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Will Supreme Court Ground Tremors Cause National Bank Preemption Tsunami?

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On May 30th, an unanimous Supreme Court ruled that the Second Circuit needed to take another shot at evaluating whether Bank of America, a national bank, can pre-empt a New York state law requiring the payment of interest on mortgage escrow balances. In the **Cantero v. Bank of America opinion**, written by Justice Kavanaugh, the Second Circuit was characterized as not having conducted the "kind of nuanced comparative analysis" necessary to determine whether a state law may be pre-empted by a national bank, and so the Second Circuit's decision in favor of Bank of America was vacated and the case was remanded.

National banks are typically extraordinarily protective of their pre-emption rights – rights that were arguably first granted to them in 1863 pursuant to the National Banking Act, which provides, that national banks are authorized under Federal law to exercise "all such incidental powers as shall be necessary to carry on the business of banking." As currently conceived, national bank pre-emption rights allow national banks to, among other things, charge interest rates that may exceed state usury laws and to not have to apply for permission to do business in a state. Nevertheless, national bank pre-emption rights have consistently been rich fodder for court cases over the last one hundred and sixty years.

The reason that all of the Supreme Court justices agreed to vacate and remand the Cantero case is because they reasoned that the Second Circuit did not apply the correct pre-emption analysis to the facts of the case. In other words, the Second Circuit relied on a series of cases stemming from the famous McCulloch v. Maryland Supreme Court decision, thereby attempting to "distill a categorical test" that would allow national banks to draw a bright line regarding when state laws are or are not pre-empted. Instead, the Supreme Court has instructed the Second Circuit to rely upon the Supreme Court's decision in **Barnett Bank of Marion County, N.A. v. Nelson** (517 U.S. 25 1996), which pre-emption standard Congress enacted in the Dodd-Frank Act, at least with respect to when a state consumer protection law is preempted. 12 U.S.C. §25b. Specifically, Dodd-Frank explicitly referenced Barnett Bank and provided "that the National Bank Act preempts a state law 'only if' the state law (i) discriminates against national banks as compared to state banks; or (ii) 'prevents or significantly interferes with the exercise by the national bank of its powers."

Commenting that “[w]e appreciate the desire by both parties for a clearer preemption line one way or the other.” The opinion points out that by Congress expressly incorporating Barnett Bank into the U.S. Code, the Second Circuit must “make a practical assessment of the nature and degree of the interference caused by a state law.” While the opinion seems to slightly weigh in favor of finding that the New York state law in question may not be pre-empted, it cuts short of conducting the analysis and reaching that conclusion.

Thus, all eyes will turn to see what the Second Circuit decides to do in the case, and whether the Supreme Court will have to weigh-in once again, when that decision is rendered. In the meantime, what should national banks do? When Dodd-Frank first became law, many of us spent countless hours cataloging individual state consumer protection laws that would apply to a state bank and evaluating those laws to determine whether national bank pre-emption applied. In many cases, in this practitioner’s experience, even if there were arguments that the state consumer protection law could be pre-empted, national banks chose to go ahead and comply with the state law, just to avoid the possibility of lawsuits like Cantero. In the intervening fifteen years, it is perhaps inevitable that such thoroughness and precision has degraded. Therefore, even though Cantero may take some additional years to be resolved, the Supreme Court has parsed through the Barnett Bank standard sufficiently to help national banks and practitioners alike to take another swing through state consumer protection laws and decide anew whether such laws should be pre-empted.