

[Banking and Finance Law Daily Wrap Up, INTEREST-USURY— Bank of America seeks rehearing in escrow interest case, claims 'uncertainty', \(Apr. 20, 2018\)](#)

Banking and Finance Law Daily Wrap Up

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By Jacob Bielanski

A federal appeals court has ignored precedent and created "uncertainty" about whether national banks are beholden to state laws, according to a request filed April 13, 2018, by Bank of America, N.A. The bank petitioned the panel to rehear arguments for dismissing a class action over mortgage escrow interest payments ([Lusnak v. Bank of America, N.A.](#), Dkt. No. No. 14-56755).

The request for a rehearing *en banc* comes after a panel with the U.S. Court of Appeals for the Ninth Circuit ruled that the National Bank Act (NBA) does not preempt California's mortgage-escrow interest law. The original proposed class action, filed in 2014, argued that Bank of America's 2009 policy of not paying interest to customers on escrow accounts violated California laws (Cal. Civ. Code §2954.8(a)), and that the Dodd-Frank Act required national banks to adhere to state laws on mortgage escrow interest payments. In reaching its decision, the panel noted that the Dodd-Frank Act essentially codified the existing preemption standard enunciated by the Supreme Court in its 1996 *Barnett Bank of Marion County, N.A. v. Nelson* decision, and the panel applied that standard.

Further, the panel held that although the borrower could not rely on federal Truth in Lending Act amendments that took effect after his mortgage escrow account already had been established, the borrower was not prevented from seeking relief under the theory that the bank violated California's Unfair Competition Law (UCL) by failing to comply with the state's mortgage-escrow interest law. As a result, the Ninth Circuit panel allowed the borrower to proceed with his UCL and breach-of-contract claims against Bank of America (see [Banking and Finance Law Daily](#), March 5, 2018).

Petition for rehearing. In its request for a rehearing, Bank of America said the panel's decision "disregarded national banks' long-recognized federal authorization to establish the terms on which they extend credit." It cited, among others, the 9th Circuit's decision *Gutierrez v. Wells Fargo Bank, N.A.*, in which a Wells Fargo's practice of "prioritizing" multiple debit card transactions in order to maximize overdraft fees result in a \$203 million verdict under California laws, as precedent for the NBA preemption of state laws.

Bank of America further argued that the court ignored the Office of the Currency Comptroller's authority under 12 CFR § 34.4, which deals with applicability of state laws in regulating national banks. Because the plaintiff did not challenge the OCC regulation's applicability, Bank of America said, the panel's ruling came "without the benefit of briefing or argument." Under those regulations, state laws are allowable within certain subjects, consistent with the Supreme Court decision in *Barnett Bank*.

OCC amicus curiae. The OCC [stated](#) its intent to file an amicus curiae in support of Bank of Americas rehearing request, according to a letter it submitted to the court on the same day as the bank's request for rehearing.

Attorneys: Roger N. Heller (Lief Cabraser Heimann & Bernstein, LLP) for Donald M. Lusnak. Peter J. Kennedy (Reed Smith LLP) for Bank of America, N.A.

Companies: Bank of America, N.A.

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