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Federal Preemption of State Law Regulating Deed of Trust Reconveyance Fees

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I. INTRODUCTION

In 1989, approximately 500,000 homes were sold in California. The vast majority of these transactions involved financing arrangements which utilized some form of security device. Many of these secured transactions included a reconveyance fee as part of the loan processing charges.

In California, a deed of trust is the most commonly used form of security device in real estate transactions. A deed of trust involves a third-party trustee holding the deed to the property used as the security for the loan. When the loan is repaid or when the lender otherwise notifies the trustee to reconvey the deed to the borrower, the trustee reconveys the deed to the borrower. In the past, lenders have often charged the costs of the future reconveyance of the deed at the time the initial loan was processed rather than when the deed was actually reconveyed to the borrower. This practice has given rise to many legal issues concerning the possible conflict between California laws on this subject and applicable federal regulations regarding savings and loan associations.

2. A "deed of trust" is defined as an instrument which takes the place and serves the use of a mortgage, by which the legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions. BLACK'S LAW DICTIONARY 414 (6th ed. 1990) [hereinafter BLACK'S].

The terms "mortgage" and "deed of trust" have come to have synonymous meanings and will be used interchangeably throughout this comment. See, e.g., Bank of Italy Nat'l Trust & Sav. Ass'n v. Bentley, 20 P.2d 940, 944 (Cal. 1933) ("At common law and, in fact, in nearly every state in the United States, a deed of trust, both in legal effect and in theory, is deemed to be a mortgage with a power of sale, and differs not at all from a mortgage with a power of sale.").

4. Id.
5. See infra notes 35-43 and accompanying text. Federal regulations give the Federal Home Loan Bank Board "plenary and exclusive authority" to regulate all
Siegel v. American Savings and Loan Association\footnote{6} addressed those legal issues in 1989. In Siegel, California's First District Court of Appeal held the state's law concerning the regulation of deed of trust reconveyance fees was not in conflict with the federal regulation of the field.\footnote{7} Therefore, the state regulation was not preempted\footnote{8} by the federal regulation of the subject.

It is important to note that this decision was rendered by a state court of appeal and not by the California Supreme Court. Therefore, the question whether the regulation of deed of trust reconveyance fees by the state is in conflict with federal regulation is not yet conclusively resolved in California as well as in every other jurisdiction in the country.\footnote{9}

This comment addresses the issue of federal preemption of state law regulating deed of trust reconveyance fees. Section II first discusses the role of reconveyance fees in real property secured transactions.\footnote{10} Federal regulations and California statutes concerning savings and loan associations and reconveyance fees are summarized.\footnote{11} Additionally, Section II explores the doctrine of federal preemption and the interrelationship of federal and state regulations.\footnote{12} Finally, Section II synopsizes Siegel and the appellate court's analysis thereof.\footnote{13}

Section III describes the problems of federal preemption of reconveyance fee regulation in relation to the court's de-

\begin{footnotes}
\footnote{6}{258 Cal. Rptr. 746 (Ct. App. 1989).}
\footnote{7}{The appellate court reversed the trial court which had held that such a conflict between the state and federal laws existed. Based upon that conflict, the trial court sustained defendant's demurrer to the suit alleging illegal collection of reconveyance fees. \textit{Id.} at 746.}
\footnote{8}{See infra notes 58-79 and accompanying text.}
\footnote{9}{At this time no other jurisdiction has decided the issue addressed in \textit{Siegel}.}
\footnote{10}{See infra notes 19-26 and accompanying text.}
\footnote{11}{See infra notes 30-57 and accompanying text.}
\footnote{12}{See infra notes 58-104 and accompanying text.}
\footnote{13}{See infra notes 105-30 and accompanying text.}
\end{footnotes}
cision in *Siegel.* Also, this section explains the significance of the problem. Section IV analyzes *Siegel* by applying the United States Supreme Court's preemption test to its facts. This section also compares *Siegel* to analogous cases decided by the United States Supreme Court and the supreme courts of other jurisdictions. Section V proposes a statutory solution to the issues addressed in *Siegel.*

II. BACKGROUND

A. Role of Reconveyance Fees in Secured Transactions

A deed of trust is a tripartite contract between the lender, the borrower and the trustee. The trustee holds title to the property until the loan is repaid. At that time, the lender executes a request for reconveyance which serves to notify the trustee that the title to the property can be reconveyed to the borrower. After receiving the request for reconveyance, the trustee executes and records a deed of reconveyance which officially transfers the hypothecated property to the former borrower. The recording of the deed of reconveyance extinguishes the lien on the property created by the deed of trust.

If the deed of trust so provides, a lender may charge the borrower the costs associated with the future reconveyance of the deed at the time the loan is originally processed. These costs may include the lender's administrative costs incurred in reconveying the deed, any applicable trustee's fees and the recording fees relating to recording the reconveyance. How-

14. See infra text accompanying notes 112-20.
15. See infra text accompanying notes 112-14.
16. See infra notes 133-57 and accompanying text.
17. See infra notes 160-63 and accompanying text.
18. See infra text accompanying notes 166-69.
20. *Id.*
21. *Id.*
22. Hypothecated property is pledged as security or collateral for a debt. BLACK'S, supra note 2, at 742.
23. *Siegel,* 258 Cal. Rptr. at 747.
24. *Id.*
25. *Id.*
ever, if a deed of trust does not provide for the charging of such fees in advance, the lender has no right to be reimbursed for the costs before they are actually incurred.\textsuperscript{26}

B. \textit{Federal Regulation of Reconveyance Fees}

The history of federal involvement in the regulation of financial institutions and problems accompanying the interrelationship between state and federal regulatory authority can be traced to the early history of the United States.\textsuperscript{27} These problems led to the firm establishment of the country's dual banking system after the Civil War\textsuperscript{28} in an attempt to reach a compromise between the often competing state and federal interests and to define the precise roles of the two sovereigns.\textsuperscript{29}

The principal force behind the enactment of the current regulations was the Great Depression of 1929. In response to the Great Depression and the accompanying economic devastation, Congress enacted several important laws during the early 1930's to impose stricter requirements on all financial institutions. These laws also established regulatory agencies to supervise the banking and thrift industries and to ensure the industries' compliance with the laws. The two most important laws concerning the home loan market were the Federal Home Loan Bank Act (the Act),\textsuperscript{30} which established the Federal Home Loan Bank Board (FHLBB), and the Home Owners' Loan Act of 1933 (HOLA),\textsuperscript{31} which provided a wide variety of restrictions on thrift institutions and federal savings and loan associations.\textsuperscript{32} The Federal Home Loan Bank Act authorized the FHLBB to adopt rules and regulations necessary to carry out the purposes of the Act and provided the means by which

\textsuperscript{26} Id.


\textsuperscript{28} National Currency Act of 1863, ch. 58, 12 Stat. 665 (1863) and National Bank Act of 1864, ch. 106, 13 Stat. 99 (1864). These acts authorized private national banks to operate under federal, rather than state, charters, thereby establishing a system of dual regulation by both the states' and federal governments, \textit{i.e.} a dual banking system.

\textsuperscript{29} Kreissman, \textit{supra} note 27, at 914.


\textsuperscript{31} Id. §§ 1461-1470.

\textsuperscript{32} See, \textit{e.g.}, id. § 1464.
the Act is enforced.\textsuperscript{33} Since the Act's passage, many FHLBB rules and regulations have been promulgated pursuant to it.\textsuperscript{34} A review of these numerous regulations is beyond the scope of this comment. However, there are three regulations which directly impact the analysis of the preemption issue. These regulations specifically address preemption,\textsuperscript{35} real estate loans\textsuperscript{36} and home loans.\textsuperscript{37}

\textsuperscript{33} Id. § 1437(a) (repealed 1989). See generally supra note 30 (this section provides the powers and duties of the FHLBB).

\textsuperscript{34} In the years since both the Federal Home Loan Bank Act and the Home Owners' Loan Act were enacted, courts and commentators have interpreted their purposes in many various ways. See, e.g., First Fed. Sav. & Loan Ass'n v. Elbert, 337 N.E.2d 420, 424 (Ill. App. Ct. 1975) ("The primary purpose of the [Home Owners' Loan] Act was to prevent violations of law and unsound practices which 'might adversely affect the Nation's financial institutions, with resulting harmful consequences to the growth and development of the Nation's economy" (quoting S. REP. NO. 1482, 89th Cong., 2d Sess. 1 (1966), reprinted in 1966 U.S.C.C.A.N. 3532, 3533)); Turtle Mountain Supply Co. v. Krieg, 7 N.W.2d 432 (N.D. 1943) ("The Home Owners' Loan Act was intended 'to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages,' and 'to extend relief to owners who occupied their own homes and who were unable to amortize their debts elsewhere.'" (quoting 12 U.S.C.A. § 1461- 1470 (West 1933))); McAllister v. Drapeau, 92 P.2d 911, 915 (Cal. 1939) ("[T]he main and controlling purpose of the [A]ct was to assist small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages . . . ."); Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1258 (9th Cir. 1979), summarily aff'd, 445 U.S. 921 (1980) (Congress intended to use the FHLBB rules and regulations as an example for uniform savings and loan regulations in hope of obviating the "hodgepodge" of laws and regulations the states had developed (citing THOMAS B. MARVELL, THE FEDERAL HOME LOAN BANK BOARD 26 (1969))).

\textsuperscript{35} 12 C.F.R. § 545.2 (1991), which provides in full:
The regulations in this part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.

See also infra note 145 and accompanying text.

\textsuperscript{36} 12 C.F.R. § 545.32 (1991). Subsection (b)(5) provides:
Except as provided in § 563.35(d) of this chapter, a Federal savings association may require a borrower to pay necessary initial charges connected with making a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closing, and other necessary incidental services and costs, in such reasonable amounts as the board of directors may fix. The Federal savings association may collect the charges from the borrower and pay the persons rendering services.

See also infra note 146 and accompanying text.

First, a close examination of each rule is necessary. FHLBB Rule 545.2 concerns the preemptive effect of the FHLBB. It provides that “the exercise of the FHLBB’s authority is preemptive of any state law purporting to address the subject of the operations of a federal savings and loan association.”

Next, Rule 545.32 regulates many different aspects of a real estate loan transaction. Specifically, it permits a savings and loan association to require a borrower to pay necessary initial loan charges, including costs incurred by the association in providing necessary incidental services.

Finally, Rule 545.33 established guidelines which govern home loan transactions. Before its repeal in 1989, subsection (f)(3) of this rule required that if a loan contract is to include escrow payments, a statement explaining the purpose of the payments, how the amount of the payment is determined and the association’s rights if the borrower fails to make the payment must be included.

C. Current California Statutes Concerning Home Loans

The following is a general overview of the current California legislation governing real property secured transactions, i.e., mortgages and deeds of trust. Special emphasis is given to those sections regulating reconveyance fees. California’s statutes concerning real property secured transactions are located both in the Code of Civil Procedure and the Civil Code. Al-
though sections 2920 through 2967 of the California Civil Code expressly regulate mortgages, the focus of this comment is a detailed examination of section 2941.

Section 2941 of the California Civil Code was extensively amended in 1988. This section sets forth the state's regulations concerning the reconveyance of a deed of trust. Subsection (a) requires the beneficiary/lender or his/her assignee to execute a certificate of discharge within thirty days of when the deed of trust is satisfied, i.e., paid in full. Subsection (b)(1)(a) requires the reconveyance of the deed of trust to be recorded within 21 days after the trustee receives the original note and request for reconveyance from the lender. Subsection (d) imposes a $300.00 fine upon any violator of the statutory provisions set forth in the section. A lender who fails to promptly request the reconveyance or provide the trustee with the necessary documentation or a trustee who fails to execute and/or record the reconveyed deed shall be subject to such a fine.

Subsection (e)(1) permits the trustee or beneficiar-
The trustee, beneficiary, or mortgagee may charge a reasonable fee to the trustor or mortgagor, or the owner of the land, as the case may be, for all services involved in the preparation, execution, and recording of the full reconveyance, including, but not limited to, document preparation and forwarding services rendered to effect the full reconveyance, and, in addition, may collect official fees. This fee may be made payable no earlier than the opening of a bona fide escrow or no more than 60 days prior to the full satisfaction of the obligation secured by the deed of trust or mortgage.

52. California Civil Code section 2941(e)(2) states that until January 1, 1992, a reconveyance fee which does not exceed sixty-five dollars ($65.00) is presumed to be reasonable.


55. CAL. CIV. CODE § 2941(e) (Deering 1986).


57. Id. § 4.
D. The Principle of Federal Preemption

1. General Discussion of the Principle

Federal preemption involves the conflict between federal law and state or local statutes or regulations. Federal preemption stems from the supremacy clause of the United States Constitution. Professor Kenneth E. Scott has developed an analytical model to determine which "pattern of relationship" exists between a given federal law or regulation and conflicting state legislation in the field of financial institutions. The pattern of relationship will determine which set of laws and regulations apply to a given fact situation. Professor Scott characterizes the possible pattern of relationship between the co-existing state and federal systems as one of four types:

1) Federal Domination: Federal law occupies the field and applies to both state and national financial institutions, to the exclusion of, or in the absence of, any state rule concerning the same matter.

2) Overlay: A financial institution may have to comply with both federal and state requirements simultaneously. This is especially likely to occur with state-chartered financial institutions.

3) Independence: There may be a federal rule that applies only to federally-chartered financial institutions and a state rule that applies to state-chartered financial institutions.

58. The United States Constitution and acts of Congress have given the federal government exclusive power over certain matters such as interstate commerce and sedition to the exclusion of state jurisdiction. Federal preemption occurs where federal law so occupies the field that state courts are prevented from asserting jurisdiction. BLACK'S, supra note 2, at 612 (citing State v. McHorse, 517 P.2d 75, 79 (N.M. 1973)).

59. U.S. CONST. art. VI, cl. 2. This clause provides:
   This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

60. Although Professor Scott's article uses the term "banks," the term "financial institutions" is substituted here since the same basic scheme of regulation is imposed on both banks and savings and loan associations and this comment focuses more towards savings and loan associations. Kenneth E. Scott, The Patchwork Quilt: State and Federal Roles in Bank Regulation, 32 STAN. L. REV. 687, 688 (1980).
tions; thus, there is independence of the two regulatory systems.

4) State Domination: The state rule governs the matter for both state- and federally-chartered financial institutions, either by express incorporation in the federal statute or by federal acquiescence.61

In terms of the patterns of relationships between state and federal laws and regulations, preemption would be considered the "federal domination" pattern.62 As such, the federal law would occupy the field63 and would apply to both state and federal financial institutions.64

Preemption itself can best be explained through a brief example. Pacific Gas & Electric Company v. State Energy Commission65 involved a California law66 which imposed a moratorium on the certification of nuclear power plants until the State Energy Commission found a demonstrated technology for the disposal of high-level nuclear waste. Pacific Gas & Electric (PG&E) sought a declaratory judgment that the moratorium was preempted by the Federal Atomic Energy Act of 1954.67 The United States Supreme Court held that Congress preserved dual regulation of nuclear energy, with the federal government maintaining complete control of the safety aspects of the industry and the states retaining control over the economic aspects, as they would over any other source of energy.68 The Court held that the moratorium's rationale was not safety-related, but rather was economically-related. Therefore, there was no conflict between the federal occupation of the field concerning the safety of nuclear energy and the state regulation concerning the economic aspect of that energy source.69

The problem of preemption arises when both Congress or a federal agency and a state legislature enact laws or regulations governing the same conduct which may result in conflict-

61. Id.
62. See id.
63. See infra note 73 and accompanying text.
64. Scott, supra note 60, at 688.
66. CAL. PUB. RES. CODE § 25524.2 (Deering 1988).
69. Id. at 223.
ing regulatory standards. A state law can be preempted by federal law either expressly or implicitly. Preemption is compelled whether Congress’ intent is explicitly stated in the statute’s language or implicitly contained in its purpose.

In 1947, the United States Supreme Court, in its decision of *Rice v. Santa Fe Elevator Corp.*, reaffirmed two situations where congressional intent to supersede state law can be inferred in the absence of explicit preemptive language. The first is where the federal regulation of the regulated area is so pervasive that it is reasonable to conclude that Congress intended to “occupy the field,” thereby leaving no room for the states to supplement the scheme of federal regulation. The second situation arises when Congress regulates a field where the federal interest is so dominant that the federal system of regulation precludes the enforcement of state laws concerning the same subject.

However, it is also possible for certain aspects of a state law to be superseded by federal law where Congress has not entirely displaced the state regulation in a specific area. This occurs when compliance with both the federal and state laws is impossible or when the state law stands as an obstacle to the achievement of congressional objectives in enacting the federal regulations.

Two peripheral issues merit mention as they are especially relevant to this comment. First, the Supreme Court has held that the principles of preemption are applicable to matters concerning real property, despite the fact that real property law is considered a matter of special concern to the states.

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74. *Rice*, 331 U.S. at 230 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)).


Secondly, the Supreme Court has held that federal regulations, for example, the regulations promulgated by the Federal Home Loan Bank Board in the Code of Federal Regulations, have no less preemptive effect than do federal statutes.

2. Fidelity Federal Savings & Loan Association v. De La Cuesta

The Supreme Court has already addressed preemption in the area of due-on-sale clauses with its 1982 decision in Fidelity Federal Savings & Loan Association v. De La Cuesta. This case involved a federal preemption issue concerning the regulation of due-on-sale clauses. The central issue in De La Cuesta was whether the California Supreme Court’s decision in Wellenkamp v. Bank of America was preempted by a Federal Home Loan Bank Board regulation. Wellenkamp limited a lender’s right to exercise a due-on-sale clause to situations where the lender demonstrates that enforcement of the clause is reasonably necessary to prevent impairment of the security or a risk of default on the loan by the borrower. In contrast, the Federal Home Loan Bank Board’s regulation did not require such a demonstration but alternatively provided that a federal savings and loan association has an unqualified power to include a due-on-sale clause in its loan instrument.

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80. A due-on-sale clause is a provision usually found in a note or mortgage whereby the entire debt becomes immediately due and payable at the lender’s option upon sale of the mortgaged property. BLACK’S, supra note 2, at 500.
81. De La Cuesta, 458 U.S. at 141.
83. 12 C.F.R. § 545.8-3(f) (1982) (originally in 12 C.F.R. § 545.6 11(f) (1980)).
84. Wellenkamp, 582 P.2d at 970.
85. De La Cuesta, 458 U.S. at 146-47 (1982) (quoting 12 C.F.R. 545.8-3(f)), which provides in relevant part:

[A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association’s security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association’s prior written consent. Except as [otherwise] provided in ... this section ..., exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by
trial court decided that *Wellenkamp* was preempted by the FHLBB regulation and granted Fidelity's motion for summary judgment. 66 De La Cuesta appealed and the California Court of Appeal reversed, holding that *Wellenkamp* controlled and that federal law did not preempt the state rule. 67

The United States Supreme Court reversed the court of appeal and concluded that the FHLBB's due-on-sale regulation was intended to preempt conflicting state limitations on the due-on-sale practices of federal savings and loan associations and that *Wellenkamp* created such a conflict. 68 The Court further stated that since it had found a conflict to exist between federal and state law, it need not decide if the Home Owners' Loan Act of 1933 or the FHLBB's regulations "occupied the field" of due-on-sale law or the entire field relating to federally-chartered savings and loan associations. 69

3. Analogous State Court Decisions Concerning Preemption

a. *Derenco v. Benjamin Franklin Federal Savings & Loan Association*

*Derenco v. Benjamin Franklin Federal Savings & Loan Association* 90 was decided by the Oregon Supreme Court in 1978. This case involved a class action suit concerning the regulation of the use of monies deposited in reserve accounts. 91 Plaintiffs sought an accounting of profits which they claimed defendant savings and loan association gained by investing the funds they deposited with defendant in their loans' reserve ac-
Defendant claimed that regulations promulgated by the Federal Home Loan Bank Board preempted the Oregon common law concerning the use of reserve account funds. The trial court ruled against preemption and ordered an accounting. Both parties appealed to the Oregon Supreme Court.

The Oregon Supreme Court held that the type of state regulation sought to be imposed by Oregon, that is, the granting of an accounting based upon agency and trust principles, was not preempted by the FHLBB regulations. Furthermore, the court stated it was following the United States Supreme Court's tendency to accommodate both federal and state law, if possible, and that it did not believe the field of savings and loan associations had been entirely occupied by Congress or federal regulations since both the Congress and federal regulators were capable of explicitly stating if they intended to exclusively occupy the field.

b. Kaski v. First Federal Savings and Loan Association

Kaski v. First Federal Savings and Loan Association reached the opposite conclusion of Derenco in a case involving a similar legal issue. This case concerned the validity of an interest rate escape clause. Plaintiff sought to have the clause in its mortgage note invalidated because it was unconscionable, vague and indefinite. The Wisconsin Supreme Court considered, among other factors, the pervasive scheme of federal regulation relating to federal savings and loan associations and concluded that Congress had completely occupied this field. The court stated that the establishment of a federal system of banking or of lending was of such importance to

92. Id.
93. Id. at 482 (quoting 12 C.F.R. § 545.6-11 (1958) and 12 C.F.R. § 545.6 (1976)).
94. Id. at 481.
95. Id. at 480.
96. Id. at 487.
97. Id. at 487.
98. 240 N.W.2d 367 (Wis. 1976).
99. An interest rate escape clause allows the lender to increase the interest rate of the loan upon advance written notice to the borrower. Id. at 369 n.1.
100. Id.
101. Id. at 372.
our national life that state laws should not be allowed to interfere.\textsuperscript{102} The court remanded the case to the lower court to be decided in accordance with federal law.\textsuperscript{103}

4. Summary

The preceding cases and discussion present two points which influence the analysis of federal preemption issues involving the field of savings and loan associations. First, the United States Supreme Court and the state supreme courts apply more than one test in determining whether a federal law or regulation preempts a state law. In the absence of express congressional or regulatory agency intent to preempt, courts must examine the facts of each individual case when rendering a decision on the preemption issue. Secondly, the two state law cases summarized in this section illustrate the split among jurisdictions concerning the occupation of the field\textsuperscript{104} relating to regulation of savings and loan associations by the FHLBB. Both of these points are important to remember while analyzing whether a state law regulating a certain aspect of a savings and loan's operations is preempted by federal law.

E. Siegel v. American Savings and Loan Association

1. Procedural and Factual Background of Siegel v. American Savings and Loan Association

\textit{Siegel v. American Savings and Loan Association}\textsuperscript{105} was decided by the California Court of Appeal, First District, Second Division in 1989. The case involved a class action suit filed by a plaintiff class of California residents who owned interests in real property located within California subject to deeds of trust held by defendant Citicorp or its predecessor.\textsuperscript{106} Plaintiffs pled twelve causes of action including violation of the Cartwright Act,\textsuperscript{107} civil conspiracy, bad faith denial of con-

\begin{itemize}
  \item \textsuperscript{102} \textit{Id.} at 373.
  \item \textsuperscript{103} \textit{Id.} at 374.
  \item \textsuperscript{104} See supra note 73 and accompanying text.
  \item \textsuperscript{105} 258 Cal. Rptr. 746 (Ct. App. 1989).
  \item \textsuperscript{106} \textit{Id.} at 747.
  \item \textsuperscript{107} The Cartwright Act is a California statute that makes unlawful a "trust," defined as a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons to restrict trade, limit production, increase or fix prices or prevent competition. \textsc{cal. bus. & prof. code} §§
tract, unfair competition, breach of contract, fraud and breach of agency duty. Plaintiffs also sought a constructive trust and an accounting.  

In their complaint, plaintiffs contended that defendant Citicorp required payment of fees for the reconveyance of the deeds of trust at the time the loan was initially processed. They further alleged that Citicorp failed to account for the reconveyance fees when the loans were sold on the secondary mortgage market. As a result of such failure, some plaintiffs were forced to pay a second reconveyance fee to the new lenders who had purchased these mortgages on the secondary market.

Plaintiffs further alleged that Citicorp violated a requirement of the Federal National Mortgage Association (FNMA). The FNMA is one of the principal buyers of pools of loans on the secondary market. Since 1977, FNMA has required that a deed of trust securing a loan it purchases must contain a provision requiring reconveyance of the deed of trust without charge. By referring to the reconveyance fees under different names, plaintiffs claimed that Citicorp collected the reconveyance fees in violation of the FNMA requirements and the express agreement not to charge such fees as provided in Citicorp's FNMA standard form deed of trust.

Finally, plaintiffs alleged that Citicorp failed to refund the prepaid reconveyance fees to the borrowers when the real property securing the loan was sold, despite the fact that any subsequent reconveyance would not benefit the original borrower. Plaintiffs claimed Citicorp's failure to so refund the reconveyance fees violated section 2941(e) of the California

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108. Siegel, 258 Cal. Rptr. at 747.
109. Id. at 748.
110. The secondary mortgage market is a mechanism whereby banks, savings and loan associations and governmental agencies, such as the Federal National Mortgage Association, pool the negotiable mortgages and deeds of trust they have in their loan portfolios and sell them to other investors at a discounted rate. This allows the original lender to receive immediate revenue without waiting many years for the loan to be repaid. Additionally, it allows the investor to earn a rate of return which it would otherwise have not received. See William H. Hippaka & J.W. Pugh, California Real Estate Finance 98, 96 (1966).
111. Siegel, 258 Cal. Rptr. at 748.
112. Id.
113. Id.
Civil Code and Citicorp's manner of collecting the fees violated the Home Owners' Loan Act (HOLA) and Federal Home Loan Bank Board regulations implementing it.\textsuperscript{114}

Defendants Citicorp and Citicorp Savings Corporation demurred to the complaint on the basis that plaintiffs' state law claims were preempted by federal law provisions in HOLA and that plaintiffs' federal claims under HOLA were barred by the doctrine of primary jurisdiction, which requires a party to exhaust its administrative remedies with the FHLBB prior to seeking judicial relief.\textsuperscript{115} The trial court sustained defendants' demurrer.\textsuperscript{116} Plaintiffs appealed to the California Court of Appeal which reversed the trial court by finding that federal law did not expressly\textsuperscript{117} or implicitly\textsuperscript{118} preempt plaintiffs' state law claims and that there was no preemption by direct conflict between the state and federal law on the subject.\textsuperscript{119} The appellate court also held that plaintiffs did not have an implied private right of action under HOLA and, thus, had no administrative remedy to exhaust. Therefore, that aspect of defendants' demurrer was also wrongfully sustained by the trial court.\textsuperscript{120}

2. Legal Rationale of Siegel v. American Savings and Loan Association

a. Express Preemption

In finding against preemption, the court held that the FHLBB regulation concerning the preemptive effect of the exercise of the FHLBB's authority\textsuperscript{121} did not apply to the question at issue. The court reasoned the FHLBB had not exercised its authority by promulgating a specific regulation concerning reconveyance fees and, therefore, no federal regulation existed to be preempted.\textsuperscript{122} The court proceeded to

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.} at 747.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at 748-50.
  \item \textsuperscript{118} \textit{Id.} at 750-52.
  \item \textsuperscript{119} \textit{Id.} at 752-53.
  \item \textsuperscript{120} \textit{Id.} at 754.
  \item \textsuperscript{121} 12 C.F.R. § 545.2 (1990). \textit{See supra} notes 35, 38 & 39 and accompanying text.
  \item \textsuperscript{122} Siegel, 258 Cal. Rptr. at 748.
\end{itemize}
declare that the FHLBB regulations concerning initial loan charges\textsuperscript{123} and the collection of advance payments of taxes and insurance premiums\textsuperscript{124} were not applicable to the case as neither mentioned reconveyance fees. The court concluded that it would not find express preemption unless it was clearly stated in the regulation or if the FHLBB had declared its intent to expressly preempt all state law in that area.\textsuperscript{125}

b. \textit{Implied Preemption}

The court disagreed with defendants' "occupation of the field" argument concerning implied congressional intent to preempt the field of regulating federal savings and loan associations. Instead, the court held that the comprehensiveness of regulation in a given field by itself was not sufficient to establish implied preemption.\textsuperscript{126} Additionally, the court reasoned that the United States Supreme Court had limited the application of the implied preemption doctrine by narrowly defining the field preempted.\textsuperscript{127}

c. \textit{Preemption by Conflict Between State and Federal Law}

Similar to its express preemption analysis, the court reasoned that there could be no conflict between California law and federal regulations because there was no specific federal regulation concerning reconveyance fees. Thus, there was no regulation with which California law could conflict.\textsuperscript{128} Additionally, the court declared the reconveyance fees at issue were neither initial charges nor advance payments of taxes or insurance premiums. Therefore, the FHLBB regulation was inapplicable.\textsuperscript{129} In conclusion, the court provided that any such conflict between state and federal law must be actual and unavoidable, not merely possible.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{123} 12 C.F.R. § 545.32(b)(5) (1990).
\item \textsuperscript{124} 12 C.F.R. § 545.32(b)(6) (1990). \textit{See, e.g., supra note 91.}
\item \textsuperscript{125} Siegel, 258 Cal. Rptr. at 749-50.
\item \textsuperscript{126} Id. at 750.
\item \textsuperscript{127} Id. at 751 (quoting Derenco v. Benjamin Franklin Fed. Sav. & Loan Ass'n, 577 P.2d 477, 484 (Or. 1978)).
\item \textsuperscript{128} Siegel, 258 Cal. Rptr. at 752.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. (quoting Askew v. American Waterways Operations, 411 U.S. 325, 336-37 (1973)).
\end{itemize}
The court’s decision is seemingly in conflict with the broad grant of authority Congress gave the FHLBB regarding regulation of federal savings associations.131 The legal problem presented by the Siegel decision and addressed in Section III below arises from this conflict.

III. STATEMENT OF THE PROBLEM

Given the current crisis in the nation’s savings and loan industry, all aspects of this industry will come under increasing scrutiny and regulation at both the federal and state levels. As this regulation increases, it becomes more important for the interrelationships between the federal and state systems to be as uniform and consistent as possible. Derenco, Kaski and Siegel are examples of litigation which would not have been necessary if the systems were uniform relative to the specific issues addressed in each case.

The remainder of this comment will utilize the United States Supreme Court’s conventional tests to analyze the pre-emption issue relating to the collection of deed of trust reconveyance fees addressed in Siegel from a perspective which encourages a uniform, efficient and mutually beneficial interrelationship between the federal and state regulatory systems.

IV. ANALYSIS

This comment considers which regulatory system controls the actions of a savings and loan association concerning the collection of deed of trust reconveyance fees. The principle case which resolved this issue in California is Siegel v. American Savings & Loan Association.132 Siegel held that in the absence of express FHLBB intent to preempt a specific area of a savings and loan association’s operations, the state’s regulations control. This section of the comment will present alternative arguments to that conclusion.

131. See supra notes 35-43 and accompanying text.
A. Preemption Analysis

1. Is There a Conflict Between State and Federal Law?

This threshold question concerning the conflict between the state and federal laws is answered in the affirmative in either of two situations. First, a conflict is deemed to exist if it is impossible to concurrently comply with both the federal law and the state law. Alternatively, a conflict is found to exist if the state law stands as an obstacle to the accomplishment of a federal purpose. In either situation, the supremacy clause of the United States Constitution dictates that the federal law is the “supreme law of the land” and should control.

In Siegel, the court held there was no specific federal regulation concerning the collection of reconveyance fees so there could be no conflict between the state and federal laws. If the court’s conclusion that there is no federal regulation governing this area is correct, then its holding is valid. However, an argument can be made that there is a federal regulation directly on point which would yield a conflict.

Presently, there exists a FHLBB regulation which provides that an association can require a borrower to pay necessary initial charges connected with making a loan and other necessary incidental services and costs. It is reasonable to interpret this regulation to include the charging of the reconveyance fee as a necessary incidental cost because the reconveyance of the deed of trust when the loan is repaid is a prerequisite for the loan to be concluded. The charging of such a “necessary incidental cost” is permissible under the regulation.

Interpreting the FHLBB regulation in such a manner is in contrast with the interpretation of California Civil Code section 2941, which prohibits the collection of a reconveyance fee up to thirty days or more before the date the loan is repaid. These differing interpretations would arguably evidence a con-

135. U.S. CONST. art. VI, cl. 2. See supra note 59.
136. Siegel, 258 Cal. Rptr. 746, 752.
138. Id.
Conflict between the state law and federal regulation. This conflict would exist because it is impossible to comply with both the federal regulation, which permits charging a reconveyance fee at the inception of the loan, and the state law, which prohibits charging such a fee prior to thirty days before the loan is due. In that situation, the Constitution's supremacy clause would apply and the federal regulation would control.

Similarly, the court's interpretation of California Civil Code section 2941 can be viewed as a hindrance to the accomplishment of the federal purpose of the FHLBB in promoting uniform and consistent laws. Its interpretation contradicts the FHLBB's allowance of the collection of initial loan charges that relate to necessary incidental services and costs of the loan. A state ban on the collection of such costs would present an obstacle to the federal regulation which permitted their collection.

The above analysis offers a different, but reasonable, interpretation of the FHLBB regulation which would yield a completely different result from that in Siegel. It is possible to find that a conflict exists between the California statute and the FHLBB regulation both concerning the impossibility of complying with both the law and the regulation and the obstacle the state law presents to the achievement of the FHLBB's federal purpose of promoting uniform regulations for savings and loan associations.

2. Express Preemption

When Congress' or a federal regulatory agency's intent to preempt a certain field is explicitly stated in the statute or regulation, preemption is compelled. In this case, the FHLBB does expressly state that the exercise of its authority is preemptive of any state law purporting to address the subject of the operations of a federal savings and loan association. The Siegel court interpreted this provision very literally when it held that the FHLBB had not exercised its authority relative to

139. Siegel, 258 Cal. Rptr. at 747.
140. See supra note 34.
141. See supra note 34.
reconveyance fees as it had not promulgated a regulation specifically concerning reconveyance fees.\textsuperscript{144}

A close examination of the FHLBB regulation concerning preemption reveals that its first sentence provides that the Board has plenary and exclusive authority to regulate all aspects of the operations of federal savings and loan associations.\textsuperscript{145} It is true that there currently is no regulation which specifically governs reconveyance fees. However, FHLBB regulation 545.32(b)(5)\textsuperscript{146} can be interpreted to include reconveyance fees as permissible initial loan charges. It is reasonable to conclude that the FHLBB has exercised its authority to regulate reconveyance fees. This exercise of the FHLBB's authority certainly makes the FHLBB's expressed intent to preempt, found in regulation 545.2, applicable. Therefore, it is reasonable to conclude that express preemption is present and the state is precluded from regulating the area concerning the collection of reconveyance fees.

Although the FHLBB's regulations do state that the Board has the authority to regulate all aspects of the savings and loan industry, the United States Supreme Court takes a conservative view in finding such express preemption. \textit{Derenco v. Benjamin Franklin Federal Savings & Loan Association}\textsuperscript{147} and \textit{Kaski v. First Federal Savings & Loan Association}\textsuperscript{148} provide examples

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{144} \textit{Siegel}, 258 Cal. Rptr. at 748.
\item\textsuperscript{145} 12 C.F.R. § 545.2 (1990), which provides in full:
\begin{quote}
The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association.
\end{quote}
\textit{See also supra} note 35 and accompanying text.
\item\textsuperscript{146} \textit{Siegel}, 258 Cal. Rptr. at 752. \textit{See also supra} notes 36, 136 and accompanying text. Subsection (b)(5) provides:
\begin{quote}
Except as provided in Section 563.35(d) of this chapter, an association may require a borrower to pay necessary initial charges connected with making a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closing, and other necessary incidental services and costs, in such reasonable amounts as the board of directors may fix. The association may collect the charges from the borrower and pay the persons rendering services.
\end{quote}
\item\textsuperscript{147} 577 P.2d 477 (Or. 1978). \textit{See supra} notes 91-97 and accompanying text.
\item\textsuperscript{148} 240 N.W.2d 367 (Wis. 1976). \textit{See supra} notes 98-103 and accompanying text.
\end{enumerate}
\end{footnotesize}
of how state courts have decided the issue. These cases demonstrate that some jurisdictions hold that the FHLBB regulations completely occupy the field of regulation of federal savings and loan associations while other jurisdictions do not. The Siegel court correctly concluded that express preemption did not exist solely because of the general statement in the FHLBB regulation. However, the argument presented above, which suggests that regulation 545.32(b)(5) includes reconveyance fees as permissible loan charges, compels a conclusion that the FHLBB did exercise its authority relative to reconveyance fees.

3. Implied Preemption

a. Occupation of the Field

Perhaps the strongest argument for preemption in Siegel is implied preemption. The Supreme Court permits Congress' or a regulatory agency's intent to supersede state law in the absence of explicit preemptive language where the federal regulation of the regulated area is so pervasive that it is reasonable to conclude that the body intended to "occupy the field."¹⁴⁹ This occupation of the field leaves no room for the states to supplement the scheme of federal regulation in that area.¹⁵⁰

The appellate court in Siegel refused to hold that the federal government exclusively occupied the field relating to regulating savings and loans. It utilized the argument that the comprehensiveness of the federal regulations alone was not sufficient to establish the federal government's intent to implicitly preempt the area.¹⁵¹ However, the court ignored the fact that in this situation there is the FHLBB's additional expression of its intent to preempt found in section 545.2 of Title 12 of the Code of Federal Regulations.¹⁵² This expression concerning the FHLBB's authority in regulating the savings and loan industry when combined with the detailed scope of feder-

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¹⁴⁹. See supra note 73 and accompanying text.
¹⁵¹. Siegel, 258 Cal. Rptr. at 750.
al regulation which exists in the field leads to a very reasonable inference of a federal intent to completely occupy the field.

b. Dominant Federal Interest

Alternatively, another situation may arise which can allow a court to imply preemption by a federal law or regulation. In this situation, the federal government regulates a field where the federal interest is so dominant that the federal system of regulation precludes the enforcement of state laws concerning the same subject.\(^5\)

The Siegel court also rejected this argument when proffered by defendant Citicorp. The court stated the federal interest in the case was not great since the main actions involved were for breach of contract and fraud. The court differentiated between the federal interest present in two cases cited by defendant as precedent and the federal interest present in Siegel. The court held that the federal interest in the other cases, which concerned discrimination in real estate sales and a jurisdictional question in a common law action, was far greater than that interest present in Siegel concerning breach of contract and fraud actions.\(^5\)

It is possible to argue that the court oversimplified the situation. While Siegel did involve common law claims including breach of contract, fraud and breach of agency duty, these claims do not exist in a vacuum, unaffected by any possible contrary federal regulations. Rather, it is quite possible that an applicable federal regulation could in some way affect one or more of the twelve claims brought by plaintiffs since the FHLBB regulations are quite comprehensive and far-reaching in their effect on the savings and loan industry. If any of the claims were affected by any regulation, the federal interest would be increased and a finding of implied preemption based on the dominant federal interest principle would be more likely.

Additionally, the court based part of its judgment on California Civil Code section 2941, which prohibits the collection

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153. Rice, 331 U.S. at 230 (citing Hines v. Davidowitz, 312 U.S. 52 (1941)).
of reconveyance fees up to thirty days or more before the date the loan is repaid.\textsuperscript{155} A reasonable interpretation of FHLBB regulation 545.32(b)(5), permitting the collection of necessary initial charges connected with making a loan, including those incurred for necessary incidental services,\textsuperscript{156} would conflict with Civil Code section 2941’s prohibition. It is reasonable to conclude that the potential conflict between a federal regulation and the state statute raises the level of federal interest and compels a finding of implied preemption based upon the dominant federal interest principle.

Finally, the argument that the federal government and, more particularly, the FHLBB has a significant interest in the financial health and well-being of savings and loan associations is pertinent to this situation. The current crisis in the savings and loan industry has heightened the FHLBB’s interest in controlling home loans. Any judicial decision affecting the federal government’s authority in regulating any savings and loan association now involves an important federal interest.

4. Summary

The previous discussion concerning the preemption issue addressed in \textit{Siegel} utilized arguments and interpretations which the appellate court either rejected or did not consider. Given the facts of the case before it and the arguably egregious acts of the defendant savings and loan institution,\textsuperscript{157} the court may have felt that the more just and equitable decision was to rule in the manner it did, namely, against preemption and in favor of the plaintiffs.

However, the court could have reached its decision pursuant to a different theory proffered by the plaintiffs, such as breach of contract, since twelve causes of action were pled.\textsuperscript{158} If the court desired to rule for plaintiffs, the alleged mishan-
dling of the situation by the defendant savings and loan would have supported that result without consideration of the preemption issue.

It appears that the court may have overreacted in arriving at its equitable conclusion. While it did reach a reasonable decision in interpreting the FHLBB regulations, the contrary argument also possessed merit. This contrary position suggested that the court did not reasonably interpret the FHLBB regulations in reaching its conclusion that federal regulations concerning the collection of reconveyance fees did not exist and could not be implied to exist despite some arguably clear language that would allow for such an implication. Once the court decided there was no specific regulation concerning reconveyance fees, there could be no preemption of the state law on the matter of reconveyance fees.

Similar arguments can be made concerning the court's refusal to apply the express preemption statement at the beginning of the FHLBB regulations to Siegel. As stated above, the court's decision not to interpret the FHLBB's authority to regulate all aspects of the savings and loan industry is reasonable given its reading of that statement. However, a contrary interpretation cannot be considered unreasonable.

B. Comparison of Siegel to De La Cuesta

The defendants in Siegel did not appear rely on De La Cuesta in their arguments. Suprisingly, the court relied on dicta from that case to support its reasoning in rejecting the "occupation of the field" theory of implied preemption. However, De La Cuesta is not a strong a precedent for this conclusion.

The major difference between the facts of these two cases is that De La Cuesta involved a FHLBB regulation which included a separate preamble stating that the due-on-sale practices of federal savings and loan associations were governed exclusively by federal law. That preamble further stated that a federal association was not subject to any conflicting state law impos-

159. See supra note 157 and accompanying text.
161. Siegel, 258 Cal. Rptr. at 750.
The reconveyance fee issue addressed in Siegel did not have its own regulation, let alone a separate, explicit preamble concerning its preemptive effect. The existence of the preamble in De La Cuesta is damaging to the argument concerning express preemption because it can be stated that if the FHLBB can issue such a proclamation for one type of regulated issue, it is able to determine what other issues should similarly have such preemptive effect. Therefore, those that are not accompanied by such statements are not intended to be preemptive. The damage of this aspect of De La Cuesta can be mitigated if the argument concerning the express preemption of FHLBB regulation 545.2 is accepted and applied to reconveyance fees.

C. Analysis of California Civil Code Section 2941(e)

No matter which interpretations are given to the FHLBB regulations, the entire preemption issue is moot unless there is either a conflict between state law and the federal regulation, express preemption or implied preemption, i.e., occupation of the field by the federal government. In Siegel, the appellate court interpreted California Civil Code section 2941(e) in a manner which provoked a conflict between the two sets of laws. The court then held that there could be no conflict because there was no federal regulation specifically concerning the collection of reconveyance fees and, therefore, no regulation with which the statute could conflict.

If the court's interpretation of the FHLBB regulations is accepted and there is no federal regulation concerning the collection of reconveyance fees, then the Civil Code section would control. However, the court's interpretation of section 2941(e) is questionable. It states that section 2941 does not allow for the collection of the reconveyance fee up to thirty days or more before the date the loan is repaid. In effect, the court ignored the specific language of section 2941(e) which provides that the trustee or lender may charge a fee to the borrower for all services rendered in connection with the preparation and recordation of a reconveyance or request for reconveyance. More importantly, the statute provides that such

163. Id.
164. Siegel, 258 Cal. Rptr. at 747.
fee may be made payable in advance of the performance of any services required to reconvey the deed to the borrower.\textsuperscript{165}

Also, no prior amendment to that statute contained any language similar to that utilized by the court. In fact, subsection (e) concerning the collection of reconveyance fees was added to the statute by the 1978 amendment.\textsuperscript{166}

The effect of the court's erroneous interpretation on its ultimate decision may be negligible as the claims for fraud and breach of contract, among others, were probably valid despite the savings and loan association's authority to collect the reconveyance fees. However, such an interpretation does have an impact on the preemption analysis the court conducted given its interpretation of the FHLBB regulations.\textsuperscript{167}

V. PROPOSAL

As the previous sections of this comment have illustrated, the issue addressed in \textit{Siegel} can be simplified into a rather basic concept: What regulatory system has ultimate control over the actions of a savings and loan association concerning the collection of deed of trust reconveyance fees?

\textit{Siegel} held that in the absence of express FHLBB intent to preempt that specific area of a savings and loan association's operations, the state has the control. This comment has argued that after a reasonable interpretation of the present FHLBB regulations, one should conclude that the federal government has such control, especially in light of the current malaise in that industry.

However, since \textit{Siegel} has already been decided, one must focus on what can be done to avoid a similar problem in the future. The most effective way to remedy this problem is to insert express preemptive clauses into the various areas of a savings and loan operations which are regulated by the FHLBB. The role of such clauses is evidenced by the impact of the FHLBB's due-on-sale clause regulation which directly affected the United States Supreme Court's ruling that the feder-

\textsuperscript{165} CAL. CIV. CODE § 2941(e) (Deering 1986).
\textsuperscript{166} \textit{id.} § 2941.
\textsuperscript{167} See supra notes 35-37, 121-30 and accompanying text.
al regulation preempted the California Supreme Court's decision in *Wellenkamp.*

Such language could be positioned prior to each portion of the regulation the FHLBB desires to preempt and could provide:

> It was and is the Board's intent to have the collection of deed of trust reconveyance fees in advance of the actual reconveyance of the deed as practiced by a federal savings and loan association governed exclusively by federal law and this regulation. Federal savings and loan associations shall be governed and controlled by federal regulations and shall not be bound by or subject to any conflicting state law or regulation which imposes different requirements concerning the collection of such reconveyance fees. No federal savings and loan association may attempt to avoid the limitations imposed by this regulation on the ground that such avoidance of limitations is permissible under a state law or regulation.

By implementing such language, the FHLBB would explicitly state its intent concerning preemption and any attempted argument against the effect of the underlying regulation would be lost based upon an express preemption theory. This preamble to the regulation would facilitate a court's construction of the regulation. The Supreme Court has held that "deference is clearly in order" when construing a preamble such as that recommended here in connection with an underlying regulation.

**VI. CONCLUSION**

This comment has examined the narrow issue of whether state regulation of the collection of deed of trust reconveyance fees is preempted by Federal Home Loan Bank Board regula-

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169. This proposed preamble is modeled after the preamble found at 41 Fed. Reg. 18286, 18287 (1976). That preamble introduced the FHLBB regulation formerly located at 12 C.F.R. § 545.8-3(f) regarding federal preemption of due-on-sale clauses, see supra note 80, and set forth in *De La Cuesta*, 458 U.S. at 158.

170. *De La Cuesta*, 458 U.S. at 158 n.13 (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)).
This topic is important at the present time because it affects many people in California due to the large number of residential real estate transactions which occur in that state. Also, with the current crisis in the savings and loan industry, increased state and federal regulation is likely and a similar issue may recur in another state as the quantity of federal regulation increases.

This comment explored the background of both California and federal regulation in the area, with an emphasis on the regulation of savings and loan associations. It also examined the principle of federal preemption and the varieties of the principle which exist. Most importantly, this comment examined a recent California case which decided the issue in question and analyzed that court's decision in light of several arguments which either were not raised or were prematurely rejected by the court.

Finally, this comment provided a regulatory solution concerning express preemption of specific areas of savings and loan operations. This solution would simplify such issues which may arise with the increased regulation and the potential overlapping of state and federal regulatory systems.

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