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What Happens When You Ignore the Supreme Court? Maybe the Ninth Circuit Will Find Out – an Update on National Bank Preemption

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As we reported in June, the Supreme Court handed down a decision in *Cantero v. Bank of America* on bank preemption matters that remanded cases decided by three different Circuit Courts, finding that the courts did not apply the correct analysis to determine whether a state law requiring interest to be paid on a mortgage escrow is preempted by the National Bank Act. The Second Circuit's case was the namesake for the Supreme Court decision, and that case is being dutifully briefed on remand, as is the Citizens Bank case in the First Circuit. However, the Ninth Circuit, in its remanded case, *Kivett v. Flagstar Bank*, moved forward with a new resolution of the preemption issue, without receiving briefing from the affected parties, and found once again that its state law is **not** preempted.

As you may recall, the Supreme Court's *Cantero* decision admonished the Circuit Courts to conduct a "nuanced comparative analysis" consistent with the *Barnett Bank* preemption standard that was codified in the Dodd-Frank Act. As we described previously, Dodd-Frank 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." And therefore, the Supreme Court remarked that the only way forward is to "make a practical assessment of the nature and degree of the interference caused by a state law."

The "unpublished" Memorandum announcing the Ninth Circuit's decision, written by a three-judge panel, basically ignored the *Barnett Bank* preemption analysis and instead applied a preemption analysis endemic to the Ninth Circuit, a case they decided in 2018 called *Lusnak v. Bank of America*. In deciding to rely upon their *Lusnak* precedent, the Ninth Circuit panel did explain that they believe "the Supreme Court's decision in *Cantero* suggests that *Lusnak* was correctly decided" and they stated that *Lusnak* "properly applied the test for preemption from" *Barnett*. However, they did not take the time to go back through the inner workings of that earlier preemption analysis, which is a shame because *Lusnak* focused on a TILA provision that **allowed** interest to be paid on certain mortgage escrow accounts. Meanwhile in *Cantero*, footnote #1 provided that, "all parties agree that [that provision] does not apply to the mortgages in this case."

California and the Ninth Circuit have a long history of chafing against national bank preemption, so in some ways, the new decision in *Kivet* is not all that surprising. But it is surprising that the Ninth Circuit did not take the opportunity to reconsider its earlier preemption analysis, as they were directed to do. This means that the industry can take no comfort in *Kivet* and must continue to operate in a cloudy post-*Cantero* world and hope that the opinions that come out from the remands to the First and Second Circuits can better dissipate the fog.