FILED

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

QUICKEN LOANS, INC., a Michigan corporation, Plaintiff, v. DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, Defendant.	NO. CV S-03-0256 GEB JFM ORDER

Plaintiff Quicken Loans, Inc. ("Quicken Loans") moves for partial summary judgment and a permanent injunction which would enjoin Defendant Demetrios Boutris, in his official capacity as the Commissioner of the California Department of Corporations ("Commissioner"), and any other agent of the state of California, from enforcing the "per diem" interest restrictions found in the current and previous version of California Civil Code § 2948.5 and California Financial Code § 50205(o),[1] as to residential mortgage loans made by Quicken Loans that either qualify under the Depository Institutions

[1] California's per diem statutes prohibit mortgage lenders from charging any interest on residential first mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. See Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50205(o).

Deregulation and Monetary Control Act of 1980 ("DIDMCA"), or are made pursuant to the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act"), or are covered by both statutes. The Commissioner opposes the motion. The motion was argued May 5, 2003.

Background[2]

Quicken Loans is a Michigan corporation that engages in residential mortgage lending in the fifty states of the United States and the District of Columbia. (Pl.'s Statement of Undisputed Facts ("Pl.'s SUF") ¶ 1; Def.'s Response to Pl.'s SUF ("Def.'s Response") ¶ 1.) Quicken Loans makes a variety of loans secured by residential mortgages, including home purchase money, refinancing and home equity residential loans. (Id.) Quicken Loans is licensed and authorized to make residential mortgage loans in California under the California Residential Mortgage Lending Act ("CRMLA"). (Id. ¶ 2.) During 2001 and 2002, Quicken Loans contends it made approximately $500 million and $745 million respectively in loans secured by mortgages on California property. (Id. ¶ 1.)

On March 11, 2002, the Commissioner delivered a letter to Quicken Loans in which he stated Quicken Loans had violated and was continuing to violate the "per diem" restrictions imposed by California Civil Code § 2948.5 that was in effect until January 1, 2001 and California Financial Code § 50204(o). (Id. ¶ 11.) In a letter dated January 28, 2003, the Commissioner ordered Quicken Loans

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[2] The Commissioner denies many of the assertions of fact made by Plaintiffs on the basis that no discovery has been conducted; however, the Commissioner states he has "admitted sufficient facts upon which he believes this court may make a substantive ruling on the motion and therefore does not request delay to conduct discovery prior to responding to the motion." (Def.'s Memo. of P. & A. in Opp'n ("Def.'s Opp'n") at 1.)

to "(1) review all loans it made in California from a period beginning October 14, 1999; (2) refund interest payments collected in violation of the 'per diem' restrictions (and pay borrowers 10% interest on the refunded interest); and (3) submit a detailed report of all such loans . . . ." (Id. ¶ 12.) The Commissioner also ordered Quicken Loans to comply with California Financial Code § 50204(o). (Id.) Quicken Loans estimates that conducting the review and completing the report would require it to review approximately 5,500 files at a cost of approximately $400,000. (Pl.'s SUF ¶ 14.)

Permanent Injunction Standards

"The requirements for the issuance of a permanent injunction are the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996). "[To] meet this standard, [Quicken Loans] must establish actual success on the merits, and that the balance of equities favors injunctive relief." Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998). Where an injunction is sought against an agency of state government, the injunction must be scrutinized closely "to make sure that the remedy protects the plaintiff['s] federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law." Clark v. Coye, 60 F.3d 600, 604 (9th Cir.1995). "This requires both that there be a determination that the conduct of the [Commissioner] violates federal constitutional law. . . and that the scope of the injunction is no broader than necessary to provide complete relief to the named plaintiff[]. . . ." Easyriders Freedom F.I.G.H.T., 92 F.3d at 1496.

Discussion[3]

Quicken Loans argues that California's "per diem" statutes are preempted by DIDMCA and therefore cannot be enforced against it. "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Fidelity Federal Savings and Loan Ass'n v. Cuesta, 458 U.S. 141, 152-53 (1982)(citation omitted).

> [When] explicit pre-emption language does not appear, or does not directly answer the question . . . . courts must consider whether the federal statute's structure and purpose or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. . . . A federal statute, for example, may create a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Alternatively, federal law may be in irreconcilable conflict with state law. . . . Compliance with both statutes, for example, may be a physical impossibility, . . .; or, the state law may stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31 (1996) (quotations and citations omitted).

Under DIDMCA,

> The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is - -
> (A) secured by a first lien on residential real property. . .
> (B) made after March 31, 1980; and
> (C) [a "federally related mortgage loan"]

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[3] Summary judgment standards are well known and will not be repeated unless relevant to a point decided.

12 U.S.C. § 1735f-7a(a). A "federally related mortgage" "(1) is secured by residential real property designed principally for the occupancy of from one to four families; and (2). . .(D) is made in whole or in part by any 'creditor,' as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C. § 1725f-5(b). A "creditor" is:

> a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. § 1602(f). The undisputed facts establish that the Quicken Loans residential loan transactions at issue in this action are subject to DIDMCA. States were able to override the DIDMCA's express preemption by explicitly opting out of its terms prior to April 1, 1983. Id. § 1735f-7a(b)(2). No evidence has been submitted demonstrating that California opted out of the DIDMCA's express preemption.

California's per diem statutes prohibit interest from being charged on loaned mortgage funds for a period in excess of one day prior to recording of the mortgage. Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o). The per diem statute that was applicable to Quicken Loans until January 1, 2001, which was an earlier version of California Civil Code § 2948.5, provided in relevant part:

> interest on the principal obligation of a promissory note secured by a mortgage or deed of

> trust on real property improved with one-to-four residential dwelling units shall not commence to accrue prior to close of escrow, the date upon which the loan proceeds have been made available for withdrawal as a matter of right, as specified in subdivision (d) of Section 12413.1 of the Insurance Code.

The current version of California Civil Code § 2948.5 provides, "[a] borrower shall not be required to pay interest on a principal obligation under a promissory note secured by a mortgage or deed of trust on real property improved with between one to four residential dwelling units for a period in excess of one day prior to recording of the mortgage or deed of trust if the loan proceeds are paid into escrow. . . ." In addition, under the CRMLA, a licensee may not "[r]equire a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust," except under certain circumstances which are not relevant to the present motion. Cal. Fin. Code § 50204(o).

Quicken Loans argues that California's per diem statutes expressly limit the amount of interest that a lender may collect on federally related mortgage loans and are therefore preempted by DIDMCA. (Pl.'s Memo. of P. & A. at 10.) Quicken Loans supports its position by relying primarily on Shelton v. Mutual Savings and Loan Ass'n, 738 F. Supp. 1050 (E.D. Mich. 1990). In Shelton, the plaintiffs argued defendant Bank "violated the Michigan usury statute, M.C.L. sections 438.31c(2) and (9), by charging interest before the loan proceeds were disbursed." Id. at 1053. The court explained, "the broadest possible interpretation of the exemption from state usury laws is consistent with the legislative purpose [of DIDMCA]," and therefore held Michigan's usury law was preempted by DIDMCA. Id. at 1057-58.

The Commissioner argues that the per diem statutes are not usury statutes[4] and "do[] absolutely nothing to frustrate the broad goals of DIDMCA[,]. . . [do] not limit the rate of interest plaintiff can charge[,] . . . [and do] not limit the total amount of interest plaintiff can collect, as the rate of interest charged remains within the control of the plaintiff and may be bargained with the consumer." (Def.'s Opp'n at 4.) Quicken Loans counters that DIDMCA is not limited to preempting only state usury statutes. (Pl.'s Reply at 4.) Quicken Loans contends, "if Congress had wished to limit the effect of DIDMCA solely to usury statutes, Congress would have done so explicitly." (Id. at 5.)

DIDMCA preempts "[t]he provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved. . . " on particular types of loans. 12 U.S.C. § 1735f-7a(a). The language of the statute does not expressly limit the preemptive scope of DIDMCA to state usury laws. However, the relevant legislative history makes clear that Congress just intended to create a limited preemption of state usury laws. See Brown v. Investors Mortgage Co., 121 F.3d 472, 476 (9th Cir. 1997)("Congress made specific findings that modification of state usury laws was necessary for a stable national financial system."). The Senate Report that accompanied the bill containing what became 12 U.S.C. § 1735f-7a provides:

> In order to ease the severity of the mortgage credit crunches of recent years and to provide financial institutions, particularly those with

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[4] California's usury laws are found in California Constitution, Article XV, § 1.

> large mortgage portfolios, with the ability to offer higher interest rates on savings deposits, H.R. 4986 as reported by the Committee would preempt any state constitutional or statutory provision setting a limit on mortgage interest rates. . . .
> H.R. 4986 as amended provides for a limited preemption of state usury laws. It provides that the state constitutional or statutory restrictions on the amount of interest, discount points or other charges on any loan, mortgage or advance secured by real estate which is described in section 527(B) of the National Housing Act are exempt from usury ceilings. . . .
> The Committee believes that this limited modification in state usury laws will enhance the stability and viability of our nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending. . . .
> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers.

S. Rep. No. 96-368, at 18-19 (1979), reprinted in 1980 U.S.C.C.A.N. 236, 254-55.

"Usury is the receiving, securing, or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law, the exaction of a greater sum for the use of money than the highest rate of interest allowed by law." 45 Laura Dietz & Anne M. Payne, American Jurisprudence, Interest and Usury § 2 (2d ed. 2002). In California, "usury" has been defined as "taking more than the law allows upon a loan or for forbearance of a debt." Hall v. Beneficial Fin. Co., 118 Cal. App. 3d 652, 654 (1981)(citation omitted). By prohibiting lenders from commencing to charge interest on loaned mortgage funds until one day prior to recordation, California's per diem statutes constitute usury laws.

The Commissioner also argues that California's per diem statutes do not fall within the type of activities preempted by DIDMCA because they do not expressly limit interest rates or amounts. The Commissioner compares California's per diem statutes with the simple interest statute ("SIS") held not preempted by the DIDMCA in Grunbeck v. Dime Savings Bank of New York, 74 F.3d 331 (1st Cir. 1996). The SIS requires that any interest rate or amount agreed to by the parties be computed on a "simple interest" basis. Grunbeck, 74 F.3d at 337. The court explained,

> [t]he SIS . . . does not "serve to . . . restrain" either the rate or the amount of simple interest which may be obtained, since the lender remains free to compensate by increasing the simple interest rate. Thus, the SIS does not "expressly" limit "the rate or amount of interest." Nor, in the alternative, does the SIS--as distinguished from market forces-- "limit" the rate or amount of interest if "limit" means a "final, utmost or furthest boundary" on the rate or amount of interest, since the SIS imposes no ceiling whatsoever on either the rate or amount of simple interest that may be exacted.

Id. at 338 n.6. The Commissioner argues that like the SIS, the per diem statutes "do not expressly limit interest rates or amount. . . [instead they] establish[] the date upon which the per diem interest may be assessed upon a borrower." (Def.'s Opp'n at 3.)

Quicken Loans counters that Grunbeck is factually distinguishable. Unlike the SIS, California's per diem restriction does not leave "entirely to the parties the rate and amount of . . . interest to be exacted" because once the lender and borrower's loan transaction is finalized, the lender has no way of collecting interest on loaned mortgage funds that would have been collected absent delays in recording the deed of trust. Grunbeck, 74 F.3d at 337. Quicken

Loans is unable to bargain for a higher interest rate to compensate it for the possible delay in recordation of the mortgage or deed of trust because such delay is typically caused by the actions of others: the settlement agents, the escrow company, and the county clerk who records the mortgage. Thus, the statute in Grunbeck simply limited the manner in which the lender expressed its interest rate without limiting the total amount of interest charged over the course of the loan. In contrast, California's per diem statutes prevent the lender from charging a specific pre-determined amount of interest over the course of the loan by tying the total amount of interest charged to events outside the lender's control which will not occur until after the loan is made.

DIDMCA preempts only those state laws "expressly limiting the rate or amount of interest . . ." charged on particular residential mortgage loans. 12 U.S.C. § 1735f-7a(a). "When engaged in the task of statutory interpretation, 'courts . . . should . . . attempt to give meaning to each word and phrase.'" Grunbeck, 74 F.3d at 338 (citation omitted). Thus, the question is whether the per diem statutes expressly place a ceiling on interest rates or amounts.[5] California's per diem statutes establish when interest can be charged by prohibiting a lender from charging interest on a mortgage for a period in excess of one day prior to recordation of the mortgage. Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o). By restricting the time period in which a lender may charge interest on loaned funds, the language of the per diem statutes "expressly limit[s] the rate or

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[5] The Commissioner also argues that the per diem interest limitation is permitted under the DIDMCA's exception for "other charges," but it is pellucid that the per diem statutes cover interest, not other charges.

amount of interest. . . which may be charged . . . ." Therefore, DIDMCA preempts California's per diem statutes. Because Quicken Loans has demonstrated that it is entitled to judgment as a matter of law, this aspect of the motion for partial summary judgment is granted.[6]

Irreparable Harm and Inadequate Remedy at Law

Although Quicken Loans has established actual success on the merits of its DIDMCA preemption claim, it must show "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." Easyriders Freedom F.I.G.H.T., 92 F.3d at 1495. Quicken Loans has presented no evidence that the Commissioner will seek to enforce the per diem statutes against it in the face of the preemption ruling. Therefore, the motion for a permanent injunction is denied.

Conclusion

Quicken Loans is granted partial summary judgment on its claim that DIDMCA preempts the current and previous versions of California Civil Code § 2948.5 and California Financial Code § 50205(o) as applied to those Quicken Loans residential mortgage loans that qualify under DIDMCA. The motion for a permanent injunction is denied.

IT IS SO ORDERED.

DATED: May 8, 2003

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

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[6] It is unnecessary to reach Plaintiff's preemption arguments based on the Parity Act in light of this ruling on DIDMCA's preemption of California's per diem statutes.

kdc

United States District Court
for the
Eastern District of California
May 8, 2003

* * CERTIFICATE OF SERVICE * *

2:03-cv-00256

Quicken Loans Inc

v.

Boutris

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 8, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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