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California Statute Regarding Convenience Checks Not Facially Preempted By Federal Law

Question: Is section 1748.9 of the Civil Code, which requires certain disclosures to credit card holders who use preprinted "convenience checks," preempted by the National Bank Act?

Answer: No, according to Fourth District Court of Appeal, Division Three, in *Parks v. MBNA America Bank, N.A.* (G040798), decided May 12, 2010.

Civil Code section 1748.9 requires credit card issuers who extend credit to cardholders through a "preprinted check or draft," known as "convenience checks" to "disclose on the front of an attachment to the preprinted check that (1) use of the check will constitute a charge against the customer's credit account, (2) the annual percentage rate and calculation of finance charges, and (3) whether the finance charges are triggered immediately upon the use of the check." Plaintiff Parks filed a class action against MBNA for allegedly not making such disclosures. The trial court granted judgment on the pleadings to MBNA on grounds that section 1748.9 was preempted by federal law applicable to national banks.

The court of appeal reversed, concluding that "section 1748.9 is not, on its face, preempted." Specifically, it held that (1) section 1748.9 "does not preclude national banks from exercising their authority to lend money on personal security under section 24 of Title 12 of the United States Code (Seventh)" and (2) "without a factual record," it could not conclude that section 1748.9 "significantly impairs national banks' authorized activities."

Several years into the case, MBNA renewed its previously rejected preemption motion based on the Ninth Circuit's holding in *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032), which on near-identical facts held that federal law preempted section 1748.9 as applied to national banks. The court of appeal noted that although it was not bound to follow federal court precedent, "federal decisions may be particularly persuasive when they interpret federal law." Nonetheless, it reached a different conclusion. Citing Supreme Court that the National Bank Act precludes states from "*forbidding*, or *impairing significantly*" the exercise of the power the Act explicitly grants to national banks, the court concluded that "section 1748.9 does not *forbid* the exercise of a banking power authorized by the NBA." Instead, it was a "generally applicable disclosure law applied to any credit card issuer that extends credit through the use of a preprinted check."

The court noted that there was a question, however, whether section 1748.9 "significantly impairs" the exercise of the power to lend money on personal security. Although it made no ruling on this issue, the court held that national banks claiming preemption on this ground "must make a factual showing that the disclosure requirement significantly impairs the exercise of the relevant power or powers." Accordingly, and although it was "reluctant to create a split of authority with the Ninth Circuit of Appeals on a point of federal law," the court of appeal reversed the judgment in favor of MBNA, leaving open the question of whether MBNA could demonstrate, on remand, that section 1748.9 "imposes burdens on national banks that significant impair the authority granted to it by the NBA."

The bottom line: "there is no basis for preempting section 1748.9 without a factual record."

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