1997

Smiley v. Citibank (South Dakota), N. A.: Banks Find Interest in Credit Card Late Payment Fees

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NOTES & COMMENTS

Smiley v. Citibank (South Dakota), N.A.: Banks Find “Interest” in Credit Card Late Payment Fees

I. INTRODUCTION

In 1863, Congress passed a bill to establish a national banking system in an effort to provide a national currency and to create a market for government bonds during the Civil War. The following year, the bill was revised and reenacted to become the National Bank Act (the NBA) of 1864. Interpreting the NBA for the first time in 1873 in Tiffany v. National Bank of Missouri, the Supreme Court determined that the Act’s purpose was to protect the newly created national banks from discriminatory state legislatures. In light of this purpose, the Tiffany Court announced what has become known as the “most favored lender” doctrine by interpreting the NBA to allow a national bank to borrow the interest rate available to the “most favored lender” in the state where the national bank is located.5

1. See Bray Hammond, Banks and Politics in America 727 (1957) (discussing the National Currency Act of 1863, ch. 58, §§ 1-65, 12 Stat. 665-82 (1863)). Before the enactment of the National Currency Act in 1863, the federal government had not established a system of federal chartering for banks. Prior to that time only two national banks had been chartered by the federal government. The first Bank of the United States, chartered by Congress in 1791, was the first national bank. However, the bank’s charter was not renewed at the end of the charter’s twenty year life. The second Bank of the United States was established in 1816. Similarly, its charter was allowed to expire after a twenty year period. See William J. Brown, The Dual Banking System in the United States 8-10 (1968).

2. See Hammond, supra note 1, at 731. The NBA, as originally worded, stated in relevant part:

[Every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act.


3. 85 U.S. (18 Wall.) 409 (1873).

4. See id. at 412-13.

5. See id. at 413. The Tiffany Court declared that the NBA “allows such [national] banks to charge such interest as State banks may charge, and more, if by the laws of the
Over one hundred years later, in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, the Supreme Court expanded the holding of the *Tiffany* decision to interstate transactions and held that section 85 of the NBA authorizes a national bank to charge out-of-state credit card customers the highest interest rate allowed by the bank’s home state, even when that rate is higher than the rate permitted by the states in which the cardholders reside. The *Marquette* decision allows a national bank located in one state to “export” the “most favored lender” rate of the bank’s home state to its customers in other states.

Most recently, in *Smiley v. Citibank (South Dakota), N.A.*, the Supreme Court addressed the question of whether late payment fees charged to out-of-state credit card customers fall under the term “interest” in section 85 and thus may be “exported” to out-of-state customers along with the interest rate. Deferring to the Comptroller of the Currency’s (the Comptroller) interpretation of the term “interest” in section 85, the *Smiley* Court found that late payment fees constitute “interest” for purposes of section 85. Thus, the *Smiley* decision enables a national bank to “export” late payment fees as a form of “interest” from its home state to the states in which its cardholders reside.

State more may be charged by natural persons.” *Id.* Thus, as a result of the *Tiffany* decision, the “most favored lender” rate available to a national bank is the greater of the rate allowed to be charged by state banks or natural persons in the state where the national bank is located.

7. Section 85 of the NBA, as amended and codified in the United States Code, reads in relevant part:
   
   Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of [one] 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, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes.

11. See id. at 1732.
12. See id. at 1736 (affirming the Supreme Court of California).
Part II of this Note will examine the facts, procedural history, and holding in the *Smiley* case. Part III will focus on the background law applicable to the *Smiley* case and will examine the decisions of various lower courts regarding whether late payment fees fall under the term “interest” in section 85. Part IV will analyze the significance of the *Smiley* case with regard to both national banks and state-chartered insured banks (state banks). Finally, in Part V, this Note will conclude that state banks, although not directly impacted by the *Smiley* decision, should also be allowed to “export” late payment fees as a form of “interest.”

II. STATEMENT OF THE CASE

In *Smiley*, the petitioner was a resident of California who held two credit cards issued by respondent, a national bank located in South Dakota. The first card agreement provided for a late fee of fifteen dollars for each monthly period in which the minimum monthly payment was not made within twenty-five days of the due date. Under the second card agreement, a late fee of six dollars would be imposed if the minimum monthly payment was not received within fifteen days of the due date. In addition, if the minimum payment was not received by the next monthly payment due date, the second card agreement provided for a charge of either fifteen dollars or 0.65% of the outstanding balance on the card, whichever was greater.

After being charged late fees on both credit cards issued by respondent, petitioner filed a class action suit in California Superior Court alleging that the late payment fees charged by respondent violated California law. Respondent, Citibank, moved for judgment on

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13. *See infra* notes 17-100 and accompanying text.
15. *See infra* notes 146-75 and accompanying text. This Note will discuss the *Smiley* decision's impact on both national banks and state-chartered insured banks. Because virtually all state-chartered banks are insured, this Note will simply refer to “state” banks.
16. *See infra* notes 176-87 and accompanying text.
18. *See id.*
19. *See id.*
20. *See id.*
21. “Petitioner ... brought a class action against respondent on behalf of herself and other California holders of respondent's credit cards, asserting various statutory and common-law claims,” *Id.*
22. *See id.* Petitioner's complaint alleged common-law claims of “breach of duty of good faith and fair dealing; unjust enrichment; fraud and deceit; negligent misrepresenta-
the pleadings, claiming that petitioner’s state law claims were preempted by section 85 of the NBA.\(^\text{23}\) The California Superior Court accepted respondent’s argument that credit card late payment fees constitute “interest” for purposes of section 85 and granted respondent’s motion.\(^\text{24}\) The California Court of Appeals affirmed the Superior Court’s dismissal of the complaint.\(^\text{25}\)

The Supreme Court of California affirmed the Court of Appeals and held that “the term ‘interest’ in section 85 should be construed to cover late payment fees, if such fees are allowed by a national bank’s home state.”\(^\text{26}\) In reaching this conclusion, the court took three deliberate steps. First, the court declared that the issue in the case is not the existence of federal law preemption under section 85, but rather the scope of the preemption based on the meaning of the term “interest” in section 85.\(^\text{27}\) Second, after determining that the term “interest” is not defined in section 85 itself\(^\text{28}\) or in its predecessor section of the NBA as originally enacted in 1864,\(^\text{29}\) the court looked to the time of the passage of the NBA to discover a basis for inferring an implied definition of the term.\(^\text{30}\) In doing so, the court found that, at the time of the passage of the NBA, “the term ‘interest’ readily embraced a periodic charge based on a percentage of a certain sum,
either the amount lent or some other, payable absolutely by matur-
ity."\textsuperscript{31} However, the court concluded that the term "interest" is not
limited to this meaning and could also include late payment fees,
payable contingently in the event of default, calculated as a "periodic
percentage charge"\textsuperscript{32} or "fixed as a flat fee."\textsuperscript{33} Finally, determining
that there had not been a change in the coverage of the term
"interest" from the time of the enactment of the NBA in 1864 until it
was later codified in section 85, the court found that the term
"interest" in section 85 should be construed to cover late payment
fees.\textsuperscript{34}

Justice Arabian, writing in dissent, rejected the majority's broad
reading of the term "interest" in section 85.\textsuperscript{35} The dissent began by
declaring that the NBA as it was originally enacted did not use the
term "interest" unaccompanied by the word "rate."\textsuperscript{36} Thus, the dis-
sent stated that "it is highly likely that in enacting section 30,
Congress actually had in its collective mind a much narrower and
more precise understanding of the term interest... a sum linked to
the lending of money calculated at a rate or a percentage of the loan
over time."\textsuperscript{37} The dissent emphasized that there is nothing in the leg-
islative history of the NBA "to suggest that the drafters of the
measure had anything in mind beyond the common sense, conven-
tional notion of 'rates of interest.'"\textsuperscript{38} Furthermore, the dissent
concluded that the Tiffany Court "alluded not to Congress's fear of
the specter of discriminatory rate setting against national banks by
the states, but to its concern that state legislatures might abolish all

\textsuperscript{31} Id.
\textsuperscript{32} Id. (citing Wilkinson v. Daniels, 1 Greene 179, 188 (Iowa 1848)).
\textsuperscript{33} Id. (citing Craig v. Pleiss, 26 Pa. 271, 271-72, 272-74 (1856)). The court stated that
one common definition of the term "interest" in use at the time of the passage of the
NBA was a "sum of money paid or allowed by way of compensation for the loan or use of
another sum..." Id. at 700 (quoting 2 ALEXANDER M. BURRILL, A NEW LAW
DICTIONARY AND GLOSSARY 629 (1851)) (internal quotation marks omitted). The court
found that another definition was "compensation which is paid by the borrower to the
lender or by the debtor to the creditor for its use." Id. (quoting 1 JOHN BOUVIER, A
LAW DICTIONARY 652 (10th ed. 1860)) (internal quotation marks omitted). Under either
definition, the court found that "[s]uch language easily encompasses late payment fees, as
compensation for use of money, specifically, its retention, beyond the loan's term." Id.
\textsuperscript{34} See id. at 701-02. The court noted that its construction of the term "interest" in
section 85 is in accord with the decisions of a majority of other courts, interpretations of
the Comptroller, and the views of commentators. See id. at 702-03.
\textsuperscript{35} See id. at 708-16 (Arabian, J., dissenting).
\textsuperscript{36} See id. at 709 (Arabian, J., dissenting) (referring to section 30 of the NBA as en-
acted in 1864).
\textsuperscript{37} Id. (Arabian, J., dissenting).
\textsuperscript{38} Id. at 710 (Arabian, J., dissenting).
Finally, the dissent took the position that the standard for preemption requires the invalidation of state law only where the state law prevents a national bank from fulfilling its governmental duties. Under this test, the dissent concluded that the respondent had failed "to establish that application of California's ban on late charge fees unrelated to actual damages will in any sense 'incapacitate' it from carrying out its duties as a federal instrumentality."

In a separate dissenting opinion, Justice George stated that the majority "failed to recognize the clear distinction that traditionally has been drawn between such late payment charges and charges that commonly are characterized as 'interest.'" The dissent maintained that late payment fees are assessed only if the borrower fails to make a timely payment and thus are "penalties" or "liquidated damages." Moreover, the dissent determined that conditional late payment fees traditionally were regarded as penalties for nonperformance of the loan agreement, rather than "interest" on the loan itself. After finding that nothing in the legislative history of the NBA suggests that the statutory reference to "interest" includes late fees, the dissent relied on cases at the time of the enactment of the NBA in 1864 that made it clear that late fees "would not be considered interest for the purpose of determining whether the loan exceeded the legally permitted rate of interest." Finally, the dissent rejected the majority's conclusion "that the term 'interest' in section 85 must be given an unusually broad interpretation, encompassing late payment fees, in order to effectuate the legislative purpose of the statute."

39. Id. at 711 (Arabian, J., dissenting). The dissent maintained that "[i]t was thus to induce state banks to convert their charters and to protect the future of banking itself, that Congress tied national bank interest rate ceilings to those set by local legislatures for lenders other than state banks." Id. at 712 (Arabian, J., dissenting). Moreover, the dissent also emphasized that neither the Marquette Court nor Congress "wrote or legislated against a backdrop of interstate banking, an arrangement that did not exist even in 1978 and was inconceivable in 1864." Id. at 713 (Arabian, J., dissenting).

40. See id. at 715 (Arabian, J., dissenting).

41. Id. (Arabian, J., dissenting).

42. Id. at 716 (George, J., dissenting).

43. See id. at 717-18 (George, J., dissenting) (citing Garrett v. Coast S. Fed. Sav. & Loan Ass'n, 511 P.2d 1197 (1973)).

44. See id. at 718 (George, J., dissenting) (citing First Am. Title Ins. & Trust Co. v. Cook, 12 Cal. App. 3d 592, 596-97 (1970)).

45. Id. (George, J., dissenting) (citing Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863)).

46. Id. at 719 (George, J., dissenting).
Recognizing disagreement not only within the California Supreme Court, but also among various lower courts as to the proper interpretation of the term "interest" in section 85, the Supreme Court granted certiorari. Justice Scalia, writing for a unanimous Court, began the Court's analysis by declaring that it would be difficult to contend that the term "interest" in section 85 is unambiguous with regard to whether the statutory term encompasses late payment fees. The Court stated that it declared, in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., that it was the Court's "practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." The Court noted "that [the] practice extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws." Adhering to the ordinary rule of deference to agency judgments, the Court looked to a regulation adopted by the Comptroller in February of 1996 which includes late payment fees within the definition of "interest" in section 85.

47. See supra notes 26-46 and accompanying text.
48. See infra notes 115-37 and accompanying text for a discussion of the two competing views of various lower courts prior to the Smiley decision.
50. See id. at 1732-33.
53. Id.
54. Although the Comptroller's regulation was in effect at the time of the Court's decision, the Comptroller's final regulation was enacted after the California Supreme Court's decision. See id. However, in March of 1995, the Comptroller noticed for public comment a proposed regulation dealing with the subject of late payment fees. See id. This proposed regulation was issued after the California Superior Court's decision but prior to the California Supreme Court's decision. See id.
55. See id. The Comptroller's regulation reads:
The term "interest" as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.
The petitioner proposed several reasons why the ordinary rule of
devance should not apply to this regulation by the Comptroller: (1)
the regulation was issued over one hundred years after the original
enactment of the NBA;56 (2) the regulation does not provide a ra-
tional basis for distinguishing the charges it denominates "interest"
from those it denominates "noninterest";57 and (3) the regulation is
"inconsistent with positions taken by the Comptroller in the past."58

Addressing petitioner's first argument, the Court declared that
the more than one hundred year delay between the enactment of the
NBA and the adoption of the Comptroller's regulation does not af-
fect the validity of the regulation.59 The Court noted that it does not
accord deference to agencies "because of a presumption that they
drafted the provisions in question, or were present at the hearings, or
spoke to the principal sponsors . . . ."60 Rather, the Court stated that
agencies are given deference "because of a presumption that Con-
gress, when it left ambiguity in a statute meant for implementation by
an agency, understood that the ambiguity would be resolved, first and
foremost, by the agency, and desired the agency (rather than the
courts) to possess whatever degree of discretion the ambiguity al-

57. See id.
58. Id. at 1734.
59. See id. at 1733 (declaring that "agency interpretations that are of long standing
come before us with a certain credential of reasonableness, since it is rare that error
would long persist" and that "neither antiquity nor contemporaneity with the statute is a
condition of validity").
60. Id.
61. Id. (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467
U.S. 837, 843-44 (1984)).
(internal quotation marks omitted).
63. Id. (citing 5 U.S.C. § 553 (1994)). Along with the delay between the enactment of
the NBA and the adoption of the Comptroller's regulation, petitioner argued that the
regulation should not be given deference because it was adopted "seemingly as a result of
this and similar litigation in which the Comptroller has participated as amicus curiae on
the side of the banks." Id. The Court dismissed this argument by stating "[It]hat it was
litigation which disclosed the need for the regulation is irrelevant." Id.
The Court next addressed petitioner's argument that the Comptroller's regulation does not provide a rational basis for distinguishing between charges it denominates "interest" from those it denominates "noninterest." The Court found that it was rational for the regulation to distinguish between payments relating to the extension of credit, the availability of a line of credit, or any default by a borrower and all other payments. Thus, the Court concluded that the line drawn by the Comptroller's regulation is reasonable.

After rejecting petitioner's first two arguments, the Court addressed petitioner's argument that the Comptroller's regulation is "inconsistent with positions taken by the Comptroller in the past." In response, the Court noted that "the mere fact that an agency interpretation contradicts a prior agency position is not fatal." However, the Court acknowledged that a "[s]udden and unexplained change" or "change that does not take account of legitimate reliance on prior interpretation" may be "arbitrary, capricious [or] an abuse of discretion." Nevertheless, the Court found that a change in official agency position has not occurred in the present case. The Court stated that petitioner relied on statements in two letters as evidence of a prior agency position that late payment fees do not constitute "interest" for purposes of section 85. After determining

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64. See id.
65. See id. at 1734. The Comptroller's regulation specifically states that the term "interest" in section 85 includes "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." 61 Fed. Reg. 4869 (1996) (to be codified at 12 C.F.R. § 7.4001(a)).
66. See Smiley, 116 S. Ct. at 1734. The Court reserved the question of whether the regulation is "‘arbitrary [or] capricious’ as an interpretation of what the statute means—or perhaps even (what Chevron also excludes from deference) ‘manifestly contrary to the statute’ " for a later segment of the opinion. Id. (alteration in original); see infra notes 84-93 and accompanying text.
68. Id.
70. Id. (citing United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 670-75 (1973)).
71. Id. (alteration in original) (quoting 5 U.S.C. § 706(2)(A) (1994)) (internal quotation marks omitted).
72. See id. The Court noted that the Statement of Basis and Purpose accompanying the Comptroller's final regulation states that the "final ruling is consistent with OCC interpretive letters in this area... and reflects the position the OCC has taken in amicus curiae briefs in litigation pending in many state and Federal courts." Id. (alteration in original) (quoting 61 Fed. Reg. 4859 (1996)) (internal quotation marks omitted).
73. See id. First, petitioner relied on a letter from the Comptroller to the President's
that neither of the letters is "sufficient in and of itself to establish a binding agency policy," the Court found that the two statements taken together do not reflect a prior agency policy because they contradict each other. Indeed, the Court declared that the statements relied on by the petitioner show, if anything, that "there was good reason for the Comptroller to promulgate the new regulation, in order to eliminate uncertainty and confusion."

After rejecting all of petitioner's arguments that the Comptroller's specific regulation interpreting section 85 should not be accorded the usual deference, the Court addressed petitioner's argument that no Comptroller interpretation of section 85 is entitled to deference because section 85 preempts state law. Specifically, petitioner argued that the Court previously announced a "presumption against . . . pre-emption" which should, in effect, trump the ordinary Chevron deference. Rejecting petitioner's argument that this presumption trumps the ordinary practice of deferring to the judgment of agencies, the Court stated that "[t]his argument confuses the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive." The Court declared that "there is no doubt that § 85 pre-empts state law."

Committee on Consumer Interests written in 1964 which states that late payment fees are not properly characterized as "interest." See id. Second, petitioner relied on a 1988 opinion letter from the Deputy Chief Counsel of the OCC stating "it is my position that [under § 85] the laws of the states where the banks are located . . . determine whether or not the banks can impose the foregoing fees and charges [including late fees] on Iowa residents." Id. (alterations in original) (quoting OCC Interpretive Letter No. 452, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676, at 78,064 (Aug. 11, 1988)) (internal quotation marks omitted).

74. Id. The Court noted that the first statement was too informal to establish a binding agency policy and that the second statement “only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks.” Id.

75. See id. (stating that the first letter asserts that "interest" is a nationally uniform concept and that the second letter asserts that "interest" is to be determined by reference to state law).

76. Id. at 1734-35.
77. See id. at 1735.
78. Id. (alteration in original) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992)) (internal quotation marks omitted).

79. See id.
80. See id. Petitioner argued that the presumption against preemption “requires a court to make its own interpretation of § 85 that will avoid (to the extent possible) pre-emption of state law.” Id.

81. Id.
82. Id.
simply the meaning of section 85.\textsuperscript{83}

In the final segment of the opinion, the Court addressed the question of whether the Comptroller’s regulation represents a reasonable interpretation of section 85.\textsuperscript{84} Looking to the definition of “interest” in legal dictionaries at the time the NBA was originally enacted\textsuperscript{85} and the Court’s own definition of “interest” pronounced shortly after the enactment of the NBA,\textsuperscript{86} the Court rejected petitioner’s argument that late fees do not constitute “interest” because they are not based on the amount outstanding on the loan.\textsuperscript{87} The Court also dismissed petitioner’s argument that the language in section 85 “at the rate allowed”\textsuperscript{88} requires “that the interest charges be expressed as functions of time and amount owing.”\textsuperscript{89} In reaching this conclusion, the Court stated that “[a]ny flat charge may, of course, readily be converted to a percentage charge”\textsuperscript{90} and that “there is no apparent reason why home-state approved percentage charges should be permissible but home-state-approved flat charges unlawful.”\textsuperscript{91} Moreover, the Court rejected petitioner’s argument that late fees cannot be “interest” because they are “penalties” by declaring that “[i]n § 85, the term ‘interest’ is not used in contradistinction to ‘penalty,’ and there is no reason why it cannot include interest charges imposed for that purpose.”\textsuperscript{92} Thus, the Court determined that the Comptroller’s regulation is reasonable.\textsuperscript{93}

\textsuperscript{83} See id.

\textsuperscript{84} See id. The Court specifically noted that the question is whether the regulation is a reasonable interpretation of the statute and not whether it is the best interpretation. See id.

\textsuperscript{85} See id. The Court stated that a common definition of “interest” at the time of the enactment of the NBA was the “compensation which is paid by the borrower to the lender or by the debtor to the creditor for . . . use [of money].” Id. (alterations in original) (quoting 1 John Bouvier, A Law Dictionary 652 (6th ed. 1856)) (internal quotation marks omitted).

\textsuperscript{86} See id. The Court’s own definition of “interest” was “the compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention.” Id. (quoting Brown v. Hiatts, 82 U.S. (15 Wall.) 177, 185 (1872)) (internal quotation marks omitted).

\textsuperscript{87} See id.

\textsuperscript{88} See supra note 7 for the language of section 85.

\textsuperscript{89} Smiley, 116 S. Ct. at 1736.

\textsuperscript{90} Id. (noting that the fact that any flat charge may be converted into a percentage charge was the basis for nineteenth century decisions holding that flat charges violated state usury laws that established maximum “rates”).

\textsuperscript{91} Id.

\textsuperscript{92} Id.

\textsuperscript{93} See id.
In summary, the Smiley Court found that the Comptroller’s regulation interpreting section 85 is entitled to deference under the Court’s holding in Chevron. In reaching this conclusion, the Court rejected petitioner’s arguments that the Comptroller’s regulation is not entitled to deference because it was issued over one hundred years after the NBA was enacted, the regulation does not provide a rational basis for distinguishing the various charges it denominates “interest” and “noninterest,” and the regulation is inconsistent with positions taken by the Comptroller in the past. The Court also dismissed petitioner’s argument that no Comptroller interpretation of section 85 should be entitled to deference because section 85 preempts state law and there is a presumption against preemption. After determining that the Comptroller’s regulation is entitled to deference under Chevron, the Court found that the regulation is a reasonable interpretation of section 85. Thus, the Court reached its ultimate conclusion that the term “interest” in section 85 includes late payment fees.

III. BACKGROUND LAW

The Supreme Court’s analysis of the term “interest” in Smiley is not the Court’s first interpretation of the term “interest” under the banking laws. Over one hundred and twenty years earlier, the Court, in Tiffany, first construed the NBA and announced what has become known as the “most favored lender” doctrine. The Tiffany Court determined that Congress enacted the NBA to protect the newly created national banks from unfair treatment by state legislatures in order to achieve a centralized national banking system.

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94. See supra notes 47-93 and accompanying text.
95. See supra notes 59-63 and accompanying text.
96. See supra notes 64-66 and accompanying text.
97. See supra notes 67-76 and accompanying text.
98. See supra notes 77-83 and accompanying text.
99. See supra notes 84-93 and accompanying text.
101. The Tiffany Court construed section 30 of the NBA. Section 30 was later codified in section 85 of the United States Code also under the title of the NBA. The Smiley Court construed section 85. For the wording of section 30, see supra note 2, and for the wording of section 85, see supra note 7.
102. The Tiffany Court stated:
It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give
After declaring that the NBA gives “advantages to National banks over their State competitors,” the Court found that the Act allows national banks “to charge such interest as State banks may charge, and more, if by the laws of the State more may be charged by natural persons.” Thus, the Tiffany Court allowed a national bank located in Missouri to charge the same interest rate as chargeable by natural persons under Missouri law while Missouri state banks were limited to a lower rate under Missouri law.

Over one hundred years later, the Marquette Court expanded the reach of the “most favored lender” doctrine to interstate transactions by announcing what has become known as the interest “exportation” principle. Construing the language of section 85, the Marquette Court held that a national bank is allowed to charge credit card customers in other states the interest rate authorized by the state where the bank is “located,” even when that rate is higher than the rate allowed under the state laws of other states.


103. See id. at 413 (declaring that national banks “were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government”).

104. Id.

105. Id.

106. See id. at 410. Under Missouri law, banks organized under its state laws were limited to eight percent interest, but the rate of interest allowed generally was ten percent. See id. In Tiffany, the national bank located in Missouri charged nine percent. See id.

107. The Marquette Court implicitly reaffirmed the “most favored lender” doctrine by citing Tiffany with approval. Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 314 (1978). Furthermore, the Marquette Court stated that “[t]he ‘most favored lender’ status for national banks under Tiffany has since been incorporated into the regulations of the Comptroller of the Currency.” Id. at 314 n.26 (citing 12 C.F.R. § 7.7310(a) (1978)).

108. See id. at 314.

109. See supra note 7 for the language of section 85.

110. See Marquette, 439 U.S. at 309 n.21. The Court declared that, for purposes of section 85, “a national bank is ‘located’ either in the place designated in its ‘organization certificate,’ . . . or in the places in which it has established authorized branches.” Id. (citation omitted) (citing Citizens & S. Nat’l Bank v. Bougas, 434 U.S. 35 (1977)).
than the rate permitted by the states in which the customers reside."111 In *Marquette*, the Court allowed a national bank located in Nebraska to charge its Minnesota credit card customers an interest rate that was allowed under Nebraska law, but was higher than the rate allowed by Minnesota usury laws.112 Furthermore, the *Marquette* Court expressly rejected petitioner’s argument that the “exportation” of interest rates would “significantly impair the ability of States to enact effective usury laws”113 and declared that “the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.”114 Thus, the *Marquette* decision, combined with the *Tiffany* decision, allows a national bank to “export” the “most favored lender” rate of the bank’s home state to its customers in other states.

Prior to the Court’s decision in *Smiley*, various lower courts disagreed on whether the term “interest” in section 85 should be interpreted to include late payment fees.115 The two main approaches that emerged from the lower courts can be described as the “broad view” and the “narrow view.”116 The “broad view” generally emphasized the enabling, rather than restrictive, nature of section 85 in determining that the term “interest” in section 85 should be read broadly to include late payment fees.117 In contrast, the “narrow view” focused on interpreting the term “interest” to only include percentage charges based on outstanding balances.118 The *Smiley* court followed the “broad view” in holding that late payment fees consti-

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111. *See id.* at 307-19. As a result of the *Marquette* decision, a bank in State A can override the intent of the legislature in State B to protect its citizens from usurious interest rates. For example, suppose State A does not have an interest rate ceiling while State B imposes an eighteen percent limit. Banks located in State A can extend credit to customers residing in State B utilizing an unlimited interest rate authorized by the laws of State A. Residents of State B would be protected by State B’s eighteen percent interest rate cap only if they received credit from a bank located in State B.

112. *See id.* at 302. Nebraska law permitted banks to charge interest on the unpaid balances of credit card accounts at the rate of eighteen percent per year on the first $999.99 and twelve percent per year on amounts over $1,000. *See id.* However, Minnesota law fixed the annual interest rate at twelve percent but allowed banks to compensate by charging annual fees of up to fifteen dollars for the privilege of using a bank credit card. *See id.* at 302-03.

113. *Id.* at 318 (stating that “[t]his impairment, however, has always been implicit in the structure of the National Bank Act ”).

114. *Id.* at 319.

115. *See infra* notes 120-37 and accompanying text.

116. *See infra* notes 120-37 and accompanying text.

117. *See infra* notes 120-27 and accompanying text.

118. *See infra* notes 128-37 and accompanying text.
In *Copeland v. MBNA America Bank, N.A.*, the Colorado Supreme Court followed the "broad view" and held that a national bank located in Delaware was permitted to charge a Colorado credit card customer "interest" in the form of late payment fees, which were valid under Delaware law, under its authority from section 85 despite the fact that Colorado law prohibited such fees. In *Copeland*, a Colorado credit card customer initiated a class action suit against a national bank located in Delaware and alleged that the bank violated Colorado law by charging late fees in addition to finance charges on his credit card account. The court reasoned that late payment fees constitute "interest" under section 85 based on a number of reasons. First, the court found sufficient authority to allow it "to conclude that a form of late payment fees was included in the definition of the term 'interest' at the time the NBA was enacted." Second, the court gave "deference to the various OCC administrative opinions and rulings interpreting late payment fees as a form of 'interest' under section 85 of the NBA." Third, the court found that Congress' enactment of the Depository Institutions Deregulation and Monetary

119. See supra notes 47-93 and accompanying text.
121. See id. at 89. In addition to the Colorado Supreme Court, other courts followed the "broad" view in dealing with the question of credit card late fees under section 85. However, the *Smiley* Court specifically cited the *Copeland* case as one of the principal reasons for granting certiorari. See Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1732 n.2 (1996).
122. See Copeland, 907 P.2d at 88-89. The card agreement provided for a fifteen dollar late fee if the minimum payment was not paid within twenty-five days of the due date. See id. at 89. Failing to make a minimum monthly payment, petitioner was assessed a fifteen dollar late fee. See id.
123. Id. at 92 (citing Library of Congress v. Shaw, 478 U.S. 310, 315 (1986)). Before looking to the definition of "interest" at the time the NBA was enacted, the court considered three things: (1) the statutory language of section 85; (2) the legislative history of the NBA; and (3) court interpretations of section 85. See id. at 90-92. The court found that neither section 85 nor the legislative history of the NBA defines the term "interest." See id. at 90-91. Further, the court found that other courts adopted an expansive view of the term "interest" to include banking charges other than periodic percentage interest rates. See id. at 92.
124. Copeland, 907 P.2d at 92 (citing 12 C.F.R. § 7.7378 (1971)). Similarly, the *Smiley* Court gave great deference to a regulation by the Comptroller that interprets the term "interest" found in section 85 to include late payment fees. See supra notes 47-93 and accompanying text.
Control Act (the DIDMCA) of 1980, which incorporated the language of section 85, lent support to finding that late payment fees constitute "interest" for purposes of section 85. Finally, the Copeland court was persuaded by the majority of other courts that interpreted late payment fees to be a form of "interest" under both section 85 for national banks and section 1831d for state banks.

In contrast, the Supreme Court of New Jersey, in Sherman v. Citibank (South Dakota), N.A., followed the "narrow view" by holding that late payment fees do not constitute "interest" under section 85. In reaching this conclusion, the Sherman court began its analysis by declaring that "[w]here the field that Congress is said to have preempted has been traditionally occupied by the states, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless there was the clear and manifest purpose of Congress.' " Finding that state usury law restrictions were historically rooted in the consumer protection field traditionally occupied by the states, the court determined that Congress’ failure to include an express preemption clause in section 85 necessitates an examination of whether section 85 conflicts with New Jersey state law prohibiting late fees.

In conducting its examination of whether section 85 conflicts with New Jersey state law, the Sherman court took several deliberate steps. First, the court rejected the notion that at the time of the enactment of the NBA “Congress contemplated an open-ended and expansive concept of interest that was light years from the traditional understanding of a fixed, basic percentage rate applied to an unpaid loan balance.” Second, the Sherman court dismissed the reasoning

126. See Copeland, 907 P.2d at 92-93 ("We believe that had Congress intended to define 'interest' with a narrow definition of numerical periodic percentage rates, it would have provided that definition in section 521 of the DID[MC]A.").
127. See id. at 93 (citing Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992)).
128. 668 A.2d 1036 (N.J. 1995), vacated, 116 S. Ct. 2493 (1996) (remanding the case to the New Jersey Supreme Court to reconsider in light of the Smiley decision). In addition to the New Jersey Supreme Court, other courts held that credit card late fees do not fall within the term "interest" in section 85. However, the Smiley Court specifically cited the Sherman case as one of the principal reasons for granting certiorari. See Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1732 n.2 (1996).
129. See Sherman, 668 A.2d at 1040.
130. Id. at 1041 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
131. See id.
132. Id. at 1044. The Sherman court looked to the legislative history of section 521 of
of other courts that interpreted the term "interest" broadly.\textsuperscript{133} Third, the court rejected the proposed interpretive ruling of the Comptroller as evidence that late fees should be included in the term "interest" for purposes of section 85 because the court found that the Comptroller had failed to adopt a consistent interpretation in administering section 85.\textsuperscript{134} Finally, the \textit{Sherman} court determined that neither Congress, in enacting the NBA, nor the New Jersey legislature, in passing its own State Bank Parity Act, "intended to include late fees in its definition of interest for the purpose of preventing discrimination against out-of-state lenders."\textsuperscript{135} Therefore, the \textit{Sherman} court determined that the term "interest" in section 85 refers "only to the periodic percentage rate charged on outstanding balances."\textsuperscript{136} Thus, the court concluded that "plaintiff's state-law defenses to the bank's charges do not conflict with federal law, are not preempted, and the late-payment fees are illegal under New Jersey law."\textsuperscript{137}

In summary, the Court has traditionally found the provisions in section 85 and its predecessor, section 30 of the NBA as originally enacted, to be enabling rather than restrictive for national banks. The \textit{Tiffany} Court, in 1873, interpreted the NBA to allow a national

\textit{The DIDMCA} (section 1831d) which uses language similar to that used in section 85 to support its conclusion that Congress' focus was on periodic interest rates. \textit{See id.} at 1042-44. The \textit{Sherman} court declared that "[i]f we cannot attribute to legislative initiative of 15 years ago [the enactment of the DIDMCA] the intent to include discrete, specialized charges within a definition of interest, we cannot ascribe that expansive definition to a legislative initiative that occurred over 100 years earlier." \textit{Id.} at 1044.

\textsuperscript{133} \textit{See id.} (stating that the cases are "unpersuasive and do not support the conclusion that Congress intended to include non-interest rate charges in its understanding of interest").

\textsuperscript{134} \textit{See id.} at 1046-48.

\textsuperscript{135} \textit{Id.} at 1051. The \textit{Sherman} court also rejected the argument that out-of-state national banks should be permitted to charge late fees because New Jersey credit unions were permitted to charge late fees under New Jersey state law. \textit{See id.} at 1051-53.

\textsuperscript{136} \textit{Id.} at 1040. Similarly, the petitioner in the \textit{Smiley} case argued that late payment fees do not constitute "interest" because they do not vary based on the payment owed and are not expressed as functions of time. The \textit{Smiley} court rejected these arguments. \textit{See supra} notes 87-89 and accompanying text.

\textsuperscript{137} \textit{Sherman}, 668 A.2d at 1040. In a strong dissent, Justice Pollock criticized the majority's "cavalier dismissal" of the Comptroller's proposed ruling. \textit{See id.} at 1060 (Pollock, J., dissenting). Furthermore, the dissent determined that the term "interest" in section 85 includes late fees. \textit{See id.} (Pollock, J., dissenting). Thus, Justice Pollock concluded that section 85 of the NBA conflicts with and preempts New Jersey state law prohibiting out-of-state national banks from charging late fees. \textit{See id.} at 1063 (Pollock, J., dissenting). In a separate dissenting opinion, Justice O'Hern agreed with the majority that section 85 of the NBA does not preempt state consumer protection laws prohibiting late fees. \textit{See id.} at 1064 (O'Hern, J., dissenting). However, Justice O'Hern concluded that national banks should be allowed to assess late fees because New Jersey law permitted state lenders to assess such fees and the state could not discriminate against national banks seeking to impose the same charges. \textit{See id.} (O'Hern, J., dissenting).
bank to borrow the interest rate available to the "most favored lender" in the state where the national bank is located. Thus, after the Tiffany decision, a national bank is authorized to charge the interest rate allowed to be charged by state banks in the state where the national bank is located or more if the state law allows more to be charged by natural persons. Over one hundred years later, the Marquette Court held that section 85 authorizes a national bank to charge out-of-state credit card customers the interest rate allowed by the bank's home state, even when that rate is higher than the rate permitted by the states in which the cardholders reside. The Marquette decision, combined with the Tiffany decision, allows a national bank to "export" the "most favored lender" rate of the bank's home state to credit card customers in other states. Prior to the Smiley Court's decision, the lower courts were divided on the issue of whether the term "interest" in section 85 should be interpreted to include late payment fees. Some courts adopted a "broad view" of the term "interest" in section 85 and interpreted the term to include nonpercentage charges such as late payment fees. In contrast, other courts adopted a "narrow view" of the term "interest" in section 85 and construed the term to be limited to percentage charges based on outstanding balances. The Smiley Court followed the "broad view" when it held that late payment fees constitute "interest" for purposes of section 85.

IV. SIGNIFICANCE OF THE CASE

The unanimous Smiley decision settled the issue of late payment fee "exportation" for national banks and eliminated the "narrow view" in favor of the "broad view." As a result of the Smiley decision, a national bank will be permitted to "export" late payment fees allowed by its home state to its customers who are residents of other states under the Court's holding in Marquette. Additionally, the Smiley decision opens the door to three potential consequences: (1)
the exportation of additional fees as "interest" under section 85; the continued evisceration of consumer protection usury laws; and (3) the discrimination against state banks which are not directly impacted by the Court's holding in *Smiley*.

Addressing the first potential consequence of the *Smiley* decision, the significance of the *Smiley* Court's holding on other fees listed as "interest" in the Comptroller's regulation is not directly settled. However, the *Smiley* decision shows that the Court is willing to give great deference to the Comptroller's interpretation of the banking laws in this area. The Comptroller's regulation, relied on by the *Smiley* Court in reaching its decision, included the following fees within the term "interest" for purposes of section 85: "numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees." Thus, it is highly likely that the Court will give the same deference to the Comptroller's regulation for the other fees listed in the regulation as "interest" as it did for late payment fees in the *Smiley* decision. As a result, a national bank will probably be able to "export" the other fees listed in the Comptroller's regulation as "interest," if allowed by the bank's home state, to its customers in other states.

The status of fees not expressly listed in the Comptroller's regulation as falling under the term "interest" in section 85 is not clear. However, the regulation specifically states that the term "interest" includes "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." Furthermore, the regulation states that the term "interest" includes the fees expressly listed "among other things." These facts leave an opening for an extremely broad interpretation of the term "interest" in section 85 to include many fees not expressly listed as "interest" in the regulation. Under the Comptroller's arguably broad definition of "interest" in the regulation, it will probably be difficult for plaintiffs to distinguish other fees as not fal-
ling under the term "interest" in section 85. Consequently, the Smiley Court's deference to the Comptroller's regulation regarding late payment fees will probably result in most other fees being "exportable" to customers in other states.

Regarding the second potential consequence of the Smiley decision, the Smiley Court's holding that late payment fees are "exportable" as "interest" under section 85 will potentially continue the evisceration of consumer protection usury laws that began with the Court's holding in Marquette. The Marquette decision, which held that a national bank may "export" the interest rate allowed by its home state to customers in other states, has "enabled banks to conduct their nationwide consumer-credit transactions from very favorable environments." Moreover, the Marquette decision has also put pressure on the legislatures of states with stricter usury laws "to repeal or relax their own interest-rate limits in response to threats by banks to move their credit-card operations elsewhere."

155. The Comptroller's regulation expressly states that the term "interest" does not ordinarily include "appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports." 61 Fed. Reg. 4869 (1996) (to be codified at 12 C.F.R. § 7.4001(a)). For a fee not expressly included in the regulation as either "interest" or "noninterest," plaintiffs could possibly argue that the fee is more analogous to the fees specifically denominated as "noninterest" than those denominated as "interest" in the regulation.

156. This would be the probable result as long as the fees to be "exported" are not expressly listed as "noninterest" in the Comptroller's regulation. See supra note 155 and accompanying text.

157. See generally Vincent D. Rougeau, Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates, 67 U. COLO. L. REV. 1 (1996) (discussing the lack of interest rate controls and concluding that interest rate controls should be reinstated).

158. Kevin G. Toh, Are Credit-Card Late Fees "Interest"? Delineating the Preemptive Reach of Section 85 of the National Bank Act of 1864 and Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 94 MICH. L. REV. 1294, 1296 (1996). In the early 1980s, many banks moved their credit card operations to a few states, such as Delaware, Nebraska, and South Dakota, that "had raised or removed interest-rate ceilings and relaxed other consumer-credit-protection laws in order to attract banks and thereby generate revenues." Id.

159. Id.; see, e.g., Tony Munroe, Virginia Law Change Attracts Credit Card Companies, WASH. TIMES, Mar. 4, 1993, at C1; see also David Conn, Key Federal Shifting Credit Card Unit to Delaware Official Blames Md. Restrictions, BALTIMORE SUN, Nov. 16, 1993, at 9C. According to a 1993 study by DRI/McGraw-Hill, the top ten "credit card friendly" states for banks were: South Dakota, Nebraska, Delaware, Utah, Florida, Arizona, Virginia, Nevada, Ohio, and Georgia. See Nicholas Towasser, South Dakota Rated Tops for Card Banks Its Costs, Regulations, Quality of Life Get High Marks in Survey, AM. BANKER, Mar. 5, 1993, at 7.

The tension can be seen in North Carolina which sets an eighteen percent interest rate cap and a twenty-four dollar annual fee limit for revolving credit charges. See N.C. GEN. STAT. § 24-11 (Supp. 1996). In addition, North Carolina imposes a limit of either
Court's holding, that late payment fees are also "exportable" as "interest" under Marquette, further enhances the ability of "a few states with the weakest consumer-protection laws . . . [to] veto the consumer-protection laws of other states and dictate the terms by which consumers in all fifty states buy credit."\textsuperscript{160}

Turning to the third potential consequence of the Smiley decision, state banks could potentially be discriminated against if they are not given the same ability to "export" late payment fees that was accorded national banks in the Smiley decision.\textsuperscript{161} The principal basis for the Smiley Court's ruling, that the Comptroller's interpretation of section 85 is entitled to deference,\textsuperscript{162} has no direct impact on state banks for two reasons. First, state banks are not regulated by the Comptroller but rather by the Federal Deposit Insurance Corporation (FDIC). Second, the statute in question in Smiley, section 85, which details the amount of "interest" a national bank may charge, does not apply to state banks. Rather, the amount of "interest" state banks may charge is included in section 1831d.\textsuperscript{163}

Although the Smiley decision does not have a direct bearing on state banks, the principle of Smiley, that late payment fees constitute five dollars or ten dollars on late fees, depending on the amount of the outstanding balance. See id. As a result, the three largest banks headquartered in North Carolina (NationsBank, First Union, and Wachovia) have their credit card operations in less regulated states in order to avoid these restrictions. See John Cochran, State's Consumers May Face Interest Hike, GREENSBORO NEWS & REC., May 23, 1996, at A1. In 1996, the legislature was to consider a proposal to relax the interest rate cap and fee limits. See id. However, the bill was pulled from the calendar for further study. See John Cochran, House to Study Banking Reforms, GREENSBORO NEWS & REC., May 29, 1996, at B1. In December 1996, another large North Carolina bank, First Citizens, announced that it was moving its credit card unit to Virginia in order to take advantage of that state's more flexible usury laws. See Joel B. Obermayer, First Citizens Moving Unit, NEWS & OBSERVER, Dec. 14, 1996, at D1. Commenting on the announcement, the executive vice president of the Community Bankers Association of North Carolina stated that it is "very difficult to run a credit card operation here . . . [because we have] a fairly rigid structure in North Carolina. Not that it's an unreasonable one . . . It just doesn't provide the flexibility that the marketplace demands." Id.

160. Toh, supra note 158, at 1296.

161. Similar to the division of opinion among various lower courts regarding late fees for national banks under section 85 prior to the Smiley decision, lower courts were divided as to whether late fees constitute "interest" for state banks under section 1831d of the United States Code. See Greenwood Trust Co. v. Massachusetts, 776 F. Supp. 21 (D. Mass. 1991), rev'd, 971 F.2d 818 (1st Cir. 1992); Hunter v. Greenwood Trust Co., 668 A.2d 1087 (N.J. 1995), vacated, 116 S. Ct. 2493 (1996) (remanding the case to the New Jersey Supreme Court).

162. See supra notes 47-93 and accompanying text.

163. See 12 U.S.C. § 1831d(a) (1994). In a note to section 1831d, states were granted the ability to "opt-out" of section 1831d's preemption of their laws. A complete discussion of this "opt-out" provision is beyond the scope of this Note.
"exportable interest," probably will apply to state banks for several reasons: (1) the express purpose of section 1831d is "to prevent discrimination against State-chartered insured depository institutions;"164 (2) the language of section 1831d closely mirrors the language of section 85,165 and (3) the FDIC legal staff interprets section 1831d to include late payment fees as "exportable interest" for state banks.166

First, national banks no longer need the favorable treatment over state banks that was necessary at the time of the enactment of the NBA. After determining that the NBA was enacted to provide a currency for the country and to create a market for the loans of the federal government, the Tiffany Court held that national banks are entitled to favorable treatment over state banks.167 However, while national banks may have originally needed extra protection from state legislatures and therefore were entitled to favorable treatment over state banks, Congress itself recognized that the times had changed and expressly stated that the purpose of section 1831d is "to prevent discrimination against State-chartered insured depository institutions . . . ."168

Second, because the language of section 1831d closely mirrors the language of section 85,169 the term "interest" in section 1831d should be interpreted for state banks the same as the term "interest" in section 85 is interpreted for national banks. The Supreme Court

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164. Id.; see infra notes 167-68 and accompanying text.
165. See infra notes 169-71 and accompanying text.
166. See infra notes 172-75 and accompanying text.
167. See supra notes 101-06 and accompanying text.
169. Section 1831d(a) reads:
In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign 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 [one] 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 or such insured branch of a foreign 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. § 1831d(a). One main difference in the wording of section 1831d as compared to section 85 is that section 1831d expressly preempts state law. See supra note 7 for the language of section 85 that applies to national banks.
itself declared that when a statute adopts words from an older statute, the language of the two statutes should be interpreted the same way. Furthermore, the First Circuit Court of Appeals stated that “Bank Act [NBA] precedents must inform our interpretation of words and phrases that were lifted from the [National Bank Act and inserted into DID[MC]A's [section 1831d] text.” The Smiley holding, that late payment fees constitute “interest” under section 85 for national banks, can reasonably be viewed as a “[National Bank Act precedent” that should be used to interpret the similar language of section 1831d for state banks.

Finally, the FDIC legal staff interprets section 1831d to include late payment fees as “exportable interest” for state banks. In the Smiley case, the Court gave great deference to the Comptroller's regulation that interprets the term “interest” in section 85 to include late payment fees because it is a regulation adopted pursuant to the proper notice-and-comment procedures. Unlike the Comptroller, the FDIC has not issued a regulation regarding whether late payment fees constitute “exportable interest” for purposes of section 1831d. However, the FDIC has issued an Advisory Opinion on whether late payment fees are “exportable” for state banks. Indeed, in 1992, the FDIC Deputy General Counsel stated that “the FDIC consistently has interpreted Section 521 [1831d] to provide state-chartered banks with the same most favored lender status and right to export interest enjoyed by national banks under Section 85.” The Advisory Opinion further stated that insured state banks are authorized to charge the “most favored lender” rate of the state where the bank is chartered and “[t]hat authorization necessarily includes the right to charge 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.” Although the Advisory Opinion of the FDIC legal staff should not be given the same degree of deference as the Comptroller's regulation in Smiley, it can reasonably be regarded as the administrative practice of the agency which is ac-

171. Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992). The First Circuit also stated that “[t]he historical record clearly requires a court to read the parallel provisions of [the] DID[MC]A and the [National] Bank Act in pari materia.” Id.
172. See supra note 63 and accompanying text.
174. Id.
corded some degree of deference.  

V. CONCLUSION

National banks have been accorded a variety of privileges since the enactment of the NBA in 1864. Beginning with the Court’s interpretation of the NBA in Tiffany, a national bank is allowed to utilize the interest rate available to the “most favored lender” in the state where the national bank is located. Indeed, the Tiffany decision enables a national bank to charge the rate allowed by natural persons under state law even if state banks are limited to a lesser amount. The Court expanded the reach of the “most favored lender” doctrine to interstate transactions by announcing in Marquette that a national bank is allowed to charge borrowers in other states the interest rate authorized by the bank’s home state even if that rate exceeds the usury laws of the states in which borrowers reside. In light of this history, the Smiley Court’s broad interpretation of the term “interest” in section 85 to include late payment fees can hardly come as a surprise. The Smiley decision can be viewed as merely a continuation of the favorable treatment bestowed on national banks over the past century and a quarter.

However, while the practice of giving national banks favorable treatment is firmly established, the continued validity of that practice should not go unquestioned in light of the potential consequences. The Smiley Court’s deference to the Comptroller’s extremely broad interpretation of the term “interest” in section 85 could potentially result in many other fees being “exported” by national banks under the Court’s holding in Marquette. As a result, consumer protection usury laws will continue to be overridden by banks in states with more lenient usury laws under the “exportation” doctrine. Furthermore, although the wisdom of interpreting late payment fees as

175. Indeed, the Smiley Court alluded that agency administrative practice is given some degree of deference by stating that the Court would deny deference “to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.” Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1733 (1996) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988)) (internal quotation marks omitted).
176. See supra note 2 and accompanying text.
177. See supra notes 101-06 and accompanying text.
178. See supra notes 101-06 and accompanying text.
179. See supra notes 107-14 and accompanying text.
180. See supra notes 47-93 and accompanying text.
181. See supra notes 150-56 and accompanying text.
182. See supra notes 157-60 and accompanying text.
“exportable interest” can be questioned because of the potential harm to the ability of states to enact effective usury laws, state banks, not directly impacted by the Smiley decision, could be discriminated against if they are not also allowed to “export” late payment fees as a form of “interest.”\(^ {183} \)

In light of this potential discrimination against state banks, state banks should also be allowed to “export” late payment fees as “interest” for several reasons. First, Congress expressly stated that it was trying to prevent discrimination against state banks in the text of section 1831d.\(^ {184} \) Second, the term “interest” in section 1831d should be interpreted for state banks the same as the term “interest” in section 85 is interpreted for national banks based on the similar language of the two statutes.\(^ {185} \) Finally, the FDIC legal staff interprets section 1831d to include late payment fees as “interest” for state banks.\(^ {186} \)

In summary, the Smiley decision is a major victory for national banks and enables them to maintain uniform, national pricing of their credit cards. However, the Smiley decision arguably gives national banks this ability at the expense of consumers. Whether one agrees with the Smiley decision or not, perhaps the Marquette Court summarized it best when it declared that “the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.”\(^ {187} \)

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183. See supra notes 161-75 and accompanying text.
184. See supra notes 167-68 and accompanying text.
185. See supra notes 169-71 and accompanying text.
186. See supra notes 172-75 and accompanying text.