Aldrich & Bonnefin
The Banking & Business Law Firm

Consumer Lending Update

MAY 2019

NBA Does Not Preempt California Interest on Impound Accounts Law

In March 2018, the Ninth Circuit Court of Appeals effectively overturned 14 years of the OCC's 2004 National Banking Act (NBA) preemption determinations in *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018). In that case, Lusnak sued BofA alleging the bank violated California Civil Code Section 2954.8(a) by not paying interest on his escrow account. Although the bank argued that the NBA preempts the California statute, the Ninth Circuit disagreed, essentially ignoring the OCC's 2004 NBA preemption determination set forth in 12 CFR 34.4(a)(6) which states, "[a] national bank may make real estate loans. . . without regard to state law limitations concerning . . . [e]scrow accounts, impound accounts, and similar accounts."

BofA petitioned the Ninth Circuit to rehear the matter *en banc*. The Ninth Circuit denied BofA's petition (*Lusnak v. Bank of Am., N.A.*, 2018 U.S. App. LEXIS 12745 (9th Cir. May 6, 2018)). However, at BofA's request, the Ninth Circuit granted a stay of its decision pending the filing and disposition of BofA's petition for writ of certiorari to the U.S. Supreme Court (*Lusnak v. Bank of Am., N.A.*, 2018 U.S. App. LEXIS 15276 (9th Cir. June 6, 2018)). On November 19, 2018, the U.S. Supreme Court denied the bank's petition for certiorari. *Bank of Am., N.A. v. Lusnak*, 139 S. Ct. 567 (2018).

Consequently, the Court's denial solidifies the Ninth Circuit's holding that national bank preemption does not extend to the California requirement to pay at least two-percent annual interest on escrow accounts. National banks and possibly other federally chartered institutions, such as federal savings banks and federal credit unions, should consider whether they have been complying (or need to comply now) with Section 2948.5.

ALDRICH & BONNEFIN
Professional Law Corporation

The Banking & Business Law Firm
www.ablawyers.com 949.474.1944
18500 Von Karman Ave., Suite 300, Irvine, California 92612

Authors: Janet M. Bonnefin, Esq., Robert K. Olsen, Esq. and Stephanie A. Shea, Esq.