

## [Banking and Finance Law Daily Wrap Up, TOP STORY—Bank and ABA seek damages over FAST Act dividend cut, \(Feb. 9, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By [John M. Pachkowski, J.D.](#)

Calling it "a straightforward case of national importance involving agreements that are central to the nation's banking system," the American Bankers Association and Seattle-based Washington Federal, N.A., have filed a [class action lawsuit](#) against the United States in the Court of Federal Claims seeking relief for government actions that, among other things, breached contracts with Federal Reserve member banks by reducing dividends paid to those institutions.

**FAST Act.** The lawsuit is a response to a 2015 law, [Fixing America's Surface Transportation \(FAST\) Act](#) which was intended to provide a longer-term solution to highway funding. To raise revenues for the highway funding, the FAST Act encroached upon decades-old practices at the Federal Reserve Board. One source of revenue reduces the dividend paid on Federal Reserve Bank stock to member banks. Under section 32203 of the FAST Act, member banks with consolidated assets of \$10 billion or less will continue to receive a 6-percent dividend on their Federal Reserve Bank stock, but the dividend is indexed to inflation. For member banks with consolidated assets greater than \$10 billion, there is a floating dividend based on the smaller of: the rate equal to the high yield of the 10-year Treasury note auctioned at the last auction held prior to the payment of a dividend, and 6 percent. The second revenue stream caps the Fed's surplus account at \$10 billion with any amounts exceeding the cap being remitted to the U.S. Treasury.

To implement the FAST Act, the Fed issued an interim final rule, in February 2016, reducing the dividend rate paid to large member banks, those with total assets of more than \$10 billion, to the lesser of 6 percent or the most recent 10-year Treasury auction rate prior to the dividend payment. The Fed finalized the rule in November 2016 (see *Banking and Finance Law Daily*, [Feb. 19, 2016](#) and [Nov. 22, 2016](#)).

**"Classic bait-and-switch."** In their complaint, the ABA and Washington Federal contend that the fixed annual dividend of six percent on stock purchased in one of 12 regional Federal Reserve Banks "had been guaranteed to member bank stockholders since the Federal Reserve Act was enacted in 1913, and it is memorialized in contracts between the Federal Reserve Banks and their member bank stockholders." The plaintiffs further claimed that the reduction in the dividend was "classic bait-and-switch." Finally, to bolster their claims, the bank and ABA noted that the dividend reduction "unilaterally eliminated the contractually guaranteed return on the investment of nearly \$28 trillion in Federal Reserve Bank stock."

**Damages.** To compensate for the government's alleged breach of contract, Washington Federal claims that it and other member bank stockholders are "entitled to recover damages from the Government equal to the value of the reduction in dividends paid by the Federal Reserve Banks pursuant to the FAST Act." The complaint noted that in 2016, Washington Federal suffered damages of approximately \$937,534.72, and the member bank stockholders suffered damages of approximately \$1.1 billion.

**Troubling precedent.** Commenting on the lawsuit, Rob Nichols, ABA president and CEO, [said](#), "The FAST Act set a troubling precedent to target specific segments of the business community to meet broad public obligations like highway infrastructure. Every industry in this country is vulnerable if this is allowed to stand." He added, "While legal action against the government is always a last resort, it's one that we must turn to when alternatives are unavailable and matters of principle are at stake."

Companies: American Bankers Association; Washington Federal, N.A.

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