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Preemption and the North Carolina Predatory Lending Law

I. INTRODUCTION

“This [North Carolina law] is the toughest law against predatory lending in the country. I am confident this will be a model law for all state legislatures.”¹ When former North Carolina Attorney General Mike Easley made this statement, it embodied his belief that the North Carolina Predatory Lending Law,² passed on July 22, 1999, would not only protect North Carolina home buyers, but also lead the nation in fighting predatory lending. It appears, however, that the North Carolina predatory lending law may be vulnerable to a claim of preemption by the Office of the Comptroller of the Currency (“OCC”) with respect to national banks.³ Despite questions about the constitutionality of preemption in state consumer protection laws,⁴ history shows that the OCC has a predetermined course of action — preemption of state law. On Thursday, September 30, 2003, the OCC preempted the Georgia Fair Lending Act (“GFLA”) in its first action against state predatory lending laws.⁵

As the continued applicability of state predatory lending laws to national banks becomes less certain,⁶ North Carolina regulators, national and state banks, and consumers must consider the possible ramifications of the OCC’s actions. Part II of this note describes the history of predatory lending and the steps both

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⁴ Paul Foley (Feb. 7, 2004) (Unpublished manuscript on file with NCBI). This note provides an analysis of the merits of preemption.
North Carolina and Georgia have taken to combat it. Part III will then analyze the OCC's order preempting Georgia's predatory lending law in order to determine the standard that the OCC will apply in future preemption issues and to identify recent trends in the actions of the OCC toward preemption. Part IV will attempt to predict the likelihood and effects of preemption in North Carolina. Finally, in Part V, this note will analyze the advantages and disadvantages of the OCC's policy toward predatory lending as compared to the North Carolina predatory lending law.

II. BACKGROUND

A. The History of Predatory Lending

Predatory lending is the use of unfair practices by lenders in order to take advantage of borrowers. In recent years, the number of loans that contain questionable practices that are generally associated with predatory lending has soared. These practices include (1) excessive prepayment penalties, (2) scheduled balloon payments, (3) negative amortization, and (4) repeated refinancing of loans. The poor, elderly, and financially unsophisticated are most vulnerable to predatory lending practices because of their need to obtain credit and their inability to understand the predatory terms.

Since the vast majority of these people are subprime borrowers, predatory lending is most prevalent in the subprime market. Subprime lenders provide credit to high-risk borrowers...
who are unable to obtain credit in the conventional market in exchange for a greater interest rate.\textsuperscript{16} Generally, the high-risk borrowers who must resort to subprime credit are the same poor, elderly, and financially unsophisticated borrowers that are vulnerable to predatory lending.\textsuperscript{17} As a result, the subprime market provides loans to the people who are most vulnerable to predatory lending.\textsuperscript{18}

As subprime borrowing became a larger share of the credit market,\textsuperscript{19} the concerns about predatory lending increased.\textsuperscript{20} In response, both federal and state governments felt compelled to take action.\textsuperscript{21} The question for lawmakers was whether to restrict the practices of predatory lending or restrict the availability of subprime credit.

**B. The North Carolina Predatory Lending Law**

On July 22, 1999, the North Carolina State Legislature passed the nation’s first state predatory lending law.\textsuperscript{22} Consumer advocacy groups effectively lobbied for strict ceilings on both interest rates and fees.\textsuperscript{23} The law passed by an overwhelming forty-seven to two vote in the Senate and one hundred and nine to nine vote in the House.\textsuperscript{24} Roy Cooper, who was North Carolina Senate Majority Leader at the time, praised the legislation as “the toughest law against predatory lending in the country.”\textsuperscript{25}

The North Carolina predatory lending law prohibits specific practices on all loans, creates a new category of “high-cost” home loans, and places greater restrictions on these so-called

\begin{footnotesize}
\begin{enumerate}
  \item Daugherty, supra note 11, at 569.
  \item Id.
  \item Id. at 575.
  \item Daugherty, supra note 11, at 570.
  \item Daugherty, supra note 11, at 592-93.
  \item The Coalition for Responsible Lending, supra note 1.
  \item Id.
\end{enumerate}
\end{footnotesize}
“high-cost” loans. A loan is characterized as a “high-cost” home loan if the interest rates, points and fees, or prepayment penalties exceed the thresholds set by the statute.

Current North Carolina law prohibits certain practices characteristic of predatory lending in all home loans. The first protection outlaws the “flipping” of a loan. “Flipping” is the practice of repeatedly refinancing an existing home loan and always charging upfront fees. Second, lenders can only finance insurance premiums calculated on a monthly basis, not single, upfront payment premiums. Finally, lenders are not allowed to encourage default in order to refinance debt. A violation of any of these prohibitions subjects an offender to both usury and unfair trade practice remedies.

The North Carolina predatory lending law also places even more extensive restrictions on loans that meet the requirements of a “high-cost” home loan. A loan is characterized as “high-cost” if its terms exceed one of the following statutory thresholds: the annual percentage rate must be lower than ten percent above the comparable Treasury bond rate; the points and fees cannot exceed five percent of the loan amount; and the prepayment penalty cannot exceed two percent of the amount prepaid. If a loan exceeds one of these thresholds, the loan is then considered “high-cost” and is subject to more statutory regulation.

26. N.C. GEN. STAT. § 24-1.1E(a)(4) (2001). A loan is considered a “high-cost” home loan if the principal does not exceed either the loan size limit for a single-family as determined by Fannie Mae or $300,000, the borrower is a natural person, the mortgaged property is used for personal, family, or household purposes, and the loan exceeds one of the thresholds in the statute. Id.
27. Daugherty, supra note 11, at 594.
28. See id. at 597.
29. N.C. GEN. STAT. § 24-10.2(c) (2002).
30. THE COALITION FOR RESPONSIBLE LENDING, supra note 1.
31. N.C. GEN. STAT. § 24-10.2(b) (2002).
32. N.C. GEN. STAT. § 24-10.2(d) (2002).
33. N.C. GEN. STAT. § 24-10.2(e) (2002).
34. Daugherty, supra note 11, at 595.
35. Id., at 593-94.
39. Daugherty, supra note 11, at 594.
A lender may not make a "high-cost" home loan until the borrower has received home-ownership counseling. Additionally, a lender cannot approve a "high-cost home loan" unless the borrower appears to have the ability to repay the loan without considering the value of the collateral. Assuming these two criteria are met, a high-cost home loan is legal as long as it does not violate the additional statutory prohibitions. The first additional restriction mandates that provisions which allow the lender to accelerate the indebtedness at its sole discretion are unlawful. Next, the statute prohibits balloon payments that require the borrower to pay a large lump sum at the end of the loan term. Third, negative amortization, a situation where payments are so low that a higher loan principal results after the payment, is prohibited. Fourth, a "high-cost" home loan cannot contain a clause that raises the interest rate upon default. Fifth, the loan must not include an advance payment of more than two periodic payments as a condition of receiving the loan. Finally, a lender may not charge fees for modifying the terms of a loan or deferring payments. Banks engaging in these prohibited practices may also be subject to usury and unfair and deceptive acts and practices liability.

Stella Adams of the North Carolina Fair Housing Center believes that the North Carolina predatory lending law "provides North Carolinians with a great safety net against predatory lending." Certainly, this law strictly prohibits the practices utilized by predatory lenders that are permitted under federal

40. N.C. GEN. STAT. § 24-1.1E(c)(1) (2002). A counselor approved by the North Carolina Housing Finance Agency must certify to the lender that the he or she has counseled the borrower on the advisability of the loan transaction. Id.
41. N.C. GEN. STAT. § 24-1.1E(c)(2) (2002).
42. N.C. GEN. STAT. § 24-1.1E (2002).
44. N.C. GEN. STAT. § 24-1.1E(b)(2) (2002).
45. Daugherty, supra note 11, at 575-76.
47. N.C. GEN. STAT. § 24-1.1E(b)(4) (2002).
50. See Daugherty, supra note 11, at 597.
51. THE COALITION OF RESPONSIBLE LENDING, supra note 1.
law.\textsuperscript{52} If one believes that the federal law is inadequate, then the North Carolina predatory lending law provides essential protection for consumers.\textsuperscript{53} As former North Carolina Attorney General Mike Easley predicted, the North Carolina predatory lending law has been “a model law for all state legislatures.”\textsuperscript{54}

\textbf{C. The Georgia Fair Lending Act}

The North Carolina predatory lending law served as the model for the Georgia State Legislature in its deliberations to develop predatory lending legislation.\textsuperscript{55} On April 22, 2002, Governor Roy Barnes of Georgia signed into law the Georgia Fair Lending Act\textsuperscript{56} (“GFLA”).\textsuperscript{57} The Act became the most stringent predatory lending law in the nation.\textsuperscript{58}

The GFLA prohibits lenders from financing single, upfront insurance premiums,\textsuperscript{59} flipping,\textsuperscript{60} and encouraging default on existing loans.\textsuperscript{61} These provisions are taken directly from the North Carolina predatory lending law.\textsuperscript{62} In addition, the GFLA also prohibits late fees for payments made less than ten days past the payment due date,\textsuperscript{63} late fees that are greater than five percent of the default,\textsuperscript{64} and fees for inquiring about the payoff balance.\textsuperscript{65}

\textsuperscript{52} See Daugherty, supra note 11, at 598-99.
\textsuperscript{53} See id.
\textsuperscript{54} THE COALITION OF RESPONSIBLE LENDING, supra note 1.
\textsuperscript{55} Matthew Eisley & Chris Serres, Laws on Lenders may Fall to Feds, THE NEWS AND OBSERVER (Raleigh, N.C.), Sept. 5, 2003, at 1A.
\textsuperscript{56} GA. CODE ANN. §§ 7-6A-1 to -11 (2003).
\textsuperscript{57} Leetra Harris & Brian Nichols, Credit or Loan Discrimination; Define and Prohibit Abusive Home Loan Practices; Provide for Prohibited Practices and Limitations for Covered Home Loans and High-Cost Home Loans Create Consumer Protections for Covered Home Loans and High Cost Home Loans; Provide for Penalties and Enforcement; Provide Exceptions for Unintended Violations; Provide for Severability, 19 GA. ST. U. L. REV. 14, 18 (2002).
\textsuperscript{58} Robert M. Jaworski, Legislating Against Bad Loans; The State/Local Battleground, 58 BUS. LAW. 1229, 1231 (May 2003).
\textsuperscript{59} GA. CODE ANN. § 7-6A-3(1) (2003).
\textsuperscript{60} GA. CODE ANN. § 7-6A-4 (2003).
\textsuperscript{61} GA. CODE ANN. § 7-6A-3(2) (2003).
\textsuperscript{62} See supra notes 28-33 and accompanying text. The GFLA has the exact same provisions. See GA. CODE ANN. § 7-6A-3 to -4.
\textsuperscript{63} GA. CODE ANN. § 7-6A-3(3) (2003).
\textsuperscript{64} Id.
\textsuperscript{65} GA. CODE ANN. § 7-6A-3(4) (2003).
The GFLA also follows the North Carolina Law in imposing greater restrictions on loans that are classified as "high-cost" home loans. If a home loan meets the "high-cost" thresholds, then the borrower must receive home-ownership counseling and the lender must consider the borrower's ability to pay without resorting to foreclosure. The GFLA also prohibits call provisions, balloon payments, negative amortization, higher default interest rates, advance payments, and modification fees on "high-cost" home loans. In addition to these prohibitions, which are also found under North Carolina law, the GFLA goes further by prohibiting foreclosure without written notice, clauses that provide for mandatory arbitration in a forum that is inconvenient to the borrower, and payment for home improvements by the lender out of the loan proceeds.

Georgia state Senator Cheeks, a supporter of the GFLA, stated, "if you are trying to gouge people, watch out... if you are violating an American Dream, older persons keeping their homes through their golden years, this bill will stop you." Consumer activist groups, such as the Association of Community Organizations for Reform Now ("ACORN"), praised the Georgia legislature for "protecting their homeowners because the federal government wasn't doing so." The Georgia legislature had responded to a mounting number of complaints of predatory lending. In response to the toughness of Georgia's predatory lending law, however, the GFLA became the first predatory lending law to come under the scrutiny of the OCC.

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66. Jaworski, supra note 58 at 1230.
69. Jaworski, supra note 58 at 1230.
70. See supra notes 40-49 and accompanying text.
71. Id.
74. Harris & Nichols, supra note 57, at 15.
III. THE PREEMPTION OF STATE LAW

A. The Preemption of the Georgia Fair Lending Act

On Thursday, September 30, 2003, the OCC preempted the GFLA. National City Corporation of Indiana requested that the OCC determine whether its operations in Georgia were subject to the GFLA. The prohibitions in the GFLA resulted in different lending thresholds between Georgia law and the federal law that National City was subject to as a national bank. Mr. Konyk, National City Corporation's Vice President for Regulatory Management, said that national banks wanted preemption because "[a]s long as there are differing standards, it causes [National City] operational difficulties."

The Order issued by the OCC significantly reduced the reach of the GFLA. It preempted all provisions of the GFLA and exempted all national banks and their subsidiaries in Georgia from the GFLA's restrictions and limitations. Because the GFLA contains a preemption parity wildcard provision that allows state-chartered banks the same advantages received by national banks through preemption, the GFLA now applies only to nonbank lenders.

Georgia lawmakers reacted critically to the move they saw as a power grab by the federal regulators at the expense of laws

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79. Id.
82. See GA. CODE ANN. § 7-6A-12 (2003). The preemption parity provision is a wildcard statute that provides state banks with at least the same powers as their national bank counterparts. See id.
83. Memorandum from Don Lampe, et. al., supra note 81.
84. Luke, supra note 80, at G1.
meant to protect consumers.\textsuperscript{85} David Sorrell, Georgia’s Banking Commissioner, stated, “[i]t certainly is a very broad reach for the federal national-bank regulator. . . . We’ve got to be careful to make sure that state laws protecting the consumer are not preempted by federal regulatory fiat. . . .”\textsuperscript{86} Georgia Governor Sonny Perdue’s spokesman said that the OCC had “overstepped its bounds.”\textsuperscript{87} John Hawke, Comptroller of the Currency, responded that the powers of national banks to determine interest rates and fees “cannot be obstructed by state laws or regulations.”\textsuperscript{88}

At the same time it preempted the GFLA, the OCC proposed a national anti-predatory lending requirement that would require banks to make loans based on the borrower’s ability to pay rather than the value of collateral.\textsuperscript{89} The benefit of the national anti-predatory lending rule according to OCC Chief Counsel Julie Williams is it establishes a “uniform, nationally applicable predatory-lending standard for all types of loans, anywhere in the country.”\textsuperscript{90} The Preemption Determination and Order against the GFLA, however, failed to consider field preemption in predatory lending.\textsuperscript{91} Had the Preemption Determination and Order considered field preemption, it would have preempted all state predatory lending laws on the theory that Congress has adopted a complete legislative scheme addressing the issue.\textsuperscript{92} It appears that the OCC’s “uniform, nationally-applicable predatory-lending standard” rationale would have supported complete preemption of all state efforts to regulate predatory lending as applicable to national banks.\textsuperscript{93} The OCC concluded, however, on January 7, 2004 that federal law does not

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Cantor, \textit{supra} note 77, at 1.
\item Luke, \textit{supra} note 80, at G1.
\item Cantor, \textit{supra} note 77, at 1.
\item Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,265.
\item See generally McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
\item Cantor, \textit{supra} note 77, at 1 (quoting Julie Williams, OCC Chief Counsel).
\end{enumerate}
\end{footnotesize}
occupy the field of real estate lending. It does, however, preempt most state predatory lending regulations. A field preemption regulation would have followed the lead of the Office of Thrift Supervision ("OTS"), which has already determined that Congress has given them the authority to occupy the field in order to enhance the safety and soundness of federal savings associations.

B. The Preemption Standard

The Supremacy Clause of the Constitution states that "the Laws of the United States... shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby..." In McCullough v. Maryland, the Supreme Court recognized that under this clause states "have no power, by taxation or otherwise to retard, impede, burden, or in any manner control the operations" of the federal government. Congress can preempt a state law with a supreme federal law in one of three ways. First, Congress may use language that sets forth the scope of preemption in the legislation. Second, Congress may adopt a scheme of legislation that effectively "occupies the field" by leaving no room for state regulation. Finally, Congress may adopt a statute that is in irreconcilable conflict with a state law. The Supreme Court in Barnett Bank of Marion County v. Nelson held that a state law is in irreconcilable conflict with the National Bank Act if it

95. See id.
96. See Letter from Carolyn J. Buck, Chief Counsel, Office of Thrift Supervision 4 (Jan. 21, 2003) www.ots.treas.gov/docs/56301.pdf. The Office of Thrift Supervision ("OTS") has also made similar preemption determinations in regard to national thrifts. The OTS, however, may have greater statutory preemptive power than the OCC. See HOLA 12 U.S.C. § 1461 (2000). This decision is outside the scope of this note.
97. U.S. CONST. art. VI, cl. 2.
98. 17 U.S. (4 Wheat.) 316 (1819).
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
stands as an obstacle to the accomplishment of one of the federal statute's purposes.\textsuperscript{105}

The questions of whether Congress occupies the field or whether laws are in irreconcilable conflict are determined by congressional intent.\textsuperscript{106} The inquiry is whether Congress, "in enacting the federal Statute, intend[ed] to exercise its constitutionally delegated authority to set aside the laws of a State."\textsuperscript{107} The OCC contends that the exercise by a national bank of a federal power is not subject to state law, with limited exceptions.\textsuperscript{108} Upon passage of the National Banking Act, Senator Sumner remarked, "[c]learly, the [national] bank must not be subjected to any local government, state or municipal; it must be kept absolutely and exclusively under the Government from which it derives its functions."\textsuperscript{109} In its analysis, the Supreme Court has been "unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation."\textsuperscript{110} Under these interpretations, the OCC argues that it should possess sole authority to examine, supervise, and regulate national banks.\textsuperscript{111} Therefore, the OCC contends that any restrictions placed on national banks by state legislation are invalid. The OCC recognizes, however, that state laws may apply if the provisions do not alter the powers granted to national banks by federal law.\textsuperscript{112} The OCC further concedes that state law may be applicable in contracts, debt collection, property transfers, zoning, and tort law.\textsuperscript{113} Noticeably absent from this list, however, is consumer protection from predatory lending.\textsuperscript{114} On the other hand, in \textit{Association of Banks in Insurance, Inc. v. Duryee},\textsuperscript{115} the southern

\begin{itemize}
\item \textsuperscript{105} \textit{Id.} at 31 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
\item \textsuperscript{106} \textit{Id.} at 30.
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} Preemption Determination and Order, 68 Fed. Reg. at 46,273-74.
\item \textsuperscript{109} Cong. Globe, 38\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. 1893 (1864).
\item \textsuperscript{110} Easton v. Iowa, 188 U.S. 220, 231-32 (1903).
\item \textsuperscript{111} Preemption Determination and Order, 68 Fed. Reg. at 46,264.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} Bank of Am. v. City & County of San Francisco, 309 F.3d 551, 559 (9th Cir. 2002).
\item \textsuperscript{114} Lipsett, \textit{supra} note 3, at 547.
\item \textsuperscript{115} Ass'n of Banks in Ins., Inc. v. Duryee, 55 F. Supp. 2d 799 (S.D. Ohio 1999).
\end{itemize}
district court for Ohio held that "[w]here state and federal laws are inconsistent, the state law is pre-empted even if it was enacted by the state to protect its citizens or consumers."

As summarized by Comptroller Hawke, "in preemption situations, the only relevant issue is whether the state law would impair or interfere with the national bank's exercise of powers granted to it under federal law. . . . If such an impact is found to exist, federal law must prevail. . . ."

On the other hand, state law supporters argue for state regulation of consumer protection against both state and national banks. At the time of the passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act, Congress found that "[s]tates have a legitimate interest in protecting the rights of their consumers." In order to protect these rights, "states have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds." According to the Riegle-Neal Act, interstate branches of national banks must comply with the laws of the host state in the areas of community reinvestment, consumer protection, fair lending, and interstate banking. Therefore, under the state regulators' interpretation, national banks should be subject to Acts like the GFLA. But, the Riegle-Neal Act also contains a provision that limits the application of state laws in these areas to the extent that the laws have not been preempted.

In the National Bank Act of 1864, Congress established the

116. Id. at 802.
117. Davenport & Cantor, supra note 73, at 4.
121. Id.
123. Id.
powers of national banks to make real estate loans.\textsuperscript{125} The National Bank Act provided that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to... such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."\textsuperscript{126} The most-favored lender doctrine allows national banks to charge the highest interest rate allowed in the state in which the bank is located rather than where it is operating.\textsuperscript{127} The GFLA applied to all banks operating in Georgia, regardless of where they were headquartered.\textsuperscript{128} The OCC contends that the GFLA attempted to prohibit banks located in states without a predatory lending law from exporting that rate to Georgia.\textsuperscript{129} Therefore, the GFLA can not apply to national banks.\textsuperscript{130}

\section*{C. The Recent Preemption Trends}

The preemption of the GFLA is the most recent evidence of the escalating dispute between state regulators and the OCC as to who has the power to regulate banking products.\textsuperscript{131} As states have become more interested in regulating national banks conducting business within their borders, the OCC has become more interested in protecting its banks from having to comply with different laws in every state.\textsuperscript{132} Indeed, John Hawke, the Comptroller of the Currency, has made strengthening the preemption power of the national banking system his top priority.\textsuperscript{133}

\begin{thebibliography}{133}
\bibitem{126} Id.
\bibitem{128} GA CODE ANN. §§ 7-6A-3 (2003). The GFLA applies to "all home loans" regardless of whether the lender is a national or state bank.
\bibitem{129} Preemption Determination and Order, 68 Fed. Reg. at 46265.
\bibitem{130} Preemption Determination and Order, 68 Fed. Reg. at 46265.
\bibitem{131} Lipsett, supra note 3, at 543.
\bibitem{132} Id.
\bibitem{133} Rob Blackwell & Todd Davenport, A Heavy Load this Fall for Regulators, AM. BANKER, Aug. 25, 2003, at 1, available at 2003 WL 61297528.
\end{thebibliography}
As the first state to enact a home loan predatory lending statute, North Carolina stands in a precarious situation in regards to the continued applicability to national banks of its predatory lending statute. This is especially true as the GFLA was based on the North Carolina Act. Yet the current North Carolina Attorney General, Roy Cooper, continues to assert North Carolina's right to police lending practices within the state to ensure fair access to credit.

IV. THE LIKELIHOOD OF PREEMPTION IN NORTH CAROLINA

A. The Similarities of the GFLA and the North Carolina Predatory Lending Law

The North Carolina predatory lending law served as the model for the GFLA. However, the Georgia law is not identical. Instead, it is more restrictive. The GFLA included every restriction and limitation contained in the North Carolina law plus additional limitations. The OCC expressly preempted every restrictive provision in the GFLA. Due to this blanket preemption, one may assume a similar result if a national bank asked the OCC to preempt the North Carolina law.

Yet it should be noted that in drafting the North Carolina predatory lending law, legislators strived to make the law

134. Eisley & Serres, supra note 55.
136. See Eisley & Serres, supra note 55.
137. Id.
138. Cf. id.
“preemption-proof.” Rather than place caps on interest rates and fees, the North Carolina law purposely placed thresholds on interest rates and fees that would subject loans to additional protections such as home ownership counseling instead of actual prohibitions on excessive interest rates. North Carolina legislators believed that if the law failed to regulate the interest rates of a loan, it could not be preempted. The OCC now believes, however, that any impediment to a national bank’s exercise of a power should result in preemption—a stance that endangers North Carolina’s efforts to fight predatory lending.

B. The Possibility of Field Preemption in Consumer Protection

The OCC has solicited comments on whether to preempt the field of national banks' real estate lending activities. It believes that only the Comptroller of the Currency, and not a state, possesses the power to regulate real estate lending, including predatory lending, by national banks. In the light of the OCC’s current view on preemption power, state regulators, banking professionals, and consumer activists expected field preemption of real estate lending activities, which would effectively invalidate the North Carolina predatory lending laws. While the OCC chose not to take this action, the extensive regulation issued by the OCC on January 7, 2004, still endangers the viability of the North Carolina predatory lending law.

144. Id.
145. Id.
146. See Davenport & Cantor, supra note 73.
149. See Lipsett, supra note 3, at 552.
C. The Effects of Preemption on Predatory Lending In North Carolina

Assuming preemption occurs in North Carolina, consumers will lose many of the state protections.151 The field preemption proposal would effectively preempt all state laws applying to national banks.152 The OCC has proposed a rule that would replace extensive state statutes with a single restriction on lenders: banks must make loans based on the borrower's ability to pay, not the foreclosure value of collateral.153 John Hawke has stated that this rule “addresses one of the defining characteristics of predatory lending—the extension of credit with the intent of seizing a borrower’s home or other collateral.”154 While the North Carolina predatory lending law and other state efforts have attacked loans with questionable terms, the OCC hopes to attack lenders with questionable practices.155 According to the Comptroller of the Currency, the OCC has found “a better way to combat abusive lending practices” than the current state regulatory schemes.156 The National Association of Attorneys General, however, believe that the OCC's preemptive strike will hurt consumers who are vulnerable to predatory lending.157

In addition, the North Carolina predatory lending law lacks a preemption parity provision like Georgia.158 The lending restrictions would still apply to state banks and nonbank lenders unless the state legislature repealed the predatory lending act.

151. Letter from Neil Milner, supra note 118.
152. Id.
153. Cantor, supra note 77.
Thus, state banks would be at a competitive disadvantage with their national counterparts.\footnote{159}{See Lisa L. Broome & Jerry W. Markham, Regulation of Bank Financial Services 181-83 (1st ed. 2001).}

V. THE ADVANTAGES AND DISADVANTAGES OF PREEMPTION ON PREDATORY LENDING

A. The Enforceability of Predatory Lending Laws

State law supporters contend that state regulators should possess a greater ability to prevent, detect, and prosecute predatory lenders.\footnote{160}{See Eisley & Serres, supra note 55, at 1A.} Roy Cooper maintains that regulators in Washington, D.C. are not able to combat predatory lending in North Carolina as effectively as regulators in North Carolina.\footnote{161}{See id.} In defense of the North Carolina predatory lending law, Cooper has said that “if the feds take away our authority on the issue, it could lead to predatory lending falling right back to where it was.”\footnote{162}{Id.}

The OCC discards this argument based on its belief that the evidence that national banks are involved in predatory lending is “virtually non-existent.”\footnote{163}{Statement of the Comptroller of the Currency John D. Hawke, Jr. Regarding National City Preemption Determination and Order (July 31, 2003), http://www.occ.treas.gov/statementhawke.pdf (last visited Feb. 7, 2004).} The OCC points to a brief filed by nearly two dozen state Attorneys General who now oppose preemption.\footnote{164}{Press Release, Office of the Comptroller of the Currency, Preemption Determination and Order Concerning the Georgia Fair Lending Act, Questions and Answers (July 31, 2003), http://www.mortgagebankers.org/industry/docs/03/occ_nprm_ga_qa.pdf (last visited Feb. 7, 2004) [hereinafter Questions and Answers].} In the brief, the Attorneys General argue the position that: “[b]ased on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market....”\footnote{165}{Id.} These subprime lenders are usually mortgage and finance companies who would not be affected by preemption by the OCC.\footnote{166}{Id.}
B. The Uniformity of a National Standard

State law supporters question why the OCC would not allow national banks to be subject to state predatory lending laws if no national bank engages in predatory lending. John Hawke believes that differing state laws “introduce new standards for subprime lending that are untested, sometimes vague, often complex, and in many cases, different from established and well-understood federal requirements.” The uniform standard that would result from the enactment of the OCC’s anti-predator rule will protect national banks from having to operate under different laws in every state. Wachovia Corporation, already challenging a Connecticut mortgage company licensing statute on preemption grounds, has joined with other national banks in “support[ing] national standards that address unfair lending practices...” According to the OCC, the differing standards in each state place a burden on interstate banks because liability could arise from any misstep.

C. The Stringency of the Predatory Lending Law Provisions

Consumer activists agree that states should continue to regulate predatory lending because federal efforts are inadequate. Under the current federal scheme, most statutory efforts are concerned with ensuring fair disclosure and nondiscrimination, not preventing the actual predatory practices. In response to the OCC’s action, William Brennan, director of the Home Defense Program of the Atlanta Legal Aid Society, said that “[the OCC] sent a message that predatory lending is fine for Georgia.” In similarity with the GFLA, the North Carolina law

168. Cantor, supra note 77.
169. See id.
171. Questions and Answers, supra note 164.
172. See Davenport & Cantor, supra note 73.
173. See Daugherty, supra note 11, at 576-77.
has strict provisions that prohibit predatory practices that the federal law does not.\textsuperscript{175} Again, the OCC responds that more stringent provisions are not needed because national banks are not engaged in predatory lending.\textsuperscript{176}

\textbf{D. The Availability of Credit under Predatory Lending Laws}

The OCC believes that the problem with state predatory lending laws is that varying standards and strict provisions lead to less credit.\textsuperscript{177} John Hawke has concluded that state predatory lending laws “obstruct or, for practical purposes... prevent national banks and their subsidiaries from making certain types of real estate loans, which causes an overall reduction in credit...”\textsuperscript{178} The OCC argues that high interest rates, balloon payments, and fees are not necessarily abusive lending practices.\textsuperscript{179} Higher effective interest rates on these loans are simply a result of the higher risks associated with subprime lending.\textsuperscript{180} Additionally, according to the OCC, there are three reasons why predatory lending laws may impede the flow of legitimate credit to homebuyers if lenders cannot charge higher rates and fees: (1) lenders may be reluctant to extend credit in jurisdictions with these laws because of the increased legal risks, (2) lenders may be unable to sell loans originated in that jurisdiction, and (3) lenders face the increased costs of complying with the law in these jurisdictions.\textsuperscript{181} The OCC favors a policy of protecting access to credit while preventing predatory lending, rather than prohibiting national banks from making loans on favorable terms to risky borrowers.\textsuperscript{182}

\textsuperscript{175} Eisley & Serres, \textit{supra} note 55.
\textsuperscript{176} See Statement of the Comptroller of the Currency John D. Hawke, Jr., \textit{supra} note 163.
\textsuperscript{177} See id.
\textsuperscript{178} Cantor, \textit{supra} note 77.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Statement of the Comptroller of the Currency John D. Hawke, Jr., \textit{supra} note 163.
As evidence of the reduced availability of credit, the OCC cites a study conducted for them by Gregory Elliehausen and Michael Staten. Their study found that lending to subprime borrowers in North Carolina declined significantly since the passage of the North Carolina predatory lending law. The overall number of subprime mortgage originations declined by about fourteen percent. During the same time period, according to Elliehausen and Staten, out-of-state subprime borrowers secured the same number of loan originations.

North Carolina state law supporters, however, point to a contradictory study conducted by the Center for Community Capitalism at The University of North Carolina. According to this study, the overall decline in subprime originations can be attributed to refinance originations, not loans for purchase. Since the majority of predatory loans are refinances, this should be expected. Dr. Stegman, Director of UNC’s Center for Community Capitalism said “the study shows that since the North Carolina law went into full effect the subprime market has behaved just as the law intended. The number of loans with predatory characteristics has fallen without . . . restricting access to loans to borrowers with blemished credit. . .”

The UNC Center for Community Capitalism believes that it revealed different findings from the Elliehausen Study because it focused on specific market segments with and without predatory features rather than the overall subprime market. By analyzing

185. Id.
186. Id.
188. Quercia, et. al., The Impact of North Carolina’s Anti-Predatory Lending Law: A Descriptive Assessment, Center for Community Capitalism at the Frank Hawkins Kenan Institute of Private Enterprise (2003).
189. Id.
191. Quercia, et. al., supra note 188.
the law from this perspective, the study was able to show a decrease in refinancing fees, balloon payments, and negative amortization, but not in purchase originations. The OCC, however, attributes the different findings to the UNC study's definition of a subprime borrower as one with a FICO score, a measure of a person's creditworthiness, of less than 580. The largest sector of subprime borrowers, however, have a FICO score of 580-660. Therefore, the OCC argues the UNC study presents an incomplete picture of the subprime market.

VI. CONCLUSION

The preemption of North Carolina predatory lending law appears to be a foregone conclusion. The new federal regulation would insure a uniform standard that will hopefully enable lenders to provide more credit to subprime borrowers. In accomplishing this goal, however, the OCC has sacrificed stringent prohibitions and enforcement abilities. Therefore, the OCC's policy should provide more credit to subprime borrowers, but it will allow this credit to be extended at more oppressive terms. North Carolina home purchasers may need to be better informed in order to secure fair credit without the state protections. Instead, the OCC has provided them with a greater opportunity to own their own home.

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192. Id.
194. Id.
195. Id.
196. See supra notes 131-146 and accompanying text.
197. See supra notes 167-171 and accompanying text.
198. See supra notes 172-175 and accompanying text.
199. See supra notes 167-195 and accompanying text.