The "Supreme Surprise" – Cuomo v. Clearing House Assn., L.L.C.

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In what has been called a "Supreme Surprise," [1] on June 29, 2009, the United States Supreme Court held that the National Bank Act, 12 U.S.C. §§ 71 et seq., does not prohibit ordinary enforcement of nonpreempted state laws by the various states against national banks. *Cuomo v. Clearing House Assn., L.L.C.,* 557 U.S. ___ (2009). The case began as Eliot Spitzer, the Attorney General for the State of New York, sent letters to several national banks making a request "in lieu of subpoena" that they provide certain non-public information about their lending practices to determine whether the national banks violated New York fair lending laws. The Office of the Comptroller of the Currency ("OCC"), the federal agency charged with interpreting and implementing the National Bank Act ("NBA"), joined with the Clearing House Association ("CHA"), a banking trade group, in an action to enjoin the New York Attorney General's information request. The OCC and CHA argued that regulations promulgated by the OCC prohibit such an exercise of "visitorial control" by any state agency against a national bank. The OCC regulation at issue, 12 C.F.R. § 7.4000(a), states: "State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."

The Supreme Court framed the question presented as whether the OCC's regulation purporting to preempt state law enforcement can be upheld as a reasonable interpretation of the NBA. In a five-four decision, the Supreme Court answered in the negative, with Justice Scalia writing the Court's opinion joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Chief Justice Roberts and Justices Kennedy and Alito joined.

Although the majority acknowledged "some ambiguity" in the NBA's term "visitorial powers," the majority concluded that the outer limits of the term, as discerned through the "clouded lens of history," do not include "ordinary enforcement of the law." The Court focused on the distinction between sovereign-as-supervisor and sovereign-as-law-enforcer. The former refers to a sovereign state's supervisory powers over corporations, including administrative oversight that allows the inspection of books and records on demand. The latter refers to a sovereign state's law enforcement power to pursue enforcement of it laws in a court, just like every other litigant. Given this distinction, the majority held that "Channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise 'visitorial' oversight) would preserve a regime of exclusive administration oversight by the Comptroller while honoring in fact rather than merely in theory Congress's decision not to pre-empt substantive state law." By allowing states to resort to judicial process to enforce state laws, national banks, at least in theory, are protected by judges who prevent "fishing expeditions" and "undirected rummaging through bank books and records for evidence of some unknown wrongdoing."

The Court also contrasted the issue presented in *Cuomo* with that presented in the 2007 decision in *Watters v. Wachovia Bank, N.A*., 550 U.S. 1 (2007). The Court explained that *Watters* held that "a state may not exercise 'general supervision and control' over a subsidiary of a national bank," an issue of sovereign-as-supervisor, not sovereign-as-law-enforcer as presented in *Cuomo*.

In accordance with the *Cuomo* decision, the OCC regulation prohibiting state prosecution of enforcement actions was invalidated. However, the New York Attorney General's attempt to obtain non-public financial records of national banks through the issuance of letters "in lieu of subpoenas" was enjoined because it was not brought through a civil action or through a judicial search warrant based on probable cause. Instead, the New York Attorney General attempted to exercise authority under New York Executive Law, which permits the issuance of subpoenas in connection with an investigation of "repeated fraudulent or illegal acts … in the carrying on, conducting or transaction of business." *See* N.Y. Exec. Law Ann. § 63(12).

Thus, the Supreme Court affirmed the issuance of an injunction as applied to the threatened issuance of executive subpoenas by the New York Attorney General, but vacated the injunction insofar as it prohibits the New York Attorney General from bringing judicial enforcement actions.

The impact of this decision is fivefold. First, the essence of *Cuomo* – that states may enforce state laws against national banks through civil litigation – almost undoubtedly will be codified in the Obama administration's new Consumer Financial Protection Agency proposal. Second, we expect continued litigation over the difference between permitted enforcement of state laws and the prohibited exercise of visitorial powers. Third, national banks and federal savings banks will not be able to automatically seek shelter behind the their primary federal regulators, the OCC and the Office of Thrift Supervision, when state attorneys general challenge their practices and seek to enforce state laws through civil litigation. Fourth, state attorneys general will not attempt to embark on investigatory "fishing expeditions;" they can simply file a civil action against the national bank or federal savings bank and start the arduous process of civil discovery. And fifth, district judges will begin to clarify the line between allowing a civil litigant to employ the tools of discovery to uncover facts supporting his allegations and "rummaging through bank books and records for evidence of some unknown wrongdoing."

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American Banker, Cheyenne Hopkins, "States Win in Supreme Surprise," June 30, 2009