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Opinion No. 09-86

Crediting Credit Card Payments under Senate Bill 2084/House Bill 2120

QUESTIONS

Senate Bill 2084/House Bill 2120, as revised by a proposed amendment, would require a credit card issuer to credit payments made by mail on the date the payment is postmarked.

1. Would this legislation be preempted by the Fair Credit Billing Act, 15 U.S.C. §§ 1666, *et seq.*?

2. Would this legislation be preempted by the National Bank Act, 12 U.S.C. §§ 21, *et seq.*?

3. Would this legislation be preempted by any other federal law?

4. Would this legislation violate the Commerce Clause of the United States Constitution?

OPINIONS

1. The proposed law would not be preempted under 15 U.S.C. § 1666j of the Fair Credit Billing Act.

2. The proposed law is probably preempted by the National Bank Act and could not be enforced against a national bank. Under the state "wild card" statute, the proposed law would also be inapplicable to state banks.

3. The proposed law is also probably preempted by the federal Home Owners' Loan Act and could not be enforced against a federal savings association. The Tennessee Commissioner of Financial Institutions could exempt state savings banks from complying with the law if he determines that the state institutions are otherwise at a significant competitive disadvantage. Tenn. Code Ann. § 45-14-105(b).

4. We think the proposed law is defensible against a challenge that it violates the Commerce Clause.

ANALYSIS

This opinion concerns Senate Bill 2084/House Bill 2120, as revised by an amendment included with the request. The amendment would add the following Tenn. Code Ann. § 47-18-130 to the state consumer protection laws:

> (a) If any cardholder submits a payment to a card issuer by mail, then such payment shall be credited to the cardholder's account as being received on the date the payment is postmarked.
>
> (b) A violation of subsection (a) constitutes an unfair and deceptive act or practice.
>
> (c) For the purposes of this section, "cardholder" and "card issuer" have the same meaning as provided in § 47-22-201.

Section 2 of the proposed legislation would add violations of the new statute to the list of deceptive trade practices in Tenn. Code Ann. § 47-18-104(b). Section 3 of the amendment provides:

> No later than July 1, 2009, the attorney general and reporter shall submit a request to the secretary of the board of governors of the federal reserve system for a determination that this act is not inconsistent with the Fair Credit Billing Act, codified at 15 U.S.C. 1666 et seq., as provided in the act and regulations promulgated pursuant to such act.

Section 4 would provide:

> Section 3 of this act shall take effect upon becoming a law, the public welfare requiring it. All other sections of this act shall take effect March 1, 2010, the public welfare requiring it, and shall apply to contracts entered into on or after that date.

The term "card issuer" or "issuer" means:

> a person doing business in Tennessee that issues a credit card or that person's agent or assignee with respect to the card.

Tenn. Code Ann. § 47-22-201(4). The term "cardholder" means:

> a natural person residing in Tennessee who has agreed with a card issuer to pay debts arising from card transactions, whether the card used in such transactions has been issued to the cardholder or to another person.

Tenn. Code Ann. § 47-22-201(3).

1. Preemption by the Fair Credit Billing Act, 15 U.S.C. §§ 1666a-1666j

The first question is whether the proposed legislation would be preempted by the federal Fair Credit Billing Act, 15 U.S.C. §§ 1666a-1666j. This act is part of a federal statutory scheme governing consumer credit cost disclosure, and it generally applies to credit transactions nationwide. 15 U.S.C. § 1602 (definitions and rules of construction). 15 U.S.C. § 1666j addresses the applicability of state laws. Subsection (a) of this statute provides:

> This part does not annul, alter, or affect, or exempt any person subject to the provisions of this part from complying with, the laws of any State with respect to credit billing practices, except to the extent that those laws are inconsistent with any provision of this part, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any State law is inconsistent with any provision of this part if the Board determines that such law gives greater protection to the consumer.

The Board of Governors of the Federal Reserve System administers the Fair Credit Billing Act. Board regulations interpreting this statute provide:

> (ii) State law requirements are inconsistent with the requirements contained in chapter 4 (Credit billing) of the Act (other than section 161 or 162) and the implementing provisions of this regulation and are preempted if the creditor cannot comply with State law without violating Federal law.
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> (iii) A State may request the Board to determine whether its law is inconsistent with chapter 4 of the Act and its implementing provisions.

12 C.F.R. § 226.28(a)(2)(ii) and (iii). Section 161 applies to correction of billing errors, and section 162 applies to regulation of credit reports. 15 U.S.C. § 1666c provides:

> Payments received from an obligor under an open end consumer credit plan by the creditor shall be posted promptly to the obligor's account as specified in regulations of the Board. Such regulations shall prevent a finance charge from being imposed on any obligor if the creditor has received the obligor's payment in readily identifiable form in the amount, manner, location, and time indicated by the creditor to avoid the imposition thereof.

This statute appears to be section 164 of the public law enacting the act. Board rules provide:

> (a) General rule. A creditor shall credit a payment to the consumer's account ***as of the date of receipt,*** except when a delay in crediting does not result in a finance or other charge or except as provided in paragraph (b) of this section.
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> (b) Specific requirements for payments. If a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments,

> but accepts a payment that does not conform to the requirements, the creditor shall credit the payment within 5 days of receipt.
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> (c) Adjustment of account. If a creditor fails to credit a payment, as required by paragraphs (a) and (b) of this section, in time to avoid the imposition of finance or other charges, the creditor shall adjust the consumer's account so that the charges imposed are credited to the consumer's account during the next billing cycle.

12 C.F.R. § 226.10 (emphasis added) (effective until July 1, 2010). Thus, under the federal law, a creditor must credit a credit card payment on the date when the creditor receives the payment. The proposed state law would require a creditor to credit a mailed payment from a Tennessee resident on the postmarked date, rather than the date the creditor receives the payment. Since the payment is postmarked when placed in the mail, the proposed law would require the credit card issuer to credit the payment one or more days before the issuer physically receives it. The proposed law, therefore, imposes a more stringent duty on the credit card issuer than does the federal law. But, under 15 U.S.C. § 1666j and regulations promulgated by the Board of Governors of the Federal Reserve System, the proposed law would not be preempted by the Fair Credit Billing Act. Under § 1666j, the federal act does not exempt creditors from complying with state law unless the state law is inconsistent with the federal act. But the same statute specifies that the Board of Governors may not determine that any state law is inconsistent with the act if the Board determines that the law gives greater protection to the consumer.

In this case, the proposed act protects a credit card holder from incurring finance charges if his or her payment is delayed in the mail. Further, under Board regulations, state law requirements are inconsistent with the act if the creditor cannot comply with state law without violating federal law. In this case, federal law requires the card issuer to credit a payment upon receipt. State law requires the creditor to credit the payment as of its postmarked date. A card issuer can comply with the state law requirement without violating its duty under federal law to credit the payment upon receipt. For this reason, the proposed law would not be preempted under 15 U.S.C. § 1666j of the Fair Credit Billing Act.

2. Preemption under the National Bank Act

The next question is whether the proposed law would be preempted by the National Bank Act, 12 U.S.C. §§ 21, *et seq.* It is clear that national banks must comply with the federal provisions of the Fair Credit Billing Act. But 15 U.S.C. § 1666j only provides that the Fair Credit Billing Act itself does not preempt state law if it meets the conditions of that statute. It does not address whether a state law, even if not preempted by the Fair Credit Billing Act, would be preempted by another federal statutory scheme. Courts have found that provisions similar to § 1666j of the Fair Credit Billing Act, preserving certain state laws from preemption under that act, do not prevent the state statute from being preempted by another federal act. *See, e.g., Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002), *as amended on denial of rehearing and rehearing en banc* (Dec. 20, 2002), *cert. denied*, 538 U.S. 1069, 123 S.Ct. 2220, 155 L.Ed.2d 1127 (2003) (municipal ordinances that were not preempted under 15

U.S.C. § 1693q[1] of the Electronic Funds Transfer Act were, nevertheless, preempted by both the Home Owners' Loan Act and regulations promulgated under it and the National Bank Act and regulations promulgated under it); *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008) (California Unfair Competition law, while not preempted under § 15 U.S.C. § 1610(a)(1)[2] of the Truth in Lending Act was, nevertheless, preempted by the Home Owners' Loan Act and regulations promulgated under it).

The National Bank Act appears at 12 U.S.C. §§ 21, *et seq.* Under 12 U.S.C. § 24 (seventh), a national bank is authorized to lend money on personal security. The United States Supreme Court has found that the National Bank Act preempts state laws that interfere with the business of banking conducted by national banks, either directly or through their subsidiaries. *Watters v. Wachovia Bank, N.A.* 550 U.S. 1, 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007). Here, the proposed state law would require credit card issuers, including national banks, to credit payments mailed by Tennessee residents on the date they are postmarked, rather than the date they are received. By contrast, the Fair Credit Billing Act and regulations promulgated under it require the issuer to credit the payment when it is received. The proposed act, therefore, would require national banks doing business in Tennessee to credit payments mailed by Tennessee residents at a different time from the time federal law requires them to credit payments mailed by residents of other states. Since lending money through the issuance of credit cards is a part of the business of banking, a court would probably conclude that the proposed law is preempted by the National Bank Act.

In addition, the Comptroller of the Currency has promulgated extensive regulations regarding the applicability of state law to national banks. These regulations generally provide that any state law that obstructs, impairs, or conditions the exercise of lending powers or other powers by a national bank is preempted by the federal banking laws. 12 C.F.R. § 7.4008(a) provides:

> Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, *subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.*

12 C.F.R. § 7.4008(a) (emphasis added). Paragraph (d) of the same regulation addresses the applicability of state law, and provides in relevant part:

> Applicability of state law. (1) Except where made applicable by Federal law, state laws ***that obstruct, impair, or condition a national bank's ability to fully***

[1] That statute provides in relevant part: "This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter."

[2] That statute provides in relevant part: "Except as provided in subsection (e) of this section, this part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency."

> ***exercise its Federally authorized non-real estate lending powers*** are not applicable to national banks.
> (2) A national bank may make non-real estate loans without regard to state law limitations concerning:
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> * * * *
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> (iv) The terms of credit, ***including the schedule for repayment of principal and interest,*** amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
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> * * * *
>
> (ix) Disbursements and ***repayments;*** and
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> (x) Rates of interest on loans.

Id. (emphasis added). The regulation also provides that any other law the effect of which the OCC determines to be "incidental" to the non-real estate lending operations of national banks or otherwise consistent with the powers described in Paragraph (a) of the regulation is not preempted.

We think a court would probably conclude that, by imposing a different requirement from that imposed by federal law, the proposed act would "obstruct, impair, or condition" a national bank's exercise of its lending authority within the meaning of 12 C.F.R. § 7.4008(a). Further, under (b) of the regulations, national banks are explicitly authorized to exercise their lending authority without regard to state law imposing limitations on loan repayments. The proposed act concerns when a credit card payment must be credited, and thus places a limit on loan repayments. For these reasons, we think a court would conclude that the proposed law regarding crediting mailed credit card payments is preempted under the National Bank Act. The law, therefore, would not be enforceable against national banks.

The State's "wild card" statute appears at Tenn. Code Ann. § 45-2-601. It provides in relevant part that "any state bank may exercise any power or engage in any activity that it could exercise or engage in if it were a national bank located in Tennessee, subject to regulation by the commissioner for the purpose of maintaining the state bank's safety and soundness." Under the last sentence of this statute, any power accorded by federal law to a national bank located in Tennessee is automatically extended to state banks, subject to regulation by the Commissioner of Financial Institutions for the purpose of maintaining the state bank's safety and soundness. Op. Tenn. Att'y Gen. 86-156 (September 2, 1986). Historically, this Office has interpreted this provision to permit state banks to exercise any power that national banks may exercise, subject to the same terms and conditions, and subject to state regulation to maintain the state bank's safety and soundness. *See, e.g.*, Op. Tenn. Att'y Gen. 06-072 (April 17, 2006) (to the extent a limit on credit card fees was preempted by the National Bank Act, the wild card statute would prevent its application to state banks); Op. Tenn. Att'y Gen. 04-059 (April 7, 2004); Op. Tenn. Att'y Gen. 02-103 (February 1, 2002) (through the wild card statute, state banks may invest in a subsidiary licensed as a title insurance agent on the same terms and conditions as national

banks). For this reason, to the extent the proposed law does not apply to national banks, it would not apply to state banks through the operation of the wild card statute.

3. Preemption by Other Federal Laws

The next question is whether the proposed law would be preempted by any other federal law. The Home Owners' Loan Act governs the activities of federal savings associations. The statute is administered by the Office of Thrift Supervision ("OTS"). OTS has promulgated regulations on the applicability of state laws to federally chartered savings and loan associations. Under these regulations, OTS:

> hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part.

12 C.F.R. § 560.2(a). Paragraph (c) of the regulation preserves state laws that only incidentally affect the lending operations of federal savings associations. 12 C.F.R. § 560.110 addresses most favored lender usury preemption. Paragraph (b) of § 560.2 provides illustrative examples and states:

> [T]he types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:
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> * * * *
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> (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, ***balance, payments due,*** or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
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> * * * *
>
> (11) Disbursements and ***repayments***;

12 C.F.R. § 560.2(b)(4) and (11) (emphasis added.) For the same reasons with respect to preemption under the National Bank Act discussed above, we think the proposed law requiring card payments by Tennessee residents to be credited on the date a mailed check is postmarked is preempted by the federal Home Owners' Loan Act. For this reason, the requirement would not apply to federal savings and loan associations. *See, e.g., State Farm Bank, FSB v. Reardon*, 539 F.3d 336 (6th Cir. 2008); *Flagg v. Yonkers Savings and Loan Association, FA*, 396 F.3d 178 (2d Cir. 2005), *cert denied*, 546 U.S. 817, 126 S.Ct. 343, 163 L. Ed.2d 55 (2005), discussing the scope of the OTS' preemptive authority. The term "federal savings association" includes federal savings banks. 12 U.S.C. § 1462(5). Under Tenn. Code Ann. § 45-14-105(b), the Tennessee Commissioner of Financial Institutions could exempt state savings banks from complying with

the proposed law if he determines that the state institutions are otherwise at a significant competitive disadvantage with federal savings banks.

4. Validity under the Commerce Clause

The Commerce Clause of the United States Constitution states in relevant part that "[t]he congress shall have power . . . [t]o regulate commerce . . . among the several states . . .." U.S. Const. art. I, § 8. As a general matter, where a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests it will be struck down without further inquiry. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79, 106 S.Ct. 2080, 2083-84, 90 L.Ed.2d 552 (1986). On the other hand, when a statute only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefit. 476 U.S. at 579, 106 S.Ct. at 2084. In both cases, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*, (discussed in *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997), *cert. denied*, 522 U.S. 977, 118 S.Ct. 435, 139 L.Ed.2d 334 (1997)).

The proposed law would regulate credit card issuers doing business in Tennessee. It would apply to credit card payments mailed by Tennessee residents. Credit cards are used to make purchases all over the United States and, therefore, are involved in interstate commerce. Further, credit card payments must frequently be mailed to addresses outside of Tennessee. Although the law potentially affects interstate commerce, it does not discriminate between credit card issuers based within this state and issuers based outside the state. Further, the State has a legitimate interest in protecting the interests of Tennessee residents who borrow under credit cards. Although the law would impose some burden on out-of-state credit card issuers that do business in Tennessee, we think it can be argued that this burden does not clearly exceed the local benefit the legislation provides. *See*, *e.g.*, *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (Connecticut Gift Card Law did not violate Commerce Clause). For this reason, we think the proposed law would be defensible against a challenge that it violates the Commerce Clause.

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