IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2083

MIDWEST TITLE LOANS, INC.,
Plaintiffs/Appellee,

v.

JUDITH G. 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-01479-SEB-DML
The Honorable Sarah Evans Barker, Judge

BRIEF AND REQUIRED SHORT APPENDIX
OF APPELLANT JUDITH G. RIPLEY

GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

ASHLEY E. TATMAN
Deputy Attorney General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

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JURISDICTIONAL STATEMENT

On November 16, 2007, Midwest Title filed a complaint under 42 U.S.C. § 1983 in the U.S. District Court for the Southern District of Indiana against Judith G. Ripley, in her official capacity as Director of the Indiana Department of Financial Institutions. [Docket No. 1]. The complaint requested a declaratory judgment and injunctive relief enjoining Director Ripley from enforcing the IUCCC against Midwest Title because doing so would be forbidden by the Commerce Clause and the Due Process Clause (Count I), and because Indiana Code § 24-4.5-1-201(1)(d) allegedly discriminates against companies not affiliated with Indiana industrial loan and investment companies (Count II). [Docket No. 1]. The district court had federal-question subject-matter jurisdiction under 28 U.S.C. § 1331.

On March 21, 2008, Midwest Title voluntarily dismissed Count II. [Docket No. 37]. On March 24, 2008, Midwest Title filed a Motion for Summary Judgment and Permanent Injunction but chose not to pursue its due process claim. [Docket No. 38]. Ripley filed a cross-motion for Summary Judgment. [Docket No. 41]. App. at 3. The district court issued an Order on March 24, 2009, granting Midwest Title's motion for summary judgment and finding that the Territorial Application Provision is "unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois." App. at 22-23. The Court also granted Midwest Title a permanent injunction forbidding the Department to apply the IUCCC to "loans made wholly in the state of Illinois to Indiana residents." *Id*. at 23.

On April 15, 2009, Ripley filed a motion for extension of time to file a notice of appeal, to and including May 6, 2009 [Docket No. 61], and the district court granted it on April 16, 2009 [Docket No. 62]. Ripley filed a notice of appeal on April 24, 2009, seeking review of the district court's March 24, 2009, Order. [Docket No. 63].

The district court's March 24, 2009, Order disposed of all pending claims: Midwest Title had voluntarily dismissed Count II of its complaint and waived its due process argument. *See Brookins v. Kolb*, 990 F.2d 308 (7th Cir. 1993), *abrogated on other grounds*, *Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009) (holding that claims alleged in a complaint but not argued leading to final judgment are waived). Accordingly, this is an appeal of a final judgment over which this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. In the alternative, if Midwest Title's due process claim, which the district court never formally dismissed, renders the judgment below non-final, this Court nonetheless has jurisdiction over this case as an interlocutory appeal of an injunction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUE

May a State, consistent with the Commerce Clause, enforce a consumer protection statute regulating predatory lending against a firm that advertises in the State, loans money to the State's residents, and conducts multiple other acts of commerce in the State to administer those loans, but executes all loan agreements in another State?

STATEMENT OF THE CASE

In 2007, the Indiana General Assembly amended the Indiana Uniform Consumer Credit Code to impose licensing and regulatory requirements on lenders from Indiana and other States "who are soliciting by any means and then making consumer loans to Indiana residents[.]" App. at 25, 28-29; Ind. Code § 24-4.5-1-201. Under this "Territorial Application Provision," a loan transaction occurs in the State of 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 mail, print and television. Ind. Code § 24-4.5-1-201(1)(d).

If a lender triggers the Territorial Application Provision by lending, advertising or soliciting in Indiana, the IUCCC applies to that lender's loans to Indiana residents. After obtaining the proper licenses from the Department of Financial Institutions, the lender, whether located in Indiana or elsewhere, may make loans to Indiana residents within Indiana's usury limits (capped at a maximum of 36% annual percentage rate) and note its lien on the title of the consumer's motor vehicle as security for the loan. Ind. Code § 24-4.5-3-508.

Regulated lenders may also obtain licenses to make "payday" loans to Indiana residents pursuant to Indiana's Small Loan Act, where the lending limit is $550. *See* Ind. Code § 24-4.5-7-101 *et seq.*; § 24-4.5-7-201(4). With interest and fees, the annual rate may be as high as 391% for payday loans. *See Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533, 536 (Ind. Ct. App. 2006). However, pursuant to

Indiana Code § 24-4.5-7-403, lenders may not accept security for payday loans other than a customer's check or automatic clearinghouse electronic debit. In addition, a lender may obtain a pawnbroker's license pursuant to Indiana Code § 28-7-5-1 *et seq*., and charge interest and fees resulting in an APR as high as 276%. Ind. Code § 28-7-5-28. A pawnbroker, however, must retain physical possession of the consumer's automobile as security.

On November 16, 2007, Midwest Title filed its complaint in this matter challenging Indiana's ability to enforce the IUCCC against it. On March 24, 2008, the parties filed cross-motions for summary judgment [Docket Nos. 38 and 41], and the district court issued an Order on March 24, 2009, granting Midwest Title's motion for summary judgment and finding that the Territorial Application Provision is "unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois." App. at 22-23. The Court also granted Midwest Title a permanent injunction forbidding the Department to apply the IUCCC to "loans made wholly in the state of Illinois to Indiana residents." *Id*. at 23. Ripley here appeals that judgment and injunction.

STATEMENT OF FACTS

1. Midwest Title is a consumer installment loan company incorporated in Illinois and licensed by the Illinois Department of Financial Institutions. App. at 24. Midwest Title is known as a "title lender" because it operates stores (including 23 in Illinois) from which it provides "title loans"—loans secured by title to the borrower's motor vehicle. *Id.* at 24, 25. Although there are no Midwest Title stores

in Indiana, Midwest Title has made thousands of title loans to Indiana residents who have taken their motor vehicles and titles to one of Midwest Title's Illinois stores and applied in person for a loan. *Id.* at 24, 26. Approved applicants execute loan documents at Midwest Title's stores and provide Midwest Title with keys to the collateral vehicle in order to make self-help repossession easier in case of default. *Id.* at 26. Midwest Title submits the necessary documents to the Indiana Bureau of Motor Vehicles so that Midwest Title's lien will be noted on the title provided by the borrower and provides the borrower with loan proceeds at its store in the form of a cashier's check drawn on an Illinois bank. *Id.* at 26, 27.

Midwest Title's title loans are payable in monthly installments over 12, 18, or 24 months, and the typical amount loaned is approximately 50% of the wholesale value of the vehicle securing the loan. *Id.* at 25. Midwest Title charges an annual percentage interest rate of approximately 300%. *Id.* If permitted to apply, the Indiana Code would limit the per annum interest rate that Midwest Title could charge Indiana customers to 36%. *Id.*

While it is true that an Indiana borrower must travel to Illinois to obtain a title loan, Midwest Title does, with each such loan to an Indiana borrower, undertake or anticipate several contacts with Indiana. For example, prior to this lawsuit, Midwest Title advertised on television stations in Indianapolis and Terre Haute and bought listings in the Indiana Yellow Pages. *Id.* at 27. Midwest Title sent annual mailings to past customers in Indiana in an attempt to solicit repeat business. *Id.* at 26. After making a loan to an Indiana resident, Midwest Title

would submit the necessary documents to the Indiana Bureau of Motor Vehicles so that the lien would be noted on the vehicle's title. *Id.* at 27.

Continuing the commercial transaction, Indiana borrowers may cash their loan checks and deposit their loan proceeds at Indiana banks and make their payments through the mail or in other ways that cross state lines. *Id.* at 27. Upon default, Midwest Title pays an unaffiliated third party repossession company to repossess the vehicle and then obtains a new title from the Indiana Bureau of Motor Vehicles showing Midwest Title as the owner of the vehicle. *Id.* at 27-28. The repossessed Indiana vehicle would remain in Indiana until it was sold through an unaffiliated Indiana auction house. *Id.* at 28.

2. In mid-August 2007, shortly after Indiana's Territorial Application Provision became law and extended the reach of Indiana's consumer credit code, the Supervisor of the Division of Consumer Credit in Indiana—a division of the Department of Financial Institutions—sent a letter to Midwest Title advising that Indiana law "requires lenders who are soliciting by any means and then making consumer loans to Indiana residents to be licensed[.]" *Id.* at 28. The letter further explained that under Indiana law, "[i]f a creditor has violated [this provision], the loan is void and the debtor is not obligated to pay either the principal or loan finance charge, as set forth in § 24-4.5-5-201." *Id.* at 28-29.

Midwest Title promptly suspended offering loans to Indiana residents and discontinued charging or collecting interest on loans to Indiana borrowers made between July 1, 2007, and Midwest Title's receipt of the letter ("the Covered

Loans"). *Id.* at 29. Midwest Title also refunded all previous payments of interest on the Covered Loans but continued to collect principal payments. *Id.* at 29-30. As noted, Midwest Title initiated this litigation on November 16, 2007. [Docket No. 1].

SUMMARY OF THE ARGUMENT

In this case the Court must decide how far states may go to protect their consumers from predatory lending—here, 300% APR loans secured by title to the borrower's car valued at twice the loan amount, complete with a set of keys. If a borrower is unable to repay the principal and interest charges, the vehicle will be promptly repossessed and the borrower will lose what is often his or her most valuable asset—the means to get to work, child care and the doctor's office. It is the State's most vulnerable residents who would agree to these long-term, over-secured, high interest loans, and Indiana must be able to protect them from predatory loans, even if it must incidentally affect interstate commerce to do so.

In *Healy v. Beer Institute*, 491 U.S. 324, 329 (1989), the Court said that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." *Id.* at 332. In *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), this Court applied *Healy* to invalidate an economic protection statute. Here, in turn, the district court applied *Healy* because *Dean Foods* said that, for purposes of determining whether a regulated business transaction occurs "wholly" in another state, all that matters is the place of contracting. App. at 13 (citing *Dean Foods*, 187 F.3d at 620). In the district court's view, *Healy* and *Dean Foods* represent a rule of "per se" invalidity of

state regulation involving a contract executed in another state, and it accordingly invalidated the Indiana law at issue here because, incidental to protecting consumers from predatory lending, it regulates contracts signed in Illinois. App. at 19.

At one level, this case may turn on whether this "per se" rule, as understood by this Court in *Dean Foods*, applies to consumer protection legislation that is triggered by an Illinois firm's actions directing advertising and solicitations into Indiana to lure consumers that the government of Indiana is trying to protect. The answer to this question should be "no" because, at least in cases where consumer protection statutes are at stake, examining the place of contracting does not tell the whole story as it relates to legitimate regulatory interests. Courts should instead look to the entire commercial relationship and examine whether the regulated business has sufficient contacts with the regulating state that the commercial transaction can fairly be deemed to cross state lines and thereby implicate the legitimate interests of the regulating state. Here, where Midwest Title directs advertisements into Indiana, loans money to Indiana residents at exorbitant rates, collects payments sent from Indiana, repossesses defaulting borrowers' cars in Indiana, and ultimately causes economic hardship in Indiana, that is undoubtedly the case. The commerce, in other words, does not end when the contract is signed in Illinois. Indeed, when the contract is signed, the commerce has just begun.

There is a broader question, moreover, whether *Healy* really commands per se invalidity where a statute of one state regulates commerce that occurs entirely in

other states (whatever that means), regardless of impact in the regulating state. Instead, *Healy* should be understood only as requiring invalidation of extraterritorial statutes that advance no *legitimate* (*i.e.*, non-protectionist) interests of the regulating state. Because Indiana's consumer credit code advances legitimate state interests, Indiana may regulate Midwest Title's loans to Indiana consumers.

Regardless of the proper analytical structure, however, the main inquiry is the same: Are Midwest Title's contacts with Indiana—advertising on Indiana television stations and in the Yellow Pages, soliciting repeat customers through direct mailings, perfecting security interests through the Indiana Bureau of Motor Vehicles, collecting payments sent from Indiana, and contracting with repossession companies and auction houses—relevant to Indiana's power to regulate Midwest Title's loans to Indiana consumers? App. at 25-28.

If so, and because there can be no plausible claim that the Territorial Application Provision discriminates against interstate commerce (Indiana firms must also comply with the substantive IUCCC provisions when making loans to Indiana customers), the strictest Commerce Clause standard that can apply is the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Pike* balancing weighs a challenged law's impact on interstate commerce against the public benefit to the enacting state. *Pike*, 397 U.S. at 142. States have traditional, fundamental, compelling interests in protecting their residents from unfair trade practices, including predatory lending, and fully protecting them sometimes requires incidental effects on interstate commerce. On the other hand, the consequential

burden on interstate commerce, which apparently relates only to Midwest Title, is very weak. Therefore, this court should uphold the Territorial Application Provision as a constitutional exercise of Indiana's police power.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Jackson v. County of Racine,* 474 F.3d 493, 498 (7th Cir. 2007). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence should be viewed in the light most favorable to the party against whom the motion under consideration was made—here, Ripley. *Hess v. Reg-Ellen Mach. Tool Corp.,* 423 F.3d 653, 658 (7th Cir. 2005) (quoting *Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004)).

ARGUMENT

I. Consumer Protection Statutes That Affect Some Out Of State Conduct Are Not Invalid Per Se Under The Commerce Clause

A. Applying the IUCCC to Midwest Title's loans to Indiana consumers does not, in light of Midwest Title's advertising and other transactional contacts with Indiana, constitute wholly extraterritorial regulation

1. As this Court has already said, *Dean Foods* is limited to its facts

The district court relied on *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), to find that the "commerce" at issue in this case includes only the formation of loan contracts that occur wholly outside of Indiana because both the offer and

acceptance occur in Illinois. App. at 12-14. With this understanding of the relevant commercial activity, it was clear to the court that, because the "statute does not regulate the conduct of Midwest Title *within* the state of Indiana[,]" the State may not constitutionally apply it to Midwest Title. App. at 20, 22-23.

Dean Foods, however, was a case about business protection rather than consumer protection. The statute at issue was a Wisconsin law prohibiting milk processors from paying price premiums to high-volume milk producers. *Dean Foods*, 187 F.3d. at 611. Wisconsin had determined that the incentives processors paid to encourage bigger herds led to the loss of nearly 15,000 dairy farms in the State and that small processors had also been hurt by their inability to pay the premiums; the anti-premium statute was meant to protect the business interests of these small dairy farmers and processors. *Id.* Dean Foods attempted to circumvent the volume premium ban by asking high-volume Wisconsin producers to transport their milk to the Illinois plants themselves, which allowed the risk of loss to stay with the Wisconsin farmer until the milk arrived in Illinois and Dean Foods accepted the shipments. *Id.* at 612. In reviewing the statute for Commerce Clause compliance, 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. *Id.* at 619.

To understand the limits of the holding in *Dean Foods*, however, it is important to observe that, in arguing that the milk sale transactions took place at least partially in Wisconsin and would thus be subject to Wisconsin law, Wisconsin

did not argue—as Indiana argues in this case—that minimum contacts between a regulated business and the regulating state can be enough to justify the regulation. *Id.* at 617 ("Although the appellant puts heavy emphasis on the number of contacts between the appellee and Wisconsin, we do not perceive him as arguing that substantial contacts with that state are sufficient to support a finding that some of the commerce occurred within its borders. Instead, we take him to mean that these contacts show that a contract was formed in Wisconsin.").

Furthermore, this Court itself has stated that "the reach of the language [in *Dean Foods*] should be confined to the type of facts in that case." *Alliant Energy Corp. v. Bie*, 336 F.3d 545, 548 (7th Cir. 2003). Indeed, no other Seventh Circuit opinion has used the "contracts" analysis set forth in *Dean Foods*. At the very least, this case, where a consumer protection statute is at issue, affords the opportunity to define the limits of, and address a theory not presented in, *Dean Foods*.

2. Business conduct becomes subject to another State's consumer protection laws when directed into that State

The "contracts" rule of *Dean Foods* should not apply here—and should instead yield to a "minimum contacts" or "sufficient state interest" rule—because the Indiana statute protects consumers instead of business interests.

a. There are two reasons for distinguishing between business protection and consumer protection when it comes to analyzing extraterritorial statutes under the Commerce Clause. First, states have long exercised a legitimate (indeed, compelling) role in protecting their citizens and consumers from unfair trade practices that originate in other states. As this Court observed in *Aldens, Inc. v.*

LaFollette, 552 F.2d 745, 751 n.12 (7th Cir. 1977), "[t]he police power requires less of a nexus than a state's power to tax or to regulate intrastate commerce. Protection of its citizens is the primary function of state government." *See also, e.g.*, *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.") (internal citations omitted). The Indiana consumer credit code advances these interests by protecting consumers from highly predatory loan products that threaten to liquidate the one piece of property—the borrower's vehicle—that may enable the borrower to remain financially viable over the long term. Indiana exercises its power to protect its residents from unfair business practices by out-of-state firms in other contexts as well. *See, e.g.*, Ind. Code § 24-5-19-1(3) (applying a Deceptive Commercial Solicitation statute to any person who "sends the solicitation from outside Indiana to a location or person in Indiana").

Second, dormant Commerce Clause doctrine is principally concerned with deterring states from engaging in *economic* protection of in-state businesses. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) (stressing that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce"). As the Sixth Circuit recently observed, "the core concern of the dormant commerce clause [is] protectionism—that is, 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Tennessee Scrap Recyclers Ass'n. v. Bredesen*,

556 F.3d 442, 449 (6th Cir. 2009) (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 99 (1994)).

Indeed, at the Founding, federal regulation of interstate commerce was justified by reference to the proclivity of states to regulate in furtherance of their parochial economic interests, even to the point of extracting rents from passers through:

> A very material object of this power [to regulate commerce] was the relief of the states which import and export through other states, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, as must be foreseen, that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former.

The Federalist No. 42, at 218 (James Madison) (Gideon ed. 2001).

That concern continues to animate modern Commerce Clause doctrine where courts often find discrimination in cases "when a State shifts the costs of regulation to other States, because when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767-768 n.2 (1945)). Not only is the Indiana consumer credit code completely devoid of any suggestion of economic protectionism, but it imposes burdens on residents as well as out-of-state businesses. Indiana lenders, who might enter the title loan market if usury caps were eased, and Indiana consumers, for whom title loans (and other high risk loans)

are less available than without the IUCCC, also are affected. Accordingly, if the costs of title loan regulation are too great, Indiana residents have sufficient incentives to elect officials who will change the law. When drafting the Commerce Clause, the Founders were not concerned with preventing this sort of good-faith consumer protection statute that imposes costs internal to the regulating State.

b. Again, as a matter of Commerce Clause doctrine, the central issue in this case concerns whether Midwest Title engages in sufficient activity in Indiana to become subject to Indiana's predatory lending laws. It would seem a fairly uncontroversial and straightforward proposition that, if commercial activity occurring in one State crosses the border and causes genuine injury in another State, it is not commercial activity occurring "wholly" in one State.

In that regard, when addressing Federal Trade Commission consumer protection jurisdiction, this Court has said that commercial activity can be deemed "interstate" based on *all* related contacts, not just the site of contract formation: "[E]very negotiation and dealing between citizens of different States which contemplates and causes [an importation into one State from another], whether it be goods or information, is a transaction of interstate commerce." *Progress Tailoring Co. v. Fed. Trade Comm'n*, 153 F.2d 103, 105 (7th Cir. 1946) (citing *Butler Bros. Shoe Co. v. U.S. Rubber Co.*, 156 F. 1, 17 (8th Cir. 1907); *Int'l Text-Book Co. v. Pigg*, 217 U.S. 91 (1910); *Furst v. Brewster*, 282 U.S. 493 (1931)).

In *Progress Tailoring*, in fact, this Court ruled in favor of FTC jurisdiction to seek redress against false advertising in interstate commerce because "the

advertisements are a part of the preliminary negotiations leading up to a sale in interstate commerce. They cannot be separated from the final sale, and are themselves a part of interstate commerce." *Id*. at 105. By that rationale, Midwest Title's decision to advertise in Indiana renders its transactions with Indiana consumers "interstate" in character rather than wholly intrastate in Illinois.

c. This Court and others have applied this principle in Commerce Clause challenges to consumer protection statutes similar to this one. In *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977), this Court upheld a Wisconsin law setting a maximum permissible finance charge for extension of credit under open-end credit plans against a challenge from an Illinois mail order business that wanted to charge a higher interest rate. The Court held that the Act was "clearly justified by Wisconsin's interest in protecting its citizens from sharp credit practices." *Id.* at 751 n.11.

In another Commerce Clause case brought by Aldens, Inc., the Third Circuit upheld a Pennsylvania law regulating credit rates and requiring specific disclosures in contracts and billing statements because the State "is not attempting to export obligations to its treasury, or to export its public policy on consumer credit interest rates. It merely seeks to afford uniform protection to all Pennsylvania residents with respect to such rates." *Aldens, Inc. v. Packel*, 524 F.2d 38, 42, 49 (3d Cir. 1975).

And in yet another Aldens case, the Tenth Circuit upheld an Oklahoma statute setting maximum interest rates for credit sales, observing that the Supreme

Court had "'rejected the contention' that the doctrines of place of contracting and place of performance should govern, and held that they must give way to the 'degree of interest' the state had in the transaction of subject, and give way to the consequences of the contracts in the regulating states." *Aldens, Inc. v. Ryan*, 571 F.2d 1159, 1161 (10th Cir. 1978) (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950)).

A more recent Tenth Circuit case, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 2062 (2009), applied the *Aldens* "minimum contacts" principles to hold that a Kansas statute regulating consumer lending could apply to payday loans offered by an out-of-state company over the Internet. The district court in this case erroneously concluded that *Quik Payday* stands for a bright line rule that commerce occurs in the State where the contract is made. App. at 15. The Tenth Circuit was very clear, however, 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." *Quik Payday, Inc.*, 549 F.3d at 1308. Thus, the Tenth Circuit found Quik Payday's *contacts* with the State of Kansas, not the location where the contract was signed, to be of paramount importance in the Commerce Clause analysis of whether a regulated consumer transaction occurred "wholly" in one State. This Court should remain consistent with the Tenth Circuit in this regard

and look beyond where Midwest Title signs its contracts to where the transaction begins (with advertisements in Indiana) and ultimately leads (back to Indiana).

B. *Healy* does not require "per se" invalidation where a statute advances legitimate state interests even as it affects extraterritorial activity

On a broader level, this Court should not accept uncritically the notion that *Healy* compels invalidation of any state statute that regulates commercial activity beyond the state's borders without regard to the impact of that activity in the regulating state. When set in proper context, *Healy* stands for the more limited proposition that state laws are per se invalid under the Commerce Clause only where they (1) regulate wholly extraterritorial commercial activity and (2) do not advance *legitimate* state interests. Because the IUCCC advances traditional, legitimate state interests in protecting consumers from abusive business practices, it does not fall under this standard.

1. *Healy* was not the first case where the Supreme Court invalidated a state law that regulated wholly extraterritorial business activity. At least as far back as *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the Court has rejected state laws that, while facially applicable only in the state where enacted, had crippling economic effects down the line in another state. In that case, the Court invalidated, as applied to trains running interstate routes, an Arizona law that limited trains to 70 freight cars or 14 passenger cars. *Id.* at 763. The problem, of course, was that to effectuate compliance with Arizona's laws while its interstate trains ran through Arizona, Southern Pacific had to comply with Arizona's law all

along its interstate route: Arizona law thus dictated business conduct occurring wholly in other states. *Id.* at 774. Notably, however, the Court did not invalidate this law using a per se rule. Rather, in view of Arizona's legitimate safety interests in regulating the lengths of trains running across its borders, the Court balanced the competing interests, though it still found Arizona's interests wanting. *Id.* at 775-76.

2. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Court struck down an Illinois law regulating hostile takeovers of corporations based in Illinois that applied even if the target company had zero Illinois shareholders. *Id.* at 642. In the portion of his opinion joined by only three other Justices, Justice White, discussing *Southern Pacific*, noted that "[t]he Commerce Clause also 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." *Id.* at 642-43.

As this Court has observed, however, Justice White's formulation in *Edgar* "did not draw support from a majority of the Court and is therefore not the opinion of the Court." *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 916 (7th Cir. 2003). The majority of the Court instead joined the portion of Justice White's opinion that expressly invoked the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under that standard, the Court ultimately held that "the State has no legitimate interest in protecting nonresident shareholders." *Edgar*, 457 U.S. at 644;

Alliant Energy, 330 F.3d at 917. In this case, of course, Indiana is protecting *resident* consumers.

Then, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Court upheld an Indiana statute requiring a majority of pre-existing disinterested shareholders of a company organized under Indiana law and having a minimum number of Indiana resident shareholders to approve any acquisition. *Id.* at 73, 78. The Court, once again invoking *Pike*, found the statute valid even though it regulated control share acquisitions potentially occurring wholly outside of Indiana because "Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing [and] every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting." *Id.* at 93. The same is true here. Every application of the IUCCC will affect Indiana residents, whom the State may protect.

3. During the same time period as the *CTS* case, the Court also examined state alcohol price-affirmation statutes. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court invalidated a New York price-affirmation statute that required liquor distillers and producers to sell their wares to New York wholesalers at a price no higher than the prices they charge wholesalers anywhere else in the country. *Id.* at 575. Notably, while the Court observed the choice between evaluating the statute as either a "direct regulation of commerce" (in which case it was invalid per se) or as a law having an incidental burden on interstate commerce (in which case it would be subject to *Pike* balancing),

it bemoaned the difficulty of drawing a distinction between the two and reconciled them by saying that "[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* at 578-79; *see also Wiesmueller v. Kosobucki*, No. 08-2527 (7th Cir. July 9, 2009) (quoting the above passage from *Brown-Forman* and noting that "[t]his is an acknowledgement that the two tiers sometimes cannot always be distinguished in practice—as this case illustrates"). In this case, the district court erroneously ignored this mode of analyzing the statute at issue.

Finally, in *Healy v. Beer Institute*, 491 U.S. 324, 329 (1989), the Court invalidated a substantially similar Connecticut price-affirmation law. In so doing, the Court repeated the extraterritoriality principle voiced by the *Edgar* plurality—which in turn was actually based on the balancing case *Southern Pacific*—that the "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." *Id.* at 336. Hence, *Healy*'s use of this rule traces back not to a clearly demarcated line of cases employing a rule of per se invalidity—see again this Court's recent *Wiesmueller* decision—but instead to *Southern Pacific*, a case about balancing legitimate state interests with national interests. *S. Pac. Co.*, 325 U.S. at 775-76.

That said, the Court in *Healy* did not profess to balance competing interests. The reason is straightforward enough: there was no *legitimate* competing state interest to balance. The purpose of the price-affirmation law was ostensibly to

enable Connecticut consumers to buy alcohol at the lowest possible prices. The price-affirmation law, however, created a situation where the prices of alcohol in neighboring states could not be reduced as the market dictated without violating Connecticut's law. *Healy*, 491 U.S. at 330. And while Connecticut had a legitimate interest in keeping absolute prices low for its residents, that interest was not implicated by the comparative prices charged to consumers in other states. *Id.* States do not, that is, have a legitimate interest in ensuring that their residents pay the lowest prices offered anywhere. Such an "attempt[] to give local consumers an advantage over consumers in other States" amounts to illegitimate economic protectionism. *Brown-Forman*, 476 U.S. at 580.

Accordingly, the Court's prohibition in *Healy* on "regulating commerce occurring wholly outside that State's borders" means something other than how the district court in this case interpreted it, *i.e.*, to mean that states may not under any circumstances regulate transactions where the contract is signed outside the State. It means instead only that a state may not regulate extraterritorially where its only objective relates to economic protectionism. This reading of *Healy* is fully consonant with this Court's decision in *Dean Foods*, where Wisconsin's sole objective in regulating milk contracts executed in Illinois was to protect small Wisconsin dairy farms and processors. *Dean Foods*, 187 F.3d. at 611.

Conversely, Indiana's regulation of title loans, while seeking to limit the price of capital for Hoosiers, does not do so at the expense of Illinois residents. While the IUCCC imposes a determinate APR cap for title loans to Indiana residents, there is

no territory-conscious requirement that Midwest Title loan to Indiana residents at rates no higher than it charges Illinois residents. Accordingly, there is no objective to engage in illegitimate economic protectionism. Rather, Indiana's interest at stake is the traditional, compelling interest in protecting consumers from predatory lending practices that ultimately have negative effects in Indiana.

Another critical distinction with *Brown-Forman* and *Healy*—and, indeed, with *Edgar*—is the lack of any prospect that similar statutes in other states would lead to an interlocking web of regulations subjecting individual loans to multiple, and perhaps inconsistent, regulatory oversight. In *Healy*, the Court was troubled that "the practical effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. The Indiana statute creates no interlocking regulations: it has no effect on the interest rates Midwest Title charges borrowers outside of Indiana and, perhaps more fundamentally, 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. This is simply not the kind of law that the Court rejected in *Healy*, and therefore should be subject to *Pike* balancing.

C. Ignoring Midwest Title's many contacts with Indiana would unnecessarily exacerbate tensions between Commerce Clause cases and Due Process Clause cases involving choice of law issues

Commerce Clause cases do not provide the sole context where the Supreme Court has examined constitutional limitations on extraterritorial applications of state law. In decisions concerning Due Process Clause limits on legislative jurisdiction and choice of law doctrine, the Court has examined *all* relevant contacts with the regulating State, rather than simply the site of contract formation, to discern which state's laws can apply. And when imposing limits on the extent to which state courts may consider out-of-state conduct for purposes of calculating punitive damages, the Court has suggested that the Commerce Clause permits a regulation of extraterritorial conduct having negative effects in the regulating state.

The Supreme Court has permitted, in response to due process claims, extraterritorial application of consumer protection statutes where multiple contacts of various types exist between the regulating State and the regulated business.[1] In *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 72 (1954), the Court found that a Louisiana statute could constitutionally apply to a Massachusetts insurance contract because it "is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers." In fact, "[p]ersons injured or killed in

[1] The district court seemed to misunderstand that the State was suggesting that personal jurisdiction doctrine applied here. App. at 16 n.9. The State, rather, is arguing that a different, though analogous, minimum contacts analysis applies to questions of legislative jurisdiction, at least with respect to consumer protection legislation aimed at out-of-state companies, and that this doctrine conflicts with a ruling that the site of contracting alone determines whether a state may apply its law consistent with the Commerce Clause.

Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. . . . The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help." *Id.* Furthermore, "Louisiana courts in most instances provide the most convenient forum for trial of these cases." *Id.* Finally, because of "Louisiana's legitimate interest in safeguarding the rights of persons injured there[,] . . . the direct action provisions . . . do not violate due process." *Id.* at 73.[2]

This standard continues to carry the day in legislative due process cases. In *Allstate Insurance Co. v. Hague,* 449 U.S. 302, 312-13 (1981), the Court, upholding application of a Minnesota insurance stacking provision to policies issued in Wisconsin, collected prior authority (including *Watson*) and ruled that, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *See also Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1237-38 (11th Cir. 2001) (holding that "there must be at least some minimal contact between a state and the regulated subject matter or transaction before the state can, consistent with the requirements of Due Process, exercise legislative

[2] Even where the Supreme Court has rejected extraterritorial application of a consumer protection statute on due process grounds, it has done so based on lack of minimum contacts rather than the site of contract formation. In *Home Insurance Co. v. Dick*, 281 U.S. 397, 408 (1930), the Supreme Court found that Texas did not have legislative jurisdiction to regulate an insurance policy that had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering a Mexican risk when "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas."

jurisdiction."); *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008) (applying Indiana law, considering all factors and stating that "[t]he place of contracting, standing alone, is often insignificant"); *Hinc v. Lime-o-Sol Co.*, 382 F.3d 716, 720 (7th Cir. 2004) (applying Indiana law and observing that "[w]hile the place of contracting favors Illinois, the place of negotiation, the place of performance, and the location of the subject matter of the contract all favor Indiana"); *Soo Line R.R. Co. v. Overton*, 992 F.2d 640, 644 (7th Cir. 1993).

In light of these cases, there is the potential for considerable tension between legislative jurisdiction due process cases and per se invalidity in Commerce Clause cases. In the due process cases, courts consider all manner of contacts between the affected individual or business and the regulating state, and in particular whether the extraterritorial business practices will have negative effects on the regulating state's citizens. In *Healy*, however, the Court suggested that, at least in some cases, the effect of extraterritorial business practices in the regulating state cannot justify regulation of business activity occurring "wholly" in another state. *Healy*, 491 U.S. at 336. Notably, however, *Healy* relied expressly on Justice White's plurality opinion in *Edgar*, which itself stated that "[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar*, 457 U.S. at 643. Thus, the roots of the Commerce Clause doctrine's "per se" rule lie to some extent in due process doctrine, which should further discourage applying *Healy* to forbid regulatory conduct that the Due Process Clause would permit.

Furthermore, the Supreme Court has to some extent eased the tension between Commerce Clause doctrine and due process doctrine in the context of deciding whether states may permit punitive damages awards based on business conduct occurring wholly in other states. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996), the Court ruled that awarding punitive damages predicated on conduct occurring in another state where it is lawful violates the Due Process Clause. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003). It also suggested that the Commerce Clause would not permit an award of punitive damages on the basis of lawful out-of-state conduct. *Gore*, 517 U.S. at 573-74. But in doing so, the Court implied that business activity in one state that *causes injury* in another state may properly be subject to cross-border regulation. *See id.* at 572-73 (stating that Alabama could not "punish . . . conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*") (emphasis added). Here, Midwest Title's conduct, while lawful in Illinois, has a substantial negative impact on Indiana and its citizens.

Regardless, neither *Gore* nor *Campbell* purported to overrule *Hague* or even involved penalties for out-of-state business activities that actually caused harm in the state seeking to impose the penalties. If *Healy* is understood to mean that states may not regulate out-of-state business conduct even where the business solicits the state's citizens and then causes them injury, then *Healy* cannot be reconciled with *Hague*, which permits extraterritorial application of state law when

the regulating State has a sufficient interest in protecting its citizens from out-of-state business activities.

This Court should avoid setting up that conflict or even irritating the tensions that exist between *Hague* and *Healy*. It can do so by holding that the decision whether a State consumer protection law operates wholly extraterritorially turns not only on where the contract at issue was executed, but also on the regulating state's overall interest in the transaction, including whether the regulated business advertises in or solicits customers from the regulating state, whether the regulated transaction has an impact in the regulating State, and whether the regulation is of the type traditionally undertaken by states to protect their consumers from unfair business practices.

D. Midwest Title has substantial contacts with Indiana justifying application of Indiana's predatory lending law

Under a "minimum contacts" or "sufficient state interest" rule, applying the IUCCC to Midwest Title plainly does not regulate commercial activity occurring wholly in another state. When fully engaged in business with Indiana customers, 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. App. at 25-28.

It is also worth noting that the factors relied upon by the Supreme Court in *Watson* to uphold extraterritorial application of a consumer protection statute are implicated by Midwest Title's predatory lending practices: (1) people who will agree to the egregious terms of Midwest Title's loans may be nearly destitute; (2) if consumers are unable to make their loan payments and their cars are repossessed, it is likely that they may have to call upon friends, relatives, or the public for help; and (3) if an Indiana consumer has a cause of action against Midwest Title, they would likely file suit in Indiana and, as the district court noted, Midwest Title would unquestionably "be subject to the jurisdiction of Indiana courts should a suit against it be filed there." *Id.* at 16 n.9; *cf. Watson*, 348 U.S. at 72**.**

In sum, Midwest Title has many contacts with Indiana, such as advertising, soliciting repeat customers, collecting payments remitted from Indiana, and repossessing vehicles in Indiana. App. at 26-28, 30. A loan with a term of 24-months plainly contemplates significant ongoing commercial interactions including not only payments but also collection calls, possible re-negotiations, etc. These contacts, as well as the *Watson* factors, are surely significant enough to support a conclusion that the lending transactions do not take place wholly outside of Indiana and that, therefore, Indiana is permitted to regulate the loans between Midwest Title and its residents.

II. The Indiana Statute is Constitutional Under *Pike* Balancing

As noted, the most scrutiny that should apply here is the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See Nat'l Paint & Coatings Ass'n v.*

City of Chicago, 45 F.3d 1124, 1131 (7th Cir. 1995) (setting forth the various Commerce Clause standards of scrutiny). Under the *Pike* balancing test, a law's impact on interstate commerce is measured against the public benefit to the enacting State. *See Pike,* 397 U.S. at 142. And, when a party "challeng[es] a law that treats in-state and out-of-state entities identically, whoever wants to upset the law bears these burdens." *Baude v. Heath*, 538 F.3d 608, 613 (7th Cir. 2008). Furthermore, statutes "regularly pass" *Pike* balancing, "for the Justices are wary of reviewing the wisdom of legislation (after the fashion of Lochner) under the aegis of the commerce clause." *Id.* at 611 (internal citation omitted).

1. Indiana has an extremely strong interest in protecting its residents from unfair business practices such as predatory lending, and in particular from title loans. In recent years, an alternative financial system has emerged where lenders offer high risk, high interest products such as title loans, payday loans, and high cost mortgage products. This market "has boomed by opening outlets in areas not served by banks, promising loans regardless of credit history and providing quick cash, including Internet lending and disbursements via prepaid ATM cards for clients without bank accounts." *See* Sue Kirchhoff, *Some Consumers Run into Big Problems with Auto Title Lending*, USA. Today, Dec. 26, 2006, *available at* http://www.usatoday.com/money/perfi/general/2006-12-26-title-loans-usat_x.htm.

While such lenders provide access to capital, "[c]onsumer advocates worry that these lenders are stripping assets from lower-income Americans who can least afford it, helping exacerbate an already huge U.S. wealth gap." *Id.* Accordingly,

twenty-four states (including Indiana) and the District of Columbia ban title loans or limit interest rates to those allowed on consumer loans. *See* Jeff E. Schapiro, *Virginia Considering Regulating Car Title Loans*, Richmond Times-Dispatch, June 30, 2009, *available at* http://www.timesdispatch.com/rtd/news/state_regional/state_regional_govtpolitics/article/TITL30_20090629-222804/277121/. Seventeen more states regulate title loans in other ways. *Id.*

Predatory lending generally is such a problem that Congress recently imposed a limit of 36% APR on loans to military families. Erik Eckholm, *Seductively Easy, Payday Loans Often Snowball*, N.Y. Times, Dec. 23, 2006, *available at* http://www.nytimes.com/2006/12/23/us/23payday.html. And a recent report sponsored in part by the Consumer Federation of America found that "car title loans are marketed as small emergency loans, but in reality these loans trap borrowers in a cycle of debt. Car title loans put at high risk an asset that is essential to the well-being of working families—their vehicle." Amanda Quester & Jean Ann Fox, *Car Title Lending: Driving Borrowers to Financial Ruin* 2 (2005), *available at* http://www.responsiblelending.org/other-consumer-loans/car-title-loans/rr008-Car_Title_Lending-0405.pdf.

Indiana may regulate title lending to Indiana residents in order to protect the most vulnerable Hoosiers from this "abusive and unconscionable" practice. App. at 22. The Indiana General Assembly declined to remove usury limitations on long-term loans in Indiana in spite of aggressive lobbying during the 2006 legislative session from an affiliate of Midwest Title, Select Management Resources, LLC.

App. at 31. Of course, Midwest Title's owner, Rod Aycox, is entitled to lobby for laws that help his business, but when he loses, as he has so far in Indiana, he should not be able to creep in from a neighboring State with a more favorable regulatory climate and target Indiana residents.

Moreover, the terms of Midwest Title's loans are truly shocking. As an example, several Indiana residents received loans in excess of $5,000, some with interest rates of 372%. If structured as a 12-month loan, a $5,000 loan would require monthly payments of $1,617—totaling more than $19,400 for the year. Midwest Title typically lends 50% of the value of the vehicle. App. at 25. So, if the residents who received the $5,000 loans were unable to pay $19,400 back to Midwest Title in the allotted time, their cars would be repossessed and they would be stripped of the equity—approximately $10,000—that previously existed. This is a situation that cries out for consumer protection.

2. In contrast, the burden that the IUCCC imposes on interstate commerce—capping Midwest Title's APR or else deterring Midwest Title from advertising in Indiana so that it does not trigger the Territorial Application Provision—is very weak. It does not keep Midwest Title from lending to Indiana residents, and does not even cap Midwest Title's interest rates for Indiana residents if Midwest Title is willing to forgo advertising and soliciting in Indiana.

As this Court has observed, "[i]t is impossible to tell whether a burden on interstate commerce is 'clearly excessive in relation to the putative local benefits' without understanding the magnitude of both burdens and benefits." *Baude v.*

Heath, 538 F.3d 608, 612 (7th Cir. 2008). What is more, "it takes more than lawyers' talk to condemn a statute under *Pike*." *Id.* Midwest Title has offered no evidence demonstrating that the IUCCC's burden on interstate commerce is in any way disproportionate to the local benefits it provides. It has not even attempted to show how much business it loses by not advertising or soliciting in Indiana, much less has it attempted to demonstrate that the statute impacts any business other than itself, or has negative effects on interstate commerce generally. The record here does not justify invalidating the IUCCC under *Pike* balancing, a test that has only rarely been used to invalidate state legislation in any event. *See S. Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002).

CONCLUSION

The judgment of the district court should be REVERSED and the permanent injunction should be VACATED.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana

By: ________________________________

THOMAS M. FISHER
Solicitor General

ASHLEY E. TATMAN
Deputy Attorney General

CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding tables and certificates, contains 8,738 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: ______________________________
Thomas M. Fisher
Solicitor General

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

By: ______________________________
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I certify that two copies of the Brief and Short Appendix of Appellant, along with a computer diskette containing the same, have been served this 10th day of July, 2009, by United States First Class Mail, postage prepaid, upon the following counsel of record:

Stanley C. Fickle
John R. Maley
Paul L. Jefferson
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204

Alan S. Kaplinsky
Jeremy T. Rosenblum
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103-7599

Thomas M. Fisher
Solicitor General

Office of Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov

APPENDIX

APPENDIX

Pursuant to Circuit Rule 30, Defendant/Appellant submits the following as her Required Short Appendix. Appellant's Appendix contains all of the materials required under Circuit Rule 30(a) and (b).

GREGORY F. ZOELLER
Attorney General of Indiana

By: ____________________________________

THOMAS M. FISHER
Solicitor General

APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

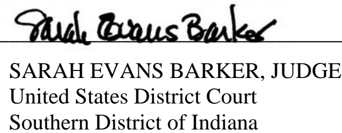
MIDWEST TITLE LOANS, INC.,	)	
	)	
Plaintiff,	)	
	)	1:07-cv-1479-SEB-DML
vs.	)	
	)	
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	)	
	)	
Defendant.	)	

JUDGMENT

The Court, having contemporaneously granted Plaintiff's Motion for Summary Judgment and Permanent Injunction and denied Defendant's Motion for Summary Judgment, now, pursuant to Rule 58(a), enters judgment in favor of Plaintiff and against Defendant.

IT IS SO ORDERED.

Date: 03/24/2009



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Gary W. Bippus
INDIANA OFFICE OF THE ATTORNEY GENERAL
gary.bippus@atg.in.gov

Chadwick C. Duran
INDIANA OFFICE OF THE ATTORNEY GENERAL
cduran@atg.state.in.us

Stanley C. Fickle
BARNES & THORNBURG LLP
sfickle@btlaw.com

Paul L. Jefferson
BARNES & THORNBURG LLP
pjefferson@btlaw.com

Alan S. Kaplinsky
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
kaplinsky@ballardspahr.com

John R. Maley
BARNES & THORNBURG
jmaley@btlaw.com

Jeremy T. Rosenblum
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST TITLE LOANS, INC.,	)	
	)	
Plaintiff,	)	
	)	1:07-cv-1479-SEB-DML
vs.	)	
	)	
JUDITH J. RIPLEY, In Her Official Capacity as Director of the Indiana Department of Financial Institutions,	)	
	)	
Defendant.	)	

CORRECTED ENTRY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION[1]

This cause is before the Court on Plaintiff Midwest Title Loans, Inc.'s ("Midwest Title") Motion for Summary Judgment and Permanent Injunction [Docket No. 38], filed on March 24, 2008; and Defendant Judith J. Ripley's cross motion for Summary Judgment [Docket No. 42], filed on March 24, 2008. Midwest Title brought its complaint, pursuant to 42 U.S.C. § 1983, against Defendant, Judith J. Ripley, in her official capacity as Director of the Indiana Department of Financial Institutions ("IDFI"), seeking to enjoin Ms. Ripley from enforcing the Indiana Uniform Consumer Credit Code, Ind. Code § 24-4.5-1-101 to 24-4.5-7-212 (the "IUCCC"), against Midwest Title. Plaintiff filed its action following receipt of a cease-and-desist letter issued by the

[1]This entry is being reissued because the pages in the previous version of the entry were out of order. This corrected entry makes no substantive changes and is identical to the entry issued on March 24, 2009. All dates related to appeals and other procedures remain unchanged.

Supervisor of the IDFT Consumer Credit Division charging Midwest Title with being in violation of the IUCCC. Plaintiff asserts that, under Seventh Circuit and Supreme Court precedent, Defendant is forbidden by the Commerce Clause of the United States Constitution (Art. I, § 8) from applying the IUCCC extraterritorially to an Illinois business.[2]

For the reasons detailed below, Plaintiff's Motion for Summary Judgment and Permanent Injunction is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

Factual Background

Plaintiff Midwest Title is an Illinois business corporation licensed by the Illinois Department of Financial Institutions as a consumer installment loan company. Stip. at ¶ 1. Defendant Judith Ripley is chief executive and administrative officer of the Indiana Department of Financial Institutions ("IDFI"). Id. at ¶ 3.

Plaintiff issues consumer loans, which are secured by the borrower's motor vehicle, and operates exclusively from 23 separate locations throughout the state of Illinois. Plaintiff has no business locations within Indiana. Id. at ¶¶ 1-2; 4. Plaintiff does not own or lease property in Indiana and does not hold a certificate of authority or license

[2] On March 24, 2008, the parties stipulated to the dismissal, with prejudice, of Count II of Plaintiff's Complaint [Docket No. 37]. That portion of the Complaint requested declaratory and injunctive relief and alleged that the IUCCC discriminated against "companies such as Plaintiff that are not affiliated with Indiana industrial loan and investment companies." Compl. at ¶ 31. We accepted that stipulation in a signed Order entered on March 25, 2008 [Docket No. 44].

to do business in Indiana. Id. at ¶ 9. The parties agree that no Midwest Title agent or employee solicits business *in person* in Indiana, and all reminder and collection calls to Indiana borrowers are made from Plaintiff's Illinois-based offices. Id. at ¶ 8. However, Plaintiff does solicit business from Indiana consumers via other means. See id. at ¶ 8.

The parties have stipulated to certain uncontested facts [see Docket No. 39 (Designation of Evidence in Support of Plaintiff's Motion for Summary Judgment, Pl.'s Exh. 1); Docket No. 43 (Designation of Evidence in Support of Defendant's Motion for Summary Judgment, Def.'s Exh. A)]. The following material facts are lifted from those stipulations or are otherwise undisputed:

Prior to August 2007, Midwest Title accepted in-person applications for loans from Indiana residents. To apply, an applicant drove his motor vehicle and certificate of title to one of Midwest Title's Illinois locations. If approved, the applicant executed the necessary loan documents at the Illinois location and provided Midwest Title with a set of keys to the vehicle to secure the loan.[3] Stip. at ¶ 8(a). Midwest Title would then submit the necessary documentation to the Indiana Bureau of Motor Vehicles to have its lien noted on the borrower's certificate of title. Id. at ¶ 8(f). Loan funds were disbursed in person to the borrower at the Illinois business location. Borrowers could make principal and interest payments at any Midwest Title location in Illinois. Payments were also

[3]This enabled Midwest Title to engage in self-help repossession in the event of an uncured default by the borrower. Stip. at ¶ 8(a). On occasion, Plaintiff contracted with an unaffiliated third-party repossession company to repossess vehicles licensed in the state of Indiana. Prior to judicial sale, such vehicles were stored in Indiana and sold through an unaffiliated Indiana auction house. Id. at ¶ 8(h).

accepted via money order or certified check transmitted through U.S. mail, by credit card, or through Western Union. Id. at ¶ 8(a), (g).

Plaintiff admits that it engaged in advertising and solicitation activities targeting Indiana customers. Plaintiff made annual mailings to Indiana residents who had previously used its services, with the effect of soliciting repeat business from those customers. Id. at ¶ 8(b). Plaintiff further admits to advertising on television stations in Indianapolis and Terre Haute, Indiana, and on Chicago-based television and radio stations that reached Indiana residents. Id. at ¶ 8(c). In addition, Plaintiff was listed in the Yellow Pages telephone directory in some Indiana communities. Id. at ¶ 8(d).

In August 2007, Plaintiff received a letter from the IDFI informing the company of a recent amendment, the "Territorial Application Provision," to the IUCCC. Stip. at ¶ 5, 10. As amended, the IUCCC imposes Indiana licensing and regulatory requirements on lenders "who are soliciting by any means and then making consumer loans to Indiana residents . . . " IND. CODE § 24-4.5-1-201. For purposes of the Territorial Application Provision, a sale, lease, or loan transaction occurs in Indiana "if a consumer who is a resident of Indiana enters into a 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(d) (emphasis added). The letter noted that if a creditor violates this provision, "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."[4] IND. CODE § 24-4.5-1-201(8). Finally, IDFI warned Plaintiff that "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." Stip. at ¶ 10. The parties agree that while the letter does not explicitly say so, "it is the position of the Director that the IUCCC does not apply to a loan consummated in a face-to-face meeting outside Indiana unless the loan resulted from either a solicitation received by the borrower in Indiana or media advertising originating in Indiana." Id. at ¶ 11.

Upon receipt of the warning letter, Plaintiff immediately suspended offering loans to Indiana residents. Id. at ¶ 12. Plaintiff also stopped charging and collecting interest on loans made to Indiana borrowers between July 1, 2007, and Plaintiff's receipt of the letter, and refunded all previously made payments of interest on the covered loans. Id. at ¶ 13.

Plaintiff extended a total of 2,054 loans to Indiana borrowers in 2006, which represented approximately 9 percent of Plaintiff's business. Id. at ¶ 6, Pl.'s Br. in Supp. at 2. The interest rate charged by Plaintiff exceeds the 36 percent per annum limit allowed by the IUCCC, Stip. at ¶ 4; therefore, the loans do not comply with Indiana law.

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[4] These provisions became effective on July 1, 2007. Stip. at ¶ 10.

Legal Analysis

I. Standard of Review

Summary judgment is appropriate when the record establishes that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. See id. at 255. However, neither the "mere existence of some alleged factual dispute between the parties," id. at 247, nor the existence of "some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), will defeat a motion for summary judgment. Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687, 692 (7th Cir. 2000).

The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. The party seeking summary judgment on a claim on which the non-moving party bears the burden of proof may discharge its burden by showing an absence of evidence to support the non-moving party's case. Id. at 325.

When the issues presented are purely questions of law, as the case at bar, summary judgment standards nonetheless apply. See Oneida Tribe of Indians of Wisconsin v. State of Wisconsin, 951 F.2d 757, 760 (7th Cir. 1991). Courts are often confronted with cross-motions for summary judgment because Rules 56(a) and (b) of the Federal Rules of Civil Procedure allow both plaintiffs and defendants to move for such relief. "In such situations, courts must consider each party's motion individually to determine if that party has satisfied the summary judgment standard." Kohl v. Ass'n. of Trial Lawyers of Am., 183 F.R.D. 475 (D.Md.1998). While cross motions for summary judgment may lead to a judgment without trial, the standard for determining whether summary judgment should issue is unchanged from that which applies when only a single party has moved for the relief.

II. Dormant Commerce Clause:

The Territorial Application Provision of the IUCCC provides that Indiana law applies to any transaction in which "a consumer who is a resident of Indiana enters into a 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(d) (emphasis added). Plaintiff contends that this amendment violates the Commerce Clause of the United States Constitution by attempting to impose an extraterritorial regulation on commerce conducted lawfully in Illinois. Compl. at 8-9.

Plaintiff claims that, because Indiana is attempting to apply the IUCCC to contracts made wholly outside the state, the Territorial Application Provision is *per se* invalid. Pl.'s Br. in Supp. at 8-15. Plaintiff seeks both declaratory and injunctive relief.

Defendant rejoins that the Indiana statutory scheme is not triggered unless a lender affirmatively targets Indiana consumers by advertising or soliciting in Indiana, and that, because Plaintiff solicits business across state lines, the loans in question are not transacted "wholly" within Illinois. Def.'s Br. in Supp. at 16. Defendant argues that the purpose of the Territorial Application Provision is to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit," and that a socially protective legislative purpose, as opposed to economic protectionism, is permissible, even if it imposes an incidental burden on interstate commerce. Id. at 18. Defendant further maintains that the facts stipulated by the parties "readily acknowledge a number of [Midwest Title's] activities which have a nexus with Indiana." Id. at 8. Specifically, Defendant asserts that by directing mailings to Indiana consumers, advertising on radio and television stations located in Indianapolis and Terre Haute, and paying to have its name listed in the Yellow Pages in Indiana, "Midwest Title has invoked Indiana's consumer protection laws." Id. at 9. Defendant thus urges us to apply the balancing test of Pike v. Brue Church, 397 U.S. 137 (1970), to Plaintiff's Dormant Commerce Clause challenge and uphold the Territorial Application Provision of the IUCCC.

The United States Constitution allocates to Congress the power to "regulate Commerce . . . among the several States." U.S. Const. Art I, § 8. Implicit in Congress's exclusive authority over interstate commerce is a restriction on states from doing the same. See New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988). This prohibition is commonly referred to as the Dormant Commerce Clause. Intended to prevent economic protectionism, the Dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism . . . . " Id. at 273-74.

Laws motivated by simple economic protectionism are *per se* invalid. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Under certain circumstances, however, a statute which merely burdens interstate commerce in the course of advancing a legitimate state interest may be upheld if the state interest outweighs the burden on interstate commerce. Pike, 397 U.S. 137.

A. The Extraterritoriality Principle:

States may also run afoul the Commerce Clause by seeking to regulate commerce which takes place "wholly" outside their own state. Healy v. Beer Inst., 491 U.S. 324, 332 (1989) ("[A] state law that has the 'practical effect' of regulating commerce occurring wholly outside the state's borders is invalid under the Commerce Clause.");

Dean Foods Co. v. Brancel, 187 F.3d 609, 614 (7th Cir. 1999) (stating that it is "a fact well known" that extraterritorial legislation is barred by the federal constitution); Nat'l Solid Waste Mgmt. Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995) ("[T]he Commerce Clause constrains a state from projecting its economic legislation onto commerce wholly occurring in its sister states."). The parties' dispute, appropriately framed, is whether the loans offered by Midwest Title constitute commerce "wholly outside" the state of Indiana, thus implicating the Dormant Commerce Clause.[5]

In support of its argument, Plaintiff cites Dean Foods, stating that "Indiana's aggressive effort to assert the IUCCC extraterritorially to govern Midwest Title's business activities in Illinois cannot be harmonized" with that decision. Pl.'s Br. in Supp. at 9.

Dean Foods involved a Wisconsin law that attempted to prohibit an Illinois milk processor from paying price premiums to high-volume Wisconsin milk producers. Prior to the enactment of the Wisconsin law, the Illinois processor hired haulers to go to Wisconsin, purchase Wisconsin milk, and transport the milk to Illinois for processing. Dean Foods, 187 F.3d at 611-12. When the law passed, the Illinois processor altered its operations in an effort to avoid the law by requiring Wisconsin milk producers to

[5]Notably, a few commentators have questioned whether the Extraterritoriality Principle is appropriately considered an outgrowth of the Commerce Clause. See Peter C. Felmly, Comment, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial Legislation, and the Concerns of Federalism*, 55 ME. L. REV. 467 (2003); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987).

transport their own milk to Illinois, where the Illinois processor would agree to purchase it and accept delivery. Id. Wisconsin attempted to enforce its new pricing regulations on the transactions despite the Illinois' processors' attempts around it. Dean Foods filed an action in federal court, arguing that Wisconsin's actions amounted to unconstitutional extraterritorial interference.

Even though Dean Foods maintained a sales office in Wisconsin, mailed business solicitations to Wisconsin customers, and had its representatives "enroll" Wisconsin producers in the new milk purchase program in Wisconsin, id. at 618-19, the Seventh Circuit nonetheless held that the actual milk sales took place wholly outside Wisconsin, no contracts were formed in Wisconsin, and no commitment bound the Illinois processor and Wisconsin producers before the milk was accepted in Illinois. Id. at 619. The Seventh Circuit concluded that mere contacts with another state are not enough to overcome the ban on extraterritorial legislation. Id. at 618-19. Rather, an element of the actual contract formation must occur within a state for that contract to come within the purview of the state's laws. Id. at 620.

The Dean Foods analysis focused particularly on the elements of contract formation in determining whether transactions occurred wholly within the state of Illinois. The court indicated that the crucial contacts are those which form a binding agreement: offer and acceptance of specific terms. Id. at 617, 619-20. If an offer occurs in one state and an acceptance in another, both states' laws may apply. Id. at 620. However, where the entire transaction occurs wholly within one state, only that state's laws may apply. Id.

Advertising, and even preliminary negotiations in another state, are not enough to invoke that state's laws. Id. at 619.

Other courts have applied a similar analysis. The Fourth Circuit recently considered a case, Carolina Trucks & Equip. Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484 (4th Cir. 2007), where South Carolina sought to regulate transactions in which residents of South Carolina traveled to a Georgia dealership to purchase trucks. The offending Georgia dealership was listed in the Yellow Pages in South Carolina, advertised in regional trade publications, and mailed brochures to individuals in South Carolina. Id. at 487. All actual sales transactions, however, occurred on the dealership lot in Georgia. Id. The court held that advertising in South Carolina was insufficient to subject the challenged transactions to South Carolina law, stating that "[o]ne state may not 'project its legislation' into another." Id. at 489 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935)). The court explicitly rejected the argument that the transactions took place partially in South Carolina by virtue of the advertising solicitations sent there. Id. 490-91.[6]

Most recently, in Quick Payday Inc. v. Stork, 549 F.3d 1032 (10th Cir. 2008), the Tenth Circuit considered the application of a Kansas regulation on an out-of-state payday

[6]In the present case, Defendant alternatively argues that elements of the loan agreement are performed in Indiana because Indiana consumers may mail their payments from Indiana and have an ongoing relationship with Midwest Title. Def.'s Reply to Subm. at 5, 10-11 [Docket No. 55]. We find this argument unavailing. We doubt, for instance, the Fourth Circuit's analysis in Carolina Trucks would have substantially changed if South Carolina customers financed their truck purchases and mailed payments from their home state.

loan company who solicited business in Kansas via the internet. Quick Payday is of particular relevance to our case, because the Kansas Office of the State Bank Commission sought to apply the KUCCC based on a territorial application provision, KAN. STAT. ANN. § 16a-1-201(1)(b), which is remarkably similar to the Indiana provision at issue in our case.[7] The solicitation in question involved the lender web site, which could be accessed by Kansas residents in Kansas, as well as emails sent directly to prospective borrowers in Kansas.

In Quick Payday, Tenth Circuit adopted the view that "the borrower's physical location at the time of the solicitation is controlling." 549 F.3d at 1308. The Defendant in our case vigorously maintains that this language indicates that the solicitation is part of a loan transaction, and that if a consumer is within Indiana when a solicitation resulting in a loan is received, the IUCCC applies. Def.'s Reply to Subm. at 2.

In taking that position, Defendant misconstrues the Tenth Circuit's holding as it applies to the case at bar. In Quick Payday, a prospective borrower could view the soliciting web page or email, and within a few electronic clicks enter into a loan agreement with the out-of-state lender, all while remaining at a computer terminal in Kansas. 549 F.3d at 1304. Prospective borrowers *did not* need to travel to another state to get an offending loan; this is a distinguishing fact from the present case. A close

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[7] KAN. STAT. ANN. § 16a-1-201(1)(b) states that the KUCCC applies if "the creditor induces the consumer who is a resident of this state to enter into the transaction by solicitation in this state by any means, including but not limited to: Mail, telephone, radio, television or any other electronic means."

reading of Quick Payday reveals that both the Tenth Circuit and State of Kansas reflected this distinction, conceding that the advertisement alone did not trigger application of the Kansas statute. Rather, the controlling factor was the location of the borrower when the loan was actually contracted for. Id. at 1308. The Kansas Office of the State Bank Commission specifically conceded that it would not attempt to apply the Kansas statute to situations where a Kansas consumer left Kansas to acquire a loan. Id.[8]

In the present case, there is no doubt that Midwest Title solicited business in Indiana. However, it is equally clear that no credit agreements were finalized within Indiana.[9] All customers had to physically present themselves at a Midwest Title location

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[8]"[The Kansas Office of the State Bank Commission's] brief in this court further clarified . . . that '[t]he [KUCCC] regulates the conduct of Internet payday lenders who choose to make payday loans with Kansas consumers *while they are in Kansas*.' And referring to Quick Payday's hypothetical 'about a Kansas consumer leaving Kansas to acquire a payday loan' it declared that 'the OSBC would not try to apply the [KUCCC] to loans that occur under th[ose] circumstances.' We adopt this reasonable interpretation of the statute by those charged with its enforcement." Quick Payday, 549 F.3d at 1308 (emphasis in original) (internal citations omitted).

[9]Defendant at times seems to confuse a state's legislative reach with a state's judicial jurisdiction. "Contacts" analysis certainly applies when considering the jurisdiction of a state's courts over a party or matter. See International Shoe Co. v. Washington, 326 U.S. 310 (1945). There is no question that Midwest Title, by virtue of its contacts with the forum and activity injected into Indiana, would be subject to the jurisdiction of Indiana courts should a suit against it be filed there. However, the reach of a court's jurisdiction does not determine the territorial bounds of a state legislature's laws (nor does it necessarily even determine the state law to be applied by the court). A state is generally prohibited from asserting legislative power over parties and activities wholly beyond it's borders. See Gerling Global Reinsurance Corp. of Am. v. Gallagher, 267 F.3d 1228, 126-37 (11th Cir. 2001) (explaining the similarities and distinctions between judicial and legislative jurisdiction, and holding that life insurance policies issued outside the state by out-of-state entities were not subject to Florida legislative regulation). Applying the Seventh Circuit's analysis in Dean Foods, the contacts in this case are insufficient to give Indiana legislative jurisdiction over the loan contracts in question.

in Illinois in order to enter into a binding loan agreement. Just as a Yellow Pages advertisement would not create a loan agreement, it is spurious to argue that a loan has not been transacted until a consumer mails in his payments from his home state. In the present case, no loan agreement came into existence until an Indiana customer traveled to Illinois and obtained a loan at a Midwest Title store. That transaction at that point was completed and it clearly occurred within Illinois where loan documents were signed and Midwest Title had tendered a loan payment in exchange for a promise to repay.[10]

Pursuant to established Seventh Circuit precedent, and consistent with conclusions reached by other circuits, we hold that the loan transactions at issue in this case occurred wholly within the state of Illinois.

B. Invalidity of Extraterritorial Statutes:

The IDFT correctly argues that, even where a law is held to burden interstate commerce, the Seventh Circuit applies the two-tiered analysis of Pike. See Pike, 397 U.S. at 142; Def.'s Br. in Supp. at 15 (citing Alliant Energy Corp v. Bie, 336 F.3d 545, 546 (7th Cir. 2003)). Pursuant to that test, a statute which facially or directly

[10]Other cases Defendant cites are similarly distinguishable. In each of the Aldens cases, an Illinois mail-order company was required to comply with the consumer credit laws of other states when its customers ordered merchandise on credit through the Aldens catalog. See Aldens, Inc. v. Ryan, 571 F.2d 1159 (10th Cir. 1978); Aldens, Inc. v. LaFollette, 552 F.2d 745 (7th Cir. 1977); Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975). However, in each of these cases, the customer was located in his or her home state when he or she ordered merchandise and entered into the purchase contract. Under the Dean Foods analysis, such transactions could not be held to have occurred wholly outside the customer's state.

discriminates against or regulates interstate commerce is subject to strict scrutiny. Alliant Energy, 336 F.3d at 546. If a statute's effects on interstate commerce are only incidental, or are direct but applied evenhandedly, the Pike balancing test balances the burden on interstate commerce against the state's legitimate policy concerns. Id. Alliant Energy rejected the premise that "precedent mandates the *per se* invalidation of *every* state regulation that has any extraterritorial effect whatsoever." Id. at 546.[11] In fact, several cases have specifically noted that, while economic protectionism is *per se* invalid, other motivations may trigger a balancing of interests. See CTS Corp., 481 U.S. at 93 (rejecting the contention that Indiana has no interest in protecting its citizens from unfair business dealings); Alliant Energy, 336 F.3d at 549 (acknowledging that a state has an interest in protecting the welfare of its citizens); Morley-Murphy v. Zenith, 142 F.3d 373, 379 (7th Cir. 1998) ("[State courts] are well aware that the Supreme Court has held that *certain assertions* of extraterritorial jurisdiction violated the dormant Commerce Clause.") (emphasis added). However, although the Supreme Court has held that certain extraterritorial *effects* of statutes are permissible, e.g., CTS, 481 U.S. at 93 (holding that a statute that regulated internal matters but had external effects was constitutionally valid),

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[11]Initially, this statement appears to be in conflict with Supreme Court precedent. In Edgar v. MITE, 457 U.S. 624 (1982), Justice White, writing for the Court, suggested that *all* extraterritorial regulation should be *per se* invalid. The Seventh Circuit noted that "a majority of justices agreed that the two-tiered [Pike] test was the appropriate approach; however, they didn't agree on how the case before them fit that test. Read in this light, the opinion suggests that extraterritorial regulations are subject to the traditional interstate commerce analysis." Alliant Energy, 336 F.3d at 548; see also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) (noting that "as the plurality in MITE did not represent the views of a majority of the Court, we are not bound by its reasoning").

statutory provisions that specifically seek to regulate extraterritorial conduct are a different matter. See Alliant Energy, 336 F.3d at 548-49 (indicating that a statute directly regulating extraterritorial activity is unquestionably invalid, but applying Pike balancing to statutes with indirect effects on extraterritorial commerce).

The present case does not involve a statute which merely burdens interstate commerce or has extraterritorial *effects*. It concerns a statutory provision which, by design, directly regulates extraterritorial activity. Even according to Defendant's primary authority, Alliant Energy, such a statute is *per se* invalid. 336 F.3d at 548-49 (holding that "direct extraterritorial interference" or regulation is "unquestionably *per se* invalid," but reserving that a statute may be balanced against state interests where the statute "regulates internal matters and the regulations have external effects" or where the statute has "indirect effects on extraterritorial commerce"); see also Healy, 491 U.S. at 336 ("[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 . . . ."); Nat'l Solid Waste Mgmt. Ass'n, 63 F.3d at 658-60 (indicating that a statute is invalid where it has the "practical effect" of controlling commerce wholly outside the state). Cf. Ill. Rest Ass'n v. City of Chicago, 492 F. Supp. 2d 981 (holding that despite a city ordinance's extraterritorial effects, it was valid because it was aimed at a sufficiently local problem).

A state may not directly regulate conduct or events beyond its own borders, no matter its motivation for doing so. See Bigelow v. Virginia, 421 U.S. 809, 824-25 (1975) ("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.") Here, the territorial application provision, as interpreted by the Defendant, purports to apply the IUCCC to consumer loan transaction occurring wholly within the state of Illinois. Despite Defendant's attempt to paint the loan transactions as occurring partially in Indiana based on the reach of the solicitations issued to potential customers in this state, it is clear that the statute does not regulate the conduct of Midwest Title within the state of Indiana; it seeks to regulate Midwest Title's lending activities in Illinois.[12]

Were we to adopt the Defendant's view we would be giving the proverbial *carte blanche* to states to impose their diverse regulatory schemes on any commercial activity which affects any other state's interests and satisfies a rudimentary minimum contacts test. Just as "citizens do not carry their home state's laws with them wherever they go," Warriner v. Stanton, 475 F.3d 497, 504 (3d Cir. 2007), state laws surely should not be permitted to travel wherever someone would have them go.

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[12]The Supreme Court also noted in CTS Corp. that statutes are routinely held invalid if they "adversely affect interstate commerce by subjecting activities to inconsistent regulations." 481 U.S. at 88; see also Healy, 491 U.S. at 336-37 (indicating that the Commerce Clause is designed to protect against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state"). This problem is readily apparent in the present action. Do the Plaintiff's title loans need to adhere to Indiana law, or Illinois law? The Defendant argues that a loan made to an Indiana consumer must follow Indiana law, even if the loan is transacted in Illinois. However, Illinois law indicates that a title lender in Illinois need only comply with the Illinois Consumer Installment Loan Act. 205 ILL. COMP. STAT. 670/9; ILL. ADMIN. CODE. tit. 38 §§ 110.320 to .430.

III. Permanent Injunction

When a permanent injunction is requested at summary judgment, a court must consider whether (1) the plaintiff has succeeded on the merits; (2) remedies at law, such as monetary damages, are inadequate to compensate for that harm; (3) an injunction is warranted after balancing the hardship to plaintiff against potential hardship to the defendant in granting the injunction; and (4) the public interest does not argue against granting the injunction. Collins v. Hamilton, 349 F.3d 371 (7th Cir. 2003). A violation of constitutional rights under the Commerce Clause constitutes an irreparable injury for the purposes of considering an injunction. Kendall-Jackson Winery v. Branson, 82 F. Supp. 2d 844, 878 (N.D. Ill. 2000); Gov't Suppliers Consolidating Serv., Inc. v. Bayh, 734 F. Supp. 853, 864 (S.D. Ind. 1990). In addition, Midwest Title's losses are not recoverable against the State because the 11th Amendment's doctrine of sovereign immunity bars suits for money damages against a state in federal court. Wynn v. Southward, 251 F.3d 588, 592 (7th Cir. 2001).

Balancing harm to the parties and considering the public interest "largely overlap" when a Plaintiff sues a government entity to enjoin enforcement of a statute. Prof'l Towing & Recovery Operators fo Ill. v. Box, 2008 U.S. Dist. LEXIS 100002, 45 (N.D. Ill. 2008). While the public has an interest in enforcing laws that promote safety or welfare, the public has no cognizable interest in enforcing laws that are unconstitutional. See id. at 45-46. Indeed, the public interest is best served by preventing unconstitutional enforcement. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003)

("Surely, upholding constitutional rights serves the public interest."); Preston v. Thompson, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.").

This court is not unsympathetic to Indiana's policy interests against the predatory lending practices seemingly prevalent in the consumer loan industry. The loan terms offered by Midwest Title appear to us to at least approach being abusive and unconscionable. However, it is the domain of Illinois to regulate its own consumer lending industry, as Indiana has the power and responsibility to regulate its own consumer lending industry. As far back as 1935, in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), 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.

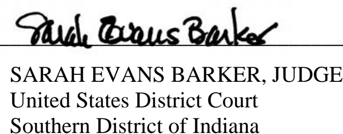
IV. Conclusion:

For the foregoing reasons, IND. CODE § 24-4.5-1-201(d) is hereby ruled

unconstitutional as applied to Midwest Title to regulate title loans made wholly in the state of Illinois; and Midwest Title is entitled to a permanent injunction against IDFT's application of the IUCCC to loans made wholly in the state of Illinois to Indiana residents. Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED. Final judgment shall be entered accordingly.

IT IS SO ORDERED.

Date: 04/03/2009



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Gary W. Bippus
INDIANA STATE ATTORNEY GENERAL
gary.bippus@atg.in.gov

Stanley C. Fickle
BARNES & THORNBURG LLP
sfickle@btlaw.com

Paul L. Jefferson
BARNES & THORNBURG LLP
pjefferson@btlaw.com

John R. Maley
BARNES & THORNBURG
jmaley@btlaw.com

Alan S. Kaplinsky and Jeremy T. Rosenblum
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor, Philadelphia, PA 19103-7599

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

AFFIDAVIT OF MARK B. TARPEY

Mark B. Tarpey, (the "Affiant"), being first duly sworn upon his oath, deposes and says as of this 18th day of January, 2008:

1. Affiant is the Division Supervisor of the Consumer Credit Division of the Indiana Department of Financial Institutions (the "Department") and competent to testify to, and has personal knowledge of, the matters contained herein.

2. In his job as Supervisor of the Consumer Credit Division, Affiant is responsible to investigate complaints, meet with potential consumer credit licensees and registrants and assist the Department in legislative matters relating to the Indiana Consumer Credit Code, Ind. Code § 24-4.5 ("UCCC").

3. Based upon Affiant's information and belief, Affiant investigated inquiries and complaints about Midwest Title Loans, Inc. ("Midwest Title") beginning in approximately May, 2006.

4. During the 2006 legislative session, Affiant had met with representatives of a company named, Select Management Resources, LLC ("Select Management"), who were lobbying the General Assembly in support of SB 383 and trying to garner the support of the Department.

5. Shortly after the General Assembly had defeated SB 383, Affiant received information from the Illinois Department of Financial and Professional Regulation which, along with the information Affiant had received from Select Management, led Affiant to reasonably believe that Midwest Title and Select Management were affiliated and under the common control of Roderick A. Aycox.

6. On or about May 18, 2006, Affiant sent a letter to Rod Aycox, President of Midwest Title, (a copy of which is attached at Exhibit "A"), advising him that Midwest Title was violating Indiana law with advertisements on various Indiana television stations offering Indiana residents auto title loans.

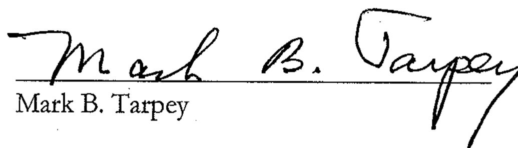
7. The Department determined not to take any action on the Midwest Title matter in 2006 since the territorial application statute (which in its amended form is the law being challenged in the instant lawsuit) in effect in 2006 did not contain the language specifically requiring compliance with Indiana law by creditors who "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.

9. Following the amendment of Ind. Code § 24-4.5-1-201, the Department advised Midwest Title by the letter dated August 6, 2007 of the change in the law and their potential violations (See Exhibit A of the Complaint.)

10. Midwest Title advised Affiant by letter dated September 5, 2007 that it had discontinued soliciting loans from Indiana residents which Affiant reasonably believed ended any outstanding matters with Midwest Title until the instant suit was filed. (See Exhibit B of the Complaint).

I affirm, under the penalties for perjury, that the foregoing representations are true.

"AFFIANT"



Mark B. Tarpey

STATE OF INDIANA

DEPARTMENT OF FINANCIAL INSTITUTIONS

30 South Meridian Street, Suite 300
Indianapolis, IN 46204
Telephone: (317) 232-3955
FAX: (317) 232-7655
WEB SITE: http://www.dfi.state.in.us

May 18, 2006

Mr. Rod Aycox, President
Midwest Title Loans, Inc.
330 N. Gilbert Street
Danville, IL 61832

Dear Mr. Aycox:

This office has been notified that Midwest Title Loans, Inc is advertising on various Indiana television stations in regards to title loans. The advertisement refers customers to an "877-511-Cash" phone number for the nearest location.

As you are aware, single-pay, short-term, loans secured by the customer's lien-free auto title are not authorized in Indiana except by licensed pawnbrokers who are also securing the customer's auto in pawn.

Indiana statutes (IC 24-4.5, et. seq) prohibit the soliciting of consumer loans in Indiana unless the company and the loan terms offered comply with Indiana law.

Failure to comply with Indiana law could subject your company to regulatory enforcement by the office of the Indiana Attorney General and raise possible civil claims by customers.

We understand that your company is currently licensed at 21 locations in Illinois. We are forwarding a copy of this letter to the Illinois regulator so that their office will be aware of our concerns.

We ask that you review the above information and respond in writing to this office no later than 10 business days after receipt of this UPS sent letter as to steps your company will be taking to eliminate the illegal advertisements in all types of media or mailings, and to fully comply with Indiana law.

Sincerely,

Mark B. Tarpey

Mark B. Tarpey
Division Supervisor
Consumer Credit Division

c.c. Mr. Jordan Matyes, Illinois Department of Financial Institutions- Supervisor, Consumer Credit Division

EQUAL OPPORTUNITY EMPLOYER