Journal of Law and Policy

Volume 17 | Issue 1 Article 7

2008

Without Other Options: The Limited Effectiveness, Unique Availability, and Overall Impact of State-Directed Lawsuits Against Predatory Lenders

Justin Collins

WITHOUT OTHER OPTIONS: THE LIMITED EFFECTIVENESS, UNIQUE AVAILABILITY, AND OVERALL IMPACT OF STATE-DIRECTED LAWSUITS AGAINST PREDATORY LENDERS

*Justin Collins**

INTRODUCTION

In recent months, people reading or watching the news have been bombarded with stories about subprime loans, a sharp rise in foreclosures, and the tenuous state of the mortgage industry.[1] In 2006, there were 1.2 million foreclosure filings in the United States—up 42 percent from 2005.[2] Based on current rates in 2006, foreclosure filings are predicted to rise to two million in 2007, a

* Brooklyn Law School Class of 2009; B.A. in Urban Studies, University of Pennsylvania, 2004. The author would like to thank Mom, Dad, Alex, and Sona, for all their support throughout this entire process, as well as Professor David Reiss and the staff of the *Journal of Law and Policy* for the advice and guidance they provided in connection with this Note.

[1] *See generally* Edmund L. Andrews, *Democrats Prepare Bills to Tighten Loan Rules*, N.Y. TIMES, Sept. 6, 2007, at C1; Editorial, *Subprime Mortgages: Get Help to Homeowners*, PHILA. INQUIRER, Sept. 4, 2007; *Housing Woes Hurt NovaStar and Insurer*, N.Y. TIMES, Sept. 6, 2007, at C10; *Subprime Squeeze Hits Automakers; Fewer Buyers Finance Cars*, WASH. TIMES, Sept. 5, 2007, at A01; Adam Thomson, *Regulators' Call to Help Homeowners,* FIN. TIMES, Sept. 5, 2007, at 8. These articles represent only a fraction of the articles appearing in major national and international newspapers during the week of September 3, 2007, discussing the current crisis in the subprime loan industry.

[2] RealtyTrac is a real estate resource site billing itself as "The nation's # 1 source of foreclosure listings." RealtyTrac Home Page, http://www.realtytrac.com (last visited Dec. 3, 2007).

rate approaching heights not seen since the Great Depression.[3] At the core of this crisis is the subprime loan industry, which furnishes high-interest loans to individuals and families with "less than pristine credit" that cannot qualify for a loan at the prime interest rate because they are considered to be higher credit risks.[4] The media has failed to address the predatory nature of many of these loans, which are generally given to low-income borrowers.[5] The clustering of these predatory loans in at-risk, low- and moderate-income communities has resulted in mass foreclosure and the destruction of entire neighborhoods and communities.[6]

Home ownership is increasingly touted as a community development strategy and a means for lower-income Americans to accumulate wealth, achieve financial stability, and move into the middle class.[7] However, predatory lending has gradually eroded

---

[3] Nelson Schwartz, *Can the Mortgage Crisis Swallow a Town?*, N.Y. TIMES, Sept. 2, 2007, at BU1.

[4] Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2277 (2004).

[5] *Id.*

[6] Emily Brady, *Stranger at the Door*, N.Y. TIMES, Sept. 30, 2007, at CY4. A clear example of the clustering of predatory loans in a community and resulting foreclosures is Southeastern Queens. *Id.* In communities of color in that part of New York City, studies have demonstrated notably high levels of foreclosures, which have been attributed to higher rates of subprime lending. *Id.*

> Foreclosed properties damage the value of nearby homes and the tax bases of municipalities. There is also a strong correlation between foreclosures and crime rates. For every one percentage point increase in a neighborhood's foreclosure rate, violent crime rises 2.3 percent, according to a recent study by Dan Immergluck of the Georgia Institute of Technology and Geoff Smith of Woodstock Institute, a research and advocacy organization in Chicago.

Editorial, *Spreading the Misery*, N.Y. TIMES, Nov. 29, 2007, at A30. Furthermore, housing vacancies appear to lead to prostitution, vagrancy, and drug dealing. *Id.*

[7] Kathe Newman, *Race, Politics, and Community Development in U.S. Cities: Newark, Decline and Avoidance, Renaissance and Desire: From Disinvestment to Reinvestment*, 594 ANNALS 34, 35–36 (2004). Newman disagrees with the idea of homeownership as an effective economic development strategy for the poorest urban neighborhoods, but she notes and discusses it as a popular strategy among city and other government officials. *Id.*

communities of homeowners because of lax federal regulations and the preemption of state laws.[8] In the past decade, states have responded with a new strategy whereby state Attorneys General file suits against unscrupulous lenders.[9] While these suits have received great media attention and have led to multi-million dollar settlements,[10] experts and politicians are still debating whether this approach to curbing predatory lending has been, or will be, successful.

This Note will explore the tactic of Attorneys General suing predatory lenders, focusing on how it has been only partially effective, what it has taught and can continue to teach lawmakers, and how it can be effectively used to develop a comprehensive anti-predatory lending and consumer protection strategy in the future. Part I will provide a background on the development of the subprime mortgage industry, the methods utilized by predatory lenders, and existing law regarding predatory lending. Part II will examine how states have responded to the shortfall of federal law and federal restrictions on state action, and will address how states have employed the method of Attorneys General filing suits against predatory lenders. Part III will evaluate the success of this strategy, arguing that while state-directed lawsuits may be the best anti-predatory lending tool available in light of federal preemption, they have fallen short of stemming systemic change. Additionally, Part III will propose potential solutions for the future, based on the current activities in the subprime market, and will discuss important knowledge gained from state-directed lawsuits to further develop anti-predatory lending strategies.

See also U.S. DEP'T OF HOUS. & URBAN DEV. OFFICE OF POL'Y DEV & RESEARCH, IDEAS THAT WORK: BUILDING COMMUNITIES THROUGH HOMEOWNERSHIP (2006), *available at* www.huduser.org/Publications/Pdf/ideas thatwork.pdf [hereinafter HUD, IDEAS].

8 *See Spreading the Misery*, *supra* note 6.

9 Thomas Miller, *Remarks to the Board of Governors of the Federal Reserve System, Iowa Department of Justice, Office of the Attorney General*, 1 (Aug. 14, 2007), *available at* http://www.state.ia.us/government/ag/latest_news/ releases/aug_2007/Federal_Reserve_HOEPA.pdf.

10 *See infra* notes 117–36 and accompanying text.

I. BACKGROUND – THE RISE OF THE SUBPRIME INDUSTRY AND PREDATORY LENDING

Home ownership has long been touted as a means to achieve financial stability and economic success, for individuals, families, and neighborhoods.[11] The U.S. Department of Housing and Urban Development ("HUD") refers to homeowners as "more likely to maintain their properties, thereby improving their neighborhoods and surrounding communities."[12] These improvements "help to stabilize neighborhoods, which, in turn, are able to access resources to improve schools, support small businesses and churches, and build the capacity of community-based organizations."[13] Throughout American history, and most notably since Franklin Delano Roosevelt's New Deal, policymakers have tied home ownership to citizenship.[14] As a result, "after 1948, the national incidence of annual [residential] mobility dropped by more than 50 percent; the five-year rate by more than 40 percent."[15] Stable homeowner communities were developing nationwide.[16] During this period, residential mobility decreased for renters as well as homeowners, but increased home ownership

---

[11] HUD, IDEAS, *supra* note 7.

[12] *Id.*

[13] *Id.* at vii.

[14] In their examination of residential mobility, homeownership, and citizenship (particularly focused on Riverside, California), Ronald Tobey, Charles Wetherell, and Jay Brigham write that President Roosevelt:

> badly wanted to [create federal housing policy to] modernize the nation's housing stock, not simply in order to improve the quality of life for the American people but to engender a revitalized idea of citizenship that directly and specifically involved homeownership. Although the Lockean notion that citizens should have a property stake in society had persisted as a major theme in American political culture virtually undiluted since the eighteenth century, it was the sheer power of the New Deal state that made possible implementation of the idea.

Ronald Tobey, Charles Wetherell, & Jay Brigham, *Moving Out and Settling In: Residential Mobility, Home Owning, and the Public Enframing of Citizenship, 1921-1950,* 95 THE AMERICAN HISTORICAL REVIEW 1395, 1395–96 (1990).

[15] *Id.* at 1402–03.

[16] *Id.*

appears to have directly coincided with the development of communities with long-term residents.[17] Along with home ownership, the mortgage industry grew rapidly, culminating in the mortgage crisis we see today.[18]

A. The Roots of the Mortgage Industry and Subprime Lending

Middle-class homeowners with strong credit have traditionally financed home purchases through conventional, "prime rate" mortgages.[19] Prior to the 1980s, these loans were virtually the only mortgages available, and they were only granted to individuals with strong credit and steady employment.[20] However, the mortgage market changed significantly in the early 1980s as a result of deregulation legislation that eliminated state restrictions on interest rates and loan payment structures.[21] For example, the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") of 1980 eliminated state interest rate caps, and the Alternative Mortgage Transaction Parity Act ("AMTPA") of 1982 opened the door for adjustable rate mortgages and balloon payment structures.[22] Additionally, the Tax Reform Act ("TRA") of 1986 made "high-cost mortgage debt cheaper than consumer debt," thus making subprime lending much more profitable.[23] Subsequently,

---

[17] In addition to increased homeownership and programs developed to enable this, other programs developed during the New Deal and postwar period, such as rent control, helped to established more stable renter communities. *Id.* at 1404–05.

[18] Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, FED. RES. BANK OF ST. LOUIS REVIEW, January/February 2006, 88(1), 31, 38, *available at* http://research.stlouisfed.org/publications/review/06/01/ChomPennCross.pdf.

[19] Christopher Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 9 (2005).

[20] David Reiss, *Subprime Standardization: How Rating Agencies Allowed Predatory Lending To Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 985, 992–93 (2006).

[21] Chomsisengphet &Pennington-Cross, *supra* note 18, at 31, 38.

[22] *Id.*

[23] "The TRA increased the demand for mortgage debt because it prohibited the deduction of interest on consumer loans, yet allowed interest deductions on

the subprime market expanded greatly throughout the 1990s.[24] Due to the TRA, borrowers began to use mortgages like regular consumer loans, often at the suggestion of lenders, by using equity in their home to secure needed cash or consolidate debt.[25]

Proponents of subprime lending argue that it has expanded access to home ownership for low-income communities and families with poor credit, but this assertion has been shown to be inaccurate due to the high rate of subprime loans on refinance mortgages.[26] Even though "the rate of minority and low-income home ownership has increased over the past decade," this cannot be conclusively tied to subprime lending because, according to industry data, 82 percent of subprime mortgages were refinances as opposed to home purchases.[27]

B. Defining Subprime Loans and Predatory Lending

There is no exact standard for establishing which loans are "subprime," and the individual lenders determine who falls below the credit threshold necessary for a prime loan.[28] Currently, lenders rate the credit risk of potential borrowers using a graded system, with "A" as the best possible credit and "D" as the worst.[29] Prime rate borrowers traditionally have "A" credit, while all others fall

---

mortgages for a primary residence as well as one additional home." *Id.* at 38.

[24] *Id.*

[25] Due to this fact, the vast majority of home mortgages are being used as if they were credit cards or personal loans. The only difference is that they are secured by the buyer's home. Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 13–14 (Seton Hall Public Law Working Paper No. 20, 2004), *available at* http://ssrn.com/abstract=594042.

[26] *Id.* at 11–12.

[27] Results are as of 2004. *Id.* at 12.

[28] U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SPECIAL COMM. ON AGING, U.S. SENATE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 1, 21 (2004), *available at* http://www.gao.gov/new.items/d04280.pdf.

[29] Peterson, *supra* note 19, at 9.

into the subprime category.[30] Since their inception, subprime loans have increased rapidly, and in 2004 they accounted for almost twenty percent of furnished loans.[31]

Subprime loans take on various forms.[32] However, subprime clients are generally deemed to be a greater credit risk due to their weaker credit ratings, which disqualify them from prime-rate loans. Accordingly, the interest rates on subprime loans are inherently higher than on prime loans.[33] In addition, these loans often come with higher points and settlement fees than prime loans.[34] Furthermore, the vast majority of subprime loans are refinances of existing debt, as opposed to mortgages used to purchase a home.[35] Another common trend across the subprime industry is its target population, as it has disproportionately affected communities of color and other vulnerable populations.[36]

While "A" loans, and as of late, some "A-" loans, have been sold by lenders on the secondary market to government-sponsored purchasers such as Fannie Mae and Freddie Mac, subprime loans

[30] *Id.*

[31] Reiss, *supra* note 20, at 994.

[32] These forms include refinances to borrowers with poor credit, loans to buyers with credit histories similar to those eligible for "A" loans but with limited documentation, and "high loan-to-value (LTV) refinance mortgages," which allow borrowers to take out loans worth nearly as much as, or sometimes even more than, their homes. *Id.* at 995.

[33] *Id.*

[34] Points and fees are up-front payments, or amounts financed into the loan principal, ostensibly to "compensate for higher origination and servicing costs that lenders claim subprime loans have." *Id.* at 995–96.

[35] *Id.* at 996.

[36] Professor David Reiss notes that:

> African Americans and Hispanics combined made up less than eight percent of the prime home purchase market in 1998, but such borrowers made up nearly twenty percent of the subprime home purchase mortgage market in that same year. Similarly, African-American and Hispanic borrowers together make up about six percent of all prime conventional refinance mortgages and seventeen percent of subprime refinance mortgages. And more than half of all loans in predominantly African-American communities are subprime, compared to only nine percent in predominantly white communities.

Reiss, *supra* note 20, at 997.

have a far more varied system of sale to secondary-market investors.[37] In contrast to the manner in which prime loans are furnished and sold, subprime loans are generally originated by a lender and then are quickly sold in bundles with other subprime loans to investors on the secondary market through a process called "securitiziation."[38] Most securitized loans are purchased by institutional investors.[39] Due to securitization, lenders are far more willing to furnish borrowers with unaffordable loans because they eliminate all risk of loss when they sell the loans to investors.[40] When foreclosure occurs, the holder of the loan, as opposed to the originator, takes the loss.[41] Recently, due to mass foreclosures, investors on the secondary market have faced huge losses.[42] However, some other investors, mostly hedge funds, have purchased derivative contracts that have enabled them to make

---

[37] Part of this is due to the higher underwriting requirements of government-sponsored buyers. Other secondary-market purchasers have far more lax standards. Peterson, *supra* note 19, at 9–10.

[38] Subprime lenders are frequently not traditional banks or depositary institutions, and as such, they frequently borrow money from Wall Street to finance their loan transactions. In order to pay Wall Street back, and limit their risk of loss (which is particularly high in subprime loans, due to high rates of foreclosure), they engage in a process called securitization. Securitization is a process in which, after an originator has held the loan for sixty to ninety days, the loan is combined with other subprime loans into an aggregate fund, and sold to institutional investors. The institutional investor then generally sells shares in this fund to individual investors. The originator of the loan uses the funds earned from selling the loans to investors to pay back the lenders who provided them with the funds to furnish the subprime loan. Patrick Madigan, Memorandum: Overview of the Subprime Foreclosure Crisis 5 (Sept. 10, 2007), *available at* http://www.law.columbia.edu/center_program/ag/predatorylend.

[39] Reiss, *supra* note 20, at 1002.

[40] When mortgage originators sell loans on the secondary market, the investors purchase both the loans and their risk of default, and the lenders receive cash for the loans' value. Madigan, *supra* note 38, at 5.

[41] *Id.*

[42] Bear Stearns, Morgan Stanley, and Goldman Sachs, three of the nation's largest investment firms, have lost billions of dollars due to investments in securitized subprime loans that have ended up in foreclosure. Bloomberg News, *Holding of Debt Securities Falls Again at Goldman*, N.Y. TIMES, Oct. 11, 2007, at C5. *See also* Associated Press, *Judge Rejects Bankruptcy for Two Hedge Funds*, N.Y. TIMES, Aug. 31, 2007, at C4.

money precisely in the situation when loans fail and borrowers go into foreclosure.[43]

Predatory lending and the subprime loan industry go hand in hand.[44] The prime rate market is strictly regulated due to the presence of "such regulated entities as banks and credit unions, as well as through robust competition among lenders, more informed borrowers and simpler, more homogenous loan terms."[45] In contrast, the subprime market is relatively free of regulation.[46] While not all subprime lending is predatory,[47] virtually all predatory lending occurs on subprime loan transactions.[48]

Predatory lending is a malleable concept,[49] but can generally be defined as deceptive lending practices that are used to prey upon unsophisticated and low-income borrowers.[50] Predatory lenders employ numerous practices that are present even in legitimate loan transactions, including balloon payments,[51] adjustable rate

---

43 This fact has hurt borrowers even more, as it has prevented borrowers from modifying bad loans, as the holders of the loans, often hedge funds, want them to fail. Madigan, *supra* note 38, at 7.

44 Reiss, *supra* note 20, at 997.

45 Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, And the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 571 (2002).

46 *Id.*

47 Peterson, *supra* note 19, at 11.

48 Reiss, *supra* note 20, at 998.

49 Bagley, *supra* note 4, at 2277–78.

50 *Id. See also* Eggert, *supra* note 45, at 507.

51 The National Community Reinvestment Coalition ("NCRC") defines a "balloon mortgage" as a:

> [t]ype of mortgage loan in which the final payment is significantly larger than the payments that are made over the mortgage term. Buyers might choose a balloon mortgage if they anticipate refinancing at the end of the term, if they have enough money to pay off the loan in a lump sum, or if they can afford to buy only because of the comparatively smaller monthly payments that may be available with a balloon mortgage.

National Community Reinvestment Coalition Glossary, *available at* http://www.ncrc.org/consumerresources/glossary.php (last visited Sept. 23, 2008).

mortgages ("ARMs"),[52] frequent refinances, and inflated fees and interest rates.[53] These terms are frequently misrepresented by the lender and are not properly understood by the borrower, and many subprime customers pay fees of over eight percent of the loan amount.[54] In many cases, lenders furnish loans to borrowers with no expectation that the borrowers will be able to repay.[55] As of 2002, it was estimated that predatory lending cost borrowers in the United States $9.1 billion, not including the greatest cost of all—mortgage foreclosure and loss of their homes.[56]

Predatory lending schemes frequently involve multiple actors in addition to mortgage lenders.[57] Often, predatory lenders work with unethical mortgage brokers to lure consumers into more expensive loans with higher interest rates and higher fees paid both to the broker and the lender.[58] In return for these "services," the brokers receive a payment from the lender called a "yield spread premium," which is often concealed by lenders.[59] Low-income families, immigrants, and people of color are often trapped in these

---

[52] The NCRC defines "adjustable rate mortgages" as mortgages that:

> [U]sually start with a lower interest rate than a fixed-rate mortgage, therefore lowering monthly payments. This allows the borrower to qualify for a larger mortgage than would be possible with a fixed-rate mortgage. The interest rate on an ARM is adjusted periodically based on an index that reflects changing market interest rates. When the interest rate is adjusted, the monthly payment goes up or down.

Id.

[53] Eggert, *supra* note 45, at 513.

[54] *Id.* at 513–14.

[55] *Id.* at 515. This is often done through falsification of the borrower's income by brokers on loan application forms to show a "higher income or asset level." *Id.* This practice is known as "equity stripping," as borrowers generally go into foreclosure and lose all equity in their homes. *Id.*

[56] *Id.* at 507.

[57] Peterson, *supra* note 19, at 16.

[58] *Id.*

[59] *Id.* at 16–17. A yield spread premium is a payment made directly by the lender to the broker, paid out of proceeds from the consumer's loan payments. Frequently, if a borrower pays a higher rate on his or her loan, the broker who steered him or her to the loan will receive a greater yield spread premium from the lender. *Id.*

schemes, as they more frequently depend on professionals in conducting mortgage transactions.[60] In response to these multi-player predatory lending schemes, the federal government and numerous states have proposed various laws to prevent abuses by many of these parties.[61]

C. Regulatory Legislation at the Federal Level

The Federal Government and several state governments have proposed diverse solutions to the scourge of predatory lending. The Truth-in-Lending Act ("TILA") was enacted primarily to "promote the informed use of consumer credit," by providing disclosure requirements and remedies for borrowers.[62] Due to the TILA and its more recent amendments, borrowers must be provided with the "critical elements of credit cost" by their lender, including the finance charge, annual interest rate (APR or "annual percentage rate"), and various other disclosures.[63] The TILA differentiates "between open-end credit plans [such as credit cards] and closed end transactions,"[64] such as mortgages, and mandates additional disclosures to and rights for borrowers in closed end transactions.[65]

---

[60] "Immigrants and minority borrowers are particularly dependent upon real estate professionals because they may not speak fluent English or understand the complex loan terms and documents, which can certainly confound native speakers as well." Vikas Bajaj & Miguel Helft, *The Loan That Keeps on Taking*, N.Y. TIMES, Sept. 25, 2007, at C1. Frequently, non-English-speaking borrowers sign loan documents in English, at the advice of mortgage brokers and other professionals, even though the negotiations related to the mortgage were conducted in their native language. All the professionals involved earn "lucrative fees." *Id.*

[61] *See infra* notes 62–114 and accompanying text.

[62] RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING 4 (2000), 4-5; 15 U.S.C. § 1605 (2007); 15 U.S.C. § 1631 (2007).

[63] ROHNER & MILLER, *supra* note 62, at 4–5; 15 U.S.C. § 1605; 15 U.S.C. § 1631 (2007).

[64] ROHNER & MILLER, *supra* note 62, at 4–5.

[65] *Id.*; 15 U.S.C. § 1602 (2007), 15 U.S.C. § 1631. For open-ended consumer credit plans, such as credit cards, creditors must disclose the nature and conditions of any finance charges that may be imposed, as well as other disclosures related to finance charges, and whether or not any security interest has been taken in any of the borrower's assets, along with a few other limited

In addition to disclosures, the TILA mandates a "right to cancel" or rescind for borrowers entering refinance mortgage transactions.[66] Under the TILA, lenders must now provide borrowers in all mortgage transactions with forms detailing interest rates, total payments, pay schedules, and other information important to the consumer, both prior to closing and at closing.[67]

Unfortunately, the success of the TILA depends on very informed borrowers, because much of the essential information about a mortgage is buried among thousands of pages of form contract provisions, discouraging consumers from reading them.[68] Generally, consumers simply sign the closing papers.[69] In addition, some brokers and lenders commit outright fraud, making changes to documents after they have been signed.[70]

The TILA is not the only federal law that has been passed in an attempt to stop predatory lending. In 1974, Congress passed the Real Estate Settlement Procedures Act ("RESPA"),[71] which prohibits practices by lenders such as kickbacks and referral fees,[72] limits the amount that borrowers must place in escrow accounts

---

disclosures. *See* 15 U.S.C. § 1637 (2007). For closed-end credit plans like mortgages, TILA mandates more expansive disclosures, including: disclosures of the amount of actual credit available to the borrower under this transaction; the total cost of credit; total payments; the number, amount, and due dates of all payments; and other important disclosures essential to understanding the cost of credit and the nature of payments. *See* 15 U.S.C. § 1638 (2007).

[66] Borrowers have up to three business days to rescind the mortgage, pursuant to a mandatory notice of right to cancel provided by the lender. However, if this notice is not provided, the borrower has up to three years to cancel the transaction. *See* 15 U.S.C. § 1635 (2007).

[67] *See* 15 U.S.C. § 1638.

[68] *See infra* notes 156–58 and accompanying text.

[69] *See infra* notes 156–58 and accompanying text.

[70] Chris Arnold, *Former Ameriquest Workers Tell of Deception* (Morning Edition, National Public Radio Broadcast, May 14, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=10165859.

[71] RESPA was amended in 1976. 12 U.S.C. § 2601 *et. seq.* (2007).

[72] Kickbacks and referral fees are payments made by lenders to brokers and other agents in exchange for no services other than referring a consumer to or placing an application with that lender. KENNETH R. REDDEN & JAMES MCCLELLAN, FEDERAL REGULATION OF CONSUMER-CREDITOR RELATIONS 102 (1982).

when buying a home, and mandates both additional disclosures of settlement costs and a uniform settlement statement.[73] The RESPA was passed with the goal of ensuring that consumers get better and more timely information regarding the costs of their transaction and are protected from high fees and other abusive lending practices.[74] While the RESPA does mandate uniformity for information given to borrowers by lenders and prohibits kickbacks, it does little else: it does not set any limits for fees or costs, fails to set forth best practices, and fails to develop or mandate any ethical standard for lenders or other real estate professionals.[75]

The strongest federal protection for homebuyers against predatory lending is the Home Ownership and Equity Protection Act of 1994 ("HOEPA").[76] The HOEPA provides additional protections for borrowers facing "high-cost" loans.[77] These are home loans in which the APR is eight percentage points over the treasury rate on first-lien loans or ten percent above for subordinate-lien loans, or those in which points and fees amounting to higher than eight percent of the loan's principal or $400, whichever is greater.[78]

Under the HOEPA, lenders that trigger the law must provide disclosures in addition to those mandated by the TILA, and are prevented from including certain terms in their loans, such as balloon payments (except for loans spanning less than one year), negative amortization, advance payments, increased interest rates, prepayment penalties, and due-on-demand clauses.[79] In effect, the law prohibits many practices that are commonly associated with predatory lenders for loans that meet the HOEPA trigger interest rates or fee amounts.[80]

Despite being the strongest federal subprime lending regulation

---

[73] *See* 12 U.S.C. § 2601 *et. seq.* (2007).

[74] *See* 12 U.S.C. § 2601(a) (2007).

[75] *See* 12 U.S.C. § 2601 *et. seq* (2007).

[76] Bagley, *supra* note 4, at 2280–82; *See* 15 U.S.C. § 1602(aa) (2007).

[77] Bagley, *supra* note 4, at 2280.

[78] *See* 12 C.F.R. § 226.32(a); ALVIN HARRELL, ED., TRUTH IN LENDING: 2006 SUPPLEMENT 459 (2006).

[79] *See* 12 C.F.R. § 226.32(d) (1994).

[80] *Id.*

in existence, the HOEPA has done little to curb predatory lending.[81] Its high triggers have enabled unscrupulous lenders to set interest rates, fees, and points just below the HOEPA standards, thus exempting them from having to provide HOEPA disclosures.[82] In addition, the HOEPA fails to address "junk fees"[83] charged by lenders and the predatory practice of rapid refinancing.[84] Lenders frequently will set their charges just below the HOEPA triggers and then aggressively encourage borrowers to enter into frequent, unnecessary refinances, extracting fees time and again.[85] The borrowers receive no benefit, and the lenders continue to profit.[86]

A more recent federal law, the Credit Reporting Organizations Act ("CROA"), enacted in 1996, applies to lenders in their capacity as credit repair agencies.[87] The CROA is broader than other federal lending legislation, as it prohibits "any person" from making or advising consumers to make false or misleading statements about credit history or creditworthiness to credit agencies and lenders or engaging in any other fraud or deception related to their business in credit repair.[88] The Act also mandates additional disclosures by credit repair organizations.[89] With regard to predatory lending, it prohibits lenders or brokers that claim to be working to improve a borrower's credit rating or creditworthiness from misrepresenting that borrower's financial information on loan applications.[90] However, the law's impact is relatively limited, as it

81 Bagley, *supra* note 4, at 2282.

82 *Id.*

83 Junk fees are "unnecessary costs for providing certain . . . services that are related to, but technically independent of the mortgage itself." *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 CHI CHI WU & ELIZABETH DE ARMOND, FAIR CREDIT REPORTING 447–51 (6th ed. 2006).

88 The Act "only applies if the [person or] organization uses an instrumentality of interstate commerce." *Id.* at 449; 15 U.S.C. § 1679a (2007); 15 U.S.C. § 1679b (2007).

89 WU, *supra* note 87, at 456.

90 Financial information can include information such as savings, income, or anything else that could be used to misrepresent a borrower's credit status. *Id.*

only addresses falsification of creditworthiness.[91] This falsification is difficult to prove because lenders can simply claim that they received no documents from borrowers, and took them at their word regarding statements of their income.[92]

Finally, the Equal Credit Opportunity Act ("ECOA") "prohibits treating [any loan] applicant less favorably than other applicants," at any stage in the loan process, due to his or her membership in a protected class.[93] The law ostensibly constrains predatory lending practices, which have disproportionately affected minority homebuyers and other vulnerable communities.[94] However, by its very nature, the ECOA requires predatory lending victims to prove that they were targeted, rather than setting strict standards with regard to loan terms and conditions.[95] Therefore, even though it prohibits lenders from discriminating against minority borrowers, it does nothing to set benchmarks with regard to interest rates or

at 459–60.

[91] *See* 15 U.S.C. § 1679b (2007).

[92] Press Release, Office of the Att'y Gen. of Mass., Attorney General Martha Coakley Files Lawsuit Against National Mortgage Lender-Fremont Investment and Loan (Oct. 5, 2007), *available at* http://www.mass.gov (Follow Attorney General hyperlink, followed by Press Releases, and then search by Title). So-called "no-doc" loans, which require little-to-no documentation of a borrower's income, are a common form of predatory mortgage.

[93] DEANNE LOONIN & CHI CHI WU, CREDIT DISCRIMINATION 1, 73–74 (3d. ed. 2002).

[94] "Predatory lending campaigns occur not only in the inner-city, but also in depressed rural areas, especially including Native American Reservations. Any group that is traditionally underserved by mainstream lenders is vulnerable to predatory lending. Predatory lenders also gravitate toward the elderly." Peterson, *supra* note 19, at 14. In 2007, a study by New York University's Furman Center for Real Estate and Policy found substantial discrepancies between the percentage of subprime loans furnished in communities of color versus predominantly white communities. In New York City, the ten neighborhoods with the highest concentration of subprime loans were predominantly black and Latino, while the ten neighborhoods with the lowest concentration of these loans were predominantly white. The study also revealed that "even when median income levels were comparable, home buyers in minority neighborhoods were more likely to get a loan from a subprime lender." Manny Fernandez, *Study Finds Disparity in Mortgages by Race*, N.Y. TIMES, Oct. 15, 2007, at A2.

[95] *See* 15 U.S.C. § 1691 (2007).

fees, and it is silent with regard to other practices used by predatory lenders.[96] Furthermore, it has been shown that, despite the ECOA's existence, borrowers of color continue to be disproportionately represented in the subprime market.[97]

While much of this federal regulation appears preventative on its face, it has been deceptively ineffective.[98] Although the TILA mandates disclosures, the disclosures are often difficult to read and understand, and consumers sometimes do not know they have a right to cancel their transactions.[99] Also, the HOEPA's triggers are set so high that, despite the law's ability to prevent multiple predatory practices, lenders can easily evade the act by setting their interest rates and fees just below the trigger amounts.[100] Furthermore, the CROA is limited to only one element of predatory lending—falsification of creditworthiness—which is often avoidable.[101] Finally, regardless of addressing the discrimination element, the ECOA has been shown to be ineffective through the continuing disproportionate effect of predatory lending on communities of color.[102]

D. State Anti-Predatory Lending Laws and Preemption

In response to ineffective federal laws, multiple states have passed laws to combat unscrupulous lending.[103] In 1999, North Carolina started the trend by passing a law similar to the HOEPA that prohibited various predatory contract provisions and sales practices.[104] However, the law set the trigger for fees lower than

---

[96] *Id.*

[97] *See* Fernandez, *supra* note 94.

[98] Miller, *supra* note 9, at 3–4.

[99] *See id.*; *See also* 15 U.S.C. § 1638 (2007).

[100] Miller, *supra* note 9, at 3–4.

[101] 15 U.S.C. § 1679b (2007).

[102] Reiss, *supra* note 20, at 997.

[103] As of 2004, twenty-five states had passed anti-predatory lending laws. Peterson, *supra* note 19, at 5. In addition, twelve cities passed laws of their own combating the practice. *Id.*

[104] *See* N.C. GEN. STAT. §§ 24-1.1A-10.2 (2003).

those of the federal act and included additional prohibitions.[105] Numerous states followed suit,[106] and many municipalities developed their own similar ordinances.[107] State laws in response to predatory lending have been touted as highly effective, as states have been better able to innovate and respond to constituents and local needs.[108]

However, due to an outcry from the lending industry, the federal government has undercut such regulation by issuing statements declaring that federal banking law preempts state action with regard to federally-chartered, FDIC-insured banks.[109] Beginning in 2003, the Office of the Comptroller of Currency ("OCC"), a federal agency, issued a series of orders preempting various state predatory lending statutes as applied to national banks, despite the vigorous objection of State Attorneys General across the country.[110] This preemption has prevented states from developing new legislation and utilizing creative solutions to stop the scourge of predatory lending.[111] Consequently, aside from state consumer protection acts and fraud claims, states and consumers generally have been forced to depend on federal legislation.[112]

---

105 *See* 12 C.F.R. § 226.32 (1994); § 24-1.1A-10.2; Peterson, *supra* note 19, at 62–63. The North Carolina Predatory Lending Act of 1999 prohibited practices such as balloon payments, negative amortization and others, but unlike HOEPA, it set its fee trigger at five percent, as opposed to HOEPA's eight percent. Peterson, *supra* note 19, at 62–63. It maintained an interest rate trigger of ten percent above the rate on comparable U.S. Treasury securities. *Id*. In addition, unlike HOEPA, it prohibited rapid refinancing and furnishing loans without regard to a borrower's ability to repay. *Id.*

106 "Indiana, New Jersey, New Mexico, New York, and Massachusetts . . . all adopted strong predatory lending laws echoing the North Carolina approach." *Id.* at 65–66. Georgia passed a strong law and then repealed it, and multiple other states have passed anti-predatory lending and consumer protection laws that ostensibly protect consumers, but are not nearly as strong. *Id.* at 65–67.

107 Peterson, *supra* note 19, at 64–65.

108 Azmy, *supra* note 25, at 5.

109 Peterson, *supra* note 19, at 70–71.

110 The OCC claimed that "state laws do not apply to national banks whenever they 'obstruct, impair, or condition' the ability of national banks to engage in consumer lending." *Id.* at 70.

111 *See id.*

112 *See id.*

Therefore, due to weak federal regulation and preemption of state laws, states and others interested in combating predatory lending have had to utilize other methods to prevent unethical lending practices.[113] The primary method has been in the form of suits filed by state Attorneys General on behalf of aggrieved consumers.[114]

II. STATE ACTION AND ATTORNEY GENERAL-DIRECTED LAWSUITS

Federal preemption of state predatory lending laws has left states with few options.[115] In response, state Attorneys General have filed numerous lawsuits against large predatory lenders, often relying on state unfair and deceptive acts and practices ("UDAP") laws and fraud claims.[116]

A. The Household Finance and Ameriquest Suits

In December 2002, Tom Miller, the Iowa Attorney General and Chair of the Subprime Lending Committee of the National Association of Attorneys General, along with the Attorneys General of every other state, reached a settlement with Household Finance Corporation and Beneficial Corporation ("Household"), a subprime, predatory lender.[117] Under the terms of the settlement,

---

[113] *Id.*

[114] *See infra* notes 117–55 and accompanying text.

[115] Peterson, *supra* note 19, at 70–71.

[116] *See infra* notes 117–55 and accompanying text.

[117] Press Release, Office of the Iowa Att'y. Gen., Miller: All Fifty States Join Settlement with Household Finance (Dec. 16, 2002), *available at* http://www.iowaattorneygeneral.org/latest_news/releases/dec_2002/hhold.html. This settlement between the State of Iowa and Household Finance is substantially the same as settlements between Household and the forty-nine other states and the District of Columbia. *Id.* The settlement identified numerous predatory practices by Household, including but not limited to the following: interest rates, points and origination fees, monthly payment amounts, balloon payments, prepayment penalties, limited documentation, and rapid refinancing without benefit to the consumer. *Id.* In Iowa, the State's suit was based upon the claim that Household had violated the Iowa Consumer Fraud Act, Iowa Code Sec. 714.16. Settlement Consent Agreement 4, *available at* http://www.iowaattorneygeneral.org/latest_news/releases/dec_2002/hhconsent.p

Household agreed to pay out $484 million to aggrieved consumers across the country.[118] However, while Household paid hundreds of millions of dollars into a restitution fund, defrauded borrowers received minimal proceeds.[119] Often, victims of predatory lending are thousands of dollars in debt, so the restitution received by each victim in the Household settlement was likely only a fraction of the amount owed.[120]

However, in addition to the settlement fund set up by Household,[121] the settlement called for restitution of some prepayment penalties paid by consumers[122] and multiple forms of injunctive relief.[123] After this suit, Household's lender fees were limited to five percent of the loan principal,[124] and the lender had to provide disclosure regarding calculation of points, interest rates,

---

df (last visited July 27, 2008).

[118] Miller: All Fifty States Join Settlement Agreement, *supra* note 117.

[119] Press Release, Office of the Iowa Att'y. Gen., 1.5 Million on its Way to Household Finance Customers (Dec. 16, 2003), *available at* http://www.iowaattorneygeneral.org/latest_news/releases/dec_2003/household.html. For example, Iowa received approximately $1.5 million of the $484 million restitution fund. *Id.* However, this was split among 2,886 households, such that most Household borrowers in Iowa received between $100 and $500 in restitution, and no borrower received more than $5,768. *Id.*

[120] Gretchen Morgenson, *Can These Mortgages Be Saved?*, N.Y. TIMES, Sept. 30, 2007, at C1. Frequently, predatory lending victims have fallen behind on their loans by thousands of dollars. *Id.* For example, Sharon Rivas-Spivey, a borrower from southern New Jersey, has seen her $141,000 loan increase to over $196,000 due to rising interest, late fees and other charges. *Id.* Jane Connor, a Massachusetts borrower, owes over $550,000 for a loan on which she owed approximately $442,000 when she went into default. *Id.* These borrowers, who both received loans from Countrywide Mortgage, are not uncommon. *Id.*

[121] The money paid by Household would primarily be distributed via an interest-bearing trust administered in California by the Office of the California Attorney General, and through other settlement accounts for states not participating in this fund. *See* Settlement Consent Agreement, *supra* note 117, at 7.

[122] *Id.* at 9–10.

[123] *Id.* at 10–20.

[124] *Id.* at 11. These fees are referring to "loan origination charges, Discount Points, or both." *Id.*

and balloon payments.[125] Further, Household had to provide a good faith estimate of all charges to be incurred by a potential borrower, no later than three days after the prospective borrower's application had been delivered, and could not represent its interest rates or any loan terms in a "deceptive manner."[126] In addition, Household was prohibited from charging prepayment penalties on any loans (without making disclosures), charging discount points or origination fees on any mortgages that had been refinanced or originated by Household in the previous twelve months, and selling credit insurance on mortgages.[127] Borrowers had the right to cancel all open-ended lines of credit furnished by Household at any time.[128]

While the restitutionary funds provided for consumers in the Household settlement were minimal, the injunctive relief secured by the states was substantial, as it limited Household's ability to use deceptive practices and charge exorbitant rates to unwitting consumers.[129] However, the settlement and its injunctive provisions only applied to Household, and numerous other predatory lenders continued to prey upon homeowners throughout the country.

Following the Household case, forty-nine state Attorneys General and the Attorney General of the District of Columbia followed suit and in 2006, instituted proceedings against Ameriquest, another large subprime lender.[130] This suit netted $325 million, with $295 million going to the lender's victims and $30 million paying for legal costs.[131] Like the Household settlement, the Ameriquest settlement called for injunctive relief,

---

[125] *Id.*

[126] *Id.* at 11–12.

[127] *Id.* at 16–17.

[128] *Id.* at 15.

[129] *See supra* notes 121–28 and accompanying text.

[130] Press Release, State of N.Y. Banking Dep't, *Banking Department Joins Regulators and Law Enforcement Officials from 48 Other States in Announcing Settlement Agreement With Ameriquest Mortgage Company* (Jan. 23, 2006), *available at* http://www.banking.state.ny.us/pr060123.htm.

[131] *Ameriquest to Pay $325 Million in a Settlement Over Lending,* N.Y. TIMES, Jan. 21, 2006, at C1.

requiring Ameriquest to provide the same interest rates and discount points for "similarly-situated consumers," to eliminate the use of incentives for employees to charge consumers extra fees or prepayment penalties, to provide full disclosure of the cost and terms of the loan, to provide accurate, good-faith estimates, to limit prepayment penalties on adjustable rate mortgages, and to institute many other changes to the company practice.[132] However, state officials have also engaged in other activities, aside from suing major lenders, in an effort to stop predatory lending.[133]

B. More State Action and the Push for Substantive Change

A developing trend is state agencies suing other lenders, such as Delta Financial,[134] Advantage Mortgage Service,[135] and First Alliance Mortgage Company.[136] However, each of these suits has led to a settlement that applies only to the specific lender that was sued. As a result, there has not been industry-wide change, since settlements bind only the parties involved, and do not establish precedent.

State Attorneys General and other state officials have

---

[132] *See* Press Release, State of N.Y. Banking Dep't, *supra* note 130.

[133] *See infra* notes 134–55 and accompanying text.

[134] Delta Financial Corporation settled for $1.65 million in 2002, with $500,000 going to defrauded consumers. Joseph P. Fried, *Home Lender Offers to Settle Claims of Predatory Practices*, N.Y. TIMES, May 7, 2002, at B3.

[135] The State of Nebraska sued Advantage Mortgage Services, a mortgage lender, for violation of "Nebraska's Mortgage Bankers Registration and Licensing Act, the Consumer Protection Act, and the Uniform Deceptive Trade Practices Act." Nelson Lampe, *Nebraska Sues Mortgage Broker for Predatory Lending*, USA TODAY (Sept. 15, 2007), *available at* http://www.usatoday.com/money/industries/banking/2007-09-14-nebraska-mortgage-suit_N.htm. Advantage originates more than $100 million in loans per year. *Id*.

[136] Minnesota successfully sued First Alliance in 1999 for its "teaser" ARMs, which led Minnesota consumers to purchase unaffordable loans. Lori Swanson, Att. Gen., St. of Minn., Testimony to the Board of Governors of the Federal Reserve System (June 14, 2007), *available at* http://www.ag.state.mn.us/PDF/Consumer/SwansonTestimonyFederal%20Reserve.pdf.

continued to take actions designed to combat lending abuses.[137] In addition to suing predatory lenders, they have pushed for federal legislative change and regulation to prevent mass foreclosure.[138] A task force, led by Miller and comprised of Attorneys General and banking regulators from ten states, has begun working to "persuade mortgage-servicing companies and investors in mortgage-backed securities to increase the number of troubled subprime loans they restructure, to stem the tide of foreclosures."[139] The task force is working with banks to collaboratively address skyrocketing rates of foreclosure, pursuing this new tactic in lieu of enforcement actions.[140]

In addition, the task force is pushing for federal legislative action.[141] In August 2007, Miller addressed the Federal Reserve Board of Governors, and argued that HOEPA should be amended to incorporate various regulations to prohibit numerous "unfair and deceptive practices."[142] Building upon the success of the Household and Ameriquest suits, Miller claimed that the settlements helped state governments develop the expertise necessary to stop predatory lending, and led the lenders to establish better practices that had been adopted by others in the mortgage industry.[143] He emphasized that the Federal Reserve Board was in a unique position to address the preemption issue and develop regulations that would apply to all members of the mortgage lending community and establish uniform standards of conduct.[144]

---

[137] *See infra* notes 139–53 and accompanying text.

[138] *See infra* notes 139–53 and accompanying text.

[139] Ruth Simon, *Task Force Will Seek More Loan Revisions*, WALL ST. J., Sept. 8, 2007, at A3.

[140] *Id.*

[141] Press Release, Iowa Office of the Att'y. Gen., Iowa Attorney General Tom Miller Comments to the Federal Reserve Board of Governors on Adopting Regulations to Prohibit Unfair and Deceptive Acts and Practices under the Home Ownership and Equity Protection Act (HOEPA) (August 14, 2007), *available at* http://www.state.ia.us/government/ag/latest_news/releases/aug_2007/Fed_reserve_hoepa.html.

[142] *Id.*

[143] Miller, *supra* note 9.

[144] *Id.* at 2.

Additionally, Miller echoed the sentiment that HOEPA, in its present form, has been somewhat useful, but overall ineffective because it has only applied to the limited category of "high-cost" loans.[145] He stated, "[a]fter all, the problems [that] the States uncovered in the Household and Ameriquest cases did not involve high cost loans (as defined under HOEPA), but regular subprime loans."[146] In addition, he acknowledged that existing disclosure documents provided to consumers were inadequate, but that improved disclosures alone would not suffice to stop predatory lending.[147] Miller also argued for a new underwriting standard for subprime loans, based upon the borrower's ability to repay the loan, instead of his or her ability to pay off low teaser rates on adjustable rate mortgages and the possibility of market appreciation.[148] Further, he suggested prohibiting prepayment penalties for subprime loans[149] and other concessions from the mortgage industry.[150]

---

[145] *Id.* at 3.

[146] *Id.*

[147] "No matter how good the disclosure, it will always be subject to misrepresentations, omissions, and downright lying by a loan originator who has every incentive to close the loan. Subprime originators have a propensity to engage in deception and misrepresentations which undermine even the best disclosures." *Id.* at 4.

[148] A teaser rate is an introductory interest rate that adjusts upward rapidly as part of an adjustable rate mortgage (ARM). Investopedia.com, *available at* http://www.investopedia.com/terms/t/teaserrate.asp. Low teaser rates often get homebuyers into homes, but make foreclosure almost inevitable. While market appreciation will make the house easier to sell for greater value in the future, it will not help a homeowner make his or her monthly mortgage payments. In order to make payments, homeowners frequently have to refinance, often ending up in more oppressive loans. *See* Miller, *supra* note 9, at 4–7.

[149] Miller, *supra* note 9, at 8–9.

[150] These additional requests included requiring escrow accounts for taxes and insurance, as lenders frequently leave taxes and insurance out of their monthly payment quotes to borrowers, leading them to believe payments will be lower than they actually are. *Id.* at 9. This is especially prevalent on loan transactions in which a borrower is refinancing a current loan and consolidating debt into a mortgage. *Id*. Miller also suggested restrictions on "low-doc" loans, which frequently allow lenders to furnish unaffordable loans, as lenders can claim they furnished the loan based on the borrower's stated income and no

In addition to the actions of Miller and the task force, other state officials have similarly pushed for change in how lenders relate to investors who purchase mortgages on the secondary market.[151] Since securitization has eliminated much of the risk of loss for subprime lenders and has eliminated the risk of liability for both lenders and investors,[152] policymakers have called for its regulation.[153]

These combined tactics, by which state officials have worked with banks while pushing for legislative change, are built upon the litigation strategy previously used by the states, and are being used to supplement the impact of the litigation. This new strategy seems tailored to fit the current foreclosure crisis and the numerous parties involved in and affected by it.

State-directed lawsuits alone were not effective at creating systemic change and reforming the entire subprime market.[154] However, they were the best tool available to fight predatory lenders, given the then-existing federal laws and their preemption of state legislative action.[155] In addition, they provided valuable information and lessons to state officials, enabling officials to make well-grounded policy recommendations to the federal government and to work with the industry itself to combat abusive

---

additional documentation, *Id.* at 10–11. Further, he recommends prohibition of future promises to refinance, as these frequently are made to convince borrowers who have discovered a "bait-and-switch" at closing to enter bad loans, thinking they will soon refinance into a better one that never actually happens. *Id.* at 12. Miller's comments supported those made to the Federal Reserve Board by Minnesota Attorney General Lori Swanson, when in June 2007, she argued for aggressive enforcement and expansion of HOEPA and against federal preemption of state consumer protection laws. Swanson, *supra* note 136, at 3–6.

151 *See, e.g.*, Madigan, *supra* note 38, at 5–6.

152 Investors have generally not been held liable for the actions of a loan originator, and once the originator sells the loan through securitization, the originator's risk of loss is gone, because it has been paid in full by investors. Therefore, subprime lenders are far more willing to engage in predatory practices and furnish unaffordable loans, as all risk of default is passed along to the secondary market. *Id.* at 5–6.

153 *Id.* at 9–11.

154 *See supra* notes 117–33 and accompanying text.

155 *See* Peterson, *supra* note 19, at 70–71.

practices.

III. THE IMPACT OF THE STATE ATTORNEYS' GENERAL ACTION

While the suits against individual lenders exerted limited systemic impact, they have provided a framework and an opportunity for developing broad policy change in the future.

A. The Influence of the Banking Industry

The banking industry, including the mortgage lending industry, has wielded important influence over politicians in both major parties through its political donations and support of candidates.[156] Providing substantial financial support for politicians and parties can buy an industry significant influence over legislation and federal policy.[157] Since 1990, the mortgage industry has donated over $45 million to federal politicians, with fifty-six percent going to Republicans and forty-four percent to Democrats.[158] Also, since 1990, the securities and investment sector, which is closely tied to the mortgage industry due to securitization, has contributed $473

---

[156] *See* Center for Responsive Politics, http://www.opensecrets.org/ industries/indus.asp?Ind=F4600 (last visited Sept. 24, 2008).

[157] This effect has been demonstrated by the tobacco industry and its ongoing lobbying efforts. *See* Yussuf Saloojee & Elif Dagli, *Tobacco Industry Tactics for Resisting Public Policy on Health*, 902, BULL. OF THE WORLD HEALTH ORG. 78.7 (July 2000). According to the World Health Organization, throughout its history, the tobacco industry used multiple methods to block legislation hostile to its interests. Prominent among these methods was buying influence through gifts to politicians, such as "dinners and tickets to sports events like the Indianapolis 500." *Id.* at 905. This was in addition to political donations and other financial contributions. In 1998, in the United States alone, the industry spent over $43 million on lobbying against federal anti-tobacco legislation. *Id.* at 906.

[158] This amount includes both soft money and hard money contributions, according to opensecrets.org, the website of the Center for Responsive Politics, which tracks political donations from individuals, companies, and industrial sectors. Center for Responsive Politics, http://www.opensecrets.org/industries/ indus.asp?Ind=F4600 (last visited Sept. 24, 2008). During the 2004 election cycle, the industry provided close to $8 million in political contributions, with 64 percent going to Republicans and the rest to Democrats. *Id.*

million to both major parties, with fifty-one percent going to Republicans and forty-eight percent to Democrats.[159] Due to the political power inherent in the banking industry, this continuing influence will remain an inhibiting force on any type of federal reform on the mortgage banking industry.[160]

B. Valuable Lessons for the Future

Despite the power of the mortgage industry and the securities sector, state officials have been able to glean multiple important lessons from their prior efforts, which have informed more recent action and will likely continue to do so going forward. Prior to the burst of the housing bubble and the collapse of the subprime market, state-directed lawsuits led by the Attorneys General were the only feasible actions that could be taken.[161] The states attempted to stop large predatory lenders by using consumer protection and fraud statutes, since these were the few weapons that were at their disposal.[162] While this strategy established little substantive change and provided only minimal compensation for victims, Attorneys General were successful in changing certain practices of one major predatory lender, Ameriquest, and virtually shut down another lender, Household.[163] HSBC, which purchased Household, now funds the National Community Reinvestment Coalition's "Consumer Rescue Fund," which provides low-interest

---

[159] Ctr. for Responsive Pol., http://www.opensecrets.org/industries/indus.asp?Ind=F07 (last visited Sept. 24, 2008).

[160] Stephen Labaton, *Loan Industry Fighting Rules on Mortgages*, N.Y. TIMES, Apr. 28, 2008, at A1.

[161] Federal preemption of state law eliminated states' abilities to develop comprehensive anti-predatory lending statutes, Peterson, *supra* note 19, at 70–71. Therefore, state Attorneys General brought suits on behalf of victimized borrowers based on state UDAP statutes. Complaint against Household Fin.Corp., Of. of the Iowa Att'y. Gen., *available at* http://www.state.ia.us/government/ag/latest_news/releases/dec_2002/hhpetition.pdf.

[162] *Id.*

[163] Household Finance was purchased by HSBC in 2003, which settled its above-mentioned lawsuit. Julia Werdigier, *Two Executives Are Ousted at HSBC*, N.Y. TIMES, Feb. 23, 2007, at C1.

loans for victims of predatory lending.[164] This is a positive development for aggrieved borrowers—with the federal government hesitant to provide support for subprime borrowers over the past several years,[165] this was the best result for which anti-predatory lending advocates could have hoped.

Nonetheless, predatory lending has continued to thrive through a large network of lenders, brokers, and other unscrupulous real estate professionals.[166] Lenders provide "yield spread premiums," which are special bonuses to brokers who steer consumers into more expensive loans.[167] In addition, lenders sometimes bring lawyers to closings, who purportedly represent the borrowers' interests.[168] Instead, these lawyers frequently serve the interest of the brokers or lenders, and the borrowers rarely have the chance to read through their loan documents at that time.[169] Further,

---

[164] Sue Kirchhoff, *More U.S. Home Buyers Fall Prey To Predatory Lending*, USA TODAY, Dec. 6, 2004, *available at* http://www.usatoday.com/money/perfi/housing/2004-12-06-subprime-predatory-lending_x.htm. The Consumer Rescue Fund, developed by the National Community Reinvestment Coalition, was developed to prevent homeowners, facing foreclosure, from losing their homes. It provides multiple forms of support for victims of predatory lending, including mediation with the lender or holder of the loan to eliminate abusive loan terms, refinancing into a fair, affordable loan through the lender or servicer, or, in some cases, forgiving unaffordable portions of the loan. The Consumer Rescue Fund provides refinancing services in seventeen states. NCRC Consumer Rescue Fund, www.fairlending.com (last visited Sept. 24, 2008) (providing a more in-depth description of the Consumer Rescue Fund and its terms and conditions).

[165] The federal government has undercut state attempts to protect consumers via federal preemption of state predatory lending laws. *See* Peterson, *supra* note 19, at 70–71.

[166] Bajaj, *supra* note 60. Frequently, predatory lenders will work with attorneys, title companies, brokers, and other professionals who use unethical tactics to steer borrowers toward inflated, bogus charges and unaffordable loans. Telephone Interview with Margaret Becker, Dir., Foreclosure Prevention Unit at Legal Services for N.Y. City – Staten Island, (Dec. 4, 2007), hereinafter "Becker Interview". *See generally* ELIZABETH RENUART, STOP PREDATORY LENDING: A GUIDE FOR LEGAL ADVOCATES (2002).

[167] Peterson, *supra* note 19, at 16–17.

[168] Becker Interview, *supra* note 166

[169] *Id.*

predatory lenders often work with title agencies that charge inflated prices and bogus fees for their services.[170]

C. Out of Crisis Comes an Opportunity for Change

The collapse of the subprime market and rapidly increasing rates of foreclosure have appeared prominently in the news throughout 2007 and 2008.[171] Predatory lending's impact is affecting a segment of America beyond subprime borrowers, including investors, the media, the political sector, and the public at-large.[172] At this time, there is a unique opportunity to develop substantive change at both the state and federal level, based upon the prior successes of the State Attorneys General in pursuing predatory lenders and attempting to change their practices.[173]

i. The Ripple Effect of a Collapsing Industry

The casualties of the subprime industry did not end with Ameriquest or Household. Instead, the collapsing subprime industry has contributed to a nationwide economic downturn.[174] Countrywide Mortgage was a major casualty in the "subprime crisis."[175] As of September 7, 2007, the lender had announced plans to cut 12,000 of its approximately 60,000 employees, nearly 20 percent of its workforce.[176] Countrywide has been an influential party in subprime lending, with numerous accusations of predatory

---

[170] *Id.* From personal experience at Legal Services for New York City – Staten Island during the summer of 2007, I observed loan documents outlining charges for numerous predatory loans. On these documents, I saw the same title agencies appear time and again, charging high fees to clients and repeatedly doing business with predatory lenders. *Id.*

[171] *See* sources cited *supra* note 1.

[172] *See* discussion *infra* notes 174–89 and accompanying text.

[173] *See* discussion *supra* notes 115–55 and accompanying text.

[174] Peter S. Goodman & Floyd Norris, *No Quick Fix to Downturn*, N.Y. TIMES, Jan. 13, 2008, at A1.

[175] Eric Dash, *Countrywide Plans to Cut Staff Deeply*, N.Y. TIMES, Sept. 8, 2007, at C1.

[176] *Id.*

activity.[177] In April 2007, Countrywide settled with the State of Connecticut for $500,000 because of its predatory practices.[178] More recently, based upon its exposure to 80,000 potential foreclosures due to resetting interest rates on ARMs, Countrywide has agreed to refinance up to $16 billion in loans.[179] As of October 2007, 450,000 of the nine million loans serviced by Countrywide were at least a month late on payments, and at least 80,000 were facing foreclosure.[180] Countrywide serves as an example of a large-scale subprime lender whose engagement in predatory lending has harmed the company itself, forcing it to refinance billions of dollars in loans and lay off thousands of workers.[181] Countrywide's collapse serves to illustrate the impact predatory lending has had on not just borrowers, but on workers, renters,[182] and investors as well.[183] By engaging in unscrupulous practices, Countrywide has

---

[177] *See* Bob Tedeschi, *When State Laws Do Not Apply*, N.Y. TIMES, Apr. 29, 2007, at RE11.

[178] *Id.*

[179] Countrywide had identified 80,000 potential borrowers who had been able to make payments at their current interest rates, but were scheduled to face a rate adjustment that would make their loans unaffordable. *Countrywide Offers Help for Reset Shock*, CNNMoney.com, Oct. 23, 2007, http://money.cnn.com/2007/10/23/news/companies/countrywide_default_program/. According to Countrywide, 52,000 of these customers, representing approximately $10 billion in loans, will qualify for either prime rate loans or loans guaranteed by the Federal Housing Administration ("FHA"). *Id.* An additional 20,000 borrowers, currently meeting payments, but with more severe credit problems, could receive other loan modifications totaling $4 billion dollars. *Id.*

[180] *Id.*

[181] *See* Dash, *supra* note 175.

[182] In addition to the subprime collapse's impact on employees at Countrywide, renters have faced eviction from properties in foreclosure. *See* Dash, *supra* note 175. For example, in Nevada, 28 percent of foreclosed-upon properties were home to renters, as were 22 percent of foreclosed-upon properties in California. Thus, these individuals, who never interacted directly with a predatory lender or broker, are feeling the unfortunate effects of mass foreclosure. John Leland, *As Owners Feel Mortgage Pain, So Do Renters*, N.Y. TIMES, Nov. 18, 2007, at A1; *see also* Kelly Evans, *Mortgage Turmoil Hits Renters*, WALL ST. J., at D1, Oct. 11, 2007.

[183] Some hedge funds and other investment firms have faced huge losses,

put a massive number of people at risk.

The crises faced by Countrywide and other lenders have increasingly caused market-wide problems throughout the United States economy.[184] In addition, the mortgage crisis has hurt renters, as landlords have fallen behind on mortgage payments and faced foreclosure.[185] Recently, additional important actors in the subprime industry have faced similar fates, and the impact has even spread to more traditional lenders.[186] In the summer of 2008, government-supported mortgage agencies Fannie Mae and Freddie Mac had to rely on a federal bail-out, due to a downward spiral in the economy.[187] Further, the general public has faced significant financial losses due to investment in subprime loans,[188] as have major American banks.[189]

ii. An Opportunity for Discussion and Ideas for the Future

The subprime crisis has finally forced state and federal officials to consider the importance of preventing foreclosure and the abuse

---

and have even filed for bankruptcy, based on losses due to investment in the subprime market. *See* Associated Press, *Judge Rejects Bankruptcy for Two Hedge Funds*, N.Y. TIMES, Aug. 31, 2007, at C4; *see also* Bloomberg News, *Holding of Debt Securities Falls Again at Goldman*, N.Y. TIMES, Oct. 11, 2007, at C5.

[184] Bank of America, for example, reported that, "net income fell 32 percent, as it set aside an additional $865 million for credit losses and announced that loans that have gone bad rose by nearly $1 billion." *Countrywide Offers Help for Reset Shock*, *supra* note 179.

[185] Evans, *supra* note 182.

[186] Gretchen Morgenson, *Fair Game – What Will Mac 'n' Mae Cost You and Me?*, N.Y. TIMES, Aug. 24, 2008, at BU1.

[187] *Id*.

[188] *See supra* notes 182–84.

[189] For example, Citigroup announced the departure of its Chairman and CEO as it faced potential writedowns (reductions in the book value of overvalued assets) of up to $11 million. *Citigroup's Day of Reckoning*, CNNMoney.com, Nov. 4, 2007, http://money.cnn.com/2007/11/04/news/ companies/citigroup_prince/. Less than a week earlier, the CEO of Merrill Lynch also resigned, due to severe losses stemming from investments in the subprime market. David Ellis, *O'Neal Out at Merrill*, CNNMoney.com, Oct. 31, 2007, http://money.cnn.com/2007/10/30/news/companies/merrill_oneal/.

of borrowers and investors by subprime lenders and the organizations with whom they do business.[190] The federal government has seized this opportunity, leveraging knowledge gained from state-directed lawsuits and other strategies around predatory lending to develop new legislation aimed at combating abusive lending practices.[191] In particular, Congress has recently been pushing the Mortgage Reform and Anti-Predatory Lending Act of 2007, also known as House Bill 3915,[192] a bill designed to regulate subprime lenders and to prevent the abuses that have injured consumers and affected the entire market.[193] Most notably, the bill mandates that lenders not furnish loans without regard to a borrower's ability to repay.[194] It also addresses disclosures, yield spread premiums, and various other tactics used by predatory lenders.[195] In addition, it deals with elements of predatory lending

---

[190] *See* Paul Krugman, Op-Ed, *Enron's Second Coming?*, N.Y. TIMES, Oct. 1, 2007, at A25.

[191] *See* Editorial, *Putting an End to Abusive Lending*, N.Y. TIMES, Nov. 4, 2007, at A24; s*ee also* Miller, *supra* note 9, at 1.

[192] Mortgage Reform and Anti-Predatory Lending Act of 2007, H.R. Res. 3915, 110th Cong. (2007). According to the office of Congressman Christopher Murphy, a Democrat from Connecticut, the bill (among other things):

> 1) Establishes a federal duty of care, prohibits steering, and calls for licensing and registration of mortgage originators, including brokers and bank loan officers; 2) Sets a minimum standard for all mortgages which states that borrowers must have a reasonable ability to repay; 3) Attaches limited liability to secondary market securitizers who package and sell interest in home mortgage loans outside of these standards. However, individual investors in these securities would not be liable; and 4) Expands and enhances consumer protections for "high-cost loans" under the Home Ownership and Equity Protection Act and includes important protections for renters of foreclosed homes.

Press Release, Office of Representative Christopher Murphy, Murphy Successful in Moving Mortgage Kickback Prohibition Bill, October 23, 2007, *available at* http://chrismurphy.house.gov/ (follow "latest news," hyperlink; then follow hyperlink for Oct. 23, 2007).

[193] Editorial, *Putting an End to Abusive Lending*, *supra* note 191.

[194] *Id.*

[195] House Bill 3915 § 129A establishes a general standard of care to be followed by lenders, and lists mandatory disclosures. H.R. Res. 3915 § 129A. Section 123 of this resolution prohibits yield spread premiums based upon the

that are ignored by existing statutes, such as TILA and HOEPA.[196] Further, it explicitly prevents federal preemption of state banking laws.[197]

Notwithstanding these characteristics, the bill provides only limited means for redress for aggrieved consumers.[198] A major example of this is the bill's treatment of assignee (secondary-market investor) liability.[199] With regard to companies who

---

terms of the loan and other forms of "steering" consumers towards higher-cost loans. H.R. Res. 3915 § 123. Section 103 sets forth licensing and registration regulations for lenders. H.R. Res. 3915 § 103. This federal regulation is directly in line with Attorney General Miller's request for federal intervention, based upon his experience in the Ameriquest suit and his involvement with the ten-state task force. *See generally* Miller, *supra* note 9.

[196] TILA purely addresses disclosures, *See* 15 U.S.C. § 1638 (2008). HOEPA does not address junk fees, rapid refinancing, or furnishing loans without regard to repayment ability. Bagley, *supra* note 4 at 2282. House Bill 3915 closes these loopholes. *See* H.R. Res. 3915, § 201 *et. seq.* (2007)

[197] *See* H.R. Res. 3915 § 208(b) (2007). The statute does indicate that TILA supersedes any state law with which it conflicts. *See* H.R. Res. 3915 § 208(a). However, Section 208(b) states that, aside from that one provision, the law in no way limits the states from applying any state law against a creditor, assignee or securitizer. H.R. Res. 3915 § 208(b) (2008).

[198] Editorial, *Watered Down Mortgage Reform*, N.Y. TIMES, Nov. 6, 2007, at A28.

[199] The Act provides that aggrieved borrowers can receive only limited remedies from securitizers, including rescission of the loan and all costs that occur in conjunction with this rescission, including attorney's fees. However, the securitizer can remain exempt from all liability if it cures the mortgage's flaws or if the following conditions are met:

(i) The assignee [or securitizer] --

(I) has a policy against buying residential mortgage loans other than qualified mortgages or qualified safe harbor mortgages (as defined in subsection (c)); and

(II) exercises reasonable due diligence to adhere to such policy in purchasing residential mortgage loans through adequate, thorough, and consistently applied sampling procedures established in accordance which regulations which the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and the Federal Deposit Insurance Corporation shall jointly prescribe.

(ii) The contract under which such assignee acquired the residential purchase loans on the secondary market, aggrieved borrowers can only have the loan rescinded and receive restitution for any costs incurred dealing with this rescission.[200] Furthermore, assignees and securitizers are even protected from this limited liability if they meet certain conditions—namely that they have policies and practices in place that prevent the furnishing of unaffordable mortgages.[201] This limitation on liability leaves borrowers virtually powerless once their loans have been securitized and sold, because there is no legal mechanism to force secondary-market actors to behave ethically with regard to purchasing loans.[202]

Unfortunately, in addition to these substantial limitations, Congress has proposed amendments to H.R. 3915 that weakened it further.[203] One such amendment would eliminate any means for redress under the law at the state level, rendering the section preventing federal preemption of state predatory lending regulation functionally meaningless.[204] Much of the blame has been placed on the banking industry's influence on both parties in Congress, as the banking industry has extensive lobbying power and the ability to donate large sums to candidates.[205] Despite these weaknesses, though, H.R. 3915 still remains a tougher federal anti-predatory lending law than those that are already in existence.[206] While the

---

> mortgage loan from a seller or assignor of the loan contains representations and warranties that the seller or assignor--
>
> > (I) will not sell or assign any residential mortgage loan which is not a qualified mortgage or a qualified safe harbor mortgage; or
> >
> > (II) is a beneficiary of a representation and warranty from a previous seller or assignor to that effect, and the assignee in good faith takes reasonable steps to obtain the benefit of such representation or warranty.

H.R. Res. 3915, 110th Cong. (2007) § 204.

200 *Id.*

201 *Id.*

202 The only risk is the risk of rescission. *Id.*

203 Editorial, *Watered Down Mortgage Reform*, *supra* note 198.

204 *Id*.

205 *Id.*

206 *See supra* notes 62–102 and accompanying text.

resolution is evidence that the federal government is at least considering taking a small step to protect borrowers, that protection will not arrive until the bill passes the Senate.[207]

iii. Potential Solutions

There are a wide range of potential options for preventing predatory lending in the future and rectifying the lending abuses that have already occurred. While H.R. 3915, in its original form, addressed some of the suggestions of Attorney General Miller and his task force,[208] there are still additional means to address abuses in the subprime market. These options include: (1) more comprehensive federal policy change;[209] (2) allowing states more leeway in developing their own anti-predatory lending programs and statutes;[210] (3) Attorneys General continuing to pursue abuses in the subprime market, focusing on rating agencies in addition to lenders;[211] and (4) campaign finance reform, curbing the banking industry's influence on the political process.[212]

There is ample opportunity and desire for change at the federal level.[213] As evidenced by the development of H.R. 3915 and the

---

[207] GovTrack.us, H.R. 3915: Mortgage Reform and Anti-Predatory Lending Act of 2007, *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-3915 (last visited Sept. 4, 2007).

[208] Miller has suggested more stringent regulations that would apply to a broader class of loans than the HOEPA; that merely improved disclosure standards would not be enough to prevent predatory lending; that loans should be furnished based upon a standard for a borrower's ability to repay; that prepayment penalties should be eliminated; and other policy recommendations. *See* Miller, *supra* note 9, at 1. H.R. 3915 has adopted many of these recommendations, but has failed to provide necessary enforcement mechanisms, particularly with regard to secondary-market investor liability *See* H.R 3915; *supra* note 199 and accompanying text.

[209] *See infra* notes 213–25 and accompanying text.

[210] *See* Peterson, *supra* note 19, at 70–71.

[211] *See infra* notes 226–31 and accompanying text.

[212] *See* Editorial, *Candidates Bungle With Bundlers*, CHRISTIAN SCI. MONITOR, Oct. 2, 2007, at 8.

[213] *See* Murphy, *supra* note 192; s*ee also* Press Release, Office of Congresswoman Stephanie Tubbs Jones, Tubbs Jones Releases Statement in

high levels of publicity associated with the Ameriquest and Household suits,[214] the public has finally recognized the need for strict federal laws to regulate subprime lenders.[215] The federal government has attempted to make some policy changes based upon Attorney General Miller's suggestions.[216] Most notably, H.R. 3915 extends some liability to purchasers on the secondary market for the first time.[217] This is especially important in the case of hedge funds that purchase wholesale bundles of loans that are designed to fail.[218] Unfortunately, the statute lacks teeth due to limitations in its securitizer/assignee liability provision.[219] The provision fails to provide either a strong incentive to prevent originators who plan to pass on their loans to the secondary market from furnishing unaffordable mortgages, or a real incentive to prevent secondary-market assignees and securitizers from purchasing unaffordable, predatory loans.[220] Still, H.R. 3915 does set some higher standards for lending practices, bans several common predatory practices for loan originators,[221] and ends much of the practice of federal preemption.[222] Far from a perfect solution, H.R. 3915 thus provides a modest improvement from previously existing anti-predatory lending enforcement mechanisms.

Another way to address abuses in the subprime market is for Congress to enact legislation that would provide states with the necessary leeway to establish their own predatory lending laws.[223]

Support of Mortgage Reform, Anti-Predatory Lending Legislation, Nov. 15, 2007, *available at* http://tubbsjones.house.gov/.

[214] *See supra* notes 117–33 and accompanying text.

[215] *See* Editorial, *Putting an End to Abusive Lending*, *supra* note 191.

[216] *See supra* notes 141–50 and accompanying text.

[217] *See* H.R. Res. 3915, 110th Cong. § 204 (2007).

[218] Madigan, *supra* note 38, at 7–8.

[219] *See* H.R. Res. 3915 § 204 (2007).

[220] Editorial, *Watered Down Mortgage Reform*, *supra* note 198*; see also* Editorial, *Putting an End to Abusive Lending*, *supra* note 191.

[221] *See supra* notes 194–97; H.R. Res. 3915, 110th Cong. § 129A, 123, 201 *et. seq* (2007).

[222] *See* H.R. Res. 3915, 110th Cong. § 208(b) (2007).

[223] *See supra* notes 103–08 and accompanying text.

Previous state laws were far more demanding on abusive lenders than federal statutes, and served to deter lenders from preying on vulnerable populations.[224] However, federal preemption of state laws radically diminished their efficacy and allowed predatory lenders to flourish.[225] Therefore, cutting off preemption would provide states with the ability to react to problems and develop the necessary laws that would appeal to their constituents and serve consumers.

Attorneys General also have the means to combat problems in the subprime market. They could expand their existing strategy of suing lenders to take legal action against the rating agencies that have made investments in bundled subprime loans appear safe.[226] Rating agencies, which are responsible for assessing the risk of investments,[227] allegedly downplayed the risk of securitized loans. This decision resulted in leading additional investors purchasing them without fully understanding their instability and high likelihood of default.[228] States are already beginning to act, investigating the three major ratings agencies: Moody's, Standard and Poor's, and Fitch Ratings.[229] These agencies allegedly gave unduly positive ratings to securitized mortgage investments in exchange for payment from the issuer of the investment.[230] By investigating, banning, and prosecuting these practices, the federal government and the states would force the ratings agencies to give accurate, honest assessments of the risk of securitized loans, thus discouraging investors from investing in bundled predatory

---

[224] *Id.*

[225] *See supra* notes 108–11 and accompanying text.

[226] *See* Krugman, *supra* note 190 (holding ratings agencies partially responsible for the mortgage crisis, allowing predatory loans to flourish and be easily sold in the secondary market).

[227] "Investment banks and other financial institutions, which issue trillions of dollars in various types of debt for sale to investors, depend upon ratings from the agencies to sell their paper. The ratings rank creditworthiness and the ability of the issuer to repay investors." Lynnley Browning, *Connecticut Investigates Major Debt-Rating Agencies*, N.Y. TIMES, Oct. 27, 2007, at C4.

[228] Krugman, *supra* note 190.

[229] Browning, *supra* note 227.

[230] *Id.*

mortgages.[231] From this, it could be inferred that regulation and prosecution of the ratings agencies would indirectly limit predatory lenders' ability to sell their loans on the secondary market, ultimately drying up their business.

Finally, campaign finance reform could play a very strong role in preventing predatory lending. The banking industry has contributed millions of dollars to politicians who are members of both the Republican and Democratic parties.[232] Therefore, the industry wields significant influence.[233] As such, politicians have significantly undercut progress in regulating the lending industry because they fear losing campaign funds.[234] If a law mandating full public financing of federal elections were to be passed, the purchasing of political influence through campaign contributions would cease to be an issue.[235] Without this undue influence over legislators, the banking industry would be unable to exert comparable sway on the federal policy agenda.[236] Legislators would then be focused more on the issues important to constituents than to their donors, and could develop sweeping consumer protection legislation that would protect borrowers.

---

[231] *Connecticut AG Subpoenas Debt-Rating Agencies*, USA TODAY, Oct. 26, 2007, *available at* http://www.usatoday.com/money/companies/regulation/2007-10-26-credit-rating-agencies-subpoena_N.htm.

[232] *See* Center for Responsive Politics, *Mortgage Bankers and Brokers: Long Term Contribution Trends*, http://www.opensecrets.org/industries/indus.asp?Ind=F4600 (last visited July 27, 2008); Center for Responsive Politics, *Securities and Investments: Long-Term Contribution Trends*, http://www.opensecrets.org/industries/indus.asp?Ind=F07 (last visited July 27, 2008).

[233] *See id.*

[234] *See* Editorial, *Watered Down Mortgage Reform*, *supra* note 198; *see also* notes 155–60 and accompanying text.

[235] Under the current campaign contribution system, major donors and "bundlers," individuals who recruit other donors to support politicians and parties, are often lobbyists, or once the politician to whom they contribute wins an election, they become lobbyists for various industries or causes, or sometimes even officials in that candidate's administration. Editorial, *Candidates Bungle With Bundlers*, CHRISTIAN SCI. MONITOR, Oct. 2, 2007, at 8.

[236] *Id.*

CONCLUSION

Prior to the mortgage collapse, Congress was under the influence of the banking industry and its ability to provide millions of dollars in campaign support.[237] Consequently, it undercut opportunities for regulation of the subprime lending market through things like federal preemption.[238] Federal anti-predatory lending laws had no real enforcement mechanisms, and were focused more on mandating disclosures and preventing loans with interest rates that skyrocketed above the norm. When states were preempted from developing their own, more stringent legislative solutions, state Attorneys General responded through the only means with which they could act—they pursued suits against unscrupulous lenders. These suits subjected the lenders to millions of dollars in costs, but failed to truly compensate injured borrowers or develop substantive change in the industry. Still, the suits provided a valuable lesson to the Attorneys General, giving them the opportunity to learn more about the problems at all stages in the subprime market and to push for change at the federal level. As the subprime industry has faced its inevitable collapse, Congress finally has the opportunity to act through its introduction of H.R. 3915.

While H.R. 3915 is an imperfect and somewhat weak solution, it is only the beginning of potential opportunities for change in combating predatory lending. The public is becoming more aware of the subprime market and is demanding change in the lending industry. As a result, the opportunity is ripe to build upon H.R. 3915, to give the law the enforcement mechanisms necessary, close its loopholes, and utilize the facts and strategies learned from Attorney General Miller and his counterparts. The time is right to develop more stringent state and federal regulations to combat

---

[237] *See* Peterson, *supra* note 19, at 70–71; *see also* Center for Responsive Politics, *Mortgage Bankers and Brokers: Long-Term Contribution Trends*, http://www.opensecrets.org/industries/indus.asp?Ind=F4600 (last visited July 27, 2008); *see also* Center for Responsive Politics, *Securities & Investments: Long-Term Contribution Trends*, http://www.opensecrets.org/industries/indus.asp?Ind=F07 (last visited July 27, 2008).

[238] *See* Peterson, *supra* note 19, at 70–71.

predatory lenders. These new regulations can take into account substantive provisions that mirror those mentioned in the Household and Ameriquest suits.

America is witnessing the collapse of not only the real estate market, but the entire economy as a whole. Given this economic landscape, it is critical that Congress, or the states, develop new regulations to protect at-risk homeowners. As Americans see more and more homes with windows boarded up and foreclosure notices on the door, the government must act now to stop the scourge of irresponsible and predatory lending. Homes, lives, and communities are at stake.