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ATM Fees: Increasing Charges Give Rise to the Debate over Preemption and States' Rights in Electronic Banking

Kathryn Smetana

I. Introduction

These days it seems that there is a charge or tip involved in every type of transaction, for any kind of service. Tips are always welcome, and often invited; for example, coffee shops, and take out counters offer eye-catching, decorated tip jars filled with singles to lure the guilty. While we might avert our gaze in the coffee line, we can’t always get away so easily. Take automatic teller machines (“ATMs”), for example; we slide our card, withdraw our cash, and tip not one, but two banks, just to access our own money. This practice, aptly termed a “double whammy” by some, allows your bank to assess a fee, and the bank that owns the machine you are using to assess another fee, per transaction. ATM fees are not new, but the charges continue to increase, which today can add up to $4.50 per transaction, or a startling $45 per month to get cash two or three times per week. The staggering fees have gained such recognition that, according to the Federal Reserve Board, from 1994 to 1999, ATM fees exceeded the rate of inflation. While banks proffer the rising cost of operation and security for existing ATM machines as justification for the increasing fees,
it is ironic that the number of ATMs in the United States has more than doubled from the early 1990s to 1999. ATMs, originally designed to offer the services of a teller at a reduced cost to the banks, operated for years without assessing fees on consumers. Now, however, transaction fees are a lucrative mainstay of bank profit, with fee structures expanding to other banking services, such as using live tellers in the banks, and in some cases just to own an ATM/debit card.

Consumer groups and legislators have attacked the ever-increasing fees, but whether the efforts will result in a halt in fees is questionable, particularly in light of the recent decision of the United States District Court for the Northern District of California in Bank of America v. City and County of San Francisco. This Note will discuss the potential for change in the ATM fee structure and whether there is any relief in sight for consumers, based upon how courts view preemption of local ordinances in light of the National Banking Act. Part II of this Note addresses the history behind ATM fee structures and the emergence of surcharges. Part III analyzes the evolving legal debate on the issue of ATM transaction administration, including the most recent Bank of America decision. Part IV looks into the true nature of the preemption debate, the potential impact of the Bank of America decision on the future of state and consumer rights in the face of the National Banking Act and the nationwide lock on fees.

II. Background

A. The Emergence of Fees

Banks, like all businesses, rely on customer volume to ensure profit. However, where taking deposits and making loans were once the primary source of bank revenue, now banks generate a significant profit by simply charging fees on transactions at ATMs.
ATMs, banks hesitated to assess transaction fees on their customers, fearing a backlash. As an alternative, the Federal Reserve enacted Regulation Q ensuring that banks would give lower interest rates to consumers on their deposits. Once Regulation Q was repealed, banks could provide competitive interest rates on deposits, which rendered the assessment of fees a minor concern to consumers outweighed by the benefit of receiving higher interest income. Over time, fees were assessed not only on checking and savings accounts, but also on mortgage services, credit cards, managing mutual funds, and securities brokerages, such that fee income became primary income for banks. As a result, banks experienced a 152% increase in fee income, with corresponding net interest income generating a comparatively meager increase of 75%. Consumers now pay an estimated $20 billion annually in assorted bank fees.

The advent of ATM machine transactions allowed unprecedented convenience to consumers: no lines for tellers, no need to worry about bank hours, and no need to withdraw the weekend's spending money on Friday. Consequently, ATM use skyrocketed in the 1990s, with the number of machines more than doubling in the United States, and over 700,000 machines established worldwide. The convenience and immediate, anytime service was considered a commodity, a product that banks could market to consumers for a price.

B. Shared Networks, Foreign Transactions, and the Advent of the Surcharge

ATMs are generally managed by banks that participate in a network, agreeing to a set of proscribed rules for membership. This pooling agreement eliminates the need for individual contract agreements that would be cost prohibitive and could create inconsistencies among the network partners. Under the shared network system, when account holders use their ATM cards to with-
draw cash from another bank’s ATM, it is considered a “foreign” transaction. Without the assurance that the cardholder’s bank will reimburse the bank operating the machine, foreign withdrawals would not be possible. When a foreign withdrawal occurs, the bank operating the ATM machine charges the cardholder’s bank a fee, an “interchange fee.” In addition, the ATM operator can charge the network it is associated with a fee for each withdrawal. The cardholder’s bank, in turn, may charge the holder an unlimited fee for the service.

Before 1996, cardholder banks charged “foreign fees” to customers who used ATMs owned by another bank, in order to ensure the cardholder bank would recoup the “interchange fee” it was charged by the bank managing the ATM providing the cash to the consumer. Foreign fee charges to customers were often comprised of the interchange fee going to the ATM owner, a network fee going to the network of banks agreeing to work together, and any remainder serving as profit to the customer’s bank. For several years this fee structure satisfied all parties to the transaction with nominal consequence to consumers paying for the apparent convenience of ATM banking.

Then on April 1, 1996, after years of using this arrangement, the big banking institutions began charging “surcharges,” an additional fee assessed to the customer by the ATM owner for using the ATM if the customer’s account is with another bank. The surcharges do not filter through the banking system to cover costs; rather these fees provide significant, direct profit to the ATM owners, generally the largest nationwide banks.

Banking institutions defend surcharges by claiming that they cover the cost and maintenance of the machines and that the fees are necessary in order to expand the convenience of ATM banking by establishing new machines in low-traffic areas or in high-rent establishments. Most of the ATM business, however, is still conducted at ATMs that were economically viable
prior to 1996.31 It is estimated that ATM surcharge revenues exceed $2 billion annually.32 This figure would provide for 40,000 new ATM machines at a cost of $50,000 per machine; however, machines cost as little as $5,000 and maintenance costs are only $12,000, showing clearly that surcharges are for profit, not to cover operation costs.33 As if the steep profits aren’t advantageous enough to the banks, ATM transactions cost banks significantly less than teller transactions, a savings of $2.66 per transaction even without the surcharge, which can add up to $5.00 sheer profit for the bank per transaction with the cost savings and surcharge combined.34

Recognizing the income potential generated by fees, banks have expanded the services that will impose fees on consumers by adding fees to transactions performed by live tellers, and now imposing annual fees for carrying an ATM card with their bank.35

C. Surcharges Charging up Competition

ATM surcharges give large banks an unfair advantage over smaller banks in the competition for consumers. Consumers are admittedly fickle when it comes to company loyalty when cost savings are at issue, and it is well known that many consumers will switch their bank accounts to the larger banks in an effort to avoid fees.36 This leverage over small banking institutions was evidenced by a 1998 survey showing that one third of those consumers surveyed would switch banks solely to avoid the ATM surcharges.37

Some legislators believe that the fees target those who are poor, the elderly and students.38 The hardest hit by the increased use of fees and double charges are those with low or fixed incomes, who are forced to withdraw smaller amounts at a time, racking up fee upon fee, and who have no incentive to switch to a large bank because their lower income may not meet the requisite minimum balance required by the larger institutions needed to
avoid additional fees.\textsuperscript{39} Banking institutions, on the other hand, insist that consumers have a choice and they can avoid the fees simply by using their bank’s ATMs or shopping around to find machines that don’t levy surcharges.\textsuperscript{40}

By forcing consumers to pay up or join the big banks, the large conglomerate banking institutions are engaging in unfair competition, forcing smaller, more consumer-friendly institutions out of the marketplace, while also utilizing coercive techniques to induce customer loyalty.\textsuperscript{41} It is also said that the power to surcharge nondepositing customers, with the right fee structure, could act to exclude nondepositors from ATM use altogether, which echoes \textit{McCulloch v. Maryland}, in that “the power to charge fees, or to tax, constitutes the power to destroy altogether.”\textsuperscript{42}

D. The Need To Impose Reasonableness

The problem isn’t cost associated with a worthwhile service; it is that banks expect a profit (and price fees to increase profits) at the expense of the consumer.\textsuperscript{43} As a result of bank mergers and customers switching their accounts to the larger banks, the majority of the ATM machines are owned and operated by the major banks, eliminating the efficacy of neighborhood branch banks and smaller banks.\textsuperscript{44} Additionally, with the elimination of live tellers (or the imposition of a fee to receive the service of a live person) and with the consolidation of the banking industry forcing smaller local banks out of business, using an ATM is no longer a customer convenience; it has become a necessity.\textsuperscript{45} The trend toward big bank control over consumer banking options, and the implementation of cost-prohibitive transactions implies that the banks operate to increase the number of high balance accounts, and that they don’t want to do business with lower income consumers, at least not without increasing their profits in the process. There is clearly a
need to slow down this transformation of the banking industry by bringing about reasonable means for banks to achieve profit without taking advantage of consumers in the process. Congress has identified a balance between the banks and consumer interests, which the courts have not enforced.46

III. The Legal Debate – To Preempt or Not to Preempt

Between 1996 and 1998, Congress and several states attempted unsuccessfully to ban surcharges.47 The legal argument thwarting legislators’ efforts centers on the notion that the National Banking Act, enacted by Congress in 1863, preempts state law action against the imposition of surcharges pursuant to the provision granting national banks the power to conduct the business of banking.48 On the other hand, state legislators and consumer advocates argue that anti-preemption language found in the Electronic Fund Transfer Act of 1978 protects state action outlawing the surplus charges.49

The analysis central to determining whether a federal statute preempts a state statute requires courts to inquire whether Congress, when enacting the federal statute, intended to exercise its constitutional authority to set aside the laws of a state.50 Sometimes the language of the statute will reveal congressional intent to preempt state laws, but usually courts must inquire beyond the language of the statute itself.51 Courts must then consider the “structure and purpose” of the statute to determine if there is an implicit intent to preempt that is clear upon consideration of the nonstatutory language.52 The inquiry continues with whether the federal and state statutes are in “irreconcilable conflict,” which may result in a finding that the federal regulation is such that there can be a reasonable inference that the states were to supplement it, or conversely that compliance with both the federal
and state laws may be literally impossible, or that the state law would interfere with congressional objectives.\(^5\)

The tension between federal law and state law governance of national banks that began with \textit{McCulloch v. Maryland}, continues to spawn debate, but a general rule has emerged that state laws are applicable to national banks provided the state laws don't discriminate unfairly against national banks, or otherwise frustrate, destroy or hamper the national banks' exercise of their power.\(^5\)

The National Banking Act, which regulates nationally-chartered banks, authorizes these banks to "exercise ...all such incidental powers as necessary to carry on the business of banking."\(^5\) According to the banks, ATM surcharges fall within the purview of this clause, and are thereby a legitimate exercise of federally granted power that should not be subject to state regulation.\(^5\) The states, on the other hand, argue that pursuant to a provision of the Electronic Funds Transfer Act ("EFTA"), the states have congressionally granted power to enact legislation that protects consumers in electronic banking transactions without fear of preemption.\(^5\)

ATM issues have come to the forefront of banking concerns only within the past decade, and there have been very few court decisions on the issue of federal preemption of state laws relating to ATM transactions. The few cases available deal with a surprising breadth of topics relating to the regulation of ATM transactions under the traditional laws of banking. In most circumstances, however, the courts have found preemption appropriate in light of the broad power the National Banking Act grants national banks.\(^5\)

The first decision in 1990, \textit{Valley Bank of Nevada v. Plus System, Inc.}, dealt with whether a Nevada statute violated the commerce clause of the Constitution when it required ATM networks to refrain from prohibiting Nevada banks from charging transaction fees to cardholders with accounts at other banks.\(^5\) This case
addressed the validity of a state bank assessing charges that did not benefit the network of banks, a novel idea long before the nationwide imposition of surcharges. 

The United States Court of Appeals for the Ninth Circuit stated that because the customer is given notice on the ATM screen that the transaction fee will be assessed, "[b]y paying the ATM transaction fee from the customer’s account, the bank simply disburses funds as requested by the customer,... analogous to honoring a customer’s check." 

This ruling implies that as long as the customer agrees to a fee on the ATM screen, any fee can be levied without restriction simply because the customer authorized the payment in order to withdraw cash.

Additionally, the Plus network’s argument that the Nevada transaction fees violated the commerce clause could not be upheld under the principle that the assessment of fees negatively impacted uniformity of state laws. The Ninth Circuit reasoned that the commerce clause does not prevent states from enacting laws that conflict with the network’s business, and more notably, that “the Constitution does not protect any particular economic structure or approach.” Further, the Ninth Circuit stated that not only do states have a legitimate interest in regulating banking, but also that Congress expressly declined to restrict the states from enacting regulations in the ATM context. The court cited the congressional intent in enacting the EFTA, which includes permission for the states to enact legislation that confers greater consumer protection. By pointing to this language, the court noted that state legislatures may take action to protect consumers, but that any state action relating to ATMs does not have to be consistent in accordance with the commerce clause. Finally, the court, in affirming summary judgment in favor of Valley Bank of Nevada, stated that states have great freedom to regulate their banking industries because such regulation does not overburden interstate commerce.
Valley Bank was unique in addressing the commerce clause and the interaction between a national bank's business practices against the business practices of a state bank. Also unique was the court's willingness to acknowledge state power under EFTA. Since then, only a few courts have addressed preemption in the context of banking and ATM transactions, dealing instead with the issue of preemption as it pertains to the impact of state legislation of ATM transactions on the federal National Banking Act, while effectively ignoring the intent behind EFTA and any power granted to the states.

The most complex litigation to date, with both state and federal actions decided in 1999, involves the efficacy of surcharges and the appropriateness of findings of preemption by the Office of the Comptroller of Currency ("OCC") pertaining to Connecticut legislation governing ATMs, respectively. In Burke v. Fleet National Bank, the Connecticut supreme court held that the Connecticut statute, passed in 1975, governs the establishment of ATMs and the relationship between banking institutions using the ATMs. The court's discussion was limited to the statute, which did not reach the issue of fee assessments on ATM transactions, as ATM banking was entirely experimental at the time it was enacted, and customer fees were not a consideration. As a result, the court concluded that the statute at issue was clearly not intended to be comprehensive as to ATM fee structures or to other nuances of usage and administration. Under this reasoning, the existing statute could not prohibit banks from assessing surcharge fees on cardholders that do not have accounts with the ATM managing bank.

In the federal Burke action, the United States District Court for the District of Connecticut dealt specifically with the power of the OCC to regulate and enforce authority over banks. The OCC has broad power over national banks to enforce provisions of the National Banking Act, and to supervise national banks falling within the purview of the Act. The court noted that
certain provisions of the National Banking Act subject national banks to limitations imposed by state legislation, and further that the OCC may grant special permits to national banks if the permits do not contravene state law.\(^7\) The OCC is also granted express authority by Congress to enforce the provisions of the EFTA.\(^6\)

While the OCC generally is the first reviewing body when questions of preemption arise, the court acknowledged congressional concern that the OCC's historically consistent rulings of preemption have been, "inappropriately aggressive resulting in preemption...in situations where the federal interest did not warrant that result."\(^7\) Nevertheless, the court found that the OCC does maintain its regulatory power over ATM transactions as they pertain to the National Banking Act, even though the Act itself does not address regulation of ATMs.\(^8\)

With this determination, the court found that whether the National Banking Act or the EFTA applied to the regulation at hand, the OCC had authority to review the claim for preemption.\(^9\) This resolved, the court ruled in accordance with the OCC to enjoin Connecticut from proceeding on its pending action to eliminate surcharges imposed by Fleet Bank and First Union National Bank.\(^8\) Unfortunately, the court found no reason to address whether the National Banking Act or the EFTA provided proper guidance as to whether the Connecticut statute was preempted, which remains undetermined.\(^8\)

The federal Burke action, while touching on the issues of preemption, really skirted the issue as to how the National Banking Act and the EFTA are to interact.\(^8\) The court deferred heavily to findings of the OCC, which further empowers the administrative entity responsible for overseeing both statutes, but the court did not resolve the question of the efficacy and possible coexistence of state legislation with the Congressional intent of both overlapping federal statutes.\(^8\)

Also in 1999, in Bank One, N.A. v. Guttau, the United States Court of Appeals for the Eighth Circuit
held that the National Banking Act preempted an Iowa statute, though not on the issue of surcharges. At issue was the interaction between Iowa’s legislation, the Iowa Electronic Funds Transfer Act, which is similar in concept but not in provisions to the federal EFTA and the power granted to national banks under the National Banking Act. In this case, Iowa attempted to keep Bank One from operating ATM machines in Iowa and to fine the bank for attempting to operate ATMs in contravention of Iowa’s EFTA provision that restricted out-of-state banks from operating ATMs within Iowa. The state law required a bank to have an in-state office in order to establish ATMs within the state.

The court noted that while Congress anticipated that national bank branches would have to comply with state regulations, the crucial question for the court was whether ATM machines are “branches” pursuant to the National Banking Act. The court cited a 1996 amendment to the National Banking Act specifically exempting ATM machines from inclusion within the term “branch.” The Eighth Circuit stated that in light of the language found in the 1996 amendment, the Iowa regulation should be preempted, and Bank One ATMs should not be subject to the Iowa EFTA. Coupled with the language of the 1996 amendment, the court considered the OCC’s amicus brief, which encouraged a finding of preemption based upon the National Banking Act provision allowing national banks the power to provide any current services offered via electronic facilities. The court, acknowledging the great weight that is to be accorded to OCC interpretations, found the OCC’s preemption interpretation reasonable. Pursuant to the same reasoning, the Eighth Circuit preempted Iowa’s legislation banning national banks or networks from advertising their names on ATM machines. The court held without supporting authority, that “Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation.”
Even though the court found in favor of Bank One on both issues, it did address Iowa's argument pursuant to the federal EFTA "anti-preemption provision," with brevity at the end of the opinion. The preemption provision declares that state legislation is not in conflict with the EFTA if it provides greater consumer protection than the EFTA itself. The Eighth Circuit countered the state's argument by stating that the anti-preemption provision of the EFTA applies only to the EFTA itself, which does not confer additional authority on the states beyond the National Banking Act to regulate national banks. Finally, the court pointed out that state regulation of national banks is proper if it does not interfere with the bank's exercise of its powers.

Although the court in Valley Bank of Nevada saw fit to allow a state law to coincide with the National Banking Act, the other courts addressing the issue succumbed to the strength and breadth of power granted national banks to do whatever is necessary to carry out the business of banking. While preemption favors federal legislation when state laws appear to conflict, the question remains as to how two federal statutes can coincide when provisions of each have conflicting congressional intent that then frustrates state attempts to utilize any power it is given. Here, the EFTA confers power to the states to enact legislation that would give consumers greater protection than the EFTA does itself regarding ATM transactions, specifically without the fear of preemption. However, the courts have given credence to the National Banking Act, strengthening the banks, while dismissing the federally granted state powers under the EFTA.

In the most recent debate over states' rights to regulate ATM transactions, the United States District Court for the Northern District of California followed suit by preempting San Francisco's newly enacted Proposition F, which authorized banning surcharges on area ATM transactions.
The City’s argument in support of Proposition F rested on the principle that the ordinance is a lawful extension of the power granted the states under the anti-preemption language of the EFTA as it pertains to regulations of ATM transactions. Bank of America and Wells Fargo, joined by the OCC, who filed an amicus brief, argued that the National Banking Act preempts the ordinance because assessing surcharges is part of the power granted banks to exercise “all such incidental powers as necessary to carry on the business of banking.”

The banks argued against the notion that the EFTA grants the states rights to enact legislation prohibiting surcharges, stating that the types of consumer rights protections envisioned by the anti-preemption language of the EFTA consist of measures to safeguard the experience of banking via ATM, such as “lighting, hours of operation, location, and foreign language capabilities.” The banks further asserted that the anti-preemption language of the EFTA applies strictly to the EFTA itself, that it may have no effect on aspects of banking under the National Banking Act. The banks went on to say that the EFTA’s provisions requiring notice to customers of the surcharges is implicit evidence that Congress condones the assessment of surcharges on customers, particularly in light of the fact that Congress could have addressed whether limitations on fees were permissible but did not do so.

The District Court began its analysis by pointing to the National Banking Act as the primary regulator of nationally chartered banks such as plaintiffs, Bank of America and Wells Fargo. The court stated that the National Banking Act authorizes national banks to operate ATMs and to charge a fee for the use of the machines, but the court gives no indication as to where this power is derived from or if it is implicit in the National Banking Act’s provisions. The court commented that an OCC regulation expressly permits banks to charge non-interest
fees to customers, but the court declined a discussion as to whether these fees encompassed electronic transfer or ATM fees, which is not addressed in the OCC regulation.107 Predicating its analysis on these principles without further inquiry, the District Court established a platform by which preemption of the state law is nearly impossible to avoid, particularly in light of prior court deference to the OCC and to broad readings of the National Banking Act.108 The court commented that the banks’ arguments rest on “governing federal law and not the EFTA.”109 However, the EFTA is governing federal law.

The court then addressed the anti-preemption language of the EFTA, basing its analysis upon the decision in Bank One, N.A. v. Guttau, and concurring with the Eight Circuit’s decision that the anti-preemption provision of the EFTA only applied to the administration of the provisions of the EFTA itself.110 The court’s analysis reinforced the notion that the enforcement of EFTA provisions could somehow regulate the administration of electronic transfers without interference with the business of banking under the National Banking Act.111 To put this concept into practice is impossible, particularly when the issue is imposing fees on ATM transactions, both an electronic transfer and a lucrative part of the business of banking.

Ultimately the court held, based in part on conclusory interpretations of federal law, that San Francisco’s ordinance was preempted by the broad congressional power granted banks under the National Banking Act, authorized further by the OCC.112 The court remarked that were the ordinances to be enforced, the banks would “suffer irreparable economic loss.”113
IV. Analysis – Federal Law Preempting
Federal Law

The court in Bank of America v. City & County of San Francisco, ruled in favor of the large national banks as a result of deference to the OCC and statutory interpretation of the National Banking Act, conferring power on the banks to perform all necessary aspects of "the business of banking." According to the court, the National Banking Act preempts state efforts that frustrate the banks' operations pursuant to the Act. The state legislation banning ATM surcharges is precisely the type of legislation envisioned as "frustrating the banking business." It is perhaps easy to see losing $2 billion in profit annually as frustrating, but the national banks cannot continue to operate without regulation of questionable practices. Banks are given latitude to charge consumers up to three dollars, which does not cover the operating costs, network expense, or other administrative cost to the bank. This money is sheer profit, a practice that does not appear to be much different from the bully taking lunch money at school. With the big banks using the extra fees to coerce customers to join their bank as a means to avoid the add-on fees, while continuing to increase the amount of the surcharges, it is almost dizzying to consider what hoops customers must go through to minimize the costs of accessing their money. Surcharges are rightfully coming under fire by the states; however, the courts must consider the real issue at hand, which is not state or city ordinances fighting the National Banking Act. The courts must tackle the preemption at stake which is the National Banking Act preempting the anti-preemption clause in the federal EFTA.

Although the court in Bank of America states pointedly that the "governing law for ATM fee regulations for nationally-chartered banks and federal savings banks is not the EFTA," this is simply not true.14 The National Banking Act does not have a provision addressing elec-
tronic transactions; but the EFTA, which deals solely with electronic transactions in banking, specifically addresses ATMs.\textsuperscript{115} The EFTA also provides the statutory provision that requires fee notifications on ATM machines assessing surcharges, which is upheld as a governing law for ATMs.\textsuperscript{116} The National Banking Act regulates national banking, but it does not purport to deal with ATM transactions. The only relevant statutory language that could potentially impact the issuance of surcharges, addresses general banking fees including charges on "dormant accounts," fees for credit reports, or investigations into credit matters.\textsuperscript{117} These fees address conventional banking matters and are expressly enumerated in the statutory language. It is a puzzling answer to the preemption dilemma to say that the power to assess surcharges on ATM transactions is implicit in the statute describing traditional, not electronic banking matters, while conversely declaring that the express language in the EFTA which regulates issues of electronic banking is not of any import on the issue of regulating surcharges. Congress enacted both statutes and gave neither law the power to preempt the other, and concomitantly offered no instructive language by which state legislatures and courts could truly understand the intended relationship between the two laws. This neglect and the subsequent debates over which law has more or less power exhibits something akin to sibling rivalry.

Unfortunately, the courts take the issue as straight, traditional preemption simply because a state law exists, discounting the authority of the EFTA outright, and empowering the banks by way of overly broad language in the National Banking Act. The National Banking Act regulates the business of banking, whereas the EFTA merely regulates electronic banking transfers, which the courts deem not a worthy subset or complement to the National Banking Act. Furthermore, when Congress enacted the 1996 amendment to the National Banking Act, the new language expressly stated that the term
“branch” under the Act was not to include ATM machines, which evinces intent to have traditional banking practices singularly within the purview of the National Banking Act, and electronic transfer transactions separately under the EFTA.118

The City of San Francisco will appeal the District Court’s decision in Bank of America, based on the fact that there is “no evidence that Congress ever intended to prevent a city from protecting consumers against predatory banking practices.”119

V. Conclusion

Banks are charging more fees, higher fees and making it harder to avoid fees.120 Both parties in the City of San Francisco litigation have filed leave to appeal to the United States Court of Appeals for the Ninth Circuit, but that court upheld a Nevada state statute that said ATM networks may not prohibit a Nevada bank from charging transaction fees to a cardholder from another bank.121 This earlier Ninth Circuit decision can be read in one of two ways, either it evinces the court’s willingness to uphold state legislation, or it can be seen as promoting surcharges on ATM transactions.

In order for this issue to be properly resolved, courts must be willing to address the problematic issue of how both the National Banking Act and the EFTA interact, which should entail a determination of what consumer protection measures are permissible under the anti-preemption provision of the EFTA, and how national banks must accommodate certain state regulations, as contemplated by Congress under the National Banking Act.

Endnotes


3. Id.


5. Patricia Sabatini, Here a Fee, There a Fee, Everywhere a Fee Fee, PITTSBURGH POST-GAZETTE, August 20, 2000 Business at C-1.

6. Id.


9. Pidgeon, supra note 1, at 397.

10. Id. at 398.

11. Id. at 397. This process was guaranteed by Federal Reserve Regulation Q, now repealed.

12. Id.

13. Id.

14. Id. Figure covers the period from 1987 to 1997.

15. As reported by the Consumer Federation of America. See Sabatini, supra note 5, at C-1.

16. Pidgeon, supra note 1, at 399.

17. Id. at 398-9.
18. See id.


20. Id.

21. Id.

22. See id.

23. Id. Plus System, Inc.'s network rules.

24. Id.

25. Id.


27. See Valley Bank of Nev., 914 F.2d at 1188.

28. ATM Fee Backlash, supra note 26, at 1. Fees in Chicago can add up to $4.50 per transaction. In 1999, the average fee charged to customers incurring foreign transaction fees totaled $4.02 in Houston, $2.65 in Denver, $2.51 in Los Angeles, and $2.10 in New York. Banks Are Increasing ATM Fees To Help Boost Revenues; Customers Complain, supra note 2; Louise Renne, Biggest Banks Should Eliminate ATM Fees Too, THE SAN FRANCISCO EXAMINER, October 13, 2000, at A-23.

29. ATM Fee Backlash, supra note 26, at 1.


32. ATM Fee Backlash, supra note 26, at 5. Estimates by the U.S. Congressional Budget Office and PIRG.
33. *Id.* at 6.

34. *Id.* Human teller transactions cost $2.93 per transaction, while ATM transactions cost a mere $.27.

35. Sabatini, *supra* note 5, at C-1.


37. *Id.*

38. *New York City Reconsiders a Surcharge Ban, supra* note 7, at 41.

39. Sabatini, *supra* note 5, at C-1; Renne, *supra* note 28, at A-23. The Pittsburgh Post-Gazette noted that of its area banks, the smaller banks offer free checking with modest minimum balances ranging between $100-300, but that all of the areas larger institutions require minimum balances of $750 to $1000 for non-interest bearing accounts, and $1500 to $2000 for interest bearing accounts. One bank that offers free checking assesses ATM fees on its customers even for using its own machines unless the customer maintains a $1500 balance in a separate savings account.


43. *New York City Reconsiders a Surcharge Ban, supra* note 7, at 41.

44. Renne, *supra* note 28, at 34.

45. *Id.*

46. *ATM Fee Backlash, supra* note 26, at 1; Bank of America v. City & County of San Francisco, 2000 U.S. Dist. LEXIS 12587, at *4 (June 29, 2000).

47. *ATM Fee Backlash, supra* note 26, at 1.

48. *Id.*

49. *Id.*

51. Id. at 31, 1108.

52. Id.

53. Id.


56. Id.

57. Id.

58. Id.


60. Id. at 1191.

61. Id.

62. Id. at 1192.

63. Id. at 1193.

64. Id. at 1195.

65. Id. at 1188. The provision states Congressional intent as: "to eliminate minute deviations in State EFT (electronic funds transfer) laws and thereby foster the development of national standards, while also permitting the States to enact legislation affording greater consumer protection. While annulling all State EFT laws would produce the benefit of uniform EFT standards in all 50 states, the committee rejected this approach because it would contravene Congress' longstanding policy of deferring to those States which choose to provide more stringent consumer safeguards."

66. Id.

67. Id. at 1197.

69. Id.

70. Id. The statute, § 36a-156, entitled, “Availability of machines, devices and terminals for use by other banks and credit unions,” addressed the types of banking devices used, and how these devices would be regulated. The notion of customer fees is “conspicuously absent.”

71. Id. at 303.

72. Id. at 306.


74. Id. at 137. This power “extends over all aspects of a [national] bank’s existence.”

75. Id. at 138.

76. Id. at 147.

77. Id. at 146. Noting the legislative history of the Riegle Neal Inter-state Banking Act.

78. Id. at 146.

79. Id. at 149.

80. Id. at 146.

81. Id.


83. Id.

84. Bank One, N.A. v. Guttau, 190 F.3d 844, 846 (8th Cir. 1999).

85. 12 CFR § 7.4002(a); Iowa Code § 527.

86. Bank One, N.A., 190 F.3d at 846.

87. Id. at 848.
88. 12 U.S.C. § 36; Bank One, N.A., 190 F.3d at 848.


90. Id.

91. Id. Referring to 12 C.F.R. § 7.1019.

92. Id.

93. Id. at 850.

94. Id.

95. Id. at 846 (quoting 15 U.S.C. § 1693q). The “anti-preemption” provision, 15 U.S.C. § 1693q, states: This subchapter does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

96. Bank One, N.A. v. Guttau, 190 F.3d 844, 850 (8th Cir. 1999).


98. 12 C.F.R. § 7.1019.

99. ATM Fee Backlash, supra note 26, at 1. During the campaign surrounding the proposed ordinance, the California Bankers Association spent an estimated $500,000 to defeat the bill, while the legislators spent $15,000 in support of it. The Association’s expenses are less than 10% of annual revenues generated by surcharges alone.


102. Id. at *7.

103. Id.

104. Id.
105. *Id.* at *4.

106. *Id.*

107. *Id.* at *5* (citing 12 CFR § 7.4002(a)).


110. *Id.* at 14; *Bank One, N.A.*, 190 F.3d at 850. *Bank One* held that Congress made it clear that ATMs were not subject to state regulation in the National Banking Act, which does not address ATMs.


112. *Id.* at *12.

113. *Id.* at *13.

114. *Id.*

115. 12 USCA § 21-216d.; 15 USCA §16936, 1693a to 1693r.

116. *Id.*

117. 12 CFR 7.4002(a).

118. Bank One, N.A. v. Guttau, 190 F.3d 844, 848 (8th Cir. 1999).

119. Renne, *supra* note 28, at 1. San Francisco’s city attorney, Louise Renne, commenting on the city’s arguments to be presented on appeal after the Bank of America decision in June 2000, an argument joined by the attorneys-general of 11 states, who filed a brief in support of San Francisco on appeal.

120. Sabatini, *supra* note 5, at C-1. Quoting Ed Mierzwinski, of the U.S. Public Interest Group.