Banking and Finance Law Daily Wrap Up, TOP STORY—Utah Sup. Ct.: State laws on authority to foreclose not preempted by National Bank Act, (Jul. 24, 2013)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

A national bank acting as a trustee to foreclose on a trust deed for property in Utah was required to comply with Utah state laws, according to the Utah Supreme Court. The National Bank Act did not preempt the state's laws, the court said, and the Office of the Comptroller of the Currency regulations that would have preempted Utah laws were an unreasonable interpretation of the NBA (*Federal National Mortgage Association v. Sundquist*, July 23, 2013, Parrish, Justice).

Foreclosure and possession. The consumer challenging the foreclosure had defaulted on her three-year-old residential loan, which was secured by a trust deed on the property. The trust deed beneficiary appointed ReconTrust, which the court described as a wholly-owned national bank subsidiary of Bank of America, as the successor trustee to carry out the foreclosure. ReconTrust used the Utah nonjudicial foreclosure process to foreclose on the trust deed, then deeded the property to Fannie Mae.

When Fannie Mae filed a suit to evict the consumer, who remained in the home after the foreclosure, she asserted that Fannie Mae had no right to the property because ReconTrust had no authority under state law to act as a trustee and carry out the foreclosure. The trial court disagreed, deciding that the NBA preempted Utah laws, and gave possession of the property to Fannie Mae.

Utah law requirements. The Supreme Court began by noting that Utah laws restrict who may act as a trustee in a nonjudicial foreclosure to two groups: Utah attorneys and title insurance companies doing business in Utah. ReconTrust was neither.

However, Fannie Mae claimed that ReconTrust's authority to act as a trustee came from the NBA, which preempted the state laws. The relevant portion of the NBA, as quoted by the court, says that the OCC has the authority to grant national banks "the right to act as trustee . . . under the laws of the State in which the national bank is located" (12 U.S.C. Sec. 92a). The issue, then, was where ReconTrust was located.

Where is a bank located? Fannie Mae contended that ReconTrust was located in Texas and that, under Texas law, it had the authority to act as a trustee. The OCC regulation supported that position. The consumer, on the other hand, claimed that the bank was located in Utah. The court concluded that the NBA unambiguously stated that the bank was located in the state in which it performed the relevant duties and, in the case of a foreclosure, that was the state where the property was located.

Referring to the common meaning of the word "located," the court first said that a bank was located in all states where it acted or did business. In the case of a foreclosure, that would be the state in which the property was located, the notice of default was filed, and the foreclosure sale was held. While Fannie Mae pointed out that ReconTrust had satisfied the OCC regulation's criteria for being located in Texas because the substitution of trustee, notice of default, and trustee's deed all were executed there, the court decided those acts were not determinative.

Even if the plain meaning of the law were not clear, the rules of statutory construction would yield the same result, the court continued. To begin with, when Congress intended to preempt a state's actions in an area that historically was the subject of state control—such as real estate ownership—it would clearly state its intent to do so. The NBA did not include such a clear statement, the court said.

Additionally, if Congress intended to leave a major policy determination to an administrative agency, it would clearly state its intent, the court said. Under Fannie Mae's interpretation of the NBA, Congress would have given the OCC the discretion to allow Texas to regulate foreclosures in Utah, the court pointed out. There was no clear statement that Congress intended that result.

Unreasonable regulation. The court observed that, as the NBA was unambiguous, there was no necessity to consider the OCC's implementing regulation. It then went on to say that it had considered the regulation and found it to be an unreasonable interpretation of the law.

While the court conceded that it was obligated to defer to the OCC interpretation as long as that interpretation was reasonable, the regulation failed that test. The regulation said that, when acting as a trustee, a bank was located in the state where it engaged in three specific activities: accepting the fiduciary relationship, executing the documents creating the relationship, and making investment or distribution decisions. However, the NBA provided no basis to prefer these three activities over other fiduciary activities, the court pointed out. Also, the three described activities could be carried out anywhere, regardless of where the property was located.

The OCC regulation was unreasonable because it exceeded the law and gave out-of-state banks an advantage over banks located in Utah, which could not act as trustees, the court concluded.

Competition. The court also rejected Fannie Mae's argument based on what the company referred to as the "competition clause" of 12 U.S.C. 92a. That portion of the law provided that if a state permitted companies that competed with national banks to exercise trust powers, then national banks were to be permitted to exercise the same powers.

Fannie Mae asserted that ReconTrust competed with Utah title insurance companies and thus had the same fiduciary powers the title insurers had. However, ReconTrust competed with Utah banks, not Utah title insurance companies, the court said. Since Utah banks could not act as trustees, neither could ReconTrust. It would be irrational to interpret the NBA as giving a national bank a power that Utah banks did not enjoy, the court decided.

The case is No. 2013 UT 45.

Attorneys: Maria-Nicholle Beringer for Fannie Mae. Daniel J. Morse (Wilson Elser Moskowitz Edelman & Dicker LLP) for Loraine Sundquist.

Companies: Bank of America; Fannie Mae; ReconTrust

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