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10-1978

Marquette National Bank of Minneapolis v. First of Omaha Service Corp.

Lewis F. Powell Jr.

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SE

Division
Probably Grant
(Brief Mely Briefing issue)

Resp., a national bank in Neb. (principal place of business there) conducts a credit card program in Minn. Under Neb. law 18% interest may be charged. Under Minn. law only 12%. Q = whether under § 85 of Nat Bkng Act, Minn. (Resp) may enforce its 12% limit on credit cards issued by nat Neb Banks (Resp) to residents of Minn. S/Ct of Minn. held Nat § 85 controls, + that it permits a bank to charge the higher of the rates where it is "located" (home office) or where it "operates" (doing bus).

PRELIMINARY MEMORANDUM

April 21, 1978 Conference

List 1, Sheet 3

No. 77-1258

STATE OF MINNESOTA — Cert. to Sup. Ct. Minn. (Todd; Sheran, concurring; Scott, Yetka & Wahl, dissenting)

v.

FIRST OF OMAHA SERVICE CORP., et al. — State/Civil — Untimely (JOT) ?

No. 77-1265

MARQUETTE NATIONAL BANK OF MINNEAPOLIS — Cert. to Sup. Ct. Minn. (Todd; Sheran, concurring; Scott, Yetka & Wahl, dissenting)

v.

FIRST OF OMAHA SERVICE CORP., et al. — State/Civil — Untimely (JOT) ?

I would grant notwithstanding the absence of a conflict and the presence of a substantial timeliness question. In my — Dann

1. SUMMARY: These petns raise the question whether the National Bank Act, 12 U.S.C. § 85, prohibits Minnesota from regulating the interest rate charged Minnesota residents under a bank credit card program conducted within that state by a national bank having its principal place of business in Nebraska, which permits higher interest rates than Minnesota. There is a substantial question as to timeliness.

2. TIMELINESS: The Minn. Sup. Ct. rendered its decision on November 10, 1977. Resp Marquette then filed a petn for rehearing, which apparently had the effect of staying the entry of judgment.

> "The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment....The filing of a petition for rehearing stays the entry of judgment until disposition of such petition. It does not stay the taxation of costs." Rules 136.02 and 140 of Minn. Supreme Court Rules, See Reply in Support of Certiorari, A-1.

By order dated December 8, 1977, the court denied the petn and also granted "a stay of judgment" pending the application for cert. in this Court. On December 14, 1977, the clerk of the Minn. Sup. Ct. entered a document reciting the terms of the court's order and containing a settlement of costs. As the petn in this case was filed on March 13, 1978, jurisdiction turns on whether the computation of time should start with the denial of the rehearing petn, December 8, or the entry of the latter document, December 14.

Petr Marquette (No. 77-1265) argues that under Minnesota law, a petn for rehearing stays the entry of judgment; by contrast, under Rules 36 and 40 of the F.R.App.P. judgment is entered shortly after the opinion and the petn for rehearing may be filed after entry of judgment. Thus, it is argued that the federal rule -- that the clock starts running with the denial of rehearing-- should not apply here because there is no judgment until after rehearing has been denied. Petr relies on Puget Sound Power & Light Co. v. King County, 264 U.S. 22 (1924). In Puget Sound, state law provided that the decision of the state sup. ct. did not become final until after it was filed, but "in all cases when the decision became final, there was a specific provision that a judgment shall issue thereon." The Court noted: "It is apparent that however final the decision may be, it is not the judgment." Relying on the state law's characterization, the Court rejected the argument that document termed judgment "is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision." Id., at 25.

Resp relies primarily on Dept. of Banking v. Pink, 317 U.S. 264 (1942). There an order and judgment of the New York Court of Appeals was entered on remittitur as the order and judgment of the trial court. A motion was later filed in the Court of Appeals to amend its remittitur by adding that a federal question had been

passed upon in that court. That motion was granted, and the trial court then amended the remittitur. This Court held that time began to run from the entry of the original order and judgment of the Court of Appeals "when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur." Id., at 268. The Court adopted a functional standard:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final, but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court." Ibid.

If Pink is read broadly to embrace a purely functional test, resp wins and this petn is JOT. Frank Lorson of the Clerk's Office thinks that the petn is untimely. On the other hand, although the matter is not entirely free of ambiguity, it seems that a judgment of the Court of Appeals was entered in Pink before the remittitur.

> "It appears from the record that a judgment of that court was affirmed by an order of the Appellate Division, which was on June 18, 1942 ordered affirmed by the Court of Appeals, whose remittitur to the Supreme Court was issued the same day." 317 U.S, at 265.

If so, Puget Sound may still be good law because there the judgment was entered after the decision. Stern & Gressman §6.2, at 247-248, appear to adopt this view.

3. FACTS & DECISION BELOW: Petr Marquette

National Bank of Minneapolis sought to enjoin the First National Bank of Omaha and its wholly-owned subsidiary, resp First of Omaha Service Corp., from issuing BankAmericard cards to Minnesota residents. As permitted by Nebraska law, the Omaha Bank's program imposed an annual interest rate of 18 percent on unpaid balances of less than $1,000, which is computed upon the previous balance of the customer's account. A Minnesota statute prohibits banks conducting bank credit card programs in Minnesota from charging an interest rate of more than 12 percent per annum and interest is to be computed on the basis of the average daily balance of the customer's account. The issue in this case is whether the Minnesota statute is preempted by § 85 of the National Bank Act, 12 U.S.C. § 85, which provides in pertinent part:

> "Any [national banking] association may... charge on any loan or discount made...interest at the rate allowed by the laws of the State...where the bank is located...and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

The state trial court declined to find preemption, holding the statute inapplicable to an interstate transaction where the application of Minnesota law would not involve intrastate discrimination against national banks. "No one in the state is allowed to issue credit at a more favorable rate; to allow First National Bank of Omaha to charge a higher rate would violate the

doctrine of parity."

On appeal, the Minn. Sup. Ct. reversed, albeit with considerable reluctance. Following the lead of Fisher v. National Bank of Omaha, 548 F.2d 255 (CA 8 1977), and Fisher v. First National Bank of Chicago, 538 F.2d 1284 (CA 7 1976), cert. denied, 429 U.S. 1062 (1977), it held that § 85 privileged a national bank to charge the higher of the rates permitted by law of the state where it is "located" (Nebraska) or that of the state where it is "existing" (Minnesota). The court noted, however, that this result was not explainable in terms of the congressional intent in enacting § 85. For here, there was no question of discrimination between national banks and local banks or other lending institutions. "[B]y allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Banking Act."

4. CONTENTIONS: Petrs' principal contention is that § 85 does not apply to interstate transactions, where a national bank located in one state seeks to apply that state's law to a loan made in another state. In their view, the provision permits a national bank located in one state to charge on loans made in that state the higher of the rates allowed general lenders or state banks in that

state; it is simply silent on the question of interstate transactions. Even if a broad definition of "located" is taken, along the lines of Citizens & Southern National Bank v. Bougas, 98 S.Ct. 88 (1977), to mean the state in which the national bank conducts business at a branch, petrs argue that § 85 cannot be used to create a condition of interstate inequality between national banks doing business in the same state. Petrs rely on this Court's decision in Tiffany v. Bank of Missouri, 85 U.S. (18 Wall.) 409, 412 (1873), which stated that the purpose of §85 was "to give [national banks] a firm footing in different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition."

Resp argues that § 85 applies to all loans made by a national bank, and restricts the role of state law to one of "defin[ing] the available range of options to a national bank in its selection of an interest rate." Resp relies, of course, on the two CA decisions cited above.

5. DISCUSSION: (a) Timeliness. One difficulty with petrs' argument is that it fails to explain the Minn. Sup. Ct.'s grant of a "stay of judgment" in its December 8 order. It is possible that the state uses the term "judgment" loosely to mean both "judgment" and "mandate." If a functional test controls under Pink, the petn is JOT. On the other hand, by analogy to the Rule 58, F.R.Civ.P.,

Bankers Trust Co. v. Mallis, No. 76-1359 (decided March 28, 1978), the interest in certainty is furthered by having the time run with the entry of a separate document by the clerk of the state court. On balance, I would find that the petn was timely filed.

(b) The Merits. Even though there is no conflict, the lower courts seem to have adopted an extreme reading of § 85 to permit the extraterritorial application of one state's law to transactions in other states. As petrs point out, national banks can arrange to be located in a state with highly favorable usury laws, and export that favorable treatment to every other state in which they do business. It is hard to believe that Congress intended such a result.

I would grant to decide both issues.

There is a response.

4/12/78 Estreicher ops in both petns; Minn. Sup. Ct. rule in reply

SE

PRELIMINARY MEMORANDUM

April 21, 1978 Conference

List 1, Sheet 3

No. 77-1265

MARQUETTE NATIONAL BANK OF MINNEAPOLIS	Cert. to Sup. Ct. Minn. (Todd; Sheran, concurring; Scott, Yetka & Wahl, dissenting)
v.	
FIRST OF OMAHA SERVICE CORP., et al.	State/Civil Untimely (JOT) ?

This case is curve-lined with No. 77-1258.

Please see the memorandum in that case.

4/12/78 Estreicher ops in petn

Court .....

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19.... APR 21 1978

Assigned ....., 19...

Announced ....., 19...

No. 77-1265

MARQUETTE NATL. BANK OF MINNEAPOLIS

vs.

FIRST OF OMAHA SERVICE CORP.

Time Question.

Grant (tentative - see 77-1258)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Same vote on 77-1258

APR 21 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19....
Assigned ....., 19...
Announced ....., 19...

No. 77-1258

MINNESOTA

vs.

FIRST OF OMAHA SERVICE CORP.

Time Question

Harry Hunter
under Minn. law
case is not moot.
The Byron Number case
is wrongly decided. (Probably is)
John Hunter's own Rules control
& under them case is moot.

Grant
subject to
~~[illegible]~~
study of
mootness
by Legal Office.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.			✓		Out of time								
Stewart, J.			✓										
White, J.		✓	✓										
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓			John 3								
Rehnquist, J.		✓											
Stevens, J.			✓		Untimely								

SE

To: Mr. Justice Powell

From: Sam Estreicher Date: April 26, 1978

Re: Nos. 77-1258, -1263, Minn. v. First of Omaha Service Corp.

The Court tentatively granted cert. in this case subject to views of the Legal Officers on the timeliness of the petns. Sue Goltz recommends a denial on the ground that the petns are JOT. I am not sure, and recommend a grant with a direction to the parties to brief both the timeliness question and the merits.

Under 28 U.S.C. § 2101(c), the "entry of such judgment or decree" marks the starting point for computation of time. Apparently, under Minn. Rule of Civil App. Proc., which is self consciously dissimilar to F.R, App.P. 36, "[t]he clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment." (emphasis supplied; see enclosed). Petrs argue that no judgment was entered in this case until after the denial of their petn for rehearing. Under the federal rules, the judgment is ordinarily entered soon after the opinion of the CA. United States v. Hark, 320 U.S. 527, 534-535 (1944), makes clear that in the federal system a formal judgment signed by a judge "is prima facie the decision or judgment rather

Discussion: The leading case treating this subject for the instruction of the bar is Department of Banking v. Pink, supra (Pink). In that case, review on certiorari was sought from a final judgment of the New York Court of Appeals. A motion to amend the remittitur was filed. This Court expressly disapproved the practice of computing the time for applying for review in this Court from the date of entry of judgment by the lower court upon the Court of Appeals' remittitur. In Pink, the Court stated as follows:

> For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (citations omitted), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (citation omitted). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established (317 U.S. 268).

The Court's discussion of the timeliness question in Market Street R. Co. v. Railroad Com. of Cal., 324 U.S. 548 (1945), confirmed the rule established in Pink. California Rules on Appeal expressly provided that a decision of the State's highest court "becomes final thirty days after filing unless otherwise ordered prior to the expiration of said 30-day period." This Court declared:

> Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run (324 U.S. 551-552).

The Court held that the judgment became final on the date of the denial of rehearing and not upon the expiration of 30 days from the date of denial of rehearing. The

Court considered dispositive the date upon which the issues were adjudicated.

None of the parties to the instant case makes the claim that any issue in the case remained unresolved after the December 8 order of Minnesota Supreme Court. Petitioners impliedly concede that the December 14 entry of judgment was in the nature of a "ministerial act" insofar as it had any bearing on judicial determination of the claims presented by the parties. (The Clerk of the Minnesota Supreme Court has advised the Clerk's Office that the filing of the December 14 order was a wholly administrative act.) It appears significant that, in the instant case, neither the parties nor the state supreme court were authorized to take any action affecting the original judgment after filing of the December 8 order. By comparison, in Market Street R. Co., California Supreme Court was empowered by statute to alter its original judgment following its order denying rehearing. This Court seems to have made plain in Pink and in Market Street R. Co. that it is disinclined to allow the vagaries of state practice to determine how compliance with the federal statute shall be effected. The Court has clearly favored a uniform practice tied to the final resolution of the issues rather than a variable standard tied to the technical finality of judgments as prescribed by local procedure.

In Puget Sound Power & Light Co. v. King County, supra, relied upon by petitioner Marquette National Bank, a Washington statute (since repealed) provided that a judgment of the highest court of the State is not final until 30 days after it is filed during which time a petition for rehearing may be filed. This Court held that the time for seeking review in this Court ran from the date of issuance of the judgment and not from the date the decree was filed. Although the Court deferred to state practice in that case, it is not clear that it would have done so if the matter arose after Pink and Market Street R. Co.

Scofield v. NLRB, supra, also cited by petitioner, seems plainly inapposite. There, in a case involving enforcement by a federal appellate court of the order of an administrative agency, the Court of Appeals, on March 5, 1968, filed an opinion reciting that an appropriate decree would be forthcoming. The decree was entered on April 16, 1968. This Court found that there was no notice of any entry of judgment as required by F.R. A.P. Rule 36 (effective July 1, 1968) and, accordingly, that the date of judg-

ment was not clear to petitioners. The Court held that the time for petitioning for certiorari ran from the date of entry of the decree, but it nevertheless expressly recited that it adhered to the standard set forth in Market Street R. Co., i.e., "judgment for our purposes is final when the issues are adjudged."

Applying the settled practice of this Court, the instant petitions for certiorari are untimely for petitioners' failure to file within 90 days from the date Minnesota Supreme Court denied rehearing. Nothing contained in the state appellate rules or the practice of the state appellate court appears convincingly to favor an exception to the Court's practice in this case. Although petitioner argues that, until December 14, there existed no state court judgment within the meaning of §2101(c), provisions of the order of December 8 appear to refute this position. On December 8, simultaneously with its decision denying rehearing, Minnesota Supreme Court granted the request of Marquette National Bank for a stay of its judgment pending application for writ of certiorari to this Court. If the state supreme court considered that its determination of the merits of the appeal was without effect or "non-final" until entry of the judgment, it would seem to have been appropriate for it to order the judgment stayed at the time of entry on December 14 and not sooner.

Conclusion: The petitions for writ of certiorari in Nos. 77-1258 and 77-1265 should be denied for want of jurisdiction.

Susan Ackerman Goltz

Court ..... *Voted on* ....., *19*... APR 28 1978

Argued ....., *19*... *Assigned* ....., *19*... No. 77-1265

Submitted ....., *19*... *Announced* ....., *19*...

MARQUETTE NATL. BANK OF MINNEAPOLIS

vs.

FIRST OF OMAHA SERVICE CORP.

Relisted for Mr. Justice White.

Relist
for
Hann

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

APR 28 1978

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 77-1258

Submitted ....., 19... *Announced* ....., 19...

MINNESOTA

vs.

FIRST OF OMAHA SERVICE CORP.

~~Relisted for Mr. Justice White.~~

D

Remand not to consider Jurisdictional Issue

Relist for Harry to write

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.			✓										
Stewart, J.			✓										
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.			✓										

Linda - bring to my attention

Altho for too long, I'd be joining on 9 Minn case denied

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 10 1978

Recirculated: _____

No. 77-1258 - Minnesota v. First of Omaha Service Corp.
No. 77-1265 - Marquette National Bank v. First of Omaha Service Corp.

be Granted

MR. JUSTICE BLACKMUN, dissenting.

As a member of the Minnesota Bar and as one who practiced in that State for a number of years, I am not nearly so certain, as the Court seems to be, that these petitions are out of time and, hence, that they are to be denied for want of jurisdiction. If they are, it is unfortunate, for I feel -- and I suspect that at least three other members of the Court also would feel -- that the cases present "certworthy" issues.

I

The Court's action lets stand, because of the supposed untimeliness of the petitions for certiorari, what is for me at the very least a questionable ruling, by a divided vote of the Supreme Court of Minnesota sitting en banc, that a national bank with its principal place of business in Nebraska but also doing business in Minnesota may apply to the unpaid balances of Minnesota bank credit-card customers an annual interest rate above the rate permitted by Minnesota law and above the rate that any national or state bank based in Minnesota may charge. _____ Minn. _____, 262 N. W. 2d 358 (1977). In reaching that result, the Minnesota court, with three Justices dissenting, stated that it felt constrained to follow the ruling of the United States Court of Appeals for the Eighth Circuit in a similar case, Fisher v. First Nat. Bank of Omaha, 548 F. 2d 255

(1977). The Fisher court found such an advantage for out-of-state national banks to be mandated by a provision of the National Bank Act, 12 U.S.C. § 85:

> "Any [national banking] association may . . . charge on any loan or discount . . . interest at the rate allowed by the laws of the State . . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

As the Minnesota Supreme Court recognized, however, ____ Minn. ___, at _____, 262 N.W.2d, at 364-365, this interpretation distorts § 85 from its original purpose of preventing discrimination against national banks and, instead, makes it a sword for discrimination in favor of out-of-state national banks. A national bank organized in Nebraska

now may do business in Minnesota on terms more favorable than a Minnesota state bank and, indeed, on terms more favorable than a national bank located in Minnesota. I question whether so unlikely a result may be attributed to Congress in the absence of a clear expression. The issue deserves at least plenary considera-tion here.

II

The Court, however, declines today to review this decision on the ground that it lacks jurisdiction to do so, evidently based on the assumption that the petitions for certiorari were untimely filed. That conclusion seems to me to be an erroneous one.

The time allowed in a civil case for any writ of certiorari from this Court to the highest state court or to a federal court of appeals is 90 days. The statute setting this limit on our jurisdiction, 28 U.S.C. § 2101(c), provides that, in the absence of a proper extension, a petition for certiorari seeking review of the judgment or decree must be applied for within 90 days "after the entry of such judgment or decree." In the case now before us, the petitions for certiorari, filed on March 13, 1978, obviously are timely if the 90-day period is counted from the entry of judgment by the Minnesota Supreme Court on December 14, 1977.

The difficulty the Court seems to perceive in this case is occasioned by two features of Minnesota practice: First, under Minn. R. Civ. App. Proc. 136.02,[1] the judgment of the Minnesota Supreme Court is not entered until at least 10 days after the court's opinion is filed. Second, under the same rule and Rule 140,[2] if a petition for rehearing is filed within the 10-day period, entry of judgment is mandatorily deferred until after the disposition of the petition for rehearing. Here, the Minnesota Supreme Court filed its opinion in the case on November 10, 1977. This document was captioned "Syllabus and Opinion" and was so noted on the clerk's docket sheet. A timely petition for rehearing was filed and was later denied on December 8, 1977. Only on December 14 was judgment entered. This was by way of a separate document stating that "the order and judgment of the Court below . . . be and the same hereby

is in all things reversed," and closing, "Dated and signed December 14, 1977[.] By the Court[.] Attest: John McCarthy[,] Clerk". This judgment, it should be noted, was distinct from the mandate or remittitur, which was yet another document addressed to the lower court.

In denying the petitions for certiorari for want of jurisdiction, the Court evidently concludes that time must run from the date the petition for rehearing was denied, December 8, rather than from the entry of judgment on December 14.

This conclusion is occasioned by a mistaken analogy to the quite different practice under the Federal Rules of Appellate Procedure. Counting time from the denial of a rehearing petition is logical in the case of a party who seeks certiorari to a federal court of appeals because, under the federal appellate rules, judgment is entered

before the petition for rehearing is entertained.[3/] Minnesota procedure is significantly different, and the Advisory Committee Notes to the Minnesota Rules of Civil Appellate Procedure disclose that the drafters were well aware of the difference. Under Minn. R. Civ. App. Proc. 136.02, which the Advisory Committee Note describes as "dissimilar to" Fed. R. App. Proc. 36, the clerk of the court is directed to enter judgment after the rendering of a decision or order, but "not less than ten days after the filing" of the decision. Within that 10-day period, a petition for rehearing may be filed under Minn. R. Civ. App. Proc. 140, which the Advisory Committee also called "dissimilar to" Fed. R. App. Proc. 40, evidently because the period for a petition for rehearing is counted from the filing of the opinion rather than from the entry of judgment. Rule 136.02 then provides that "The service and filing of a petition for rehearing shall stay the entry of

the judgment." Here, judgment was entered six days after the denial of the petition for rehearing. Where § 2101(c) provides that time is to be counted from "the entry of such judgment or decree," it would seem most reasonable to count time from the date of what is actually the Minnesota judgment. That, in a federal appeal, time runs from the denial of the petition for rehearing, is not authority to the contrary, for, as I have noted above, a judgment, described as such in the federal rules, has already been entered. The legitimate interests of civil litigants in having fair notice of the time for appeal would recommend a rule that presumptively treats as the entry of a judgment what the applicable rule nominates as such. The Court, however, treats the filing of the opinion on November 10, 1977, as the functional equivalent of entry of judgment so that, upon denial of the petition for rehearing,

judgment was already in place.

Attaching this significance to the filing of the opinion is starkly inconsistent with our treatment of an appeal from the Minnesota Supreme Court just two Terms ago. In Bryan v. Itasca County, 426 U.S. 373 (1976), a case that recognized certain tax immunity for Indian personal property, the opinion of the Minnesota Supreme Court was filed March 28, 1975. A separate judgment order of the Minnesota court, identical in form to the December 14 order in this case, was signed and entered on April 10, 1975. The petition for certiorari was filed July 7, 1975, within 90 days of the judgment order, but 101 days after the filing of the opinion. The Clerk of the Minnesota Supreme Court represented, in a letter dated July 7, 1975, to the Clerk of this Court, that indeed the separate judgment order of April 10 constituted the entry of judgment. In choosing to

hear and decide the case, this Court evidently at that time considered the separate judgment order to be indispensable to "entry of . . . judgment" for purposes of § 2101(c). I see no reason to follow a different practice in the case now before us.

III

This Court has recognized that there "are bound to be diversities in the modes of rendering and recording judgments of the [50] systems of State courts." Commissioner v. Estate of Bedford, 325 U.S. 283, 288 (1945). Where state practice provides for the setting forth of a judgment on a separate document, and captions the earlier opinion as nothing more than "syllabus and opinion," I see no reason for disregarding the State's explicit characterization of its own procedure. The Federal Rules of Civil Procedure were amended in 1963 to provide for the rendition of judgment on a "separate document," to clarify when the time for appeal begins to run. See United States v. Indrelunas, 411 U.S. 216 (1973); Bankers Trust Co. v. Mallis, _____ U.S. _____ (1978). Respect for the same concerns at the state level certainly would counsel our giving effect to a State's practice of entering judgment as a separate document.

None of the cases cited by respondent suggest a contrary conclusion. Citizens Bank v. Opperman, 249 U.S. 448, 450 (1919), stands merely for the proposition, noted above, that, where judgment already has been entered, a petition for rehearing suspends the finality of the judgment until the petition has been denied. Department of Banking v. Pink, 317 U.S. 264 (1942), held that it is the judgment or order of the highest state court, rather than the judgment of a lower state court upon remittitur, that is reviewed in this Court, and hence from whose entry the time for review should run. Pink does not state that the entry of judgment in the highest state court is itself to be disregarded, any more than that formal act is disregarded in an appeal to this Court from a federal court of appeals, see Fed. R. App. Proc. 36, or from a three-judge federal district court, see Fed. R. Civ. Proc. 58.

Nor is respondent aided by Market Street R. Co. v. Railroad Comm'n, 324 U.S. 548 (1945). That case held, in accord with Pink, that where a judgment by the highest state court was entered July 1, 1944, but the judgment did not become "final" to permit the issuance of remittitur until August 1, the original entry of the judgment on July 1 governed the time for appeal. The Court issued a stricture on finality: the finality of the judgment was "not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." 324 U.S., at 551 (emphasis supplied). But nowhere did this Court suggest that it would disregard the State's own procedural formula for actual entry of judgment. To the contrary, in Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 23-25 (1924), a case that Market Street R. Co. did not question, this Court recognized that where, under state law, the judgment of the Washington Supreme Court was not entered until 30 days after rendition of its opinion, the time for petitioning for review did not begin until that entry of judgment.

Puget Sound is in accord with later decisions of this Court. Just as United States v. Hark, 320 U.S. 531, 535 (1944), declined to treat a formal judgment order, signed by a federal district judge, as nugatory despite the fact that there had been an earlier opinion and earlier docket entry of the decision, so we should decline to dismiss Minnesota's provision for the entry of judgment as unimportant. We should be "unwilling to assume that [the State] deemed this an empty form or . . . acted from a purpose indirectly to extend the appeal time." 320 U.S., at 535. So, too, in Commissioner v. Estate of Bedford, supra, a case arising before the enactment of the Federal Rules of Appellate Procedure, the Court concluded in regard to an appeal from the Second Circuit that the judgment order, rather than an opinion of three weeks earlier, was to be deemed the judgment for appeal purposes, even though the opinion had concluded that

"The order of the Tax Court is reversed," and the judgment order had also contained an order issuing mandate. See also Bindczyck v. Finucane, 342 U.S. 76, 84 n. 9 (1951).

Scofield v. NLRB, 394 U.S. 423 (1969), similarly held that since, at the time the Court of Appeals opinion was filed, there had been no separate entry of judgment with notice, time would be counted from a decree later entered, even though the Federal Rules of Appellate Procedure had not yet become effective at the time the opinion and decree were rendered. "Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not we hold, without abandoning the standard that a 'judgment for our purposes is final when the issues are adjudged' and settled with finality, Market Street R. Co., v. Railroad Commission, . . . that in this case the relevant date is that of the entry of the decree." 394 U.S., at 427. Finally, in United States v. Indrelunas, 411 U.S., at 220, we held that the "separate

document" requirement of Fed. R. Civ. Proc. 58 applied to all district court judgments, repeating Professor Moore's observation, 6A J. Moore, Federal Practice ¶ 58.04 [4.-2], at 58-161 (1972), that the rule "represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective. . . ."

The arguments that might be mustered in favor of regarding the December 8 order as the event from which time should run each fail to convince. Though the December 8 order granted petitioner Marquette National Bank a "stay of judgment pending application for writ of certiorari," in so doing, the court was simply issuing an anticipatory stay of /enforcement of the judgment. And though, under the Minnesota Rules of Civil Appellate Procedure, parties are automatically sent notice

of the filing of an opinion but not of the entry of judgment, compare 136.01 with 136.02, we have never defined judgment as "that thing of which parties are sent notice." The most obvious reason for the notice provision is that the period for rehearing under Minnesota law runs from the filing of the opinion. In appeals from the lower Minnesota courts to the Minnesota Supreme Court, it is the entry of judgment that is the crucial event in determining when time for appeal begins to run. See Minn. R. Civ. App. Proc. 104.01 and 104.02.

Because I see no reason for treating the November 10 or December 8 orders as equivalent to the entry of judgment, I dissent from the Court's decision to deny certiorari for want of jurisdiction.

1/ Minn. R. Civ. App. Proc. 136.01(1) and 136.02 read:

136.01(1) Notice of Decision.

"Upon the filing of a decision or order which determines the matter, the clerk shall mail a copy thereof to the attorneys for the parties and to the trial court. The mailing of such copy shall constitute notice of the filing.

136.02 Entry of Judgment; Stay

"The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment."

2/

Rule 140. Petition for Rehearing

"A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the [Minnesota] Supreme Court within the 10-day period."

3/ Fed. R. App. Proc. 36 provides that "following receipt of the opinion of the court," a clerk of a court of appeals will prepare, sign, and enter the judgment. Notation of a judgment in the docket constitutes entry. In the absence of a petition for rehearing, time is counted from the date of the entry of judgment in accord with the plain language of § 2101(c). See Scofield v. NLRB, 394 U.S. 423, 427 (1969). A petition for rehearing may be filed, according to Fed. R. App. Proc. 40(a), "within 14 days after entry of judgment unless the time is shortened or enlarged by order" (emphasis added). The rehearing petition tolls the running of the 90-day period by "operat[ing] to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." Department of Banking v. Pink, 317 U.S. 264, 266

CHIEF JUSTICE	MARSHALL, J.
BRENNAN, J.	POWELL, J.
STEWART, J.	REHNQUIST, J.
WHITE, J.	STEVENS, J.

MEMO:

CHIEF JUSTICE	MARSHALL, J.
BRENNAN, J.	POWELL, J.
STEWART, J.	REHNQUIST, J.
WHITE, J.	STEVENS, J.

MEMO:

pp. 1, 3, 4, 5, 6

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 17 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA *v.* FIRST OF OMAHA SERVICE CORPORATION ET AL. and MARQUETTE NATIONAL BANK OF MINNEAPOLIS *v.* FIRST OF OMAHA SERVICE CORPORATION ET AL.

We granted cert 5/18

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Nos. 77-1258 and 77-1269. Decided May —, 1978

MR. JUSTICE BLACKMUN, dissenting.

As a member of the Minnesota Bar and as one who practiced in that State for a number of years, I am not nearly so certain as the Court seems to be that these petitions are out of time and, hence, that they are to be denied for want of jurisdiction. If they are, it is unfortunate, for I feel—and I suspect that at least three other Members of the Court also would feel—that the cases present "certworthy" issues.

I

The Court's action lets stand, because of the supposed untimeliness of the petitions for certiorari, what is for me at the very least a questionable ruling, by a divided vote of the Supreme Court of Minnesota sitting en banc, that a national bank with its principal place of business in Nebraska but also doing business in Minnesota may apply to the unpaid balances of Minnesota bank credit card customers an annual interest rate above the rate permitted by Minnesota law and above the rate that any national or state bank based in Minnesota may charge. — Minn. —, 262 N. W. 2d 358 (1977). In reaching that result, the Minnesota court, with three Justices dissenting, stated that it felt constrained to follow the ruling of the United States Court of Appeals for the Eighth Circuit in a similar case, *Fisher* v. *First Nat. Bank of*

Omaha, 548 F. 2d 255 (1977). The *Fisher* court found such an advantage for out-of-state national banks to be mandated by a provision of the National Bank Act, 12 U. S. C. § 85:

> "Any [national banking] association may . . . charge on any loan or discount . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

As the Minnesota Supreme Court recognized, however, — Minn., at —, 262 N. W. 2d, at 364–365, this interpretation distorts § 85 from its original purpose of preventing discrimination *against* national banks and, instead, makes it a sword for discrimination *in favor of out-of-state* national banks. A national bank organized in Nebraska now may do business in Minnesota on terms more favorable than a Minnesota state bank and, indeed, on terms more favorable than a national bank located in Minnesota. I question whether so unlikely a result may be attributed to Congress in the absence of a clear expression. The issue deserves at least plenary consideration here.

II

The Court, however, declines today to review this decision on the ground that it lacks jurisdiction to do so, evidently based on the assumption that the petitions for certiorari were untimely filed. That conclusion seems to me to be an erroneous one.

The time allowed in a civil case for any writ of certiorari from this Court to the highest state court or to a federal court of appeals is 90 days. The statute setting this limit on our jurisdiction, 28 U. S. C. § 2101 (c), provides that, in the absence of a proper extension, a petition for certiorari seeking review of the judgment or decree must be applied for within 90 days "after the entry of such judgment or decree." In the

case now before us, the petitions for certiorari, filed on March 13, 1978, obviously are timely if the 90-day period is counted from the entry of *judgment* by the Minnesota Supreme Court on December 14, 1977.

The difficulty the Court seems to perceive in this case is occasioned by two features of Minnesota practice: First, under Minn. Rule Civ. App. Proc. 136.02,[1] the judgment of the Minnesota Supreme Court is not entered until at least 10 days after the court's opinion is filed. Second, under the same rule and Rule 140,[2] if a petition for rehearing is filed within the 10-day period, entry of *judgment* is mandatorily deferred until after the disposition of the petition for rehearing. Here, the Minnesota Supreme Court filed its *opinion* in the case on November 10, 1977. This document was captioned "Syllabus and Opinion" and was so noted on the clerk's docket sheet. A timely petition for rehearing was filed and was later denied on December 8, 1977. Only on December 14 was judgment entered. This was by way of a separate document stating that "the order and judgment of the Court below . . . be and the same hereby is in all things reversed," and closing, "Dated and signed December 14, 1977[.] By the Court[.] Attest: John McCarthy[,] Clerk." This judgment, it should be noted, was distinct from the mandate or remittitur, which was yet another document addressed to the lower court.

In denying the petitions for certiorari for want of jurisdic-

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[1] Minn. Rule Civ. App. Proc. 136.01 (1) and 136.02 read:

"*136.01(1) Notice of Decision.*

"Upon the filing of a decision or order which determines the matter, the clerk shall mail a copy thereof to the attorneys for the parties and to the trial court. The mailing of such copy shall constitute notice of the filing.

"*136.02 Entry of Judgment; Stay*

"The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment."

[2] Rule 140. Petition for Rehearing

"A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the [Minnesota] Supreme Court within the 10-day period."

tion, the Court evidently concludes that time must run from the date the petition for rehearing was denied, December 8, rather than from the entry of judgment on December 14. This conclusion is occasioned by a mistaken analogy to the quite different practice under the Federal Rules of Appellate Procedure. Counting time from the denial of a rehearing petition is logical in the case of a party who seeks certiorari to a federal court of appeals because, under the federal appellate rules, judgment is entered before the petition for rehearing is entertained.[3] Minnesota procedure is significantly different, and the Advisory Committee Notes to the Minnesota Rules of Civil Appellate Procedure disclose that the drafters were well aware of the difference. Under Minn. Rule Civ. App. Proc. 136.02, which the Advisory Committee Note describes as "dissimilar to" Fed. Rule App. Proc. 36, the clerk of the court is directed to enter judgment after the rendering of a decision or order, but *"not less than ten days after the filing"* of the decision. Within that 10-day period, a petition for rehearing may be filed under Minn. Rule Civ. App. Proc. 140, which the Advisory Committee also called "dissimilar to" Fed. Rule App. Proc. 40, evidently because the period for a petition for rehearing is counted from the filing of the opinion rather

[3] Fed. Rule App. Proc. 36 provides that "following receipt of the opinion of the court," a clerk of a court of appeals will prepare, sign, and enter the judgment. Notation of a judgment in the docket constitutes entry. In the absence of a petition for rehearing, time is counted from the date of the entry of judgment in accord with the plain language of § 2101 (c). See *Scofield* v. *NLRB*, 394 U. S. 423, 427 (1969). A petition for rehearing may be filed, according to Fed. Rule App. Proc. 40 (a), "within 14 days *after* entry of judgment unless the time is shortened or enlarged by order" (emphasis added). The rehearing petition tolls the running of the 90-day period by "operat[ing] to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942); *United States* v. *Healy*, 376 U. S. 75, 78 (1964). Upon denial of the petition for rehearing, since judgment already has been entered, time begins to run again without further ado. *Ibid.*

than from the entry of judgment. Rule 136.02 then provides that "The service and filing of a petition for rehearing shall stay the entry of the judgment." Here, judgment was entered six days after the denial of the petition for rehearing. Where § 2101 (c) provides that time is to be counted from "the entry of such judgment or decree," it would seem most reasonable to count time from the date of what is actually the Minnesota judgment. That, in a federal appeal, time runs from the denial of the petition for rehearing, is not authority to the contrary, for, as I have noted above, a judgment, described as such in the federal rules, has already been entered. The legitimate interests of civil litigants in having fair notice of the time for appeal would recommend a rule that presumptively treats as the entry of a judgment what the applicable rule nominates as such. The Court, however, treats the filing of the opinion on November 10, 1977, as the functional equivalent of entry of judgment so that, upon denial of the petition for rehearing, judgment was already in place.

Attaching this significance to the filing of the opinion is starkly inconsistent with our treatment of an appeal from the Minnesota Supreme Court just two Terms ago. In *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), a case that recognized certain tax immunity for Indian personal property, the opinion of the Minnesota Supreme Court was filed March 28, 1975. A separate judgment order of the Minnesota court, identical in form to the December 14 order in this case, was signed and entered on April 10, 1975. The petition for certiorari was filed July 7, 1975, within 90 days of the judgment order, but 101 days after the filing of the opinion. The Clerk of the Minnesota Supreme Court represented, in a letter dated July 7, 1975, to the Clerk of this Court, that indeed the separate judgment order of April 10 constituted the entry of judgment. In choosing to hear and decide the case, this Court evidently at that time considered the separate judgment order to be indispensable to "entry of . . . judgment" for purposes of § 2101 (c). I see no reason to follow a different practice in the case now before us.

III

This Court has recognized that there "are bound to be diversities in the modes of rendering and recording judgments of the [50] systems of State courts." *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, 288 (1945). Where state practice provides for the setting forth of a judgment on a separate document, and captions the earlier opinion as nothing more than "syllabus and opinion," I see no reason for disregarding the State's explicit characterization of its own procedure. The Federal Rules of Civil Procedure were amended in 1963 to provide for the rendition of judgment on a "separate document," to clarify when the time for appeal begins to run. See *United States* v. *Indrelunas*, 411 U. S. 216 (1973); *Bankers Trust Co.* v. *Mallis*, — U. S. — (1978). Respect for the same concerns at the state level certainly would counsel our giving effect to a State's practice of entering judgment as a separate document.

None of the cases cited by respondent suggest a contrary conclusion. *Citizens Bank* v. *Opperman*, 249 U. S. 448, 450 (1919), stands merely for the proposition, noted above, that, *where judgment already has been entered*, a petition for rehearing suspends the finality of the judgment until the petition has been denied. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942), held that it is the judgment or order of the highest state court, rather than the judgment of a lower state court upon remittitur, that is reviewed in this Court, and hence from whose entry the time for review should run. *Pink* does not state that the entry of judgment in the highest state court is itself to be disregarded, any more than that formal act is disregarded in an appeal to this Court from a federal court of appeals, see Fed. Rule App. Proc. 36, or from a three-judge federal district court, see Fed. Rule Civ. Proc. 58.

Nor is respondent aided by *Market Street R. Co.* v. *Railroad Comm'n*, 324 U. S. 548 (1945). That case held, in accord with *Pink*, that where a judgment by the highest state court was entered July 1, 1944, but the judgment did not become

"final" to permit the issuance of remittitur until August 1, the original entry of the judgment on July 1 governed the time for appeal. The Court issued a stricture on *finality:* the finality of the judgment was "not deferred by the existence of a latent power in the rendering court to *reopen* or *revise* its judgment." (Emphasis supplied) 324 U. S., at 551. But nowhere did this Court suggest that it would disregard the State's own procedural formula for actual entry of judgment. To the contrary, in *Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, 23–25 (1924), a case that *Market Street R. Co.* did not question, this Court recognized that where, under state law, the judgment of the Washington Supreme Court was not entered until 30 days after rendition of its opinion, the time for petitioning for review did not begin until that entry of judgment.

Puget Sound is in accord with later decisions of this Court. Just as *United States* v. *Hark,* 320 U. S. 531, 535 (1944), declined to treat a formal judgment order, signed by a federal district judge, as nugatory despite the fact that there had been an earlier opinion and earlier docket entry of the decision, so we should decline to dismiss Minnesota's provision for the entry of judgment as unimportant. We should be "unwilling to assume that [the State] deemed this an empty form or . . . acted from a purpose indirectly to extend the appeal time." 320 U. S., at 535. So, too, in *Commissioner* v. *Estate of Bedford, supra,* a case arising before the enactment of the Federal Rules of Appellate Procedure, the Court concluded in regard to an appeal from the Second Circuit that the judgment order, rather than an opinion of three weeks earlier, was to be deemed the judgment for appeal purposes, even though the opinion had concluded that "The order of the Tax Court is reversed," and the judgment order had also contained an order issuing mandate. See also *Bindczyck* v. *Finucane,* 342 U. S. 76, 84 n. 9 (1951).

Scofield v. *NLRB,* 394 U. S. 423 (1969), similarly held that since, at the time the Court of Appeals opinion was filed, there had been no separate entry of judgment with notice, time

would be counted from a decree later entered, even though the Federal Rules of Appellate Procedure had not yet become effective at the time the opinion and decree were rendered. "Since no notice was given and it could not have been clear to petitioners whether there was a March 5 judgment or not we hold, without abandoning the standard that a 'judgment for our purposes is final when the issues are adjudged' and settled with finality, *Market Street R. Co.*, v. *Railroad Commission*, . . . that in this case the relevant date is that of the entry of the decree." 394 U. S., at 427. Finally, in *United States* v. *Indrelunas*, 411 U. S., at 220, we held that the "separate document" requirement of Fed. Rule Civ. Proc. 58 applied to all district court judgments, repeating Professor Moore's observation, 6A J. Moore, Federal Practice ¶ 58.04 [4.–2], at 58–161 (1972), that the rule "represents a mechanical change that would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective. . . ."

The arguments that might be mustered in favor of regarding the December 8 order as the event from which time should run each fail to convince. Though the December 8 order granted petitioner Marquette National Bank a "stay of judgment pending application for writ of certiorari," in so doing, the court was simply issuing an anticipatory stay of enforcement of the judgment. And though, under the Minnesota Rules of Civil Appellate Procedure, parties are automatically sent notice of the filing of an opinion but not of the entry of judgment, compare 136.01 with 136.02, we have never defined judgment as "that thing of which parties are sent notice." The most obvious reason for the notice provision is that the period for rehearing under Minnesota law runs from the filing of the opinion. In appeals from the lower Minnesota courts to the Minnesota Supreme Court, it is the entry of judgment that is the crucial event in determining when time for appeal begins to run. See Minn. Rule Civ. App. Proc. 104.01 and 104.02.

Because I see no reason for treating the November 10 or December 8 orders as equivalent to the entry of judgment, I dissent from the Court's decision to deny certiorari for want of jurisdiction.

May 18, 1978

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 77-1258

Submitted ....., *19*... *Announced* ....., *19*...

MINNESOTA

vs.

FIRST OF OMAHA SERVICE CORP.

Relisted for the Chief Justice.

ask parties to brief juris. 9

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.				Pass									
Stevens, J.			✓										

May 18, 1978

Court ..... *Voted on* ....., *19*.....

Argued ....., *19*... *Assigned* ....., *19*... No. 77-1265

Submitted ....., *19*... *Announced* ....., *19*...

MARQUETTE NATL. BANK OF MINNEAPOLIS

vs.

FIRST OF OMAHA SERVICE CORP.

Relisted for the Chief Justice.

Granted
with 77-1258

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

1. Timeliness issue. Judgment was not entered
BB 10/19/78 until the disposition of pet. for rehearing.
The cert. pet. was filed within 90 days. This
satisfies 28 USC 2101(c). We have juris.

2. Merits. The S/Ct. of Minn. held that
a national bank, headquartered in Neb., but
also doing business in Minn. may charge interest
rates (on unpd. credit card balances due from
Minn. residents) higher than rate permitted
by Minn. law, and also higher than any national
or state bank based in Minn. could charge.
Minn S/Ct (3 dissenters) followed CA8 opinion
in Fisher v. 1st Nat. Bk of Omaha (16)

Under Neb. law, 18% int. may be charged
on credit card balances. Under Minn. law, only 12%

All parties rely on § 85 of Nat Banking
Act (11). Its language, as found by Minn. Ct.,
favors Resps. But this statute was enacted
long before Nat. Bks. did an interstate business.
And purpose of § 85 was to assure
equal status of Nat. Bks with state banks
in each state — to prevent a state
from placing Nat. Bk at competitive disadvantage.
See p 12-16. In Citizens Southern Nat Bk (1977) (P.S. op.),
we relied on purpose of § 94 as to
venue for suit, rather than plain language.

Nothing to Resps claim that even
if § 85 normally requires equality
of credit rates bet. state & nat. bks;
a credit card a/c should carry same rate
as small loan co. rates.

BENCH MEMORANDUM

To: Justice Powell

Re: No. 77-1258, Minnesota v. First of Omaha Service Corp.,
and No. 77-1265, Marquette National Bank v. First of
Omaha Service Corp.

Summary

At the request of the Court, the parties have briefed the question of the timeliness of the petition for certiorari.

Minnesota law provides that the judgment of the Minnesota Supreme Court is not entered until after disposition of any petition for rehearing. In the present case, rehearing was

denied on December 8, 1977, and the judgment was entered by the Clerk of the Minnesota Supreme Court on December 14, 1978. The Court must decide whether 28 U.S.C. § 2101(c) measures the time for the filing of the petition from the order of the court on December 8 or from the entry of judgment on December 14.

I have divided the discussion of the merits into four sections. Section 2 of the Memorandum rejects the resp's arguments that because the petrs relied on state law in their complaints, they are barred from any reliance on federal law, and that injunctive relief against usurious interest rates is not allowed by the National Bank Act. Section 3 clarifies the statement of the Minnesota Supreme Court that even though the resp was the only defendant in the state circuit court, "the matter was considered as though the Omaha Bank still remained as a defendant."

Section 4 of this Memorandum deals with the central issue in the case. (1) Does § 85 of the National Bank Act regulate the interest rates that a national bank located in Nebraska may charge on loans that it makes in Minnesota? (2) If so, does § 85 refer to Nebraska or Minnesota law for the applicable interest rate limit? In Section 5 I discuss the resp's contention that even if Minnesota law determines the interest rate chargeable on credit card accounts in Minnesota, the national banks doing business in Minnesota may charge interest on credit card accounts at the rate allowed by state law for small loans instead of the lower rate established specifically for credit card accounts.

1. Jurisdiction -- Timeliness of the Petition. (See HAB's dissent from denial of Cert.)

The briefing of the parties on this issue adds nothing to Justice Blackmun's lengthy discussion in his draft dissent from denial of certiorari. A copy of that draft is attached to this memorandum.

The parties rely principally on four of the Court's decisions as authority for their respective positions. The oldest of these is Puget Sound Co. v. King County, 264 U.S. 22 (1924), which is close on the facts to the present case. One of the departments of the Washington Supreme Court filed its opinion in the case on October 15, 1921. The case was reargued before the court sitting en banc, and the opinion of the entire court was filed on June 12, 1922. On July 10, 1922, a Judgment was entered on the minutes of the court; the judgment provided that the cause "is now, on this 10th day of July ... considered, adjudged and decreed". The writ of error in this Court was timely if measured from July 10, but untimely if measured from June 12.

The Court found that under Washington law, the decision of the Washington Supreme Court, sitting en banc, is final when filed, but that

> "there is a specific provision that a judgment shall issue thereon. It is apparent that however final the decision may be, it is not the judgment. It is said that the latter is a mere formal ministerial entry of a clerical character, whereas the real judgment is the final decision. Whatever the effect of the distinction in the procedure of the State ..., we are in no doubt that that which Washington statute calls the judgment

> is the judgment referred to in [the jurisdictional statute governing this Court's jurisdiction]."

Taking this view, the Court held that the application for review was timely.

In Comm'r v. Estate of Bedford, 325 U.S. 279 (1945), the Court took a similarly practical view of the importance of local rules in measuring the time for applications for review by this Court. On August 8, 1944, the CA 2 filed a a document entitled "Opinion"; on the same day, the Clerk made a docket entry reading "Order reversed, A.N. Hand, C.J." On August 29, 1944, a document entitled "Order for Mandate" was filed and the mandate issued on that day; on November 29, 1944, the petition for a writ of certiorari was filed. Justice Frankfurter, writing for the Court, said the following:

> "Even long continued practice cannot alter the limits within which Congress has bound the appellate jurisdction of this Court. See Dept of Banking v. Pink, 317 U.S. 264 [discussed infra]. But such practice may be decisive in interpreting procedureal ways which, as a matter of dialectic or abstract analysis, may appear dubious. We are naturally impressed by the common understanding that in the [CA 2] the so-called "Order for Mandate" is deemed the judgment. ... We have taken and decided as a matter of course a considerable number of cases in which certiorari was sought within three months after entry of the "order for Mandate" but not within three months after the "Opinion." This practical understanding of the controlling significance, for appellate purposes, of the "Order for Mandate" is supported and certainly not contradicted by all that is conveyed by the "Opinion" and "Order for Mandate" and the Rules of the lower court.

> It does not detract from the "Opinion" as an opinion that in its heading it gives as dates "Argued January 6, 1944. Decided August 8, 1944," and that it concludes with "The order of the Tax Court is reversed." The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits judgment orders are separately filed. In spite of its title, the "Order for Mandate" on its face fulfills the function of such a judgment order."

Measuring the time for the petition from the date of the Order for Mandate, the Court held that the petition was timely.

Justice Blackmun's draft dissent sets out at length the basis in Minnesota law for the conclusion that Minnesota has purposefully constructed its procedural system so that the entry of judgment is deferred until after the state supreme court has disposed of petitions for rehearing. He also correctly notes that in Bryan v. Itasca County, the Court reviewed the decision of the Supreme Court of Minnesota on a petition that was only timely if time was measured from the entry of judgment rather than the filing of the court's opinion.

The resp has found language in two of the Court's opinions that appear to support its position. But neither of the opinions contains a holding on the problem now before the Court. In Dep't of Banking v. Pink, 317 U.S. 264, reh. denied, 318 U.S. 802 (1942), the New York Court of Appeals ordered the affirmance of a judgment of the New York Supreme Court, and

issued a remittitur to that court, on June 18, 1942. On June 25, 1942, the order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court. A motion to amend the remittitur to clarify the presence and decision of a federal question was filed thereafter in the Court of Appeals, which granted the motion on July 29. The petition for certiorari was filed on October 20.

The Court held that because the motion for amendment of the remittitur did not challenge the final judgment entered by the Court of Appeals, it did not have the effect of a timely motion for rehearing in tolling the time for filing a petition for certiorari in this Court. Accordingly, the petition was untimely and the Court was without jurisdiction. The case did not involve a situation such as the one in the present case, in which the opinion of the state court, the petition for rehearing, and the denial of that petition, all preceded the formal entry of judgment.

The decision in Market Street R. Co. v. R. Comm'n, 324 U.S. 548 (1945), applied the accepted rule that where judgment is entered at the time of the appellate court's decision, the time for a petition of certiorari runs from the date of denial of the petition for rehearing. In the present case, in contrast, judgment was not entered until after the petition for rehearing was denied. Stern & Gressman, Supreme Court Practice 398 (5th ed. 1978), distinguishes Market Street R. Co. from Puget Sound Co., supra, on precisely this basis.

2. The Procedural History, the Federal Question, and the Available Remedy.

This should be on next pg

2. Procedural Hist., the Fed Q, & Available Remedies:

In Section II of its brief, the resp argues that the decision of the Minnesota Supreme Court should be affirmed because the state law on which petrs (Marquette National Bank and the State of Minnesota) rely is pre-empted by federal law with respect to both substantive regulations and available remedies. The resp contends that since the petrs relied exclusively on state law in their complaints, and denied any reliance on federal law during the removal proceedings, the pre-emption of state law by the National Banking Act leaves them with no cause of action against the resp. This argument can be assessed most clearly by considering the procedural history of the case and the way in which the question of the applicability of federal law was raised.

The action was filed by the petr bank in the state district court. It named as defendants the First National Bank of Omaha (the Bank), the First of Omaha Service Corporation (the resp), and the St. Paul Credit Bureau (the credit bureau), and sought relief under § 48.185 of the Minnesota Statutes. (Section 48.185 is reprinted at A-4 to A-7 of the Petn.) The action was removed to the federal district court, whereupon the petr bank voluntarily dismissed the Bank as a defendant. The petr bank then moved for the remand of the action to the state court, arguing that the cause of action arose from the state statute, Minn. Stat. § 48.185, and not federal law; in support of remand, the petr bank also argued that removal could not be justified on diversity of citizenship grounds because the credit bureau was a citizen of Minnesota.

The USDC's memorandum opinion remanding the case to the state court is reprinted at App. 49a-63a. The DC handled the question in a quite sophisticated manner. The petr bank's claim, it noted, was stated consistently as a claim under §48.185 of the Minnesota law. The defense that state law was pre-empted by federal law, § 85 of the National Bank Act, did not convert the petr's claim into a federal law claim. The DC concluded that since removability is determined at the time that the removal petition is filed, and since at that time the petr had stated only a claim under state law, the action should be remanded to the state court. The resp does not challenge the remand.

After the remand to the state court, the petr State of Minnesota intervened. The resp and the credit bureau defended on the ground that the interest rate that a national bank may charge is governed by § 85 of the National Bank Act and not by the Minnesota law upon which petrs rested their claim. Petrs, in addition to arguing that § 85 did not control the regulation of foreign national banks doing business in Minnesota, also argued that even if federal law did control, it referred to Minnesota law for the controlling rules.

With this background it is possible to assess the arguments advanced in Section II of resp's Brief. Under the theory of petr bank's complaint, the regulation of interest charges by foreign national banks on loans made in Minnesota is unregulated by federal law and is a matter of Minnesota law alone. If § 85 does not extend to govern state regulation of

interest charges by foreign national banks, then Minnesota is free to regulate those rates as it wishes. The only constraints would be the Commerce Clause and possibly the Equal Protection Clause.

The petrs lost on this theory in both the state district court and the Minnesota Supreme Court, and they do not press it in this Court. Instead they argue, as they did below, that assuming the applicability of § 85, the effect of that statute is to refer to the law of Minnesota rather than the law of Nebraska for the applicable limit on interest rates. This argument goes to the sufficiency of the defense raised by the resp, and is not foreclosed to the petrs simply because their original reliance solely on state law has proved inadequate.

Arguments as to preemption are misleading.

Both petrs and resp make numerous references to the doctrine of pre-emption, and this seems the best place to note that those references are misleading. Since petrs no longer argue that §85 does not govern and that the regulation in question is left to state law alone, any pre-emption question has disappeared from the case. The issue is the proper construction of § 85.

As a corollary of the foregoing analysis, it is clear that a decision in petrs' favor would not leave the state free to discriminate against national banks located in other states. The holding would be that § 85 of the National Bank Act refers to the law of Minnesota for interest rate limits on all national banks operating there, just as it refers to the law of Nebraska for the interest rate limits on national banks

operating in that state.

In Farmers & Merchants National Bank v. Dearing, 91 U.S. 29 (1875), the Court held that the provision of the National Bank Act authorizing recovery of double the amount of any usurious interest from a national bank precluded the application of state law requiring the forfeiture by the bank of the entire obligation. But I do not think that either this case or the statute can be read to preclude state law remedies intended to allow prospective relief against violations of §85. After all, the effect of a ruling enjoining the resp from charging more than the interest allowed by Minnesota law would be only to deprive it prospectively of all of the usurious interest it might otherwise have charged, whereas judgments after the fact would result in recovery of double that amount.

3. Implications of Dismissal of the Bank as a Party.

In Section V of its Brief, the resp argues that the cause of action created by Minn. Stat. §48.185(7) is only against banks and savings banks engaged in the credit card business. It contends that upon the dismissal of the Bank from the action, the Minnesota courts lost subject matter jurisdiction of the suit and should have dismissed it. This is obviously a question of the construction of the Minnesota statute, and this Court must abide by the implicit construction given to the statute by the Minnesota Supreme Court. That court evinced no misgivings about the propriety under the statute of petrs' claims against resp and the credit bureau; in fact, in speaking of the state statute, that court said that it

applied "uniformly to all lending institutions within the state." (App. 168a)(emphasis added).

If the resp were unaffiliated with the Bank, then the dismissal of the Bank as a defendant might have removed the question of the effect of §85 from the case. The claim against the resp and the credit bureau was that they took part in a program of solicitation that induced Minnesota residents to enter into agreements on credit terms that violated Minnesota law. The defense to that charge, however, was that the Minnesota law was inapplicable because the credit terms were extended by a national bank subject to § 85 of the National Banking Act. Thus, even though the Bank was not a party to the suit, the question of the meaning and application of § 85 of the National Bank Act was an important element in the defense put on by the resp and the credit union.

4. The Application of § 85 to a State's Regulation of the Interest Charged by a Foreign National Bank on Loans Made in the State.

Section 85 of the National Bank Act subjects national banks to the interest rate regulations of the various states. The statute provides in part:

> "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located ..., except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

The language of § 85 appears to favor the resp's contention that because the Bank is located in Nebraska, it may charge the interest rate allowed by Nebraska law everywhere that it does business. But the petrs muster several strong arguments in favor of their contention that the interest the Bank may charge on the loans it makes in Minnesota is limited by Minnesota law.

The petrs point out that this Court has departed from the plain language of § 85 in the past when such a course was necessary to effectuate the purpose of the statute. In Tiffany v. Bank of Missouri, 85 U.S. (18 Wall.) 409 (1873), the case arose out of a claim of usury against a national bank located in Missouri. Missouri law permitted general lenders to charge 10% interest, but limited state banks to 8%. The language of the second clause of § 85, quoted supra, appears to apply interest rate limits on state banks to national banks whenever the limit for state banks is "different" from the general limit. In upholding the right of the national bank to charge 9%, the Court construed § 85 to allow the national bank to charge the higher of the rate allowed generally to lenders by the law of the state or the rate allowed to banks organized under state law (that is, the Court substituted "higher" for "different" in § 85). The Court based its holding explicitly on the legislative purpose in enacting § 85.

> "It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to given them a firm footing in the different States where they might be

> located. It was expected they would come into competition with State banks, and it was intended to given them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation."

85 U.S. (18 Wall.) at 412.

More recently, the Court has recognized that when dealing with a statute that was enacted originally to govern a banking system with a structure and practices quite different from the present system, congressional purpose must inform the Court's application of the statute to transactions and problems never contemplated by the Congress. In Citizens and Southern National Bank v. Bougas, 434 U.S. 35 (1977), the Court considered the proper application of § 94 of the National Bank Act to suits against national banks with branches in more than one county. Section 94 provides that a national bank may be sued in any state, county, or municipal court in the county or city in which the bank is located. In holding that a national bank is "located" in every county in which it has a branch, the Court noted that "Congress did not contemplate today's national banking system, replete with branches, when it formulated the 1864 Act ...." Id. at 43. The aim of Congress in enacting the venue statute, according to the Court, was to prevent the untoward interruption of a national bank's business that might result from compelled production of bank records for distant litigation. "That concern largely evaporates when the venue of

a state-court suit coincides with the location of an authorized branch. It is also diminished by improvements in data processing and transportation." Id. at 44 (footnotes omitted).

The problem addressed by Congress in § 85 was competition between state and national banks within a given state. As the Court's opinion in Tiffany makes clear, the concern was that state legislators would favor state banks or other lending institutions at the expense of national banks. The intent of Congress to forestall such favoritism through the provisions of § 85 has been remarked frequently by this Court. E.g., Daggs v. Phoenix National Bank, 177 U.S. 549 (1900) ("The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it.").

The petrs suggest that when Congress enacted what is now § 85, it never considered that national banks located in one state would make loans in other states. In considering the application of the venue statute of the National Bank Act, 12 U.S.C. § 94, after the advent of branch banking, this Court made much the same observation. Citizens & Southern National Bank v. Bougas, 434 U.S. 35, 42-43 (1977)("There can be little question ... that at the time the 1864 Act was passed, the activities of a national bank were restricted to one particular location.") In view of this assumption and of the purpose of the statute, it is difficult to conclude that § 85 should be read to fix the interest rate limit of a national bank's home state as the governing limit for that bank wherever it does

business. In fact, it seems most consistent with the purpose of § 85 to construe it as adopting the Minnesota law as the applicable interest rate limit for national bank business done in Minnesota. This ensures competitive equality between the national banks and the state banks in each state in which the national bank does business, including the state in which it is organized. This construction does not interfere with the purposes for which the national banks were created, nor does it tend to impair or destroy their efficiency as federal agencies. First National Bank in St. Louis v. Missouri, 263 U.S. 656 (1923). This construction can be reconciled with the language of § 85 by reasoning that just as a national bank is "located" in each county in which it has a branch, for purposes of the venue statute, see Citizens & Southern Nat. Bank v. Bougas, supra, it is "located" in each state in which it makes loans for purposes of applying the § 85 rules on the allowable rate of interest.

Section 85 does provide for an interest rate ceiling of 7% for national banks operating in states where no rate is fixed by state law. But when it enacted §85, Congress rejected the suggestion of several of its members that there should be a uniform national rate of interest for national banks. This seems to me to supply additional evidence that §85 is meant to secure the evenhanded application of state law and not interstate uniformity in the interest rates allowed to national banks.

The Iowa Supreme Court recently decided that First of

Omaha's credit card program is subject to the Iowa law limiting interest on credit cards to 15%, rather than to the Nebraska law allowing 18%. It reasoned that the purpose of § 85, intrastate competitive equality among state lenders and banking institutions, would not be furthered by a construction of § 85 that allowed out-of-state national banks to compete on more advantageous terms than any in-state lender. It rejected the Fisher rationale, see next paragraph infra, on the ground that under the principle adopted in that case, "national bank lenders located outside Iowa would not only have 'most favored status' in Iowa but rights greater than the most favored lender in the state." Iowa v. First of Omaha Service Corp., 269 N.W.2d 409 (Sept. 1, 1978).

The CA 7 and CA 8 have held that the law of the state where the national bank is located governs the interest rate it may charge, unless the law of the state where the loan is made allows its banks to charge a higher interest rate. In Fisher v. First National Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), cert. denied, 429 U.S. 1062 (1977), an Iowa credit card customer sued the Chicago bank to recover allegedly usurious interest charges on his credit card account. Illinois law allowed an 18% per annum interest charge on such accounts. Under Iowa law, loans under $1,000 could carry annual interest of 18%, but Iowa state banks were limited to 12% per annum. The CA 7 noted that under Tiffany, supra, national banks because of their "most favored lender" status were entitled under Iowa law to charge 18% for loans under $1,000. The CA 7

could have stopped here, with the observation that the applicable interest limits of Illinois and Iowa law were identical. But it declined to put its holding on that ground. Instead, it held that the law of the state where the Chicago bank was located, Illinois, governed the interest that the bank could charge its Iowa customers, unless Iowa allowed a higher rate of interest to its own state banks. Since Iowa allowed its state banks only 12%, Illinois law governed.

In Fisher v. First National Bank of Omaha, 548 F.2d 255 (8th Cir. 1977), the CA 8 adopted the conclusion of the CA 7, supra, in a case in which once again the interest rates allowed by the two states were the same.

The DC in Fisher v. First National Bank of Chicago, supra, held that § 85 required the application of the interest rate law of the state where the loan was made. See 538 F.2d at 1290. In Meadow Brook National Bank v. Recile, 302 F.Supp. 62 (E.D.La. 1969), the DC held that §85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located, and not as to loans made by the bank in other states. This latter holding approaches if it does not adopt the theory of petr bank's original complaint in the present case.

The Alden's, Inc. cases did not deal with national banks, and raised no questions about the construction of § 85 of the National Bank Act. 552 F.2d 745 (7th Cir.), cert. denied, 98 S. Ct. 236 (1977); 524 F.2d 38 (3d Cir. 1975), cert. denied, 425 U.S. 943 (1976).

5. Does Application of Minn. Stat. § 48.185 to National Banks Deny Them Most Favored Lender Status Under Minnesota Law?

Even if Minnesota law on interest rate limits applies under § 85 to the Bank's operations in Minnesota, the resp questions whether Minn. Stat. § 48.185 can be applied to the credit card business of the Bank or any other national bank located or doing business in Minnesota. Under Tiffany, supra, national banks are allowed to charge the interest rate allowed generally to lenders by state law, and are not bound by a lower interest rate set for state banks. By its terms, § 48.185 appears to apply only to bank credit card accounts. To the extent that other financial institutions might enter the credit card business, and charge a higher interest rate, national banks would be denied most favored lender status.

The petr does not argue that this has occurred or is likely to occur. Any such argument would be difficult to sustain in view of the statement of the Minnesota Supreme Court that the laws of the state, including presumably § 48.185, apply "uniformly to all lending institutions within the state."

The resp does contend that Minnesota cannot undercut the most favored lender status of national banks by treating credit card accounts as different from other small loans. It points out that the law of Minnesota allows interest charges on small loans as high or higher than the Bank charges on its credit card accounts. Minn. Stat. § 56.13. It concludes that national banks, as most favored lenders, are entitled to charge the higher rate allowed for small loans.

The state district court held that national banks are

subject to non-discriminatory state law classifications of types of loans. It relied chiefly on 12 C.F.R. § 7.7310, a regulation of the Comptroller of the Currency that details the most favored lender status of national banks. Section 7.7310 provides in part:

> "(a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate."

The District Court concluded that the state law had marked credit card accounts as a separate "class of loans." National banks along with all other lenders in the state are subject to the limitations on interest established for that class of loans. Because the state law did not discriminate among classes of lenders, the national banks had no complaint under the most favored lender doctrine.

The Minnesota Supreme Court indicated that it would have adopted the analysis of the district court, as consistent with the history and purpose of § 85. But because it felt constrained by the Fisher cases to hold that the Bank was entitled to charge the rates of interest allowed under Nebraska law, it did not reach the question of which of the two Minnesota statutes should apply to the credit card business of national banks. Petn for Cert., at A-41 to A-44.

I think that the state district court decided this

question correctly. The purpose of § 85 is to maintain competitive equality of national banks with state lending institutions. If a state legislature identifies various classifications of loans, and establishes different interest rate ceilings for the different classifications, there is no necessary inconsistency with the purpose of § 85. The only problem that could arise would occur if the state's classification of types of loans contained an implicit classification of types of lenders. For example, if Minn. Stat. §48.185 applied only to banks, then national banks would be at a competitive disadvantage with other institutions in the market for credit card business. Or if consumers regarded credit card accounts and small consumer loans as essentially interchangeable products, then restricting credit card issuers (banks) to lower interest rates than lending institutions that make small consumer loans would place national banks at a competitive disadvantage in this single market for consumer credit. For another example, see Northway Lanes v. Hackley Union National Bank & Trust, 464 F.2d 855, 863 (6th Cir. 1972), where the court held that because state savings and loan associations were allowed to participate in the industrial real estate loan market, national banks making such loans were entitled to charge the rate of interest allowed to the SLA's on such loans. Where, however, the classifications of types of loans coincide fairly well with natural economic divisions in the "loan market," and the regulations limiting interest charged on each class of loans apply to all lenders making that

type of loan, national banks are not put at a competitive disadvantage by being subjected to those regulations. The continuing authority of the states to make regulations governing the interest chargeable by all lenders on particular classes of loans is recognized in 12 C.F.R. § 7.7310, quoted supra.

In the present case, it would be difficult to conclude that by establishing credit card accounts as a separate classification of loans, the Minnesota legislature has put national banks at a competitive disadvantage in a single larger market of which credit card "loans" are only a part. Judging from personal experience, I would say that a great many credit card users regard a credit card account as a quite different "product" than a small loan. Absent some showing by the resp that bank credit card accounts and small loans compete to fill the same demand for loans, I would conclude that the classification of loans embodied in Minn. Stat. § 48.185 does not deny national banks most favored lender status.

In their reply briefs, petrs point out that in contrast to the open-ended loans made on resp's credit card accounts, Minnesota's small loan law calls for closed-ended loans of a definite term. By not complying with the requirements of the state law as to conditions and limitations on loans under the small loan act, the petr's argue, the resp has disqualified itself from claiming the right to charge the higher interest rate allowed on small loans. I have some doubt about the strength of this argument, since there are some

indications that national banks need comply only with the state law "material to the determination of the interest rate." 12 C.F.R. §7.7310, supra. But the differences between credit card accounts and small loans that are noted by the petrs do support the conclusion that the state legislature acted consistently with § 85 when it marked the two types of transactions as different and subject to different interest rate limits.

77-1258 Minnesota v. First of Omaha Argued 10/31/78
77-1265 Marquette Nat Bk of Minn. v. First of Omaha

Petrs are the consolidated cases and Marquette Bk of Minn. (Minn. Bk) & State of Minn.

Respts are bank & bank H/Co headquartered in Nebraska (Neb. Bk)

x x x

1. Juris (timeliness). For reasons stated in Harry dissent from denial of cert., we have juris. Under Minn. law, judg. was not entered until resolution of pet. for rehearing.

2. Merits (see my notes on Bench Memo)

Allyn (Retire) - Sol Gen of Minn.

Under decision of Minn S/Ct, a Nat. Bk in Nel. could ~~organize~~ organize a credit card sub. and do bus in any other state ~~R~~ ~~choose Nat. rates from~~ free of its req. of rates.

Troyer (also for Peter - rep. Marquette Bk) 585 is silent as to inter-state ~~relations~~.

P.S. relies on one of Amicus briefs as supporting view that a nat. bank can be located only in one state. ~~Peter~~ (Then is Amicus Br. on behalf of State Bank Supervisors)

See this Brief

~~Peter~~.

Book (Resp)

The Service Corp in Minn. does not pay the credit charge bills. These are mailed to Neb for payment there.

Relies on Tiffany – tho not a square precedent.

Plain text + meaning of 85 applies to every loan (or credit) made by a Nat. Bk.

The Credit Instructor's practice is consistent with Minn. s/ct

P.S. observed that plain language applies only to St. in which Bk does business.

This case applies to all interstate loans – not just credit cards – including mtg. loans.

The Resp. is a service corp. It is not a branch bank & does no banking business in Minn. It solicits applications for credit cards, but credit is extended only in Neb. No banking business is done in Minn.

Credit is extended in Omaha when & only when the bank there pays the merchant who accepted the charge by card.

Affirm - 8-0
(I am tentative)

77-1258 Minnesota v. First of Omaha Conf. 11/3/78

The Chief Justice Affirm

Only the follow-up - collection is left to Minn - except advertising & ~~E~~ ministerial functions.

§85 controls. ~~The~~ Nothing to argument that statute only applies to single states.

CA 7 & 8 opinions are persuasive

Bork is right.

We have juris

Mr. Justice Brennan Affirm

Bork is right.

Brief of ~~1st~~ First Nat Bk of Chicago is good

Mr. Justice Stewart Affirm

Mr. Justice White Affirm

Persuaded by oral argument

Mr. Justice Marshall Affirm

Mr. Justice Blackmun Affirm

Timely

Mr. Justice Powell Affirm (quite tentative)

We have juris. Under Minn. law judg not entered until resolution of plt. for rehearing Service Co., tho its Hq. was in Neb., was authorized to do bus. in Minn. It made agts with merchants & banks there.

The credit card forms were accepted by Minn. merchants, sent to their Minn banks for credit (not sure when credit is given), & Minn. Bk then collects from Neb Bk.

§85 of Act – Nat. Bk may charge interest "at rate allowed by laws of state --- where Bk is located". Plain language difficult to avoid & may control.

Mr. Justice Rehnquist Reverse

Minn. could subject these transactions to its usury laws.

§85 was intended to prevent a nat. bank being discriminated against. Here it would be used to give it an advantage.

Mr. Justice Stevens Affirm

Unless the location of bank controls, there would be confusion when card holders move from state to state.

We have juris.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 6, 1978

Re: Nos. 77-1258 and 77-1265, Minnesota
v. First of Omaha Service Corp.

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

December 7, 1978

No. 77-1258 Minnesota v. First of Omaha
No. 77-1265 Marquette v. First of Ohama

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Confernce

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 7, 1978

Re: Nos. 77-1258 & 77-1265 -

State of Minnesota v. First of Omaha Service Corporation, et al;

Marquette National Bank of Minneapolis v. First of Omaha Service Corporation, et al.

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 7, 1978

Re: No. 77-1258 - Minnesota v. First of Omaha
No. 77-1265 - Marquette National Bank v. First of Omaha

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 7, 1978

Re: Nos. 77-1258 and 77-1265, Minnesota
v. First of Omaha Service Corp., et al.

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 7, 1978

Re: 77-1258 - Minnesota v. First of Omaha Svs. Corp.
77-1265 - Marquette Nat'l Bank of Minneapolis v. First of Omaha Svs. Corp.

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 11, 1978

Re: Nos. 77-1258 and 77-1265 Minnesota v. First of Omaha Service Corp. et al.

Dear Bill:

I had the most doubts about this case at Conference, I think, but you have written a good opinion and I am glad to join it. My only question is whether you really want to set out, as you do in the text and footnotes on pages 15-16, the cities at which bank notes could be redeemed. As you will note, they include not only larger metropolitan areas of the time, but Albany and Leavenworth; the footnote indicates that later Charleston and Richmond were added. Yet not a single city in New Jersey is included! Incidentally, Milwaukie, as you have spelled it, is a suburb of Portland, Oregon; if the Statutes at Large do indeed spell the name that way, I suppose you have no choice, but I would guess that they intended my native city of Milwaukee, Wisconsin.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 14, 1978

RE: (77-1265 - Marquette National Bank of
(Minneapolis v. First of Omaha
(Service Corporation
(
(77-1258 - State of Minnesota v. First
(of Omaha Service Corporation

Dear Bill:

I join.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

P.S. If any other cases "emerge," I suggest that we schedule a sitting for Monday to get them down. More later.

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
	11/13/78							
Join WJB 12/14/78	~~Join~~ 1st draft 12/6/78	Join w JB 12/6/78	Join w JB 12/7/78	Join WJB 12/7/78	Join w JB 12/8/78	Join w JB 12/7/78		Join WJB 12/7/78
	2nd draft 12/14/78							
				77-1258 Minnesota v. First of Omaha				

MAY 11 1978

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 77-1265

Submitted ....., *19*... *Announced* ....., *19*...

MARQUETTE NATL. BANK OF MINNEAPOLIS

vs.

FIRST OF OMAHA SERVICE CORP.

Relisted for Mr. Justice Blackmun.

Relist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

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