University of Arkansas at Little Rock Law Review

Volume 13 | Issue 4 Article 6

1990

Banking Law—Branch Banks—Arkansas Branch Banking Laws are Preempted by the Emergency Acquisition Provision of FIRREA. Arkansas State Bank Commissioner v. Resolution Trust Corp., 911 F.2d 161 (8th Cir. 1990)

S. Scott Luton

BANKING LAW—BRANCH BANKS—ARKANSAS BRANCH BANKING LAWS ARE PREEMPTED BY THE EMERGENCY ACQUISITION PROVISION OF FIRREA. *Arkansas State Bank Commissioner v. Resolution Trust Corp.*, 911 F.2d 161 (8th Cir. 1990).

On February 13, 1990, the Resolution Trust Corporation (RTC) held an instructional bid meeting.[1] At this meeting the RTC informed prospective bidders about the sale of two failed Arkansas thrift institutions.[2] An RTC representative conveyed that the RTC's interpretation of 12 U.S.C.A. § 1823(k),[3] a provision within the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),[4] authorized the RTC to override Arkansas branch banking restrictions with regard to a bank acquiring a failed or failing thrift and operating its offices as bank branches.[5]

---

1. Arkansas State Bank Comm'r v. Resolution Trust Corp., 911 F.2d 161, 162 (8th Cir. 1990). The RTC is a newly created governmental agency entrusted with the duty of disposing of failed or failing thrifts and managing these thrifts in the interim before sale. 12 U.S.C.A. § 1441a(b) (West 1989).

2. Arkansas State Bank Comm'r v. Resolution Trust Corp., 745 F. Supp. 550, 551 (E.D. Ark.), *rev'd*, 911 F.2d 161 (8th Cir. 1990).

3. The emergency thrift acquisition provision of FIRREA originated in section 408(K) of the National Housing Act and has been transferred to the Federal Deposit Insurance Act as section 13(K). For the wording of the provision, see *infra* text accompanying note 84. 12 U.S.C.A. § 1823(k) (West 1989). The branching subsection provides:

> If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association eligible for assistance and a bank or bank holding company, a savings association may retain and operate any existing branch or branches or any other existing facilities. If the savings association continues to exist as a separate entity, it may establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the same State.

12 U.S.C.A. § 1823(k)(4)(A) (West 1989).

4. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at 12 U.S.C.A. § 1811 (West 1989)).

5. 911 F.2d at 162. Arkansas state branching restrictions will gradually be phased out until December 31, 1998, when statewide branching is permitted. ARK. CODE ANN. § 23-32-1202 (Supp. 1989). The section provides:

> (b) (1) A bank may establish full service branches and customer-bank communication terminals anywhere within the county in which the establishing bank's principal banking office is located;
>
> (2) A bank which relocates its principal banking office may continue to use its former principal banking office location as a full service branch and customer-bank communication terminal so long as the use as a banking facility is uninterrupted;

Following this initial meeting, on February 15, 1990, the RTC notified the Arkansas State Bank Commissioner (Commissioner)[6] of its intent to file a declaratory action that would allow it to sell the two thrift institutions to state[7] or nationally[8] chartered banks in Arkansas.[9] However, on February 21, 1990, the RTC instead advised the Commissioner that another bid meeting would be held on February 27, 1990.[10]

On February 23, 1990, after being advised of the RTC action, the Commissioner filed an action in federal district court requesting a preliminary injunction to enjoin the threatened preemption of Arkansas branch banking law.[11] The Commissioner also filed a motion for emergency declaratory relief and for a temporary restraining order.[12] The motion for a temporary restraining order was dismissed without prejudice, but the court allowed the Commissioner the right to renew the claim.[13] After the initial ruling, the RTC assured the court that if it received any bids conditioned upon the preemption of Arkansas branch banking law, it would notify the Commissioner within forty-

---

(3) In addition to the above subdivisions, after December 31, 1993, a bank may locate one (1) or more full service branches and customer-bank communication terminals anywhere within any counties contiguous to the county in which its principal banking office is located;

(4) After December 31, 1998, a bank may locate one (1) or more full service branches and customer-bank communication terminals anywhere in this state.

Id. Arkansas branching restrictions also apply to nationally chartered banks located in the state pursuant to federal law which provides:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question. . . .

12 U.S.C. § 36(c)(1988).

6. The Bank Commissioner is appointed by the Governor, subject to Senate approval, and is charged with the execution of Arkansas banking laws. ARK. CODE ANN. §§ 23-31-204 to -205 (1987).

7. The State Banking Board has the responsibility of ruling upon an application for a state bank charter after such application has been filed with the Bank Commissioner. If the Board approves the application, the Commissioner, if he also approves, may issue the charter. ARK. CODE ANN. § 23-31-305 (1987).

8. With regard to national bank charters, the Comptroller of the Currency has the responsibility of ruling upon the applications for such charters. 12 U.S.C.A. § 1814 (West 1989).

9. 745 F. Supp. at 552.

10. *Id.*

11. 911 F.2d at 162.

12. *Id.*

13. 745 F. Supp. at 552.

eight business hours.[14] Relying on this assurance, the Commissioner withdrew the request for a preliminary injunction.[15] At that time, the Arkansas Independent Bankers Association (Independent Bankers) successfully intervened, and the RTC cancelled its scheduled February 27th meeting.[16]

On April 19, 1990, the RTC published notice in the Federal Register of a proposed rule that would authorize a state or nationally chartered bank to acquire and convert failed or failing thrift offices into bank branches.[17] The proposed rule was adopted by the RTC Board of Directors and became effective as of June 1, 1990.[18]

The RTC held another bid meeting on June 8, 1990, to inform prospective bidders about the sale of failed or failing thrift institutions.[19] One of the thrift institutions in question was Independence Federal Bank, F.S.B. (Independence).[20]

Twenty bids were submitted for Independence and its branches, but only the bid of Worthen Bank & Trust Company, N.A. (Worthen) included the entity as a whole.[21] The Worthen bid contained a $1,500,001 premium for acquiring Independence and all of its twenty branch offices.[22] However, it was expressly conditioned upon a preemption of Arkansas branch banking law.[23] In accordance with the district court's order, the RTC notified the Commissioner on June 26, 1990, of its intent to preempt Arkansas branch banking law and to allow Worthen to retain and operate the Independence offices as branches of

---

14. *Id.*

15. *Id.*

16. *Id.*

17. 911 F.2d at 163. The regulation provides:

> (a)(2) The regulations of this section provide for the retention and operation by acquiring banks of the offices of savings associations acquired pursuant to Section 13(k).
>
> (b) Each existing office or other existing facility of each savings association that is merged or consolidated with, or the assets and liabilities of which are transferred to an insured bank pursuant to Section 13(k) may be retained by the insured bank and operated by the bank as a branch or other facility.

55 Fed. Reg. 22,323 (1990) (to be codified at 12 C.F.R. § 1611.1).

18. 911 F.2d at 163.

19. 745 F. Supp. at 552.

20. *Id.* Independence operated twenty branch facilities located throughout fifteen Arkansas counties. 911 F.2d at 163.

21. 911 F.2d at 163. Worthen Bank & Trust Company, N.A. is a nationally chartered bank with its principal office in Little Rock, Arkansas. As of June 30, 1990, it had total assets of $619,481,000. Worthen is held by Worthen Banking Corporation which is a multi-bank bank holding company. REPORT OF THE BANK COMMISSIONER OF ARKANSAS (1990).

22. 911 F.2d at 163.

23. *Id.* at 162.

Worthen.[24]

Upon receiving this notification, all parties involved filed successive motions. First, the Commissioner and Independent Bankers each filed motions for a temporary restraining order and for a preliminary injunction.[25] Worthen moved to intervene, filed a response to the Commissioner's and Independent Bankers' motions, and requested declaratory relief.[26] The RTC, as well as the Federal Deposit Insurance Corporation (FDIC)[27] and the Comptroller of the Currency (Comptroller),[28] filed motions to dismiss the complaints of the Commissioner and Independent Bankers.[29]

The district court concluded that the RTC regulation that would allow the preemption of state law was null and void and granted the Commissioner's and Independent Bankers' motions for preliminary injunction.[30] The court commented that 12 U.S.C.A. § 1823(k)(4)[31] states nothing about the operation of thrift branches as bank branches, but merely authorizes the acquisition of failed or failing thrifts by an acquiring bank or bank holding company.[32] Although the court recognized the broad authority of federal agencies, it stated that "in this case [the] RTC, in issuing its Override Rule, clearly overstepped its authority pursuant to the language of the statute under which it was acting. . . . [T]he RTC cannot by regulation amend FIRREA to add provisions that are not there. . . ."[33]

The United States Court of Appeals for the Eighth Circuit reversed the district court's ruling.[34] The court held the RTC interpretation of 12 U.S.C.A. § 1823(k)(4) permissible, and thus provided the statutory authority to promulgate the overriding regulation.[35] The court also determined that the McFadden Act, which is the principal source

---

24. 745 F. Supp. at 552.

25. 911 F.2d at 164.

26. 745 F. Supp. at 552.

27. The FDIC was established by Congress in 1933. Under FIRREA, it oversees the operations of the RTC and is charged with the responsibility of federally insuring qualified depository institutions. Each individual depositor is presently insured up to $100,000. 12 U.S.C.A. § 1811-1831 (West 1989).

28. *See supra* note 8.

29. 911 F.2d at 164.

30. *Id.*

31. *See supra* note 3.

32. 911 F.2d at 164.

33. *Id.*

34. *Id.* at 175.

35. *Id.* at 172.

of authorization for national bank branching, did not limit the statute under which the regulation was issued.[36] *Arkansas State Bank Commissioner v. Resolution Trust Corp.*, 911 F.2d 161 (8th Cir. 1990).

The controversial nature of the ability of a commercial bank to expand its deposit base through the concept of branch banking arose relatively recently in the history of the American banking system.[37] Throughout the nineteenth century, the propriety of branch banking was not a prominent issue.[38] America possessed a rural and localized economy, and geographic expansion of the small number of existing banks was limited.[39] As a result, unit banking predominated as the almost exclusive form of bank organization.[40]

At the beginning of the twentieth century, with the nation entering the modern era of industrialization and with a more mobile and increasingly affluent populace, branch banking became more important.[41] Many leaders in government and the business community advocated a bill that would provide needed banking services to rural towns.[42] This developing environment provided a rich opportunity for bank expansion by means of branching, but this movement was thwarted with the passage of the Gold Standard Act of 1900.[43] In the Act Congress reduced capital requirements for nationally chartered banks in rural communities.[44] As a result, hundreds of new banks were created which, in effect, "undermined the movement for branch banking before it could gain momentum."[45]

The years following the passage of the Gold Standard Act exemplified the growing tension between nationally chartered and state

---

36. *Id.* at 174. The McFadden Act provides that nationally chartered bank branches may be located within the state where the bank's principal office is located to the same extent that state chartered banks are authorized to locate branches. 12 U.S.C. § 36(c) (1988).

37. E. SYMONS & J. WHITE, BANKING LAW 97 (2d ed. 1984).

38. *Id.*

39. A. POLLARD, J. PASSAIC, JR., K. ELLIS & J. DALY, BANKING LAW IN THE UNITED STATES 106 (1988).

40. *Id.* Unit banking involves the operation of one bank, possibly with branches, but all in the same locality. *Id.*

41. Glidden, *Legal Constraints on Bank Expansion: Can They Be Removed Without Destroying the Dual Banking System?* 1980 LAW F. 369, 376 (1980).

42. *Id.*

43. *Id. See* Act of March 14, 1900, ch. 41, 31 Stat. 45 (1900).

44. Glidden, *supra* note 41, at 376. The Act contained a provision which reduced the capital requirements for a nationally chartered bank to $25,000 if the bank was established in a community with a population of 3000 or less. Glidden, *supra* note 41, at 376.

45. Glidden, *supra* note 41, at 376.

chartered banks.[46] Many state legislatures authorized state chartered banks to pursue some form of branching, while nationally chartered banks were confined to the restrictive concept of unit banking.[47] The practical result of this marked advantage in favor of state chartered banks was the conversion of national banks to state banks and the rapid departure of banks from the newly created Federal Reserve System.[48]

This mounting tension came to a head in 1924 when the United States Supreme Court decided *First National Bank v. Missouri*.[49] The Court considered whether a nationally chartered bank has an implied power to establish branches pursuant to the general powers language of the National Bank Act.[50] The Court determined that the language of the Act vests national banking associations with "all such incidental powers as shall be necessary to carry on the business of banking."[51] The Court inferred from various provisions of the Act that a bank has but one place of business and does not have the authority to establish branches.[52] This decision left nationally chartered banks at a competitive disadvantage, faced with the prospect of being overshadowed by their state counterparts.[53]

The congressional response to this perplexing problem was the McFadden Act of 1927.[54] The Act permitted national and state banks that were members of the Federal Reserve System to open branch offices but only within the cities in which their principal offices were maintained and only when this did not run afoul of state law.[55] A common

---

46. Comment, *Circumventing the McFadden Act: The Comptroller of the Currency's Efforts to Broaden the Branching Capabilities of National Banks*, 72 KY. L.J. 707, 713 (1984).

47. *Id.* at 712. The Comptroller argued in his 1923 annual report that if state banks continue to practice unlimited branch banking, it would mean the eventual destruction of the national banking system. *See* H.R. DOC. NO. 90, 68th Cong., 1st Sess. 6 (1924).

48. Glidden, *supra* note 41, at 377. National banks are required by law to be members of the Federal Reserve System. 12 U.S.C. § 282 (1988). However, state banks may elect not to be members. 12 U.S.C. § 321 (1988).

49. 263 U.S. 640 (1924).

50. *Id.* at 656. The National Currency Act, as amended by the National Bank Act in 1864, created a national currency and the Office of the Comptroller of the Currency within the Treasury Department. Ch. 106, 13 Stat. 99 (1864). The Act also created a national banking system primarily designed to finance operations of the Union Army in the American Civil War. *See* Comment, *Expansion of National Bank Powers: Regulatory and Judicial Precedent Under the National Bank Act, Glass-Steagall Act, and Bank Holding Company Act*, 36 SW. L.J. 765, 767-68 (1982).

51. 12 U.S.C. § 24 (1988).

52. 263 U.S. at 659.

53. Comment, *supra* note 46, at 712.

54. Glidden, *supra* note 41, at 378. *See supra* note 5.

55. Glidden, *supra* note 41, at 378.

misconception surrounding the passage of the Act is that it was the origin of the doctrine of competitive equality.[56] Most state banks were not members of the Federal Reserve System and thus were not affected by the limitations imposed by the Act.[57] This allowed some state chatered banks to maintain a competitive edge because they could take advantage of less restrictive state branching laws.[58]

A few years later, federal branching law was made even more definitive with the passage of the Banking Act of 1933, more commonly referred to as the Glass-Steagall Act.[59] The Act allows nationally chartered banks to establish branches to the same extent as their state counterparts, limited only by applicable state law.[60] With this amendment to the McFadden Act, Congress took a positive step in establishing an equal basis upon which both national and state banks could compete.[61]

As amended in 1933, the McFadden Act has remained substantially intact and is considered the primary source of authority for federal bank branching.[62] However, in the early 1960s many attempts were made to circumvent the Act, primarily by the Office of the Comptroller of the Currency.[63] In recent years, the Comptroller has asserted

---

56. Glidden, *supra* note 41, at 378. The doctrine of competitive equality envisions a dual banking system that puts national and state banks on an equal footing when competing in a banking market. Glidden, *supra* note 41, at 378.

57. Glidden, *supra* note 41, at 378. The Act provided that a state could prohibit branching altogether. However, a state did not have the power to authorize state chartered banks that were members of the Federal Reserve System to branch beyond the city where their principal offices were located. Glidden, *supra* note 41, at 378.

58. Glidden, *supra* note 41, at 378.

59. Glidden, *supra* note 41, at 378. The Glass-Steagall Act included various provisions designed to separate investment and commercial banking and was passed to restore public confidence in the soundness of commercial banks by preventing banks from dealing in securities. Act of June 16, 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

60. Glidden, *supra* note 41, at 378. *See supra* note 5.

61. Glidden, *supra* note 41, at 378.

62. Comment, *supra* note 46, at 714. The bank holding company movement was an effective development in the circumvention of state branching law and interstate branching law. Glidden, *supra* note 41, at 380. The Bank Holding Company Act relieved pressure for adoption of interstate branching authority and this form of organization is still a useful tool to bypass intrastate restrictions. Glidden, *supra* note 41, at 380.

63. Comment, *supra* note 46, at 714-15. On November 16, 1961, Comptroller Saxon took office and publicly declared a policy directly in conflict with the McFadden Act. Comment, *supra* note 46, at 714-15. In 1966 the Supreme Court reaffirmed the doctrine of competitive equality and overruled the Comptroller's attempt to certify a national bank branch in violation of state and therefore federal law. First Nat'l Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966). In 1969 the Comptroller authorized nationally chartered banks to use armored car messenger services. First Nat'l Bank in Plant City v. Dickinson, 396 U.S. 122 (1969). Under Florida

a position affording national or state member banks the authority to create branches regardless of applicable state law.[64]

Arkansas defined its branching policy in 1973 when the Arkansas Legislature enacted Act 228, authorizing the establishment of branch banks in the county in which a bank's main office is located.[65] The Act provided that a city or town in which the branch was to be established must have a population of 250 and must not already have a legally chartered bank existing in the city or town.[66] The Act provides some insight into the prevailing attitude toward bank branching in Arkansas at the time. It contains a statement of intended policy favoring applications for a new banking facility in the same city or town over applications for the establishment of a branch.[67]

A decade later, the legislature amended the Act to provide that any bank may also establish a full service branch in any unincorporated area within six miles of the city limits where the bank's principal office is located.[68] A 1985 amendment allows branching outside the county in which the bank's principal office is located if the building to be utilized was previously used as a bank facility and had been closed by the State Bank Commissioner or the Comptroller of the Currency.[69]

In 1987 the Fifth Circuit Court of Appeals decided *Department of Banking & Consumer Finance v. Clarke*,[70] more popularly known as the *Deposit Guaranty* decision.[71] The court held that if state chartered thrifts are "engaged in the banking business" they would be considered state banks within the meaning of the McFadden Act.[72] This decision allowed national banks to branch to the extent of "more liberal thrift

---

law, which provided for unit banking, this use of armored cars was not permitted. The Supreme Court struck down the Comptroller's attempt to technically finesse his way around the McFadden Act and reasserted the doctrine of competitive equality. *Id. See* Note, *Interstate Banking Restrictions under the McFadden Act*, 72 VA. L. REV. 1119, 1128 (1986).

64. Comment, *supra* note 46, at 714.

65. 1973 Ark. Acts 755, § 2 (codified as amended at ARK. CODE ANN. § 23-32-1202 (Supp. 1989)).

66. *Id.*

67. 1973 Ark. Acts 757, § 5 (codified as amended at ARK. CODE ANN. § 23-32-1205 (1987)).

68. 1983 Ark. Acts 357, § 1 (codified as amended at ARK. CODE ANN. § 23-32-1202 (Supp. 1989)).

69. 1985 Ark. Acts 191, § 1 (codified as amended at ARK. CODE ANN. § 23-32-1202 (Supp. 1989)).

70. 809 F.2d 266 (5th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

71. Pitts, *Interstate Banking and State Wide Branching in Arkansas: Act 12 of the 76th Arkansas General Assembly*, 11 U. ARK. LITTLE ROCK L.J. 457, 459 (1988-89).

72. 809 F.2d at 271. *See supra* note 5.

branching statutes" which usually allowed statewide branching.[73]

Many smaller community banks were concerned that national banks would be allowed to circumvent the Arkansas branch banking restrictions by relying upon the *Deposit Guaranty* decision.[74] In response to this concern, the Arkansas Legislature met in special session and implemented a gradual removal of all intrastate branch restrictions by enacting a provision immediately establishing unlimited county-wide branching.[75] Branching in any county contiguous to the county where the bank's principal office is located is authorized after December 31, 1993, and statewide branching is authorized after December 31, 1998.[76]

In *Arkansas State Bank Commissioner v. Resolution Trust Corp.*[77] the Eighth Circuit Court of Appeals addressed the issue of whether the Emergency Acquisitions provision of FIRREA provides authority for the RTC to issue a regulation overriding Arkansas state bank branching law and allowing a nationally or state chartered bank to acquire a failed or failing thrift and convert the thrift's offices into bank branches.[78] The court concluded that the RTC's interpretation of 12 U.S.C.A. § 1823(k)(4) rests on a premissible construction of the statute[79] and that Congress granted broad rulemaking authority to the RTC to carry out its duties.[80] Relying upon these two conclusions, the court upheld the regulation and ruled that FIRREA can serve as a source of federal branching authority as an alternative to the McFadden Act.[81]

In reaching its decision, the court relied upon *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[82] In *Chevron* the United States

---

73. Pitts, *supra* note 71, at 459 n.15.

74. Pitts, *supra* note 71, at 457.

75. Pitts, *supra* note 71, at 457. *See* 1988 Ark. Acts 12 (codified at ARK. CODE ANN. § 23-32-1202(b)(1) (Supp. 1989)).

76. ARK. CODE ANN. § 23-32-1202(b)(3)-(4) (Supp. 1989).

77. 911 F.2d 161 (8th Cir. 1990) (Judge Gibson wrote the opinion for the majority).

78. *Id.* at 162.

79. *Id.*

80. *Id.* at 168. The duties of the RTC are statutorily defined as requiring the corporation to proceed in a manner that "maximizes the net present value return from the sale or other disposition of institutions;. . . minimizes the impact of such transactions on local real estate and financial markets; [and] . . . minimizes the amount of any loss realized in the resolution of cases. . . ." 12 U.S.C.A. § 1441a(b)(3)(C) (West 1989).

81. 911 F.2d at 174.

82. 467 U.S. 837 (1984). *See* Luneburg, *Judicial Review of Agency Statutory Interpretation: An Introduction*, 2 ADMIN. L. J. 243 (1988).

Supreme Court concluded that when a court reviews a federal agency's interpretation of a federal statute administered by the agency, two considerations must be addressed: 1) whether the congressional intent of the statute in question is clear and unambiguous; and, if not, 2) whether the agency's interpretation of the statute is grounded upon a permissible construction.[83] The statute in question, 12 U.S.C.A. § 1823(k)(4)(A), provides:

> If a merger, consolidation, transfer, or acquisition under this subsection involves a savings association eligible for assistance and a bank or bank holding company, a *savings association* may retain and operate any existing branch or branches or any other existing facilities. If the savings association continues to exist as a separate entity, it may establish and operate new branches to the same extent as any savings association that is not affiliated with a bank holding company and the home office of which is located in the same State.[84]

The narrow issue of statutory interpretation concerned the meaning of the second use of the words "savings association."[85] The Independent Bankers argued that the statute is clear and unambiguous, and that the words "savings association" mean just that—a savings association.[86] According to the Independent Bankers, a bank or bank holding company does have the authority to acquire a savings association eligible for assistance, but does not have the authority to convert the acquired facilities into bank branches.[87] The Independent Bankers also argued that the statute only provides a savings association authority to retain and operate the offices of the sold thrift.[88]

The RTC contended that "savings association" means a pretransaction entity which refers to a thrift as it exists prior to merger, consolidation, transfer, or acquisition with or by an acquiring bank.[89] If not, RTC argued, the merger language preceding it in the statute would be meaningless.[90] The court concluded that Congress had not directly addressed the precise issue at hand and that the words "savings association" were capable of dual interpretation.[91] Therefore, the first

83. 467 U.S. at 842-43.
84. 12 U.S.C.A. § 1823(k)(4)(A) (West 1989).
85. 911 F.2d at 170.
86. *Id.* at 171.
87. *Id.*
88. *Id.*
89. *Id.* at 170.
90. *Id.* at 171.
91. *Id.* at 172. *See supra* note 83 and accompanying text. *See also* Independent Community

prong of the *Chevron* test was satisfied.[92]

The court then turned to the issue of whether the RTC's interpretation of the statute was grounded upon a permissible construction.[93] The RTC argued that it was given broad rulemaking authority by Congress.[94] It further maintained that this authority, combined with the express override language of subsection 1823(k)(1) which grants to the RTC the power to authorize acquisitions, "notwithstanding any provisions of State law" supports the view that its interpretation of the statute is permissible.[95] In opposition to this position, the Independent Bankers argued that the clause, "notwithstanding any provision of State law," is applicable to paragraph (k)(1), which authorizes the acquisition of a failed or failing thrift, but is not applicable to paragraph (k)(4), which is the branching provision.[96]

The court relied upon the standard established in *Mourning v. Family Publications Service, Inc.*[97] in which the Supreme Court held that "the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation."[98] Applying this standard, the Eighth Circuit concluded that when considering the broad grant of authority given to the RTC, coupled with the introductory language of the subsection, the RTC could have permissibly read subsection 1823(k) as providing the needed legislative authority to issue the overriding regulation.[99]

The court noted that federal preemption is the underlying issue that must be affirmatively satisfied to uphold the validity of the RTC override authority.[100] The Supreme Court dealt with this question de-

---

Bankers of N.M. v. Resolution Trust Corp., No. 1990 WL 119633 (No. CIV. 90-532 SC D.N.M. June 15, 1990) (court concluded that the second usage of the word "savings association" was ambiguous at best and held that the RTC reached a permissible construction of the statute); Colorado v. Resolution Trust Corp., 1990 WL 51191 (CIV. A. No. 90-Z-190 D. Colo. Feb. 14, 1990) (court stated that 12 U.S.C.A. § 1823 (k)(4)(A) is unambiguous and provides that a savings association, not a bank, may retain and operate any existing branch or branches or any other existing facilities). *But see* Colorado v. Resolution Trust Corp., 926 F.2d 931 (10th Cir. 1991) (court consolidated the Colorado and New Mexico federal district court cases, applied the *Chevron* test, and upheld the RTC regulation).

92. 911 F.2d at 171.
93. *Id.* at 166.
94. *Id.* at 168.
95. *Id.* at 169.
96. *Id.*
97. 411 U.S. 356 (1973).
98. *Id.* at 369.
99. 911 F.2d at 171.
100. *Id.* at 173.

finitively in *City of New York v. FCC*,[101] holding, "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulation or frustrates the purposes thereof."[102] Pursuant to this standard, the Eighth Circuit determined that because the RTC was operating within the sphere of its statutory authority, it may override state law that either conflicts with or frustrates the duties delegated to the RTC.[103]

In conclusion, the court considered whether the RTC regulation directly conflicted with the McFadden Act.[104] The Commissioner argued that the McFadden Act is the exclusive source for approving national bank branches and that the regulation conflicts with this well-established precedent.[105] The Comptroller argued that FIRREA constitutes additional and distinct authority for approving national bank branches.[106] In ruling upon this issue, the court stated that great deference should be given to the Comptroller of the Currency's interpretation of the National Bank Act.[107] It therefore determined that FIRREA exists as an independent source of federal branching authority and that the McFadden Act does not curtail the authority given in subsection 1823(k).[108]

Senior Circuit Judge Heaney dissented, basing his opinion on two substantive conclusions.[109] First, he determined that 12 U.S.C.A. § 1823(k) is not ambiguous and the RTC does not have the authority to rewrite the statute in order to promulgate regulations not authorized by the statute itself.[110] Judge Heaney concluded that because the statute is not ambiguous, the first prong of the *Chevron* test is not satisfied and, therefore, the majority misapplied the test.[111]

Additionally, Judge Heaney found that the principal source of law

---

101. 486 U.S. 57 (1988).

102. *Id.* at 64.

103. 911 F.2d at 173.

104. *Id.* at 174.

105. *Id.* at 173-74.

106. *Id.* at 174. The court weighed heavily the RTC's arguments that not only does subsection 1823(k) provide additional authority for national bank branching, but that subsection 1823(f)(4), which applies to acquisitions by out-of-state entities, is an additional source of branching authorization. *Id.*

107. *Id.* The McFadden Act of 1927 was an amendment to the National Bank Act. 12 U.S.C. § 36 (1988).

108. 911 F.2d at 174.

109. *Id.* at 175 (Heaney, J., dissenting).

110. *Id.*

111. *Id.* at 179.

concerning the branching of nationally chartered banks is the McFadden Act and he concluded that, until expressly repealed, this Act may not be circumvented.[112] The dissent further argued that the initial purpose of the Act was to promote "competitive equality" by enabling national banks to branch under the same restrictions as their state counterparts.[113] However, the present effect is to restrain national banks from intruding upon areas that were traditionally regulated by the states.[114] Judge Heaney determined that neither the legislative history of FIRREA nor the statute itself manifests an intent to amend the McFadden Act and that amendments by implication are disfavored.[115] He concluded, " 'This is a basic premise of our representative democracy; legislatures, not courts, amend and repeal statutes.' "[116]

Although much of the majority opinion is devoted to the narrow issue of statutory construction of FIRREA and the RTC's authority to override state branch banking law, the decision has a much broader and further reaching significance. One practical result of the court's decision is to diversify and enlarge the class of potential acquirers of failed or failing thrifts.[117] Pursuant to the RTC regulation, bank holding companies no longer possess the exclusive authority to purchase a thrift with facilities in multiple counties because now single unit commercial banks may also enter the bidding process.[118] This should mean more competitive bidding and should result in a lower cost to the American public who may nevertheless be required to fund an estimated five hundred billion dollar savings and loan bailout.[119]

---

112. *Id.* at 177. *See supra* note 5.

113. 911 F.2d at 176.

114. *Id.*

115. *Id.* at 177.

116. *Id.* (quoting Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988)).

117. K. SHAW, J. SIVON & M. JOHANNES, FIRREA: IMPLEMENTATION AND COMPLIANCE, para. 7.02[7](e) (1991) [hereinafter SHAW].

118. *Id.* A single unit commercial bank could not bid for thrift offices that were located outside of the county where the bank's principal office was located. This would have been in violation of state branch banking law. However, a bank holding company could bid for thrift offices in any county and then individually charter each office as a unit bank within the bank holding company. *Id.*

119. *See* Murphy & Meyer, *FIRREA and the S&L Bailout*, 19 COLO. LAW 2021 (1990). As of August 22, 1989, there were approximately 2930 thrifts holding total deposits of $960 billion with nominal assets reaching $1.34 trillion. In the first half of 1989 these thrifts posted an aggregate net loss of $7.2 billion. Almost 600 of the thrifts were insolvent when measured by generally accepted accounting principles. Glancz, *Thrift Industry Restructured: An Overview of FIRREA*, 36 FED. B. NEWS & J. 472 (1989).

An additional consideration is that although the RTC regulation in question is only concerned with the preemption of state law barring intrastate branching, FIRREA may be interpreted as providing a source of authority for interstate branching.[120] If this authority exists, it is subject to approval by the appropriate federal banking agency.[121] Ostensibly this would appear to be a substantial check on the RTC's authority. However, if the agency from which the approval is needed, particularly the Comptroller of the Currency, has voiced opposition to the branching restrictions, this check upon the scope of RTC authority becomes nonexistent. This extended authority could supplant interstate branching laws, namely the McFadden Act.[122] Within the regulation itself, the RTC noted it has no such intention of overriding restrictions placed upon interstate branching.[123] Nevertheless, once one takes a step down the slippery slope, it is increasingly difficult to stop.

Even though a state may have little or no access to direct bank expansion by out-of-state entities, such acquirers, via the RTC regulation, could still assemble a network of branches within the state by acquiring a failed or failing thrift.[124] In 1988 the Arkansas Legislature passed the Regional Reciprocal Banking Act giving the Commissioner the authority to rule upon an application of a regional bank holding company that wishes to acquire an Arkansas bank or bank holding company.[125] Allowing an out-of-state acquirer to buy a failed or failing

---

120. SHAW, *supra* note 117, at 7-11. Presently the McFadden Act does not provide the authority for a national banking association to establish branches across state lines. 12 U.S.C. § 36(c) (1988).

121. The statute provides, "[W]here otherwise required by law, transactions under this subsection must be approved by the appropriate Federal banking agency of every party thereto." 12 U.S.C.A. § 1823(k)(1)(A) (iii) (West 1989). The Office of the Comptroller of the Currency (OCC) is the federal banking agency that authorizes the branching capability of a national banking association. 12 U.S.C. § 36(c) (1988). By a letter which was submitted to the RTC by the Chief Counsel of the OCC, the Comptroller publicly took a position that the McFadden Act is not the exclusive source of federal branch authorization. 55 Fed. Reg. 22,323, 22,326 (1990).

122. *See supra* note 5. There is a possibility that the McFadden Act could be legislatively repealed. Treasury Secretary Nicholas Brady has proposed a restructuring plan that would authorize national banking associations to branch across state lines provided there are no intrastate restrictions. Wall St. J., Feb. 6, 1991 at 1, col. 2.

123. The RTC did not absolutely rule out this possibility, but qualified its intention by stating, "[T]he RTC does not at this time intend to authorize emergency transactions that would result in interstate branching." 55 Fed. Reg. 22,323, 22, 327 (1990).

124. SHAW, *supra* note 117, at 7-11.

125. ARK CODE ANN. §§ 23-32-1801 to -1805 (Supp. 1989). The Commissioner is authorized to approve applications for acquiring an Arkansas bank or bank holding company. However, the section is silent as to an out-of-state acquirer buying a thrift and subsequently converting the thrift into a bank and bank branches.

thrift and establish an entirely new banking network within the state would indirectly circumvent the Commissioner's power to regulate in this area.

The decision may also facilitate a continuing trend in the banking industry of consolidation and centralization in Arkansas and the nation. An unstated policy of the RTC is to prefer the sale of an entity in its entirety and avoid selling a thrift in piecemeal fashion.[126] Presumably, then, the most likely acquirers are large banks or bank holding companies. Based on this presumption, these larger institutions may obtain a significant advantage because of the broader lending authority resulting from a network of branches.[127] Because of economies of scale, the overhead and administratiave cost can be spread over a larger asset base. Given this fact, coupled with the realization that many larger institutions are nationally chartered banks,[128] the decision may in effect promote erosion of the doctrine of competitive equality.[129]

Finally, even though the preemption of Arkansas branch banking laws will become moot after December 31, 1998,[130] this precedent may be extended to other Arkansas banking laws. A major barrier to continuing acquisition of failed or failing thrifts by large bank holding companies is a limitation on the percentage of state-wide deposits that a bank holding company may control.[131] In Arkansas a bank holding

---

126. Telephone interview with Jane Jankowski, a spokesperson for the RTC in the Kansas City office, March 11, 1991.

127. SHAW, *supra* note 117 at 7-11.

128. As of June 30, 1990, only 80 of Arkansas' 257 commercial banks were nationally chartered, yet these 80 banks held 50.5% of total aggregate deposits. REPORT OF THE BANK COMMISSIONER OF ARKANSAS (1990).

129. As of June 30, 1990, six of the state's seven largest commercial banks were nationally chartered. REPORT OF THE BANK COMMISSIONER OF ARKANSAS (1990). Worthen Banking Corporation, the state's largest bank holding company, may be at the forefront of the continued expansion of larger institutions. When asked about the state's two largest thrifts, now held by the RTC, Worthen CEO Curt Bradbury said, "We remain interested in the government's plan with respect to the recapitalization of Savers Federal and First Federal Savings & Loan in Little Rock. . . .We would be as interested in one as the other." Ark. Gazette, June 30, 1989, at C1, col. 2.

130. *See supra* note 5. Bills were introduced in the Arkansas Legislature in 1991 that would eliminate the phase-in steps required by ARK. CODE ANN. § 23-32-1202(b) (Supp. 1989), and would immediately allow state-wide branching. However, the bills never progressed to the floor of either house for a vote.

131. ARK. CODE ANN. § 23-32-308(a) (1987). The section provides:

> A bank holding company is prohibited from acquiring ownership or control of the stock or the assets of any bank if, after giving effect to the acquisition of the stock or the assets of that bank, the acquiring bank holding company would own or control, directly or indirectly, banks having in the aggregate more than fifteen percent (15%) of the total deposits held by all state and national banks having principal offices within the state.

company may possess no more than fifteen percent of the total bank deposits in the state. Attempts to repeal this limitation in the Arkansas Legislature failed in 1991.[132] Nevertheless, the RTC may rely upon the precedent set by the Eighth Circuit Court of Appeals and use its override power to supplant this limitation as well.

S. Scott Luton

132. A bill was introduced in the Arkansas Legislature in 1991 that would repeal the law placing a fifteen percent limitation on deposits held by bank holding companies. However, the bill was voted down after the House Insurance and Banking Committee gave it a pass recommendation. Ark. Gazette, Feb. 19, 1991, at D10, col. 5.