

[Banking and Finance Law Daily Wrap Up, FEDERAL RESERVE SYSTEM —Fed. Cl.: Court rejects ABA’s, bank’s FAST Act lawsuit challenging reduced dividends, \(Oct. 31, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By [Thomas G. Wolfe, J.D.](#)

The U.S. Court of Federal Claims has dismissed the proposed class-action lawsuit brought by the American Bankers Association and Washington Federal, N.A. against the United States government challenging the funding of the 2015 Fixing America’s Surface Transportation (FAST) Act. As part of legislation to fund the FAST Act, the Federal Reserve Act was amended, bringing about the reduction of the historic, statutory 6-percent dividend paid to certain member banks on their Federal Reserve stock. After first determining, as a threshold matter, that the ABA lacked jurisdictional standing in the case, the federal court then determined that Washington Federal and other similarly situated national banks had no contractual or statutory entitlement to a dividend at any specific rate nor a property interest in which to assert a Taking Clause claim under the Fifth Amendment to the Constitution. According to the court, "the remedy for the understandable grievances alleged in this case lies within the exclusive jurisdiction of the Congress" ([American Bankers Association v. United States](#), Oct. 30, 2017, Braden, S.).

In 2015, Congress enacted the FAST Act to provide \$2.7 billion over five years for "national transportation infrastructure," and funding efforts included the Federal Reserve Act amendment. The ABA and Washington Federal contended that the 6-percent annual dividend 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." Among other things, the ABA’s and Washington Federal’s amended complaint alleged that a valid contract existed between the federal government and member banks for the banks to receive the expected 6-percent dividends (see [Banking and Finance Law Daily](#), April 17, 2017).

In May 2017, the government [asked](#) the U.S. Court of Federal Claims to dismiss the amended complaint, maintaining that there was no express or implied contract between the parties and that there was no "compensable taking" of any cognizable property right in a specified dividend rate (see [Banking and Finance Law Daily](#), May 16, 2017).

ABA lacks standing. Noting its jurisdiction in the case under the Tucker Act (28 U.S.C. §1491), the court outlined the necessary showing by the plaintiffs to demonstrate that the source of substantive law they rely on "can fairly be interpreted as mandating compensation by the Federal Government." While the court ruled that Washington Federal met the standard for establishing standing, the ABA did not.

Although the ABA alleged that 66 member banks had a contract with the Federal Reserve Bank, the court noted that each "owns a different amount of Federal Reserve Bank stock and experienced different amounts of monetary loss, as a result of the implementation of the FAST Act." The ABA argued that individualized proof was not needed because each member bank "had an equal reduction in dividend receipts." While the court recognized that the net decrease in dividend receipts differed because each ABA member purchased a different amount of stock when it joined the Federal Reserve System, the amended complaint did *not* allege that the ABA suffered individual monetary injury nor did it allege that any member bank assigned to the ABA the right to recover damages on its behalf.

Court’s decision. The court observed that the parties to the litigation spent much of their time arguing about whether Washington Federal had a contractual relationship with the Federal Reserve Bank and, if so, whether Congress could change the terms of that contract by legislation. However, from the court’s perspective, the

parties "overlooked the dispositive fact" that section 31 of the Federal Reserve Act provides that "the right to amend, alter, or repeal this act is hereby expressly reserved." According to the court, the Federal Reserve Act "conferred no right to Washington Federal or any other holder of Federal Reserve Bank stock to receive a dividend at any rate certain that Congress could not amend, change, or even eliminate."

Moreover, the Federal Reserve Act did not convey a contractual or statutory right to a 6-percent dividend, the court stressed. If Washington Federal did not have a right to a 6-percent dividend, then it could not be viewed as having a "property interest" in a 6-percent dividend rate as well. At most, Washington Federal had "only a mere unilateral expectation" of a 6-percent dividend, the court determined. Further, the court pointed out that Federal Reserve Bank stock cannot be sold or transferred and that the U.S. Court of Appeals for the Federal Circuit has considered those indicia as an important factor in determining whether a property right is present.

Based on its analysis of Washington Federal's lack of a contractual or statutory right or a property interest in an annual 6-percent dividend, the court had little trouble also determining that the bank did not have a cognizable private property interest subject to the Taking Clause of the Fifth Amendment to the Constitution.

The case is [No. 17-194](#).

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

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