# Summary Contents

Using the Digital Library ......................................................... iii

The Leading Resource for All Consumer Law ................................. iv

Contents .................................................................................. ix

Chapter 1  Background .................................................................. 1

Chapter 2  Analyzing a Mortgage Lending Origination Case ................. 43

Chapter 3  Federal Laws Relevant to Abusive Mortgage Lending .............. 89

Chapter 4  State Law Claims and Defenses to Abusive Mortgage Lending ...... 141

Chapter 5  Preemption of State Laws that Conflict with Federal Banking Laws .... 201

Chapter 6  Ability to Repay, Steering, Loan Churning, Property Flipping, and Appraisal Fraud .......................................................... 273

Chapter 7  Mortgage Brokers and Other Third Parties: Charges and Abuses ...... 343

Chapter 8  Interest and Other Loan Terms ........................................ 397

Chapter 9  Reverse Mortgages .......................................................... 439

Chapter 10  Land Installment Contracts ............................................. 455

Chapter 11  Other Nontraditional Mortgage Loans ................................. 493

Chapter 12  Mortgage Litigation ..................................................... 507

Chapter 13  Litigating Claims When a Bank Fails ................................. 569

Appendix A  State Mortgage Lending Statutes .................................... 639
<table>
<thead>
<tr>
<th>Appendix</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appendix B</td>
<td>State Predatory Lending Statutes</td>
<td>647</td>
</tr>
<tr>
<td>Appendix C</td>
<td>Real Estate Settlement Procedures Act.</td>
<td>657</td>
</tr>
<tr>
<td>Appendix D</td>
<td>Truth in Lending Act Substantive Mortgage Regulation</td>
<td>703</td>
</tr>
<tr>
<td>Appendix E</td>
<td>National Bank Regulation</td>
<td>705</td>
</tr>
<tr>
<td>Appendix F</td>
<td>Federal Savings Association Regulation</td>
<td>723</td>
</tr>
<tr>
<td>Appendix G</td>
<td>Federal Credit Union Regulation</td>
<td>729</td>
</tr>
<tr>
<td>Appendix H</td>
<td>Other Substantive Mortgage Restrictions</td>
<td>737</td>
</tr>
<tr>
<td>Appendix I</td>
<td>Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA)</td>
<td>757</td>
</tr>
<tr>
<td>Appendix J</td>
<td>Alternative Mortgage Transaction Parity Act</td>
<td>765</td>
</tr>
<tr>
<td>Appendix K</td>
<td>Loans Insured by Federal Agencies</td>
<td>771</td>
</tr>
<tr>
<td>Appendix L</td>
<td>Federal Reverse Mortgage Provisions</td>
<td>781</td>
</tr>
<tr>
<td>Appendix M</td>
<td>Summary of State Reverse Mortgage Laws</td>
<td>823</td>
</tr>
<tr>
<td>Appendix N</td>
<td>Failed Bank Receivership Statutes</td>
<td>851</td>
</tr>
<tr>
<td>Appendix O</td>
<td>Websites Relating to Mortgage Lending Issues</td>
<td>857</td>
</tr>
</tbody>
</table>

Index: 859
Contents

Using the Digital Library .................................................. iii

The Leading Resource for All Consumer Law .............................. iv

Chapter 1  Background

1.1 About This Treatise ......................................................... 1
  1.1.1 About *Mortgage Lending* and Its Relationship to Other NCLC Treatises .......................... 1
    1.1.1.1 All Subscribers Have Access to the Digital Edition .............................................. 1
    1.1.1.2 Topics Covered in This Treatise .................................................................................. 1
    1.1.1.3 Related Topics Covered in Other NCLC Treatises ...................................................... 1

1.1.2 This Treatise’s Appendices .............................................. 2

1.1.3 Additional Pleadings, Practice Tools, and Primary Source Materials Found Online .................. 2

1.1.4 Important Distinctions When Using This Treatise ................. 3

1.2 A Brief History of Mortgage Lending ................................... 3
  1.2.1 Before the Great Depression ........................................ 3
  1.2.2 The Great Depression and the Federal Response ............... 4
    1.2.2.1 The Federal Home Loan Bank System ..................................................................... 4
    1.2.2.2 The Home Owners’ Loan Act .................................................................................. 4
    1.2.2.3 The Federal Housing Administration ....................................................................... 5

1.2.3 Origins of the Modern Secondary Market .......................... 6
  1.2.3.1 Rise of the Government Sponsored Entities ........................................................... 6
  1.2.3.2 Fall of the Government Sponsored Entities ............................................................... 8

1.2.4 The Rise of Predatory Lending ......................................... 9

1.2.5 The Recent Foreclosure Crisis ....................................... 10
  1.2.5.1 Overview .................................................................................................................. 10
  1.2.5.2 Consequences for Communities: Vacant and “Zombie” Properties ......................... 12

1.2.5.3 The Effects of Bulk Sales of Government Insured or GSE Guaranteed Loans ................ 13
  1.2.5.4 How Poor Servicing Fed the Crisis ............................................................................. 14
  1.2.5.5 The Impact on Post-Crisis Origination Practices ...................................................... 14

1.2.5.6 Sloppy Transfers of Mortgage Loans ....................................................................... 16

1.2.6 Manufactured Housing Financing: Parallels to the Mortgage Loan Crisis ............................ 16

1.3 The Recent Foreclosure Crisis Proved the Need for Mortgage Regulation .............................. 17
  1.3.1 Market Deregulation and the Crisis ................................ 17
  1.3.2 The Structure of the Mortgage Market and Self-Policing ............................................. 19
  1.3.3 Consumer Decision-Making and Market Forces ............................................................... 20
    1.3.3.1 Barriers to Consumer Decision-Making ................................................................. 20
    1.3.3.2 Mere Disclosure As a Cure for the Problem ........................................................... 23

1.3.3.3 Role of Prepayment Penalties in Refinancing Out of Bad Loans .................................. 24
Contents

2.2.8.1  List of Items to Ask for in Discovery ........................................ 51
2.2.8.2  Confidentiality/Protection Orders ........................................ 52

2.3  Understanding the Loan Documents .............................................. 52
2.3.1  The Application .............................................................. 52
2.3.2  Federal Cost Disclosures ...................................................... 52
2.3.3  The Promissory Note and the Mortgage ................................... 53
2.3.4  The Payoff Statement and Payment History ............................... 54

2.4  Types of Mortgages—An Overview ............................................... 54

2.5  Mortgage Math Basics ............................................................ 57
2.5.1  Introduction ................................................................. 57
2.5.2  Checking the Math on the TILA Disclosure ............................. 58
2.5.3  Calculating the Interest Due ............................................... 58
2.5.4  Calculating the Loan Payment for a Typical Mortgage ............... 61
2.5.5  Amortizing a Mortgage Loan .............................................. 62
  2.5.5.1  Overview .............................................................. 62
  2.5.5.2  Building a Spreadsheet to Check the Amortization of a Loan ... 64

2.6  More Mortgage Math—Complications .......................................... 67
2.6.1  Effect of Extending the Loan Term ....................................... 67
2.6.2  Effect of Making Biweekly Versus Monthly Payments .................. 67
2.6.3  Effect of Making Partial Prepayments .................................... 68
2.6.4  Checking the Application of Payments .................................... 68
2.6.5  Variable or Adjustable Rate Mortgages (ARMs) ......................... 68
  2.6.5.1  Overview .............................................................. 68
  2.6.5.2  How Adjustable Rate Mortgage Loans Work ....................... 69
    2.6.5.2.1  In general ....................................................... 69
    2.6.5.2.2  Amortizing adjustable rate loans over fixed time periods ... 70
    2.6.5.2.3  Caps and floors ............................................... 70
    2.6.5.2.4  Recapture clauses ............................................. 71
2.6.6  Teaser Rates ........................................................................ 71
2.6.7  Interest-Only Loans ............................................................. 72
2.6.8  Unpaid Accrued Interest and Negative Amortization .................... 72
  2.6.8.1  In General .............................................................. 72
  2.6.8.2  Payment-Option Adjustable Rate Mortgages and Negative Amortization ........................................ 73
    2.6.8.2.1  Description ....................................................... 73
    2.6.8.2.2  Two examples of amortizing a payment-option ARMs ...... 74
    2.6.8.2.2.1  Overview ...................................................... 74
    2.6.8.2.2.2  Amortizing a payment-option ARM looking forward ....... 74
    2.6.8.2.2.3  Amortizing a payment-option ARM looking backward ... 77
2.6.9  Balloon Payments ............................................................... 78
2.6.10  Daily Accrual Accounting ..................................................... 79
  2.6.10.1  General ............................................................... 79
  2.6.10.2  Daily Accrual Accounting Without Compounding ................ 79
  2.6.10.3  Daily Accrual Accounting with Compounding ...................... 82
  2.6.10.4  Unconventional Payment Allocations ................................ 82
2.6.11  Home Equity Lines of Credit (HELOCs) .................................... 83
Chapter 3

Federal Laws Relevant to Abusive Mortgage Lending

3.1 Introduction ........................................ 89

3.2 Real Estate Settlement Procedures Act ........................................ 89
  3.2.1 Introduction ........................................ 89
  3.2.2 Scope ........................................ 90
    3.2.2.1 Generally ........................................ 90
    3.2.2.2 Applicability to Cooperative Apartment Buildings and Timeshares ........ 92
      3.2.2.2.1 Units in cooperative apartment buildings ........................................ 92
      3.2.2.2.2 Timeshares ........................................ 93
    3.2.2.3 Applicability to Manufactured Homes ........................................ 93
    3.2.2.4 RESPA Preemption ........................................ 94
  3.2.3 Overview of Prohibition Against Kickbacks and Unearned Fees .................. 95
  3.2.4 RESPA's Cost Disclosure Provisions ........................................ 96
    3.2.4.1 General ........................................ 96
    3.2.4.2 Partial Exemptions from RESPA ........................................ 96
      3.2.4.2.1 Subordinate liens ........................................ 96
      3.2.4.2.2 Loans subject to Regulation Z’s integrated disclosures, effective October 3, 2015 ........ 97
    3.2.4.3 Good Faith Estimate ........................................ 97
    3.2.4.4 Settlement Statement ........................................ 99
      3.2.4.4.1 The role of the HUD-1 or HUD-1A settlement statement ........ 99
      3.2.4.4.2 Format and contents ........................................ 100
      3.2.4.4.3 Use of average versus actual prices ........................................ 100
      3.2.4.4.4 Rate increase and monthly payment disclosures ........................................ 101
      3.2.4.4.5 Documentation requirements ........................................ 101
    3.2.4.5 Tolerance for Changes from Good Faith Estimate to Settlement Statement ........ 101
    3.2.4.6 Revised Good Faith Estimates and Changed Circumstances .................. 102
    3.2.4.7 Potential Claims ........................................ 102
  3.2.5 Transfer of Servicing Notice ........................................ 103
  3.2.6 List of Housing Counselors ........................................ 104
  3.2.7 Remedies for RESPA Violations ........................................ 105
    3.2.7.1 Generally ........................................ 105
    3.2.7.2 Venue and Statute of Limitations ........................................ 105

3.3 S.A.F.E. Act ........................................ 108
  3.3.1 Generally ........................................ 108
  3.3.2 Determining Who Must Be Licensed or Registered ........................................ 110

3.4 Truth in Lending Act ........................................ 110
  3.4.1 General ........................................ 110
Chapter 4

State Law Claims and Defenses to Abusive Mortgage Lending

4.1 Introduction ............................................................................................................. 141
4.2 State UDAP Statutes ............................................................................................. 141
  4.2.1 Overview ........................................................................................................... 141
  4.2.2 Scope ................................................................................................................ 142
  4.2.3 Mortgage-Related Conduct Giving Rise to UDAP Claims ......................... 142
    4.2.3.1 Overview .................................................................................................... 142
    4.2.3.2 Actionable Deception and Unfairness in Mortgage Lending ................. 142
    4.2.3.3 Framing Other Violations As UDAP Violations ....................................... 145
  4.2.4 UDAP Remedies ............................................................................................... 146
4.3 State Mortgage Lending Laws .............................................................................. 146
4.4 State High-Cost Mortgage Statutes .................................................................... 146
  4.4.1 Overview ........................................................................................................... 146
  4.4.2 Scope ................................................................................................................ 146
    4.4.2.1 Consumer Purpose .................................................................................... 146
    4.4.2.2 Definition of Lender .................................................................................. 147
    4.4.2.3 Purchase-Money Mortgages ..................................................................... 147
    4.4.2.4 Loan Amount ............................................................................................ 147
    4.4.2.5 Triggers ....................................................................................................... 148
      4.4.2.5.1 Pleading that the loan meets one of the triggers ............................. 148
      4.4.2.5.2 The APR trigger .................................................................................. 149
      4.4.2.5.3 The points and fees trigger ................................................................. 149
    4.4.2.6 Effective Dates ........................................................................................... 150
  4.4.3 Statutory Prohibitions and Limitations ............................................................ 150
    4.4.3.1 Introduction ............................................................................................... 150
    4.4.3.2 Prohibited Fees ......................................................................................... 150
    4.4.3.3 Net Benefit Requirements and Loan Churning ....................................... 151
    4.4.3.4 Ability to Repay ....................................................................................... 151
    4.4.3.5 Negative Amortization ......................................................................... 152
    4.4.3.6 Prepayment Penalties .............................................................................. 152
    4.4.3.7 Balloon Payments .................................................................................. 153
    4.4.3.8 Loan Counseling ...................................................................................... 153
    4.4.3.9 Mandatory Arbitration Clauses ............................................................... 153
    4.4.3.10 Other Prohibited Terms ....................................................................... 153
  4.4.4 Remedies ........................................................................................................... 154
  4.4.5 Liability of Servicers and Assignees ............................................................... 156
  4.4.6 Preemption ....................................................................................................... 157
4.5 Home Improvement Credit .................................................................................. 158
4.6 State Mortgage Broker Laws .............................................................................. 160
4.7 State Credit Services Laws .................................................................................. 160
4.8 Unconscionability ............................................................................................... 161
How the *Barnett Bank* Standard Has Been Applied by the Supreme Court ...........................................203

What Are the Powers of National Banks and Thrifts That the *Barnett Bank* Standard Protects from Significant Interference? ................206

General Standards ........................................206

Incidental Powers ........................................206

Congress’s 2010 Restoration of the *Barnett Bank* Standard and Enactment of Further Limits on Preemption ...........................................207

The Enactment of the Dodd-Frank Act .......................207

Preemption Limited to Three Circumstances .................208

Repudiation of Field Preemption ............................208

Requiring Case-by-Case Preemption Determinations ..........209

Repudiation of the Banking Agencies’ Existing Preemption Rules ..........209

Little Preemption of General State Laws ....................210

Mechanics and Procedures for Preemption Determinations ..........210

Judicial Review of Preemption Determinations; *Skidmore Versus Chevron* Deference ........................................211

Judicial Preemption ........................................211

Effective Dates; Use of New Standards As Interpretive Guide; Grandfather Clause ........................................212

The Impact of the Dodd-Frank Changes on the Interpretation of Preemption Standards ...........................................213

Is There a Presumption Against Preemption? ................215

No Preemption of State Law Claims That Parallel Federal Requirements ...........................................217

The OCC’s Pre-2011 Preemption Activity .....................218

History of the OCC’s Preemption Activity Prior to 2004 ........218

The OCC’s Pre-2004 Regulations ............................218

The OCC’s Opinion Letters .....................................218

Upholding state law ........................................218

Preempting state law ........................................219

The OCC’s Broad 2004 Preemption Regulations .................220

Description of the 2004 Rule ................................220

Comparing the 2004 and 2011 OCC Rules with the OTS Rules; Precedential Value ...........................................221

Adoption, Structure, and Validity of the 2011 OCC Preemption Regulations ...........................................222

Adoption of the 2011 OCC Rules; Differences from the 2004 Rules ...........................................222

Outline of the 2011 OCC Preemption Rules ....................222

Do the OCC’s Preemption Regulations Comply with the Dodd-Frank Act? ...........................................223

Significant Questions As to Validity of the OCC’s 2011 Preemption Regulations ...........................................223

Can the OCC’s 2011 Preemption Rules Be Interpreted to Be Consistent with the Dodd-Frank Act? .........................224

Interpreting and Applying the OCC’s 2011 Preemption Rules ...........................................225

To What Banking Activities Do the OCC Preemption Rules Apply? ...........................................225

The Two Parts of the OCC’s Preemption Regulations Must Be Read Together ...........................................226

Interpretation of Categories of State Law Limitations That Are Preempted for National Bank Lending ...........................................226

Introduction ........................................226

Licensing ........................................227

Right to Require Insurance ....................................227
Contents

5.8.3.4 Loan-to-Value Ratios .................................................. 228
5.8.3.5 Terms of Credit ......................................................... 228
5.8.3.6 Escrow Requirements .................................................. 229
5.8.3.7 Security Property ..................................................... 229
5.8.3.8 Use of Credit Reports .................................................. 229
5.8.3.9 Disclosure and Advertising ......................................... 230
5.8.3.10 Disbursements and Repayments .................................. 230
5.8.3.11 Interest; Non-Interest Fees ......................................... 231
5.8.3.12 Loan Amount for Real Estate Loans ............................... 232
5.8.3.13 Processing, Origination, Servicing, Sale or Purchase of, Investment in, or Participation in Mortgages .................................................................................................................. 233
5.8.3.14 Due-on-Sale Clauses ................................................... 234
5.8.3.15 Covenants and Restrictions in Leases ............................. 234
5.8.4 Categories of State Laws That Are Not Preempted ..................... 234
5.8.4.1 General Interpretation of the Savings Clause .................... 234
5.8.4.2 Contract Claims Not Preempted; Duty of Good Faith ........ 235
5.8.4.3 Tort Claims Not Preempted .......................................... 236
5.8.4.4 Criminal Laws Not Preempted ....................................... 236
5.8.4.5 Texas Constitution’s Homestead Protections Not Preempted .......................... 237
5.8.4.6 Debt Collection Laws Not Preempted ............................... 237
5.8.4.7 State Taxation Laws Not Preempted ............................... 238
5.8.4.8 Laws Regarding Acquisition and Transfer of Real Property and Zoning Not Preempted .................................................................................................................. 238
5.8.4.9 “Any Other Law” .......................................................... 238
5.8.4.10 Treatment of State UDAP Statutes ................................. 238
5.8.4.11 State Anti-Discrimination and Labor Laws ................... 238
5.9 Visitorial Powers ................................................................. 241
5.9.1 National Banks .............................................................. 241
5.9.2 Visitorial Powers over Operating Subsidiaries of National Banks .................................................................................. 242
5.9.3 Primary Jurisdiction Distinguished ...................................... 242
5.10 Subsidiaries, Affiliates, and Agents ........................................_____ 243
5.10.1 The Dodd-Frank Act Eliminates Preemption for Subsidiaries, Affiliates, and Agents of National Banks .............................. 243
5.10.2 Preemption for Operating Subsidiaries Prior to Dodd-Frank Act .................................................................................. 243
5.10.2.1 Rules and Decisions Prior to Dodd-Frank Act ............... 243
5.10.2.2 Determining Whether an Entity Is a National Bank Operating Subsidy ................................................................. 244
5.10.3 Preemption for National Bank Agents and Affiliates Prior to Dodd-Frank Act ............................................................... 244
5.10.4 Rent-a-Bank Issues ......................................................... 246
5.11 Federal Preemption’s Indirect Application to State-Chartered Depository Institutions ................................................................. 246
5.11.1 Introduction ................................................................. 246
5.11.2 Federal Choice of State Law Regarding Branches of Out-of-State, State-Chartered Banks ...................................................... 247
5.11.3 State Parity Statutes ....................................................... 247
5.12 Preemption Rules When a National Bank or Federal Savings Association Is the Assignee or Assignor ........................................ 248
5.12.1 When a Mortgage Loan Is Assigned to a Federal Depository Institution .................................................................................. 248
Chapter 6  Ability to Repay, Steering, Loan Churning, Property Flipping, and Appraisal Fraud

6.1 Introduction ................................................................................................................. 273
6.2 Extending Credit Without Regard to Ability to Repay ............................................... 273
  6.2.1 Introduction ........................................................................................................ 273
  6.2.2 Manual and Automated Underwriting ................................................................. 276
    6.2.2.1 Overview ........................................................................................................ 276
    6.2.2.2 Automated Underwriting As a Solution? ....................................................... 277
  6.2.3 Legal, Regulatory, and Industry Standards Addressing the Ability to Repay .......... 279
    6.2.3.1 HOEPA and the Higher-Priced Mortgage Loan Rules .................................. 279
      6.2.3.1.1 HOEPA .................................................................................................... 279
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2.3.1.2</td>
<td>Higher-priced mortgage rules</td>
</tr>
<tr>
<td>6.2.3.1.3</td>
<td>Ability-to-repay rules for HOEPA and higher-priced mortgage loans from October 2009 to January 2014</td>
</tr>
<tr>
<td>6.2.3.1.4</td>
<td>Ability-to-repay rules for open-end HOEPA loans effective January 2014</td>
</tr>
<tr>
<td>6.2.3.2</td>
<td>State Laws</td>
</tr>
<tr>
<td>6.2.3.3</td>
<td>The Dodd-Frank Act</td>
</tr>
<tr>
<td>6.2.3.3.1</td>
<td>Overview</td>
</tr>
<tr>
<td>6.2.3.3.2</td>
<td>Minimum ability-to-repay standards</td>
</tr>
<tr>
<td>6.2.3.3.3</td>
<td>Qualified mortgages</td>
</tr>
<tr>
<td>6.2.3.3.4</td>
<td>Presumption of compliance for qualified mortgages</td>
</tr>
<tr>
<td>6.2.3.3.5</td>
<td>Qualified residential mortgages and credit risk retention</td>
</tr>
<tr>
<td>6.2.3.4</td>
<td>Federal Banking Agency Guidance on Ability to Repay</td>
</tr>
<tr>
<td>6.2.3.5</td>
<td>Other Sources of Industry Standards</td>
</tr>
<tr>
<td>6.2.4</td>
<td>What Is Affordable?</td>
</tr>
<tr>
<td>6.2.4.1</td>
<td>Overview</td>
</tr>
<tr>
<td>6.2.4.2</td>
<td>Measuring Income; Grossing Up</td>
</tr>
<tr>
<td>6.2.4.3</td>
<td>Debt-to-Income Ratios</td>
</tr>
<tr>
<td>6.2.4.4</td>
<td>Residual Income Standards</td>
</tr>
<tr>
<td>6.2.4.5</td>
<td>Compensating Factors: Beyond Debt-to-Income and Residual Income Standards</td>
</tr>
<tr>
<td>6.2.5</td>
<td>Duty to Document the Ability to Repay</td>
</tr>
<tr>
<td>6.2.5.1</td>
<td>Verification of Income and Expenses</td>
</tr>
<tr>
<td>6.2.5.2</td>
<td>Special Considerations for Stated-Income Loans</td>
</tr>
<tr>
<td>6.2.5.2.1</td>
<td>Problems with stated-income loans</td>
</tr>
<tr>
<td>6.2.5.2.2</td>
<td>Post-2014 regulation of stated-income loans</td>
</tr>
<tr>
<td>6.2.6</td>
<td>Measuring Affordability for Nontraditional Mortgage Products</td>
</tr>
<tr>
<td>6.2.6.1</td>
<td>The Nature of Risk in Nontraditional Mortgage Products</td>
</tr>
<tr>
<td>6.2.6.1.1</td>
<td>The role of adjustable rates</td>
</tr>
<tr>
<td>6.2.6.1.2</td>
<td>Teaser-rate ARMs: 2-28s and 3-27s</td>
</tr>
<tr>
<td>6.2.6.1.3</td>
<td>Interest-only loans</td>
</tr>
<tr>
<td>6.2.6.1.4</td>
<td>Payment-option ARMs</td>
</tr>
<tr>
<td>6.2.6.2</td>
<td>Standards of Affordability for Nontraditional Mortgage Loans</td>
</tr>
<tr>
<td>6.2.6.2.1</td>
<td>Problems of measuring affordability in non-standard mortgages</td>
</tr>
<tr>
<td>6.2.6.2.2</td>
<td>Banking agency guidance on standards of affordability for nontraditional mortgages</td>
</tr>
<tr>
<td>6.2.6.2.3</td>
<td>HOEPA and higher-priced mortgage standards of affordability for nontraditional mortgages</td>
</tr>
<tr>
<td>6.2.6.2.4</td>
<td>Dodd-Frank standards of affordability for nontraditional mortgages</td>
</tr>
<tr>
<td>6.2.7</td>
<td>Claims Arising from the Making of Unaffordable Loans</td>
</tr>
</tbody>
</table>
6.2.7.1 Overview .......................................................... 297
6.2.7.2 Unfair and Deceptive Acts and Practices (UDAP) ................. 300
  6.2.7.2.1 Specific UDAP prohibitions against improvident lending .................. 300
  6.2.7.2.2 Improvident lending as a violation of general UDAP principles ............... 300
  6.2.7.2.3 Illusory promises of refinancing as a UDAP violation ............. 302
6.2.7.3 Risk-Layering; *Commonwealth v. Fremont Investment and Loan* ......................................................... 302
6.2.7.4 Other State Statutes .............................................. 305
6.2.7.5 State Common Law Claims ......................................... 305
6.3 Steering and Discriminatory Pricing ........................................ 306
  6.3.1 Introduction ..................................................... 306
  6.3.2 Racial Differences in Pricing ..................................... 309
  6.3.3 Racial Differences in Denial Rates ................................ 313
  6.3.4 Market Segmentation and Targeting Neighborhoods ................. 314
  6.3.5 Investigating Credit Scores ....................................... 315
  6.3.6 Survey of Legal Claims for Steering and Targeting .................. 316
    6.3.6.1 Overview .................................................... 316
    6.3.6.2 Discrimination Claims ....................................... 317
    6.3.6.3 Truth in Lending Act ......................................... 318
6.4 Loan Churning .......................................................... 318
  6.4.1 Introduction ..................................................... 318
  6.4.2 Examples of Loan Churning ....................................... 319
  6.4.3 Claims Arising from Loan Churning .................................. 320
6.5 Property Flipping ........................................................ 321
  6.5.1 Overview .......................................................... 321
  6.5.2 Role of FHA Insurance in Property Flipping ......................... 322
  6.5.3 Potentially Liable Parties ......................................... 322
    6.5.3.1 Overview .................................................... 322
    6.5.3.2 Lenders ....................................................... 323
    6.5.3.3 Appraisers .................................................... 324
    6.5.3.4 Title Companies and Closing Agents .......................... 324
  6.5.4 Possible Claims in Property Flipping Cases ......................... 325
  6.5.5 Damages in Property Flipping Cases .................................. 326
  6.5.6 FHA Anti-Flipping Regulation ...................................... 327
6.6 Appraisal Fraud ......................................................... 327
  6.6.1 Introduction ..................................................... 327
  6.6.2 Appraisals, Broker Price Opinions, and Automated Valuation Models Described .............. 330
    6.6.2.1 Appraisals .................................................... 330
    6.6.2.2 Broker Price Opinions ....................................... 331
    6.6.2.3 Automated Valuation Models ................................ 331
  6.6.3 Appraisal Standards ............................................... 332
    6.6.3.1 In General .................................................... 332
    6.6.3.2 Appraisal Standards for Higher-Priced Mortgage Loans ........... 333
  6.6.4 Appraisal Review and Supervision .................................. 333
  6.6.5 Appraiser Independence ............................................ 335
    6.6.5.1 Overview .................................................... 335
    6.6.5.2 Dodd-Frank Act Appraisal Regulation ......................... 336
  6.6.6 Investigating an Appraisal Fraud Case ............................. 336
## Contents

6.6.6.1 What to Look For ................................. 336  
6.6.6.2 Getting the Original Appraisal ................................. 336  
6.6.6.3 Retrospective and Review Appraisals ................................. 336  
6.6.7 Claims ............................................. 337  
6.6.7.1 Overview .................................. 337  
6.6.7.2 Fact Versus Opinion ................................. 340  
6.6.7.3 Reliance .................................. 341  

### Chapter 7  
Mortgage Brokers and Other Third Parties: Charges and Abuses  
7.1 Introduction ................................. 343  
7.2 Mortgage Brokers ............................................. 343  
7.2.1 Generally .................................. 343  
7.2.2 What Do Mortgage Brokers Do ......................... 344  
7.2.3 Regulation of Mortgage Brokers ......................... 345  
7.2.4 Mortgage Brokers As Agents ............................................. 346  
7.2.4.1 Overview .................................. 346  
7.2.4.2 When the Broker Is the Lender’s Agent ......................... 347  
7.2.4.3 When the Broker Is the Borrower’s Agent ................. 349  
7.2.4.4 State Statutes Regarding the Broker’s Relationship with Borrowers ............................................. 350  
7.2.5 Survey of Potential Claims Arising from Broker Misconduct ............................................. 352  
7.3 Mortgage Broker and Loan Originator Compensation ............................................. 354  
7.3.1 Introduction .................................. 354  
7.3.2 How Brokers Are Compensated: Then, Now, and HELOCs ............................................. 355  
7.3.3 Problems with Broker Compensation ............................................. 356  
7.3.4 Regulating Broker Compensation ............................................. 356  
7.3.4.1 General .................................. 356  
7.3.4.2 Broker Compensation in Closed-End Loans Starting April 2011 ............................................. 358  
7.3.4.2.1 Definition of loan originator .................................. 358  
7.3.4.2.2 Regulation Z’s rules on mortgage originator compensation ............................................. 358  
7.3.4.3 Issues of Loan Officer Compensation ............................................. 358  
7.3.4.4 Yield Spread Premiums: Closed-End Loans Pre-April 2010, HELOCs, and Timeshares ............................................. 359  
7.3.4.5 Yield Spread Premiums: Practice Issues ............................................. 361  
7.4 RESPA’s Prohibition Against Kickbacks, Referral Fees, and Splitting Charges ............................................. 363  
7.4.1 General .................................. 363  
7.4.2 Marketing Services Agreements ............................................. 365  
7.4.3 Exceptions to Ban on Referral Fees and Kickbacks ............................................. 366  
7.4.4 Affiliated Business Arrangements ............................................. 367  
7.4.4.1 Generally .................................. 367  
7.4.4.2 Must a Settlement Service Provider Be Bona Fide Too? ............................................. 368  
7.4.4.3 Failure to Disclose an Affiliated Business Arrangement ............................................. 371  
7.4.5 Home Warranties ............................................. 371  
7.4.6 Standing ............................................. 372  
7.4.6.1 Article III Standing ............................................. 372  
7.4.6.1.1 Overview of Article III standing and Spokes ................................. 372  
7.4.6.1.2 Viability of pre-Spokeo decisions finding Article III standing in cases brought under RESPA section 2607 ............................................. 373  
7.4.6.1.3 Nature of section 2607 violations ............................................. 373
8.5.3 Exceptions for Maine, Massachusetts, New York, South Carolina, Texas, and Wisconsin 408
8.5.4 AMTPA Preemption for Mortgage Loans Extended After July 21, 2011 409
8.5.5 AMTPA Preemption Prior to July 22, 2011 410
8.6 Restrictions on Mortgage Loan Interest Rates 411
  8.6.1 Generally 411
  8.6.2 Federal Credit Unions 411
  8.6.3 Effect of HOEPA and State Predatory Lending Laws 411
  8.6.4 Servicemembers Civil Relief Act 412
  8.6.5 State Law Limits and Federal Preemption 412
    8.6.5.1 State Law 412
    8.6.5.2 Federal Preemption 412
8.7 Restrictions on Points and Other Origination Charges 413
  8.7.1 Description of Points 413
  8.7.2 FHA Loans 415
  8.7.3 VA Loans 415
  8.7.4 HOEPA Loans 417
  8.7.5 State Restrictions and Federal Preemption 417
    8.7.5.1 State Law 417
    8.7.5.2 Federal Preemption 419
8.8 Restrictions on Adjustable Rates 420
  8.8.1 Introduction 420
  8.8.2 All ARMs Must Include a Cap 420
  8.8.3 Home Equity Lines of Credit (HELOCs) 420
  8.8.4 National Banks 420
  8.8.5 Federal Savings Associations 421
  8.8.6 New Dodd-Frank Limits on ARMs 421
  8.8.7 FHA Loans and RHS Guaranteed Loans 422
  8.8.8 VA Loans 422
  8.8.9 State Restrictions and Federal Preemption 422
    8.8.9.1 State Law 422
    8.8.9.2 Federal Regulatory Agency Preemption 423
    8.8.9.3 AMTPA Preemption 423
  8.8.10 Legal Issues in Adjustable Rate Credit 423
8.9 Negative Amortization 424
  8.9.1 Introduction 424
  8.9.2 VA Loans 425
  8.9.3 FHA and RHS Loans 425
  8.9.4 HOEPA 425
  8.9.5 Dodd-Frank Act Requirements 425
  8.9.6 State Laws and Federal Preemption 425
    8.9.6.1 State Law 425
    8.9.6.2 Federal Banking Agency Preemption 426
    8.9.6.3 AMTPA Preemption 426
8.10 Prepayment Penalties 426
  8.10.1 Background 426
  8.10.2 Rebates of Unearned Interest for Pre-Computed Mortgages 427
  8.10.3 Federal Credit Unions 427
  8.10.4 FHA and VA Loans 428
  8.10.5 HOEPA Loans 428
  8.10.6 “Higher- Priced” Mortgage Loans 429
8.10.7 ARMs, Certain Non-Prime Loans, and Loans That Are Not “Qualified Mortgages” .................................................. 429
8.10.8 Manufactured Home Financing .................................................. 429
8.10.9 State Restrictions on Prepayment Penalties and Federal Preemption ................................................................. 429
  8.10.9.1 State Statutory Restrictions .................................................. 429
  8.10.9.2 Contract, Fraud, and UDAP Challenges .................................................. 431
  8.10.9.3 HOEPA and “Higher-Priced” Mortgage Loan Regulation Explicitly Preserve State Law .................................................. 432
  8.10.9.4 Depository Institution Exportation of Its Home State Law .................................................. 432
  8.10.9.5 OTS Preemption As to Federal Savings Associations .................................................. 432
  8.10.9.6 OCC Preemption Regarding ARMs .................................................. 432
  8.10.9.7 AMTPA Preemption Regarding ARMs .................................................. 433
8.10.10 Prepayment Penalties and Due-on-Sale Clauses .................................................. 433
8.11 Balloon Payments ........................................................................................................................................ 434
  8.11.1 Introduction ........................................................................................................................................ 434
  8.11.2 FHA Loans ........................................................................................................................................ 434
  8.11.3 HOEPA ........................................................................................................................................ 434
  8.11.4 Dodd-Frank Act Definition of “Qualified” Mortgage ........................................................................................................................................ 435
  8.11.5 Manufactured-Home First Lien Loans ........................................................................................................................................ 435
  8.11.6 State Restrictions and Federal Preemption ........................................................................................................................................ 435
    8.11.6.1 State Law ........................................................................................................................................ 435
    8.11.6.2 Federal Banking Agency Preemption ........................................................................................................................................ 436
    8.11.6.3 AMTPA Preemption ........................................................................................................................................ 436
8.12 Loan Maturity ........................................................................................................................................ 436
8.13 Late Charges and Penalty Interest Rates ........................................................................................................................................ 436
  8.13.1 FHA, VA, and RHS Loans ........................................................................................................................................ 436
  8.13.2 High-Rate Mortgage Loans ........................................................................................................................................ 437
  8.13.3 Manufactured-Home Loans ........................................................................................................................................ 437
  8.13.4 State Law and Federal Preemption ........................................................................................................................................ 437

Chapter 9 Reverse Mortgages

  9.1 Introduction ........................................................................................................................................ 439
  9.2 The Reverse Mortgage Industry and Securitization ........................................................................................................................................ 439
  9.3 Home Equity Conversion Mortgages (HECMs) ........................................................................................................................................ 440
    9.3.1 Overview ........................................................................................................................................ 440
    9.3.2 Eligibility ........................................................................................................................................ 441
    9.3.3 Loan Terms ........................................................................................................................................ 441
    9.3.4 Fees ........................................................................................................................................ 443
    9.3.5 Payment Obligations ........................................................................................................................................ 444
    9.3.6 Property Charge Payments, Financial Assessments, and Life Expectancy Set-Asides ........................................................................................................................................ 444
    9.3.7 Other Loan Requirements ........................................................................................................................................ 445
    9.3.8 HECM for Purchase ........................................................................................................................................ 446
  9.4 Counseling ........................................................................................................................................ 446
    9.4.1 General ........................................................................................................................................ 446
    9.4.2 The HECM Counseling Requirement ........................................................................................................................................ 446
  9.5 Truth in Lending Act Applied to Reverse Mortgages ........................................................................................................................................ 447
  9.6 Other Applicable Federal Laws ........................................................................................................................................ 448
  9.7 Abuses in Reverse Mortgage Lending ........................................................................................................................................ 448
    9.7.1 In General ........................................................................................................................................ 448
    9.7.2 Fraud, Misrepresentation, and Unfair Practices ........................................................................................................................................ 448
    9.7.3 Yield Spread Premiums and Steering ........................................................................................................................................ 449
Chapter 10  
Land Installment Contracts

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>10.1</td>
<td>Introduction</td>
<td>455</td>
</tr>
<tr>
<td>10.2</td>
<td>The Common Law: Characteristics of the Land Installment Contract</td>
<td>456</td>
</tr>
<tr>
<td>10.2.1</td>
<td>Comparison to Short-Term Executory Contracts for Sale</td>
<td>456</td>
</tr>
<tr>
<td>10.2.2</td>
<td>Comparison to Lease with an Option to Buy</td>
<td>457</td>
</tr>
<tr>
<td>10.2.3</td>
<td>Comparison to Seller-Financed Mortgages</td>
<td>459</td>
</tr>
<tr>
<td>10.2.4</td>
<td>Is a Land Installment Contract a Mortgage?</td>
<td>460</td>
</tr>
<tr>
<td>10.3</td>
<td>The Common Law: Buyer and Sellers’ Rights During the Contract Term</td>
<td>460</td>
</tr>
<tr>
<td>10.3.1</td>
<td>Recording the Contract</td>
<td>460</td>
</tr>
<tr>
<td>10.3.2</td>
<td>Buyer’s Possession and Use of the Property</td>
<td>460</td>
</tr>
<tr>
<td>10.3.3</td>
<td>Risk of Loss</td>
<td>461</td>
</tr>
<tr>
<td>10.3.4</td>
<td>Prepayment by Purchaser</td>
<td>461</td>
</tr>
<tr>
<td>10.4</td>
<td>The Common Law: Title Concerns</td>
<td>462</td>
</tr>
<tr>
<td>10.4.1</td>
<td>Seller’s Title</td>
<td>462</td>
</tr>
<tr>
<td>10.4.2</td>
<td>Preexisting and Post-Contract Liens</td>
<td>462</td>
</tr>
<tr>
<td>10.4.3</td>
<td>Assignment of the Seller’s Interest</td>
<td>463</td>
</tr>
<tr>
<td>10.4.4</td>
<td>Assignment of the Buyer’s Interest</td>
<td>464</td>
</tr>
<tr>
<td>10.4.5</td>
<td>Condition of the Property</td>
<td>464</td>
</tr>
<tr>
<td>10.5</td>
<td>The Common Law: Buyer’s Remedies</td>
<td>464</td>
</tr>
<tr>
<td>10.5.1</td>
<td>Seller’s Breach of Contract and Failure to Provide Deed</td>
<td>464</td>
</tr>
<tr>
<td>10.5.2</td>
<td>Seller’s Fraud and Overreaching</td>
<td>465</td>
</tr>
<tr>
<td>10.5.3</td>
<td>Seller’s Failure to Act in Good Faith</td>
<td>465</td>
</tr>
<tr>
<td>10.6</td>
<td>The Common Law: Seller’s Non-Forfeiture Remedies</td>
<td>466</td>
</tr>
<tr>
<td>10.6.1</td>
<td>Choice of Remedies</td>
<td>466</td>
</tr>
<tr>
<td>10.6.2</td>
<td>Rescission</td>
<td>466</td>
</tr>
<tr>
<td>10.6.3</td>
<td>Suits for Breach of Contract</td>
<td>467</td>
</tr>
<tr>
<td>10.7</td>
<td>State Statutory Protections</td>
<td>467</td>
</tr>
<tr>
<td>10.7.1</td>
<td>Introduction</td>
<td>467</td>
</tr>
<tr>
<td>10.7.2</td>
<td>Disclosure Requirements</td>
<td>467</td>
</tr>
<tr>
<td>10.7.3</td>
<td>Paying Down the Principal: Interest Rate Caps, Fee Limits, and Payment Allocation</td>
<td>470</td>
</tr>
<tr>
<td>10.7.3.1</td>
<td>States That Have Enacted the Uniform Consumer Credit Code</td>
<td>470</td>
</tr>
<tr>
<td>10.7.3.2</td>
<td>Interest Rate Caps</td>
<td>471</td>
</tr>
<tr>
<td>10.7.3.3</td>
<td>Prepayment and Late Fee Limits</td>
<td>472</td>
</tr>
<tr>
<td>10.7.3.4</td>
<td>Allocation of Payments</td>
<td>472</td>
</tr>
<tr>
<td>10.7.4</td>
<td>Escrow Requirements and Which Party Is Responsible for Property Taxes</td>
<td>473</td>
</tr>
<tr>
<td>10.7.4.1</td>
<td>Requiring and Policing Escrows for Property Taxes</td>
<td>473</td>
</tr>
<tr>
<td>10.7.4.2</td>
<td>Responsibility for Payment of Property Taxes</td>
<td>473</td>
</tr>
<tr>
<td>10.7.5</td>
<td>Responsibility to Provide Habitable Conditions and Make Repairs</td>
<td>473</td>
</tr>
<tr>
<td>10.7.6</td>
<td>Appraisal, Title Report, and Recordation Requirements</td>
<td>474</td>
</tr>
<tr>
<td>10.7.6.1</td>
<td>Appraisals</td>
<td>474</td>
</tr>
<tr>
<td>10.7.6.2</td>
<td>Title Reports</td>
<td>474</td>
</tr>
<tr>
<td>10.7.6.3</td>
<td>Recordation</td>
<td>474</td>
</tr>
</tbody>
</table>
10.7.7 Post-Contract Liens; Or, Can a Seller or Buyer Encumber the Title? ................................................. 475
  10.7.7.1 Introduction ................................................................................................................................. 475
  10.7.7.2 The Seller’s Liens and Marketable Title .................................................................................. 475
  10.7.7.3 The Buyer’s Right to Encumber Title ....................................................................................... 476
  10.7.7.4 Converting a Land Installment Contract to a Deed Subject to a Security Interest .................. 476
10.7.8 Annual or Periodic Statements. ........................................................................................................ 476
10.7.9 Seller’s Unfair and Deceptive Acts or Practices ............................................................................. 477
10.7.10 Limits on Contract Termination or Forfeiture, Including Right to Cure ................................. 478
   10.7.10.1 Right to Cure ........................................................................................................................... 478
   10.7.10.2 Limits on Forfeiture Remedy; Requiring Sellers to Foreclose .......................................... 478
10.7.11 Statutory Remedies ....................................................................................................................... 478
10.7.12 Local Ordinances .......................................................................................................................... 480
10.8 Federal Statutory Protections. ............................................................................................................ 481
  10.8.1 The Truth in Lending Act ............................................................................................................ 481
     10.8.1.1 Disclosure Requirements ........................................................................................................ 481
     10.8.1.2 Substantive Protections for Closed-End Mortgages Secured by a Dwelling ...................... 482
     10.8.1.3 Substantive Protections for Higher- Priced Mortgage Loans .............................................. 483
     10.8.1.4 Substantive Protections for High Cost Mortgage Loans ...................................................... 484
  10.8.2 Real Estate Settlement Procedures Act ......................................................................................... 484
  10.8.3 The Fair Housing Act and the Equal Credit Opportunity Act .................................................... 485
     10.8.3.1 The Fair Housing Act ............................................................................................................. 485
     10.8.3.2 The Equal Credit Opportunity Act ....................................................................................... 486
  10.8.4 The S.A.F.E. Act ............................................................................................................................ 486
10.9 Practice Guide ...................................................................................................................................... 487
  10.9.1 Determining Whether the Transaction Is a Land Installment Contract or a Lease with an Option to Buy ................................................................. 487
  10.9.2 Advising the Consumer in an Existing Land Installment Contract ......................................... 487
  10.9.3 Advising the Consumer in an Existing Lease with an Option to Buy ........................................ 488
  10.9.4 Litigation Options for Land Installment Contracts ..................................................................... 489
     10.9.4.1 Raising Affirmative Claims Against Land Contract Sellers ............................................... 489
     10.9.4.2 Defensive Litigation When a Land Contract Is Being Terminated or Foreclosed .......... 490
  10.9.5 Litigation Strategies for Leases with an Option to Buy ............................................................... 491
  10.9.6 Bankruptcy Options for Land Installment Contracts and Leases with an Option to Buy ........... 492

Chapter 11 Other Nontraditional Mortgage Loans

11.1 Overview ............................................................................................................................................... 493
11.2 Loans with Precomputed Interest ................................................................................................. 493
11.3 Home Equity Lines of Credit (HELOCs) ...................................................................................... 493
11.4 Land Installment Sales ................................................................................................................... 495
11.5 Home Improvement Loans ............................................................................................................ 495
11.6 Foreclosure Rescue Scams ............................................................................................................ 496
11.7 Reverse Mortgages ......................................................................................................................... 497
11.8 Wraparound Mortgages .................................................................................................................. 497
11.9 Sharing or Selling Home Equity .................................................................................................... 498
Contents

11.9.1 In General ................................................................. 498
11.9.2 Purchase Assistance .................................................. 499
11.9.3 Restricting Access to Equity to Preserve Affordability ......... 499
11.9.4 Government Programs ............................................... 500
11.9.5 Converting Equity to Cash ........................................... 500
11.9.6 Loss Mitigation .......................................................... 500
11.9.7 Regulation and Risks for Homeowners ......................... 501

11.10 Property Assessed Clean Energy (PACE) Loans ............... 502
11.10.1 Introduction ............................................................. 502
11.10.2 Financing Terms ..................................................... 503
11.10.3 Regulation of PACE ................................................... 503
11.10.4 Abuses in PACE Lending ........................................... 504

11.11 Installment Sales of Manufactured Homes ....................... 504
11.11.1 Introduction ............................................................. 504
11.11.2 State Regulation of Manufactured Home Installment Sales .... 505
11.11.3 Federal Preemption of State Installment Sales Laws .......... 506
11.11.4 TILA, RESPA, and the Federal Rebate Statute’s Applicability to Manufactured Home Installment Sales ................. 506

Chapter 12 Mortgage Litigation

12.1 Choice of Federal or State Court .................................... 507
12.2 Federal Question Jurisdiction .......................................... 508
12.2.1 General ................................................................. 508
12.2.2 Supplemental Jurisdiction ........................................... 509
12.2.3 Complete Preemption and Beneficial Bank ..................... 509
  12.2.3.1 The Nature of Complete Preemption ......................... 509
  12.2.3.2 Complete Preemption Under the National Bank Act ....... 509
  12.2.3.3 Assignees, Non-Banks, and State-Chartered Banks ....... 511
  12.2.3.4 No Complete Preemption Under Other Banking Laws .... 511
  12.2.4 Federal Jurisdiction Based on Fannie Mae’s and Freddie Mac’s Charters ........................................... 512
12.3 Diversity Jurisdiction .................................................... 512
  12.3.1 Diversity Jurisdiction in Individual Cases ..................... 512
  12.3.2 Diversity Jurisdiction Under the Class Action Fairness Act .... 513
12.4 Removal and Remand ..................................................... 513
12.5 Personal Jurisdiction over Out-of-State Defendants ............ 514
  12.5.1 Overview of General Jurisdiction and Specific Jurisdiction .... 514
  12.5.2 Personal Jurisdiction over Securitization Trusts ............. 516
    12.5.2.1 Overview ........................................................ 516
    12.5.2.2 General Jurisdiction over Securitization Trusts ......... 516
    12.5.2.3 Specific Jurisdiction When Claim Relates to Property in Forum State ........................................ 516
    12.5.2.4 Jurisdiction in Bankruptcy Court and over Counterclaims .... 519
  12.5.3 Jurisdiction over Parent Companies and Holding Companies .......... 519
12.6 Third-Party Liability .................................................... 520
  12.6.1 General ............................................................. 520
  12.6.2 Liability for Employees and Agents ............................. 523
  12.6.3 Aiding and Abetting, Civil Conspiracy ........................ 523
  12.6.4 Joint Venture ....................................................... 525
  12.6.5 Accepting Fruits of a Fraud ...................................... 526
  12.6.6 Closing Protection Letters ....................................... 527
12.7 Limits to the Holder-in-Due-Course Defense ....................... 528
12.7.1 The Basics ................................................................................. 528
  12.7.1.1 Twelve Limits to the Holder-in-Due-Course Defense. ............. 528
  12.7.1.2 The Elements of Holder-in-Due-Course Status. .................... 528
  12.7.1.3 The Shelter Rule: Acquiring the Rights of a Holder in Due Course Without Being a Holder in Due Course. .......... 529

12.7.2 The Holder in Due Course and Home Improvement Contracts .......... 530
  12.7.2.1 Introduction ..................................................................... 530
  12.7.2.2 When the Contractor Originates the Credit. ................. 530
     12.7.2.2.1 Generally ......................................................... 530
     12.7.2.2.2 Holder’s maximum liability under the FTC Holder Rule .. 530
  12.7.2.3 When the Contractor Refers the Consumer to a Lender ......... 531
  12.7.2.4 When the Home Improvement Lender Is Unrelated to the Contractor ...................................................... 531

12.7.3 No Holder in Due Course in Land Installment Sales .................. 532

12.7.4 No Holder in Due Course in Home Equity Lines of Credit .......... 532

12.7.5 No Holder in Due Course in Reverse Mortgages ....................... 532

12.7.6 No Holder in Due Course in HOEPA Loans ............................ 533
     12.7.6.1 General ............................................................... 533
     12.7.6.2 State Law May Extend Scope of HOEPA’s Elimination of Holder in Due Course ................................................ 534

12.7.7 Option-ARMs and Other Variable Rate Notes .......................... 534

12.7.8 Limited Holder-in-Due-Course Rights When Homeowner Delinquent Prior to Instrument’s Transfer ........................................ 534

12.7.9 No Holder in Due Course When Assignee Takes in Bad Faith or Is on Notice of Consumer Defenses ............................ 535
     12.7.9.1 Notice of Defenses .................................................. 535
     12.7.9.2 Bad Faith ............................................................ 536
     12.7.9.3 Exception When Transferor Is Holder in Due Course .......... 537

12.7.10 No Holder in Due Course with Sloppy Paperwork ................... 537

12.7.11 No Holder in Due Course When Electronic Note Fails to Comply with E-Sign and UETA ......................................................... 539
     12.7.11.1 Increasing Use of Electronic Mortgage Notes .................. 539
     12.7.11.2 Overview of Requirements for Electronic Notes .......... 541
     12.7.11.3 Is the Electronic Note a “Transferable Record”? .......... 541
     12.7.11.4 Was the Transferable Record Created, Stored, and Assigned in Compliance with Control-Related Requirements? .......... 542
     12.7.11.5 Can the Person Claiming Control Provide “Reasonable Proof” of Its Claim? ......................................................... 543
     12.7.11.6 Does the Person Controlling the Record Meet the UCC Holder-in-Due-Course Requirements? ............................. 543
     12.7.11.7 What If the Electronic Note Does Not Qualify As a Transferable Record? ............................................................. 543

12.7.12 No Holder in Due Course When Note Comes with “Luggage” or Incorporates Mortgage Provisions ................................. 544

12.7.13 Defenses That Can Be Raised Against a Holder in Due Course ...... 545

12.8 Mandatory Arbitration Clauses .................................................... 546
     12.8.1 Introduction ..................................................................... 546
     12.8.2 Federal Law Now Prohibits Mandatory Arbitration in Most Consumer Mortgage Loans ............................ 546
         12.8.2.1 Scope ............................................................... 546
Contents

12.8.2.2 Two Separate TILA Provisions Limit Arbitration ................................................................. 546
12.8.2.3 Effective Date and Retroactive Application ............................................................................. 547
12.8.3 Challenging Arbitration Requirements That Apply Despite the Federal Ban ......................................................... 548
  12.8.3.1 Introduction ............................................................................................................................... 548
  12.8.3.2 Does the Court or Arbitrator Decide Whether a Clause Is Enforceable? ............................ 548
  12.8.3.3 Proof of an Applicable Arbitration Agreement and Party’s Standing to Enforce That Agreement ................................................................. 549
  12.8.3.4 Enforceability of Arbitration Agreement Specifying the NAF As the Sole Arbitration Forum ........................................................................ 549
  12.8.3.5 Unconscionability As Grounds to Challenge an Arbitration Requirement ...................................... 549
  12.8.3.6 Limits on Arbitration in Judicial Foreclosures and Bankruptcy Court Litigation ...................... 550
  12.8.3.7 Litigation Concerning Insurance ............................................................................................... 550
  12.8.3.8 Arbitration Requirements Related to TILA Rescission, CROA, and Usury Claims ................................................................. 550
  12.8.3.9 Class Actions and Class Arbitration ......................................................................................... 550
    12.8.3.9.1 Congress overrides CFPB limits on class arbitration ....................................................... 550
    12.8.3.9.2 Bringing a class action in the arbitration proceeding ...................................................... 551
  12.8.3.10 Arbitration and Punitive Damages ......................................................................................... 551

12.9 Uniform Covenant Giving Parties Notice and Opportunity to Cure ................................................. 552
  12.9.1 Introduction ............................................................................................................................... 552
  12.9.2 Provision Restricted to Breach of Contract Claims ....................................................................... 552
  12.9.3 Not Applicable to Consumer Protection Claims ......................................................................... 553
  12.9.4 Not Applicable to Loan Servicers ............................................................................................... 554
  12.9.5 Pleading and Procedure ........................................................................................................... 554
  12.9.6 Not Applicable If Providing Notice and an Opportunity to Cure Would Have Been Futile .................... 554
  12.9.7 Timing Issues ............................................................................................................................ 554

12.10 Settlement Issues ........................................................................................................................... 555
  12.10.1 Introduction .............................................................................................................................. 555
  12.10.2 Make Sure the Agreement Is Enforceable .................................................................................. 555
  12.10.3 Issues Impacting the Dollar Value of the Settlement .................................................................. 555
  12.10.4 Non-Monetary Elements of Settlement Agreements .................................................................... 557

12.11 Confidentiality in Consumer-Related Litigation; Discovery and Settlement ........................................ 557
  12.11.1 Overview ................................................................................................................................. 557
  12.11.2 The Cost of Confidentiality in Settlement ................................................................................. 561
  12.11.3 When to Agree to Confidentiality and How to Limit the Harms ............................................... 564
  12.11.4 Ethical Obligations of Counsel ............................................................................................... 565

Chapter 13  Litigating Claims When a Bank Fails ......................................................................................... 569
  13.1 Introduction ..................................................................................................................................... 569
  13.2 The Role of the FDIC and Other Agencies When a Financial Institution Fails ............................. 569
    13.2.1 The FDIC’s Role When a Bank Fails ....................................................................................... 569
    13.2.2 The Status of Related Corporations When a Bank Fails ......................................................... 571
    13.2.3 The Federal Housing Finance Agency’s Role ......................................................................... 571
    13.2.4 When a Credit Union Fails ...................................................................................................... 571
Mortgage Lending

13.3 The Administrative Claims Process and Its Implications .................................. 571
13.3.1 Introduction ........................................................................................................ 571
13.3.2 Overview of Claims Process ................................................................. 572
13.3.2.1 Introduction .................................................................................................. 572
13.3.2.2 The FDIC Must Publish and Mail Notice to the Failed Bank’s Creditors .................................................. 572
13.3.2.3 Deadline for Filing a Claim .......................................................................... 573
13.3.2.4 The FDIC’s Resolution of the Claim and the Claimant’s Right to Seek Review or File Suit .................. 574
13.3.2.5 Termination of the Receivership .............................................................. 576
13.3.3 Consequences of Failure to Submit a Claim .............................................. 576
13.3.3.1 Jurisdictional Bar over Unexhausted Claims ............................................. 576
13.3.3.2 What Types of Claims Are Subject to the Jurisdictional Bar ............... 577
13.3.4 Potential Mismatch Between the Jurisdictional Bar and the Claims That Are Eligible for Relief .................. 579
13.3.5 Affirmative Defenses ....................................................................................... 580
13.3.5.1 Exhaustion Requirement Inapplicable to Affirmative Defenses ............... 580
13.3.5.2 Distinction Between a Claim and an Affirmative Defense ...................... 581
13.3.5.3 Affirmative Defenses That Could Also Have Been Asserted As Independent Claims .................................................. 584
13.3.5.4 FDIC’s Purported Sale of Obligations Without Defenses ....................... 585
13.3.5.5 Practical Considerations ............................................................................. 586
13.3.6 Lawsuits Filed Before the Bank’s Failure .................................................... 586
13.3.6.1 Courts Retain Jurisdiction over Pre-Receivership Suits ....................... 586
13.3.6.2 Must Plaintiff in Pre-Receivership Suit Exhaust Administrative Claims Process? .................................................. 587
13.3.6.3 What Is a Pre-Receivership Suit? .............................................................. 589
13.3.6.4 When the Failed Bank Was the Plaintiff in a Pre-Receivership Suit .......... 589
13.3.6.5 How to “Continue” a Case ........................................................................ 589
13.3.7 Claims Against the FDIC for Actions It Took As Receiver and Other Claims That Accrue After the Claims Bar Date .......................................................... 590
13.3.8 Claims Regarding Loans That the Bank Sold Before It Failed .................. 592
13.3.8.1 Does the Exhaustion Requirement Apply to Loans the Bank Sold Before It Failed? .................................................. 592
13.3.8.2 Determining Whether Loans Were Bank Assets at Time of Failure ........ 593
13.3.9 Claims Against the FDIC’s Assignees Regarding Assets the Failed Bank Owned at Time of Failure .................. 595
13.3.9.1 Claims That Arise After the FDIC Transfers an Obligation ...................... 595
13.3.9.2 Claims Asserted Against the FDIC’s Assignee That Arise from the Failed Bank’s Actions .................................................. 596
13.3.9.3 Asserting TILA Claims Against Assignees ............................................. 599
13.3.9.4 Claims Against Bridge Banks .................................................................. 600
13.3.9.5 Claims Regarding Whether Purchase and Assumption Agreement Required Assignee Bank to Assume an Obligation .................................................. 600
13.3.10 Other Exceptions to Exhaustion Requirement ........................................... 601
13.3.11 Due Process Issues .......................................................... 601
13.3.12 Other Constitutional Issues .............................................. 604
13.3.13 How to File a Claim .......................................................... 604
13.3.14 Mechanics of Suing on the Claim ...................................... 606
13.3.15 The FDIC’s Right to Remove a Case to Federal Court ......... 607
13.3.16 The FDIC’s Right to Obtain a Stay .................................... 608
13.3.17 Class Claims ................................................................. 608
13.3.18 Prohibition of Injunctive Relief ....................................... 609
13.3.19 Prohibition of Relief in Nature of a Penalty ................. 611
13.3.20 Navigating the Claims Process Minefield ..................... 612
13.3.21 Practical Concern: Likelihood of Recovery from Failed Bank Assets .............................................. 613

13.4 Overview of the Three Related Special Substantive Defenses Available to the FDIC .................................................. 614

13.5 Does Section 1823(e) Displace D’Oench and the Federal Holder-in-Due-Course Doctrine? ....................... 614

13.6 D’Oench .......................................................... 616
13.6.1 Overview of the Doctrine ................................................. 616
13.6.2 Exceptions to D’Oench .................................................... 616
13.6.3 Treatment of Innocent Borrowers .................................. 619

13.7 12 U.S.C. § 1823(e) .................................................................. 619
13.7.1 Outline of Section 1823(e) .............................................. 619
13.7.2 Requirements for Enforceability of Agreements ............... 620
13.7.3 What Is an “Agreement” Under Section 1823(e)? ......... 622
13.7.4 Requirement That the Agreement Tend to Diminish or Defeat FDIC’s Interest in an Asset ....................... 624
13.7.5 Fraud in the Factum and Other Reasons That an Agreement May Be Void .............................................. 626
13.7.6 Equitable Considerations .................................................. 627
13.7.7 Comparison of Section 1823(e) and D’Oench ................. 627

13.8 Federal Holder-in-Due-Course Doctrine .................................. 628

13.9 Who Can Claim Protection Under D’Oench and Section 1823(e) ................................................................. 630
13.9.1 Did the Bank Actually Fail? ............................................ 630
13.9.2 Subsidiaries, Institutions That Are Not Federally Insured 630
13.9.3 Assignees ................................................................. 630
13.9.4 Whether Assignees Benefit from FIRREA’s Limitations Period ...................................................... 632

13.10 Effect of the FTC Holder Rule and the Assignee Liability Provisions of HOEPA .................................................. 632

13.11 A Sampling of Claims and Defenses That May Avoid D’Oench and Related Doctrines ........................................... 633

13.12 Application of D’Oench and Related Doctrines to Common Consumer Claims ............................................. 636
13.12.1 Introduction ................................................................. 636
13.12.2 Loan Servicing Abuses .................................................. 636
13.12.3 Loan Origination Abuses ............................................... 637
   13.12.3.1 Fraud and UDAP Claims ....................................... 637
   13.12.3.2 Truth in Lending Act Claims ................................. 637
   13.12.3.3 Breach of Contract ............................................... 637
13.12.4 Other Statutory Claims ................................................. 637

13.13 FDIC and RTC Liability for Their Own Conduct ....................... 638
Appendix A  State Mortgage Lending Statutes .............................................. 639
Appendix B  State Predatory Lending Statutes .............................................. 647
Appendix C  Real Estate Settlement Procedures Act
C.1 Overview of RESPA and Regulation X Statutory, Administrative, and Legislative History Archive .................................................. 657
C.2 Selected Statutory Provisions .............................................................. 657
C.3 Selected Regulation X Provisions ......................................................... 663
  C.3.1 Chart of Regulation X Amendments .............................................. 663
  C.3.2 Regulation X ............................................................................ 665
C.4 Supplement I to Part 1024—Official Bureau Interpretations .............. 699
Appendix D  Truth in Lending Act Substantive Mortgage Regulation ............. 703
Appendix E  National Bank Regulation
E.1 Rate Exportation Statutory Provisions ................................................. 705
E.2 Dodd-Frank Standards for Preemption Determination .......................... 705
E.3 OCC Regulations ........................................................................... 707
E.4 OCC Interpretive and Advisory Letters ............................................. 718
E.5 OCC Preemption Determinations ....................................................... 721
Appendix F  Federal Savings Association Regulation
F.1 Statutory Provision on Rate Exportation ............................................. 723
F.2 Dodd-Frank Act Provision on Preemption and Regulation .................. 723
F.3 Current Regulations .......................................................................... 723
Appendix G  Federal Credit Union Regulation
G.1 National Credit Union Administration Regulations .......................... 729
G.2 NCUA Interpretive Letters ................................................................. 732
G.3 NCUA Formal Statements of Interpretation and Policy ....................... 735
Appendix H  Other Substantive Mortgage Restrictions
H.1 Adjustable Rate Mortgage Caps ......................................................... 737
H.2 Federal Rebate Statute .............................................................. 737
H.3 Servicemembers Civil Relief Act ......................................................... 738
H.4 Secure and Fair Enforcement (S.A.F.E.) for Mortgage Licensing Act ........ 739
  H.4.1 S.A.F.E. Act ........................................................................... 739
  H.4.2 S.A.F.E. Act, Regulation G ......................................................... 746
  H.4.3 S.A.F.E. Act, Regulation H ......................................................... 750
Appendix I  Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA)
I.1 Statutory Provisions .............................................................. 757
  I.1.1 Definition of Federally Related Mortgage Loan .............................. 757
  I.1.2 DIDA Statutory Provisions ......................................................... 757
I.2 DIDA Regulations .............................................................. 760
I.3 Interpretations Concerning State Depository Rate Exportation ............. 763
**Contents**

**Appendix J**  
Alternative Mortgage Transaction Parity Act  
J.1 Statutory Provisions  765  
J.2 Regulatory Provisions  766  
J.2.1 Introduction  766  
J.2.2 Regulation D  766  
J.2.3 Official Commentary to Regulation D  766

**Appendix K**  
Loans Insured by Federal Agencies  
K.1 Federal Housing Administration Insured Loans  771  
K.1.1 Statutory Provision Preempting State Law  771  
K.1.2 Selected Federal Housing Administration Regulations  777  
K.1.2.1 Single Family Home Loans  771  
K.1.2.2 Home Improvement and Manufactured Home Loans  772  
K.2 Department of Veterans Affairs (VA) Loans  773  
K.2.1 Statutory Provision Preempting State Law  773  
K.2.2 Selected VA Regulations  774  
K.3 Rural Housing Service (RHS) Insured Loans  778  
K.3.1 Effective Through Nov. 30, 2014  778  
K.3.2 Effective Dec. 1, 2014  778

**Appendix L**  
Federal Reverse Mortgage Provisions  
L.1 Statutory Provisions  781  
L.1.1 National Housing Act Provisions  781  
L.1.2 Truth in Lending Act Provisions  784  
L.2 Selected Regulations  784  
L.2.1 HUD Home Equity Conversion Mortgage Insurance Provisions  784  
L.2.2 HUD Housing Counseling Program Provisions  813  
L.2.3 Truth in Lending Regulation Z Provisions  813  
L.2.3.1 Selected Regulation Provisions  813  
L.2.3.2 Selected Official Interpretations  814  
L.3 HUD Mortgagee Letters  815

**Appendix M**  
Summary of State Reverse Mortgage Laws  823

**Appendix N**  
Failed Bank Receivership Statutes  
N.1 The Administrative Claims Process  851  
N.2 Requirements for Enforceability of Agreements Against Failed Banks  855

**Appendix O**  
Websites Relating to Mortgage Lending Issues  857

Index  859