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**MEMORANDUM**

June 29, 2009

To Our Clients and Friends

Re: Supreme Court Decision on National Bank Preemption

The U.S. Supreme Court today ruled that the National Bank Act does not preclude state authorities from bringing actions against national banks to enforce state laws.<sup>1</sup> The decision is significant because it draws a clearer line between the preemption authority of the Comptroller of the Currency (the “Comptroller”) and the authority of states to bring enforcement actions against national banks.

**DISCUSSION**

In 2005, the Attorney General of New York State requested information from selected national banks regarding their lending practices. The request was made under threat that the Attorney General would issue a subpoena for the documents. On behalf of the banks, The Clearing House Association obtained an injunction which prohibited the Attorney General from enforcing the state’s fair lending laws through demands for records or judicial proceedings. The lower court held that the Attorney General’s actions were inconsistent with the “visitation” provision of the National Bank Act, which grants the Comptroller exclusive authority to examine national banks.

In reviewing the lower court’s grant of an injunction, Justice Scalia, speaking for the Court’s majority, stated that the visitation provision of the National Bank Act does not prevent the enforcement of state laws by state authorities. The Court distinguished “visitation” from enforcement of the law, stating that visitation involves general supervision of a company’s activities by a supervisory entity, whereas enforcement involves the judicial branch. Justice Scalia referred to a 1924 Supreme Court decision, *First National Bank in St. Louis v. Missouri*, in which the Court held that the exclusive federal power of visitation does not prevent states from enforcing state laws.

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<sup>1</sup> *Cuomo v. The Clearing House Association, L.L.C.*, No. 08-453, Slip Op. (June 29, 2009).

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Accordingly, if a state statute of general applicability is not substantively preempted, then the state has power to enforce the provision.<sup>2</sup>

Having determined that a state may enforce its laws against national banks, the Court went on to conclude that the Attorney General's request for information from national banks under threat of subpoena, rather than by bringing a lawsuit against the banks or by obtaining a judicial search warrant, was not the exercise of the power of law enforcement. Accordingly, the Court upheld the injunction that had been issued, which enjoined the Attorney General from issuing subpoenas against the banks.

A copy of the Court's opinion can be found on our website at [http://www.schwartzandballen.com/whats\\_new.html](http://www.schwartzandballen.com/whats_new.html).

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox or Heidi Wicker at (202) 776-0700.

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<sup>2</sup> 263 U.S. 640, 660 (1924).