Cuomo v. The Clearing House Association, L.L.C.: National Banks Are Subject to State Lawsuits to Enforce Non-Preempted State Laws

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Summary

On June 29, 2009, the U.S. Supreme Court ruled that the National Bank Act (NBA) does not preempt states from bringing judicial actions against national banks to enforce non-preempted state anti-discrimination laws, and by implication state consumer protection laws, as long as the state authorities do not encroach on the visitorial powers of the national bank regulator, the Office of Comptroller of the Currency (OCC). The Court ruled that administrative subpoenas or other forms of administrative oversight or examination are included in visitorial powers and, thus, are not available as state enforcement tools. The case, *Cuomo v. The Clearing House Association, L.L.C.*,___ U.S. ___, 129 S.Ct. 2710 (2009), involves a challenge by national banks and OCC to an attempt by the New York State Attorney General (AG) to investigate possible discrimination in real estate lending by certain national banks and their subsidiaries. In response to a request that these banks provide non-public information about their real estate policies and loans in New York, a banking association to which these banks belong, The Clearing House Association, L.L.C., and OCC obtained trial and appellate court orders enjoining the state investigation and enforcement efforts.

The Supreme Court decision invalidated an OCC regulation, 12 C.F.R. § 7.4000, to the extent that it preempted state officials from "prosecuting enforcement actions" against national banks. That regulation reflected OCC's interpretation of 12 U.S.C. § 484, a provision of the NBA which proclaims that "no 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." The Court's opinion analyzed the OCC regulation on the basis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It recognized that the term "visitorial powers" is ambiguous and that judicial deference should be accorded to a reasonable interpretation of the term by the agency charged with interpreting it, OCC. The Court, however, found that OCC's interpretation did not meet the reasonableness standard. The Court's opinion concluded that OCC had no reasonable basis for equating visitorial power delegated to OCC by the NBA and a state's sovereign power to enforce its own non-preempted state laws with respect to national banks. Dissenting on this point, Justice Thomas, joined by Chief Justice Roberts and Justices Kennedy and Alito, would have upheld the OCC regulation and the breadth of OCC's interpretation of visitorial power as a reasonable interpretation of an ambiguous statute and, therefore, falling within *Chevron* and worthy of judicial deference.

Subtitle D of Title X, the Consumer Financial Protection Act of 2010, of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), P.L. 111-203, contains a provision designed to codify the ruling of the Supreme Court in *Cuomo* that federal visitorial clause provisions do not prohibit state enforcement actions. There is also a provision authorizing state attorneys general and state regulators to bring actions against national banks and federal savings associations for violations of Title X and any implementing regulations. The legislation also defines a standard and some procedural requirements for OCC to follow in preempting the applicability of state consumer protection laws to national banks or federal savings associations. These provisions in Dodd-Frank follow other efforts in the 111th Congress to deal with the issue of federal preemption of state efforts to enforce financial consumer protection laws.

The 112th Congress may be presented with legislation to amend the Dodd-Frank provisions and/or opportunities to evaluate how the interaction between state and federal consumer protection laws and enforcement efforts is protecting consumers without unduly burdening nationwide banking concerns.

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Background

The existence of the dual banking system and the relative insulation of federally chartered national banks from state law[1] form the backdrop of *Cuomo v. The Clearing House Association, L.L.C.* (*Clearing House Association*),[2] in which the Supreme Court, in a five-to-four decision announced on June 29, 2009, ruled that the National Bank Act (NBA) does not preempt states from bringing judicial actions against national banks to enforce non-preempted state anti-discrimination laws, and by implication state consumer protection laws, as long as the state authorities do not encroach on the visitorial powers of the national bank regulator, the Office of the Comptroller of the Currency (OCC).

The Court ruled that administrative subpoenas or other forms of administrative oversight or examination are included in visitorial powers and, thus, are not available as state enforcement tools. The Court's ruling reverses an appellate court ruling[3] that sheltered national banks and their subsidiaries from the reach of state enforcement of fair lending laws. National banks are chartered and regulated under the terms of the NBA[4] by OCC. They are also subject to other federal laws, including federal tax, consumer protection, securities, fair housing, anti-money laundering, and laws of general applicability. Moreover, much of their daily activity is subject to state law.[5]

Supreme Court Precedent

Preemption of Substantive State Law

The starting point for preemption analysis is the language of the federal legislation. If Congress enacts legislation under one of its delegated powers that includes an explicit statement that state law is preempted, the Supreme Court generally will give effect to that legislative intent.[6] Where there is no language of preemption, the Court is likely to find preemption when it identifies a direct conflict between the federal law and the state law or when it concludes that the federal government has so occupied the field as to preclude enforcement of state law with respect to the subject at hand.[7] On questions of whether, in the absence of express language of preemption in a

[1] In Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007), the Supreme Court ruled that state mortgage lending requirements do not apply to state-chartered operating subsidiaries of national banks, relying, in part on 12 U.S.C. § 484.

[2] ___ U.S. ___, 129 S. Ct. 2710 (2009).

[3] Clearing House Association, L.L.C. v. Cuomo, 510 F. 3d 105 (2d Cir. 2007).

[4] The Currency Act of 1863, 12 Stat. 665, and the National Bank Act of 1864, 13 Stat. 99 (NBA), established the national banking system under the National Bank Act, which has been amended numerous times. This law provides a system for the federal government to charter banks, with the Office of the Comptroller of the Currency (OCC), in the Department of the Treasury, as the chartering authority. The NBA sets the requirements for obtaining a national bank charter and the powers of national banks. The NBA is found at 12 U.S.C. §§ 21-216d and in other sections scattered throughout Title 12, U.S. Code.

[5] "It is certain that, in so far as not repugnant to acts of congress [*sic.*], the contracts and dealings of national banks are left subject to state laws." Davis v. Elmira Savings Bank, 161 U.S. 275, 287 (1896).

[6] Rice v. Santa Fe Elevator Corp., 331 U.S. 281, 230 (1947); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

[7] *See* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted)

federal statute, state laws apply to national banks, there is considerable Supreme Court precedent. The Court, in cases beginning with *McCulloch v. Maryland*,[8] has stated the standard for courts to use to determine whether a state law applies to national banks when there is no express federal language of preemption and articulated that standard in various ways. Essentially, however, the Court identifies state laws which are inapplicable to national banks in terms of the degree to which they interfere with federally granted powers. In *McCulloch v. Maryland*, in which the question was whether a state tax could be applied to the first Bank of the United States, the Court, relying on the Supremacy Clause of the U.S. Constitution,[9] used broad language to voice its conviction that "states have no power by taxation or otherwise to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[10]

The most recent case in which the Supreme Court identified a standard for courts to use in deciding whether a state law may be applied against a national bank, that is, whether the state law has been preempted as being inconsistent with federal law, is *Watters v. Wachovia Bank.*[11] In that case, the Court ruled that state licensing and regulation could not be applied to a real estate subsidiary of a national bank. The Court relied on the express language of the visitorial[12] powers clause of the NBA, 12 U.S.C. § 484(a), as indicative of congressional intent to protect the national banking system from intrusive or inconsistent state laws. The text of the visitorial powers clause is as follows:

> (a) No 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.
>
> (b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its 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.[13]

The Court reviewed a long line of cases, beginning with *McCulloch v. Maryland*, that have held the federal bank system generally immune to state laws negatively affecting operations. It spoke of federal law as shielding national banks "from unduly burdensome and duplicative regulation"[14] and national banks as being "subject to state laws of general application in their daily business to

[8] 17 U.S. (4 Wheat.) 316, 435 (1819).

[9] U.S. Const., Art. VI, cl. 2, declaring that the Constitution and "the laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[10] 17 U.S. (4 Wheat.) 316, 435.

[11] Watters v. Wachovia Bank, N.A. 550 U.S. 1 (2007).

[12] "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'" Hughes v. First National Bank of Youngstown, 6 F. 737, 740-741(5th Cir. 1881), *app. dismissed* 106 U.S. 523. "Burrill" refers to Alexander M. Burrill, 1807-1869, who was the author of legal dictionaries in use at the time of the enactment of the NBA, including *New Law Dictionary and Glossary* (1851). The Supreme Court, in Guthrie v. Harkness, 199 U.S. 148, 158 (1905), relied on the same definition.

[13] 12 U.S.C. § 484.

[14] 550 U.S. 1, at 11.

the extent such laws do not conflict with the letter or the general purposes of the NBA."[15] It emphasized that the standard the Court applied to preempt state law in *Barnett Bank of Marion County, N.A. v. Nelson*,[16] extends to powers of the national bank regulator, OCC, and to powers exercised under the incidental powers clause: "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way."[17]

It, thus, appears that the standard for determining whether a state law is preempted involves the question of whether the state law "prevents[s] or significantly interfere[s] with the national bank's or the national bank regulator's exercise of its powers."

Preemption of State Enforcement of Non-preempted State Law

The issue of whether a state agency may enforce against a national bank a state law that has not been preempted, however, has not been the subject of extensive litigation. In *Waite v. Dowley*, 94 U.S. 527 (1877), the U.S. Supreme Court found that a state statute not in conflict with federal law regarding the place for assessing national bank shares for tax purposes could be enforced. In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924), the Court both upheld a state law that prohibited banks, including national banks, from forming branches and permitted the state bank regulator to enforce that law. The principal reason appears to have been the fact that at that time the NBA did not permit national banks to operate branches. The Court said: "national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purpose of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States."[18] It examined the language and purpose of the NBA and determined "that the power sought to be exercised by the bank finds no justification in any law or authority of the United States," and found "the way ... open for the enforcement of the state statute."[19] The Court stated:

> The state statute as applied to national banks is therefore valid, and the corollary that it is obligatory and enforceable necessarily result, unless some controlling reason forbid; and, since the sanction behind it is that of the state, and not that of the national government, the power of enforcement must rest with the former, and not with the latter.... The state is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation.[20]

[15] 550 U.S. 1, at 11.

[16] 517 U.S. 25, 32 (1996) (upholding national bank sales of insurance from offices in small towns despite a conflicting state statute).

[17] Watters v. Wachovia Bank, 550 U.S. 1, at 12.

[18] 263 U.S. 640, 656.

[19] *Id.*, at 660.

[20] *Id.*, at 659-660.

Onset of the Case

The case began when New York's Attorney General (AG),[21] examining publicly available Home Mortgage Disclosure Act (HMDA)[22] data, found disparities between the interest rates charged African American and Hispanic borrowers and those charged white borrowers by certain banks operating in New York State and their subsidiaries. When asked by the AG to provide non-public information on their lending policies and practices, national banks belonging to The Clearing House Association (CHA), including Wells Fargo, HS-BC, J.P. Morgan Chase, and Citigroup, refused to supply the data. They saw the AG's requests as involving "visitation," a concept which the Supreme Court defined in *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) as "'the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.'" They charged that the AG's request was incompatible with OCC's exclusive visitorial powers under the NBA. In their behalf, therefore, the CHA, joined by OCC, challenged the authority of the AG to investigate the operations of national banks and succeeded in securing rulings at the trial and appellate level enjoining the AG from investigating national banks for violations of state anti-discrimination laws. In *Office of the Comptroller of the Currency v. Spitzer*,[23] the district court granted OCC's request for an injunction against the state AG's enforcement of fair lending laws. OCC's objection to the AG's investigation of national bank mortgage practices was grounded in the visitorial powers clause of the NBA and the OCC regulations interpreting that clause. The New York AG challenged OCC's regulatory interpretation of the visitorial powers clause of the NBA, which states:

> (a) No 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.
>
> (b) Notwithstanding subjection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its 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.[24]

The second clause of that statute is referred to as the courts-of-justice exception.

The implementing regulation is 12 C.F.R. § 7.4000. It provides, in pertinent part, "State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or

[21] The investigation was initiated in 2005 by Eliot Spitzer, who was at that time New York's Attorney General; the case was continued by the next New York Attorney General, Andrew Cuomo.

[22] 12 U.S.C. §§ 2801-2810. This law, implemented by the Board of Governors of the Federal Reserve System Regulation C, 12 C.F.R. § 203, requires lending institutions to maintain and make available publicly certain information and data regarding home mortgage lending. According to 12 C.F.R. §§ 203.1(b), the purpose of these requirements is "to provide the public with loan data that can be used (i) To help determine whether financial institutions are serving the housing needs of their communities; (ii) To assist public officials in distributing public investment so as to attract private investment to private areas where it is needed; and (iii) To assist in identifying possible discriminatory lending practices and enforcing antidiscrimination statutes."

[23] 396 F. Supp. 2d 383 (S. D. N.Y. 2005).

[24] 12 U.S.C. § 484.

prosecuting enforcement actions, except in limited circumstances authorized by federal law."[25] Included among the list of "visitorial powers" specified in the regulation as exclusive to OCC is "[e]nforcing compliance with any applicable federal or state laws" that concern "activities authorized or permitted pursuant to federal banking law."[26]

In *The Clearing House Association, L.L.C. v. Cuomo*,[27] the U.S. Circuit Court of Appeals for the Second Circuit, with one dissenting opinion, upheld the district court determining that the OCC regulation warranted deference under the standard announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[28] Under *Chevron*, courts must defer to agency interpretations of ambiguities in federal statutes under certain conditions. Deference is to be accorded to an interpretation in a regulation issued by an agency charged by Congress with enforcing a statute if two conditions are satisfied: (1) the statute is ambiguous rather than clear on the issue; and (2) the interpretation of the agency is reasonable in light of the statutory scheme. Citing Supreme Court precedent, it rejected the AG's argument that there was a presumption against preemption because OCC's visitorial powers regulation divested states of enforcing state laws, an aspect of state sovereignty. It cited *Barnett Bank of Marion County, N.A. v. Nelson*[29] as authority for the contrary standard: explicit statutory grants of authority to national banks generally preempt contrary state law. It also rejected the AG's argument that the language of the visitorial powers clause should be construed as merely limiting states from interfering with OCC's statutory grants of authority. After reviewing the statutory language and judicial constructions of the visitorial powers clause, the appellate court found that although "the precise scope of 'visitorial' powers is not entirely clear," the statute does not preclude OCC's interpretation and that, to some extent, the AG's inquiry involves visitation.[30] The court also found that the AG's investigation did not fall within the courts-of-justice exception by comparing it with the facts of *Guthrie v. Harkness,* 199 U.S. 148, 158 (1905), in which the Supreme Court ruled that a court could permit a private party, a shareholder, to inspect the books of a national bank without violating the exclusive visitorial power of OCC. In a dissenting opinion, Circuit Judge Cardamone saw the result of the majority rule as an alteration of "the compact between the state and national governments" from a "co-equal relationship between two independent co-existing sovereigns" to "one more akin to parent-child or employer-employee."[31]

Supreme Court Decision

Opinion of the Court

The Court, in an opinion written by Justice Scalia and joined by Justices Stevens, Souter, Breyer, and Ginsburg, viewed the case as raising the question of whether OCC's regulatory preemption of state enforcement could be upheld as a reasonable interpretation of the visitorial powers provision

[25] 12 C.F.R. § 7.4000(a)(1).

[26] 12 C.F.R. §§ 7.4000(a)(2)(iii) and (iv).

[27] 510 F. 3d 105 (2d Cir. 2007).

[28] 467 U.S. 837 (1984).l

[29] 517 U.S. 23, 32 (1996).

[30] 510 F. 3d 105, at 117.

[31] 510 F. 3d 105, 126 (Cardamone, J., concurring in part and dissenting in part).

of the NBA. It concluded that neither the language of the regulation, nor OCC's interpretation of it, comported with the statute.

The Court first determined that the term "visitorial powers" carries "some ambiguity and, under *Chevron*, "[t]he Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty ... [b]ut the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act."[32] The opinion first explored the history of the concept of visitation, including the use of prerogative writs such as mandamus, by a corporation's superintendent or superior authority, to prevent it from exceeding its powers or harming the public. Next, it distinguished visitation from sovereign authority by noting that Supreme Court "cases have always understood 'visitation' as ... [the] right to oversee corporate affairs, quite separate from the power to enforce law."[33] It cited *First National Bank in St. Louis v. Missouri* both for its holding—that a state attorney general may enforce a non-preempted state law against a national bank—and for the larger principle that "if a state statute of general applicability is not substantively pre-empted, 'the power of enforcement must rest with the [State] and not with' the National Government." It distinguished *Watters*, which had upheld the preemptive effect of the OCC regulation with respect to a mortgage subsidiary of a national bank, as involving only "whether operating subsidiaries of national banks enjoyed the same immunity from state visitation" as do national banks.[34]

The Court buttressed this conclusion in several ways, including carefully examining and identifying inconsistencies in OCC's published interpretation of its regulation. It characterized the result of applying state laws to national banks without authorizing state enforcement as producing a result akin to permitting the "bark" without the "bite."[35] It contrasted this with the result that distinguishing visitorial powers from state sovereign enforcement powers would produce in terms of the structure of the visitorial statute.[36] It found that by interpreting visitation to be administrative as distinguished from a state's sovereign enforcement powers, the statutory clause preserving the powers "vested in the courts of justice" was not eviscerated since its "only conceivable purpose is to preserve normal civil and criminal lawsuits."[37] Finally, it identified as practical differences between visitorial powers, which include ready access to books and records, and litigation, which involves an adversarial process, judicial oversight, and limitations on access.

Although the Court found that "the Comptroller erred by extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions' in state courts,"[38] the Court ruled that the AG had no authority to issue a subpoena for the documents he was seeking. It, therefore, affirmed the injunction with respect to the threat of subpoenas and vacated it with respect to prohibiting the AG from initiating a judicial action to enforce state anti-discrimination laws.

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[32] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2715 (2009).

[33] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S.C. 2710, 2716, citing Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 676, 681 (1819).

[34] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2717.

[35] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2718.

[36] "[C]hanneling state attorneys general into judicial law enforcement proceedings (rather than allowing them to exercise 'visitorial' oversight) 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." Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2713.

[37] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2718.

[38] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2721.

The Dissenting Opinion

There is an opinion written by Justice Thomas and joined by Chief Justice Roberts, Justice Kennedy, and Justice Alito, which concurs in the Court's conclusion that the AG was without authority to issue an administrative subpoena for the national bank records, but registers a dissent with respect to the issue of the validity of OCC's preemption of state enforcement power. Although the dissent takes issue with the majority's interpretation of previous cases and its reading of the structure of the visitorial powers clause, its emphasis is on the majority's *Chevron* analysis. Instead of agreeing with the Court that OCC's interpretation is overbroad, the dissent would rule that OCC's interpretation is reasonable and would find that the visitorial powers clause, as interpreted by OCC, precludes state enforcement of the anti-discrimination laws against national banks. The dissenting opinion stated that "[t]he statutory term 'visitorial powers' is susceptible to more than one meaning, and the agency's construction is reasonable."[39] Unlike the majority opinion, the dissent sees no clear delineation of visitorial powers either in historical practice or in judicial treatment that precludes OCC's interpretation. It takes exception to the majority's view of the history of the concept. The dissent suggests that OCC's broad view of its visitation power is consistent with the extent to which sovereigns held visitation authority over corporations in contrast to the church's authority to visit charitable institutions. According to the dissent: "[a]t common law, all attempts by the sovereign to compel civil corporations to comply with state law—whether through administrative subpoenas or judicial actions—were visitorial in nature."[40] Without finding support for one particular view of the reach of visitorial powers, the dissent, thus, argues that OCC's interpretation is a reasonable one, and in view of the ambiguity of the term "visitorial powers," and, therefore, permissible under *Chevron*.

Legislation

111th Congress

Dodd Frank: Federal Preemption and State Enforcement of Consumer Protection Provisions

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), P.L. 111-203, in Subtitle D of Title X, the Consumer Financial Protection Act of 2010, contains a provision designed to codify the ruling of the Supreme Court in *Cuomo* by making it clear in statute that the National Bank Act's visitorial powers clause does not preclude state enforcement actions against national banks for violation of non-preempted state law.[41] A parallel provision applies to federal

[39] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2723 (J. Thomas, dissenting).

[40] Cuomo v. The Clearing House Association, L.L.C., ___ U.S. ___, 129 S. Ct. 2710, 2727 (J. Thomas, dissenting).

[41] The provision reads:

> In accordance with the decision of the Supreme Court … in *Cuomo* …, no provision of this title which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law to seek relief as authorized by such law.

P.L. 111-203, § 1047 (a), 124 Stat. 1376. 2119, amending § 5136C of the Revised Statutes.

savings associations and their subsidiaries.[42] There is also a provision authorizing state attorneys general and state regulators to bring actions against individual defendants, state institutions, and national banks and federal savings associations for violations of Title X and regulations promulgated under Title X.[43] The legislation also defines a standard and procedural requirements for OCC to follow in preempting the applicability of state consumer protection laws to national banks or federal savings associations.[44]

Other Proposals During the 111th Congress

The provisions in Dodd-Frank follow other efforts in the 111th Congress to deal with OCC preemption of state efforts to enforce consumer protection laws against national banks, including the following.

The Consumer Financial Protection Agency Act of 2009,[45] released on June 30, 2009, by the U.S. Treasury Department, contained provisions applying state consumer protection laws to national banks and a section specifying that no federal law is to be interpreted as precluding state enforcement of state consumer protection laws by bringing a judicial action against national banks involving potential violations of state or federal consumer protection laws. This proposal essentially proclaimed that state consumer protection laws, subject to certain standards, are applicable to national banks and federally chartered savings associations and their subsidiaries, and that state attorneys general may enforce those laws against those institutions.[46]

H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009, which was passed by the House of Representatives on December 11, 2009, included, as its Title IV, the Consumer Financial Protection Agency Act, which had been separately reported by the House Financial Services Committee.[47] This legislation would have transferred responsibility for administering various federal consumer protection laws addressing financial matters to a newly established Consumer Financial Protection Agency. It would have specified that a state consumer financial law is preempted only if its effect on national banks is discriminatory in comparison with its effect upon state-chartered banks; moreover, under this bill, no OCC regulation or order could have been subject to interpretation or application to preempt a provision of a state consumer protection law without a specific finding based on substantial evidence on the record that the provision "prevents, significantly interferes with, or materially impairs the ability of a national bank to engage in the business of banking."[48]

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[42] P.L. 111-203, § 1047(b), 124 Stat. 1376.

[43] P.L. 111-203, § 1042, 124 Stat. 1375, 2012, adding 12 U.S.C. § 5552.

[44] For further information, *see* CRS Report R41338, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau*, by (name redacted).

[45] http://www.financialstability.gov/docs/CFPA-Act.pdf.

[46] See Consumer Financial Protection Agency Act of 2009, §§ 1042 (Preservation of Enforcement Powers of States); 1043 (State Law Preemption Standards for National Banks and Subsidiaries Clarified); 1044 (Visitorial Standards); 1045 (Clarification of Law Applicable to Nondepository Institution Subsidiaries); 1046 (State Law Preemption Standards for Federal Savings Associations and Subsidiaries Clarified); 1047 (Visitorial Standards); and 1048 (Clarification of Law Applicable to Nondepository Institution Subsidiaries), http://www.financialstability.gov/docs/CFPA-Act.pdf.

[47] H.Rept. 111-367, Part 1 (2009).

[48] H.R. 4173, § 4404, 111th Cong., 1st Sess., as passed by the House of Representatives, § 4404(a) adding § 5136C to the Revised Statutes. The version which was passed by the House of Representatives differs from that reported by the (continued...)

Under this bill, preemption authority would not have covered subsidiaries. The bill also provided a rule of construction applicable to the visitorial powers clause of the NBA to preclude interpreting that clause to prevent a state attorney general from bringing a judicial action to enforce against a national bank any applicable federal or non-preempted state law as authorized by such law.[49]

Senator Christopher Dodd, chairman of the Senate Committee on Banking, Housing, and Urban Affairs, presented a draft proposal, the Restoring American Financial Stability Act of 2009.[50] It paralleled H.R. 4173 with respect to transferring consumer protection functions from the banking agencies to a single regulatory agency, also named the Consumer Financial Protection Agency. It contained a provision applying state consumer laws of general applicability to national banks unless such laws discriminate against national banks or unless the CFPA determines that they are inconsistent with federal law.[51] The draft legislation also includes a provision precluding the interpretation of the visitorial powers clause as limiting the authority of a state's attorney general from bringing a judicial action "to require a national bank to produce records relevant to the investigation of violations of State consumer law, or federal consumer laws; ... to enforce any applicable provision of Federal or State law, as authorized by such law."[52]

H.R. 3310, the Consumer Protection and Regulatory Enhancement Act, introduced on July 23, 2009, by Representative Spencer Bachus, would have continued the current practice of having the federal banking regulators monitor consumer protection compliance with respect to banking institutions, although it would consolidate bank regulation. It would have established a Financial Institutions Regulator (FIR) to assume the functions of the various current federal banking regulators. Within the FIR there would be an Office of Consumer Protection to be responsible for administering and enforcing consumer protection laws. It contained no provision altering current law with respect to the visitorial authority over national banks or the preemption of state consumer protection laws for the benefit of national banks.

112th Congress

As OCC and the states begin to operate under the new rules covering preemption of state consumer protection laws and state enforcement authority over national banks, some of the matters which may draw attention from Congress include (1) how well OCC and the Consumer Financial Protection Bureau are coordinating efforts with those of the states; and (2) the extent to which the regime established in Dodd-Frank improves consumer protection without unduly burdening the financial services industry.

(...continued)

House Committee on Financial Services. *For information see* CRS Report R40696, *Financial Regulatory Reform: Consumer Financial Protection Proposals*, by (name redacted) and (name redacted), pp. 8-9.

[49] H.R. 4173, § 4405. 111th Cong., 1st Sess., as passed by the House of Representatives.

[50] Committee Print, S. ____, "Restoring American Financial Stability Act of 2009," 111th Cong., 1st Sess. (2009), http://banking.senate.gov/public/_files/111609FullBillTextofTheRestoringAmericanFinancialStabilityActof2009.pdf.

[51] *Id*., § 1043.

[52] *Id.*, § 1046.

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