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Expert Analysis

The National Bank Act: So Much for Preemption

The U.S. Supreme Court's recent decision in *Cuomo v. Clearing House Assoc'n*, 2009 WL 1835148, marks a significant shift in the Court's conception of the statutory banking regulation scheme and represents a dramatic departure from decades of precedent in this area.¹ The decision, which will allow state attorneys general to bring charges against national banks for certain alleged violations of state law, promises to have a serious impact on the way that banks do business in this country. This article provides a summary of this holding and outlines the potential impact of what could be characterized as one of the most important banking decisions to be handed down in decades.

Business of Banking

The National Bank Act (the act), promulgated in 1864, provided for the creation of national banks that would exercise "all such incidental powers as shall be necessary to carry on the business of banking."² Section 484(a) of the act states that "no national bank shall be subject to any visitatorial powers except as authorized by Federal law, vested in the courts..., or... directed by Congress."³

As the agency responsible for national banks under the act,⁴ the Office of the Comptroller of the Currency (OCC) undertook to clarify the preemptive nature of this provision in 1996 through notice and comment rulemaking.⁵ The regulation ultimately adopted by the OCC expressly prohibits states from exercising visitatorial powers with respect to national banks, and includes, within its description of visitatorial powers: "(i) Examination of a bank; (ii) Inspection of a bank's books and records; (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) Enforcing compliance with any applicable federal or state laws concerning

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those activities." 12 CFR §7.4000. It is the last prohibition aimed at state law enforcement that paved the way for the *Cuomo* decision.

In connection with an investigation into the residential lending practices of several national banks, former New York State Attorney General Eliot Spitzer⁶ sent "letters of inquiry"

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requesting that the banks voluntarily produce certain non-public information regarding their mortgage policies and practices.⁷ Shortly thereafter, the OCC and the Clearing House Association (Clearing House), a consortium of national banks, filed separate lawsuits to enjoin the Attorney General from issuing subpoenas or taking any other action to enforce federal and state fair-lending laws.⁸

The OCC took the position that the Attorney General's conduct constituted an unlawful exercise of visitatorial powers. In the litigation initiated by the Clearing House Association, the Attorney General counterclaimed and argued that the regulation at issue violated the Administrative Procedure Act. He contended that the investigation did not constitute a visitatorial power or, alternatively, that it came within the §484(a) exception for "visitatorial powers...authorized by Federal law."⁹ Applying a *Chevron* analysis (*Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984)), the United States District Court for the Southern District of New York deferred to the

OCC's interpretation of the statute and granted declaratory and injunctive relief. On appeal, the Second Circuit determined that the OCC's interpretation of this term was reasonable under the *Chevron* framework, and affirmed the injunction against the Attorney General's investigation in the litigation initiated by OCC.¹⁰ In its opinion, the Second Circuit identified the meaning of the term "visitatorial powers" as the central issue in this case.¹¹ The Supreme Court granted certiorari on Jan. 16, 2009.¹²

Statute and Case Law

The Supreme Court's opinion, authored by Justice Antonin Scalia, seemed to agree with the Second Circuit's identification of the central issue in the case, if little else. After a brief recitation of the operative facts, the Court plunged into a consideration of the term "visitatorial powers" as it appears in 12 U.S.C. §484(a).¹³ While recognizing that there is "necessarily some ambiguity as to the meaning of 'visitatorial powers,'" the Court stated at the outset that the "expansive" regulation promulgated by the OCC went beyond the outer limits of the term.¹⁴

Tracing the roots of visitation back to the right of the founder of a charitable institution "to see that his property was rightly employed," the Court noted that this principle was soon extended to civil corporations.¹⁵ By the time the act was drafted, according to the majority, lower courts understood the term to mean "the act of a superior or superintending officer, who visits a corporation, to examine into its manner of conducting business, and enforce an observance of its laws and regulations."¹⁶

In addition to exploring the common law history of this term, the Court considered several prior Supreme Court decisions that interpreted "visitation" as a right distinct from the power to enforce the law.¹⁷ The Court cited first to *Trustees of Dartmouth College v. Woodward*, where Justice Story contrasted the power of "general superintendence" afforded to a legal visitor with the power of the court of chancery, which acted "not as itself possessing a visitatorial power but as possessing a general jurisdiction to redress grievances, and fraud."¹⁸ Similarly, in *Guthrie v. Harkness*, the Court drew a distinction between "suing in the courts of

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the State” and the visitorial “supervision of the Comptroller of the Currency.”¹⁹

The Court found further support for this distinction in *First Nat'l Bank in St. Louis v. Missouri*, where the Supreme Court upheld the right of the Attorney General to bring suit to enforce a state anti-bank-branching law against a national bank.²⁰ This decision noted that if a state statute of general applicability is not substantively preempted, then “the power of enforcement must rest with the [State] and not with” the National Government.

Finally, the Court addressed *Watters v. Wachovia Bank, N.A.*, a more recent decision.²¹ While the dissent's portrayal of the case focused upon language in the opinion that suggested that state lending laws would have been preempted by the act had they purported to apply to national banks, the majority emphasized the decision's reference to a prohibition on “states' general supervision and control.” Noting that “general supervision and control” are “worlds apart” from law enforcement, the Court held that the decision was “fully in accord” with the distinction it had drawn between supervision and law enforcement.²²

The Court appeared to rely heavily upon the “bizarre” consequence of maintaining valid state laws but denying states the ability to enforce them.²³ The Court felt that this result—which it described as preserving the “bark” of state law while preventing the “bite”—contrasted sharply with the logic of the petitioner's reading, which would, according to the Court, “preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress' decision not to preempt substantive state law.”²⁴ Noticeably absent from this discussion was any reference to the ability of private litigants to enforce state lending laws.

According to the majority, an interpretation of the statute as prohibiting state law enforcement also renders “inexplicable”²⁵ the statute's reservation of powers “vested in the courts of justice.”²⁶ The drafters could not have intended to exempt from prohibition any visitation conducted through the use of prerogative writs such as mandamus and quo warranto, as was the historical practice, because such an exception would “swallow the rule.”²⁷ Therefore, the only logical purpose of such an exemption, according to the Court, was to ensure that the right of judicial enforcement was not affected by the prohibition on state visitation.²⁸

Other Findings

The Court was similarly puzzled by the OCC's interpretation of its regulation, specifically the recognition, as stated in the statement of basis and purpose, that states retain the power to enforce regulations in the area of contracts, debt collection acquisition and transfer of property, taxation, zoning, criminal, and tort

law.²⁹ This acknowledgment of a state's power to enforce its laws against national banks in some areas could simply not be reconciled, in the Court's view, with the sweeping prohibition on enforcement contained in 12 CFR 7.4000(a) (1).

The Court found the distinction between visitation and law enforcement logical on a pragmatic level as well.³⁰ Despite certain obvious similarities between the power of visitation and civil discovery, a civil litigant must overcome several procedural hurdles before he or she can undertake an examination. And civil discovery, as contrasted with visitation, is subject to limitations and court supervision. Courts will prevent undirected “fishing expeditions” in the context of litigation, but an individual with visitation rights “may inspect books and records at any time for any or no reason.”³¹

The majority was unpersuaded by the dissent, which focused on what it perceived to be an unjustified denial of the deference owed to agency interpretations under *Chevron*.³² According to the dissenters, nothing in the text, structure or history of the statute precluded the interpretation adopted by the OCC regulation and, therefore, its reasonable interpretation should have been upheld.³³

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The Court's rationale for striking down the regulation was dependent upon a perceived distinction between enforcement, on the one hand, and general supervision, on the other.³⁴ The clarity of this distinction, as it was pressed by the Court, necessitated a clear ruling on the propriety of the injunction. Because the subpoenas at issue were served “in lieu of” other action, pursuant to a New York law which permits the Attorney General to issue subpoenas in connection with an investigation of business fraud,³⁵ the court held that the requests for information were not an exercise of enforcement power but rather an example of impermissible state oversight.³⁶

Conclusion

The ultimate result for the litigants? The Attorney General's efforts were thwarted. Nevertheless, in this post-subprime collapse atmosphere of public mistrust and governmental blame-shifting, state attorneys general will likely view the Court's endorsement of their enforcement powers as a mandate to initiate litigation on behalf of consumers. And, in a sense, the decision's reasoning has forced

their hands when it comes to compliance. Deprived of the ability to obtain information except in the context of a lawsuit, it is likely that state attorneys general will “resort” to litigation early and often. As a result, much of the litigation that will undoubtedly be inspired by this decision may properly be characterized as avoidable.



1. A line of decisions involving the usury provisions set forth in 12 USC 86 provide persuasive authority for the preemption of state causes of action under the act. See *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003); *Farmers and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29 (1875); *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108 (1919); *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901).

2. 12 U.S.C. §24 Seven.

3. 12 U.S.C. §484(a); *Clearing House Assoc., LLC v. Cuomo*, 510 F.3d 105, 110-11 (2d Cir. 2007) rev'd on other grounds.

4. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995).

5. *Cuomo v. Clearing House Association*, —U.S.—, 2009 WL 1835148, at 4 (2009).

6. Pursuant to Fed. R.App. P. 43(c)(2), Andrew M. Cuomo was automatically substituted for former Attorney General Eliot Spitzer in this action.

7. *Clearing House*, 510 F.3d at 109.

8. *Id.* at 110.

9. *Id.*

10. The Second Circuit sustained this injunction with regard to the case filed by the OCC, but held that the district court lacked jurisdiction to decide the issue in the claim advanced by Clearing House because the Attorney General had not yet filed any lawsuits against the banks under investigation. *Id.*

11. *Id.*

12. *Cuomo v. Clearing House Association, LLC*, 555 U.S.—, 129 S.Ct. 987 (2009).

13. *Cuomo*, 2009 WL 1835148, at 5.

14. *Cuomo*, 2009 WL 1835148, at 4.

15. *Id.* at 5 (citing 1 W. Blackstone, Commentaries on the Laws of England 469 (1765)).

16. *Id.* (citing *First Nat. Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C.N.D. Ohio 1881)).

17. *Cuomo*, 2009 WL 1835148, at 5.

18. 4 Wheat. 518, 676, 681, 4 L.Ed. 629 (1819) (concurring opinion).

19. 199 U.S. 148, 159 (1905).

20. 263 U.S. 640 (1924).

21. 550 U.S.1 (2007).

22. *Cuomo*, 2009 WL 1835148, at 6.

23. *Id.* at 7.

24. *Id.*

25. *Id.* at 7.

26. 12 U.S.C. §484(a).

27. *Cuomo*, 2009 WL 1835148, at 7.

28. *Id.* at 7.

29. 69 Fed.Reg. 1896 (2004).

30. *Cuomo*, 2009 WL 1835148, at 7.

31. *Id.*

32. *Id.* at 19.

33. *Id.* at 21.

34. See *id.* at 6.

35. N.Y. Exec. Law Ann. §63(12) (West 2002).

36. *Cuomo*, 2009 WL 1835148, at 10.