



June 11, 2024

SUPREME COURT REMANDS SECOND NATIONAL BANK ACT PREEMPTION CASE

The United States Supreme Court granted the petition for a writ of certiorari in *Flagstar Bank V. Kivett* and at the same time vacated the judgment of the Ninth Circuit and remanded the case for further consideration in light of *Cantero v. Bank of America, N.A.*, _____ U.S. _____ (2024). Like the *Cantero* case, *Flagstar Bank* involves the National Bank Act and the preemption of a state law that requires lenders and holders to pay interest on residential mortgage escrow accounts.

At the end of May, the Supreme Court remanded *Cantero* to the Second Circuit for a preemption analysis consistent with the *Barnett Bank* case as required by the Dodd Frank Act. See our [ALERT of June 4, 2024](#). The unanimous decision by the Supreme Court included a summary of the *Barnett Bank* case and the Dodd Frank Act's incorporation of the decision and the "prevents or significantly interferes" standard into federal statutory law. The Supreme Court pointed out that *Barnett Bank* did not establish a clear line to demarcate when a state law "significantly interferes" with a national bank's powers. The Supreme Court found that a court applying the *Barnett Bank* standard must make a practical assessment of the nature and degree of the interference caused by a state law.

Based on the Supreme Court's directive, both the Second Circuit and the Ninth Circuit will be required to make a preemption determination consistent with *Barnett* as summarized by the Supreme Court. The Second Circuit ruled in *Cantero* that the National Bank Act preempts New York's escrow-interest statute, while the Ninth Circuit ruled that the National Bank Act does not preempt California's escrow-interest statute. It will be interesting to see if either court comes to a new conclusion with the required new analysis framework. If on remand the cases continue to reach different preemption conclusions, it may result in the issue coming before the Supreme Court again.

We will continue to watch these and other national bank preemption cases. Please let us know if you have questions regarding the cases or National Bank preemption.

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