OCC Submits Amicus Brief in Hymes v. Bank of America, N.A.

- *by Lisa Weingarten Richards*

June 15, 2021, the Office of the Comptroller of the Currency ("OCC") submitted a rare amicus brief in support of Bank of America in Hymes v. Bank of America, N.A.,[1] before the Eastern District of New York. The OCC noted that the case "is a matter of foundational consequence to the OCC and to the federal banking system." The EDNY stated this was a matter of first impression for all Circuits except the Ninth -- the facts are very similar to those in Lusnak v. Bank of America, N.A.,[2] which was decided in favor of the plaintiffs, and for which the Supreme Court denied certiorari.[3]

Hymes v. Bank of America - Overview

In Hymes, the EDNY held that the National Bank Act ("NBA") did not preempt a state law requiring interest be paid on escrow funds, and the plaintiff was thus entitled to recover the interest through its claim for breach of contract.[4] The central issue in Hymes is whether 15 USC § 1639d, a Dodd-Frank Act addition to the Truth in Lending Act ("TILA"), prevents preemption from applying to state escrow laws. According to the statute, "If *prescribed* by *applicable* State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as *prescribed* by that *applicable* State or Federal law."[5] (emphasis added).

The Hymes plaintiffs argued, and the EDNY held, that New York General Obligation Law ("NYGOL") § 5-601 applies, and because that law requires "mortgage investing" institutions to pay a defined interest rate on customers' mortgage escrow account balances, Bank of America was required to pay interest on the mortgage escrow account balance. The EDNY thus treated "applicable" state law as simply referring to the law of the relevant state. Whereas the OCC in its amicus brief (and Bank of America) asserted that a state law is not "applicable" if it has been preempted by federal law.

OCC Escrow Regulation and Preemption

In its amicus brief, the OCC repeatedly referred to its regulation, 12 C.F.R. § 34.4, which provides "a) A national bank may make real estate loans…*without regard to state law limitations*

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[1] Hymes v. Bank of Am., N.A., 408 F. Supp. 3d 171 (E.D.N.Y. 2019), amended, No. 18CV2352RRMARL, 2020 WL 9174972 (E.D.N.Y. Sept. 29, 2020). The matter has been combined with the related Cantero v. Bank of America, N.A., and other plaintiffs have also been included, creating a putative class action.

[2] Lusnak v. Bank of Am., N.A., 883 F.3d 1185, 1188 (9th Cir. 2018).

[3] In Lusnak, the OCC also submitted an Amicus Brief in support of B of A's request for a 9th Circuit panel rehearing.

[4] The EDNY also dismissed two of the plaintiffs' claims, one for unjust enrichment, the other alleging the bank engaged in a deceptive act or practice in not paying interest on the escrow accounts.

[5] 15 USC 1639d(g)(3).

concerning: … (6) Escrow accounts, impound accounts, and similar accounts" (emphasis added). In addition, the OCC repeatedly cited the Supreme Court ruling in the seminal preemption case, Barnett Bank of Marion County, N.A. v. Nelson.[6] The OCC also characterized the EDNY as asserting that preemption is only permitted to be used in cases in which state laws "practical[ly] abrogat[e]" or "nullif[y]" a national bank's exercise of a banking power." The OCC argued that the EDNY has thereby set a much more restrictive standard for preemption than does Barnett Bank.

The OCC further explained that Congress has authorized the OCC to grant national banks the power to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate."[7] That express grant of authority from Congress also empowers the OCC to create "such restrictions and requirements as [the OCC] may prescribe by regulation or order."[8] Flowing from this authority, the OCC has, in addition to regulations, provided guidance which allows national banks the authority to provide, establish, and service escrow accounts.[9] Further, the OCC's regulations do not mandate any interest be paid on escrow accounts and also explicitly provide that national banks are exempt from all state law requirements relating to escrow accounts.[10] The OCC asserted that its preemption regulations for escrow accounts therefore preempt NYGOL § 5-601, which requires "mortgage investing" institutions to pay a defined interest rate on customers' mortgage escrow account balances.

The OCC also noted that state law is not permitted to significantly burden a national bank's exercise of its real estate lending power, just as it may not curtail nor hinder a national bank's efficient exercise of any other power under the NBA. The essential character of the national bank charter is the preemption it provides, which shields national banks from local laws that could undermine the powers granted to them by federal law.

EDNY Position on OCC Preemption for Escrow Accounts

The EDNY asserted that Bank of America's assertions of preemption are invalid, stating that the OCC did not give an adequate reason for including escrow accounts under preempted activities. The OCC included escrow accounts in 2004 when it amended its regulations to increase preemption for national banks following Barnett Bank. In those 2004 preemption amendments, the OCC both added a new section 12 CFR § 7.4008 and revised its 12 CFR § 34.4 to include escrow accounts on a list of state law items which were fully preempted for national banks. The EDNY asserted that the OCC did not offer any basis for the inclusion of escrow accounts on the list, that the OCC did not state that it had consulted with HUD (which, in 2004, was the agency

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[6] Barnett Bank of Marion Cty., N.A. v. Nelson, 517 U.S. 25 (1996).

[7] 12 U.S.C. § 371(a).

[8] 12 U.S.C. § 371(a).

[9] OCC Interpretive Letter No. 1041 (Sept. 28, 2005), https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2005/int1041.pdf.

[10] 12 CFR § 34.4(a)(6).

with authority to implement the relevant RESPA regulations), nor that it had determined state regulation regarding escrow accounts, "had encroached too far on the federal domain."

OCC Refutation of EDNY's Assertions on Preemption

However, the OCC disagreed, stating in its amicus brief that when the OCC drafted 12 CFR § 7.4008 and revised 12 CFR § 34.4, in 2003/2004, it specifically identified state escrow laws as laws that materially impact a national bank's exercise of its federally granted authority. The OCC added that after the passage of the Dodd-Frank Act in 2010, the OCC again reviewed these regulations. As a result of this review, the OCC reaffirmed its previous conclusions that state laws regarding the establishment and terms of escrow accounts, impound accounts, and similar accounts conflicted with the power of a national bank to make loans secured by real estate. In particular, the OCC stated that it reaffirmed that 12 C.F.R. § 34.4 and other similar regulations, such as 12 CFR § 7.4008 are "based on the OCC's experience with the potential impact of such laws on national bank powers and operations."[11]

In 2010, through Dodd-Frank, Congress granted the Consumer Financial Protection Bureau ("CFPB") authority over TILA and RESPA rulemaking. In addition, the EDNY asserted that according to Dodd-Frank, the OCC is required to make preemption determinations, "concerning the impact of a particular State consumer financial law"… "case-by-case" and in "consult[ation] with the [CFPB]." 12 USC § 25b(b)(3).[12] The EDNY further asserted that when the OCC later reaffirmed (post-Dodd-Frank) its position that state escrow account laws are preempted for national banks, it was required to consult with the CFPB but did not do so. However, the OCC has a starkly different reading of this statutory requirement. In its amicus brief, the OCC does not directly address the EDNY's statement or explicitly express its position, but in its Interpretive Letter 1173, issued December 2020, the OCC explains its view of 12 USC § 25b. In that interpretive letter, the OCC provides a highly nuanced explanation which narrows what it considers to be the sorts of preemption decisions subject to "consultation" with the CFPB.[13]

Conflicting Readings of 15 USC § 1639d

The EDNY also stated that January 22, 2013, when the CFPB promulgated its implementing regulations for 1639d, in the notice accompanying the rulemaking, the CFPB stated: "Depending

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[11] Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011).

[12] Hymes at 180.

[13] The OCC considers that those preemption decisions subject to mandatory consultation with the CFPB are are only those which are "preempted pursuant to the Barnett standard", and further notes that "an OCC action that has only indirect or incidental effects on a state consumer financial law is not a preemption determination." The OCC then adds that has not made "a preemption determination, and thus is not subject to the procedural requirements of section 25b, when it concludes that (1) a state consumer financial law is preempted pursuant to the discriminatory effect or other federal law standards or (2) a state law other than a state consumer financial law is preempted." OCC Interpretive Letter 1173, OCC Chief Counsel's Interpretation: 12 U.S.C. § 25b, (December 18, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-176a.pdf.

on the State, the creditor might not have to pay interest on the money in the escrow account."[14] The EDNY then pointed out that the CPFB did not make any separate statement or qualifier about 1639d(g)(3)'s applicability to national banks. The EDNY used this to support that the OCC was not permitted to exert preemption authority over state escrow laws.[15]

The EDNY thus concluded that 1639d includes the plaintiffs' mortgages among loans which must have an escrow account.[16] Thus, regarding these mortgages' escrow accounts, the statute requires "each creditor *shall* pay interest to the consumer…in the manner as prescribed by that applicable State or Federal law."[17] (emphasis added)

The OCC in its amicus brief responded to the EDNY's assertions, countering that the escrow accounts that the plaintiffs' obtained were in fact *not* required by law, and therefore these escrow accounts were not required under 1639d(g)(3) to provide interest "in accordance with state law." The OCC noted that the plaintiffs had *even conceded* that Bank of America was not required to provide them an escrow account for these mortgages. The OCC asserted that the EDNY was thus incorrect in requiring Bank of American to follow 1639d(g)(3)'s requirement to follow state law because the requirement did not apply to these consumers' mortgages.[18]

Conclusion

It is unclear what the Second Circuit will decide on appeal. The key issue is the reading of "applicable" in 1639d, which determines whether a state law requiring interest on escrow accounts need be followed. Bank of America reads "applicable" to mean "not preempted," while the plaintiffs rely on the more natural reading of "applicable," to simply mean "relevant." The EDNY has sided with the plaintiffs, stating that "applicable" appears ten times in 1639d, and in the majority of cases, the term means, roughly, "relevant."[19] The Lusnak court had also discussed this issue in detail and asserted that "applicable" means roughly, "relevant".[20] On balance, the more natural reading of "applicable" does seem to be "relevant" and thus this would more likely favor the plaintiff.

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[14] See Escrow Requirements Under the Truth in Lending Act, 78 Fed. Reg. at 4726.

[15] Hymes at 179.

[16] Hymes at 178, 179.

[17] 15 USC § 1639d(g)(3).

[18] The OCC asserts that the requirement under 1639d(g)(3) specifically only applies to escrow accounts which were *required* by State or Federal law to be set up for the customer, according to 1639d(b). But in this case, *no escrow account was required by law*, therefore the mandate under 1639d(g)(3) did not apply.

[19] Hymes at 187.

[20] Lusnak v. Bank of Am., N.A., 883 F.3d 1185, 1196 (9th Cir. 2018)

A second issue is whether the OCC was required to consult with the CFPB before making its determination in 2011, reflected in 12 CFR § 34.4, that state escrow laws are preempted for national banks. Here too, the OCC has mounted a strong counterargument, reflected in its guidance, Interpretive Letter 1173. Finally, while likely not helpful to the OCC and Bank of America's position, even if the Second Circuit believes that the OCC was required to consult with the CFPB, this does not necessarily mandate that the OCC's preemption decision must fail. The statute does not provide any remedy for the OCC failing to consult with the CFPB when required.

A final issue, which the OCC raised in its amicus brief which has not yet been addressed by any court (and which was submitted after the EDNY provided its ruling), is whether these plaintiff escrow accounts, which it seems were not actually required by state or federal law, should follow the analysis under 15 USC § 1639d for which the title of a 1639d(g) even states:
(g) Administration of *mandatory* escrow or impound accounts (emphasis added). Perhaps the court may simply note that these escrow accounts were not mandatory, thus falling outside the scope of the entire issue. In this way, the Second Circuit could potentially decide in favor of Bank of America while deferring to resolve the significant issues of the case.

This is ultimately a very high-stakes decision for the OCC, as is clearly reflected in its having submitted a rare amicus brief. If the Second Circuit upholds the EDNY's decision, it will be a crucial case on banking preemption, possibly further solidifying the holding of Lusnak. It will also have a major effect on the entire national bank system, the OCC's authority, and could even have repercussions for administrative agencies more broadly.