

Interstate Consumer Credit Transactions: Greenwood Trust and Other Developments

By Michael C. Tomkies



Michael C. Tomkies is an Associate with the Columbus, Ohio office of Jones, Day, Reavis & Pogue. He is a member of the Ohio and District of Columbia Bars and the Ohio, District of Columbia, American and International Bar Associations. Mr. Tomkies is a graduate of the Harvard Law School (J.D. 1986) and Hampden-Sydney College (B.A. summa cum laude 1983). The author thanks Darrell L. Dreher, Esq. of Jones, Day, Reavis & Pogue for his comments on the manuscript. The views expressed in the article are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

This article is the third in a series of articles published in the *Quarterly Report* discussing interstate lending in the context of consumer credit transactions.¹ Since publication of the last article in the Summer 1989 edition of the *Quarterly Report*, the litigation between the Iowa Attorney General and Citibank (South Dakota), N.A. ("Citibank"), United Missouri Bank of Kansas City, N.A. ("UMBKC"), and United Missouri Bank, U.S.A. ("UMBUSA"), reported

on in that article, has been settled.² New litigation has arisen, however, and in a dramatic development, a federal district court in Massachusetts has ruled in *Greenwood Trust Co. v. Massachusetts*³ that a federally insured, Delaware-chartered bank cannot charge late charges as permitted by Delaware law on credit card transactions with residents of Massachusetts because of a Massachusetts prohibition on late charges, *i.e.*, the bank cannot "export" Delaware late charges to Massachusetts. In Iowa, continuing litigation involving the Iowa Attorney General has raised issues relating to the authority of federally insured, state-chartered banks to export rates and the effect of state opt-out authority.⁴ Other developments in this area include a preliminary ruling by a Vermont superior court that loans made by out-of-state lenders who fail to comply with the licensing requirements of Vermont's small loan act (the Licensed Lenders statute) may be unenforceable⁵ and an interpretive letter issued by the Office of the Comptroller of the Currency ("OCC")⁶ that broadly construes the scope of federal preemption granted national banks.

I. The *Greenwood Trust* Litigation

The court's ruling in *Greenwood Trust* represents the first significant judicial pro-

nouncement on the scope and interplay of federal usury preemption, state law, and choice of law principles in the context of fee exportation.⁷ While ruling on the exportation of late charges by a federally insured, state-chartered bank, the court's analysis, if adopted by other courts, could have broader implications, affecting the scope of exportation authority granted to national banks, federally insured savings associations and federally insured credit unions and the exportability of various charges and terms in addition to late charges. The briefs of the parties on cross-motions for summary judgment and the briefs of several *amicus curiae* are discussed below.⁸ This case raised many of the same issues and arguments concerning exportation authority that were discussed in the last article with respect to the litigation involving Citibank.⁹ Of particular interest here, however, are the arguments made with respect to the foundation of exportation authority for federally insured,

1. See Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 Consumer Fin. L.Q. Rep. 152 (1989); 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 Consumer Fin. L.Q. Rep. 4 (1988).

2. See 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); 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); 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).

3. 776 F. Supp. 21 (D. Mass. 1991) (Young, J.); see generally Bock, Dreher & Tomkies, *Developments in the Interstate Delivery of Consumer Financial Services*, 46 Bus. Law. 1223, 1236-46 (1991) (discussing the briefs of the parties and *amicus*).

4. 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) (involving precious metals contracts offered by telephone to Iowa residents by Morgan Whitney Trading Group and the precomputed loans made by SafraBank (California), a California-chartered bank, to finance the precious metals contracts).

5. Pizzagalli Constr. Co. v. H.E.F. Partnership, No. S17056-90 CnC (Sup. Ct. Chittenden County, Vt. Jan. 3, 1991).

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

7. Earlier litigation in Delaware and Iowa involving both national banks and state-chartered banks (other than Greenwood Trust Company) and raising similar issues was settled prior to any adjudication. See 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 *supra* note 2.

8. The parties filed cross motions for summary judgment with briefs in support thereof on September 7, 1990; briefs in opposition to the other party's motion on October 1, 1990; and briefs in reply and further support of their respective motions on October 17, 1990. Various *amicus curiae* briefs were filed in support of Greenwood Trust by MasterCard International, Inc. and VISA U.S.A., Inc., the American Financial Services Association, the Delaware State Bank Commissioner and Delaware Bankers Association, and the Consumer Bankers Association and in support of Massachusetts by the States of Iowa, Maine, Minnesota, South Carolina, and Wisconsin and the National Association of Consumer Credit Administrators, and the American Conference of Uniform Consumer Credit Code States. See 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); *Amicus Curiae* Brief filed by the American Financial Services Association 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); *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); Brief for the Consumer Bankers Association *Amicus Curiae*, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); Brief of *Amicus Curiae* filed by the States of Iowa, Maine, Minnesota, South Carolina, and Wisconsin and the National Association of Consumer Credit Administrators, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); 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's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989); Bock, Dreher & Tomkies, *supra* note 3, at 1241-44.

9. See Tomkies, *supra* note 1, at 163-78.

state-chartered banks (as it may be distinguishable from the authority for national banks), the proper definition of "interest" in light of the relevant statutes, and the effect of contractual choice-of-law provisions.

A. Background

Greenwood Trust, a federally insured, Delaware-chartered bank, filed suit on November 14, 1989 in federal district court in Massachusetts against the Commonwealth of Massachusetts and the Massachusetts Attorney General ("Attorney General"). The suit was filed in response to the Attorney General's assertions¹⁰ that Greenwood Trust's practice of imposing late payment charges on Massachusetts cardholders with respect to its Discover Card accounts constituted an unfair and deceptive act or practice in violation of the Massachusetts Consumer Protection Act, and regulations promulgated thereunder,¹¹ and Mass. Gen. L. chapter 140, section 114B ("Section 114B").¹² Greenwood Trust sought judgment that (i) the imposition of late payment charges pursuant to its cardholder agreement was authorized by federal law and the law of Delaware; (ii) Massachusetts law was preempted under the Supremacy Clause of the United States Constitution¹³ to the extent that Massachusetts law conflicts with federal law and the law of Delaware; (iii) the enforcement by Massachusetts of its asserted prohibition of Greenwood Trust's late payment charge would contravene the Commerce Clause of the United States Consti-

tution;¹⁴ and (iv) Greenwood Trust's conduct in contracting for and collecting the late payment charge pursuant to the cardholder agreement does not constitute an unfair or deceptive practice under Massachusetts law.¹⁵ The Attorney General filed counter-claims.

B. The Court's Decision

The specific issue in *Greenwood Trust* was whether Greenwood Trust, a federally insured, Delaware-chartered bank, could impose late charges permitted under Delaware law on its Massachusetts Discover Card cardholders when Massachusetts law prohibits such charges. The court restated the primary issue more broadly as a consumer protection issue:

[M]ay a bank located in a state with permissive consumer lending laws take advantage of those favorable non-interest rate provisions in its own state's laws and "export" them to or impose them upon residents of another state which maintains greater consumer protection for its residents when they borrow in that state?¹⁶

The court declared that a resolution of this question required consideration of two subsidiary issues: whether Massachusetts usury law is preempted under the Supremacy Clause by section 521 ("Section 521") of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA")¹⁷ and, if not so preempted, whether Massachusetts' "usury" law prohibiting late charges¹⁸ contemplates the reg-

ulation of out-of-state credit card issuers.¹⁹ In finding against Greenwood Trust and for the Attorney General, the court held that (i) the provisions of Section 521 do not preempt Massachusetts' prohibition on late charges, (ii) Massachusetts law evidences a fundamental public policy that overrides the contractual provision in the cardholder agreement choosing Delaware law to govern the cardholder agreement, and (iii) the Massachusetts law prohibition against late charges on credit card loans reaches out-of-state credit card issuers.²⁰ Because the material facts were said by the court to have been stipulated by the parties, the court merely recited certain facts²¹ and devoted the majority of its opinion to an analysis of the legal issues.

C. Principal Arguments

1. Federal Preemption

The essence of Greenwood Trust's argument was that (i) 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 and (ii) because Delaware law allows interest to be charged at any rate agreed to by the borrower²² and allows a late payment charge of any amount to be imposed "as interest,"²³ Greenwood Trust's late payment charge was expressly authorized by federal law.²⁴ Greenwood Trust further contended that Massachusetts law is implicitly preempted by federal law because it (i) frustrates 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 and (ii) would, if upheld, effectively and substantially restrain interstate commerce involving credit transactions in contravention of the Commerce Clause without satisfying any compelling

10. See Letter from Ernest L. Sarason, Jr., Asst. Atty' Gen., Mass., to Greenwood Trust Co. (Oct. 27, 1989) (unpublished).

11. Section 2 of the Consumer Protection Act generally declares unfair methods of competition and deceptive acts or practices in the conduct of any trade or commerce to be unlawful. Mass. Gen. L. ch. 93A, § 2(a) (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, s. 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).

12. Section 114B 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. Gen. L. ch. 140, § 114B (1985 & Supp. 1991). 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 (1981 & Supp. 1991). This definition of open-end credit plan taken from the Massachusetts Truth-in-Lending Act ("Massachusetts TILA") is expressly incorporated by reference into Section 114B. *Id.* ch. 140, § 114B. The term "creditor" as used in § 114B is not defined. *Id.* Two bills introduced in the Massachusetts legislature to address the foregoing prohibitory language died in committee December 31, 1991.

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

14. U.S. Const. art. I, § 8, cl. 3.

15. Complaint for Declaratory and Injunctive Relief, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989) ("Greenwood Trust Complaint"). Greenwood Trust originally also requested an order enjoining the Attorney General from seeking to enforce the challenged provisions of Massachusetts law. *Id.* Greenwood Trust's request was withdrawn following a December 5, 1989, letter in which the 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.

16. *Greenwood Trust*, 776 F. Supp. at 23 n.3.

17. Pub. L. No. 96-221, § 521, 94 Stat. 132, 164 (1980) (codified at 12 U.S.C. § 1831d). Section 521, as 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.

12 U.S.C.A. § 1831d (West 1989) (emphasis added).

18. Mass. Gen. L. ch. 140, § 114B. See *supra* note 12.

19. *Greenwood Trust*, 776 F. Supp. at 23.

20. *Id.* at 47.

21. See *id.* at 24-25. The court adopted the facts as presented by the Attorney General, stating that Greenwood Trust had failed to make a filing. *Id.* at 25 n.5. In fact, Greenwood Trust attached its Statement of Undisputed Material Facts to its Motion for Summary Judgment filed in accordance with local rules on September 7, 1990. Greenwood Trust Company's Motion for Summary Judgment, *Greenwood Trust Co. v. Massachusetts*, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989).

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

23. *Id.* § 950 (1985 & Supp. 1990).

24. Greenwood Trust Complaint at 5-6; see also 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") at 2-16.

state interest.²⁵ In addition, Greenwood Trust argued that Delaware law should govern the propriety and extent of the late payment charge provided for in Greenwood Trust's cardholder agreement under applicable choice of law principles because the cardholder agreement contains a contractual choice of law provision choosing Delaware law.²⁶ In sum, Greenwood Trust contended that 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 Massachusetts Consumer Protection Act because (i) Greenwood Trust has fully complied with applicable Delaware and federal banking law with respect to the late payment charges and (ii) to the extent Massachusetts law may purport to prohibit the imposition by Greenwood Trust of late charges on Massachusetts consumers, Massachusetts law is preempted.

The Attorney General disputed Greenwood Trust's general position that Section 521 should be read in the same manner as 12 U.S.C. section 85 ("Section 85"),²⁷ claiming that "critical differences" exist between the National Bank Act ("NBA") and the DIDMCA.²⁸ The Attorney General asserted that the opt-out provision in section 525 of the DIDMCA ("Section 525")²⁹

evidences a congressional intent to intrude only narrowly and noted that the DIDMCA fails to address the principle of exportation even though the DIDMCA was enacted two years after *Marquette National Bank v. First of Omaha Service Corp.*³⁰ The Attorney General argued that these facts stand in contrast to the congressional intent of creating a national banking system under the NBA that may affect interpretations of Section 85.³¹ Further, the Attorney General challenged any notion that late payment charges may be "material to the determination of the interest rate" (within the meaning of the OCC's interpretive ruling on the most favored lender doctrine³²) and thus perhaps be exportable along with, if not as, "interest." The Attorney General argued that the language and legislative history of the DIDMCA leave no room for a broad interpretation of the term "interest" and that the "materiality" concept only makes sense in the context of the classification of loans for purposes of the most favored lender doctrine and thus cannot be used in the exportation context. 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, the Attorney General asserted, "patently" inconsistent with the limited preemptive approach of the DIDMCA.³³ The Attorney General also disputed Greenwood Trust's allegation that Massachusetts law may violate the Commerce Clause, asserting that the local benefits of the applicable Massachusetts statutes outweigh any burden on interstate commerce or Greenwood Trust.³⁴

In disputing Greenwood Trust's reading of Section 521 authority, the Attorney

General expanded on the argument raised in the litigation involving Citibank that the term "interest rate" is used with precision in the DIDMCA as a reference to a numeric multiplier that is exclusive of late payment charges, rather than as a generic reference to interest in the ordinary sense of compensation for the use of money or damages for its detention.³⁵ The 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 for a rate of 1% over the discount rate on specified commercial paper.³⁶ The Attorney General argued that the pure rate (*i.e.*, numeric) character of this alternative rate authority reinforces the conclusion that Congress intended to allow the exportation of state interest rate ceilings only.³⁷ The Attorney General also argued that a consideration of federal terminology in other federal authorities such as the federal Truth-in-Lending Act,³⁸ a comparison of the terms of Section 521 to section 501 ("Section 501") of the DIDMCA,³⁹ and a review of congressional reports related to Section 501⁴⁰ lead to the conclusion that the DIDMCA should be construed narrowly and interpreted only within the specific context of the economic circumstances that precipitated its enactment.⁴¹ Further, allowing states to determine whether late payment charges are or are not interest would conflict with congressional intent evidenced by the committee report discussing Section 501,⁴² the Attorney General argued.⁴³ The Attorney General asserted that

25. Greenwood Trust Complaint at 6-7.

26. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("Restatement") §§ 187, 195 (1971). Sections 187 and 195 of the Restatement have been adopted by Massachusetts courts and support the application of Delaware law to the cardholder agreements. Greenwood Trust argued. Greenwood Trust Brief at 17-20.

27. Section 85 contains language substantially similar to Section 521, permitting national banks to charge:

on any loan ... interest at the rate allowed by the laws of the State ... where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater

12 U.S.C.A. § 85 (West 1989) (emphasis added); cf. Section 521, *supra* note 17, and Section 501, *infra* note 39.

28. See generally 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") at 5-9, 8 n.11.

29. 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.

Pub. L. No. 96-221, § 525, 94 Stat. 132, 167 (1980); see 12 U.S.C.A. § 1730g note (West 1989).

The states of Colorado, Iowa, Massachusetts, Maine, Nebraska, North Carolina, Wisconsin, and the Commonwealth of Puerto Rico formally opted out of sections 521 through 523 of the DIDMCA, although two states have since repealed their statutes opting out of

(Continued in next column)

29. (Continued from previous column)

sections 521 through 523. See Colo. Rev. Stat. § 5-13-104 (Supp. 1990); 1980 Iowa Acts ch. 1156, § 32 (not codified); Me. Rev. Stat. Ann. tit. 9A, § 1-110 (Supp. 1990); 1981 Mass. Acts ch. 231, § 2 (codified at Mass. Gen. L., ch. 183, § 63 note (1987), repealed by 1986 Mass. Acts ch. 177); 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 (Supp. 1988).

30. 439 U.S. 299 (1978) (the landmark case construing the language of Section 85 to provide that a national bank may charge interest at the rate allowed by the state of its location regardless of the law of the state of the borrower's residence).

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

32. 12 C.F.R. § 7.7310 (1990). For a general discussion of the most favored lender doctrine, see Langer & Wood, *supra* note 1.

33. Mass. AG Brief at 17.

34. *Id.* at 17-20.

35. See *id.* at 6-9, 12-15.

36. See *id.* at 9 n. 12; Section 521, *supra* note 17; cf. Section 85, *supra* note 28 (also contains alternative 1% rate).

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

38. 15 U.S.C. § 1601 *et seq.* The Attorney General asserted 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. Mass. AG Brief at 12-13.

39. Section 501 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. No. 96-221, § 501(a)(1), 94 Stat. 161 (1980); see 12 U.S.C.A. § 1735f-7a(a)(1) (West 1989).

40. A Senate committee report on the House Bill that, after the addition of the parity provisions (sections 521 through 523), eventually 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 payment charges or similar limitations designed to protect borrowers." *Id.*

41. See Mass. AG Brief at 9-12.

42. See *supra* note 40.

43. Mass. AG Brief at 10.

the general purposes for late payment charges (to deter default and to reimburse lenders for the added, unintended costs of late payment) also take them outside any concept of interest as compensation.⁴⁴

Greenwood Trust countered the Attorney General's analogies, arguing (a) 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 payment charges is a classification adopted by the Board of Governors of the Federal Reserve System in its regulations, not a classification imposed by Congress under the Truth-in-Lending Act, and (b) that Section 501 is inapposite because (i) Section 501 and the Senate Report cited by the Attorney General preceded the addition of the rate parity provisions (Sections 521 through 523 of the DIDMCA) to 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 point for authority on the interpretation of Section 521.⁴⁵

2. Choice-of-Law

In disputing the Attorney General's assertions on the issue of choice-of-law, Greenwood Trust argued that (i) Section 114B, unlike several other Massachusetts consumer credit statutes, has no explicit extraterritorial application language and (ii) applicable choice-of-law principles applied to the present facts support the application of Delaware law. Greenwood Trust noted, *inter alia*, that the existence of late payment charge authority in other Massachusetts statutes supports the view that the prohibition of late payment charges is not a "fundamental" policy of Massachusetts.⁴⁶ Greenwood Trust countered the Attorney General's assertion that Greenwood Trust's credit card agreements are contracts subject to the "adhesion contract" exception of the *Restatement (Second) of Conflict of Laws* ("*Restatement*"), by noting that 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.⁴⁷ Moreover, Massachusetts case law does not deny the enforceability of standardized contracts unless unconscionable or in some way fundamentally unfair.⁴⁸ Finally, Greenwood Trust argued that Massachusetts could not meet the burden of showing a "materially greater" interest as required by the *Restatement*.⁴⁹

The Attorney General asserted that all transactions between Greenwood Trust and residents of Massachusetts were entered into in Massachusetts.⁵⁰ The application of Massachusetts law was appropriate, the Attorney General claimed, because (i) Section 114B applies on its face to all creditors without limitation; (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;⁵¹ and (iii) other choice of law principles, in particular the "adhesion contract" and "fundamental policy" exceptions of the *Restatement*,⁵² operate to make Massachusetts law applicable. The Attorney General asserted that Massachusetts' fundamental policy with respect to late payment charges is evidenced by other consumer credit statutes because late payment charges are consistently permitted only where lenders are not permitted additional finance charges or interest.⁵³ Finally, the Attorney General argued that to determine which state has the more significant relationship to the late charge issue, the court should consider the choice-influencing considerations of section 6(2) of the *Restatement*. The Attorney General asserted that, in this light, Delaware has only an attenuated economic interest, characterizing the situation as a clash

between the "economic convenience" of creditors and state protection of consumers.⁵⁴

3. Massachusetts Law

In arguing that Greenwood Trust was a "creditor" within the contemplation of Section 114B,⁵⁵ the Attorney General adopted the definition of "creditor" found in the Massachusetts TILA.⁵⁶ Greenwood Trust contended that the Attorney General's reliance on the definition in the Massachusetts TILA was inappropriate, citing *Northampton Nat'l Bank v. Attorney General*⁵⁷ for the proposition that Section 114B does not define "creditor" by reference to Mass. Gen. L. chapter 140D.⁵⁸

D. The Court's Analysis

1. Preemption Analysis

The court began its analysis of the issues with a consideration of the federal preemption issue. The court presented a history of the DIDMCA and Massachusetts law, attributing the source of the present controversy to "the increasingly unsettled relations among banks, state regulators, and federal authorities over the last decade." Against a background of the historical interplay of state and federal usury and banking law, the court noted that in enacting Section 521, "Congress also recognized the continued importance of state consumer protection laws" by including Section 525, the state opt-out provision.⁵⁹ The court's view of the controversy as essentially a clash of state interests rather than a matter of statutory interpretation is evident in the court's characterization of the issues and its citation of commentary.⁶⁰

Taking a narrow view of preemption and the interpretation of Section 521, the court stated that by its "literal terms," Section 521 preempts only "state interest rates which conflict with the federal rate permitted" by Section 521.⁶¹ Thus the court found that the "plain meaning" of Section 521 "does not evince Congressional intent to preempt state

47. 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) ("Greenwood Trust Reply Brief").

48. *Id.*

49. See *Restatement*, *supra* note 26, § 187(2)(b).

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

51. See Mass. Gen. L. ch. 93A, § 1(b) (1985 & Supp. 1991).

52. See *Restatement*, *supra* note 26, § 187(2)(b).

53. Reply Brief of Defendant, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989).

54. Memorandum of Commonwealth of Massachusetts in Opposition to Greenwood Trust's Motion for Summary Judgment, Greenwood Trust Co. v. Massachusetts, No. 89-2583-Y (D. Mass. filed Nov. 14, 1989) at 19.

55. See *supra* note 12.

56. Mass. AG Brief at 4 n.6.

57. 8 Mass. App. 809, 812 (1979).

58. Greenwood Trust Brief at 17; Greenwood Trust Reply Brief at 12 n.10.

59. *Greenwood Trust*, 776 F. Supp. at 25.

60. See, e.g., *id.*

61. *Id.* at 27 (emphasis in original).

44. See *id.* at 13-15, 17; see, e.g., 12 U.S.C. § 86a(b)(2) (Supp. VI 1988) (interest defined as "any compensation, however denominated, for a loan").

45. Memorandum of Law in Opposition to Defendants 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).

46. *Id.*

