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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.

PETITIONERS' ANSWER TO *AMICUS CURIAE* BRIEF
OF THE STATE OF WASHINGTON

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ORIGINAL

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I. INTRODUCTION

The State of Washington rightly observes that Washington's Consumer Protection Act (the "WCPA") does not attempt to specifically regulate banks, but instead is a law of general application which prohibits *all* companies doing business in Washington from engaging in unfair and deceptive practices. State of Washington *Amicus Curiae* Brief at 4-5.

Because there is no attempt in the WCPA to specifically regulate banks' lending activities, the McCurrys' WCPA claims are not preempted under 12 C.F.R. § 560.2(b). Instead, the savings provisions of § 560.2(c) apply.

Because the WCPA is a contract or commercial law exempt from preemption under § 560.2(c), and Chevy Chase Bank's compliance with it will not more than incidentally affect its lending activities, the McCurrys' WCPA claims are not preempted. This Court should reverse the Court of Appeals and should reinstate the McCurrys' WCPA claims against Chevy Chase.

II. DISCUSSION

Chief Counsel for the Office of Thrift Supervision ("OTS") has concluded that state laws like the WCPA prohibiting unfair and deceptive conduct are "contract [or] commercial laws" under 12 C.F.R. §560.2(c)(1). "Preemption of State Laws Applicable to Credit Card Transactions" (Op. OTS Chief Counsel, P-96-14, December 24, 1996) (cited in *In re: Ocwen*

Loan Servicing, LLC Mortgage Servicing Litigation, 491 F.3d 638, 643-44 (7th Cir. 2007)), available at 1996 WL 767462. Thus, whether the McCurrys' claims against Chevy Chase are preempted turns on whether requiring the Bank to comply with the WCPA will more than "incidentally affect" its lending operations. The reasoned and logical view is that requiring banking companies doing business in Washington to comply with the WCPA – and not to engage in unfair and deceptive practices – should not and will not have more than an incidental affect on Chevy Chase's lending activities. The majority of courts that have addressed similar cases have concurred.

1. The WCPA is a law of general application and does not specifically regulate a bank's operations.

In addition to the cases cited in the State of Washington's Brief at 4, n.4, the McCurrys' Petition for Review at 15, n.7, and the McCurrys' Supplemental Brief at 8-9, other courts have also recently permitted plaintiffs to pursue claims based on state consumer protection laws against federal savings banks, deciding that such claims are not preempted by the Homeowners Loan Act ("HOLA") or Office of Thrift Supervision ("OTS") regulations. Most relevant is the September 29, 2009 decision by the federal district court for the Eastern District of New York, *McAnaney v. Astoria Financial Corp.*, 2009 WL 3150430 (E.D.N.Y. 2009) (Slip

Copy). The facts in that case are very similar to the facts in this one. In *McAnaney*, borrowers who had taken out and paid off loans with the defendant savings bank secured by real estate sued to recover various fees the bank had required to satisfy the loans when they were paid off, including (just like in this case) fees for payoff statements faxed to the closing agents handling the payoffs. The plaintiffs asserted several causes of action, including ones based on New York statutes specifically regulating what banks may charge at the time borrowers pay off their loans, but also breach of contract and deceptive practices claims virtually identical to the ones the McCurrys have asserted here against Chevy Chase.¹ With respect to the claims that were based on state statutes purporting to specifically regulate the bank's practices, those claims were determined to be preempted and were dismissed. *Id.* at *21 (dismissing claim based on statute providing that an owner of real property encumbered by a mortgage must receive a loan payoff statement at no charge); *22 (dismissing claim based on statute requiring lender to timely record satisfaction of mortgage within specified period after loan payoff).

¹For the breach of contract claim, the plaintiffs alleged (just like the McCurrys allege here) that the collection of the disputed fees was prohibited by the real property security instruments. *Id.* at *22. For the claim based on New York's equivalent to the WCPA, the plaintiffs alleged, "Defendants violated [General Business Law] § 349 by demanding and collecting the Disputed Fees when they were not owed by Class members." *Id.* at 25.

However, the court ruled that the plaintiffs' breach of contract and deceptive practices claims were not preempted by HOLA or 12 C.F.R. §560.2. The court concluded that the preemption analysis for both claims was appropriately conducted under § 560.2(c), as the applicable contract laws and deceptive practices statutes were "contract and commercial laws" that did not more than incidentally impact the bank's lending operations. *Id.* at *22, 23, 25-26. As to the claim asserted under New York's deceptive practices statute, the court stated,

[T]he Court finds that plaintiffs' § 349 claim is not preempted, to the extent that plaintiffs seek relief for deceptive acts and practices incident to the alleged breach of the mortgage agreements. ... [P]laintiff has asserted that *specific contractual provisions have been breached* when the Disputed Fees were collected from plaintiffs, and thus the [General Business Act] § 349 cause of action does not seek to set substantive standards or establish particular requirements for lending operations in the state of New York.

Id. at *25 (emphasis in original, citations and internal quotations omitted).²

The court allowed a trial to proceed on plaintiffs' breach of contract and deceptive practices claims. *Id.* at *33.

²The trial court dismissed the McCurrys' unjust enrichment claim, ruling that it was also preempted. Clerk's Papers 39-40. This dismissal was affirmed by the Court of Appeals. *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wn. App. 900, 904, 193 P.3d 155 (2008). The *McAnaney* court held that the plaintiffs' unjust enrichment claims were not preempted because they were asserted under "laws of general application, which simply seek redress for allegations that the plaintiffs were not treated honestly and fairly as customers under common law standards applicable to businesses." *McAnaney*, 2009 WL 3150430, at *26. The Court of Appeals should not have ruled that the McCurrys' unjust enrichment is preempted.

In *Reyes v. Premier Home Funding, Inc.*, __ F. Supp.2d __, 2009 WL 1704574 (N.D. Cal. 2009), a mortgagor brought an action against a federal savings association, alleging that the lender had violated the California Translation Act (“CTA”) when it made the loan and had engaged in unfair competition. The CTA requires that persons who do not speak or read English as a first language who enter into contracts be provided “a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement.” *Id.* (citation omitted). The lender argued that the plaintiffs’ state law claims were preempted by HOLA and 12 C.F.R. § 560.2, but the court disagreed, ruling that the relevant laws applied to all businesses generally, not just to lenders, and therefore they did not have more than an incidental affect on the bank’s lending activities:

Under step two of the [preemption] analysis, the Court finds that the CTA does affect lending. Section 1632(b)(2) and (b)(4) expressly require a translation for contracts regarding a “loan or extension of credit.” This requirement makes the CTA presumptively preempted. However, the CTA clearly falls within the limitation on preemption contained in 12 C.F.R. § 560.2(c), which excepts generally applicable “contract and commercial laws” that only affect lending incidentally. The CTA applies generally to all businesses, not just lending institutions, engaging in a wide range of commercial contracts that extend beyond lending. Thus, the Court finds the CTA is generally applicable law under 12 C.F.R. § 560.2(c) and not preempted by HOLA.

Id. Further, the court ruled that to the extent the plaintiff's unfair competition claim was based on his CTA claim, it also was not preempted, because "the CTA is a generally applicable state law that only incidentally affects lending." *Id.*

A like result occurred in *Poskin v. TD Banknorth, N.A.*, ___ F.Supp.2d ___, 2009 WL 2981963 (W.D. Pa. 2009), a case involving the National Bank Act, which is similar to HOLA. There, the plaintiff asserted a claim against the defendant national bank based on Pennsylvania's deceptive practices act (similar to the WCPA) arising from his purchase of a building lot financed by the bank. The bank moved to dismiss the action, arguing the claim was preempted. The court denied the motion, ruling that the Pennsylvania statute was a law of general application which governed the practices of all businesses operating in the state, and was not targeted directly at banking or lending. *Id.* at 21.³

³*Accord, Cuomo v. Clearing House Association, LLC*, 557 U.S. ___, 129 S.Ct. 2710 (2009) (New York's enforcement of state lending laws against national banks not preempted by NBA or OCC regulations promulgated); *Baldanzi v. WFC Holdings Corporation*, 2008 WL 4924987, at *2 (S.D.N.Y. 2008) ("In contrast to findings of federal preemption in cases involving state regulations that conflict with the NBA, causes of action sounding in contract, consumer protection statutes, and tort have repeatedly been found by federal courts not to be preempted."); *Great Western Resources, L.L.C. v. Bank of Arkansas, N.A.*, 2006 WL 626375, at *3 (W.D. Ark. 2006) (court held "Plaintiffs' claims of breach of contract, violations of the Arkansas Deceptive Trade Practices Act, conversion and breach of implied covenant of good faith [were] not subject to complete preemption [by the NBA]"); *Levitansky v. FIA Card Services, N.A.*, 492 F.Supp.2d 758, 762 (N.D. Ohio 2007) (allegations of improper extra charges for cash and balance transfers involved only "state law breach of contract claims" and were thus not preempted); *Patterson v. Regions Bank*, 2006 WL 3407852, at *5 (S.D. Ill. 2006) (alleged violations of Illinois Consumer Fraud and Deceptive Business Practices Act due

The WCPA is a contract or commercial law of general application and does not specifically regulate banking or lending. Therefore, whether the McCurrys' claims under it are preempted should be analyzed under 12 C.F.R. § 560.2(c).

2. The WCPA only incidentally affects banks' lending operations.

As the State of Washington also notes, because the WCPA is a law of general application, requiring Chevy Chase to comply with its provisions will only incidentally affect its lending operations. *See* State of Washington Brief at 4-5. Many courts addressing whether plaintiffs' state law deceptive practices claims against federal savings banks should be preempted have ruled that the claims are not preempted and permitted the claims to proceed to trial. *See* cases cited in Petitioners' Petition for Review at 17, n.8.

In *Chaffin v. Automated Finance Corporation*, 2009 WL 3088401 (S.D. Cal. 2009) (Slip Copy), in the context of whether a case should be remanded to state court, the court considered whether a plaintiff's state law claims for breach of contract, fraud and negligence against a savings bank arising from a foreclosure sale on her real property were preempted by HOLA. The court concluded that they were not, because they only

to the imposition of an interest rate higher than that agreed upon "amount to nothing more than state law causes of action," and were therefore not preempted).

incidentally affected the bank's lending operations:

Plaintiff's state law causes of action are not of a type listed as being specifically preempted under § 560.2(b), as none of her state common law claims impose the type of requirements listed in subsection (b). Therefore, the Court evaluates whether the state laws at issue affect lending. The Court concludes that the state laws at issue have only an incidental effect on lending operations and do not affect lending within the meaning of § 560.2(a). Plaintiff's breach of contract, fraud, negligence, and actions to set aside Trustee's Sale and Deed are premised on the allegation that Automated Finance Corporation breached the loan contract by changing the amount of the loan without Plaintiff's knowledge or consent. Because Plaintiff's claims are premised on a simple breach of contract claim, they only incidentally affect lending operations because a lender happens to be a party to the alleged contract. Additionally, Plaintiff's claims are of the type that fit within § 560.2(c)'s list of state laws that are not preempted. ... [T]he Court reads 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 activities.

Id. at *2-3.⁴ The court ruled that the plaintiff's state law claims should be permitted to proceed to trial in state court. *Id.* at 3.

Applicability of the WCPA to Chevy Chase's lending operations will have only an incidental effect on them. Under 12 C.F.R. § 560.2(c), the McCurrys' WCPA claims should not be preempted.

⁴See also *Yeomalakis v. F.D.I.C.*, 562 F.3d 56, 61 (1st Cir. 2009) ("...HOLA does not preempt ordinary contractual claims based on state law.").

3. The Eighth Circuit Court of Appeals' decision in *Casey v. F.D.I.C.* is not inconsistent with the McCurrys' contention that their WCPA claim is not preempted by HOLA and OTS regulations.

Although the Eighth Circuit Court of Appeals concluded last week in *Casey v. F.D.I.C.*, ___ F.3d ___, 2009 WL 33499950 (8th Cir., October 20, 2009) that a state law of general application was preempted as it applied to the conduct challenged in that case, the decision does not suggest that the McCurrys' WCPA claim should be preempted. At issue in *Casey* was a Missouri statute prohibiting the charging of fees for document preparation by non-lawyers. The plaintiffs sued a federal savings association for charging them fees for loan documents prepared by non-lawyers, in derogation of the Missouri statute. The bank argued and the court agreed that the claims were preempted by HOLA and 12 C.F.R. §560.2(b), because the statute, as applied, purported to limit the amount of initial loan charges, an item specifically enumerated as preempted in §560.2(b)(5). *Casey* at *7.

Here, however, the McCurrys do not allege that the WCPA specifically prohibits Chevy Chase from engaging in any of the activities listed in § 560.2(b)(5). The gravamen of the McCurrys' WCPA claim is that it prohibited the Bank from assessing and collecting the Fax and Notary Fees in a deceptive manner – *not* that it prohibited the Bank from

assessing and collecting the Fees. It is the McCurrys' common law breach of contract and equitable unjust enrichment claims – which are general commercial and contract laws to which the exception listed in §560.2(c)(1) applies – that support their claims that Chevy Chase could not charge them the Fees in the first instance. Because the McCurrys do not seek to use the WCPA to specifically prohibit Chevy Chase from engaging in the conduct specified in § 560.2(b), *Casey* is not inconsistent with the McCurrys' request that their WCPA claim be reinstated.

III. CONCLUSION

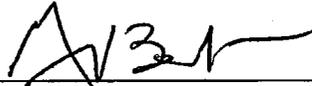
It is the public policy of Washington that consumers should have the ability to bring suit to prevent deceptive practices by companies doing business in this State.⁵ The trial court's dismissal of the McCurrys' WCPA claims against Chevy Chase, and the Court of Appeals decision affirming that dismissal, frustrated this policy and left the McCurrys without a remedy for conduct that has been determined to be deceptive as a matter of law.⁶ This Court has the ability in this case to right this wrong

⁵See e.g., *Scott v. Cingular Wireless*, 160 Wn.2d 843, 861, 161 P.3d 1000 (2007) (“The ... CPA ... unquestionably embodies the legislative statement of strong public policy favoring private actions to enforce the act[.]”).

⁶*Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547, 13 P.3d 240 (2000).

by reversing the Court of Appeals and reinstating the McCurrys' claims.

RESPECTFULLY SUBMITTED THIS 29th day of October, 2009.

A handwritten signature in black ink, appearing to read 'G. W. Beckett', written over a horizontal line.

Gay W. Beckett, WSBA #14939
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CERTIFICATE OF SERVICE

Guy W. Beckett declares:

On October 29, 2009, I sent via e-mail a copy of the foregoing

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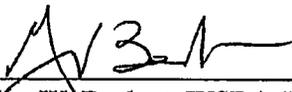
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I declare under penalty of perjury under the laws of the State of
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EXECUTED THIS 29th day of October, 2009, at Seattle,
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