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NATIONAL BANKS

Decision Not to Review Preemption Case Reinforces Status-Quo View of Dodd-Frank



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On Oct. 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

¹ *Baptista v. JPMorgan Chase Bank N.A.*, U.S., No. 11-137, cert. denied 10/3/11.

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Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

The *Baptista* case arose out of Chase's practice of charging non-customers a fee for cashing checks drawn on accounts held at Chase. Florida, like several other states, has a so-called "par value" statute that prohibits a bank from "settling any check drawn on it otherwise than at par."² *Baptista* brought a putative class action alleging that Chase's fee for cashing checks payable to non-customers violated Florida's par value statute and unjustly enriched the bank. 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,³ and the Eleventh Circuit Court of Appeals affirmed.⁴

Although the District Court issued its opinion before the Dodd-Frank Act was signed into law, the preemption analysis in the Eleventh Circuit's May 2011 opinion began, "*Baptista* and Chase both make much ado about which type of preemption is applicable to the [National Bank Act], ignoring the fact that the [Dodd-Frank Act] amended the [National Bank Act's] preemption section to address this very issue." The court was referring to Section 1044 of the Dodd-Frank Act, which provides that state consumer financial laws are preempted only if:

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination

² Fla. Stat. § 655.85 (2011).

³ *Baptista v. JPMorgan Chase Bank N.A.*, No. 6:10-cv-139-Orl-22DAB, (M.D. Fla. June 4, 2010).

⁴ *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. May 11, 2011).

under this subparagraph may be made by a court, by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than this title.⁵

The Supreme Court's refusal to consider the Dodd-Frank Act's preemption provision is somewhat surprising given the tumultuous history of federal preemption of state consumer financial laws. The regulators, the courts and Congress have battled for years over the scope of preemption under the National Bank Act and the Home Owners' Loan Act. For example, the recently abolished Office of Thrift Supervision ("OTS") took the position that "OTS hereby occupies the entire field of lending regulation for federal savings associations," and all state laws in that field were therefore preempted.⁶

Similarly, the Office of the Comptroller of Currency ("OCC") has had an expanding view of preemption in recent years. For example, in 2004, the OCC finalized rules claiming exclusive visitorial authority for national banks⁷ and proclaiming that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized [deposit-taking powers, real estate lending powers, non-real estate lending powers, or powers to conduct other activities] are not applicable to national banks."⁸ In 2009, the Supreme Court partially rejected the OCC's preemption rules in *Cuomo v. Clearing House Association* by restricting the definition of "visitorial powers" within the scope of the OCC's claim to exclusive authority.⁹

The Dodd-Frank Act's preemption provisions were seemingly aimed at curtailing the OCC's recently expanding position on preemption, and they expressly adopted the *Barnett Bank* and *Cuomo* standards.¹⁰ Additionally, in defining what it means for preemption to be determined on a "case-by-case basis," the Dodd-Frank Act adopted the heightened level of scrutiny for an agency determination as set forth in *Skidmore v.*

*Swift & Co.*¹¹ as opposed to the highly deferential *Chevron v. NRDC*¹² standard.¹³

The OCC and the courts, however, are largely taking the position that the Dodd-Frank Act did not effect any meaningful change from prior law. On July 21, 2011, the OCC finalized amended preemption rules.¹⁴ The OCC's final rules recognized that the Dodd-Frank Act's preemption provision requires the same set of rules to apply to national banks, Federal thrifts, Federal savings associations, and the subsidiaries of each of these types of financial institutions. The rules also deleted the "obstruct, impair or condition" language quoted above and incorporated exceptions and exemptions that expressly reference *Barnett Bank* and *Cuomo*. Still, the OCC took the position that the changes were primarily matters of form, not substance. Similarly, the United States District Court for the Southern District of Iowa issued an opinion on August 29, 2011 stating that "the Dodd-Frank Act did not materially alter the standard for preemption the Court must apply in this case."¹⁵

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. Given the conflict and tension between the recent statutory, regulatory and judicial authority on federal preemption of state consumer financial laws, it is surprising that the Supreme Court denied certiorari in *Baptista*. The denial could be viewed as an implicit statement that the Court had no reason to revisit its prior decisions on preemption for consumer financial laws because the Dodd-Frank Act did not meaningfully change the standard. Even if the Court's intent was not so deliberate, its decision certainly has the effect of permitting the development of a line of regulatory authority and lower court decisions that interpret the Dodd-Frank Act's preemption provisions as simply restating and maintaining the *status quo*.

In spite of the Supreme Court's denial of certiorari in *Baptista*, the law in this area is expected 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. Financial institutions and their attorneys must monitor the developments in this area to make sound determinations as to which state laws apply and which ones do not.

⁵ Dodd-Frank Act, 111th Cong. § 1044(a) (2010) (codified at 12 U.S.C. § 5136C(b)(1)(B)).

⁶ 12 C.F.R. § 560.2(a).

⁷ Bank Activities and Operations, 69 Fed. Reg. 1904 (Jan. 13, 2004) (codified at 7 C.F.R. § 7.4000(a)(3)).

⁸ Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1916-17 (Jan. 13, 2004) (codified at 12 C.F.R. §§ 7.4007(b)(1), 7.4008(d)(1), 7.4009(b); 34.4(a)).

⁹ *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009).

¹⁰ Dodd-Frank Act, 111th Cong. § 1044(a) (2010) (codified at 12 U.S.C. § 5136C(b)(1)(B)); Dodd-Frank Act, 111th Cong. § 1047(a) (2010) (codified at 12 U.S.C. § 5136C(i)(1)).

¹¹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹² *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

¹³ Dodd-Frank Act, 111th Cong. § 1044(a) (2011) (codified at 12 U.S.C. 5136C(b)(5)(A)).

¹⁴ OTS Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549 (July 21, 2011).

¹⁵ *U.S. Bank Nat. Ass'n v. Schipper*, No. 4:10-cv-00064-JEG, (S.D. Iowa Aug. 29, 2011).