North Dakota Law Review

Volume 65 | Number 4 Article 3

1989

Banks and Banking - States: Three Year Divestiture Period Required for Creditor Corporation under North Dakota's Corporate Farming Statute Not Pre-empted by the National Bank Act

Ronald O. Zink

BANKS AND BANKING - STATES: THREE YEAR DIVESTITURE PERIOD REQUIRED FOR CREDITOR CORPORATION UNDER NORTH DAKOTA'S CORPORATE FARMING STATUTE NOT PRE-EMPTED BY THE NATIONAL BANK ACT

On September 19, 1983 Marvin D. Lutz conveyed 320 acres of farmland to Liberty National Bank and Trust Company (Liberty National) to avoid foreclosure of a real estate mortgage.[1] In February 1987 the State of North Dakota (State) brought this action against Liberty National to force Liberty National to divest itself of the farmland pursuant to subsection five of section 10-06-13 of the North Dakota Century Code (Corporate Farming Law).[2] Subsection five of the Corporate Farming Law provides that unless retention of foreclosed farmland is specifically permitted by a statutory exception, a corporation must divest itself of the farmland within three years after acquiring ownership.[3] Liberty National moved for summary judgement claiming that the three-year holding period in subsection five of the Corporate Farming Law was pre-empted by the five-year holding period in title 12 section 29 of the United States Code (National Bank Act).[4] The district court granted Liberty National's motion for summary judgment and dismissed the State's claim against Liberty National.[5] The North Dakota Supreme Court reversed the district court and *held* that subsection five of the Corporate Farming Law was not pre-empted

---

1. State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307, 308 (N.D. 1988), cert. denied, 109 S. Ct. 393 (1988). Liberty National leased the land to Lutz with an option to purchase from 1983 to 1986. *Id.* In the fall of 1986 Lutz told Liberty National that he had quit farming and would not buy or lease the land. *Id.* According to the Bank, attempts to locate purchasers did not result in any offers "for an amount which would prevent the Bank from suffering a substantial loss on its investment." *Id.*

2. *Id; see* N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987). Section 10-06-13(5) of the North Dakota Century Code provides:

> Unless retention of the farmland or ranchland is permitted under subsection 6 or 7, all farmland or ranchland acquired as security for indebtedness, in the collection of debts, or by the enforcement of a lien or claim shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter.

Id.

3. N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987). For the text of section 10-06-13(5) of the North Dakota Century Code, see *supra* note 2. The exceptions under subsections six and seven of section 10-06-13 of the North Dakota Century Code allow a retention period of greater than three years if the corporation leases with an option to purchase or contracts for the sale of the land with the mortgagor. N.D. CENT. CODE § 10-06-13(6)-(7) (1985 & Supp. 1987). None of the exceptions to retention of farmland by a corporation, however, applied to Liberty National. *Liberty Nat'l Bank*, 427 N.W.2d at 308.

4. *Liberty Nat'l Bank*, 427 N.W.2d at 308; National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (Corporate Farming Law) (1985 & Supp. 1987).

5. *Liberty Nat'l Bank*, 427 N.W.2d at 308.

by the holding period found in the National Bank Act.[6]

The supremacy clause of article IV of the United States Constitution provides Congress with the power to pre-empt state law.[7] Federal law may pre-empt state law in any of the following three ways: (1) by explicit definition; (2) by an attempt to occupy an entire field of law; and (3) whenever there is actual conflict between a federal and state law.[8]

Express pre-emption occurs when Congress unambiguously states it is overriding state law.[9] When the language of a federal statute explicitly overrides state law, courts need not look to any implicit intent behind the statute; rather, the courts must look only at the plain meaning of the statute in determining a pre-emption question.[10]

However, when Congress has not explicitly defined whether a state statute is pre-empted by federal law, congressional intent in enacting the federal law must be considered.[11] Congressional

---

6. *Id.* at 315; *see* National Banking Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (Corporate Farming Law). After oral argument Liberty National sold the land involved in this lawsuit. *Liberty Nat'l Bank*, 427 N.W.2d at 308. The North Dakota Supreme Court refused to dismiss the appeal as moot because "the issue presented in this case is a question of great public interest and will have important consequences in the State's future enforcement of the corporate farming laws." *Id.* at 309.

7. See U.S. CONST. art. VI, cl. 2. Clause 2 of article 6 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Id. See, e.g., Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986) (supremacy clause provides congress with the power to pre-empt state law).

8. *See* Michigan Canners & Freezers v. Agricultural Bd., 467 U.S. 461, 469 (1984) (discussing three ways in which federal law can pre-empt state law). *See also* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1988). In *Louisiana Public Service Commission* the Supreme Court found that pre-emption is justified when there is "outright or actual conflict" between federal and state law, where there is "implicit in federal law a barrier to state regulation," or "where congress has legislated comprehensively, . . . leaving no room for the states to supplement federal law." *Id.* at 368-69.

9. *See* Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983). In *Aloha Airlines* the United States Supreme Court found that a federal statute expressly forbid states from imposing a tax on the gross income of airlines traveling within the State. *Id.* The Supreme Court indicated that courts should look to the plain meaning of the statute when the language is direct and unambiguous. *Id.*

10. *Id.* The Court in Aloha Airlines stated that courts should look to implicit intent only when the language is ambiguous, and thus requires a look to congressional intent. *Id. See also* Exxon Corp. v. Hunt, 475 U.S. 355, 362 (1986) (in determining express pre-emption cases courts need not go further than the statutory language to determine whether state law is pre-empted).

11. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) (to determine an implied pre-emption question one must look to Congress' intent in enacting the federal law at issue). *See also* Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-53 (1982)(quoting Jones v. Rath Packing Co. 430 U.S. 519, 525 (1977)) (pre-emption is compelled regardless of whether Congress' command is explicit or implicit in the structure of statute).

intent to pre-empt state law falls under two general categories: (1) an intent to occupy a given field of law;[12] or (2) a situation in which state law is in actual conflict with federal law.[13] The key element needed in determining whether there is implied pre-emption, despite the test or specific language used in an analysis, is whether Congress intended that the federal regulations supersede state law.[14]

An intent by Congress to occupy a given field was shown to control the pre-emption issue in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*.[15] In *Pacific Gas & Electric* the United States Supreme Court addressed the issue of whether the Atomic Energy Act pre-empted the field of law regarding nuclear power, thereby leaving regulation under exclusive federal control.[16] The Court held that the entire field of law concerning nuclear safety was occupied by federal law.[17] The Court stated that when a given field is occupied by the federal government, federal law will pre-empt state law in the entire field,

---

12. *See* Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145, 1150 (1988). In *Schneidewind* the Supreme Court noted that Congress has indicated an intent to occupy a given field where the pervasiveness of the federal regulations precludes supplementation by the state, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

13. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). State law need not be entirely displaced by federal law in order to find federal pre-emption. *Id.* Pre-emption of state law will only occur to the extent that state law actually conflicts with federal law. *Id.*

14. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1988) ("[t]he critical question in any pre-emption analysis is always whether Congress intended that the federal regulation supersede state law"). *See also* Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). In *Rice* the Supreme Court recognized that in considering a question of federal pre-emption Congress may choose to regulate an entire field, share the task of regulation with the states, or adopt the state scheme as federal policy. *Id.* The Court stated that one must look to Congress' purpose in enacting the legislation to determine which case applies to a particular area of law. *Id. See also* Wardair Canada Inc. v. Florida Dept. of Revenue, 477 U.S. 1, 6 (1986). In *Wardair Canada Inc.* the Supreme Court stated:

> [T]he first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law.

Id.

15. 461 U.S. 190 (1983).

16. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 194-95 (1983). *Pacific Gas & Electric* concerned California's imposition of a moratorium on certification of new nuclear power plants until a demonstrated technology or means could be found for the permanent disposal of nuclear wastes. *Id.* at 198. Petitioner electric utility companies contended that the State's moratorium was invalid under the Atomic Energy Act of 1954, through which the federal government maintains control of the safety and "nuclear" aspects of nuclear power generation. *Id.* at 198, 212. *See* 42 U.S.C. § 2021(K) (1982) (states may regulate nuclear power plants for "purposes other than protection against radiation hazards").

17. *Pacific Gas & Electric*, 461 U.S. at 212.

except for those limited powers expressly left to the states.[18] The Court concluded that the test of pre-emption for a given field is whether "the matter on which the state asserts the right to act is in any way regulated by the Federal Act."[19] However, the Court held that California's imposition of a moratorium on certification of new power plants was not pre-empted by the Atomic Energy Act because the intent of the Act was to regulate safety aspects involved in the construction and operation of the plant and not the economic question of whether the plant should be built.[20]

Even where Congress has not manifested the intent to pre-empt a given field of law, the state law will be pre-empted to the extent it actually conflicts with federal law.[21] No rigid formula or rule has been established to determine what constitutes an actual conflict between state and federal law.[22] However, two standards have predominantly been used by the courts in determining whether the challenged state law is pre-empted by federal law.[23] Under the two standards developed by the courts, an actual conflict arises when "compliance with both federal and state law is a physical impossibility"[24] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*Hines* test]."[25]

---

18. *Id.* at 212-13 (when an entire field is occupied the test of pre-emption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act.") (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)). In *Rice* the United States Supreme Court stated that state law need not necessarily conflict with federal law in order to find pre-emption. *Rice*, 331 U.S. at 236. The Court stated that federal law will control when Congress acts "so unequivocally as to make clear that it intends no regulation except its own." *Id.*

19. *Pacific Gas & Electric*, 461 U.S. at 212-213 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)).

20. *Id.* at 205-08.

21. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (federal law will pre-empt state law if compliance with both is physically impossible or where the state law stands as an obstacle to the objectives of federal law).

22. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In *Hines* the United States Supreme Court stated that the very nature of the implied pre-emption problem prohibits the use of a "universal pattern to determine the meaning and purpose of every act of Congress." *Id.* The Court stated "in considering the validity of state laws in light of treaties or federal laws touching the same subject, [this court] has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Id.* (footnotes and citations omitted).

23. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983).

24. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). The Court in *Florida Lime & Avocado Growers* stated that state law will be pre-empted by federal law to the extent that compliance with each law is impossible. *Id.* However, the Court noted that pre-emption does not necessarily occur just because both federal and state law address a particular area of law. *Id.* at 142. For instance in *Florida Lime & Avocado Growers* the Court held that the state law was not pre-empted even though it was more restrictive than the federal law. *Id.* at 141.

25. *Hines*, 312 U.S. at 67. In *Hines* the Supreme Court implied that it would look to the

The Supreme Court considered whether an actual conflict existed between a state and federal law in *Florida Lime & Avocado Growers, Inc. v. Paul.*[26] In *Florida Lime & Avocado Growers* the United States Supreme Court upheld a California statute which placed stricter standards on the marketing of avocados within California than was required under federal regulations.[27] This determination upholding the validity of the state statute was based on the *Hines* test; i.e., does the state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?[28] In particular, the Supreme Court asked whether there was a congressional intent to occupy the entire field of marketing avocados or whether an actual conflict existed between the State and federal marketing requirements.[29]

In determining whether Congress intended to displace the entire field of marketing avocados, the Court considered both the nature of the subject matter (maturity of avocados) and any explicit declarations made by Congress to displace state regulation.[30] The marketing of avocados was found by the Court to be a subject traditionally within the scope of state supervision because of the strong state interest in protecting consumers against deception in retail markets.[31] Thus, the Court determined the that subject matter was not one which required exclusive regulation by the federal government.[32] In addition, an examination by the

---

purpose of the entire scheme of the federal act to determine the pre-emption issue. *Id.* at n. 20 (citing Savage v. Jones, 225 U.S. 501, 533 (1912)). The Court acknowledges that state law must yield to federal law if the purpose of the act cannot be accomplished; for example if a state law frustrates the purpose of a federal law or if the provisions of the act are not given their natural effect. *Id. See also* Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (quoting *Florida Lime & Avocado Growers* and *Hines*, the court found that actual conflict exists where compliance is physically impossible or where state law stands as an obstacle to the objectives of federal law).

26. 373 U.S. 132 (1963).

27. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963). The debate in Florida Lime & Avocado Growers stemmed from laws designed to determine the maturity of avocados. *Id.* at 133-34. California measured maturity using an oil-to-weight ratio while federal marketing orders determined maturity based upon the picking date and the size and weight of the avocado. *Id.* The result of the California requirement was to exclude a small fraction of Florida avocados from California markets which met federal marketing requirements. *Id.* at 136.

28. *Id.* at 141; *see Hines*, 312 U.S. at 67. For a discussion of the federal pre-emption test as formulated by the Court in *Hines*, see *supra* note 25 and accompanying text.

29. *Florida Lime & Avocado Growers*, 373 U.S. at 141-43.

30. *Id.* at 143.

31. *Id.* at 144. The Court noted that states have a legitimate interest in protecting citizens against fraud and deception in food markets within that state. *Id.* In addition, the Court found the marketing of avocados to be an unlikely area to warrant exclusive federal regulation. *Id.* at 143. The Court stated that the maturity of avocados is not a subject which lends itself to exclusive national supervision, nor is it an area of vital interest demanding uniformity throughout the nation. *Id.* at 143-44.

32. *Id.* at 143.

Court of the Congressional purpose in enacting the statute revealed that the standards established were meant to be minimum standards.[33] Therefore, the Court concluded that no specific intent to displace state regulation had been shown.[34]

Finding no specific intent to displace state law in the field of the marketing of avocados, the Court considered whether compliance with both the federal and state law was a physical impossibility, and thus, in actual conflict with the federal marketing order.[35] The federal marketing order tested the maturity of the avocados based upon the picking dates and minimum size and weight requirements.[36] Conversely, California's statute based maturity solely upon the testing of the oil to weight ratio of the avocado.[37] The Court stated that compliance with both the federal and state requirements was not physically impossible because the Florida avocado varieties marketed in California could meet or exceed the California oil content requirement and still be in compliance with the federal date, size, and weight restrictions.[38] Therefore, the Supreme Court held that the California statute was not pre-empted by federal law.[39]

Coupled with the strong emphasis placed upon congressional intent is an overriding reluctance for court's to infer pre-emption.[40] This reluctance stems from the "Supreme Court's repeated emphasis on the central role of Congress in protecting the sover-

33. *Id.* at 147. *See* 7 U.S.C. § 602(3) (1982) (standards under this title are to be "minimum standards of quality and maturity . . . as will effectuate such orderly marketing . . . in the public interest").

34. *Florida Lime & Avocado Growers*, 373 U.S. at 147-48. The Court stated that "there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of congressional design to pre-empt the field." *Id.* at 141.

35. *Id.*

36. *Id.* at 139. The federal regulations forbid the picking of avocados before a prescribed date. *Id. See* 7 C.F.R. § 969.53 (Supp. 1955) (superseded by 7 C.F.R. § 915.53 (1988) (provides exemptions to any grower who can show that his avocados are mature prior to the time they may be picked under federal regulation). However, because the ultimate goal of the statute was to ensure that avocados were mature when picked, the Court noted that exemptions to the prescribed picking date may be granted upon a showing that a particular variety will meet maturity prior to the prescribed date. *Florida Lime & Avocado Growers*, 373 U.S. at 139.

37. *Florida Lime & Avocado Growers*, 373 U.S. at 133-34. California's Agricultural Code prohibited the transportation or sale of avocados in California which contained less than 8 per cent oil, by weight of the avocado, excluding the skin and seeds. *Id. See* CAL. AGRIC. CODE § 792 (West 1954) (repealed 1967).

38. *Florida Lime & Avocado Growers*, 373 U.S. at 143. The Supreme Court indicated that the possibility that the avocados could meet the federal maturity requirements prior to reaching the California oil content minimum did not render compliance physically impossible. *Id.*

39. *Id.* at 152.

40. *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1979) (Supreme Court generally reluctant to infer pre-emption).

eignty of the states."[41] In the final analysis, "the question whether federal law in fact pre-empts state action in any given case necessarily remains largely a matter of statutory construction."[42] However, the burden of persuasion is on the party claiming that Congress intended to pre-empt state law.[43]

The National Bank Act,[44] as enacted in 1864, prohibited national banking associations from holding onto real estate for more than a five-year period.[45] The Supreme Court has found that the object of the restrictions of the National Bank Act were threefold: 1) to keep capital flowing; 2) to deter banks from real estate speculation; and 3) to prevent accumulation of large masses of property.[46] The Supreme Court has also stated, as have various state courts, that the purpose of the five-year holding period placing limitations on the power of national banks to invest in real estate is to protect bank depositors and stockholders from speculation or risky investments.[47] The North Dakota Supreme Court has

41. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 479-80 (2d ed. 1988). An inference against pre-emption is justifiable for the protection of state sovereignty. *Id.* at 480.

42. *Id.* at 480.

43. Elsworth v. Beech Aircraft Corp., 37 Cal. 3d. 540, —, 691 P.2d. 630, 634, 208 Cal. Rptr. 874, 878 (1984) (party claiming pre-emption must prove it). *Cf.* New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 413 (1972) (states must be allowed "considerable latitude" in resolving social problems).

44. Ch. 106, 13 stat. 99-113 (1864).

45. National Banks, ch. 1, (1878) (codified as amended at 12 U.S.C. § 29 (1982)). Section 5137 provides:

> A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Id. See also First Nat'l Bank v. Comptroller of Currency, 697 F.2d 674, 681 (5th Cir. 1983). The court of appeals in *First National Bank* noted that the National Bank Act described "four exclusive categories of real property that a bank can purchase, hold, or convey." *Id.* at 682. The five-year limitation applies to property falling within one of these four categories that was purchased or mortgaged to secure debts due the bank. *Id.* National banks are not authorized to hold property falling outside the four categories. *Id.* Thus, the court of appeals concluded that the five-year limitation period was meant to limit the four categories and not expand them. *Id.*

46. National Bank v. Matthews, 98 U.S. 621, 626 (1879).

47. *See, e.g.*, Colorado Nat'l Bank v. Bedford, 310 U.S. 41, 49 (1940) (restrictions placed on national banks limiting investment in real estate are to safeguard customers and stockholders from risky investments); Central Nat'l Bank v. Fleetwood Realty Corp., 110 Ill. App. 3d 169, —, 441 N.E.2d 1244, 1250-51 (1982) (limitations on the power of national banks to invest in real estate are to "protect bank depositors and stockholders from risky investments"); Exchange Bank v. Meadors, 199 Okla. 10, —, 184 P.2d 458, 463 (1947)

indicated that the purpose of placing such limitations upon national banks is primarily for the protection of depositors.[48]

The five-year holding period adopted in the 1864 National Bank Act is still applicable today.[49] However, amendments adopted in 1980 and 1982 allow the Comptroller of the Currency to extend the holding of real estate beyond the five-year limitation if: (1) the bank has made a good faith effort to sell the real estate; or (2) requiring disposal within the five-year limitation would be detrimental to the bank.[50] The extension allows a bank up to an additional five years to divest itself of the real estate.[51] The National Bank Act was amended to provide this extension because the Comptroller expressed concern that depressed economic conditions might force a bank to dispose of real estate at prices that did not reflect the bank's investment.[52]

North Dakota adopted a corporate farming law in 1932 prohibiting corporations from holding real estate unless necessary for the conducting of business.[53] In 1933 the corporate farming

---

(purpose of provisions of section 29 of title 12 of the United States Code is to prevent speculation in real estate).

48. *See* Smith v. Rennix, 52 N.D. 935, 943-44, 204 N.W. 843, 844 (N.D. 1925). The North Dakota Supreme Court in *Smith* stated that the regulatory measures which limit the holding of real estate by national banking associations are intended primarily for the protection of depositors. *Id.* The court reasoned that banks would not be in a position to meet obligations of depositors if bank assets were tied up in real estate holdings. *Id. See also* Jaiski v. Farmers and Merchants State Bank, 53 N.D. 470, 477-78, 206 N.W. 773, 776 (N.D. 1925) (contract by bank to purchase land was held void as contrary to statute whose purpose was to protect depositors).

49. *See* National Bank Act, 12 U.S.C. § 29 (1982). Section 29 of title 12 of the United States Code provides in relevant part:

> But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.
>
> For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period, or (2) disposal within the five-year period would be detrimental to the association.

Id. In addition, section 29 of title 12 of the United States Code allows a national bank to hold interest in real estate for a longer period than five years if: (1) the real estate had been acquired prior to October 15, 1982, (2) the real estate had not been valued on the bank's books for more than a nominal amount (as of December 31, 1979), and (3) if state law would permit a state chartered bank to hold real estate for a longer period. *Id.* If these conditions are met, the national bank will be allowed to hold the real estate for such a time as would a state bank. *Id.*

50. *Id.*

51. *Id.*

52. *See* 125 CONG. REC. 14,599 (1979) (letter from John G. Hermann to William Proxmire, May 31, 1979, discussing concern over the five-year divestiture period placed upon national banks which have foreclosed on real estate).

53. Prohibiting Corporation Farming, 1933 N.D. Laws 494, § 1. The initiated measure provided:

law was modified disallowing real estate ownership by corporations entirely.[54] In 1981 a law was enacted to allow corporate farming or ranching for only family farms.[55] The current version of North Dakota's corporate farming law is found in chapter 10-06 of the North Dakota Century Code.[56]

Section 10-06-01 of the North Dakota Century Code provides that "[a]ll corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching."[57] Exceptions to section 10-06-01 of the North Dakota Century Code are set forth in the Corporate Farming Law.[58] Subsection four of the Corporate Farming Law allows corporations to acquire farmland as security for indebtedness through process of law for the collection of debts, or by lien or claim subject to divestiture requirements under subsections four through seven of the Corporate Farming Law.[59]

> That all corporations, both domestic and foreign, except as otherwise provided in this act, are hereby prohibited . . . from acquiring or holding real estate in excess of that necessary for the conduct of their business, unless the same is acquired in the course of their business by judicial process or operation of law.

Id. *See* Note, North Dakota's Corporate Farming Statute: An Analysis of the Recent Change in the Law, 58 N.D.L. REV. 283, 284-87 (1982) (provides an analysis of the history of corporate farming in North Dakota and describes requirements for farming in the corporate form pursuant to the 1981 amendment to North Dakota's corporate farming law allowing family farms to incorporate).

54. *See* Corporations, ch. 89, 1933 N.D. Laws 119, 122-23. Chapter 89, § 1 provides: "That all corporations, both domestic and foreign, except as otherwise provided in this act, are hereby prohibited from engaging in the business of farming or agriculture." *Id.*

55. *See* Corporations, ch. 134, 1981 N.D. Laws 309-10. The 1981 amendment to the corporate farming statute allows corporate farming or ranching if: (1) the corporation has 15 shareholders or less, (2) each shareholder is related to each of the other shareholders, (3) each shareholder is an individual with certain limited exceptions for trusts and estates; (4) each individual member is a citizen or permanent resident alien of the United States, (5) the officers and directors are actively engaged in farming, and (6) other statutory requirements are met with respect to the corporation's gross income and earnings. *Id.*

56. N.D. CENT. CODE §§ 10-06-01 to -15 (1985 & Supp. 1987).

57. N.D. CENT. CODE § 10-06-01 (1985 & Supp. 1987).

58. N.D. CENT. CODE § 10-06-13 (1985 & Supp. 1987). For the text of subsection 5 of section 10-06-13 of the North Dakota Century Code, see *supra* note 2. For an explanation of the exceptions provided for under subsection 5 of section 10-06-13 of the North Dakota Century Code allowing an interest in real estate to be held by a corporation, see *supra* note 3.

59. *See* N.D. CENT. CODE § 10-06-13(4) to -(7) (1985 & Supp. 1987). Subsection four of section 10-06-13 of the North Dakota Century Code provides:

> Subject to the divestiture requirements of subsections 5, 6, and 7, a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise.

N.D. Cent. Code § 10-06-13(4) (1985 & Supp. 1987). For the text of section 10-06-13(5) of the North Dakota Century Code, see *supra* note 2. Subsections six and seven of section 10-06-13 of the North Dakota Century Code allow a corporation to retain land past the three year divestment period where the corporation leases with an option to purchase or con-

The North Dakota Supreme Court addressed whether the National Bank Act superseded North Dakota's corporate farming law in *State v. Liberty National Bank & Trust*.[60] Liberty National failed to divest itself of farmland that it had acquired through foreclosure within the three-year time limitation permitted under the Corporate Farming Law.[61] Liberty National contended that the three-year divestiture period contained in the Corporate Farming Law was not applicable to national banks.[62] Rather, Liberty National contended that national banks should be subject to the five-year limitation prescribed in the National Bank Act because an actual conflict existed between the real estate holding limitations imposed by the National Bank Act (five-year limitation) and those imposed by North Dakota's Corporate Farming Law (three-year limitation).[63] Thus, Liberty National asserted that the three-year holding period in the Corporate Farming Law was pre-empted by the National Bank Act's five-year limitation.[64] Liberty National's second contention focused on the interaction of North Dakota's corporate farming statute with the laws of North Dakota governing state banks.[65] Section 6-03-09 of the North Dakota Century Code grants state banks a five-year divestiture period in

---

tracts for the sale of the land with the mortgagor. N.D. CENT. CODE § 10-06-13(6)-(7) (1985 & Supp. 1987).

60. 427 N.W.2d 307, 308 (N.D. 1988).

61. State v. Liberty Nat'l Bank & Trust, 427 N.W.2d 307, 308 (N.D. 1988); N.D. CENT. CODE § 10-13-06(5) (1958 & Supp. 1987).

62. *Liberty Nat'l Bank*, 427 N.W.2d at 308.

63. *Id. See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws). Liberty National did not contend that any of the exceptions under section 10-06-13 of the North Dakota Century Code applied. *Liberty Nat'l Bank*, 427 N.W.2d at 308; N.D. CENT. CODE § 10-06-13(6)(7) (1985 & Supp. 1987). After oral argument, Liberty National informed the supreme court that the land in issue had been sold. *Liberty Nat'l Bank*, 427 N.W.2d at 308. The supreme court did not consider the case moot because the issue presented "is a question of great public interest and will have important consequences in the State's future enforcement of the corporate farming laws." *Id.* at 309.

64. *Liberty Nat'l Bank*, 427 at 308. *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws).

65. *Liberty Nat'l Bank*, 427 N.W.2d at 315. Exemption to North Dakota's corporate farming laws is codified in 10-06-13(5) of the North Dakota Century Code. N.D. CENT. CODE. § 10-06-13 (1985 & Supp. 1987) (corporations in North Dakota are subject to a three-year divestiture period for farmland). For the text of subsections four and five of section 10-06-13 of the North Dakota Century Code, see *supra* notes 2 & 59. The laws governing state banks real estate holdings are codified in section 6-03-09 of the North Dakota Century Code. N.D. CENT. CODE. § 6-03-09 (1987). Section 6-03-09 of the North Dakota Century Code provides:

> No banking association may hold the possession of any real estate under mortgage, nor title and possession of any real estate purchased to satisfy indebtedness, for a longer period than five years from the date of acquiring title thereto unless such time has been extended by certificate of the commissiomer [sic].

Id. The North Dakota Century Code excludes national banks from the definition of "bank-

which to dispose of real estate.[66] Before *Liberty National*, it was unclear whether state banks would be subject to a three-year divestiture period under the Corporate Farming Law or a five-year divestiture period under section 6-03-09 of the North Dakota Century Code; the two laws being in conflict and no legislative guidance as to the applicable divestiture period. Liberty National contended that if federal banks are subject to the three-year holding period under the Corporate Farming Law and assuming state banks would be subject the five-year holding period found in section 6-03-09 of the North Dakota Century Code, then state banks would have a competitive advantage over federal banks.[67] The State of North Dakota contended that national banks must yield to State law governing corporate real estate holdings, notwithstanding the provisions of the National Bank Act, because no actual conflict existed between the State and federal law and compliance with both federal and State law was physically possible.[68]

The supreme court stated that the inquiry to determine if an actual conflict exists is "whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[69] The court noted that the determination of whether an actual conflict exists rests largely on the purpose of each statute's enactment.[70] In looking to the enactment of the National Bank Act, the court found that the primary congressional purpose was to prevent banks from becoming monopolistic holders of property.[71] The supreme court recognized three primary objectives which the National Bank Act purports to establish: (1) to keep capital flowing; (2) to deter banks from investing in hazard-

---

ing association" for purposes of title 6. N.D. CENT. CODE § 6-01-02(1) (1987). Thus, Liberty National would not be governed by section 6-03-09 of the North Dakota Century Code. *Id.*

66. *Liberty Nat'l Bank*, 427 N.W.2d at 315. *See* N.D. CENT. CODE § 6-03-09 (1987). For the text of section 6-03-09 of the North Dakota Century Code, see *supra* note 65.

67. *Liberty Nat'l Bank*, 427 N.W.2d at 315. Liberty National contented that State banks would have a competitive advantage because they would be subject to a five-year divestiture period while national banks would have a three-year period. *Id.*

68. Brief for Appellant at 12, State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307 (1988)(No. 870256)(available at the University of North Dakota Law Library). *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws).

69. Liberty Nat'l Bank, 427 N.W.2d at 314. For a discussion of what constitutes an actual conflict between a state and federal law, see *supra* notes 24-25 and accompanying text.

70. *Id.*

71. *Id.* at 312. *See* National Bank Act, 12 U.S.C. § 29 (1982). The North Dakota Supreme Court's determination of the purpose of the divestiture period found in the National Bank Act was based primarily on United States Supreme Court cases and in looking to the legislative history of the statute prior to it's enactment. *Id.* at 311-12. For a discussion of the United States Supreme Court's analysis of the five-year divestiture period found in the National Bank Act, see *supra* notes 46-47 and accompanying text.

ous real estate speculation; and (3) to prevent the accumulation of large quantities of real estate.[72]

The court found that the purpose of the anti-corporate farming law was to prevent lending institutions and insurance companies from foreclosing on thousands of acres of land during the depression.[73] The supreme court recognized that repeated attempts to allow corporate farming by families succeeded in 1981.[74] However, the ban on ownership of agricultural land by non-family corporations engaged in farming has remained intact.[75]

After looking to the history of each statute, the court noted that the primary purpose of each law was to prevent banks and corporations from becoming monopolistic holders of real estate.[76] The court further noted that the secondary goals of each law were similar.[77] The secondary goals of the statutes were to provide a measure of protection to banks and corporations through reasonable divestiture periods.[78] Because the primary and secondary objectives of each law were found to be substantially the same, the North Dakota Supreme Court found that the Corporate Farming Law was not repugnant to the purposes and objectives of the National Bank Act.[79] Therefore, the supreme court found that section 10-06-13(5) of the North Dakota Century Code was not an obstacle to the purposes of the National Bank Act, 12 U.S.C. section 29, and thus concluded that no actual conflict existed between the two laws.[80] Thus, the court held that the National Bank Act

72. *Liberty Nat'l Bank*, 427 N.W.2d. at 311 (citing National Bank v. Matthews, 98 U.S. 621 (1878)).

73. *Id.* at 313. *See* Prohibiting Corporation Farming, 1933 N.D. Laws 494 § 1. For the text of section one of the 1933 N.D. Laws 494 § 1, see *supra* note 53.

74. *See* Note, supra note 53, at 288.

75. *See* Note, *supra* note 53, at 288.

76. *Liberty Nat'l Bank*, 427 N.W.2d at 314. *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws).

77. *Liberty Nat'l Bank*, 427 N.W.2d at 314-15. *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws).

78. *Liberty Nat'l Bank*, 427 N.W.2d at 315. *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws).

79. Liberty Nat'l Bank, 427 N.W.2d at 314-15. *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13 (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws). To determine whether an actual conflict between the state and federal law existed, the North Dakota Supreme Court looked to the test formulated in *Hines*. LIBERTY NAT'L BANK, 427 N.W.2d at 309-10, 315. The Hines test asks whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941). For a discussion of the *Hines* test see *supra* note 25 and accompanying text.

80. *Liberty Nat'l Bank*, 427 N.W.2d at 314-15. *See* National Bank Act, 12 U.S.C. § 29 (1982); N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws). The state law imposed a more stringent divestiture period upon a

did not pre-empt the Corporate Farming Law.[81]

After finding that the Corporate Farming Law was not pre-empted by the National Bank Act, the supreme court considered Liberty National's contention that state banks would have a competitive advantage over national banks (assuming state banks would be subject to a five-year divestiture period under section 6-09-03 of the North Dakota Century Code while national banks would be subject to a three-year divestiture period under the Corporate Farming Law).[82] This consideration required the court to look at whether a state bank in North Dakota is subject to the three-year divestiture period found in the Corporate Farming Law or the five-year divestiture period under section 6-03-09 of the North Dakota Century Code.[83] Section 6-03-09 of the North Dakota Century Code provides that "[state] banking associations" must divest of real estate within five years of acquisition.[84] Section 10-06-13(4)(5) of the North Dakota Century Code requires "corporations" (which would include state banks) to divest of farmland within three years.[85] Thus, both laws are applicable to state banks which have an interest in farmland or ranchland, creating a conflict as to the appropriate divestiture period.[86] In resolving the conflict, the court examined section 1-02-07 of the North Dakota

---

national bank than would be required under federal law. Liberty Nat'l Bank, 427 N.W.2d at 315. The supreme court noted that the difference in the time periods allowed before divestiture represented "the respective legislative bodies reasonable choices of appropriate divestiture periods." *Id.* at 315. The North Dakota Supreme Court noted that the fact that both choices are reasonable and were made with the same policy considerations in mind was evidence that the state and federal laws were not in actual conflict with one another. *Id.* at 314-15.

81. *Liberty Nat'l Bank*, 427 N.W.2d at 315.

82. *Liberty Nat'l Bank*, 427 N.W.2d at 315-16. *See* N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws); N.D. CENT. CODE § 6-03-09 (1987) (holding of Real Estate-Limitation). For the text of section 6-03-09 of the North Dakota Century Code, see *supra* note 65. Section 6-03-09 of the North Dakota Century Code allows state banks five years to divest of real estate. *Liberty Nat'l Bank*, 427 N.W.2d at 315. If national banks are held to a three-year divestiture period under section 10-06-13(5) of the North Dakota Century Code, state banks would have the advantage of two additional years to divest themselves of real estate. *Compare* N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (requiring a three-year divestiture period for corporations) *with* N.D. CENT. CODE § 6-03-09 (1985) (allowing state banks five-year divestiture period).

83. *Liberty Nat'l Bank*, 427 N.W.2d at 315-16. *See* N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws); N.D. CENT. CODE § 6-03-09 (1987) (holding of Real Estate-Limitation).

84. N.D. CENT. CODE § 6-03-09 (1987) (holding of Real Estate-Limitation). For the text of section 6-03-09 of the North Dakota Century Code, see *supra* note 65.

85. N.D. CENT. CODE § 10-06-13(4)(5) (1985 & Supp. 1987) (Corporate Farming Law). While the North Dakota Century Code does permit certain organizations to own farmland, state banks do not fall under an exception to the general prohibition against corporations owning farmland. *Id.*

86. *Liberty Nat'l Bank*, 427 N.W.2d at 315. *See* N.D. CENT. CODE § 10-06-13(5) (1985 & Supp. 1987) (subsection on enforcement of corporate farming laws); N.D. CENT. CODE § 6-03-09 (1987) (holding of Real Estate-Limitation).

Century Code which states that if two laws are in irreconcilable conflict, the law which is considered a "special" provision (i.e., one confined to a particular purpose) will prevail over one considered a "general" provision.[87] However, the court found that section 1-02-07 of the North Dakota Century Code was not controlling because each law was considered a "special" provision; the Corporate Farming Law as to "farmland or ranchland" and section 6-03-09 of the North Dakota Century Code as to "banking associations."[88]

Because section 1-02-07 of the North Dakota Century Code was not controlling, the court concluded that the statute enacted most recently would determine the applicable law.[89] The determination by the court that the more recent statute prevails was based in part on section 1-02-08 of the North Dakota Century Code, which provides that conflicting clauses found in the same statute are reconciled using the clause "last in order of date or position."[90] The court found the Corporate Farming Law, the more recent enactment, to be controlling; therefore, state banks would be held to a three-year divestiture period.[91] Thus, the court found that state banks do not have a competitive advantage over

87. *Liberty Nat'l Bank*, 427 N.W.2d at 315. *See* N.D. CENT. CODE § 1-02-07 (1987) ("whenever a general provision in a statute is in conflict with a special provision . . . the special provision must prevail and must be construed as an exception to the general provision, . . ."). *Id.* The words in any statute of the North Dakota Century Code are to be understood in their ordinary sense. N.D. CENT. CODE § 1-02-02 (1987). In this light, the word "special" has been defined as "confined to a particular purpose, object, person, or class." BLACK'S LAW DICTIONARY 1253 (5th ed. 1979).

88. *Liberty Nat'l Bank*, 427 N.W.2d at 315. *See* N.D. CENT. CODE § 10-06-13 (1985 & Supp. 1987) (subsection on enforcement of corporate farming law); N.D. CENT. CODE § 6-03-09 (1987) (holding of Real Estate-Limitation); N.D. CENT. CODE § 1-02-07 (1987) (special provision prevails over general provision when the two provisions are irreconcilable). The court concluded that section 1-02-07 of the North Dakota Century Code was not controlling because each section was considered both a special and a general provision. *Liberty Nat'l Bank*, 427 N.W.2d at 315. The divestiture period found in Section 10-06-13 of the North Dakota Century Code is "general" in the sense that it governs corporations and "special" with respect to control over farmland and ranchland. *Id. See* N.D. CENT. CODE § 10-06-13 (1985 & Supp. 1987). For the text of subsection 5 of section 10-06-13 of the North Dakota Century Code, see *supra* note 2. In the same manner, the divestiture period found in Section 6-03-09 of the North Dakota Century Code is "general" in the sense that it governs real estate and "special" with respect to control over banking associations. *Liberty Nat'l Bank*, 427 N.W.2d at 315. *See* N.D. CENT. CODE § 6-03-09 (1985 & Supp. 1987). For the text of section 6-03-09 of the North Dakota Century Code, see *supra* note 65. *See also* Northwestern Sav. & Loan Ass'n v. Baumgartner, 136 N.W.2d 640, 643 (N.D. 1965) (section 1-02-07 of the North Dakota Century Code is not applicable where both statutes are considered "special" provisions).

89. *Liberty Nat'l Bank*, 427 N.W.2d at 316. *See* Kershaw v. Burleigh County, 77 N.D. 932, 936, 47 N.W.2d 132, 135 (1951) (where two irreconcilable statutes exist, the subsequent enactment is the later declaration of legislative will and should prevail).

90. N.D. CENT. CODE § 1-02-08 (1987) (conflicting clauses within a statute should be reconciled by looking to the clause in the last position or with the last date).

91. *Liberty Nat'l Bank*, 427 N.W.2d at 316. *See* N.D. CENT. CODE § 10-06-13 (1985 & Supp. 1987) (enacted in 1981); N.D. CENT. CODE § 6-03-09 (1987) (enacted in 1890).

national banks.[92] The decision by the North Dakota Supreme Court finding that the Corporate Farming Law is not pre-empted by the National Bank Act raises questions concerning the enforcement of North Dakota's corporate farming statute. Subsection one of the Corporate Farming Law subjects a corporation to dissolution should it fail to comply with a court order to divest itself of real estate.[93] Whether the State has the power to dissolve a national bank for non-compliance with the Corporate Farming Law has not been determined.

A second concern regarding *Liberty National Bank* decision is its affect upon the availability of credit within North Dakota. Lending institutions are becoming increasingly wary of agricultural loans because of deflated land and commodity prices and the increasing cost of production.[94] The requirement of a three-year divestiture period is yet another factor institutions will be forced to consider in agricultural lending — and the tightening of credit for farmers is not what North Dakota's corporate farming statute envisioned.

Ronald O. Zink

92. *Liberty Nat'l Bank*, 427 N.W.2d at 316.

93. N.D. CENT. CODE § 10-06-13(1) (1985 & Supp. 1987). Subsection 1 of section 10-06-13 of the North Dakota Century Code provides in relevant part that "[a]ny corporation that fails to comply with the court's order [of dissolution] is subject to a civil penalty not to exceed twenty-five thousand dollars and may be dissolved by the secretary of state." N.D. CENT. CODE § 10-06-13(1) (1985 & Supp. 1987). Subsection 10 of section 10-06-13 provides that "[a]ny corporation continuing to violate this chapter . . . may be dissolved by the attorney general in accordance with the laws of this state." N.D. CENT. CODE § 10-06-13(10) (1985 & Supp. 1987).

94. The National Bank Act was amended in 1982 to allow an extension of the five-year divestiture period because of deflated land prices. Garns-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, title 4, § 413, 96 stat. 1521 (1983). For a discussion of congressional purpose behind the amendment see *supra* notes 52 and accompanying text.