

OP. NO. 03-122

BANKING AND FINANCE: BANKING ACT – MULTISTATE TRUST INSTITUTIONS ACT.

National Bank Act preempts Virginia Banking Act to extent state statutes prohibit national bank from serving as executor, administrator, or testamentary trustee in Virginia.

The Honorable William J. Howell
Speaker of the House
December 12, 2003

Issue Presented

You inquire whether a national bank established under the Federal National Bank Act and supervised and regulated by the Comptroller of the Currency may serve as executor, administrator, or testamentary trustee in Virginia absent a physical presence in Virginia. Specifically, you ask whether the National Bank Act preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act.

Response

It is my opinion that § 92a of the National Bank Act preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act to the extent that the state statutes prohibit a national bank supervised and regulated by the Comptroller of the Currency from serving as executor, administrator, or trustee¹ in Virginia.

Applicable Law and Discussion

Article 3.3, §§ 6.1-32.31 through 6.1-32.45, comprises the Multistate Trust Institutions Act in Chapter 2 of Title 6.1, the Virginia Banking Act. Article 3.3 permits "out-of-state trust institutions, including without limitation national banks whose home state is other than Virginia, to engage in the trust business in this state, in accordance with the provisions set forth in [the Multistate Trust Institutions Act]."² Section 6.1-32.35 provides that "[a]n out-of-state trust institution may engage in a trust business at an office in this state only if it maintains (i) a trust office in this Commonwealth as permitted by [Article 3.3] or (ii) a branch in this Commonwealth." Section 6.1-32.32 defines "out-of-state bank" as "a bank chartered to act as a fiduciary whose home state is a state other than Virginia." Section 6.1-5 of the Virginia Banking Act requires the existence of a Virginia branch or office before a multistate trust institution may operate in Virginia. There are no specific exceptions for national banks.

National banks are established under the National Bank Act³ and are supervised and regulated by the Comptroller of the Currency.⁴ Section 92a(a) of the National Bank Act authorizes the Comptroller to grant fiduciary powers to national banks:

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right

to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Section 92a(b) provides that the grant of trust powers pursuant to § 92a(a) is not deemed to be in contravention of state law:

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of [§ 92a].

By virtue of the Supremacy Clause of the Constitution of the United States,⁵ federal law supersedes any conflicting state law.⁶ The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area.⁷ Even if Congress does not intend the enactment of a federal statutory scheme completely to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.⁸

The Supreme Court of the United States has identified three ways in which preemption may occur:⁹ (1) Congress may adopt express language setting forth the existence and scope of preemption;¹⁰ (2) Congress may adopt a framework for regulation that "occupies the field" and leaves no room for states to adopt supplemental laws;¹¹ and (3) when state law actually conflicts with federal law, typically when compliance with both laws is a "physical impossibility"¹² or the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³

Regarding supervision of the National Bank Act, the United States Supreme Court observes that "the Comptroller [of the Currency] bears primary responsibility for surveillance of 'the business of banking.'"¹⁴ Further, the Court reiterates the well-settled rule that "'courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of [the business of banking].'"¹⁵ "In defining the preemptive scope of statutes and regulations granting a power to national banks, ... Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."¹⁶ Thus, the Court has determined that "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, ... no such condition applies."¹⁷

Supreme Court decisions give weight to interpretations of the Comptroller in matters related to national banks.¹⁸ The Comptroller of the Currency has ruled that "federal law preempts state law when the federal law merely authorizes national banks to engage in activities that a state law expressly forbids."¹⁹ Sections 6.1-5 and 6.1-32.35 of the Virginia Banking Act prohibit a national bank from serving in a fiduciary capacity without having a physical presence in Virginia. The Comptroller, in reviewing the activities of a national bank in Michigan, specifically determined that federal law preempts §§ 6.1-5 and 6.1-32.35.²⁰ In addition, the Comptroller has determined that, "[t]o the extent that

[§§ 6.1-5 and 6.1-32.35] conflict with the authority to engage in fiduciary activities under section 92a, they are ... preempted."²¹ Therefore, it is my opinion that § 92a of the National Bank Act, as it relates to the fiduciary activities of national banks, preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act.

Conclusion

Accordingly, it is my opinion that § 92a of the National Bank Act preempts §§ 6.1-5 and 6.1-32.35 of the Virginia Banking Act to the extent that the state statutes prohibit a national bank supervised and regulated by the Comptroller of the Currency from serving as executor, administrator, or trustee in Virginia.

¹For the purposes of this opinion, the use of the word "trustee" is intended to include those activities also associated with a testamentary trustee.

²Va. Code Ann. § 6.1-32.31(B) (Michie Repl. Vol. 1999).

³12 U.S.C.A. §§ 21-216d (West 2001 & Supp. 2003).

⁴See 12 U.S.C.A. § 26 (West 2001). See *generally* 12 U.S.C.A. §§ 1-14 () ("The Comptroller of the Currency").

⁵"This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

⁶See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824); see *also* *Savage v. Jones*, 225 U.S. 501, 533 (1912).

⁷See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Op. Va. Att'y Gen.*: 2001 at 143, 144; 1984-1985 at 280, 282; 1973-1974 at 284, 285.

⁸See *Jones*, 430 U.S. at 525-26 (citing U.S. Const. art. VI).

⁹See, e.g., *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996) (analyzing methods used by courts to determine preemption questions).

¹⁰See *Jones*, 430 U.S. at 525.

¹¹*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹²*Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹³*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), *quoted in Barnett Bank*, 517 U.S. at 31.

¹⁴*Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (quoting § 24 of National Bank Act).

¹⁵*Id.* (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971))).

¹⁶ *Barnett Bank*, 517 U.S. at 33.

¹⁷ *Id.* at 34.

¹⁸ See *supra* note 15 and accompanying text.

¹⁹ Comp. of the Currency Interpr. Ltr. 872 (Oct. 28, 1999) (citing *Barnett Bank*, 517 U.S. at 31), available at <http://www.occ.treas.gov/interp/dec99/int872.pdf>.

²⁰ Comp. of the Currency Interpr. Ltr. 866, (Oct. 8, 1999) available at <http://www.occ.treas.gov/interp/oct99/int 866.pdf>.

²¹ See *supra* note 20.

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