IN THE CIRCUIT COURT OF THE STATE OF OREGON

IN AND FOR THE COUNTY OF MULTNOMAH

ANYDAY'S PAYDAY, LLC, an Oregon Limited Liability Company, dba ANYDAY'S PAYDAY LOANS, *et al*

Plaintiffs

vs.

CITY OF PORTLAND, OREGON by and through the Portland City Council,

Defendant.

Case No. 0603-03013

OPINION AND ORDER

This matter came on for trial on Plaintiffs' motion for preliminary injunction and the parties' stipulation for trial of all issues on April 18, 2006. Plaintiffs appeared through counsel Loren D. Podwill and John M. Junkin. Defendant appeared through counsel, Senior Deputy City Attorney Tracy Pool Reeve. *Amicus* State of Oregon, by and through the Governor, the Attorney General, and the Director of the Department of Consumer and Business Services (DCBS), appeared by unopposed leave of court through counsel Senior Assistant Attorney General Charles Fletcher. The matter was argued and submitted for decision.

Plaintiffs seek an injunction against enforcement of Portland City Ordinance 179948 (Portland City Code Chapter 7.26), contending that its substantive provisions regulating the "Payday Loan" operations within Portland City Limits are preempted by state law and regulations of payday loans. They contend that the state though such law and regulations has preempted the field of payday loan regulation or at least those portions of the "field" in which Portland's Ordinance purports to operate, and in any event that the provisions in question impermissibly

conflict with state law and regulations and are therefore invalid. Plaintiffs contend, finally, that the provisions in the Ordinance for a licensing fee and local administrative authority fail because there is no valid substantive role for the Ordinance in light of the preemption they assert.

The City and *Amicus* contend that the state has not preempted the field of payday loan regulation, that neither the state statutes nor the state regulations were intended to foreclose further restrictions by localities upon payday loan operations, and that the provisions in question do not sufficiently "conflict" with state law or regulations to establish their invalidity under preemption principles.[1]

The tests for preemption under these circumstances are critical. As the City and *Amicus* argue, both the language of the "home rule" provision of our constitution[2] and applicable caselaw recognize that the authority of home rule municipalities to legislate without preemption by state law is far broader in civil than in criminal matters.[3] Outside the area of criminal law, the parties

---

[1] The Plaintiffs assert *only* preemption arguments. While they "reserve" rights to make other contentions, the only issues before me are preemption issues. Therefore, for example, though the plaintiffs argue that the "payment plan" requirement forces them to extend loans for free (without any interest or fee) and that the right to cancel a loan under PCC 7.26.060 forces them to grant one day loans for free, there is no contention now before me that these consequences somehow invalidate the local provisions for any reason unrelated to preemption.

[2] Or. Const. Art. XI, §2 provides, in relevant part: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and *criminal* laws of the State of Oregon" [emphasis added].

[3] "The essential test for displacement of local ordinances (civil or criminal) by state law is whether the local rule is 'incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive.' In the area of civil or administrative ordinances regulating local conditions, it is reasonable to assume that the legislature did not mean to displace local ordinances, unless that intention is apparent. The reservation in Article XI, section 2, however, reverses this assumption with respect to state criminal law." *City of Portland v. Dollarhide,* 300 Or 490, 501 (1986) [citations omitted]. Also, "We are left . . . . with the inescapable conclusion that the voters who adopted Article XI, section 2 envisioned a stricter limitation on the lawmaking power of cities in respect of criminal laws than with regard to civil or regulatory measures. Thus, the same interpretation and assumptions of compatibility found in civil and regulatory areas cannot be applied in evaluating the relationship between state and municipal criminal laws." 300 Or at 497.

purport[4] to agree that this articulation captures the applicable tests for preemption:

> * * * * If we find an express or otherwise clearly manifested intention that the state's legislation is to be exclusive, we need go no further.
>
> If we find no express or otherwise clear manifestation of preemption, we must examine whether the ordinances "cannot operate concurrently" with state law. *LaGrande/Astoria*, 281 Or. at 148, 576 P.2d 1204. The relevant question is whether the ordinances "conflict" with state law, *i.e.*, that the local legislation prohibits what the state legislation permits or permits what the state legislation prohibits. [*citations omitted*] We begin with a presumption against preemption of local regulation. Indeed, "[w]e cannot simply 'assume' that, by its silence, the legislature intended to permit conduct made punishable under an ordinance." *Jackson*, 316 Or. at 149, 850 P.2d 1093 (emphasis in original).
>
> [*Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624, 634 (2000)]

Because, for the reasons stated on the record during the trial of this matter, I do not see any "clearly manifested intention that the state's legislation . . . be exclusive" in the sense of preempting the entire field of payday loan regulation,[5] I will focus on the contentions that state law (including regulations) was either intended to displace local regulation on the particular subjects addressed by the Ordinance or that state law (including regulations) is sufficiently inconsistent with the Ordinance to invalidate it.

Plaintiffs essentially equate the significance of considerations by DCBS during promulgation of relevant regulations to the role of *legislative* history in such cases as *City of Portland v. Lodi,* 308 Or. 468, 475 (1989). I find references to DCBS regulatory history unpersuasive as to any state intent to displace local regulations of the sort here in issue for three

---

[4] The parties surely disagree as to what "conflict" means, and the City apparently contends that the permit/prohibit test here articulated is actually applicable only regarding criminal laws.

[5] Briefly, while I have some difficulty agreeing with *Amicus* that the degree of regulation is "minimal," it is far short of the sort of pervasive regulation or inherent need for uniformity that might convey a decision to exclude regulation absent some express attention to the issue by the Legislature

reasons: First, *Lodi* obviously analyzes the issue in the context of criminal law, which is far less deferential to local regulation than analysis in the civil context.[6] Second, although administrative consideration may have some relevance to preemption in some contexts, where, as here, there is no apparent intent to occupy the field on the part of the legislature or to delegate the issue of preemption to the administrative agency, arguments that the agency's choice of means of addressing an issue preclude local variation carry little weight. Third, outside the criminal context, that an agency chose among competing approaches to a problem, and selected some but not others, hardly implies any decision (or even any contemplation) that home rule municipalities were thereby prevented from choosing differently.[7]

In my view, this case comes down to the spirit with which the law approaches contentions that local regulation conflicts with state law or regulations. As the Plaintiffs repeatedly demonstrated, it is surely easy to read the provisions in question as conflicting, but the dispositive issue is to what extent the presumption against preemption in the civil context (and in the absence of any express or implicit legislative policy to occupy a field) permits enthusiastic pursuit of reconciliation between state and local regulation. While the authorities cast doubt upon the City's suggestion that it is sufficient that the local and state regulations can operate "concurrently,"[8] the presumption against preemption is strong enough here to avoid fatal

---

[6] See notes 2 and 3, *supra*, and accompanying text.

[7] *See also Lindquist v. Clackamas County,* 146 Or App 7, 13 (1997): "the repeal and replacement of a statutory provision containing a particular substantive regulation does not necessarily indicate a legislative intent to displace local regulations of comparable substance." Note, however, that once an agency validly exercises delegated authority to adopt a regulation, the issue whether local law "conflicts" with that regulation is the same as when a statute arguably conflicts with local regulation.

[8] *Compare LaGrande/Astoria v. PERB*, 281 Or. 137, 148 (1978), *with Ashland Drilling, Inc. v. Jackson County*, *supra*, 168 Or App at, 634 *and Lindquist v. Clackamas County, supra*, 146 Or App at 12.

"conflict" because what the Plaintiffs contend state law "permits" is merely a mitigation of the restriction otherwise imposed, rather than anything approaching state policy affirmatively sanctioning, authorizing, or protecting against local regulation the conduct in question. After all, there is nothing in the legislative history to suggest that the Legislature was balancing the social *value* of short term loans burdening cash-strapped borrowers with interest rates up to 500 percent[9] against the social consequences of such transactions – as opposed to deciding how far to go in mitigating those consequences.

The Plaintiffs assert that the three substantive provisions of the Ordinance conflict with state regulation in a variety of ways.[10]

First, Plaintiffs assert that the Ordinance's prohibition of renewals without a twenty five percent paydown –

> A Payday Lender may not renew a Payday Loan unless the Borrower has paid an amount equal to at least twenty-five percent (25%) of the principal of the original Payday Loan, plus interest on the remaining balance of the Payday Loan.
>
> [PCC 7.26.050]

– conflicts with state regulations allowing up to three renewals as long as the lender has a good faith belief that the borrower has the ability to repay, and avoiding the three-renewal limit if

[9] I am not precisely clear on how the parties arrive at the 500% figure, but there seems to be no dispute, at least as to the order of magnitude of the effective interest rate. It is an annual percentage rate, and has to do with the ability of lenders to charge $15 per $100 borrowed for *two weeks* and renewed three times.

[10] I do not discuss the arguments by Plaintiffs that there is a "conflict" because the requirements of the Ordinance somehow exceed the *definitions* of "payday loans" in the statute and regulations. The definitions serve to describe the target of the statute and regulations, but are far weaker in terms of any implication of a state policy to displace local law than the substantive inconsistencies the Plaintiffs assert. If, as I conclude, those inconsistencies are insufficient to establish preemption, it follows that the weaker tensions between the definitions and the requirements of the Ordinance are also insufficient. If I am wrong about the substantive inconsistencies, there is still no need to reach the tensions arising from the definitions, as preemption would already be established.

the borrower has not reached a previously established credit limit.[11] This is the most obvious example of the Ordinance merely adding a restriction to those imposed by state law. As *Amicus* notes, there is no conflict with the provision for an "additional loan"[12] under the regulations when the borrower has not exhausted a credit limit, because the Ordinance provision in question addresses *renewals*. The only argument remaining for preemption is that DCBS considered and rejected a paydown requirement, an argument that I reject for reasons stated at pages 3-4 of this opinion, *supra*.

Second, Plaintiffs assert that the Ordinance's establishment of a cancellation right –

> A Payday Lender shall cancel a Payday Loan without any charge to the Borrower if prior to the close of the business day following the day on which the Payday Loan originated, the Borrower:
>
> 1. Informs the Payday Lender in writing that the Borrower wishes to cancel the Payday Loan and any future payment obligations; and
> 2. Returns to the Payday Lender the uncashed check or proceeds given to the Borrower by the Payday Lender or cash in an amount equal to the principal amount of the Payday Loan..
>
> [PCC 7.26.060]

– conflicts with state regulations that allow the lender to recoup at least ten percent in the event of prepayment:

> (1) If a borrower pays off a Short-Term Personal Loan that is a Payday or Title Loan prior to the due date, the licensees must refund all unearned interest and charges and may not charge a Prepayment Penalty except as provided in section (2) of this rule.
> (2) A Short-Term Personal Loan licensee who has made a Payday or Title loan may increase the earned interest and charges to a maximum of 10% of the loan amount if the earned interest and charges at the time of loan pay-off is less than that amount.
>
> [OAR 441-730-0310]

---

[11] OAR 441-730-0270(1)(i), (L), (2).

[12] OAR 441-730-0270(1)(L).

Plaintiffs dismiss the argument of *Amicus* that the Ordinance addresses "rescission" rather than prepayment as semantics, since the borrower gets the use of the lender's money for a day without a charge. But for purposes of preemption, the issue of the consequences to the lender, or how those consequences compare to the right of check-cashing services, is of no impact. It is fair to view the right to charge ten percent as a mitigation of the restriction on prepayment penalties imposed by subsection (1); indeed, the state regulation is entitled "Refund of Unearned Interest and Charges and Prohibition on Prepayment Penalty." The difference between the existing formulation of the regulation and one that prohibited prepayment penalties in excess of ten percent would be "semantics" in light of the function of the regulation, which is to prohibit prepayment penalties or costs in excess of ten percent. Accordingly, there is no fatal conflict between the state regulation and the further regulation by the Ordinance of prepayment by the close of the next business day.

Third, Plaintiffs assert that the Ordinance's provision for a prepayment plan –

> C. After a Payday Loan has been renewed to the maximum amount allowed by state law, and prior to default on the Payday Loan, a Payday Lender shall allow a Borrower to convert the Borrower's Payday Loan into a payment plan. Each payment plan shall be in writing and acknowledged by both the Payday Lender and the Borrower.
>
> D. The Payday Lender shall not assess any fee, interest charge or other charge to the Borrower as a result of converting the Payday Loan into a payment plan.
>
> E. The payment plan shall provide for the payment of the total of payments due on the Payday Loan over a period of no fewer than 60 days in three or more payments. The Borrower may pay the total of payments due on the payment plan at any time. The Payday Lender may not assess any penalty, fee or other charge to the Borrower for early payment on the payment plan.
>
> [PCC 7.26.070]

– conflicts with state regulations that prohibit further charges but allow collection efforts,

prohibit a "same day transaction," and prohibit more than three extensions or renewals:

> (1) The following conditions apply to all Short-Term Personal Loan licensees making Payday loans.
> * * * *
> (i) A Short-Term Personal Loan licensee may not renew or extend a Payday loan more than three times. If the borrower is unable to repay the loan after the third renewal or extension, the lender may not assess further charges, but may institute collection efforts to recover the balance of the loan.
> (j) A Short-Term Personal Loan licensee may not make a "same day transaction" with a borrower who has renewed or extended the Payday loan three times. The lender must wait until the next business day following receipt of the payoff from the borrower before making a new Payday loan to that borrower.
> * * * *
> (L) A Short Term Personal Loan licensee making a Payday Loan may not make more than one Payday Loan to an applicant at a time. * * * *
>
> [OAR 441-730-0270]

Again, the state provisions mitigate restrictions otherwise imposed rather than affirmatively establishing rights on the part of lenders to do what the Ordinance further restricts. Thus, OAR 441-730-0270(1)(i) prohibits further charges against a borrower who "is unable to repay the loan after the third renewal or extension," while not disallowing collection efforts. The further imposition of a requirement to allow a prepayment plan is not such a conflict as to establish preemption, particularly where the borrower may be "able" to "repay the loan *after* the third renewal or extension," and where the regulation does not purport to establish a right to an *immediate* collection effort. Besides, repayment plans are a form of "collection effort," and imposing an additional prerequisite to commencing an action is no more inconsistent with collection efforts than, say, a local court filing fee or mandatory pre-filing mediation.

And although it may be "semantics" to argue that the Ordinance is a "conversion" of an existing "transaction" rather than a "new" "same day transaction" or a prohibited "extension" or

"renewal" of the loan, the obvious purpose of these prohibitions is to prevent a lender from exacerbating the debt itself or related charges when the borrower has already had three extensions or renewals. A required relaxation of the payment of the debt without new charges is hardly inconsistent with the prohibitions of the regulations or their purpose, and is not such a "conflict" as would establish preemption.[13]

For the reasons stated above, the Ordinance is not preempted by state law or regulations. Accordingly, the Plaintiffs shall take nothing by their complaint.

The City shall prepare, circulate, and submit a proposed judgment to facilitate appeal.

April 18, 2006

Michael H. Marcus, Judge

[13] Again, that the Ordinance essentially gives borrowers in their fourth loan term [original plus three renewals] a right to force a payment plan upon the lender before there is a default may or may not raise other issues, but only the preemption argument is before me.