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No. 60075-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ANNE and CHRIS MCCURRY, on behalf of themselves and others  
similarly situated,

Appellants,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

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On Appeal From King County Superior Court  
Hon. Richard Eadie

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APPELLANT'S OPENING BRIEF

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FILED  
COURT OF APPEALS, DIV. #1  
STATE OF WASHINGTON  
2007 SEP 18 AM 10:46

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
I. ASSIGNMENTS OF ERROR .....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
III. STATEMENT OF THE CASE .....	3
A. Facts giving rise to lawsuit .....	3
B. Procedural history .....	5
IV. SUMMARY OF ARGUMENT .....	6
V. ARGUMENT .....	10
A. Standards for dismissal pursuant to CR 12(b)(6) .....	10
B. HOLA and OTS regulations do not preempt the McCurrys' claims as they seek relief under state law theories which the regulations specifically state are <i>not</i> preempted .....	11
1. The McCurrys' State Law Claims are not Preempted by Federal Law .....	12
a. Plaintiffs' Claim for Deceptive Practices Under the WCPA is not Expressly Preempted .....	14
b. Courts that have Analyzed Claims Similar to the McCurrys' WCPA Claim have held those Claims are not Preempted By HOLA .....	14
c. The McCurrys' WCPA Claim is also not Preempted because their Deed of Trust is to be governed by Washington law .....	23
2. Fax Fees are Not "Loan-Related Fees" .....	24

3.	No Evidence or Legal Authority Supports the Court’s Conclusion that Notary Fees are “Loan-Related Fees” .....	27
4.	The trial court judge’s conclusion that fax and notary fees are “servicing fees” is not supported by any evidence or legal authority .....	28
5.	Whether preventing Chevy Chase’s charging and collection of fax and notary fees would have more than an “incidental” effect on Chevy Chase’s lending operations presents, at a minimum, an issue of fact .....	30
	a. The McCurrys’ state law claims are preserved under §560.2(c) .....	31
	b. The McCurrys have a valid claim for breach of contract .....	37
	i. The Deed of Trust expressly identifies the sums it secures, and Chevy Chase required the McCurrys to pay unsecured sums in order to obtain the reconveyance of the property securing their loan .....	40
	c. The McCurrys asserted a valid claim for unjust enrichment .....	42
	d. Under established precedent in this Division, the McCurrys have a valid claim against Chevy Chase for violating the WCPA .....	42
C.	The McCurrys’ WCPA Claim is not Preempted by RCW 19.86.170 .....	45
VI.	CONCLUSION .....	49

APPENDIX:

1. 12 C.F.R. § 560.2
2. “Preemption of State Laws Applicable to Credit Card Transactions,” (Opinion of OTS Chief Counsel, December 24, 1996, P-96-14, 1996 WL 767462)

**TABLE OF AUTHORITIES**

<u>CASES</u>	<u>Page</u>
<i>Allen v. Am. Land Research</i> , 95 Wn.2d 841, 631 P.2d 930 (1981) .....	46
<i>American Airlines, Inc. v. Wolens</i> , 513 U.S. 219, 115 S.Ct. 817, 130 L. Ed.2d 715 (1995) .....	31, 32, 33
<i>Barnett Bank of Marion County, N.A. v. Nelson</i> , 517 U.S. 25, 116 S.Ct. 1103, 134 L. Ed.2d 237 (1996) .....	21-22
<i>Bayview Hunters Point Cmty. Advocates v. Metro Transp. Comm'n.</i> , 366 F.3d 692 (9th Cir. 2004) .....	24
<i>Blaylock v. First American Title Ins. Co.</i> , ___ F. Supp.2d ___, 2007 WL 2318143 (W.D. Wash., August 8, 2007) .....	49
<i>Bowman v. Two</i> , 104 Wn.2d 181, 704 P.2d 140 (1985) .....	10
<i>Bravo v. Dolsen</i> , 125 Wn. 2d 745, 888 P.2d 147 (1975) .....	10, 27
<i>Brown v. MacPherson's Inc.</i> , 86 Wn. 2d 293, 545 P.2d 13 (1975) .....	10
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed.2d 694 (1984) .....	24-25
<i>Christensen v. Harris County</i> , 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) .....	24
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504, 112 S.Ct. 2608, 120 L. Ed.2d 407 (1992) .....	13, 31, 33
<i>College Loan Corp. v. SLM Corp.</i> , 396 F.3d 588 (8th Cir. 2005) .....	23
<i>Courtney v. Halleran</i> , 485 F.2d 942 (7 <sup>th</sup> Cir. July 12, 2007) .....	21
<i>Dicks v. Attorney General</i> , 83 Wn.2d 684, 521 P.2d 702 (1974) .....	47

<i>Dwyer v. J.I. Kislak Mortgage Corp.</i> , 103 Wn. App. 542, 13 P.2d 240 (2000) .....	6, 7, 14, 22, 29, 42, 43, 44
<i>Erection Co. v. Dep't. of Labor &amp; Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993) .....	39
<i>Ethridge v. Hwang</i> , 105 Wn. App. 447, 20 P.3d 958 (2001) .....	48
<i>Fenning v. Glenfed, Inc.</i> , 40 Cal. App. 4th 1285, 47 Cal. Rptr.2d 715 (Cal. App. 2 Dist. 1996) .....	17
<i>Fidelity Fed. Sav. &amp; Loan Ass'n v. de la Cuesta</i> , 458 U.S. 141, 102 S.Ct. 3014, 73 L. Ed.2d 664 (1982) .....	26
<i>Fondren v. Klickitat County</i> , 79 Wn. App 850, 905 P.2d 928 (1995) .....	10
<i>Gerber v. First Horizon Home Loans Corporation</i> , 2006 WL 581082 (W.D. Wash. 2006) .....	42, 44
<i>Gibson v. World Sav. and Loan Ass'n</i> , 103 Cal. App. 4th 1291, 128 Cal. Rptr. 2d 19 (Cal. App. 4 Dist. 2003) .....	13, 16, 22, 31
<i>Glenn K. Jackson, Inc. v. Roe</i> , 273 F.3d 1192 (9 <sup>th</sup> Cir. 2001) .....	43
<i>Grunbeck v. Dime Sav. Bank of New York, FSB</i> , 74 F.3d 331 (1st Cir. 1996) .....	25
<i>Halver v. Welle</i> , 44 Wn.2d 288, 266 P.2d 1053 (1954) .....	42
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978) .....	10
<i>Hood v. Santa Barbara Bank &amp; Trust</i> , 143 Cal. App.4th 526, 49 Cal. Rptr.3d 369 (Cal. App. 2 Dist. 2006) .....	13
<i>In re: Ocwen Loan Servicing, LLC Mortgage Servicing Litigation</i> , 491 F.3d 638 (7 <sup>th</sup> Cir. June 22, 2007) .....	17, 18, 19, 20, 33, 34, 35
<i>In re Parker</i> , 269 B.R. 522 (D. Vt. 2001) .....	31
<i>In re Real Estate Brokerage Antitrust Litig.</i> , 95 Wn.2d 297, 622 P.2d 1185 (1981) .....	49
<i>In re Union Pacific Railroad Employment Practices Litigation</i> , 479 F.3d 936 (8th Cir. 2007) .....	24
<i>Konynenbelt v. Flagstar Bank, FSB</i> , 617 N.W.2d 706	

(Mich. App. 2000) .....	16, 17, 26, 27
<i>Leto v. World Savings</i> , 1998 WL 1784221 (W.D. Tex. 1998) .....	32, 33
<i>Lopez v. World Sav. and Loan Ass'n</i> , 105 Cal. App. 4th 729, 130 Cal. Rptr.2d 42 (Ct. App. 1 Dist. 2003) .....	15, 22
<i>Madison Prop. 's, Inc. v. United States</i> , 375 F.2d 740 (9th Cir. 1967) .....	38
<i>McKell v. Washington Mutual</i> , 142 Cal. App.4th 1457, 49 Cal. Rptr.3d 227 (Cal. App. 2 Dist. 2006) .....	13, 14, 21
<i>New York v. Fed. Energy Regulatory Comm'n</i> , 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47(2002) .....	12, 13, 25
<i>Orser v. Select Portfolio Servicing, Inc.</i> , 2005 WL 3478126 (W.D. Wash. 2005) .....	41, 42
<i>Parker v. Dacres</i> , 2 Wash. Terr. 439, 7 P. 893 (1885) .....	38
<i>Rustad Heating &amp; Plumbing Co. v. Waldt</i> , 91 Wn.2d 372, 588 P.2d 1153 (1979) .....	38
<i>Sepulveda v. Highland Federal Savings and Loan</i> , 14 Cal. App. 4th 1692, 19 Cal. Rptr.2d 555 (Cal. App. 2 Dist. 1993), <i>cert. denied sub nom Highland Fed. Loan v. California</i> , 510 U.S. 928, 114 S.Ct. 338, 126 L. Ed.2d 282 (1993) .....	17
<i>Short v. Demopolis</i> , 103 Wn.2d 52, 691 P.2d 163 (1984) .....	48
<i>Siegel v. American Savings and Loan Ass'n</i> , 210 Cal. App. 3d 953, 258 Cal. Rptr. 746 (Cal. App. 1 Dist. 1989) .....	16
<i>Stephens v. Omni Insurance Company</i> , 138 Wn. App. 151, 159 P.3d 10 (2007) .....	29, 47, 48
<i>Vogt v. Seattle-First Nat'l Bank</i> , 117 Wn.2d 541, 817 P.2d 1364 (1991) .....	45, 46, 47
<i>Ward v. Coldwell Banker/San Juan Properties, Inc.</i> , 74 Wn. App. 157, 872 P.2d 69 (1994) .....	29, 40
<i>Washington Mutual v. Superior Court</i> , 95 Cal. App. 4th 606, 115 Cal. Rptr.2d 765 (Cal. App. 2 Dist. 2002) .....	13
<i>Watters v. Wachovia Bank, N.A.</i> , 550 U.S. ___, 127 S.Ct. 1559, 167 L. Ed.2d 389 (April 17, 2007) .....	35, 36, 37

<i>Wells v. Chevy Chase Bank, F.S.B.</i> , 832 A.2d 812 (Md. Ct. App. 2003), <i>cert. denied</i> , 541 U.S. 983, 124 S.Ct. 1875, 158 L.Ed.2d 485 (2004) .....	23
---	----

**STATUTES, REGULATIONS AND COURT RULES**

12 U.S.C. § 1 .....	36
12 U.S.C. § 24 (Seventh) .....	36
12 U.S.C. § 26 .....	36
12 U.S.C. § 27 .....	36
12 U.S.C. § 481 .....	36
12 U.S.C. § 1462 .....	1, 11, 37
12 U.S.C. § 1463 .....	11, 37
12 U.S.C. § 1464 .....	11, 37
15 U.S.C. § 1692(a) .....	11, 48
29 U.S.C. § 1132(a) .....	19
29 U.S.C. § 1132(e) .....	19
49 U.S.C. § 41713(b)(1) .....	33
12 C.F.R. § 9.15(a) .....	47
12 C.F.R. § 545.2 .....	16, 17
12 C.F.R. § 560.2 .....	6, 11, 12, 16, 17, 18, 19, 20, 22, 25, 26, 30, 31, 33, 47, 43, 44
12 C.F.R. § 560.2(a) .....	19, 32, 37
12 C.F.R. § 560.2(b) .....	26
12 C.F.R. § 560.2(b)(5) .....	1, 2, 7, 26, 27, 28, 30
12 C.F.R. § 560.2(c) .....	2, 22, 30, 31, 37, 43
12 C.F.R. § 560.2(c)(1) .....	19, 42, 44

12 C.F.R. § 560.2(c)(4) .....	42, 44
12 C.F.R. §560.2(c)(6)(ii) .....	30, 32
CR 12(b)(6) .....	2, 10, 27, 30, 41
Laws of 1974, 1 <sup>st</sup> Ex. Sess., Ch. 158, § 1 .....	46
RCW 19.86.020 .....	45
RCW 19.86.170 .....	5, 9, 45, 46, 47, 49
RCW 19.86.920 .....	20, 45
RCW 61.16.020 .....	38, 39
RCW 61.24.020 .....	38
Cal. Bus. & Prof. §170000 .....	16

#### **TREATISES AND OTHER AUTHORITY**

4 POWELL ON REAL PROPERTY §37.46 .....	38
12 THOMPSON ON REAL PROPERTY § 101.07(c)(1) (David A. Thomas ed. 2004) .....	39
55 AM. JUR.2d MORTGAGES § 454 (1996) .....	39
IV AMERICAN LAW OF PROPERTY § 16.79 (1952) .....	39
59 C.J.S. MORTGAGES § 5 (1998) .....	38
59 C.J.S. MORTGAGES § 6 (1998) .....	38
59A C.J.S. MORTGAGES § 991 (1998) .....	29, 38
59A C.J.S. MORTGAGES § 998 (1998) .....	29, 38
59A C.J.S. MORTGAGES § 1040 (1956) .....	39-40
61 Fed. Reg. 50951, 50965 (Sept. 30, 1996) .....	25
OTS Opinion Letter P-99-3 (March 19, 1999) .....	24

OTS Opinion Letter P-2000-6 (April 21, 2000) ..... 24

“Preemption of State Laws Applicable to Credit Card  
Transactions” (Opinion of OTS Chief Counsel,  
Dec. 24, 1996, P-96-14, 1996 WL 767462).....19, 20

## **I. ASSIGNMENTS OF ERROR**

1. The trial court committed error when it held that the Home Owners' Loan Act ("HOLA"), 12 U.S.C. §1462 et seq., and the federal regulations promulgated thereunder by the Office of Thrift Supervision ("OTS"), preempt Appellants McCurrys' state law claims against Respondent Chevy Chase Bank, F.S.B. ("Chevy Chase"), and therefore dismissed the McCurrys' Complaint.

2. The trial court committed error when it ruled that the "Accumulated Fax Fees" and "Notary Fee" charged by Chevy Chase when the McCurrys paid the amount necessary to obtain the reconveyance of their Deed of Trust were "servicing fees" under 12 C.F.R. §560.2(b)(5) and therefore "loan-related fees."

3. The trial court committed error when it apparently held that Chevy Chase was exempt from liability on the McCurrys' claims under Washington's Consumer Protection Act ("WCPA"), RCW Chapter 19.86, et seq.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court commit error because it concluded the McCurrys' claims against Chevy Chase were preempted by HOLA?

2. Did the trial court commit error because it determined that fax fees and notary fees charged by Chevy Chase were "servicing fees" and thus "loan-related fees" under 12 C.F.R. § 560.2(b)(5)?

3. Did the trial court commit error when it relied on OTS opinion letters that contained no reasoning and simply stated the conclusion that fax fees were “loan-related fees” under 12 C.F.R. § 560.2(b)(5) in determining that fax fees and notary fees were “loan-related fees”?

4. Did the trial court commit error when it determined that fax fees charged by Chevy Chase for the delivery of the McCurrys’ loan payoff statement were “servicing fees” and therefore “loan-related fees” under 12 C.F.R. § 560.2(b)(5), because under their absolute right to exercise their equity of redemption the McCurrys were entitled to learn how much they had to pay in order to obtain reconveyance of their Deed of Trust without imposition of additional charges?

5. Did the trial court commit error when it granted Chevy Chase’s CR 12(b)(6) motion because a conceivable set of hypothetical facts is that Chevy Chase incurred no notary fees when it requested reconveyance of the McCurrys’ Deed of Trust?

5. Did the trial court commit error when it ruled the McCurrys’ claims against Chevy Chase are preempted because the state law claims they asserted are of the very type listed in 12 C.F.R. § 560.2(c) that are *not* preempted?

6. Did the trial court commit error when it ruled the McCurrys’ claims are preempted, because their Deed of Trust contract provided it would be governed by Washington state law in addition to federal law?

7. Did the trial court commit error when it ruled that Chevy Chase is exempt from the McCurrys' claim under the Washington Consumer Protection Act, RCW Chapter 19.86, *et seq.*, because no regulatory agency specifically permitted Chevy Chase to deceptively charge fax and notary fees when the McCurrys attempted to obtain the reconveyance of their Deed of Trust; no regulatory agency specifically permitted Chevy Chase to ignore its contract obligations; and no regulatory agency specifically permitted Chevy Chase to charge fax and notary fees when borrowers paid off their loans secured by deeds of trust?

### III. STATEMENT OF THE CASE

#### A. Facts giving rise to lawsuit.

In February 2003, Appellants Anne and Chris McCurry ("the McCurrys") obtained a loan from Chevy Chase and signed a Deed of Trust in favor of Chevy Chase to secure it. Clerk's Papers ("CP") 4. Chevy Chase is a federally chartered savings bank. CP 104.

The McCurrys' Deed of Trust defined "Loan" as

[T]he debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

CP 13. The Deed of Trust defined "Lender" as "Chevy Chase," and "Security Instrument" as "this document," (*id.*) and, in Paragraph 23, stated upon what conditions the Deed of Trust would be reconveyed:

**Reconveyance.** *Upon payment of all sums secured by this*

*Security Instrument*, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs and the Trustee's fee for preparing the reconveyance.

CP 24 (emphasis supplied). The Deed of Trust secured Chevy Chase's loan, interest due on the loan, and other charges specified in the Note and Deed of Trust. CP 14. Nothing in the Deed of Trust stated that Chevy Chase could charge the McCurrys "Accumulated Fax Fees" or a "Notary Fee" when they paid off their loan, or made such fees secured by the Deed of Trust. CP 12-31. Nor did the Deed of Trust state that the McCurrys would be required to pay such fees when they repaid their loan in order to obtain the release of Chevy Chase's security interest in their real property. *Id.*

The McCurrys sought to pay off their loan prior to its due date, in November 2004. CP 4-5, 33. Their escrow agent requested a loan payoff amount from Chevy Chase. *Id.* In the payoff statement it delivered to the escrow agent, specifying the amount the McCurrys needed to pay in order to pay off their loan and obtain a reconveyance of the Deed of Trust, Chevy Chase required the McCurrys pay, as part of the "Total Amount Due Chevy Chase", \$20 in "Accumulated Fax Fees" and a \$2 "Notary Fee." CP 33. The Payoff Statement warned, "Payoffs cannot be processed unless the 'Total Amount Due Chevy Chase', shown above, is remitted." *Id.* The McCurrys paid Chevy Chase the required "Accumulated Fax Fees" and "Notary Fee"

in order to obtain the reconveyance of their Deed of Trust. CP 5.

**B. Procedural history.**

The McCurrys filed their Complaint against Chevy Chase on April 12, 2006. CP 3. The McCurrys alleged that Chevy Chase's extraction from them of the fax and notary Fees constituted a breach of contract and a violation of the WCPA, and that by retaining the fees, Chevy Chase was unjustly enriched. CP 7-9. The McCurrys, on their own behalf and on behalf of a putative class of Chevy Chase borrowers, sought declaratory relief, to recover damages and restitution, and for an injunction to prevent Chevy Chase from deceptively charging such fees in the future. CP 8-10.

On August 2, 2006, Chevy Chase filed its motion to dismiss. CP 40-68. Chevy Chase argued, *inter alia*, that the McCurrys' claims were preempted under HOLA and that RCW 19.86.170 exempted it from the McCurrys' WCPA claim because OTS regulations permitted Chevy Chase to charge the "Accumulated Fax Fees" and the "Notary Fee." CP 46-59, 64-66. On May 11, 2007, King County Superior Court Judge Richard Eadie ruled that the McCurrys' claims were preempted by HOLA and dismissed their Complaint.<sup>1</sup> CP 259-60; Report of Proceedings ("RP") 54-56.

The McCurrys timely filed a Notice of Appeal from the trial court's dismissal of their Complaint. CP 261-65.

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<sup>1</sup> Judge Eadie seemingly also agreed that Chevy Chase was exempted from the McCurrys' WCPA claim pursuant, but his oral ruling is ambiguous, and the written order dismissing the Complaint does not elaborate on the reasons for the dismissal. RP 55-56; CP 259-260.

#### IV. SUMMARY OF ARGUMENT

This Court should reverse the trial court's order dismissing the McCurrys' claims. HOLA and the OTS regulations do not preempt the McCurrys' state law causes of action, nor is Chevy Chase exempt under RCW 19.86.170 from the McCurrys' WCPA claims.

The OTS regulations are found in 12 C.F.R. § 560.2. In part (b), the regulations identify the types of state laws that are preempted by HOLA. In part (c), the regulation makes clear that state contract, commercial, and tort laws only incidentally affecting FSBs are not preempted. Therefore, claims against FSBs under state statutes and common law are not preempted if the laws are not listed in § 560.2(b) and only incidentally affect an FSB's lending operations. The state laws upon which the McCurrys rely for their claims are not listed in part (b), and only incidentally (if at that) affect Chevy Chase's lending operations.

State laws of general application that regulate an FSB's deceptive business practices, like the WCPA, are not preempted by HOLA. Nor does HOLA permit an FSB to escape liability for its breach of contract or for violation of state common law in its transactions with its borrowers. Charges for fax and notary fees were not secured by the McCurrys' Deed of Trust. By requiring the McCurrys to pay fax fees of \$20 and a \$2 notary fee in order to obtain the reconveyance of their Deed of Trust, Chevy Chase engaged in the very conduct that this Court, in *Dwyer v. J.I. Kislak Mortgage Corp.*, 103

Wn. App. 542, 547-48, 13 P.2d 240 (2000), has already held is deceptive violates the WCPA. It had the capacity to deceive the McCurrys to believe that they were required to pay the unsecured fax and notary fees in order to obtain the reconveyance of the Deed of Trust. And because Chevy Chase promised in the Deed of Trust that it would request reconveyance of the Deed of Trust upon the McCurrys' payment of sums secured by it, Chevy Chase's requirement that the McCurrys pay the fees before Chevy Chase would request reconveyance was a breach of contract. In addition, Chevy Chase was unjustly enriched by its retention of these fees. Pursuant to 12 C.F.R. §560.2(c), these state law claims are not intended to be preempted by HOLA, and the McCurrys' claims in this case relying on them should not be preempted.

The McCurrys' claims also are not preempted because the Deed of Trust provides that is governed by Washington and federal law. Because Washington law applies to the rights and obligations under the Deed of Trust, any basis for preemption of the McCurrys' state law claims is inapplicable.

Chevy Chase argues that the McCurrys' claims are preempted because the "Accumulated Fax Fees" and the "Notary Fee" it charged the McCurrys in the loan payoff statement are "servicing fees" and therefore "loan-related fees" under 12 C.F.R. § 560.2(b)(5). However, this argument is based on OTS opinion letters that only discuss fax fees, not notary fees. Thus, the letters have no application to the McCurrys' claims related to the

“Notary Fee,” and Chevy Chase offered no other evidence or authority to support its contention that the “Notary Fee” was a “servicing fee” or a “loan-related fee,” or that it in fact actually incurred an expense for notarization relating to the McCurrys’ loan or Deed of Trust that it was entitled to pass on to them.

Furthermore, the OTS opinion letters simply state the conclusion that fax fees like Chevy Chase charged in this instance are “loan-related fees,” without any explanation or supportive reasoning. Opinion letters from a regulatory agency are only entitled to be considered to the extent they have the power to persuade, and since there is no rationale in the OTS opinion letters, the Court can disregard them.

In fact, fax fees are not “loan-related fees.” The charging of fax fees has nothing to do with loan origination or expenses incurred or services provided by a lender to service a loan. The charging of fax fees at the time it delivers a loan payoff statement to the borrower is purely incidental to Chevy Chase’s lending operations. Furthermore, every borrower has the inherent contract right to exercise his equity of redemption and to pay off the debt secured by a mortgage or deed of trust, at any time prior to a foreclosure sale of the real property. A lender may not charge a servicing fee to inform its borrower of the amount which must be paid in order for him to exercise that right, and requiring payment of such a charge therefore constitutes an impermissible imposition of its borrowers’ exercise of, and a breach of, their

contract rights.

As to Chevy Chase's argument that it is exempt from the McCurrys' WCPA claim, it bases that argument on RCW 19.86.170 and the fact that FSBs like Chevy Chase are generally regulated by the OTS. However, in order for exemption under RCW 19.86.170 to be warranted, the conduct alleged to be deceptive must be specifically permitted, prohibited, or regulated by the relevant agency. In this case, the statutes and federal regulations upon which Chevy Chase relies for its claim of exemption do not specifically permit FSBs to deceptively charge its borrowers fees in its loan payoff statements, or agree to reconvey deeds of trust or satisfy mortgages upon payment of certain specified amounts, then require the payment of additional previously unidentified fees prior to processing the reconveyance or satisfaction, both as occurred here. And the statutes and OTS regulations are silent concerning Chevy Chase's right to charge fax and notary fees as part of the sums that its borrowers need to pay in order to satisfy their loan obligations and obtain reconveyance of their Deed of Trust. Thus, because Chevy Chase's conduct at issue in this case was not specifically permitted, prohibited, or regulated, it is not exempt from the McCurrys' WCPA claims.

For these reasons, trial court Judge Eadie committed error when he granted Chevy Chase's motion for dismissal, and this Court should reverse the order and remand the case to the Superior Court so that it may be resolved on its merits.

## V. ARGUMENT

Trial court Judge Eadie committed error when he dismissed the McCurrys' Complaint on Chevy Chase's CR 12(b)(6) motion, and this Court should reverse Judge Eadie's order and allow this case to be resolved on its merits.

### A. Standards for dismissal pursuant to CR 12(b)(6).

A defendant's motion to dismiss a complaint for failure to state a claim must be denied unless there is no set of facts that the plaintiff could prove consistent with the complaint that would entitle him to relief. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). In reviewing a CR 12(b)(6) motion, the trial court is to treat all allegations contained in the plaintiff's Complaint as true. *Bowman v. Two*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985). If the plaintiff can present any set of hypothetical, imaginary facts that will support a valid claim, a CR 12(b)(6) motion should be denied. *Fondren v. Klickitat County*, 79 Wn. App 850, 854, 905 P.2d 928 (1995).

The purpose of proposing hypothetical facts is to "assist the court in establishing the 'conceptual backdrop' against which the challenge to the legal sufficiency of the claim is considered." *Brown v. MacPherson's Inc.*, 86 Wn. 2d 293, 298 n.2, 545 P.2d 13 (1975). Thus, the inquiry on a 12(b)(6) motion is "whether any facts which would support a valid claim *can be conceived*." *Bravo v. Dolsen*, 125 Wn. 2d 745, 751, 888 P.2d 147 (1975)

(emphasis added). In this case there should have been no question about whether the McCurrys pleaded facts sufficient to support claims for relief against Chevy Chase, and their Complaint should not have been dismissed in the trial court.

**B. HOLA and OTS regulations do not preempt the McCurrys' claims as they seek relief under state law theories which the regulations specifically state are *not* preempted.**

HOLA authorizes the creation and operation of federally chartered savings associations and federal savings banks like Chevy Chase, subject to regulation by the OTS. 12 U.S.C. §§ 1462(a), 1463(a), and 1464. The OTS promulgated regulations pursuant to HOLA, and Judge Eadie agreed with Chevy Chase that HOLA, together with OTS regulations at 12 C.F.R. §560.2, operates to preempt the McCurrys' state law claims.

Section 560.2 purports to set out the analytical framework to be used in determining whether a state law that affects lending is preempted by federal law. Essentially, under that framework, any state laws imposing requirements regarding any of the listed matters in part (b) are preempted. Part (c) makes clear that certain state laws that only incidentally affect an FSB's lending operations are not preempted.

In pertinent part, 12 C.F.R. § 560.2 provides:

(b) Illustrative examples. Except as provided in Sec. 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

...

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

...

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

- (1) Contract and commercial law;
- (2) Real property law;
- (3) Homestead laws specified in 12 U.S.C. 1462a(f);
- (4) Tort law;
- (5) Criminal law; and
- (6) Any other law that OTS, upon review, finds: (i) Furthers a vital state interest; and (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

In the trial court, Chevy Chase argued that section (b)(5) supported its preemption of the McCurrys' claims, characterizing fax and notary fees as "loan-related fees." CP 53-59. Judge Eadie agreed and dismissed the Complaint. RP 54-55. This conclusion is incorrect, and Judge Eadie's dismissal order should be reversed.

**1. The McCurrys' State Law Claims are not Preempted by Federal Law.**

The Court should apply a presumption against the preemption of state law when analyzing whether the McCurrys' claims are preempted. Particularly with their WCPA claim, where the state law at issue falls within the traditional police power of the state, there is a heightened presumption against preemption. *See New York v. Fed. Energy Regulatory Comm'n*, 535

U.S. 1, 18, 122 S.Ct. 1012, 152 L. Ed.2d 47(2002) (“[T]he Court ‘start[s] with the assumption that the historic police powers of the States were not to be superseded ... unless that was the clear and manifest purpose of Congress.’”) (citation omitted); *Washington Mutual v. Superior Court*, 95 Cal. App. 4th 606, 613, 115 Cal. Rptr.2d 765 (Cal. App. 2 Dist. 2002) (“Laws concerning consumer protection . . . are included within the states’ police power and thus subject to this heightened presumption against preemption.”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522-23, 112 S.Ct. 2608, 120 L. Ed.2d 407 (1992) (noting “the strong presumption against preemption” in areas of traditional state regulation); *see also Gibson v. World Sav. and Loan Ass’n*, 103 Cal. App. 4th 1291, 1300, 128 Cal. Rptr.2d 19 (Cal. App. 4 Dist. 2003) (“The state’s historic police powers include the regulation of consumer protection . . . . Therefore there is a strong presumption that section 560.2 [of HOLA] does not preempt the claims brought in this action.”); *Hood v. Santa Barbara Bank & Trust*, 143 Cal. App.4th 526, 536, 49 Cal. Rptr.3d 369 (Cal. App. 2 Dist. 2006) (“The states’ historic police powers include the regulation of consumer protection in general and of the banking and insurance industries in particular.”). Thus, There is a “general presumption that . . . a federal statute or regulation does not preempt a state’s historic police powers unless preemption is a clear and manifest purpose of the U.S. Congress.” *Id.* at 537

The party claiming that state law is preempted by federal legislation has the burden to demonstrate preemption. *McKell v. Washington Mutual*,

142 Cal. App.4th 1457, 49 Cal. Rptr.3d 227 (Cal. App. 2 Dist. 2006). Even where an intent to preempt state law is found, the Court must determine the scope of that preemption by examining Congress' intent, and should narrowly construe the precise language of the preemption clause in light of the strong presumption against preemption. *Id.* at 1480 (citation omitted).

**a. The McCurrys' Claim for Deceptive Practices Under the WCPA is not Expressly Preempted.**

Whether claims like the McCurrys are preempted under HOLA and the OTS regulations is apparently an issue of first impression in Washington. However, courts in other jurisdictions have considered claims similar to the McCurrys' claims and held them not preempted by HOLA or any OTS regulation. The WCPA claim in this case is not challenging Chevy Chase's right to charge fax fees or notary fees or their amount, but its misrepresentation of the charges. Indeed, this Court has held that the precise conduct at issue here is deceptive and a violation of the WCPA. *See Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. at 547-48 (holding that it is a deceptive practice violating the WCPA to deceive borrowers into believing that payment of miscellaneous non-secured fees is required before a mortgage will be released, and stating "[o]ur holding does not infringe on Kislak's right to charge a fax fee. It merely forecloses the ability to do so in a deceptive manner.").

**b. Courts that have Analyzed Claims Similar to the McCurrys' WCPA Claim have held those Claims are not Preempted By HOLA.**

Several courts that have considered claims of misrepresentation of

fees by FSBs have recognized that such claims are not preempted by HOLA.<sup>2</sup> In *Lopez v. World Sav. and Loan Ass'n*, 105 Cal. App. 4th 729, 130 Cal. Rptr.2d 42 (Ct. App. 1 Dist. 2003), the plaintiff sued World Savings (an FSB) for breach of contract and deceptive practices for charging plaintiff a fee to send payoff statements via facsimile. The court held that plaintiff's breach of contract claim, claims for fraud and unjust enrichment, and unfair competition claim based on the breach of contract claim, were not preempted by HOLA. *Id.* at 745 n.9 (noting alternative theory of unfair practices not preempted); *id.* at 733 (noting that, of the five causes of action pled, the statutory claim and the California Competition Act claim based on the statutory claim were preempted, but the claims for breach of contract, unjust enrichment, and fraud were not); *id.* at 742 (stating that neither the breach of contract claim nor the deceptive practices claim based on that breach were preempted by § 560.2); *see also id.* at 745-48 (reaching the merits of the breach of contract, unjust enrichment, fraud and part of the unfair competition claims). While a limited part of the decision dismissed a specific part of the plaintiff's unfair competition claim because it was based on a California statute regulating the *amount* an FSB could charge for a payoff statement, the court stated that plaintiff's other claims were not preempted. The McCurrys' claims in this case are virtually identical to those in *Lopez* held not preempted by HOLA: breach of contract, unjust enrichment and deceptive practices.

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<sup>2</sup> Chevy Chase will likely cite cases from courts in other jurisdictions supporting its position. The McCurrys submit that the cases Chevy Chase will likely cite are either distinguishable on their facts or poorly reasoned, and will respond to them in their reply brief.

Similarly, in *Gibson v. World Sav. and Loan Ass'n*, the plaintiffs challenged World Savings' practice of charging borrowers the cost of excessively expensive hazard insurance, claiming that this violated California's Unfair Practices Act<sup>3</sup> because it violated the terms of their deeds of trust and also because it misrepresented the cost of the hazard insurance. *Gibson*, 103 Cal. App. at 1301. The appellate court held that HOLA did not preempt the plaintiffs' claims. *Id.* at 1307.

In *Siegel v. American Savings and Loan Ass'n*, 210 Cal. App. 3d 953, 258 Cal. Rptr. 746 (Cal. App. 1 Dist. 1989), defendant Citicorp, an FSB, allegedly "disguised the reconveyance fees it charged by using other names ... [and] collected reconveyance fees ... despite the express agreement not to charge such ... fees ... set forth in Citicorp's ... deeds of trust." *Id.* at 958. The court rejected defendant's arguments that plaintiff's breach of contract and fraud claims (among others) were either expressly or impliedly preempted.<sup>4</sup>

While *Konynenbelt* did not involve a claim for deceptive practices, its analysis is directly applicable. Plaintiffs alleged a claim for breach of contract when Flagstar (an FSB) charged them a "recording fee" to discharge plaintiffs' mortgages despite a contract provision that precluded such charge. Flagstar asserted that plaintiffs' suit was an attempt "to govern what fees [it]

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<sup>3</sup> Cal. Bus. & Prof. §170000, *et seq.*

<sup>4</sup> The *Siegel* court relied on a version of the "preemption statement" contained in 12 C.F.R. 545.2 that predated the statement now in effect at §560.2. *Id.* at 961. But the *Siegel* court's conclusion regarding express preemption would have been the same under §560.2. Indeed, one court, considering the same issue, has explicitly noted that it would have reached the same result denying preemption based on §545.2 had it instead applied §560.2. *Konynenbelt v. Flagstar Bank, FSB*, 617 N.W.2d 706, 713 (Mich. App. 2000).

may collect. *Konynenbelt*, 617 N.W.2d at 711. The court held that neither plaintiffs' breach of contract action nor any of their other statutory claims were preempted, either explicitly or implicitly.<sup>5</sup> These cases are directly comparable to the McCurrys' WCPA claims against Chevy Chase and provide useful guidance to the Court because they involved claims of misrepresentation of fees or for breach of contract, not *whether* the FSB could collect fees from its customers.

Still other courts have found consumer protection claims not to have been preempted by HOLA. For instance, in *Sepulveda v. Highland Federal Savings and Loan*, 14 Cal. App. 4th 1692, 19 Cal. Rptr.2d 555 (Cal. App. 2 Dist. 1993), *cert. denied sub nom Highland Fed. Loan v. California*, 510 U.S. 928, 114 S.Ct. 338, 126 L. Ed.2d 282 (1993), plaintiffs alleged various state claims including violation of the California Unfair Business Practices Act and fraud arising from FSB Highland's involvement in financing slum properties. *Id.* at 1700. The court held that plaintiffs' unfair practices and fraud claims were not preempted. In *Fenning v. Glenfed, Inc.*, 40 Cal. App. 4th 1285, 47 Cal. Rptr.2d 715 (Cal. App. 2 Dist. 1996), the court held plaintiff's consumer protection and fraud claims not preempted when those claims arose from misrepresentations by an FSB that certain financial instruments sold under its name were FDIC insured.

In *In re: Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638 (7<sup>th</sup> Cir. June 22, 2007), borrowers in several federal districts

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<sup>5</sup> As noted *supra* n. 4, the *Konynenbelt* court relied on 12 C.F.R. §545.2 rather than §560.2 for its preemption analysis because the loan had been made before §560.2 became effective. However, the court concluded that its analysis would be no different under §560.2. *Konynenbelt*, 617 N.W.2d at 33-34.

brought putative class actions under federal and state law claiming that mortgage servicers who were also FSBs had charged excessive service charges in connection with mortgage foreclosures. The defendant servicers' motion to dismiss the complaints on the basis that the claims were preempted under HOLA was denied, and the servicers appealed. In affirming the trial court, Judge Posner went through an exhaustive analysis of the various claims and requested remedies, determining which should be preempted by HOLA and which should not. Under Judge Posner's analysis, the McCurrys' WCPA claim – which is based on the deception Chevy Chase employed in its payoff statement to extract payment of the “Accumulated Fax Fees” and the “Notary Fee” – should not be preempted by HOLA:

The line between subsections (b) and (c) [of 12 C.F.R. 560.2] is both intuitive and reasonably clear. The Office of Thrift Supervision has exclusive authority to regulate the savings and loan industry in the sense of fixing fees (including penalties), setting licensing requirements, prescribing certain terms in mortgages, establishing requirements for disclosure of credit information to customers, and setting standards for processing and servicing mortgages. [Citations omitted]. But though it has some prosecutorial and adjudicatory powers ancillary to its regulatory functions, [citations omitted], the Office has no power to adjudicate disputes between the S & Ls and their customers. [Citation omitted]. So it cannot provide a remedy to persons injured by wrongful acts of savings and loan associations, and furthermore HOLA creates no private right to sue to enforce the provisions of the statute or the OTS's regulations. [Citation omitted].

Against this background of limited remedial authority, we read subsection (c) to mean that OTS's assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies. Suppose an S & L signs a mortgage agreement with a homeowner that specifies an annual interest rate of 6 percent and a year later bills the homeowner at a rate of 10 percent and when the homeowner refuses to pay institutes foreclosure proceedings. It would be surprising for a federal regulation to forbid the homeowner's

state to give the homeowner a defense based on the mortgagee's breach of contract. Or if the mortgagee (or a servicer like Ocwen) fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud. Some federal laws do create such bars, notably ERISA, see 29 U.S.C. §§ 1132(a), (e), but this is recognized as exceptional. [Citations omitted]. Enforcement of state law in either of the mortgage-servicing examples above would complement rather than substitute for the federal regulatory scheme.

This is well explained in "Preemption of State Laws Applicable to Credit Card Transactions" ¶ IIC (Opinion of OTS Chief Counsel, Dec. 24, 1996, 1996 WL 767462):

State laws prohibiting deceptive acts and practices in the course of commerce are not included in the illustrative list of preempted laws in § 560.2(b).... The [Indiana] DAP [deceptive acts and practices] statute prohibits specified acts and representations in all consumer transactions without regard to whether the transaction involves an extension of credit. Although not directly aimed at lenders, this law affects lending to the extent that it prohibits misleading statements and practices in loan transactions by a federal savings association. Accordingly, ... a presumption arises that the DAP statute would be preempted in connection with loans made by the Association.

The OTS has indicated, however, that it does not intend to preempt state laws that establish the basic norms that undergird commercial transactions.... The Indiana DAP falls within the category of traditional "contract and commercial" law under § 560.2(c)(1). While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute-the regulation of the ethical practices of all businesses engaged in commerce in Indiana. There is no indication that the law is aimed at any state objective in conflict with the safe and sound regulation of federal savings associations, the best practices of thrift institutions in the United States, or any other federal objective identified in § 560.2(a).

In fact, because federal thrifts are presumed to interact with their borrowers in a truthful manner, Indiana's general prohibition on deception should have no measurable impact on their lending operations. Accordingly, we conclude that the Indiana DAP is not preempted by federal law.

*Id.* at 643-644. Like the state consumer protection statutes discussed by Judge Posner, the WCPA falls within the category of traditional contract and commercial law, and any effect it has on lending relationships between FSBs and their borrowers is incidental to its primary purpose.<sup>6</sup> It is not intended to meet a state objective in conflict with “the safe and sound regulation of federal savings associations, the best practices of thrift institutions in the United States, or any other federal objective specified in 12 C.F.R. § 560.2. Indeed, the WCPA’s prohibition on deception should have no measurable impact on FSBs lending operations. Thus, applying this analysis, it is clear that Judge Posner would conclude that the McCurrys’ state law claims – including their claim to recover under the WCPA for Chevy Chase’s deceptive conduct – would not be preempted.<sup>7</sup>

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<sup>6</sup>The purpose of the WCPA “is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition.” RCW 19.86.920.

<sup>7</sup>The December 24, 1996 OTS Chief Counsel’s letter continues,

As indicated above, nothing in federal law preempts general deceptive practices statutes. The Association is required to comply with the Indiana DAP and those deceptive practices statutes of other states that are worded in a manner to apply to the Association's loans. The applicability of conflicting state requirements should be resolved under traditional conflicts of laws principles and may turn on the facts of the specific transaction. Under some circumstances, the deceptive practices laws of more than one state may apply to the same transaction.

OTS Opinion Letter P-96-14 at 6. Thus, the OTS agrees that Chevy Chase is not immune from liability under consumer protection laws like the WCPA when it engages in deceptive

In *McKell v. Washington Mutual, Inc.*, mortgagors brought an action against the FSB lender, claiming violations of California's Unfair Competition Law ("UCL") and Consumer Legal Remedies Act in connection with alleged overcharging for underwriting, tax services, and wire transfer fees related to home loan closings. Washington Mutual argued that the claims were preempted under HOLA, a position rejected by the court:

As Division Five of this court observed in holding UCL and fraud claims were not preempted by HOLA, actions for fraud are governed almost exclusively by state law, and do not raise issues of great federal interest. There is no reason to suppose that Congress intended to preempt common law tort claims, effectively granting savings associations immunity from such state law claims, and a number of courts have so held. And the Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiff's ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, *the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Bank chooses to operate, it do so free from fraud and other deceptive business practices.*

*McKell*, 142 Cal. App.4th at 1487 (emphasis supplied).

In *Courtney v. Halleran*, 485 F.2d 942 (7<sup>th</sup> Cir. July 12, 2007), depositors sued an insolvent FSB's owners, officers, directors, and accountants for relief under Illinois state laws, including the Illinois Consumer Fraud Act, which is similar to the WCPA. Defendants moved for dismissal, arguing (among other things) that HOLA preempted plaintiffs' claims. The court disagreed:

The Supreme Court held in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103, 134 L. Ed.2d

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conduct like it did in this case.

237 (1996), that state banking laws are not preempted if they “do[ ] not prevent or significantly interfere with the national bank’s exercise of its powers. *Id.* at 33, 116 S.Ct. 1103. If state banking laws are not preempted, there is even less reason to think that federal banking laws preempt state laws of general applicability like the Illinois Consumer Fraud Act or the Public Accounting Act. Regulations issued by the Office of Thrift Supervision of the Department of Treasury confirm that conclusion: “State laws of [contract and commercial law and tort law] are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations.” 12 C.F.R. § 560.2(c).

*Id.* at 951 (bracketed additions in original).

The reasoning of these courts is directly applicable to the Court’s consideration of the McCurrys’ WCPA claim in this case. In *Dwyer*, this Court has already recognized the important distinction between a challenge to the amount of a fee charged by a lending institution and the use of the WCPA to prevent that institution from deceptively representing the nature of that fee to consumers. *Dwyer*, 103 Wn. App. at 548. As the court stated in *Lopez*,

the duties of a contracting bank ... not to misrepresent material facts, and ... to refrain from unfair or deceptive business practices ... are not requirements or prohibitions of the sort that [part] 560.2 preempts...these duties. . . do not purport to regulate federal savings associations and are not specifically directed toward them.... Any effect they have on the lending activities of a federal savings association is incidental rather than material.

*Lopez*, 105 Cal. App. 4th at 742 (quoting *Gibson*, 103 App. 4th at 1301-02) (emendation in *Lopez*). Accordingly, because the McCurrys’ WCPA claim is not seeking to prevent Chevy Chase from charging the fees at issue, but instead seeks to prevent it from charging them in a deceptive manner, their claim should not be preempted and should not have been dismissed.

**c. The McCurrys' WCPA Claim is also not Preempted because their Deed of Trust is to be governed by Washington law.**

Paragraph 16 of the McCurrys' Deed of Trust provides that it is to be "governed by federal law and the law of the jurisdiction where the Property is located." CP 22. Thus, the parties agreed that Washington law would apply to the relationship between them, vis-a-vis the rights and obligations under the Deed of Trust. "Washington law" includes the provisions of the WCPA and state common law pertaining to breach of contract and unjust enrichment. *See Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812, 832-33 (Md. Ct. App. 2003), *cert. denied*, 541 U.S. 983, 124 S.Ct. 1875, 158 L. Ed.2d 485 (2004) (inclusion of statement in FSB's credit cardholder agreement that agreement was "governed" by "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws" meant that FSB had incorporated notice provisions of state law in its agreement; plaintiffs' claims based on the state law were thus not preempted by HOLA); *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598-99 (8th Cir. 2005) (where parties incorporated obligations imposed by the Higher Education Act in their contract, state law claim for breach of contract action based on violation of standards imposed by Act was not preempted, notwithstanding comprehensive federal regulations promulgated pursuant to and under the Act). Accordingly, even if there was a basis for preemption under the OTS regulations, by agreeing that Washington law would apply to govern the rights and obligations under the Deed of Trust, any basis for preemption is rendered inapplicable.

## 2. Fax Fees are Not “Loan-Related Fees”

Chevy Chase bases its argument that Plaintiffs’ claims are preempted upon two OTS opinion letters, P-99-3 (issued March 10, 1999) and P-2000-6 (issued April 21, 2000). *See* CP 106-125, 135-138. In those letters, the OTS merely states, without any explanation or discussion, that fax fees are “loan related fees.” P-99-3 at 16 (CP 122); P-2000-6 at 2 (CP 137).<sup>8</sup> However, opinion letters from a regulatory agency are not due the deference owed to regulations propounded by that agency, and are only as valuable as their “power to persuade.” *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L. Ed.2d 621 (2000)(rejecting Department of Labor’s Opinion letter and stating that “opinion letters . . . do not warrant . . . deference” but are rather “entitled to respect ... only to the extent that those interpretations have the power to persuade”); *Bayview Hunters Point Cmty. Advocates v. Metro Transp. Comm’n.*, 366 F.3d 692, 703 (9th Cir. 2004) (rejecting EPA opinion letter because its “interpretation is unwarranted”); *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943 (8th Cir. 2007) (An agency’s interpretation that is found in an opinion letter, policy statement, agency manual or enforcement guideline “lack[s] the force of law” and is not entitled to deference under *Chevron U.S.A., Inc. v.*

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<sup>8</sup> The March 10, 1999 letter merely states, “The fees at issue in the example provided by the Associations, demand statement fees and facsimile charges, are loan-related fees.” OTS Op. Letter P-99-3 at 16 (CP 122). The April 21, 2000 letter states, “Here, the fee the Association charges for faxing loan payoff statements, at the borrower’s request, is a loan-related fee.” OTS Op. Letter P-2000-6 at 2 (CP 137). No further explanation is provided in either letter. Interestingly, even though the March 10, 1999 opinion letter, P-99-3, states that fax fees are “loan related fees,” it also states that a plaintiff’s claims based on “the charging of loan fees may still be brought in state court based on traditional contract claims or other causes of action.” P-99-3 at 18 (CP 124). Thus, the OTS itself does not believe that state lawsuits by consumers to recover fax fees assessed for loan payoff statements are preempted.

*Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed.2d 694 (1984)). Notwithstanding the conclusory statements in the OTS opinion letters that fax fees are “loan-related fees,” the fact is they are not. Charging consumers fax fees for loan payoff statements has nothing to do with “lending operations” but relates only to loan payoffs. The OTS regulations in are intended to regulate only loan origination and not loan payoffs. This is clear from the OTS statement issued when 12 CFR 560.2 was promulgated:

Because lending lies at the heart of the business of a federal thrift, OTS and its predecessor, the FHLBB, have long taken the position that the federal lending laws and regulations occupy the entire field of lending regulation for federal savings associations, leaving no room for state regulation. For these purposes, the field of lending regulation has been defined to encompass all laws affecting lending by federal thrifts, except certain specified areas such as basic real property, contract, commercial, tort, and criminal law.

As a result, instead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, *federal thrifts are free to originate loans under a single set of uniform federal laws and regulations.*

61 Fed. Reg. 50951, 50965 (Sept. 30, 1996) (CP 131) (emphasis supplied).

Because the OTS’ own statement indicates that §560.2 is only supposed to pertain to loan origination matters and because the OTS proffered no support for its conclusion in the two opinion letters that fax fees are “loan related fees,” this conclusion is therefore owed no deference. *See Grunbeck v. Dime Sav. Bank of New York, FSB*, 74 F.3d 331, 341-42 (1st Cir. 1996) (disregarding OTS opinion letters when the “regulatory body tendered [no] *rationale* for its opinion” and hence the opinions were owed no deference because they lacked “persuasiveness”) (emphasis in original). In

contrast, in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 168-69, 102 S.Ct. 3014, 73 L. Ed.2d 664 (1982), the United States Supreme Court, in giving deference to the OTS' opinions, detailed the analysis carried out by the OTS to decide on the appropriate nature of the regulation governing clauses.

In deciding whether a fax fee is truly a "loan related fee" it is useful to compare such fees with the OTS' examples of "loan-related fees": "initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees." 12 C.F.R. §560.2(b)(5). "Fax fees" are not mentioned. The difference on the effect of fees charged for the listed items and a fax fee upon a bank's lending operations is striking. Each of the listed fees is a cost of either issuing or servicing the loan, and is therefore legitimately a part of the lending process. Fax fees are totally incidental to the loan making process and have nothing to do with loan origination. Accordingly, state laws and lawsuits regulating or affecting such fees are not preempted pursuant to §560.2(b).

The analysis of the Michigan Court of Appeals in *Konynenbelt* is very persuasive. The Michigan court found that a \$9 fee to record the discharge of a mortgage "did not affect interest rates and was not an up-front cost of the loan ... [and hence] is incidental [to] and has nothing to do with the lending of money." *Konynenbelt*, 617 N.W.2d at 713. The court therefore held that Plaintiff's breach of contract claim for charging the fee was not preempted. Everything that the *Konynenbelt* court found true of recordation fees is equally true of fax fees like those at issue here – they are not an "up-front cost of the loan" and have nothing to do with, and are incidental to, the

lending of money. Most significantly, the *Konynenbelt* court noted that it based this opinion on the findings of the trial court below. At the very least, whether a fax fee is a “loan-related fee” as defined by §560.2(b)(5) and whether charging the fees has more than an incidental effect on Chevy Chase’s lending operations are issues of fact unsuitable for determination on a CR 12(b)(6) motion for dismissal. *Bravo v. Dolsen*, 125 Wn.2d at 751 (“[T]he inquiry on a CR 12(b)(6) motion is whether any facts which would support a valid claim can be conceived.”).

**3. No Evidence or Legal Authority Supports the Court’s Conclusion that Notary Fees are “Loan-Related Fees”**

There is nothing in the trial court record to identify what the purpose was for the \$2 “Notary Fee” charged by Chevy Chase when the McCurrys paid off their loan. No explanation was provided for why the charge was included as part of the required amount for loan payoff and deed of trust reconveyance or why Chevy Chase considered the charge a “loan related fee.” Further, in the trial court Chevy Chase offered no authority, not even an unpersuasive OTS regulation or opinion letter, that supported its contention that the “Notary Fee” was a “loan related fee”, and there is no support for Chevy Chase’s contention that they were. Hence, nothing in the record supports the conclusion that the Notary Fee was a “loan related fee” within the ambit of §560.2(b)(5). One hypothetical fact that the Court must consider in determining whether Chevy Chase’s motion to dismiss should have been granted is that Chevy Chase in fact did not incur, and did not pay, any “Notary Fee” related to the McCurrys’ loan payoff and deed of trust reconveyance. If that hypothetical fact is indeed true – and it is a possible

fact which can be conceived – then there was no basis for Chevy Chase to include the charge as a required fee, and it would not have been a “loan related fee.” Accordingly, the trial court’s conclusions that the fee was a “loan-related fee” and that the McCurrys’ claim to recover it is preempted were not supported. The trial court’s dismissal of the McCurrys’ claim to recover the “Notary Fee” should be reversed.

**4. The trial court judge’s conclusion that fax and notary fees are “servicing fees” is not supported by any evidence or legal authority.**

Judge Eadie’s conclusion that fax and notary fees charged by Chevy Chase related to the payoff statement were legitimate “servicing fees” and therefore “loan-related fees” under 12 C.F.R. § 560.2(b)(5) was not supported by any evidence or legal authority. Chevy Chase offered no authority in the trial court as to what fees are considered “servicing fees” in the mortgage industry, or that either of these fees are in fact considered “servicing fees.” It is counterintuitive that fax fees and notary fees associated with delivery of a payoff statement should be considered “servicing fees” for a loan. With respect to “Accumulated Fax Fees,” one set of hypothetical facts is that the charge is solely related to the generation of the payoff statement and the delivery of it to the escrow agent. The delivery of a payoff statement to an escrow agent is not an extra “service” provided by Chevy Chase to the borrower but is instead an integral and necessary response to the borrower’s right to exercise his right of redemption and pay off and redeem his

mortgage.<sup>9</sup> In order to exercise his right to redeem his mortgage, the borrower must be provided the amount due on it by the mortgage company; the imposition of a fee by Chevy Chase as a condition of its borrowers' exercise of this right would constitute an impermissible imposition on its borrowers' exercise and performance of their contract rights. *See Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn. App. 157, 168, 872 P.2d 69 (1994) (each party to a contract has a duty not to interfere with the other party's performance). Thus, if the fax fees identified in the payoff statement were for the delivery of the statement to the McCurrys' escrow agent, they were not legitimate "servicing fees" for their loan. *Cf. Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 169, 159 P.3d 1 (2007) (discussing *Dwyer v. J.I. Kislak Mortgage Corp.*, and characterizing the payoff statement faxed to the escrow agent in that case as containing fax fees "unrelated to the mortgage").

Similarly, if the "Notary Fee" relates to the cost to notarize the reconveyance, then it was not an appropriate expense to be passed on to the

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<sup>9</sup> See 59A C.J.S. MORTGAGES §§ 991, 998 at 623, 631 (1998):

"Redemption," as the term is used in the law of mortgages, may be defined as a transaction through which the mortgagor, or one claiming in his right, by means of a payment or the performance of a condition, reacquires or buys back the title which may have passed under the mortgage or divests the mortgaged premises of the lien which the mortgage may have created. . . .

The right of redemption is the right to discharge the lien of the mortgage by payment or performance of its conditions. It is the mortgagor's right to take prescribed action to satisfy the debt secured by the mortgage. In other words, it is the right to pay off the creditor and save the property from sale. . . .

A right of redemption is inherent in, and essential to, every mortgage, and is an absolute right, so that a mortgagor has the right to redeem whether or not he realizes he has that right.

(Emphasis supplied). *See also, infra* at 37-42.

McCurrys, as, pursuant to the terms of the Deed of Trust, they were entitled to reconveyance upon payment of the sums secured by the Deed of Trust (CP 24 at ¶23), recordation costs, and the Trustee's fee for preparing the reconveyance, but *not* the Notary's fee for notarizing the Trustee's signature on the Deed of Reconveyance. In either event, there is no support for the trial court's conclusion that fax and notary fees are legitimate "servicing fees" constituting "loan-related fees" under 12 C.F.R. § 560.2(b)(5), and the court's decision that preemption was appropriate for that reason is similarly unsupported.

**5. Whether preventing Chevy Chase's charging and collection of fax and notary fees would have more than an "incidental" effect on Chevy Chase's lending operations presents, at a minimum, an issue of fact.**

12 C.F.R. §560.2(c) provides that state laws pertaining to, *inter alia*, contracts, commercial law, and torts are not preempted "to the extent that they only incidentally affect the lending operations" of an FSB. Judge Eadie, having decided that the fax and notary fees collected by Chevy Chase were service fees and thus "loan-related fees" under §560.2(b)(5), did not address whether preventing Chevy Chase from charging and collecting them would have more than an incidental affect on Chevy Chase's lending operations. The McCurrys submit that Judge Eadie could not have decided the CR 12(b)(6) motion to dismiss on the basis of preemption under 12 C.F.R. §560.2(c)(6)(ii) because consideration of this proposition would require presentation of evidence concerning, for example, how much Chevy Chase receives in profit from such fees; what the actual expenses incurred by Chevy Chase are for faxing payoff statements and having documents notarized; and

what financial effect would occur if Chevy Chase would be prevented from charging and collecting such fees. It is certainly conceivable that preventing Chevy Chase from charging for faxed payoff statements and for notarization would have no more than an incidental effect on Chevy Chase's lending operations. Thus, because a hypothetical set of facts can be conceived that would negate preemption, dismissal under §560.2(c) was not warranted.

**a. The McCurrys' state law claims are preserved under §560.2(c).**

Even if HOLA permits FSBs to charge fax fees and notary fees, if Chevy Chase contracted with the McCurrys<sup>10</sup> not to charge such fees, then the existence of a federal regulation permitting such fees cannot change the contract and cannot preempt the McCurrys' right to enforce it. *Cf. American Airlines, Inc. v. Wolens*, 513 U.S. 219, 230, 115 S.Ct. 817, 130 L. Ed.2d 715 (1995) (noting that the ability to enforce private contractual agreements is essential to the efficient functioning of an economy built on free exchange). As stated by the court in *Gibson v. World Saving*, addressing plaintiffs' claims regarding hazard insurance premiums charged by the FSB and World Savings' unsuccessful argument that the claims were preempted,

While state law cannot prescribe limits on the premiums to be charged, the parties can agree to contractual terms that place certain restrictions on those premiums. And if the parties have done so, the courts of this state can interpret and enforce those contractual limitations without impinging upon the preempted field of regulation.

*Gibson*, 103 Cal. App.4th at 1306. *See also Cipollone*, 505 U.S. at 526 (“[A]

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<sup>10</sup> The Deed of Trust was a contract of adhesion drafted by the Defendant. *See In re Parker*, 269 B.R. 522, 530 (D. Vt. 2001 (noting that standardized mortgage contracts are contracts of adhesion, thus ambiguities must be interpreted against their drafters)).

common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a ‘requirement ... *imposed under State law*’ within the meaning of [the Federal Cigarette Labeling and Advertising Act] ....”) (emphasis in original); *American Airlines, Inc. v. Wolens*, 513 U.S. at 228 (1995) (“[T]erms and conditions airlines offer and passengers accept are privately ordered obligations ‘and thus do not amount to a State’s enactment or enforcement [of] any law, rule, regulation, standard, or other provision having the force and effect of law’ ....”).

The OTS regulations themselves recognize that state contract and commercial laws, as well as tort laws, are not preempted to the extent they “only incidentally affect the lending operations of [FSBs] or are otherwise consistent with the purposes of paragraph (a) of this section.” 12 C.F.R. §560.2(c)(6)(ii).<sup>11</sup> As discussed above, the fees at issue here are clearly incidental.<sup>12</sup> And as stated by the federal court in *Leto v. World Savings*, 1998 WL 1784221 (W.D. Tex. 1998), where plaintiff sued a lender for breach of contract, unjust enrichment, and fraud, in violation of the Texas Fair Debt Collection Act, for its imposition of a “Facsimile Fee” and a “Demand Statement Fee,”

... Leto’s state law claims are not entirely preempted by

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<sup>11</sup> OTS has issued no specific opinion letters concerning whether FSBs doing business in Washington can ignore their contract responsibilities and charge their borrowers fees that are not permitted in loan documents, like the Fax Fee and Notary Fee at issue in this case.

<sup>12</sup> Indeed, allowing FSBs to breach their contracts would act undermine the “sound operation” of FSBs and would be entirely inconsistent with the “best practices of thrift institutions,” since, were borrowers aware that they would be unable to enforce contracts with FSBs, no borrower would ever wish to enter any business relationship with a thrift immune from suit for breaching any term of a contract that related to fees (quoted terms excerpted from 12 C.F.R. §560.2(a)).

federal law.... The federal regulations interpreting HOLA provide that Leto's state law claims for breach of contract and tort are *not* preempted to the extent that they "only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of [12 C.F.R. 560.2]." Thus, Texas contract and tort laws are not completely displaced by federal law.

(Emphasis in original)<sup>13</sup>

In *Wolens*, the Supreme Court held that a breach of contract claim was not preempted by the Airline Deregulation Act despite the broad preemption provision of the Act. *Wolens*, 513 U.S. at 223 (Airline Deregulation Act prevented any state from enacting any law "related to a price, route or service of an air carrier.") (quoting 49 U.S.C. § 41713(b)(1)). The Supreme Court emphasized that enforcement of private agreements advances market efficiency that federal regulations are designed to promote and the federal agency lacked either resources or any special expertise required to "superintend a contract dispute resolution regime" *Id.* at 220; *see also Cipollone*, 504 U.S. at 526 n.24 (interpreting statutory preemption clause and concluding that voluntarily undertaken obligations are not "imposed" by state law, but "imposed" by contracting party upon itself).

In *In re: Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, Judge Posner agreed that the depositors' state law breach of contract claims concerning mortgage foreclosure servicing fees were not necessarily preempted:

The breach of contract allegations are elaborated in the fifth

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<sup>13</sup> In *Leto*, the court did not address the merits of plaintiff's complaint, as the issue before it was whether preemption provided a basis for federal jurisdiction. The court ruled that because not all of plaintiff's state law claims were preempted, remand to state court was appropriate.

claim (the fourth seeks restitution as a remedy for the third claim, the one we've just been discussing). Here we read that Ocwen assumed the obligations in the plaintiffs' loan agreements when it took over the loans for servicing, that the "plaintiffs satisfied their obligations by making timely payments of principal and interest on their loans," but that nevertheless "by charging late fees on payments that were not late, Ocwen breached its contracts with Plaintiffs and the Class" and also did so by "increasing the monthly payment amount due without notice" and "demanding payment of attorneys' fees in connection with legal proceedings that have not commenced and/or have not yet been incurred" (meaning of course that the *fees* have not yet been incurred, though the literal antecedent is "legal proceedings").

Although these seem like conventional breach of contract allegations, Ocwen argues that they are preempted by subsection (b)(10) of the OTS regulation: "Processing, origination, *servicing*, sale or purchase of, or investment or participation in, mortgages" (emphasis added). At least so far as bears on this case, servicing refers to the exercise of rights that are conferred by a partial assignment of a mortgage by the mortgagee. Instead of assigning the entire mortgage to Ocwen, the mortgagee in this case assigned some of the rights created by the mortgage contract-the "servicing rights"-to Ocwen, which according to the complaint proceeded to violate its contractual obligations. It is no different than if the original mortgagee, or an assignee of the entire mortgage, had violated the terms of the mortgage or defrauded the mortgagor. We would have a different case if state law purported to forbid servicing or prescribe the terms of the assignment-suppose a state tried to limit the rights that the assignment conferred on the servicing S & L. But nothing like that is suggested here. If an original mortgagee can be sued under state law for breach of contract, so may the partial assignee if he violates the terms of the part of the mortgage contract that has been assigned to him.

*In re: Ocwen*, 491 F.3d at 645. Here, the McCurrys' Deed of Trust stated what needed to be paid in order for them to obtain its reconveyance. Despite the clear language of the contract, Chevy Chase required them to pay fax and notary fees – a clear breach of contract for which Chevy Chase should be

required to respond in state court.<sup>14</sup>

Although not directly on point, by analogy a recent decision of the United States Supreme Court supports the McCurrys' contention that their state law claims are not preempted. In *Watters v. Wachovia Bank, N.A.*, 550 U.S. \_\_\_, 127 S.Ct. 1559, 167 L. Ed.2d 389 (April 17, 2007), the United States Supreme Court affirmed the Sixth Circuit Court of Appeals and ruled that a subsidiary of a national bank is subject to superintendence under the Office of the Comptroller of the Currency ("OCC") to the same extent as the parent national bank, and is not subject to the licensing, reporting, and visitorial regimes of states where the subsidiary operates. Thus, the Court ruled that Linda Watters, the commissioner of Michigan's Office of Insurance and Financial Services, was not permitted to enforce Michigan's banking registration prescriptions against Wachovia Mortgage, the wholly owned real estate mortgage lending subsidiary of Wachovia Bank, N.A. ("Wachovia"). Nevertheless, the Court emphatically held that the National Bank Act ("NBA") and the regulations promulgated thereunder by the Office of the Comptroller of the Currency ("OCC") -- which are very similar to HOLA and regulations promulgated thereunder by the Office of Thrift Supervision ("OTS") -- do not preempt private state law claims like those at issue in this case.

The NBA confers upon national banks the power and authority

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<sup>14</sup> See also *In re: Ocwen*, 491 F.3d at 647 ("The fourteenth claim is under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, and complains that Ocwen 'demand[s] [from the mortgagors] payments of fees for an entire case at its inception.' If this demand is forbidden by the loan contract, then the charge is not preempted; otherwise, it probably is.").

To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes ....

12 U.S.C. § 24 (Seventh).

To regulate national banks under the NBA, Congress empowered the OCC with the power to issue regulations implementing the Act, to supervise national banks and their operating subsidiaries, and to redress and punish violations of the NBA by national banks and their subsidiaries. *See* 12 U.S.C. §§ 1, 26-27, and 481. Despite this broad grant of authority, in *Watters* the Court reaffirmed that the laws of the states where national banks and their subsidiaries do business govern matters the NBA does not address. *Watters*, 127 S.Ct. at 1573. As Justice Ginsburg stated, “Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA.” *Id.* at 1567. Accordingly, “states are permitted to regulate the activities of national banks [and their subsidiaries] where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers.” *Id.* Among state laws which apply to national banks’ and their subsidiaries’ conduct of business, the Supreme Court noted that “state usury laws govern the maximum rate of interest national banks can charge on loans, contracts made by national banks ‘are governed and construed by State laws,’ and national banks’ acquisition and transfer of property [are] based on State law.” *Id.* (citations omitted).

While *Watters* involved the NBA and the extent to which state laws

are preempted by the NBA and OCC regulations and this case involves HOLA, the regulation of federally chartered savings banks by the OTS, and the extent to which state laws are preempted by HOLA and OTS regulations, the decision in *Watters* is instructive by analogy. Like the broad powers and authority Congress gave to the OCC to regulate national banks and their subsidiaries under the NBA, it created the OTS to be responsible for the regulation of all federally-chartered savings associations. 12 U.S.C. §§ 1462(a), 1463(a), and 1464. Indeed, in 12 C.F.R. § 560.2(a), the regulation provides that “OTS . . . occupies the entire field of lending regulation for federal savings associations.” Notwithstanding the broad grant of authority provided by this regulation, however, 12 C.F.R. § 560.2(c) makes it clear that certain state law claims against federally chartered savings bank are not preempted, including state contract, commercial, and tort laws.

Thus, under the Supreme Court’s holding in *Watters*, while federally-chartered savings banks may not be regulated by banking officials in states where they operate, they are nevertheless subject to state statutes and common law to the extent the statutes and the common law do not more than incidentally affect their lending operations. Under the principles reaffirmed in *Watters*, the trial court should not have dismissed the McCurrys’ claims based on state statutes and common law because a conceivable set of facts is that application of those laws to Chevy Chase will have no more than an incidental effect on its lending operations.

**b. The McCurrys have a valid claim for breach of contract.**

Under Washington law a deed of trust is just another form of a

mortgage<sup>15</sup> and at any time after a mortgagor grants a mortgage on his property, he is entitled to redeem -- or "pay off" -- the mortgage by paying the amount it secures. *Parker v. Dacres*, 2 Wash. Terr. 439, 446, 7 P. 893 (1885) (citation omitted) ("The mortgagor's interest being a mere lien, it is wholly destroyed, and the mortgagor's estate is left free and unencumbered by a payment of the debt secured by it at *any* time before the premises are actually sold under a decree of foreclosure.") (emphasis in original). *See also* 59A C.J.S. MORTGAGES §§ 991, 998 at 623, 631 (1998).<sup>16</sup>

A reconveyance of a deed of trust is the functional equivalent of a satisfaction of mortgage. While under a deed of trust it is the trustee who must reconvey title, it is still the beneficiary/lender that must request the trustee to do so. RCW 61.16.020 *required* Chevy Chase to request the Trustee to reconvey the McCurrys' Deed of Trust upon receipt of the sum secured by it, without more:

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<sup>15</sup> A deed of trust is a "species of mortgage." *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 377, 588 P.2d 1153 (1979); *cf.* RCW 61.24.020 ("Except as provided in this chapter [which governs non-judicial deed of trust foreclosures], a deed of trust is subject to all laws relating to mortgages on real property."); 59 C.J.S. MORTGAGES §6 at 54 (1998) ("A deed of trust executed for the purpose of securing a debt, conditioned to be void on payment of the debt, and containing a power of sale on default, is essentially a mortgage."); 59 C.J.S. MORTGAGES §5 at 53 (1998) (a deed of trust is construed and enforced as a mortgage).

<sup>16</sup> Quoted *supra* in n. 9 at 28-29. Washington recognizes two distinct redemption periods. The first, and the one at issue in this case, is from the time the borrower grants the mortgage (or executes the Deed of Trust) until the time of a Sheriff's Sale in the event of a judicial foreclosure action (the "equity of redemption"); the second is the statutory period permitted for redemption after the Sheriff's Sale ("statutory redemption"). 4 POWELL ON REAL PROPERTY §37.46 at 37-317 to 337-18 (2004). Conceptually, the two different periods provide significantly different rights to a mortgagor -- the "equity of redemption" gives the mortgagor the right to pay off the mortgage, while "statutory redemption" gives the mortgagor only the rights afforded by the foreclosure statutes. *Id.*; *see also* *Madison Prop. 's, Inc. v. United States*, 375 F.2d 740, 741 (9th Cir. 1967) (applying Washington mortgage foreclosure statute) ("While courts of equity have long recognized an equity of redemption in a mortgagor prior to foreclosure sale, any right of redemption after the sale is purely statutory.").

*Whenever the amount due on any mortgage is paid, the mortgagee or the mortgagee's legal representative or assigns shall at the request of any person interested in the property mortgaged, execute an instrument in writing referring to the mortgage by the volume and page of the record or otherwise sufficiently describing it and acknowledging satisfaction in full thereof.*

RCW 61.16.020 (emphasis added).

The use of the word “shall” in a statute imposes a mandatory requirement unless a contrary legislative intent is apparent. *Erection Co. v. Dep't. of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). Thus, upon receipt of the sum secured by a mortgage, the mortgagee is required to record a satisfaction of the mortgage. Likewise, upon receipt of the sum secured by a deed of trust, a beneficiary must request the trustee to reconvey it. That a mortgagee need only pay the debt secured by the mortgage in order to obtain a mortgage satisfaction – and that a grantor of a deed of trust need only pay the beneficiary the amount secured by the deed of trust in order to obtain a reconveyance – is hornbook law. *See* 55 AM. JUR.2d MORTGAGES § 454 at 149 (1996) (“The general rule is that the imposition of conditions not contained in a mortgage, or the payment of a debt not secured thereby, may not be exacted as a condition of redemption from the mortgage.”); IV AMERICAN LAW OF PROPERTY § 16.79 at 144 (1952) (it is a “fundamental principle” that a mortgage secures only the debt intended by the parties at the time it was created); *id.* at 146 (“[T]he general rule is that the mortgagee cannot require as a condition of redemption the payment of any other debt not a lien on the land.”); 12 THOMPSON ON REAL PROPERTY § 101.07(c)(1) at 468-69 (David A. Thomas ed. 2004) (price to redeem before foreclosure is the amount of the debt secured); 59A C.J.S. MORTGAGES § 1040 at 688

(1956) (“[I]n order to redeem, the mortgagor can be required by law to pay only such debt or debts as are secured by the mortgage.”).

- i. **The Deed of Trust expressly identifies the sums it secures, and Chevy Chase required the McCurrys to pay unsecured sums in order to obtain the reconveyance of the property securing their loan.**

In order to redeem their Deed of Trust and obtain a reconveyance, according to Paragraph 23 of their Deed of Trust, the McCurrys were only required to pay “all sums secured by [the] Security Instrument.” CP 24. The “sums secured by” the Deed of Trust were

- (a) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (b) the performance of Borrower’s covenants and agreements under [the] Security Instrument and the Note.

CP 14. “Sums secured by” the Deed of Trust did *not* include extra charges for fax or notary fees. Absent a provision in the Deed of Trust that the McCurrys would be required to pay for a faxed copy of the Payoff Statement and a Notary Fee, Chevy Chase could not make the reconveyance of their Deed of Trust conditioned upon its receipt of such fees. By doing so, Chevy Chase breached the McCurrys' Deed of Trust contract.

The McCurrys had the absolute contract right to redeem their Deed of Trust for the amount that it secured. In order for a mortgagor to exercise his contract right to redeem, he must be provided the amount of the debt secured by the real property; otherwise, he will be unable to reap one of the contract benefits. Chevy Chase thus was not permitted to place barriers to its borrowers’ exercise and performance of their contract rights. *See Ward v. Coldwell Banker/San Juan Properties, Inc.*, 74 Wn. App. at 168 (each party to a contract has a duty not to interfere with the other party's performance).

But here, Chevy Chase's imposition of fax and notary fees was such a barrier and therefore a further breach of the contract between it and the McCurrys.

In *Orser v. Select Portfolio Servicing, Inc.*, 2005 WL 3478126 (W.D. Wash. 2005), Judge Coughenour denied a defendant's CR 12(b)(6) motion to dismiss a borrower's contract and unjust enrichment claims in a case with facts very similar to those in this case. In *Orser*, when the borrower paid off his loan secured by a Deed of Trust he was also required to pay a Payoff Statement Fee. Just as in this case, the Deed of Trust required the lender to "release the property upon payment of the sums secured by the Deed of Trust." *Orser*, 2005 WL 3478126 at \*2. Judge Coughenour noted that by requiring the plaintiff to pay the Payoff Statement Fee before it would request the trustee to reconvey the property, the lender "in effect [held] Plaintiff's property hostage to collect the statement fee." *Id.* Judge Coughenour ruled that these facts present a valid breach of contract claim:

This language does not permit Defendant to require payment of sums *not* secured by the Deed of Trust before it requests the Trustee to reconvey the property and before it surrenders the Deed. (citation omitted). Both parties agree that the Deed of Trust is silent with respect to sums not secured by the Deed. The parties also agree that the statement fee is not a sum secured by the Deed. Thus, Plaintiffs' claim that Defendant improperly required payment of the statement fee before it would make the required request to the Trustee and surrender the Deed is a cognizable breach of contract claim.

*Id.* (emphasis in original).

Although *Orser* involved a "Payoff Statement Fee" instead of a "Fax Fee" or "Notary Fee," Judge Coughenour's reasoning applies here. By stating the "Total Amount Due Chevy Chase" which had to be paid in the payoff statement, and by threatening that the payoff could not be "processed unless

the ‘Total Amount Due Chevy Chase’” was remitted, Chevy Chase effectively held the McCurrys' property hostage to collect these unauthorized fees. Such conduct was a breach of the Deed of Trust contract.

**c. The McCurrys asserted a valid claim for unjust enrichment.**

The McCurrys paid \$20 in “Accumulated Fax Fees” and \$2 for a “Notary Fee” not authorized under their Deed of Trust; Chevy Chase collected and retained these sums. Chevy Chase thus received “an unmerited enrichment . . . which is unjust, and in equity and good conscience [it] should repay . . . .The law in such cases implies a liability to refund the illegal payment, and, if not refunded, an action will lie to recover the amount unjustly retained.” *Halver v. Welle*, 44 Wn.2d 288, 292, 266 P.2d 1053 (1954); *accord Orser*, 2005 WL 3478126 at \*4 (plaintiffs’ complaint seeking recovery of payoff statement fee from lender asserted valid unjust enrichment claim); *Gerber v. First Horizon Home Loans Corporation*, 2006 WL 581082, \*3 (W.D. Wash. 2006) (slip copy) (J. Pechman) (same, but fee at issue a fax fee identified as “Priority Fee”).

**d. Under established precedent in this Division, the McCurrys have a valid claim against Chevy Chase for violating the WCPA.**

In *Dwyer*, the Washington Court of Appeals ruled that a lender’s conduct nearly identical to Chevy Chase’s in this case was deceptive and violated the WCPA. The WCPA regulates commercial conduct and therefore claims under it are not preempted pursuant to 12 C.F.R. §560.2(c)(1). Also, HOLA does not preempt state tort claims, 12 C.F.R. §560.2(c)(4), and a party’s violation of the WCPA is equivalent to commission of a statutory tort.

*Cf. Glenn K. Jackson, Inc. v. Roe*, 273 F.3d 1192, 1203 (9<sup>th</sup> Cir. 2001) (defendant's violation of California's similar Unfair Business Practices Act constituted a statutory tort). Thus, under 12 C.F.R. §560.2(c), the McCurrys' WCPA claim is not preempted, and it should not have been dismissed in the trial court.

In *Dwyer*, borrowers with a home loan secured by a deed of trust sought to refinance. In preparation for closing, the escrow agent requested the lender, Kislak, to provide a mortgage payoff statement. Kislak delivered a statement that said, "This statement reflects the amount needed to prepay this mortgage in full . . . ." The "Balance Due" included itemized specific charges, including the principal due; interest; deferred late charges; a recording fee; and "Misc Service Chgs" of \$50. The borrowers paid the "Balance Due" without protest or comment, then filed a lawsuit against Kislak for breach of contract, unjust enrichment, and violation of the WCPA. On Kislak's motion for summary judgment, the trial court dismissed the WCPA claim, and the borrowers appealed. The court reversed, framing the "sole question" on appeal as:

[W]hether Kislak's practice of including "Misc Service Chgs" along with secured sums due on its mortgage payoff statement "Balance Due" violates Washington's Consumer Protection Act because it has the capacity to deceive consumers into believing that Kislak will not release their mortgages unless they pay the fee.

*Dwyer*, 103 Wn. App. at 545-46. The court held that the lender's payoff statement was indeed deceptive and violated the WCPA:

A plain reading of Kislak's statement considered in light of its purpose reveals its capacity to deceive a substantial portion of the public. The Dwyers requested the statement to learn the sums due to obtain a release of their mortgage. It is

reasonable to assume that Kislak's response would include only those charges actually required to release the mortgage, or if other fees appeared, that they would be specifically identified as extraneous charges that need not be paid in order to obtain a release of the prior lien.

The document Kislak provided is entitled, "Payoff Statement" and the balance due is headed by a paragraph which begins, "This statement reflects the amount needed to prepay this mortgage in full." Taken at face value, a reasonable consumer could believe that declaration to mean that unless all sums included on the statement are paid, Kislak will not release the mortgage. Moreover, under the statement of account section, the "Misc Service Chgs," which the parties agree are fax fees, are listed in the same column as charges secured by the deed of trust (i.e., principal, interest, late charges, and recording fee). The amount of the "Misc Service Chgs" is then included in the total sum due to pay the mortgage in full. Including non-secured fees with secured obligations has the capacity to deceive reasonable consumers into believing that they must pay the fees before Kislak will release the mortgage.

*Id.* at 547-48.

The facts here are very similar to those in *Dwyer*. Chevy Chase's payoff statement included a \$20 "Accumulated Fax Fee" and a \$2 "Notary Fee" – both unsecured by the Deed of Trust – and Chevy Chase required the McCurrys to pay both fees before it would reconvey the property securing the McCurrys' loan. Thus, the payoff statement, and its requirement that the McCurrys pay the unsecured fee in order to obtain a reconveyance of their Deed of Trust, was unfair and deceptive and violated the WCPA. *Accord, Gerber*, 2006 WL 581082 at \*3 (plaintiffs' action to recover fax fee extracted by lender at time of loan payoff stated valid cause of action under WCPA). Accordingly, the McCurrys' Complaint contained a well-pleaded WCPA claim which is not preempted by HOLA, and Judge Eadie should not have dismissed it. 12 C.F.R. §560.2(c)(1), (4).

**C. The McCurrys' WCPA Claim is not Preempted by RCW 19.86.170.**

Although not entirely clear, it appears that Judge Eadie also based his dismissal of the McCurrys' WCPA claim on the exemption provided by RCW 19.86.170. From the bench he stated:

I would comment that the CPA issue is something of some concern, but I think under this circumstance, the CPA claim would meet the "regulate and permit" part of the Consumer Protection Act then if the Court finds that these are servicing fees that are permitted or are preempted by federal regulation.

RP 55-56. If Judge Eadie intended to dismiss the WCPA claim pursuant to RCW 19.86.170, that also was error.

The CPA protects consumers by declaring unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. In enacting the WCPA, the legislature intended that it "shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920. "Liberal construction' is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (citation omitted).

In certain circumstances, a defendant's actions and transactions are exempt from application of the WCPA. RCW 19.86.170. In pertinent part, RCW 19.86.170 provides:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States . . . .

Under this test, in order to determine whether a defendant's actions are exempt, a trial court must assess whether a regulatory body is involved, and whether the specific activity at issue is subject to regulation:

There are two inquiries which determine the applicability of the cited exemption: first, is there a "regulatory body" involved and second, is the transaction "permitted, prohibited or regulated".

To satisfy the first requirements, an agency must do more than merely monitor the business practices of those who are in the area; the entry into that area must also be controlled.

...

Even if a business is generally regulated, the specific activity complained of must be subject to regulation to come within this exemption.

*Allen v. Am. Land Research*, 95 Wn.2d 841, 846, 631 P.2d 930 (1981).<sup>17</sup>

RCW 19.86.170 "does not exempt actions or transactions merely because they are regulated generally; the exemption applies only if the particular practice found to be unfair or deceptive is specifically permitted, prohibited, or regulated." *Vogt*, 117 Wn.2d at 552, 817 P.2d 1364 (1991)). "Overly broad construction of 'permission' may conflict with the legislature's intent that the [WCPA] be liberally construed so that its beneficial purposes may be served." *Id.*

In *Vogt*, a trust beneficiary brought an action against the trustee, a national bank, to recover for violations of the WCPA. She alleged that the bank had not properly invested trust income and had charged excessive and unreasonable fees in administering the trust, which was part of a pattern

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<sup>17</sup> The Washington legislature amended RCW 19.86.170 in 1974 to add a specific proviso pertaining to regulation by state agencies. Laws of 1974, 1<sup>st</sup> Ex. Sess., ch. 158, § 1. However, because the regulatory agency involved in this case – the OTS – is a federal agency, the amendment is not relevant to the issue presented in this case.

which was unfair and deceptive in violation of the WCPA. The defendant bank argued that the following Comptroller of the Currency regulation gave it “permission” to engage in the fee practices upon which the beneficiary based her complaint:

If the amount of the compensation for acting in a fiduciary capacity is not regulated by local law or provided for in the instrument creating the fiduciary relationship or otherwise agreed to by the parties, a national bank acting in such capacity may charge or deduct a reasonable compensation for its services.

*Id.* at 550 (quoting 12 C.F.R. § 9.15(a)). The beneficiary countered by arguing that national bank regulators have never “permitted” banks to charge “‘extraordinary’ fees for the routine management of trust property.” *Id.* at 548-549. The Supreme Court agreed that while the Comptroller of the Currency had regulatory and supervisory authority over the bank’s actions as trustee of the trust, “that authority alone does not result in exemption under the [WCPA]”, its conduct was not preempted by federal regulation nor exempt pursuant to RCW 19.86.170, and it was thus subject to the WCPA. *Id.* at 553-554.

Nor does mere regulation of an industry mean that its actors are exempt from the WCPA. A party may not obtain exemption from a WCPA claim simply because the business or industry is generally regulated; instead, the particular practice alleged to be unfair or deceptive must be specifically regulated by the relevant agency in order for the actor’s conduct to be exempt from the WCPA. *Dicks v. Attorney General*, 83 Wn.2d 684, 688, 521 P.2d 702 (1974). This Court reiterated that proposition in *Stephens v. Omni Insurance Company*, where the Court reviewed a credit collection agency’s

practice of sending aggressive notices to tortfeasors on behalf of insurance companies to recover subrogation interests. Those notices were styled as “formal collection notices,” demanding immediate payment of an “amount due.” The Court of Appeals concluded the notices were deceptive and violated the Consumer Protection Act.

As does Chevy Chase in this case, the defendants in *Stephens* argued that they were not subject to the WCPA. This Court rejected this argument:

The fact that a business operates in a highly regulated arena does not mean that its activities are exempt from liability under the Consumer Protection Act. That argument was made on behalf of mobile home park landlords in *Ethridge v. Hwang*, 105 Wn. App. 447, 457, 20 P.3d 958 (2001). The landlord argued that mobile home tenancies should be exempt from the Consumer Protection Act because of the specific regulations already found in the Mobile Home Landlord Tenant Act, RCW Ch. 59.20. We rejected this contention, noting that “other heavily regulated areas of trade and commerce, such as the legal profession and the banking industry, are subject to the CPA”. *Ethridge*, 105 Wn. App. at 457, 20 P.3d 958, citing *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). The area of debt collection is heavily regulated because of the “abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.” 15 U.S.C. § 1692(a). The absence of regulation specifically directed at collection of subrogation claims does not mean that debt collection practices used in the recovery of subrogation claims are exempt from suit under the Act, and it does not undermine our conclusion that the practice here is deceptive.

*Id.* at 172. Thus, *Stephens* makes clear that the fact that an industry may be generally regulated does not, in and of itself, mean that is exempt from the WCPA.

Here, the federal regulations upon which Chevy Chase relies for its claim of exemption do not specifically permit FSBs to deceptively charge its borrowers fees in its loan payoff statements like occurred with the McCurrys.

Nor do they permit FSBs to agree to reconvey deeds of trust or satisfy mortgages upon payment of certain specified amounts, then require the payment of additional previously unidentified fees prior to processing the reconveyance or satisfaction, also as occurred here. For that matter, the regulations are silent as to whether Chevy Chase was permitted to charge fax and notary fees as part of the sums that the McCurrys needed to pay in order to satisfy their loan obligations, and “Washington courts have long interpreted RCW 19.86.170 to shield only conduct affirmatively authorized by the agency.” *Blaylock v. First American Title Ins. Co.*, \_\_\_ F. Supp.2d \_\_\_, 2007 WL 2318143, at \*10 (W.D. Wash., August 8, 2007) (where complained-of conduct of defendant title insurers was not specifically permitted by Washington Insurance Commissioner, defendants were not exempt from plaintiffs’ WCPA claims). Conduct that is merely acquiesced to by a regulatory agency is not “specifically permitted” and is therefore not exempt from the WCPA. *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 301, 622 P.2d 1185 (1981). Accordingly, Chevy Chase is not exempt from the McCurrys’ WCPA claims under RCW 19.86.170, and if Judge Eadie held that it is, he committed error which should be reversed.

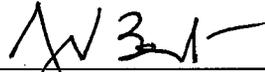
## VI. CONCLUSION

Judge Eadie of the King County Superior Court committed error when he dismissed the McCurrys’ lawsuit against Chevy Chase. Accordingly, the McCurrys request this Court to reverse Judge Eadie’s order of dismissal and remand the case to the Superior Court so that it may be

resolved on its merits.

DATED THIS 17<sup>th</sup> day of September, 2007.

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**DECLARATION OF SERVICE**

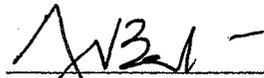
Guy W. Beckett declares:

On September 17, 2007 I mailed a copy of the foregoing document by United States first-class mail, with proper postage affixed, to:

Timothy J. Filer  
Jeffrey S. Miller  
FOSTER PEPPER PLLC  
1111 Third Ave., Ste. 3400  
Seattle, WA 98101-3299

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED THIS 17<sup>th</sup> day of September, 2007, at Seattle, Washington.

  
\_\_\_\_\_  
Guy W. Beckett

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 SEP 18 AM 10:46

# APPENDIX

## 12 C.F.R. § 560.2 Applicability of law.

(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or Sec. 560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

(b) Illustrative examples. Except as provided in Sec. 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

- (1) Licensing, registration, filings, or reports by creditors;
- (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;
- (3) Loan-to-value ratios;
- (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
- (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;
- (6) Escrow accounts, impound accounts, and similar accounts;
- (7) Security property, including leaseholds;
- (8) Access to and use of credit reports;
- (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
- (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;
- (11) Disbursements and repayments;
- (12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and Sec. 560.110 of this part; and
- (13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

- (1) Contract and commercial law;
- (2) Real property law;
- (3) Homestead laws specified in 12 U.S.C. 1462a(f);
- (4) Tort law;
- (5) Criminal law; and
- (6) Any other law that OTS, upon review, finds:
  - (i) Furthers a vital state interest; and
  - (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

## Office of Thrift Supervision (OTS)

(Letter)

## PREEMPTION OF STATE LAWS APPLICABLE TO CREDIT CARD TRANSACTIONS

December 24, 1996

Dear \*\*\*

This responds to your inquiry, submitted on behalf of \*\*\* (the "Association"), to the Office of Thrift Supervision ("OTS") regarding the application of three specific Indiana laws to the Association's proposed \*\*\* credit card loan program. Your inquiry raises issues regarding federal preemption and application of the Most Favored Lender ("MFL") provision of the Home Owners' Loan Act ("HOLA"). [FN1]

In brief, we conclude that federal law does not preempt the cited Indiana law prohibiting fraudulent and deceptive loan practices. Federal law does, however, preempt the cited Indiana laws that pertain to disclosure and loan-related charges (except for charges that constitute "interest" under the MFL provision). Moreover, under the MFL provision, the Association may elect to charge interest (including charges that constitute interest) up to the maximum amount authorized by the laws of Indiana for the state's most favored lender, notwithstanding any contrary provision in Indiana's laws or the laws of any other states where borrowers reside.

## I. Background

The Association is a federal savings bank located in Indiana. The Association proposes to issue \*\*\* credit cards to customers nationwide.

You indicate that the Indiana Uniform Consumer Credit Code (the "UCCC") regulates all persons making consumer loans in Indiana, including unsecured credit card loans. [FN2] The UCCC addresses two areas: (1) finance charge rates and other charges; [FN3] and (2) disclosure requirements incorporated from the federal Truth in Lending Act (the "TILA") and Federal Reserve Board Regulation Z. [FN4] You also represent that the Indiana deceptive acts and practices statute (the "DAP") regulates the activities of lenders by prohibiting specified acts and representations in connection with consumer transactions. [FN5]

You inquire whether the Association must comply with these three Indiana laws in connection with \*\*\* credit card loans issued to borrowers located in Indiana and in other states.

## II. Discussion

A complete response to the Association's inquiry requires examination of both HOLA's MFL provision and OTS's lending regulations.

When a savings association issues credit cards, it may utilize the MFL rate authorized by section 4(g) of the HOLA. This provision permits savings associations to charge interest on loans at the most favorable rate allowed any lender by the laws of the state in which the association is located, notwithstanding any contrary state law. Moreover, a savings association may "export" the favorable MFL rate of the location state when making loans to borrowers who reside in other states. [FN6] The practical effect of section 4(g) is to preempt state usury laws to a limited extent.

Beyond the MFL provision, the HOLA also authorizes OTS to promulgate regulations that have preemptive effect. Prior to enactment of the HOLA. " 'the states had developed a hodgepodge of savings and loan laws and regulations.... [[When enacting HOLA.] Congress hoped that [the] ... rules [of the Federal Home Loan Bank Board and now OTS] would set an example for uniform and sound savings and loan regulation.' " [FN7] Consistent with this intent, courts have long recognized that federal savings associations are uniquely federalized financial institutions--even more so than national banks. [FN8] As the Supreme Court has recognized:

Congress directed that in regulating federal [savings associations], the [ [Bank Board and now OTS should] consider "the best practices of local mutual thrift and home financing institutions in the United States," which were at the time all state-chartered. By so stating, Congress plainly envisioned that federal savings [associations] would be governed by what the [Bank Board and now OTS]--not any particular state--deemed to be the best practices, and approved the ... promulgation of regulations superseding state law.... [FN9]

Consistent with the foregoing, the OTS has authority to issue regulations preempting state laws that affect the operations of federal savings associations.

The OTS and the Bank Board have long taken the position that federal lending laws and regulations are intended to occupy the entire field of lending regulation for federal savings associations, leaving no room for state regulation. [FN10] For these purposes, the field of lending regulation has been defined to encompass all laws affecting lending by federal thrifts, except certain specified areas where state law furthers a vital state interest and has only an incidental effect on lending operations.

The preamble to OTS's recent final rule streamlining its lending and investment regulations explains the rationale for this position:

[I]nstead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, federal thrifts [should] be free to originate loans under a single set of uniform federal laws and regulations. This furthers both the "best practices" and safety and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden. At the same time, the interests of borrowers are protected by the elaborate network of federal borrower-protection statutes applicable to federal thrifts.... In addition, in those instances where OTS has detected a gap in the federal protections provided to borrowers, the agency has promulgated regulations imposing additional consumer protection requirements on federal thrifts. [FN11]

Accordingly, OTS has preempted most state laws affecting lending by federal thrifts. This position was previously reflected in the OTS regulation at 12 C.F.R. § 545.2 (1996), has been confirmed and carried forward in OTS's recent final rule updating and streamlining its lending and investment regulations, and will be codified in OTS regulations at 12 C.F.R. § 560.2. [FN12]

The preamble to OTS's recent final rule describes the analytic framework to be used in determining whether a particular state law that affects lending is, or is not preempted by federal law. The preamble states:

When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed [among the illustrative examples of preempted state laws] in paragraph (b) [of § 560.2]. If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of [the types of state laws not preempted, as described in § 560.2(c)]. For these purposes, paragraph (c) is intended to be interpreted narrowly. [FN13]

We have examined the three cited Indiana laws under this analytic framework.

#### A. Interest Rates and Related Charges

The new OTS lending regulation specifically addresses your inquiry regarding federal preemption of state laws regulating interest rates and related charges. The illustrative list of preempted state laws at § 560.2(b) indicates, in subparagraph (12), that state interest rate ceilings are preempted to the extent provided in the MFL provision of the HOLA. Thus, when the Association issues a credit card under the MFL provision, it may "charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of [Indiana]," notwithstanding any contrary provisions in Indiana law or the law of the states where borrowers reside. [FN14] The OTS MFL regulation defines interest as follows:

The term 'interest' ... includes any payment compensating a creditor or prospective creditor for an extension of credit... It includes, among other things, the following fees connected with credit extension or availability: numerical periodic interest rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports. [FN15]

Loan-related fees not covered by the definition of interest under the MFL provision of the HOLA are governed by subparagraph (5) of § 560.2(b). [FN16] This provision preempts state laws regulating "loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees," but does not apply to numerical interest rates. Subparagraph (5) reflects OTS's determination that federal thrifts should be free to contract with customers for fees that are driven by the market for financial services, rather than government regulation, provided adequate loan-fee disclosure is given to consumers (as federal law mandates).

We note that at least one type of fee (late fees) listed as preempted in subparagraph (5) also falls within the scope of the term "interest" under the OTS MFL regulation. Because the statutory MFL provision is a specific expression of Congressional intent, any overlap between that provision and subparagraph (5) must be resolved in favor of the MFL provision whenever a lender originates a loan under the MFL provision. What this means for the Association is as follows.

Indiana's UCCC sets a maximum finance charge for supervised consumer loans that varies based on the amount of the unpaid balance of the loan. Under the UCCC, the finance charge is broadly defined to include "all charges payable directly or indirectly to the lender as an incident to the extension of credit." [FN17] This language is broad enough to encompass all fees and charges that constitute "interest" under the MFL provision. Thus, when issuing a credit card loan under the MFL provision, the Association must abide by any limits in the Indiana UCCC governing not only the numerical interest rate, but also late fees, NSF fees, overlimit fees, annual fees, cash advance fees, and membership fees.

The Indiana UCCC also purports to apply its usury limits to any charges imposed by the Association "for any guarantee or insurance protecting the lender against the debtor's default or other credit loss; and charges incurred for investigating the collateral or credit-worthiness of the debtor." [FN18] These charges, however, are expressly excluded from the definition of "interest" under OTS's MFL regulation. [FN19] As provided in the MFL regulation at § 560.110(b), the status of state laws that are not encompassed by the MFL regulation are governed by the general principles of preemption set forth in § 560.2. As noted above, § 560.2(b)(5) preempts state laws that attempt to "impose requirements regarding ... loan-related fees." This language encompasses fees charged for appraisals required for loan origination and premiums charged for credit insurance.

Thus, when issuing credit cards, the Association will be required to limit all fees and charges that constitute "interest" (as defined in § 560.110(a)) to the maximum rate authorized for Indiana's most favored lender. No other state's laws will apply to these fees and charges, even if the Association's borrowers reside in another state. All state laws that purport to address loan-related fees that are not included within the MFL definition of interest are preempted by federal law.

## B. Disclosure Requirements

The new OTS lending regulation also addresses federal preemption of disclosure requirements. Section 560.2(b)(9) provides that state laws imposing lending disclosure and advertising requirements are preempted. State laws within the purview of § 560.2(b)(9) include those that require specific statements, information, or other content to be included in credit

application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents. The provision of the Indiana UCCC requiring specific lending disclosures by the Association is preempted by this federal regulation. [FN20] Instead, the Association is required to comply with the elaborate federal network of disclosure laws, including TILA and Regulation Z. [FN21]

This conclusion is not altered by the fact that the MFL provision will apply to the Association's credit card program. Although institutions utilizing the MFL provision must comply with any provisions of state law that are "material to the determination of the permitted interest rate." [FN22] Indiana's disclosure laws are not material to this determination.

In the past, state laws have been deemed to be material to the determination of the interest rate in only two instances. First, whenever a state authorizes an interest rate for a particular category of loan, the provisions of law defining the fundamental characteristics of that category of loan must be observed. [FN23] Second, state laws defining how interest is to be computed must also be observed. [FN24]

Indiana's UCCC disclosure law, however, neither defines the fundamental characteristics of the category of loans covered by the usury rates in question nor affects the manner of computing the interest rate. Accordingly, the UCCC disclosure law is not material to the interest rate and is not encompassed by the MFL provision. [FN25]

Thus, general principles of federal preemption determine what disclosure requirements apply to loans made by the Association under the MFL provision. [FN26] As indicated above, § 560.2(b)(9) preempts the Indiana disclosure law.

You have also asked whether federal law would preempt a cited Ohio disclosure law which requires lenders to provide written statements notifying borrowers of their rights under state anti-discrimination statutes. [FN27] Specifically, this statute requires that credit application forms (or where there is a multi-state distribution, notices of acceptance or rejection of the application) include the following statement: "Ohio laws against discrimination require that all creditors make credit equally available to all credit worthy customers." As already discussed above, the OTS regulation at § 560.2(b)(9) preempts state laws imposing disclosure requirements, including the cited Ohio disclosure law. [FN28] Accordingly, the Association need not comply with this disclosure provision.

#### C. Deceptive Acts and Practices Statute

Your final preemption inquiry involves Indiana's DAP law. State laws prohibiting deceptive acts and practices in the course of commerce are not included in the illustrative list of preempted laws in § 560.2(b). Thus, a more extensive preemption analysis of Indiana's DAP statute is required. The DAP statute prohibits specified acts and representations in all consumer transactions without regard to whether the transaction involves an extension of credit. [FN29] Although not directly aimed at lenders, this law affects lending to the extent that it prohibits misleading statements and practices in loan transactions by a federal savings association. Accordingly, under the analysis described above, a presumption arises that the DAP statute would be preempted in connection with loans made by the Association.

The OTS has indicated, however, that it does not intend to preempt state laws that establish the basic norms that undergird commercial transactions. [FN30] Accordingly, in § 560.2(c), the OTS has identified certain categories of state law that are not preempted. [FN31] A state law that falls within the specified categories will not be preempted if the law only incidentally affects the lending operations of federal savings associations, or is otherwise consistent with the objectives that underlie OTS's preemption position, as set forth in paragraph (a) of § 560.2. [FN32] Paragraph (a) indicates that the OTS's objectives are to facilitate the safe and sound operation of federal savings associations, to enable federal associations to conduct their operations in accordance with best practices of thrift institutions in the United States, and to further other purposes of the HOLA.

The Indiana DAP falls within the category of traditional "contract and commercial" law under § 560.2(c)(1). While the DAP may affect lending relationships, the impact on lending appears to be only incidental to the primary purpose of the statute--the regulation of the ethical practices of all businesses engaged in commerce in Indiana. There is no indication that

the law is aimed at any state objective in conflict with the safe and sound regulation of federal savings associations, the best practices of thrift institutions in the United States, or any other federal objective identified in § 560.2(a). In fact, because federal thrifts are presumed to interact with their borrowers in a truthful manner. Indiana's general prohibition on deception should have no measurable impact on their lending operations. Accordingly, we conclude that the Indiana DAP is not preempted by federal law. [FN33]

You have asked whether the Association may "export" the Indiana DAP prohibitions when issuing credit cards to borrowers located in other states under the MFL provision. In other words, may the Association comply with Indiana's DAP in lieu of the deceptive practices laws of any other state?

As noted above, only state laws that set the maximum amount of interest or that are material to the determination of interest are covered by the MFL provision. Indiana's DAP does not establish the maximum interest permitted under Indiana law, does not prescribe unique characteristics of a specified class of loans permitted under Indiana law, and does not address the manner in which interest is computed. Accordingly, the DAP is not covered by the MFL provision.

Thus, general principles of federal preemption govern. As indicated above, nothing in federal law preempts general deceptive practices statutes. The Association is required to comply with the Indiana DAP and those deceptive practices statutes of other states that are worded in a manner to apply to the Association's loans. The applicability of conflicting state requirements should be resolved under traditional conflicts of laws principles and may turn on the facts of the specific transaction. Under some circumstances, the deceptive practices laws of more than one state may apply to the same transaction.

In reaching the foregoing conclusions, we have relied upon the representations made in the materials you submitted and in subsequent discussions. Our conclusions depend upon the accuracy and completeness of those representations. Any material difference in facts or circumstances from those described herein could result in different conclusions.

If you have any questions regarding this matter, please feel free to contact Karen Osterloh, Counsel (Banking and Finance), (202) 906-6639.

Very truly yours,

Carolyn J. Buck

Chief Counsel

FN1 12 U.S.C.A. § 1463(g) (West Supp.1996).

FN2 See Ind.Code § 24-4.5-1-101 et seq. (1995).

FN3 Ind.Code § 24-4.5-3-508 (1995), as amended by 750 IAC 1-1-1, provides that the maximum finance charge permissible for supervised consumer loans is 36% for unpaid balances of less than \$870; 21% for unpaid balances between \$870 and \$2,900; and 15% for unpaid loan balances in excess of \$2,900.

FN4 The UCCC directs the creditor to "disclose to the debtor to whom credit is extended with respect to a consumer loan the information required by the Federal Consumer Credit Protection Act." Ind.Code § 24-4.5-3-301(2) (1995). The UCCC defines "Federal Consumer Credit Protection Act" to mean the federal Truth in Lending Act (15 U.S.C.A. § 1601 et seq.) as amended by the Truth in Lending Simplification and Reform Act (Pub.L. 96-221, 94 Stat. 168), and any regulations issued thereunder. Ind.Code §§ 24-4.5-1-102(4) and 24-4.5-1-302 (1995). Regulation Z implements TILA and is located at 12 C.F.R. Part 225 (1996).

FN5 See Ind.Code §§ 24-5-0.5-1 et seq. (1995). For example, the statute prohibits a person who regularly engages in

consumer transactions from making representations that "a specific price advantage exists as to [the] subject of the consumer transaction, if it does not and the [person] knows or should reasonably know that it does not" and from making oral or written representations that a consumer transaction involves "rights, remedies or obligations, if the representation is false and if the [person] knows or should reasonably know that the representation is false." Ind.Code § 24-5-0.5- 3(6) & (8) (1995).

FN6 See Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978).

FN7 Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d 1256 (9th Cir.1979) (citations omitted).

FN8 People v. Coast Federal Savings and Loan Association, 98 F.Supp. 311, 319 (S.D.Calif.1951).

FN9 Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 153-154 (1982).

FN10 For a general discussion of the principles of federal preemption, see OTS Op. Chief Counsel (Oct. 11, 1991).

FN11 61 Fed.Reg. 50951 at 50965-50966 (Sept. 30, 1996).

FN12 See 61 Fed.Reg. at 50972. The preamble to this regulation, which became effective on October 30, 1996, contains an extensive discussion of the scope of, and the legal basis for, the OTS authority to preempt by regulation. See 61 Fed.Reg. at 50965-67. A copy of the preamble is enclosed for your reference.

FN13 61 Fed.Reg. at 50966.

FN14 The OTS recently conformed the text of its regulation implementing HOLA § 4(g) to the regulation implementing a similar statutory MFL provision for national banks. See 61 Fed.Reg. at 50981 (to be codified at 12 C.F.R. § 560.110). The Office of the Comptroller of the Currency's ("OCC") rule implementing 12 U.S.C.A. § 85 (West 1989) is found at 61 Fed.Reg. 4849, 4869 (Feb. 9, 1996) (to be codified at 12 C.F.R. § 7.4001).

FN15 12 C.F.R. § 560.110(a).

FN16 See 12 C.F.R. § 560.110(b) ("Except as provided in this paragraph, the applicability of state law to Federal savings associations shall be determined in accordance with § 560.2 of this part.")

FN17 Ind.Code § 24-4.3-109(1) (1995).

FN18 Id.

FN19 12 C.F.R. § 560.110(a) (Interest "does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit .... or fees incurred to obtain credit reports.")

FN20 This conclusion is consistent with the agency's longstanding position that state disclosure laws are preempted. See e.g., OTS Op. Dep. Chief Counsel (Oct. 18, 1994) (state law requiring a savings association to provide copies of credit reports held by the savings association); OTS Op. Chief Counsel (Jan. 3, 1991) (state law requiring disclosure of information on escrow accounts for mortgages); FHLBB Op. by Gen. Counsel (Apr. 28, 1987) (state regulations purporting to regulate lending disclosure); and FHLBB Op. by Gen. Counsel (Nov. 12, 1985) (state truth in lending laws).

FN21 Because the Indiana law merely incorporates by reference already-applicable federal requirements under TILA and Regulation Z, we recognize that the practical effect of preemption, in this instance, would be negligible.

FN22 12 C.F.R. § 560.110(b).

FN23 See OCC Interpretive Letter No. 354 [1985-87 Transfer Binder] Fed. Bank L.Rep. (CCH) ¶ 85.524. The OTS and the FHLBB have long looked to OCC precedent interpreting the national bank MFL provision for guidance in interpreting section 4(g) and the OTS implementing regulation. See e.g. OTS Op. Chief Counsel, Dec. 24, 1992, pp. 3-4.

FN24 Id.

FN25 Accord OCC Interpretive Letter No. 178, [1981-82 Transfer Binder] Fed.Bank.L.Rep. (CCH) ¶ 85.259; OCC Interpretive Letter No. 333, [1985-87 Transfer Binder] Fed.Bank.L.Rep. (CCH) ¶ 85.503. This determination is consistent with the preamble to the OTS regulation which states that a disclosure provision will be material to the determination of the interest rate only in "rare instances." 61 Fed.Reg. 50968. This position reflects a change in the OTS's interpretation of the MFL statute. Under the prior OTS regulation at 12 C.F.R. § 571.22 (1996), thrifts were required to comply with consumer protection laws, including disclosure provisions, of the state in which they were located when making loans under the MFL provision. Id. Under the new regulation, consumer protection laws no longer automatically apply.

FN26 12 C.F.R. § 560.110(b).

FN27 Ohio Rev.Code Ann. § 4112.021(g) (Anderson 1996).

FN28 We note that the Ohio law is largely duplicative of the disclosure requirement contained in Regulation B which implements the Equal Credit Opportunity Act. See 12 C.F.R. § 202.9(a)(2) (1996). This regulation requires lenders to provide a notice setting forth the protections contained in section 701(a) of the Act "whenever an adverse action is taken with regard to a credit application."

FN29 See Ind.Code § 24-5-0.5-2(1) (1995) (definition of consumer transaction).

FN30 61 Fed.Reg. at 50966.

FN31 12 C.F.R. § 560.2(c)(1) through (5). These categories include: contract and commercial law, real property law, homestead laws, tort law and criminal law.

FN32 12 C.F.R. § 560.2(c).

FN33 This conclusion is consistent with relevant case law. See Morse v. Mutual Federal Savings and Loan Association of Whittingham, 536 F.Supp. 1271 (D.Mass.1982) (federal savings associations are subject to a general Massachusetts statute proscribing unfair and deceptive trade practices).

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