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ATM Fees: Federal Government Pushed to the Forefront of ATM Surcharge Bans

John Marten*

I. Introduction

Since their introduction in the 1970s, Automated Teller Machines (“ATMs”) in America have become so common that all banks and nearly all supermarkets, convenience stores, gas stations, bars, and movie theatres provide ATMs for their customers.¹ The greatest expansion of ATMs occurred in the 1990s when the number of ATMs in the United States more than doubled.² Consumers now use ATMs as their primary method for withdrawing funds from and depositing funds into their bank accounts.³ The proliferation of ATMs allows consumers easy access to cash, especially since networking capabilities permit withdrawals through ATMs not owned and run by the consumer’s own bank.⁴

The convenience of ATMs, however, often comes with a price in the form of surcharges or service fees. Banks first assessed surcharges in April of 1996.⁵ Since then, ATM fees have increased from an average of \$1 per transaction in 1996 to \$2.86 per transaction

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¹ See Anita Famili, Note, *The Legality of Local ATM Surcharge Bans: The Case for the Cities of Santa Monica and San Francisco*, 74 S. CAL. L. REV. 1353, 1353 (2001).

² Kathryn Smetana, *ATM Fees: Increasing Charges Give Rise to the Debate Over Preemption and States’ Rights in Electronic Banking*, 13 LOY. CONSUMER L. REV. 246, 247 (2001).

³ Famili, *supra* note 1.

⁴ See *id.*

⁵ Edmund Mierzwinski, *Double ATM Fees, Triple Trouble: A Fifth PIRG National Survey of ATM Surcharging Rates*, U.S. Public Interest Research Group Reports, at 1 (Mar. 29, 2001), at <http://uspirg.org/uspirg.asp?id2=5076&id3=USPIRG&>.

in 2001.⁶ The increase caused significant consumer outcry against surcharges, and in 1999, governments made their first attempts to ban surcharges.⁷

In late 1999, Santa Monica, California, and San Francisco, California, became the first American cities to pass ordinances banning ATM surcharges.⁸ A year later, Bank of America, Wells Fargo Bank, the California Bankers Association, and California Federal Bank successfully secured a permanent injunction against the enforcement of these municipal ordinances in the United States District Court for the Northern District of California.⁹ Santa Monica and San Francisco appealed this decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the injunction.¹⁰

The *Loyola Consumer Law Review* previously addressed the topic of ATM surcharge bans before the Ninth Circuit issued its ruling in *Bank of America v. City and County of San Francisco*.¹¹ This note addresses the most recent issues and rulings regarding surcharge bans since the decision by the Ninth Circuit. This note provides the background of the cities' ordinances and how the case came before the Ninth Circuit. This note then examines the reasoning

⁶ Mierzwinski, *supra* note 5, at 1.

⁷ See *Bank of America v. City and County of San Francisco*, No. C-99-4817, VRW, 2000 WL 33376673, at *1 (N.D. Cal. June 30, 2000); see also City of Santa Monica, *ATM Fees*, at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ (last updated Oct. 03, 2001); City and County of San Francisco, *Legislative Analyst Report – ATM Surcharges* (Feb. 10, 1999), http://www.sfgov.org/site/bdsupvrs_page.asp?id=4755 (discussing San Francisco's findings regarding ATM fees).

⁸ New Rules Project, *Santa Monica ATM Surcharge Ban*, at <http://www.newrules.org/finance/smonica.html> (last visited May 15, 2003); see SANTA MONICA, CAL., CODE § 4.32.040 (1999), available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL., POLICE CODE ch. 8, part 2, § 648.1 (1999), available at <http://www.newrules.org/finance/sanfran.html>. The cities of Santa Monica and San Francisco are not the only local governments that have tried to ban ATM surcharges. In 2001, the Iowa Department of Commerce attempted to prohibit non-depositor surcharges. Iowa, like Santa Monica and San Francisco, argued that banks are adequately compensated by interchange fees, making surcharges pure profit to the banks. *Metrobank v. Foster*, 193 F. Supp. 2d 1156, 1156–58 (S.D. Iowa 2002); see IOWA CODE §§ 527.4–.5 (2002).

⁹ *Bank of America*, 2000 WL 33376673, at *5.

¹⁰ See *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 555–56 (9th Cir. 2002).

¹¹ See Smetana, *supra* note 2.

behind the Ninth Circuit's decision to uphold the permanent injunction and concludes that the Court's reasoning that federal law preempts the ordinances is sound. Finally, this note discusses the effect of the Ninth Circuit's decision on state regulation of ATM service fees and what the future may hold for ATM fee regulation.

II. Background

A. The City Ordinances and Other ATM Fee Regulation

In the fall of 1999, Santa Monica and San Francisco passed nearly identical ordinances banning ATM surcharges.¹² The ordinances both state that "[a] financial institution may not impose a surcharge of any kind on a customer for accessing an ATM of that financial institution . . . with an access device not issued by that financial institution."¹³ Banks were banned from assessing ATM surcharges to non-depositors using their ATMs.¹⁴ Other fees assessed during an ATM transaction were left intact by the ordinances.¹⁵ These other fees include interchange fees and foreign fees.¹⁶ An interchange fee is a payment from the ATM user's home bank to the bank providing the ATM for offering and maintaining that machine.¹⁷ Banks offset the interchange fees they pay by charging their customers a foreign fee, which is a charge to the bank's customer for using another bank's ATM.¹⁸

The Santa Monica and San Francisco findings leading to the ordinances focused heavily on the dual nature of the fees charged to consumers.¹⁹ The findings stated that consumers are subject to two

¹² *Bank of America*, 309 F.3d at 556.

¹³ SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

¹⁴ *Bank of America*, 2000 WL 33376673, at *1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm.

¹⁸ *Id.*; *Bank of America*, 2000 WL 33376673, at *1.

¹⁹ See SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica,

ATM fees: the surcharge that banks charge to non-depositors using their ATMs, and the foreign fee charged to them by their home bank for using another bank's ATM.²⁰ The combination of surcharge and foreign fee can cost a consumer up to \$4.00 per withdrawal.²¹ The average total of the surcharge and foreign fee is \$2.41 per transaction, which is more than 10% charge of a \$20.00 withdrawal.²²

Notwithstanding these double charges, San Francisco and Santa Monica decided to ban only the surcharges.²³ The cities offered several reasons for banning the surcharges assessed to non-depositors.²⁴ First, they claimed that the surcharge was not necessary to compensate banks for the use of their ATMs or to help them finance new ATMs to better serve customers.²⁵ In fact, the San Francisco City Council found that banks had proven themselves capable of installing tens of thousands of ATMs without the imposition of surcharges.²⁶ The cities reasoned that banks already receive interchange fees as compensation for the use of their ATMs

available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

²⁰ See SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

²¹ SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2 § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

²² Edmund Mierzwinski, *Double ATM Fees, Triple Trouble: A Fifth PIRG National Survey of ATM Surcharging Rates*, U.S. Public Interest Research Group Reports, at 1 (Mar. 29, 2001), at <http://uspirg.org/uspirg.asp?id2=5076&id3=USPIRG&>.

²³ *Bank of America*, 2000 WL 33376773, at *1.

²⁴ See *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 556 (9th Cir. 2002); SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

²⁵ SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

²⁶ SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

by non-depositors.²⁷ Further, any interchange fees banks pay out are recouped through the foreign fee charged to their customers.²⁸ Therefore, the surcharge is pure profit to the banks.²⁹

Second, the cities argued that the double charges harmed consumers, especially the elderly, disabled, and poor.³⁰ These disadvantaged groups often have less mobility, and consequently, have greater limitations on the number and location of ATMs they can access.³¹ Therefore, they were more often subject to ATM surcharges because of limited access to ATMs provided by their home banks.³² Moreover, the poor and elderly usually live on fixed incomes, which forces them to withdraw smaller amounts, making their surcharges proportionally larger.³³ Furthermore, smaller banks tend to offer higher interest rates on deposits and tend to charge lower account fees.³⁴ Because they often seek to avoid ATM surcharges by depositing at larger banks, the elderly and poor are harmed by not being able to take advantage of the higher rates of return and lower account fees offered by smaller banks.³⁵

Third, the cities found that ATM surcharges harmed smaller banks.³⁶ Small, local banks lack the resources to provide the same number of ATMs that larger banks could provide causing consumers to transfer their accounts to larger banks in order to avoid ATM surcharges.³⁷ In fact, a 1998 survey showed that one third of the

²⁷ See SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm; SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

²⁸ SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm.

²⁹ *Id.*

³⁰ See *Bank of America*, 309 F.3d at 556.

³¹ *Id.*

³² See *id.*

³³ See Smetana, *supra* note 2, at 250.

³⁴ SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

³⁵ *Id.*

³⁶ See *Bank of America* 309 F.3d at 556.

³⁷ See SAN FRANCISCO, CAL. POLICE CODE ch. 8, part 2, § 648.1 (1999), New Rules Project, available at <http://www.newrules.org/finance/sanfran.html>.

consumers surveyed would switch banks solely to avoid ATM surcharges.³⁸

Finally, the cities argued that consumers lacked bargaining power with banks over ATM surcharges.³⁹ Banks negotiate the cost of interchange fees between themselves, and since banks attempt to keep costs down, they negotiate reasonable interchange fees.⁴⁰ However, there is no negotiation over surcharges between banks and the consumer; therefore, the banks are more able to assess unreasonable surcharges.⁴¹

B. The District Court Cases

The day after San Francisco enacted its ordinance, Bank of America, Wells Fargo Bank, and the California Bankers Association sued San Francisco and Santa Monica seeking to enjoin enforcement of the ordinances.⁴² California Federal Bank later intervened as a plaintiff in the action.⁴³ The United States District Court for the Northern District of California entered a preliminary injunction on behalf of the banks on November 15, 1999, and on June 30, 2000, the District Court permanently enjoined the cities from enforcing the ordinances.⁴⁴

The District Court found that the Home Owners' Loan Act and Office of Thrift Spending regulations preempted the ordinances in relation to the federal savings associations and the National Bank

³⁸ Anne Marie Squeo, *DOJ Launches Antitrust Probe of ATM Fees*, LEGAL INTELLIGENCER, Aug. 3, 1998, at 4.

³⁹ SANTA MONICA, CAL. CODE § 4.32.040 (1999), City of Santa Monica, available at http://pen.ci.santa-monica.ca.us/atty/consumer_protection/ATM/ord&sr.htm.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 557 (9th Cir. 2002).

⁴⁴ *Bank of America v. City and County of San Francisco*, No. C-99-4817 VRW, 2000 WL 33376673, at *5 (N.D. Cal. June 30, 2000); *cf. Metrobank v. Foster*, 193 F. Supp. 2d 1156, 1157, 1162 (S.D. Iowa 2002) In Iowa, Metrobank, Bank of America, and Wells Fargo Bank brought an action against the State of Iowa seeking injunctive relief from the ban on ATM fees to non-depositors in the United States District Court for the Southern District of Iowa. On March 6, 2001, the District Court granted a permanent injunction on behalf of the banks. *See id.*

Act preempted the ordinances as applied to national banks.⁴⁵ San Francisco and Santa Monica appealed the District Court's ruling to the U.S. Court of Appeals for the Ninth Circuit.⁴⁶ This note examines the Ninth Circuit's decision in *Bank of America v. City and County of San Francisco* because it is the first appellate level decision regarding ATM fee bans by local government.

III. Discussion

A. Overview

The most recent statement of the law regarding the legality of municipal and state attempts to ban ATM surcharges comes from the United States Court of Appeals for the Ninth Circuit, in *Bank of America v. City and County of San Francisco* decided October 25, 2002.⁴⁷ It is the first, and the only, appellate review of ATM surcharge bans. The case came before the Ninth Circuit on an appeal by the cities seeking to reverse a permanent injunction, which prevented enforcement of the ordinances.⁴⁸ The issue before the Ninth Circuit was whether federal law preempted the cities' ordinances, or if the Electronic Fund Transfer Act saved them from preemption.⁴⁹ The cities argued the district court erred in finding that federal law preempted the ordinances.⁵⁰

B. Preemption by the Home Owners' Loan Act

The Ninth Circuit first reviewed whether the ordinances were preempted by the Home Owners' Loan Act ("HOLA")⁵¹ and the

⁴⁵ *Bank of America*, WL 33376673 at *3-4; see Home Owners' Loan Act, 12 U.S.C. §§ 1461-1470 (2002); 12 C.F.R. § 545 (2002); National Bank Act, 12 U.S.C. § 38; cf. *Metrobank*, 193 F. Supp. 2d at 1162 (finding that the Iowa prohibition of ATM fees was preempted by the National Bank Act).

⁴⁶ *Bank of America* 309 F.3d at 556.

⁴⁷ *Id.*

⁴⁸ *Id.* at 555.

⁴⁹ *Id.* at 555-56; see Electronic Fund Transfer Act, 15 U.S.C. § 1693 (2002).

⁵⁰ *Id.* at 556.

⁵¹ Home Owners' Loan Act, 12 U.S.C. §§ 1461-1470 (2002).

Office of Thrift Supervision (“OTS”) regulations,⁵² as applied to federal savings institutions, such as California Federal Bank, the intervening plaintiff.⁵³ The HOLA is responsible for organization, incorporation, examination, operation, and regulation of federal savings institutions.⁵⁴ It also grants the OTS the power to create the rules and regulations under which the HOLA is administered.⁵⁵ If the court found that the HOLA and OTS regulations pre-empted the San Francisco and Santa Monica ordinances, then the ordinances would be void as applied to federal savings institutions.⁵⁶

The Ninth Circuit first questioned whether OTS regulations permit ATM surcharges or if they preempt the ordinances.⁵⁷ OTS regulations expressly allow federal savings institutions, like California Federal Bank, to use electronic means or facilities, like ATMs, to perform any function or provide any service.⁵⁸ Further, the OTS permits federal savings institutions “to transfer, with or without fee, its customers’ funds from any account . . . of the customer . . . to third parties or other accounts of the customer on the customer’s order or authorization by any mechanism or device”⁵⁹ Reading these regulations together, the court held that a “federal savings associations may charge non-depositors for ATM services.”⁶⁰

The court then concluded that the regulation of federal savings associations by the OTS was so pervasive that it raised the implication of field preemption.⁶¹ Field preemption is found when “federal regulation in a particular field is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”⁶² The court found that the regulations grant OTS the

⁵² 12 C.F.R. § 545 (2002).

⁵³ *Bank of America*, 309 F.3d at 559–60.

⁵⁴ Home Owners’ Loan Act, 12 U.S.C. § 1464(a); *see Bank of America*, 309 F.3d at 559.

⁵⁵ 12 U.S.C. § 1463(a); *Bank of America*, 309 F.3d at 559.

⁵⁶ *See Bank of America*, 309 F.3d at 561.

⁵⁷ *See id.* at 559–60.

⁵⁸ 12 C.F.R. § 555.200 (2002).

⁵⁹ *Id.* § 545.17.

⁶⁰ *Bank of America*, 309 F.3d at 560.

⁶¹ *Id.* at 560–61.

⁶² *Id.* at 558 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

authority to control all aspects of federal savings institutions' operations, which include offering ATM services and charging fees for those services.⁶³ Furthermore, the court found express preemption in section 545.2.⁶⁴ Section 545.2 provides the OTS with "plenary and exclusive authority . . . to regulate all aspects of the operations of [f]ederal savings associations"⁶⁵ The provision also states that the OTS's "authority is preemptive of any state law purporting to address the subject of the operations of a [f]ederal savings association."⁶⁶ Therefore, the Ninth Circuit held that the HOLA and OTS regulations preempt the ordinances and they are invalid as applied to federal savings associations.⁶⁷

C. Preemption by the National Bank Act

The Ninth Circuit next determined whether the National Bank Act ("NBA") preempted the ordinances, as applied to national banks, such as Bank of America and Wells Fargo Bank.⁶⁸ National banks are bound by the rules and regulations of the NBA, which gives national banks the power to "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking"⁶⁹ Courts, including the United States Supreme Court, have defined the "business of banking" very broadly.⁷⁰ The NBA, like the HOLA, has a regulatory agency, the Office of Comptroller of Currency ("OCC"), which creates rules and regulations to enforce the NBA.⁷¹ The Ninth Circuit reviewed the relevant OCC regulations and determined that they authorize ATM surcharges by national banks.⁷² Section 7.4003 of the OCC regulations expressly allows national banks to establish ATMs to conduct banking functions, such as receiving deposits or

⁶³ *Id.* at 560–61.

⁶⁴ *Bank of America*, 309 F.3d at 560; *see* 12 C.F.R. § 545.2 (2002).

⁶⁵ 12 C.F.R. § 545.2.

⁶⁶ *Id.*

⁶⁷ *Bank of America*, 309 F.3d at 561.

⁶⁸ *See id.*

⁶⁹ *Id.* at 562 (quoting 12 U.S.C. § 24).

⁷⁰ *See id.* (citing *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995)).

⁷¹ *Id.*

⁷² *Bank of America*, 309 F.3d at 562.

paying withdrawals.⁷³ Section 7.4002 specifically grants national banks the authority to charge its customers “non-interest charges and fees, including deposit account service charges.”⁷⁴ Reading these sections together, the court held that the NBA and the OCC regulations permit surcharges.⁷⁵

The wide authority of the NBA and the OCC over national banks led the Ninth Circuit to determine that they preempted the cities’ ordinances.⁷⁶ Like the HOLA and OTS regulations, the breadth of the NBA and OCC regulations leave no room for the city ordinances to supplant the federal laws.⁷⁷

D. The Electronic Fund Transfer Act

The Ninth Circuit rejected the cities’ argument that the Electronic Fund Transfer Act (“EFTA”) saved the ordinances from preemption by the HOLA and NBA.⁷⁸ The EFTA was enacted to create a framework of the rights, liabilities, and responsibilities for persons using electronic fund transfer systems.⁷⁹ The court found that the regulation of ATM fees is not the type of consumer protection allowed by the EFTA and that the EFTA’s anti-preemption provision does not preclude the ordinances from being preempted by HOLA and NBA.⁸⁰

The court held that, although the EFTA was designed to provide individual consumers with rights, protection from excessive ATM fees was not one of those rights.⁸¹ The court noted that nothing in the EFTA could be pointed to as regulating ATM fees.⁸² Instead, the consumer protection measures of the EFTA focus on preventing fraud, embezzlement, and unauthorized disclosure in electronic funds

⁷³ 12 C.F.R. § 7.4003 (2002).

⁷⁴ *Id.* § 7.4002.

⁷⁵ *Bank of America*, 309 F.3d at 562.

⁷⁶ *See id.* at 564.

⁷⁷ *See id.*

⁷⁸ *Id.* at 564.

⁷⁹ *Bank of America*, 309 F.3d at 564 (quoting 15 U.S.C. § 1693(b) (2002)).

⁸⁰ *Id.* at 564–65.

⁸¹ *Id.* at 564.

⁸² *Id.*

transfers.⁸³ Therefore, the court determined that “regulation of ATM fees is not the type of consumer protection measure contemplated by the EFTA.”⁸⁴

The EFTA contains an anti-preemption provision, which provides that state laws offering greater consumer protection than the EFTA are not preempted by the EFTA.⁸⁵ The cities argued that this provision prohibits the preemption of the ordinances by the HOLA and the NBA because it allows them to regulate ATM fees charged by national banks and federal savings institutions as a consumer protection measure.⁸⁶ The Ninth Circuit, however, reviewed the plain language of the EFTA and found that the anti-preemption provision applies only to laws that would be preempted by the EFTA.⁸⁷ Therefore, the court held that the anti-preemption provision would only save the city ordinances from a possible EFTA law that preempted them, and the provision has no saving effect on preemption by the NBA and HOLA.⁸⁸

IV. Analysis

One problem with the Ninth Circuit’s reasoning in *Bank of America* is its strict reading of the EFTA versus its liberal reading of the HOLA and the NBA.⁸⁹ The court read different sections of the OTS and OCC regulations in conjunction with each other to conclude that the HOLA and the NBA empower banks to assess surcharges.⁹⁰ Both the OTS and OCC regulations authorize banks to provide ATMs, but authority to charge fees is less clear.⁹¹ The court found that the language of OTS regulation 545.17, stating that federal savings associations could transfer “with or without fee” a customer’s funds to a third party or another of the customer’s accounts by any device, was enough to support the conclusion that the OTS

⁸³ *Id.*

⁸⁴ *Bank of America*, 309 F.3d at 564.

⁸⁵ *Id.* at 565; see 15 U.S.C § 1693q (2002).

⁸⁶ *Bank of America*, 309 F.3d at 565.

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *See id.* at 560, 562.

⁹⁰ *See id.*

⁹¹ *See* 12 C.F.R. § 555.20 (2002); 12 C.F.R. § 7.4003 (2002).

regulations authorize ATM surcharges.⁹² The plain language of this section refers to “a customer’s funds” being transferred for a fee, not to ATM surcharges charged to non-depositors.⁹³ This regulation seems to authorize foreign fees, not surcharges, yet the court used it to find that banks may assess surcharges to non-depositors.

The case for concluding that the OCC regulations authorize surcharges is only slightly stronger. The court looked to section 7.4002, which states, “a national bank may charge its customers non-interest charges and fees, including deposit account service charges.”⁹⁴ The plain language of the regulation authorizes charging fees only to a bank’s customers.⁹⁵ However, the OCC has issued interpretative letters that construe the OCC regulations as allowing ATM services to non-depositors at a charge, and the court deferred to the OCC’s interpretation of the regulation.⁹⁶

Whether OTS and OCC regulation expressly permit ATM surcharges is not completely clear. The regulations do allow banks to provide ATMs and they do allow banks to charge fees for many deposit and lending related services. In the end, this was enough for the court to firmly decide the issue in favor of the regulations’ authorization of surcharges.⁹⁷

The court did not afford the EFTA provisions the same liberal reading. It was unwilling to look past the plain language of the EFTA and refused to find that the EFTA granted states with the power under the EFTA to protect consumers from onerous surcharges.⁹⁸ This same strict construction approach was used in deciding that the anti-preemption provision of the EFTA did not save the ordinances from federal preemption.⁹⁹

The court did not explain why it construed the OTS and OCC regulations loosely, but strictly construed the EFTA; however, the difference in construction is not enough to conclude the Ninth Circuit’s decision in *Bank of America* was erroneous. The issue was

⁹² *Bank of America*, 309 F.3d at 560; see 12 C.F.R. § 545.17.

⁹³ 12 C.F.R. § 545.17.

⁹⁴ *Bank of America*, 309 F.3d at 562; see 12 C.F.R. § 7.4003.

⁹⁵ See 12 C.F.R. § 7.4003.

⁹⁶ *Bank of America*, 309 F.3d at 563.

⁹⁷ *Id.*

⁹⁸ See *id.* at 564.

⁹⁹ See *id.* at 565.

not whether the OTS and OCC regulations expressly allow surcharges, but whether federal law preempted the ordinances.¹⁰⁰ The Ninth Circuit correctly concluded that the HOLA and the NBA preempted the city ordinances.

ATMs provide consumers with access to their accounts for deposit and withdrawal purposes. These are services that have been provided by banks since their creation, and areas that the NBA and HOLA traditionally regulated. Furthermore, the OTS and OCC regulations authorize banks to provide ATMs and permit fees for many lending and deposit related activities. Therefore, the control of federal savings associations by the HOLA and national banks by the NBA is so pervasive in the areas that ATMs are predominantly serve that there is no room for state legislation.

The decision reached by the Ninth Circuit in *Bank of America* points strongly implies that state and municipal governments are left with no power to regulate ATM surcharges. *Bank of America* preempted the ordinances only as applied to federal savings associations and national banks; therefore, a state can still ban ATM fees charged by state-chartered banks. This is a hollow victory for states and municipalities, considering that one of the cities' stated purposes in enacting the ordinances was protecting local banks from losing customers to the larger national banks. It would be illogical under this reasoning for states to prohibit local banks from charging ATM fees.

The strong preemption stance by the court in *Bank of America* means that if relief from surcharges is to come it must come from the federal government. In 1999, Congress addressed ATM fees in the ATM Fee Reform Act.¹⁰¹ The ATM Fee Reform Act, however, is added reason for a proponent of ATM surcharge bans to believe that ATM fees will not be banned anytime in the future. The Act requires ATMs that impose fees to notify consumers of the fee on the screen and on the ATM itself and to offer the consumer the choice of accepting the fee and proceeding with the withdrawal or denying the fee and canceling the transaction.¹⁰² The Act is implicit approval by Congress of ATM fees, and an implicit statement that they are allowed under federal law.¹⁰³

Bank of America will probably dampen the spirits of

¹⁰⁰ See *id.* at 557.

¹⁰¹ See generally, ATM Fee Reform Act, 15 U.S.C § 1693 (2002).

¹⁰² 15 U.S.C § 1693b(d)(3).

¹⁰³ *Bank of America*, 309 F.3d at 565.

advocates of ATM surcharge bans. The focus has now shifted from states and municipalities to the federal government. If consumers are to be freed from the burdens of ATM fees, help will have to come from the federal government through new laws or amendments.

V. Conclusion

In late 1999, the cities of Santa Monica and San Francisco placed themselves at the head of the fight against ATM surcharges by enacting ordinances that banned ATM fees to non-depositors. They lost. The Ninth Circuit found the HOLA and the NBA preemptive of the ordinances. The strong statement by the Ninth Circuit against local governmental bans will affect state and municipal legislators' future attempts to enact such laws. *Bank of America* sent the message to local governments that if relief is to be had from ATM fees, only the federal government that has the power to grant it.