SUPREME COURT OF FLORIDA
CASE NO. SC10-974

L.T. CASE NOS. 4D08-4796
4D08-4797
502008CA4416
502008CA4419

140 ASSOCIATES, LTD, etc., et al.,

Appellants,

v.

SEACOAST NATIONAL BANK,
etc., et al.,

Appellees.
________________________________/

APPELLANTS' INITIAL BRIEF

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INTRODUCTION

The Fourth District Court of Appeal ("District Court") in 770 PPR LLC v. TJVC Land Trust, 30 So.3d 613 (Fla. 4th DCA 2010), *sua sponte* consolidated the following two appeals from the Circuit Court:

A. 770 PPR LLC and Gregory K. Talbott, Appellants v. TJCV Land Trust, as successor in interest to Seacoast Nat'l Bank, Appellee, Case No. 4D08-4796, LT. Case No. 50-2008-CA-4419 ("770 PPR Appeal").

B. 140 Associates, Ltd. and Gregory K. Talbott, Appellants v. Tcoast Holdings, LLC, as successor in interest to Seacoast Nat'l Bank, Appellee, Case No. 4D08-4797, LT. Case No. 50-2008-ca-4416 ("140 Appeal").

But for different real properties and different assignments by the original mortgagee, Seacoast National Bank, the 140 Appeal and the 770 Appeal are identical in all respects regarding the issues discussed in this Appeal. For convenience, this Initial Brief shall refer only to the facts of the 140 Appeal.

Appellant 140 Associates, Ltd., shall be referred to as "140".

Appellant 770 PPR, LLC, shall be referred to as "770".

Appellant Gregory K. Talbott, shall be referred to as "Talbott".

Appellee Tcoast Holdings, LLC, as successor in interest to Seacoast National Bank, shall be referred to as "Seacoast".

Appellee TJCV Land Trust, a Florida Land Trust, shall be referred to as "TJCV".

This Initial Brief is accompanied by an Appendix to Initial Brief which shall be referred to by the letter "A" followed by a Tab reference, followed by a page or other reference, if necessary. For example, (A:1 – pg. 6). Copies of the mid-nineteenth century decisions and other authorities cited herein are provided in the Appendix at A: 9.

The National Bank Act, 12 U.S.C. Banks and Banking §§ 21 *et. seq.* (2008) shall be referred to as the "National Bank Act."

All references to Florida Statutes are to Florida Statutes 2008.

All references to the United States Code are to the 2008 version.

STATEMENT OF THE CASE AND FACTS

140 owned a two-story bank and office building ("140 Building") in Boca Raton, Florida. In October, 2006, Seacoast loaned $3,200,000.00 to 140, and 140 gave Seacoast a first mortgage ("Seacoast Mortgage") on the 140 Building. The Seacoast Mortgage was personally guaranteed by Talbott ("Talbott's Guaranty").

On February 15, 2008, Seacoast filed a Verified Complaint for Foreclosure of the Seacoast Mortgage (Count II), for a Money Judgment on Talbott's Guaranty (Count IV), and for other relief. A First Amended Verified Complaint ("Verified Complaint") was filed on March 24, 2008 (A: 1).

The Verified Complaint, at paragraph 2, alleges:

> Plaintiff, Seacoast National Bank, a National Banking Association ("Seacoast") is a National Banking Association, which, at all relevant times to this action, was and is doing business in Palm Beach County, Florida.

On May 15, 2008, Seacoast filed its Motion for Summary Judgment. (A: 2).

On August 18, 2008, 140 and Talbott filed the Affidavit of Gregory K. Talbott ("Talbott Affidavit"). (A:3). The Talbott Affidavit states in part:

> 7. Seacoast is a National Banking Association chartered by the United States of America Department of Treasury Comptroller of the Currency. Seacoast is not registered with the State of Florida Department of State Division of Corporations, as a foreign corporation transacting business in the State of Florida.

At the October 16, 2008, Summary Judgment Hearing the Circuit Court requested memoranda of law on the issue from the parties. (A:10 – pgs. 27-28)

Seacoast, in its Supplemental Memorandum of Law in Support of Motion for Summary Judgment ("Supplemental Memorandum") (A: 4), acknowledges that Seacoast: (a) is a national bank chartered by the United States Comptroller of the Currency; (b) is a foreign corporation transacting business in Florida; and (c) by choice, does not hold a Certificate of Authority to transact business in Florida as a foreign corporation.

On October 29, 2008, the Circuit Court entered a Final Summary Judgment of Foreclosure ("Foreclosure Judgment") against 140 (A: 5), and a Final Judgment against Talbott ("Talbott Guaranty Judgment") on Talbott's Guaranty (A: 6).

140 and Talbott timely appealed to the District Court. (A: 7).

On appeal to the District Court, 140 and Talbott argued that the Foreclosure Judgment and the Talbott Guaranty Judgment should be reversed and the Verified Complaint dismissed without prejudice because Seacoast, despite the clear mandate of section 607.1501(1), Florida Statutes, at no time held and maintained a Certificate of Authority from the Florida Department of State to transact business in Florida as a foreign corporation. Section 607.1502(1), Florida Statutes provides

that Seacoast shall not maintain any action in a Florida court until it holds a Certificate of Authority. The Circuit Court, therefore, never had subject matter jurisdiction over the Seacoast claims set forth in the Verified Complaint.

The District Court affirmed with opinion ("Opinion"), holding that section 607.1501(1), Florida Statutes, was expressly pre-empted by the National Bank Act. 770 PPR, LLC v. TJVC Land Trust, supra.

In the Opinion, the District Court first held that because there is a significant federal presence in national banking that the presumption regarding Congressional intent shifted in favor of federal pre-emption of section 607.1501(1), Florida Statutes.

The District Court then stated: "Because this case presents a novel issue in Florida, we find the holdings in numerous foreign jurisdictions to be persuasive." 770 PPR, LLC v. TJVC Land Trust, supra, at 617.

Finally, citing Bank of America v. Lima, 103 F. Supp. 916 (D. Mass. 1952), Indiana Nat'l Bank v. Roberts, 326 So. 2d 802 (Miss. 1976), and State Nat'l Bank of Conn. V. Laura, 45 Misc.2d 430, 256 N.Y.S.2d 1004 (Westchester County Ct. 1965), the District Court held:

> These cases demonstrate the law is well-established that a state cannot require a national bank to register or file as a "foreign corporation" in order to maintain a lawsuit in state court. In view of these holdings and the plain language of 12 U.S.C. § 24, Subdivision Fourth, we find

> that section 607.1502(1) is expressly preempted as applied to all national banking associations.
>
> 770 PPR, LLC v. TJVC Land Trust, supra, at 618.

This appeal invoking the mandatory jurisdiction of the Florida Supreme Court timely followed. (A: 8).

Prior to this appeal, Seacoast acquired the 140 Building at the Foreclosure Sale and later sold the 140 Building.

STANDARD OF REVIEW

The point on appeal is a pure question of law. Matters of law are reviewed de novo, particularly where the issue is the federal pre-emption of a Florida statute. Marcy v. Daimler Chrysler Corp., 921 So. 2d 781 (Fla. 5th DCA 2006).

The Florida Supreme Court has mandatory jurisdiction of any "decisions of the district courts of appeal declaring invalid a state statute . . ." Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure. The District Court invoked the doctrine of federal pre-emption to declare section 607.1501(1), Florida Statutes, invalid as to national banks. Declaring a Florida statute invalid as to a class is within the mandatory jurisdiction of the Florida Supreme Court. See State v. Rubio, 967 So. 2d 768 (Fla. 2007); State v. Harden, 938 So. 2d 480 (Fla. 2006).

SUMMARY OF ARGUMENT

Seacoast is a national bank chartered by the United States. Seacoast operates 42 retail branch banks in Florida. Seacoast is a foreign corporation transacting business in Florida. Seacoast is required, under section 607.1501(1), Florida Statutes, to file with the Florida Department of State and hold a Certificate of Authority to transact business in Florida as a foreign corporation. Seacoast at no time in these proceedings held a Certificate of Authority. Seacoast had numerous opportunities prior to entry of the Foreclosure Judgment and the Talbott Guaranty Judgment to obtain a Certificate of Authority.

Section 607.1502(1), Florida Statutes, provides that a foreign corporation may not maintain a lawsuit in a Florida court unless and until it holds a Certificate of Authority.

Section 607.1501(1), Florida Statutes, is not pre-empted by the National Bank Act. Congress did not intend the National Bank Act to pre-empt state laws such as section 607.1501(1), Florida Statutes. The National Bank Act does not expressly pre-empt state laws such as section 607.1501(1), Florida Statutes.

With regard to section 607.1501(1), Florida Statutes, the presumption is against pre-emption.

The National Bank Act does not implicitly pre-empt state laws such as Section 607.1501(1), Florida Statutes, because: (a) there is no similar federal

repository of corporate information on National Banks; (b) Seacoast may comply with both the National Bank Act and section 607.1501(1), Florida Statutes, without conflict; (c) section 607.1501(1), Florida Statutes, does not place any burden on the operation of Seacoast as a national bank.

As a result of Seacoast's failure to hold a Certificate of Authority, the Circuit Court never had subject matter jurisdiction over the claims in the Verified Complaint. Subject matter jurisdiction may not be waived. Subject matter jurisdiction may be raised at any time. The Foreclosure Judgment and the Talbott Guaranty Judgment should be reversed and vacated. On remand, the Circuit Court should be instructed to dismiss the Verified Complaint without prejudice.

ARGUMENT

THE DISTRICT COURT ERRED WHEN RULING ON THE BASIS OF FEDERAL PRE-EMPTION THAT SEACOAST NATIONAL BANK COULD SEEK FORECLOSURE AND A MONEY JUDGMENT IN A FLORIDA COURT WITHOUT HOLDING AND MAINTAINING A CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN FLORIDA AS A FOREIGN CORPORATION PURSUANT TO SECTION 607.1501(1), FLORIDA STATUTES.

A. Overview.

The Opinion of the District Court is erroneous and should be reversed for the following reasons:

(1) The District Court misapplied the law regarding the presumption in federal pre-emption analysis, and erroneously applied a presumption that Congress intended to pre-empt section 607.1501(1), Florida Statutes. The correct presumption is that Congress did not intend to pre-empt section 607.1501(1), Florida Statutes.

(2) The District Court held that the pre-emption of section 607.1501(1), Florida Statutes, is an issue of first impression in Florida. The District Court relied exclusively on decisions from other jurisdictions. The decisions from other jurisdictions upon which the District Court relied are either: (a) not based on principles of pre-emption, set forth no pre-emption analysis to reach their conclusions, and, rely on principles of law other than implicit pre-emption; or (b) erroneously find from the phrase: "to sue or be sued . . . as fully as natural persons"

a Congressional intent to pre-empt state laws requiring foreign corporation to qualify to transact business in the state before it may access state courts

(3) The District Court erroneously held that section 607.1501(1), Florida Statutes, was expressly pre-empted without pointing to any language in the National Bank Act sufficiently explicit to justify such express pre-emption.

(4) The District Court did not analyze section 607.1501(1), Florida Statutes, under principles and practices of implicit federal pre-emption. The application of the principles and practices of implicit federal pre-emption to section 607.1501(1), Florida Statutes, demonstrate no intent of Congress to pre-empt section 607.1501(1), Florida Statutes.

Essentially the District Court made two distinct, mutually exclusive errors. First the District Court relied upon precedent from other jurisdictions, which precedent was either wrong or not germane. Second, the District Court neglected to analyze the federal pre-emption of section 607.1501(1), Florida Statutes, in accordance with principles and practices of federal pre-emption jurisprudence. Either error alone would be sufficient to reverse the District Court Opinion. Cumulatively those errors leave no doubt that the District Court Opinion should be reversed.

B. The Requirement for a Certificate of Authority.

Seacoast is a national bank created and existing pursuant to the National Bank Act. Seacoast operates 42 retail branch bank locations in Florida and is headquartered in Stuart, Florida. Seacoast is a foreign corporation transacting business in Florida. Section 607.01401(12), Florida Statutes.

Section 607.1501(1), Florida Statutes, states: "A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Department of State."

Section 607.1502(1), Florida Statutes, states: "A foreign corporation transacting business in this state without a certificate authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority."

The Florida Business Corporation Act (Chapter 607, Florida Statutes) is based on the Model Business Corporation Act ("MBCA").[1] Section 607.1501(1), Florida Statutes, is based section 15.01(a) of the MBCA. Section 15.01(a) of the MBCA has been enacted in all 50 states.[2]

[1] Model Business Corporation Act (4th Edition) as promulgated by the American Bar Association, Business Law Section, Committee on Corporate Laws.
[2] Model Business Corporation Act Annotated (4th Edition) pgs. 15-10 to 15-12. Three states do not provide for a certificate of authority to be issued but require certain filings to be made.

At no time during these proceedings did Seacoast hold a Certificate of Authority from the Florida Department of State to transact business in the State of Florida as a foreign corporation.

The requirement that foreign corporations hold a Certificate of Authority in order to transact business in Florida is a law of fundamental organic importance. Corporations derive their existence and powers from the special or general acts of state and federal legislatures. Corporations do not posses any inherent rights, privileges and immunities, as do individual persons.

Permission for a foreign corporation to transact business in a state is conferred only by the legislature of that state. Taylor v. Branham, 35 Fla. 297, 17 So. 552 (1895). No other legislative body – federal, state or local – can confer that permission. A corporation "must dwell in the place of its creation, and cannot migrate to sovereignty." Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

If a national bank in Florida does not hold and maintain a Certificate of Authority, it has no corporate power to transact business in Florida or access Florida courts. In pre-empting section 607.1501(1), Florida Statutes, the District Court did not show how national banks otherwise gain permission to transact business in Florida. This is a fundamental flaw in the District Court's pre-emption of section 607.1501(1), Florida Statutes. Congress cannot confer permission upon

national banks to transact business in a given state. There is no provision in the National Bank Act addressing or solving this dilemma. How could Congress intend to pre-empt state laws such as section 607.1501(1) Florida Statutes conferring permission on national banks to transact business in the state and to access State courts without at the same time providing for the grant of such permission from the Florida legislature by means other than section 607.1501(1), Florida. Just how Congress could accomplish this is not clear. The very fact that Congress did not address this problem demonstrates an absence of any Congressional intent to pre-empt section 607.1501(1), Florida Statutes.

C. State Government Maintained Repositories

Florida's application for a Certificate of Authority requires the foreign corporation to provide basic information regarding its *incorporation* in the foreign jurisdiction, its principal place of business in Florida, and the name and address of officers and directors, and to designate a registered agent and registered office for service of process in Florida. Section 607.1503, Florida Statutes. Once the Certificate of Authority is issued, the foreign corporation must file an Annual Report with the Florida Department of State to update this basic information. Section 607.1622(1), Florida Statutes.

Florida requires all domestic and foreign artificial entities transacting business within Florida to initially file and then provide Annual Reports. See, for

example, sections 607.0202(1) and 607.1622, Florida Statutes (domestic corporations); sections 608.407 and 608.4511, Florida Statutes (domestic limited liability companies); section 608.501, Florida Statutes (foreign limited liability companies). Using the initial filings and Annual Report as source data, the Florida Department of State Division of Corporations ("Division") maintains for public use a repository of information on all domestic and foreign article entities transacting business in Florida. See www.sunbiz.org.

State government-maintained repositories of current information regarding entities doing business within the state, such as Florida's www.sunbiz.org, are common throughout the United States. These state government-maintained repositories provide essential information to their citizens doing business with such artificial entities.[3]

[3] The Division describes these essential services as follow: "This website is the official business entity index. The Division of Corporations created and maintains sunbiz.org as an online public search mechanism to aid in fostering business activities. Since 1996 all documents and records have been imaged and placed on this website for ready access by all. Sunbiz.org is available worldwide, 24 hours a day, 7 days a week and processes over 240,000,000 events annually. . . . Public information about corporations and other business entities filing activity protects consumers and businesses and ensures that commerce is conducted by properly registered business entities. Sunbiz.org serves as a deterrent to unscrupulous business practices and is used by law enforcement, business entities, and citizens as a resource to locate businesses operating in Florida." See, www.sunbiz.org at 'Overview of the Division of Corporations.'

As of December 31, 2010, there were 1,458 national banks active in the United States.[4] These include the "too big to fail" national banks, such as Bank of America and Wells Fargo, which have branches in almost every state. Beyond the didactics of modern federal pre-emption analysis to follow, it defies common sense that Congress ever intended national banks, as a class, not to participate in state maintained repositories of basic corporate data. The absence of national banks, as a class, from these repositories leaves a significant gap and diminishes the effectiveness of these repositories not only in Florida but across the nation. Moreover, national banks are not contributing any annual revenue to these repositories in the form of filing fees. Nonetheless, national banks make significant use of these repositories in their daily business – from verifying the status of their customers to litigation.

D. Federal Pre-emption.

1. Federal Pre-emption in General.

The Supremacy Clause of the United States Constitution provides that the laws of the United States are the supreme law of the land. U.S. Const. Art. VI §2. A state law that is contrary to a federal statute is void or "pre-empted." The two cornerstones of pre-emption jurisprudence are: (a) there is a presumption that Congress does not intend to supersede state law, particularly in areas where states

[4] See www.occ.treas.gov/topics/licensing/national-bank-lists/index-national-bank-lists.html.

have historically acted, and (b) the intent of Congress to supersede state law must be clear and manifest. Wyeth v. Levine, ___ U.S. ___, ___, 129 S.Ct. 1187, 1193, 173 L.Ed 2d 51, 60 (2009). Further, federal pre-emption jurisprudence establishes two broad areas of judicial inquiry: (a) express pre-emption and (b) implicit pre-emption.

a. Express Pre-emption. Congress may, through explicit statutory language, define the extent to which a federal statute pre-empts state law. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed. 2d 407 (1992). Express pre-emption is the best indication of Congressional intent to pre-empt. In Cipollone, the language of express pre-emption was found in §5 of the Public Health Cigarette Smoking Act of 1968 (codified as 15 U.S.C. Commerce and Trade §1334). Section 5 is labeled "Pre-emption" and states specifically what state laws are pre-empted.[5]

Another example of clear language of express pre-emption is found in the National Bank Act at 12 U.S.C. Banks and Banking §484(a), which reads: "No

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[5] "Pre-emption…(b) State regulations. No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. Commerce and Trade § 1334(b).

national bank shall be subject to any visitorial powers except as authorized by federal law . . . ."

The District Court held in its Opinion, "…we find that section 607.1502(1) is expressly pre-empted as applied to all national bank associations." 770 PPR LLC v. TJVC Land Trust, supra, at 616. The District Court points to 12 U.S.C. Banks and Banking, §24-Fourth as the language of express pre-emption.

12 U.S.C. Banks and Banking, §24-Fourth grants to national banks the enumerated corporate power "[t]o sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." This statutory language is found in the initial enactment of the National Bank Act on June 3, 1864, and has never been amended. 13 Stat. 99 (1861-1865) at §8. [A:9(c)]

The statutory language "to sue and be sued . . . as fully as natural persons" is not sufficiently explicit to demonstrate an express Congressional intent to pre-empt, as to national banks, all state law requirements and procedures for granting foreign corporations permission to transact business in the state, and, to access the state's court system.

b. Implicit Pre-emption. Absent explicit language of pre-emption in a federal statute, a court must consider whether the purpose, structure and language of the statute reveal a clear, though implicit, Congressional intent to pre-empt the

state law. Altria Group, Inc. v. Good, ___ U.S. ___ 129 S.Ct. 538 ___ L.Ed. 407 (2008).

Generally, implied pre-emption is established by showing that: (a) there is an outright or actual operational conflict between the federal statute and state law or "conflict pre-emption." CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed. 2d 387 (1993); (b) Congress has legislated so comprehensively in the area that no room is left for state regulation or "preclusion pre-emption." Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991); or (c) the state law stands as an obstacle to the clear objectives of the federal statute or "obstacle pre-emption." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed. 2d 831 (1986).

The pre-emption of section 607.1501(1), Florida Statutes, rises or falls solely on an implicit pre-emption analysis, which the District Court did not perform.

2. The National Bank Act and Pre-emption.

The overwhelming weight of authority holds that when it comes to federal pre-emption analysis, national banking is a duality. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 10-12, 127 S.Ct. 1559, 1566-1568, 167 L.Ed. 2d 389, 399-401 (2007); National State Bank v. Long, 630 F.2d 981, 985(3d Cir. 1980) ("[R]egulation of banking has been one of dual [federal-state] control since the

passage of the first National Bank Act . . ."); Perdue v. Crocker Nat'l Bank, 38 Cal.3d 913, 937, 216 Cal.Rptr. 345, 702 P.2d 503, 520 (1985)("Congress has declined to provide an entire system of federal law to govern every aspect of national bank operations.").

State laws that interfere with the regulation and oversight of national banks by the United States Comptroller of the Currency are expressly pre-empted. 12 U.S.C. Banks and Banking §484(a). State laws regarding the mundane, day to day, business operations of a national bank such as contracts, notes, mortgages, the enforcement of notes and mortgages and access to state courts are neither expressly nor implicitly pre-empted by the National Bank Act.

a. Visitorial Powers. The National Bank Act provides: "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law. . ." 12 U.S.C. Banks and Banking §484(a). State laws which frustrate, interfere or infringe the visitorial exclusivity of the Comptroller of the Currency are expressly pre-empted. Beneficial Nat. Bank v. Andersen, 539 U.S. 1, 123 S.Ct. 2058, 156 L.Ed. 2d 1 (2003).

Visitorial powers are those powers exercised by the Comptroller of the Currency over national banks. Visitorial powers include, for example, regulation and supervision of national banking practices, capitalization standards, regulatory

reporting, on site examinations, inspection of books and records, and enforcement. See, 12 CFR § 7.4000(a)(2) (2010) (defining visitorial powers).

In accordance with the National Bank Act, Section 607.1505(3), Florida Statutes provides:

> (3) This Act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.

Section 607.1501(1), Florida Statutes, directing national banks as foreign corporations to provide and update annually basic information and to hold and maintain a Certificate of Authority in order to transact business in Florida and access Florida courts, in no way frustrates, interferes with, or infringes upon the visitorial exclusivity of the Comptroller of the Currency. Section 607.1501(1) Florida Statutes is not expressly pre-empted by 12 U.S.C. Banks and Banking § 484(a).

b. Non-Visitorial Matters. Whether the National Bank Act pre-empts a state law in areas other than visitorial powers is a matter of implicit pre-emption analysis. With regard to national banks, a state law will be implicitly pre-empted only when it, ". . . frustrate[s] the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the laws of the United States." McClellan v. Chipman, 164 U.S. 347, 357, 17 S.Ct. 85, 87, 41 L.Ed. 461, 465 (1896). "This Court has often pointed out that

national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." Anderson National Bank v. Luckett, 321 U.S. 233, 248, 64 S.Ct. 599, 607, 88 L.Ed. 692, 705 (1944).

Most recently, in Watters v. Wachovia Bank, supra, the United States Supreme Court articulated the implicit federal pre-emption analysis with regard to state laws affecting national banking as follows: "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers." Id. at 550 U.S. 12, 127 S.Ct. 1567, 167 L.Ed. 2d 400 (2007).

A national bank operates under the state laws of its location regarding contracts, promissory notes, interest rates, ownership of property, security agreements, mortgages and the enforcement of same.[6] Such state laws, which differ from state to state, are implicitly pre-empted by the National Bank Act only when they frustrate, interfere or infringe on the purposes for which Congress enacted national banking.

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[6] "First, national banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law." McClellan v. Chipman, supra, at 164 U.S. 356-57, 17 S.Ct. 87, 41 L.Ed. 462.

Examples where state laws did not frustrate, interfere or infringe on national banking: in First Nat'l Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), a Florida law relating to branch banks was not implicitly pre-empted by the National Bank Act; in Blackfeet National Bank v. Bill Nelson, 171 F.3d 1237 (11th Cir. 1999), a Florida law regarding retirement certificates of deposit was not implicitly pre-empted by the National Bank Act; in Video Trax, Inc v. Nations Bank, N.A., 33 F.Supp.2d 1041 (S.D. Fla. 1998), a Florida law regarding usury was not implicitly pre-empted by the National Bank Act.

What are the Congressional purposes for national banking? The Controller of the Currency says, "ensuring a safe and sound national banking system for all Americans." See Home Page at www.occ.gov/index.html. "National banks were established to aid or promote governmental purposes and to provide a uniform and reliable national currency" 9 C.J.S. Banks and Banking §514. Section 607.1501(1), Florida Statutes does not frustrate, interfere or infringe on the purposes for which Congress enacted national banking.

3. Implicit Pre-emption Analysis of Section 607.1501(1) Florida Statutes.

Section 607.1501(1), Florida Statutes, is not implicitly pre-empted by the National Bank Act because:

a. No conflict. Seacoast can comply with both section 607.1501(1), Florida Statutes, and the National Bank Act. Seacoast admitted as

much when it offered in its Supplemental Memorandum to obtain a Certificate of Authority.

b. No preclusion. The National Bank Act does not confer permission to national banks to transact business in any state, nor could it. The power to grant permission belongs solely to the state legislature. The National Bank Act does not attempt to regulate in any way how a state may confer permission on national banks to transact business in the state. The Comptroller of the Currency does not maintain a repository of basic corporate information on national banks that can be accessed by the public. There is no federal presence whatsoever in the area within which section 607.1501(1), Florida Statutes operates – conferring permission on foreign corporation to transact business in Florida.

c. No obstacle. Obstacle pre-emption contemplates a substantial obstacle which prevents the national bank from fulfilling its mission. The obstacle must frustrate, interfere or infringe on the purposes for which Congress enacted national banking. National banks must be able to sue in state courts because diversity jurisdiction in Federal Court would rarely occur. As a practical matter, section 607.1501(1), Florida Statutes is no obstacle to a national bank from filing suit in Florida courts. In order to obtain a Certificate of Authority, a foreign corporation files a simple application with the Division and pays a $70.00 filing fee. Thereafter, the foreign corporation must file an Annual Report with the

Division. The filing fee for the Annual Report is $150.00 if the Annual Report is timely filed. Seacoast, as do most national banks, makes extensive use of state courts. The time, effort and cost to obtain, hold and maintain a Certificate of Authority is less than completing a civil docket sheet and paying the filing fees for one foreclosure.[7]

An implicit pre-emption analysis of the operation and impact of section 607.1501(1), Florida Statutes, on national banks does not reveal any indicia of Congressional intent to pre-empt. The District Court did not employ or even consider an implicit pre-emption analysis in its Opinion.

4. "As Fully as Natural Persons."

The National Bank Act was first enacted on June 3, 1864. 13 Stat. 99 (1861-1865) [A:9 (c)]. The National Bank Act grants various enumerated corporate powers to national banks, including the power: "[t]o sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." 12 U.S.C. Banks and Banking §24-Fourth.

[7] If as Seacoast contends, it is to be treated "as fully as natural persons," then surely it is a non-resident natural person. As such, Seacoast would have been required to file a non-resident plaintiff cost bond to commence the instant litigation. Section 57.011, Florida Statutes. Seacoast did not file a non-resident plaintiff cost bond. Moreover, this demonstrates that states have legislative power over the access of even fully natural persons to their courts.

Some federal[8] and state[9] courts, including the District Court here, have held that the Congressional grant to "sue and be sued . . . as fully as natural persons" places national banks in the same category as individuals in suits by and against them. The "logic" goes that because natural persons do not have to obtain, hold and maintain Certificates of Authority to access courts of their state, the state cannot require a Certificate of Authority from national banks.

Under these holdings, the organic nature of national banks as foreign corporations is transmuted by legal alchemy to that of individuals with all the natural rights, privileges and immunities of individuals. Based on these holdings from other jurisdictions, the District Court held, as a matter of first impression in Florida, that ". . . a state cannot require a national bank to register or file as a 'foreign corporation' in order to maintain a lawsuit in state court" 770 PPR, LLC v. TJVC Land Trust, supra, at 616.

Congress intended no such thing. Even in 1864, there was a very clear distinction between domestic and foreign corporations. Even in 1864, states required some form of registration of foreign corporations before the foreign corporation could transact business in the state, including access to state courts.

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[8] Bank of America v. Lima, 103 F.Supp. 916 (Mass. D.C. 1952).

[9] Indiana Nat'l Bank v. Roberts, 326 So. 2d 802 (Miss. 1976); In Re: Hibernia Nat. Bank, 21 S.W. 3d 908 (Tex. App. Corpus Christi 2000).

The phrase, “as fully as natural persons” was directed to a completely different concern of the day.

Most of the causes of action and remedies of 2011 American jurisprudence had their origins in the common law of England. For example, the extensive and complex modern law of torts emerged over 800 years from the single common law plea of Trespass on the Case. In the centuries of evolution of English common law (including that occurring in American courts), the plaintiffs and defendants were, with very limited exception,[10] individuals.

With the advent of the industrial revolution in the mid-eighteenth century, incorporated entities became widespread in England and America in order to aggregate capital to undertake ventures too large for one individual, and to limit risk. The rise of incorporated entities in every day commerce collided with a common law based on the rights, duties and remedies of individuals.

In the mid-eighteenth century to mid-nineteenth century, how incorporated entities could sue and be sued was extensively litigated in English and American courts. A copy of Chapter XI – “Of the power to sue and be sued” from the 1869 practice book – “A General Digest of the Law of Corporations” (hereinafter, “Abbott on Corporations”) by Benjamin Abbott and Austin Abbott, is set forth in the Appendix. [A: 9(a)] A quick read of Chapter XI reveals the struggle of both the

[10]Exceptions were the church, guilds and local governments which all had their own unique problems in the emerging common law not relevant here.

nineteenth century corporate plaintiff to state a cause of action in the name of the corporation,[11] and of the nineteenth century corporate defendant to evade liability on the ground that a given cause of action can only be brought against an individual.[12]

Accordingly, congressional use of the phrase, "as fully as natural persons" did not mean national banks should be pre-empted from state law requirements on foreign corporations to transact business in the state and thereby have access to state courts. Rather, the Congressional intent behind the phrase was that national banks should, in terms of stating or defending a cause of action, suffer no impediments and enjoy no advantages solely as a result of its incorporated status.

Cases decided shortly after the passage of the National Bank Act demonstrate that Congress never intended national banks to be considered anything but foreign corporations in the states where they operate.

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[11] "Where the question . . . was whether a corporation could sue for use and occupation, where the tenant had occupied land belonging to the corporation without deed, it was held, that it could, as otherwise, or if a promise could not be implied, an action for use and occupation could never be brought by a corporation." Abbott on Corporations at 443-44.

[12] "And as late as 1799, in a case in the Supreme Court of Pennsylvania, the question arose of *indebitatus assumpsit*, upon an implied promise, could be maintained against an incorporated turnpike company, as a corporation could only contract by deed under the corporate seal; and the court held, that, on the ground stated, the company was not liable to be sued in that for of action." Abbott on Corporations at 454.

For example, in National Park Bank v. Gunst, 1 Abb. N. Cas. 292 (N.Y. S.Ct. 1876) [A: 9(b)], a national bank in a court of initial jurisdiction sought to avoid the New York State requirement for plaintiff foreign corporations to file a cost bond because it conducted its banking business in New York and was located in New York, just as a domestic New York banking corporation. The New York court required the cost bond, holding that the national bank was, in fact, a foreign corporation under New York law.

For example, in Manufacturers' National Bank v. Baack, 2 Abb. U.S. 232, 16 F. Cas. 671(D.C. New York 1871) [A:9(d)], United States District Court Judge Samuel Blatchford[13] held that for purposes of determining federal court diversity jurisdiction a national bank was a citizen only of the state in which its federal charter from the Comptroller of the Currency designated it to operate. In so ruling

[13] Judge Blatchford was appointed district judge for the Southern District of New York in 1867, the same year in which he became a trustee of Columbia University, his alma mater. In 1872, he became a judge for the Second Circuit in New York. On April 13, 1882, after being nominated by President Chester Arthur, Judge Blatchford was confirmed by the Senate as a member of the United States Supreme Court. A confirmed moderate on the Court, Judge Blatchford supported the opinions of the Court in all but two cases, and wrote 430 majority opinions. He became known for his courtesy to judges and lawyers alike and his modest and pleasant temperament, as well as for his encouragement of younger members of the legal profession. He took on more cases than his fair share, and was considered a "workhorse" of a justice. After serving on the Court for 11 years, Judge Blatchford died in Newport, Rhode Island on July 7, 1893. www.historycentral.com/bio/rec/SamuelBlatchford.html

Judge Blatchford had occasion to discuss the very phrase "to sue or be sued . . . as fully as natural persons" at issue here, saying:

> The 8th section of the act of June 3, 1864 (13 Stat. 101), under which the plaintiffs are incorporated, provides, that every association formed pursuant to the provisions of the act shall be a body corporate, and may have a corporate seal, and shall have succession by the name designated in its organization certificate, and may, by such name, 'sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.' The effect of this provision is not to give to the corporation the right to sue, or the capacity to be sued, in every court within the United States, whether state or federal, or to give to every such court jurisdiction over every suit which may be brought in it, wherein the corporation is plaintiff or defendant. Its only proper effect is, to provide that the corporation, when it has come, or been brought, as a suitor, into a court which has jurisdiction of the suit, shall stand in court, in all respects, in the same position, as regards its own rights or the rights of others against it, as to the subject matter of the suit, in which a natural person, who is a suitor in such court, can stand.
>
> 16 F.Cas. at 671.

The District Court Opinion and the authority upon which it relies are based upon an inventive but completely fallacious interpretation of the Congressional intent behind the phrase "to sue or be sued. . . as fully as natural persons."

5. **The Decisions From Other Jurisdictions.**

The decisions from other jurisdictions upon which the District Court relied are either: (a) not based on principles of pre-emption, set forth no pre-emption analysis to reach their conclusions, and rely on principles of law other than implicit

pre-emption;[14] or (b) erroneously find from the phrase: "to sue or be sued . . . as fully as natural persons" a Congressional intent to pre-empt state laws requiring foreign corporation to qualify to transact business in the state before it may access state courts.[15]

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[14] First Nat'l Bank of Tonasket v. Slagle, 5 P.2d 1013 (Wash. 1931): This case was decided on the basis that the state statute in question requiring corporations to pay an annual license fee before it could access Washington state courts applied only to domestic corporations and foreign corporations "having their articles on file in the office of the secretary of state" and the instant national bank did not fall into that category of corporations. Id. at 1014. The Washington Supreme Court went on to say in dicta: "In any event, the Legislature has no power to so limit corporations organized under federal law and exercising powers granted by the federal government." Id. at 1014. This broad statement is not supported by any precedent.
State Nat'l Bank of Conn. V. Laura, 256 N.Y.S.2d 1004, 1006 (Westchester County Ct. 1965): This case was decided on the basis that the New York statute requiring a foreign corporation to register exempted "moneyed corporations" and the plaintiff national bank was a moneyed corporation. The New York County Court did note, citing only Bank of America, supra, that, "since a national bank is brought into existence under federal legislation, it does not come within New York's statutory requirements limiting the right of foreign corporations to sue." Id. at 1006.
Indiana Nat'l Bank v. Roberts, 326 So. 2d 802, 802 (Miss. 1976): The Supreme Court of Mississippi holds, "Unanimously, other state courts have held that a statute, similar to Mississippi's, prohibiting a foreign corporation not qualified to do business in the State from maintaining any action in any court of the State, does not apply to a national banking corporation." The Supreme Court of Mississippi cites First Nat'l Bank of Tonasket v. Slagle; Bank of America v. Lima; State Nat'l Bank of Conn. V. Laura; and, Steward v. Atlantic National Bank, 27 F.2d 224 (1928).
Steward v. Atlantic National Bank, 27 F.2d 224 (1928): This case held that ". . . a national bank is not a foreign corporation within the terms of the constitutional and statutory provisions of Arizona . . ." Id. at 228.
[15] Bank of America v. Lima, 103 F. Supp. 916 (D. Mass. 1952): This case was decided on the basis that the plaintiff was not transacting business in Massachusetts and therefore not subject to the Massachusetts statute requiring all

The decisions from other jurisdictions upon which the District Court relies are distinguishable, and do not serve as any precedent to ignore the logical, straight forward conclusions of the express and implicit pre-emption analyses discussed above.

6. <u>Presumption.</u>

The District Court in its Opinion held:

> The supremacy question is generally met with a presumption against pre-emption. However, this presumption is not implicated when the area of law analyzed is subject to significant federal presence. [citations deleted]. National banking is an example.
>
> <u>Bank of America v. City and County of San Francisco</u>, 309 F.3d 551 (9th Cir. 2002).
>
> <u>770 PPR, LLC v. TJVC Land Trust</u>, <u>supra</u>, at 617.

The District Court correctly states the law regarding the initial presumption against pre-emption, but incorrectly applies the shift in the presumption in instances of significant federal presence. In <u>Bank of America v. City and County of San Francisco</u>, 309 F.3d 551 (9th Cir. 2002), a local ordinance which prohibited certain fees for ATM use and Electronic Transfers was held pre-empted and void.

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foreign corporations doing business in Massachusetts to register with the secretary of state as a condition to access Massachusetts courts. The Massachusetts Federal District Court does discuss in dicta that the Massachusetts statute is question does not apply to national banks. The District Court only cites a line of cases holding that states do not have the power to levy license fees on national banks.

The Comptroller of the Currency regulates the fees that national banks may charge. Federal presence in that aspect of national banking is pervasive and part of the visitorial powers of the Comptroller of the Currency. Therefore, in Bank of America, the presumption shifted in favor of pre-emption.

The instant case deals with the enforcement by a national bank of a note and mortgage in state court. These activities of a national bank are controlled by state law, with no federal presence. Therefore, the presumption against pre-emption remains in place in the instant case.

D. Summary on Pre-emption.

On every level of consideration and analysis, Congress did not intend to pre-empt section 607.1501(1), Florida Statutes, as to national banks.

On a practical level the pre-emption results in a gap in Florida's repository of corporation transacting business in Florida. Florida is denied revenue from users of its repository. The same can be said for every state.

On the presumption/burden of proof and persuasion level, the District Court indulged the wrong presumption. The correct presumption is that Congress did not intend to pre-empt section 607.1501(1), Florida Statutes, as to national banks. Seacoast, not 140 and Talbott, has the burden of proof and persuasion.

On the level of express pre-emption, Congress never used the explicit statutory language required to demonstrate an express intent to pre-empt.

On the level of implicit pre-emption, none of the objective factors of conflict, preclusion or obstacle are present to evince an implicit pre-emptive intent of Congress.

On the level of precedent, there is no controlling or persuasive precedent. The pre-emption of national banks from state laws regarding how foreign corporations transact business and access courts is one of first impression in Florida. This Court is not bound by the decisions from other jurisdictions. The challenge of this issue of first impression in Florida deserves more than stale and dubious precedent. Rather, the issue should be decided on the application of principles and practices of federal pre-emption jurisprudence.

Pursuant to the correct presumption, and upon the proper pre-emption analytical review, there is no doubt that section 607.1501(1), Florida Statutes, and similar state laws throughout the nation, are not pre-empted by the National Bank Act.

E. The Remedy.

Sub-sections 607.1502(1) and (5), Florida Statutes, provide:

> (1) A foreign corporation transacting business in this state without a Certificate of Authority may not maintain a proceeding in any court in this state unless it obtains a certificate of authority.
>
> (5) Notwithstanding subsection (1), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of any of its contracts, deeds,

> mortgages, security interests, or corporate acts or prevent
> it from defending any proceeding in this state.

The only consequence to a foreign corporation transacting business in Florida without a Certificate of Authority is that it cannot access Florida courts. The validity of its business dealings are preserved and, if sued, it may defend.

Section 607.1502, Florida Statutes is based on section 15.02 of the MBCA. "All jurisdictions expressly provide that a foreign corporation may not commence or maintain a suit in any court of that jurisdiction until it has obtained a certificate of authority." Model Business Corporation Act Annotated (4th Edition) at pgs. 15-38 to 15-40.

Seacoast elected to proceed to final judgments without a Certificate of Authority. Seacoast, in its Supplemental Memorandum to the Circuit Court, offered to obtain a Certificate of Authority. (A-4 at pg. 8). Seacoast was therefore capable of obtaining, holding and maintaining a Certificate of Authority. Seacoast knowingly let the action go to final judgment without holding a Certificate of Authority.

A trial court may not proceed with a civil action unless the court has judicial power to resolve the issues presented by the case. This is commonly referred to as subject matter jurisdiction. The Circuit Court did not have subject matter jurisdiction when the Verified Complaint was filed or when the Foreclosure Judgment and the Talbott Guarantee Judgment were entered. Without a Certificate

of Authority, Seacoast was expressly prohibited from commencing and maintaining the action. Section 607.1502(1), Florida Statutes. A judgment entered without subject matter jurisdiction is void. Caudell v. Leventis, 43 So. 2d 853 (Fla. 1950); Fedan Corp. v. Reina, 695 So. 2d 1982 (Fla. 3d DCA 1997). Subject matter jurisdiction may not be conferred by consent or waiver. Snider v. Snider, 686 So. 2d 802 (Fla. 4th DCA 1997); J.A.B. Enterprises v. Gibbons, 596 So. 2d 1247 (Fla. 4th DCA 1992). The absence of subject matter jurisdiction can be raised at any time, even for the first time on appeal. Rule 1.140(h)(2) Florida Rules of Civil Procedure.

Section 607.1502(1), Florida Statutes and the similar laws in all other states, are intended to induce foreign corporations who do not hold and maintain a Certificate of Authority to promptly qualify without imposing harsh or erratic sanctions. Model Business Corporation Act Annotated (4th Edition) at pg. 15-36. To this end, Section 607.1502(3), Florida statutes provides that a court may stay a proceeding to determine if a plaintiff foreign corporation is required to hold and maintain a Certificate of Authority, and time to obtain the Certificate of Authority. Seacoast could have asked for such a stay before proceeding to final judgment but chose not to. Seacoast wanted to proceed immediately to a foreclosure sale and recovery of any deficiency. Certain results flow from that calculated business decision.

In South Carolina Equipment Co. v. Sheedy, 353 N.W. 2d 63 (Wisc. App. 1984) South Carolina Equipment, a foreign corporation in Wisconsin, filed a mortgage foreclosure without first holding a certificate of authority to transact business in Wisconsin. The applicable Wisconsin statutes are based on the MBCA and are similar to section 607.1502, Florida Statutes. The defendants in the foreclosure were the real property owners, lien-holders, judgment creditors and a local tax collector. The foreclosure action was dismissed by the lower court because South Carolina Equipment did not hold a certificate of authority. After a notice of appeal was filed by another party in the proceeding, South Carolina Equipment obtained a certificate of authority. The Wisconsin Court of Appeal noted the curative effect generally of obtaining an after-the-fact certificate of authority, but affirmed the dismissal on the unique facts of the case. Under Wisconsin appellate law, as is the case in Florida, an appellate court can only review matters in the record of the trial court proceeding which record ends when a notice of appeal is filed. Therefore, the Wisconsin Court of Appeal could not consider the after-the-fact certificate of authority.

In the instant case, on the date the record on appeal closed, when 140 and Talbott filed their notice of appeal, Seacoast did not hold a Certificate of Authority. Based upon the record on appeal, the Foreclosure Judgment and the Talbott

Guaranty Judgment should be reversed and vacated. On remand, the Circuit Court should be instructed to dismiss the Verified Complaint.

CONCLUSION

Section 607.1501(1), Florida Statutes, is neither expressly nor implicitly pre-empted by the National Bank Act. There is no nexus between promoting the purpose for a national banking system and pre-empting national banks from completing the simple procedure to qualify to transact business in a state required of every foreign corporation.

The Foreclosure Judgment and the Talbott Guaranty Judgment should be reversed. On remand, the Circuit Court should be instructed to dismiss Seacoast's Verified Complaint without prejudice.

140 ASSOCIATES, LTD., 770 PPR, LLC and GREGORY K. TALBOTT,
Appellants

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Initial Brief has been prepared using Times New Roman 14 point font.

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