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Locke Lord QuickStudy: The Supreme Court Is Asked to Clarify ?the Scope of NBA Preemption in *Cantero v. Bank of ?America*

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The Supreme Court is poised to resolve a circuit court split on whether the National Bank Act ("NBA") preempts state laws requiring national banks to pay interest on mortgage escrow accounts. *Cantero, et al. v. Bank of America, N.A.,* Case No. 22-529. The Second Circuit found in *Cantero* that the NBA preempts a New York law requiring banks to pay interest on mortgage escrow accounts because it impermissibly asserts control over the bank's ability to exercise its banking power, including its ability to create and fund escrow accounts. This is contrary to two Ninth Circuit decisions finding that a similar California law was not preempted because the fact that Congress requires creditors to comply with state interest escrow laws for certain mortgages in other provisions of the Dodd-Frank Act necessarily means that complying with such laws does not significantly interfere with their banking powers.[1]

The Supreme Court's decision is expected to have a sweeping effect. Twelve states currently have laws requiring banks to pay a minimum interest amount on escrow balances for mortgage accounts. Not only will this decision determine whether the escrow laws of these other states are preempted by the NBA, it will also clarify how courts must apply the preemption standard set forth in Dodd-Frank when determining whether other state consumer financial laws are preempted under the NBA.

1. Factual and procedural history.

Petitioners in *Cantero* are mortgage borrowers with Bank of America whose property taxes and insurance are paid through an escrow account. Under New York General Obligations Law section 5-601, banks subject to such law must pay borrowers a minimum 2% interest rate on mortgage escrow accounts. The *Cantero* plaintiffs claim that Bank of America is subject to this law and did not pay interest on their escrow accounts. The *Cantero* plaintiffs filed two related class action lawsuits as a result. Bank of America moved to dismiss both cases on the grounds that the New York escrow law does not apply to national banks because it is preempted by the NBA. The district court denied the motions, and Bank of America sought interlocutory review. The Second Circuit accepted Bank of America's appeal and ultimately reversed and remanded the district court's order, finding the New York escrow law is preempted under the "ordinary legal principles of pre-emption" espoused in *Barnett Bank of Marion Cnty., N.A. v. Nelson,* 517 U.S. 25, 37 (1996) because it "would exert control" over the bank's power to use escrow accounts.

**2. Petitioners argue the Second Circuit erred by using a "control test" which failed to consider the factors

required by the Dodd-Frank Act.

Petitioners argue that the “control test” used by the Second Circuit ignores the legal standard for NBA preemption set forth in section 25b of the Dodd-Frank Act, which clarifies that “State consumer financial laws are preempted, only if….(B) in accordance with the legal standard for preemption in the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers.” Petitioners argue that the Second Circuit’s “control” test is incompatible with Dodd-Frank in the following ways:

- *First*, Petitioners argue that, as defined by Dodd-Frank, a “State consumer financial law” necessarily controls activity that a national bank may be authorized to engage in. Thus, if “control” were the standard for NBA preemption, every “State consumer financial law” would be preempted by the NBA, thus resulting in field preemption.
- *Second*, Petitioners argue that in finding preemption does not turn on “how much a state law impacts a national bank, but [on] whether it purports to ‘control’ the exercise of its powers,” the Second Circuit ignores Dodd-Frank’s use of the term “significantly.”
- *Third*, Petitioners argue that Dodd-Frank requires a “preemption determination” to assess the “impact of a particular State consumer financial law” and that the Second Circuit erred in finding courts should not consider the impact or “degree of interference” of the law.

The amicus briefs submitted in support of reversal echo Petitioners’ arguments, including those in a brief submitted by the Department of Justice. The DOJ argues that the “control test” used by the Second Circuit runs afoul of Dodd-Frank and urges that a case-by-case, fact intensive assessment is required to determine whether a state law is preempted by the NBA. Five additional briefs were filed in support of Petitioners, including by 33 states and the District of Columbia, an association of state official regulators, and consumer protection non-profits. Each amicus brief argues that the Second Circuit applied the wrong standard, as it failed to apply the *Barnett* test as codified in Dodd-Frank, and that the Second Circuit’s “control test” would result in preemption of broad categories of state law, depriving consumers of necessary protections.

3. Respondent argues that the standard used by the Second Circuit properly applied *Barnett Bank* as codified in Dodd-Frank and that Petitioners are misreading the statute.

Respondent Bank of America argues that under established Supreme Court precedent, including *Barnett Bank* as codified in Dodd-Frank, the NBA preempts state laws “that control or otherwise unduly burden national banks’ exercise of federally granted powers.” Because the New York law deprives national banks such as Bank of America of the authority to set the terms of their mortgage escrow account themselves, Respondent argues the Second Circuit did not err in finding that the law was preempted by the NBA.

Respondent replied to Petitioners’ main arguments as follows:

- Respondent disputes Petitioners’ claim that application of the Second Circuit’s “control test” would necessarily preempt all “State consumer financial laws” and notes that many state consumer protection laws, including laws banning racial discrimination in lending, fit that definition and are not preempted under this standard.
- Respondent counters that the use of the phrase “significantly interferes” in section 25b does not necessarily mean quantitatively large as Petitioners suggest, but could also mean “importantly.”And regardless of the inclusion of the word “significantly” in the statute, Respondent argues that Dodd-Frank did not create a new preemption test but instead merely codified the existing “control test” espoused in *Barnett Bank* – which the federal government itself has repeatedly interpreted as barring any attempt by states to exercise control over a

national bank’s powers.

- Respondent also disputes Petitioners’ and the government’s claim that Dodd-Frank requires a factual showing of the law’s impact on the bank’s specific powers. Respondent notes that the mention of a case-by-case analysis in Dodd Frank only applies when the OCC issues a rule preempting state law – not preemption decisions by courts. Respondent further argues that transforming NBA preemption into a fact-specific inquiry would create confusion among banks and regulators and could result in inconsistent rulings.

Seven amicus briefs were filed in support of Respondent, including by the former Comptrollers and senior OCC officials, the United States Chamber of Commerce, and the Washington Legal Foundation. These briefs urge affirmance of the Second Circuit decision due to the potentially massive costs of compliance, as the cost of litigating each state law, and the likely destabilization of the banking industry should the uniformity and predictability of a federal bank charter be undermined. The former OCC Comptrollers and senior officials were critical of the government’s position, arguing that it shows no recognition of the *Barnett* standard as has been understood by both regulators and regulated banks. The United States Chamber of Commerce urges affirmance of the Second Circuit’s decision as well, arguing that the test proposed by Petitioners would threaten the viability of the dual banking system and hinder competition, innovation, and customer choice. The Washington Legal Foundation, a non-profit law firm and policy center, notes the reversal would have far-reaching implications not only on the banking and lending industry, but also on other industries regulated by both federal and state laws, such as the health care and aviation industries.

4. Conclusion

The Supreme Court’s decision in *Cantero* will likely provide guidance and clarification as to the limits of NBA preemption in the aftermath of Dodd-Frank. National banks should consider the possible implications a decision limiting NBA preemption could have on their obligation to comply with other state consumer financial laws, apart from just interest-on-escrow laws. Oral argument is set for February 27, 2024, and a decision is expected this summer.

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[1] *Flagstar Bank v. Kivett.,* No. 21-15666, 2022 WL 1553266 (9th Cir. 2022); *Lusnak v. Bank of America,* 883 F.3d 1185 (9th Cir. 2018).

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