

No. 81896-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others
Similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners sued Chevy Chase Bank, F.S.B. (“Chevy Chase”) in a putative class action for \$22.00 in fees. Having had their claims rejected twice below, they argue that this \$22.00 dispute is an issue of substantial public interest requiring further review. Superior Court Judge Richard Eadie properly dismissed the Complaint under CR 12(b)(6), and the Court of Appeals affirmed the dismissal in a well-reasoned published decision, *McCurry v. Chevy Chase Bank, F.S.B.*, No. 60075-3-I, 2008 WL 2231460 (Wn. App. Div. I, June 2, 2008) (“Opinion”). This case does not raise any novel or substantial issue of law and does not conflict with any opinion of this Court. Review should be denied.

Petitioners complain that Chevy Chase charged \$20.00 for fax services and \$2.00 for notary service (the “Accumulated Fax Fee” and the “Notary Fee”), itemized on a Payoff Statement for their home loan. Petitioners reviewed these charges and paid them in full without objection, but sued some two years later. Judge Eadie and the Court of Appeals followed authority from across the country and held that Petitioners’ state law claims are preempted by comprehensive federal regulations governing the lending operations of federal savings banks.

Petitioners give no persuasive reasons why this straightforward holding merits review by this Court. They argue that the holding of the

Court of Appeals conflicts with federal cases. Such a conflict would not state a ground for review. Moreover, there is no conflict. The Court of Appeals reviewed Petitioner's off-point cases, and expressly found that courts routinely dismiss state law claims regarding the type of fees challenged by Petitioners:

every currently valid published judicial opinion – with the exception of *Konynebelt* – and OTS itself conclude that fees of the type at issue in this case are ‘loan-related fees’ . . . and any claim alleging the illegality of such fees ‘is preempted’ . . . [and] ‘that is the end of the case.’

Opinion at *6 ¶ 20 (citations omitted).

Petitioners further assert that the dismissal of their Washington Consumer Protection Act (“WCPA”) claim as preempted raises a substantial issue of public concern under RAP 13.4(b)(4), because the WCPA embodies a public policy. Pet’rs’ Br. at 14, 17. But the WCPA does not apply to the sort of heavily-regulated conduct at issue. And no public interest is served when a plaintiff asks the Court to oversee a federal savings bank’s fees and disclosures contrary to federal regulation.

Finally, Petitioners assert that the Court of Appeals required more detailed pleading than required by this Court’s precedent. To the contrary, the Court of Appeals applied the current Washington standard for Rule 12(b)(6) motions and expressly declined to follow the more stringent federal standard of *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965

(2007). Opinion at *1 ¶¶ 3-5. If this Court were to accept review of this case on other grounds, however, it should take the opportunity to adopt *Twombly*, under which Petitioner's claims would even more surely fail.

II. RESTATEMENT OF PETITIONER'S PROPOSED ISSUES

1. Is there a ground for review, where the Court of Appeals properly affirmed that the federal Home Owners' Loan Act and regulations preempt state law claims regarding Chevy Chase's loan-related fees?
2. Is there a ground for review, where the Court of Appeals properly applied the established Washington standard for dismissal under CR 12(b)(6)?

III. STATEMENT OF ADDITIONAL ISSUES IN THE EVENT REVIEW IS GRANTED

3. Should Washington adopt the same standard for dismissal under CR 12(b)(6) that is now applied under Fed. R. Civ. P. 12(b)(6)?
4. Should this case be dismissed on any of the alternate grounds considered but not reached by the Court of Appeals, including:
 - a. Petitioners' contract permits the fees at issue;
 - b. Petitioners' claims fail under the voluntary payment doctrine;
and
 - c. Petitioners fail to plead necessary elements of a Consumer Protection Act claim?

IV. STATEMENT OF THE CASE

A. Petitioners Contract Does Not Prohibit Incidental Fees.

Petitioners obtained a home loan from Chevy Chase, secured by a deed of trust ("DOT"). CP 4, 12-31. The DOT expressly requires Petitioners to pay any "Trustee's fee for preparing the reconveyance" of their home upon payoff. CP 24 (Compl., Ex. A ¶ 24). Although the DOT does not address specifically other costs of preparing for payoff, such as fax and notary fees, it states broadly that "the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee." CP 21 (Compl., Ex. A ¶ 14).

B. Petitioners Approved And Paid The Fees At Issue.

When Petitioners prepaid their loan in November 2004, they requested a statement of the amount they owed. CP 33. Chevy Chase provided a Payoff Statement that expressly disclosed the \$2.00 "Notary Fee" and \$20.00 "Accumulated Fax Fees." *Id.* Petitioners reviewed and approved the Payoff Statement "as to form and content," and paid it in full. *Id.* They do not allege that they questioned or contested the fees before paying them. *See* CP 5.

C. Petitioners' Claims Were Properly Dismissed As Preempted.

On April 12, 2006, almost two years after paying off their loan, Petitioners brought this suit. Petitioners attached the DOT and Payoff Statement to the Complaint. CP 11-33. Petitioners claimed breach of contract and a WCPA violation on the sole ground that “[t]he Deeds of Trust and mortgages do not permit Defendant to charge fees, other than recordation costs and Trustee fees.” CP 7-8 (Compl. ¶ 27).

Chevy Chase moved under CR 12(b)(6) to dismiss the Complaint. CP 40-68. On May 11, 2007, after oral argument, Judge Eadie granted Chevy Chase’s motion, holding that Petitioners’ claims were preempted by 12 C.F.R. § 560.2, a regulation promulgated by the Office of Thrift Supervision (“OTS”) under the authority granted to OTS by the Home Owners’ Loan Act, 12 U.S.C. § 1462 *et seq.* (“HOLA”). CP 262-63. This regulation provides:

[T]o enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), **OTS hereby occupies the entire field of lending regulation for federal savings associations** For purposes of this section, ‘state law’ includes any state statute, regulation, ruling, order or **judicial decision**. 12 C.F.R. § 560.2(a) (emphasis added).

Petitioners appealed. On June 2, 2008, the Court of Appeals affirmed the dismissal in a published opinion. Petitioners now seek review under RAP 13(b)(1) and (4).

V. ARGUMENT

Petitioners do not satisfy this Court's standards for discretionary review. Petitioners ask this Court to overrule the Court of Appeals and shoehorn state law causes of action and disclosure rules for federal savings banks into the network of federal disclosure laws that already apply to these banks' mortgage documents. Petitioners assert, without analysis, that this goal satisfies the standards of RAP 13.4(b)(4). It does not, because there is no substantial public interest at stake in changing the federal scheme piecemeal, and to do so would put Washington law squarely at odds with HOLA, the OTS regulations, and case law applying them to these sorts of claims.

A. The Supposed Conflict With Federal Decisions Presents No Ground For Review And Does Not Exist.

1. Conflict With Federal Court Decisions, Without More, Does Not Satisfy RAP 13.4(b).

RAP 13.4(b) directs this Court's power of review to matters of special import to Washington: direct conflict within Washington's court system, "significant" questions of constitutional law, or matters of "substantial" public interest that for some reason cannot be resolved at a lower level. None of these factors apply here.

Petitioners claim this appeal satisfies RAP 13.4(b)(4) – requiring an issue of "substantial public interest that should be determined by the

Supreme Court” – because the Opinion supposedly conflicts with U.S. Supreme Court cases on preemption. Pet’rs’ Br. at 13-14. This Court has never suggested that differences from the federal courts require this Court’s attention. In fact, RAP 13.4(b) implies exactly the opposite: it expressly provides for discretionary review where a Court of Appeals decision conflicts with an opinion of the Washington Supreme Court or the Washington Court of Appeals, but does not mention the federal courts at all. *See* RAP 13.4(b)(1), (2). This Court should not accept Petitioners’ invitation to write in a new ground for review.

2. There Is No Substantial Public Interest At Stake.

There is no “substantial public interest” at stake in this \$22.00 dispute, especially because the Opinion of the Court of Appeals is so narrow. Petitioners suggest that the Opinion may bar all State claims against federal savings banks, painting a picture of homeowners helpless to stop lenders from extortion or even “battery.” Pet’rs’ Br. at 11. But the Court of Appeals properly focused in on “the fax fees and notary fees,” which it held “are precisely the type of ‘loan-related fees’” expressly reserved for federal regulation by OTS. Opinion at *2 ¶ 6. This issue is therefore far less broad, and less dramatic, than Petitioners suggest.

Moreover, Petitioners ignore the extent of protections afforded to consumers under the very federal scheme they ask this Court to displace.

As OTS noted when it promulgated its preemptive regulation:

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. In addition, in those instances where OTS has detected a gap in the federal protections provided to borrowers, the agency has promulgated regulations imposing additional consumer protection requirements on federal thrifts.

61 Fed. Reg. 50951, 50965-50966 (Sept. 30, 1996) (footnotes omitted).

Washington's public interest does not mandate a need for this Court to intervene in this pervasive federal scheme.

3. The Court Of Appeals Opinion Does Not Conflict With Federal Case Law.

Moreover, Petitioners' fundamental premise is flawed: there is no conflict between the U.S. Supreme Court opinions they cite and the Court of Appeals' reasoning in dismissing their case. They cited most of these inapplicable cases before the Court of Appeals, which correctly rejected their argument and interpreted the OTS regulation in line with the weight of authority on this distinct issue.

a. OTS Regulations Expressly Preempt Judicial Decisions Controlling Loan-Related Fees.

In 1933, Congress enacted HOLA, creating a new kind of financial

institution – federal savings banks and thrifts. Congress intended to restore public confidence in financing at a time when 40 percent of all residential home loans were in default. *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002). HOLA was a “radical and comprehensive response” to “inadequacies of the existing state systems.” *Conference of Fed. Sav. & Loan Ass’ns v. Stein*, 604 F.2d 1256, 1257 (9th Cir. 1979), *aff’d*, 445 U.S. 921 (1980). Congress authorized federal regulation to create practices for the new federal system determined by “the Board – not any particular State.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 161-62 (1982).

OTS therefore promulgated comprehensive regulation that “occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. § 560.2(a) (emphasis added). In particular, HOLA regulation expressly preempts “judicial decision[s]” that purport to limit a federal savings bank’s “terms of credit,” including “adjustments to . . . payments due” and “the circumstances under which a loan may be called due and payable,” or to control the bank’s “[l]oan-related fees, including without limitation . . . prepayment penalties [and] servicing fees.” 12 C.F.R. § 560.2(a), (b)(4), (b)(5). OTS expressly envisages preemption of contract claims; it exempts from preemption only those contract claims that affect lending operations incidentally. 12 C.F.R.

§ 560.2(c)(1).

Chevy Chase is a federal savings bank regulated by OTS. CP 104. Yet Petitioners seek a judicial decision prohibiting and seeking recovery of Chevy Chase's fees charged in connection with prepayment of its loan absent further disclosure in its mortgage documents – exactly what HOLA preempts. The Illinois Court of Appeals held as to this exact question that a contract claim based on a federal savings bank's alleged failure to disclose fees for preparing and faxing a payoff statement was preempted under 12 C.F.R. § 560.2, because a payoff statement is “an integral part of the lending process,” under OTS guidance. *Moskowitz v. Wash. Mut. Bank, F.A.*, 768 N.E.2d 262, 265-66 (Ill. App. 2002) (quoting 2000 OTS Op., No. P-2000-6 (April 21, 2000)) (in the record at CP 136-38).

b. The Court of Appeals Opinion Does Not Conflict With United States Supreme Court Decisions.

Ignoring the OTS regulations at issue, Petitioners erroneously rely on U.S. Supreme Court decisions interpreting entirely different laws for the proposition that federal law cannot preempt state law contract claims – even though 12 C.F.R. § 560.2(c) clearly envisages preemption of contract claims. Actually, federal preemption of contract claims is commonplace. *See, e.g., Santa-Rosa v. Combo Records*, 471 F.3d 224, 227 (1st Cir. 2006) (contract claim preempted by Copyright Act); *Moskowitz*, 768 N.E.2d at

266 (same under HOLA regulations); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 763, 881 P.2d 216 (1994) (same under ERISA). What Petitioner's cases actually show is that the scope of preemption by any particular statute depends on Congress's intent.

American Airlines, Inc. v. Wolens, 513 U.S. 219, 229 n.6, 232 (1995), cited in Pet'rs' Br. at 7-8, for example, expressly reaffirms that some federal statutes, including ERISA and the Interstate Commerce Act, do preempt certain contract claims. Distinguishing *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), the Court reasoned that although it served the purpose of the Interstate Commerce Act to insulate certain rail carriers from related "obligations imposed by contract," the purpose of the Airline Deregulation Act was to expose airlines to the risks of free competition – including consumer contract actions. *See id.* at 229 n.6, 230.¹

Similarly, *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), does not preclude federal preemption of contract claims at all. *Volt* merely holds that because the Federal Arbitration Act was

¹ *Wolens* also emphasized that the Airline Deregulation Act removed the Government's power to fix rates and expressly preserved common-law remedies. 513 U.S. at 230, 231-32. In contrast, the HOLA regulations were intended to regulate every aspect of lending operations at federal savings banks from "cradle to corporate grave." *de la Cuesta*, 458 U.S. at 145 (citation omitted).

intended to protect the *right to contract to arbitrate*, enforcing a choice of law provision supports the purpose of Congress. *Id.* at 477-78.²

Petitioners' purported "holding" from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), did not command a majority of that Court, but only a plurality – and even the plurality conceded that contract claims could have been preempted if the statute had covered “liability” imposed under state law” instead of “requirement[s] or prohibition[s]” of state law. *Id.* at 526 n. 24 (plurality op.). The OTS regulations are exactly what the *Cipollone* plurality’s hypothetical envisioned: the OTS regulations free federal savings banks to extend credit and set terms “**without regard** to state laws” including judicial decisions, that purport to “regulate **or otherwise affect** their credit activities.” 12 C.F.R. § 560.2(a) (emphasis added).³

These cases affirm that “[t]he purpose of Congress,” as expressed in the structure and purpose of the statute, is “the ultimate touchstone” of preemption analysis. *Cipollone*, 505 U.S. at 516 (for a majority) (quoting

² *Volt* also held that the Federal Arbitration Act “does [not] reflect a congressional intent to occupy the entire field of arbitration.” 489 U.S. at 477. In contrast, the HOLA regulations expressly “occup[y] the entire field.” 12 C.F.R. § 560.2(a).

³ Moreover, our Court of Appeals has held that *Cipollone* does not apply where the claim arises from activity directly regulated by federal law. *See Didier v. Drexel Chem. Co.*, 86 Wn. App. 795, 803, 938 P.2d 364 (1997)

Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)). The Court of Appeals' Opinion correctly analyzed the purpose and structure of HOLA and its enabling regulations, guided by case law that is directly on point.

As the Court of Appeals held, preemption analysis under the HOLA regulations must focus on whether the State law claims – be they statutory, contract, or tort – fall within the zone covered by 12 C.F.R. § 506.2(b). *See, e.g., In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 641 (7th Cir. 2007) (court must determine “which claims fall on the regulatory side of the ledger”) (quoted in Opinion at *3 ¶ 11).⁴ If they do, “that is the end of the case.” *Id.* at 643; *see also* 61 Fed. Reg. 50951, 50966 (Sept. 30, 1996) (“the analysis will end there; the law is preempted.”). *Wolens, Volt* and *Cipollone* do not dispense with the need for a claim-by-claim analysis conducted through the lens of Congressional intent regarding HOLA – and Petitioners do not identify any flaw in the preemption analysis conducted by the Court of Appeals.

c. The DOT Choice-of-Law Provision Does Not Change The Preemption Analysis.

Petitioners alternatively contend that the choice of law provision in

(distinguishing *Cipollone* and holding State law claims preempted under Federal Insecticide, Fungicide and Rodenticide Act).

⁴ Petitioner suggests that *Ocwen* permits any and all contract claims against a federal savings bank for its lending operations; but actually,

their Deed of Trust incorporates all Washington State law into the contract. Pet'rs' Br. at 12-13. This argument was considered and rejected by the Court of Appeals, and does not merit review.⁵ The choice of law provision simply means that federal law applies to the extent applicable (including federal laws as to preemption) and State law also applies to the extent applicable (which does not include State law that is preempted). *Flagg v. Yonkers Sav. & Loan Ass'n, FA*, 396 F.3d 178, 186 (2d Cir. 2005) (nearly identical choice of law clause does not avoid HOLA preemption). Petitioners would impermissibly read out applicable federal law altogether. In any event, this contract interpretation issue is not one of substantial public interest warranting review under RAP 13.4(b)(4).

B. Washington's Interest In Regulating Business Practices Does Not Without More Warrant Review Or Justify Ignoring Federal Preemption.

Petitioners argue that review is warranted by the State's interest in regulating deceptive conduct by business entities. Pet'rs' Br. at 17. Under this theory, any dismissal of a claim under the WCPA would be a matter of substantial public interest. This conclusion is not borne out by the text

Ocwen acknowledges that contract claims are preempted unless they only incidentally affect lending operations. *Ocwen*, 491 F.3d at 643.

⁵ Petitioners rely on the same single case they raised below, *Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812, 832-33 (Md. 2003). See Appellants' Br. at 23. *Wells* is not on point because the contract in that

of the WCPA, and such a view would greatly increase the number of appeals fit for this Court's review.

The WCPA on its face disclaims such pre-eminent power:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority.

RCW 19.86.170. The WCPA therefore does not even apply to lending activities "closely regulated under federal law." *Interstate Prod. Credit Ass'n v. MacHugh*, 61 Wn. App. 403, 410, 810 P.2d 535 (1991). Courts addressing the issue agree that fax fees and payoff statement fees are among the loan-related fees OTS regulates. See Opinion at *4-*6 (analyzing case law and OTS guidance).⁶ This WCPA claim has no special privilege or aptitude for review.

case incorporated specific State laws, whereas the Deed of Trust refers generally to "applicable" (i.e., not preempted) State law.

⁶ For the same reason, Petitioners' purported presumption against preemption does not apply; "pervasive federal regulation of the banking system" does preempt WCPA claims. *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 420, 865 P.2d 536 (1994). Other jurisdictions agree that no such presumption exists as to banking law, an area of traditional federal regulation. *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1002, 1004-5 (9th Cir. 2008) (affirming dismissal of unfair business practice claim as preempted by 12 C.F.R. § 560.2). Moreover, such presumptions have no force as to an express preemption provision. *Pinchot v. Charter One Bank, F.S.B.*, 792 N.E.2d 1105, 1110-11 (Ohio 2003).

C. The Court of Appeals Applied The *Conley* Standard For Dismissal Under CR 12(b)(6), So The Pleading Standard Does Not Present A Basis for Accepting Review.

Petitioners ask this Court to accept review because, in a footnote, the Court of Appeals correctly observed that they had not alleged that Chevy Chase charged a bogus fee. *See* Opinion at *7 n.1. Petitioners alleged that the DOT prohibited fax or notary fees under all circumstances. *See* CP 7-8 (Compl. ¶ 27). On appeal, Petitioners sought reversal on the new ground that their complaint might have survived preemption if they had instead alleged that the \$2.00 Notary Fee had been faked, and had asserted a claim based on that allegation. Appellants' Br. at 27. Petitioners never sought before the trial court to amend their complaint to assert such a claim, nor did they ever claim they had a basis for it within the strictures of CR 11.

The Court of Appeals' footnote did not set or suggest a new CR 12(b)(6) standard. The Court of Appeals used the exact standard Petitioners argued for: that the motion be denied unless there is "no state of facts" that would require relief. Opinion at *1 ¶ 5. As this Court has repeatedly held, "[e]ven our liberal rules of pleading require a complaint to contain direct allegations sufficient to give notice...of the nature of the plaintiff's claim." *Berge v. Gorton*, 88 Wash.2d 756, 762, 567 P.2d 187, 191 (1977) (claim dismissed under CR 12(b)(6) for failing to raise the

issue raised on appeal), *quoted in Champagne v. Thurston County*, 163 Wash.2d 69, 85, 178 P.3d 936, (2008); *and see Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (complaint that alleges insufficient facts under a cognizable legal theory should be dismissed).⁷

Under Petitioners' approach, CR 12(b)(6) motions would always be denied because any colorable ambiguity in the allegations "would always preclude ruling out facts from the set of possibly provable consistent facts." *Greenberg v. Compuware Corp.*, 889 F. Supp. 1012, 1016 (E.D. Mich. 1995). Such "emasculatation" of the rule would merely encourage unwarranted "fishing expeditions." *Id.*; *and see Oreman Sales, Inc. v. Matsushita Elec. Corp. of America*, 768 F. Supp. 1174, 1180 (E.D. La. 1991) ("plaintiff may no longer file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend its complaint in order finally to set forth well-pleaded allegations.") Petitioners' failure to satisfy the established standard does not contradict any Washington appellate case or raise any significant public issue.

Chevy Chase asked the trial court to follow the clarification recently set forth by the U.S. Supreme Court, that a complaint must set out

⁷ Petitioners failed to complete their citation to *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 358, 144 P.2d 276 (2006), in which this Court affirmed that the plaintiff had failed to give "fair notice of the basis for its claim": Petitioners instead quoted the dissent.

enough facts to state a claim that is plausible on its face. *Twombly*, 127 S. Ct. at 1974 (2007) (dismissing putative class action). The U.S. Supreme Court rejected the formulation used in Washington. *Id.* at 1968-69 (overruling *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Washington courts are guided by federal court interpretation of the Federal Rules in construing the parallel Civil Rules. *Sanderson v. Univ. Vill.*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999); and see *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119 n.2, 147 P.3d 1275 (2006) (Madsen, J., concurring) (“CR 12(b) mirrors its federal counterpart.”). While Petitioners’ claims fail under the *Conley* standard, *Twombly* would provide a further basis for affirming the order dismissing the complaint.⁸ Because the Court of Appeals declined to adopt the *Twombly* standard, however, Petitioners’ purported issue for review does not exist.

D. If Review Is Accepted, The Opinion Should Be Affirmed On Alternate Grounds Supported By The Record.

If this Court accepts review, it should affirm on alternate grounds. See *Bock v. State*, 91 Wn.2d 94, 586 P.2d 1173 (1978) (decision will be affirmed on appeal on any theory within the pleadings and proof). Even if

⁸ Adopting the *Twombly* standard would be beneficial in that it would cut down on fishing expeditions and unnecessary litigation costs by requiring that plaintiffs – especially plaintiffs in putative class actions – put forth at least plausible claims. See *Twombly*, 127 S. Ct. at 1966-67 (dismissal standard should take litigation costs into account).

it were not preempted, this case would fail on at least three grounds.

First, Petitioners' allegation that the DOT prohibits the Accumulated Fax Fee and Notary Fee is patently inconsistent with the text of the DOT (which they included in their pleadings): "In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee." CP 21 (Compl., Ex. A ¶ 14). The DOT thus reserves Chevy Chase's right to charge administrative fees, and Petitioners expressly waived their claims that the fees were prohibited.

Second, Washington has long recognized the voluntary payment doctrine, which bars recovery of voluntary payments, absent fraud or mistake. *See Hawkinson v. Conniff*, 53 Wn.2d 454, 458, 334 P.2d 540 (1959). A complaint that, like this one, alleges payments voluntarily made and does not allege fraud or mistake should be dismissed. *Putnam v. Time Warner Cable of Se. Wis., LP*, 649 N.W.2d 626, 637 (Wis. 2002).

Third, Petitioners do not plead and in fact contradict in their WCPA claim elements that must be pleaded, namely (1) an unfair or deceptive act or practice, (2) which causes injury to a party's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 784-85, 719 P.2d 531 (1986). Petitioners concede that the challenged fees were clearly set forth in, and related to the

preparation of, the Payoff Statement they asked for, *see* CP 4, so the fees were neither unfair nor deceptive; and Petitioners also fail to allege causation. *See* CP 7-8.

VI. CONCLUSION

The trial court ruled correctly when it dismissed Petitioners' lawsuit against Chevy Chase under CR 12(b)(6), and the Court of Appeals properly affirmed the dismissal. The decision of the Court of Appeals poses no constitutional issue and impairs no substantial public interest. It poses no new or novel theory and is not contrary to any Washington decision. Instead, the Court of Appeals simply follows the same reasoning as virtually every other court to have considered the issues. As such, review is not proper under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 1st day of August, 2008.

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FILED AS ATTACHMENT TO E-MAIL

APPENDIX

- A. *McCurry v. Chevy Chase Bank, F.S.B.*, No. 60075-3-I, 2008 WL 2231460 (Wn. App. June 2, 2008).
- B. 12 C.F.R. § 560.2 (2008).
- C. 61 Fed. Reg. 50951 (OTS Sept. 30, 1996)(excerpted as at CP 130-34).
- D. 2000 OTS Op., No. P-2000-6 (April 21, 2000).
- E. RAP 13.4 (2008).

McCurry v. Chevy Chase Bank, F.S.B.
Wash.App. Div. 1,2008.

Only the Westlaw citation is currently available.

Court of Appeals of Washington, Division 1.
Anne and Chris McCURRY, on behalf of them-
selves and others similarly situated, Appellants,
v.

CHEVY CHASE BANK, F.S.B., Respondent.
No. 60075-3-I.

June 2, 2008.

Background: Borrowers brought class action against home loan lender, alleging that fax and notary fees charged as a result of payoff of the loan violated the loan contract and Washington's Consumer Protection Act (CPA). The Superior Court, King County, Richard D. Eadie, J., granted lender's motion to dismiss. Borrowers appealed.

Holding: The Court of Appeals, Dwyer, J., held that borrowers' state law challenge to fax and notary fees was preempted by Office of Thrift Supervision (OTS) regulations.

Affirmed.

[1] Courts 106 ↪85(2)

106 Courts

106II Establishment, Organization, and Procedure

106II(F) Rules of Court and Conduct of Business

106k85 Operation and Effect of Rules

106k85(2) k. Construction and Application of Rules in General. Most Cited Cases
Courts interpret court rules as if they were statutes.

[2] Courts 106 ↪91(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k91 Decisions of Higher Court or Court of Last Resort

106k91(1) k. Highest Appellate Court. Most Cited Cases

Once the state Supreme Court decides an issue with respect to a state court rule, that interpretation is binding on all lower courts until it is overruled by the state Supreme Court.

[3] Pretrial Procedure 307A ↪624

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)4 Pleading, Defects In, in General

307Ak623 Clear and Certain Nature of Insufficiency

307Ak624 k. Availability of Relief Under Any State of Facts Provable. Most Cited Cases

A challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim. CR 12(b)(6).

[4] States 360 ↪18.3

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.3 k. Preemption in General. Most Cited Cases

Supremacy Clause provides the basis for federal preemption of state laws. U.S.C.A. Const. Art. 6, cl. 2.

[5] States 360 ↪18.9

360 States

360I Political Status and Relations

APPENDIX A

360I(B) Federal Supremacy; Preemption

360k18.9 k. Federal Administrative Regulations. Most Cited Cases

For purposes of determining Congressional intent, federal regulations enacted under authority granted by Congress are entitled to the same preemptive effect as a federal statute.

[6] Antitrust and Trade Regulation 29T ↪132

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk132 k. Preemption. Most Cited Cases

States 360 ↪18.84

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.83 Trade Regulation; Monopolies

360k18.84 k. In General. Most Cited

Cases

Office of Thrift Supervision preemption provisions would preempt any state statute or judicial decision purporting to regulate loan-related fees or the processing and servicing of mortgages, or any state statute or judicial decision that has more than an incidental effect on the lending operations of federal savings associations. 12 C.F.R. § 560.2.

[7] Building and Loan Associations 66 ↪2.1

66 Building and Loan Associations

66k2.1 k. Regulation in General. Most Cited Cases

States 360 ↪18.19

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.19 k. Banking and Financial or Credit Transactions. Most Cited Cases

For purposes of a federal preemption analysis, the key determination in any case where state law

claims challenge the legality of actions taken by federal savings associations against their customers is which claims fall on the regulatory side of the ledger and which, for want of a better term, fall on the common law side. 12 C.F.R. § 560.2.

[8] Building and Loan Associations 66 ↪2.1

66 Building and Loan Associations

66k2.1 k. Regulation in General. Most Cited Cases

Office of Thrift Supervision (OTS) opinion letters are not entitled to judicial deference; rather, interpretations contained in formats such as opinion letters are entitled to respect, but only to the extent that those interpretations have the power to persuade.

[9] Antitrust and Trade Regulation 29T ↪132

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk132 k. Preemption. Most Cited Cases

States 360 ↪18.84

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.83 Trade Regulation; Monopolies

360k18.84 k. In General. Most Cited

Cases

Fax fee and notary fee charged by home loan lender as a part of payoff of home loan were loan-related fees, and thus borrowers' state law challenge to the fees, under contract law and Washington's Consumer Protection Act (CPA), was preempted by Office of Thrift Supervision (OTS) regulations enacted under the federal Home Owners' Loan Act (HOLA). U.S.C.A. Const. Art. 6, cl. 2; 12 U.S.C.A. §§ 1461 to 1470; 12 C.F.R. § 560.2(b)(5); West's RCWA 19.86.010 et seq.

Appeal from King County Superior Court; Honorable Richard D. Eadie, J.

Roblin John Williamson, Williamson & Williams, Bainbridge Island, WA, Guy William Beckett, Beckett Law Offices PLLC, Seattle, WA, for Appellants.

Timothy J. Filer, Jeffrey S. Miller, Neil Armstrong Dial, Foster Pepper PLLC, Seattle, WA, for Respondent.

PUBLISHED OPINION

DWYER, J.

*1 ¶ 1 In this case we are asked to decide whether federal regulations preempt certain state law claims made against a home loan lender. Anne and Chris McCurry appeal the trial court's dismissal of their putative nationwide class action against federally chartered savings bank Chevy Chase Bank, F.S.B. Chevy Chase charged the McCurrys \$20 in "Accumulated Fax Fees" and a \$2 "Notary Fee" as a result of the McCurrys' payoff of a home loan made to them by Chevy Chase. In a "Payoff Statement" issued to the McCurrys, Chevy Chase stated that the McCurrys' "[p]ayoffs cannot be processed unless the 'Total Amount Due Chevy Chase' [including the fax and notary fees] is remitted."

¶ 2 The McCurrys' complaint alleges that these fees breached Chevy Chase's contract with the McCurrys (i.e., the deed of trust securing their loan), unjustly enriched Chevy Chase, and violated Washington's Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court ruled that these allegations fail to state a claim upon which relief could be granted because regulations issued by the federal Office of Thrift Supervision (OTS), pursuant to its authority under the federal Home Owners' Loan Act (HOLA), 12 U.S.C. §§ 1461-70, occupy "the entire field of lending regulation for federal savings associations," and expressly preempt state statutes and judicial decisions that purport to regulate "loan-related fees." 12 C.F.R. § 560.2. Because we agree with the trial court that the fees about which the McCurrys complain are not subject to additional regulation arising out of Washington state court adjudication of state statutory or common law claims, we affirm.

CR 12(b)(6) Standard

¶ 3 A preliminary issue is whether, in reviewing the trial court's dismissal of the McCurrys' complaint, we should adopt the standard for dismissal now utilized by the federal courts in resolving motions brought pursuant to Federal Rule of Civil Procedure 12(b)(6). See *Bell Atl. Corp. v. Twombly*, --- U.S. ---, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Chevy Chase urges us to apply the *Twombly* standard, noting that it requires that allegations be "plausible" in order to survive a motion for dismissal. *Twombly*, 127 S.Ct. at 1965-66.

[1][2] ¶ 4 We interpret "court rules as if they were statutes." *Farmers Ins. Exch. v. Dietz*, 121 Wash.App. 97, 100, 87 P.3d 769 (2004). Thus, once the state Supreme Court decides an issue with respect to a state court rule, that interpretation is binding on all lower courts until it is overruled by the state Supreme Court. *State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984). Accordingly, we are without authority to adopt a standard for claim dismissal different from the one previously announced by our Supreme Court.

[3] ¶ 5 This being the case, "a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim." *Halvorson v. Dahl*, 89 Wash.2d 673, 674, 574 P.2d 1190 (1978).FN1

Preemption

*2 ¶ 6 The central issue before us is whether the express preemption regulations issued by OTS bar the state law claims asserted by the McCurrys. The McCurrys contend that their claims against Chevy Chase are not preempted by 12 C.F.R. § 560.2 because, first, the fax and notary fees charged by Chevy Chase are not "loan-related fees," and, second, their claims pertaining to these fees, if found to be viable under Washington law, would

have "only incidentally affect[ed] the lending operations" of federally chartered savings banks such as Chevy Chase. See 12 C.F.R. § 560.2(b)(5) and (c). Chevy Chase responds that the fax fees and notary fees charged in its payoff statement are precisely the type of "loan-related fees" described in 12 C.F.R. § 560.2(b)(5) and are, accordingly, immune from state regulation either directly by statute or indirectly by judicial application of state law. Chevy Chase is correct.

[4][5]¶ 7 "The Supremacy Clause of the United States Constitution provides the basis for federal preemption of state laws." *Boursiquot v. Citibank F.S.B.*, 323 F.Supp.2d 350, 354 (D.Conn.2004) (citing *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982)). Enacted in 1933 to provide emergency relief from a crisis of home loan defaults during the Great Depression, HOLA "empowered what is now the Office of Thrift Supervision in the Treasury Department to authorize the creation of federal savings and loan associations, to regulate them, and by its regulations to preempt conflicting state law." *In re Ocwen Loan Servicing, LLC, Mortg. Servicing Litig.*, 491 F.3d 638, 641-42 (7th Cir.2007) (citing *de la Cuesta*, 458 U.S. at 161-62). Based on this authority conferred by Congress, "OTS promulgated 12 C.F.R. § 560.2(a) with the specific intention of occupying 'the entire field of lending regulation for federal savings associations.'" *Boursiquot*, 323 F.Supp.2d at 355 (quoting 12 C.F.R. § 560.2(a)).FN2

¶ 8 The OTS regulations are explicit that federal law leaves no room for direct state regulation of the loan-related activities of federally chartered savings associations, including regulation through judicial decisions of state law claims:

(a) *Occupation of field*.... 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. Accord-

ingly, 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. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

*3 12 C.F.R. § 560.2(a).

¶ 9 The OTS preemption regulations then provide a non-exclusive, illustrative list of the types of state regulatory behaviors, categorized by the object of regulation, that are expressly barred by the application of federal law. In addition to listing nearly every conceivable state licensing or other requirement that might be imposed on the savings associations themselves, as well as state regulations purporting to mediate the terms of credit as between the lender and borrower, the OTS regulations explicitly list as preempted those state regulatory actions that attempt to define the lawfulness of various fees imposed by savings associations on their customers:

(b) *Illustrative examples*.... [T]he types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

....

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees.

12 C.F.R. § 560.2(b).

[6]¶ 10 Finally, the OTS regulations provide that generally applicable state laws are not preempted, provided that they do not directly affect the lending operations of federally chartered savings associations:

(c) *State laws that are not preempted*. State

laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

- (1) Contract and commercial law;
- (2) Real property law;
- (3) Homestead laws specified in 12 U.S.C. 1462a(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.

12 C.F.R. § 560.2(c). "Thus, § 560.2 would preempt any state statute or judicial decision purporting to regulate loan-related fees or the processing and servicing of mortgages, or any state statute or judicial decision that has more than an incidental effect on the lending operations of federal savings associations." *Haehl v. Wash. Mut. Bank, F.A.*, 277 F.Supp.2d 933, 940 (S.D.Ind.2003).

[7]¶ 11 Intrinsic to this preemption framework, then, is that federally chartered savings associations are subject to the majority of generally applicable state laws, except when those laws purport to affect their lending operations, in which case the state laws are superseded. Accordingly, the key determination in any case where state law claims challenge the legality of actions taken by federal savings associations against their customers is "which claims fall on the regulatory side of the ledger and which, for want of a better term, fall on the com-

mon law side." *Ocwen*, 491 F.3d at 644.

*4 ¶ 12 When OTS promulgated the final version of 12 C.F.R. § 560.2, it explained how to make this decision. It first clarified that the purpose of the final version of section 560.2 is to "provide an interpretive standard for identifying state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers." 61 Fed.Reg. 50,951, 50,966 (Sept. 30, 1996). OTS's rule-writers made clear that the absence of a particular type of state law in 12 C.F.R. § 560.2(b) "should *not* be deemed to constitute evidence of an intent to permit state laws of that type to apply to federal thrifts." 61 Fed.Reg. at 50,966. Rather, courts must presume that state laws that regulate the relationship between borrowers and lenders are uniformly preempted:

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 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. at 50,966-67 (emphasis added).

[8]¶ 13 Given this presumption, it is hardly surprising that almost all published court decisions examining fax and other fees charged by a lender in a payoff statement hold that state law claims challenging such fees are preempted.^{FN3} For example, in *Boursiquot*, the federal district court for the district of Connecticut found preempted claims alleging the illegality of \$90 in "FAX/STATEMENT" fees in-

cluded in a payoff statement, ruling that the claims “fall squarely within the fields of state law” expressly listed in 12 C.F.R. 560.2(b). *Boursiquot*, 323 F.Supp.2d at 352, 355. The *Boursiquot* court relied upon OTS's own informal interpretation of its preemption regulations to reach its conclusion that the fax and other charges associated with the plaintiffs' payoff statement were “loan-related fees” within the meaning of 12 C.F.R. 560.2(b), and that claims premised upon their illegality were barred by federal law:

A working example of the types of laws OTS intended to preempt comes from [the Connecticut consumer protection law's] analog, the Unfair Competition Act (“UCA”), Cal. Bus. & Prof.Code §§ 17200 et seq. In an opinion letter OTS stated that UCA is preempted by HOLA where it attempts to regulate loan-related fees including statement fees and facsimile charges.

Boursiquot, 323 F.Supp.2d at 355 n. 3 (citing OTS Opinion Letter P-99-3, Mar. 10, 1999, at 16 (emphasis added in *Boursiquot*)).^{FN4}

*5 ¶ 14 Similarly, in *Lopez v. World Savings & Loan Association*, 105 Cal.App.4th 729, 130 Cal.Rptr.2d 42 (2003), the California Court of Appeal rejected precisely the same argument that the McCurrys are making in this case—that “a fee for providing a payoff demand statement is not a loan-related fee,” and thus is not preempted. *Lopez*, 105 Cal.App.4th at 738-39, 130 Cal.Rptr.2d 42. The court pointed out, reasonably, that “[p]roviding a payoff demand statement is a service provided by the association as lender in connection with its outstanding loan, and is a necessary step in paying off the loan.” *Lopez*, 105 Cal.App.4th at 739, 130 Cal.Rptr.2d 42. Accordingly, the court concluded that fees associated with the plaintiffs' payoff statement were “loan-related fees,” and that the plaintiffs' claims were barred by federal law. *Lopez*, 105 Cal.App.4th at 737-38, 130 Cal.Rptr.2d 42. The contrary contention, advanced by both the McCurrys and the plaintiffs in *Lopez*—that fees associated with something fundamentally necessary to the

discharge of the loan (the payoff statement) are somehow not “loan-related”—fairly strains the English language.^{FN5}

¶ 15 Most other cases directly on point are in accord. See, e.g., *Haehl*, 277 F.Supp.2d at 941 (reconveyance fee “falls within the broad category of ‘loan-related fees’”) (citing *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md.App. 64, 748 A.2d 34 (2000)); *Moskowitz v. Wash. Mut. Bank, FA*, 329 Ill.App.3d 144, 148, 263 Ill.Dec. 502, 768 N.E.2d 262 (2002) (fax and other fees in payoff statement are “loan-related fees” within the meaning of 12 C.F.R. § 560.2(b)(5)).

¶ 16 The *Chaires* opinion additionally, and correctly, rejects one of the McCurrys' subsidiary arguments—that a choice of law provision in a deed of trust can, by selecting state law, displace a superseding federal regulation. *Chaires*, 131 Md.App. at 85, 748 A.2d 34 (“appellees did not, as they could not, elect state law over federal law”). This result is hardly surprising; insofar as “OTS ... occupies the entire field of lending regulation for federal savings associations,”¹² C.F.R. § 560.2(a), there is no applicable state law that the McCurrys may elect.

¶ 17 The decisions that the McCurrys rely upon, in contrast, either address different types of fees, and so are irrelevant, are unpersuasive, or have been overturned. First, the vast majority of the McCurrys' authority must be distinguished as dealing with different types of fees or claims. See *McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457, 1465, 49 Cal.Rptr.3d 227 (2006) (pass-through fees, which dissent nonetheless convincingly argues are “loan-related”); *Gibson v. World Sav. & Loan Ass'n*, 103 Cal.App.4th 1291, 1294, 128 Cal.Rptr.2d 19 (2002) (unlawful insurance charges); *Femming v. Glenfed, Inc.*, 40 Cal.App.4th 1285, 1289-90, 47 Cal.Rptr.2d 715 (1995) (fraudulent inducement to purchase risky investments; no lending at issue); *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 398, 792 N.E.2d 1105 (2003) (mortgage satisfaction statute not preempted because not regulating lending activity).

*6 ¶ 18 Others of the McCurrys' cited cases are simply unpersuasive.^{FN6} For instance, in *Konynebelt v. Flagstar Bank F.S.B.*, 242 Mich.App. 21, 29-30, 617 N.W.2d 706 (2000), the Michigan Court of Appeals reasoned that charges imposed upon reconveyance for the recordation of mortgage could form the basis of valid state law claims simply because the precursor regulation to 12 C.F.R. § 560.2(b), 12 C.F.R. § 545.2, did not explicitly list the type of charges at issue. However, 12 C.F.R. § 560.2 expressly states that the examples listed in subsection (b) are merely illustrative and "without limitation," going so far as to repeat "without limitation" again in the subsection listing those fees regulated solely by OTS. 12 C.F.R. § 560.2(b)(5). Further, the *Konynebelt* court expressly based its holding upon the rationale advanced in *Siegel v. American Savings & Loan Association*, 210 Cal.App.3d 953, 258 Cal.Rptr. 746 (1989), which was (correctly) recognized as abrogated by 12 C.F.R. § 560.2 in *Lopez*, 105 Cal.App.4th at 740, 130 Cal.Rptr.2d 42. See *Konynebelt*, 242 Mich.App. at 29, 617 N.W.2d 706.

¶ 19 Similarly, *Leto v. World Sav. & Loan Ass'n*, No. CIV.A.SA-98-CA0261OG, 1998 WL 1784221 (W.D.Tex.1998), another opinion cited by the McCurrys, is lacking in persuasive power. *Leto* is simply an unpublished report and recommendation by a federal magistrate judge, in which the court finds no basis for federal removal jurisdiction because some state law claims might preclude total preemption. *Leto*, 1998 WL 1784221, at *4.

[9]¶ 20 In sum, every currently valid published judicial opinion-with the exception of *Konynebelt*-and OTS itself conclude that fees of the type at issue in this case are "loan-related fees" within the plain meaning of 12 C.F.R. § 560.2(b)(5). As such, "the analysis [ends] there," and any claim alleging the illegality of such fees "is preempted." 61 Fed.Reg. at 50,966. Put more bluntly, our conclusion that the fax fees and notary fees challenged by the McCurrys are "loan-related fees" means "that is the end of the case." *Ocwen*, 491 F.3d at 643.

¶ 21 Moreover, even were we to conclude that 12 C.F.R. § 560.2(b)(5) did not conclusively resolve the preemption issue, we would nonetheless conclude, consistent with the rationale stated in *Haehl*, that a judicial decision imposing restrictions on the type of fees at issue in this case would more than "incidentally affect" the lending operations of federally chartered savings banks and thus nonetheless be preempted pursuant to 12 C.F.R. § 520.2(c):

A decision in plaintiffs' favor would have the same effect as a direct regulation of the fees: to determine the circumstances under which [the defendant] may charge its customers a reconveyance fee.... Thus, applying [state tort] law in this case would more than "incidentally affect" lending operations by imposing substantive requirements on lending operations.

Haehl, 277 F.Supp.2d at 942. This rationale applies with equal force to the McCurrys' state contract and CPA claims.

*7 ¶ 22 Contrary to the McCurrys' contention, there is no basis for distinguishing between the fax fees and notary fees that the McCurrys claim to be unlawful. Both are "loan-related fees" required for the reconveyance and recordation of the deed of trust that was held by Chevy Chase as security for the McCurrys' home loan. This being so, the fees at issue here are directly regulated by OTS, and state law may not directly or indirectly impose additional requirements on Chevy Chase with respect to them.

¶ 23 Affirmed.

WE CONCUR: AGID and LEACH, JJ.

FN1. The McCurrys contend that a conceivable fact, requiring reversal, is that Chevy Chase may not have actually had anything notarized. But the McCurrys did not include such an allegation in their complaint, and so it provides no basis to reverse the complaint's dismissal.

FN2. "For purposes of determining Con-

gressional intent, federal regulations enacted under authority granted by Congress are entitled to the same preemptive effect as a federal statute.’ “ *Lopez v. World Sav. & Loan Ass’n*, 105 Cal.App.4th 729, 736, 130 Cal.Rptr.2d 42 (2003) (quoting *Wis. League of Fin. Insts. v. Galecki*, 707 F.Supp. 401, 404 (W.D.Wis.1989)).

FN3. Numerous courts, both state and federal, have examined whether a variety of state law claims (based on a variety of fees) are preempted by OTS’s regulations. Because no Washington judicial opinion addresses OTS preemption, the value of these decisions, which conflict in greater or lesser degrees, is limited to their power to persuade. “[W]e are properly guided by the principles of law announced in the most well-reasoned of the decisions we have reviewed. We are not, however, bound to follow a holding of a lower federal court merely because it was announced as such.” *S.S. v. Alexander*, 143 Wash.App. 75, 177 P.3d 724, 733 (2008).

FN4. The McCurrys contend that OTS opinion letters are not entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The McCurrys are correct. Rather, “interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those interpretations have the ‘power to persuade.’” “ *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). But it hardly follows from this principle that OTS’s view of its own regulation is irrelevant.

FN5. The McCurrys have put forward the

theory that only fees associated with the *origination* and *maintenance* of loans—rather than their discharge—are “loan-related fees” within the meaning of 12 C.F.R. § 560.2(b)(5). This theory, while plausible-seeming, suffers from the fact that it is utterly unsupported by legal authority.

FN6. The McCurrys rely heavily on our decision in *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wash.App. 542, 13 P.3d 240 (2000), as authority that their CPA claim must be remanded for consideration on the merits. The McCurrys are correct that, in *Dwyer*, we found the type of fees at issue in this case to be sufficiently deceptive to violate the CPA, holding that they had the “capacity to deceive reasonable consumers into believing that they must pay the fees” before release of the instrument securing a home loan. *Dwyer*, 103 Wash.App. at 547, 13 P.3d 240. But the defendant in *Dwyer* apparently never raised the issue of federal preemption with respect to the plaintiffs’ claims. Nowhere does the opinion mention federal preemption, or perform any analysis of whether the claims at issue might be barred by superseding federal regulations. As such, *Dwyer* does not resolve the issues properly raised by Chevy Chase in this case.

Wash.App. Div. 1,2008.

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market. Each association should adequately monitor the condition of its portfolio and the adequacy of any collateral securing its loans.

§ 560.2 Applicability of law.

(a) *Occupation of field.* Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), 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. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

(b) *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.

(c) *State laws that are not preempted.* State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

- (1) Contract and commercial law;
- (2) Real property law;
- (3) Homestead laws specified in 12 U.S.C. 1462a(f);
- (4) Tort law;
- (5) Criminal law; and
- (6) Any other law that OTS, upon review, finds:
 - (i) Furthers a vital state interest; and

§ 560.3

(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.

§ 560.3 Definitions.

For purposes of this part and any determination under 12 U.S.C. 1467a(m):

Consumer loans include loans for personal, family, or household purposes and loans reasonably incident thereto, and may be made as either open-end or closed-end consumer credit (as defined at 12 CFR 226.2(a) (10) and (20)). Consumer loans do not include credit extended in connection with credit card loans, bona fide overdraft loans, and other loans that the savings association has designated as made under investment or lending authority other than section 5(c)(2)(D) of the HOLA.

Credit card is any card, plate, coupon book, or other single credit device that may be used from time to time to obtain credit.

Credit card account is a credit account established in conjunction with the issuance of, or the extension of credit through, a credit card. This term includes loans made to consolidate credit card debt, including credit card debt held by other lenders, and participation certificates, securities and similar instruments secured by credit card receivables.

Home loans include any loans made on the security of a home (including a dwelling unit in a multi-family residential property such as a condominium or a cooperative), combinations of homes and business property (i.e., a home used in part for business), farm residences, and combinations of farm residences and commercial farm real estate.

Loan commitment includes a loan in process, a letter of credit, or any other commitment to extend credit.

Real estate loan, for purposes of this part, is a loan for which the savings association substantially relies upon a security interest in real estate given by the borrower as a condition of making the loan. A loan is made on the security of real estate if:

(1) The security property is real estate pursuant to the law of the state in which the property is located;

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(2) The security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located;

(3) The security property is capable of separate appraisal; and

(4) With regard to a security property that is a leasehold or other interest for a period of years, the term of the interest extends, or is subject to extension or renewal at the option of the Federal savings association for a term of at least five years following the maturity of the loan.

Small business includes a small business concern or entity as defined by section 3(a) of the Small Business Act, 15 U.S.C. 632(a), and implemented by the regulations of the Small Business Administration at 13 CFR Part 121.

Small business loans and *loans to small businesses* include any loan to a small business as defined in this section; or a loan that does not exceed \$2 million (including a group of loans to one borrower) and is for commercial, corporate, business, or agricultural purposes.

[61 FR 50971, Sept. 30, 1996, as amended at 61 FR 60184, Nov. 27, 1996; 62 FR 15825, Apr. 3, 1997; 64 FR 46565, Aug. 26, 1999; 66 FR 65825, Dec. 21, 2001]

Subpart A—Lending and Investment Powers for Federal Savings Associations

§ 560.30 General lending and investment powers of Federal savings associations.

Pursuant to section 5(c) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. 1464(c), a Federal savings association may make, invest in, purchase, sell, participate in, or otherwise deal in (including brokerage or warehousing) all loans and investments allowed under section 5(c) of the HOLA including, without limitation, the following loans, extensions of credit, and investments, subject to the limitations indicated and any such terms, conditions, or limitations as may be prescribed from time to time by OTS by policy directive, order, or regulation:

permissible under section 202.6(b)(2)(iv). In addition, under section 202.6(b)(2)(iii), a creditor may consider a borrower's age to evaluate a pertinent element of creditworthiness, such as the amount of the credit or monthly payments that the borrower will receive, or the estimated repayment date.

* * * * *
 5. In Supplement I to Part 202, Section 202.7—Rules Concerning Extensions of Credit, is amended as follows:

- a. Under Paragraph 7(d)(2), paragraph 1, is revised; and
 - b. Paragraph 7(c)(6) is revised.
- The revisions read as follows:

* * * * *

Section 202.7 Rules Concerning Extensions of Credit

* * * * *

Paragraph 7(d)(2)

1. *Jointly owned property.* If an applicant requests unsecured credit, does not own sufficient separate property, and relies on joint property to establish creditworthiness, the creditor must value the applicant's interest in the jointly owned property. A creditor may not request that a nonapplicant joint owner sign any instrument as a condition of the credit extension unless the applicant's interest does not support the amount and terms of the credit sought.

i. *Valuation of applicant's interest.* In determining the value of an applicant's interest in jointly owned property, a creditor may consider factors such as the form of ownership and the property's susceptibility to attachment, execution, severance, or partition; the value of the applicant's interest after such action; and the cost associated with the action. This determination must be based on the form of ownership prior to or at consummation, and not on the possibility of a subsequent change. For example, in determining whether a married applicant's interest in jointly owned property is sufficient to satisfy the creditor's standards of creditworthiness for individual credit, a creditor may not consider that the applicant's separate property may be transferred into tenancy by the entirety after consummation. Similarly, a creditor may not consider the possibility that the couple may divorce. Accordingly, a creditor may not require the signature of the nonapplicant spouse in these or similar circumstances.

ii. *Other options to support credit.* If the applicant's interest in jointly owned property does not support the amount and terms of credit sought, the creditor may offer the applicant other options to provide additional support for the extension of credit. For example—

- A. Requesting an additional party (see § 202.7(d)(3)(5));
- B. Offering to grant the applicant's request on a secured basis (see § 202.7(d)(4)); or
- C. Asking for the signature of the joint owner on an instrument that ensures access to the property in the event of the applicant's death or default, but does not impose personal liability unless necessary under state law (e.g., a limited guarantee). A

creditor may not routinely require, however, that a joint owner sign an instrument (such as a quitclaim deed) that would result in the forfeiture of the joint owner's interest in the property.

* * * * *

Paragraph 7(d)(6)

1. *Guarantees.* A guarantee on an extension of credit is part of a credit transaction and therefore subject to the regulation. A creditor may require the personal guarantee of the partners, directors, or officers of a business, and the shareholders of a closely held corporation, even if the business or corporation is creditworthy. The requirement must be based on the guarantor's relationship with the business or corporation, however, and not on a prohibited basis. For example, a creditor may not require guarantees only for women-owned or minority-owned businesses. Similarly, a creditor may not require guarantees only from the married officers of a business or married shareholders of a closely held corporation.

2. *Spousal guarantees.* The rules in § 202.7(d) bar a creditor from requiring a signature of a guarantor's spouse just as they bar the creditor from requiring the signature of an applicant's spouse. For example, although a creditor may require all officers of a closely held corporation to personally guarantee a corporate loan, the creditor may not automatically require that spouses of married officers also sign the guarantee. If an evaluation of the financial circumstances of an officer indicates that an additional signature is necessary, however, the creditor may require the signature of a spouse in appropriate circumstances in accordance with § 202.7(d)(2).

* * * * *

6. In Supplement I to Part 202, Section 202.13—Information for Monitoring purposes, is amended as follows:

- a. Under 13(a) Information to be requested, paragraph 6, is revised; and
- b. Under 13(b) Obtaining of information, paragraphs 4, and 5, are redesignated as paragraphs 6, and 7, respectively, and new paragraphs 4, and 5, are added.

The revisions and additions are to read as follows:

* * * * *

Section 202.13 Information for Monitoring purposes

13(a) Information to be requested.

* * * * *

6. *Refinancings.* A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower. A creditor that receives an application to refinance an existing extension of credit made by that creditor for the purchase of the applicant's dwelling may request the monitoring information again but is not required to do so if it was obtained in the earlier transaction.

* * * * *

13(b) Obtaining of information.

* * * * *

4. *Applications through electronic media.* If an applicant applies through an electronic medium (for example, the Internet or a facsimile) without video capability that allows the creditor to see the applicant, the creditor may treat the application as if it were received by mail or telephone.

5. *Applications through video.* If a creditor takes an application through a medium that allows the creditor to see the applicant, the creditor treats the application as taken in person and must note the monitoring information on the basis of visual observation or surname, if the applicant chooses not to provide the information.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, September 24, 1996.

Jennifer J. Johnson,
 Deputy Secretary of the Board.
 [FR Doc. 96-24917 Filed 9-27-96; 8:45 am]
 BILLING CODE 6210-01-P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 556, 560, 563, 566, 571, 590

[No. 95-87]

RIN 1550-AA94

Lending and Investment

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS or Office) is today issuing a final rule updating, reorganizing, and substantially streamlining its lending and investment regulations and policy statements. These amendments are being made pursuant to the Regulatory Reinvention Initiative of the Vice President's National Performance Review (Reinvention Initiative) and section 303 of the Community Development and Regulatory Improvement Act of 1994 (CDRIA), which requires OTS and the other federal banking agencies to review, streamline, and modify regulations and policies to improve efficiency, reduce unnecessary costs, and remove inconsistent, outmoded, and duplicative requirements.

EFFECTIVE DATE: October 30, 1996.

FOR FURTHER INFORMATION CONTACT: For general information contact: William J. Magrini, Senior Project Manager, (202) 906-5744, Supervision Policy; Ellen J. Sazzman, Counsel (Banking and Finance), (202) 906-7133; or Deborah Dakin, Assistant Chief Counsel, (202)

Section 571.22 Most Favored Lender Status

Section 571.22 implemented section 4(g) of the HOLA, which authorizes savings associations to charge on any extension of credit an interest rate equal to the greater of: (a) One percentage point above the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district in which the savings association is located; or (b) the rate allowed by the laws of the State in which the savings association is located for the state's most favored lender. OTS proposed to move § 571.22 into new § 560.2(d)(1) and requested comment on whether certain provisions in § 571.22 should be modified. Because HOLA section 4(g) and this regulation apply to all savings associations, however, § 571.22 is being moved to a new § 560.110, "Most Favored Lender, Usury Preemption" in Subpart B of Part 560, which applies to all savings associations. Changes to the text of the regulation are discussed under § 560.110 below.

2. New Part 560—Lending and Investment

OTS proposed to adopt a new Part 560, Lending and Investment, that would ultimately include all of the agency's lending and investment regulations except for Appraisals (Part 564) and subsidiary-related investments (currently proposed to be located in new Part 559). Commenters generally agreed with OTS's view that this reorganization will make it much easier for those using the agency's regulations to find all relevant lending and investment powers, authorities, and limitations. Accordingly, OTS is adopting new Part 560 as discussed below.

Section 560.1 General

This section sets out the basic statutory authority for lending and indicates which regulations in this part will apply only to federal savings associations and which regulations apply to all savings associations. It also briefly sets forth the agency's expectations that all lending and investment activities are to be conducted prudently, consistent with safety and soundness, with adequate portfolio diversification, and in a manner appropriate for the size of the institution, the nature and scope of its operations, and conditions in its lending market. OTS received no comment on this section, which is adopted as proposed, with minor clarifications.

Section 560.2 Applicability of Law

This section sets forth OTS's longstanding position, as developed in case law and legal opinions by both OTS and its predecessor, the FHLBB, and as reflected in § 545.2, on the federal preemption of state laws affecting the lending activities of federal savings associations. Because the agency proposed to move its lending regulations out of Part 545 and, thus, separate them from its general preemption regulation, § 545.2, and because the agency proposed to remove many of the details of the lending regulations that had been previously cited in preemption opinions, OTS also proposed new § 560.2 to confirm and carry forward its existing preemption position.

It is well established that state laws can be preempted not only by federal statutes, but also by federal regulations promulgated pursuant to authority delegated by Congress.⁵¹ In this regard, the Supreme Court has recognized that Congress gave the regulator of federal savings associations broad preemptive authority:

Congress enacted the HOLA [as] "a radical and comprehensive response to the inadequacies of the existing state systems * * *." Thus, in section 5(a) of the [HOLA], Congress gave the [FHLBB and now the OTS] plenary authority to issue regulations * * * "providing for the * * * incorporation, examination, operation, and regulation of [federal savings] associations * * *."

Congress directed that, in regulating federal [savings associations], the [FHLBB and OTS should] consider "the best practices of local mutual thrift and home financing institutions in the United States," which were at the time all state-chartered. By so stating, Congress plainly envisioned that federal savings [associations] would be governed by what the [FHLBB and now OTS]—not any particular state—deemed to be the best practices, and approved the [FHLBB's and OTS's] promulgation of regulations superseding state law * * *.⁵²

Consistent with the foregoing, courts have long recognized that federal savings associations organized under the HOLA are uniquely federalized financial institutions—even more so than national banks.⁵³ Prior to enactment of the HOLA, "the states had developed a hodgepodge of savings and loan laws and regulations, and Congress hoped the [the FHLBB, and now OTS] rules would set an example

for uniform and sound savings and loan regulation."⁵⁴

Thus, OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to: (i) Facilitate the safe and sound operation of federal savings associations, (ii) enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or (iii) further other purposes of the HOLA. Because lending lies at the heart of the business of a federal thrift, OTS and its predecessor, the FHLBB, have long taken the position that the federal lending laws and regulations occupy the entire field of lending regulation for federal savings associations, leaving no room for state regulation. For these purposes, the field of lending regulation has been defined to encompass all laws affecting lending by federal thrifts, except certain specified areas such as basic real property, contract, commercial, tort, and criminal law.

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.⁵⁵ In addition, in those instances

⁵¹ *Confederation of Federal Savings and Loan Associations v. Steia*, 804 F.2d 1256 (9th Cir. 1978) (citation omitted).

⁵² Several of these statutes contain provisions that expressly disclaim any intent to preempt non-conflicting state statutes falling in the same subject area. E.g., 12 U.S.C. 2616 (Real Estate Settlement Procedures Act); and 15 U.S.C. 1610 (Truth in Lending Act). The fact that one or several federal statutes do not preempt certain types of state laws, however, does not preclude the possibility that other federal statutes or regulations might do so under more defined or specific circumstances. In this regard, it is important to note that the above-referenced federal statutes that contain preemption disclaimers apply to all types of lenders (including state-chartered lenders), not just federal savings

Continued

⁵³ *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153-154 (1982).

⁵⁴ *Id.* at 160-167 (citations omitted).

⁵⁵ *People v. Coast Federal Savings & Loan Association*, 98 F. Supp. 311, 319 (S.D. Cal. 1951).

where OTS has detected a gap in the federal protections provided to borrowers, the agency has promulgated regulations imposing additional consumer protection requirements on federal thrifts.⁵⁶

New § 560.2 carries forward this approach to federal preemption. Although the final form of regulation is similar to what was proposed, some changes have been made in response to comments received. Several commenters expressed concern that the statement in proposed § 560.2(a) that OTS intended to occupy the entire field of lending regulation for federal thrifts would not be sufficient to restrain state regulators from asserting jurisdiction, given that OTS was also proposing to remove some of its more detailed regulatory language specifically authorizing federal thrifts to engage in various lending-related practices, e.g., advertising, charging certain fees, and establishing escrow accounts. One commenter suggested that OTS expand its noninclusive illustrative list of the types of state laws preempted to reference additional laws, such as those pertaining to private mortgage insurance or other credit enhancements, loan servicing, charging application and overlimit fees, establishing impound and similar accounts, using credit reports, and setting certain interest rate ceilings. Other commenters echoed these concerns.

In response to commenters' concerns, OTS has made some changes to § 560.2.

associations. The fact that Congress did not wish to preempt the application of state laws to this general universe of lenders (including lenders chartered and regulated by the very states whose laws would be preempted), does not preclude the possibility that Congress may have elsewhere evidenced a specific intent to preempt, or permit a federal regulator to preempt, the application of state laws to a particular category of lender—in this case, federal savings associations. This is precisely the conclusion reached by the court in *First Federal Savings & Loan Association v. Greenwald*, 591 F.2d 417 (1st Cir. 1979). There, the court held that OTS's predecessor, the FHLBB, was authorized by Congress in the HOLA to preempt state lending laws even when they fall in areas covered by the preemption disclaimer in the Real Estate Settlement Procedures Act. We believe the court's holding reflects a correct understanding of the interplay between the HOLA and the above-referenced statutes, as evidenced by the legislative history of the HOLA. See, e.g., 124 Cong. Rec. 33848 (Statement of Rep. Minsh); 124 Cong. Rec. 36148 (1978) (colloquy between Sen. Proxmire and Sen. Brooke confirming that federal thrifts are not subject to state truth in lending requirements); 124 Cong. Rec. 33848-33849 (statement of Rep. St Germain to the same effect); and 125 Cong. Rec. 6981 (1980) (colloquy between Rep. St Germain and Rep. Patterson confirming that thrifts, unlike national banks, are not subject to state lending laws).

⁵⁶ See, e.g., 12 CFR Part 535 (prohibited consumer credit practices) and new §§ 560.33 (late charges), 560.34 (prepayments), and 560.35 (adjustments to home loans).

Paragraph (a) still explicitly states the agency's intent to occupy the field of lending regulation for federal thrifts. However, the statutory bases and regulatory rationale for this occupation are more clearly articulated. In addition, to avoid any impression that the repeal of certain lending regulations is intended to abdicate portions of the lending field to state regulation, we have added an affirmation that, "OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation."

Paragraph (b) contains an expanded list of examples of the types of state laws that are preempted. The introductory text in paragraph (b) continues to emphasize that the list is not intended to be exhaustive. Failure to mention a particular type of state law that affects lending should not be deemed to constitute evidence of an intent to permit state laws of that type to apply to federal thrifts. To the contrary, § 560.2 is based on the premise that any state law that affects lending is preempted unless it clearly falls within the parameters of paragraph (c).

Paragraph (b) also continues to contain an exception clause indicating that certain state laws that would not ordinarily apply to federal savings associations may nevertheless apply when an association elects to utilize a state's most favored lender usury rate. When utilizing a state's most favored lender rate, a federal savings association must comply with all laws of its "location" state that fall within the ambit of the term "interest," as used in section 4(g) of the HOLA, as well as any other state laws "material to the determination of the interest rate." For a fuller discussion of these issues, see the description below of new § 560.110 (most favored lender).

Paragraph (c) describes certain types of state laws that OTS does not intend to preempt. Several commenters urged deletion of this paragraph. Commenters expressed concern that states seeking to avoid federal preemption of their laws or regulations might attempt to characterize those laws as falling within paragraph (c). Commenters contended that the language used to describe the categories of non-preempted laws was too broad and could create ambiguity about which state laws federal thrifts would be required to follow. For example, states might place laws purporting to regulate lending-related fees in the portions of state codes dealing with general contract or real property laws in an effort to avoid preemption.

OTS believes that paragraph (c) should be retained in order to provide guidance regarding the scope of preemption intended by paragraph (a). OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts, torts, and crimes. To reduce the potential for misunderstanding, however, we have made several changes to paragraph (c). First, we have modified the regulatory language that precedes the list of state laws that are not preempted. The introductory language now indicates that laws falling in these areas are not preempted to the extent that they either: (i) Have only an incidental impact on lending; or (ii) are otherwise not contrary to the purposes expressed in paragraph (a) of the regulation. We also have added a provision to paragraph (c) disclaiming an intent to preempt other state laws that may affect lending, but that OTS, upon review, finds further a vital state interest and meet the foregoing two-part test.

Adding this two-part test to the regulation will provide an interpretive standard for identifying state laws that may be designed to look like traditional property, contract, tort, or commercial laws, but in reality are aimed at other objectives, such as regulating the relationship between lenders and borrowers, protecting the safety and soundness of lenders, or pursuing other state policy objectives.

When 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 paragraph (c). For these purposes, paragraph (c) is intended to be interpreted narrowly. Any doubt

should be resolved in favor of preemption.

As questions arise, OTS will issue interpretive guidance consistent with the foregoing. While recognizing that no regulation can anticipate and expressly resolve all questions, we believe that new § 560.2 provides thrifts with substantially more guidance than was available under § 545.2, thereby enabling them to plan and operate their lending operations more efficiently. From time to time, OTS will review, update, and modify § 560.2 to ensure that it reflects new developments and promotes "best practices" and safety and soundness.

Paragraph (d) of proposed § 560.2 was derived from former § 571.22. It is being adopted as § 560.110, incorporating the modifications described earlier under that section.

Section 560.3 Definitions

This new section has been added to set forth in Part 560 lending-related definitions formerly located in Part 545.

Subpart A—Lending and Investment Powers for Federal Savings Associations

This subpart contains lending and investment regulations directly applicable only to federal savings associations. These regulations are nonetheless relevant to state-chartered savings associations by virtue of § 28 (a) and (b) of the FDIA and the Federal Deposit Insurance Corporation's regulations at 12 CFR 303.13, which look to the type and amount of activities permissible for federal savings associations as a baseline for activities permitted for state-chartered savings associations.

Section 560.30 General Lending and Investment Powers

Proposed § 560.30 took the form of a chart that listed many of the lending and investment powers granted to federal thrifts by the HOLA. It was derived from the regulations that currently appear in Part 545. An important component of this regulation are the endnotes to the chart that elaborate upon statutory limitations, impose regulatory limitations, or otherwise describe conditions on the exercise of these powers.

Commenters generally found the chart to be a very workable reference tool, particularly for percentage of assets limitations for specific types of loans and investments. Commenters believed that the chart form with its statutory cross references made it easier for the CFR user to locate statutory authority for various types of loans and investments. At least one commenter

suggested that the chart would be more useful if it were more inclusive and listed additional statutory and regulatory lending and investment powers. Accordingly, OTS is adopting the lending and investment powers chart in the final rule in a more inclusive form with additional references to thrifts' statutory powers with regard to bankers' bank stock, business development credit corporations, unsecured construction loans, deposits, securities issued by the Federal government and government-sponsored enterprises, HUD-insured or guaranteed investments, insured loans, liquidity investments, mortgage-backed securities, nonconforming loans, the National Housing Partnership Corporation and related partnerships and joint ventures, and small business-related securities.⁵⁷ Other references in the chart on community development and letters of credit have been modified or removed so that the chart more clearly reflects lending and investment powers specifically authorized by the statute.

Section 560.31 Election Regarding Categorization of Loans or Investments and Related Calculations

This section is derived from current § 545.31, incorporating the modifications described earlier under that section.

Section 560.33 Late Charges

This section is derived from current § 545.34(b). It has been modified as discussed under that section.

Section 560.34 Prepayments

This section is derived from current § 545.34(c). The first sentence of that section has been rewritten to make it easier to understand, but no substantive change is intended. Advanced payments of regular installments are not considered prepayments for purposes of this regulation, as compared to payments to reduce the principal balance due on a loan.

Section 560.35 Adjustments to Home Loans

This section is derived from current § 545.33(c) and has been modified as discussed under that section.

⁵⁷ As part of its subsidiaries and equity investment proposal, OTS has requested comment on other additions to this chart, affecting service corporations, certain open-end management investment companies, and small business investment companies. 61 FR at 29081.

Section 560.40 Commercial Paper and Corporate Debt Securities

This section is derived from paragraphs (b) and (c) of current § 545.75. It has been modified as discussed under that section.

Section 560.41 Leasing

This section consolidates and reorganizes current § 545.53 (finance leasing) and § 545.78 (general leasing authority), incorporating the modifications described under those sections. It has been reorganized to clarify the separate sources of authority and requirements that apply to these two types of leasing.

Section 560.42 State and Local Government Obligations

This section is derived from § 5(c)(1)(H) of the HOLA and paragraphs (a) and (b) of current § 545.72. It is being adopted as proposed.

Section 560.43 Foreign Assistance Investments

This section is a consolidation and reorganization of current §§ 545.39 and 545.73.

Subpart B—Lending and Investment Provisions Applicable to All Savings Associations

This subpart contains safety and soundness based lending standards and provisions applicable to all savings associations, including state savings associations, to the extent that they have the authority to make the investments it discusses.

Section 560.93 Lending Limitations

This section, including its appendices, has been moved, with only technical conforming changes, from § 563.93.

Section 560.100 Real Estate Lending Standards; Purpose and Scope

This section has been transferred without change from § 563.100.

Section 560.101 Real Estate Lending Standards

This section and the accompanying appendix have been transferred with only technical and conforming changes, from § 563.101 and Part 563, Subpart D, Appendix A.

Section 560.110 Most Favored Lender Usury Preemption

This section implements section 4(g) of the HOLA. Section 4(g) provides that, notwithstanding any contrary state law, savings associations may charge interest on any extension of credit at a rate equal to the greater of: (a) One percentage



Office of Thrift Supervision
Department of the Treasury

P-2000-6

Chief Counsel

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

April 21, 2000

[

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Re: State Law Limiting Payoff Statement Fees

Dear []:

This responds to your inquiry submitted on behalf of [] ("Association") located in []. You request that the Office of Thrift Supervision ("OTS") confirm your conclusion that federal law preempts the application of provisions of a New York law that limits the imposition of fees for providing mortgage loan payoff statements. In brief, we conclude that federal law preempts application of the New York law to the Association.

The Association engages in residential mortgage lending. You indicate that upon request, the Association will prepare and provide its residential mortgage loan borrowers with loan payoff statements showing the balance owed on their mortgage loans, including principal and accrued interest as of a specific date, and the per diem interest charges accruing after such date. If the borrower requests that the payoff statement be prepared and sent by fax, the Association charges a fee of \$[]; otherwise the Association will prepare and mail the payoff statement to the borrower free of charge.

You have provided us with a copy of § 274-a of the New York Real Property Law.¹ Section 274-a(2) requires that under certain circumstances, the mortgagee of certain residential real property deliver within 30 days of a "bona fide written demand" certain "mortgage-related documents," defined to include a loan payoff statement to an authorized individual.² Section 274-a(2) also prohibits the mortgagee from charging

¹ N.Y. Real Prop. Law 274-a (Consol. 1999).

² Section 274-a(2)(b)(iii) defines "bona fide written demand" as "a written demand made by an authorized individual in connection with a sale or refinancing of the mortgaged property or some other event where the mortgage is reasonably expected to be paid off or assigned." The term "mortgagee" is defined to include banking institutions chartered or licensed by the United States.

APPENDIX D

borrowers for the mortgage-related documents pursuant to an initial request, but a mortgagee “may charge not more than twenty dollars, or such amount as may be fixed by the banking board, for each subsequent payoff statement provided” (Emphasis added.)

While it is not entirely clear from the face of the statute that it would bar charging for the service of faxing a payoff statement to a borrower,³ you advised us that a recent New York state court decision indicates that such a charge would be barred. On November 5, 1999, a New York state appellate court found that a borrower who alleged that a mortgagee charged a fax fee to provide a payoff statement to borrower upon an oral request stated a cause of action for violation of §274-a(2).⁴ The court allowed the borrower to proceed with a cause of action challenging the imposition of the fee by the lender. You are concerned that the Association might be found liable for its practice and ask whether the limitation on charging fees in §274-a(2) applies to the Association.

OTS regulations are clear that federal law preempts state laws that restrict loan-related fees. Section 560.2(b)(5) expressly provides that state laws purporting to impose requirements regarding loan-related fees are preempted.⁵ On numerous prior occasions, the OTS and its predecessor agency have interpreted and applied § 560.2(b)(5) in the context of state laws restricting particular types of fees.⁶

Here, the fee the Association charges for faxing loan payoff statements, at the borrower’s request, is a loan-related fee. The Association charges this fee for providing its loan customers the convenience of rapid receipt of a payoff statement containing information concerning all outstanding amounts on, and the payoff value of, their loans.⁷ The payoff statement is an integral part of the lending process as it provides the information necessary to satisfy the debt and extinguish the extension of credit.

³ Discussions with a legal representative in the New York Banking Department concerning § 274-a(2) did not clarify the ambiguity.

⁴ Negrin v. Norwest Mortgage, Inc., 700 N.Y.S.2d 184 (N.Y. App. Div. 1999).

⁵ 12 C.F.R. § 560.2(b)(5) (1999).

⁶ See e.g., OTS Op. Chief Counsel (November 22, 1999) (certain ATM-fees); OTS Op. Chief Counsel (March 10, 1999) (fax fees for payoff statements); OTS Op. Chief Counsel (December 24, 1996) (appraisal and credit insurance fees); FHLBB Op. Chief Counsel (June 29, 1988) (late payment charges).

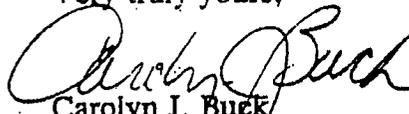
⁷ OTS has noted in the past that institutions are not required to provide services free of charge. See OTS Op. Chief Counsel (Nov. 22, 1999) at 10.

Therefore, under § 560.2(b)(5), to the extent § 274-a(2) would prohibit the Association from charging a borrower for faxing a loan payoff statement requested by the borrower, § 274-a(2) does not apply to the Association.

In reaching this conclusion, we have relied on the information, representations, and materials you submitted to us in writing and in subsequent conversations with OTS staff, as summarized herein. Any material differences in the facts or circumstances from those described herein could result in different conclusions.

If you have any questions regarding this matter, please contact Teresa A. Scott (Counsel, Banking and Finance) at 202-906-6478.

Very truly yours,



Carolyn J. Buck
Chief Counsel

cc: Regional Directors
Regional Counsel

RAP RULE 13.4
DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated: (1) Cover. A title page, which is the cover. (2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited. (3) Identity of Petitioner. A statement of the name and designation of the person filing the petition. (4) Citation to Court of Appeals Decision. A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration. (5) Issues Presented for Review. A concise statement of the issues presented for review. (6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record. (7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument. (8) Conclusion. A short conclusion stating the precise relief sought. (9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for

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review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.

(g) Service and Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5. The clerk will serve the petition, answer, or reply if the party has not done so.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Amended September 1, 1999; December 5, 2002; September 1, 2006.]
