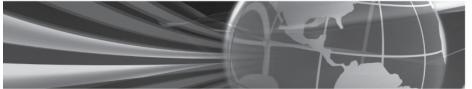
Greenberg Traurig

ALERT: Financial Institutions





April 2007

Supreme Court Holds National Bank Act Preempts State's Regulation of Mortgage Lending Subsidiary of National Bank

On April 17, 2007, the United States Supreme Court, in a 5 to 3 vote, affirmed the opinion of the U.S. Court of Appeals for the Sixth Circuit, holding that the State of Michigan may not require the operating mortgage lending subsidiary of a national bank to register and comply with state mortgage lending laws.

On April 17, the U.S.

Supreme Court
affirmed the opinion of
the U.S. Court of
Appeals for the Sixth
Circuit, holding that
the State of Michigan
may not require the
operating mortgage
lending subsidiary of a
national bank to
register and comply
with state mortgage
lending laws.

In Watters v. Wachovia Bank, N.A., the Court concluded that federal law shields national banks and their operating subsidiaries from "unduly burdensome and duplicative" state regulation. The Court distinguished operating subsidiaries of national banks, which may engage solely in activities the bank itself can conduct, from other types of affiliates authorized to engage in nonbanking financial activities that are subject to state regulation. Conducting business through operating subsidiaries, the Court opined, has long been recognized as part of a national bank's "incidental power" in carrying on the business of banking under the National Banking Act, 12 U.S.C. § 1 et seq. (the "Act"). The Act, and the Office of Comptroller of Currency ("OCC") regulations promulgated under it, specifically authorize national banks to engage in real estate lending. Accordingly, the Court concluded, states may not significantly burden national banks or their operating subsidiaries engaged in such activity. Further, states may not examine and inspect operating subsidiaries of national banks, as this "visitorial" control is exclusively vested in the OCC.

The *Watters* case was initiated in 2003, when Wachovia's mortgage lending business, in reliance on the OCC rules, advised the Michigan Office of Financial and Insurance Services that it was surrendering its state lending registration because it had become an operating subsidiary of Wachovia Bank, a national bank. Linda Watters, Commissioner of the state regulatory agency, responded, advising the company that it would no longer be authorized to make mortgages in the state. Wachovia sued.

Before *Watters*, the Court had not taken a preemption case involving national banks for years. The Court's decision affirms the decisions of four federal appeals courts on preemption issues. However, the three-justice dissent leaves room for argument that the case does not decide the matter once and for all as many had hoped.

Greenberg Traurig





ALERT: Financial Institutions April 2007

State regulators and consumer advocates claim state regulation of the mortgage industry focuses on consumer protection, and the Court's decision in *Watters* impinges on this area of traditional state control. In its press release, the OCC expressed its pleasure with the Court's decision. As a result of the Court's decision, many believe mortgage companies seeking to avoid the patchwork of state legislation will seek out national bank parents. However, the Court's decision comes at the same time that the collapse of the subprime mortgage industry is causing Congress to consider national standards for all types of mortgage lenders, as Congressman Barney Frank (Chairman of the House Financial Services Committee) alluded to shortly after the Court issued the *Watters* decision. The decision may also encourage federal legislation to clarify the extent of the OCC's preemptory powers, especially in connection with consumer protection issues.

Although the *Watters* decision applies squarely to the operating subsidiaries of national banks, the decision should apply with equal force to the operating subsidiaries of federal savings banks regulated by the Office of Thrift Supervision.

Greenberg Traurig





ALERT: Financial Institutions April 2007

This GT Alert was written by Robert Dinerstein in New York; Carl Fornaris in Miami; and Gil Rudolph and Julie Rystad in Phoenix. Questions about the content of this Alert should be directed to:

Robert Dinerstein (dinersteinr@gtlaw.com; 212-801-2212)

Carl Fornaris (fornarisc@gtlaw.com; 305-579-0626)

Gil Rudolph (rudolphg@gtlaw.com; 602-445-8206)

Julie Rystad (rystadj@gtlaw.com; 602-445-8234)

Albany	Houston	Sacramento
518.689.1400	713.374.3500	916.442.1111
Amsterdam	Las Vegas	Silicon Valley
+ 31 20 301 7300	702.792.3773	650.328.8500
Atlanta	Los Angeles	Tallahassee
678.553.2100	310.586.7700	850.222.6891
Boca Raton	Miami	Tampa
561.955.7600	305.579.0500	813.318.5700
Boston	New Jersey	Tokyo
617.310.6000	973.360.7900	+ 81 3 3264 0671
Chicago	New York	Tysons Corner
312.456.8400	212.801.9200	703.749.1300
Dallas	Orange County	Washington, D.C.
972.419.1250	714.708.6500	202.331.3100
Delaware	Orlando	West Palm Beach
302.661.7000	407.420.1000	561.650.7900
Denver	Philadelphia	Zurich
303.572.6500	215.988.7800	+ 41 44 224 22 44
Fort Lauderdale	Phoenix	
954.765.0500	602.445.8000	

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2007 Greenberg Traurig, LLP. All rights reserved.