

as evolving articulations of the same idea.

In no respect does the statute express or imply that the power granted is limited, to some variable degree, by application of fifty different state laws. Part 34 of our rules, which was issued pursuant to the OCC's authority under section 371, already identifies certain types of state laws that do not apply to national banks. Section 34.4(a) expressly preempts state laws concerning five areas of fixed-rate mortgage lending. Section 34.4(b) provides that, when considering whether to preempt state laws in other areas of mortgage lending, the OCC will apply recognized principles of Federal preemption.

We analyze first the provisions of the GFLA that are preempted under § 34.4(a). Two of the five types of state laws expressly preempted by § 34.4(a)—state laws concerning the schedule for the repayment of principal and interest (§ 34.4(a)(2)) and the term to maturity of the loan (§ 34.4(a)(3))—are relevant here. Following our analysis of the GFLA provisions preempted by §§ 34.4(a)(2) and (3), we analyze GFLA provisions preempted under recognized principles of Federal preemption as provided by § 34.4(b).⁸¹

1. Provisions of GFLA Preempted by § 34.4(a)(2) (State Laws Concerning the Schedule for Repayment of Principal and Interest)

Section 34.4(a)(2) preempts state laws "concerning * * * [t]he schedule for the repayment of principal and interest." The inherent and inseparable elements of any repayment schedule are: (1) The timing of the expected payments; and (2) the amount of the expected payments. The following six provisions of the GFLA concern one or both of these elements and are therefore preempted pursuant to § 34.4(a)(2):

- *Balloon payments.* Under the GFLA, no scheduled payment on a high-cost home loan may be more than twice as much as the average of earlier scheduled payments, except where payment schedules are adjusted to the seasonal or irregular income of a borrower. A limitation on the ability to offer balloon loans limits the ability of the lender and the borrower to agree on a repayment schedule that would permit lower principal payments initially.

- *Negative amortization.* The GFLA prohibits a high-cost home loan from

including payment terms under which the principal balance increases because regular periodic payments fail to pay interest due. A prohibition on negative amortization limits the ability of the lender and borrower to agree on terms for the repayment and schedule of payment of principal and interest.⁸²

- *Advance payments.* The GFLA provides that a high-cost home loan contract may not include a payment schedule that consolidates more than two periodic payments and pays them in advance from loan proceeds. This provision is an express limitation on a lender's and borrower's ability to agree to a schedule for the repayment of principal and interest.

- *Late fees.* Under the GFLA, a creditor or servicer may not assess a late payment fee on a home loan unless the loan document specifically authorizes the fee, the payment is at least ten days late, and the fee does not exceed 5% of the amount of the late payment. Late fees may be imposed only once for each late payment. If a late fee is deducted from a payment and causes a default on a subsequent payment, no late fee may be imposed for such default. A lender may apply any payment made in order of maturity to a prior period's payment due even if it results in late payment charges accruing on subsequent payments due. Late fees are considered "interest" under the OCC's regulations at 12 CFR 7.4001(a).⁸³ The GFLA limitation on this form of interest is an impermissible state law concerning the schedule for repayment of interest and principal under § 34.4(a)(2). A limitation on late fees limits the ability of a lender and a borrower to agree to terms allowing for the imposition of increased interest charges if the borrower fails to adhere to the agreed-upon repayment schedule.

- *Prepayment fees.* Prepayment fees on a high-cost home loan under the GFLA are limited to 2% of the amount prepaid in first year of loan; 1% of the amount prepaid in second year of loan; and zero thereafter. Like late fees, prepayment fees, when imposed in connection with non-ARM loans, are considered "interest."⁸⁴ A limitation on

prepayment fees limits the ability of a lender and a borrower to agree to terms allowing for alteration of the timing and amount of expected payments.

- *Default rates of interest.* The GFLA prohibits increasing the interest rate charged after default on a high-cost home loan unless the rate is changed due to a variable-rate feature in the loan. This provision limits the ability of a borrower and lender to agree to loan terms permitting the imposition of increased interest charges if the borrower fails to adhere to the agreed-upon repayment schedule.

Each provision of the GFLA summarized above concerns the schedule for repayment of principle and interest. Accordingly, each is preempted by § 34.4(a)(2).

2. Provisions of GFLA Preempted by § 34.4(a)(3) (State Laws Concerning Term to Maturity)

The following three provisions of the GFLA concern the term to maturity of a real estate loan and, as such, are preempted by § 34.4(a)(3):

- *Prepayment fees limited.* As described above, the GFLA limits prepayment fees on a high-cost loan to 2% of the amount prepaid in first year of loan; 1% of the amount prepaid in second year of loan; and zero thereafter. In addition to establishing impermissible restrictions on a national bank's authority to establish the schedule for repayment of interest and principal under § 34.4(a)(2), this provision also frustrates the ability of a national bank to structure the maturity of loans it originates by prohibiting the use of incentives designed to achieve the desired maturities.

- *Acceleration in absence of default prohibited.* Under the GFLA, a high-cost loan agreement may not contain a provision that permits a creditor or servicer, in its sole discretion, to accelerate the indebtedness unless there is a *bona fide* default by borrower. A limitation on the ability to accelerate the indebtedness in situations where there is no default but the borrower's creditworthiness may have significantly deteriorated limits the ability of a lender and a borrower to agree to terms that would alter the term to maturity of a loan.

- *Right to "cure" a default.* If a high-cost home loan is accelerated, the GFLA gives the borrower the right to "cure" the default at any point up to foreclosure. Cure of default reinstates

prepayment fees are also analyzed below under 12 U.S.C. 85 and, like limits on late fees, are preempted under that provision for national banks not located in Georgia that make loans secured by property located in Georgia.

⁸¹ Although National City's request does not raise issues under Federal law governing adjustable rate mortgage lending, we note that Subpart B of part 34 states as a general rule that national banks may engage in ARM lending without regard to any state law limitation. See 12 CFR 34.21(a).

⁸² In other contexts, however, failure to disclose the existence of a negative amortization feature may be an unfair or deceptive practice. See, e.g., OCC, "Interagency Account Management and Loss Allowance Guidance" (Jan. 8, 2003), available at <http://www.OCC.Treas.Gov/ftp/bulletin/2003-1a.pdf>.

⁸³ For this reason, the GFLA limits on late fees are also analyzed below under 12 U.S.C. 85, and are preempted under that provision for national banks not located in Georgia that make loans secured by property located in Georgia.

⁸⁴ See OCC Interpretive Letter No. 803 (Oct. 7, 1997). For this reason, the GFLA limits on