



# BANKING REPORT



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## OCC v. Spitzer: OCC's Exclusive Authority Over National Banks Affirmed

By **RAYMOND NATTER, ESQ.**

In a sweeping decision decided on October 12, 2005, the Federal District Court for the Southern District of New York upheld the right of the Comptroller of the Currency to bar State Attorney Generals from investigating or taking legal action against national banks and their operating subsidiaries.<sup>1</sup> In a companion case,<sup>2</sup> the court also made clear that the prohibition against State investigations and prosecutions applies whether the State Attorney General is acting on behalf of the State directly, or on behalf of affected citizens of the State.<sup>3</sup> As a result of these cases, the New York Attor-

ney General is enjoined from investigating or taking enforcement actions against national banks.

### Exclusive Visitorial Authority

In order to appreciate the district court's decisions, it is necessary to distinguish the concept of exclusive visitorial authority from the related, but different 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,<sup>4</sup> 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 to a national bank by statute or regulation.<sup>5</sup>

The OCC's exclusive visitorial power stems from a Federal statute, not directly from the U.S. Constitution. By statute, Congress declared, "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. . . ."<sup>6</sup>

On November 4, 1999, the OCC published a regulation interpreting this statutory provision. The regulation explained that "visitorial powers" include inspection of

affected group of citizens of the state in order to enforce their rights.

<sup>4</sup> U.S. Const., Art. VI, cl. 2.

<sup>5</sup> 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).

<sup>6</sup> 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."

<sup>1</sup> *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).

<sup>2</sup> *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).

<sup>3</sup> 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

*Raymond Natter, of Barnett, Sivon & Natter P.C., Washington, D.C., was formerly deputy chief counsel at the Office of the Comptroller of the Currency. He has also been counsel to the Senate Banking Committee and served as senior counsel at the Federal Reserve Board.*

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. The OCC regulation went on to provide that visitorial authority also covers attempts to enforce compliance with applicable law.<sup>7</sup> On January 13, 2004, the OCC again amended its regulations to elaborate that the exclusive visitorial authority applies with respect to the "content and conduct of activities authorized for national banks under Federal law," and to clarify the exception for actions in "courts of justice."<sup>8</sup>

The regulation explains 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. Instead, the exception simply permits private litigants to obtain discovery and other typical judicial relief in actions involving national banks.

Thus, under the OCC's regulation, unless a specific exception applies, 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 recent New York litigation.

**Factual Background.** The litigation arose from attempts by the New York State Attorney General, Eliot Spitzer, to investigate allegations that lending institutions, including national banks, may have discriminated in the pricing of mortgage loans in violation of New York law, as well as Federal law.

The Attorney General's concerns were based on preliminary and raw data released under the Home Mortgage Disclosure Act, that showed that members of certain minority groups were charged, on average, higher mortgage rates than whites. The data did not include information on creditworthiness of the borrowers, such as their credit scores.

In April 2005, the Attorney General sent letters to national banks demanding non-public lending information as part of his "preliminary inquiry" into potential lending discrimination violations. 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. In the OCC case, the court noted that the OCC was not arguing that the State laws in question were preempted.

<sup>7</sup> 64 Fed. Reg. 60092 (Nov. 4, 1999), codified at 12 CFR § 7.4000.

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

Rather, the OCC was taking the position that these applicable State anti-discrimination laws could only be enforced against national banks by the OCC pursuant to the Comptroller's regulation. Thus, the primary issue before the court was the validity of the OCC regulation.

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.<sup>9</sup>

## Constitutional Power and Statutory Authority

The district court saw no constitutional problem with the OCC's exclusive visitorial authority position. The court noted that 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.<sup>10</sup> 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.<sup>11</sup> In addition, the court found statutory 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.<sup>12</sup>

**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 State 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.

On the other hand, the Attorney General argued that in the 1924 case of *First National Bank of St. Louis v. Missouri*,<sup>13</sup> 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.

<sup>9</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>10</sup> See, e.g. *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

<sup>11</sup> Citing, *Wachovia Bank v. Burke*, 414 F.3d 305 (2d Cir. 2005).

<sup>12</sup> 12 U.S.C. § 93a.

<sup>13</sup> 263 U.S. 640 (1924).

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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 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 to the Federal banking agencies in 1966.

Finally, the court noted that while the exclusive visitatorial 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 visitatorial statute.

In summary, the district court concluded that the visitatorial powers 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 regulation's 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 by the Congress during the 1863 debate on that legislation. That debate supports 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 visitatorial 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.

Normally, a State Attorney General brings an action to enforce a State right, or to prevent or seek redress for damage to a State's interest. For example, a State has an interest, as a sovereign, in ensuring that its taxes are paid and its laws are enforced. In addition, a State Attorney General may bring an action in many jurisdictions under a different theory, the theory that the State may act in the interests of its individual citizens, protecting their rights and seeking remedies for their individual damages. When a State Attorney General is acting in this role, he or she is said to be acting in a *parens patriae* capacity.

In the Clearinghouse case, the Attorney General argued that he could bring an action against national banks in a *parens patriae* capacity, and that such a suit was authorized under the Fair Housing Act.

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 U.S. 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 Federal banking law.

## Conclusion

There is no question that the U.S. district court's decision represents a significant victory for the OCC. Under this precedent, 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. Unless this case is overturned on appeal, it would be clear that national banks will be essentially subject to uniform and nationally consistent supervision and regulation by the OCC.

However, while the legal issues may be resolved, policy issues still need to be addressed. Attention will no doubt turn from the legal debate to the more practical questions of how to assure that applicable State laws will apply to national banks, and how to assuage the concerns of the States that their citizens will be pro-

tected at the Federal level. Also, there is the broader question of the competitive balance between State and national banks. The successful resolution of these

policy issues will be the next challenge for the OCC, the State bank regulators and the banking industry.