THE AUTHORITY OF THE STATES OVER DEBTOR COERCION BY FEDERAL SAVINGS AND LOAN ASSOCIATIONS

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I. INTRODUCTION

This Article discusses the interplay of the McCarran-Ferguson Insurance Regulation Act[1] (McCarran Act) with the Home Owners' Loan Act of 1933[2] (HOLA), and involves the question of conflicting regulatory authority where a federal savings and loan association requires insurance to be purchased from a specific person or organization as a condition precedent to granting a loan (debtor coercion).[3] Thus, HOLA purports to

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1. 15 U.S.C. §§ 1011-1015 (1970).

2. 12 U.S.C. §§ 1461-1470 (1970).

3. Debtor coercion is a generic term and connotes any one of several coercive requirements by a lender. The debtor coercion provision of the Iowa Code illustrates the range of coercive insurance practices:

> 1. No person may do any of the following:
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> a. Require, as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation the creditor is to acquire or finance, negotiate any policy or contract of insurance through a particular insurer or group of agents or brokers.
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> b. Unreasonably disapprove the insurance policy provided by a borrower for the protection of the property securing the credit or lien.
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> c. Require directly or indirectly that any borrower, mortgagor, purchaser, insurer, broker, or agent pay a separate charge, in connection with the handling of any insurance policy required as security for a loan on real estate, or pay a separate charge to substitute the insurance policy of one insurer for that of another.
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> d. Use or disclose information resulting from a requirement that a borrower, mortgagor or purchaser furnish insurance of any kind on real property being conveyed or used as collateral security to a loan, when such information is to the advantage of the mortgagee, vendor, or lender, or is to the detriment of the borrower, mortgagor, purchaser, insurer, or the agent or broker complying with such a requirement.
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> 2. Subsection 1, paragraph "c" of this section does not include the in-

grant exclusive jurisdiction over the operations of federal savings and loan associations to the Federal Home Loan Bank Board (Board).[4] The Board has regulations specifically prohibiting debtor coercion.[5] However, the McCarran Act grants exclusive jurisdiction over the "business of insurance" to the several states.[6] Pursuant to this power, every state in some form[7] has enacted the Model Unfair Trade Practice Act of the Na-

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terest which may be charged on premium loans or premium advancements in accordance with the security instrument.

3. For purposes of subsection 1, paragraph "b" of this section, such disapproval shall be deemed unreasonable if it is not based solely on reasonable standards uniformly applied relating to the extent of coverage required and the financial soundness and the services of an insurer. Such standards shall not discriminate against any particular type of insurer, nor shall such standards call for the disapproval of an insurance policy because such policy contains coverage in addition to that required.
4. If a violation of this section is found, the person in violation shall be subject to the same procedues and penalties as are applicable to other provisions of this chapter.
5. For purposes of this section, "person" includes any individual, corporation, association, partnership, or other legal entity. IOWA CODE § 507B.5 (1977).

As indicated, this Article limits the term "debtor coercion" to the unlawful requirement that as a condition precedent to granting credit, the borrower must purchase insurance (generally homeowner, but sometimes life and credit life) from a specific person or organization. Cases have characterized this arrangement as a "tie-in" practice. *See, e.g.*, Zelson v. Phoeniz Mut. Life Ins. Co., 549 F.2d 62, 67 (8th Cir. 1977); Dexter v. Equitable Life Assurance Soc'y., 257 F.2d 233 (2d Cir. 1975). Under the tie-in arrangement considered here, the insurance is the "tied" item and the loan is the "tying" item. Zelson, 549 F.2d at 67.

For an exhaustive list of the cases which have addressed the issue of whether there is federal preemption in the area of federal savings and loan debtor coercion, *see* Amicus Curiae Brief at 2 n.1, Benjamin Franklin Savings & Loan Ass'n v. Derenco, Inc., No. 77-1694 (U.S. 1977).

4. 12 U.S.C § 1464 (1970).
5. *See* 12 C.F.R. § 563.35 (1978).
6. 15 U.S.C. § 1012(a) (1970).
7. ALA. CODE tit. 28A, § 237 (Supp. 1973); ARIZ. REV. STAT. § 20-448 (1975); ARK. STAT. ANN. § 66-3005 (Supp. 1975); CAL. INS. CODE § 790.03 (West Supp. 1976); COLO. REV. STAT. § 10-3-1104 (Supp. 1975); CONN. GEN. STAT. ANN. § 38-61(9) (West Supp. 1976) (defining as an unfair trade practice a violation of § 38-149 (general discrimination) and § 38-150 (prohibiting discrimination as to premiums and otherwise between whites and persons of African descent)); DEL. CODE tit. 18, § 2304 (1975); D.C. CODE § 35-715 (1968); FLA. STAT. ANN. § 626.962 (West 1972); GA. CODE ANN. § 56-704 (1971); HAW. REV. LAWS § 431-6434 (1968); IDAHO CODE § 41.1331 (1961); ILL. REV. STAT. ch. 73, § 1031 (Supp. 1976); IND. CODE ANN. § 27-4-1-4 (Burns 1975); IOWA CODE § 507B.4.7 (1975); KAN. STAT. § 40-24-4 (1973); KY. REV. STAT. ANN. § 304.12-080 (Baldwin 1972); LA. REV. STAT. ANN. § 22:1214 (West 1976); ME. REV. STAT. tit. 24A., § 2159 (1974); MD. ANN. CODE art. 48A, § 223(a) (1972); MASS. GEN. LAWS ANN. ch. 176D, § 3 (West 1976); MICH. STAT. ANN. § 24.12019 (1972); MINN. STAT. ANN. § 72A.-20(1) (West Supp. 1976); MISS. CODE ANN. § 83-5-35 (1973); MO. ANN. STAT. § 375.936 (Vernon Supp. 1976); MONT. REV. CODES ANN. § 40-3509 (1961); NEB. REV. STAT. § 44-1504 (1968); NEV. REV. STAT. §

tional Association of Insurance Commissioners (NAIC Model Act),[8] which provides specific statutory authority for state insurance departments to prohibit debtor coercion by any lending institution.[9] Additionally, further questions arise pursuant to the Supremacy Clause of the Federal Constitution[10] which must be considered where both state and federal laws purport to regulate the same subject matter.

Thus, the issue addressed in this Article is which governmental body, the states or the Federal Board, or both, has ultimate authority over debtor coercion by a federal savings and loan association. This Article will demonstrate that the state's authority over a federal savings and loan association's debtor coercion practices supersedes the Federal Board's authority.

II. General Authority of the Federal Board

Federal savings and loan associations were created by the Federal Home Loan Bank Act,[11] enacted by Congress during the early 1930's. The associations were created as a vehicle for securing uniform and stable nationwide home financing.[12] Under this Act, the forerunner of HOLA, the Federal Board was obligated to issue charters for twelve regional Federal Home Loan Banks to serve as credit sources for financial institu-

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686A.100 (1973); N.H. Rev. Stat. Ann. § 417:4 (Supp. 1975); N.J. Stat. Ann. § 17B:30-12 (West 1976); N.M. Stat. Ann. § 58-9-25 (Supp. 1975); N.Y. Ins. Law § 273 (McKinney Supp. 1975) (defining as an unfair trade practice a violation of 40(10) which prohibits discrimination as to premiums or otherwise on the basis of race, color, creed or national origin); N.C. Gen. Stat. § 58-54.4 (Supp. 1975); N.D. Cent. Code § 26-30-04 (Supp. 1975); Ohio Rev. Code Ann. § 3901.21 (Page 1971); Okla. Stat. Ann. tit. 36, § 1204 (West Supp. 1975); Or. Rev. Stat. § 746.015 (1969); Pa. Stat. Ann. tit. 40, § 1171.5 (Purdon Supp. 1976); R.I. Gen. Laws § 27-29-4 (1969); S.C. Code § 37-1212 (Supp. 1975); S.D. Compiled Laws Ann. § 58-22-12 (1967); Tenn. Code Ann. § 56.1204 (1968); Tex. Ins. Code Ann. art. ____, 21.21A (Vernon Supp. 1975); Utah Code Ann. § 31-27-22 (1974); Vt. Stat. Ann. tit. 8, § 4724 (Supp. 1975); Va. Code § 38.1-52 (1970); Wash. Rev. Code Ann. § 48.18.480 (1961); W. Va. Code § 33-11-4 (1975); Wis. Stat. Ann. § 207.04 (West Supp. 1975); Wyo. Stat. § 26.1-251 (Supp. 1975).

8. National Association of Insurance Commissioners Model Unfair Trade Practices Act §§ 1-13 [hereinafter cited as NAIC Model Act]. The National Association of Insurance Commissioners is a voluntary organization established in 1871, having as its members the commissioners and directors or superintendents of the insurance departments of the several states. The NAIC has as its objective the promotion of uniformity in legislation affecting insurance; the encouragement of uniformity in departmental rulings under the insurance laws of the several states; the dissemination of information of value to insurance supervisory officials in the performance of their duties; the establishment of ways and means of fully protecting the interests of insurance policyholders of the various states territories and insular possessions of the United States; and the preservation to the several states of the regulation of the business of insurance. NAIC Const. art. 2.

9. NAIC Model Act § 5.

10. U.S. Const. art. VI § 2.

11. 12 U.S.C. §§ 1421-49 (1970).

12. *Id.*

tions who were members.[13] These banks were also directed to make home mortgage loans directly to the public.[14] In 1933, Congress enacted HOLA.[15] This legislation eliminated the power of the Federal Home Loan Banks to make direct loans to individuals, and instead, authorized a nationwide system of federally chartered savings and loan associations to facilitate individual savings and to provide for home financing.[16]

The Federal Board, under section 1464(a) of HOLA, is granted extensive supervisory powers over these savings and loan associations.[17] Under this statutory provision, the Federal Board's authority is unquestionably broad, and cases have so held. It has been stated that Congress intended to grant the Federal Board exclusive authority over an association's operations. The courts have found that the Federal Board, to operate successfully, needs wide ranging discretionary power in order to effectively make day to day decisions.[18] In fact, it has been noted that this broad power over savings and loan associations provides the Federal Board with the authority to regulate and govern "the powers and operations of every savings and loan association from its cradle to its corporate grave,"[19] and as such, state regulation of the associations is thought to be precluded.[20] However, it only follows that before application of state law is precluded, the federal regulations must be valid.

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13. 12 U.S.C. § 1423 (1970).
14. 12 U.S.C. §§ 1421-49 (1970).
15. 12 U.S.C. §§ 1461-70 (1970).
16. *Id.*
17. 12 U.S.C. § 1464(a) (1970). This section states:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefore, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. *Id.*

18. Bloomfield Fed. Savings and Loan Ass'n v. American Community Stores Corp., 396 F. Supp. 384, 386 (D. Neb. 1975). *See, e.g.*, Bridgeport Fed. Savings and Loan Bank Bd. v. Federal Home Loan Bank Bd., 307 F.2d 580, 584 (3d Cir. 1962); Miami Beach Fed. Savings and Loan Ass'n v. Callander, 256 F.2d 410, 413-15 (5th Cir. 1958); Beverly Hills Fed. Savings and Loan Ass'n v. Federal Home Loan Bank Bd., 371 F. Supp. 306, 312-13 (C.D. Cal. 1973).

19. People v. Coast Fed. Savings and Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951). *See* Kupiec v. Republic Fed. Savings and Loan Ass'n, 512 F.2d 147, 150 (7th Cir. 1975); Myers v. Beverly Hills Fed. Savings and Loan Ass'n, 499 F.2d 1145, 1147 (9th Cir. 1974); Kaski v. First Fed. Savings and Loan Ass'n of Madison, 72 Wis. 2d 132, ____ , 240 N.W.2d 367, 370 (1976).

20. *See, e.g.*, Meyers v. Beverly Hills Fed. Savings and Loan Ass'n, 499 F.2d 1145, 1147 (9th Cir. 1974); Rettig v. Arlington Heights Fed. Savings and Loan Ass'n, 405 F. Supp. 819, 823-24 (N.D. Ill. 1975); City Fed. Savings and Loan Ass'n v. Crowley, 393 F. Supp. 644, 655 (E.D. Wis. 1975); Lyons Savings and Loan Ass'n v. Federal Home Loan Bank Bd., 377 F. Supp. 11, 17 (N.D. Ill. 1974); Elwert v. Pacific First Fed. Savings and Loan Ass'n, 138 F. Supp. 395, 399-400 (D. Ore. 1956); People v. Coast Fed. Savings and Loan Ass'n, 98 F. Supp.

A. *The Federal Board's Regulations Concerning Debtor Coercion*

The Federal Board's regulations pertinent to debtor coercion constitute an absolute prohibition of debtor coercion, and provide as follows:

> (a) Tie-in prohibitions. No insured institution or service corporation affiliate thereof may grant any loan on the prior condition, agreement, or understanding that the borrower contract with any specific person or organization for the following:
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> (1) Insurance services (as an agent, broker or underwriter), except insurance or a guarantee provided by a government agency or a private mortgage insurance; . . .
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> (b) Notice with respect to insurance on home loans, an insured institution or subsidiary thereof shall notify the borrower in writing of his right to freely select the person or organization rendering the insurance services referred to in paragraph (a)(1) of this section in connection with a loan on a home . . . occupied or to be occupied by the borrower at or prior to the time of the written commitment to make such loan.[21]

These regulations clearly prohibit an association from predicating the extension of credit upon the purchase of insurance from a particular person or organization. The existence of this regulation is significant when considered in light of *Meyers v. Beverly Hills Federal Savings & Loan Association*,[22] a case which held that where the Federal Board adopts a regulation covering a specific subject area, federal law preempts the field. Attempted attacks on these regulations have failed because the Federal Board's regulations have also been held to have the full force and effect of federal law.[23]

In addition to the above prohibitions, through the use of various disciplinary tools, the Federal Board has the power to penalize, associations which fail to conform to the regulations.[24] These tools include the right to notify an association of alleged violations,[25] to issue a cease and desist order if a hearing establishes the alleged violations[26] and the right to enforce such an order in federal district court.[27]

III. State Authority over Debtor Coercion

Following the enactment of the McCarran Act, there occurred wide-

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311, 318-19 (S.D. Cal. 1951); Washington Fed. Savings and Loan Ass'n v. Balaban, 281 So. 2d 15, 17 (Fla. 1973).

21. 12 C.F.R. § 563.35 (1978).

22. 499 F.2d 1145, 1147 (9th Cir. 1974).

23. Community Fed. Savings and Loan Ass'n v. Fields, 128 F.2d 705, 707 (9th Cir. 1942); City Fed. Savings and Loan Ass'n v. Crowley, 393 F. Supp. 644, 651 (E.D. Wis. 1975); People v. Coast Fed. Savings and Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1952); Woodard v. Broadway Fed. Savings and Loan Ass'n, 111 Cal. App. 2d 218, 244 P.2d 467, 471 (Dist. Ct. App. 1952).

24. 12 U.S.C. § 1464(d) (1970).

25. 12 U.S.C. § 1464(d)(2)(A) (1970).

26. *Id.*

27. 12 U.S.C. § 1464(d)(8) (1970).

spread passage of model regulatory legislation.[28] This legislation, prepared through the cooperation of the state insurance departments and sponsored by the National Association of Insurance Commissioners (NIAC), was concerned primarily with rate regulation and unfair methods of competition, and was designed to exempt these areas from federal regulation and intervention.[29] The Model Act under consideration here was designed specifically to prohibit unfair and deceptive insurance practices.[30] It generally provides that no "person" shall engage in unfair trade practices.[31] In order to deal directly with the problem of debtor coercion by lending institutions, section 5 of the Model Act was adopted, which provides *inter alia* that:

> No person may require as a condition precedent to the lending of money or extension of credit, or any renewal thereof, that the person to whom such money or credit is extended or whose obligation a creditor is to acquire or finance, negotiate any contract of insurance or renewal thereof through a particular insurer or group of insurers or agent or broker or group of agents or brokers.[32]

The critical point here is that, for the purpose of this section, "person" is specifically and uniquely defined to include any individual, corporation, association, partnership or other legal entity.[33] This definition contemplates a wide ranging application of the term "person," and includes a federal savings and loan association. This broader definition of "person" as stated in the Model Act was intentional, and the history of the Model Act substantiates this conclusion. In the drafting stages of the Model Act, the NAIC B-4 subcommittee[34] comments dealt specifically with the unique definition of "person." Referring to the debtor coercion provision, the subcommittee stated:

> If this provision is to be made an integral part of the Model Act then the word "person" must be defined, as in the above asteriked note so as not to conflict with the definition contained in the Model Act itself. That definition restricts the definition of "person" to licensees under the insurance code. *This is too narrow an application for the purpose of this provision.*[35]

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28. R. KEETON, BASIC TEXT ON INSURANCE LAW 538 (1971).
29. *Id.*
30. NAIC MODEL ACT § 1.
31. *Id.*
32. *Id.* at § 5(a).
33. *Id.* at § 5(g).
34. The NAIC carries out its function through the committee process. At present there is an executive committee and four standing committees; Financial Condition, Examination and Reporting (the A committee); Laws, Legislation and Regulation (the B committee); Life, Accident and Health Insurance (the C committee); and Property and Liability Insurance (the D committee). The B-4 subcommittee, considers unfair trade practice problems. *See* NAIC CONST. art. VI.
35. I NAIC PROCEEDINGS 518 (1972) (emphasis added).

The history of the Model Act, and its definitions, suggests rather conclusively that section 5 was intended to include, among others, federal savings and loan associations. Having concluded that the Model Act's debtor coercion prohibitions were intended to apply to associations, two further critical issues must be resolved. First, it must be decided whether the state's debtor coercion prohibitions fall within the state's regulatory authority granted by the McCarran Act, and if so, it must be determined how such state regulations interface with HOLA where a federal savings and loan association is involved.

A. *State Debtor Coercion Provisions Are Consistent with the McCarran Act*

A discussion of the authority for state debtor coercion provisions must first begin with the McCarran Act. For many years prior to the enactment of the McCarran Act, the Supreme Court's decision in *Paul v. Virginia*[36] stood for the principle that the business of insurance was not commerce, and thus not subject to federal regulation. In *United States v. South-Eastern Underwriters Association*,[37] however, the Supreme Court held that a fire insurance company conducting a substantial part of its business across state lines was engaged in interstate commerce and therefore subject to federal regulation, casting doubt on the *Paul* decision. Congress, concerned about the effect this decision might have on state regulation of the insurance industry, responded by enacting the McCarran Act.[38]

The McCarran Act declares that the continued regulation and taxation of the business of insurance by the states is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to such regulation or taxation by the states.[39] It specifically provides that the "business of insurance" shall be regulated by the states, and that existing federal laws shall not interfere with state regulation of insurance unless the federal statutes relate specifically to insurance.[40] In addition, the McCarran Act provides that three federal antitrust statutes, the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the insurance business only to the extent that such business is not regulated by state law.[41] Section 3(b) limits the above exemption by providing that "[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement

36. 75 U.S. 168 (1869).
37. 322 U.S. 533 (1944).
38. 91 CONG. REC. 478-79, 481-82, 488, 1484, 1488 (1945).
39. 15 U.S.C. § 1011 (1970).
40. *Id.* at § 1012(b).
41. *Id.*

to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[42]

In brief, the McCarran Act provides that the business of insurance, and every person engaged therein, is primarily subject to the applicable laws of the state in question. Therefore, federal law will not preempt the applicable state insurance law unless the federal law specifically relates to the business of insurance.

B. *General Meaning of the "Business of Insurance" under the McCarran Act*

An initial question that arises when considering the McCarran Act is what constitutes the "business of insurance." This discussion will first consider decisions[43] which generally outline the parameters of the "business of insurance," and then consider directly whether the debtor coercion by a savings and loan association constitutes the doing of insurance business within the meaning of the McCarran Act.

In *Securities and Exchange Commission v. National Securities, Inc.*,[44] the Supreme Court issued some revealing language on the scope and meaning of the business of insurance. In this case, the Court set forth the basic test to determine whether a particular state statute was a proper regulation of the business of insurance under the McCarren Act. The Court stated:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."[45]

Similarly, in *California League of Independent Insurance Producers v. Aetna Casualty and Surety Co.*,[46] the federal district court held that it had no jurisdiction to hear an alleged violation of the Sherman Act due to

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42. *Id.* at § 1013(b).

43. Section 2(b) of the McCarran Act provides that the Sherman Act, the Clayton Act and the Federal Trade Commission Act are applicable to the business of insurance only if such business has not been regulated by state law. Because of this provision, a common defense to an antitrust action with insurance implications in federal court is (1) that the defendant's acts fall within the "business of insurance," and (2) that state law regulates the acts. This explains why many of the key decisions defining "business of insurance" relate to antitrust actions.

44. 393 U.S. 453 (1969).

45. *Id.* at 460.

46. 175 F. Supp. 857 (N.D. Cal. 1959).

the McCarran Act, finding that if a state generally proscribes or permits certain conduct on the part of those involved with insurance, it is regulating the business of insurance within the meaning of section 1012(b) of the McCarran Act.[47]

Because the federal courts have not strictly limited the meaning of "business of insurance," state insurance regulation has not been limited to only those matters involving the insurer-policyholder relationship. In *Schwartz v. Commonwealth Land Title Insurance Co.*,[48] the federal district court determined that, in the sale of real property, a charge to the seller by a title insurance company for expenses incurred in the title search was properly regulated by the state as the "business of insurance" under the McCarran Act. The court held that the regulatory authority granted to the states by the McCarran Act was not strictly limited to insurer-policyholder matters, but applies, as well, where the policy of that Act is best effectuated by recognizing the exclusivity of state regulation.[49] The *Schwartz* court reasoned that under Pennsylvania law, the title search, as well as the other activities undertaken to perfect the title to be insured, are part of the company's insurance business. As a result, it was concluded that the close relationship of these services to the realty conveyance, with which the title insurance is associated, compels a finding that the initiation of a "seller charge" by the title insurance company is part of the "business of insurance."[50] As a result, it is clear that not all courts have limited the definition of the "business of insurance" to activities surrounding the insurer-policyholder relationship.

Where states do have the authority under the McCarran Act to regulate the business of insurance, federal legislation generally affecting the same subject area may not be applicable. In *Gerlach v. Allstate Insurance Co.*,[51] the federal district court exempted an insurance company, Allstate, from regulation under the Federal Truth in Lending Act.[52] The plaintiff had argued that this federal law should be applied to force Allstate to disclose that the service charge on its premium installment payments included an amount allocable to interest. The court rejected this argument by concluding that the service charge was part of the premium, and since the fixing of premium rates was a legitimate aspect of the business of insurance, the premium service charge was also part of the business of insurance. Since the state of Florida had legislation regulating the disclosure of premium financing terms, the application of the Truth in Lending Act would have impaired the state law, and

47. *Id.* at 860. *Accord*, Ohio AFL-CIO v. Insurance Rating Board, 451 F.2d 1178, 1181 (6th Cir. 1971).

48. 374 F. Supp. 564 (E.D. Pa. 1974).

49. *Id.* at 572.

50. *Id.* at 575.

51. 338 F. Supp. 642 (S.D. Fla. 1972).

52. 15 U.S.C. §§ 1601-65a (1970).

therefore the federal legislation was deemed to be barred by the McCarran Act.[53]

C. *Debtor Coercion by an Association Constitutes the "Business of Insurance" under the McCarran Act*

Several recent decisions have specifically held that a tie-in arrangement by a lender requiring the borrower to obtain insurance from a specific person or organization as a condition to the granting of a loan constitutes the "business of insurance" within the meaning of the McCarran Act.[54] In *Addrisi v. Equitable Life Assurance Society,*[55] the defendant Equitable, in addition to offering the usual insurance products, was

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53. Gerlach v. Allstate Ins. Co., 338 F. Supp. 642, 650 (S.D. Fla. 1972).

54. Dexter v. Equitable Life Assurance Soc'y, 527 F.2d 233 (2d Cir. 1975); Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725, 726 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

In one case directly on point, the Iowa Insurance Commissioner initiated administrative proceedings against a federal savings and loan association, alleging a violation of section 507B.5(1) of the Iowa Code. Prior to the administrative hearing, notice of which was filed in May 1975, Algona Savings and Loan Association filed a motion to dismiss; the Association challenged the applicability of section 507B.5(1) (dealing with debtor coercion) to a savings and loan association, contending that even if that section were applicable to such associations, application thereof would violate the supremacy clause of the United States Constitution (Art. IV, cl. 2). The Iowa Insurance Commissioner ruled against the Association on both contentions, and as a result, it filed a petition for judicial review in the United States District Court for the Northern District of Iowa seeking declaratory relief. On appeal to the Eighth Circuit Court of Appeals, the petition was dismissed. The court stated as follows:

> Home Federal's allegations of preemption and failure to engage in the 'business of insurance,' asserted in its federal petition, actually are in the nature of defenses to the Commissioner's charges. Hence they will not suffice for federal question jurisdiction here. The case is basically simply an alleged violation of state law. It is not a federal case and is not converted to one by Home Federal's defenses to the state's basic allegations. . . .
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> Under the view we have taken of the case, we do not reach questions presented going to the merits. We find a lack of jurisdiction over the subject.

Home Federal Savings and Loan Ass'n v. Insurance Dep't of Iowa, No. 77-1330 slip op. at 11 (8th Cir., filed Feb. 21, 1978).

In addition to the federal petition, the Association simultaneously filed a petition for judicial review in the Kossuth County District Court of Iowa. Because the decision rendered by the district court was somewhat unclear, an interlocutory appeal was filed before the Iowa Supreme Court and is currently pending. *See* Home Fed. Savings and Loan Ass'n v. Insurance Dep't, No. 2-61748 (Iowa Sup. Ct., filed June 14, 1978). The narrow issue before the Iowa Supreme Court is whether the specific definition of "person" as set forth in section 507B.5(5) of the Iowa Code controls for purposes of section 507B.5 of the Iowa Code relating to debtor coercion. It will be interesting to see whether the Iowa Supreme Court applies the reasoning of an earlier case which addressed a similar issue. *See* Merchants Supply Co. v. Iowa Employment Security Comm'n, 235 Iowa 372, 16 N.W.2d 572 (1944). If the court follows *Merchants Supply*, it is likely to rule that the unique definition of "person" contained within the debtor coercion subsection controls as to that subsection and that the general definition of "person" set forth in section 507B.2(1) of the Iowa Code is precluded from application.

engaged in the business of making loans for the purpose of financing the purchase of residential real property. Equitable's insurance agents also acted as loan agents, and as a condition precedent to making a loan, Equitable required the debtor to purchase a high cost Equitable life insurance policy. The plaintiff Addrisi applied for such a loan and was subjected to the above debtor coercion. The *Addrisi* court, in determining the merits of the case, stated the most relevant issue to be whether Equitable's conduct was properly regulated by the state under the McCarran Act.[56] In resolving the issue, the court emphasized the fact that the McCarran Act contemplates state regulation of the relationship between an insurance company and its policyholders. In this case, the state laws dealing with "unfair practices" constituted a valid state regulation of the debtor coercion activities of Equitable within the meaning of sections 1012(a) and 1012(b) of the McCarran Act.[57] As such, the federal Sherman Antitrust Act was not applicable to regulate the conduct of Equitable.

In *Dexter v. Equitable Life Assurance Society*,[58] the identical issue posed in *Addrisi* was again litigated. Plaintiffs alleged that Equitable had violated federal antiturst laws, specifically the Sherman and Clayton Act. In rejecting plaintiff's claim, the *Dexter* court suggested that even if the lender was not an insurer, the "tie-in" practice fell within the McCarran Act. Relying on the *Addrisi* decision, the court stated:

> We believe that decision [*Addrisi*] is correct. Even if we agreed with plaintiffs that the lending of mortgage money by an insurance company does not in itself constitute "the business of insurance" and so is subject to the antitrust laws, a question we need not decide here, the very basis of the Dexter's complaint is that Equitable used the mortgage loan to coerce the purchase of an insurance policy. *Forcing people to buy insurance may well be an undesirable practice—and we do not suggest that we approve of it—but it is a part of "the business of insurance."*[59]

Dexter is significant in that the court suggests that the nature of the entity precipitating the coercion is not the relevant factor. It is the fact that people are forced to become policy holders because insurance is the

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55. 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

56. *Id.* at 727. The *Addrisi* court also considered the issue of whether Equitable's conduct was an act of coercion subject to the Sherman Act. The court concluded that conduct such as debtor coercion, which coerces policyholders at large, falls within the regulation of the McCarran Act, not the Sherman Act, because it involves the insurer-policyholder relationship. *Id.* at 728-29.

57. *Id.* at 728-29.

58. 527 F.2d 233 (2nd Cir. 1975).

59. *Id.* at 235 (emphasis added). *But cf.* St. Paul Fire & Marine Ins. Co. v. Barry, 98 S.Ct. 2921 (1978) (in discussing the section 3(b) boycott exception to the McCarren Act, the United States Supreme Court expressly declined to consider what effect its decision would have on the scope of the "coercion" and "intimidation" aspects of section 3(b)). *See* Case Note, 27 DRAKE L. REV. 722 (1978).

tied item which brings the transaction within the business of insurance. The right of a prospective insured to have freedom in deciding where he purchases an insurance contract is the protection granted in the debtor coercion statutes; clearly these statutes are "aimed at protecting this relation between an insurer and insured directly or indirectly"[60] by assuring freedom to purchase from any insurer and agent.

Logically, it only follows that any association engaged in debtor coercion, where insurance is the tied item, is engaged in the business of insurance and subject to state regulation under the McCarran Act.

IV. State Regulation of Aspects of an Association's Operations is Commonplace

Despite the breadth of authority granted the Board under HOLA, the pervasiveness of its statutory and regulatory scheme,[61] the fact that the Board's regulations have the force and effect of federal law[62] and the fact that the regulatory scheme may preclude applicability of state law,[63] the suggestion that states may regulate federal savings and loan associations is not without precedent. It is possible for a state to regulate certain aspects of federal savings and loan associations, to the extent such laws do not interfere with the purposes for which the savings and loan was created, destroy its efficiency or conflict with paramount federal law.[64] In numerous instances, courts have allowed state regulation of various operational aspects of federal savings and loan associations. In *First National Savings Foundation v. Samp*,[65] a federal savings and loan offered a "Guaranty Estate Plan" which consisted of a contract between the investor and association. There the court held that persons selling interests in the plan were engaged in the business of selling securities and thus came within the definition of "dealer" in the state registration statute.

As the court in *Samp* pointed out, state regulation of this aspect of a federal savings and loan did not result in regulation of the savings and loan association itself, but only resulted in the regulation of an independent enterprise which was soliciting savings accounts in such associations.[66] With that rationale, the court upheld the Wisconsin securities law requiring the savings and loan to obtain a dealer's license.

From a close reading of the debtor coercion section of the NAIC Model Act,[67] it is evident that there is no attempt to regulate the savings

60. SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969).
61. *See* note 20 *supra*.
62. *See* note 25 *supra*.
63. *See* note 21 *supra*.
64. Pearson v. First Fed. Savings and Loan Ass'n of Tarpon Springs, 149 So. 2d 891 (Fla. Dist. Ct. App. 1963).
65. 274 Wis. 118, 80 N.W. 2d 249 (1956).
66. 274 Wis. at ____ , 80 N.W.2d at 261.
67. *See* note 34 *supra*.

and loan associations themselves. The debtor coercion provision of the Model Act does not interfere with or destroy the efficiency of associations. Regulation by the states of this aspect of the business of insurance in which associations become involved does not affect the operations of an association which are specifically contemplated in their federal enabling legislation.

V. State Regulation of Debtor Coercion Does Not Conflict with the Supremacy Clause

The supremacy clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[68]

Accordingly, under certain circumstances when federal and state laws come into conflict, the state laws are preempted.[69]

Whether a federal statute or regulation has preempted an area of law depends upon the express language of the statute and the intent of Congress with respect to its enactment. While this judgment is not always easy to make, the United States Supreme Court has given some guidance. In *Florida Lime and Avocado Growers, Inc. v. Paul*,[70] the Supreme Court stated:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits *no other conclusion*, or that the Congress *has unmistakably so ordained*.[71]

The Supreme Court in *Kelly v. Washington*,[72] considered the preemption issue as it applied to a state statute governing the inspection and regulation of vessels in navigable waters over which the federal government had control. In its decision the Court observed that "[i]t should never be held that Congress intends to supersede or by its legislation suspend the exercise of police powers of the States, even when it may do so, unless its purpose to effect that result is *clearly manifested*."[73] The Court has reached numerous similar conclusions concerning the preemption issue

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68. U.S. Const. art. VI, cl. 2.
69. Hines v. Davidowitz, 312 U.S. 52, 66-68 (1941)
70. 373 U.S. 132 (1963).
71. *Id.* at 142 (emphasis added).
72. 302 U.S. 1 (1937).
73. *Id.* at 11 (emphasis added).

when determining applicability of state statutes to federally regulated areas.[74]

To properly address the preemption question, an analysis of the issue at hand must consider (1) the authority granted the Board by HOLA as it relates to the debtor coercion regulation, and (2) the authority granted the states by the McCarran Act as it relates to the debtor coersion provision of the Model Act. First, it is contended that there is no pervasive or comprehensive scheme of *federal* regulation of the business of insurance. Indeed, federal incursion into the regulation of insurance has been cautious, specific and highly selective. Second, consideration of the McCarran Act in analyzing the preemption issue is important for the reason that Congress expressly provided that its own statutory silence was not to be construed as a barrier to the exclusive rights of the states to regulate the business of insurance.[75] Congress further stated that only if a federal act *expressly* provided the authority for federal insurance regulation could that act supersede state insurance regulations promulgated under the McCarran Act.[76]

Scrutiny of HOLA, from which the Board draws its authority to promulgate regulation,[77] shows that the word "insurance" does not appear. In view of this, HOLA cannot be said to "specifically relate to the business of insurance."[78] Furthermore, according to the express language of the McCarran Act, this congressional silence "shall not be construed to impose *any barrier* to the regulation" of insurance.[79] As a result, it becomes clear from reading the applicable statutory and case law that neither the McCarran Act nor the supremacy clause of the United States Constitution preclude state regulation of debtor coercion by a federal savings and loan association.

VI. State Regulations of Debtor Coercion Supercede and Render the Board's Regulations Void

The preceeding analysis suggests that the Board's recently promulgated debtor coercion regulations may lack a statutory foundation and when applied to an association in a state with a debtor coercion provision of its own, are void.

In a highly analagous case, *Federal Trade Commission v. National*

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74. *See, e.g.*, United Auto, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1955) (state statute governing labor relation); California v. Zook, 336 U.S. 725 (1949) (state statute regulating interstate transportation); Hartford Indem. Co. v. Illinois, 298 U.S. 155 (1936) (state statute requiring a license and bond as to fraudulent handling of produce).

75. 15 U.S.C. § 1011 (1970).

76. *Id.* at § 1012(b).

77. 12 U.S.C. § 1464(a) (1970).

78. 15 U.S.C. § 1012(a) (1970).

79. *See* note 77 *supra.*

Casualty Co.,[80] the Federal Trade Commission entered cease and desist orders prohibiting the respondent insurance company from carrying on certain insurance advertising practices found by the Commission to be false, misleading and deceptive under the Federal Trade Commission Act. On appeal, the Supreme Court concluded that the existence of applicable state insurance statutes enacted under the McCarran Act prohibited the Federal Trade Commission from regulating such practices. The Court said that "Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision."[81] The Court emphasized that the state, in this case, had within its boundaries the power to regulate the insurance advertising in question.[82] Thus, the otherwise exclusive jurisdiction of the Federal Trade Commission pursuant to the Federal Trade Commission Act was forced to yield to the relevent state insurance laws, and the Court found that the Commission's action was void.

In the context of this Article, the Board's debtor coercion regulation[83] relates to an area of the business of insurance already fully regulated by the states,[84] and as the *National Casualty* case instructs, any action taken by the Board under such a regulation is void and is superceded by the state regulations pursuant to the express mandate of the McCarran Act.

VII. CONCLUSION

Despite the breadth of the Board's authority underr HOLA to govern associations, acts of debtor coercion by an association are regulated by state insurance law under the debtor coercion laws.[85] The state's regulation of an association's debtor coercion (1) is consistent with the grant of authority to the states in the McCarran Act in that debtor coercion by an association while engaging in the act itself, constitutes doing the business of insurance (2) does not vitiate (a) HOLA nor (b) the supremacy clause of the United States Constitution. As such, any action taken by the Board under its regulations in a state with a debtor coercion provision of its own, is void. Such states are therefore free to exercise their exclusive authority over an association's debtor coercion.

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80. 357 U.S. 560 (1958).
81. *Id.* at 564.
82. *Id.*
83. 12 C.F.R. § 563.35 (1978).
84. *See* NAIC MODEL ACT.
85. *See* note 7 *supra.*

FIRST PARTY INSURANCE: CLAIMS, PRACTICES AND PROCEDURES IN LIGHT OF EXTRA-CONTRACTUAL DAMAGE ACTIONS

†*Thomas M. Zurek*

I. INTRODUCTION

Insurance has been defined as an arrangement in which one party, called the insurer, contracts with another party, called the insured, to perform a service upon the occurrence of a specified harmful contingency.[1] In its most simplistic form this arrangement is accomplished by an insurer calculating both, the risk of the harmful contingency occurring and the amount of consideration which the insured must provide to compensate the insurer for contractually assuming the risk of occurrence.[2] Insurers seek to accurately predict the liability exposure which results from entering into the insurance contract by underwriting and administering claims. This prediction must be based not only on the mathematical tables which predict the probability of the specified contingency occurring, but also on the law which governs the insured's rights which arise from the contract with the insurer.

Historically, the contract of insurance has been relatively free from acrimonious legal scrutiny.[3] The relationship between insurers and insureds has traditionally been controlled by the narrow terms and conditions found within the four corners of the contract. If there was a cause of action for breach of the terms of the contract, it was brought for the

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1. Due to the limited scope of this article all references to the term "insurance" will mean disability income insurance unless otherwise indicated. This article will also pertain only to "first party coverage," i.e., the situation where the insured has actually suffered the injury or economic loss which creates the need for insurance benefits and not to "third party coverage," i.e., where the insured has either been sued as a tortfeasor or where a third party makes a claim against the insured and the insurer must either defend the insured or tender benefits to the third person, respectively. These limitations will apply unless otherwise indicated.

2. R. KEETON, BASIC TEXT OF INSURANCE LAW § 1.2(a) (1971).

3. *See* Hirsch, *Strict Liability: A Response To the Gruenberg-Silberg Conflict Regarding Insurance Awards*, 7 SW. U.L. REV. 310 (1975).