

Consumer Lending Update

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NINTH CIRCUIT OVERTURNS 14 YEARS OF OCC PREEMPTION REGULATION

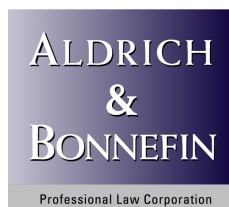
Last month, the Ninth Circuit Court of Appeals effectively overturned one of the OCC's 2004 National Banking Act (NBA) preemption determinations. In *Lusnak v. Bank of Am., N.A.*, 833 F.3d 1185 (9th Cir. 2018), Donald Lusnak filed a class action suit against Bank of America (BOA) alleging that BOA violated California Civil Code Section 2954.8(a). In short, Section 2954.8(a) requires financial institutions to pay two percent interest per year on funds held in escrow accounts in connection with mortgage loans.

The NBA preemption standard preempts a state consumer financial law only if the state law "prevents or significantly interferes with the exercise by the national bank of its powers." The NBA permits the OCC to declare certain state laws preempted under this standard. Since 2004, the OCC has set forth the following preemption determination in 12 CFR 34.4 (a)(6): "A national bank may make real estate loans . . . without regard to state law limitations concerning . . . [e]scrow accounts, impound accounts, and similar accounts." Citing this OCC determination, BOA moved to dismiss Lusnak's claims on the basis that the NBA preempts Section 2954.8(a).

The Ninth Circuit effectively ignored the OCC's preemption determination in Section 34.4(a)(6). The Ninth Circuit seemed to imply that the OCC did not meet the requisite procedural requirements for such preemption determinations.

After ignoring the OCC's preemption determination, the court made its own. It ultimately held that "no legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated they do not." In the last part of this quote, the Ninth Circuit is referring to Dodd-Frank's addition of escrow requirements to Truth in Lending Act Section 1639d(g)(3). Specifically, post-Dodd-Frank, Section 1639d(g)(3) requires creditors to pay interest to the consumer on the amount held in any impound, trust or escrow account if prescribed by applicable state or federal law. Even though Section 1639d(g)(3) applies only to higher-priced mortgages, the court concluded that Section 1639d(g)(3) shows Congress' view that creditors can comply with state escrow interest laws without any significant interference with their banking powers. As a result, the Ninth Circuit held that the NBA does not preempt California Civil Code Section 2954.8(a).

Prior to relying on NBA preemption, national banks should consult with Bob Olsen at ROlsen@ABLawyers.com.



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