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Supreme Court Opens Door For State Suits Against National Banks

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The Supreme Court today issued its decision in *Cuomo v. The Clearing House Association and Office of the Comptroller of Currency*, No. 08-453.

Summary

The Court ruled that the National Bank Act's grant of visitorial exclusivity to the Office of the Comptroller of Currency (OCC) did not prohibit lawsuits filed by state governments seeking to enforce state laws, even if those suits involve the lending practices of national banks.

The Court unanimously held, however, that States could not rely on administrative subpoenas (or the threat of administrative subpoenas) to obtain information from a national bank because that would be equivalent to prohibited visitation. Instead, a State may invoke the judicial process by initiating civil litigation (like any other litigant), or by seeking to obtain a search warrant from a court, if it can establish to the court that it has probable cause to believe there is a violation of state law.

Cuomo opens the door for additional litigation by States against national banks. But it makes clear that the States are not entitled to any special treatment in bringing civil litigation. Like private parties, a State must thus meet certain pre-suit requirements (reflected in Federal Rule of Civil Procedure Rule 11, which has been followed by most other States); specifically, before filing suit, a State must engage in an "inquiry reasonable under the circumstances" and determine the "factual contentions" of the complaint "have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Otherwise, the State faces the risk sanctions if its claim is frivolous.

The Court also made clear that a State, unlike the OCC, is not entitled to engage in any "fishing expedition" or "undirected rummaging through bank books and records for evidence of some unknown wrongdoing." Like private parties, a State's conduct will be subject to judicial oversight, including sanctions for abusive discovery tactics abusive. Even search warrants can be authorized only on

probable cause that a violation of law is occurring.

Background

Since 1864, the National Bank Act has contained a provision conveying exclusive visitorial powers to the OCC. The provision currently states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a).

In March 2005, four national bank members of the Clearing House Association disclosed data pursuant to the Home Mortgage Disclosure Act of 1975 (HMDA), 12 U.S.C. 2801 *et seq*., which requires lenders making loans secured by residential real property to make available to the public information about their mortgage lending activities. Required disclosures include applicants' race, ethnicity, gender, and income, and, for certain loans, the interest rate charged. Because HMDA data does not capture all information necessary for prudent underwriting and pricing, HMDA data alone cannot establish unlawful lending discrimination.

Shortly thereafter, the New York State Attorney General's office sent "letters of inquiry" to the four banks. The letters asserted that the HMDA data indicated racial disparities in loan pricing between white borrowers and African-American and Hispanic borrowers. The letters further stated that the disparities, "unless legally justified[,] may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a." "In lieu of issuing a formal subpoena," the letters requested certain non-public information concerning the banks' lending activities, including data on real estate loans made in the State.

In June 2005, the OCC and the Clearing House Association each filed a complaint in federal district court seeking declaratory and injunctive relief against the New York State Attorney General. They contended that the Attorney General's demand for bank records and his threatened enforcement actions constituted a prohibited exercise of visitorial powers over national banks.

The United States District Court for the Southern District of New York entered an injunction in favor of the plaintiffs, prohibiting the Attorney General from enforcing state fair-lending laws through either demands for records or judicial proceedings. The United States Court of Appeals for the Second Circuit affirmed.

The Supreme Court's Decision

In the majority opinion, authored by Justice Scalia, the Court held that the injunction could be sustained as applied to the State's demand for records, but that the lower courts had exceeded their authority by enjoining the State from bringing a judicial action to enforce an otherwise non-preempted state law.

The Court first concluded that, as a matter of history, although the term "visitorial powers" was ambiguous in many respects (and thus gave the OCC some latitude in defining the term), the term could not be read to include "ordinary enforcement of the law." Instead, the Court held, visitorial power was the power of "general supervision" over a corporation. "Visitorial powers" in the National Bank Act "include any form of administrative oversight that allows a sovereign to inspect books and records on demand, even if the process is mediated by a court through prerogative writs or similar means."

Applying these holdings, the Court held that the OCC "reasonably interpreted this statutory term to include 'conducting examinations [and] inspecting or requiring the production of books or records of national banks,' [12 C.F.R.] §7.4000, when the State conducts those activities in its capacity as supervisor of corporations." However, the Court held, "when a state attorney general brings suit to enforce state law against a national bank, he is not acting in the role of sovereign-as-supervisor, but rather in the role of sovereign-as-law-enforcer. Such a lawsuit is not an exercise of 'visitorial powers' and, thus, the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions' in state courts, §7.4000."

"As a pragmatic matter," the Court held, if a State "chooses to pursue enforcement of its laws in court,

then it is not exercising its power of visitation and will be treated like a litigant." The Court cautioned that in bringing such a lawsuit, the State must be subject to the same rules that govern private parties. "An attorney general acting as a civil litigant must file a lawsuit, survive a motion to dismiss, endure the rules of procedure and discovery, and risk sanctions if his claim is frivolous or his discovery tactics abusive."

In addition, the discovery to which a civil litigant is entitled "is far more limited than the full range of 'visitorial powers' that may be exercised by a sovereign." A visitor, such as the OCC, "may inspect books and records at any time for any or no reason." By contrast, because the discovery will be overseen by a judge, the Court believed that it was preventing "fishing expeditions" or "an undirected rummaging through bank books and records for evidence of some unknown wrongdoing."

In this case, "the threatened action was not the bringing of a civil suit, or the obtaining of a judicial search warrant based on probable cause, but rather the Attorney General's issuance of subpoena on his own authority." The Court concluded that that is "not the exercise of the power of law enforcement 'vested in the courts of justice' which 12 U. S. C. § 484(a) exempts from the ban on exercise of supervisory power." Thus, the lower courts' injunction was affirmed "as applied to the threatened issuance of executive subpoenas by the Attorney General for the State of New York, but vacated insofar as it prohibits the Attorney General from bringing judicial enforcement actions."

Justice Thomas, joined by Chief Justice Roberts, Justice Kennedy, and Justice Alito, concurred with the majority's conclusion that the injunction against the executive subpoenas should be affirmed, but would have held that the OCC's interpretation of "visitorial powers" should be sustained *in toto* and thus would have sustained the entire injunction.

Conclusion

Cuomo opens the door for additional litigation by States. But it does not permit States to engage in fishing expeditions. States continue to lack supervisory authority to demand information from national banks. States can seek such information through courts, but must have a basis, before filing a lawsuit or requesting the issuance of a search warrant, for thinking there is wrongdoing.

Morrison & Foerster filed an *amicus* brief in the Supreme Court in support of The Clearing House and the OCC on behalf of six former Comptrollers of the Currency who directed the OCC starting in July 1973 and ending in October 2004: James E. Smith, John G. Heimann, C. Todd Conover, Robert L. Clarke, Eugene A. Ludwig, and John D. Hawke, Jr.