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attempts to attract the business of national credit card issuing banks.

Justice Arabian regarded the majority's expansive definition of interest, based on the need to protect national banks' "most favored lending" status, as seriously flawed. He asserted that such an expansive definition failed on the grounds that it simply was not supported by the language of the statute or Congressional record. The statute, in using the word "interest," was never unaccompanied by the word "rate"; he found it highly unlikely for Congress, in enacting the legislation, to have had any other definition in its mind other than the narrowly, popularly understood definition cited to by the majority — a sum linked to the lending of money, calculated at a rate or percentage of the loan over time. Further, Congressional debate centered on "interest rates," and did not consider any notions of the expansive definition embraced by the majority.

Justice Arabian also disputed the majority's determination that the purpose of the National Bank Act was to provide "favored lending" status to national banks. As the Act was passed during the middle of the Civil War, Justice Arabian found that the purpose of the Act was the financing of the conflict. Section 85 was provided, not to protect national banks from local efforts to destroy them, but to induce state banks to change their charters over to federal charters, and protect the future of banking in the United States.

Further, Justice Arabian pointed out that at the time of passage of the National Bank Act in 1864, and at the time of the *Marquette* decision, interstate banking as it persists today simply was not in existence. It was untenable to conclude from the Act and the above case that non-interest credit terms such as late payment penalties were impliedly included within the definition of interest. It was not logical to hold that Congress should include late payment fees in its definition of interest when such fees were as of yet non-existent.

Late payment fees are penalties, not interest

Justice George also dissented, and took exception to the majority reading into the word "interest" any definition other than its common and properly understood definition, believing such fees to be properly viewed as either penalties or liquidated damages. Nothing in the statute or legislative history suggested that Congress meant to include within the definition of "interest" such payments, and indeed, several leading Supreme Court cases at the time of enactment made it clear that such late payment charges would not be considered interest for the purpose of ruling on usury cases.

USDA regulations eclipse Kansas farmer's state claims

by Russ Collins

Robert Murphy purchased vaccinations for his cows that ultimately failed. However, in ***Murphy v. Smithkline Beecham Animal Health Group***, 898 F.Supp. 811 (D. Kan. 1995), the Kansas District Court prevented Murphy from suing the vaccine's manufacturer. The Kansas court granted the defendant's summary judgment motion on the ground that Congress granted the United States Department of Agriculture ("USDA") ultimate authority to regulate the safety, efficacy, potency, and purity of veterinary biological products.

In late 1993, Murphy began injecting the cows from his cattle feeding business with BoviShield 4 and BoviShield 4 + L5 — vaccines manufactured by Smithkline Beecham Animal Health Group ("Smithkline"). Although Murphy administered the injections until early 1994, the vaccines failed to prevent the cows from developing, and in some cases caused the cows to develop, debilitating or fatal infections and diseases.

Murphy sued Smithkline alleging breach of implied warranty, false advertising, fraudulent misrepresentation, negligence, and failure to warn of dangers associated with use of the vaccine. In response, Smithkline filed a motion for summary judgment and argued federal USDA regulations, specifically the Virus-

Serum-Toxin Act ("VSTA"), 21 U.S.C. §§ 151-159, preempted Murphy's state law claims.

In deciding Smithkline's motion, the Kansas District Court applied a three-prong analysis to detect whether USDA regulations prevented Murphy's state claims. Starting with the premise that federal agencies may preempt state law when the agency acts within the limits of the power Congress granted to it, the district court examined three issues: 1) whether Congress authorized the USDA to preempt state law; 2) if so, whether the federal regulation preempted state law; and 3) if the federal regulations precede state common law, whether the regulations preempt Murphy's specific state law claims.

Congress granted the USDA power to preempt

To prevent and eliminate burdens on interstate commerce, Congress enacted 21 U.S.C. § 154, which grants the Secretary of Agriculture the power to establish rules and regulations necessary to police the sale of serum, toxins, or similar products used for treating domestic animals. Subsequently, the USDA delegated its power to the Animal and Plant Health Inspection Service ("APHIS") to execute and enforce regulations like the VSTA. The first question explored the preemptive power of such agency regulations over state law.

In answering the first prong of the inquiry, the Kansas court first looked to an analogous case that allowed federal regulations to preempt state law. In *City of New York v. FCC*, 486 U.S. 57 (1988), the United States Supreme Court held that since Congress gave the Federal Communications Commission ("FCC") the authority to establish rules to enforce communications laws, the FCC has the power to preempt state regulations of television signals. The Kansas court noted the language granting power to the USDA here mirrors that of the FCC's. The Kansas court also acknowledged that the only case to examine the VSTA, *Lynnbrook Farms v. SmithKline Beecham Corp.*, 887 F. Supp. 1100 (Ill. 1995), supports the comparison of the USDA's regulatory power to that of the FCC and its preemption of state law.

Murphy conceded that Congress gave the APHIS some power to prevent state claims, but he maintained that the VSTA lacked a specific provision allowing it to preempt state tort laws. To support his contention, Murphy argued that Executive Order No. 12,612 limits the preemptive power of executive agencies to circumstances where regulations expressly authorize, or compelling evidence supports the conclusion that Congress intended to grant such power.

However, the court rejected this argument, reasoning that the Executive Order only applies as a guideline for executive agencies and not a nullification of preemption power. The court further found that Supreme Court precedent holds that statutory express authorizations are not necessary for federal agencies to preempt state law. Based on this analysis, the court held that Congress authorized the USDA regulations to preempt state law.

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The USDA acted to preempt Kansas law

The court next turned to the second step of its analysis: whether APHIS acted affirmatively to preempt state law. The court looked to the agency's own interpretation of the VSTA in 9 C.F.R. § 102 to determine whether the APHIS intended to preempt state law. The agency maintained that the legislative history and purpose of the VSTA show the act was established to occupy the field of regulation by imposing uniform national standards in the distribution of veterinary biological products. The purpose of such regulation was ultimately to limit burdens on interstate commerce. The act prevented states from adding requirements of their own that implicated the "safety, efficacy, potency or purity" of veterinary biological products. This limitation included labeling requirements but did not include policies that address unique local disease conditions.

Pointing out that the language of VSTA itself limits its preemptive powers, Murphy argued that the court's interpretation of VSTA was limited to affirmative state legislative regulations and did not apply to the basic, common law remedies he sought in his suit against Smithkline. Murphy also maintained that the APHIS' interpretation of VSTA merely set minimum standards; he argued that tort remedies remained viable.

The court rejected these arguments primarily based on precedent established in the analogous case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Cipollone* involved a challenge to the regulatory power of the Federal Cigarette and Advertising Act ("Cigarette Act"), which contained language akin to that in the VSTA. In that case, the United States Supreme Court rejected arguments similar to those offered by Murphy and held that the language of the Cigarette Act preempted the plaintiff's state claim regarding the failure to warn consumers. Murphy argued that while the *Cipollone* court disallowed the suit based on the defendant's failure to warn, it permitted several of the plaintiff's tort claims.

Murphy did not persuade the Kansas court to follow *Cipollone* and hold that his tort claims should not be preempted. Instead, it distinguished that case by finding that the language of the Cigarette Act was specific and limited its preemptive scope to advertising regulations. In contrast, the language of the VSTA is quite broad, preempting all "state requirements 'regarding the safety, efficacy, potency or purity' as well as the labeling of animal vaccines." In response to Murphy's argument that VSTA merely set the minimum requirements, the court pointed to the express language of APHIS, which explicitly states that "[s]tates are not free to impose requirements which are different from, or in addition to, those imposed by USDA." This language is identical to that in *Cipollone* and other cases that preempted state common law actions.

The Kansas court concluded that the APHIS interpretation was persuasive because the agency's interpretation of the VSTA was not "arbitrary, capricious, or manifestly contrary to the statute." The court reasoned that since Congress granted the USDA power to establish rules governing animal veterinary products, the APHIS decision to preempt state law did not contradict the language of the VSTA. To support this conclusion, the court repeated that Congress expressed its purpose to control interstate commerce by imposing regulations for veterinary biological products applicable in all fifty states. Accordingly, the court held that the language of the VSTA supports federal preemption of state requirements that are "different from, or in addition to, those imposed by USDA."

USDA regulations preempt Murphy's specific claims

Finally, the court examined the individual claims brought by Murphy to decide whether those claims or duties under Kansas law impose requirements in addition to those enforced by the USDA and therefore are preempted by the VSTA. The court compared each claim against the standard established by the APHIS interpretation of the VSTA: whether common law duties constitute requirements that are "different from, or in addition to, those imposed by the USDA regarding the safety, efficacy, potency or purity of a (veterinary biological) product."

The court held that Murphy's claims of breach of implied warranty, false advertising, misrepresentation, and negligence would all implicate the safety, efficacy, potency or purity of the product if enforced. Further, the court held that enforcing Murphy's claim that Smithkline failed to provide adequate warnings would impose an additional labeling requirement, which VSTA does not permit.

Since USDA regulations preempted all of Murphy's claims promulgated under the VSTA, the farmer whose cattle were destroyed from the allegedly defective vaccine was left without a cause of action against the manufacturer of the vaccine.

California court invalidates liquidated damages provision in credit card agreement

by David Weissman

In ***Hitz v. First Interstate Bank*, 44 Cal. Rptr. 2d 890 (Cal. Ct. App. 1995),** the California Court of Appeal held that Civil Code section 1671, subdivision (d) ("§ 1671(d)"), invalidates the liquidated damages clause in a credit card agreement when the amount of those damages does not represent a "reasonable endeavor" to estimate potential loss resulting from a breach of the agreement. However, the court also held that the credit card-issuing bank is entitled to its actual damages resulting from the breach based on the interest rate established in the credit card agreement.

Class action plaintiffs awarded nearly $14 million at trial

This suit was initiated by credit card customers of First Interstate Bank (the "Bank") who breached their credit card agreements by failing to make timely minimum monthly payments or by exceeding their credit limits. The trial court certified these plaintiffs as a class, consisting of the Bank's cardholders who were assessed late or overlimit fees after February 10, 1983. The plaintiffs argued at trial that the Bank's fees were void under § 1671(d) as invalid liquidated damages. After a bench trial, the trial court ruled in favor of the plaintiffs, awarding the class a judgment of $13,971,830.

On appeal, the California Court of Appeal agreed with the trial court's determination that § 1671(d) invalidated the liquidated damages in the form of late and overlimit fees, which were imposed by the Bank. However, the court modified the judgment to reflect the Bank's actual damages resulting from the cardholders' breach of the credit card agreements. The court held that these damages consisted of the interest on the plaintiffs' late and overlimit balances assessed at the contract (credit card agreement) rate.

Court of appeal finds error in computation of defendant's actual damages

The court first addressed the issue of the Bank's actual damages. The trial court had calculated these damages by looking at the Bank's cost of borrowing the funds to pay the cardholders' late and overlimit balances. The trial court based this cost on the average federal funds interest rate, which is the rate that the Bank had to pay to obtain the money from the reserves of other banks in order to cover the costs incurred from the plaintiffs' breaches. Because the Bank had charged the cardholders the rate of interest established by the credit card agreement, a higher rate than the federal funds interest rate, the trial court awarded the plaintiffs the difference between these two amounts. In other words, the trial court returned to the plaintiffs the amount the Bank had collected from them above what it considered the Bank's actual damages to be.

The court of appeal, however, cited several reasons why this calculation of the Bank's actual damages was in error. First of all, the court looked to statutory language and precedent for the proposition that interest is to be charged at the rate agreed upon in a contract after a breach of that contract. Civil Code section 3298, subsection (a), "specifically provides for interest to continue at the rate stipulated to by the contract," according to the court. Also, the California Supreme Court case of *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, 511 P.2d 1197 (Cal. 1973), discussed "the fixed nature of damages resulting because of the wrongful withholding of money."

The court of appeal pointed out the possible anomalous results of the trial court's application of the federal funds interest rate to the late and overlimit balances, in that "delinquent cardholders would pay less on their delinquent balances than nondelinquent cardholders would pay on their nondelinquent balances." The court further noted that such a rule could then be applied to commercial loans in general, creating confusion and uncertainty for borrowers and lenders alike.

The trial court's second error, according to the court of appeal, was accepting the plaintiffs' theory that their breach of the credit card agreement conferred a