Predatory Lending (Note)

Imagine losing ownership of your home at the end of your life because of questionable business practices and terms that you don’t fully understand, but were persuaded to agree to. Imagine being plunged into significant debt for the same reason. Such is the case in America as companies target the poor and elderly for high-interest and high-fee loans and mortgages.

According to the Association for Community Reform Now (ACORN), predatory lending generally involves:
- Aggressive and deceptive marketing;
- Attaching prepayment penalties to a loan, and typically at high rates;
- Balloon payments;
- Charging higher interest rates than a borrower’s credit warrants;
- Financing excessive fees into loans;
- Home improvement scams;
- Loan flipping;
- Making loans for more than 100% loan to value;
- Making loans without regard to the borrower’s ability to pay;
- Negative amortization;
- Property flipping; and
- Single premium credit insurance.

Several states introduced or enacted legislation in 2001 and 2002 to combat the problem.

**Alabama**

Senate Bill 273 of 2002 would prohibit making equity-based loans that include financing high points and financial fees.

**California**

AB 489, which became law in 2001, imposes various requirements on consumer loans secured by specified real property, defined as “covered loans.” The law prohibits various acts in making covered loans, including the following:
- Failing to consider the financial ability of a borrower to repay the loan;
- Financing specific types of credit insurance into a consumer loan transaction;
- Making a covered loan without providing the consumer a specified disclosure, and
- Recommending or encouraging a consumer to default on an existing consumer loan in order to solicit or make a covered loan that refinances the consumer loan.

Violations are subject to a civil penalty.

**Colorado**

Colorado, HB 1259, which became law in 2002, creates additional protections regarding certain “covered loans” as defined in the federal “Home Ownership and Equity Protection Act of 1994,” including:
- Charging a fee for providing a credit balance;
- Financing of credit insurance;
- Increased interest rates after default;
- Lending without regard to repayment ability;
- Limitations on balloon payments, accelerations of indebtedness;
- Mandatory arbitration clauses;
- Negative amortization;
- Prepayment penalties;
- Prohibiting advance payments;
- Recommendations to default on existing loans;
- Refinancing that does not benefit the borrower or that results in a loss of certain benefits to the borrower.
- Requiring certain disclosures and reporting; and
- Using loan proceeds to pay home improvement contractors.

This measure also preempts local law attempting to regulate lending activities that are subject to the Act or to certain federal authorities; specifies civil remedies; and grants the state attorney general authority to enforce the consumer protections.

Colorado Chapter 145 of 2001 requires the owners of certain loans secured by deeds of trust that encumber dwellings, and owners of loans primarily secured by an interest in land, to comply with the notice provisions of the “Uniform Consumer Credit Code” before the commencement of foreclosure proceedings. Failure of any owner to comply with such provisions necessarily precludes said people from providing default information to a credit-reporting agency; and constitutes an absolute defense in any debt recovery action. It also clarifies the definition of “consumer loan.”

**Connecticut**

Public Act 01-34 of 2001 requires lenders to make certain disclosures to prospective borrowers seeking high-cost home loans, including the interest rate and the consequences of mortgaging a home. It prohibits lenders from including certain loan provisions or from taking certain actions with respect to high-cost home loans, such as charging unwarranted or excessive fees or providing incomplete information. It also imposes conditions on a lender's ability to sell credit insurance to a borrower.

The Act allows lenders to charge a fee for payoff statements only when they are delivered on an expedited basis pursuant to an agreement with the borrower. It creates new penalties for lenders who violate its provisions.

**Florida**

Concerning high-cost home loans, Chapter 57 of 2002:
- Allows a borrower to cure a default;
- Authorizes the state banking department to bring actions for injunctions; providing for issuance of subpoenas;
- Authorizes the state banking department to impose certain fines under certain circumstances;
- Authorizes the state banking department to issue and serve cease and desist orders for certain purposes;
- Prohibits certain acts relating to high-cost home loans;
- Provides that a lender who violates the Act forfeits the interest in the high-cost home loan;
• Provides that certain unintentional good-faith errors are not deemed violations of the Act;
• Requires certain disclosures for high-cost home loans;
• Requires lenders of high-cost home loans to provide notice to borrowers prior to taking foreclosure actions, and
• Specifies the liability of purchasers and assignees.

Georgia

SB 435 of 2002 would:
• Create a Council for the Prevention of Predatory Lending through Education;
• Direct the Council to design, approve, and implement education programs that inform and educate consumers, particularly those most vulnerable to being taken advantage of by predatory and unscrupulous lenders, as to the dangers and pitfalls of entering into a home loan through cooperation contracting with community based organizations to accomplish such directive;
• Direct the Council to refer individual cases in which there is evidence of an apparent violation of federal or state laws or regulations to the appropriate governmental agency for further investigation and action, and
• Direct the Council to conduct an extensive statewide study of the root cause of home loans that go into default and foreclosure, using as much empirical data as are available.

Georgia HB 1361:
• Creates specific and numerous consumer protections for covered home loans and high-cost home loans, and
• Prohibits practices and limitations relating to covered home loans and high-cost home loans;
• Provides for penalties and enforcement; to provide for exceptions for unintentional violations.

This bill became law in 2002.

Iowa

HCR 21 of 2002 would establish a legislative committee to study predatory and subprime lending practices.

Massachusetts

Senate Bill 18 of 2002 would establish practices to govern high-cost home loans. Such loans are defined as loans in which the annual percentage rate of the home at consummation exceeds five or more percentage points the average weekly yield on United States Treasury securities adjusted to a constant maturity of one year.

New York

A11856, which became law in 2001, imposes certain requirements on high-cost home loans. These include:
• Requiring all high-cost home loans to have a legend on the top of the mortgage indicating that it is a high-cost home loan;
• Applying to any person who acting in bad faith attempts to avoid said provisions by splitting or dividing a high cost-home loan transaction;
• Providing that a lender acting in good faith that fails to comply with certain parts of the Act would not be deemed in violation of the section if the lender notifies the borrower of the compliance failure within 30 days of the loan closing and appropriate restitution is made or the compliance failure resulted from a bona fide error;
• Allowing for a private right of action against a lender or mortgage broker within 6 years of the origination of the loan;
• Directing that violators of the Act are liable to the borrowers for actual damages and statutory damages;
• Allowing a court to award reasonable attorney fees to a borrower;
• Providing for injunctive, declaratory and other equitable relief for borrowers;
• Deeming a home loan agreement void if intentional violation by the lender of the Act is found by a court;
• Allowing a borrower to recover any payments certain circumstances;
• Granting borrowers the right to rescind upon a judicial finding that the high-cost home loan violates provisions of the Act whether such violation is raised as an affirmative claim or defense, and
• Granting borrowers the right to assert any claims in recoupment and defenses to payment in a foreclosure action against the assignee or original lender of the loan.

North Carolina

Session Law 332 of 1999 modifies permissible fees which may be charged in connection with home loans secured by first mortgage or first deed of trust, to impose restrictions and limitations on high-cost home loans, to revise the permissible fees and charges on certain loans, to prohibit unfair or deceptive practices by mortgage brokers and lenders, and to provide for public education and counseling about predatory lending.

Pennsylvania

Act 55 of 2001 regulates the terms and conditions of certain subprime mortgage loan transactions. Generally, it prohibits business entities and affiliates from making, issuing or arranging subprime or high-cost loans or assisting others in so doing in an abusive, unscrupulous or misleading manner. The law also provides for enforcement, a private right of action, education, outreach, and counseling about such transactions.

Virginia

Chapter 511 of 2001 increases the maximum penalty for a violation of the state Mortgage Lender and Broker Act from $1,000 to $2,500, and increases the amount of a bond that mortgage lenders and brokers are required to post from $5,000 to $25,000. The measure also prohibits a mortgage lender from recommending or encouraging a person to default on an existing loan or other debt, if such default adversely affects such person's creditworthiness, in connection with the solicitation or making of a refinancing mortgage loan.
Chapter 510 of 2001 prohibits mortgage lenders and brokers from flipping mortgage loans. "Flipping" a mortgage loan means refinancing a mortgage loan within 12 months after the mortgage was originated when refinancing doesn’t benefit the borrower.