Banking and Finance Law Daily Wrap Up, INTEREST-USURY—OCC brief opposes state AGs' challenge to non-bank interest rule, (Feb. 26, 2021)

Banking and Finance Law Daily Wrap Up

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By Thomas G. Wolfe, J.D.

The OCC argues that its final rule on "Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred" should remain intact as validly promulgated.

In reply to briefs filed by the state attorneys general of California, Illinois, and New York, and in support of its own request for summary judgment in the case, the Office of the Comptroller of the Currency has filed a brief with the federal district court in Oakland, California in advance of a March 2021 hearing on the validity of the OCC's June 2020 promulgation of a final rule on "Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred" (Permissible Interest Rule). The state AGs have argued that the Permissible Interest Rule violates the Administrative Procedure Act and allows lenders to circumvent state laws by charging interest rates that would otherwise exceed state limits. In contrast, the OCC's reply brief, filed Feb. 25, 2021, argues that the OCC's Permissible Interest Rule validly interprets the National Bank Act; no federal preemption analysis is required because the OCC's rule does not preempt state law; and the Permissible Interest Rule is neither arbitrary nor capricious (*People of the State of California v. Office of the Comptroller of the Currency,* N.D. Cal., Case No. 20-cv-5200-JSW).

In June 2020, the OCC promulgated its Permissible Interest Rule, seeking to uniformly solidify the "valid when made" doctrine—that when a bank transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer.

In July 2020, before the Permissible Interest Rule was slated to take effect, California Attorney General Xavier Becerra, Illinois Attorney General Kwame Raoul, and New York Attorney General Letitia James challenged the OCC's final rule, filing a complaint with the Oakland, California federal trial court. In their lawsuit asking the court to invalidate the final rule, the state AGs assert that the OCC's Permissible Interest Rule takes aim at state laws that protect consumers from predatory lenders because the rule exempts buyers of high-interest loans from state interest-rate caps. The AGs also maintain that the OCC is extending National Bank Act preemption to non-banks in violation of the Administrative Procedure Act. Further, the OCC did not comply with requirements established by the Dodd-Frank Act and exceeded its own agency authority, the state AGs allege (see *Banking and Finance Law Daily*, July 30, 2020).

Most recently, in February 2021, after a series of court filings by both parties seeking summary judgment in its respective favor, the state AGs filed a brief arguing, among other things, that: (i) the OCC failed to comply with the requirements set forth in section 25b of the National Bank Act regarding federal preemption when the rule was promulgated; (ii) the OCC did not apply the required "significant interference" standard for National Bank Act preemption when promulgating the rule; and (iii) the OCC's Permissible Interest Rule is "arbitrary and capricious" in violation of the Administrative Procedure Act (see *Banking and Finance Law Daily*, Feb. 12, 2021).

OCC brief highlights. Against this backdrop, the OCC filed its February 2021 brief in reply to the state AGs' brief and in support of the OCC's own motion for summary judgment in the case.

First, the OCC argues that its Permissible Interest Rule validly interprets the National Bank Act. According to the OCC, the state AGs' opposition to the rule "is premised on the erroneous assumption" that the agency's final rule preempts state law and "inappropriately extends §85 to non-banks." However, the Permissible Interest Rule "does no such thing," the OCC asserts. Rather, the final rule "clarifies that the originally agreed upon interest rate for a national bank loan continues if the loan is later sold, assigned or otherwise transferred." The OCC contends

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that the state AGs' challenges to the Permissible Interest Rule are "significantly flawed," particularly because the OCC is "entitled to *Chevron* deference"; the state AGs' assertion otherwise "inexplicably ignores numerous decisions applying *Chevron* deference to OCC interpretations of the National Bank Act and, specifically, §85."

Second, the OCC's final rule "clarifies the 'conspicuous' ambiguity identified in §85 and confirms national banks' authority to transfer loans with the originally agreed-upon interest terms intact," the OCC maintains. According to the agency, the state AGs fail to recognize statutory provisions and caselaw "confirming national banks' broad ability to transfer loans," and engage in "misplaced reliance on later-enacted statutes outside the National Bank Act that reflect similar ambiguities" to those allegedly interpreted in the final rule.

Third, the Permissible Interest Rule "does not make §85 preemption assignable to third parties." The OCC argues that the final rule "does not transfer any powers but merely interprets national banks' authority to charge interest under §85."

Fourth, no federal preemption analysis is required because the OCC's rule does not preempt state law. According to the OCC, section 25b of the National Bank Act "is inapplicable" to the agency's final rule because Congress explicitly incorporated a "§25b analysis, or a *Barnett Bank* analysis" into the pertinent provision of the National Bank Act.

Fifth, the OCC's Permissible Interest Rule is neither arbitrary nor capricious because it is "based on the evidence in the record coupled with the OCC's supervisory expertise." Moreover, the OCC argues that it "considered all important aspects of the problem and, competing policy considerations," in promulgating the final rule.

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