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Ralph J. Rohner
The Catholic University of America, Columbus School of Law

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THE REVIEW OF
BANKING & FINANCIAL SERVICES
AN ANALYSIS OF
CURRENT LAWS AND REGULATIONS
AFFECTING BANKING AND RELATED INDUSTRIES

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Exporting Bank Credit Card Rates and Charges

Banks Enjoy Virtually Unlimited Authority to Export Interest Rates, Late Fees, and Over-Limit Charges Across State Lines. Open Issues Include the Exportability of Other Fees, the Viability of Consumer Common Law Claims such as Unconscionability, and the Effect of Home-State Choice-of-Law

Ralph J. Rohner*

Bank credit cards have proven to be a remarkable legal success. Banks issuing credit cards across state lines in regional and national markets have enjoyed 20 years of virtually uninterrupted victory in persuading courts that they can "export" rates and charges from hospitable home states to customers anywhere in the country, even if such rates or charges are limited or barred in the states where those customers live. The watershed 1978 decision from the Supreme Court in *Marquette Nat'l Bank v. First of Omaha Service Corp.*[1] acknowledges that its approval of rate exporting may disrupt state consumer protection policies, and suggests that any corrective action must come from Congress—yet Congress has remained silent. The federal bank regulators have consistently supported exportation policies, even joining as amici curiae on behalf of banks in litigated cases. Still, the lawsuits continue, questions about the scope of the "exporting" privilege remain unanswered, new issues arise, and the banks and their counsel remain somewhat nervous.

1. 439 U.S. 299 (1978).

*RALPH J. ROHNER is Dean and Professor of Law, Columbus School of Law, The Catholic University of America, Washington, D.C. He serves as Special Counsel to the Consumer Bankers Association, Rosslyn, Virginia.

BACKGROUND

The notion of banks "exporting" interest rates from one state to another goes back to the National Bank Act of 1864, establishing national banks as "national favorites,"[2] entitled to charge whatever rates are authorized for other lenders in the state where the bank is located.[3] The utility of this principle for interstate credit-card marketing surfaced in 1977 when a federal appeals court[4] acknowledged that national banks could impose home-state charges on customers who lived elsewhere. This was reinforced by the unanimous opinion of the Supreme Court in *Marquette* the following year.

2. *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874).
3. National Bank Act §85, 12 U.S.C. §85. This section authorizes national banks to choose between a home-state-law rate or a benchmarked federal rate (set by reference to Federal Reserve discount rates), "whichever may be greater."
4. *Fisher v. First National Bank*, 548 F.2d 255 (8th Cir. 1977).

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• ***Exporting Bank Credit Card Rates and Charges***

Marquette interpreted section 85 of the National Bank Act, and so applied only to national banks. But within two years, amid spiraling inflation and high interest rates generally, Congress acted to level the playing field for federally insured state-chartered banks (and thrifts and credit unions). In particular, section 521 of the Depository Institutions Deregulation Act of 1980 contained language almost identical to that in section 85 of the National Bank Act—authorizing state-chartered banks to charge interest "at the rate allowed by the laws of the State ... where the bank is located."[5]

Even though the legislative history of section 521 barely mentions *Marquette* and says nothing about state banks "exporting" rates to customers in other states, the FDIC[6] and the courts[7] quickly agreed that the parallel language in that section and in section 85 meant that Congress intended to accord the same "most favored lender" privileges to state-chartered banks as to national banks. These agency interpretations and court holdings encouraged state banks to act on the belief that the full thrust of *Marquette* applied to their rate exporting practices.[8] The relocation of card-issuing bank subsidiaries to rate-friendly states such as Delaware and South Dakota proceeded apace. The basic proposition that section 521, being clearly modeled on section 85, should be interpreted in the same way has not been seriously challenged.

If rate exporting is now established as permissible for state as well as national banks, how broad is the privilege? What of late charges, annual fees, over-credit-limit charges, bounced-check charges, and the like? Can the statutory and judicial authority to export "interest rates" be read expansively to include those items as well? There was caselaw under section 85, for national banks, that "interest" meant more than the nominal rate of finance charge, and included other charges for the use or detention of money.[9] The bank regulators have interpreted both section 85 and section 521 generously in this regard.[10] Some state legislatures helped out by enacting laws stat-

5. Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (hereafter "DIDA"), Pub. L. No. 96-221, 94 Stat. 132, codified as section 27 of the Federal Deposit Insurance Act, 12 U.S.C. §1831d. The opening words of section 521 specifically say that it is intended "to prevent discrimination against State-chartered insured depository institutions." Like section 85 of the National Bank Act, it also provides the alternative Federal Reserve discount-rate option. In the rate climate of 1980, Congress and the banking industry may have been more concerned to allow state banks to use this alternative federal rate than they were conscious of the exporting possibilities section 521 would create.
6. Letter from Frank L. Skillern, Jr., General Counsel, FDIC No. 81-3 [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,006 (Feb. 2, 1981); Letter from Kathy A. Johnson, Attorney, FDIC No. 81-7 [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,008 (Mar. 17, 1981).
7. *Attorney General v. Equitable Trust Co.*, 294 Md. 385, 450 A.2d 1273 (1982); *First Bank v. Miller*, 131 Mich. App. 764, 347 N.W.2d 715 (1984); *First Bank East v. Bobeldyk*, 391 N.W.2d 17 (Minn. App. 1986). These were not exporting cases, but rather situations in which state banks wanted to borrow rates authorized for certain non-bank lenders in the same state.
8. The focus of this article is on credit-card marketing. But note that the exportation principle flowing from *Marquette* applies to all forms of credit extension, from the largest commercial loans to mortgages, home equity lines, and signature loans and credit-card programs. For a comprehensive review of these developments through 1988, see Langer & Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks*, Cons. Fin. L. Q. Rep., Vol. 42, No. 1, 4–28 (1988) (hereafter "Langer & Wood").
9. E.g., *Northampton Nat'l Bank v. Attorney General*, 397 N.E.2d 1149 (Mass. App. Ct. 1979) (credit-card annual fees); *Fisher v. First Nat'l Bank*, 548 F.2d 255 (8th Cir. 1977) (cash-advance fees); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972) (closing costs).
10. OCC Interpretive Letter, William P. Bowden, Chief Counsel, 1992 WL 136390 (OCC) (Feb. 4, 1992) (national banks are not subject to customer-state law on over-limit charges, bounced-check charges, late charges, or attorney's fees); Letter from Douglas H. Jones, Deputy General Counsel, FDIC No. 92–47, [Current] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992) (state bank may export late fees "and other charges permitted by the bank's home state which are either a component of interest or material to the determination of the interest rate."). Id. at 55,731.

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ing that "interest" included late charges and similar fees.[11] But still the banks remained nervous.[12]

Judicial affirmation that state-chartered banks could rely on home-state rules for late charges finally came in 1992, in *Greenwood Trust Co. v. Massachusetts.*[13] After characterizing it as a "train wreck of a case," posing a "headlong collision between a state consumer-protection law and a federal banking law," the federal appellate court unequivocally held that under section 521, a Delaware state bank could charge late fees to customers in Massachusetts despite a ban on late charges in that state. Late charges, said the court, are encompassed in the term "interest" for purposes of that section. A month later a federal district court in Minnesota,[14] relying on *Greenwood Trust* and *Marquette*, ruled that national banks could likewise export late charges as part of the interest rate.

Thus, a general framework has emerged, without dissent from courts, agencies, or Congress, encouraging banks to market credit cards regionally or nationally with such rates or charges as are permitted in the bank's state of location. Other state legislatures are powerless to protect local consumers from the terms and conditions contained in the big-bank marketings. Banks have achieved much of the credit-card rate relief they had long sought, albeit in a roundabout fashion based on a federal statutory choice-of-law rule favoring the banks' home state.[15]

RECENT DEVELOPMENTS

Through 1992–93 there were dozens of pending lawsuits, mostly class actions, challenging bank credit-card exporting practices. With the exception of the trial court in *Greenwood Trust*[16] (since reversed) and another recent trial court holding discussed below, all courts that have reached decisions on the merits have upheld and applied the *Marquette/Greenwood Trust* principles. All involve some types of charge beyond the nominal interest rate.

Typical is *Tikkanen v. Citibank (South Dakota) N.A.*,[17] granting summary judgment to the national bank that was exporting late fees and over-limit charges. Both types of flat fee, the court held, are included in the term "interest" in section 85. In *Gilbert v. Greenwood Trust Co.*,[18] the court dismissed challenges that the Delaware state bank's late-payment fees and returned-check charges violated Pennsylvania law. The same result occurred in *Mazaika v. Bank One, Columbus, N.A.*,[19] in which plaintiffs had broadly attacked the exporting bank's annual fees, late charges, returned-check charges, and over-limit fees; all of these are swept up in "interest," defined by the court to include "those fees and charges that arise out of the extension and maintenance of credit." Other unreported trial court decisions are to the same effect.[20]

Another set of cases addresses the preemptive effect of section 85 or section 521 in a procedural context, to decide whether there is sufficient federal-question jurisdiction to support removal of the case from state to federal court. Typical is *Goehl v. Mellon Bank (DE)*,[21] in which the court found that the preemptive effects of sections 85 and 86 of the National Bank Act were so complete as to transform plaintiffs' claims (superficially for violations of state law) into claims that "are necessarily federal in nature and were therefore properly removed" to federal court. The supporting rationale is that the federal statutory term "interest" subsumes the very issues of permissible charges that the plaintiffs are trying to raise under color of state law. The other cases are essentially the same, whether they involve section 85 or section 521.[22]

11. E.g., Del. Code Ann. tit. 5, §950 (1985).
12. Some banks voluntarily customized their credit-card contracts to conform to the law of the customers' states; other banks, when sued for their exported terms, settled the litigations by agreeing to abide by disputed portions of customer-state law. See the discussion of cases settled in Iowa in Langer & Wood, n. 8 supra at 4 n. 8.
13. 971 F.2d 818 (1st Cir. 1992), cert. denied, 113 S. Ct. 974 (1993).
14. *Tikkanen v. Citibank (South Dakota) N.A.*, 801 F.Supp. 270 (D. Minn. 1992).
15. In theory, banks might have sought higher ceilings or complete deregulation of rates in other ways. Congress might have preempted all state credit-card rates with a national ceiling (or no ceiling, as it did in section 501 of DIDA for residential mortgage loans). Or the various state legislatures might have uniformly raised or deregulated credit-card rate limits, obviating the need for banks to locate in and export from a few especially hospitable jurisdictions. Neither of these alternatives was politically feasible during the 1980s.
16. 776 F.Supp. 21 (D. Mass. 1991).
17. 801 F.Supp. 270 (D. Minn. 1992).
18. [Current] Fed. Banking L. Rep. (CCH) ¶89,412 (Ct. of Common Pleas, Phila. Co., 1st Jud. Dist., Pa., 1993).
19. 25 Phila. 192, [Current] Fed. Banking L. Rep. (CCH) ¶89,411 (Ct. of Common Pleas, Phila. Co., Pa., 1992).
20. E.g., *Copeland v. MBNA America, N.A.*, No. 92-CV-3909 (Dist. Ct., Denver Co., Colo., 1993); *Gadon v. The Chase Manhattan Bank (USA)*, Mar. Term 1992 No. 2909 (Ct. of Common Pleas, Phila. Co., Pa., 1993); *Hunter v. Greenwood Trust Co.*, No. L-02509-92 (Super. Ct., Camden Co., N.J., 1993); *State of Wisconsin v. Ameritech Corp.*, No. 92-CV-1013 (Dane Co., Wis., 1993); *Harris v. The Chase Manhattan Bank (USA)*, No. 941164 (Super. Ct., San Francisco Co., Calif., 1993); *Sherman v. Citibank (South Dakota), N.A.*, No. L-01834-92 (Super. Ct., Camden Co., N.J., 1992). Appeals are pending in a number of these cases.
21. 825 F.Supp. 1239 (E.D. Pa. 1993).
22. *Nelson v. Citibank (South Dakota) N.A.*, 794 F.Supp. 312 (D. Minn. 1992); *Hill v. Chemical Bank*, 799 F.Supp. 948 (D. Minn. 1992); *Ament v. PNC National Bank*, 825 F.Supp.

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The maverick among the recent cases is the December 1993 trial court decision in *Irwin v. Citibank (South Dakota), N.A.*,[23] in which the judge felt "constrained to agree" that section 85 is unconstitutional to the extent that it purports to allow South Dakota (the bank's state of location) to "prohibit Pennsylvania from protecting her own citizens from the questionable practices of out-of-state lenders." According to the court, *Marquette* merely interpreted the statutory language and "never considered the constitutional implications of the exportation principle." Construed as broadly as it has been, section 85 is unconstitutional because "[i]n a nutshell, it delegates too much congressional power to the wrong agency." The judge sees section 85 (and inferentially section 521) as an improper delegation from Congress to such states as South Dakota and Delaware of unfettered authority to set interest rates for the rest of the nation.[24]

A full constitutional analysis is beyond the scope of this article. Despite a certain populist or states-rights attractiveness,[25] however, the court's theory seems dubious. Congress, in sections 85 and 521, does not purport to delegate legislative authority; it merely establishes a federal choice-of-law rule. The Supreme Court in *Marquette* at least implicitly assumes that section 85 is an appropriate exercise of congressional legislative authority. Certainly Congress might enact a federal law setting interest-rate limitations for credit cards nationwide; but it has chosen not to do so, leaving state law in place but providing guidance as to which state law controls for federally chartered or insured lenders. It is hard to see a constitutional flaw in that approach. In any event, the *Irwin* case will be appealed and the constitutional issue presumably will be dealt with more authoritatively.

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1243 (W.D. Pa. 1992). But see *Copeland v. MBNA America, N.A.*, 820 F.Supp. 537 (D. Colo. 1993) (preemptive effect of section 85 not so complete as to create federal-question jurisdiction, thus case remanded to state court [where decision on merits was in bank's favor; see n. 20 supra]).

23. No. 9112-2557 (Ct. of Common Pleas of Phila., 1st Jud. Dist., Pa., 1993).
24. The court's cited authorities included such venerable landmarks as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Knickerbocker Ice Co. v. Stuart*, 253 U.S. 149 (1920); and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), as well as citations to the treatises of distinguished scholar/professors Lawrence Tribe, Ronald Rotunda, and Kenneth Culp Davis.
25. The court calls it "Kafkaesque nonsense" to think that South Dakota legislators are competent to legislate for the nation. In another case in which a similar constitutional argument was made (but rejected), plaintiffs stressed the lack of accountability of legislators in one state (the bank's home) to the citizens of other states. *Tikkanen v. Citibank (South Dakota)*, n. 14 supra at 279.

OPEN ISSUES

Although the framework for banks to export credit-card rates and charges seems clearly established under sections 85 and 521, there are questions not yet fully answered.

Constitutionality

Unless and until reversed, the *Irwin* holding on the unconstitutional delegation of Congress's authority, just discussed, remains troubling. A related argument has been made that the rate-exporting pattern unconstitutionally violates principles of state sovereignty by allowing one state to "trump other states' consumer protection laws." In the one case addressing it,[26] that argument was dismissed on the authority of *Marquette*, which recognized that the federal law permitting exporting would impair state power to enforce local usury laws. Still, it is notable that outside the context of the federal banking laws, there is a line of caselaw authority that allows states to impose local consumer protection laws on out-of-state creditors without unconstitutionally breaching the "Full Faith and Credit" clause, creating an undue burden on interstate commerce, or denying lenders due process of law.[27] There may not be a constitutional clash between this line of cases and *Marquette* and its progeny (they are distinguishable precisely because the latter reflect Congress's legitimate interest in regulating federally chartered or insured depository institutions). But there is at least a policy tension—why should a state be free to restrict the practices of out-of-state mail-order retailers, but not out-of-state mail-order banks?

What Charges Can Be Exported?

The existing caselaw and agency interpretations read the critical term "interest" in sections 85 and 521 broadly to include late charges and other flat fees closely related to the extension of credit. Specifically covered by court holdings are late charges,[28] annual fees (discussed above under *Mazaika*), cash-advance fees,[29] over-limit charges,[30] and returned-check charges.[31] Agency interpretations have identified most of these as well.[32] These

26. *Tikkanen*, n. 14 supra at 279.
27. See, e.g., *Aldens, Inc. v. Miller*, 610 F.2d 538 (8th Cir. 1979), cert. denied, 446 U.S. 919, 64 L.Ed. 2d 273, 100 S. Ct. 1853 (1980); *Alden's, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), cert. denied, 425 U.S. 943 (1975).
28. *Greenwood Trust*, n. 13 supra.
29. *Fisher v. First Nat'l Bank*, 548 F.2d 255 (8th Cir. 1977).
30. *Tikkanen*, n. 14 supra at 279.
31. *Gilbert v. Greenwood Trust Co.*, n. 18 supra.
32. See OCC and FDIC letters, n. 10 supra.

all have a rational common denominator in that they are charges for access to the line of credit or the use (or misuse) of it.

A similar result could be expected for credit-report fees, filing or recordation fees, or other front-end closing costs (as for a home equity line),[33] and collection costs on default, including attorney's fees.[34] A bank could presumably market a variable-rate credit-card plan despite restrictions on variable-rate terms in customer states.[35] Matters that directly affect calculation of the numerical rate seem clearly included, such as free-ride periods, balance assessment methods, 360/365-day years, and probably also home-state rules on changes in terms that, though cast as a disclosure rule,[36] can affect when a specified rate takes effect.

Less clear are miscellaneous charges or practices that affect the bank's yield but relate only indirectly to the credit extension. Fees for account documentation—canceled cash-advance checks, or verification of purchases, for example—or the charge for new packets of cash-advance checks, may seem questionable under a notion of "interest" as a charge for the use or detention of money. Still, they affect discrete pieces of the lender's cost and yield, and the consumer's price of participation, in the overall credit-card program.

There is another category of state laws that do not address permissible rates and charges at all, but clearly influence the way creditors price their products. Examples are restrictions on permissible security, inhibitions on debt collection practices, or limits on the enforceability of judgments. Can a bank contract with out-of-state customers to bring the permissive rules of its home state into collection or foreclosure proceedings in the customers' states? Arguably, the bank's home state rules are "material" to the pricing of that credit product, but it strains language to bring those kinds of rule into a definition of "interest."[37]

Similarly, some states may impose unique disclosure requirements on credit card transactions—front-end disclosure of certain terms, or an annual summary of account activity, perhaps. Must an exporting bank comply with these rules in customer states, or can it rely on the absence of such rules in its home state? No court or agency has yet said that "interest" includes everything that affects a bank's compliance costs or profits; thus, exporting banks probably need to comply with these kinds of customer-state disclosure laws.[38]

The exportation principle applies, by its terms, only in credit transactions in which there are interest charges. Banks cannot, therefore, rely on sections 85 or 521 to export fees and charges on deposit or investment products (checking or savings accounts, CDs, mutual funds, and so forth). But where a deposit account has a credit feature (e.g., a checking account with an overdraft credit line), it seems clear the bank could export the interest rate and the fees and charges that are related to the overdraft loans.

A working definition of what can be included in "interest" for exporting purposes will need to evolve in subsequent cases. The *Greenwood Trust* court straddled the fence on the question of whether "interest" should be defined by reference to state law, or as a matter of federal law. Delaware law explicitly incorporated late charges into the state's definition of "interest." Likewise, earlier caselaw under section 85 had held that a number of similar charges were covered by the term "interest" in that federal statute, and the OCC and FDIC had issued interpretations saying that all charges "material to the determination of the interest rate" are exportable.[39] Thus, under

33. Such charges had earlier been held to be included in "interest" under section 85. *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972).
34. OCC Letter, n. 10 supra.
35. OCC Interpretive Letter No. 354, Roberta W. Boylan, Director of Legal Advisory Services, [1985–87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,524 Nov. 18, 1985).
36. Cf. Uniform Consumer Credit Code §3.205 (1974) (change in rates effective for prior balances only if consumer receives two disclosures, one at least three months before the change takes effect).
37. Credit insurance coverages and premiums present unique questions. Typically, those premiums are "imposed" by the insurance company and merely offered—and passed on—by the creditor/bank. Congress has ceded the regulation of

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insurance to the states (through the McCarran-Ferguson Act), and it seems likely that credit insurance underwriters could not piggyback on the banks' exporting powers and would need to conform their premium and coverage structures to applicable customer-state law.

38. There is some irony in this conclusion. System-wide compliance costs, for disclosure or non-discrimination rules, for example, are not likely to be passed on to customers as separate charges. They are almost certainly treated as general operating costs or overhead, and so reflected in the bank's pricing as part of the contractual interest rate. In this sense, various forms of compliance cost do affect the rate of interest just as much as various delinquency charges that are imposed separately.
39. The court in *Greenwood Trust* acknowledges this interpretation from OCC and FDIC staff (the letters are cited at n. 10 supra), but does not decide how much "deference these materials deserve, for we would reach the same result independent of any reliance on them." 971 F.2d at 830 n. 11.

The agency phraseology—"material to a determination of the interest rate"—comes from a long-standing OCC

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either approach *Greenwood Trust*'s late charges could be exported, and the court saw no need to write a comprehensive definition.[40]

Adopting state law is attractive because it is relatively easy—especially in exporting states such as Delaware and South Dakota, which have rewritten their state codes to define "interest" in an expansive way.[41] State and national banks in that state can operate, and export, with the same definitional ground rules under the "law of the state where the bank is located." But this approach is dangerous, for the same reason: it permits individual states to customize their notions of "interest" in ways that may become competitively mischievous vis-à-vis other states, and not conducive to nationally uniform practices.

The "federal law" approach also has problems. Deference to the federal agency interpretations, or reliance on older caselaw precedents, might produce a definition of "interest" that is either broader or narrower than the bank's home-state law. Any divergence then tends to undercut the "most favored lender" and level-playing-field policies of sections 85 and 521—"interest" means one thing intrastate and another when it is being exported interstate. Exporting under those sections is clearly a federal policy that depends on the preemptive effect of the federal statutes. This suggests that ultimately the definition of "interest" must be a matter of federal law. But in so interpreting it, courts need to give considerable weight—perhaps a presumption of correctness—to state law definitions of "interest."

State "Common Law" Claims

Facing quick defeat on the authority of *Marquette* and *Greenwood Trust*, consumer lawyers have begun advancing the theory that even though the exportation principle in section 521 defeats customer-state constitutional and statutory provisions, it does not displace state common law claims that the interest charges are an unlawful penalty, are unconscionable, constitute unjust enrichment, or are otherwise unfair.[42] The argument is based largely on the language of section 521, which says that its interest-rate authorizations apply, "notwithstanding any State constitution or statute which is hereby preempted ...," but does not expressly mention common law. If successful, the argument would drive a large hole in the exportation principle, for it would mean that consumer lawyers need only characterize their cause of action against exporting banks as a common law claim (rather than a statutory usury violation) in order to get past a motion to dismiss and into the hands of (they hope) a sympathetic judge or jury. It would also unlevel the playing field between state and national banks.[43]

The short answer is that this attempted bypass of *Marquette* and *Greenwood Trust* doesn't work. It would wreak havoc on the carefully structured exportation principle developed in those landmarks, and there is no indication in those opinions that common law claims are retained even while state constitutional and statutory objections are preempted.[44]

The relevant caselaw authority has rejected the common law claims argument. The court in *Gilbert v. Greenwood Trust Co.*[45] noted that Congress had not included in section 521 a savings clause for common law claims—which Congress has often done when it intends that result. Moreover, said the court, plaintiffs had not advanced

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Interpretive Ruling on the "most favored lender" doctrine, 12 C.F.R. §7.7310(a). But historically that Ruling has most often been applied as a limitation on national bank rate authority, defining the scope of state laws the bank must comply with when it borrows a more favorable rate from another class of lenders in its home state. Cf. *Attorney General v. Equitable Trust Co.*, 294 Md. 385, 450 A.2d 1273 (1982). It may be appropriate to turn that Interpretive Ruling around and use it as an enabling provision for exporting purposes, if for no other reason than to prevent banks from mixing and matching the most favorable pieces of home-state and customer-state law. That is, if the bank relies on home-state law, it must take the entire package of that law (everything "material"), and not just the favorable rate number.

40. *Greenwood Trust*, 971 F.2d at 828: "In this case, we need not decide whether federal or state law is the appropriate point of reference. Since both sources produce the same result, it would be a mere matter of form—and idle—to choose between them."
41. A state apparently need not adopt a laundry list of all conceivable charges that are included in interest. Legislative silence—not prohibiting certain charges—may be just as effective to establish what the banks are permitted to charge. See OCC Interpretive Letter No. 452, Robert B. Serino, Deputy Chief Counsel, [1988–89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,676 (Aug. 11, 1988).
42. E.g., *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1383 (1991), holding that bank charges may be struck down as impermissible penalties or unreasonable liquidated damages.
43. There is no comparable language in section 85, and it has been long established that state common law challenges are barred by that provision. *Carter v. Carusi*, 112 U.S. 478 (1884) (common law right of set-off preempted by section 85).
44. Almost all of the recent cases discussed in this article included common law counts as well as statutory ones. The courts' preemption determinations did not differentiate.
45. [Current] Fed. Banking L. Rep. (CCH) ¶89,412 (Ct. of Common Pleas, Phil. Co., 1st Jud. Dist., Pa., 1992). There is a parallel holding under section 522, the companion section of DIDA applicable to savings and loan associations: *People v. Highland Fed. Sav. & Loan*, 14 Cal. App. 4th 1692 (1993).

any cogent theory to explain why Congress intended to preempt state constitutions—the supreme law of the states—and state statutes—the most current and frequently employed state vehicle for regulating charges by lenders—and at the same time might have intended to preserve state common law claims.[46]

This view is reinforced by the fact that related provisions of federal law, section 86 of the National Bank Act and section 521(b) of DIDA, are held to provide the exclusive remedy for violations of the rates authorized in sections 85 and 521(a).[47]

A simpler answer might be that the common law power of state courts—the power to create rules of law by precedential decisions—does not exist in a vacuum. It is an aspect of state judicial systems that derives, explicitly or implicitly, from the state constitution or statutes that created those court systems on the model of their British antecedents. A broad preemption of the regulatory effects of state constitutions or statutes, as in section 521, inevitably preempts common law rules as well—unless, of course, Congress clearly "saves" the common law in the preemptive statute.[48]

The preemptive effect of sections 85 and 521 on common law claims needs to be read narrowly, however, so that it does not become a blanket immunity from contractual challenge. State common law should be considered preempted only insofar as it affects the permissibility of the banks' interest and related charges. Underlying common law rules affecting the validity or enforceability of the credit-card agreement—such as the rules on valid contract formation, capacity to contract, fraud and deceit, and so forth—must stay in place absent a complete federal takeover of the law of contracts.

Exportation into "Opt-Out" States

As a political trade-off when section 521 was enacted in 1980, Congress included in section 525 of DIDA authority for states to "opt out" of the most-favored-lender privileges being extended to state-chartered banks—i.e., states could declare that the preemptive effect of section 521 would not apply to loans "made in" the opt-out state. About half a dozen states chose to opt out.[49] Congress has since repealed section 525,[50] so no additional states can opt out. But meantime there is a nice question as to whether banks in friendly non-opt-out states can export home-state rates and charges into those states that have opted out. In other words, does a state's having opted out shield its citizens from the rates and charges of out-of-state exporters?

The issue has not been decided judicially, though it is part of a case pending on appeal in Colorado.[51] The several early FDIC opinion letters, and other commentary, are equivocal.[52]

There are three grounds on which banks can argue that a state opt-out does not bar exporting into that state. One is that Congress's 1989 repeal of the opt-out provision (section 525 of DIDA) nullifies all earlier opt-outs. This depends on congressional intent, and it is not at all clear that this was Congress's thinking; more likely, Congress intended to close the door on future opt-outs without disturbing those in place.

A second avenue comes from the statutory language of section 525. State opt-outs apply only with respect to loans "made in" that state. For banks exporting from elsewhere, the credit-card agreement or other plan documentation should be able to specify that the credit arrangement is agreed to in, and advances of credit are extended from, the bank's home state. This ought to establish that the loans are "made" in the bank's state, thus escaping the opt-out.[53]

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46. Id. at 82,831.
47. See, e.g., *Hill v. Chemical Bank*, 799 F.Supp. 948 (D. Minn. 1992), holding that the "exclusive remedy" provided by sections 86 and 521(b) made the preemptive effect of sections 85 and 521(a) "complete" for purposes of removal of actions from state to federal court.
48. According to an FDIC interpretation, recent Supreme Court holdings, such as *Cipollone v. Liggett Group*, 112 S. Ct. 2608 (1992), dealing with the proper analysis of express and implied preemption provisions in federal statutes, do not help plaintiffs' counsel on this point. Common law claims may still be implicitly preempted even if the express statutory language does not say so, and this is the case with section 521. FDIC Interpretive Letter, Douglas H. Jones, Deputy General Counsel, FDIC-93-27, [Current] Fed. Banking L. Rep. (CCH) ¶81,635 (July 12, 1993).
49. Colorado, Iowa, Maine, Massachusetts, Nebraska, North Carolina, Wisconsin, and Puerto Rico. Massachusetts and Nebraska have since repealed their opt-outs.
50. Title V of FIRREA, Pub. L. No. 101-73, 103 Stat. 183, 363 (1989).
51. *Stoorman v. Greenwood Trust Co.*, Case No. 93CA224, Court of Appeals, Colo. The district court in *Greenwood Trust* apparently believed the Massachusetts opt-out was still in effect; the court of appeals noted, however, that in 1986 Massachusetts "reversed direction, and in effect opted back in" to section 521. *Greenwood Trust*, 971 F.2d at 823 n. 4.
52. See Langer & Wood, n. 8 supra at 27, discussing the FDIC interpretations.
53. The issue gets more complicated if the courts or legislature in the opt-out state rule that credit-card loans are "made" in that state, based perhaps on the customer's mailing of the credit application or receipt or use of the card there. A federal common law interpretation of where loans are "made" would be necessary to break the standoff.

The best argument may flow from the anti-discrimination purpose of section 521 itself. That purpose was to ensure interest-rate parity for state and national banks in the same state. There is no opt-out provision connected to section 85, so national banks can always export rates or charges into any state in the nation. If state banks are to have equivalent exporting powers, they must likewise be free to export into all states, including those that have opted out. In those few states that have opted out, the opt-out remains effective for banks located there; this leaves them at no greater competitive disadvantage, versus the out-of-state exporting banks, than they would be without any opt-out at all.

Bank Location

The linchpin in the *Marquette/Greenwood Trust* exporting structure is the state in which the bank is "located." According to *Marquette*, this is the state named in the national bank's organization certificate; for state banks, presumably, it is the chartering state. There has been no serious challenge to the bank's state of location in any of the exporting cases since *Marquette*. Certainly, for banks engaged in interstate marketing, it makes little sense to try to "locate" the bank in the various states where its customers live, where participating merchants are situated, or where credit-card transactions occur.[54] But the operations side of bank credit cards seems to be increasingly far-flung—cards issued from one location, billings and payments handled elsewhere, data processing and record-keeping at perhaps another site, and the bank itself may have branches or affiliates, or a holding company parent, in other states. Brick-and-mortar facilities, number of employees, and business activity in the home state may be only fractional parts of the overall bank enterprise.[55]

At some point, some court may feel inclined to question whether the bank should be "located" solely by the address on charter documents. Lest the exporting structure disintegrate under unpredictable answers to this question, courts ought to resist the temptation to relocate the bank based on some diffuse "contacts" or center-of-gravity analysis of its activities.[56]

As long as the bank retains a separate corporate identity and charter, even within a multistate holding company structure, there is no reason to depart from the holding in *Marquette* that, for exporting purposes, the bank is "located" where its charter documents specify. Nor should the bank's essential location change because non-bank entities participate in the credit marketing activity.[57]

Moreover, it is entirely possible that for some purposes a bank may be considered "located" in more than one state. For example, under the trial-court venue rules of section 94 of the National Bank Act, a bank is considered "located" wherever it has branches.[58] This need not, and should not, have any effect on the bank's exporting powers from its charter state; if anything, it may broaden those powers by letting the bank export from any state where its branches are "located."

"Borrowing" and "Importing" Interest Rates

These are two variations on the exporting pattern.

The classic "most-favored-lender" doctrine allows a bank to "borrow" an interest rate authorized for other classes of lender in the bank's home state. For example, a bank might borrow rates allowed for retailers or small loan companies, or rates authorized for thrift institutions or credit unions. In doing so, the authorities suggest the bank must comply with all other provisions that are "material to the determination" of the borrowed rate.[59] Can a bank first "borrow" another in-state rate in this fashion, and then "export" it to customers in other states? The answer seems clearly yes, on the combined authority

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54. Said the Supreme Court in *Marquette*: "If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term 'located' would be so stretched as to throw into confusion the complex system of modern interstate banking." 439 U.S. at 312.
55. *Marquette* was a simpler case in this regard. The national bank and its credit-card subsidiary were physically situated in Nebraska, evaluated applicants there, and issued cards, honored sales drafts, and received payments there. 439 U.S. at 311–12.
56. If the bank's charter address, and thus its state of location, are in fact a fraud or sham, presumably it can be dealt with on that basis by the bank regulators.
57. E.g., merchant stuffers in monthly statements, co-branded credit-card offerings, intake of loan applications through retail outlets (such as tax refund loans through H & R Block offices). In one recent case the court granted summary judgment in favor of a bank that was marketing tax refund anticipation loans through out-of-state offices of a tax return preparation company; the court found that the bank was still "located" in its home state for rate exportation purposes. *Cade v. H&R Block, Inc.*, C/A No. 4:92–1454–21 (D.S.C. 1993) (summary judgment orders of July 16 and November 8, 1993).
58. *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35 (1977). For a recent instance of this rule being applied to destroy diversity jurisdiction, involving a Connecticut-headquartered bank with branches in Rhode Island, see *The Connecticut Nat'l Bank v. Iacono*, 785 F.Supp. 30 (D. R.I. 1992).
59. See discussion at n. 39 supra.

of all the agency interpretations and caselaw affirming the borrowing and exporting principles.[60]

Sometimes a bank might prefer to contract for interest and related charges under the law of its customers' state. That is, the bank wants to "import" into its card agreements the higher interest rates allowed in another state for customers living there. There was some early judicial dicta that such importing was permissible, but the issue has not been fully litigated in light of *Marquette*.

The proper answer would seem to be that sections 85 and 521 should be read to allow banks to use the whole law of their home states, including choice-of-law rules. A national or state bank can contract for interest at rates authorized by other states if other lenders (including nonbanks) in the bank's home state can do so. In other words, the bank can do whatever "importing" the most favored lender in its state can do.[61] From there, it is a matter of the bank satisfying whatever the state choice-of-law doctrines say is needed to confirm the applicability of the out-of-state rules on interest and related charges. Usually a clear choice-of-law clause in the credit-card agreement would suffice.

A caveat may be needed here. It would seem impermissible, or at least not prudent, for a bank to pick and choose, or mix and match, provisions of home-state law and customer-state law in any choice-of-law clause. An inference from all the caselaw and agency interpretations on exporting/importing is that the bank must take as a package the whole law of the relevant state—the interest rate, related charges, and any other provisions "material" to that rate.

CONCLUSION

The legal framework for credit-card banks to export home-state rates and terms to customers throughout the nation is clearly established, and is being refined by court decisions on issues around the margins. More such litigation can be expected, on open issues discussed here and perhaps others as well, but the direction of movement is overwhelmingly in the banks' favor. The exporting structure has been in place for at least the 16 years since *Marquette*, and is reinforced by subsequent congressional action (enacting section 521), and by a consistent stream of court holdings, agency interpretations, and other commentary.[62]

The exportation principle has profoundly affected the way banks plan and deploy their credit-card programs, and has steered significant capital and personnel investment. It has undoubtedly helped to open up regional and national credit-card markets, enhanced competition among the major bank card issuers, and encouraged nonbank companies (Sears, AT&T, General Motors, and so on) to join that competition by buying or creating card-issuing banks. Judging from the success of interstate card marketing, and despite the interest-rate differentials which prompt the lawsuits, consumers generally must be finding the "exported" credit-card plans to be attractive ones.

The good effects of exporting, and the banks' understandable reliance on it, however, come at some cost. There is the somewhat unseemly competition among states to coax banks to relocate there solely to establish an exporting base—moving jobs and capital to get a better interest rate (and other inducements, such as tax breaks). There persists a competitive disadvantage for banks located in lower-rate states. There is the anomaly that banks can export in ways that certain competitors—e.g., retailers, finance companies—cannot do. There is the frustration of state officials who see the exporting banks as end-running consumer protection laws duly enacted for that state's citizenry. And regrettably, exporting pits state against state and leaves the country at large no closer to a national consensus on consumer-credit-pricing policy than before.[63] ■

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60. This question of borrowing plus exporting has not arisen in the recent exporting cases because the banks' home state laws clearly allowed high or unlimited rates to banks as such. There was no need for the banks to "borrow" anything from other classes of lenders.
61. Cf. Langer & Wood, n. 8 supra at 14–15, 28, suggesting that national banks may import, but that section 521 might somehow be a barrier for state banks.
62. E.g., Langer & Wood, n. 8 supra. Some early criticisms of *Marquette* and exporting generally, however thoughtful when first published, now seem clearly overtaken by events. See, e.g., Burgess & Ciolfi, *Exportation or Exploitation? A State Regulator's View of Interstate Credit Card Transactions*, 42 Bus. Law. 929 (1987); Comment, *Extension of the Most Favored Lender Doctrine Under Federal Usury Law: A Contrary View*, 27 Vill. L. Rev. 1077 (1981). This includes this author: Rohner, *Marquette: Bad Law and Worse Policy*, J. Retail Banking, Vol. 1 at 76 (1979); Arnold & Rohner, *The "Most Favored Lender" Doctrine for Federally Insured Financial Institutions—What Are Its Boundaries?*, 31 Cath. U. L. Rev. 1 (1981).
63. See generally Rohner, *Multiple Sources of Consumer Law and Enforcement (Or: "Still in Search of a Uniform Policy")*, 9 Ga. State L. Rev. 881 (1993).