Relationship of State Usury Preemption Laws
FDIC-88-45
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You have asked our opinion of the meaning of section 525 of the Depository Institution Deregulation and Monetary Control Act of 1980 ("DIDMCA"), 12 U.S.C. 1730g note, and its relationship with section 521 of DIDMCA, 12 U.S.C. 1831d(a). Section 521 provides for a preemption of state usury laws that apply to FDIC-insured state-chartered banks.{*}

{* Section 522 (12 U.S.C. 1730g) and 523 (12 U.S.C. 1785g) of DIDMCA contain provisions similar to those of section 521; but, they do not apply to banks. Section 522 applies to institutions insured by the Federal Savings and Loan Insurance Corporation and section 523 applies to credit

unions insured by the National Credit Union Administration.}

Section 521 preempts state usury laws in two ways. It gives insured state banks the right to charge a federally-prescribed rate on loans. It also says an insured state bank may "export" its home state's interest rate-- *i.e.,* that the bank may charge the highest rate allowed in the State where the bank is located, no matter where the borrower may be located.

Section 525 gives states the power to countermand the federal preemption. This right of countermand, however, belongs to the state where the loan is made. Specifically, section 525 reads as follows:

The amendment made by section 521 through 523 of this title shall apply only with respect to loans *made in any State* during the period beginning on April 1, 1980, and ending on the date, on or after April 1, 1980, on which *such State* adopts a law . . . which states explicitly and by its terms that such States does not want the amendments made by such sections to apply with respect to loans *made in such State* . . . . 12 U.S.C. 1730g note (emphasis added).

You have suggested that section 525 should be read to be congruent with section 521-- *i.e.,* that the state where the loan is made must be the same, as a matter of law, as the state where the bank is located. Accordingly, in your view, only a bank's home state has any right to countermand the federal preemption with respect to loans made by that bank. In support of your conclusion, you refer to a 1983 FDIC staff opinion. (Letter to Peter D. Schellie, from Peter M. Kravitz, dated October 20, 1983). This staff letter occasionally has been misunderstood. As a consequence, I will attempt to clarify our interpretation of section 525.

First, I am unable to agree with your interpretation of section 525. Section 525 uses plain language. The language differs considerably from that of section 521. There is nothing on the face of the statute to indicate they are meant to say the same thing. Moreover, section 525 has its own legislative history, and its own peculiar purpose and rationale. Congress had economic objectives in mind when it adopted section 521; in particular , it was enacted in order to enable state banks to compete with national banks. By contrast, Congress adopted section 525 in an effort to preserve principles of federalism. Recognizing that section 521 deprived states of authority over matters traditionally committed to State control, Congress enacted section 525 in order to enable states to recover authority that section 521 had taken away.

In my opinion, section 525 should be read in accordance with the plain meaning of the language used. *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians,* 466 U.S. 765, 772 (1984). The state that has the right of countermand is the one in whcih the loan is "made". This is not necessarily the state in which the bank is located; nor is it necessarily the state in which the borrower is located.

{{4-28-89 p.4346}}

Section 525 is a federal statute. It must be interpreted as having a single meaning throughout the nation. To do otherwise would be both confusing and disruptive to the nation's banking system. *Cf. Marquette National Bank* v. *First of Omaha Service Corporation,* 439 U.S. 299, 312-313 (1978). Resort to individual State statutory provisions in order to determine where a loan is made does not provide a single federal standard and does not result in the equity or the predictability I believe was intended when sections 521 and 525 were enacted. Instead, I believe an analysis of all the facts surrounding a transaction must be used in determining where a loan is "made". See *Marquette,* 439 U.S. at 311-312.

In summary, then, the right of countermand belongs to the state in which a loan is made. The determination of where a loan is made should be based upon an analysis of the facts surrounding the extension of credit. The fact that a state has countermanded under section 525 should not affect the usury preemption of section 521 for a bank not located in that state, so long as the loan is not made in the state that has countermanded. And, since the determination of where a loan is made is factual, such a countermanding state should not be able under section 525 to legislatively extend its reach in order to affect the determination.

You have stated that your client is an FDIC-insured bank chartered in New York with a nationwide credit card business. New York has not enacted legislation countermanding section 521's usury preemption. You also have stated that: (i) your client assesses the final charges on

their credit cards in New York; (ii) payment is remitted to your client in New York; (iii) the decision to extend credit is performed by your client in New York; and (iv) your client issues its credit cards from New York. Therefore, you suggest that if the home State of a bank is not the automatic basis for determining where a loan is made, than a factual examination under a traditional conflict-of-laws analysis also supports a conclusion that loans (or extensions of credit) on credit cards issued by your client are made in New York.

These are indeed very relevant factors in any analysis of where loans are made. *See e.g.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188, 195 (1971). Equally so is where the parties intend the contract to be made under the contractual provisions itself. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). The final conclusions where a loan is made, however, is a factual one based upon the terms of the contract and all the facts present. This office is not in a position to analyze these or determine whether we have all the facts in order to reach a conclusion. That is more appropriately the role of bank counsel, who will be in a position to analyze the relevant facts in light of the standards referred to above and so advise his client.