Developments in the Interstate Delivery of Consumer Financial Services

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INTRODUCTION

The emerging definition of the scope of authority granted to federally chartered and federally insured institutions to charge every borrower, regardless of the laws of the borrower's home state and the interest rates and fees permitted by the laws of the state where the lending institution is located, thereby allowing the institution to effectively "export" interest rates and fees, continues to be generally favorable to financial institutions. Cases in Alabama, California, Colorado, Pennsylvania, New Jersey, and South Carolina and interpretive letters from the National Credit Union Administration (NCUA)[1] and the Office of Thrift Supervision (OTS)[2] have dealt with the issue of the federal preemption of state regulation of fees. In addition, federal legislation regarding interstate banking and branching has been enacted that will have an impact on the interstate delivery of consumer financial services.

EXPORTATION OF FEES AND OTHER CHARGES

Over forty class action lawsuits were filed following the trial court decision in *Greenwood Trust Co. v. Massachusetts.*[3] While some of these cases

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1. Letter from Richard S. Schulman, Esq., Acting Assoc. Gen. Counsel, National Credit Union Administration, 62 Banking Rep. (BNA) 766 (Apr. 11, 1994) [hereinafter Schulman Letter].

2. *A Federally-Chartered Savings Association Was Able to "Export" the Same Credit Card Fees as Were Authorized by State Law for the "Most Favored Lender" in Whose Shoes the Association Stood,* [Current] Fed. Banking L. Rep. ¶ 82,852 (Sept. 29, 1994) [hereinafter *Most Favored Lender Provision*].

3. 776 F. Supp. 21 (D. Mass. 1991), *rev'd,* 971 F.2d 818 (1st Cir. 1992), *cert. denied,* 113

have been dismissed, most continue to wind their way through the state and federal courts.

STOORMAN v. GREENWOOD TRUST CO.

Stoorman v. Greenwood Trust Co.[4] involved the question of whether opt-out states were subject to fee exportation.[5] A Colorado court of appeals, relying on the "well reasoned" decision of the United States Court of Appeals for the First Circuit in *Greenwood Trust*,[6] affirmed the determination of the trial court that section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA)[7] preempts Colorado law with respect to the assessment of late fees, concluding that "interest" under section 521 includes late fees.[8] The Colorado court of appeals concluded that the plaintiff's contentions as to the meaning of "interest" were without merit.[9] With respect to the effect of Colorado's opt-out provision,[10] the court of appeals noted that effective August 9, 1989, Congress repealed section 525, the opt-out provision of DIDA.[11] But the court found that the repeal of the opt-out provision was immaterial because Colorado could only opt out with respect to loans made in Colorado and the loans involved in *Stoorman* were made in Delaware, where the bank was located.[12]

One argument advanced by the plaintiff was that section 521 did not preempt Colorado common law.[13] Adopting the rationale of *Gilbert v.*

S. Ct. 974 (1993). *See generally* Michael C. Tomkies, *Interstate Consumer Credit Transactions: Card Issuers Win Fee Exportation Cases,* 47 CONSUMER FIN. L.Q. REP. 105 (1993); Darrell L. Dreher et al., *Developments in the Interstate Delivery of Consumer Financial Services: Location, Fees and Common Law,* 49 BUS. LAW. 1325, 1329 (1994). In *Greenwood Trust,* 971 F.2d at 821, the United States Court of Appeals for the First Circuit ruled that a federally insured, state-chartered bank may charge credit card holders a late fee permitted under the laws of the bank's home state, even when the law of a cardholder's state of residence would prohibit such fees.

4. 888 P.2d 289 (Colo. Ct. App. 1994), *reh'g denied* (May 26, 1994), *cert. granted* (Jan. 30, 1995).

5. Colorado opted out of the federal preemption of state usury laws in DIDA. COLO. REV. STAT. § 5-13-104 (1992 repl. vol.). Greenwood Trust Comapany, the card issuer, is an FDIC-insured state-chartered bank located in Delaware, relying on the § 521 preemption to export late fees, which are prohibited under the Colorado Consumer Credit Code, COLO. REV. STAT. §§ 5-3-203 & 5-5-202 (1992 repl. vol.).

6. *Greenwood Trust,* 971 F.2d at 818.

7. 12 U.S.C. § 1831d (1988).

8. *Stoorman,* 888 P.2d at 292.

9. *Id.* at 293.

10. Colorado has repealed its opt-out provision. *See* 1994 Colo. Legis. Serv. S.B. 94-176 (West 1994).

11. *Stoorman,* 888 P.2d at 293.

12. *Id.* at 294.

13. *Id.* at 293 ("Plaintiff . . . alleges that even if § 521 preempts Colorado statutory law, it does not preempt the common law.").

Greenwood Trust Co.[14] and finding that federal preemption under section 85 of the National Bank Act[15] does not permit relief under state common law theories, the court ruled against the plaintiff.[16]

AMENT v. PNC NATIONAL BANK

Ten Pennsylvania class action cases challenging a variety of fees were consolidated with *Ament v. PNC National Bank.*[17] In *Ament*, the plaintiffs argued (i) out-of-state lenders,[18] including national banks and state-chartered banks, were subject to Pennsylvania laws[19] which prohibited such lenders from charging annual fees, late fees, returned check fees, and overlimit fees; and (ii) even if Pennsylvania law were preempted by section 85 of the National Bank Act[20] and sections 521-523 of DIDA,[21] the fees

14. [Current] Fed. Banking L. Rep. (CCH) ¶¶ 89,412, 89,830 (1993).

15. 12 U.S.C. § 85 (1988).

16. *Stoorman*, 888 P.2d at 294.

17. 849 F. Supp. 1015 (W.D. Pa. 1994); Bartlam v. Bank of Am., No. 92-1427 (W.D. Pa. filed June 12, 1992) (defendant's motion for summary judgment granted April 8, 1994); Caplan v. Mellon Bank (DE) N.A., No 92-302 (W.D. Pa.) (defendant's motion for judgment on the pleadings granted April 8, 1994); Deffner v. CoreStates Bank & Household Bank, f.s.b., No. 92-349 (W.D. Pa.) (consolidated with No. 92-398) (defendant's motion for judgment on the pleadings granted April 8, 1994); Goehl v. Mellon Bank (DE) N.A., No. 92-2547 (E.D. Pa.), transferred to Western District, No. 93-878 (W.D. Pa.) (defendant's motion for judgment on the pleadings granted April 8, 1994); Spellman v. Meridian Bank (DE), No. 92-CV-3860 (E.D. Pa.), transferred to Western District, No. 93-868 (W.D. Pa.) (defendant's motion for judgment on the pleadings granted April 8, 1994); Szydlik v. Associates Nat'l Bank (DE), No. 92-1025 (W.D. Pa. filed Apr. 6, 1992) (defendant's motion for judgment on the pleadings granted April 8, 1994); Szydlik v. Associates Nat'l. Bank, N.A., No. 92-357 (W.D. Pa.) (dismissed by stipulation of the parties); Szydlik v. First Omni Bank, N.A., No. 92-330 (W.D. Pa.) (defendant's motion for judgment on the pleadings granted April 8, 1994); Thompson v. Maryland Bank, No. 92-346 (W.D. Pa.) (defendant's motion for judgment on the pleadings granted April 8, 1994); Tompkins v. American Gen. Fin. Ctr., No. 92-375 (W.D. Pa.) (stayed pending outcome of *Tompkins v. Greenwood Trust Co.*); Tompkins v. Chase Manhattan Bank (USA), No. 92-714 (W.D. Pa.) (defendant's motion for judgment on the pleadings granted April 8, 1994). These 11 cases, originally filed in state court and then removed to federal court, were consolidated for purposes of motions to remand. In addition, Tompkins v. American Gen. Fin. Ctr. is challenging cash advance fees. These cases collectively claim violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 PA. CONS. STAT. ANN. §§ 201-1 to 201-2 (1994).

18. Most of the defendants were national banks incorporated in Delaware. Chase Manhattan Bank (USA) was a national bank and a state bank at different times during the relevant period, and three defendants, Household Bank, Bank of America, and Associates National Bank of Delaware (California), were located in California. *Ament*, 849 F. Supp. at 1018.

19. Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 PA. CONS. STAT. ANN. §§ 201-1 to 201-2 (1994); Pennsylvania Goods and Services Installment Sales Act, 69 PA. CONS. STAT. ANN. §§ 1101-1501 (1994) (restricting banks issuing credit cards to periodic interest at 18% per year); Pennsylvania Banking Code of 1965, 7 PA. CONS. STAT. ANN. §§ 101-2201 (1994).

20. 12 U.S.C. § 85 (1988 & Supp. V 1993)

21. *Id.* § 1831d (1988 & Supp. V 1993).

at issue were not included in the definition of "interest" in the National Bank Act or sections 521 through 523 of DIDA.[22]

The *Ament* court, relying, in general, on the First Circuit decision in *Greenwood Trust* and in particular on the statement that "federal case law has long suggested that, in ordinary usage, interest may encompass late fees and kindred charges,"[23] asserted that the "strong weight" of the legal authority on the issue of whether late fees and other charges constitute "interest" under section 85 supported its holding in favor of the defendants.[24] The court stated its holding was consistent with "ordinary congressional intent that the national banks should not be subject to more restrictive interest provisions than state banks."[25] The court also deferred to the technical expertise of the Office of the Comptroller of the Currency (OCC), quoting from the OCC's amicus brief[26] and noting prior OCC rulings.[27]

This case has been appealed to the United States Court of Appeals for the Third Circuit, briefed and argued.[28]

HUNTER v. GREENWOOD TRUST CO.

Hunter v. Greenwood Trust Co.,[29] a late fee exportation case under section 521, was filed in state court, removed to federal court, later remanded to state court, and subsequently dismissed. The defendant's motion to dismiss for failure to state a claim was granted and the Superior Court of New Jersey, Appellate Division, affirmed the trial court's dismissal.[30] The plaintiff appealed on grounds that "section 521 preempts state interest laws but excludes late charges from its preemptive scope."[31] The Appellate Division cited and agreed with six federal court decisions (including *Ament*) holding that late payment charges are "interest," finding plaintiff's attempt to distinguish these cases unpersuasive.[32]

The plaintiff argued, as did the plaintiff in *Stoorman*, that even if preemption applies to statutory claims, the plaintiff's state common law claims

22. *Ament*, 849 F. Supp. at 1018.

23. *Id.* at 1019 (citing Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 825 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993)).

24. *Id.* at 1018.

25. *Id.* at 1019 (citing Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 315 (1978)).

26. *Id.* at 1020.

27. *Id.* ("The OCC has also issued rulings to the effect that a national, non-Pennsylvania bank may charge its Pennsylvania customers annual fees, and other credit card charges, at its home state rates.").

28. No. 94-3215 (3d Cir. filed Apr. 29, 1994).

29. 640 A.2d 855 (N.J. Super. Ct. App. Div.), *cert. granted*, 649 A.2d 1289 (N.J. 1994).

30. *Id.*

31. *Id.* at 857.

32. *Id.* at 860.

should not have been dismissed.[33] The court rejected the plaintiff's argument that state common law claims for breach of contract and conversion should fall outside the preemptive language of section 521.[34] The basis for the plaintiff's "non-preemption of common law" theory lies in the decision of the United States Supreme Court in *Cipollone v. Liggett Group, Inc.*[35] In *Cipollone*, the Court held that under a federal statute providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes,"[36] certain state common law claims were not preempted.[37] Section 521's express preemption clause reads in pertinent part: "notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section."[38] It does not expressly mention state common law. The *Hunter* court thus found that the allowance of state common law claims would contravene the express congressional intent in DIDA to prevent discrimination against state-chartered banks.[39] Because national banks can charge late fees without interference of common law claims,[40] the *Hunter* court reasoned, allowance of plaintiff's common law claims would cause state-chartered banks to suffer "precisely the type of discriminatory disadvantage which Congress expressly sought to eradicate through DIDA."[41]

SHERMAN v. CITIBANK (SOUTH DAKOTA), N.A.

Section 85 preemption of New Jersey law was also the subject of *Sherman v. Citibank (South Dakota), N.A.*[42] The defendant's motion to dismiss at trial was granted.[43] The trial court observed that interest "can come in many forms including (under relevant federal case law) late fees, closing costs,

33. *Id.* at 861.

34. *Id.* at 861-62.

35. 112 S. Ct. 2608 (1992).

36. *Id.* at 2617 (citing the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-1340 (1988 & Supp. V 1993)).

37. *Id.* at 2621.

38. 12 U.S.C. § 1831d (1989 & Supp. 1995).

39. *Hunter*, 640 A.2d at 862 ("State-chartered banks would therefore suffer a disadvantage in relation to national banks if plaintiff's common law claims were allowed.").

40. *Id.*

41. *Id.* The Federal Deposit Insurance Corporation (FDIC) also has concluded that state common law claims are preempted by section 521. *FDIA Section 27 Preempts State Common Law Restrictions on Credit Card Loans*, [Current] Fed. Banking L. Rep. (CCH) ¶ 81,635 (July 12, 1993).

42. 640 A.2d 325 (N.J. Super. Ct. App. Div.), *cert. granted*, No. A-1802-92T2, 1994 N.J. LEXIS 917 (N.J. Oct. 19, 1994).

43. Sherman v. Citibank (South Dakota), N.A., No. L-01834-92 (Super. Ct. Camden, N.J. Nov. 25, 1992) (order dismissing plaintiff's Complaint).

prepayment charges and 'other varieties,' "[44] and therefore section 85 preempts New Jersey law.[45]

The Superior Court of New Jersey, Appellate Division, affirmed the trial court's dismissal.[46] The court reviewed recent and historical case law and concluded that "federal case law and administrative opinions support the trial judge's decision and undercut plaintiff's position that section 85 incorporates only a state's numerical rate of interest."[47] The court found the plaintiff's reference to the debates of the 1864 Congress "not determinative of whether the term 'interest' could also include other fees."[48] With respect to the plaintiff's other "equally unavailing" arguments, the court determined, *inter alia*, that Congress did not unlawfully delegate its legislative authority but rather adopted state usury laws with respect to national banks and specifically rejected the plaintiff's reliance on legislative history under section 501 of DIDA.[49] Appeal to the New Jersey Supreme Court was granted on October 19, 1994.[50]

SYX v. GREENWOOD TRUST CO.

Relying on the First Circuit's decision in *Greenwood Trust* and the many decisions consistent with that ruling, an Alabama trial court has granted Greenwood Trust's motion for summary judgment on the grounds that section 521 preempts Alabama law limits on late fees.[51] No appeal has been taken.

SMILEY v. CITIBANK (SOUTH DAKOTA), N.A.

In *Smiley v. Citibank (South Dakota), N.A.*,[52] the plaintiff challenged the exportation of late fees by a national bank located in South Dakota to credit card customers in California.[53] The plaintiff contended that California law, not South Dakota law, should apply to these transactions.[54] The trial court granted defendant's motion for judgment on the pleadings.[55] The court of appeals affirmed the trial court's decision in favor of

44. Transcript of Proceedings, No. L-01834-92 (Super. Ct. Camden, N.J. Nov. 25, 1992) at 31, lines 20-22.
45. *Id.* at 32, lines 23-25 through 33, lines 1-8.
46. *Sherman*, 640 A.2d 325.
47. *Id.* at 331.
48. *Id.*
49. *Id.*
50. No. A-1802-92T2, 1994 N.J. LEXIS 917 (N.J. Oct. 19, 1994).
51. Syx v. Greenwood Trust Co., No. CV 91-8824-MC, slip op. (Ala. Cir. Ct. May 2, 1994).
52. 32 Cal. Rptr. 2d 562, *cert. granted*, 883 P.2d 387 (Cal. 1994).
53. *Id.* at 564.
54. *Id.* at 565-66.
55. No. BC059202 (Super. Ct. Los Angeles County, Cal. filed July 7, 1992).

federal preemption,[56] following the decision of the First Circuit in *Greenwood Trust,*[57] as well as other court decisions and OCC Interpretations.[58]

The *Smiley* decision included a lengthy dissent criticizing the *Greenwood Trust* decision.[59] The dissent noted that *Greenwood Trust* was based on section 521 of DIDA[60] and addressed section 85, the basis of the *Smiley* case, only indirectly.[61] The dissent criticizes the argument in *Greenwood Trust* that utilizing the dictionary definition of the term "interest" could allow for items other than a numeric rate of interest, even though other items may not be in the term's "common parlance" meaning.[62] In the dissent's view, "late payment fees are costs, such as those which might accompany an attachment or foreclosure, which are contingent on a failure of performance on the part of the borrower. They are not what the ordinary citizen thinks of as part of the 'rate of interest.' "[63] The dissent also contended that a bank's home state's law cannot determine the meaning of the term "interest"; otherwise, Congress has unconstitutionally delegated to state legislatures the authority to establish the scope of federal preemption under section 85.[64] Finally, the dissent took issue with the majority's deference to the opinion of the OCC, stating in a footnote that the question is one of statutory construction, not administrative expertise, and that the OCC itself has not been entirely consistent in its interpretations.[65] In its conclusion, the dissent called upon the California Supreme Court to take up the case.[66]

Petition for review was granted on October 27, 1994.[67]

56. *Smiley*, 32 Cal. Rptr. 2d at 562.

57. Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), *cert. denied,* 113 S. Ct. 974 (1993).

58. *Smiley*, 32 Cal. Rptr. 2d at 566.

59. In response to the First Circuit's railroad metaphor in *Greenwood Trust*, the dissent stated the following:

> Taking a ride on the First Circuit's railroad I don't hear the whistle at all. Maybe that's because there is no collision between California's consumer-protection law governing late fees and federal banking law, since the federal banking law is on another track. It is speeding down the "interest" track, while this state's laws and judicial decisions limiting late fees are chugging up the "penalty" track. Giving out-of-state banks a clear signal to charge whatever rate of interest their home state may allow on credit cards does not mean Congress intended state governments should be precluded from regulating other aspects of credit card transactions.

Id. at 567 (Johnson, J., dissenting).

60. 12 U.S.C. § 1831d (1988 & Supp. V 1993).

61. *Smiley*, 32 Cal. Rptr. 2d at 567.

62. *Id.*

63. *Id.* at 567-68.

64. *Id.* at 569.

65. *Id.* at 572 n.7.

66. *Id.*

67. *Smiley*, 883 P.2d 387 (Cal. 1994).

In an *amicus* brief,[68] the OCC has stated its conclusion that the definition of "interest" is governed by federal, not state, law, although federal law looks to state law to establish the limits of interest.[69] The OCC drew upon the United States Supreme Court's decision in *First National Bank v. Dickinson*[70] to illustrate the manner in which federal and state law can interact to further the legislative policy of competitive equality by establishing a self-executing mechanism to accommodate changes in state regulation in response to the changing economic conditions and requirements of the nation.[71] The OCC noted that it "has long had in place a regulation that explicitly recognizes the application of section 85 to all aspects of loan compensation that are 'material to the determination of the interest rate.' "[72] This regulation, along with judicial interpretations of section 85 and many OCC interpretive letters, the OCC argued, establishes that "interest" under section 85 has not, and should not, be narrowly construed.[73] Failure to broadly construe section 85 would expose national banks to the very discrimination section 85 and the most favored lender doctrine were designed to overcome, the OCC asserted.[74] The Supreme Court's recent decision in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*,[75] in which the Court expressed support for deference to the OCC as the administrator of the National Bank Act, bolsters the OCC's assertions.[76]

HARRIS v. CHASE MANHATTAN BANK, N.A.

A California court of appeals has affirmed the general demurer granted in favor of the defendant in *Harris v. Chase Manhattan Bank*.[77] The court rejected in turn the various arguments made by the plaintiff and the *amici* supporting the plaintiff. The court noted that cases interpreting section 85 do not recognize a contingent/non-contingent fee distinction and that "section 85 (and by implication section 521)" allows the exportation of

68. DRAFT Amicus Brief of the Office of the Comptroller of the Currency, Smiley v. Citibank (South Dakota), N.A., No. S041711 (Cal. S. Ct.) [herinafter OCC Amicus Brief].

69. *Id.* at 5-7.

70. 396 U.S. 122, 130-134 (1969), *reh'g denied*, 396 U.S. 1047 (1970).

71. OCC Amicus Brief, *supra* note 68, at 5-6.

72. *See* 12 C.F.R. § 7.7310(a) (1994). While admitting that its letters have not been entirely consistent in their methods over the years, the OCC asserted that its letters have consistently reached the same result in permitting national banks to charge fees that are necessary to compensate banks for extending credit and for borrowers' default, subject only to state law limitations on charges for state-chartered lenders where the national bank is located.

73. OCC Amicus Brief, *supra* note 68, at 7-9.

74. *Id.* at 6.

75. 115 S. Ct. 810 (1995).

76. *See id.* at 813 ("As the administrator charged with supervision of the National Bank Act . . . the Comptroller [of the Currency] bears primary responsibility for surveillance of the 'business of banking'. . . .").

77. 35 Cal. Rptr. 2d 733, *cert. granted*, 889 P.2d 540 (Cal. 1995).

not only a bank's "home state's periodic [interest] rate, but its entire body of usury law, even though it may conflict with the law of the customer's state of residence."[78] The court also rejected (i) reference to interpretations under section 501 of the DIDA as inapposite,[79] and (ii) the non-preemption of common law theory, noting, *inter alia*, that such theory would create a loophole that would "eviscerate" the legislative policy of lending parity between national and state-charted banks and that plaintiff's claims were statutory, not common law, in nature, notwithstanding that the statute in question codified preexisting case law.[80] Finally, the court rejected an argument for impermissible delegation by Congress of one state's legislative powers to another state, noting that Congress may properly adopt definitional terms of another state in furtherance of its "overall objective of regulating banking" as an issue of legislative policy.[81]

MAZAIKA v. BANK ONE, COLUMBUS, N.A.

In *Mazaika v. Bank One, Columbus, N.A.*,[82] the Superior Court of Pennsylvania, sitting *en banc*, reversed the trial court's dismissal of claims and the prior decision of a three-judge panel of the Superior Court, ruling that an out-of-state national bank many not export annual, returned check, overlimit, or late fees into Pennsylvania because Pennsylvania's restrictions on such fees are not preempted by section 85.[83] The court found the reasoning of the First Circuit in *Greenwood Trust* "singularly unpersuasive" with respect to the definition of "interest,"[84] finding "beyond peradventure that the plain and ordinary meaning of the term 'interest' or 'interest rate' does not include late fees, over credit limit charges, or the like which are not levied *on a percentage basis*."[85] The court did not find support for the premise that section 85 was intended or was interpreted in *Marquette v. First Omaha Service Corp.*[86] to preempt all state consumer protection laws that seek to regulate aspects of consumer loan transactions other than rates of interest at the "whim" of one state legislature and felt "compelled to view that federal law, and not state law, must be applied in determining whether the contingent penalties permitted by the State of Ohio under

78. *Id.* at 738.

79. *Id.* at 739.

80. *Id.*

81. *Id.* (citing Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 829 (1st Cir. 1992)).

82. 653 A.2d 640 (Pa. Super. Ct. 1994), *rev'g* Mazaika v. Bank One, Columbus, N.A., No. 4058, slip op. (C.P. Phila. County, Pa., Dec. 17, 1992).

83. *Id.* at 645.

84. *Id.* at 646.

85. *Id.* (emphasis added) The court inferred from the structure of the relevant Ohio statute that the Ohio legislature agrees that the term "interest" does not include late fees, among other fees, because the legislature distinguishes among components of "interest" for different purposes. *See* OHIO REV. CODE §§ 1107.261, 1107.262(A) (Anderson 1994).

86. 439 U.S. 299 (1978).

the label of 'interest' can be considered 'interest charges' for purposes of section 85."[87] The court, therefore, remanded the case for further proceedings.[88]

A concurring opinion asserted that adoption of a state definition of interest would amount to an unconstitutional delegation of congressional power and expanded at length upon the contingent/non-contingent fee distinction.[89] Three members of the panel joined in a reasoned dissent supportive of the view that state law definitions of "interest" are incorporated into federal preemption statutes and that the exportation of fees other than periodic interest "represent[s] a logical application of the 'exportation' principle announced in *Marquette National Bank v. First Omaha Service Corp.*," noting that courts historically have declined to affix to the term "interest" a narrow definition that would exclude flat rate fees.[90] The dissent also noted that the issue of unconstitutional delegation of Congressional power was not considered by the trial court and hence not properly before the appellate court.[91]

GADON v. CHASE MANHATTAN BANK (USA); GILBERT v. GREENWOOD TRUST CO.; IN RE CITIBANK (SOUTH DAKOTA) CREDIT CARD LITIGATION

In *Gadon v. Chase Manhattan Bank (USA)*[92] and *Gilbert v. Greenwood Trust Co.*,[93] the Superior Court of Pennsylvania extended the *Mazaika* ruling to state-chartered banks and affirmed the majority's analysis in *Mazaika*; and, in *In re Citibank (South Dakota) Credit Card Litigation*,[94] the same court affirmed the trial court's dismissal of Citibank's preliminary objection in light of the decision in *Mazaika*.[95]

87. *Mazaika*, 653 A.2d at 650 (citing in support of its mode of analysis First Nat'l City Bank v. Dickinson, 396 U.S. 122 (1969) (defining "branch" governed by federal law even as state law determines how, where and when branches may be operated and referencing the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994), for its provisions requiring that national banks comply with certain state consumer protection laws).

88. *Id.* at 651.

89. *Id.* at 651-57 (Cirillo, J., concurring).

90. *Id.* at 657-63.

91. *Id.* at 663 n.2.

92. 653 A.2d 697 (Pa. 1995).

93. Nos. 00994 PHILA. 1993 and 00995 PHILA. 1993, slip op. (Pa. Super. Ct., Jan. 5, 1995). A third case, *Thompkins [sic] v. Greenwood Trust Co.*, was previously consolidated with Gilbert.

94. 653 A.2d 39 (Pa. Super. Ct. 1994); *Irwin v. Citibank (South Dakota), N.A.*, (Pa.Ct.C.P. Dec. 9, 1993), No. 9112-2557; and *Magaw v. Citibank (South Dakota), N.A.*, were consolidated and retitled to create this case, in which late, annual, overlimit, and returned check charges are being challenged.

95. *Citibank*, 653 A.2d at 40.

NATIONAL CREDIT UNION ADMINISTRATION

The NCUA has joined other federal banking agencies and courts that have determined that, under applicable federal law, late fees constitute "interest" and common law claims, as well as statutory claims, are preempted. The NCUA's opinion interprets section 523 of DIDA to be consistent with section 85 of the National Bank Act, section 521 of DIDA, and section 4(g) of the Home Owners' Loan Act of 1933.[96]

OFFICE OF THRIFT SUPERVISION

The OTS has affirmed prior opinions of the Federal Home Loan Bank Board with regard to exportation authority under section 4(g) of the Home Owners' Loan Act of 1933,[97] opining that (i) loan fees, including annual, late, return check, cash advance and overlimit fees, are covered by the savings association most favored lender provision[98] and may be exported in the same manner as interest rates;[99] and (ii) when originating a loan under the savings association most favored lender provision,[100] a savings association is required to follow the state consumer protection laws applicable to the most favored lender in whose shoes the association seeks to stand, rather than the consumer protection laws of the borrower's state of residence.[101]

INTERSTATE BANKING AND BRANCHING

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 was signed by the President on September 30, 1994.[102] This legislation will affect many aspects of the banking industry, including the interstate delivery of consumer financial services. For example, the Act permits bank subsidiaries of bank holding companies to act as agents for certain affiliates in certain transactions, including taking deposits and cer-

96. 12 U.S.C. § 1463(g)(1) (1988 & Supp. V 1993).

97. *Id.*

98. 12 C.F.R. § 571.22 (1994).

99. *See* Letter from Harry W. Quillian, Esq., Acting General Counsel, Office of Thrift Supervision, to the Federal Home Loan Bank Board (June 27, 1986), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 82,852, at 62,403-04 (Dec. 16, 1994); Ament v. PNC Nat'l Bank, 849 F. Supp. 1015 (W.D. Pa. 1994); Greenwood Trust Co. v. Massachusetts, 971 F. 2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993).

100. 12 C.F.R. § 571.22 (1994).

101. *Federal Preemption of State Law Regulating Credit Cards and Most Favored Lender Status*, [1991-1992 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,591 (Apr. 2, 1992).

102. Pub. L. No. 103-328, 108 Stat. 2338 (1994).

tain loan transactions, without being considered a branch of the affiliate.[103] An opt-out provision in the Act allows states to prohibit interstate merger transactions by passing a law to that effect after enactment of the Act and before June 1, 1997.[104] The Act also allows banks to establish branches in states outside their home state in two new ways:[105] (i) through the process of interstate mergers,[106] or (ii) through what the Act calls *de novo* branching, i.e., establishing a branch that is not the result of the acquisition of another bank or of a conversion, merger, or consolidation of another bank or branch.[107]

The Act raises the question of how exportation authority will apply to newly allowed branches.[108] For national banks, the term "located" as used throughout the National Bank Act has traditionally been understood to

103. Section 18 of the Federal Deposit Insurance Act (12 U.S.C. § 1828) is amended by adding the following new subsection:

> Any bank subsidiary of a bank holding company may receive deposits, renew time deposits, close loans, service loans, and receive payments on loans and other obligations as an agent for a depository institution affiliate. Notwithstanding any other provision of law, a bank acting as an agent in accordance with the provision above will not be considered to be a branch of the affiliate.

140 CONG. REC. H6625-03, at H6626 (daily ed. Aug. 2, 1994).

104. *Id.* at H6632.

105. Currently, national banks may establish or operate branches in states outside their home state in two ways. First, a national bank may, upon written notice to the Comptroller of the Currency, change the location of its main office to any location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits. 12 U.S.C. § 30(b) (1988). The OCC has allowed national banks to move their main office to another state under this provision and maintain existing branches in the former state. *See, e.g.*, Applications of First Fidelity Bank, National Association, Pennsylvania, Philadelphia, Pennsylvania, and First Fidelity Bank, National Association, New Jersey, Newark, New Jersey, OCC Corp. Decision No. 94-04 (Jan. 10, 1994). Second, the Federal Deposit Insurance Act provides for assisted emergency interstate acquisitions. 12 U.S.C. § 1823f (1988 & Supp. V 1993). An out-of-state bank may purchase an insured bank in danger of default, with FDIC approval, thus gaining a branch network in another state.

106. The Act provides that following the consummation of any interstate merger transaction, the resulting bank may establish, acquire, or operate additional branches at any location where any bank involved in the transaction could have established, acquired, or operated a branch under applicable federal or state law if such bank had not been a party to the merger transaction. 140 CONG. REC. H6625-03, at H6627. Federal agencies may approve interstate merger transactions beginning on June 1, 1997. *Id.* at H6626. An interstate merger transaction, however, may not take place if the transaction involves a bank the home state of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and before June 1, 1997 that applies equally to all out-of-state banks and expressly prohibits merger transactions involving out-of-state banks. *Id.*

107. *Id.* at H6628.

108. *See supra* note 106 and accompanying text.

mean the state in which the bank's principal office is found.[109] In *Marquette National Bank v. First of Omaha Service Corp.*,[110] the plaintiff challenged the exportation of interest rates by a national bank chartered in Nebraska to its credit card customers in Minnesota.[111] The United States Supreme Court held that the Omaha Bank was a national bank under section 85 and was "located" in Nebraska and could therefore export Nebraska interest rates.[112] In determining the location of the Nebraska bank for exportation purposes, the Court considered the fact that the bank had no branches in Minnesota.[113] Because *Marquette* was decided when national banks were generally not permitted to establish branches outside their home state, the provision preserving the applicability of section 85 may require a reexamination of the application of *Marquette*. The first part of the Court's opinion suggests that a national bank's charter or organization certificate alone may determine the bank's location because a national bank is not permitted to extend credit from any location other than its charter location or a branch in the charter state.[114] The extension of credit to out-of-state residents, the honoring of credit cards by out-of-state merchants and financial institutions, and the collection and remittance of sales drafts by out-of-state financial institutions did not affect the location of the bank.[115] The Court considered direct mail solicitation of an out-of-state resident to be equivalent to such a resident traveling to the bank's offices.[116] Charter address is apparently the most important factor in determining location.[117]

The plaintiffs in *Marquette* asserted that, despite the bank's charter address, the bank was located in Minnesota for purposes of determining the

109. Helco, Inc. v. First Nat'l City Bank, 470 F.2d 883, 884 (3d Cir. 1972); Buffum v. Chase Nat'l Bank, 192 F.2d 58, 60 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); National City Bank v. Domenech, 71 F.2d 13, 16 (1st Cir. 1934), *aff'd*, 294 U.S. 199 (1935); *see also* Bank of Am. v. Whitney Cent. Nat'l Bank, 261 U.S. 171, 172-73 (1923) (holding that a bank with its principal office in New Orleans was not located in New York despite the fact that extensive business was done in New York); Klein v. Bower, 421 F.2d 338, 342 (2d Cir. 1970) (expressly rejecting contention that a bank in Scranton, Pennsylvania, was located in New York merely because it did business in New York through an agent). *Cf.* Citizens & So. Nat'l Bank v. Bougas, 434 U.S. 35 (1977) (for purposes of the venue provisions of 12 U.S.C. § 94, a bank may be "located" in counties where it has authorized branches in addition to its charter address).

110. 439 U.S. 299 (1978).

111. *Id.* at 301 ("The question for decision is whether the National Bank Act . . . as amended . . . authorizes a national bank based in one state to charge its out-of-state credit-card customers an interest rate on unpaid balances allowed by its home State, when that rate is greater than that permitted by the State of the bank's nonresident customers" (footnote omitted) (citations omitted)).

112. *Id.* at 309-13.

113. *Id.* at 309.

114. *Id.* at 309 & n.21.

115. *Id.* at 310-13.

116. *Id.* at 310-11.

117. *Id.* at 309-10.

permissible interest rate because of various contacts with the state.[118] While the Court rejected a transaction-oriented analysis of where a national bank and its credit card program are located, the Court did engage in a detailed analysis of the contacts of the national bank and its credit card program with each state, an analysis similar to a traditional conflict of laws contacts analysis, in the second half of its opinion.[119] After considering the contacts, the Court reiterated its conclusion that the bank and its credit card program were located in Nebraska.[120] Contacts evaluated by the Court included the following: (i) where credit assessments were made,[121] (ii) where credit cards were issued,[122] (iii) where credit was extended by the honoring of sales drafts,[123] (iv) where finance charges were assessed,[124] and (v) where payments were received.[125]

No further pronouncement has come from the Supreme Court regarding the proper analysis for the determination of the location of an institution. Federal regulators have declined to opine as to the sufficiency of the charter address or the necessity of a program analysis in determining location.[126] In OCC Interpretive Letter No. 325, Peter Liebesman of the OCC made the following statement in a footnote: "[a] national bank is located either in the place designated in its organizational certificate or in the places in which it has established authorized branches."[127]

The effect of authorized branches in multiple states was not considered in *Marquette*. Lending from authorized branches could have the consequence of subjecting transactions to limitations on rates, fees or other terms of a state where a branch is found rather than the state of the charter address. Under a contacts analysis, it is possible that an institution could be deemed to have more than one "location" based on a finding that a sufficient number of significant contacts occur in another state. The Court in *Marquette* clearly recognized that third-party service corporations, even wholly-owned corporations, located in another state could have some

118. *See supra* text accompanying note 109.
119. *Marquette*, 439 U.S. at 310-19.
120. *Id.* at 310-13.
121. *Id.* at 312.
122. *Id.*
123. *Id.* at 311.
124. *Id.* at 311-12.
125. *Id.* at 312.
126. *See, e.g., Interest Rate on Loans to Customers Residing in States That Have Rejected the Federal Preemption Provision*, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,013 (Oct. 20, 1983) (raising the question but declining to opine); *cf.* FDIC Letter No. 81-7 from Kathy A. Johnson, Attorney, to Harvey Bock (Mar. 17, 1981), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,008 (equating "location" with the charter and suggesting that in *Marquette*, the Supreme Court simply found "additional support" on the facts).
127. OCC Interpretive Letter No. 325 from Peter Liebesman, Asst. Dir. Legal Advisory Services Div. (Jan. 22, 1985), *reprinted in* [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,495 (citing *Marquette*, 439 U.S. at 309 n.21).

role in interstate transactions, provided the role was limited and did not encroach upon the role of the named creditor in the direct extension of credit or receipt of interest.[128] One possible resolution of the issue is that the OCC and the FDIC adopt interpretations similar to those adopted by the OTS for thrift institutions, which determines the location for rate authority purposes based on where transactions are "booked."[129]

With respect to new banking agency preemption opinions, Congress has established new procedures.[130] The new procedures do not apply, however, with respect to any opinion letter or interpretive rule that raises issues of federal preemption of state law essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule.[131] This exception appears to give tacit approval to current broad interpretations of federal usury preemption. The exception also could be viewed as lending support to agencies which adopt the OTS viewpoint.

OTHER RELATED DEVELOPMENTS

The following developments have occurred in previously reported cases.[132]

COPELAND v. MBNA AMERICA (DELAWARE), N.A.

The Colorado Supreme Court has granted appeal in *Copeland v. MBNA America (Delaware), N.A.*[133]

CADE v. H&R BLOCK, INC.

In *Cade v. H&R Block, Inc.*, the United States Court of Appeals for the Fourth Circuit affirmed the summary judgment in favor of defendants.[134] The United States Supreme Court has denied certiorari.[135]

128. *Marquette*, 439 U.S. at 302, 305 n.10.

129. *Application of HOLA's "Most Favored Lender" and Trust Powers Provision to Interstate Savings Association*, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 82,645 (Dec. 24, 1993).

130. 140 CONG. REC. H6625-03, H6632-33.

131. *Id.*

132. *See* Darrell L. Dreher & Michael C. Tomkies, *Interstate Delivery of Consumer Financial Services: Credit Card Issuers Win Decisions in* Greenwood Trust *and Related Cases*, 48 BUS. LAW. 1097, 1104 n.63 (1993); Dreher et al., *supra* note 3, at 1327-28, 1331 n.60.

133. No. 92-CV-3909, slip op. (Colo. Dist. Ct. Denver Cty. (1993) (dismissed for failure to state a claim), No. 92-CV-3909 (Colo. Dist. Ct. Denver Cty. July 9, 1993) (order granting defendant's motion for judgment on the pleadings), *aff'd*, 883 P.2d 564 (Colo. Ct. App. 1994), *cert. granted*, No. 94-SC-409 (Colo. Sup. Ct., Oct. 24, 1994). This case was originally filed in state court, removed to federal court, and remanded to state court. Late fees are being challenged.

134. 43 F.3d 869 (4th Cir. 1994).

135. 63 U.S.L.W. 3756 (May 30, 1995).

RICHARDSON v. CITIBANK (SOUTH DAKOTA), N.A.

On January 30, 1995, the Colorado Supreme Court granted certiorari in *Richardson v. Citibank (South Dakota), N.A.*[136] This case was dismissed with prejudice by the trial court[137] and appealed.[138] Before the Colorado Court of Appeals rendered a decision, the Colorado Supreme Court agreed to consider the same issues that were before the Court of Appeals on the basis of an appellate rule allowing appeal directly to the Colorado Supreme Court.[139] The plaintiffs were challenging late fees.

CONCLUSION

The flow of decisions from the state and federal courts continues to support the banking industry's interpretations of the scope of federal preemption and the meaning of "interest" under the federal statutes. Although no other cases since the First Circuit decision in *Greenwood Trust* have been decided by a federal court of appeals, the weight of authority supports a broad interpretation of federal preemption in the interstate delivery of consumer financial services.

136. No. 94-SC-670 (Colo. Jan. 30, 1995).
137. No. 92-CV-1460 (Colo. Dist. Ct. Denver Cty. Mar 21. 1994).
138. No. 94-CA-554 (Colo. Ct. App. 1994).
139. COLO. APP. R. 50.