

Applicability of the Wisconsin Motor Vehicle Consumer Lease Law

Summary Conclusion: Wisconsin laws that impose specific disclosure and substantive requirements on automobile finance leases that are the functional equivalent of loans are preempted by federal law. Federal savings associations may engage in finance leasing, restricted only by the limitations contained in OTS regulations.

Date: May 14, 2002

Subjects: Home Owners' Loan Act/Savings Association Powers

P-2002-4



Office of Thrift Supervision
Department of the Treasury

Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

May 14, 2002

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Re: Applicability of the Wisconsin Motor Vehicle Consumer Lease Law

Dear []:

This responds to your inquiry to the Office of Thrift Supervision (OTS) on behalf of [], Wisconsin (Association). You ask for our concurrence with your assertion that the Association is not subject to the Wisconsin Motor Vehicle Consumer Lease Law (Wisconsin Statute). For the reasons discussed below, we concur.

Background

The Association is a federal savings bank headquartered in Wisconsin. All of the Association's branches also are located in Wisconsin. You represent that the Association conducts automobile leasing programs in Wisconsin. You state that the Association engages in both direct leasing programs to its customers as well as indirect leasing programs through the acquisition of automobile leases, and the vehicles subject to those leases, from automobile dealers. You further represent that the lease transactions in which the Association engages are closed-end leases and that many of them would be considered finance leases under OTS's regulations. You have orally advised us that for purposes of your inquiry, we may limit our analysis only to those leases that meet the criteria for "finance leases" under OTS regulations. See 12 C.F.R. § 560.41(c) (2001) (Leasing).¹ We therefore express no opinion whether the Wisconsin Statute would apply to those leases into which the Association enters under its general leasing authority.

¹ Section 560.41 is discussed in detail at pp. 2-3, below.

Your inquiry provided a copy of the Wisconsin Statute.² The Wisconsin Statute imposes a number of disclosure and substantive requirements on “consumer leases.”³ For instance, the Wisconsin Statute sets out detailed disclosure requirements, including the size type and specific language that must be used in a consumer lease, and specific items that must be disclosed in a consumer lease.⁴ The Wisconsin Statute also, among other things, specifies how to determine the realized value of a motor vehicle lease that is terminated; imposes certain specific restrictions on early termination and specifies how a lessor must determine the early termination obligation of a lessee; specifies how a lessor must determine excess wear and damage to a leased automobile; and imposes requirements on the renegotiation or extension of an automobile lease.⁵

Discussion

Under § 560.41, a federal savings association may, “subject to the limitations of this section,” engage in leasing activities.⁶ The regulation provides that certain leasing activities, known as finance leases, are the functional equivalent of loans made under the Home Owners’ Loan Act (HOLA).⁷ The regulation also sets out the requirements a lease must meet to be a finance lease, and thus the functional equivalent of a loan under § 560.41(c)(2).⁸ As noted, the Association is limiting its inquiry to only those finance leases that are the functional equivalent of loans.

² Wis. Stat. Ann. §§ 429.101–301 (West 2001).

³ Under the Wisconsin Statute, a “consumer lease” is “a lease entered into in [Wisconsin] that transfers the right of possession and use by a natural person of a motor vehicle primarily for a personal, family, household or agricultural purpose, for a period of time exceeding 4 months, if the total lease obligation, excluding any option to purchase or otherwise become owner of the motor vehicle at the expiration of the consumer lease, does not exceed \$25,000.” Wis. Stat. Ann. § 429.104(9) (West 2001).

⁴ See, e.g., Wis. Stat. Ann. § 429.203(2)(a) (West 2001) (the words “MOTOR VEHICLE LEASE AGREEMENT” must appear in at least 10-point type at the top of a consumer lease); Wis. Stat. Ann. § 429.203(6)(b)1.b (West 2001) (a consumer lease must contain a statement notifying the lessee that it may substitute for an existing motor vehicle insurance policy any other policy with similar coverage.)

⁵ Wis. Stat. Ann. §§ 429.206–209 (West 2001).

⁶ 12 C.F.R. § 560.41(a) (2002).

⁷ 12 U.S.C. §§ 1461, *et seq* (West 2001).

⁸ 12 C.F.R. § 560.41(c)(2) (2002). The lease must be a net, full-payout lease representing a non-cancelable obligation of the lessee, notwithstanding the possible early termination of the lease. In addition, the portion of the estimated residual value of the property involved must be reasonable in light of the nature of the leased property and all relevant circumstances so that realization of the lessor’s investment plus the cost of financing the property depends primarily on the creditworthiness of the lessee. Finally, at the termination of the

A federal savings association derives its authority to enter into finance leases from a number of sources. Section 560.41(c)(1) provides that a federal savings association may conduct leasing activities that are the functional equivalent of loans under HOLA §§ 5(c)(1)(B) (residential real estate loans), 5(c)(2)(A) (commercial, business, corporate or agricultural loans), 5(c)(2)(B) (nonresidential real estate loans) and 5(c)(2)(D) (consumer loans).⁹

As we have noted on a number of occasions,¹⁰ HOLA §§ 4(a) and 5(a)¹¹ authorize OTS to provide for the safe and sound operation of federal savings associations. These provisions grant OTS exclusive and plenary authority to regulate all aspects of the operations of a federal savings association including, under HOLA § 5(c), an association's lending activities. Pursuant to that authority, OTS has promulgated through notice and comment rulemaking detailed regulations governing the lending activities of federal savings associations,¹² including § 560.41, which governs the leasing activities of federal savings associations.

The Association's authority to conduct leasing activities derives directly from HOLA § 5(c) and is governed by federal law. The Association may conduct leasing activities "subject to the limitations" of § 560.41. Section 560.41 contains detailed requirements and limitations on the leasing activities of federal savings associations. OTS's Thrift Activities Handbook also contains detailed guidance to examiners reviewing a federal saving association's leasing activities.¹³ A federal savings association's leasing activities are also subject to the disclosure requirements of the Federal Reserve Board's Regulation M,¹⁴ which applies to all lessors of personal

lease, property acquired must be liquidated or released on a net basis as soon as practicable, and any property held in anticipation of re-leasing must be reevaluated and recorded at the lower of fair market value or book value. The definitions of "net lease" and "full-payout lease" are found at 12 C.F.R. §§ 560.41(b)(1) and (2), respectively.

⁹ See 12 U.S.C.A. §§ 1464(c)(1)(B) and (c)(2)(A), (B) and (D) (West 2001).

¹⁰ See, e.g., OTS Op. Chief Counsel (January 10, 2002); OTS Op. Chief Counsel (July 26, 1999); OTS Op. Chief Counsel (July 1, 1998); OTS Mem. Chief Counsel (September 2, 1997).

¹¹ 12 U.S.C.A. §§ 1463(a) and 1464(a) (West 2001).

¹² 12 C.F.R. Part 560 (2002); see Final Rule: Lending and Investment, 61 Fed. Reg. 50951 (September 30, 1996).

¹³ OTS Regulatory Handbook: Thrift Activities § 219 (June 1999).

¹⁴ 12 C.F.R. Part 213 (2002).

property under consumer leases.¹⁵ You stated that the association conducts its programs in compliance with Regulation M.

Federal courts, OTS, and its predecessor, the Federal Home Loan Bank Board (“FHLBB”), have found that § 5(a) of the HOLA, and implementing regulations of OTS and the FHLBB, preempt state laws that purport to regulate the “activities or operations” of federal savings associations because Congress conferred on the FHLBB and OTS exclusive authority to regulate the operations of federal savings associations.¹⁶ Federal courts also have found that FHLBB regulations preempted state law where the law in question was an obstacle to the achievement of the objectives of, and therefore conflicted with, federal regulations.¹⁷

In enacting HOLA, Congress intended that the FHLBB (and now the OTS) provide for the organization, incorporation, examination, operation, and regulation of federal savings associations “giving primary consideration of the best practices of thrift

¹⁵ See 12 C.F.R. §§ 213.2(e)(1) (2002) (definition of “consumer lease”) and (h) (definition of “lessor”). A state may apply for an exemption from Regulation M. See 12 C.F.R. § 213.9 (2002). However, according to a staff member at the Federal Reserve Board, which administers Regulation M, Wisconsin has not applied for an exemption.

¹⁶ See, e.g., *Conference of Federal Savings and Loan Associations v. Stein*, 604 F. 2d 1256, 1260 (9th Cir. 1979) (“[T]he regulatory control of the [FHLBB] over federal savings and loan associations is so pervasive as to leave no room for state regulatory control The broad regulatory authority over the federal associations conferred upon the [FHLBB] by HOLA does wholly preempt the field of regulatory control over these associations.”), *aff’d mem.*, 445 U.S. 921 (1980); *FHLBB v. Empie*, 628 F. Supp. 223, 225 (W.D. Okla. 1983) (“Congress intended the HOLA to preempt all state regulation over federally-chartered savings and loan institutions.”), *aff’d on other grounds (conflict)*, 778 F.2d 1447 (10th Cir. 1985); *People v. Coast Federal Savings and Loan Ass’n*, 98 F. Supp. 311, 316 (S.D. Cal. 1951) (“The FHLBB has adopted comprehensive rules and regulations governing the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.”). See also OTS Op. Chief Counsel. (January 18, 1996) (state reporting requirements preempted); OTS Op. Chief Counsel (October 11, 1991) (deposit taking); FHLBB Op. General Counsel (April 28, 1987) (lending and examination).

¹⁷ *Fidelity Federal Savings and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 156, 159 (preempting state limitation on due on sale practices that conflicted with FHLBB regulation); *Empie*, 778 F.2d at 1453-54 (10th Cir. 1985) (preempting state limitation on use of word “bank” in advertising that conflicted with FHLBB regulation); *First Federal Savings and Loan Ass’n of Boston v. Greenwald*, 591 F. 2d 417, 425 (1st Cir. 1979) (preempting Massachusetts law requiring payment of interest on tax escrow account that conflicted with FHLBB regulation); *Kupiec v. Republic Federal Savings and Loan Ass’n*, 512 F.2d 147-50 (7th Cir. 1975) (preempting “common law” right to inspect and copy membership list that conflicted with FHLBB model by-law governing communication between members or depositors); *FSLIC v. Kidwell*, 716 F. Supp. 1315 (N.D. Cal. 1989), *vacated in part on other grounds*, 937 F.2d 612 (9th Cir. 1991) (preempting state laws of negligence and waste that conflicted with FHLBB lending and preemption regulations).

institutions in the United States.”¹⁸ Consistent with this language, OTS has made clear in its lending regulations its intent to carry out this Congressional objective by enabling federal savings associations to conduct their operations in accordance with a uniform federal scheme of regulation.¹⁹ That uniform federal scheme occupies the field of regulation for lending activities. Congress intended the federal scheme to be exclusive, leaving no room for state regulation, conflicting or complementary.

As stated in § 560.41, finance leases are the functional equivalent of loans, which brings the full force of OTS’s lending regulation on preemption into play. As § 560.41 notes, a federal savings association derives its authority to conduct leasing activities pursuant to a number of HOLA provisions, all of which relate to the lending authority of a federal savings association. If a finance lease entered into under this authority is the functional equivalent of a loan, then the preemption principles applicable to a loan also apply to the finance lease.²⁰

Under OTS lending regulation § 560.2,²¹ OTS occupies the entire field of lending regulation in order to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Under § 560.2(a), federal savings associations may extend credit as authorized under federal law without regard to state laws purporting to regulate or otherwise affect their credit activities. Moreover, specific areas in which state laws do not apply to the lending activities of federal savings associations include credit terms; security property, including leaseholds; and advertising and disclosures.²² The Wisconsin Statute imposes a number of very specific disclosure and substantive requirements on automobile finance leases. With regard to the Association’s finance

¹⁸ 12 U.S.C.A. § 1464(a) (West 2001).

¹⁹ 12 C.F.R. § 560.2 (2002).

²⁰ We note that even though a savings association classifies a lease as a “general” lease for other regulatory purposes, such as asset classification, the lease may still qualify as a “finance lease” for purposes of our analysis if it meets the requirements of § 560.41(c). *See, e.g.*, Thrift Bulletin 78 (October 5, 2001).

²¹ 12 C.F.R. § 560.2 (2002).

²² 12 C.F.R. §§ 560.2(b)(4), (7) and (9) (2002). We note in this regard that that OTS has a long-standing regulation that prohibits savings associations from using advertising or making representations that are inaccurate or that misrepresent the association’s products, services, or contracts. 12 C.F.R. § 563.27 (2002); *see also* 12 U.S.C.A. § 1468a (West 2001). As a safety and soundness matter, when using third party contractors to perform lending activities, the Association should assure that its system of internal controls encompasses a review of the contractor’s compliance.

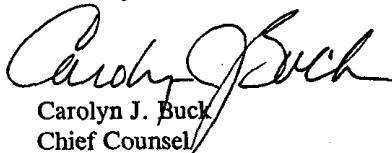
leases that are the functional equivalent of loans, the Wisconsin Statute would regulate areas covered by § 560.2 and therefore does not apply to those leases.²³

The specific provisions of the Wisconsin Statute also conflict with § 560.41, which permits federal savings associations to engage in leasing, restricted only by being subject to "the limitations of [§ 560.41]." This conflict also results in preemption of the Wisconsin Statute.

In reaching the foregoing conclusions, we have relied on the factual representations made in the material you submitted to us and in subsequent discussions, as summarized herein. Our conclusions necessarily depend on the accuracy and completeness of those facts. Any material difference in facts or circumstances from those described herein could result in different conclusions.

If you have any questions regarding this matter, please feel free to contact Timothy P. Leary (Counsel, Banking & Finance) at (202) 906-7170.

Sincerely,



Carolyn J. Buck
Chief Counsel

cc. All Regional Directors
All Regional Counsel

Wisconsin Department of Financial Institutions
345 W. Washington Avenue
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²³ As previously noted, you have not asked, and we express no opinion regarding, whether the Wisconsin Statute would apply to those leases into which the Association enters under its general leasing authority. Your letter indicated that the Association conducted such leasing activities, although we do not know the details of how those leases are structured or how closely they resemble actual extensions of credit. Given an appropriate, sufficiently detailed fact pattern raising the same issue under the general leasing authority of federal savings associations, we would consider whether state law applies to those leases.