Developments in the Interstate Delivery of Consumer Financial Services: Location, Fees, and Common Law

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INTRODUCTION

Courts and banking regulators continue to wrestle with the scope of federal usury preemption, particularly the scope of authority granted federally chartered and federally insured institutions to charge interest and fees at rates permitted by the state where the institution is located to every borrower, regardless of the limitations of the borrower's state's law (referred to as the exportation of interest and fees). The current debate also has sparked once again consideration of the location of such institutions for purposes of such authority.

LENDERS' "LOCATION" FOR EXPORTATION PURPOSES

Recently, the Office of Thrift Supervision (OTS), the United States District Court for the District of South Carolina, and the Arkansas Supreme Court issued opinions relating to the location of federal savings associations and national banks for purposes of interest rate exportation under federal law.[1] The OTS and district court opinions address the issue of whether the location of branch offices affects the location of the lender

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1. *See* OTS Gen. Counsel Op. No. 92/CC-59 (Dec. 24, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,645 (Dec. 24, 1992) [hereinafter *OTS Opinion*]; Cade v. H&R Block, Inc., No. 92-1454-21, slip op. (D.S.C. July 16, 1993); Wiseman v. State Bank & Trust, N.A., 854 S.W.2d 725 (Ark. 1993).

for purposes of exportation analysis.[2] In the Arkansas Supreme Court case, the plaintiffs challenged the location of a national bank, asserting that the contacts of the bank's owners with another state should affect a national bank's "location" for purposes of exportation authority.[3]

OTS BRANCHING OPINION

In the OTS opinion,[4] the chief counsel for the OTS interpreted the "most favored lender" provision of the Home Owners' Loan Act,[5] which permits a federal savings association to charge interest "at the rate allowed by the laws of the State in which such savings association is located."[6] The OTS counsel concluded that a federal savings association is "located" in the state where its home office is located, as well as any state where the association maintains a branch office.[7]

With respect to loans originated from a branch of a federal savings association, the OTS counsel stated the association may apply the most favored lender rates of either its home state or the state in which the branch is located.[8] A federal savings association always may export the rates authorized by its home state, but also has the option of applying the rates of the branch state to loans booked in that state.[9] The OTS counsel specifically declined to consider whether a federal savings association would be located in states in which the association merely maintains agency offices.[10]

2. *OTS Opinion, supra* note 1, at 62,004; *Cade*, No. 92-1454-21, slip op. at 10-11. The location of branch offices was a factor noted but not addressed by the United States Supreme Court in the landmark case of Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978). In *Marquette*, the Court held that a national bank may charge interest at the rate allowed by the law of the state where it is located to every borrower, regardless of the limitations of the law of the state where the borrower may be located. *Id.* at 312-13. The Court discussed the Bank's location in terms of the bank's charter address, noting, for example, that the bank was not authorized to carry on business at any address other than its charter address. *Id.* at 309. Although the Court also engaged in an extended analysis of the bank's contacts with states other than that of its charter address, specifically noting that the bank in *Marquette* did not have a branch in the borrower's state of residence, it did not make clear what relevance, if any, such contacts have in determining a bank's location for exportation purposes. *Id.* at 309-11.

3. *Wiseman*, 854 S.W.2d at 727.

4. *OTS Opinion, supra* note 1.

5. 12 U.S.C. § 1463(g) (Supp. IV 1992).

6. *Id.*

7. *OTS Opinion, supra* note 1, at 62,006.

8. *Id.* at 62,007.

9. *Id.*

10. *Id.* at 62,006 n.12.

COBRANDING: CADE *TO* AMERITECH

In *Cade v. H&R Block, Inc.*,[11] the district court considered an arrangement between H&R Block, Inc. (H&R Block) and Beneficial National Bank (Beneficial) in connection with H&R Block's rapid refund program.[12] Under the arrangement, Beneficial, a national bank headquartered in Delaware, provided loans to qualified H&R Block customers in the amount of a taxpayer's expected tax refund, less a fixed-amount finance charge. The gravamen of the plaintiff's complaint was that Beneficial, through H&R Block, charged usurious rates of interest to South Carolina residents on such refund anticipation loans.[13]

The court rejected the plaintiff's charge of usury, finding that H&R Block is not a lender in the rapid refund program.[14] Rather, the court said, H&R Block acts as Beneficial's disclosed agent, and, as such, if Beneficial has complied with all applicable federal and state laws, H&R Block likewise has complied with such laws.[15]

The court accordingly focused on Beneficial's compliance with applicable law. The court noted that under section 85 of the National Bank Act, a national banking association may charge on a loan "interest at the rate allowed by the laws of the State . . . where the bank is located."[16] The court stated that a national bank is located, for purposes of section 85, in the state where the bank has its charter address.[17] Because Beneficial's charter address is in Delaware, the court concluded, Beneficial may extend credit to South Carolina residents at interest rates allowed by Delaware law.[18] Under Delaware law, a bank may charge "[l]oan fees, points, finders fees and other front-end and periodic charges," provided that the charges are included in the loan documents.[19] Beneficial's loan documents expressly provide for collection of the fixed-amount finance charge; therefore, the court concluded that Beneficial's imposition of the finance charge is permitted under applicable Delaware law and section 85.[20]

The court also rejected the plaintiff's argument that H&R Block operated as a branch of Beneficial in the rapid refund program and therefore Beneficial, through H&R Block, lent money in South Carolina and triggered the application of the South Carolina Consumer Protection Code.[21]

11. No. 92-1454-21, slip op. (D.S.C. July 16, 1993).
12. *Id.* at 5.
13. *Id.* at 6.
14. *Id.*
15. *Id.*
16. 12 U.S.C. § 85 (1988).
17. *Cade*, No. 92-1454-21, slip op. at 8 (citing Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 249 (1978)).
18. *Id.*
19. *Id.* (quoting DEL. CODE ANN. tit. 5, § 965 (1991)).
20. *Id.* at 8-9.
21. *Id.* at 16. *See* S.C. CODE ANN. §§ 37-1-101 to -106 (Law. Co-op. 1989 & Supp. 1993).

The court observed that H&R Block and Beneficial are unaffiliated, autonomous corporations.[22] Thus, the offices of H&R Block offering the rapid refund program were not in any way established by Beneficial, as required for a finding that a facility amounts to a branch office of a national bank.[23] In any event, the court said, "it is immaterial whether H&R Block's South Carolina offices are considered 'branches' of Beneficial."[24] In the court's view, "a national bank is 'located' where it has its charter address regardless of whether the bank operates branches in several states."[25]

In *Wisconsin v. Ameritech Corp.*,[26] Wisconsin's Dane County Circuit Court rejected Wisconsin's argument that because two parties acted in concert with Household Bank, N.A. (Household Bank) in operating the Ameritech Complete MasterCard program, a possible material factual dispute existed as to whether the lender in this case was "located," for purposes of section 85, in Wisconsin or California.[27] The court accepted defendant Household Bank's argument that section 85 preempts the Wisconsin Consumer Act's limitations on late fees, overlimit fees, and cash advance fees, and that the bank could export such fees from its home state of California.[28]

WISEMAN

The Supreme Court of Arkansas ruled in *Wiseman v. State Bank & Trust, N.A.*[29] that a national banking association is located in the state designated in its organization certificate for purposes of determining the interest rate it may charge out-of-state customers.[30] The plaintiffs, a married couple residing in Arkansas, purchased a car at a local dealership where their car salesman arranged for financing from Oklahoma-based State Bank & Trust, N.A. (State Bank). Plaintiffs subsequently brought an action for declaratory judgment in state court, alleging that the interest rate on their loan was usurious.[31] The rate of interest on the couple's loan was permissible under

22. *Cade*, No. 92-1454-21, slip op. at 16.

23. *Id.* at 16-17. *See* 12 U.S.C. § 36 (1988); Independent Bankers Ass'n v. Marine Midland Bank, N.A., 757 F.2d 453 (2d Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986).

24. *Cade*, No. 92-1454-21, slip op. at 17.

25. *Id.* at 17-18.

26. No. 92 CV 1013 (Dane County Cir. Ct., Wis. filed Mar. 5, 1992) (trial transcript).

27. *Id.* at 87.

28. *Id.* at 90. *See, e.g.*, WIS. STAT. ANN. § 422.202 (West 1988). *Ameritech* was brought originally against Ameritech Corp., Household Bank, N.A., Household Credit Services, Inc., and Wisconsin Bell, alleging violations of the Wisconsin deceptive advertising law and the Wisconsin Consumer Act in the promotion of the Ameritech Complete MasterCard. On a motion for judgment on the pleadings, the court decided for the defendants on both the deceptive advertising claims and the claims of Consumer Act violations. *Ameritech*, No. 92 CV 1013, trial transcript at 90. This case is going to trial on other issues.

29. 854 S.W.2d 725 (Ark. 1993).

30. *Id.* at 726-27.

31. *Id* at 726.

Oklahoma law but exceeded the maximum rate allowed by the Arkansas Constitution.[32]

The lower court granted defendant's motion for summary judgment on two grounds: (i) that the loan agreement's choice-of-law provision required the application of Oklahoma law; and (ii) the National Bank Act and the doctrine of federal preemption mandated application of Oklahoma's interest rate provisions.[33] Plaintiffs appealed, contending that the bank should have been deemed located in Arkansas.[34] Although State Bank's charter address was in Oklahoma because the bank's principal place of business is in Tulsa and it does not operate any branch offices in Arkansas, a majority of the bank's stock is owned by an Arkansas bank holding company.

The Arkansas Supreme Court rejected the plaintiffs' "location" argument, noting that a corporation is an entity separate from its shareholders and that charter address is an indicator of location under section 85.[35] *Wiseman* did not present facts relating to other contacts by the bank with the state of the borrower's residence.

POST-GREENWOOD TRUST *CASE UPDATE*

Several courts have issued decisions regarding the ability of national banks and other federally-insured credit card issuers to export from their home state late fees, annual fees, overlimit fees, and returned check fees.[36] The majority of these courts' decisions generally are consistent with the decision of the United States Court of Appeals for the First Circuit in *Greenwood Trust Co. v. Massachusetts*.[37] In *Greenwood Trust*, the First Circuit ruled that a federally insured, state-chartered bank may charge credit card holders a late fee permitted under the law of the bank's home state, even when the law of a cardholder's state of residence would prohibit such fees.[38]

In *Copeland v. MBNA America, N.A.*,[39] a Colorado state court granted MBNA America's motion for judgment on the pleadings, thereby rejecting

32. *Id.* at 726-27.

33. *Id.* at 726.

34. *Id.* at 727.

35. *Id.* at 726-28 (citing Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 309 (1978)).

36. *See also* Wisconsin v. Ameritech Corp., No. 92-CV-1013 (Dane County Cir. Ct., Wis. filed Mar. 5, 1992).

37. 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

38. *Id.* at 831.

39. No. 92-CV-3909 (Denver Co., Colo. July 9, 1993). *Copeland* was brought originally in state court. MBNA America, whose charter address is in Delaware, removed the case to federal court, but the federal court remanded the case to state court because, among other grounds, Copeland's state law claim was not "completely preempted" by federal law. Copeland v. MBNA Am., N.A., 820 F. Supp. 537, 539-40 (D. Colo. 1993).

the plaintiff's allegation that the bank charged late fees in violation of the Colorado Consumer Credit Code.[40] In its July 9, 1993 order, the state court offered only a brief rationale for its ruling, stating that "[i]t is better to know whether state law is preempted by federal law on the subject issues prior to trial of this large class-action law suit."[41]

In *Goehl v. Mellon Bank (Delaware)*,[42] the United States District Court for the Eastern District of Pennsylvania held that sections 85 and 86 of the National Bank Act[43] completely preempt the plaintiffs' claims and therefore denied the plaintiffs' motion to remand to the Court of Common Pleas of Philadelphia County.[44] The court subsequently transferred the case to the Western District of Pennsylvania under 28 U.S.C. § 1441(a).[45] In its decision to transfer, the court gave considerable weight to the pendency in the Western District of *Caplan v. Mellon Bank (Delaware), N.A.*,[46] another class action lawsuit alleging the unlawful charging of certain credit card fees by the defendant bank. In *Goehl*, the plaintiffs alleged the defendant bank assessed late fees in violation of the Pennsylvania Goods and Services Installment Sales Act[47] and the Pennsylvania Unfair Trade Practices and Consumer Protection Law[48] and that the late fees constituted unjust enrichment in violation of Pennsylvania common law.[49]

In *Mazaika v. Bank One, Columbus, N.A.*,[50] a Pennsylvania Superior Court affirmed the decision of a lower court that an out-of-state national bank may charge, as interest, various fees to Pennsylvania cardholders to the extent the fees are permitted by the national bank's home state, notwithstanding that the fees are prohibited by Pennsylvania law.[51] The decision is the first state court appellate decision to address, on the merits, the ability of a bank to export fees. The decision, however, is styled as a memorandum opinion which, under Pennsylvania rules, carries no precedential value.[52]

In *Irwin v. Citibank*,[53] the Common Pleas Court of Philadelphia County ruled that federal law does not preempt the application of Pennsylvania's

40. *Copeland*, No. 92-CV-3909, slip op. at 1. *See* COLO. REV. STAT. tit. 5 (1993).
41. *Copeland*, No. 92-CV-3909, slip op. at 1.
42. 825 F. Supp. 1239 (E.D. Pa. 1993).
43. 12 U.S.C. §§ 85, 86 (1988).
44. *Goehl*, 825 F. Supp. at 1243.
45. *Id.* at 1251.
46. CA No. 92-302 (W.D. Pa. filed Jan. 16, 1992).
47. 69 PA. CONS. STAT. ANN. §§ 1101-2303 (1994).
48. 73 PA. CONS. STAT. ANN. §§ 201-1 to -9.2 (1994).
49. *Goehl*, 825 F. Supp. at 1240.
50. No. 93-PH-231, 1993 Pa. Super. LEXIS 3705 (Pa. Super. Ct. Oct. 29, 1993) (mem.).
51. *Id.* at *1.
52. Also pending in the same court is a similar case involving a state-chartered bank, Gadon v. Chase Manhattan Bank (USA), No. 93-PH-994 (Pa. Super. Ct. filed Mar. 17, 1992). Oral argument in *Gadon* was held on Oct. 21, 1993, but no opinion has been issued.
53. No. 9112-2557, 1993 Phila. Cty. Rptr. LEXIS 59 (C.P. Philadelphia Co., Pa. filed Dec. 9, 1993).

prohibition against certain credit card fees to an out-of-state national bank in denying Citibank's preliminary objection to the lawsuit on the basis of federal preemption.[54] The court based its ruling on the ground that section 85, on which Citibank relied to export certain fees under South Dakota law into Pennsylvania and other states, in effect transforms the permissive South Dakota statute into a federal statute that prohibits Pennsylvania from protecting its own citizens against out-of-state lenders.[55] This, the court concluded, is an unconstitutional delegation of power to the home state of the bank.[56] The court appeared to recognize that its conclusion conflicts with the United States Supreme Court's decision in *Marquette*, stating that in *Marquette*, the Court made the "jurisprudential leap of faith" that Congress' broad power over national banks justified its "enabling one state to establish rates for another."[57] So construed, the court said, "section 85 is unconstitutional."[58]

The *Irwin* court noted in its order the likelihood of immediate appeal, certifying that under applicable Pennsylvania law, the order implicates "a controlling question of law as to which there is substantial ground for difference of opinion."[59] On December 20, 1993 the court issued a stay pending the outcome of an interlocutory appeal.

Appeals similar to *Mazaika* are pending in at least three other states: California;[60] Colorado;[61] and New Jersey.[62] In all of these appellate cases, the right of the bank to charge fees was upheld in the trial court. In addition, a number of cases currently pending in the United States District Court for the Western District of Pennsylvania are awaiting disposition of the banks' motions for summary judgment.[63]

54. *Id.* at *2.
55. *Id.*
56. *Id.*
57. *Id.* at *3.
58. *Id.* at *7.
59. *Id.* at *10.
60. Harris v. Chase Manhattan Bank, N.A., No. A060791 (Cal. Ct. App. filed Mar. 6, 1992); Smiley v. Citibank (South Dakota), N.A., No. B077960 (Cal. Ct. App. filed July 7, 1992).
61. Sherman v. Greenwood Trust Co., No. 93-CA-224 (Colo. Ct. App. filed Feb. 9, 1992); Copeland v. MBNA Am. (Delaware), N.A., No. 93-CA-1191 (Colo. Ct. App. filed June 5, 1992).
62. Hunter v. Greenwood Trust Co., No. A-2884-92T3 (N.J. Super. Ct. App. Div. filed Mar. 16, 1992); Sherman v. Citibank (South Dakota), N.A., No. A-1802-92Y2 (N.J. Super. Ct. App. Div. filed Feb. 19, 1992).
63. Bartlam v. Bank of Am., No. 92-1427 (W.D. Pa. filed June 12, 1992); Spellman v. Meridian Bank (Delaware), No. 93-868 (W.D. Pa. filed May 20, 1992); Szydlik v. Associates Nat'l Bank (Delaware), No. 92-1025 (W.D. Pa. filed Apr. 6, 1992); Ament v. PNC Nat'l Bank, No. 92-244 (W.D. Pa. filed Feb. 3, 1992); Tompkins v. American Gen. Fin. Ctr., No. 92-375 (W.D. Pa. filed Jan. 31, 1992); Thompson v. Maryland Bank, No. 92-346 (W.D. Pa. filed Jan. 28, 1992); Deffner v. CoreStates Bank & Household Bank, f.s.b., No. 92-349 (W.D. Pa. filed Jan. 28, 1992) (consolidated with No. 92-348); Szydlik v. Associates Nat'l Bank, N.A., No.

FDIC OPINION ON PREEMPTION OF COMMON LAW CLAIMS

The Federal Deposit Insurance Corporation (FDIC) issued an opinion that section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980[64] authorizes FDIC-insured, state-chartered banks to export charges authorized by the bank's chartering state on credit card loans to borrowers in states having common law prohibitions on such charges.[65] Section 521 expressly preempts "any State constitution or statute" that would prohibit FDIC-insured, state-chartered banks from charging "interest . . . at the rate allowed by the laws of the State . . . where the bank is located."[66] Section 521, however, does not refer to state common law doctrines.

In its opinion, the FDIC observed its consistent position that section 521 was intended to give federally insured, state-chartered banks the same "most favored lender" status and right to export interest enjoyed by national banks under section 85.[67] The FDIC expanded on its previous pronouncements on the scope of the exportation right by stating that the form of attempted restrictions by the borrower's home state—that is, whether they arise under a state statute, constitution, or common law doctrine—is not controlling.[68]

The FDIC reached this conclusion because a distinction based on the form of restriction "would necessarily eviscerate the underlying purpose of [s]ection 521," namely, to provide competitive equality between national banks and federally insured, state-chartered banks.[69] The FDIC noted that the parallel provision in the National Bank Act (section 85) impliedly preempts all contrary state law, including state common law.[70] The FDIC stated that Congress clearly intended in section 521 to establish competitive equality between state and national banks;[71] on the other hand, the

92-357 (W.D. Pa. filed Jan. 21, 1992); Szydlik v. First Omni Bank, N.A., No. 92-330 (W.D. Pa. filed Jan. 21, 1992); Tompkins v. Chase Manhattan Bank (USA), No. 92-714 (W.D. Pa. filed Jan. 17, 1992); Caplan v. Mellon Bank (Delaware), N.A., No. 92-302 (W.D. Pa. filed Jan. 11, 1992).

64. 12 U.S.C. § 1831d (1988 & Supp. IV 1992).

65. Letter from Douglas H. Jones, Deputy Gen. Counsel, FDIC-93-27 (July 12, 1993), *reprinted in* [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 81,635 (July 12, 1993) [hereinafter *Jones Letter*].

66. 12 U.S.C. § 1831d(a). *See, e.g.*, Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (discussed *supra* text accompanying notes 36-38).

67. *Jones Letter, supra* note 65, at 55,839.

68. *Id.*

69. *Id.*

70. *Id.* at 55,840. *See* 12 U.S.C. § 85. Section 85 contains no express preemption provision regarding state constitutions or statutes similar to that contained in *id.* § 1831d.

71. *Jones Letter, supra* note 65, at 55,840.

FDIC found no evidence that Congress intended to save common law claims from the preemptive sweep of section 521.[72]

OCC LETTERS DECLARE PREEMPTION OF STATE LAWS

In two separate interpretive letters, the Office of the Comptroller of the Currency (OCC) concluded that the National Bank Act preempts several states' laws requiring a national bank to file a notification or to obtain a license before engaging in credit card operations or to file certain credit card information (such as rate or fee information) with state authorities.[73] In both letters, the OCC concluded that these state laws are preempted by the National Bank Act because the state laws provide for an impermissible exercise of visitorial powers over national banks by the states.[74]

In the Glidden Letter, the OCC concluded that a Massachusetts statute requiring a credit card issuer to file comparative rate and fee information with the Massachusetts Commissioner of Banks on a quarterly basis is preempted to the extent the statute applies to national banks.[75] In the Nathan Letter, the OCC concluded that Idaho, Wisconsin, and Wyoming statutes requiring a national bank to file annual notifications with state credit administrators regarding credit card loan volumes and an Idaho statute requiring licensing of and recordkeeping by a national bank credit card issuer similarly are preempted.[76]

CONCLUSION

The judicial decisions to date favor a broad interpretation of the scope of federal preemption, although many of the more than forty class action cases filed in various states in the aftermath of the district court decision in *Greenwood Trust* remain pending. In addition, the federal banking agencies continue to take similarly expansive views of applicable federal law. Thus, although recent developments have been uniformly favorable for financial institutions engaged in the interstate delivery of consumer financial services, some issues remain to be finally resolved and the final chapter remains unwritten.

72. *Id.* at 55,841.

73. OCC Interpretive Letter No. 614 from Wallace S. Nathan, Director, Bank Ops. & Assets Div., 1993 OCC Ltr. LEXIS 8 (Jan. 15, 1993) [hereinafter *Nathan Letter*]; OCC Interpretive Letter No. 616 from William B. Glidden, Assistant Director, Bank Ops. & Assets Div., 1993 OCC Ltr. LEXIS 10 (Feb. 26, 1993) [hereinafter *Glidden Letter*].

74. *Nathan Letter*, *supra* note 73, at *3; *Glidden Letter*, *supra* note 73, at *2.

75. *Glidden Letter*, *supra* note 73, at *5-6.

76. *Nathan Letter*, *supra* note 73, at *9.