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EASTERN DISTRICT OF CALIFORNIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff Quicken Loans, Inc. ("Quicken Loans") moves for reconsideration of the May 8, 2003, Order which failed to reach its argument that the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act") preempts California's "per diem" statutes.¹ Quicken Loans also moves for partial summary judgment on its claim that Defendant Commissioner Boutris's interpretation and application of California's per diem statutes violate the Takings Clause of the United States Constitution. Defendant opposes the motions and moves for summary judgment of Quicken Loans's takings claim.

¹ California's per diem statutes prohibit lenders from charging any interest on residential 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 § 50204(o).

1 Background²

2 Quicken Loans is a Michigan corporation that engages in
3 residential mortgage lending in all fifty states of the United States.
4 (Pl.'s Statement of Undisputed Facts in Support of Mot. for Partial
5 Summ. J. - Takings ("Pl.'s SUF") ¶ 1; Def.'s Response to Pl.'s SUF
6 ¶ 1.) Quicken Loans makes a variety of loans secured by residential
7 mortgages, including home purchase money, refinancing and home equity
8 residential loans. (Id. ¶ 2.) Quicken Loans is licensed and
9 authorized to make residential mortgage loans in California under the
10 California Residential Mortgage Lending Act ("CRMLA"). (Id. ¶ 3.)
11 During 2001 and 2002, Quicken Loans contends it made approximately
12 \$500 million and \$745 million respectively in loans secured by
13 mortgages on California property. (Pl.'s SUF ¶ 4.) It further
14 asserts it regularly makes alternative mortgage transactions, and has
15 made in excess of 1800 of these loans since 1999 to the present.
16 (Pl.'s Statement of Undisputed Facts in Support of its Mot. for
17 Partial Summ. J. - Parity Act ¶ 5.)

18 Discussion³

19 Quicken Loans is correct in its position that the May 8
20 Order should have reached its Parity Act preemption argument. The
21 May 8 Order held California's per diem statutes are preempted by the
22 Depository Institutions Deregulation and Monetary Control Act of 1980

23 _____
24 ² The Commissioner denies many of the assertions of fact made
25 by Quicken Loans on the basis that no discovery has been conducted;
26 however, the Commissioner states he has "admitted sufficient facts
27 upon which he believes this court may make a substantive ruling on the
28 motion and . . . does not request a delay to conduct discovery prior
to responding to the motion." (Def.'s Memo. of P. & A. in Opp'n to
Mot. for Partial Summ. J. - Takings at 2.)

³ Summary judgments standards are well-known and will not be
repeated unless relevant to a point decided.

1 ("DIDMCA"), which applies to "any loan, mortgage, credit sale, or
2 advance which is . . . secured by a first lien on residential real
3 property[,]. . . made after March 31, 1980; and [which is a federally
4 related mortgage loan.]" 12 U.S.C. § 1735f-7a(a). In contrast, the
5 Parity Act applies to "alternative mortgage transactions" which do not
6 have to be first liens on residential property. Quicken Loans
7 contends the Parity Act applies to its alternative mortgage
8 transactions that are not first liens and that the Parity Act preempts
9 the Commissioner's auditing authority over these transactions.

10 I. Parity Act Preemption

11 Quicken Loans argues California's per diem statutes are
12 preempted by the Parity Act because they cannot be enforced against
13 federally chartered lenders. The Commissioner counters that the per
14 diem laws are not in conflict with or expressly preempted by federal
15 statute or any regulation promulgated by the federal Office of the
16 Thrift Supervision ("OTS") under the Parity Act.

17 The Parity Act "'authorize[s] non-federally chartered
18 housing creditors to offer alternative mortgages in accordance with
19 the Federal regulations issued by the appropriate Federal regulatory
20 agencies[, thereby allowing] . . . those creditors [to] have parity
21 with federally chartered institutions.'" Nat'l Home Equity Mortgage
22 Ass'n v. Face, 239 F.3d 633, 635 (4th Cir. 2001) (quoting Sen. Conf.
23 Rep. No. 97-641, at 94 (1982), reprinted in 1982 U.S.C.C.A.N. 3128,
24 3137). According to 12 U.S.C. § 3803(a) of the Parity Act:

25 In order to prevent discrimination against
26 State-chartered depository institutions, and other
27 nonfederally chartered housing creditors, with
28 respect to making, purchasing, and enforcing
alternative mortgage transactions, housing
creditors may make, purchase, and enforce
alternative mortgage transactions, except that
this section shall apply . . . [and]

1 (3) with respect to all other housing creditors,
2 including without limitation, savings and loan
3 associations, mutual savings banks, and savings
4 banks, only to transactions made in accordance
5 with regulations governing alternative mortgage
6 transactions as issued by the Director of the
7 Office of Thrift Supervision for federally
8 chartered savings and loan associations, to the
9 extent that such regulations are authorized by
10 rulemaking authority granted to the Director of
11 the Office of Thrift Supervision with regard to
12 federally chartered savings and loan associations
13 under laws other than this section.

8 Furthermore, "[a]n alternative mortgage transaction may be made by a
9 housing creditor in accordance with this section, notwithstanding any
10 State constitution, law, or regulation." 12 U.S.C. § 3803(c). "An
11 alternative mortgage is one which is not a traditional, fully
12 amortized, fixed rate loan."⁴ Shinn v. Encore Mortgage Services,
13 Inc., 96 F. Supp. 2d 419, 422 (D.N.J. 2000).

14 The practical effect of the [Parity Act's]
15 statutory scheme is to permit a non-federally
16 chartered housing creditor to make a loan either
17 under state law, in which case the loan
18 transaction remains subject to the full range of

17
18 ⁴

18 [T]he term "alternative mortgage transaction" means a
19 loan or credit sale secured by an interest in
20 residential real property, a dwelling, all stock
21 allocated to a dwelling unit in a residential
22 cooperative housing corporation, or a residential
23 manufactured home (as that term is defined in section
24 5402(6) of Title 42)- (A) in which the interest rate or
25 finance charge may be adjusted or renegotiated; (B)
26 involving a fixed-rate, but which implicitly permits
27 rate adjustments by having the debt mature at the end
28 of an interval shorter than the term of the
amortization schedule; or (C) involving any similar
type of rate, method of determining return, term,
repayment, or other variation not common to traditional
fixed-rate, fixed-term transactions, including without
limitation, transactions that involve the sharing of
equity or appreciation; described and defined by
applicable regulation.

12 U.S.C. § 3802(1).

1 state regulations, or under federal law, in which
2 case the loan transaction becomes subject to
3 federal regulations governing similar loans by
4 federally chartered lending institutions.
5 Non-federally chartered housing creditors exercise
6 this regulatory "option" by affirmatively
7 complying with substantive federal regulations
8 identified by the Office of Thrift Supervision.

9 Face, 239 F.3d at 635-36. Quicken Loans has provided no evidence that
10 it complied with the substantive federal regulations identified by the
11 OTS when engaging in the alternative mortgage transactions at issue.
12 Therefore, Quicken Loans has failed to show that the Parity Act
13 governs the loans at issue and its motion for partial summary judgment
14 is denied.

15 II. Takings Clause

16 Both parties seek partial summary judgment of Quicken
17 Loans's claim that the Commissioner's interpretation and application
18 of California's per diem statutes constitute an unconstitutional
19 regulatory taking under the Fifth Amendment. At the hearing on June
20 30, 2003, Quicken Loans clarified that neither its Complaint nor its
21 regulatory taking motion asserts a facial challenge against the per
22 diem statutes; rather it challenges the Commissioner's application of
23 the statutes to the interest Quicken Loans seeks to earn on mortgage
24 loans.⁵

25 Quicken Loans suggests that California's per diem statutes
26 do not authorize the Commissioner to limit when interest accrues on
27 mortgage loans to just one day prior to recording of the mortgage or
28 deed of trust, and Quicken Loans explicitly argues that the
Commissioner incorrectly interprets the term "recording" in the per

⁵ Therefore Quicken Loans has withdrawn any facial challenge asserted in its Complaint.

1 diem statutes. The Commissioner contends that "recording" occurs when
2 the Recorder's office affixes the official seal on the mortgage or
3 deed of trust, notwithstanding when the document is delivered to the
4 Recorder's office. (Def.'s Response to Separate Statement of
5 Undisputed Facts - Takings at ¶ 8.) Quicken Loans counters that
6 California Civil Code section 1170 prescribes when recording occurs,
7 and that under this section recording occurs upon delivery of the
8 mortgage or deed of trust to the Recorder's office. Section 1170
9 provides, "An instrument is deemed to be recorded when, being duly
10 acknowledged or proved and certified, it is deposited in the
11 Recorder's office, with the proper officer, for record."

12 To prevail on an as-applied challenge under the takings
13 clause, Quicken Loans is required to establish that the Commissioner
14 has (1) taken its property by application of the per diem statutes in a
15 manner that goes too far (2) without tendering just compensation for
16 the taking. Del Monte Dunes at Monterey, Ltd. v. City of Monterey,
17 920 F.2d 1496, 1500 (9th Cir. 1990). "Both the taking element and the
18 compensation element must be ripe before the claim is justiciable [in
19 federal court]." Id. "[T]o assert an as-applied takings claim,
20 [Quicken Loans] must establish two things: (1) the [Commissioner] has
21 reached a final decision on the applicability of the [per diem
22 statutes] to [Quicken Loans's] property; and (2) [Quicken Loans] is
23 unable to receive just compensation from [California]." San Remo
24 Hotel v. City and County of San Francisco, 145 F.3d 1095, 1102 (9th
25 Cir. 1998). The ripeness doctrine "prevents 'the courts . . . from
26 entangling themselves in abstract disagreements over administrative
27 policies, and also . . . protect[s] the agencies from judicial
28 interference until an administrative decision has been formalized and

1 | its effects felt in a concrete way by challenging parties.’”

2 | Washington Legal Foundation v. Legal Foundation of Washington, 271
3 | F.3d 835, 850 (9th Cir. 2001) (citation omitted).

4 | California Finance Code sections 50321 and 50323 set forth
5 | the procedural requirements that must be met before an order issued by
6 | the Commissioner becomes final. Section 50321 reveals if the
7 | Commissioner “has reasonable grounds to believe that any [mortgage
8 | lender] licensee has violated . . . any law or rule binding upon it,
9 | the [C]ommissioner shall, by written order addressed to the licensee,
10 | direct the discontinuance of the violation.” Cal. Fin. Code § 50321.
11 | However, no such order “may become final except after notice to the
12 | affected licensee of the [C]ommissioner’s intention to make the order
13 | final and of the reasons for the finding.” Id. § 50323. Section
14 | 50323 further prescribes:

15 | The [C]ommissioner shall also notify the licensee
16 | that upon receiving a request the matter will be
17 | set for hearing to commence within 15 business
18 | days after receipt. The licensee may consent to
19 | have the hearing commence at a later date. If no
20 | hearing is requested within 30 days after the
 mailing or service of the required notice, and
 none is ordered by the [C]ommissioner, the order
 may become final without hearing and the licensee
 shall immediately discontinue the practices named
 in the order.

21 | Id.

22 | In the present action, neither party has established that
23 | the Commissioner has issued a final order on the application of
24 | California’s per diem statutes to Quicken Loans. Instead the parties
25 | rely on a letter dated March 11, 2002, in which the Commissioner
26 | identified five loans disclosing that Quicken Loans overcharged per
27 | diem interest and the Commissioner further expressed concern that “it
28 | appears that there may be other loans with the same problem.” (Request

1 for Judicial Notice in Support of Pl.'s Mot. for Partial Summ. J. -
2 Takings Ex. B at Ex. A.) This letter has not been shown to constitute
3 the Commissioner's final decision under California Financial Code
4 section 50323.⁶

5 Notwithstanding the parties' failure to show that the
6 Commissioner has taken final action as required by Section 50323, the
7 parties argued at the June 30 hearing that this case is ripe because
8 the Commissioner has expressed his final decision on the application
9 of the per diem statutes to Quicken Loans. They also argued at that
10 hearing that the exact amount of property involved in the alleged
11 taking is immaterial because the "taking" focus should be on the
12 Commissioner's interpretation and application of the per diem statutes
13 to Quicken Loans's property. This argument is premised on the
14 existence of a property interest, even though that interest has not
15 yet been established, and even assuming its existence, its precise
16 value is presently unknown. Further, the parties' respective
17 arguments about when "recording" occurs under the per diem statutes,
18 considered in the context of the as-applied takings challenge,
19 indicate they could be inviting the federal court to become entangled
20 in an abstract disagreement. This is because should recordation under
21 each party's interpretation occur at the same time, resolving their

22
23 ⁶ Quicken Loans also submitted a letter which it received from
24 the Commissioner, dated January 28, 2003, in which the Commissioner
25 rejected arguments made by Quicken Loans in a June 11, 2002, letter.
26 (Request for Judicial Notice in Support of Pl.'s Mot. for Partial
27 Summ. J. - Takings Ex. B at Ex. B.) The Commissioner's January 28
28 letter ends by requesting Quicken Loans, "within 14 days of the date
of [the] letter [to] submit Quicken's plan to complete review and a
proposed date for completion of this review and the date for
submission of the report of the review." (*Id.* Ex. B. at Ex. B at 1.)
Neither the Commissioner's March 11 nor January 28 letters show that
the Commissioner has taken final action required under Section 50323.

1 dispute on when "recording" occurred would decide an issue that is
2 immaterial to Quicken Loans's as-applied takings claim.

3 Not only do the parties appear to invite resolution of an
4 issue of past events where there is no certainty that judicial
5 decision makes a difference to the as-applied takings claim, Quicken
6 Loans has failed to satisfy the second ripeness requirement obligating
7 it to seek just compensation from the state.

8 The Fifth and Fourteenth Amendments do not
9 prohibit the taking of property; they prohibit the
10 taking of property without just compensation.
11 Therefore, there is no constitutional injury until
12 the plaintiff has availed himself of the state's
13 procedures for obtaining compensation for the
14 injury, and been denied compensation.

12 San Remo Hotel, 145 F.3d at 1102. "Ordinarily, a plaintiff must seek
13 compensation through state inverse condemnation proceedings before
14 initiating a takings suit in federal court, unless the State does not
15 provide adequate remedies for obtaining compensation." Suitum v.
16 Tahoe Regional Planning Agency, 520 U.S. 725, 734 n.8 (1997). Quicken
17 Loans has failed to show that California does not provide adequate
18 remedies for obtaining compensation for the alleged taking by the
19 Commissioner. See Massingill v. Department of Food & Agriculture, 102
20 Cal. App. 4th 498, 506 (2002) ("property owner may bring an inverse
21 condemnation action and, if successful, the regulatory agency must
22 either withdraw the regulation or pay just compensation").

23 Because the parties have failed to establish that the as-
24 applied takings claim is ripe, both parties' motions are denied.

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1 | Since Quicken Loans's as-applied takings claim is unripe, it is
2 | dismissed.

3 | IT IS SO ORDERED.

4 | DATED: July 2, 2003

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GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

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United States District Court
for the
Eastern District of California
July 3, 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 July 3, 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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Jack L. Wagner, Clerk

BY: 
Deputy Clerk