable only to certain "federally related" first mortgage loans by certain lenders), *supra* note 39; *see, e.g.*, from the court's own discussion. *Greenwood Trust*, 776 F. Supp. at 26 ("Section 521 of [DIDMCA] allowed state banks, like the national banks, to charge interest at the federal rate and thereby preempted state usury laws."), 26 n.14 (Sections 501 and 521 amended different statutes), 29 (Senate Report No. 96–368 was written before Congress' consideration of the language of S. 1988 that was incorporated into H.R. 4986 and subsequently became Section 521); *see also supra* note 69 (no shared state opt–out provision).

72. The most favored lender doctrine was first expressed in Tiffany v. National Bank, 85 U.S. (18 Wall.) 409, 411 (1874). For a discussion of the most favored lender doctrine, *see* Langer & Wood, *supra* note 1.

73. 439 U.S. 299 (1978).

74. *See Greenwood Trust*, 776 F. Supp. at 32-36.

75. 845 F.2d 519 (5th Cir. 1988).

76. *Greenwood Trust*, 776 F. Supp. at 36. In fact, *Gavey* deferred to an opinion of the General Counsel of the Federal Home Loan Bank Board ("FHLBB"). *See* Letter from General Counsel to the FHLBB (Aug. 6, 1982), reprinted in [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 82,022. The court's reference to contradictory opinions of the Federal Deposit Insurance Corporation ("FDIC") is a reference to the court's analysis of a letter by the FDIC's Deputy General Counsel regarding state opt–out under Section 525. *See Greenwood Trust*, 776 F. Supp. at 35-36. *See also* FDIC Letter No. 88–45 from Douglas H. Jones, Deputy Gen. Counsel (Jun. 29, 1988), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 81,110 ("Jones Letter"). For a discussion of the Jones Letter, *see* Tomkies, *supra* note 1, at 157–58. The court found it "difficult to square" the letter's recognition of the preservation of "principles of federalism" through Section 525 and the letter's conclusion that the right of "countermand" granted by Section 525 belongs to the state where the loan is made. *Greenwood Trust*, 776 F. Supp. at 35-36. Pursuant to the letter's reasoning, Section 525 should not affect the usury preemption of Section 521 for a bank not located in the countermanding state so long as the loan is not made in the countermanding state.

77. *Greenwood Trust*, 776 F. Supp. at 37.

78. *Id.* at 24-25 n. 7.

79. *Id.* at 38.

80. *Id.*

81. *Id.* at 39.

82. *Id.*

2. Choice-of-Law

On the choice-of-law issue, the court found that under existing Massachusetts precedent generally adopting the approach of the *Restatement*, a Massachusetts court would be inclined to uphold the general application of Delaware law to the cardholder agreement pursuant to the choice-of-law provision in the cardholder agreement, even though the cardholder agreement was an adhesion contract.[83] However, the court concluded that Massachusetts' "evident concern" in the protection of its citizens generally "outweighs" Delaware's interest in the charging of late charges by Delaware banks.[84] In reaching its conclusion, the court did not explicitly determine that Massachusetts had a materially greater interest in the late charge issue, as generally required by the *Restatement*,[85] nor did it compare each state's statements of the relative significance of this issue as evidenced by the language of their respective statutes.[86]

3. Reach of Massachusetts Law

On the final issue of the reach of the Massachusetts law, the court reviewed certain legislative history and considered Greenwood Trust's arguments. The court found that Section 114B is "silent" with respect to reaching out-of-state creditors[87] and that there is "no direct evidence" that the Massachusetts legislature intended to reach out-of-state creditors.[88] Nonetheless, the court concluded that Section 114B is "not ambiguous"[89] and that the Massachusetts legislature "simply and unequivocally" barred credit card late charges.[90]

E. Conclusion

Because of the significance of the legal issues relating to the scope of federal preemption and the application of choice-of-law analysis to interstate consumer credit transactions, additional litigation, on appeal or otherwise, seems inevitable.[91] This case may become the vehicle, through its interpretation of Section 521, that by implication provides gloss to Section 85 and defines the scope of exportation authority under *Marquette*. In deciding the scope of preemption under Section 521, the court addressed the terms of Section 85 and the purpose behind the National Bank Act. While the court has apparently left some room for distinguishing Section 521 from Section 85, the court's mode of "plain meaning" analysis may render distinctions more difficult to make. Because of the similarities in preemption language, the court's interpretation of Section 521 could also affect the exportation rights of federally insured savings associations and federally insured credit unions.[92]

This district court decision in *Greenwood Trust* represents the first judicial effort at weighing the numerous arguments for and against the exportation of fees and other terms in interstate credit transactions by federally insured institutions. The decision does not fully discuss or resolve all issues.[93] While the appellate process in this case may fill in certain gaps, significant issues will remain with respect to the impact of this decision (i) on other types of institutions, (ii) on other fees and terms contracted for by federally insured institutions, and (iii) in other states that have statutes different from those of Massachusetts. At the time this article was written, numerous class action lawsuits had been filed against various banks in several states based upon allegations similar to those in the *Greenwood Trust* case.[94]

In *Greenwood Trust* the district court's opinion reflects only an abbreviated analysis of the relative interests of the forum and non-forum states and no analysis of the applicability of Massachusetts law in the absence of the contractual provision. The court's failure to engage in a full analysis of the choice-of-law issue raises important questions regarding the efficacy of choice-of-law provisions not only in interstate consumer credit contracts but, more broadly, in all contracts. The appellate decision in this case will perhaps provide much needed guidance on this issue.

II. Litigation in Iowa

As previously reported, the Iowa Attorney General has been actively contesting the interstate consumer credit transactions practices of national and state-chartered banks.[95] The Iowa Attorney General has generally sought the enforcement of the restrictions placed by Iowa law on various contractual terms in consumer credit contracts (including contractual choice of law provisions, late payment charges, returned check charges, over-limit charges, attorneys' fees and collection costs provisions, change of terms provisions, and default provisions) and has 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 a state other than Iowa applies to credit agreements with Iowa residents. The several banks involved have generally argued that federal preemption of state usury law available to national banks and federally insured, state-chartered banks under the NBA or the DIDMCA, as applicable, or the application of choice-of-law principles in the context of contractual choice of law provisions permit their practices. While several of these cases have been settled, the litigation involving SafraBank (the "*SafraBank* litigation") is continuing.

83. *Id.* at 40-41.

84. *Id.* at 41.

85. *See* Restatement, *supra* note 26, § 187(2)(b) (Supp. 1989); *id.* § 187, Comment g (Supp. 1989).

86. *Compare* Mass. Gen. L. ch. 140 (silent) *with* Del. Code Ann. tit. 5 § 956 ("A revolving credit plan between a bank and an individual borrower shall be governed by the laws of [Delaware]."); *see also* Del. Code Ann. tit 5, §§ 945 (permitting in addition to or in lieu of periodic interest certain interest charges, including late fees), 955 (stating that all terms, conditions and other provisions of the Delaware statute are deemed to be material to the determination of the interest rate under Delaware law, the most favored lender doctrine, and Sections 85 and 521).

87. *Greenwood Trust*, 776 F. Supp. at 42.

88. *Id.* at 44.

89. *Id.* at 46.

90. *Id* at 47.

91. The case has been appealed to the United States Court of Appeals for the First Circuit. Greenwood Trust Co. v. Massachusetts, Nos. 91-2205, 91-9086, 92-1065 (petition filed Dec. 27, 1991).

92. *See, e.g.*, 12 U.S.C.A. § 1463(g) (West Supp. 1991) (savings associations) and 12 U.S.C.A. § 1785(g) (West 1989) (credit unions).

93. For discussions of some of these issues, *see, e.g.*, Tomkies, *supra* note 1; Langer & Wood, *supra* note 1.

94. *See, e.g.*, Syx v. Greenwood Trust Co., No. CV 91-8824 (Cir. Ct., Jefferson County, Ala. amended complaint filed Nov. 12, 1991) (late charges); Lagorio v. Citicorp, No. 91-13025S (D. Mass. filed Nov. 21, 1991) (Citicorp sued as proposed defendants' class representative for alleged defendant class of "over 200" banks and corporations) (late charges); Irwin v. Citibank (South Dakota), N.A., No. 2557 (C.P. Philadelphia Cty., Pa. filed Dec. 17, 1991) ("delinquency, late or similar charges"); Magaw v. Citibank (South Dakota), N.A., No. G.D. 91-22507 (C.P. Allegheny Cty., Pa. filed Dec. 24, 1991) (late charges); Magaw v. Barnett Bank, No. GD 91-22639 (C.P. Allegheny Cty., Pa. filed Dec. 24, 1991 (late charges); Ament v. PNC National Bank, No. GD 92-0129 (C.P. Allegheny Cty., Pa. amended complaint filed Jan. 8, 1992) (annual fees, late charges, return check charges, overlimit charges); Gilbert v. Greenwood Trust Co., No. 1233 (C.P. Philadelphia Cty., Pa. filed Jan. 20, 1992) (late charges). Additional suits against additional defendants in other states, involving California and New Jersy, have been or are expected to be filed. In

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94. *(Continued from previous column)*
Minnesota, a complaint was served upon (but voluntarily dismissed before proper service) six banks and two bankcard associations with regard to late charges and overlimit charges. (Complaints served December 1991; Consum. D. Ct., Hennepin Cty., Minn.) In Maine, the administrator of the Maine Consumer Credit Code scheduled a hearing March 20, 1992, to determine whether to issue an order against Greenwood Trust with respect to Greenwood Trust's assessment of late fees on Maine Discover Card cardholders. *In re* Greenwood Trust Co., No. CCP-92-101.

95. *See, e.g.*, 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* the cases cited at note 2. For a discussion of issues raised by this litigation, *see generally* Tomkies, *supra* note 1, and Langer & Wood, *supra* note 1.

A. The *SafraBank* Litigation

Like the litigation involving Greenwood Trust, the *SafraBank* litigation offers an opportunity for judicial guidance with respect to the scope of exportation authority granted federally insured, state–chartered banks. Notably, because Iowa has exercised its right under Section 525[96] to opt out of the federal usury preemption granted federally insured, state–chartered banks by Section 521,[97] the *SafraBank* litigation also raises unresolved issues regarding the interpretation of Section 525 opt–out authority.[98]

The continuing litigation concerning SafraBank involves closed–end precomputed loans, in particular loans to finance precious metals contracts, rather than credit card programs.[99] The Iowa Attorney General is seeking injunctive relief against certain alleged 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 of right to cure required by the Iowa Consumer Credit Code and a notice required by the Iowa Uniform Commercial Code for certain 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.[100] The Iowa Attorney General also asserted that, because 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"),[101] SafraBank was required to obtain a license under Iowa law before charging interest at a rate in excess of the floating rate permitted by the Iowa interest statute.

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 the ICCC and the rescission of contracts that Iowa residents entered into in violation of the ICCC; (iii) the payment of money to which Iowa residents allegedly have a right of recovery pursuant to the ICCC; and (iv) the imposition of a civil penalty on SafraBank for its alleged repeated and intentional violations of the ICCC. Both parties have filed requests for summary judgment.[102]

In its brief in support of its initial motion for summary judgment,[103] SafraBank challenged the application of the ICCC to the transactions in question on several grounds: (i) that the jurisdictional provision of the ICCC[104] is unconstitutional;[105] (ii) that the bank lacked necessary minimum contacts with Iowa;[106] and (iii) that the transactions between SafraBank and Iowa residents did not constitute "consumer loans" within the meaning of the ICCC.[107]

With respect to the Iowa Attorney General's concerns about SafraBank's failure to obtain a license to make supervised loans under Iowa law, SafraBank argued that the rate of interest charged by SafraBank on its loans is governed by Section 521 rather than Iowa law, notwithstanding Iowa's exercise of its right to opt out of federal preemption pursuant to section 525,[108] because the loans were "made in" California, not Iowa.[109] In support of its position that the loans were made in California, SafraBank asserted that (i) the bank assesses loan charges in California, (ii) loan payments are submitted to and accepted by the bank in California, (iii) the decision to extend credit is made in California, (iv) the loan documents are prepared and issued in California, and (v) the bank protects its security interests under the collateralized loans by taking delivery in California of the precious metals purchased by the borrowers.[110] Even if Iowa law did apply, SafraBank asserted that its practices did not violate the terms of the ICCC.[111]

Further, because its customers were engaging in investment activity, SafraBank argued that the Iowa Attorney General's allegation that SafraBank is making unauthorized "supervised loans" was "immaterial" because of the exception in chapter 535 of the Iowa Code that permits a person to agree to pay any rate of interest if he borrows for a business purpose, expressly including "an investment activity."[112]

In its reply brief,[113] the Iowa Attorney General argued that the presence of disputed facts and unanswered discovery make summary judgment inappropriate.[114] 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[115] and the United States Court of Appeals for the

96. Iowa's opt–out legislation provides in relevant part:

> The general assembly of the state of Iowa hereby declares and states . . . that it does not want any of the provisions of the amendments contained in Public Law No. 96–221 (94 stat. 132), sections 521, 522 and 523 to apply with respect to loans made in this state . . . . It is the intent of the general assembly to exercise all authority granted by Congress and to satisfy all requirements imposed by Congress in Public Law No. 96–221 (94 stat. 132) . . . section 525, for the purpose of rendering the provisions of Public Law No. 96–221 (94 stat. 132), Title V, inapplicable in this state.

1980 Iowa Acts ch. 1156 § 32 (not codified); *see* Section 525, *supra* note 29.

97. *See* Section 521, *supra* note 17.

98. *See generally* Tomkies, *supra* note 1, at 156–58 (discussing Section 525 and FDIC Letter No. 88–45 from Douglas H. Jones, Dep. Gen. Counsel (June 29, 1988), *reprinted* in [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 81,110 (June 29, 1988)); *see also* Langer & Wood, *supra* note 1, at 22, 27–28.

99. *Compare* 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) with the cases listed in note 2, *supra*. As of the time this article was written, the *SafraBank* litigation was still in the discovery stage with no significant hearings scheduled.

100. 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) (citing Iowa Code Ann. §§ 537.1201(6), 537.2502, 537.2507, 537.3104, 537.3211 (West 1987 & Supp. 1991)).

101. Iowa Code Ann. ch. 537 (West 1987 & Supp. 1991).

102. 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.

103. 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").

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

105. SafraBank Brief at 3–6.

106. *Id.*

107. *See* Iowa Code Ann. § 537.1301(14) (West 1987 & Supp. 1991) (definition of "consumer loan"). SafraBank argued that the transactions in question were investment loans falling outside the ICCC and thus the Iowa Attorney General failed to state a cause of action. SafraBank Brief at 6–7, 13.

108. *See supra* notes 96–98 and accompanying text.

109. SafraBank Brief at 16.

110. *Id.* at 16 (citing the Jones Letter, *see supra* note 76). For a discussion of the Jones Letter, *see* Tomkies, *supra* note 1, at 157–58.

111. *See* Iowa Code Ann. § 537.5110 (West 1987 & Supp. 1991).

112. SafraBank Brief at 7, 18; *see* Iowa Code Ann. § 535.2(2)(a)(5) (West 1987).

113. Plaintiff's Memorandum in Support of its Resistance to SafraBank's Motion For Summary Judgment, 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").

114. *Id.* at 1–4.

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

Eighth Circuit[116] have upheld the territorial provisions of the ICCC on due process grounds; and (iii) SafraBank's contacts with Iowa do satisfy minimum contacts analysis under due process requirements.[117]

The Iowa Attorney General stated that SafraBank's assertion that the loans are business loans, and thus subject to the "business purpose" rate exception of Iowa Code,[118] begs the question of the characterization of the loans and the applicability of the ICCC.[119] 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.[120] The Iowa Attorney General argued that loans for investment purposes do not necessarily fall outside the scope of "consumer loans."[121] 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"[122] would be unnecessary, according to the Iowa Attorney General.[123] 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.[124]

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 applies in the absence of federal preemption of the analysis of where a loan is made for purposes of Section 525.[125] 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 protecting consumers in consumer credit transactions.[126] 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.[127] The Iowa Attorney General asserted that Section 525 makes sense only if applied to all loans made to citizens of an opt-out state.[128] To the extent that 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.[129] Even if Iowa law is preempted by Section 521, Iowa's opt-out notwithstanding, the Iowa Attorney General claimed that the non-interest terms of SafraBank's loans remain subject to, and violate the provisions of, the ICCC.[130]

Although this case principally involves interpretations of Iowa law, it may have a significant impact on federally insured, state-chartered banks with respect to their loans made to residents of opt-out states[131] in reliance upon federal rate exportation authority, depending upon the courts' interpretation of a state's opt-out under Section 525. This case may also have an effect on the interpretation of the territoriality provision of the Uniform Consumer Credit Code as adopted by Iowa and other states. As of the date this article was prepared, no hearing had been set on SafraBank's refiled motion for summary judgment.

B. The Citibank, UMBKC and UMBUSA Litigation

By separate Settlement Memoranda, the suits involving the Iowa Attorney General and Citibank, UMBKC and UMBUSA, respectively, were settled.[132] Subsequent to the filing of the actions in the litigation involving Citibank, the OCC staff issued an interpretive letter providing that 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,[133] and the Iowa legislature enacted legislation permitting late payment charges, over-limit charges, and nonsufficient funds charges in connection with open-end credit.[134]

1. Citibank

In settlement, Citibank made certain representations, and agreed that it would abide by its representations, with respect to the amounts of certain fees charged and to certain procedures followed in dealing with Iowa cardholders with respect to collections, changes in terms and notices of default.[135] Citibank also 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.[136] The Iowa Attorney General in return agreed not to challenge Citibank's practices set forth in the Settlement Memorandum.[137]

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

117. Iowa AG Brief at 5.

118. Iowa Code Ann. § 535.2(2)(a)(5) (West 1987).

119. Iowa AG Brief at 33.

120. *Id.* at 11–12.

121. *Id.* at 11–19. The Iowa Attorney General cited the FRB's Official Staff Commentary to 12 C.F.R. § 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. *Id.* at 12–14.

122. Iowa Code Ann. § 537.1202(4) (West 1987).

123. Iowa AG Brief at 14–15.

124. *Id.* at 16–18.

125. *Id.* at 19–21, 24.

126. *Id.* at 24–27.

127. *Id.* at 25.

128. *Id.* at 26.

129. *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).

130. *Id.* at 29.

131. *See supra* note 29.

132. 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 (South Dakota), No. CE 029-16973 (Dist. Ct. Polk County, Iowa filed May 13, 1988, dismissed per stipulation Nov. 29, 1989) ("*Citibank* Settlement Memorandum"); Settlement Memorandum, 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) ("*UMBKC* Settlement Memorandum"); Settlement Memorandum, 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) ("*UMBUSA* Settlement Memorandum").

133. OCC Interpretive Letter No. 452 from Robert B. Serino, Deputy Chief Counsel (Policy), to Linda Thomas Lowe, Deputy Cons. Credit Code Adm'r & Asst. Att'y Gen., Iowa (Aug. 11, 1988), *reprinted in* [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 85,676, discussed in Tomkies, *supra* note 1, at 159–63.

134. 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.

135. *Citibank* Settlement Memorandum at 2; *see also* Letter from Curt J. Bernard, Vice President, Citibank, to Richard Cleland, Adm'r of the Iowa Consumer Credit Code (Nov. 13, 1989) (unpublished). The Settlement Memorandum was stipulated to bind the parties only until September 1, 1992 and was made subject to supervening events. *Citibank* Settlement Memorandum at 3–5. The Settlement Memorandum did not constitute an admission by either party. *Id.* at 5.

136. *Id.* at 3.

137. *Id.* at 4–5.

Notwithstanding Citibank's agreement to remove the contractual choice of law provision from its credit card agreements, as the Iowa Attorney General noted in its press release regarding the settlement, the settlement did not resolve the continuing dispute between the parties regarding the applicability of Iowa and South Dakota law to credit card agreements between Citibank and Iowa residents.[138] Citibank had maintained that federal and South Dakota law govern its credit card agreements exclusively, while the Iowa Attorney General had maintained that the challenged terms were subject to Iowa law.

2. UMBKC

The litigation between the Iowa Attorney General and UMBKC, which was settled,[139] involved a private label credit card program,[140] and had been stayed pending the outcome of the litigation involving Citibank.

In settlement, UMBKC agreed that until December 31, 1992, it would limit charges imposed on Iowa residents, not enforce its attorneys' fees provision against Iowa residents, and provide notices of certain changes in terms and notification of cardholders' rights to cure default in accordance with procedures detailed in the Settlement Memorandum.[141] UMBKC also agreed to 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 UMBKC's credit card agreements, which state that Missouri law applies.[142] 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.[143]

3. UMBUSA

In general, the settlement reached between UMBUSA and the Iowa Attorney General was similar to that reached in the litigation involving UMBKC,[144] with two exceptions: (i) UMBUSA agreed to make an application for, and to take all reasonable actions to obtain, a license under chapter 536A[145] of the Iowa statutes[146] and (ii) UMBUSA agreed to pay certain funds to the Consumer Education Fund of Iowa.

In return for the agreements of UMBUSA, the Iowa Attorney General agreed not to challenge UMBUSA's credit card program. In consideration for UMBUSA's prompt licensure and payment to the Consumer Education Fund, the Iowa Attorney General 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.

While not resolving any issues relating to the scope of exportation authority for national or state-chartered banks, the nature of Section 525 opt-out authority, or the enforceability of choice of law provisions, the settlements in the litigation involving Citibank, UMBKC and UMBUSA may serve as models for future settlements against other lenders.

III. Vermont Licensed Lenders Decision

In *Pizzagalli Construction Company v. The H.E.F. Partnership*,[147] a Vermont superior court reviewed the licensing requirements of Vermont's small loan act, the Licensed Lenders statute.[148] In *Pizzagalli*, a New Hampshire-chartered savings bank took a first mortgage on certain property. The property was also subject to the judgment lien of a general contractor. When the general contractor sought to foreclose its lien and have the bank's prior mortgage set aside, it argued that the bank was subject to the Licensed Lenders statute and, because the bank did not obtain the requisite license under that statute, the bank's loan and mortgage were unenforceable. The bank moved for dismissal, arguing that the loan and mortgage were enforceable because (i) the loan was made in New Hampshire and thus not subject to the Licensed Lenders statute and (ii), even if the Licensed Lenders statute might apply, the bank was a "bank" for purposes of the Licensed Lenders statute's general exemption for banks.[149] The court denied the bank's motion, noting that the definition of "bank" for purposes of the Licensed Lenders statute applied only to Vermont-chartered banks and thus the bank would not be exempt from the Licensed Lenders statute. The court was unable to determine on the facts thus far presented whether the bank's loan was in fact made in New Hampshire and thus not subject to the Vermont Licensed Lenders statute. The court noted that while the place of the loan contract arguably was in New Hampshire where the last act essential to the completion (acceptance) occurred, the Vermont Licensed Lenders statute provides that "[a] loan solicited and made by mail to a Vermont resident shall be subject to the provisions of [the Licensed Lenders statute] notwithstanding where the loan was legally made."[150] The court therefore left the determination of the

138. Press Release of Iowa Department of Justice (Nov. 30, 1989) (quoting Iowa Att'y Gen. Thomas J. Miller).

139. *See supra* note 132.

140. A private label credit card program is a credit card program established by a card issuer for a sponsoring person ("sponsor") 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 sponsor's name and may be used to make purchases only from the sponsor-affiliated establishments.

141. *UMBKC* Settlement Memorandum at 2-5. The Settlement Memorandum was stipulated to bind the parties until December 31, 1992 and was made subject to supervening events. *Id.* at 5-7. The Settlement Memorandum does not constitute an admission by either party. *Id.* at 7.

142. *Id.* at 3. The special notice, which must be sent a few days prior to the mailing of the Iowa resident's credit card agreement and credit card, provides that the ICCC 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 Missouri and federal law shall govern is inapplicable to Iowa residents and is to be considered deleted from the credit card agreement.

143. *Id.* at 6-7.

144. UMBUSA agreed to limit certain charges, to perform certain procedures in the manner set forth in the Settlement Memorandum, and to provide 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. *UMBUSA* Settlement Memorandum at 3-4. The majority of UMBUSA's agreements terminate May 15, 1993. *Id.* at 11. The Settlement Memorandum did not constitute an admission by either party. *Id.*

145. Chapter 536A 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. *See* Iowa Code Ann. chs. 535, 536A (West 1987 & Supp. 1991).

146. 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 inapplicable 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.

147. No. S17056-90 CnC (Sup. Ct. Chittenden Cty., Vt., Jan. 3, 1991) (denying motion to dismiss).

148. Vt. Stat. Ann. tit. 8 §§ 2201 *et seq.* (1984 & Supp. 1990).

149. *Id.* § 2201 (1984 & Supp. 1990).

150. *Id.* § 2230(b) (1984).

disputed facts with respect to the existence of mail solicitations and disbursements in Vermont for trial. Both the Vermont Department of Banking, Insurance and Securities and the Vermont Bankers Association intervened in the case.

This preliminary decision highlights existing uncertainties in dealing with many state licensing statutes. Many of these statutes do not clearly indicate whether their provisions or exemptions may apply to out-of-state lenders, including state-chartered banks, savings banks, savings and loan associations, credit unions, industrial loan companies, or other state-chartered entities. Because many state licensing statutes likely were enacted with only intrastate consumer credit transactions in mind, when such statutes are applied to out-of-state lenders certain provisions, such as recordkeeping requirements, may not be practical.[151] Even where some attempt has been made to define the scope of a licensing statute's applicability, as in Vermont, the statute may not be a paragon of clarity.

The Vermont General Assembly may have rendered the preliminary *Pizzagalli* decision moot by amending the Licensed Lenders statute to clarify that for purposes of the Licensed Lenders statute the term "bank" is not limited to Vermont-chartered banks.[152] The amending act adds a new subsection (b) to Vt. Stat. Ann. tit. 8, section 2201. This new subsection provides:

> (b) For purposes of [the Licensed Lenders statute], the term "bank," "savings and loan association," "credit union" or "insurance company" shall mean an institution which is organized and regulated as such under the laws of the United States or any state or territory of the United States, and a bank not organized within the United States, or a United States branch or agency thereof, which is conducting business pursuant to the International Banking Act of 1978, 12 U.S.C. section 3101 et seq.[153]

The act further provides:

> This act . . . is intended to clarify existing law and be remedial in nature. None of the provisions of chapter 73 of Title 8 including the penalties specified in section 2233 of Title 8, shall apply to any loan under contract of loan made by any lender which is exempt under section 2201 of Title 8, whether such loan or contract of loan was made before, on or after the effective date of this act.[154]

Because the act sets forth a test for exemption based upon status, it is uncertain whether entities not specifically named in the exemption language, such as industrial loan companies, may be included within the scope of the exemption.

The *Pizzagalli* case was settled before any further adjudication by the court.[155]

IV. OCC Letter

William B. Glidden, Assistant Director of the OCC's Legal Advisory Services Division, has issued a letter that adopts a broad view of the federal preemption granted national banks.[156] Asked whether a Wisconsin law, requiring notice to Wisconsin regulators and the payment of fees by persons offering consumer credit in Wisconsin at rates above a legally specified interest rate, can be enforced against a national bank located in California that establishes credit card-accessed accounts for Wisconsin residents as well as residents of other states, Glidden noted that state laws that hinder the authorized powers of national banks may be preempted under the authority of the supremacy clause as unlawful state regulation of "federal instrumentalities" or as intruding into an area governed by a pervasive federal scheme which leaves "no room for the States to supplement it."[157] As Glidden stated the general rule governing preemption under the NBA, state law applies to national banks unless that law conflicts with federal law, unduly burdens the operations of national banks or interferes with the objectives of the national banking system.[158] Glidden noted instances in which the preemption doctrine has been applied to states' attempts to license or condition the authorized lending powers of national banks.[159]

Glidden, however, went further, opining that federal preemption of state law is not limited to licensing statutes, "but extends to any significant regulatory condition placed upon the exercise of a national bank's powers by state law."[160] Glidden concluded that in light of federal preemption under the NBA and OCC precedent, the Consumer Act cannot be enforced against the bank because its notice and fee requirements conflict with the bank's power to carry on credit card activities under federal law.[161] Glidden stated that "[t]he power of a state law to prohibit or condition the exercise of federally authorized power is a clear conflict with the federal statute granting that power."[162] Glidden reasoned that the Wisconsin statute, although technically an ex post notice requirement, is in effect a regulatory condition imposed by Wisconsin on national banks seeking to loan money under 12 U.S.C. section 24 (Seventh)[163] and section 85 and thus the Wisconsin statute's provisions cannot be enforced against national banks.[164]

Glidden concluded that the Consumer Act's requirements were also preempted "because they undermine the underlying objective of the National Bank Act — to create a uniformly regulated banking system in the United States . . . . Quite simply, there is no room for state regulation of the kind imposed by the Consumer Act in the presence of a comprehensive regulatory scheme like the National Bank Act."[165] While the NBA does specifically defer to state law restrictions in some instances, as in the area of branching or fiduciary powers, and, without specific statutory grant, as to generic questions of contract, property, and tort law, Glidden opined that the only state usury law entitled to deference under the NBA is the law of the state of the

151. *See, e.g.*, Iowa Code Ann. ch. 536A, discussed *supra* note 145 with respect to the settlement of the litigation involving UMBUSA.

152. *See* 1991 Vt. Laws 1 (approved Feb. 27, 1991) (introduced as H. 266 in the 1991 Regular Session) (amending Vt. Stat. Ann. tit. 8 § 2201).

153. *Id.* § 1.

154. *Id.* § 2.

155. Court Record of Settlement, Pizzagalli Constr. Co. v. H.E.F. Partnership, No. S17056-90 CnC (Sup. Ct. Chittenden Cty., Vt., report of settlement dated June 14, 1991).

156. Glidden Letter, *supra* note 6.

157. Glidden Letter, *supra* note 6, at 2 (citing Davis v. Elmira Sav. Bank, 161 U.S. 275 (1896) and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

158. Glidden Letter, supra note 6, at 2 (citing Davis, 161 U.S. at 283; Franklin Nat'l Bank v. New York, 347 U.S. 373, 378–79 (1954); Easton v. Iowa, 188 U.S. 220, 238 (1903); and National State Bank v. Long, 630 F.2d 981, 985–86 (3d Cir. 1980)).

159. *See, e.g.*, Bank of America v. Lima, 103 F. Supp. 916 (D. Mass. 1952); OCC Interpretive Letter No. 122 from John E. Shockey, Chief Counsel (Aug. 1, 1979), *reprinted in* [1981–82 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 85,203 (Aug. 1, 1979); OCC Interpretive Letter from Roberta Walsh Boylan, Asst. Dir., Legal Advisory Servs. Div. (Nov. 20, 1980) (unpublished) ("Boylan Letter").

160. Glidden Letter, *supra* note 6, at 3 (citing OCC Interpretive Letter from John E. Shockey, Chief Counsel (July 19, 1977) (unpublished)).

161. Glidden Letter, *supra* note 6, at 3 (citing 12 U.S.C. §§ 24 (Seventh), 24 (Third), 24 (Fourth), 85).

162. Glidden Letter, *supra* note 6, at 3.

163. *See* 12 U.S.C.A. § 24 (Seventh) (West 1989 & Supp. 1991).

164. Glidden Letter, *supra* note 6, at 3.

165. *Id.* at 4 (citing Franklin Nat'l Bank v. New York, 347 U.S. 378 (1954); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–54 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 235–36; Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 154–69 (1941)).

national bank's charter. Because the Consumer Act is a regulatory scheme, not a usury law entitled to deference under the NBA, Glidden concluded that the Consumer Act does not warrant deference with respect to lending by national banks.

Glidden also opined that the fee imposed by the Consumer Act is structured more in the way of a regulatory fee than a revenue-raising (tax) device and thus, considering the use of the proceeds of the Consumer Act fee, cannot be properly assessed against national banks under 12 U.S.C. section 548.[166]

Finally, Glidden opined that the notice portion of the Consumer Act is separately preempted by 12 U.S.C. section 484,[167] which vests exclusive power of visitation over national banks in the OCC.[168]

The Glidden letter is noteworthy for the breadth of its statements of the scope of federal preemption.[169]

V. Conclusions

The full effect and ramifications of the *Greenwood Trust* decision are unclear. Regardless of the outcome of *Greenwood Trust* on appeal, significant legal issues relating to the scope of federal preemption and to the application of choice-of-law analysis to interstate consumer credit transactions may remain unresolved. The filing of several class actions around the country is a clear consequence of *Greenwood Trust*. While the litigation involving SafraBank also holds the possibility of an adjudication of some of these issues, additional litigation, on appeal or otherwise, seems inevitable. The effect that the pronouncements of regulators like the OCC, evidenced by the Glidden letter's broad vision of federal preemption under the NBA, may have on these issues is uncertain, although such opinions were given no deference by the *Greenwood Trust* court. While the litigation of federal issues continues, the *Pizzagalli* decision demonstrates continuing uncertainties in the regulation of interstate consumer credit transactions at the state law level, particularly with respect to licensing statutes. Because of the number of unresolved issues and because the business of lending cannot wait for Congress to act or the courts to decide, these and other developments in the future can be expected to have a significant impact on lenders and the nature and direction of interstate consumer credit transactions.

166. *See* 12 U.S.C.A. § 548 (West 1989).

167. *See* 12 U.S.C.A. § 484 (West 1989).

168. *See, e.g.*, OCC Letter from Thomas G. DeShazo, Deputy Comptroller of Currency (Dec. 27, 1973) (unpublished); Boylan Letter, *supra* note 159; 12 C.F.R. § 7.6025(b) (1990).

169. *See also*, *State Laws Restricting National Banks Will Be Pre-Empted, OCC Counsel Says*, 55 Banking Rep. (BNA) 136 (July 23, 1990) (remarks of P. Alan Schott, Chief Counsel, OCC); First Nat'l Bank v. Taylor, 907 F.2d 775 (8th Cir.) (upholding preemption of attempted state insurance law regulation of national bank's debt cancellation contracts under incidental powers authority of the NBA), *cert. denied*, 111 S. Ct. 442 (1990).