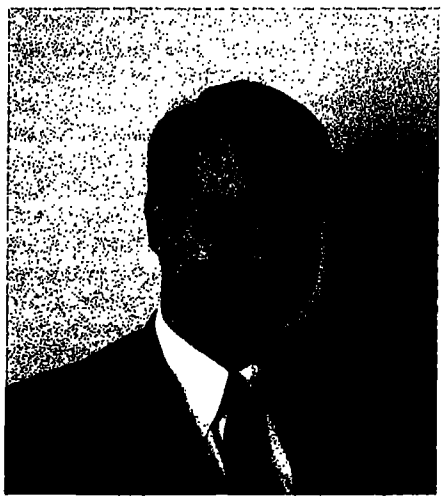
Interstate Consumer Credit Transactions: Recent Developments

By Michael C. Tomkies



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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 Properties/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

1. Langer and Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Saving Institutions and FDIC-Insured State Banks,* 42 Consumer Fin. L. *Q. Rep.* 4 (1988) [hereinafter Langer & Wood].

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 significent issues must be resolved. Weiner, *Card Fees Law May Make Iowa Suits Moot,* Am. 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 *amici 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)).

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. § 1730g(a).

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 overrjde. 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 status[37] 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

41. *Id.*
42. *Id.*
43. *Id.* at 806-07; *see* 12 U.S.C. § 85.
44. 425 N.W. 2d 806 n.2 (citing 12 U.S.C. § 85 (1982)).
45. 464 F.2d 855, 862-63 (6th Cir. 1972) (quoting *Tiffany*, 85 U.S. (18 Wall.) at 412).
46. 425 N.W.2d at 806 n.2.
47. *Id.*
48. *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 Minnestoa Supreme Court's finding 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

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.*

77. *Id.*

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

79. Petition at 7.

80. *VanderWeyst*, 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 enterd 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.

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 is "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 OCC[95] 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 collection 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 Interpretive 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 Interpretative 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. § 54-3-1 (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. § 9:3511(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. Seiter*, 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 materality 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 borrower'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 forebearance 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 Act[168] permits 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 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

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).

158. *See* Defendant's Motion to Dismiss, *Iowa ex rel. Miller v. Citibank*, No. 88-189-E (S.D. Iowa, filed May 6, 1988).

159. *See* Notice of Dismissal Without Prejudice, *Iowa ex rel. Miller v. Citibank*, No. 88-189-E (S.D. Iowa, filed May 13, 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. Defendent'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.*

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.

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 affimatively 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 Act[176] 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-

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.

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.

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.

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 Act[209] 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.

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 *M'Culloch 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 Citibank 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

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.

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. Polskie 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 Formemto v. Vintero Sales Corp., 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 444 U.S. 1080, (1981); Citibank, N.A. v. Benkoczy, 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.

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. Consurve, 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).

Attempts by states such as Iowa to regulate out-of-state consumer credit plans improperly frustrates the legitimate policies of states where exporting banks are located by restricting the ability of exporting banks to evaluate and develop compensation packages upon the terms allowed by their home states, Delaware opined.[287] A clear conflict of legitimate interests exists, a conflict which Congress through section 85 has arguably decided in favor of a national bank's home state. Delaware argued that complete disclosure and consumer choice will protect consumer residents of states like Iowa from charges which states like Iowa may think are "unfair" or "hidden" and penalty-type charges.[288]

Delaware suggested that compliance with the local laws of many states may defeat the federal policy of promoting safe and sound banking.[289] Section 85 evidences Congress' determination that the facilitation of interstate lending and a national banking system takes precedence over the protection of state usury laws, Delaware asserted.[290] "Congress' intent . . . was for a national bank to serve only one master at the state level, not fifty."[291] Thus, only the laws of the home state of a national bank should govern the compensation which the bank may charge in connection with the loans it makes with consumers. Delaware saw no problem in the competitive advantage which a bank that exports attractively priced loans may enjoy over lenders in a foreign state. Indeed, Delaware asserted that this result is precisely the effect Congress intended in enacting section 85.[292]

In the final analysis, Delaware asserted, states having restrictive lending statutes should not be permitted to place their interest in regulating the lending market ahead of the legitimate policies of "deregulated" states such as Delaware and South Dakota in providing their home-state lenders with the maximum flexibility in interstate lending available under federal law.[293]

4. South Dakota

The State of South Dakota (South Dakota) also filed a brief in support of Citibank.[294] The purpose of the South Dakota Brief was to provide the court with an official interpretation of the relevant provisions of South Dakota usury and consumer credit law and the public policies underlying those laws.[295]

South Dakota explained that its legislature has enacted a comprehensive set of laws governing consumer credit, usury and the legal relationship between debtors and creditors, as well as laws governing banks and banking activities, in the form of Titles 51 and 54 of the South Dakota Codified Laws. Because the real economic interest of borrowers and lenders relate to the total cost of credit, South Dakota law recognizes that the term "interest" includes every cost, South Dakota explained.[296] South Dakota provided historical information on the term "interest" under South Dakota law and contended that South Dakota's definition is in accord with the definition of "interest" enunciated by the United States Supreme Court in *Brown* where the Court held that "[i]nterest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention."[297] Section 54-3-1 of the South Dakota Codified Laws states that

> interest is the compensation allowed by law for the use, or forbearance, or detention of money or its equivalent, including without limitation, points, loan origination fees, credit service or carrying charges, charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit. These charges do not include charges made by a third party.[298]

The current South Dakota statutory definition of "interest," South Dakota asserted, is in accordance with prior law.[299]

South Dakota has deregulated the cost of credit to South Dakota customers within the last decade, said South Dakota.[300] The purpose of deregulation, South Dakota explained, was to make credit available on more flexible terms to South Dakotans and to give South Dakota lending institutions greater flexibility to meet their customers' credit needs while operating on safe and sound lending principles.[301] The South Dakota legislature concluded that competition and full disclosure of credit terms would protect customers from unnecessarily high credit card costs, said South Dakota.[302] Additionally, deregulation has benefited South Dakota's local economy by permitting lenders to expand their activities and to compete more effectively with out-of-state lenders.[303] South Dakota noted that many other states, including Iowa, have modified their usury laws, resulting in "substantial growth" in the availability of credit for consumers since 1980 and the promotion of local economies through the expansion of banking operations.[304]

Like Delaware, South Dakota reviewed the *Marquette* line of cases and concluded that a logical and practical construction requires uniform application of home state law to nationwide lenders.[305] Consequently, Citibank, South Dakota concluded, is authorized to impose all of those credit card charges considered "interest" under South Dakota law.[306] South Dakota urged that the State of Iowa not be permitted "to narrow the holding of the *Marquette* decision to a point that would have the effect of overruling that case."[307]

5. Iowa Bankers

a. Merchants National Bank

The Merchants National Bank of Cedar Rapids, Iowa, (Merchants National Bank) filed a brief to underscore the importance of the question before the court and to frame the practical ramifications of a decision.[308]

Merchants National Bank asserted that uniform application of the lending authority and restrictions established by the National Bank Act to credit card programs is critically important.[309] If the interpreta-

287. Delaware Brief at 24.

288. *Id.* at 25.

289. *Id.* at 26.

290. *Id.* (citing *Tiffany*, 85 U.S. (18 Wall.) at 413, and *Marquette*, 439 U.S. at 314-19).

291. Delaware Brief at 27.

292. *Id.*

293. *Id.* at 28.

294. Brief for the State of South Dakota, *amicus curiae*, filed October 7, 1988 (South Dakota Brief) in the *Citibank* litigation, *supra*, note 2.

295. South Dakota Brief at 1.

296. *Id.* at 2.

297. South Dakota Brief at 2-3; quoting *Brown*, 82 U.S. (15 Wall.) at 185. Indeed, South Dakota's historical common law definition is substantially identical to the federal definition in *Brown*.

298. S.D. Codified Laws Ann. § 54-3-1.

299. South Dakota Brief at 4.

300. *Id.* at 4-5.

301. South Dakota Brief at 6. The existence of more flexible terms permits some customers to obtain credit on terms which might not otherwise be available, asserted South Dakota. The introduction of specific charges such as charges for late payments or NSF charges permit creditors to isolate and cover specific, identifiable risks and provide credit at generally lower rates.

302. *Id.*

303. *Id.*

304. *Id.* at 7.

305. *Id.* at 8-11.

306. *Id.* at 11.

307. *Id.*

308. Brief for the Merchants National Bank of Cedar Rapids, *amicus curiae*, filed September 28, 1988 (Merchants National Bank Brief) in the *Citibank* litigation, *supra*, note 2.

309. Merchants National Bank Brief at 1.

tion argued by the Attorney General of Iowa were adopted and each individual state where a card holder resides were to have authority to regulate certain aspects of national bank credit card programs, "[s]maller national banks would be effectively eliminated from participating in a nationwide credit card program" because of the onerous necessity to remain current and knowledgeable of all usury and consumer credit provisions in each of the states where credit card holders may reside.[310] Moreover, each change in a credit card holder's residence could require a modification in the terms of the governing credit card agreement to reflect the laws of the state into which the cardholder moved, resulting in a cost prohibitive administrative nightmare.[311] Consequently, Merchants National Bank urged that a common sense definition be given to "interest" under section 85.[312] Such an interpretation would be beneficial to national banks everywhere.[313]

b. Norwest Bank Des Moines

Norwest Bank Des Moines, N.A., the largest bank in Iowa, also filed a brief in support of Citibank's position, arguing that *Marquette* applies to all compensation in connection with the extension and repayment of loans and against the Attorney General of Iowa's narrow interpretation of *Marquette*.[314] Norwest Bank Des Moines also explained that, at its request, the Iowa legislature amended Iowa law to remove interest rate ceilings upon bank credit cards in 1984.[315]

c. Iowa Bankers Association

The Iowa Bankers Association also filed a brief in support of Citibank's Motion on behalf of the Association's members.[316] The Iowa Bankers Association encouraged the court to adopt a "common-sense" construction of the term "interest" as used in section 85 that would "include all compensation in connection with the extension and repayment of loans," including late payment and NSF charges.[317] A practical definition would further the National Bank Act's goal of uniformity and lessen the administrative burdens of compliance with the laws and court decisions of the several states by allowing a bank to follow the single set of laws of its home state when lending to a borrower regardless of the borrower's residence or location, the Iowa Bankers Association stated.[318] Such a definition would promote competition by permitting a diversity of products to be presented to Iowa consumers. A contrary rule might lead out-of-state lenders to withdraw from Iowa leading to a reduction of credit available to Iowa consumers, the Iowa Bankers Association asserted.

The Iowa Bankers Association also contended that the Iowa Attorney General's reliance on *Perdue v. Crocker National Bank* was misplaced, stating that the policy considerations underlying section 85 were not implicated in *Perdue*.[319]

C. Iowa Attorney General's Resistance

The Iowa Attorney General filed its Motion for Summary Judgment and Resistance to Citibank's Motion for Summary Judgment and an attached Memorandum in Support on December 15, 1988.[320] The Iowa Attorney General asserted that relevant provisions of Chapter 537 of the Iowa Code (Chapter 537) are consumer protection provisions not preempted by the National Bank Act.[321] Such provisions are, moreover, fully applicable to Citibank because late fees and returned check charges are not defined as "interest" by federal law such that exportation authority does not extend to these fees.[322] The Iowa Attorney General argued that Congress has not manifested in the National Bank Act a clear and deliberate congressional intent to preempt state consumer protection laws regulating consumer credit which fall within the traditional police powers of the states.[323] Moreover, the Iowa Attorney General asserted that the Iowa provisions do not "expressly conflict with federal law or interfere with the federal purpose of the act."[324]

Finally, the Iowa Attorney General asserted that the disputed provisions are fully applicable to Citibank under applicable full faith and credit clause and federal choice of law principles.[325]

The Iowa Attorney General explained that Iowa Code section 537.1201(2)(b) provides that an open-end credit transaction is entered into in Iowa

> [i]f the . . . debtor is a resident of [Iowa] either at the time the . . . debtor forwards or otherwise gives to the person extending credit a written . . . communication of the intention to establish the open end transaction, or at the time the person extending credit forwards or otherwise gives to the . . . debtor a written . . . communication giving notice to the . . . debtor of the right to enter into open end transactions with such person . . . .[326]

Under the circumstances, the Iowa Attorney General claimed that Citibank's cardholder agreements with Iowa residents are consequently subject to the provisions of the Iowa Consumer Credit Code.[327] The Iowa Attorney General further explained that, to the extent relevant, the Iowa Code provides that non-default charges may not be assessed except as authorized under Chapter 537 and that section 537.2502 of the Iowa Code only authorizes delinquency charges with respect to precomputed consumer credit transactions.[328]

The Iowa Attorney General explained that the reason that charges are permitted by Iowa law in the precomputed consumer credit context but not for open-end credit transactions is that the creditor is still collecting interest during the default period with respect to open-end credit transactions but not with respect to precomputed transactions.[329] The Attorney General asserted that only those fees expressly authorized by statute or by administrative rule may be contracted for and received in Iowa pursuant to the Iowa Code.[330] Because neither section 537.2501 of the Iowa Code, which specifies what fees a creditor may receive from a debtor in addition to the finance charge, nor any other provision in Chapter 537 authorizes a returned check fee, a returned check charge is an excess charge under section 537.3402 of the Iowa

310. *Id.* at 1-2.

311. *Id.* at 2.

312. *Id.*

313. *Id.*

314. Brief for Norwest Bank Des Moines, N.A., *amicus curiae*, filed September 30, 1988, in the *Citibank* litigation, *supra*, note 2.

315. *Id.*; *see* Iowa Code Ann. § 537.2402(5) (West 1987). Recent Iowa legislation authorizing late fees, NSF charges and overlimit fees was also adopted at Norwest's request. *See* Laws 1989, H.B. 552, approved April 27, 1989, effective July 1, 1989.

316. Brief for Iowa Bankers Association, *amicus curiae*, filed January 20, 1989 (Iowa Bankers Brief), in the *Citibank* litigation, *supra*, note 2.

317. Iowa Bankers Brief at 2-3 (citing *Fisher*, 548 F.2d at 261).

318. Iowa Bankers Brief at 3. Uniformity and clarity in the administration of the law may be persuasive and would be consistent with purposes behind section 85.

319. Iowa Bankers Brief at 4 (citing *Perdue*, 702 P.2d 503, *cert. denied*, 475 U.S. 1001).

320. Defendant's Motion for Summary Judgment and Resistance to Plaintiff's Motion for Summary Judgment and Memorandum of the Defendant in support thereof, filed December 15, 1988 (Iowa AG Brief), in the *Citibank* litigation, *supra*, note 2.

321. Iowa AG Brief at 3-4.

322. *Id.* at 4.

323. *Id.*

324. *Id.*

325. *Id.*

326. Iowa Code § 537.1201(1)(a)(1987); Iowa AG Brief at 5.

327. *Id.*

328. *See* Iowa Code §§ 537.3402, 537.2502 (1987).

329. Iowa AG Brief at 5-6, 6 n.2.

330. *Id.* at 6.

Code that is prohibited under Iowa law.[331] Because section 537.5109(1) of the Iowa Code declares a cardholder not to be in default for nonpayment unless the cardholder fails to make payment within ten days of the time required by the cardholder agreement and because Citibank's cardholder agreement declares that the cardholder is in default for failure to pay the full minimum payment on time, Citibank's cardholder agreement violates section 537.5109(1) of the Iowa Code, in the Iowa Attorney General's opinion.[332] The Iowa Attorney General also asserted that because sections 537.5110 and 537.5111 of the Iowa Code provide for notice of alleged default and of the right to cure default in certain circumstances, Citibank's cardholder agreements, which do not provide for such notices, also violate these sections of the Iowa Code.[333] Because the Iowa Code prohibits any agreement for the payment by the consumer of attorneys' fees and prohibits the imposition of any charges for default not specifically authorized under Chapter 537, Citibank's cardholder agreements, which provide that the cardholder agrees to pay a lawyer's fees plus court costs or any other fees as allowed by law, are again in violation of the Iowa Code.[334] Moreover, because the change in terms provision of Citibank's credit card agreements do not provide for at least three months' notice as required by the Iowa Code, such provisions also violate the Iowa Code, the Iowa Attorney General asserted.[335]

The Iowa Attorney General rejected Citibank's claim that its late fees and NSF charges are "interest" within the scope of section 85 of the National Bank Act.[336] The Iowa Attorney General rejected resort to state law definitions of "interest" and asserted that the definition of the term "interest" as used in section 85 is a federal question.[337] The Iowa Attorney General reasoned that the addition of a definition of interest to section 86a is indicative of Congress' recognition of this fact.[338] The Iowa Attorney General took the position that state definitions of "interest" have no application in determining what constitutes "interest" for purposes of section 85 and that state law is to furnish only the allowable interest rate.[339] The allowable interest rate under section 85, in the Iowa Attorney General's opinion, is "the maximum numerical rate of return as compensation for a loan, independent of other charges that may be permitted to compensate banks for additional costs."[340] Thus, a state definition of "interest rate" cannot "be stretched to include the host of consumer credit provisions at issue here," said the Iowa Attorney General.[341] The Iowa Attorney General further asserted that if Congress intended that state law to provide the definition of "interest" under section 85, the recent addition of section 86a(b)(2) would be superfluous.[342]

Because the term "interest" in section 85 is modified by the term "rate," the unambiguous meaning of the term "interest rate" is the numerical rate of interest to be applied against the loan, exclusive of all charges such as late fees and NSF charges, said the Iowa Attorney General.[343] The Iowa Attorney General observed that the federal definition of "interest" provided in section 86a(b)(2) does not expressly include late fees and NSF charges as interest.[344] The Iowa Attorney General characterized late fees and NSF charges as constituting penalties to deter default and reimburse lenders for the added, unanticipated costs of late payment and insufficient fund checks, not "interest" in the sense of compensation for the extension of credit to a lender's cardholder.[345] The Iowa Attorney General did not provide any citation to federal law or legislative history to support this characterization of these fees as a matter of federal law. While the Iowa Attorney General explained at length that many courts have held that late fees are not part of the interest calculation,[346] he did not provide evidence that such fees are categorically excluded from the scope of the term "interest" by federal law for purposes of section 85, nor did he cite federal case law evidencing the methodology of decision to be followed within the federal usury scheme. The Iowa Attorney General asserted that Citibank's own statements and its documentation admit that late charges are compensation for the additional costs incurred by the creditor, rather than for the forebearance of asserting Citibank's right of collection, and act as a penalty for delayed payment.[347] Consequently, Citibank cannot now be heard to claim the fees as "interest," in the Iowa Attorney General's view. Likewise, Citibank's NSF charges also are not compensation for a loan or an extension of credit, but constitute penalties upon the debtor and reimbursement to the creditor.[348]

The one piece of federal law which the Iowa Attorney General presented to support its contention that late fees and NSF charges are not interest within the contemplation of federal statutes was the federal Truth-In-Lending Act (TILA) and section 226.4(c)(2) of Regulation Z which implements the TILA.[349] The Iowa Attorney General asserted that federal law provides that open-end credit transaction finance charges (which include interest and other payments deemed compensation for the extension of credit) do not include late fees.[350] The Iowa Attorney General asserted that if, as Citibank claims, late fees are

331. *Id.*; Iowa Code §§ 537.2501 and 537.3402 (1987).

332. Iowa AG Brief at 6; Iowa Code § 537.5109(1) (1987).

333. Iowa AG Brief at 6; Iowa Code §§ 537.5110 and 537.5111 (1987).

334. Iowa AG Brief at 7; Iowa Code §§ 537.2507 and 537.3402 (1987).

335. Iowa AG Brief at 7; Iowa Code § 537.3205 (1987).

336. Iowa AG Brief at 8.

337. *Id.* (citing *Marquette*, 439 U.S. at 308; First Nat'l Bank v. Dickinson, 397 U.S. at 133-34).

338. Iowa AG Brief at 9.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. Iowa AG Brief at 10. Contrary to Iowa Attorney General's apparent assertion, section 85 does not use the term "interest rate" but rather is phrased in terms of "interest at the rate allowed" by state law. An alternative reading of this language would be that Congress intended to be inclusive of all elements of compensation rather than exclusive of any form of compensation other than interest expressed as a multiplier. Because interest is calculated over and as a function of time and because usury limitations have been traditionally expressed in terms of a "rate," regardless of the components of interest or fees which may be deemed interest by state law, Congress' use of the term "rate" was merely consistent with the common terminology of usury laws at the time of enactment and consistent with its understanding of the fundamentals of lending, the paying of compensation for use of money over time. The fact that states now enact consumer credit codes, retail installment sales acts, small loan acts, consumer finance acts, and other statutes which use a variety of formulae to regulate usury or compensation for loans or other practices related to lending, should not affect a court's determination of the federal concepts expressed by Congress in the passage of the National Bank Act. Arguably, the Iowa Attorney General committed the same error that he charged Citibank with committing when he sought to impose or project Iowa concepts of finance charges, delinquency charges and other fees upon the federal concept of "interest."

344. Iowa AG Brief at 10.

345. *Id.*

346. *See Id.* at 10-13 (quoting Wilson v. Dealy, 434 S.W.2d 835, 837 (Tenn. 1968) and citing Camilla Cotton, Oil Co. v. Spencer Kellogg & Sons, 257 F.2d 162, 165-67 (5th Cir. 1958); Bunn v. Weyerhauser Co., 598 S.W.2d 54, 55-57 (Ark. 1980) (stating rule); Hayes v. First Nat'l Bank, 507 S.W.2d 701, 703 (Ark. 1974) (distinguishing late fees from extension fees); Harris v. Guaranty Fin. Corp., 424 S.W.2d 355, 356 (Ark. 1968); First Am. Title Ins. v. Cook, 12 Cal. App. 3d 592, 596-97, 90 Cal. Rptr. 645, 647 (1970); Barbour v. Handlos Real Est. & Bldg. Corp., 393 N.W.2d 581, 587 (Mich Ct. App. 1986); Randall v. Home Loan & Investment Co., 12 N.W.2d 915, 917 (Wisc. 1944)). Notably, many of these cases repeat that the characterization of fees as interest or as penalties is a question of fact and is not susceptible to an absolute rule. While the intention of the parties occasionally plays a role, there is no assertion that a fee could not constitute both a penalty and interest simultaneously. Frequently, the final determination is based upon the particular facts and evidence entered in the case and upon the particular language or usury scheme of the individual state such that generalizations are not particularly helpful or appropriate.

347. Iowa AG at 12.

348. *Id.* at 12-13.

349. *Id.* at 13-14; *see* 12 U.S.C. §§ 1601 *et seq.* (1982 & Supp. VI 1988) (Truth-in-Lending Act) and 12 C.F.R. § 226.4(c)(2) (1988) (Regulation Z).

350. Iowa AG Brief at 13.

interest, then Citibank is not disclosing these fees as required by the Act.[351]

The Iowa Attorney General's argument is not well-founded. A distinction may be drawn between the denomination or characterization of charges or fees for purposes of federal truth-in-lending disclosures and for purposes of charging permissible fees. That a particular fee may be "interest" for purposes of determining its validity but must be disclosed for purposes of federal truth-in-lending as a separate item is not inconsistent with the purposes of either usury law limitations or credit disclosure. The general purpose of usury laws is to define a ceiling with respect to the return received by a creditor. In contrast, the general purpose of credit disclosure is to identify and state the various elements of the cost of credit to the borrower in order to educate the borrower about the terms of the transaction in a clear and consistent manner. For section 85 purposes, whether a late or delinquency charge is or is not "interest" for disclosure purposes is irrelevant. Disclosure requirements simply seek to make the borrower aware that such a charge may be assessed and under what terms that charge will be assessed in the course of the transaction.

The Iowa Attorney General asserted that additional evidence that "Congress does not confuse the regulation of interest rates with other consumer credit laws" is found in the legislative history of the DIDMCA.[352] When preempting state usury statutes for mortgage loans, the Iowa Attorney General noted, the Senate Report related that only those limitations that are included in the annual percentage rate were intended to be exempted, and not limitations on prepayment charges, attorneys' fees, late charges or similar limitations designed to protect borrowers.[353] The Iowa Attorney General presented the Senate Report as clear evidence that the term "interest" under section 85 excludes late fees and NSF charges.[354]

In the Iowa Attorney General's view, Congress has classified consumer credit laws into two categories: (i) those regulating interest rates and (ii) other state laws protecting borrowers.[355] The Iowa Attorney General asserted that in the DIDMCA Congress "preempted all state laws pertaining to the annual percentage rate (*i.e.,* the state interest rate or cap)," *e.g.,* consumer credit laws regulating interest rates.[356] Consequently, all state consumer credit protections not included in the annual percentage rate are excluded from federal preemption, the Iowa Attorney General asserted, including late charges, attorneys' fees and other "limitations designed to protect borrowers."[357] The statutory language of the DIDMCA concerning state interest rates is intentionally identical to section 85, the Iowa Attorney General insisted, and the legislative history to the DIDMCA "confirms [that the phrase "interest at the rate allowed by the laws of the state"] means precisely, and only, what it states: interest is defined as the numerical interest rate; penalties, charges, and other credit terms are distinct from this definition."[358]

The Iowa Attorney General also asserted that the Serino letter is not entitled to judicial deference. The administrative record consisted only of a March 15, 1988 letter from the Iowa Department of Justice informing the Deputy Comptroller of the Currency that Iowa was preparing to commence litigation, and therefore the response from the OCC Deputy Chief Counsel is merely an unsolicited informal opinion regarding the interpretation of section 85 which was written in the midst of the *Citibank* litigation and is not entitled to usual deference.[359]

The Iowa Attorney General specifically rejected Citibank's reliance on *Marquette* as authority permitting the exportation of late fees and NSF charges.[360] The Iowa Attorney General explained that the two major questions addressed in *Marquette*, a reading of the phrase "where the bank is located" and the decision that the National Bank Act permitted a national bank to export to its cardholder an interest rate in excess of that permitted by the cardholder's state, are not at issue in the *Citibank* litigation.[361] The Iowa Attorney General asserted that the provisions at issue are not usury laws and that late fees and NSF charges are not "interest."[362] Moreover, in examining the applicable laws in Nebraska and Minnesota, the United States Supreme Court considered only the problem of interest rates and never addressed whether the National Bank Act authorized national banks to ignore state laws regulating charges and substantive contract terms, according to the Iowa Attorney General.[363]

The Iowa Attorney General asserted that neither *Fisher* nor *Northway Lanes* support the proposition that the term "interest" may include late fees and NSF charges.[364] The Eighth Circuit in *Fisher* never decided the issue whether a cash advance fee was defined as "interest" or a separate charge, but instead determined simply that the Nebraska bank was entitled to charge interest at the rate permitted to small loan companies in Nebraska, claimed the Attorney General.[365] The Iowa Attorney General noted that Iowa does not contest that a cash advance fee may be considered "interest" on grounds that such a charge is part of the cost of credit and may be defined as part of the finance charge under federal truth-in-lending and the Iowa Consumer Credit Code.[366] The Iowa Attorney General distinguished late fees and NSF charges from cash advances on grounds that late fees and NSF charges are not compensation for the cost of credit, but are penalties to defer default and reimburse creditors for the cost associated with default.[367] The court in *Fisher* only interpreted the National Bank Act as providing national banks equality or possibly advantages over state banks under the most favored lender doctrine "in the field of *interest rates*," the Iowa Attorney General noted.[368] The Iowa Attorney General concluded that "*Fisher* is simply a precursor to *Marquette* and does not address or advance

351. *Id.* at 14.

352. Iowa AG Brief at 14.

353. *Id.* at 14-15; S. Rep. No. 96-368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News, 236, 255.

354. Iowa AG Brief at 14-15.

355. *Id.* at 15.

356. *Id.*

357. *Id.* (repeating the language of the Senate Report).

358. Iowa AG Brief at 15.

359. *Id.* at 16 n.6 (citing Immigration and Naturalization Service v. Cardozo-Fonseca, 480 U.S. 421, 445-48 (1987); Chevron U.S.A., Inc., 467 U.S. 837, 843 n.9 ("the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."), *reh. denied*, 468 U.S. 1227 (1984; Bureau of Funeral Labor Relations Authority, 464 U.S. 89, 97 (1983) ("[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress,'" (citing American Shipbuilding Co. v. NLRB, 380 U.S. 300, 318 (1965))).

360. Iowa AG Brief at 16-17.

361. *Id.* at 17. The Iowa Attorney General quoted from *Marquette:*

> The question for decision is whether the National Bank Act...authorizes a national bank based in one State to charge to 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 non-resident customers.

Iowa AG Brief at 17 n.7 (quoting *Marquette*, 439 U.S. at 301).

362. Iowa AG Brief at 17 (citing Burgess and Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 Bus. Law. 929, 935-36 (1987) [hereinafter Burgess & Ciolfi]).

363. Iowa AG Brief at 18.

364. *Id.*

365. *Id.*

366. *Id.* at 18 n.10; *see* 15 U.S.C. § 1605 and Iowa Code § 537.1301(19).

367. Iowa AG Brief at 18 n.10.

368. *Id.* at 18 (quoting *Fisher*, 548 F.2d at 259 (emphasis added by the Iowa Attorney General)).

the proposition that late fees and NSF fees are exportable as interest under § 85 of the [National Bank Act]."[369]

Similarly, the Iowa Attorney General asserted that in *Northway Lanes* the Sixth Circuit simply ruled that a national bank within a state was entitled to charge closing costs as allowed to in-state savings and loan associations.[370] The court provided no analysis of whether such costs were considered "interest," contended the Iowa Attorney General.[371] The Iowa Attorney General observed that the *Northway Lanes* court, "in dealing solely with in-state institutions, noted that the congressional intent behind the [National Bank Act] was to permit 'national banks to charge interest at the highest rate available to lenders generally in *each respective state*.' "[372] The Iowa Attorney General asserted that application of the Iowa Consumer Credit Code to Citibank's program furthers rather than hinders this congressional intent because Citibank would be able to charge exactly what is allowed to every other credit card issuer doing business in Iowa.[373]

In addition to the provisions for charges which the Iowa Attorney General characterized as "illegal under Iowa law," the Iowa Attorney General alleged that Citibanks' choice of law, default, and change in terms provisions also violate the Iowa Consumer Credit Code.[374] Because these additional provisions are unrelated to the issue of compensation and cannot be considered "interest" as defined by federal law, they do not fall within the exportation authority of *Marquette*, the Iowa Attorney General asserted.[375] In a footnote the Iowa Attorney General noted that "[t]he California Supreme Court rejected the notion that national banks were immune to state laws prohibiting unconscionable charges and terms," citing *Perdue*.[376]

Regarding Citibank's position that even if section 85 did not encompass state provisions authorizing late fees and NSF charges, Iowa law would still be preempted, the Iowa Attorney General rejected such a position on grounds that such an interpretation is overbroad and that state consumer protection laws regulating consumer credit are clearly within the traditional police powers of the state.[377] The Iowa Attorney General quoted the Eighth Circuit in *Aldens, Inc. v. Miller,* where the court stated: "[I]t is necessary for the state to enact reasonable consumer credit legislation to protect [the] public interest..."[378] The Iowa Attorney General asserted that the Iowa legislature enacted the Iowa Consumer Credit Code to protect consumers.[379] Consequently, the Iowa Consumer Credit Code is entitled to significant deference and cannot be preempted absent a clear intent by Congress, in the Iowa Attorney General's view.[380]

The Iowa Attorney General admitted that the federal government has power to preempt the consumer credit provisions of the Iowa Consumer Credit Code, but asserted that neither the plain language, the legislative history, nor the case law interpreting section 85, demonstrate a clear intent by Congress to preempt the application of all state consumer credit laws regulating credit cards issued by national banks.[381] The Iowa Attorney General asserted that in areas traditionally reserved to the states state laws are not preempted unless there is a clear and deliberate Congressional statement to that effect.[382] The requisite clear statement of intent to preempt consumer credit laws other than "interest," as narrowly defined, in the Iowa Attorney General's opinion, is not present in the relevant federal law.[383]

The Iowa Attorney General emphasized the national currency aspect in a very brief review of the statutory and legislative history of the National Bank Act.[384] While admitting that a central concern during the formative period before enactment of the National Banking Act was the fear that states would be tempted to regulate banking activities to the detriment of national banks, the Iowa Attorney General asserted that section 85 accorded national banks competitive equality with state-chartered institutions but did not immunize national banks from state law.[385] Again, the Iowa Attorney General argued that no evidence of a Congressional design to preempt the neutral application of state banking laws to national banks is evident in the legislative history.[386]

The Iowa Attorney General asserted that the United States Supreme Court has consistently identified two major themes in the National Bank Act: (i) the prevention of discrimination by states against national banks in favor of state institutions and (ii) a lack of immunity on the part of national banks from state laws that neutrally regulate banking within a state.[387] The Iowa Attorney General quoted from *First National Bank v. Kentucky*,[388] upholding a state law requiring banks to deduct state taxes on bank shares held by its stockholders, where the Court stated:

> [A]gencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. ...*They [national banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation.* All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.[389]

369. Iowa AG Brief at 19.

370. *Id.*

371. *Id.* (citing *Northway Lanes*, 464 F.2d at 864).

372. Iowa AG Brief at 19 (quoting *Northway Lanes*, 464 F.2d at 861 (emphasis added by the Iowa Attorney General)).

373. Iowa AG Brief at 19.

374. *Id.* at 19-20.

375. *Id.* at 20.

376. *Id.* at 20 n.11 (quoting *Perdue*, 702 P.2d at 524-25 ("Defendant [a national bank] is really asking for a market free of those restraints against oppression and overreaching applicable to all other commercial operations. We find no indication that Congress envisioned not only a free and competitive market, but one freer than any other market.")).

377. Iowa AG Brief at 20.

378. *Id.* at 21; Aldens, Inc. v. Miller, 610 F.2d 538, 539-40 (1979), *cert. denied*, 446 U.S. 919 (1980).

379. Iowa AG Brief at 21.

380. *Id.* at 21 (citing Burgess & Ciolfi, *supra*, note 362, at 932).

381. Iowa AG Brief at 21.

382. *Id.* at 22 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 525, *reh. denied*, 431 U.S. 925 (1977); TRIBE, AMERICAN CONSTITUTIONAL LAW 316 (2d 1988); Texas v. United States, 730 F.2d 339, 347 (5th Cir. 1984), *cert. denied*, 469 U.S. 892 (1987); Burgess & Ciolfi, *supra*, note 362, at 932).

383. Iowa AG Brief at 21-22.

384. *Id.* at 22-24.

385. *Id.* at 24.

386. *Id.* at 23-24 (citing Mercantile Bank v. New York, 121 U.S. 138, 154 (1887); *Daggs*, 177 U.S. at 555; North Dakota v. Merchants Nat'l Bank & Tr. Co., 634 F.2d 368, 379 (8th Cir, 1980); and Preston State Bank v. Ainsworth, 552 F. Supp. 578, 579-80 (N.D. Tex. 1982)). The Iowa Attorney General quoted Senator Sherman from Ohio, a sponsor of the National Bank Act, who declared: "My own preference, however, as I have already stated, is to establish a uniform rate of interest by our law; but having been overruled on that point, I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its laws." Cong. Globe, 38th Cong., 1st Sess., 2126 (1864), Iowa AG Brief at 24 n.22.

387. Iowa AG Brief at 25.

388. 76 U.S. (9 Wall.) 353 (1870).

389. *Id.* at 25-26; *First Nat'l Bank*, 76 U.S. (9 Wall.) at 362 (emphasis added by the Iowa Attorney General); also citing McClellan v. Chipman, 164 U.S. 347, 356-57 (1896).

The Iowa Attorney General also cited *First National Bank v. Walker Bank and Trust Company,*[390] *Nowlin,*[391] *National State Bank v. Long,*[392] *Perdue,*[393] and *Citibank (South Dakota) v. Gonzalez,*[394] in support of his assertion that national banks have been subjected to a wide variety of state laws. Implicit in the Iowa Attorney General's argument is the belief that, contrary to the assertions of Citibank and several of the *amici curiae*, enforcement of the Iowa provisions on late fees, NSF charges and contractual provisions pose no impairment on a national bank's efficiency in performing the functions which national banks were designed to serve.

A key element to the Iowa Attorney General's argument is the characterization of state laws as neutral and the emphasis upon "competitive equality." It may be argued that in the exportation context, as distinct from a most favored lender intrastate loan situation, state banks and national banks are not playing on the same field. Implicit in the Iowa Attorney General's argument is the characterization of the transaction as involving an out-of-state lender entering Iowa to lend money to an Iowa resident in competition with Iowa banks. An alternative view of the transaction is that the borrower seeks credit from the out-of-state lender.

The *Marquette* court expressly adopted this second view. Under the characterization of interstate consumer credit transactions adopted by the Supreme Court in *Marquette* a national bank should be subject to and should comply with the state laws of the state where it is located. Arguably, the lender's home state is the only relevant location from which to evaluate Congress' long-standing policy of competitive equality. The *Marquette* Court's reading of section 85 was not that section 85 authorizes national banks to lend in other states in competition with banks in other states, but rather that section 85 permits national banks to charge interest at the rate allowed by the national bank's home state to any borrower that seeks a loan from the national bank. Indeed, the *Marquette* Court was very explicit in its view that a national bank is permitted to extend loans only from its charter location by law.[395] The Iowa Consumer Credit Code arguably impairs the ability of Iowa resident consumers to seek loans from lenders located in other states. From the *Marquette* perspective of the characterization of interstate lending by mail, the effect of the Iowa territoriality provision is the impairment of the free flow of interstate commerce.

The key to the Iowa Attorney General's argument is the assertion that late fees, NSF charges, and contractual term restrictions relate to substantive consumer credit protections applicable to national banks that are not preempted by the federal usury statutes, sections 85, 86 and 86a of Title 12 of the United States Code. While the Iowa Attorney General referred to state conceptions of usury, interest, and numeric interest rates, he did not produce evidence of any federal definitions or conceptions which would clearly blunt Citibank's assertions.

The Iowa Attorney General asserted that the Iowa Consumer Credit Code does not frustrate any purposes of the National Bank Act, particularly the purpose relating to national currency, and does not impair the development of a national banking system or the pursuit of interstate lending.[396]

The Iowa Attorney General stated that late payment does not deprive banks of present use of money because banks continue to receive interest on the past due accounts.[397] Moreover, the Iowa Attorney General argued, banks are free to use a variety of methods to recover default and delinquency costs, as long as no additional charges that have not been approved by the Iowa Consumer Credit Code are imposed.[398] "Citibank's arguments are those of a private organization, not a federal instrumentality," argued the Iowa Attorney General; "federal preemption of state law...would therefore be inappropriate and unconstitutional."[399]

The Iowa Attorney General asserted that the federal usury provisions of sections 85, 86 and 86a do not reach the issue of credit card charges such as late fees or NSF charges, nor to provisions regarding default or choice of law.[400] Although Congress could expand section 85 beyond a simple usury statute, it has yet to do so, said the Iowa Attorney General.[401]

The Iowa Attorney General also rejected the argument made by VISA[402] that under federal choice-of-law principles South Dakota law may supersede any contrary provisions of the Iowa Consumer Credit Code. The Iowa Attorney General asserted that the State of Iowa is attempting to enforce its laws and under the full faith and credit clause[403] is entitled to do so as to transactions entered into in Iowa, notwithstanding contrary South Dakota provisions.[404] The Iowa Attorney General noted that the full faith and credit clause "does not require one state to apply another state's law in violation of its own legitimate public policy."[405] Implicit in this argument is the position that the Iowa Consumer Credit Code represents the fundamental policy of the State of Iowa which overrides the possible choice of South Dakota law. The Iowa Attorney General's argument has merit only to the extent that (i) section 85 may not in reality represent an explicit federal, as distinct from private contract, choice-of-law, (ii) the term "interest" and "rate" may be narrowly defined, or (iii) section 85 may be narrowly interpreted.

Based on these arguments the Iowa Attorney General concluded that the court should enter summary judgment for the defendant, the State of Iowa, and deny Citibank's motion for summary judgment.

D. Amici Curiae for the Iowa Attorney General's Position

1. Minnesota

Minnesota by its Attorney General presented a brief in support of Iowa's position out of concern for the integrity of state consumer protection safeguards.[406] Minnesota asserted that the exportation of fees

390. 385 U.S. 252 (1966), *reh. denied*, 385 U.S. 1032 (1967) (rejecting the OCC's position that the OCC could permit national banks to establish branch banks in a manner forbidden to both state and national banks by state law).

391. 509 F.2d at 880 ("The most favored lender policy has not, however, been extended to give national banks superiority over all state lenders, corporate and individual, including banks, as is contended by the Bank in the instant case.").

392. 630 F.2d 981 (3rd Cir. 1980) (holding that national banks were subject to New Jersey's anti-redlining statute which forbids banks from arbitrarily denying mortgage loan requests, and where the court stated: "Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act of 1863." *Id.* at 985.)

393. 702 P.2d at 519-525 (Cal. 1985) (rejecting the argument that the National Bank Act preempted California law prohibiting banks from exacting unreasonable charges or enforcing unconscionable provisions relating to bank deposits).

394. 452 N.Y.S. 2d 1012 (N.Y. Civ. Ct. 1982) (rejecting Citibank's argument that the National Bank Act preempted state law requiring out-of-state corporations to post security before proceeding in a civil suit in New York).

395. 429 U.S. at 309-10.

396. Iowa AG Brief at 30-32.

397. *Id.* at 32.

398. *Id.*

399. *Id. at 33.*

400. *Id.*

401. *Id.*

402. *Id.* at 37-39; *see* Visa Brief at 16-21.

403. U.S. Const., art. IV, § 1, 28 U.S.C. § 1738.

404. Iowa AG Brief at 37.

405. *Id.* at 37-38 (quoting Struebin v. Iowa, 322 N.W.2d 84, 85-86 (Iowa), *cert. denied*, 459 U.S. 1087 (1982) (citing Nevada v. Hall, 440 U.S. 410, 422 (1979))).

406. Brief for Minnesota, *amicus curiae*, filed January 19, 1989 (Minnesota Brief), in the *Citibank* litigation, *supra*, note 2.

and terms under the "guise" of "interest rate" works a *de facto* preemption and deregulation of all state consumer protection legislation by states such as South Dakota that have chosen to deregulate their statutory law.[407] Minnesota reasserted the Iowa position that late fees, NSF charges, and credit card agreement terms "do not fall within the meaning of 'interest rate' in section 85."[408] Federal law governs, but since federal law is silent on these issues and states have not been preempted from regulating this area, Minnesota reasoned, Citibank's agreements with Iowa consumers are subject to Iowa consumer protection laws.[409] Wholesale exportation of consumer protection laws from one state to another should not be permitted, Minnesota urged.

Minnesota assserted that, contrary to the claims of Citibank, the legislative history of the National Bank Act and case law create a strong precedent against a broadening of the meaning of the term "interest rate" as used in section 85.[410] *Marquette* indicates "only *when* an interest rate can be exported" and not what constitutes the "interest rate," Minnesota observed.[411] In response to the policy arguments presented by Citibank and its supporters, Minnesota urged the court to leave the determination of national policy to Congress and expressed its opinion that an individual state should not be permitted to determine consumer credit issues for other states merely by defining any credit terms it wishes as "interest."[412]

Minnesota reviewed the characteristics of the banking system in the United States at the time of the passage of the National Bank Act, noting the local, "over-the-counter" nature of the typical transaction of the period, the fear in some states of federal domination, and the public fear of monopoly or concentration of economic power.[413] "Competitive equality" undergirded the passage of section 85, evidenced by the rejection of a national interest rate, Minnesota asserted.[414] When Congress realized that a national uniform rate was unworkable because of the varying needs and philosophy in different regions of the country regarding appropriate rates of interest, it adopted a policy of deference to local regulation as a means of parity, and parity only.[415] Minnesota developed this concept of parity in its discussion of *Marquette* and *Tiffany*. *Marquette* did not reach the question of the definition of "interest" in section 85 and should not be read to suggest that the rule espoused in *Tiffany* supports anything more than competitive equality in the form of strict parity, Minnesota contended.[416] The *Tiffany* Court was not concerned with and did not consider interstate lending or exportation, but rather the Court sought merely to ensure the ability of a national bank to compete on par with a state-chartered bank in the same state, Minnesota stated.[417] Minnesota urged the court "to preserve, as Congress intended, the states' right to legislate on consumer protection matters affecting its [sic] residents."[418]

A decision allowing Citibank to export fees and terms which violate Iowa law would unduly upset the regulatory balance Congress struck, Minnesota argued.[419] Congress is aware that the states have reserved certain regulatory powers over national banks and has purposely acquiesced in this regulatory relationship so that, insofar as government supervision of non-rate issues is concerned, all banks in a given market area would be on an equal competitive footing, Minnesota contended. Minnesota also noted that the court's decision should not be influenced by the claims of Citibank and its supporters that 50 state compliance would be inconvenient.[420] All regulation is inconvenient, Minnesota noted.[421]

2. Massachusetts

Massachusetts also filed a brief in support of Iowa and in resistance to Citibank's motion for summary judgment,[422] in which it focused upon the most favored lender doctrine, arguing that the doctrine does not support the exportation of late fees and NSF charges and other non-rate terms. Massachusetts asserted that under the most favored lender doctrine the plain language of the National Bank Act authorizes a national bank to borrow only the numerical rate of interest from the laws of the state where it is located, noting that the courts and the federal agencies charged with administering the federal banking laws have placed an interpretive gloss on the language of the National Bank Act commonly known as the most favored lender doctrine. This doctrine is currently interpreted to permit national banks to charge the highest rate permitted to "competing" lenders for a specified "class" of loans and requires compliance with any state restrictions on the relevant class of loans that are "material to a determination of the interest rate" on that type of loan, Massachusetts explained.[423] The interpretation of the scope of this doctrine, assuming its applicability to exportation, has different effects when applied in an interstate as distinct from intrastate context, Massachusetts noted.[424] The broad reading of the "materiality" concept urged by Citibank, favorable to banks in the interstate context, is contrary to the historically narrow interpretation of the doctrine by the courts which has permitted borrowing of non-rate state law terms in only two narrow categories: state law restrictions relating to loan classification and computation requirements.[425] Neither of these two categories, Massachusetts con-

407. *Id.* at 3.

408. *Id.* at 8-9. "Interest rate" is Minnesota's term of choice. Section 85 is actually written in terms of "interest at the rate allowed" by state law rather than "interest rate" per se.

409. *Id.* at 9 (citing First Nat'l Bank v. Commonwealth, 75 U.S. (9 Wall.) 353 (1870); Iowa AG Brief at 8).

410. Minnesota Brief at 9.

411. *Id.*

412. *Id.* at 10.

413. *Id.* at 12-14.

414. *Id.* at 14 (citing First Nat'l Bank v. Walker Bank & Tr. Co., 385 U.S. 252, 261-62 (1966)).

415. Minnesota Brief at 14-18 (quoting the statement of Senator of Ohio, a sponsor of the original bill:

> My own preference, however, as I have already stated, is to establish a uniform rate of interests [sic] by our law; but having been overruled on that point, I prefer now to place the national banks in each state on precisely the same footing with individuals and persons doing business in the State by its laws.

Cong. Globe 38th Cong., 1st Sess., 2126 (1864) (emphasis added by Minnesota)). In support of the proposition that if Congress had considered or intended the exportation of anything, it considered or intended only the numerical rate of interest narrowly conceived and not the whole of usury law, Minnesota also quoted the remarks of Representative Kasson during the House committee deliberation regarding a national interest rate:

> Suppose, sir, that on my part I were to ask this House to adopt a condition of things existing in my own new state of Iowa, and apply the system and rate of interest adopted there to control the rest of the country. I take it for granted that very few gentlemen in the House could see in that any particular reason why the whole balance of the country should be subjected to the same system; and I think that when the gentleman from Maine comes here and asks that the representatives of the entire Union should adopt a rule that is adapted to the condition of things as he thinks, in his own state, he asks too much of the sound judgment of the House.

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

416. Minnesota Brief at 19-22.

417. *Id.* at 22.

418. *Id.* at 23.

419. *Id.*

420. *Id.* at 24.

421. *Id.*

422. Brief for Massachusetts, *amicus curiae*, filed January 20, 1989 (Massachusetts Brief), in the *Citibank* litigation, *supra*, note 2.

423. *Id.* at 10-12; *cf.* Langer & Wood, *supra*, note 1, at 10-14.

424. Massachusetts Brief at 16-17.

425. *Id.* at 17-18 (citing cases, articles and interpretive letters).

tended, comprehends state law prohibitions on non-interest fees, such as late fees and NSF charges, and other consumer protection provisions, such as default and cure provisions.[426]

The interpretation of the most favored lender doctrine urged by Citibank and the Serino letter represents a dramatic departure from the plain language of section 85, conflicts with the historical interpretations of the most favored lender doctrine by the courts and OCC, and departs from the policies and concerns that gave rise to the most favored lender doctrine, Massachusetts asserted.[427] Moreover, such an interpretation simply does not make sense from a public policy perspective.[428]

With respect to MasterCard's market argument for consumer choice, Massachusetts asserted that the argument assumes a level of sophistication on the part of consumers that defies reality.[429] Most consumers do not have a sufficient understanding of the subleties of the state and national credit laws and cardholder agreement terms to do the kind of comparison shopping suggested by MasterCard's argument, Massachusetts argued.[430] The market argument presumes equal availability of credit cards issued by local and out-of-state issuers which in many cases is not the case given telemarketing programs, mail-in applications, and the like, according to Massachusetts.[431] Moreover, consumers may presume that large, well-known banks like Citibank abide by the laws of states where it does business which Massachusetts implies is not usually the case.[432] Massachusetts's attack on the market argument presumes the necessity of a perfect market. Of course, a perfectly efficient market with respect to each consumer would not be required to achieve substantial efficiency and such imperfections as Massachusetts has noted can be significantly reduced through improved information availability.

In conclusion, Massachusetts urged that Iowa's motion for summary judgment be granted and that Citibank's motion be denied.

3. South Carolina

South Carolina, by the Administrator of the South Carolina Department of Consumer Affairs (S.C. Administrator) filed a brief in support of the Iowa Attorney General's position and against the position of Citibank and its supporters.[433] The S.C. Administrator emphasized the fact that the Iowa Consumer Credit Code, which is similar to South Carolina's Consumer Protection Code, is a consumer protection law that encompasses more than simply usury or interest rate regulation.[434] The S.C. Administrator assailed Citibank's position that certain fees may be deemed a part of or material to the interest rate which a national bank may export notwithstanding "consumer protection legislation passed by the elected representatives of Iowa pursuant to its police powers prohibiting such non-rate assessments as bad check fees, over limit fees, and so forth."[435]

In South Carolina's view, the National Bank Act allows only the interest rate (narrowly conceived as a numeric rate) to be exported.[436] So conceived, the interest rate does not include the charges imposed by Citibank. The "materiality" concept of Interpretive Rule 7.7310 should be construed as providing guidance only with respect to the elements of the law of a national bank's home state with which the bank must comply, the S.C. Administrator urged. Application of the concept of materiality in the exportation context is asserted to be a misconstruction of Interpretive Rule 7.7310. Finally, the Serino letter cited by Citibank should not be accorded deference by the court, the S.C. Administrator stated. "Nothing in the National Bank Act, its legislative history or subsequent enactments of Congress supports the proposition that state consumer protection laws should or could be preempted by that Act or by the Interpretive Rulings of the Comptroller of the Currency allegedly promulgated pursuant to that Act," asserted the S.C. Administrator.[437] Contract terms such as Citibank's change in terms, attorneys' fees or choice of law provisions are not interest, are not material to the interest rate, and have no connection with the interest rate "other than in the remotest possible sense," and thus should not be preempted by the National Bank Act.[438]

The S.C. Administrator rejected the theory that section 85 may serve as a federal choice of law.[439] In the absence of "a genuine preemption issue with regard to each challenged provision of Iowa law," there is no general reason to favor South Dakota law over Iowa law, he asserted, unless a well reasoned choice of law analysis would lead to such a conclusion.[440] The S.C. Administrator asserted that default terms such as Iowa's prohibition against acceleration and notice of right to cure are "simply nominal procedural safeguards widely recognized to prevent the harsh results of boiler-plate adhesion contracts."[441] As consumer protection measures, such Iowa regulations should not be preempted.[442]

The S.C. Administrator replied to Citibank's section 86a argument by referring to the conference report accompanying the Fair Credit and Charge Card Disclosure Act of 1988, where in describing the preemptive effect of the new legislation the committee of conference stated:

> This section applies to State credit and charge card disclosure laws, not to general disclosure statutes such as state retail installment sales acts and state plain language statutes. *Nor does this section affect other State consumer laws regarding credit cards or charge cards, such as a State statute requiring banks in that state to offer a grace period.*[443]

The S.C. Administrator argued that with the DIDMCA's extension of most favored lender status to federally-insured state-chartered institutions "there seems to be no one left to whom such state laws would apply."[444] The S.C. Administrator concluded

426. Massachusetts Brief at 18-19, 19 n.39, endorsing Iowa's position that late fees and NSF charges are not "interest" within the federal definition of interest as compensation under section 86a(b)(2), but rather are penalties and reimbursement for added, unanticipated costs. *See* Iowa Brief at 8-16.

427. Massachusetts Brief at 21.

428. *Id.* at 21-22.

429. *Id.* at 25.

430. *Id.* (citing Burgess & Ciolfi, *supra*, note 362, at 930-31).

431. Massachusetts Brief at 25 (citing Federal Reserve Bank of Chicago Letter No. 10, *Small States Teach a Big Banking Lesson* (June 1988)).

432. Massachusetts Brief at 26 (citing Burgess & Ciolfi, *supra*, note 36, at 931).

433. Brief for South Carolina, filed January 18, 1989, (S.C. Brief), in the *Citibank* litigation, *supra*, note 2. Like Iowa, South Carolina has adopted a version of the Uniform Consumer Credit Code.

434. *Id.* at 3.

435. *Id.* at 3-4.

436. S.C. Brief at 5.

437. *Id.* at 6.

438. S.C. Brief at 7.

439. *Id.*

440. *Id.* (citing the Brief of the American Conference of Uniform Consumer Credit Code States, *amicus curiae*, discussed *infra* in the text accompanying footnotes 448-65, at 10).

441. S.C. Brief at 7.

442. *Id.* (The S.C. Administrator noted that the FHLBB has determined that even where state laws are affirmatively preempted, such preemption may reach only state laws which provide less protection than federal law, citing 12 C.F.R. sections 590.4(b)(2) and 590.4(h)(1) and (2)).

443. H.R. Rep. No. 1069, 100th Cong., 2d Sess. 22, *reprinted in* 134 Con. Rec. 9809 (1988) (emphasis added by the S.C. Administrator).

444. S.C. Brief at 11.

ed that "[o]bviously, Congress never meant for state consumer protection provisions to be abrogated by statutes overriding state interest rate restrictions."[445]

The S.C. Administrator endorsed other positions of the Iowa Attorney General including the Iowa Attorney General's argument for a close reading of the TILA and National Bank Act.[446] Citibank's reading of the National Bank Act is "arcane," the S.C. Administrator charged.[447] The modern TILA is instructive and persuasive authority for a narrow and congruent reading of "interest" under section 85 and "finance charges" under the TILA and accurately reflects Congress' current and historical concerns and views of preemption and rate regulation. An expanded view of "interest" which equates all "income" with "interest" would dilute the TILA, the S.C. Administrator asserted, and thus, Citibank's position should be rejected.

4. American Conference of Uniform Consumer Credit Code States

The American Conference of Uniform Consumer Credit Code States (ACUCCCS) also filed a brief in opposition to Citibank's motion for summary judgment.[448] The ACUCCCS endorsed the views and positions expressed in the briefs of Iowa and South Carolina and argued that with regard to non-interest rate items, in the absence of actual federal preemption, Iowa law should control the issues before the court.[449] First, the Iowa Consumer Credit Code clearly sets forth its applicability to the Citibank transactions in its territorial application provisions[450] and in a non-discriminatory manner. Second, modern interest analysis conflict of laws rules dictate that the Iowa Consumer Credit Code, which was enacted as an exercise of state police power and designed to protect Iowa citizens from overcharges and overreaching, be given precedence over any purported interest South Dakota may have or claim in exporting its conflicting banking laws over state lines.[451] Even if the "validation rule" of the Restatement (Second) of Conflict of Laws is applied, the ACUCCCS urged, Iowa's interest in protecting its citizens is more than sufficient to require the application of Iowa law under the state policy exception to that rule.[452] Finally, the ACUCCCS submitted that *Marquette* was incorrectly decided.

In the opinion of the ACUCCCS, "Citibank's contract is a near classic standardized adhesion contract" and presents the classic case for giving effect to Iowa's own statutory choice of law provisions.[453] First, in the absence of controlling federal preemption, the ACUCCCS noted, courts are to give effect to statutory choice of law provisions absent some attempted connection with the forum state which would make the application of the *lex fori* an unfair surprise,[454] particularly where a lender systematically solicits in the borrower's state[455] or offers credit on a "take it or leave it basis."[456]

If Iowa's statutory choice of law provisions alone were deemed insufficient to require the application of Iowa law to the credit card transactions, Citibank's contractual choice of law provision should nevertheless be disregarded and Iowa law should be applied pursuant to a modern interest balancing conflicts of law analysis.[457] The ACUCCCS applied a five factor analysis and concluded that on each point Iowa law would or should prevail.[458] Moreover, even if Citibank's contractual choice of law provision is recognized, the present litigation would fit squarely into the governmental interest exception of the Restatement (Second) of Conflict of Laws.[459]

The ACUCCCS asserted that the fundamental error in *Marquette* was that the Court truncated the allowance and exception clauses of section 85 and assumed that section 85 permits a national bank to charge any rate that any person (natural or artificial) can charge in the national bank's state.[460] While Congress may have sought to give national banks somewhat favorable treatment in order to facilitate the national system and prevent discriminatory state legislation, the ACUCCCS asserted, such concern does not support the vast and unjustified extraterritorial effects which follow from the allowance of wholesale and unlimited exportations of rates to other states.[461] There is considerable doubt that Congress intended or foresaw that the most favored lender doctrine would allow exportation of interest rates over state lines in credit card transactions or that a single state could deregulate such rates for the entire nation, the ACUCCCS stated.[462] National banks should be "favored" in the sense that the supremacy clause prevents them from being destroyed by discriminatory state legislation, the ACUCCCS contended. Congress sought only equality between national banks and state-chartered institutions.[463]

The ACUCCCS also asserted that it is erroneous to conclude that national banks exist only in the states of their charter.[464] To permit some national banks to have advantages over other national banks simply based upon differences in location when the motivating factor undergirding the most favored lender doctrine is the prevention of competitive disadvantages by discriminatory state interest statutes makes no sense, contended the ACUCCCS. In conclusion, the ACUCCCS asserted that a state where a bank systematically solicits,

445. *Id.* (emphasis added by the S.C. Administrator).

446. *Id.* at 11-13.

447. *Id.* at 13.

448. Brief for the American Conference of Uniform Consumer Credit Code States, *amicus curiae*, filed January [18], 1989 (ACUCCCS Brief), in the *Citibank* litigation, *supra*, note 2. The ACUCCCS is an association of states which have adopted a version of the Uniform Consumer Credit Code, commonly known as the UCCC. ACUCCCS Brief at 1. The ACUCCCS's membership includes Wyoming, Indiana, Oklahoma, Colorado, Maine, Kansas, South Carolina, Iowa and Wisconsin. Formed in 1972, the ACUCCCS meets biannually to discuss enforcement and interpretive issues. *Id.* at 2. Attached as Appendix 1 to the ACUCCCS Brief is the "Resolution Urging the 100th Congress to Enact Legislation to Overturn the Decision of the United States Supreme Court in *Marquette National Bank v. First Omaha Service Corporation*," as adopted May 15, 1987, by the ACUCCCS.

449. ACUCCCS Brief at 3.

450. Iowa Code § 537.1201 (1985). The ACUCCCS also noted that the rights of Iowa residents under the Iowa Consumer Credit Code may not be waived. ACUCCCS Brief at 6 (citing Iowa Code § 537.1106 (1985)).

451. ACUCCCS Brief at 3-4.

452. *Id.* at 4.

453. *Id.* at 6 (citing Iowa Code § 537.1201(b)(1), (2), (6) (1985)).

454. ACUCCCS Brief at 6 (citing R. LAFLAR, AMERICAN CONFLICTS OF LAW, § 94, at 189, § 101, at 200 (3d ed. 1977)).

455. ACUCCCS Brief at 7 (citing R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWs 389-94 (2d ed. 1980) [hereinafter Commentary]; Weintraub, *Beyond Depecage: A "New Rule" Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code*, 25 Case W. Res. L. Rev. 16-43 (1974) [hereinafter *Beyond Depecage*]).

456. ACUCCCS Brief at 8 (quoting Weintraub, *Beyond Depecage*, *supra*, note 455, at 30 and citing Ehrenzweig, *Adhesion Contracts in the Conflicts of Laws*, 53 Colum. L. Rev. 1072 (1953)).

457. ACUCCCS Brief at 10 (citing R. Weintraub, Commentary, *supra*, note 455, at 356-57; Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 Colum. L. Rev. 1659 (1982)).

458. ACUCCCS Brief at 10-14 (citing R. LEFLAR, AMERICAN CONFLICTS OF LAW, § 96, at 195; Note, *supra*, note 457, at 1680). The five factors were: (i) the predictability of results, noting that it is predictable and traditional that the law of a citizen's state should apply to credit transactions solicited in that state, (ii) the maintenance of the interstate and international order, noting no federal or state policy calling for nationwide deregulation of all aspects of credit card applications, (iii) simplification of the judicial task, (iv) advancement of the forum's governmental interests, and (v) application of the better rule of law.

459. ACUCCCS Brief at 14 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(2) (1969)).

460. ACUCCCS Brief at 16.

461. *Id.* (citing Rohner, *Marquette: Bad Law and Worse Policy*, 1 J. Retail Banking 76 (1979)).

462. ACUCCCS Brief at 17.

463. *Id.* (citing the dissent of Justice Pitney in *Evans*, 251 U.S. at 117-18).

464. ACUCCCS Brief at 17.

from which the bank takes payments, and whose courts the bank uses to collect debts and settle disputes, can and should be considered a state in which the bank exists.[465]

"Fortunately, Citibank's construction of its powers under the National Bank Act is so extreme and so lacking in logical limitations on ability to contract for any term or fee, that the construction is an effective argument against itself," the ACUCCCS submitted, and thus Citibank's motion for summary judgment should be denied and Iowa's motion for summary judgment granted.

E. Citibank's Reply

In its Reply Memorandum[466] Citibank responded to the Iowa Attorney General's argument that Citibank's late fees and NSF charges are not compensation for the extension of credit and for that reason are not covered by the National Bank Act. Citibank reasserted that such charges are compensation, that they fall within the broad federal conception of "interest," and that under section 85, South Dakota law, the relevant law, authorizes such charges. Citibank noted that the Iowa Attorney General agreed that "interest" under section 85 includes "any compensation, however, denominated, for a loan."[467]

Citibank countered the Iowa Attorney General's assertion that section 85 embraces only those charges expressed as a numerical rate or percentage by citing cases decided under section 85 authorizing fees whether expressed as a flat fee or percentage.[468] With respect to the Iowa Attorney General's argument that Citibank's charges are not covered by section 85 because they constitute a penalty, Citibank had several replies. First, the fact that such fees may function to discourage late payment or the tendering of back checks does not make them any less a part of the compensation that Citibank is entitled to receive.[469] The two functions are not mutually exclusive.[470] Such charges expressly serve a compensation function because a late payment charge is imposed in recognition of increased credit risk and for the use of Citibank's money during the period from the time the minimum payment not paid was due to the time the charge was imposed (25 days later) and, similarly, a bad check charge is imposed because of a continued extension of credit occasioned by the tendering of a bad check.[471] Citibank forebears for a period of time in either case from terminating the account and calling the loan due and receives compensation for its trouble. Moreover, Citibank asserted, to narrowly read section 85 would defeat its purpose of establishing a federal usury ceiling and granting national banks most favored lender status.[472] A contrary rule would open the door for evasion of federal usury law applicable to national banks.[473]

Citibank rejected the Iowa Attorney General's suggestions that the federal TILA or section 501 of the DIDMCA are instructive or controlling in the construction of section 85.[474] These statutes "were designed for purposes entirely different and unrelated to [section 85]."[475] Citibank noted that the TILA, a disclosure statute, concerns "finance charges" and "annual percentage rate," terms not analogous to "interest" as used in the National Bank Act.[476] Section 501 of the DIDMCA was a special purpose, temporary, housing statute intended to deregulate certain aspects of lending with respect to first mortgage loans.[477] Moreover, section 511 of DIDMCA, enacting section 86a, a provision related to and more analogous to section 85 than section 501, contains an express definition of "interest" under the National Bank Act.[478]

VI. Conclusions

The outcome of the *Citibank* litigation may provide a long awaited resolution of some of the issues confronting lenders engaged in interstate consumer lending. Depending on the grounds of decision and reasoning of the court, however, more questions may be raised than settled.

In an order dated January 12, 1989, the Iowa district court ordered argument on Citibank's motion for summary judgment and motion to dismiss the Iowa Attorney General's counterclaim to be held as soon as the court's schedule allows.[479] The Iowa Attorney General's motion for summary judgment will be held in abeyance pending the court's ruling on Citibank's motions.[480] The necessity of a Citibank response to the Iowa Attorney General's motion for summary judgment will be considered following a ruling on Citibank's motions.[481]

If the *Citibank* litigation is decided on the narrow ground of federal preemption under the National Bank Act, the questions of the exportation of "interest" and fees will remain open with respect to all federally-insured institutions that depend on the DIDMCA for exportation authority. If the decision is based on complete deferral to state law, in the absence of a federal definition of "interest," the decision will provide no solution for the many institutions located in states which do not have definitions of interest as clear or explicit as those of South Dakota or Delaware. Adoption of a materiality standard, as supported by the Serino letter, will provide no solution to the extent that the concept of materiality is left ill-defined. Moreover, the materiality standard may have undesirable consequences when removed from the most favored lender context and applied in the distinct exportation context. A narrow federal definition of "interest," as advocated by the Iowa Attorney General, will not promote a coherent scheme of regulation to the extent that a numeric rate standing alone is meaningless and the effect of section 85 is reduced to the substitution of the numeric rate of the state of location for the numeric rate of another state without consideration as to other forms of compensation or return to the lender.

Section. 85 should be interpreted to authorize national banks to receive the total compensation or return ("interest" as defined by federal law, subsuming the recovery of costs and expenses plus profit) that may be permitted under the relevant law of the state of the bank's location. This expansive federal definition of "interest" should include all fees, costs or expenses permitted by state law plus a reasonable

465. *Id.* at 19.

466. Reply Brief of Plaintiff, filed January 20, 1989 (Citibank Reply Brief), in the *Citibank* litigation, *supra*, note 2. By order of U.S. Magistrate R.E. Lonstaff on January 13, 1989, Citibank's reply brief was limited to eight pages.

467. *See* 12 U.S.C. §§ 85, 86a.

468. Citibank Reply Brief at 3 (citing *Fisher*, 548 F.2d 255 (flat transaction fee); *Northway Lanes*, 464 F.2d 855 (flat amount on closing costs); *McAdoo*, 535 F.2d 1050 (compensating balance requirement); and Citibank Brief at 13-19)).

469. Citibank Reply Brief at 3 (citing *Brown*, 82 U.S. (15 Wall.) at 185, and Weinrich v. Hawley, 19 N.W.2d 665, 669 (Iowa 1945), defining interest as compensation for the use or forbearance of money or as damages for its detention).

470. Citibank noted that in Iowa late payment charges are treated as "interest" governed by Iowa general usury law. Citibank Reply Brief at 5, 5 n.8 (citing 1977-78 Op. Att'y Gen. Iowa 839 (Dec. 19, 1978)).

471. Citibank Reply Brief at 4, 4 n.5.

472. Citibank Reply Brief at 4 (citing *Union National Bank*, 163 U.S. 325; *Tiffany*, 85 U.S. (18 Wall.) 409; *Fisher*, *supra*, 548 F.2d 255; *McAdoo*, 535 F.2d 1050; *Northway Lanes*, 464 F.2d 855; Panos v. Smith, 116 F.2d 445, 446; In re Gerber's Estate, 9 A.2d 438, 443 (Pa. 1939); Serino letter, *supra*, note 112; Fitzgerald letter, *supra*, note 132; Taylor letter, *supra*, note 184; Citibank Brief at 22-27).

473. Citibank Reply Brief at 4-5 (quoting Ferrier v. Scott's Adm'rs and Heirs, 17 Iowa 578 (1864)).

474. Citibank Reply Brief at 5; *see* Iowa AG Brief at 13-16.

475. Citibank Reply Brief at 5.

476. *Id.* at 5-6 (citing passages of Regulation Z, 12 C.F.R. Part 226).

477. Citibank Reply Brief at 6-7.

478. *Id.* at 7, 7 n.6.

479. Order filed January 17, 1989, in the *Citibank* litigation, *supra*, note 2 at 1.

480. *Id.*

481. *Id.* at 2.

profit. State law should be consulted only with respect to the determination of the measure of the total compensation (the forms and kinds of compensation that may be taken) permitted under that law. Under some state statutes certain costs or expenses in the form of fees and charges may be excluded or distinguished from other compensation constituting finance charges, service charges, or interest for the purpose of determining whether a lender's return exceeds the usury limitations of state law. Such a structure, however, should not affect the fact that fees and charges other than a numeric rate constitute "interest" for the purpose of federal rate authority under section 85 and, by extension, the provisions of the DIDMCA.

In substance, "interest," as the compensation allowed by law for the use or forebearance of money or for its detention, should subsume all costs, expenses and profit, all return in cash or kind, that is received by a lender from a borrower during the life of a loan transaction, regardless of semantic formulations within the usury laws of the several states. The making of a loan is not costless. Semantics should give way to an examination of the substance of the transaction. Fees and charges such as late fees and NSF charges perform many functions, including compensation for (new or continued) higher risks associated with the extension of credit, deterrence, liquidated damages and the recovery of proximate costs and expenses (both direct and indirect). Both cost recovery and profit must be considered in the responsible regulation of this area. Each state's body of laws contains a comprehensive, coherent system of regulation, or mechanisms for decision within the framework of its law, which addresses both cost and profit components. Any failure to recognize the whole of that framework as it relates to the indivisible question of total compensation raises the potential for grave conflicts. Indivisible aspects of a single transaction will become the subject of duplicative regulation. Because each state's regulatory scheme for loan transactions necessarily springs from its particular conception of contract law principles, its grouping or division of cost and profit recoveries,[482] and other premises, state regulatory schemes are likely very often to conflict. Only through a federal definition of "interest" and adoption of the whole, coherent law of one state will the optimum situation, where an indivisible aspect of a transaction is subject to only a single, harmonious, and coherent set of regulation be achievable.

Deregulation is not necessarily an evil. Through clear, simple disclosure, the workings of the market for credit can be enhanced. A perfect market, although desirable, is not necessary for the protection of consumers. Already states such as Illinois have considered ways of promoting market information by gathering and providing to the public comparative information. The regions of the United States are not so insular or disparate as they were in 1864. More uniformity in the area of usury and lending regulation is not only inevitable but desirable. The divergence in regulation by the several states adds to the confusion of consumers and does not promote their knowledgeable procurement of the credit products they need. The best way to help consumers and to protect them is to educate them and provide them with choices to suit their needs and lifestyles.

The more carefully "interest" is defined to include all the elements or components of the return to the lender, the more comprehensive will be the solution. With proper disclosure, borrowers may best choose for themselves the loan package which suits their own needs, habits and economic situation at the lowest cost. An effective, coherent usury policy should be the goal. Without a broad definition of interest or federal choice-of-law interpretation, state usury laws will be impaired but without reason. Congress' express use of the state of the lending institution's location as a reference point in section 85, and later use in sections 521, 522 and 523 without amendment or change, must carry some significance.

Exportation authority is not premised on a need for protection from potentially hostile state legislation as a matter of policy. Rather, exportation authority is descriptive of one implication of existing federal usury authority in a particular context, that of interstate lending. A coherent and rational interpretation of section 85 which may be consistently applied is now required.

The issue is usury, that is, price regulation. The problem is that the price of credit is not a unitary concept in practical terms and subsumes a host of potential components in the form of various charges and assorted fees. Semantic distinctions may be drawn between the various components and the kinds of costs and expenses to which the components relate, but in the final analysis the only constant is that in a viable loan program the recovery of all costs and expenses plus a measure of profit will equal the total return to the lender. Each state generally undertakes by its usury law, in the context of the particular state's unique legal framework, to monitor and regulate the return to the lender to avoid "excessive" profit. Justifiable and reasonable costs are generally not the focus of usury regulation. Usury laws ordinarily are not self-contained but draw upon the full breadth of a state's legal system, including contract, debtor and creditor rights, attorneys' fee and court and collection costs provisions, among others. In isolation, rate regulation is meaningless, or at the very least of limited value. Only when viewed as a whole do an individual state's laws provide a coherent and complete usury framework. Only with a broad definition of "interest" may sections 85, 86 and 86a and sections 521, 522 and 523 achieve some coherent system of regulation on a federal level.

Beyond the issues regarding what sections of the National Bank Act and the DIDMCA govern or authorize in the way of "interest" remains the question with regard to the effect of state "opt-out" on DIDMCA preemption. Even if the position advocated in the FDIC's Jones letter is adopted, a clarification of the federally-mandated factual analysis will still be required. Moreover, the adequacy of opt-out legislation in those states which have passed opt-out legislation, and the adequacy of the "opt-in" legislation of Massachusetts and Nebraska, has yet to be tested.

Lingering questions regarding the precise textual basis for the most favored lender doctrine and the applicability of judicial and adminstrative interpretations promulgated in the most favored lender context to the exportation context are open to more definitive resolution.

This area of the law remains far from settled. Appeals may further postpone resolution of the issues raised in the *Citibank* litigation. Nevertheless, the materials discussed above contribute to the continuing discussion of these issues and help to frame some of the practical and policy implications of any resolution.

482. States may adopt any of a number of formulations, including a broad definition of interest, a narrow concept of 'interest' plus certain other allowable fees, a broad concept of finance charges and other enumerated fees, a general civil or criminal usury ceiling prohibiting fees over the 'legal' rate expressed as a single percentage rate or otherwise, or other formulations to identify and regulate the taking of compensation.