

Spitzer Cases Affirm OCC's Exclusive Authority

By Raymond Natter^{*1}

Introduction

On October 12, 2005, the Federal District Court for the Southern District of New York validated the OCC's position that it has the exclusive right to enforce applicable State law against national banks and their operating subsidiaries and the State Attorney General has no authority in this sphere.² In a companion case,³ the court found that the OCC's exclusive visitorial authority applies whether the State Attorney General is acting on behalf of the State directly, or on behalf of affected citizens of the State.⁴ As a result of these cases, the New York Attorney General is enjoined from investigating or taking enforcement actions against national banks.

The U.S. district court's decisions represent a significant victory for the OCC. Under these precedents, the ability of the States to regulate the banking activities of national banks is narrowly circumscribed to those relatively few areas where another Federal law grants authority for such State action.

Exclusive Visitorial Authority

The exclusive visitorial authority is different from the related concept of Federal preemption. Federal preemption concerns the question of whether a particular State or local law is applicable to a national bank. Under the Supremacy Clause,⁵ a State law may not override a Federal statute or regulation. The Supreme Court has interpreted this Clause to mean that a State or local law may not impermissibly interfere with the exercise of a Federal power granted a national bank by statute or regulation.⁶

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¹ This article is a shorter version of a more in-depth analysis of the Spitzer litigation that was published in the BNA Banking Report of November 7, 2005.

² Office of the Comptroller of the Currency v. Eliot Spitzer, Attorney General of New York, 05 Civ. 5636 (SHS)(S.D. N.Y. Oct. 12, 2005).

³ The Clearing House Association, L.L.C. v. Eliot Spitzer, Attorney General of New York, 05 CV 5629 (SHS) (S.D. N.Y. Oct. 12, 2005).

⁴ An attorney general may always act as a representative of the State seeking to enforce a right of the State Government or prevent harm to the State as a political entity. In addition, in certain circumstances, an attorney general may also act in a "parens patriae" capacity, in which he is acting on behalf of an affected group of citizens of the state in order to enforce their rights.

⁵ U.S. Const., Art. VI, cl. 2.

⁶ See, e.g. Barnett Bank v. Nelson, 517 U.S. 25 (1996); Fidelity Federal S&L v. De La Cuesta, 458 U.S. 141 (1982).

The OCC's exclusive visitorial power stems from a Federal statute. By statute, Congress declared that "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice.... or have been exercised or directed by Congress...."⁷

The OCC's regulation explains that "visitorial powers" include inspection of a bank's books and records, as well as any other form of regulation or supervision of activities authorized or permitted under Federal banking law. On January 13, 2004, the OCC amended this regulation to explain that the exception for the courts of justice does not permit a State to use the courts to inspect, examine, regulate or compel action by a national bank.⁸ Instead, the exception only permits private litigants to obtain discovery and other typical judicial relief in actions involving national banks. The OCC is the only governmental entity that can enforce compliance by a national bank with applicable State or Federal law, whether administratively or through the courts. It is this interpretation of the OCC's authority that was at the heart of the litigation.

The N.Y. Attorney General's Investigation

In April 2005, the New York Attorney General sent letters to national banks demanding non-public lending information as part of his "preliminary inquiry" into potential violations of State anti-discrimination laws. The letters asked for voluntary compliance, but also implied that a formal subpoena could be issued if necessary under New York law.

In response to these letters, the OCC brought suit in the U.S. District Court in New York on June 16, 2005, seeking a preliminary injunction against the Attorney General taking any "visitorial action" with respect to national banks and seeking a declaratory judgment that the Attorney General does not have authority to examine the books and records of a national bank. That same day the Clearinghouse Association, an association of commercial banks, brought suit in that court seeking similar relief.

The Court's Decisions

On October 12, 2005, the U.S. District Court issued its opinion in both cases, upholding the position of both the OCC and the Clearinghouse Association. The court noted that the OCC was not arguing that the State laws in question were preempted, but instead was taking the position that these applicable State anti-discrimination laws could only be enforced against national banks by the OCC. The primary issue before the court was the validity of the OCC regulation.

⁷ 12 U.S.C. § 484. The statute goes on to make an exception for lawfully authorized State examiners to review national bank records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

⁸ 69 Fed. Reg. 1895 (Jan. 13, 2004) also codified at 12 CFR § 7.4000.

The court's role in reviewing a Federal agency regulation is to determine if the agency was acting within Constitutional and statutory authority, and if so, whether the regulation reflects a permissible construction of an ambiguous statute. If these standards are met, the Supreme Court directs that the court give deference to the agency's interpretation of the statute, or as the district court put it, "controlling weight" to the agency's position.⁹

Constitutional Power and Statutory Authority

The district court saw no constitutional issues. National banks are Federal instrumentalities that are subject to the paramount authority of the United States. Supreme Court and other precedent clearly state that national banks remain subject to State laws only to the extent that these laws do not impermissibly interfere with national bank powers.¹⁰ And the Congress was within its authority in limiting the States ability to exercise supervisory power over national banks when it enacted the exclusive visitorial power statute.¹¹ In addition, the court found authority for the OCC to issue the regulation in the National Bank Act, which provides that the Comptroller may issue rules and regulations to carry out its statutory responsibilities.¹²

Ambiguity in the Statute

The district court determined that the visitorial powers statute does not specifically address the authority of a State agency to enforce its laws directly with respect to national banks. It also found that the exception for the "courts of justice" did not clearly grant State agencies the right to go to court to compel national bank action. The court was not persuaded that either the legislative history of the provision or rules of statutory construction resolved these questions. It thus found that the statute was ambiguous on these points.

The Attorney General argued that in the 1924 case of First National Bank of St. Louis v. Missouri,¹³ the Supreme Court permitted the State of Missouri to enforce a State law prohibiting bank branching directly against a national bank. The Attorney General took the position that since the Supreme Court was aware of the exclusive visitorial provision, its decision in that case should stand for the principle that the statute does not prevent State enforcement of its applicable laws against national banks.

The court disagreed. It noted that the case involved a state prohibition, not the regulation of permissible conduct. The court also noted that the bank was also acting

⁹ Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

¹⁰ See, e.g. Barnett Bank v. Nelson, 517 U.S. 25 (1996).

¹¹ Citing, Wachovia Bank v. Burke, 414 F.3d 305 (2nd Cir. 2005).

¹² 12 U.S.C. § 93a.

¹³ 263 U.S. 640 (1924).

outside of its Federal powers, since at that time the National Bank Act also did not permit any branching. Further, the court stated that when the case was decided the OCC did not have the power to enforce State law, but that authority was thereafter granted the Federal banking agencies in 1966. Finally, the court noted that while the exclusive visitorial power statute was briefed before the Supreme Court, it was not explicitly mentioned in the Court's opinion. In light of these facts, the District Court declined to view the 1924 Supreme Court decision as providing a conclusive interpretation as to the scope of the exclusive visitorial statute.

In summary, the District Court concluded that the statute did not address the specific questions raised in this litigation, that the St. Louis case was not dispositive, and that the court would therefore have to give deference to the OCC's regulation if it were a "reasonable construction" of the provision.

Reasonableness of the OCC Regulation

The court found that the OCC's regulation represents a reasonable construction of the statute. The regulations definition of what constitutes a "visitation" is consistent with prior court opinions and the common law. Further, the regulation's limitation on State actions is also consistent with the legislative history of the National Bank Act, and in particular, the desire expressed in Congress during the 1863 debate on that legislation supporting the view that the national bank system should operate according to Federal laws and supervision, and without the intrusion of potentially unfriendly State regulation. The court also found support for the OCC's position in the 1994 Riegle-Neal Interstate Banking and Branch Efficiency Act, which provides that interstate branches of national banks would be subject to certain State laws, but those laws would be enforced by the OCC. Finally, the District Court determined that the OCC's reading of the "courts of justice" exception was also consistent with the statutory scheme establishing the national banking system.

Fair Housing Act Issue

The Attorney General raised as a defense the theory that the Fair Housing Act evidences a Congressional intent that in the area of mortgage discrimination, the Congress wants the States to have an enforcement role. The Attorney General then posited that the exclusive visitorial statute should be read as granting an exception for mortgage discrimination matters. The court held, however, that the Fair Housing Act should not be read as containing an implied override of the banking law. It also noted that while the Fair Housing Act contains a mechanism for the Secretary of HUD to make a referral to certain certified State agencies to take enforcement actions, the Attorney General was not one of these certified entities. The court refused to read the Fair Housing Act as implicitly modifying the exclusive visitation section.

Clearinghouse Association Case

In the Clearinghouse case, the District Court decided a different, but closely related question. The issue addressed in the court's opinion concerned the right of the State Attorney General to sue a national bank in its parens patriae capacity.

The district court reviewed the parens patriae doctrine and found that it requires the State to have some interest in the litigation other than merely to represent a group of its citizens. In fact, under the Constitution, the State must have such an interest in order to have standing in Federal court. Because a State must allege some proprietary interest in the litigation, other than its interest in representing a group of its citizens, the court concluded that the Attorney General's parens patriae action constituted a "visitation" of a national bank, and could not be sustained unless authorized by Federal law. The court also determined that the Fair Housing Act does not authorize the Attorney General to bring a parens patriae action against national banks, since that would again result in an implicit override of the banking law.

Conclusion

The district court's opinions in these two cases continues a long line of judicial opinions upholding the OCC's legal position with respect to both preemption and exclusive visitorial authority. Under the approach taken by the OCC, and affirmed by numerous courts, national banks will be subject to uniform supervision and regulation throughout the United States. This will provide important operational efficiencies to national banks operating on an interstate basis. However, under this framework, the OCC will be responsible for enforcing applicable State laws against national banks, and, to guard against any potential Congressional action to change its authority, will also have to continue its efforts to assure consumer groups and State officials that Federal laws and regulations, combined with applicable State laws, will provide adequate protection for consumers.

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