

LITIGATION ALERT

NEW EXPOSURE FOR BANKS TO STATE AG INVESTIGATIONS

In 2005, the New York attorney general began an investigation into the lending practices of several national banks that he believed, based on publicly available data, had issued a disproportionate number of high-interest loans to minority borrowers. The Office of the Comptroller of the Currency (OCC) and a banking trade group went to federal court to enjoin the attorney general's investigation, arguing that a 2004 regulation promulgated by the OCC prohibited states from enforcing their own fair lending laws. Both the District Court and the 2nd Circuit agreed with the OCC, and the New York attorney general sought Supreme Court review.

On June 29, 2009, the Supreme Court, by a vote of five to four in *Cuomo v. The Clearing House Ass'n, L.L.C.*, largely rejected the OCC's argument. At issue in the case is a provision of the National Bank Act (NBA) that—as relevant here—provides that national banks shall not “be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice.” In 2004, the OCC adopted a regulation to implement the NBA that prohibited states from “exercis[ing] 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.” However, the regulation did provide that “production of a bank's records . . . may be required under normal judicial procedures.”

Writing for an unusual lineup that included Justices Stevens, Souter, Ginsburg and Breyer, Justice Scalia acknowledged “some ambiguity” in the meaning of “visitorial powers.” But such uncertainty, he continued, “does not expand *Chevron* deference to cover virtually any interpretation of the NBA.” Surveying the Supreme Court's jurisprudence, the Court deemed it clear that a state's “‘visitorial powers’ and ‘its power to enforce the law are two different things,” and the NBA “pre-empts only the former.” The Court also questioned the consequences that would arise from the OCC's interpretation of the NBA: Although some state laws regulating banks would remain in effect, states would be precluded from enforcing those laws. By contrast, the Court noted, allowing state attorneys general to enforce state laws in court (but not exercise visitorial powers) “would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress's decision not to pre-empt substantive state law.” Moreover, the Court notes, judicial law-enforcement proceedings are subject to greater constraints and, thus, will limit the likelihood of “fishing expeditions” by state officials.

Having concluded that the OCC's regulation was not consistent with the statute insofar as it precluded states from bringing suit to enforce state laws against national banks, the Court then turned to the OCC's interpretation of its regulation, which purported to limit the scope of the regulation by conceding that states could still regulate national banks in some respects, such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." The exceptions that the OCC would carve out, the Court explained, "cannot be reconciled with the regulation's almost categorical prohibition in 12 CFR §7.4000(a)(1) of 'prosecuting enforcement actions.'"

Returning to the facts of the case before it, the Court concluded that because the attorney general had requested information in lieu of a subpoena—rather than, for example, filing a lawsuit or obtaining a search warrant—it would affirm the decision below "as applied to the threatened issuance of executive subpoenas," but it vacated the decision insofar as it barred judicial law-enforcement actions.

Justice Thomas wrote a decision, joined by the chief justice and Justices Kennedy and Alito, concurring in part and dissenting in part. He would have held that (1) the phrase "visitorial powers" is ambiguous; (2) the OCC's interpretation of that phrase "fits comfortably within this broad dictionary definition of visitation" and (3) the attorney general's request for information to enforce state fair lending laws constituted an effort to exercise such powers. In the dissenters' view, the attorney general's "federalism-based objections to *Chevron* deference ultimately turn on a single proposition: It is doubtful that Congress pre-empted state enforcement of state laws but not the underlying state laws themselves." Even if that were true, however, the dissenters counter that "it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even '[b]izarre.' The Court must decide only whether the construction adopted by the agency is unambiguously foreclosed by the statute's text."

As a result of the Court's decision, state attorneys general throughout the country may now seek to enforce their states' fair lending laws against national banks, creating a scenario in which banks could potentially be subject to conflicting laws in different states.

Given the inevitable interest of testing this newly ratified power, state attorneys general will begin to review consumer complaints and other sources of information regarding the lending practices of national banks in search of opportunities to enforce their respective fair lending laws. Developing an internal compliance review to address suspect lending practices well before they become the focus of an enforcement action would be well advised.

CONTACT INFORMATION

If you have questions regarding this alert, please contact—

Michael G. Rossetti.....	202.887.4311	mrossetti@akingump.com	Washington, D.C.
Anthony T. Pierce	202.887.4411	apierce@akingump.com	Washington, D.C.
Thomas C. Goldstein	202.887.4060	tgoldstein@akingump.com	Washington, D.C.
Smith W. Davis.....	202.887.4060	sdavis@akingump.com.....	Washington, D.C.