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National Bank Preemption Addressed by the First Circuit

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The Supreme Court handed down an opinion last year regarding national bank preemption in the case ***Cantero v. Bank of America***, which we wrote about **here**. In that case, which involved a Second Circuit decision regarding a New York state law requiring the payment of interest on mortgage escrow balances, the Court reemphasized the preemption standard established in its ***Barnett Bank of Marion County v. Nelson* opinion**, which was enacted into law by Congress in Dodd-Frank (12 U.S.C. §25b). Specifically, state consumer protection laws should only be preempted "only if" the state law "(i) discriminates against national banks as compared to state banks; or (ii) 'prevents or significantly interferes with the exercise by the national bank of its powers.'"

We all expected that the Second Circuit would have been the first to circle back around to re-hear *Cantero* on remand, but instead, the First Circuit has stepped forward and applied the *Cantero* opinion to "substantively identical" facts, resulting **in an opinion issued on September 22, 2025** that has found that a Rhode Island state law requiring the payment of interest on mortgage escrow balances is **not** preempted by national bank powers.

Before we delve into the *Conti* decision and how useful it should be for the industry (i.e., very useful), we should step back and consider whether this is another "bite" into national bank powers. As a long-time practitioner who has been particularly focused on consumer protection laws in financial services, the *Conti* opinion (and *Cantero* for that matter) does not seem like new news. When Dodd-Frank was passed in 2010, many banks procured detailed opinions from law firms and lawyers like me regarding which state consumer protection laws could still be considered preempted and which could not. Accordingly, in the last fifteen years, the conservative approach has been to value national bank preemption powers so highly that most, if not all, state consumer protection laws should not be deemed to be preempted by a national bank. And, now the courts are beginning to underscore that that conservative approach is the intent of Congress, absent further direction from them on the topic of national bank preemption.

One of the things that is most useful about the First Circuit's opinion in *Conti* is that it has clearly conducted the "practical assessment of the nature and degree of the interference caused by a state law" required by the Supreme Court in *Cantero* and provided a template for how to parse through the several Supreme Court decisions that give greater contour to the national bank preemption question. In particular, *Conti* says that "national banking is subject to local restrictions when Congress has indicated as much, as well as in the absence of such express language." This last point is important because the national bank in question had argued that because the Truth In Lending Act requires payment of mortgage interest on some escrow accounts, but not all, that means that Congress intended that ONLY those escrow accounts should have mortgage interest paid by national banks. And, the First Circuit rejected that argument. Continuing onto another argument made by the national bank in *Conti*, the concept of field preemption was also rejected: "the Supreme Court and Congress have squarely rejected the notion that the National Bank Act 'occup[ies] the field in any area of [s]tate law.'"

Again, from the seat of this practitioner, *Cantero* and *Conti* are not surprising results and national banks, as well as the fintechs doing business with them in particular, are well advised to return to a much more circumspect and careful approach when deeming a consumer protection law to be preempted.