

Issues in Subprime Litigation: Removal Despite Lack of Federal Claims

By: Travis P. Nelson¹

Introduction

As the subprime meltdown continues to evolve, we are seeing attorneys for aggrieved consumers file individual and class action lawsuits alleging a variety of novel and not-so-novel theories as to why their clients are not liable for delinquent or defaulted mortgages. Increasingly, in order to get what they perceive as a more favorable forum, consumers are pleading what would otherwise be causes of action under the Truth in Lending Act (TILA),² Real Estate Settlement Procedures Act (RESPA),³ or Fair Debt Collections Practices Act (FDCPA),⁴ as state causes of action ranging from breach of contract, to violation of state substantive disclosure or lending laws, to state unfair or deceptive acts or practices (UDAP)⁵ laws. The goal of proceeding under state claims is often to either seek state law remedies, or to retain jurisdiction in more favorable state courts. Notwithstanding these creative measures (“artful pleading”), there remain valid approaches that bank counsel can take to get the case removed to a more favorable federal court.

Overview of the Rule

Any civil action brought in state court may be removed by the defendant to the federal district court in the district where such action is pending, if the district court would have original jurisdiction over the matter.⁶ Where the defendant seeks removal based on federal question jurisdiction, the district court’s jurisdiction is: “all civil actions arising under the Constitution, laws, or treaties of the United States.”⁷

¹ Travis P. Nelson (nelson@pepperlaw.com) is an attorney in the Philadelphia office of Pepper Hamilton, LLP, where he practices in the Financial Services Group and White Collar and Corporate Investigations Practice Groups. Mr. Nelson is formerly with the Enforcement Division at the Office of the Comptroller of the Currency, and served a term on the Maryland State Banking Board. He regularly assists financial institutions and their insiders with regulatory compliance, enforcement, litigation, and internal investigations.

² 15 U.S.C. § 1601 *et seq.*

³ 15 U.S.C. § 2601 *et seq.*

⁴ 15 U.S.C. § 1695 *et seq.*

⁵ Examples of UDAP laws include California’s Cal. Bus. & Prof. Code § 17200 *et seq.*, or Pennsylvania’s 73 P.S. § 201 *et seq.*

⁶ 28 U.S.C. § 1441(a); *Franchise Tax Bd. of Calif. v. Constr. Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 7-8 (1983).

⁷ 28 U.S.C. § 1331, 1441(b); *Franchise Tax Bd.* 463 U.S. at 8.

The challenge for bank counsel arises when the plaintiff does not plead any federal causes of action, and the complaint does not facially present a federal question.⁸ A plaintiff's claims may nevertheless "arise under federal law," for as the U.S. Supreme Court has long recognized, federal question jurisdiction also lies "over state-law claims that implicate significant federal issues."⁹ A complaint characterized by "artful pleading," the practice of carefully drafting a complaint so as to avoid removal, is one of those "less frequently encountered cases"¹⁰ in which federal jurisdiction is proper despite the plaintiff's failure to plead federal causes of action. To assess whether federal question jurisdiction is proper requires the reviewing court to apply the Supreme Court's *Grable* decision, where in 2005 "the Court clarified that the existence of a private cause of action is not the litmus test for the existence of a federal question, as many federal courts had previously held."¹¹ Rather, the proper test for exercising federal jurisdiction is whether "a state-law claim necessarily raises a stated federal issue, actually disputed and substantial, without disturbing any congressionally approved balance of federal and state judicial responsibilities."¹² Thus, the test under *Grable* is: "First the district courts should ask whether the 'state-law claim necessarily raises a federal issue, [which is] actually disputed and substantial.'"¹³ "Second, courts must examine whether 'the federal forum may entertain [the issue] without disturbing any congressionally approved balance of federal and state judicial responsibilities.'"¹⁴ "Despite this added clarity, the Supreme Court made clear that there is no bright-line rule for ascertaining whether a plaintiff's state law claim gives rise to federal question jurisdiction."¹⁵

⁸ "[E]ven if both federal and state law provide a remedy, the plaintiff can avoid federal jurisdiction by pleading solely state law claims – at the price, of course, of foregoing the federal remedies." *Ball v. Argent Mortgage Company, LLC*, 2007 U.S. Dist. Lexis 16370 (S.D. Miss. 2007). See also, *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (stating that "when both federal and state remedies are available, plaintiff's election to proceed exclusively under state law does not give rise to federal jurisdiction.").

⁹ *Grable & Sons Metal Products, Inc., v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

¹⁰ *Id.*

¹¹ *Zahora v. Precision Automotive Corp.*, 2007 U.S. Dist. Lexis 17155, *6 (E.D. 2007), citing *Grable* at 314.

¹² *Id.*

¹³ *Chirik v. TD Banknorth, N.A.*, 2008 U.S. Dist. Lexis 3939, *9 (E.D. Pa. 2008). See also *Grable* at 313 ("It has become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a *substantial* one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

¹⁴ *Id.* See also *Grable*, at 313 ("But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.").

¹⁵ *Chirik* at *10.

In *Grable*, the Supreme Court addressed a case where a plaintiff filed a quiet title claim in state court under Michigan law, specifically Mich. Ct. Rule 3.411(b)(2)(c), in which the plaintiff premised its superior title claim on a failure by the IRS to give it adequate notice as defined by federal law.¹⁶ The Supreme Court affirmed that removal was proper and that the district court properly exercised federal question jurisdiction over *Grable*'s quiet title claim. First, the Court reasoned that the success of *Grable*'s suit turned directly on the "meaning of [a] federal statute [that was] actually in dispute."¹⁷ Second, the Court observed that "the meaning of a federal tax provision is an important issue of federal law that sensibly belongs in federal court."¹⁸ Third, the Court viewed the availability of a federal forum for both the government and private litigants as "valuable" because of the opportunity to appear "before judges used to federal tax matters."¹⁹ And fourth, the Court believed that because it would be "the rare state title case that raises a contested matter of federal law," exercising federal question jurisdiction in this instance will "portend only a microscopic effect on the federal-state division of labor."²⁰

Relevant Precedent

Various federal district and appellate courts have applied *Grable* to removal actions where the complaint at issue pled only state law causes of action.

In *Pennsylvania Employees Benefit Trust Fund v. Eli Lilly & Co., Inc. et al.*,²¹ the state trust fund (the "Fund") sued defendants for illegally promoting their respective drugs for non-medically accepted indications and non-medically necessary uses. The complaint alleged a series of claims arising under state law, specifically: failure to warn, negligence, breach of warranty, fraud and misrepresentation, misrepresentation under the Restatement of Torts, unjust enrichment, and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). The defendants, in support of removal, argued that removal was proper because the marketing of prescription drugs is extensively regulated by the Food and Drug Administration and that resolution of the plaintiff's claims necessarily turned on construction and application of federal law, namely, the federal Food Drug and Cosmetic Act ("FDCA"). The court held that remand was proper because: (1) unlike *Grable*, the case involved violations of Pennsylvania law that were fact-specific and not based on the meaning of a federal statute, and (2) the federal issues were not "substantial" because, among other reasons, "there is no meaningful indication that Congress intended to confer federal jurisdiction over state law causes of actions implicating the FDCA."²² As to this latter point, the court noted:

¹⁶ *Grable* at 314.

¹⁷ *Grable* at 315.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 2007 U.S. Dist. Lexis 74579 (E.D. Pa. 2007).

²² *Id.* at *22.

Considering the absence of a federal cause of action in FDCA, the Supreme Court held that “the Congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a Congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ‘substantial’ to confer federal-question jurisdiction.” Due to the absence of any indication of congressional intent to confer federal jurisdiction over claims involving the FDCA, the Defendants also fail to demonstrate the requisite substantiality required by *Grable*.²³

In *Korensko v. Ed Murphy, et al.*,²⁴ a federal court addressed a motion for remand where one of the counts in the plaintiff’s complaint sought rescission of a contract between the parties because a condition precedent to the contract – “the disclosures required under federal law” – were allegedly never made. Specifically, the plaintiff alleged that defendants breached the contract because defendants failed to comply with the requirements of 49 U.S.C. § 32705 relating to the transfer of an automobile. The plaintiff argued that the case should be remanded because notwithstanding the allegation of violations of federal statutes, the central dispute “is squarely within the purview of state law.”²⁵ In denying the motion for remand, the court held as to the first prong of *Grable*:

Plaintiff’s rescission claim is analogous to *Grable*’s quiet title claim, and it is therefore within the court’s federal question jurisdiction. Plaintiff’s rescission claim necessarily raises a federal issue – i.e., whether the Defendants satisfied the condition precedent to the contract becoming binding by making the disclosures required by federal law (that is, 49 U.S.C. § 32705). If not, Plaintiff is entitled to consider the contract void and recover his deposit. The outcome-determinative nature of this issue makes it “actually disputed and substantial” at this stage of the litigation.

As to the second prong of the *Grable* test, the court held:

Finally, the court’s exercise of jurisdiction over the Plaintiff’s rescission claim will not disturb the congressionally approved balance of federal and state judicial responsibilities, because unlike the federal statutes at issue in *Grable* and *Merrell Dow*, the federal odometer statute expressly authorizes a private cause of action

²³ *Id.*, citing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 (1986). See also, *Allen v. GSK, et al.*, 2008 U.S. Dist. Lexis 42491 (E.D. Pa. 2008) (A federal court in Pennsylvania similarly found that the marketing provisions of the FDCA are insufficient to constitute a substantial federal question for purposes of “arising under” federal question jurisdiction). In *Pennsylvania Employees Benefit Trust Fund v. Eli Lilly & Co., Inc.*, it is important to consider that while the unavailability of a federal cause of action seemed to heavily influence the court’s decision, were a federal cause of action present, the opposite holding would not necessarily have resulted.

²⁴ 464 F.Supp.2d 463 (E.D. Pa. 2006).

²⁵ *Id.* at 467.

against violators.²⁶ Plaintiff presumably tried to avoid litigating this case in federal court by omitting 49 U.S.C. § 32710(b)'s express private cause of action from the complaint, but this exercise in artful pleading will not deny the defendants their right to a federal forum for this case.

In a federal banking case, *Chirik v. TD Banknorth*,²⁷ the court addressed facts where the plaintiff attempted to rollover tax-qualified IRA funds into another eligible account, however the defendant bank misdirected the funds into an ordinary savings account that was not eligible for special tax treatment. The plaintiff alleged various state law claims, including breach of fiduciary duty, breach of contract, rescission, and negligence, and sought declaratory relief under the Pennsylvania Declaratory Judgment Act, specifically, to make certain declarations interpreting IRS procedures. The court found that the determination of IRS procedures as applied to the plaintiff's claim constituted "an actual and substantial dispute over the meaning of federal law" because the plaintiff's state law declaratory judgment claim required the reviewing court "to interpret multiple statutory and regulatory provisions of the [Internal Revenue Code] and ultimately determine whether they can be summarily dispensed with."²⁸ The court was also "satisfied that entertaining this action will not disturb any congressionally approved division of labor between state and federal courts," because, among other reasons, the "failure to exercise jurisdiction over this matter is an invitation to state courts to issue declarations regarding federal tax law that could substantially upset and interfere with the federal government's ability to uniformly resolve federal tax matters."²⁹

In a pre-*Grable* case, *Smith v. Team Dodge-Kia*,³⁰ a plaintiff asserted the following claims under Pennsylvania law: common law conversion, UCC violations, violations of the Pennsylvania Automotive Industry Trade Practices Act, violations of the Pennsylvania UTPCPL, common law negligence, common law fraud, and punitive damages. Although issued one day before the U.S. Supreme Court's ruling in *Grable*, this case provided an analysis similar to that which is now available in prong one of *Grable*. In *Smith*, the court found that federal-question jurisdiction failed because on the face of the complaint the plaintiff's claims were based on Pennsylvania state law, not federal law. Further, the defendant failed to adequately support its assertion that proving violations of federal law, namely TILA, was an essential element of the plaintiff's claim. Conversely, according to the court, proving violations of TILA disclosure provisions would not be necessary for the plaintiff to prevail on her negligence claim because twenty-one other instances of negligent conduct were alleged in the complaint. This result in *Smith* is similar to the California Section 17200 case, discussed below (and decided post-

²⁶ See 49 U.S.C. § 32710(b) (2006); see also *Grable* at 318 (analogizing an express federal cause of action to a "welcome mat" to the federal courthouse).

²⁷ *Chirik v. TD Banknorth, N.A.*, 2008 U.S. Dist. Lexis 3939 (E.D. Pa. 2008).

²⁸ *Id.* at *13.

²⁹ *Id.* at *14-15.

³⁰ 2005 U.S. Dist. Lexis 11556 (E.D. Pa. 2005).

Grable), in that TILA was not necessary to resolution of the claim because factually there were other non-federal issues that would resolve the claim. Were the state law claims founded solely on a federal violations, the result would likely have been different.

In *California v. H&R Block*,³¹ the California Attorney General brought suit under California's UDAP statute³² against H&R Block related to the defendant's sale and marketing of Refund Anticipation Loans ("RAL"). The defendant argued that the Attorney General's request for an order enjoining defendant from doing any of the acts set forth in the complaint necessarily raised substantial and disputed federal issues because a single violation of the TILA is among the many allegations on which the complaint predicates its Section 17200 UDAP cause of action. The court granted the motion to remand, stating: "The AG's allegation that Block has violated the TILA does not form an 'essential part' of the AG's Section 17200 cause of action against Block. Rather, it is but one of eight basic predicate violations (many containing sub-violations) on which the AG bases its Section 17200 cause of action. If the AG successfully proves any one of these predicate acts it will prevail on its Section 17200 cause of action."³³ In other words, the possibility that TILA may have been violated was but one possible theory under which a court could have found Section 17200 liability. Therefore, because the Section 17200 claim could have proceeded without TILA, the federal question was not essential to resolving the dispute. A similar result was reached in *Cortazar v. Wells Fargo & Co., et al.*,³⁴ where the plaintiffs alleged Section 17200 violations based on violations of TILA, RESPA, the Home Owners Equity Protection Act (HOEPA), the Home Equity Loan Consumer Protection Act (HELCPA), and violations of California Finance Code § 4970 et seq. The court determined that liability under Section 17200 could attach independent of the federal statutes because the claim was supported by an independent state law theory.³⁵

In *King v. Provident Bank*,³⁶ a plaintiff brought suit against a defendant bank relating to a mortgage loan dispute where the plaintiff claimed fraudulent misrepresentation, unconscionability, unjust enrichment, and negligent hiring and retention, among other causes of action. The defendants sought removal on the basis that TILA and Reg. Z³⁷ determined the adequacy of representations regarding home mortgages in the plaintiff's state. Additionally, the

³¹ 2006 U.S. Dist. Lexis 69472 (N.D. Cal. 2006).

³² Cal. Bus. & Prof. Code § 17200 *et seq.*

³³ *H&R Block* at *12.

³⁴ 2004 U.S. Dist. Lexis 30215 (N.D. Cal. 2004).

³⁵ *Id.* See also, *Howell v. Grant Holding, Inc., et al.*, 2004 U.S. Dist. Lexis 9400 (D. Minn. 2004) ("It is axiomatic, as here, that when a claim can be supported by alternative and independent theories – one of which is a state law theory and one of which is a federal law theory – federal question jurisdiction does not attach because federal law is not a necessary element of the claim.").

³⁶ 428 F.Supp.2d 1226 (M.D. Ala. 2006).

³⁷ 12 C.F.R. Pt. 226.

defendants claimed that RESPA and its implementing regulations determined the adequacy of representations regarding settlement costs for home mortgages. The defendants further asserted that the plaintiff's state law causes of action gave the federal court jurisdiction because they required the court to determine whether the alleged misrepresentations and omissions violated TILA or RESPA. The plaintiff, however, denied asserting any federal causes of action and did not claim that the disclosures made in connection with the loan failed to comply with TILA or RESPA. The court held that remand was required because the plaintiff had asserted valid state law claims that would permit recovery even absent a TILA violation. Additionally, the court was persuaded by the plaintiff's express disclaiming of the application of federal law or any remedies available under federal law.³⁸

In *Levett v. American International Group, Inc.*,³⁹ the plaintiff filed in state court claiming fraud, misrepresentations, concealment, negligent and wanton hiring, training, and supervision, and breach of fiduciary duty, all in connection with several loans to the plaintiff. In support of removal, the defendants argued that TILA, Reg. Z, and regulations promulgated by the Office of Thrift Supervision ("OTS"), were "sure to be disputed" in the case. They further asserted that their compliance with TILA and Reg. Z's disclosure requirements was likely to arise throughout the litigation, especially with regard to negligence claims. The plaintiff responded that she had expressly repudiated any federal claims, relying instead exclusively on state-law claims that do not require proof of violation or an interpretation of federal law. In remanding the case, the court ruled that the assertion that TILA and Reg. Z issues are "surely" or "likely" to be disputed in the litigation is insufficient to present a federal question under the *Grable* standard. Of interest to the court was that the defendants were unable to point to a single case where TILA was found as a basis for federal jurisdiction when TILA was not invoked by the plaintiffs in the complaint.⁴⁰ A similar result was reached in *Ball v. Argent Mortgage Company*,⁴¹ where the plaintiff explicitly disclaimed any claim under federal law and any federal remedy, and did not tie a state law claim to a federal standard. Consequently, the court found the plaintiff's claims not to contain an "actually disputed and substantial" question of federal law, and even if it did, it would not have been "so important that it 'sensibly belongs in federal court.'"⁴²

³⁸ *Id.* at 1230.

³⁹ 2006 U.S. Dist. Lexis 14398 (M.D. Ala. 2006).

⁴⁰ *Id.* at *14. *See also, Anderson v. Household Fin. Corp. of Alabama*, 900 F.Supp. 386, 389 (M.D. Ala. 1995) (remanding case because the causes of action were supported by state-law claims and the TILA was not essential to any of those theories); *Easterling v. Gulf Guar Ins. Co.*, 60 F.Supp.2d 586 (S.D. Miss. 1999) (remanding case where "the Plaintiff had stated viable state law causes of action and if TILA had been invoked, it was only in an unsubstantial way.").

⁴¹ 2007 U.S. Dist. Lexis 16360 (M.D. Miss. 2007).

⁴² *Id.* at *11.

In *Leggette v. Washington Mutual Bank, F.A.*,⁴³ a plaintiff brought a breach of mortgage action against the defendant, Washington Mutual (“WAMU”), in which the plaintiff alleged a breach of contract based on three grounds, each of which asserted a failure to comply with regulations promulgated by the Department of Housing and Urban Development (“HUD”), pursuant to the National Housing Act (“NHA”). In satisfying the first prong of *Grable*, the court determined that each ground of the plaintiff’s wrongful foreclosure claim necessarily turned on WAMU’s obligations under federal law, that the dispute between the parties “rests entirely on the correct interpretation of three federal regulations” related to mortgage lending, and that if WAMU violated the provisions of the federal regulations, it may have breached the contract. In short, federal issues were the only questions contested in the case. On this basis, the court found that the first prong of *Grable* was met. As to the second prong, the court noted that regulating foreclosure on real property has traditionally been the province of the states, and that “[e]xercising federal jurisdiction over home foreclosure disputes typically governed by private contract and state law portends a significant transfer of judicial responsibilities from state to federal courts.”⁴⁴ On this basis, the court found that the case did not meet the second prong of the *Grable* removal test.

In a California district court case, *Moore v. Chase Bank*,⁴⁵ decided post-*Grable* but not citing to it, a plaintiff filed a complaint alleging six causes of action in connection with a mortgage refinancing: declaratory judgment for violations of California Civil Code § 2924 (establishing protections and procedures for valid foreclosure sales), unfair business practices (§ 17200), fraud, unconscionability, breach of contract, and accounting. The plaintiff stated that the defendants “are subject to and must comply with the Federal Truth in Lending and with the Act’s corresponding Regulation Z.” The complaint also alleged that the defendants “are debt collectors as defined by 15 U.S.C. § 1692a(6), the Federal Fair Debt Collection Practices Act,” and that the defendants “were at all times alleged in [the] complaint required to comply with and [sic] the federal Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601-2617[.]” The court noted: “In light of Plaintiff’s facial invocation of these federal-statute allegations, Plaintiff’s argument that he did not ‘raise any federal issues,’ . . . is plainly contradicted by his own Complaint.”

In addition, several of the plaintiff’s causes of action contained predicate federal statutory violations. For example, in the plaintiff’s second cause of action for unfair business practices, the plaintiff alleged: “Defendants . . . made the following untrue and misleading statements, and engaged in the following unfair business practices. . . . They failed to comply with the disclosure provisions of the Federal Truth in Lending Act. They failed to comply with the disclosure provisions of the Homeowner Equity Protection Act, a part of the Truth in Lending Act.” Under this same cause of action, the plaintiff also alleged that various fees demanded by the defendants “are erroneous and fraudulent, and are based on fraudulent representations, violations of the Federal Truth in Lending Act, violations of HOEPA, and concealed excessive charges and fees.” In the plaintiff’s third cause of action for fraud, the plaintiff alleged: “Defendants . . . committed

⁴³ 2005 U.S. Dist. Lexis 24405 (N.D. Tex. 2005).

⁴⁴ *Id.* at *14.

⁴⁵ 2008 U.S. Dist. Lexis 11337 (N.D. Cal. 2008).

fraud in the following ways. . . . They failed [to] comply with the disclosure provisions of the Homeowner Equity Protection Act, a part of the Truth in Lending Act.” Thus, the court held, “although Plaintiff has pleaded California state-law causes of action, Plaintiff’s decision to include numerous allegations relating to underlying federal statutory violations brings his action within this Court’s jurisdiction.” Thus, the court noted in denying the motion to remand, the plaintiff’s “right to relief necessarily depends on resolution of a substantial question of federal law.”⁴⁶

To restate, the test under *Grable* as announced by federal courts is: “First the district courts should ask whether the ‘state-law claim necessarily raises a federal issue, [which is] actually disputed and substantial.’” “Second, courts must examine whether ‘the federal forum may entertain [the issue] without disturbing any congressionally approved balance of federal and state judicial responsibilities.’”

The U.S. Supreme Court’s rule in *Grable*, as applied by lower federal courts makes clear that a state law claim that turns on interpretation of a federal law will support federal question jurisdiction. The *Korensko* court’s holding is instructive that “the outcome-determinative nature of this issue makes it ‘actually disputed and substantial’ at this stage of the litigation.” Similar to the outcome-determinative nature of the contract remedies at issue in *Korensko*, a bank defending against an artfully pled complaint must consider whether the complaint would turn exclusively on interpretation of federal law, and thus the cause of action would support federal question jurisdiction. The ultimate question for the courts would therefore be whether the outcome of a plaintiff’s claim is necessarily and exclusively dependent upon violations or interpretations of federal law.

Summary

As *Korensko* illustrates, the propriety of removal of an artfully pleaded state law cause of action relying on a dispositive provision of federal law that itself contains a private right of action, and for which Congress has explicitly granted access to the federal courts, arguably warrants even greater willingness to remove than was granted in *Grable*, where the underlying federal statute lacked a private right of action. Even if the underlying federal laws do not provide for a private right of action and jurisdiction in the federal courts, the second prong of the *Grable* test might still be satisfied by arguing that the federal interest in uniform application of federal laws relating to mortgage lending, loan servicing, and debt collection justify removal to the federal courts. From a plaintiff’s perspective, the challenge will be to allege standards based in federal and state law. This may prove difficult as many state substantive laws either contain express exceptions for federally-chartered institutions, or are inapplicable through federal preemption. Finally, an open question remains as to what extent the courts will consider the current national nature of the mortgage foreclosure crisis in applying the second prong of *Grable*, where the intent of Congress is considered in examining the underlying federal statute, and where, in the current crisis, the uniform application of federal mortgage foreclosure statutes is (at least as a policy matter) paramount.

⁴⁶ *Id.*, citing *Franchise Tax Board*, 463 U.S. at 27-28.