IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2083

MIDWEST TITLE LOANS, INC.,
Plaintiff/Appellee

v.

JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,
Defendant/Appellant

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:07-cv-1479-SEB-DML
The Honorable Sarah Evans Barker, Judge

BRIEF OF APPELLEE MIDWEST TITLE LOANS, INC.

Stanley C. Fickle
John R. Maley
Paul L. Jefferson
BARNES & THORNBURG LLP
11 SOUTH MERIDIAN STREET
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
E-mail: sfickle@btlaw.com
jmaley@btlaw.com
pjefferson@btlaw.com

Alan S. Kaplinsky
Jeremy T. Rosenblum
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103
Telephone: (215) 665-8500
Facsimile: (215) 864-8999
E-mail: kaplinsky@ballardspahr.com
rosenblum@ballardspahr.com

Attorneys for Appellee
Midwest Title Loans, Inc.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

In compliance with Circuit Rule 26.1 and FED. R. APP. P. 26.1, the undersigned counsel of record for the Appellee, Midwest Title Loans, Inc., provide the following information:

1. The full name of the party whom the undersigned counsel represents in this case is Midwest Title Loans, Inc. ("Midwest Title").

2. The names of the law firms whose partners or associates have appeared for Midwest Title in this case are "Barnes & Thornburg LLP" and "Ballard Spahr Andrews & Ingersoll, LLP."

3. Midwest Title has no parent corporation. There is no publicly held company that owns ten percent (10%) or more of Midwest Title's stock.

Dated: September 10, 2009

<u>/s/Stanley C. Fickle</u>
Stanley C. Fickle
Counsel of Record
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
E-mail: sfickle@btlaw.com

Alan S. Kaplinsky
Jeremy T. Rosenblum
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103
Telephone: (215) 665-8500
E-mail: kaplinsky@ballardspahr.com
rosenblum@ballardspahr.com

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement in the Brief Of Appellant Judith J. Ripley ("Director Brief") is not complete and correct.

1. District Court Jurisdiction. Appellant Midwest Title Loans, Inc. ("Midwest Title") brought this action in the District Court pursuant to 42 U.S.C. § 1983, alleging that Ind. Code § 24-4.5-1-201(1)(3) as applied against Midwest Title's title loan business in Illinois violates the Commerce Clause and the Due Process Clause of the Fourth Amendment to the United States Constitution, U.S. Const. art. I, § 8, cl. 3 & amend. XIV § 1. Dkt. 1 (complaint). The District Court had jurisdiction under 28 U.S.C. § 1331.

2. Court Of Appeals Jurisdiction. The District Court issued an order directing entry of final judgment disposing of all claims as to all parties on March 24, 2009, Dkt. 56, and subsequently entered a corrected order making non-substantive changes on April 3, 2009. Dkt. 59, p. 1, n.1. On April 16, 2009, the District Court granted appellant Judith J. Ripley (the "Director") an extension of time to May 6, 2009 in which to file her Notice of Appeal. Dkt. 63. The Director timely filed her Notice of Appeal on April 24, 2009. Dkt. 63. The Court of Appeals has jurisdiction of the appeal under 28 U.S.C. § 1291.

ISSUE PRESENTED

Midwest Title offers loans only to Indiana residents who travel to a Midwest Title store in Illinois, where the loan terms are established, the loan contract is executed, and the loan proceeds are disbursed to the borrower. The question is whether Ind. Code § 24-4.5-1-201(d), a 2007 amendment to Indiana's version of the Uniform Consumer Credit Code, violates the Commerce Clause in purporting to regulate Midwest Title's Illinois business, including but not limited to the terms of the loan transactions with Indiana residents, on the ground that Midwest Title "advertise[s] or solicit[s] . . . in Indiana by any means."

STATEMENT OF THE CASE

Pursuant to Fed. R. App. P. 28(b)(3), Midwest Title adopts the Statement of the Case in the Director's Brief.

STATEMENT OF FACTS

Midwest Title is an Illinois business corporation and licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. It makes loans from 23 stores located in Illinois. Joint Stipulation ¶ 1.[1] Midwest

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[1] The parties entered into a Joint Stipulation of Facts. The Joint Stipulation, which appears at both Docket Nos. 39 and 43, was designated as evidence by both parties in the summary judgment briefing below. It also appears without exhibits in the Appellant's Short Appendix at 24-30. Hereafter, it is cited as "Stip. ¶ __."

Title only makes loans in-person to borrowers who visit its Illinois stores. Stip. ¶ 2.

Appellant Judith Ripley (the "Director") serves as the chief executive and administrative officer of the Indiana Department of Financial Institutions. The Director exercises managerial control over the work of the Department, including the Supervisor of the Division of Consumer Credit. Stip. ¶ 3.

Midwest Title maintains no stores, employees or agents in Indiana and only made loans to Indiana residents who visited a Midwest Title store in Illinois. Stip. ¶ 8(a). Midwest Title made Loans to Indiana residents from 1999 through mid-August 2007. Stip. ¶ 6. Loans to Indiana residents during 2006 and 2007 represented less than 10% of Midwest Title's total loans. Stip. ¶ 6; Verified Complaint ¶ 6.

To obtain a loan from Midwest Title, an Indiana resident had to travel to Illinois with his or her motor vehicle and the title and appear in person at a Midwest Title Illinois store, where loan terms were negotiated. Stip. ¶¶ 8(a), 9. If approved, the loan applicant had to execute the necessary loan documents at the Illinois store and provide Midwest Title with keys and the title to the automobile. The loan funds would then be dispersed at the Illinois store by check drawn on an Illinois bank (which could be cashed without a charge at the Illinois store or cashed

elsewhere). The Installment Loan and Security Agreement provided that the transaction would be governed by the law of the state in which the Agreement was executed, which was Illinois. Midwest Title did not make loans to Indiana residents who were not physically present at an Illinois store. Stip. ¶ 8(a); Stip. Ex. 3.

After making a loan to an Indiana resident, Midwest Title generally submitted to the Indiana Bureau of Motor Vehicles ("BMV") the documentation necessary for Midwest Title's lien to be noted on the borrower's motor vehicle title. Borrowers could make payments in person at Midwest Title's Illinois stores or pay by money order or certified check transmitted through the U.S. mail or other means, by credit card or through Western Union. From its Illinois offices, Midwest Title made reminder and collection calls to Indiana borrowers. In the event of a deault of at least 30 days, Midweset Title paid an unaffiliated third party repossession company to repossess the motor vehicle, and obtained a new title from the BMV showing Midwest Title as the owner. Midwest Title did not bring lawsuits to collect deficiency judgments and has never filed any lawsuit in an Indiana court, except this one. Stip. ¶ 8(f), (g), (h).

Midwest Title advertised on radio and television stations in Indianapolis and Terre Haute, Indiana. Stip. ¶¶ 8(c), 9. It also advertised on radio and television

stations in Chicago which reached Indiana residents. Stip. ¶ 8(c). Midwest Title made annual mailings to past customers, reminding them of the availability of loans from Midwest Title. Midwest Title's name and Illinois phone number or an 800 number may have been included in Yellow Pages listings in Indiana. Stip. ¶ 8(d). Midwest Title had an 800 number, staffed by personnel physically located outside Indiana, which provided information about the loans and the application process. Prospective borrowers could not apply for loans over the telephone, through the mail, by fax, over the Internet, or by any means other than travelling to one of Midwest Title's Illinois stores. Stip. ¶ 8(e).

In August 2007, Midwest Title received a letter (the "Warning Letter") from the Indiana Department of Financial Institutions stating that, as amended effective July 1, 2007, Ind. Code § 24-4.5-1-201, the "Territorial application" section of the Indiana UCCC, "requires lenders who are soliciting (by any means) and then making consumer loans to Indiana residents to be licensed" by the Indiana Department of Financial Institutions.[2] Stip. ¶¶ 6, 8(a), 12; Stip. ¶ 5 & Ex. 1; Stip. ¶

[2] Ind. Code § 24-4.5-1-201 is titled "Territorial application." As amended in 2007, it provides, *inter alia*, that:

> [A] sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor or a person acting on behalf of the creditor in another state and the creditor or the person acting on behalf of the creditor has advertised or solicited sales, leases, or loans in Indiana by

(continued...)

10 & Ex. 1. The Warning Letter quoted subsection (8) of the Territorial Application Provision as follows: "'If a creditor has violated the provisions of this article that apply to the authority to make consumer loans (IC 24-4.5-3-502), the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in IC 24-4.5-5-202.'" *Id.* The Warning Letter added: "Failure to comply with Indiana law concerning loans made to Indiana residents could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers." *Id.*

The Indiana Department has statutory authority to take a variety of actions against a company believed to be in violation of the Indiana UCCC. Under Ind. Code § 24-4.5-5-202(9), the Department may act on behalf of a debtor to enforce the debtor's rights to void the debtor's loan obligation under Ind. Code §§ 24-4.5-1-201(8) and 24-4.5-5-202(2). Additionally, the Indiana UCCC authorizes the Department to issue cease and desist orders, Ind. Code § 24-4.5-6-108; bring civil actions for injunctive relief, Ind. Code § 24-4.5-6-110; bring actions for civil penalties, Ind. Code § 24-4.5-6-113(2); and impose civil penalties on its own, Ind.

(...continued)

> any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means.

Ind. Code § 24-4.5-1-201(1)(d) (hereafter, the "Territorial Application Provision").

Code § 24-4.5-6-113(3). The penalties under the latter subsection may be up to $10,000 per violation.

After its receipt of the Warning Letter and because of the unacceptable risks that continued lending to Indiana residents would have entailed, Midwest Title suspended making loans to Indiana residents who come to Midwest Title's Illinois stores. Stipulation ¶ 12.[3] This lawsuit followed.

SUMMARY OF ARGUMENT

The Director attempts to defend what the constitution prohibits – an Indiana statute that regulates the terms of loan contracts between (1) a business located only in Illinois, and (2) Indiana residents who must travel to and be physically present in Illinois in order to enter into the contracts. The District Court held that this new Indiana statute, the Territorial Application Provision of the Indiana Uniform Consumer Credit Code as amended in 2007, is invalid under the Commerce Clause rule prohibiting extraterritorial state legislation. The District Court's decision was manifestly correct under binding Seventh Circuit and Supreme Court authority.

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[3] Midwest Title also discontinued charging or collecting interest on post-June 30, 2007 loans to Indiana residents and refunded all payments of interest on those loans. Stipulation ¶ 13 & Ex. 4. Midwest Title did not seek any relief in this action regarding those loans.

Dean Foods Co. v. Brancel, 187 F.3d 609 (7th Cir. 1999), invalidated a Wisconsin regulation that purported to apply price controls on sales of milk consummated in Illinois. This Court held that the regulation was impermissible, even though the effect of the extraterritorial commerce was "felt . . . *predominately*" in Wisconsin. *Id.* at 619-20 (emphasis in original). Similarly, the Supreme Court held in *Healy v. Beer Institute*, 491 U.S. 324 (1989), that a "State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. . . . The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* at 336-37.

Further, Indiana "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State;" and it "does not acquire power or supervision over the internal affairs of another State merely because the health and welfare of its own citizens may be affected when they travel to that State." *Bigelow v. Virginia*, 421 U.S. 809, 824-25 (1975). Contrary to those constitutional rules, the Territorial Application Provision as amended presents Midwest Title "with the Hobson's choice between complying with the extraterritorial regulations of [its] out-of-state activities, and foregoing [its] participation in interstate trade due to the

silencing of [its] speech." *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 492 (4th Cir. 2007).

The Director argues that *Dean Foods* is inapposite because it involved a "business protection" regulation, whereas the IUCCC is a "consumer protection" statute. She never explains why consumers who choose to obtain loans from Midwest Title in Illinois are more deserving of protection than the small farmers sought to be protected in *Dean Foods* (all of whom, of course, are themselves consumers). More important, the Commerce Clause makes no such distinction.

Dean Foods is supported by *Healy* and a long line of Commerce Clause precedents holding that a state may not regulate the price and other terms of contracts made entirely in other states, whereas no authority supports the Director's position that "*Healy* should be understood only as requiring invalidation of extraterritorial statutes that advance no *legitimate* (*i.e.,* non-protectionist) interests of the regulating state." Director Brief at 9 (emphasis in original). This argument is created out of whole cloth. The Director cannot point to a single passage in *Healy* limiting the reach of the decision to statutes that have no legitimate purpose. And, in fact, neither *Dean Foods* nor *Healy* relied on an improper legislative purpose. As here, the problem in both cases was

extraterritorial regulation of out-of-state transactions, not any discrimination against interstate commerce.

Nor do the principal cases relied upon by the Director otherwise provide support for her position. Those cases involve readily distinguishable situations where an out-of-state company contracts with a consumer *physically present in the regulating state*. In *Dean Foods*, this Court readily distinguished one such case, *A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780 (3d Cir. 1999), as "factually inapposite." 187 F.3d at 620.

The Director's new argument, based on the limited contacts between loans made by Midwest Title and the State of Indiana and supposed "tension" between the governing Commerce Clause precedent and extant choice of law authority under the Due Process clause, is unavailing for multiple reasons. Most important, that argument would have this Court disregard controlling Supreme Court precedent. To the extent there is "tension" between the Supreme Court lines of authority under the Due Process and Commerce Clauses, it is for the Supreme Court, not this Court, to decide whether the tension needs to be resolved and, if so, to adopt the appropriate constitutional rules. This Court's obligation is to apply the relevant line of authority – the line addressing Commerce Clause limits on extraterritorial legislation.

The Director's attempt to assert that the commerce regulated here is not "wholly extraterritorial" is likewise misguided for multiple reasons. Most important, this Court held in *Dean Foods* that the relevant jurisdictional fact for regulation of contract prices was the location of contract formation, and that other activities in the regulating state going far beyond the Indiana activities here were not "relevant." As shown by this holding in *Dean Foods* and other pertinent Commerce Clause cases, "wholly extraterritorial" refers to location of the activity the state legislation directly regulates. In this case, that activity is establishing the terms of the contractual loan agreement, which (1) occurs entirely in Illinois, where the Indiana resident is physically present, and (2) is exactly the activity the IUCCC regulates under the Territorial Application Provision as amended.

ARGUMENT

The 2007 Amendment to the Territorial Application Provision of the IUCCC is an extreme and overbroad attempt to exercise extraterritorial jurisdiction over loans transacted outside the State of Indiana. Controlling precedent establishes that the extraterritorial principles found in, *inter alia*, the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, prohibits Indiana from applying its legislation extraterritorially to regulate the price and other terms of contracts made entirely in another state.

I. Both This Court's Decision In *Dean Foods* And Controlling Supreme Court Precedent Prohibit Indiana From Regulating The Terms Of Midwest Title Loans Made In-Person In Illinois.

As amended effective July 1, 2007, the IUCCC provides in pertinent part:

> (1) Except as otherwise provided in this action, this article applies to sales, leases, and loans made in this state and to modifications, including refinancings, consolidations and deferrals, made in this state, of sales, leases, and loans, wherever made. For purposes of this article, the following apply:
>
> * * *
>
> (d) A sale, lease, or loan transaction occurs in Indiana if a consumer who is a resident of Indiana enters into a consumer sale, lease, or loan transaction with a creditor in another state and the creditor has advertised or solicited sales, leases, or loans in Indiana by any means, including by mail, brochure, telephone, print, radio, television, the Internet, or electronic means. . . .

Ind. Code § 24-4.5-1-201. Thus, both on its face and as applied by the Department to Midwest Title, the Territorial Application Provision purports to regulate loans made in other states to Indiana residents if the lender has undertaken any advertising or other solicitation of loans in Indiana.

As established by the stipulated facts, Midwest Title conducted limited advertising in Indiana and made mailings to Indiana. However, it made loans only to Indiana residents who traveled to Illinois and were physically present in one of its Illinois stores – where the loan terms were negotiated and established, the loan applications were prepared and completed, the loan documents were executed, and the loan proceeds were paid. In these circumstances, Indiana's effort to assert the

IUCCC extraterritorially to govern Midwest Title's loans in Illinois cannot be harmonized with *Dean Foods Co. v. Brancel,* 187 F.3d 609 (7th Cir. 1999), where this Court rejected the State of Wisconsin's attempt to dictate the price terms of milk sales in Illinois. Nor can it be harmonized with the U.S. Supreme Court precedent, including the precedent upon which *Dean Foods* relied. Accordingly, the Territorial Application Provision is constitutionally infirm.

A. *Dean Foods* Holds That A State May Not Apply Its Laws To Govern Terms Of Contracts Entered Outside The State.

Dean Foods involved an Illinois milk processor that purchased raw milk from Wisconsin dairy producers and price regulations adopted by Wisconsin that "prohibit[ed] dairy processors from paying 'unjustified' volume premiums to dairy farmers." 187 F.3d at 611. Before Wisconsin adopted the pricing regulations, Dean Foods paid large Wisconsin dairy farmers volume premiums above the base price for milk earned by smaller farms. The price regulations in *Dean Foods* were designed to address an issue important to Wisconsin: Because of the processing industry's preference for larger dairy herds and incentives paid to encourage bigger herds, Wisconsin had suffered the loss of roughly 15,000 farms over the prior 15 years. *Id.* The pricing regulations applied equally to intrastate milk sales in Wisconsin and to extraterritorial milk sales outside the State.

After Wisconsin adopted the price regulations, "Dean Foods announced a new milk-purchasing program intended to circumvent Wisconsin's volume premium ban." *Id.* at 612. Under this program, instead of Dean Foods acquiring Wisconsin milk in Wisconsin and itself transporting the milk from Wisconsin to its processing plants in Northern Illinois, Dean Foods told large Wisconsin farms that they could arrange to transport the milk themselves to Illinois. Dean Foods would not be required to accept milk shipped to it and would not bear the risk of loss until the milk was accepted by it in Illinois. *Id.*

Dean Foods continued to maintain a significant general presence in Wisconsin – it leased property there, had employees there, mailed business solicitations to Wisconsin businesses and held a certificate of authority from the Wisconsin Department of Financial Institutions, authorizing it to do business as a foreign corporation in Wisconsin. *Id.* at 618. Moreover, Dean Foods used a field representative in Wisconsin to solicit business from Wisconsin farmers in person and "enroll" them in its new milk-purchasing program. *Id*. at 618-19. "Enrollment" entitled Wisconsin farmers to deliver their milk to one of Dean Foods' Illinois plants. *Id*. at 619.

Significantly, after this enrollment in Wisconsin, "no further discussions with Dean Foods needed to occur before the farmer began delivering milk" to

Dean Foods. *Id*. In other words, the enrollment plan, entered in Wisconsin, specified the prices Dean Foods would pay for milk, including volume premiums. *Id*. Some farmers expected to ship milk to Dean Foods "every day," although they had "no formal contractual agreement to do so." *Id*.

Dean Foods sued the Secretary of the Wisconsin Department of Agriculture to enjoin enforcement of the Wisconsin milk-pricing regulations against milk sales under its new milk-purchasing program. The district court granted injunctive relief based on its conclusion that the milk purchase transactions took place in Illinois. Accordingly, enforcement of the Wisconsin regulations against those transactions would run afoul of the "Constitutional ban on extraterritorial legislation." *Id.* at 610-11.

On appeal, this Court affirmed. It applied the "well known" principle that "extraterritorial regulation is barred by the federal constitution," *id.* at 614, and followed the "long line of cases holding that states violate the Commerce Clause by regulating or controlling commerce occurring wholly outside their own borders." *Id.* at 615. The Court noted that "extraterritorial legislation aimed at regulating commerce was precluded 'whether or not the commerce has effects within the [regulating] state.'" *Id.* (quoting *Edgar v. MITE Corp.,* 457 U.S. 624, 642 (1982)). Thus, it made no difference that the milk sales to Dean Milk "ha[d]

an effect that is felt, perhaps even predominantly, in Wisconsin." *Id.* at 619. Under the controlling constitutional rules, "the fact that a particular transaction may affect or impact a state does not license that state to regulate commerce which occurs outside of its jurisdiction." *Id*.

The core of this Court's decision was its determination that, "the sales indisputably occurred in Illinois, and . . . no contracts were formed in Wisconsin." *Id.* For that reason, this Court held that "the commerce at issue here *occurred wholly outside of Wisconsin,* and thus any attempt by Wisconsin to enforce its volume premium rules against it would violate the extraterritoriality principle." *Id.* at 620 (emphasis added). As the Director concedes, "this Court looked to where Dean Foods and the producers formed their contracts, and, concluding they formed their contracts wholly in Illinois, decided that the Wisconsin statute could not constitutionally be applied." Director Brief at 11. As the District Court ruled, the same result is required in this case.

B. *Dean Foods* Follows The Supreme Court's Controlling Commerce Clause Precedent.

Dean Foods followed *Healy v. Beer Institute*, 491 U.S. 324 (1989), and a "long line of cases holding that states violate the Commerce Clause by regulating or controlling commerce occurring wholly outside their own borders." 187 F.3d at

615.[4] In *Healy*, the Supreme Court held that a state may not enact laws that establish prices for transactions that occur in other states. The State of Connecticut prohibited in-state beer sales at prices exceeding the distributor's out-of-state prices. Although the trigger of the regulation was the sale of beer *within* the State, the Supreme Court held it unconstitutional under the Commerce Clause because the pricing mechanism also regulated prices in out-of-state transactions:

> [T]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, and, specifically, *a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states.* . . . [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority . . . .

491 U.S. at 336 (emphasis added; quotation marks and citations omitted).

Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935), applied the same rule a half-century earlier. In *Baldwin*, the State of New York set minimum prices to be paid by milk processors to dairy farmers, a perfectly valid regulation when applied to dairy farms located in New York. However, the State also required New York processors to pay the same minimum prices to dairy farmers in Vermont for milk

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[4] *Dean Foods* also relied on this Court's previous ruling that a "state cannot regulate sales that take place wholly outside it." 187 F.3d at 615 (*citing In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 613 (7th Cir. 1997)). *Accord Glass v. Kemper Corp.*, 133 F.3d 999, 1001 (7th Cir. 1998).

resold in New York. The Supreme Court held this state regulation purporting to set prices for transactions occurring in another state invalid under the Commerce Clause. Simply put: "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 522.[5]

Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), is further authority for the proposition that a state may not regulate price terms on loan transactions entered into by its residents when physically present in another state. The issue in *Marquette* was whether the interest rate permitted by the lender's state or the borrower's state would apply to a national bank's loan under 12 U.S.C. § 85. The State of Minnesota, where borrowers of the bank were located, argued that its laws should apply "'[i]n the context of a national bank which systematically solicits Minnesota residents for credit cards to be used in transactions with Minnesota merchants . . . .'" 439 U.S. at 310 (citation omitted).

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[5] Many Supreme Court cases preceding *Baldwin* are likewise inconsistent with the Director's attempt to defend the Territorial Application Provision. *See, e.g., Shafer v. Farmers Grain Co.*, 268 U.S. 189, 201, 203 (1925) (state regulation to prevent "unreasonable margins of profit" on sales in other states invalid under Commerce Clause); *American Express Co. v. Iowa*, 196 U.S. 133, 143 (1905) (under Commerce Clause, "the law of Iowa [could not] operate[] in another State so as to invalidate a lawful contract as to interstate commerce made in such other State"); *New York, Lake Erie & W. R.R.. v. Pennsylvania*, 153 U.S. 628, 646 (1894) (state may not constitutionally regulate payments by railroad in another state).

The Supreme Court unanimously rejected this contention and held that Nebraska law would apply under Section 85. Although not citing to the Commerce Clause, the decision was premised in substantial part on the Court's understanding, consistent with its Commerce Clause precedent discussed herein, that one state could not regulate the interest rate charged on loans made in-person in another state. The Court noted: "*Minnesota residents were always free to visit Nebraska and receive loans in that State. It has not been suggested that Minnesota usury laws would apply to such transactions*." *Id.* at 310-11 (emphasis added). Similarly, Illinois law, not Indiana law, applies to loans made to Indiana residents who "visit [Illinois] and receive loans in that state." *Id*.

C. Midwest Title's Solicitation Of Indiana Residents For Out-Of-State Transactions Does Not Empower Indiana To Regulate Those Transactions.

Dean Foods, *Healy* and the other cases described above are unconditional: A state regulates impermissibly when it attempts to control on an extraterritorial basis pricing and other terms of contracts entered into outside the state. The Commerce Clause rule prohibiting extraterritorial regulation of out-of-state transactions does not depend upon whether a contracting party solicits that business within the state. Indeed, *Dean Foods* expressly states that it is not "relevant" that "Dean Foods . . . mails business solicitations to Wisconsin

businesses . . . ." 187 F.3d at 618.[6] Supreme Court and other Circuit guidance confirms this conclusion.

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), a for-profit company located in New York referred pregnant women for lawful New York abortions. A Virginia newspaper advertised the referral company's services and the editor was convicted under a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. 421 U.S. at 811. The Supreme Court made clear that Virginia had no power to interfere with out-of-state abortions and abortion referrals that were lawful in the state where they occurred and also had no right to prohibit the in-state solicitation of such business:

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

Id. at 824-25.

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[6] In *Dean Foods*, moreover, *in-person* solicitation activities in Wisconsin, even including the "enrollment" of Wisconsin dairy farmers into the new purchasing program and specification of price terms, did not permit Wisconsin to apply its price regulation to transactions consummated outside the state. *See* 187 F.3d at 618-19. Here, by contrast, Midwest Title's activities – on which basis the Director applied the IUCCC against it – were limited to some general advertising and once-a-year letters to former customers.

In reaching this conclusion, the Supreme Court recognized that Virginia "has a legitimate interest in maintaining the quality of medical care provided *within its borders*." *Id.* at 827 (emphasis added).

> No claim has been made, however, that this particular advertisement in any way affected the quality of medical services within Virginia. As applied to Bigelow's case, the statute was directed at the publishing of informative material relating to services offered in another State and was not directed at advertising by a referral agency or a practitioner whose activity Virginia had authority or power to regulate.

Id. As in *Bigelow*, the State of Indiana has no "authority or power to regulate" Midwest Title's out-of-state business transactions or to prohibit advertising for such transactions.[7] It is telling that the District Court relied heavily on *Bigelow, see* App. at 19-20 (quoting *Bigelow,* 421 U.S. at 824-25), but the Director failed even to mention the case.

Another case extensively discussed by the District Court but ignored by the Director is *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484 (4th Cir. 2007). There, despite the dissemination in South Carolina of advertising by a Georgia motor vehicle dealer, the court was constrained by the Commerce Clause prohibition against extraterritorial regulation to interpret South Carolina statutes not to apply to truck sales to South Carolina residents by the

[7] As in *Bigelow*, the State's regulation here is not to ensure the accuracy or fairness of advertisements.

dealer at its Atlanta lot. 492 F.3d at 487, 489-93. The Fourth Circuit rejected the argument that the advertising reaching South Carolina caused the sales "to have occurred in part within [that] state" – the precise argument made by the Director here. Director Brief at 11-12. The court said that its analysis "parallel[ed] that of the Seventh Circuit in *Dean Foods*," where "'no contracts were formed in Wisconsin,' and the contacts in the state amounted to 'preliminary negotiations.'" *Id*. at 490, 492 n.2 (*quoting Dean Foods*, 187 F.3d at 619).

The Fourth Circuit in *Carolina Trucks* further explained that the Commerce Clause rule "'preclud[ing] the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' reflects core precepts of constitutional structure." 492 F.3d at 490 (*quoting Healy*, 491 U.S. at 326) (internal citation omitted).

> [This rule] derives in part from the structure of federalism, which is built upon "the autonomy of the individual states within their respective spheres." *Healy*, 491 U.S. at 336 . . . . It also reflects "the Constitution's special concerns" with "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce." *Healy*, 491 U.S. at 335-36. As the Supreme Court has indicated, extraterritorial laws disrupt our national economic union just as surely as "customs duties," [*Baldwin*, 294 U.S. at 521.] The compliance costs that such laws impose undermine the Commerce Clause's objective of a "national common market." *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350 (1977) (internal citation omitted). As a result, they jeopardize the benefits of a unified national market for the entrepreneur, who "shall be encouraged to produce by the certainty that he will have free access to every market in the Nation," and for the consumer, who "may look to the free

> competition from every producing area in the Nation to protect him from exploitation by any." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

Id.

The Fourth Circuit properly regarded an advertising trigger on extraterritorial application of the law as an invalid attempt to execute an end-run around the constitutional extraterritoriality limitation:

> Each state could thus seek to regulate the company's out-of-state conduct as connected to the sale without being held to regulate extraterritorially. This approach would take the commercial speech that is vital to interstate commerce and use it as a basis to allow the extraterritorial regulation that is destructive of such commerce.
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> * * *
>
> Concluding that [the dealer's] Atlanta sales occurred within South Carolina on the basis of such advertising contacts would transform the rule against extraterritorially from a protection of commerce into a formality easily evaded. Companies would be faced with a Hobson's choice between complying with extraterritorial regulations of their out-of-state activities, and foregoing their participation in interstate trade due to the silencing of their speech.

Id. at 491, 492. In short, Indiana cannot regulate the terms of Illinois loans made by Midwest Title on the pretext that Midwest Title exercises its right to disseminate information about such loans in Indiana.

Rahmani v. Resorts Int'l Hotel, Inc., 20 F. Supp. 2d 932 (E.D. Va. 1998), *aff'd mem.*, 182 F.3d 909 (4th Cir. 1999), provides another excellent illustration of this point, as well as of the absurd results that would follow from the Director's

contrary argument. In *Rahmani,* a New Jersey casino repeatedly contacted an inveterate (and wealthy) Virginia gambler over a 13-year period and induced her to gamble. *Id.* at 933-34. It called her, sent her letters and then sent limousines to transport her and her friends and family to New Jersey. *Id.* at 934. Notwithstanding Virginia's "unambiguous hostility to gambling," the court held that a Virginia statute providing for the return of gambling losses could not be applied to losses that occurred lawfully in New Jersey. In a conclusion that applies equally to the instant case, it said: "A state cannot invalidate the lawful statutes of another state or penalize activity that lawfully occurs in another state." *Id.* at 936.

By contrast, under the Director's constitutional theory, because Las Vegas casinos advertise in Indiana, Indiana may regulate the terms of the transactions between those casinos and Indiana residents who travel to Las Vegas to gamble. Indeed, Indiana could require the casinos to apply for and successfully obtain an Indiana license before transacting any business with Hoosiers visiting Las Vegas. *See* Part ___, *infra*.[8]

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[8] Of course, many other equally absurd results follow from the Director's view of federal constitutional law. To note only two examples, both New York City hotels and Michigan state parks advertise in Indiana, soliciting business from Indiana residents who travel to those out-of-state locations. Nevertheless, the Director would be hard-pressed to justify Indiana regulation of the prices charged by the hotels and parks to Indiana residents.

D. The Facts Showing Invalidity Under The Commerce Clause Are Even Stronger Here Than In *Dean Foods*.

Given that Wisconsin could not constitutionally apply its price regulations to Dean Milk's purchases from Wisconsin producers in Illinois, *a fortiori* the Director cannot apply Indiana law to Midwest Title's loans made in Illinois to Indiana residents. The improper extraterritorial reach of the IUCCC is both clearer and far more extensive than the Wisconsin law this Court rejected in *Dean Foods*.

First, unlike Dean Foods' relationship with Wisconsin, Midwest Title does not: (1) own or lease real property in Indiana; (2) hold or need to hold a certificate of authority to do business in Indiana;[9] (3) use agents or employees to solicit Indiana business in person; (4) negotiate any term of the contractual relationship in Indiana; or (5) enter into substantial and repeated transactions with the same Indiana residents on a daily basis. Moreover, Dean Foods annually purchased over a billion pounds of raw milk from the Wisconsin dairy producers, amounting to 89% of Dean Foods total purchases, 187 F.3d at 611, which dwarfs both the

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[9] Because of the very limited contacts Midwest Title has had with Indiana when it made loans to Indiana residents, it was not required to have a certificate of authority to do business in Indiana. *See* Ind. Code § 23-1-49-1 (company "[s]oliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside Indiana before they become contracts" or company "[t]transacting business in interstate commerce" is not considered to be transacting business in Indiana).

volume and the percentage of Midwest Title's loan transactions with Indiana residents.

Even as to the controlling fact in this Court's analysis – the place of contracting – the instant case is clearer than *Dean Foods.* Here, prospective Indiana borrowers must be physically present at a Midwest Title store in Illinois in order to submit loan applications, sign loan documents, and receive loan proceeds. There is no in-state enrollment plan stating the terms of any future transactions outside the State. Thus, the terms of the loan transactions indisputably are established entirely and exclusively in Illinois. By contrast, because terms of the contracts in *Dean Foods* – including prices – were specified in Wisconsin, the Court had to resort to legal analysis to determine where the milk sales occurred (ultimately concluding they occurred solely in Illinois because no binding contract was formed until Dean Foods accepted the milk in Illinois). *See* 187 F.3d at 619.

Second, the extraterritorial impact of the Indiana statute is *far* more extreme than the Wisconsin regulation in *Dean Foods*. There, the Wisconsin regulation purported to govern only one aspect of the price Wisconsin dairy farmers would be paid for milk they sold in Illinois. Here, the challenged Indiana statute projects beyond the state's boundaries far more of the state's law than merely the maximum interest rates Indiana borrowers may be charged on loans transacted in other states.

Specifically, the Territorial Application Provision, as amended, would require Midwest Title to comply with *all parts* of the IUCCC. This begins with requiring Midwest Title to obtain an Indiana loan license. Ind. Code § 24-4.5-3-502. The Department may deny the license for a variety of reasons, which would result in an absolute bar on engaging in loan transactions with Indiana residents who come to Illinois stores. Ind. Code § 24-4.5-3-503; *see also* http://www.in.gov/dfi/applications/uccc/18542.pdf (detailing the Department's requirements for a loan license application). Application of this licensing requirement to Midwest Title is an independent violation of the Commerce Clause under Supreme Court precedent. "[T]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 337; *accord Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986).

In the event of licensure, Midwest Title would have to pay fees to Indiana based on the volume of its Illinois loans. Ind. Code § 24-4.5-6-203. Midwest Title also would have to either make its Illinois business records available for Department inspection in Indiana or pay the expenses incurred by the Department to examine the records at the out-of-state location where they are maintained. Ind. Code § 24-4.5-3-506(1)-(2).

In addition, the IUCCC extensively regulates the terms of individual loan transactions beyond maximum interest rates, including:

- permitted and maximum delinquency and deferral charges (Ind. Code §§ 24-4.5-3-203.5, -204).
- prohibitions, limitations and requirements concerning penalties, credits and refunds upon a debtor's prepayment in full (*id.*, §§ 24-4.5-3-209, -210).
- a general requirement to refinance all balloon payments on no less favorable terms than the original loan (*id.*, § 24-4.5-3-402).
- restrictions on attorney's fees and prohibitions on other default charges (*id.*, § 24-4.5-3-404, -405).
- prohibitions against assignments of earnings and confessions of judgment (*id.*, §§ 24-4.5-3-403, -407).
- restrictions on the rates, charges, terms and conditions of credit insurance, property insurance and liability insurance written in connection with consumer loans (*id.*, §§ 24-4.5-4-101 *et seq.*).[10]

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[10] Additional requirements include, *inter alia*, provisions for advances to perform covenants of the debtor, including prerequisites to charging, disclosures and maximum loan finance charge rates on such advances (Ind. Code § 24-4.5-3-208); the crediting of payments (*id.*, § 24-4.5-3-408); restrictions on the use of multiple agreements by a lender with the same debtor or with a husband and wife,

(continued...)

II. The Director's Arguments Are Meritless.

A. There Is No Distinction Under The Commerce Clause Between "Business Protection" And "Consumer Protection."

The Director attempts to distinguish *Dean Foods* on the ground that it was "about business protection rather than consumer protection." Director Brief at 11. *See also id.* at 12 (stating that the "'contracts' rule of *Dean Foods* should not apply here – and should instead yield to a 'minimum contacts' or 'sufficient state interest' rule" for the *sole* reason that the "Indiana statute protects consumers instead of business interests"). To buttress this argument, the Director cites *Alliant Energy Corp. v. Bie,* 336 F.3d 545 (7th Cir. 2003), for the proposition that "the reach of the language [of *Dean Foods*] should be confined to the type of facts in that case." *Id.* at 548.

In fact, and as even a glance at the *Alliant Energy* opinion shows, when this Court said that *Dean Foods* should be limited to "the type of facts" it presented, it was *not* concerned with whether the statute protected small businesses (family farms) or consumers. To the contrary, the Court was concerned with whether the statute *directly regulated extraterritorial commerce*. As explained by the

(...continued)
in order to obtain a higher loan finance charge rate than if the multiple loans were combined in a single loan (*id.*, § 24-4.5-3-509); and maximum loan terms when the loan finance charge rate exceeds 21% (maximum term of 37 months if the principal is more than $1,020, and maximum term of 25 months if principal is $1,020 or less) (*id.*, § 24-4.5-3-511; 750 Ind. Admin. Code § 1-1-1).

sentences that immediately followed the *Alliant Energy* reference to "the type of facts" at issue in *Dean Foods*: "The Wisconsin statute at issue there was being applied to dictate the price of mile sold in Illinois. Thus, we were dealing with a *direct* regulation of extraterritorial commerce." *Alliant Energy,* 336 F.3d at 548 (emphasis in original). This, of course, is precisely what is at issue in the instant case – a statute involving the "*direct* regulation of extraterritorial commerce."

The Director's attempt to draw a constitutional distinction between business protection and consumer protection is not only unsupported by *Alliant Energy* but also contrary to Supreme Court precedent. Both business and consumer protection are well within the police powers of the states, and states regularly and properly enact legislation to protect businesses against injurious conduct. State antitrust, trademark and labor laws all fit within this category. *See, e.g.,* Ind. Code §§ 24-1, *et seq.* (Combinations in Restraint of Trade); 24-2-1, *et seq.* (Trademark Act); and 22, *et seq.* (2009) (Labor and Safety). "Economic welfare is always related to health, for there can be no health if men are starving." *Baldwin*, 294 U.S. at 523. As the District Court noted:

> As far back as 1935, in [*Baldwin*], when New York attempted to project price regulation upon milk producers in Vermont to ensure an adequate supply of milk for New York citizens, despite the worthy social policy behind the regulation, the Supreme Court ruled: "One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories . . . the legislature of Vermont and not

> that of New York must supply the fitting remedy." *Id.* at 524. So it is, seventy-five years later, between Indiana's and Illinois's respective economic interests: each is limited to managing and regulating its own activities.

App. 22. *See also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205-06 (1994) (reaffirming *Baldwin's* analysis on this point).[11]

B. The Commerce Clause Prohibition Of Extraterritorial Regulation Is Not Limited To "Illegitimate Economic Protectionism" Or "Competing And Interlocking" Regulation.

The Director repeatedly disparages the Commerce Clause authorities Midwest Title relies upon as involving illegitimate "protectionism," *see, e.g.,* Director Brief at 9, 22, 23, and contends that "*Healy* stands for the more limited proposition that state laws are invalid per se under the Commerce Clause only where they (1) regulate wholly extraterritorial commercial activity and (2) do not advance legitimate state interests," *id*. at 18. As an initial matter, the Director's argument is internally inconsistent. Immediately after this attempt to limit *Healy* to state legislation with an improper economic protectionism purpose, the Director

[11] The Director also suggests, without stating outright, that the Territorial Application Provision is somehow shielded from invalidation because the IUCCC applies not only to extraterritorial transactions but also to in-state extensions of credit. Director Brief at 14-15 (observing that "the Indiana consumer credit code . . . imposes burdens on residents as well as out-of-state businesses. . . . Accordingly, if the costs of title loan regulation are too great, Indiana residents have sufficient incentives to elect officials who will change the law."). This defense of the Territorial Application Provision is plainly unavailing. *See West Lynn Creamery*, 512 U.S. at 203 ("The cost of a tariff is . . . primarily borne by local consumers, yet a tariff is the paradigmatic Commerce Clause violation.").

invokes a case where the Supreme Court invalidated a state law that plainly had a legitimate purpose. *Id.* (discussing *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), and its rejection of an Arizona law that limited trains to 70 freight cars or 14 passenger cars).

More important, *Healy* contains no language suggesting that the prohibition of extraterritorial state laws is limited to those with an improper protectionist purpose. To the contrary, the Court reaffirmed its statement in *Brown-Forman* that *both* state statutes that "directly regulate[]" interstate commerce *and* those that "discriminate[] against" it are usually *per se* invalid. 491 U.S. at 337 n.14 (quoting 476 U.S. at 579). Likewise, this Court in *Alliant Energy* said *Healy* "deal[t] with *direct* extraterritorial interference," and "direct extraterritorial price regulation, which unquestionably is *per se* invalid." 336 F.3d at 548-49 (Court's emphasis).

Likewise in *Dean Foods,* this Court was clear that extraterritorial regulation, not discrimination against interstate commerce, was the basis for its decision. In the very first paragraph of its opinion, the Court expressly stated the extraterritorial nature of the state law was the *sole* ground for its decision, eschewing any reliance on the argument that the regulations in question discriminated against interstate commerce:

> [T]he district court [held] . . . that because these transactions took place outside Wisconsin (and in Illinois), the Wisconsin regulations

> could not be enforced because of the Constitutional ban on extraterritorial legislation. The district court additionally suggested that the regulations likely violate the dormant Commerce Clause's restriction on statutes discriminating against interstate commerce, although it refrained from actually declaring them unconstitutional. For the reasons set out below, *we reach only the extraterritoriality grounds, and affirm the district court's ruling on that basis.*

187 F.3d at 610-11 (emphasis added). Subsequently, in *Alliant Energy*, this Court again explained that in *Dean Foods*, "we were dealing with a *direct* regulation of extraterritorial commerce. . . . As we have stated there is no question that such a regulation is *per se* invalid." 336 F.3d at 548 (Court's emphasis). *See also United States Brewer's Ass'n v. Healy*, 692 F.2d 275, 279 (2d Cir. 1982) ("If the purpose or effect of a state's law is to regulate conduct occurring wholly outside the state, the burden on commerce is generally held impermissible, and *the fact that the law may not have been intended as protectionist or discriminatory will not save it*") (emphasis added), *aff'd mem.*, 464 U.S. 909 (1983).

The Director also tries another tack, this time attempting to distinguish *Healy* on the ground that the beer-pricing laws in *Healy* could have created "'competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.'" Director Brief at 23 (quoting *Healy,* 491 U.S. at 337). In contrast the Director says, "no loan that Midwest Title makes to an Indiana consumer subject to the Indiana APR caps will be stymied by conflicting laws of other states." *Id.*

Significantly, the Director does not attempt to distinguish – and cannot distinguish – *Dean Foods* on this basis. Nor did the Supreme Court suggest in *Healy* that there must actually be "competing and interlocking" laws in multiple states in order to invalidate extraterritorial legislation on the basis of the Commerce Clause. *See* 491 U.S. at 337 (noting the *potential* effect of "laws that have been *or might be* enacted throughout the country" without stating that the rule of the case was limited to such situations) (emphasis added).

Furthermore, contrary to the Director's unsupported assertion, the Territorial Application Provision of the IUCCC threatens precisely the type of conflict with the law of other states that concerned the Supreme Court in *Healy*. For example, if a licensee under Kentucky's Consumer Loan Law were to solicit an Indiana borrower to visit Kentucky to obtain a $10,000 second mortgage loan, the Kentucky Consumer Loan Law would limit the licensee to charging up to 2% per month (or 24% per year), with no origination fee or other charges. KRS 286.4-530(1) and (10). Conversely, the IUCCC would allow on this same loan an interest rate of 21% per year, IC 24-4.5-3-201(1), *plus* a loan origination fee up to 2% of the loan amount. IC 24-4.5-3-201(8)(a). Because of the dueling statutes, however, acceptance of the Director's constricted view of the Commerce Clause prohibition against extraterritorial legislation would preclude the licensee from charging the interest and fees permitted under *either* statute. The 24% annual rate

permitted by Kentucky would be prohibited by the IUCCC and the 2% origination fee permitted by Indiana would be prohibited by Kentucky Consumer Loan Law. The Commerce Clause rule enunciated in *Healy* and followed in *Dean Foods*, of course, prevents this inappropriate result by making the loan in question unequivocally subject to Kentucky – and only Kentucky – law.

In sum, the Territorial Application Provision, as amended in 2007, is invalid because it attempts to regulate the terms of loans transacted entirely in Illinois. Invalidation of the Territorial Application Provision under the Commerce Clause neither depends upon any illegitimate legislative purpose nor upon the existence of conflicting laws in other states. Despite the Director's assurances to the contrary, however, validation of the Territorial Application Provision would threaten to subject Midwest Title and other lenders to inconsistent state laws.

C. The Director's Case Authority Does Not Support Her Position.

When the laws of two states conflict, as here, one law or the other must give way. When a citizen of one state travels to another state to enter into a contract consummated in that state, application of the non-contract state's law denigrates the policy preferences of the contract state. The harm to national unity and the interests protected by the Constitution is profound. By contrast, where a contract is entered into by contracting parties physically located in separate states, there is no

obvious and natural answer to the question of which state law should (or constitutionally must) apply.

This is why *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied,* 129 S.Ct. 2062 (2009), is inapposite. In *Quik Payday*, the court upheld the application of the Kansas Uniform Consumer Credit Code (the "KUCCC") to an out-of-state lender making loans to Kansas residents over the internet. The Kansas Bank Commissioner *conceded* that the KUCCC only "'regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas.*'" 549 F.3d at 1308 (emphasis added by court). "[R]eferring to a Quik Payday hypothetical 'about a Kansas consumer leaving Kansas to acquire a payday loan,' [the Commissioner] declared that 'the [Commissioner] would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances.'" *Id.* (citations to Kansas Bank Commissioner's brief omitted).

The internet lender, however, claimed to have no way of determining whether a Kansas resident was in Kansas or elsewhere when Quik Payday transacted a loan with such resident. On that basis, the lender argued that the KUCCC might apply to at least some out-of-state transactions involving a borrower located outside Kansas. The Tenth Circuit, however, observed that

"Quik Payday has failed to show that this possible extraterritorial effect of the statute is more than speculation. It has provided no evidence of any loan transaction with a Kansas resident that was effected totally outside Kansas." *Id.* The Court further commented that "Quick Payday has not explained how it would be burdensome for it simply to inquire of the customer in which state he is located while communicating with Quick Payday." *Id*. at 1308-09.

The Director emphasizes language in *Quik Payday* that, "[e]ven if the Kansas resident applied for the loan on a computer in Missouri, other aspects of the transaction are very likely to be in Kansas—notably, the transfer of loan funds to the borrower would naturally be to a bank in Kansas" such that "the transaction would not be wholly extraterritorial, and thus not problematic under the dormant Commerce Clause." Director Brief at 17-18 (quoting *Quik Payday* at 1308). For several reasons, the quoted language does not support the Director's position here.

First, the lender's hypothetical in *Quik Payday* did not involve a Kansas resident traveling to another state *in order to* engage in the internet loan transaction, much less being required to travel to the lender's state as here. While internet transactions may pose interesting questions concerning physical location in determining state legislative jurisdiction – a circumstance that may lend itself to federal regulation – no such uncertainty is presented here.

Second, the overwhelming majority of Quik Payday's loans to Kansas residents were undoubtedly consummated while such residents were physically in Kansas. Indeed, as noted above, Quik Payday could not show that a single loan was entirely transacted outside the State. At most, a handful of Quik Payday loans might have been made to consumers who, by happenstance, found themselves at a computer terminal outside Kansas. By contrast, each and every loan from Midwest Title to an Indiana resident was made after the borrower consciously decided to get in his or her car and drive to one of Midwest Title's Illinois stores.

Third, the *Quik Payday* court focused on the fact that that "the transfer of loan funds to the borrower would naturally be to a bank in Kansas." 549 F.3d at 1308. The court may have regarded this funding of Kansas bank accounts as the last step in the contracting process. *Cf.* 74 Fed. Reg. 41208 (Aug. 14, 2009) (in preamble to student loan regulation, Federal Reserve Board observes that "[u]nder many current private education loan agreements, the consumer is not contractually obligated until funds are disbursed to the consumer"); *Baribault v. Peoples Bank of Oxford*, 714 A.2d 1040 (Pa. Super. 1998) (in deciding whether a lender violated a duty to disclose certain information to the borrower "before the transaction is consummated," the court held that consummation of a loan "occurs when the lender issues the loan proceeds"). In contrast**,** Midwest Title delivers loan

proceeds checks to its borrowers in-person in Illinois, and unequivocally enters into the loan contracts in Illinois.

Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975); and *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), also cited by the Director, are distinguishable on the same basis – the consumer formed the contract while physically present in the regulating state. *See also A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 787 (3d Cir. 1999) (holding that "'when an offer is made in one state and accepted in another, . . . elements of the transaction have occurred in each state, and . . . both states have an interest in regulating the terms and performance of the contract.'"). As this Court stated in *Dean Foods*, the holding in *A.S. Goldmen* – like the holdings in *Quik Payday* and the *Aldens* cases – is "factually inapposite." 187 F.3d at 620. Rather than "occurring in both [states]," as in all the cases the Director cites, the loan transactions here do not involve a situation "where elements of the transaction have occurred in each state." *Id*. (internal quotation marks omitted).

In sum, *Quik Payday,* the *Aldens* cases and *A.S. Goldmen* are all irrelevant. Indiana may not constitutionally apply the IUCCC to loans made by Midwest Title to Indiana residents because Indiana residents must apply for their loans in person

at one of Midwest Title's stores in Illinois, where all facets of the loan transaction are completed.[12]

D. The Director's "Contacts" Argument Asks The Court To Disregard Supreme Court Precedent.

In the face of the overwhelming authority contrary to her position, the Director argues that "contacts" between Midwest Title's loans and the State of Indiana should suffice to justify the application of the IUCCC to the loans. She starts by quoting a passage from *Dean Foods* saying that Wisconsin did not "'argu[e] that substantial contacts'" between Dean Foods and Wisconsin "'are sufficient to support a finding that some of the commerce occurred within its borders.'" Director Brief at 11-12 (quoting *Dean Foods*, 187 F.3d at 617).

However, the Director omits the next sentence in *Dean Foods,* which shows that the "contacts" argument would not have succeeded if Wisconsin had made it explicitly: "If [Wisconsin] cannot make this showing [that a contract was formed in Wisconsin], then the regulations will have the impermissible 'effect of . . . controlling conduct beyond the boundaries' of Wisconsin." 187 F.3d at 617

[12] *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987), *see* Director Brief at 13, 20, did not address the location where contracts were entered but rather turned on "the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." 481 U.S. at 89. Thus, the Director does not cite a single case that applies *Pike* balancing to a State's regulation of out-of-state contracts or that supports the 2007 amendment's regulation of such contracts.

(Court's ellipsis; *quoting Healy*, 491 U.S. at 336). Moreover, the Court rejected a similar argument concerning the location of contract formation based on "different contacts that [Dean Foods] has with the State of Wisconsin." *Id*. at 618-19. *See also Carolina Trucks*, 492 F.3d at 492 n.2 (approving result in *Dean Foods* that "Wisconsin could not prohibit the milk purchases at issue" based on the "Seventh Circuit conclu[sion] that 'no contracts were formed in Wisconsin,' and the contacts in the state amounted to 'preliminary negotiations . . . .'").

The Director goes on to suggest that ignoring Midwest Title's many contacts with Indiana would unnecessarily "exacerbate tensions" between Commerce Clause cases and Due Process choice of law cases. Director Brief at 24. *See also id.* at 24-28 (articulating argument); Amici Brief at 15-26. This argument should be rejected for multiple reasons.

First, the argument is improper at this stage of the lawsuit. The Director Briefs below did not refer a single time to conflict or choice of law precedent. Simply put, it is far too late for the Director to argue that the Supreme Court's views on choice of law issues under the Due Process Clause have any bearing on the Commerce Clause issues raised in this case.[13]

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[13] *See, e.g., A. Bauer Mech. Inc. v. Joint Arbitration Bd. of the Plumbing Contractors' Ass. Local Union 130*, 562 F.3d 784, 792 (7th Cir. 2009) ("Bauer did

(continued...)

Second, the Supreme Court cases the Director cites in this section of her brief all *predate Healy* and *Dean Foods*. Certainly, neither the Supreme Court nor this Court felt that the Director's Due Process cases conflicted with or mandated rethinking the Commerce Clause's ban on extraterritorial state laws.

Third, the argument is addressed to the wrong Court. Notwithstanding arguments that issues concerning extraterritorial legislation and choice of law ought to be governed by the same constitutional standards, the Supreme Court has treated them differently in two separate lines of cases. *See, e.g.,* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritorial Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1068-92 (2009) (surveying the two lines of cases). Unlike the "law" the Director and Amici urge this Court to adopt, the Supreme Court's extraterritorial legislation cases "are unconcerned with the number or nature of contacts between the legislating state and the targeted out-of-state activity, and they do not ask whether the out-of-state activity being regulated causes harm within the state." *Id.* at 1091. Consequently,

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not raise this argument before the district court; therefore, it is waived on appeal"); *Bus. Sys. Eng'g, Inc. v. Int'l Bus. Machs. Corp.*, 547 F.3d 882, 889 n.3 (7th Cir. 2008) ("Arguments not raised before the district court are waived on appeal."); *Local 15, Int'l Bd. of Elec. Workers v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007) ("A party waives any argument that it does not raise before the district court").

if constitutional limitations on extraterritorial legislation and choice of law are to be merged, it is up to the U.S. Supreme Court and not the lower federal courts to authorize and effectuate both the merger and the particular form it takes. *But see id*. at 1119-22 (discussing reasons why constitutional limitations on extraterritorial legislation, *i.e.*, state legislatures, and choice of law, *i.e.*, state courts, might be treated differently).[14]

Fourth, there is no reason to assume that the Supreme Court would subordinate its Commerce Clause jurisprudence to its choice of laws jurisprudence. To the contrary, the Supreme Court has recently employed the reasoning of its extraterritorial legislation cases in addressing Due Process Clause limitations on state choice of law for punitive damages. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 573 (1996), the Court held that a state court may not award punitive damages based upon conduct that was lawful in the state where it occurred, saying a state may not "impose sanctions . . . in order to deter conduct that is lawful in other jurisdictions." (This sentence immediately follows the sentence in *Gore* that the Director selectively quotes. Director Brief at 27.) In so holding, the Court

[14] Professor Florey ultimately concludes that both issues should be governed by the same constitutional standards. 84 Notre Dame L. Rev. at 1123-34. Unlike the superficial arguments advanced by the Director and Amici, however, she recognizes that a proper integration of these two branches of constitutional law would require the Supreme Court to make changes in both branches. *See id*.

directly relied upon its precedents holding that "[n]o State can legislate except with reference to its own jurisdiction"; that "[i]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State"; and that "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States." *Gore*, 517 U.S. at 572 & n.16 (citations omitted).

Subsequently, the Court expressly stated this Due Process Clause limitation on punitive damages in terms of choice of law, saying that "any proper adjudication of conduct that occurred outside of Utah" would require "in the usual case [application of] the laws of [the] relevant jurisdiction." *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003).[15] Notably, both *Gore*, 517 U.S. at 572, and *Campbell*, 538 U.S. at 421, also relied upon the Court's *Bigelow* decision discussed above.

E. As Shown By Controlling Commerce Clause Precedent, The Relevant Commerce Here Is "Wholly Outside" Indiana.

Finally, the Director argues that the Territorial Application Provision, as amended, can be reconciled with Commerce Clause precedent because "applying

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[15] The Director erroneously asserts that Midwest Title "waived its due process argument." Director Br. at 2. In fact, Midwest Title specifically argued *Gore* and *Campbell* in opposition to the Director's motion for summary judgment. Dkt. 45 at ___.

the IUCCC to Midwest Title plainly does not regulate commercial activity occurring wholly in another state." Director Brief at 28. In support of this argument, the Director emphasizes that:

> Midwest Title advertises on television stations in Indianapolis and Terre Haute and buys listings in the Indiana Yellow Pages; it sends annual mailings to past customers in Indiana to solicit repeat business; it routinely submits documents to the Indiana Bureau of Motor Vehicles so that its lien will be noted on the vehicle's title; it collects payments sent from Indiana; and it contracts with repossession and auction companies to assist with liquidating the collateral of loan defaulters.

Id. This argument, too, fails for multiple reasons.

First, post-contract formation conduct is irrelevant under the Indiana statute. The 2007 amendment makes advertising and other solicitation the sole basis for applying the IUCCC to a loan transaction with an out-of-state lender. *See* Ind. Code § 24-4.5-1-201(1)(d). Indeed, the Director previously told the District Court that:

> [The Indiana Department of Financial Institutions] has not invoked any application of the IUCCC with respect to the actions listed below [including submitting lien documentation to the Indiana Bureau of Motor Vehicles, accepting payments sent from Indiana, making reminder or collection calls to Indiana borrowers and repossessing and selling motor vehicles in Indiana] which Midwest Title has putatively engaged in, and the DFI does not interpret the Territorial Application Provision to apply as a result of [such] actions . . . .

Dkt. 42 at 9.

Second, this Court held in *Dean Foods* that the fact relevant to the question whether Wisconsin could regulate the milk sales at issue concerned the *location of contract formation*. This Court stated that it was not "relevant to our inquiry" that "Dean Foods leases property in Wisconsin, has employees there, mails business solicitations to Wisconsin businesses and holds a certificate of authority from the Wisconsin Department of Financial Institutions authorizing it to do business as a foreign corporation in Wisconsin." 187 F.3d at 618. The contacts between Dean Foods and Wisconsin, which this Court found irrelevant, were far more sustained and systematic than the limited solicitation and episodic post-formation contacts between Midwest Title and Indiana that the Director recites (filing lien documentation with the Indiana Bureau of Motor Vehicles and hiring independent companies to repossess and sell vehicles that secure defaulted loans).

Third, evaluation of whether a State is regulating commerce "wholly outside" its jurisdiction focuses upon the location of the specific activity that is regulated. In this case, Midwest Title is challenging an Indiana law regulating *terms of contracts* entered into outside Indiana. The IUCCC provisions at issue purport to govern the terms of consumer credit transactions established entirely in Illinois after the Indiana resident leaves Indiana (along with his or her car) and

travels to a Midwest Title store in Illinois. That is "wholly extraterritorial" regulation under the governing case law.[16]

Indeed, the Supreme Court has held the relevant commerce as being wholly outside the regulating state, and hence beyond the state's police power, even where the litigant challenging the statute triggers its application by simultaneously engaging in the same commerce in-state. In *Healy,* Connecticut prohibited *in-state* beer sales at prices exceeding the distributor's out-of-state prices. Notwithstanding that the regulation only applied when there were beer sales *within* the state, the Supreme Court held it was an unconstitutional price regulation of out-of-state transactions:

> [T]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State, . . . and, specifically, *a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states*. . . . [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. *The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State*.

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[16] By contrast, the Director does not purport to show – and obviously could not show – that the "wholly extraterritorial" regulation in *Dean Foods* involved transactions that had no relationship to (or "contacts" with) Wisconsin; or that the price regulation in *Healy* involved transactions having no contacts with Connecticut.

491 U.S. at 336-37 (emphasis added; quotation marks and citations omitted). *Accord Brown-Foreman Distillers*, 476 U.S. at 583 (the fact that the New York law "is addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States.").

F. The Director's *Pike* Balancing Argument Is A Red Herring Serving As An Improper Attack On Title Lending And Illinois' Policy Choice Permitting It.

The Director's closing argument (Director Brief at 29-33) – that the Territorial Application Provision would survive *Pike* balancing, if it applied – merely serves as a thinly disguised excuse to launch an *ad hominem* attack on Midwest Title and its business. As the District Court said, "*Pike* blancing [applies] to statutes with indirect effects on extraterritorial commerce," whereas "a statute directly regulating extraterritorial activity is unquestionably invalid." App. 19 (citing *Alliant Energy*, 336 F.3d at 548-49).

Whether the IUCCC or the Illinois law represents the "better" policy judgment is not the issue. Suffice it to say that, notwithstanding the Director's facile and inaccurate references to "predatory lending" and "abusive and unconscionable" practices, *see, e.g.,* Director Brief at 31, as well as individuals who "creep in" to Indiana to exercise their constitutional rights to promote legislation favorable to their businesses, *id.* at 31-32, there is a strong rationale for Illinois' different legislative judgment. As Judge Posner recently explained in

reference to the proposed Consumer Financial Protection Agency Act of 2009, "the more consumers are protected (largely from themselves) from being abused, deceived, and so forth in the purchase of financial products, the more those products will cost and so the less rapidly the market will grow and underserved consumers--a disproportionate number of whom are poor credit risks – will have access to it." Richard A. Posner, *A Failure of Capitalism*, The Atlantic (July 4, 2009).[17]

The important point here, however, is that in circumstances like these, the Constitution resolves the policy debate. The question here is whether an Illinois business and an Indiana citizen who takes the trouble of leaving Indiana and traveling to Illinois to engage in a commercial transaction unavailable in Indiana should be subject to Indiana's contrary legislative judgment. While the Director views the extraterritoriality rule as nothing more than a loophole that prevents her from effectuating Indiana's allegedly superior laws, that rule is a fundamental feature of our federal system. *See, e.g.*, Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 318 (1992) ("when I fly from Texas to California, I

[17] The Director's criticism of Illinois law and Midwest Title loans rings somewhat hollow in light of her admission that Indiana law allows payday loans with rates up to 391% per annum and pawn loans with rates up to 276% per annum. Director Brief at 2-3.

knowingly leave the territory Texas is empowered to govern, enter the territory that California is empowered to govern, and submit myself to the authority of California. To deny that matters . . . is simply to claim that the existence of fifty states is irrational . . . [and] ignores our constitutional scheme").

Ultimately, of course, the rule prohibiting extraterritorial legislation protects not only federalism and interstate commerce but also individual liberties. *See, e.g.,* Seth F. Kreimer, *Response: Elines in the Sand: The Importance of Borders in American Federalism*, 150 U. Pa. L. Rev. 973, 983 (2002); Laurence H. Tribe, *Saenz Sans Prophecy; Does the Privileges or Immunities Revival Portend the Future – Or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 152 (1999). It also accords with the understanding of ordinary Americans. As Professor Kreimer puts it, "Most Americans, when they drive across the border from Pennsylvania to New Jersey, assume that the relevant speed limit becomes New Jersey's, not Pennsylvania's; if offered a seat at a blackjack table in Nevada, they would believe that the question of its legality is governed by Nevada law." 150 U. Pa. L. Rev. at 975.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

Dated: September 10, 2009

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Stanley C. Fickle
John R. Maley
Paul L. Jefferson
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
E-mail: sfickle@btlaw.com
jmaley@btlaw.com
pjefferson@btlaw.com

Alan S. Kaplinsky
Jeremy T. Rosenblum
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103-7599
(215) 665-8500

Attorneys for Appellee
Midwest Title Loans, Inc.

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In compliance with Circuit Rule 31(e), I certify that at the time of filing of the paper version of the foregoing Brief of Appellee, digital media versions thereof were furnished to the Clerk of the Court and to counsel of record for Appellant and Amici Curiae. A searchable PDF version of the Brief of Appellee was furnished to the Clerk via CD, an electronic copy of the Brief of Appellee was furnished to all counsel of record on CD via Federal Express.

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Stanley C. Fickle

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Stanley C. Fickle

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I certify that on September 10, 2009, a digital version of the Brief of Appellee and two paper copies of the Brief of Appellee were served by Federal Express delivery prepaid upon the following all in accordance with Fed. R. App. P. 25(c)(1)(C):

Gregory F. Zoeller
Thomas M. Fisher
Ashley E. Tatman
OFFICE OF THE ATTORNEY GENERAL
5th Floor
302 West Washington Street
Indiana Government Center South
Indianapolis, Indiana 46204-2770

Daniel Mosteller
Matthew Brinegar
Nina Simon
CENTER FOR RESPONSIBLE LENDING
910 17th Street, NW, Suite 500
Washington, DC 20006

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Stanley C. Fickle