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## OHIO REPOSSESSION LAWS NOT PREEMPTED FOR NATIONAL BANK

The United States District Court for the Northern District of Ohio recently held that provisions of the Ohio Retail Installment Sales Act ("RISA") governing repossession were not preempted by the National Banking Act ("NBA") and the implementing Office of Comptroller of the Currency ("OCC") regulations.

The case arose from plaintiffs' purchase of a car from a Chrysler dealership, evidenced by a retail installment sales contract with the dealership. The dealership subsequently assigned the contract to the bank. Plaintiffs defaulted, and the bank repossessed and sold the vehicle, which resulted in a deficiency owed by the plaintiffs. Plaintiffs filed a class action complaint, alleging various violations of the RISA and the Ohio Uniform Commercial Code ("UCC"), including (i) failing to disclose the correct date of public sale, (ii) failing to disclose the correct minimum bid, (iii) failing to conduct a commercially reasonable sale and (iv) charging prohibited "collection" fees. Plaintiffs also asserted breach of contract and unjust enrichment claims. The bank moved to dismiss all of plaintiffs' claims.

The bank alleged that plaintiffs' statutory claims were preempted by the NBA and the OCC regulations, and made alternative arguments for all three types of preemption (express, field and obstacle).

In addressing the express preemption argument, the court rejected the assertion that repossession laws are state law limitations concerning "other credit-related documents," which are preempted by the OCC regulations, as this term is meant to govern documentation in the early states of loan activity (*i.e.*, application forms, solicitations and the like). The court held that the repossession laws fall under the category of "rights to collect debts," which are expressly *not* preempted by the OCC regulations. The repossession notices at issue were deemed to relate only to debt collection on default of a loan, and were not "disclosures" within the meaning of the NBA and OCC regulations.

With regard to field preemption, the court cited case precedent stating that the OCC has explicitly avoided full field preemption in its rulemaking and has not been granted full field preemption by

Congress.

In addressing obstacle preemption, the court rejected the argument that the RISA and UCC interfered with the bank's exercise of its powers. The court focused on the bank's *lending* operations, and held that repossession laws become relevant well after the loan is made and when the consumer defaults on the contract. Furthermore, the court reasoned that a bank cannot, on one hand, avail itself of the right to repossess a vehicle under state law and then, on the other hand, disclaim the applicability of that very law by arguing that it significantly interferes with its ability to engage in the business of banking.

The court also rejected the bank's alternative argument that the RISA was not applicable to transactions between consumers and financial institutions. Although this is true, the court reasoned that the RISA does, in fact, apply to three-party transactions in which a retailer extends credit to a buyer and takes a security interest in the goods being purchased on credit, and subsequently assigns the note to a financial institution.

The court denied the bank's motion to dismiss the breach of contract claims based on the charging of "collection fees" not authorized by the contract. The court stated that the questions could not be resolved at the pleading stage, it could only be determined after discovery has commenced and the facts have been developed.

Lastly, the court granted the bank's motion to dismiss the claim for unjust enrichment. In Ohio, recovery is generally not allowed for unjust enrichment when there is an express contract, unless the party against whom the claim is asserted has acted in bad faith. The court dismissed the claim because the dealership, who was not a party to the transaction, entered into the contract with plaintiffs and, furthermore, the plaintiffs did not allege any facts that showed the bank had a dishonest purpose.

This case was properly decided on the RISA issue and the bank's status as an assignee. There is substantial case law precedent in Ohio that retail installment contracts are not loans and that the assignee has no better rights than the assignor (the dealer). Federal banking preemption does not override this basic legal principle. □

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