

made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions because the federal power-granting statute there in question contained 'no indication that Congress [so] intended' * * * as it has done by express language in several other instances.' *Barnett*, 517 U.S. at 34 (citations omitted; emphasis in original).

As was the case in *Barnett*, Congress placed no restrictions in 12 U.S.C. 371 on the ability to conduct real estate lending activities other than by rules and/or regulations as may be promulgated by the OCC. The OCC has done so by promulgating 12 CFR 34, which by its terms reserves no right to the states to regulate in the area of real estate lending by a national bank or its operating subsidiary. National City is of the opinion as supported by the Supreme Court's decision in *Barnett* that the federal statute governing the power of a national bank to lend creates a scheme of federal law and regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.

Therefore, a conflict between GFLA and federal law need not be complete in order for federal law to have preemptive effect. If, as here, the state law (GFLA) places limits on an unrestricted grant of authority under federal law, the state law (GFLA) is preempted.

B. The Preemption Analysis Applicable to National Banks Applies With Equal Force to National Bank Operating Subsidiaries

In section 121 of the Gramm Leach Bliley Act ("GLBA"), Congress expressly acknowledged that national banks may own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. 24 a(g)(3).

Consistent with section 121, the OCC regulations state that "[a]n operating subsidiary conducts activities authorized under [12 CFR 5.34] pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. 12 CFR 5.34(e)(3); See also 12 CFR 7.4006.

National City's operating subsidiaries are conducting mortgage lending and servicing activities as permitted for a national bank pursuant to 12 U.S.C. 24(Seventh), 12 U.S.C. 371, and 12 CFR 5.34(e)(5)(v). As such, they are subject to federal law and States do not have the right to limit the powers over a national bank or its operating subsidiaries in the conduct of these real estate lending activities, except where such authority is specifically granted by federal law, which is not the case here. Like the Bank, the operating subsidiaries are examined on a continuous basis by OCC examiners specifically assigned to, and in most cases physically present at, the facilities of the Banks and their operating subsidiaries.

C. National Bank Real Estate Powers and Part 34 of the Comptroller's Regulations

The National Bank Act's underlying objective is to create a uniformly regulated

national banking system. The National Bank Act is a comprehensive statute which governs not only the internal workings of national banks, but also their powers, and virtually all aspects of their regulation is the exclusive responsibility of the OCC. See OCC Unpublished Interpretive Letter dated September 5, 1989 (holding that a Wisconsin statute imposing notification filing and fee requirements on lenders making certain consumer loans was preempted for national banks); OCC Advisory Letter 2002-9. In section 24 (Seventh) of the National Bank Act, 12 U.S.C. 24(Seventh) Congress granted national banks the power to exercise, "by its board of directors or duly authorized officers or agents, * * * all such incidental powers as shall be necessary to carry out the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * * [and] by loaning money on personal security; * * * " Congress further specifically authorized national banks to engage in real estate lending beginning with the Act of September 7, 1916. From 1916 to 1982, in the statutory predecessors to the present 12 U.S.C. 371, Congress gradually broadened the scope of national bank authority to make real estate loans, culminating in the enactment of the Garn-St. Germain Depository Institutions Act of 1982 (Garn-St. Germain"). Prior to Garn-St. Germain, 12 U.S.C. 371 contained specific provisions establishing maximum loan to value ratios, amortization requirements, maximum loan maturity and aggregate limits on the amount of real estate loans a national bank could make or purchase. In Garn-St. Germain, Congress removed these limitations entirely, and gave national banks unlimited power to engage in real estate lending subject only to the regulations and orders established by the OCC. Thus, the history of national bank power to engage in real estate lending demonstrates Congressional intent to occupy the field, and to replace Congressional control over the terms of national banks' real estate lending with a complete delegation of control to the OCC as the ultimate arbiter of the national bank's exercise of those powers. Further, section 371 is an illustration of the familiar maxim of statutory construction: *expressio unius est exclusio alterius*; in that the specificity of the grant of authority to engage in real estate lending leaves no room for state law or regulation.

Currently, section 371 provides as follows:

Authorization to make real estate loans; orders, rules and regulations of Comptroller of the Currency. Any national banking association may make, arrange, purchase or sell loans or extension of credit secured by liens on interests in real estate, subject to section 18(o) of the Federal Deposit Insurance Act [12 USCS 1828(o)] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.²¹

²¹ 12 U.S.C. § 1828(o) authorized the OCC to establish uniform regulations for real estate secured extensions of credit. In adopting such regulations, the OCC is required to consider: the risk posed to the deposit insurance funds by real estate lending; the need for safe and sound operation of the insured institutions; and the availability of credit. The OCC is authorized to permit differing standards among

The OCC fully implemented the authority granted by Garn-St. Germain in 1983 by amending or removing the interpretive rulings regarding real estate lending that had their origins in earlier versions of 12 U.S.C. 371 and promulgated Part 34, which comprehensively defines real estate lending by national banks. Part 34 recognizes that the forms and terms of national bank lending must be determined by the management of national banks themselves, to enable the banks to have the necessary flexibility to respond to market conditions. OCC regulatory authority insures that national banks do so prudently and in a safe and sound manner. Part 34 also clarifies the scope of federal preemption of state laws that could impact real estate lending activities by national banks.

The pertinent regulations provide:

§ 34.3 General rule

A national bank may make, arrange, purchase or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate, subject to terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order.

§ 34.4 Applicability of State law

(a) Specific preemption. National banks may make real estate loans under 12 U.S.C. 371 and § 34.3 without regard to state law limitations concerning:

- (1) The amount of a loan in relation to the appraisal value of the real estate;
- (2) The schedule for the repayment of principal and interest;
- (3) The term to maturity of the loan;
- (4) The aggregate amount of funds that may be loaned upon the security of real estate; and
- (5) The covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) General standards. The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other real estate lending activities of national banks.

The provisions of GFLA which fall within the scope of 12 CFR 34.4(a)'s specific state law preemptions fall without need for further analysis. Other provisions of GFLA can be analyzed under 12 CFR 34.4(b). OCC regulations specifically provide that the provisions of 12 CFR 34.4 are applicable to both national banks and their operating subsidiaries. See 12 CFR 34.1(b).

1. Provisions of GFLA Which Are Preempted Under 12 CFR 34.4(a)

Taken together, the provisions of 12 CFR 34.4(a)(1)-(4) which remove any limits on loan to value ratios, amortization requirements, maturity requirements and aggregate loan limits preempt state laws

the types of real estate-secured loans, as warranted by federal law, the risk to the federal deposit insurance fund, and based on considerations of institutional safety and soundness. Thus, Congress has instructed the OCC to exercise its supervisory authority over real estate lending in support of mandates found in federal law alone.