Emerging Trends in Preemption Impacting Interstate Lending by Federally-Regulated Financial Institutions

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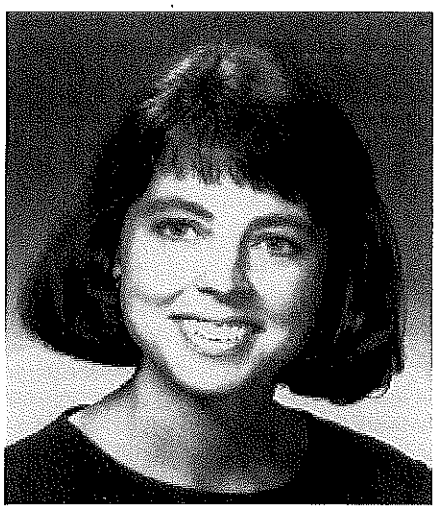

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I. Introduction

Preemption continued to be an important topic in the courts and the federal banking agencies in 2004 and 2005. The Office of the Comptroller of the Currency (OCC) began 2004 by adopting final amendments to its visitorial powers regulation and more detailed preemption regulations. In 2005 the Federal Deposit Insurance Corporation (FDIC) issued proposed preemption regulations to give state-chartered banks parity with national banks. The Office of Thrift Supervision (OTS) addressed by letter the location of a federal savings bank for exportation purposes and the use of agents by a federal savings bank. In addition, the courts continued to address federal preemption with sometimes conflicting results. This article provides a summary of the 2004–2005 regulatory issuances and court decisions regarding preemption that impact interstate lending by federally-regulated financial institutions.[1]

II. National Banks

A. Preemption Based on Section 85 and OCC Regulations

1. Preemption Rule

The most recent series of developments began in early 2004 when the OCC took dramatic action to reinforce its preemption authority. The OCC adopted preemption regulations to clarify what types of state laws apply to national banks. The regulations amended 12 C.F.R. Parts 7 and 34. Part 34 deals with real estate lending and Part 7 deals with non-real estate lending, deposit-taking and other

1. *See also* Darrell L. Dreher and Elizabeth L. Anstaett, *Preemption Developments Impacting Interstate Lending by Federally Regulated Financial Institutions*, 58 Consumer Fin. L.Q. Rep. 8 (2004) (covering late 2002 to early 2004 developments).

national bank activities. The regulations took effect February 12, 2004.[2]

The preemption rule specifies the types of state laws that do not apply to national banks' lending and deposit activities and the types of state laws that generally do apply to national banks. The list of the types of state laws that are preempted are substantially the same as in OTS section 560.2. The list of the types of state laws that are not preempted in the final rule are substantively the same as in the OTS rule with the addition of laws relating to rights to collect debts, taxation, and zoning.

The OCC regulation states that except where made applicable by federal law, state laws that "obstruct, impair or condition" a national bank's exercise of its lending, deposit-taking or other federal powers do not apply to national banks. In its supplementary comments, the OCC stated that the regulation does not entail any new powers for national banks or any expansion of national banks' existing powers. The OCC stated that the preemption standards in the regulation are consistent with the standards articulated by the United States Supreme Court.

The OCC preemption regulation contains new provisions prohibiting the making of any type of consumer loan based predominantly on the bank's realization of the foreclosure value of the borrower's collateral without regard to the borrowers ability to repay the loan. The final rule also adds a new provision that explicitly prohibits a national bank from engaging in practices that are unfair and deceptive under the Federal Trade Commission Act.

The OCC stated that based on existing law and regulations, the regulation applies to the bank's operating subsidiaries.

2. Preemption of the Ohio RISA

a. Ohio Federal District Court Cites to New OCC Preemption Rule in Finding RISA Preempted

Citing to the new OCC preemption regulation for support, the U.S. District Court for the Northern District of Ohio found that the National Bank Act (NBA) and corresponding federal regulations preempted the Ohio Retail Installment Sales Act (RISA).[3]

The case involved a class action brought by plaintiffs who obtained student loans from KeyBank USA, N.A., a national bank. The plaintiffs claimed a violation of the Ohio RISA provision providing that a buyer can assert defenses against a holder of the contract and can assert these defenses as affirmative claims.[4]

The bank argued that the NBA preempts the plaintiffs' RISA claim. The bank argued that the Ohio RISA impermissibly interferes with the ability of national banks to negotiate promissory notes, lend money, and collect on outstanding loans, powers specifically granted by the NBA. The defendants also argued that the regulations recently issued by the OCC demonstrate the federal government's intent to preempt state laws such as the Ohio RISA.

The court considered the case law on preemption, including the preemptive effect of the OCC regulations, and concluded that the NBA and corresponding federal regulations preempt the Ohio RISA. The court found that the Ohio RISA provision at issue would significantly interfere with a national bank's ability to negotiate promissory notes and lend money, and that recent revisions to the Code of Federal Regulations support this conclusion and evidence a federal intent to preempt state statutes such as the Ohio RISA. The court specifically cited 12 C.F.R. section 7.4008(d)(2)(10) of the new OCC regulation providing that state law limitations concerning the terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments or the term of maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan, are preempted, as support for finding that the Ohio RISA is preempted.

The *Abel* court concluded that the Ohio RISA more than "incidentally" affects the lending activities of national banks and thus rejected the plaintiffs' position that the Ohio RISA was a state law that applies to national banks. The court also rejected the plaintiffs' argument that the Ohio RISA was not preempted because it is a consumer protection statute, citing the OCC testimony on the new OCC preemption regulations before the Subcommittee on Oversight and Investigations of the Committee on Financial Services of the U.S. House of Representatives on January 28, 2004. The court interpreted that testimony, which directly addressed state consumer protection statutes, to indicate at least in a general sense the OCC's intent to preempt state consumer protection laws by enacting the revisions to the federal regulations.

b. Ohio Decision Finding RISA Provision Not Preempted By National Bank Act Vacated

In contrast, the U. S. District Court for the Northern District of Ohio held in *Blanco v. Keybank* that the Ohio RISA is not preempted by the NBA.[5] The court subsequently issued an order vacating this September 30, 2005 decision. In the order vacating the September 30 decision, Judge Gwin recused himself from the case, citing an inherited equity

2. 12 CFR §§ 7.4007, 7.4008, 7.4009, 34.3, and 34.4. *See also supra* note 1.

3. Abel v. KeyBank USA, N.A., 313 F. Supp. 2d 720 (N.D. Ohio 2004).

4. *See* Ohio Rev. Code § 1317.032.

5. Blanco v. KeyBank USA, N.A., Case No. 04 CV 230 (N.D. Ohio Sept. 30, 2005), *op. vacated*, Case No. 04 CV230 (N.D. Ohio Dec. 28, 2005).

interest in the defendant in the case. The case was reassigned to Judge O'Malley.

3. Court Finds Mortgage Fees Part of Interest

The U.S. Court of Appeals for the Eighth Circuit held that loan origination and discount fees charged by a national bank were a part of interest under the OCC's definition of interest.[6] The court held that federal statutes governing national banks create an exclusive cause of action against national banks for usury and, thus, no state law cause of action exists. In addition to the loan origination and discount fees, the court found that the underwriting and application fee were charged as compensation to the bank for extending credit, and thus the charges fall within the OCC's definition of interest. Concluding that the plaintiffs' state laws claims were preempted, the *Phipps* court affirmed the district court's dismissal. The decision is consistent with other federal court decisions finding lender fees to be included in interest.

4. California Statute Regarding Governmental Benefits Not Preempted

The Superior Court of California found that claims brought under California law against a national bank for seizing governmental benefits deposited into accounts held at the bank were not preempted by federal law.[7]

This case involved a class action brought by Bank of America customers who had governmental benefits electronically deposited into accounts held by the bank. The funds in these accounts were subject to seizure by the bank without prior notice to satisfy debts the customers owed the bank, including checking account overdrafts and nonsufficient fund (NSF) fees. The plaintiffs claimed that the bank's practice of seizing the deposited funds violated California common law and various California statutes, including the Consumer Legal Remedies Act,[8] the Unfair Competition Law,[9] and the False Advertising Act.[10]

The bank argued, among other things, that the California laws were preempted by the NBA because they would impair, obstruct, and condition the bank's right to take deposits and charge fees. The bank also argued that the laws were preempted because section 7.4002 of the OCC's preemption regulation authorizes the bank to charge customers non-interest charges and fees including deposit account service charges. In arguing in favor of federal preemption of the California law, the bank cited *Lopez v. Washington Mutual Bank*.[11] In *Lopez* the Ninth Circuit found that California law prohibiting the charging of a transmission fee in regard to a pay-off demand statement was preempted by OTS section 560.2.

In *Miller,* the California court found *Lopez* distinguishable as it involved a federal savings bank subject to OTS section 560.2. Additionally, the *Miller* court stated that federal court decisions on state law are not binding on state courts, and that decisions of lower federal courts on federal law are merely persuasive when the lower federal courts are divided, as in the *Lopez* decision. The court stated that the bank had the burden of demonstrating preemption and had failed to do so. The court also disagreed with the bank's interpretation of the preemption standard of "impair, obstruct or condition," stating that the standard as stated in *Barnett* is "to forbid, or to impair significantly the exercise of a power that Congress explicitly granted." The *Miller* court found no specific federal authority for national banks to deduct NSF fees from exempt Social Security benefits that were directly deposited in savings or checking accounts. Additionally, the court found that this issue related to unlawful debt collection, a subject area traditionally within the state's police powers and therefore subject to a presumption against preemption. Moreover, the court indicated that California law does not conflict with the bank's ability to charge fees or take deposits, as the plaintiffs' action did not challenge the bank's ability to charge fees, but rather challenged the bank's collection of monetary claims through the exercise of a setoff against exempt governmental benefits. For these reasons, the court found that the plaintiffs' causes of action were not preempted by federal law and entered judgment in favor of the plaintiff class.

5. State Laws Preempted as to Acquiring National Bank

The Appellate Court of Illinois, First Judicial District, affirmed the decision of the Circuit Court of Cook County, Illinois holding that the NBA preempts the Illinois Interest Act in regard to loans originated by a corporation and purchased by a national bank subsidiary.[12] The court found that the NBA applies equally to all loans held by national banks, as the NBA neither expressly nor impliedly distinguishes between loans generated by a national bank and those acquired from other institutions. Although the holding benefits national banks, it is unlikely to be followed by other courts, as NBA interest rate preemption is generally understood to apply only to loans originated by national banks.

6. NSF Fees

OCC Interpretive Letter No. 997 concludes that national banks are authorized, pursuant to section 24(Seventh) of the NBA and 12 C.F.R section 7.4002, to charge NSF fees that result from the high-to-low order of check posting described in the bank's inquiry to the OCC.[13]

6. Phipps v. FDIC, 417 F.3d 1006 (8th Cir. 2005).

7. Miller v. Bank of America N.T & S.A., No. CGC-99-301917, 2004 WL 3153009 (Cal. Super. Dec. 30, 2004).

8. Cal. Civ. Code §§ 1750 *et seq.*

9. Cal. Bus. & Prof. Code §§ 17200 *et seq.*

10. *Id.* §§ 17500 *et seq.*

11. 302 F.3d 900 (9th Cir. 2002).

12. Dannewitz v. EquiCredit Corporation of America, No. 01 L 008188 (Cir. Ct. Ill. June 29, 2004), *affirm'd*, 362 Ill. App.3d 82 (1st Dist. 2005).

13. OCC Letter 997, from John D. Hawke, Jr., Comptroller of the Currency, April 15, 2002 (published Aug. 2004).

7. Prepayment Fees

OCC Interpretive Letter No. 1004 concludes that pursuant to the most-favored lender doctrine under section 85 of the NBA, 12 C.F.R. section 7.4001(b), and the Michigan "parity" statute,[14] national banks can charge prepayment fees to the same extent as federal savings associations if state banks may impose prepayment fees based on the state law parity provision and federal savings banks' authority to impose prepayment fees.[15]

8. Restrictions on Balloon Loans

OCC Interpretive Letter No. 1015 concludes that based on the OCC real estate lending regulations and prior preemption opinions, section 24-4.5-3-402 of the Indiana Code restricting balloon payment loans was preempted as to subordinate loans originated by national banks.[16]

B. Operating Subsidiaries

1. Operating Subsidiary Rule Within OCC's Authority

The U.S. Court of Appeals for the Sixth Circuit affirmed the decision of the District Court for the Western District of Michigan holding that it was within the OCC's authority to promulgate 12 C.F.R. section 7.4006 relating to operating subsidiaries.[17] The case was brought by Wachovia Bank, N.A., a national bank, and Wachovia Mortgage Company, a wholly-owned operating subsidiary of Wachovia Bank. The plaintiffs sought declaratory and injunctive relief against the Commissioner of the Michigan Office of Insurance and Financial Services (the Commissioner), who was seeking to prevent Wachovia Mortgage Company from conducting mortgage lending activities in Michigan. The Commissioner argued that the OCC exceeded its authority by promulgating 12 C.F.R. section 7.4006, the regulation limiting the application of state laws to national bank operating subsidiaries to the same extent as they apply to national banks. The Commissioner contended that the regulation impermissibly expanded the definition of "national bank." The Commissioner took the position that a national bank's wholly owned operating subsidiary is subject to state law, including licensing requirements.

The Sixth Circuit found that the district court appropriately conducted its analysis pursuant to *Chevron* and concluded that the regulations are within the OCC's authority and are a reasonable interpretation of the statute. The Sixth Circuit stated that contrary to Michigan's arguments, the OCC regulations do not expand the definition of "national bank" as Congress used it in 12 U.S.C. section 484 to include an "operating subsidiary," such as Wachovia Mortgage. Rather, the Sixth Circuit found that the OCC regulations interpret a national bank's "incidental powers" under 12 U.S.C. section 24(Seventh) to include the power to conduct business through an operating subsidiary. The Sixth Circuit stated that the OCC has the authority to define a national bank's "incidental powers" to include conducting the business of banking through an operating subsidiary. The Sixth Circuit agreed with the Second Circuit that the OCC regulations reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. section 24(Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending. Thus, the Sixth Circuit affirmed the district court's holding that the Michigan law is preempted as to a national bank's operating subsidiary.

2. Licensing

The U.S. Court of Appeals for the Second Circuit affirmed the district court's holding in the *Burke* case that federal law preempts state regulation of a national bank operating subsidiary to the same extent that it preempts regulation of the parent national bank.[18] The Second Circuit stated that the history of the banking laws indicates that operating subsidiaries have been treated distinctly by Congress and the OCC, and no statute speaks directly to the scope of federal versus state power over them. The court found that Congress has intentionally left open a gap concerning the treatment of national bank operating subsidiaries. Thus, the court stated, the OCC has the authority to fill that gap by defining a national bank's incidental powers to include conducting the business of banking—business that the national bank itself could conduct directly—through an operating subsidiary. Having so defined a national bank's power to conduct business through an operating subsidiary, the Second Circuit found the OCC further has the authority to preempt state laws concerning operating subsidiaries to the same extent that those laws would be preempted with respect to the parent national bank. The court stated that it must defer to the regulations if they reflect a reasonable construction of the statutory scheme. The court concluded that the OCC regulations reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. section 24(Seventh) and national banks' ability to use operating subsidiaries in the dynamic market of banking and real estate lending. Thus, the Second Circuit held that it must defer to the OCC's authorized and reasonable implementation of the NBA and apply the operating subsidiary regulations.

The case was originally filed by Wachovia in April of 2003 challenging

14. Mich. Comp Laws § 487.14201(1).

15. OCC Letter 1004 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Aug. 24, 2004 (published Aug. 2004).

16. OCC Interpretive Letter 1015 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel (Sept. 20, 2004).

17. Wachovia Bank, N.A. v. Watters, 431 F.3d 556 (6th Cir. 2005).

18. Wachovia v. Burke, 414 F.3d 305 (2nd Cir. 2005).

Connecticut's authority to license and supervise Wachovia Mortgage Corporation, a wholly-owned operating subsidiary of Wachovia Bank, N.A. Wachovia claimed that federal law preempts the authority of state officials to regulate the operating subsidiaries of national banks. Thirty-five state attorneys general, supported by forty-three state bank commissioners, filed an *amicus* brief in support of Connecticut Banking Commissioner John P. Burke in the district court. However, the district court upheld the OCC preemption authority.[19]

The State of Connecticut has asked the U.S. Supreme Court to reverse the decision. However, the Second Circuits ruling in *Burke* is consistent with the two other U.S. Court of Appeals decisions that have addressed this issue.[20] In the absence of a split of authority, the State of Connecticut apparently is hoping that the significance of the issue alone may encourage the Supreme Court to take the case. However, as other circuit courts may soon take up this issue, the Supreme Court seems likely to decline the petition at this time.[21]

3. Operating Subsidiary Not Required to Obtain a License But Must Comply with Per Diem Statute

The U.S. Court of Appeals for the Ninth Circuit affirmed the District Court for the Eastern District of California's ruling in favor of national banks Wells Fargo Bank, N.A. and National City Bank of Indianapolis, holding that: (1) the Commissioner of the California Department of Corporations (Commissioner) did not have authority to audit their respective wholly-owned operating subsidiaries, Wells Fargo Home Mortgage, Inc. and National City Mortgage Co.; and (2) the subsidiaries were not required to be state-licensed in order to engage in mortgage lending in California.[22]

The Commissioner had sought to audit the lending activities of the operating subsidiaries, both of which held California Residential Mortgage Lender licenses. The banks objected, arguing that the NBA grants the OCC exclusive authority to exercise visitorial powers over national banks as well as their operating subsidiaries. They also argued that under the NBA the operating subsidiaries are not required to be licensed under California law in order to engage in mortgage lending in California. The Ninth Circuit substantially agreed with both of these arguments, holding that: (1) the Commissioner is preempted under the NBA from ordering regulatory audits of national bank operating subsidiaries; and (2) California real estate lending licensing requirements as applied to operating subsidiaries of national banks are "field-preempted" by OCC operating subsidiary licensing regulations.

However, the Ninth Circuit reversed the district court's holding that a California law prohibiting the charging of interest on mortgage loans for a period in excess of one day prior to recording (the per diem statute) was preempted by section 501(a)(1) of the Depository Institutions Deregulation and Monetary Control Act of 1980. The Ninth Circuit found that the California law did not *expressly* limit the rate or amount of interest that may be charged and, therefore, was not preempted. The court followed the analysis in *Grunbeck v. Dime Savings Bank of New York, FSB*,[23] in which another federal appellate court held that section 501(a)(1) did not preempt the New Hampshire simple interest statute's requirement that lenders compute their interest rate by summing "simple interest," *i.e.*, by not charging interest on unpaid interest.

4. Prepayment Fees

A district court in Maryland held that Maryland law restricting prepayment fees imposed by mortgage lenders was preempted as to national banks and their operating subsidiaries under the NBA and OCC regulations. The court found the OCC preemption regulations to be a reasonable interpretation of the NBA. The court enjoined the Maryland Commissioner of Financial Regulation from exercising visitorial and regulatory power over the operating subsidiaries of national banks.[24]

5. Document Preparation Fee Limits Preempted

The New York Nassau County court held that charging a document preparation fee is permitted under the federal law and regulations as a "safe and sound" banking practice and to the extent that any New York statute purports to prevent federally-chartered banks from collecting such a fee, they are preempted by federal statutes and regulations.[25] The court found that this preemption applies to an operating subsidiary of a national bank. The court held that as the bank is permitted, under federal banking laws and regulations, to charge a document preparation fee and the charging of such a fee is not a violation of New York law, the plaintiff was not entitled to either a declaratory judgment or a permanent injunction and the cause of action had to be dismissed.

C. Visitorial Powers

1. Visitorial Powers Rule

The OCC adopted a visitorial powers regulation that clarifies issues related to the OCC's exclusive visitorial powers

19. Wachovia Bank, N.A. v. Burke, 319 F.Supp.2d 275 (D.Conn. 2004), *affirmed in part* and *reversed in part*, Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2nd Cir. 2005).

20. *See* Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005), *discussed below*; Wachovia Bank, N.A. v. Watters, 431 F.3d 556 (6th Cir. 2005), *discussed supra* this text at note 17.

21. *See* Turnbaugh v. National City Bank of Indiana, 367 F. Supp. 2d 805 (D.C. Md. 2004) (on appeal) (discussed *infra*).

22. *Boutris*, 419 F.3d 949.

23. 74 F.3d 331 (1st Cir. 1996).

24. *Turnbaugh*, 367 F. Supp. 2d 805.

25. Fuchs v. Wachovia Mortgage Corp., 9 Misc. 3d 1129 (N.Y. Sup. Nov. 15, 2005).

over national banks. The rule took effect February 12, 2004.[26]

This regulation clarifies the scope of the OCC's exclusive visitorial authority over national banks in regard to activities authorized under federal law. The regulation also clarifies the exception to the OCC's exclusive visitorial authority as to power vested in the courts of justice. In its supplementary comments, the OCC stated that the regulation is consistent with federal law and the dual banking system.

2. Case Law

a. California Court Finds Vistorial Powers Regulation Prevents Individuals from Seeking Public Enforcement-Type Remedies

A California district court held that only the OCC or an authorized representative of the OCC may exercise visitorial powers over national banks and their operating subsidiaries.[27] The court defined "visitorial powers" to include the inspection of books and records and the initiation, prosecution, and maintenance of proceedings against national banks and their operating subsidiaries. The court held that "visitorial powers" also includes the initiation and prosecution of proceedings against national banks or their operating subsidiaries by private persons acting pursuant to state law in the capacity of a representative of an actual or putative class and/or as individuals, for an injunction and/or disgorgement of money or profits when such remedies are sought by such private persons pursuant to state law to enforce compliance with federal or state laws affecting lending or the exercise of other powers of national banks under the NBA. The court stated that in this context the remedies of injunction and disgorgement are primarily public enforcement-type remedies designed to benefit the general public and deter unlawful conduct and are not primarily private remedies designed to compensate individuals for harm they have personally suffered.

b. Court Enjoins N.Y. Attorney General from Enforcing State Laws Against National Banks

The U.S. District Court for the Southern District of New York permanently enjoined New York Attorney General Eliot Spitzer from enforcing the state's fair lending laws against national banks and their operating subsidiaries.[28] Two opinions were issued by the court, one in the case brought by the OCC and the other in the case brought by The Clearing House Association, an association of banks that includes national banks. Both plaintiffs sought declaratory and injunctive relief to stop the New York Attorney General from investigating national banks and their operating subsidiaries in an attempt to enforce New York's fair lending laws, designed to prevent racial discrimination. The plaintiffs argued that the state was infringing on the OCC's exclusive visitorial authority by its actions.

The OCC did not challenge the applicability of state anti-discrimination laws to national banks but rather focused on the Attorney General's attempt to enforce the law against national banks including requests for books and records.

The court found that the OCC's regulation on visitorial powers[29] reflects a reasonable interpretation of section 484 of the National Bank Act and is therefore entitled to deference under the standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[30] The court enjoined the Attorney General from subpoenaing and inspecting the books and records of national banks and from instituting any enforcement actions relating to fair lending.

In so ruling, the court dispensed with the Attorney General's argument that *First National Bank in St. Louis v. Missouri*[31] conclusively established that states could sue national banks to enforce non-preempted state laws. The court noted that in *St. Louis*, the national bank was acting entirely outside the powers granted by federal law while engaging in an activity prohibited by state law. Moreover, at that time the OCC's authority to enforce national bank compliance with state banking law was not as clear as under current section 7.4000, so the state was permitted to pursue a *quo warranto* action to fill a gap in the law. However, the circumstances in *St. Louis* were unlike those in *OCC v. Spitzer*. The court therefore found *St. Louis* inapposite and unpersuasive in view of the modern precedent discussed by the court.

An additional issue addressed in the *Clearing House Association* case was the ability of the Attorney General to proceed against a national bank for alleged violations of the federal Fair Housing Act under that statute. The Attorney General argued that the Fair Housing Act provides an implicit exception to section 484 of the National Bank Act. However, the court concluded that actions in a state's *parens patriae* capacity constitute a form of the visitorial authority prohibited by the National Bank Act and that an implicit exception cannot be read into section 484 under the circumstances. Thus, the court also enjoined the Attorney General from instituting any judicial actions based on the state's *parens patriae* authority to enforce the federal Fair Housing Act.

26. 12 CFR § 7.4000. *See also supra* note 1.

27. Bank One, Delaware, N.A. v. Wilens, Case No. SACV-03-1258 JVS CAN (D.C. Cal. March 7, 2005).

28. *See* Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (S.D.N.Y. 2005); The Clearing House Association, LLC v. Spitzer, 394 F. Supp. 2d 620 (S.D.N.Y. 2005).

29. 12 CFR § 7.4000.

30. 467 U.S. 837 (1984).

31. 263 U.S. 640 (1924).

D. Preemption as to Third Parties

1. OCC Opines That Massachusetts Gift Card Laws Are Not Preempted

The OCC issued a letter stating its position that state laws are not preempted by federal laws or regulations in regard to certain claims in litigation between the State of Massachusetts and Simon Property Group, L.P.

The letter was written in connection with a suit brought by the Massachusetts Attorney General alleging that certain mall gift cards sold by Simon, a mall operator, violated Massachusetts law. Simon sought to remove the action to federal court on the basis of preemption. Simon takes the position that the cards are exempt from state law because they are issued by a national bank. The gift cards carry the VISA logo and have an initial handling fee, a monthly dormancy fee after the first six months, and a one year expiration date.

The OCC did not comment in the letter on whether or not such claims made against the card-issuing bank would be preempted. Presumably, they would be preempted.

2. Georgia Fair Lending Act

OCC Interpretive Letter No. 1002 clarified the applicability of the OCC's Preemption and Determination and Order concerning the Georgia Fair Lending Act (GFLA) and application of the OCC's new preemption regulation to mortgage brokers.[32] The letter states that the preemption regulation applies to real estate lending activities *only* of national banks and their operating subsidiaries. The letter states that where a non-national bank lender makes a loan that is later sold to a national bank, the original lender, including a mortgage broker funding loans made by a non-national bank originator, would be subject to the GFLA regardless of the fact that a national bank subsequently purchases the loan.

E. State Laws Not Preempted

1. State Anti-Discrimination Laws

a. Washington State Law

The United States Court of Appeals for the Ninth Circuit held that the Washington Law Against Discrimination (WLAD) was not preempted as to a national bank.[33] The Ninth Circuit held that the provision of the National Bank Act allowing national banks to dismiss its officers "at pleasure," 12 U.S.C. section 24(Fifth), did not preempt a former employee's state-law age discrimination claim.

The Ninth Circuit stated that the anti-discrimination provisions of the Age Discrimination in Employment Act (ADEA) conflict with the bank's authority to dismiss officers "at pleasure," and as a result, effect must be given to the congressional intent expressed in the ADEA by limiting the power granted to banks through section 24(Fifth). The court concluded that the dismiss-at-pleasure provision of section 24(Fifth) is repealed by implication only to the extent necessary to give effect to the ADEA.

Accordingly, the court found that the authority to dismiss officers "at pleasure" does not encompass the right to terminate an officer in a manner that violates the prohibitions against discrimination enumerated in the ADEA. Thus, the court reasoned that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act. The court stated that in light of the ADEA's prohibition against age discrimination and the integral role of state anti-discrimination laws in the federal anti-discrimination scheme, Congress did not intend section 24(Fifth) to preempt the WLAD employment discrimination provisions, at least insofar as they are consistent with the prohibited grounds for termination under the ADEA.

b. OCC Letter

OCC Interpretive Letter No. 998 confirms that state anti-discrimination laws are not preempted by the OCC's new preemption rule.[34]

2. State Uniform Commercial Codes

OCC Interpretive Letter No. 1005 to the National Conference of Commissioners on Uniform State Laws and the American Law Institute concludes that neither the OCC's preemption regulations nor judicially developed standards of preemption applicable to laws not specifically listed in the OCC's preemption regulations would preempt provisions of the state Uniform Commercial Code.[35]

3. State Unclaimed Property and Escheat Statutes

OCC Interpretive Letter No. 1006 to the National Association of State Treasurers and the National Association of Unclaimed Property Administrators clarifies that the OCC's preemption and visitorial powers regulations do not change existing standards that govern the applicability and enforcement of state unclaimed property and escheat laws.[36]

4. Banks Acting as Trustees

OCC Interpretive Letter No. 1016 concludes that federal law does not preempt application of the New Jersey Consumer Fraud Act regarding claims

32. OCC Letter 1002 from John D. Hawke, Jr., Comptroller of the Currency, May 13, 2004 (published Aug. 2004).

33. Kroskev v. US Bank Corp., 432 F 3d 976 (9th Cir. 2005), *op. amended by*, 2006 WL 319025 (9th Cir. Feb. 13, 2006).

34. OCC Letter 998, from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Mar. 2004 (published Aug. 2004).

35. OCC Letter 1005 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, June 10, 2004 (published Aug. 2004).

36. OCC Letter 1005 from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, June 10, 2004 (published Aug. 2004).

and defenses to loans purchased and held by national banks acting as trustees in connection with the issuance of mortgage-backed securities.[37]

III. Federal Savings Banks

A. Location of a Federal Savings Bank for Exportation of Interest

The OTS issued an interpretive letter concluding that a federal savings bank may use and export the interest rate on loans permitted by the state in which the federal savings bank's home office is located.[38] The OTS stated that the performance of certain non-ministerial functions in another state or states in which the federal savings bank has branch offices does not require that the federal savings bank use the interest rate permitted by the branch state. In the letter the OTS reviewed the positions of the OCC and the FDIC with respect to interstate branching. The OTS explained that federal savings banks derive their interstate branching authority from a different source than national banks and FDIC-insured institutions. Therefore, the OTS did not find the OCC and FDIC positions controlling. The OTS summarized its position by stating that a federal savings bank may use and export, at its option, the most favored lender interest rate of: (1) the state in which its home office is located; or (2) any state in which a branch office is located and in which a loan is booked.

B. Agents of Federal Savings Banks Entitled to Preemption Powers

The OTS issued an interpretive letter concluding that state licensing and registration requirements that do not apply to a federal savings bank also do not apply to the bank's agents when the agents perform marketing, solicitation, and customer service activities related to the bank's deposit and loan products and services and other authorized banking powers.[39] The OTS stated that it is beyond question that federal savings banks are authorized to contract with third parties to perform a variety of authorized activities for the bank. The OTS found that the state licensing and registration requirements under consideration interfered and conflicted with the authority of the bank to exercise its deposit and lending powers, by limiting the federal savings bank's ability to market its products and services in the manner it chooses.

Specifically, the federal savings bank can chose to use agents for these functions. The OTS found that the state requirements also thwart the congressional objective that the OTS exercise exclusive responsibility for regulating the operations of federal savings banks, "giving primary consideration to the best practices of thrift institutions in the United States." To the extent a state law purports to regulate the way in which a federal savings bank can perform its authorized activities, the OTS found that the state law is an impermissible interference with bank powers and with the OTS's regulatory authority.

However, for the preemption to extend to the agents of a federal savings bank the OTS stated that the savings bank must: (1) consult with its appropriate OTS Regional Office; and (2) submit a business plan or proposal that provides in-depth information about how the arrangement with the agents will be structured and carried out. In addition, the OTS stated that a federal savings bank must comply, at a minimum, with the conditions set forth in Appendix A to the letter in connection with any arrangement with agents. Appendix A contains conditions that include entering into detailed written agreements with agents, providing in-depth training to the agents, and adopting a detailed compliance program to ensure adequate supervision and control and that contains the elements listed in the Appendix. The OTS indicated that such agents would be subject to supervision by the OTS.

C. California Debt Collection Statutes Not Preempted by Section 560.2

The U.S. District Court for the Northern District of California denied defendant Citimortgage Inc.'s motion to dismiss for failure to state a claim in a case filed by a mortgage borrower alleging violations of, *inter alia,* the California Rosenthal Fair Debt Collection Practices Act (CFDCPA).[40]

The CFDCPA claim stemmed from the defendant's alleged failure to properly credit a payment sent by the borrower to prepay the remaining balance on his mortgage. Although the payment should have satisfied the principal balance, the plaintiff alleged that Citimortgage subsequently reported his account as past due, assessed a late charge, sent threatening collection letters, and made harassing collection telephone calls.

Citimortgage challenged the CFDCPA claim on the grounds that the CFDCPA is preempted by OTS section 560.2(a). Pursuant to its power under the Home Owners' Loan Act, the OTS explicitly declared in section 560.2(a) that it "hereby occupies the entire field of lending regulation for federal savings associations."[41]

The district court rejected Citimortgage's argument that because debt collection is an essential part of lending practices, any limitation on debt collection constitutes a lending regulation. Comparing illustrative examples of lending regulations in section 560.2(b) (*i.e.*, laws affecting loan terms, interest rates, security requirements, loan-related fees, escrow account requirements, and processing or servicing issues) to the practices regulated by CFDCPA (*i.e.*, making harassing telephone calls, using obscene

37. OCC Interpretive Letter No. 1016 from Daniel P. Stipano, Acting Chief Counsel (Jan. 14, 2005).

38. OTS Letter 2004-8 from John E. Bowman, Chief Counsel (Sept. 17, 2004).

39. OTS Letter 2004-7 from John E. Bowman, Chief Counsel (Oct. 25, 2004).

40. Alkan v. Citimortgage Inc., 336 F.Supp. 2d 1061 (N.D. Cal. 2004).

41. 12 CFR § 560.2(a).

language, or engaging in threatening conduct to collect a debt after a loan is made), the court concluded that the CFDCPA was too dissimilar from the section 560.2 examples to constitute a "lending regulation." In reaching this conclusion, the court relied on *Hussey-Head* v. *World Savings & Loan Association*,[42] which held that the California Consumer Credit Reporting Agencies Act was not preempted by section 560.2(a) because "[t]he California statutory scheme does not come into play until after a loan is made or credit otherwise extended, and it does not affect the manner in which the lender services or maintains the loan." The same is true for the CFDCPA, posited the *Alkan* court, and so the CFDCPA does not constitute a lending regulation and the plaintiff's claims under the CFDCPA were not preempted.

IV. State-Chartered Banks

A. FDIC Issues Proposed Preemption Rule

The FDIC issued a notice of proposed rule-making in response to a petition requesting a rule preempting certain state laws as to FDIC-insured state-chartered banks in order to establish parity with national banks.[43]

The FDIC held public hearings in May of 2005 at which written and oral statements were given in response to the petition. Those in favor of an FDIC preemption rule discussed the need for parity in order for state banks to remain competitive, while those opposed to a preemption rule focused on state consumer protection laws. The two sides also disagreed over the FDIC's authority to issue such a rule.

The FDIC concluded that it has authority to issue a preemption rule under 12 U.S.C. section 1819(a) and 12 U.S.C. section 1820(g). In the explanation for the rule, the FDIC focused on section 24(j),[44] giving state banks full parity with respect to interstate branching, and section 27,[45] preventing discrimination against insured state banks with regard to interest rates.

The proposed rule places state banks on par with national banks by providing that "host state" law does not apply to activity conducted at a branch in the host state of an out-of-state state bank, to the same extent that the "host state" law does not apply to activity conducted at a branch in the host state of an out-of-state national bank.

The proposed rule provides that subject to the restrictions of Part 362,[46] regarding activities of insured banks, an out-of-state, state-chartered bank that has a branch in a host state may conduct any activity at such branch that is permissible under its home state law, if it is either: (1) permissible for a bank chartered by the host state; or (2) permissible for a branch in the host state of an out-of-state, national bank.

The FDIC proposed rule also contains a provision regarding interest rates that contains a definition of "interest" and an explanation like that found in 12 C.F.R. section 7.4001, applicable to national banks. The FDIC proposed rule contains several provisions addressing location issues.

B. Preemption and Payday Lending

1. No Preemption of State Law Claim

Borrowers filed a class action in state court alleging that a pawn shop, purportedly acting as agent of an FDIC-insured bank, violated the Oklahoma Consumer Credit Code and engaged in usury and fraud by charging excessive interest on "payday loans" to class members.[47] After removal by the defendants to federal court, the borrower moved to remand to state court. The federal district court held that the pawn shop failed to establish that the state-chartered, federally-insured bank was the true lender in the allegedly usurious payday loan transactions. Thus, the court held that the borrower's state law claims against pawn shop were not removable to federal court (on complete preemption grounds under the Depository Institutions Deregulation and Monetary Control Act), where the complaint did not assert any claim against the bank and the pawn shop introduced no evidence of an agreement between it and the bank.

2. Payday Lending Law Not Preempted

The Eleventh Circuit U.S. Court of Appeals affirmed a district court decision denying a preliminary injunction to bar enforcement of the Georgia Payday Lending statute.[48] The court subsequently granted rehearing en banc and vacated the opinion. The Eleventh Circuit then vacated its prior opinion in *BankWest v. Baker* and the opinion of the lower court and dismissed the pending appeal as moot. The action was brought by out-of-state federally-insured banks to prevent enforcement of the provisions of the Georgia Payday Loan law that restricts a payday loan store from acting as an agent for an out-of-state bank when the agreement grants the in-state agent "the predominate economic interest" in the bank's payday loan. In finding the appeal moot, the Eleventh Circuit concluded that because of recent developments, the payday loan programs that gave rise to the preliminary injunction ruling are no longer being used by any of the banks.

C. Usury Preemption

The United States Court of Appeals for the Third Circuit held that section 521 of the Depository Institutions Deregulation and Monetary Control Act (DIDMCA)

42. 111 Cal. App. 4th 773, 782 (2003).

43. 70 Fed. Reg. 60019 (Oct. 14, 2005).

44. 12 U.S.C. § 1831(a)(j)(1).

45. 12 U.S.C. § 1831d.

46. 12 CFR pt. 362.

47. Flowers v. EZ Pawn Oklahoma, Inc., 307 F. Supp. 2d 1191 (N.D. Okla. 2004).

48. Bankwest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005), *reh'g. granted, opinion vacated*, 433 F.3d 1344 (11th Cir. 2005) order vacated 2006 WL 1329700 (11th Cir. April 27, 2006).

completely preempted state usury claims against federally-insured state-chartered banks.[49] The court stated that not only does section 521 contain an express preemption clause, "notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section," but the statute also incorporates verbatim the language of section 85 of the National Bank Act. When Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts ordinarily should be interpreted the same way, the court explained. The case involved the consolidation of six separate settlement-only class actions alleging an illegal home equity lending scheme against two banks and a company that acquired second mortgage loans from those banks in the secondary market.

V. DIDMCA 501 Preemption

A. Maryland Law Limiting Mortgage Broker Fees Not Preempted

The Maryland Court of Appeals held that the borrower-paid mortgage broker fee limits under the Maryland Finder's Fee Law are not preempted by section 501(a)(1) of the federal DIDMCA.[50]

The plaintiff-borrower in the case brought suit against a mortgage broker alleging that the finder's fee that the broker charged in connection with a refinance mortgage loan exceeded the eight percent limitation allowed under the Maryland Finder's Fee Law.[51] The mortgage broker argued that the Finder's Fee Law was preempted by section 501(a) of DIDMCA, which provides that a state is prohibited from expressly limiting the rate or amount of interest, discount points, finance charges, or other charges applying to qualifying first-lien residential mortgage loans.[52]

The plaintiff raised a number of arguments against preemption of the Maryland statute. First, the plaintiff argued that the DIDMCA only covers state limitations on the rate or amount of interest that a lender may charge, and thus does not preempt state laws regulating finder's fees. The court noted, however, that the plain language of DIDMCA indicates that finder's fees fall under the "discount points, finance charges, or other charges" that are controlled by the DIDMCA. The court indicated that the legislative history of the DIDMCA and regulations issued by the Federal Home Loan Bank Board (FHLBB) (now the OTS) support this conclusion.

Second, the plaintiff argued that the loans under consideration were refinance mortgages, not purchase-money loans, and thus were not subject to the DIDMCA. According to the court, however, the plain language of the DIDMCA indicates that the DIDMCA applies to any loan that is secured by a first lien on residential real property. Thus, the court found that the loans under consideration should not be excluded from the scope of the DIDMCA preemption, because the loans were secured by a first lien regardless of the fact that they were not purchase-money loans.

Finally, the plaintiff argued that the DIDMCA should not apply because it applies only to creditors and not mortgage brokers. The mortgage broker responded that the transaction under consideration was a qualified mortgage because it met the three requirements of section 501(a)(1) of the DIDMCA, and thus the Finder's Fee Law should be preempted regardless of whether the mortgage broker is a creditor. The court indicated that either party's interpretation was plausible from a fair reading of the plain language of the DIDMCA; however, the court ultimately agreed with the plaintiff based upon the DIDMCA's legislative history and a 1989 OTS letter in which the OTS commented that the FHLBB "noted that certain lenders will be eligible for usury preemption if they are considered creditors" under the federal Truth in Lending Act (TILA). Because the mortgage broker did not qualify as a "creditor" under the TILA, the court held that the Finder's Fee Law was not preempted in the case.

B. DIDMCA Preemption Overridden by Illinois Statute

The Illinois Supreme Court reversed the decision of the Illinois Appellate Court by concluding that a 1992 amendment to section 4.1a of the Illinois Interest Act did not override the federal preemption under section 501 of the DIDMCA.[53]

The *Clark* case involved foreclosure actions brought by the plaintiff creditors. The defendant debtors who were the subject of these actions raised counterclaims and affirmative defenses arguing that the plaintiffs violated section 4.1a of the Illinois Interest Act by imposing fees in excess of three percent on loans with an interest rate in excess of eight percent.[54] The plaintiffs filed motions to dismiss that were granted because, according to the trial court, the defendants' counterclaims and affirmative defenses under the Interest Act were preempted by the DIDMCA and, in certain cases, the federal Alternative Mortgage Transaction Parity Act of 1982.

The Appellate Court disagreed with the trial court's conclusion that the DIDMCA preempted section 4.1a of the Interest Act. According to the Appellate Court, Illinois overrode this preemption by passing an amended version of section 4.1a of the Interest Act after March 31, 1980.

The Illinois Supreme Court rejected the Appellate Court view, holding that the amendment of the Interest Act to permit

49. *In re* Community Bank of Northern Virginia, 418 F.3d 277 (3rd Cir. 2005).

50. Sweeney v. Savings First Mortgage, LLC, 388 Md. 319 (Md. 2005).

51. *See* Md. Com. Law Code Ann. § 12-804(a), (c).

52. 12 U.S.C. § 1735f-7a(a)(1).

53. U.S. Bank N.A. v. Clark, 837 N.E. 2d 74 (Ill. App. Ct. 2004). *See generally* John L. Ropiequet and Eugene J. Kelley, Jr., *Usury Revisited: The Illinois Supreme Court Rights the Balance in Mortgage Lending*, 60 Consumer Fin. L. Q. Rep. 133 (2006).

54. *See* 815 ILCS 205/4.1a(f).

lenders to impose unlimited interest and compensation on all real estate mortgage loans implicitly repealed the section of the act limiting, to three percent, the non-interest charges lenders could impose on residential mortgage loans with annual interest rates exceeding eight percent, and that passage of the High Risk Home Loan Act did not demonstrate a continued viability of the section of the Interest Act which was implicitly repealed. The Supreme Court concluded that the provisions of the DIDMCA preempting every existing state limitation on the rate or amount of interest and charges applicable to any mortgage secured by a "first lien" on residential real property applies to both purchase-money and refinancing first lien mortgages. The Supreme Court held that the amendment of the provision of the Interest Act which was repealed by implication was insufficient to revive that provision and, thus, the amendment did not constitute an opt-out of preemption by the DIDMCA.

VI. Alternative Mortgage Transactions

A. Prepayment Penalties

In *Glukowsky v. Equity One, Inc.*,[55] the New Jersey Supreme Court held that the prohibition against prepayment penalties under the New Jersey Prepayment Law (NJPL) was preempted by former OTS regulations, which gave state-chartered housing lenders the authority to charge prepayment penalties in alternative mortgage transactions. The plaintiff obtained a "balloon payment" mortgage loan from Equity One, Inc., which loan qualified as an alternate mortgage transaction (AMT) under the Alternative Mortgage Transaction Parity Act of 1982 (Parity Act).[56] When the plaintiff-borrower subsequently sold the property securing the loan, Equity One exercised its right under the loan contract to demand full payment and impose a prepayment penalty. The plaintiff filed suit against Equity One, claiming that imposing such a fee violated, among other things, the NJPL. The lender filed a motion to dismiss, arguing that OTS regulations preempt any state law, including the NJPL, that prohibits a state-chartered lending institution from charging a prepayment penalty on an AMT. At the time of suit and prior to its amendment in 2002, section 560.220 of the OTS regulations had extended section 560.34 of the OTS regulations, which permits federally-chartered housing lenders to impose prepayment penalties, to state-chartered housing lenders.

The trial court agreed with Equity One and dismissed the plaintiff's complaint on the grounds of federal preemption. The appellate court, however, held that the OTS exceeded its authority under the Parity Act when promulgating section 560.220, and thus reversed the trial court. The New Jersey Supreme Court disagreed and reversed the appellate court. In support of its conclusion, the Supreme Court indicated that the OTS's enactment of section 560.220 should be given deference unless the OTS acted outside the scope of its authority or arbitrarily. According to the New Jersey Supreme Court, the OTS did not act in either manner because at the time of enactment it was reasonable to conclude that section 560.220 would promote the goal of the Parity Act, *i.e.*, parity between state-chartered and federally-chartered housing lenders. The Supreme Court also indicated that in the interests of judicial comity, it should give due consideration to the interpretations of the Parity Act by federal courts, which had uniformly concluded that the OTS acted within its authority by promulgating regulations preempting state laws governing prepayment penalties. For these reasons, the New Jersey Supreme Court refused to invalidate section 560.220, and held that the NJPL was preempted by federal law.

B. Appeals Court Upholds OTS Final Rule

The U.S. Court of Appeals for the District of Columbia Circuit ruled that the OTS did not exceed its statutory authority in promulgating a final rule pursuant to the Parity Act designating certain of its alternative mortgage transaction regulations (*e.g.*, prepayment penalty and late fee regulations) inapplicable to state-chartered housing creditors.[57] An alternative mortgage transaction is a mortgage loan for which the term or interest rate or both are adjustable rather than fixed.[58] The National Home Equity Mortgage Association, a trade association of non-prime mortgage lenders representing state-chartered housing creditors other than commercial banks and credit unions, had sought an order declaring the final rule invalid.[59] The appellate court's decision affirmed a grant of summary judgment in favor of the OTS by the district court. The district court had concluded that the Parity Act was ambiguous with regard to the scope of the state laws preempted, and that the OTS' interpretation of the extent of such preemption was based on a permissible construction of the statute and was therefore entitled to deference.

VII. Consumer Protection Laws

On a motion to remand to state court, the U.S. District Court for the Eastern District of Pennsylvania held that, based on the statutory language, the TILA (as amended by the Home Ownership and Equity Protection Act), the Equal Credit Opportunity Act, and the Real Estate Settlement Procedures Act preempt a state's statutory scheme only in the event and to the extent that a state law conflicts with these federal acts and accompanying

55. 848 A. 2d 747 (N.J. May 26, 2004), *cert. denied*, 125 S. Ct. 864 (2005).

56. 12 U.S.C. §§ 3801 *et seq.*

57. National Home Equity Mortgage Association v. Office of Thrift Supervision, 373 F. 3d 1355 (D.C. Cir., July 13, 2004).

58. *See* 12 U.S.C. § 3802(1).

59. 67 Fed. Reg. 60,542 (Sept. 26, 2002).

regulations.[60] The court concluded that "conflict" preemption does not equate to complete preemption and thus while the defendants may raise preemption as a defense in a state court action, the raising of a federal defense does not, of itself, support removal. The court remanded the case to state court.

VIII. Privacy and the FCRA

The U.S. District Court for the Eastern District of California granted declaratory judgment in favor of the plaintiffs, the American Bankers Association, the Financial Services Roundtable, and the Consumer Bankers Association, in the *Lockyer* case.[61] The court held that the affiliate-sharing provisions of the California Financial Information Privacy Act[62] are preempted by the federal Fair Credit Reporting Act (FCRA). The district court also permanently enjoined enforcement of the affiliate-sharing provisions as codified in California Financial Code[63] to the extent they are preempted by the FCRA preemption provision.[64]

The district court previously held that SB1 was not preempted by the FCRA, in a June 30, 2004 opinion, but the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the case in June of 2005. The Ninth Circuit declared that the FCRA's affiliate-sharing preemption clause preempts SB1 insofar as the latter attempts to regulate communications between affiliates as to "information," as that term is used in 15 U.S.C. section 1681a(d)(1) of the FCRA, defining "consumer report" as any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit, insurance, employment or other purposes authorized under the FCRA. On remand, the district court determined that, applying this restricted meaning of "information," no portion of the affiliate-sharing provisions of SB1 survives preemption. The district court did stress, however, that the vast majority of protections afforded by SB1 remain untouched by the decision.

IX. Insurance

In 2002, the OCC opined that provisions of the Massachusetts Consumer Protection Act relative to the Sale of Insurance by Banks were preempted by federal law. The Massachusetts Bankers Association (MBA) challenged the provisions of Massachusetts law prohibiting them from selling, soliciting, and marketing insurance products.[65] Specifically the MBA challenged provisions of Massachusetts law prohibiting referrals by bank employees prior to a customer inquiry, prohibiting paying of referral fees, prohibiting solicitation of insurance prior to loan approval communicated in writing, and requiring a physically separate area for insurance solicitation. The court concluded that the restrictions significantly curtail a bank's ability to engage in the sale of insurance permitted by federal law and are preempted. The court noted that the state has the ability to regulate insurance, but not to hinder the banks' attempts to sell, solicit, and cross-market insurance.

X. Conclusion

The preemption authority of federally-regulated financial institutions continues to be explored and clarified by the courts and regulators. With certain limited exceptions, the trend is clearly in the direction of expanding federal preemption authority, and the critics of such legal developments have not been successful in their challenges. However, a range of issues remains to be settled and resolution of these issues may require extensive further litigation in the years ahead.

60. Jamal v. WMC Mortgage Corp., 2005 WL 724204 (E.D. Pa. March 28, 2005).

61. American Bankers Association v. Lockyer, No. Civ. S 04 0778 MCE KJM (E.D. Cal. Oct. 5, 2005).

62. Cal. Fin. Code §§ 4050 *et seq.* (commonly known as "SB1").

63. *Id.* § 4053(b)(1).

64. 15 U.S.C. § 1681t(b)(2).

65. Massachusetts Bankers Association v. Bowler, 392 F. Supp. 2d 24 (D. Mass. Jan. 10, 2005).

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