Three Recent Cases Support OCCs Construction of the Preemption Language in the Dodd-Frank Act*

Raymond Natter

October, 2011

The Dodd-Frank Act (DFA) inserted new language into the National Bank Act (NBA) concerning the preemptive effect of the NBA on State consumer finance laws. The OCC, as the agency responsible for implementing the NBA, issued a final regulation effective as of July 21, 2011 that explained that the Dodd-Frank Act language essentially codified the "conflict" preemption standard described by the Supreme Court in the case of Barnett Bank v. Nelson, and therefore did not represent a change in the long-standing principle that Federal law preempts conflicting State laws. Three recent court decisions confirm the OCC's construction of the Dodd-Frank language.

In Baptista v. JP Morgan Chase Bank, the 11th Circuit Court of Appeals held that a State law preventing a national bank from charging a fee for cashing a check drawn on the bank was preempted. Although the DFA was technically not in force at the time, the court nevertheless applied the new law to the case. The court determined that the DFA amendment was simply directing the use of the conflict preemption principles of the Barnett Bank case, and proceeded to analyze the preemption question based on these long-standing principles and relevant court cases that pre-dated the DFA. Thus, the court of appeals took the same approach to the DFA amendment as did the OCC in its July 21 rulemaking.

In U.S. Bank, N.A. v. Schipper, the U.S. District Court for the Southern District of Iowa became the second Federal court to opine that the Dodd-Frank Act did not change the preemption standard. This case involved an Iowa law that required State banks to use a State approved and regulated system for authorizing certain ATM transactions. The court held that this law was preempted by the NBA because it interfered with the ability of a

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

national bank to provide this service to State banks. The court rejected the argument that the DFA changed the preemption standard applicable to the NBA, noting that the DFA "did not materially alter the standard for preemption that the court must apply." Again, this decision directly supports the conclusion reached by the OCC.

The third case, Cline v. Bank of America, N.A., was decided earlier this month. The State law at issue prohibits abusive debt collection practices, such as making repeated telephone calls to the debtor, or calls at unusual times, with the intent to annoy, abuse or threaten the consumer. The Federal court for the Southern District of West Virginia noted that the DFA preemption standard was "rather narrow" in that it only applies to "State consumer financial laws" as that term is defined in the DFA. In this case, the court found that the State law was not a "State consumer financial law" because it did not "directly and specifically" regulate the terms of a financial transaction. Instead, the law concerned the ability to collect a debt *after* the transaction was completed. Therefore, the new DFA language was not applicable. The court proceeded to find that the State law was not preempted because there was no conflict with the OCC's regulations.

Although the court did not apply the DFA preemption provision, it did include a lengthy discussion of the amendment. The court focused on the fact that the DFA amendment specifically referenced the Barnett Bank case. The court went on to quote various passages from the Barnett decision in which the Supreme Court stated that State laws would be preempted if they used such phrases as an impermissible conflict instance in which State laws "encroach on the rights and privileges of national banks," "interfere with, or impair national banks' efficiency," "stand as an obstacle to the accomplishment of one of the purposes of a [the NBA]," or "prevent or significantly interfere with" a national bank power.

Thus, this decision also supports the OCC's view that the DFA does not establish a new preemption standard, but instead is a codification of the traditional preemption principles annunciated by the Supreme Court in its Barnett decision.

Raymond Natter is a partner with the law firm of Barnett Sivon & Natter, P.C.

©2011 Barnett Sivon & Natter, P.C.