

## LexisNexis® Expert Commentaries

### Jaworski on Clearing House Association, L.L.C. v. Cuomo: A Fight Over Visitation Rights

On December 4, 2007, the Second Circuit Court of Appeals issued an important decision concerning states' rights to enforce their own non-preempted laws against national banks doing business within their borders. The decision, [\*Clearing House Ass'n, L.L.C. v. Cuomo\*, 510 F.3d 105 \(2d Cir. 2007\)](#), concluded that, while national banks must obviously comply with non-preempted state laws, only representatives of the Office of the Comptroller of the Currency ("OCC"), the regulator of national banks, may investigate national banks and/or pursue enforcement actions against them in connection with possible violations of those state laws.

The dispute centers around the exclusive "visitorial powers" over national banks that the National Bank Act, [12 U.S.C. § 21](#) *et seq.* ("NBA"), gives to the OCC, and that the OCC has clarified (or, some would say, expanded) by regulation. It raises two questions: (1) How far do the OCC's exclusive visitorial powers extend; and (2) are there any viable exceptions available to states that wish to act to protect their citizens. The court's answers to these questions, in short, are "very far" and "maybe."

**Factual Background.** This particular controversy began in 2005 when the New York State Attorney General ("NYAG") sent "letters of inquiry" to several large national banks and/or their operating subsidiaries (collectively, "National Banks"). The letters requested that the National Banks voluntarily produce certain non-public information regarding their mortgage lending policies and procedures and data concerning loans secured by real property in New York State. The NYAG sent the letters after reviewing recent federal Home Mortgage Disclosure Act ("HMDA") data that indicated that a significantly higher percentage of high-interest home mortgage loans were issued to African-American and Hispanic borrowers in New York than to white borrowers, and stated in the letters that the disparities reflected in the HMDA data "are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws...". [510 F.3d 105, 109](#).

In response to the letters, the OCC and The Clearing House Association ("CHA"), a consortium of national banks (including some recipients of the letters), sued the NYAG, in separate actions, to enjoin his investigation and enforcement efforts in this regard. The OCC and the CHA claimed that any such efforts constituted an unlawful exercise of

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visitorial powers over the National Banks in violation of [§ 484](#) of the National Bank Act and applicable OCC regulations (collectively, the “Visitation Prohibition”).

For his part, the NYAG claimed that the OCC’s regulation, [12 C.F.R. § 7.4000](#) (1997), was unlawful, that his investigation was not a prohibited exercise of visitorial powers under the NBA, and that, regardless, he was authorized by the Fair Housing Act (“FHA”) to sue the National Banks, as *parens patriae* (under an exception to the Visitation Prohibition for “visitorial powers ... authorized by federal law”) (the “FHA Claim”).

After a trial, the district court ruled in favor of both the OCC ([Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 \(S.D.N.Y. 2005\)](#)), and the CHA ([Clearing House Ass’n, LLC v. Spitzer, 394 F. Supp. 2d 620 \(S.D.N.Y. 2005\)](#)), on all counts. On appeal, the Second Circuit Court of Appeals affirmed the rulings below, except as to the lower court’s ruling on the FHA Claim, which the Second Circuit remanded to the lower court as not being ripe for adjudication and with instructions to dismiss.

**Legal Background.** [Section 484](#) provides in pertinent part that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law ...”. *Visitation* has been defined by the United States Supreme Court as “the act of a superior or superintending officer, who visits a corporation to examine into its manner to conducting business, and enforce its observance of its laws and regulation.” [Guthrie v. Harkness, 199 U.S. 148, 158, 26 S. Ct. 4, 50 L. Ed. 130 \(1905\)](#).

In 1996, the OCC adopted a regulation clarifying that only the OCC may exercise “visitorial powers” over national banks. [12 C.F.R. § 7.4000](#) (1997); [61 Fed. Reg. 4862, 4869](#) (Feb. 9, 1996). In 1999, the OCC revised this regulation to clarify the extent of its exclusive visitorial powers. [64 Fed. Reg. 60092, 60094](#) (Nov. 4, 1996). It essentially defined “visitorial powers” as any power included in a non-exclusive list of powers set forth in the regulation. Among the powers appearing on this list are: examining or inspecting or requiring the production of the national bank’s books and records; regulating and supervising activities authorized or permitted by federal banking law; and, of particular relevance here, enforcing compliance with any applicable federal or state laws concerning those activities.

**The Court’s Rationale.** With respect to the NYAG’s assertion that the OCC’s regulation was unlawful, the Second Circuit undertook a *Chevron* analysis (after rejecting the NYAG’s contention that such an analysis was inappropriate under the facts of this case). It found, first, that the NBA does not clearly preclude the interpretation of [§ 484](#),

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which the OCC adopted in its regulation; *i.e.*, that the term “visitorial powers” as used in [§ 484](#) is broad enough to encompass the type of investigative and enforcement powers sought to be exercised by the NYAG. It then found that the OCC’s interpretation of the term “visitorial powers” was reasonable and, hence, lawful. As evidence of the reasonableness of the OCC’s interpretation, the court pointed to, among other things, a provision in the Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994, which said that interstate branches of a national bank remain subject to “[t]he laws of the host State regarding community reinvestment, consumer protection, [and] fair lending,” except when such laws are federally preempted or determined by the OCC to have a discriminatory effect on national banks, but that insofar as such laws remain applicable, they “shall be enforced ... by the [OCC].” [12 U.S.C. §§ 36\(f\)\(1\)\(A\), 36\(f\)\(1\)\(B\)](#).

The NYAG also argued that no deference is owed to the OCC’s regulation because it interprets “purely legal concepts, as opposed to technical matters within the OCC’s expertise.” [510 F.3d 118](#). Although the court admittedly struggled with this argument, it nevertheless decided that judicial deference to an agency rule which attempts to harmonize the rule with judicial precedent is appropriate.

An interesting aspect of the court’s decision is how it dealt with the FHA Claim, *i.e.*, that the FHA gives the NYAG the right to sue national banks as *parens patriae* for violation of its provisions, and that the NYAG’s exercise of this right falls within the exception to the Visitation Prohibition for visitorial powers “authorized by federal law.” The lower court found that any such lawsuit would constitute a “visitation” and would not fall within the stated exception. [394 F. Supp. 2d 620, 628–630](#). The Second Circuit, however, noted that the issue is “significantly more complicated than the district court’s analysis suggests.” [510 F.3d 125](#).

However, rather than deciding the issue, the Second Circuit determined essentially that, since the NYAG had not yet sued the National Banks for violation of the FHA, the matter was not yet ripe for adjudication. It therefore remanded it to the district court with orders to dismiss. Not having been adjudicated, the issue thus survives — to be decided, perhaps, if and when the NYAG, or some other state official, actually sues a national bank for violating the FHA.

**Impact of the Decision.** The impact of this decision is potentially far-reaching. It is likely that most state officials have recognized, even before this decision, that the Visitation Prohibition prevents them from examining a national bank’s exercise of its banking powers for compliance with preempted and even non-preempted state laws. However, it

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seems doubtful they have understood that it also prevents them from ordering a national bank to produce records as part of an investigation into possible violations of non-preempted state laws and/or from suing a national bank for violating non-preempted state laws. State attorneys general and other state regulatory officials are therefore likely to view this decision as preventing them from fulfilling what they perceive as their duty to investigate and prosecute violations of state law on behalf of their state's citizens. National banks and the OCC, on the other hand, will consider this decision as necessary and appropriate to protect and preserve the regulatory structure of the national banking system as it is intended to operate; *i.e.*, as a uniform and exclusive system of regulation and supervision by the OCC over national banks. With such a dichotomy of interests, and while the decision itself may not have been a surprise, the surprise will be if it does not end up being a focus for debate in the halls of Congress.

**About the Author.** Robert M. Jaworski is a partner in the Financial Services Regulatory Group of Reed Smith, LLP in Princeton, New Jersey and a former Deputy Commissioner of the New Jersey Department of Banking. He is also Co-Chair of the RESPA and Housing Finance Subcommittee of the American Bar Association's Consumer Financial Services Committee; the former Editor of Pratt's Mortgage Compliance letter, a national publication on mortgage compliance issues; and the Secretary of the Board of Directors of the New Jersey Bar Association's Banking Law Section. Mr. Jaworski provides federal and state compliance and regulatory advice to banks, mortgage lenders and other consumer financial services providers, and regularly assists Reed Smith litigators in defending financial institutions in individual and class actions. He has written on real estate topics for several LexisNexis publications, including Real Estate Financing (LexisNexis Matthew Bender), which features his Special Alert on *State Governmental Responses to Problems in the Subprime Mortgage Loan Origination Business*.