LEGAL UPDATES

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Wisconsin Supreme Court to Hear NBA Preemption Case

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The Wisconsin Supreme Court recently granted a petition for review of a Wisconsin Court of Appeals decision holding that the National Bank Act (NBA) does not preempt the Wisconsin Consumer Act's notice of default and right-to-cure requirement. As a published decision, *Riffard v. Bank of America* is binding precedent in Wisconsin unless reversed by the Wisconsin Supreme Court. *Riffard* viewed the Wisconsin right-to-cure provision as a state debt collection law that only incidentally affects a national bank's lending powers and therefore held it is not preempted. Accepting review in *Riffard*, the Wisconsin Supreme Court will revisit this holding and consider whether the NBA preempts the Wisconsin Consumer Act (WCA) right-to-cure notice requirement.

Case on review

On February 18, 2025, the Wisconsin Court of Appeals issued a decision in *Riffard v. Bank of America N.A.*, addressing whether the pre-suit notice and right-to-cure requirement of the WCA is preempted by the NBA. Under the Dodd-Frank Act and case law, the NBA preempts state consumer financial laws only under certain situations, including if the state consumer financial law "prevents or significant interferes" with the exercise of a national bank's power. The appellate court held that the WCA's right-to-cure notice requirement does not significantly interfere with the exercise of a national bank's lending powers. Therefore, national banks must comply with the WCA's right-to-cure notice requirement.

Riffard is a small-claims court collection case, in which a national bank creditor brought an action against a consumer debtor to recover unpaid credit card debt. Before a creditor can accelerate a debt or sue in court on a consumer debt in Wisconsin, it generally must send the customer a notice of default and right to cure under the WCA. If the customer cures the default within 15 days

(e.g., by making specified missed payments), Wisconsin law requires the creditor to treat the account as if the default did not occur.

If a creditor does not provide the required right-to-cure notice before suit, the collection action must be dismissed without prejudice under the WCA. Here, the customer claimed that the bank did not send the required right-to-cure notice and moved to dismiss the action. In response, the bank argued that the WCA notice requirement is preempted by the NBA. The trial court agreed and awarded judgment to the national bank.

On appeal, the Wisconsin Court of Appeals disagreed with the trial court on NBA preemption. In deciding whether the NBA preempts the Wisconsin law, the court considered U.S. Supreme Court precedent including *Cantero v. Bank of America*, *Barnett Bank of Marion County v. Nelson*, and other federal court cases. The court also looked to the Office of the Comptroller of the Currency (OCC) federal preemption regulations as guidance to analyze whether the WCA right-to-cure notice provision is a non-preempted state law regulating debt collection or a preempted state law conditioning the terms of bank credit.

Ultimately, the Wisconsin Court of Appeals found that the WCA right-to-cure notice requirement is merely a state debt collection law that does not significantly interfere with a national bank's lending powers and, therefore, is not preempted by the NBA. In the court's view, the right-to-cure notice requirement arises only when a national bank wants to pursue a defaulted debt in court and governs the process of debt collection—a traditional area of state regulation. The court held that the WCA notice requirement does not regulate the terms of credit or place conditions on the bank's lending relationship with its customer. The court concluded that the WCA right-to-cure notice only incidentally affects a national bank's lending powers.

But this isn't the end of the road on these issues in Wisconsin. With the recent grant of review, the Wisconsin Supreme Court will decide these questions anew. Briefing will take place in October and November, and the Supreme Court then will hear oral argument in this case, with a decision expected by the end of the term in July 2026.

Similar Wisconsin NBA preemption cases

As acknowledged by the Wisconsin Court of Appeals in *Riffard*, there is no controlling Wisconsin state-law precedent on whether the NBA preempts the WCA right-to-cure notice requirement. Wisconsin's federal district courts have split on this question, considering the WCA notice requirement and arriving at different NBA preemption conclusions. In *Lako v. Portfolio Recovery Associates*, the Western District of Wisconsin held in 2021 that although the WCA right-to-cure notice requirement relates "in part to debt collection," it goes "beyond that by imposing conditions on the terms of credit within the lending relationship"; therefore, the WCA notice requirement is preempted

by the NBA. In *Boerner v. LVNV Funding LLC*, the Eastern District of Wisconsin held in 2019 that the WCA right-to-cure notice is merely a debt collection procedural requirement and is not preempted by the NBA. Both cases were decided pre-*Cantero*. In *Riffard*, the court came to the same NBA preemption conclusion as in *Boerner*.

NBA preemption questions in litigation and the regulatory context

The Wisconsin Supreme Court's grant of review in *Riffard* comes at an opportune time. After the U.S. Supreme Court rejected a bright-line NBA preemption test in its 2024 *Cantero* decision, national banks continue to monitor how courts and regulators approach NBA preemption questions. While *Riffard* is not the first post-*Cantero* NBA preemption case, the Wisconsin Supreme Court's decision will contribute to the limited body of NBA preemption case law. The decision may provide valuable guidance that courts in other states may find persuasive in future NBA preemption challenges to state laws involving pre-suit notice and rights to cure.

In the regulatory context, the scope of NBA preemption continues to be contested. This summer the OCC responded to a letter by the Conference of State Bank Supervisors (CSBS) asserting that the OCC's federal preemption regulations (cited in *Riffard*) are unlawful. The OCC disagreed with the CSBS, stating that the preemption regulations are consistent with federal law, Supreme Court precedent, and executive orders. The OCC refused to rescind its regulations and pledged that it will continue to vigorously support and defend federal preemption. The OCC and CSBS are often foes on the scope of federal bank preemption.

Contact us

We have deep knowledge on federal bank preemption, Wisconsin consumer finance law, and Wisconsin courts. If you have questions about NBA preemption or Wisconsin courts, please contact Susan Seaman, Lisa Lawless, Becky Bavlsik, or your Husch Blackwell attorney.