

The Battle Over Mortgage Escrow Accounts: A New Stage in the Preemption Fight for National Banks?

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The Supreme Court has asked the solicitor general to weigh in on an issue that could affect lenders and borrowers alike: whether the National Bank Act (NBA) trumps state laws that require lenders to pay interest on mortgage escrow accounts. The request, which follows the Supreme Court's previous denial of a request to review a federal appellate decision holding that NBA preemption did not protect national banks from a state law mandating payment of interest on escrow, indicates that the Supreme Court may be seriously considering taking up a new case on the same issue. And if the Supreme Court grants review, it could produce the most significant Supreme Court decision on the scope of federal preemption under the federal banking laws in years.

The new case, [*Cantero v. Bank of America*](#), concerns a challenge to a [New York state law](#) that requires lenders to pay interest on funds held in mortgage escrow accounts for borrowers.

The plaintiff in *Cantero* alleged that Bank of America violated the state's escrow-interest law by not paying interest on mortgage escrow accounts for borrowers in New York. In response, Bank of America contended that it is not obligated to pay interest on escrow accounts because the NBA preempts New York's law. The Second Circuit Court of Appeals agreed with Bank of America, holding that the NBA overrides New York's escrow-interest law and that Bank of America is therefore not required to pay interest on escrow accounts.

Cantero has submitted a petition for a writ of certiorari to the Supreme Court, arguing that the Second Circuit's ruling conflicts with other circuit courts that have upheld similar state escrow-interest laws. Cantero's petition points to the Ninth Circuit's decision in [*Lusnak v. Bank of America*](#), 883 F.3d 1185 (9th Cir. 2018), which reached the opposite conclusion by holding that the NBA does not preempt a California law requiring lenders to pay interest on funds held in borrowers' escrow accounts. In that case, the court reasoned that state escrow-interest laws do not prevent or significantly interfere with a national bank's exercise of its powers. Although Bank of America sought the Supreme Court's review in *Lusnak*, the Court denied the petition in November 2018.

The solicitor general's submission will provide the administration's perspective on the proper scope of NBA preemption. But more importantly, the Supreme Court's request for input from the solicitor general signals the Court's potential interest in granting the petition for certiorari. National banks that have experienced years of limbo as to whether they had to abide by state interest laws may soon

learn their fate.

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