

Interstate Consumer Credit Transactions: Recent Developments

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In the Winter 1988 edition of the *Quarterly Report* Jeffrey I. Langer and Jeffrey B. Wood discussed interstate lending by national banks and other federally-insured financial institutions and, in particular, the exportation of interest rates and other credit terms in connection with consumer credit transactions.¹ Langer and Wood compared the most favored lender and exportation rights of national banks, savings institutions insured by the Federal Savings and Loan Insurance Corporation (FSLIC), and state-chartered banks insured by the Federal Deposit Insurance Corporation (FDIC). Since the publication of that article, several court decisions and interpretative letters of federal regulators have been issued. Additionally, briefs have been filed in the continuing litigation between Citibank (South Dakota), N.A. (Citibank)

and the Iowa Attorney General (the *Citibank* litigation).² These materials contribute to the ongoing discussion of issues and considerations which national banks and other federally-insured financial institutions must analyze and weigh when contemplating interstate consumer lending programs. This article considers issues previously discussed in the work of Langer and Wood and the reader is referred to that article and to the articles cited therein for a more general treatment of issues raised in this article.

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

One issue not previously decided in the courts was whether federally-insured savings institutions enjoy most favored lender and exportation rights under section 522 (section 522) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA).³ In *Gavey Proper-*

ties/762 v. First Financial Savings & Loan Association,⁴ the United States Court of Appeals for the Fifth Circuit held that federally-insured savings institutions do enjoy such rights. The Fifth Circuit affirmed a trial court ruling which granted summary judgment to an Illinois-chartered savings and loan against a Texas debtor's claim of usury.

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

The Fifth Circuit first reviewed the applicable federal law, stating that First Financial obtained its rate-charging authority from section 522.⁶ The court interpreted section 522 to allow a federally-insured savings institution to charge the highest of three possible interest rates: (i) the rate it would be permitted to charge in the absence of section 522; (ii) a rate of not more than 1% in excess of the discount rate

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

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

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

Pub. L. 96-221, § 522, 94 Stat. 165 (Mar. 31, 1980) (codified at 12 U.S.C. § 1730g (1982)) (prior to 1983 amendment).
The 1983 amendment to section 522 added, after the words "insured institution," "(which, for the purposes of this section shall include a Federal association the deposits of which are insured by the Federal Deposit Insurance Corporation)." Pub. L. 97-457, § 33, 96 Stat. 2511 (Jan. 12, 1983) (codified at 12 U.S.C. § 1730g (Supp. V. 1987)).

1. Langer and 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) [hereinafter Langer & Wood].

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

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

6. 845 F.2d at 520.

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

banks.¹⁰ Because it concluded that a consistent interpretation of section 85 and section 522 is warranted, the Fifth Circuit reasoned that federally-insured savings institutions such as First Financial are permitted to export the favorable interest rates of their home state to other states in the same manner as national banks may export rates.¹¹

The court stated that the Federal Home Loan Bank Board (FHLBB) has interpreted section 522 "to harmonize fully with Section 85."¹² The court recognized that the FHLBB regulation interpreting section 522 defines the "applicable rate" as the greater of the most favored lender rate under state law or 1% over the federal reserve discount rate.¹³ The court further noted that in a published interpretive letter (the FHLBB letter), the FHLBB General Counsel has advised that a savings institution can export the most favored lender rate of its home state to other states based upon the parallel between sections 522 and 85.¹⁴ The court recognized that to the extent that section 522 is ambiguous, the FHLBB letter is entitled to deference provided that the interpretation is reasonable.¹⁵ While the court believed that the argument for ambiguity in the statutory language was weak, the court found the interpretation expressed in the FHLBB letter to be reasonable.¹⁶

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

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

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

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

7. *Id.* at 520-21.

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

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

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

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

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

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

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

11. 845 F.2d at 521.

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

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

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

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

16. 845 F.2d at 522.

17. See 12 U.S.C. § 1730(ga).

18. 845 F.2d at 522.

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

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

21. 845 F.2d at 522.

22. *Id.*

23. *Id.*

24. *Id.*

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

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

Thus, because federal law in the form of section 522 was applicable to the loan transaction in *Gavey*, notwithstanding choice of

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

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

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

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

The banks claimed, however, that the DIDMCA granted them most favored

lender status³⁷ and that the most favored lender doctrine authorized them to charge the highest interest rate allowed under Minnesota law to any lender empowered to make agricultural loans. Because Minnesota law authorized industrial loan and thrift companies to make agricultural loans at rates not exceeding 21.75% per annum, the banks argued that pursuant to the most favored lender doctrine, they also could make agricultural loans at rates not exceeding 21.75% per annum. The farmers countered that the DIDMCA does not accord federally-insured state banks most favored lender status, that state law did not permit industrial loan and thrift companies to charge 21.75% interest on agricultural loans, and that, even if banks could charge a 21.75% rate of interest, the banks had failed to comply with other material provisions of state law that regulated loans made by industrial loan and thrift companies, in violation of Minnesota usury laws.³⁸

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

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

25. *Id.*

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

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

28. *Id.* at 523.

29. *Id.*

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

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

32. 458 U.S. at 157.

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

34. The four cases consolidated on appeal were *VanderWeyst v. First State Bank*, 408 N.W.2d 208 (Minn. App. 1987); *Walsh v. First State Bank and Heimark v. Norwest bank Montevideo*, 409 N.W.2d 5 (Minn. App. 1987); and *Bandas v. Citizens State Bank*, 412 N.W.2d 818 (Minn. App. 1987). The *Bandas* case was remanded for further proceedings to determine whether, in fact, the "origination fee" charged constituted interest and to determine a separate Racketeer Influenced and Corrupt Organizations (RICO) Act issue that was left undecided by the appellate court. 425 N.W.2d 811-12.

The Minnesota Supreme Court denied further review in the case of *First Bank East v. Bobeldyk*, 391 N.W.2d 17 (Minn. App. 1986), in which a Minnesota court of appeals held that the DIDMCA extended most favored lender status to federally-insured state banks. The cases consolidated in *VanderWeyst* all followed the decision in *Bobeldyk*. Because of the continuing litigation, the Minnesota Supreme Court agreed to review the question first raised in *Bobeldyk*. The Minnesota Supreme Court denied rehearing of the consolidated cases on July 5, 1988.

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

36. Minn. Stat. § 334.011 (1986).

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

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

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

40. *Id.*

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

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

then say—that state banks can charge what state law says they can charge."⁴⁹

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

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

The court rejected the plaintiffs' contention that industrial loan and thrift companies were intended to make only consumer loans. The court observed that nothing in the applicable provisions of Minnesota law limited industrial loan and thrift companies to loans for particular purposes. Thus industrial loan and thrift companies had

the right to make agricultural loans, whether or not they in fact exercised such a right.⁵⁷

The relevant provision of Minnesota law governing the authority of industrial loan and thrift companies permitted such companies to extend credit or lend money and to collect and receive charges, as provided by Chapter 334, or "in lieu thereof" to charge, collect and receive interest at the rate of 21.75% per annum.⁵⁸ The court construed this provision to mean that industrial loan and thrift companies may make Chapter 334 loans and charge interest as provided in Chapter 334, but that in lieu of the interest allowed by Chapter 334 on such loans, these companies may charge 21.75% interest.⁵⁹ The court read the "[n]otwithstanding the provisions of any law to the contrary" language found in section 334.011 to mean that the floating rate of section 334.011 is permitted for agricultural loans even though other provisions of Minnesota law provide for contrary rates.⁶⁰ Even if the language in section 334.011 were read to mean that the floating rate for agricultural loans in section 334.011 was the exclusive rate that may be charged on agricultural loans, the court determined, the general provisions of section 53.04 of the Minnesota Statutes (section 53.04), which were enacted subsequently to the specific provisions of section 334.011, exhibited a manifest intent on the part of the legislature to prevail over section 334.011.⁶¹ Therefore, section 53.04 should control.⁶² Consequently, the court held, "the floating rate under § 334.011 is not an exclusive rate for agricultural loans for all lenders under state law, but 21.75 percent is available for agricultural loans made by [industrial loan and thrift companies] and, hence, also to insured state banks with most favored lender status."⁶³

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

11. *Id.*

12. *Id.*

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

4. 425 N.W. 2d 806 n.2 (citing 12 U.S.C. § 85 (1982)).

5. 464 F.2d 855, 862-63 (6th Cir. 1972) (quoting *Tiffany*), 85 U.S. (18 Wall.) at 412.

6. 425 N.W.2d at 806 n.2.

7. *Id.*

8. *Id.*

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

50. See 94 Stat. at 164.

51. See 94 Stat. at 164-68.

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

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

54. *Id.*

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

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

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

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

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

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

61. *Id.*

62. *Id.*

63. *Id.* at 808.

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

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

The farmers claimed that the banks' failure to comply with certain provisions governing loan splitting and the charging of attorneys' fees rendered the loans usurious. The trial courts and courts of appeals disagreed, holding that such provisions of

state law were not material. The Minnesota Supreme Court also found the regulatory provisions of Minnesota law to be inapplicable, but did so without reaching the question of their materiality to the determination of the interest rate.⁷² Because the regulatory provisions identified by the farmers were contained in Chapter 56 and not Chapter 53, the court concluded that the regulatory provisions of Chapter 56 did not apply to the loans made by the banks.⁷³

In their petition for certiorari to the United States Supreme Court, the farmers again argued that the DIDMCA did not extend the most favored lender doctrine to state banks and that the lenders failed to satisfy conditions precedent to the application of section 521.⁷⁴ The farmers claimed that the Minnesota Supreme Court's ruling conflicted with the United States Court of Appeals for the Eighth Circuit's ruling in *Lawson Square* and with *Marquette*. The farmers argued that the Minnesota Supreme Court's interpretation of section 521 conflicted with the Eighth Circuit's interpretation of section 522 in *Lawson Square*.⁷⁵ The farmers asserted that the Minnesota Supreme Court's conclusion that section 521 was applicable regardless of the amount of the permitted rate allowed by state law conflicts with the Eighth Circuit's determination that section 522, a provision "identical" to section 521, requires that the applicable federal rate exceed the permitted rate allowed by state law as a condition precedent to the application of section 522.⁷⁶ The farmers asserted that on this federal question the Minnesota Supreme Court's find-

ing of no condition precedent under section 521 constituted error.⁷⁷ The farmers also argued that the court's holding that the most favored lender doctrine was extended to state-chartered, federally-insured banks with the passage of the DIDMCA conflicted with *Marquette* to the extent that the Minnesota court based its decision upon the incorporation of the allowance clause language of section 85 into the DIDMCA. In *Marquette*, the farmers submitted, the Supreme Court reiterated the enabling effect of the exception clause as interpreted by the *Tiffany* court.⁷⁸ The exception clause was not incorporated into the DIDMCA. The Minnesota court's holding that the basis for the most favored lender doctrine is the allowance clause, rendering the exception clause superfluous, was thus also asserted as error.⁷⁹ Nevertheless, the United States Supreme Court denied certiorari on November 7, 1988.⁸⁰

III. The Effect of a State Override

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

77. *Id.*

78. *Id.* at 7 (citing *Marquette*, 439 U.S. at 308 n.19).

79. Petition at 7.

80. *Vander Weijst*, No. 88-591, _____ U.S. _____, 109 S.Ct. 369.

81. Section 525 of the DIDMCA provides:

The amendments made by section 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the amendments made by such sections to apply with respect to loans made in such State, except that such amendment shall apply to a loan made on or after the date such law is adopted or such certification is made if such loan is made pursuant to a commitment to make such loan which was 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. 96-221 § 525, 94 Stat. 167 (Mar. 31, 1980) (codified at 12 U.S.C. § 1730g note (1982)).

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

64. *Id.* at 807.

65. *Id.* at 808-09.

66. *Id.* at 809.

67. 251 U.S. 108 (1919).

68. See *Evans*, 251 U.S. at 111.

69. 425 N.W.2d at 810-11; see 12 C.F.R. § 7.7310.

70. 294 Md. 385, 450 A.2d 1273 (1982).

71. *Partain v. First Nat'l Bank*, 467 F.2d 167, 173 n.5 (5th Cir. 1972) and 425 N.W.2d at 810 (citing 12 C.F.R. § 7.7310).

72. 425 N.W.2d at 810.

73. *Id.* at 810-11. In the *Bandas* appeal, the additional question was raised whether an origination fee constituted interest so as to make the loan's annualized interest rate 51.52%. The court of appeals had relied upon a definition of interest found in Chapter 56 in finding that the origination fee did constitute interest. Once again, however, the Minnesota Supreme Court found that the cited provision of Chapter 56 was inapplicable to the loan made by the bank. 425 N.W.2d at 811. In the absence of any applicable statutory provision defining interest for purposes of a Chapter 53 loan made in 1984, the Minnesota Supreme Court applied Minnesota common law. The court noted that the general rule in Minnesota was that reasonable expenses incurred by the lender in preparing a loan may be charged to the borrower without making the loan usurious under Minnesota law. 425 N.W.2d at 811 (citing *Kroll v. Windsor*, 259 Minn. 200, 201, 107 N.W.2d 53, 55 (1960); *Hatcher v. Union Trust Co.*, 174 Minn. 241, 244, 219 N.W. 76, 77-78 (1928); *Lassman v. Jacobson*, 125 Minn. 218, 218, 219-20, 146 N.W. 350, 351 (1914)). While the trial court had found that the origination fee was for services rendered and thus not interest, nothing in the record before the Minnesota Supreme Court supported the finding, other than an affidavit of a bank officer. Consequently, the Minnesota Supreme Court remanded the issue to the trial court for further proceedings.

74. Petition for Writ of Certiorari, No. 88-591 (U.S.S.Ct., filed Oct. 3, 1988) (hereinafter cited as Petition); see 57 U.S.L.W. 3335 (1988).

75. Petition at 6.

76. *Id.*

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

A. FDIC Letter

In a letter dated June 29, 1988, FDIC Deputy General Counsel Douglas H. Jones rendered an opinion (Jones letter) regarding the meaning of section 525 and the relationship of that section to section 521.⁸³

The Jones letter observed that section 521 provides for a preemption of state usury laws by permitting insured state banks to charge a federally-prescribed rate on loans and to export their home state's interest rate, *i.e.*, to charge the highest rate allowed in the state where the bank is located, no matter where the borrower may be located.⁸⁴ Section 525, however, authorizes states to countermand the federal preemption of section 521. Counsel for the bank requesting the FDIC opinion suggested that section 525 should be read to be congruent with section 521.⁸⁵ Under such an interpretation, the state where the loan is made must be the same as the state where the bank is located, as a matter of law. Thus, only a bank's home state would have any right to countermand federal preemption with respect to loans made by that bank. Jones disagreed.

Jones noted that section 525 uses plain language which differs considerably from

that of section 521.⁸⁶ He observed that nothing on the face of the statute indicates that the two sections are meant to say the same thing. Moreover, each section has a distinctive legislative history, purpose and rationale. Section 521 was designed to meet the economic objective of enabling state banks to compete with national banks, while section 525, he observed, seeks to preserve principles of federalism. The purpose of section 525 was to enable states to recover authority over matters traditionally committed to state control that section 521 had usurped, according to the letter.

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

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

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

Although counsel for the bank which requested the opinion provided certain

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

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

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

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

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

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

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

84. *Id.* at 1.

85. *Id.* at 2.

86. *Id.*

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

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

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

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

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

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

93. *Id.* at 3.

adopted which recognizes a choice of law stipulation.

B. An Alternative Analysis

Two well-developed rules of statutory construction are that Congress is presumed to (i) know the law and the executive or judicial interpretations given similar terms and (ii) intend that the terms used in previous statutes have the same meaning and interpretations as such terms have been given in similar or analogous statutes.⁹⁴ Because the OCC⁹⁵ and the Court of Appeals for the District of Columbia Circuit (D.C. Circuit)⁹⁶ interpreted a provision similar to the operative provision used in section 525 in an analogous context to mean that a loan "is made" where the loan is approved and funds disbursed, it may be presumed that Congress intended the language employed in section 525 to have the same meaning.

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

Origination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office

of the bank does not violate 12 U.S.C. 36 and 81: *Provided*, That the loans are approved and *made* at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.⁹⁸

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

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

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

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

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

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

A. Conflicting State and Federal Definitions

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

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

95. See 12 C.F.R. § 7.7380 (1988).

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

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

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

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

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

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

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

103. Section 501 provides in relevant part:

The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—

(A) secured by a first lien on residential real property, by a first lien on stock in a residential cooperative housing corporation where the loan, mortgage, or advance is used to finance the acquisition of such stock, or by a first lien on a residential manufactured home;

(B) made after March 31, 1980; and

(C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)) [with certain qualifications].

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

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

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

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

The Texas Supreme Court considered whether the Texas legislature had opted out of the DIDMCA preemption as is expressly permitted by section 501.¹⁰⁶ After reviewing the relevant Texas statutes and legislative history, the court concluded that Texas had not opted out of section 501 of the DIDMCA.¹⁰⁷ The court then noted that while the DIDMCA makes no mention of late charges, the legislative history to section 501 clearly states that under section 501 Congress intended to preempt only those limitations that are included in the annual percentage rate, and not to preempt state limitations on "prepayment charges, attorneys' fees, late charges or similar limitations designed to protect borrowers."¹⁰⁸

The Seiters argued a different point, however. They claimed that because under Texas law late charges are considered interest, such charges would be a part of the annual percentage rate which Congress intended to preempt. The Seiters thus

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

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

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

The Iowa Administrator informed the OCC in early 1988 of the determination of the Iowa Attorney General that certain fees and charges provided for in open-end consumer credit card agreements and certain fees and charges provided for in "private label" consumer credit card agreements by Citibank (South Dakota), N.A. and United Missouri Bank of Kansas City, N.A., violated the Iowa Consumer Credit Code. In the open-end credit card agreement context, the fees and charges were late fees, charges for non-sufficient funds (NSF) checks received in payment on consumer credit accounts, and cash advance fees; in the private label credit card context, the fees and charges were late fees, NSF charges, and attorneys' fees payable by the consumer in any lawsuit brought for collec-

tion of the consumer credit card account. The Serino letter responded that the law of the state where a national bank is located determines the permissibility of the fees and charges which the bank may seek to impose on Iowa residents, not Iowa law.¹¹⁴

Serino noted that the rate of interest that a national bank is permitted to charge on loans is governed by section 85 and the OCC's Interpretative Rule 7.7310.¹¹⁵ National banks enjoy most favored lender status under *Tiffany* and *Marquette*.¹¹⁶ Additionally, section 85 incorporates state usury laws to determine the interest rate allowed by the state where the national bank is located.¹¹⁷ Serino stated that Interpretative Rule 7.7310 reflects prior judicial interpretations of section 85.¹¹⁸ Further, he noted that Interpretative Rule 7.7310 has never been questioned by any court and has been adopted by at least three courts as the basis for decisions involving the relationship between national banks and state usury laws.¹¹⁹ The letter observed that the authority given to national banks to charge interest at the rate allowed by the laws of the state where the bank is located is designed to place national banks on an equal footing with the most favored state-chartered lenders in the bank's state of location and to protect national banks from unfriendly state legislation.¹²⁰

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

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

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

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

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

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

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

111. *Id.*

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

113. See, *supra*, note 2.

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

115. *Id.*

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

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

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

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

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

Missouri, respectively.¹²¹ Serino noted that in *Marquette* the Supreme Court rejected the argument that a bank could be deprived of its location merely because it was extending credit to the residents of a foreign state.¹²² Further, the Supreme Court concluded that Congress contemplated interstate lending at the time section 85 was passed in 1864 and thus drafted section 85 to facilitate a national banking system.¹²³ Serino's analysis thus rejected the applicability of Iowa law based upon the combined authority of *Marquette* and Interpretive Rule 7.7310.

The Serino letter embraced the analysis of the United States Court of Appeals for the Eighth Circuit in *First National Bank v. Nowlin*,¹²⁴ in which the Eighth Circuit stated:

The primary principle of construction of 12 U.S.C. § 85, to which *Evans [v. National Bank]*, 251 U.S. 108 (1919) might be considered a narrow exception, is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state.¹²⁵

In the OCC's opinion, a "provision of State law" that is "material to the determination of the interest rate" is a specific provision that sets restrictions on the rates and terms of loan transactions or allows for certain fees or charges as well as to legislative silence.¹²⁶ Consequently, the OCC determined that "if a fee or other provision in a loan agreement is material to the determination of the interest rate, a national bank which adopts the maximum permissible interest rate under the law of the state in which it is located also is subject to that state's law pertaining to the fee or provision."¹²⁷ Thus the law of the state of a bank's location governs all items which are material to the determination of the interest rate, and silence in a state law as to a particular fee or charge is to be read as permission in the absence of an express general prohibition or limitation.

The letter then reviewed existing law relating to materiality.¹²⁸ In *Northway*

Lanes, the United States Court of Appeals for the Sixth Circuit concluded that when a national bank adopts the interest rate permitted by the law of the state in which it is located, it must also adopt that state's law pertaining to all fees and charges incurred in connection with making the loan.¹²⁹ Serino also noted that in *Attorney General v. Equitable Trust Co.*, the Maryland Court of Appeals defined "material to the determination of the interest rate" as "material to a judicial determination of whether or not the interest charged in a given transaction is unlawful."¹³⁰ The Maryland court found several fees to be "material" because they would affect the amounts paid by the borrower on the loan. The letter additionally observed that the United States Supreme Court also recognized the materiality of a national bank's annual credit card fee to the bank's determination of the interest rate it will charge on credit card loans in *Marquette*.¹³¹ Serino further noted that the OCC has taken the position that state law providing for or prohibiting annual credit card fees is material to the determination of the interest rate within the meaning of Interpretive Rule 7.7310.¹³² As expressed by the OCC, if a state's laws prohibiting annual credit card fees were to apply to an out of state national bank, the national bank "could be faced with the anomalous situation of being a 'least favored lender,' since it might be governed by the lower interest rate ceiling of the state where it is located but still not be permitted to levy the annual fees allowable under that state's laws. This anomalous situation could not have been intended by the authors of the National Bank Act."¹³³ The letter did not offer a more explicit definition of the concept of "materiality."

Thus, the OCC concluded that the permissibility of a national bank's fees with respect to Iowa credit card customers is an issue to be decided solely under the laws of the state where it is located. It further determined that state law incorporated by federal law includes those provisions "material to a determination of the interest rate," as reflected in Interpretive Rule

7.7310 and relevant case law and administrative interpretation. Serino did not embrace a purely federal definition of "interest." By adopting the expansive incorporation of the law of a state of a bank's location expressed in *Nowlin* and *Northway Lanes*, the OCC's analysis attempts to avoid having national banks subjected to a multiplicity of laws depending upon the state of residence of the borrower. The difficulty with this analysis is the fact that the concept of "materiality" remains open to interpretation and does not necessarily include all fees and charges which a bank may wish to charge in addition to a numeric rate.

This lack of clarity creates a significant level of uncertainty to the extent that a particular state does not have a clear statutory or common law definition of "interest" which specifically addresses various possible fees and charges.¹³⁴ Uncertainty is also created to the extent that states have not made any explicit determination as to what is or is not "material" to the determination of the interest rate provisions of their law.¹³⁵ Whether concepts of "finance charges," "service charges," or other formulations are equivalent to "interest" as used in the federal usury preemption provisions is unclear.¹³⁶ Furthermore, whether a determination of "materiality" is properly the province of state law is unclear where the operative statute and regulation is federal in nature. Arguably, a federal definition of

121. Serino letter, *supra*, note 112, at 3-4.

122. *Id.* (quoting *Marquette*, 439 U.S. at 310, 312).

123. Serino letter, *supra*, note 112, at 4 (citing *Marquette*, *supra*, 439 U.S. at 314-18).

124. 509 F.2d 872.

125. *Nowlin*, 509 F.2d at 876.

126. Serino letter, *supra*, note 112, at 6.

127. *Id.*

128. *Id.* at 7-8.

129. See *Northway Lanes*, 464 F.2d 855.

130. See *Equitable Trust*, 294 Md. at 418, 450 A.2d at 1292.

131. See *Marquette*, 439 U.S. at 302-03.

132. See OCC Interpretive Letter from Richard V. Fitzgerald, Dir., Legal Advisory Services Div. (Nov. 24, 1980) (unpublished) (Fitzgerald letter) (a copy was attached to the Serino letter, *supra*, note 112).

133. *Id.* at 4.

134. A few states have acted to change their laws in attempts to clarify their definition of "interest." See S.D. Codified Laws Ann. § 34-3-1 (1980) (South Dakota law has defined the "interest" issue by defining interest on credit card accounts and other loans as including certain specified fees and "any other charges, direct or indirect, as incident to or as a condition of the extension of credit"). See also 66 Del. Laws 283 (1988), codified at Del. Code Ann. tit. 5, § 941 *et seq.* (clarifying various passages of Delaware law with regard to "periodic interest, interest charges and other charges" in order "to codify the law of this State relating to the fees and charges assessed by banks with respect to revolving credit plans and closed end credit as it has existed since the enactment of Subchapters II and III of Chapter 9, Title 5 of the Delaware Code.") The Delaware enactment included provisions declaring as material to the determination of the interest rate "all terms, conditions and other provisions of Delaware law relating to revolving credit plans and closed-end credit under Delaware law, the most favored lender doctrine, and section 85 or section 521 including, *inter alia*, change in terms requirements and rights to charge and collect attorneys' fees, court and collection costs." See Del. Code Ann. tit. 5, § 955. Moreover, specific provisions declare Delaware law to be the governing law of revolving credit plans and agreements governing loans between banks and individual borrowers. See Del. Code Ann. tit. 5, § 956.

135. A few states have already acted to change their laws in attempts to clarify the "materiality" issue. Recent Louisiana legislation appearing as Act 629 of 1988 to be codified at La. Rev. Stat. § 9:351 (D), for example, expressly deems all fees and charges authorized by the Louisiana Consumer Credit Law as "material to the determination of the interest rate" for purposes of exportation to borrowers residing in other states under the most favored lender doctrine.

136. *Cf. Selter*, 756 S.W.2d 303, discussed *supra* in text accompanying notes 102-11.

"materiality" is needed to set a uniform standard from which states may tailor their laws.

Reliance upon a "materiality" standard to define the items which may be exported under *Marquette* and section 85 raises conceptual difficulties. The concept of materiality expressed by Interpretative Rule 7.7310 does not necessarily comport with the full reaches of section 85's grant of authority.¹³⁷ Moreover, whether the concept of materiality properly applies to exportation is far from certain. Interpretative Rule 7.7310 was intended only to clarify the *Tiffany* decision. Wholesale adoption of regulatory and judicial interpretation in the most favored lender context may not be appropriate in the exportation context. This is particularly true to the extent that the two concepts are divergent in focus (fundamentally intrastate versus interstate) or in rationale (concern for protection versus the promotion of national policies and goals). Various qualifications have arisen to the application of Interpretative Rule 7.7310 which may be incongruous in the exportation context.¹³⁸

The practical result of Interpretative Rule 7.7310 in the most favored lender context is to permit a national bank to take advantage of the highest competitive rate while requiring compliance with certain restrictions related to that higher rate.¹³⁹ In the most favored lender context a narrow interpretation of materiality which would limit the scope of state law that must be borrowed along with the higher interest rate may be desirable in order to avoid those provisions of state law which may hinder a national bank's competitive position, encroach upon the status of national banks as federal instrumentalities, or be rendered superfluous by existing regulatory oversight at the federal level. In the exportation context, however, such a limitation may create the negative effect of hindering a lender's ability to operate under one coherent body of law.

Section 85 is silent with respect to any bearing of the laws of the state of the bor-

rower's situs, unless they are also the laws of the bank's location, on the rate of interest to be permitted to the bank. The laws of the state of the borrower's location, if they are not the laws of the bank's location, might become important if (i) an argument can be made that the public policy of the borrower's home state may override the public policy of the lender's home state, to the extent that the policies diverge significantly, (ii) an argument can be made that the terms "interest" or "rate" appearing in section 85 must be narrowly defined such that there is room for not-inconsistent state regulation of interstate transactions by the several states, or (iii) that not-inconsistent regulation by the borrower's state should have some bearing on the transaction notwithstanding any lack of reference thereto in section 85. Each of these arguments has been suggested by some participant in the *Citibank* litigation.¹⁴⁰

The problem with the first argument is that the dispute is not necessarily between competing states. Exportation authority is a matter of federal law and thus federal public policy. Cast as a conflict between the policy of the borrower's home state and federal policy, the borrower's home state's law must yield to the federal scheme. Only if it can be shown that the scope of federal policy leaves room for state regulation is there a potential for conflict between the public policies of the several states. *Citibank* and the Iowa Attorney General have agreed in the *Citibank* litigation that the resolution of the definition of interest issue and the consequent scope of federal policy expressed in section 85 is a federal question. *Citibank* has made a statutory argument for broad definitions based upon section 86a and supported by federal judicial decisions interpreting section 85. It also has sought to present an argument based on the applicability of most favored lender doctrine concepts such as materiality in the exportation context. The Iowa Attorney General has countered with analogies to state usury laws and judicial decisions. Resolution of the second and third possible arguments requires a consideration of (i) the breadth of the terms used in section 85 or, in another formulation, (ii) the extent to which the law of the state where the bank is located is incorporated into section 85.

The definitional question can be resolved in several ways. The law of the bank's home state could be incorporated both as to the

definition of "interest" and the measure or determination of "rate." Alternatively, federal law could provide a narrow definition of "interest" which would result in the incorporation of the selective parts of state law determining "rate" as they relate to the components of the federal definition. Finally, a broad federal definition of interest could be applied which would incorporate all the laws of the state of location relating to rate regulation as a coherent whole. The Serino letter advocates the first resolution. *Citibank's* position essentially combines elements of the first and third resolutions. The Iowa Attorney General has advocated the second resolution. Arguably, the third resolution provides the best long-term resolution of the issues.

The Serino letter sets forth a potential resolution of some of these issues but does not provide a comprehensive solution for national banks not located in states with laws as favorably clear as Delaware, Louisiana or South Dakota. The position taken by the Iowa Attorney General (discussed in Part V *infra*) would provide more certainty to the extent that the question of the exportable rate of "interest" as narrowly conceived may be clarified, but would leave unresolved issues regarding fees and other items not clearly or closely tied to the narrow concept of numeric rate. While some guidance may exist in prior decisions on federal issues such as compounding, other issues will require resolution to the extent that a numeric rate standing alone is meaningless.

Comprehensive incorporation of state law under a broad federal definition of interest presents the least disruptive resolution and would comport with the *Marquette* characterization of interstate lending as the extension of a loan by a lender from its place of location to a borrower, with no regard for the borrower's location. Unlike a "materiality" standard, adoption of the coherent body of one state's law would eliminate many questions regarding the scope of the incorporation of state law or the potential conflict between states with respect to the regulation of economic return.

C. A Federal Definition Of Interest

Some problems inherent in the use of the "materiality" concept of the most favored lender doctrine in the exportation context may be avoidable through a federal definition of "interest." A federal definition could reduce uncertainty by establishing a national standard as a basis for interpretation and

137. See Langer & Wood, *supra*, note 1, at 9-10.

138. See Langer & Wood, *supra*, note 1, at 9-10, for a discussion of qualifications which have been applied to the most favored lender doctrine and Interpretive Rule 7.7310.

139. Cf. 12 C.F.R. § 570.11 (1988). (The FHLBB's rule interpreting section 522 requires broader compliance with "borrowed" state law than Interpretive Rule 7.7310 with its "materiality" concept. To the extent that federally-insured savings institutions are governed by 12 C.F.R. § 570.11 in the exportation context, they may enjoy a firmer foundation for the exportation of a greater number of provisions of the law of the state where the savings institution is located than national banks.)

140. The briefs filed in the *Citibank* litigation are discussed *infra* in the text accompanying notes 164-478.

discussion of usury issues. Unfortunately, Congress has not provided a clear statutory definition in section 85. As suggested in the Iowa litigation, the statutory definition of "interest" in 12 U.S.C. section 86a (section 86a) may illuminate the term "interest" as used in section 85.¹⁴¹

Section 85 contains general authority for a national bank to charge "interest." Section 86a authorizes a national bank to charge interest at a rate 5% above the local Federal Reserve discount rate on 90-day commercial paper with respect to certain business or agricultural loans originated within certain time periods.¹⁴² An explicit definition of "interest" as including "any compensation, however denominated, for a loan" is contained in section 86a(b)(2).¹⁴³ Arguably, such a definition could include charges that are a part of the terms of a lending agreement other than simply a numeric rate of interest. Because the effect of section 85 and section 86a is similar, the two sections arguably should share a common definition of "interest."

Language substantially similar to that now found in section 86a was first enacted as part of section 85.¹⁴⁴ The original provisions applied to loans originated after October 29, 1974 but prior to July 1, 1977. A similar but broader provision was later enacted as a new section 86a.¹⁴⁵

Legislative history shows that the definition of "interest" contained in section 86a was added as "a technical clarifying amendment making no substantive changes in the usury preemption provisions."¹⁴⁶ Sections 85, 86, and 86a comprise the general federal usury scheme applicable to national banks. It may be argued that the definition of interest in section 86a stands as a codification of Congress' general understanding of "interest" and is equally applicable to section 86 and section 85.

Another federal definition of "interest" appeared as part of the Credit Control Act.¹⁴⁷ The relevant portion of the Credit Control Act provided that

the amount of the interest charge in connection with any credit transaction shall be determined under the regulations of the [Federal Reserve] Board as the sum of all charges payable directly or indirectly to the person by whom the credit is extended in consideration of the extension of credit.¹⁴⁸

Like the definition in section 86a, this definition is not particularly helpful in determining the classification of potential fees and charges in a consumer credit transaction. A lender must work to characterize particular fees as falling within the scope of these broad definitions.

A potential problem in relying on a federal definition of interest which defines interest in terms of consideration for an extension of credit arises because of the uncertainty in the characterization of fees and charges. Late fees may be characterized as (i) a default or delinquency charge related to the costs associated with late or delinquent payment or (ii) as additional compensation (interest) for the extension of credit beyond the original terms of the credit arrangement, or (iii) both. Similarly, an over limit fee may be characterized as a default charge related to expenses or as additional compensation to the lender related to the additional risk assumed by the lender as a result of the unanticipated extension of credit above the original amount agreed upon by the parties, or both. It is tempting to project the concepts and terms of state interest regulation upon the federal scheme. However, given the diversity of state regulatory formulae and use of terminology, analogy to state law cannot be dispositive and may not be persuasive.

As a general proposition, interest has been defined as "the compensation allowed by law, for the use or forbearance of money," or as damages for the inability to use money.¹⁴⁹ Arguably, "compensation allowed" includes all provisions of state law which affect a lender's total anticipated monetary return, regardless of whether such compensation is obtained to cover costs and expenses or as profit. In *Union*

National Bank v. Louisville, N.A. & C. Ry.,¹⁵⁰ the Supreme Court described the effect of section 85 as follows:

It may be said that the rights of a national bank as to interest are given by the Federal statute; that the reference to the state law is only for a *measure* of those rights; that a misconstruction of the state law really works a denial of the rights given by the Federal statute, and thus creates a Federal question. [Citation omitted.] A sufficient answer is that the true construction of state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by state law.¹⁵¹

Union National Bank supports a construction that would have the concept of "interest" broadly defined by federal law with state law left to determine the "measure" or components of compensation, *i.e.*, the permissible numeric rate and associated fees and charges which compose the total compensation or monetary return that is permitted to a lender under state law in the course of making a loan.

A similar course of interpretation has already been adopted in the closely analogous context of section 36 with respect to the definition of "branch" under the National Bank Act. Under section 36 a national bank is permitted to establish branches to the same extent as a bank under the law of the state where it is located. In *First National Bank v. Dickinson*,¹⁵² the Supreme Court held that the definition of "branch" for purposes of section 36 was a matter of federal, not state, law, although state law controlled the permissibility of branches and the definition of branch for the purpose of determining what business activities constitute the operation of a "branch" under that state's law.

The primary focus of state usury ceilings, as popularly conceived, is arguably the curtailment of excessive return in the form of profit above the prevailing reasonable rate in the relevant geographic area. Under the view that a broad, federal definition of "interest" governs the interpretation of section 85 and that state law simply provides the measure of "interest," the difficulty of

141. See, e.g., the brief of Citibank filed in the *Citibank* litigation, *supra*, note 2, discussed *infra* in text accompanying notes 164-201.

142. Section 86a permits a lender to charge the higher rate prescribed by that section if the rate prescribed "exceeds the rate a person would be permitted to charge in the absence of this section." 12 U.S.C. § 86a(a) (Supp. VI 1988).

143. 12 U.S.C. § 86a(b)(2) (Supp. VI 1988).

144. See Pub. L. 93-501, § 201, 88 Stat. 1558 (Oct. 29, 1974).

145. See Pub. L. 96-104, § 105, 93 Stat. 791 (Nov. 5, 1979); Pub. L. 96-161, § 205, 93 Stat. 1237 (Dec. 28, 1979). When similar provisions were enacted as part of the DIDMCA, the original provision found in section 85 and applicable only to national banks was repealed. See Pub. L. 96-221, § 511-12, 94 Stat. 164 (Mar. 31, 1980) (applying to certain loans originated after April 1, 1980 but before April 1, 1983), as amended by Pub. L. 96-399, § 324(b)-(d), 94 Stat. 1648 (Oct. 8, 1980) and Pub. L. 96-221, § 529, 94 Stat. 168 (repealing the duplicative provisions in section 85).

146. 126 Cong. Rec. 16112 (1980) (remarks of Sen. Proxmire).

147. 12 U.S.C. § 1903 (1969) (repealed 1982).

148. *Id.*

149. *Deputy v. du Pont*, 308 U.S. 488, 498 (1940); *Brown v. Hiatt*, 82 U.S. (15 Wall.) 177, 185 (1873); *Rosen v. United States*, 288 F.2d 658, 660 (3d Cir. 1961).

150. 163 U.S. 325 (1896).

151. *Id.* at 330-31 (emphasis added).

152. 396 U.S. 122 (1969), *reh. denied*, 396 U.S. 1047 (1970). See *Rosenblum, Exporting Annual Fees*, 41 Bus. Law. 1039, 1041 (1986) (arguing for a purely federal definition of "interest").

determining whether (i) certain fees and charges such as late fees, delinquency fees, or over limit fees constitute recovery of costs and expenses or additional profit for the assumption of additional risk or (ii) whether state definitions of interest, finance charge of the like are equivalents to the federal term would become moot. Recognizing that "interest" under section 85 encompasses both the recovery of costs and expenses and profit components of compensation would obviate the need to consider the effects of state law definitions.

V. Litigation in the Exportation Context

A. Briefs Filed in the Citibank Litigation

As previously reported, litigation in Delaware between the Iowa Attorney General and the First National Bank of Wilmington has been settled.¹⁵³ In that case, the Iowa Attorney General entered into a settlement agreement requiring First National Bank of Wilmington to impose charges only "to the extent permitted by Iowa law."¹⁵⁴ New credit terms subsequently instituted by the bank, and reviewed and approved by the Iowa Attorney General's office for compliance with Iowa law, increased the percentage charges on unpaid balances if an account became delinquent in certain respects. The Iowa Attorney General's office stated publicly that such an arrangement does not violate any Iowa law.¹⁵⁵

In new litigation, the Iowa Attorney General turned its attention to Citibank. In letters of January 8 and February 19, 1988, the Office of the Iowa Attorney General notified Citibank that, in its view, Citibank's late fee and NSF charge were in violation of the Iowa Consumer Credit Code and demanded that Citibank change its credit card agreements with Iowa customers. Iowa also notified the OCC.¹⁵⁶ On April 11, 1988, before receiving the Serino letter, the Iowa Attorney General filed an action in the United States District Court for the Southern District of Iowa seeking enforcement of his interpretation.¹⁵⁷ Citibank moved for dismissal May 6, 1988, on

grounds that the court lacked jurisdiction over an action brought solely to enforce state law, pointing out that Iowa could not anticipate a Citibank defense based upon federal laws and issues as a basis for jurisdiction.¹⁵⁸ Iowa subsequently withdrew its complaint.¹⁵⁹

Citibank initiated the currently pending action at the same time it moved to dismiss Iowa's original suit.¹⁶⁰ Citibank is seeking declaratory and injunctive relief. On May 13, 1988, Iowa filed its answer and counterclaim. Iowa's counterclaim was a duplicate of the state court enforcement claim it filed in Polk County, Iowa.¹⁶¹ Citibank, in turn, filed a motion to dismiss the counterclaim on June 6, 1988, arguing for dismissal on jurisdictional grounds. Iowa answered by filing a resistance. On September 30, 1988, Citibank filed a motion for summary judgment.¹⁶² As the basis for its motion, Citibank asserted that the National Bank Act preempts the relevant provisions of the Iowa Consumer Credit Code as to Citibank's transactions with Iowa residents and that late fees and NSF charges are governed by section 85. On December 15, 1988, Iowa too filed a motion for summary judgment along with resistance to Citibank's motion for summary judgment.¹⁶³

Citibank filed its memorandum in support of its motion for summary judgment on September 30, 1988.¹⁶⁴ Citibank is a national bank based in South Dakota which makes all extensions of credit to Iowa and other states and receives all payments from cardholders at its South Dakota offices.¹⁶⁵ Citibank accepts credit applications by mail and conducts its banking relationship with customers by mail or telephone.¹⁶⁶ Citibank has no offices or employees in Iowa. The National Bank Act prohibits it by law from establishing a branch in Iowa or extending credit from any place in Iowa.¹⁶⁷

Citibank framed the question at issue to be whether the National Bank Act¹⁶⁸ per-

mits Citibank to receive flat rate charges for certain late or dishonored payments at the rates permitted by South Dakota law as "interest" and whether the affirmative authority of the National Bank Act preempts application of contrary Iowa law.¹⁶⁹ Additionally, Citibank asserted that the question is governed by the usury provisions established in the National Bank Act, 12 U.S.C. sections 85, 86 and 86a. By framing the question in this manner, Citibank prepared for two arguments: (1) that federal law exclusively covers the subject matter of usury limits as they relate to national banks and (2) that the broad definition of "interest" found in 12 U.S.C. section 86a reflects the broad scope intended by Congress in the use of the term "interest" in section 85.

Citibank further asserted (i) that national banks impose charges on their borrowers as compensation for lending services; (ii) that national banks incur a number of costs in connection with their lending activities, including the cost of money, costs associated with default, servicing and transaction costs, and overhead; (iii) that national banks structure their charges in a variety of ways to cover these costs and earn a reasonable return, to make lending services attractive to their prospective customers, and to comply with applicable usury restrictions; and (iv) that all items of compensation which make up a national bank's credit card fee schedule are interrelated and interdependent.¹⁷⁰

Citibank noted that late fees (i) discourage payment deficiencies that may lead to default, thus lowering credit loss and charges overall, (ii) compensate banks for increased servicing costs associated with late or dishonored payments, and (iii) compensate banks for the added risks of extending credit to cardholders who are unable or unwilling to make their agreed-upon payments.¹⁷¹ It observed that Iowa law also provides for late fees and NSF charges in certain circumstances.¹⁷² Citibank cited *Marquette* for the propositions that a

169. Citibank Brief at 1-2.

170. *Id.* at 4 (citing generally Canner and Fergus, *The Economic Effects of Proposed Ceilings on Credit Card Interest Rates*, 73 Fed. Res. Bull. 1 (1987) [hereinafter Canner & Fergus]).

171. Citibank Brief at 5-6.

172. See Iowa Code Ann. §§ 537.2502 (West 1987) (precomputed loans), 537.2601 (West 1987) (other credit transactions covered by Part 6 of the Iowa Consumer Credit Code), and 554.3507(5) (West Supp. 1988) (dishonored check charge under the Iowa Uniform Commercial Code). Recent legislation in Iowa now expressly authorizes charges in the amount of \$10.00 for late payments, overlimit transactions, and NSF checks in connection with open-end credit. Laws 1989, H.B. 552, approved April 27, 1989, effective July 1, 1989. This legislation has no retroactive effect.

153. See Iowa ex rel. Miller v. First Nat'l Bank, No. 88-20 (D. Del., filed Jan. 19, 1988, dismissed Apr. 15, 1988); Langer & Wood, *supra* note 1, at 4.

154. See Assurance of Discontinuance, § 2(b), Iowa ex rel. Miller v. First Nat'l Bank, No. 88-20 (D. Del., dated April 6, 1988).

155. Newman, *Delaware Bank Finds Way to 'Export' Card Fees*, Am. Banker, Aug. 31, 1988, pp. 2, 23.

156. The Serino letter, *supra*, note 112, was written in response to this notification.

157. Iowa ex rel. Miller v. Citibank, No. 88-189-E (S.D. Iowa, filed Apr. 11, 1988).

160. See, *supra*, note 2.

161. See, *supra*, note 2.

162. Plaintiff's Motion for Summary Judgment, filed Sept. 30, 1988, in the Citibank litigation, *supra*, note 2.

163. Defendant's Motion for Summary Judgment, filed Sept. 30, 1988, in the Citibank litigation, *supra*, note 2.

164. Brief of Plaintiff, filed September 30, 1988 (Citibank Brief), in the Citibank litigation, *supra*, note 2.

165. *Id.* at 4-5.

166. *Id.* at 5.

167. *Id.* at 5; see 12 U.S.C. §§ 36, 81.

168. 12 U.S.C. §§ 1 *et seq.*

national bank may charge uniform interest rates to credit card customers across the country (the exportation principle) and that interest rate restrictions or remedies adopted by states other than the state where the national bank is located (its home state) are preempted.¹⁷³

The essence of the Iowa Attorney General's argument, Citibank stated, is that the late fee, NSF charges and cash advance fees Citibank charges, although admittedly "interest" for purposes of South Dakota law, do not constitute "interest" exportable under section 85.¹⁷⁴

Citibank asserted that the Iowa Attorney General's position is untenable on five grounds. First, section 85 is a general usury statute covering all charges imposed by a national bank in connection with the extension and repayment of loans, including, according to interpretations by several courts and the OCC, charges such as transaction fees, closing costs, and compensating balance requirements, whether calculated as a flat amount or as a percentage basis. Second, such an encompassing interpretation is consistent with the practical purposes of section 85. Citibank asserted that because the various fees charged by a bank are economically related, and because Congress intended to impose a federal limit on charges, "interest" must embrace all fees, whether imposed as a percentage fee, flat fee, or fee based on certain features of a loan arrangement. Citibank further asserted that such an interpretation is confirmed by the definition of "interest" in section 86a of the usury provisions of the National Bank Act.

Third, Citibank contended, acceptance of the Iowa Attorney General's restrictive interpretation would frustrate congressional intent, noting that if the term "interest" could be narrowly read to exclude loan charges that other lenders are permitted to receive, then states could discriminate in favor of state-chartered lenders, which would be contrary to the principle of the most favored lender doctrine. Fourth, it asserted that because section 85 is applicable and affirmatively authorizes the charges in question, contrary state law provisions in states other than the bank's home state are preempted under *Marquette*.

Finally, Citibank argued that even if section 85 did not affirmatively authorize its

charges, Iowa law would remain inapplicable. Citibank asserted that 12 U.S.C. sections 85, 86 and 86a were adopted to establish general federal limitations over usury by national banks, which limitations are exclusive and are preemptive of state laws except insofar as state law is specifically incorporated. Section 85 incorporates only the law of one state, Citibank argued: the state where the bank is located.

Citibank interpreted the authorization to "take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located" found in section 85 to mean that a national bank and its customers "may lawfully arrange their credit terms in whatever way they choose so long as it is in accordance with the laws of the state where the national bank has its chartered location."¹⁷⁵ Citibank asserted that a broad definition of "interest" which includes all loan charges permitted by the law of the state where the bank is located accords with the judicial understanding of the word "interest" at the time of the National Bank Act¹⁷⁶ and subsequent interpretations.¹⁷⁷ Citibank noted that South Dakota has long defined "interest" equally as broadly. It further observed that, because current South Dakota law specifies that late charges and dishonored payment charges are includable within the definition of "interest,"¹⁷⁸ its charges are permissible "interest at the rate allowed by the laws of the state...where the bank is located" as prescribed by section 85.¹⁷⁹

Citibank reviewed the Eighth Circuit's holdings in *Fisher*¹⁸⁰ and *McAdoo v. Union National Bank*,¹⁸¹ the Sixth Circuit's decision in *Northway Lanes*,¹⁸² and other cases in which, Citibank asserts, courts have interpreted the term "interest" to include various fees and charges permitted by the law of the state where the bank was located.¹⁸³

Citibank then reviewed the interpretations of section 85 issued by the OCC. In

1980, the OCC explained that section 85 covers "all charges permitted or prohibited by state law [of the state where the national bank is located] in connection with . . . loans."¹⁸⁴ This interpretation was adopted and repeated in the Serino letter, which concluded that Iowa law was preempted by section 85 and that all charges deemed "interest" by South Dakota law were incorporated into section 85.

Citibank argued that section 85 contains no distinction between charges calculated as percentage fees on an unpaid balance and flat fees.¹⁸⁵ Moreover, as a practical matter, all fees are economically related and fall within the scope of the general problem of usury ceilings addressed by Congress through the passage of the usury provisions of the National Bank Act, according to Citibank.¹⁸⁶ It further contended that if all loan charges are not covered by section 85, then no federal prohibition or remedy will be available to borrowers if the national bank decides to impose charges that exceed what is permitted to state lenders.¹⁸⁷ Such a gap in the coverage of the federal usury provisions would, Citibank submitted, frustrate the practical utility of those sections as borrower protection and national bank regulatory measures.¹⁸⁸ Moreover, a reading of sections 85 and 86a suggests that the word "interest" as used in section 85 has as broad a scope as section 86a and includes the charges at issue, said Citibank.¹⁸⁹

Citibank emphasized that the National Bank Act was enacted in 1864 specifically to establish a national system of banking for the support and encouragement of a national economy.¹⁹⁰ It observed that Congress was well aware of the competing interest between the states and state banks, on the one hand, and the federal govern-

184. See Fitzgerald letter, *supra*, note 132, at 3, relying upon *Northway Lanes*, 464 F.2d 855. The Fitzgerald letter concluded that national banks located outside Pennsylvania were not subject to Pennsylvania usury restrictions on annual membership fees for credit cards when extending credit to Pennsylvania customers. See also OCC Interpretive Letter from W.M. Taylor, Deputy Comptroller (Apr. 11, 1956) (unpublished) (Taylor letter) at 1 (concluding that a national bank may charge interest under section 85 at either "the legal rate of 6% plus permissible charges" or at the most favored lender rate permitted by local law).

185. Citibank Brief at 18.

186. *Id.*; see 12 U.S.C. §§ 85, 86, 86a (1982).

187. Citibank Brief at 19, noting that the remedy provided by 12 U.S.C. § 86 is exclusive and provides a remedy for usury only when a national bank's charges exceed the rate allowed by § 85. See, e.g., *Schuyler v. Nat'l Bank*, 191 U.S. 451 (1903) and *Farmers' & Merchants' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875).

188. Citibank Brief at 19.

189. *Id.* at 20-21.

190. *Id.* at 23-24.

175. Citibank Brief at 13.

176. See *Brown*, 82 U.S. (15 Wall.) at 185 ("interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention").

177. See *Daggs*, 177 U.S. at 555 ("The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it.")

178. See S.D. Codified Laws Ann. § 54-3-1 (1980).

179. See Citibank Brief at 15.

180. *Fisher*, 548 F.2d 255.

181. 535 F.2d 1050 (8th Cir. 1976).

182. 464 F.2d 855.

183. Citibank Brief at 16.

173. Citibank Brief at 9-10, (citing *Marquette*, 439 U.S. 299; *Fisher*, 548 F.2d 255; Iowa ex rel. Turner v. First of Omaha Service Corp., 281 N.W.2d 452 (Iowa 1979)).

174. Citibank Brief at 10.

ment and national banks, on the other.¹⁹¹ Congress' intent to give national banks at least as equal advantage as state lenders, whether banks or others, led Congress to incorporate language giving rise to the most favored lender doctrine, Citibank explained.¹⁹² In the most favored lender context, an inflexible or narrow view of the term "interest" could invite discriminatory state legislation in which a state would permit fees to local lenders other than compensation denominated as "interest" and thereby permit local lenders an advantage in the pricing and structuring of loan transactions which would not be available to national banks.¹⁹³ Implicit in Citibank's analysis is the argument that the term "interest" cannot have a different meaning in the most favored lender and exportation contexts.

Marquette, Citibank asserted, was decided solely on the terms and structure of the National Bank Act and recognized that national banks were intended to fulfill a special role in the national economy.¹⁹⁴ Citibank noted that the Supreme Court recognized that the exportation of rates by a national bank could provide a national bank in one state with a competitive advantage over state and national banks located in another state, but concluded that the potential impairment of state usury laws had "always been implicit in the structure of the National Bank Act" and was what Congress had intended.¹⁹⁵ With any less authority, Citibank stated, national banks could not fulfill the role envisioned for them by Congress.

While Iowa law is arguably preempted by the affirmative statutory authority of section 85 under the Supremacy Clause of the United States Constitution,¹⁹⁶ Iowa law has also arguably been made inapplicable

by the general doctrine of preemption, asserted Citibank.¹⁹⁷ "The National Bank Act's usury scheme cover[s] the entire subject" and "the power to supplement it by State legislation is conferred neither expressly nor by implication."¹⁹⁸ Consequently, Citibank reasoned, a national bank is not subject to state regulation with respect to the matter of usury, except to the extent that Congress has adopted the interest restrictions of the state where the bank is located as an alternative federally permitted interest rate.

Citibank concluded its brief by arguing that application of more than one state's law is not only contrary to the federal scheme but would create serious practical difficulties.¹⁹⁹ The effect of allowing a state such as Iowa to control some aspects of a bank's loan charges would be to force national banks to conform their programs to the structure of the foreign state's usury law rather than the standards set by the bank's home state, Citibank explained.²⁰⁰ The National Bank Act, however, does not subject national banks to separate legislation by each state where a bank's customers may reside, said Citibank, but implicitly impairs the ability of individual states to enact effective usury provisions for the furtherance of federal goals.²⁰¹

B. Amici Curiae for Citibank's Position

1. Consumer Bankers Association

The Consumer Bankers Association (Association) filed a brief in support of Citibank's position.²⁰² The purpose of the brief was to set forth the historical context of the development of national banking in

the United States.²⁰³ The Association stated that the major objectives of the First and Second Banks of the United States were the expansion of interstate credit and the development of national currency and payment systems.²⁰⁴ The desire to achieve these same economic goals led to the enactment of the National Bank Act, the Association asserted.²⁰⁵ Bank credit card systems, the Association submitted, uniquely serve both functions. Consequently, as an integral part of the national banking system, bank credit card systems merit the full benefits of the policy of facilitation evident in the national banking acts enacted by Congress.²⁰⁶ In the Association's opinion, adoption of the Iowa Attorney General's position would contravene this policy of facilitation, and therefore the Iowa Attorney General's interpretation of section 85 should be rejected.²⁰⁷

The Association presented a brief history of the First and Second Banks of the United States.²⁰⁸ While facilitation of the government's financing of the Civil War effort may have precipitated passage of the National Currency Act²⁰⁹ and the National Bank Act, because of a need for a uniform and stable currency,²¹⁰ the extension of credit by national banks was also an important goal, the Association asserted.²¹¹ The importance of interstate lending transactions, in particular, the Association demonstrated, was clearly recognized by Congress at the time it enacted the National Bank Act.²¹²

Congress embraced a policy of facilitation towards the growth of a national banking system when it enacted the National Bank Act, recognizing that national banks required ample authority to compete effectively with state banks and needed freedom from state legislation which might impede the development of a national banking system to fulfill their role, the Association explained.²¹³ Concern about potential hostile state action led Congress to reject a

191. *Id.* at 24-25, (citing *Tiffany*, 85 U.S. (18 Wall.) 409, 412-13, subsequent federal decisions including *Marquette*, 439 U.S. 299 and scholarly articles).

192. *Id.*

193. Citibank Brief at 25-27.

194. *Id.* at 27.

195. *Id.* at 28, (quoting *Marquette*, 439 U.S. at 318).

196. See U.S. Const. art. VI, cl. 2; *Marquette*, 439 U.S. at 318 n.31.

197. Citibank noted that state laws are preempted if they curtail the federally authorized banking business of national banks. Citibank Brief at 29-30. See, e.g., *First Nat'l Bank v. California*, 262 U.S. 366, 368-69 (1923). As stated by the Eighth Circuit: "[A] state law . . . is void not only if the state and federal laws actually conflict, but also if the state law 'interferes with the purposes for which national banks were created or 'impair[s] . . . their efficiency as federal agencies.' In more general terms, '[a] conflict will be found . . . where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Dakota v. Merchants Bank & Trust Co.*, 634 F.2d 368, 378 (8th Cir. 1980) (*en banc*) (citation omitted). See also *de la Cuesta*, 458 U.S. at 152-53 (1982) (federal regulation may be so pervasive as to raise the inference that Congress left no room for state supplementation).

198. Citibank Brief at 31 (quoting *Farmers' & Mechanics' Nat'l Bank*, 91 U.S. at 32, 35).

199. Citibank Brief at 33-34.

200. *Id.* at 34.

201. *Id.* (citing *Marquette*, 439 U.S. at 318 (the limitation upon state usury authority "has always been implicit in the structure of the National Bank Act").

202. Brief for Consumer Bankers Association, *amicus curiae*, filed September 30, 1988 (Consumer Bankers Brief) in the *Citibank* litigation, *supra*, note 2.

203. Consumer Bankers Brief at 3-5.

203. Consumer Bankers Brief at 3-5.

204. *Id.* at 4, 5-11.

205. *Id.* at 4, 11-14.

206. *Id.* at 4, 14-20.

207. *Id.* at 25-26.

208. *Id.* at 5-11.

209. 12 Stat. 665 (1863).

210. Consumer Bankers Brief at 11-13.

211. *Id.* at 14.

212. *Id.* See, e.g., *Marquette*, 439 U.S. at 315-19; Cong. Globe, 38th Cong., 1st Sess. 2021 (1864) (statement of Sen. Johnson, noting that "[t]hese banks will, of course, have extensive loan transactions all over the country. They are organized for that purpose, and they will be sure to carry it out to the whole extent of power.")

213. Consumer Bankers Brief at 14-16; *Marquette*, 439 U.S. at 316.

uniform national rate of interest, the Association asserted.²¹⁴ Under a uniform rate of interest, national banks might become unable to compete effectively in those parts of the nation where the cost of funds exceeded a national rate or where state legislatures might authorize state banks to collect a higher rate of interest.²¹⁵ Consequently, the provision now contained in section 85 setting the allowable interest rate by reference to the law of the state in which the bank was located was added to the proposed National Bank Act, the Association explained.²¹⁶ Because in some states state banks were permitted interest rates lower than other lenders, the language adopted permitted national banks to charge the highest rate of interest available to any class of lender under state law.²¹⁷ In *Marquette*, the Association said, the Supreme Court recognized that these interest rate provisions govern interstate as well as intrastate lending activities.²¹⁸

The Association asserted that in enacting section 85 Congress effectively enacted a federal choice of law provision which insures that each individual national bank will be subject to a uniform usury law in all its lending transactions: the most favorable law of the state of its location.²¹⁹ Such a rule of choice, the Association explained, avoids impediments to the growth of national banks and the complexity of operations and inconsistency of treatment which could occur if national banks were subject to the usury laws of each state in which they conduct lending operations.²²⁰

The Association suggested that the legislative policy of facilitation found in the National Bank Act is similar to the "federal instrumentality" doctrine first articulated in *McCulloch v. Maryland*.²²¹

The Association traced the growth of bank credit cards and observed that the bank credit card operations of national

banks promote the development of uniform currency and payment systems and the expansion of credit in the tradition of the First and Second Banks of the United States and the National Bank Act.²²² Bank credit cards today have the same effect in the creation of a more efficient system of payment as national bank notes and federal reserve notes or checks had over the issuance of specie or the notes of individual banks during the 18th and early 19th centuries.²²³ The Association noted that many consumers use their cards simply as payment devices, paying the entire amount of their balance each month and incurring no interest charges.²²⁴ Bank credit cards provide a payment system which combines the convenience and certainty of cash with the safety of checks.²²⁵ Moreover, bank credit cards have promoted the expansion of credit by permitting the making of loans to persons who because of the small amount they wished to borrow or their creditworthiness might not otherwise have sought or received bank credit.²²⁶

The Association asserted that the application of Iowa law as suggested by the Iowa Attorney General would frustrate Congress' policy of facilitation.²²⁷ Annual percentage rates and flat fee arrangements are fungible, the Association stated, and are an important part of the total pricing matrix used by banks in making credit available to cardholders.²²⁸ The Association asserted that "no reasonable, principled distinction [may] be made between interest expressed as a percentage rate and interest expressed as a flat fee."²²⁹ Allowing a bank's credit card plan to be subjected to more than one set of laws would create the very situation Congress intended to avoid in adopting a uniform choice of law for interest charges, said the Association.²³⁰

The Association quoted the observation of Representative Kasson of Iowa during the debates preceding enactment of the National Bank Act where he stated that:

in respect to commerce and manufactures, which furnish the very basis of

banking, and to facilitate which this very act itself is proposed—in respect to these two great interests there are no States in this Union; we are one country in respect to these interests You should not have interest on the one side of an imaginary line controlled by one system of laws and on the other side controlled by another system of laws.²³¹ In addition, the Association asserted, because credit card operations serve the goals of national banking, such operations should be entitled to the benefits of Congress' policy of facilitation.²³² Consequently, as to interest charges, national bank credit card operations should be free of regulation by states other than the state of the bank's location.²³³ The Association closed its brief by stating: "With the adoption of section 30 [of the National Bank Act] (as [codified] in 12 U.S.C. § 85), Congress rejected those imaginary lines; they should not be resurrected now."²³⁴

2. MasterCard International, Inc. and VISA U.S.A. Inc.

Both MasterCard International, Inc. (MasterCard) and VISA U.S.A. Inc. (VISA) filed briefs in support of Citibank's position.²³⁵

MasterCard asserted that the National Bank Act governs the rates and charges that may be imposed by national banks exclusively and embodies a policy of facilitation toward national banks that affords advantages to national banks over their state competitors and protects national banks from the hazards of unfriendly legislation by the states.²³⁶ Like the Consumer Bankers Association, MasterCard emphasized the dual function of credit cards as credit instruments and as superior alternative payment mechanisms.²³⁷ MasterCard asserted that a decision in favor of Iowa would likely reduce competition, a result inconsistent with the policies underlying

214. Consumer Bankers Brief at 15.

215. *Id.*; see, e.g., Cong. Globe, 38th Cong., 1st Sess. 1374 (statement of Rep. Higby), 1375 (statement of Rep. Pike) (1864).

216. Consumer Bankers Brief at 16; J. Knox, *A History of Banking in the United States* (2d ed. 1969), at 248, 254-55.

217. Consumer Bankers Brief at 16-17; see, e.g., Cong. Globe, 38th Cong., 1st Sess. 2123-27 (1864); *Tiffany*, 85 U.S. (18 Wall.) at 413.

218. Consumer Bankers Brief at 17; *Marquette*, 439 U.S. at 316-17.

219. Consumer Bankers Brief at 18.

220. *Id.*

221. 17 U.S. (4 Wheat.) 316 (1819); see also *Easton v. Iowa*, 188 U.S. 220, 229 (1902) ("[The National Bank Act] has in view the erection of a system extending throughout the country and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.");

222. Consumer Bankers Brief at 19-20.

223. *Id.* at 20-21.

224. *Id.*

225. *Id.* at 23.

226. *Id.* at 24-25.

227. *Id.* at 25-26.

228. *Id.* See Shay, *Bank Credit Card Pricing: Is The Market Working?*, 9 J. Retail Bank. 26, 31 (1987) (charges are linked and reductions or increases in any one charge affects other charges).

229. Consumer Bankers Brief at 26.

230. *Id.*

231. Cong. Globe, 38th Cong., 1st Sess. 1374 (1864).

232. Consumer Bankers Brief at 27.

233. *Id.*

234. *Id.*

235. Brief for MasterCard International, Inc., *amicus curiae*, filed September 30, 1988 (MasterCard Brief), and Brief for Visa U.S.A. Inc., *amicus curiae*, filed September 30, 1988 (Visa Brief) in the *Citibank*, litigation, *supra*, note 2.

236. MasterCard Brief at 2-3, (citing *Tiffany*, 85 U.S. (18 Wall.) at 415).

237. MasterCard Brief at 3. See Brandel and Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 Mich. L. Rev. 1033, 1038-39 (1971).

National Bank Act and the Iowa Consumer Credit Code.²³⁸

The MasterCard brief contained a history of credit card use in the United States and a description of the mechanics of credit card transactions.²³⁹

MasterCard noted that the Supreme Court in *Marquette* recognized that a patchwork system of state-specific regulations could create havoc in modern interstate banking practices.²⁴⁰ The confusion and expense created by multiple state-specific regulations would disproportionately affect the credit card operations of the small to medium size banks, MasterCard asserted.²⁴¹ The threat of multiple state-specific restrictions, MasterCard postulated, could result in a restriction in credit availability and a reduction of borrowing alternatives.²⁴² Stricter credit requirements would disadvantage low to moderate income individuals.²⁴³ Moreover, a decision requiring national banks to comply with the "pricing laws" of each state would impede the development of the credit card as a national payment mechanism, MasterCard stated.²⁴⁴

MasterCard asserted that to the extent that Iowa has a legitimate interest in insuring that its citizens have the option of obtaining credit cards on terms which do not exceed the late charge or dishonored check charge limitations of the Iowa Consumer Credit Code, Iowa's interest is adequately accommodated by the enforcement of the Iowa Consumer Credit Code against Iowa state-chartered institutions.²⁴⁵ An Iowa citizen can avail himself or herself of the full protections of the Iowa Consumer Credit Code simply by acquiring a credit card from a national or state bank located in Iowa, MasterCard noted.²⁴⁶

VISA likewise emphasized consumer choice. VISA asserted that under the Citi-

bank interpretation, a consumer may apply for those cards which suit the individual customer's preferences and planned usage.²⁴⁷ VISA also alluded to the characterization of state consumer laws as packages.²⁴⁸

VISA endorsed a broad reading of "interest" under section 85 which includes fees for late payments and insufficient funds as components of compensation charged by a bank in the making of a loan.²⁴⁹ VISA also suggested that, independent of the National Bank Act, federal choice of law principles mandate that the law of the state where the bank is located should govern the rights of parties under credit card agreements in a case involving a federal question because the state of location will have the most significant contacts with nationwide credit card program transactions.²⁵⁰ Moreover, the federal interest in regulating a complex interstate banking system, insuring the safety and soundness of the banks that participate in the system, and promoting competition clearly outweighs local state interests.²⁵¹

VISA reiterated the argument that *Marquette*, when combined with the most favored lender doctrine and a broad definition of "interest" supported by the rationales underlying the most favored lender doctrine and the definition of "interest" contained in related section 86a, supports the fee structure adopted by Citibank.²⁵²

VISA endorsed the argument that the scope of the definition of "interest" is controlled by federal law and is determined by an interpretation of sections 85 and 86a.²⁵³ This federal definition of "interest" refers to the law of the state where the bank is located for its measure and includes every component of the law of the bank's home state that defines the maximum compensation that a most favored lender in that state can lawfully receive by agreement with a borrower.²⁵⁴

VISA asserted that even if "interest" under section 85 is narrowly interpreted to include only numeric finance charges, then, because national banks are federal instrumentalities which serve a national function, the applicable choice of law rule as to what law governs the permissibility of other

compensation features is one of federal law.²⁵⁵ Consequently, in VISA's opinion, the application of South Dakota law rather than Iowa law is mandated under traditional choice of law considerations and the policies underlying the National Bank Act.²⁵⁶ VISA asserted that the application of South Dakota law is mandated by a substantial contacts analysis, by the express agreement of the parties, and by an analysis of the underlying policy issues.²⁵⁷ The Eighth Circuit, VISA noted, has recognized that a state's policy of protecting consumers does not necessarily defeat choice of law rules applying the laws of another state which does not have the same policy.²⁵⁸

Not only is the impairment of state usury laws implicit in the structure of the National Bank Act, VISA proposed, but, as the Supreme Court noted in *Marquette*, "citizens of one State [have always been] free to visit a neighboring State to receive credit at foreign interest rates."²⁵⁹

Recognizing that the encouragement of competition is one of the stated purposes of Iowa's Consumer Credit Code,²⁶⁰ VISA submitted that the application of laws of states other than the state where a national bank is located will diminish competition by eliminating consumer choices because banks will lack the opportunity to present terms different from those provided for by the laws of the state where the consumer resides.²⁶¹ The terms of a foreign bank's credit card program need not be more attractive in every feature, but may reflect the preferences of particular types of consumers who may be more sensitive to certain pricing features such as periodic rates

255. *Id.* at 16.

256. *Id.* VISA cited in support, *Edelmann v. Chase Manhattan Bank, N.A.*, No. 87-1885, slip op. (1st Cir. Sept. 1, 1988); *Harris v. Polska Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987); *American Nat'l Bank v. FDIC*, 710 F.2d 1528, 1534 n.7 (11th Cir. 1983); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 444 U.S. 1080, (1981); *Citibank, N.A. v. Benkozy*, 561 F. Supp. 184 (S.D. Fla. 1983). It noted that the application of federal law is appropriate where a federal instrumentality is involved so as to assure a uniform rule or where state law interferes or conflicts with a federal statute, see *Free v. Bland*, 369 U.S. 663 (1962) and *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

257. *Visa Brief* at 17-20.

258. *Visa Brief* at 20-21 (citing *Wilkins v. M&H Financial, Inc.*, 621 F.2d 311 (8th Cir. 1980); *U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 576 F.2d 153 (8th Cir. 1978) (finding Arkansas usury law inapplicable to loan transactions notwithstanding that the plaintiff was a resident of Arkansas which had opened margin accounts with the defendant in Arkansas and had engaged in numerous loan transactions through an Arkansas office; rather, New York law governed pursuant to a choice of law stipulation by the parties and the reasonable relationship between the transaction and the State of New York); *Gamer v. duPont Walston, Inc.*, 65 Cal. App. 3d 280, 135 Cal. Rptr. 230 (1976)).

259. See *Marquette*, 439 U.S. at 318 (footnote omitted).

260. See Iowa Code § 537.1102(c) (1987).

261. *Visa Brief* at 22-23.

238. MasterCard Brief at 4-6. See Iowa Code Ann. § 537.1102(c) (West Supp. 1988) (indicating that one purpose of the Iowa Consumer Credit Code is to "foster competition among suppliers of consumer credit").

239. MasterCard Brief at 6-14.

240. *Id.* at 18-19, quoting from *Marquette*, 439 U.S. at 312 ("If the location of the bank were to depend on the whereabouts of each credit card transaction, the meaning of the term located would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85.")

241. MasterCard Brief at 19.

242. *Id.* at 19-20; see *Canner & Fergus, supra*, note 170, at 6-7.

243. MasterCard Brief at 20.

244. *Id.* at 20-21.

245. *Id.* at 22.

246. *Id.* at 22-23.

247. *Visa Brief* at 3-4.

248. *Id.* at 5; cf. the Fitzgerald letter, *supra*, note 132.

249. *Id.* at 6.

250. *Id.* at 6-7.

251. *Id.* at 7.

252. *Id.* at 6-12.

253. *Id.* at 13-14.

254. *Id.* at 14.

or annual fees, as distinct from fees and charges such as late fees, overlimit fees or NSF charges.²⁶²

VISA asserted that the question in the *Citibank* litigation concerns the degree to which an interstate lender can introduce competition into local banking markets that are more pervasively regulated than the market at the lender's location.²⁶³ Under this analysis, the restriction of terms available to a borrower by the state of the borrower's residence denies the availability of other terms and shelters financial institutions of the state of the borrower's residence from important forms of rate competition, *i.e.*, competition in the provision of terms other than simply numeric rates.²⁶⁴ Given the interrelationship of fees and terms in usury law, only the exportation of a complete set of provisions will result in a coherent pricing policy that provides the most competitive and most diverse market which is open to the greatest number of creditors and borrowers of all sizes, in VISA's opinion.²⁶⁵

VISA concluded its brief by stating that the interest of the federal government in the economic health of the banking system is promoted by interest competition among banks and choice for consumers.²⁶⁶ Application of the laws of the consumer's state, however, will standardize the loan agreements available to the consumer, stifling competition and eliminating choice, a state of affairs inconsistent with the United States Supreme Court's decision in *Marquette*.²⁶⁷ VISA urged the court to find in favor of Citibank's position.

3. Delaware

The Delaware State Bank Commissioner and the Delaware Bankers Association (collectively, Delaware) also filed a brief in support of Citibank's position.²⁶⁸ Delaware essentially argued that where a state has decided to define "interest" to include all forms of compensation pertaining to loan transactions, a national bank empowered to export "interest" under *Marquette* should be permitted to export all components of "interest" defined by the Bank's home state.

Delaware began by noting that the National Bank Act was enacted to protect national banks from the hazards of unfriendly legislation by the states and ruinous competition with state banks and has been construed to place national banks at competitive parity with all state lending institutions.²⁶⁹ Delaware quoted the United States Supreme Court's statement in *Daggs v. Phoenix National Bank*²⁷⁰ that "[t]he intention of the national law [the National Bank Act] is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it."²⁷¹ Thus, according to Delaware, local law becomes "surrogate federal law" for purposes of determining the rate which a national bank may charge in accordance with section 85.²⁷² Delaware embraced the reasoning of *Northway Lanes*, *Nowlin*, and the Fitzgerald letter.²⁷³ Delaware concluded that section 85 allows a national bank to adopt the entire regulatory framework of its home state which governs the compensation that lenders and the state may charge for loans.²⁷⁴

Delaware explained that legislation recently enacted in Delaware expressly provides that all fees and charges assessed in connection with bank revolving credit plans and closed-end credit plans are "interest" notwithstanding the form in which the charges are computed and paid.²⁷⁵ Delaware stated that this legislation was intended to recognize and codify the settled law of the State of Delaware.²⁷⁶ It argued that this formulation recognizes the economic realities of commercial transactions and the existence of compensation "packages." By combining periodic numerical percentage rates with fees and charges at various perceived risk levels, lenders attain an overall yield on the loans, Delaware explained.²⁷⁷ If such "packages" are not recognized and national banks are authorized to take advantage of only certain

components of such packages, Delaware submitted, national banks may be placed at a competitive disadvantage through hostile state legislation, a result contrary to the goals of section 85 enunciated by *Tiffany* and other judicial decisions which have followed.²⁷⁸

Further, Delaware urged that even in states where "interest" is not broadly defined by statute, economic reality dictates that interest must include all forms of compensation pertaining to loan transactions.²⁷⁹

The Delaware Brief also contained an analysis of *Marquette*, arguing that a narrow reading of *Marquette* would be plainly contrary to the *Marquette* decision.²⁸⁰ In *Marquette*, Delaware noted, the Supreme Court recognized that the realities of "common commercial transactions" in the credit card business should control the Court's decision.²⁸¹ Delaware asserted that the Court was aware of the fact that numerical percentage rates are only one component of the compensation a bank receives for a loan.²⁸² Delaware noted that in interpreting *Marquette*, the Court held that interstate loans were a part of a widespread national banking practice of which Congress could not have been "oblivious."²⁸³ Delaware concluded that the Iowa district court cannot ignore the realities of "common commercial transactions" and find that a narrow reading of "interest" is appropriate.²⁸⁴

Additionally, Delaware asserted that legitimate state and federal interests in promoting safe and sound banking are served through the exportation by national banks of all the forms of compensation pertaining to loan transactions permitted by the home state of the lending bank.²⁸⁵ Many states have determined that a safe and sound banking system is enhanced by allowing banks to compete in a "deregulated" market characterized by competition and minimal restrictions on pricing and other terms of loan contracts, Delaware submitted.²⁸⁶

262. *Id.*
 263. *Id.* at 23-24.
 264. *Id.*
 265. *Id.* at 24-26.
 266. *Id.* at 26.
 267. *Id.*
 268. Brief for Delaware State Bank Comm'r and Delaware Bankers Ass'n, amici curiae, filed October 7, 1988 (Delaware Brief) in the *Citibank* litigation, *supra*, note 2.

269. Delaware Brief at 6 (citing *Tiffany*, 85 U.S. (18 Wall.) at 413).
 270. 17 U.S. at 549.
 271. See *Daggs*, 177 U.S. at 555.
 272. See, e.g., *Roper v. Conserve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), *aff'd*, 445 U.S. 326 (1980).
 273. *Northway Lanes*, 464 F.2d 855; *Nowlin*, 509 F.2d 872; Fitzgerald letter, *supra* note 132. Delaware also cited *Bartholomew v. Northampton Nat'l Bank*, 584 F.2d 1288 (3d Cir. 1978), for the proposition that section 85 incorporates by reference the usury law of the state in which the lending national bank is located.
 274. Delaware Brief at 9; *cf.* the Serino letter, *supra*, note 112.
 275. Delaware Brief at 10. See 66 Del. Laws 283 (1988) (codified at 5 Del. Code § 941 *et seq.*). *Cf.* S.D. Codified Laws Ann. § 54-3-1 (1987).
 276. Delaware Brief at 10.
 277. Delaware Brief at 10-11 (citing *Canner & Fergus*, *supra*, note 170, at 6-7).

278. Delaware Brief at 11. It may be argued that a broadly-defined standard of "interest" could similarly result from a consideration of the "material to the determination of the interest rate" standard promoted by the OCC. See, e.g., 12 C.F.R. § 7.7310 (1988), Serino letter, *supra*, note 112; the Fitzgerald letter, *supra*, note 132.
 279. Delaware Brief at 12-14 (citing *Canner & Fergus*, *supra*, note 170, at 8-9).
 280. Delaware Brief at 14-20; see *Marquette*, 439 U.S. at 314-19.
 281. Delaware Brief at 18; see *Marquette*, 439 U.S. at 318.
 282. Delaware Brief at 18 (quoting *Marquette*, 439 U.S. at 304).
 283. Delaware Brief at 19 (citing *Marquette*, 439 U.S. at 318).
 284. See Delaware Brief at 18-20.
 285. *Id.* at 21.
 286. *Id.* (noting Georgia, Nebraska, South Dakota and Virginia among such states).

