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Post-*Cantero* Decision Analyzing National Bank Act Preemption

Court Holds Illinois Law Limiting Interchange Fees and Data Usage Is Likely Preempted by the National Bank Act

On Friday, December 20, 2024, the U.S. Court for the Northern District of Illinois granted the Illinois Bankers Association ("IBA") and other trade associations a preliminary injunction against the enforcement of the Illinois Interchange Fee Prohibition Act ("IFPA") as to national banks. In granting the injunction, the District Court determined that the IBA was likely to succeed on the merits because the two key provisions of the IFPA — prohibiting interchange fees on state taxes and gratuities and precluding use of data — were preempted as to national banks by the federal National Bank Act ("NBA"). In reaching this decision, the District Court relied on the U.S. Supreme Court's recent decision in *Cantero* v. *Bank of America, N.A.*, 602 U.S. 205 (2024).

Because *IBA* is the first decision to do a significant analysis of the NBA preemption in light of *Cantero*,[1] *IBA* could have important implications for the numerous pending cases involving the issue of NBA preemption and, more broadly, state regulation of the banking system.[2]

Cantero Decision

The issue in *Cantero* was whether the NBA preempted state laws that purported to impose a minimum rate of interest on mortgage escrow accounts. The Supreme Court analyzed this question under its holding in *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996), which had been expressly incorporated in Section 1044 of the Dodd-Frank Act ("DFA").[3] The Court did not reach a decision on the merits, but rather remanded the case, and shortly thereafter a companion case, to address the preemption issue on the basis of "the text and structure of the laws, comparison to other precedents, and common sense." *Cantero* at 219-20. The Court explained that in the *Barnett Bank* case, the Court had "looked to prior cases of [the Supreme Court] where the state law was preempted, as well as several cases where the state law was not

preempted." *Cantero* at 215. These precedents "furnish content to *Barnett Bank*'s significant-interference test—and therefore also to Dodd-Frank's preemption standard incorporating *Barnett Bank*." *Cantero* at 219. When courts decide NBA preemption issues, they must therefore "take account of those prior decisions of [the Supreme Court] and similar precedents." *Cantero* at 216.

IBA Decision

The key issue left open after *Cantero* (and *Barnett Bank* and the *DFA*) is what state laws constitute "significant interfer[ence]" with a national bank's powers. The *IBA* decision follows a long line of Supreme Court cases that indicate that state laws that restrict a national bank's ability to provide a legally authorized product or service constitute significant interference.

The analysis in *IBA* begins by citing *Barnett Bank* itself for the proposal that enumerated and incidental national bank powers are "grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." The District Court continued by noting that although "[c]ourts generally apply a presumption against preemption in fields the states traditionally regulate," such a presumption does not exist in the context of national bank powers (citing *Nat'l City Bank of Indiana* v. *Turnbaugh*, 423 F.3d 325, 330-31 (4th Cir. 2006)).

In analyzing the IFPA's prohibition against interchange fees on taxes and gratuities, the District Court described the "clear[ ] tension between the plain language of the [IFPA] and the [National Bank Act]." The IFPA "directly constrains the express powers provided for in the NBA's implementing regulation" (12 C.F.R. § 7.4002) that provides for a national bank to "charge its customers non-interest charges and fees, including deposit account service charges." The District Court further explained that Illinois was "directly regulat[ing] credit and debit card transactions . . . by dictating to Issuers how much they may charge for a given transaction."

The District Court then turned, as directed by *Cantero*, to an analysis of Supreme Court precedent. The two principal cases relied on by the District Court were *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373 (1954) and *Fidelity Federal Savings & Loan Association* v. *De la Cuesta*, 458 U.S. 141 (1982)). Notably, the Supreme Court in *Cantero* prominently cited both cases.

With respect to *Franklin*, the District Court said that the IFPA "appears even more directly at odds with the federal statute" than *Franklin*, in which the Supreme Court held that the NBA preempted a state law limiting the manner in which banks could advertise savings accounts. The District Court held that a restriction on banks' advertising was a lesser limitation than "whether the state may restrict … the non-interest fees national banks charge for their services." In perhaps the most important statement in the opinion, the District Court explained that "a national bank's authority to provide a banking service necessarily carries with it the authority to charge for that service."

Likewise, the District Court found that the fee limitation "also more dramatically limits national banking powers than the state law did in [*De la Cuesta*]." In *De la Cuesta*, the Supreme Court held that a California state law limiting the ability of federal savings and loan associations to enforce due-on-sale clauses in certain circumstances was preempted. The District Court found that the IFPA's interchange fee limitation "goes further" than the law in *De la Cuesta* "because it applies in all instances." More generally, the District Court found that the interchange fee limitation "is facially more extreme than the sort of state laws that the Supreme Court intended for national banks to be subject to" (citing *McClellan* v. *Chipman*, 164 U.S. 347 (1896)).[4]

The District Court buttressed its opinion with several lower court cases for the proposition that "the level of 'interference' that gives rise to preemption under the NBA is not very high" (citing *Monroe Retail* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009)). Because the IFPA "threatens to undermine Congress's creation of a national banking system," the District Court held that the IBA was likely to prevail on the merits of their National Bank Act preemption claims. Accordingly, the court granted the IBA's requested injunction.[5]

Implications of the *IBA* Decision

Over the years, numerous states have enacted laws purporting to impose restrictions or requirements on all banks, including national banks. The validity of these laws has frequently been challenged by national banks and bank trade associations as preempted by the NBA. The validity of these laws has significant implications for the current and future operations of banks, particularly those that operate in multiple states.

If the well-reasoned decision in *IBA* is followed by other courts, it would resolve many of the pending cases and caution states against enactment of new statutes that impede national bank powers. Specifically, *IBA* stands for the proposition that state statutes that attempt to affect the pricing of a national banker's products or services are preempted. As noted, the District Court explicitly held that "a national bank's authority to provide a banking service necessarily carries with it the authority to charge for that service." Further, state statutes that would restrict the usage of information obtained by a national bank are an impermissible restriction on the national bank's authority.

It remains to be seen how other courts will apply *Cantero*. Nonetheless, *IBA* would seem to create strong precedent because of the District Court's adherence to the *Cantero* analytical framework.

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ENDNOTES

[1] In an unpublished decision post-*Cantero*, the Ninth Circuit upheld on remand its prior decision sustaining a California law imposing a minimum interest rate on mortgage escrow accounts. The Ninth Circuit's decision referred to *Cantero*, but did not engage in any analysis of it.

[2] Although the constitutional invalidity of state laws that would impermissibly interfere with the powers and authority of national banks may not directly affect state-chartered banks, it is widely assumed that states would not place their state banks at a competitive disadvantage by imposing restrictions only on them.

[3] Section 1044 of the DFA provides that the National Bank Act preempts a state law "only if" the state law (i) discriminates against national banks as compared to state banks; or (ii) "prevents or significantly interferes with the exercise by the national bank of its powers," as determined "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in [*Barnett Bank*]." 12 U.S.C. §§ 25b(b)(1)(A), (B).

[4] The District Court also examined the IFPA's provision that makes it unlawful for "[a]n entity, other than the merchant" involved in a transaction to "distribute, exchange, transfer, disseminate, or use" the associated data "except to facilitate or process the electronic payment transaction or as required by law." 815 ILCS 150-15(b). The District Court found this limitation "directly constrain[ed]" national bank's power to "provide data processing and transmission services for itself and others" and therefore "clearly runs afoul of the Supreme Court's national banking preemption cases."

[5] The District Court found IBA was also likely to succeed on its claim that the Home Owners' Loan Act preempts the IFPA's application to federal savings associations, but deferred ruling on whether the Federal Credit Union Act preempts the IFPA as it applies to federal credit unions pending additional briefing. Further, the District Court (i) ruled that NBA preemption does not cover non-national bank transaction participants liked card networks, (ii) rejected that the Durbin Amendment to the DFA, which sets a ceiling for interchange fees, preempts the IFPA, and (iii) dismissed IBA's state law claims due to Illinois's sovereign immunity.

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