



SECOND CIRCUIT UPHOLDS NATIONAL BANK PREEMPTION IN *CANTERO* ON REMAND

The U.S. Court of Appeals for the Second Circuit has issued its long awaited opinion on remand in [Cantero v Bank of America, N.A.](#)¹ upholding national bank preemption with regard to New York's interest on escrow law. This decision creates a clear conflict with the First Circuit in *Conti* and the Ninth Circuit in *Kivett*, setting the stage for a potential appeal to the U.S. Supreme Court for further guidance on the proper application of the "nuanced comparative analysis" required by the Supreme Court's earlier decision in *Cantero*. See our ALERT of [Dec. 11, 2025](#). The Second Circuit's decision was not unanimous, however, so a request for *en banc* review is possible.

The Second Circuit's majority opinion again concluded that New York General Obligations Law § 5-601 is preempted. First, New York's interest-on-escrow requirement affects a national banking power: the power to offer mortgages. Second, it targets banks and limits their broad power to set the terms of mortgage-escrow accounts, so it is similar in nature to the preempted laws in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996). Finally, its degree of interference on banks' ability to make real-estate loans efficiently is similarly severe to the interference created by the preempted advertising law in *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954). The majority found that the nature and degree of New York's interference with federal law is "more akin" to the cases in which state laws were preempted than those in which state laws were not.

This time, the Second Circuit had the benefit of the Office of the Comptroller of the Currency's ("OCC") two notices of proposed rulemaking regarding national banks' and federal savings associations' real estate lending powers with respect to the payment of interest on funds held in escrow accounts, although the majority did not directly rely on the proposed rules. See our ALERT of [Jan. 2, 2026](#).

In a dissenting opinion, Judge Pérez, who had joined the majority opinion in the Second Circuit's initial *Cantero* decision, disagreed with the majority's assessment of the degree of

interference, finding New York's two percent minimum requirement marginal. The dissent referenced the OCC's position, including its recent proposed regulation and preemption determination, and found the OCC's reasoning flawed.

The majority said that it disagreed with the First Circuit's decision in *Conti*, for two main reasons: First, *Conti* disregarded the Real Estate Settlement Procedures Act of 1974 ("RESPA") and Truth in Lending Act ("TILA") in summarily concluding that *Barnett Bank* and *Fidelity* were "generally inapposite" to its analysis, noting that federal statutes like RESPA and TILA were relevant in the Supreme Court's preemption precedents, including *Barnett Bank*, *Franklin* and *Fidelity*. Second, *Conti* failed to acknowledge the practical reality that a state law restricting the pricing of a bank's product could have a "material impact . . . on banking operations."

With three Circuit Courts in clear disagreement, national banks must continue to await greater clarity from the Supreme Court.

The shifting fortunes of regulation and changes in enforcement priorities require constant monitoring and periodic review, if not to change tack then to reaffirm positions and to maintain and supplement defensive arguments. We will continue to follow developments and are happy to assist with evaluations and will continue to follow and report on these and other issues affecting federal preemption and state regulation of lending. □

✧ *Mike Tomkies, Elizabeth Anstaett and Mercedes Ramsey*

¹ August Term, Nos. 21-400, 21-403 (May 5, 2026), *on remand from* 602 U.S. 205 (2024).

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