IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case Nos. 11-3249 & 11-2708

JOSE TELLADO and MARIA TELLADO,

Plaintiffs - Appellees,

v.

INDYMAC MORTGAGE SERVICES, a division of OneWest Bank, FSB; and HOME FUNDING GROUP, LLC,

Defendants - Appellants.

On appeal from the United States District Court
for the Eastern District of Pennsylvania
(Hon. Petrese B. Tucker, United States District Judge)

BRIEF FOR APPELLEES JOSE AND MARIA TELLADO

Irwin Trauss
PHILADELPHIA LEGAL ASSISTANCE
42 South 15th Street, Suite 500
Philadelphia, PA 19102
(215) 981-3811

Scott Michelman
Michael T. Kirkpatrick (on the brief)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiffs - Appellees

Dated: November 23, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. The Tellados' Transaction Is Subject To Pennsylvania Consumer Protection Law, Plaintiffs Retained Their Right To Cancel, And Onewest Is Liable For Its Failure To Cancel 12

A. The Transaction Falls Within The Coverage Of The Act Because It Resulted From Contacts With The Buyers In Their Home 14

B. The Transaction Did Not Involve A Sale Of Real Property 17

C. The Language Principally Used In The Oral Sales Presentation Was Spanish, And The Cancellation Was Timely 18

D. OneWest Is Incorrect That A TILA Notice Contains The Form And Content Required By FTC Regulations And Therefore Satisfies The CPL Under § 201-7(m) 21

E. OneWest Must Honor The Tellados' Right To Cancel Even Though It Is Not The Original Seller 23

F. Repayment Of The Principal Amount Of The Loan Is Not A Condition Of The Right To Cancel 25

1. The tender obligation does not apply to services 25

2. OneWest's obligation to cancel is not in any case conditioned on a prior tender 26

3. The trial court fashioned the appropriate remedy 28

II. FIRREA Does Not Defeat Jurisdiction Because Plaintiffs' Cause Of Action Does Not Run Against Assets Of The FDIC As Receiver And Is Not A "Claim" Under FIRREA 32

A. The Judgment Below Provides Relief Against OneWest For Its Own Conduct And Does Not Adjudicate Rights Respecting Assets Of The FDIC 33

B. Plaintiff's Cause Of Action Is Not A "Claim" Within The Meaning Of FIRREA 35

III. Under Settled Third Circuit Law, The FDIC Is Not An Indispensable Party 41

IV. Plaintiffs' Claim Is Not Preempted By HOLA 44

V. Plaintiffs' Claim Is Not Preempted By TILA 52

VI. The Penalty Order Did Not Violate Due Process....................................54

CONCLUSION 56

CERTIFICATIONS 57

ADDENDUM (Text of 73 Pa. Stat. Ann. § 201-7) 59

TABLE OF AUTHORITIES

CASES

Adams v. Ford Motor Co.,
653 F.3d 299 (3d Cir. 2011) 56

American National Insurance Co. v. FDIC,
642 F.3d 1137 (D.C. Cir. 2011)...*passim*

In re Andrews,
78 B.R. 78 (Bankr. E.D. Pa. 1987) 18, 25

Auction Co. of America v. FDIC,
141 F.3d 1198 (D.C. Cir. 1998)...38

Auer v. Robbins,
519 U.S. 452 (1997)...46

Bank of America National Trust & Savings Ass'n v. Hotel Rittenhouse Assoc.,
844 F.2d 1050 (3d Cir. 1988) 41, 43, 44

Bank of New York v. First Millennium, Inc.,
607 F.3d 905 (2d Cir. 2010) 35, 36

Behrend v. Comcast Corp.,
655 F.3d 182 (3d Cir. 2011) 4

Binetti v. Washington Mutual Bank,
446 F. Supp. 2d 217 (S.D.N.Y. 2006) 46, 48, 49

Burke v. Yingling,
666 A.2d 288 (Pa. Super. Ct. 1995) ....*passim*

Casey v. FDIC,
583 F.3d 586 (8th Cir. 2009) 51

Christopher v. First Mutual Corp.,
Civ. Nos. 05-0115 & 05-1149, 2008 WL 1815300 (E.D. Pa. Apr. 22,
2008) 17, 18

Clark v. Township of Falls,
890 F.2d 611 (3d Cir. 1989) 4

Cole v. Lovett,
672 F. Supp. 947 (S.D. Miss. 1987) 26, 29

Commonwealth by Creamer v. Monumental Properties, Inc.,
329 A.2d 812 (Pa. 1974)..24

Culbreth v. Lawrence J. Miller, Inc.,
477 A.2d 491 (Pa. Super. 1984) 13, 28

Dixon v. Wells Fargo Bank, N.A.,
Civ. No. 11-10368, 2011 WL 2945795 (D. Mass. July 22, 2011)....48, 49, 51

Fowler v. Rauso (In re Fowler),
425 B.R. 157 (Bankr. E.D. Pa. 2010) ....*passim*

Gardiner v. V.I. Water & Power Authority,
145 F.3d 635 (3d Cir. 1998) 41, 44

Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak,
539 A.2d 357 (Pa. 1988)..23

Himes v. Cameron County Construction Corp.,
444 A.2d 98 (Pa. 1982)..23

Hudson United Bank v. Chase Manhattan Bank of Conn., N.A.,
43 F.3d 843 (3d Cir. 1994) 35, 36, 38

Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.,
11 F.3d 399 (3d Cir. 1993) 41, 42, 43, 44

Johnson v. Metlife Bank, N.A.,
Civ. No. 11-800, 2011 WL 4389582 (E.D. Pa. Sept. 21, 2011)........15, 17, 53

Lewis v. Delta Funding Corp. (In re Lewis),
290 B.R. 541 (Bankr. E.D. Pa. 2003) 16

Louis Luskin & Sons v. Samovitz,
166 Cal. App. 3d 533 (Cal. Ct. App. 1985)...26, 29

Lutz v. Stewart Michigan Title,
781 F. Supp. 2d 526 (E.D. Mich. 2011) 40, 41

McAnaney v. Astoria Finance Corp.,
665 F. Supp. 2d 132 (E.D.N.Y. 2009)..46, 49

McClure v. Kline Roofing Siding Insulation, Inc.,
35 Pa. D. & C. 3d 1 (Pa. Com. Pleas Ct. Lancaster County 1985) 15

Mwantembe v. TD Bank, N.A.,
669 F. Supp. 2d 545 (E.D. Pa. 2009)..50

National Union Fire Insurance Co. of Pittsburgh v. City Savings, F.S.B.,
28 F.3d 376 (3d Cir. 1994) 35, 38, 39

Newton v. A.C. & S., Inc.,
918 F.2d 1121 (3d Cir. 1990) 55

In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation,
491 F.3d 638 (7th Cir. 2007) ....*passim*

Pasco International (London) Ltd. v. Stenograph Corp.,
637 F.2d 496 (7th Cir. 1980) 41, 42

Pennsylvania v. Local Union 542, International Union of Operating Engineers,
552 F.2d 498 (3d Cir. 1977) 54, 55

Peoples Pittsburgh Trust Co. v. Commonwealth,
60 A.2d 53 (Pa. 1948)..23

Perez v. Saxon Mortgage Services, Inc.,
Civ. No. 09-1392-L, 2010 WL 1087625 (S.D. Cal. Mar. 22, 2010).............41

Poskin v. TD Banknorth, N.A.,
687 F. Supp. 2d 530 (W.D. Pa. 2009) 50

In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions,
278 F.3d 175 (3d Cir. 2002) 54

Reyes v. Premier Home Funding, Inc.,
640 F. Supp. 2d 1147 (N.D. Cal. 2009)...50

Rodden v. Town & Country Kitchens & Bath, Inc.,
19 Pa. D. & C. 5th 511 (Pa. Com. Pleas Ct. Montgomery County 2010)
....14, 15, 29

Rodriguez v. Indymac Bank,
Civ. No. 09-5843, 2010 WL 1186315 (D.N.J. Mar. 24, 2010).....................41

Rosa v. Resolution Trust Corp.,
938 F.2d 383 (3d Cir. 1991) 33, 34, 35, 36

St. Hill v. Tribeca Lending Corp.,
403 F. App'x 717 (3d Cir. 2010)...15, 16

*Silvas v. E*Trade Mortgage Corp.*,
514 F.3d 1001 (9th Cir. 2008) 50, 51

Teeters Construction v. Dort,
869 N.E.2d 756 (Ohio Mun. Ct. 2006)...26, 29

Village of Oakwood v. State Bank & Trust Co.,
539 F.3d 373 (6th Cir. 2008) 40

Williams v. Empire Funding Corp.,
109 F. Supp. 2d 352 (E.D. Pa. 2000)..53

STATUTES

12 U.S.C. § 1821 ....*passim*

15 U.S.C. § 1610 52

15 U.S.C. § 1635 30

28 U.S.C. § 1291 1

28 U.S.C. § 1332 1

1 Pa. Stat. Ann. § 1922 24

73 Pa. Stat. Ann. § 201-7 .... *passim*

REGULATIONS & ADMINISTRATIVE MATERIALS

12 C.F.R. § 226.28 52

12 C.F.R. § 560.2 .... *passim*

12 C.F.R. Pt. 226 Supp. I, Commentary to 12 C.F.R. § 226.28(a)(3) 52, 53

16 C.F.R. § 429.0 22

16 C.F.R. § 429.1 .... 21, 22

OTS Opinion Letter P-96-14 (Dec. 24, 1996), 1996 WL 767462 .... 46, 47

OTS Opinion Letter P-99-3 (Mar. 10, 1999), 1999 WL 413698 .... 47, 51

MISCELLANEOUS

Black's Law Dictionary (6th ed. 1990) 25

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this appeal from the final decision of the district court. *See* 28 U.S.C. § 1291; App. 25.

The district court's subject matter jurisdiction is a disputed question in this appeal. For the reasons explained in Part II of the Argument, the Tellados disagree with OneWest that FIRREA precluded the district court's jurisdiction. Rather, jurisdiction was proper based on diversity of citizenship. *See* 28 U.S.C. § 1332(a); App. 17 (amount in controversy greater than $75,000); App. 57-58 (noting citizenship of parties).

STATEMENT OF THE ISSUES

1. The Pennsylvania Unfair Trade Practices and Consumer Protection Law (CPL) requires that when a consumer is sold goods or services in the consumer's own home, the consumer is entitled to cancel the transaction within three days of receiving specified written notices of the right to cancel, including notices of the right in the same language used in the oral sales presentation and notices proximate to the consumers' signatures on the contracts. Was the district court correct to find that plaintiffs, who entered into a loan contract negotiated in Spanish in their home, are entitled to cancel the transaction because they never received written, Spanish-language notification of their right to cancel or notice in any language of that right proximate to their signatures?

2. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) bars federal subject matter jurisdiction for actions that seek payment from a failed financial institution that has gone into receivership or from the FDIC as receiver. FIRREA also bars jurisdiction over "claims" that have not been exhausted through the FIRREA administrative process.

This Court, along with the D.C. and Second Circuits, has recognized that under FIRREA, the term "claims" refers to claims resolvable through the FIRREA administrative process against an institution that has gone into receivership. In this case, plaintiffs obtained a loan from a bank that subsequently failed and entered FDIC receivership, and the loan was subsequently sold to an entirely separate institution and therefore is no longer an asset of the failed bank or the FDIC. Does FIRREA bar federal jurisdiction over plaintiffs' suit against the separate institution to remedy that institution's failure to comply with state-law duties regarding the loan?

3. When a defendant claims it has an indemnification agreement with a third party, when the plaintiff's suit against the defendant cannot lead to a determination of any dispute as between the defendant and the third party, and when the defendant may subsequently sue the third party for collection or indemnification, is the third party an "indispensable party" whose joinder is required if feasible under Federal Rule of Civil Procedure 19?

4. The federal Home Owners' Loan Act (HOLA), according to its regulations, preempts laws specifically governing lending disclosures and origination, but not generally-applicable state commercial laws that have only an incidental effect on lending. Does HOLA preempt a state law requiring that all consumers (including but not limited to borrowers) involved in any "door-to-door" sales transaction receive notice of their right to cancel the transaction in the same language in which the transaction was negotiated?

5. The federal Truth in Lending Act (TILA) requires that borrowers be notified that they have the right to cancel a transaction within three days. TILA and its regulations indicate that TILA preempts state laws only if they are "inconsistent" with TILA. Does TILA preempt a state law requiring that notification of the three-day cancellation period be provided in the same language in which the transaction was negotiated?

6. A court may enter "any just orders" in response to a party's failure to comply with a scheduling or pretrial order. Fed. R. Civ. Pro. 16(f)(1)(C). Did the district court abuse its discretion by fining a company for violating

the court's order to have its CEO present for trial, after the court heard the company's explanation that it simply substituted its own judgment for the court's?

STATEMENT OF THE CASE

In the summer of 2007, Plaintiffs Jose and Maria Tellado, low-income senior citizens who speak primarily Spanish, refinanced their mortgage. The transaction was conducted through telephone contacts with and a personal visit to the Tellados at their home. Although the oral communications were entirely in Spanish, the lender, Indymac Bank, provided the loan papers exclusively in English. As a consequence, the Tellados did not understand that the loan papers included terms to which they had not agreed. In addition, Indymac Bank failed to provide the Tellados with a Spanish-language notice of their right to cancel both as a separate document and in the contract—notices state law required because the transaction was conducted in Spanish. Because the lender never provided the required notices regarding cancellation, under state law the period for cancellation never expired.

Indymac Bank failed and went into FDIC receivership in 2008, and the FDIC sold the Tellados' loan to Defendant OneWest Bank in March 2009. In August 2009, the Tellados exercised their state-law right to cancel the loan by notifying OneWest. After OneWest failed to respond, the Tellados filed this action seeking rescission or damages.

OneWest removed the case to federal court and filed a series of unsuccessful dismissal and summary judgment motions attacking plaintiffs' case on a variety of grounds, including failure to state a claim under Pennsylvania law, unavailability of plaintiffs' requested remedy, federal preemption, lack of jurisdiction, and failure to join an indispensable party. After a bench trial, the court issued a written decision in August 2011 in favor of the Tellados. The court ordered OneWest to cancel the loan and return all payments by the Tellados. Separately, the court fined OneWest $10,000 for violating the court's order to have its CEO present at trial.

In these consolidated appeals, OneWest challenges both the fine and the trial court's ruling in the Tellados' favor.

STATEMENT OF FACTS

This Court views the evidence adduced at a trial in the light most favorable to the winning party. *Clark v. Township of Falls*, 890 F.2d 611, 613 (3d Cir. 1989). The fact-finder's factual determinations must be accepted unless they are clearly erroneous, which means "completely devoid of minimum evidentiary support displaying some hue of credibility" or "bear[ing] no rational relationship to the supportive evidentiary data." *Behrend v. Comcast Corp.*, 655 F.3d 182, 189 (3d Cir. 2011).

Plaintiffs Jose and Maria Tellado are married, low-income senior citizens from Puerto Rico who speak primarily Spanish and live in Philadelphia. App. 14

(Trial Decision); 105 (Joint Statement of Agreed Upon Findings of Fact and Conclusions of Law (hereafter "Jt. St.")), 299 (Trial Tr. (hereafter "Tr.") - Test. of J. Tellado), 328 (Tr.-Test. of M. Tellado). Around June 2007, Jose heard a Spanish-language radio advertisement for mortgage refinancing services. App. 14 (Trial Decision), 300 (Tr.-J. Tellado). When Jose called the number in the advertisement, he reached a man named Carlos Enrique, and the two conversed exclusively in Spanish. App. 14 (Trial Decision), 300-01 (Tr.-J. Tellado). Enrique assisted Jose with the submission of an application to refinance a loan he had secured by his house, and arranged for a closing agent to visit the Tellados' home on July 3, 2007. App. 14-15 (Trial Decision), 105 (Jt. St.), 301-03 (Tr.-J. Tellado), 328 (Tr.-M. Tellado). The loan transaction, from Jose's initial contact with Enrique until the loan closing, was conducted in Spanish. App. 15 (Trial Decision), 300-04 (Tr.-J. Tellado).

Jose and Maria saw their loan terms for the first time in their home at closing, and the loan documents—including the Note, the Mortgage, and the Notice of Right to Cancel—were provided in English only. App. 15 (Trial Decision), 106 (Jt. St.), 302-03 (Tr.-J. Tellado). At Enrique's suggestion, the Tellados' daughter Marcelin Fuster was present at the closing to act as an interpreter. App. 15 (Trial Decision), 302-03 (Tr.-J. Tellado), 332-33 (Tr.-Test. of M. Fuster). Although Marcelin translated for her parents the closing agent's verbal

instructions and explanations, Marcelin did not have the opportunity to read or translate the loan documents themselves. App. 15 (Trial Decision), 333 (Tr.-Fuster). The Tellados are unable to read English and did not understand the contents of the documents they were signing. App. 15 (Trial Decision), 304 (Tr.-J. Tellado), 329 (Tr.-M. Tellado). Thus, the Tellados did not realize they had signed documents providing for a loan at an adjustable rate despite the Tellados' intention to enter into a fixed rate mortgage; the Tellados were also unaware that the first ten years of loan payments would not be applied to the principal or that the loan documents contained falsified information about the Tellados' monthly income. App. 15 (Trial Decision), 335 (Tr.-Fuster); *compare id.* at 299 (Tr.-J. Tellado), *with id.* at 148 (Loan Application).

Through the July 3, 2007 transaction at their home, the Tellados purchased mortgage refinancing services for a price in excess of $25. App. 16 (Trial Decision), 106 (Jt. St.). The lender was Indymac Bank, F.S.B. App. 16 (Trial Decision), 105 (Jt. St.).[1]

The following year, on July 11, 2008, Indymac Bank went into receivership, with the FDIC as receiver. App. 16 (Trial Decision), 106 (Jt. St.). On March 18,

[1] Of the loan proceeds, $7,904.54 was paid to Indymac Bank for fees and costs required as a condition of the loan. App. 263-64 (closing instructions).

2009, Defendant OneWest Bank, F.S.B., acquired the Tellados' loan from the FDIC. App. 16 (Trial Decision), 106 (Jt. St.).

On August 5, 2009, the Tellados sent a Notice of Cancellation to OneWest (specifically, to the "Indymac Mortgage Services" division). App. 16 (Trial Decision), 107 (Jt. St.). Having received no response from OneWest, the Tellados filed this action on August 24, 2009, App. 16 (Trial Decision), 107 (Jt. St.), seeking cancellation of the loan under Pennsylvania law and a judicial determination that OneWest had forfeited its right to further payments under Pennsylvania law, App. 16-17 (Trial Decision), 57 (Cmpt.), 107 (Jt. St.). OneWest never requested that the Tellados return the loan proceeds. App. 327 (Tr.-J. Tellado), 353 (Tr.-Test. of R. Marks). More than a month after the Tellados filed this lawsuit, OneWest finally responded to the original cancellation notice; OneWest's letter to the Tellados refused to cancel the transaction. App. 157-58.

After removing the case to federal court, App. 51 (Dkt.), OneWest raised an assortment of legal defenses via various dismissal and summary judgment motions, which were denied. *See* Aplt.'s Opening Br. (hereafter "AOB") 9-10. To increase the parties' chance of reaching a settlement, the court ordered OneWest to have its CEO present on the day of trial. App. 4, 286-88 (Tr.). On the day before trial, OneWest filed a motion for relief from this order. App. 112-17. Despite having received no favorable response to their motion, OneWest decided not to bring its

CEO to the trial. App. 279, 286 (Tr.). On the morning of trial, the court heard arguments from the parties about OneWest's failure in this regard, including an argument by the Tellados' counsel that sanctions were appropriate, and the court took the matter under advisement. App. 279-88, 372-73 (Tr.).

The Tellados were up to date in their loan payments through the trial date. App. 17 (Trial Decision), 357 (Tr.). As of trial, they had paid $36,593.38 under the loan agreement. App. 355 (Tr.-Marks).

After a bench trial, App. 288-373 (Tr.), the court ruled in favor of the Tellados and ordered OneWest to cancel the loan and return all payments to the Tellados, App. 14-26. The court also fined OneWest $10,000 for violating its order to produce its CEO on the day of trial. App. 6.

SUMMARY OF ARGUMENT

Taking a kitchen-sink approach to its appeal, OneWest advances a litany of theories to avoid the application of state consumer protection law, including claims that a consumer's initiation of a contact with the seller in response to an advertisement voids the protections of the law, that the law does not apply to mortgage refinancing services, and that the right to cancel under the law is inoperative if someone other than the original seller holds the loan when it is cancelled. None of these theories is supported by the language of the Pennsylvania consumer protection statute or cases interpreting it. OneWest also argues that the

transaction occurred in English because the closing agent spoke English and a translator rendered his words into Spanish. But the district court found based on the evidence that the transaction took place in Spanish; additionally, to hold that the language of the sales presentation depends on whether the language is spoken by the seller's agent or translated by a third party would invite end-runs around the consumer protection law. OneWest suggests that the notice provided to the Tellados satisfied state law requirements because it satisfied the federal Truth in Lending Act; this is incorrect as a matter of law under the plain language of the Pennsylvania consumer protection statute. In any event, providing notice to the consumer on a separate document is only one of the notification requirements under state law; providing this notice does not satisfy the distinct state-law obligation *also* to notify the consumer *in the contract*, near the signature line, of the right to cancel. OneWest also argues that rescission of the contract was not an available remedy unless the Tellados returned to OneWest the original loan amount. This contention finds no support in the language of the Pennsylvania statute or relevant case law.

Second, OneWest is incorrect that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) bars jurisdiction. FIRREA's jurisdictional bar applies to actions seeking payment from a failed financial institution that has gone into receivership or from the FDIC as receiver. Here, the

Tellados seek only to cancel their loan owned by OneWest, not to obtain assets of or damages from either the failed institution Indymac Bank or the FDIC. FIRREA also bars "claims" that have not been exhausted through its administrative process. This Court and other circuits have held that "claims" is a term of art referring only to claims resolvable through the FIRREA administrative process. As is clear from the language and structure of FIRREA, such claims include only claims against a failed institution that has gone into receivership, not a cause of action—such as the Tellados'—against an entirely separate institution that has acquired some of the failed institution's assets.

Third, the fact that OneWest claims the FDIC indemnifies it against losses in this case does not render the FDIC an indispensable party under Rule 19. As this Court has held, a defendant can seek indemnification or collection from a third party via either Rule 14 impleader or via a separate action, and neither the defendant's nor the third party's rights are prejudiced by the adjudication of the plaintiff's underlying claim against the defendant.

Fourth, OneWest's federal preemption claim under the Home Owners' Loan Act (HOLA) fails. HOLA regulations exempt from preemption state commercial laws of general applicability, even where such laws incidentally affect lending. OneWest's reading would result in the preemption of ordinary state consumer-protection laws, such as common-law protections against fraud and breach of

contract, that undergird all commercial and contract law. Accordingly, HOLA does not preempt the Tellados' claim, which arises under a generally applicable consumer-protection statute requiring that consumers in door-to-door sales transactions are notified, in the same language as used in the sales presentation, of their right to cancel.

Fifth, the federal Truth in Lending Act (TILA) likewise does not preempt the Pennsylvania notification requirements at issue here. TILA preempts only requirements that are inconsistent with it, not merely additional but consistent requirements. Pennsylvania's requirement that the Tellados receive notice of their right to cancel in an additional language does not conflict in any way with the cancellation notice required under TILA; both notices provide the same substantive rights.

Finally, the district court's decision to fine OneWest for violating its order was neither a violation of due process nor an abuse of discretion. Fines to vindicate a court's authority are nothing extraordinary. OneWest had the opportunity in open court to explain itself and to respond to the possibility of sanctions, and due process requires no more.

The district court's decisions were correct and should be affirmed.

ARGUMENT

I. THE TELLADOS' TRANSACTION IS SUBJECT TO PENNSYLVANIA CONSUMER PROTECTION LAW, PLAINTIFFS RETAINED THEIR RIGHT TO CANCEL, AND ONEWEST IS LIABLE FOR ITS FAILURE TO CANCEL.

The Pennsylvania Unfair Trade Practices and Consumer Protection Law (CPL) is designed to provide consumers with a way of obtaining relief from unfair and deceptive conduct perpetrated against them in the marketplace. Section 201-7 of the CPL, referred to as the Door to Door Sales Act, provides a "cooling off period," *Fowler v. Rauso* (*In re Fowler*), 425 B.R. 157, 186 (Bankr. E.D. Pa. 2010), allowing a consumer to extract herself, without penalty, from a transaction in which goods or services are "sold or contracted to be sold to a buyer, as a result of, or in connection with, a contact with or call on the buyer or resident at his residence either in person or by telephone . . . ." 73 Pa. Stat. Ann. § 201-7(a).[2]

Among its protections, the CPL provides that consumers involved in such transactions have the right to cancel the transaction within three days. *Id.* § 201-7(a).[3] To ensure the cancellation right is not merely theoretical, the CPL requires that the consumer be notified of the right to cancel three times: once orally, *see id.*

---

[2] The entire text of 73 Pa. Stat. Ann. § 201-7 is included as an addendum to this brief.

[3] The only exceptions to the CPL's coverage are transactions for less than $25 and transactions involving metals, bonds, or foreign currency whose price is subject to daily fluctuation. *Id.* § 201-7(*l*) & (*l*.1).

§ 201-7(d), and twice in writing—once in a statement in the contract near the signature space, *id.* § 201-7(b)(1), and again via two copies of a separate "Notice of Cancellation" provided to each buyer. *Id.* § 201-7(b)(2); *Fowler,* 425 B.R. at 185-87. Finally, to protect individuals from being taken advantage of because of their limited command of English, the CPL explicitly requires both the written notices to be provided "in the same language (Spanish, English, etc.) as that principally used in the oral sales presentation." *Id.* § 201-7(b)(1); *see also id.* § 201-7(b)(2). The cancellation period "shall not begin to run" until the buyer has received the required notices and been informed of the right to cancel. *Id.* § 201-7(e); *Culbreth v. Lawrence J. Miller, Inc.*, 477 A.2d 491, 495 (Pa. Super. Ct. 1984); *Fowler,* 425 B.R. at 186.

Here, the district court found that the Tellados "purchased the mortgage refinancing services for a price in excess of $25," App. 16 (Trial Decision), that the transaction took place as a result of contacts and a visit to the Tellados' home, App. 14-15, that it was conducted in Spanish, App. 15, and that the Tellados never received Spanish-language cancellation notices as required under the CPL, App. 15 (Trial Decision).[4] Therefore under the CPL, the Tellados' cancellation period

[4] Additionally, the cancellation notice did not appear, in Spanish or English, on the contract near the signature line, as required by the CPL. *See* 73 Pa. Stat. Ann. § 201-7(b)(1); App. 122, 123, 137, 145 (signature pages of Note and Mortgage).

never ended, and they were entitled to exercise their right to cancel the transaction, *see* 73 Pa. Stat. Ann. § 201-7(e), which they did on August 5, 2009. App. 16.

OneWest argues that the CPL is inapplicable to the Tellados' mortgage refinancing for a variety of reasons, none meritorious.

A. The Transaction Falls Within The Coverage Of The Act Because It Resulted From Contacts With The Buyers In Their Home.

OneWest does not dispute the facts as found by the trial court; instead it argues the transaction did not occur in the home because it was initiated by Jose Tellado. AOB 49-50. But the CPL itself contains no such limitation, and both Pennsylvania and federal courts have rejected such a narrow view of the CPL's scope.

As the Pennsylvania courts have held, the CPL applies where a transaction occurs within the consumer's home, even if the initial contact was made by the consumer, and even if the buyer had time to reflect on the transaction. *Burke v. Yingling*, 666 A.2d 288, 291-92 (Pa. Super. Ct. 1995) ("The statute provides for no exceptions. . . . [T]he legislature did not exclude transactions . . . where the initial contact was made by the buyer."); *Rodden v. Town & Country Kitchens & Bath, Inc.*, 19 Pa. D. & C. 5th 511, 517-20 (Pa. Com. Pleas Ct. Montgomery County 2010) (holding CPL applied even though buyer initiated transaction), *appeal dismissed* 2011 Pa. Super. LEXIS 2647 (Pa. Super. Ct. May 26, 2011) & 2011 Pa.

Super. LEXIS 2685 (Pa. Super. Ct. May 26, 2011).[5] In *Fowler*, the court applied the CPL to facts similar to those at issue here. There, a consumer received a letter at home advertising real estate-related services and, like the Tellados, called the phone number in the ad. *Fowler*, 425 B.R. at 164. As here, the mortgage-related transactions at issue in *Fowler* occurred as a result of a series of telephone calls to the consumer and finally a visit to the consumer's home in which the consumer signed the documents consummating the transactions. *Id.* at 169-172. The court held the CPL applied to the transactions. *Id.* at 191-93. *See also Johnson v. Metlife Bank, N.A.*, Civ. No. 11-800, 2011 WL 4389582, at *1, *3-6 (E.D. Pa. Sept. 21, 2011) (motion to dismiss denied where reverse mortgage consummated in buyer's home); *McClure v. Kline Roofing Siding Insulation, Inc.*, 35 Pa. D & C. 3d 1, 3 (Pa. Com. Pleas Ct. Lancaster County 1985) (transaction cancelled on summary judgment where defendant admitted roofing contract was presented to consumer for signing in her home).

OneWest cites the non-precedential decision *St. Hill v. Tribeca Lending Corp.*, 403 F. App'x 717 (3d Cir. 2010), but that case merely held that the CPL does not cover a transaction into which the buyer enters for primarily "commercial" reasons. *Id.* at 721. In *dicta*, the court also found there was no in-home solicitation where the plaintiff's home-office was in fact "her principal place

---

[5] The *Rodden* case is available on the Lexis electronic database but not Westlaw.

of business." *Id.* *St. Hill* did *not* hold (as OneWest suggests) that the consummation of a transaction in a home is insufficient to bring it within the scope of the CPL. *See* AOB 50. Rather, *St. Hill* stands only for the proposition that on certain facts a home can be a place of business—a characterization that does not apply (nor does OneWest claim it applies) to the Tellados' home.

OneWest's reliance on *Lewis v. Delta Funding Corp.* (*In re Lewis*), 290 B.R. 541, 553 (Bankr. E.D. Pa. 2003), is similarly misplaced. In that case, the only contact that occurred in the consumer's home was an initial call from the consumer. The court held that a single call initiated by the consumer from her home was not sufficient to invoke the CPL, where every other contact, including consummation, occurred outside the home. *Id.* at 554. *Lewis* did not, however, suggest that the identity of the initiating party is dispositive; rather, *Lewis* cautioned that "the fact that the [consumer] initiated the contact . . . may not automatically exclude application" of the CPL. *Id.* Unlike in *Lewis*, the transaction involving the Tellados *was* consummated in their home, where they saw the contract they were asked to sign for the first time, in a language that was foreign to them. Thus, *Lewis* does not undermine the solid line of case law holding that initiation of a transaction by a consumer does not defeat the application of the CPL.

B. The Transaction Did Not Involve A Sale Of Real Property.

OneWest next attempts to avoid the CPL by asserting that the Tellados' transaction was a "real property transaction" and is therefore not covered because the CPL applies only to transactions for "goods or services." AOB 51. OneWest's premise is incorrect: what the Tellados purchased from Indymac was not "real property" but mortgage refinancing services. App. 16 (Trial Decision). The Tellados already owned their home, where they have lived for twenty years before they entered into a contract with Indymac. App. 298, 309 (Tr.-J. Tellado). They continued to own it after the contract was consummated. *See* App. 124-126. The fact that their house was used as security for the transaction did not change the nature of the transaction. In fact, the CPL contemplates that security interests, including security interests in property not covered by the CPL, will be taken in connection with covered transactions, and the CPL provides for the prompt termination of such "security interest created in the transaction" "through any action necessary or appropriate" when the transaction is cancelled. 73 Pa. Stat. Ann. § 201-7(g).

Courts have consistently applied the CPL to transactions involving mortgage refinancing services. *See Johnson v. Metlife Bank, N.A.*, Civ. No. 11-800, 2011 WL 4389582, at *1, *3-6 (E.D. Pa. Sept. 21, 2011) (reverse mortgage loan, secured by lien on residence, covered by CPL); *Christopher v. First Mut Corp.*, Civ. Nos.

05-0115 & 05-1149, 2008 WL 1815300, at *9 (E.D. Pa. Apr. 22, 2008) ("[T]he refinancing of mortgage loans constitutes a 'service' under the []CPL."); *In re Andrews*, 78 B.R. 78, 82 (Bankr. E.D. Pa. 1987) (concluding that "the business of mortgage lenders is the sale of a service within the scope of" the CPL (internal quotation marks omitted)). The CPL has even been applied where consumers of "mortgage rescue services" were tricked into selling their home. *See Fowler*, 425 B.R. at 188 ("They dealt with Rauso as 'buyers' interested in 'purchasing' Rauso's 'services'— i.e., his assistance in avoiding foreclosure on and permanent loss of the Allengrove Property.").

C. The Language Principally Used In The Oral Sales Presentation Was Spanish, And The Cancellation Was Timely.

OneWest faces a high bar in asking this Court to overturn the trial court's factual finding that the "loan transaction . . . was conducted in Spanish." App. 15 (Trial Decision). OneWest acknowledges that this factual conclusion is reviewed for clear error. *See* AOB 27. Far from demonstrating clear error, the record reflects strong support for the conclusion that the transaction was conducted in Spanish: in uncontroverted testimony, Jose Tellado explained that his initial call with the intermediary Enrique was in Spanish; Enrique suggested Jose have an interpreter at the closing; and the Tellados' daughter did in fact translate the closing instructions into Spanish. App. 300-04 (Tr.-J. Tellado). OneWest points to no contrary facts in the record.

Instead, OneWest argues that the Tellados' use of a translator of their own choosing at the closing transformed the "language principally used in the oral sales presentation" from Spanish to English. AOB 52-53. But nothing in the CPL suggests that the language in which the presentation is deemed to have occurred depends on which party chooses the interpreter. The relevant question is what language was the principal language of the oral sales presentation to the consumer. All the communications prior to the closing were in Spanish. At the Tellados' home, all the information concerning the terms of the transaction was conveyed to the Tellados in Spanish. Though the presentation to the Tellado's daughter, who agreed to translate, was in English, she was not the buyer.

OneWest's proposed rule would permit sellers to circumvent the CPL's requirements simply by obtaining the consent of the consumer to the use of an interpreter and thereby converting the language of the presentation into English because of the language spoken to the interpreter. This result would permit sellers to render the CPL's protection for non-English speaking consumers ineffective.

Alternatively, OneWest seems to argue that if Indymac Bank were required to provide the documents and the Notice of Cancellation in Spanish, it should be treated as having done so, because the Tellados' daughter could translate the documents for them. AOB 52-53. But as the district court found, based on the evidence, Marcelin did not translate the documents and the Tellados could not read

them and did not understand what they contained or that they contained contract provisions of which the Tellados were not aware. *See* App. 15 (Trial Decision), 304 (Tr.-J. Tellado), 329 (Tr.-M. Tellado), 333-35 (Tr.-Fuster). Moreover, nothing in the CPL supports the suggestion that documents in English can be treated as if they were in Spanish if someone of the buyer's choosing is available to translate. This Court must apply the CPL as written. *Burke v. Yingling*, 666 A.2d 288, 292 (Pa. Super. Ct. 1995).

OneWest does not address at all the trial court's finding that the Tellados did not receive, in any language, notice of their right to cancel *on the contract* in proximity to their signatures, as the CPL requires in addition to the separate notice. *See* 73 Pa. Stat. Ann. § 201-7(b)(1). This fact is uncontroverted. *See* App. 122, 123, 137, 145 (signature pages of Note and Mortgage). Nor does OneWest dispute that this single omission alone indefinitely extended the time the Tellados had to cancel, regardless of the language of the presentation. Thus, even without a resolution of the Tellados' right to receive documents in Spanish, OneWest has no basis for disputing the timeliness of the Tellados cancellation. *See Burke*, 666 A.2d at 289 (consumer permitted to cancel after three days where not presented with receipt or contract with notice of right to cancel proximate to signature).

D. OneWest Is Incorrect That A TILA Notice Contains The Form And Content Required By FTC Regulations And Therefore Satisfies The CPL Under § 201-7(m).

OneWest also argues that it was not required to provide a Spanish version of the Notice of Cancellation because it provided a TILA Notice of Right to Cancel in English, and this notice in turn met the requirements of 73 Pa. Stat. Ann. § 201-7(m).[6] AOB 46-47. OneWest is mistaken that a TILA notice satisfies the notice requirements of the CPL. Under the CPL, "A 'Notice of Cancellation' which contains the form and content required by the rule or regulation of the Federal Trade Commission shall be deemed to be in compliance with the requirements of this section." 73 Pa. Stat. Ann. § 201-7(m). However, the Tellados did not receive a notice with the "form and content" prescribed by the FTC regulations, but instead a notice with the form and content provided by TILA. The two are not equivalent. Rather, the "form and content" of the Notice of Cancellation required by the FTC rule, found at 16 C.F.R. § 429.1(b), is in relevant respects identical to the Notice of Cancellation required by the *CPL*, not TILA. Whereas the notice actually provided in this case, pursuant to TILA requirements, was in English only, *see* App. 146, the FTC rule requires, in language nearly identical to that used in the CPL, that the

---

[6] In making this argument, OneWest does not suggest that § 201-7(m) relieves the seller of the obligation to provide the *contract* in English and Spanish and the notice of the right to cancel in 10 point type proximate to the Tellados' signatures in English and Spanish. Thus even if OneWest's reliance on § 201-7(m) were justified, the Tellados would still be entitled to cancel the transaction.

contract be provided in the same language as the oral sales presentation. *See* 16 C.F.R. § 429.1(a) (requiring seller "to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation"); *id.* § 429.1(b) (requiring a separate Notice of Cancellation "in the same language, e.g. Spanish, as that used in the contract.").

Ignoring § 429.1 entirely, OneWest claims that a TILA-FTC equivalence is demonstrated by 16 C.F.R. § 429.0, the definitional section of the regulation, which excludes from the term "door-to-door sale" for the purpose of the FTC rule a transaction in which the consumer receives a TILA Notice of Cancellation.[7] For purposes of the CPL, however, the question is not whether the FTC might deem its *own* requirements satisfied by a TILA notice, but rather whether the notice provided to the consumer "contain[ed] the form and content" prescribed under FTC regulations. 73 Pa. Stat. Ann. § 201-7(m). That "form and content" is spelled out at section 429.1, and it includes the requirement (also present in the CPL) that the cancellation notice be provided in the same language as the oral presentation. Because the notice the Tellados received did not comply with the FTC's prescribed "form and content," OneWest cannot avail itself of the protection of § 201-7(m).

[7] This exclusion does not apply to the CPL, whose coverage is broader than that of the FTC door-to-door sales rule. *See Burke*, 666 A.2d at 291-92.

E. OneWest Must Honor The Tellados' Right To Cancel Even Though It Is Not The Original Seller.

Without citation to authority, One West argues that it cannot be required to honor the Tellados' cancellation of the consumer credit transaction because it was not involved in the initial transaction and therefore had no way of knowing that the note it held remained subject to cancellation. *See* AOB 48. This interpretation of the statute is inconsistent with the intent of the CPL and with the common law.

Under Pennsylvania common law, OneWest, as the assignee of Indymac, succeeded to no greater rights against the Tellados than those possessed by Indymac. *See Himes v. Cameron County Constr. Corp.*, 444 A.2d 98, 100 (Pa. 1982). As an assignee, OneWest steps into the shoes of its assignor Indymac. *See Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357, 358 (Pa. 1988). And it has long been recognized that "[a]n assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment." *Peoples Pittsburgh Trust Co. v. Commonwealth*, 60 A.2d 53, 56 (Pa. 1948) (citation and internal quotation marks omitted).

As the assignee of Indymac's rights, OneWest claims a right to the benefits of the refinancing contract with the Tellados. After acquiring the contract,

OneWest, operating as "IndyMac Mortgage Services, a division of OneWest Bank FSB," continued to demand payment from the Tellados on the contract. *See* App. 153-54, 159-62. Correspondingly, just as Indymac would have been obligated to honor a valid notice of cancellation upon receipt of such notice, *see* 73 Pa. Stat. Ann. § 201-7(g), OneWest, having stepped into Indymac's shoes, is subject to the same obligation.

There is nothing in the CPL to suggest that the legislature intended to change this rule and deprive consumers of the remedies they would otherwise have simply because their loan changed hands. Rather, the CPL "is to be construed liberally to effect its object of preventing unfair or deceptive practices." *Commonwealth by Creamer v. Monumental Props., Inc.*, 329 A.2d 812, 817 (Pa. 1974). The CPL nowhere defines the term "seller" to mean only the original seller or to exclude anyone that assumes the seller's rights and obligations.[8] Thus, when OneWest obtained the Tellados' contract, it obtained a contract that was still subject to the Tellados' right to cancel. It had an obligation to comply with that right in accordance with the provisions of Pennsylvania law.

---

[8] Such a reading would simply encourage circumvention of the law. *See* 1 Pa. Stat. Ann. § 1922(1) ("[T]he General Assembly does not intend a result that is absurd . . . or unreasonable.").

F. Repayment Of The Principal Amount Of The Loan Is Not A Condition Of The Right To Cancel.

OneWest argues the trial court's rescission order must be reversed because the court did not require the Tellados to return the loan amount they received. *See* AOB 53. This argument must be rejected for each of three reasons.

1. The tender obligation does not apply to services.

As the trial court found, the contract at issue is for "services"[9] and not a contract for "goods" or "merchandise." App. 16 (Trial Decision). The CPL imposes no obligation to tender anything other than "merchandise received under the contract or sale," 73 Pa. Stat. Ann. § 201-7(a), and OneWest has conceded that "merchandise" does not include services. *See* AOB 51 n.9. The term "merchandise" as used in § 201-7(a) denotes a subset of what is included in the term "goods."[10] The Tellados received nothing which can be construed as

---

[9] *In re Andrews*, 78 B.R. 78, 82 (Bankr. E.D. Pa. 1987) (concluding that "the business of mortgage lenders is the sale of a service within the scope of" the CPL (internal quotation marks omitted)).

[10] Merchandise is defined as: "All goods which merchants usually buy and sell, whether at wholesale or retail; wares and commodities such as are ordinarily the objects of trade and commerce. But the term is generally not understood as including real estate and is rarely applied to provisions such as are purchased day by day for immediate consumption." *Black's Law Dictionary* 987 (6th ed. 1990). "Goods" is defined as "A term of variable content and meaning. It may include every species of personal property or it may be given a very restrictive meaning. Items of merchandise, supplies, raw materials. Sometimes the meaning of 'goods' is extended to include all tangible items, as in the phrase 'goods and services.'" *Id.* at 694.

merchandise or goods. For this reason the trial court cannot be faulted for enforcing the Tellados' cancellation right in the absence of tender or a tender offer by the Tellados.

Because the service in this case was provided prior to the expiration of the cancellation period, the seller relinquished any right to tender, as it is considered to have assumed the risk of acting prematurely. *See Teeters Constr. v. Dort*, 869 N.E.2d 756, 775-76 (Ohio Mun. Ct. 2006) (refusing to allow contractor, deemed a seller of services, to recover anything for work performed under a contract that was cancelled because buyer had not been provided proper notice of cancellation under Ohio's Home Solicitation Sales Act); *Cole v. Lovett*, 672 F. Supp. 947, 955-56 (S.D. Miss. 1987) (seller of service denied tender for service provided without notice of cancellation right under Mississippi Home Solicitation Sales Act); *Louis Luskin & Sons v. Samovitz*, 166 Cal. App. 3d 533, 538 (Cal. Ct. App. 1985) (same, under California Home Solicitation Statute).

2. OneWest's obligation to cancel is not in any case conditioned on a prior tender.

The CPL does not require that consumers make any tender of proceeds as a condition of cancellation, even in those cases where a tender obligation exists. *See* 73 Pa. Stat. Ann. § 201-7(b) & (g). Specifically, the last paragraph of the "Notice of Cancellation" prescribed in § 201-7(b) of the CPL lays out everything the Tellados were required to do to effectuate the cancellation: "To cancel this

transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram . . . . [saying] I hereby cancel this transaction." The Tellados complied with this provision, as the district court found. App. 16 (Trial Decision). The provision that spells out One West's obligations upon receipt of the Tellado's cancellation notice does not condition those obligations on the existence or nonexistence of tender. To the contrary, the CPL is unconditional in its requirements:

> "Any valid notice of cancellation by a buyer shall be honored and within ten business days after the receipt of such notice, seller shall (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument . . . ."

73 Pa. Stat. Ann. § 201-7(g).

Further, if the Tellados had a tender obligation that can be inferred by extending the CPL's provisions regarding "goods" to "services" (contrary to the plain language of the statute, as explained in the previous subsection), the CPL would place on OneWest the burden of acting first if it wished to recoup payments. OneWest would have been required "within 10 days of receipt of [the Tellados'] notice of cancellation, [to] notify [them] of whether [it] intend[ed] to repossess or abandon any shipped or delivered goods." 73 Pa. Stat. Ann. § 201-7(i). If OneWest "elect[ed] to repossess, [it] [needed] do so within twenty days of the date of buyer's notice of cancellation or *forfeit all rights*" to recover. *Id.* (emphasis

added).[11] Here, OneWest never asked for any tender in response to the notice of cancellation. App. 353 (Tr.-Marks). Instead, it ignored the notice, refused to cancel the transaction, App. 157, did none of the things required of it by the CPL, and insisted on performance of the contract, threatening to foreclose on the Tellados' home if performance was not forthcoming. App. 159-63. In addition, OneWest did not file a counterclaim for any money it believed the Tellados owed following cancellation. Whatever rights OneWest had to tender under the CPL, it has long since forfeited, first by failing to demand tender within 10 days and then by failing to act on any demand within 20 days of the Tellados' August 5, 2009 cancellation notice. 73 Pa. Stat. Ann. § 201-7(i).

3. The trial court fashioned the appropriate remedy.

To the extent rescission under the CPL is an equitable remedy, the fashioning of that remedy rests within the sound discretion of the trial court. *See Fowler*, 425 B.R. at 192 (court empowered to fashion equitable remedy for violation of § 201-7); *Culbreth*, 477 A.2d at 500-01. The district court did not abuse its discretion in fashioning the relief it provided. Instead, the court ordered

[11] The CPL expressly reverses the normal order of rescission as an equitable remedy under common law, by requiring action by the seller before requiring any action of the buyer.

precisely the relief § 201-7(g) requires, including requiring OneWest to "refund all payments made under the contract."[12]

OneWest argues that the trial court erred by refusing to condition cancellation on the Tellados' making further payments to OneWest. Cases decided under the CPL and similar statutes in other jurisdictions do not support this argument, but are instead consistent with the district court's order. *See Rodden*, 19 Pa. D. & C. 5th at 513-14, 520 (where consumers entitled to rescind contract under the CPL, consumers awarded entire $19,000 they paid seller despite significant seller expenses related to the contract). *Accord Teeters Constr.*, 869 N.E.2d at 775 (under Ohio Home Solicitation Sales Act contract cancelled and contractor denied any recovery for value of services); *Cole*, 672 F. Supp. at 955-56 (same, under Mississippi Home Solicitation Sales Act); *Louis Luskin*, 166 Cal. App. 3d at 538 (same, under California Home Solicitation Statute).

OneWest acknowledges that its position finds no support in any case law regarding the CPL. *See* AOB 54. Instead, it urges this Court to look to TILA rescission cases. *See id.* at 54-55. But cases under TILA are inapposite because the two statutory schemes are not the same. The CPL's cancellation procedure requires the seller to cancel the transaction within 10 days whether the buyer does

[12] OneWest's assertion that these payments, amounting to $36,593.38, include "thousands of dollars" to cover the Tellados' property insurance and taxes, AOB at 56, is unsupported. App. 352-56 (Tr.-Marks).

anything or not. *See* 73 Pa. Stat. Ann. § 201-7(g). To the extent the buyer must subsequently return anything, that duty is contingent on a demand from the seller, *see id.* § 201-7(i)—a demand that was not made in this case. The CPL contains no provision permitting the court to alter the order of performance. TILA, by contrast, does. It provides that the specified order of performance upon rescission applies "except when otherwise ordered by the court." 15 U.S.C. § 1635(b). Thus, courts have flexibility in fashioning remedies under TILA, but none under the CPL. The remedies courts have ordered under TILA therefore shed no light on what the CPL requires.

Finally, OneWest's demand of a lump sum tender, as a condition of cancellation, is inequitable because OneWest is not able or willing to return the Tellados to their *status quo ante*. This obligation of the seller after receipt of a notice of cancellation is set forth in 73 Pa. Stat. Ann. § 201-7(g)(iii), which instructs the seller to "return any goods or property traded in, in substantially as good condition as when received by the seller." Effectively, Indymac Bank had the Tellados "trade in" the loan they previously had for the new loan. While it may have had its flaws, the previous loan was affordable for the Tellados, up to date and something they could pay in monthly installments.[13] Again by analogy, if

[13] The Tellados were current with their monthly contract payments when they cancelled and remained current through the date of trial. App. 17 (Trial Decision).

OneWest wishes the court to treat the loan proceeds from the Indymac Bank loan as "goods" that must be tendered to it in a lump sum upon cancellation, then it must also treat the loan the Tellados gave up as a "trade in." Following this analogy to its logical conclusion requires OneWest to restore the Tellados' previous loan to them, or the equivalent, in the same condition it would have been in had the cancelled transaction not occurred. Requiring anything less would leave the Tellados with an obligation to make an immediate balloon payment of approximately $70,513.27,[14] instead of with their previous affordable loan, previous affordable monthly payments, and an equivalent balance, that they could continue paying. Thus, requiring a lump sum payment from the Tellados would not be restoring the *status quo ante*. Rather, such a result would punish the Tellados for trying to take advantage of their cancellation rights under the CPL.

Ultimately, the power to fashion an equitable cancellation remedy rests within the sound discretion of the trial court. *See Fowler*, 425 B.R. at 192. Here, the trial court did not abuse its discretion. Given the unconditional language of the CPL, requiring cancellation upon demand and expressly limiting when tender is

---

The Tellados continued to make payments to OneWest of approximately $630 per month through the payment due as of August 2011, and after the district court canceled the transaction. From the November 8, 2010 trial date through August 2011, the Tellados paid approximately $5,670 to OneWest.

[14] Prior to canceling the transaction, the Tellados had already paid back $36,593.38, i.e., $8,857.42 more than the $27,735.96 actually paid to them, as opposed to third parties, from the loan proceeds. App. 263-64, 316-17, 355.

required, and given OneWest's failure to seek any recovery from the Tellados within the CPL's time limit for doing so, the court's exercise of discretion was reasonable and must be upheld.

II. FIRREA DOES NOT DEFEAT JURISDICTION BECAUSE PLAINTIFFS' CAUSE OF ACTION DOES NOT RUN AGAINST ASSETS OF THE FDIC AS RECEIVER AND IS NOT A "CLAIM" UNDER FIRREA.

OneWest incorrectly asserts that the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) deprives the federal courts of jurisdiction over the Tellados' entire suit. As relevant here, FIRREA creates an administrative claims process for banks in federal receivership in order to facilitate the winding-up of failed financial institutions. *See* 12 U.S.C. § 1821(d)(3)-(13). As a corollary to its administrative process, *see id.* § 1821(d)(5)-(6), FIRREA bars a court from exercising jurisdiction, "[e]xcept as otherwise provided" in the Act, over

> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or
> (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

Id. § 1821(d)(13)(D).

FIRREA "otherwise provide[s]" for jurisdiction over suits asserting claims that have already gone through the FIRREA administrative process, *id.*

§ 1821(d)(6), and this Court has understood § 1821(d)(13)(D) as an exhaustion provision with respect to the claims and actions described in subsections (i) and (ii) of § 1821(d)(13)(D). *See Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 391-92 (3d Cir. 1991). The jurisdictional question here therefore turns on whether the Tellados' case falls within either of these categories. For the following reasons, it does not.

A. The Judgment Below Provides Relief Against OneWest For Its Own Conduct And Does Not Adjudicate Rights Respecting Assets Of The FDIC.

The first prong of the jurisdictional bar is inapplicable by its terms. As the district court understood, the Tellados sued to enforce their statutory right of cancellation against OneWest when OneWest failed to comply with its statutory obligation to cancel a loan that it owned. App. 16, 23-24 (Trial Decision).

The Tellados' action does not seek "payment from, or . . . a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver." 12 U.S.C. § 1821(d)(13)(D)(i). The Tellados do not seek "payment from" the institution for which the FDIC was appointed receiver, i.e., Indymac Bank. The Tellados do not seek either any assets of Indymac Bank or of the FDIC, or a "determination of rights with respect to" any such assets. Indeed, the district court's judgment in the Tellados' favor had no effect on the assets of

Indymac Bank or the FDIC, neither of which is even mentioned in the court's order granting relief. *See* App. 25.

Rather, the Tellados' suit concerns only an asset all parties agree belongs to OneWest: the Tellados' consumer credit obligation secured by the mortgage on their home, which OneWest admits (and the district court found) it acquired from the FDIC. AOB 19, 21; App. 16 (Trial Decision). Because the Tellados seek only to exercise their statutory rights with respect to the loan, the question whether OneWest agreed to assume any further "liabilities" under the MPA, *see* AOB 32-34, is irrelevant. OneWest acquired the rights in the consumer credit contract with the Tellados, so OneWest was, at the time this action was filed, the party with the contractual right to collect payments under the consumer credit contract and the corresponding obligation to do so consistent with the provisions of the contract and with applicable Pennsylvania law. This lawsuit seeks only to remedy OneWest's failure to follow state law with respect to an asset it held, the Tellados' loan.

As this Court has explained, causes of action do not fall under § 1821(d)(13)(D)(i) where "they seek neither payment from nor a determination of rights with respect to the assets of a depository institution for which [a federal agency] has been appointed receiver." *Rosa*, 938 F.2d at 394. Therefore the first prong of FIRREA's jurisdictional bar is inapplicable.

B. Plaintiff's Cause Of Action Is Not A "Claim" Within The Meaning Of FIRREA.

The second prong of FIRREA's jurisdictional bar is in a crucial respect narrower than the first: whereas the first clause covers "any claim or action," the second clause applies only to "claim[s]." This limitation defeats OneWest's argument as to the second clause because, as used in this provision, "claim" is a term of art that applies only to a "claim" recognized by FIRREA and susceptible of resolution through the administrative process established by FIRREA. *See Hudson United Bank v. Chase Manhattan Bank of Conn., N.A.*, 43 F.3d 843, 848-49 (3d Cir. 1994); *Rosa*, 938 F.2d at 394. *Accord Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1142 (D.C. Cir. 2011); *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 921 (2d Cir. 2010). Because the Tellados do not assert such a "claim" in this case, the second prong of the jurisdictional bar, like the first, is inapplicable.

This Court has distinguished the "claims" language of clause (ii) from the broader "claim or action" language of clause (i). *See Nat'l Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.*, 28 F.3d 376, 387 n. 12, 388-90 (3d Cir. 1994). Whereas the term "action" under clause (i) is not limited to claims capable of resolution through the FIRREA administrative process, *see id.* at 386, the term "claim" in clause (ii) is narrower, referring only to claims "that may be filed under the administrative procedures of [FIRREA]." *Hudson United Bank*, 43 F.3d at

848-49 (citation and internal quotation marks omitted). *Accord Rosa*, 938 F.2d at 394 ("Whatever its breadth, we do not believe that clause (ii) encompasses claims that are not susceptible of resolution through the claims procedure.").

Citing this Court's decision in *Rosa*, the D.C. Circuit's decision in *American National Insurance Co. v. FDIC* is the most recent and comprehensive discussion of the meaning of "claim" under FIRREA. Writing for the court, Chief Judge Sentelle explained how the structure of the Act demonstrates that the term "claim" means something very specific in the FIRREA context:

> The Act creates a comprehensive administrative mechanism simply for the processing and resolution of "claims." . . . For example, after establishing the "[a]uthority of [the FDIC-as-receiver] to determine claims," § 1821(d)(3), and the FDIC's "[r]ulemaking authority relating to determination of claims," § 1821(d)(4), FIRREA sets forth the "[p]rocedures for determination of claims," § 1821(d)(5), the requirements for "agency review or judicial determination of claims," § 1821(d)(6), the content of administrative "[r]eview of claims," § 1821(d)(7), the availability of "[e]xpedited determination of claims," § 1821(d)(8), the exclusion of certain "[a]greement[s] as [forming the] basis of claim[s]," § 1821(d)(9), and the authority of the FDIC to make "[p]ayment of claims," § 1821(d)(10). It borders on tautology, therefore, that "claims" are necessarily demands that come within the scope of FIRREA's administrative process.

642 F.3d at 1142. *See also Bank of N.Y.*, 607 F.3d at 921 (refusing to read § 1821(d)(13)(D)(ii) as an "isolated edict" divorced from its context in FIRREA).

The structure of FIRREA, in turn, demonstrates that its administrative process is meant only for claims *against depository institutions that have gone into receivership*. First, FIRREA requires the receiver, when winding up a failed

depository institution, to "promptly publish a notice to the depository institution's creditors to present their claims" within a set time period. *See* 12 U.S.C. § 1821(d)(3)(B)(i). This notice requirement applies only in situations "involving the liquidation or winding up of the affairs of a closed depository institution," *id.*; the only group for whom notice is required is "the depository institution's creditors"; and it is this group to whom the statute refers in discussing the deadline to present "their claims." Second, the deadline for resolution of "claims" under FIRREA is tied to "the date any claim against a depository institution is filed with the [FDIC] as receiver." *Id.* § 1821(d)(5)(A)(i). FIRREA contains no other deadline for resolving any other type of claim. Third and perhaps most revealing, FIRREA instructs the receiver to distribute "amounts realized from the liquidation or other resolution of any insured depository institution" in payment of claims. *Id.* § 1821(d)(11)(A). Such relief would be "categorically inappropriate in cases not against a depository institution for which the FDIC is receiver." *Am. Nat'l*, 642 F.3d at 1143.

In light of these provisions, the D.C. Circuit concluded that "where, as here, neither the failed depository institution nor the FDIC-as-receiver bears any legal responsibility for claimant's injuries, the claims process offers only a pointless bureaucratic exercise. And we doubt Congress intended to force claimants into a process incapable of resolving their claims." *Id.* (citation omitted). *Accord*

Hudson United Bank, 43 F.3d at 849 (explaining that FIRREA's administrative proceedings and jurisdictional bar must cover the same "claims" lest FIRREA "become a source of immunity for the Receiver"). Additionally, foreclosing relief in any forum would create a remedial gap that several courts, including this one, have suggested could raise constitutional concerns. *See Nat'l Union Fire Ins.*, 28 F.3d at 390 n. 16; *Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1200, 1201 (D.C. Cir. 1998).

Finally, applying the jurisdictional bar to claims other than those resolvable through the FIRREA administrative process would produce absurd results. Here, for instance, the FDIC was appointed receiver for Indymac on July 11, 2008, App. 16 (Trial Decision), so the deadline to present administrative claims could have run as soon as October 2008. *See* 12 U.S.C. § 1821(d)(3)(B)(i) (period for presenting claims may be as short as 90 days). But the Tellados' right to relief arises from OneWest's failure to honor the couple's August 2009 cancellation demand. App. 16. If the Tellados' cause of action were truly a "claim" under FIRREA, the Tellados would have had to pursue this claim through the administrative process by October 2008—ten months *before* the violation of Pennsylvania law of which the Tellados complain—against an institution, OneWest, that was never subject to the receivership.

For these reasons, where (as here) an action is not susceptible to resolution through the FIRREA administrative process because the action seeks relief based on the conduct of a party *other than* the FDIC or failed institution itself, that action is not encompassed within the term "claim" in § 1821(d)(13)(D)(ii) and therefore may proceed in court. *See Am. Nat'l*, 642 F.3d at 1144. Because the Tellados' case against OneWest for OneWest's own violation of Pennsylvania law is not a claim against a depository institution that has gone into receivership, it is not a "claim" contemplated by FIRREA and therefore it is not subject to FIRREA's jurisdictional bar.

In support of its alternative reading of the jurisdictional bar, OneWest cites this Court's decision in *National Union Fire Insurance*. *See* AOB 29. But as noted, that case explicitly differentiated between the "claim or action" language of § 1821(d)(13)(D)(i) and the "claim" language of clause (ii). *See Nat'l Union Fire Ins.*, 28 F.3d at 387 n. 12, 388-90. In that case, the Court's application of the jurisdictional bar concerned the "action" language found in clause (i) but not clause (ii): specifically, this Court held that clause (i) barred two insurance companies' declaratory judgment "action" seeking to rescind insurance policies issued to a failed financial institution in order to avoid paying claims asserted by the failed institution's receiver. *See id.* at 380-81, 388, 389.

Village of Oakwood v. State Bank & Trust Co., 539 F.3d 373 (6th Cir. 2008), on which OneWest relies, is inapposite. There a failed institution's depositors sued the bank that assumed the failed institution's assets on the grounds that the *FDIC*—not the assuming bank—breached its fiduciary duty to the original bank's depositors. *See id.* at 375-76. Because "all of [plaintiffs'] claims against [the assuming bank] [were] directly related to acts or omissions of the FDIC as the receiver of Oakwood" rather than wrongdoing by the assuming bank, the plaintiffs were raising "claims" that should have been resolved administratively and were therefore barred by § 1821(d)(13)(D)(ii). *Id.* at 386. This reasoning is inapplicable here. The Tellados sued an assuming bank for its own misconduct, not any acts or omissions by the FDIC as receiver. *See Am. Nat'l*, 642 F.3d at 1144 (distinguishing *Oakwood* on this basis). Nor can the fact that the predicate for the Tellados' right of cancellation against OneWest was a series of acts and omissions by Indymac Bank change the nature of the Tellados' suit. *Cf. id.* ("[T]hat actions by the FDIC form one link in the causal chain connecting [the assuming bank's] wrongdoing with [plaintiffs'] injuries is insufficient to transform the complaint into one against the FDIC.").

The other cases OneWest cites apply the jurisdictional bar to cases asserting only violations of law by the failed institution that went into receivership rather than (as in this case) a bank that assumed its assets. *See Lutz v. Stewart Mich.*

Title, 781 F. Supp. 2d 526, 528-29, 532 (E.D. Mich. 2011); *Rodriguez v. Indymac Bank*, Civ. No. 09-5843, 2010 WL 1186315, at *1, *4 (D.N.J. Mar. 24, 2010); *Perez v. Saxon Mortg. Servs., Inc.*, Civ. No. 09-1392-L, 2010 WL 1087625, at *1 (S.D. Cal. Mar. 22, 2010).

Because the term "claim" under § 1821(d)(13)(D)(ii) of FIRREA refers only to "claims" contemplated by the FIRREA administrative process and not to all causes of action, and because the Tellados' cause of action against OneWest for OneWest's own violation of Pennsylvania law is not a "claim" under FIRREA, FIRREA's jurisdictional bar does not apply to this case.

III. UNDER SETTLED THIRD CIRCUIT LAW, THE FDIC IS NOT AN INDISPENSABLE PARTY.

OneWest is mistaken as a matter of law that the FDIC's potential for liability as an indemnifier of OneWest renders the FDIC an indispensable party. This Court has repeatedly held that the possibility that a third party might be liable as a co-obligor or indemnifier does not render that party indispensable under Federal Rule of Civil Procedure 19 as long as the court can grant relief as between the parties before it. *See, e.g., Gardiner v. V.I. Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 (3d Cir. 1993); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 844 F.2d 1050, 1054 (3d Cir. 1988); *see generally Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 503 (7th Cir. 1980) ("[P]otential

indemnitors have never been considered indispensable parties, or even parties whose joinder is required if feasible."). OneWest cites no case to the contrary.

Under Rule 19(a), a party whose joinder would not destroy subject matter jurisdiction is a "required party" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. Pro. 19(a)(1). If a party does not qualify as a "required party" under either of these standards, then it cannot be an "indispensable" party whose non-joinder requires dismissal. *Janney*, 11 F.3d at 404 (using term "necessary party" for "required party" under previous language of rule).

The FDIC fails both tests for a required party. Under the "complete relief" criterion of Rule 19(a)(1)(A), the district court could, and did, grant complete relief to the Tellados without the FDIC. The Tellados sought to cancel the loan held by OneWest, and the court granted this relief. App. 25. OneWest protests that under its agreement with the FDIC, the FDIC must reimburse OneWest for its losses in this action. AOB 36. But under this Court's precedent, the question of complete

relief concerns relief as between the parties already involved in the action, and not the effect on absent parties. *Janney*, 11 F.3d at 405. Therefore under the "complete relief" prong of Rule 19(a), the FDIC's joinder was not necessary.

Nor does the judgment against OneWest prejudice its rights, "impair or impede" the FDIC's ability to protect its own interest, or expose OneWest to multiple or inconsistent obligations. Fed. R. Civ. Pro. 19(a)(1)(B). Rather, OneWest can pursue a separate claim against the FDIC for whatever contribution OneWest believes it is owed, and the FDIC does not forfeit any defense by its absence from this proceeding. *See Janney*, 11 F.3d at 407-08 (rejecting argument that proceeding against one of two obligors has preclusive effect on claims between the two obligors whose interests differ); *id.* at 412 (explaining that third party is not a necessary party where "[a] holding that [the defendant] is liable to [the plaintiff] does not legally imply that [the third party] is also liable"). Any FDIC obligation to OneWest is a matter of contract between those parties and may be determined separately from this case. *See Hotel Rittenhouse*, 844 F.2d at 1054.

This case presents no risk that OneWest will be subject to multiple or inconsistent obligations. When a defendant is held liable to a plaintiff, that judgment affects only the dispute between those two parties; it does not settle any claims with respect to a third party from whom the defendant seeks contribution or indemnity. *Janney*, 11 F.3d at 411 ("[I]f [the defendant] is held liable, the result

will bind it only in its dispute with [the plaintiff], and it will remain free to claim contribution or indemnity from [a third party].”).

If OneWest had wished for efficiency’s sake to seek relief against the FDIC in this action, it could have used Rule 14 impleader, but OneWest’s failure to do so does not prejudice its right to bring a separate action for contribution or indemnity. *Id.* at 412. Even if, as OneWest implies, FIRREA precluded the FDIC’s joinder here, *see* AOB 37-38, this Court has held that barriers to a third party’s joinder do not render a party “indispensable” under Rule 19 as long as contribution or indemnity can be sought in a subsequent proceeding; the relative efficiency or inefficiency of any subsequent action for obtaining relief against the absent party does not affect the indispensability analysis. *See Gardiner*, 145 F.3d at 642.

As this Court has summarized, “[a] defendant’s right to contribution or indemnity from an absent non-diverse party does not render that absentee indispensable pursuant to Rule 19.” *Janney*, 11 F.3d at 412 (quoting *Hotel Rittenhouse*, 844 F.2d at 1054). This Court should reject OneWest’s Rule 19 argument.

IV. PLAINTIFFS’ CLAIM IS NOT PREEMPTED BY HOLA.

OneWest’s argument that the Home Owners’ Loan Act (HOLA) preempts the Tellados’ claims relies on an unreasonably broad understanding of preemption under HOLA and Office of Thrift Supervision (OTS) implementing regulations.

OneWest correctly lays out the structure of the inquiry under OTS regulations, which set forth a general list of subject-matter areas in which state laws are preempted, *see* 12 C.F.R. § 560.2(b), and then a second list of types of state laws that 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." *Id.* § 560.2(c); *cf. id.* § 560.2(a) (declaring purpose "[t]o enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices"). Among the types of state laws preempted are those "purporting to impose requirements regarding" "[d]isclosure[s]" and "origination." *Id.* § 560.2(b)(9)-(10). Among the types not preempted is state "[c]ontract and commercial law." *Id.* § 560.2(c)(1).

OneWest's chief contention is that the district court erred by failing to consider sections (b) and (c) of the regulation in sequence: according to OneWest, the district court should have found that by specifying the language in which buyers receive notice of their right to cancel, the CPL provisions at issue regulated "disclosure" and "origination" under (b)(9) and (b)(10) and were therefore preempted without consideration of section (c). *See* AOB 41-44. The flaw in OneWest's argument is its unstated—and unexplained—assumption that the regulation's reference to "state laws purporting to impose requirements regarding"

"[d]isclosure[s]" and "origination," *id.* § 560.2(b)(9)-(10), covers *any* state law with *any* effect on loan disclosure or origination regardless of whether the law is targeted at lending activities. OTS's own interpretation of its regulation, which is entitled to deference, *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and on which many courts have relied, *see, e.g., In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 644 (7th Cir. 2007); *McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132, 168-96 (E.D.N.Y. 2009); *Binetti v. Wash. Mut. Bank*, 446 F. Supp. 2d 217, 219-21 (S.D.N.Y. 2006), belies this assumption.

In 1996, OTS's chief counsel issued an opinion about HOLA's preemptive effect on various provisions of Indiana commercial law, including Indiana's deceptive acts and practices ("DAP") statute. *See* OTS Opinion Letter P-96-14 (Dec. 24, 1996), 1996 WL 767462 (hereinafter "OTS 1996 Letter"). Although the Indiana DAP specifically regulated what the lender was permitted to tell a consumer, *see id.* Pt. I (describing the DAP law as "prohibiting specified acts and representations in connection with consumer transactions" and giving examples of prohibited disclosures), OTS concluded the law was *not* preempted under section 560.2(b). *See id.* Pt. II.C. Whereas OTS concluded that a different state law "requiring specific *lending* disclosures," *see id.* Pt. II.B (emphasis added), was preempted under subsection (b)(9), the DAP was not preempted because it "prohibit[ed] specified acts and representations in *all* consumer transactions

without regard to whether the transaction involve[d] an extension of credit," *id.* Pt. II.C (emphasis added). OTS explained that it "d[id] not intend to preempt state laws that establish the basic norms that undergird commercial transactions." *Id.* OTS found that the DAP fell within the regulation's exception for "traditional 'contract and commercial' law under § 560.2(c)(1)," and that its impact on lending was incidental to its goal of ensuring ethical practice by all businesses operating in Indiana. *Id.*

The OTS opinion letter demonstrates that a generally applicable law is *not* preempted under section 560.2(b) merely because it incidentally regulates a listed aspect of lending. This principle is confirmed by a 1999 OTS opinion letter, in which the OTS found a California law preempted but—crucially—analyzed the law under section 560.2(c) rather than finding it automatically preempted by section 560.2(b)(9) even though the statute explicitly regulated "advertising." *See* OTS Opinion Letter P-99-3 (Mar. 10, 1999), 1999 WL 413698 (hereinafter "OTS 1999 Letter") Pt. I.B.1; *id.* Pt. II.A (noting that the law at issue "is not directly aimed at federal savings associations, or lenders generally" and therefore proceeding to section 560.2(c) analysis). The threshold question for preemption is therefore whether the law affecting one of the activities enumerated in section 560.2(b) is aimed at lending institutions or is a law of general applicability. *Cf. Ocwen*, 491 F.3d at 644 ("We must decide . . . which claims fall on the regulatory

side of the ledger and which, for want of a better term, fall on the common law side."); *Dixon v. Wells Fargo Bank, N.A.*, Civ. No. 11-10368, 2011 WL 2945795, at *13 (D. Mass. 2011) (same). A law of general applicability is not preempted if it is a contract or commercial law that only incidentally affects lending.

Interpreting the HOLA regulation's reference to a law regulating "disclosure" to include any law that affects disclosures, no matter how general, would exempt lenders from ordinary principles of fair dealing enshrined in the common law. *See Ocwen*, 491 F.3d at 644 ("It would be surprising for a federal regulation to forbid [a homeowner who refused to pay a charge not agreed to] based on the mortgagee's breach of contract. Or if the mortgagee . . . fraudulently represents to the mortgagor that it will forgive a default, and then forecloses, it would be surprising for a federal regulation to bar a suit for fraud."); *see also Dixon*, 2011 WL 2945795, at *17 ("[E]specially because HOLA does not give a private right of action, Congress could not have intended to deny all traditional state-law avenues of recourse to consumers who are harmed by the unseemly conduct of lenders."); *Binetti*, 446 F. Supp. 2d at 219 (expressing concern that "the Bank would be completely insulated from liability for its breach [of contract] if the Court were to find plaintiff's [fraud] claim preempted"). It is doubtful that either Congress or OTS sought such a result.

Instead, as Judge Posner has explained on behalf of the Seventh Circuit, "OTS's assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies." *Ocwen*, 491 F.3d at 643.[15] Other courts have likewise recognized that state statutory and common-law rules of general applicability are not preempted where their effect on lending is merely incidental. *See, e.g.*, *Dixon*, 2011 WL 2945795, at *15 (holding common law promissory estoppel claim not preempted, and explaining that "[o]nly claims that are specific to a defendant's lending activities, as distinguished from legal duties applicable to all businesses, are preempted by HOLA" (citation and internal quotation marks omitted)); *McAnaney*, 665 F. Supp. 2d at 164, 166, 168 (rejecting preemption challenge to state common law breach of contract and fraud claims and statutory deceptive-practice claim); *Binetti*, 446 F. Supp. 2d at 219-21 (relying on OTS's 1996 and 1999 opinion letters in rejecting preemption challenge to state consumer fraud statute).

---

[15] *Ocwen* considered a complaint alleging violations of (among other things) the Pennsylvania CPL. Because the complaint there was poorly drafted, however, the court did not rule on these allegations but instead merely suggested that certain claims under Pennsylvania law would likely be preempted and others likely not. *See id.* at 647. The particular provision at issue in this case was not at issue in *Ocwen*.

Of particular relevance here, *Reyes v. Premier Home Funding, Inc.*, 640 F. Supp. 2d 1147 (N.D. Cal. 2009), held that HOLA did not preempt a state law requiring that a party to a contract (including a borrower) be provided a copy of the contract (including a lending agreement) in the language in which it had been negotiated. *See id.* at 1155. OneWest's attempt to distinguish *Reyes* as a case about a "translation" requirement rather than a "disclosure" requirement, *see* AOB 44, is unconvincing: a "translation" requirement is a requirement that the borrower be given a "disclosure" of the contract's terms in another language.[16]

Applying these principles to the CPL is straightforward. The CPL, like the translation law upheld in *Reyes*, is not aimed at lending; it is a law of general applicability. *See, e.g., Poskin v. TD Banknorth, N.A.*, 687 F. Supp. 2d 530, 556 (W.D. Pa. 2009); *Mwantembe v. TD Bank, N.A.*, 669 F. Supp. 2d 545, 553 (E.D. Pa. 2009). The CPL affects lending activities at most incidentally, by requiring one extra piece of paper to be given to the borrower and one extra paragraph in the contract so that the borrower can understand the terms of the loan.

In the case on which OneWest principally relies, *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008), the Ninth Circuit failed to analyze

[16] OneWest also observes that *Reyes* held certain *other* state-law claims preempted, *see* AOB 44-45, but the preempted claims were only those that blended the substantive standards of other federal laws with the remedies available under state law, in what the court found was an attempt "to obtain a remedy under state law that does not exist under federal law." *Reyes*, 640 F. Supp. 2d at 1156.

OTS's own interpretations of the regulation, which it cited without discussion in a footnote. *See id.* at 1005 n.1. In following the Ninth Circuit's approach to HOLA preemption, the Eighth Circuit did consider the OTS opinion letters, but wrongly understood the OTS's 1999 letter to apply a per se rule under section 560.2(b) rather than an effects-based analysis under section 560.2(c). *Compare Casey v. FDIC*, 583 F.3d 586, 593-94 (8th Cir. 2009), *with* OTS 1999 Letter, 1999 WL 413698, Pt. II.B (subsection of letter titled "Section 560.2(c)" analyzing whether, under that section, state law had more than an "incidental impact" on lending). Additionally, the approach advanced by the Eighth and Ninth Circuit is troubling for the reasons explained by Judge Posner's opinion for the Seventh Circuit: under the broad preemption view, HOLA preemption would become a vehicle for lenders to ignore states' general consumer protection laws. *See Ocwen*, 491 F.3d at 643-44. The better view is the one espoused by the Seventh Circuit and numerous district courts throughout the country that "generally applicable state laws that fit within paragraph (c) without more than incidentally affecting lending are exempt from preemption." *Dixon*, 2011 WL 2945795, at *13.

Because the CPL imposes a modest notification requirement that is not aimed at lenders in particular but rather is part of the state's generally applicable commercial law, and its effect on lending activities is incidental at most, the district court correctly held it was not preempted by HOLA.

V. PLAINTIFFS' CLAIM IS NOT PREEMPTED BY TILA.

OneWest argues that the Truth in Lending Act (TILA) preempts the CPL because the latter provides that disclosures satisfying TILA and FTC regulations also satisfy the CPL. *See* AOB 45 (citing 73 Pa. Stat. Ann. § 201-7(m)). Setting aside OneWest's mistaken contention that a TILA disclosure satisfies FTC regulations and therefore state law (addressed in Part I.D, *supra*), this argument fails to demonstrate preemption of any kind. On the contrary, OneWest seems to be arguing that Pennsylvania and federal law are congruent and do *not* conflict. *See* AOB 47 ("[W]here both TILA and the Act apply, TILA notices satisfy both state and federal requirements . . . ."). In terms of federal preemption, i.e., a conflict between state and federal law, this argument fails on its face.

To the extent OneWest suggests a conflict between TILA and Pennsylvania law because the CPL requires in certain circumstances that notifications be given in another language in addition to English, this argument is plainly wrong. TILA preempts only those state laws that are "inconsistent" with its requirements. 15 U.S.C. § 1610(a)(1). According to TILA's implementing regulation, "[a] State law is inconsistent if it requires a creditor to make disclosures or take actions that *contradict* the requirements of the Federal law." 12 C.F.R. § 226.28(a)(1) (emphasis added). Moreover, "[s]tate law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more

detailed disclosures, do not contradict the Federal requirements." 12 C.F.R. Pt. 226 Supp. I, Commentary to 12 C.F.R. § 226.28(a)(3).

Accordingly, the Eastern District of Pennsylvania recently held that TILA does not preempt the CPL's disclosure provision—the same provision at issue in this case—simply because it "requires additional and different language to be contained in the cancellation notice." *Johnson v. Metlife Bank, N.A.*, Civ. No. 11-800, 2011 WL 4389582, at *7 (E.D. Pa. Sept. 21, 2011). Because both federal and state law require notice of a three-day cancellation period, there is no inconsistency. *See id.* (comparing 73 Pa. Stat. Ann. § 201-7 with 15 U.S.C. § 1635(a)); *cf. Williams v. Empire Funding Corp.*, 109 F. Supp. 2d 352, 356, 361 (E.D. Pa. 2000) (holding state-required disclosure preempted as inconsistent where state and federal disclosures specified *different* lengths of time for cancellation of a financing agreement).

Here, as in *Johnson*, there is no inconsistency in the content required by state and federal law. The only difference between the required notifications is that Pennsylvania law requires the notification to be "in the same language (Spanish, English, etc.) as that principally used in the oral sales presentation" as well as in English. 73 Pa. Stat. Ann. § 201-7(b)(1).[17] The state-law requirement of

[17] Section 201-7(b) also requires an additional notice of the right to cancel to be provided in ten-point type near the consumer's signature on the contract. OneWest

disclosure of the same information in a different language is not preempted under the plain language of TILA, its regulations, or the regulatory commentary.

VI. THE PENALTY ORDER DID NOT VIOLATE DUE PROCESS.

The district court was well within its authority to fine OneWest for flouting the court's order that its CEO appear for trial. Courts possess inherent authority to impose sanctions to vindicate their authority and ensure compliance with their orders. *See, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 188-89 (3d Cir. 2002). And the Federal Rules of Civil Procedure authorize a court to "issue *any just orders* . . . if a party . . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. Pro. 16(f)(1)(C) (emphasis added). Here, the district court ordered OneWest to produce its CEO for trial, and OneWest deliberately disobeyed, reasoning that since its CEO was new to his position, the bank should take it upon itself to choose a different corporate employee than the one the court specified. *See* App. 279-80 (defense counsel's explanation to the court). Sanctioning a party for a deliberate violation of a court order is nothing extraordinary. *See, e.g., Pennsylvania v. Local Union 542, Int'l*

---

does not contend TILA preempts this requirement. Nor could it: the additional notice on the contract is completely consistent with TILA. Because this separate requirement was not met, the Tellados would be entitled to relief even if the additional notice in Spanish were preempted.

Union of Operating Eng'rs, 552 F.2d 498, 509 (3d Cir. 1977) ("[F]louting a trial judge's commands is the essence of obstructing the administration of justice.").

OneWest's reliance on *Newton v. A. C. & S., Inc.*, 918 F.2d 1121 (3d Cir. 1990), is misplaced. That appeal concerned a district court's practice of setting a settlement deadline and then fining the parties if they settled after that date. *See id.* at 1124-25. This Court held the practice improper because attempting to coerce the parties via sanctions was in the nature of civil contempt rather than a court's authority to manage its schedule under Rule 16, and the fines did not satisfy due process requirements for contempt. *See id.* at 1126-27. Unlike in *Newton*, the court's order in this case did not attempt to "coerce" the parties, AOB 57, by taking the unusual step of threatening sanctions if they did not settle. The court here was merely enforcing its authority to facilitate settlement—a practice *Newton* condoned: "the imposition of sanctions for failure to comply with a settlement schedule is entirely consistent with the purpose of Rule 16." 918 F.2d at 1126.

OneWest's concern that the amount of the fine was not linked to expenses the Tellados incurred, *see* AOB 59, seems to be based on the district court's authority under Rule 16(f)*(2)* to "order [a] party, its attorney, or both to pay the reasonable expenses . . . incurred because of any noncompliance with this rule." But the district court fined OneWest under Rule 16(f)*(1)(C)*, *see* App. 6 n.2, which as noted authorizes "any just orders" when a party violates a scheduling order.

Finally, OneWest's contention that it lacked a hearing at which to explain its noncompliance, *see* AOB 59-60, is belied by the record, which reveals that the court provided OneWest just such an opportunity. *See* App. 279-88. OneWest also had an opportunity to respond to the possibility of a fine. *See* App. 283-84. It was not an abuse of discretion for the district court to refuse to accept OneWest's post hoc rationalization and impose sanctions to vindicate the authority of the court. *See Adams v. Ford Motor Co.*, 653 F.3d 299, 304 (3d Cir. 2011) (aside from due process concerns, sanctions reviewed for abuse of discretion).

CONCLUSION

The judgment of the district court should be affirmed.

Dated: November 23, 2011

Respectfully submitted,

/s/ Scott Michelman
Scott Michelman
Michael T. Kirkpatrick (on the brief)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

/s/ Irwin Trauss
Irwin Trauss
PHILADELPHIA LEGAL ASSISTANCE
42 South 15th Street, Suite 500
Philadelphia, PA 19102
(215) 981-3811

Attorneys for Plaintiffs - Appellees

CERTIFICATION OF BAR MEMBERSHIP

I certify that Irwin Trauss and Scott Michelman, counsel for Appellees, are members of the Bar of this Court.

/s/ Scott Michelman

/s/ Irwin Trauss

CERTIFICATION OF SERVICE

I certify that on November 23, 2011, I caused this brief to be served by First Class mail and by ECF on the following counsel for appellants, as follows:

Martin C. Bryce, Jr.
Damian L. DiNicola
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

and that on November 23, 2011, I caused to be delivered by hand ten copies of this brief to the Clerk of the Court, as follows:

Marcia M. Waldron, Clerk
U.S. Court of Appeals for the Third Circuit
Room 21400, U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

/s/ Irwin Trauss

CERTIFICATION CONCERNING IDENTICAL VERSIONS OF BRIEF

I certify that the electronic and hard copies of this brief are identical.

/s/ Irwin Trauss

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with Fed. R. App. Pro. 32(a)(7)(B) because this brief contains 13,997 words, excluding those parts of the brief excluded by Fed. R. App. Pro. 32(a)(7)(B)(iii).

/s/ Scott Michelman

CERTIFICATION CONCERNING VIRUS CHECK

I certify that the electronic file of this brief was scanned with VIPRE anti-virus software.

/s/ Scott Michelman

ADDENDUM (Fed. R. App. Pro. 28(f)): SECTION 201-7 OF THE CPL

(a) Where goods or services having a sale price of twenty-five dollars ($25) or more are sold or contracted to be sold to a buyer, as a result of, or in connection with, a contact with or call on the buyer or resident at his residence either in person or by telephone, that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale. Such notice of rescission shall be effective upon depositing the same in the United States mail or upon other service which gives the seller notice of rescission.

(b) At the time of the sale or contract the buyer shall be provided with:

> (1) A fully completed receipt or copy of any contract pertaining to such sale, which is in the same language (Spanish, English, etc.) as that principally used in the oral sales presentation, and also in English, and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of ten points, a statement in substantially the following form:
>
> > "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."
>
> (2) A completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point bold face type the following information and statements in the same language (Spanish, English, etc.) as that used in the contract:
>
> > Notice of Cancellation
> >
> > (Enter Date of Transaction)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to (name of seller), at (address of seller's place of business) not later than midnight of (date).

I hereby cancel this transaction.

....

(Date)

....

Buyer's Signature

(c) Before furnishing copies of the "Notice of Cancellation" to the buyer, both copies shall be completed by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Each buyer shall be informed at the time he signs the contract or purchases the goods or services, of his right to cancel.

(e) The cancellation period provided for in this section shall not begin to run until buyer has been informed of his right to cancel and has been provided with copies of the "Notice of Cancellation."

(f) Seller shall not misrepresent in any manner the buyer's right to cancel.

(g) Any valid notice of cancellation by a buyer shall be honored and within ten business days after the receipt of such notice, seller shall (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) No note or other evidence of indebtedness shall be negotiated, transferred, sold or assigned by the seller to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Seller shall, within ten business days of receipt of the buyer's notice of cancellation, notify him whether the seller intends to repossess or to abandon any shipped or delivered goods. If seller elects to repossess, he must do so within twenty days of the date of buyer's notice of cancellation or forfeit all rights to the delivered goods.

(j) Deleted by 2004, Nov. 30, P.L. 1553, No. 196, § 1, effective in 60 days [Jan. 31, 2005].

(j.1) (1) Rights afforded under this section may be waived only through the execution of an emergency authorization form:

(i) where goods or services have a sale price of twenty-five dollars ($25) or more;

(ii) are contracted to be sold to a buyer as a result of or in connection with a contact made by the buyer to the seller; and

(iii) the goods or services contracted for are needed to remedy a bona fide emergency on the buyer's residential real property. Nothing in this subsection shall prohibit a seller contacted by a buyer as a result of a bona fide emergency from taking any immediate preliminary steps necessary to remedy a clear and immediate danger that may cause death or serious bodily injury to the buyer, the seller or other persons without having to obtain the emergency authorization form.

(2) To obtain a waiver under this section, the seller must furnish the buyer with an emergency work authorization form as well as a written estimate of the goods or the performance of services. This authorization will allow the seller to immediately proceed with the delivery of the goods or the performance of the services necessary to remedy the bona fide emergency.

(3) The emergency work authorization form provided for in this section shall be:

(i) on a preprinted card at least four inches by six inches in size; and

(ii) the writing thereon must be in at least ten-point bold face type in the following form:

Emergency Work Authorization

(Enter Date of Transaction)

You, the buyer, having initiated the contract for the goods and services of (enter the name of the seller), the seller, for the remediation of a bona fide emergency hereby authorize the seller to immediately proceed with the delivery of goods or the

performance of services necessary to remedy the bona fide emergency. By providing the seller with this authorization, you agree to make full payment for the goods or services provided. You agree not to exercise the rights afforded you by the Unfair Trade Practices and Consumer Protection Law to cancel the contract within three business days from the above date.

You, the buyer, attest that the attached estimate is an accurate description of the goods and services which will be provided by the seller for the correction of the bona fide emergency:

....

(Date)

....

(Buyer's Signature)

(j.2) Prior to the buyer signing the emergency authorization form, the seller shall provide the buyer with a written estimate of the total cost of the goods or services, including any fee for the service call. The estimate shall be provided prior to the delivery of the goods or the performance of the services necessary to remedy a bona fide emergency. If the cost of the goods or services actually provided exceeds the estimate provided, the seller must obtain further written authorization from the buyer to perform the additional work or service. Nothing in this subsection shall be construed to prohibit the seller from charging the buyer a fee for a service call for the purpose of determining the cause of and the appropriate remedy of the bona fide emergency, regardless of whether further goods or services are provided. The seller shall immediately disclose to the buyer whether a service call fee shall be charged upon initiation by the buyer of a contract for goods or services for the remediation of a bona fide emergency. The seller may also charge a fee for immediate preliminary steps without having to obtain a written emergency authorization.

(k) As used in this section, merchandise shall not be construed to mean real property.

(l) The provisions of this section shall not apply to the sale or contract for the sale of goods or services having a sale price of less than twenty-five dollars ($25).

(l.1) This section shall not apply, however, to the sale of precious metals, bonds or foreign currency when the value of the items can fluctuate daily.

(m) A "Notice of Cancellation" which contains the form and content required by rule or regulation of the Federal Trade Commission shall be deemed to be in compliance with the requirements of this section.

(n) As used in this section, "bona fide emergency" means any condition existing on the buyer's residential real property which renders or has the capability to render the residential real property uninhabitable. The term includes, but shall not be limited to, conditions significantly affecting the heating system, electrical system, plumbing system, ventilation system, roof or outer walls of the residential real property.

(o) As used in this section, "immediate preliminary steps" means only those steps necessary to eliminate a clear and immediate danger that may cause death or serious bodily injury to the buyer, the seller or other persons. The term includes, but shall not be limited to, termination of the carrying of gas, oil or oil product, sewage or water through an underground pipe or the carrying of electric or communication service through an underground conductor, pipe or structure. The term shall not be construed as including any other steps necessary to repair and remedy the bona fide emergency.