

## Developments in the Interstate Delivery of Consumer Financial Services

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During the last two years a flurry of suits have been filed and settled, and some are still pending, that raise significant issues affecting the ability of national and state banks, and by implication other federally insured lenders, to engage in interstate consumer credit transactions. These suits include litigation between the Iowa Attorney General and several banks, including Citibank (South Dakota), N.A. ("Citibank"), United Missouri Bank of Kansas City, N.A. ("UMBKC"), United Missouri Bank, U.S.A. ("UMBUSA"), and SafraBank (California) ("SafraBank"),<sup>1</sup> and between the Massachusetts Attorney General and Greenwood Trust Company.<sup>2</sup> Several of the suits involving the Iowa Attorney General have recently been settled, after the filing of briefs on cross-motions for summary judgment.<sup>3</sup> Other developments in this area include an interpretive letter issued by the Office of the Comptroller of the Currency

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1. Citibank (South Dakota), N.A. v. Miller, No. 88-258-E (S.D. Iowa filed May 6, 1988, dismissed per stipulation Nov. 29, 1989) and Iowa *ex rel.* Miller v. Citibank (South Dakota), No. CE 029-16973 (Dist. Ct. Polk County, Iowa filed May 13, 1988, dismissed per stipulation Nov. 29, 1989) (the "Citibank litigation"); Iowa *ex rel.* Miller v. United Missouri Bank of Kansas City, N.A., No. CE 029-17029 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation Feb. 27, 1990) and United Missouri Bank of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation Feb. 27, 1990) (the "UMBKC litigation"); Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., No. CE 029-17028 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation June 8, 1990) and United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation June 8, 1990) (the "UMBUSA litigation"); and Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990) (the "SafraBank litigation").

2. Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989) (the "Greenwood Trust litigation"). Mr. Bock is employed by an affiliate of Greenwood Trust Company.

3. See cases cited at note 1.

("OCC"),<sup>4</sup> broadly construing the scope of federal preemption under the National Bank Act ("NBA") and the industry reaction to the American Telephone and Telegraph Company ("AT&T") Universal Card. These developments have contributed to the continuing public debate of unresolved legal issues in interstate delivery of consumer financial services.

## LITIGATION IN IOWA

The Iowa Attorney General has been actively litigating the interstate consumer credit transactions practices of national and state banks since first filing suit against the First National Bank of Wilmington in Delaware in 1988.<sup>5</sup> These suits, in particular the litigation involving Citibank ("the *Citibank* litigation"), have received public attention because of the important issues raised.<sup>6</sup> The Iowa Attorney General has generally sought the enforcement of the restrictions placed by Iowa law on contractual choice of law provisions, late charges, returned check charges, over-limit charges, attorneys' fees and collection costs provisions, change of terms provisions, and default provisions. The Iowa Attorney General has also challenged the authority of national banks and federally insured, state-chartered banks to rely on federal law and contractual choice of law provisions stipulating that the law of states other than Iowa apply to credit agreements with Iowa residents. All of these suits, with the exception of the litigation involving SafraBank, have been settled.<sup>7</sup>

## THE CITIBANK LITIGATION

By a Settlement Memorandum agreed to November 29, 1989,<sup>8</sup> Citibank and the Iowa Attorney General settled the federal court action brought by Citibank seeking declaratory and injunctive relief against the exercise of regulatory authority by the Iowa Attorney General over Citibank's MasterCard and Visa credit card agreements and transactions with Iowa residents. The related state court action brought by the Iowa Attorney General was simultaneously settled. Subsequent to the filing of these suits, the OCC issued a written opinion that

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

5. *Iowa ex rel. Miller v. First Nat'l Bank*, No. 88-20 (D. Del. filed Jan. 19, 1988, dismissed per stipulation Apr. 15, 1988). See also cases cited at note 1.

6. Twelve *amicus curiae* briefs were filed in the *Citibank* litigation alone, in addition to those of the parties. See Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 Cons. Fin. L.Q. Rep. 152, 163-78 (1989) ("Tomkies"). For a discussion of issues raised by this litigation, see generally Tomkies, *supra*, and Langer & Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC Insured Savings Institutions, and FDIC Insured State Banks*, 42 Cons. Fin. L.Q. Rep. 4 (1988) ("Langer & Wood").

7. See cases cited at note 1.

8. Settlement Memorandum, *Citibank (South Dakota), N.A. v. Miller*, No. 88-258-E (S.D. Iowa filed May 6, 1988, dismissed per stipulation Nov. 29, 1989); and *State of Iowa ex rel. Miller v. Citibank*, No. CE 029-16973 (Dist. Ct. Polk County, Iowa filed May 13, 1988, dismissed per stipulation Nov. 29, 1989) ("*Citibank* Settlement Memorandum").

the laws of a national bank's home state control the "interest" a national bank can charge and the "material" fees and terms it can impose,<sup>9</sup> and the Iowa legislature enacted legislation permitting late payment charges, over-limit charges, and nonsufficient funds charges in connection with open-end credit.<sup>10</sup>

In the Settlement Memorandum, Citibank represented, and agreed that until at least September 1, 1992 it would abide by its representations, that it charges Iowa residents no more than \$10 for each billing period in which payment is not received within 25 days after the payment due date and no more than \$10 for returned checks.<sup>11</sup> Citibank further represented that it neither demands nor authorizes anyone to demand attorneys' fees from Iowa cardholders in connection with collection activities and that it makes changes in terms and provides notices of default in accordance with procedures previously disclosed to the Iowa Attorney General by Citibank.<sup>12</sup> Finally, Citibank agreed that it would remove from credit card agreements entered into with Iowa residents after December 31, 1989 the contractual choice of law provision stipulating that South Dakota law applied to the credit card agreements between Citibank and Iowa residents.<sup>13</sup> The Iowa Attorney General in return agreed not to challenge Citibank's practices set forth in the Settlement Memorandum.<sup>14</sup> The Settlement Memorandum was stipulated to bind the parties only until September 1, 1992 and was made subject to supervening events.<sup>15</sup> The Settlement Memorandum does not constitute an admission by either party.<sup>16</sup>

Notwithstanding Citibank's agreement to remove the contractual choice of law provision from its credit card agreements, the settlement does not resolve the dispute between the parties regarding the applicability of Iowa and South Dakota law to credit card agreements between Citibank and Iowa residents.<sup>17</sup> Citibank continues to maintain that federal and South Dakota law govern its credit card agreements exclusively, while the Iowa Attorney General continues to maintain that the challenged terms are subject to Iowa law.

9. OCC Interpretive Letter No. 452 from Robert B. Serino, Deputy Chief Counsel (Policy), to Linda Thomas Lowe, Deputy Cons. Credit Code Adm'r and Asst. Att'y Gen., Iowa (Aug. 11, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (Aug. 11, 1986), *discussed in* Tomkies, *supra* note 6, at 159-63.

10. 1989 Iowa Acts 552, approved Apr. 27, 1989, effective July 1, 1989 (expressly authorizing charges in the amount of \$10 for payments more than 10 days late, over-limit transactions, and nonsufficient funds checks in connection with certain open-end credit transactions). Citibank charged \$10 for payments more than 25 days late and \$10 for nonsufficient funds checks. The Iowa legislation has no retroactive effect.

11. *Citibank Settlement Memorandum* at 2.

12. *Id.*; see Letter from Curt J. Bernard, Vice President, Citibank, to Richard Cleland, Administrator of the Iowa Consumer Credit Code (Nov. 13, 1989) (unpublished).

13. *Citibank Settlement Memorandum* at 3.

14. *Id.* at 4-5.

15. *Id.* at 3-5.

16. *Id.* at 5.

17. Press Release of Iowa Department of Justice (Nov. 30, 1989).

## THE UMBKC LITIGATION

Like the *Citibank* litigation, the litigation between the Iowa Attorney General and UMBKC ("the *UMBKC* litigation") principally concerned the fees and charges imposed by an out-of-state national bank on Iowa residents.<sup>18</sup> Unlike the *Citibank* litigation, however, the *UMBKC* litigation involved a private label credit card program.<sup>19</sup> The *UMBKC* litigation was stayed pending the outcome of the *Citibank* litigation.

By a Settlement Memorandum dated February 23, 1990, UMBKC and the Iowa Attorney General settled the *UMBKC* litigation.<sup>20</sup> In the Settlement Memorandum, UMBKC agreed that until December 31, 1992, it would limit charges imposed on Iowa residents to not more than \$10 for each billing period in which an "appropriate payment" is not received within 15 days of its due date and \$10 for returned checks.<sup>21</sup> UMBKC's credit card agreement terms had previously provided for late payment charges for payments not received within 15 days of the date due in the amount of the lesser of 5% of the past due payment or \$15 and, "to the extent allowed by law," returned check charges of \$5.<sup>22</sup> UMBKC also agreed in the Settlement Memorandum not to demand, or authorize anyone else to demand, that Iowa cardholders pay attorneys' fees when UMBKC refers the balance of a cardholder's account for collection.<sup>23</sup> UMBKC's credit card agreement terms had previously provided for reasonable attorneys' fees, "as allowed by law," in the event of a collection action.<sup>24</sup> UMBKC further agreed to provide to Iowa cardholders (i) two written notifications of changes in terms that would result in any additional costs or charges to Iowa cardholders, the first of which is to be given at least 90 days prior to the effective date of the change; and (ii) in accordance with procedures detailed in the Settlement Memorandum, notification of cardholders' rights to cure default.<sup>25</sup> Finally, UMBKC agreed to send to each Iowa resident for whom it establishes a credit card account after the date of the Settlement Memorandum a

18. Iowa *ex rel.* Miller v. United Missouri Bank of Kansas City, N.A., No. CE 029-17029 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation Feb. 29, 1990); United Missouri Bank of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation Feb. 27, 1990).

19. A private label credit card program is a credit card program established by a card issuer for a sponsoring person pursuant to which "private label" cards are issued that may only be used to purchase specified goods or services at specified merchants who agree to honor the card. Commonly, the private label cards prominently display the sponsoring person's name and may be used to make purchases only from the sponsor's establishments.

20. Settlement Memorandum, Iowa *el rel.* Miller v. United Missouri Bank of Kansas City, N.A., No. CE 029-17029 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation Feb. 27, 1990); United Missouri Bank of Kansas City, N.A. v. Miller, No. 88-1344-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation Feb. 27, 1990) ("*UMBKC* Settlement Memorandum").

21. *UMBKC* Settlement Memorandum at 2.

22. *Id.* at Group Exhibit A.

23. *Id.* at 2.

24. *Id.* at Group Exhibit A.

25. *Id.* at 2-5.

special written notice discussing the inapplicability to Iowa residents of the contractual choice of law provisions of UMBKC's credit card agreements which state that Missouri law applies.<sup>26</sup> In addition to providing the special notice, UMBKC agreed that it would not raise the Settlement Memorandum to bar the State of Iowa from appearing as an amicus curiae in court proceedings respecting the issue of whether Iowa law governs the contractual relationship between UMBKC and an Iowa resident who has received the required written notice, or from joining a then-existing judicial proceeding filed by an Iowa resident who did not receive the required written notice. In return for UMBKC's agreements, the Iowa Attorney General agreed not to challenge UMBKC practices that conform to the Settlement Memorandum.<sup>27</sup> The Settlement Memorandum was stipulated to bind the parties until December 31, 1992 and was made subject to supervening events.<sup>28</sup> The Settlement Memorandum does not constitute an admission by either party.<sup>29</sup>

### THE UMBUSA LITIGATION

Unlike previous litigation involving the Iowa Attorney General, the litigation involving UMBUSA ("the UMBUSA litigation") concerned the interstate consumer credit transactions of a federally insured, state-chartered bank, rather than a national bank.<sup>30</sup> Iowa has exercised its right under section 525 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA")<sup>31</sup> to opt out of the federal usury preemption granted federally

26. *Id.* at 3. The special notice, which is to be sent a few days prior to the mailing of the Iowa resident's credit card agreement and credit card, provides that the Iowa Consumer Credit Code states that it is applicable to consumer credit agreements such as the cardholder's credit card agreement with UMBKC and that any contrary contractual choice of law provision is invalid. The notice further states that unless the Iowa law is unconstitutional or is preempted by federal law, the contractual choice of law provision in the credit card agreement specifying that Delaware and federal law shall govern is inapplicable to Iowa residents and is to be considered deleted from the credit card agreement.

27. *Id.* at 6-7.

28. *Id.* at 5-7.

29. *Id.* at 7.

30. Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., No. CE 029-17028 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation June 8, 1990); United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation June 8, 1990).

31. Section 525 of the DIDMCA provides:

The amendments made by sections 521 through 523 of this title shall apply only with respect to loans made in any State during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the amendments made by such sections to apply with respect to loans made in such State, except that such amendments shall apply to a loan made on or after the date such law is adopted or such certification is made if such loan is made pursuant to a commitment to make such loan which was entered into on or after April 1, 1980, and prior to the date on which such law is adopted or such certification is made.

insured, state-chartered banks by section 521 of the DIDMCA.<sup>32</sup> Thus, the *UMBUSA* litigation raised unresolved issues regarding the interpretation of section 525 opt-out authority<sup>33</sup> as well as, fundamentally, the right of a federally insured, state-chartered bank to export interest under section 521. *UMBUSA*, a Delaware-chartered bank, was charging a delinquency charge of the lesser of 5% of the minimum payment due or \$15 on payments not received within 15 days, an over-limit charge of \$10, and a returned check charge of \$7.50 under its credit card agreements. The Iowa Attorney General challenged these charges and certain other practices with respect to Iowa cardholders.

Pub. L. 96-221, § 525, 94 Stat. 132, 167 (1980) (codified at 12 U.S.C.A. § 1730g note (West 1982)).

Iowa has opted out of section 521 pursuant to section 525. 1980 Iowa Acts ch. 1156, § 32 (not codified). In addition to Iowa, the states of Colorado, Massachusetts, Maine, Nebraska, North Carolina, Wisconsin, and the Commonwealth of Puerto Rico formally opted out of sections 521-523 of the DIDMCA, although several states have since repealed their statutes opting out of section 521-523. *See* Colo. Rev. Stat. § 5-13-104 (Supp. 1988); 1981 Mass. Acts ch. 231 § 2 (codified at Mass. Ann. Laws ch. 183 § 63 note (Law. Co-op. 1987), repealed by 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 (1988), repealed by amendment in 1988 Neb. Laws 913, § 2); N.C. Gen. Stat. § 24-2.3 (1986); 1981 Wis. Laws ch. 45, § 50 (not codified); and P.R. Laws Ann. tit. 10, § 998(1) (Supp. 1988).

Section 522 of the DIDMCA, which enacted for federally insured savings associations federal usury preemption similar to section 521, was repealed by section 407 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Substantially similar authority was enacted by section 301 of FIRREA. *See* Home Owners' Loan Act of 1933, § 4(g), 12 U.S.C.A. § 1463(g) (West 1989 & Supp. 1990). The opt-out limitation on the authority of federally insured savings associations has thus been removed by FIRREA while preserving federal usury preemption for federally insured savings associations. *See generally* Langer, *FIRREA Removes Opt-Out Limitation on Interest Rate Exportation by Insured Savings Associations*, 44 Cons. Fin. L.Q. Rep. 213 (1990).

32. Section 521 of the DIDMCA has been codified at 12 U.S.C.A. § 1831d (West 1989). Section 521 of DIDMCA, as codified and amended, states in relevant part:

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

Pub. L. 96-221, § 521, 94 Stat. 132, 164 (1980). Section 521 was the first of the three sections enacted in the DIDMCA relating to federal preemption of state usury law with respect to "Other Loans" by federally insured institutions.

33. *See generally* Tomkies, *supra* note 6, at 156-58 (discussing section 525 and FDIC Letter No. 88-45 from Douglas H. Jones, Deputy Gen. Counsel (June 29, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,110 (June 29, 1988); *see also* Langer & Wood, *supra* note 6, at 22, 27-28.

On June 6, 1990, UMBUSA and the Iowa Attorney General entered into a Settlement Memorandum.<sup>34</sup> Pursuant to the Settlement Memorandum, UMBUSA agreed to limit its late charges to \$10 for each billing period in which payment is not received within 15 days of its due date, to limit its over-limit charges to \$10, and to limit its returned check charges to \$10 per returned instrument. UMBUSA also agreed that it would (i) not demand, or authorize anyone else to demand, that any Iowa cardholder pay debt collectors' fees or attorneys' fees when UMBUSA refers the balance of the Iowa cardholder's account for collection; (ii) provide two written notifications, the first of which is to be sent at least 90 days in advance of the effective date of a change in terms, prior to changing any terms of a credit card agreement with an Iowa resident that would result in any additional costs or charges to the Iowa cardholder; and (iii) provide to Iowa cardholders written notifications of default and of cardholders' right to cure default.

UMBUSA further agreed that it would send to each Iowa resident for whom it establishes a credit card account after the date of the Settlement Memorandum a special written notice discussing the inapplicability to Iowa residents of the contractual choice of law provisions of UMBUSA's credit card agreements which state that Delaware law applies.<sup>35</sup> In addition to providing the special notice, UMBUSA agreed that it would not raise the Settlement Memorandum to bar the State of Iowa from appearing as an *amicus curiae* in court proceedings respecting the issue of whether Iowa law governs the contractual relationship between UMBUSA and an Iowa resident who has received the required written notice, or from joining a then-existing judicial proceeding filed by an Iowa resident who did not receive the required written notice. UMBUSA agreed to promptly notify its collection counsel regarding the terms of the Settlement Memorandum; to direct such counsel to promptly notify UMBUSA of any court proceedings in which the choice of law issue is raised; and to promptly notify the State of Iowa regarding any such proceedings.

In addition to the changes in fees and charges and practices with respect to Iowa residents, UMBUSA agreed to make an application for, and to take all reasonable actions to obtain, a license under chapter 536A<sup>36</sup> of the Iowa statutes

34. Settlement Memorandum, Iowa *ex rel.* Miller v. United Missouri Bank, U.S.A., EC No. 029-17028 (Dist. Ct. Polk County, Iowa filed May 31, 1988, dismissed per stipulation June 8, 1990); United Missouri Bank, U.S.A. v. Miller, No. 88-1343-E (S.D. Iowa filed Aug. 1, 1988, dismissed per stipulation June 8, 1990) ("*UMBUSA Settlement Memorandum*").

35. *UMBUSA Settlement Memorandum* at 3-4. The special notice, which is to be sent a few days prior to the mailing of the Iowa resident's credit card agreement and credit card, provides that the Iowa Consumer Credit Code states that it is applicable to consumer credit agreements such as the cardholder's MasterCard Cardmember Agreement with UMBUSA and that any contrary contractual choice of law provision is invalid. The notice further states that unless the Iowa law is unconstitutional or is preempted by federal law, the contractual choice of law provision in the credit card agreement specifying that Delaware and federal law shall govern is inapplicable to Iowa residents and is to be considered deleted from the credit card agreement. *Id.*

36. Chapter 536A specifically contemplates the licensing of out-of-state lenders to permit such lenders to make "supervised loans," *i.e.*, loans at rates in excess of that permitted by the Iowa interest statute, Iowa Code Ann. §§ 535, 536A (West 1987).

from the Iowa Superintendent of Banking.<sup>37</sup> Finally, UMBUSA agreed to pay certain funds to the Consumer Education Fund of Iowa.

In return for the agreements of UMBUSA, Iowa agreed not to challenge UMBUSA's credit card program. In consideration for UMBUSA's prompt licensure and payment to the Consumer Education Fund, Iowa released and discharged UMBUSA as well as UMBKC—from whom some of the credit card agreements were assigned—from claims, penalties, and causes of action arising out of past or existing credit card agreement provisions or credit card transactions or dealings relating to the fees, charges or practices that were the subject of the litigation. The majority of UMBUSA's agreements terminate May 15, 1993. Unlike the Citibank Settlement Memorandum, however, the terms and provisions of the UMBUSA Settlement Memorandum are binding upon the parties without a general "sunset" date. The Settlement Memorandum does not constitute an admission by either party.<sup>38</sup>

### THE SAFRABANK LITIGATION

Like the *UMBUSA* litigation, the litigation concerning SafraBank ("the *SafraBank* litigation") involves a state-chartered bank, but unlike previous litigation, the litigation involves precomputed loans, in particular loans to finance precious metals contracts rather than credit card programs.<sup>39</sup> The Iowa Attorney General is seeking injunctive relief against certain unlawful practices of Morgan Whitney Trading Group ("Morgan Whitney") and SafraBank in connection with the solicitation of Iowa residents by telephone for the sale of precious metals contracts. In connection with telephone contacts made by Morgan Whitney, SafraBank, a California-chartered bank, mailed loan contracts and other documents to Iowa residents. The Iowa Attorney General challenged certain contractual provisions in SafraBank's loan documents, including (i) the provisions imposing a delinquency charge of 3% per month on the principal amount due; (ii) the provisions requiring consumers to pay attorneys' fees and costs of collection; (iii) the failure of documents used by SafraBank to include a notice to consumers required by Iowa law and a notice required by Iowa law for negotiable instruments; and (iv) the contractual choice of law provisions stating that the agreements with Iowa residents will be governed by the laws of California.<sup>40</sup> The Iowa Attorney General asserted that

37. In a related Memorandum of Understanding, dated June 6, 1990, UMBUSA and the Superintendent of Banking entered into a binding agreement to deal with certain provisions of Iowa Code chapter 536A that were considered incompatible with, or not applicable to, the operations of an out-of-state open-end credit card issuer such as UMBUSA. The Memorandum of Understanding included provisions for the keeping of records out-of-state and the furnishing of financial information by the parent of UMBUSA in lieu of certain reports by UMBUSA.

38. *UMBUSA* Settlement Memorandum at 11.

39. *Iowa ex rel. Miller v. Morgan Whitney Trading Group*, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990).

40. First Amended Petition at 8-9, *Iowa ex rel. Miller v. Morgan Whitney Trading Group*, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990)

the debt incurred by Iowa residents in connection with the precious metals contracts is for consumer purposes and governed by the Iowa Consumer Credit Code ("ICCC")<sup>41</sup> and that the terms of SafraBank's loans violate several provisions of the ICCC.

The Iowa Attorney General's prayer for relief requested (i) temporary and permanent injunctions against SafraBank to prohibit SafraBank from directly or indirectly entering into consumer credit transactions, or engaging in conduct, that violate the ICCC; (ii) the reformation of contracts between Iowa residents and SafraBank to conform with Iowa Code chapter 537 and the rescission of contracts that Iowa residents entered into in violation of chapter 537; (iii) the payment of money to which Iowa residents allegedly have a right of recovery pursuant to Iowa Code chapter 537; and (iv) the imposition of a civil penalty on SafraBank for its alleged repeated and intentional violations of Iowa Code chapter 537.

Requests for summary judgment were filed by both parties.<sup>42</sup>

### ***Brief of SafraBank***

In its brief in support of its initial motion for summary judgment, SafraBank challenged the application of the ICCC to the transactions in question.<sup>43</sup> SafraBank challenged the jurisdictional provision of the ICCC<sup>44</sup> as unconstitutional.<sup>45</sup> SafraBank argued that it lacked necessary minimum contacts with Iowa.<sup>46</sup> SafraBank also challenged the Iowa Attorney General's assertion that the transactions between SafraBank and Iowa residents constitute "consumer loans" within the meaning of the ICCC,<sup>47</sup> arguing that the transactions in question are investment loans falling outside the ICCC and thus, as the ICCC does not apply to SafraBank, the Iowa Attorney General fails to state a cause of action.<sup>48</sup> SafraBank asserted that the investors made investments in precious metals for the purpose of making a profit or earning income and not "primarily for a personal, family or household purpose" as required by the ICCC.<sup>49</sup>

(citing Iowa Code Ann. 3104 (West 1987 & Supp. 1990); §§ 537.2507, .3211, .1201(6) (West 1987)).

41. Iowa Code Ann. ch. 537 (West 1987 & Supp. 1990).

42. The Iowa Attorney General's motion for summary judgment was subsequently withdrawn and SafraBank's initial motion for summary judgment was denied on procedural grounds. SafraBank has refiled its request for summary judgment. As of the date this article was written, no date had been set for a hearing on the motion.

43. Brief of SafraBank in Support of Motion For Summary Judgment filed May 3, 1990, Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990) ("*SafraBank* Brief").

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

45. *SafraBank* Brief at 3-6.

46. *Id.*

47. See Iowa Code Ann. § 537.1301(14) (West 1987 & Supp. 1990) (definition of "consumer loans").

48. *SafraBank* Brief at 6-7.

49. *Id.* at 7.

SafraBank noted that the federal Truth-in-Lending Act uses language substantially similar to that used by the ICCC to describe consumer transactions,<sup>50</sup> but in addition expressly exempts "credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes."<sup>51</sup> SafraBank argued that a distinction between consumer and commercial purposes on the basis of the profit motive likewise should be applied under the ICCC. SafraBank reasoned that the debts incurred by customers of SafraBank for the purchase of precious metals as investments were not, as matter of law, incurred "primarily for a personal, family or household purpose" within the meaning of the ICCC and thus the ICCC may not be applied.<sup>52</sup>

With respect to the Iowa Attorney General's concerns about the interest charged by SafraBank, SafraBank asserted that because (i) it assesses loan charges in California, (ii) loan payments are submitted to and accepted by SafraBank in California, (iii) the decision to extend credit is made in California, (iv) the loan documents are prepared and issued in California, and (v) SafraBank protects its security interests under the collateralized loans by taking delivery in California of the precious metals purchased by the borrowers, SafraBank's loans are made in California.<sup>53</sup> Consequently, the rate of interest charged by SafraBank on its loans is governed by section 521 of the DIDMCA notwithstanding Iowa's exercise of its right to opt out of federal preemption pursuant to section 525 of the DIDMCA.<sup>54</sup> Even if Iowa law did apply, SafraBank asserted that its practices did not violate the terms of the ICCC.<sup>55</sup>

With respect to the Iowa Attorney General's allegation that SafraBank is making "supervised loans" at interest rates exceeding those allowed by Iowa Code chapter 535, SafraBank asserted that an exception exists in chapter 535 permitting a person to agree to pay any rate of interest if he borrows for a business purpose, expressly including "an investment activity."<sup>56</sup> Because its customers engaged in an investment activity, SafraBank argued that this exception applies and thus the Iowa Attorney General's allegations as to interest rates are "immaterial."<sup>57</sup> SafraBank further asserted that the contracts between it and the borrowers did not violate the ICCC's provisions regarding notice of default and the right to cure default because the borrowers voluntarily surrendered possession of the goods that were collateral for the loans, which collateral

50. See 15 U.S.C.A. § 1602(h) (West 1982).

51. See 15 U.S.C.A. § 1603(1) (West 1982).

52. *SafraBank* Brief at 13.

53. *Id.* at 16 (citing FDIC Letter No. 88-45 from Douglas H. Jones, Deputy Gen. Counsel (June 29, 1988), reprinted in [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,110 (June 29, 1988) ("Jones letter")). For a discussion of the Jones letter, see Tomkies, *supra* note 6, at 157-58.

54. *Id.*; see *supra* notes 27-28.

55. See Iowa Code Ann. § 537.5110 (West 1987 & Supp. 1990).

56. See *SafraBank* Brief at 7; see Iowa Code Ann. § 535:2(2)(a)(5) (West 1987).

57. *SafraBank* Brief at 18.

SafraBank accepted in full satisfaction of any debt owing on the transactions in default.<sup>58</sup>

As to the Iowa Attorney General's allegation that SafraBank was making precomputed consumer loans and imposing a delinquency charge in excess of that permitted by the ICCC, SafraBank said that it applied a variable rate of interest and therefore could not precompute finance charges. Thus, SafraBank asserted that because the ICCC's limitation on delinquency charges applies only to precomputed consumer credit transactions, it was not in violation of the ICCC.<sup>59</sup> SafraBank further argued that the ICCC renders attorneys' fees provisions merely unenforceable, and contractual choice of law provisions merely invalid, and thus SafraBank's attorneys' fees and California contractual choice of law provisions did not constitute violations of substantive law which would entitle a borrower to any damages.<sup>60</sup> Finally, SafraBank asserted that its variable interest rate notes do not constitute negotiable instruments under the Iowa Uniform Commercial Code because they do not constitute a "promise or order to pay a sum certain" within the meaning of the statute and thus a notice required by the ICCC need not be given for its contracts.<sup>61</sup> SafraBank also disputed any assertion that it had violated the Iowa Consumer Fraud Act<sup>62</sup> because it was not involved in the alleged representations made by Morgan Whitney.<sup>63</sup>

### ***Brief of Iowa Attorney General***

In its brief,<sup>64</sup> the Iowa Attorney General argued that the presence of disputed facts and unanswered discovery make summary judgment inappropriate.<sup>65</sup> Moreover, as a matter of substantive law, summary judgment, if given, would be appropriate for Iowa, not SafraBank.<sup>66</sup> The Iowa Attorney General asserted that the ICCC is a constitutional exercise of Iowa's police powers, contending that (i) SafraBank unconditionally waived any right to contest the court's personal jurisdiction; (ii) SafraBank lacked standing to dispute the ICCC's jurisdictional provisions on their face, noting that decisions of the Iowa Supreme Court<sup>67</sup> and Eighth Circuit<sup>68</sup> have upheld the territorial provisions of the ICCC

58. *Id.* at 16-17.

59. *Id.*

60. *Id.* at 19.

61. *Id.*

62. Iowa Code Ann. § 714 (West 1987 & Supp. 1990).

63. *SafraBank* Brief at 20-27.

64. Plaintiff's Memorandum in Support of its Resistance to SafraBank's Motion For Summary Judgment, filed July 11, 1990, Iowa *ex rel.* Miller v. Morgan Whitney Trading Group, No. 13167 (Dist. Ct. Linn County, Iowa filed Aug. 14, 1989, amended complaint filed Jan. 22, 1990) ("Iowa AG Brief").

65. Iowa AG Brief at 1-4.

66. *Id.* at 1.

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

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

on due process grounds; and (iii) SafraBank's contacts with Iowa do satisfy minimum contacts analysis under due process requirements.<sup>69</sup>

The Iowa Attorney General stated that SafraBank's assertion that the loans are business loans, and thus subject to the rate exception of Iowa Code section 535.2(2)(a)(5), begs the question of the characterization of the loans and the applicability of the ICCC.<sup>70</sup> The Iowa Attorney General reasserted that the transactions in question constitute "consumer loans" within the contemplation of the ICCC and that, in light of the consumer understanding and consumer protection purposes of the ICCC, any ambiguity should be resolved in favor of finding the ICCC applicable to the transactions.<sup>71</sup> The Iowa Attorney General argued that loans for investment purposes do not necessarily fall outside the scope of "consumer loans."<sup>72</sup> The Iowa Attorney General cited the Board of Governors of the Federal Reserve System's ("Federal Reserve Board") Official Commentary to 12 C.F.R. section 226.3(a) as presenting an appropriate mode of analysis for use under the ICCC because of the ICCC's similarity to, and express incorporation of, provisions of the federal Truth-in-Lending regulation.<sup>73</sup> If investment-related transactions were clearly outside the scope of the ICCC, then the ICCC's express exclusion for "transactions in securities or commodities accounts with a broker-dealer registered with the securities exchange commission"<sup>74</sup> would be unnecessary, according to the Iowa Attorney General.<sup>75</sup> The Iowa Attorney General further argued that the facts of the case support the view that the investors were not sophisticated business or professional investors and that the investments, like certificates of deposit and other common income producing accounts, should be considered consumer, rather than business, transactions.<sup>76</sup>

The Iowa Attorney General asserted that SafraBank violated the ICCC by making loans in excess of permitted rates without an Iowa license because the loans were "made in" Iowa within the contemplation of the ICCC's territorial application provision, which the Iowa Attorney General asserted applied in the absence of a preemptive federal mode of analysis regarding the place of the making of a loan for section 525 purposes.<sup>77</sup> The Iowa Attorney General contended that an interpretation that Iowa's opt-out under section 525 only applies to loans made by Iowa-chartered institutions to Iowa residents is unsupported by case law, statutes or regulations, defeats the congressional purpose behind section 525 of permitting states to maintain the opt-out state's usury protections, and violates the fundamental public policy of Iowa of

69. Iowa AG Brief at 5.

70. *Id.* at 33.

71. *Id.* at 11-12.

72. *Id.* at 11-19.

73. *Id.* at 12-14.

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

75. Iowa AG Brief at 14-15.

76. *Id.* at 16-18.

77. *Id.* at 19-21, 24.

protecting consumers in consumer credit transactions.<sup>78</sup> The Iowa Attorney General reasoned that section 525 identified three possible locations where a loan may be made: where the bank is located, where the customer resides, or both states if there are significant contacts with both states.<sup>79</sup> The Iowa Attorney General asserted that section 525 makes sense only if applied to all loans made to citizens of an opt-out state.<sup>80</sup> To the extent the congressional intent in enacting section 525 may be uncertain, the Iowa Attorney General asserted that the ambiguity must be construed against the preemption of state law.<sup>81</sup> Even if Iowa law is preempted by section 521 notwithstanding Iowa's opt-out, the Iowa Attorney General claimed that the noninterest terms of SafraBank's loans remain subject to, and violate the provisions of, the ICCC.<sup>82</sup>

The Iowa Attorney General asserted that the voluntary surrender of collateral that may obviate the notice of default required by the ICCC may occur only after default and that there was nothing voluntary in the arrangements in question since the loans were not even finalized until after SafraBank obtained possession.<sup>83</sup> Further, the Iowa Attorney General asserted that any waiver by the customers of statutory rights under the ICCC was invalid.<sup>84</sup> On the question of delinquency charges, the Iowa Attorney General asserted that SafraBank either (i) imposes a charge in excess of that permitted by precomputed loans, if the loans are deemed precomputed under the terms of the ICCC,<sup>85</sup> or (ii) imposes an unauthorized charge in violation of Iowa Code section 537.2501 because delinquency charges are not permitted for non-precomputed loans.<sup>86</sup> The Iowa Attorney General asserted that attorneys' fees provisions are not merely unenforceable but separately actionable for damages and that choice of law provisions similarly are not merely invalid but separately actionable under the ICCC and the Iowa Consumer Fraud Act.<sup>87</sup> Finally, the Iowa Attorney General detailed reasons why SafraBank's benefit from the activities of Morgan Whitney should subject SafraBank to charges of unfair practices under the Iowa Consumer Fraud Act, asserting further that disclaimers in the contract documents do not shield SafraBank.<sup>88</sup>

As of the date this article was prepared, no hearing had been set on SafraBank's refiled motion for summary judgment.

78. *Id.* at 24-27.

79. *Id.* at 25.

80. *Id.* at 26.

81. *Id.* at 28-29 (noting that the principles of federalism require courts to defer to state regulation of areas within the police power of the states absent a clear statement of congressional intent to preempt such laws).

82. *Id.* at 29.

83. *Id.* at 29-31.

84. *Id.* at 32; see Iowa Code Ann. § 537.1107(1) (West 1987).

85. See Iowa Code Ann. § 537.1301(33) (West 1987 & Supp. 1990).

86. Iowa AG Brief at 33-35.

87. *Id.* at 36-37 (citing Iowa Code § 714.16(2)(a) (1989) of the Consumer Fraud Act).

88. Iowa AG Brief at 37-49.

## THE GREENWOOD TRUST LITIGATION

In a letter dated October 27, 1989,<sup>89</sup> the Massachusetts Attorney General charged that Greenwood Trust Company's ("Greenwood Trust") practice of charging Massachusetts consumers late fees on its Discover financial services card accounts constituted an unfair and deceptive act or practice in violation of the Massachusetts Consumer Protection Act, and regulations promulgated thereunder,<sup>90</sup> and of Mass. Gen. Laws chapter 140, section 114B.<sup>91</sup> According to the letter, settlement of the matter would require the entry of an appropriate judgment and the payment to Massachusetts of civil penalties and consumer restitution and the costs of the Massachusetts Attorney General's investigation and litigation of the matter, including reasonable attorneys' fees. On November 14, 1989, after meeting with the Massachusetts Attorney General, Greenwood Trust filed suit against the Massachusetts Attorney General.<sup>92</sup>

In its suit, Greenwood Trust is seeking a declaratory judgment that (i) the imposition of late payment charges as set forth in its cardmember agreement is authorized by federal law and the law of Delaware; (ii) Massachusetts law is preempted under the supremacy clause<sup>93</sup> to the extent that Massachusetts law conflicts with federal law and the law of Delaware; (iii) the enforcement by Massachusetts of its proposed prohibition of Greenwood Trust's late payment charge would contravene the Commerce Clause;<sup>94</sup> and (iv) Greenwood Trust's

89. Letter from Ernest V. Sarason, Jr., Assistant Attorney Gen., to Greenwood Trust Co. (Oct. 27, 1989) (unpublished).

90. Section 2 of chapter 93A declares unfair methods of competition and deceptive acts or practices in the conduct of any trade or commerce to be unlawful. Mass. Ann. Laws ch. 93A, § 2 (Law. Co-op. 1985). The Attorney General's regulations promulgated under chapter 93A provide:

Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of M.G.L. c. 93A, § 2 if:

\* \* \*

(3) It fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection. . . .

Mass. Regs. Code tit. 940, § 3.16 (1986).

91. Section 114B ("section 114B") of chapter 140 provides that "[n]o creditor shall impose a delinquency charge, late charge, or similar charge on loans made pursuant to such an open-end credit plan." Mass. Ann. Laws ch. 140, § 114B (Law. Co-op. 1985 & Supp. 1990). The term "open-end credit plan" means "a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance." *Id.* ch. 140D, § 1. The definition of open-end credit plan is expressly incorporated into section 114B by reference from the Massachusetts Truth-in-Lending Act ("Massachusetts TILA"). The term "creditor" is not defined in section 114B. *Id.* ch. 114B. In briefed arguments, the Massachusetts Attorney General used the definition of creditor found in the Massachusetts TILA. Greenwood Trust contends that the Massachusetts Attorney General's reliance on the definition in the Massachusetts TILA is inappropriate.

92. Greenwood Trust Co. v. Massachusetts, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

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

94. U.S. Const. art. I, § 8, cl. 3.

conduct in contracting for and collecting the late payment charge pursuant to the cardmember agreement does not constitute an unfair or deceptive practice under Massachusetts law.<sup>95</sup>

Greenwood Trust asserts that as a federally insured bank, it is authorized by federal law to charge interest at the rate allowed by the laws of the state where it is located (i.e., Delaware) pursuant to section 521 of the DIDMCA. Greenwood Trust further asserts that because Delaware law allows interest to be charged at any rate agreed to by the borrower<sup>96</sup> and expressly allows a late payment charge of any amount to be imposed "as interest,"<sup>97</sup> Greenwood Trust's late payment charge is expressly authorized by federal law. Thus, the supremacy clause preempts Massachusetts' laws and threatened actions. Greenwood Trust also contends that Massachusetts' laws and actions are implicitly preempted by federal law because they frustrate the purposes of federal banking laws to the extent that those laws grant Greenwood Trust the right to contract for and receive the late payment charge. Greenwood Trust claims that Massachusetts' efforts to invalidate the late payment charge with respect to Massachusetts residents would, if successful, effectively and substantially restrain interstate commerce involving credit transactions in contravention of the commerce clause without satisfying any compelling state interest. Finally, Greenwood Trust asserts that, regardless of the scope of federal preemption, Delaware law should in any event govern the propriety and extent of the late payment charge provided for in Greenwood Trust's cardholder agreement under applicable choice of law principles. In conclusion, Greenwood Trust asserted that because it is in full compliance of the laws of Delaware and federal banking law with respect to the late payment charge it imposes under the cardmember agreements, its activities in contracting for and collecting the late payment charge should be declared not to violate section 114B or otherwise constitute unfair or deceptive trade practices within the meaning of the Consumer Protection Act.

In its Answer and Counterclaim of December 11, 1989, the Massachusetts Attorney General asserted that all transactions between Greenwood Trust and residents of Massachusetts are entered into in Massachusetts and reiterated the charges set forth in the October 27, 1989 letter to Greenwood Trust.<sup>98</sup>

Cross-motions for summary judgment and briefs in support of those motions were filed by both parties on September 7, 1990.<sup>99</sup> Briefs by each party in

95. Greenwood Trust also requested an order enjoining the Massachusetts Attorney General from seeking to enforce the challenged provisions of Massachusetts law. Greenwood Trust's request was withdrawn following a December 5, 1989, letter in which the Massachusetts Attorney General's office agreed not to seek such an action until after a decision by the federal district court on the parties' cross motions for summary judgment.

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

97. Del. Code Ann. tit. 5, § 950 (1985 & Supp. 1990).

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

99. In addition, *amicus curiae* briefs have been filed in support of Greenwood Trust's Motion for Summary Judgment by (i) MasterCard International, Inc. and Visa U.S.A., Inc., (ii) the

opposition to the other party's motion were filed October 1, 1990, and briefs in reply and further support of the motions were filed October 12, 1990.

### ***Brief of Greenwood Trust***

In its brief,<sup>100</sup> Greenwood Trust reasserted its position that because a late or delinquent charge is permissible under the law of Delaware "as interest"<sup>101</sup> and section 521 of the DIDMCA permits federally insured state-chartered banks to export interest in the same manner as national banking associations are permitted to export interest under section 85 of the NBA ("section 85"),<sup>102</sup> Greenwood Trust's late payment charge is permissible, notwithstanding any Massachusetts law to the contrary. Greenwood Trust cited extensively decisions and regulatory interpretations construing section 85 in support of its interpretation of section 521. Greenwood Trust detailed (i) the similarity in language between section 521 and section 85; (ii) the incorporation of the usury laws of the state where the bank is located under federal law; and (iii) its position that "rate" is not limited to a mere numerical rate of interest but includes all of those statutory provisions relating to any charge, fee or expense involving loans. Greenwood Trust argued that the antidiscriminatory purpose of the most favored lender doctrine demonstrates conclusively that the right of insured institutions and national banks to charge interest at the rate allowed by the laws of the state where such institution is located includes, in addition to a numerical rate, all fees, charges, and expenses allowed by that state's laws.<sup>103</sup> Further, Greenwood Trust's cardmember agreements contain contractual choice of law provisions stipulating that Delaware law, not Massachusetts law, governs. Applicable choice of law principles, including Sections 187 and 195 of the Restatement (Second) of Conflict of Laws ("Restatement"),<sup>104</sup> which have been adopted by Massachusetts' courts, support the application of Delaware law to the cardholder agreements, Greenwood Trust argued.<sup>105</sup>

American Financial Services Association, (iii) the Delaware State Bank Commissioner and Delaware Bankers Association, and (iv) the Consumer Bankers Association. *See infra* text at pages 1241-42. *Amicus curiae* briefs have been filed in support of the Massachusetts Attorney General's Motion for Summary Judgment by (i) the States of Iowa, Maine, Minnesota, South Carolina, and Wisconsin and the National Association of Consumer Credit Administrators and (ii) the American Conference of Uniform Consumer Credit Code States. *See infra* text at pages 1242-44.

100. Memorandum of Law in Support of Greenwood Trust Company's Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989). ("Greenwood Trust Brief").

101. *See* Del. Code Ann. tit. 5, § 950 (1985 & Supp. 1990).

102. 12 U.S.C.A. § 85 (West 1989).

103. *Greenwood Trust Brief* at 10-13.

104. Restatement (Second) of Conflict of Laws ("Restatement"), §§ 187, 195 (1971).

105. *Greenwood Trust Brief* at 17-20.

### ***Brief of Massachusetts Attorney General***

In its brief,<sup>106</sup> the Massachusetts Attorney General characterized the *Greenwood Trust* case as “a clash between state consumer protection interests and private banking interests trying to gain federal law protection where none, in fact, exists.”<sup>107</sup> The Massachusetts Attorney General asserted that federal preemption is limited to “interest rates” and not state law restrictions on “non-interest charges and fees.”<sup>108</sup> The Massachusetts Attorney General charged that Greenwood Trust’s late charges violate Massachusetts law, which applies on its face to out-of-state companies that issue credit cards to Massachusetts consumers.<sup>109</sup>

As to Greenwood Trust’s principal claim of federal preemption, the Massachusetts Attorney General asserted that Greenwood Trust bears a substantial burden in attempting to demonstrate that Congress intentionally disturbed the federal-state balance with regard to the traditional police powers of the states regarding consumer credit and that Greenwood Trust cannot meet this burden.<sup>110</sup> The Massachusetts Attorney General disputed Greenwood Trust’s position that section 521 should be treated in the same manner as Section 85. The Massachusetts Attorney General outlined “critical differences” between the NBA and DIDMCA. The Massachusetts Attorney General asserted that the DIDMCA was enacted with a congressional intent to intrude only narrowly, as evidenced by the opt-out provisions of section 525, and noted that the DIDMCA fails to address specifically the principle of exportation even though the DIDMCA was enacted after *Marquette National Bank v. First of Omaha Service Corp.*<sup>111</sup> The Massachusetts Attorney General argued that these facts stand in contrast to the congressional intent of creating a national banking system under the NBA.<sup>112</sup>

The Massachusetts Attorney General expanded on the argument raised in the *Citibank* litigation that the term “interest rate” is used with precision in the DIDMCA as a reference to a numeric multiplier that is exclusive of late charges rather than as a generic reference to interest in the general sense of compensation for the use of money or damages for its detention. The Massachusetts Attorney General noted that as an alternative to the rate of interest permitted by the law of the state of the institution’s location, Congress provided

106. Memorandum of the Commonwealth of Massachusetts in Support of its Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989). (“Mass. AG Brief”).

107. *Id.* at 2.

108. *Id.* at 4.

109. *Id.* at 5 and n.8 (citing Restatement, *supra*, note 104, § 6(n)).

110. Mass. AG Brief at 5–6.

111. 439 U.S. 299 (1978) (construing 12 U.S.C.A. § 85 (West 1989) to provide that a national bank may charge interest at the rate allowed by the state of its location regardless of the state of the borrower’s residence).

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

for a rate of 1% over the discount rate on specified commercial paper.<sup>113</sup> The Massachusetts Attorney General argued that the pure rate (i.e., numeric) character of the alternative rate reinforces the conclusion that Congress intended to allow the exportation of state interest rate ceilings only.<sup>114</sup> The Massachusetts Attorney General also compared the terms of section 521 to section 501 ("section 501") of the DIDMCA<sup>115</sup> and cited congressional reports related to section 501 as further evidence of congressional intent.<sup>116</sup> In the Massachusetts Attorney General's view, the DIDMCA should be construed narrowly and interpreted only within the specific context of the economic circumstances that precipitated its enactment.

The Massachusetts Attorney General raised arguments that federal terminology found in other federal authorities, such as the federal Truth-in-Lending Act,<sup>117</sup> support the proposition that Congress' reference to interest in the DIDMCA does not include late charges. As the definition of "interest" is a federal question, the Massachusetts Attorney General argued, allowing states to determine whether late charges are or are not interest would conflict with congressional intent evidenced by the committee report discussing section 501.<sup>118</sup> The Massachusetts Attorney General further asserted that the purposes of late charges—to deter default and to reimburse lenders for the added, unintended costs of late payment—take late charges outside the concept of interest as compensation.<sup>119</sup> The Massachusetts Attorney General said that Massachusetts law prohibits late payment charges because a credit card lender is permitted to continue to charge and accrue interest on all delinquent accounts. Implicit in this argument is the position that additional interest at the original contract rate adequately compensates the lender. In support of the position that late charges should not be considered interest, the Massachusetts Attorney General detailed

113. See section 521, *supra* note 32; cf. 12 U.S.C.A. § 85 (West 1989) (also contains alternative 1% rate).

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

115. Section 501 of the DIDMCA states in relevant part: "the provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply. . . ." Pub. L. 96-221, § 501(a)(1), 94 Stat. 161 (Mar. 31, 1980) (codified at 12 U.S.C.A. § 1735f-7a(a)(1) (West 1989)).

116. The Senate committee report on the House Bill that became the DIDMCA states that the purpose of the passage of section 501 was to ease the severity of mortgage crunches that were prevalent at the time of the bill's consideration through the "limited" preemption of mortgage ceilings. S. Rep. No. 368, 96th Cong., 2d Sess. 18-19, *reprinted in* 1980 U.S. Code Cong. & Admin. News, 236, 254-55. The report further states that "[i]n exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers." *Id.*

117. 15 U.S.C.A. §§ 1601-16 (West 1982).

118. See *supra* note 116.

119. See, e.g., 12 U.S.C.A. § 86a(b)(2) (Supp. VI 1988) (interest defined as "any compensation, however denominated, for a loan").

Greenwood Trust statements and practices indicating the penal purpose of the late charges imposed by Greenwood Trust.

The Massachusetts Attorney General also challenged the argument that late charges are material to the determination of the interest rate within the meaning of the interpretive ruling by the OCC relating to the most favored lender doctrine.<sup>120</sup> The Massachusetts Attorney General argued that the language and legislative history of the DIDMCA leave no room for a "materiality" argument and that the "materiality" concept only makes sense in the context of the classification of loans for purposes of the most favored lender doctrine. An approach that permits states the power to determine the scope of federal preemption in the area of consumer credit regulation by means of defining "interest" and "material" to include every conceivable state law provision regulating consumer credit is "patently" inconsistent with the limited preemptive approach of the DIDMCA, the Massachusetts Attorney General argued.<sup>121</sup>

Finally, the Massachusetts Attorney General disputed Greenwood Trust's allegation that Massachusetts law violates the commerce clause, asserting that the local benefits of the Massachusetts statutes outweigh any burden on interstate commerce or Greenwood Trust.

### ***Briefs in Support of Greenwood Trust***

Each amicus curiae brief filed in support of Greenwood Trust provided a different perspective on the issues in the *Greenwood Trust* litigation. The brief of MasterCard International Inc. and Visa USA, Inc. advocated parity between federally insured, state-chartered banks and national banks.<sup>122</sup> The brief also discussed the economic effects, including the potential avoidance by creditors of problematic states and consequent restriction of credit availability to consumers, in particular less affluent consumers, that would likely occur if the Massachusetts Attorney General's position is accepted.

The brief of the American Financial Services Association also advocated the view that parity between federally insured, state-chartered banks and national banks is fundamental to the DIDMCA and discussed portions of the DIDMCA and its legislative history which would support a broader reading of the DIDMCA than advocated by the Massachusetts Attorney General.<sup>123</sup>

120. 12 C.F.R. § 7.7310 (1990). For a general discussion of the most favored lender doctrine, see Langer & Wood, *supra* note 6.

121. Mass. AG Brief at 17.

122. Brief of Mastercard International, Inc. and Visa U.S.A., Inc. in Support of Greenwood Trust Company's Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

123. *Amicus Curiae* Brief in Support of Greenwood Trust Company's Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

The brief of the Delaware State Bank Commissioner and Delaware Bankers Association ("Delaware Bankers") attacked the Massachusetts Attorney General's "artificial" distinction between interest and late charges.<sup>124</sup> The Delaware Bankers also discussed the reasons why state definitions of "interest," incorporated into federal usury preemption law by reference, should control in the area of federal exportation authority and usury preemption. Notwithstanding that federal preemption should conclusively determine the question before the court, the Delaware Bankers detailed the reasons why Delaware law should apply to Greenwood Trust's credit card agreements under applicable choice of law principles. The Delaware Bankers specifically noted that an override of the contractual Delaware choice of law provision contained in Greenwood Trust's credit card agreements by Massachusetts law would be appropriate under the principles of the Restatement only if Massachusetts has a "materially greater interest" than Delaware, a circumstance not existing in this case.<sup>125</sup> Moreover, in the absence of a contractual choice of law provision, the general principle of the Restatement is that "[t]he validity of a contract for the repayment of money lent and the rights created thereby are determined . . . by the local law of the state where the contract requires that repayment be made. . . ."<sup>126</sup> Thus, Delaware, not Massachusetts, law is relevant to the late charges issue.

The brief filed by the Consumer Bankers Association provided a historical perspective on national banking policy from the early days of the republic to the present, supporting the view that, in the broader context of federal national banking policy and history, the broad interpretation of the DIDMCA advocated by Greenwood Trust and the amici is appropriate.<sup>127</sup>

### ***Briefs in Support of the Massachusetts Attorney General***

Briefs in support of the Massachusetts Attorney General were filed by (i) the States of Iowa, Maine, Minnesota, South Carolina, and Wisconsin and the National Association of Consumer Credit Administrators ("States' Brief")<sup>128</sup> and (ii) the American Conference of Uniform Consumer Credit Code States ("ACUCCCS Brief").<sup>129</sup> The States' Brief expounded upon many of the same points made by the Massachusetts Attorney General: (i) the DIDMCA's preemption of state law should be narrowly construed in accordance with a

124. *Amicus Curiae* Brief on Behalf of Delaware State Bank Commissioner and Delaware Bankers Association, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

125. See Restatement, *supra* note 104, § 187(2)(b).

126. See Restatement, *supra* note 104, § 195.

127. Brief for the Consumer Bankers Association *Amicus Curiae*, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

128. Brief of *Amicus Curiae*, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989) ("States' Brief").

129. Brief of the American Conference of Uniform Consumer Credit Code States as *Amicus Curiae* in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989) ("ACUCCCS Brief").

restricted view of congressional intent; and (ii) absent a clear statement of congressional intent to preempt, which cannot be found here, the court should defer to state consumer protection laws in accordance with principles of federalism. The amici in the States' Brief cited, as evidence of the federal government's limited intervention in the area of consumer protection laws, provisions of federal law indicating deference to state law found in the Federal Truth-in-Lending Act,<sup>130</sup> the Fair Credit Reporting Act,<sup>131</sup> the Equal Credit Opportunity Act,<sup>132</sup> and the Fair Debt Collection Practices Act.<sup>133</sup> Finally, the amici noted that it is not difficult, impossible or burdensome for Greenwood Trust to comply with both federal and Massachusetts law and thus Massachusetts law does not impede the purpose of the DIDMCA.

The ACUCCCS Brief focused on the choice of law issues raised by the parties and provided a more detailed analysis of the allegation, also raised in the States' Brief, that the credit card agreements should be analyzed as adhesion contracts. After asserting that the Massachusetts Consumer Credit Code clearly sets forth its applicability to the transactions in question, and does so in a manner that is nondiscriminatory, the American Conference of Uniform Consumer Credit Code States ("ACUCCCS") proffered a "modern" interest analysis of conflicts of law principles, concluding that the Massachusetts laws, enacted as exercises of state police power designed to protect citizens from overcharges and overreaching, should be given precedence over any purported interest Delaware may have or claim in the transactions. Even if the Restatement approach advocated by Greenwood Trust, and accepted by Massachusetts courts, is applied, the ACUCCCS asserted, Massachusetts' interest in protecting its citizens is "more than sufficient" to require the application of Massachusetts law under the fundamental state policy exception of the Restatement.<sup>134</sup> The ACUCCCS relied heavily upon the work of Russell J. Weintraub<sup>135</sup> in advocating the application of a five step "objective determination" analysis to the determination of the choice of law issue.<sup>136</sup> The ACUCCCS' assertion that

130. See 15 U.S.C.A. § 1610(b) (West 1982).

131. See *id.* § 1681t.

132. See *id.* § 1691d(f).

133. See *id.* § 1692n.

134. Restatement, *supra* note 104, § 187(2).

135. See Weintraub, *Beyond Depechage: A "New Rule" Approach to Choice of Law and Consumer Credit Transactions and a Critique of the Territorial Application of Uniform Consumer Credit Code*, 25 Case W. Res. 16 (1974).

136. The steps in this analysis include:

- (A) predictability of results;
- (B) maintenance of the interstate and international order;
- (C) simplification of the judicial task;
- (D) advancement of the forum's governmental interest; and
- (E) application of the better rule of law.

ACUCCCS Brief at 9 (*citing* R. Leflar, *American Conflicts of Law*, § 96, at 195 (3d ed. 1977) and Note, *Effectiveness of Choice of Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 Colum. L. Rev. 1659 (1982)).

the credit card agreements are adhesion contracts appears to be based primarily on the fact that Greenwood Trust uses a standardized, preprinted agreement. The ACUCCCS contended that the credit card agreements are offered to Massachusetts residents on a "take it or leave it" basis. The ACUCCCS did not offer evidence of coercion or the lack of alternatives to support its assertion that the credit card agreements are contracts of adhesion whose choice of law provisions should not be honored, aside from noting that there are "certain dangers" to allowing contractual choice of law provisions to control in adhesion situations.

### ***Subsequent Briefs of the Parties***

#### ***Massachusetts Attorney General's Opposition Brief***

In its brief in opposition to Greenwood Trust's motion for summary judgment, filed October 1, 1990, the Massachusetts Attorney General reiterated the arguments that the express language of sections 521 and 501 and the legislative history to section 501 demonstrate that late charge provisions are not preempted and that, because Congress was concerned with limiting the infringement of state law as much as expanding tight credit markets, federal preemption was limited to interest rates to allow states interested in protecting consumers to do so within their own borders.<sup>137</sup> The Massachusetts Attorney General asserted that pre-*Marquette* decisions do not support the exportation of broad interpretations of "interest rate" and argued that there is no logical limit to the argument for broad preemption. The Massachusetts Attorney General asserted that the appropriate place to draw the line is at "interest rates" because everything from state disclosure requirements to limitations on collection practices to fees for filing collection cases affects lenders' economic returns and because it cannot seriously be argued that the DIDMCA or NBA preempts these state law requirements.

The Massachusetts Attorney General reasserted that the logical and legal differences between late payment charges and interest should not be ignored. Finally, the Massachusetts Attorney General contended that choice of law principles require the court to apply Massachusetts law because (i) section 114B applies on its face to creditors without distinction; (ii) the jurisdictional reach of the Consumer Protection Act indicates that the Massachusetts legislature intended to extend section 114B as far as permitted under the Consumer Protection Act, that is, to acts in trade or commerce directly or indirectly affecting the people of Massachusetts,<sup>138</sup> and (iii) other choice of law principles applicable to contracts of adhesion and respecting the fundamental public policy

137. Memorandum of the Commonwealth of Massachusetts in Opposition to Greenwood Trust Company's Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

138. See Mass. Ann. Laws ch. 93A, § 1(b) (Law. Co-op. 1985 & Supp. 1990).

exception under the Restatement<sup>139</sup> operate to make Massachusetts law applicable because of the nature of the credit card agreements and Massachusetts' policies and relationship to the transaction.

### *Greenwood Trust's Opposition Brief*

In its brief in opposition to the Massachusetts Attorney General's motion, filed October 1, 1990, Greenwood Trust countered that the "clash" in this case is between an expressly preemptive federal statute and a state statute that, as interpreted by the Massachusetts Attorney General, conflicts with the federal statute and is therefore preempted.<sup>140</sup> Greenwood Trust asserted that the only disputed issue is the proper construction of section 521: whether the alternative federal rate, which incorporates the laws of the state where the bank is located, includes all of that state's laws relating to charges, fees or expenses arising out of or in connection with the lending of money or only numeric periodic interest rates. Greenwood Trust reasserted that in enacting section 521, Congress granted federally insured banks competitive "rate" equality with banks, specifically establishing the scope of federal preemption without legislating what fees, charges, and expenses could be charged, other than by requiring that, as in the case of national banks, they be in accordance with the rate allowed by the laws of the state where the bank is located. Greenwood Trust noted the similarities between Massachusetts and Delaware law, arguing that, with the exception of the late charge in question, the kinds of fees permitted by the two states are the same. Greenwood Trust argued that this case therefore does not present the specter of nationwide deregulation or the attack on consumer protection suggested by the Massachusetts Attorney General.

Greenwood Trust asserted that the Federal Truth-in-Lending Act, a disclosure statute, has no relevance, but, if deemed relevant, would nonetheless support Greenwood Trust's position because the distinction between broadly defined finance charges and late charges is a classification adopted by the FRB, not a distinction imposed by Congress. Greenwood Trust also asserted that section 501 is inapposite because (i) section 501 and the Senate Report cited by the Massachusetts Attorney General preceded the addition of the rate parity provisions of the DIDMCA, and (ii) in enacting section 521 Congress tracked the language of section 85 substantially verbatim such that section 85, not section 501, is the appropriate reference for authority on the interpretation of section 521. Greenwood Trust reasserted that decisional and administrative interpretations under section 85 support its positions.

Greenwood Trust disputed the Massachusetts Attorney General's assertions (i) that section 114B "plainly" applies, arguing that section 114B, unlike

139. Restatement, *supra* note 104, § 187(2)(b).

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

several other Massachusetts consumer credit statutes, has no explicit extraterritorial application language, and (ii) that applicable choice of law principles applied to the present facts support the application of Massachusetts law, arguing, inter alia, that the existence of late payment charge authority in other Massachusetts statutes supports the view that the prohibition of late charges is not a fundamental policy of Massachusetts.

### *Massachusetts Attorney General's Reply Brief*

In its reply brief, filed October 12, 1990, the Massachusetts Attorney General countered Greenwood Trust's claims that (i) the Federal Truth-in-Lending Act is inapplicable, stating that "interest" is narrowly and precisely defined within the Federal Truth-in-Lending Act as a component of finance charges and that in that context "interest" cannot reasonably be read to include late payment charges, and (ii) Massachusetts' fundamental policy with respect to late payment charges is indeed evidenced by other consumer credit statutes because late payment charges are consistently permitted only where lenders are not permitted additional finance charges or interest.<sup>141</sup>

### *Greenwood Trust's Reply Brief*

In its reply brief filed October 12, 1990, Greenwood Trust corrected "multiple errors" of fact and law set out in its opponent's briefs and focused the argument on the essential question of the interpretation of section 521.<sup>142</sup> Greenwood Trust asserted that the Massachusetts Attorney General is attempting to rewrite section 521 by ignoring existing interpretations. Greenwood Trust further detailed its arguments and provided additional context to certain quotations made by the Massachusetts Attorney General. Greenwood Trust countered the Massachusetts Attorney General's assertion that the credit card agreements were contracts of adhesion by noting that (i) Comment b to section 187 of the Restatement states that choice of law provisions usually are respected even in situations of "take it or leave it" contracts, absent some improper circumstances such as misrepresentation, duress, undue influence or mistake, none of which had been alleged or shown in this case, and (ii) Massachusetts case law does not deny the enforceability of standardized contracts unless unconscionable or in some way fundamentally unfair.

As of the date this article was written, no decision has been handed down by the district court.

141. Reply Brief of Defendants, Greenwood Trust Co. v. Massachusetts, No. 89-2583-y (D. Mass. filed Nov. 14, 1989).

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

**OCC LETTER**

In a letter dated September 5, 1989,<sup>143</sup> William B. Glidden, Assistant Director of the OCC's Legal Advisory Services Division, rendered an opinion regarding whether a Wisconsin law, requiring notice to Wisconsin regulators and the payment of fees by persons offering consumer credit in Wisconsin at rates above a legally specified interest rate, can be enforced against a national bank located in California that establishes credit card-accessed accounts for Wisconsin residents as well as residents of other states. The bank charged interest at a rate in excess of 12% on outstanding balances and collected delinquent balances from Wisconsin residents. The Wisconsin Commissioner of Banking ("Commissioner") stated that the bank had not complied with the provisions of the Wisconsin Consumer Act<sup>144</sup> requiring a person who makes, solicits, collects or enforces loans at an annual interest rate above 12% to file notice providing information about its consumer credit activities in Wisconsin within 30 days of commencing business and to pay an annual fee based on the total volume of consumer credit outstanding to Wisconsin residents.<sup>145</sup>

After noting that the bank's credit card activities in Wisconsin are authorized under several provisions of the NBA, Glidden noted that state laws that hinder the authorized powers of national banks may be preempted under the authority of the supremacy clause as unlawful state regulation of "federal instrumentalities" or as intruding into an area governed by a pervasive federal scheme which leaves "no room for the States to supplement it."<sup>146</sup> As Glidden stated the general rule governing preemption under the NBA, state law applies to national banks unless that law conflicts with federal law, unduly burdens the operations of national banks or interferes with the objectives of the national banking system.<sup>147</sup> Glidden noted instances in which the preemption doctrine has been applied to states' attempts to license or condition the authorized lending powers of national banks.<sup>148</sup> Glidden opined, however, that federal preemption of state law is not limited to licensing statutes, "but extends to any significant regulatory condition placed upon the exercise of a national bank's powers by state law."<sup>149</sup> Glidden concluded that in light of the preemption doctrine and OCC precedent,

143. Glidden Letter, *supra* note 4.

144. Wis. Stat. Ann. §§ 421-27 (West 1988 & Supp. 1990).

145. *Id.* §§ 426.201-202; *see also id.* § 138.05(1) (West 1988) (12% rate incorporated by reference into the Consumer Act).

146. Glidden Letter, *supra* note 4, at 2 (citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

147. Glidden Letter, *supra* note 4, at 2 (citing *Davis*, 161 U.S. at 283; *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378-79 (1954); *Easton v. Iowa*, 188 U.S. 220, 238 (1903); and *National State Bank v. Long*, 630 F.2d 981, 985-86 (3d Cir. 1980)).

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

149. Glidden Letter, *supra* note 4, at 3 (citing OCC Interpretive Letter from John E. Shockey, Chief Counsel (July 19, 1977) (unpublished)).

the Consumer Act cannot be enforced against the bank because its notice and fee requirements conflict with the bank's power to carry on credit card activities under federal law.<sup>150</sup> Glidden stated that "[t]he power of a state law to prohibit or condition the exercise of federally authorized power is a clear conflict with the federal statute granting that power."<sup>151</sup> Glidden reasoned that the Wisconsin statute, although technically an ex post notice requirement, is in effect a regulatory condition imposed by Wisconsin on national banks seeking to loan money under 12 U.S.C. section 24 (Seventh) and 12 U.S.C. section 85.<sup>152</sup>

Glidden further concluded that the Consumer Act's requirements were also preempted "because they undermine the underlying objective of the National Bank Act—to create a uniformly regulated banking system in the United States. . . . Quite simply, there is no room for state regulation of the kind imposed by the Consumer Act in the presence of a comprehensive regulatory scheme like the National Bank Act."<sup>153</sup>

Glidden noted that the NBA does specifically defer to state law restrictions in some instances, as in the area of branching or fiduciary powers, and, without specific statutory grant, as to generic questions of contract, property, and tort law. Glidden stated that the only state usury law entitled to deference under the NBA is the law of the state of the national bank's charter. Glidden characterized the Consumer Act as a regulatory scheme, not a usury law entitled to deference under the NBA, and stated that the NBA does not defer to state regulatory schemes in the area of national bank lending.

Glidden also opined that the Consumer Act's fee cannot be properly assessed against national banks under 12 U.S.C. section 548, distinguishing between permissible taxes and preempted regulatory fees. After reviewing the purposes of the Consumer Act, noting that the fee is structured more in the way of a regulatory fee than a revenue-raising device, and considering the use of the proceeds of the Consumer Act fee, Glidden concluded that the fee was evidently regulatory in nature.

Finally, Glidden opined that the notice portion of the Consumer Act appears to be separately preempted by 12 U.S.C. section 484, which vests exclusive power of visitation over national banks in the OCC.<sup>154</sup>

The Glidden letter is noteworthy in the breadth of its statements of the scope of federal preemption.<sup>155</sup>

150. Glidden Letter, *supra* note 4, at 3 (citing 12 U.S.C. §§ 24 (Seventh), 24 (Third), 24 (Fourth), 85).

151. Glidden Letter, *supra* note 4, at 3.

152. *Id.*

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

154. *See, e.g.*, OCC Letter from Thomas G. DeShazo, Deputy Comptroller of Currency (Dec. 27, 1973) (unpublished); Boylan Letter, *supra* note 148; 12 C.F.R. § 7.6025(b) (1990).

155. *See also State Laws Restricting National Banks Will Be Pre-Empted*, OCC Counsel Says, 55 Banking Rep. (BNA) 136 (July 23, 1990) (July 16, 1990 remarks of P. Alan Schott, Chief Counsel, OCC); *First Nat'l Bank v. Taylor*, 907 F.2d 775 (8th Cir. 1990) (upholding preemption

## **AT&T UNIVERSAL CARD AND VISA AFFINITY CARD RULES CHANGES**

Perhaps the most dramatic development in interstate lending has been the successful introduction of the AT&T Universal Card issued by Universal Bank and marketed by AT&T and the reaction by members of the bankcard industry to that success. Bankcard industry members have sought regulatory proceedings before the Federal Reserve Board, the Federal Deposit Insurance Corporation ("FDIC"), the Georgia Department of Banking and Finance, and the Federal Communications Commission ("FCC").<sup>156</sup> On October 9, 1990, Visa U.S.A., Inc. ("Visa") announced changes in its affinity card regulations.<sup>157</sup> MasterCard International, Inc. has indicated that it may consider similar rules.<sup>158</sup> While the Visa rules have only prospective effect on affinity card programs started after October 8, 1990, and thus they do not immediately have an impact on the AT&T program, Visa has stated that it may consider applying the rules retroactively.<sup>159</sup>

Under the AT&T Universal Card program, credit cards are issued by the Universal Bank of Columbus, Georgia, bearing the AT&T logo and Universal Bank name. The AT&T Universal Card is the primary product of the Universal Bank, a subsidiary of the Synovus Financial Corporation ("Synovus"). AT&T has dedicated significant resources to marketing and back-office processing supporting the card. In addition, AT&T makes daily purchases of credit card receivables from Universal Bank.

### **INDUSTRY REACTION TO AT&T UNIVERSAL CARD**

Based on information available to the public, the members of the banking industry who have approached federal and state regulators concerning the AT&T Universal Card have expressed concerns about the arrangements of attempted state insurance law regulation of national bank's debt cancellation contracts under incidental powers authority of National Bank Act).

156. See, e.g., Petition of The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. Before the Board of Governors of the Federal Reserve System to Initiate Cease and Desist Proceedings Against Synovus Financial Corporation and American Telephone & Telegraph Company (May 14, 1990); Letter from Christopher R. Lipsitt, Counsel for The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A., to L. William Seidman, Chairman, FDIC (May 14, 1990) (unpublished); Letter from John L. Douglas, Counsel for The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. to E. D. "Jack" Dunn, Commissioner, Georgia Department of Banking and Finance (May 14, 1990) (unpublished); and BankAmerica Corporation, The Chase Manhattan Corporation, Citibank, and MBNA America Bank, N.A. v. American Telephone & Telegraph Co., AT&T Universal Card Services Corp., and Universal Bank (FCC, May 14, 1990).

157. Press Release of Visa U.S.A., Inc., Oct. 9, 1990; see also Quint, *Visa in Credit Card Rule Change That May Affect A.T. & T.*, N.Y. Times, Oct. 10, 1990, at C2, col. 1; Chase, *Visa Acts to Limit Nonfinancial Firms' Issuance of Cards*, Wall St. J., Oct. 11, 1990, at C11, col. 5; text of revised regulations.

158. Roosevelt, *Visa's Restrictive Rules To Get 14 States' Scrutiny*, Am. Banker, Oct. 11, 1990, at 1, col. 4.

159. *Id.*

among AT&T, Universal Bank, and Synovus,<sup>160</sup> among the concerns noted were the following:

- (i) that Universal Bank may be making commercial loans and selling telecommunications common carrier services, activities not permitted to credit card banks under the Bank Holding Company Act of 1956 ("BHCA"), as amended,<sup>161</sup> and thus that Synovus' control of Universal Bank may violate the BHCA;
- (ii) that AT&T may impermissibly "control" Universal Bank;
- (iii) that discounts on AT&T telephone services offered in connection with the AT&T Universal Card may violate the anti-tying provisions of the BHCA Amendments of 1970;<sup>162</sup>
- (iv) that Universal Bank's transactions with AT&T may be subject to and may violate provisions of sections 23A and 23B of the Federal Reserve Act;<sup>163</sup>
- (v) that Universal Bank's activities may constitute unsafe and unsound operations in violation of federal deposit insurance and state banking laws;
- (vi) that AT&T's discount rate for customers of the AT&T Universal Card may violate AT&T's obligations under federal law as a dominant common carrier to offer the same rates to all customers for like telecommunications services; and
- (vii) that AT&T has failed to file appropriate tariffs for the discount offered to, and the finance charges and late fees imposed on, users of the AT&T Universal Card.

### *AT&T AND SYNOVUS' RESPONSE*

By letter dated July 16, 1990, AT&T and Synovus responded to industry reaction.<sup>164</sup> AT&T and Synovus asserted that the AT&T Universal Card has evolved out of recognized trends in the credit card business, in particular affinity cards, revenue sharing arrangements between affinity card sponsors and issuers, discounts and rebates offered by affinity card sponsors, the contracting out of back-room manufacturing, processing and mailing tasks by card issuers, and the sale of receivables as a means for card issuers to manage balance sheets or to provide funding for ongoing operations. AT&T and Synovus asserted that the AT&T Universal Card is the first program for Universal Bank but is not expected or intended to be the only program. According to AT&T and Synovus, the key relationships among AT&T, Universal Bank, AT&T Universal Card

160. See *supra* note 156.

161. 12 U.S.C.A. §§ 1841 *et seq.* (West 1989).

162. *Id.* § 1972(1)(B).

163. *Id.* §§ 371c, 371c-1.

164. Letter from Mark A. Weiss and Nicholas W. Fels, Counsel for Synovus Financial Corporation and American Telephone & Telegraph Company to J. Virgil Mattingly, Gen. Counsel, Board of Governors of the Federal Reserve System (July 16, 1990) (unpublished).

Services Corporation ("UCS"), a subsidiary of AT&T, and Total Systems Services, Inc. ("TSYS"), a subsidiary of Synovus, are set forth in (i) a Telecommunications Card Service Agreement between AT&T and Universal Bank, permitting cardholders to use the card to place calls on the AT&T telephone network at the tariffed rate, which rate is charged to the cardholder's account and settled in full (less a billing and collection ("merchant") fee) by Universal Bank; (ii) an Affinity Group Agreement between Universal Bank and UCS, pursuant to which UCS acts as the program sponsor, markets the card, and performs certain back-office processing services, Universal Bank undertakes to issue credit cards to applicants qualifying under credit criteria it establishes which are similar to those prevailing in the industry, and UCS agrees to purchase merchandise receivables, fund telephone receivables in excess of \$25 million, and provide funding to Universal Bank in the form of a \$10 million deposit and \$20 million revolving line of credit; and (iii) a Processing Agreement between UCS and TSYS, pursuant to which UCS subcontracts back to TSYS certain processing obligations under the Affinity Group Agreement. AT&T and Synovus said that the cost of the telephone discount is borne by UCS, not Universal Bank. AT&T and Synovus assert that the division of responsibilities under the AT&T Universal Card program tracks commonly accepted practices in the industry. These divisions, AT&T and Synovus assert, respect Universal Bank's role as card issuer while permitting the affinity card program's sponsoring organization a meaningful role in the program, particularly with respect to contacts with the general public, without presenting any of the problems suggested by industry members. AT&T and Synovus provided detailed responses to each of the concerns raised by industry members, concluding that inquiries by regulators are unnecessary.

### *REPLIES TO RESPONSES AND CONCERNS*

Industry members have filed responses to AT&T and Synovus' responses, charging that AT&T and Synovus' responses do not alleviate the concerns previously expressed that, in the present context, AT&T exerts or may exert improper control over Universal Bank and that the AT&T Universal Card relationships raise issues that should be reviewed for appropriate regulatory action.<sup>165</sup>

165. See, e.g., Supplemental Memorandum in Support of Petition of The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. Before the Board of Governors of the Federal Reserve System to Initiate Cease-and-Desist Proceedings Against Synovus Financial Corporation and American Telephone & Telegraph Company (Aug. 14, 1990); Letter from Christopher R. Lipsett, Counsel for The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A., to L. William Seidman, Chairman, FDIC (Aug. 30, 1990) (unpublished); Letter from Kenneth H. Robin, Asst. Gen. Counsel-Operations, Household International, Inc. to J. Virgil Mattingly, Gen. Counsel, Board of Governors of the Federal Reserve System (Aug. 31, 1990) (unpublished).

AT&T and Synovus too have provided further responses, asserting that the complaining banks are vainly attempting to find some violation of law where none exists to stem a competitive threat they fear.<sup>166</sup>

In connection with its announcement of changes in its affinity card regulations, Visa said that it had requested that the FRB and FCC expedite their investigations of the AT&T Universal Card program in the interests of all concerned.<sup>167</sup>

### VISA AFFINITY CARD REGULATIONS

Visa said that the changes in affinity card regulations announced October 9, 1990, are intended to "protect the integrity of the Visa system and those who rely on it—cardholders, merchants, and member financial institutions—by allowing only financially regulated organizations to act as issuers of affinity cards."<sup>168</sup> The new rules, which address the respective roles of the card issuer and the affinity partner, provide that (i) affinity cards may not be used to access any account other than one maintained by a card-issuing Visa member financial institution; (ii) the embossing, printing or encoding of numbers (other than Visa account numbers) permitting point-of-sale transactions is prohibited; (iii) an affinity program must honor all Visa cards, not just its own; (iv) nonmembers may not directly or indirectly, control or exercise controlling influence over the management or policies of the card-issuing Visa member financial institution; (v) nonmembers may not finance more than 25% of the receivables arising out of the use of the affinity cards, whether by loans, deposits, purchase or financing of receivables, guarantees or otherwise; and (vi) nonmembers may not provide credit evaluations, billings or other Visa services.<sup>169</sup>

Industry executives and state attorney generals have indicated that the Visa affinity card regulations are likely to be challenged on antitrust and other legal grounds.<sup>170</sup>

Financial institutions that are members of Visa have been concerned for some time that nonmember organizations have been unfairly benefiting through affinity programs from the systems developed by Visa and its members.<sup>171</sup> The competition between traditional bankcard issuers and companies who own or have arrangements with card issuers is likely to increase as the credit card industry matures and its markets become saturated.

166. Letter from Mark A. Weiss and Nicholas W. Fels, Counsel for Synovus Financial Corporation and American Telephone & Telegraph Company to J. Virgil Mattingly, Gen. Counsel, Board of Governors of the Federal Reserve System (Aug. 31, 1990) (unpublished).

167. See Press Release, *supra* note 157.

168. *Id.* (statement of Charles T. Russell).

169. Visa Operating Regulations 14.2C(3)(a), 14.4(C)(2), as revised (Oct. 1990).

170. Chase, *supra* note 157; Roosevelt, *supra* note 158.

171. See Chase, *supra* note 157; Roosevelt, *supra* note 158.

## **CONCLUSIONS**

The settlements of the various cases involving the Iowa Attorney General send mixed signals. Significant legal issues relating to the scope of federal preemption and to the application of choice of law analysis to interstate consumer credit transactions remain unresolved. Further litigation appears inevitable, although the *SafraBank* litigation and *Greenwood Trust* litigation still hold the possibility of some initial adjudication of the issues. If the litigants have the stamina, these issues could wind their way to the U.S. Supreme Court. The Glidden letter offers further testimony to the continuing tensions between federal and state regulation of interstate consumer credit transactions. To the extent that lenders rely on similarities of wording and interpretation of 12 U.S.C. section 85 and the usury preemption authority granted other federally insured institutions, expansive interpretations of national bank powers may affect interpretations of the interstate lending authority of other federally insured institutions. However, as noted by the Massachusetts Attorney General and others, some dissimilarities arguably do exist. It remains to be seen what the response of a court will be to the arguments of either side. Finally, the introduction of the AT & T Universal Card and the bankcard industry responses to the AT & T Universal Card may prove to be the catalysts for dramatic change from the current methods of delivering interstate consumer financial services.