

No. 10-2444

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DONNA EPPS,
Plaintiff-Appellant,

v.

JP MORGAN CHASE BANK, N.A.,
Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland
No. 10-cv-1504

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

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I certify that on January 12, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Scott C. Borison
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JURISDICTIONAL STATEMENT

Jurisdiction in the district court was based on 28 U.S.C. § 1332(d)(2). In removing Plaintiff-Appellant Donna Epps's complaint to federal court, JP Morgan Chase Bank, N.A. ("the Bank") alleged that it is a citizen of Ohio, that Ms. Epps is a citizen of Maryland, and that the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. *See* Joint Appendix ("JA") 8–9.

This is an appeal from a final judgment disposing of all parties' claims, which gives this Court jurisdiction under 28 U.S.C. § 1291. The district court entered judgment for the Bank on November 19, 2010. JA 86. Ms. Epps filed a timely notice of appeal on December 15, 2010. JA 87; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Did the district court err in holding that the debt-collection provisions of Maryland's Credit Grantor Closed End Credit Provisions ("CLEC"), Md. Code Ann., Com. Law § 12-1001 *et seq.*, are preempted when (a) JP Morgan Chase Bank, N.A., assumed a contractual obligation to comply with the CLEC's requirements, and (b) the federal regulation on which the district court relied, 12 C.F.R. § 7.4008, preserves state debt-collection law from preemption? [Yes.]
2. Did the district court err in dismissing those aspects of Ms. Epps's complaint that do not rely on the CLEC? [Yes.]

STATEMENT OF THE CASE

This is a putative consumer class action against JP Morgan Chase Bank, N.A., under Maryland's Credit Grantor Closed End Credit Provisions, Md. Code Ann., Com. Law § 12-1001 *et seq.*, which details procedures that creditors must follow in repossessing cars if they wish to collect a deficiency judgment after selling the vehicle.¹ Plaintiff-Appellant Donna Epps filed suit in state court, alleging that the Bank's debt-collection practices violate the CLEC. JA 25–26. Ms. Epps also asserted claims for breach of contract, unjust enrichment, and violation of the Maryland Consumer Protection Act. JA 26–32.

The Bank removed Ms. Epps's complaint to federal court and then moved to dismiss. JA 3, 6. The district court granted the Bank's motion, holding that the CLEC's debt-collection provisions are preempted by 12 C.F.R. § 7.4008, a regulation promulgated by the Office of the Comptroller of the Currency ("OCC") under the National Bank Act ("NBA"), 12 U.S.C. § 1 *et seq.* JA 64–85.

Ms. Epps appeals the district court's decision.

¹ Pursuant to Fed. R. App. P. 28(f), an addendum containing the text of the relevant CLEC provision, as well as the text of other relevant statutes and regulations, is set forth beginning at page A-1 of this brief.

STATEMENT OF FACTS

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Bank's Wrongful Conduct

In December 2007, Donna Epps entered into a retail installment sales contract with Thompson Toyota Scion to finance a used PT Cruiser. JA 48–51. After the purchase, Thompson Toyota Scion assigned its interest in Ms. Epps's contract to the Bank. JA 52.

Ms. Epps made payments on her car for two years, but she eventually fell behind and defaulted. JA 17. The Bank repossessed Ms. Epps's car and sent her a single notice, on December 11, 2009, stating its intent to dispose of her vehicle by "private sale sometime after 12/28/2009." JA 38. The notice did not inform Ms. Epps of the "time and place of the sale" or the "exact location where the tangible personal property is stored," as required by the CLEC, Md. Code Ann., Com. Law § 12-1021(e)(3), (j)(1)(ii). JA 14.

After sending its inadequate notice, the Bank sold Ms. Epps's car on January 25, 2010. JA 40. The Bank then demanded that Ms. Epps make deficiency payments to cover the sum it claimed to be the difference between the vehicle's price at auction and her total contract obligation. JA 40. The Bank's demand included a statement that "We sought N/A bids, and we received N/A bids," JA 40; as such, it did not comply with the provision of the CLEC requiring that "a full accounting shall be made to the borrower" that includes "[t]he number of bids sought and received." § 12-1021(j)(2)(viii).

The Bank's demand was unlawful. By sending two inadequate notices that violated § 12-1021(e)(3), (j)(1)(ii), and (j)(2)(viii), the Bank forfeited its right to collect any deficiency debt under the CLEC. § 12-1021(k)(4).

The Bank made similarly unlawful demands of other class members. After sending them inadequate notices, and thereby forfeiting its right to collect deficiency debts, the Bank nevertheless demanded that they make payments, in violation of the CLEC. JA 21–22. The Bank's collection activity has included suing and threatening to sue borrowers who did not owe any deficiency, as well as notifying credit reporting agencies of alleged balances due, thus damaging the credit scores and credit history of the class members. JA 28.

B. Relevant Terms of Ms. Epps's Contract

The contract between Ms. Epps and Thompson Toyota Scion includes several provisions relevant to this appeal. The contract states that “[t]his contract shall be subject to the Credit Grantor Closed End Credit Provisions (Subtitle 10) of Title 12 of the Commercial Law Article of the Maryland Code.” JA 51. The contract also bears a notation, at the bottom of each page, that it is “Form No. 553-MD,” which indicates that it is a form agreement prepared specifically for use in Maryland. JA 49, 51. Additionally, the contract states that its terms cannot be changed simply by virtue of an assignment; it provides that “[a]ny change to this contract must be in writing and we must sign it.” JA 49. Finally, the contract states that any subsequent holder of the agreement is “subject to all claims and defenses which the debtor could assert against the [original] seller.” JA 51.

C. Ms. Epps's Complaint

Ms. Epps brought five causes of action against the Bank. She sued for (1) a violation of the CLEC, based on the Bank's failure to comply with § 12-1021(e)(3), (j)(1)(ii), and (j)(2)(viii), JA 25–26; (2) breach of contract resulting from the Bank's express agreement to comply with the CLEC, JA 26–27; (3) declaratory and injunctive relief under Cts. & Jud. Proc. § 3-406, JA 27–30; (4) unjust enrichment arising from the Bank's collection, acceptance, and retention of deficiency balances, interest, fees, and costs to which it was not entitled, JA 30; and (5) a violation of Maryland's Consumer Protection Act ("CPA"), Com. Law § 13-101 *et seq.*, based on the Bank's unfair and deceptive practices in its attempts to collect alleged debts that were not in fact due. JA 31–32.

Ms. Epps seeks a classwide injunction prohibiting the Bank from collecting invalid deficiency balances, interest costs and fees from class members, as well as restitution of deficiency payments, interest, fees, costs, and other payments made in response to the Bank's unlawful demands. JA 33. She also seeks an order requiring the Bank to notify credit reporting agencies that the class members have a zero balance on their accounts and to remove any notation to the effect that the account has been charged off, as well as a declaratory judgment establishing that the Bank may not collect deficiency balances, interest, fees, costs, or other charges from class members. JA 33. Finally, Ms. Epps seeks statutory penalties pursuant to § 12-1018(a)(2) and (b) of the CLEC. JA 33–34.

D. The District Court's Decision

The district court dismissed Ms. Epps's complaint on the grounds that the

CLEC's post-repossession notice requirements fall within an OCC regulation, promulgated under the NBA, that preempts certain categories of state law that substantially interfere with bank lending. 12 C.F.R. § 7.4008(d)(2)(viii). JA 69–80. The court also rejected Ms. Epps's argument that the Bank had contractually agreed to comply with the CLEC, instead concluding that the Bank's promise in taking assignment of the contract had not been "voluntary." JA 82–84. The district court did not consider Ms. Epps's CPA or unjust enrichment claims.

II. STATUTORY AND REGULATORY BACKGROUND

A. Maryland Statutes

This appeal implicates two Maryland statutes: the CLEC and the CPA.

1. The CLEC

Ms. Epps alleges that the Bank's debt-collection practices violate the CLEC. In Maryland, a creditor financing an auto sale can choose to have the contract governed by one of two separate credit statutes, the CLEC and the Retail Installment Sales Act ("RISA"), Md. Code Ann., Com. Law § 12-601 *et seq.* The CLEC, enacted in 1983, relaxed some laws for those creditors who elect to proceed under it, but in exchange, when the CLEC's terms are violated, the statute contains "more severe civil damages" as compared to RISA. *Biggus v. Ford Motor Credit Co.*, 613 A.2d 986, 992 (Md. 1992). The Maryland legislature enacted the CLEC with the intention of providing important protections to consumers. *See* Md. House Econ. Matters Comm., Bill Analysis of HB 424, H. 1993 Sess. at 3–4 (1992) [hereinafter Bill Analysis].

The CLEC contains numerous provisions governing how a creditor can repossess and resell a vehicle. These provisions include requirements that the creditor provide the consumer, within five days of repossession, a notice stating the “exact location where the tangible personal property is stored,” § 12-1021(e)(3); that the creditor notify the consumer at least ten days before the sale of “the time and place of the sale,” § 12-1021(j)(1)(ii); and that, after a private sale, the creditor make “a full accounting” to the consumer that includes the “number of bids sought and received,” § 12-1021(j)(2)(viii), as well as other information demonstrating to the consumer that the sale was conducted properly. § 12-1021(j)(2)(i)–(ix).

The CLEC’s consumer protections relating to post-repossession debt collection were of such importance to the General Assembly that it built in several safeguards to ensure that creditors would comply. For example, it specified that a creditor may not receive a deficiency judgment unless it complies with each of the CLEC’s provisions. § 12-1021(k)(4); *see also Green v. Ford Motor Credit Co.*, 828 A.2d 821, 836 (Md. Ct. Spec. App. 2003) (“Under the CLEC, [a creditor] would have had no right to collect any deficiency judgment if, as alleged, it routinely sent invalid notices or if their notice was otherwise improper.”); *Moore v. Nissan Motor Acceptance Corp.*, 831 A.2d 12, 17 (Md. 2003) (creditor not entitled to deficiency judgment when it could not establish that it had sent required notice). A creditor who violates any provision of the CLEC also may only “collect only the principal amount of the loan and may not collect any interest, costs, fees, or other charges with respect to the loan.” § 12-1018(a)(2). Finally, the penalty for knowing violations of the CLEC is “forfeit[ing] to the borrower 3 times the amount

of interest, fees, and charges collected in excess of that authorized by” the CLEC. § 12-1018(b). In fact, a “willful” violation of the CLEC is a crime. § 12-1017.

2. Maryland’s CPA

The General Assembly enacted the CPA in 1975, in light of “mounting concern over the increase of deceptive practices in connection with sales of merchandise, real property, and services and the extension of credit.” Md. Code Ann., Com. Law § 13-102(a)(1). It noted that while other federal and state laws protect consumers, “existing laws are inadequate, poorly coordinated and not widely known or adequately enforced.” § 13-102(a)(2). The CPA was thus intended to help restore “public confidence in merchants offering goods, services, realty, and credit.” § 13-102(b)(2). All told, the legislature hoped that the CPA would constitute “strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland.” § 13-102(b)(3). As a result of this broad purpose, the General Assembly expressly noted that the CPA “shall be construed and applied liberally.” § 13-105. *See also Citaramanis v. Hallowell*, 613 A.2d 964, 968 (Md. 1992) (“[T]he General Assembly enacted the CPA as a comprehensive consumer protection act to provide protection against unfair or deceptive practices in consumer transactions.”).

Section 13-301 of the CPA “includes a non-exhaustive list of unfair or deceptive trade practices.” *Forrest v. P & L Real Estate Inv. Co.*, 759 A.2d 1187, 1196 (Md. Ct. Spec. App. 2000). One provision included in the non-exhaustive list prohibits “any . . . misleading oral or written statement . . . which has the capacity,

tendency, or effect of deceiving or misleading consumers.” § 13-301(1). Unfair and deceptive trade practices are prohibited in both the “extension of consumer credit” and, more relevant to this case, the “collection of consumer debts.” § 13-303(3)–(4). In the event of a misleading statement or any other violation of the CPA, a consumer is entitled to “bring an action to recover for injury or loss sustained by him as the result of” the statement. § 13-408(a).

B. Federal Law

In finding Ms. Epps’s claim preempted, the district court relied on the NBA and an OCC regulation promulgated under that statute.

1. The National Bank Act

Congress enacted the NBA in 1864 to encourage the creation of federally chartered banks. *See Atherton v. FDIC*, 519 U.S. 213, 222 (1997). The NBA vests in national banks a series of enumerated powers—powers thought essential to the business of banking. *See* 12 U.S.C. § 24(Seventh). The NBA also authorizes federally chartered banks to exercise “such incidental powers as shall be necessary to carry on the business of banking.” *Id.*

The NBA authorizes national banks to engage in the business of banking, but it does not—and was not intended to—free banks from state regulation. As the Supreme Court has explained, the NBA leaves national banks “subject to the laws of the State,” and banks “are governed in their daily course of business far more by the laws of the State than of the nation.” *Atherton*, 519 U.S. at 222 (quoting *Nat’l Bank v. Commonwealth*, 75 U.S. 353, 362 (1869)). In particular, the NBA leaves national banks’ contractual obligations to be governed and construed according to

state law, *id.* at 222–23, and the NBA has always been interpreted as leaving debt-collection regulation in state control. *See, e.g., id.* at 223; *Nat’l Bank*, 75 U.S. at 362; *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) (“[S]tates retain some power to regulate national banks in areas such as . . . debt collection. . . .”).

More recently, in *Cuomo v. The Clearing House Ass’n, L.L.C.*, --- U.S. ----, 129 S. Ct. 2710 (2009), the Supreme Court held that the OCC exceeded its authority in issuing 12 C.F.R. § 7.4000, which had the effect of preempting state enforcement of state law. The Court reminded the agency that states “have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years.” *Id.* at 2720–21 (citing cases). As the Court explained many years ago in *McClellan v. Chipman*, 164 U.S. 347 (1896), valid state regulation of banks is the “rule,” not the “exception.” *Id.* at 357.

Congress has amended the NBA several times since its enactment, and in so doing, it has repeatedly recognized states’ legitimate role in regulating certain aspects of national banks’ operations. In 1994, in a conference report to the Riegle-Neal Interstate Banking and Branching Efficiency Act, Congress emphasized that “national banks are subject to State law in many significant respects” and that “States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions.” H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074. Congress specifically addressed state consumer-protection regulations, explaining that

“States have a legitimate interest in protecting the rights of their consumers.” *Id.* Additionally, Congress expressed its concern about over-aggressive OCC preemption regulations:

[T]he Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive It is of utmost concern to the Conferees that the agencies issue opinion letters and interpretive rules concluding that Federal law preempts state law regarding . . . consumer protection . . . only when the agency has determined that the Federal policy interest in preemption is clear.

Id. Congress also endorsed a “rule of construction” that “avoids” finding state law preempted when possible. *Id.*²

Just last year, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Pub. L. No. 111-203, 124 Stat. 1376 (2010). Recognizing the role of state law in regulating certain aspects of national banks’ operations, Dodd-Frank codified the longstanding rule that the NBA preempts state law “only if” the law “prevents or significantly interferes with the exercise by the national bank of its powers.” Dodd-Frank § 1044. The NBA has always had this meaning; Dodd-Frank merely provides further emphasis. *Loving v. United States*, 517 U.S. 748, 770 (1996) (“subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction”) (citation omitted); *Brown v. Thompson*, 374 F.3d 253, 260 (4th Cir. 2004) (the

² Congress has also expressed a particular intent to preserve state debt-collection law from preemption. When Congress imposed some requirements on third-party debt collectors in the Fair Debt Collection Practices Act, it included a savings clause that expressly preserves stronger state debt-collection laws. *See* 15 U.S.C. § 1692n.

Supreme Court “has long instructed that such declarations” of earlier statute’s intent “be accorded great weight”) (citation and quotation marks omitted).

2. The OCC’s Regulation

In 2004, the OCC promulgated 12 C.F.R. § 7.4008 to state the OCC’s conclusions regarding the scope of NBA preemption. The OCC intended § 7.4008 to protect banks’ statutorily authorized power to “loan[] money,” 12 U.S.C. § 24(Seventh), and it accordingly preempts state laws that interfere significantly with banks’ “non-real estate lending powers.” 12 C.F.R. § 7.4008(d)(1).

Section 7.4008 includes an express preemption provision, paragraph (d)(2), that preempts certain categories of state law to the extent they substantially affect banks’ ability to lend. Paragraph (d)(2) provides, in relevant part, that a national bank may “make non-real estate loans” without regard to state-law limitations concerning “[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts or other credit-related documents.” § 7.4008(d)(2)(viii).

Section 7.4008 also includes a savings clause, paragraph (e), that lists categories of state law—including debt-collection law—that are not preempted by the NBA. Paragraph (e) provides, in relevant part:

State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks’ non-real estate lending powers:

(1) Contracts;

(2) Torts;

...

(4) Rights to collect debts;

...

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

§ 7.4008(e).

In promulgating § 7.4008, the OCC made clear that it intended to preempt only those state laws “for which substantial precedent existed” to support a finding of preemption. OCC Interpretive Ltr. No. 1005, at 1. The OCC also explained that it intended its regulation to be “entirely consistent with” the Supreme Court’s conflict-preemption case law under the NBA; the regulation was not intended as a new preemption standard but merely as a “distillation” of controlling case law. Final Rule, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) [hereinafter Final Rule].

SUMMARY OF ARGUMENT

The district court’s conclusion that federal law preempts Ms. Epps’s claims permits the Bank to disregard, without consequence, its express promise to comply with the CLEC. It thus allows the Bank to enjoy a benefit of Maryland law—the right to pursue some consumers for a deficiency judgment after their cars have been repossessed and sold—while simultaneously avoiding the conditions that Maryland law requires a creditor to meet if it wishes to receive that benefit. Not

only does this ruling lead to patently unfair results, but it is also wrong as a matter of law.

First, the district court erred in failing to apply a strong presumption against preemption. In *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1195 n.3 (2009), the Supreme Court held that the presumption against preemption must be applied in any field in which there is a history of state regulation. Ms. Epps's complaint challenges the Bank's practices with respect to debt collection, which the Court has identified as a quintessentially state concern since 1869. *See Nat'l Bank*, 75 U.S. at 362. The presumption against preemption should therefore have been applied.

Second, the district court erred in holding that the CLEC's post-repossession notice requirements are preempted because the Bank expressly agreed that the contract was subject "to the Credit Grantor Closed End Credit Provisions (Subtitle 10) of Title 12 of the Commercial Law Article of the Maryland Code." JA 51. The Supreme Court has been clear that federal law does not preempt a party's "self-imposed undertakings." *See Am. Airlines v. Wolens*, 513 U.S. 219, 228 (1995). This Court, too, has held that a defendant may not "enter into a contract that invoked" a law, and then "proceed to breach its duties thereunder and to shield its breach by pleading preemption." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005). Moreover, in a case involving a remarkably similar contract and similar facts, Maryland's highest court applied this rule to claims against a federal savings association. *Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812, 832 (Md. 2003).

Third, the district court erred in holding that the CLEC's post-repossession

notice requirements are preempted by the NBA and 12 C.F.R. § 7.4008. Under the NBA itself, state laws are only preempted if they “*prevent or significantly interfere* with the national bank’s exercise of its powers,” *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 34 (1996) (emphasis added), which the Bank has not shown to be the case here. Furthermore, consistently with case law interpreting the NBA, the OCC’s regulation distinguishes sharply between state laws that regulate lending and state laws that regulate debt collection. While many state laws governing the creation of lending relationships are preempted under the OCC’s regulations, state debt-collection laws—like the CLEC—are expressly preserved from preemption by the regulation’s savings clause.

Finally, the district court erred because it ignored Ms. Epps’s additional claims under the CPA and for unjust enrichment.

ARGUMENT

The district court dismissed Ms. Epps’s claims on the basis of federal preemption. The district court’s decision is reviewed *de novo*. *AES Sparrow Point LNG, LLC v. Smith*, 527 F.3d 120, 125 (4th Cir. 2008)

I. THE DISTRICT COURT ERRED BY NOT APPLYING A STRONG PRESUMPTION AGAINST PREEMPTION.

Preemption is an affirmative defense for which the Bank bears the burden of proof. *See Great-West Life & Annuity Ins. Co. v. Info. Sys. & Networks Corp.*, 523 F.3d 266, 270 (4th Cir. 2008). In determining whether the Bank met its burden, the Court must start, as “in all pre-emption cases,” with the “two cornerstones” of preemption jurisprudence: first, that “the purpose of Congress is the ultimate

touchstone in every preemption case,” and second, “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.” *Wyeth*, 129 S. Ct. at 1194–95 (citation omitted) (emphasis added). As this Court has stated, the presumption against preemption is especially strong with respect to a “field which the States have traditionally occupied.” *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 192 (4th Cir. 2007).

The district court declined to apply this presumption against preemption because of the federal government’s historical involvement in banking regulation. JA 69–70. This analysis, however, has been superseded by *Wyeth*, where the Supreme Court explicitly rejected an argument that, because “the Federal Government [had] regulated [in the relevant area] for more than a century,” the presumption did not apply. 129 S. Ct. at 1195 n.3. The Court explained that the presumption “accounts for the historic presence of state law but does not rely on the absence of federal regulation.” *Id.* In other words, the “presumption against preemption applies in any field in which there is a history of state law regulation, even if there is also a history of federal regulation.” *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 178 (1st Cir. 2009) (*Wyeth* “clarified” this point).

In this case, Ms. Epps alleges a violation of the post-repossession notice requirements in Maryland’s CLEC, which regulate creditors’ right to collect consumer debts. *See Green*, 828 A.2d at 836 (“Under the CLEC, [the creditor] would have had no right to collect any deficiency judgment if, as alleged, it

routinely sent invalid notices or if their notice were otherwise improper.”). Debt collection is a quintessentially state concern: the right to collect debts is created by state law, and the Supreme Court has held for more than a century that debt-collection regulation is an area left to state control, even in cases involving national banks. *See, e.g., Atherton*, 519 U.S. at 223 (national banks remain subject to state law regulating their “right to collect their debts”) (quoting *Nat’l Bank*, 76 U.S. at 362); *see also infra* Part III.B.1.a. Because the CLEC regulates debt collection, an area where there is a “historic presence of state law,” *Wyeth*, 129 S. Ct. at 1195 n.3, the presumption against preemption applies.³

Application of the presumption is particularly appropriate where, as here, federal law does not address the subject regulated by state law and would therefore leave injured plaintiffs without a remedy. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 286–90 (1995) (claims involving a manufacturer’s failure to install antilock brakes were not preempted because “[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers”); *Poskin v. TD Banknorth, N.A.*, 687 F. Supp. 2d 530, 556–57 (W.D. Pa. 2009) (where state-law claim challenged allegedly wrongful conduct not addressed by the NBA, emphasizing the federal

³ The CLEC’s post-repossession notice requirements also address two other areas of historic state presence, in addition to debt collection. First, these requirements were added to the CLEC for the explicit purpose of consumer protection. *See* Bill Analysis at 3–4. Second, many of the law’s provisions regulate contracts. *See, e.g.,* § 12-1021(a)(1) (in event of default, credit grantor may repossess property “under an agreement, note, or other evidence of the loan”). “Contract and consumer protection laws”—like debt-collection laws—“have traditionally been in state law enforcement hands.” *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010); *see also Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 42–43 (2d Cir. 1990) (“Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.”).

law's lack of any "duplicative . . . protections"). This Court, too, has cautioned against finding preemption when it would leave plaintiffs without a remedy, noting that "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Worm v. Am. Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *Anderson*, 508 F.3d at 193 (noting "exceptionally strong presumption against preemption of such state remedies that would be warranted" if federal law did not provide remedy).

II. THE CLEC'S POST-REPOSSESSION NOTICE REQUIREMENTS ARE NOT PREEMPTED BECAUSE THE BANK AGREED TO COMPLY WITH THEM.

When Ms. Epps purchased her car from Thompson Toyota Scion, her contract with the car dealer included a provision that "[t]his contract shall be subject to the Credit Grantor Closed End Credit Provisions (Subtitle 10) of Title 12 of the Commercial Law Article of the Maryland Code." JA 51. This provision can mean only one thing: that the holder of the contract was bound to comply with the CLEC. The Bank voluntarily assumed this contractual obligation when it purchased Ms. Epps's agreement, and the Supreme Court, this Court, and the Maryland Court of Appeals have all held that federal law does not preempt a party's "own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. The district court erred in reaching the opposite conclusion.

A. Ms. Epps's Contract Promised Compliance with the CLEC.

Ms. Epps's contract specifically states that it is governed by the CLEC. JA 51. In interpreting what the parties meant by this language, the Court must apply

Maryland contract law. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (“[C]ontracts made by national banks are governed and construed by State laws[.]”) (citation omitted). Under Maryland law, “[w]hen the clear language of a contract is unambiguous, the court will give effect to its plain, ordinary, and usual meaning.” *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 829 A.2d 540, 546 (Md. 2003). Maryland “adheres to the principle of the objective interpretation of contracts,” and the meaning of a contract is therefore determined based on “the four corners of the agreement.” *Clancy v. King*, 954 A.2d 1092, 1101 (Md. 2008). In short, “the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.” *Cochran v. Norkunas*, 919 A.2d 700, 710 (Md. 2007) (citation omitted).

Applying these principles to Ms. Epps’s contract, it is clear that the contract is subject to the CLEC—because it says so explicitly. The contract also includes another sentence stating that, in general, “federal law and Maryland law” apply to the contract. But with respect to the matters governed by the CLEC, the contract’s more specific sentence makes clear that the Maryland statute applies. *See Fed. Ins. Co. v. Allstate Ins. Co.*, 341 A.2d 399, 407 (Md. 1975) (if “two clauses or parts of a written agreement are apparently in conflict, and one is general in character and the other is specific, the specific stipulation will take precedence over the general, and control it”). The parties could not have intended the “written notice” to be dictated by federal law, since there exists no federal statute requiring post-repossession notice.

Moreover, at the time Ms. Epps signed the contract, there was no possibility that the contract could be read through a gloss of federal preemption, because she entered into the contract with a Maryland car dealer, subject to Maryland law, which had no conceivable claim to any federal-preemption defense. A reasonable person in Ms. Epps's position could only have believed that the contract meant what it said: that it was subject to Maryland law and the CLEC. The plain language of a contract does not change its meaning merely because the contract is later assigned.

B. The Bank Voluntarily Assumed the Promise to Comply with the CLEC.

Ms. Epps originally entered into her contract with Thompson Toyota Scion. But when Thompson Toyota Scion assigned her contract to the Bank, the Bank assumed all of dealership's contractual promises—including the promise to comply with the CLEC.

This conclusion is mandated by the hornbook rule of contract law that an assignee “stand[s] in the shoes of the assignor.” *Citizens' Nat'l Bank of Pocomoke City v. Custis*, 138 A. 261, 262 (Md. 1927); *see also Fed. Fin. Co. v. Hall*, 108 F.3d 46, 48 (4th Cir. 1997) (“[T]he common law speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.*”) (emphasis in original) (citations omitted). As such, an assignor cannot assign more rights than it has under an agreement. *See, e.g., James v. Goldberg*, 261 A.2d 753, 757 (Md. 1970) (“[a]n unqualified assignment . . . does not confer upon the assignee any greater right than the right possessed by the assignor”); *Citizens' Nat'l Bank of Pocomoke*

City, 138 A. at 262 (“an assignee acquire[s] no greater or other right under the instrument than his assignor had”); *Textor v. Orr*, 38 A. 939, 940 (Md. 1897) (assignee “can assert no claim to the property which the assignor could not”). Here, the right that Thompson Toyota Scion possessed was the right to collect a deficiency debt—a right provided by state law—only to the extent that it sent post-repossession notices that complied with the CLEC. Thompson Toyota Scion could not assign the right to collect deficiency payments without adequate notices because it never possessed such a right under Ms. Epps’s contract.

Put another way, an assignee assumes responsibility for all of the assignor’s rights *and* obligations. *See, e.g., Biggus*, 613 A.2d at 994 (when creditor assumed contract specifying that the CLEC applied, creditor assumed “rights” and “obligations” imposed by the contract and the CLEC); Md. Code Ann., Com. Law § 9-404(a)(1) (secured creditor’s assignee is subject to “[a]ll terms of the agreement between the account debtor and assignor”).⁴ As the Seventh Circuit has

⁴ This bedrock rule of contract law is also expressed in the FTC Holder Rule, 16 C.F.R. § 433.2, which requires that a consumer credit contract state that any subsequent holder of the agreement is “subject to all claims and defenses which the debtor could assert against the seller.” The FTC was clear, in promulgating the rule, that a subsequent holder “stands in the shoes” of the seller and cannot assert any rights superior to the seller’s rights. Guidelines on Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (May 14, 1976). Accordingly, the rule ensures that a contract’s assignee cannot demand payment unless contractual promises made to the consumer are fulfilled such that the original seller would have been entitled to payment. Final Rule, Preservation of Consumers’ Claims and Defenses: Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53,506, 53,507, 53,523 (Nov. 18, 1975) (“a consumer’s duty to pay for goods or services must not be separated from a seller’s duty to perform as promised, regardless of the manner in which payment is made”). As applied here, this means that the Bank could not demand that Ms. Epps make deficiency payments because her contract’s promise to comply with the CLEC was not

explained, were this not the rule, “assignment would be a method of shucking off contractual obligations without the consent of the obligee.” *In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951, 956–57 (7th Cir. 2003). The district court allowed precisely that result in this case by permitting the Bank to reap the benefits of its assumption of the contract—and its right, provided by Maryland law, to obtain a deficiency judgment—while also escaping its obligation to comply with the very Maryland law that conferred these benefits.

The language in Ms. Epps’s agreement also compels the conclusion that the Bank assumed Thompson Toyota Scion’s promise to comply with the CLEC. The contract provides that any “change” to its terms “must be in writing” and signed by both parties. JA 49. Under this provision, the contract’s assignment to the Bank must have included an assignment of the promise to comply with the CLEC, because Ms. Epps never agreed to any alteration of the contract’s rights and duties.

Indeed, even the Bank does not appear to have had any doubt—before this litigation—about its duty to comply with the CLEC’s post-repossession notice requirements, as each of the Bank-issued notices at issue in this case is specific to Maryland. The Notice of Our Plan To Sell Property is labeled “MD” and provides that the recipient has “additional rights under Maryland law,” including the right to reinstate the contract—a right provided by the CLEC. *Compare* JA 38 with § 12-1021(g) (explaining how consumer may “[r]esume the performance of the agreement”). Additionally, the Explanation of Calculation of Surplus or

fulfilled; as such, Thompson Toyota Scion would not have been entitled to demand payments either.

Deficiency, JA 40–41, includes, nearly verbatim, the language of § 12-1021(j)(2)(i)–(vii) of the Maryland Code. Although each of these documents was ultimately deficient because it did not provide Ms. Epps with *all* the required information, the recitation of Maryland law in the two notices demonstrate that the Bank knew it had to comply with the CLEC’s requirements.

C. Federal Law Does Not Preempt the Bank’s Voluntary Promise to Comply with the CLEC.

The district court did not disagree with Ms. Epps’s argument that her contract promised compliance with the CLEC. Nonetheless, the district court held that the Bank could disregard its promise because, under *Wells Fargo Home Mortgage v. Neal*, 922 A.2d 538 (Md. 2007), it “had no choice but to include” the provision calling for the contract to be governed by the CLEC. JA 83. This holding cannot be squared with controlling precedent.

1. Under *Wolens*, the Bank’s Voluntary Promise Is Not Preempted.

The Supreme Court has explained that the purpose of preemption doctrine is to ensure that the States do not regulate in a manner that conflicts with federal law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The doctrine is concerned with obligations imposed by state law; it does not apply to a party’s voluntary promises because such promises are “self-imposed undertakings.” *Wolens*, 513 U.S. at 228; *see also, e.g., Cipollone*, 505 U.S. at 526 n.24 (plurality op.) (“a contractual requirement, although only enforceable under state law, is not ‘imposed’ by the State, but rather is ‘imposed’ by the contracting party upon itself”); *Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Envtl. Prot.*, 208

F.3d 1, 7 (1st Cir. 2000) (“federal preemption is generally . . . not applicable to contracts and other voluntary agreements”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (“courts usually read preemption clauses to leave private contracts unaffected”).

The Supreme Court applied this principle in *American Airlines v. Wolens*, where it held that the plaintiffs could sue the airline for violating a promise pertaining to the airline’s frequent-flyer program, regardless of whether the plaintiffs’ claim might otherwise have been preempted by the Airline Deregulation Act (“ADA”). The Court explained that airlines are capable of making their own “business judgments” about what contracts to enter into and may be held “to their agreements.” *Wolens*, 513 U.S. at 229. The Court declined to read the ADA’s preemption clause as sheltering American Airlines from a suit

seeking recovery solely for the airline’s alleged breach of its own, self-imposed undertakings. . . . [P]rivately ordered obligations . . . do not amount to a State’s enactment or enforcement of any law, rule, regulation, standard or other provision having the force and effect of law within the meaning [of the ADA].

Id. at 228–29 (citation and internal quotation marks omitted). As explained by this Court in *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, when a party “*expressly agreed*” to comply with a particular law, its argument that such law is preempted “boils down to a contention that it was free to enter into a contract that invoked [the law] as the indicator of compliance, then to proceed to breach its duties thereunder and to shield its breach by pleading preemption.” *Id.* at 598 (emphasis in original).

The Maryland Court of Appeals adopted *Wolens* in *Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812, which is directly applicable to this case. In *Wells*, credit card holders sued the card issuer for breach of contract resulting from the issuer's charging interest rates higher than that provided by the agreement, increasing the interest on past balances, failing to provide the required notice of amendment, changing the method of calculating finance charges without proper notice, and increasing late and over-limit fees without proper notice. *Id.* at 815. The question before the court was whether, notwithstanding federal preemption, the issuer had voluntarily agreed to comply with state law via a contract provision, titled "Governing Law," stating that the agreement "is governed by Subtitle 9 ['Credit Grantor Revolving Credit Provisions'] of Title 12 ['Credit Regulations'] of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws." *Id.* at 814. After analyzing *Wolens* and discussing the objective standard for contract interpretation in Maryland, the court concluded that the credit card issuer had indeed contractually agreed to comply with Maryland law by virtue of this provision. *Id.* at 832.

The contract term at issue in *Wells* is almost identical to the contract term in this case. Both provisions make plain that the contract is governed by Maryland law in general and with a specific subtitle of the Maryland Commercial Law Article in particular. *Compare* JA 51 with 832 A.2d at 814. The law at issue in *Wells*—the Credit Grantor Revolving Credit Provisions—has a provision identical to the CLEC's in that a creditor may choose to proceed under this law, but if it wishes to do so it must "make a written election to that effect in the agreement

governing the plan.” Md. Code Ann., Com. Law § 12-913.1(a)(2). In neither case was the provision selecting Maryland law mandatory. The conclusion in *Wells* that the credit card issuer had agreed by contract to comply with Maryland law thus applies with equal force here.

2. The District Court Erred in Rejecting the *Wolens* Rule.

The district court in this case found that *Wolens*, *College Loan Corp.*, and *Wells* did not apply because of *Wells Fargo Home Mortgage v. Neal*, 922 A.2d 538. At issue in *Neal* was whether Wells Fargo, a mortgagee by assignment under a loan insured by the Fair Housing Administration (“FHA”) had, by contract, agreed to comply with certain regulations set forth by the United States Department of Housing and Urban Development (“HUD”). The contract in that case was an “FHA-prescribed form deed of trust” that referred to HUD regulations. *Id.* at 541. The court agreed with Wells Fargo that it had not voluntarily agreed to comply with the HUD regulations because it was “required to use a form deed of trust created by the FHA,” *id.* at 545, over the terms of which neither it nor the original mortgagee had any control. *Id.* at 546 & n.7. In contrast, the parties in *Wells* and *College Loan Corp.*, the court held, were “free to draft their . . . agreement[s] as they liked,” since in their situations “the contractual term binding the parties privately to an otherwise statutory standard of conduct was the product of a negotiation yielding a freely-entered contract.” *Id.* at 546.

This case is distinguishable from *Neal* in several key ways. Crucially, unlike in *Neal*, Maryland law did *not* require that Ms. Epps’s contract include any promise to comply with the CLEC. Credit grantors have the option of electing one

of two statutory frameworks: the CLEC and RISA, which have somewhat differing requirements.⁵ *See Biggus*, 613 A.2d at 992; Marjorie A. Corwin, *A Road Map Through Maryland's Consumer Credit Laws*, Md. Bar J., Mar./Apr. 2002, at 31 (automobile sales may be financed by either RISA *or* the CLEC; creditors determining which law to elect include “convenience of administration,” “permissible interest rates,” “flexibility of fees and charges,” and penalties). Only if a creditor wishes the contract to be governed by the CLEC—and, as the district court noted, wishes to “take advantage of CLEC’s interest rate and fee authority,” JA 83—must the creditor affirmatively elect the CLEC in the written contract. § 12-1013.1(a) (“(1) a credit grantor may at its option elect to make a loan to any borrower either pursuant to this subtitle or as otherwise permitted by applicable law. (2) In order to make a loan under this subtitle, a credit grantor shall make a written election to that effect in the agreement, note, or other evidence of the loan.”). If the creditor does not make such a written election, the contract is still valid—but it is governed by RISA rather than the CLEC. *See Corwin, supra* (a “financed sale will be governed by Subtitle 10 [the CLEC] if there is an express election of that law in the installment sales contract. Otherwise, it will be governed by RISA”).

⁵ For example, the CLEC has “more severe civil damages” than RISA, *Biggus*, 613 A.2d at 992, but offers creditors more flexibility than RISA on such issues as when a creditor may hold a private sale and where property is to be stored. *See, e.g.*, § 12-626(a) (holder must sell repossessed goods at public auction if buyer paid at least 50% of the goods’ cash price); § 12-625(a) (repossessed goods must be retained for 15 days “in the county where the goods were sold to the buyer or were repossessed”).

This critical difference makes the instant case unlike *Neal* and precisely like *Wells*. The parties in *Neal* were forced to include the reference to the FHA; here, however, the lender was free to choose between the CLEC and RISA. In this respect, the statutory provisions are just like the statute at issue in *Wells*, § 12-913.1(a), which also requires that the parties include an affirmative election in the contract if they wish to proceed under that statutory regime. The court in *Wells* had no trouble holding that the credit card issuer in that case had voluntarily agreed to comply with Maryland law.

Neal is distinguishable for a number of additional reasons as well. For example, the original contract between Ms. Epps and Thompson Toyota Scion was promulgated by the dealership and the parties could, theoretically, have negotiated it—unlike in *Neal*, where the contract was a form created and imposed by a third party. 922 A.2d at 545. The fact that the Bank did not itself negotiate the terms of the contract, *see* JA 53, but instead assumed them by assignment, cannot be determinative, or else the black-letter rule that assignees “stand in the shoes” of assignors would have no meaning. *Cf. College Loan Corp.*, 393 F.3d at 592 (defendant had acquired contract specifying compliance with particular law). Indeed, it defies the “one of the most commonsensical principles in all of contract law” to argue that a party who voluntarily signs a contract is not bound by the plain terms of that contract simply because he did not draft it. *See Walther v. Sovereign Bank*, 872 A.2d 735, 746 (Md. 2005). *Cf. id.* (a contract of adhesion—“drafted unilaterally by the dominant party and then presented on a ‘take-it-or-leave-it’ basis to the weaker party who has no real opportunity to bargain about its terms”—

is not *per se* unenforceable) (citation omitted). Moreover, the Bank voluntarily decided to purchase Ms. Epps's contract with Thompson Toyota Scion. It could have decided that the necessity of complying with the requirements of the CLEC made Ms. Epps's contract a poor investment. Instead, it made the reasoned business decision to assume the contract.

In summary, the lender in this case could have entirely omitted the contract term specifying that the contract is subject to the CLEC and still have made substantially identical loans under retail installment sales contracts. The district court therefore erred in holding that the Bank "had no choice but to include in th[e] contract a provision calling for the applicability of a particular law." JA 83. To the contrary, the Bank had numerous choices at its disposal—and faced with these options, it nevertheless made the choice to comply with the CLEC. *Neal* is distinguishable for all of these reasons.

III. THE CLEC'S POST-REPOSSESSION NOTICE REQUIREMENTS ARE NOT PREEMPTED BY THE NBA OR 12 C.F.R. § 7.4008.

The district court's dismissal of Ms. Epps's complaint was incorrect for another, independent reason: it misunderstood the extent to which both the NBA and regulations promulgated by the OCC preempt state law. Neither the NBA nor the OCC's regulation preempt the CLEC's post-repossession notice requirements.

A. The NBA Itself Does Not Preempt the CLEC's Post-Repossession Notice Requirements.

The Supreme Court has explained that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks and citation omitted). In this case, the Bank has

never even argued that Ms. Epps's claims are preempted by the congressionally enacted NBA—and for good reason.

Because the NBA contains no express preemption provision, it can preempt state law only by field preemption or conflict preemption, and it is widely agreed that the NBA does not have field-preemptive force such that states may not regulate banks at all. *See, e.g., Cuomo*, 129 S. Ct. at 2720–21 (states have always regulated national banks); *State of N.D. v. Merchants Nat'l Bank & Trust Co.*, 634 F.2d 368, 378 (8th Cir. 1980) (any finding of NBA preemption “cannot be premised on presumed intent of Congress to exclude all state legislation from the field”). Accordingly, the only potentially applicable form of preemption in this case is conflict preemption, which can arise in two ways: “from a direct conflict between state and federal law, such that compliance with both is impossible (called ‘direct conflict’), or because a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (called ‘obstacle preemption’).” *College Loan Corp.*, 396 F.3d at 596 (citations omitted).

Neither type of conflict preemption is applicable here. First, the Bank could easily have complied with both federal and state law by sending notices that complied with the CLEC, so impossibility preemption is not at issue. Second, in the context of the NBA, conflict preemption arises only when state laws “*prevent or significantly interfere* with the national bank’s exercise of its powers.” *Barnett Bank*, 517 U.S. at 33 (emphasis added). *See also Watters*, 550 U.S. at 12 (“[W]hen state prescriptions significantly impair the exercise of authority, enumerated or

incidental under the NBA, the State's regulations must give way."); *Anderson Nat'l Bank v. Lueckett*, 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions.").

Here, there is simply no basis for concluding that the CLEC's post-repossession notice requirements "significantly interfere" (or interfere at all) with the Bank's power to "loan[] money on personal security"—the only statutorily granted bank power at issue in this case. 12 U.S.C. § 24(Seventh); *see Smith v. BAC Home Loans Servicing, LP*, --- F. Supp. 2d ----, 2011 WL 843937, at *10 (S.D. W. Va. Mar. 11, 2011) (rejecting bank's assertion of preemption where it "has not adequately explained how complying with [the state law] at issue here would disrupt the workings of [its] business"). The CLEC's requirements leave banks free to make loans, to set loan terms, to purchase retail installment contracts, to collect payments, and to repossess collateral. *See* Md. Code Ann., Com. Law § 12-1021. The CLEC regulates banks' rights to claim and collect deficiency judgments, but that right is itself created by state law. *See id.*

Moreover, the factual record in this case demonstrates that compliance with the CLEC's requirements does not at all impair the Bank's lending operations. The two notices that the Bank sent to Ms. Epps were both Maryland-specific, and the Bank has never offered any indication beyond mere speculation that the state-specific notices it already sends have been burdensome to its ability to lend. Nor did it offer any indication that full compliance with the notice requirements would

be burdensome in any way. *See Atherton*, 519 U.S. at 220 (“To invoke the concept of ‘uniformity,’ however, is not to prove its need.”). It did not avail itself of the ample opportunity to put any evidence before the district court that would have provided a factual basis for the court to reach such a determination.

B. 12 C.F.R. § 7.4008 Does Not Preempt the CLEC’s Post-Repossession Notice Requirements.

Just as the CLEC’s debt-collection provisions are not preempted by the NBA itself, they are also not preempted by 12 C.F.R. § 7.4008. First, § 7.4008 does not preempt state debt-collection law, and the regulation’s savings clause expressly preserves state debt-collection law from preemption. Second, even if the language of the regulation were not so clear, it still would not apply because the OCC intended the preemptive scope of § 7.4008 to extend no farther than the NBA itself, and the CLEC’s post-repossession notice provisions are not preempted by the statute. Finally, even if § 7.4008 could somehow be read as expressing the OCC’s conclusion that post-repossession notice requirements are preempted (which it cannot), that conclusion is not entitled to deference and should be rejected.

1. The plain language of § 7.4008 shows that the CLEC’s requirements are not preempted.

- a. The CLEC’s post-repossession notice requirements do not regulate banks’ ability to lend under § 7.4008(d)(2).

The OCC promulgated § 7.4008, which is titled “Lending,” to protect banks’ enumerated power to “loan[] money on personal security.” 12 U.S.C.

§ 24(Seventh); Final Rule, 69 Fed. Reg. at 1904 (regulation addresses effect of

state laws on “national banks’ lending” activities). As a result, the types of state laws listed as preempted in § 7.4008(d)(2) are preempted only to the extent that they affect banks’ ability to “make non-real estate loans.” § 7.4008(d)(2); *see also* OCC Interpretive Ltr. No. 1005, at 1 (describing § 7.4008(d)(2) as preempting certain state laws “pertaining to making loans”). The CLEC’s post-repossession notice requirements do not fall within this category because they regulate debt collection, not lending, and debt collection has always been understood to be an area left to the states.

Section 7.4008 draws a sharp distinction between debt collection and lending: much of state lending regulation is preempted, *see* § 7.4008(d), while debt-collection laws are expressly preserved from preemption by the regulation’s savings clause. § 7.4008(e)(4); *see also* Statement of John D. Hawke, Jr., Comptroller of the Currency, before the S. Comm. on Banking, Hous. and Urban Affairs, on Federal Preemption of State Laws, Washington, D.C., April 7, 2004, 23 OCC Q.J. 69, 2004 WL 3418806, at *2–*3 [hereinafter Hawke Statement] (the OCC’s rules preempt some state laws that apply to national banks’ “lending and deposit-taking activities” but state laws on “rights to collect debts” are not preempted). As one district court explained, a debt-collection regulation, unlike a lending regulation, “does not come into play until after a loan is made or credit otherwise extended, and . . . does not affect the manner in which the lender services or maintains the loan.” *Alkan v. Citimortgage, Inc.*, 336 F. Supp. 2d 1061, 1064 (N.D. Cal. 2004) (citation omitted); *see also Flanagan v. Germania, F.A.*,

872 F.2d 231, 234 (8th Cir. 1989) (also distinguishing between lending regulation and regulation of “collection practices”).

The distinction drawn in § 7.4008 between debt-collection regulations and lending regulations makes sense because lending is among banks’ enumerated powers, *see* 12 U.S.C. § 24(Seventh), while banks’ debt-collection practices are not regulated by the NBA and have been left to the control of state law since the creation of the NBA. As stated by the Supreme Court in 1869, national banks are

subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed by state law. Their acquisition and transfer of property, their *right to collect their debts*, and their ability to be sued for debts, are all based on State law.

Nat’l Bank, 76 U.S. at 362 (emphasis added); *see also, e.g., Atherton*, 519 U.S. at 222–23 (same); *Bank of Am.*, 309 F.3d at 559 (same). In promulgating § 7.4008, the OCC stated that it intended to preempt only those types of state law for which there was “substantial precedent” to support a finding of conflict with the NBA—not categories of state law, like debt collection, where all precedent goes the other way. OCC Interpretive Ltr. No. 1005, at 1; Hawke Statement, at *2.

With these principles in mind, it is clear that the CLEC’s post-repossession notice requirements regulate debt collection, not lending. As the Maryland Court of Special Appeals has explained, the CLEC places at issue a creditor’s “*debt collection practices . . . because proper notice was a condition precedent to recovery.*” *Green*, 828 A.2d at 836 (emphasis added). The CLEC’s post-repossession notice requirements do not regulate any aspect of the offer of credit, the terms of credit, or the parties’ pre-default credit relationship. *Cf., e.g., Rose v.*

Chase Bank USA, N.A., 513 F.3d 1032, 1037 (9th Cir. 2008) (holding preempted a state statute that regulated banks' offer of credit, because it interfered with banks' lending operations). Instead, they apply to post-repossession notice, which is sent long after credit has been extended—indeed, after the consumer has defaulted under his contract, when the parties' credit relationship has broken down and the contract's creditor is trying to collect what it is owed. *See* Md. Code Ann., Com. Law § 12-1021; *see also* JA 50 (Ms. Epps's contract, making clear that post-repossession notice is sent only after the consumer has "default[ed]," when the creditor is trying to collect "the amount you owe"). The entire purpose of the sections of the CLEC on which Ms. Epps relies is to regulate creditors' ability to collect deficiency debts and deficiency judgments. *See* § 12-1021(k)(4); *Green*, 828 A.2d at 836 (creditor "would have had no right to collect any deficiency judgment if, as alleged, it routinely sent invalid notices or if their notice was otherwise improper"); *Md. Nat'l Bank v. Darovec*, 820 F. Supp. 1083, 1089 (N.D. Ill. 1993) ("Maryland law requires a finding that no deficiency judgment is available against defendants by virtue of [bank's] failure to explicitly comply with statutory notice and sale procedures of the Maryland Commercial Code.").

In short, because the CLEC's post-repossession notice requirements regulate debt collection, rather than lending, they do not affect banks' power to "make . . . loans" within the meaning of § 7.4008(d)(2) and are thus not preempted by that section. The district court did not consider the inherent distinction between debt

collection and lending or the century of case law supporting that distinction.⁶

- b. The CLEC's post-repossession notice requirements do not regulate "credit-related documents" under § 7.4008(d)(2)(viii)

The district court's application of § 7.4008(d)(2) was flawed in a second respect as well. The district court focused on paragraph (d)(2)(viii), which preempts state laws that affect lending by regulating the content of "credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents." Contrary to the district court's conclusion, JA 74–75, the post-repossession notices required by the CLEC are not "credit-related documents" within the meaning of this paragraph.

It is axiomatic that "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (citation omitted); *see also, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) ("a word is known by the company it keeps") (citation omitted). All of the documents listed in § 7.4008(d)(2)(viii)—"credit application forms, credit solicitations, billing statements, credit contracts"—pertain either to banks' initial extension of credit or to the terms of credit. A post-repossession notice, by contrast, has nothing to do with an application for credit or the terms of credit. Instead, it is part of the debt-

⁶ Instead, the district court rejected Ms. Epps's explanation of how the CLEC's requirements concern debt collection by concluding that they more than "incidentally affect" banks' lending operations. JA 80. As will be shown *infra* Part III.B.1.c, the court's understanding of "incidentally affect" is incorrect.

collection process, which begins only after default and after the parties' credit relationship has broken down. None of the documents listed in § 7.4008(d)(2)(viii) has anything to do with debt collection.

Section 7.4008 does include one specific reference to state debt-collection regulation—but only in its savings clause, which expressly preserves state debt-collection law from preemption. § 7.4008(e)(4). This specific reference to debt collection demonstrates that the OCC knows exactly how to refer to state debt-collection law and that it could easily have mentioned collection-related documents by name in § 7.4008(d)(2)(viii). *Cf.* 12 C.F.R. § 590.4(h) (another federal regulation, governing thrifts, which refers explicitly to repossession notice in the housing context). The fact that it did not confirms that such documents are not covered by paragraph (d)(2)(viii). *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (declining to give statute meaning not clearly expressed when “Congress knew how” to convey that meaning if “it wanted to”).

The district court's broad interpretation of § 7.4008(d)(2)(viii) also conflicts with the OCC's understanding of its own regulation. The OCC has stated that state laws incorporating the Uniform Commercial Code (“UCC”) are not preempted, *see* OCC Interpretive Ltr. No. 1005, at 2, and Maryland's version of the UCC—just like the model UCC and the CLEC—regulates the contents of post-repossession notices. *See* Md. Code Ann., Com. Law §§ 9-613, 9-614 (dictating the contents of

post-repossession notices in secured transactions not subject to the CLEC); UCC §§ 9-613, 9-614 (model code, same). Under the district court’s analysis, these provisions of the Maryland UCC would necessarily also be preempted as “credit-related documents,” notwithstanding the OCC’s clear intention that the NBA not preempt the UCC.

In nevertheless concluding that a post-repossession notice is a “credit-related document[],” the district court relied on *Aguayo v. U.S. Bank*, 658 F. Supp. 2d 1226, 1233 (S.D. Cal. 2009), *appeal pending*, which cited only one case for this point: *Crespo v. WFS Financial Inc.*, 580 F. Supp. 2d 614 (N.D. Ohio 2008). *Crespo*’s analysis is inapplicable, however, because that case involved a different regulation, 12 C.F.R. § 560.2, promulgated by a different agency, the Office of Thrift Supervision (“OTS”), operating under a different preemption framework. OTS’s regulation governs federal thrifts, not national banks, and it implements a statute—the Home Owners’ Loan Act (“HOLA”), 12 U.S.C. § 1461 *et seq.*—that preempts the entire field of regulation, whereas the NBA leaves much bank regulation to the States. *Compare* 12 C.F.R. § 560.2(a) (occupying the field) *with, e.g.*, Final Rule, 69 Fed. Reg. at 1910–11 (declining to occupy the field), *and Cuomo*, 129 S. Ct. at 2720–21 (national banks are subject to state laws). Most importantly, the OTS’s regulation does not draw the same distinction between lending regulation and debt-collection regulation that is clear in 12 C.F.R.

§ 7.4008. *See* 12 C.F.R. § 560.2(c) (OTS savings clause, which does not explicitly preserve debt-collection law). Given this key difference, numerous courts have explained that it is inappropriate “to import wholesale the HOLA and OTS analysis into the context of NBA and OCC preemption.” *See, e.g., Smith*, 2011 WL 843937, at *8. *Aguayo*’s application of 12 C.F.R. § 560.2 thus has no bearing on § 7.4008 and this case.

- c. The CLEC’s post-repossession notice requirements are not preempted because, under § 7.4008(e), they are debt-collection regulations that only incidentally affect lending.

The district court made an additional mistake in applying § 7.4008, in that it failed properly to consider the regulation’s savings clause, which expressly preserves state laws that regulate debt collection and “only incidentally affect” bank lending. § 7.4008(e)(4). The CLEC provisions at issue here are such a law.

In promulgating § 7.4008, the OCC expressly preserved state laws that regulate banks’ “rights to collect debts.” § 7.4008(e)(4). The purpose of this clause was to ensure consistency with more than 100 years of case law, as the Supreme Court, this Court, and others have all held repeatedly that state debt-collection regulation is not preempted by the NBA. *See, e.g., supra* Part III.B.1.a. The OCC could not have been clearer, in promulgating § 7.4008, that it intended the regulation not to establish a new preemption standard but instead to be “entirely consistent with” and serve as a “distillation” of this existing law on NBA preemption. *See* Final Rule, 69 Fed. Reg. at 1910; Hawke Statement, at *2.

Maryland's CLEC undoubtedly regulates creditors' "rights to collect debts" within the meaning of the OCC's savings clause. Md. Code Ann., Com. Law § 12-1021 imposes requirements on creditors with which they must comply in order to collect deficiency debts. *See also, e.g., Green*, 828 A.2d at 836. These provisions are nothing if not regulations of creditors' right to collect; if creditors do not comply, they may not collect the debt.

It is equally clear that the CLEC's notice requirements at most "only incidentally affect" bank lending within the meaning of the second prong of the OCC's savings clause.⁷ Shortly after the OCC promulgated § 7.4008, the Comptroller explained that the regulation's savings clause was intended to preserve "undiscriminating" state laws "that form the legal infrastructure for conducting a banking or other business"—*i.e.*, state laws that do not discriminate against banks and that instead apply equally to banks and other businesses. Hawke Statement, at *3; *see also* Final Rule, 69 Fed. Reg. at 1910–11, 1913.

"Incidentally affect" thus refers to an antidiscrimination principle, rather than the degree to which lending is affected.⁸ Under this test, a state statutory provision is

⁷ Comptroller Hawke suggested that the "incidentally affect" language was not intended to impose an additional or separate requirement on the categories of state law listed as preserved from preemption in § 7.4008(e). *See* Hawke Statement, 2004 WL 3418806, at *3 (describing debt-collection law as simply "not preempted" and describing the "incidentally affect" language as preserving "other law," not explicitly listed in the regulation, that also does not discriminate against banks or bank powers). But even if the Court considers the "incidentally affect" language as imposing an additional requirement, that requirement is satisfied here.

⁸ A contrary rule—interpreting "incidentally affect" to measure the degree to which a state law affects banks—would have the perverse result of preserving state laws only when those laws provide consumers minimal benefit. For example, if a contract that would be saved from preemption by § 7.4008(e)(1) involved

not preempted if its impact on banks or bank lending “is incidental to the [state] statute’s primary purpose.” *Binetti v. Wash. Mut. Bank, FA*, 446 F. Supp. 2d 217, 221 (S.D.N.Y. 2006) (construing another regulation that uses the same language).⁹ Moreover, the Supreme Court in *Cuomo* called into question the validity of the OCC’s “legal infrastructure” distinction, which “rest[s] upon neither the text of the regulation nor the text of the statute” and “attempts to do what Congress declined to do: exempt national banks from all state banking laws.” 129 S. Ct. at 2720.

The CLEC’s post-repossession notice requirements fit easily within the OCC’s “incidentally affect” language. They do not discriminate against banks. Instead, they apply equally to all businesses, of whatever form, that choose to offer credit under this particular statutory regime—including, for example, the dealer who sold Ms. Epps her car. *See* Md. Code Ann., Com. Law § 12-1001(g)(1) (defining “credit grantor” as “any individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity making a loan or other extension of credit under this subtitle”). Nor are the CLEC’s post-repossession notice requirements intended to target any statutorily authorized bank power, as

substantial sums of money, a bank could break that contract with impunity by arguing that it more than “incidentally affects” lending.

⁹ This understanding of “incidentally affect” is consistent with case law in a variety of other contexts where the same phrase has been interpreted and applied. *See, e.g., Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 275 (1993) (act “incidentally affects” a protected right if it is not “aimed at” that right); *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1261–62 (4th Cir. 1995) (state law only “incidentally affects” interstate commerce if it “regulates evenhandedly” and does not “discriminate” against out-of-state interests).

they regulate debt collection, not lending, and the NBA has always been interpreted to leave banks' debt-collection practices subject to state control.

Ultimately, the CLEC's notice requirements have the kind of tangential relationship to banks and banking that is the very definition of "incidentally affect." It is possible that they may have some effect on banks because they apply generally to all contract holders, but that is true of any state law that forms part of the "legal infrastructure." Final Rule, 69 Fed. Reg. at 1912; *see also McClellan*, 164 U.S. at 358 (national banks remain subject to generally applicable contract law even though such law, "in the broadest sense," may impose a "restraint upon the power of a national bank"). The district court's contrary view of "incidentally affects"—for which the court cited no authority—is, respectfully, incorrect. *See* JA 80.

2. Section 7.4008 does not preempt the CLEC's post-repossession notice requirements because those requirements are not preempted by the NBA itself.

As explained above, the CLEC's post-repossession notice requirements are not preempted under the plain language of § 7.4008. But even if that language were less clear, § 7.4008 could not properly be applied here because the OCC intended the preemptive scope of its regulation to extend no farther than the NBA itself, and the NBA does not preempt the CLEC's post-repossession notice requirements.

In promulgating § 7.4008, the OCC was careful to explain that it intended the regulation to be merely as a "distillation" of controlling case law, not a new

preemption standard. Final Rule, 69 Fed. Reg. at 1910.¹⁰ For precisely this reason, one recent and well-reasoned district court opinion rejected a bank's assertion that the OCC's parallel regulation on real-estate lending expressly preempted the plaintiff's state-law claims. To the contrary, the court held that "only conflict preemption applies," because "all the OCC set out to do in adopting [the regulation] was to codify the principles of NBA conflict preemption that had percolated throughout the federal courts over several decades." *Smith*, 2011 WL 843937, at *9. Put another way, "while the OCC's regulation may be a helpful tool in distilling 150 years' worth of NBA preemption jurisprudence, it is not the actual stuff from which" preemption arises. *Id.* at *10.

In this case, as explained *supra* Part III.A, the CLEC's post-repossession notice requirements are not preempted under the traditional NBA conflict-preemption test. These requirements do not significantly interfere with banks' statutorily granted power to lend money on personal security, and the Bank has offered no indication that the Maryland-specific notices it already sends consumers in any way impact its lending operations.

¹⁰ That conflict preemption in general—and the *Barnett Bank* language in particular—is the proper test for preemption under the NBA and OCC regulations was recently confirmed by Congress's passage of Dodd-Frank, which explicitly states that under the NBA, state consumer financial laws are preempted "only if, . . . in accordance with *Barnett Bank* . . . the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." Dodd-Frank § 1044. *Barnett Bank* makes plain that the NBA has always had this meaning; Dodd-Frank merely underscores the point. *See Loving*, 517 U.S. at 770 ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction") (citation omitted).

3. Even if § 7.4008 could be read as expressing the OCC’s conclusion that the CLEC’s post-repossession notice requirements are preempted, that conclusion is not entitled to deference and should be rejected.

The Supreme Court explained in *Wyeth v. Levine* that agency preemption of state law can arise under two circumstances. In the first, Congress has authorized an agency to issue substantive regulations whose content preempts state law. 129 S. Ct. at 1200. A court will ordinarily defer to the substance of such a regulation while conducting its own conflict-preemption determination that “rel[ies] on the substance of state and federal law and not on agency proclamations of preemption.” *Id.* at 1200–01. The Court listed as illustrations three statutes that give agencies authority to preempt state law. *Id.* at 1201 n.9 (citing delegations of preemptive authority to the FCC, the Department of the Interior, and the Department of Transportation). Notably, in contrast to those three examples, Congress has never given the OCC any independent authority to preempt state law. *Compare, e.g.*, 47 U.S.C. § 253 (authorizing the FCC to preempt state law) *with* 12 U.S.C. §§ 43(a), 93a (referring to preemption and authorizing OCC to promulgate rules, but not authorizing it to preempt); *see also* Remarks of Comptroller John D. Hawke, Jr., Before Women in Hous. & Fin. (Feb. 12, 2002), *reprinted in* 2 OCC Q.J. 23 (“the OCC has no self-executing power to preempt state law”).

The second kind of regulation described in *Wyeth* is one that merely states an agency’s *legal conclusions* regarding preemption—and an agency’s “mere assertion that state law is an obstacle to achieving its statutory objective” is not entitled to deference. 129 S. Ct. at 1201. To the contrary, because “agencies have

no special authority to pronounce on pre-emption absent delegation by Congress,” courts look to “an agency’s explanation of how state law affects the regulatory scheme.” *Id.* The weight to be given to the agency’s explanation “depends on its thoroughness, consistency, and persuasiveness.” *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In *Wyeth*, as in this case, only the second type of regulation is at issue, and the Court there was not persuaded by the FDA’s explanation of why state law was preempted. *See id.* at 1201–02. The outcome should be the same here. Section 7.4008 does not provide *any* explanation—let alone a thorough explanation—of how post-repossession notice requirements like those in the CLEC “affect the regulatory scheme.” Even if it had, such an explanation would not be consistent with the savings clause in the regulation itself, which preserves debt-collection law from preemption, § 7.4008(e)(4), or with the OCC’s statements that it did not intend to preempt any state laws that are not preempted by the NBA itself. Final Rule, 69 Fed. Reg. at 1910.

Moreover, any such explanation would not be persuasive, because for more than a century, the NBA has been held to preempt only those state laws that “prevent or significantly interfere with the national bank’s exercise of its powers,” *Barnett Bank*, 517 U.S. at 34, and has been held not to preempt state debt-collection laws. *Atherton*, 519 U.S. at 223. Additionally, as discussed *supra* Part I, any suggestion by the OCC that the NBA preempts the post-repossession notice requirements in the CLEC would also run counter to the longstanding presumption

against preemption of state laws in fields that states have “traditionally occupied,” *see Anderson*, 508 F.3d at 192, and where wiping out state law would leave individuals with no remedy. *See Worm*, 970 F.2d at 1308.

IV. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE PORTIONS OF MS. EPPS’S COMPLAINT THAT DO NOT RELY ON THE CLEC.

In dismissing Ms. Epps’s case, the district court failed to consider two additional components of her complaint: her claim under Maryland’s Consumer Protection Act and her claim for unjust enrichment.

A. Ms. Epps Adequately Pleaded a Claim Under Maryland’s Consumer Protection Act.

The district court erred in not considering Ms. Epps’s separate claim for a violation of the CPA, even though Ms. Epps’s complaint adequately alleges both an unfair or deceptive trade practice and damages.

The CPA prohibits “any . . . [f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers.” § 13-301(1). The notices that the Bank sent to Ms. Epps are precisely the kind of misleading statements barred by the CPA; they falsely inform Ms. Epps that she owes a deficiency judgment and assorted other fees, when in fact the Bank is not entitled to those payments. The notices thus have the effect of misleading their recipients into making payments that they do not owe, in violation of the CPA. JA 31–32.¹¹

¹¹ The Bank also argued below that a CPA claim cannot be predicated on a violation of the CLEC because the CLEC is not among the statutes identified as *per se* violations of the CPA in § 13-301(14). This argument is equally without

Additionally, in the district court, the Bank argued that Ms. Epps failed to adequately plead damages as part of her CPA claim. The district court did not cite or accept this argument, which is without merit. Ms. Epps alleged that the Bank unlawfully “assessed, demanded, and collected” payments from Ms. Epps and the putative class to which it was not entitled. JA 21–22. She also alleged that the Bank made false and misleading reports to credit reporting agencies regarding her account and the accounts of other class members. JA 32. These allegations stated a plausible damages claim. To the extent that this Court holds that further factual allegations are required, the proper response would be to remand with allowance for Ms. Epps to amend her complaint, rather than to dismiss the claim in its entirety. *See Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 769 (4th Cir. 2011) (leave to amend should be freely granted under Fed. R. Civ. P. 15(a)(2)).

B. Ms. Epps Adequately Pleaded a Claim for Unjust Enrichment.

Similarly, Ms. Epps’s complaint pleaded a claim for unjust enrichment arising out of the Bank’s retention of deficiency judgment payments, interest, fees, and other payments to which it was not entitled as a result of its violations of the CLEC. JA 30–31.

Under Maryland law, a claim for unjust enrichment consists of three elements: (1) a “benefit conferred upon the defendant by the plaintiff”; (2) an

merit. The first subparagraph of § 13-301(14) provides that “[u]nfair or deceptive trade practices include any . . . [v]iolation of a provision of [] *this title*.” § 13-301(14)(i) (emphasis added). As explained above, the Bank violated § 13-301(1) by making false and misleading statements.

“appreciation or knowledge by the defendant of the benefit”; and (3) “[t]he acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.” *Hill v. Cross Country Settlements, LLC*, 936 A.2d 343, 351 (Md. 2007). Unjust enrichment arises out of the fact that a “person who receives a benefit by reason of an infringement of another person’s interest, or of loss suffered by the other,” ought not be allowed to retain that benefit. *Berry & Gould, P.A. v. Berry*, 757 A.2d 108, 113 (Md. 2000) (citation omitted). *See also, e.g., Mass Transit Admin. v. Granite Constr. Co.*, 471 A.2d 1121, 1126 (Md. Ct. Spec. App. 1984) (“The restitution claim . . . is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep.”).

Ms. Epps’s complaint alleges each of the elements of an unjust enrichment claim. In particular, it alleges that the Bank unlawfully “assessed, demanded, and collected” deficiency payments from Ms. Epps and the putative class that were not owed. JA 21–22. As a result, Ms. Epps has adequately pleaded that the Bank has received a benefit from Ms. Epps and the putative class to which it is not entitled.

Moreover, while Ms. Epps cannot prevail on *both* her claim for unjust enrichment and her claim for breach of contract absent an allegation of fraud or bad faith, *County Comm’rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 608–09 (Md. 2000), nothing prevents her from pleading her claims in the alternative. *See RaceRedi Motorsports, LLC v. Dart Machinery, Ltd.*, 640 F. Supp. 2d 660, 666 (D. Md. 2009) (permitting party to plead both breach of contract and unjust enrichment in the alternative); Fed. R. Civ. P. 8(d)(2) (“[a] party may

set out 2 or more statements of a claim or defense alternatively or hypothetically”).

Therefore, she need not allege fraud or bad faith.

The district court erred by not addressing Ms. Epps’s claim for unjust enrichment.

CONCLUSION

For the foregoing reasons, the district court’s decision should be reversed.

DATE: April 21, 2011

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34, Plaintiff-Appellant Donna Epps respectfully requests oral argument. This case presents an important issue for consumers nationwide: whether the NBA and regulations promulgated by the OCC preempt consumer protections afforded by state debt-collection law, even when a national bank has expressly agreed to comply with state law. Under the district court's decision, a bank—merely by virtue of its federal charter—can enjoy benefits provided by state law without providing the consumer protections on which the state legislature expressly conditioned those benefits.

The question at issue in this case is a complex one. It involves more than a century of case law on the NBA as well as the relatively recent decision by the OCC to write a regulation that purports to expand the scope of its preemptive power, despite the lack of any congressional authorization for it to do so. As a result, it implicates numerous recent Supreme Court decisions, most notably *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187 (2009), and *Cuomo v. The Clearing House Ass'n, L.L.C.*, --- U.S. ----, 129 S. Ct. 2710 (2009). Additionally, this issue is arising across the country, but district courts are lacking needed guidance; while the question is currently pending before the Ninth Circuit in *Aguayo v. U.S. Bank*, No. 09-56679, no Court of Appeals has yet ruled on the issue.

In light of the far-reaching implications of the Bank's argument, Ms. Epps respectfully requests the opportunity to present oral argument in this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 13,404 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a 14-point proportionally spaced typeface using Microsoft Word.

Date: April 21, 2011

Public Justice, P.C.

/s/ F. Paul Bland

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on April 21, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

Date: April 21, 2011

Public Justice, P.C.

/s/ F. Paul Bland

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ADDENDUM

12 U.S.C. § 24..... A-2
12 C.F.R. § 7.4008 A-3
12 C.F.R. § 560.2 A-5
Md. Code Ann., Com. Law § 12-1021 A-7

12 U.S.C. § 24
(excerpt)

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power--

...

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

12 C.F.R. § 7.4008

- (a) Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.
- (b) Standards for loans. A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.
- (c) Unfair and deceptive practices. A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this § 7.4008.
- (d) Applicability of state law.
 - (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.
 - (2) A national bank may make non-real estate loans without regard to state law limitations concerning:
 - (i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;
 - (ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;
 - (iii) Loan-to-value ratios;
 - (iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called

due and payable upon the passage of time or a specified event external to the loan;

- (v) Escrow accounts, impound accounts, and similar accounts;
 - (vi) Security property, including leaseholds;
 - (vii) Access to, and use of, credit reports;
 - (viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;
 - (ix) Disbursements and repayments; and
 - (x) Rates of interest on loans.
- (e) State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:
- (1) Contracts;
 - (2) Torts;
 - (3) Criminal law;
 - (4) Rights to collect debts;
 - (5) Acquisition and transfer of property;
 - (6) Taxation;
 - (7) Zoning; and
 - (8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

12 C.F.R. § 560.2

- (a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 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:
- (1) Licensing, registration, filings, or reports by creditors;
 - (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;
 - (3) Loan-to-value ratios;
 - (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;
 - (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;
 - (6) Escrow accounts, impound accounts, and similar accounts;
 - (7) Security property, including leaseholds;

- (8) Access to and use of credit reports;
 - (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;
 - (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;
 - (11) Disbursements and repayments;
 - (12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and § 560.110 of this part; and
 - (13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.
- (c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:
- (1) Contract and commercial law;
 - (2) Real property law;
 - (3) Homestead laws specified in 12 U.S.C. 1462a(f);
 - (4) Tort law;
 - (5) Criminal law; and
 - (6) Any other law that OTS, upon review, finds:
 - (i) Furthers a vital state interest; and
 - (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

Md. Code Ann., Com. Law § 12-1021

- (a)
 - (1) A credit grantor may repossess tangible personal property securing a loan under an agreement, note, or other evidence of the loan if the consumer borrower is in default.
 - (2) The credit grantor may repossess tangible personal property from a consumer borrower only by:
 - (i) Legal process; or
 - (ii) Self-help, without use of force.
- (b) Nothing in this section authorizes a violation of criminal law.
- (c)
 - (1) At least 10 days before a credit grantor repossesses any tangible personal property, the credit grantor may serve a written notice on the consumer borrower of the intention to repossess the tangible personal property.
 - (2) The notice shall:
 - (i) State the default and any period at the end of which the tangible personal property will be repossessed; and
 - (ii) Briefly state the rights of the consumer borrower in case the tangible personal property is repossessed.
- (d) The notice may be delivered to the consumer borrower personally or sent to him at his last known address by registered or certified mail.
- (e) Within 5 days after the credit grantor repossesses the tangible personal property the credit grantor shall deliver to the consumer borrower personally or send to him at his last known address by registered or certified mail, a written notice which briefly states:
 - (1) The right of the consumer borrower to redeem the tangible personal property, and the amount payable for it;
 - (2) The rights of the consumer borrower as to a resale, and his liability for a deficiency; and
 - (3) The exact location where the tangible personal property is stored and the address where any payment is to be made.

- (f) For 15 days after the credit grantor gives the notice required by subsection (e) of this section, the credit grantor shall retain any repossessed property.
- (g) During the period provided for in subsection (f) of this section, the consumer borrower may:
 - (1) Redeem and take possession of the property; and
 - (2) Resume the performance of the agreement.
- (h) To redeem the property, the consumer borrower shall:
 - (1) Tender the amount due under the agreement at the time of redemption, without giving effect to any provision which allows acceleration of any installment otherwise payable after that time;
 - (2) Tender performance of any other promise for the breach of which the property was repossessed; and
 - (3) If the discretionary notice provided for in subsection (c) of this section was given, pay the actual and reasonable expenses of retaking and storing the property.
- (i)
 - (1) Notwithstanding subsections (g) and (h) of this section, the credit grantor shall have the right to require the consumer borrower to tender payment of the entire balance due under the agreement if:
 - (i) The date of the default in the payments due under the agreement that led to the present repossession occurred within 18 months after the last repossession; or
 - (ii) The consumer borrower was guilty of fraudulent conduct, intentionally and wrongfully concealed, removed, damaged, or destroyed the property, or attempted to do so, and the property was repossessed because of that conduct.
 - (2) Under paragraph (1) of this subsection, the payment by the consumer borrower of the entire balance due under the agreement shall:
 - (i) Constitute redemption by the consumer borrower; and
 - (ii) Entitle the consumer borrower to take possession of the property.

- (j)
 - (1)
 - (i) Subject to subsection (1) of this section, the credit grantor shall sell the property that was repossessed at:
 - 1. Subject to paragraph (2) of this subsection, a private sale; or
 - 2. A public auction.
 - (ii) At least 10 days before the sale, the credit grantor shall notify the consumer borrower in writing of the time and place of the sale, by certified mail, return receipt requested, sent to the consumer borrower's last known address.
 - (iii) Any sale of repossessed property must be accomplished in a commercially reasonable manner.
 - (2) In all cases of a private sale of repossessed goods under this section, a full accounting shall be made to the borrower in writing and the seller shall retain a copy of this accounting for at least 24 months. This accounting shall contain the following information:
 - (i) The unpaid balance at the time the goods were repossessed;
 - (ii) The refund credit of unearned finance charges and insurance premiums, if any;
 - (iii) The remaining net balance;
 - (iv) The proceeds of the sale of the goods;
 - (v) The remaining deficiency balance, if any, or the amount due the buyer;
 - (vi) All expenses incurred as a result of the sale;
 - (vii) The purchaser's name, address, and business address;
 - (viii) The number of bids sought and received; and
 - (ix) Any statement as to the condition of the goods at the time of repossession which would cause their value to be increased or decreased above or below the market value for goods of like kind and quality.

- (3) The Commissioner of Financial Regulation may make a determination concerning any private sale that the sale was not accomplished in a commercially reasonable manner. Upon that determination, the Commissioner may enter an order disallowing any claim for a deficiency balance.
- (k)
- (1) The provisions of this subsection apply to a public sale of property which secured a loan in excess of \$2,000 at the time the loan was made.
 - (2) The proceeds of a sale to which this subsection applies shall be applied, in the following order, to:
 - (i) The actual and reasonable cost of the sale;
 - (ii) The actual and reasonable cost of retaking and storing the property; and
 - (iii) The unpaid balance owing under the agreement at the time the property was repossessed.
 - (3) The credit grantor shall furnish to the consumer borrower a written statement which shows the distribution of the proceeds.
 - (4) If the provisions of this section, including the requirement of furnishing a notice following repossession, are not followed, the credit grantor shall not be entitled to any deficiency judgment to which he would be entitled under the loan agreement.
- (l)
- (1)
 - (i) In this subsection, “consumer goods” means tangible personal property used or bought for use primarily for personal, family, or household purposes that is:
 1. Movable at the time a security interest attaches; or
 2. A fixture.
 - (ii) “Consumer goods” does not include money, documents, instruments, accounts, chattel paper, or general intangibles.
 - (2) This subsection applies to tangible personal property securing a loan that:

- (i) Has been repossessed by the credit grantor; or
 - (ii) Is in actual or constructive possession of the credit grantor where the perfection of the security interest in the property depends on the possession of the property.
- (3) In the case of a purchase money security interest in consumer goods, if a consumer borrower has paid 60 percent of the cash price or 60 percent of the loan in the case of another security interest in consumer goods and, after default, has not signed a statement renouncing or modifying the consumer borrower's rights under this subsection, a credit grantor who has repossessed the consumer goods must take reasonable action within 90 days after the repossession to commence disposal of them in the manner provided under subsection (j) of this section.
- (4)
- (i) In any other case involving tangible personal property securing a loan, a credit grantor may, after default, propose to retain the property in full satisfaction of the obligations of the borrower under the loan.
 - (ii) If, as authorized by subparagraph (i) of this paragraph, a credit grantor proposes to retain property in full satisfaction of the obligations of the borrower under the loan, the credit grantor shall send written notice of the proposal to:
 - 1. The consumer borrower; and
 - 2. Except in the case of consumer goods, any other person who has a security interest in the property and who:
 - A. Has duly filed a financing statement indexed in the name of the consumer borrower in this State; or
 - B. Is known by the credit grantor to have a security interest in the property.
 - (iii)
 - 1. If the consumer borrower or other person entitled to receive notification objects in writing within 30 days from the sending of the notification, the credit grantor must take reasonable action to dispose of the property in the manner provided under subsection (j) of this section.

2. In the absence of written objection, the credit grantor may retain the property in full satisfaction of the outstanding unpaid indebtedness under the loan.
- (5) If despite complying with the requirements of this section there is no sale of tangible personal property securing a loan under subsection (j) of this section:
- (i) The credit grantor may retain the property without obligation to account to the borrower; and
 - (ii) If the property is retained, all obligations of the borrower under the loan shall be discharged.