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PREEMPTION OF STATE INTEREST RATE LIMITATIONS: CURRENT CHALLENGES INVOLVING BANK PARTNERSHIP MODELS

Federal preemption of state usury laws is currently under attack by “true lender” theories. The author discusses the statutory and regulatory background of preemption and “true lender” challenges to bank partnership models. She then argues that preemption should apply to any loan for which a bank contracts and provides funds to the borrower. Widespread adoption of the alternative “true lender” framework, she argues, would undermine the liquidity that is essential to a robust lending market.

By Ashley M. Simonsen *

National banks have the power under the National Bank Act (“NBA”) to make loans at the rate of interest allowed by the laws of their home states, without regard to other state law interest rate limitations, such as usury laws. State-chartered banks that offer deposits insured by the Federal Deposit Insurance Corporation (“FDIC”) have the same power under Section 27 of the Federal Deposit Insurance Act (“FDIA”). Claims asserted against banks under the usury laws of other states (besides their home states) are preempted under these statutes. Moreover, under the “valid-when-made” rule, state laws that would be preempted in a lawsuit against a bank are also preempted in a suit against the bank’s assignee.

These clear, predictable, uniform rules provide the structure and framework upon which banks and loan purchasers have depended for more than 150 years to make and sell interstate loans. Nevertheless, in recent years, state regulators and private plaintiffs have attempted to circumvent and undermine this regime of legal certainty by arguing that preemption should apply *only* if — after applying a fact-intensive, multi-factor test — the bank is determined to be the “true lender” on the loan. Citing a handful of lower court decisions that have endorsed this totality-of-the-circumstances approach to determining the lender on a loan, these litigants have sought to attack bank partnership models in which third parties provide origination and other

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