

Moreover, our enforcement record amply demonstrates the OCC's commitment to using the FTC Act to address consumer abuses that are not specifically prohibited by regulation.⁸⁹

Finally, the following provisions of the GFLA impermissibly impose restrictions on, and interfere with, the exercise of the Federal power of national banks to make real estate loans and accordingly are preempted:

- *Discouraging use of ADR prohibited.* "[A]ny provision of a high-cost loan that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this state where the borrower may otherwise properly bring the claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void."

- *No encouraging borrower to default.* In connection with a home loan or high-cost home loan, "[n]o creditor or servicer shall recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a home loan that refinances all or any portion of such existing loan or debt."

- *Assignee liability.* A purchaser of a high-cost home loan is subject to all claims and defenses that the borrower could assert against the lender, unless the purchaser shows that it exercised reasonable due diligence to prevent the purchase of a high-cost home loan.

- *Assignment of contractor liability.* Under the GFLA, where a home loan was "made, arranged, or assigned by a person selling home improvements to the dwelling of a borrower, the borrower may assert against the creditor all affirmative claims and defenses that the borrower may have against the seller or home improvement contractor." This provision applies to high-cost home loans and home loans where applicable law requires a certificate of occupancy, inspection, or completion to be obtained and the certificate was not obtained.

Each of these provisions adds a special restriction to the making of real state loans in Georgia. Unlike state laws that provide the legal infrastructure needed for real property conveyances generally, the GFLA provisions single out a subset of real estate transactions authorized by section 371 and our part 34 for additional regulation. They

introduce new standards for a category of subprime loans that are untested, vague, and different from well-understood Federal requirements. They also create new potential liabilities and penalties for any lender that missteps in its efforts to comply with the new standards and restrictions. Thus, they materially increase a bank's costs and compliance risks in connection with an entire category of subprime lending. Given the already generally higher credit risk of lending to subprime borrowers, bank lenders are simply unable to effectively cover these increased costs and risks.

For example, the standards of the alternative dispute provision—"less convenient, more costly, or more dilatory"—are vague and not susceptible of certainty before an action is filed. Similarly, while a lender may not intend to "recommend or encourage" conduct that would fit within the GFLA prohibition on encouraging a borrower to default, an argument by a borrower that the lender did so may be difficult to disprove, given the imprecise nature of those words. Moreover, the assignment of contractor liability provision requires the impossible—namely, that a creditor ascertain and manage all potential legal risks generated by third party contractors notwithstanding that the contractors act independently and beyond the lender's control. Where a bank cannot ascertain precisely what is necessary to comply with a statute, on pain of potential civil liability imposed on both the bank and assignees of loans originated by the bank, that uncertainty in itself imposes costs weighing upon national banks' ability to conduct real estate lending operations in Georgia.⁹⁰

These costs and uncertainties have been amply publicized in the months since the GFLA was enacted, particularly in connection with the assignee liability provision. As mentioned above, following the enactment of the original GFLA, Moody's Investors Service and Standard and Poor's took the unusual step of announcing that including GFLA-covered loans in securitizations was too risky, causing lenders to scale back loans in the state and leading issuers to remove Georgia loans from securitizations. The recent amendments

to the GFLA capped the originally unlimited liability imposed on assignees of GFLA loans, but did not entirely remove the threat of liability, which continues to create substantial uncertainty in the secondary market. For example, Standard and Poor's has announced that it "may consider" rating transactions that include GFLA "high-cost" loans.⁹¹ Moody's Investors Service recently indicated that loans subject to predatory lending laws may be included in residential mortgage-backed securitizations only if seven conditions are satisfied.⁹² In addition, GFLA high-cost home loans remain ineligible for purchase by Freddie Mac and Fannie Mae.⁹³ Without a reliable secondary market for these loans, banks will be required to hold more of these loans to maturity. This, in turn, ties up more of a bank's resources, requiring it to hold capital against the full amount of these loans, and thus adversely affects the ability of the bank to originate or acquire other real estate loans. As such, the assignee liability provision of the GFLA, if the rest of the GFLA's provisions were applicable to national banks notwithstanding the conclusions reached in this Determination and Order, would stand as an obstacle to the exercise of national banks' real estate

⁹¹ For such transactions, the criteria will be stringent. Standard and Poor's will require lenders to identify which loans are "high-cost" and which of those loans are predatory, and prevent their transfer into the securitization. Natalie Abrams, Esq., "Evaluating Predatory Lending Laws: Standard & Poor's Explains its Approach" (Apr. 15, 2003), available at <http://www.standardandpoors.com>. By putting the onus on the lender to identify which loans are predatory, many banks may simply decline to make any "high-cost" home loans to avoid exposure. Indeed, several studies have documented that an unfortunate and unintended consequence of legislation similar to the GFLA adopted in other jurisdictions has been the overall reduction in subprime loans being originated. See *supra* note 26 and studies discussed therein.

⁹² "Moody's Investors Service Special Report: Impact of Predatory Lending Laws on RMBS Securitizations" (May 6, 2003). Among these seven conditions is that the "statute must be sufficiently clear so that the lender can effectively comply." *Id.* at 5. The Moody's Report does not specifically address the GFLA but gives as an example of insufficiently clear statutory language a provision, such as the GFLA provision on "flipping," that requires a lender to only make loans for which there is a "tangible net benefit" to the borrower. The Moody's Report notes that until such time that a regulation or court decision provides clear guidelines of what constitutes "tangible net benefit," "it may be impossible for a lender to demonstrate compliance." *Id.* at 3.

⁹³ See Fannie Mae Announcement 03-02, "Purchase of Georgia and New York 'High Cost Home Loans'" (Mar. 31, 2002); see also Freddie Mac Industry Letter, "Revisions to Freddie Mac's mortgage purchase requirements based on Section 6-L of the New York State Banking Law and amendments to the Georgia Fair Lending Act" (Mar. 31, 2003), available at <http://www.freddiemac.com/sell/selbuln/0331indltr.html>.

⁸⁹ Since the Provident settlement in 2000, see *supra* note 31, the OCC has taken action under the FTC Act to address unfair or deceptive practices and consumer harm involving five other national banks. These orders can be found at <http://www.occ.treas.gov/foia/foiadocs.htm>.

⁹⁰ The OCC made a similar argument recently in connection with a California statute requiring creditors to provide minimum payments warnings on credit card billing statements. In granting a permanent injunction against enforcement of the state statute, a federal district court found "the OCC's interpretation of the preemptive effect of the NBA on [the state law] to be reasonable." *Lockyer*, 239 F. Supp. 2d at 1014.