

No.

IN THE
Supreme Court of the United States

MICHAEL CASEY, *et al.*,

Petitioners,

v.

NORTH AMERICAN SAVINGS, F.S.B., *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Missouri statutory and common law prohibits anyone other than a lawyer licensed to practice law in Missouri from charging others a fee for the preparation of documents affecting legal rights in the state. The respondents, three federal savings associations, none of which are licensed to practice law in Missouri, charged their Missouri borrowers fees for the preparation of mortgage loan documents.

The question presented is: Does 12 CFR § 560.2, which preempts all state laws “purporting to regulate or otherwise affect [the] credit activities” of federal savings associations, preempt any application to federal savings associations of Missouri’s prohibition against charging document preparation fees, where the prohibition is part of the state’s law regulating the practice of law?

In analyzing the question presented, the Court should note: (1) the prohibition is part of the state’s general contract, commercial, and tort law; (2) the prohibition applies to all persons and not just lenders; (3) the law establishing the prohibition is silent on the credit activities of lenders; (4) the law was not enacted to surreptitiously regulate or affect the credit activities of lenders; and (5) although the law affects the credit activities of federal savings associations, it does so only incidentally to the law’s purpose of regulating the practice of law.

LIST OF PARTIES

Petitioners Michael Casey, Richard Keller, Kathleen Keller, Julie Pennington, Richard Piatchek, and Heidi Piatchek (jointly, “Borrowers”) are homeowners residing in St. Louis County, Missouri. Borrowers were plaintiffs below.

Respondents North American Savings, F.S.B., Heartland Bank, and ABN AMRO (jointly, “Lenders”) are federal savings associations that made loans to Borrowers to finance the purchase of Borrowers’ respective homes.

Michael Crider was another plaintiff in state court. His loan was from North American Mortgage Company (“NAMCO”), a federal savings association subsequently acquired by Washington Mutual Bank (“WaMu”). NAMCO was a defendant; WaMu was never a party below. While the state-court judgment was on appeal, WaMu went into receivership. The FDIC, as receiver, removed the case to the district court under 12 U.S.C. § 1819(b)(2)(B). Following removal, Crider moved to dismiss his appeal against the FDIC. The United States Court of Appeals for the Eighth Circuit granted Crider’s motion to dismiss his appeal, and neither Crider nor the FDIC are parties here.

CORPORATE DISCLOSURE STATEMENT

Petitioners are individuals.

North American Savings, F.S.B., is a subsidiary of NASB Financial, Inc., a publicly-held company that owns more than 10% of its stock.

Heartland Bank is a subsidiary of Love Savings Holding Company. No publicly-held company owns 10% or more of the stock of Heartland Bank or its parent.

ABN AMRO has been merged into Citimortgage, Inc. Its ultimate parent is Citigroup, Inc., a publicly-held company that beneficially owns more than 10% of ABN AMRO's stock.

As a result of past transactions, Bank of America Corporation, through various subsidiaries, retains an interest in ABN AMRO with respect to this litigation.

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Decision of the United States District Court
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Accel Mortgage Services, Inc.*, 2008 U.S. Dist.
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Order of the Circuit Court for St. Louis
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Casey v. FDIC*, 583 F.3d 586 (8th Cir. 2009). [*Appendix* at A-1].

The district court decision is unreported, but is available online as *Casey v. Accel Mortgage Services, Inc.*, 2008 U.S. Dist. Lexis 104859 (E.D. Mo., Dec. 30, 2008). [A-19].

The case was removed from the Missouri state courts to the district court by the FDIC while pending on appeal. Pursuant to Eighth Circuit precedent, the district court adopted the orders and judgment of the state trial court as its own. The relevant state court order [A-24] is unreported and is not available online.

The state-court case originally involved more parties than appear here. After entry of the relevant state court order, claims against five of the remaining defendants were split into separate cases. [A-38]. Two of those cases were tried, while the three others settled. The Missouri Supreme Court ultimately decided appeals in the two cases that were tried. Its decisions are published as *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007) [A-36], and *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008) [A-45].

STATEMENT OF JURISDICTION

The district court had jurisdiction under 12 U.S.C. § 1819(b)(2)(B), which gives the FDIC as receiver the authority to remove to federal court any state-court case in which the FDIC becomes a party, so long as it does so within 90 days of being substituted as a party in the case. The FDIC was substituted in the state-court appeal October 31, 2008. The FDIC removed the appeal to the district court November 6, 2008, less than 90 days after its substitution.

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, which gives the Courts of Appeals jurisdiction from all final decisions of the district courts.

This Court has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. Background.

Some mortgage lenders doing business in Missouri, including Lenders herein, engaged in the practice of charging their Missouri customers for the preparation of legal documents, including promissory notes and deeds of trust, used by the Lenders to effect residential mortgage loans to those customers, even though the documents had not been prepared by lawyers licensed to practice law in Missouri.

This practice of charging document preparation fees for non-lawyer-prepared legal documents was not

limited to Lenders and other federal savings associations, but was also practiced by some state-chartered banks and U.S. banks doing business in Missouri. In addition, some persons engaged in non-banking businesses in Missouri, such as automobile dealers, recreational vehicle dealers, real estate brokers, and escrow companies, among others, have from time to time charged their customers document preparation fees, even though the documents for which such fees were charged were not prepared by Missouri-licensed lawyers.

In Missouri, the charging of a separate fee for the preparation of legal documents is part of the law business, and only lawyers licensed to practice in Missouri are lawfully allowed to charge document preparation fees for documents affecting legal rights in Missouri.

Missouri courts have consistently held — with one exception discussed below — that *anyone* who is not a Missouri lawyer who charges a document preparation fee is liable to pay a refund to the person charged. A statute passed by the Missouri General Assembly to help implement this law provides that a person charged an improper document preparation fee who sues for a refund within two years of paying the fee shall recover treble damages. If the person does not bring suit within the two-year period, the Missouri Attorney General may sue for the treble damages. Section

484.020.2, Revised Statutes of Missouri (“RSMo.”). In addition, if a person charged an improper document preparation fee does not sue within the two years provided by statute, he or she can still sue for a refund of the fee under the equitable common-law doctrine of money had and received. *Carpenter*, 250 S.W.3d at 703. [A-56].

The present case is the only known exception to the unbroken string of Missouri cases enforcing Missouri’s prohibition on non-lawyers charging document preparation fees. Here, the state trial judge held that Lenders and other federal savings associations were not bound by Missouri’s restrictions on the charging of document preparation fees because the Missouri unauthorized practice of law statute was preempted by federal regulation, namely 12 CFR § 560.2. The state trial judge held:

Under 12 C.F.R. 560.2(a), the Director, by regulation has elected to occupy the field except for limited areas covered by (c) of the regulations, none of which appear to be relevant to this proceeding. Federal regulations such as 12 CFR 560.2(a) have the same effect as federal statutes. Regulation of fees related to financial transactions is within the clear intent of the regulations preempted. Therefore, this field has been preempted by federal law

and Plaintiff fails to state a cause of action against those Defendants.

[A-33 (citation omitted)].

The Court of Appeals for the Eighth Circuit affirmed the judgment finding federal preemption. Although the Court of Appeals acknowledged that, “Neither statute^[1] purports on its face to impose requirements on lending,” the Court of Appeals nevertheless held that the statutes, “as applied,” impose requirements on Lenders’ credit activities, and are therefore preempted under Section 560.2(b). *Casey*, 583 F.3d at 595, 596. [A-16, A-18].

¹ The second statute referenced in the Court of Appeals’ opinion is the Missouri Merchandising Practices Act, Sections 407.010, *et seq.*, R.S.Mo. (the “MPA”), which prohibits fraudulent conduct in commerce. A violation of Section 484.020.2 with respect to charging document preparation fees also violates the MPA. *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 716 (Mo. App. 2008).

The prohibition on non-lawyers charging a document preparation fee is also part of Missouri’s common law, as is the right to recover any fees paid to a non-lawyer. The Court of Appeals misreads Missouri law in concluding that the common-law right of recovery was contingent upon a violation of the statute. *See Casey*, 583 F.3d at 595 n.3 [A-16], and compare with *Carpenter*, 250 S.W.3d at 703 [A-56].

**II. The federal regulation at issue in the case:
12 CFR § 560.2.**

12 CFR § 560.2 was enacted by the Office of Thrift Supervision (“OTS”) by authority granted by Congress through the Home Owners’ Loan Act, 12 U.S.C. §§ 1461-68 (“HOLA”).

Section 560.2 states in relevant part:

§ 560.2 Applicability of law.

(a) Occupation of field.... 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 § 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 § 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; ...
- (4) Tort law; ...

12 CFR § 560.2 (emphasis added).

As discussed in detail below, the crux of the Court of Appeals' error was its misinterpretation of the regulatory phrases, "state laws purporting to regulate or otherwise affect their credit activities" and "state laws purporting to impose requirements regarding: ... Loan-related fees."

In short, the Court of Appeals effectively ignored the words “purporting to” in each phrase in reaching its conclusion that the preemptive effect of the regulation reached even state laws which did not *purport* to regulate (or otherwise affect or impose requirements upon) credit activities, but which only had *an affect* upon those activities “as applied.” *See Casey*, 583 F.3d at 595 [A-16].

In other words, the Court of Appeals’ interpretation effectively reads out of the regulation a separate subsection that specifies when state laws that affect credit activities are preempted even though they do not purport to regulate those activities.

III. The OTS’s final rule issuance and the interpretive guidelines stated therein.

In its final rule issuance for the regulations including 12 CFR § 560.2, the OTS explained the scope of the federal preemption it intended in issuing the regulations. The OTS in that issuance: (a) expressed its intention that the regulation not preempt basic state laws that have only an incidental affect on lending; and (b) explained the sequence to be followed in applying the regulation to determine whether a particular state law was preempted. 61 Fed. Reg. 50,951, 50,966-67 (1996). Although the text of the final rule issuance is lengthy, it is useful to quote the applicable portions in full to properly understand the OTS’s intentions with regard to Section 560.2:

Paragraph (c) describes certain types of state laws that OTS does not intend to preempt....

OTS believes that paragraph (c) should be retained in order to provide guidance regarding the scope of preemption intended by paragraph (a). *OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts, torts, and crimes.* To reduce the potential for misunderstanding, however, we have made several changes to paragraph (c). First, we have modified the regulatory language that precedes the list of state laws that are not preempted. The introductory language now indicates that laws falling in these areas are not preempted to the extent that they either: (i) have only an incidental impact on lending; or (ii) are otherwise not contrary to the purposes expressed in paragraph (a) of the regulation....

Adding this two-part test to the regulation will provide an interpretive standard for identifying state laws that may be designed to look like traditional property,

contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers, protecting the safety and soundness of lenders, or pursuing other state policy objectives.

When confronted with interpretive questions under § 560.2, we anticipate that courts will, in accordance with well established principles of regulatory construction, look to the regulatory history of § 560.2 for guidance. *In this regard, OTS wishes to make clear that the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations.* 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 in paragraph (b). 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 paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption

61 Fed. Reg. at 50,966-67 (emphasis added).

IV. Missouri’s regulation of the practice of law within the state includes a ban on non-lawyers charging fees for the preparation of legal documents.

Missouri, like the other States, defines and regulates the practice of law within its borders. Under Missouri law, the power to define and regulate the practice of law is the sole province of the Missouri Supreme Court, although the Missouri General Assembly may assist the Supreme Court in its efforts. *Eisel*, 230 S.W.3d at 338-39. [A-41-42].

Missouri defines the “law business” as including “the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights...” Section 484.010.2, RSMo.

The Missouri General Assembly provided assistance in enforcing the law against the unauthorized practice of law by, among other actions, enacting Section 484.020, RSMo., which imposes penalties, including misdemeanor criminal liability and civil treble

damages, on non-lawyers who violate Missouri's restrictions on the unauthorized practice of law.

Section 484.020 states in relevant part:

Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor ... and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person ... paying the same within two years from the date the same shall have been paid...

Section 484.020.2, RSMo.

The prohibition discussed above is not aimed solely at the Lenders or, indeed, specifically at lenders of any type. It is a general rule of law aimed at all who would charge or increase a fee for services when the services involve non-lawyers performing legal work within Missouri or affecting Missouri property or other legal rights. *See Eisel*, 230 S.W.3d at 339. [A-41-43].

For example:

The Missouri Supreme Court prohibits **real estate brokers** from charging a separate, additional fee for the preparation of documents affecting property rights. *Hulse v. Criger*, 247 S.W.2d 855, 863 (Mo. banc 1952).

The Missouri Supreme Court prohibits **escrow companies** from either charging a separate fee for document preparation or varying their customary fees for closing services based upon whether documents are to be prepared in the transaction. *In re First Escrow, Inc.*, 840 S.W.2d 839, 849 (Mo. banc 1992).

The Missouri Supreme Court prohibits **commercial businesses** from charging for the drawing, preparing, or assisting in the preparation of trust workbooks, trusts, wills, and powers of attorney for a Missouri resident without the direct supervision of an independent licensed attorney selected by and representing the resident. *In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 871 (Mo. banc 1996).

The Missouri Court of Appeals has held that Missouri law prohibits **recreational vehicle dealers** from charging a separate document fee to prepare “purchase agreements, invoices, retail installment contracts, title work, financing documents, and other instruments and documents of legal significance, or that affect or relate to rights and title to property” in connection with the sale of all-terrain vehicles, motorcycles, or other recreational vehicles. *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712 (Mo. App. 2008).

Moving to the lending arena, the Missouri Supreme Court prohibits **state-chartered banks** from charging document preparation fees in mortgage transactions to

recoup the cost of preparing standard-form documents necessary to facilitate the selling of mortgage loans on the secondary market. *Eisel*, 230 S.W.3d at 338-39. [A-41-43].

The Missouri Merchandising Practices Act (“MPA”) is similarly a statute of general application. The MPA has a scope far broader than misbehaving lenders or violations of restrictions on the unauthorized engagement in the law business. It is a general part of Missouri’s commercial or business tort law. *See, e.g., Finnegan v. Old Republic Title Co. of St. Louis, Inc.*, 246 S.W.3d 928, 929 (Mo. banc 2008) (MPA applies to **notaries** who charged for notarizations without recording the signatures in their notary journals as required by the notary statute); *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007) (MPA applies to **car wholesaler** who sold rebuilt car without disclosing that car had been in an accident, even though there was no privity of contract between the buyer and the wholesaler); *Raster v. Ameristar Casinos, Inc.*, 280 S.W.3d 120, 131 (Mo. App. 2009) (MPA applies to claim that **casino** gave misleading description of changes to rules of compensation club; “a customer placing a bet is owed a duty of fair play”); *Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 233 (Mo. App. 2006) (MPA applies to claim that an **HVAC contractor** would not honor “lifetime warranty” on new equipment installed by the contractor).

And the same is true with respect to the common-law remedy of money had and received, which applies in a large range of circumstances and not only as to claims made against Lenders or against persons who improperly charged document preparation fees. *See, e.g., Investors Title Co. v. Hammonds*, 217 S.W.3d 288, 293-94 (Mo. banc 2007) (county required to repay title company money stolen over time by employee of county recorder of deeds notwithstanding absence of an express contract between county and title company).

Thus all of the state laws involved in this case are laws of general application.

REASONS FOR GRANTING THE PETITION

There are three primary reasons for granting the petition for a Writ of Certiorari.

- (1) The Court of Appeals made a substantial error in its interpretation of Section 560.2 which results in the preemption of basic state laws that neither Congress nor the OTS intended to preempt, and which effectively causes other paragraphs of Section 560.2 to be without effect.
- (2) The Court of Appeals' interpretation deepens a split among the Circuits about the scope of preemption under Section 560.2.

- (3) The Court of Appeals' method of interpretation, and in particular its expansion of the meaning of the word "purporting" far beyond its ordinary meaning, has significant implication for numerous other statutes and regulations that use language similar to that in Section 560.2.

An additional, although not primary, ground for granting the petition is the significant and ongoing impact the Court of Appeals' decision will have in Missouri. This impact will affect not only the parties and the members of the putative plaintiffs' classes, but also the Missouri Supreme Court in its ability to prevent the unauthorized practice of law, future mortgage borrowers who will be charged for legal work performed by non-lawyers, and U.S. banks and other lenders in competition with federal savings associations.

The financial impact of this case is also great. This case and its offshoots have resulted in judgments and settlements recovering in excess of \$16 million in damages, plus attorneys' fees, for over 50,000 Missouri homeowners. Based on petitioners' pre-filing investigation, the potential claims against the three Lenders here involve approximately as many potential class members, and even greater total damages than has already been recovered.

DISCUSSION

I. The Court of Appeals misinterpreted Section 560.2 by ignoring the plain meaning of the regulatory term “purporting” and adopting an “as applied” interpretation for 560.2(b).

The word “purporting”, which is the disputed term appearing in the two key phrases in Section 560.2, is not specially-defined in the regulations. This Court interprets undefined terms using their ordinary meanings. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). And, in innumerable decisions, this Court has turned to dictionaries to find the ordinary meaning of a word.

Turning to two dictionaries, the word “purport”, the root of “purporting”, means:

tr.v. **1.** To have or present the often false appearance of being or intending; profess.

2. To have the intention of doing; purpose.

n. **1.** Meaning presented, intended, or implied; import. **2.** Intention; purpose.

American Heritage College dic • tion • ary (4th ed. 2002).
See also Merriam-Webster Online: “**1:** to have the often specious appearance of being, intending, or claiming (something implied or inferred)...; **2:** intend, purpose.”

The OTS, in choosing to use the word “purporting” in writing its preemption regulation, expressed its purpose to preempt state laws that *intended* or had *the purpose of* regulating the credit activities of federal savings associations. This is the plain meaning of the regulatory language used by the OTS.

While the OTS has adopted a broad scheme of preemption in Section 560.2, it is not all encompassing. The OTS’s regulatory scheme does not bar states from adopting and enforcing laws of general application that affect Lenders’ credit activities, so long as (a) the laws are not intended to regulate or affect credit activities, and (b) whatever affect that the laws may have on credit activities is only incidental to the laws’ primary purposes. Indeed, Justices of this Court have recognized the limitations of preemption under HOLA: “[T]he authority of [OTS’s predecessor] to pre-empt state laws is not limitless ... it is clear that HOLA does not permit the Board to pre-empt the application of all state and local laws to such institutions.” *Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 171 (1982) (O’Connor, J., concurring).

The Court of Appeals, however, failed to appreciate the importance, and meaning, of the term “purporting” used in Section 560.2. Instead, the Court of Appeals summarized its view of the regulatory-interpretation issue before it as follows:

The parties contest the precise meaning of this language. The homeowners read the words “state laws purporting to impose requirements” to mean state laws that *on their face* impose requirements expressly upon lenders.^[2] Thus the argument goes, a law which makes no mention of lending necessarily falls outside the scope of the § 560.2(b) examples and is preempted only if § 560.2(a) requires that result, without regard to § 560.2(b). The FSA lenders read the regulation more broadly: a state law that does not expressly mention lending is nevertheless preempted if, *as applied*, the law is one described in § 560.2(b).

Casey, 583 F.3d at 593. [A-12-13].

The Court of Appeals, relying on the decision of the Ninth Circuit in *Silvas v. E*Trade Mortgage Corp.*, 514

² The Court of Appeals somewhat misstates the Borrowers’ position. It is Borrowers’ view that the “purporting to impose requirements” language does not cover only state laws that on their face expressly impose requirements upon lenders, but that it also covers, in the words of the OTS, “state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers, protecting the safety and soundness of lenders, or pursuing other state policy objectives.” 61 Fed. Reg. at 50,966.

F.3d 1001 (9th Cir. 2008), adopted the Lenders’ proposed “as applied” interpretation. Although the Court of Appeals acknowledged that *Silvas* “failed to explain the reason for its conclusion that an ‘as applied’ analysis was required,” it explained that the Ninth Circuit “cited two OTS legal opinions which support its approach,” and in turn cited those OTS legal opinions as support for its own conclusion. *See Casey* 583 F.3d at 594. [A-14].

The earlier of the two OTS legal opinions, a 1996 Opinion of Chief Counsel,³ considered whether an Indiana deceptive acts and practices (“DAP”) statute — a statute that essentially corresponds to the Missouri MPA — was preempted by Section 560.2. The Court of Appeals’ reliance upon the 1996 opinion is odd. The 1996 opinion did not use the “as applied” analysis described by the Eighth and Ninth Circuits. Rather, the OTS determined that the Indiana statute did not “on its face” come within the scope of 560.2(b), and thus needed to be analyzed under 560.2(c). Moreover, the 1996 opinion concluded that the Indiana DAP statute was not preempted by Section 560.2. *Casey*, 583 F.3d at 594. [A-14-15].

Specifically, with respect to the Indiana DAP, the OTS’s General Counsel opined in 1996 stated:

³ *See* <http://files.ots.treas.gov//56615.pdf>.

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 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. ... Accordingly, we conclude that the Indiana DAP is not preempted by federal law.

1996 Opinion at 9, 10.

Thus, both the analysis and the holding of the 1996 opinion are directly contrary to the legal principals for which the Eighth and Ninth Circuits purportedly cite it as authority.

The Eighth and Ninth Circuits' reliance on the 1999 Opinion of Chief Counsel⁴ is as misplaced as their reliance on the 1996 opinion. For most of its analysis, the 1999 opinion examines whether various applications of the California Unfair Competition Act ("UCA")⁵ are preempted under the balancing tests established by paragraph (a) and (c) of Section 560.2, having found that the statutes are not preempted as a whole under 560.2(b). *See 1999 Opinion* at 12-13, 14-17.

Thus, while the 1999 opinion held that *certain lawsuits* brought under the UCA are preempted⁶ — for example, a suit seeking to obtain an order directing a lender how it should disclose its interest rates in advertising was held to be preempted — the UCA statute as a whole is not preempted. *1999 Opinion* at 14-15, 18. The 1999 opinion states:

⁴ See <http://files.ots.treas.gov//56903.pdf>.

⁵ The California UCA is a unique statute that allows any person to bring a suit to enjoin "unfair competition" and obtain an order of restitution, even if the person is not himself injured. Moreover, the statute is broadly defined. An "unfair" business practice "is one whose harm to the victims outweigh its benefits to society," and "fraudulent" conduct is "any conduct by which the public is likely to be deceived; no actual deception, reasonable reliance, or damages are required." Moreover, the statute is one of strict liability; there is no requirement that the defendant intend to injure anyone. *1999 Opinion* at 2-3.

⁶ The OTS defines state law as including any judicial decision. *See* Section 560.2(a).

A state law that, *on its face*, purported to regulate the advertising of a federal savings association would be preempted under § 560.2(b). Accordingly, to the extent that the UCA is being used, directly or indirectly, to require a particular form of interest rate disclosure in advertising the Associations' lending programs in order to be considered "fair" or "not misleading," the UCA is preempted.

Id. at 14-15 (emphasis added). But the OTS does not contend that the UCA is preempted as a whole simply because it is being used in some cases in an attempt to regulate Lenders. To the contrary:

We do not preempt the entire UCA or its general application to federal savings associations in a manner that only incidentally affects lending and is consistent with the objective of allowing federal savings associations to operate in accordance with uniform standards.

Id. at 18.

In short, the primary authorities on which the Court of Appeals relied to reach its decision in this case either "fail[] to explain the reason for its conclusion" (*Silvas*) or actually reach holdings 180-degrees contrary to the supposed legal rule for which the Court

of Appeals cites them (*i.e.*, the 1996 and 1999 opinions). Consequently, to the extent that the Court of Appeals purports to rely upon the OTS's interpretation of its own regulation to adopt an interpretation of that regulation contrary to the ordinary meaning of the regulatory language, the supposed OTS interpretations did not, in fact, say what the Court of Appeals thinks they said.

The Court of Appeals' decision thus severely and materially misstates the law and the applicable authorities.

II. The Court of Appeals' decision irreconcilably conflicts with the prior decision of the Court of Appeals for the Seventh Circuit.

Although the Court of Appeals denies it, its decision in this case is in absolute conflict with an earlier decision of the Court of Appeals for the Seventh Circuit interpreting and applying the same regulation. This is a conflict which ought to be addressed by the Supreme Court.

The Seventh Circuit held in *In re Ocwen Loan Servicing, LLC, Mortgage Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007), that because HOLA and the OTS regulations provide no remedy to persons injured by the wrongful acts of federal savings associations, "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.” *Id.* at 643.

Relying heavily on the 1996 opinion of the OTS’s General Counsel — the same opinion on which the Eighth and Ninth Circuits purport to rely — the Seventh Circuit held: “Not all state statutes that might be invoked against a federal S&L are preempted, any more than all common law doctrines are; for remember that contract and commercial law are among the laws listed in subsection (c) of the regulation...” *Id.* at 646. Specifically, the Seventh Circuit held that state DAP statutes — such as the Missouri MPA — are not generally preempted by HOLA and its regulations. *Id.* at 644.

Oddly, the Court of Appeals here refuses to even recognize that its decision is in conflict with that of the Seventh Circuit or that there is a split between the Seventh and Ninth Circuits on the very issue raised in this appeal. Instead, the Court of Appeals attempts in very general terms to distinguish *Ocwen*, describing that opinion as holding that “several generally applicable state statutes were preempted by § 560.2(a) because, as applied, they fell within the § 560.2(b) illustrative examples.” *Casey*, 583 F.3d at 595 n.3. [A-16]. As shown above, however, this characterization is inaccurate and ignores that *Ocwen* held DAP statutes and many other state-law remedies not preempted.

III. The Court of Appeals’ decision that the “purporting to impose requirements” element established by Section 560.2(b) is satisfied by an “as applied” test effectively abrogates paragraphs (a) and (c) of the regulation, which control the preemption of state laws that “affect” a federal savings association’s credit activities.

Reversal of the Court of Appeals’ decision applying Section 560.2(b) to the Missouri law here does not mean that the regulation does not preempt any state law which, “on its face,” does not purport to impose requirements on Lenders’ credit activities. To the contrary: analysis of the application of paragraph (b) is the just the first step of a multi-step analysis under the regulation. If a state law passes muster under paragraph (b), it still must satisfy the tests stated in paragraphs (a) and (c). Paragraph (a) asks if the state law affects credit activities. If it does, then the state law is presumed to be preempted unless it is saved by paragraph (c) as a state law of general application that only incidentally affects such credit activities.

The Court of Appeals’ holding, however, short-circuits the entire regulatory framework established by the OTS. Under the “as applied” analysis adopted below, if a state law, as applied, affects the Lender’s credit activities, it is preempted under Section 560.2(b). But this means that no state law that affects credit

activities, whether incidentally or not, will ever be subject to the analysis stated in paragraphs (a) and (c).

Thus, the Court of Appeals' analysis effectively abrogates paragraphs (a) and (c) of Section 560.2 by eliminating any possibility that any state law will ever be subject to being tested by those paragraphs. Thus the Court of Appeals' interpretation violates the well-established rule that courts should interpret statutes and regulations so as to give effect, whenever possible, to every clause and word. *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007).

IV. The Court of Appeals' decision has implications far beyond just the preemption of state laws that have an affect on Lenders' credit activities.

The Court of Appeals' decision, if left undisturbed, will have an impact that goes well beyond just Section 560.2 and the regulation of the practice of law in Missouri. "Purporting" and various other forms of "purport" are used frequently in federal statutes and regulations, including those concerning the preemption of state law. Redefining "purporting" away from its ordinary dictionary meanings, as the Court of Appeals has done here, threatens an unintended wholesale revision of federal law, which this Court ought to nip in its bud.

Perhaps the potentially most far-reaching impact of this new interpretation will be in the area of pensions and retirement plans. The Employee Retirement Income and Security Act (“ERISA”) includes a preemption provision, the scope of which is defined in reference to any state or local governmental organization “which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.” 29 U.S.C. § 1144. The Court of Appeals’ decision will thus likely encourage litigants to revisit numerous previously-settled decisions with regard to the scope of laws preempted by ERISA.

In *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), for example, this Court held that language of ERISA’s preemption of state law — which would appear to be broader than that of Section 560.2, in that it includes the phrase “directly or indirectly” — does not preempt laws of general application that only incidentally affect the designated activities:

[T]o read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services would effectively read the limiting language in § 514(a) out of the statute, a conclusion

that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that pre-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.

514 U.S. at 661 (internal quotation omitted).

The Court of Appeals' holding here, however, invites the courts to do just what this Court has instructed should not be done: ignore the limiting language in federal preemption statutes and regulations, extending preemption to all areas, actions and entities even remotely affecting the areas defined by statute. If the "purporting to regulate" language in Section 560.2 is expanded to the wide breadth of the "as applied" standard adopted by the Court of Appeals, this broader reading would appear to be directly applicable to the ERISA provision mentioned above.

Many other federal statutes and regulations use similar "purporting to" language, and are therefore likely affected by the Court of Appeals' decision here. For example, the preemption language of regulations relating to banks' fiduciary activities (12 CFR § 550.136) and deposit activities (12 CFR § 557.11) are essentially identical to that used in Section 560.2.

Similarly, the Department of Housing and Urban Development has exercised its statutory rulemaking power with regard to certain housing projects, and in so doing has declared that “[a]ny state or local law, ordinance, or regulation is without force and effect insofar as it purports to regulate rents” for such projects. 24 CFR § 246.1. Under the Court of Appeals’ decision here, any general state law which might affect the costs of owning, managing, or leasing real estate — such as laws requiring compliance with generally-enforced health and safety standards or compelling participation in trash-recycling programs—would appear to now be preempted, as the costs of complying with such generally-applicable laws would naturally have a tendency to affect the rent charged tenants.

CONCLUSION

For the reasons given above, this case presents important issues of federal law affecting the preemption of potentially numerous state laws of all types, as well as the ability of a state to regulate the practice of law within its borders. Because the decision below also deepens a split between the Circuits and essentially writes out of existence an important regulatory limitation on preemption, this case presents issues of sufficient magnitude and national importance as to merit consideration by the Supreme Court of the United States.

Respectfully submitted,

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