Loyola Consumer Law Review

Volume 2 | Issue 1 Article 6

1989

Subpoena Power of Federal Home Loan Bank Board Extends to Records of Bank Customer Where Neither Bank Nor Customer Is the Investigatory Target

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United States Supreme Court: State Law Indirect Purchaser Claims Do Not Obstruct the Purposes of the Sherman and Clayton Acts

The United States Supreme Court addressed the issue of whether section 4 of the Clayton Act, which limits recovery under the Sherman Act to direct purchasers, preempts state antitrust laws which expressly allow indirect purchasers to recover damages for overcharges. The Court stated that federal law preempts state law (1) if the federal law expressly provides for preemption; (2) if Congress intended to preempt state law in a particular field; and (3) to the extent that the state law obstructs the objectives of the federal law. However, when Congress legislates in an area traditionally regulated by the states, the Court will presume that Congress did not intend to supersede the states' laws.

ARC did not claim that federal antitrust laws expressly preempt state antitrust laws which allow indirect purchasers to recover for damages, or that Congress impliedly preempted the area of antitrust law. Rather, ARC argued that the state antitrust laws are preempted because they obstruct the broad purposes of federal antitrust law.

The Court initially noted that states have traditionally regulated the field of antitrust law, and that Congress intended to supplement, not displace, state antitrust laws with federal antitrust laws. The Court pointed out that on previous occasions it had held that federal antitrust laws did not preempt state antitrust laws.

Furthermore, the Court determined that the court of appeals had misunderstood *Illinois Brick.* The *Illinois Brick* Court did not address whether and to what extent federal antitrust law preempts state antitrust law. Instead, the *Illinois Brick* Court merely interpreted section 4 of the Clayton Act to allow only direct purchaser claims under the federal antitrust laws.

The Court held that state indirect purchaser laws do not obstruct the three policy goals identified in *Illinois Brick* — avoiding unnecessarily complicated litigation, providing direct purchasers with incentives to bring private antitrust actions, and avoiding multiple liability of defendants. First, state indirect purchaser claims would not unnecessarily complicate federal antitrust proceedings. Most state indirect purchaser claims would be brought in state courts. Additionally, the federal courts may decline to hear the state indirect purchaser claims if the claims would complicate the federal antitrust proceedings. Therefore, the burden on the federal courts would be minimal.

Second, the indirect purchaser claims would not reduce the direct purchasers' incentives to bring antitrust actions by reducing the amount that direct purchasers could recover from a fund. In this case the parties established the settlement fund to dispose of all claims, regardless of whether they were state law claims or federal law claims, or whether they were brought by direct or indirect purchasers. "That direct purchasers may have to share with indirect purchasers is a function of the fact and form of settlement rather than the impermissible operation of state indirect purchaser statutes." 488 U.S. at ___, 109 S.Ct. at 1667.

Finally, the Court rejected ARC's argument that the federal antitrust laws preempt the state antitrust laws because the state claims might subject violators to multiple liability. The Court noted that state laws are not ordinarily preempted solely because they impose liability greater than that imposed under federal laws. Nor was there evidence that Congress intended to preempt state law to prevent defendants from being liable under both state and federal law.

Marianne L. Simonini

Subpoena Power Of Federal Home Loan Bank Board Extends To Records Of Bank Customer Where Neither Bank Nor Customer Is The Investigatory Target

In *Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board,* 878 F.2d 875 (5th Cir. 1989), the Fifth Circuit held that the Federal Home Loan Bank Board ("FHLBB") may subpoena a bank customer's records although neither the bank nor the customer is directly associated with the target of the FHLBB's legitimate law enforcement inquiry. The court determined that a subpoena may not be quashed where the subpoenaed records are relevant to the FHLBB's inquiry and the FHLBB substantially complies with the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1988).

Overview of the FHLBB

The FHLBB acts as the "operating head" of the Federal Savings and Loan Insurance Corporation ("FSLIC"). The FHLBB examines all FSLIC-insured establishments to guarantee that they function safely and comply with governing laws and regulations. To enable the FHLBB to accomplish its duties, Congress granted the FHLBB broad investigative authority. The FHLBB's investigative powers are specified in 12 U.S.C. §§ 1730(m)(1)-(3) (1988). Section 1730(m)(2) gives the FHLBB the power to garner "testimony under oath as to any matter in respect of the affairs or ownership of any such institution or affiliate thereof, and to issue subpoenas and subpoenas duces tecum. . . ."[11] 12 U.S.C. § 1730(m)(2).

The only judicial remedy for bank customers who oppose a FHLBB investigation is the Right to Financial Privacy Act ("the

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Act"). Under the Act, the FHLBB may not obtain a customer's financial records unless the records sought are relevant to a legitimate law enforcement inquiry and the procedural requirements of the Act are observed.

The Act's procedures require the FHLBB to deliver a subpoena for the financial records and a notice of the right to challenge the subpoena to the customer. If the customer objects to the subpoena, the customer must file a motion to quash in federal district court. The motion must include an affidavit alleging either that the financial records are irrelevant to the inquiry and the reasons supporting the allegation, or that the agency has not complied with the Act. 12 U.S.C. § 3410(a). If it finds the customer's challenge to the subpoena is proper, the district court must order the government to file a response. If the government demonstrates that the records are relevant to a legitimate law enforcement inquiry, the court must deny the motion to quash.

Factual History

The FHLBB examined the records of Vision Banc Savings and Loan ("Vision Banc") and discovered that Vision Banc had granted four individual loans totalling $20.4 million to four companies. All four companies applied the loan proceeds to purchase land from the Walton Development Corporation ("Walton"). Walton then gave $2.5 million and a tract of land to the Chairman of the Board and majority stockholder of Vision Banc. In addition, Walton gave $7 million to Sandsend Financial Consultants, Ltd., ("Sandsend") which deposited the money in the West Belt Bank ("West Belt") and made several large withdrawals within days of this deposit. These transactions led the FHLBB to suspect that all four individual loans were really one loan exceeding Vision Banc's lending limits and that Sandsend was either defrauding Vision Banc or participating in a scheme to wrongfully use the Vision Banc loans.

The FHLBB subpoenaed Sandsend's financial records from West Belt on June 20, 1989. On July 8, Sandsend filed a motion to quash the subpoena. The district court granted Sandsend's motion. However, in doing so, the court neither allowed the FHLBB time to reply to Sandsend's motion, nor ordered the FHLBB to respond, as the Act requires. In addition, the court failed to hold a hearing or render an opinion. The district court denied the FHLBB's motion for reconsideration of its ruling and the FHLBB subsequently appealed.

Appellate Court Examines the Scope of the FHLBB's Investigatory Power

On appeal, Sandsend argued that the FHLBB's investigatory powers extend only to parties under direct investigation (i.e., Vision Banc). In contrast, the FHLBB argued that under the Act its subpoena power extends to Sandsend's records because they are relevant to a legitimate agency investigation.

The fifth circuit had not previously addressed whether the FHLBB's subpoena power is limited to parties directly associated with the target of an investigation. The court applied two principles to decide the issue. First, an administrative agency's broad investigative powers need only be supported by a suspicion of unlawful conduct. Second, the court's review of an administrative subpoena is limited to two questions: (1) whether the agency's investigation is based on an appropriate statutory purpose; and (2) whether the subpoenaed documents are relevant to the investigation.

Although Congress limited the FHLBB's investigative authority to insured banks and their affiliates, it provided the FHLBB broad investigative tools. The FHLBB's subpoena power is not limited to any class of persons. Thus, the court reasoned that the subpoena power extends to any person, provided that person has information "as to any matter in respect of the affairs or ownership" of the institution or affiliation. 12 U.S.C. § 1730(m)(2). Therefore, the FHLBB's investigative scope includes parties such as Sandsend, who are not necessarily associated with the FHLBB's investigative target.

The court noted that Congress patterned Section 1730 on the investigative authority of national bank examiners (12 U.S.C. § 481 (1988)) and FDIC examiners (12 U.S.C. § 1820(c) (1988)). A national bank examiner may "make a thorough examination of all the affairs of the bank and . . . examine any of the officers and agents" of a national bank. 12 U.S.C. § 481. Sandsend argued that under Section 481, bank examiners may subpoena only bank officers and agents. Thus, because Congress modeled Section 1730 upon Section 481, the FHLBB's subpoena power is similarly restricted.

The court rejected Sandsend's argument and held that Section 481 limits only the class of people that the national bank examiners may examine, not the people it may subpoena. Moreover, even if Section 481 limits who the bank examiners may subpoena, the language of Section 1730 does not limit the FHLBB's subpoena power to "officers and agents."

Instead, the court noted that Section 1730 contains the same language as Section 1820. The FDIC has the power to subpoena "any matter in respect of the affairs or ownership of any" insured bank or affiliate. 12 U.S.C. § 1820(c). Both Sections 1730 and 1820 empower an agency to subpoena any party and any document that relates to any matter of a bank's affairs or ownership. Thus, the court held that although Congress modeled Section 1730 after Sections 481 and 1820, Congress chose the more expansive language of Section 1820 rather than the restrictive language of Section 481.

Finally, Sandsend argued that if the FHLBB can subpoena its records the FHLBB can subpoena the records of anyone who has any contact with investigated loan proceeds. The court, however, found that such an inquiry is proper if the FHLBB suspects that the parties under investigation are involved in unlawful conduct.

Procedural and Substantive Errors of the Lower Court

The court held that the district court failed to follow the Act's procedures and denied the FHLBB an opportunity to respond to Sandsend's motion to quash the subpoena. First, under the Act, if a party moves to quash a subpoena, the district court "shall order the Government authority to file a sworn response." 12 U.S.C. § 3410(b). Thus the burden is placed upon the district court to obtain the government's response. By failing to demand a response from the FHLBB, the district court thwarted Congress' intent that the FHLBB be heard before a court quashes a subpoena. Additionally, the district court had ruled before the FHLBB's time to respond had expired, thereby denying the FHLBB its right to be heard.

While the court indicated that the procedural errors would have been sufficient grounds for remanding the case, the court also addressed the district court's substantive errors. The court held that Sandsend had failed to meet any of the three bases for quashing a subpoena. First, it was undisputed that the FHLBB's examination of Vision Banc was a legitimate law enforcement inquiry. Second, Sandsend's records were relevant to the FHLBB's inquiry. Although Sandsend had only a tangential relationship to the target of the FHLBB investigation, Sandsend's records were relevant because the FHLBB suspected that Sandsend was involved in unlawful activity. Third, the FHLBB substantially complied with the Act in serving the subpoena. The court held that even if the FHLBB did not technically comply with the service requirements, the FHLBB gave Sandsend actual notice of the subpoena and, therefore, substantially complied with the Act's requirements. The court reversed the district court's judgment and directed the district court to enforce the FHLBB's subpena.

Sheila Hanley

Ninth Circuit Meticulously Applies Consumer Protection Act To Protect "Uninformed" Consumers

In *Jackson v. Grant,* 876 F.2d 764 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that under California law no contractual loan obligation exists until both lender and borrower are identified. Because notice of the three day rescission period required by the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (1988), was provided when the borrower agreed to be bound by the loan, but not when the lender was finally identified, the borrower could cancel the loan agreement three years after it was entered into.

Background

In 1981, Ms. Edna Jackson ("Jackson") secured a $26,000 loan with a deed of trust on her home. Jackson defaulted on her mortgage payments, and Union Home Loans ("Union"), a real estate loan broker, initiated foreclosure proceedings in June of 1982. In January of 1983, Jackson and Union agreed to refinance the loan in order to avoid foreclosure.

On February 18, 1983, Jackson executed the following documents to secure the new loan: Truth in Lending Act ("TILA") Disclosure Statement, Mortgage Loan Disclosure Statement, Summary of Loan Terms, Deed of Trust, Promissory Note, and Notice of Right to Cancel. The Summary of Loan Terms indicated that Union was not the lender, that the lender was unknown at the time, and that Union did not guarantee that Jackson would receive the loan she requested. The Promissory Note and the Deed of Trust left the lender's name blank. The Notice of Right to Cancel indicated that Jackson could cancel the agreement until March 1, 1983.

Union, unable to find a lender, informed Jackson on April 28, 1983, that it would provide the loan from its own funds. The terms of the loan under this new agreement were essentially the same as previously agreed, except Jackson was to pay an additional $700 to delete credit life insurance from the loan. Jackson agreed to the changes and the parties closed the loan on April 29, 1983, more than one month after signing the original loan documents.

On February 7, 1986, nearly three years later, Jackson notified the assignees of the loan, Syd and Belle G. Grant, that she was electing to cancel the loan agreement pursuant to the TILA provisions. Jackson sought to rescind the transaction in the United States District Court for the Northern District of California three days later.

District Court Proceedings

At trial, Jackson claimed that the loan was consummated on April 29, when Union agreed to provide the loan, and that Union failed to give her notice of her right to rescind the loan agreement within three business days after its consummation. Jackson also alleged that Union had made insufficient payment schedule disclosures in violation of the Consumer Credit Protection Act ("the Act"). The district court held that the loan was consummated on February 18, 1983, when Jackson agreed to be bound by the loan, and therefore Union had properly notified Jackson of her right to cancel the loan. Therefore, the court denied Jackson's request to rescind the loan agreement. The United States Court of Appeals for the Ninth Circuit reversed the trial court's decision.

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