National Bank Act Rulings Facilitate More Preemption Analysis

By **John Stoker and John Lightbourne** (February 12, 2025)

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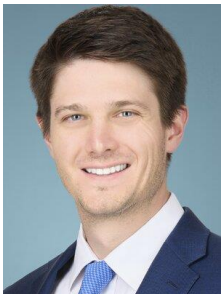

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For followers of developments related to National Bank Act preemption, and the U.S. Supreme Court's May decision in Cantero v. Bank of America,[1] the waning days of 2024 proved noteworthy.

On Dec. 20, in Illinois Bankers Association v. Raoul, the U.S. District Court for the Northern District of Illinois applied Cantero's principles for evaluating claims of NBA preemption of state law and granted a preliminary injunction from enforcement of Illinois' Interchange Fee Prohibition Act, or IFPA, against national banks and federal savings associations.[2]

Only a few days later, on Dec. 24, the U.S. Court of Appeals for the Ninth Circuit in Kivett v. Flagstar Bank withdrew its August decision that had affirmed its 2022 decision that the NBA did not preempt California's interest on escrow, or IOE, law, indicating it would schedule oral arguments and requesting supplemental briefing by the parties to address whether the IOE law was preempted "under the standard and methodology" announced in Cantero.[3]

These developments gave us one of the first reasoned lower court opinions applying Cantero, and set the stage for potentially three circuit courts — the First, Second and Ninth — to explicitly address and apply Cantero in 2025.

Cantero v. Bank of America

In Cantero, the Supreme Court, for the first time, evaluated application of the standard established by the Dodd-Frank Act for the NBA's preemption of state consumer financial laws. The Dodd-Frank Act codified the NBA preemption standard articulated by the Supreme Court in Barnett Bank of Marion County NA v. Nelson in 1996, which provided that state laws that "prevent or significantly interfere with" the exercise of a national bank's powers are preempted by the NBA.[4]

While the standard itself may have been clearly articulated, the proper application of that standard had become less clear, as evidenced by the Ninth Circuit and the U.S. Court of Appeals for the Second Circuit each reaching different preemption conclusions following their purported application of the Barnett Bank standard to state IOE laws in California and New York, respectively.

The Supreme Court took up the issue in Cantero and did not reach a decision on the specific merits of NBA preemption of a New York IOE law found by the Second Circuit to have been preempted, but it held that there are no bright-line tests for NBA preemption. The Supreme Court directed lower courts to conduct a nuanced analysis of Barnett Bank's "prevents or significantly interferes" standard by evaluating "the text and structure of the laws, comparison to other precedents, and common sense," and ultimately remanded both the Second and Ninth Circuits' decisions for reconsideration.

Why This Matters

The recent rulings in Illinois Bankers Association v. Raoul and Kivett v. Flagstar, discussed in more detail below, are consequential preemption decisions for the banking industry.

When the Office of the Comptroller of the Currency filed its amicus brief in IBA v. Raoul, we saw how the agency was applying Cantero, with many viewing the OCC's brief as supporting the view that Cantero may not be the sea change that some commentators have claimed.

Prior to IBA v. Raoul, and the decision of the U.S. District Court for the Eastern District of Virginia in In re: Capital One 360 Savings Account Interest Rate Litigation in November 2024,[5] however, we had not seen any instance of a lower court applying Cantero, except for the Ninth Circuit's brief August decision in Kivett v. Flagstar.

The Kivett decision merely affirmed its view that its 2022 decision in the same case was consistent with the analysis called for under Cantero.

The Ninth Circuit's order signals it also is prepared to provide a more detailed preemption analysis in line with that called for by Cantero, compared to the brief analysis it afforded the NBA preemption arguments in the now-withdrawn August decision.

Depending on the Ninth Circuit's conclusions following rehearing, and those of other federal circuit courts following Cantero — including the Second Circuit's reconsideration of the New York IOE law at issue in Cantero and the U.S. Court of Appeals for the First Circuit's consideration of Rhode Island's IOE law, discussed below — preemption may be back on the Supreme Court's docket doorstep more quickly than many imagined.

The Illinois Interchange Fee Prohibition Act

The IFPA, scheduled to take effect July 1, prohibits (1) credit and debit card payment system participants from imposing interchange fees against the value of gratuities and taxes on card transactions; and (2) the distribution or use by any entity (other than the merchant) of the data associated with the transaction for purposes other than facilitating or processing the payment or as otherwise required by law.

By passing the IFPA, Illinois became the first state seeking to regulate the operation of the nation's credit and debit card payment systems. If ultimately found enforceable, the IFPA could be a harbinger of efforts by other states to enact similar laws, potentially subjecting banks to compliance with a mushrooming number of state laws all seeking to impose their own views of how a nationwide payment system should appropriately operate and charge, or potentially not charge, for those services.

In granting the preliminary, and partial, injunction in IBA v. Raoul, the Northern District of Illinois found that the plaintiffs had established a likelihood of success on their claims that the IFPA was preempted, but only with respect to participants that are national banks and federal savings associations. The plaintiffs had also sought an injunction from enforcement as to other participants in card payment systems.

Among other arguments for a broader injunction from enforcement of the act, the plaintiffs argued that the district court's decision granting a preliminary injunction as to national banks and federal savings associations necessitated extension of the injunction to other participants. The district court preliminarily declined to extend the injunction on that ground, but requested further briefing on other preemption arguments for federal credit unions and out-of-state, state-chartered banks. The district court subsequently issued an

order denying a preliminary injunction as to federal credit unions, but granting a preliminary injunction as to out-of-state banks.[6]

While the district court's ruling to partially enjoin the IFPA is noteworthy in and of itself, the ruling is particularly notable for the preemption analysis undertaken by the court in reaching its preemption decision. In applying Cantero's preemption analysis framework to the IFPA, the district court first concluded that the IFPA's prohibitions barred or constrained the authority granted to national banks by federal law both to set their noninterest fees and charges for their authorized products and services, and to use the data from processing transactions.

The district court also looked to Supreme Court precedent and found that the IFPA's restrictions resulted in a greater degree of interference with a national bank's powers than other state laws where the Supreme Court had found preemption.

Restricting the bank's ability to charge for a service can operate as a restriction on the service itself. For instance, the district court concluded that if a state law restricting advertising of a national bank's authorized products was found by the Supreme Court in 1954 in Franklin Square v. New York[7] to interfere with the bank's effective and efficient exercise of its authority to receive savings deposits, then the IFPA's fee prohibitions were even more at odds with federal law.

The district court also looked to the Supreme Court's 1982 decision in Fidelity Federal Savings & Loan Association v. de la Cuesta[8], which found preemption of a state law that limited the ability of federal savings and loan associations to enforce due-on-sale clauses when the banks were otherwise authorized to enforce the clauses by federal law. The district court reasoned that the IFPA's level of interference was even greater than the law in Fidelity, as the IFPA did not just limit the amount of fees that could be applied to the value of gratuities and taxes, but outright prohibited them.

With respect to the IFPA's purported attempt to restrict a national bank or federal savings associations' uses of transaction data that were allowed by federal law, the district court found the restriction similar in kind to the law preempted in Barnett Bank that prohibited banks from selling insurance products in the state when they were otherwise authorized by federal law to provide the products.

In keeping with Cantero's analytical framework, the district court, however, not only considered Supreme Court precedent finding preemption of state law, but also considered Supreme Court cases finding a state law was not preempted.

The district court differentiated the case of McClellan v. Chipman, in which the Supreme Court in 1896 held that a state property law on preferential transfers in advance of insolvency was a generally applicable law that did not impair the bank's efficiency or frustrate its purpose.[9] In contrast to the law in McClellan, the district court noted that the IFPA was not a generally applicable law, but was specifically directed at banks, and that the NBA was enacted precisely to protect national banks from such intrusive state regulation.

The ultimate operational impacts of the ruling remain unclear as other participants in the system, such as federal credit unions, Illinois chartered banks and the networks, for the time being, are subject to compliance with the act.

We expect the district court's partial injunction to be appealed. So, while the ultimate resolution of whether, and to what extent, Illinois may enforce the IFPA is unclear, what is

clear is that the district court took steps to ground its preemption analysis in the analytical framework called for by Cantero.

Kivett v. Flagstar Bank

While the Ninth Circuit's order in Kivett v. Flagstar may not be as immediately impactful as the decision in IBA v. Raoul, it sets the stage, again, for potential conflict between federal circuit courts on NBA preemption of state IOE laws.

Following the Supreme Court's decision in Cantero, and remand to the Second Circuit for a reevaluation of the application of New York's IOE law to national banks, the Supreme Court also remanded the Ninth Circuit's 2022 decision in Kivett with respect to California's IOE law for reconsideration.

While the Second Circuit requested briefings from the parties in Cantero to prepare for a March 3 oral argument on the impact of the Supreme Court's Cantero ruling, the Ninth Circuit requested neither new briefings nor oral arguments following the remand of its decision. Instead, it issued an order and brief opinion on Aug. 22, reaffirming its 2022 decision that California's IOE law was not preempted by the NBA.[10]

The Ninth Circuit concluded that it remained bound by its pre-Cantero decision in Lusnak v. Bank of America,[11] holding in 2018 that California's IOE law was not preempted by the NBA. In the Lusnak decision, the Ninth Circuit found that there was no legal authority establishing that IOE laws significantly interfere with a national bank's powers, and that a provision in the Dodd-Frank Act amending the Truth In Lending Act to allow for payment of interest on certain escrow accounts reflected a congressional view that they did not.

In its August Kivett v. Flagstar decision, the Ninth Circuit stated that Lusnak had been decided correctly and had properly applied the preemption standard in Barnett Bank.

The Ninth Circuit's Dec. 24 decision to reconsider preemption of California's IOE law "under the standard and methodology" announced in Cantero is not only in keeping with the Second Circuit's request for further briefing and oral arguments in light of Cantero, but also that of the First Circuit's approach in the case of Conti v. Citizens Bank NA.[12] In Conti, the U.S. District Court for the District of Rhode Island found in 2022 that a Rhode Island IOE law was also preempted by the NBA.

The First Circuit requested further briefing by the parties in light of Cantero, and oral argument took place on Feb. 3. Depending on the decisions following the 2025 hearings in Cantero, Kivett and Conti, the industry may again face a split within the federal circuit courts as it did in 2022, and will again look to the Supreme Court for resolution of the proper application of NBA preemption to state IOE laws.

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[1] Cantero v. Bank of America, N.A., 602 U.S. 205 (2024).

[2] Illinois Bankers Association et. al. v. Raoul, No. 24 C 7307, 202 WL 5186840 (N.D. Ill., Dec. 20, 2024).

[3] Kivett v. Flagstar Bank, FSB, No. 21-15667, 2024 WL 5206133 (9th Cir. Dec. 24, 2024).

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

[5] In Re: Capital One 360 Savings Account Interest Rate Litigation, No. 1:24md3111, 2024 WL 4753821 (E.D. Va., Nov. 12, 2024) (determining that any common or statutory law mandating a specific interest rate on savings accounts significantly interferes with a national bank's authority under the NBA to accept deposits and determine appropriate interest rates to pay on those deposits).

[6] Illinois Bankers Association et. al. v. Raoul, No. 24 C 7307 (N.D. Ill., Feb. 6, 2025). With respect to federal credit unions, the District Court determined that normal conflict preemption principles applied (rather than Barnett Bank's significant interference standard applicable to national banks) and that Plaintiffs had failed to demonstrate they were likely to prevail on their claim that the IFPA was preempted by the Federal Credit Union Act. With respect to out-of-state banks, the District Court determined that provisions in the Riegle-Neal Interstate Banking and Branching Efficiency Act (12 U.S.C. § 1831a(j)(i)) extend the preemption afforded to national banks by the NBA to out-of-state banks.

[7] Franklin Square v. New York, 347 U.S. 373 (1954).

[8] Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982).

[9] McClellan v. Chipman, 164 U.S. 347 (1896).

[10] Kivett v. Flagstar Bank, FSB, No. 21-15667, 2024 WL 3901188 (9th Cir. Aug. 22, 2024).

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

[12] Conti v. Citizens Bank, N.A., C.A. No. 1:21-CV-00296-MSM-PAS, 2022 WL 4535251 (R.I. Dist. Ct. Sept. 28, 2022).