AMERICAN BANKER®
THE FINANCIAL SERVICES DAILY
Thursday, January 28, 2010

VIEWPOINTS

Bank Defenses in State Litigation

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The Supreme Court's June 2009 decision in Cuomo v. Clearing House Association LLC has been aptly described as a surprise that sent shock waves through the banking industry and that could generate a wave of state proceedings against national banks.

The case involved the New York attorney general's issuance to several national banks of administrative requests for nonpublic information. The court concluded that the attorney general's "requests" were mandatory and therefore held that the New York Attorney General's office had asserted a right to inspect the banks' records at any time. This right is known legally as "visitorial power." Because visitorial power over national banks is reserved exclusively to the Office of the Comptroller of the Currency, the Supreme Court invalidated the attorney general's requests. This decision confirmed that state attorneys general cannot conduct administrative "fishing expeditions" into national bank records.

State attorneys general, however, argue that the decision permits and perhaps even encourages other state enforcement actions that would not intrude on the OCC's powers. Specifically, the attorneys general cite the court's ruling — "[i]f 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" — as empowering attorneys general to bring state consumer protection lawsuits against national banks.

For example, according to *The New York Times*, Iowa Attorney General Tom Miller says that the decision puts state attorneys general "back on the field" and that "certainly there will be some litigation."

State attorney general lawsuits resemble class actions in many ways. Each can involve the aggregation of claims from a potentially large group, and each can therefore entail large monetary claims. Moreover, attorney general actions (like class actions) can be very costly to defend. Accordingly, it is crucial for national banks and their counsel to understand the evolving application of the Cuomo decision and other legal authorities related to the litigation powers of state attorneys general.

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Only time and further litigation will determine the ultimate significance of the Cuomo decision for national banks facing state attorney general consumer-protection litigation. Nevertheless, we believe the New York case leaves important defenses in place.

For example, national banks can still argue that federal banking law preempts particular provisions of state law and thereby negates any attorney general action to enforce the preempted law's terms. Indeed, the Cuomo decision stated clearly that it is only when "a state statute of general applicability is not substantively preempted" that state officials may apply that law against national banks.

Some courts may, however, read the decision as narrowing the circumstances in which preemption applies. Mann v. TD Bank, a Nov. 12 decision from New Jersey, and Mwantembe v. TD Bank, a Nov. 17 decision from Pennsylvania, acknowledged that preemption applies where state and federal laws conflict but applied a restrictive view of when such conflicts arise.

These courts permitted plaintiffs to assert certain claims in state law against a national bank defendant. The Mwantembe court said that the Cuomo case "reverses [a] trend" toward granting greater preemptive effect to federal banking statutes and regulations. It also created "a sea change in the perception of the preemptive effect of the [National Bank Act] and the OCC regulations," the court said.

That reading of the Cuomo decision is debatable. In our view, it addresses the exclusivity of federal visitorial power over national banks, not the scope of federal banking law preemption. The Mann and Mwantembe courts' expansive reading of Cuomo as potentially creating a "sea change" in preemption law has yet to be reviewed by a higher court, and it remains uncertain whether other courts will give the Cuomo decision a similar reading.

Nevertheless, the Mann and Mwantembe decisions indicate that preemption will probably be a major battlefield in state attorney general actions against national banks. They also highlight that national banks facing state attorney general litigation must present their preemption arguments

clearly while emphasizing that the Cuomo decision did not address, much less alter, the substantive law of preemption.

In addition, national banks may argue that the Federal Deposit Insurance Act precludes attorneys general from litigating claims that could overlap with a federal enforcement action. The act states that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order" in an FDIC or OCC administrative proceeding.

Thus, an actual or potential federal administrative proceeding might prevent any court from hearing a state attorney general claim concerning the same underlying conduct. Some banks might consider approaching their federal regulator with potential issues to give the regulator the opportunity to commence an administrative proceeding before state attorney general litigation materializes, though such an approach carries obvious risks.

State law itself may also give national banks potentially powerful defenses against attorney general litigation.

For example, state attorneys general are often required to articulate an interest separate from that of private parties who could bring their own cases. What constitutes a sufficient interest is not always clear, and banks should be diligent about testing the attorney general claims.

The substantive state law underlying a particular attorney general action can also limit attorney general authority. For example, consumer-protection and unfair-business-practice statutes may include "safe harbor" provisions for conduct permitted by, or taken to comply with, other applicable law. To the extent that federal banking law requires specific conduct, state law may offer a defense against a claim that the same conduct is a deceptive practice.

Banks should also be aware that the Consumer Financial Protection Agency legislation pending in Congress may affect the ability of state attorneys general to bring claims against banks under state law. A coalition of 37 state attorneys general recently asked Congress to enact provisions authorizing states not only to "enforce their own consumer protection laws" but also to "enforce federal standards," arguing that such enforcement power would "maximize government resources" and "promote healthy competition." The House bill passed without such provisions, but the Senate has not yet acted.

Though efficiency gains might result from the states' specializing in consumer protection claims and federal banking authorities' focusing on issues with systemic-risk implications, such as capital adequacy, it is also possible that competition could arise to see which regulatory authority can be toughest on national banks.

Regardless of how Congress addresses the preemptive effect of federal banking regulation, banks are likely to see increased attorney general litigation of consumer protection claims. In such cases, the scope of preemption is likely to be hotly contested, and nonpreemption defenses are likely to become increasingly important.

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