



# Financial Services Litigation Alert

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## Supreme Court Permits States to Enforce Their Consumer Protection Laws Against National Banks

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In a departure from previous rulings affirming the preemptive power of the National Bank Act in the regulation of national banks, the United States Supreme Court recently ruled in [\*Cuomo v. Clearing House Association, LLC\*, 557 U.S. \\_\\_\\_\\_\\_ \(2009\)](#), that individual states may sue national banks to enforce state consumer protection laws. The Supreme Court rejected the position of the Office of the Comptroller of Currency (“OCC”) that states were prohibited from initiating litigation to enforce their state laws against national banks. The *Cuomo* decision may now expose national banks to claims for violations of the different consumer protection statutes of the various states.

### *Background*

In 2005, Eliot Spitzer, then-Attorney General for the state of New York, requested certain national banks to informally provide non-public information about their consumer lending practices. Spitzer’s letter requests, made in lieu of subpoenas, were intended to discover information about the banks’ lending practices to minority customers to determine whether any of the banks had violated New York’s fair lending laws. The requests also suggested that failure to provide the requested information voluntarily would lead to the issuance of formal subpoenas.

The OCC and the Clearing House Association, LLC, a banking trade group, brought suit in federal court to enjoin Spitzer’s requests, based on the National Bank Act and regulations promulgated by the OCC in 2004 prohibiting enforcement efforts against national banks by the states. In 2005, the District Court ruled in favor of the OCC and Clearing House, and the United States Court of Appeals for the Second Circuit affirmed the injunction in 2007. During this time, Andrew Cuomo replaced Mr. Spitzer as the Attorney General for the state of New York, and continued the litigation, seeking a writ of certiorari that the Supreme Court granted.

### *The Decision*

In a 5-to-4 decision, the Supreme Court vacated the injunction obtained by the OCC and Clearing House to the extent it prohibited the Attorney General from bringing judicial enforcement actions against national banks to enforce state law, but affirmed the injunction against the threatened issuance of executive subpoenas.

In an unusual alliance, Justice Antonin Scalia, joined by Justices Stevens, Souter, Ginsburg, and Breyer, authored the majority opinion. Engaging in an analysis of the legislative history of the National Bank Act, enacted in 1864 (“NBA”), 12 U.S.C. §§ 484(a) *et seq.*, which states that national banks are not subject to “visitorial powers” except as authorized by federal law or vested in the judiciary, the Court concluded that states are not precluded from pursuing the “ordinary enforcement” of their laws through litigation. *Cuomo*, majority op. at 1. The Court carefully considered the meaning of “visitorial powers” and concluded that when a state attorney general brings suit to enforce state law against a national bank, he is not exercising visitorial powers, but rather acting as a law enforcer. Accordingly, the Court struck down the OCC’s regulation that included state prosecution of enforcement actions within the scope of the ban on the exercise of visitorial powers. *See* 12 C.F.R. §7.400(a). In determining the “outer limits” of visitorial powers, the Court drew a distinction between “‘visitation’ as this right to oversee corporate affairs, quite separate from the power to enforce the law.” *Cuomo*, majority op. at 4. Noting that the NBA allowed states to enact some substantive laws affecting banks, the Court rejected the OCC regulation to the extent that it would preclude the states from enforcing their own otherwise valid laws. Similarly, the Court separately rejected the OCC’s interpretation of its regulation, reflected in the agency’s statement of basis and purpose in the *Federal Register*, finding that it “attempts to do what Congress declined to do: exempt national banks from all state banking laws, or at least state enforcement of those laws.” *Cuomo*, majority op. at 10.

At the same time, however, the Court enjoined the informal request for documents in lieu of issuance of a subpoena under the New York Executive Law. The statutory exemption from the ban on visitorial powers in the NBA is for those actions “vested in the courts of justice” and does not extend to non-judicial processes, whether informal requests or the issuance of extra-judicial subpoenas under state executive law. The Court noted that the general civil litigation procedures and discovery process provide protection to national banks from frivolous lawsuits or abusive discovery tactics.

The Court specifically considered and rejected the OCC’s argument that the recent Supreme Court case, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (holding a state may not exercise general supervision and control over a subsidiary of a national bank), supported a finding that state enforcement actions are preempted. Noting that *Watters* related solely to the authority of the OCC to exercise supervision, control, and oversight over a subsidiary of a national bank, the Court echoed the theme that a state must have the authority to enforce its own laws. Specifically, the Court noted that “‘general supervision and control’ and ‘oversight’ [of banks by the principal regulator, in this case the OCC] are worlds apart from law enforcement.” *Cuomo*, majority op. at 6.

Justice Thomas filed an opinion dissenting in part and concurring in part, in which Chief Justice Roberts and Justices Kennedy and Alito joined, that would have affirmed the issuance of adopted the OCC’s interpretation of the NBA as reflected in the OCC’s regulation and affirmed the injunction against enforcement efforts. The dissent focused on ambiguities in the statutory term “visitorial” and

urged that the Court give deference to the interpretation of the NBA by the OCC. Unlike the majority opinion, Justice Thomas' opinion also found that the *Watters* case supported the OCC's interpretation of visitorial powers, as *Watters* deprived the state of the power of enforcement authority over mortgage lending practices of subsidiaries of national banks. The dissent was not concerned by the resulting inability of the states to enforce their otherwise valid fair lending laws against national banks. Noting that it is not for the Court to "decide whether the statutory scheme established by Congress is unusual or even '[b]izarre,'" the dissent would leave it to Congress to remedy any such unreasonable result. *Cuomo*, dissenting op. at 21.

#### *Impact On National Banks*

The *Cuomo* decision will likely result in additional litigation by state attorneys general against national banks to enforce individual state's laws. Some of this litigation could be politically motivated, enhanced by the current economic crisis, and will certainly focus on consumer protection issues, such as state fair lending laws or laws dealing with rights of the elderly in financial transactions. While states' enforcement tools may be limited to litigation, the mere threat of litigation will require banks to seriously consider the appropriate response to informal requests for information and cooperation.

National banks will also face increased regulatory and compliance challenges as they attempt to comply with a patchwork of enforcement efforts of states with varying consumer protection and lending laws. National banks may wish to develop national "best practices" that meet the highest standards of compliance among the various states in which they operate, although that may be difficult to do for all products and all consumers.

The *Cuomo* decision may also change the response of national banks to future litigation. Early motion practice, including motions to dismiss, may limit or eliminate overly broad or unreasonably aggressive actions. Early battles to limit the scope of document requests and the discoverability of records may be decisive. Although national banks may still assert the defense of preemption under the National Bank Act to limit the applicability of certain state laws, that defense will not bar state enforcement actions altogether.

The *Cuomo* decision raises anew what were considered to be well-settled issues of federalism and states' rights that had favored the broad preemptive power of the OCC under the NBA and the Office of Thrift Supervision under the Home Owners Loan Act. The Obama Administration's pending revisions to financial regulations, including the plan for a Consumer Financial Protection Agency, could diminish the preemptive powers of the OCC, causing, as the proposals stated, "federal consumer protection laws to be a floor and not a ceiling." It is anticipated that the banking industry may seek remedial legislation to strengthen the OCC's preemptive authority as part of the prospective legislation to effect broad reform of financial services and banking regulation.

We welcome your questions and comments. If you need assistance on any matter, please call or e-mail:

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