

## 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).

