The Preservation of Diversity Jurisdiction for National Banks

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The Preservation of Diversity Jurisdiction for National Banks

I. INTRODUCTION

Where is a national bank located? Common sense suggests the response that a bank is located where it maintains physical presence. However, taking this common definition and incorporating it into federal court diversity jurisdiction law has negative implications on parties seeking to gain access to federal court where no federal question exists.\(^1\)

Federal court diversity jurisdiction is premised on the notion that federal courts provide litigants with an arena free from state and local biases.\(^2\) If there is no question of federal law, a litigant may access federal court only by means of the diversity statute, which provides that federal courts will have jurisdiction over any civil suit involving \textit{citizens of different states} in which the amount in controversy exceeds $75,000.\(^3\) Citizenship of corporations is determined by statute.\(^4\) For the purposes of the diversity statute, a corporation "shall . . . be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ."\(^5\) However, national banks are not treated as corporations and have a special citizenship statute.\(^6\) The national bank citizenship statute (hereinafter "citizenship statute") was enacted as part of the same legislation as the diversity jurisdiction statute, and supplements § 1332 by deeming that national banks\(^7\) are citizens of "the States in which they are respectively located."\(^8\)

\(^1\) See discussion \textit{supra} Part V.
\(^4\) Id.
\(^5\) Id. (emphasis added).
\(^7\) "National Banks are instrumentalities or agencies of the federal government created in accordance with the National Banks Act." 10 AM. JUR. 2D \textit{Banks and Financial Institutions} § 13 (1997).
However, the meaning of the term "located" in the citizenship statute caused a split among circuits.\textsuperscript{9}

The Supreme Court’s interpretation of the statutory language of 28 U.S.C. § 1348,\textsuperscript{10} the citizenship statute, in \textit{Wachovia Bank, N.A. v. Schmidt}\textsuperscript{11} will have a profound effect on the ability of national banks that operate in more than one state to access federal court and will prevent national banks from being in a position adverse to that of their state chartered counterparts.\textsuperscript{12} In \textit{Wachovia}, the Fourth Circuit, with one dissent, held that national banks are “located” in every state in which they operate a branch office.\textsuperscript{13} The citizenship statute has been interpreted in the past, and the Fourth Circuit’s opinion was new and different from other interpretations of the citizenship statute.\textsuperscript{14} For example, the dissent in \textit{Wachovia}, the Seventh Circuit, and the Fifth Circuit have all interpreted the term “located” to include only one or two places.\textsuperscript{15} On appeal of the \textit{Wachovia} case to the United States Supreme Court, Wachovia and the United States, as amicus curiae, argued that “located” as used in the citizenship statute includes only a national bank’s main office, or one place.\textsuperscript{16} Likewise, common sense would construe citizenship as encompassing but one location.\textsuperscript{17}

\textsuperscript{9} See, e.g., Horton \textit{v. Bank One, N.A.} 387 F.3d 426 (5th Cir. 2004) (holding that the term “located” did not extend to states in which banks operate a branch); \textit{Wachovia Bank, N.A. v. Schmidt}, 388 F.3d 414 (4th Cir. 2004) (holding that a national bank is located in each state in which it operates a branch for diversity jurisdiction purposes), \textit{rev’d}, No. 04-1186, 2006 WL 89196 (U.S. Jan. 17, 2006); \textit{Firstar Bank, N.A. v. Faul}, 253 F.3d 982 (7th Cir. 2001) (holding that a national bank is “located” where it operates its principal place of business and in the state listed on its organization certificate).

\textsuperscript{10} See supra note 8 and accompanying text.


\textsuperscript{12} See \textit{Wachovia Bank, N.A. v. Schmidt}, No. 04-1186, 2006 WL 89196, at *3 (U.S. Jan. 17, 2006) (“Held: A national bank, for § 1348 purposes, is a citizen of the State in which its main office, as set forth in its articles of incorporation, is located .... Were we to hold, as the Court of Appeals [the Fourth Circuit] did, that a national bank is additionally a citizen of every State in which it has established a branch, the access of a federally chartered bank to a federal forum would be drastically curtailed in comparison to the access afforded stated banks and other state-incorporated entities. Congress, we are satisfied, created no such anomaly.”); See also discussion infra Part V.B.

\textsuperscript{13} \textit{Wachovia Bank, N.A. v. Schmidt}, 388 F.3d 414 (4th Cir. 2004). A bank branch is defined as a place “at which deposits are received, or checks paid, or money lent.” The term “branch” does not include ATMs. 12 U.S.C. § 36(j) (2000).

\textsuperscript{14} Supra note 9 and accompanying text.

\textsuperscript{15} See supra note 9 accompanying text.

\textsuperscript{16} Transcript of Oral Argument at 20, \textit{Wachovia}, No. 04-1186. Justice Stevens raises a textual argument noting that the use of the word “respectively” in the citizenship statute
In *Wachovia*, a South Carolina citizen filed a complaint against Wachovia Bank in South Carolina state court. Wachovia, a national bank, incorporated and headquartered in North Carolina, petitioned the United States District Court in South Carolina on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332 (hereinafter “diversity statute”) to compel arbitration of the matter. The petition was denied, and on appeal, the Fourth Circuit dismissed the matter for lack of subject matter jurisdiction because Wachovia operates branches in South Carolina and is therefore a citizen of South Carolina, destroying diversity.

Wachovia successfully petitioned the United States Supreme Court for certiorari, and argued that Wachovia can have but one location under the citizenship statute, North Carolina. The Supreme Court leads to the conclusion that the citizenship statute is referring to many national banks that are “respectively citizens — of different States.” *Id.* He argues that because the statute says banks should “be deemed citizens of the States in which they are respectively located,” Congress is addressing multiple national banking associations but only one location for each association and that the word “States” is plural not because it is referring to more than one state but because it is referring to more than one national banking association. *Id.* Furthermore, Justice Stevens points out that typically, a citizen is a citizen of only one place and that to overcome this presumption with regards to corporations, Congress amended the diversity statute to make corporations citizens of two places. *Id.* He goes on to note that Congress has failed to add language to the citizenship statute to overcome this same presumption with regards to national banks. *Id.* at 38-40 & 47-48.

17. *See id.* at 44. (“we normally don’t think that entities are citizens of multiple states.... People aren’t citizens of—of 50 states. I mean, that—that’s an extraordinary result to reach.”).

18. In the original action, Respondent, Schmidt, alleged civil conspiracy, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, South Carolina Unfair and Deceptive Trade Practices Act violations, breach of fiduciary duty, and aiding and abetting against Petitioner, Wachovia Bank, N.A. Brief in Opposition for a Writ of Certiorari at 5, 7, Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414 (4th Cir. Aug. 18, 2005) (No. 04-1186), rev’d, 2006 WL 89196 (U.S. Jan. 17, 2006). These claims have not been settled as Wachovia filed an action to compel arbitration on the basis of diversity jurisdiction and under the Federal Arbitration Act. *Id.* Other defendants in the original action have filed similar actions to compel arbitration in South Carolina State Court and such motions have been denied. *Id.* Wachovia’s motion to compel arbitration was denied by the district court on August 1, 2003. *Id.* Wachovia appealed, and the Fourth Circuit found that the district court lacked subject matter jurisdiction because of lack of diversity and dismissed the case. *Id.* Interestingly enough, Schmidt won on the merits in the district court and argued that the district court lacked diversity jurisdiction for the first time on appeal to the Fourth Circuit. *Wachovia,* 388 F.3d at 415.


20. *Id.*

21. *Id.* at 432.

heard oral arguments on November 28, 2005. On January 17, 2006, the Supreme Court reversed the Fourth Circuit's interpretation of the citizenship statute, as that interpretation was contrary to the common sense understanding that a citizen can be a citizen of only one place and contrary to congressional intent because it would place national banks in a position adverse to that of their state chartered counterparts by severely limiting their access to federal court on diversity grounds; the Court held that national banks are deemed citizens of the state in which they operate their main office as set forth in their article of incorporation.

This Note will examine both the rationale and implications of the interpretation of the word "located" as used in the citizenship statute. More specifically, Part II will describe the conflicting interpretations of the term "located" as used in that statute. Part III will analyze the intent of Congress with respect to a national bank's ability to access federal court and how the holding in Wachovia could have undercut this intent. Part IV will consider the role of the Office of the Comptroller of the Currency in interpreting the jurisdiction statute. Lastly, Part V will address the possible implications of the Wachovia holding by the Fourth Circuit on national banks and the potential disparate treatment between national banks and state banks and between national banks and non-banks.

II. THE MEANING OF "LOCATED"

The Fourth Circuit's dismissal of Wachovia effectively turned on the meaning of the term "located" as used in the citizenship statute. The statute fails to define the term and because of this, courts are to "... construe [the] statutory term in accordance with its ordinary or natural meaning." "Location" is defined by the most recent edition of Black's

24. Wachovia, 2006 WL 89196, at *1; see supra note 16; see also discussion infra Part III.
25. See infra notes 29-57 and accompanying text.
26. See infra notes 58-92 and accompanying text.
27. See infra notes 93-106 and accompanying text.
28. See infra notes 107-164 and accompanying text.
30. Id. at 416 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).
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Law Dictionary as "[t]he specific place or position of a person or a thing."\textsuperscript{31} The Fourth Circuit in \textit{Wachovia} used this definition as a basis for holding that the word "located" signifies physical presence.\textsuperscript{32} An amicus brief submitted by JPMorgan Chase Bank, N.A.\textsuperscript{33} interprets this same definition to mean that a location is limited to a specified number of places, and that the term should not extend to physical presence.\textsuperscript{34} Furthermore, JPMorgan relies on \textit{MCI Telecommunications Corp. v. AT&T Co.},\textsuperscript{35} to point out that the dictionaries in existence at the time of the statute's enactment are the most relevant in determining the meaning of an undefined or ambiguous word used in a statute.\textsuperscript{36} Section 1348 was enacted in 1948; in 1951, Black's Law Dictionary made a reference to banks in its "location" definition.\textsuperscript{37} The 1951 dictionary stated "[a] bank is 'located' in the place specified in its organization certificate."\textsuperscript{38} The possibility of disagreement as to even the "ordinary and natural use" of the term led the federal circuit courts to split as to the meaning of "located" and whether it included states in which a national bank operates a branch.\textsuperscript{39}

The Circuit Courts that have considered the issue have used varying methods in order to arrive at their respective interpretations, but each method begins with the plain language of the statute.\textsuperscript{40} Section 1348, the citizenship statute, reads

\[ \text{the district courts shall have original jurisdiction of any civil action commenced by the United States, or by} \]

\textsuperscript{31} \textit{BLACK'S LAW DICTIONARY} 958 (8th ed. 2004).
\textsuperscript{32} \textit{Wachovia}, 388 F.3d at 416-17.
\textsuperscript{35} 512 U.S. 218, 228 (1994) (finding that the most relevant time to determine the meaning of a statute is the time of the statute's enactment).
\textsuperscript{36} Brief Amicus Curiae, supra note 34, at 5.
\textsuperscript{37} \textit{Id.} at 7.
\textsuperscript{38} \textit{Id.} at 7 (quoting \textit{BLACK'S LAW DICTIONARY} 1088 (4th ed. 1951)).
\textsuperscript{39} See supra note 9 and accompanying text.
the direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held. . . .

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.41

The major argument amongst the circuits revolved around whether the use of the terms "established" and "located" should be given different meanings within the same statute, and if the two words must be given a different meaning, national banks are precluded from claiming that they are only citizens of their state of incorporation, that is, where they are established.42

One canon of statutory interpretation is that different words in the same statute should be given different meanings.43 The Fourth Circuit relied on this canon to apply the interpretation of the national bank venue statute in Citizens and Southern National Bank v. Bougas44 to the present case. The Fourth Circuit justified using the interpretation of the national bank venue statute in Bougas to interpret the national bank jurisdiction statute at issue on the notion that the jurisdiction and venue statutes should be treated as in pari materia.45 In Bougas, the Supreme Court held that the use of both "established" and "located" in the venue statute expressed Congress' intent to assign them different

42. See infra notes 43-53 and accompanying text.
43. Cunningham v. Scibana, 259 F.3d 303, 308 (4th Cir. 2001) (where words were similar but not the same, the court recognized Congress's deliberate intent to use different words to assign them different meanings).
44. 434 U.S. 35 (1977).
45. Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414, 418-19 (4th Cir. 2004), rev'd, No. 04-1186, 2006 WL 89196 (U.S. Jan. 17, 2006). In pari materia refers to a canon of construction in which statutes relating to the same subject matter can be interpreted the same way so that inconsistencies in one can address inconsistencies of the other. BLACK'S LAW DICTIONARY 807 (8th ed. 2004). The Supreme Court rejected this argument stating that "venue and subject-matter jurisdiction are not concepts of the same order." Wachovia, 2006 WL 89196, at *7 (U.S. Jan. 17, 2006).
meanings and because of this, “established” refers to the place at which a bank was chartered, and “located” must refer to “any place where it operates and maintains a branch doing general banking business.” The Fourth Circuit adopted this view and held that a national bank had two types of presence; one is that of physical presence, such as operating a branch, and the other is the place where a national bank is chartered.

Prior to the Fourth Circuit’s holding in Wachovia, the Fifth and Seventh Circuits rejected this argument on multiple grounds. In Horton v. Bank One, N.A., the Fifth Circuit relied on what it called a “longstanding interpretation” that the location of a national bank did not include branches. One of these “longstanding interpretations” was by the Seventh Circuit in Firstar Bank, N.A. v. Faul. In Firstar, the court ruled that the Bougas case was at most minimally applicable to the interpretation of the citizenship statute because venue and jurisdiction are not the same issue and therefore not in pari materia. The Firstar Court also held that the terms “located” and “established” could be assigned distinct meanings in order to follow the statutory interpretation canon without a finding that national banks are “located” in each state where they operate a branch. “Established” connotes the state noted on a bank’s charter while “located” refers to the bank’s principal place of business. Both the Fifth Circuit and the Seventh Circuit agree that a national bank is “located” where it operates its principal place of business and in the state listed on its charter or organization certificate.

In addition, the Supreme Court in Marquette Nat’l Bank of Minneapolis v. First of Omaha Service Corp., found that “the mere

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46. Bougas, 434 U.S. at 40, 46. Although Bougas settled the meaning of the term “located” in the national bank venue statute, the Supreme Court left open the issue of the statutory meaning of that term in the jurisdiction statute at issue in Wachovia. In the case at issue, Justice Ginsburg writing for a unanimous court found that “Congress’ use of two terms may be best explained as a coincidence of statutory codification.” Wachovia, 2006 WL 89196, at *7 (U.S. Jan. 17, 2006).
47. Wachovia, 388 F.3d at 419.
48. See infra notes 49-54.
50. 253 F.3d 982 (7th Cir. 2001).
51. Id. at 990.
52. Id. at 992.
53. Id.
54. Horton, 387 F.3d 426 at 436 (5th Cir. 2004); Firstar Bank, N.A. v. Faul, 253 F.3d 982, 994 (7th Cir. 2001).
fact that a national bank 'transacts business'... in a [S]tate other than that of its 'organization certificate'... does not suffice to locate the bank in the foreign [S]tate for purposes of venue under the National Bank Act, 12 U.S.C. § 94."56 This holding seemed to narrow the meaning of "located" within that statute as interpreted by Bougas.57

III. CONGRESSIONAL INTENT

A. History

Wachovia argued that the intent of Congress was not to limit the national banks' access to federal court.58 Therefore, Wachovia contended, upholding the Wachovia decision would defeat congressional intent by destroying the ability of national banks to remove cases to federal court in the majority of states.59

In the beginning, a national bank's ability to remove cases to federal court was sweeping.60 In 1863, Congress enacted the National Currency Act under which federal courts had original jurisdiction over any actions involving a national bank regardless of citizenship or federal question; this provided national banks with an automatic pathway to federal court.61 In 1882, however, the predecessor to the citizenship statute was enacted and governed jurisdiction over national banks.62 That statute did away with automatic access to federal court as

56. Id. at 314 n 25. The statute dealing with national bank venue provides that "[a]ny action or proceeding against a national banking association... shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located, or, in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association's principal place of business is located." 12 U.S.C. § 94 (2000).

57. See supra notes 55-56 and accompanying text.

58. See infra notes 61-92 and accompanying text.


60. See infra note 61 and accompanying text.


provided by the National Bank Act, effectively giving national banks the same access to federal court as allowed to state banks. The "located" language was added to the national bank jurisdiction statute in 1887. "Located" was interpreted in 1892 in Petri v. Commercial National Bank of Chicago, and the United States Supreme Court found that "[n]o reason is perceived why [we] should [hold] that [C]ongress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might." As the language of the historical citizenship statute became more similar to the modern day citizenship statute, and as courts continued to interpret the language, there appeared to be no intent to limit the national banks' access to federal court.

In 1943, in American Surety Co. v. Bank of California, the Ninth Circuit held that a bank is "located" in the state where it maintains its principal place of business. Five years later, the citizenship statute was enacted in its current form and preserved the exact language that was interpreted by the court in American Surety. "[I]f a phrase or section of a law is clarified through judicial construction, and the law is amended, but retains the same phrase or section, then Congress presumably intended for the language in the new


the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers or agents, shall be the same as, and not other than the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.

63. Id.

64. Law of March 3, 1887, ch. 373, § 4, 24 Stat. 552, 554-55 (1887) (current version at 28 U.S.C. § 1348 (2000)) ("That all national banks... for the purposes of all actions by or against them... be deemed citizens of the states in which they are respectively located... ").

65. 142 U.S. 644 (1892).
66. Id. at 650-51.
67. See supra note 65 and accompanying text.
68. 133 F.2d 160 (9th Cir. 1943).
69. Id. at 162.
70. See 28 U.S.C. § 1348 (2000) ("National banking associations, shall, for the purposes of all other actions by or against them, be deemed citizens of the states in which they are respectively located.").
law to have the same meaning as the old.\textsuperscript{77} Thus, had Congress intended to expand the meaning of "located" in the jurisdiction statute, the rationale is that they would have done so subsequent to \textit{American Surety} and prior to the enactment of the current national bank jurisdiction statute.\textsuperscript{72}

B. \textit{The Parity Argument}

The Law of July 12, 1882,\textsuperscript{73} established parity between state and national banks with regards to diversity jurisdiction.\textsuperscript{74} According to the amicus brief of the United States in \textit{Wachovia}, the purpose of this statute was "to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States."\textsuperscript{75} Because state banks are not governed by the citizenship statute for diversity jurisdiction purposes their citizenship is determined like corporations under the diversity statute, 28 U.S.C. § 1332.\textsuperscript{76} As a result, state banks are considered citizens of the state in which they are chartered and the state in which they maintain their principal place of business.\textsuperscript{77} The notion is, as adopted by the Supreme Court, that national banks should not be treated in a disparate manner under the holding of the Fourth Circuit, which

\begin{itemize}
  \item \textsuperscript{72} \textit{See supra} note 71 and accompanying text.
  \item \textsuperscript{73} \textit{See supra} notes 62-63 and accompanying text.
  \item \textsuperscript{76} \textit{See} 28 U.S.C. § 1348 (2000) ("All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located." (emphasis added).
  \item \textsuperscript{77} 28 U.S.C. § 1332 (2000). It is important to note that state banks also have interstate branches. For example, SunTrust Banks, Inc., a state bank headquartered in Atlanta, GA, has branches in Florida, Georgia, Maryland, North Carolina, South Carolina, Tennessee, Virginia, and the District of Columbia. SunTrust Banks, Inc., \textit{About SunTrust}, http://www.suntrust.com (follow "More" hyperlink under "About Suntrust") (last visited Jan. 28, 2006).
\end{itemize}
provides that national banks are “located” in each state in which they operate a branch.\textsuperscript{78}

As noted above, the addition of the “located” language as used today was not interpreted to limit national banks’ access to federal court.\textsuperscript{79} For this reason alone, entities with an interest in preserving national bank diversity jurisdiction argued that parity between state chartered banks and nationally chartered banks has survived the amendments to the diversity statutes.\textsuperscript{80}

C. \textit{Section 1348 Did Not Anticipate Interstate Branching}

The argument that it is consistent with congressional intent that national banks have access to federal court in the same way that state banks have access to federal court is furthered by the recognition that at the time the citizenship statute was enacted, there was very little interstate branching for national banks, and it was therefore almost impossible for national banks to be “located” in more than one state.\textsuperscript{81} The McFadden Act afforded national banks the first opportunity to establish branches in 1927, but they were limited to operating branches in the \textit{cities} in which the national banks operated their principal place of business, and then only if state banks were permitted to do the same.\textsuperscript{82} The McFadden Act was amended in 1933 to permit national banks to establish branches within the \textit{state} in which their principal office was

\begin{itemize}
\item \textsuperscript{79} See supra notes 65-66 and accompanying text.
\item \textsuperscript{81} See Brief for the Petitioner at note 15, Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414 (4th Cir. Aug. 18, 2005) (No. 04-1186), \textit{rev’d}, 2006 WL 89196 (U.S. Jan. 17, 2006). Although national bank interstate branching was not expressly allowed until the passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, a 1959 amendment to the National Banking Act allowed national banks to move their main offices thirty miles and made no mention of state lines. This allowed interstate branching in some limited circumstances. \textit{Id}.
\end{itemize}
located, but still did not provide them with the opportunity to create *interstate* branches. 83 It was not until June 1, 1997 that national banks were permitted to operate interstate branches. 84

It does not seem possible that Congress intended for the term “located” to include states in which national banks operated a branch when interstate branches were not in use at the time the citizenship statute was enacted. 85 The language in the citizenship statute has remained identical to that of its original 1948 form, which was codified at a time when national bank interstate branching was non-existent; 86 what follows is the simple fact that “located” could not have included branches at the time the statute was enacted. Chief Justice Roberts stated at oral argument that “Congress could have dealt with [the spread of national banks] by enacting something that dealt with the proliferation of branch banks rather than interpreting the 1948 statute in light of the 1980’s.” 87 However, Congress has not done this, and Wachovia argued that Congress “saw no need” to do so in light of the interpretations that gave the citizenship statute its original meaning and maintained parity between state and national banks. 88

Furthermore, the citizenship statute was enacted at the same time as the diversity statute in its original form. 89 In its original form, the diversity statute did not include the language relating to corporations; this language was added in 1958. 90 As noted earlier, the citizenship statute was intended only to supplement the diversity jurisdiction statute, notably at a time when there were few interstate

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85. See supra note 81 and accompanying text.
86. See supra notes 70, 81 and accompanying text. “When Congress enacted § 1348’s statutory predecessors and then § 1348 itself, a national bank was almost always “located” only in the State in which it was “established,” under any of the proffered definitions of the two word, for, with rare exceptions, a national bank could not operate a branch outside its home State.” Wachovia Bank, N.A. v. Schmidt, No. 04-1186, 2006 WL 89196, at *7 (U.S. Jan. 17, 2006).
88. Id.
90. Id.
IV. THE ROLE OF THE OCC IN INTERPRETING § 1348

In an interpretive letter, the Office of the Comptroller of the Currency (OCC) stated that a national bank is a citizen of the state in which its principal place of business is located and of the state that was originally designated in its organization certificate and articles of association, or if applicable, the state to which that designation has been changed under other authority (i.e., the state in which its main office is currently located).

In this letter, the OCC for all intents and purposes adopted the holding of the Seventh Circuit in *Firstar Bank, N.A. v. Faul* with the only change being the instructions for dealing with the movement of a "main office." There is a question about what weight should be given to this interpretation because in *Chevron U.S.A., Inc. v. NRDA, Inc.*, the Supreme Court held that when a court reviews an administrative agency’s construction of the statute *that it administers*, there are two questions. The first is whether or not Congress has spoken to the issue

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91. *See supra* note 81 and text accompanying note 10.
92. *See supra* note 90 and accompanying text.
93. Office of the Comptroller of the Currency, Interpretive Ltr. No. 952 (Oct. 23, 2002), 12 USC 21-23, 12 USC 30B (February 2003), available at http://www.occ.treas.gov/interp/feb03/int952.pdf. ("If the Fourth Circuit’s interpretation in this case is adopted, and a bank is “located” for jurisdictional purposes ‘wherever it has physical presence,’ then diversity is largely destroyed for national banks with multiple branches (and possibly even ATMs and processing centers as well, under the Fourth Circuit’s broad language.").
94. *Id.* at 5 ("We believe the interpretation of the statute and fundamental reasoning of the *Firstar Bank, N.A. v. Faul* court are correct."). In the same letter, the OCC recognized the possibility that a bank will change the location of the main office that was listed on the organization certificate as a result of a merger or some other reason and because of this noted that a bank is a citizen of the state listed in its articles of association which reflect these changes. *Id.*
96. *Id.* at 842.
at hand, and the second is whether the agency's regulation addressing the statute at issue is a "permissible construction of the statute." The Court further held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency." This deference principle has been applied in interpreting banking statutes in light of OCC regulations. Applying *Chevron* deference to the case at hand poses at least two problems. First, the OCC is not charged with enforcing the federal jurisdiction statute. Second, even if it was, the OCC has not issued a regulation on point; instead they have issued an interpretive letter which sets out its position with regards to the statute. In determining what deference must be given to agency interpretations that fall short of regulations, the Supreme Court held that United States Customs Service "classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale." This holding distinguished those interpretations from regulations promulgated with a lawmaking intent by not affording them *Chevron* deference.

The role of the OCC in *Wachovia* was therefore likely no more than another voice. However, although interpretations may not qualify for *Chevron* deference, that does not mean that they do not qualify for any deference whatsoever. "*Chevron* did nothing to eliminate *Skidmore* 's holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and

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97. See id. at 842-43.
98. Id. at 844.
99. See, e.g., Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995) (relying on *Chevron* to hold that an OCC regulation allowing a national bank to sell annuities should be give considerable deference as it was a reasonable interpretation of a statute for which the OCC was charged with administering).
101. See supra note 93 and accompanying text.
103. Id.
104. See supra notes 93-103 and accompanying text.
given the value and uniformity in its administrative and judicial understandings of what national law requires.”

V. IMPLICATIONS

A. Destruction of Parity with State Banks and The Decline in Access to Federal Court

If the Supreme Court affirmed the Fourth Circuit’s holding that a national bank is “located” in every state where it operates a branch, the parity between national banks and state banks created by the 1882 amendment to the National Banking Act would have been destroyed. The citizenship statute applies only to national banks, therefore, only national banks would be considered citizens in every state where they operate a branch. The most extensive national bank branch network is in thirty states. Under the Fourth Circuit’s holding in Wachovia, these banks would be able to gain access to federal court through diversity in only twenty-one of the available fifty-one jurisdictions because diversity would be destroyed if sued by a citizen of any of the thirty states in which they operate. A state bank, on the other hand, would continue to have access to federal court by virtue of diversity jurisdiction in forty-nine or fifty of the available jurisdictions. This disparate treatment cuts directly against the congressional intent to place national banks on “equal footing” with state banks.

106. Id. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)). “The weight [accorded to an administrative] judgment in a particular case will depend upon the thoughtfulness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” Skidmore, 323 U.S. at 140.

107. See supra notes 73-80 and accompanying text.

108. See supra note 76 and accompanying text.


110. See also supra note 59.

111. See supra notes 74-75 and accompanying text.
B. State Bank Advantages

Limiting the ability of national banks to access federal courts without doing so for state banks would likely put state banks at a slight competitive advantage.\textsuperscript{112} For one, "[b]ankers fear that state courts favor local plaintiffs and are not friendly to large, national organizations."\textsuperscript{113} Such local bias is what the diversity statute set out to quell\textsuperscript{114} and can potentially lead to unfavorable rulings for an out-of-state national bank forced to litigate in state court while a similarly situated out-of-state bank could litigate its claims against a state's citizen in federal court. Because state banks would have the option of litigating in federal court, they could be subject to more sympathetic interpretations and verdicts.\textsuperscript{115} In discussing an act that would force class-action lawsuits to be heard in federal court, Gary S. Caplan, a financial services partner at Sachnoff & Weaver, stated that "'[t]he sponsors [of the act] believe that state courts are too prone to large verdicts and don't have tight controls on awards and damages, and perhaps even let suits carry on and sustain a life of their own... It's more of a known commodity in federal courts. State courts are often a crapshoot."\textsuperscript{116} Diane Casey-Landry, president and CEO of America's Community Bankers recognizes that the higher costs resulting from large settlements would lead to increased costs for consumers in the form of higher fees and lower dividends for shareholders.\textsuperscript{117} Logic dictates that consumers will be less drawn to national banks if they are unable to match the lower fees of state banks due to large state court judgments.\textsuperscript{118} A loss of consumers would be detrimental to national banks as many of their assets are attributable to loans to consumers, and a large portion of a banks' income comes from interest earned on these loans.\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{112} See infra text accompanying notes 113-14.
  \item \textsuperscript{113} Ethan Zindler, \textit{Top Court to Hear Two Big Cases for Industry}, AM. BANKER 1, Sept. 2, 2005, available at 2005 WLNR 14151759.
  \item \textsuperscript{114} See supra note 2 and accompanying text.
  \item \textsuperscript{115} See infra note 116 and accompanying text.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} See supra notes 116-17 and accompanying text.
  \item \textsuperscript{119} LISSA L. BROOME & JERRY W. MARKHAM, \textit{REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES: CASES AND MATERIALS} 317 (2nd ed., 2004).
\end{itemize}
Historically, Congress has tried to ensure that national banks will not be at a competitive disadvantage to state banks. Courts have also recognized this intent. "In 1969, [the Supreme Court] reiterated that the McFadden Act 'reflects the congressional concern that neither system [state or national] have advantages over the other in the use of branch banking.'" It necessarily follows that in order to maintain equality between state and national banks, national banks must have equal access to federal court.

C. Regulatory Arbitrage

Both state and national banks are uninhibited in their ability to switch from a state to national charter and visa versa. As a result, banks often adjust their charters as needed to take advantage of the most favorable regulations. Had the Supreme Court agreed with the Fourth Circuit and held that national banks are "located" in every state in which they maintain a branch, the disadvantage that national banks would be facing could have caused some national banks to switch charters. Switching to state charters would allow these national banks to maintain access to federal court in all states except those in which the bank is chartered and in which the bank operates its principal place of business. Of course, many other factors would weigh into a national bank’s decision to switch charter; banks typically switch charters to gain more powers, reduce regulatory cost, form a more favorable relationship with their principal regulator, or in order to expand

120. See, e.g., The Banking Act of 1933, ch. 89, § 23, 48 Stat. 162, 189-90 (1933) (current version at 12 U.S.C. § 36 (2000 & Supp. 2002)). (in further response to state branching, national banks were permitted to establish intrastate branches to the same extent that state banks were permitted to do so); The McFadden Act, ch. 191, § 7, 44 Stat. 1224, 1228 (1927) (current version at 12 U.S.C. § 36 (2000 & Supp. 2002)) (in response to state bank branching, the Act allowed national banks to create branches within the municipality of their main office to the extent that state banks were permitted to do so).
121. See supra note 66 and accompanying text.
123. Broome & Markham, supra note 119, at 76-77.
124. Id.
125. See infra note 126 and accompanying text.
126. See supra note 76 and accompanying text.
nationwide. But it is possible that the economic effect of state court settlements would have been considered an indirect cost to be factored into a decision to switch charters.

D. Non-Bank Advantages

"Non-banks" are entities closely related to banks but treated differently than banks in terms of regulation because they do not fall under the traditional definition of a "bank." Therefore, "non-banks" are not subject to the citizenship statute and are governed by the same diversity statute as state banks and other corporations. In addition to the destruction of parity between national banks and state banks, there was a potential disparity between the ability of national banks to invoke diversity jurisdiction and the ability of other corporations such as insurance brokers and other financial companies, two types of companies that compete with banks, to do so. This result would have been anomalous, because even though those non-bank corporations have a "physical" presence in many states just like banks, they are only considered citizens of a maximum of two states.


128. See supra note 116 and accompanying text.

129. See supra note 127 and accompanying text.

130. For the purposes of the Bank Holding Company Act, banks are defined as any of the following: "(A) An insured bank as defined [by the Federal Deposit Insurance Corporation Act]. (B) An institution organized under the laws of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin islands which both (i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and (ii) is engaged in the business of making commercial loans." 12 U.S.C. § 1841(c) (2000 & Supp. 2002). The statute also prescribes exceptions for which institutions will be considered "non-banks" and therefore not subject to the restrictions of the Bank Holding Company Act. Id.


132. See supra notes 112-22 and accompanying text.

133. Brief for Clearing House Ass’n, L.L.C. as Amicus Curiae in Support of Petitioner at 3, Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414 (4th Cir. Aug. 18, 2005) (No. 04-1186), rev’d, 2006 WL 89196 (U.S. Jan. 17, 2006). "A corporation can have only one principal place of business for purposes of establishing its citizenship for diversity jurisdiction, since the statute [28 U.S.C. § 1332] used the word 'the,' rather than 'a,' in referring to the corporation's 'principal place of business' as one of the tests of citizenship. This is true even when a corporation has a complex structure and conducts business in several states."
Banks in general are already seeing a decline in their ability to attract commercial and industrial borrowers due to the increased number of restrictions they face that "non-banks" do not. In order to maintain presence in the financial services field, national banks must remain competitive with state banks and non-banks. Larger judgments that will result from state court litigation would further inhibit this ability.

E. Federal Thrifts and Diversity Jurisdiction

National banks are not the only entities to whom the Fourth Circuit's decision in Wachovia Bank, N.A. v. Schmidt was of concern, the citizenship of federal thrifts is also inconclusive. Because 28 U.S.C § 1348 applies only to national banks, the citizenship of federal thrifts is not defined, and as a result, courts have found that thrifts are not a citizen of any state. This decision with regards to thrifts is perplexing to say the least, and it will be interesting to see whether or not Congress addresses this gap in the wake of the Wachovia decision.

In an interpretative letter, the chief counsel of the Office of Thrift Supervision stated that "[w]e continue to be of the view that the fact that the Association's home office is located in the state from which interest rates will be exported provides, by itself, a sufficient nexus between the loan and the home office state, regardless of any activities that may occur in a branch state." For the purposes of exportation federal savings associations are considered located in the state of their home office.

135. See supra note 134 and accompanying text.
136. See supra notes 114-116 and accompanying text.
138. Id.
139. "[T]he case [Wachovia v. Schmidt] might prove to be problematic later because it does not carve out the same federal protections for national thrifts that it does for national banks." Damian Paletta, High Court Rules for Wachovia in Venue Case, AM. BANKER 1, January 18, 2006, available at 2006 WLNR 1308367.
home office state.\textsuperscript{141} This interpretation, if eventually incorporated into a diversity jurisdiction statute, is more in line with the "location" of corporations under the diversity jurisdiction statute than the interpretation of the same in the Fourth Circuit's decision.

F. How Far Will it Go?

Another consideration of the possible adoption of the Fourth Circuit's interpretation is the likely practical effect that it would have had.\textsuperscript{142} Not only did the Fourth Circuit hold that "located" included states in which a national bank operates a branch, but it also found that "located" is functionally equivalent to "physical presence."\textsuperscript{143} In light of the growth of the banking industry and the expansion of the use of internet banking, this language potentially opened the door to require national banks to be citizens of states in which they do not operate a branch at all.\textsuperscript{144} It is possible to imagine a scenario in which a citizen of State A banks electronically with a national bank only located in State B, and the question becomes whether or not the national bank is now "physically present" in State A because its services are available there. However, the more far reaching implication is that it is also possible to construe this language to include ATMs\textsuperscript{145} and loan production offices, offices that generate loans but do not take deposits.\textsuperscript{146} In 2004, Bank of America, N.A. had ATMs located in forty-five states.\textsuperscript{147} In one

\begin{itemize}
\item \textsuperscript{141} Id.
\item \textsuperscript{142} "[W]hy in the world would Congress have wanted to impose the – the system that follows from – from you result in which the – the national banks are – are excluded from diversity jurisdiction to a degree that the State banks clearly are not? . . . we try to avoid freakish results, and this seems like a freakish result.” Transcript of Oral Argument at 34-35, \textit{Wachovia}, No. 04-1186.
\item \textsuperscript{144} See Transcript of Oral Argument at 36-37, \textit{Wachovia}, No. 04-1186 (Justice Roberts and Justice Breyer questioned whether a broad reading of "located" would extend to ATM's, messengers, and warehouses).
\item \textsuperscript{146} See Transcript of Oral Argument at 12, \textit{Wachovia}, No. 04-1186 ("[B]ut what about where it has an office that’s not a branch? What about where it stores – where it has warehouses that store its [the bank’s] records?").
\item \textsuperscript{147} Brief for the United States, supra note 75, at 24.
\end{itemize}
instance, the Supreme Court held that an armored car service could be considered a branch under the National Banking Act.\textsuperscript{148} Being mobile, an armored car could potentially be "located" in all fifty-one jurisdictions meaning that the particular national bank that owned the car would never be able to access federal court on diversity grounds.\textsuperscript{149} The obvious implication of this consideration is a further decrease in the potential access of national banks to federal court.\textsuperscript{150}

G. \textit{Impact on Pending Cases}

The Fourth Circuit remanded \textit{Wachovia Bank, N.A. v. Schmidt} for dismissal based upon lack of jurisdiction.\textsuperscript{151} If the Supreme Court affirmed the Fourth Circuit's decision, the decision would not only have had a prospective effect on the access to federal court but will also have retroactively affected suits well on its way to resolution.\textsuperscript{152} Affirmation would have required all cases involving national banks pending in federal court on the basis of diversity be dismissed or remanded if diversity is destroyed because the national bank operates a branch in the state in which its adversary is a citizen.\textsuperscript{153} This would have resulted in a loss of time and resources for many litigants.\textsuperscript{154} For example, from January 2001 until August 2005, Wachovia Bank alone, the fourth largest bank in asset size as of June 30, 2005,\textsuperscript{155} was a party in 105 appellate cases and 575 civil cases in federal district court.\textsuperscript{156} This would not only have been inefficient for national banks and

\textsuperscript{149}. See supra note 148 and accompanying text.
\textsuperscript{150}. See supra notes 108-11 and accompanying text.
\textsuperscript{151}. Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414 (4th Cir. 2004), rev'd, No. 04-1186, 2006 WL 89196 (U.S. Jan. 17, 2006). Note that an objection to subject matter jurisdiction can be made at any time and is not waived if a motion is not made or if a responsive pleading is filed. Fed.R.Civ.P. 12.
\textsuperscript{152}. See infra note 153 and accompanying text.
\textsuperscript{154}. Id.
\textsuperscript{156}. Brief for American Bankers Association, supra note 153, at 19 and note 13 (data was obtained from the U.S. Party/Case Index on PACER, which is a national tracker for federal court activity).
individual litigants, but inefficient for state courts as it would set into motion "case dumping" from the federal to state level.157

H. Inconsistency in Decisions

Many who fight to maintain diversity jurisdiction in its broadest form argue that national commercial transactions are made possible by the federal court's uniformity. If national banks were forced to litigate most claims in state courts, each applying the state's own procedural and substantive law, the results may have been wholly unpredictable and inconsistent. For one, the "value of cases involving state-law claims may well be increased," especially where local bias influences a judgment. This takes away from the predictability that is integral to operations as a nationwide entity and to policy development of national banks. State banks, thrifts, and other corporations, such as "non-banks," on the other hand, would not be plagued by this inconsistency as their ability to remove to federal court would remain intact.164

VI. CONCLUSION

Although the Fourth Circuit's holding may have followed common sense in that a bank is "located" in each state where it operates

157. See supra note 153 and accompanying text.
159. See Lyle Washowich, National Banks Beware: Your Branches May Carry Greater Risk that You Realize, 122 BANKING L.J. 699, 702-03 (2005). One specific inconsistency will potentially occur in the enforceability of waivers of class-wide arbitration. Federal courts have found that such waivers do not violate the Truth in Lending Act, citing a "liberal federal policy favoring arbitration agreements." Randolph v. Green Tree Financial Corp.-Alabama, 244 F.3d 814, 818 (11th Cir. 2001). On the contrary, some state courts have found such waivers to be unconscionable. See Szetala v. Discover Bank, 118 Cal. Rptr.2d 862 (Ct. App. 2002), cert. denied, 537 U.S. 1226 (2003).
160. See Washowich, supra note 159, at 702-03.
161. See supra note 116 and accompanying text.
162. See Washowich, supra note 159, at 702-03. ("The impact of the split [among circuits as to the meaning of "located" in § 1348] is three-fold: (1) it removes a strategic option in defending a matter in the circuits which adopt the Wachovia Bank rationale; (2) the value of cases involving state-law claims may well be increased; and (3) the way policy is made affecting national banks could shift in an important way.").
163. See supra note 130 and accompanying text.
164. See supra note 76 and accompanying text.
The Supreme Court ruling in *Wachovia Bank, N.A. v. Schmidt* will have a profound effect on the national banking industry in that it will not force national banks to file suit or be sued in the courts of states in which they maintain a branch. If the Court had affirmed *Wachovia* and held that for the purposes of 28 U.S.C. § 1348, the citizenship statute, the term “located” includes each state in which a national bank operates a branch, national banks would have been severely restricted in their ability to gain access to federal courts which would put them at a competitive disadvantage to state banks, thrifts, and other corporations. This holding would have had many implications, including running counter to congressional intent by producing disparate treatment between state and national banks. Such a decision would have also affected cases pending in federal court whether at the district or appellate level. However, “[n]ational banks won a major legal victory Tuesday, [January 17, 2006,] as the U.S. Supreme Court made it harder for them to be sued in state courts.” Another obvious positive effect was reconciling the differences in interpretation amongst circuits.

The Court could not uphold the Fourth Circuit’s decision in *Wachovia* because no policy reason justified the disparate treatment and the negative impact it would have on national banks. “Treating national banks differently [from corporations and state banks]... imposes extraordinary restrictions on their access to federal courts [and] runs directly counter to a more than century-old federal policy dictating that national banks not be disadvantaged vis-à-vis their state chartered counterparts.” Regardless of the favorable holding for national banks, it “does not supplant the need for a uniform rule that would apply to

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165. See discussion supra Part III.
166. See discussion supra Part V.
167. See discussion supra Part V.B & Part V.D-E.
168. See discussion supra Part V.
169. See discussion supra Part V.G.
171. See supra note 9 and accompanying text.
national banks and federal thrifts to ensure that all federally chartered depository institutions are treated in the same manner with respect to access to Federal court in diversity cases."

The Supreme Court's decision that national banks are citizens of the state located on their articles of incorporation for the purposes of the citizenship statute is very advantageous to national banks. At oral argument, Justice Ginsburg stated the entire issue concisely: "Why would Congress want to give the... State banks greater access to Federal courts than it gives [to] national banks? What earthly reason would there be for Congress wanting to do that?" National banks asked the same question, and the Supreme Court answered.

MICHELLE E. O'LEARY

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