The More Things Change the More They Stay the Same: OCC Issues Notice of Proposed Rule on National Bank Act Preemption and Claims It Was Right All Along

Richard P. Eckman | eckmanr@pepperlaw.com
Stephen G. Harvey | harveys@pepperlaw.com
Michael J. Callaghan | callaghannm@pepperlaw.com

The global financial crisis that began in 2008 led to the passage in July 2010 of the Dodd-Frank Act Wall Street Reform and Consumer Protection Act (Dodd-Frank). During the debate before Dodd-Frank became law, the suggestion was made that Congress should do or say something in Dodd-Frank about the extent to which national banks, which operate under the National Bank Act (NBA) and are subject to the supervision of the Office of the Comptroller of the Currency (OCC), should be permitted to operate without giving effect to state law. What came out of the legislative process at the end of the day was Dodd-Frank Section 1044, which clarified that the standard for NBA preemption is whether the state law at issue “prevents or significantly interferes with the exercise by the national bank of its powers” in accordance with the Supreme Court’s decision in Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996) (Barnett Bank). This codification of the Barnett Bank “prevents or significantly interferes” standard was thought to be necessary because in 2004 the OCC issued preemption regulations that described the standard as whether the state law “obstructs, conditions, or impairs the exercise by a national bank of its powers.” Some OCC critics contended that the 2004 regulation should be read to mean that state laws just “obstruct,” “condition,” or “impair” the exercise of national bank powers, according to Barnett Bank. What is not clear is whether the OCC’s interpretation is consistent with the 2004 preemption regulations. The OCC’s proposed rule would address the issues of whether state laws prevent or significantly interfere with the exercise of national bank powers.
tion set a standard for NBA preemption that was different from and more preemptive of state law than the Barnett Bank standard.

The OCC recently rejoined the conversation on this issue when on May 26, 2011 it issued a notice of proposed rulemaking on a number of subjects, including federal preemption, to conform its regulations to Dodd-Frank. Comments on the proposed rule were due on or before June 27, 2011. This Alert summarizes the key aspects of the proposed rule as they relate to NBA preemption.

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At the same time, the OCC noted that Dodd-Frank Section 1044 “could have been intended to clarify” the Barnett Bank standard “relative to how current OCC regulations have distilled principles” from Barnett Bank. It also acknowledged that the “obstruct, impair, or condition” formulation “has created ambiguities and misunderstandings regarding the preemption standard,” and therefore proposes to remove the language from its regulations. Nevertheless, according to the OCC, because the 2004 regulations “were premised in principles drawn from the Barnett case,” any existing precedent based on the 2004 regulations remain valid. The OCC even goes a step further and states that the 2004 regulations are themselves “preserved.” In effect, the OCC is saying the 2004 regulations are consistent with Barnett Bank and therefore valid, but the phrasing of the preemption standard in the regulations is being changed simply for clarification.

The OCC also proposes to clarify provisions of its regulations regarding the types of state laws that would not be preempted (e.g., contracts, torts, criminal law, etc.). The OCC proposes to amend portions of its regulations describing the types of state laws that are not preempted by making specific reference to Barnett Bank as the proper standard.

OCC Preemption Determinations

Preemptions questions can be decided by a reviewing court or by the OCC itself. Dodd-Frank imposes procedures and consultation requirements for how the OCC can make preemption determinations after July 21, 2011. The OCC in its notice of the proposed rule recognizes these procedures and requirements: any preemption determination must be made under the Barnett Bank standard and then on a case-by-case and not a categorical basis; it must be supported by substantial evidence made on the record of the proceeding; the OCC must consult with the Consumer Financial Protection Bureau under certain circumstances; and the OCC must publish a list of preemption determinations every quarter and must conduct a periodic review of preemption determinations every five years. Note that the OCC in its
notice to the proposed rule made no reference to and seemingly ignored the provision in Dodd-Frank Section 1044(a) that any preemption determination “shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.” Note as well the OCC does not propose any new regulations to implement the process for making preemption determinations, possibly because it decided that the new requirements are so onerous that it is unlikely to make any preemption determinations.

Elimination of Preemption for National Bank Subsidiaries

Dodd-Frank eliminates preemption of state law for national bank subsidiaries, agents and affiliates. In accordance with Dodd-Frank, the OCC proposes to eliminate its regulation concerning the application of state laws to national bank subsidiaries. This proposal is directly in line with Dodd-Frank, which reverses the Supreme Court’s holding in Watters v. Wachovia, N.A., 550 U.S. 1 (2007). This will force national banks to either conduct the operations of subsidiaries, agents and affiliates at the bank level or have subsidiaries, agents and affiliates comply with applicable state law.

Preemption Standard Applicable to Thrifts

The proposed rule also addresses the issue of preemption with regard to federal savings associations. The OCC proposes amendments to its regulations to apply national bank standards on preemption and visitorial powers to Federal savings associations and their subsidiaries to the same extent and in the same manner as they apply to national banks and their subsidiaries. This complies with Dodd-Frank Section 1046, which provides that any preemption determinations made by a court or the OCC under the Home Owners' Loan Act with respect to federal savings associations "shall be made in accordance with the laws and legal standards applicable to national banks regarding the preemption of State law."

Visitorial Powers

The proposed rule also discusses the OCC’s proposal to revise its regulation addressing visitorial powers with respect to national banks. Dodd-Frank specifically codifies the decision in Cuomo v. Clearing House Association, L.L.C., 129 S. Ct. 2710 (1999), in which the Supreme Court held that when a state attorney general files a lawsuit to enforce a state law against a national bank, such lawsuit is not an exercise of visitorial powers. The Supreme Court held that the OCC erred by extending the definition of visitorial powers to include “prosecuting enforcement actions” in state courts. Accordingly, the OCC proposes to modify its visitorial powers regulation to provide that an action by a state attorney general to enforce a non-preempted state law against a national bank and seek relief thereunder is not an exercise of visitorial powers.

Conclusion – The More Things Change the More They Stay the Same

From the perspective of the OCC, nothing has really changed with regard to NBA preemption, except for new OCC procedural processes for preemption determinations and the elimination of “field preemption” for federal savings banks. The standard under which the OCC will make preemption determinations is and remains the Barnett Bank standard.

Pepper Point: Certain consumer groups and Rep. Barney Frank (D- Mass.) take the position that the “prevent or substantially interfere” standard of Barnett Bank is the sole standard for the courts to use and not the more than 150 years of judicial precedent on this issue. Who is correct in this interpretation will no doubt be answered by future court decisions.

How Can We Help You?

Our attorneys have worked hard to stay ahead of these and other important developments that may affect your organization. We regularly advise clients on all aspects of banking and financial services laws, including regulatory counseling, litigation, class actions, and enforcement actions.

For more information, please contact any of the authors or the Pepper Hamilton attorney with whom you usually work.

Endnotes


2 Other subjects covered in the proposed rule that are not addressed in this Alert include the transfer of Office of Thrift Supervision to the OCC; implementation of the moratorium on the approval of a change in control of credit card banks, industrial banks and trust banks if the change of control would result in a commercial firm controlling such bank; and the transfer of authority to collect assessments for federal savings associations from the OTS to the OCC.
3. Under Dodd-Frank Section 1044, “[t]he term ‘State consumer financial law’ means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.”


Ultra-Marathon of Litigation

A classic race to the courthouse ended in March of this year without a winner. The starting gun was fired on Dec. 3, 2007, when VeriFone Holdings Inc. announced that its operating income for the preceding three quarters had been overstated by 129 percent.

As Bob Hickok, Gay Rainville, and Jay McMillan describe in a two-part series contributed to the Delaware Business Court Insider, the district court’s decision marks the finish line for the first leg of what has become an ultra-marathon of litigation, involving VeriFone, its officers, directors, and stockholders, the Securities Exchange Commission, the federal court in California, the Delaware Court of Chancery and the Delaware Supreme Court in more than a dozen legal actions.

Visit www.pepperlaw.com and search “VeriFone” to access the full articles from this series.

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The Dodd-Frank Act One Year Later: What’s New and What to Expect

Financial Services Reform Webinar Series: A Closer Look at the Dodd-Frank Act

Recorded on July 21, 2011
www.pepperlaw.com/webinars_update.aspx?ArticleKey=2138

One year after adoption of the Dodd-Frank Act, much has happened, but much remains to be done. On the consumer finance side, Elizabeth Warren has been busy guiding the creation and implementation of the new Consumer Financial Protection Bureau, but President Obama has yet to appoint a permanent director of the CFPB. While certain powers automatically transferred to the CFPB on July 21, how will the lack of a director affect the CFPB’s role? What impact will efforts in Congress to cut funding to the CFPB have? Treasury, the Fed, the FDIC, the SEC, the CFTC and other agencies also have issued reams of proposed rules and regulations since passage of the Dodd-Frank Act. In June and July 2011 alone, for example, comment periods end on the Fed and FDIC “living will” proposed regulations on resolution plans and credit exposure reports for covered systemic organizations; the CFTC’s proposal on margin requirements for uncleared swaps; proposed regulations on capital requirements of swap dealers and major swap participants; SEC-proposed regulations on short sale reporting; and multi-agency proposed regulations governing reporting requirements for OTS-supervised thrifts and S&L holding companies, just to name a few. Listen and learn the latest on federal regulation and how it will impact your business.

Visit the Webinars section of www.pepperlaw.com to listen to past webinars from the Financial Services Reform Series.

More Resources on the Dodd-Frank Act

For additional information, please visit Pepper’s Financial Services Reform Resource Center available online at www.pepperlaw.com/news.aspx?AnnouncementKey=655.
Late Filed Appeal Denied - Computer Oversight Not ‘Excusable Neglect’

Francis J. Lawall | lawallf@pepperlaw.com
James C. Carignan | carignanj@pepperlaw.com

A litigant has a much better chance of demonstrating excusable neglect if it can show that the delay was the result of circumstances outside its control.

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A basic component of practice management in the federal courts involves calendar maintenance to ensure deadline compliance. Bankruptcy practitioners are required not only to know the local and federal bankruptcy court rules of procedure, but also must be familiar with those applicable to the district and circuit courts, each of which may have appellate (and sometimes original) jurisdiction over bankruptcy matters.

The nightmare scenario for any practicing lawyer is missing a procedural deadline that results in a court refusing to consider a critical filing, and in some cases may even divest such court of jurisdiction. To circumvent such a harsh outcome, the federal rules provide a mechanism that enables tardy litigants to seek an extension of an expired deadline provided the delay was the result of “excusable neglect.”

In a recent decision, the 4th U.S. Circuit Court of Appeals analyzed the excusable neglect standard in the context of a notice of appeal from a district court judgment that was filed one day late as a result of a technical error by counsel’s computer calendaring system. The court’s May 23 opinion is captioned Symbionics Inc. v. Ortlieb.

On Dec. 4, 2009, the U.S. District Court for the Eastern District of Virginia entered judgment on the defendant’s counterclaims against Symbionics. Pursuant to Fed. R. App. P. 4(a)(1), the notice of appeal with respect to that judgment had to be filed within 30 days. The 4th Circuit opinion said Symbionics filed one day late, on Jan. 5, 2010, but requested that the district court permit the late filing on the grounds that “a quirk in the functionality of counsel’s computer calendar caused counsel to miscalculate the deadline to appeal as Jan. 5, 2010, rather than the correct date of Jan. 4, 2010.”

The district court determined that Symbionics’ delay was the result of “excusable neglect” within the meaning of Fed. R. App. P. 4(a)(5)(A), and thus authorized the late filing. The counter-party to the litigation timely appealed this decision to the 4th Circuit, arguing that Symbionics had not satisfied the standard for excusable neglect and that the district court had abused its discretion.

The 4th Circuit began its analysis by discussing the factors that federal courts consider in determining whether, in a given case, excusable neglect justifies the extension of a statutory or rule-based deadline, such that a late filing can be considered timely. Those factors, which were set forth by the U.S. Supreme Court in its 1993 opinion in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, are: “(1) danger of prejudice to the opposing party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.”

The 4th Circuit noted that the third factor — the reason for the delay — is the most important consideration to the excusable neglect inquiry. The court reasoned that this is because “the first two Pioneer factors will favor the moving party because the time limits inherent in [the Federal Rules] necessarily minimize the extent of any prejudice or delay ... [and because] the fourth Pioneer factor is rarely material, as the absence of good faith is seldom at issue in excusable neglect cases.”
With respect to the “reason for delay” factor, the court held that while inadvertence, mistake, carelessness and intervening circumstances can fall within the ambit of excusable neglect, “a mere concession of palpable oversight or administrative failure generally has been held to fall short of the necessary showing.” Further, the court held that excusable neglect is designed to be, and is, a difficult standard to satisfy, and that courts should carefully circumscribe its application especially in instances of carelessness and mistake. “A district court should find excusable neglect only in the extraordinary cases where injustice would otherwise result,” the opinion said.

The court found that Symbionics’ explanation for its delay did not present the type of “extraordinary” circumstance satisfying the excusable neglect standard. Symbionics had argued its delay was caused by a computer miscalculation: counsel had used his computer calendaring system, which, according to counsel, had a glitch causing him to believe the applicable period expired one day subsequent to the actual deadline. The court found that this explanation was not extraordinary or unusual, nor did it excuse Symbionics’ failure to comply with the deadline set forth in the federal rules.

“Counsel’s total dependence on a computer application — the operation of which counsel did not completely comprehend — to determine the filing deadline for a notice of appeal is neither ‘extraneous’ to nor ‘independent’ of counsel’s negligence,” the court said. “Rather, the failure to discover that the calendar display had reverted to January 2009, and the reliance on the resulting incorrect deadline computation, are the very essence of counsel’s negligence here. Furthermore, this neglect is precisely the sort of ‘run-of-the-mill inattentiveness by counsel’ that we have consistently declined to excuse in the past.”

The presence or absence of excusable neglect is inherently fact-intensive. Whether an instance of tardiness can be excused will depend in large part on the degree of blame the derelict party directly bears for missing the deadline. The Symbionics decision reinforces the notion that a litigant has a much better chance of demonstrating excusable neglect if it can show that the delay was the result of circumstances outside its control, rather than because of simple carelessness or inattention. Symbionics also serves as a warning to counsel that reliance upon technology that he or she does not fully understand is unlikely to serve as an excuse if a deadline is missed.

David B. Stratton Named to 2011 Delaware Super Lawyers List

David B. Stratton, a partner in the firm’s Wilmington office, has been named by Delaware Super Lawyers magazine as one of the top attorneys in the state for 2011. Each year, no more than 5 percent of the lawyers in Delaware receive this honor.

Mr. Stratton is co-chairman of Pepper Hamilton’s Corporate Restructuring and Bankruptcy Practice Group and the managing partner of the firm’s Wilmington office. He is a past member of the firm’s Executive Committee. Mr. Stratton has more than 30 years of experience representing debtors, creditors’ committees, secured and individual creditors, and parties-in-interest as both lead and co-counsel in bankruptcy courts in the Districts of Delaware and Maryland, the Southern District of New York and other U.S. bankruptcy courts. Mr. Stratton is a graduate of Gettysburg College and the University of Pittsburgh School of Law.

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