

The Role of State Attorneys General in Preserving Competitive Enforcement of Anti-Predatory
Lending Regulations

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In January 2004, the Office of the Comptroller of the Currency (OCC), a division of the Treasury Department, issued federal regulations that pre-empted the ability of state attorneys general to enforce state anti-predatory lending laws against national banks and their operating subsidiaries.¹ To justify the regulations, the OCC explained that its pre-emption of state laws promotes uniformity and efficiency for national banking operations, which ultimately benefits consumers by keeping down the operating costs of banks.² In response, state attorneys general, national consumer groups, and members of the House and Senate, expressed extreme dissatisfaction with the regulations.³ In particular, attorneys general were concerned with the OCC's aggressive campaign of pre-empting state consumer protection laws enforced against national banks.⁴ Furthermore, critics of the regulations feared that the OCC would not adequately pursue anti-predatory lending actions against national banks, given the OCC's history of siding with national banks in the courtroom against states and consumers filing suit.⁵

According to the OCC, the Supremacy Clause of the United States grants them the authority to enact the regulations that pre-empt any state laws that "obstruct, impair, or condition" the activities of national banks in the

¹ 12 C.F.R. §§ 7.4007-7.4009 (2004); 12 C.F.R. § 34.4 (2004)

² *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Financial Servs.*, 108th Cong., 6-7 (2004) [hereinafter *House Subcomm. Hearings*] (testimony of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel of the Office of the Comptroller of the Currency)

³ Letter from the National Association of Attorneys General to the Office of the Comptroller of the Currency (October 6, 2003) [hereinafter *NAAG Letter*]; *Review of the National Banking Preemption Rules: Hearing before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004) [hereinafter *Senate Comm. Hearings*] (statement of Sen. Paul S. Sarbanes (D-Md.); *Oversight of the Office of the Comptroller of the Currency Before the House Comm. on Financial Servs.*, 108th Cong. (2004) [hereinafter *House Comm. Hearings*] (opening statement of Rep. Luis Gutierrez (D-Ill.); *House Subcomm. Hearings*, *supra* note 2, (testimonies of W. Lee Hammond, Member AARP Board of Directors; Hilary Shelton, Director, Washington Bureau of the National Association for the Advancement of Colored People; Diana L. Taylor, Superintendent of Banks for the State of New York, on behalf of the Conference of State Bank Supervisors; John Taylor, President and CEO of the National Community Reinvestment Coalition)

⁴ NAAG letter, *supra* note 3, at 1.

⁵ *Wells Fargo v. James*, 321 F.3d 488, 492 (5th Cir. 2003); *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002); *ABIA v. Duryee*, 270 F.3d 409, 411 (6th Cir. 2001); *Bank One v. Guttau*, 190 F.3d 844, 849 (8th Cir. 1999); *Metrobank v. Foster*, 193 F.Supp.2d 1156, 1161 (S.D. Iowa 2002); NAAG letter, *supra* note 3, at 6-7.

areas of lending and deposit-taking.⁶ The OCC maintains that the “obstruct, impair, or condition” standard of the regulations adopt the same standards set forth in Supreme Court precedent spanning the last 130 years.⁷ Not so fast, say the attorneys general.⁸ They argue that case precedent and Congressional intent support their position that federal regulations only pre-empt state laws when they “significantly interfere” with national banking operations.⁹ This paper examines the merits of both arguments against existing case law and evaluates whose position the law favors.

Part I of the paper provides a brief history of the federal and state anti-predatory lending regulations in existence before the issuance of the OCC’s pre-emption rule in January. Part II sets forth the OCC’s January pre-emption regulations in more detail. Part III discusses the policy underlying the OCC regulations and the counter-arguments of the opposition. Finally, Part IV examines the legal validity of the regulations, and in conclusion, Part V evaluates whether or not there should be competitive enforcement of anti-predatory lending legislation.

Part I: Federal and State Anti-Predatory Lending Regulations

There is no clear definition of predatory lending, but generally, it occurs when lenders take advantage of borrowers through unfair practices.¹⁰ Most predatory lending is targeted at minority and elderly communities.¹¹ Several federal laws that can be enforced against predatory lending practices have been in place for over the past twenty years, yet these regulations did little to curb the growth of predatory lending.¹² Some of these laws include the Truth in Lending Act, the Home Owners Equity Protection Act, section 5 of the the Federal Trade Commission Act barring businesses from engaging in “unfair and deceptive practices”, and the Equal Credit Opportunity Act.¹³ Yet despite the existence of all these federal regulations, the nineties witnessed a dramatic increase in the sub-prime

⁶ 12 C.F.R. §§ 7.4007(b)(1) and 7.4008(d); *Senate Comm. Hearings*, (testimony of John D. Hawke, Jr., Comptroller of the Currency, United States Treasury), *supra* note 3, at 47; *House Subcomm. Hearings*, (testimony of Julie Williams), *supra* note 2, at 5.

⁷ *House Subcomm. Hearings*, (testimony of Julie L. Williams), *supra* note 2, at 5.

⁸ NAAG letter, *supra* note 3, at 3-5.

⁹ *Id.*

¹⁰ C. Bailey King, Jr., *Pre-emption and the North Carolina Predatory Lending Law*, 8 N.C. BANKING INSTITUTE 377, 377 (2004)

¹¹ *House Subcomm. Hearings* (testimony of Lee Hammond), *supra* note 2, at 3; *House Subcomm. Hearings* (testimony of Hilary Shelton), *supra* note 2, at 1.

¹² Tania Davenport, Note, *An American Nightmare: Predatory Lending in the Subprime Home Mortgage Industry*, 36 SUFFOLK U. L. REV. 531, 545-46 (2003) (chronicling the growth of predatory lending practices in the 1980s and 1990s and the available federal regulations in place during that time).

lending market.¹⁴ Although not all sub-prime lending is predatory lending, most predatory lending occurs in the sub-prime market.¹⁵ Predatory lending grew despite the existence of federal regulations for two reasons. First of all, the federal regulations did not cover all kinds of predatory lending activity.¹⁶ Secondly, federal agencies were not enforcing existing regulations against predatory lenders.¹⁷

Recognizing the problem of predatory lending within their own borders, states began enacting their own legislation to combat the problem of predatory lending.¹⁸ In 1999, North Carolina was the first state to pass an anti-predatory lending law.¹⁹ Afterwards, several states followed suit, including New York and Massachusetts.²⁰ Today, there are nine states with anti-predatory lending laws or regulations, five major cities with anti-predatory lending laws, and five more states with bills pending that would restrict predatory lending.²¹

The federal agency most prominently pursuing anti-predatory lending actions has been the Federal Trade Commission (FTC).²² In recent years, the FTC pursued three separate actions against Fleet Finance, Inc., Citigroup, Inc., and First Alliance Mortgage Co., all of which resulted in settlements.²³ In 1999, the FTC charged Fleet Finance with violations of TILA and section 5 of the FTC Act.²⁴ In 2000, the FTC charged First Alliance with violations of the FTC Act and TILA.²⁵ In 2002, the FTC brought charges against Citigroup, Inc. under the

¹³ *House Subcomm. Hearings* (testimony of Edward L. Yingling, Executive Vice President of the American Bankers Association), *supra* note 2, at 6.

¹⁴ U.S. DEP'T OF TREASURY & U.S. DEP'T OF HOUS. & URBAN DEV., *Curbing Predatory Home Mortgage Lending*, 28-30 (2000) [hereinafter HUD/TREASURY REPORT]

¹⁵ *Id.* at 1.

¹⁶ Davenport, *supra* note 12, at 552.

¹⁷ New York Attorney General Eliot Spitzer, Lecture at Georgetown University: *Whose Side Are They On? The Federal Government's Effort to Curtail State Enforcement of Predatory Lending and Other Consumer Protection Laws* (February 24, 2004) (transcript available at: http://www.oag.state.ny.us/press/statements/georgetown_university.html) [hereinafter *Spitzer Lecture*]

¹⁸ Davenport, *supra* note 12, at 553.

¹⁹ King, *supra* note 10, at 377.

²⁰ Davenport, *supra* note 12, at 553.

²¹ Ass'n. of Cmty. Org. for Reform Now, <http://www.acorn.org/acorn10/predatorylending/anti-pl-laws.htm>

²² Kathleen C. Engel and Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1304 (2002)

²³ Josh Davin Morton, *Predatory Lending*, 22 ANN. REV. BANKING & FIN. L. 158, 158 (2003); Press Release, Federal Trade Commission (October 5, 1999) (available at: <http://www.ftc.gov/os/1999/10/fleetfinancecmp.htm>)

²⁴ Press Release, Federal Trade Commission (October 5, 1999) (available at: <http://www.ftc.gov/os/1999/10/fleetfinancecmp.htm>)

²⁵ Press Release, Federal Trade Commission (October 4, 2000) (available at: <http://www.ftc.gov/opa/2000/10/firstalliance.htm>)

FTC Act, TILA, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act.²⁶ The Fleet Finance settlement resulted in \$1.3 million.²⁷ The First Alliance settlement resulted in \$60 million.²⁸ Finally, the Citigroup settlement resulted in \$215 million, which was the largest consumer protection settlement in FTC's history.²⁹

However, these settlements pale in comparison to the settlements that attorneys general have succeeded in securing with predatory lenders. In December 2002, a group of attorneys general from different states brought an action against Household International under their own state anti-predatory lending laws.³⁰ The case resulted in a \$484 million settlement, more than twice as large as the FTC's record settlement with Citigroup.³¹ Attorneys general succeeded in securing remedies for victims in all states where Household International had done business, not just those with anti-predatory lending laws.³²

Part II: The OCC's January 2004 Regulations

The two regulations that the OCC issued in January 2004 were the pre-emption rule and the visitorial powers rule. The pre-emption rule exempts national banks and their operating subsidiaries from complying with state legislation in the areas of deposit-taking and lending that "obstruct, impair, or condition" their national banking activities.³³ According to the visitorial powers rule, the OCC has the exclusive power of visiting national banks and their operating subsidiaries to investigate their national banking activities.³⁴ Even before the visitorial powers rule was issued, the OCC formally advised its member national banks that if any state officials visited them, the banks had to inform the OCC.³⁵ When New York Attorney General Eliot Spitzer tried to resolve an issue

²⁶ Press Release, Federal Trade Commission (available at: <http://www.ftc.gov/os/2001/03/citigroupcmp.pdf>); Press Release, Federal Trade Commission (March 6, 2001) (available at: <http://www.ftc.gov/opa/2001/03/associates.htm>)

²⁷ Press Release, Federal Trade Commission (July 26, 1999) (available at: <http://www.ftc.gov/opa/1999/07/fleet.htm>)

²⁸ Press Release, Federal Trade Commission (March 21, 200) (available at: <http://www.ftc.gov/opa/2002/03/famco.htm>)

²⁹ Press Release, Federal Trade Commission (September 19, 2000) (available at: <http://www.ftc.gov/opa/2002/09/associates.htm>)

³⁰ Household Beneficial Settlement, (available at: <http://www.household-beneficial-settlement.com/home.htm>)

³¹ *Id.*

³² Household Beneficial Settlement, (available at: <http://www.household-beneficial-settlement.com/home.htm>)

³³ 12 C.F.R. §§ 7.4007 – 7.4009

³⁴ 12 C.F.R. § 7.4000

³⁵ OFFICE OF THE COMPTROLLER OF THE CURRENCY, Advisory Letter 2002-9

involve a loan issued by a national bank subsidiary, First Horizon, bank officials told an attorney from his office that, per the OCC's directive, they should not speak with the office.³⁶

The pre-emption rule includes the anti-predatory standard adopted by the OCC.³⁷ 12 C.F.R. § 7.4008(b) and 12 C.F.R. § 7.4008(c) set forth two standards under which the OCC will pursue a predatory lending action against a national bank or its operating subsidiary.³⁸ 12 C.F.R. § 7.4008(b) prohibits banks from engaging in asset based lending, which is one kind of predatory lending.³⁹ Asset-based loans are those based predominantly on the expectation that the borrower cannot repay the loan, thus resulting in foreclosure of the collateral used to secure the loan.⁴⁰ Under 12 C.F.R. § 7.4008(c), the OCC will enforce section 5 of the FTC Act prohibiting “unfair or deceptive practices” actions against national banks and operating subsidiaries.⁴¹ This standard is meant to cover all other predatory lending activities.

Part III: Policy Arguments

The OCC provides several policy reasons for the January regulations. First and foremost, the OCC argues that these regulations promote uniformity and efficiency for national banks, which ultimately benefits consumers by keeping operating costs down.⁴² The variety of standards enacted by different states entails a greater fear of litigation and higher compliance costs for banks, which means greater costs for consumers.⁴³ At worst, under this scenario, less credit would be available for banks loans.⁴⁴ Rather than litigate state legislation on a case-by-case basis to determine the validity of local laws, the OCC viewed pre-emption of state laws as a way of preserving a uniform, efficient environment in which national banks could operate.⁴⁵

³⁶ Press Release, Office of the New York State Attorney General Eliot Spitzer (January 20, 2004) (available at: http://www.oag.state.ny.us/press/2004/jan/jan20a_04.html)

³⁷ See 12 C.F.R. § 7.4008(b) – (c)

³⁸ *Id.*

³⁹ 12 C.F.R. § 7.4008(b)

⁴⁰ *Id.*

⁴¹ 12 C.F.R. § 7.4008(c)

⁴² *Senate Comm. Hearings* (testimony of John Hawke), *supra* note 3, at 26; *House Subcomm. Hearings* (testimony of Julie Williams), *supra* note 2, at 7.

⁴³ *House Subcomm. Hearings* (testimony of Julie Williams), *supra* note 2, at 7.

⁴⁴ *House Subcomm. Hearings* (testimony of Edward Yingling), *supra* note 2, at 1-2.

⁴⁵ *House Subcomm. Hearings* (testimony of Julie Williams), *supra* note 2, at 9.

Secondly, the OCC pre-empted state anti-predatory legislation against national banks to preserve the secondary mortgage market.⁴⁶ The OCC wanted to prevent what happened in Georgia, the state with the strictest anti-predatory lending standards, from happening in other states.⁴⁷ In Georgia, banks from the secondary mortgage market who purchased predatory loans that originated in Georgia could be held liable under the state's anti-predatory lending laws even though the original bank that issued the loan, and not the secondary mortgage purchaser, had engaged in the predatory lending.⁴⁸ As a result, Fannie Mae and Freddie Mac would not purchase any mortgages that originated in Georgia, drying up the secondary mortgage market in the state.⁴⁹ The OCC feared similar situations would result in other states if a variety of different anti-predatory standards across the country were allowed to stand, so they decided to enact a uniform national standard.⁵⁰

Finally, the OCC submits that attorneys general and consumers need not be concerned about state anti-predatory lending standards being pre-empted because national banks and their operating subsidiaries, according to the OCC, are not engaged in predatory lending in the first place.⁵¹ Because most predatory lending occurs primarily on the local level, attorneys general will be able to enforce state laws against local predatory lenders.⁵²

Critics of the OCC provide several reasons for their opposition to the regulations. First of all, there are federalism concerns.⁵³ Some have charged the OCC, an un-elected body, with being anti-democratic by using its rulemaking authority to do away with state legislation debated, crafted, and enacted by thousands of legislators across the country.⁵⁴ After an un-elected body removes the protections states enacted to protect their constituents, what is left to protect the interests of those constituents?⁵⁵ Next, critics deem the claim that national banks are not engaged in predatory lending disingenuous: if the national banks are not engaged in predatory lending, then how

⁴⁶ *Id.* at 14.

⁴⁷ *Id.*

⁴⁸ Micah Hallock, *Predatory Lending: Legislative and Regulatory Challenges*, BANK ACCOUNTING & FINANCE, February 1, 2004

⁴⁹ *Id.*

⁵⁰ *House Subcomm. Hearings* (testimony of Julie Williams), *supra* note 2, at 14.

⁵¹ *Senate Comm. Hearings* (testimony of John Hawke), *supra* note 3, at 12.

⁵² *Id.*

⁵³ *House Subcomm. Hearings* (testimony of Diana Taylor), *supra* note 2, at 4-5; *House Subcomm. Hearings* (testimony of Thomas Miller), *supra* note 2, at 7.

⁵⁴ *Id.*

⁵⁵ *See id.*

does fear of litigation and compliance with a variety of state laws drive up the operating costs of national banks?⁵⁶ Furthermore, if the national banks are not engaged in predatory lending, then why is there a need to pre-empt the state legislation that will not be enforced against them?⁵⁷ Finally, what evidence bases the OCC's assertion that national banks are not engaged in predatory lending?⁵⁸ Testifying before the Senate Committee on Banking and Finance in April 2004, Comptroller Hawke admitted that the OCC had never conducted a survey, investigation, or hearing into the predatory lending practices of national banks and operating subsidiaries.⁵⁹ Rather, the OCC based this assertion on the rules and guidance issued to the national banks.⁶⁰

Third, state attorneys general fear that more banks and operating subsidiaries will seek national bank charters to avoid complying with state laws.⁶¹ The OCC readily dismisses this fear as untenable, but the Household International situation validates the concern of the attorneys general.⁶² After the settlement with the attorneys general, HSBC bought Household International.⁶³ Shortly after the OCC issued the pre-emption rule, HSBC applied for a national charter for its banking subsidiary in the United States in an attempt to shed its New York state charter.⁶⁴ Thus, had the January 2004 regulations been in place in 2002, state attorneys general would not have been able to enforce anti-predatory lending charges against Household International, the subsidiary of a national bank, leaving victims without the record settlement that the attorneys general successfully secured.⁶⁵

Finally, one of the critics' major concerns is that the OCC cannot and will not enforce the regulations against the national banks.⁶⁶ According to Comptroller John Hawke state legislation is pre-empted all the time, validating the claim of the attorneys general that the OCC has a history of pre-empting state legislation, siding with national banks in the courtroom, rather than with consumers.⁶⁷ Furthermore, the OCC is unlikely to enforce anti-predatory lending regulations against national banks as aggressively as states would because national banks

⁵⁶ Spitzer lecture, *supra* note 17; NAAG letter, *supra* note 3, at 10.

⁵⁷ *Id.*

⁵⁸ *Sen. Comm. Hearings* (statement of Sen. Sarbanes), *supra* note 3

⁵⁹ *Sen. Comm. Hearings* (oral testimony of John Hawke), *supra* note 3

⁶⁰ *Sen. Comm. Hearings* (oral testimony of John Hawke), *supra* note 3

⁶¹ NAAG letter, *supra* note 3, at 13.

⁶² Todd Davenport, *HSBC Seeks National Charter for U.S. Bank Unit*, AMERICAN BANKER, March 23, 2004

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *House Comm. Hearings* (opening statement of Rep. Gutierrez), *supra* note 3; *Sen. Comm. Hearings* (testimony of Roy Cooper, Attorney General of North Carolina), *supra* note 3, at 5-8.

themselves fund the OCC's entire operating budget, which may explain why the OCC has a history of siding with national banks in the courtroom.⁶⁸ Next, the OCC may not have adequate resources to enforce the regulation.⁶⁹ As the House Committee on Financial Services noted:

The new rules necessitate that the OCC investigate all consumer complaints for 2150 national banks in the 50 states from a single customer assistance center which only takes calls from 9:00 am to 4:00 pm, on four days each week, excluding federal holidays. There are currently only 40 full time staff members allocated for these tasks at the OCC. In contrast, according to the Conference of State Bank Supervisors, state banking agencies and state attorney generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance. In the area of abusive mortgage lending practices alone, state bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions.⁷⁰

The OCC has no plans to increase its resources to take over the states' cases, and in recent years, its overall staff declined, from 2810 employees in 2001, to 2766 employees in 2002, to 2758 employees in 2003.⁷¹

Finally, like the federal regulations in place before states started enacting anti-predatory legislation, the OCC's anti-predatory legislation does not cover all types of predatory lending.⁷² Asset based lending is only one kind of predatory lending.⁷³ Though the FTC's "unfair and deceptive practices" Act may appear broad, it does not cover specific types of predatory lending.⁷⁴ When North Carolina found that its own "unfair and deceptive practices" did not address predatory lending abuses, the state recognized the need to enact anti-predatory lending legislation more specifically tailored to predatory lending predatory lending practices.⁷⁵ North Carolina was the first state to enact anti-predatory lending legislation and its legislation has been a model to the states that followed it.⁷⁶

⁶⁷ *Senate Comm. Hearings* (oral testimony of John Hawke), *supra* note 3

⁶⁸ Spitzer lecture, *supra* note 17

⁶⁹ STAFF OF HOUSE COMM. ON FIN. SERVS., 108th Cong., VIEWS AND ESTIMATES OF THE COMMITTEE ON FINANCIAL SERVICES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005 (Comm. Print 2004) (as amended by amendment offered by Mr. Gutierrez and Mr. Paul)

⁷⁰ *Id.*

⁷¹ P'SHIP FOR PUB. SERV. and INST. FOR THE STUDY OF PUB. POLICY IMPLEMENTATION, <http://www.bestplacestowork.org/>

⁷² See 12 C.F.R. § 7.4008(b) – (c)

⁷³ NAAG letter, *supra* note 3, at 10.

⁷⁴ *Senate Comm. Hearings* (testimony of Roy Cooper), *supra* note 3, at 8.

⁷⁵ *Id.*

⁷⁶ Hallock, *supra* note 46

Part IV: The Legal Battle

The OCC and the attorneys general are at odds over whether or not the OCC overstepped its legal authority in pre-empting state legislation.⁷⁷ Both sides agree that state laws are pre-empted when they expressly conflict with federal laws.⁷⁸ At issue is what pre-emption test should be applied to state laws.⁷⁹ The January 2004 OCC regulations pre-empt state laws that “obstruct, impair, or condition” national banking activities.⁸⁰ The OCC argues that the “obstruct, impair, or condition” standard simply adopts the pre-emption standards in decades of Supreme Court precedent.⁸¹ Attorneys general disagree.⁸² According to them, federal laws conflict with state laws when they “significantly impair” with national banking activities.⁸³ In support of their argument, attorneys general also cite Supreme Court precedent and refer to recent legislative history asserting that national banks were never meant to be exempted completely from state laws.⁸⁴

What is the actual test for pre-emption? Federal law pre-empts state law when state law: 1) impairs the efficiency of national banks to discharge their duties; 2) frustrates the purpose of the National Bank Act; or 3) irreconcilably conflicts with federal law.⁸⁵ There are three ways that state law irreconcilably conflicts with federal law. First, when it is physically impossible for the national bank to comply with both laws without breaking one of them.⁸⁶ Second, “where the federal scheme expressly authorizes an activity which the state scheme allows.”⁸⁷ Third, when the state law is an “obstacle to the accomplishment and execution of the full purposes of the objectives of Congress.”⁸⁸ State statutes fall within the scope of pre-emption if they “significantly interfere with the national bank’s exercise of its powers.”⁸⁹

⁷⁷ See 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004); NAAG letter, *supra* note 3, at 4.

⁷⁸ Barnett Bank of Marion Co. v. Nelson, 517 U.S. 25, 31 (1996).

⁷⁹ See 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004); NAAG letter, *supra* note 3, at 4.

⁸⁰ 12 C.F.R. § 7.4008(d)(1)

⁸¹ 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004)

⁸² NAAG letter, *supra* note 3, at 4

⁸³ *Id.*

⁸⁴ NAAG letter, *supra* note 3, at 3-5.

⁸⁵ First National Bank of San Jose v. California, 262 U.S. 366, 369 (1923); McClellan v. Chipman Traders’ National Bank, 164 U.S. 347, 357 (1896)

⁸⁶ Barnett, 517 U.S. at 31.

⁸⁷ Wells Fargo, 321 F.3d at 491, n. 3

⁸⁸ Barnett, 517 U.S. at 31 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))

⁸⁹ *Id.* at 33

Thus, the test for pre-emption is neither as narrow as what the attorneys general claim nor as broad as what the OCC asserts.⁹⁰ When state laws have been pre-empted, courts have not limited themselves to the narrow “significantly interfere” test posited by the attorneys general.⁹¹ Judging from case precedent, state laws that obstruct or impair national banking activities probably are pre-empted.⁹² However, there are no cases where state laws that merely “condition” national banking activity are pre-empted.⁹³

Attorneys general would probably have a tough battle to fight with the OCC over the legal validity of the regulations. Courts tend to defer to the OCC’s interpretations of the National Banking Act.⁹⁴ Furthermore, no matter how sound the underlying policy of a state law is, time and again, the pre-emption doctrine forces courts to strike state laws down when they conflict with federal regulations.⁹⁵

Part V: Conclusion

The OCC’s policy arguments in support of the pre-emption rule reveal that consumers need competitive enforcement of anti-predatory lending legislation. The OCC’s position on enforcement clearly favors national banks more than consumers. Enforcement left solely in the hands of the OCC would leave consumers with inadequate protection against predatory lending abuses. The anti-predatory lending standard of 12 C.F.R. § 7.4008 cuts back substantially on the state standards that were put into place to protect consumers. The standard retreats back into the ineffective, effete federal standards that witnessed the dramatic rise of the sub-prime lending market in the nineties. Furthermore, the OCC’s claim that national banks are not engaged in predatory lending is wholly unconvincing. The OCC rests this claim on the fact that they have issued rules and advisory letters telling its members that the practice is wrong. In essence, according to the OCC, national banks are not engaged in predatory lending because the OCC told them not to do so. Such a hands-off approach to enforcement is wholly inadequate for consumers.

⁹⁰ See Barnett, 571 U.S. at 31; First National Bank, 262 U.S. at 369; McClellan, 164 U.S. at 357.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.*

⁹⁴ See e.g., Duryee, 270 F.3d at 405 (noting that in cases involving the question of state banking law pre-emption, OCC interpretations are entitled to deference under Chevron v. National Resources Defense Counsel, 467 U.S. 837 (1984)); Guttau, 190 F.3d at 850 (giving deference to the OCC’s interpretation of national banking laws and finding pre-emption of state law).

⁹⁵ Franklin National Bank of Franklin Square v. New York, 347 U.S. 373, 378 (1954)

Next, from a logistical perspective, the OCC cannot and will not curb predatory lending abuse practices. The OCC simply lacks adequate resources to handle the same volume of cases that offices of state attorneys general do. Unlike the offices of attorneys general, the OCC does not have an office in each state.⁹⁶ Unlike the offices of attorneys general, the OCC does not have a phone number listed in the local phone books of constituents nationwide.⁹⁷ Unlike the offices of attorneys general, the OCC is not an office that constituents are aware of and know that they report abuses to.⁹⁸

Finally, the anti-democratic abuse of federalism here is chilling. It is a daunting concept that a federal sub-agency can, in one fell swoop, draft two rules pre-empting countless state laws nationwide, leaving the consumers without adequate protection against abusive practices. Since the “New Federalism” policy of the Reagan administration, federal agencies have abandoned their duties of enforcing federal regulations in areas of consumer protection.⁹⁹ In the wake of this abandonment, state attorneys general banded together to assume the mantle of consumer protection on behalf of their constituents.¹⁰⁰ Yet because attorneys general threaten to be effective in protecting consumers in the areas of national banking, the OCC has usurped this power, and it does not appear that it will pursue these abuses with half as much zeal. Without adequate protection for consumers, what are attorneys generals to do on their behalf?

Shortly after the OCC issued the regulations, Attorney General Spitzer brought a case against a national bank subsidiary, First Horizon, as a direct challenge to the legal validity of the regulations.¹⁰¹ However, in light of the deference that courts have to the OCC’s interpretations of the National Banking Act and the many times state laws have been pre-empted by federal laws, the state of New York may not be successful in its legal challenge.

Thus, attorneys general must continue to band together and use their influence to bring predatory lending abuses to the attention to those who can do something about this. If the OCC pre-emption rules do actually legally trump state consumer protection laws, then the clearest remedy would be Congressional legislation overruling the OCC regulations. Thus, attorneys general must continue to report predatory lending abuses to the OCC, and if the

⁹⁶ *Senate Comm. Hearings* (oral testimony of Gavin Gee, Director of Finance, Idaho Department of Finance), *supra* note 2

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Spitzer lecture, *supra* note 17

¹⁰⁰ *Id.*

¹⁰¹ Press Release, Office of the New York State Attorney General Eliot Spitzer (January 20, 2004), *supra* note 34

OCC does not effectively deal with the problem, attorneys general must bring this to the attention of Congress. Congress does seem to be listening. In his disapproving remarks of the regulations at the Senate Committee Hearings, Senator Sarbanes quoted extensively from the NAAG letter.¹⁰² Also, if the OCC does not adequately cooperate with states when they report predatory lending abuses to the office, then Congressman Barney Frank of Massachusetts would consider pursuing a congressional resolution of disapproval that would overrule the OCC regulations.¹⁰³

The OCC's attempt to pre-empt state anti-predatory lending laws seems to be just another step, albeit a notably bold one, in its campaign against state consumer protection laws. Now, more than ever, consumers need the power and the voice of the attorneys general on their side to salvage not only state anti-predatory lending legislation, but other consumer protection laws that the OCC may try to pre-empt in the future.

¹⁰² *Senate Comm. Hearings* (statement of Sen. Sarbanes), *supra* note 2

¹⁰³ Todd Davenport, *OCC's Foes Might Take Preemption Battle to the Hill*, AMERICAN BANKER (March 18, 2004)