

IN THE COURT OF APPEALS OF MARYLAND

No. 148
September Term, 2004

LINDA SWEENEY,

Appellant,

v.

SAVINGS FIRST MORTGAGE, LLC,

Appellee.

On Writ of Certiorari to the Circuit Court for Frederick County

APPELLANT'S REPLY BRIEF

F. Paul Bland, Jr.
Trial Lawyers for Public Justice
1717 Massachusetts Ave., NW
Suite 800
Washington, D.C. 20036-2001
(202) 797-8600

Scott C. Borison
Douglas B. Bowman
Legg Law Firm, LLC
5500 Buckeystown Pike
Frederick, MD 21703
(301) 620-1016

Leslie A. Bailey
(admitted *pro hac vice*)
Trial Lawyers for Public Justice
555 Twelfth Street, Suite 1620
Oakland, CA 94607-3616
(510) 622-8150

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	4
I. DIDMCA PREEMPTION DOES NOT EXTEND TO SAVINGS FIRST BECAUSE SAVINGS FIRST IS NOT A QUALIFIED LENDER.....	4
A. DIDMCA Preemption Extends Only To Qualified Lenders.....	4
1. DIDMCA’s Own Terms and Statutory Structure Limit Preemption to Qualified Lenders.	5
2. The Legislative History and Subsequent Interpretations of DIDMCA Make Clear That Preemption Does Not Extend to Mortgage Brokers.....	9
3. No Judicial Precedent Exists for Extending DIDMCA Preemption to Mortgage Brokers.	16
B. It Is Undisputed That Savings First Is Not A Qualified Lender.	18
II. DIDMCA DOES NOT PREEMPT STATE LAWS REGULATING BORROWER-PAID MORTGAGE BROKER’S FEES.....	19
III. SAVINGS FIRST’S FACTUAL AND POLICY ARGUMENTS LACK MERIT.....	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<i>Bates v. Dow Agrosciences LLC</i> , 125 S. Ct. 1788, 2005 WL 957193 (April 27, 2005).....	7, 10, 23
<i>Brown v. ACE Cash Express</i> , Case No. 01-2674 (D. Md. Nov. 14, 2001).....	17
<i>Brown v. Investors Mortgage Co.</i> , 121 F.3d 472 (9th Cir. 1997)	1, 16
<i>Bumpers v. Bank One</i> , 2003 WL 22119929 (N.D. Ill. 2003).....	6, 7
<i>Burris v. First Financial Corp.</i> , 928 F.2d 797 (8th Cir. 1991)	16
<i>Calica v. Independent Mortgage Bankers Ltd.</i> , Civ. A. No. 88-0452, 1989 WL 117057 (E.D.N.Y. Sept. 28, 1989)	6
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992).....	9
<i>Colorado ex. rel. Salazar v. ACE Cash Express, Inc.</i> , 188 F. Supp. 2d 1282 (D. Colorado 2002).....	17
<i>Doyle v. Southern Guaranty Corp.</i> , 795 F.2d 907 (11th Cir. 1986).....	16
<i>Dupuis v. Yorkville Federal Sav. & Loan Ass’n</i> , 589 F. Supp. 820 (S.D.N.Y. 1984)	10
<i>Geier v. American Honda Motor Co., Inc.</i> , 529 U.S. 861 (2000)	8, 14
<i>Grant v. Gen. Electric Credit Corp.</i> , 764 F.2d 1404 (11th Cir. 1985)	16
<i>Greenwood Trust Co. v. Com. of Mass.</i> , 971 F.2d 818 (1st Cir. 1992).....	6
<i>Grunbeck v. Dime Savings Bank</i> , 74 F.2d 331 (1st Cir. 1996)	5
<i>Hutto v. Francisco</i> , 107 P.3d 934 (Ariz. App. Div. 1 2005)	17
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525, (2001)	9
<i>Medtronic v. Lohr</i> , 518 U.S. 470 (1996)	9, 14, 20
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992).....	6
<i>Noel v. Fleet Finance, Inc.</i> , 971 F. Supp. 1102 (E.D. Mich. 1997)	7
<i>Pacific Mortgage & Investment Group v. Horn</i> , 100 Md. App. 311, 641 A.2d 913 (1994)	4
<i>Robey-Harcourt v. BenCorp Financial Co. Inc.</i> , 326 F.3d 1140 (10th Cir. 2003)	7
<i>Wile v. Green Tree Servicing, LLC</i> , 2004 WL 2644390 (E.D. Pa. 2004)	7

STATUTES

12 U.S.C. § 1462a.....	12
12 U.S.C. § 1735f-5(b)	1, 5

12 U.S.C. § 1735f-5(b)(2)(D).....	5, 18
12 U.S.C. § 1735f-7.....	16
12 U.S.C. § 1735f-7a.....	5
12 U.S.C. § 1735f-7a(f).....	12
15 U.S.C. § 1602(f)	1, 5
15 U.S.C. § 1605(a).....	20, 21
15 U.S.C. § 1605(a)(6)	19
38 U.S.C. § 1828	16
Md. Code Ann., Com. Law § 12-801 et. seq.....	17
Md. Code Ann., Com. Law § 12-804(a).....	17
Md. Code Ann., Com. Law § 12-804(c).....	17

REGULATIONS

12 C.F.R. § 590.3(c)	8
----------------------------	---

ADMINISTRATIVE MATERIALS

73 Md. Op. Atty. Gen. 144 (1988)	15
FHLBB Op. by Eugene M. Katz (Sept. 18, 1989) (op. no. 89/RLD/10), 1989 WL 1114192	14
OTS Official Staff Commentary, 12 C.F.R. § 226.4(a)-3 (April 3, 1995).....	21
OTS Op. by Chief Counsel Harris Weinstein (June 29, 1992) (op. no. 92-CC-25), 1992 WL 12005227	14
OTS Op. of Harris Weinstein, Mar. 17, 1992 (op. no. 92/CC/13), 1992 WL 12005208	13

OTHER AUTHORITIES

126 Cong. Rec. H6965 (1980).....	11
126 Cong. Rec. H6972 (1980).....	11
141 Cong. Rec. H9515 (1995).....	22
141 Cong. Rec. S14568 (1995)	22
48 Fed. Reg. 14882, at 1983 WL 134566.....	6
Pub. L. 104-29 § 2(b)(1).....	19
S. Rep. No. 96-368 (1979), <i>reprinted in</i> 1980 U.S.C.C.A.N. 236	6, 12, 19

SUMMARY OF ARGUMENT

In the 25 years since the Depository Institutions Deregulation and Monetary Control Act (“DIDMCA”) was passed, there have been many efforts to invoke it by parties eager to exceed state usury laws or similar limitations. In resolving these many claims, courts have repeatedly started with the question of whether the company making the claim was a **qualified lender** within the meaning of the Act. *E.g.*, *Brown v. Investors Mortgage Co.*, 121 F.3d 472, 477 (9th Cir. 1997) (“DIDMCA applies only to creditors”).

According to Appellee Savings First Mortgage (“Savings First”), however, DIDMCA not only preempts state usury laws that limit the rates charged by qualified lenders, but also wipes away other state consumer protection laws that limit the charges that can be imposed by any other party, so long as a qualified lender is involved. Savings First says that it is “no holds barred” for anyone who can get a piece of the action.

Savings First’s proposal is frankly radical. It takes a statute that was aimed at providing immunity from certain laws to a limited group of qualified lenders and greatly expands its scope to immunize a wide variety of other actors from longstanding state consumer protections laws. As this Reply will establish, Savings First’s proposed expansion of DIDMCA preemption is at odds with the law for several reasons.

First, DIDMCA’s exemption from certain state laws is limited to transactions defined in § 527(b) of the National Housing Act. That section limits the scope to loans made by “creditors,” a term that is further defined and sharply limited to a subset of lenders in yet another statute, § 1602(f) of the Truth in Lending Act (“TILA”). In short,

when the text of the DIDMCA provision is viewed in its full context, it is clear that the preemption of state law is limited to specific lenders called “creditors.”

Likewise, the legislative history of DIDMCA repeatedly discusses Congress’s desire to protect ***lenders*** from state usury laws, but never evidences any intention to eliminate state consumer protection laws relating to other actors such as mortgage brokers. The subject of brokers was only raised once in the Congressional debates that led to the passage of DIDMCA, and on that occasion the floor manager of the bill flatly stated that DIDMCA did *not* preempt state laws governing brokers and that any such further preemption would have to be addressed—if ever—in a future statute.

Congress’s intent to limit DIDMCA’s preemptive scope to qualified lenders has also been confirmed by the Office of Thrift Supervision (“OTS”), the agency charged with interpreting DIDMCA. Indeed, the OTS has suggested that the limitation of DIDMCA preemption to creditors was based in constitutional limitations on the power of the federal government to intrude into state law. The Maryland Attorney General, similarly, has definitively interpreted DIDMCA’s preemption provision as affecting state laws that impose a limit not on all charges in a mortgage transaction, but on charges that are received ***by the lender***. Finally, courts around the country have consistently held that DIDMCA preemption applies only to qualified lenders defined as “creditors.”

DIDMCA preemption does not apply here for a second independent and sufficient reason as well. Savings First repeatedly stresses that DIDMCA preemption is tied to the definition of “finance charge” used in TILA. Savings First admits that, when Congress enacted DIDMCA, it intended to exempt only those limitations on charges that were

included in the annual percentage rate. What Savings First does not stress, however, is that “borrower-paid mortgage broker fees” were **not** part of the definition of “finance charge” when DIDMCA was passed, and did not get added to that definition until 1995. In other words, Savings First is really arguing that in 1995 when Congress acted to strengthen consumer rights by improving TILA disclosures, Congress also supposedly dramatically struck down numerous state consumer protection laws by silently expanding the scope of federal preemption under DIDMCA. Congress never actually said that it intended to expand DIDMCA preemption in 1995, however, and all evidence is to the contrary.

This Court should refuse Savings First’s invitation to radically expand the scope of federal preemption. In a case decided just a few weeks ago, the U.S. Supreme Court rejected a claim of express preemption (in the context of pesticide labeling) and stressed that there is a heavy presumption against finding that state laws are wiped away by federal law.

In sum, Savings First is asking the Court to extend the preemptive scope of DIDMCA—a statute clearly designed to permit a subcategory of qualified lenders to impose specific charges—to third-party mortgage brokers. Such a dramatic expansion of federal preemption could only be based on evidence of clear Congressional intent, and Savings First offers none here. Rather, when informed by the statute’s legislative history, official agency interpretations, and judicial authority, it is clear that DIDMCA was drafted to insulate **lenders** from liability for violations of state laws that were likely to deter mortgage lending in those states, and that it does not apply to mortgage brokers or

other third parties. Extending the benefits of DIDMCA preemption to brokers like Savings First would leave consumers such as Ms. Sweeney vulnerable to abusive practices by a category of actors Congress never intended to exempt from state regulation.

ARGUMENT

I. DIDMCA PREEMPTION DOES NOT EXTEND TO SAVINGS FIRST BECAUSE SAVINGS FIRST IS NOT A QUALIFIED LENDER.

The law is well-established, in Maryland as elsewhere, that the defendant Savings First has the burden of proving that it is among the category of actors (lenders) who are eligible to assert DIDMCA preemption. Thus, the Maryland Court of Special Appeals rejected an argument by a mortgage lender that DIDMCA preempted state law claims against it, where the lender had failed to prove that it was qualified to assert preemption. *Pacific Mortgage & Investment Group v. Horn*, 100 Md. App. 311, 329–30, 641 A.2d 913, 922 (1994). The court explained, “The creditor, in this case Pacific, has the burden of showing that DIDMCA applies to it. . . . In order to invoke the DIDMCA, the **lender** must meet the burden of establishing that **it** is within the definitions of these terms.” *Id.* (internal citations omitted, emphasis added). Savings First is not a qualified lender, and thus cannot assert the defense of DIDMCA preemption.

A. DIDMCA Preemption Extends Only To Qualified Lenders.¹

¹ Ms. Sweeney made this argument in her opening brief and trial brief. Appellant’s Br. at 4, 10–12; E9–10. However, given that Savings First’s entire argument in response is dependent on a single premise—that DIDMCA can be extended to a mortgage broker as long as a qualified lender was a party to the same transaction (see Br. of Appellee at 3–4, 4 n.3, 16 n.8, 24, and 27–28)—more detail is warranted here to explain why this premise is wrong.

1. DIDMCA’s Own Terms and Statutory Structure Limit Preemption to Qualified Lenders.

Far from preempting state laws that limit all charges by all parties in all types of first-lien mortgages, DIDMCA’s preemption provision is narrow in scope. *Grunbeck v. Dime Savings Bank*, 74 F.2d 331, 340 (1st Cir. 1996) (concluding that given Congress’s “narrow preemptive intent under section 501(a)(1),” DIDMCA did not preempt a state consumer protection law banning compounding of interest). First, it applies only in the context of “federally related mortgage loans[s]” as defined by the National Housing Act. DIDMCA § 501(a), codified as amended at 12 U.S.C. § 1735f-7a; *id.* at § 1735f-5(b). Second, it is limited to “creditor[s]” who make or invest in residential real estate loans aggregating more than \$1 million per year. *Id.* § 1735f-5(b)(2)(D). The heart of the preemption provision at issue here is the definition of “creditor,” which DIDMCA incorporated from the Truth in Lending Act (“TILA”):

The term “creditor” refers only to a person who both (1) regularly extends . . . consumer credit which is payable by . . . installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of the indebtedness

15 U.S.C. § 1602(f). In sum, DIDMCA exempts only qualified lenders who make certain first-lien mortgage loans from liability under state usury laws.

By incorporating the definition of “creditor” from TILA, Congress adopted a structure that plainly aimed to limit DIDMCA preemption to lenders. After all, when Congress enacted DIDMCA, it simultaneously amended TILA to **exclude** mortgage brokers and other arrangers of credit from the TILA definition of “creditor.” S. Rep. No.

96-368, at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 259 (“This section simplifies the definition of ‘creditor’ This will eliminate confusion under the current Act as to the responsibilities of assignees and ‘arrangers of credit.’”).² In other words, at the same time that Congress was exempting “creditors” from state usury laws, it was also clarifying that brokers like Savings First are not creditors. *Cf. Calica v. Independent Mortgage Bankers Ltd.*, Civ. A. No. 88-0452, 1989 WL 117057, at *1 (E.D.N.Y. Sept. 28, 1989) (“Certainly, it is for Congress to decide which aspects of loan transactions and which participants therein will be subject to federal regulation. Congress having deliberately amended the definition of ‘creditor’ to delete loan brokers, the court must dismiss plaintiffs’ [TILA] claims [against the mortgage broker]”).

Thus, courts have consistently held that mortgage brokers are not “creditors” for purposes of TILA disclosure liability.³ For example, in *Bumpers v. Bank One*, 2003 WL 22119929 (N.D. Ill. 2003), a borrower sought to rescind her loan transaction based on inconsistent terms in the disclosure statements provided by the lender and the mortgage broker. The court, relying on the structure and legislative history of TILA, held that the statute’s disclosure provisions applicable to lenders could not be imputed to the mortgage broker:

[T]he statutory scheme does not support [broker liability]. . . . [T]he statutory language references the **creditor** and **not other parties, such as**

² The amendment would become effective October 1, 1982. *See* 48 Fed. Reg. 14882, 14883, at 1983 WL 134566.

³ It is a “general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way.” *Greenwood Trust Co. v. Com. of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)).

the mortgage broker. . . . Further, congressional committee records concerning TILA reinforce the idea that the creditor was the focus of TILA [C]ongressional records make no reference to anyone but the creditor.

Id. at *10 (emphasis added); *see also Robey-Harcourt v. BenCorp Financial Co. Inc.*, 326 F.3d 1140, 1142 (10th Cir. 2003) (absent evidence that mortgage broker was the person to whom the debt was payable, consumer failed to establish broker was a “creditor” under TILA); *Wile v. Green Tree Servicing, LLC*, 2004 WL 2644390 at *4 (E.D. Pa. 2004) (“A broker is not a creditor of the mortgage.”) (internal quotations omitted); *Noel v. Fleet Finance, Inc.*, 971 F. Supp. 1102, 1109 (E.D. Mich. 1997) (mortgage broker not subject to TILA disclosure requirements applicable to creditors).

Savings First suggests that, notwithstanding the language and structure in DIDMCA relating to creditors, any corporation can take advantage of DIDMCA’s preemption provision, because the language of the statutory provision is “passive.” Br. of Appellee at 27. Drawing upon a generalization relating to linguistics in an unrelated text, Savings First argues that whenever a statute is written in passive language, we should infer that Congress meant the statute to apply to anyone.

In essence, Savings First would have the Court interpret DIDMCA’s limited preemption provision to mean that “As long as a qualified lender is somehow involved in the transaction, DIDMCA permits *virtually anyone* to impose illegal fees on a borrower with impunity.” This theory may be creative, but a more reliable guide to Congress’s intent is available: we can look at what it *said* it meant when it enacted DIDMCA. *Cf. Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 2005 WL 957193 at *9 (April 27, 2005) (rejecting defendant’s proposal to expand the scope of preemption under FIFRA as

contrary to Congressional intent). And, as the next Section explains, what Congress repeatedly said was this: it was trying to preempt certain laws that relate to *lenders*. Brokers were not on Congress's radar screen. The only time that any legislator even raised the question of whether DIDMCA's preemption might extend brokers, the answer given by the floor manager was that preemption for brokers was not addressed in DIDMCA, but might be addressed in some future bill.

The structure of DIDMCA—as read in terms of its implementing regulations—also militates against the expansive interpretation suggested by Savings First, because those regulations include a savings clause. The savings clause provides that “Nothing in this section preempts limitations in state laws on prepayment charges, attorneys’ fees, late charges or other provisions designed to protect borrowers.” 12 C.F.R. § 590.3(c). The U.S. Supreme Court has interpreted express preemption provisions narrowly in statutes where there are savings clauses. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000) (reading express preemption provision of National Traffic and Motor Vehicle Safety Act narrowly not to reach any common law claims in light of Act's savings clause).

Savings First urges this Court to simply disregard the savings clause. Armed with general doctrines of statutory construction taken from settings unrelated to federal preemption, Savings First argues that all the savings clause does is specify that DIDMCA preemption applies only to those fees and items that are part of the finance charge under TILA. In other words, Savings First argues that the savings clause has no independent meaning, but merely repeats the content of the core preemption provision of DIDMCA.

Of course, reducing the savings clause to redundant surplusage is an improper interpretation on its face.

A more reasonable construal of the savings clause, and one that gives it meaning, is that it requires a narrow interpretation of DIDMCA preemption in keeping with the statute's limited purpose. As the next section of this Reply will demonstrate, DIDMCA was intended to benefit only lenders, and only with respect to certain charges. The savings clause should be read to bar adventurous interpretations—such as that proffered by Savings First—which would expand DIDMCA to wipe away other types of state consumer protection laws, such as Maryland's Finder's Fee Law.

2. The Legislative History and Subsequent Interpretations of DIDMCA Make Clear That Preemption Does Not Extend to Mortgage Brokers.

“The purpose of Congress is the ultimate touchstone in every preemption case.” *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)). Where, as here, a federal law includes an express preemption provision, the Court should infer that “Congress did not intend to pre-empt other matters.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). Thus, the Court's role is to ascertain Congress's intent in order to “identify the domain expressly preempted by the language.” *Medtronic*, 518 U.S. at 484.

Savings First asserts that the presumption against preemption does not apply in cases involving claims of express preemption. Br. of Appellee at 9. This argument is flatly wrong. Just a few weeks ago, in a case involving assertions of express preemption that had been accepted by every federal court of appeals to consider the issue, the U.S.

Supreme Court emphatically reaffirmed in a forceful 7–2 decision that all analysis—even in the context of express preemption—must begin with the presumption against federal preemption of state law:

Even if Dow had offered us a plausible alternative reading of § 136v(b)—indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption. “Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” *Medtronic*. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest.

Bates, 125 S. Ct. at 1801, 2005 WL 957193 at *10 (internal quotations and citations omitted).

Preemption is particularly disfavored in this case given that the mortgage lending industry is traditionally regulated by the states. See *Dupuis v. Yorkville Federal Sav. & Loan Ass’n*, 589 F. Supp. 820, 822 (S.D.N.Y. 1984) (“The laws of contracts and of mortgages . . . are of state origin and concern issues traditionally of state concern . . .”).

The legislative history of DIDMCA clearly indicates that Congress intended to provide an exemption **for qualified lenders** from state laws that imposed usury limits on mortgages. Representative Reuss, the Chairman of the House Committee on Banking, Finance and Urban Affairs and the floor manager of the bill, summarized the impetus behind the preemption provision when he introduced DIDMCA to the House:

Usury ceilings in some 24 States have left **lenders unable to lend** and **borrowers unable to borrow** This bill lifts usury ceilings to reflect the realities of the marketplace and makes it possible for banks and thrift associations to continue necessary lending.

126 Cong. Rec. H6965 (1980) (emphasis added). There is no sign at all that Congress was concerned that brokers would be unable to broker, nor any indication of an intent to preempt state laws regulating brokers. This understanding that the preemption provision was intended specifically to benefit **lenders** is reflected throughout the debates recorded in the Congressional Record. *See, e.g.*, 126 Cong. Rec. H6972 (1980) (statement of Rep. St. Germain) (“Under this legislation, institutional **lenders** with \$1 million or more in mortgage loans **will be exempt** from State usury ceilings.”) (emphasis added). Rep. St. Germain’s point was not, as Savings First would have it, that anyone would be exempt from state laws if they were part of a transaction; it was that one type of actor—lenders—would be exempt. In fact, the only time the notion of extending DIDMCA preemption beyond lenders did arise, the chief sponsor of the bill promptly clarified that DIDMCA did *not* address this issue, and that the topic would be left for another day:

Mr. St. Germain. As I understand the provision of this legislation, institutional lenders with \$1 million or more in mortgage loans will be exempt from State usury ceilings. Today more and more homeowners are resorting to “creative financing” techniques such as vendor’s liens, land contracts, and purchase-money mortgages. In these instances, the homeowner himself takes back the mortgage. Also, real estate brokers sometimes engage in temporary financing in order to help out a seller. Should not such individuals also be exempt from State usury ceilings?

Mr. Reuss. It would be my intention that this problem should be considered in the upcoming housing and community development bill of 1980.

Id. Fortunately for Maryland consumers and unfortunately for Savings First, no proposal to exempt mortgage brokers from state laws was addressed in any later bill in 1980, or in

any subsequent year. This exchange conclusively nails down that the Congressional leadership did not intend for DIDMCA to immunize brokers from state law.

Consistent with this understanding that preemption is limited to lenders, the Senate Report on DIDMCA explains the first-lien preemption provision in these terms:

H.R. 4986 as amended by the Committee contains the following provisions:
... an exemption from state usury limitations on residential mortgage loans
for specified lenders unless the state reenacts ceilings within 2 years

S. Rep. No. 96-368, at 3 (emphasis added). This language was clearly limited to one—and only one—set of actors. The exemption from usury laws was for “specified lenders.” This passage is hardly an isolated example. The Senate Report consistently summarized the effect of the provision as being limited to lenders:

[DIDMCA] [p]rovides that state usury limits on residential mortgage loans and [sic] **inapplicable to the lenders** described in the section unless and until the state adopts a provision of law (within 2 years) limiting the rate of interests [sic] on any such residential mortgage loan.

S. Rep. No. 96-368, at 23 (emphasis added). When, as here, the authoritative Senate Report explicitly states what Congress meant to do, this Court should put no weight upon Savings First’s speculations rooted in generic theories about distinctions between active and passive sentences.

The Office of Thrift Supervision (“OTS”), the agency authorized by Congress to issue regulations and publish interpretations governing the implementation of DIDMCA’s preemption provision,⁴ has similarly emphasized that the scope of DIDMCA preemption is limited to certain lenders. For example, the OTS has stated that **DIDMCA**

⁴ 12 U.S.C. § 1735f-7a(f). The OTS is the successor to the Federal Home Loan Bank Board (“FHLBB”). 12 U.S.C. § 1462a.

preemption “applies only to regular providers of ‘consumer’ credit within the meaning of the Truth in Lending Act.” OTS Op. of Harris Weinstein, Mar. 17, 1992 (op. no. 92/CC/13), 1992 WL 12005208 (emphasis added). Savings First would have this Court re-write the OTS’s statement, to extend DIDMCA preemption far more broadly. Savings First’s version would drastically alter the OTS’s interpretation of the statute, re-wording it to read: “**DIDMCA preemption applies to any party to a transaction where another party was** a regular provider of consumer credit.” Unfortunately for Savings First, the agency charged with interpreting DIDMCA did not describe DIDMCA in the manner hypothesized by Savings First, but rather definitively stated that DIDMCA preemption applies only to creditors.

The OTS’s narrow description of DIDMCA is not a mere accident. Indeed, the OTS has made clear that the narrow scope of DIDMCA is rooted in the fundamental principles that govern our nation. The OTS explained that the limitations on DIDMCA preemption to qualified lenders is constitutionally mandated, and that Congress could not justify preempting state laws with respect to other actors:

The apparent Congressional purpose behind the \$1 million loan volume requirement in the usury preemption statute was jurisdictional, i.e., to ensure that Congress had authority under the Commerce Clause of the Constitution to suspend the application of state usury laws **to a particular lender** because that lender generates a sufficient volume of loans to affect interstate commerce.

Id. (emphasis added). This passage is crucial, because it demonstrates that the limits on DIDMCA preemption are rooted in the constitutional dimension of the presumption against federal preemption. The OTS recognized that if the statute were to be re-

interpreted as sweepingly as Savings First suggests, such a reading might render DIDMCA unconstitutional.

This March 17, 1992 OTS letter is not an isolated statement. Indeed, the agency has consistently and repeatedly described DIDMCA preemption as being available only to lenders. In a subsequent letter, for example, the OTS made clear that, “**to qualify for usury preemption** under [DIDMCA], **the Lender must meet the definition of ‘creditor’** set forth in the Truth-in-Lending Act.” OTS Op. by Chief Counsel Harris Weinstein (June 29, 1992) (op. no. 92-CC-25), 1992 WL 12005227 (emphasis added); *see also* FHLBB Op. by Eugene M. Katz (Sept. 18, 1989) (op. no. 89/RLD/10), 1989 WL 1114192 (explaining that the regulations implementing DIDMCA made clear that “certain **Lenders will be eligible for usury preemption**”) (citing 45 Fed. Reg. at 24113) (emphasis added).

In short, the OTS has flatly rejected Savings First’s theory. To the extent that this Court must choose between the authoritative statements of the expert agency that implements DIDMCA and the clever construct that Savings First has generated from the way some linguists view “passive” language, this Court should side with the OTS. As the U.S. Supreme Court has directed, the views of the OTS, the expert agency that Congress has charged with implementing this statutory scheme, are entitled to deference by the Court. *See Medtronic*, 518 U.S. at 496 (majority opinion) (court should give “substantial weight” to agency’s view of the preemptive effect of statute it is authorized to implement); *id.* at 505–07 (Breyer, J., concurring); *see also Geier*, 529 U.S. at 883–86

(federal government’s interpretation of preemptive scope of agency regulations is entitled to “special weight”).

Finally, the Maryland Attorney General has recognized that DIDMCA preemption only applies to finance charges received by creditors. In an opinion addressing whether DIDMCA preempted a Maryland statute prohibiting a lender from requiring advance payment of interest, the Attorney General concluded that the state law in question was preempted because it was “an effective limit on the ‘amount of interest, discount points, finance charges, or other charges which may be . . . **received’ by the lender.**” 73 Md. Op. Atty. Gen. 144, 147 (1988) (emphasis added). As Savings First concedes, “[f]inder’s fees are charged by, and paid to, a third party—the mortgage broker—rather than the lender.” Br. of Appellee at 31. And, as the Attorney General made clear, preemption is triggered by funds “received” not by any party, but by only one party: the ***lender***. The opinion further explained:

[T]he State law provision has been preempted by federal law and, accordingly, ***lenders*** who make loans secured by first mortgages on residential property to which the DIDMCA applies ***may not be prohibited from collecting interest in advance*** at the time of loan closing.

Id. at 144 (emphasis added).

In sum, both DIDMCA’s legislative history and subsequent interpretations of the preemption provision make clear that the intent and effect of the provision is to preempt only state laws limiting charges imposed by qualified lenders. No authority has embraced the expansive alternative proposed by Savings First, that every third party capable of imposing fees on a borrower should be exempt from state regulation.

3. No Judicial Precedent Exists for Extending DIDMCA Preemption to Mortgage Brokers.

Unsurprisingly, Savings First cites no authority for its assertion that DIDMCA preemption can be extended to a mortgage broker. Indeed, Appellant can find no case in which a court extended the protections of DIDMCA § 501(a) preemption to a party that was not a qualified lender. Rather, “DIDMCA applies **only** to creditors.” *Brown v. Investors Mortgage Co.*, 121 F.3d 472, 477 (9th Cir. 1997) (emphasis added); *see also Grant v. Gen. Electric Credit Corp.*, 764 F.2d 1404, 1405 (11th Cir. 1985) (DIDMCA preemption “enable[es] **creditors** to charge a rate of interest in excess of state law limits”) (emphasis added).⁵

This line of cases—limiting the benefits of preemption to one category of actor—is consistent with the preemption analysis in many other areas of law. There is ample precedent in which, in the context of other federal statutes, courts have refused to extend

⁵ Savings First’s argument (Br. of Appellee at 27 n.11) that lenders in certain other types of federally-related mortgage loans can qualify for federal preemption without meeting the “creditor” criteria misses the point. Lenders whose loans are insured by the federal government are in a special category subject to federal regulation separate and distinct from DIDMCA. In *Burris v. First Financial Corp.*, 928 F.2d 797, 800 (8th Cir. 1991), the court explains that state laws limiting the rate of interest that may be charged on loans guaranteed by the Veteran’s Administration (“VA”) and Federal Housing Authority (“FHA”) are preempted by separate federal statutes enacted immediately prior to DIDMCA. *See* 12 U.S.C. § 1735f-7 (FHA preemption); 38 U.S.C. § 1828 (VA preemption). DIDMCA “preempts state usury laws limiting the rate of interest which may be charged on not only FHA insured and VA guaranteed loans, but also conventional loans which are ‘federally related.’” *Burris*, 928 F.2d at 800. Given the parallel statutory scheme, “a lender entitled to preemption under the FHA or VA preemption statutes need not comply with DIDMCA regulations.” *Id.* at 801; *see also Doyle v. Southern Guaranty Corp.*, 795 F.2d 907, 909–10 (11th Cir. 1986) (explaining that certain lenders may qualify for preemption under either DIDMCA or the FHA/VA provisions).

the benefits of preemption beyond a limited category of actors. For example, in *Colorado ex. rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp. 2d 1282 (D. Colorado 2002), a check-cashing business accused of violating state consumer protection laws argued that the National Bank Act (“NBA”) completely preempted the state law claims against it. Conceding that it was not itself a national bank, the defendant attempted to assert preemption based on that fact that it arranged loans through a national bank. The court flatly rejected the claim: “[T]he NBA regulates national banks and only national banks Defendant’s relationship with [a national bank] does not elevate Defendant’s status to that of a national bank.” *Id.* at 1284. The court held that, thus, the defendant could not assert the preemption available to national banks. *Id.* at 1285; *see also Brown v. ACE Cash Express*, Case No. 01-2674 (D. Md. Nov. 14, 2001) (NBA does not completely preempt claim against lender for violation of Maryland usury law where lender is not national bank); *cf. Hutto v. Francisco*, 107 P.3d 934, 936 (Ariz. App. Div. 1 2005) (claim against car owner not barred by federal statute regulating auto manufacturers).

In sum, only lenders who prove their eligibility are qualified to assert DIDMCA preemption. Therefore, Savings First’s argument that DIDMCA preempts Ms. Sweeney’s claims against it for violations of Maryland’s Finder’s Fee Law⁶ fails because Savings First itself is not a qualified lender.

⁶ Md. Code Ann., Com. Law § 12-801 et. seq. Savings First has not denied that it violated the provisions of the law prohibiting mortgage brokers from charging a finder’s fee in excess of 8% of the difference in value between the second loan and the first loan. *Id.* §§ 12-804(a), 12-804(c).

B. It Is Undisputed That Savings First Is Not A Qualified Lender.

To be eligible for DIDMCA preemption, a lender must both “make[] or invest[] in residential real estate loans aggregating more than \$1 million per year, 12 U.S.C. § 1735f-5(b)(2)(D), and qualify as a “creditor.” *Id.*

Savings First has never claimed to be a lender or creditor for purposes of DIDMCA preemption. Rather, Savings First was the mortgage broker for the transaction at issue. The lender for the transaction at issue, and the person to whom the mortgage was initially payable, was Concorde Acceptance Corporation. E1; Br. of Appellee at 3.

Indeed, Savings First’s own documentation clearly indicates that it was not acting as the lender in Ms. Sweeney’s transaction. As explained in Appellant’s Opening Brief at 11–12, the Fee Disclosure Form provided by Savings First to Ms. Sweeney makes clear that the broker’s fee “is required by the broker. It is not imposed by the lender.” E-19A. The form further explains the nature of the relationship between broker and lender:

The mortgage broker will submit your application for a residential mortgage loan to a participating lender The lenders have asked that we furnish this form to you to clarify the role of mortgage brokers. . . . The mortgage broker has entered into separate independent contractor agreement with various lenders.

Id.

There is no serious question here that Savings First is not a creditor or lender.⁷

The only way that Savings First can claim to be exempt from the Finder’s Fee Law is if

⁷ Given DIDMCA’s legislative history, a mortgage broker that otherwise *nominally* qualifies as a “creditor” under TILA, and which designates itself as the initial payee on the mortgage documents, but which is not actually the lender, should likewise be ineligible to claim DIDMCA preemption. This scenario may well require a more

this Court were to radically expand the scope of DIDMCA. Given that this is improper for the reasons set forth above, the Circuit Court’s decision must be reversed.

II. DIDMCA DOES NOT PREEMPT STATE LAWS REGULATING BORROWER-PAID MORTGAGE BROKER’S FEES

Savings First next argues that because “borrower paid mortgage broker’s fees” are included in the Truth in Lending Act (“TILA”) definition of “finance charge,” DIDMCA preempts the Maryland Finder’s Fee Law. Br. of Appellee at 12–16. This argument misunderstands federal law and ignores Congressional intent.⁸

First, Congress ***could not have*** intended to preempt laws limiting borrower-paid broker’s fees when it enacted DIDMCA in 1980. As Savings First concedes (Br. of Appellee at 12), Congress clearly indicated its intent to “exempt ***only*** those limitations that ***are*** included in the annual percentage rate.” S. Rep. No. 96-368, at 19 (emphasis added). And at the time Congress enacted DIDMCA and made this statement, borrower-paid broker’s fees were ***not*** among those charges includable in the APR, because they were ***not*** included in the definition of “finance charge.” That category was not added to TILA for 15 years.⁹ In other words, the charges made by Savings First do not fall within the category specified in the statute’s language. They would only fall within the statute’s

detailed analysis than that required here, consistent with *Salazar* and *Brown v. ACE Cash Express*, discussed above. Here, of course, Savings First does not even nominally qualify as a creditor, so the question of whether a more substantive test may be required in certain circumstances need not be resolved in this case.

⁸ This argument was set out by Appellant in her Opposition to Motion to Dismiss. E5, E7–9. It is necessary to develop it more thoroughly here to explain why Savings First’s assertions to the contrary (Br. of Appellee at 12–16) are unfounded.

⁹ In 1995, TILA was amended to include “borrower-paid mortgage broker fees” in its definition of “finance charge.” 15 U.S.C. § 1605(a)(6); Truth in Lending Act Amendments of 1995, Pub. L. 104-29 § 2(b)(1), at 61 Fed. Reg. 49237, 49238.

language if Congress had referred not to items that “are” finance charges, but instead had referred to items that “are now, or might someday be added to the category” of finance charges.

This Court should reject Savings First’s proposed re-write of DIDMCA because Savings First’s proposal would embrace a sweeping new approach to federal preemption. If Savings First’s argument became law, the scope of federal preemption under DIDMCA would be inadvertently expanded with every adjustment to TILA without any other indication that Congress had intended to preempt a whole new category of state laws. This concept, which might be termed “automatic silent preemption,” flatly conflicts with the well-established rule that courts must assume “Congress does not cavalierly pre-empt state-law causes of action.” *Medtronic*, 518 U.S. at 485.

In sum, given that there is no evidence of Congressional intent to expand the scope of DIDMCA preemption to borrower-paid mortgage broker’s fees, this Court should restrict DIDMCA’s preemptive scope to those actors and charges that Congress originally intended.

While Savings First did not make this argument in its brief in this Court, in the trial court it made another argument on this point. At that time, Savings First suggested that its fees fit within the scope of TILA, as it stood in 1980, because broker’s fees like the third-party charges it imposed on Ms. Sweeney might have been included in the category “finder’s fees” that was part of TILA back in 1980. Def’s Reply at 5–9 (citing 15 U.S.C. § 1605(a)). This is not borne out by the facts. While Maryland’s statute did

use (and does use) the phrase “finder’s fee” to describe these charges, the federal statutes used a very different nomenclature.

When Congress enacted DIDMCA in 1980, the OTS regulations provided that in most actual transactions, “finder’s fees” were not included in the lender’s finance charge.¹⁰ Rather, these fees were counted in the finance charge only if one of two specific factors applied: (1) “the creditor requires the use of [a broker] as a condition of or incident to the extension of credit,” or (2) “the creditor retains the charge.” OTS Official Staff Commentary, 12 C.F.R. § 226.4(a)-3, at 60 F.R. 16771 (April 3, 1995). Neither factor applies in this case. In sum, the type of third-party broker’s fees at issue here were not “finder’s fees” as that phrase was used in federal law, and thus they were **not** included in the scope of DIDMCA preemption.

Finally, Savings First claims that since Congress amended TILA in 1995 to add “borrower-paid broker’s fees,” this somehow overrides the fact that Congress originally did not intend to preempt laws limiting these charges. But the 1995 amendments to TILA in no way signal Congressional intent to broaden the preemptive scope of DIDMCA to encompass third-party mortgage broker’s fees. Rather, as pointed out in the House and Senate debates on the 1995 amendments to TILA, Congress enacted these amendments to clarify when lenders would be liable under TILA for failure to include broker’s fees in the finance charge disclosure:

¹⁰ Despite Savings First’s characterization (Br. of Appellee at 14), TILA in no way “expressly mandates” that all the types of charges it lists be included in the APR. Rather, the statute indicates that “[e]xamples of charges which are included in the finance charge include any of the [listed] types of charges which are applicable.” 15 U.S.C. § 1605(a).

The current treatment of fees, such as mortgage broker fees, has been challenged in litigation. It is not fair to subject a lender to extreme penalties for their treatment of these fees, which some are now trying to recharacterize as finder's fees. The entire industry historically excluded these fees from the finance charge, without regard to whether the broker received . . . compensation from the lender—known or unknown to the borrower—or whether the broker is acting as an agent of the borrower, the lender, or both. Based upon the preexisting language of TILA . . . this exclusion is manifestly correct. However, it seems proper to eliminate any issue whatsoever. With this legislation, lenders will now be able to get on with the business of making loans.

141 Cong. Rec. S14568 (1995) (statement of Sen. Mack). Similar concerns were expressed in the House debate:

The current treatment of fees, such as mortgage broker fees, is very ambiguous under current law. Section 106(a) of TILA has been revised to clarify prospectively that the inclusion of mortgage broker fees in the finance charge extends only to borrower paid fees, regardless of whether such fees are paid by the borrower directly to the broker or to the lender for delivery to the broker, or whether such fees are paid in cash or financed. Lender paid broker fees . . . will continue to be excluded from the finance charge. It is not fair to subject lenders to extreme penalties for their treatment of these fees—which some are now trying to recharacterize as finder's fees—when the rules were not clear.

141 Cong. Rec. H9515 (1995) (statement of Rep. McCollum). These statements confirm that Congress's understanding was that prior to 1995, the charges made by Savings First here were not considered finance charges within the meaning of TILA. Accordingly, these charges were not within the scope of DIDMCA preemption when that statute was enacted.

Savings First's related argument (Br. of Appellee at 28) that "any number of charges" that may be received by parties other than the lender are included in the calculation of the APR is equally unavailing. The fact that charges imposed by a credit-

checking business, investigator, or courier must be disclosed by the lender if they are factored into the finance charge of a federally-related mortgage loan does not mean that the credit-checker, investigator, and courier can all claim DIDMCA preemption if they violate state consumer protection laws. There is no indication in the legislative history that Congress was seeking to immunize a broad category of non-lenders from any state consumer protection laws, and Savings First points to none.

III. SAVINGS FIRST'S FACTUAL AND POLICY ARGUMENTS LACK MERIT.

As the Public Justice Center and other *amici* have persuasively explained, the Maryland Finder's Fee Law is an important consumer protection statute that guards vulnerable borrowers who otherwise could (and often would) be easily victimized by predatory lending behavior by mortgage brokers. Savings First responds to *amici* mostly by citing to conservative law review articles or industry-funded pieces that suggest that consumer protection laws such as the Finder's Fee Law are generally bad ideas, and that it would have been better for the Maryland Legislature to have trusted entirely to an unregulated free market to funnel funds in the manner that would be the most efficient. *E.g.*, Br. of Appellee at 37–38, 41–42.

Even if this Court were to decide that Savings First's policy arguments are persuasive (a proposition with which Ms. Sweeney does not agree, but with which she will not take issue here due to space considerations), the fact remains that the Maryland Legislature duly enacted this statute and the Governor properly signed it. Unless this Court were to find (pursuant to the U.S. Supreme Court's direction in *Bates*) that

Congress clearly and definitively intended DIDMCA to preempt and override the Finder's Fee Law, then Savings First's policy arguments are of no significance.

In addition to offering a sweeping defense of absolute libertarianism and a pre-New Deal vision of government, Savings First attacks Ms. Sweeney's supposed failure to make detailed allegations about policy matters. Where is Ms. Sweeney's proof that this case involves predatory lending?, Savings First demands. Br. of Appellee at 2, 5, 45–46.

First of all, it is unfair for Savings First to flay Ms. Sweeney for not making more policy arguments in the trial court. Ms. Sweeney brought this case because Savings First blatantly violated a Maryland consumer protection statute, the Finder's Fee Law. That law does not require consumers to introduce evidence that the law was a good idea in the first place, nor does it require allegations of specific intent to deceive or treat the consumer unfairly. Rather, like other consumer protection laws, the law predetermined that certain conduct (a fee in excess of 8% of the increased value of a second loan within two years) was unfair and provided an automatic remedy.

As it happens, however, Ms. Sweeney's allegations **do** establish that Savings First's conduct here was abusive. Less than two years after her first loan, Savings First refinanced the same loan, charging her more in broker's fees than she obtained in increased loan value. Appellant's Br. at 1; Br. of *Amici Curiae* at 27–28 (discussing “loan flipping”). Even if this Court were to agree with Savings First's “Live-and-let-gouge” philosophy, however, Savings First is not entitled to disregard those state consumer protection laws with which it disagrees unless Congress clearly chose to excuse it from complying with those laws. As this Reply demonstrates, that did not happen here.

CONCLUSION

The Court should hold that Maryland's Finder's Fee Law is not preempted by DIDMCA, reverse the decision of the Circuit Court of Frederick County, and remand the case for further proceedings.

Respectfully submitted this 24th May, 2005.

F. Paul Bland, Jr.
Trial Lawyers for Public Justice
1717 Massachusetts Ave., NW
Suite 800
Washington, D.C. 20036-2001
(202) 797-8600

Leslie A. Bailey
(admitted *pro hac vice*)
Trial Lawyers for Public Justice
555 Twelfth Street, Suite 1620
Oakland, CA 94607-3616
(510) 622-8150

Scott C. Borison
Douglas B. Bowman
Legg Law Firm, LLC
5500 Buckeystown Pike
Frederick, MD 21703
(301) 620-1016

Attorneys for Appellant