Leadership Message

Welcome to the new format for the Consumer Financial Services Committee Newsletter. Over the past several months, the Publications Subcommittee has been working hard to try to improve the ways that the CFSC delivers content to its members. The first change has been to the CFSC Newsletter, which beginning in 2010, will be distributed to all CFSC members every two months. Each newsletter will follow this general format, with content in each of the six main headings, and rely on the participation of both the CFSC leadership and the membership at large to help make it a success. In this section, various members of the CFSC leadership will provide an update on what is going on with the CFSC and different ways members can get involved. Our hope is that you will find the CFSC Newsletter to be a valuable source for staying informed about the CFSC and keeping up with what is going on in the industry.

I also want to take a second to remind everyone about the CFSC website. My guess is that most of you either have no idea that the CFSC has a website or you visited it once and never bothered to visit again. Regardless of which category you fall in, I am pleased to inform you that we DO have a website and that it has been completely overhauled this fall to help make it more useful to the membership. In addition to general CFSC info, the website is also constantly being updated to notify the membership of recent legislation, regulations and court decisions impacting the industry. Because the CFSC membership covers the entire country and we do not always pick up on the news, please let me know if you become aware of a recent court decision or legislative change that you think might be of interest to the group and I will make sure it gets posted on the website. You can reach the CFSC website by clicking here. Please check it out, add it to your list of favorites and let us know if you have any thoughts or ideas on ways that we can improve.

R. Frank Springfield
Publications Chair
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Meeting Promos/Postcards

It’s not too late to sign up for the Winter Meeting at The Canyons in Park City, Utah, January 9-12, 2010. The Meeting will begin on Saturday, the 9th at 4:00 PM with Beer and Basics, sponsored by the Young Lawyers Subcommittee, and followed by the Welcome Reception at Park Meadows Country Club at 6:30 PM. Sunday through Tuesday will be filled with a range of presentations focusing on such “hot button” issues as the Consumer Financial Protection Agency Act and the CARD Act Rules. Don’t forget to sign up for the Committee Dinner (affectionately labeled “DonFest”) on Saturday night at the Canyons at the Red Pine Lodge. In addition to the numerous skiing opportunities, other local activities include snow shoeing, cross country skiing, snowmobiling, ice skating and even bobsledding at the Olympic Park! To sign up for the meeting, please visit the registration page here. We hope to see you in Park City!
The Consumer Financial Services Committee is composed of many different sub-committees, each focused on a different subject area in the consumer financial services legal realm. Once each year, the Chair or Vice Chair of each sub-committee will have the opportunity to spotlight their committee in this section of the newsletter, letting all of us know a little more about their sub-committee, resources available from the sub-committee’s web site, and their plans for the coming year.

CFSC Members in the Community

There are many unsung heroes within CFSC who serve their communities in numerous ways. It might be through a special pro bono project, through time volunteered to improve financial literacy, or through another form of community service. This section of the newsletter will feature articles about these unsung heroes. We know these folks are out there, but we need you to point them out and make sure they get the recognition they deserve, but would not seek for themselves. Their service might be to their local community or on a national or even international scale. If you know a CFSC Committee member who is serving in a special way, please contact a member of the CFSC Newsletter Editorial Board. Better yet, volunteer to write an article about one of these deserving folks for us to publish here in CFSC Newsletter.

CFSC is filled with an interesting array of attorneys with a common interest - consumer financial services law. However, individuals within the Committee approach this common interest from diverse perspectives and experiences. In each issue, this section of the CFSC Newsletter will shed more light on one of these diverse groups and the role they play within the Committee.

Read Full Article...

CFSC Legal Feature

Each CFSC Newsletter will include article(s) authored by the CFSC members. We are always looking for volunteers to help with articles. Therefore, please let us know if you have an article that you would like to be featured in an upcoming newsletter. This edition's feature is:

Post-Cuomo: The Floodgates Have Not Opened and Watters Still Predominates

By: Nicholas P. Mooney II and Angela L. Beblo, Spillman Thomas & Battle, PLLC

This article provides insight into the effect, or lack thereof, that the U.S. Supreme Court's decision in *Cuomo v. Clearing House Association* has had on lawsuits filed by state attorneys general against financial institutions in *Post-Cuomo: The Floodgates Have Not Opened and Watters Still Predominates*. The authors analyze the *Cuomo* decision and make observations regarding the remaining ability of attorneys general to file suits to enforce non-preempted state laws. To read the full article, click here.

http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/200912/
CFSC Constituents

CFSC is filled with an interesting array of attorneys with a common interest - consumer financial services law. However, individuals within the Committee approach this common interest from diverse perspectives and experiences. In each issue, this section of the CFSC Newsletter will shed more light on one of these diverse groups and the role they play within the Committee.

CFSC includes experienced professionals (the old timers) who have practiced in this area for decades, and young lawyers just learning the ropes in this unique legal arena. Some members represent the financial services industry, either as corporate counsel or as outside counsel, while other members, such as our Consumer Fellows, advocate the consumers' perspective. We also have law school professors and government lawyers within our ranks as well.

The intent of this section of the CFSC Newsletter is to highlight these different CFSC constituencies, but we need authors. If you have special insight into one of these distinct groups within CFSC, or one we may have overlooked, and would like to write an article about that group, please contact a member of the CFSC Newsletter Editorial Board as soon as possible.
Post-Cuomo: The Floodgates Have Not Opened and Watters Still Predominates

by: Nicholas P. Mooney II and Angela L. Beblo, Spilman Thomas & Battle, PLLC

On June 29, 2009, the United States Supreme Court issued its decision in Cuomo v. Clearing House Association,¹ which held that state attorneys general were prohibited from exercising “visitorial powers” over national banks. The effect of that ruling was that attorneys general could no longer serve subpoenas on national banks to obtain information or documents in connection with an investigation an attorney general was conducting. The attorneys general remained free to file suits against national banks to enforce non-preempted state laws.² However, in doing so, the attorney general will be treated like any other litigant and will be subject to motions to dismiss, the rules of discovery, and the possibility of sanctions for bringing a frivolous action.³ Although this decision has been heralded as an aberration that impinged the federal government’s powers to regulate national banks and effectively abrogated preemption from a traditional federal regulatory scheme, the Cuomo decision has not opened national banks to excessive and over-zealous state regulation or suit – yet.

In 2005, based upon a review of public information published pursuant to the Home Mortgage Disclosure Act,⁴ Eliot Spitzer, then Attorney General for the State of New York,⁵ sent letters requesting that various national banks voluntarily provide non-public information to him in order to determine whether the banks had violated state and federal fair lending laws by engaging in racial discrimination.⁶ In response, the Office of the Comptroller of Currency (“OCC”) and the Clearing House Association, a banking trade group, instituted separate suits

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² Id. at 2717-18, 2721.
³ Id. at 2718-19.
⁵ During the proceedings, Andrew M. Cuomo replaced Spitzer as the Attorney General for the State of New York.
seeking injunctive relief to prevent the Attorney General’s investigation into the banks.\(^7\) The Southern District of New York granted the request for injunctive relief on the grounds that the investigation was preempted by the National Bank Act\(^8\) and the Act’s implementing regulations\(^9\) and was not otherwise authorized by federal law.\(^10\) The Second Circuit, hearing a consolidated appeal, affirmed the issuance of injunctive relief prohibiting the investigation.\(^11\) The Supreme Court affirmed the injunction to the extent it “applied to the threatened issuance of executive subpoena,” but vacated the lower court decisions to the extent they “prohibit[ed] the Attorney General from bringing judicial enforcement actions.”\(^12\)

According to commentators, the surprising decision “sent shock waves through the financial services industry”\(^13\) and was “a dramatic departure from decades of precedent in this area”\(^14\) that would “have a serious impact on the way that banks do business”\(^15\) because attorney generals,” [d]eprived of the ability to obtain information except in the context of a lawsuit,”\(^16\) would “likely . . . ‘resort’ to litigation early and often.”\(^17\)

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\(^7\) *Clearing House*, 394 F. Supp. 2d at 385; *Office of the Comptroller*, 396 F. Supp 2d at 625.

\(^8\) 12 U.S.C. § 484 (which prohibits a national bank from being subject to an investigation except as authorized federal law).

\(^9\) 12 C.F.R. 7.4000.


\(^11\) *Clearing House Assoc., L.L.C. v. Cuomo*, 510 F.3d 105, 110 (2d. Cir. 2007) (upholding the lower court’s decision regarding preemption and the issuance of injunctive relief, but vacating the lower court’s decision insofar as it relied upon the Fair Housing Act on the grounds that such a claim was unripe for consideration by the court).

\(^12\) *Cuomo*, __ U.S. at __, 129 S. Ct. at 2722.

\(^13\) Barkley Clark and Barbara Clark, *The Law of Bank Dep., Coll. & Cr. Cards* ¶ 3.18 (August 2009 update); see also Associated Press, *Court: State can apply some laws to national banks* (June 29, 2009) (quoting individual stating that decision would lead to a “patchwork of duplicative and conflicting federal and state regulation and enforcement actions”); but see Dwight Smith, et al., *National Banks and Sate Enforcement: Supreme Court Open the Door for State Judicial Enforcement Action*, 14 NO. 5 Elec. Banking L. & Com. Rep. 15 (indicating that state action is limited and does not reinvigorate administrative investigations, although it does impact litigation).


\(^15\) Id.

\(^16\) Id.

\(^17\) Id.
These dire predications have yet to come to fruition. In fact, only one Attorney General\(^{18}\) (Illinois) has instituted litigation against a national bank for violation of state laws.\(^{19}\) Not even Attorney General Cuomo appears to have proceeded with litigation against the banks that his predecessor sought information from in 2005. Thus far, this part of the Supreme Court’s decision in *Cuomo* has failed to yield the flood of lawsuits that at least one commentator has predicted.

Nor has *Cuomo* been adopted by courts faced with questions of preemption and the National Bank Act. *Cuomo* only allows state attorneys general to bring suit to enforce non-preempted state laws.\(^{20}\) Despite the preemption language in *Cuomo*, courts are more often relying on the *Watters v. Wachovia Bank, N.A.*\(^{21}\) decision when faced with questions of preemption and the reach of the National Bank Act in cases filed against financial institutions. More specifically, of the nine district court decisions citing to *Cuomo*, only two decisions\(^{22}\)

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\(^{18}\) See press releases and news articles on the respective Attorney General websites: (the attorney general has requested information from ten entities, including banks, relating to their plans to assist home owners with pay option ARMs); (this Attorney General has the only announcement about a suit being filed against a national bank for violations of state law); (the attorney general announced on Sept. 1, 2009, that it had reached a nationwide agreement with a credit card company to ensure that disabled customers with hearing or vision loss are accommodated with improved communication options and services); (Pennsylvania); (available through Sept. 11, 2009); (no press releases since 2006) (last visited Nov. 2, 2009) (note that some states had press information relating to the private case filed against Bank of America for the alleged problems with the Merrill-Lynch merger; information relating to mortgage fraud scams and debt settlement companies; information relating to the settlement of various states with Countrywide Financial Corp.; and information relating to their support for the proposed Consumer Financial Protection Agency).


\(^{20}\) *Cuomo*, ___ U.S. at ___, 129 S. Ct. at 2717-18 and 2721.


\(^{22}\) *Young v. Wells Fargo & Co. and Wells Fargo Bank, N.A.*, ___ F.R.D. __, 2009 WL 3450988 (S.D. Iowa Oct. 27, 2009) (finding that a putative plaintiff could proceed with claims based upon property inspection fees because the claims sounded in unfair and deceptive acts and practices and were not usury claims that would otherwise be preempted under the National Bank Act); *Davis v. Chase Bank USA, N.A.*, ___ F. Supp. 2d ___, 2009 WL 2868817 (C.D. Cal. Sept. 3, 2009) (finding that false advertising claims regarding “no payments, no interest” promotions were not preempted as they only incidentally affected the bank’s lending practices, but also finding that any challenge to the allocation of payments made or fees imposed on the accounts were preempted).
address preemption under the National Bank Act and both decisions include significant reference to *Watters*.\(^{23}\) The remaining seven\(^{24}\) cases do not.

Nor is the *Cuomo* decision being used by courts to address preemption beyond the National Bank Act. Courts thus far have explicitly refused to apply *Cuomo* to other federal statutes outside the National Bank Act. Of the seven decisions issued post-*Cuomo* that cite to *Watters*, six\(^{25}\) deal with preemption issues under the National Bank Act. It does not appear that *Cuomo* yet has had the game-changing effect that commentators believe it will have, both in the context of the National Bank Act and beyond.

Nonetheless, while state attorneys general have not begun filing lawsuits against national banks in the wake of the *Cuomo* decision, it remains possible that they will. In that event, banks

\(^{23}\) *Young*, 2009 WL 3450988 at *7; *Davis*, 2009 WL 2868817 at *5.

\(^{24}\) *School Dist. of City of Pontiac v. Sec. of U.S. Dept. of Educ.*, __ F.3d __, 2009 WL 3320517 (6th Cir. Oct. 16, 2009) (reviewing school district compliance with the No Child Left Behind Act and citing *Cuomo* for the proposition that implausibility of an alternative interpretation defeats a claim for ambiguity); *Loeffler v. State Island Univ. Hosp.*, __ F.3d __, 2009 WL 3172687 (2d. Cir. Oct. 6, 2009) (regarding failure of a hospital to provide a sign language interpreter for a patient; the concurring opinion string cited *Cuomo* for the proposition that a standing provision should be broadly interpreted); *Goodspeed Airport, LLC v. East Haddam Inlands Wetlands & Watercourses Comm’n*, 632 F. Supp. 2d 185 (D. Conn. 2009) (concerning action brought against the state EPA regarding state law regulating wetlands and citing *Cuomo* for language regarding when imminence of a threat permits preemptively filing suit to prevent a suit from being filed against a party); *Tombers v. Fed. Dep. Ins. Corp.*, 2009 WL 3170298 (S.D.N.Y. Sept. 30, 2009) (citing general passages relating to preemption, but stating that plaintiff’s focus on *Cuomo* was misplaced because the National Bank Act was not at issue in the case); *McAnaney v. Astoria Fin. Corp.*, 2009 WL 3150430 (E.D.N.Y. Sept. 29, 2009) (finding *Cuomo* inapplicable to determine “the preemptive effect of HOLA and its implementing regulations”); *US Bank, N.A. v. Mayhew*, 2009 WL 2169240 (D. Colo. July 17, 2009) (citing to *Cuomo* only for the proposition that sometimes certain claims are preempted, but stating the none of the decisions cited addresses whether a TILA claim falls within the purview of complete preemption); *Gawry v. Countrywide Home Loans, Inc.*, __ F. Supp. 2d __, 2009 WL 1954717 (N.D. Ohio July 6, 2009) (stating that the *Cuomo* decision does not apply to HOLA claims).

\(^{25}\) *Davis*, supra note 18; *Young*, supra note 18; *Aguayo v. U.S. Bank, N.A.*, __ F. Supp. 2d __, 2009 WL 3149607 (S.D. Cal. Sept. 24, 2009) (finding that the National Bank Act preempted state law that required additional post-repossession notices on the grounds that the “power to collect debts and repossess collateral property under default is inseparable from the power to make or purchase loans” and, thus, the state law was preempted); *Spinelli v. Capital One Bank*, 2009 WL 3053696 (M.D. Fla. Sept. 18, 2009) (finding that both express and field preemption applied to claims relating to the bank’s payment protection program, thus preempting state laws relating to claims for unfair and deceptive trade practices, and therefore concluding that the class must be closed at the time that the bank became a national association under the National Bank Act); *Poskin v. TD Banknorth, N.A.*, __ F. Supp. 2d __, 2009 WL 2981963 (W.D. Pa. Sept. 11, 2009) (finding that the National Bank Act does not preempt a state law claim for malicious prosecution because such a claim “does not conflict with the language or purpose of the” National Bank Act); *In re: Hollis*, 2009 WL 3030125 (Bankr. D.N.J. Sept. 17, 2009) (containing extensive quotations from *Watters* and holding that the National Bank Act does not preempt state law fraud claims against national banks relating to real estate transaction).
should remain vigilant in reviewing the decisions resulting from suits brought by private litigants involving preemption of state laws in the wake of Cuomo. Courts faced with a challenge to an attorney general’s authority to bring an action under a specific state law likely will rely on decisions involving individual consumers to determine whether a particular state law is preempted under the National Bank Act. Financial institutions need to be aware of how courts are addressing state law claims, how they are splitting hairs on claims that are preempted in private actions (i.e. Davis), and what claims courts are finding preempted by federal law. 26

26 See Davis, supra note 18, wherein a court held that a plaintiff could proceed with claims relating to false advertising for a “no payments, no interest” promotion where the payments were applied in a specific manner as per the Cardholder agreement, but also finding that the plaintiff could not challenge the application of the payments themselves. The court stated that credit card lending fell within the actions permitted by federal law and, thus, could not be attacked under state law. But claims for false advertising sounded in contract and were not incidentally related to the bank’s lending powers.