National Bank Act Preemption Revisited*

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The application of State law to national banks was hotly debated in the run-up to the Dodd-Frank Act. Passage of that Act quieted that debate – until now.

Prior to the enactment of the Dodd-Frank Act, the National Bank Act had been interpreted to preempt the application of certain State laws to national banks, including some State anti-predatory lending laws. This led to calls for limitations on the preemptive power of the National Bank Act.

The original version of what became the Dodd-Frank Act included a provision limiting National Bank Act preemption over "State consumer protection" laws. The final version of the Act did not go that far, but did impose procedural conditions on the application of preemption to "State consumer financial" laws, and permits such laws to apply to non-depository subsidiaries of national banks.

More importantly, the final version of Dodd-Frank did not change the legal standard for National Bank Act preemption. The Act codified the standard applied by the U.S. Supreme Court in a 1996 case involving Barnett Bank. The Act states that State consumer financial laws are preempted only if "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*… the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers…"

Another part in the Dodd-Frank Act that helped to quell the debate over National Bank Act preemption was the creation of the Bureau of Consumer Financial Protection. With the creation of that new federal agency, Congress established a regulatory framework for the adoption of uniform federal consumer financial protection standards for banks and providers of financial services. This reduced the pressure on the States to adopt consumer financial protection laws that might conflict with the National Bank Act.

Two recent developments are raising new questions about the scope of National Bank Act preemption over State laws.

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First, the U.S. Court of Appeals for the Ninth Circuit has endorsed a narrow interpretation of the legal standard for preemption codified in the Dodd-Frank Act. In a case involving the application of a California statute requiring the payment of interest on mortgage escrow accounts (*Lusnak v. Bank of America*), the Court interpreted the legal standard for preemption to be simply whether the State law "prevents or significantly interferes" with the exercise of a national bank's authorized powers. The problem with this interpretation is that it ignores the first half of the text of the standard codified in Dodd-Frank, which, as quoted above, provides that preemption must be "in accordance with" the legal standard for preemption in the Barnett Bank case.

In a 2012 law review article, (Dodd Frank Act and National Bank Preemption: Much Ado About Nothing, Virginia Law & Business Review, Volume 7, Fall 2012, Number 2), my colleagues Ray Natter and Katie Wechsler analyzed the text and history of the preemption standard codified in the Dodd-Frank Act and concluded that "The logical reading of the [Barnett Bank] case is that the [U.S. Supreme] Court intended the phrase 'prevents or significantly interferes' to include such concepts as 'hamper,' 'impair the efficiency,' and 'encroach upon the rights' of national banks.

In other words, the "prevent or significantly interfere" standard is not the holding of *Barnett Bank*. The State law in question in that case was preempted because it stood as an *obstacle* to the national bank's authority. Presumably, Bank of America will appeal this decision, and ultimately the U.S. Supreme Court may be called upon to interpret the scope of the preemption standard codified in the Dodd-Frank Act.

The second recent development related to preemption occurred during the Senate's consideration of S. 2155, Senator Crapo's bill to modify certain provisions of the Dodd-Frank Act, which has since been approved by the House and enacted. During that debate, Senators Nelson (D-FL), Harris (D-CA), Warren (D-MA), Blumenthal (D-CN), and Merkley (D-OR) filed an amendment to authorize State authorities to examine national banks for compliance with State law. This amendment would have reversed a long-standing provision in the National Bank Act that bars States from conducting examinations of national banks (12 U.S.C. § 484). While the amendment was never brought to a vote, it signals a renewed interest on the part of some Members of Congress in addressing the application of State law to national banks.