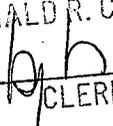


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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

WILLIAMSON & WILLIAMS
Rob Williamson, WSBA #11387
187 Parfitt Way SW
Bainbridge Island, WA 98110
Tel: (206) 780-4447

BECKETT LAW OFFICES, PLLC
Guy W. Beckett, WSBA #14939
1708 Bellevue Ave.
Seattle, WA 98122
Tel: (206) 264-8135

KELLER ROHRBACK, L.L.P.
Mark A. Griffin, WSBA #16296
1201 Third Ave., Ste. 3200
Seattle, WA 98101-3052
Tel: (206) 623-1900

Attorneys for Petitioners

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I. INTRODUCTION

Since the original briefing for this case was completed, the United States Supreme Court, the Washington Supreme Court, and trial courts in other jurisdictions have issued decisions supporting the result sought by the McCurrys in this case – that the trial court’s dismissal of their claims be reversed so that they may present their state law claims against Chevy Chase to a jury. This brief discusses those decisions and other developments relevant to this Court’s consideration of the issues presented.

II. DISCUSSION

A. **Recent U.S. Supreme Court and Washington Supreme Court decisions support the McCurrys’ request to try their claims to a jury.**

In *Altria Group, Inc. v. Good*, ___ U.S. ___, 129 S.Ct. 538 (December 15, 2008) and *Wyeth v. Levine*, ___ U.S. ___, ___ S.Ct. ___, 2009 WL 529172 (March 4, 2009), the U.S. Supreme Court ruled that plaintiffs’ remedies arising under state law were not preempted by federal statutes and regulations. In doing so, the Court reiterated overriding principles important to determining that the McCurrys’ claims should not be preempted.

1. *Altria Group, Inc. v. Good* and *Wyeth v. Levine*.

In *Altria Group, Inc.*, the Supreme Court held that tobacco smoker

plaintiffs' claims against a cigarette manufacturer were not preempted by the Federal Cigarette Labeling Act ("FCLA"). The plaintiff argued that the manufacturer's claims that its product was "light" and had "lowered tar and nicotine" were misrepresentations under Maine's Unfair Trade Practices Act (which is similar to Washington's Consumer Protection Act ("WCPA"), RCW 19.86, *et seq.*). The defendant argued that the FCLA provided the sole basis for regulation of a manufacturer's claims regarding its tobacco products. The Court disagreed, ruling that the federal labeling statute and regulations do not preempt state law claims predicated on the manufacturer's duty not to deceive, and therefore authorizing plaintiffs' claims to be presented to a jury. *Altria Group, Inc.*, 129 S.Ct. at 551.

In *Wyeth*, the issue was whether a drug manufacturer may be held liable under state law for failure to provide adequate warnings about its product when the warnings accompanying the product had been submitted to and approved by the Federal Drug Administration ("FDA"). The plaintiff had been injected with Wyeth's anti-nausea drug by a medical professional using one of two possible types of IV procedure. Wyeth's warnings accompanying the product notified users that the other IV method was the preferred method. Although Wyeth was aware that the risk of gangrene infection was significantly higher with the method used in this case, its warnings did not include this information. The plaintiff, a

professional musician, developed a gangrene infection, necessitating the amputation of her arm. The patient sued Wyeth for damages, asserting state law claims for negligence and improper warnings.

Wyeth argued that because the warnings accompanying its product had been submitted to and approved by the FDA, and the FDA has sole authority to regulate warnings accompanying drugs approved for use in the United States, it was immune from suit based on the inadequacy of those warnings. However, there is no FDA regulation prohibiting a drug manufacturer from including warnings with its products that are more detailed than those approved by the FDA, and the Supreme Court held that because the FDA approval constituted a floor and not a ceiling concerning what warnings are required to be delivered with its products, state law tort claims based on a drug company's alleged inadequate drug warnings are not preempted by federal law. The Supreme Court upheld the jury verdict in favor of the plaintiff, which had been rendered in state court applying Vermont law. *Wyeth*, 2009 WL 529172, at *12-13.

In both *Altria Group, Inc.* and *Wyeth*, the Supreme Court looked to the relevant federal statutes and regulations to determine if it was clearly Congress' intention to prevent plaintiffs like those in these cases from obtaining state law remedies in these federally-regulated fields. In both of these cases, the Supreme Court noted that in cases where federal

preemption is alleged, courts must start with the assumption that “the historic police powers” of the State are not to be “superseded” by a Federal Act unless “that was the clear and manifest purpose of Congress.” *Altria Group, Inc.*, 129 S.Ct. at 543 (quotation omitted); *Wyeth*, 2009 WL 529172, at *5 (quotation omitted). As the Court also instructed in *Altria Group, Inc.*, courts are “ordinarily” to “accept the reading disfavoring preemption” where an alleged express preemption clause “is susceptible of more than one plausible reading.” *Altria Group, Inc.*, 129 S.Ct. at 540. In both of these cases, the Supreme Court held that the federal acts and regulations at issue did not clearly and specifically require preemption of state law remedies.

Even though they concern federal statutes and agencies different than those at issue here, these Supreme Court decisions are instructive in this case. 12 C.F.R. § 560.2(c) makes it quite clear that state law causes of action and remedies based on contract law, commercial law, and tort law consistent with the purposes of §560.2(a) that only incidentally affect the lending operations of the subject federal savings associations should not be affected by the Home Owners Loan Act (“HOLA”) 12 U.S.C. §1462, *et seq.*, and the Office of Thrift Supervision (“OTS”) regulations.¹

¹According to 12 C.F.R. § 560.2(a), the “purposes” of the regulations are (1) to facilitate the safe and sound operation of federal savings associations; (2) to enable federal savings associations to conduct their operations in accordance with the best

The “police powers” of Washington State include “the regulation of consumer protection in general and ... the banking and insurance industries in particular.” *Hood v. Santa Barbara Bank & Trust*, 143 Cal. App.4th 526, 536, 49 Cal. Rptr.3d 369 (Cal. App. 2 Dist. 2006); *see also* *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[.]”); *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.”). HOLA and the OTS regulations do not clearly and specifically preclude a plaintiff from invoking state contract, commercial law, and tort law remedies against a federal savings association; at best, any such alleged prohibition is ambiguous. Therefore, under the principles reaffirmed by the U.S. Supreme Court in *Altria Group, Inc.* and *Wyeth*, the McCurrys’ state law claims against Chevy Chase should not be preempted.

2. *McKee v. AT & T Corporation.*

The conclusion that the McCurrys’ claims should not be preempted is also strongly supported by the Washington Supreme Court’s decision in

practices of thrift institutions in the United States; and (3) to further other purposes of the HOLA.

McKee v. AT & T Corporation, 164 Wn.2d 372, 191 P.3d 845 (2008). In *McKee*, the plaintiff filed a class action suit for recovery under the WCPA against AT & T, alleging that it had wrongly charged him and others like him city utility surcharges and late fees. AT & T collected city surcharges from all customers with zip codes for residences within city limits, even though some of those customers lived outside of the city boundaries. AT & T sought to prevent a class action suit pursuant to a provision in the service agreement it alleged applied to its business relationship with the plaintiff. Also, AT & T argued that the plaintiff's state law claims were preempted by the Federal Communications Act of 1934.

In deciding both of these issues against AT & T, the Supreme Court looked to the strong public policy of Washington State that consumers' rights be protected under the WCPA. In holding that the class action prohibition in the contract was unconscionable, the Court held that the availability of class-based relief under the WCPA for small consumer claims was a "fundamental policy" of Washington state. *McKee*, 164 Wn.2d at 386.

In evaluating whether the plaintiff's claims were preempted, the Court looked to Congress' intent when it passed the federal law:

Under the supremacy clause of the United States Constitution article VI, clause 2, state laws are not superseded by congressional legislation unless that is the

clear and manifest purpose of Congress. ... Conflict preemption is found where it is impossible to comply with both state and federal law or where state law “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” The obstruction strand of conflict preemption focuses on both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law’s text, application, history, and interpretation. ... Thus, the question for us is whether Congress’s intent or goals would truly be frustrated if AT & T were required to comply with Washington’s laws regarding the formation of consumer contracts and the strong public policy of Washington’s Consumer Protection Act that consumers be able to vindicate their right to be free of unfair and deceptive practices in consumer transactions.

Id. at 387-88 (citations omitted). The Court concluded, after analyzing the legislative history, that Congress intended that telecommunications providers would compete in a free market place and that consumers would have the protection of state consumer protection laws; therefore, the plaintiff’s claims were not preempted by the Federal Communications Act of 1934. *Id.* at 389.

Thus, under *McKee*, unless it is crystal clear that Congress intended the state law claims asserted by the McCurrys in this case to be preempted, they must be permitted to pursue them through a jury verdict.

This is especially so for their claim to recover under the WCPA for Chevy Chase’s actions that are undisputably deceptive and violate the WCPA.

See Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 547, 13 P.2d 240 (2000) (“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.”)² Because HOLA and the OTS regulations do not clearly establish Congress’ intent to preempt the common and statutory state law upon which the McCurrys assert their claims, the claims are not preempted.

B. Recent cases from other jurisdictions support the conclusion that the McCurrys’ claims are not preempted.

1. *Fultz v. World Savings and Loan Association.*

In *Fultz v. World Savings and Loan Association*, 571 F.Supp.2d 1195 (W.D. Wa. 2008), Judge Lasnik of the Seattle federal bench considered claims asserted against a federal savings association which the defendant argued were preempted by HOLA and the OTS regulation, and stated the framework by which such claims should be analyzed:

[I]f the court finds that the object of a state law is to regulate the relationship between federal savings associations and borrowers, the law will be automatically preempted under [12 C.F.R.] § 560.2(b). If, on the other hand, the law is one of general applicability and plaintiff is attempting to use the statute to impose requirements on the association’s banking-related conduct, the court must evaluate the state law under § 560.2(c).

Fultz, 571 F.Supp.2d at 1196-97. Because the laws upon which the

²In the Payoff Statement it sent to the McCurrys’ escrow agent, Chevy Chase included the unsecured Fax and Notary Fees in the “Total Amount Due Chevy Chase” which the McCurrys had to pay in order to pay off their loan and obtain the reconveyance of their Deed of Trust. CP 4-5, 33. This is precisely the conduct that the Court of Appeals held constituted a violation of the WCPA in *Dwyer*.

plaintiff sought to support his claim were not specifically intended to regulate a savings association's conduct, Judge Lasnik concluded that the preemption analysis had to be made under § 560.2(c), not § 560.2(b). That decision is important in this case, because the state laws upon which the McCurrys rely for their claims against Chevy Chase – the law of contracts and unjust enrichment, and the WCPA – are laws of general applicability. Thus, whether the Fax and Notary Fees imposed upon the McCurrys by Chevy Chase as a condition of paying off their loan and obtaining the reconveyance of their Deed of Trust are “loan related fees” under §550.2(b)(5) is irrelevant.³ The Court must instead analyze whether the laws relied upon by the McCurrys are consistent with HOLA and OTS regulations and whether their application will more than incidentally affect Chevy Chase's lending operations. 12 C.F.R § 560.2(c). With no evidence before the Court on those topics, it is impossible for this Court to rule, and it should have been impossible for the trial court and the Court of Appeals to rule, that these laws are not consistent with the purposes of HOLA and the OTS regulations, or that their application would more than

³The McCurrys dispute that the Fax and Notary Fees are “Loan-related fees” under 12 C.F.R. § 560.2(b)(5). See Petitioners' Opening Court of Appeals Brief, at 24-28.

incidentally affect Chevy Chase's lending operations.⁴ Thus, dismissal under CR 12(b)(6) of the McCurrys' claims was neither warranted nor appropriate.

2. *Nava v. Virtualbank.*

In *Nava v. Virtualbank*, 2008 WL 2873406 (E.D. Cal. 2008), the plaintiff sued a savings association regulated by the OTS for damages under state law for, *inter alia*, misrepresentations in the loan disclosures it made to him prior to his execution of the contract documents and for breach of the loan contract. The defendant moved to dismiss, arguing that all the claims were preempted under § 560.2, in particular the provisions under § 560.2(b)(4) and (9) concerning terms of credit and disclosures. The court refused to absolve the defendant of the obligations it willingly undertook when it entered into the loan contract with the plaintiff and refused to dismiss the claims for breach of contract and breach of the implied covenant of good faith:

[P]laintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims will not

⁴Judge Lasnik ultimately ruled that the state law claims asserted by the plaintiff in *Fultz* were all based on the savings association's failure to provide timely and meaningful disclosure of the costs and terms of their loans, and therefore to use state laws of general applicability to accomplish the same result that is not permitted under §560.2(b). Therefore, Judge Lasnik ruled, the application of the state laws upon which the plaintiff relied undermined the purposes of § 560.2(a). No such analysis is applicable in this case, because the McCurrys simply want to require Chevy Chase to comply with the contract it willingly undertook, and not to engage in deceptive conduct which our state courts have ruled violates the WCPA.

potentially impose any requirements for the type of lending activities described in § 560.2(b). Instead, the court will determine whether parties to a contract have performed the obligations they made between themselves, and have done so in good faith and with fair dealing. As such, a ruling against defendants will not alter their lending practices, but only their practice of performing contracts. Accordingly, plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims are not the types of laws expressly preempted under paragraph (b) since they do not have the effect of imposing requirements on defendants' lending practices.

Id. at *9. The court ruled that requiring savings associations to abide by their contracts would not "more than incidentally affect" their lending practices:

Nor are breach of contract and breach of the implied covenant of good faith and fair dealing the types of state laws that more than incidentally affect on the lending practices of defendants under § 560.2(c). Again, defendants' lending practices will not be affected whatsoever by these claims. Instead, it is defendants' practices of performing contractual obligations with good faith and fair dealing that might be affected.

Id.

3. *Mincey v. World Savings Bank, FSB.*

In *Mincey v. World Savings Bank*, ___ F. Supp.2d ___, 2008 WL 3845438 (D.S.C. 2008), the plaintiff borrowers sued a federally regulated savings association for allegedly failing to disclose that its adjustable rate mortgage was designed to, and did, cause negative amortization to occur. Among the claims asserted, the plaintiffs claimed the defendant's conduct

constituted a breach of contract. The defendant moved for summary judgment that all of the plaintiffs' causes of action were preempted because they dealt with its loan disclosures, the subject of § 560.2(b)(9). To the extent the plaintiffs asserted a breach of contract claim related to those disclosures, the court ruled that it was not preempted and refused to dismiss it:

Plaintiffs' last cause of action is for breach of contract and the implied covenant of good faith and fair dealing. In reading the allegations under that cause of action, it appears Plaintiffs are again complaining, at least in part, about the failure to make certain disclosures. *See* Am. Compl. ¶ 158 ("The written payment schedules prepared and created by Defendants, and applicable to Plaintiffs' loans, did not disclose, and by omission, failed to inform Plaintiffs that the payment amounts owed by Plaintiffs to Defendants in years one through ten are insufficient to cover the true costs of the loan."). However the court concludes that Plaintiffs' fourth cause of action [for breach of contract] is not preempted. As previously noted, the Note states that Plaintiffs "will pay Principal and interest by making payments" monthly or every two weeks. The substance of the claim for breach of contract is that although the Note indicated that payments "will pay Principal and interest," the payments for the first ten years went solely to interest. ... This cause of action is a straightforward breach of contract action: Plaintiffs allege the contract said payments will be applied to interest and principal but that WSB breached that contract by applying payments only to interest. The court therefore concludes this cause of action is not preempted.

Id., at *33 (citations omitted).

4. *In re Countrywide Financial Corp. Mortgage Marketing and Sales Practices Litigation.*

In In re Countrywide Financial Corp. Mortgage Marketing and Sales Practices Litigation, 2009 WL 458780 (S.D. Cal. 2009), several plaintiffs sued Countrywide Financial Corp., a federal savings association, alleging that Countrywide fraudulently pushed them to obtain subprime loans, without regard to their ability to repay the loans or whether other loans would have been more suitable for them, so that Countrywide could sell the loans as investments in the secondary mortgage market. In particular, plaintiffs Leyvases claimed that when they finalized their loan with Countrywide, instead of receiving cash back of nearly \$13,959, they only received \$1,294. They also claimed that they were presented with conflicting amortization schedules, one for a thirty-year loan at 9.8% interest, and one for a forty year term at 10.25% interest. After the loan closed, the Leyvases learned that the loan was a hybrid ARM loan with a 40-year term. With respect to plaintiff Brown, she alleged that she was promised that her monthly loan payment would decrease once she completed her loan with Countrywide, but after she signed her loan documents, she realized she had obtained a negatively amortizing loan and needed to make payments greater than those she had made before the loan was closed to avoid the negative amortization. Brown alleged that no one

with Countrywide told her that her loan balance would increase if she made only the minimum required payment, and that Countrywide induced her to enter into the loan by promising that all she needed to make was the minimum payment. Brown also alleged that the interest rate she obtained on her Countrywide loan was greater than the interest rate on her previous loan.

The Leyvases and Browns asserted claims against Countrywide under California's Business and Professions Code and for unjust enrichment. Countrywide moved to dismiss the claims, arguing that they were preempted under HOLA and 12 C.F.R. § 560.2(b)(9), which provides for preemption of state laws that seek to impose requirements regarding disclosures and advertising. The court concluded that the provisions of the California Business and Professions Code relied upon by the Leyvases and Brown attempted to regulate savings associations' disclosures and advertising; therefore, the claims based on the statute were preempted. However, the court refused to dismiss the claims for unjust enrichment, stating,

The Court agrees with Plaintiffs that the Leyvases' and Brown's unjust enrichment claims are not preempted by either [12 C.F.R. § 560.2](b)(4) or (b)(9). Those claims did not seek to impose requirements on Defendants' conduct. Rather, they simply seek the return of funds paid to Defendants under the alleged scheme.

Id., at *17.

The McCurrys allege that Chevy Chase breached its contract with them by requiring them to pay for a Payoff Statement and requiring that they pay Fax and Notary Fees – which were not secured by the Deed of Trust – as a condition of paying off their loan and obtaining the reconveyance of their Deed of Trust. They further assert that Chevy Chase was unjustly enriched by its receipt and retention of the Fax and Notary Fees. Finally, the McCurrys allege that by requiring them to pay unsecured Fax and Notary Fees as a condition of paying off their loan and obtaining the reconveyance of their Deed of Trust, Chevy Chase violated established Washington law, committed a deceptive practice, and violated the WCPA. Nothing about these claims seeks to impose requirements about “Loan-related fees” or implicates Chevy Chase’s “lending activities”; instead, they implicate Chevy Chase’s practices of performing – or *not* performing – its contractual obligations; its practice of retaining funds it is not entitled to receive; and its practice of engaging in deceptive conduct. The McCurrys’ claims are therefore not preempted under HOLA and 12 CFR § 560.2.

C. The U.S. Supreme Court has not clarified its decision in *Bell Atl. Corp. v. Twombly*.

The U.S. Supreme Court has not clarified its decision concerning

what standard applies to the court's consideration of a motion to dismiss under CR 12(b)(6) since the briefing was completed for this case. Although the Court applied the "plausibility" standard in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, ___ U.S. ___, ___ S.Ct. ___, 2009 WL 454286 (February 25, 2009), that decision is not helpful to this Court's task of determining whether the plausibility standard should be adopted for CR 12(b)(6) motions in Washington, as the claims in that case were asserted under the Sherman Act. *Id.* at *12.⁵ The Supreme Court specifically limited the plausibility standard to Sherman Act cases in *Bell Atl. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965-66 (2007).

Accordingly, in light of the Supreme Court's failure to clarify that the plausibility standard should apply to all motions to dismiss brought under Rule 12(b)(6), this Court should not discard the standard enunciated in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), that a plaintiff's complaint should not be dismissed unless there is no set of facts the plaintiff may prove consistent with the complaint that would entitle him to relief.

Nevertheless, even if the Court does adopt the *Twombly*

⁵Under the "plausibility" standard, a court is to determine whether a complaint asserts sufficient facts to make it plausible that the plaintiff will be able to recover on the claims asserted in it. *See Bell Atl. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965-66 (2007)

“plausibility” standard, the McCurrys asserted sufficient facts in their Complaint to withstand Chevy Chase’s motion to dismiss. CP 3-10. Whether the *Gibson v. Conley* or *Twombly* standard is used, the McCurrys’ Complaint should not have been dismissed.

D. The citation of a case discussed in the McCurrys’ Court of Appeals briefing has been amended.

Since the McCurrys completed their briefing for the Court of Appeals, the citation for *T.C. Jefferson v. Chase Home Finance* (cited at pages 9 and 10 of the McCurrys’ Court of Appeals Reply Brief) has changed due to the court’s order on a party’s motion for reconsideration. While the opinion is not different, the new citation is *Jefferson v. Chase Home Finance*, 2008 WL 1883484 (N.D. Cal. 2008).⁶

III. CONCLUSION

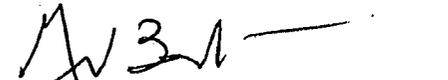
As this supplemental brief demonstrates, cases decided by the U.S. Supreme Court, the Washington Supreme Court, and from trial courts in other jurisdictions since the original briefing in this case was completed further support the conclusion that the trial court and the Court of Appeals were incorrect when they ruled that the McCurrys’ claims were preempted

⁶In *Jefferson*, the court ruled that a borrower’s state law claim brought under California’s Unfair Competition Law that a national bank regulated under the National Bank Act (which is similar to HOLA) misrepresented how it would apply payments made on his loan, was not preempted because “The duty to refrain from misrepresentation falls on all businesses” and “does not target or regulate banking or lending.” *Jefferson*, 2008 WL 1883484, at *13.

by HOLA and OTS regulations. This Court should reverse the trial court and the Court of Appeals and remand the case for trial.

RESPECTFULLY SUBMITTED THIS 9th day of March, 2009.

BECKETT LAW OFFICES, PLLC



Guy W. Beckett, WSBA #14939

WILLIAMSON & WILLIAMS
Rob Williamson, WSBA No. 11387

KELLER ROHRBACK L.L.P.
Mark A. Griffin, WSBA No. 16296

Co-Counsel for Petitioners

DECLARATION OF SERVICE

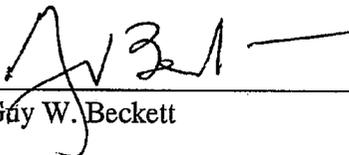
Guy W. Beckett declares:

On March 9, 2009, I mailed a copy of the foregoing document by United States first-class mail, with proper postage affixed, to:

Timothy J. Filer
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 9th day of March, 2009, at Seattle, Washington.



Guy W. Beckett

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