In 2007, the Supreme Court, in Watters v. Wachovia Bank, held that among national banks’ incidental powers is the power to conduct certain activities through operating subsidiaries, subject to the same terms and conditions as the bank.\footnote{139} Thus, the Court held that state laws are preempted as to those subsidiaries to the same extent as to the bank itself.

The Dodd-Frank Act overturned Watters and amended the NBA and HOLA to provide that the benefits of preemption are limited to banks and federal savings associations and do not extend to bank subsidiaries, affiliates, or agents.\footnote{140} The OCC subsequently repealed a rule that had purported to preempt state laws that limited bank powers or operations that were incidental to the business of banking.\footnote{141}

Consequently, non-bank entities that are involved with bank products, such as prepaid card companies or non-bank issuers of gift cards, should not be entitled to assert preemption unless the claim involves an older contract covered under the Dodd-Frank grandfather clause.\footnote{142} Even then, the facts should be examined closely to determine if the challenged conduct prevents or significantly interferes with a bank’s exercise of its powers.\footnote{143} However, a state law may still be preempted if it prohibits or restricts an entity such as a state-chartered bank from doing business with a national bank. For example, a district court held that federal law preempted a state law that prohibited state-chartered banks from using a national bank to process certain ATM transactions unless the national bank met certain conditions.\footnote{144} The court held that processing electronic fund transactions was an incidental power of a national bank, and that the state law significantly interfered with the bank’s exercise of this power. The court relied on pre-Dodd-Frank Act cases that are now of questionable validity in light of the Dodd-Frank Act’s NBA amendments preventing preemption of state laws as to agents of national banks.\footnote{145}

The National Credit Union Administration has never preempted state laws as to credit union subsidiaries.\footnote{146}

Footnotes


\footnote{140} [131] See 12 U.S.C. \S\S 25b(e), 25b(h)(2), 1465(a).


\footnote{143} [134] See SPGGC, L.L.C. v. Blumenthal, 505 F.3d 183 (2d Cir. 2007) (finding ban on gift card inactivity fees did not interfere with national bank’s ability to develop and market prepaid gift cards, but rather interfered only with conduct of seller who was not protected under NBA or subject to OCC’s exclusive oversight and who bore costs of administering program, collected fees, and established terms and conditions of gift cards).


\footnote{145} [136] The \textit{Schipper} court held that the Dodd–Frank Act did not materially alter the standard for preemption to be applied in the case but failed to note the Dodd-Frank Act’s repeal of preemption as to agents. 12 U.S.C. \S\ 25b(h)(2). The court relied on Watters v. Wachovia Bank, 550 U.S. 1, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007), for the holding that the preemptive reach of the NBA extends beyond the national bank itself, despite the Dodd-Frank Act’s overruling of the Watters holding as to bank subsidiaries. 12 U.S.C. \S\ 25b(e). The \textit{Schipper} court also relied on SPGGC, L.L.C. v. Ayotte, 488 F.3d 525, 536 (1st Cir. 2007), a decision extending bank preemption to bank agents, which was also effectively overturned by the Dodd-Frank Act. Arthur E. Wilmarth, Jr., \textit{The Dodd–Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services}, 36 J. of Corp. Law 895, 935 & n.318 (2011).
1.5.3 Bank Subsidiaries, Affiliates, and Agents Are Not Entitled to Preemption

146 [137] See § 1.5.4 [3], infra.

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