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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AMERICAN FINANCIAL SERVICES ASSOCIATION, Plaintiff and Appellant, v. CITY OF OAKLAND et al., Defendants and Appellants.	A100258 and A097784 (Alameda County Super. Ct. No. 2001-027338)

The City of Oakland adopted an ordinance regulating sub-prime consumer loans secured by Oakland real property. Federally chartered lenders were exempted. The American Financial Services Association (AFSA) sued the city, alleging that its lending ordinance was preempted by state law. On cross-motions for summary judgment, the trial court upheld the ordinance subject to severance of the exemption for federal lenders.

AFSA appeals from the ensuing judgment and from an earlier order denying its motion for a preliminary injunction. The City cross-appeals from that portion of the judgment ordering severance. We agree with the City's position that, as a matter of law, no part of the ordinance is preempted by state law. Accordingly, we reverse the judgment insofar as it orders severance of the exemption, and dismiss as moot AFSA's appeal from the order denying injunctive relief.

BACKGROUND

Assembly Bill 489

In 2001 the Legislature adopted Assembly Bill No. 489 (2001–2002 Reg. Sess.), legislation designed to regulate a segment of the home mortgage loan business in

California known as "sub-prime lending."[1] Sub-prime lending is the business of making loans, primarily home loans or equity lines of credit based upon the borrower's equity in a home, to persons with low income, high debt relative to income, or impaired or limited credit histories. Sub-prime borrowers are generally charged stiffer up-front fees and substantially higher interest rates than conventional borrowers.

Some practices of the sub-prime lending industry have been labeled "predatory lending" by critics. According to consumer groups who have lobbied for legislation to regulate the industry, sub-prime lenders often employ deceptive sales techniques targeting low-income communities. Critics assert that some lenders try to steer unsophisticated, low-income borrowers into accepting highly unfavorable fees, interest rates, and loan terms that often result in default, foreclosure, and loss of equity. On the other hand, industry representatives point out that sub-prime lending has extended the benefits of home finance to many who would otherwise have no access to home credit.

AB 489 regulates "covered loans" defined as home loans of $250,000 or less in which either: (1) the annual percentage interest rate exceeds by eight percentage points or more a benchmark interest rate based on the yield of comparable Treasury securities; or (2) the total points and fees payable at closing exceed 6 percent of the loan amount. (Fin. Code, § 4970, subd. (b)(1).)

The legislation prohibits the lender from engaging in any of the following acts, among others, when making a covered loan: (1) imposing a prepayment penalty applicable after the first three years of the loan, failing to offer the consumer a choice of a loan with no prepayment penalty, or charging an excessive penalty as defined in the statute; (2) requiring the borrower to pay monthly payments in advance from loan

[1] Assembly Bill No. 489 (2001–2002 Reg. Sess.) added Division 1.6, commencing with section 4970 to the Financial Code. (Stats. 2001, ch. 732, § 1.) A trailer bill, Assembly Bill No. 344 (2001–2002 Reg. Sess.), modified some of Assembly Bill No. 489's provisions. (Stats. 2001, ch. 733, §§ 1–9.) Both bills were signed into law on October 11, 2001. The provisions added by these bills will be referred to hereinafter as "AB 489."

proceeds; (3) including a provision raising the interest rate if the borrower defaults; (4) proceeding with the loan if the lender does not reasonably believe the borrower will be able to repay it based on the borrower's income, employment status, other financial resources, and monthly debt; (5) encouraging the borrower to default on an existing debt to be refinanced by the covered loan; (6) including a term allowing the lender to accelerate the indebtedness in circumstances other than borrower fraud or default, or the exercise of a due-on-sale provision; (7) refinancing an existing home loan on terms that will not result in an identifiable benefit to the borrower; (8) making a loan without providing specified written notice to the consumer at least three business days prior to signing the loan documents stating that the consumer should consider obtaining loan counseling and describing how to obtain a list of counselors; (9) financing points and fees exceeding $1,000 or 6 percent of the loan amount, whichever is greater. (Fin. Code, §§ 4973, subds. (a), (d), (e), (f), (h), (i), (j), (k) & 4979.6.)

AB 489 contains an additional restriction applicable to a wider range of home loans than covered loans. The statute defines "consumer loans" as loans other than reverse mortgages, open lines of credit, bridge loans, or loans secured by rental property or a second home, that are secured by an owner-occupied residence containing up to four residential units. (Fin. Code, § 4970, subd. (d).) No consumer loan, as so defined, may be structured to finance the premiums for any credit life, credit disability, credit property, or credit unemployment insurance, or to finance fees for any debt cancellation or suspension agreement. (Fin. Code, § 4979.7.)

The regulatory provisions of AB 489 apply without distinction to both state-licensed and federally chartered lending institutions. However, liability for a lender's noncompliance does not extend to entities that purchase home loans on the secondary market. (Fin. Code, § 4979.8.)

The Oakland Ordinance

The Oakland City Council began actively studying the issue of predatory lending in 2000. A proposed ordinance addressing the issue was under consideration by the City Council while AB 489 was pending in the Legislature. On October 2, 2001, just before

AB 489 was signed into law by the Governor, the City Council adopted an Anti-Predatory Lending Ordinance, Ordinance No. 12361 C.M.S., codified at Oakland Municipal Code chapter 5.33. Simultaneously, the City adopted amendments to its Linked Banking Services Ordinance requiring financial institutions to certify substantial compliance with chapter 5.33 as a condition of receiving deposits of City funds or of participating in any City-financed development project or mortgage program. In its capacity as the governing board of the Redevelopment Agency, the City Council also adopted a resolution barring financial institutions from any development project financed by that agency without furnishing a similar certification.[2]

The Ordinance regulates two defined categories of loans: "home loans" and "high-cost home loans." A "home loan" is defined as any loan other than a reverse mortgage, including a line of credit or an open-end credit plan, that is: (1) primarily for personal, family, or household uses; (2) secured by Oakland real property containing one to four residential units, or residential units of a condominium or cooperative, one of which is or will be the borrower's principal dwelling; and (3) for a principal amount that does not exceed the current conforming loan amount established by the Federal National Mortgage Association. (Oak. Mun. Code, § 5.33.030.)

"High-cost home loans" are "home loans," as so defined, that meet either of the following additional criteria: (1) for a first mortgage, an annual percentage rate that is three points or more than a benchmark rate derived from prevailing Federal National Mortgage Association (FNMA) and Federal Home Loan Mortgage Association (FHLM) rates and, for junior mortgages, a rate five points higher than the benchmark; or (2) total points and fees that are equal to or exceed 5 percent of the loan amount or $800, whichever is greater. (Oak. Mun. Code, § 5.33.030.)[3]

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[2] For ease of reference Oakland Municipal Code chapter 5.33, the related amendment to the City's Linked Banking Services Ordinance, and the Redevelopment Agency's resolution will be referred to hereinafter collectively as "the Ordinance."

[3] The "high-cost home loan" interest rate and fee thresholds are both lower than the threshold levels for "covered loans" set by AB 489. As to home loans secured by

The Ordinance prohibits the lender from engaging in any of the following acts, among others, when making a "high-cost home loan": (1) imposing any prepayment penalty; (2) requiring the borrower to pay more than two monthly payments in advance from loan proceeds; (3) including a provision raising the interest rate if the borrower defaults; (4) proceeding with the loan if the lender does not reasonably believe the borrower will be able to repay it based on the borrower's income, employment status, other financial resources, and monthly debt;[4] (5) including a term allowing the lender to accelerate the indebtedness in circumstances other than borrower default or the exercise of a due-on-sale provision; (6) refinancing an existing home loan or other debt on terms that will not result in a "reasonable and tangible net benefit" to the borrower;[5] (7) making the loan without obtaining written certification from an independent credit counselor that the consumer has contacted the counselor and either received independent counseling about the advisability of the loan transaction or waived the right to counseling; (8)

Oakland real property, it is undisputed that the high-cost loan provisions of the Ordinance would apply to all home loans falling under the "covered loan" provisions of the state statute, and also reach some loans that do not come under the state law provisions.

[4] Under the Ordinance, if the borrower's debt-to-income ratio exceeds 50 percent, the lender must justify its decision to approve the loan in a written statement provided to the borrower setting forth specific compensating factors justifying approval of the loan. (Oak. Mun. Code, § 5.33.050 B.) In contrast, under AB 489, a borrower is presumed able to repay if the borrower's debt-to-income ratio does *not* exceed 55 percent, but no presumption of *inability* to pay and no obligation to provide a written justification arises if the ratio *does* exceed that figure. (Fin. Code, § 4973, subd. (f).)

[5] The Ordinance creates a presumption of such benefit if any of the following apply as a result of the refinance: (1) the borrower's combined monthly expenses for service of the new loan, insurance, and taxes will remain lower than the total of the monthly payments on all debts consolidated into the high-cost home loan for a period of 36 months or more; (2) the borrower obtains a reduction in the interest rate paid on the consolidated debt and will recoup points and fees paid for the refinance in 5 years or less; (3) the borrower receives cash proceeds sufficiently large in relation to points and fees or the loan amount; or (4) the borrower avoids a default under an existing secured debt owed to another lender. (Oak. Mun. Code, § 5.33.050 I.) AB 489's rule regarding refinance benefits contains no language specifying when a benefit to the borrower may be presumed. (Fin. Code, § 4973, subd. (j).)

refinancing a special mortgage that is government-subsidized or has specified preferential features unless an independent loan counselor has determined that the refinance is in the borrower's best interests; (9) financing points and fees exceeding $800 or 5 percent of the loan amount, whichever is greater; and (10) charging a fee to modify or renew a loan or defer any payment, unless as part of a workout of default. (Oak. Mun. Code, § 5.33.050.)

The Ordinance includes the following restrictions applicable to the broader category of "home loans": (1) the lender may not finance any credit life, credit disability, credit property, or credit unemployment insurance, or any other life or health insurance premiums as part of the loan; (2) the lender may not encourage a borrower to default on any debt in connection with a home loan that refinances any part of the borrower's debt; (3) for non-high-cost loans, prepayment penalties may be charged if they expire after the first 36 months of the loan and do not exceed 3 percent of the total loan amount in the first year, 2 percent in the second year, and 1 percent in the third year; and (4) the lender may not make a home loan that violates any provision of the federal Truth in Lending Act (TILA), as amended by the Home Ownership and Equity Protection Act of 1994 (HOEPA) (15 U.S.C. § 1601 et seq.), or any applicable provision of the federal Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. § 2601 et seq.), or any regulations implementing these statutes. (Oak. Mun. Code, § 5.33.040.)

Unlike AB 489, the regulatory provisions of the Ordinance apply *only* to state-licensed lending institutions and specifically exclude federally chartered banks, savings and loans, and credit unions. (Oak. Mun. Code, § 5.33.030.) Also unlike AB 489, liability for a lender's noncompliance extends to any person who purchases or is otherwise assigned a home loan on the secondary market. (Oak. Mun. Code, § 5.33.070.)

The Ordinance provides for civil enforcement and remedies, and declares that any person who willfully violates its provisions is guilty of an infraction. (Oak. Mun. Code, §§ 5.33.080, 5.33.100.)

Trial Court Proceedings

AFSA filed this suit on October 15, 2001, seeking a declaration that the Ordinance is preempted by state law, as well as an injunction against its enforcement. AFSA moved

for a preliminary injunction that the trial court denied by order entered on December 12, 2001. AFSA timely appealed from the order denying its motion for an injunction (appeal No. A097784).

The parties then filed cross-motions for summary judgment. On June 21, 2002, the trial court entered an order finding that the Ordinance was preempted to the extent that it exempted federally chartered lending institutions from its restrictions. The court held that the sentence exempting such institutions should be severed from the Ordinance so that its provisions could be enforced against both state and federally chartered lenders.[6] Subject to elimination of the federal exemption, the trial court denied AFSA's summary judgment motion and granted the City's. Judgment was entered severing the sentence exempting federal lenders, dismissing AFSA's complaint, and deeming the Ordinance valid as modified.

AFSA timely appealed from the judgment (appeal No. A100258). The City cross-appealed from the judgment in appeal No. A100258. We ordered the appeals and cross-appeal consolidated for argument and decision.

DISCUSSION

On the grounds detailed below, we find that the Ordinance is neither preempted under Civil Code section 1916.12 to the extent that it exempts federally chartered financial institutions, nor is it invalidated in whole or in part by AB 489 under any other theory of preemption. We begin with an overview of state preemption law.

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[6] Section 7 of Ordinance No. 12361 included the following severance clause: "The provisions of this Ordinance are severable, and if any clause, sentence, paragraph, provision, or part of this Ordinance, or the application of this Ordinance to any person, is held to be invalid or preempted by state or federal law, such holding shall not impair or invalidate the remainder of this Ordinance. If any provision of this Ordinance is held to be inapplicable to any specific category, type, or kind of loan or points and fees, or category of lender, the provisions of this Ordinance shall nonetheless continue to apply with respect to all other covered loans, points and fees, and lenders. It is hereby declared to be the legislative intent of the City Council that this Ordinance would have been adopted had such provisions not been included or such persons or circumstances been expressly excluded from its coverage."

Applicable Preemption Law

The general principles governing state law preemption were well summarized in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893 (*Sherwin-Williams Co.*): "Under article XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.' [¶] 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.] [¶] 'A conflict exists if the local legislation " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.] [¶] Local legislation is 'duplicative' of general law when it is coextensive therewith. [Citation.] [¶] Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.] [¶] Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at pp. 897–898, fn. omitted.)

It bears emphasis that a city's police powers under article XI, section 7 of the California Constitution are as broad as the police power exercisable by the Legislature itself. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140.) If the Legislature has the power to regulate a certain area, municipalities have the power to regulate that same area. (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1310 (*California Rifle*).) The issue is not whether Oakland is constitutionally

authorized to regulate predatory lending practices within its borders, but whether the Legislature has acted to *remove* that power from Oakland. (*Id.* at pp. 1309–1310.)

Because Oakland is a charter city, the "home rule" doctrine may also come into play. Article XI, section 5 of the California Constitution reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided the subject of the regulation is a "municipal affair" rather than one of "statewide concern."[7] (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399; *Horton v. City of Oakland* (2000) 82 Cal.App.4th 580, 585.) In analyzing whether an ordinance adopted by a charter city is preempted, we apply a two-step procedure: " 'First, a court must determine whether there is a genuine conflict between a state statute and a municipal ordinance. [Citations.] Only after concluding there is an actual conflict should a court proceed with the second question; i.e., does the local legislation impact a municipal or statewide concern?' [Citation.] . . . In other words, the preemption question begins with an inquiry into the existence of a conflict. If there is no conflict, the home rule doctrine is not brought into play." (*Horton v. City of Oakland*, *supra*, 82 Cal.App.4th at p. 585.) Because, as discussed below, we find no conflict between AB 489 and the Oakland ordinance, we do not reach the issue of whether the ordinance impacts a municipal or statewide concern.

AFSA contends the Ordinance conflicts with state law because it contains multiple provisions that contradict and duplicate state law, and because the Ordinance trespasses into fields of regulation that the state has impliedly fully occupied. AFSA further contends that even assuming the trial court was correct in finding only one portion of the

[7] Article XI, section 5, subdivision (a) provides as follows: "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." Oakland's City Charter grants it the right and authority to make and enforce all laws and regulations with respect to municipal affairs pursuant to its home rule powers. (Oakland City Charter, § 106.)

Ordinance preempted—the sentence exempting federal lenders—the court's remedy of severing that provision is not permissible and cannot save the Ordinance.

Contradiction Preemption

According to AFSA, the Ordinance contradicts and is inimical to state law in the following four areas: (1) exempting federally chartered lending institutions; (2) partially banning prepayment penalties; (3) making secondary market loan assignees liable for violations; (4) making loan counseling mandatory.

Legal Standard

The parties cite apparently conflicting standards for determining when a local ordinance is inimical to a state statute. According to AFSA, an ordinance is inimical to state law when it prohibits conduct state law authorizes or imposes stricter standards and makes impermissible that which state law has allowed. For this proposition, AFSA cites *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853 (*Great Western Shows*) at p. 866 and this court's decision in *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109 (*Suter*) at pp. 1124–1125.

AFSA's reliance on these cases is misplaced. Both cases in fact apply a much more stringent test for contradiction preemption than AFSA advocates. In *Great Western Shows*, the California Supreme Court upheld a Los Angeles County ordinance prohibiting the sale of firearms on county property against a preemption challenge even though state law permitted the type of sale barred by the ordinance. (*Great Western Shows*, *supra*, 27 Cal.4th at 865–866, 870.) The test applied in *Great Western Shows* was whether the ordinance *mandated* what state law expressly *forbids* or *forbids* what state law expressly *mandates*. The mere fact that a local ordinance prohibits conduct that is not prohibited by state law is insufficient to establish that the ordinance is inimical to or contradicts state law under *Great Western Shows*. (*Id.* at p. 866.)

This court's decision in *Suter* also does not advance AFSA's position. In *Suter*, we considered the effect of a state law that required gun dealers to store their firearms in a secure fashion by one of three specified means. (*Suter*, *supra*, 57 Cal.App.4th at pp. 1122–1126.) A gun dealer subject to the state law challenged a local ordinance requiring

dealers to employ two of the specified methods in combination. (*Id.* at p. 1123.) We found no contradiction between state law and the local ordinance because it was perfectly possible to comply with both by complying with the more stringent local ordinance. (*Id.* at p. 1124.) Since the state law did not expressly prohibit local regulation of the conduct, such regulation did not contradict state law merely because it imposed stricter requirements. (*Ibid.*)[8]

AFSA's proposed test for contradiction preemption, that the local ordinance imposes stricter requirements than state regulation of the same conduct, is incompatible with settled case law. (See, e.g., *In re Iverson* (1926) 199 Cal. 582 [stricter local regulation on sale of alcohol]; *Nat. Milk etc. Assn. v. City etc. of S. F.* (1942) 20 Cal.2d 101 [stricter local regulation of milk processing]; *In re Hoffman* (1909) 155 Cal. 114 [enhanced local standards for milk contents]; *Sternall v. Strand* (1946) 76 Cal.App.2d 432 [stricter local prohibition on gambling]; cf. *Ex parte Daniels* (1920) 183 Cal. 636, 655 [noting that if the Legislature merely fixed a maximum speed limit for vehicles, and did not expressly prohibit lower limits, an ordinance setting a lower limit would not be in conflict].)

Thus, the standard we apply in this case is that there is no contradiction between the local ordinance and state law unless the ordinance mandates what state law expressly

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[8] AFSA latches on to our phrasing in *Suter* that an ordinance contradicts state law if it "penalizes conduct that state law expressly authorizes or permits conduct which state law forbids." (*Suter, supra,* 57 Cal.App.4th at p. 1124.) *Great Western Shows*, *supra*, articulates a seemingly more stringent standard for contradiction, that the ordinance penalizes conduct the state law *mandates* or *mandates* conduct state law forbids. (*Great Western Shows*, *supra*, 27 Cal.4th at 866.) In our view, AFSA's proposed test is inconsistent with both formulations. Express authorization for conduct in this context requires more than merely refraining from prohibiting the conduct. As the test was applied in *Suter*, express authorization requires some affirmative expression of the Legislature's intent to promote, mandate, or protect the conduct from further restriction. Similarly, a local ordinance should not be deemed to "permit" conduct that state law forbids for purposes of establishing contradiction unless, at a minimum, it mandates or promotes the forbidden conduct.

forbids or forbids what state law expressly mandates. (*Great Western Shows*, *supra*, 27 Cal.4th at 866.)

Exemption for Federal Lenders

The trial court agreed with AFSA that the Ordinance's exemption for federal lending institutions was inimical to the state law, as set forth in Civil Code section 1916.12.[9] The trial court relied on portions of the statement of legislative intent found in subdivision (a) of the state statute, declaring that (1) "local regulatory guidelines must

[9] Adopted in 1981, Civil Code section 1916.12 provides in relevant part as follows: "(a) The Legislature finds that the economic environment of financial institutions has become increasingly volatile as a result of regulatory revisions enacted by the United States Congress and federal agencies such as, but not necessarily limited to, the Comptroller of the Currency, the Federal Home Loan Bank Board, Federal Reserve Board, and the Depository Institutions Deregulation Committee. The Legislature further finds that deposit rate ceilings are being phased out while the cost of and competition for funds have escalated. It is the purpose of this section to maintain the quality of competition between state-licensed and federally regulated financial institutions in the field of mortgage lending, as well as promote the convenience, advantage and best interests of California residents in their pursuit of adequate and available housing. In order to remain competitive and provide the optimum housing environment for the citizens of California, state institutions require the ability to respond in a timely manner to changes in mortgage lending parameters initiated at the federal level. Local regulatory guidelines must promote continued parity between the state and federal levels in order to avoid creation of discriminatory burdens upon state institutions and to protect interests held by California citizens. It is the intent of the Legislature to eliminate past and prevent future inequities between state and federal financial institutions doing business in the State of California by creating a sensitive and responsive mortgage parity procedure. [¶] (b) The Secretary of the Business, Transportation and Housing Agency . . . shall have the authority to prescribe rules and regulations extending to lenders who make loans upon the security of residential real property any right, power, privilege or duty relating to mortgage instruments that is equivalent to authority extended to federally-regulated financial institutions by federal statute or regulation. [¶] (c) In order to grant equivalent mortgage authority to state financial institutions to that which has been extended to federal financial institutions, the secretary . . . shall adopt such regulations within 60 days of the effective date of the statute or regulation extending the comparable right, power, privilege or duty to federally regulated financial institutions. [¶] . . . [¶] (e) Any regulations adopted pursuant to this section shall expire on January 1 of the second succeeding year following the end of the calendar year in which the regulation was promulgated. . . ."

promote continued parity between the state and federal levels in order to avoid creation of discriminatory burdens upon state institutions and to protect interests held by California citizens" and that (2) the intent of the statute was to "eliminate past and prevent future inequities between state and federal financial institutions doing business in . . . California by creating a sensitive and responsive mortgage parity procedure." Based on these provisions, the trial court suggested that the Ordinance promotes conduct, namely disparate treatment of state and federal lenders, that section 1916.12 forbids.

We do not concur with the trial court's expansive reading of Civil Code section 1916.12, or with its finding that the Ordinance is "inimical" to the state statute. When all parts of the state statute are read together, including both its statement of intent and its operative provisions, it becomes clear that the primary objective of the legislation was to create a speedier mechanism for the state to respond to changes in federal regulation—*if* it chose to—by adopting conforming changes in the regulation of state lenders. It is evident from its preamble that section 1916.12 was enacted at a time when Congress and federal agencies were active in reforming the regulation of federally chartered lenders. In that environment, to avoid stranding state lenders under "discriminatory burdens" pending action by the state Legislature, subdivisions (b), (c), and (e) grant the Secretary of Business, Transportation and Housing the blanket authority to respond quickly to changes in federal regulations by adopting equivalent state regulations on a temporary basis until the Legislature had time to act.

It is not clear that Civil Code section 1916.12 places a mandatory duty to maintain parity on any state agency, much less on local agencies. Amicus California Bankers Association (CBA) takes the position that subdivision (c) *compels* the Secretary to automatically adopt conforming changes within 60 days following every change in federal lending regulations. Although subdivision (c) states that the Secretary "shall adopt such regulations within 60 days," the phrase "such regulations" refers back to subdivision (b), which merely states that the Secretary has the *authority*, not the duty, to adopt conforming regulations in response to federal initiatives. Thus it is not clear whether the words "shall adopt" in subdivision (c) require the Secretary to adopt state

regulations conforming to every change in federal law, or merely require the agency, if it elects to exercise its authority under subdivision (b), to do so within 60 days. However, even under CBA's interpretation, the choice whether to follow the federal government's lead is ultimately left to the Legislature. Subdivision (e) specifies that any parity regulations adopted by the state agency automatically expire after two years unless the Legislature votes to make them permanent. Thus, although subdivision (a) certainly reflects a legislative view that competitive parity between state and federal regulations is generally desirable as a matter of public policy, the statute stops far short of mandating absolute parity under all circumstances.

More importantly, we find no indication that in adopting Civil Code section 1916.12 the Legislature intended to limit the power of local governments to adopt lending regulations. The statute addresses how the state should respond to *federal* actions jeopardizing competitive parity. The procedural solution it adopted was to expand the rulemaking powers of a state agency, not to limit any rulemaking power of local legislative bodies. On the subject of local legislation, the statute was entirely silent. No preemptive intent can reasonably be imputed to the Legislature's passing reference to "[l]ocal regulatory guidelines" in subdivision (a). Viewed in the context of the statute as a whole and of the problem it was meant to solve, the word "local" is used in that sentence merely to contrast California *state* guidelines with federal regulations that are promulgated outside of California. In fact, there is no suggestion in the record that any local jurisdiction sought to or did regulate mortgage lending practices at the time of section 1916.12's passage.

Thus, we are unpersuaded that Civil Code section 1916.12 "forbids" local lending regulations that apply only to state-chartered lenders. Because we find that the clause of the Ordinance exempting federal lenders was not preempted by state law, we do not reach the issue of whether severance of this clause was an appropriate remedy.

Other Contradiction Claims

AFSA asserts that the following are additional contradictions between the Ordinance and state law: (1) the Ordinance's prohibition on prepayment penalties in the

case of "high-cost home loans" conflicts with Financial Code section 4973, subdivision (a)(2), which allows prepayment penalties during the first three years of a "covered loan" subject to a specified ceiling; (2) the Ordinance's three-year limitation and percentage restrictions on the amount of prepayment charges allowable for non-high-cost loans conflict with Civil Code section 2954.9, subdivision (b);[10] (3) section 5.33.070 of the Ordinance, subjecting any assignee to all claims, actions, and defenses that could be asserted against the original lender, conflicts with AB 489's exemption from liability of holders in due course; and (4) the Ordinance's requirement that borrowers contact an independent loan counselor before closing a "high-cost home loan" conflicts with AB 489 which merely requires the lender to notify the borrower to consider obtaining loan counseling.

We do not find any of the cited provisions of the Ordinance to be inimical to state law. None of these provisions penalizes conduct that state law mandates or expressly authorizes. Although state law does not prohibit prepayment charges in circumstances where the Ordinance either does prohibit such penalties or sets lower limits on their amount, there is no express language in state law mandating such charges or protecting them from further restriction or interference by local jurisdictions. Since a lender can easily comply with the Ordinance and state law by not charging prepayment penalties on high-cost home loans, not imposing penalties after the first three years, and limiting its charges based on the formula set forth in the Ordinance, there is no contradiction. (See *Suter*, *supra*, 57 Cal.App.4th at p. 1124.)

Likewise, AB 489's exemption of holders in due course is not a blanket immunity from all possible liability under state and local law. It provides only that "[t]he

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[10] The Ordinance limits prepayment charges to 3 percent of the loan amount in the first year, 2 percent in the second, and 1 percent in the third. (Oak Mun. Code, § 5.33.040 A.) No charges are allowed after three years. (*Ibid.*) Civil Code section 2954.9, subdivision (b) allows prepayment charges within the first *five* years of the loan for amounts prepaid that are in excess of 20 percent of the original loan amount. The charge is limited to six months' advance interest on the amount prepaid in excess of 20 percent of the original loan.

provisions *of this division* shall not impose liability on an assignee that is a holder in due course." (Fin. Code, § 4979.8, emphasis added.) It says nothing about the power of local legislative bodies to impose liability on holders in due course for violating local regulations.

Finally, the loan counseling provisions do not conflict. The Ordinance does not require borrowers to obtain independent loan counseling unless the new loan would replace a special mortgage with preferential terms. (Oak Mun. Code, § 5.33.050 A & J.) In most cases, it merely requires the lender to obtain a counselor's certificate that the borrower has either waived independent advice or received it. A lender can comply with the Ordinance and state law by not proceeding with any loan in Oakland unless it has provided the notice required by state law and obtained the certificate required by the Ordinance. There is no conflict between these requirements, both of which are intended to promote the use of independent loan counseling in the sub-prime lending market.[11]

Accordingly, we find that the Ordinance is not inimical to state law.

Duplication Preemption

An ordinance may be preempted by state law if it is duplicative of state law, i.e., it criminalizes " ' "precisely the same acts which are . . . prohibited" ' by statute." (*Great Western Shows*, *supra*, 27 Cal.4th at p. 865, quoting *Pipoly v. Benson* (1942) 20 Cal.2d 366, 370.) A local ordinance is duplicative of general law if it is coextensive therewith in scope and substance. (*Sherwin-Williams Co., supra,* 4 Cal.4th 893, 897, 902.) The reason for the rule that provisions of a local ordinance are deemed to be preempted if they duplicate state law is that "a conviction under the ordinance will operate to bar prosecution under state law for the same offense" (*People v. Orozco* (1968) 266

[11] In the case of refinancing special mortgages under the Ordinance, the notice required by state law might mislead the borrower in that it implies that obtaining independent advice is optional when, in fact, the loan cannot lawfully be completed under the Ordinance without such advice. This is not a "conflict" for preemption purposes. State law does not preclude the lender from supplementing the notice by informing the borrower that the refinance transaction cannot be completed without an independent certification that it is in the borrower's interest.

Cal.App.2d 507, 511, fn. 1), thus setting up a conflict of jurisdiction. (*Pipoly v. Benson*, *supra*, 20 Cal.2d at p. 371.) Accordingly, the application of preemption by duplication has been "largely confined to penal ordinances." (*Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 179.)

In this case, the predominant enforcement mechanisms under both AB 489 and the Ordinance are civil liabilities and administrative penalties, not criminal prosecution. (Fin. Code, §§ 4977, 4978; Oak. Mun. Code, § 5.33.080.) However, AB 489 provides that certain violations by a licensed person may be deemed violations of the licensing law applicable to that person. (Fin. Code, § 4975.) Knowing and willful violations of certain lender licensing laws are punishable as misdemeanors. (Bus. & Prof. Code, § 10185 [real estate licensing law]; Fin. Code, §§ 5300, 14752, 18435, 18450, 22753, 50500 [savings associations, credit unions, industrial loan companies, finance lenders, residential mortgage lenders].) Willful violations of the Ordinance are punishable as infractions. (Oak. Mun. Code, § 5.33.100.) Thus, if we assume for the sake of analysis that any provisions of the Ordinance do precisely duplicate state law, there is at least a theoretical possibility of conflicting prosecutions against the same lender for violating state and local law. However, criminal enforcement is so tangential to both AB 489 and the Ordinance that the realistic potential for any such conflict to materialize, much less to compromise either jurisdiction's power to enforce its laws, is practically nil.

AFSA contends the following prohibitions in the Ordinance duplicate provisions of state law, including AB 489: (1) including terms requiring advance payments to be made from loan proceeds; (2) including terms raising the borrower's interest rate upon default; (3) including a provision allowing the lender to unilaterally accelerate indebtedness; (4) financing points and fees above specified limits; (5) recommending default on an existing loan; (6) lending without a reasonable belief in the borrower's ability to repay; (7) lending without an identifiable benefit to the consumer; (8) financing credit insurance premiums out of the loan; and (9) making a home loan that violates specified federal lending laws and regulations.

As to provisions (1) through (7), it is undeniable that the prohibitory language in the Ordinance is quite similar, although not substantively identical, to that in AB 489. However, the scope of the loan transactions to which these prohibitions apply is not the same. The Ordinance's provisions apply to "high-cost home loans" (or to "home loans" in provision (5)) whereas the state law provisions apply in each case to "covered loans." "Covered loans" charge significantly higher interest premiums over market rates and/or charge higher fees compared to "high-cost home loans" or "home loans" as defined in the Ordinance.

Relying primarily on *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277 (*Cohen*), AFSA contends that such differences in the scope of the loans covered by the two enactments do not affect the preemption analysis. *Cohen* involved a preemption challenge to a local ordinance requiring permits for escort services. (*Id.* at pp. 283–285.) The ordinance also included a provision prohibiting an escort from engaging in any type of criminal conduct, as defined by state law, with the escort service's customer. (*Id.* at p. 292.) Although it upheld the permitting provisions of the ordinance, the Supreme Court found the criminal conduct provision to be preempted on the ground that it "unquestionably duplicates state criminal law insofar as it applies to 'escorts.' " (*Ibid.*) Thus, according to AFSA, *Cohen* teaches that a difference in scope between state law and an otherwise duplicative local ordinance will not save the latter from preemption.

We find *Cohen* distinguishable. The escort service provision at issue in *Cohen* incorporated the state's criminal law by reference. There could be no question that it precisely duplicated state law, and that double jeopardy principles would be implicated by successive prosecutions under the escort ordinance and state law. (See *People v. Sipe* (1995) 36 Cal.App.4th 468, 488 [double jeopardy applies to overlapping offenses unless each offense requires proof of a fact that the other does not].)[12] Moreover, because the

[12] In this connection, AFSA also cites *In re Portnoy* (1942) 21 Cal.2d 237 (*Portnoy*), a case finding a local gambling ordinance duplicative of state law even though state law covered only owners and lessees of gambling premises whereas the ordinance also covered employees and others. (*Id.* at pp. 241–242.) However, in *Portnoy* no fact in

overlapping provisions of local and state law at issue in *Cohen* were penal in nature, the risk of conflicting jurisdiction was real rather than, as in this case, remote at best.

Most importantly, the Ordinance and AB 489 do not prohibit precisely the same acts and conduct. Taking but one example for illustrative purposes, the Ordinance states that "[n]o lender may make a *high cost home loan* that includes any provision increasing the interest rate after default or delinquency." (Oak. Mun. Code, § 5.33.050 H, emphasis added.) AB 489 states that "[a] *covered loan* shall not contain a provision that increases the interest rate as a result of a default." (Fin. Code, § 4973, subd. (e), emphasis added.) To prosecute a lender for violating section 533.050 H, the City would have to prove several facts *not* required in order to prove violation of Financial Code section 4973, subdivision (e): (1) the benchmark interest rate set by prevailing FNMA and FHLM rates at the time of the loan; (2) that the loan interest rate exceeded the benchmark rate by the required number of percentage points; (3) that the loan amount did not exceed the conforming first mortgage loan size limit for single-family dwellings set by FNMA; and (4) that the lender was state-licensed. (Oak. Mun. Code, §§ 5.33.030, 5.33.050 H.) Equally, to prosecute under Financial Code section 4973, subdivision (e), the state would have to prove facts not required to be proven under the Ordinance: (1) that the original principal balance of the loan does not exceed $250,000 as periodically adjusted for inflation; (2) the benchmark yield on Treasury securities of comparable maturities; and (3) that the annual percentage rate exceeds the benchmark rate by 8 percentage points. Thus, although the local and state provisions overlap, they are not coextensive under double-jeopardy principles or preemption analysis.[13]

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addition to those needed to prove a state law violation would have been essential to prove a violation of the ordinance.

[13] AFSA tries to distinguish between the *acts* prohibited by the Ordinance and the scope of the loans it covers, asserting that the latter is irrelevant to preemption analysis. However, the making of a high-cost home loan containing one of the offending terms is an essential element of proof in any hypothetical prosecution under the Ordinance.

Other substantive differences distinguish the Ordinance from state law as well. AB 489 bars terms consolidating monthly payments to be paid in advance from loan proceeds whereas the Ordinance bars consolidation and prepayment of "more than two" such payments. AB 489 permits acceleration of the loan due to fraud or material misrepresentation while the Ordinance contains no express exemption in such circumstances. AB 489 limits the financing of points and fees to the greater of $1,000 or 6 percent of the loan amount while the Ordinance sets a limit of the greater of $800 or 5 percent of the loan amount. AB 489 establishes one set of presumption rules for determining whether the lender reasonably believes the borrower can repay and the Ordinance establishes a different set of rules. AB 489 creates a broadly-worded standard for determining whether a covered refinance loan is beneficial to the borrower while the Ordinance creates a presumption of benefit if specified financial results are obtained by the refinance. In these and the other respects described above, provisions (1) through (7) of the Ordinance are not coextensive with state law in scope and substance, and are not preempted. (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at pp. 897, 902.)

AFSA further claims that the Ordinance's prohibition on the financing of credit insurance is duplicative of Financial Code section 4979.7. We disagree. The Ordinance's prohibition applies to *state-licensed* lenders making "home loans" as defined in the Ordinance; the state law prohibition applies to *any* lender who makes a "consumer loan" as defined in Financial Code section 4970. The definitions of "home loan" and "consumer loan" differ in several respects: (1) the principal amount of a home loan cannot exceed the prevailing maximum amount for a conforming first mortgage home loan set by FNMA; a consumer loan is not limited in amount; (2) a home loan must be secured by real property located within the City of Oakland; a consumer loan can be secured by property located anywhere in the state; (3) a home loan can be secured by an owner-occupied condominium or cooperative unit; a consumer loan cannot; (4) a home loan includes open-ended lines of credit; a consumer loan excludes these types of loans; (5) a home loan includes construction loans; a consumer loan does not. (Oak. Mun. Code, § 5.33.030, Fin. Code, § 4970, subd. (d).) Further, the Ordinance prohibits

financing of any life or health insurance premiums whereas AB 489's prohibition is limited to the financing of premiums for various forms of credit insurance. (Oak. Mun. Code, § 5.33.040 B, Fin. Code, § 4979.7.) Based on these differences, we find that the local and state prohibitions on financing credit insurance are not duplicative because they do not criminalize "precisely the same acts." (*Great Western Shows*, *supra*, 27 Cal.4th at p. 865.)

Finally, AFSA claims the Ordinance duplicates state law by declaring that a home loan violating certain federal lending laws also violates the Ordinance. (See Oak. Mun. Code, § 5.33.040 D.) AFSA cites Financial Code section 50505 and Business and Professions Code section 17200 as the duplicated state law provisions.[14] We find no impermissible duplication as to section 50505. Many types of lenders covered by the Oakland ordinance are exempt from the provisions of the CRMLA. (See Fin. Code, § 50003, subd. (g).) For those lenders subject to both enactments, violation of RESPA would not subject the lender to criminal prosecution under state law and therefore implicates no double jeopardy concern. (See Fin. Code, § 50510 [nothing in section 50505 and other penalty provisions of CRMLA authorizes criminal prosecution for violation of civil statutes incorporated by reference into CRMLA].)

We are also not persuaded that the City's attempt to provide additional remedies for violations of federal law is preempted because Business and Professions Code section 17200 also provides remedies for the same conduct. In fact, the essence of section 17200 is to "borrow" violations of other laws and treat them as independently actionable. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383.) The unfair business practices statute encompasses "any practices forbidden by law, be it civil or

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[14] Financial Code section 50505 applies to mortgage bankers regulated under the California Residential Mortgage Lending Act, Financial Code sections 50000 et seq. (CRMLA), and only addresses one of the federal lending laws referenced in the Ordinance: "Any person who violates any provision of [RESPA] . . . or any regulation promulgated thereunder, violates this division." Business and Professions Code section 17200 defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." Section 17200 makes no reference to federal law.

criminal, federal, state, or municipal, statutory, regulatory, or court-made." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838–839.) Were we to disallow the City's ordinance on the ground that section 17200 provides a duplicative remedy for its violation, the same logic would require preemption of all local ordinances regulating business because state law supplies an additional remedy for their violation. We decline to lend such sweeping effect to a statute plainly designed to supplement, not displace, local law. Moreover, no criminal penalties are associated with section 17200. (See *People v. Toomey* (1984) 157 Cal.App.3d 1, 17–18.) The rationale for preemption by duplication has no application here.

Accordingly, we find that none of the Ordinance's provisions impermissibly duplicates state law.

Implied Preemption

AFSA contends that the Ordinance is impliedly preempted by state law.[15] In addressing this issue, we are concerned solely with the Legislature's intent regarding preemption. This court's view of whether it is good public policy to permit localities to adopt their own regulations in a particular subject area is wholly immaterial: "Whether to preempt or not to preempt is a decision for the Legislature, not for the courts. . . . The courts cannot properly base decisions about preemptive intent upon subjective opinions . . . of the Legislature's reasons. Instead, the courts must simply determine whether the Legislature did or did not intend to preempt. The reasons which might motivate one decision or the other are matters within the exclusive province of the Legislature." (*California Rifle*, *supra*, 66 Cal.App.4th at p. 1312, fn. omitted.)

Implied preemption may properly be found, moreover, only when the circumstances *clearly* indicate a legislative intent to preempt. (*Horton v. City of Oakland*, *supra*, 82 Cal.App.4th at p. 586.) The courts are reluctant to imply preemption

[15] Appellant makes no contention that the Legislature has expressly preempted local regulation of high-cost lending generally, or of any of the specific subjects or practices addressed by AB 489.

because, if the Legislature intended to take preemptive action, it would have been easy to include an express preemption clause in the legislation. (*California Rifle*, *supra*, 66 Cal.App.4th at p. 1317.) When, in addition, "there is a significant local interest to be served that may differ from one locality to another," courts must be especially hesitant to imply an intent to preempt. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707.)

The case law instructs us to organize our analysis of legislative intent around the following criteria: (1) the extent to which the field of regulation is occupied by state law; (2) whether state law—even if not fully occupying the field—is expressed in terms that clearly indicate a paramount state concern; and (3) whether the adverse effect of a local ordinance on transient state citizens outweighs any benefit to the locality. (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898.)

AFSA argues that, within the broad subject area of home loan regulation, AB 489 fully occupies nearly every "field," narrowly defined, that the Ordinance touches upon. Thus, AB 489 fully occupies the "fields" of prepayment penalties, credit counseling, points and fees, etc. to the exclusion of local regulation. According to AFSA, the Legislature has weighed the pros and cons of, e.g., prepayment penalties, and has "decided" when to allow them and in what amounts. The Legislature having addressed that issue, AFSA maintains, a city such as Oakland "may not reweigh the policy arguments and strike a different balance."

Declaring that the City may not "strike a different balance" from the Legislature begs the question of preemption. The Oakland City Council heard evidence, received staff reports, and made findings that predatory lending practices were having a particularly severe impact in Oakland, causing "conditions of blight[,] the loss of affordable housing . . . , increase[d] displacement and economic dislocation," among other ills. The Council found that Oakland residents were prime targets for predatory practices due to the city's relatively high property values and large population of low-income and minority homeowners. It received evidence that loan counseling, which is not required by AB 489, would be the single most effective means of protecting Oakland residents from such practices. Absent preemption, it is " ' . . . proper and even necessary

for municipalities to add to state regulations provisions adapted to their special requirements.' " (*Cohen*, *supra*, 40 Cal.3d at p. 298, quoting *In re Hoffman, supra*, 155 Cal. 114, 118.) Thus, unless the Legislature revoked its power to do so, Oakland was free to fashion its own policies on predatory lending even if the Legislature opted to strike a different balance.[16]

We are thus left with the question of whether in enacting AB 489 the Legislature expressly or impliedly intended to set statewide *minimum* standards or statewide *uniform* standards for the sub-prime home loan market.

In order to decide whether the Legislature has impliedly preempted a "field," we must first define the field. (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 904.) Although our discretion is broad, the "field" must be defined to embrace subjects of legislation that are sufficiently logically-related that a court or local legislative body can detect a cohesive approach to the subject. (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 861–862.) We find the appropriate field in this case to be the regulation of abusive practices in the sub-prime, home lending market. The core of AB 489 is to describe prohibited provisions and acts for "covered loans," a term defined in the legislation to reach only loans charging atypically high interest rates or fees. AFSA itself characterizes AB 489 as a bill addressing "predatory lending," which is the term critics apply to certain practices in the sub-prime lending market. On the other hand, classifying each separate type of loan term mentioned in Financial Code section 4973 as if it stood alone as a "field" of regulation ignores the logical connection between these practices, i.e., that all are associated with sub-prime lending.

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[16] AFSA makes the related argument that "[t]here would have been little point" for the Legislature to draw up a detailed set of lending rules if Oakland, Sacramento, and Los Angeles, could each apply conflicting rules. Although many good public policy arguments can be made for statewide uniformity in this field, we decline to substitute our views on this subject for the Legislature's. As noted earlier, our function is to determine the Legislature's intent, not to second-guess the wisdom of its actions or omissions.

Unquestionably, AB 489 marks legislative entrance into the field of regulating sub-prime lending practices. It can hardly be maintained that this area has been left "untouched" by the Legislature. The issue is whether the Legislature has " ' . . . so fully and completely covered . . . ' " this field " ' . . . as to *clearly indicate* that it has become exclusively a matter of state concern . . . . ' " (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898, emphasis added.) The legislation itself cannot resolve this issue. It contains no expression of a legislative intent to preempt, nor does it contain language expressly permitting local ordinances on the same subject. The Legislature remained silent on preemption, and we are left to discern from the circumstances surrounding the passage of AB 489 what, if anything, that silence means.

The issue of preemption was by no means overlooked in the legislative deliberations on AB 489. As AFSA itself points out, there were strongly held disagreements over preemption between industry representatives and consumer proponents of the bill. The Legislature was made aware that at least one charter city had proceeded with its own legislation on the subject. At a state Senate policy committee hearing on AB 489, held two weeks before its final passage, the committee members heard testimony in support of AB 489 from the president of the Oakland City Council, Ignacio De La Fuente. Councilmember De La Fuente informed the committee that the City had proceeded with its own predatory lending ordinance after waiting two years to see if federal or state legislation would emerge on the subject.

In response to Mr. De La Fuente's testimony, a member of the committee expressed concern that if the bill was silent about preemption "we could have a host of different policies . . . from community to community based upon a city's determination." In response, AB 489's legislative author explained the bill's silence on preemption in these terms: "We're trying to make sure that everyone can live with the bill, industry and consumers alike and . . . . we've decided . . . to be silent on [preemption], which does lend different interpretations." Several industry witnesses expressing opposition to the bill emphasized that the absence of a preemption clause was an important concern to them.

At the time of the bill's passage, legislators also had before them an opinion about the bill's preemptive force by Legislative Counsel. Legislative Counsel opined that "if A.B. 489 is enacted, a local government ordinance to regulate high-cost lending would not be preempted by state law to the extent that the ordinance does not duplicate, contradict, or enter an area fully occupied by A.B. 489 or another state law." The opinion also pointed out that AB 489 contained no express preemption of local legislation, unlike many other state statutes that the opinion enumerated.

Thus, if the Legislature intended AB 489 to have preemptive effect, several factors would have impelled it to include an express preemption clause in the bill: (1) its knowledge that local legislation on the subject of predatory lending was actually forthcoming; (2) its Legislative Counsel's opinion that AB 489 would very likely not preempt local regulation absent such a clause; and (3) the affected industry's vocal preference for preemptive, statewide legislation. From the Legislature's silence in these circumstances, we can only infer that no bill expressing an intent to preempt local regulation would have commanded the votes for passage and, therefore, no such intent may be imputed to the Legislature in adopting AB 489.[17]

AFSA concedes that AB 489 would not have been passed had it contained an express preemption clause, but argues that the legislative history shows, equally, that no bill with an express *authorization* for local regulation could have passed either. From this, AFSA concludes that the Legislature's silence weighs neither for nor against preemption. Based on the circumstances surrounding the Legislature's consideration of AB 489, we cannot agree with this proposition.

The Legislature must be charged with knowing that its silence on preemption would open the door to local legislation on this subject. The Legislature's own counsel advised it that a valid local ordinance could be developed to regulate some aspects of

[17] We note that in signing AB 489, Governor Davis expressed concern that the Legislature had failed to include "definitive language that would preempt local governments from enacting their own versions of anti-predatory lending legislation," and "urge[d] the Legislature to address this important issue."

high-cost lending. Legislative Counsel further noted that because such an ordinance would primarily affect local property owners and would have virtually no effect on non-residents, prevailing case law would favor local regulation.

This advice was consistent with prevailing legal precedents with which the Legislature must also be presumed to be familiar. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 65.) First, no case holds that a home rule city like Oakland *needs* express legislative permission to enter into a field of regulation. (Cf. Cal. Const., art. XI, § 5 [home rule cites may make and enforce all ordinances and regulations in respect to municipal affairs]; *People v. Smith* (1958) 161 Cal.App.2d Supp. 860, 865, revd. on federal grounds in *Smith v. California* (1959) 361 U.S. 147 [city needs no legislative permission to exercise local power].) To the contrary, as noted earlier, when the Legislature is silent on preemption, courts presume there is *no* intent to preempt. (*California Rifle*, *supra*, 66 Cal.App.4th at p. 1317.) Second, as many cases have held, the validity of local regulation is presumed when there is a significant local interest to be served that may differ from one locality to another. (*Gluck v. County of Los Angeles* (1979) 93 Cal.App.3d 121, 133.) AFSA makes no claim that all areas of the state are identically situated with respect to the prevalence and perceived impact of abusive high-cost lending practices.

Under these circumstances we cannot impute to the Legislature an intent to preempt local legislation in the field of regulating sub-prime lending practices. Had the Legislature intended to displace local regulations on this subject, it would certainly have included an express preemption clause in the legislation. We therefore conclude that the Legislature did not intend to occupy the field, either fully or partially, so as to make it exclusively a matter of state concern.

There is also no basis for finding that local regulation of predatory lending would so adversely affect the "transient citizens of the state" that an intent to preempt may otherwise be inferred. AFSA conceded this point in the trial court. The Ordinance has *no* appreciable effect on citizens of the state who are not residents of Oakland. It only applies to loans secured by owner-occupied real property located in Oakland.

We therefore reverse the judgment insofar as it orders severance of the language exempting federally chartered lenders from its coverage and we dismiss as moot AFSA's appeal from the trial court's order denying a preliminary injunction against enforcement of the Ordinance (appeal No. A097784).

DISPOSITION

In appeal No. 100258, the judgment is reversed insofar as it orders severance of the portion of the Ordinance exempting federally chartered lenders from its coverage. In all other respects, the judgment is affirmed. Appeal No. A097784 is dismissed as moot.

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Margulies, J.

We concur:

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Marchiano, P.J.

_____
Stein, J.

Trial Court: Alameda County Superior Court

Trial Judge: Hon. James A. Richman

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