TURF WARS: *BANKS v. CREDIT UNIONS*

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The Federal Credit Union Act was enacted in 1934 in order to "make more available to people of small means credit for provident purposes."[1] Section 109 of the Act provided then and provides now that federal credit union membership shall be limited to groups having a common bond of occupation or association or to groups within a well-defined neighborhood, community or rural district.[2]

THE MEANING OF "COMMON BOND"

The term "common bond" as it appears in section 109 of the Act has long been understood to be a "*pre-existing* condition which causes the members of a group to associate together."[3] The National Credit Union Administration, the regulatory agency for federal credit unions, has excluded as a group ineligible for a federal credit union charter, members of a group "organized primarily for the purpose of providing a field of membership for a Federal credit union."[4]

Historically, section 109 was also understood to mean that there could only be one common bond per credit union. For example, an effort by a United States Air Force base credit union to extend its membership to persons in the military that did not have any connection to that particular base was disallowed by the National Credit Union Administration, and that decision was upheld by the United States Court of Appeals for Tenth Circuit.[5] The Tenth Circuit concluded that service in the military alone did not constitute a sufficient "common bond."[6] Similarly, an effort by a state employees' credit union to expand its services to employees of local governments and to Federal Government employees working in conjunction with those local governments was disallowed by the North Carolina Supreme Court.[7] The court stated that "all persons eligible for membership in a credit union

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1. Federal Credit Union Act, ch. 750, 48 Stat. 1216 (1934) (preamble).
2. 12 U.S.C. § 1759 (1994).
3. BUREAU OF FED. CREDIT UNIONS, PROCEDURE FOR ORGANIZING FEDERAL CREDIT UNIONS (June 1965).
4. NATIONAL CREDIT UNION ADMIN., ORGANIZING A FEDERAL CREDIT UNION 15-16 (Sept. 1972).
5. Board of Dirs. & Officers, Forbes Fed. Credit Union v. National Credit Union Admin., 477 F.2d 777 (10th Cir. 1973).
6. *National Credit Union Admin.*, 477 F.2d at 782-83.
7. *In re* Appeal of N.C. Sav. & Loan League, 276 S.E.2d 404 (N.C. 1981).

must share one and the same common bond. . . . If the requisite degree of commonality required for a common bond to exist could be met by showing similarity of occupation for sub-groups of the membership only, the scope of eligible membership would know no bounds and the Legislature's enactment of the common bond requirement would be rendered a nullity."[8]

In 1982, all of that changed. The National Credit Union Administration ("the Agency") promulgated a new rule, Interpretive Ruling and Policy Statement (IRPS) 82-1, in which, for the first time, the agency permitted the establishment of federal credit unions consisting of "multiple occupational groups."[9] The policy was amended shortly thereafter so as to allow existing credit unions to add "distinct group[s]" to their respective fields of membership so long as each such group had its own internal "common bond."[10] Finally, in 1989, the Agency made it clear that it was not necessary for the new "groups" to have anything in common with the original membership of the credit union.[11]

THE *FIRST NATIONAL* LITIGATION

Concerned that expansion of credit unions would now be unbounded, and that expanded credit unions would be able to take important competitive advantage of their tax exempt status granted by Title 12 of the United States Code section 1768, their freedom from compliance with burdensome regulatory requirements with which banks have to contend, and other special legislatively-bestowed benefits, the banking industry challenged the Agency's interpretation of the statute.[12]

To date, the litigation has consumed over six years, and the end may not yet be in sight. Before reaching the merits of the dispute, it was necessary for the banking industry to establish that it had "standing to sue."

8. *In re Appeal of N.C. Sav. & Loan League*, 276 S.E.2d at 411 (construing North Carolina state law G.S. 54-109 which does not differ substantively from section 109 of the Federal Credit Union Act).

9. National Credit Union Administration, Interpretive Ruling and Policy Statement 82-1, 47 Fed. Reg. 16,775, 16,775 (1982).

10. National Credit Union Administration, Interpretive Ruling and Policy Statement 82-3, 47 Fed. Reg. 26,808, 26,808 (1982).

11. National Credit Union Administration, Interpretive Ruling and Policy Statement 89-1, 54 Fed. Reg. 31,168, 31,176 (1989).

12. First Nat'l Bank & Trust Co. v. National Credit Union Admin., 988 F.2d 1272, 1274 (D.C. Cir. 1993). *See, e.g.*, 12 U.S.C. § 1770 (1994) (permitting free office space and services in federal buildings to state or federal credit unions under certain circumstances).

In *Association of Data Processing Service Organizations, Inc. v. Camp*,[13] the United States Supreme Court held that a party had standing to sue under the Administrative Procedure Act if that party could be shown to have been "injured in fact" by allegedly unlawful agency action, *and* that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question."[14] The first application of the "zone of interests" test in the context of a challenge to alleged credit union common bond abuses occurred in the United States Court of Appeals for the Fourth Circuit.

In *Branch Bank & Trust Co. v. National Credit Union Administration Board*,[15] there was no serious challenge to the allegation by the banking industry that it satisfied the "injury in fact" portion of the *ADAPSO* test.[16] Instead, the court focused on the "prudential standing" or "zone of interests" portion of the test.[17] It ultimately concluded that there was no intention on the part of Congress when it passed the Federal Credit Union Act (and particularly when it enacted the "common bond" provisions of the law) to protect the interests of the banks.[18] In fact, the court suggested "that competitive interests of banks were purposely sacrificed by Congress to the interests of facilitating credit for people of limited personal means."[19]

The year following the Fourth Circuit's decision in *Branch Bank & Trust* the United States Supreme Court elaborated upon its "standing" jurisprudence in *Clarke v. Securities Industry Ass'n*.[20] In *Clarke*, the Supreme Court granted "standing to sue" to a trade association of the securities industry.[21] The trade association challenged an interpretation of the McFadden Act by the Comptroller of the Currency, who administers the National Bank Act and regulates nationally-chartered banks.[22] Sections 36 and 81 of the McFadden Act limited the locations in which national banks could have branch offices.[23] The

13. 397 U.S. 150 (1970).
14. Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152-53 (1970).
15. 786 F.2d 621 (4th Cir. 1986).
16. Branch Bank & Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621, 624 (4th Cir. 1986). The banking industry easily satisfied the "injury in fact" part of the *ADAPSO* test in subsequent cases. *See, e.g.*, First Nat'l Bank & Trust Co. v. National Credit Union Admin., 988 F.2d 1272, 1275 (D.C. Cir. 1993) (stating "that appellants will suffer competitive or economic injury is not in doubt.").
17. *Branch Bank & Trust Co.*, 786 F.2d at 625-26.
18. *Id.* at 626.
19. *Id.*
20. 479 U.S. 388 (1987).
21. Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 394 (1987).
22. *Clarke*, 479 U.S. at 392-93.
23. The McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified in scattered sections of § 12 U.S.C.).

Comptroller determined that "discount brokerage" offices operated by national banks were not "branches" and therefore were not governed by the McFadden Act.[24] There is little question that Congress's sole interest in passing that Act was to provide competitive equality with respect to "branching" rights between national and state-chartered banks.[25] No thought was given — one way or the other — to the interests of stockbrokers when that particular statute was enacted in 1927. Nevertheless, the Court held that the brokers had standing to challenge the Comptroller's action because their interests were congruent with the general congressional purpose and with the interests of the intended beneficiaries.[26]

In *First National Bank & Trust Co. v. National Credit Union Administration*,[27] the United States Court of Appeals for the District of Columbia Circuit applied *Clarke* and upheld the banking industry's standing to sue the National Credit Union Administration over its allegedly unlawful interpretation of section 109 of the Federal Credit Union Act.[28] The court found that banks were suitable challengers, as competitors to a regulated industry: "[A] competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end."[29]

The court also took note of the earlier *Branch Bank & Trust* decision of the Fourth Circuit and concluded that the Supreme Court's subsequent *Clarke* decision "empties the *Branch Bank* decision of its persuasiveness."[30] Subsequent courts dealing with the issue of bankers' standing to sue for competitive injury in a regulated industry have followed suit.[31]

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24. *Clarke*, 479 U.S. at 391.
25. *Id.* at 402.
26. *Id.* at 402-03.
27. 988 F.2d 1272 (D.C. Cir. 1993).
28. First Nat'l Bank & Trust Co. v. National Credit Union Admin., 988 F.2d 1272, 1279 (D.C. Cir. 1993).
29. *First Nat'l Bank & Trust Co.*, 988 F.2d at 1278-79.
30. *Id.* at 1277 n.3.
31. *See* Community First Bank v. National Credit Union Admin., 832 F. Supp. 1118, 1120-21 (W.D. Mich. 1993) (allowing four banks to challenge a decision of the NCUA approving the amendment of a federal credit union's membership charter), *aff'd*, 41 F.3d 1050 (6th Cir. 1994); Financial Institutions for Tax Equality v. National Credit Union Admin., No. CV 93-130-M-CCL, slip op. at 9-14 (D. Mont. 1995) (holding that FITE had standing to bring an action to limit the expansion of a credit union pursuant to a common bond provision because FITE had a competitive interest); Utah Bankers Ass'n v. America First Credit Union, 912 P.2d 988, 991 (Utah 1996) (applying state credit union law and stating that a bank has standing if injured by competitors in a regulated industry).

Having resolved that preliminary issue, the courts have turned to the merits of the bankers' complaints. After remand of the *First National Bank & Trust Co.* "standing to sue" decision, the United States District Court for the District of Columbia initially granted summary judgment to the National Credit Union Administration, concluding that the language of section 109 of the Federal Credit Union Act was "ambiguous."[32] The court stated that:

> Plaintiffs argue that the common bond provision should be read in the singular, i.e., that each credit union shall have a single common bond. Defendants counter that the reference to 'groups' proves that Congress contemplated multiple groups within a single credit union. The Court concludes that either interpretation is plausible.[33]

Because an "ambiguous" statute is involved, the court concluded, deference was owed to the interpretation of that statute by the agency charged with administering it under the Supreme Court's *Chevron* doctrine.[34]

The United States Court of Appeals for the District of Columbia Circuit again reviewed the case and reversed.[35] The court did not find any "ambiguity" in the statute. It found that "the intent of Congress is clearly discernible from the statutory text and purpose of the statute."[36] The court concluded that federal credit unions could be composed of multiple "groups," but that there must be a bond common to all of them, otherwise the reference to "common bond" in the statute would be surplusage.[37] A "group," by common definition, is an assemblage of individuals that *already have* some common characteristic.[38] As for the purpose of the statute, the court stated the following:

> Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to "ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, 'could loan on char-

32. First Nat'l Bank v. National Credit Union Admin., 863 F. Supp. 9, 13-14 (D.D.C. 1994), *rev'd*, 90 F.3d 525 (D.C. Cir. 1996), *cert. granted sub nom.* National Credit Union Admin. & AT&T Family Credit Union v. First Nat'l Bank & Trust Co., 1997 WL 73467 (U.S. Feb. 24, 1997).

33. *First Nat'l Bank*, 863 F. Supp. at 11.

34. *Id.* (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

35. First Nat'l Bank & Trust Co. v. National Credit Union Admin., 90 F.3d 525, 531 (D.C. Cir. 1996), *cert. granted sub nom.* National Credit Union Admin. & AT&T Family Credit Union v. First Nat'l Bank & Trust Co., 1997 WL 73467 (U.S. Feb. 24, 1997).

36. *First Nat'l Bank & Trust Co.*, 90 F.3d at 527.

37. *Id.* at 528.

38. *Id.*

acter.'" There can be little doubt that growth on the scale achieved by ATTF is inconsistent with that purpose.[39]

The Sixth Circuit followed suit in April, 1997. In *First City Bank v. National Credit Union Administration*,[40] the court concluded that it was unlawful for the Agency to have allowed the AEDC Federal Credit Union of Tullahoma, Tennessee, to expand its field of membership to over three hundred unrelated employee groups. The key point made by the majority was that

> if the NCUA's interpretation is accepted, it would make the common-bond requirement meaningless. If credit unions are permitted to join together an infinite number of distinct groups, so long as each group has within it a common bond, it makes no sense to have the common-bond requirement at all. . . .While we do not pretend to know the rationale behind the common-bond requirement. . .we simply cannot conceive, and no one has suggested, any statutory rationale for requiring the type of "common bond" the NCUA has invoked.[41]

Thus, the only two United States Courts of Appeals to have dealt recently with the issues are in agreement that the membership limitations imposed upon federal credit unions by section 109 of the Federal Credit Union Act are real, and that competing bankers are entitled to have those limitations enforced. Nevertheless, the Supreme Court has granted certiorari in the *First National* case on both the "standing to sue" issue and on the merits of the case.[42] Oral argument is projected to occur early in the Supreme Court's October Term 1997.

"COMMUNITY" CREDIT UNIONS

The above described litigation has been entirely over the common bond limitations (if any) of *occupational* credit unions. At issue in that litigation is essentially a pure question of law: Does the Federal Credit Union Act necessarily limit membership in *occupational* credit unions to *one* common bond per credit union or does it permit the NCUA the discretion to authorize *more than* one common bond per credit union? Obviously, the bankers have taken the former position,

39. *Id.* at 529-30 (quoting *First Nat'l Bank & Trust Co.*, 988 F.2d at 1275). The court's reference was to the AT&T Family Federal Credit Union of Winston-Salem, North Carolina, a party to the litigation. It began as a credit union for Western Electric employees in Winston-Salem, Greensboro and Burlington, North Carolina, but after the NCUA adopted the regulation challenged in the *First National* litigation, it grew to include "112,000 members in more than 150 disparate occupational groups spread across all 50 states." *Id.* at 527.

40. No. 95-6543, 1997 WL 174314 (6th Cir. 1997).

41. First City Bank v. National Credit Union Administration, No. 95-6543, 1997 WL 174314, at *5-6 (6th Cir. 1997).

42. *First Nat'l Bank & Trust Co.*, 90 F.3d at 531.

NCUA the latter. As indicated above, the current state of the law seems to be that all members of an occupational credit union must share a single common bond.

In the expectation (or fear) that the *First National* decision will become and remain the law of the land, federal credit unions are, individually and collectively, seeking means of growth other than the continuous addition of unrelated groups to pre-existing credit unions. Some are converting to state charters in those jurisdictions where local law either is or is thought to be more "liberal" on membership restrictions than the federal law as construed by the United States Court of Appeals for the District of Columbia Circuit. Others are converting from "occupational" or "associational" charters to "community" charters.

On November 18, 1996, for example, the Alaska USA Federal Credit Union submitted an application to the cognizant Regional Director of the National Credit Union Administration to do exactly that. Alaska USA currently serves an estimated 3,000 "groups" extending from Air Force personnel at Elmendorf Air Base near Anchorage to a dozen Regional Native Corporations (the indigenous tribes, such as the Chugach, Inuit, and Aleut) and a long list of Catholic and Lutheran parishes in and around Seattle, Washington. It now proposes to redefine itself as a "community" credit union, with its "community" consisting of the entire State of Alaska. (The fact that Seattle is not actually located *in* Alaska is of no consequence.)

While the National Credit Union Administration has not yet approved anything quite *that* large as a "well-defined community," it has recently hinted at a willingness to do so. On November 14, 1996, the agency adopted an "interim field of membership policy" designed to help problems credit unions faced as a result of an injunction issued by a United States District Court a few weeks before.[43] Among other things, the "interim" rule provided that the "well-defined community" requirements of the Federal Credit Union Act would be met *automatically* "if the area to be served is in a single political jurisdiction or portion thereof" and the population did not exceed one million people.[44] Something larger than that could still be approved, but it would require the offer of "proof" by the applicant that the area in question did in fact constitute a single "community." This "interim" rule was temporarily set aside by a United States District Court on December 4, 1996, for reasons largely unrelated to the merits of the new defini-

43. Organization & Operations of Fed. Credit Unions, 61 Fed. Reg. 59,305, 59,305-06 (1996); First National Bank & Trust Co. v. National Credit Union Admin., Nos. 90-2948, 96-2312, slip op. (D.D.C. Oct. 25, 1996).

44. Organization & Operations of Fed. Credit Unions, 61 Fed. Reg. at 59,307.

tion of "well-defined community," but the rule is indicative of the agency's current thinking on the subject.[45]

Although there is an obvious surface similarity in the analysis of "occupational" common bond issues and "community" common bond issues, the two actually present very different questions for resolution. In the case of "occupational" credit unions, the two sides argue over whether there should be only one common bond or more than one. In the case of "community" credit unions, both sides *agree* that a credit union can only serve a *single* community. Where the bankers and the credit unions invariably disagree is over what does or does not constitute that single community. As often as not, that is more of a *factual* question than a question of law. It is an important distinction, since courts more readily defer to factual determinations by an agency charged with administration of a statute than they do to legal determinations of the agency. Since the issues raised by the two types of credit union charters are different, the fact that the bankers have won major victories in the context of the "occupational" credit unions says a little, but not much, about the bankers' prospects for prevailing in litigation over alleged "community" credit union abuses.

In point of fact, there has already been litigation over community credit unions in several jurisdictions, and the bankers have yet to achieve much success in such litigation.

Background to "Community" Credit Union Issues

Before May, 1967, the Bureau of Federal Credit Unions defined "common bond" as a "preexisting condition which causes the members of a group to associate together, be *extensively acquainted* with the other members of the group (and) have common interests and purposes. . . . Common bond in groups within a well-defined neighborhood, community or rural district is based upon a concept of relatively close geographical proximity of members to one another, personal acquaintance and objectives."[46] This definition was changed, but only slightly, in May, 1967, to provide that a common bond was "that preexisting condition which causes the members of a group to associate together, to *know* each other, [and] to have common interests and purposes." The 1967 regulation added to the "community" credit union consideration the concept that there be a "community of interests [and] activities."[47]

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45. First National Bank & Trust Co. v. National Credit Union Admin., Nos. 90-2948, 96-2312, slip op. at 1-3 (D.D.C. Dec. 4, 1996).

46. Bureau of Federal Credit Unions, Procedure for Organizing Federal Credit Unions (June 1965).

47. Bureau of Federal Credit Unions, Organizing a Federal Credit Union (May 1967) (emphasis added).

Indeed, with respect specifically to the potential field of membership of "community" credit unions, the Bureau of Federal Credit Unions, both in its 1965 and 1967 publications, disallowed "urban" credit unions where the population was "materially in excess of 7,500," and allowed "rural" credit unions where the service area "does not have a population greater than 7,500 or cover more than one county."[48] When the National Credit Union Administration succeeded the Bureau as the regulator of federal credit unions, its first effort to define terms, in 1972, imposed a limit of "not greatly exceeding 25,000" upon the field of membership of "community" credit unions, and retained the earlier BFCU limitation that the service area "should not cover more than one county."[49]

In 1980, the National Credit Union Administration abolished the "not greatly in excess of 25,000" limitation on community credit unions.[50] But even then, the Agency did not do so with the stated intent of expanding "community" charter opportunities of credit unions beyond those limits. It did so over an expressed concern that approvals of community credit union charters would be without any standards at all. The NCUA vehemently denied that claim and asserted the contrary:

> The specific objection to the removal of the 25,000 population limit alleged that this limit represented a "standard" for determining a well-defined community. The number represented only a numerical limitation. The number was never considered a factor in determining whether the boundaries represented a well-defined area. The requirements for a community charter are *much more stringent under the proposed policy* than under current policy. In fact, removal of the numerical guideline requires the applicant to document the community proposal to a much greater degree.[51]

The regulations adopted by the National Credit Union Administration, as they appear in the current edition of the *Chartering and Field of Membership Manual*, provide "that there be regular contact among persons who live or work within a well-defined neighborhood, community or rural district in order to satisfy the common bond requirements. . . ."[52]

48. *See* NATIONAL CREDIT UNION ADMINISTRATION, RESEARCH REPORT NO. 9 10 (July 1975).

49. *Id.*

50. National Credit Union Administration, Organizing a Federal Credit Union, 45 Fed. Reg. 8,280, 8,284 (1980).

51. *Id.*

52. NATIONAL CREDIT UNION ADMINISTRATION, CHARTERING AND FIELD OF MEMBERSHIP MANUAL 2-4 (1989).

RECENT LITIGATION

In *Community First Bank v. National Credit Union Administration*,[53] four community banks in south central Michigan sued over the expansion of the Portland Federal Credit Union.[54] PFCU became a "community" credit union in 1953, serving residents of the Portland, Michigan, area.[55] Its charter offered membership to all persons who lived within a six mile radius of the Portland post office, all within Ionia County.[56] In 1981, the credit union was permitted to expand its "community" into other adjacent areas of Ionia County and also of Clinton and Eaton Counties.[57] Finally, in 1992, it sought to expand so as to cover all of Ionia County and about one-fourth of Clinton County.[58]

The National Credit Union Administration approved Portland's application, carving out a few exceptions from the proposed "community" so as to protect existing credit unions (but not banks) from competition.[59] Nevertheless, the "community" to be served by Portland FCU after approval amounted to 44,000 people who lived in three different counties, numerous separate cities and towns, three separate U.S. Congressional districts, three separate state senatorial districts, and six separate public school districts, and who had two different area codes.[60] This latter approval is what precipitated the litigation.[61]

The United States Court of Appeals for the Sixth Circuit affirmed the decision of the Agency.[62] It recited the Agency's definition of "well-defined community" as one in which "[t]he geographical area's boundaries must be clearly defined; and . . . the area is recognized by those who live and work there as a distinct 'neighborhood, community or rural district.'"[63] Concluding that such a definition was "reasonable", the court deferred to it under the familiar *Chevron* test.[64]

The court then went on to conclude that "[s]ubstantial evidence exists in the administrative record to support the NCUA's decision"

53. 41 F.3d 1050 (6th Cir. 1994).
54. Community First Bank v. National Credit Union Admin., 41 F.3d 1050, 1052 (6th Cir. 1994).
55. *Community First Bank*, 41 F.3d at 1052.
56. *Id.* The Town of Portland had a 1990 population of about 4,000 persons. *Id.*
57. *Community First Bank*, 41 F.3d at 1052.
58. *Id.*
59. *Id.*
60. *Id.* at 1053.
61. *Id.*
62. *Id.* at 1056.
63. *Id.* at 1055 (citing 54 Fed. Reg. 31,165 (1989)).
64. *Id.* at 1055. *See supra* note 34.

that Portland's application satisfied the regulatory definition.[65] Among that "evidence" is the fact that the City of Ionia — an area newly to be served by the expanded credit union — was the county seat of the same county in which the City of Portland was located.[66] Predictably, therefore, people in Portland had occasion to "regularly travel there to conduct business."[67] People in both cities thought that a rural environment was important, and existing members of the credit union "strongly recommended expansion."[68]

Community First is the only decided federal case exactly on point, but similar issues have arisen under comparable state law as well.[69] In Maine, for example, state law provides, in Title 9-B, section 814, that a credit union's field of membership "means those persons having a common bond of occupation or association; residence or employment within a well-defined neighborhood, community or rural district; employment by a common employer or by employers located within a well-defined industrial park or community; membership in a bona fide fraternal, religious, cooperative, labor, rural, educational or similar organization."[70]

In *Maine Bankers Ass'n v. Bureau of Banking*,[71] the Saco Valley Federal Credit Union applied to convert its charter from a federal one to one issued by the state, and in the process to expand its field of membership from the City of Saco, on the southern coast, inland along the Saco River so as to include a dozen and one-half more small towns.[72] After contested administrative proceedings, the Superintendent of the Bureau of Banking approved part of the application, allowing the now state-chartered credit union to serve a half-dozen towns in addition to the City of Saco.[73] The remaining part of the application was disallowed.[74] The Maine Bankers Association appealed, but the state supreme court summarily concluded that "there is ample evidence in the record to support the Superintendent's find-

65. *Community First Bank*, 41 F.3d at 1055-56.
66. *Id.* at 1056.
67. *Id.*
68. *Id.*
69. In *Financial Institutions for Tax Equality v. National Credit Union Administration*, No. CV-93-130-M-CCL, slip op. at 9-14 (D. Mont. 1996), a United States magistrate for the United States District Court for the District of Montana reached a similar conclusion on October 1, 1996, in a case involving an expansion of a "community" federal credit union to cover all of one county and parts of two others in Montana. The area to be served included 90,000 people spread over 3,600 square miles. The "recommended decision" of the magistrate is subject to exceptions filed by the parties and is awaiting final action by the district judge.
70. ME. REV. STAT. ANN. tit. 9-B, § 814 (West 1980 & Supp. 1996).
71. 684 A.2d 1304 (Me. 1996).
72. Maine Bankers Ass'n v. Bureau of Banking, 684 A.2d 1304, 1305 (Me. 1996).
73. *Maine Bankers Ass'n*, 684 A.2d at 1306.
74. *Id.*

ings" that the area sought to be served "comprised a 'well-defined community' within the meaning of section 814."[75]

In Nebraska, the state law does not directly provide for "community" credit unions at all. Section 21-1774 describes credit union membership as limited to groups having "a common bond of occupation."[76] It is lawful for a state-chartered credit union in Nebraska to operate with a "community"-based field of membership only under the authority of section 21-17,115.[77] That statute provides that state-chartered credit unions "shall have all the rights, powers, privileges, benefits and immunities which may be exercised . . . by a federal credit union doing business in Nebraska. . . ."[78]

In *Nebraska Bankers Association v. Department of Banking and Finance*,[79] Western Heritage Credit Union, formerly serving only Box Butte County in the western part of the state, applied to the Department of Banking and Finance for authority to expand its field of membership so as to include the entire Nebraska Panhandle plus Grant County.[80] The total area that Western Heritage wished to serve amounted to 14,957 square miles, and the population totalled 91,818.[81] There are nine states in the United States that are smaller than the Panhandle-plus-Grant County. Massachusetts, Connecticut and Rhode Island combined would fit within the area; Delaware would fit within Sioux County alone. The land areas of Hawaii, Maryland, Vermont, New Hampshire and New Jersey all pale in comparison to the Panhandle.

As in other jurisdictions, a consortium of local banks challenged the application as exceeding the limits imposed by the "common bond" language in the statute.[82] And, as in other jurisdictions, the reviewing court found that there was sufficient evidence in the record to support a finding that "those who live and work within the proposed expansion area commingle and interact regularly."[83] The matter was not appealed further.

This is not to say that the regulators have carte blanche authority to approve *any* conglomeration of people into a "group" for purposes of thereby becoming eligible for membership in (or chartering of) a federal credit union. The Sixth Circuit, while ruling against the banks in

75. *Id.*
76. NEB. REV. STAT. § 21-1774 (Reissue 1991).
77. NEB. REV. STAT. § 21-17,115 (Cum. Supp. 1996).
78. *Id.*
79. Docket 504, Page 176 (D.C. Lancaster Co., Neb. Feb. 2, 1995).
80. Nebraska Bankers Ass'n v. Dep't of Banking & Finance, Docket 504, Page 176, slip op. at 1 (D.C. Lancaster Co., Neb. Feb. 2, 1995).
81. RAND MCNALLY COMMERCIAL ATLAS & MARKETING GUIDE 407 (1993).
82. *Nebraska Bankers Ass'n*, Docket 504, Page 176, slip op. at 1-2.
83. *Id.* at 7.

Community First, cautioned that "this decision is confined to the facts of this case; it is not intended to establish a precedent that community federal credit unions, or persons in a similar status, are free to expand to an entire county or to an adjacent county. Each case must be viewed on its own merits."[84]

In fact, one federal district court specifically refused to defer to the NCUA's determination of what constituted a single "group."[85] In *Texas Bankers Association v. National Credit Union Administration*,[86] NCUA allowed the Communicators Federal Credit Union, originally a credit union for telephone company employees, to offer membership in the credit union to members of "CU Link."[87] CU Link was a credit union created organization open to all senior citizens (persons over the age of 50) and retirees who lived within a 25-mile radius of downtown Houston, Texas.[88] The organization had no purpose other than to be a "group," and therefore secure membership in the credit union.[89]

The court (subsequently reversed on this point) concluded that it was lawful for the credit union to extend its services to a group that was unrelated to the original membership of the credit union.[90] However, according to the court, the group had to be one in which the members had a common bond.[91] Despite the conclusions of the National Credit Union Administration to the contrary, the court went on to hold that senior citizens and retirees did not have a "commonality based upon their stage in life."[92] The court pointed out that a 51-year-old corporate executive had few concerns in common with a "lower middle class retiree struggling to live on a fixed income."[93] The court acknowledged all of the "policy" arguments advanced to support extending credit union services beyond an original limited field of membership, but ended up holding that the NCUA cannot grant exemptions that void the statutory requirements of a common bond."[94]

Additionally, it is difficult to square the concept of far-flung "community" credit unions with the original intent of Congress as described by the District of Columbia Circuit in the *First National* case:

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84. *Community First Bank*, 41 F.3d at 1056.
85. Texas Bankers Ass'n v. National Credit Union Admin., 888 F. Supp. 184, 191 (D.D.C. 1995).
86. 888 F. Supp. 184 (D.D.C. 1995).
87. *Texas Bankers Ass'n*, 888 F. Supp. at 187-88.
88. *Id.*
89. *Id.* at 188.
90. *Id.*
91. *Id.*
92. *Id.* at 190.
93. *Id.*
94. *Id.* at 190-91.

"Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to 'ensure both that those making lending decisions would know more about the applicants and that borrowers would be more reluctant to default.'"[95]

CONCLUSION

The National Credit Union Administration, by its aggressive reinterpretation of long settled credit union law, has attempted to change the nature of credit unions from the idealized "cohesive associations" into large, wealthy and far-flung financial institutions. It was entirely predictable that the banks and thrift institutions, for whose business the credit unions are now competing, would resist such incursions. The courts, by and large, have confirmed their rights to challenge the agency's actions, but success on the merits of such challenges is not yet assured for either side.

It may well be time now for Congress to intervene in the matter rather than allowing the seemingly endless litigation over the matter to play itself out. Congress and Congress alone has the capacity to bring the 1930's-style credit unions into the twenty-first century. In doing so, it will be necessary for the legislators to examine not only the continuing usefulness of membership limits, but also the question whether the tax exemption and other special regulatory benefits that have historically been the credit unions' still continue to make any sense in a modern economy.

95. *First National*, 90 F.3d at 529-30.