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Does Federal Law Preempt State or Local Laws that Ban ATM Surcharges?

I. INTRODUCTION

Today there are approximately 708,555 automated teller machines (ATMs) worldwide, with 227,000 located in the United States. The arrival of ATMs, with the first U.S. ATM appearing in 1971 in Atlanta, Georgia at Citizens & Southern National Bank, has changed the way many Americans do their banking. The convenience and accessibility of ATMs, along with internet banking, has resulted in fewer people going inside a bank, talking to a human teller, and depositing or withdrawing money. In 1999, there were 11.0 billion dollars worth of ATM transactions, down 200 million from 1998. Although an additional 40,000 machines were added in 1999, part of the reason ATM transactions were down may be attributed to surcharges. PSI Global, a Tampa, Florida based research and marketing firm conducted a survey of 3,217 consumers in April and May of 1999 and found that in response to surcharging, 15% of consumers have limited their use of ATMs, 40% avoided fees by using only their financial institution's ATMs, and 11% use only those ATMs which do not surcharge.

The topic of surcharging has become of interest to virtually everyone. This article discusses the history of preemption

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2. See id.
3. See id.
4. See id.
in the federal banking system looking at cases beginning in the 1820s to today, to determine if banks do have the right to surcharge and whether states can enact legislation which will prevent banks from surcharging. The article first discusses the issues surrounding ATMs, focusing on the different types of fees, the imposition of surcharges, and the challenges to ATM surcharges. The article reviews the analysis the Supreme Court and state courts have used, and continue to use, to determine whether a federal law preempts a state law. Finally, the article discusses the current litigation, market, and access consequences.

II. ATM Fees

There are several types of fees involved when using an ATM. If Jane is a customer of Bank A, and uses Bank A's ATM to withdraw money, she may be charged a "fee" for using the ATM. If Jane uses Bank B's ATM even though she is a customer of Bank A, Bank A pays Bank B an interchange fee, Bank A pays the network a switch fee, Jane pays Bank B a surcharge fee and pays Bank A, her own Bank, a foreign fee. While bankers argue that the fees are a reasonable charge for the convenience of using another bank's ATM, consumer groups argue that institutions are charging twice, or "double dipping," since the ATM owner is also receiving an interchange fee from the card-issuing bank, in addition to the surcharge fee the bank which owns the ATM charges. The main focus of recent litigation and legislation is regarding the surcharge fee - the fee a customer is paying to a bank other than their own,

7. See infra notes 25-144.
8. See infra notes 145-169.
10. See id. at 9, Chart 1-B.
for using the ATM.

Prior to 1996, ATM operators could not impose surcharges directly on ATM users; instead, they were restricted to recovering costs primarily through network agreements. Visa and MasterCard rules and some regional ATM network rules prohibited surcharges at ATMs. In addition, a few states enacted limits on surcharges, but did not directly prohibit them. Frustrated by the restrictions, ATM owners brought antitrust challenges arguing that the surcharge bans inhibited ATM deployment. They argued that ATM surcharges were necessary to cover the cost of ATMs where volumes were low and/or servicing costs were high. The antitrust action was settled again in April 1996, allowing the ATM operators to surcharge. Regional networks followed, resulting in over 80% of all banks imposing a surcharge on foreign transactions.

For many, it just doesn’t seem right to have to pay to access your own money, and this view seems to be a motivation for the interest in adopting laws that ban ATM surcharges. On November 2, 1999, the citizens of San Francisco voted on a ballot referendum that banned ATM charges throughout the city, and Santa Monica followed shortly after. California Bankers sued to enjoin the San Francisco ordinance the morn-

12. Hearing on Consumer ATM Charges Before the House Subcommittee on Financial Institutions and Consumer Credit of the Committee on Banking and Financial Services, 104th Cong. (1996) (statement by Lawrence B Lindsey, Member, Board of Governors of the Federal Reserve System) [hereinafter Lindsey Statement].
13. See id.
14. See id.
15. See Litan, supra note 9, at 11.
16. See id.
17. See id.
18. See id.
19. See Litan, supra note 9, at 2.
20. See Helen Stock, San Francisco Vote Bans ATM Charges, AM. BANKER, Nov. 4, 1999, at 23. See also Joyce E. Cutler, Cal. Bankers File Lawsuit To Block Anti-ATM Fee Ordinance, BNA BANKING REP., Nov. 8, 1999, at 752 (stating that “Proposition F, which passed Nov. 2, 1999, by 62 percent to 38 percent, prohibits financial institutions from imposing surcharges of any kind on any customer for accessing an ATM located within San Francisco”).
ing after the election, while the Office of the Comptroller of the Currency (OCC) moved to preempt the San Francisco ordinance. On November 15, 1999, Judge Vaughn R. Walker held that federal law probably preempted the ordinance. On November 24, 1999, he declared that individual consumers in Santa Monica could not use the ordinance as a basis for a lawsuit against banks that charge fees, and that the San Francisco Board of Supervisors could not certify the results of the November 2, 1999 election. San Francisco and Santa Monica have both announced that they will appeal the federal court ruling that has temporarily barred them from enforcing legislative bans on ATM surcharging. Until the court renders its final decision, the question remains: does federal law preempt state or local laws that ban ATM surcharging?

III. HISTORY OF PREEMPTION

The central question of this debate is whether such legislation will be preempted by federal law through the National Bank Act (NBA), or regulations of the Office of the Comptroller of the Currency promulgated under the NBA. A fundamental principle of our constitutional system is that "when the federal government acts within the sphere of authority conferred upon it by the Constitution, federal law is paramount over, and may preempt state law." In the 1821 case Cohen v. Virginia.

23. See id.
25. OCC Interp. Letter No. 789 (July 1997), reprinted in [1997-98 Transf. Binder] FED. BANKING L. REP. (CCH) ¶ 81-216. See U.S. CONST. art. VI, cl. 2. The supremacy clause of the United States Constitution states that, "[t]his Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id. See also Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821) (holding that a District of Columbia law allowing the sale of lottery tickets does not preempt a Virginia statute prohibiting such sales).
Chief Justice Marshall held that "[t]he constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void." 27

There are three basic ways in which federal preemption may arise: (1) congressional intent to preempt state law; 28 (2) implied preemption based on the language and purpose of a federal statute; 29 or, (3) instances of an irreconcilable conflict with state law. 30

"Congress has not occupied the field of banking so as to preclude state legislation because the United States has a dual state-federal banking system." 31 The "federal instrumentalities" doctrine is the preemption theory applicable to activities of national banks. 32 This doctrine, which was discussed in Davis v. Elmira Savings Bank, 33 holds that:

27. Id. at 414.
28. See Jones v. Rath Packing Co., 430 U.S. 519 (1977) (holding that the Fair Packaging and Labeling Act (15 USC 1461), preempted California law. The pertinent part of the Act stated that the Act supersedes any state laws insofar as they impose weight labeling requirements that "are less stringent than or require information different from" the federal law).
29. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (holding that the Federal Aviation Administration, along with the Environmental Protection Agency has full control over aircraft noise, preempting state and local control under the police power). See also Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (holding that the police powers of the state will be superseded by Federal legislation when it is clear that it was the manifest purpose of Congress, or when the Federal regulation is so pervasive, or the Federal interest is so predominate that the Federal system will be assumed to preclude enforcement of a state law on the same subject).
30. See Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982) (holding that even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law and compliance with both federal and state regulation is a physical impossibility).
33. See id.
National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created.34

Beginning in the 1870s the Supreme Court began to indicate that state laws which interfere with the ability of national banks to exercise powers granted to them under federal law are preempted.35 In Tiffany v. National Bank of Missouri,36 the question was whether an Act of Congress prohibits the national banks of Missouri from taking a greater rate of interest than the eight percent interest rate which is prescribed in the Missouri Act.37 This suit was brought under the National Banking Act of June 3d, 1864.38 In Missouri, the banks organ-

34. Id. at 283.
35. See Waite v. Dowley, 94 U.S. 527 (1876) (holding that National Banks are subject to state legislation except where such legislation is in conflict with an Act of Congress, or where it tends to impair utility of such banks as instrumentalities of the U.S.); Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S 29 (1875) (holding that state laws can exercise no control over national banks, or in any way effect their operation, except so far as Congress may see proper to permit); National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1870) (holding that National banks, as agencies of the federal government, are exempted from state legislation only so far as that legislation may interfere with or impair the efficiency in performing functions by which they are designed to serve that government).
36. 85 U.S. (18 Wall.) 409 (1874).
37. See id. at 410-411. Missouri limited state chartered banks to 8% and the National Banks wanted to charge 9%. See id. See also 12 U.S.C. §85 (1994) (setting out allowable rates of interest for loans, notes, etc.).
38. See Tiffany v. National Bank of Mo., 85 US (18 Wall.) 409, 410 (1874). The provision under which the suit was brought stated,

Every association organized under this act, make take, receive, re-
ized under the state laws are limited to eight percent interest rate, but the rate of interest allowed by the laws of Missouri is generally ten percent, and the Bank of Missouri, a national bank, had charged nine percent.\textsuperscript{39} The Court explained that if state statutes allow their banks to issue a rate of interest greater than the ordinary rate allowed, national banking associations could not compete with them, and there would no longer be a level playing field.\textsuperscript{40} The purpose was to prohibit discrimination against national banks.\textsuperscript{41} However, the Court noted that if the rates were restricted to the rates allowed under state statutes for state chartered banks, unfriendly legislation might make the existence of national banks in the state impossible.\textsuperscript{42}

The Supreme Court has indicated that the federal government is the ultimate authority in dealing with specific national banking issues.\textsuperscript{43} It has consistently "held that state laws that conflict with federal law by preventing or impairing the ability of national banks to exercise powers granted to them under federal law, are preempted."\textsuperscript{44}

Not all state laws affecting national banks are pre-

\textsuperscript{39} See id. at 411.
\textsuperscript{40} See id.
\textsuperscript{41} See id. at 412.
\textsuperscript{42} See id. at 412-413.
\textsuperscript{44} Id. See also Julie L. Williams, the Chief Counsel for the OCC noted in OCC Interp. Letter No. 789 (July 1997) [1997-98 Transf. Binder.] FED. BANKING L. REP. (CCH) ¶ 81-216 (noting that the court has used the same language in several subsequent cases following Davis). See also Easton v. Iowa, 188 U.S. 220, 238 (1903) (holding state law prohibiting insolvent national banks from receiving deposits preempted); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 667-68 (1899) (holding state tax on national banks preempted).
emptied under the federal instrumentalities doctrine.\textsuperscript{45} Although the Supreme Court has allowed federal law to preempt state laws in many situations, there have been a number of cases where the Court has given state law preference, unless the state law either: 1) directly conflicts with federal law; 2) frustrates the purpose of federal law; or, 3) impairs the banks’ efficiency.\textsuperscript{46} Such was the case in \textit{McClellan v. Chipman},\textsuperscript{47} where the court upheld a Massachusetts statute which voided the taking of real estate in satisfaction of an antecedent debt where the debtor was insolvent or in contemplation of insolvency, despite a provision in the National Bank Act authorizing national banks to take real estate in satisfaction of debts previously contracted.\textsuperscript{48} The court stated that the dealings and contracts of national banks are subject to the operation of general state laws, unless it conflicts with, or frustrates, the purpose of federal law, or impairs the banks’ efficiency results.\textsuperscript{49} In \textit{First National Bank of San Jose v. California},\textsuperscript{50} the Court stated that national banks’ “contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter of the general object and purpose of congressional legislation.”\textsuperscript{51} The Court found, however, that the state escheat law was nevertheless preempted.\textsuperscript{52}

The conflict in \textit{Franklin National Bank of Franklin Square v. New York}\textsuperscript{53} concerned a New York statute which prohibited national banks from using the word “saving” or “savings” in their advertising or business.\textsuperscript{54} Since it was the policy of New

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\textsuperscript{45. See supra notes 46-51and accompanying text.}
\textsuperscript{46. See \textit{McClellan v. Chipman}, 164 U.S. 347, 357, (1846).}
\textsuperscript{47. See id. The Court relied on the reasoning set forth in \textit{Davis v. Elmira Savings Bank}, 161 U.S. 275, 284 (1894), in concluding that the New York statutes conflict in letter and spirit with the U.S. statute, and therefore must yield. See id.}
\textsuperscript{48. See id.}
\textsuperscript{49. See id. at 357 (citing \textit{First Nat’l Bank of Louisville v. Kentucky}, 76 U.S. (9 Wall.) 353 (1870)).}
\textsuperscript{50. 262 U.S. 366 (1923).}
\textsuperscript{51. Id. at 368-369.}
\textsuperscript{52. See id. at 368.}
\textsuperscript{53. 347 U.S. 373 (1954).}
\textsuperscript{54. See id. at 374.}
\end{flushleft}
York to charter mutual savings banks, along with savings and loans associations, the legislature was concerned that commercial banks that used the word "savings" would lead uninformed persons to believe they were dealing with state chartered savings institutions instead of banks. The Court noted that since the federal government is a rival chartering authority for banks, the federal government may constitutionally create and govern banks within the states, and it has frequently expanded its function and authority to prevent "disadvantage in competition with state-created institutions." The National Bank Act does not limit or qualify how national banks can receive deposits, and it provides that they shall possess "all such incidental powers as shall be necessary to carry on the business of banking . . . ." The Court found no indication that Congress intended to make this aspect of national banking subject to local restrictions. The court concluded that the state law must submit to the conflicting federal policy.

IV. FEDERAL PREEMPTION TRENDS IN MORE RECENT CASES

A number of more recent cases have continued the trend of decisions holding that when there is a clear conflict between the law of a state and the federal law, the policy of the state must yield. In Smiley v. Citibank, a California resident held two credit cards issued by a national bank in South Dakota.

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55. See id. The Court relied on the reasoning in McCulluch v. Maryland, 17 U.S. 316 (1819) (holding that Congress has the power to incorporate a bank). See id.
56. See id. at 375.
57. Id. at 376 (citing 12 U.S.C. §24 (1952)).
58. See id. at 378.
59. See id. at 379. The Court held that it would be resolved as a matter of supremacy, not as to the wisdom of the particular policy. See id. Reed, J. dissenting, wrote that since no federal statute expressly authorizes the national banks to use the word "saving" or "savings" in their advertisements, they must conform to the New York law for the protection of the public from misunderstanding. See id. at 379. He stated that he knows of no precedent that approved such a limitation on state power as the Court now announces. See id.
60. 517 U.S. 735 (1996).
61. See id. at 737-738.
Both cards included a provision in the agreement regarding late fees, which are permitted under South Dakota law. Ms. Smiley brought the class action suit against a bank in a California state court, on behalf of herself and other California citizens who held the South Dakota banks' credit cards. She argued that the late payment fees were unconscionable and violated both the statutory and common law of California. Citibank argued that the cardholders' claims were preempted by section 85 of the National Bank Act, which authorizes national banks to charge interest to its loan customers at a rate allowed by a state in which the bank is located.

At issue was the location of the bank and whether late fees equal interest. The OCC had interpreted section 85's definition of interest to include credit card charges. Under Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc, the Court stated that it would look to an administrative agency's interpretation when there is ambiguity in a statute, as Congress presumed the agency should resolve an ambiguity, rather than the courts. Justice Scalia, on behalf of a unanimous Court, rejected several of Smiley's arguments on why the ordinary rules of deference should not apply to this regulation. The Court ruled that it made no difference that this regulation was issued more than 100 years after the enactment of section 85. In addition, the Court did not agree with Smiley's argument that the Comptroller's regulation was not deserving of deference because there was no rational basis for distinguishing "interest" charges from "non-interest"

62. See id.
63. See id.
64. See id.
66. See Smiley, 517 U.S. at 739.
67. See id. at 740.
69. See Smiley, 517 U.S. at 740-741.
70. See id. at 740-743.
71. See id. at 740. Justice Scalia noted that neither antiquity nor contemporaneity with the statute is a condition of validity. See id.
charges. The Court ruled that the regulation draws a line between those charges that are specifically assigned to expenses that are necessary for making a loan and those that are assigned in event of the borrower's default. Smiley's final argument was that the regulation was not entitled to deference because it was incompatible with prior positions taken by the Comptroller. The Court held that the fact that an agency interpretation contradicts a past agency position is not fatal, because Chevron charged the implementing agency with the discretion necessary to resolve the ambiguities in a statute. The Court stated that while there is no question that section 85 preempts state law, the issue here concerned the meaning of a provision and that interpretation did not deal with preemption.

The Second Circuit Court of Appeals dealt with the issue of preemption in great detail in Fleet Bank v. Burke. In 1995, Fleet Bank sought an opinion from the Commissioner that the Connecticut statutes governing the use of ATMs in Connecticut did not place any limitations on federally chartered banks from imposing surcharge fees on non-customers who use other banks' ATMs. The Commissioner responded by stating that the Connecticut statute carried with it an implied prohibition against the banks imposing fees on customers of other banks for using the ATM, since the statute already allowed banks to charge a usage, or interchange fee.
Fleet brought suit alleging both that there was an erroneous interpretation of the Connecticut ATM statute, and that the statute was preempted by section twenty-four of the National Bank Act. The district court permitted Fleet to impose the surcharge fee on non-customers who use the ATM. The defendants appealed, challenging the district court’s subject matter jurisdiction. The court had serious concerns that opening the federal court to preemption claims by plaintiffs raising disputes about the meaning and application of state law, risks an infringement on the authority of state courts to construe state statutes. The court of appeals vacated the judgment of the district court and remanded with directions to dismiss the complaint for lack of subject matter jurisdiction.

The Office of the Comptroller of the Currency (OCC) issued an amicus curiae brief ("brief") in the United States Court of Appeals for the Second Circuit in the case of Fleet Bank. The OCC submitted the brief "to assist the court in its analysis of whether ATM surcharges on non-depositors are permitted by federal law, should such an analysis becomes necessary." The OCC argued that operating ATMs and requiring fees for the operation are both part of the "business of banking," and, therefore, legitimate under the National Bank Act.

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81. See Fleet, 160 F.3d at 885.
82. See id. The well-pleaded complaint rule requires that a complaint invoking federal question jurisdiction to assert the federal question as part of the plaintiff’s claim, not to anticipate a federal defense. See id.
83. See id. at 892.
84. See id. at 893.
85. See Brief for Amicus Curiae, Fleet Bank v. Burke, 160 F.3d 883 (2nd Cir. 1998) (No.98-9324) [hereinafter Amicus Curiae Brief].
86. See id. at 2.
87. See id. at 3. See NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Corp., 513 U.S. 251, 258 n.2 (1995) (holding that, "the 'business of banking' is not limited to enumerated powers in §24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated").
banks may impose fees for services provided to their "customers."\textsuperscript{88} Although "customer" is not defined in the regulation, the OCC looked to the definition used in two dictionaries and concluded that a person who voluntarily uses the bank's ATM and pays for that use, is a customer.\textsuperscript{89} The OCC distinguished "customer," a person who voluntarily uses the bank's services or facilities for a fee, from a "depositor."\textsuperscript{90} The latter is a person who also maintains an account with the bank.\textsuperscript{91}

The OCC concluded that a "national bank is not required to obtain the OCC's prior approval for the imposition of a fee or service charge,"\textsuperscript{92} and that it is immaterial whether the ATM user is a depositor or not.\textsuperscript{93} For all of the above discussed reasons and because the user has conceded to pay the fee for the convenience of using another bank's ATM, the OCC contends that the imposi-

\footnotesize

\textsuperscript{88} See id. at 8.
\textsuperscript{89} See id. See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (defining "customer" as "one that purchases some commodity or service"); BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (defining "customer" as "a person who buys the merchandise or engages in the service of another person").
\textsuperscript{90} See Amicus Curiae Brief, at 3.
\textsuperscript{91} See id. See 12 C.F.R. §§ 7.4002(a)-(b) (1999) which provides:
\textit{Customer charges and fees.} A national bank may charge its customers non-interest charges and fees, including deposit account service charges. For example, a national bank may impose deposit account service charges that its board of directors determines to be reasonable on dormant accounts. A national bank may also charge a borrower reasonable fees for credit reports or investigations with respect to a borrower's credit. All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers (b) Considerations. The establishment of non-interest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others: (1) The cost incurred by the bank, plus a profit margin in providing the service; (2) The deterrence of misuse by customers of banking services; (3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and (4) The maintenance of the safety and soundness of the institution.
\textit{Id.}
\textsuperscript{92} See Amicus Curiae Brief at 7.
\textsuperscript{93} See id. at 3.
tion of the fee is authorized under federal law.94

This, however, was not the end of the preemption discussion. The *Fleet* case was continued in part in *First Union National Bank v. Burke*,95 in which Fleet Bank was the consolidated plaintiff and the Office of the Comptroller of the Currency joined as intervenor-plaintiff.96 Here, the court questioned who had the authority to enforce state banking laws against in-state branches of national banks.97 This case arose within the context of the "ongoing dispute between Fleet Bank and the Connecticut Banking Commissioner over whether a national bank may impose surcharge or 'convenience' fees on non-depositors who access Fleet's ATMs" in Connecticut.98 One of the issues raised in this case, which was not previously discussed in *Fleet Bank v. Burke*,99 was whether the Commissioner’s cease and desist order unlawfully interfered with the OCC’s exclusive regulatory and enforcement authority over national banks on this subject.100 In its intervening complaint, the OCC claimed that the National Bank Act and related federal banking statutes showed Congress’ intent for the OCC to have exclusive and administrative enforcement authority over national banks for all laws, including state banking laws related to ATM transaction fees.101

The Court determined that the OCC is charged with the enforcement of banking laws, although the OCC is not specifically referred to in section 484.102 The OCC has been granted

94. See id.
96. See id. at 135.
97. See id. at 135.
98. Id.
100. See First Union, 48 F.Supp.2d at 135.
101. See id. at 135, 137. 12 U.S.C. §484(a) (1994), provides:

No national bank shall be subject to any visitorial powers except as authorized by Federal law; vested in the courts of justice or as such shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Id.
102. See First Union, 48 F. Supp.2d at 135.
administrative enforcement power under 12 U.S.C. §1818, to issue cease and desist orders related to any national bank’s violation of any “law, rule or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other requests by the bank,” or to prevent any practice that the OCC deems “an unsafe or unsound practice.”

The court determined that the OCC’s position of exclusive enforcement authority was likely to be successful. The court agreed that the OCC could face irreparable harm if national banks under the OCC’s supervisory jurisdiction were forced to respond to the state, because such a rule would interfere with and discredit the OCC’s supervision role. The Commissioner was “preliminarily enjoined from proceeding with the pending administrative enforcement proceedings against Fleet Bank and First Union National Bank until final disposition of the merits of the OCC’s complaint.”

The ruling focused only on the authority state regulators had to enforce the Connecticut prohibition on banks’ charging non-customers for using ATMs, as Judge Janet Bond Arerton held that the state could not coerce national banks to observe the ban. At the time of this ruling, OCC Chief Counsel Julie L. Williams had not addressed the issue of whether national banks in Connecticut are allowed to impose ATM surcharges. This left many state officials and others confused. Deputy general counsel for litigation at the


104. See First Union, 48 F.Supp.2d at 150.

105. *See id.* at 150.

106. *Id.* at 150.


108. *See id.*

109. *See id.* Gerald Noonan, president of the Connecticut Bankers Association, said “most of them [national banks] are just bewildered as anything else, because it
American Bankers Association said, "if they [the OCC] do decide [to enact a ban], then the question of federal preemption is clearly presented. That is a whole new story."\textsuperscript{110}

On December 20, 1999 the Connecticut Supreme Court issued a five-two decision overturning Banking Commissioner John Burke's four-year ban on ATM surcharges.\textsuperscript{111} Since January 1997, when the litigation began, FleetBoston has estimated it has lost $15,000 a day in revenue on 370 machines.\textsuperscript{112} The Connecticut Supreme Court decision did not address the federal preemption issue; instead, it focused on how the 1975 Connecticut law on fees should be interpreted.\textsuperscript{113} Since there is no constitutional issue on which an appeal can be raised, and because the case was decided by the state's highest court, there is no other procedure in which Burke can appeal.\textsuperscript{114} However, a Connecticut legislator intends to introduce legislation that would ban ATM surcharges in the state of Connecticut when the lawmakers convene in February, 2000.\textsuperscript{115} Surcharging, which may lead customers of smaller banks to switch to larger banks with more ATMs, is not the only option Connecticut banks have.\textsuperscript{116} Citizens Bank of Connecticut is one of seventeen banks which have recently joined the SUM program, a surcharge-free network in which banks agree not to surcharge each other's customers.\textsuperscript{117}

\textsuperscript{110} Id. (quoting Michael F. Crotty).

\textsuperscript{111} See Katharine Fraser, Conn. High Court Takes Banks' Side on ATM Charges, AM. BANKER, Dec. 21, 1999, at 1.

\textsuperscript{112} See id. at 2.

\textsuperscript{113} See Helen Stock, Conn. Banks Slow to Start ATM Surcharging, AM. BANKER, Jan. 6, 2000, at 12. First Union Corp. of Charlotte, NC began applying $1 fees to its 123 ATMs the next day, on December 22, 1999, and FleetBoston Financial of Boston also began charging $1 on its 518 Fleet and BankBoston machines on January 3, 2000. See id.

\textsuperscript{114} See Fraser, supra note 111, at 2.

\textsuperscript{115} See Katharine Fraser, ATM Fee Ban to Be Proposed in Conn., AM. BANKER, Jan. 11, 2000, at 3.


\textsuperscript{117} See id. SUM is administered by the NYCE Corp. ATM network and began in Massachusetts. It has extended to Connecticut, Vermont New Hampshire, Rhode Island, Maine, New York, New Jersey, Pennsylvania, and Delaware. SUM has 150 machines in Connecticut as of January 10, 1999. See id.
Although two municipalities, San Francisco and Santa Monica, California adopted bans on surcharging, the Connecticut ruling leaves Iowa as the only state that bans non-customer surcharges.\textsuperscript{118} The litigation in Iowa over ATM surcharges has taken place in the case \textit{Bank One, N. A. v. Gutta}.\textsuperscript{119} Bank One, a national bank with its main office located in Utah and no offices in Iowa, installed ATMs at retail stores throughout Iowa, including Sears, Roebuck & Co. (Sears) stores.\textsuperscript{120} Shortly thereafter, the Iowa Superintendent of Banking ordered Sears to cease its operation of the ATMs, because Iowa Electronic Funds Transfer Act (EFTA) calls for an in-state office as a prerequisite for the establishment of ATMs.\textsuperscript{121} Consequently, Sears ordered Bank One to remove all of its ATMs from Sears’ Iowa stores.\textsuperscript{122} Bank One filed suit, seeking a declaration that section 36 of the National Bank Act (NBA) preempts the provisions of the Iowa EFTA which prohibit out of state banks from state from operating ATMs within Iowa.\textsuperscript{123} The district court denied Bank One’s motion for a preliminary injunction, claiming that Iowa’s provisions were not preempted and that Bank One was unlikely to succeed on any of its constitutional claims.\textsuperscript{124} The Court of Appeals for the Eighth Circuit considered Bank One’s motion for a permanent injunction and ruled in its favor.\textsuperscript{125}

Bank One argued that section 36 of the NBA implicitly authorizes the placement of ATMs without restrictions by the

\textsuperscript{118} See Stock, supra note 113, at 12.
\textsuperscript{119} 190 F.3d 844 (8th Cir. 1999).
\textsuperscript{120} See id. at 847.
\textsuperscript{121} See id.
\textsuperscript{122} See id.
\textsuperscript{123} See id. The provision of the Iowa EFTA which Bank One objected to reads:

\begin{quote}
A satellite terminal shall not be established within this state except by a financial institution whose principal place of business is located in this state, one which has a business location licensed in this state under chapter 536A, or one which has an office located in this state and which meets the requirements of subsection 4.
\end{quote}

\textit{Id.} at 848. See also Iowa Code § 527.4(4) (1998).
\textsuperscript{124} See \textit{Bank One}, 190 F.3d at 847.
\textsuperscript{125} See \textit{id.} at 851.
states and that the provisions of the Iowa EFTA hinders that placement, in addition to advertisements on ATMs. The Court cited both Barnett Bank v. Nelson and Hines v. Davidowitz in stating that grants of both enumerated and incidental powers to national banks "are grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." In addition, where state law stands "as an obstacle to the accomplishment and the execution of the full purpose and objectives of Congress," it may be preempted. However, state regulations are not preempted when Congress accompanies "a grant of explicit power with an explicit statement that the exercise of that power is subject to state law." For example, in section 36(c), Congress predicated the establishment of national bank branches upon compliance with state regulations regarding branch locations.

The court's next step was to determine whether an ATM is a "branch" as defined in section 36. Prior to 1996, although the definition of "branch" did not explicitly state whether or

126. See id. at 848. See also 12 U.S.C §§21-216d (1994).
127. 517 U.S. 25 (1996) (holding that states have the power to regulate national banks where doing so does not prevent or significantly interfere with a national bank's exercise of its powers).
128. 312 U.S. 52 (1941) (holding that the Federal Alien Registration Act of June 28, 1940 was intended by Congress as a uniform scheme for the regulation of aliens, and supersedes a state law requiring aliens to carry and produce on demand alien identification cards).
129. Bank One, 190 F.3d at 848.
130. Id. at 847 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
131. See id.
132. See id. Section §36(c) reads in pertinent part:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishments and operations are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

not ATMs were included, the courts held that ATMs were subject to the same state restrictions as branches. Since the 1996 amendment to the definition of branch "expressly" states that ATMs and remote service units are not included, the court held that Congress intended to end state authority over the ATMs of national banks. Given the legislative history and the judicial decisions regarding the 1996 amendment, the court concluded that Bank One's ATMs are not subject to the restrictions contained in the Iowa Code. In addition, the Court followed precedent established by Franklin National Bank v. New York, and concluded that the state's attempt to regulate the advertisements on Bank One's ATMs was preempted. The ruling will make it easier for national banks to reach into new markets using electronic networks.

However, this case may be far from over. Iowa has asked the U.S. Court of Appeals to review its own ruling. The petition for rehearing notes that one judge dissented from the ruling and argues that the majority reached too far. Judge Myron H. Bright argued in dissent that "many of the restrictions imposed by Iowa law are consumer protection measures that ought not be analyzed as geographical restric-

133. See Bank One, 190 F.3d at 848-849.
134. See id. at 849. The term "branch," includes:
   any branch bank, branch office, branch agency, additional office, or
   any branch place of business located in any State or Territory of the
   United States or in the District of Columbia at which deposits are
   received, or checks paid, or money lent. The term "branch", as
   used in this section, does not include an automated teller machine
   or a remote service unit.
135. See Bank One, 190 F.3d at 849-850.
136. 347 U.S. 373 (1954) (holding that where was a clear conflict existed be-
   tween the law of New York and a federal statute regarding advertising regulations,
   the policy of the state must yield to the federal enactment).
137. See Bank One, 190 F.3d at 850.
138. See National Bank Act Preempts Iowa Statute Regulating ATMs Run by Out-of-
   State Banks, 68 U.S.L.W. 1148 (Sept. 21, 1999).
139. See R. Christian Bruce, Iowa Seeks Rehearing in ATM Dispute, Urges Full
   Eighth Circuit Court to Hear Case, BNA BANKING REP., Sept. 27, 1999, at 494.
140. See id.
Iowa Attorney General Thomas J. Miller said that this case of first impression is being followed nationally by all states, financial institutions, government regulators, and most importantly, consumers. On February 2, 2000, Iowa officials filed a petition to the U.S. Supreme Court, asking for a review of the September federal appeals court ruling. Iowa Attorney General Thomas J. Miller and Iowa Banking Superintendent Holmes Foster contend the Federal Electronic Funds Transfer Act protects the Iowa law from preemption.

V. CURRENT CONCERNS

The purpose of the municipal prohibition in San Francisco is to "protect consumers from exorbitant and unfair fees and to protect smaller financial institutions from anticompetitive business tactics." The Board of Supervisors for the city of San Francisco found that the rates and types of fees charged by financial institutions have increased at an alarming rate in recent years. From 1993 to 1995, the rate of bank fees nationwide increased at least double the rate of inflation. The surcharge fee for ATM use along with the "off-use" fee that nearly all financial institutions already charge their account holders for using another institution's ATM can total $4.00 for a $20.00 withdrawal.

According to the United States Public Interest Research Group

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142. See Bruce, supra note 139, at 494. Attorney General Miller added, "[t]his decision yields more questions than answers. Answers to those questions should come appropriately from the full Court." Id.
143. See R. Christian Bruce, Iowa Seeks U.S. Supreme Court Review of Eight Circuit Ruling on ATM Placement, BNA BANKING REP., February 14, 2000, at 323.
144. See id. Miller and Holmes argue that under the EFTA, "national banks can be subject to state restrictions that offer more consumer protection than the EFTA itself." Id.
146. See id. at 1
147. See id. These figures are according to a study conducted by the USPIRG and measured by the Consumer Price Index. See id.
148. See id. at 2.
BUSINESS METHODS

(USPIRG), the average fees are $2.41 per transaction, an amount that equals more than a 10% charge for withdrawing $20.00 of an account holder's funds.¹⁴⁹ According to former Senate Banking Committee Chairman Alfonse D'Amato, 122,000 out of the 165,000 machines were installed well before the double charge, and in the beginning of 1996, only 17% of ATMs imposed such surcharges, but by 1998, the number increased to 79%.¹⁵⁰

The question of whether federal law preempts state or a local law that bans ATM surcharges still remains. D'Amato pushed for a bill to ban surcharges in 1998, but was defeated.¹⁵¹ Representative Bernard Sanders, an Independent from Vermont, attempted to attach a surcharge ban to the financial reform law enacted November 12, 1999, but the provision was watered down to require merely a disclosure of ATM fees.¹⁵² Representative Sanders has reintroduced a bill that would ban surcharges nationally, and Representative Maxine Waters has introduced similar legislation.¹⁵³ In addition to national legislation, several major cities are looking to follow Santa Monica and San Francisco in introducing measures to prohibit fees.¹⁵⁴ The Department of Defense wants to prohibit 63 banks and 171 credit unions that operate on military bases from imposing surcharges.¹⁵⁵ Bankers are warning that if such initiatives succeed, many banks will stop allowing non-customers to use their ATMs.¹⁵⁶ Both Bank of America and Wells Fargo, which operate 86 percent of the ATMs in San

¹⁴⁹. See id.
¹⁵⁰. See id. at 2-3.
¹⁵¹. See Olaf de Senerpont Domis, Opposition to ATM Fees Spreading Coast to Coast, AM. BANKER, Nov. 17, 1999, at 4.
¹⁵². See id.
¹⁵⁴. See de Senerpont Domis, supra note 151 at 4. New York, Los Angeles, and New Orleans are among the cities discussing bans. The U.S. Public Interest Research Group has reported queries from an "overwhelming" number of city councils interested in drafting surcharge bans. See id.
Francisco, have refused non-customers access to ATMs in Santa Monica.157 Both banks estimate they would lose $455,000 a month in San Francisco if the ordinance is upheld.158

One of the arguments used by the supporters of the San Francisco initiative is that surcharging harms competition in banking markets by disadvantaging smaller depositories such as banks, thrifts, and credit unions.159 Since larger banks have many more ATMs than smaller institutions, customers may be pressured to switch financial institutions to avoid paying surcharges.160 Opponents of the San Francisco initiative state that the average charge for small banks is $1.18, which is just below the national average for all banks, $1.35.161 In addition, they argue that smaller institutions can band together to form no-surge alliances.162

One opponent of the San Francisco initiative concluded that laws banning ATM surcharges will harm consumers, resulting in fewer ATMs and/or higher surcharges.163 Since surcharge bans are aimed solely at financial institutions, they shelter non-bank ATM owners from competition by financial institutions in the ATM market.164 The Office of Thrift Super-

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157. See Olaf de Senerpont Domis, Wells, B of A Recast Debate On ATM Fees With Lockout, AM. BANKER, Nov. 12, 1999 at 1. David Burgess, vice president of policy analysis at the California Bankers Association, said, "This is Economics 101. If you can’t charge for a service, that service might not be offered any longer." Id. at 8. Bank of American is the top ATM owner with 14,000 machines while Wells Fargo if the fourth with 4,432 machines. See ATM Fact Sheet, supra, note 1. See Joyce E. Cutler, District Court Rules for Banks in California Dispute Over ATM Fees, BNA BANKING REP., Nov. 22, 1999, at 842.

158. See Joyce E. Cutler, State Attorneys General Join Forces in Brief in California ATM Fee Ban Dispute, BNA BANKING REP., Feb. 7, 2000, at 269.

159. See Litan, supra note 9, at 18.

160. See id.

161. See id. at 18, 20.

162. See id. Opponents also note that a study by PULSE revealed that only 2 percent of consumers have switched financial institutions due to ATM charges. See id. at 20.

163. See id. at 22. In a survey of ATM owners conducted by Dove Associates, 74 percent said they would remove some of their existing off-premise ATMs as a result of a surcharge ban and 79 percent said they would not add any additional off-premise machines. See id.

164. See id. at 23.
vision concluded that the California ordinances do not apply to federal savings associations by reason of federal preemption.\textsuperscript{165} It is possible that because only non-banks can continue surcharging under the discriminatory prohibitions, they are likely to buy off premise ATMs from financial institutions, which may lead to higher surcharges.\textsuperscript{166} Studies by the Federal Reserve Board and consumer groups have shown that credit unions and small banks tend to offer higher interest rates on deposits and tend to charge lower account fees; losing these institutions would therefore harm all customers, particularly the elderly, who are often dependent on a fixed income and reliant on the higher rates of return offered to account holders at smaller institutions.\textsuperscript{167}

At the time of this printing, attorneys general from nine states and two commonwealths filed a joint friend-of-the court brief on February 2, 2000, on behalf of San Francisco and Santa Monica, arguing that local ATM fee ban ordinances are permissible under the National Bank Act and EFTA.\textsuperscript{168} What is certain is that banks and cities proposing surcharge bans are likely to en-

\textsuperscript{165} See Rob Garver, OTS Weighs In on Teller Machine Fees; Says Thrifts Entitled to Charge Nonclients, AM. BANKER, Nov. 29, 1999, at 4. The 20-page opinion holds that the Santa Monica ordinance is preempted because the Home Owners' Loan Act gives the OTS "exclusive authority to regulate the operation of federal savings associations." \textit{Id.}

\textsuperscript{166} See Litan, \textit{supra} note 9, at 23.

\textsuperscript{167} See Legislative Digest, \textit{supra} note 145, at 3-4.

\textsuperscript{168} See Cutler, \textit{supra} note 158, at 269. The attorneys general filing the brief are from California, Connecticut, Iowa, Minnesota, Nevada, New York, Oregon, Washington, West Virginia, and the commonwealths of the Northern Mariana Islands and the Virgin Islands. See \textit{id}. California Attorney General Bill Locker said,

\textit{Nothing in the NBA regulates charges that banks may or may not impose for ATM transactions. The EFTA, on the other hand, contains an anti-preemption provision—section 1693q—that expressly saves state laws protecting consumer rights in ATM transactions, which encompasses the right to protect non-account holders from ATM surcharges. In short, the EFTA authorizes the states to prohibit the surcharges and the NBA does not preempt such authority.}

\textit{Id.}
gage in a lengthy battle. One expert predicts it will be decided by the U.S. Supreme Court.  

MELANIE ELIZABETH DOULÉ

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169. See Helen Stock, Anti-Fee Activist Predicts Years-Long Fight, AM. BANKER, Nov. 22, 1999, at 29. David Bartone, a Washington, D.C. lawyer with expertise in ATM cases, predicted widening national skirmishes over the matter will “inevitably” bring the case to the U.S. Supreme Court. See id.