

Post-Cuomo: The Floodgates Have Not Opened and *Watters* Still Predominates

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On June 29, 2009, the United States Supreme Court issued its decision in *Cuomo v. Clearing House Association*,¹ which held that state attorneys general were prohibited from exercising “visitorial powers” over national banks. The effect of that ruling was that attorneys general could no longer serve subpoenas on national banks to obtain information or documents in connection with an investigation an attorney general was conducting. The attorneys general remained free to file suits against national banks to enforce non-preempted state laws.² However, in doing so, the attorney general will be treated like any other litigant and will be subject to motions to dismiss, the rules of discovery, and the possibility of sanctions for bringing a frivolous action.³ Although this decision has been heralded as an aberration that impinged the federal government’s powers to regulate national banks and effectively abrogated preemption from a traditional federal regulatory scheme, the *Cuomo* decision has not opened national banks to excessive and over-zealous state regulation or suit – yet.

In 2005, based upon a review of public information published pursuant to the Home Mortgage Disclosure Act,⁴ Eliot Spitzer, then Attorney General for the State of New York,⁵ sent letters requesting that various national banks voluntarily provide non-public information to him in order to determine whether the banks had violated state and federal fair lending laws by engaging in racial discrimination.⁶ In response, the Office of the Comptroller of Currency (“OCC”) and the Clearing House Association, a banking trade group, instituted separate suits

¹ *Cuomo v. Clearing House Assoc., L.L.C.*, ___ U.S. ___, 129 S. Ct. 2710 (2009).

² *Id.* at 2717-18, 2721.

³ *Id.* at 2718-19.

⁴ 12 U.S.C. §§ 2801-2810.

⁵ During the proceedings, Andrew M. Cuomo replaced Spitzer as the Attorney General for the State of New York.

⁶ *Clearing House Assoc., L.L.C. v. Spitzer*, 394 F. Supp. 2d 620, 623 (S.D.N.Y. 2005); *Office of the Comptroller of Currency v. Spitzer*, 396 F. Supp. 2d 383, 387-88 (2005).

seeking injunctive relief to prevent the Attorney General's investigation into the banks.⁷ The Southern District of New York granted the request for injunctive relief on the grounds that the investigation was preempted by the National Bank Act⁸ and the Act's implementing regulations⁹ and was not otherwise authorized by federal law.¹⁰ The Second Circuit, hearing a consolidated appeal, affirmed the issuance of injunctive relief prohibiting the investigation.¹¹ The Supreme Court affirmed the injunction to the extent it "applied to the threatened issuance of executive subpoena," but vacated the lower court decisions to the extent they "prohibit[ed] the Attorney General from bringing judicial enforcement actions."¹²

According to commentators, the surprising decision "sent shock waves through the financial services industry"¹³ and was "a dramatic departure from decades of precedent in this area"¹⁴ that would "have a serious impact on the way that banks do business"¹⁵ because attorney generals, "[d]eprived of the ability to obtain information except in the context of a lawsuit,"¹⁶ would "likely . . . 'resort' to litigation early and often."¹⁷

⁷ *Clearing House*, 394 F. Supp. 2d at 385; *Office of the Comptroller*, 396 F. Supp. 2d at 625.

⁸ 12 U.S.C. § 484 (which prohibits a national bank from being subject to an investigation except as authorized federal law).

⁹ 12 C.F.R. 7.4000.

¹⁰ *Clearing House*, 394 F. Supp. 2d at 631-32; *Office of the Comptroller*, 396 F. Supp. 2d at 407.

¹¹ *Clearing House Assoc., L.L.C. v. Cuomo*, 510 F.3d 105, 110 (2d. Cir. 2007) (upholding the lower court's decision regarding preemption and the issuance of injunctive relief, but vacating the lower court's decision insofar as it relied upon the Fair Housing Act on the grounds that such a claim was unripe for consideration by the court).

¹² *Cuomo*, ___ U.S. at ___, 129 S. Ct. at 2722.

¹³ Barkley Clark and Barbara Clark, *The Law of Bank Dep., Coll. & Cr. Cards* ¶ 3.18 (August 2009 update); see also Associated Press, *Court: State can apply some laws to national banks* (June 29, 2009) (quoting individual stating that decision would lead to a "patchwork of duplicative and conflicting federal and state regulation and enforcement actions"); but see Dwight Smith, et al., *National Banks and State Enforcement: Supreme Court Open the Door for State Judicial Enforcement Action*, 14 NO. 5 Elec. Banking L. & Com. Rep. 15 (indicating that state action is limited and does not reinvigorate administrative investigations, although it does impact litigation).

¹⁴ David A. Scheffel, *The National Bank Act: So Much for Preemption*, N.Y.L.J. 4, col. 1 (Aug. 3, 2009).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

These dire predications have yet to come to fruition. In fact, only one Attorney General¹⁸ (Illinois) has instituted litigation against a national bank for violation of state laws.¹⁹ Not even Attorney General Cuomo appears to have proceeded with litigation against the banks that his predecessor sought information from in 2005. Thus far, this part of the Supreme Court's decision in *Cuomo* has failed to yield the flood of lawsuits that at least one commentator has predicted.

Nor has *Cuomo* been adopted by courts faced with questions of preemption and the National Bank Act. *Cuomo* only allows state attorneys general to bring suit to enforce non-preempted state laws.²⁰ Despite the preemption language in *Cuomo*, courts are more often relying on the *Watters v. Wachovia Bank, N.A.*²¹ decision when faced with questions of preemption and the reach of the National Bank Act in cases filed against financial institutions. More specifically, of the nine district court decisions citing to *Cuomo*, only two decisions²²

¹⁸ See press releases and news articles on the respective Attorney General websites: (the attorney general has requested information from ten entities, including banks, relating to their plans to assist home owners with pay option ARMs); (this Attorney General has the only announcement about a suit being filed against a national bank for violations of state law); (the attorney general announced on Sept. 1, 2009, that it had reached a nationwide agreement with a credit card company to ensure that disabled customers with hearing or vision loss are accommodated with improved communication options and services); (Pennsylvania); (available through Sept. 11, 2009); (no press releases since 2006) (last visited Nov. 2, 2009) (note that some states had press information relating to the private case filed against Bank of America for the alleged problems with the Merrill-Lynch merger; information relating to mortgage fraud scams and debt settlement companies; information relating to the settlement of various states with Countrywide Financial Corp.; and information relating to their support for the proposed Consumer Financial Protection Agency).

¹⁹ *Illinois v. Wells Fargo & Co., Wells Fargo Bank, N.A., and Wells Fargo Financial Illinois, Inc.*, 09-CH-26434, Circuit Court of Cook County, July 31, 2009 (requesting injunctive relief and asserting claims for violations of the Illinois Human Rights Act, the Illinois Fairness in Lending Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, and the Illinois Deceptive Trade Practices Act).

²⁰ *Cuomo*, ___ U.S. at ___, 129 S. Ct. at 2717-18 and 2721.

²¹ *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559 (2007).

²² *Young v. Wells Fargo & Co. and Wells Fargo Bank, N.A.*, ___ F.R.D. ___, 2009 WL 3450988 (S.D. Iowa Oct. 27, 2009) (finding that a putative plaintiff could proceed with claims based upon property inspection fees because the claims sounded in unfair and deceptive acts and practices and were not usury claims that would otherwise be preempted under the National Bank Act); *Davis v. Chase Bank USA, N.A.*, ___ F. Supp. 2d ___, 2009 WL 2868817 (C.D. Cal. Sept. 3, 2009) (finding that false advertising claims regarding "no payments, no interest" promotions were not preempted as they only incidentally affected the bank's lending practices, but also finding that any challenge to the allocation of payments made or fees imposed on the accounts were preempted).

address preemption under the National Bank Act and both decisions include significant reference to *Watters*.²³ The remaining seven²⁴ cases do not.

Nor is the *Cuomo* decision being used by courts to address preemption beyond the National Bank Act. Courts thus far have explicitly refused to apply *Cuomo* to other federal statutes outside the National Bank Act. Of the seven decisions issued post-*Cuomo* that cite to *Watters*, six²⁵ deal with preemption issues under the National Bank Act. It does not appear that *Cuomo* yet has had the game-changing effect that commentators believe it will have, both in the context of the National Bank Act and beyond.

Nonetheless, while state attorneys general have not begun filing lawsuits against national banks in the wake of the *Cuomo* decision, it remains possible that they will. In that event, banks

²³ *Young*, 2009 WL 3450988 at *7; *Davis*, 2009 WL 2868817 at *5.

²⁴ *School Dist. of City of Pontiac v. Sec. of U.S. Dept. of Educ.*, ___ F.3d ___, 2009 WL 3320517 (6th Cir. Oct. 16, 2009) (reviewing school district compliance with the No Child Left Behind Act and citing *Cuomo* for the proposition that implausibility of an alternative interpretation defeats a claim for ambiguity); *Loeffler v. State Island Univ. Hosp.*, ___ F.3d ___, 2009 WL 3172687 (2d. Cir. Oct. 6, 2009) (regarding failure of a hospital to provide a sign language interpreter for a patient; the concurring opinion string cited *Cuomo* for the proposition that a standing provision should be broadly interpreted); *Goodspeed Airport, LLC v. East Haddam Inlands Wetlands & Watercourses Comm'n*, 632 F. Supp. 2d 185 (D. Conn. 2009) (concerning action brought against the state EPA regarding state law regulating wetlands and citing *Cuomo* for language regarding when imminence of a threat permits preemptively filing suit to prevent a suit from being filed against a party); *Tombers v. Fed. Dep. Ins. Corp.*, 2009 WL 3170298 (S.D.N.Y. Sept. 30, 2009) (citing general passages relating to preemption, but stating that plaintiff's focus on *Cuomo* was misplaced because the National Bank Act was not at issue in the case); *McAnaney v. Astoria Fin. Corp.*, 2009 WL 3150430 (E.D.N.Y. Sept. 29, 2009) (finding *Cuomo* inapplicable to determine "the preemptive effect of HOLA and its implementing regulations"); *US Bank, N.A. v. Mayhew*, 2009 WL 2169240 (D. Colo. July 17, 2009) (citing to *Cuomo* only for the proposition that sometimes certain claims are preempted, but stating the none of the decisions cited addresses whether a TILA claim falls within the purview of complete preemption); *Gawry v. Countrywide Home Loans, Inc.*, ___ F. Supp. 2d ___, 2009 WL 1954717 (N.D. Ohio July 6, 2009) (stating that the *Cuomo* decision does not apply to HOLA claims).

²⁵ *Davis*, *supra* note 18; *Young*, *supra* note 18; *Aguayo v. U.S. Bank, N.A.*, ___ F. Supp. 2d ___, 2009 WL 3149607 (S.D. Cal. Sept. 24, 2009) (finding that the National Bank Act preempted state law that required additional post-repossession notices on the grounds that the "power to collect debts and repossess collateral property under default is inseparable from the power to make or purchase loans" and, thus, the state law was preempted); *Spinelli v. Capital One Bank*, 2009 WL 3053696 (M.D. Fla. Sept. 18, 2009) (finding that both express and field preemption applied to claims relating to the bank's payment protection program, thus preempting state laws relating to claims for unfair and deceptive trade practices, and therefore concluding that the class must be closed at the time that the bank became a national association under the National Bank Act); *Poskin v. TD Banknorth, N.A.*, ___ F. Supp. 2d ___, 2009 WL 2981963 (W.D. Pa. Sept. 11, 2009) (finding that the National Bank Act does not preempt a state law claim for malicious prosecution because such a claim "does not conflict with the language or purpose of the" National Bank Act); *In re: Hollis*, 2009 WL 3030125 (Bankr. D.N.J. Sept. 17, 2009) (containing extensive quotations from *Watters* and holding that the National Bank Act does not preempt state law fraud claims against national banks relating to real estate transaction).

should remain vigilant in reviewing the decisions resulting from suits brought by private litigants involving preemption of state laws in the wake of *Cuomo*. Courts faced with a challenge to an attorney general's authority to bring an action under a specific state law likely will rely on decisions involving individual consumers to determine whether a particular state law is preempted under the National Bank Act. Financial institutions need to be aware of how courts are addressing state law claims, how they are splitting hairs on claims that are preempted in private actions (i.e. *Davis*), and what claims courts are finding preempted by federal law.²⁶

²⁶ See *Davis*, *supra* note 18, wherein a court held that a plaintiff could proceed with claims relating to false advertising for a "no payments, no interest" promotion where the payments were applied in a specific manner as per the Cardholder agreement, but also finding that the plaintiff could not challenge the application of the payments themselves. The court stated that credit card lending fell within the actions permitted by federal law and, thus, could not be attacked under state law. But claims for false advertising sounded in contract and were not incidentally related to the bank's lending powers.