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Ten State Attorneys General Seek to Invalidate OCC Mortgage Escrow Rule and Interest-on-Escrow Preemption Determination

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On August 11, 2026, a coalition of 10 state attorneys general filed a lawsuit in the US District Court for the District of Oregon seeking to invalidate a rule adopted by the Office of the Comptroller of the Currency (OCC) regarding Real Estate Lending Escrow Accounts and its associated preemption determination concerning certain state laws requiring the payment of interest on mortgage escrow accounts.

The Plaintiff States

The complaint was filed by the attorneys general of Oregon, New York, California, Connecticut, Maine, Maryland, Massachusetts, Minnesota, Rhode Island, and Vermont (the "Plaintiff States").

The Oregon Attorney General is the lead plaintiff in the action, which was filed in the Portland Division of the District of Oregon. The New York State Attorney General also appears to be playing a leading role in this challenge. [1]

Background: State Interest-on-Escrow Laws

The Plaintiff States alleged that since at least the 1970s, they have had in effect interest-on-escrow laws requiring mortgage lenders to pay borrowers prescribed rates of interest on funds held in mortgage escrow accounts for the payment of property taxes, insurance premiums, and other escrow items.

According to the complaint, the interest-on-escrow laws of the Plaintiff States were enacted because "lenders often required significantly larger deposits than necessary, inflating the interest-free loans lenders received from their borrowers through the use of escrow accounts."[2]

The Two OCC Rules

On May 15, 2026, the OCC finalized two rules that together seek to preempt all state interest-on-escrow laws as applied to national banks and federal savings associations.

1. The Escrow Powers Rule

- The Escrow Powers Rule purports to codify the powers of national banks and Federal savings associations to "establish and maintain escrow accounts" and to clarify that the terms and conditions of an escrow account, "including fees assessed for the provision of such accounts [and] whether and to what extent interest or other compensation is . . . paid to customers whose funds are placed in the escrow account, are business decisions to be made by each bank in its discretion."[3]

2. The Preemption Rule

- The Preemption Rule makes a formal preemption determination that the New York interest-on-escrow law, and 13 other state and territorial laws with terms "substantively equivalent to" the New York law, are preempted with respect to national banks and Federal savings associations by federal law.
- Specifically, the rule says that "[t]he OCC has determined that Federal law preempts State laws that restrict a national bank's or Federal savings association's flexibility to decide whether and to what extent to pay interest or other compensation on funds placed in escrow accounts or assess fees for such accounts, including" the interest-on-escrow laws of California, Connecticut, Guam, Maine, Maryland, Massachusetts, Minnesota, Oregon, Rhode Island, the US Virgin Islands, Utah, Vermont, and Wisconsin.[4]

The two OCC rules were published in the Federal Register on May 19, 2026, and became effective on June 18, 2026.

The States' APA Claims

The complaint alleges two causes of action under the Administrative Procedure Act (APA):

Count 1 – Agency Action in Excess of Statutory Authority and Contrary to Law

The Plaintiff States first assert that the rules exceeded the OCC's preemption authority and were contrary to Section 1044 of the Dodd-Frank Act in multiple respects, including by: (i) "creating a new national bank power solely to preempt state [interest-on-escrow] laws"; and (ii) misapplying the National Bank Act powers preemption standard established by *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and codified by Congress in the Dodd-Frank Act.[5]

The complaint further alleges that the rules violate the Supreme Court holding in *Cantero v. Bank of America, N.A.*, 602 U.S. 205 (2024), which rejected a categorical preemption test in favor of a "practical assessment of the nature and degree of the interference caused by a state law" asserted to be preempted.[6]

The Plaintiff States also contend that the OCC failed to comply with the Dodd-Frank Act's procedural requirements by failing to support its determinations with "substantial evidence" made on the record of the proceeding and by failing to conduct a case-by-case analysis of each state's interest-on-escrow law before determining that the terms of the remaining laws were "substantively equivalent" to those of New York.[7]

Notably, the Plaintiff States assert in their complaint that the Dodd-Frank Act instructs a court reviewing an OCC preemption determination regarding a state consumer financial law to afford the OCC "at most, only '*Skidmore* deference,' under which an 'agency's views are 'entitled to respect' only to the extent they have the power to persuade.'"[8]

Count 2 – Arbitrary and Capricious Agency Action

The Plaintiff States also allege the rules "lack any factual basis, are based on unsupported speculation" about potential harm to bank operations, and "fail to meaningfully consider how eliminating escrow-interest protections would harm consumers and the financial system."

Relief Sought

The states ask the court to declare both rules unlawful and vacate them, and award them costs, attorneys' fees, and any additional relief the court deems appropriate.

The Broader Context

The complaint was filed by the Plaintiff States in an evolving context that has been active, to say the least. It includes the following appellate decisions directly addressing the preemption question that the OCC rules purport to resolve:

- In *Conti v. Citizens Bank, N.A.*, 157 F.4th 10 (1st Cir. 2025), *cert. denied*, No. 25-1004, 2026 WL 1052171 (Apr. 20, 2026), the First Circuit held that the Rhode Island interest-on-escrow law is not preempted with respect to national banks. It found no clear conflict with federal law and held that the bank had not developed a showing that the practical effects of applying the state law would result in significant practical interference.
- Prior to the Supreme Court decision in *Cantero*, the Ninth Circuit had held that the California interest-on-escrow law was not preempted. *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). After the Supreme Court decision in *Cantero*, over a vigorous dissent by Judge Nelson, a divided Ninth Circuit panel held in another case that it did not have the authority to overrule *Lusnack* because the intervening decision in *Cantero* was not clearly irreconcilable with the reasoning of the result in *Lusnak*. *Kivett v. Flagstar Bank, FSB*, 154 F.4th 640 (9th Cir. 2025), *reh'g en banc denied*, 2026 U.S. App. LEXIS 8917 (9th Cir. March 26, 2026), *petition for cert. filed*, No. 25-1350 (U.S. June 1, 2026).

- On remand from the United States Supreme Court, a split panel of the Second Circuit held that the New York interest-on-escrow law was not preempted with respect to national banks. *Cantero v. Bank of Am., N.A.*, 175 F.4th (2nd Cir. 2026), *petition for cert. filed*, No. 25-1313 (U.S. May 22, 2026). As the Plaintiff States note in their complaint, there was a vigorous dissenting opinion by Judge Perez in the Second Circuit.

These post-*Cantero* decisions reach different conclusions with respect to preemption of interest-on-escrow laws based on differing rationales. In *Cantero* and *Kivett*, petitions for a writ of certiorari are pending, and in the third case, *Conti*, a certiorari petition was denied on April 20, 2026.

However, the defendant in *Conti* subsequently filed a petition for rehearing based on the intervening Second Circuit decision to the contrary in *Cantero*.[9] On June 8, 2026, the Court requested the *Conti* plaintiff to file a response to the petition for rehearing.

In their response to the defendant's petition for rehearing, the *Conti* plaintiff argued that it is unnecessary to grant the petition because there is a pending certiorari petition in *Cantero* and, if that petition is granted, a Supreme Court decision on the merits in *Cantero* would govern *Conti* because *Conti* is only at the motion-to-dismiss stage. Alternatively, the plaintiff in *Conti* has suggested that the Court should hold the petition for rehearing pending resolution of the certiorari petition in *Cantero* and then dispose of it accordingly.[10]

In what might well foreshadow further review by the United States Supreme Court, the Supreme Court also requested the plaintiffs in *Kivett* to file a response to the certiorari petition by the defendant in that case.[11] This response was filed on July 30, and 15 days prior to that, the Bank Policy Institute, the American Bankers Association, the Chamber of Commerce, and the Mortgage Bankers Association filed an amicus brief supporting the petition for a writ of certiorari.

Additionally, the certiorari petition of the plaintiffs in *Cantero* is supported by amicus briefs from the Conference of State Bank Supervisors (CSBS) and from 26 states and the District of Columbia, with New York and Iowa as the lead states.[12] The amicus brief of the Conference of State Bank Supervisors directly targets the OCC preemption rules, devoting eight pages of its amicus brief to challenging them.[13]

These pending petitions for certiorari and rehearing have been distributed for the Conference of September 28, 2026.

Implications

Exercise of OCC Preemption Determination Authority Faces Direct Challenge Under APA

The case presents a significant test of the OCC's authority to make preemption determinations with respect to state consumer financial laws under the Dodd-Frank Act and how the statute's substantive limits and procedural requirements will be applied by the courts. While the action commenced by the Plaintiff States challenges the

OCC preemption rules directly under the APA, the OCC preemption rules have been referenced in some of the briefs submitted in connection with the pending certiorari petitions.

Supreme Court Review Could Clarify Issues

If one or more of the petitions is granted, the impact of the OCC preemption rules on the private litigations may be addressed by the Supreme Court in its October 2026 Term before the challenge filed by the Plaintiff States in Oregon is resolved. Ultimately, these converging developments are likely to resolve the preemption question left open by the Supreme Court in *Cantero* and to clarify the Dodd-Frank Act requirements for OCC preemption determinations of state consumer financial laws. This would be a significant development in the law of National Bank Act preemption.

Multistate AG Coordination Remains a Key Enforcement Trend

The multistate challenge to the OCC rules is also significant because it is another example of state attorneys general collaborating to bring cases jointly that impact the consumer financial services industry. For example, a coalition of 13 state attorneys general brought a case against OneMain Financial in March 2026, and a similarly large coalition of state attorneys general brought a case against Mariner Finance in August 2022. These cases more broadly illustrate the willingness of multistate coalitions of state attorneys general to pursue litigation jointly when they perceive that federal regulators have not adequately addressed consumer protection concerns.

Hinshaw Will Continue Tracking Parallel Developments

Hinshaw will continue to monitor the multistate attorneys' general challenge to the OCC escrow powers and preemption rules and the pending petitions in the United States Supreme Court relating to *Cantero*, *Conti,* and *Kivett*.

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[1] Except for New York and Oregon, the lead plaintiff, the states are listed in alphabetical order. Oregon and New York are listed as the first two plaintiff states, with the remaining states being listed in alphabetical order.

[2] In connection with a federally-related mortgage loan, Section 10 of the Real Estate Settlement Procedures Act and its implementing Regulation X limit the amount that a mortgage lender or servicer may require a homeowner to pay into a mortgage escrow account at settlement and as a monthly mortgage escrow payment. 12 U.S.C. § 2609(a)(1), (2); 12 C.F.R. § 1024.17(c)(1) (Regulation X provision limiting the amount that a lender or servicer may require a borrower to deposit into a mortgage escrow account created in connection with a federally-related mortgage loan).

[3] OCC, *Real Estate Lending Escrow Accounts*, 91 Fed. Reg. 29340 (May 19, 2026) (to be codified at 12 C.F.R. §§ 34.2 (defining an "escrow account"), 34.3(d) (general rule)). The Escrow Account Powers Rule includes a counterpart regulation for Federal savings associations. *See* 12 C.F.R. §§ 160.3 (defining an "escrow account"), 160.30(b) (general rule).

[4] OCC, *Preemption Determination: State Interest-on-Escrow Laws*, 91 Fed. Reg. 29350 (May 19, 2026) (to be codified at 12 C.F.R. §§ 34.7(b)).

[5] Compl. ¶ 97 (citing 12 U.S.C. § 25b(b)(1)(B), (b)(4)). The Plaintiff States assert, in particular, that "the OCC created a new standard that turns on whether New York's law impairs in any way the 'flexibility granted to a national bank under Federal law' or 'interferes with a national bank's effectiveness or efficiency in exercising its Federal power. Under the OCC's framing, all interest-on-escrow laws meet its novel standard because they affect banks' 'flexibility' to not pay interest on escrow accounts, even if any asserted interference is slight." Compl. ¶ 87.

[6] Compl. ¶ 97 (citing *Cantero*, 602 U.S. at 220-21).

[7] Compl. ¶ 97 (citing 12 U.S.C. §§ 25b(b)(1)(B), (b)(3)(A), (c)).

[8] Compl. ¶¶ 63-64 (citing *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185, 1192 (9th Cir. 2018); 12 U.S.C. § 25b(b)(5)(A)). The Dodd-Frank Act states that a reviewing court "shall assess the validity of such determinations, depending on the thoroughness evident in the consideration of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision." *Id.*

[9] Petition for Rehearing of Denial of Certiorari, *Citizens Bank*, *N.A .v. Conti*, No. 25-1004 (U.S. May 11, 2026). The petitions and briefs filed with the Supreme Court in *Conti* are available at https://www.supremecourt.gov/docket/docketfiles/html/public/25-1004.html .

[10] Response to Petition for Rehearing at 3-4, *Citizens Bank, N.A., v. Conti*, No. 25-1004 (U.S. July 8, 2026).

[11] The petitions and briefs filed with the Supreme Court in *Kivett* are available at https://www.supremecourt.gov/docket/docketfiles/html/public/25-1350.html .

[12] Brief for States of New York *et al.* as *Amicus Curiae* in Support of Petitioner, *Cantero v. Bank of Am., N.A.*, No. 25-1313 (U.S. June 26, 2026).

[13] Brief of *Amicus Curiae* Conference of State Bank Supervisors in Support of Petitioners at 17-25, *Cantero v. Bank of Am., N.A.*, No. 25-1313 (U.S. June 26, 2026). As the national association of state officials responsible for regulating state-chartered banks and state-licensed providers of financial services, the CSBS stated that its interest is in ensuring that national banks not be given "an unwarranted competitive advantage over state-chartered banks and state-licensed mortgage lenders and servicers" that would "seriously impair the States' authority to regulate financial institutions and protect consumers." *Id.* at 1 (Statement of Interest of *Amicus Curiae*). The petitions and briefs filed with the Supreme Court in *Cantero* are available at https://www.supremecourt.gov/docketfiles/html/public/25-1313.html.

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