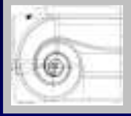

DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

January 8, 2026

RIFFARD V. BANK OF AMERICA: MISSED OPPORTUNITY OR COMING ATTRACTION?

On November 5, the appeal to the *Wisconsin Supreme Court in Riffard v. Bank of America N.A.* was voluntarily dismissed before briefing began. In 2022, the Circuit Court of Milwaukee County had held that the National Bank Act (NBA) preempts the Wisconsin notice of default and right to cure notice (RTC) provisions of the Wisconsin Consumer Act (WCA),[1] finding that the RTC provisions impermissibly limit a national bank's ability to set the terms of credit.[2] A 2018 Wisconsin Department of Financial Institutions letter came to the same result.[3] But in a February 18, 2025 opinion, the Court of Appeals of Wisconsin reversed the Circuit Court's decision and remanded, finding that NBA preemption did not apply, characterizing the RTC provisions as a (mere) "procedural" requirement to access Wisconsin courts, falling within the "savings clause" for "[r]ights to collect debt" under the Office of the Comptroller of the Currency's (OCC) preemption rule for non-mortgage loans.[4]

Two federal district courts in Wisconsin have addressed this issue previously but split: The *Boerner v. LVNV Funding, LLC*[5] court held that the NBA does not preempt the procedural requirements of the WCA. The *Lako v. Portfolio Recovery Associates*[6] court held that the WCA was preempted because Wisconsin's RTC provisions exceed a simple notice requirement and affect "the terms of credit itself," falling within the "preemption" clause of the OCC's preemption rule.[7]

In *Riffard*, the Wisconsin Court of Appeals leaned heavily on the U.S. Court of Appeals for the Fourth Circuit's decision in *Epps v. JP Morgan Chase Bank, N.A.*,[8] which addressed deficiency judgements under Maryland law. The Wisconsin Court of Appeals in *Riffard* found "a striking resemblance" between Maryland's disclosure requirement[9] and the WCA's RTC notice requirement. The national bank in *Epps* had asserted that a required disclosure under Maryland law was preempted. Absent the disclosure, a creditor is not entitled to a deficiency judgement under Maryland law and could be limited to recovering only principal.

The Wisconsin Court of Appeals expressly disagreed with the *Lako* court's analysis, asserting that the WCA's notice requirement "does not exceed the State's governance of debt collection and its conditions to bring an action in state court" and specifically "does not condition the lending relationship between a national bank and its customer."[10]

Wisconsin Consumer Act

The WCA provides that creditors have no cause of action with respect to a consumer credit obligation unless a default has occurred.[11] With respect to open-end credit plans, default is defined as: (i) the failure to pay when due on two occasions within any 12-month period, without justification under any law; or (ii) the failure to observe, without justification under any law, any other covenant of the transaction, the breach of which materially impairs the condition, value or protection of or the merchant's right to any collateral securing the transactions or materially impairs the customer's ability to pay amounts due under the transaction.[12] If a merchant believes that a customer is in default, the merchant may give the customer detailed written notice of both the alleged default and, if applicable, the customer's right to cure the default.[13]

The WCA goes on to say, however, that a merchant may not accelerate the maturity of a consumer credit transaction or commence an action unless the merchant believes the customer to be in default, and then only upon the expiration of 15 days after the above notice is given if the customer has a right to cure the default under the WCA.[14] Cure restores the customer to the customer's rights under the agreement as though no default had occurred.[15]

Thus, the WCA, like similar laws in other states, both imposes a notice requirement and purports to set conditions on acceleration with a right to cure. The Wisconsin Court of Appeals and *Boerner* court focused upon the first requirement, while *Lako* took note of the second. The Wisconsin Court of Appeals asserted that the WCA RTC requirements "are only triggered when a creditor is attempting to collect on a debt, not by the establishment of the lending relationship or the creditor's decision to make the loan,"[16] flatly disagreeing with *Lako.*

Preemption principles

The Wisconsin Court of Appeals addressed *Cantero v Bank of America, N.A.*,[17] but started from a premise that state law (particularly "traditional areas" like state consumer protection law) is ordinarily not to be preempted, but the U.S. Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson* said the NBA's grants of authority, both enumerated and incidental, are "not normally

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limited by, but rather ordinarily pre-empt[], contrary state law."[18] As the *Barnett Bank* Court explained, "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."[19] Accordingly, while a "presumption against federal preemption of state law" sometimes applies, that principle "is inapplicable to federal banking regulation."[20]

The NBA's "preemption provision" for non-real estate loans states that national bank may make non-real estate loans without regard to state law limitations concerning, among other things, "[t]he terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to 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."[21] The "savings clause" states that state laws on certain subjects *not inconsistent* with the non-real estate lending powers of national banks apply to national banks to the extent consistent with *Barnett Bank*.[22]

Is Wisconsin's RTC notice "inconsistent" with the NBA under Barnett Bank?

According to Cantero, a "nuanced" analysis is required. Can a state provision that addresses an area of traditional state control like debt collection nonetheless be preempted because the provision is inextricably linked to conditions that are subject to preemption? As noted above, the U.S. Supreme Court has said that there is no presumption against preemption in the context of NBA preemption[23] and federal courts have recognized that "'the level of interference that gives rise to preemption under the [NBA] is not very high.'"[24]

The WCA's RTC provisions, which restrict acceleration and provide for borrower cure (directly affecting the loan contract terms, not purely post-default remedies), do not have general application to all contracts under Wisconsin law but are particularized to covered consumer credit. They directly address the lender-borrower relationship, dictating bank risk-taking and loan terms (by conditioning loan acceleration and permitting borrower's to cure *as though no default had occurred)*, thereby affecting both the efficiency and the flexibility of a national bank's lending operations with regard to enumerated and incidental federal banking powers. The WCA's RTC provisions create a classic case of conflict preemption where federal law should prevail.[25]

The OCC recently issued a proposed preemption determination addressing interest-on-escrow. See our ALERT of Jan. 2, 2026. Might the OCC soon issue a similar determination addressing state right to cure provisions?

We are happy to assist with all aspects of program evaluation, including structuring, marketing and contract assessment, having helped set up the very first bank partnership for a national bank private label card following the *Marquette* decision,[26] and will continue to follow and report on issues affecting federal preemption and state regulation of interstate lending. ❑

✧ *Mike Tomkies, Elizabeth Anstaett and Mercedes Ramsey*

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[1] Wis. Stat. Ann. § 425.103.
[2] 2022 WL 22352400.
[3] Wis. Dept. Fin. Inst., Letter to Kohn Law Firm S.C. (Aug. 31, 2018). Notably, the appellate record before the Court of Appeals of Wisconsin did not contain a copy of the letter for the court's review. Consequently, the Court of Appeals of Wisconsin was not persuaded that the letter affected the court's analysis. *See* 415 Wis.2d 568, 587n.13 (Ct. App. 2025).
[4] 415 Wis.2d at 589; see 12 C.F.R. § 7.4008(e)(4).
[5] 358 F.Supp.3d 767 (E.D. Wis. 2019).
[6] 21 WL 3453632 (W.D. Wis. Aug. 4, 2021).
[7] Elizabeth L. Anstaett and Benjamin J. Hurford, *Circuit Courts Split In Important National Bank Preemption Cases*, 76 CONSUMER FIN. L.Q. REP. 205 (2023).
[8] 675 F. 3d 315 (4th Cir. 2012).
[9] Md. Code. Ann., Com. Law §§ 12-1021(k)(4), 12-1018(a)(2), (b).
[10] 415 Wis.2d at 588.
[11] Wis. Stat. Ann. § 425.103(1).
[12] *Id.* § 425.103(2)(b)-(c).
[13] *Id.* § 425.104(1). The notice must contain (i) the name, address and telephone number of the creditor, (ii) a brief identification of the transaction, (iii) a statement of the nature of the alleged default, (iv) a clear statement of the total payment, including an itemization of any delinquency charges or other performance necessary to cure the alleged default, (v) the exact date by which the amount must be paid or performance tendered and (vi) the name, address and telephone number of the person to whom payment must be sent, if other than the creditor. *Id.* § 425.104(2).
[14] *Id.* § 425.105(1). The WCA provides that for 15 days after the notice to cure default is given, a customer may cure a default by tendering the amount of all unpaid installments due at the time of the tender, plus any unpaid delinquency or deferral charges, and by tendering performance necessary to cure any default other than nonpayment of amounts due. *Id.* § 425.105(2). The customer will not have a right to cure the default if twice during the preceding 12 months the customer had been in default on the same open-end credit plan, the creditor had given the customer notice of the right to cure the previous defaults, and the customer had cured the previous defaults. *Id.* § 425.105(3).
[15] *Id.*
[16] 415 Wis.2d at 588, citing *Epps*, 675 F.3d at 325.
[17] 602 U.S. 205 (2024).
[18] 517 U.S. 25, 32 (1996).
[19] *Id.* at 33.
[20] *See, e.g.,Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008) and *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 554–55 (2009) (Thomas, J., concurring in part and dissenting in part).
[21] 12 C.F.R. § 7.4008(d)(4).
[22] *Id.* § 7.4008(e)(4).
[23] *Barnett Bank*, 517 U.S. at 32.
[24] *See, e.g., Illinois Bankers Ass'n v. Raoul*, 760 F. Supp. 3d 636, 657 (N.D. Ill. 2024) (citing *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283-284 (6th Cir. 2009) (holding that state garnishment law would "'significantly interfere' not only with the [b]anks' ability to collect and set their service fees, but also with the [b]anks' federal authority to complete other transactions and balance their accounts" (citation omitted)) and quoting *Am. Bankers Ass'n v. Lockyer*, 239 F. Supp. 2d 1000, 1017 (E.D. Ca. 2002) ("The threshold of preemption is in some cases remarkably low.")).
[25] *See, e.g., Parks v. MBNA America Bank, N.A.*, 278 P.3d 1193, 1200 (Cal. 2012), cert. denied, 468 U.S. 1028 (2012) ("However, to say that [a national bank] may offer [a product] so long as it complies with [state disclosure laws on certain credit products] is equivalent to saying that [the bank] may not offer convenience checks unless it complies with [the state law]. Whether phrased as a conditional permission or as a contingent prohibition, the effect of [the state law] is to forbid national banks from offering credit … unless they comply with state law." (emphasis in original)).
[26] *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

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