TUCKER ELLIS & WEST LLP
ATTORNEYS AT LAW

CLIENT ALERT **JULY 2009**

IN ANOTHER BLOW TO FEDERAL PREEMPTION, STATES CAN ENFORCE STATE UNFAIR LENDING LAWS AGAINST NATIONAL BANKS

MATTHEW I. KAPLAN
ANNE SWOBODA CRUZ

The United States Supreme Court has again clawed back the breadth of federal preemption in the 2008-2009 term. On June 29, 2009, the Court issued a decision in *Cuomo v. Clearing House Association, L.L.C., et al.*, 08-453, 2009 WL 1835148, ruling that while states cannot conduct oversight investigations of national banks under the National Bank Act, states can sue to enforce their own laws. The Supreme Court also rejected regulations issued by the Office of the Comptroller of the Currency ("OCC") in favor of an expansive reading of state power, stating they do "not comport with the statute." This result falls in line with the current era of increased scrutiny on banking practices and the Obama Administration's push to revise and increase the regulation of the financial services industry. If national banks are not already fine tuned to individual state statutes, they soon should be. State attorneys general have won a major victory. Whether private law enforcement actions based on state laws such as California's expansive unfair competition statute will be allowed to proceed remains to be determined.

The *Cuomo* case arose from the efforts of former New York Attorney General Eliot Spitzer to investigate whether certain national banks violated New York's state fair lending laws. Spitzer sent threatening letters "in lieu of subpoena", seeking non-public information about lending practices to several national banks. The OCC and a banking trade group filed suit to stop Spitzer's enforcement of New York law, claiming regulations issued by the OCC implementing the National Bank Act preempted the state's action. The Supreme Court agreed with the lower courts that use of "letters in lieu of subpoena" was improper, but rejected the attempt to stop New York from enforcing its banking laws.

The Court's ruling hinges on the distinction between so-called "visitorial powers" under the National Bank Act, 12 U.S.C. § 484(a), and a state's police power to enforce the law. The National Bank Act preempts only these "visitorial powers". In implementing § 484(a), the OCC adopted regulations defining the scope of "visitorial powers". 12 CFR § 7.4000. The OCC's regulation provided that state officials were prohibited from exercising "visitorial powers" against national banks, including powers such as "conducting examinations, inspecting or requiring the production of books or records of national banks, *or prosecuting enforcement actions*, except in limited circumstances authorized by federal law." (emphasis added). The OCC gave an

expansive interpretation of this regulation to prohibit all state actions related to "banking activities", while leaving the door open to regulations "in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law." The OCC successfully defended this broad interpretation of preemption in the lower courts.

In a sharp critique of 12 C.F.R. § 7.4000, the Supreme Court ruled the OCC's interpretation went far beyond the text of the National Bank Act. The Court stated that "visitorial powers" refer to "a sovereign's supervisory powers over corporations" including general supervision, control, and administrative oversight, and stated the "unmistakable and utterly consistent teaching of our jurisprudence … is that a sovereign's 'visitorial' powers and its power to enforce the law are two different things. There is not a credible argument to the contrary. And contrary to what the Comptroller's regulation says, the National Bank Act pre-empts only the former." Because Spitzer's letters were based on the Attorney General's investigatory authority backed by the implicit threat that non-compliance would result in issuance of a subpoena under the New York Executive Law, these efforts were preempted.

However, the Court emphasized that enforcement of state lending laws in the courts do not fall under the purview of "visitorial powers". States can exercise the power of law enforcement "vested in the courts of justice" under the National Bank Act. Despite the Comptroller's regulation, national banks are simply not exempt from all state consumer protection laws. State attorneys general can pursue judicial enforcement of state laws against national banks. Thus, states not only have the power to enact stricter laws against national banks, they also have the power to enforce those laws.

PRACTICAL POINTS:

- State attorneys general still lack authority to perform oversight or informal investigation and review of national banks. Any queries under state lending laws to national banks for information or documents outside of a formal litigation action are prohibited.
- However, *Cuomo* provides a timely reminder of why now may be the time for a best practices audit. National banks are now conclusively subject to state enforcement of fair lending and other laws. National banks must be sure they comply with all state statutes that apply to their banking practices.

For more information please contact:

Lawrence A. Callaghan (415) 617-2225
larry.callaghan@tuckerellis.com

Matthew I. Kaplan (213) 430-3309
matthew.kaplan@tuckerellis.com

Glenn E. Morrical (216) 696-3431
glenn.morrical@tuckerellis.com

Hugh M. Stanley (216) 696-3934
hugh.stanley@tuckerellis.com

www.tuckerellis.com