Client Alert.

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Parks v. MBNA: The California Supreme Court Issues Sweeping Decision on National Bank Act Preemption

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INTRODUCTION

The California lower courts have not been friendly toward national banks' claims of preemption. That may change. On June 21, the California Supreme Court held in a unanimous opinion that the National Bank Act preempts California's statute that specifies detailed disclosure rules for "convenience checks." *Parks v. MBNA America Bank, N.A.*, S183703 (June 21, 2012). The decision avoids what would have been an unseemly split with the Ninth Circuit over the same issue, and the breadth of the decision means it cannot be limited just to "convenience" checks. *Parks* could result in the preemption of other state and local rules that "significantly impair the exercise of authority" granted to national banks.

PARKS BACKGROUND

Facts. Allan Parks filed a putative class action alleging that MBNA failed to include on its "convenience check" loan offers all of the disclosures required by Section 1748.9 of the California Civil Code. Section 1748.9 required a "credit card issuer" that extends credit through convenience checks to include "on the front of an attachment that is affixed by perforation or other means to the preprinted check or draft, in clear and conspicuous language" specific detailed disclosures. Cal. Civ. Code § 1748.9. The plaintiff alleged that MBNA's failure to provide those disclosures amounted to "unlawful" conduct under California's unfair competition law (Cal. Bus. & Prof. Code § 17200).

Trial court—yes. MBNA moved for judgment on the pleadings on the grounds that Section 1748.9 is preempted by the National Bank Act and OCC regulations. The trial court initially denied the motion. In 2008, however, the Ninth Circuit held in *Rose v. Chase Bank USA* that the National Bank Act preempts Section 1748.9.[1] In light of *Rose*, the trial court revisited MBNA's motion and found Section 1748.9 preempted.

Court of Appeal—no. The Court of Appeal reversed.[2] It recognized that "[i]n all material respects" *Rose* was "factually identical," 184 Cal. App. 4th at 657, and stated that it was "reluctant to create a split" with the Ninth Circuit, *id*. at 668-69, but nevertheless rejected preemption. It ruled that "when a state disclosure requirement does not, on its face, forbid or significantly impair national banks from exercising a power granted to it by Congress" national banks "must make a *factual showing* that the disclosure requirement significantly impairs the exercise of the relevant power or powers." *Id*. at 665 (emphasis added). It ruled that Section 1748.9 does not "on its face" impose such burden and, although it declined to "elucidate a precise yardstick," it found that the evidentiary test was not met. *Id*.

[1] *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008).

[2] *Parks v. MBNA America Bank, N.A.*, 184 Cal. App. 4th 652 (2010).

THE CALIFORNIA SUPREME COURT'S DECISION

By a vote of 7-0, the California Supreme Court reversed, ruling Section 1748.9 is preempted by the National Bank Act. Congress vested national banks with the power to loan money on personal security and the Court found "no indication that Congress intended to subject that power to local restriction." Slip op. at 10 (citations omitted). Applying the preemption framework set forth in *Barnett Bank v. Nelson* and *Watters v. Wachovia Bank*, the Supreme Court found that by burdening a national bank's exercise of that power, Section 1748.9 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives."

WHAT *PARKS* MEANS

The California courts, and the Supreme Court in particular, have not been warm to preemption arguments made by national banks. That makes the Court's opinion all the more noteworthy, especially in these regards.

First, the *Parks* court could have reversed merely to avoid an awkward split of authority with the Ninth Circuit's decision in *Rose*, and been done. Instead, the Court hardly mentions *Rose*, except as background, and embarks on a thorough analysis of the California statute and the progression of U.S. Supreme Court preemption cases starting with *McCullough v. Maryland* through *Barnett Bank* and *Watters*. Slip op. at 5-10.

Second, the Court emphasized that preemption is not limited just to state laws that *prohibit* a banking activity. Rather, it also extends to laws that attach burdensome *conditions* on the exercise of a national bank power. Slip op., at 11. And here, "[a]s demonstrated by the instant lawsuit brought under California's unfair competition law (Bus. & Prof. Code § 17200 *et seq*.), a national bank may be subject to monetary liability, and its convenience check offers may be enjoined, if it does not comply." *Id.* This is important, because Section 1748.9 is not alone in that regard. Lots of state laws impose "monetary liability" and the threat of injunctive relief for violations.

Third, the *Parks* court extended *Barnett Bank* beyond just situations in which, as in that case, the state law prohibited an entire category of banking activity. Rather, the sort of "burden" that could topple a state law includes the cumulative burden posed by monitoring and complying with a patchwork of likely differing and evolving rules in the fifty states. Slip op. at 13.

Fourth, the opinion never mentions the Dodd-Frank Act, except to note that the Court expresses "no view on whether section 1748.9 is also preempted by former regulation [12 C.F.R. §]7.4008(d). Slip op. at 19. It based its decision squarely on *Barnett Bank*, and thereby avoided wading into the thicket of whether the OCC's pre-Dodd Frank preemption regulations survive.

Fifth, quite apart from addressing "what" gets preempted, the *Parks* court also addressed the "how"—How does a national bank go about proving "significant impairment?" In this, the Supreme Court may have rendered its most important holding. It rejected the Court of Appeal's requirement that banks must "make a *factual showing* that the disclosure requirement significantly impairs" a banking power. It simply quoted verbatim the *amicus curiae* brief filed by Morrison & Foerster LLP on behalf of American Bankers Association and California Bankers Association and concluded: "We believe the Court of Appeal's approach is unsupported by preemption case law and unworkable in practice." Slip op. at 17.

WHAT ELSE MIGHT BE PREEMPTED?

State disclosure laws. *Parks* involved a state court disclosure statute, so the Court's reasoning would certainly call into question the continuing validity of other state-mandated disclosure rules. Nothing about the decision, for example, was limited to "convenience" checks. Instead, the Court emphasized the burden of local "content, language, manner and format" disclosure rules generally.

Beyond disclosure laws. The effect of *Parks* on other kinds of state laws is harder to predict. However, the decision arms national banks with powerful arguments, particularly in light of the Court's focus on the nationwide burden posed by such rules and the Court's mention of state law remedies as constituting burden—here, "monetary liability" and injunction. As noted above, lots of state laws fit that description.

CONCLUSION

Historically, national banks have not done well on the issue of preemption in the California lower courts, and after the passage of the Dodd-Frank Act many have wondered what will happen to *Barnett Bank* preemption. That a decision of this breadth would emanate from a unanimous California Supreme Court ought to come as welcome news.

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