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Preemption of State Disclosure Laws

July 24, 2012

In Parks v. MBNA America Bank, N.A., No. S183703, 2012 WL 2345006 (Cal. June 21, 2012), the California Supreme Court ruled that the National Bank Act, 12 U.S.C. §21 et seq. ("NBA"), preempts California Civil Code section 1748.9, which requires that credit-card issuers provide certain disclosures when providing credit customers preprinted convenience checks.

The Issue: Section 1748.9 of the California Civil Code requires a credit-card issuer that extends credit to a cardholder through the use of preprinted checks to provide specific, concurrent disclosures regarding use of the checks. Specifically, the credit-card issuer must disclose the APR and the calculation of finance charges associated with the use of the check or draft as required by Section 226.16 of Regulation Z of the Code of Federal Regulations, whether the finance charges are triggered immediately upon use of the check or draft, and that "use of the attached check or draft will constitute a charge against your credit account." The NBA contains no such requirements respecting convenience checks. Rather, the NBA grants national banks "all such incidental power as shall be necessary to carry on the business of banking . . . by [among other powers] loaning money on personal security."[1] The California Supreme Court held that Section 1748.9 significantly impairs the exercise of authority that the NBA grants to national banks. The high court also held that no evidentiary showing would be necessary to establish preemption.

Defendant MBNA sent plaintiff Parks several convenience checks that were not accompanied by the disclosures mandated by Section 1748.9. After Parks used the checks and incurred finance charges he alleged were greater than those he would have incurred had he used his credit card for the transactions, Parks filed a putative class action under California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"), alleging that the purported violation of Section 1748.9 constituted a UCL violation. MBNA moved for judgment on the pleadings, contending that Section 1748.9 was preempted. Following the Ninth Circuit's opinion in an unrelated but similar case, *Rose v. Chase Bank USA, N.A.,* 513 F.3d 1032 (9th Cir. 2008), the trial court granted MBNA's motion, ruling that the NBA preempts Section 1748.9. Recognizing its departure from Rose, the California Court of Appeal reversed, citing *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996). The appellate court said "[s]ection 1748.9 does not, on its face, significantly impair federally authorized powers under the NBA" and that "given the procedural posture of this case, MBNA has not yet had an opportunity to submit evidence establishing a significant impairment." The California Supreme Court granted review and reversed the appellate court.

California's high court ruled that the NBA preempts Section 1748.9 because "requiring compliance with section 1748.9 as a condition of 'loaning money on personal security' (12 U.S.C. § 24, par. Seventh) through convenience checks 'significantly impair[s] the exercise of authority' granted to national banks by the NBA."[2] The court further noted that while the burdens imposed by Section 1748.9 may not seem on their own to be particularly onerous, they become more so when

considered collectively with such requirements from all 50 states. The State Supreme Court further rejected the appellate court's ruling that preemption could not be established absent an evidentiary showing of significant impairment. In so doing, the court quoted amici, the American Bankers Association and the California Bankers Association:

Additionally, the new evidentiary requirement will make it very difficult for national banks to predict, in advance, with which state laws they must comply. Even where one national bank has litigated the applicability of the precise state law at issue, other national banks will not be able to rely on the outcome of that litigation because the inquiry will vary depending on the particular operations of the bank and the factual showing made. A national bank that believes it has been subjected to a preempted law will be forced to initiate a lawsuit and submit its own evidence, to prove significant impairment of its own operations. Otherwise, absent such a lawsuit, the bank would have to monitor, analyze, and comply with state laws that may in fact be preempted.

Implications: The direct implication of the California Supreme Court's ruling in *Parks* is obvious: the NBA preempts Section 1748.9 of the California Civil Code as a matter of law. But the opinion benefits national banks in several other respects as well. It reiterates that the NBA preempts not only state laws that affirmatively prohibit banking activities undertaken pursuant to the banks' federally granted powers, but also preempts state laws that are phrased as "conditional permission" to undertake certain banking activities. Additionally, the case clarifies the California Supreme Court's view that an evidentiary showing need not be made to establish preemption. Finally, the opinion may signal that courts will not retreat from preemption even post-Dodd Frank.

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[1] 12 U.S.C. §24. [2] *Parks,* 2012 WL 2345006 at *7 (quoting *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 12(2007)).