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CERTIFIED FOR PUBLICATION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

WFS FINANCIAL, INC., Petitioner, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; JOSE F. DE LA CRUZ, Real Party in Interest.	C051414 (Super. Ct. No. CV024031)

ORIGINAL PROCEEDINGS in mandate. Carter P. Holly, Judge. Petition granted.

Morrison & Foerster, Michael J. Agoglia, Jay Thomson for Petitioner.

No appearance for respondent.

Kemnitzer, Anderson, Barron & Ogilvie, Carol McLean Brewer, Andrew J. Ogilvie; Herum Crabtree Brown, James Belford Brown for real party in interest.

Petitioner, WFS Financial, Inc., a California corporation, (WFS) is an operating subsidiary of Western Financial Bank, a federal savings association, both of which operate under the Home Owners' Loan Act (HOLA).[1] (12 U.S.C. § 1461 et seq.) Real party in interest Jose De La Cruz (De La Cruz) is a purchaser of a motor vehicle, whose automobile loan was assigned to WFS by the automobile dealer. When De La Cruz defaulted on his loan, WFS repossessed the vehicle, gave notice of its intent to dispose of the vehicle by private sale, sold the vehicle, and filed suit against De La Cruz for the deficiency between the sale price and remaining balance due, including various costs and fees. De La Cruz answered the complaint alleging he was not liable for any deficiency as the notice of intent to dispose of the motor vehicle sent by WFS did not contain all the disclosures required by the Rees-Levering Automobile Sales Finance Act (Rees-Levering). (Civ. Code, § 2981 et seq.) De La Cruz also filed a class action cross-complaint against WFS alleging WFS's practice of collecting deficiency claims and judgments obtained as the result of giving defective notices was an unfair business practice within the meaning of California's

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[1] Federal savings associations may establish and acquire operating subsidiaries. (See 57 Fed.Reg. 12228 (Apr. 9, 1992); 57 Fed.Reg. 48942 (Oct. 29, 1992) and 61 Fed.Reg. 66561 (Dec. 18, 1996); see also 12 C.F.R. § 559.1 et seq.) "The operating subsidiary is subject to the same federal regulations as its parent and is treated as a department or division of its parent for regulatory purposes." (*WFS Financial, Inc. v. Dean* (W.D.Wis. 1999) 79 F.Supp.2d 1024, 1026; see 2003 OTS LEXIS 7, fn. 4.)

Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17200 et seq; Code Civ. Proc, § 382.) WFS demurred to the cross-complaint, asserting the particular notice requirements imposed by Rees-Levering (Civ. Code, § 2983.2) do not apply to WFS because it operates exclusively under federal regulations, which preempt Civil Code section 2983.2. The trial court overruled the demurrer.

WFS seeks a writ of mandate directing the trial court to vacate its order overruling the demurrer of WFS to the cross-complaint of De La Cruz and to issue a new order sustaining the demurrer on the grounds of federal preemption. Agreeing with WFS's preemption claim, we shall issue the requested writ.

DISCUSSION

I.

Standard of Review

"A pure legal issue of preemption is properly handled by demurrer, and its denial is properly reviewed by petition for writ of mandate. [Citation.] Where, as here, the issues are tendered on undisputed facts and are purely legal in nature, it calls for the court's independent appellate review. [Citation.]"[2] (*Washington Mutual Bank v. Superior Court* (2002)

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[2] Although WFS claims it "makes" automobile loans and that De La Cruz "obtained financing" for the purchase of his vehicle "through WFS," while De La Cruz disagrees, contending he signed his conditional sale contract with the dealer, who then sold or assigned the fully-executed contract to WFS, there is no real dispute as to what happened, only its characterization. The parties agree De La Cruz purchased his vehicle from the dealer

95 Cal.App.4th 606, 612 (*Washington Mutual*); accord *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1476.)

II.

General Principles of Federal Preemption

The preemption doctrine has its roots in the Supremacy Clause of the United States Constitution. (U.S. Const., art. VI, cl. 2; *Fidelity Federal S. & L. Assn. v. de la Cuesta* (1982) 458 U.S. 141, 152 [73 L.Ed.2d 664, 674] (*de la Cuesta*).) Under such clause, "Congress has the power to preempt state law concerning matters that lie within the authority of Congress." (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955 (*Bronco*).) In determining whether a state statute is preempted by federal law we must determine congressional intent. (*de la Cuesta, supra,* at p. 152 [73 L.Ed.2d at p. 675]; *California Federal Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 280 [93 L.Ed.2d 613, 623] (*Guerra*); *Bronco, supra,* at p. 955.) Congress may express its intent to preempt state law by stating so in express terms. Where Congress has not expressly stated its intent to preempt state law, its intent to preempt may still be inferred "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room'

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and signed a "Retail Installment Sale Contract Simple Interest Finance Charge" on September 2, 2001. On the same day the contract was assigned to WFS. WFS repossessed the vehicle from De La Cruz on October 21, 2003 and three days later sent De La Cruz the notice that De La Cruz claims was defective. De La Cruz did not redeem the vehicle or reinstate the loan and the vehicle was sold. WFS then filed the underlying action against De La Cruz.

for supplementary state regulation. [Citation.]" (*Guerra, supra,* at pp. 280-281 [93 L.Ed.2d at p. 623]; see *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [91 L.Ed. 1447, 1459] (*Rice*).) "As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law." (*Guerra, supra,* at p. 281 [93 L.Ed.2d at p. 623]; see *American Bankers Assn. v. Lockyer* (E.D. Cal. 2002) 239 F.Supp.2d 1000, 1007-1008 (*Lockyer*).)

"When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*.'" (*California v. ARC America Corp*. (1989) 490 U.S. 93, 101 [104 L.Ed.2d 86, 94], quoting *Rice, supra*, 331 U.S. at p. 230 [91 L.Ed. at p. 1459], italics added; accord *Cipollone v. Liggett Group* (1992) 505 U.S. 504, 516 [120 L.Ed.2d 407, 422].) The "'"historic police powers of the States"'" include consumer protection and banking. (*Smiley v. Citibank (S.D.), N.A.* (1995) 11 Cal.4th 138, 148; see *Washington Mutual, supra,* 95 Cal.App.4th at p. 613.)[3] It is the party claiming federal

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[3] The presumption against preemption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." (*United States v. Locke* (2000) 529 U.S. 89, 108 [146 L.Ed.2d 69, 88].) We recognize one federal court has found the field of banking to be such an area. (*Bank of America v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 558-559.) Another federal court has found

preemption who bears the burden of demonstrating preemption. (*Bronco, supra,* 33 Cal.4th at p. 956.)

Federal regulations may preempt state statutes just as fully as federal statutes. (*de la Cuesta, supra,* 458 U.S. at p. 153 [73 L.Ed.2d at p. 675]; *Louisiana Public Service Comm'n v. FCC* (1986) 476 U.S. 355, 369 [90 L.Ed.2d 369, 382].)

III.

Preemption Under The HOLA And Agency Regulations

The HOLA was originally enacted after the Great Depression in the 1930's, primarily to provide home financing. (*de la Cuesta, supra,* 458 U.S. at pp. 159-160 [73 L.Ed.2d at p. 679].) The HOLA created a system of federal savings and loan associations, which would be regulated by the Federal Home Loan Bank Board (FHLBB), "'to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors.' [Citations.]" (*Id.* at p. 160 [73 L.Ed.2d at p. 679].) The HOLA provided the FHLBB with plenary authority to issue rules and regulations for the federal savings and loan associations. (*Ibid.*) Indeed, the language of the HOLA expressed no limits on the FHLBB's authority to regulate the lending practices of federal savings and loan associations. (*Id.* at p. 161 [73 L.Ed.2d at p. 680].) "[T]he statutory language suggests that Congress expressly contemplated, and approved, the [FHLBB]'s promulgation of regulations superseding

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banking to be an area of traditional dual federal/state control. (*National State Bank v. Long* (3d Cir. 1980) 630 F.2d 981, 985.) We need not resolve this issue for purposes of this appeal.

state law." (*Id.* at p. 162 [73 L.Ed.2d at p. 680].) It "'would have been difficult for Congress to give the [FHLBB] a broader mandate.'" (*Id.* at p. 161 [73 L.Ed.2d at p. 680].)

The FHLBB exercised this congressional mandate, comprehensively regulating the operations of every federal savings association, including its lending practices, "'from its cradle to its corporate grave.'" (*de la Cuesta, supra,* 458 U.S. at pp. 145, 166-167 [73 L.Ed.2d at pp. 670, 683-684], quoting *People v. Coast Federal Sav. & Loan Assn.* (S.D. Cal. 1951) 98 F.Supp. 311, 316.) According to the Ninth Circuit Court of Appeals, the FHLBB regulations were so pervasive "as to leave no room for state regulatory control." (*Conference of Federal Sav. & Loan Ass'ns v. Stein* (9th Cir. 1979) 604 F.2d 1256, 1260.)

In 1989 Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, amending the HOLA. (Pub.L. No. 101-73, § 1(a) (Aug. 9, 1989) 103 Stat. 183; 12 U.S.C. § 1462, et seq.) The FHLBB was replaced by the Office of Thrift Supervision (OTS). (12 U.S.C. § 1462a.) The Director of OTS was given the authority to "prescribe such regulations and issue such orders as the Director may determine to be necessary for carrying out [the HOLA]." (12 U.S.C. § 1462a, subd. (b)(2); see § 1463, subd. (a); 12 C.F.R. § 500.1.) Section 1464 of the HOLA now authorizes the Director to provide "for the organization, incorporation, examination, *operation, and regulation*" of federal savings associations "[i]n order to provide thrift institutions for the deposit of funds and for the extension of credit for homes *and other goods and services*"

"giving primary consideration of the best practices of thrift institutions in the United States." (12 U.S.C. § 1464, subd. (a), italics added; 12 C.F.R. § 500.1, subd. (b).)

As relevant here, the HOLA expressly authorizes federal savings associations to invest "[t]o the extent specified in regulations of the Director" in consumer loans for "personal, family, or household purposes[.]" (12 U.S.C. § 1464, subd. (c)(2)(D); see 12 C.F.R. § 560.30.) In the Thrift Activities Regulatory Handbook Update of 2000, the OTS defines consumer loans "as credit extended to individuals for personal, family, or household purposes[,]" including "the financing or refinancing of: automobiles[.]" (2000 OTS LEXIS 1, 4.) According to the OTS consumer loans "may be secured or unsecured, open-end or closed-end, direct or indirect." (2000 OTS LEXIS 1, 8.) "When an institution originates the loan, it is a direct loan. If a seller of retail goods (dealer) originates the loan and then sells it to the institution, it is an indirect loan." (2000 OTS LEXIS 1, 10.)[4]

The preemptive effect of the regulations adopted under the HOLA was formerly expressed in part 545 of title 12 of the Code of Federal Regulations as follows: "The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive

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[4] OTS also continued the authorization of federal savings associations to engage in various leasing activities that are the functional equivalent of lending, subject to certain regulatory limitations. (12 C.F.R. § 560.30; 61 Fed.Reg. 50951, 50960 (Sept. 30, 1996).)

authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of [the HOLA]. This exercise of the [OTS's] authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association." (Former 12 C.F.R. § 545.2 (Jan. 1, 1996).) OTS moved the lending regulations in 1996 to part 560 and replaced section 545.2 with part 560.2 (section 560.2). (12 C.F.R. § 560.2; 61 Fed.Reg. 50951, 50952 (Sept. 30, 1996); *Lopez v. World Savings & Loan Assn.* (2003) 105 Cal.App.4th 729, 734-735 (*Lopez*).)

In issuing the amended regulations OTS commented that section 560.2 "restates long-standing preemption principles applicable to federal savings associations, as reflected in earlier regulations, court cases, and numerous legal opinions issued by OTS and the [FHLBB], OTS's predecessor agency. In those opinions, OTS has consistently taken the position that, with certain narrow exceptions, any state laws that purport to affect the lending operations of federal savings associations are preempted. None of the changes implemented today should be construed as evidencing in any way an intent by OTS to change this long held position: OTS still intends to occupy the field of lending regulation for federal savings associations." (61 Fed.Reg. 50952 (Sept. 30, 1996).) "As a result, instead of being subject to a hodgepodge of conflicting and overlapping state lending requirements, federal thrifts are free to originate loans under a single set of uniform federal laws and regulations. This furthers both the 'best practices' and safety

and soundness objectives of the HOLA by enabling federal thrifts to deliver low-cost credit to the public free from undue regulatory duplication and burden. At the same time, the interests of borrowers are protected by the elaborate network of federal borrower-protection statutes applicable to federal thrifts, including the Truth in Lending Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, the Fair Housing Act, the Home Mortgage Disclosure Act, the Fair Credit Reporting Act, the Consumer Leasing Act, the Fair Debt Collection Practices Act, the Community Reinvestment Act, and the Federal Trade Commission Act." (61 Fed.Reg. 50965 (Sept. 30, 1996), fn. omitted.)

Section 560.2, subdivision (a) provides, in part, "OTS *hereby occupies the entire field of lending regulation* for federal savings associations. OTS intends to give federal savings associations *maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation*. Accordingly, federal savings associations *may extend credit* as authorized under federal law, including this part, *without regard to state laws purporting to regulate or otherwise affect their credit activities*, except to the extent provided in paragraph (c) of this section or § 560.110 of this part." (Italics added.)

Subdivision (b) of section 560.2 provides a list of illustrative examples of the types of state laws preempted by

paragraph (a) of section 560.2.[5] The list was not meant to be exhaustive and failure to mention a particular type of state law that affects lending was not meant to indicate such types of state laws were applicable to federal savings associations. (61 Fed.Reg. 50966 (Sept. 30, 1996).)

Subdivision (c) of section 560.2 then lists the types of state laws that are not preempted "to the extent that they only

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[5] Subdivision (b) of section 560.2 reads in full as follows: "Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding: (1) Licensing, registration, filings, or reports by creditors; (2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements; (3) Loan-to-value ratios; (4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan; (5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees; (6) Escrow accounts, impound accounts, and similar accounts; (7) Security property, including leaseholds; (8) Access to and use of credit reports; (9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants; (10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages; (11) Disbursements and repayments; (12) Usury and interest rate ceilings to the extent provided in *12 U.S.C. 1735f-7a* and part 590 of this chapter and *12 U.S.C. 1463(g)* and § 560.110 of this part; and (13) Due-on-sale clauses to the extent provided in *12 U.S.C. 1701j-3* and part 591 of this chapter." (Paragraphing omitted.)

incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section[.]"[6]

OTS commented that "[w]hen confronted with interpretive questions under § 560.2, we anticipate that courts will, in accordance with well established principles of regulatory construction, look to the regulatory history of § 560.2 for guidance. In this regard, OTS wishes to make clear that the purpose of paragraph (c) is to preserve the traditional infrastructure of basic state laws that undergird commercial transactions, not to open the door to state regulation of lending by federal savings associations. When analyzing the status of state laws under § 560.2, the first step will be to determine whether the type of law in question is listed in paragraph (b). If so, the analysis will end there; the law is preempted. If the law is not covered by paragraph (b), the next question is whether the law affects lending. If it does, then, in accordance with paragraph (a), the presumption arises that the law is preempted. This presumption can be reversed only if the law can clearly be shown to fit within the confines of

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[6] Section 560.2, subdivision (c) lists the following types of state laws that are not preempted: "(1) Contract and commercial law; (2) Real property law; (3) Homestead laws specified in 12 U.S.C. § 1462a, [subd.] (f); (4) Tort law; (5) Criminal law; and (6) Any other law that OTS, upon review, finds: (i) Furthers a vital state interest; and (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section." (Paragraphing omitted.)

paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt should be resolved in favor of preemption." (61 Fed.Reg. 50951, 50966-50967 (Sept. 30, 1996).)

These statutes, regulations, and comments of the OTS make abundantly manifest and clear the congressional intent to expressly preempt state law in the area of lending regulation of federal savings associations. There is no issue of implied preemption here. (*Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1300 (*Gibson*).)

IV.

Preemption of Civil Code Section 2983.2

Rees-Levering regulates the sale and financing of motor vehicles in California. (*Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 68.) It "was designed to provide a more comprehensive protection for the unsophisticated motor vehicle consumer." (*Id.* at p. 69, fn. omitted.) As part of Rees-Levering, Civil Code section 2983.2 (section 2983.2) requires at least 15 days written notice of intent to dispose of a repossessed motor vehicle. (§ 2983.2, subd. (a).) The notice must, among other things, set forth the right to redeem the vehicle by paying in full the indebtedness evidenced by the contract within 15 days from the date of giving notice (§ 2983.2, subd. (a)(1)), state either that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving notice or that there is no right of reinstatement and provide a statement of reasons

therefor (§ 2983.2, subd. (a)(2)), allow a 10-day extension of the redemption and any reinstatement periods upon written request (§ 2983.2, subd. (a)(3)), disclose where the vehicle will be returned upon redemption or reinstatement (§ 2983.2, subd. (a)(4)), designate the name and address of the person or office to whom payment is to be made (§ 983.2, subd. (a)(5)), state the seller's or holder's intent to dispose of the vehicle after the expiration of the applicable periods of time (§ 983.2, subd. (a)(6)), inform the persons being given notice of their right to an accounting regarding the disposition of the vehicle upon written request (§ 983.2, subd. (a)(7)), include a notice in specific statutory language in at least 10-point bold type regarding their potential liability for a deficiency (§ 2983.2, subd. (a)(8)), and inform the persons being given notice of their liability for the deficiency balance plus interest. (§ 2983.2, subd. (a)(9).) The notice given by a secured creditor must comply with all of these provisions or the secured creditor loses the right to a deficiency judgment. (§ 2983.2, subd. (a) [debtor is liable for any deficiency after disposition of the vehicle "only if" the notice is given within a specified time period and complies with all notice requirements]; *Bank of America v. Lallana* (1998) 19 Cal.4th 203, 210, 215 [secured creditor must comply with all requirements to be entitled to deficiency].)

De La Cruz alleges in his answer and class action cross-complaint the notice given by WFS was defective under section 2983.2. Although his pleadings did not specify the nature of

the alleged defect, De La Cruz informed the trial court at the hearing on WFS's demurrer his claim is that the notice failed to set forth exactly where he should send either the reinstatement or redemption amount. WFS's demurrer contended its notice did not need to comply with section 2983.2 as it was a federally regulated financial institution whose automobile finance operations were governed exclusively by federal law.

The trial court overruled WFS's demurrer to the cross-complaint, stating De La Cruz's claims "are not federally preempted as alleged, because the post-repossession debt collection activities alleged in the pleading are not part of WFS Financial Inc.'s lending operations."[7] We disagree. Section 2983.2 is very much directed at the lending operations of companies providing automobile financing, including WFS, specifically conditioning their exercise of their security rights.

We begin by rejecting the argument of De La Cruz that consumer protection policy requires section 2983.2 apply to federal savings associations. "In determining whether a state statute is pre-empted by federal law . . . , our sole task is to ascertain the intent of Congress." (*Guerra, supra,* 479 U.S. at p. 280 [93 L.Ed.2d at p. 623].) The laudatory purpose of the

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[7] WFS argues the trial court erred in reaching this conclusion without undertaking the three-step analysis required by the OTS regulations. We need not address this contention as we independently review and decide the legal issue of preemption in this writ proceeding. (See *Washington Mutual, supra,* 95 Cal.App.4th at p. 12.)

state statute is not the point and does not preclude preemption. (*Abel v. KeyBank USA* (N.D. Ohio 2004) 313 F.Supp.2d 720, 728.) A state law may be pre-empted "'even if it was enacted by the state to protect its citizens or consumers.'" (*Ibid.*, quoting *Assn. of Banks in Ins. v. Duryee* (6th Cir. 2001) 270 F.3d 397, 404.)

De La Cruz also claims preemption would unfairly tilt the playing field in favor of WFS and against those companies that are not federal savings associations because the latter would still have to comply with Rees-Levering. Actually, section 2983.2 itself already exempts certain lenders (those licensed under the California Finance Lenders Law) from compliance with its requirements. (§ 2983.2, subd. (d).) The inequity De La Cruz fears already exists by virtue of the statutory language of section 2983.2. Federal preemption would only add an additional category of lenders to which section 2983.2 will not apply.

We also reject the suggestion of De La Cruz that there can be no federal preemption here because he negotiated the purchase of a vehicle, not a mortgage, and signed the conditional sale contract with the dealer, who then assigned the contract to WFS. According to De La Cruz, WFS cannot then "magically strip[]" the contract of its Rees-Levering protection. It is clear, however, federal savings associations are authorized to engage in indirect vehicle financing (12 U.S.C. § 1464, subds. (a) and (c)(2)(D); 2000 OTS LEXIS 1, 8, 10), which was what occurred here, and there is nothing in the HOLA or OTS regulations indicating any intention to limit the broad express preemption

of state laws "affecting the operations of federal savings associations" (§ 560.2, subd. (a)) to specific forms of lending or to only home loans.

To the contrary, the OTS has taken the position preemption is not limited to direct loans on homes. Even indirect vehicle finance leases that are the functional equivalent of loans "brings the full force of OTS's lending regulation on preemption into play." (2002 OTS LEXIS 7, 9 [application of Wisconsin Motor Vehicle Consumer Lease Law to federal savings bank preempted].) "Congress intended the federal scheme to be exclusive, leaving no room for state regulation, conflicting or complementary." (2002 OTS LEXIS 7, 9.) An agency's interpretation of its own regulation is controlling unless "'"plainly erroneous or inconsistent with the regulation."'" (*Auer v. Robbins* (1997) 519 U.S. 452, 461 [137 L.Ed.2d 79, 90].) Given the authority of federal savings associations to make consumer loans and the unlimited language of section 560.2, such construction is not plainly erroneous or inconsistent with the regulation.

Moreover, a number of courts have found federal preemption under section 560.2 outside the direct loan and mortgage context. (*WFS Fin., Inc. v. Dean, supra,* 79 F.Supp.2d at p. 1025 [Wisconsin laws governing sales finance companies preempted and could not be applied to WFS, whose business in Wisconsin was 100 percent indirect automobile loans]; *Lockyer, supra,* 239 F.Supp.2d at p. 1008 [Civ. Code § 1748.13 imposing requirements on credit card issuers preempted under § 560.2].)

If section 2983.2 falls within the scope of federal preemption intended by the HOLA and OTS regulations, the statute may not be applied to WFS's vehicle lending operations, whether direct or indirect.

Section 2983.2 falls within the scope of section 560.2, subdivision (b)(4). Such subdivision preempts state laws purporting to impose requirements regarding "terms of credit." Here, the provisions of section 2983.2, inter alia, read into each vehicle conditional sale contract a right of redemption of a repossessed vehicle upon statutorily provided conditions, a right to a statement as to whether there is a conditional right to reinstate the contract and if not, the provision of a statement of reasons why not, a right to an extension of the redemption or reinstatement time period upon written request, and a right to an accounting regarding disposition of the vehicle. Persons liable on the contract must be given a statutorily prescribed notice of all of these rights with specifically included statements and information in precise compliance with the statute or the borrowers obtain a defense to any attempt to collect a deficiency after disposition of the vehicle. (§ 2983.2, subd. (a).) In essence, section 2983.2 adds terms to a vehicle conditional sale contract for the event of a default, limiting the lender's right to enforce its security interest in the vehicle and obtain a deficiency judgment. These imposed terms of credit clearly impact the lender's ability to collect on its delinquent loans. In this way section 2983.2 impermissibly regulates and affects the

lending or credit activities of federal savings associations. (§ 560.2, subd. (a); see also, *Abel v. KeyBank USA, supra,* 313 F.Supp.2d at pp. 727-728 [finding federal preemption of Ohio statute which essentially imposed credit terms concerning defenses to repayment on national banks under regulation analogous to § 560.2]; but see *Blanko v. Keybank USA* (N.D. Ohio 2005) 2005 U.S.Dist. LEXIS 31768 [disagreeing with *Abel*].) The application of section 2983.2 to federal savings associations is preempted by subdivision (b)(4) of section 560.2.[8]

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[8] De La Cruz appears to agree the consumer protections of section 2983.2 become part of the original contract terms for a vehicle conditional sale contract in California. De La Cruz argues such protections cannot be stripped when the contract is purchased by a federal savings association, a reference back to his argument that federal preemption does not apply to indirect loans, which we have already rejected. According to De La Cruz, WFS voluntarily took the contract subject to those terms, as WFS's disclosures to the SEC recognize. We have taken judicial notice of WFS's "United States Securities and Exchange Commission Form 10-K" for the fiscal year ended December 31, 2002. In such document WFS acknowledges it must comply with "each state's consumer finance, automobile finance, licensing and titling laws and regulations *to the extent those laws and regulations are not pre-empted by OTS regulations.*" (Italics added.) WFS generally references the California Rees-Levering Act as one such law and states it must follow state consumer protection laws governing the process by which it repossesses and sells a vehicle pledged as security in order to maximize the amount of money recovered on a defaulted contract. It does not matter if this statement evidences an understanding or agreement by WFS that it purchases California contracts subject to the requirements of section 2983.2 as federal preemption is not a matter of contractual agreement, but of Congressional intent. (*Chaires v. Chevy Chase Bank, F.S.B.* (Md. Ct. Spec. App. 2000) 748 A.2d 34, 42 [parties could not elect state law over federal law where section 560.2 expressly provided federal regulations are to be the governing laws for certain activities by federal institutions].)

Section 2983.2 also falls within the scope of section 560.2, subdivision (b)(9). Such subdivision preempts state laws purporting to impose requirements regarding *"[d]isclosure* and advertising, *including laws requiring specific statements, information, or other content to be included in* credit application forms, credit solicitations, billing statements, credit contracts, or other *credit-related documents*." (Italics added.) Section 2983.2 clearly imposes detailed requirements regarding the statements, information, and content of a creditor's notice of intent to dispose of a vehicle. Such notice is a "credit-related document." It is sent by the creditor (lender) to persons liable (the borrowers) on a vehicle conditional sale contract (a loan), at a time when the loan is in default and the collateral (the vehicle) has been repossessed, but not yet sold. The notice informs the borrowers of the right to redeem the vehicle by paying off the loan and of any right to reinstate the loan. The notice informs the borrowers of their right to seek an extension of time to exercise these options. The notice informs the borrowers how to go about exercising these options. The notice informs the borrowers of their right to an accounting regarding the disposition of the vehicle if it is sold and of their potential liability for any deficiency. At the point this notice is given there is still an ongoing credit relationship between the lender and the borrowers, which is directly affected by this notice, especially since any defect in the notice cuts off the lender's right to a deficiency judgment.

We reject the claim section 560.2, subdivision (b)(9) does not apply to post-repossession documents. The language of subdivision (b)(9) does not support such a narrow construction as it lists not only documents related to when credit is being solicited, offered, or extended, but specifically lists "billing statements," a kind of document sent in the course of an on-going credit relationship, and "other credit-related documents." (See *Lockyer, supra*, 239 F.Supp.2d 1000 [California law requiring minimum payment warnings and disclosures in monthly bills preempted under § 560.2, subd. (b)(9)].)

Our conclusion is supported by an opinion of the OTS in which the OTS concluded preemption applied not just to laws purporting to regulate the documents generated during the formation of the credit relationship, but also to state law provisions triggered upon default on the loan. Specifically, the OTS issued a legal opinion in 2003 advising that a federal savings association was not subject to New Mexico's Home Loan Protection Act. (2003 OTS LEXIS 7.) Such Act included provisions "triggered upon default on high-cost home loans rather than at loan origination." (2003 OTS LEXIS 7, at p. 3.) The provisions required creditors to accept any partial payment made or tendered in response to a default notice, to reinstate the borrower to the same position as if a default had not occurred and nullify an acceleration of an obligation and prohibited charges, fees or penalties for curing a loan default. (2003 OTS LEXIS 7, at p. 3.) The opinion of the OTS stated, "All of these NM Act provisions -- whether they are triggered at

loan origination or upon default -- purport to regulate the terms of credit, loan-related fees, disclosures, mortgage processing, origination, refinancing, and servicing, and disbursements. Thus, they are preempted from applying to federal savings associations . . . ." (2003 OTS LEXIS 7, at p. 3.) The New Mexico Act provisions preempted included those allowing borrowers to bring civil actions for violations and to assert claims, defenses, counterclaims, and actions against creditors or subsequent holders or assignees in foreclosure actions, as well as the provisions making violations unfair or deceptive trade practices. (2003 OTS LEXIS 7, at p. 3.)

As we conclude section 2983.2 falls within the kind of state laws preempted by section 560.2, subdivision (b)(4) and subdivision (b)(9), we need not consider whether the statute might also be preempted by subdivision (b)(10) of section 560.2, which lists regulations regarding "[p]rocessing, origination, *servicing*, sale or purchase of, or investment or participation in, mortgages." (Italics added.) Our analysis could end here without reaching the question of whether section 2983.2 is the type of law that comes within subdivision (c) of section 560.2. (61 Fed.Reg. 50951, 50966-50967 (Sept. 30, 1996).)

Nevertheless, we find it useful to note section 2983.2 is expressly directed at vehicle financing lenders and that it more than incidentally affects their lending operations so as not to come within subdivision (c) of section 560.2. This easily distinguishes this case from several cases relied upon by De La Cruz.

In *Gibson, supra,* 103 Cal.App.4th 1291, plaintiffs brought a class action suit against World Savings and Loan Association alleging World financially benefited from purchasing expensive replacement hazard insurance for borrowers who failed to maintain hazard insurance on their real property and charging the borrowers the full price of the replacement insurance, instead of simply reinstating the borrowers' insurance policies. Plaintiffs alleged this practice violated the terms of the borrowers' deeds of trust, which authorized World to advance funds on behalf of the borrowers only to the extent necessary to protect World's rights. Plaintiffs sought restitution under the UCL. (*Id.* at p. 1294.) The court reversed a trial court finding of federal preemption. The court of appeal noted plaintiffs' claims were "predicated on the duties of a contracting party to comply with its contractual obligations and to act reasonably to mitigate its damages in the event of a breach by the other party, on the duty not to misrepresent material facts, and on the duty to refrain from unfair or deceptive business practices. [¶] Those predicate duties are not requirements or prohibitions of the sort that section 560.2 preempts. That section preempts (1) state laws that (2) either purport to regulate federal savings associations or otherwise materially affect their credit activities. The predicate duties underlying the plaintiffs' claims do not meet that description." (*Gibson, supra,* at pp. 1301-1302.) "A stated intent to preempt requirements or prohibitions imposed by state law does not reasonably extend to those voluntarily assumed in a contract."

(*Id.* at p. 1302.) In this case, De La Cruz does not allege violation of any requirement voluntarily assumed by WFS in the contract, but a violation of the notice requirements imposed on the contract by section 2983.2.

In *Hussey-Head v. World Savings and Loan Assn.* (2003) 111 Cal.App.4th 773 (*Hussey-Head*), a consumer sued her lender claiming it had furnished incomplete and inaccurate information about her to several credit reporting agencies thereby violating the California Consumer Credit Reporting Agencies Act. (Civ. Code, § 1785.1 et seq.) The court rejected the lender's contention that the claims were preempted by section 560.2, reasoning the statutes were not "lending regulations" purporting to govern the manner in which the lender ran its business, but were laws ensuring that any credit information voluntarily reported by the lender to third party credit reporting agencies was fair and accurate. (*Hussey-Head, supra,* at pp. 781-783.) The Court stated, "the California statutory scheme does not come into play until after a loan is made or credit otherwise extended, and it does not affect the manner in which the lender services or maintains the loan; as a result, the California statutes are not inconsistent with the federal Home Owners' Loan Act." (*Id.* at p. 782.) The court found the statutes plainly did not affect the lender's lending activities. (*Id.* at p. 783.) In contrast here, section 2983.2 may come into play after the loan is made, but it does clearly affect the manner in which the lender handles the loan upon default. Section 2983.2 does not regulate actions only voluntarily undertaken with third

parties, but directly impacts how the lenders run their business in enforcing their rights to collateral. The loan has not been satisfied and the credit relationship between the lender and borrower still exists. (See *Pinchot v. Charter One Bank* (S.Ct. Ohio 2003) 792 N.E.2d 1105 [the recording of a mortgage satisfaction or real estate lien release is not an integral part of lending process as it occurs after debt is satisfied and extension of credit is extinguished].)

In *Alkan v. Citimortgage, Inc.* (N.D. Cal. 2004) 336 F.Supp.2d 1061, the plaintiff borrower mailed a check to defendant lender in an effort to pay down the remaining balance on his mortgage loan. The lender cashed the check, but placed the funds in an "Unapplied Funds" account, instead of using them to satisfy the principal balance of the mortgage. The following month, the lender reported the borrower's account was past due and assessed a late charge. During the subsequent months the lender engaged in collection efforts including sending allegedly threatening letters and making harassing collection phone calls. Eventually, the lender reported allegedly false and derogatory credit information about the borrower to national credit bureaus. (*Id.* at p. 1062.) The borrower sued his lender under the Federal Credit Reporting Act and the California Rosenthal Fair Debt Collection Practices Act (CFDCPA; Civ. Code, § 1788.10 et seq). (*Alkan v. Citimortgage, Inc., supra,* at p. 1063.) The federal district court rejected the lender's contention that the borrower's claims under the CFDCPA were preempted by section 560.2. (*Alkan v. Citimortgage, Inc., supra,* at pp. 1064-1065.)

Relying on *Hussey-Head, supra,* the district court concluded the CFDCPA's regulation of the permissible practices for attempting to collect a debt once a loan has been made, including prohibitions of harassing phone calls, obscene language, or threatening conduct, did not affect the manner in which the lender services or maintains the loan and therefore, did not constitute a lending regulation. (*Alkan v. Citimortgage, Inc., supra,* at p. 1064.) In comparison, section 2983.2 does not regulate similar inappropriate debt collection actions of a lender. Section 2983.2 does affect the manner in which the lender handles a loan in default after repossession of the vehicle serving as collateral. Section 2983.2 is a lending regulation.

"[T]he UCL remains available to remedy a myriad of potential unfair, unlawful, and fraudulent practices engaged in by federally chartered savings and loan associations, so long as the practice is outside the scope of federal regulation. [Citation.]" (*Lopez, supra,* 105 Cal.App.4th at pp. 741-742; see *Fenning v. Glenfed, Inc.* (1995) 40 Cal.App.4th 1285 [fraud claim not preempted because the fraudulent deception had nothing to do with the thrift's lending practices].) However, we hold section 2983.2 is within the scope of state laws that section 560.2 is intended to preempt. De La Cruz cannot use the UCL to enforce a statutory violation where the underlying statute is preempted by federal law. The cross-complaint of De La Cruz premised on section 2983.2 and the UCL may not proceed.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to set aside its order overruling petitioner's demurrer to real party in interest's cross-complaint and to enter a new order sustaining without leave to amend petitioner's demurrer. The alternative writ issued in this proceeding is discharged. Petitioner shall recover the costs of this petition. (Cal. Rules of Court, rule 56(l).)

CANTIL-SAKAUYE , J.

We concur:

RAYE , Acting P.J.

MORRISON , J.