

Preemption under the National Bank Act and the Home Owners' Loan Act

Amy Quester

Legal Aid Society of Milwaukee

(with funding provided by IFLA, a project of CRL managed
by NACA)

Types of Preemption

- Express
 - if Congress explicitly states that it is overriding state law
- Implied
 - *Field*
 - if federal law or regulation is so pervasive that it occupies an entire field
 - *Conflict*
 - if compliance with both federal and state regulations is impossible, OR
 - if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress

General Preemption Issues

1. Presumption against preemption

Applies if the states' historic police powers are at issue UNLESS there is a history of a "significant federal presence," *see US v. Locke*, 529 U.S. 89, 107-08 (2000)

2. Role of federal agencies

Federal regulations can have preemptive effect BUT agencies' determinations regarding the scope of preemption may not deserve as much deference as other agency determinations.

National Bank Act

(NBA)

- Enacted in 1860s
- Governs national banks
- Administered by the Office of the Comptroller of the Currency (“OCC”)

Home Owners’ Loan Act

(HOLA)

- Enacted in 1933
- Governs federal savings associations (“thrifts”)
- Administered by the Office of Thrift Supervision (“OTS”)

Who can claim preemption under the NBA or HOLA?

1. National banks or thrifts
2. Their operating subsidiaries
(*See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007))
3. Other affiliates? Agents? Third-party contractors?

What types of laws and claims are preempted by HOLA?

- RATES: “Most favored lender status” and exportation rights under 12 U.S.C. § 1463(g)
- OTHER MATTERS: OTS regulations purport to “occupy the field” re:
 - Lending
 - Deposit-taking
 - Fiduciary operations

OTS Lending Preemption Regulation 12 C.F.R. § 560.2

- (a) Occupation of field & purposes
- (b) Examples of types of laws that are preempted, including those re:
- (5) loan-related fees
 - (9) disclosure and advertising
 - (10) processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages
- (c) Lists state laws that are not preempted to the extent that they only incidentally affect lending operations or are otherwise consistent with the purposes in (a):
- Contract & commercial law;
 - Real property & some homestead law;
 - Tort & criminal law; &
 - Others added by the OTS.

What types of laws and claims are preempted by the NBA?

- **RATES:** Most favored lender status and exportation rights under 12 U.S.C. § 85
- **“VISITORIAL POWERS”:** 12 U.S.C. § 484(a)
- **OTHER MATTERS:** Various conflict preemption regulations (e.g., re real estate lending)

OCC Real Estate Lending Preemption Regulation 12 C.F.R. § 34.4

(a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks.
[Lists examples of preempted laws]

(b) State laws on the following subjects . . . apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:
[Lists types of laws (e.g., contract law)
+ allows OCC to add more]

For additional information:

see National Consumer Law Center, Cost of Credit: Regulation, Preemption, & Industry Abuses ch. 3 & App. C & D (3d ed. 2005 & 2008 Supp.)