

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
JUNE 19, 2006

Today the Supreme Court granted certiorari in one case of interest to the business community. Absent extensions, which are likely, amicus briefs in support of the petitioner will be due on August 3, 2006, and amicus briefs in support of the respondent will be due on September 7, 2006.

National Banking Act—Federal Preemption of State Regulation of Banks' Operating Subsidiaries. The National Banking Act (“NBA”) establishes nationally chartered banks, to which it grants “all such incidental powers as shall be necessary to carry on the business of banking.” 12 U.S.C. § 24. The NBA further provides that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law.” 12 U.S.C. § 484(a). As interpreted in regulations promulgated by the Office of the Comptroller of the Currency (“OCC”), the agency responsible for the statute’s implementation, the NBA allows nationally chartered banks to issue mortgages through operating subsidiaries that, like the national banks themselves, are subject only to the OCC’s exclusive visitorial (*i.e.*, supervisory) authority. *See* 12 C.F.R. §§ 7.4000, 7.4006, 5.34, 34.1, 34.4. Thus, under the OCC regulations, federal law preempts state laws purporting to regulate the mortgage-lending activity of subsidiaries of nationally chartered banks. The Supreme Court today granted certiorari in *Waters v. Wachovia Bank, N.A.*, No. 05-1342, to decide whether the OCC’s interpretation of the NBA is entitled to deference and is consistent with the Tenth Amendment, which reserves to the states unenumerated powers not granted to the federal government.

In the decision below, reported at 431 F.3d 556 (2005), the Sixth Circuit upheld the OCC regulations and, rejecting the State’s constitutional challenge, affirmed a permanent injunction that prevents Michigan from exercising supervisory powers over a mortgage-issuing subsidiary of Wachovia Bank. In so holding, the Sixth Circuit agreed with the Ninth Circuit’s decision in *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d (2005), and the Second Circuit’s decision in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2005), both of which held that Congress did not directly speak to the issue in the NBA and that the OCC’s preemptive regulations are a reasonable interpretation of the statute. Michigan, supported by 32 states and the District of Columbia, sought certiorari, arguing that the NBA, by its plain terms, extends only to nationally chartered banks and not their subsidiaries, and that the OCC’s contrary conclusion was therefore not entitled to *Chevron* deference—especially insofar as it impermissibly curtailed the states’ own regulatory authority as guaranteed by the Tenth Amendment.

This case is of obvious importance to national banks. In addition, the Court’s decision could affect the scope of federal regulatory preemption across a range of industries, not just banking. If the decision below is reversed, nationally active businesses could find themselves increasingly subject to multiple, restrictive regulations imposed on a state-by-state basis.

Mayer, Brown Rowe & Maw LLP is co-counsel for Wachovia Bank, N.A., the respondent in this matter. Any questions about the case should be directed to Charles Rothfeld (202-263-3233) in our Washington, D.C. office.

Supreme Court Docket Report

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Today the Supreme Court also invited the Solicitor General to file a brief expressing the views of the United States in the following case of interest to the business community:

Credit Suisse First Boston Ltd. v. Billing, No. 05-1157. The question presented is whether, in a private damages action under the antitrust laws challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the Securities and Exchange Commission has power to compel the specific practices at issue. Mayer Brown Rowe & Maw LLP is counsel of record for petitioners in this matter.

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