The *Cantero* Clarification of National Bank Preemption

The Supreme Court Favors Interpreting Existing Standards Over Establishing New Ones

June 3, 2024

On May 30, 2024, in a 9-0 decision, the U.S. Supreme Court in *Cantero v. Bank of America, N.A.* ("*Cantero*") vacated and remanded a decision of the U.S. Court of Appeals for the Second Circuit that the National Bank Act preempted a New York State law requiring banks to pay borrowers interest on mortgage escrow accounts. The Supreme Court also established the approach courts must follow when determining whether a state consumer financial law "prevents or significantly interferes" with the exercise of a national banking power and is thus preempted by the National Bank Act.

The standard the Supreme Court set in *Cantero* is not as favorable to national banks as the Second Circuit's decision, which the *Cantero* opinion described as "a categorical test that would preempt virtually all state laws that regulate national banks."[1] Nor did the Court adopt the framework proposed by the borrowers, which "would preempt virtually no nondiscriminatory state laws that apply to both state and national banks."[2] *Cantero* will require lower courts to perform a nuanced analysis based on a review of statutory and judicial precedents that is likely to spawn rather than quell litigation over the applicability of particular state consumer financial laws to national banks. [3]

The National Bank Act furnishes three grounds for analyzing whether a state law is preempted. As relevant here, the National Bank Act preempts a state consumer financial law "only if" it "prevents or significantly interferes with the exercise by the national bank of its powers," as determined "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of*

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1 *Cantero* at 14. The Second Circuit held that the relevant inquiry was whether a state law "purports to control the exercise of [a national bank's] powers" and that "[i]t is the nature of an invasion into a national bank's operations—not the magnitude of its effects—that determines whether a state law purports to exercise control over a federally granted banking power and is thus preempted." *Cantero v. Bank of America* 49 F. 4th 131 (2d Cir. 2022).

2 *Cantero* at 13.

3 *See* Bloomberg, *Banks, OCC Face Litigation Headaches After Supreme Court Ruling* (May 31, 2024), *available at* https://news.bloomberglaw.com/banking-law/banks-occ-face-litigation-headaches-after-supreme-court-ruling.

Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996)."[4]

The Court held that Congress's instruction that the preemption analysis must be ground "in accordance with" the *Barnett Bank* standard necessarily requires a "nuanced comparative analysis" because *Barnett Bank* itself does not establish any bright-line rule to determine whether a state law "prevents or significantly interferes" with a national banking power. Rather, the Court observed that *Barnett Bank* "sought to carefully account for and navigate this Court's prior bank preemption cases" and held that "[t]hose precedents furnish content to . . . Dodd-Frank's preemption standard incorporating *Barnett Bank*."[5]

It remains to be seen how lower courts will conduct and apply the "nuanced comparative analysis" of *Barnett Bank* and its progeny to state consumer financial laws that purport to regulate national banks. While *Cantero* is not as favorable to national banks as the "categorical" preemption promoted by the Second Circuit, several Supreme Court decisions support preemption[6] (many of which are cited in *Cantero*) and should support national banks in their pursuit of a more uniform national legal framework than compliance with state laws would permit. In a concluding footnote, the *Cantero* opinion states that the Second Circuit did not address the significance of any preemption rules of the Office of the Comptroller of the Currency, but may do so on remand. The Supreme Court may set the framework for that evaluation as well in the coming weeks when it issues its ruling in *Loper Bright v. Raimondo* revisiting its 1984 determination in *Chevron U.S.A, Inc. v. NRDC*, 467 U.S. 837, as to the deference which courts should provide to agency determinations.

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4 §§25b(b)(1)(A), (B).

5 *Cantero* at 12. The *Cantero* opinion notes that Dodd-Frank did not actually change the preemption since, "Barnett Bank was also the governing preemption standard before Dodd-Frank." *Cantero* fn. 2. *See also* Congressional Research Service, *Federal Preemption in the Dual Banking System: An Overview and Issues for the 116th Congress* (2019), *available at* https://crsreports.congress.gov/product/pdf/R/R45726.

6 According to *Cantero*, "[f]or purposes of applying Dodd-Frank's preemption standard, *Franklin*, [*National Bank of Franklin Square v. New York* 347 U. S. 373] *Fidelity* [*Federal Savings & Loan Association v. De la Cuesta*, 458 U. S. 141], and *Barnett Bank* together illustrate the kinds of state laws that significantly interfere with the exercise of a national bank power and thus are preempted is." *Cantero* at 9. To determine the kinds of state-law interference that are not "significant" and therefore not preempted, *Cantero* cites three examples identified by *Barnett Bank*: *Anderson National Bank v. Luckett* (1944); *National Bank v. Commonwealth*, 9 Wall. 353 (1870); and *McClellan v. Chipman*, 164 U. S. 347 (1896). *Cantero* at 12. *See also* 12 CFR Part 7.

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