

## A Mortgage and Consumer Finance Law Update

06/13/08

### Washington Court of Appeals Affirms Preemption of State Law Claims In Connection With Lending Practices

In *McCurry v. Chevy Chase Bank*, an appeal of a dismissal of a nationwide class action filed against Chevy Chase Bank, F.S.B., a three-judge panel of the Washington Court of Appeals, Division One, recently affirmed a ruling that “regulations issued by the federal Office of Thrift Supervision (“OTS”)...expressly preempt state statutes and judicial decisions that purport to regulate ‘loan related fees.’” In other words, federally licensed savings banks are subject only to OTS regulation regarding lending operations.

The McCurrys alleged that “Accumulated Fax Fees” and a “Notary Fee” assessed in paying off their home loan (1) was a breach of the deed of trust securing their loan, (2) unjustly enriched Chevy Chase, and (3) violated Washington’s Consumer Protection Act (“CPA”). On appeal, the McCurrys argued that these fees are not “loan related fees” as defined by 12 C.F.R. § 560.2 (preempting state regulations of “loan related fees”). The Court of Appeals, however, agreed with Chevy Chase, interpreting “loan related fees” to refer “precisely” to the fees at issue in this case.

The Court discussed three components of 12 C.F.R. § 560.2 at length. First, OTS has exclusive control over regulations governing the lending practices of federal savings associations, a delegation of authority which effectively preempts any regulation by “state statute...ruling, order or judicial decision.” In other words, because of OTS’ exclusive control over federal savings associations, these associations’ lending operations are subject only to OTS regulations and not state regulations. Second, § 560.2 presents a “non-exclusive, illustrative” list of lending activities which are immune to state regulation. Finally, § 560.2 notes that federal savings associations are still subject to state regulations, that only “incidentally affect” lending practices, such as criminal law. In evaluating whether a state regulation is preempted, the Court must first determine whether the law in question is specifically preempted by § 560.2. If it is not, then the Court must determine whether that law “affects lending.” If it does, the state regulation is preempted. A state regulation may not be preempted, however, if that regulation can be shown to only “incidentally affect” lending.

Although “Accumulated Fax Fees” and “Notary Fee[s]” are not contained in the language of § 560.2, the Court rejected the contention that “only fees associated with the origination and maintenance of the loans” fall within the scope of the section. The Court also noted that even if the plain meaning of § 560.2 did not preempt these state law claims, a judicial decision imposing such restrictions on the lending operations of Chevy Chase would nonetheless be preempted.

## What This Means for Mortgage Lenders

The *McCurry* decision confirms that OTS has the exclusive power to regulate the lending practices of federally licensed savings banks. State regulations which are expressly included in § 560.2(b) are clearly preempted, but whether other state regulations which appear to directly or indirectly affect lending practices are preempted is less certain and therefore more likely to be the subject of litigation. Fortunately for mortgage lenders, courts operate under a presumption of preemption, and so any uncertainty will likely be resolved in favor of preemption. If, however, the regulation in question will only have an “incidental affect [on] lending operations,” then it may form the basis of a state law claim. While federal savings associations should err on the side of caution, it is possible that specific state imposed regulations may be superseded by more vague OTS regulations.

The policy in favor of uniform federal regulation illustrated by the Court’s decision in *McCurry* should be welcomed by mortgage lenders because it helps reduce the present confusion in the industry that has been engendered by the patchwork of state and federal laws which apply to residential lending activities

## Resources

The opinion can be found at:

[Washington State Court Opinions](#)

(<http://www.courts.wa.gov/opinions/index.cfm>)

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