

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 17 2022

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

WILLIAM KIVETT; et al.,

No. 21-15667

Plaintiffs-Appellees,

D.C. No. 3:18-cv-05131-WHA

v.

MEMORANDUM\*

FLAGSTAR BANK, FSB,

Defendant-Appellant.

Appeal from the United States District Court  
for the Northern District of California  
William Alsup, District Judge, Presiding

Argued and Submitted April 14, 2022  
San Francisco, California

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,\*\* District Judge.

Flagstar Bank, FSB (“Flagstar”), a midsize federal savings bank operating in all fifty states, appeals the district court’s order granting summary judgment to William Kivett, Bernard Bravo, and Lisa Bravo. The three are representatives of

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

former and current mortgagors to whom Flagstar never paid interest on escrow (“IOE”), notwithstanding California Civil Code § 2954.8(a), which requires all banks to pay 2% interest to borrowers on money held in escrow accounts. The district court found that *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), foreclosed Flagstar’s argument that the National Bank Act (“NBA”) preempted § 2954.8(a) and granted summary judgment to the classes without making any factual findings as to the impact of § 2954.8(a) on Flagstar’s banking operations. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. “Questions of statutory interpretation are reviewed de novo . . . as are questions of preemption.” *Lopez v. Wash. Mut. Bank, F.A.*, 302 F.3d 900, 903 (9th Cir. 2002), *as amended*, 311 F.3d 928 (9th Cir. 2002) (internal citations omitted). Summary judgment is also reviewed de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). Viewing the evidence in the light most favorable to the nonmovant, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.* (citation omitted).

In *Lusnak*, we reversed a district court’s holding that the NBA preempted § 2954.8(a). 883 F.3d at 1194–97. We found that the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Dodd–Frank”), which mandates that national banks comply with applicable state IOE laws, “expresses Congress’s view

that [IOE] laws would not necessarily prevent or significantly interfere with a national bank’s operations.” *Id.* at 1194–95. We therefore held that the NBA did not preempt § 2954.8(a).

Here, the district court correctly concluded that, given our decision in *Lusnak*, Flagstar could not succeed in arguing that § 2954.8(a) was preempted by the NBA. Flagstar concedes that its banking operations in this case are regulated by the NBA, which has regulated all federal savings banks since the passage of Dodd–Frank. *See id.*, 883 F.3d at 1196 & n.8 (reasoning that the OCC, regulator under the NBA, does not enjoy field preemption over the regulation of national banks or federal savings associations). Though Flagstar argues that *Lusnak*’s holding applies only to “large corporate banks,” *Lusnak*’s language is unqualified: “no legal authority establishes that state [IOE] laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd–Frank, has indicated that they do not. Accordingly, we hold that the NBA does not preempt California Civil Code § 2954.8(a).” *Id.* at 1197.

Flagstar’s argument that *Lusnak*’s procedural posture limits its authority in this case is similarly unavailing. Arguing that the instant appeal of summary judgment should not be controlled by a decision reversing a motion to dismiss, Flagstar ignores our practice of deciding questions of preemption whenever they may arise in litigation, including on motions to dismiss. *See, e.g., McShannock v. JP*

*Morgan Chase Bank N.A.*, 976 F.3d 881, 895 (9th Cir. 2020) (reversing denial of motion to dismiss on basis that the Home Owners’ Loan Act of 1933 preempted state law); *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 716–18, 730 (9th Cir. 2012) (vacating permanent injunction after bench trial on basis that the NBA preempted state law); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1035–38 (9th Cir. 2008) (affirming judgment on the pleadings on basis that the NBA preempted state law); *Polich v. Burlington N., Inc.*, 114 F.3d 122, 124 (9th Cir. 1997) (per curiam) (affirming summary judgment on basis that the Interstate Commerce Act preempted state law). Relatedly, Flagstar argues that Dodd–Frank mandated preemption determinations be “case-by-case” and based on “substantial evidence.” But as the *Lusnak* court reasoned, “[t]hese [regulations] have no bearing here where the preemption determination is made by this court and not the OCC.” 883 F.3d at 1194; *see also* 12 U.S.C. § 25b(b)(1)(B). No factual review of Flagstar’s record on summary judgment was necessary to determine whether § 2954.8(a) prevented or significantly interfered with Flagstar’s banking operations, and the district court did not err in declining to conduct such review.

Flagstar and amici Mortgage Bankers Association and American Bankers Association alternatively ask us to overrule *Lusnak* as wrongly decided. A three-judge panel may only depart from an earlier panel’s decision if it is “clearly irreconcilable with the reasoning or theory of intervening higher authority[.]” *Miller*

*v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Considering neither the Supreme Court nor the Ninth Circuit sitting en banc has heard a case that could bring *Lusnak*'s holding into question, we reject Flagstar and amici's invitation to overturn *Lusnak*.

2. Flagstar also argued that the district court incorrectly tolled the statute of limitations and accordingly misstated the award. Appellees concede this point and all parties agree that, pursuant to 28 U.S.C. § 2106, we should modify the final class certification order and judgment. The Court will therefore remand for modification of these two points.

**The district court's preemption holding is AFFIRMED. The judgment and class certification order are VACATED and REMANDED to modify the judgment amount from \$9,262,769.24 to \$9,180,580.15 and the class definition date from April 18, 2014, to August 22, 2014.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista ([maria.b.evangelista@tr.com](mailto:maria.b.evangelista@tr.com)));
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

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