



# BANKING REPORT



## Watters v. Wachovia: State Regulators Meet Their Waterloo

By JOSEPH CALLUORI

**W**atters v. Wachovia Bank is a resounding, comprehensive, and final defeat for efforts by state regulators to monitor national banks. Notwithstanding the predictions of some, the Supreme Court was in no mood to entertain arguments regarding the alleged need for a state-friendly preemption doctrine that would have undercut OCC's claim to exclusive regulatory authority over national banks, and *Chevron v. Natural Resources Defense Council* (467 U.S. 837, 1984) was not even a factor in this case (*Watters v. Wachovia Bank N.A.*, U.S., No. 05-1342, 4/17/07— "Watters").

As Justice Ginsburg noted in her opinion for the majority, the language of the statute itself supported the OCC's claim to exclusive regulatory authority over national banks. Consequently, there was no need for arcane discussions as to the degree of deference that the Court should afford OCC's reading of the National Bank Act (NBA) and OCC's preemption regulations. (see related report in the Legal section.)

Justice Ginsburg gave equally short shrift to Michigan's "Tenth Amendment" argument. There is no way

to improve upon Justice Ginsburg's language on this point:

[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U. S. 144, 156 (1992) Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. See *Citizens Bank v. Alafabco, Inc.*, 539 U. S. 52, 58 (2003) (per curiam). The Tenth Amendment, therefore, is not implicated here. *Watters*, slip op. at 17.

Viewed with the benefit of hindsight, one wonders whether the Supreme Court granted *certiorari* in *Watters*, rather than similar cases emanating from other circuits, because it considered the Michigan case the best vehicle for definitively and finally ending state regulators' efforts to assert regulatory authority over national banks.

The State of Michigan conceded that the NBA preempts it from regulating a national bank engaged in mortgage lending. Throughout her opinion, Judge Ginsburg used this concession to repeatedly hoist the Michigan regulator on its own petard:

It is uncontested in this suit that Wachovia's real estate business, if conducted by the national bank itself, would be subject to OCC's superintendence, to the exclusion of state registration requirements and visitorial authority." *Watters*, slip op. at 2.

"[t]he Michigan provisions at issue exempt national banks from coverage. Mich. Comp. Laws Ann. § 445.1675(a) (West 2002). This is not simply a matter of the Michigan Legislature's grace. Cf. post, at 13-14, and n. 17. For, as the parties recognize, the NBA would have preemptive force, i.e., it would spare a national bank from state controls of the kind here involved. See Brief for Petitioner 12; Brief for Respondents 14; Brief for United States as Amicus Curiae 9. *Watters*, slip op. at 8

Michigan's concession regarding the OCC's exclusive regulatory authority over national banks made it easier to narrow the question before the Court to whether a national bank that conducts its mortgage lending through a non-bank subsidiary should lose the exemp-

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tion from state regulation contained in 12 U. S. C. § 484(a). The very question is a harbinger of the outcome.

Michigan never articulated a convincing policy reason for treating operating subsidiaries differently from their national bank parents. Furthermore, Justice Ginsburg quickly disposed of Michigan's narrow and hyper-technical statutory arguments and instead extrapolated from an amendment to the NBA and from the Gramm-Leach-Bliley Act, congressional support for the OCC's position.

Although the New York State Attorney General's appeal from a lower federal court's order prohibiting it from gathering HMDA data from national banks (*OCC v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) and *Clearing House Ass'n. v. Spitzer*, 394 F. Supp. 2d 620 (S.D.N.Y. 2005)) is still pending before the United States Court of Appeals for the Second Circuit, there is

no way that the attorney general can distinguish *Watters*. Consequently the Second Circuit will probably soon affirm the lower court decision on the strength of *Watters*.

The OCC has released a press release applauding the Supreme Court's decision in *Watters*. However, celebrations may be short lived. Now that it is established beyond peradventure that the OCC has exclusive regulatory authority over national banks, the OCC also has exclusive responsibility for disciplining any national banks, and operating subsidiaries of national banks, that might be involved in unfair or deceptive lending practices. Thus some in Congress and public interest advocates are likely to increase their demands that the OCC vigorously exercise its oversight responsibilities. Now that state regulators are out of the picture, the buck stops at the OCC.