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DISTRICT COURT REJECTS STATE CLAIM OF HIGHER PREEMPTION STANDARD UNDER DODD-FRANK

A U.S. district court has determined that the Iowa Electronic Funds Transfer Act (IEFTA) is preempted by the National Bank Act (NBA) because the IEFTA "prevents of significantly interferes" with a national bank's ability to provide central routing unit (CRU) services to state-chartered banks. *U.S. Bank v. Schipper,* 2011 WL 4347892 (S.D. Iowa Aug. 29, 2011). Consequently, Iowa may not enforce the IEFTA against the national bank or any other financial institution that engages in business with the national bank.

In a footnote the court addressed the state's argument that the Dodd–Frank Act raised the standard for NBA preemption. The court stated that "the Dodd–Frank Act adopts the same standard applied by the *Watters* court, that is, "State consumer financial laws are preempted, only if ... in accordance with the legal standard for preemption in the decision of the Supreme Court of the ... *Barnett Bank* ..., the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." (citation omitted). Thus, the Dodd–Frank Act did not materially alter the standard for preemption the court must apply in this case."

Under the IEFTA an entity that seeks to operate as a CRU (part of the processing of an ATM transaction) must disclose information about the CRU to an IEFTA administrator and receive written approval from an IEFTA administrator. An entity operating a CRU within the state of Iowa must "include public representation on any board setting policy for the CRU," by allowing the administrators to appoint at least four public members to the board. Further, the public members appointed must be granted full participation and voting rights and must "represent the interest of consumers and the business and agricultural communities in establishing policies for the CRU." Finally, a CRU operating under the approval of the administrator shall be subject to examination by the administrator for the purpose of determining compliance with the IEFTA.

The national bank had provided an Iowa state-chartered bank with EFT services for "on-us" transactions since 2006. Although the national bank sought to provide the state bank and other Iowa state-chartered banks with CRU services necessary to complete "not-us" transactions, the national bank was not able to do so because it was not an approved CRU. Only one company had been approved by the IEFTA administrator as a CRU. In order to process all of the state bank's transactions, the national bank had to route "not-us" transactions through the one approved company and reimburse the state bank for the per-transaction charges imposed by the company. The national bank provided EFT services to four other state-chartered banks but did not reimburse those four state-chartered banks for fees incurred from routing information through the company.

The court found that the proper inquiry is to determine the degree to which the national bank's ability to exercise its federally granted powers was impaired by the IEFTA, not whether the IEFTA directly regulates only state-chartered banks. The court found that it was indisputed that the national bank cannot exercise its power to provide CRU services to state-chartered banks because state-chartered banks are prohibited from utilizing the national bank to provide CRU services unless the national bank becomes an authorized CRU under Iowa law. The court determined that under federal law the national bank need not comply with the CRU-related provisions of the IEFTA because such provisions stand as an obstacle to the national bank's ability to provide CRU services and are in direct conflict with federal law. Thus, the court concluded that although "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's ... exercise of its powers," in this instance, the state has entirely prevented the national bank from providing CRU services to state-chartered banks. Therefore, the court held that the provisions in the IEFTA that prevent or significantly interfere with the national bank's ability to provide CRU services are preempted by federal law. ❑

✧ *Mike Tomkies and Elizabeth Anstaett*

STATE DEBT COLLECTION REQUIREMENTS NOT PREEMPTED BY FEDERAL LAW

The U.S. Court of Appeals for the Ninth Circuit court has reviewed the Office of the Comptroller of the Currency's preemption

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regulation (Section 7.4008) and concluded that reading the regulation's express preemption and savings clauses together, mandatory California Rees–Levering Act post-repossession notices are not preempted under the regulation's "disclosure" or "other credit-related documents" terms. *Aguayo v. U.S. Bank,* 2011 WL 3250465 (9th Cir. Aug. 1, 2011). The regulation's saving clause expressly exempts a state laws governing "rights to collect debts." The plaintiff claimed that a national bank violated the section of the Rees–Levering Act that requires a car loan lender to provide certain post-repossession notices to a defaulting borrower prior to selling the repossessed car. Under the Act, if the lender fails to provide the required notices, the lender is barred from collecting any remaining deficiency after the car is sold. The plaintiff argued that because the notices he received from the bank did not contain all the information required by state law, the bank was barred from collecting any deficiency. The bank argued that the state post-repossession notice requirements are preempted by the National Bank Act (NBA) and its regulations. Because the state law at issue was directed at debt collection, the Ninth Circuit concluded that the requirements are not preempted by the NBA. (The plaintiff purchased the motor vehicle and signed the contract in 2003. The motor vehicle was repossessed in 2007. Thus, all action occurred prior to the Dodd–Frank Act.) ❑

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DISCLOSURE OF DEFAULT RULES

On remand, the U.S. Court of Appeals for the Ninth Circuit has concluded that Delaware law permitted a card issuer to increase a cardholder's interest rate upon default without first providing a change-in-terms notice where the terms of the cardholder agreement allowed the issuer to raise the cardholder's interest rate following delinquency or default. *McCoy v. Chase Manhattan Bank, USA, N. A.,* 2011 WL 3634158 (9th Cir. Aug. 19, 2011). As a result, none of the plaintiff's claims survived and the court dismissed the action.

The U.S. Supreme Court had reversed the court's earlier decision and held that the Truth-in-Lending Act and Regulation Z (as they existed at the relevant time) did not require notice of a default rate increase at the time of the increase when the triggering events and maximum default rates were stated in the customer agreement. *See* our Alert of February 2, 2011. ❑

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WEST VIRGINIA AG CASE REMANDED TO STATE COURT

The West Virginia Attorney General filed suit in state court against a national bank and its subsidiaries (collectively, "bank") for alleged violations of the West Virginia Consumer Credit and Protection Act. *See McGraw v. Capital One Bank, USA, N.A.,* 2011 WL 3516149 (Aug. 11, 2011, S.D. W. Va.). The bank attempted to remove the case to federal court based on federal preemption of Counts III and VII. The bank argued that Counts III and VII of Plaintiff's Complaint were preempted by sections 85 and 86 of the NBA, because they were "direct challenges" to the interest rate charged by the bank. The court rejected the bank's position, concluding that the claims were not traditional usury claims and, thus, not completely preempted and not removable. Accordingly, the Attorney General sent the bank a proposed settlement. Among other proposed relief, the settlement proposed to restrain the bank from imposing over-the-limit fees in excess of the total amount of credit extended above the credit limit during the billing cycle in which the fee is imposed and to cap most fees on low-limit accounts. The bank filed a second notice of removal, contending that this settlement proposal now clearly illustrates that the Attorney General was in fact challenging the amount of fees the bank charged and its ability to charge those fees. The court disagreed with the bank and said that the settlement proposal was "just that: a settlement proposal." The court did not view the settlement proposal as changing the court's prior findings regarding the claims in the complaint. Thus, the court found that the settlement proposal did not change the court's view that the Attorney General's claims were not completely preempted. The court noted that the burden of establishing jurisdiction is always on the party seeking removal and the bank failed to meet its burden of establishing federal jurisdiction.

In Count III the Attorney General alleged that the bank billed and attempted to collect over-the-limit fees when it was the bank's monthly finance charges or sales of the bank's own goods or services which caused the consumer to exceed his or her limit. The Attorney General contended that the bank had no procedure to stop soliciting goods and services when a cardholder was in excess of his or her limit, and that the bank failed to decline charges made to a consumer's account even when that account was over the limit. In Count VII the Attorney General alleged that membership fees along with fees for other services were billed on the cardholder's second monthly statement and that as a result, many consumers had substantially less than $200 to $300 of credit available on their cards and some would actually be over their limits as a result of fees at the time the card was issued. The Attorney General alleged that the bank would routinely add a monthly over-the-limit fee, even if the limit was exceed by a late fee being assessed. ❑

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