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Legal Sidebar

Appeals Court Clears Most Roadblocks to Credit Union Expansion Regulations

September 5, 2019

On August 16, 2019, a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld National Credit Union Administration (NCUA) regulations expanding the ability of community credit unions to draw members from wider geographic areas than previously permitted. The decision, *American Bankers Association v. National Credit Union Administration*, is an outgrowth of long-standing competition between community credit unions and community banks and is not likely to settle the issue. The appellate decision differs sharply from and largely reverses a 2018 district court decision that had vacated provisions of the credit union field-of-membership and chartering regulations, issued in 2016, and held them to be beyond the agency's authority under the Federal Credit Union Act (the Act). Whether the American Bankers Association (ABA) seeks further review, either from the D.C. Circuit sitting *en banc* or from the Supreme Court, the rivalry between community credit unions and community banks and the differences in how they are regulated may provoke congressional interest. That is because, as discussed here, these two types of depository institutions share similar business models and are likely to vie for the same clientele, but are subject to distinct regulatory regimes and tax treatment.

Background

This case involves challenges to four aspects of how the 2016 regulations reinterpret field-of-membership requirements for community credit unions. Unlike banks, which may offer their services to any customers, federal credit unions, are member-owned cooperatives that are restricted to serving only their members, and membership must be based on a common bond of occupation or association, or, in the case of community credit unions, geographical area. Under the Act, community credit unions are required to have a common bond limiting their membership to "[p]ersons or organizations within a well-defined local community, neighborhood, or rural district." In 1998, following a Supreme Court decision invalidating an NCUA regulation permitting credit unions to have multiple common bonds, Congress enacted the Credit Union Membership Access Act, P.L. 105-219, reversing that decision and permitting multiple-group credit unions under certain circumstances. That legislation also delegated broad authority to the NCUA to construe the language at issue in the current case and to "mak[e] any determination with regard to the field of membership of a [community] credit union."

Challenged Aspects of the NCUA's 2016 Regulations

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LSB10345

In the case, the ABA challenged the 2016 regulations under the Administrative Procedure Act as not "in accordance with law" and outside the NCUA's "statutory jurisdiction" for:

- Defining "local community" to include an individual portion of what the Office of Management and Budge defines as a Combined Statistical Area (CSA) as long as the portion's population does not exceed 2.5 million. In the appellate court's layperson's description, a CSA is "[e]ssentially . . . a regional hub with urban centers connected by commuting patterns."
- Increasing the population limit for a "rural district" "local community" from 250,000 or 3 percent of the relevant state to 1 million.
- Eliminating a requirement that a "local community" based on what the Bureau of the Census defines as a Core-Based Statistical Area (CBSA) include the core and retaining a 2.5 million population limit despite eliminating the requirement of a core. According to the appellate court, a CBSA means "a city or town and its suburbs."
- Adding an area or areas adjacent to the perimeter of a "local community" which is a portion of a Single Political Jurisdiction, CSA, or CBSA that the community credit union is already serving, if "based upon a narrative showing that residents on both sides of the perimeter interact or share common interests."

The District Court Decision

In General. The district court rejected the NCUA's treatment of CSAs as "local communities" as well as its expansion of the population of "rural districts," but ruled in favor of the agency's not requiring the urban core to be included in a CBSA qualifying as a "local community." The court analyzed the NCUA regulations under the Supreme Court's *Chevron* doctrine, which requires courts to defer to an agency's reasonable interpretation of ambiguous statutory terms. In this case, the district court determined that Congress had expressly delegated "definitional authority" to the NCUA to interpret the language and that the task of the district court, under *Chevron*, was to determine whether the agency's construction was not "'contrary to the statute.'"

The Question of Whether a CSA May Qualify as a "Local Community." To determine whether the NCUA had authority to define "local community" to include a portion of a Combined Statistical Area, the court examined dictionaries and state laws from when the term was added to the statute, concluding that "*local* meant geographically limited," and that, by changing "community" to "local community" in 1998, Congress had "shrunk the phrase's geographic scope." According to the court's analysis, "[o]n the whole, these definitions suggest that *local community* was understood in 1998 as generally encompassing an area no larger than a county." The court, therefore, held that the NCUA had exceeded its authority when it defined "local community" to include a portion of a Combined Statistical Area "[b]ecause the Rule automatically qualifies any area of 2.5 million or fewer people from any Combined Statistical Area as part of a local community—despite its potential geographic breadth and lack of commonality." To illustrate how unreasonable this definition is, the court noted that it would permit a community credit union to serve a thin strip running from Virginia to Pennsylvania in "a series of daisy-chained Core-Based Statistical Areas that are linked to their neighbors but have nothing to do with those at the end of the chain."

Raising the Population Cap for Rural Districts. The district court also rejected NCUA's expansive definition of "rural district," holding it to be contrary to the statute on the basis of conclusions reached from dictionaries and judicial opinions of the era when that term first appeared in statute in 1934. According to the court, in 1934, a rural district would be smaller than a state. The court, therefore, held that the geographic expansiveness of the NCUA's definition was unreasonable because it could extend to an area as large as of "portions of Texas, Oklahoma, Kansas, Colorado, and New Mexico," an area that would also include the urban center of Amarillo, Texas.

Eliminating the Core for Core-Based Statistical Areas to Qualify as a "Local Community." On the other hand, the district court rejected ABA's challenge to the elimination of the core of a Core-Based Statistical Area, which it held to be reasonable, although it characterized it as "troubling." The court was persuaded by NCUA's rationale that eliminating the core requirement avoided "adverse results" such as, forcing credit unions "to sacrifice service to non-core portions of Core-Based Statistical Areas."

Adding Adjacent Areas to a Portion of a Single Political Jurisdiction, CBSA, or CSA. The district court also ruled against ABA's facial challenge to that portion of regulations that permits a community credit union to add an adjacent area to a Single Political Jurisdiction, Core-Based Statistical Area, or Combined Statistical Area already being served by the credit union. The court held that this provision has "no definitional import" and that as-applied challenges would be possible when the NCUA rules on a particular application.

The Appellate Court's Decision

In General. Like the district court, the D.C. Circuit relied on *Chevron*; noted that Congress had delegated explicit authority to NCUA "to clarify the statute"; and saw its task as discerning "whether the agency's definitions are 'based on a permissible construction of the statute.'" The appellate court, unlike the trial court, upheld the NCUA's regulations permitting a portion of a Combined Statistical Area to qualify as a "local community" and expanding the population limit for a "rural district" to 1 million. Also in contrast to the trial court's ruling, the appellate court rejected allowing a Core-Based Statistical Area without its urban core to qualify as a "local community"; instead, it remanded that issue for the NCUA to provide "further explanation." To avoid a "disruptive effect," such as "mak[ing] it more difficult for some poor and minority suburban residents to receive adequate financial services," the appellate court ordered the district court not to vacate the rule, having "concluded that the NCUA might be able to offer a satisfactory reason on remand."

The Question of Whether a CSA May Qualify as a "Local Community." To the appellate court, the district court erred in concluding that the term "local community" as added in 1998 means a geographic area comparable to a county. In contrast to the district court, the D.C. Circuit panel quoted from a 1993 dictionary and concluded that the 1998 insertion of "local" before "community" merely "implies that the community 'relate[s] to' a 'particular limited district' or is 'confined to a particular place.'" The appellate court, thus, held that '[t]he NCUA sensibly reads the term 'local' to mean simply that the community regardless of shape or size, should be neither 'broad' nor 'general.'" This holding was buttressed by the court's noting that qualifying a Combined Statistical Area as a "local community" furthered the purposes for which Congress enacted the credit union legislation: promoting "'credit union safety and soundness'" and providing a community credit union with a "'well-understood sense of cohesion or identity.'"

Raising the Population Cap for Rural Districts. The appellate court also reversed the district court and upheld the NCUA's raising the population cap for rural districts. Characterizing the district court's research into 1934-era dictionaries and judicial decisions as "pretty thin," the court found dictionary support to conclude that "'rural' and 'district' do not connote specific population or geographical constraints," but imply "resembling the countryside." The appellate court proclaimed, therefore, that "[n]othing about the 1-million-person cap prevents the rural district from resembling the countryside." According to the appellate court, that the NCUA's definition of a rural district could include urban areas did not make the definition unreasonable when considered in connection with another section of the regulations. This was a limitation on the population density of rural districts to 100 persons per square mile, which, according to the appellate court, meant that: "even if most residents live on urban areas in the rural district, those areas will be surrounded by rural land. . . . [and] 100 people per square mile . . . is a rural population density." The court also found additional support for the reasonableness of the rural district definition in NCUA's assertion in its preamble to the 2016 regulations that one effect of the increased population cap would be to reach "persons of modest means," persons for whom Congress established federal credit unions.

Eliminating the Core for Core-Based Statistical Areas to Qualify as a "Local Community." The appellate court determined that elimination of the core requirement in the definition of local community based on a Core-Based Statistical Area was consistent with the "dual purposes of promoting credit union growth and ensuring some cohesion among members." However, the court remanded the issue for NCUA to explain how this would not result in redlining—gerrymandering that cherry-picked wealthy suburbs from a CBSA and omitting the poorer population within the urban core. Eliminating the core, according to the court, supported the goals for which community credit unions exist, specifically: CBSAs are defined to have common commuting ties, therefore, "[o]mission of the urban core . . . will permit community credit unions to reach new members in the suburban parts of the Core Based Statistical Area and thus to maintain a healthy membership." However, the problem, according to the court, was that the NCUA had not addressed the possibility that elimination of the core would sacrifice credit union services to poorer populations of CSA. Although during the litigation, the NCUA had made assertions of how its supervisory process and its ability to reject proposals on the basis of suspected discrimination would prevent this type of gerrymandering, the court found that nothing in the regulations addressed this issue or the possibility of serving persons outside the designated local community, i.e., the residents of the eliminated core area. On remand, the NCUA will likely either propose amendments to this part of the regulation that would include standards that it would impose to avoid this type of redlining or return to court with an explanation sufficient to remove any possibility of redlining.

Considerations for Congress

The differences between the two decisions are decidedly sharp, with the appellate court upholding and the trial court rejecting most of the NCUA's definitions that expand the geographic areas possible for community credit unions. The disparity in how the two courts viewed the NCUA's expansive regulations may turn Congress's attention to an examination of the credit union industry, including its tax exempt status. On the other hand, although the ABA has not yet chosen a course in the face of the unfavorable decision from the D.C. Circuit, it is considering its "next steps to ensure NCUA doesn't violate the expansion parameters set by Congress." Those may include two possible litigation strategies: (1) seeking a review of the panel decision by the full D.C. Circuit, sitting *en banc*; or (2) appealing directly to the Supreme Court. ABA could also seek a legislative fix. Whether or not the litigation continues, however, the competition between the community banking industry and credit unions may cause Congress in the not too distant future to look into the whether there is need for adjustments with respect to such factors as community credit union field-of-membership definitions; credit union tax exempt status; and whether or not credit unions should be subjected to certain requirements applicable to other depository institutions, i.e., such as those included in the Community Reinvestment Act.

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