MENDING THE POTHOLES & EXPANDING AVENUES OF ENFORCEMENT: HOME MORTGAGE LITIGATION REFORM

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I. INTRODUCTION

Across the political spectrum, there is consensus that if one “works hard” and “plays by the rules,” then he or she should have the opportunity to pursue the “American Dream."1 Although individual home ownership is often characterized as the realization of this dream; today, the deceptive practices of predatory lenders threaten the ability of many low and middle-income people, particularly women and people of color, to purchase homes.2 Historically, the courts have provided avenues for groups to challenge industry, government, and the status quo to advance social justice.3 This comment argues that, by enacting measures to support the claims of plaintiff-borrowers against certain lenders, the courts may become a mechanism for reforming the mortgage industry and protecting

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1 See e.g., William J. Clinton & Arnold Schwarzenegger, Beyond Payday Loans, WALL. ST. J., Jan. 24, 2008, at A17 (“The American dream is founded on the belief that people who work hard and play by the rules will be able to earn a good living, raise a family in comfort and retire with dignity”).

2 See Robert B. Avery et al., The 2006 HMDA Data, FED. RES. BULL. (manuscript at 1, 39, 68 tbl. 11), available at http://www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06draft.pdf (reporting that in 2006, 53.7% of African-Americans and 46.6% of Latinos, but only 17.7% of whites received high-priced loans). See also Christopher L. Peterson, Federalism and Predatory Lending: Unmasking the Deregulatory Agenda, 78 TEMP. L. REV. 1, 2–5 (explaining that leading home mortgage lenders, consumer advocates, and scholars widely acknowledge predatory lending as “one of our nation’s most pressing social problems”).

the interests of consumers. By expanding existing consumer laws, private litigation in the public interest can become an important means of curbing certain wide-spread and egregious predatory lending practices.

II. THE PROBLEM WITH PREDATORY LENDING

Predatory lending is broadly defined to include any practice that allows lenders to target and take advantage of classes of unsophisticated borrowers. Commentators label a number of specific practices “predatory,” including, but not limited to, reverse redlining, aggressive sales tactics, fraudulent lending, no document loans, balloon payments, pre-payment penalties, broker and lender fee manipulation in the form of yield spread premiums, deceitful servicing of loans, and loan flipping. Though new legislation may help to restrict many of these predatory practices, this comment primarily proposes legislative reforms targeting lenders who sell “noncompetitively overpriced and overly risky” home mortgages. Predatory lenders structure these mortgages to be “non-transparent to many consumers, creating information asymmetries between borrowers and loan sellers that can be exploited by the latter.”

New innovations in securitization and computational processing allow loan sellers, i.e., mortgage lenders and brokers, to cheaply and efficiently open credit lines for many borrowers who traditionally would not have qualified for an ordinary thirty-year fixed rate mortgage. However, these modern but Byzantine loan structuring and servicing schemes often create substantial informational advantages for loan sellers; advantages that are used to push large numbers of borrowers into risky loans. While lucrative for loan sellers, the loans are ultimately too expensive for most borrowers. The sale of predatory loans is facilitated by “borrower decisionmaking [sic] vulnerabilities.” Targeted borrowers often lack access to credit or significant knowledge about the mortgage sales

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4 Lauren E. Willis, Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price, 65 Md. L. Rev. 707, 723–34 (2006) (explaining how the “targeting of minority and elderly communities for predatory loans has been dubbed ‘reverse redlining’” and how the rise of “creative loan structuring” in theory was supposed to lead to a positive market “nichification,” but instead created incentives for pre-loan, closing, and servicing practices that are now widely considered predatory).

5 Id.

6 Id. at 735–40 (recognizing the limits of the two traditional methods of defining predatory lending as outright fraud, under-inclusive and difficult to prove, or by listing factors of predatory loans, factors may be over- or under-inclusive).

7 Id. at 728.

8 Id.

9 Id. at 740.
process. By exploiting borrowers’ vulnerabilities, lenders weaken market forces by “prevent[ing] segments of borrowers from stimulating and benefiting from price competition within the sub-prime [sic] loan industry.”

This gamesmanship by loan sellers restricts “borrowers’ effective choice set when they are deciding whether to borrow at all.” As such, predatory lending is a problem created by lenders who, rather than “playing by the rules,” use a range of techniques to undermine a borrower’s ability to act in his or her best interest. Instead, borrowers are manipulated into acting in the interest of the lender.

Over the last twenty years, financial deregulation permitting loan securitization and brokers’ aggressive sales tactics together fueled an increase in sub-prime and predatory lending. Prior to deregulation, “A” graded borrowers, i.e., individuals deemed acceptable credit risks, were sold “prime loans” that met the Federal National Mortgage Association (“Fannie Mae”) and Federal Home Loan and Mortgage Corporation (“Freddie Mac”) guidelines. Any loan failing to meet these guidelines is broadly defined as “sub-prime.” However, in recent years, over fifty percent of all sub-prime loans are actually qualified for prime loans. To deal with the presumed, though arguably illusionary, increased risk associated with sub-prime loans, loan sellers use advanced computer data processing to organize and sell packaged mortgages to an assignee.

The assignee, usually an investment bank, then bundles the loan with other mortgages from additional originators into an entity that exists only to hold the loans in a pool; the entity itself is then sold off as “securities” issued by the pool. This “securitization allows loan originators to make great profit from origination fees by leveraging relatively small amounts of capital to make many loans.” Although securitization benefits borrowers by democratizing credit, more often, predatory lenders use the process to

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10 Id.
11 Id.
12 Id. at 740–41.
13 See generally Peterson, supra note 3, at 2–30 (discussing the various causes of predatory lending).
14 Id. at 9–11 (noting that “insiders call subprime [sic] lending the ‘wild-west’ of the real estate secured credit market” because it is thought to service borrowers with less than “A” credit histories).
15 Id.
17 Peterson, supra note 3, at 27.
18 Id.
19 Id.
create judgment-proof brokerage firms.  

Securitization allows brokers to quickly establish lending operations with financing from large lending institutions. By structuring loans with arbitrary fees and excessive costs, predatory brokers are paid upfront for their loans.  

Brokers can swiftly sell multiple loans, garner huge profits, and, should victims detect the scheme's predatory nature, declare bankruptcy; thus becoming insolvent and avoiding liability.  

Under the current "holder-in-due-course" rule, the victims, unable to recoup from insolvent brokers, also cannot pursue the financing lender. The lender or assignee, who actually holds the securitization, may continue to hold or foreclose on the mortgage without facing most of the substantive defenses the borrower retains against the broker. The assignee

may take the obligation to receive a borrower's payments without taking liability risk from most claims or defenses assertable against the originator ...[And] can pass the right to receive payment on to an investment trust, which once again is not subject to the borrower's claims or defense. 

Because there is little accountability, lenders who originate the mortgage can "cleanse a loan of the most important defenses simply by assigning it," while victimized borrowers are left without significant legal protections. 

III. A CRITIQUE OF EXISTING FEDERAL LAWS

At present, a number of federal laws exist to halt discriminatory and unsavory credit practices. The Equal Credit Opportunity Act ("ECOA"); the Truth in Lending Act ("TILA"); the Real Estate Settlement

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20  id.
21  id.
22  id.
23  id. at 26–28
24  id. at 27–29.
25  id.
26  id.
27  15 U.S.C. § 1691 (2007) (prohibiting lenders from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age, the fact that all or part of the applicant's income comes from any public assistance program, or the fact that the applicant exercised any right under any federal consumer credit protection law). See also FHA, supra note 4 (discussing the related prohibitions of the Fair Housing Act).
Procedures Act ("RESPA"); and the Home Ownership and Equity Protection Act ("HOEPA"), all explicitly attempt to discourage predatory lending. These acts either (1) provide disclosures to increase consumer information prior to the closing of the loan, e.g., TILA, or (2) forbid lenders from using very specific practices or issuing specific types of loans, e.g., ECOA and HOEPA. This comment rejects the law and economics view that disclosures alone are a sufficient method for establishing fair markets and combating information disparities between borrowers and lenders. Instead, this comment accepts that market failures related to predatory lending are due to (1) widespread cognitive limitations of most consumers who lack a functional knowledge of the proper use of the available information; (2) lenders’ willingness to take advantage of information asymmetries; and (3) the clear substantive limitations of disclosure forms, i.e., these are often long, obtuse forms overlooked by borrowers. While accepting that disclosures must be simplified and further borrower education, this comment also assumes that even effective reforms in these areas are both inefficient and unrealistic. Therefore, this comment argues that disclosures are most useful when used as tools by plaintiffs’ lawyers in litigation against loan sellers engaged in predatory practices. By holding loan sellers accountable, litigators and government will promote optimal responsible lending behavior and force the worst predatory lenders out of the market.

The most effective way to deal with predatory lending is to strengthen the consumer protection laws already applicable to mortgages and increase incentives for private litigators to pursue claims in the public interest. Part I of this comment explains the shortcomings of current consumer protection law as it relates to predatory lending. It reviews the

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31 See Willis, supra note 5, at 741–43 (noting that the neoclassical law and economics school assumes that predatory lending is solely the result of uninformed borrowers making irrational decisions and that this assumption disparages regulatory legislation while favoring additional disclosure legislation).
32 Michael Barr, Modes of Credit Market Regulation, in BUILDING ASSETS, BUILDING WEALTH: CREATING WEALTH IN LOW INCOME COMMUNITIES 206, 221-22 (Nicolas Resinias & Eric Belsky eds., 2005) (recognizing “the efficacy of disclosures” is diminished by inadequacies in their nature and timing, their limited effect on consumer behavior, and consumers’ cognitive limitations; in the case of TILA he notes four failings: (1) timing; (2) consumer cognitive failures, e.g. 75% of respondents in one survey found TILA statements complicated; (3) consumers are provided with too much data for them to properly process; and (4) for low income, minority and limited English proficiency buyers the other effects may be exacerbated).
barriers and limitations to litigation inherent in the current legal scheme, particularly those that affect the practical viability of private actions, the lack of remedial incentives, and, briefly, the failures of government regulation. Part II considers potential means of improving avenues of private litigation, including the extension of liability and remedies. Part III explores potential criticisms of the proposals presented, particularly those criticisms aimed at mass tort and public interest litigation generally. Part IV concludes with a brief discussion of the prospects for establishing a broad consensus for legislative reform in consumer rights enforcement and how increased litigation may increase equal opportunity and foster more equitable lending practices.

IV. CURRENT BARRIERS AND LIMITATIONS OF LITIGATION

Commentators have noted a number of successes and failures with the laws currently available to combat predatory lending practices. To explain these criticisms, this comment begins with the two broad concerns that limit the enforcement of private rights: (1) the lack of viability of private lawsuits; and (2) the limited options for both de jure and de facto remedies. In the current system, private claims are made unviable by the limited availability of private rights of action, the lack of fee-shifting statutes, limits on damage awards, and other substantive concerns. Limited de jure remedies, such as federal courts’ inability to prevent foreclosures and certain timing restrictions, and similarly limited de facto remedies, e.g., limited assignee liability, only add to the problems associated with predatory lending. This comment shows how these issues are interrelated and work to hinder the enforcement of consumers’ rights.

A. Lack of Viability of Private Actions

The lack of viable avenues for private enforcement in the area of consumer credit is largely due to the government’s concession to law and economics theory that predatory lending occurs only when borrowers make irrational loan choices based on bad information. However, this ignores the wealth of research that suggests the real problem is that loan sellers often take advantage of both the borrowers’ ignorance and the almost total lack of both seller liability and regulation of the industry. As this section will demonstrate, the law and economics model justified the substantial

33 Willis, supra note 5, at 741–43.
34 Id.
limits on loan seller liability and was consistent with deregulation. Yet, limited private and federal enforcement noticeably failed to lead to any significant consumer rights enforcement; and prior to the 2008 economic meltdown, federal regulatory bodies were mostly sympathetic to the interests of the loan sellers over those of borrowers. States’ attempts to pass laws to fill in the gaps left by federal deregulation and to enforce RESPA, HOEPA, and ECOA have been thwarted by general preemption concerns and states’ limited ability to carry out expansive enforcement work. These structural barriers make private plaintiffs’ attorneys extremely hesitant to sue predatory lenders.

B. Lack of Private Rights of Action

Chief among the barriers to litigation is the lack of a private right of enforcement. Most prominently, private litigation is hindered by the lack of a private right of action in RESPA. Courts have been reluctant to find a private right of action in section 10(a) of RESPA, which bars lenders from overcharging escrow accounts and certain other servicing practices, and thus the section 10(a) is under enforced. An escrow account is a “bank account, generally held in the name of the depositor and an escrow agent, that is returnable to the depositor or paid to a third person on the fulfillment of specific conditions,” and should be used to cover taxes and insurance. However, often loan sellers will, in violation of section 10(a), use ambiguous fees to overcharge borrowers’ escrow accounts, then invest the money on Wall Street. For decades, consumer groups have been concerned about the abuse of escrow funds. For example, a 1994 study

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35 See, e.g., Stephen F.J. Ornstein, Recent HOEPA Mortgage Litigation, 55 CONSUMER FIN. L.Q. REP. 59 (2001) (noting that although HOEPA was first passed in 1994, it was not until late 1998 that the first judicial opinions were reported). See also Eugene J. Kelley, Jr., John L. Ropiquet & Anna-Katrina S. Christakis, An Overview of HOEPA, Old and New, 59 CONSUMER FIN. L.Q. REP. 203, 210 (2005) (noting that HOEPA loans are rare).


37 Peterson, supra note 3.

38 See 12 U.S.C. § 2609(a) (2007) (limiting the amount lenders may hold in escrow accounts to cover taxes and insurance premiums). See also Seth M. Mott, Tackling the Perplexing Sound of Statutory Silence, 64 WASH. & LEE L. REV. 1159 (2007) (referring to § 2609, generally, as Section 10 and § 2609(a) as Section 10(a), naming adopted here, and viewing the need for more Circuits to recognize a private right of action in RESPA Section 10).


40 Mott, supra note 39, at 1166–68.

41 Id. at 1167 (explaining the history of escrow accounts in the 1930s and, writing in the
found that lenders overcharged borrowers $5 to $10 billion dollars and were seeing huge investment returns from this money; lenders were essentially stealing billions of dollars in interest from their borrowers.42 Even with evidence of rampant wrongdoing by loan sellers, most courts refuse to imply a private right of action in section 10(a) because the clause does not explicitly create one.43 Only the Sixth Circuit permits private plaintiffs to litigate under RESPA;44 all other jurisdictions allow only the states and the federal government to enforce section 10(a).

States have not been successful in their attempts to enforce section 10(a).45 Even in those states with aggressive attorney generals, the states’ ability to combat this national problem is limited.46 While HUD, which under the provisions of section 10(d) has the power to “assess to the lender . . . a civil penalty,”47 does too little enforcement through fines or other means. Further, the Federal Trade Commission (“FTC”), which has the authority to enforce and define unfair and deceptive trade practices, brings only a few cases challenging predatory lending, and its enacting statutes also fail to provide a private right of action.48 The lack of government oversight has allowed lenders to continue to profit from borrowers’ escrow accounts.

Additionally, HUD constrains RESPA litigation through the

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42 Id. (quoting Edwin C. Mills, The Functioning and Regulation of Escrow Accounts, 5 Housing Policy Debate 203 (1994)).

43 See, e.g., Hardy v. Regions Mortgage, Inc., 449 F.3d 1357, 1359–60 (11th Cir. 2006) (finding that RESPA offers only HUD the power to enforce section 10 violations); Clayton v. Fed. Sav. Bank, No. 96-1696, 1997 WL 82624, at *1 (4th Cir. Feb. 27, 1997) (affirming, without comment, a lower court holding that RESPA contained no private right of action); Louisiana v. Litton Mortgage Co., 50 F.3d 1298, 1301-02 (5th Cir. 1995) (“We are comfortable in deciding for this circuit that there is no private right of action under Section 10 of RESPA”); Allison v. Liberty Sav., 695 F.2d 1086, 1091 (7th Cir. 1982) (holding that no private right of action exists under Section 10); McAnaney v. Astoria Fin. Corp., 357 F. Supp. 2d 578, 591 (E.D.N.Y. 2005) (holding that no private right of action exists under Section 10).

44 See Vega v. First Fed. Sav. and Loan Ass’n, 622 F.2d 918, 925 n.8 (6th Cir. 1980) (finding a private right of action in RESPA).

45 See Mott, supra note 39, at 1168 (noting that “coalitions of state attorneys generals have successfully won settlements worth millions of dollars against lenders for violations of Section 10(a), but they lack the necessary time and resources” to conduct a nationwide campaign).

46 Id.


48 See Peterson, supra note 3, at 47–48 (noting that there is no private right of action for the Federal Trade Commission and that, although FTC provides definitions, state laws creating private rights of action under the FTC provide the “real teeth in enforcement”).
promulgation of HUD Policy Statements I and II, which narrowly interpret the relevant sections of RESPA prohibiting referral and kickback fees for brokers.⁴⁹ HUD’s interpretations do not per se prohibit yield spread premiums ("YSPs"), i.e., fees imbedded within mortgage loans meant to compensate brokers for the services provided to individual borrowers; but it does nearly prohibit class actions against lenders using YSPs.⁵⁰ YSPs are widely criticized by consumer advocates as “optional and rarely needed” excessive fees, designed primarily to “increase broker compensation, while costing borrowers thousands of dollars, especially African-American and Hispanic borrowers.”⁵¹ Yet HUD justifies its leniency with YSPs by arguing that YSPs allow low-income borrowers to pay indirect fees to brokers through the terms of the loan, rather than through costly up-front or direct fees.⁵²

The issuance of Policy Statement II’s more lenient “total compensation” test for the reasonableness of YSPs is in part a response to the successful class litigation brought against a mortgage broker in Culpepper v. Inland Mortgage Corp.⁵³ In Culpepper, a broker was successfully sued by a class of plaintiffs for offering a uniform YSP to all borrowers, when, under the law, the broker was required to charge a YSP based on each individual borrower’s loan and the services provided.⁵⁴ The new test makes it more difficult for plaintiffs to successfully press a claim since reasonableness is now measured not by the individual loan, but by the “total” services offered by a loan seller; courts are now even more reluctant

⁵⁰ See Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 24 C.F.R. § 3500 (1999) (establishing that under HUD regulations YSPs are not illegal per se, but that a two-part analysis of whether goods were actually exchanged and whether the payment was reasonable would determine the validity of YSPs) [hereinafter Policy Statement I]. See also Real Estate Settlement Procedures Act (RESPA) Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052 (Oct. 18, 2001) (codified at 24 C.F.R. pt. 3500) (adopting a more stringent “total compensation test” for the validity of yield spread premiums and denying the bringing of class actions against lenders) [hereinafter HUD Policy Statement II].
⁵² See id. at 371–72 (“HUD maintains that indirect fees, such as yield spread premiums, enable consumers who are unable to pay direct, or up-front, fees to obtain home loans... More often than not, a mortgage broker is both paid directly and indirectly, with the yield-spread premium going undisclosed to the borrower”).
⁵³ 253 F.3d 1324 (2001).
⁵⁴ Id. at 1332 (2001) (certifying a class action against a broker who charged a uniform yield-spread premium to a class of borrowers and that the YSP was not proper compensation).
to certify classes of borrowers; and loan sellers are not prevented from charging and hiding excessive fees.\textsuperscript{55}

These regulations constrain private litigation by allowing borrowers to be bamboozled by predatory loans, while also creating “safe harbors” and incentives for loan sellers to profit from the massive issuance and securitization of predatory sub-prime loans.\textsuperscript{56}

C. Lack of Financial Viability

Even if more federal private rights of action are created, under current law, lenders and the assignees of securitized trusts still could not be held liable for the illegal conduct of brokers. Private plaintiffs therefore are less likely to bring expensive federal lawsuits against small brokers who, by the close of trial, may become insolvent. From the plaintiffs’ perspective, securitized trusts and their investors are more attractive defendants.

The majority of sub-prime loans are securitized by Wall Street investment firms, who have few underwriting criteria for the loans and often fail to perform screenings to discourage the use of predatory practices in loan disbursement.\textsuperscript{57} Investment firms get away with this haphazard screening and due diligence because federal laws do not provide “full, quantifiable assignee liability” on trusts.\textsuperscript{58} Securitization trusts are structured to be distant from the illegal activity of loan sellers, so as to avoid liability.\textsuperscript{59} These trusts rely on the holder-in-due course doctrine, which permits only the holder of the mortgage note to be liable to certain borrower claims and defenses, to insulate themselves from liability.\textsuperscript{60}

The holder-in-due-course doctrine is found in both \textit{RESPA} and \textit{ECOA} and defines the “holder” as the “holder of a negotiable note, who took the note for value, in good faith, and without notice that the note contains certain defects.”\textsuperscript{61} The doctrine allows the assignee trust to claim the notes “free of most defenses to nonpayment and affirmative claims that

\textsuperscript{55} See Cantwell, \textit{supra} note 53, at 381–82 (noting that “most courts have refused to certify class litigation surrounding the legality of yield-spread premiums” after the arrival of Policy Statement II; partially because its requirement that plaintiffs bring “individual litigation of claims with little monetary value” lessen the financial incentives for bringing claims).

\textsuperscript{56} \textit{Id.} at 382.


\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} at 2053.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.}
borrowers could have pursued against the originators.62 Further, under TILA and HOEPA, the assignee can be cleared of liability merely by denying any knowledge of the original loan sellers’ predatory practices.63 Although TILA and HOEPA do have a more extensive form of assignee liability, even this liability is limited.64 The lack of liability permits Wall Street investors to continue to fund predatory lenders who, with the large availability of cheap and easy money, are able to continue their operations and who, if caught, can declare bankruptcy.65 This leads to a startling lack of accountability on the part of both investment firms and the loan sellers.

The financial interest of the plaintiffs’ bar in bringing enforcement actions is further dampened because state fraud claims do not include fee shifting provisions. Further, although plaintiffs are entitled to punitive damages in most jurisdictions, to recover damages the plaintiff must demonstrate that the lender exhibited “ill-will” or “malice” towards the borrower.66 Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”)67 claims also allow for the recovery of punitive damages, but these damages are limited by the parameters set out in In re First Alliance Mortgage Co.,68 as well as other constitutional concerns.69 In First Alliance Mortgage Co., a federal bankruptcy court found Lehman Brothers liable for its part in aiding and abetting First Alliance Mortgage

62 Id.
63 Id.
64 Id. at 2052–53 (“Although these statutes allow for [strict] assignee liability, in reality the application of the laws is quite narrow. In some cases, the laws require active participation by the assignees. In others, the laws only apply to a small fraction of loans, as is true for HOEPA;” and while “TILA allows borrowers to recover against assignees for originators’ violations” it also requires that those violations be “apparent on the face of” the federal disclosures).
65 Peterson, supra note 3, at 29.
68 In re First Alliance Mortgage Co., 298 B.R. 652, 659–65 (Bankr. C.D. Cal. 2003) (findings of fact) (finding that because Lehman Brothers became liable when it learned of FAMCO’s fraud during due diligence and nevertheless gave FAMCO “substantial assistance” in financing its operations through securitization). See also Engel & McCoy, supra note 58, at 2061 (explaining that the verdict against Lehman Brothers “sent shock waves throughout the securitization world because Lehman Brothers was found liable in part, as FAMCO’s investment bank and warehouse lender, for faulty due diligence on FAMCO’s securitization loans” and was one of three developments that prompted some investors to intensify their due diligence on sub-prime investments).
Corporation ("FAMCO") in defrauding borrowers. Although the court did not condone Lehman Brothers' conduct, the court found that its actions did not "shock the conscience of the court" and that the Trustee had "failed to establish the first element required for the harsh remedy of equitable subordination of Lehman's secured claim by a preponderance of the evidence;" allowing Lehman Brothers to escape some liability.

The limited remedies available to plaintiffs bringing successful claims against predatory lenders, particularly given the difficulties of bringing class actions, results in very few financial incentives for private lawyers to assume the costs of litigation. For-profit private plaintiffs' firms will not prosecute predatory lenders if the firms cannot predict a substantial financial return on their investments in such lawsuits. Even nonprofit public interest firms and state prosecutors may be constrained by the protracted and expensive nature of this type of litigation. The lack of liability combined with the limited damages available make predatory lender litigation unattractive to the private plaintiffs' bar.

D. Lack of Practical Viability

Substantive obstacles to proving a claim and establishing a defendant's liability also exist. For example, the requirement in HOEPA litigation that plaintiffs show that defendant-lenders' exhibited a "pattern or practice" of violating the statute's prohibition on asset-based high cost loan lending is a difficult standard. Pattern-or-practice litigation, like the disparate impact claims available under ECOA, requires a large group of

Footnotes:

70 First Alliance, 298 B.R. at 667.
71 Id. at 669–71.
72 Fed. R. Civ. P. 23 and 28 U.S.C. § 1332 (d) (2007) requires that the class actions arising under the statute show that (1) the class is large enough so as to make individual suits impractical and/or that the class is a superior vehicle for disputes' resolution; (2) that there is commonality of legal and/or factual claims and/or that these common claims will predominate the proceedings; (3) that typical claims and/or defenses will apply for all parties; and (4) that the class members are representative parties who will adequately protect the interests of the class. Class actions are hard to prove in these cases often because it is difficult to show commonality of claims; as defendants are able to show that the class members were treated differently based, for example, on different credit ratings. See, e.g., Barr, supra note 33, at 218 (explaining that ECOA class actions are often difficult to bring because "[g]iven the complexity and proprietary nature of credit scoring systems, and the difficulty of proving that any two applicants are similarly situated except for their race, disparate treatment proof is hard to make out"). See also Policy Statement II, supra note 51 (discussing the limitations on RESPA class actions imposed by federal regulations).
73 See Engel & McCoy, supra note 58.
74 See 15 U.S.C. § 1639(h) (2007) (stating that a "creditor shall not engage in a pattern or practice of extending credit to consumers under mortgages referred" to in HOEPA).
75 See, e.g., Garcia v. Johanns, 444 F.3d 625, 632–33 (D.C. Cir. 2006) (holding that
borrowers to demonstrate their rights were systematically violated by loan sellers. It is logistically prohibitive to find, gather evidence from, and coordinate with a group of potential plaintiffs. Moreover, ECOA requires a showing that the individual plaintiffs are similar enough that only race or sex separates them, or under HOEPA, that the plaintiffs were not all treated similarly because of shared bad credit histories. Additionally, both pattern-or-practice and disparate impact litigation often require plaintiffs to present complex statistical analyses of the data collected from the class to prove defendants engaged in illegal conduct. Even if these hurdles are met, there still remain the difficulties of establishing commonality of a class and stringing together claims under the limited assignee liability. Further, there is the problem of HOEPA’s hyper-effectiveness to the point where critics have labeled it a “new federal usury statute.” HOEPA loans expose lenders to so much liability, that lenders are reluctant to make these loans available to any borrower.

Even to prove fraud, the plaintiff must provide evidence of the subjective states of mind of both parties. The common law requires plaintiffs to prove the bad actor’s ill intent, as well as the victim’s reliance on the bad actors’ claims. Intent standards are difficult to meet and, even assuming one is able to show the proper elements, the damages are often not worth the litigation costs. Additionally, class certification is “extremely difficult” because the reliance element requires the class to show that its members were all equally reliant on one defendant; preventing the consolidation of multiple fraud claims, escalating the costs of litigation, and intensifying private attorneys reluctance to on these lawsuits.

disparate impact is available under ECOA, but that “[e]stablishing commonality for a disparate treatment class is particularly difficult where ...multiple decisionmakers [sic] with significant local autonomy exist ...[And that] appellants failed to identify any centralized, uniform policy or practice of discrimination by the USDA that formed the basis for discrimination against Hispanic loan applicants with varied eligibility criteria in over 2,700 counties nationwide over a 20-year period”).

Barr, supra note 33, at 220 (noting that ECOA is “hemmed in by equal protection jurisprudence,” which requires plaintiffs to show defendants acted with some discriminatory intent, and the “business necessity defense,” whereby defendants can rebut plaintiffs’ claims by maintaining all decisions were made consistent with normal business practices). See also Johanns, 444 F.3d at 632–33 (discussing the difficulties with bringing disparate impact claims).

Kelley et al., supra note 36, at 210 (noting that because HOEPA loans require lenders to follow a highly restrictive set of rules, lenders are unwilling to finance such loans).

See id. (noting the lack of successful HOEPA litigation).

See Peterson, supra note 3, at 47–49 (explaining the difficulties of common law fraud claims in state courts).

Id.

Id. at 48.

Id.
E. Limited Remedies

Under the current enforcement regime, restrictions on the remedies available to plaintiffs are built into the system both legally, de jure, and structurally, de facto. These limitations create powerful impediments for plaintiffs attempting to hold predatory lenders accountable for their unscrupulous behavior.

i. De Jure Remedies

De jure remedies are those remedies that are explicitly available under the law as it exists today. The limitations on these remedies in the law are primarily caused by timing issues and, as discussed earlier, the lack of assignee liability. The statutorily limited time period in which claims under RESPA, ECOA, and HOEPA may be brought is a significant problem. Under RESPA, private plaintiffs have only one year to enforce the sections 8 and 9 prohibitions against unearned fees and unreported mandatory title insurance fees within the Annual Percentage Rate ("APR") and three years to bring section 6 complaints questioning overcharges on escrow accounts.\(^\text{83}\) HUD, public prosecutors, and insurance commissioners have a slightly longer three year period to bring section 6, 8 or 9 claims.\(^\text{84}\) Although some provisions of TILA and HOEPA are revived at foreclosure,\(^\text{85}\) most RESPA claims die after three years.\(^\text{86}\) Because of the nature of securitized mortgages,\(^\text{87}\) a borrower is unlikely to become aware of the predatory nature of their servicing program until long after the loan is originated. Borrowers often only become aware of problems with the loan when their homes enter into foreclosure.\(^\text{88}\) Only during foreclosure does the average borrower have any incentive to seek out costly legal counsel.

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\(^\text{84}\) Id.


\(^\text{87}\) See Peterson, supra note 3, at 29 (explaining how securitization effects the mortgage industry).

\(^\text{88}\) Engel & McCoy, supra note 58, at 2076.
with the expertise to notice predatory servicing, origination fees, and other unsavory aspects of the mortgage. Under current law, foreclosure is often far too late to bring the available defenses and claims because it falls outside the claims’ timing limitations or because lawsuits against lenders and brokers, which can last several years, do not halt a foreclosure initiated in state court by the note’s current assignee. Therefore, by the time the protracted lawsuit is over, the plaintiff has been irreparably harmed by the loss of her home.

ii. De Facto Remedies

*De facto* remedial limitations are caused by structural mechanisms built into existing consumer laws. These *de facto* limitations are loopholes that often leave plaintiffs without a defendant to sue. For example, unscrupulous originators are able to take advantage of these structural limitations, e.g., the lack of lender liability and timing issues, to prey upon neighborhoods. The originators are quickly able to declare bankruptcy and disappear without penalty. This scenario often occurs when home mortgages are securitized. Securitization provides finances for brokers to avoid because the holder-in-course rule prevents borrowers from suing the holders of the securitized loans and assignees are almost completely free of liability.

In addition, lack of government enforcement and oversight compounds these *de facto* limitations. For example, while HOEPA does increase liability for assignees, its enhanced liability is rarely enforced because HOEPA loans are so uncommon. Currently, lenders and brokers can avoid responsibility for loans that violate consumers’ rights, while assignees are not offered the incentives necessary to encourage proper due diligence, oversight that would ensure that loans were not originated by predatory lenders. Finally, arbitration clauses in many mortgage agreements require borrowers to go before business-friendly arbitrators before bringing other claims, which limits plaintiffs’ ability to seek remedies when lenders violate consumer’s rights.

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89 Id. See also Peterson, supra note 3, at 29–30.
90 See Peterson, supra note 3, at 27–29.
91 See Engel & McCoy, supra note 58, at 2052–54.
92 See Kelley et al., supra note 36, at 210.
93 Id.
94 See Peterson, supra note 3, at 23–24.
V. EXPANDING ENFORCEMENT

Despite the immense problems with the current enforcement of ECOA, HOEPA, RESPA, and TILA, these laws generally provide valuable protection to home mortgage buyers and help to prevent the most invidious lending practices. However, to increase the efficiency of such regulation, private enforcement of current laws must be encouraged. Increased enforcement through the actions of hundreds of “private attorney generals” will weed out bad actors and promote responsible lending and financing by investment firms. The following is a non-exhaustive list of modifications and reforms that would promote private litigation and close some of the loopholes discussed above.

A. Improve Private Actions’ Viability

i. Private Right of Action

Given the problems with relying solely on federal enforcement, the enforcement of existing predatory lending laws depends on the creation of private rights of action in RESPA. HUD has neither the administrative capabilities to enforce section 10 and other regulations nor the political will to fund and implement its broad general protection powers. However, once consumers have the right to bring individual claims, courts will see a sharp increase in the number of private claims against lenders. Private enforcement of section 10, for example, would “help consumers protect themselves from predatory lenders by providing an effective mechanism by which they can seek true recourse for lenders’ overcharging of escrow accounts and can deter lenders from overcharging other consumers.”

Even assuming HUD acquired the necessary resources to protect consumers, the general power of a federal agency cannot protect everyone. The establishment of a private right of action opens the door for all borrowers who feel wronged to bring their claims to court. By creating a private right of enforcement for section 10 of RESPA, thereby creating a private claim against lenders who fail to provide a good faith APR estimate, Congress would allow RESPA to finally live up to the spirit of the law.

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95 See Mott, supra note 39, at 1201–02.
96 Id. at 1196.
97 Id. at 1201–02.
98 See Allison v. Liberty Sav., 695 F.2d 1086, 1091–93 (7th Cir. 1982) (Posner, J., dissenting); see also Mott, supra note 39, at 1186-88 (discussing Judge Posner’s dissent in Allison and finding it “compelling” justification for a private right of action).
Further, an increase in private enforcement of RESPA would lead to the kind of self-regulation and weeding out of bad actors that has largely occurred in employment discrimination law through the use of disparate treatment and impact schemes. As more private actors are held accountable, the industry would be forced to take notice and begin to conform to the new expectations set out by the promulgated case law.

A private right of action may also be extended to Federal Trade Commission ("FTC") law, allowing the FTC to take a role similar to the Equal Employment Opportunity Commission; or the role the FTC already plays in many state statutory schemes, i.e., a regulatory body whose standards are enforced by state, federal and private attorneys. Increased litigation in this area may also spur regulators to take notice and assume a more active role in litigating more cases. More enforcement would democratize regulation by taking it out of the hands of bureaucrats, who are easily captured by special interests, and place it into the hands of private actors, as well as federal courts. Private actors are much more likely to act independently in interpreting the consumer statutes in the public interest.

ii. Expand Financial Incentives

Current laws do not offer enough financial incentives for private attorneys to bring suits on behalf of individual plaintiffs. These lawsuits are often expensive, involving years of litigation, document production and review, and expert evidentiary analysis. Without statutory assurances that costs can be recovered, private rights of action will not be enough to increase the number of enforcement lawsuits. Litigation reform must include mechanisms for increasing the availability of attorneys' fees, fee-shifting arrangements, punitive damages, aggregated small claims, as well

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100 See Peterson, supra note 3, at 47–48 (discussing hybrid state statutory schemes in which the FTC’s regulations are used as guidelines for state and private enforcement of consumer protection laws).


102 See, e.g., Schuetz v. Banc One Mortgage Corp., 292 F.3d 1004, 1014 (9th Cir. 2002) (holding that the court will defer to HUD’s more restrictive interpretation of YSP’s legality under RESPA from the Policy Statement II). Under a regime of increased litigation, courts would be allowed to develop their own expertise and decrease their deference to HUD’s position on YSPs.
as the extension of liability to “deep-pocketed” defendant-assignees.

Attorneys’ fees are already available under both ECOA\textsuperscript{103} and HOEPA.\textsuperscript{104} Parts of RESPA do explicitly allow for the collection of attorneys’ fees by successful plaintiffs,\textsuperscript{105} however, section 9 places a damages cap of “three times all charges made for such [illegal] title insurance”\textsuperscript{106} and section 10 includes no private right of action or recovery.\textsuperscript{107} Caps and limitations on reasonable recovery of attorneys’ fees should be removed and fee-shifting agreements encouraged. This will create incentives, namely, the opportunity for large-scale recovery, necessary for private attorneys to bring enforcement actions.

The United States Supreme Court encourages the use of punitive damages when it “further[s] a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”\textsuperscript{108} Punitive damages are available in most federal claims, including RICO, HOEPA, and ECOA,\textsuperscript{109} if the plaintiff can show that such damages are reasonably based on the reprehensibility of the defendant’s actions.\textsuperscript{110} Reprehensibility is defined as illegal conduct that is pervasive and harmful, evincing a reckless disregard for the interests of vulnerable victims, and done with particular malice or deceit.\textsuperscript{111} Punitive damages may not exceed certain ratios when compared to statutory fines or compensatory damages imposed in the same action.\textsuperscript{112}

In recent years, punitive damages have been awarded in actions against firms responsible for servicing mortgages.\textsuperscript{113} Private attorneys

\textsuperscript{107} Mott, supra note 39, at 1164.
\textsuperscript{109} 15 U.S.C. § 1691e(b) (2007) (limiting punitive damages in ECOA cases to $10,000 or, in a class action, “the lesser of $500,000 or 1 per centum of the net worth of the creditor,” and requiring the court to consider the traditional punitive measures of reprehensibility, risk taking, etc, on the part of the lender).
\textsuperscript{110} Gore, 517 U.S. at 575–77. See also State Farm Mutual Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (refining Gore, adding that “few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process” and finding that punitive damages may not take into account interjurisdictional conduct of defendant)..
\textsuperscript{111} See Campbell, 538 U.S. at 425.
\textsuperscript{112} Id. at 411.
\textsuperscript{113} Blank Rome LLP, Loan Servicer Failure to Disclose Proof of Claim Preparation Fees Results in Millions in Damage Awards, 2002, available at http://www.blankrome.com/index.cfm?contentID=37&itemID=563 (citing two cases in which the court awarded damages, attorneys’ fees and $2 million in punitive damages to nationwide classes of debtors for failure to disclose proof of claim preparation fees, Slick v. Northwest Mortgage, Inc. (In re Slick), Bankr.
bringing these actions must be encouraged to continue to seek punitive damages. Given the exhaustive nature of predatory lending, plaintiffs will likely be able to show the reprehensibility of defendants, as well as the state’s interest in prohibiting the conduct of fraudulent investors. Punitive damages are not only lucrative for plaintiffs’ attorneys, but if properly used, can achieve meaningful deterrence and protect the public interest.

Policy Statement II, with its de facto bar on class actions, must be repealed and replaced with the two part reasonableness test for YSPs from Policy Statement I. This will allow for the certification of class actions and the aggregation of multiple claims. In addition, the term “commonality of purpose” as used in Federal Rule of Civil Procedure Rule 23 and 28 U.S.C. § 1332(d) should be defined within any reform statute. Under such a statute, this requirement could be met with a general showing of suitability amongst a class of plaintiffs; allowing for wider classes of plaintiffs and additional opportunities for aggregate claims.

Finally, the extension of liability to wealthy assignees will help to create more interest in private litigation. Better financial incentives can adequately compensate private attorneys who represent the interests of borrowers, thereby increasing the incentives for private enforcement.

iii. Remove Substantive Hurdles

To buttress the additional enforcement rights, the pattern-or-practice requirement should be eliminated and burdens of proof shifted to be replaced with a suitability requirement for RESPA, HOEPA, and ECOA. See Cantwell, supra note 53, at 392–95 (discussing the benefits of a suitability requirement). See also Willis, supra note 5, at 819 (criticizing the suitability standard because (1) the borrower must still recognize that the loan is overpriced; (2) enforcing the standard is costly to limited judicial and administrative resources; and (3) it is difficult to use the standard to pass on liability to the secondary market). The suitability standard proposed here addresses all of Willis’s concerns. The standard would (1) allow the borrower’s claims to be renewed upon foreclosure, so even if the borrower did not recognize a high priced loan initially, an attorney or judge during the foreclosure hearing likely would; (2) this proposal is based upon the idea that an increase in enforcement and action, on the part of both the judiciary and administrative bodies, is a good thing, the hope being that increased regulation through litigation will lead to an increased concern about predatory lending and cause additional resources to be allocation to regulation; and (3) about half of those borrowers in sub-prime loans, i.e. the secondary market, do not belong there, so in their case, unsuitability will likely be easily demonstrated. Further, the more judicial and administrative resources brought to bear on the issue, the more I believe the courts and HUD will begin to seriously develop standards for suitability for borrowers of all classes as well as define the responsibilities of assignees.

No. 98-14378-MAM, slip op. (Bankr. S.D. Ala. May 10, 2002) and Dean v. First Union Mortgage Corp. (In re Harris), No. 00-11321MAM-13, slip op. (Bankr. S.D. Ala. May 10, 2002)).
defendants would sustain the cause of action. The suitability requirement and the repeal of Policy Statement II will lead to a litigation scheme that requires defendants to justify the terms of the mortgages sold and the fees received. Loan sellers will become more conscious of the nature of the loans sold, and although still compensated, sellers’ compensation more closely correlated to the benefits received by borrowers.

Uniform fees will be discouraged, and with more litigation, patterns will develop, which will demonstrate the types of loans judges and juries find suitable for various plaintiffs. To give loan sellers additional guidance, HUD can promulgate regulations regarding what loans it believes are suitable. These regulations would be given deference in lawsuits. However, courts could also determine whether a loan is suitable by using a preponderance of the evidence standard. The suitability requirement would allow lenders to be more flexible, even with high priced HOEPA loans. Under the new scheme, rather than completely avoiding the issuance of HOEPA loans, all loans would include a suitability requirement. A mortgage broker could offer a loan if he or she could justify certain practices, e.g., balloon payments on short-term loans or high asset based lending. A fiduciary duty can also be imposed on the mortgage broker through this suitability requirement. The duty would increase liability for brokers who are failing to responsibly represent the best interests of their client, the borrower, and thus force bad actors out of the market, while encouraging better practices amongst the remaining brokers. Additionally, the added liability of assignees would reassure brokers, since they would not be the only party held liable for improper actions. This shared liability would ease brokers’ bankruptcy fears and encourage Wall Street firms that fund these brokers and lenders to be more cautious about their investments.

Further, without the explicit need to demonstrate pattern-or-practice, plaintiffs can bring claims that are not large class actions. Under ECOA, protected classes, such as race and sex, will no longer be the primary claim; instead these categories will be “plus” factors. For example, if all the loans to blacks within a predominately African-American neighborhood are unsuitable, then plaintiffs will demonstrate a prima facie class-wide ECOA claim. This requirement will make the business necessity defense more difficult for mortgage brokers to present, since it will limit sellers’ ability to claim that unsuitable loans were provided due to “business necessity.”

The suitability requirement also makes commonality and disparate impact much easier to show than under current law. It will generally make plaintiffs’ claims easier to prove and more attractive to the plaintiffs’ bar. Allowing plaintiffs to rely on a commonality-of-unsuitability requirement
will make class actions more prevalent and improve the viability of individual claims. It will also eliminate the evidentiary hurdles of pattern-or-practice litigation, such as evidence from a broad class of plaintiffs.

Fear of litigation will force lenders, servicers and assignees to tighten their requirements for loans. Self-regulation will improve as assignees and others work to constrain brokers and lenders who allow “no-docs” loans, i.e., loans granted with no documentation of a borrower’s income, wealth, or credit history, or the forging of documents. Pressure from Wall Street will help end fraudulent practices by mortgage brokers.

B. Extend Remedial Options

Remedial options can be expanded primarily by extending the opportunities for plaintiffs to seek remedies and by removing other _de jure_ and _de facto_ hurdles. Reform must focus on ensuring that plaintiffs’ claims survive long enough to hold loan sellers and their financiers accountable for predatory lending.

i. Renew Claims and Halt Foreclosures

The new legislation must include a provision that allows for the renewal of all federal claims under RESPA, HOEPA, and ECOA following the initiation of state foreclosure proceedings. Borrowers are often unable to recognize the high costs and predatory nature of loans until after their homes are forced into foreclosure. The renewal provision would ensure that plaintiffs are able to bring all remaining claims. It will allow borrowers in state foreclosure actions to either remove their cases to federal courts or bring separate federal actions. District court judges will have the power to issue preliminary injunctions to halt foreclosure actions. These hearings will be no more burdensome than other preliminary injunction proceedings. Movants will have to show ripeness and irreparable injury before an immediately appealable injunction will be issued. The lender or assignee holding the borrower’s mortgage and initiating the foreclosure can secure its interests through a negotiated bond amount, also immediately appealable. If the preliminary injunction is invalidated following the full adjudication of the claims, the bond would protect the note-holder’s interests. In order for federal courts to intervene, however, Congress


\[116\] See Fed. R. Civ. P. 65(c) (“The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully
must explicitly grant federal judges the power to issue preliminary injunctive relief to halt state foreclosure hearings when there is evidence that the loan seller violated RESPA, HOEPA, TILA, or ECOA.\textsuperscript{117}

\textit{ii. Extend Liability}

The assignee liability found in HOEPA should be adopted and added to federal ECOA, RESPA, and TILA claims. Under HOEPA, liability extends to assignees and "[a]ny person who purchases or is otherwise assigned a mortgage referred to in" HOEPA, unless "the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising ordinary due diligence, could not determine . . . the itemization of the amount financed, and other disclosure of disbursements that the mortgage" violated HOEPA.\textsuperscript{118} This broad based liability language, including the due diligence requirement, could be inserted into the parts of the act covering home mortgages in ECOA, RESPA, and TILA.\textsuperscript{119} Extended liability would create incentives for private attorneys to go after large lenders. Liability will encourage more stringent self-monitoring by lenders, brokers, and Wall Street investors and assignees, all of whom are better prepared than the average borrower to determine loan suitability. The loan sellers and others exposed to this extensive liability are the "least-cost avoiders," i.e., the party for whom it is least costly in terms of time, expertise, and interest to ensure that loans are advantageous to both parties. To ensure efficiency, the least-cost avoiders must be held responsible for ensuring that mortgage loans are not predatory, in stark contrast to the present legal scheme, which places the burden on ill-informed borrowers.

Investors, i.e., Wall Street firms and securitized trusts, will seek to avoid exhaustive liability by ceasing the funding of credit lines for unscrupulous lenders. Further, more uniform due diligence will ensure that

\textsuperscript{117} See 28 U.S.C. \$ 2283 (2007) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"). See also Younger v. Harris, 401 U.S. 37, 45 (1971) (citing a long history of case law proposing that only "when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting ... actions ... except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate").


\textsuperscript{119} 15 U.S.C. \$ 1641(a) (2007) (recognizing that, under TILA, assignee liability is currently available, but only when "the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary").
investors no longer back predatory loans. States are unable to extend assignee liability because firms can simply exclude loans originating from liability states from securitized bundles. By federalizing extensive liability, assignees will be forced face liability and improve the thoroughness of due diligence. Extended liability will close the most prominent loopholes in mortgage laws. loopholes that currently allow investors to “look the other way” while predatory lenders take advantage of whole communities. Liability will also ensure that investors who profited from predatory lending will remain available to compensate the victims of these bad practices.

Finally, under the new scheme, arbitration clauses can be circumvented by enacting a law to prevent predatory lending related claims from entering arbitration; unless formally agreed to by a plaintiff, not at closing, but when the claims and defenses are renewed again at foreclosure.

VI. LIMITATIONS AND CRITICISMS

There are two major criticisms of reform proposals aimed at increasing private litigation: (1) that additional liability and increased scrutiny by the plaintiffs’ bar will lead to the closing of the sub-prime market, which has provided valuable services to low-income communities; and (2) that the country will see an increase in frivolous lawsuits that will cripple our already overburden courts and administrative bodies, as borrowers facing foreclosures rush to federal courts to seek injunctive relief.

A. Closes Credit Opportunities

Some critics allege that by increasing private enforcement of existing laws, viable credit opportunities for risky borrowers will be lost. This allegation must be met with both sensitivity and suspicion. At present, there is no evidence that this kind of predatory borrowing has helped communities. On the contrary, there is growing evidence, that reverse redlining and predatory lending have only hurt borrowers who qualified for better loans but were preyed upon by bad actors. If lenders and others

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120 See Engel et al., supra note 58, at 2052–53 (recognizing that assignee liability can increase proper due diligence).
121 Id.
122 See also discussion following supra note 106 (responding to criticisms of the suitability requirement raised by Willis).
123 Brooks & Simon, supra note 17.
are truly concerned about the welfare of low-income borrowers, then the lenders should not be bothered by the enforcement of existing requirements that ensure loans made to low-income borrowers are responsible and suitable. Increased enforcement will prevent the sort of rampant exploitation that has occurred in low-income and minority communities like Baltimore.124 The federal government and Wall Street lenders can move into low-income communities with either alternative loan programs for borrowers with bad credit or regular loan programs. It is possible to safely invest, provide credit to, and profit from transactions with low-income communities in a way that is beneficial to both borrowers and lenders, rather than exploitive. It is certainly more advantageous to allow those with good credit to have access to suitable loans and to hold bad actors responsible for making bad loans, than to hold no one responsible for the actions that led to the current credit crisis.

Additionally, regulation will improve the quality of loans. If lenders are ready to make real commitments to these communities, they will see an increased return on investments, as well as a marked improvement in the quantity and quality of investments. For example, the Community Reinvestment Act ("CRA"), which required some responsibility on the part of banks and lenders to the communities they were lending to, helped create strong, meaningful community investment programs that have increased credit in formerly neglected and maligned neighborhoods.125 An increase in viable regulation will help to place borrowers and lenders on an even playing field during negotiations. For brokers this will create a level of responsibility and accountability to clients that most borrowers already falsely believe exists. As indicated by successes with the CRA, an increased sense of responsibility amongst lenders will solve more problems than it creates. The present problem is that loan sellers are too willing to take advantage of borrowers, with no accountability. These proposals will help to swing the pendulum back into balance.

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124 See Sean Zielenbach, Moving Beyond the Rhetoric: Section 8 Housing Choice Voucher Program and Lower-Income Urban Neighborhoods, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 9, 24 (2006) (noting that several communities in Baltimore "had been particularly hard-hit by property flipping and predatory lending," to the point where, when "federal authorities prosecuted and ultimately convicted over 100 people for illegal transactions associated with property flipping in the late 1990s and early 2000s. The convicted individuals collectively owned over 1,000 properties at the time of their sentencing").

125 Barr, supra note 33, at 219 (discussing how CRA reinforces anti-discrimination ideals and how the "CRA has encouraged banks to increase their lending in [low-income and minority communities], and minority households now constitute a larger share of such lending than they did a decade ago").
B. Increase in Frivolous Lawsuits

There will likely be an initial increase in lawsuits, including additional frivolous lawsuits. However, the district courts are the gateways to the legal system. The lower courts are competent enough to use the many powerful tools available to them to ensure that these lawsuits neither overrun the system, nor lead to an over abuse of the halts on foreclosures. The courts can use their dismissal powers under Rule 12(b)(6) and Rule 56, as initial lawsuits will establish the rules for when such motions are appropriate and when they will be granted. Extending judges’ equity power to foreclosure proceedings is no different than other requests for injunctive relief. The initial upsurge caused by the lack of substantive regulation and the current crisis in the mortgage industry should not worry reformers. The first lawsuits will likely attack the major violators and, presumably, lead to settlements or judgments that can spur major reforms in industry. Future lawsuits will act as “cleanup,” targeting smaller assignees and lenders.

Further, the view that our courts are constantly teetering on the edge of collapse due to frivolous lawsuits, overlooks the reality that only a small percentage of lawsuits actually make it through the court system to trial or appeal. An increase in lawsuits actually means an increase in settlements. Brokers, assignees and lenders will be forced to re-enter loan negotiations with classes of borrowers now represented by attorneys and backed by the law. Settlement agreements will lead to more mutually beneficial loans and lending guidelines. Additionally, settlement agreements may provide excellent opportunities to fund and establish programs to improve borrowers’ financial literacy. Settlements can also be used to improve credit access for vulnerable communities and encourage mutually beneficial lending practices. This criticism ignores the

126 See Scott A. Moss, Illuminating Secrecy: A New Economic Analysis of Confidential Settlements, 105 Mich. L. Rev. 867, 877 n.46 (2007) (describing parties’ incentives to settle cases and referring to “data from the federal courts” reporting that “ninety-eight percent of all civil cases and ninety-five percent of criminal cases settle through agreement of the parties or are withdrawn from the court without a final court decision”) (citation omitted).
127 See, e.g., Elizabeth Topoluk, RESPA, HOEPA, and High Cost Mortgage Litigation and Related Developments, 53 Consumer Fin. L.Q. Rep. 62, 69 (2001) (explaining the terms of a recent settlement agreement between Delta Funding Corporation and the federal government, including HUD, the FTC, and Department of Justice, that required Delta to comply with ECOA by adopting stricter broker compensation rules, additional compensation data collection, and broker monitoring systems).
128 See, e.g., Justice Cracks Down on Redlining, N.Y. Times, Aug. 26, 1994, at A28 (discussing an anti-redlining settlement against Chevy Chase, in which the DC area bank was accused of failing to prove services to local high-, middle-, and low-income Black communities and, as a part of the settlement, agreed to open additional services and develop outreach
possibility that the problem with predatory lending is that there are too few claims, not too many.

VII. CONCLUSION

The problems in the home mortgage industry and the resulting credit crisis are the result of deregulation, lack of enforcement of existing consumer protection laws, broker greed, and crafty Wall Street securitization schemes. This crisis may help to forge a political consensus that the federal government has an important role to play in protecting the interests of home buyers and traditional American values: whether by becoming directly involved in mortgages or by allowing improved avenues for individual plaintiffs to bring their own claims. The proposed act, which could be called "A Bill to Promote Enforcement of this Nation's Current Lending Laws," would do little to change the substantive law. Instead it would focus on improving the enforcement of the existing laws. This increase in private litigation will also put pressure on the federal government to enforce existing laws. Additionally, more plaintiff-centered laws will make litigation easier and more attractive. These proposals will go a long way in helping to force out lenders who refuse to comply with current consumer protection standards and ensure real equality of opportunity for all Americans.