SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MAR 28 2003

Part 48

THE MAYOR OF THE CITY OF NEW YORK,

Plaintiff,

THE AMERICAN FINANCIAL SERVICES ASSOCIATION,

Plaintiff-Intervenor,

-against-

THE COUNCIL OF THE CITY OF NEW YORK and THE COMPTROLLER OF THE CITY OF NEW YORK,

Defendants.

Index No. 400583/03
IAS Part 48
Justice Marylin G. Diamond

BRIEF *AMICUS CURIAE*
OF THE BOND MARKET ASSOCIATION AND
THE SECURITIES INDUSTRY ASSOCIATION
IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

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Preliminary Statement

The Bond Market Association and the Securities Industry Association (collectively, the "Associations") submit this brief *amicus curiae* in support of the Mayor's contention that New York City Local Law Number 36 of the Year 2002 ("Local Law 36") is preempted by the New York State Banking Law and regulations, and should therefore be enjoined from taking effect.

Interest of *Amici Curiae*

The Bond Market Association, located in New York City, is the trade association representing the largest securities markets in the world, the $20 trillion debt markets. As the

voice for the bond industry, the Association advocates the industry's positions and represents its interests in this country and abroad, and with issuer and investor groups worldwide.

The Bond Market Association comprises a diverse mix of securities firms and banks, including large, multi-product firms and companies with special market niches. Collectively, its membership accounts for approximately 95% of the nation's municipal bond underwriting and trading activity. It also includes all primary dealers in U.S. government securities, as recognized by the Federal Reserve Bank of New York, and all major dealers in federal agency securities, mortgage-backed and asset-backed securities and corporate bonds, as well as money market and funding instruments.

The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. These include 130 firms headquartered in New York City. Member-firms of the Securities Industry Association include investment banks, broker-dealers, and mutual fund companies. They are active in all U.S. and foreign markets and in all phases of corporate and public finance. Collectively they employ nearly one-half a million people nationwide, and approximately 150,000 people in New York City. The U.S. securities industry manages the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2001, the industry generated $280 billion in U.S. revenue and $383 billion in global revenues.

Among the many activities of the member firms of the Associations is **mortgage securitization**, which constitutes a nearly $5 *trillion* segment of the American economy. The process of mortgage securitization involves the creation of a financial instrument that represents an ownership interest in, or an obligation secured by, a pool of mortgage loans. The securitization process may proceed as either a sale, with the issuer selling certificates that

represent an undivided fractional ownership interest in the issuer's mortgage pool, or as a financing, with the issuance of debt instruments secured by the issuer's mortgage pool as collateral. Alternatively, member firms may originate, or purchase in the secondary market, "whole" loans which are retained in their mortgage loan (as opposed to bond) portfolios and/or are sold to other investors.

In the past five years, approximately 40% of all home loans have been "securitized" through the secondary market. Consumers have reaped very significant benefits as a result of the widespread securitization of mortgage loans. In addition to the other economic benefits it provides, securitization has vastly increased the availability of lower cost "subprime" home-equity mortgage credit to consumers who have flawed credit profiles and do not meet the underwriting standards of prime lenders. These borrowers no longer have to rely exclusively on unscrupulous loan sharks to obtain credit.

The very existence of this important secondary market presupposes the ready negotiability and assignability of mortgage instruments. Because subprime loans to people with imperfect credit home loans, like other home loans, are packaged as securities, lenders transfer the risk and return associated with a mortgage to institutional investors seeking to assume them, such as public employee retirement systems. This process frees up lenders' balance sheets to make new loans and allows lenders to broaden their geographic coverage of borrowers, in each instance making credit more widely available. The Associations are concerned that Local Law 36 will have the unintended effect of causing legitimate competitors to forego this burgeoning market, as well as compelling existing loan originators to stop offering subprime loans altogether.

Summary of *Amici's* Position

The Associations address here only the Mayor's contention that Local Law Number 36 is preempted by the State Banking Law and regulations. We argue that New York City's ordinance applies to a broader group of loans, touches a larger class of affected businesses, employs different quantitative and legal standards, provides for additional enforcement mechanisms and threatens harsher sanctions than does State law. Additionally, if the Court were to sustain Local Law 36, it would create a likelihood that other localities in New York will enact their own variants, subjecting lenders and investment bankers to a crazy quilt of sometimes inconsistent regulation and further undermining the purpose of a predatory lending law of Statewide application.[1]

Further, we show, from the knowledgeable vantage point of the Associations, that among the many reasons why Local Law 36 should be enjoined is its measurably adverse effect on the secondary market (in which many of our member firms transact business) for home loans that were initially made to people in the subprime lending market. This will predictably harm the business of investment banks that deal in the secondary market for high-cost home loans, but it will affect even more negatively the cost and availability of such loans to consumers. Additionally, because it is so difficult and expensive to attempt to assure compliance with Local Law 36 and the consequences of failed compliance are so great, Local Law 36 is likely to cause

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[1] Our position that Local Law 36 is preempted by State law on predatory lending is not intended as a substantive endorsement of that State law. We have in the past expressed concerns about the soundness of that law, and we do not here retreat from them. Nonetheless, State law does comprehensively address subprime mortgage loan origination and the oversight of mortgage lenders. Unless and until that law is amended or nullified, any local regulation must be analyzed in terms of State preemption. Further, we do not here touch on the issue of federal preemption of either the State or City laws, but instead reserve all rights in that connection.

the City to have fewer bidders at higher prices for many of the financial services it requires. Simply put, Local Law 36 is an invalid ordinance which will also do more harm than good.

The Applicable Legal Principles Of Preemption

The Court of Appeals has clearly expressed the principles governing State preemption of local laws as follows:

> Broadly speaking, State preemption occurs in one of two ways -- first, when a local government adopts a law that directly conflicts with a State statute ... and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility ... The State Legislature may expressly articulate its intent to occupy a field, but it need not. It may also do so by implication.

DJL Restaurant Corp. v. City of New York, 96 N.Y.2d 91, 95, 725 N.Y.S.2d 622, 625 (2001) (citations omitted) (emphasis added).[2]

The Court of Appeals provides guidance for determining an implied intent to preempt:

> An implied intent to preempt may be found in a "declaration of State policy by the State Legislature ... or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" .... In that event, a local government is "precluded from legislating on the same subject matter unless it has received 'clear and explicit' authority to the contrary" ... More specifically, "a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe ...or (2) imposes additional restrictions on rights granted by State law."

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[2] The doctrine of state preemption of local enactments derives from the municipal home rule provisions of the State Constitution [art. IX, 2(c)] and the Municipal Home Rule Law [§10(1)], which authorize localities to regulate in ways that are not inconsistent with State law. Albany Area Builders Association v. Town of Guilderland, 74 N.Y.2d 372, 376, 547 N.Y.S.2d 627, 628 (1989); New York City Health and Hospitals Corporation v. Council of the City of New York, __ A.D.2d __, 752 N.Y.S.2d 665, 669 (1st Dep't 2003).

DJL Restaurant, 96 N.Y.2d at 95, 725 N.Y.S.2d at 625 (citations omitted) (emphasis added); New York State Club Association v. City of New York, 69 N.Y.2d 211, 217, 513 N.Y.S.2d 349, 351 (1987).

The Court has articulated the rationale for State preemption in pragmatic terms. "Such local laws, 'were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns.'" Albany Area Builders Association v. Town of Guilderland, 74 N.Y.2d 372, 377, 547 N.Y.S.2d 627, 629 (1989) (*quoting* Jancyn Manufacturing Corp. v. County of Suffolk, 71 N.Y.2d 91, 97, 524 N.Y.S.2d 8, 11 (1987)). *See also* Consolidated Edison Company of New York v. Town of Red Hook, 60 N.Y.2d 99, 107 n.3, 469 N.Y.S.2d 596, 600 n.3 (1983) (local law imposing requirements for conducting site studies was preempted by Public Service Law; Court specifically noted that after local law was enacted, another town adopted similar one and "the proliferation of such local laws would lead to the very 'uncoordinated welter of approvals' [the Public Service Law] was meant to replace").

Most recently in New York City Health and Hospitals Corporation v. Council of the City of New York, __ A.D.2d __, 752 N.Y.S.2d 665 (1st Dep't 2003), the First Department applied those principles in finding that a local law mandating that the New York City Health and Hospitals Corporation utilize "peace officers" as security guards was preempted by a state law, the New York City Health and Hospitals Corporation Act, giving the corporation the right to operate autonomously in deciding whom to hire. Noting that "the City Council cannot achieve even laudable goals by making illegal what is specifically allowed by State law," the First Department held that the local law was preempted, 752 N.Y.S.2d at 672:

> ...[w]ith respect to inconsistency, we have stated that there need not be an express conflict between State and local laws to render a local law

> invalid....Rather, inconsistency "has been found where local laws prohibit what would have been permissible under State law or impose 'prerequisite "additional restrictions"' on rights under State law, so as to inhibit the operation of the State's general laws."

Comparison of State and City "Predatory Lending" Laws

Preemption analysis initially requires a comparison of the City and State laws.

New York State has adopted comprehensive legislation regulating predatory lending practices. Section 6-l of the New York State Banking Law, scheduled to take effect April 1, 2003, prohibits defined "predatory" lending practices.[3] It provides a borrower who has been subjected to those practices legal defenses and other rights as against the lender and any entity that acquires the loan by purchase or assignment. The borrower under a predatory home loan is entitled to offset against the principal loan amount the interest, points, fees and closing costs it paid, with certain exceptions, and the loan transaction may be rescinded. If the lender is further found to have intentionally violated the ban on predatory loans, the loan is void and therefore the principal must be forfeited and the loan must be rescinded. The Attorney General and the New York Superintendent of Banks are given authority to enforce this law.

Local Law 36 reflects an express legislative finding that "[New York] City should not encourage or support predatory lending," and therefore should not be "doing business with institutions that engage, directly or indirectly, in predatory lending practices." *Id.* §1, ¶5. Local Law 36 applies not only to assignees of predatory home loans, as the State law does, but to anyone who "purchases or invests in, directly or indirectly, including through collective

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[3] The New York State Legislature's enactment in 2002 of Banking Law §6-1 is patterned generally on Part 41 of the General Regulations of the New York State Banking Board, 3 NYCRR Part 41, in effect since 2000. Because the legislation is more extensive and more stringent than the regulations, we focus here on the preemptive effect of the new statute.

investment or securitization entities, one or more home loans," or any person who, directly or indirectly, "arranges" such collective investment or securitization, including trustees and underwriters. N.Y.C. Admin. Code §6-128(a)(11). By its terms, Local Law 36 governs the conduct of investment banking firms involved in securitizing mortgage loans, as well as those who "arrange" such loans. All such "lenders" must certify to the Comptroller that neither they nor any of their "affiliates" (*i.e.*, companies under common control) are or will become "predatory" lenders. If the Comptroller, through investigation or otherwise, determines that the "lender" or its "affiliate" is a predatory lender, it can cause City agencies to employ any of a number of sanctions: debarment as a contractor, ineligibility for financial assistance, revocation of designation as a city funds depository and financial penalties, among others.

Thus, Local Law 36 is broader in reach than Banking Law §6-l in three key respects:

(i) it regulates the conduct of persons and entities in addition to the original lender and its assignee(s) which are regulated by State law;

(ii) it authorizes sanctions against violators beyond those sanctions specified in State law; and,

(iii) it creates a governmental enforcement mechanism (Comptroller investigation and agency action) above and beyond the one provided by State law (in which compliance is assured by the Attorney General and Superintendent of Banks, as well as by private litigation).

Local Law 36 also sweeps within its ambit more transactions and more conduct than does Banking Law §6-l. Local Law 36 covers more loan transactions, with lower points and fees thresholds, than does the State's new lending law. In other respects too, the challenged City ordinance lowers the bar established by State law as to which loans are "predatory."

The upshot is that in numerous instances an investment banking firm which arranges securities offerings backed by home mortgages is not considered a predatory lender if all of the mortgaged properties are in Hempstead or Yonkers but is considered a predatory lender if as few as ten of the mortgaged properties are in nearby Queens or The Bronx. Below is a table which

illustrates only some of the important substantive differences between the two new laws as to the criteria for determining whether there has been predatory lending:

SUBJECT	NEW YORK STATE	NEW YORK CITY
Rate maximum: 1st mortgage	APR of 8% over Treasury yield	APR of 6% over Treasury yield
Rate maximum:2nd mortgage	APR of 9% over Treasury yield	APR of 8% over Treasury yield
"Points and fees" maximums	5% if loan is at least $50,000	4% if loan is at least $50,000
	6% if loan is at least $50,000 and is federally insured	4% if loan is at least $50,000 and is federally insured
	6% or $1500, whichever is greater, if loan amount is $50,000 or less	5% or $1500, whichever is greater, if loan amount is $50,000 or less
	Up to 2 bona fide loan discount points may be excluded, as long as interest rate does not exceed comparable Treasury yield by more than 1%	Up to 4 bona fide loan discount points may be excluded, as long as interest rate does not exceed 90-day commitment by more than 2%
Points paid on refinancing	Cannot finance more than 3 points	Cannot finance more than 4 points
	Cannot charge points or fees for financing existing high-cost loan with another one from same lender	Loan considered predatory if existing high-cost loan is refinanced with another from same lender within 5 years
Credit counseling of borrower	Disclosure must be furnished but counseling not required	Lender must have proof that borrower received or knowingly waived counseling
	Cannot refinance "special mortgage" w/o proof of borrower's counseling	Cannot refinance "special mortgage" w/o borrower counseling (non-waivable)
Criterion of borrower's repayment ability	Based on test of borrower's ability to repay	Based on lender's reasonable belief in ability to repay
Prepayment penalty	Prepayment fees for refinancings with same lender or affiliate are not included in "points and fees" test	Prepayment fees for refinancings with same lender or affiliate are included in "points and fees" test
Definition of "Total Loan Amount"	Principal minus points and fees included in principal amount	Not defined
Loan flipping	Borrower must receive "tangible net benefit" from new loan (undefined)	Borrower must receive "*reasonable* and tangible benefit" from new loan
Certification of lender about non-predatory lending	N/A	CEO/CFO must certify to City company not a predatory lender

Certain of these differences are numerical and obvious. For example, in determining whether the interest rate charged for a first mortgage loan on a residence is predatory, New York City uses as the benchmark a U.S. Treasury reference point that differs from what the rest of New York State uses by law. New York City treats loan origination points and fees as predatory if they exceed 4% of a federally insured loan of more than $50,000; New York State does not treat points and fees as predatory unless they exceed 6% of a similar loan. New York City limits the points paid on a refinancing to four; New York State permits only three. There is no apparent justification for these local regulatory disparities that seek to override Statewide rules.

In People v. Town of Clarkstown, 160 A.D.2d 17, 25, 559 N.Y.S.2d 736, 741 (2nd Dept. 1990), the Court (per Justice Rosenblatt) engaged in a similar quantitative comparison of state and local standards for family day care homes and found that because "local regulations overburden State law and are inconsistent with it in many respects," 160 A.D.2d at 25, 559 N.Y.S.2d at 741, and create additional costs for those affected, they are preempted. The Court noted that State law permits family day care for up to eight children, whereas the town's law limited such care to six children; State law permits family day care to be provided in a two-family house, whereas the town's law restricted day care to detached single-family residences; State law does not contain a minimum play area per child, whereas the town's law mandated at least 200 square feet per child; and so forth. *Id.*

To a significant extent, the State statute and the municipal ordinance here likewise set out different legal standards. For example, both the City and the State laws look to certain objective criteria of the borrowers' repayment ability. In New York City, a loan is not considered predatory if, although it does not fall within those guidelines, the lender had a "reasonable belief" that the borrower would repay it, based on documents in its loan file. N.Y.C. Admin.

Code §6-128(a)(16)(b). Under State law, the comparable standard is whether the lender gave "due regard to repayment ability" of the borrower, based on documents in its loan file. N.Y. Banking Law §6-l (2)(k). The difference is that New York City appears to adopt a partially subjective test ("reasonable belief") while New York State employs an objective test ("due regard") in assessing, after the fact, the lender's crucial judgment about the borrower's repayment ability.

Similarly, a refinancing of a home loan is predatory under State law if the borrower receives no "tangible net benefit" from it. Banking Law §6-l (2)(i). In New York City, a refinancing of a home loan is predatory if the borrower receives no "reasonable and tangible net benefit" from it. N.Y.C. Admin. Code §6-128(a)(16)(a). Arguably, the requirement that a refinancing produce not only some measurable benefit to the borrower but also one that the Comptroller determines is "reasonable" means that New York City is again injecting an unpredictable element of subjectivity, not present in State law, into its after-the-fact assessment of whether there was an acceptable justification for the loan.

Consequently, New York City's ordinance not only regulates more entities and more loans, and provides more sanctions, than does State law, but it does so according to criteria that are more subjective than those reflected in State law. On top of that, Local Law 36 adds an enforcement apparatus to what the State has provided, raising the possibility that those who purchase and invest in home loans may be subjected to regulatory inquiry and action by not only the State Superintendent of Banks and/or the Attorney General but also the Comptroller and City agencies. Landsdown Entertainment Corp. v. New York City Department of Consumer Affairs, 141 A.D.2d 468, 530 N.Y.S.2d 574 (1st Dept.) ("...even if a local law does not deviate from a state law, but merely makes minor additions, it must be held invalid if it intrudes in an area that

falls within the parameters of the regulatory scheme preempted by the state."), aff'd, 74 N.Y.2d 761, 545 N.Y.S.2d 82 (1988).

Local Law 36 is thus preempted because it applies to more loans, touches more businesses, employs different legal standards and creates more enforcement mechanisms than does State law. That is not all. As discussed below, Local Law 36 also calls for more unguided "due diligence" by financial firms and threatens them with more exposure to more sanctions than does State law.

Effects of Incompatibility of Local Law 36 and Banking Law §6-l

One finds further support for the proposition that Local Law 36 is impliedly preempted by Banking Law §6-l by considering the practical effects of the incompatibility of the two laws. The Associations submit that regulation of predatory lending on the municipal level, such as the New York City law envisions, can only undermine the objectives of the State statute.

Consolidated Edison Company of New York v. Town of Red Hook.

Our analysis begins with the legally critical fact that the New York State Legislature, before passing the predatory lending statute last year, and the Governor, before signing it into law, weighed competing considerations. What emerged was a calibrated set of benchmarks ("thresholds," as they are termed in the statute) to determine when a home loan is "high-cost" and thus subject to certain restrictions. These thresholds are expressed in numerical terms reflecting a legislative judgment -- one as to which we have expressed concerns, but a judgment nonetheless -- about protecting homeowners from certain lending practices while keeping in mind the need to insure the availability of credit for people of limited means.

Local Law 36, in derogation of that Statewide judgment, adopts trigger points which enormously broaden the concept of what is a high-cost home loan. Calling a first mortgage loan

"high-cost" if it is more than 6% over a certain Treasury reference point (as Local Law 36 does), rather than 8% above that point (as State law does), vastly expands the category of what may be considered "predatory" loans.

Indeed, the benchmarks for determining what is a "high-cost home loan" under Local Law 36 are so low that many responsible lenders will simply not risk extending credit to those people who most need it. It necessarily follows that a smaller percentage of people in New York City than in the rest of the State who, due to their circumstances, can only qualify for high-cost home loans will get them. Whatever one may think about that result, the point here is that it repudiates the balance the State Legislature struck in terms of insuring available credit to persons who present less than optimal risk profiles to conventional lenders. *Cf.* Halpern v. Sullivan County, 171 A.D.2d 157, 160, 574 N.Y.S.2d 837, 839 (3rd Dept. 1991) ("In view of the State's clear purpose and design to statutorily create a balance in the area of mobile home regulation, it is unreasonable to conclude that it intended to permit localities, through patchwork legislation, to intrude on the legislative scheme by shifting that balance in favor of mobile home tenants.").

A number of the largest, most well-established investment banking firms, which engage both in the securitization of subprime loan pools and in underwriting municipal bonds (or providing other financial services to New York City), have indicated they are discontinuing the purchase of high-cost loans because of Local Law 36. These firms have significant concerns that it will be impossible for them to assure that any high-cost loans they purchase will not be considered "predatory" by the Comptroller to the level of certainty required by Local Law 36. *The New York Times*, February 14, 2003, section C, page 5, column 1.

The easily foreseeable result of such decisions will be that lenders that originate high cost loans in New York City will no longer have access to what are currently the sources of funding

for high-cost loans. Therefore, those lenders will be compelled to cease making high-cost loans or to make them at a higher cost. As a result, consumers with the most difficult economic circumstances will no longer be able to obtain credit from reputable lenders. This result would parallel the recent events in the State of Georgia, where a strict anti-predatory lending law resulted in the inability of lenders to sell high cost loans into the secondary markets, which in turn resulted in the lack of availability of such credit to consumers.[4]

In the end, a significant quantity of home loans will not be originated in New York City because the City Council, disagreeing with the State Legislature, has found that a sizable group of would-be borrowers is insufficiently creditworthy as a matter of local policy. Whether or not one agrees with that local legislative assessment, what matters most here is that it upsets the balance of competing considerations reflected in the State's law.

Local Law 36, as noted, imposes compliance burdens on purchasers and assignees of mortgages, including many of our member organizations. These burdens go well beyond what the State law requires of lenders. Local Law 36 provides a "safe harbor" only if a firm's practices conform to the ordinance's ambiguous, ill-defined standards of "due diligence." Admin. Code §6-128(a)(15)(b)(iii). Sampling a small percentage of loan files, in an attempt to satisfy these standards, is seen by many financial institutions as inadequate protection, in light of

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[4] When Georgia's Fair Lending Act went into effect earlier this year with a provision holding assignees liable for predatory loan practices, the secondary market in home loans dried up virtually overnight. Daniel Hidalgo, "Fair Lending Act Is Hurting Georgians," *Atlanta Business Chronicle*, January 27, 2003. An article in the *Atlanta Constitution* described it as "a classic law of unintended consequences." Harold Cunliffe, "Fair Lending Legislation has Unintended Fallout," January 27, 2003. An article in the *Dow Jones Newswire* the same day pointed out that the Georgia law "threatens to shut off the flow of home loans in the State." Jennifer Ablan, "Georgia Law Sparks Mortgage 'Crisis'." In *Newsday*, it was reported that "Georgia legislators are now redrafting the Fair Lending Act to soften or possibly eliminate the assignee liability provision." Charles Murray, "A Struggle For Loan Protection," March 7, 2003. The Georgia Legislature amended the law on March 6, 2003. Ga. Code Ann., title 7, ch. 6A (2003).

the obviously adverse consequences of being found a predatory lender and becoming unable to do business with New York City. Because a firm can be deemed a predatory lender based on a very small number of proscribed loans, many will feel the need to investigate *all* loans involving mortgages on New York City properties that are to be purchased or securitized. For example, if a 10% random sample of 1000 loans detects even one predatory loan, simple prudence may dictate that all the loans must be sampled.

This burden on conscientious assignees and purchasers, in the ordinary course of their business, goes far beyond anything necessitated by the State's new lending law. In a candid comment to *Reuters*, the General Counsel to the New York City Council confirmed that this result was intended. When asked to compare Local Law 36 to State law, he stated: "It's tougher but also more thoughtful in that it essentially *makes the secondary market help us in weeding out predatory loans.*"[5] This underscores the point that Local Law 36 by design demands more than State law does in terms of the compliance efforts required of those who purchase or invest in home loans.

While requiring those in the secondary home loan market to do more "due diligence" scrutiny than State law demands, Local Law 36 also gives them little or no guidance. The investigative process, as noted above, may involve recreating the subjective as well as the objective elements of the original lender's decision-making based only on its loan file. A typical home loan file may contain little more than the borrower's application, showing assets and employment status (and verification of the facts in them), tax returns, an appraisal of the property, credit reports, forms reflecting mandated disclosures, and the loan documents themselves. Some loan files, however, are certain to be incomplete, inconsistent or confusing.

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[5] Joan Gralla, "NYC Anti-Predatory Loan Law Won't Halt Bond Sale," February 25, 2003.

Compounding this problem is the failure of Local Law 36 to guide assignees' conduct when their due diligence does raise more questions or turn up problems, such as incomplete files. Is the assignee supposed to conduct further investigations, and, if so, what is it expected to do? Or is it supposed to call off the transaction? Again, New York City's lending law, not the State's, creates this quandary.

The difficulties of trying to comply with the City's and the State's lending laws are further aggravated by the different legal standards those laws establish. Local Law 36 establishes a presumption of repayment ability where certain numerical criteria are met, such as the borrower's having sufficient residual income for monthly expenses under published federal guidelines, N.Y.C. Admin. Code §6-128(a)(16)(b), but the information needed to make these determinations is not necessarily present in most loan files. Looking at the originating lender's files, how are investment banks which propose to purchase or invest in home mortgages to determine -- and how is the Comptroller's Office to determine -- with the necessary level of certainty, in nearly every instance, whether the lender "reasonably belie[ved]" the borrower would repay the loan and whether the borrower received a "reasonable and tangible net benefit" from a refinancing outside certain guidelines?

Local Law 36 nonetheless leaves little margin for error by loan assignees in conducting their due diligence. Investment banks and their affiliates risk being sanctioned by the City if they make more than nine mistakes every year after reviewing tens of thousands of loan files. There is no comparable exposure in the State law. Local Law 36 threatens the very real possibility that a City agency will withdraw valuable business from one of the Associations' member firms because it or its subsidiary arranged mortgage-backed securities offerings that included, among all the thousands of pooled mortgages over the course of an entire year, as few

as ten that New York City *but not New York State* views as being "predatory" home loans. See N.Y.C. Admin. Code §6-128(a)(15)(a)(i). On this ground, too, Local Law 36 is at odds with the State's regulatory scheme.

Both the difficulty and cost of good-faith due diligence by institutional purchasers and assignees of home mortgages seeking to assure that lenders complied with Local Law 36, and the burden and uncertainty of a Comptroller investigation into that issue, create very serious problems for our member firms anxious not to run afoul of any laws. Some investment banking, securities and banking firms that now serve as City contractors and depositories will likely have no choices other than to withdraw from offering such services or to charge more for them in order to cover the full costs of the required due diligence. As the Mayor points out, this means that the City will have fewer bidders and suppliers for the complex of financial services it obtains by private contract, resulting in higher costs to the City for those services (Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction, dated February 21, 2003, at 22).[6] In preemption terms, this important consequence again underlines

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[6] One can make some projections as to how much greater the cost to the City could be. In 2002, New York City issuers sold a combined total of approximately $25.7 billion in debt. If, as a result of reduced participation in the issuance process by underwriting firms, these governmental issuers had been forced to pay interest rates on their debt issues that were only one basis point (0.01 percent) higher than they would otherwise be, the City would have to pay approximately $39 million dollars in increased financing costs every year over the life of those bonds. Of course, this increased cost would increase further if the City faced higher interest rates than the low ones now prevailing. (These issuers include the City of New York, the Metropolitan Transportation Authority, the NYC Transitional Finance Authority, the Triborough Bridge and Tunnel Authority, the NYC Municipal Water Finance Authority, the NYC Housing Development Corporation, the NYC Health and Hospitals Corporation, the Tobacco Settlement Asset Securitization Corporation, the Jay Street Development Corporation, the NYC Municipal Assistance Corporation, and the NYC Trust for Cultural Resources.)

the point that local regulation of predatory lending undermines the choices made by the State Legislature as to suitable responses and remedies for predatory lending.

To sum up, if Local Law 36 is upheld, there will be widespread economic harm in the form of either (1) loss of availability of credit to those New York City consumers in the most difficult economic circumstances, and/or (2) reduced availability or increased costs to New York City for financial services. Because a substantial number of investment banking firms that provide financial services to New York City also engage in the underwriting of subprime loan pools, either or both forms of economic harm will almost certainly occur to some degree, if the local law is not invalidated. Because the loss occasioned by loans that were never originated and securitized cannot be measured retrospectively, this harm is irreparable and warrants a preliminary injunction.

In the last analysis, as the Court of Appeals instructed in the Con Edison case, the Court must consider, as central to its preemption analysis, the legal consequences of allowing localities to regulate in this area that the State has occupied. Upholding Local Law 36 would mean that not only New York City but New City and Garden City and the City of Rye can decide to supplement or modify State law on predatory home mortgages on property within their borders. The result would be a regulatory hodgepodge creating such burdens and chaos in home mortgage lending as to eviscerate the purpose of Statewide standards. There is simply no room for selective municipal initiatives. *Cf.* Penny Lane/East Hampton, Inc. v. County of Suffolk, 191 A.D.2d 19, 26-27, 598 N.Y.S.2d 806, 812 (2nd Dept. 1993).

Conclusion

The injunctive relief sought in plaintiff's second cause of action should be granted.

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