Foreign Corporation Registration and the Ability to Perform Non-Judicial Foreclosures in Arkansas in Light of *JPMorgan Chase Bank v. Johnson*

I. INTRODUCTION

In response to the Johnson family's default on their mortgage, Chase Bank initiated non-judicial foreclosure proceedings against the Johnsons' home.[1] Soon thereafter, the Johnsons filed for Chapter 13 bankruptcy to receive protection from their creditors, Chase Bank included.[2] Eventually, Chase transferred its proof of claim and rights to J.P. Morgan Bank.[3] However, Chase first objected to the amount owed to it under the Johnsons' debt plan, and to the confirmation of the plan.[4] This objection led to a series of recent bankruptcy cases, culminating in the Court of Appeals for the Eighth Circuit's decision in *JPMorgan Chase Bank v. Johnson* (*JPMorgan II*).[5]

Although these cases cover a multitude of issues, the primary issue this note addresses is whether the Arkansas Statutory Foreclosure Act (ASFA)[6] authorized J.P. Morgan to perform non-judicial foreclosures. The divergent opinions from *In re Johnson* and *JPMorgan I* (the predecessor to the Eighth Circuit's decision) present two distinct courses of action regarding the interpretation of the ASFA and its interaction with the Wingo Act and the National Bank Act (NBA).[7] Before drawing conclusions or

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1. *In re* Johnson, 460 B.R. 234, 239 (Bankr. E.D. Ark. 2011), *rev'd sub. nom* JPMorgan Chase Bank v. Johnson (*JPMorgan I*), 470 B.R. 829 (E.D. Ark. 2012).

2. *Id.*

3. *JPMorgan I*, 470 B.R. 829, 831 (E.D. Ark. 2012), *aff'd*, 719 F.3d 1010 (8th Cir. 2013).

4. *Id.*

5. 719 F.3d 1010 (8th Cir. 2013).

6. Act 53, 1987 Ark. Acts 121 (codified as amended at ARK. CODE ANN. §§ 18-50-101 to -117 (Repl. 2003)).

7. *Compare JPMorgan I*, 470 B.R. at 834, 836-37 (holding that the Wingo Act did not preempt the ASFA because the language of subsection 18-50-102(a)(2) of the Arkansas Code allowed J.P. Morgan to do business in Arkansas under either state

offering suggestions, one must understand the construction of these Acts. Part II of this note discusses the ASFA, the Wingo Act,[8] the NBA,[9] and Arkansas's principles of statutory interpretation. Part III delves into the opinions of *In re Johnson* and *JPMorgan I.* Part IV analyzes the Eighth Circuit's decision in *JPMorgan II*, which affirmed *JPMorgan I*.[10] This Part concludes that the Eighth Circuit reached the appropriate decision and examines the consequences of that decision.

II. DISCUSSION OF RELEVANT LAW

A. The Arkansas Statutory Foreclosure Act

States traditionally offer two primary choices for foreclosure processes: (1) judicial; and (2) non-judicial or statutory. Though all states offer some form of judicial foreclosure, as of 2011, thirty-three states and the District of Columbia offered lenders the option of non-judicial foreclosure.[11] The primary difference between the two is that judicial foreclosures require administration by the

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law or federal law and further concluding that, as a national bank, J.P. Morgan could perform non-judicial foreclosures under the NBA), *with Johnson*, 460 B.R. at 243, 249 (holding that specific provisions of the Wingo Act preempted the more general ASFA and required J.P. Morgan to register with the Secretary of State in order to perform non-judicial foreclosures).

8. Act 958, 1987 Ark. Acts 2345 (codified as amended at ARK. CODE ANN. §§ 4-27-1501 to -1519 (Repl. 2001 & Supp. 2013)).

9. National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C.). For this note, the relevant provision of the NBA states:

> [A] national banking association . . . shall have [the] power—
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> . . . .
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> [t]o exercise by its board of directors or duly authorized officers or agents, subject to [the] law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, bullion; by loaning money on personal security . . . .

12 U.S.C. § 24 (Seventh) (2012).

10. *JPMorgan II*, 719 F.3d at 1018 (8th Cir. 2013).

11. Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 350 (2011).

court,[12] whereas non-judicial foreclosures bypass the court and its associated due-process rights.[13] Characterized as "less friendly to the borrower," non-judicial foreclosures aid lenders by offering a speedier and cheaper process.[14] Further, because non-judicial foreclosures avoid the court system, borrowers have "no structured opportunity . . . to have a judicial hearing to contest issues of default or the validity of a foreclosure."[15]

Before 1987, the only method of foreclosure available to lenders in Arkansas was the judicial process.[16] Passed in 1987, the ASFA gave lenders the ability to foreclose on mortgages through a non-judicial process.[17] The Arkansas General Assembly designed the Act to allow any lender, including non-Arkansas (foreign) lenders, to foreclose on mortgages without resorting to the Arkansas courts, as required under the judicial process.[18]

Under the ASFA, lenders must meet certain requirements before carrying out the foreclosure and sale. First, the lender must file a notice of default with the recorder in the county where the property is located.[19] Second, the lender must wait sixty days from the date of notice before conducting a foreclosure sale.[20] Lastly, the lender must provide to the borrower (or debtor) notice of the default and foreclosure ten days prior to the sale.[21] Further, Arkansas courts consider the ASFA to be "in

12. *See id.* at 343 ("In a judicial state, the foreclosure process goes through the court system. Lenders are typically required to give notice before filing the foreclosure complaint.").

13. *See id.* ("[T]he lender typically only needs to send a notice of sale to the homeowner, place an advertisement in a local paper, and hire an auctioneer to sell the property.").

14. *Id.* at 344 (noting that non-judicial states impose fewer duties upon lenders and allow them shorter notice periods); Debra Pogrund Stark, Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws, 51 OKLA. L. REV. 229, 232 (1998).

15. Alexander et al., *supra* note 11, at 345.

16. *See* Union Nat'l Bank of Ark. v. Nichols, 305 Ark. 274, 278, 807 S.W.2d 36, 38 (1991) (noting that the ASFA established a non-judicial procedure in 1987).

17. *See* Act 53, 1987 Ark. Acts 121 (codified as amended at ARK. CODE ANN. §§ 18-50-101 to -117 (Repl. 2003)); *Nichols*, 305 Ark. at 278, 807 S.W.2d at 38.

18. *Nichols*, 305 Ark. at 278, 807 S.W.2d at 38.

19. ARK. CODE ANN. § 18-50-104(a)(1) (Supp. 2013).

20. ARK. CODE ANN. § 18-50-104(a)(2).

21. ARK. CODE ANN. § 18-50-104(a)(3)(A)(ii).

derogation of common law, [and, therefore, it] must be strictly construed."[22]

In re Johnson, and *JPMorgan I* and *JPMorgan II* (collectively, the *JPMorgan* cases), focus primarily on portions of the ASFA that concern the procedure for authorizing foreign lenders.[23] The Act requires that to perform a non-judicial foreclosure, the business must be "authorized to do business under the laws of the State of Arkansas."[24] Further, the statute requires that foreign corporations must be authorized to do business in Arkansas in order to "avail themselves" of the privilege of non-judicial foreclosure.[25] The interaction of the ASFA's authorization requirements with the Wingo Act and the NBA are the focus of the decisions in *JPMorgan I* and *In re Johnson*.[26]

B. The Wingo Act

At least thirty states have laws requiring foreign corporations to obtain authorization to conduct business in their respective state.[27] Authorization differs from state to state, but the consequences and benefits are the same.[28] Authorized foreign corporations may legally conduct business within a state's borders, and they may also bring suit in that state's courts.[29] A foreign corporation's failure to obtain authorization bars that corporation from seeking

22. Robbins v. Mortg. Elec. Registration Sys., Inc., No. CA 06-417, 2006 WL 3507464, at *1 (Ark. Ct. App. Dec. 6, 2006) (citing Henson v. Fleet Mortg. Co., 319 Ark. 491, 892 S.W. 2d 250 (1995)).

23. *See JPMorgan II*, 719 F.3d 1010, 1014 (8th Cir. 2013); *JPMorgan I*, 470 B.R. 829, 831 (E.D. Ark. 2012), *aff'd*, 719 F.3d 1010 (8th Cir. 2013); *In re* Johnson, 460 B.R. 234, 240 (Bankr. E.D. Ark. 2011), *rev'd sub nom. JPMorgan I*, 470 B.R. 829 (E.D. Ark. 2012).

24. ARK. CODE ANN. § 18-50-102(a)(2) (Supp. 2013).

25. ARK. CODE ANN. § 18-50-117 (Repl. 2003).

26. *See infra* Part III.

27. 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:64-65 (Danny R. Veilleux ed., 4th ed. 2010).

28. *See id.* § 19:64 (noting that states have different authorization requirements that impose some type of penalty); *see also, e.g.*, TradeWinds Envtl. Restoration, Inc. v. Brown Bros. Constr., L.L.C., 999 So. 2d 875, 878 (Ala. 2008) (noting that the failure of a foreign corporation to obtain authorization meant the foreign corporation could not enforce contracts entered into in Alabama).

29. *See* LORD, *supra* note 27, §19:65 ("An unauthorized foreign corporation is barred both from pursuits in state courts and from pursuing a diversity action in the federal court of the state.").

relief in that state's courts, and it may also result in an injunction from conducting business in that state.[30]

Embedded in the Arkansas Business Corporations Act of 1987, the Wingo Act governs the ability of foreign corporations to transact business in Arkansas.[31] The Wingo Act requires foreign corporations to obtain a certificate of authority from the Arkansas Secretary of State before transacting business within the state.[32] However, the Act only requires registration for certain types of business transactions in Arkansas.[33] The Act does not specify which transactions require registration but, rather, exempts a specific list of business transactions from registration.[34] While not exhaustive,[35] this list includes both the creation and enforcement of mortgages.[36]

The Wingo Act levies severe civil penalties against foreign corporations violating its provisions. A corporation transacting business in violation of the Wingo Act must pay a penalty of up to $5000 for every year (and partial year) it conducted business without authorization from the Secretary of State.[37] Additionally, the corporation is responsible for all fees that it should have paid to properly register.[38] Perhaps the most severe sanction a foreign corporation can face for violating the Wingo Act is an injunction on the company's activities in Arkansas.[39] These penalties restrain the corporation's rights and privileges,[40] including the ability to bring suit in Arkansas.[41]

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30. *Id.*

31. Act 958, 1987 Ark. Acts 2345, 2482 (codified as amended at ARK. CODE ANN. § 4-27-1501 (Repl. 2001)). The Act has been widely known as the Wingo Act since its original enactment in 1907. Robert A. Leflar, *Doing Business in Arkansas Under the Wingo Act*, 5 ARK. L. BULL. 3, 3 (1936).

32. ARK. CODE ANN. § 4-27-1501(a) (Repl. 2001).

33. *See* ARK. CODE ANN. § 4-27-1501(b) (providing a non-exhaustive list of eleven activities that "do not constitute transacting business").

34. ARK. CODE ANN. § 4-27-1501(b).

35. ARK. CODE ANN. § 4-27-1501(c).

36. ARK. CODE ANN. § 4-27-1501(b)(7)–(8).

37. ARK. CODE ANN. § 4-27-1502(d)(2) (Supp. 2013).

38. ARK. CODE ANN. § 4-27-1502(d)(1)(B).

39. ARK. CODE ANN. § 4-27-1502(d)(3)(B)(i).

40. ARK. CODE ANN. § 4-27-1502(d)(3)(B)(i).

41. ARK. CODE ANN. § 4-27-1502(a).

C. The National Bank Act

The third pertinent law addressed in the *JPMorgan* and *In re Johnson* cases is the National Bank Act (NBA).[42] The NBA governs the Office of the Comptroller of Currency (OCC) and regulates national banks.[43] The law allows commercial banks to organize under a charter granted by the OCC,[44] which oversees national banks, such as J.P. Morgan, and sets the "bank's powers, capital requirements, and lending limits."[45] A great advantage for national banks is their ability to use the NBA to preempt certain state laws, including banking and consumer-protection laws.[46]

The pertinent section of the NBA reviewed by the court in *JPMorgan* and *In re Johnson* was the provision granting incidental powers to national banks.[47] The NBA gives national banks the power to conduct business within states, including "all such incidental powers as shall be necessary to carry on the business of banking."[48] The statute lists "incidental powers" required for interstate banking, including receiving deposits, making loans, and negotiating documents that provide evidence of debt.[49] The NBA's construction suggests the list of incidental powers is non-exhaustive and that a national bank's powers to conduct

42. *See JPMorgan II*, 719 F.3d 1010, 1017-18 (8th Cir. 2013); *JPMorgan I*, 470 B.R. 829, 834-35 (E.D. Ark. 2012), *aff'd*, 719 F.3d 1010 (8th Cir. 2013); *In re* Johnson, 460 B.R. 234, 245 (Bankr. E.D. Ark. 2011), *rev'd sub nom. JPMorgan I*, 470 B.R. 829 (E.D. Ark. 2012).

43. National Bank Act, ch. 106, § 54, 13 Stat. 99, 116 (1864); *see also* Matthew J. Nance, Note, *The OCC's Exclusive Visitorial Authority Over National Banks After* Clearing House Ass'n v. Cuomo, 87 TEX. L. REV. 811, 813 (2009) ("[T]he National Bank Act laid out the powers and responsibilities of the OCC—including the power to appoint officials to examine national banks.").

44. *See* Christine E. Blair & Rose M. Kushmeider, *Challenges to the Dual Banking System: The Funding of Bank Supervision*, 18 FDIC BANKING REV. 1, 1 (2006) ("Since 1863, commercial banks in the United States have been able to choose to organize as national banks with a charter issued by the Office of the Comptroller of the Currency . . . ."), *available at* http://www.fdic.gov/bank/analytical/banking/2006mar/br18n1full.pdf.

45. *Id.*

46. *See id.* at 4, 14.

47. 12 U.S.C. § 24 (Seventh) (2012); *see JPMorgan II*, 719 F.3d at 1017 (8th Cir. 2013); *JPMorgan I*, 470 B.R. at 834-35; *Johnson*, 460 B.R. at 247.

48. 12 U.S.C. § 24 (Seventh).

49. 12 U.S.C. § 24 (Seventh).

business extend beyond the plain language of the statute.[50] In fact, anyone may consider any power to be incidental if it "is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the [NBA]."[51]

The incidental-powers clause is most advantageous for a national bank when the bank acts contrary to the laws of a state in which it operates because the clause applies when the OCC may preempt conflicting state law.[52] Preemption occurs when an irreconcilable conflict exists between federal and state law,[53] and the Supremacy Clause of the U.S. Constitution requires federal law to govern the conflict.[54] The conflict in the *JPMorgan* cases concerned whether the incidental-powers clause allows a national bank to use the ASFA when the bank is authorized under federal law but does not register with the Arkansas Secretary of State.[55]

When addressing the NBA's incidental powers, one must understand the two ways federal law may preempt state law. The first is express preemption, by which Congress constructs a statute to express explicitly its intent to preempt state law.[56] The second is implied preemption, which courts may apply when a federal statute is silent as to Congress's intent to preempt state law.[57] Two types of implied preemption exist: (1) field preemption;[58] and (2) conflict preemption.[59] Courts use field preemption when Congress

50. *See* Ralph F. Huck, *What is the Banking Business?*, 83 BANKING L.J. 491, 493-94 (1966) (noting that 12 U.S.C. § 21 provides that banks form "for the purpose of 'carrying on the business of banking'" (quoting 12 U.S.C. § 21 (2012))).

51. *See* 10 AM. JUR. 2D *Banks and Financial Institutions* § 496 (1997).

52. Blair & Kushmeider, *supra* note 44, at 4; *see also* 10 AM. JUR. 2D *Banks and Financial Institutions* § 493.

53. Metrobank v. Foster, 193 F. Supp. 2d 1156, 1161 (S.D. Iowa 2002) (quoting Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 31 (1996)).

54. *Id.* (citing U.S. CONST. art. VI, cl. 2).

55. *JPMorgan II*, 719 F.3d 1010, 1014 (8th Cir. 2013); *JPMorgan I*, 470 B.R. 829, 834-35 (E.D. Ark. 2012), *aff'd*, 710 F.3d 1010 (8th Cir. 2013); *In re* Johnson, 460 B.R. 234, 245 (Bankr. E.D. Ark. 2011), *rev'd sub nom. JPMorgan I*, 470 B.R. 829 (E.D. Ark. 2012).

56. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citing City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

57. *See id.* (citing *City of Burbank*, 411 U.S. at 633; *Rice*, 331 U.S. at 230).

58. *See, e.g.*, *Rice*, 331 U.S. at 230.

59. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

clearly intended federal law to cover the subject area thoroughly, leaving no room for state law.[60] Conflict preemption arises when the state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[61] The application of these different types of preemption hinges on statutory interpretation, specifically whether Congress intended to grant national banks the power to foreclose as incidental to the business of banking.

D. Principles of Statutory Interpretation in Arkansas

Statutory interpretation in Arkansas requires courts to "give effect to the intent of the legislature."[62] This rule of construction is absolute; therefore, all other "interpretative guides are . . . subordinate" to the General Assembly's intent.[63] Several methods exist to interpret the General Assembly's intent, including the evaluation of the statute's language, "the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, [and] legislative history."[64] Arkansas courts seem to place the greatest weight in determining legislative intent on the plain language of the statute at issue.[65]

Typically, a court's first decision when interpreting a statute is whether to construe that statute strictly or broadly.[66] Strict construction requires courts to interpret a statute narrowly.[67] Essentially, when a court strictly construes a statute, "nothing [can] be taken as intended that

60. *See, e.g.*, *Rice*, 331 U.S. at 230.

61. *Hines*, 312 U.S. at 67.

62. Ward v. Doss, 361 Ark. 153, 158-59, 205 S.W.3d 767, 770 (2005) (citing Barclay v. First Paris Holding Co., 344 Ark. 711, 42 S.W.3d 496 (2001)).

63. Holt v. City of Maumelle, 302 Ark. 51, 53, 786 S.W.2d 581, 583 (1990) (citing Hice v. State, 268 Ark. 57, 593 S.W.2d 169 (1980)).

64. Henson v. Fleet Mortg. Co., 319 Ark. 491, 495, 892 S.W.2d 250, 252 (1995) (citing McCoy v. Walker, 317 Ark. 86, 876 S.W.2d 252 (1994); Gritts v. State, 315 Ark. 1, 864 S.W.2d 859 (1993)).

65. *See, e.g.*, Mamo Transp., Inc. v. Williams, 375 Ark. 97, 100, 289 S.W.3d 79, 83 (2008); Cent. & S. Cos. v. Weiss, 339 Ark. 76, 80, 3 S.W.3d 294, 297 (1999).

66. *See* Michael W. Mullane, *Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach*, 2005 ARK. L. NOTES 73, 75.

67. Lawhon Farm Servs. v. Brown, 335 Ark. 276, 984 S.W.2d 1 (1998).

is not clearly expressed."[68] To narrowly interpret a statute, a court must use only the plain meaning of the statute's language.[69] Strict construction precludes inference and requires that the statute clearly state the General Assembly's intent.[70] Statutes requiring strict construction are those "in derogation of or at variance with the common law."[71] Because the ASFA is in derogation of common law, Arkansas courts must strictly construe the Act and evaluate its plain meaning.[72]

Interpreting the plain language of a statute requires "giving [its] words their ordinary and usually accepted meaning in common language."[73] Courts must evaluate the plain language of not only the statute in question but also each word within the statute.[74] Thus, Arkansas courts must determine a statute's intent by considering both the statute as a whole and certain words in the statute.[75] If possible, a court must give "some meaning and some effect . . . to the wording of the law."[76] Therefore, Arkansas courts should interpret statutes such that no word is uncounted, "superfluous, or insignificant."[77]

However, reading a statute for its plain language and individual wording is insufficient. Although the words and phrases of a statute are excellent indicators of the General Assembly's intent, the language of the statute as a whole is most revealing.[78] The law in question may only be a portion

68. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 151, 41 S.W.3d 822, 825 (2001) (citing Thomas v. State, 315 Ark. 79, 864 S.W.2d 835 (1993)).

69. Elam v. Hartford Fire Ins. Co., 344 Ark. 555, 568, 42 S.W.3d 443, 451 (2001) (citing Holaday v. Fraker, 323 Ark. 522, 915 S.W.2d 280 (1996)).

70. Mullane, *supra* note 66, at 76.

71. Henson v. Fleet Mortg. Co., 319 Ark. 491, 497, 892 S.W.2d 250, 253 (1995) (citing Simmons First Nat'l Bank v. Abbot, 288 Ark. 304, 705 S.W.2d 3 (1986)).

72. *See id.*

73. Stephens v. Ark. Sch. for the Blind, 341 Ark. 939, 945, 20 S.W.3d 397, 401 (2000) (citing Ford v. Keith, 338 Ark. 487, 996 S.W.2d. 20 (1999)).

74. *See, e.g.*, Glover v. Henry, 231 Ark. 111, 113-14, 328 S.W.2d 382, 384 (1959) (determining the meaning of the word "'district'").

75. *See id.* at 114, 328 S.W.2d at 384 (requiring the interpretation of an individual word "in the light of its context").

76. *Id.* at 118, 328 S.W.2d at 386-87 (citing Cypress Creek Drainage Dist. v. Wolfe, 109 Ark. 60, 158 S.W. 960 (1913)).

77. *Ford*, 338 Ark. at 494, 996 S.W.2d at 25.

78. *See* Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 993 (8th Cir. 1945) (quoting Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943)).

of a statute or a statute within an act, but in either case, the court must read the statute and act as a whole.[79] In doing so, the court will assimilate the details of the statute's language with the General Assembly's purpose and intent in creating the statute, thus giving the statute its proper meaning.[80]

Two statutes may not conflict with one another when the result is an inconsistency within the law.[81] When two statutes conflict, Arkansas law requires that they are open to the interpretation of the court.[82] The court must interpret the competing statutes and determine which statute will control.[83] The determining factor is the specificity or generality of the statutes in question,[84] with Arkansas law requiring the more specific statute to control.[85] Accordingly, courts harmonize two or more seemingly conflicting statutes whenever possible. [86]

When federal and state statutes conflict, the question becomes one of preemption. Congressional intent determines whether a federal statute will preempt a state statute.[87] "If Congress intends a federal statute to set aside the laws of a State, then the Supremacy Clause of the United States Constitution requires the courts follow federal law."[88] A common test courts employ is whether the state law stands "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[89] That is, if the state statute is in "irreconcilable conflict" with the federal law, then courts conclude that Congress intended to resolve the conflict in favor of federal law.[90]

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79. *See* Fiser v. Clayton, 221 Ark. 528, 536, 254 S.W.2d 315, 318 (1953) (citing *Elizabeth Arden Sales Corp.*, 150 F.2d at 993).

80. *See Elizabeth Arden Sales Corp*., 150 F.2d at 993 (quoting *C. M. Joiner Leasing Corp*., 320 U.S. at 350-51).

81. *See* Williams v. City of Pine Bluff, 284 Ark. 551, 554, 683 S.W.2d 923, 925 (1985).

82. *See id.*

83. *See, e.g.*, Raley v. Wagner, 346 Ark. 234, 240, 57 S.W.3d 683, 687 (2001).

84. Shelton v. Fiser, 340 Ark. 89, 94, 8 S.W.3d 557, 560 (2000).

85. *Id.*

86. *See* Bolden v. Watt, 290 Ark. 343, 346, 719 S.W.2d 428, 429 (1986) (citing Sargent v. Cole, 269 Ark. 121, 598 S.W.2d 749 (1980)).

87. *See* Metrobank v. Foster, 193 F. Supp. 2d 1156, 1161 (S.D. Iowa 2002).

88. *Id.* (citing U.S. CONST. art. VI, cl. 2).

89. Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 31 (1996) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

90. *Id*. (internal quotation marks omitted).

III. *IN RE JOHNSON* AND *JPMORGAN I*

A. Background

In re Johnson and *JPMorgan I* represent the consolidation of three separate bankruptcy cases: Johnson, Peeks, and Estes.[91] In Johnson and Estes's cases, Chase Bank initiated non-judicial-foreclosure proceedings against the debtors after they defaulted on their mortgage payments.[92] Prior to the completion of the foreclosures, each debtor filed for Chapter 13 bankruptcy.[93] Upon filing, an automatic stay halted the foreclosure proceedings.[94] Chase Bank and J.P. Morgan filed a proof of claim[95] against each debtor, claiming the amount of the secured debt and the arrearage for costs and fees associated with each foreclosure.[96] After filing the proof of claim against Estes and Johnson, Chase Bank transferred its proofs of claim to J.P. Morgan.[97] J.P. Morgan then filed an objection to the confirmation of plan[98] in each debtor's case.[99]

The primary issue in these cases was whether J.P. Morgan was entitled to the total amounts listed on its proofs of claim.[100] The debtors argued that J.P. Morgan could not use non-judicial foreclosure against them because the ASFA required J.P. Morgan "to be authorized to do business in Arkansas," and J.P. Morgan had no such authorization.[101] Failure to comply with this requirement under the ASFA meant J.P. Morgan could not enforce the non-judicial

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91. *In re* Johnson, 460 B.R. 234, 238-239 (Bankr. E.D. Ark. 2011), *rev'd sub nom. JPMorgan I*, 470 B.R. 829 (E.D. Ark. 2012).

92. *Id.* at 239.

93. *Id.* Section 301 of the Bankruptcy Code governs the administration and filing of voluntary petitions, including Chapter 13 petitions filed by individual debtors. 11 U.S.C. § 301 (2006).

94. *Johnson*, 460 B.R. at 239; *see also* 11 U.S.C. § 362(a) (2006) (governing automatic stays).

95. During Chapter 13 cases, the creditor must file a proof of claim to receive payment from the bankruptcy estate. 11 U.S.C. § 1305 (2006).

96. *Johnson*, 460 B.R. at 239.

97. *Id.*

98. *See* 11 U.S.C. § 1324(a) (2006) (governing hearings on the confirmation of the plans).

99. *Johnson*, 460 B.R. at 238.

100. *Id.* at 239-40.

101. *Id.* at 240.

foreclosures performed and, thus, could not collect against the debtors in bankruptcy proceedings.[102]

J.P. Morgan argued that although it was not authorized to do business under the ASFA, it was qualified to use non-judicial foreclosure against the debtors.[103] J.P. Morgan raised three arguments in support of its position: (1) the ASFA allowed J.P. Morgan to perform non-judicial foreclosures without being authorized; (2) the conflicting Wingo Act superseded the ASFA; and (3) the NBA federally preempted the ASFA.[104]

In the subsequent appeal to the federal district court, two new debtors joined the litigation: Rivera and Jones.[105] Rivera sought to create a class of individuals in Arkansas against whom J.P. Morgan instituted non-judicial foreclosures.[106] In the complaint, Rivera asserted that because J.P. Morgan was not authorized to perform non-judicial foreclosures, it injured "hundreds, if not thousands of Arkansas residents throughout the state during the past five years."[107] The Joneses' case involved two debtors attempting to prevent J.P. Morgan from performing a non-judicial foreclosure against their property.[108] The Joneses argued that J.P. Morgan could not "seek [to] foreclose on their home using the [ASFA]" because J.P. Morgan was not authorized to do business in Arkansas.[109] After filing the case in state court, the Joneses received a temporary injunction to prevent the foreclosure, and J.P. Morgan removed the case to federal court on the basis of diversity of citizenship.[110]

B. The Bankruptcy Court's Opinion from *In re Johnson*

The Bankruptcy Court for the Eastern District of Arkansas heard the consolidated hearing on J.P. Morgan's

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102. *Id.*
103. *Id.*
104. *Johnson*, 460 B.R. at 243-45.
105. *JPMorgan I*, 470 B.R. 829, 831 (E.D. Ark. 2012), *aff'd*, 719 F.3d 1010 (8th Cir. 2013).
106. *Id*. at 832.
107. *Id.* (internal quotation mark omitted).
108. *Id.*
109. *Id.*
110. *JPMorgan I*, 470 B.R. at 832.

objection to the confirmation of plan for Johnson, Peeks, and Estes in July 2011.[111] The court held that J.P. Morgan was not authorized to perform non-judicial foreclosures.[112] Further, the court held that the Wingo Act did not supersede the ASFA based on the principles of statutory interpretation.[113]

The court looked to Arkansas law requiring that in the case of two conflicting statutes, the more specific statute controls over the general.[114] The court held that the Wingo Act's exclusions are specific as to "[s]ecuring or collecting debts or enforcing mortgages," which is a broad construction.[115] However, the ASFA provides specifically for the non-judicial-foreclosure process, including who may perform foreclosures, who is authorized to perform them, and the procedure involved.[116] In comparing the two statutes, the court drew the conclusion that because the ASFA is specific as to non-judicial foreclosures and the process it requires companies to use, the ASFA is the more specific statute compared to the Wingo Act.[117]

The court also held that the general provision in the Wingo Act does not include the performance of non-judicial foreclosures within the enforcement of mortgages.[118] Under the Wingo Act, J.P. Morgan could "bring a cause of action in the Arkansas courts in furtherance of its collection activities, without a certificate of authority."[119] The court reasoned that because the Wingo Act did not require J.P. Morgan to obtain authorization from the Secretary of State, J.P. Morgan could have employed judicial-foreclosure proceedings to collect from the debtors.[120] The court explained that while the Wingo Act allowed judicial foreclosure without a certificate of authority, the extension

111. *In re* Johnson, 460 B.R. 234, 238 (Bankr. E.D. Ark. 2011), *rev'd sub nom. JPMorgan I*, 470 B.R. 829 (E.D. Ark. 2012).

112. *Id.* at 248.

113. *Id.* at 249.

114. *Id.* at 243 (citing Ozark Gas Pipeline Corp. v. Ark. Pub. Serv. Comm'n, 342 Ark. 591, 602, 29 S.W.3d 730, 756 (2000)).

115. *Id.* at 243 (quoting ARK. CODE ANN. § 18-27-1501(b)(8) (Repl. 2003)).

116. *Johnson*, 460 B.R. at 243.

117. *Id.*

118. *Id.* at 243-44.

119. *Id.* at 244.

120. *Id. Johnson*, 460 B.R. at 244.

of that exception to include non-judicial foreclosures was unwarranted.[121] The interpretation of the exclusion to include non-judicial foreclosures was, in the opinion of the court, "far too broad."[122]

The court rejected J.P. Morgan's reliance on *Omni Holding & Development Corp. v. C.A.G. Investments, Inc.*[123] In *Omni*, the Arkansas Supreme Court held that a Louisiana investment group's debt-collection activities in Arkansas did not fall under the exclusions of the Wingo Act.[124] J.P. Morgan relied on *Omni*, arguing that foreign corporations involved in "collection activities" did not need authorization to perform a non-judicial foreclosure.[125] The court rejected this argument, holding that "*Omni* only stands for the proposition that a creditor can file a lawsuit in furtherance of collection activities without a certificate of authority."[126] Non-judicial foreclosures, in the court's opinion, did not fall within the category of simple "collection activities"; therefore, *Omni* did not permit J.P. Morgan to perform non-judicial foreclosures.[127]

The *Johnson* court also addressed the question of federal preemption in dicta.[128] The court examined the interaction between the NBA, the ASFA, and the Wingo Act, holding that federal and state law did not conflict.[129] Accordingly, federal preemption did not apply, and the ASFA required J.P. Morgan to register with the Secretary of State.[130] Looking at the three different types of federal preemption, the court found that none required federal preemption of Arkansas's authorization requirements.[131]

First, analyzing express preemption, the court reasoned the lack of an express provision in the NBA regarding authorization of non-judicial foreclosure indicated that

121. *Johnson*, 460 B.R. at 244.
122. *Id.*
123. *Id.*
124. Omni Holding & Dev. Corp. v. C.A.G. Invs., Inc., 370 Ark. 220, 226, 258 S.W.3d 374, 379 (2007).
125. *Johnson*, 460 B.R. at 244.
126. *Id.* (citing *Omni*, 370 Ark. at 226, 258 S.W.3d at 374).
127. *Id.*
128. *Id.* at 245.
129. *Id.* at 248.
130. *Johnson*, 460 B.R. at 248.
131. *Id.* at 245.

Congress intended state law to control these issues.[132] Without any provision in the NBA to contradict the authorization requirements in Arkansas law, an obstacle blocking Congress's policies or objectives does not exist.[133] Therefore, express preemption did not apply.

Second, under field preemption, the court held that federal preemption of the ASFA and the Wingo Act was inappropriate.[134] The court concluded that debt collection was an area of law reserved for the state.[135] Debt-collection activities, according to the court, included non-judicial foreclosures under the ASFA.[136] The court ruled that because the NBA's provisions were not "so pervasive as to . . . [leave] no room for" state law, field preemption did not apply.[137]

Finally, the court rejected the argument for conflict preemption for several reasons. First, the court found that J.P. Morgan could comply with both statutes; it could easily register with the Secretary of State under Arkansas law and comply with the NBA.[138] The court also held that Arkansas law does not interfere significantly with the objectives of the NBA because the Arkansas statutes are not "duplicative" of federal laws.[139] The court reasoned that the ASFA did not impair J.P. Morgan's incidental powers under the NBA.[140] Finally, the court found conflict preemption inapplicable because Arkansas's authorization requirement provided J.P. Morgan with recourse—if J.P. Morgan chose not to register with the Secretary of State, it could still employ judicial foreclosure.[141]

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132. *Id.*
133. *Id.*
134. *Id.* at 246.
135. *Johnson*, 460 B.R. at 246.
136. *Id.* at 247.
137. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
138. *Id.*
139. *Id.*
140. *Johnson*, 460 B.R. at 247; *see also* 12 U.S.C. § 24 (Seventh) (2006) (containing no authorized-to-do-business requirement).
141. *Johnson*, 460 B.R. at 247.

C. The District Court's Opinion in *JPMorgan I*

Following the decision from the bankruptcy court, J.P. Morgan appealed to the United States District Court for the Eastern District of Arkansas.[142] The district court in *JPMorgan I* reversed the bankruptcy court's decision, holding that J.P. Morgan was authorized to perform non-judicial foreclosures.[143] The court relied on principles of statutory interpretation, applying them to reach a different conclusion than the bankruptcy court.[144] The *JPMorgan I* court sought to interpret the conflicting statutes in a manner that "makes them consistent, harmonious, and sensible."[145]

Accordingly, the court first addressed the relevant ASFA language in section 18-50-117 of the Arkansas Code, which provides: "'No . . . company, association, fiduciary, or partnership, either domestic or foreign, shall avail themselves of the procedures [of non-judicial foreclosure] unless authorized to do business in this state.'"[146] The court then isolated a separate ASFA provision—subsection 18-50-102(a)(2)—that allows any bank or loan entity to perform non-judicial foreclosures if "authorized to do business in Arkansas pursuant to either state law or federal law."[147] The court's construction of section 18-50-117 in conjunction with subsection 18-50-102(a)(2) authorized a company to do business "either by state or federal law," allowing J.P. Morgan to avoid complying with the Wingo Act.[148]

The court acknowledged that the Wingo Act requires business entities to be certified by the Secretary of State.[149] It further refuted the Act's authority by pointing to an Arkansas statute that requires banking entities seeking to transact specific types of business in Arkansas to receive

142. *JPMorgan I*, 470 B.R. 829, 829 (E.D. Ark. 2012), *aff'd*, 719 F.3d 1010 (8th Cir. 2013). On appeal, two additional cases were consolidated with the original three bankruptcies. *Id.* at 832.

143. *Id.* at 837.

144. *See id.* at 835.

145. *Id.* (quoting Mamo Transp., Inc. v. Williams, 375 Ark. 97, 100, 289 S.W.3d 79, 83 (2008)).

146. *JPMorgan I*, 470 B.R. at 836 (quoting ARK. CODE ANN. § 18-50-117 (Repl. 2003)).

147. *Id.* (citing ARK. CODE ANN. § 18-50-102(a)(2) (Supp. 2013)).

148. *Id.* at 837.

149. *Id.* at 836 (citing ARK. CODE ANN. § 4-27-1503 (Repl. 2001)).

certification from the Arkansas Bank Commissioner, rather than from the Secretary of State.[150] Thus, the court seemingly dismissed the Wingo Act in light of the ASFA's allowance for businesses to be authorized under either state or federal law and the banking statute's requirement that foreign banking institutions, "in some instances," must obtain authorization from the Bank Commissioner.[151]

Ultimately, the court found the Wingo Act of little help in interpreting the ASFA's phrase, "authorized to do business in this state."[152] The court concluded that this phrase is "the broadest language available in the light of" the Wingo Act and the Arkansas banking statute.[153] Finding no limitations in the language, the court determined that the phrase does not specifically require certification from the Secretary of State but, instead, requires only "authorization," which may come from either Arkansas law or federal law.[154]

Moreover, the court compared the broadness of the ASFA's phrase "authorized to do business in this state" with the specific nature of the Wingo Act.[155] The court held that the Wingo Act's specific language requiring foreign entities to register with the Secretary of State indicated the General Assembly's ability and intent to impose limitations in certain instances.[156] Essentially, when the General Assembly intends to impose a certification requirement, it knows how to do so.[157] The broad language of the ASFA indicated the General Assembly's intent for foreign companies not to concern themselves with the stringent requirements of the Wingo Act.[158] "Had the General Assembly intended to require that an entity obtain a certificate of authority from the Arkansas Secretary of State, . . . the [ASFA] would have said so."[159] Following this logic, the court ultimately held

150. *Id.* (quoting ARK. CODE ANN. § 23-48-1001 (Repl. 2012)).
151. *JPMorgan I*, 470 B.R. at 836-37.
152. *See id.*
153. *Id.* at 836.
154. *Id.* at 837.
155. *See id.* (internal quotation marks omitted).
156. *JPMorgan I*, 470 B.R. at 837.
157. *Id.*
158. *Id.*
159. *Id.*

that so long as J.P. Morgan was authorized to do business in Arkansas—whether through state or federal law—registration under the Wingo Act was not required.[160]

The *JPMorgan I* court did not directly address the question of federal preemption. Since the court held that either state or federal law could authorize a lender under the ASFA, discussion of federal preemption was unnecessary.[161] In conclusion, J.P. Morgan's status as a national bank under the control of the OCC gave it sufficient authority to perform non-judicial foreclosures in Arkansas.[162]

IV. ANALYSIS

A. The Eighth Circuit Appropriately Affirmed the District Court

In the event of default, a lender undoubtedly has the right to collect on its mortgage. However, in the best interests of all parties, the lender should follow all the necessary steps to enforce the defaulted mortgage. In light of the divergent opinions from *In re Johnson* and *JPMorgan I*, the Eighth Circuit correctly affirmed the district court.

In addressing whether J.P. Morgan could collect costs and fees associated with non-judicial foreclosure, the Eighth Circuit resolved two critical issues. First, the Eighth Circuit correctly addressed the central question of whether a nationally authorized state bank can perform non-judicial foreclosures under the ASFA.[163] Additionally, unlike the lower courts, the Eighth Circuit analyzed the next major issue: If a nationally chartered bank can use federal law to perform non-judicial foreclosures, does the NBA provide sufficient authorization?[164] The court correctly answered both questions in the affirmative.[165]

Like previous courts, the Eighth Circuit relied on Arkansas law and principles of statutory interpretation;[166] however, unlike the lower courts, the Eighth Circuit

160. *Id.*
161. *JPMorgan I*, 470 B.R. at 837.
162. *Id.*
163. *JPMorgan II*, 719 F.3d 1010, 1014 (8th Cir. 2013).
164. *Id.*
165. *See id.*
166. *Id.* at 1015.

performed a strict, plain-language interpretation of section 18-50-117 of the ASFA.[167] Under a narrow reading of section 18-50-117, as required by Arkansas's statutory-interpretation jurisprudence, the statute is ambiguous.[168] Section 18-50-117 fails to provide definitive guidance on the authorization requirements for the non-judicial foreclosure process.[169] As the Eighth Circuit correctly noted, "authorized to do business in this state" merely requires a national bank to be authorized; the language does not specify how to obtain authorization.[170]

The Eighth Circuit, before declaring section 18-50-117 ambiguous, properly evaluated the ASFA as a whole.[171] In reviewing all of the provisions of the ASFA, the Eighth Circuit focused on language within the Act that allowed the court to discern the Arkansas General Assembly's intent and, thus, clarify the ambiguity in section 18-50-117.[172] Instead of looking outside the ASFA to resolve the section's ambiguity, the court used subsection 18-50-102(a) to show that the General Assembly intended for national banks to be authorized under either Arkansas or federal law.[173] The General Assembly, as the court correctly surmised, would not allow a national bank authorized under federal law to be a trustee in a non-judicial foreclosure without also allowing the bank to perform a non-judicial foreclosure absent state authorization.[174] To resolve this conflict, the Eighth Circuit correctly held that to resolve this conflict, section 18-50-117 means that a national bank can take advantage of the non-judicial-foreclosure process through either state or federal authorization.[175]

Since the ASFA, as a whole, resolves the ambiguity of section 18-50-117, a thorough analysis of its interaction with

167. *See id.* at 1015-17.
168. *JPMorgan II*, 719 F.3d at 1015.
169. *Id.* (quoting Mamo Transp., Inc. v. Williams, 375 Ark. 97, 289 S.W.3d 79, 83 (2008)).
170. *Id.* at 1015-16.
171. *Id.* at 1016.
172. *Id.*
173. *JPMorgan II*, 719 F.3d at 1016.
174. *Id.* at 1016-17.
175. *Id.*

the Wingo Act was unnecessary.[176] Instead of focusing on its strict interaction with the ASFA, the Eighth Circuit found that the Wingo Act helped demonstrate the General Assembly's intent.[177] The Wingo Act specifically requires a foreign entity to register with the Secretary of State to perform certain business activities in Arkansas.[178] The Eighth Circuit—and the district court to a lesser extent—explained that a plain reading of the Wingo Act reveals that when the Arkansas General Assembly intends for a business to be authorized under Arkansas law, it will set forth those requirements in the statute's language.[179] Thus, had the General Assembly intended for national banks to register under Arkansas law before conducting non-judicial foreclosures, it would have set forth those requirements in section 18-50-117.[180]

Unlike the lower courts, the Eighth Circuit correctly held that the NBA authorized J.P. Morgan to perform non-judicial foreclosures under the ASFA[181] In determining that J.P. Morgan possessed the power to take advantage of the ASFA, the court looked to whether the ability to foreclose was an incidental power to banking.[182] Because mortgage lending is an enumerated power granted to national banks, the court properly considered whether performing foreclosures is closely related to that power.[183] Since it would be impracticable for a bank to hold a mortgage without having the ability to also foreclose on that mortgage, foreclosure is a closely related activity.[184] The Eighth Circuit correctly held that because foreclosure is so closely related and necessary to carrying out a mortgage, it is an incidental power that grants national banks the ability to use the nonjudicial-foreclosure process in Arkansas.[185]

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176. *See id.* at 1016.
177. *Id.*
178. ARK. CODE ANN. § 4-27-1501 (Repl. 2001).
179. See *JPMorgan II*, 719 F.3d at 1016; *JPMorgan I*, 470 B.R. 829, 836 (E.D. Ark. 2012), *aff'd*, 719 F.3d 101 (8th Cir. 2013).
180. *JPMorgan II*, 719 F.3d at 1016.
181. *Id.* at 1017.
182. *Id.*
183. *Id.*
184. *Id.* at 1018.
185. *JPMorgan II*, 718 F.3d at 1018.

B. Consequences of the Eighth Circuit's Decision

The Eighth Circuit's decision in *JPMorgan II* promises to have far-reaching consequences, especially in the current economic climate. Perhaps the greatest fallback of the court's decision is that it may weaken the protection that state registration affords the debtor. Non-judicial foreclosure strips the debtor of due-process rights, including the right to a hearing and adjudication.[186] Registration with the Secretary of State adds a layer of security for the debtor, ensuring that the corporation may be subject to the laws and processes of Arkansas.[187] Registration also protects foreign lenders by providing them due-process rights.[188] Although, in light of the Eighth Circuit's decision, registering with the Arkansas Secretary of State is not required, doing so may ultimately offer greater certainty to both lenders and debtors during the non-judicial-foreclosure process.

One positive aspect of the Eighth Circuit's decision is the promotion of judicial economy and security in the lending process. After the bankruptcy court decided *In re Johnson*, non-judicial foreclosures came to a halt throughout the state.[189] Had the Eighth Circuit reversed the district court and held that J.P. Morgan was not authorized to perform non-judicial foreclosures in Arkansas, the entire process could have remained stagnant for a considerable length of time. As mortgage lending would be futile without the ability to foreclose, many lenders would be unwilling to make loans that they might not collect.[190] The Eighth Circuit's decision affected more than the foreclosure process—it affected and encouraged lenders' willingness to make loans secured by mortgages altogether.

One of the most positive outcomes of *JPMorgan II* is that it prevented flooding Arkansas courts with litigation. A reversal of the district court could have increased litigation

186. *See* Alexander et al., *supra* note 11, at 350.

187. *See id.*

188. *See* ARK. CODE ANN. § 4-27-1501 (Repl. 2001).

189. Ethan Nobles, *Bankruptcy Court Ruling Slows Down Foreclosure Sales in State*, FIRST ARK. NEWS (Nov. 12, 2011), http://firstarkansasnews.net/2011/11/bankruptcy-court-ruling-slows-down-foreclosure-sales-in-state.

190. *JPMorgan II*, 718 F.3d at 1016-17.

in two ways: (1) through the flood of cases from injured borrowers who were wrongly foreclosed upon by unauthorized institutions; and (2) through the increase of judicial foreclosures. The court's decision to affirm the district court sidestepped this potential deluge, preventing highly litigious fallout. A reversal of the district court might have produced class-action lawsuits filed by injured borrowers—not only in Arkansas but also across the nation in states with similar laws. Finally, requiring national banks to register with the Arkansas Secretary of State would leave lenders with judicial foreclosure as the only viable option. This would clog the courts while lending institutions secured authorization or made decisions about proceeding on judicial foreclosures. For the foregoing reasons, the Eighth Circuit's decision in *JPMorgan II* may have a net positive impact on Arkansas foreclosure law.

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