

Supreme Court Clarifies Standard for Analyzing National Bank Act Preemption

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In *Cantero v. Bank of America*, the U.S. Supreme Court clarified the standard for analyzing whether the National Bank Act (the NBA) preempts state laws regulating banks chartered under the NBA. In doing so, the Court rejected “a clear line,” instead holding that lower courts must conduct a “nuanced comparative analysis” to determine whether the “nature and degree of the interference” by the state law on a national bank is impermissible. And after conducting that analysis, “[if] the state law prevents or significantly interferes with the national bank’s exercise of its powers, the law is preempted.”

Background

In 1863, Congress passed the NBA, paving the way for the dual system of banking in the United States made up of parallel federal and state regulatory regimes. In balancing those parallel systems, courts have generally taken a broad view that the NBA preempts many state laws attempting to regulate national banks. About two decades ago, the Court in *Barnett Bank v. Nelson* synthesized the framework for deciding when the NBA preempts a state law. Summarizing the Court’s opinions on this issue stretching back to 1870, *Barnett Bank* ruled that the NBA preempts a state law if it “prevents or significantly interferes with the exercise by the national bank of its powers.” In support, the Court cited precedent holding that a state law is preempted if it hampers a federal law, interferes with the purposes of a federal law, or obstructs Congress’ objectives. Congress later incorporated the *Barnett Bank* preemption framework in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). See 12 U.S.C. § 25b(b)(1).

Cantero

In *Cantero*, the plaintiffs alleged that Bank of America violated a New York statute requiring the bank to pay interest on mortgage escrow accounts. The Second Circuit held that the NBA preempts the New York statute because it asserts “control” over the bank’s ability to exercise its federally granted banking power, including on its ability to create and fund escrow accounts.

In a unanimous opinion, the Court vacated the Second Circuit’s decision, concluding that it did not apply the correct NBA preemption standard from *Barnett Bank* as codified in Dodd-Frank. The Court reasoned that the Second Circuit’s “control” test was too categorical and was not the “kind of nuanced comparative analysis” Congress required when passing Dodd-Frank. To apply this “nuanced” analysis, the Court directed lower courts to “make a practical assessment of the nature and degree of the interference caused by a state law.” The Court suggested lower courts should examine the text and structure of the relevant state law, compare the state law’s “interference” to the “interference caused by the state laws in *Barnett Bank*” and other Court opinions on the subject, and rely on “common sense.”

The Court declined to apply the *Barnett Bank* preemption framework to the New York interest on mortgage escrow law, leaving that case-by-case analysis to the Second Circuit on remand.

Implications

Most immediately, the Court’s decision and how the Second Circuit rules on remand will be important because about a dozen states have similar statutes governing interest on mortgage escrow accounts.

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Beyond mortgage escrow laws, however, the Court's decision to double down on *Barnett Bank's* nuanced standard is likely to produce uncertainty about which state laws are preempted. The Court's instruction to compare state laws on a statute-by-statute basis with the laws it has addressed in its decisions going back more than 150 years, and also to apply "common sense," is guidance that will prove challenging to implement in a consistent and predictable manner. One possible result is disagreement in the lower courts about whether the same or similar laws are preempted, leading to a patchwork legal regime unless and until the Court steps in again.

Another likely result is that the uncertainty will prove costly to banks and consumers alike. Banks will be forced to choose whether to comply with laws they suspect a court might hold preempted; choose to challenge those laws in declaratory judgment actions; or not to comply with those laws and risk state enforcement actions or consumer actions like those in *Cantero*, with an uncertain outcome. The increased costs from that uncertainty may also lead to less consumer choice as banks reassess which services to provide in light of their legal risks.

Ultimately, the Court alluded to the trouble, observing that it "appreciated the desire by both parties for a clearer preemption line one way or the other." But it laid the blame on Congress and its own prior precedent, noting that "Congress expressly incorporated *Barnett Bank* into the U.S. Code," and "*Barnett Bank* did not draw a bright line."

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At the same time, the Court's decision suggests that lower courts may resolve much of this uncertainty by looking — as the Chamber of Commerce urged in a [Skadden amicus brief](#) — to predictable, self-evident economic consequences of classes of statutes rather than requiring expert testimony or data, and considering those consequences in light of precedent. Indeed, the Court's opinion appears to rule out the highly fact-intensive preemption analysis the plaintiffs sought, rejecting the plaintiffs' request to adopt a standard that "would preempt virtually no non-discriminatory state laws that apply to both state and national banks." The Court's reasoning suggests that analogy to caselaw and articulation of straightforward economic principles may help show lower courts when state laws are preempted, as Congress intended when setting up the dual-banking regime.

Conclusion

We will continue to monitor developments in the Second Circuit on remand and other courts of appeals' responses to the Court's decisions. If you have questions, please do not hesitate to contact any of the attorneys listed below.