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Where in the U.S. can national banks sue or be sued? A jurisdictional flip flop.

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Earlier this year, the Office of the Comptroller of the Currency issued final rules which attempt to clarify the applicability of state law to national banks' operations.[1] The new rules identify the types of state laws that are or are not preempted by federal law. While we await the long process of review of the application of the new rules by the courts, the answer to a much older but related question appears to be ready for a more conclusive resolution. Where in the U.S. can national banks sue or be sued? Are national banks on the same footing as corporations when it comes to federal diversity jurisdiction? The answer to that question appears to be, yes.

The Historical Context of Federal Jurisdiction Over National Banks.

National banks were created by the National Bank Act of 1863. Initially, because national banks were creatures of federal law, any suit involving a national bank could be brought in or removed to federal court.[2] In the 1880's, Congress acted to put national banks on the same footing as the banks of the state where they were located for all jurisdictional purposes. The Act of March 3, 1887 declared that all national banking associations "shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of

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[1] 12 CFR parts 7 and 34

[2] *Petri v. Commercial Nat'l Bank, 142 U.S. 644, 648, 35 L. Ed. 1144, 12 S. Ct. 325 (1892)*

the States in which they are respectively located."[3]

The language of the 1887 Act was consistently interpreted by the Supreme Court and the various courts of appeal to maintain jurisdictional parity between national banks and state banks or other corporations.[4]

In the 1940's Congress, by enacting 28 USC §1348, created a new jurisdictional statute for national banks:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.
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> *All national banking associations shall,for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.*

The question became where is a national bank "located" for purposes of §1348. The United States Court of Appeals for the Ninth Circuit was the first appeals court to address the issue in *American Surety*[5] in 1943. The *American Surety* court held that national banks are "located" for purposes of diversity jurisdiction in the state where they maintain their principal place of business. For the next fifty years, the federal courts applied the rule of *American Surety*.

The Flip.

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[3] § 4, 24 Stat. 552, 554-55

[4] *Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 565-66, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963)* ("Section 4 [of the 1882 and 1887 Acts] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited.")

[5] *American Surety Co. v. Bank of California, 133 F.2d 160, 161-62 (9th Cir. 1943)*

Then, in 1992, the U.S. District Court for the District of Rhode Island in the *Iacono* case held that a national bank is "located" in every state where a national bank has a branch.[6] Of course, because so many national banks had branches in many different states, the ability of national banks to file suit in federal court or to remove state cases to federal court was severely limited by this ruling.

The *Iacono* Court used as support for its decision *Citizens & Southern National Bank v. Bougas*[7]. In *Bougas,* while deciding venue, the Supreme Court held that a bank was "located" wherever it had a branch. The *Iacono* Court also argued that the first paragraph of §1348 used the word "established" to refer to a single district. Thus, a bank should be considered to be "established" in the single state where its principal of business is found. In order to give "located" a different meaning than "established," the Court determined that "located" must refer to any state in which the national bank has a branch.

For the next decade, most district courts that weighed in on the question, favored the rule of *Iacono* and held that a bank is located wherever it has a branch.[8]

The Flop

In 2001, the pendulum swung again and the Seventh Circuit Court of Appeals decided

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[6] *Connecticut National Bank v. Iacono, 785 F. Supp. 30 (D.R.I. 1992).*

[7] *Citizens & Southern National Bank v. Bougas, 434 U.S. 35, 54 L. Ed. 2d 218, 98 S. Ct. 88 (1977)*

[8] *Ferraiolo Constr., Inc. v. Keybank, 978 F. Supp. 23 (D. Me. 1997); Norwest Bank Minn., N.A. v. Patton, 924 F. Supp. 114 (D. Colo. 1996); Bank of N.Y. v. Bank of Am., 861 F. Supp. 225, 231 (S.D.N.Y. 1994)*(all following *Iacono* and holding that a national bank is a citizen of every state where it has a branch).

Firstar Bank, N.A. v. Faul.[9]. In *Firstar*, the Seventh Circuit concluded that a national bank appeared to be analogous in most respects to a corporation rather than any other kind of business organization. Therefore, "located" in the jurisdictional context should have the same meaning for a bank as it does for a corporation. The Seventh Circuit also concluded that the statutory history evidenced Congress' intention to treat national banks in the same manner as state banks and other corporations. Moreover, the Court pointed out that various versions of *§1348* were enacted between the decisions in *American Surety* and *Iacono* and Congress continued to use the same phrase, which indicated that Congress did not intend to alter the then prevalent judicial construction.

The traditional justification for diversity jurisdiction was to minimize potential bias against out-of-state parties. It has been argued over the years that national banks are not subjected to local bias in states where they maintain branch banks, and so diversity jurisdiction is not necessary in such cases. The court in *Firstar* noted that Congress had rejected an analogous argument with regard to corporations, which have access to diversity jurisdiction if sued in any state other than where they are incorporated or have their principal place of business, *28 U.S.C. § 1332,* even if they have a significant and visible presence in the state in question.[10] The *Firstar* Court reasoned that whatever justification Congress had for retaining diversity jurisdiction for corporations supported an equal degree of access to diversity jurisdiction for national banks.

The Seventh Circuit in *Firstar* concluded by holding that for purposes of *28 U.S.C. §*

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[9] *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th cir. 2001).

[10] *Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1223 (7th Cir. 1991)* (stating that a party's "doing lots of business" in a state is irrelevant for diversity jurisdiction so long as the party is not incorporated and does not have its principal place of business in that state).

1348 a national bank is "located" in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate.

No other appellate court has yet spoken to the conclusion reached in *Firstar*. However, every district court since 2001, save one[11], that has construed § 1348 has adopted the *Firstar* analysis.[12] We anticipate another decision by a different Circuit soon. In *Bank One, N.A. v. Horton*, et al, Case No. 03-CV-150, the U.S. District Court for the Western District of Texas denied the defendant's motion to remand on the basis that the plaintiff was not "located" in Texas for purposes of determining diversity jurisdiction.[13] The parties are awaiting a review of that decision by the Fifth Circuit Court of Appeals.

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[11] The lone exception is *Century Bankcard Services, Inc. v. U.S. Bancorp*, 318 F. Supp. 2d 983 (C.D. Cal. 2004).

[12] See *Pitts v. First Union Nat'l Bank*, 217 F. Supp. 2d 629, 630-31 (D. Md. 2002); *Bank One, N.A. v. Euro-Alamo Invs., Inc.*, 211 F. Supp. 2d 808, 810 (N.D. Tex. 2002); *Bank of Am., N.A. v. Johnson*, 186 F. Supp. 2d 1182, 1183-84 (W.D. Okla. 2001). *Evergreen Forest Prods. of Ga. v. Bank of Am., N.A.*, 262 F. Supp. 2d 1297, 1302 (D. Ala., 2003); *RDC Funding Corp. v. Wachovia Bank, N.A.*, 2004 U.S. Dist. LEXIS 5524.

[13] The Office of Comptroller of the Currency has, as in *Firstar*, filed an *amicus curiae* brief arguing in favor of the *Firstar* analysis.

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Note: On November 1, 2004, the Fourth Circuit Court of Appeals decided Wachovia Bank v. Schmidt, 2004 US App. LEXIS 22638, wherein the court determined that a national bank is located for diversity purposes in any state in which the national bank operates a branch office.