

Consumer Lending Update

July 2018

NINTH CIRCUIT STAYS LUSNAK DECISION

In April we reported that the Ninth Circuit effectively overturned one of the OCC's 2004 National Banking Act's (NBA) preemption determinations. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018).

Background. Recall that Donald Lusnak filed a class action suit against Bank of America (BOA) alleging that BOA violated California Civil Code Section 2954.8(a). That California law requires financial institutions to pay borrowers two percent interest per annum on impound accounts. BOA moved to dismiss the suit based on the NBA preemption standard. The NBA preemption standard preempts a state consumer financial law only if that state law "prevents or significantly interferes with the exercise by the national bank of its powers." Since 2004, the OCC has declared the following preemption standard: "A national bank may make real estate loans . . . without regard to state law limitations concerning . . . [e]scrow accounts, impound accounts and similar accounts." 12 CFR 34.4(a)(6).

In *Lusnak*, a panel of the Ninth Circuit (that is, just three judges, not the full court, heard the case) ruled 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. Accordingly, [the panel court held] that the NBA does not preempt California Civil Code § 2954.8(a)."

What's New. BOA petitioned the Ninth Circuit to rehear the matter *en banc* (that is, the full court would hear the case). The Ninth Circuit denied BOA's petition. *Lusnak v. Bank of Am., N.A.*, 2018 U.S. App. LEXIS 12745 (9th Cir. May 6, 2018).

BOA also petitioned the court to stay its decision pending the filing and disposition of BOA's petition for writ of certiorari to the U.S. Supreme Court. To the surprise of some observers, the court granted this request. *Lusnak v. Bank of Am., N.A.*, 2018 U.S. App. LEXIS 15276 (9th Cir. June 6, 2018). Accordingly, the *Lusnak* decision is on hold until the Supreme Court decides to hear the case and, if it does, until the Supreme Court issues a decision. BOA's petition to the Supreme Court is due on August 14, 2018.

Note that the OCC has filed an amicus brief that, in part, asserts that the Ninth Circuit panel decision errs in matters of fundamental importance to the national banking system. Among other things, the OCC pointed to the U.S. Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). The OCC argues that the passage of Dodd-Frank did not change the Supreme Court's precedent, nor did it diminish the OCC's authority to determine preemption.



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.