

lending powers, including the power to sell real estate loans into the secondary market or to securitize these loans.

Under *Franklin, Barnett*, and other Federal cases, a conflict between a state law and Federal law need not amount to a whole, or even partial, prohibition in order for the Federal law to have preemptive effect.⁹⁴ Where a Federal grant of authority is unrestricted, state law that attempts to obstruct the scope and effective exercise by a national bank of its express or incidental powers will be preempted.⁹⁵ Moreover, as noted in *Lockyer*, the degree of state interference or intrusion need not be notably high to warrant a conclusion that a state law is preempted.

B. The GFLA Provisions Limiting the Rate of Interest a National Bank Charges Are Inapplicable to National Banks Pursuant to 12 U.S.C. 85 and 12 CFR 7.4001

As we have described, under 12 U.S.C. 85, a national bank is authorized to charge interest according to the most favored lender rate permitted by the laws of the state in which the bank is located. OCC regulations at 12 CFR 7.4001 provide that a national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. This “most favored lender” status permits a national bank to contract with borrowers in any state for interest at the maximum rate permitted by the law of the state in which the national bank is located. As discussed below, for a bank, such as National City, which is not located in Georgia for purposes of section 85 and 7.4001, this means that its permissible rates of interest are not tied to Georgia law, but instead are determined by reference to the most favored lender rates in the state where the bank is located. Applying this rule to National City, any limits on interest imposed by Georgia are preempted by section 85 and 7.4001. For a national bank that is located in Georgia for this purpose, the limits on rates set by the GFLA are simply inapplicable, for the reasons explained below.

Pursuant to the recent amendments to the GFLA and the OTS determination that the GFLA is preempted for Federal

thrifts, state-chartered savings associations are the most favored lenders in Georgia for purposes of national banks that apply Georgia rates of interest under section 85. As mentioned above, the recent amendments to the GFLA created preemption parity for state-chartered institutions if “federal law * * * preempts or has been determined to * * * preempt the application of the provisions of [the GFLA]” to their Federally-chartered counterparts. The OTS concluded that, because it occupied the field of regulation for lending activities of Federal savings associations, the GFLA provisions that purport to regulate the terms of credit, loan-related fees, disclosures, or the ability of a creditor to originate or refinance a loan, do “not apply to Federal savings associations” home lending.”⁹⁶ As a result, the GFLA provisions that limit the rate of interest a lender may charge a borrower—those limiting late fees, prepayment fees for non-ARM loans, and default rate of interest—do not apply to state-chartered thrifts. By operation of section 85, these limits also would not apply to national banks located in Georgia because such banks are permitted to charge the maximum rates permitted to these “most favored lenders.”⁹⁷

C. The GFLA Conflicts With the Federal Grant of Power to National Banks to Charge Non-Interest Fees

As described above, section 24(Seventh) authorizes national banks to engage in activities that are part of, or incidental to, the business of banking as well as to engage in certain specified activities listed in the statute. Mortgage lending is expressly authorized for national banks and therefore part of the business of banking. Moreover, a bank’s authority to provide the products or services authorized by section 24(Seventh) to its customers necessarily encompasses the ability to charge a fee

for the product or service.⁹⁸ The authority to charge fees for the bank’s services is expressly set out in the OCC’s regulations at 12 CFR 7.4002(a).

Three provisions of the GFLA restrict or prohibit a creditor or servicer from imposing various non-interest fees for its products and services:

- *Prohibition on payoff balance and release fees.* Under the GFLA, a creditor or servicer may not charge a fee to inform a person of the payoff balance or to provide a release upon prepayment of a home loan. Payoff balances must be provided within five business days of a request. A processing fee of up to \$10 may be charged if information is provided by fax or if provided within 60 days of a previous request.

- *Prohibition on certain other fees.* The GFLA prohibits a creditor or servicer from charging a borrower any fee to modify, renew, extend, or amend a high-cost home loan or to defer any payment due.

- *Right to “cure” a default.* A borrower may not be charged a fee attributable to curing a default of a high-cost home loan unless the fee is otherwise authorized by the GFLA.

These provisions conflict with well-established statutory and regulatory authority permitting national banks to charge such fees. As explained above, section 24(Seventh) authorizes a national bank to engage in activities that are part of, or incidental to, the business of banking as well as to engage in certain specified activities listed in the statute. A bank’s authority to provide these services to its customers necessarily encompasses the ability to charge a fee for them, and this ability to charge a fee for the bank’s services is expressly affirmed in 12 CFR 7.4002(a).⁹⁹

Restrictions on a national bank’s ability to impose fees have consistently been held to be preempted by section 24(Seventh) and 7.4002.¹⁰⁰ The fees at issue here are fees that a national bank may charge in the exercise of its authority under section 24(Seventh) and § 7.4002. In accordance with the case

⁹⁴ OTS Op. Chief Counsel, *supra* note 5, at 3.

⁹⁷ We note that Federal thrifts have most favored lender authority under a statute (12 U.S.C. 1463(g)) and regulation (12 CFR 560.110) that are identical to section 85 and § 7.4001 in all material respects. It is not clear that the OTS opinion addressed preemption issues raised by the GFLA by applying section 1463(g) and § 560.110 since the thrift requesting the OTS opinion appeared not to be located in Georgia. The OTS appears instead to have based its preemption analysis solely on the OTS’s occupation of the entire field of lending. To the extent that (a) that theory supercedes specific standards in sections 1463(g) and 560.110, and (b) Federal thrifts are thus free to set interest either pursuant to the most favored lender rule set out in § 560.110 or pursuant to the maximum rate permitted in light of the preemption rule set out in § 560.2, national banks in Georgia would similarly be free to set interest under either part 34 or § 7.4001.

⁹⁸ See *supra* note 13 and accompanying text.

⁹⁹ We note that a fee to defer a payment due is, in substance, a debt suspension agreement subject to 12 CFR part 37, which expressly occupies the field in this area and imposes uniform, nationally applicable safeguards on national banks offering this product. Part 37 states:

“This part applies to debt cancellation contracts and debt suspension agreements entered into by national banks in connection with extensions of credit they make. National banks’ debt cancellation contracts and debt suspension agreements are governed by this part and applicable Federal law and regulations, and not by part 14 of this chapter or by State law.”—12 CFR 37.1(c).

¹⁰⁰ See *supra* notes 56–60 and accompanying text.

⁹⁴ See *Barnett*, 517 U.S. at 31–32.

⁹⁵ See, e.g., *Franklin Nat’l Bank*, 347 U.S. at 378; *Duryee*, 270 F.3d at 409 (“The intervenors’ attempt to redefine “significantly interfere” as “effectively thwart” is unpersuasive.”); *New York Bankers Ass’n, Inc. v. Levin*, 999 F. Supp. 716, 719 (W.D.N.Y. 1998) (holding that a New York statute that restricted the types of insurance banks could sell to their customers was preempted on the grounds that the state law “constitutes an interference with [banks’] rights” to sell insurance).