

FINANCIAL INSTITUTIONS ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Supreme Court Declines to Consider Dodd-Frank Preemption Case

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On Monday, October 3, 2011, the United States Supreme Court denied the petition for a writ of certiorari in *Baptista v. JPMorgan Chase Bank*.¹ In doing so, the Court declined to interpret the preemption provisions related to consumer financial laws in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Baptista alleged that Chase violated a state statute and was unjustly enriched by charging non-customers a fee for cashing checks drawn on accounts held at Chase. The United States District Court for the Middle District of Florida agreed with Chase's argument that Baptista's state law claims were preempted by the National Bank Act.² The Eleventh Circuit Court of Appeals likewise affirmed the decision, basing its holding on the preemption provisions in Section 1044 of the Dodd-Frank Act.³

The Supreme Court's refusal to hear the *Baptista* case is somewhat surprising given the tumultuous history of federal preemption of state consumer financial laws. Regulators, courts and Congress have battled for years over the scope of preemption under the National Bank Act and the Home Owners' Loan Act. In fact, the recently abolished Office of Thrift Supervision even took the position that its regulations preempted all state laws in the field of lending by federal savings associations. Likewise, the Office of the Comptroller of Currency ("OCC") has had an expanding view of preemption in recent years, especially since it finalized a controversial set of rules in 2004.

The Dodd-Frank Act's preemption provisions were seemingly aimed at curtailing the OCC's expanding position on preemption. Under the Dodd-Frank Act, state consumer financial laws are generally preempted only if they (1) have a discriminatory effect on national banks, (2) prevent or significantly interfere with the exercise by the national bank of its powers, or (3) are preempted by other provisions of federal law. Additionally, the Dodd-Frank Act adopts a heightened level of scrutiny for an agency's preemption determination. However, when the OCC finalized rules implementing the Dodd-Frank Act's preemption provisions on July 21, 2011, it largely took the position that changes were matters of form, not substance.⁴ Consumer advocates have heavily criticized the OCC's final rules on preemption as detrimental to consumer rights, while financial institution trade associations have lauded the OCC for creating rules that permit national banks to operate uniformly among the states.

¹ *Baptista v. JPMorgan Chase Bank*, No. 11-137, 2011 WL 4534031 (Oct. 3, 2011).

² *Baptista v. JPMorgan Chase Bank N.A.*, No. 6:10-cv-139-Orl-22DAB, 2010 WL 2342436 (M.D. Fla. June 4, 2010).

³ *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. May 11, 2011); *see also* Dodd-Frank Act, 111th Cong. § 1044(a) (2010) (codified at 12 U.S.C. § 5136C(b)(1)(B)).

⁴ Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549 (July 21, 2011).

In spite of the Supreme Court's denial of certiorari in *Baptista*, we expect the law in this area to remain in flux for the foreseeable future. Should a split of authority among the Courts of Appeal develop, the high Court may be encouraged and willing to directly address the Dodd-Frank Act's preemption provisions. We will continue to monitor the developments in this area, and will provide updates when necessary.

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