IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 50 EAP 2005

WILL SALLEY, JR.

v.

OPTION ONE MORTGAGE
CORP.; CIT GROUP; JOHN DOE, TRUSTEE;
JOHN DOE TRUST; and JOHN DOES #S 1-100

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CONSUMER BANKERS ASSOCIATION PENNSYLVANIA BANKERS ASSOCIATION, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, PENNSYLVANIA ASSOCIATION OF COMMUNITY BANKERS AND PENNSYLVANIA FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF APPELLEE OPTION ONE MORTGAGE CORP.

On Petition for Certification of Question of Law From the United States Court of Appeals for The Third Circuit

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Amici Curiae American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Chamber of Commerce of the United States of America ("U.S. Chamber"), Consumer Bankers Association ("CBA"), Pennsylvania Bankers Association ("PBA"), Pennsylvania Chamber of Business and Industry ("PA Chamber"), Pennsylvania Association of Community Bankers ("PACB") and Pennsylvania Financial Services Association ("PFSA") (collectively "*Amici*") respectfully submit this brief in support of Appellee Option One Mortgage Corporation ("Option One").

AMICI'S INTEREST IN THIS CASE

The ABA is the principal national trade association of the banking industry in the United States. It has members located in each of the fifty states and the District of Columbia and includes banks of all types and sizes -- money centers, regional banks and community banks. ABA members hold approximately ninety-five percent of the domestic assets of United States banks. The ABA frequently appears in litigation as either a party or as *amicus curiae* where the issues raised are of widespread importance and concern to banks or consumers of banking services.

The AFSA was organized in 1916. It represents more than 300 companies making residential mortgage loans or otherwise extending consumer credit

throughout the United States. These companies range from independently owned consumer finance offices to the nation's largest banking, financial services, retail and automobile companies.

The U.S. Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of all sizes. U.S. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the U.S. Chamber is to represent the interests of its members in important matters before the state and federal courts, legislatures and executive branches. To that end, the U.S. Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community. In particular, the U.S. Chamber has been involved in a wide variety of cases involving the interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally-insured financial institutions that

collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States. CBA members regularly include arbitration agreements in their consumer loan documents and deposit contracts.

The PBA has represented the Pennsylvania banking industry at the state and federal level since 1895. The PBA supports the diverse needs of its membership through volunteer participation, education, member services and industry advocacy, including participation in litigation affecting the interests of its members. The PBA is considered one of the strongest and most respected trade associations in Pennsylvania.

The PA Chamber is a not-for-profit trade association devoted to representing the interests of the business community throughout the Commonwealth. It has thousands of member corporations, trade associations and local chambers of commerce employing more than half the private workforce in the state. The Pennsylvania Chamber acts as an advocate for the business community in the region, and seeks to assist its members in competing regionally, nationally and globally.

PACB represents, exclusively, the interests of almost 260 community-oriented commercial banks, savings banks and savings associations in the Commonwealth of Pennsylvania. PACB members all share a strong commitment and philosophy to meet the financial and social needs of their community and

citizens through hometown, quality service. PACB members believe that inclusion of arbitration agreements in their consumer loan documents, including arbitration agreements sharing the features of the arbitration provision in the current lawsuit, serves these ends.

PFSA represents over 65 financial services companies, with more than 430 branches, doing business in Pennsylvania. It has been representing the consumer lending industry since 1915 and the secondary mortgage industry since 1980. PFSA's purposes include the protection and improvement of the consumer finance and mortgage lending business and the creation of a regulatory climate in which reasonable regulation will be adopted for the benefit of its members and Pennsylvania citizens.

Many of *Amici*'s members, constituent organizations and affiliates (collectively, "Members") have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes with consumers and other contracting parties and because arbitration minimizes the disruption and loss of good will that often results from litigation. Indeed, based on the U.S. Supreme Court's consistent endorsement of arbitration over the past

several decades (and as recently as February 2006), Members have structured millions of contractual relationships around arbitration agreements.

The Court's decision in this case will impact most mortgage arbitration clauses, which frequently exclude foreclosure proceedings from the scope of arbitration. A finding of unconscionability would interfere with the contractual freedom of Members to enter into arbitration agreements tailored to their needs. Moreover, toleration of the hostility to arbitration manifested by Lytle v. CitiFinancial Serv., Inc., 810 A. 2d 643 (2002), would invite lower courts to find unconscionability and reject even the fairest arbitration agreements almost at will, whether because of professed concerns about fees the consumer might incur, the level of discovery the consumer might obtain, the consumer's inability to obtain class relief in arbitration, the arbitration administrator or any other feature of the arbitration agreement. Members could never be sure whether their arbitration agreements will be enforced as written. And the adverse effects would not be confined to arbitration agreements of subprime lenders or even to arbitration agreements related to loans or other financial services. Accordingly, *Amici* have a compelling interest in the issues at stake in this case.

BACKGROUND

By order dated October 20, 2005, the U.S. Court of Appeals for the Third Circuit certified the following question to this Court:

> Whether the arbitration agreement under consideration in this case, which exempts from binding arbitration certain creditor remedies, while requiring the submission of other claims to arbitration, is unconscionable under Pennsylvania law, as suggested by Lytle v. CitiFinancial Serv., Inc., 810 A. 2d 643 (2002) (one-sided agreement presumptively unconscionable) (contra Harris v. Green Tree Fin. Corp., 183 F. 3d 173 (3d Cir. 1999)), and is therefore unenforceable?

By order dated December 28, 2005, this Court accepted the certification and agreed to consider the issue.

SUMMARY OF ARGUMENT

Congress enacted the FAA in recognition of the fact that arbitration of disputes provides a benefit to consumers. Empirical studies confirm that consumers gain from arbitration and prefer it to litigation. Even Plaintiff's *Amici* acknowledge, as they must, that "[m]andatory arbitration agreements can, and frequently do, benefit consumers and corporations alike, while also fostering the interests of judicial economy." Pl. Amici Br., p. 3.

Lytle indulged in the very hostility to arbitration that the FAA was specifically enacted to reverse (as well as a hostility to banks and consumer lenders). It improperly assumed that arbitration is inferior to litigation and

disregarded that borrowers are fully protected in judicial foreclosure proceedings. Even though Section 2 of the FAA, 9 U.S.C. § 2, requires enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract" (emphasis added), and even though this Court has specifically rejected any requirement for complete mutuality of remedies to enforce a contract, Lytle held that a consumer arbitration agreement is presumptively unconscionable in the absence of complete mutuality. Significantly, Lytle found a foreclosure carve-out to be unconscionable at the same time as a judicial arbitration program established by the Pennsylvania Legislature exempts foreclosure proceedings from mandatory arbitration. 42 Pa. C.S.A. §7361(b)(1). Plaintiff's attempt to portray Lytle as a mainstream decision simply will not wash.

The Brief submitted by Plaintiff's *Amici* attempts to divert attention from the specific legal issue certified by the Third Circuit. Under the guise of supplying this Court with the "legal and policy context" of the certified question (Pl. *Amici* Br., p. 3), Plaintiff's *Amici* launch a lengthy diatribe against predatory lending and argue that arbitration facilitates predatory lending. *Amici* do not write to defend predatory lending or the unproven allegations of misconduct against Option One, which are for the arbitrator to decide. However, *Amici* are compelled to rebut the fallacious argument that arbitration somehow fosters predatory lending. To the contrary, as shown herein, arbitration greatly benefits consumers.

As their sole argument against a carve-out of foreclosure proceedings from arbitration, Plaintiff's *Amici* assert that the carve-out creates a "split-forum effect" that makes it more difficult for borrowers to vindicate their statutory rights. The plain language of the parties' arbitration agreement itself refutes any such notion. Further, any practical difficulties created by the arbitration agreement are inherent in arbitration itself and not in the foreclosure carve-out. If anything, the carve-out reduces the likelihood of a "split forum" and enhances the ability of the borrower to obtain discovery. Not only do consumers have a fair opportunity to vindicate their rights in arbitration, but government authorities are also aggressively exercising the strong enforcement powers at their disposal to protect consumers.

The conclusion is inexorable under both the FAA and Pennsylvania law that parties may carve out foreclosure proceedings from an arbitration agreement without rendering their agreement unconscionable. If this Court were to approve Lytle, the adverse effect on Members and consumers alike would be serious. Accordingly, this Court should reject the arguments made by Plaintiff, Plaintiff's *Amici* and the Lytle court and hold that arbitration agreements that require litigation of foreclosure proceedings are not for that reason alone unconscionable under Pennsylvania law.

ARGUMENT

I. Congress, The Courts And Consumers Alike Have Repeatedly Recognized The Consumer Benefits Of Arbitration.

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts.'" EEOC v. Waffle House, Inc., 534 U.S. 279, 288 (2002) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)). The FAA embodies a liberal federal policy favoring arbitration agreements. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002). To implement this policy, Section 2 of the FAA, its core provision, states that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Section 2 creates a body of federal substantive law of arbitrability that is binding on state as well as federal courts. Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1208-9.[1]

Contrary to the unfounded aspersions cast against arbitration by Plaintiff and his *Amici*, the FAA is not an anti-consumer statute, and an arbitration provision

[1] Plaintiff's *Amici* acknowledge "the Commonwealth's long established public policy generally favoring the settlement of disputes by arbitration, consistent with the [FAA]." (Pl. Amici Br., p. 26).

that remits consumers to their remedies in arbitration is wholly consistent with the policy of the FAA favoring arbitration. Indeed, decisions under the FAA have consistently made it clear that the FAA applies to consumer contracts (including contracts involving subprime lenders). See, e.g., Cardegna, supra (U.S. Supreme Court enforced arbitration clause in dispute between borrower and payday lender); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000) (enforcing arbitration clause between consumer and subprime lender); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 222 (1987) (enforcing arbitration agreement between customer and brokerage firm); Jenkins v. First American Cash Advance of Georgia, Inc., 400 F.3d 868 (11th Cir. 2005), cert. denied, 126 S. Ct. 1457 (2006) (enforcing arbitration agreement in contract between consumer and payday lender); Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999) (enforcing arbitration agreement between borrower and subprime lender); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997) (enforcing arbitration agreement between consumer and computer manufacturer).

The arguments of Plaintiff's *Amici* notwithstanding, arbitration no more facilitates predatory lending here than it did in Cardegna, Randolph, Jenkins and Harris. Rather, arbitration merely provides an alternative forum for resolving claims that the law has been violated. The U.S. Supreme Court has repeatedly

instructed that by agreeing to arbitrate, "a party does not forgo ... substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); accord, Randolph, supra, 531 U.S. at 90 ("even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions").

The U.S. Supreme Court has emphasized that Congress intended the FAA to apply to consumer transactions because arbitration benefits consumers:

> "We agree that Congress, when enacting this law [the FAA] had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike ..., corporate interests [and] ... individuals'). Indeed, arbitration's advantages often would seem helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation. See, e.g., H.R. Rep. No. 97-542, p. 13 (1982)."

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 290 (1995). Arbitration is highly favored for its "simplicity, informality, and expedition." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

Empirical studies confirm that consumers benefit from arbitration and actually prefer it to litigation. For example, in April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by

the U.S. Chamber's Institute for Legal Reform.[2] The survey was conducted online among 609 adults who had participated in a binding arbitration case that culminated in a decision. The major findings were that: (i) arbitration was widely seen as faster (74%), simpler (63%) and cheaper (51%) than going to court; (ii) two-thirds (66%) of the participants said they would be likely to use arbitration again, with nearly half (48%) saying they were extremely likely to do so; (iii) even among those who lost, one-third said they were at least somewhat likely to use arbitration again; (iv) most participants were very satisfied with the arbitrator's performance, the confidentiality of the process and its length; and (v) predictably, winners found the process and outcome very fair and losers found the outcome much less fair; however, 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome.

Similarly, in December 2004, Ernst & Young issued a study, titled "Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases," which examined the outcomes of contractual arbitration in lending-related, consumer-initiated cases.[3] The study, based on consumer arbitration data from

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2 See www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf.

3 See http://adrinstitute.com/edit/Feb_05/022105EYPressReleaseADR.htm. This study was funded in part by *amicus* ABA.

January 2000 to January 2004 from the National Arbitration Forum, observed that: (i) consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer;[4] (ii) consumers obtained favorable results -- i.e., results from arbitration decisions, as well as settlements satisfactory to the consumer and cases that were dismissed at the claimant's request -- in 79% of the cases that were reviewed; and (iii) 69% of consumers surveyed indicated that they were very satisfied with the arbitration process.

II. Lytle Was Wrongly Decided.

Plaintiff portrays Lytle as a mainstream decision standing for the unexceptionable proposition that arbitration agreements, like other contracts, will be held unenforceable if they are unconscionable. He never attempts to defend the true nature of the decision -- that complete mutuality of remedies, which is not required under Pennsylvania law for other contracts, is nevertheless required for arbitration agreements, which are presumptively unconscionable and unenforceable if the remedies available to the parties are asymmetrical.

4 This is the exact same win-rate for consumers as exists in state court. See Contract Trials and Verdicts in Large Counties, 1996, p.5 (April 2000), Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/pub/pdf/ctvlc96.pdf.

Remarkably, Plaintiff's *Amici* do not cite Lytle a single time, much less attempt to defend it.

A. Lytle Was Premised On A Hostility To Arbitration That Is Completely Incompatible With The FAA.

Lytle's holding that the CitiFinancial arbitration provision was presumptively unenforceable cannot be justified based upon Pennsylvania legal precedent and was obviously driven by the very hostility to arbitration that the FAA was designed to overcome. The court's anti-arbitration animus is evident not only in the result it reached, but also in its clear preference for proposed anti-arbitration bills -- which Congress chose not to enact -- over the FAA which Congress did enact.

The bills in question would have rendered arbitration provisions in consumer contracts unenforceable. According to the Lytle court, the bills "recognized the relentless attempts by corporate entities to thwart, through the use of such provisions, every state consumer statute enacted to balance the economic disparity of the parties." 810 A. 2d at 660. The court was clearly displeased by the fact that the "Senate bill languishes, some would say has been waylaid, in the legislative process," as does the House bill. Id. at 661. In effect, the Lytle court adopted the

anti-arbitration philosophy that Congress rejected and ignored the pro-arbitration commands of the FAA that Congress made the law of the land.[5]

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5 Not only was Lytle hostile to arbitration, it was equally hostile to banks and consumer lenders. In an astonishing footnote, the court quoted in its entirety an anthem accusing banks of lining their coffers by stealing from the mouths of farmers and the homes of miners the food and coal they have produced and need to survive. According to the refrain:

> "[T]he banks are made of marble
> With a guard at every door
> And the vaults are stuffed with silver
> That the [farmer] [miner] sweated for."

In case the point of the song might otherwise be lost on the reader, the Lytle court helpfully added five paragraphs of its own, "express[ing] the hope that the awesome advantage of the powerful would someday be adjusted and a semblance of equality would prevail." It went on to comment: "Alas, however, the bankers are still stuffing – ever larger vaults." Lytle, 810 A. 2d at 658 n. 8.

Remarkably, the court's initial attack on banks did not sate its ire. Thus, the court went on to characterize corporate entities using arbitration clauses in consumer contracts as "pinstriped exploiters," 810 A. 2d at 660-61, and, in a second footnote, it quoted the following passage from a prior (reversed) decision by Lytle's author:

> "Don Corleone once rasped: "A lawyer with his briefcase can steal more than a hundred men with guns." Mario Puzo, The Godfather, p. 51 (Putnam Publishing Group 1969) – one supposes that professional courtesy precluded his allusion to the banker."

Lytle, 810 A. 2d at 661 n. 12 (quoting Mazaika v. Bank One, Columbus, N.A., 439 Pa. Super. 95, 653 A. 2d 640, 642 n. 3 (Pa. Super. 1994), rev'd, 545 Pa. 115, 680 A. 2d 845 (1996)). It is notable that Lytle's author was not deterred from repeating his *ad hominem* Mazaika attack by this Court's reversal of his Mazaika decision.

The Lytle court held that the arbitration provision at issue was presumptively unconscionable because borrowers were forced to arbitrate their claims against the lender while the lender was free to litigate foreclosure actions against its borrowers. Lytle's conclusion was fatally flawed and should not be applied in the present case.

Under the FAA, arbitration is the equal of litigation but the parties remain free to determine the nature of the arbitration and to have some of their disputes resolved by a court instead of an arbitrator. See Volt Info. Sciences, Inc. v. Stanford Univ., 489 U.S. 468, 478 (1989) (stating that "the FAA does not require parties to arbitrate when they have not agreed to do so," see [Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)] (the Act 'does not mandate the arbitration of all claims', nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., [473 U.S. 614, 628 (1985)]").

Section 2 of the FAA is clear: Arbitration contracts must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). "Thus, generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the FAA." Harris v. Green Tree Fin. Corp., supra, 183 F.3d 173 at 179 (emphasis added). However, state laws that single out arbitration for special adverse treatment are

preempted by the FAA pursuant to the Supremacy Clause of the United States Constitution. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); Southland Corp. v. Keating, 465 U.S. 1 (1984).

The Lytle court made no effort to survey Pennsylvania contract law concerning whether complete mutuality of remedies is required. If it had, it necessarily would have reached the same conclusion as the Third Circuit in Harris: "Modern contract law largely has dispensed with the requirement of reciprocal promises ..., provided that a contract is supported by sufficient consideration. See Restatement (Second) of Contracts § 79 (1981)." Harris, 183 F.3d at 180. In fact, this Court has clearly held that no mutuality of remedy requirement exists as a matter of Pennsylvania contract law. See, e.g., Erkess v. Eisenthal, 354 Pa. 161, 164, 47 A.2d 154, 156 (1946) ("The assertion that there is no mutuality of remedy is without foundation. Mutuality of obligation is one thing; mutuality of remedy another. The parties became mutually obligated to each other and each had a remedy."); Driebe v. Fort Penn Realty Co., 331 Pa. 314, 319, 200 A. 62, 64 (1938) (same).[6]

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6 The Lytle court erred not only in imposing a mutuality of remedies requirement on the arbitration agreement, but also in reading the agreement to lack mutuality. This is not a case like Zak v. Prudential Property and Casualty Insurance Co., 713 A. 2d 681 (Pa. Super. 1998), quoted at length by the Lytle court, 810 A. 2d at 659-60, and cited by Plaintiff's *Amici* at page 44 of their Brief. In Zak, the insurer stacked the deck against its

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Because generally applicable Pennsylvania contract law does not require complete mutuality of remedies, the FAA preempts Lytle's holding that complete mutuality is presumptively required in an arbitration agreement. Neither Lytle nor any other court has ever suggested that, in the absence of an arbitration clause governing other claims, there is anything the least bit unconscionable about a lender resorting to the courts to initiate foreclosure of a mortgage loan in default. It was only the fact that the foreclosure carve-out existed within an arbitration agreement that created an unconscionability issue for the Lytle court. Accordingly, an arbitration agreement cannot be found to be unconscionable and unenforceable simply by virtue of the fact that the parties' remedies are not perfectly symmetrical.

B. The Lytle Court Improperly Assumed That Arbitration Is Inferior To Litigation.

The Lytle court improperly assumed that requiring consumers to arbitrate their claims somehow impairs the ability of borrowers to obtain remedies for legal

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insureds by providing that small arbitration awards were binding but large awards were appealable. Like the arbitration agreement in the instant case, the agreement in Lytle did not give the lender any greater rights than the borrower. Thus, upon written request from the other party, both lender and borrower alike were required under the arbitration agreement at issue to arbitrate claims within the scope of the arbitration provision, but neither could "require the other to arbitrate" any foreclosure action. 810 A.2d at 649-50 (quoting arbitration agreement).

violations by their lenders. It gave undue attention to the minority of cases from jurisdictions hostile to arbitration,[7] while relegating some but not all of the much

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[7] Like Lytle, the cases upon which Lytle relied manifest a hostility to arbitration and a confusion between the existence of a substantive right to redress and the ability to pursue that right in a judicial forum. See, e.g., Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 855, 113 Cal. Rptr. 2d 376, 383 (Cal. Ct. App. 2001) ("HomeFirst is entitled to exercise any rights or remedies 'afforded by law or equity' while plaintiffs are confined to arbitration for all purposes."); Arnold v. United Companies Lending Corp., 204 W.Va. 229, 237, 511 S.E. 2d 854, 862 (1998) (treating arbitration agreement as "a substantial waiver of the borrower's rights, including access to the courts" and failing to articulate any waived rights other than "right" to access to courts); Iwen v. U.S. West Direct, 293 Mont. 512, 522, 977 P.2d 989, 996 (1999) (finding arbitration agreement "unconscionable" because "U.S. West Direct pointedly protected itself by preserving its constitutional right of access to the judicial system while at the same time completely removed that right from the advertiser"; failing to articulate why arbitration is less effective than litigation); State of West Virginia ex rel. Dunlap v. Berger, 211 W.Va. 549, 560-61, 567 S.E. 2d 265, 276-77 (2002) (court elucidates at length the importance West Virginia attaches to the right to trial by jury, claims that it will give "no weight to [the plaintiff's] state constitutional rights to a jury trial in the public court system" and then states that the defendant's "retention of the right to use the courts for its most important remedies, at the same time that it denies that forum to [the plaintiff] with respect to his most important remedies, meets our established criteria for unconscionability"), cert. denied, 537 U.S. 1087 (2002).

Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 119-120, 6 P.3d 669, 693-94 (2000), also cited by Lytle, at least attempted an explanation for why it might be unfair in certain circumstances to compel arbitration of some claims but allow litigation of other claims. The court surmised that the availability of greater discovery in litigation and the supposed likelihood that arbitrators will "split the difference" mean that litigation may be better for plaintiffs. Armendariz did not involve a foreclosure carve-out or even a loan. In a foreclosure action, of course, the

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larger number of cases which hold that an arbitration claim is not unconscionable for lack of mutuality to a mere footnote containing no analysis whatsoever. It made no effort to explain how the majority cases could be distinguished or why they are incorrect. Lytle, 810 A. 2d at 665 n. 13.

The Lytle court's assumption that consumers are disadvantaged by arbitration is wholly insupportable under the FAA. As discussed in detail above, arbitration does not deprive parties of any substantive rights. Moreover, it greatly benefits consumers. Empirical studies have confirmed that consumers fare well in and like arbitration. Even borrowers who do not have disputes with their lenders benefit from the lower dispute resolution costs inherent in arbitration. This is because competition and economic forces cause lenders to pass on to consumers, in whole or in part, the lower dispute resolution costs they incur as a result of

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plaintiff has no need for discovery and there is no prospect of a judgment "splitting the difference" on a claim for damages. Moreover, Armendariz' assumption that the risk of "splitting the difference" in arbitration is bad for the plaintiff assumes without basis that the hypothetical legal claim is a strong one that would likely prevail in court.

Lytle's citation to Williams v. Aetna Finance Co., 83 Ohio St. 3d 464, 700 N.E. 2d 859 (1998), cert. denied, 526 U.S. 1051 (1999), is entirely inapposite. While the Lytle court characterized Williams as involving the "preserv[ation] for the finance company [of] the judicial remedy of foreclosure," Lytle, 810 A. 2d at 663, it is clear that the Ohio Supreme Court found the clause in question unconscionable because of the costs of arbitration and not any foreclosure carve-out that may or may not have existed. Williams, 83 Ohio St. at 473, 700 N.E. 2d at 866-67.

arbitration provisions. Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 91-93 Indeed, economic theory teaches that consumer costs will fall with producer costs even if the producer has a monopoly. Richard A. Posner, Economic Analysis of Law 7 (6th ed. 2003). Thus, as a result of their arbitration agreements, borrowers receive lower prices for their loans.

C. Contrary To Lytle's Unfounded Assumption, Borrowers Are Fully Protected In Judicial Foreclosure Proceedings.

While the Lytle court concluded that a foreclosure carve-out unfairly benefits lenders, in fact such a carve-out is reasonable and fair to both parties.[8] By contrast to the other disputes that may arise between borrowers and lenders, foreclosure proceedings rarely require resolution of contested issues and extensive

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[8] While foreclosure actions might be the most common legal action brought by mortgage lenders against their borrowers, there are several other types of claims that a lender could initiate under its arbitration agreement which would be subject to arbitration. For example, in appropriate circumstances it could seek reformation of normally applicable Truth in Lending Act ("TILA") rescission procedures pursuant to 15 U.S.C. §1635(b), see e.g. Williams v. Homestake Mortgage Co., 968 F.2d 1137 (11th Cir. 1992) (permitting conditions on voiding of lender's security interest in TILA rescission); declaratory judgment actions to determine the legality of particular lender fees or conduct or the right to accelerate a mortgage for nonfinancial defaults; actions for clarification or reformation of loan documents; quiet title actions, see, e.g., Regions Mtg., Inc. v. Muthler, 844 A.2d 580 (Super. Ct. 2004), aff'd, 889 A.2d 39 (Pa. 2005) (mortgagee brought action against mortgagor's wife to quiet title); actions to enjoin waste or unlawful conduct on the mortgaged premises; and actions relating to insurance coverage and the proceeds thereof.

fact-finding. State court systems are well-equipped to process foreclosure litigation efficiently. And Pennsylvania law provides a host of protections to borrowers at risk of foreclosure.

Protections afforded borrowers facing potential foreclosure include: (1) special notice requirements, 41 P.S. §403, 35 P.S. §1680.402c; (2) limits on the grounds for foreclosure, 35 P.S. §1680.403c(a); and (3) rights to credit counseling and financial assistance preceding foreclosure. 35 P.S. §1680.403c(b)(4), 35 P.S. §1680.403c(b)(6). Additionally, Pennsylvania law offers special procedural protections to borrowers in foreclosure lawsuits -- protections that would not necessarily be available in arbitration. For example, in a foreclosure lawsuit, the plaintiff needs to serve any person not named as a party who is found in possession of the property. Pa. R.C.P. 410. The plaintiff must bring the lawsuit in the county where the property is located. Id. R. 1142. It is not allowed to state more than one cause of action in the complaint. Id. R. 1146. The plaintiff must set forth specified information in the complaint, including an itemized statement of the amount due, and should set forth an averment of compliance with 41 P.S. §403 (regarding notice of foreclosure). Id. R. 1147 and note. The defendant is expressly

authorized to plead a counterclaim. Id. R. 1148. And, of course, a foreclosure judgment is fully appealable as a final order.[9] Id. R. 341(a).

Because of the special procedures developed over the years for foreclosure lawsuits, borrowers might well prefer to litigate rather than arbitrate actions of this type. Thus, in Lackey v. Green Tree Financial Corp., 330 S.C. 388, 401, 498 S.E. 2d 898, 905 (Ct. App. 1998), the court enforced an arbitration agreement with a foreclosure carve-out, observing as follows:

> Judicial remedies for the recovery of property, such as the replevin action, and the foreclosure action, provide specific procedures for protection of collateral and the parties during the pendency of the proceedings. These protections relate to both parties, and are facilitated by the enforcement procedures specified in the law. Thus, we conclude this clause does bear a reasonable relationship to the business risks.

Likewise, in Walther v. Sovereign Bank, 386 Md. 412, 435-36, 872 A. 2d 735, 749 (2005), the highest court in the State of Maryland enforced an arbitration provision with a foreclosure carve-out, noting that "Maryland foreclosure proceedings ... do not act solely to protect the interests of the mortgage lender against a defaulting debtor but instead provide protections for both sides." See also Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 343 (Ky. App. 2001) ("The exceptions, moreover, are not unreasonable. Arbitration is meant to provide

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[9] By contrast, under the FAA, the grounds for vacating, modifying or correcting an arbitration award are very limited. 9 U.S.C. §§10-11.

for expedited resolution of disputes, but the claims the agreement permits Conseco to litigate -- basically claims asserting its security interest -- may be litigated expeditiously. Such claims have come to be heavily regulated by statute, allowing for streamlined procedures and effective protections for both sides. It does not strike us as unreasonable, much less oppressive, to forego arbitration of such claims."); Christopher R. Drahozal, Nonmutual Agreements to Arbitrate, 27 J. Corp. L. 537, 541 (2002) (because foreclosure actions "are routine proceedings to which arbitration may add an inefficient additional step," requiring mutuality of remedy "may actually make consumers worse off, not better off … [and] may result in arbitration proceedings that are less fair, rather than more fair, to consumers"); Ware, supra, 2001 J. Disp. Resol. at 98-99 ("The carve-out relating to collateral also seems well-suited to saving the lender money. A court order is a preliminary step to repossession of collateral by a sheriff or to a judicial foreclosure sale of collateral. Arbitration of lenders' claims relating to collateral would be an additional step the lender would have to take before going to court to get the necessary order …. [Requiring mutuality of remedy] make[s] arbitration more costly to lenders … [and] raise[s] the interest rates consumers pay.") (footnotes omitted).

Significantly, Pennsylvania has a program allowing courts to refer specified matters to arbitration. However, Pennsylvania has carved out of its mandatory

arbitration program all matters involving title to real property. 42 Pa.C.S.A. § 7361(b)(1). Thus, an arbitration provision that excludes foreclosure proceedings from its scope is fully in keeping with Pennsylvania public policy. See 1 Pa. C.S.A. §1922 (legislative enactments are presumed to be reasonable and in the public interest). Since the Legislature itself has implemented a foreclosure carve-out in court mandated arbitration programs, clearly the same carve-out cannot be unconscionable in a contractual arbitration agreement.

D. In Attempting To Defend Lytle, Plaintiff Has Failed To Address The True Nature Of The Decision.

According to Plaintiff, Lytle merely held that an evidentiary hearing was required to determine whether the arbitration agreement was substantively unconscionable. Lytle, however, did much more than that. Lytle presumed that the agreement was unconscionable. It required the lender to affirmatively show not that it had some reasonable basis for excluding foreclosure proceedings from the scope of the agreement, but instead to "establish, if it can, an unavoidable 'business reality' which precludes its use of the arbitration forum." 810 A. 2d at 666 (emphasis added).

In Pennsylvania, as elsewhere, the "burden of proof lies with the party who alleges unconscionability." Borden, Inc. v. Advent Ink Co., 701 A. 2d 255, 264 (Pa. Super. 1997); Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 175, 608 A. 2d 1061, 1067 (1992). Cf. Randolph, 531 U.S. at 91 (burden on party resisting

arbitration to show arbitration inappropriate). Plaintiff concedes in his brief, as he must, that "the doctrine of unconscionability does not require mutuality of obligation." Pl. Br. at 28. And nowhere does Plaintiff or the Lytle court articulate how a foreclosure carve-out injures borrowers. Plaintiff's unsupported insinuation that the carve-out was necessarily injurious to consumers and his argument that it is the lender's obligation to affirmatively justify the carve-out, id. at 29-35, simply cannot be squared with the general principles of unconscionability prevailing in Pennsylvania. In any event, the business justifications for the arbitration carve-out, detailed above, also establish that the carve-out is not unconscionable. The naked assertion that a foreclosure carve-out is indicative of an unconscionable arbitration agreement is completely unsupportable as a matter of Pennsylvania law.

III. Contrary To The Unsupported Claims Of Plaintiff's *Amici,* Arbitration Does Not Facilitate Predatory Lending.

The Third Circuit asked this Court to answer a single narrow question: whether the foreclosure carve-out in this case "is unconscionable under Pennsylvania law, as suggested by Lytle ...." However, nowhere in their 49-page brief do Plaintiff's *Amici* even mention Lytle. Instead, they dwell inordinately on the alleged "public policy crisis of predatory home lending" and the supposed "problematic role that mandatory arbitration clauses play in insulating unscrupulous home mortgage lenders from scrutiny and liability for their

wrongdoing."[10] Pl. *Amici* Br., p. 3. Plaintiff's *Amici* devote a mere seven pages to a discussion of the mutuality issue that the Third Circuit certified to this Court.

Amici do not write to address the unproven allegations in Plaintiff's Complaint. That is the arbitrator's job. See, e.g., AT&T Technologies, Inc. v. Comm. Workers of Am., 475 U.S. 643, 649 (1986) (the merits of the dispute cannot be considered when deciding an arbitration motion). Indeed, Plaintiff's *Amici* concede that the issue of "predatory lending" concerns the merits of Plaintiff's claims against Option One. See Pl. Amici Br., p. 7 ("Mr. Salley brought this action in the United States District Court for the Eastern District of Pennsylvania alleging that Option One engaged in predatory lending practices and violated mortgage law under several state and federal consumer protection statutes"). Plaintiff's *Amici* put the rabbit in the hat by insinuating that because this case involves allegations of predatory lending, it is not suitable for arbitration in the first place. Under well-established federal arbitration law which is also applicable to the states, arguments concerning the circumstances surrounding the

[10] In addition, Plaintiff's *Amici* argue arbitration issues that are completely beside the point. For example, their arguments that arbitration is oppressive because of its alleged "high cost" and "private" nature (Pl. Amici Br., pp. 28-29) are outside the scope of the Third Circuit's certification and, accordingly, will not be addressed herein even though they are erroneous.

mortgage transaction as a whole must be resolved by the arbitrator, not a court. Cardegna, 126 S. Ct. at 1209.

Nor do *Amici* write to defend predatory or even subprime lending. Rather, *Amici* are compelled to rebut the fallacious argument by Plaintiff's *Amici* that arbitration somehow fosters predatory lending. To the contrary, as shown herein, arbitration greatly benefits consumers and does not in any manner facilitate predatory lending.

A. The Attempt By Plaintiff's *Amici* To Explain How A Foreclosure Carve-Out From Arbitration Could Harm Consumers Fails Utterly.

Plaintiff's *Amici* argue that an arbitration agreement carving out foreclosure facilitates predatory lending because the borrower might have to defend a foreclosure proceeding in court while simultaneously asserting predatory lending or other claims in arbitration. This argument fails for a number of reasons. First, it misreads the arbitration agreement at issue. Second, it seeks to invalidate the arbitration agreement on the basis of a hypothetical scenario -- not present in the instant case -- that may rarely, if ever, occur. And finally, it greatly exaggerates the supposed adverse consequences to the borrower in this situation.

Plaintiff's *Amici* object to an arbitration agreement that could force borrowers to defend a foreclosure action in court and at the same time assert their claims against the lender in arbitration. That, of course, is not the arbitration

agreement before the Court. Rather, the agreement provides that "any judicial or non-judicial foreclosure proceeding against any real or personal property that serves as collateral for the loan" is not a dispute subject to arbitration. This foreclosure carve-out is not limited to foreclosure claims brought by the mortgagee; it applies to the entire foreclosure proceeding.

Foreclosure defenses, counterclaims and third party claims are parts of the foreclosure "proceeding." Thus, they may be adjudicated by the borrower in court along with the foreclosure claim. Indeed, Plaintiff's *Amici* concede, Pl. Amici Brief, p. 41, that Rule 1148 of the Pennsylvania Rules of Civil Procedure expressly provides that a defendant to a foreclosure proceeding is entitled to plead a counterclaim in the foreclosure proceeding. See Meritor Savings Bank v. Barone, 399 Pa. Super. 213, 582 A.2d 21 (1990) (counterclaim against mortgagee for failure to procure promised mortgage disability insurance allowed to go forward). By the same token, third parties may also be made parties to foreclosure proceedings. See Barone (mortgagor named insurance company providing mortgage disability insurance as additional defendant); Peoples Savings Ass'n v. Whallin, 14 Pa. D.&C. 3d 136, 138-39 (C.P. Butler County 1980) (dismissing additional defendant's preliminary objections). Accordingly, it simply is not true that lender foreclosure claims and related borrower claims need to be adjudicated in separate "split forums." Indeed, because neither party has the power to compel

arbitration of claims involving non-signatories to the arbitration agreement, the foreclosure carve-out operates to reduce the likelihood of "split forum" proceedings.

In any event, the concern expressed by Plaintiff's *Amici* about the "split-forum effect" is completely conjectural and hypothetical. Plaintiff is not defending a foreclosure action initiated by Option One and has made no showing that the scenario addressed by Plaintiff's *Amici* -- a foreclosure action against a borrower with strong counterclaims that can be forced to arbitration -- occurs with any frequency.

It would be wholly inappropriate to invalidate an arbitration agreement on the ground that it might potentially produce unintended difficulties in limited circumstances not present in the instant case. As now Chief Justice Roberts of the U.S. Supreme Court recently instructed, to invalidate an arbitration agreement on the basis of "speculation would reflect the very sort of 'suspicion of arbitration' the Supreme Court has condemned as 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" Booker v. Robert Half Int'l, 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.) (rejecting arguments that arbitration should not be compelled because "the arbitrator might provide inadequate discovery, might not order a needed conference, might assign burdens of production or proof that do not vindicate

statutory rights, and so on") (emphasis in original and citation omitted). See also PacifiCare Health Sys. Inc. v. Book, 538 U.S. 401, 405 (2003) (a court cannot decline to enforce an arbitration agreement based upon "mere speculation" about what may occur in the future); Randolph, supra, 531 U.S. at 91 ("[t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement").

Even where a borrower might be required to defend a foreclosure action in court and assert affirmative claims in arbitration – which is not the case here – Plaintiff's *Amici* tremendously exaggerate the practical difficulties. Plaintiff's *Amici* claim that this "split forum" "places overwhelming practical barriers before Mr. Salley that make it effectively infeasible for him or counsel to vindicate his statutory rights against his two [hypothetical] adversaries [the original lender and the trustee of a securitization trust holding his mortgage]." Pl. *Amici* Br., p. 35. Apart from the fact that Plaintiff is not faced with the need to confront a "split forum," Plaintiff's *Amici* cannot and do not substantiate their claims that it is "effectively infeasible" for a borrower in such a situation to vindicate his statutory rights or that lenders utilizing such clauses are effectively "running judgment-proof operations." Id. at 36 (citation omitted). This is sheer hyperbole.

The first practical objection that Plaintiff's *Amici* raise to separate proceedings is that a borrower facing foreclosure who wishes to establish a strong

claim against the original lender "would first be required to seek this essential information from [the lender] in the arbitration proceeding," id. at 37, where he would be subject to the limitations on discovery that typically prevail in arbitration. See id. at 38.

Of course, if discovery limitations are a problem -- and they are not -- it is not a problem created by the foreclosure carve-out. Rather, Plaintiff's *Amici's* complaints relate to the arbitral forum generally and have repeatedly been rejected. See, e.g., Gilmer, 500 U.S. at 30-33 (specifically rejecting arguments that limited discovery would hinder a plaintiff attempting to prove his or her case in arbitration). In any event, Plaintiff's *Amici* never adequately explain why the borrower could not conduct all necessary discovery in the foreclosure lawsuit, where he or she has the benefit of all available Pennsylvania discovery rules, including rules pertaining to discovery against third parties. See e.g. Pa. R.C.P. 4007.1 (authorizing deposition of "any person"); id. R. 4009.21 (authorizing subpoena of non-parties). Because more discovery is available in court than in arbitration, the foreclosure carve-out actually enhances a borrower's ability to obtain discovery.

Plaintiff's *Amici*'s other practical objection is that "[l]itigating identical issues regarding a loan originator's liability in two forums ... creates the real possibility of inconsistent judgments." Pl. *Amici* Br., p. 38. Plaintiff's *Amici* never

explain how this "real possibility" could arise in the real world. Instead, they speculate that in a single action, but not in separate proceedings, "a borrower may be able to use money obtained from the loan originator -- either by judgment or by settlement -- to pay off the foreclosing entity and cure the loan default." Id. Plaintiff's *Amici* would thus have this Court believe that the court handling the foreclosure action and the arbitrator will necessarily be unable or unwilling to coordinate their separate proceedings. But courts and arbitrators regularly coordinate in precisely the manner required to avoid this fanciful concern of Plaintiff's *Amici*, and trial courts have discretion to stay the litigation of non-arbitrable claims pending the resolution of a related arbitration. See, e.g., Subway Equipment Leasing Corp. v. Forte, 169 F.3d 324, 329 (5th Cir. 1999) (litigation against all parties should be stayed even through only one defendant could invoke arbitration because the court "fail[ed] to see how litigation could proceed on the [plaintiffs'] claims without adversely affecting [defendant's] right to arbitration"); OneBeacon Ins. Group v. Liberty Mut. Ins. Co., No. 02670, 2005 Phila. Ct. Com. Pl. LEXIS 215, at *6-7, (May 15, 2005) ("A trial court has discretion to stay or to litigate non-arbitrable claims. See Moss v. Prudential-Bache Securities, Inc., 18 Phila. 436, 460-462 (1989); Donegal Mut. Ins. Co. v. Stern, 34 Pa. D.&C.3d 314 (Allegheny Co. 1984).").

In reality, Plaintiff's *Amici*'s argument is nothing more than a dressed-up attack on arbitration clauses as potentially creating piecemeal litigation. However, the U.S. Supreme Court has rejected this argument time and again. Thus, while Plaintiff's *Amici* attempt to distinguish the leading case, Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 20-21 (1983), on the ground that it involved a commercial dispute (Pl. *Amici* Br., p. 41 n. 14), the U.S. Supreme Court and the Third Circuit, among many other courts, have repeatedly reached the same result in consumer cases. See, e.g., Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (in securities law case involving an individual's investment account, Supreme Court quoted Moses Cone for proposition that "even though the arbitration would result in bifurcated proceedings, 'the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement'") (emphasis original); Johnson v. West Suburban Bank, 225 F.3d 366, 375 (3d Cir. 2000), cert. denied, 531 U.S. 1145 (2001) (Third Circuit held in case involving high-interest "payday lending" to consumers that "the FAA requires piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis in original).[11]

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[11] The foreclosure carve-out helps lenders avoid piecemeal litigation when the U.S. Government has a subordinate lien on the mortgaged property. This is because the lender must bring the U.S. into the foreclosure proceeding – something it cannot do in arbitration because the U.S. has not consented to

(continued...)

In short, Plaintiff's *Amici* attack an arbitration agreement not before this Court and then go on to engage in wholly unsupported and unjustified speculation about how the agreement might unfairly disadvantage borrowers. Their argument is wholly misguided.

B. Government Enforcement Of Consumer Lending Laws Provides Substantial Additional Protection Of Consumers.

Not only do consumers have a fair opportunity to vindicate their rights in arbitration, but powerful administrative enforcement mechanisms also serve to ensure that subprime lenders obey the law or pay the consequences. Thus, arbitration does not enable subprime lenders to insulate themselves from consumer protection laws, as Plaintiff's *Amici* assert. Pl. Amici Br., pp. 36, 39.

Subprime lenders are subject to a host of federal laws to ensure that they do not engage in the type of predatory lending described by Plaintiff's *Amici*. These laws include, without limitation: (1) the federal Home Ownership Equity Protection Act ("HOEPA"), adopted as part of TILA, 15 U.S.C. §§1601 et seq. and principally codified at 15 U.S.C. §1639; (2) the federal Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§1691 et seq.; and (3) Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §45. Further, most states have adopted

(...continued)
arbitration of its claims – or bring a separate quiet title action to eliminate the U.S. lien. 28 U.S.C. § 2410.

"UDAP" statutes, such as the Pennsylvania Unfair Trade Practices and Consumer Protection Law (the "UTPCPL"), 73 P.S. §§201-1 et seq., which broadly proscribe unfair and deceptive acts and practices in trade or commerce.

Pursuant to the FTC Act and 15 U.S.C. § 1607(c), the Federal Trade Commission ("FTC") has primary responsibility for enforcing HOEPA, TILA, the ECOA, the remainder of Title 15 of the U.S. Code and Section 5 of the FTC Act against the nonbank lenders whom Plaintiff's *Amici* identify as being largely responsible for predatory lending (Pl. Amici Br., p. 11). In exercising this authority, the FTC may utilize all of its enforcement powers under the FTC Act. 15 U.S.C. § 1607(c).[12]

Under the FTC Act, the FTC can bring a civil proceedings to obtain: (1) a civil penalty of up to $10,000 for each violation, Section 5(m) of the FTC Act, 15

[12] The Office of the Comptroller of the Currency ("OCC"), Office of Thrift Supervision ("OTS") and Federal Deposit Insurance Corporation (FDIC") have the primary responsibility for enforcing federal laws with respect to FDIC-insured banks and thrifts. For example, if a bank or savings institution violates TILA, the appropriate agency may initiate cease and desist proceedings and obtain an order that requires the offending institution, among other things, to: (1) cease and desist the unlawful conduct; (2) make restitution or provide reimbursement against loss in the case of unjust enrichment or reckless disregard for the law; (3) rescind the underlying agreement; or (4) take such other action as the agency determines to be appropriate. 12 U.S.C. § 1818(b). These agencies have substantial additional enforcement powers, 12 U.S.C. § 1818, including the power to levy civil monetary penalties of up to $25,000 per day for violations that are part of a pattern of misconduct. 12 U.S.C. § 1818(i).

U.S.C. §45(m); (2) an injunction and ancillary relief, Section 13(b) of the FTC Act, 15 U.S.C. §53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers ... [including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages ...." Section 19(b) of the FTC Act, 15 U.S.C. §57b(b). See, e.g., United States v. National Financial Services, Inc., 98 F.3d 131, 139 (4th Cir. 1996) (affirming award of $500,000 in civil penalties pursuant to Section 5(m) of the FTC Act for a violation of the Fair Debt Collection Practices Act); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) (following Singer and affirming award of monetary equivalent of rescission).[13]

State Attorneys General generally have strong enforcement powers under State law to redress UDAP violations by lenders other than national banks, federal savings associations and their operating subsidiaries.[14] In Pennsylvania, for

[13] Additionally, any person convicted of a willful and knowing violation of Title 15 of the U.S. Code (including TILA, HOEPA and the ECOA) is subject to a $5,000 fine, a year in prison or both. 15 U.S.C. §1611.

[14] The OCC and the OTS retain the exclusive authority to exercise "visitorial" authority with respect to the institutions that they charter and their operating (continued...)

example, the Attorney General and District Attorneys are authorized under the UTPCPL to obtain: (1) temporary or permanent injunctions against persons violating the UTPCPL, 73 P.S. §201-4; (2) restitution for victims of unlawful practices, 73 P.S. §201-4.1; (3) civil penalties of up to $1,000 for each willful violation ($3,000 if the victim is 60 or older), 73 P.S. §201-8(b); and (4) further remedies against parties who violate injunctions or assurances of voluntary compliance under the UTPCPL. 73 P.S. §§201-8(a), 9. The Pennsylvania Department of Banking can levy a $2,000 fine for each violation by a licensee or exempt party of the Pennsylvania Mortgage Bankers and Brokers and Consumer Equity Protection Act, 63 P.S. §§456.301 et seq. 63 P.S. §456.314. Parties who fail to obtain a required license commit a third degree felony. Id.

(...continued)

subsidiaries, including the enforcement of applicable state laws. See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 145 (1982) (OTS predecessor has "cradle to ... grave" authority over federal savings associations); Wachovia Bank v. Watters, 431 F.3d 556 (6th Cir. 2005) (OCC has exclusive visitorial authority with respect to national banks, preempting state authority to regulate operating subsidiaries of national bank); Wachovia Bank, N.A. v. Burke, 414 F.3d 305 (2d Cir. 2005) (same); Wells Fargo Bank, N.A. v. Boutris, 419 F.3d 949 (9th Cir. 2005); Office of the Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) (injunction granted barring the Attorney General of the State of New York from infringing on the OCC's exclusive visitorial authority over national banks and their operating subsidiaries by seeking to investigate and enforce state or federal fair lending laws through judicial actions).

As Plaintiff's *Amici* themselves have noted (see, e.g., Pl. Amici Br., pp. 13-14), increasingly the FTC and State Attorneys General have aggressively utilized their powers to prevent and redress predatory lending and/or other violations of consumer protection laws. Thus, even if arbitration provisions in residential mortgage documents somehow impaired the ability of consumers to pursue redress directly against abusive lenders -- which they emphatically do not -- federal, state and local enforcement authorities are taking aggressive steps to assure compliance with applicable laws and standards of fairness. Clearly, arbitration does not facilitate predatory lending.

CONCLUSION

For the foregoing reasons, this Court should advise the Third Circuit that the carve-out of foreclosure proceedings from the scope of an arbitration agreement does not render the agreement presumptively unconscionable or unenforceable under Pennsylvania law.

Respectfully submitted,

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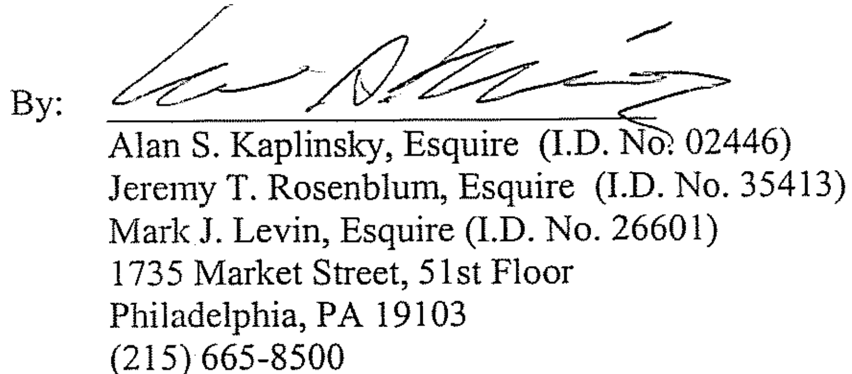

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IN THE SUPREME COURT OF PENNSYLVANIA

WILL SALLEY, JR.,	:	
Appellant	:	
v.	:	No. 50 EAP 2005
OPTION ONE MORTGAGE CORPORATION, et al.,	:	
Appellees.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief of *Amici Curiae* were served by United States first-class mail, postage prepaid, this 10th day of April, 2006, upon the following:

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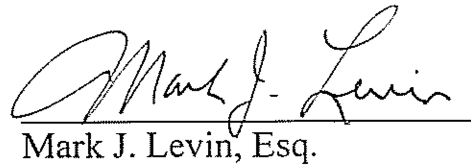

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