ARTICLES

PREDATORY LENDING PREVENTION PROJECT: PRESCRIBING A CURE FOR THE HOME EQUITY LOSS AILING THE ELDERLY

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The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you it's the monster. Men made it, but they can't control it.[1]
—*John Steinbeck*

I. INTRODUCTION

The Predatory Lending Prevention Project discussed in this article grew out of the author's experience with elderly clients facing foreclosure on homes that should have been owned outright or held subject to the minimal remaining balance of a purchase money mortgage obligation. Instead, their homes were encumbered by high-cost home equity loans or refinancings of existing mortgages coupled with debt consolidation.[2] By the time most of these clients sought assistance,

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[1] JOHN STEINBECK, THE GRAPES OF WRATH 45 (Penguin Books 1992) (1939).

[2] In 1995, 78% of the 20.8 million households headed by seniors owned their own homes with a median value of $81,956. The median income for these older homeowners was $21,627, and they spent 34% of that income on housing, including maintenance and repair. In addition, 53% of seniors owned homes built before 1960. *See* THOMAS GALLANIS ET AL., ELDER LAW: READINGS, CASES AND MATERIALS 11 (2000). From these statistics, it is apparent that a majority of elderly persons nationwide both have a need for additional cash flow and have sufficient home equity accrued to make them attractive to lenders.

foreclosure was virtually inevitable, as will be illustrated by the discussion in Section IV below and the data set forth in Appendix A following this article.[3]

The devastating spectacle presented by these clients, and the paucity of effective tools available to remedy such situations retroactively, inspired exploration into strategies for prevention of these exploitative transactions. This article begins with an examination in Section II of the history of federal investment in home ownership in the United States and the ways in which recent contradictory federal policies have served to undermine that investment, leading to the proliferation of what has been called equity skimming and/or "predatory lending."[4] The research methodology employed in the Predatory Lending Prevention Project will be described in Section III, along with a brief explication of the results. Section IV will explore the options potentially available to address the problem, which include enforcement of disclosure provisions found in existing federal law, use of civil rights and fair housing legislation to curtail abusive lending, outright prohibition of some of the more exploitative varieties of predatory lending, mandatory housing counseling in all home equity or mortgage refinancings involving the elderly, and increased availability of loan options through more extensive use of the Community Reinvestment Act and home equity conversion mortgages. Section V will present the author's recommendations for prescriptive action and further research on the issue. The strengths and weaknesses of each recommendation will

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[3] The prevalence of foreclosure is not a local phenomenon. Testimony received by the House Subcommittee on Housing and Community Opportunity indicated that the foreclosure rate increased 384% from 1980 to 1997. *See Rewrite of Truth in Lending Act and Real Estate Settlement Procedures Act: Hearings Before the Sub-comm. on Housing and Community Opportunity and Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 105th Cong. 448 (1998) (statement of Margot Saunders, Managing Attorney, National Consumer Law Center). *See also* NATIONAL TRAINING AND INFORMATION CENTER, PREYING ON NEIGHBORHOODS: SUBPRIME MORTGAGE LENDING AND CHICAGOLAND FORECLOSURES (Sept. 21, 1999), which found a doubling in the rate of foreclosure between 1993 and 1998 and linked that increase to a correlative increase in the market share of foreclosures conducted by subprime lenders. Although the foreclosure figures do not provide data concerning the age of the homeowner, the experience of advocates suggests the elderly compose a significant percentage of those suffering foreclosure. Patricia Sturdevant & William J. Brennan, Jr., *A Catalogue of Predatory Lending Practices*, *in* THE CONSUMER ADVOCATE 36, 36 (1999).

[4] "Equity skimming" refers to the practice of looking for borrowers who have accrued substantial equity value in their homes and who are vulnerable to sales practices convincing them to purchase a high cost home equity loan which the borrower is then unable to pay, resulting in foreclosure and "skimming" or taking of the equity value by the lender. *See* NORMA PAZ GARCIA, *The Hard Sell, Combating Home Equity Lending Fraud in California* (Report, Consumers Union, West Coast Regional Office, 1998). "Predatory lending" is actually a broader term, encompassing not only "home equity" lending abuses, but fraudulent and abusive practices dating back "at least to biblical times." NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING 504 (Kathleen E. Keest et al. eds., 3d ed. 1995).

be discussed, recognizing that any prescriptive action will have costs and concomitant effects that may outweigh or offset the intended benefits.

II. BACKGROUND

Modern mortgages evolved from English common law, under which the deed to property was transferred outright from mortgagor to mortgagee, giving the lender both ownership and right to possession pending repayment of the loan.[5] Technically, the arrangement was "a conveyance of fee simple ownership . . . expressly on condition subsequent."[6] Increasingly, mortgagors were allowed to take possession of the land so long as any income collected from use of the property was allocated to pay the mortgage.[7] Failure to pay on the part of the mortgagor resulted in immediate and absolute divestiture of the mortgagor's ownership interest with no recourse.[8] The resulting inequities gave rise to application by mortgagors to the courts of equity, which granted relief in those instances involving "fraud, accident, misrepresentation or duress."[9] The equitable right to redemption grew out of these equitable relief measures, giving the mortgagor a right to recover the property in the event of default by tendering the amount due "within a reasonable time" after the due date.[10] The undefined nature of the right of redemption led to uncertainty on the part of mortgagees, who were theoretically vulnerable to challenge at any time in the courts of equity by delinquent mortgagors. To remove this potential cloud on the title, mortgagees sought equitable relief to "foreclose" the mortgagor's right to redeem.[11] Thus, if the mortgagor had defaulted on his payments and had not redeemed, the mortgagee could petition the court for an order requiring the mortgagor to exercise the right and pay the redemption amount due, with interest and costs, within a determinate period of time or else forfeit the property.[12] This forfeiture practice came to be known as "strict foreclosure."[13]

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[5] Johnny L. Woodruff, *Certiorari to In Re BFP: The Eve of Decision to a Dozen Years of Durrett Conflict—Will Resolution of the Issue Solve the Real Problem?*, 24 U. MEM. L. REV. 773, 775 (1994).

[6] Rene Fowler, *BFP v. Resolution Trust Corp.: Interpretations of Section 548 of the Bankruptcy Code and the Potential Effects on Mortgages and the Economy*, 17 WHITTIER L. REV. 579, 582 (1996). This "title" theory of mortgages holds that the mortgage conveys a fee simple interest to the mortgagee which is defeasible in its entirety upon satisfaction of the underlying debt. 54A AM. JUR. 2D *Mortgages* § 1 (1996).

[7] Eric S. Palace, *Notes and Comments, In Re BFP: Just A Band-Aid? Looking for a Stable Solution that Balances Creditors' and Debtors' Rights Under Bankrupcty Code Section 548(A)(2)*, 15 ANN. REV. BANKING L. 359, 363 (1996).

[8] *See id.*

[9] Fowler, *supra* note 6, at 582.

[10] *Id.*

[11] *Id.* at 583.

[12] *See id.*

[13] Palace, *supra* note 7, at 364.

This again led to inequitable results, because the mortgagor lost all interest in the property, without compensation, no matter how small the default.[14] American courts subsequently developed the concept of judicial sale through public auction to permit the mortgagor to recover some of the equity value in those situations where the value of the property exceeded the amount owed.[15] In the event the property did not sell for an amount sufficient to cover the amount owed, the mortgagee could then obtain a deficiency judgment for the balance.[16] In addition, instead of the fee simple with condition subsequent arrangement, American jurisdictions developed "power of sale" clauses within the mortgage contract itself or, alternatively, deeds of trust conveying the property to a trustee for purposes of conducting a sale in the event of the mortgagor's default.[17]

Except for the federal land ordinances governing settlement of public lands in the territories enacted in the late 18th century[18] and the Homestead Act passed in 1862,[19] the United States federal government did not become directly involved in addressing national housing problems until the Depression era of the 1930s.[20] A plethora of often conflicting and disconnected housing programs have been enacted over the ensuing seven decades, leading to what has been characterized as "a hodge-podge of accumulated authorizations" beset with "internal inconsistencies, numerous duplications, cross-purposes and overlaps as well as outright conflicts and gimmickry."[21] Still, J. Paul Mitchell suggests that despite the apparent chaos and lack of coherent focus, the federal government's housing investment efforts have in fact been aimed at furthering two overarching goals: 1) achievement of a substantial percentage of home ownership at all economic levels of society and 2) eradication of poverty, with concomitant economic growth and neighborhood stability.[22]

The catalyst for federal intervention in the 1930s was the rising rate of foreclosures.[23] Unemployment peaked at 25% in 1933, leading to over 270,000

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[14] *See id.* at 365.

[15] This led to the development of the more modern lien theory of the mortgage as a security interest in, or encumbrance upon, the property, as opposed to a fee simple conveyance. A mortgagee under the lien theory has no immediate ownership of the property and must take action to establish entitlement to possession thereof. 54A AM. JUR. 2D *Mortgages* § 1 (1996).

[16] *Palace*, *supra* note 7, at 359.

[17] 54A AM. JUR. 2D *Mortgages* § 146 (1996).

[18] ENCYCLOPEDIA OF AMERICAN HISTORY 134-35 (Richard B. Morris, et al. eds., 1976) at 134-35.

[19] 12 Stat. 392 (1862), *repealed by* Pub. L. No. 94-579 (1976).

[20] J. Paul Mitchell, *The Historical Context for Housing Policy*, *in* FEDERAL HOUSING POLICY AND PROGRAMS 3, 3 (J. Paul Mitchell ed., 1985); JOHN C. WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS 1 (1980).

[21] Mitchell, *supra* note 20, at 4.

[22] *See id.* at 5.

[23] *See id.* at 7.

foreclosures that same year, over three times the number in 1926.[24] In addition, real estate prices declined dramatically, leaving financial institutions in an unenviable position with non-liquid investments of diminishing value. Bank failures increased as fearful depositors sought to withdraw cash, squeezing hardest those lenders who had dealt most heavily in the illiquid area of home finance.[25] This in turn adversely impacted the construction industry, which then aligned politically with the finance industry to press for federal intervention.[26] This political effort benefited from the public's perception that those facing foreclosure were in fact "virtuous" poor; i.e., persons who had been industrious and thrifty, and who were simply "down on their luck" through no fault of their own. A plethora of legislation was passed during the Depression years, the most significant of which was the National Housing Act of 1934.[27] The Housing Act of 1934 created the Federal Savings and Loan Insurance Corporation to guarantee individual depositors' accounts in financial institutions and the Federal Housing Administration (FHA) to guarantee individual home mortgage loans. This transformed home lending, as lenders were increasingly willing to offer low-interest, long-term, fixed-rate loans on the strength of this loan guarantee, instead of the former limited installment payment arrangement, followed by a balloon note.[28] Although their numbers are dwindling, many of today's elderly victims of predatory lending are undoubtedly the "virtuous" poor that the government saw fit to assist in the Depression era.

The federal government's next major foray into housing investment occurred during the World War II era, when the FHA loan program was supplemented by the VA Home Loan program, which was passed by a thankful nation to show its gratitude to veterans of the armed services.[29] The VA Home Loan program guaranteed mortgages for veterans, mandated low interest, long terms, and very low or even zero down payment.[30] In addition, unlike the FHA program, which

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[24] *See Id.*

[25] *See id.*

[26] *See id.*

[27] 12 U.S.C.§§ 1701 et seq. Also worthy of mention is the Home Owners' Loan Act of 1933, Public Law No.43, 73rd Congress, which operated, until its expiration in 1936, on an emergency basis to "refinance home mortgages in default or process of foreclosure, and even to make loans to permit owners to recover homes lost through foreclosure. . ." Milton P. Semer Et Al., *Evolution of Federal Legislative Policy in Housing: Housing Credits, in* FEDERAL HOUSING POLICY AND PROGRAMS *supra* note 20, at 69, 73. The authors note that despite its short-lived, emergency status, the Home Owners' Loan Act laid the groundwork for a complete overhaul of mortgage financing, from five year balloon note obligations to long-term, amortized loans at fixed interest, paid in reasonable monthly installments. *Id.* at 73.

[28] Semer, *supra* note 27, at 74-5.

[29] *See* Servicemens Readjustment Act of 1944-45, Pub. L. No. 346, §§ 502(3),503(3); Pub. L. No. 268.

[30] U. S. PRESIDENT'S COMMISSION ON VETERANS' PENSIONS, A REPORT ON VETERANS' BENEFITS IN THE UNITED STATES (U.S. Gov't printing office 1956) *reprinted in* FEDERAL

required payment of a premium by the mortgagor, the VA guarantee was entirely subsidized by the government. The availability of VA loans constituted a major factor in the expansion of home ownership to a more diverse population throughout the nation.[31]

FHA and VA insured mortgages fueled the housing industry and promoted home ownership. At the same time, property values rose dramatically, with the median value of a home rising from $3,000 in 1940 to $7,400 in 1950 and $11,900 in 1960.[32] These rising values reduced lender risk and increased the willingness of lenders to issue loans approaching an 80-90% loan to value ratio.[33] Real estate was transformed into an opportunity for investment. Home ownership increased from 44% of all households in 1940 to 62% by 1960.[34] In short, the federal government's promotion of home ownership achieved breathtaking results.

During the 1960s, the federal government's focus changed, as the country began to wrestle with acknowledging that the impressive gain in home ownership had not been evenly distributed throughout all segments of the population.[35] Increasingly, federal housing policy concentrated on the elimination of racism, culminating in the passage of the Civil Rights Acts to remedy and prohibit discrimination based on race, color, creed, and national origin.[36] The atmosphere was one of overall social concern, exemplified by President Johnson's highly publicized "War on Poverty," arising out of passage of the Economic Opportunities Act of 1964.[37] The U.S. Department of Housing and Urban Development was created in the mid-1960s to coordinate and administer federal government housing efforts. Finally, in 1968, Congress enacted "Section 235," an interest rate subsidy program designed to make home ownership more affordable and accessible to lower-income families.[38] This program represented the government's major effort to support urban home ownership. Unfortunately, it came to an abrupt halt in 1973, when it was suspended due to mismanagement.[39] Suburban home ownership continued to flourish during the 1960s, with 15.5% of loans subsidized by FHA and 3.5% by VA.[40]

The housing euphoria crashed in 1973, with a cascade of disturbing national events, from the debacle in Vietnam and the Arab oil embargo to the Nixon

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HOUSING POLICY AND PROGRAMS, *supra* note 20, at 107-22.

[31] *See id.* at 118.

[32] Mitchell, *supra* note 20, at 9.

[33] *See id.*

[34] *See id.*

[35] *See id.* at 11.

[36] 42 U.S.C. §§ 1981, 1982 (1994).

[37] 42 U.S.C. § 2809 (1994) *repealed by* Pub. L. No. 97-35, § 683(a), 95 Stat. 519.

[38] U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW (U.S. Government Printing Office 1974) *reprinted in* FEDERAL HOUSING POLICY AND PROGRAMS, *supra* note 20, at 15-16.

[39] Mitchell, *supra* note 20, at 13.

[40] *See id.*

resignation and increasing recognition of a loss of economic dominance,[41] causing the nation to recoil. Housing concerns took a back seat to concern over the need for economic, technological and industrial development to make America "competitive" again.[42] Thus the Housing and Community Development Act of 1974[43] replaced the former specifically designated housing grants with one large block grant to cities, which could then allocate the funds to a broad range of needed services as perceived by local communities. The Rent Supplement program[44] was passed to increasingly incorporate the private sector into the public housing arena.[45] "Re-industrialization" replaced housing as the congressional funding favorite in the 1980s.

Nevertheless, housing starts continued to boom as rapid inflation and soaring interest rates made real estate investment, even in single family dwellings, exceedingly attractive. Buyers who could still obtain homes with low down payments and long-term fixed interest rate mortgages were able to profit handsomely from housing price appreciation that far outstripped inflation.[46] The median price of a new home in 1971 was $25,200 by 1980 it had jumped to $64,500 an increase of 156%.[47] This amazing home equity growth culminated in home equity borrowing to finance such disparate goals as college tuition and swimming pools, home improvement and trips to Europe.[48] First-time home buyers, however, found it increasingly difficult to find affordable homes, a development that was exacerbated by passage of the 1980 Depository Institutions Deregulation and Monetary Control Act[49] (DIDMCA). The Act broadened the investment/asset and deposit/liability power of thrift (savings & loan) institutions, expanded the number of alternative mortgage instruments, removed or provided greater flexibility for deposit rate ceilings and provided for override of state usury ceilings and reserve requirements.[50] As a result of the Act, savings and loan

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[41] *See* THEODORE H. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956-1980 152-55 (1982); ANDREW J. EDELSTEIN & KEVIN MCDONOUGH, THE SEVENTIES FROM HOT PANTS TO HOT TUBS 64, 74 (1990); Carl Dassbach, *Where is North American Automobile Production Headed?: Low Wage Lean Production*, 1 ELECTRONIC JOURNAL OF SOCIOLOGY 1¶ 6 (1994) at http://www.sociology.org /content/vol001.001 /dassbach_d.html.

[42] Mitchell, *supra* note 20, at 14.

[43] 12 U.S.C. § 1701j (1994): 42 U.S.C. §§ 1438-39, 5302-05 (1994).

[44] 12 U.S.C. § 1701s.

[45] Mitchell, *supra* note 20, at 15.

[46] ROLF GOETZE, RESCUING THE AMERICAN DREAM 3-7 (1983); DAVID C. SCHWARTZ, ET AL., A NEW HOUSING POLICY FOR AMERICA 15-16 (1988).

[47] Mitchell, *supra* note 20, at 14.

[48] Traditional savers, on the other hand, lost with high inflation eroding the value of passbook savings accounts, leading to the creation of new and more aggressive (and often more risky) vehicles for financial investment. *Id.* at 14-15.

[49] 12 U.S.C. § 1735f-7a.

[50] Kent W. Colton, *Housing Finance in the 1980s: Economic Factors Indicate Future Directions*, *in* FEDERAL HOUSING POLICY AND PROGRAMS, *supra* note 20, at 153-57.

institutions could now compete with commercial lenders, and, in a time of inflation, this meant higher interest rates and fewer long-term fixed-rate mortgages.

Next, the enactment of the Tax Reform Act of 1986[51] in essence "changed the tax code to establish a tax preference for interest on second mortgages over interest on other consumer loans."[52] The Tax Reform Act's tax preference was transformed into an ubiquitous marketing tool by those engaged in home equity lending, who were pleased to tout a collateral economic advantage that had no negative impact on their profit margin.[53] However, most elderly individuals living on a limited retirement income have no significant tax obligations to begin with, so the alleged tax advantage is of negligible utility at best. Nevertheless, the lender's suggestion that such loans are economically advantageous often proves compelling, particularly to a borrower whose credit standing may be less than optimal.[54]

In 1989, legislation was passed which had the effect of tightening capital standards for lending institutions, thereby causing a movement away from reliance on local lending standards to the development of uniform nationwide loan standards.[55] This created a scarcity of loan options for borrowers with credit problems among prime lenders and fostered the nascent subprime mortgage industry.[56] Abuses[57] proliferated as growth in the subprime lending industry

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[51] 26 U.S.C. § 163(h)(3) (1994).

[52] Gary Klein, *Preventing Home Equity Lending Fraud*, 7 LOY. CONSUMER L. REP. 126, 127 (1995).

[53] EARL PEATTIE, NAVIGATING THE SUBPRIME MORTGAGE 16 (Consumer Mortgage Education Consortium 1998).

[54] Elderly borrowers are often at a disadvantage in the lending marketplace through no fault of their own. The deductible and co-pay portions of medical bills left unpaid after Medicare has reimbursed the provider may prove devastating, as may the loss of a spouse's income following an unexpected death. In addition, those elderly borrowers living in older communities may find themselves the victims of "reverse redlining." *See* William J. Brennan, Jr., *Predatory Mortgage Lending Practices Directed Against the Elderly*, BIFOCAL, Spring 1998 at 1. In testimony presented to the Senate Special Comm. on Aging, Mr. Brennan defined "reverse redlining" as the practice engaged in by high cost lenders of aggressively directing offers of "overpriced loan products" to communities that have historically been denied access to credit, "knowing that the residents are a captive market with no access to reasonably-priced credit." *See Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearings Before the Special Comm. on Aging, United States Senate*, 105th Cong. 86 (1998) (statement of William J. Brennan, Jr., Director, Home Defense Program, Atlanta Legal Aid Society).

[55] The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 , Pub. L. No. 101-73, 103 Stat. 187 (1989), enacted in response to the savings and loan crisis of the late 1980s, established an Office of Thrift Supervision in the Department of the Treasury, and set up the Resolution Trust Corporation to "contain, manage, and resolve failed savings associations." The Act further set up a variety of supervisory lending requirements designed to create a "safe and stable system of affordable housing finance." 12 U.S.C. § 1811 nt (1994).

[56] PEATTIE, *supra* note 53, at 3.

[57] *See* Brennan, *Predatory Mortgage Lending Practices Directed Against the Elderly*,

exploded,[58] and set the stage for the emergence in the early 1990s of equity skimming and/or "predatory lending" as a major issue. This led to passage of the Home Ownership and Equity Protection Act, hereinafter HOEPA.[59] In the case of certain "high cost" mortgage loans,[60] HOEPA provided for enhanced advance disclosures[61] and contained some prohibitions and limitations[62] that were clearly

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supra, note 54, Exhibit A for a list of the myriad incarnations of predatory lending.

[58] Evan M. Gilreath, *The Entrance of Banks into Subprime Lending: First Union and the Money Store*, 3 N.C. BANKING INST. 149, 150-51 (1999).

[59] Home Ownership and Equity Protection Act of 1994, Subtitle B of Title 1 of the Riegle Community Development and Regulatory Improvement Act, Pub. L. No. 103-325 (Sept. 23, 1994) (codified as amended to the Truth in Lending Act, at 15 U.S.C. § 1601 et seq. (1994)). The Senate Report on the Riegle Community Development Act quotes testimony presented during the February 17, 1993 Senate Banking Committee's hearing on reverse redlining, which proves illustrative: One 72 year-old homeowner, Ms. Eva Davis, was victimized by a home improvement contractor who contacted her at her home. By the end of the day, she had financed repairs to her home with a $150,000 second mortgage, for which she paid an initial "prepaid finance charge" of over $23,000. The monthly payment exceeded her monthly income. S. REP. NO. 103-69, at 22 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1881, 1906.

[60] The "triggering" definition of a "high cost" loan is found at 15 U.S.C. § 1602(aa)(1) (1994), which states as follows:

> A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction, a reverse mortgage transaction, or a transaction under an open end credit plan, if—
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> (A) the annual percentage rate at consummation of the transaction will exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or
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> (B) the total points and fees payable by the consumer at or before closing will exceed the greater of —
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> (i) 8 percent of the total loan amount; or
>
> (ii) $400

[61] The "enhanced disclosures" requirements are set out at 15 U.S.C. § 1639 and Reg. Z §§ 226.31, 226.32. In essence, they require disclosures to be made three days in advance in addition to the disclosure already required by Truth in Lending to be made at the time the loan is consummated.

[62] Prohibited terms include limitations on prepayment penalties, 15 U.S.C. § 1639(c) and Reg. Z § 226.32(d)(6); prohibition of interest rate increase upon default, 15 U.S.C. § 1639(d) and Reg. Z § 226.32(d)(4); limitations on balloon payments, 15 U.S.C. § 1639(e) and Reg. Z § 226.32(d)(1); prohibition on negative amortization, 15 U.S.C. § 1639(f) and Reg. Z § 226.32(a)(2); limitation on prepaid payments, 15 U.S.C. § 1639(g) and Reg. § 226.32(d)(3); prohibition against engaging in a pattern or practice of extending credit without regard to

intended to protect consumers from some of the worst abuses characteristic of such loans. The Act further provided an enhanced remedy[63] for violations of the law.[64] As will be discussed more fully below, the numerous egregious situations that have continued to surface subsequent to the passage of HOEPA indicate that the elderly are in need of additional measures in order to adequately safeguard their interests.[65]

III. PREDATORY LENDING PREVENTION PROJECT - CONCEPT AND METHODOLOGY

The lack of adequate and effective safeguards against abusive home mortgage lending involving the elderly is abundantly clear to anyone working with older homeowners, particularly those older persons with limited income.[66] The author's personal concern about the issue culminated in a proposal to the Borchard Foundation Center on Law and Aging for a grant to fund the Predatory Lending Prevention Project to study predatory lending and to generate policy recommendations if appropriate.[67] Locally, elderly persons who had been victimized by predatory lending practices were identified and, if they were willing to speak about their experiences, were interviewed in depth concerning what had occurred. Information from these interviews is used illustratively throughout the article, and a brief abstract of each interviewee's information is contained in Appendix A. A questionnaire (see Appendix B) was developed and distributed to over 150 housing counseling agencies across the nation.[68] The results of the

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repayment ability, 15 U.S.C. § 1639(h); Reg. Z § 226.32(e)(1); and special escrow requirements where loan proceeds are disbursed to home improvement contractors, 15 U.S.C. § 1639(I) and Reg. Z § 226.32(e)(2).

[63] Enhanced damages in the amount of all finance charges and fees paid by the borrower are available pursuant to 15 U.S.C. § 1640(a)(4).

[64] For a comprehensive exposition of the legislative background and provisions of HOEPA, see Gary Klein, *Preventing Home Equity Lending Fraud*, 7 LOY. CONSUMER L. REP. 126 (1995). For a simpler version, see Stephen F. J. Ornstein, *Examining the Effect of New Legislation on Consumer Protection for "High Cost Mortgages,"* 25 REAL EST. L. J. 40 (1996).

[65] Examples abound: An illiterate seventy-two year old man in Decatur, Georgia pays $9,000 in fees to close on a $26,000 loan Scott Mooneyhan, *Complaints Grow About Subprime Lending Practices*, Associated Press, Jan. 23, 2000, *available at* http://www.cra-nc.org/News%20Clips/ap5-5.html.; a seventy-year-old couple in Massachusetts pay an effective interest rate of 40% on a $26,000 loan as a result of a series of refinancings, each one of which packed an additional set of closing costs and wound up with the couple owing a principal balance of over $60,000 (*Preventing Foreclosures: Spotting Loan Scams Involving Vulnerable Homeowners*, *available at* consumerlaw@nclc.org.consumer/foreclosure.html last visited November 12, 2000. The accounts from the elderly Memphis borrowers contained in Appendix A are also illustrative and virtually all of them entered into their loan transaction AFTER the passage of HOEPA.

[66] *See* Brennan, *supra* note 54, at 1-4.

[67] The grant award was $15,000 for fiscal year 1999-2000, which funded two research assistants.

[68] The mailing list for distribution was culled from the list of HUD Approved Housing

questionnaire are reproduced in Appendix C.

In addition, input on the issue was solicited from a variety of local community agencies actively working with housing and seniors.[69] Information from these sources was not formally tabulated, but provided a rich source of inspiration, as did the additional comments and phone calls received from questionnaire respondents.[70]

Finally, we conducted legal research, examining everything possible that might have an impact on the issue of predatory lending. The result of our efforts is contained in Section IV. If nothing else, it demonstrates the need for additional research efforts to assess the effectiveness of the very exciting initiatives that are taking place in a number of areas across the country.

IV. PREVENTION: AN EXAMINATION OF THE OPTIONS

Consideration of the factual and legal research conducted during the course of the project yielded five broad categories of potential preventive measures: 1) disclosure; 2) prohibition; 3) procedural protection; 4) expanded credit opportunity; and 5) counseling. An examination of each category will be undertaken in this section.

A. *Disclosure*

1. Burden of Initiation

Disclosure has been by far the most popular legislative model for dealing with issues involving consumer fraud and exploitation.[71] Both Truth in Lending and

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Counseling Agencies, *at* http://www.hudhcc.org/agencies/all.txt last visited November 4, 1999. Two housing counseling agencies for each state were selected from the list, and where permitting, the selection preference was for agencies located in urban areas having a population greater than 100,000 people. In addition, any agencies designated as exclusively serving the elderly (i.e., those providing reverse mortgage or HECM counseling) were automatically selected.

[69] Input was solicited from the following local agencies: Memphis Inter-Faith Association (MIFA); City of Memphis Housing Resource Center; Memphis Field Office, U.S. Department of Housing and Urban Development, Cooper-Young Development Corp; Memphis Community Development Partnership; City of Memphis, Housing and Community Development; Memphis Area Community Reinvestment Organization (MACRO); Center for Neighborhoods; Vollentine-Evergreeen Community Association; Memphis City Council staff; Memphis Area Legal Services, Inc.

[70] Special thanks to the many housing counselors who took time to provide additional comments and insights in their responses to the questionnaire—particular thanks go to those who even took the time to call and offer suggestions and unique perspectives from their communities.

[71] William K. Brandt and George S. Day, *Information Disclosure and Consumer*

HOEPA predominantly mandate disclosures without proscribing or prescribing any further conduct. While HOEPA provides certain substantive limits to lender behavior, as noted above,[72] enforcement of both statutes consists of consumer remedies available to the victimized borrower after the alleged predatory transaction has taken place.[73] This, coupled with the relative ineffectiveness of disclosure of contract and financial terms in general as a protective measure,[74] especially for those consumers who are most vulnerable, cast doubt on whether proposals for more extensive disclosure will be any more effective. Although the failure to disclose provides escape through rescission to those consumers lucky enough to consult counsel prior to the expiration of the three-year extended right under Truth in Lending,[75] the bulk of elderly consumers will struggle to keep paying the loans and wind up in foreclosure and/or bankruptcy court. *Newton v. United Companies Financial Corp.*,[76] in which the plaintiffs sought relief under HOEPA and various other federal statutes,[77] is illustrative of the effectiveness of existing law for addressing the predatory lending problem.

The plaintiffs in *Newton* consisted of five homeowners: two widows and one married couple, all over the age of fifty, and one younger individual, who had purchased her home with the help of her elderly mother, who was no longer living at the time the loan that was the subject of the lawsuit was made.[78] Although all of

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Behavior: An Empirical Evaluation of Truth in Lending, 7 J. L. REF. 297, 297-98 (1974).

[72] 15 U.S.C. § 1639 (1994).

[73] The Federal Trade Commission and various other agencies also have administrative enforcement authority pursuant to 15 U.S.C. § 1607. However, the FTC's enforcement obligations have been held "broadly discretionary," with the agency being under no affirmative duty to act. *See* Pendleton v. Trans Union Systems Corp., 430 F. Supp. 95, 97 (E.D. Pa. 1977). Recently, the FTC brought several enforcement actions against high cost mortgage lenders. *See* Federal Trade Commission v. Capital City Mortgage Corp., 186 F.R.D. 245 (D. D.C 1999), and Alvin C. Harvell, *Subprime Lending Developments with Implications for Creditors and Consumers*, 52 CONSUMER FIN. L. Q. REP. 238, 241-42 (1998). The HOEPA amendments also granted added authority to state attorneys general to initiate enforcement proceedings pursuant to 15 U.S.C. § 1640(e), after first providing notice to the FTC. In states like California, where local district attorneys have already established aggressive real estate fraud units to prosecute some of the most egregious cases of consumer fraud and abuse, this provision may yield significant results. *See* GARCIA, *supra* note 4, at 6-14.

[74] Brandt, *supra* note 71, at 326-27.

[75] 15 U.S.C. § 1635.

[76] 24 F. Supp. 2d 444 (E.D. Pa. 1998).

[77] Plaintiffs also sought relief pursuant to the Equal Credit Opportunity Act, 15 U.S.C. § 1691(d)(1), the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(c) (1994), the Pennsylvania Home Improvement Finance Act, PA. STAT.ANN. 73 § 500-101-500-602, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law, PA. STAT.ANN. 73 § 201-1-201-8.

[78] Plaintiff Margaret Newton, one of the widows, was 76 years of age, had "suffered four strokes," and was "unable to walk without assistance." The court further described her as having difficulty "seeing, speaking and concentrating." Newton, 24 F.Supp. 2d at 446. She

the plaintiffs were literate, *none* of them read the loan documents and disclosures that were delivered to them at closing.[79]

Three of the four loans were subject to the provisions of HOEPA, having been consummated after October 1, 1995, the effective date of the Act.[80] As a matter of law, the district court found that with each of the three loans the defendant mortgage companies had failed to deliver the three-day advance disclosure mandated by the Act.[81] This failure entitled each of the plaintiffs to rescind the

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had originally purchased her home in 1968. Plaintiffs Jasper and Catherine Sutton were described as "retired," suggesting an age of at least 62. They both had an 8th grade education and had acquired their house by lease-purchase in 1982, after paying $100 a month for five years. *Id.* at 447. Plaintiff Frauncine Lora Myers, the other widow, was 54 years old, and had completed the 11th grade. She bought her house outright in 1982, using the life insurance proceeds paid to her upon the death of her husband. *Id.* at 448. Plaintiff Judith Fowler also dropped out of school in the 11th grade, and purchased her home along with her mother in 1990 for cash. *Id.* at 447.

[79] *See id.* at 448.

[80] *See id.*

[81] 15 U.S.C. § 1639(a)(1)(b)(1) provides as follows:

(a) Disclosures

(1) Specific disclosures

In addition to other disclosures required under this subchapter, for each mortgage referred to in §1602(aa) of this title, the creditor shall provide the following disclosures in conspicuous type size:

(A) You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application.

(B) If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

(2) Annual percentage rate

In addition to the disclosures required under paragraph (1), the creditor shall disclose—

(A) in the case of a credit transaction with a fixed rate of interest, the annual percentage rate and the amount of the regular monthly payment; or

(B) in the case of any other credit transaction, the annual percentage rate of the loan, the amount of the regular monthly payment, a statement that the interest rate and monthly payment may increase, and the amount of the maximum monthly payment, based on the maximum interest rate allowed pursuant to section 3806 of Title 12.

(b) Time of disclosures

(1) In general

The disclosures required by this section shall be given not less than 3 business days mortgage loans, recover the Truth in Lending statutory monetary damages, and recover an "enhanced" amount "equal to the total finance charge and fees paid."[82] In calculating the finance charges and fees paid, the court compared the total of each plaintiff's actual payments with the amount of loan origination fees and finance charges that were assessed by the lender. Since in each case, the fees and finance charges exceeded the plaintiff's actual payments, the district court allocated the entire amount paid by each plaintiff to the finance charges.[83] The court awarded rescission,[84]the $2,000 maximum statutory penalty for the violation pursuant to 15 U.S.C. §1640(a), the additional actual damages based on payment of finance charges, as noted above, and attorneys' fees.[85]

The plaintiffs in *Newton* also alleged that the defendants engaged in "a pattern or practice of extending credit . . . based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment."[86] Although the plaintiffs offered expert testimony concerning the deficiencies of the lending guidelines employed by the defendants,[87] the court, after a bench trial, ruled that the plaintiffs failed to

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prior to consummation of the transaction.

[82] *See* Newton, 24 F. Supp. 2d at 451.

[83] *See id.* at 450-51.

[84] The district court ruled that the plaintiffs were entitled to rescission, but did not discuss or enumerate the terms of the rescission. The statute, found at 15 U.S.C. §1635(b), sets out the following procedure:

> (b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor. . . .

Under the statutory procedure, notice of the borrower's desire to rescind triggers the lender's duty to release any mortgage or other lien encumbering the borrower's property and to return any amounts paid by the borrower, all to be accomplished within a 20-day period. Failure to follow this procedure on the part of the lender ostensibly authorizes the borrower to retain the loan funds received from the transaction, but compliance with the procedure triggers the borrower's duty to tender back the loan proceeds. As a general rule, the loan funds will already have been distributed to third parties to pay existing debts and/or to pay for home improvements, and will thus not be available to the borrower to tender back. This dilemma raises yet another stumbling block in the use of rescission as a remedy, one which is not addressed by the district court in Newton.

[85] *See* Newton, 24 F. Supp. 2d at 451.

[86] *Id.*

[87] *See infra* text accompanying notes 133-46.

sustain their burden of establishing that defendants had engaged in a "wide-ranging and institutionalized practice of . . . making loans as a matter of course without considering repayment ability and based only on the collateral value of the property,"[88] as required by the statute.[89]

In any event, the remedies provided under HOEPA and Truth in Lending in general, must be affirmatively asserted by the individual borrower.[90] Where the loan is secured, as is the case with mortgage loans, this burden on the debtor places the creditor at a distinct advantage. Enforcement of the creditor's rights pursuant to the promissory note and mortgage is a straightforward matter, with the only issue being that of default on the part of the debtor.[91] Enforcement of the loan generally occurs at an accelerated rate as well, particularly in states having a trust deed mechanism that circumvents the necessity for any sort of judicial action in order to accomplish foreclosure.[92] As Professor Julia Patterson Forrester has observed, in a deed of trust state, both the burden of proof and the burden of initiating a lawsuit to raise claims or defenses concerning the debtor's rights are placed on the debtor homeowner, who is least equipped to bear the burden.[93] The homeowner generally has little experience or knowledge of the judicial system and limited funds, particularly at the moment of foreclosure, with which to gain access to it.[94] Elderly homeowners, who may be in poor health, are especially disadvantaged by a "fast track" to foreclosure that affords them no procedure for challenge other than the institution of a lawsuit.[95] Forrester discusses how, in this context, allocation of the burden of proof to the homeowner is not consonant with the rationale upon which the allocation is usually made as a matter of policy. She argues that factors to be considered are as follows: a) relative access to evidence; b) probability of success;

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88 Newton, 24 F. Supp. 2d at 456.

89 15 U.S.C. § 1639(h).

90 *See supra* text accompanying note 73.

91 UCC §§ 3-307—3-308; *See also* 6 HAWKLAND UCC SERIES §§ 3-308:02-04 (1998) and 11 AM.JUR.2D *Bills and Notes* §§ 247-63 (1997).

92 A deed of trust is "an absolute and indefeasible conveyance of the subject matter thereof." 54 AM. JUR. 2D *Mortgages* § 146 (1996 & Supp. 1999). The deed of trust is so-called because the instrument is executed to a disinterested third party or trustee, who either holds title until the debt is repaid (under the "title" theory of deed of trust) or who is responsible for taking control of the property in the event of the mortgagor's default and conducting a sale by means of advertisement. 55 AM. JUR. 2D *Mortgages* § 532 (1996 & Supp. 1999).

Judicial foreclosure, on the other hand, as noted in Section II *supra*, developed as "a suit to forfeit the interest of the owner or cut off the right of redemption." 55 AM. JUR. 2D *Mortgages* § 530. It is also known as a "foreclosure by judicial sale" in the majority of states which recognize that real property values may fluctuate and thus treat the mortgage simply as security for payment of the debt. *Id.*

93 Julia Patterson Forrester, *Constructing a New Theoretical Framework for Home Improvement Financing*, 75 OR. L. REV. 1095, 111-17, 1121-26 (1996).

94 *Id.* at 1129-31.

95 *Id.* at 1117-21.

and c) public policy.[96] With respect to all three factors, she opines that the burden of proof in foreclosure situations involving shoddy and overpriced home improvement contracts should be placed on the lender if it can be shown that the lender has a relationship with the contractor who was paid for the work.[97]

With respect to the burden of initiating suit, Forrester argues that allocation of the burden should be "determined by the circumstances giving rise to the claim."[98] In situations involving property, the party seeking possession generally has the burden of initiating suit.[99] The deed of trust power of sale mechanism effectively allows the lender to circumvent the necessity of going forward with any proof at all. Under Tennessee law, for example, the mere assertion of default and entitlement in a public advertisement is sufficient to accomplish the purpose.[100]

HOEPA enforcement does nothing to address the imposition of the burden of initiation on the homeowner.[101] The case of A.H. illustrates the considerable inequity that typically results. A.H. is a 67-year-old African-American woman who has been living in and paying for her home in Memphis, Tennessee since 1971. She purchased the home for $16,000 with a FHA loan that she financed through a local bank. She was able to pay for the house until she had a stroke in 1986. At that point, she was no longer able to work and had to adjust her standard of living to fit a reduced income consisting of Social Security disability benefits. Consequently, she filed a Chapter 13 bankruptcy in 1989 to catch up on her bills

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[96] *See id.*

[97] *See id.*

[98] *See id.*

[99] *Id.*

[100] *See* TENN. CODE. ANN. §§ 35-5-101—114 (1996). Professor Forrester's article addresses in some detail the constitutional due process issues concerning foreclosure by power of sale. Unfortunately, as she points out, deed of trust arrangements "pass constitutional muster, not because of the adequacy of... their notice and hearing requirements, but because of the absence of state action. Forrester, *supra* note 93, at 1124.

[101] Violations of HOEPA and/or Truth in Lending must be raised by the borrower, either affirmatively in a lawsuit brought before the loan goes into default, or, if after default, as a defense to foreclosure. *See* 15 U.S.C. § 1640. Although the statute does provide criminal penalties for lenders who "willfully and knowingly" provide false information or "consistently" understate the finance charge, imposition of the criminal penalties (fine and imprisonment) will not automatically provide relief for the borrower. 15 U.S.C. § 1611. John Roddy noted that the grounds for affirmative lawsuits have progressively narrowed, culminating in 1995, when the Truth in Lending Act was amended to greatly increase the tolerances for accuracy of disclosure of both the finance charge and the annual percentage rate of interest. John Roddy, *Reversing Field: Is there A Trend Toward Abrogating Truth In Lending?*, 771 PLI COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 637 (Apr.-May 1998). The finance charge will now be deemed accurate if it is within $100 of being correct or it is more than the amount that the lender is actually required to disclose. 15 U.S.C. § 1605(f). The annual percentage rate (APR) will be deemed accurate if the disclosed rate varies no more than one-eighth of one percent under the actual amount. 15 U.S.C. §1606(c).

and prevent the loss of her home.[102] Although her adult daughter and minor grandchildren moved in to help her continue to live in the home, another stroke and additional medical expenses not covered by Medicare resulted in the filing of a second Chapter 13 bankruptcy in 1996, again, to keep from losing her home. A.H. was due to pay out on her original mortgage in 2001. The lender agreed to refinance the remaining balance over a ten year period at 7% APR, resulting in a very affordable monthly payment of $224 including escrow for homeowner's insurance and taxes.

Unfortunately, A.H.'s home, being over twenty years old, needed some repair. The house was brick, but the eaves and carport area were wood and badly in need of paint. A.H. heard an advertisement on television featuring a local contractor offering a "free estimate" of the cost of installation of aluminum siding. A.H. had the contractor come out to her house, and instead of a free estimate, she received a credit contract for $10,000 to sign. No disclosure of the interest rate, monthly payment amount, total amount of payments, or term of the loan appeared in the contract. By the time the transaction was consummated approximately three weeks later, A.H. had signed a promissory note obligating her to pay $29,250 over a thirty-year period to a subprime lender. The promissory note was secured by a deed of trust on her home. The loan she refinanced in 1996 with the local lender was paid off at closing, as were A.H.'s debts in bankruptcy, in order to give the new lender priority as first lienholder. The interest rate (APR) on the new loan was 14.562% and the new monthly payment amount was $338.49, which did *not* include any escrow amount for insurance and taxes. Disclosures were made at closing for this loan and for a loan amount of $31,000, that presumably would have given A.H. an additional cash pay-out, but which evidently was not approved. A.H. did not read any of the disclosures, but if she had, she certainly would have been more confused than enlightened.

In any event, she was only able to pay the new note for four months. At the beginning of the third month of default, she received a notice of foreclosure. In Tennessee, all that a creditor must do in order to foreclose is to place an advertisement of the sale in a newspaper of general circulation "at least three (3) different times" with the first publication "at least twenty (20) days previous to the sale."[103] The sale can then be conducted on the court house steps without further ado. Although A.H. had numerous defenses to raise concerning violation of HOEPA and Truth in Lending in connection with the loan, the procedure she needed to follow to raise these claims was significantly more arduous than that faced by the lender in foreclosing. Even discounting the fact that A.H. is disabled

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[102] More than half of those who file for bankruptcy are homeowners, and the profile obtained from studies of homeowners who file for bankruptcy suggests that the mortgages on their homes are higher than those of homeowners in the general population and that they have a lower income from which to pay for them. TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 129-31 (Oxford University Press 1989).

[103] *Supra* note 100.

and confined to a wheelchair or walker, the fact that she does not own an operable motor vehicle to use for transportation, and the fact that her speech is somewhat slurred as a result of the strokes, making telephone communication difficult, one can imagine that, for the average elderly person, being confronted with the burden of filing an extremely complex lawsuit raising a multitude of federal claims within a three-week time frame with no funds to retain an attorney is overwhelming. Fortunately, A.H. was able to secure legal assistance from Memphis Area Legal Services, Inc., the local legal services program, through its Fair Housing Unit, assisted by student attorneys working at the University of Memphis Elder Law Clinic. But a cursory glance at the statistics concerning the number of persons eligible for free legal services versus the number of attorneys funded to represent those persons will make it abundantly clear just how fortunate A.H. was to have received such legal assistance.[104] The inescapable conclusion is that the majority of elderly homeowners who have entered into high cost mortgages will lose their homes without an opportunity to raise the claims or seek the relief afforded them under HOEPA.

2. Problems of Proof

In addition, even if a lawsuit is filed, problems of proof are inherent with respect to demonstrating a violation of HOEPA's advance disclosure requirements. In *Newton*, the defendants produced disclosure forms that bore pre-printed, computer-generated dates three days in advance of closing, complete with the plaintiffs' signatures.[105] In the section establishing the right to rescission under Truth in Lending and HOEPA, the statute provides that a signed disclosure notice creates a "rebuttable presumption" of receipt or delivery.[106] Without any consideration or discussion of this presumption, the *Newton* court simply dismissed the computer-

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[104] According to testimony presented by Douglas S. Eakeley, Chairman, Legal Services Corporation, before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the House Appropriations Committee, some 4,300 legal services lawyers must represent thirty-five million indigent people, which would translate into a per attorney caseload of over 8100 individuals if all were to in fact apply for assistance. DOUGLAS S. EAKELEY, F2000 COMMERCE-JUSTICE-STATE APPROPRIATIONS CONGRESSIONAL TESTIMONY (presented 3/3/99). In addition, as Mr. Eakeley's testimony starkly demonstrates, elders must compete for legal services with a myriad of other low-income populations equally as vulnerable and deserving. *Id.* For the fiscal year 2000, for example, Legal Services will place special emphasis on providing legal assistance to women and children victimized by domestic violence.

[105] Newton, 24 F. Supp. 2d at 448-49.

[106] 15 U.S.C. §1635(c) provides as follows:

> Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

generated form entirely, holding that "the printed date is not proof that the notice was in fact delivered or signed by the customer on that date."[107] Although this perfunctory approach was certainly beneficial to the plaintiffs in *Newton,* the court's failure to recognize or deal with the statutory presumption at all may vitiate the persuasiveness of the *Newton* opinion on this issue for purposes of future decisions. Fortunately, the issue was revisited recently in *In re Jackson v. U.S. Bank National Association Trustee, et al.*,[108] which focuses on the "does no more than" language introducing the presumption.[109] The court in *Jackson* explicitly held that the production of signed, dated disclosures did not conclusively establish the fact of timely delivery, but rather, "did no more than create a rebuttable presumption of delivery thereof, "which could be "rebutted by the 'testimony of a debtor that the disclosures were not given . . . ."[110] The court went on to state that rebuttal of the presumption shifted the burden back to the lender to "produce some positive evidence that delivery" actually occurred.[111]This explicit analysis supports the holding in *Newton,* because it appears that the plaintiffs in each instance went forward with sufficient proof to rebut the presumption. In Margaret Newton's case, the court noted that the testimony given by the loan officer concerning his personal delivery of the notice to the plaintiff's home was not "credible" due to several peculiarities in the described delivery, as well as the fact that the loan officer's testimony on another point was contradicted by that of the closing attorney.[112] In the other two cases, the court was troubled by vague testimony from the lenders' employees and the defendants' reliance on testimony showing "conformity with business practice" with respect to alleged delivery of the advance notices.[113] The court basically refused to credit such testimony absent a showing of "procedures designed to ensure that delivery would in fact take place."[114]

Existing case law dealing with the presumption issue within the context of Truth in Lending holds that an affidavit from the borrower affirmatively denying delivery is enough to create "a genuine issue of material fact" sufficient to withstand summary judgment.[115] On the other hand, the presumption has also been held to constitute prima facie proof of delivery and at least one court has held that it is not rebutted by unsupported allegations contained in the pleadings.[116] One can only

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[107] Newton, 24 F. Supp. 2d at 449.

[108] 245 B.R. 23 (Bankr. E.D. Pa. 2000).

[109] *Id.* at 30. *See also* Williams v. Gelt Financial Corporation, 237 B.R. 590, 594 (Bankr. E.D. Pa. 1999).

[110] *In re* Jackson, 245 B.R. at 30.

[111] *Id.*

[112] Newton, 24 F. Supp. 2d at 449

[113] *See id.* at 449-50.

[114] Procedures contemplated by the court included scheduling of follow-up appointments for delivery of the three-day HOEPA advance disclosures and/or a log book to record the date, time, and identification of the person actually making such deliveries. *Id.* at 450.

[115] *See* Powers v. Sims & Levin Realtors, 396 F. Supp. 12 (E.D. Va. 1975), *aff'd in part* and *rev'd in part on other grounds*, 542 F.2d 1216 (4th Cir. 1976).

[116] *See* Award Lumber & Constr. Co. v. Humphries, 441 N.E.2d 1190, 1191 (1st Dist.

assume that the court in *Newton* found each plaintiff's affirmative testimony of non-delivery, though uncorroborated, to be sufficient to rebut the presumption and to place the burden back on the defendant to establish that delivery did take place, which the defendant was unable to do, due to the absence of adequate delivery verification procedures. So applied, the statutory presumption shifts the burden to the plaintiff of going forward with evidence to place the issue of delivery in question, but leaves the burden of persuasion squarely on the defendant throughout the litigation. This is good news for elder advocates, as it is often the case that clients either cannot or do not read documents before they are signed and are therefore unaware that signing a particular document with a preprinted date might amount to a certification that the document was delivered three days before it was actually received. Furthermore, the client's testimony generally will be uncorroborated.

Unfortunately, the clear implication of the *Newton* holding is that, if defendant lenders begin to do a better job of establishing delivery verification procedures, it will become increasingly difficult for a client to effectively rebut the statutory presumption, particularly if the client has to admit that he or she cannot read, or did not read, or is sometimes forgetful. Although there is a wealth of anecdotal material suggesting that institutional policies and procedures are often disregarded, and that documentation concerning compliance with the same is routinely falsified in the "real world,"[117] it will be extremely difficult to prove such falsification, especially if the lender creates a procedure and keeps a log expressly for the purpose of HOEPA advance delivery compliance. In fact one can predict a scenario similar to that of the "computer generated date," which was found lacking in *Newton,* except that the lender will now be able to produce entries made in a log book ostensibly documenting delivery and providing a "business record" from which the lender's employees may confidently testify. Obviously, no amount of paperwork and record keeping can guarantee actual delivery, and since HOEPA only requires advance delivery and not any real demonstration that the homeowner understands the disclosure, the efficacy of advance delivery is questionable

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1982); Kicken v. Valentine Production Credit Ass'n., 628 F. Supp. 1008 (D.C. Neb. 1984), *aff'd without op*, 754 F.2d 378 (8th Cir. 1984); Whitlock v. Midwest Acceptance Corp., 76 F.R.D. 190 (E.D. Mo. 1977); College Park Credit Corp. v. Aitkens, 317 So. 2d 238 (La. App. 1975). The College Park case did not actually involve the statutory presumption, but rather discussed the concept of prima facie proof of delivery. Testimony by one borrower that he did not recall the transaction at all, and testimony by the other that she kept all papers concerning the transaction and that no notice was to be found therein were held insufficient to rebut the presumption of delivery created by the borrowers' signatures on the notice document.

[117] The following articles were pulled as a random sampling of the pervasive and varied contexts within which such disregard arises: Jeffrey A. Miller, *Ethics in Employment Law: The Americans with Disabilities Act and the Employee with HIV*, 201 J. BUS. ETHICS 67 (1999); *Business Today Series*, ST. PETERSBURG TIMES, Dec. 9, 1998, *available at* 1998 WL 18310242; Terry Morehead Dworkin, *Buying Silence*, 36 AMERICAN BUS. L.J. 151191 (1998).

anyway. One can anticipate that lenders with alert legal counsel will rush to immediate promulgation of procedures akin to those outlined in *Newton*, designed to withstand future claims of non-delivery.

3. Statute of Limitations

Finally, both Truth in Lending and HOEPA have a three-year maximum right of rescission,[118] as well as a one-year statute of limitations for recovery of damages for statutory violations.[119] Given the length of most mortgage transactions, a year represents a relatively short limitations period, although none of the plaintiffs in *Newton* ran afoul of it.[120] The harsh results are softened somewhat by the three-year extended right to rescind and by several provisions which both broaden the definition of a violation and which allow Truth in Lending violations to be raised defensively when the lender seeks collection and/or foreclosure.[121] Consider, for example, the inclusion of a balloon payment in a high-cost loan with a term of four years which is covered by HOEPA.[122] Because the elderly homeowner will be making monthly installment payments for a four-year period, he or she may not realize until the end of that time, when the balloon payment comes due, that anything is amiss. Since the balloon payment is a violative term,[123] the statutory prohibition could be raised as an affirmative defense to bar enforcement of the provision and/or to allow a set-off of the statutory damages amount in recoupment against the amount of judgment.[124] However, if the homeowner is unable to rescind the loan, he or she will still be liable for the remaining loan amount.

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[118] 15 U.S.C. § 1635.

[119] 15 U.S.C. § 1640(e).

[120] Mrs. Newton fell behind in her mortgage within the first year, the Suttons attempted rescission almost immediately, and Ms. Fowler and Ms. Myers attempted to rescind a little over a year after entering into their mortgages. Newton, 24 F. Supp. 2d at 447-48.

[121] Section 1640(e) provides that the one year limitations period does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.
Id. Section 1635(i) provides that "in addition to any other right of rescission available under this section for a transaction" in the case of a foreclosure, the borrower may also rescind if the mortgage broker fee is not included in the finance charge as required by the law operative at the time the transaction was consummated, or if the form of the notice does not comply with that published by the Federal Reserve Board or the amount of disclosed finance charge varies from the actual amount by more than $35 unless that amount is greater than the amount required to be disclosed.

[122] Balloon payments are large, lump sum payments of principal that remain owing at the end of a loan and are thus due and payable all at once.

[123] Balloon payments are prohibited by HOEPA in loans of less than five years duration. 15 U.S.C. § 1639(e), Reg. Z § 226.32(d)(2).

[124] Campbell v. Machias Savings Bank, 865 F. Supp. 26 (D. Me. 1994); Werts v. Federal Nat'l. Mortgage Ass'n. (*In re* Werts), 48 B.R. 980 (E.D. Pa. 1985); Hohenstreet v. Sterling Nat'l. Land Co., 706 S.W.2d 80 (Mo. Ct. App. 1986).

Understandably, the availability of recoupment or set-off beyond the one-year statute of limitations period for damages naturally led to attempts to raise rescission as an affirmative defense as well.[125] However, in the wake of the Supreme Court decision in *Beach v. Ocwen Federal Bank*,[126] a mortgagor would not be entitled to rescind the loan transaction unless the rescission was raised within the three-year period set out in 15 U.S.C. §1635(f). In *Beach*, the mortgagor couple refinanced the loan they obtained the year before in order to construct their house.[127] Five years later, in 1991, they stopped making payments and by 1992, judicial foreclosure proceedings had commenced.[128] Although the Beaches recognized that the time for raising a claim for rescission offensively had long expired, they attempted to assert the right to rescind as a kind of "recoupment defense" to the impending foreclosure.[129]

The Florida trial court found that the lender violated several provisions of the Truth in Lending Act,[130] and awarded the Beaches $396 in actual damages and $1,000 in statutory damages in recoupment against the mortgage debt owed.[131] This holding remained unchallenged.[132] The trial court declined, however, to award rescission, finding that the right to rescind "expired" in 1989, three years after the loan was consummated.[133] The Florida intermediate appellate court and the Florida Supreme Court both upheld the trial court's judgment.[134] The U.S. Supreme Court granted certiorari to address the "split" among state and federal courts[135] that existed concerning the issue, and ruled squarely on the side of the Florida Supreme Court, finding that the "shall expire" language of 15 U.S.C. §1635(f) defined the

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[125] *See* Barsky v. Commercial Credit Corp. (*In re* Barsky), 210 B.R. 683 (Bankr. E.D. Pa. 1997); Botelho v. Citicorp Mortgage, Inc. (*In re* Botelho), 195 B.R. 558 (Bankr. D. Mass 1996); Shaw v. Federal Mortgage & Reinvestment Corp. (*In re* Shaw), 178 B.R. 380 (Bankr. D. N.J. 1994); Federal Deposit Ins. v. Ablin, 532 N.E.2d 379 (Ill. App. 1988).

[126] 523 U.S. 410 (1998).

[127] *See id.* at 412.

[128] Pursuant to FLA. STAT. ANN. § 702.01 (West 1998), "all mortgages shall be foreclosed in equity" by means of a mortgage foreclosure action brought in chancery court.

[129] "The Beaches acknowledged their default but raised affirmative defenses, alleging, inter alia, that the bank's failure to make disclosures required by the Truth in Lending Act gave them the right under 15 U.S.C. § 1635 to rescind the mortgage agreement." Beach, 523 U.S. at 410.

[130] Specifically, the lender failed to disclose properly and accurately (1) the amount financed, in violation of § 1638(a)(3); (2) the finance charge, in violation of § 1638(a)(3); (3) the annual percentage rate, in violation of § 1638(a); (4) the number, amounts, and timing of payments scheduled to repay the obligation, in violation of 15 U.S.C. § 1638(a)(6); and (5) the total amount of payments, in violation of § 1638(a)(5). Beach, 523 U.S. at 413 n.3.

[131] *See id.* at 414.

[132] *See id.*

[133] *Id.* at 411.

[134] *See id.*

[135] *Truth in Lending: Supreme Court Limits Rescission to Three Years*, 28 REAL EST. L. REP. 2 (Nov. 1998); see listing of cases *supra* note 125.

parameters of the right to rescission itself, and limited the right to a three-year maximum time frame.[136]

The implications for elderly clients are staggering. Going back to the prohibited balloon payment example referred to above, the three-year extended rescission period may well expire before the elderly mortgagor understands the consequences of his or her home equity loan. Or consider F.B. and M.B., two elderly homeowners in their sixties, who entered into a $30,400 home equity loan for a term of ten years in order to finance some remodeling work in the kitchen and bathroom of their thirty-year old house. At the end of the ten-year period, the total amount of payments made on the loan will equal $60,813.43, yet less than eight percent of the principal balance of the loan will have been paid off and a balloon payment of $28,066.17, will be due. If the loan had been for a period of five years or less, the balloon payment would have been illegal. As it is, it is *not* illegal. However, other Truth in Lending and HOEPA violations do exist within the loan. Under the anomalous result reached in *Beach*, F.B. and M.B. may raise a claim for statutory damages by way of recoupment, so as to reduce the amount they owe. However, they are precluded from rescinding the transaction and thereby preventing the mortgagee from foreclosing. The clear message is that after the three-year rescission period, the lender wins, and the debtor loses, even if successful Truth in Lending claims are affirmatively raised in defense against foreclosure.[137]

Notwithstanding the preceding discussion, rescission *may* still be available if a state's law provides for rescission as a recoupment defense based on the sort of violations contemplated by the Truth in Lending Act, despite the expiration of three years.[138] In *Fidler v. Central Cooperative Bank*,[139] the mortgagors had entered into a series of loan transactions, beginning with an original refinancing of their home for $32,500 in 1983 and culminating with an Adjustable Rate Mortgage loan for $80,000 in 1987. The Fidlers subsequently defaulted on the loan and filed bankruptcy in order to avoid foreclosure.[140] The Fidlers further initiated an adversary proceeding in bankruptcy against the lender, raising various Truth in Lending violations and seeking rescission.[141] Relying on the suggestion in Justice Souter's majority opinion in *Beach*, the Bankruptcy Court expressly found that Massachusetts had created a right to rescind on grounds analogous to those found in the Truth in Lending law. Since the right created under Massachusetts law did

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[136] Beach, 523 U.S. at 414-15.

[137] As was observed in the November, 1998 edition of the Real Estate Law Report, "the Beach decision represents the first time since June 1981 that the United States Supreme Court has ruled on a substantive Truth in Lending issue" and this decision "is being greeted with relief by the residential mortgage industry." *Truth in Lending: Supreme Court Limits Rescission to Three Years*, *supra* note 135, at 2.

[138] Beach, 523 U.S. at 418 n.6.

[139] 226 B.R. 734, 735 (Bankr. E.D. Mass. 1998).

[140] *See id.*

[141] *See id.*

not contain the express time limit contained in the federal law, it provided a justifiable basis upon which the Fidlers could predicate a defense in recoupment.[142] Only three other states[143] have enacted similar legislation, so this option at present is of limited application.

Since HOEPA in no way alters the three-year expiration of the rescission right under Truth in Lending, elderly homeowners who manage to keep from defaulting for the first three years of the loan, unaware that they have been victimized by predatory loan practices, will find themselves caught in a conundrum. As in the first example above, it will be quite conceivable that a homeowner faced with an illegal balloon payment will not be able to rescind the transaction. Although the homeowner may be able to raise the violation as an affirmative defense in recoupment to set off against the amount owed to the mortgage creditor, that will be small comfort in light of the fact that the lender will continue to have the power to foreclose in order to collect payments that remain owing on the loan, which the homeowner no longer has the right to rescind.

4. Disregard of Repayment Ability

In addition, although providing a remedy after the fact is salutary, it is clear that Congress also intended for HOEPA to have a deterrent effect on the proliferation of abusive high-cost home equity lending.[144] One of the major hallmarks of so-called predatory home equity lending is the extension of credit without regard to the borrower's ability to repay.[145] Congressional testimony was replete with examples of elderly homeowners who had accrued considerable equity in their homes as a result of stable home ownership and rising real estate values, only to see it all evaporate as a result of the crushing burden of home equity loans they were unable to pay.[146] The consequences of "dislocation and destabilization" of entire communities justified the inclusion of a statutory prohibition against lenders engaging in "a pattern and practice of extending credit . . . without regard to repayment ability."[147]

The plaintiffs in *Newton* raised the pattern and practice claim, alleging that the Defendant United Companies Financial Corporation had extended loans to each of

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[142] *See id.* at 737.

[143] Maine, Connecticut, and Oklahoma.

[144] *See Problems in Community Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 103d Cong., 1st Sess. (1993); *Hearings on S924 Home Ownership and Equity Protection Act, before the Senate Banking Comm.*, 103d Cong., 1st Sess. (1993); The Home Equity Protection Act of 1993, *Hearings on H.R. 3153 Before the Sub-comm. on Consumer Credit and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 103d Cong., 2d Sess. (1994).

[145] H.R. CONF. REP. NO. 103-652, at 160 (1994).

[146] *See id.*

[147] 15 U.S.C. § 1639(h); Reg. Z § 226.32(e)(1).

them without any realistic assessment of their capacity to repay the loan.[148] The plaintiffs introduced expert testimony directed at the defendant's underwriting guidelines. These guidelines did at least purport to require evaluation and analysis of each loan applicant's income, monthly debt, residual income, debt ratio and loan-to-value ratio.[149] The company also utilized a separate "underwriting department" that processed all loan applications no matter where the loan originated.[150] Data concerning loan processing was submitted for a six-month period from the three separate branches that had originated plaintiffs' loans. Of the 358 substantive denials, sixty-three (or eighteen percent) were income related, while 144 (or forty percent) were collateral-related.[151] The guidelines in effect required applicants to have a minimum residual income of $400 per household member *after* house payment and after ongoing monthly debt obligations.[152] However, the residual income criterion could be waived if the applicant had shown the ability to make payments of a comparable size on a prior loan.[153] The Defendant admitted that this standard was not based on any research or market analysis; instead the company was simply adopting as written policy what it was doing in practice when dealing with low-income applicants.[154]

The Plaintiffs' experts testified that the defendant's residual income guidelines were unrealistically low and that the company's default and delinquency figures were "extremely high," which the experts deemed to be an indication of "an underwriting pattern of making loans to people who do not have the ability to repay such loans."[155] Despite such testimony, the court declined to find that the plaintiffs had sustained their burden of establishing a pattern and practice of extending mortgage credit without regard to ability to repay.[156]

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[148] Plaintiffs Newton, Suttons and Fowler raised this claim, plaintiff Myers' loan, it will be remembered, was consummated prior to the effective date of HOEPA. Mrs. Newton, who is seriously disabled, lives with her adult daughter and two grandchildren, with a household income from all sources of $1360. Considered as a household of four, Mrs. Newton would not have qualified for the loan, so the lender instead processed her loan as if she were living alone. The Suttons had a monthly income of $831.40, plus some occasional income from rental property, which was not considered by the lender in approving the loan. Ms. Fowler had an income of $833, monthly and had a minor son living with her. The lender processed her loan as if she had no dependents. Newton, 24 F. Supp. 2d at 453.

[149] *See id.* at 452.

[150] *Id.*

[151] The three branches processed a total of 1163 applications during a six-month period from July, 1996 to December, 1996. Of that total, 306 loans were originated and 855 were denied. However, only 358 of the denials were deemed "substantial," as 497 of them were denied for such reasons as "incomplete applications," "cancelled," "lack of contact with customer," etc. *Id.* at 452-53.

[152] *See Id.* at 453.

[153] *See id.*

[154] *Id.*

[155] *See id.* at 454.

[156] *See* Newton, 24 F. Supp. 2d at 456-57.

Because HOEPA itself contains no guidance as to the standard for determination of the existence of a "pattern or practice," and because no case precedent existed on the issue, the court in *Newton* looked to case law arising out of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e6(a).[157] The court noted that under Title VII, demonstration of a pattern and practice requires the plaintiff to show more than the "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[158] In other words, the burden is on the plaintiff to prove by a preponderance of the evidence that the violative conduct constitutes the company's usual and standard way of doing business, the norm rather than the exception. While recognizing that this standard placed a "harsh and perhaps unfair burden on plaintiffs," the court found that the plaintiffs had only been able to show that the defendant had apparently disregarded its own guidelines in approving their loans, and that the plaintiffs had not been able to show that a "representative sample" of loans approved by the defendant were so approved without regard to repayment ability.[159]

On a positive note, the court explicitly rejected the defendant's assertion that the mere existence of written underwriting standards was sufficient proof of the absence of a pattern and practice of lending without regard to repayment ability.[160] In its discussion of this assertion, the court noted that lenders could not simply rely on the promulgation of standards which were either illusory or irrelevant with respect to assessment of repayment ability, or that were simply disregarded in actual lending decisions.

By the same token, however, the court declined to infer a pattern and practice of lending without regard to repayment ability from the experiences of the three individual plaintiffs. The court noted that the Federal Reserve Board and HUD had advocated amending HOEPA to remove the "pattern and practice" requirement and allow individual consumers to recover based on the individual instances of irresponsible lending.[161] As of this writing, no such amendment has come to pass, and individual plaintiffs are still therefore faced with the formidable burden of proving "a pattern and practice" when all information relevant to the issue remains firmly in the hands of the opposing party, and the expense of extensive discovery and expert testimony may prove prohibitive.

B. *Prohibition*

1. Usury

During the 1960s, several states passed usury laws directed at home equity loans,

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[157] *See id.* at 456.

[158] *Id.*

[159] *Id.*

[160] *See Id.*

[161] *Id.*

second mortgages, and home improvement loans.[162] These laws prohibited the charging of interest, points, and fees beyond certain limits in such loans, and they prohibited the use of acceleration clauses or prepayment clauses, and sometimes required certain disclosures.[163] Then in 1980, the passage of DIDMCA pre-empted all state laws limiting "the rate or amount of interest, discount points, finance charges, or other charges" that could be charged in connection with loans secured by a "first lien" on residential real property.[164] In response, there was a scramble to achieve the "most favored lender" status of first lienholder and a significant increase in interest rates and other finance charges by lenders across the board who achieved that status.[165] States did have the right to "opt out" of the DIDMCA interest pre-emption through April 1, 1983, and have a continuing right to opt out with respect to pre-emption of regulations concerning points or pre-paid charges. About one third of the states have exercised the right to opt out either partially or wholesale.[166] Next, in 1982, Congress passed the Alternative Mortgage Transaction Parity Act (AMTPA),[167] which pre-empted state-imposed usury limits on loan structure in order to facilitate "variable rate" and other creative lending vehicles.[168] AMTPA did not pertain to interest ceilings as such, but rather pre-empted state prohibitions of balloon payments, variable interest rates, etc. Again, states had the option not to be governed by the statute, but only a handful of states exercised the option by the October 18, 1995 expiration date.[169]

As a consequence of federal pre-emption, the viability of state usury laws as an effective tool to combat predatory lending on a state level has been compromised in most states. Given that the usury ceilings set by most state laws were generally so high that even those loans defined as "high cost" under HOEPA would not be prohibited, the loss is more illusory than real. In a free market economy, where interest is used to regulate supply and demand for currency, efforts to artificially cap the amount that can be charged generally meet with political resistance unless the amounts are so egregious as to shock the conscience of virtually everyone. In

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[162] Russell G. Donaldson, Annotation, *Construction and Application of Statutes Expressly Protecting Borrowers in Second Mortgage Transactions*, 43 A.L.R. 4th 675, 682-86 (Supp. 1999). States discussed in the Annotation include Delaware, Georgia, Maryland, Massachusetts, New Jersey, North Carolina, Rhode Island, Texas, and Vermont.

[163] *Id.* at 704-20.

[164] *See* 12 U.S.C. § 1735f-7a (1989).

[165] KATHLEEN KEEST, NATIONAL CONSUMER LAW CENTER, THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES 63 (1995).

[166] *Id.* at 67. Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, Puerto Rico, South Carolina, South Dakota and Wisconsin have opted out either completely or partially.

[167] 12 U.S.C. § 3801 (1989).

[168] *See* Grunbech v. Dime Sav. Bank of New York, FSB, 74 F.3d 331, 343 (1st Cir. 1996), (the purpose of AMTPA is to pre-empt state bans on alternative mortgage transactions, including adjustable rate mortgages and negative amortization).

[169] KEEST, *supra* note 165, at 67. Arizona, Massachusets, Maine, New York, South Carolina, and Wisconsin are the only states to have opted out of AMTPA.

addition, limitations on the amount of interest that can be charged will predictably lead to inflation of the other finance charges not capped by the usury laws, and thus reduce, if not eliminate, the positive benefit to the consumer.

2. Discrimination

To the extent that elderly members of minority communities are victimized by "reverse redlining,"[170] Sections 1981 and 1982 of the Civil Rights Act[171] and the Fair Housing Act[172] may provide avenues of relief.[173] No court as yet has ruled on such a claim, but a case asserting that reverse redlining violates the Fair Housing Act is currently pending in the federal district court for the District of Columbia.[174] Consumer advocates believe that cases granting relief under the Civil Rights and Fair Housing Acts for outright discrimination within the context of overt redlining[175] by mortgage companies and other lenders imply a right to challenge discriminatory "reverse redlining" practices. [176] Obviously, this cause of action will only be available to those who can demonstrate that unlawful discrimination has been a factor in the defendant lender's decision to extend credit terms less favorable than would otherwise be extended.[177] Prevailing plaintiffs can obtain equitable relief, including injunctions, compensatory and punitive damages, attorneys' fees, and costs.[178]

Reliance on the Civil Rights Acts, however, presupposes that all those victimized are citizens[179] and that the victim belongs to a group that is identifiable by "ancestry

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[170] In the context of discrimination suits "reverse redlining" refers to "lending practices that target minority communities, employing interest rates and fee scales that are significantly higher than those prevailing in white communities." *See* Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. POV. L. & POL'Y 73, 77 (1999).

[171] 42 U.S.C. §§ 1981, 1982.

[172] The Fair Housing Act, 42 U.S.C. § 3601 et seq., makes it "unlawful . . . [to] otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a).

[173] Lopez, *supra* note 170, at 88-90.

[174] Clyde Hargraves, et al. v. Capital City Mortgage Corp. et al., Civ. No. 98-1021(JHG/AK) (D. D.C. April 24, 1998). As of May 9, 2000, a Motion for Summary Judgment filed by the defendant lender was still awaiting disposition.

[175] The term "redlining" refers to a pattern of discrimination or differential treatment "in which financial institutions refuse to make mortgage loans, regardless of credit record of the applicant, on properties in specified areas because of alleged deteriorating conditions." Stephen Trzcinski, *The Economics of Redlining: A Classical Liberal Analysis*, 44 SYRACUSE L. REV. 1197, 1200 (1993).

[176] *See* Evans v. First Federal Savings Bank, 669 F. Supp. 915, 919 (N.D. Ind. 1987); Mackay v. National Ins. Co., 724 F.2d 419, 421 (4th Cir. 1984).

[177] Lopez, *supra* note 170, at 89.

[178] 42 U.S.C.§§ 3613(c), 1983. *See also* Bass by Lewis v. Wallenstein, 769 F.2d 1173 (7th Cir. 1985).

[179] Only citizens can sue under 42 U.S.C. § 1982, which reads: "All citizens of the United

or ethnic characteristics."[180] Age is not a basis for a sustainable cause of action under sections 1981 and 1982[181] and neither is it a basis for recovery pursuant to the Fair Housing Act.[182] Thus, claims against predatory lending practices targeted at the elderly will only be addressed to the extent that elders are also members of a recognized "race, color, religion," etc.[183] One federal district court has held that discriminatory marketing practices designed to exclude minorities do not violate the Civil Rights Acts, but the court did not rule on whether such practices would violate the Fair Housing Act.[184] Thus, there is no certainty that aggressive lending tactics aimed at the elderly would be prohibited by the Fair Housing Act, even if elders constituted a class covered by the statute.

3. North Carolina Initiative

In July, 1999, North Carolina passed the "Prohibit Predatory Lending Act," part of which applies to all consumer home loans and part of which defines and regulates high-cost home loans.[185] As of October 1, 1999, it limits and caps the types of fees that can be charged by lenders and outlaws the imposition of prepayment penalties in home loans of $150,000 or less.[186] Finally, the law proscribes "flipping," defined in the statute itself as "the making of a consumer home loan . . . when the new loan does not have reasonable, tangible net benefit to the borrower considering all of the circumstances . . ."[187] All of these provisions should inure to the benefit of elderly, poor homeowners, along with all other

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States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[180] Lopez, *supra* note 170, at 90.

[181] *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 27.3(1), 27-9 (1991).

[182] 42 U.S.C. § 3604, which prohibits discrimination based on "race, color, religion, sex, handicap, familial status, or national origin." *See also* JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION § 2.06, 51-52 (1995).

[183] *Id.*

[184] *See* Spann v. Colonial Village, Inc., 899 F.2d 24, 35 (D.C. Cir. 1990), *cert denied*, 498 U.S. 980 (1990). Spann dealt with allegedly discriminatory advertising in the form of print media and television spots using white models only to depict potential condominium owners. The trial court's dismissal of plaintiffs' claims under 42 U.S.C. §§ 1981 and 1982 was upheld by the court of appeals, but the fair housing claims were remanded for further proceedings.

[185] *See* Ch. 332, 1999 N.C. Sess. Laws § 1149 (1999).

[186] *See* N. C. GEN. STAT. § 24-1.1(A)(b) (1999). This provision of the statute actually amends existing North Carolina law that formerly outlawed prepayment penalties on loans of $100,000 or less. *See* Philip A. Lehman and L. McNeil Chestnut, *Summary of North Carolina's Predatory Lending Act in* PREDATORY PRACTICES AND THE FAIR HOUSING AND LENDING LAWS (John Marshall School of Law, Fair Housing Legal Support Center, Conference materials, April 14-15, 2000).

[187] N. C. GEN. STAT. § 24-10.2(c) (1999).

consumer homeowners.

In addition, as of July 1, 2000, the Act prohibits financing of single premium insurance policies for credit life, disability, unemployment, etc.[188] As of that date, the Act will address "high cost home loans," which are defined a bit differently than under HOEPA.[189] The new North Carolina law ties the class of covered loans to the current Federal National Mortgage Association loan amount[190] or $300,000, whichever is less. Like HOEPA, if the loan has an APR that is ten percentage points above the rate being earned by comparable treasury securities, the loan is deemed "high cost."[191] In addition, if the loan is $20,000 or more, the loan is high cost if the total points and fees exceed five percent of the loan amount.[192] For loans under $20,000 the threshold amount is eight percent of the loan amount or $1,000 whichever is less.[193] Calculation of points and fees excludes certain "bona fide" discount points and prepayment fees.[194] The complexity of this definition exceeds that of HOEPA and this alone may limit the effectiveness of the law. There is also the possible problem of federal pre-emption, which North Carolina may not be able to circumvent as neatly as Texas did with its constitutional provisions, as will be discussed more fully in Section C below.

In any event, once a loan has been identified as a high-cost loan, the following limitations and prohibitions apply: a) the lender may not unilaterally accelerate the indebtedness, except upon default of the borrower; b) the loan may not contain any

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[188] N.C. GEN. STAT. § 24-10.2(a)— (b) (1999) read as follows:

(a) For purposes of this section, the term 'consumer home loan' shall mean a loan in which

(i) the borrower is a natural person,

(ii) the debt is incurred by the borrower primarily for personal, family, or household purposes, and

(iii) the loan is secured by a mortgage or deed of trust upon real estate upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families which is or will be occupied by the borrower as the borrower's principal dwelling.

(b) Notwithstanding the provisions of G.S. § 58-57-35(b), it shall be unlawful for any lender in a consumer home loan to finance, directly or indirectly, any credit life, disability, or unemployment insurance, or any other life or health insurance premiums; provided, that insurance premiums calculated and paid on a monthly basis shall not be considered financed by the lender.

[189] *See* N. C. GEN. STAT. § 24-1.1E(4) (1999).

[190] As of January 1, 2000, the Federal National Mortgage Association loan limit is $252,700. http://www.freddiemac.com/news/archives1999/2000limt.htm.

[191] N.C. GEN. STAT. § 24-1.1E(6)(a) (1999).

[192] N.C. GEN. STAT. § 24-1.1E(6)(b)(I) (1999).

[193] N.C. GEN. STAT. § 24-1.1E(6)(b)(ii) (1999).

[194] N. C. GEN. STAT. §§ 24-1.1E(5)(e), 24-1.1E(6)(b)(1)-(3), 24-1.1E(6)(c) (1999).

payment that is more than double the regular monthly payment, thus effectively preventing balloon payments; c) the loan may not provide for negative amortization; d) the interest rate may not be increased following default; e) the lender cannot require more than two payments to be paid in advance; f) no loan may be consummated unless the borrower receives approved housing counseling; g) no loan may be extended unless the lender "reasonably" believes that the borrower will be able to repay the loan; h) financing of fees or charges payable to third parties is prohibited; i) a lender may not charge fees in connection with the refinancing of prior loans with the borrower; and j) payments to home improvement contractors must be jointly payable to the borrower or payable to a third-party escrow agent.[195] Violations of the law are declared unfair and deceptive practices, and may be enforced by the state attorney general, the state bank commissioner, or the borrower.[196] The borrower may seek to recover twice the interest paid under the loan or an award of treble damages.[197]

Because of the overlap with HOEPA, the North Carolina act may well run afoul of federal pre-emption. North Carolina opted out of DIDMCA, but not AMTPA, so to the extent the law impinges on creative financing structures, with limits on balloon payments and financing of fees, it may be deemed to conflict with federal law. However, the statute does contain a severability clause to preserve the remainder of the Act should the high-cost loan portions be deemed invalid.[198] Perhaps the most beneficial feature of the North Carolina law is its creation of a Legislative Research Commission to study the impact and effectiveness of the Predatory Lending Law.[199] Data collected by the Commission will be valuable to everyone concerned about constructively and successfully addressing this issue.

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[195] N.C. GEN. STAT. § 24.1.1E(b)-(c) (1999).

[196] N.C. GEN. STAT. § 24-1.1E(d) (1999).

[197] *Id.*

[198] N.C. GEN. STAT. § 24-1.1E(f) (1999).

[199] 1999 N. C. Sess. Laws 332, §7, which reads as follows:

The Legislative Research Commission shall study the implementation and enforcement of this act including:

(1) Whether the provisions of this act have a measurable effect on the availability of credit in the State:

(2) Whether the act is successfully reducing the predatory lending practices proscribed by the act; and

(3) Whether there are specific circumstances in which consumers would benefit from permitting a lender to finance credit insurance premiums, which practice is prohibited by G.S. 24-10.2(b). The Commission shall report their findings and recommendations on the issue of financing credit insurance premiums to the 2000 Regular Session of the 1999 General Assembly. The Commission may report their findings and recommendations to the 2001 General Assembly and shall make a final report to the 2002 Regular Session of the 2001 General Assembly.

C. *Procedural Safeguards*

If straightforward prohibition is not feasible to prevent consummation of predatory loans, the imposition of procedural safeguards designed to impede the enforcement and collection of the loan obligation should be considered. Examination of data obtained from the Predatory Lending Prevention Project questionnaire suggests that in states where judicial foreclosure is the rule, rates of foreclosure are generally much less than in those states allowing summary power of sale disposition.[200] The foreclosure rates reported by housing counseling agencies in each state are as follows (where two rates were reported from one state, both are listed):

Power of Sale States		Judicial Foreclosure States	
Alabama	1%	Alaska	5%
D.C.	0%	California	10%
Hawaii	70%	Colorado	.01%
Massachusetts	15%, 20%	Kansas	50%
Mississippi	5%, 15%	Indiana	25%
Montana	10%	Illinois	1%
New York	5%	Louisiana	5%
Oregon	0%	Maryland	1%
Rhode Island	50%	North Carolina	5%
Tennessee	20%, 60%	Ohio	1%
Utah	2%, 10%	Pennsylvania	25%
Vermont	5%, 40%		

As the foregoing shows, although some power-of-sale states reported phenomenally low foreclosure rates, the highest reported rates in states that allowed power of sale were substantially higher than any rates reported for those states requiring judicial foreclosure. Although intuitively it would seem that the increased procedures required by judicial foreclosure states would reduce the rate of foreclosure, statistical analysis of the two samples does not reveal any significant difference between the two groups, meaning that the difference in rates reported is probably due to chance.[201] Thus, there is no objective basis for requiring judicial foreclosure proceedings as a prerequisite to foreclosure of home equity loans or refinancings of purchase money mortgage loans on residential, owner-occupied property, as the data collected do not support the conclusion that such procedures are an effective means of cushioning against the adverse impact of predatory lending. In addition, since a majority of jurisdictions now allow non-judicial foreclosure, such a recommendation will definitely be moving against the trend

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[200] Of the forty-four housing counseling agencies responding, 17 were located in states allowing power of sale foreclosure, while 11 were located in judicial foreclosure states.

[201] The statistical analysis was outlined by Professor Jack Levin for use with small samples of unequal size. *See* JACK LEVIN, ELEMENTARY STATISTICS IN SOCIAL RESEARCH 149-57 (1973). Calculation of the difference between these samples is found in Appendix E.

toward expediting and streamlining collection procedures and will undoubtedly be opposed by lenders.[202]

One final option is the prohibition of home equity loans altogether, at least for those 60 and over, perhaps in a constitutional provision similar to that which existed in Texas until 1997. The Texas provision was enacted into law in 1839, following the "Panic of 1837," which resulted in the loss of many Texas homes. [203] By 1876, the Texas Homestead provision became a part of the Texas Constitution exempting the "homestead"[204] automatically from involuntary sale to satisfy debts. This exemption did not include foreclosure of the purchase money loan, sale for taxes due on the property, or for materialmen's or mechanic's liens for work done on the property.[205] Thus, home improvement loans were always available, despite the homestead exemption, but home equity loans for purposes other than home improvement were not an option, because lenders were unwilling to extend credit while Texas law precluded foreclosure as a collection tool. As a result, Texans were deprived of the tax benefits associated with home equity loans, referred to in Section II above,[206] and were prevented from accessing an estimated $123.4 billion worth of home equity value.[207] Elderly Texans were further prevented from participating in so-called "reverse mortgage" or Home Equity Conversion mortgages discussed more fully below.

Not surprisingly, political pressure grew to eliminate this constitutional impediment to a broader panoply of home equity lending alternatives.[208] Those advocating the change emphasized the dual benefits of tax deductibility and lower interest rates that borrowers gain from home equity as opposed to other types of credit (e.g., personal unsecured loans, credit cards, installment sales contracts, etc.). However, as already noted above, for many elderly people living on fixed Social Security incomes, the "tax benefit" will be minimal to non-existent and the promise of a low interest rate may be illusory if the borrower ends up dealing with a sub-prime lender that charges additional up-front interest points and fees and packs the transaction with credit life premiums and other products not needed by, or truly beneficial to, the borrower.[209] Nevertheless, supporters of a constitutional amendment to allow home equity lending further argued that the homestead

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[202] DEANNE LOONIN ET AL., NATIONAL CONSUMER LAW CENTER, REPOSSESSIONS AND FORECLOSURES 436-37 (4th ed. 1999).

[203] Charles C. Boettcher, *Taking Texas Home Equity for a Walk, But Keeping It on a Short Leash*, 30 TEX. TECH. L. REV. 197, 199 (1999).

[204] Defined in a rural area as "not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon" and in an urban area as a "lot or lots amounting to not more than one acre of land, together with any improvements on the land." *See* TEX. CONST. art. XVI, § 51.

[205] TEX. CONST. art. XVI, § 50.

[206] *See supra* text accompanying notes 51-54.

[207] Boettcher, *supra* note 203, at 207-12.

[208] *Id.* at 211, 215-18.

[209] Brennan, *Predatory Mortgage Lending Practices Directed Against the Elderly*, *supra* note 54, at 1-2.

restrictions were "paternalistic, outdated and rooted in the needs of a different era."[210] While it may be true that the prohibition of home equity lending is paternalistic as applied to the population in general, it does not seem paternalistic to attempt to curb lending practices that victimize the elderly. Advocates of the constitutional amendment questioned the assumption that increased home equity lending would lead to increased foreclosures, noting that Texas already "ranked among states with the highest delinquency and foreclosure rates despite its lack of home equity lending."[211] The lack of any direct correlation between foreclosure rates and home equity loans and/or refinancings is corroborated by data obtained from housing counseling agencies as part of the PLPP study,[212] but this may be due to the paucity of data that accurately classifies foreclosures according to loan type.[213] Finally, to the extent that home equity loans are second mortgages as opposed to first priority mortgages, the tendency toward foreclosure may be more attenuated because the first lienholder's claim must be satisfied first in the event of foreclosure, meaning that the second or junior lienholder may be left without recompense.

In any event, the Texas Constitution was amended in 1997 to provide that in addition to debts for "the purchase money thereof, taxes due thereon" and "work and material used in constructing improvements thereon," that debts for extension of credit secured by the equity value of the homestead could be foreclosed upon, along with debts incurred as a consequence of a "reverse mortgage."[214] This exception for reverse mortgages does not include an HELOC, or home equity line of credit, which is, in essence, an open-end account that may be accessed or extended from time to time.[215] While relaxing the restriction on the one hand, the constitutional amendment also incorporated a number of extensive consumer safeguards designed to retard any projected stampede of predatory lenders bent on corralling this new bonanza supply of home equity. Although deemed "draconian" and "paternalistic" by some,[216] the new amendment contains the following consumer protections:

a) Voluntary - some of the greatest abuse stemming from so-called predatory lending is compulsory extension of credit by the lender to pay off debts in addition to those applied for by the borrower.[217] This is generally done to

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[210] Boettcher, *supra* note 203, at 211-12.
[211] *Id.* at 213-14.
[212] *See* Appendix C.
[213] The majority of housing counseling agencies responding said that they did not keep statistics concerning the type of loan involved in the foreclosures. Statistics collected in support of the Texas constitutional amendment did not address foreclosure rates per se either, but rather "average non-current rates" of "home equity lines of credit vs. that of all other loans." *See* Boettcher *supra* note 203, at 213-14.
[214] TEX. CONST. art. XVI, § 50(a)(6)-(7).
[215] TEX. CONST. art. XVI, § 50(a)(6)(F).
[216] *See* Boettcher, *supra* note 203, at 228-40.
[217] *See* Newton, 24 F. Supp. 2d at 451.

enable the lender to be first lienholder against the property, and thus attain the most favorable position both under DIDMCA, as discussed above, and for foreclosing on the loan in the event of default. Brokers and others paid on a percentage commission basis may also have an incentive for wanting to increase the principal amount of the loan through sales of insurance and other fee padding schemes.[218] As amended, Article XVI section 50(a)(6)(A) of the Texas Constitution provides that the loan must be "voluntary," in writing, and have the consent of all owners. The voluntariness provision further states that home equity lenders cannot force borrowers to use loan proceeds to pay off other debts.

Although no reported cases applying the "voluntariness" concept have arisen yet in Texas, one can project that some of the same proof problems inherent in Truth in Lending notice delivery cases, may arise, as where the lender may be asserting voluntariness of a refinancing of a first mortgage and payment of credit card debt in addition to funding of a home improvement loan while the borrower steadfastly denies requesting anything beyond the loan amount needed for home improvement. Initial credit applications may become critical documents in determining what amounts borrowers originally sought, and may become increasingly subject to manipulation by lenders. This is particularly true in the case of elderly borrowers, as applications are generally completed by agents of the lender, and simply signed by the borrower, who often signs the form while still blank. It should be noted that the signing of "any instrument in which blanks are left to be filled in" is itself a violation of the Texas Constitution,[219] but obviously the proof problem remains.

Other consumer protections in the new amendment include the following:

b) Indebtedness to Value Ratio - The value of the total indebtedness encumbering the home cannot exceed 80% pursuant to article XVI §50(a)(6)(B) of the amended Texas Constitution. The rationale for this provision is to keep borrowers from overextending themselves but, in practice, it may work more to protect lenders from suffering loss in the event of default, particularly in the case of low-income borrowers.

c) Judicial Foreclosure - Foreclosure on a home equity loan in Texas may only be had by resort to a judicial proceeding, which, while admittedly expedited, is still preferable to the normal power of sale procedures pursuant to a deed of trust. The lender is further restricted from any recovery or recourse beyond the house itself; should there be a deficiency balance following foreclosure, it will be uncollectable.[220] The lender protective aspect of the 80% loan-to-value ratio becomes clearer in light of this anti-deficiency provision.

d) Waiting Period - The amended constitution also mandates a twelve-day

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[218] *See* Brennan, *Predatory Mortgage Lending Practices Directed Against the Elderly*, *supra* note 54, Exhibit A.

[219] TEX. CONST. art. XVI, § 50(a)(6)(Q)(iii).

[220] TEX. CONST. art. XVI, § 50(a)(6)(D).

hiatus between the loan application and closing of the loan, in addition to the three-day rescission period required by Truth in Lending.[221]

e) Cap on Fees - A cap on fees in the amount of three percent of the loan is imposed by the amendment for loan origination and processing fees.[222] To prevent "flipping" to accumulate additional fees, the loan cannot be refinanced more than once a year.

f) Regulating of Lenders - Finally, Article XVI § 50(a)(6)(P)(i)-(v) limits home equity lending to "authorized lenders" either specially licensed by the state to engage in such lending or deemed "sound" and thus exempted from licensure. There can be no prepayment penalties, monthly installments are to be substantially equal to avoid unexpected "balloon" payments, and are to further "equal or exceed the amount of accrued interest . . ." to prevent negative amortization. Additional notice and disclosure requirements are embedded in the amendment as well. There is to be no "confession of judgment" or designation of power of attorney to the lender.[223]

Any failure to comply with the above consumer safeguards results in complete forfeiture by the lender of "all principal and interest" and the unenforceability of the mortgage lien and promissory note.[224] Because the stakes for lenders are high, their incentive to ensure compliance with the constitutional provisions is greatly enhanced.

D. *Expanded Credit Opportunities*

To the extent that prohibitions and restrictions on lending tend to meet with political resistance and may result in unintended consequences limiting seniors' access to credit, examination of avenues to expand the credit options available to the elderly seem promising. Two such options are explained below.

1. Community Reinvestment Act

When first enacted in 1977, the federal Community Reinvestment Act[225], hereinafter CRA, articulated legislative directives that were more aspirational than actual.[226] Statutory ambiguity,[227] combined with lackadaisical enforcement by

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[221] Boettcher notes some ambiguity in the constitutional provision concerning counting of the days: the "starting point" is left undesignated and there is no indication of whether the count is to be of calendar days or business days or whether exclusion of holidays, weekends, etc. is intended. *See* Boettcher, *supra* note 203, at 231.

[222] TEX. CONST. art XVI, § 50(a)(6)(E).

[223] TEX. CONST. art. XVI, § 50(a)(6)(Q)(iv).

[224] TEX. CONST. art. XVI, § 50(a)(6).

[225] 12 U.S.C. § 2901-07 (1994).

[226] *See* Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 292 (1993).

[227] The language within 12 U.S.C. §2903 is illustrative:

federal regulatory agencies reduced the CRA's mandate to eliminate redlining[228] and to redress community disinvestment[229] to mere lip service.[230] The CRA required banks to be responsive to the credit needs of their entire communities, including "low- and moderate-income neighborhoods," and to provide appropriate access to banking services.[231] Since many elderly people are residents of older, decaying neighborhoods,[232] implementation of a positive plan to counteract these adverse lending policies would clearly be advantageous to them, and would reduce, if not eliminate, the market for "predatory" loans.

In 1984, Congress attempted to address mounting criticism concerning lax enforcement of the CRA by passing the Financial Institutions Reform, Recovery and Enforcement Act of 1989,[233] hereinafter FIRREA. FIRREA mandated disclosure by banks of their CRA compliance evaluations to interested members of the public, and its passage spurred promulgation of twelve new CRA compliance factors to be used in rating bank performance.[234] These developments have empowered community-based organizations by providing the ammunition to launch attacks on pending bank applications on grounds of failure to satisfy CRA obligations.[235] In addition, the threat of such challenges has also given lenders an

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(a) In general. In connection with its examination of a financial institution, the appropriate Federal financial supervisory agency shall—

(1) assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution; and

(2) take such record into account in its evaluation of an application for a deposit facility by such institution. Id.(emphasis added). Nowhere in the statute is there any definition of the phrase "low-and moderate-income neighborhoods" or "safe and sound operation. Nor is there any explicit direction as to how regulatory agencies are to "take such records into account" when evaluating an institution's application. *See also* E.L. Baldinucci, *The Community Reinvestment Act: New Standards Provide New Hope*, 23 FORDHAM URB. L.J. 831, 834 (1996).

[228] "Redlining" is the practice of geographic exclusion of potential borrowers employed by a lending institution, whereby the institution determines in advance, without reference to specific lending criteria, that extension of credit to borrowers located in that area, whether commercial or residential, will be unprofitable. *See* Baldinucci, *supra* note 227, at 836-37.

[229] "Community disinvestment" is the practice of taking funds on deposits from one geographic location or community and reinvesting those funds elsewhere. *See id.*

[230] *See id.* at 834.

[231] Macey & Miller, *supra* note 226, at 293.

[232] GALLANIS, *supra* note 2.

[233] Pub. L. No. 101-73, 103 Stat. 183 (1989) (amending 12 U.S.C. § 2906).

[234] These factors were abandoned in 1995 and replaced with a three-part test, evaluating 1) volume and geographic distribution of loans; 2) assessment of actual investments made; and 3) numbers and locations of branches serving the community. Baldinucci, *supra* note 227, at 848.

[235] *Id.* at 297-98. *See also* Allen J. Fishbein, *The Community Reinvestment Act After*

incentive to work with community groups on a voluntary basis, negotiating agreed commitments to fund "flexible, below market rate mortgage products, the use of non-standard underwriting criteria . . . provision of counseling both before and after the loan application process" with the whole program administered on a partnership basis by the lender and the community organization.[236]

At present, however, the elderly have not been a focus of community-based efforts to enforce the CRA. Rather, these efforts have focused primarily on providing greater initial access to home ownership and to small business opportunities.[237] Also, by definition, the elderly most likely to be victimized by predatory lenders are those individuals least able to organize and take advantage of the technical support offered by organizations like ACORN.[238]

In addition, although the Clinton administration has been vocally supportive of CRA,[239] enforcement of the Act is still problematic.[240] From the standpoint of the elderly, who are increasingly being targeted by regional and national subprime lenders operating outside the "traditional community" concept governed by CRA, increased enforcement of the CRA on a local level may be of limited utility.[241] In any event, some critics of the CRA have asserted that the very concept is flawed and counterproductive, and that its continued popularity in some circles is attributable to the way that it has operated to benefit "organized political groups," such as ACORN.[242] However that may be, the fact that the relationship between

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Fifteen Years: It Works, But Strengthened Federal Enforcement It is Needed, 20 FORDHAM URB. L.J. 293, 297-98 (1993).

[236] Attorney Allen Fishbein recounts the extraordinary success of the Association of Community Organizations for Reform Now ("ACORN"), a national organization providing support and representation to low income communities seeking to enforce lender obligations under the CRA. In Brooklyn, Chicago, Dallas, Philadelphia, Phoenix, St. Louis, and Washington, D.C., ACORN has succeeded in establishing the type of negotiated agreement referred to above, substantially enhancing access to affordable mortgages for low-income families. Fishbein, *supra* note 235, at 299-300.

[237] *Id.* at 299.

[238] The plaintiffs in the Newton case and those clients interviewed here in Memphis are illustrative of the point—by far the majority were either chronically ill or permanently disabled, illiterate or at best marginally literate, and lacking in transportation. *See* Newton, 24 F. Supp. 2d at 444; See infra Appendix A.

[239] Baldinucci, *supra* note 227, at note 5; Macey & Miller, *supra* note 226, at 293.

[240] Baldinucci, *supra* note 227. The advent of a new administration, with possible new priorities, makes consistent enforcement of the Act even more uncertain.

[241] Professor Baldinucci suggests that this problem might be remedied by requiring such institutions to meet the "lending" and "investment" tests in certain targeted areas of need throughout the nation, rather than relying on the traditional community concept. Baldinucci, *supra* note 227, at 854.

[242] Professors Macey and Miller opine that the CRA concept is "outdated" and actually discourages movement into low-income communities by financial institutions not already serving these communities, since such expansion would thereby subject them to extending more credit in some neighborhoods than would be consistent with prudent financial management. This result can be avoided simply by declining to serve the market entirely,

CRA compliance and increased availability of affordable credit for the low-income elderly is attenuated enough to make this solution less than optimum as a measure to prevent predatory lending practices.

2. Reverse Mortgage

One lending option specifically tailored to address the plight of those who are age sixty-two or older and struggling to survive on fixed incomes is the so-called "reverse mortgage" or Home Equity Conversion mortgage (hereinafter HECM). Enacted in 1987, the federal Home Equity Conversion Mortgage Insurance Demonstration Act[243] authorized limited FHA insured mortgage loans to be distributed throughout the nation in proportion to the number of elderly. In 1990, the Act was extended to 1995, and then was extended again in 1996 to the year 2000. Finally, in 1998, the "demonstration" language was removed from the statute, bestowing permanent authority on FHA to insure such mortgages for the foreseeable future.[244]

Conceptually, the reverse mortgage is deceptively simple. The idea is to allow an elderly person to borrow against the equity value of his or her home without incurring an immediate obligation to repay. The elderly borrower is able to obtain a loan based on the equity value of the house. The repayment is deferred until the elderly borrower dies, ceases to occupy the house as principle residence or is absent from it more than twelve months, transfers ownership of the house or defaults on the loan agreement.[245] Because repayment is deferred, default on the loan is generally limited to failure to pay taxes or to maintain homeowner's insurance, etc.

Unfortunately, the deferral of payments results in an accrual of interest on interest, as each interest installment is added to the outstanding loan balance over the life of the loan.[246] The borrower benefits from the fact that the lender must accept the home in full satisfaction of the amount owed and lenders face a significant risk in the possibility that the loan balance will be well in excess of the value of the home at the time the loan becomes due.[247] However, if the borrower hopes to leave a home as a major component of his or her estate, the expectations of the heirs may be frustrated, as the inheritance will be subject to the outstanding

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which is obviously not beneficial to anyone. In addition, the Act places unintended pressure on minority owned financial institutions that are increasingly undercut in their own communities by large institutions competing at below-market rates in order to satisfy CRA requirements. Macey & Miller, *supra* note 226, at 340-41.

[243] 12 U.S.C. § 1715z-20 (Supp. 1998).

[244] Pub. L. No. 105-276(c), 112 Stat. 2461 (1998). *See The American Home Ownership Act of 1998: Hearings on H.R. 3899 Before Sub-com. on the Housing and Community Opportunity of the House Banking and Financial Services Comm.* (1998) (statement of Ruth A. Blacker, Member, National Legislative Council of AARP).

[245] Jean Reilly, *Reverse Mortgages: Backing Into The Future*, 5 ELDER L.J. 17, 18 (1997).

[246] Celeste Hammond, *Reverse Mortgages: A Financial Planning Device for the Elderly*, 1 ELDER L.J. 75, 86 (1993).

[247] Reilly, *supra* note 245, at 19.

loan balance, which will be immediately due and payable.[248]

Because of the complexity of the loan calculations, which are based on projected life expectancy of the borrower and the appreciated value of the home, factored over the chosen payment option, it is imperative that a borrower seek both legal and tax advice prior to consummation of any such loan.[249] For those borrowers receiving SSI benefits, issues concerning excess resources may arise if the loan proceeds are not spent during the calendar quarter in which they are received.[250] Federally insured home equity conversion mortgages cannot be consummated unless the borrower receives housing counseling provided by a HUD-certified housing counseling agency.[251] In addition, federally insured loans are subject to a maximum loan limit set by FHA as of January 1, 2000; the limit is $121,246 for most areas and $219,249 for areas deemed "high cost."[252] Borrowers wishing to access home equity value in excess of that limit must deal with private uninsured lenders and will generally incur greater costs and pay higher fees in connection with such loans.

There have been instances where private reverse mortgage lenders have apparently taken advantage of senior borrowers, charging excessive fees and prematurely exhausting the available home equity, resulting in a number of lawsuits.[253] Concerns spawned by these and other accounts of exploitation have soured many consumer advocates on the concept, which in turn has frightened many seniors and their family members away from consideration of even the HUD-insured HECM loans. Lenders are also wary, recognizing that entering into a fixed-rate reverse mortgage may lock them into an unprofitable rate of return for an unpredictable length of time, without any positive cash flow to offset the economic loss. In addition, although the expectation of appreciation is still dominant in the real estate market as a whole, pockets of decline do exist and often are located in older, stable neighborhoods where most seniors live. Finally, loan servicing of a reverse mortgage is much more problematic than that associated with a more conventional mortgage loan. Lenders in a reverse mortgage have no mechanism for "escrowing" for payment of taxes and homeowner's insurance and must be especially vigilant as to the condition of the property and continuing occupancy status of the borrower. These sorts of considerations have either prevented lenders from offering such loans, or, if offered, have prevented lenders from aggressively

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[248] *Id.*

[249] *Id.* at 73-74.

[250] *See* 20 C.F.R. § 416.1103(f) (2000); S. S. R. 78-26, 1976-1980 CE 531.

[251] 24 C.F.R. § 206.41 (2000).

[252] Directive No. 99-38 Dep't. of Housing and Urban Development, (visited Dec. 28, 1999) http://www.hudclips.org.

[253] McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997); Senior Income Reverse Mortgage Corp. v. Olson, No. 98 C 7250, 1999 WL 350836 (N.D. Ill. May 19, 1999); John Hancock Mutual Life Ins. Corp. v. Setser, 42 Cal. App. 4th Supp. 1524 (Cal. Ct. App. 1996).

marketing such loans to the target population.[254] The bottom line is that the reverse mortgage option, while it may prove workable for some low-income seniors, will probably not be available on a large enough scale to constitute an effective antidote to predatory lending.

E. *Housing Counseling*

"Housing counseling" refers to legal advice and practical information and referral provided to tenants and homeowners concerning pre-purchase financing, landlord/tenant law, mortgage default, fair housing, reverse mortgages, and sometimes even credit counseling as it impinges upon the individual's ability to maintain stable shelter arrangements. Pursuant to federal law, the U.S. Department of Housing and Urban Development (HUD) has funded housing counseling and created a program of certification and training for counselors.[255] In order to receive a grant from HUD, the housing counseling agency must be non-profit, must be HUD- certified, and generally must have a source for funding for operations *other* than the monies obtained from HUD. Housing counseling agencies have been especially prominent in enforcement of fair housing laws[256] and in providing counseling to seniors seeking reverse mortgages.[257] Although not funded or recognized as a separate counseling category, presumably any federally funded housing counseling agency providing comprehensive services would, upon request, agree to review home equity loan contracts for senior citizens and counsel them on the adverse consequences of entering into such loans. Of all the housing counseling agencies responding to the PLPP questionnaire, 82% provided community outreach and education, and 59% of those included the topic of predatory lending in their presentations. Unfortunately, many of these same housing counseling agencies reported minimal representation of elderly in their client population.[258]

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[254] In Tennessee, for example, there is only one in-state lender, Mortgage South of Chattanooga, that offers HECM loans and their marketing effort is virtually nonexistent as compared to selling of their other loan products. David Flaum, *Call Toll-Free For Firms That Offer Reverse Mortgages*, The Commercial Appeal, July 13, 1999, at E19.

[255] 12 U.S.C. § 1701x (1994); 42 U.S.C. § 9816 (1994); See also 24 C.F.R. 84 (2000).

[256] Agencies providing housing counseling pursuant to the Fair Housing Initiatives Program (FHIP) have often been instrumental in seeking legal redress on behalf of those who have suffered discrimination. *See* Association of Community Organizations for Reform Now v. Fowler, 178 F.3d 350 (5th Cir. 1999); Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) Arkansas ACORN Fair Housing, Inc. v. Greystone Ltd. Corp., 992 F. Supp. 1064 (E.D. Ark. 1998); South Suburban Housing Center v. Lincoln-Way Builders, Inc., 1990 WL 186193 (N.D.Ill., Nov. 13, 1990) for a sample of such litigation.

[257] *See* 24 C.F.R. § 206.41.

[258] Various explanations were offered by the agencies for the apparent underrepresentation of elderly in their client populations. One respondent noted that the elderly tend not to seek help unless they are forced to do so, and often decline to apply for benefits that they are eligible for, such as food stamps, out of a feeling of pride. Several

The inspiring news is that such agencies have gone beyond their strictly informational mandate and have empowered their clientele by engaging in advocacy pursuant to the CRA (as already discussed in the preceding section) and by going forward as plaintiffs in lawsuits challenging discrimination.[259] Housing counseling agencies have also been instrumental in raising funds or organizing volunteers to address particular areas of need. One such housing counseling agency is Brothers Redevelopment, Inc. (BRI), of Denver, Colorado, which has served "more than 10,000 clients since 1981" according to its web site.[260] On August 1, 1997, BRI started a special "Aging @ Home" program, wherein disabled seniors needing home modifications in order to be able to live independently in their homes were identified and the needed repairs done by retirees recruited from the local senior network composed of approximately eighteen organizations. This "elders helping elders" approach has enabled BRI to assist elderly homeowners at a minimal cost. Another such agency is Homeowner Options for Massachusetts Elders (H.O.M.E.), a nonprofit comprehensive housing counseling agency founded in 1984, and dedicated to assisting elderly homeowners to "age in place" (i.e. to be able to continue to live independently in the home).[261] H.O.M.E. provides in-home counseling where necessary and views its mission as a long-term commitment to addressing each client's long-term needs, in addition to responding to short-term crises.[262] To facilitate this comprehensive focus, H.O.M.E. has forged partnerships with sixty-three community lenders operating across Massachusetts, as well as participating in development of pilot foreclosure prevention programs in cooperation with the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association and the Massachusetts Housing Finance Agency.[263] In order to be eligible for membership in this corporate venture, a lender must agree that potential elderly borrowers will receive counseling by an independent third party before consummation of any mortgage loan, that borrowers be sold home loan products only as a last option, and that the loan recommended be the least costly and most effective alternative possible.[264]

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identified a need for some type of advertising campaign to combat the general lack of awareness among the elderly of the options that may be available to them to help them avoid the pitfalls of predatory lending.

[259] *See* discussion *supra* Part IV.D.1.

[260] http://www.@grass-roots.org/Brothers Redevelopment Inc.

[261] HOMEOWNER OPTIONS FOR MASSACHUSETTS ELDERS (H.O.M.E.), BACKGROUND INFORMATION *reprinted in* PREDATORY PRACTICES AND THE FAIR HOUSING AND LENDING LAWS (John Marshall Law School Fair Housing Legal Support Center ed., 2000).

[262] *Id.*

[263] Leonard Raymond, *No Single Financial Prescription For Elder Home Owners*, MORTGAGE MARKETPLACE, Summer 1997, at 24, 29.

[264] H.O.M.E. also developed a loan product especially tailored to the needs of seniors, called a Senior Equity Line of Credit (SELOC). Like a HELOC (Home Equity Line of Credit), the SELOC allows the elderly borrower to obtain modest loans at competitive interest rates that are payable in amortized monthly payments. The difference is that a system of oversight is in place so that disbursements to unlicensed, unscrupulous home

On a less optimistic note, while BRI and H.O.M.E. are evidently fortunate enough to have sufficient funding and community support to find creative ways to expand their services, many housing counseling agencies responding to the questionnaire expressed concern about having enough funding to provide basic housing counseling services, let alone to add others.[265] Some agencies only provide one type of counseling (such as reverse mortgage or pre-purchase) and foresee no expansion at any point in the future. The fate of Long Island Housing Services (LIHS) of Bohemia, New York is illustrative of the dilemma many housing counseling agencies face, as HUD funding levels remain static and the number of agencies competing for those funds grows. Although the agency has been in existence for thirty years, largely funded by HUD grants supplemented by small local donations, LIHS received notice from HUD in December 1999 that it would not be funded for the upcoming fiscal year. This has left the agency scrambling for funds in order to survive, with HUD's position being that "the intent was not to have housing groups rely solely on our funding to survive."[266] Although this philosophy sounds defensible in theory, in that local communities should be expected to absorb the cost of housing counseling provided to local citizens, in practice the very entities that agencies must turn to for support (i.e., real estate professionals, mortgage companies, landlords etc.) are potential adversaries. Thus, without continued federal support, the continued survival and vitality of housing counseling agencies may be in jeopardy.

V. EVALUATIONS AND RECOMMENDATIONS

The foregoing examination of the options available to address predatory lending fails to yield any clear panacea for curing the problem. Disclosure laws like Truth in Lending and HOEPA, although intended to be preventive, have not succeeded in preventing consummation of the most egregious and exploitative transactions, for the simple reason that poor, elderly persons are often illiterate and/or unsophisticated and/or too ill, either physically or mentally, to carefully read and comprehend a complicated sheaf of mortgage loan documents. Further issues of

repair contractors or to pay off debts of adult children, etc. are not approved. Finally, if the financial need increases and the amount borrowed exceeds the borrower's ability to repay, loan repayment can be deferred, with the borrower and H.O.M.E. counselor jointly determining the best final pay-off option, be it sale of the house, conversion to a HECM, or some other financial arrangement. *See SELOC is Here*, ON THE H.O.M.E. FRONT (Homeowner Options for Massachusetts Elders, Boston, MA) Fall 1996, at 1.

[265] *See* PLPP Questionnaire data. For example respondent 1091-REP stated that they were unable to perform even community education outreach services due to understaffing, while respondent 1039 expressed concern that "without adequate federal and state funding . . . elders will not be adequately served and the nonprofit agencies . . . who are already providing this type of counseling without state and federal support will be stressed still further."

[266] Valerie Burgher, *Housing Agency's Future in Doubt*, NEWSDAY (Dec. 30, 1999), at A36, *available at* 1999 WL 8206644.

timing and proof make lawsuits after consummation of the loan especially problematic for senior citizens. Blanket prohibitions against certain aspects of predatory lending, such as extension of credit without regard to repayment ability, usury, and discrimination are difficult to enforce and politically unpopular to the extent that they appear to interfere with the "free operation" of the marketplace. In addition, prohibitions enacted on a state level may be pre-empted by operation of federal law. Further research and study of the Texas and North Carolina experiences, where major state consumer protection and predatory lending initiatives have been enacted into law, should prove instructive concerning the continuing viability of prohibitive options.

The CRA and reverse mortgage concepts which seek to provide greater credit options for elderly borrowers are promising and merit additional research and consideration as well. Obviously, for lenders to be motivated to offer favorable terms to elderly, low-income borrowers, there must be some incentive. CRA requirements are currently focused on new borrowers, for the reason that the bulk of those actively seeking credit are younger people who have the energy to aggressively pursue the lending institutions to remind them of their CRA obligation.

Reverse mortgages, on the other hand, while a satisfactory option for some will not appeal to everyone, since exhaustion of home equity value is a virtual certainty by the time the borrower dies. In addition, in order for a reverse mortgage to be an effective preventive measure, housing counseling is a necessary prerequisite, both for purposes of federal insurance and to ensure that the reverse mortgage agreement is tailored to meet the senior's needs and does not involve any excess charges. Given the marketing bombardment that seniors are subjected to regarding home equity loans and refinancings, only a similar campaign will be effective to combat consummation of the predatory loan agreements. In order for elderly, low-income people to have an adequate understanding concerning the consequences of entering into any kind of home equity loan as well as appreciating the alternatives that may be available to them, nothing short of the kind of personal touch offered by housing counseling will be effective. Just as it is mandated in the case of federally insured HECM loans, counseling by a HUD-certified housing counseling agency should be required as a prerequisite to perfection of a valid mortgage lien or deed of trust in the case of any loan (other than a purchase money mortgage) made to a borrower who is 60 or older that will result in an encumbrance on the borrower's principal residence. If the lender chooses to consummate the loan without benefit of housing counseling, the loan will in effect be unsecured. Although this might not eradicate all instances of predatory lending, it would certainly reduce the adverse impact of any high-cost loans that were contracted for without benefit of counseling. Since the lenders will actually benefit from the provision of counseling (i.e., by obtaining a valid, enforceable security interest in the borrower's home), assessment of fees to the lenders to defray the costs of this counseling does not appear unreasonable.

In addition, as the examples of H.O.M.E. and BRI suggest, housing counseling agencies constitute a logical magnet or focal point for a myriad of housing services to be provided to seniors. Senior citizen home repair and creative, low-cost financing options have already been implemented by these two agencies and could be sponsored by local housing counseling programs across the country. Because of the work they are already doing, housing counseling agencies are in the best position to coordinate provision of available housing services by other agencies to develop a network of voluntary services, as well as to seek grant funding and in-kind financial support.[267]

VI. CONCLUSION

Despite passage of federal legislation specifically intended to address the problem of high-cost home equity loans, predatory lending practices by subprime lenders continue to flourish and such lenders routinely target the elderly. Efforts to redress the problem through litigation are often too little, too late, as the elderly borrower tends not to seek help until foreclosure is imminent and the three-year statute of limitations on rescission has expired. More comprehensive state constitutional and statutory efforts to curtail predatory lending have been enacted in Texas and North Carolina, but it is too soon to predict how effective these actions will be in prospectively stemming the tide of such loans, as opposed to mopping up after the damage has already been done. Additional sources of credit for elderly borrowers, like expanded lending opportunities under the CRA and reverse mortgages, are helpful to those knowledgeable enough to seek them out, with the provision of mandatory housing counseling in the case of reverse mortgages having been instrumental in the increased accessibility of this option to elderly borrowers.

Thus, expansion of mandatory housing counseling into the area of home equity, non-purchase money lending for borrowers over age 60 emerges as the one proposal most likely to succeed at preventing the continued proliferation of predatory lending practices by providing borrowers with complete, personally tailored information concerning all the ramifications of the proposed loan, plus a discussion of alternatives that are available to meet the borrower's needs. Achievement of that end by means of legislation conditioning the attainment of a valid mortgage lien on provision of housing counseling to the borrower seems to solve the problem of funding for the program, as no lender will want to advance credit in the absence of valid security. In the meantime, further study and examination of the effect of such counseling, as well as the effect of the other legislative initiatives discussed above, should be undertaken to determine the optimum method for addressing this continuing problem.

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[267] One possible program model is suggested in Appendix D.

APPENDIX A - CLIENT INTERVIEW DATA

1) M.H. is an 87 year old, African-American widow, who first purchased her home in 1971 for $14,750. In 1984, one of her adult daughters came to live with her. She quitclaimed the house to herself and the daughter at that time in order to finance a second mortgage to pay to build on to the house so that her daughter could have her own room and bathroom. In 1995, the house, which was built in 1960, required some minor roof repair and a home improvement contractor came to M.H.'s house and offered to fix it for $2749. M.H., whose only income consisted of $590 per month Social Security could not afford to pay that amount, even with the assistance of her daughter, who earned $1136 working in a clerical position. The contractor put them in touch with a finance company to obtain a loan for the cost of the repairs. Instead, the lender completed an application for them for $36,000 to cover the $14,000 remaining on the first mortgage, the $7,000 remaining on the second mortgage, $1000 of miscellaneous debt owed by M.H.'s daughter, a $2200 credit life insurance premium, $4200 prepaid finance charges in the form of loan origination and broker fees and $5,000 in cash distributed to M.H. and her daughter, which was used to buy a car for the daughter to use to drive to work. The APR was 12.89%, well under the HOEPA limit at the time, and the monthly P&I on the 15 year loan is $416.90. M.H. and her daughter also signed a deed of trust, conveying the property to a trustee for purposes of conducting a foreclosure sale in the event of default. Although it was not a good deal for M.H. to encumber her house so heavily so late in life, on the positive side, she was better able to remain in her home because her daughter was living with her, and while the daughter was living with her, their combined incomes were sufficient to handle the monthly mortgage payment. Unfortunately, the daughter, who is only in her forties, decided to marry and move out of the house in late 1998, leaving M.H. to struggle to make the payment on her own. Her other children have pitched in to help her, but may not be able to do so much longer. To add to the problem, from the other children's point of view, is the fact that the one daughter's name is on the deed, which will entitle her to one-half of the property automatically following M.H.'s death, whether she contributes to the cost of paying for and maintaining the house or not.

2) F.B & M.B. are an elderly, African-American, married couple; he is 71 and she is 63 years of age. While still single, she bought the home in 1969. In May, 1995 they borrowed $11,614 at 16.97 APR, to be repaid over seven years at a monthly payment amount of $215.76. Three years later, the house, which was 49 years old, needed roof repair. Mr. B. received a call from a roofer who just happened to be in the neighborhood and noticed the condition of the roof. He came over to the house, and after meeting with F.B. & M.B. added a remodeling of the kitchen and bathroom to the contract for repair, which then totaled over $7,000. The couple were living on a monthly income

of $1044 Social Security and SSI, since Mr. B. was retired and Mrs. B. was disabled, and needed financing in order to pay for the repair. They went back to the brokers who arranged the 1995 loan, and this time wound up borrowing $30,400 which was disbursed as follows: $9,152 to pay off the 1995 loan, $2574 to pay various credit card bills, $7402 to the roofer, $506 for county taxes, $900 for city taxes, $3040 broker's fees and points, $705 loan origination fee, and $6000 to the couple. The APR on this loan was 12.4809 (actually an improvement over the 16.97) but the monthly payment over the term of the 10 year loan would be $274 P & I and at the end of the term, F.B. & M.B. would owe a balloon payment of $28,066. It turned out that the roofer was NOT licensed as he had represented and as a result much of the work he performed was shoddy. Since one of the B's will probably die within the next ten years, it is highly unlikely that the remaining owner will be able to obtain financing for the balance of the loan. This is especially true since the work performed by the roofer was unsatisfactory, which may lower the appraised value of $36,000 and/or may require the performance of (and thus financing of) additional repairs. F.B. and M.B. have filed a lawsuit and are currently trying to negotiate rescission of the loan.

3) A. H. is a 67 year old, African-American woman who purchased her home in 1971 for $16,000 with a FHA loan financed through a local bank. In 1980, she suffered a stroke at the age of 54, which left her permanently disabled and confined to a wheelchair or walker. It also reduced her income to $785 per month in Social Security. She got behind on all her bills and was forced to file a Chapter 13 petition in bankruptcy court to keep from losing her home. Her adult daughter and two minor grandchildren moved in to help take care of her and the daughter contributed some of her income toward discharging the bankruptcy. In 1996, A.H. suffered another stroke and was left owing considerable medical expenses from the deductible and co-pay amounts left unpaid by Medicare. In March, 1997, A.H. re-affirmed and refinanced her FHA mortgage loan, which would have paid out in 2001, and on which she still owed $10,328. The lender financed that amount over a ten year period at 7% APR, giving A.H. a monthly P&I of $124. With escrow for homeowner's insurance and taxes, the total monthly payment came to $224. In late summer, 1998, A.H. and her daughter saw an ad on television placed by a local contractor listing a number to call for a free estimate of the cost of putting aluminum siding on a home. Since A.H.'s house was over 25 years old, it was in need of new paint and replacement of some rotted wood under the eaves and by the carport. A.H. called, the contractor came out and presented her with a contract for $10,000 for siding, wood replacement as needed, two new doors, two ceiling fans, and a set of shutters on her 1003 sq. ft. home. There was no disclosure of the credit terms until three weeks later, when A.H. wound up refinancing her existing mortgage, paying off all the debts listed in her bankruptcy petition as well as paying for the aforementioned home improvement contract. The grand total came to $29,250 over a 30-year term, with monthly P&I of $338.49 with no escrow for either homeowner's insurance or taxes. The APR was 14.52%. By the spring of 1999, A.H.'s daughter lost her job and A.H. fell behind in making the mortgage payments. By the time she consulted legal counsel, A.H. was already two months behind

in her mortgage and had received a letter advising her that her case was being transferred to the lender's foreclosure department. A.H. attempted to rescind her loan after contacting counsel and filing suit in state court seeking both rescission and an injunction stopping the foreclosure, which was proceeding pursuant to a deed of trust power of sale. Before the state court could rule on the motion for injunction (and specifically on whether the injunction could be granted without the necessity for A.H. posting bond), the lender removed the case to federal court, forcing A.H. to file yet another petition in bankruptcy in order to stop the foreclosure, which by that time was imminent. A.H.'s action also put the federal court action on hold. A.H.'s case is still pending and she plans to raise her Truth in Lending and HOEPA claims in an adversary proceeding in the bankruptcy court.

4) I.F. is 79 years old, African-American and a widow. Fifty-four years ago, she and her husband purchased the home in which she lives. They later borrowed to add on to their house in order to accommodate their nine children. Then, in 1998, they responded to a newspaper ad from a lender offering a 6.5%, 30 year fixed rate mortgage because Mr. F. was ill and they wanted to consolidate all of their credit card bills and monthly mortgage into one monthly payment. Instead of a 6.5%, 30-year loan, the couple was sold an 8.4%, 15 year loan for $28,000, AND a second mortgage for $10,000 at 11.75% for 15 years. These two loans were supposed to pay off all the couple's credit card debt, but they did not. Two major credit card bills totaling $4,195 were left unpaid, and I.F. cannot afford to pay them plus the mortgage on her limited income.

5) E.G. is a 65 year old, African-American female, living on $520 per month in Social Security. Her house fell into disrepair after her husband died in 1974. In 1995, E.G. qualified to have her old house demolished and a new house built where the old house had been through a federally funded housing rehabilitation program administered by the City of Memphis. The program paid $38,374, to rebuild the house. E.G. remained obligated on her first mortgage and was obligated to repay the City $5,000 of the assistance in the event that she were to move out of the house or were to sell, transfer or otherwise convey her interest in it prior to the expiration of five years. During each year of the five-year period, the $5,000 debt would decrease by 20% or $1,000 per year. E.G. thus had a brand new house, with an appraised value of $55,000 on which she owed less than $10,000. Unfortunately, since her old house did not have central air conditioning, the new house was built without it as well. In addition, the dilapidated fence that surrounded E.G.'s property was torn down and not replaced, since it was not part of the structure. Then, in 1999, lightning struck her central heating unit and disabled it. It never occurred to her to file a claim under her homeowner's insurance, which would have covered the repair after payment of $250 deductible. Therefore, when E.G. received an advertisement in the mail offering a free estimate and easy financing for repairs, she called and requested the free estimate. On October 1, 1999, someone came out to her home and had her sign a loan application that represented her income as being $980 per month in Social Security (close to TWICE her actual income) and then on October 6th, she wound up signing a

home improvement contract for $9140 for installation of a central heating and air conditioning unit, fence, and window security bars. The agreement made no disclosure of any credit terms other than to state that the balance was to be paid in cash. Interestingly enough, the contract was signed by a company representative whose was titled as a loan info specialist, even though she was apparently an employee of the contractor and not the lender. Two days later, E.G. signed a loan agreement for $30,000 which represented the $8,989 owing on her first mortgage, $2,380 remaining to discharge the City of Memphis rehab assistance lien (a cost that E.G. incurred only because the lender insisted on being a first lienholder and on having E.G. sign a deed of trust, which then conveyed the property to a trustee in the event of default—had E.G. remained in the property just one more year, the entire debt would have been forgiven) $1787 credit card debt, $2316 broker's and origination fees, $1024 taxes, title insurance, appraisal fees, etc., and $4,448distributed to E.G., on top of the $9,140 in home repair for which she had contracted. E.G. gave each of her adult daughters $2,000 of the cash disbursed at closing, asking them to hold it for her to pay for property taxes when they came due. One of her daughters lost her job and used the money to pay her own bills; the other daughter purchased a car using the funds as a down payment, intending to repay the money, but finding herself unable to do so as of yet. E.G. was left with a monthly mortgage payment of $306.43 P & I with no escrow for homeowner's insurance or taxes. The good news is that E.G. sought legal assistance before most of the work was actually performed on her house, and as a consequence, she was able to negotiate a rescission of the home repair contract and obtain a refund of $8,000 from the home repair contractor. She has decided not to attempt rescission of the entire loan, as she is not prepared to tender back the other loan proceeds paid on her behalf.

6) R. K. is a 75 year old African-American widow, severely diabetic and bedridden, She lives on Social Security, VA widow's benefits and welfare received for care of her 4 minor grandchildren, for a total monthly income of $736. R.K. and her now deceased husband purchased the home in 1959 with a 30-year VA loan. R.K. worked up until 1988, when her diabetes and high blood pressure became so severe as to be disabling. In 1989, after her husband died, she refinanced her house in order to pay for siding. Then she refinanced again in 1993 in order to pay for a new heating system and kitchen remodeling. Then in 1996, she got behind in her mortgage payments and was forced to refinance in order to pay off the delinquent mortgage and avoid foreclosure. The house appraised at $40,500. The payoff on the delinquent loan was $33,095.74 and $3,293 was disbursed to pay one of R.K.'s consumer debts. R.K. thought that the disbursement would pay the loan in full, but instead she was still left owing approximately $576. She also continued to owe about $4,000 on various other credit card accounts. R.K. paid $2575.39 in broker's fees and processing fees and wound up with two 15 year mortgages on her home, one for $30,003.61 at 11.367 APR and a monthly payment of $347.97 P & I and the other for $7938 at 15.6% APR, with a monthly P & I of $114.48. Thus, R.K. was paying $462.45 per month without escrow for homeowner's insurance or property taxes. Because of all the consumer debt she still owed, R.K. soon fell behind again and responded to a

mail solicitation offering her a pre-approved home equity loan. In June 1999, believing that she was finally consolidating and paying off all her bills, so that she would have only one monthly payment, she refinanced again. This time she paid $31,276.26 to pay off the larger of the two mortgage loans from 1996, $2931.00 to pay off some of her credit card debt, and $352.51 to make single payments on three debts that the loan was NOT going to pay off—the second mortgage loan from 1996, with a balance of $7,617.00 and two consumer debts totaling $5480.00. Finally, she paid points and fees totaling $2,256.39 in connection with the loan and wound up financing $37,500 at a variable interest rate with a projected APR of 11.532% over 30 years. R.K.'s monthly payment as a result of the new loan is $322.18 P & I. She still has to pay the $114.48 for the second mortgage loan, and so in effect has a $436.66 monthly house payment, without escrow for taxes or insurance. After the first three years, the interest rate on this loan may increase as much as 3% as of the first change date and then increase up to 1% every 6 months thereafter, up to a maximum of 6% over the initial interest rate of 9.75%. The disclosure statement anticipates the maximum increase in monthly payment as of the first change date, which will raise O.K.'s monthly obligation to $372.63. Thus, the $25.79 per month savings that she now enjoys in each month's mortgage payment will disappear and be replaced by a $24.66 increase, and the potential for further increases every six months thereafter until the interest rate reaches its maximum.

7) L. G. is 77 years old, Caucasian and a widower, whose total monthly income consists of $520 in Social Security benefits. He and his deceased wife purchased his current home in 1993 for an undisclosed amount using funds obtained from the sale of his and her former homes acquired during previous marriages. The house is 52 years old and appraised at $42,000. L.G. is presently confined to a nursing home as a result of having suffered a stroke. Sometime in September, 1999, he contracted for replacement of his bathroom tile, toilet and sink, painting of walls in kitchen and bathroom, installation of a new central heating and air conditioning system, and replacement of the carpet and floor in his dining room. The total contract price for this work was $10,700 to be repaid in 300 monthly installments of $193 each. No disclosure was made of the interest rate being charged, which on these terms turns out to be 21.5% APR. L.G., although confined to a wheelchair, is receiving both physical therapy and speech therapy and is steadily improving. L.G. used to make his own living as a contractor and his relatives state that although he is illiterate, he has some facility with numbers. He is clearly a proud and independent individual and, despite the pleas of the relatives who requested legal assistance on his behalf, he maintains that he knew what he was doing when he entered into this contract and he will not sign a release to allow anyone to even review the contracts on his behalf.

8) E.J. is 73 years old, a widow, African-American and lives on $1104 per month Social Security. She and her husband purchased her home at 29 East Norwood Avenue in 1970 for $8954.89 with a VA loan. In November, 1999, she decided that she wanted to consolidate all of her bills into one monthly payment, and so she refinanced her existing mortgage of $9, 943 and $23,155

worth of credit card debt, along with $1459.83 broker's fee and $444.78 cash paid to her, for a total loan amount of $35,002.83.

9) M.C. is 92 years old, African-American and lives on $893 in monthly Social Security income. She purchased her home in 1943 and owned her house outright when she saw an ad on TV for a home improvement company that offered free estimates and easy term financing. She wound up with a $30,000 loan, which represented payment for the siding, some roof repair and some credit card bills. She has a 15 year mortgage and pays $286.96 P & I each month. M.C. is one of the luckier borrowers, since the APR on the loan is only 8%, which is relatively low, she is satisfied with the work that was done and she is able to make the monthly payments.

APPENDIX B- PREDATORY LENDING PREVENTION PROJECT HOUSING COUNSELING QUESTIONNAIRE

1. How many housing counselors are employed by your agency?

2. Approximately how many clients are provided with housing counseling each month?

3. What percentage of your clients would you estimate are age 60 and older?

4. What types of housing counseling does your agency provide? (e.g., pre-purchase, mortgage default, reverse mortgage, landlord/tenant, etc.)

5) If your agency provides mortgage default counseling, what percentage of those cases would you estimate involve home equity loans or refinanced loans as opposed to original purchase money loans? Do these cases tend to involve elderly mortgagors?

6) If your agency provides mortgage default counseling, what percentage of those in default wind up losing their house through foreclosure? What percentage of these are elderly?

7) Are your housing counselors provided with training relating to home equity loans and refinancing issues? If yes, please describe the content of the training.

8) Are your housing counselors acquainted with the federal Truth in Lending and the Home Ownership and Equity Protection Acts?

9) Of your clients age 60 and older, how many would you estimate have sought counseling concerning the availability of funding for home repairs or the advisability of entering into a home repair or improvement loan?

10) Of your clients age 60 and older, how many would you estimate have sought counseling concerning the availability of funding for debt consolidation or other financial needs that may involve a home equity loan or refinancing of an existing mortgage?

11) Do you believe that the numbers indicated in questions 9 and 10 above accurately represents the number of elderly people in need of such counseling, or do you feel that more people would seek such counseling if they knew it was available?

12) What percentage of your homeowner clients would you say have benefited

from some kind of federally backed mortgage loan (i.e., FHA, VA, etc.)?

13) Does your agency do any community education or outreach? If yes, please describe and indicate whether predatory lending is a component of such education/outreach.

14) Do you feel that housing counseling is an effective way to help keep the elderly from being victimized by high cost home equity loans? Why or why not?

Additional comments and suggestions:

Name and Title of Person Completing Questionnaire (Optional) ______________________

____

____

Are you willing to be contacted by phone concerning your responses? If yes, please give phone number and best time of day to call ____

APPENDIX C - QUESTIONNAIRE RESPONSE DATA

1. Number of counselors employed reported by percentage of agencies responding [45][1]

   a) Less than or equal to 3 counselors - 71%

   b) Between 4 and 6 counselors - 18%

   c) Between 7 and 14 counselors - 7%

   d) 15 or more counselors - 4%

2. Number of clients provided with housing counseling monthly reported by percentage of agencies responding [44]

   a) Less than or equal to 10 clients - 16%

   b) Between 11 and 25 clients - 20%

   c) Between 26 and 50 clients - 30%

   d) Between 51 and 75 clients - 14%

   e) Between 76 and 89 clients - 5%

   f) 90 or more clients - 16%

3. Percentage of clients 60 and older reported by percentage of agencies responding [44]

   a) Less than or equal to 10% of clients are age 60 or older - 45%

   b) Between 11% and 39% of clients are age 60 or older - 25%

   c) Between 40% and 79% of clients are age 60 or older - 5%

   d) Between 80% and 100% of clients are age 60 or older - 25%

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[1] Of the 154 questionnaires distributed, 45 completed questionnaires were returned, representing housing counseling agencies from 29 states plus the District of Columbia. Agencies did not always respond to every question, however, so the number of responses to each question is indicated in brackets. Total of percentages may not equal 100% due to rounding.

4. Types of housing counseling provided reported by percentage of agencies responding [45]

a) Less than comprehensive housing counseling but including mortgage default - 29%

b) Less than comprehensive housing counseling without mortgage default - 13%

c) Reverse mortgage only - 16%

d) Comprehensive housing counseling - 42%

5. Percentage of cases involving home equity loans or refinancing reported by percentage of agencies providing mortgage default counseling [31][2]

a) Less than or equal to 10% of mortgage default cases involve home equity loans or refinancing - 42%

b) Between 11% and 29% of mortgage default cases involve home equity loans or refinancing - 6%

c) Between 30% and 59% of mortgage default cases involve home equity loans or refinancing - 26%

d) Over 60% of mortgage default cases involve home equity loans or refinancing - 26%

6. Percentage of clients losing homes through foreclosure reported by percentage of agencies providing mortgage default counseling [27][3]

a) Less than or equal to 10% of clients losing homes through foreclosure - 59%

b) Between 11% and 19% of clients losing homes through foreclosure - 7%

c) Between 20% and 30% of clients losing homes through foreclosure - 15%

d) Between 31% and 50% of clients losing homes through foreclosure - 7%

e) Between 51% and 70% of clients losing homes through foreclosure - 7%

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[2] A number of respondents did not track this information and those that did generally did not differentiate between older homeowners and younger homeowners, so no usable data on the question of whether these situations tended to involve the elderly was obtained.

[3] Again, a number of respondents did not track this information and those that did generally did not differentiate between older homeowners and younger homeowners, so no usable data on the question of whether these situations tended to involve the elderly was obtained.

f) Over 70% of clients losing homes through foreclosure - 4%

7. Percentage of housing counselors trained to provide counseling concerning home equity loans and mortgage refinancing [45]

a) 71% trained to provide such counseling

b) 29% not trained to provide such counseling

8. Percentage of housing counselors familiar with Truth in Lending and HOEPA? [45]

a) 76% familiar with both Truth in Lending and HOEPA

b) 20% not familiar with either Truth in Lending or HOEPA

c) 4% familiar with Truth in Lending but not with HOEPA

9. Percentage of clients age 60 or older who have sought counseling concerning availability of funding for home repairs or the advisability of entering into a home repair or improvement loan reported by percentage of agencies providing such counseling [40]

a) Less than or equal to 10% of clients age 60 or older have sought such counseling - 60%

b) Between 11% and 49% of clients age 60 or older have sought such counseling - 23%

c) Between 50% and 79% of clients age 60 or older have sought such counseling - 10%

d) Between 80% and 100% of clients age 60 or older have sought such counseling - 8%

10. Percentage of clients age 60 or older who have sought counseling for debt consolidation reported by percentage of agencies providing such counseling [37]

a) Less than or equal to 10% of clients age 60 or older have sought such counseling - 68%

b) Between 11% and 29% of clients age 60 or older have sought such counseling - 24%

c) Between 30% and 49% of clients age 60 or older have sought such counseling - 5%

d) Between 50% and 100% of clients age 60 and older have sought such counseling - 3%

11. Percentage of housing counseling agencies believing that more elderly

would seek counseling if knew of its availability [44] 80% [4]

12. Percentage of homeowner clients that have benefited from federally insured mortgage loans reported by percentage of agencies responding [37][5]

a) Less than or equal to 10% of homeowners have so benefited - 14%

b) Between 11% and 30% of homeowners have so benefited - 16%

c) Between 31% and 59% of homeowners have so benefited - 16%

d) Between 60% and 79% of homeowners have so benefited - 16%

e) Between 80% and 100% of homeowners have so benefited - 38%

13. Percentage of agencies providing community education and percentage of those providing education on predatory lending reported by percentage of agencies responding [45]

a) 82% of housing counseling agencies provide community education

b) 68% of the housing counseling agencies that provide community education include a componenet on predatory lending.

14. Percentage of agencies believing housing counseling to be an effective way to keep elderly homeowners from being victimized by predatory lending reported by percentage of agencies responding [45] 93%[6]

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4 The 20% of agencies responding in the negative noted that the elderly were often proud and resistant to asking for help unless it became absolutely necessary, which might mean avoidance of counseling, even if aware of its availability.

5 A number of housing counseling agencies did not track this data and were not able to respond to this questionnaire item.

6 A number of respondents noted that such counseling might have to be mandatory in order to be effective and several also noted that additional funding would be required in order to provide the depth of counseling that would be necessary in order to be effective.

APPENDIX D-DRAFT OUTLINE FOR ELDERLY HOME REPAIR PROGRAM

Purpose: To provide elderly low income homeowners a method for determining how to get quality home repair and how to finance it.

In order to take advantage of already existing community resources, it is recommended that this program be initiated under the auspices of a currently existing housing counseling program. This would reduce startup costs, access knowledge and training already possessed by the agency's personnel and facilitate utilization of ongoing community outreach work. It would also be easier to attract funding.

An Advisory Committee to the Housing Counseling Agency's Board should be formed for this specific Program. This working committee should include representatives from the Contractors' Association, Finance Representatives, the Appraisers Group, FHA inspectors, and other interested community groups. Instead of having agency heads appointed, it would be preferable if this Committee includes people who are actually involved in the field work and therefore aware of the specific problems that are involved. For example, ask the Executive Director of the local housing and community development agency to appoint a Rehab Estimator/Inspector to the Committee.

The success of this program will involve securing not only financial support but also considerable in kind and volunteer assistance. This program should be designed to take advantage of already existing government and community resources. If the local housing and community development agency would agree to provide AX hours of work in the form of cost estimates or appraisals, this would allow the program to provide these services without high administrative cost. A similar program was in fact suggested by the Memphis housing and community development agency to local community development corporations several years ago. HUD/FHA could also be requested to provide in kind technical assistance of inspectors, appraisers or evaluators.

Proposed Components:

Housing/Budget Counseling for Current Homeowners

Explanation of possible loan terms/amortization schedules

Types of Financing Available including Reverse Mortgages

Ramifications of New Loans - Legal/Financial

Home Repair

Develop and maintain a list of qualified contractors and sub-contractors who meet established criteria and are willing, able and financially sound.

Development of criteria for evaluating quality of repair, costs, estimates

Funding Options:

In kind assistance:

Housing and Community Development/HUD - Inspectors/Estimators

Contractors' Association - Volunteer Assistance to develop fair criteria

Banking - Finance representatives

Community Development Corps. - support where have specialized knowledge or expertise - for example, Memphis Heritage - information regarding historical impact; VECA - information on its experience coordinating a small repair program for the elderly.

Financial Assistance:

Housing and Community Development/HUD - grants

Local Financial institutions with CRA obligations

Local/Regional charitable organizations

Contractors

APPENDIX E - STANDARD ERROR OF THE DIFFERENCE BETWEEN FORECLOSURE RATES OF STATES HAVING POWER OF SALE FORECLOSURE AND FORECLOSURE RATES OF STATES REQUIRING JUDICIAL FORECLOSURE

Mean for each sample

X1 = $\underline{X1}$ (Where X1 is foreclosure rates for power of sale states)
N

$\underline{323.5}$ = 19.03$(\mathbf{X1})^2$ = 362.14
17

$\mathbf{X_2}$ = $\underline{X_2}$ (Where X_2 is foreclosure rates for judicial foreclosure states)
N

$\underline{128.01}$ = 11.64$(\mathbf{X_2})^2$ = 135.49
11

Standard Deviation for each sample

σ_1 $(\underline{X_1})^2$ - $(\mathbf{X_1})^2$ (Note that for $(X)^2$, each value is squared and then added)
N

$\underline{14105.25}$ - 362.14 = 21.62
17

σ_2 $(\underline{X_2})^2$ - $(\mathbf{X_2})^2$
11

$\underline{3928.0001}$ - 135.49= 14.89
11

Standard Error of the Difference

σ_{diff} = $\underline{N\sigma_1{}^2 + N\sigma_2{}^2\ 1}$ $+\underline{1}$
$N_1 + N_2 - 2$ N_1 N_2

$\underline{17(21.62)^2 + 11(14.89)^2}$ (.15) = 59.91
26

t ratio required to translate sample mean difference into units of standard error of the difference -

t = $\underline{(X_1) - (X_2)}$ $\underline{19.03 - 11.64}$ = .12
σ_{diff} 59.91

Appendix E (continued)

Number of Degrees of Freedom

df = $N_1 + N_2 - 2$
df = 17 + 11 - 2 = 26
obtained *t* ratio = .12

table *t* ratio[1] for 26 degrees of freedom:
t at .05 level of confidence = 2.056
t at .01 level of confidence = 2.779
The obtained *t* ratio of .12 is not sufficiently large to constitute a significant difference at either the .05 or .01 level of confidence.

[1] Taken from Table C values of *t* at the .05 and .01 levels of confidence in LEVIN, *supra* note 174, at 263.