

**Unfair and Deceptive Acts and Practices Statutes as a Mechanism for State Attorneys
General to use to Combat Predatory Lending**

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I. Introduction

Predatory lending practices in the home mortgage market are a persistent social problem in America that affects the nation's most vulnerable consumers. State and federal governments have tried to address this problem through the adoption of statutes or regulations, but have not been able to effectively solve the problem.¹ Part of the problem is that predatory lenders learn how to find gaps in the law or in the enforcement of the law and exploit them.² A regulation or statute appears to be rarely enough³ and “[t]he bottom line is that each of the [current predatory lending strategies] . . . suffer from significant drawbacks that leave many borrowers unprotected.⁴

The diverse and complicated nature of predatory lending practices has also created another problem in the nation's ability to fight such practices. Specifically, predatory lending has caused state and federal governments to respond to predatory lending, raising issues of federalism and preemption. Recently, this struggle played out in a New York court room where the court held that the Office of Comptroller of the Currency (“OCC”) regulation on national banks under the National Bank Act (NBA) prohibited the state attorney general from enforcing state fair lending laws against the banks and their operating subsidiaries.⁵

¹ At least 25 state governments have adopted specific regulations or statutes on predatory lending practices, a number of major cities have passed ordinances, and 11 different federal agencies have recognized that predatory lending is a serious social problem. Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 5 (2005).

² *Id.* at 61.

³ Sally Peacock, *How the Household Settlement Uncorked a Law Enforcement Bottleneck*, 2 (2004) available at http://www.law.columbia.edu/center_program/ag/AG_Library.

⁴ Peterson, at 61.

⁵ *OCC v. Spitzer*, 396 F. Supp.2d 383 (S.D.N.Y. 2005). The *OCC* cases raises interesting issues about what state attorneys general can do to combat predatory lending practices connected to national banks. This paper chooses to put this complicated issue to one side and seeks to determine what a state attorney general can do in light of the preemption problem. For a discussion on mixed state-federal issue see Peterson, *supra* note 1.

The court's decision in *OCC* raises doubts regarding what state attorneys general can do to combat predatory lending. This paper seeks to address part of that issue by examining what state attorneys general can do to fight predatory lending practices that are not connected to national banks. This paper argues that unfair and deceptive acts and practices (“UDAP”) statutes are a powerful tool that state attorneys general can use to stop predatory lending, regardless of whether such UDAP statutes have specific predatory lending laws.⁶

Part II of this paper lays out the problem of predatory lending. Part II.A. examines how predatory lending works and who it affects. Part II.B examines the previous actions and strategies that have been used to fight predatory lending and shows that such actions have not provided enough protection to borrowers. In Part III, this paper argues that a solution to some of the problems of predatory lending discussed in Part II is more aggressive use of general UDAP claims by state attorneys general. Part III.A. examines UDAP statutes in terms of how they work, what they regulate, and why they are an important protection for consumers and tool for state attorneys general. Part III.B. demonstrates that state attorneys general will be able to effectively combat predatory lending practice by using the flexible and broad characteristics of UDAP. This paper then explores the potential criticisms of using UDAP statutes to fight predatory lending, and answers such criticism in Part III.C. Despite the criticisms and worries that might exist in using UDAP statutes to provide greater protection against predatory lending, this paper concludes that UDAP is an important tool that needs to be used more often and in different ways by state attorneys general to protect borrowers from oppressive predatory lending practices.

⁶ As will be explored *infra* Part III.A. UDAP claims can either be based on a *per se* statutory violation or a general claim of unfair, deceptive, or oppressive conduct committed by another party. Jonathan Sheldon & Carolyn L. Carter, National Consumer Law Center, Unfair and Deceptive Acts and Practices §3.2.1 (6th ed. 2004).

II. The Problem of Predatory Lending and how Governments Protect Consumers

The national market for home mortgages can roughly be broken down into two categories: prime and subprime loans.⁷ The prime loan market is not subject to predatory lending. The borrower receives a loan that often does not have prepayment penalties and has an interest rate that is below the current market-clearing rate.⁸ Prime loans typically make up the bulk of the mortgage market and are given to borrowers who receive an “A” credit rating.⁹

The subprime market services “borrowers with “A-,” “B,” “C,” and sometimes even “D” credit histories.”¹⁰ The subprime market represents one of the fastest growing areas in lending.¹¹ For example, from 2002 to 2003 subprime lending in the United States increased 50% from \$213 billion to \$332 billion.¹² Subprime lending is thought to provide a legitimate service to borrowers.¹³ Former Federal Reserve Chairman Alan Greenspan has said that “[s]ubprime lending has benefited people whose credit history would have kept them from getting loans ... Where once more-marginal applicants would simply have been denied credit, lenders are now able to quite efficiently judge the risk posed by individual applicants and to price that risk appropriately.”¹⁴

⁷ Petersen, *supra* note 1 at 9–10; Peacock, *supra* note 3, at 1.

⁸ Peacock, at 1–2.

⁹ Petersen, at 9. “Lenders typically grade borrowers’ credit histories ranging from “A” credit through “B,” “C,” and “D” credit. *Id.*

¹⁰ *Id.* at 10.

¹¹ Nikitra S. Bailey, *Predatory Lending: The New Face of Economic Injustice*, 32 *Human Rights* 14 (2005) available at <http://www.responsiblelending.org/pdfs/ABA-PredatoryLend-sum05.pdf>. The subprime lending industry now handles one-tenth of all mortgages. Mike Chalmers, *Blacks stuck with more high-interest loans*, *New Journal*, Oct. 2, 2005, at A1.

¹² Center for Responsible Lending, *2005 Fact Sheet: Predatory Mortgage Lending*, 1 (2005) available at <http://www.responsiblelending.org/pdfs/2b003-mortgage2005.pdf> (hereinafter *Fact Sheet*)

¹³ Peacock, at 2.

¹⁴ Chalmers, at A1. The general view of subprime lending is that it is good for a borrower.

[S]ubprime lending allows those with troubled credit history to tap accumulated home equity savings to bridge income gaps, repair a home or car, fund education or entrepreneurship, or even pay medical bills. These “cash-out” refinances have annually pumped an estimated 100 billion dollars into the U.S. economy, helping it retain buoyancy despite slow economic growth. Moreover, there is certainly some truth to the standard argument that greater risk and higher

However, subprime lending is also the market where predatory lending occurs. “Most abusive lending takes place in the subprime market, targeting people with weak or blemished credit records.”¹⁵ Subprime lending has made a whole segment of a community vulnerable to being subjected to predatory lending—the borrower in the subprime market deals with some lenders that deliberately try to, and succeed, in gaining an unfair advantage over the borrower. The following subsection examines predatory lending as a practice and shows who it affects.

A. What is Predatory Lending and Who does it affect

Predatory Lending, on its surface, can be thought of as high cost, high interest loans given to vulnerable borrowers based on the lenders ability to collect collateral and not on the borrowers ability to pay back the loan.¹⁶ “Predatory lending at its heart is nothing more than misappropriation of income or equity by financial subterfuge. Predatory lenders take more from borrowers than they are rightly entitled to.”¹⁷

closing, servicing, and default costs justify higher subprime prices. It is no coincidence that the nation’s home ownership rate has risen to its highest level ever along side the growth in subprime mortgage lending.

Petersen, *supra* note 1, at 11–12. However, emerging data might suggest that the two tiered system is not good. Since the increase in subprime lending, the foreclosure rates have tripled. *Id.* at 12. Some preliminary data in studying subprime lending has found that around one in five subprime loans goes into foreclosure at least once in the first four years of the loan. Telephone interview with Kathleen Keest lawyer for Center for Responsible Lending and former Assistant Attorney General of Iowa and Deputy Administrator the Iowa Consumer Code (January 4, 2006) (hereinafter *Keest Interview*). One might argue that such a foreclosure rate is expected because the lender is dealing with a risky customer base, but it also might indicate there is a structural flaw with the subprime market. Keest offers an analogy from a friend familiar with the industry that suggests it might be useful to reorient current thought to believe there could be a structural problem. “If one out of five American made cars collapsed on the road within the first four years would you say there is a problem with the driver or would you say there is a structural problem?” *Id.* Furthermore, the idea that the foreclosure rate is based on risk pricing also might be speculative. There is some evidence that a person with a good credit history will still receive a high interest loan from a predatory lender because the lender is only authorized to give a loan at a certain rate. *Id.* (Keest relates a story where she walked into a lender and asked what the lowest rate she could get on a loan when the applicant had various factors that demonstrated a good credit history. The lender told her she could get a 12% rate even though the national rate at the time was 6 to 7%. The lender’s response suggests that the subprime lender does not always risk price based on the specific borrower; instead one might say that they “opportunistically price”).

¹⁵ Center for Responsible Lending, *Predatory Mortgage Lending*, available at <http://www.responsiblelending.org/abuses/index.cfm> (last viewed Jan. 4, 2006).

¹⁶ Bob Sanders, *Ameriquest loan puts homeowner in a costly bind*, 27 N.H. Bus. Rev. 1 (Aug. 19, 2005).

¹⁷ Petersen, *supra* note 1, at 13.

The most common way to think of predatory lending, however, is not based on some definition,¹⁸ but by reference to the abusive practices associated with predatory lending.¹⁹ Such practices include, but are by no means limited to “packing of credit insurance, balloon payments, padded fees, rapid refinancing, broker kickbacks disguised as yield spread premiums, high pressure marketing, and . . . high rates.”²⁰ Kathleen C. Engel and Patricia A. McCoy have catalogued such practices and determined that a specific predatory lending practice can be viewed as symptomatic of one or more of the following five problems. The problems are:

1. loans structured to result in seriously disproportionate net harm to borrowers,
2. harmful rent seeking,
3. loans involving fraud or deceptive practices,
4. other forms of lack of transparency in loans that are not actionable as fraud, and
5. loans that require borrowers to waive meaningful legal redress.²¹

Like most conceptions of predatory lending, Engel and McCoy’s view of predatory lending is not meant to be viewed as a definition of predatory lending, but rather a diagnostic tool for identifying inequitable and oppressive loans.²² The key to understanding the predatory lending problem is that there are no set criteria for what constitutes predatory lending, but rather there are signs and factors that suggest predatory lending has occurred.²³

¹⁸ Finding a precise definition of predatory lending is difficult because of debates regarding the practice. In part this can be attributed to a “reluctance of key policymakers to admit that a problem exists.” *Id.* at 12.

¹⁹ *Id.* at 12; Peacock, *supra* note 3, at 2–3.

²⁰ Petersen, at 12. Other signs of predatory lending include loan flipping, unnecessary products, mandatory arbitration, and steering and targeting. Center for Responsible Lending, *Common Abuses: Seven Signs of Predatory Lending*, available at <http://www.responsiblelending.org/abuses/abusive.cfm> (last viewed Jan. 4, 2006). Also included are racial targeting in advertising, equity stripping, asset-based loans, fraud and falsified loan applications, and abusive collections practices. Peacock, at 3. For a more in depth discussion of what such practices entail and their consequences see <http://www.responsiblelending.org>; Petersen, *supra* note 1; and Peacock *supra* note 3.

²¹ Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1260 (2002).

²² *Id.* at 1261.

²³ Petersen, at 13.

The practice of predatory lending begins “at the marketing stage of a loan.”²⁴ Groups vulnerable to predatory practices—usually communities of color, the elderly, women, and residents in rural areas—²⁵ are targeted by lenders looking to exploit a relatively unsophisticated borrower (when compared to a prime market borrower) who feels like few or no borrowing options exist.²⁶ The advantage the lender gains over the borrower results in devastating consequences for the borrower.

All forms of predatory lending cost Americans \$25 billion each year²⁷ and predatory mortgage lending costs borrowers \$9.1 billion annually.²⁸ The dollar figures, however, do not even begin to demonstrate the human costs involved in predatory lending. Predatory loans designed to result in foreclosure uproot families and decimate communities. The reason a surrounding community is impacted is because a foreclosed home often is uninhabited for a period of time, causing deterioration to the home and the surrounding property values. This can fracture community cohesiveness and an increase in crime can be expected in areas that are uninhabited.²⁹

The human and economic costs of predatory lending become even more troubling when one considers that predatory lending practices disproportionately affect minority neighborhoods. African-Americans are 3.6 times likely to receive a mortgage from a subprime lender and

²⁴ *Id.* at 14.

²⁵ Center for Responsible Lending, *Communities at Risk*, available at <http://www.responsiblelending.org/abuses/communities.cfm> (last viewed Jan 4, 2006).

²⁶ For example, Vicki Brown, a Wilmington, Delaware resident, refinanced her mortgage at three percentage points higher than the going rate because she said, “I wanted the money and needed the money, so I went along with it.” Chalmers, *supra* note 11, at A1. Because Brown felt she had no other option, the difference between the rate she received and the national rate means she will have to pay tens of thousands of dollars more over the life of her loan. *Id.*

²⁷ Bailey, *supra* note 11, at 14.

²⁸ Center for Responsible Lending, *supra* note 15.

²⁹ Peacock, *supra* note 3, at 7.

Latinos 2.5 times more likely.³⁰ In part, this can be attributed to redlining and reverse redlining practices. Redlining is when a lender refuses to extend credit to a borrower located in a high risk neighborhood. Reverse redlining is when a subprime lender targets the redlined community, knowing that such residents are unable to obtain reasonable loan rates.³¹ Communities of color are disproportionately impacted because of a wealth gap that exists between whites and people of color.³² The racial disparities that exist in the mortgage market magnify the injustice of predatory lending practices because such practices can be perceived as discriminatory.

Further complicating the predatory lending problem are the beliefs that the free market system will solve any predatory lending problems and that the borrower is responsible for the loan they chose to accept. Kathleen Keest explains that

[T]he problem is that for the last twenty-five years we have been building toward a culture that says two things. On the one hand making money is a good thing and number two if you get cheated it is your fault . . . In the minds of [lenders and policymakers], the free market is an amoral system . . . and if there is a problem, the market will correct itself . . . Couched in this level of individual responsibility is . . . it is your responsibility, it's your choice . . . If you say this is wrong [to a person in the lending industry], they say you are being paternalistic and depriving people of a choice.³³

The resulting psychology that emerges from such attitudes regarding predatory lending practices isolates the victimized borrower and to some extent vindicates some of the abusive lending practices that go unchecked. When combined with the discriminatory

³⁰ Mike Calhoun & Nikitra Bailey, *Predatory Lending: Undermining Economic Progress in Communities of Color*, Poverty & Race Research Action Council, January/February 2005 Newsletter, available at, http://www.prrac.org/full_text.php?text_id=1023&item_id=9349&newsletter_id=79&header=January/February%202005%20Newsletter.

³¹ Petersen, *supra* note 1, at 14; Peacock, at 5.

³² Bailey, *supra* note 11, at 14. Bailey notes that according to a recent Pew Hispanic Center report African Americans and Latinos net worth is considerably less than whites. In 2002 African Americans had a median net worth of \$5,998 and Latinos \$7,932, whereas whites' median net worth equaled \$88,651. *Id.* "Even more alarming, 32 percent of African Americans and 36 percent of Latinos have a zero or negative net worth." *Id.* Such numbers show why African Americans and Latinos are forced to turn to the subprime market more often than whites and explain why communities of color are more likely to be exposed to predatory lending practices.

³³ *Keest Interview*, *supra* note 14.

nature of predatory lending, it is not difficult to see that specific groups in the United States are being exploited and oppressed by predatory lending practices. The following subsection briefly examines some of the current efforts to combat predatory lending.

B. Actions taken to Fight Predatory Lending

The problems associated with predatory lending have not been completely ignored. Combinations of federal and state efforts have been used to try and provide a fairer lending market for borrowers. Unfortunately, the steps taken have not provided a complete solution to the predatory lending problem. Predatory lenders adapt their practices to comply with laws and exploit loop holes in the laws to achieve the same results that the laws were designed to protect against.³⁴ Moreover, the laws that have emerged too often are shaped by and catered to the lending industry.³⁵ The steps and strategies taken to fight predatory lending, for the most part, have been beneficial, but action is still needed to provide greater protection for borrowers.³⁶

In 1983, Congress passed the Alternative Mortgage Transaction Parity Act (AMPTA), which was designed to provide a level playing field for all types of lenders.³⁷ AMPTA increased the loan opportunities for a borrower, but it also increased predatory lending practices by providing predatory lenders with a preemption defense

³⁴ *Id.* Keest gives an example where one lender trained mortgage originators to comply with truth in lending laws, but still turned the pricing information that borrowers received upside down.

³⁵ *Id.*

³⁶ In addition to the federal and state efforts described *infra*, it is important to note that there has been a general strategy that has emerged to combat predatory lending. Petersen identifies seven principle strategies which are debtor amnesty, restrictions on permissible contractual provisions, anti-discrimination laws, charitable lending, facilitation of cooperative credit institutions, anti-deception laws, and price disclosure. Petersen, *supra* note 1, at 31. Engel and McCoy include additional strategies which are market discipline and consumer education and counseling. Engel, *supra* note 21, at 1298–1317. For a more in depth discussion on the successes and failures of these strategies see Petersen, at 31–61; see Engel, at 1298–1317.

³⁷ Peacock, *supra* note 3, at 8–9.

against state lending laws.³⁸ In 2002, the Office of Thrift Supervision (OTS) amended its regulations in such a way that a predatory lender would no longer be able to assert a preemption defense against states under AMPTA.³⁹ The use of AMPTA before the amendment illustrates one of the problems that have plagued predatory lending. An overarching federal law that cuts out state lending laws allows predatory lenders to exploit loopholes in the federal law while stripping a state's ability to protect its citizens.⁴⁰

The federal agency that primarily regulates predatory lending is the Federal Trade Commission (FTC).⁴¹ The FTC's authority to regulate predatory lending comes from the Fair Housing Act (FHA),⁴² the Truth in Lending Act (TILA),⁴³ the Real Estate Settlement Procedures Act (RESPA),⁴⁴ and the portion of the Federal Trade Commission Act⁴⁵ prohibiting unfair or deceptive acts and practices.⁴⁶ The FTC has provided some relief against predatory lending. In 2002 the agency successfully obtained \$215 million settlement with Associates First Capital Corporation because of loan packing practices that Associates had engaged in.⁴⁷ The FTC frequently tries to take actions to provide monetary relief to victimized borrowers.⁴⁸ However, similar to some of the problems associated with the OTS and AMPTA, the FTC is not able to provide complete relief.

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ This is not to say that federal regulation of predatory lending is a bad thing. AMPTA merely demonstrates that the type of federal solution proposed must be carefully thought out. If the law goes too far in terms of cutting out a state's ability to fight predatory lending, the federal law may have the unintended consequence of increasing predatory lending.

⁴¹ *Id.* at 10.

⁴² 42 U.S.C. §§3601–3619 (1994).

⁴³ 15 U.S.C. §§ 1601–1693 (c) (2000). In 1994 the Home Ownership Equity Protection Act (“HOEPA”) amended TILA so that most predatory lending practices were covered under TILA. Peacock, *supra* note 3, at 10.

⁴⁴ 12 U.S.C. §§ 2601–1617 (2000).

⁴⁵ 15 U.S.C. §45(a)(1)

⁴⁶ Peacock, at 10; Sheldon, *supra* note 6, at §1.1.

⁴⁷ Peacock, at 10–11.

⁴⁸ Engel, *supra* note 21, at 1304.

Resource constraints, political pressure, and an absence of a private cause of action under some of the laws linked to the FTC make relief from predatory lending “highly unlikely for the vast majority of victimized borrowers.”⁴⁹

A supplement⁵⁰ to the federal regulation that exists for predatory lending is state legislation. State actions have proven helpful in combating predatory lending practices.⁵¹ In 1999, North Carolina became the first state in the country to adopt a specific statute⁵² on predatory home mortgage lending.⁵³ The law has largely been viewed as a success.⁵⁴ In its first year of its adoption, the law saved an estimated \$100 million without increasing rates on subprime loans.⁵⁵ The law serves as a model for other states because

⁴⁹ *Id.*

⁵⁰ To say that state law supplements federal law is not completely accurate. The initial regulation promulgated by the OTS under AMPTA and *OCC v. Spitzer* show that there are times when federal law prevents state law as acting as any type of supplement. Keest makes the argument that having a civil rights type of model concerning predatory lending would provide increased protection for borrowers. Such a model views the federal law as the floor for protections against predatory lending and states build upon that floor by providing additional protections if they so choose. *Keest Interview, supra* note 14.

⁵¹ The lending industry might argue that banking is a national activity that requires uniform standards. However, housing is a local (state) problem. States may be better suited to address some of the issues involved in housing (and thus predatory lending) in their state because they are familiar with the location and changes that are occurring in a specific housing market. Therefore, the federal government should allow states to act as laboratories in regards to fighting predatory lending. *Id.* The valuable notion of states as laboratories was famously noted by Justice Brandies. He said

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 311 (1932) (Brandeis, J., dissenting).

⁵² N.C. Gen. State. §24–1.1E (1999).

⁵³ Center for Responsible Lending, *North Carolina’s Predatory Mortgage Lending Law*, available at http://www.responsiblelending.org/predlend_nc/index.cfm (hereinafter *North Carolina*) (last viewed on Jan. 5, 2006).

⁵⁴ The North Carolina law is successful in part because it lays out “what are the rules of the road. Lenders know what they can and can not do in a very objective fashion. As a result . . . there have been very few instances of violations of our [North Carolina’s] predatory lending law since its effective date in 2000.” Telephone interview with Josh Stein, Senior Deputy Attorney General of North Carolina (Jan. 4, 2006) (hereinafter *Stein Interview*). Similarly, New York has seen very few violations since it adopted its predatory home mortgage lending law. Telephone interview with Mark Fleischer, Assistant Attorney General of New York (Jan. 5, 2006) (hereinafter *Fleischer Interview*).

⁵⁵ *North Carolina*.

there is now six years of empirical data that shows that the law helps fight predatory lending while still providing fair loans to individuals in the subprime market.⁵⁶

Unfortunately, the success of local and state responses has been tempered by preemption litigation. The lending industry has aggressively attacked state efforts to enact predatory lending laws.⁵⁷ This is in part due to complaints associated with increased administrative and compliance costs with adapting practices to different state laws.⁵⁸ Today it is not entirely clear how this preemption issue will be resolved.⁵⁹

III. General UDAP claims as a solution to the predatory lending problem

General UDAP claims can provide a potential solution to some of the problems discussed in Part II.A *supra*. In fact, general UDAP claims have frequently been used to attack predatory lending;⁶⁰ however, this paper contends that state attorneys general need to more aggressively use general UDAP claims to provide protection for borrowers. Not all states have predatory lending laws, and issues of federal preemption leave the effectiveness of state predatory lending

⁵⁶ *Keest Interview*, *supra* note 14. Three years after the passage of the North Carolina law, municipal governments in Chicago, the District of Columbia, Philadelphia, Dayton, Atlanta, Oakland, Cleveland, Toledo and Los Angeles all passed ordinances that modeled North Carolina's law. Petersen, *supra* note 1, at 64–5. Similarly Indiana, New Jersey, New Mexico, New York, and Massachusetts all passed strong predatory lending legislation after the North Carolina law. *Id.* at 65–6. It is thought that the New Jersey and New Mexico laws might provide a model for the future as the North Carolina law did when it was passed, because the laws attempt to improve upon the North Carolina law. *Keest Interview*.

State efforts also can be praised for curbing predatory lending practices through multi-state litigation efforts. *See e.g.*, Peacock, *supra* note 3, at 20–36 (discussing the impact and success of the \$484 million Household settlement). The Household settlement is thought to be “the current standard for the subprime lending industry.” Erick Bergquist, *New Mexico AG Opens New Inquiry on Subprime*, *Am. Banker*, Aug. 18, 2005, at 159. In fact an impending \$325 million settlement by 33 states with Ameriquest over predatory lending practices is believed to be modeled after Household. E. Scott Reckard & Christian Berthelsen, *Ameriquest may refund \$295 million*, *L.A. Times*, Dec. 14, 2005, at Business Section, available at <http://www.latimes.com/business/la-fi-ameriquest14dec14,1,5621282.story?ctrack=1&cset=true> (last viewed Jan. 5, 2006).

⁵⁷ Petersen, at 63.

⁵⁸ *Id.*

⁵⁹ While this paper in no way tries to predict how the preemption issue will be resolved, it is important to note the tension between federal and state actions regarding predatory lending. The current model seems to allow some role for the states, but that role is in doubt. When Georgia repealed an aggressive predatory lending law for a weaker version of the law, it did so because of the controversy it generated regarding the state-federal issue. Petersen, at 66. Mark Fleischer notes that what happened in Georgia is “consistent with their [lending industry] whole view of trying to federalize the whole issue [predatory lending] and totally take the states out of the picture.” *Fleischer Interview*.

⁶⁰ *See* Petersen, at 47; *Stein Interview*; *Fleischer Interview*.

laws in doubt.⁶¹ Gaps in predatory lending laws can be filled by having a state attorney general make a general claim of unfair, deceptive, or unconscionable acts against a predatory lender. Part A of this section examines the features of UDAP. In Part B, this paper shows why general UDAP claims are a potential solution to predatory lending problems and Part C examines and answers criticisms of the paper's proposed solution in Part B.

A. What is an Unfair and Deceptive Acts and Practices Statute.

State UDAP statutes are designed to provide consumers greater protection by “preventing consumer deception and abuse in the marketplace.”⁶² UDAP statutes are a tool that protect against defects in other laws dealing with consumer protection.⁶³ Most consumer transactions are protected by UDAP statutes because they are intended to be flexible and allow for “widespread redress of marketplace misconduct and abuse of consumers.”⁶⁴

In the mid-1960s and mid-1970s UDAP statutes developed as a way to increase the states' “traditional police power arsenal” and “parallel developments in consumer law at the federal level.”⁶⁵ The statutes are modeled after the Federal Trade Commission Act's⁶⁶ language in Section 5(a)(1), and serve as a vital compliment to the act because they allow for state and private enforcement of unfair and deceptive acts and practices.⁶⁷ While some UDAP statutes list

⁶¹ See Part II.B *supra*.

⁶² Sheldon, *supra* note 6, at §1.1. All 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have some form of a statute that can be broadly applied to consumer transactions and be considered a UDAP statute. *Id.*

⁶³ See Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 Yale J. on Reg. 253, 275–76 (2000) (“these statutes can provide coverage for consumer products not protected by the current safety framework.”).

⁶⁴ Sheldon, at §1.1.

⁶⁵ Kaplan, at 275–76.

⁶⁶ 15 U.S.C. §45(a)(1).

⁶⁷ Sheldon, at §1.1. The FTC Act gives consumers more protection than merely *caveat emptor*, but only allows the FTC to enforce the law. *Id.* State UDAP laws also draw upon the Uniform Consumer Sales Practices Act given by the National Conference of Commissioners on Uniform State Laws and the American Bar Association and the Uniform Deceptive Trade Practices Act developed by the National Conference on Uniform Laws. Kaplan, at 276. The federal role in the development of prohibiting unfair and deceptive acts and practices is certainly important. One

specific prohibited practices, they also prohibit general conduct considered to be unfair, unconscionable, or deceptive.⁶⁸ Meanings of unfair, unconscionable, and deceptive are not defined in the statute.⁶⁹ This is because UDAP laws are meant to be flexible and broad so that the laws can “adapt to future business practices.”⁷⁰ The power and importance of UDAP statutes as a tool of consumer protection are the fact that they are liberal in scope.

The market place frequently changes, sometimes at a rapid pace. Such changes can pose a great risk to consumers because the “never-ending inventiveness of the unscrupulous businessm[an]”⁷¹ can discover an inequitable business practice that has not yet been ruled to be deceptive.⁷² Accordingly, UDAP statutes are written broadly so that they can be used “to the utmost degree to eradicate all forms of unfair and deceptive practices.”⁷³ Another reason for the broad language in UDAP statutes is that commercial transactions are dependent in part on community values.⁷⁴ “Consequently, the use of broad language facilitated the evolution of the unfairness standard, which could then keep pace with consumer expectations and the developing understanding of the responsibilities of commercial sellers.”⁷⁵ UDAP raises the standards of protection for consumers and business practices. Judge Learned Hand illustrates the importance

can consider the FTC act as a federal UDAP statute. However, “state law provides the real teeth in enforcement” for UDAP. Petersen, *supra* note 1, at 48.

⁶⁸ Sheldon, at §1.1. Before the development of UDAP laws consumer protection against unfair and deceptive practices was based in the common law intentional tort of fraud. Petersen, at 46. A common law fraud claim is still available for consumers to make against a predatory lender, however, UDAP claims are far easier to prove. Sheldon, at §1.1. This is because common law fraud requires “proof of the subjective state of mind of both parties: first with respect to the tortfeasor’s intent, and second with respect to the victim’s reliance.” Petersen, at 48.

⁶⁹ Kaplan, *supra* note 63, at 276.

⁷⁰ *Id.*

⁷¹ *Id.* at 278.

⁷² Sheldon, at §3.1.2.

⁷³ *Id.* See also, Kaplan, at 278 (explaining that UDAP statutes are broad so that they can provide “maximum latitude to its enforcers.”). Sheldon notes that “[a]lmost any abusive business practice aimed at consumers is at least arguably a UDAP violation, unless the trade practice falls clearly outside the scope of the statute. *Id.* at §1.1. As will be shown in Part III.B. *infra*, predatory lending falls within the scope of UDAP power.

⁷⁴ Kaplan, at 278.

⁷⁵ *Id.* at 278–79. Deception “is infinite in variety. The fertility of man’s invention in devising new schemes of fraud is so great, that the courts have always declined to define it . . . reserving to themselves the liberty to deal with it under whatever form it may present itself.” Sheldon, at §3.1.2 quoting *Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super 216, 233 (Ch. Div. 1972).

of having broad state UDAP statutes when he discussed the purpose of the FTC. The FTC is “to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.”⁷⁶ UDAP statutes could be considered the strongest form of consumer protection that exists.

Evaluating a potential violation of UDAP is done on two levels. The first level of analysis is whether the practice in question is a *per se* violation of UDAP.⁷⁷ This occurs when the practice violates a specific UDAP regulation or statute.⁷⁸ The second level of analysis under UDAP, and the focus of this paper, is whether the practice in question can be claimed to be generally unfair or deceptive.⁷⁹ The existence of a statutory “laundry list” covering unfair and deceptive practices within a state does not preclude the ability of a state attorney general⁸⁰ from bringing a general UDAP claim.⁸¹ Although proving a general UDAP claim might be harder than proving a specific statutory violation, a state attorney general should bring such a claim when a practice might be able to be characterized as unfair or deceptive.

In order to prove a violation of UDAP without the aid of a specific statutory violation, a state attorney general must adopt a three step approach: 1. develop the facts; 2. find a specific

⁷⁶ Sheldon, *supra* note 6, at §3.1.2 quoting *FTC v. Standard Education Society*, 86 F.2d 692 (2d Cir. 1936), *rev'd in part*, 382 U.S. 112 (1937).

⁷⁷ Sheldon, at §3.2.1.

⁷⁸ *Id.*; Kaplan, at 291. Finding a specific violation of a UDAP regulation or statute is always desirable. Many states that have predatory lending laws would also be able to bring a UDAP claim against a predatory lender as a *per se* violation. A statute also establishes a minimum baseline standard for what constitutes fair conduct and deceptive practices. *Id.* As a result, a statute dealing with unfair and deceptive acts and practices can be referenced to a potential violation even if the specific practice in question is not covered by the statute. However, the purpose of this paper is not to focus on the use of UDAP when there is a specific statutory framework in place for predatory lending. Instead, the paper focuses on what state attorneys general can do when either a statute does not exist or the statute that does exist does not specifically cover the deceptive practice committed by the lender.

⁷⁹ Sheldon, at §3.2.1.

⁸⁰ State UDAP laws allow both the state attorney general and a private party to bring a UDAP claim. *Id.* at §1.1. Additionally, 27 states give its state attorney general the ability to write rules or regulations under the UDAP statute. Kaplan, at 295. The rulemaking power of state attorneys general under state UDAP statutes is an important tool in state attorneys general’s ability to protect consumers. For a more in depth discussion on this issue see Aaron Snow, *Multistate Rulemaking*, (2002) available at http://www.law.columbia.edu/center_program/ag/AG_Library; see also, Kaplan, *supra* note 63.

⁸¹ Sheldon, at §3.2.2.2 (“UDAP statutes are not limited to specific enumerated practices since they are designed to permit the courts to prohibit new kinds of deception as novel practices arise.”).

precedent or similar practice that shows the act in question is a UDAP violation; and 3. demonstrate the practice violates the general standards of deception or unfairness laid out in the UDAP statute.⁸² The first step is important because by conducting a careful investigation, the attorney general is more likely to demonstrate to the court a “whole range of systematic, widespread, unscrupulous practices.”⁸³ The strength of the evidence presented will increase the credibility of the general claim, making it more likely that the general claim will be successful.⁸⁴ The second step is helpful in that it provides courts with existing guidance regarding unfair and deceptive claims. This is significant because a court might be reluctant to apply a broad statute like UDAP.⁸⁵ The final step is designed to demonstrate to the court that UDAP is meant to be broad and flexible to deal with the ever-changing nature of unfair and deceptive practices.⁸⁶ The most important factor in this last step is that the state attorney general show the activity alleged to be deceptive or unfair misleads unsophisticated consumers.⁸⁷

This subsection laid out the general framework of a state UDAP statute. The next part in this section looks at how a general UDAP claim can and should be a tool used more aggressively by state attorneys general to fight predatory lending practices.

B. General UDAP Claims as a Tool to Fight Predatory Lending Practices.

The fluid nature of the predatory lending market requires that state attorneys general have a tool that can provide a remedy for victimized borrowers. UDAP statutes, and more specifically

⁸² Sheldon, *supra* note 6, at §§ 3.3.1–3.3.4.1.

⁸³ *Id.* at §3.3.2.

⁸⁴ *Id.*

⁸⁵ *Id.* at §3.3.3. A UDAP claim can be successful when no precedent exists, especially when the deceptive practice is new. However, an argument by analogy regarding the deceptive practice will strengthen the state attorney general’s claim. Perhaps this is because the court will feel as though it is merely applying existing law into a new area as opposed to creating a new area of law to cover a new deceptive practice.

⁸⁶ *Id.* at §3.3.4.1.

⁸⁷ *Id.* at §3.3.4.2. It is also important to note that a violation of UDAP generally does not require that the practice result in actual deception, only that the practice has a “capacity or is likely to deceive.” *Id.* This means acts that are unintentional, done in good faith, or stopped once their deceptive nature was discovered can still be found to violate UDAP. *Id.*

general UDAP claims provide attorneys general with such a tool This is because UDAP is a remedy that is “currently available” for attorneys general to use, “provides the proper level of deterrence, and provides specific guidance to the industry. It . . . set[s] an objectively appropriate standard.”⁸⁸ By aggressively attacking predatory lending practices with general UDAP claims, state attorneys general will be able to provide more remedies for victimized borrowers and deter predatory lending practices.

The state attorney general’s role is to protect its consumers. Assistant attorney general of New York, Mark Fleischer explains “generally speaking, it’s our role, particularly in the consumer frauds bureau, to protect consumers from businesses that engage in unfair deceptive acts and practices.”⁸⁹ UDAP statutes are the mechanism by which state attorneys general fulfill this role of protection. While statutes may exist that provide specific protections for consumers, UDAP can be more effective when a product is in compliance with a law, yet there is a service connected to the product that is considered to be unfair or deceptive.⁹⁰ Before the emergence of specific state predatory home mortgage lending laws, UDAP was the main tool state attorneys general used to fight predatory lending.⁹¹ Today, state attorneys general use UDAP to “get at unfair deceptive acts and practices by lenders that are not covered by the predatory lending law . . . you still need unfair deceptive trade practices act to help ensure that those loans are not being

⁸⁸ Kaplan, *supra* note 63, at 275. While the notion of an objective standard for a general claim might appear contradictory, it is important to remember that the baseline standard for UDAP is that the consumer is not being misled. It is reasonable for businesses to adjust and predict what type of practices might run afoul of such a standard. See *supra* notes 78 & 87.

⁸⁹ *Fleischer Interview, supra* note 54.

⁹⁰ *Stein Interview, supra* note 54. Stein’s point illustrates the potential power of a general UDAP claim. If a borrower is harmed and does not have a specific statutory remedy, a general UDAP claim can come to the rescue and provide the relief necessary to remedy the injustice.

⁹¹ *Id.*

made unfairly or deceptively.”⁹² UDAP gives a state attorney general the unique ability to provide borrowers with greater protection against predatory lending.

Numerous reasons exist for why state attorneys general, armed with a general UDAP claims, can effectively battle predatory lending. State attorneys general are more likely to have a “pool of trained attorneys” in the area of consumer protection that allows the office of the attorney general to efficiently use its resources in fighting predatory lending.⁹³ The power of the state attorney general allows him or her to gather vital information regarding predatory lending practices under UDAP that would not be available to the public.⁹⁴ As a result, using UDAP makes it more likely that the state attorney general can prove a lending practice is predatory.⁹⁵ Using UDAP, instead of a criminal statute allows a state attorney general to bring a “preemptive, injunctive suit to stop unlawful conduct while it is still nascent,” thus mitigating potential harm to the borrower.⁹⁶ In some case borrowers are unable to bring suit because of private enforcement barriers. A state attorney general using UDAP to enforce consumer protection “would not only effectuate the substantive purpose of the law but would also help dispel any general disrespect for the laws of the state that might be engendered by the statute’s ineffectiveness in the face of open violations.”⁹⁷ Finally, UDAP allows state attorneys general to

⁹² *Id.*

⁹³ See John A. Sebert, Jr., *Enforcement of State Deceptive Trade Practice Statutes*, 42 *Tenn. L. Rev.* 689, 747 (1975).

⁹⁴ Kaplan, *supra* note 63, at 311 (noting “an attorney general may investigate a possible case using compulsory process and, thereby, gather the data needed to bring a suit even when the relevant information might not otherwise be publicly available. Because private parties cannot take advantage of either of these weapons, their ability to bring substantial cases is limited.”).

⁹⁵ Such a power in no way should be construed as a power to conduct a fishing expedition. The state attorney general must have a sound reason to conduct an investigation in the first place. Only once evidence emerges suggesting predatory lending has occurred, will the state attorney general use the compulsory process. *Fleischer Interview, supra* note 54 (“We don’t do an investigation until we have a basis to believe there is a wrong doing . . . the way we should operate is that if we see anything that might be a problem, then we should conduct an investigation.”).

⁹⁶ Kaplan, at 292.

⁹⁷ Sebert, at 706.

obtain monetary redress for harmed consumers.⁹⁸ Monetary redress is a crucial factor in the ability to fight deceptive practices.

[T]he power to obtain redress for defrauded consumers provides a meaningful sanction for violation of a deceptive practices statute that both deprives the defendant of the economic benefits of his violation and secures some recovery for his victims. This threat of monetary liability provides a potentially effective deterrent against violations of the deceptive practice statute that otherwise would be lacking if the state had only the authority to obtain prospective relief.⁹⁹

By using general UDAP claims, the state attorney general can provide an extra level of protection for borrowers. Additionally, the use of general UDAP claims fills the gaps in states that have specific predatory lending laws.

There should be no doubt that UDAP statutes apply to the predatory lending industry.¹⁰⁰ The OCC has promulgated an advisory letter stating that various predatory lending practices should be considered unfair or deceptive under the FTC Act and the letter “is persuasive precedent that they [the predatory lending practices] are UDAP violations as well.”¹⁰¹ The state attorneys general settlement with Household Finance Corp. also serves as a source that supports the notion that lenders are subject to general UDAP claims.¹⁰² A few courts have found that UDAP does not apply to credit transactions when the UDAP statute limits coverage to “goods

⁹⁸ *Id.* at 718.

⁹⁹ *Id.* at 719. Of course monetary redress is not perfect. Frequently in the predatory lending industry brokers are undercapitalized so that there can be little or no expectation of monetary relief for the borrower. *Keest Interview*, *supra* note 14. However, even if monetary redress is not available in a specific case, the threat of such a possibility can serve as a significant deterrent for many parties considering predatory lending practices.

¹⁰⁰ For example, Fleischer notes “The courts in New York have held loud and clear that that [UDAP] encompasses every industry. Doctors, lawyers, *lenders*, real estate brokers, whatever: they are all covered. It [UDAP] is a law of general applicability and we will enforce it against whoever is violating it.” *Fleischer Interview*, *supra* note 54 (emphasis added).

¹⁰¹ Sheldon, *supra* note 6, at §5.1.8 referencing OCC Advisory Letter 2003-2, Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices (Feb. 21, 2003) available at <http://www.occ.treas.gov/Advlst03.htm>.

¹⁰² *Id.* at §5.1.8 (explaining that the allegation in Household are useful in interpreting the extent of a UDAP claim for predatory lending because the settlement represented an interpretation of state UDAP statutes).

and services.”¹⁰³ However, this limitation is not as damaging as it may appear. “No matter which way a court rules on whether a credit extension is a “service,” there should be little doubt that services in connection with the loan are covered.”¹⁰⁴ UDAP is broad enough where if something that is connected to the predatory lender can be deemed to be deceptive or unfair, the state attorney general might have a basis for bringing a claim.¹⁰⁵ Additionally, “many states have an unconscionability element, and that is really helpful. You can always make an unconscionability claim on a high cost loan because . . . the high cost loan has onerous terms [sic] . . . which to some extent is the definition of unconscionability.”¹⁰⁶ Furthermore the use of UDAP should come as no surprise to the lending industry because UDAP has been and is still used against lenders engaged in deceptive practices.¹⁰⁷ UDAP has also been widely used against loan brokers, who are “often at the bottom of unfair or deceptive lending.”¹⁰⁸ The flexible and broad characteristics of UDAP mean that predatory lenders violate UDAP statutes when they engage in deceptive, unfair, or, in some states, unconscionable behavior.¹⁰⁹

¹⁰³ *Id.* at 2.2.1.2. A court in Oregon has ruled that extension of credit by a small loan company is not a good or service. *Id.* Additionally, Massachusetts has determined that the attributes of a loan by a broker is not subject to UDAP, although the broker’s deception regarding the loan would be actionable. *Id.* Alaska has ruled that a mortgage loan is not a good or service. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *Fleischer Interview*, *supra* note 54.

¹⁰⁶ *Id.* This notion has been supported in Massachusetts where a UDAP regulation has been upheld in the courts that prohibits a home mortgage loan that could be considered unconscionable. Sheldon, at §4.3.8. The court rejected as a defense that market forces make such a regulation unnecessary because empirical evidence suggests that redlining and reverse redlining prevent consumers from avoiding predatory abuses. *Id.*

¹⁰⁷ *Stein Interview*, *supra* note, 54. Fleischer also notes that general UDAP claims have been largely successful against subprime credit card companies in New York, and that there is no reason why “the mortgage lending context is really any different than other lending contexts.” *Fleischer Interview*.

¹⁰⁸ Sheldon, at §5.1.3. The fact that UDAP can be used against brokers is also significant. If the preemption problem that this paper avoids proves to prevent state attorneys general from protecting borrowers from banks, it is clear that state attorneys general can use general UDAP claims to protect borrowers from brokers.

¹⁰⁹ This point cannot be emphasized enough. At the heart of the problem of predatory lending is that the borrower has been subjected to an unfair or unconscionable deal that goes well beyond the notion of risky investment. State attorneys general need to seize upon this fact and aggressively pursue general UDAP claims against such lenders. In states without a strong predatory lending law this might be the only available channel for the state attorney general to use. In states with strong predatory lending laws, the general UDAP claim fills any gaps that exist in the lending law and might provide greater relief than the statutory remedy allows. Additionally, if the preemption problem discussed in *supra* note 5, guts a predatory lending law, the state attorneys general has years of precedent and

C. Potential Criticisms of the UDAP Approach and Answers to such Criticisms.

General UDAP claims are by no means the perfect solution to the predatory lending problem. When it is possible, state attorney general needs to resort to all available options—ranging from UDAP to specific predatory lending laws—in fighting predatory lending.¹¹⁰ However, this does not undercut this paper’s contention that aggressive use of general UDAP statutes against predatory lenders helps solve many of the problems associated with predatory lending, especially if it is the only option available to a state attorney general. However, it is still worth considering the potential criticisms of resorting to UDAP.

The overarching concern regarding general UDAP claims is that the claims come up short.¹¹¹ This is because some states have limited the scope of UDAP statutes in the predatory lending context.¹¹² Certainly limiting the scope of UDAP limits the effectiveness of the statute. However, even if a court limits the scope of UDAP, the state attorney general still might be able to use it. For example, if a court has determined that an attribution of a loan is not subject to a state’s UDAP statute, the state attorney general is able to pursue a UDAP claim by arguing a violation of UDAP occurred because of deception connected to the transaction itself.¹¹³ Anytime that a court narrows the application of UDAP, a state attorney general will just need to focus on a different aspect of the transaction to prove UDAP applies.¹¹⁴ Additionally, the incorporation of

practice to support the use of a general UDAP claim. This is supported by the fact that the federal government created a federal UDAP law by enacting the FTC Act. The state attorney general can also focus on an aspect or stage of the transaction that is not regulated by federal law in bringing the UDAP claim in order to avoid preemption. *Id.* at §2.5.1. Moreover, for a general UDAP claim “if at all possible, statutes should be construed to be consistent with each other, and one should be held to preempt the other only if there is a manifest inconsistency between them.” *Id.* at §2.3.3.5.1.

¹¹⁰ *Stein Interview, supra* note 54.

¹¹¹ Petersen, *supra* note 1, at 50.

¹¹² See Part III.B. *supra*, at 19–20 (discussing courts which have limited the extension of UDAP to credit transactions).

¹¹³ This was the case in Massachusetts. See *supra* note, 103.

¹¹⁴ Certainly, if a court rules that a particularly lender is completely excluded from being liable from a UDAP claim all of the forgoing discussion is moot. However, if there is complete exclusion under UDAP, one would expect to find some alternative arrangement of protection. Additionally, it is the attorney general’s job to protect consumers.

unconscionability as an element of UDAP helps to extend the scope of the law. The result is that a court might be forced to look at a particular transaction, even if in the past the court had ruled UDAP did not apply to a similar practice. This is because the features of the practice being questioned might rise to a level of unconscionability, whereas the previous actions did not.¹¹⁵

Lenders also are apt to criticize the use of general UDAP claims because the laws are “admittedly and intentionally vague.”¹¹⁶ As a result, lenders might not have any certainty regarding what constitutes prohibited lending practices.¹¹⁷ However, such worries are overstated. First, UDAP provides equal uncertainty for the state attorney general in terms of whether the claim will be successful.¹¹⁸ There will be an issue of fact and law as to whether the practice is unfair, deceptive, or unconscionable.¹¹⁹ As a result, the state attorney general is only likely to go after a practice that rises to a level that resembles inequitable lending practices.¹²⁰ Second, the broad concepts of unfair and deceptive still have identifiable characteristics, most specifically that the borrower not be misled.¹²¹ There is no reason to think that the use of general UDAP will result in an overwhelming harm to the lending industry. Instead, it is more likely that general

“If there is a conflict between the UDAP statute and another state regulatory scheme, it must be direct, unavoidable, patent, and sharp before the court will conclude that the UDAP statute is displaced. Sheldon, *supra* note 6, at §2.3.3.5.1. The bottom line is that “borrowers should not be lied to, period. Things should be straightforward. They should not be misleading . . . it is not *caveat emptor* and it shouldn’t be because they [borrowers] are not the ones with the power and the knowledge.” *Fleischer Interview*, *supra* note 54. Consequently, the state attorney general should not be deterred from bringing a general UDAP claim if the attorney general has plausible argument for why the UDAP should apply to a particular lending abuse.

¹¹⁵ See Part III.B. *supra*, at 20. This argument also answers the additional criticism that using UDAP in the predatory lending context does not work because many predatory loans do not involve deception. Petersen, at 50. The outrageous terms of the loan, *per se*, violate unconscionability under UDAP. *Fleischer Interview*.

¹¹⁶ Snow, *supra* note 80, at 3.

¹¹⁷ Having a specific predatory lending law in a state provides lenders with some certainty. Stein explains The benefit of having a specific predatory lending law that lays down the rules of the road is that everybody knows what they can and can not do, so they change their loan terms accordingly. When you only have a UDAP statute, which the standard is very subjective—unfair and deceptive—there is a lot more gray area and lenders are more likely to go up to the line and over the line.

Stein Interview.

¹¹⁸ *Fleischer Interview*.

¹¹⁹ *Id.* As discussed in Part III.B. *supra*.

¹²⁰ See *supra* note 95.

¹²¹ *Fleischer Interview*; *supra* note 88; *supra* note 114.

UDAP claims will allow the state attorney general to protect borrowers. Furthermore, “UDAP enforcement power is explicitly (and very obviously constitutionally) legislated to attorneys general.”¹²² Lenders can expect state attorneys general to use UDAP, and if anything the threat of using UDAP will force lenders to scrutinize their practices, increasing borrower protection.

The biggest obstacle left regarding the use of general UDAP claims for the state attorney general is the problem of federal preemption.¹²³ Although this paper does not analyze the preemption problem, it should be noted that “unless Congress specifically bars state actions, it is presumed that the federal legislators intended the states to continue to exercise their traditional police and regulatory powers.”¹²⁴ Additionally, UDAP might offer some hope to the preemption problem because the state attorney general can tailor a predatory lending claim to a practice that violates UDAP and is not covered by federal law.¹²⁵ Alternatively, UDAP may also work if the court determines that a general UDAP claim is “merely a procedural vehicle for enforcing standards that are consistent with federal law.”¹²⁶ The bottom line is that the preemption problem might pose an obstacle for state attorneys general, but “an attorney general’s primary responsibility is not to the preferences of Congress or federal regulators but to the state.”¹²⁷ Consequently, the state attorneys general should bring a general UDAP claim when a predatory

¹²² Snow, *supra* note 80, at 11. Kaplan expounds upon this point by arguing that the uncertainty involved in UDAP statutes was deliberate. “UDAP laws are remedial statutes that are purposefully flexible and preventative. They are to address both unspecified, existing wrongs and “as-yet undevised” practices that injure consumers.” Kaplan, *supra* note 63, at 300.

¹²³ *Fleischer Interview*. Even if preemption prevents the state attorneys general from combating predatory lending practices connected to many mortgage brokers and originators, the state attorneys general will always be able to protect borrowers from non-depository mortgage brokers and originators that lack a relationship with a depository institution. Petersen, *supra* note 1, at 84. Since many non-depository lenders are not currently subject to increasing scrutiny of state predatory lending laws, the aggressive use of general UDAP claims such institutions would be able to provide an effective form of protection for victimized borrowers. *Id.*

¹²⁴ Kaplan, at 319.

¹²⁵ Sheldon, *supra* note 6, at §2.5.1.

¹²⁶ *Id.*

¹²⁷ Kaplan, at 319.

lending practice is suspected and be prepared to adapt the claim to try and avoid the preemption problem.¹²⁸

VI. Conclusion

UDAP statutes are a powerful tool that state attorneys general have to combat practices that are unfair, deceptive, and unconscionable. In the past, state attorneys general have used UDAP effectively to provide protection to their state's citizens. Today, state attorneys general need to continue to use UDAP—aggressively and creatively—to protect borrowers from evolving predatory lending practices. General UDAP claims fill gaps in state law, allowing the state attorney general to provide an immediate form of relief to a victimized borrower. UDAP has the potential, because of its flexible nature, to get around some of the looming preemption problems that attorneys general currently face regarding predatory lending. Moreover, the aggressive use of general UDAP claims establishes a framework for how predatory lending will be fought. General UDAP claims show that the state attorney general will not just resign him or herself to statutory or regulatory consumer protection. If a practice has clearly harmed a consumer, yet slips through the cracks of regulation and statute, general UDAP claims demonstrate that preying upon unsophisticated borrowers will not be tolerated, period.¹²⁹

Resorting to general UDAP claims is by no means a perfect solution. UDAP claims are difficult to prove. Predatory lending practices continue to evolve and society is now willing to place more responsibility on the borrower for signing a loan with the predatory lender in the first

¹²⁸ Josh Stein, Senior Deputy Attorney General of North Carolina, explains the value of bringing a UDAP claim. “There are no drawbacks to resorting to it. If it is the only tool in your toolbox, you have got to use it . . . the AG should use it.” *Stein Interview*, *supra* note 54.

¹²⁹ The recent development of state home mortgage predatory lending laws and the enactment of regulatory rules under UDAP by the state attorney general suggest a current preference to have specific regulations or statute to provide consumer protection. While developing laws and regulations on predatory lending are desirable, the state attorney general must not forget that he or she has a tool to fight predatory lending beyond a specific law or regulation. A general UDAP claim provides protection where regulation and statute do not. For in depth discussions on the recent trend of regulatory rulemaking see Kaplan, *supra* note 63; Snow, *supra* note 80.

place.¹³⁰ However, none of these factors should deter a state attorney general from using UDAP. The state attorney general's role is to protect its citizens; consequently the state attorney general has an obligation to use every method available to provide such protection. By aggressively using general UDAP claims against predatory lenders, the state attorney general will be able to better defend against predatory lending practices.

¹³⁰ The lending industry and others have advanced the argument that the free market will provide the proper level of protection for the consumer. *Keest Interview*. While this paper does not explore this argument, its dubious nature has been rejected in a court of law. See *supra* note 106.