California District Court Upholds OCC Non-Interest Fee Rule
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In yet another case involving OCC preemption principles, the Federal District Court for the Northern District of California has upheld the ability of a national bank to charge non-interest charges and fees, notwithstanding contrary state law.

In Martinez v. Wells Fargo Bank, N.A., 2007 WL 963965 (N.D. Cal. Mar. 30, 2007), the plaintiffs claimed that Wells Fargo Bank improperly charged and collected fees for various settlement services, including fees for automatic underwriting, tax and document preparation services, in violation of both California's Unfair Practices Act and the Real Estate Settlement Procedures Act (RESPA). With respect to the state law claims, Wells argued that the OCC's non-interest fee rule (12 C.F.R. § 7.4002) permits a national bank to charge any non-interest fees, regardless of how they are priced, as long as the bank considers the factors prescribed by the OCC rule. Wells also argued that California law was preempted by the OCC's real estate lending regulations and in particular 12 C.F.R. § 34.4 ("a national bank may make real estate loans . . . without regard to state law limitations concerning . . . the terms of credit . . . and processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages.") In ruling on Wells' motion to dismiss, the court held that the California's Unfair Trade Practices Act was preempted by the National Bank Act and the non-interest fee rule.

The plaintiffs also claimed that Wells improperly overcharged for these settlement fees (i.e., charged substantially more than its costs for providing the services) in violation of Section 8(b) of RESPA. With respect to this claim, the court stated that Section 8(b) of RESPA is an anti-kickback provision, not a price control statute, and would apply only to charges where no services were performed and not to overcharges for services actually performed.

This is the latest volley in a long line of preemption cases under the National Bank Act. Together with analogous OTS rules, federally chartered commercial banks and thrift institutions continue to benefit substantially from federal preemption of contrary state law. These preemption principles were recently re-affirmed in the U.S. Supreme Court's decision in Watters v. Wachovia (see above).

The court's ruling under the RESPA aspects of this case is consistent with the Second, Third, Fourth, Seventh and Eighth Circuits, each of which have held that Section 8(b) does not extend to overcharges. Wells did not raise, and the court did not address, the related question of whether "mark-ups" (i.e., marking up a fee for services provided by a third-party vendor) were permissible under Section 8(b). Under the court's rationale for distinguishing overcharges, these mark-ups very well may be problematic from a RESPA standpoint.

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