



Insurance, Banks & Financial Services Bulletin



July 2009

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Preemption and “Visitorial” Powers: The Cuomo Case

In a decision that has potentially broad implications for federally-chartered multi-state lenders relying on long-held precepts of federal preemption, the U.S. Supreme Court has ruled in *Cuomo, Attorney General of New York v. Clearing House Association, LLC et al* (decided June 29, 2009) that state attorneys general are not “preempted” by federal law from subpoenaing records of national banks in the course of investigations related to state law enforcement matters.

The Supreme Court found that national banks in this instance, which are regulated by the Office of the Comptroller of the Currency (OCC), are in fact subject to law enforcement investigatory activities of state officials conducting an investigation of alleged violations of state fair-lending laws. Exclusive “visitorial” (examination and inspection of books and records, etc.) powers over national banks have been historically limited to the OCC through decades of court decisions interpreting the National Bank Act limiting that authority to the federal agencies charged with regulating federally-chartered institutions.

While not a “blank check” for states, the decision is important in that it further exposes national

banks to state-by-state investigatory and law enforcement proceedings by state officials. Large, multi-state institutions in particular are now more vulnerable to investigations by state attorneys general and other state officials with regard to the state-by-state patchwork of consumer lending laws and the political forces which tend to follow, making enforcement and multi-state compliance challenging at best.

The decision distinguishes between exclusive supervisory “visitorial” powers of the OCC and state authority to investigate and enforce state laws with respect to federally-chartered institutions. The same arguments may be made to apply to preemption issues involving other federally-chartered institutions such as federal thrifts. State-level investigations involving national banks, undertaken in conjunction with state law enforcement proceedings, are now more likely to proceed on a state-by-state basis.

For more information, please contact Jeff Smith at 614.227.2352 or jsmith@bricker.com.

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