

Class Action Defense Strategy Blog

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Ninth Circuit Rules That The National Bank Act Preempts California's Unfair Competition Law

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On March 9, 2010, the Ninth Circuit held that the National Bank Act ("NBA") preempts claims of "unfair" and "fraudulent" conduct in violation of state law. *See Martinez v. Wells Fargo Home Mortgage, Inc.*, No. 07-17277 (9th Cir. March 9, 2010).

In *Martinez*, the plaintiffs alleged that Wells Fargo "unfairly" overcharged underwriting fees and tax service fees and "fraudulently" failed to disclose the "actual costs" of its services in connection with plaintiffs' refinance of their home mortgage loan. The plaintiffs brought a nationwide class action on behalf of "similarly situated home mortgage borrowers" against Wells Fargo for the violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, et seq. and Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(b). The district court dismissed the action and the Ninth Circuit affirmed.

The Ninth Circuit held that the NBA preempted the plaintiffs' UCL claims because the NBA and its related regulations give banks the discretion to set their own non-interest charges and fees, including underwriting fees. The NBA allows banks to exercise all powers incidental to "the business of banking" including real estate lending. 12 U.S.C. §§ 24, 371(a). The NBA also authorizes the Office of the Comptroller of the Currency ("OCC") to establish regulations enumerating banks' incidental powers. The OCC has defined banks' "incidental powers" to include the "establishment of non-interest charges and fees." 12 C.F.R. § 7.4002(b)(2). The OCC's regulations expressly exempt banks from "state laws that obstruct, impair, or condition" their real estate lending powers, and specifically enumerate areas of preemption. 12 C.F.R. § 34.4(a). The Ninth Circuit reached its decision despite the fact that the banking regulations do not specifically identify charges or fees as an area of state regulation that is specifically preempted.

The decision is particularly significant given its likely impact on the wave of mortgage-related litigation flooding the state and federal courts. It stands for the proposition that the NBA preempts all state laws, including state common law claims, relating to powers granted to national banks by the NBA and its implementing regulations. It also supports the proposition that the NBA preempts state law causes of action based on claims—of improper or misleading disclosures or advertisements regarding the terms of the loans; that banks improperly issued loans that borrowers could not afford; regarding interest rates charged and payment schedules; regarding adjustable rate mortgages; regarding mortgage insurance; regarding escrow, impound and similar accounts; and regarding the processing, origination, or servicing of loans. *See* 12 C.F.R. § 34.4(a), § 34.21. Though it remains to be seen, the ruling of the Ninth Circuit may effectively limit most mortgage-related claims against national banks and their subsidiaries to federal claims under the Truth in Lending Act, RESPA, and other federal laws.

The Ninth Circuit also joined the Second, Third, and Eleventh Circuits to hold that there is no violation of RESPA when a borrower has been "overcharged" for services "actually performed." Contrary to the plaintiffs' interpretation, the plain language of Section 8(b) only prohibits loan service providers from charging "where no service whatsoever is performed." Both the underwriting service and the tax service constituted "actually performed" activities under RESPA.

Having held that the plaintiffs' UCL claims were preempted, and their RESPA claim invalid, the Ninth Circuit affirmed the district court's dismissal of the putative class action.