

1988

## Lock-In Laws: Adding More Patches to the Mortgage Lending Quilt

Paul A. Mondor

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Paul A. Mondor, *Lock-In Laws: Adding More Patches to the Mortgage Lending Quilt*, 37 Cath. U. L. Rev. 543 (1988).

Available at: <https://scholarship.law.edu/lawreview/vol37/iss2/9>

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## LOCK-IN LAWS: ADDING MORE PATCHES TO THE MORTGAGE LENDING QUILT

Lock-in, meaning a commitment by a mortgage lender to make a prospective loan at a particular interest rate,<sup>1</sup> has only recently appeared in the home-mortgage-industry lexicon. Before the spring of 1986, lenders rarely offered lock-in agreements.<sup>2</sup> Virtually no cases directly treated claims of breach of such lock-in agreements, although many breaches apparently occurred. In the summer of 1986,<sup>3</sup> and even more so in the spring of 1987,<sup>4</sup>

---

1. This Comment uses "lock-in" to mean an agreement between a mortgage lender and a loan applicant, executed prior to loan approval, and made contingent upon the lender subsequently committing to make the loan within a fixed period of time. During this period, the lender and borrower agree to lock in the current market interest rate, and in some cases, other terms and conditions for any future loan contract. Although borrowers may request lock-ins after loan approval, post-approval lock-ins seldom cause any problem. Lenders generally abide by such agreements because loan approval usually indicates that closing is imminent. With closing imminent at the time of the lock-in, lenders have less time and fewer reasons to back out.

A lock-in differs from a floating application. In the latter, the parties refrain from setting the terms and conditions of any loan agreement they may enter into until closing, based on the prevailing market terms at that time.

2. Before 1986, lenders commonly would quote the current market rates at the time a borrower made application. But lenders never clearly intended such quotes as binding agreements. Rather, they tacitly meant only to inform the applicant of the current state of the market, with the unrealistic expectation that the applicant grasped all of the subtleties of the mortgage industry that could contribute to the failure of the loan to close as quoted. See, e.g., *Mortgage Foreclosures and Other Current Mortgage Credit Issues: Hearings on H.J. Res. 656 and H.R. 3306 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs, 99th Cong., 2d Sess. 119 (1986)* [hereinafter *Mortgage Credit Issues Hearings*] (statement of John M. Teutsch, Jr., Chairman and Chief Executive Officer, Rainier Financial Services Company, Seattle, Wash. and Vice President, Mortgage Bankers Association of America) ("At issue is whether the parties to such a commitment are bound to honor such a commitment."). In any case, problems rarely arose before the spring of 1986 because loans almost always closed at the quoted rate. The unprecedented volume of business resulting from the precipitous drop in interest rates at that time, at least in the views of most lenders, first triggered the crisis. *Id.*; see also *id.* at 117. Mr. Teutsch stated that "[t]here is no historical precedent for the current mortgage volume, and perhaps more importantly for the rapid upsurge in applications as interest rates decreased rapidly during March and April [of 1986]." *Id.*; see also *id.* at 128-29 (statement of Leonard Shane, Chairman and President, Mercury Savings and Loan Association, Huntington Beach, Cal. and Chairman, Legislative Policy Committee, United States League of Savings Institutions).

3. In 1987, Representative Dean Gallo of New Jersey referred to the lock-in crisis of 1986 as "last summer's horror stories." 133 CONG. REC. E2267 (daily ed. June 4, 1987).

4. Representative Gallo stated that "[a]gain this spring, . . . [i]nterest rates guaranteed to consumers for limited periods are going through the roof when, through no fault of the consumer, the closing is delayed beyond the 'guaranteed' lock-in period." *Id.*

borrowers, upset over having had lock-in agreements expire or dishonored by lenders, lodged extraordinary numbers of complaints with various state officials.<sup>5</sup>

Although a few consumers have recently sued lenders for renegeing on lock-ins,<sup>6</sup> the more significant developments arising out of the lock-in shock phenomenon have been legislative. Five states have enacted laws aimed at requiring home mortgage lenders to honor lock-in commitments.<sup>7</sup> Of potentially greater significance, Congress may act on the matter. The House of Representatives has one bill pending<sup>8</sup> and, reportedly, the staff of Senate Banking Committee Chairman William Proxmire is preparing a parallel bill.<sup>9</sup> A number of states have bills pending<sup>10</sup> and at least one state has achieved the same effect by regulation.<sup>11</sup>

This Comment examines the state and federal legislative trend against the general background of consumer credit law as it relates to home mortgage finance, and considers the ramifications of imposing one more layer of state and federal regulation upon lenders. This Comment notes the advantages of simplicity and uniformity available through a comprehensive federal law. As a background for the present trend in favor of lock-in laws, this Com-

---

5. According to Representative Gallo, 2500 consumers in Maryland and 1300 in New Jersey experienced, and complained about, "mortgage rate shock." *Id.*

6. *E.g.*, Precious, *Would-Be Borrower Wins Suit Over Rejection of Application*, Wash. Post, Aug. 22, 1987, at E1, col. 1 [hereinafter Precious, *Would-Be Borrower*] (discussing lock-in case in Montgomery County, Md. Small Claims Court); *see also* Precious, *Borrowers Awarded \$50,000 in Damages*, Wash. Post, Sept. 5, 1987, at E1, col. 5 [hereinafter Precious, *Borrowers Awarded \$5,000*] (Maryland Banking Commissioner awards \$50,000 in damages to 17 borrowers upset over practices of single mortgage banking firm); Givens, *Illinois Attorney General Sues MB Companies*, Real Est. Fin. Today, June 19, 1987, at 32, col. 1 (Illinois Attorney General suing four major Chicago area mortgage lenders in part for breaching lock-in agreements).

7. These five states are Colorado, Connecticut, Maryland, Minnesota, and Washington. COLO. REV. STAT. §§ 38-38-111 to -114 (Supp. 1987); Act of Apr. 28, 1987, Pub. Act 87-73, 1987 Conn. Acts 93 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. app. at 23 (West 1988); MD. FIN. INST. CODE ANN. §§ 12-501, 12-512 (Supp. 1987); MINN. STAT. ANN. § 47.206 (West Supp. 1988); WASH. REV. CODE ANN. § 19.146.030 (Supp. 1988).

8. Residential Mortgage Credit Fairness Act of 1987, H.R. 2609, 100th Cong., 1st Sess., 133 CONG. REC. H4261 (daily ed. June 4, 1987) [hereinafter H.R. 2609] (pending in House Committee on Banking, Finance, and Urban Affairs).

9. *See* Harney, *Bill Would Eliminate "Lock-In Shock,"* Wash. Post, June 6, 1987, at E1, col. 1; Mortgage Bankers Association of America, Washington Report, May 19, 1987, at 1, col. 1.

10. Three such states are Arizona, California, and Pennsylvania. S. 1250, 38th Leg., Reg. Sess. (Ariz. introduced Feb. 4, 1987); S. 1120 and S. 1124, 1987-88 Leg., Reg. Sess. (Cal. introduced Mar. 5, 1987); S. 7, 171st Leg., Reg. Sess. (Pa. introduced Jan. 15, 1987); *see also* *State Legislatures Continue Push to Regulate Mortgage Activities—Not Just Commitments*, Inside Mortgage Fin., Aug. 7, 1987, at 6, col. 1 [hereinafter *State Legislatures*].

11. *See* N.Y. COMP. CODES R. & REGS. tit. 8, pt. 38 (1987).

ment examines the general area of consumer credit law, which historically had little to do with the area of home mortgage lending.<sup>12</sup> This examination includes a review of some of the theories of litigation upon which borrowers have founded actions against lenders, some that irate borrowers could use to enforce lock-in provisions. Next, this Comment considers the five state laws enacted to date and compares their provisions, particularly considering the effects on a lender doing business in at least two of those five states. Finally, this Comment analyzes the federal legislation in its currently proposed form, and considers the question of whether federal preemption of state lock-in laws, and/or state mortgage law generally, is likely or desirable.

## I. CONSUMER CREDIT, MORTGAGE CREDIT, AND FEDERALISM: THE BACKGROUND

### A. Legislative Background

The history of consumer credit legislation, from the perspective of the state-federal relationship, reveals how the area of mortgage lending has gradually acquired a federal presence where once there was none. This evolution has occurred in three distinct periods: pre-1968, 1968 to 1980, and post-1980.

#### 1. Pre-1968: The Labyrinth

Before 1968, the states alone regulated consumer credit.<sup>13</sup> The pattern essentially consisted of a general usury law<sup>14</sup> and an assortment of exceptions especially geared to certain types of lenders, such as savings and loan associations.<sup>15</sup> Other exceptions included loans with a principal amount below a certain ceiling,<sup>16</sup> and general exceptions to the usury law.<sup>17</sup> These laws combined in a complex tangle of independent, noncomprehensive, and

---

12. Traditionally, the term "consumer credit" has meant transactions other than mortgage loans (except, perhaps, second lien and other junior mortgages). See, e.g., B. CURRAN, LEGISLATIVE TRENDS IN CONSUMER CREDIT 14 (1965); R. ROHNER, THE LAW OF TRUTH IN LENDING, ¶ 6.01, at 6-3 (1984). More recently, the line between the two has blurred. See *infra* notes 38-40 and accompanying text.

13. See Malcolm, *Consumer Credit—Probings into the Future*, 26 BUS. LAW. 899, 899 (1971). For a comprehensive review of the legislation governing consumer credit (other than mortgage lending) as of 1965, see generally B. CURRAN, *supra* note 12.

14. See, e.g., D.C. CODE ANN. §§ 28:2701-:2709 (1961).

15. For an example of a savings and loan act, see *id.* §§ 26:406-:407.

16. Such laws are usually called "small loan acts." See, e.g., *id.* §§ 26:601-:611.

17. Usury law exceptions typically are called "installment loan acts." See, e.g., KY. REV. STAT. ANN. § 287.215 (Michie/Bobbs-Merrill Supp. 1987). These laws allowed loans, not subject to loan-type exceptions, made by lenders not covered by lender-type exceptions, to bear interest at a rate greater than the usury rate if they satisfied certain requirements. See generally B. CURRAN, *supra* note 12, at 65-75 (discussing installment loan acts).

noncoordinated regulation within any one state, with the pattern varying from one state to the next.<sup>18</sup>

In the area of home mortgage lending, at both the state and federal levels, regulation of creditors focused more on the type of entity than on the lending activities. Federally chartered savings and loan associations obeyed the regulations of the Federal Home Loan Bank Board (FHLBB).<sup>19</sup> The FHLBB also regulated those state-chartered savings and loan associations that chose to acquire the insurance of the Federal Savings and Loan Insurance Corporation (FSLIC).<sup>20</sup> However, state-chartered savings and loans answered to state regulators as well.<sup>21</sup> Thus, prior to 1968, state-chartered savings and loans often contended with double regulation in all their activities, including mortgage lending.<sup>22</sup>

As another source of home mortgage funds, commercial banks also experienced the double regulation of state and federal authorities. State-chartered banks faced an extensive and complex array of state laws governing their operations.<sup>23</sup> Meanwhile, one or two federal agencies might have exerted some control simultaneously. Under the federal regulatory system, a bank could fall under the jurisdiction of the Comptroller of the Currency,<sup>24</sup> the Board of Governors of the Federal Reserve System (Board),<sup>25</sup> and/or the Federal Deposit Insurance Corporation (FDIC).<sup>26</sup>

---

18. For a tabulation, in chart form, of the usury laws of all the states and their exceptions, as of 1965, including citations, see B. CURRAN, *supra* note 12, at 140-43.

19. Home Owners' Loan Act of 1933, Pub. L. No. 73-43, § 5(a), 48 Stat. 128, 132 (codified as amended at 12 U.S.C. § 1464(a) (1982)). The Federal Home Loan Bank Board (FHLBB) currently implements its regulatory authority through the regulations found at 12 C.F.R. pt. 500 (1987). For a description of the history and functions of the FHLBB, see generally Clarke, *The Regulatory and Housing Functions of the Federal Home Loan Bank Board*, 26 BUS. LAW. 37 (1970).

20. Act of June 27, 1934, ch. 847, § 402, 48 Stat. 125 (codified as amended at 12 U.S.C. § 1725 (1982)); see also 12 C.F.R. pt. 561 (1987); Clarke, *supra* note 19, at 40.

21. In 1965, all fifty states and the District of Columbia had savings and loan acts in effect. See B. CURRAN, *supra* note 12, at 220-25.

22. This double regulation had a significant impact on the mortgage credit industry because savings and loans originated the bulk of such loans during this period. T. MARVELL, *THE FEDERAL HOME LOAN BANK BOARD* 10 (1969). "Savings and Loan Associations are by far the most important home-financing institutions, accounting for three times as many home mortgages as any of their nearest competitors." *Id.*

23. Hackley, *Our Baffling Banking System* (pt. 1), 52 VA. L. REV. 565, 580 (1966).

24. See generally 12 U.S.C. §§ 1-14 (1982 & Supp. IV 1986) (general provisions creating the Office of Comptroller of the Currency). All federally chartered (national) banks answer to the Comptroller of the Currency. *Id.* § 24(Seventh); see also 12 C.F.R. § 1.1 (1987).

25. All member banks of the Federal Reserve System, which national banks must be, 12 U.S.C. § 222 (1982), and which state banks may be, *id.* § 321, abide by the Board's regulations. Federal Reserve Act of 1913, ch. 6, 28 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.); see also 12 C.F.R. § 201.1 (1987).

26. The Federal Deposit Insurance Corporation (FDIC) provides insurance on deposits.

Through this coexistence of state and federal chartering of banks, known as the "dual system,"<sup>27</sup> three distinct entities might have regulated an insured, member, state-chartered bank: the Federal Reserve Board, the FDIC, and whatever state authority existed in its state.<sup>28</sup> This created a complex interaction of competing regulation, characterized by a lack of coordination among the regulators.<sup>29</sup>

Private mortgage companies represented another major category of lending entities during this period. These institutions usually would originate and close loans and then sell the loans to investors, rather than retain portfolios of their own. These private mortgage companies constituted ordinary corporations that existed solely to make mortgage loans, rather than depository institutions of any kind. However, such corporations drew little attention from the state legislators, other than the ever-present usury statutes and the occasional mortgage banker or mortgage broker licensing law.<sup>30</sup>

Beyond the regulation of the various types of financial institutions, the federal mortgage insurers exerted yet another layer of control on home mortgage lending. Any lender, regardless of its nature, that intended to offer loans under any of the federal insurers' programs naturally would observe all of that entity's regulations and other requirements in order to qualify for its programs. The Federal Housing Administration (FHA)<sup>31</sup> required regula-

---

Federal Reserve membership automatically includes a bank in this insurance plan. 12 U.S.C. § 1814(b) (1982). Nonmember banks may opt for insurance without joining the Federal Reserve system. *Id.* § 1815(a).

27. See Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 3-8 (1977).

28. For an extensive overview of the federal banking regulation system, see Hackley, *supra* note 23, at 570-78.

29. One commentator graphically dubbed this situation a "tangled web." Scott, *supra* note 27, at 7 (chart). For a bank that makes mortgage loans in several states, this picture becomes even more complex. While banks were relatively local in the 1960's, the practice of interstate banking has become quite common today. See *infra* note 179. The traditional rationale for preserving local regulation of consumer credit has been its local nature. See, e.g., Malcolm, *supra* note 13, at 900.

30. As of 1968, there were still only two licensing statutes in place, in Florida and in Hawaii. Mortgage Brokerage Act, ch. 59-309, 1959 Fla. Laws 1153 (codified as amended at FLA. STAT. ANN. §§ 494.01-.121 (West 1972 & Supp. 1987)); Mortgage Brokerage Act, ch. 228, 1967 Haw. Sess. Laws 339 (codified as amended at HAW. REV. STAT. §§ 454-1 to 454-8 (1985)).

Although rare then, such licensing laws have achieved more prominence today. Twelve states had them in 1985, and more states are exhibiting a trend toward enactment of licensing laws, similar to the lock-in law activity. See Negroni, *Traps for the Unwary: Recent Legal Developments in Mortgage Banking*, MORTGAGE BANKING, Oct. 1987, at 166, 169.

31. The Federal Housing Administration (FHA) was created by the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1750c (1982 & Supp. IV 1986)).

tion by the department of Housing and Urban Development (HUD)<sup>32</sup> of lenders making FHA loans. The Veterans Administration (VA) issued its own regulations.<sup>33</sup> These two regulators added another dimension of compliance considerations for mortgage lenders.

Finally, the quasi-federal secondary mortgage market associations<sup>34</sup> exerted some control over the activities of all lenders that proposed to sell loans to them. They refused, however, to view their own role as that of regulators, then or now.<sup>35</sup>

## 2. 1968 to 1980: Truth in Lending and the Uniform Consumer Credit Code

From 1968 to 1969, two major pieces of legislation rendered slightly less distinct the ostensibly separate areas of consumer credit law and mortgage lending law. First, Congress enacted the federal Truth in Lending Act of 1968 (TILA).<sup>36</sup> Second, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Consumer Credit Code (UCCC).<sup>37</sup> Both pieces of legislation, while nominally consumer credit laws,

32. 12 U.S.C. § 1715b (1982 & Supp. III 1985); see also 24 C.F.R. pt. 200 (1987).

33. Congress gave the Veterans Administration (VA) authority to "guaranty" veterans' home mortgage loans in the Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284 (codified as amended at 38 U.S.C. §§ 1801-1832 (1982 & Supp. III 1985)); see also 38 C.F.R. pt. 36 (1987).

34. Out of the eventual three entities, only the Federal National Mortgage Association (FNMA or Fannie Mae), chartered by title III of the National Housing Act, Pub. L. No. 73-479, § 301, 48 Stat. 1246, 1252 (1934) (codified as amended at 12 U.S.C. §§ 1716-1723h (1982 & Supp. IV 1986)), actually existed prior to 1968. The Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 802, 82 Stat. 476, 536 (codified as amended at 12 U.S.C. §§ 1716-1723c (1982 & Supp. IV 1986)), separated it into FNMA and the Government National Mortgage Association (GNMA or Ginnie Mae). The Emergency Home Finance Act of 1970, Pub. L. No. 91-351, § 303, 84 Stat. 450, 452 (codified as amended at 12 U.S.C. § 1452 (1982 & Supp. IV 1986)), created the third player in the federally sponsored secondary mortgage market—the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac).

35. See Kaplan & Qutb, *The Regulatory Environment: An Overview*, in THE HANDBOOK OF MORTGAGE BANKING: A GUIDE TO THE SECONDARY MORTGAGE MARKET 183, 183 (J. Kinney & R. Garrigan eds. 1985). As Kaplan and Qutb point out, these organizations play an ever increasing role in the mortgage market today because lenders originate a steadily growing percentage of their loans for sale in the secondary market. *Id.* An expanding secondary market furthers the trend toward a national, as opposed to local, home mortgage industry. See *infra* note 179.

36. Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601-1667e (1982 & Supp. IV 1986)) [hereinafter TILA]. This Act called upon the Federal Reserve Board to issue implementing regulations. These are now found, as amended, at 12 C.F.R. pt. 226 (1987) (Regulation Z).

37. See UNIFORM CONSUMER CREDIT CODE XVII (West pamphlet 1969) [hereinafter UCCC] (prefatory note). The UCCC, a product of years of research, hearings, conferences, annual meetings, and drafting efforts by many experts, was created for adoption by the states as a uniform law. *Id.* at XXI.

took the significant step of bringing credit transactions secured by real estate, to some extent, within their respective scopes.<sup>38</sup>

Section 123 of the TILA permitted exemption of transactions in states where laws "substantially similar" to the provisions of the TILA existed, referred to as 'state exemption.'<sup>39</sup> The UCCC apparently extended its coverage to real estate transactions in order to mimic the TILA as perfectly as possible, and thus, qualify as substantially similar. Thus, the NCCUSL attempted to add a selling point to the UCCC by making it eligible for state exemption.<sup>40</sup> In every other respect, it clung to the traditional view that home mortgage transactions, a qualitatively different transaction, required separate treatment.<sup>41</sup> Ultimately, the NCCUSL did not succeed; most states never accepted the UCCC.<sup>42</sup> By 1980,<sup>43</sup> it became clear that the UCCC would not provide the uniformity desired by some.<sup>44</sup>

The TILA contained a \$25,000 ceiling on transactions subject to the Act to provide an objective test for exempting transactions having a business or commercial purpose.<sup>45</sup> Implicitly, the inclusion of real estate transactions under the TILA acknowledges that such transactions belong under the heading of "consumer credit," even though they usually involve amounts greater than \$25,000.

Congress emphasized the concept of disclosure in the TILA. Some hoped that requiring disclosure of information by creditors about the nature of the credit transaction in a uniform fashion, including the interest charged, would allow the consumer to make informed choices and thereby enhance both competition among creditors and the general welfare of consumers.<sup>46</sup>

38. See 15 U.S.C. § 1603 (1982) (transactions greater than \$25,000 exempted except those secured by real estate); UCCC §§ 3.105, 3.301(1) (consumer loan generally does not include a loan primarily secured by an interest in land, but does for limited purposes).

39. 15 U.S.C. § 1633 (1982).

40. See UCCC at XVII-XIX (prefatory note).

41. See *id.* § 2.104 comment 2; Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 388 (1968).

42. A total of 10 states adopted the UCCC in whole or in part. Of those, Utah has since repealed it. See 1 Consumer Cred. Guide (CCH) ¶ 4770 (June 18, 1985).

43. In 1975, Maine and South Carolina became the last two states to enact the UCCC. *Id.*

44. See UCCC at XXI (prefatory note); Jordan & Warren, *supra* note 41, at 387. One view explains that the UCCC was not widely accepted because it was overly "visionary" in the area of rate regulation and not "visionary" enough when it came to the scope of its coverage or its ability to handle future changes in the area of consumer credit. Miller & Rohner, *In Search of a Uniform Policy: State and Federal Sources of Consumer Financial Services Law*, 37 BUS. LAW. 1415, 1418 (1982).

45. H.R. REP. NO. 1040, 90th Cong., 1st Sess. 28, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1962, 1986.

46. 15 U.S.C. § 1601 (1982) (Findings and Declaration of Purpose); 111 CONG. REC.



Critics of this theory argued that disclosure failed to solve the problem,<sup>47</sup> or at least inadequately addressed the problem for poor consumers, the ones in greatest need of help.<sup>48</sup> The belief that disclosure would single-handedly eliminate the ills of the consumer credit world has proved unfounded. The string of further enactments following the TILA demonstrates this conclusion.<sup>49</sup>

Congress, aware of the simultaneous efforts to produce the UCCC, did not leave the TILA silent as to its relationship to state law. If it had, the TILA might arguably have preempted much of the state law in the area of consumer credit pursuant to the supremacy clause of the United States Constitution.<sup>50</sup> Instead, the TILA contained a deferential section that set forth a rule, the "inconsistent" standard, for determining the preemptive effect of the TILA on a given state law.<sup>51</sup> Under this standard, the TILA preempts state laws that are inconsistent with its provisions and then only to the extent of the inconsistency. However, the statute provides no guidance as to what constitutes inconsistency. The Board promulgated Regulation Z, pursuant to the TILA's provisions, and interpreted "inconsistent" to mean: (a) requirements to calculate the finance charge or annual percentage rate (APR) differently; or (b) requirements that are different from the federal

---

16,424 (1965) (statement of Sen. Douglas); see also Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1299-1300 (1966); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 747-49 (1967).

47. See generally Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1 (1969) (criticizing the theory of disclosure).

48. See Note, *supra* note 46, at 749-54.

49. See, e.g., Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified as amended at 15 U.S.C. § 1681 (1982 & Supp. IV 1986)) (regulating behavior of credit reporting agencies); Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1511, 1516, 1517-21, 1525 (1974) (codified as amended at 15 U.S.C. § 1691 (1982 & Supp. IV 1986)) (restricting discriminatory practices in lending); Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692 (1982 & Supp. IV 1986)) (regulating practices of debt collectors).

50. U.S. CONST. art. VI, cl. 2. The supremacy clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This provision may manifest itself in a number of ways. First, Congress may preempt state law expressly, assuming the preemptive law is constitutional. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, Congress may preempt state law implicitly by occupying a particular area so pervasively as to permit an "inference that Congress left no room for the States to supplement" the federal scheme. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congress might also preempt state law in instances where one cannot possibly comply simultaneously with a state and a federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state law undermines the objectives of a congressional act. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

51. 15 U.S.C. § 1610 (1982).

requirements regarding form, content, terminology, or time of delivery of the required disclosures.<sup>52</sup> However, creditors could make any such inconsistent disclosures, and avoid potential state liability, as long as they made the disclosures separately.<sup>53</sup> Thus, the TILA did not truly preempt "preempted" state law requirements; lenders faced multiple disclosure requirements, and borrowers contended with a host of redundant disclosure forms.<sup>54</sup>

### 3. 1980: *The Truth in Lending Simplification Act and Creeping Preemption*

Congress enacted the Truth in Lending Simplification and Reform Act of 1980 (TILSA)<sup>55</sup> seeking to simplify the disclosures provided to consumer borrowers and easing the compliance burden for creditors.<sup>56</sup> The TILSA changed the preemption rule, prohibiting compliance by creditors with preempted state laws, even separately, and precluding state liability for such noncompliance.<sup>57</sup> The TILSA also required that the Board determine whether state laws were "inconsistent" or "substantially the same."<sup>58</sup> If the state law is substantially the same, a lender may comply with it rather than the TILA.<sup>59</sup> However, Congress still provided no further assistance in determining whether or not a state law is "inconsistent."

Congress apparently expected the Board to conduct a specific, line-by-line survey of every state law and decide whether inconsistencies lurked therein.<sup>60</sup> Whether or not the Board had the capability to perform such a

52. 12 C.F.R. § 226.6(b)(1) (1982) (repealed as of Oct. 1, 1982).

53. *Id.* § 226.6(c).

54. In *Mason v. General Fin. Corp.*, 542 F.2d 1226 (4th Cir. 1976), for example, the court held the creditor in violation of the TILA because it had mixed up state and federal disclosure requirements and allowed "preempted" state disclosures to appear on the federal document. *Id.* at 1235. The creditor was probably trying in good faith to assure that it met the myriad disclosure requirements it had to satisfy; it stood to gain no practical advantage by over-disclosing.

55. Pub. L. No. 96-221, 94 Stat. 132, 168 (1980) (codified as amended in scattered sections of 15 U.S.C. §§ 1601-1667e (1982)) [hereinafter TILSA].

56. S. REP. NO. 73, 96th Cong., 2d Sess. 2-3, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 280, 280-81.

57. TILSA, Pub. L. No. 96-221, § 609, 94 Stat. 168, 173-74 (1980) (codified at 15 U.S.C. § 1610(a)). Compare 12 C.F.R. § 266.28(a) (1987) (current rule, under the TILSA) with 12 C.F.R. § 226.6(c) (1982) (old rule, prior to the TILSA, repealed as of Oct. 1, 1982).

58. 15 U.S.C. § 1610(a) (1982).

59. *Id.* Compliance with state law is known as reverse preemption, which provided almost nothing new. Section 123 of the original TILA already provided for state exemption. See *supra* text accompanying note 39. But note that only a state can request a state exemption determination, 12 C.F.R. pt. 226 app. B (1987), while a creditor, state, or other interested party may request a reverse preemption determination. 12 C.F.R. § 226.28(b) (1987).

60. In congressional words: "Under this section, the Board is required to examine the

massive project, it did not do so. Instead, the Board created a procedure by which an interested party could apply for a determination on an ad hoc basis,<sup>61</sup> and established a rule for inconsistency: the "contradictory" standard. Under this standard, a state law that requires any disclosure or action on a creditor's part that contradicts the federal requirements is inconsistent. Contradiction occurs when the state law requires either the use of the same term as the federal provisions require to represent a different amount or meaning, or the use of a different term to represent the same item.<sup>62</sup> Any creditor, state, or other interested party may request a determination from the Board regarding a particular state law under this standard.<sup>63</sup> In the absence of any further elaboration, this standard represents the most deferential end of the spectrum, given the wide range of interpretations that the Board could have given to the term "inconsistent."

As defined, the term "contradictory" only helps as a standard of inconsistency with regard to format and content of the disclosures required under the TILA. Any kind of procedural requirements, such as the form or timing of disclosures<sup>64</sup> or the rescission rights generally granted in most transactions involving a security interest in the consumer's principal dwelling,<sup>65</sup> do not fit into the Board's definition because they do not relate to terms and their meanings. The Board articulated another standard which serves better for procedural requirements: the "impede or interfere" standard.<sup>66</sup> This extra rule fills the gap for procedural requirements that the contradictory rule leaves open, although it, too, provides only a weak standard of preemption for two reasons. First, it lacks precision. It remains difficult to determine whether the state law interferes with the intent of the federal scheme unless that means having a diametrically opposed purpose. Second, to contradict, a state law must do more than just impede the operation of the TILA, it must

---

disclosure laws of each State." S. REP. NO. 73, *supra* note 56, at 13-14, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 280, 291.

61. 12 C.F.R. pt. 226 app. A (1987). The appendix provides the address to which an interested party should send its request and lists the supporting documentation required: essentially, all relevant state legislative and regulatory material and the requesting party's proposed analysis. *Id.*

62. *Id.* § 226.28(a)(1).

63. *Id.*

64. *Id.* § 226.17(a), (b).

65. *Id.* § 226.23(a)(1).

66. 48 Fed. Reg. 4454, 4454 (1983). The test is whether the state requirement "significantly impedes the operation of the federal law or interferes with the intent of the federal scheme." *Id.* This bears a strong resemblance to the third branch of the federal preemption doctrine, under *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See *supra* note 50 (summarizing federal preemption doctrine).

do so "significantly." While the rule does not clearly delineate the threshold of significance, it cannot mean that any and all impediments qualify as significant, or else the Board might have omitted the qualifier, "significantly," altogether. State procedural requirements could exist that interfere with the TILA's smooth procedural functioning but do not rise to the level of a significant impediment, and that the TILA, therefore, does not preempt.<sup>67</sup>

Since 1980, Congress has shown a greater willingness to preempt state law in the mortgage lending realm when it perceives a need. For instance, it enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA).<sup>68</sup> Title V of the DIDMCA preempted state usury laws until and unless the state acted expressly to override such preemption within three years of its effective date.<sup>69</sup> At that time, usury limits in some states were much lower than returns available on other investments. In passing title V, Congress intended to free up funds for mortgage loans that investors would otherwise withhold from the market.<sup>70</sup> Although this differs from the purpose of easing the burden of multiple laws, as in the case of the TILSA,<sup>71</sup> the DIDMCA incidentally obtained that effect because the patchwork of state usury laws yielded almost entirely to market determination of mortgage rates.

Two years later, Congress enacted the Garn-St Germain Depository Insti-

---

67. As the Board must make preemption determinations, because Congress chose not to preempt entirely, no one can criticize it for selecting a standard that will minimize the potential for inconsistency and thereby the number of occasions for making such determinations. Under this system, most state laws will remain unchallenged, and only those that clearly contradict the TILA, that clearly create a significant impediment to the TILA's smooth operation, or that clearly interfere with the federal intent underlying the TILA, will give rise to requests for determination. When the Board receives a request, its task is simpler due to the limited likelihood of meritless requests. The task is further simplified by the Board's requirement that the requesting party supply a proposed analysis. *See supra* note 61. Rather than performing its own analysis, the Board can review that of the requesting party and decide whether or not to accept it. For a recent example of such a determination, see *Truth in Lending; Determination of Effect on State Law; Indiana*, 52 Fed. Reg. 33,596, 33,596-98 (1987) (proposed Sept. 4, 1987) (Board proposing to determine that the TILA preempts Indiana law for its inconsistent use of same terminology). The fact that this constitutes only the sixth affirmative preemption determination, *see* 12 C.F.R. pt. 226 supp. I, § 226.28(a)(8)-(12) (1987), demonstrates the scarcity of such actions by the Board.

68. Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.) [hereinafter DIDMCA]. The TILSA is title VI of the DIDMCA.

69. 12 U.S.C. § 1735f-7 note (1982).

70. S. REP. NO. 368, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 236, 254. As the report stated, Congress opted to preempt state usury laws "[i]n order to ease the severity of the mortgage credit crunches of recent years." *Id.*

71. *See supra* text accompanying note 56.

tutions Act of 1982 (Garn-St Germain Act),<sup>72</sup> which provides for the preemption of state laws governing the use of "due-on-sale" clauses in mortgage instruments.<sup>73</sup> Congress sought to reaffirm the authority of federal savings and loan associations to enforce due-on-sale clauses and to grant equal authority to other lenders.<sup>74</sup> But Congress hardly needed to reaffirm the independence of federal associations from state regulation. Section 5(a) of the Home Owners' Loan Act gives the FHLBB a broad mandate to regulate federal thrifts with the stated purpose of maximizing the flexibility essential to keeping home loan funds available.<sup>75</sup> In exercising that authority, the FHLBB has declared its regulatory reach to be absolute.<sup>76</sup> Moreover, the Supreme Court has held that such a regulatory preemption, made in the exercise of an administrator's judgment pursuant to congressional mandate, has the same effectiveness as an act of Congress.<sup>77</sup> Given the redundancy of the preemptions under the DIDMCA and the Garn-St Germain Act as applied to federally chartered institutions, Congress must have intended to accomplish the placing of other lenders on an equal footing.

Title VIII of the Garn-St Germain Act also included a preemption of state laws that restrict the making of adjustable rate mortgage (ARM) loans.<sup>78</sup> This time, Congress made no pretense of "reaffirming" the authority of any federally chartered institutions. It simply noted that all federally chartered housing lenders had regulatory authority to make ARM loans. Congress, therefore, declared its purpose of establishing parity in that area on behalf of

---

72. Pub. L. No. 97-320, 96 Stat. 1469 (1982) (codified as amended in scattered sections of 12 U.S.C.) [hereinafter Garn-St Germain Act].

73. 12 U.S.C. § 1701j-3 (1982). A due-on-sale clause in a mortgage instrument effectively restricts the borrower's ability to subsequently transfer the home to a third party, whether subject to the mortgage or otherwise, by giving the lender a right to declare the entire loan balance due and payable if the borrower does so. *Id.* § 1701j-3(a)(1).

74. 12 C.F.R. § 591.1(b) (1987).

75. 12 U.S.C. § 1464(a) (1982 & Supp. IV 1986).

76. The FHLBB describes its own authority as "plenary and exclusive" and "preemptive of any state law purporting to address the subject of the operations of a Federal association." 12 C.F.R. § 545.2 (1987). For the analogous position of the Comptroller of the Currency, as to national banks, see *id.* § 34.2.

77. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). This case specifically addressed the extent of the FHLBB's ability to preempt a California law restricting due-on-sale clauses, through regulation, based solely on the federal preemption doctrine and the congressional mandate of the Home Owners' Loan Act, and in the absence of an express authorization to preempt state law. The Court held that effective preemption of state law by a regulator does not depend upon such express authority if the regulator reasonably can read its enabling statute as embracing such power. *Id.* at 154.

78. Alternative Mortgage Transactions Parity Act of 1982, Pub. L. No. 97-320, §§ 801-807, 96 Stat. 1469, 1545-48 (codified as amended at 12 U.S.C. §§ 3801-3805 (1982 & Supp. IV 1986)).

nonfederally chartered lenders.<sup>79</sup> To achieve this parity, Congress simply established authority for all housing creditors, federally chartered or not, to make ARM loans.<sup>80</sup>

Thus, since 1980, Congress has chipped away at state involvement in three distinct aspects of the residential mortgage lending industry, rendering each subject only to federal regulation. In 1980, it eliminated state usury laws<sup>81</sup> and, in 1982, it removed state restrictions on due-on-sale clauses and ARM loans.<sup>82</sup> A two-point rationale justifies these preemptions. First, Congress sought to permit federally chartered institutions to engage in a particular practice in order to assure "flexibility," and thereby, the availability of funds to meet the mortgage borrowing needs of the public, impliedly essential to serve the ultimate policy of maximizing Americans' opportunities for home ownership. Second, Congress sought to permit the same practice as other lenders in order to preserve a level playing field and ensure parity among lenders competing for borrowers. In each case, a single federal rule has displaced the patchwork of state laws, resulting in nationwide uniformity. However, this process has thus far united and simplified only single, isolated sub-areas of the mortgage lending field. In other mortgage credit sub-areas, nonfederally chartered entities, notably private mortgage bankers, continue to operate under a competitive disadvantage.

### B. Consumer Borrowers' Recent Litigation Theories Against Lenders

Until recently, consumers generally did not sue their creditors simply because of a failure to receive the loan that they had expected or for delays in processing their loan applications. Borrowers may have perceived them-

---

79. 12 U.S.C. § 3801 (1982).

80. 12 U.S.C. § 3803(c) (1982 & Supp. IV 1986). This preemption depended upon compliance by a nonfederally chartered lender with the regulations of the appropriate federal regulator for its type of institution. *Id.* § 3803. Because there is no such thing as federally chartered private mortgage companies, and thus no federal regulator specifically appropriate thereto, Congress lumped them, and "all other housing creditors," together with savings and loan associations, subject to FHLBB regulation. *Id.* § 3803(a)(3). Perhaps Congress chose the FHLBB for default regulatory duty because of the mortgage lending context of the legislation and the fact that the FHLBB's charges—savings and loans—have always been the primary entity in mortgage lending. *See supra* note 22 and accompanying text. Proximity to the mortgage industry arguably qualified the FHLBB as best suited for the new task. With regard to lock-in legislation, the approach of H.R. 2609 would eschew this logic. Drafted as an amendment to the TILA, it would place regulatory responsibility upon the Board, rather than the FHLBB. *See generally* 12 C.F.R. pt. 226 (1987) (Regulation Z, promulgated by the Board under the TILA).

81. Usury laws were eliminated through title V of the DIDMCA. *See supra* text accompanying notes 68-69.

82. Titles III and VIII of the Garn-St Germain Act achieved these two preemptions. *See supra* text accompanying notes 72-80.

selves as helpless victims with no recourse, especially where their total injury typically consisted of a nominal application fee. In addition, early case law with regard to lock-ins was sparse, primarily because, until recently, lenders seldom breached their lock-in agreements.<sup>83</sup> Since 1983, however, consumers have shown an increased willingness to sue when they feel that financial institutions have wronged them.<sup>84</sup> These consumers premised their suits on a variety of theories, some of which the courts recognized as legitimate. This Comment examines these theories for applicability to the lock-in situation.

### 1. *Morosani: Interest Overcharges and RICO*

In *Morosani v. First National Bank of Atlanta*,<sup>85</sup> the plaintiff alleged that First National systematically obtained money through false pretenses by agreeing to charge a rate of interest at a fixed margin above the prime rate and to compute interest on a 360-day-year basis, without doing either.<sup>86</sup> The United States District Court for the Northern District of Georgia dismissed Morosani's Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>87</sup> claim against the defendant bank "on the ground that 'the practice Plaintiff complains of has not traditionally been treated as criminal in nature: i.e., it is not a recognized form of criminal activity.'"<sup>88</sup>

The United States Court of Appeals for the Eleventh Circuit reversed and remanded for further proceedings, holding that obtaining money by false pretenses represents a recognized form of criminal activity.<sup>89</sup> To reinforce its position, the court cited the federal mail fraud statute which uses that very language.<sup>90</sup> The court further held that quoting one method of interest computation and then using another method, more advantageous to the lender, constitutes obtaining money by false pretenses.<sup>91</sup> According to the Eleventh Circuit, because mail fraud under the federal statute lies expressly

---

83. Leonard Shane testified that "[t]he 60-day commitment has long been a standard in the mortgage market because, until recently, everyone could reasonably expect the process to be completed within that time frame." *Mortgage Credit Issues Hearings*, *supra* note 2, at 128.

84. *See, e.g.*, *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983); *High v. McLean Fin. Corp.*, 659 F. Supp. 1561 (D.D.C. 1987); *First Fed. Sav. & Loan Ass'n of Hamilton v. Caudle*, 425 So. 2d 1050 (Ala. 1983); *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985); *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 515 A.2d 756 (1986); *see also* cases cited *supra* note 6.

85. 703 F.2d 1220 (11th Cir. 1983).

86. *Id.* at 1221.

87. 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986) [hereinafter RICO].

88. *Morosani*, 703 F.2d at 1221-22 (quoting *Kleiner v. First Nat'l Bank*, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981)).

89. *Id.*

90. *Id.*; *see also* 18 U.S.C. § 1341 (1982).

91. *Morosani*, 703 F.2d at 1222.

within the scope of RICO,<sup>92</sup> the district court erred in dismissing the claim. Thus, a lender that agrees to a certain interest rate on a loan and subsequently charges more, making use of the United States Postal Service in the process,<sup>93</sup> potentially faces civil RICO liability.<sup>94</sup>

Although *Morosani* did not involve a lock-in breach, such a case would fit the description of agreeing to one interest rate and charging another. Thus, the United States Court of Appeals for the Eleventh Circuit might consider a lock-in case amenable to civil RICO. The practical consequence of this analogy lies beyond the identification of a legal theory on which consumers frustrated by lock-ins could sue, and rests in RICO's treble damages provision.<sup>95</sup> Thus, if consumers' disinclination to sue creditors who breach lock-in agreements stems from the small amount in controversy, this fact might change that attitude.

## 2. *Perdue: Unconscionable Contract; Unfair Competition*

In *Perdue v. Crocker National Bank*,<sup>96</sup> a checking account customer challenged the six dollar charge assessed for bad checks (NSF charge). The plaintiff signed a "signature card" that the bank kept on file.<sup>97</sup> The California Supreme Court held that the signature card, which contained various terms of the checking account including authorization for the bank to make the NSF charge, constituted a contract of adhesion.<sup>98</sup> However, the court also stated that it must enforce a contract of adhesion, unless the contract was either outside of the reasonable expectations of the weaker party or un-

92. 18 U.S.C. § 1961(1)(B) (Supp. IV 1986).

93. See 18 U.S.C. § 1341 (1982). In practice, it would be a rare mortgage loan transaction that does not make use of the Postal Service to transmit the loan approval letter, notices of payments overdue, and a host of other documents mortgage lenders routinely mail to their borrowers. The standard forms prescribed by Fannie Mae and Freddie Mac for use in documenting mortgage loan transactions even provide that the parties, when called upon to render a notice of any kind under the terms of the note, mortgage, etc., shall provide said notice by first class mail, if not in person. See, e.g., FNMA/FHLMC, Form No. 3021, 14 (1983) (standard deed of trust form for use in Maryland, paragraph on notices).

94. Beyond the obtaining of money by false pretenses and use of the postal service, RICO would require only a pattern of such activity, which effectively means two or more instances, and investment of income derived therefrom in any enterprise remotely connected with interstate commerce. 18 U.S.C. §§ 1961(5), 1962 (1982 & Supp. IV 1986).

95. *Id.* § 1964(c).

96. 38 Cal. 3d 913, 702 P.2d 503, 216 Cal. Rptr. 345 (1985), *appeal dismissed*, 475 U.S. 1001 (1986).

97. *Id.* at 921, 702 P.2d at 508, 216 Cal. Rptr. at 350.

98. *Id.* at 924-25, 702 P.2d at 511, 216 Cal. Rptr. at 353. The court described a contract of adhesion as one where the stronger party provides the contract document, with no negotiation, and the weaker party has only the option of adhering to it as it stands, or rejecting it entirely. *Id.*, 702 P.2d at 511, 216 Cal. Rptr. at 353.



conscionable.<sup>99</sup> Although the court did not further discuss the “reasonable expectations” side of the test, it did remand the case for a hearing to determine whether, under the circumstances, the signature card contract was unconscionable.<sup>100</sup>

The elements of a classic contract of adhesion apply equally well to a lock-in agreement as to the signature card contract in *Perdue*. In a typical lock-in agreement, the lender drafts the document and the loan applicant either signs it or goes without a lock-in.<sup>101</sup> An equitable doctrine such as unconscionability applies to contracts generally,<sup>102</sup> not narrowly to any special term such as an NSF charge. Thus, under the line of reasoning in *Perdue*, and given the proper factual findings, a court could conceivably hold a lock-in agreement unconscionable.<sup>103</sup>

The California court determined that the plaintiff could also establish a claim under California’s unfair competition statute<sup>104</sup> if he could show deception in either the signature cards themselves or in the manner in which the bank presented them for signing.<sup>105</sup> This determination revealed another potential theory for lock-in litigation, through its innovative underlying premise that the unfair competition provisions exist to protect consumers as well as business competitors.<sup>106</sup> Should other states follow this interpretation with respect to their unfair competition statutes, another cause of action

---

99. *Id.* at 925, 702 P.2d at 511, 216 Cal. Rptr. at 353.

100. *Id.* at 928-29, 702 P.2d at 514, 216 Cal. Rptr. at 356.

101. The California court interprets the contract of adhesion doctrine as involving a document drafted by the stronger party and a “take it or leave it” posture forced upon the weaker party. *Id.* at 924-25, 702 P.2d at 511, 216 Cal. Rptr. at 353. Of course, in a lock-in situation, a borrower will still have his or her application processed, even without a lock-in, while in *Perdue*, a bank customer could not have opened an account without signing the signature card. But, a lender still has power to lock-in largely on its own terms, other than the interest rate itself which must stay more or less in line with the market. Assuming a market where the borrower would want to lock-in, due to rising rates, the lender still has unilateral power to dictate the term for which the agreement will remain in effect, as well as considerable power to determine whether the application gets processed before that term expires. When rates are falling, the lender will not breach any lock-in, or, more likely, the borrower will never request one, thus no issue arises.

102. *See, e.g., id.* at 925, 702 P.2d at 511, 216 Cal. Rptr. at 353.

103. Arguably, equitable theories are unnecessary in a case where the agreement was supported by consideration, such as a lock-in fee. In such a case, should a lender fail to honor the locked in terms, it would seem that a clear case for breach of contract exists, as the courts have acknowledged. *See High v. McLean Fin. Corp.*, 659 F. Supp. 1561, 1565 (D.D.C. 1987); *Jacques v. First Nat’l Bank*, 307 Md. 527, 537-38, 515 A.2d 756, 761 (1986); *see also infra* notes 117, 119, and accompanying text.

104. CAL. BUS. & PROF. CODE § 17,200 (West 1987).

105. *Perdue*, 38 Cal. 3d at 929, 702 P.2d at 514, 216 Cal. Rptr. at 356. Plaintiff had alleged that the bank led customers to believe that it required the cards for identification purposes only, with no contractual ramifications intended. *Id.*, 702 P.2d at 514, 216 Cal. Rptr. at 356.

106. *Id.*, 702 P.2d at 514, 216 Cal. Rptr. at 356.

will be available to consumers seeking remedies when they do not receive their locked in rates. Thus, *Perdue* offers two potential avenues of litigation that might extend to the lock-in situation: unconscionability and unfair competition.

### 3. *Negligence in Handling Loan Applications: Caudle, Jacques, High*

In *First Federal Savings & Loan Association of Hamilton v. Caudle*,<sup>107</sup> the lender had undertaken to assist the borrowers in obtaining a special type of FHA loan, assured them that it had already approved the loan, and later informed them that it had rejected their application.<sup>108</sup> Based on these facts, the Alabama Supreme Court sustained the plaintiff's theory of negligence against the lender.<sup>109</sup> Citing ordinary negligence cases as authority, it ruled that once First Federal voluntarily undertook to assist the Caudles, it had a duty to proceed with due care, and that stating that the loan had approval when in fact it had only conditional approval constituted a breach of that duty.<sup>110</sup> The court measured the damages as the difference between the cost of the loan had First Federal made it under the FHA program and the more expensive, conventional loan the Caudles had to obtain to cover their needs.<sup>111</sup>

On facts similar to those in the *Caudle* case, the Maryland Court of Appeals decided *Jacques v. First National Bank of Maryland*.<sup>112</sup> Here, the court found that a contract existed between the parties because the bank promised to process the application and to lock in the current market interest rate for ninety days. In consideration of this, the Jacques paid a \$144 appraisal and credit report fee and effectively withheld themselves from the market. The court viewed the latter consideration as creating a business

---

107. 425 So. 2d 1050 (Ala. 1983).

108. *Id.* at 1051.

109. *Id.* at 1052.

110. *Id.* (citing *McGaha v. Steadman*, 410 So. 2d 420, 421 (Ala. Civ. App. 1981) (negligent failure to renew insurance policy); *Dailey v. City of Birmingham*, 378 So. 2d 728, 729 (Ala. 1979) (wrongful death)).

111. *Id.* at 1052-53. The court failed to consider the fact that First Federal had not improperly denied the FHA loan. Rather, the court held that First Federal had negligently led the Caudles to believe that they would qualify for the FHA program when, in fact, they would not. Either way, the Caudles would have had to settle for a conventional loan, regardless of whether First Federal had negligently misled them. Thus, the court ought to have measured damages as the difference between the cost of a conventional loan at the time the Caudles should have learned of their inability to qualify for the FHA loan and the cost of the same conventional loan at the time they, in fact, learned of their lack of qualification, due to First Federal's negligence. Indeed, if the cost of such a loan did not go up during that interim, the Caudles suffered no actual damages.

112. 307 Md. 527, 515 A.2d 756 (1986).

advantage for the bank.<sup>113</sup> Noting the public nature of the mortgage lending business and the high degree of integrity required of bank officers in Maryland, the court found a concomitant duty of care arising out of that contract.<sup>114</sup> The lender had rejected the loan application, then made an offer to lend a smaller amount to the Jacques. The Jacques ultimately decided to close on that offer, because they could not find a better loan due to rising interest rates. Furthermore, their purchase contract bound them to accept any loan they could find, within certain parameters.<sup>115</sup> Forced to finance the rest of the purchase price by liquidating part of their stock portfolio and taking expensive personal loans,<sup>116</sup> the Jacques felt that the bank's sloppy treatment of their application had caused them this unnecessary extra expense. They brought suit based on this argument and, ultimately, the Maryland Court of Appeals agreed. In the process, it found that a contract existed which included among its covenants a lock-in of the rate.<sup>117</sup>

Because the court in *Jacques* recognized the lock-in as a contract, the Jacques could have advanced a breach of contract theory if the bank had attempted to change the interest rate. Moreover, the same rationale that the court used, negligent handling of the application, may still have applied.

More recently, the United States District Court for the District of Columbia, in *High v. McLean Financial Corporation*,<sup>118</sup> cited *Jacques* and relied in part on that case's reasoning, thus furthering the "negligent handling" theory of lender liability for consumers. The court actually recognized five causes of action that could conceivably have applied.<sup>119</sup> The plaintiffs in *High* alleged that McLean had accepted their loan application, assuring them of approval, and had, in fact, approved the application. Approximately one and a half months later, a second mortgage company, AmeriWest, sent the plaintiffs a letter stating that it had denied their application.<sup>120</sup> The Highs had had no indication before this point that their loan application process involved AmeriWest.<sup>121</sup> On these facts, the court denied motions to dismiss claims based on the Equal Credit Opportunity

---

113. *Id.* at 537-38, 515 A.2d at 761.

114. *Id.* at 542-43, 515 A.2d at 763-64.

115. *Id.* at 530, 515 A.2d at 757.

116. *Id.*, 515 A.2d at 757.

117. *Id.* at 537-38, 515 A.2d at 761.

118. 659 F. Supp. 1561, 1570 (D.D.C. 1987).

119. Of the five causes of action considered, the court dismissed one, breach of contract, due to technical inadequacies in the pleadings. 659 F. Supp. at 1565. However, it dismissed the claim without prejudice. *Id.* This, as in *Jacques*, was a tacit acknowledgment that the breach of contract theory itself is viable. *Jacques*, 307 Md. at 537-38, 515 A.2d at 761.

120. 659 F. Supp. at 1563.

121. *Id.*

Act,<sup>122</sup> common law fraud,<sup>123</sup> and breach of fiduciary duty.<sup>124</sup> It also sustained a negligence claim, observing that on questions of first impression under District of Columbia law, its courts frequently look to Maryland for guidance. The federal court found such guidance in the *Jacques* case.<sup>125</sup>

The *Caudle*, *Jacques*, and *High* cases not only demonstrate the viability of a negligence theory as applied to lenders that breach lock-in agreements, but also suggest the further possibilities of common law fraud, breach of fiduciary duty, and breach of contract. Although the plaintiffs did not actually rely upon these latter causes of action, the courts acknowledged them all. In addition, *Perdue* adds the prospect of unconscionable contract and/or unfair competition theories and, under the logic of *Morosani*, even the possibility of criminal liability exists, with an accompanying civil right of action.

Two questions arise in the light of these potential theories of litigation: first, why more borrowers with breached lock-in agreements have not sued; and second, why state legislatures find it necessary to enact statutory causes of action for aggrieved borrowers, and whether borrowers will avail themselves of such statutes.

#### 4. Recent Months: Lock-In Breach Cases

Recently, a few trial courts and state administrative agencies have awarded damages to mortgage borrowers or would-be borrowers for breaches of lock-in agreements. A district judge in Maryland Small Claims Court,<sup>126</sup> on facts very similar to the classic scenario that emerged from the *Caudle*, *Jacques*, and *High* cases, ordered a savings bank to refund a \$700 application fee to the applicant.<sup>127</sup> The applicant had a lock-in in effect and a closing date scheduled, but the bank suddenly rejected his application a few days before the closing date.<sup>128</sup> Up until the rejection, the lender had continually assured the borrower that his mortgage loan application would suffer no calamity, despite his apprehension over the dramatically rising market interest rates of the time.<sup>129</sup> The consumer argued successfully, *pro se*, that the lender rejected his loan on no valid criteria, but rather as a pretense to avoid making a loan at roughly two percentage points below

---

122. *Id.* at 1563-64.

123. *Id.* at 1566-67.

124. *Id.* at 1568-69.

125. *Id.* at 1569-70.

126. Precious, *Would-Be Borrower*, *supra* note 5, at E1, col. 1 (discussing lock-in case in Montgomery County, Maryland Small Claims Court).

127. *Id.*

128. *Id.* at E10, cols. 1-2.

129. *Id.* at E10, col. 2.

market.<sup>130</sup>

In a recent unreported case, the Maryland Banking Commissioner's office made a determination to distribute the entire licensing bond, posted by a now defunct mortgage company, pro rata to seventeen of that company's disgruntled customers for damages they had suffered through dealing with it.<sup>131</sup> Some of those awards compensated borrowers for higher rates that they had to pay after having lock-in commitments dishonored.<sup>132</sup>

Enough consumers have complained in the Chicago area to prompt the Illinois Attorney General to file suit against eleven mortgage companies for allegedly misleading borrowers into thinking they had locked in rates which were promised but never delivered. All of these companies allegedly delayed the processing of applications to get out of lock-in commitments.<sup>133</sup>

While these cases may represent a new trend of consumer litigiousness, they are insubstantial when compared to the thousands of complaints that state administrative agencies around the country have received.<sup>134</sup> Again, if consumers do not take advantage of already existing litigation theories, the question remains as to whether they will pursue newly created statutory rights. The states seem to believe that, with a clear statutory basis, as opposed to common law theories, consumers will bring suits more readily. If

---

130. *Id.* at E10, cols. 1, 3.

131. The Banking Commissioner's office has substantial regulatory authority over mortgage bankers. MD. FIN. INST. CODE §§ 12-507.1, 12-508 (1986). Pursuant to that authority, it may award some or all of the bond which licensees must post, *id.* § 12-504(c)(2), to anyone with a cause of action against the licensee. *Id.*

132. See Precious, *Borrowers Awarded \$50,000*, *supra* note 6, at E1, col. 5. According to the Banking Commissioner's office, the only quasi-official record of this matter is the set of "Proposed Bond Distribution" letters, which the Commissioner wrote to the bonding company upon determining that the mortgagee had violated the law (available at the Maryland Office of the Banking Commissioner, Baltimore, Md.).

133. *People v. All Am. Mortgage Co.*, No. 87CH08750 (Ill. Cook County Cir. Ct., Ch., filed Sept. 10, 1987); *People v. First Capital Mortgage, Inc.*, No. 87CH08749 (Ill. Cook County Cir. Ct., Ch., filed Sept. 10, 1987); *People v. Prairie State Mortgage Co.*, No. 87CH08698 (Ill. Cook County Cir. Ct., Ch., filed Sept. 9, 1987); *People v. Mortgage Correspondents, Inc.*, No. 87CH08748 (Ill. Cook County Cir. Ct., Ch., filed Sept. 8, 1987); *People v. Bede Corp.*, No. 87CH06292 (Ill. Cook County Cir. Ct., Ch., filed June 25, 1987); *People v. Northern Ill. Mortgage Co.*, No. 87CH06291 (Ill. Cook County Cir. Ct., Ch., filed June 25, 1987); *People v. Woodfield Mortgage Corp.*, No. 87CH05094 (Ill. Cook County Cir. Ct., Ch., filed May 22, 1987); *People v. First W. Mortgage Corp.*, No. 87CH05093 (Ill. Cook County Cir. Ct., Ch., filed May 22, 1987); *People v. Bell Mortgage Co.*, No. 87CH04880 (Ill. Cook County Cir. Ct., Ch., filed May 19, 1987); *People v. United First Mortgage Corp.*, No. 87CH04879 (Ill. Cook County Cir. Ct., Ch., filed May 19, 1987); *People v. Midwest Funding Corp.*, No. 87CH04877 (Ill. Cook County Cir. Ct., Ch., filed May 19, 1987); see also *Suit Filed in IL Against Five Mortgage Firms*, Real Est. Fin. Today, Sept. 18, 1987, at 38, col. 2; Givens, *Illinois Attorney General Sues MB Companies*, Real Est. Fin. Today, June 19, 1987, at 32, col. 1.

134. See *supra* note 5; see also *State Legislatures*, *supra* note 10, at 6-7.

such a statute will not make any difference, however, then it will only increase the burden of compliance for lenders and the volume of disclosure matter and procedural red tape with which consumer loan applicants must contend.

## II. THE NEW STATE LAWS: AN OVERVIEW

At this writing, five states have enacted lock-in laws.<sup>135</sup> Despite their common objective, lack of uniformity among them creates the potential to make interstate mortgage lending a cumbersome business. More states joining this trend will only serve to amplify this effect. An examination of the specific requirements of the Colorado, Connecticut, Maryland, Minnesota, and Washington laws follows.

### A. Colorado

The Colorado statute<sup>136</sup> treats the issue of rate lock-ins relatively lightly, requiring only that lenders put such agreements in writing and that the agreements state an expiration date.<sup>137</sup> Thus, it requires a written agreement, which a lender could simply incorporate into its standard loan application form, but does not provide any deadline for providing it. The Colorado legislature apparently enacted this law for other reasons,<sup>138</sup> with the one sentence having to do with lock-ins added almost as an afterthought.

### B. Connecticut

Under Connecticut's new law,<sup>139</sup> a lender may not enter into a lock-in agreement without putting it in writing.<sup>140</sup> Such written agreements must

---

135. See statutes cited *supra* note 7. One might say that more than five lock-in "laws" exist, if the count includes state regulations. See *supra* note 11 and accompanying text. This Comment confines the scope of its state lock-in law overview to actual legislative acts. Just as other state bills still pending may continue to expand the amount of state activity concerning lock-ins, *supra* note 10, and even more states may well introduce similar measures in the future, the regulatory level adds another dimension to the trend. Nevertheless, an examination of the varying provisions of the five state acts in force as of this writing, and the knowledge that they represent the leading edge of a growing trend, will suffice to illustrate the point intended here, that the lack of uniformity in regulating lock-in procedures adds to an existing patchwork pattern which makes compliance burdensome.

136. COLO. REV. STAT. §§ 38-38-111 to -114 (Supp. 1987).

137. *Id.* § 38-38-112(1).

138. The overall act addresses many aspects of mortgage lending, lock-ins being just one, including broker fees and escrow accounts, *id.* § 38-38-111, and standards of proper loan servicing. *Id.* § 38-38-113.

139. Act of Apr. 28, 1987, Pub. Act 87-73, 1987 Conn. Acts (Reg. Sess.), *reprinted in* CONN. GEN. STAT. ANN. app. at 23 (West 1988).

140. *Id.* § 2(a)(1), *reprinted in* CONN. GEN. STAT. ANN. app. at 23, 24 (West 1988).

provide an expiration date, as under the Colorado act,<sup>141</sup> and that date may not be sooner than the end of the lender's good faith estimate of the period needed to process the application and either approve or reject it.<sup>142</sup> The purpose of this section is to prevent a lender from locking in for sixty days only to take sixty-one days for underwriting. If a lender and borrower enter into a lock-in agreement, the lender must close at the rate promised thereunder, unless it can attribute the delay in one of four specified ways to the fault of the applicant.<sup>143</sup> In addition, if a commitment expressly requires that the applicant satisfy any condition, as is common practice, the lender may not set a closing date sooner than seven calendar days after the issuance of such commitment.<sup>144</sup> Finally, unless the lender either closes the loan or rejects the application within a specified period from the date of application, an applicant may, upon written demand, receive a full refund of all fees paid to the lender.<sup>145</sup>

### C. Maryland

The new law in Maryland<sup>146</sup> has the most stringent standards for compliance. It requires a lender accepting a loan application to provide a financing agreement within ten days thereafter.<sup>147</sup> The law does not require a lender to bind itself to the terms in the financing agreement, but, if not, the lender must issue a second document, no later than seventy-two hours before the scheduled time for closing.<sup>148</sup> The second document, known as a commitment letter, must render all terms of the agreement binding.<sup>149</sup>

The terms that these two documents must disclose and lock in include not only the interest rate and discount points but also numerous other details of the loan agreement, and a statement of the term for which the lock-in agreement remains in effect.<sup>150</sup> In other words, Maryland, like Colorado and Connecticut, requires the statement of an explicit expiration date on the lock-in.

---

141. COLO. REV. STAT. § 38-38-112(1) (Supp. 1987).

142. Act of Apr. 28, 1987, Pub. Act 87-73, § 2(a)(1), 1987 Conn. Acts (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. § 2(a)(1) app. at 23, 24 (West 1988).

143. *Id.* § 2(b), reprinted in CONN. GEN. STAT. ANN. app. at 23, 24-25 (West 1988).

144. *Id.* § 2(d)(2), reprinted in CONN. GEN. STAT. ANN. app. at 23, 26 (West 1988).

145. *Id.* § 2(c), reprinted in CONN. GEN. STAT. ANN. app. at 23, 25-26 (West 1988). This section specifies a period of 90 days or 120 days, depending on the loan to value ratio and whether or not it is a government related loan. *Id.*

146. MD. FIN. INST. CODE ANN. §§ 12-501, 12-512 (Supp. 1987).

147. *Id.* § 12-512(a)(1).

148. *Id.* § 12-512(b)(1).

149. *Id.* But the lender need not issue the commitment letter at all if it designated none of the terms in the financing agreement as floating. *Id.* §§ 12-512(a)(3), (b)(1).

150. *Id.* § 12-512(a)(2).

The Maryland law has no provision, such as Connecticut's, requiring that a lender honor the lock-in agreement beyond its stated expiration date. However, the Maryland statute does provide for an aggrieved borrower to sue a lender for damages arising out of a violation.<sup>151</sup> This conceivably could amount to the same thing if one construes damages for a dishonored lock-in as the difference in dollars between the loan on the terms the lock-in agreement had promised and the loan that a borrower ended up taking instead. Thus, by measuring damages as the difference between the loan promised and the loan made, the lender effectively makes the loan promised.

In effect, the Maryland law forces the parties to form a lock-in agreement.<sup>152</sup> In those cases where the lender and borrower form a lock-in agreement only because the seventy-two hour limit has arrived, the fact that a date for closing necessarily exists suggests that the loan has received approval, because lenders would presumably not bother setting a closing date unless they intended to make the loan. In that regard, such a forced lock-in differs from the definition of lock-in established for purposes of this Comment, because the latter definition involves an agreement entered into before, and conditioned upon, loan approval.<sup>153</sup> However, the parties may often select a date for closing without first waiting for loan approval, in which case Maryland law establishes an absolute deadline for locking in, even under this Comment's definition, whether the parties wish to or not.

#### D. Minnesota

Except for the common requirements of putting a lock-in agreement in writing<sup>154</sup> and expressing a definite expiration date,<sup>155</sup> Minnesota's new law appears to have little in common with the other state laws in terms of disclosure requirements. The required disclosure of the expiration date, like that of the Connecticut act, must reflect the reasonably anticipated duration required to process the loan application.<sup>156</sup> The Minnesota law also requires disclosure of the circumstances under which the borrower may close at more

---

151. *Id.* § 12-512(d)

152. If the lender and borrower do not agree to lock in at/or soon after application, they must do so not later than 72 hours prior to closing. Either way, they must form a lock-in agreement. *Id.* §§ 12-512(a)(3), (b)(1). None of the other laws have such an absolute requirement.

153. *See supra* note 1.

154. MINN. STAT. ANN. § 47.206 (West Supp. 1988).

155. *Id.* § 47.206, subdivision 2(1).

156. *Compare* Act of Apr. 28, 1987, Pub. Act 87-73, § 2(a)(1), 1987 Conn. Acts 93, 93 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. app. at 23, 24 (West 1988) with MINN. STAT. ANN. § 47.206, subdivision 2(1) (West Supp. 1988).



favorable terms than those disclosed in the agreement,<sup>157</sup> the steps necessary to arrive at closing,<sup>158</sup> the fact that the borrower may enforce the agreement,<sup>159</sup> and the consideration required for the agreement.<sup>160</sup>

This law implies that a written statement of current terms will operate as an offer to lock in unless accompanied by a disclaimer to the effect that it does not operate as such an offer. One provision states that a written statement of current market terms does not constitute an offer. This provision further states that such a statement must include a disclaimer as described above, but does not state explicitly what result will obtain if it does not.<sup>161</sup> On its face, the law logically implies that a written statement not accompanied by a disclaimer constitutes an offer to lock in.

As between the Connecticut-style extension of the lock-in period for as long as necessary to close the loan,<sup>162</sup> and the Maryland-style damages for violations, arguably amounting to the same effective result,<sup>163</sup> the Minnesota law more closely follows the Maryland approach. A lender who causes unreasonable delay in processing a loan application beyond the expiration date faces liability for the borrower's actual out-of-pocket damages as a result, including present value of any increased costs over the life of the loan.<sup>164</sup>

#### E. Washington

Washington's new law<sup>165</sup> essentially follows the same minimal approach to lock-ins as Colorado's. Very brief in its treatment of lock-ins, the law instead concentrates on other matters. But it does require that a lender put any agreement to lock in a specific interest rate, or other loan terms, in writing.<sup>166</sup> Aside from this requirement, the Washington law makes no further procedural or substantive provisions regarding lock-ins. It classes a viola-

157. MINN. STAT. ANN. § 47.206, subdivision 2(2) (West Supp. 1988).

158. *Id.* § 47.206, subdivision 2(3).

159. *Id.* § 47.206, subdivision 2(4).

160. *Id.* § 47.206, subdivision 2(5). In other words, the lender must disclose the amount of the lock-in fee. It may seem odd that all the laws do not require this disclosure, but only this one, and possibly the Washington law, does so. *See infra* note 166.

161. MINN. STAT. ANN. § 47.206, subdivision 5 (West Supp. 1988).

162. *See supra* text accompanying note 143.

163. *See supra* text accompanying note 151.

164. MINN. STAT. ANN. § 47.206, subdivision 7(a) (West Supp. 1988). The law does not define "unreasonable delay," although it does illustrate the term with a nonexhaustive list. *Id.* § 47.206, subdivision 7(d).

165. WASH. REV. CODE ANN. § 19.146.030 (Supp. 1988).

166. *Id.* This writing must disclose "the cost, terms, and conditions" of a lock-in agreement. *Id.* § 19.146.030(3). Subsection (3) does not clearly convey what "cost" refers to, unless the term means the lock-in commitment fee, like the Minnesota provision. *See supra* note 160.

tion as a misdemeanor.<sup>167</sup>

### III. RAMIFICATIONS OF THE STATE LAWS

Once a lender has devised forms and procedures that comply with any of the other laws, it has necessarily complied with the lock-in requirements of the Colorado and Washington acts.<sup>168</sup>

However, the written agreement required in Minnesota could not satisfy the law of Maryland.<sup>169</sup> In addition, the lender must provide the commitment letter under Maryland law no later than seventy-two hours before closing,<sup>170</sup> while Connecticut does not permit closing any sooner than one week after executing the lock-in agreement in most cases.<sup>171</sup> Conceivably, a lender could develop a uniform policy of not locking in later than Connecticut's one week before closing, no matter what the jurisdiction of the transaction. However, Maryland borrowers might insist on floating the rate until the last permissible moment. A lender cannot force a lock-in any sooner than seventy-two hours before closing because, until the law requires a lock-in, nothing compels the borrower to do so.

Only Maryland's law requires a lock-in.<sup>172</sup> Lenders could establish a uniform policy of requiring a lock-in in every state, but freedom of the marketplace suffers accordingly because such an approach takes away the otherwise purely business decision of whether or not to offer a lock-in. Lenders that do not require a lock-in will gain a business advantage through the flexibility that they can provide, because borrowers do not always want to lock in.

Connecticut's law requires a lender to honor the agreement beyond its good faith estimate-based expiration date.<sup>173</sup> Minnesota also requires a good faith estimate-based date,<sup>174</sup> but neither it nor Maryland requires the lender to honor the agreement after the expiration date. Instead, if lock-ins expire

167. WASH. REV. CODE ANN. § 19.146.110 (Supp. 1988).

168. Compare COLO. REV. STAT. § 38-38-112(1) (Supp. 1987) and WASH. REV. CODE ANN. § 19.146.030 (Supp. 1988) with Act of Apr. 28, 1987, Pub. Act 87-73, § 2(a)(1), 1987 Conn. Acts 93, 93 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. § 2(a)(1) app. at 23, 24 (West 1988), MD. FIN. INST. CODE ANN. § 12-512(a)(1) (Supp. 1987) and MINN. STAT. ANN. § 47.206, subdivisions 2(1), 3 (West Supp. 1988).

169. Compare MINN. STAT. ANN. § 47.206, subdivision 2 (West Supp. 1988) with MD. FIN. INST. CODE ANN. § 12-512(a)(2) (Supp. 1987).

170. MD. FIN. INST. CODE ANN. § 12-512(b)(1) (Supp. 1987).

171. Act of Apr. 28, 1987, Pub. Act 87-73, § 2(d)(2), 1987 Conn. Acts 93, 95 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. app. at 23, 26 (West 1988).

172. MD. FIN. INST. CODE ANN. §§ 12-512(a)(3), (b)(1) (Supp. 1987); see also *supra* note 152 and accompanying text.

173. Act of Apr. 28, 1987, Pub. Act 87-73, § 2(b), 1987 Conn. Acts 93, 94 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. § 2(b) app. at 23, 24-25 (West 1988).

174. MINN. STAT. ANN. § 47.206, subdivision 2(1) (West Supp. 1988).

without the loans closing, in violation of the law, these states allow borrowers to sue for damages<sup>175</sup> which may well give the same result.<sup>176</sup> As a practical matter, this means that lenders might as well honor lock-in commitments without regard to their expiration dates. That, in turn, means that an expiration date has no meaning, even though four of the five statutes require disclosure of one.<sup>177</sup>

Connecticut has elaborate procedures concerning refunding of fees in the event of a failure to close.<sup>178</sup> If a lender were to seek uniformity by complying with this requirement as though it applied in all states, it would encounter unpalatable, if not prohibitive, costs. Instead, it must establish a single, odd exception in its forms and procedures for Connecticut.

For a mortgage lender doing business in more than one state,<sup>179</sup> life entails a confused assortment of state-specific forms and procedures. One set exists for each state, creating an array of authorities to which each lender must answer. The new lock-in laws aggravate this situation by adding additional patches to the crazy-quilt.<sup>180</sup> Further, based on the trend so far, each state will add a patch of a different color. While the laws cannot represent actual conflicts, because any given loan need only comply with one state's law, the

---

175. MD. FIN. INST. CODE ANN. §§ 12-512(d) (Supp. 1987); MINN. STAT. ANN. § 47.206, subdivision 7(a) (West Supp. 1988).

176. See *supra* text accompanying notes 151, 162-64.

177. COLO. REV. STAT. § 38-38-112(1) (Supp. 1987); Act of Apr. 28, 1987, Pub. Act 87-73, § 2(a)(1), 1987 Conn. Acts 93, (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. app. at 23, 24 (West 1988); MD. FIN. INST. CODE ANN. §§ 12-512(a)(2) (Supp. 1987); MINN. STAT. ANN. § 47.206, subdivision 2(a) (West Supp. 1988). Only Washington requires no disclosure of an expiration date on a lock-in agreement. WASH. REV. CODE ANN. § 19.146.030 (Supp. 1988). H.R. 2609, the pending federal bill, would prohibit expiration dates on lock-ins. See *infra* note 183 and accompanying text.

178. Act of Apr. 28, 1987, Pub. Act 87-73, § 2(c), 1987 Conn. Acts 93, 94 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. app. at 23, 25-26 (West 1988).

179. The Supreme Court decided in 1985 that states may legally form interstate banking agreements with one another. *Northeast Bancorp. v. Board of Governors*, 472 U.S. 159, 178 (1985). At that time, commentators had already noted the trend away from localized and toward interstate lending. See, e.g., Miller & Rohner, *supra* note 44, at 1416-17. With the trend today among mortgage lenders to sell their loans in the secondary market, either whole or packaged into various securitized forms, see Kaplan & Qutb, *supra* note 35, at 183, the president of the Mortgage Bankers Association of America envisions not just an interstate, but an international mortgage market in the near future. French, *Mortgage Banking: Global in Reach*, Real Est. Fin. Today, Oct. 9, 1987, at 2, col. 1. The mortgage lender that operates in only one state today falls more within the exception than the rule.

180. At a minimum, they add one more document to the lender's array: the lock-in agreement writing which all of the laws require. COLO. REV. STAT. § 38-38-112(1) (Supp. 1987); Act of Apr. 28, 1987, Pub. Act 87-73, § 2(a)(1), 1987 Conn. Acts 93, 93 (Reg. Sess.), reprinted in CONN. GEN. STAT. ANN. app. at 23, 24 (West 1988); MD. FIN. INST. CODE ANN. §§ 12-512(a)(1) (Supp. 1987); MINN. STAT. ANN. § 47.206, subdivision 3 (West Supp. 1988); WASH. REV. CODE ANN. § 19.146.030 (Supp. 1988).

differences among them increase the burden on lenders' procedures and personnel. The new laws have already generated much work for lenders' compliance counsel. This will most likely result in higher rates to the borrower, because lenders, like any other business, pass their increased costs on to their customers.

#### IV. FEDERAL LOCK-IN LEGISLATION: WILL IT COME, WILL IT PREEMPT STATE LAW, AND SHOULD IT?

##### A. *The Pending Legislation*

The bill now pending in the United States House of Representatives Committee on Banking, Finance and Urban Affairs, H.R. 2609,<sup>181</sup> amounts to another lock-in law, with the same essential thrust as the state laws. It contains several notable features. First, it requires that lenders issue lock-in commitments in writing no later than three days after application.<sup>182</sup> Second, the bill provides for a flat prohibition of any lock-in agreement expiring<sup>183</sup> except when the consumer causes unreasonable delay.<sup>184</sup> Third, it creates a customer's right to withdraw an application, essentially without penalty, lasting for three days from the time the lender delivers the lock-in agreement document.<sup>185</sup>

At this writing, the bill sits in committee without making much progress, although the subcommittee reportedly plans to hold hearings.<sup>186</sup> Thus, the

---

181. See H.R. 2609, *supra* note 8. The main section of H.R. 2609 provides for the addition of a new subsection to section 128 of the TILA. *Id.* § 2. Thus, citations herein to the principal provisions of H.R. 2609 use the subdivision numbering of the proposed subsection (e).

182. *Id.* § 128(e)(5)(A).

183. *Id.* § 128(e)(2). This provision stands out as extraordinary, contrary to the state measures, and, possibly, preemptive of them to that extent. See *infra* note 196. It also stands little chance of popularity among mortgage bankers, who believe that it ignores the realities of the secondary market. Cf. *Mortgage Credit Issues Hearings, supra* note 2, at 119 (testimony of John M. Teutsch, Jr.) ("[The Mortgage Bankers Association] believes there is no justification for any requirement that quoted interest rates be committed to beyond the expiration date, where the processing delays are attributable to events or elements of the loan application process that are totally outside the scope of the lender's control."). It is likely, should Congress enact H.R. 2609 with such a provision in it, that the mortgage banking industry may see an end to the practice of offering lock-ins at all. This will not be a viable alternative in Maryland, however, which now effectively requires lock-in agreements on mortgage loans. See *supra* note 152 and accompanying text.

184. H.R. 2609, *supra* note 8, § 128(e)(4).

185. *Id.* § 128(e)(6). Under this provision, a borrower could go to as many lenders as he or she desires, extract a binding lock-in commitment from each one, and then accept the best one, simply withdrawing all the other applications within the three day period granted.

186. Telephone interview with Bonnie Caldwell, Staff, House Committee on Banking, Finance, and Urban Affairs, Subcommittee on Housing (Jan. 20, 1988).

bill's likelihood of enactment is unclear. The activity on the Senate side<sup>187</sup> also defies assessment because no bill has appeared yet. But it appears less likely to emerge in the shape of a bill, especially as Senator Proxmire intends to retire after the current session of Congress.<sup>188</sup> Even if federal legislation does eventually come forth, it may or may not resemble the present H.R. 2609.

### B. *Slim Likelihood of Preemption*

One could argue that title V of the DIDMCA already preempts the state lock-in laws<sup>189</sup> inasmuch as they purport to control the charging of interest and therefore constitute usury laws subject to preemption.<sup>190</sup> But the better view would say that the laws in question, as consumer protection measures rather than usury laws, evade preemption under the DIDMCA.<sup>191</sup>

As to whether H.R. 2609, if enacted, would preempt the state laws, the fact that the bill proposes an amendment to the disclosure provisions of the TILA<sup>192</sup> indicates that it probably would not. The amendment effectively would turn the disclosure document already required under the TILA<sup>193</sup> into a lock-in agreement, unless it expressly states otherwise.<sup>194</sup> This has the advantage, from a simplistic standpoint, of not introducing another disclo-

---

187. See *supra* note 9 and accompanying text.

188. Senator Proxmire's aide, having responsibility for the planned Senate bill, also feels that federal action grows less likely all the time, as long as the current interest rate market remains stable. Without volatility in the market, the political impetus for legislation fades. Telephone interview with Bob Malakoff, Staff, Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Housing (Jan. 22, 1988).

189. See *supra* note 69 and accompanying text.

190. Cf. Letter from Harry W. Quillian, General Counsel, FHLBB, to Francis X. Pugh, Maryland Assistant Attorney General (May 8, 1987) (available from the FHLBB upon request) (opining that DIDMCA preempts Maryland statute prohibiting the charging of interest in advance). General Counsel Quillian reasoned that the DIDMCA preempts state limitation addressing the amount of interest a lender may charge on a mortgage loan. He also viewed a limit on when a lender may charge interest as a limit on how much interest a lender may charge. Conceivably, then, one could argue that a law restricting lock-in procedures effects a limitation on interest—especially in the case of the Maryland law which prohibits floating rates for the last three days prior to closing. See *supra* note 152.

191. The legislative history of the Connecticut act supports this view. The Connecticut bill's sponsor stated that, he proposed "a very good *consumer* bill," that "[sought] to deal with two important *consumer* issues." Connecticut House of Representatives Floor Debate Transcript, Reg. Sess. 1987, at 2495 (April 1, 1987) (emphasis added). In his floor address urging passage, Representative Jepsen also emphasized that the bill aimed to regulate procedures, as opposed to substance or content of the agreement, and that its terms, including interest rate, would therefore remain within the discretion of the lender. *Id.* at 2498. Thus, this law did not constitute a usury law.

192. See *supra* note 181.

193. 15 U.S.C. § 1638 (1982).

194. H.R. 2609, *supra* note 8, § 128(e)(1), (3).

sure document into the process. The case law theories discussed earlier have this same advantage. But, as a corresponding disadvantage, the proposed amendment cannot preempt much, if any, of the state lock-in laws, because of the weak preemption criteria in effect under the TILA and Regulation Z.<sup>195</sup> As long as the Regulation Z "contradictory" standard remains in effect and the TILA continues to preempt only to the extent of inconsistency as so defined, the state laws will remain concurrently in force with the federal law.<sup>196</sup>

With no preemption whatsoever, a lender operating in Maryland, for instance, would be required to issue the TILA disclosure within three days of application,<sup>197</sup> the financing agreement within ten days of application,<sup>198</sup> and, if the financing agreement does not create a binding lock-in, a commitment letter no later than seventy-two hours before closing.<sup>199</sup> This excessive paper work will create a real and substantial burden for both the lender and the consumer.

### C. *The Need for Preemption*

Some commentators have argued for federal preemption of the entire area of consumer credit, including mortgage lending.<sup>200</sup> Reasons cited include: the higher costs to creditors resulting from the multitude of laws, confusion of borrowers due to excess documentation, the disparity of regulation of state-chartered and federally chartered institutions, and even the possibility of double recovery by consumers entitled to both state and federal remedies.<sup>201</sup>

Those who argue against federal preemption raise a states'-rights rationale claiming that Congress should not occupy the area of consumer credit which once was the exclusive domain of state law.<sup>202</sup> The basis of this position lies

---

195. See *supra* notes 50-67 and accompanying text.

196. An interesting possible exception to the failure of the federal lock-in bill to preempt the state laws lies in the fact that it precludes a lock-in agreement from ever expiring, while all of the state laws require an expressly stated expiration date. The "impede or interfere" standard of contradictory state law, see *supra* note 66, arguably permits the conclusion that H.R. 2609, if enacted, would preempt the state requirements to disclose a definite expiration date because those requirements would impede the operation of the TILA, as amended.

197. 15 U.S.C. § 1638 (1982).

198. MD. FIN. INST. CODE ANN. § 12-512(a)(1) (Supp. 1987).

199. *Id.* § 12-512(b)(1).

200. See, e.g., Leonard & Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary?*, 35 BUS. LAW. 1291 (1980).

201. *Id.* at 1303, 1305-08.

202. See, e.g., Malcolm, *supra* note 13, at 900; see also S. REP. NO. 73, *supra* note 56, at 14, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 280, 291 (Reverse preemption is a "workable compromise" that will "still show deference to the laws of the States.").

in the supposed local nature of consumer credit; specifically, that the best regulation of a local phenomenon occurs on the local level.<sup>203</sup> But the underlying premise of the local character of consumer credit has lost its validity. Indeed, the trend since the early 1970's away from local markets and toward interstate lending<sup>204</sup> has amplified the need for uniformity across state lines. But sweeping preemption of state consumer credit law, however compelling in abstract principle, in practice will probably not occur anytime soon.<sup>205</sup>

Looking to the narrower area of mortgage lending, the chances of a federal preemption seem somewhat better. The recent DIDMCA/Garn-St Germain Act preemptive trend<sup>206</sup> suggests that Congress perceives a need to exercise greater federal authority in the area. The proposition that federally chartered lending institutions enjoy virtually full preemption of state laws governing mortgage lending has at least the implicit imprimatur of Congress.<sup>207</sup> Thus, state lock-in laws, and much of the states' other mortgage lending law, apply only to private mortgage lenders and, except to the extent that such laws excuse them, to state-chartered banks, and to other depository institutions. The rationale of DIDMCA and the Garn-St Germain Act to afford those lenders the same competitive benefit as federally chartered institutions derive from preemption,<sup>208</sup> readily extends to all of the consumer protection measures in the area of mortgage lending.<sup>209</sup> Congress should act to make it so, and perhaps it intends to, though it seems to believe that it can more efficaciously achieve the desired end by acting slowly. Chipping away at the mortgage lending industry,<sup>210</sup> instead of sweeping away the whole body of state mortgage law in one act, will meet with less political resistance in the aggregate. Congress realizes that whichever regulator receives the new responsibility for overseeing the mortgage credit field will handle it more easily if it receives authority incrementally.

The logical place for the next chip is in the area of lock-ins, because the area already needs federal action. Furthermore, the logical time to preempt

---

203. Malcolm, *supra* note 13, at 900.

204. *See generally supra* note 179.

205. *See, e.g.,* Miller & Rohner, *supra* note 44, at 1432.

206. *See supra* notes 68-80 and accompanying text.

207. *Cf. supra* notes 75-80 and accompanying text.

208. *Id.*

209. Arguably, reverse preemption available under the TILA "levels the playing field." *See supra* note 59 and accompanying text. But this argument has two problems. First, the TILA does not extend to all aspects of mortgage lending by any means. Second, reverse preemption does not totally solve the disadvantage. The burden of complying with multiple state laws, even if each of them had reverse preemptive status, would still exist while federal institutions answer to the same single set of rules in all states.

210. *See supra* notes 81-82 and accompanying text.

is now, before more states enact lock-in laws, thus avoiding any further complications. Each of the other areas in which Congress has yet to preempt state law, directly or by extension through the federal regulators, ought to receive the benefit of federal preemption for the same reason that underlies the existing preemptions—providing a level playing field for nonfederally chartered lenders. But, for the reasons just given, lock-in laws stand out as the best choice for the next step in that direction.

To achieve federal preemption of lock-in laws, Congress must do one of three things: (1) abandon the approach taken by H.R. 2609 of regulating lock-ins through an amendment to the TILA and enact an independent law;<sup>211</sup> (2) modify the preemptive rule under TILA so that it will at least preempt redundant, as well as “inconsistent,” state provisions;<sup>212</sup> or (3) regulate lock-ins through a TILA amendment, but with a section that has its own preemption standard, separate and more thorough than the existing standard.<sup>213</sup> The last alternative appears best because it preserves the advantage of a TILA amendment, which alternative (1) forsakes, yet also avoids the overreaching result that alternative (2) would yield.<sup>214</sup>

Assuming that Congress chooses to preempt state lock-in laws, it then must decide how extensively it should do so. Congress may not see absolute preemption as necessary or even desirable.<sup>215</sup> The DIDMCA method of pre-

---

211. The bill as it presently stands would preempt little to nothing. *See supra* notes 192-96 and accompanying text. But regulating lock-ins through a TILA amendment has the advantage of avoiding the imposition of yet another form upon the loan process and this alternative would sacrifice that advantage.

212. While this would help with the state-to-state variance problem that reverse preemption does not solve, *see supra* note 209, it would also have an impact far beyond mortgage lending since the TILA has a much wider scope. It would result in a federal core of consumer credit disclosure law around which states may customize to suit local needs, subject, of course, to any other federal preemptions in effect. One proposal would call for such an arrangement, with a test for allowable state overlays that would require the state to demonstrate that its proposed additional law would provide significantly greater consumer protection and not unduly increase the compliance burden on creditors. *See Leonard & Tidwell, supra* note 200, at 1308-09. Regardless of the merits of such proposals, they seem to go farther than Congress wishes. *See supra* notes 200-05 and accompanying text.

213. An even broader, but compatible, approach than the present proposal would be to enact a new “Relation to Other Laws” section to the TILA which preserves the existing, weak preemption standard for all consumer credit transactions other than residential mortgage transactions and establishes complete preemption for mortgage transactions. Thus, not only the newly proposed lock-in provisions, but all aspects of the TILA having to do with mortgage lending would become preemptive of state law. Again, the policy of assuring mortgage fund availability nationwide, *see supra* notes 68-82 and accompanying text, applies appropriately.

214. *See supra* notes 211-12. Thus, regulating lock-ins through an amendment to the TILA with its own distinct, custom-crafted preemption standard preserves the advantage of not creating another piece of paper while also not preempting more of state law than Congress really wants to preempt.

215. *Cf. DIDMCA*, 12 U.S.C. § 1735f-7 note (1982). Under the DIDMCA preemption



emption provides a good model because it is moderate in its approach. This method allows states to override federal preemption, but requires the state legislature to feel strongly enough about the matter to legislate actively on it. This provides a means of reassuring those who would oppose preemption on federalism grounds, but still achieves extensive preemption as the default course in the absence of state action. States would have the ability to decide the issue for themselves, but would do so with the knowledge that federally chartered institutions will enjoy the advantages of preemption regardless of what states do. State legislatures must decide, therefore, whether such an advantage would suffice to preclude effective competition on the part of private and state-chartered lenders. If they believe that this would happen, the state legislators would have to consider the possibility that such nonfederal entities would abandon the mortgage market within their state, which could cause a tightening of mortgage funds available to their constituents. With each successive aspect of the mortgage lending industry that Congress preempts but the state overrides, this effect might grow more pronounced. Thus a state would have to consider not only how it believes overriding any given federal preemption measure would affect its intra-state mortgage market, but also the likelihood that Congress will further exaggerate that effect through subsequent preemptive enactments. Nevertheless, state legislators may very well find unpersuasive the entire preceding line of conjecture. Under the DIDMCA model of mitigated preemption, it retains its ability to respond accordingly.

## V. CONCLUSION

This Comment proceeds from the assumption that all parties concerned stand to benefit by adding elements of uniformity and simplicity to the regulation of consumer credit. Ultimately, the trend of consumer credit away from an essentially local nature toward a nationwide nature and the relative failure of the UCCC have heightened the need for federal preemption. Yet it remains unlikely to occur in any broad manner.

Congress, however, has displayed some tendency toward expanding federal presence in the limited area of residential mortgage lending, founded on the longstanding imperative of assuring availability of home financing funds, and thereby furthering the American dream of home ownership for the average citizen. While this trend of federal involvement may not extend far enough at this time to justify calling it a pervasive occupation of the field,

---

approach, states may override federal preemption through express enactment, within a finite period. *Id.*

sufficient to allow an inference that Congress intends to leave the states no room to participate, it may reach that point yet, and indeed it should.

Undertaking preemption of mortgage lending through this gradual approach may not satisfy the purist because it delays the necessary and inevitable result, but it offers the advantages of a smoother transition and, not inconsequentially, easier implementation over the resistance of its opponents. The transition is smoother because it allows whichever federal entity would have to assume the additional regulatory responsibility to react and meet that responsibility over time, instead of becoming overburdened by the responsibility to regulate all aspects of private mortgage banking at once. The latter situation could conceivably make the solution worse than the problem.

Congress should continue the trend by acting to preempt state lock-in laws, through whatever federal legislation eventually emerges. To do so would constitute nothing more than the continuation and logical extension of a sound, longstanding policy.

*Paul A. Mondor*

