

# Contents

	CD-Rom Contents . . . . .	xix
Chapter 1	Introduction	
	1.5 References. . . . .	1
	1.6 Getting Started. . . . .	1
	1.6.3 Analyzing the Legal Issues . . . . .	1
	1.6.3.2 Supplemental Checklist for Fixed-Term Consumer Credit Sales and Loans . . . . .	1
	1.6.3.2.5 Are there non-rate violations in the contract? . . . . .	1
Chapter 2	Overview of Substantive Regulation of the Cost of Consumer Credit: State Laws	
	2.2 Historical Development of Usury Laws . . . . .	3
	2.2.1 Early Attitudes Toward Interest . . . . .	3
	2.3 The Modern Consumer Credit Marketplace. . . . .	3
	2.3.1 Types of Creditors . . . . .	3
	2.3.1.1 Introduction . . . . .	3
	2.3.1.2 Depository Creditors . . . . .	4
	2.3.1.2.1 Banks . . . . .	4
	2.3.1.3 Non-Depository Creditors. . . . .	4
	2.3.1.3.1 Finance companies and other licensed lenders . . . . .	4
	2.3.2 Types of Credit . . . . .	4
	2.3.2.4 Security Taken in Credit Transactions. . . . .	4
	2.3.3 Types of Special Usury Statutes . . . . .	4
	2.3.3.2 Small Loan Laws and Their Progeny . . . . .	4
	2.3.3.7 Second Mortgage and Home Equity Loan Laws. . . . .	4
	2.3.3.9 Pawnbroker Statutes . . . . .	5
	2.3.3.11 Servicemembers Civil Relief Act . . . . .	5
	2.4 Deregulation of Usury Law . . . . .	5
	2.4.1 Changing or Abolishing Interest Ceilings. . . . .	5
	2.4.2 Deregulation of the Residential Mortgage Market . . . . .	6
	2.5 Post-Deregulation: The Next Generation . . . . .	6
Chapter 3	Federal Preemption of State Laws Limiting Credit Charges and Regulating the Terms and Conditions of Lending	
	3.2 Checking for Preemption: A Summary Guide . . . . .	9
	3.2.2 Preemption Analysis: A Step-by-Step Guide. . . . .	9
	3.2.2.1 Overview. . . . .	9
<i>new subsection</i>	<b>3.2.2.8 Step Seven: Does More Than One Statutory Preemption             Regime Apply?</b> . . . . .	9
	3.3 The Bureaucracy of Preemption . . . . .	9

3.3.2	Deference to Agency Preemption Regulations and Opinions . . . . .	9
3.4	The National Bank Act . . . . .	10
3.4.1	History and Purpose of the National Bank Act . . . . .	10
3.4.5	Interstate Banking: National Banks and Rate Exportation . . . . .	10
3.4.5.1	Background: <i>Marquette</i> and Its Legacy . . . . .	10
3.4.5.1.1	Overview and constitutional concerns . . . . .	10
3.4.5.1.2	The role of a national bank's "location" . . . . .	10
3.4.5.1.3	National bank as an assignee . . . . .	10
3.4.5.2	Scope of the Term "Interest Rate" for Exportation Purposes . . . . .	11
3.4.6	National Bank Act Preemption . . . . .	11
3.4.6.1	Conflict Preemption . . . . .	11
3.4.6.2	OCC's Broad 2004 Preemption Regulations . . . . .	12
3.4.6.3	Visitorial Powers of the OCC . . . . .	14
3.4.6.4	Preemption Rights of Operating Subsidiaries and Agents . . . . .	15
3.5	The Home Owners' Loan Act and Federal Savings Associations . . . . .	16
3.5.2	Most Favored Lender Doctrine and Exportation . . . . .	16
3.5.3	HOLA and "Field" Preemption . . . . .	16
3.5.4	Preemption Rights of Certain Subsidiaries and Agents . . . . .	17
3.6	Federal Credit Union Act and Federal Credit Unions . . . . .	17
3.6.2	Most Favored Lender Status . . . . .	17
3.7	The Federal Deposit Insurance Act and State-Chartered Banks . . . . .	18
3.7.1	The "Dual" Banking System and State-Chartered Bank Powers . . . . .	18
3.7.2	Most Favored Lender Doctrine and Exportation . . . . .	18
3.7.3	Other Preemption Rights Extended by Federal Law to State-Chartered Banks . . . . .	19
3.9	The Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA): Most Favored Lender Status for Federally-Insured Lenders; First Lien Mortgage Preemption . . . . .	20
3.9.2	DIDA and Federally-Related Lenders . . . . .	20
3.9.2.1	Extension of Federal Alternate Interest Ceiling and Most Favored Lender Status to Federally-Related Lenders . . . . .	20
3.9.3	DIDA's "First Mortgage" Preemption . . . . .	20
3.9.3.1	Overview . . . . .	20
3.9.3.3	Qualifying Lenders . . . . .	20
3.9.4	Opting Out of DIDA by State Legislation . . . . .	21
3.9.4.2	First Lien Preemption Opt-out: Interest Cap Versus Points and Fees Limitations . . . . .	21
3.10	The Alternative Mortgage Transactions Parity Act (AMTPA): Preemption of State Non-Rate Mortgage Credit Regulation . . . . .	21
3.10.1	Scope of AMTPA's Preemption . . . . .	21
3.10.2	AMTPA's Regulatory Scheme . . . . .	21
3.13	Faux Bank Preemption: "Rent-a-Charter" Arrangements . . . . .	21
3.13.1	General . . . . .	21
3.13.2	Private Litigation and State Enforcement . . . . .	22
3.13.3	The OCC, OTS, and FDIC Enter the Fray . . . . .	23
3.14	Usury Deregulation by State "Parity" Laws . . . . .	24
3.14.3	Parity Statute Interaction with Federal "Most Favored Lender" . . . . .	24
3.15	Federal Jurisdiction: Removal of Preemption Issues to Federal Court . . . . .	24

Chapter 4

Credit Math For Practitioners: Calculations of Interest Rate and Other  
Charges

4.3	Interest Calculation: Installment Credit . . . . .	27
4.3.1	Actuarial Interest . . . . .	27

*new subsection*

4.3.1.2	Negative Amortization; Non-Amortizing Credit; Balloon Payments . . . . .	27
4.3.2	Add-on Interest . . . . .	27
4.3.4	Split Rate Interest—Graduated Rates . . . . .	27
4.3.5	Open-End Credit . . . . .	27
4.3.5.2	Methods of Calculating Interest on Open-End Credit . . . . .	27
	<b>4.3.6.6 Interest-Only Loans and Option-Payment ARMs . . . . .</b>	<b>28</b>
	<b>4.3.6.6.1 The rise of alternative mortgage products . . . . .</b>	<b>28</b>
	<b>4.3.6.6.2 Key features of alternative ARMs . . . . .</b>	<b>28</b>
4.6	Special Calculation Problems . . . . .	30
4.6.3	Daily Interest Rates and the 365/360 Method . . . . .	30
4.6.3.1	General . . . . .	30
4.6.3.4	365/360 Day Method: “The Bankers’ Year” . . . . .	30
4.6.8	Daily Accrual Accounting . . . . .	30
4.6.8.1	Daily Accrual Without Compounding . . . . .	30
4.7	Points . . . . .	30
4.7.2	Legal Issues Arising in Calculation of Points . . . . .	30
4.8	Calculation of Late Charges and Deferral Charges . . . . .	31
4.8.1	Late Charges . . . . .	31

Chapter 5                      **The Cost of Early Termination: Rebates of Unearned Charges and Prepayment Penalties**

5.7	Proving Rebate Violations Are Illegal Charges . . . . .	33
5.7.1	Usury Upon a Contingent Event . . . . .	33
5.8	Prepayment Penalties . . . . .	33
5.8.1	General . . . . .	33

Chapter 6                      **The Cost of Refinancing: Calculation and Legal Issues**

6.2	Usurious Taint in Refinanced Obligations . . . . .	35
6.2.3	Novation vs. Waiver . . . . .	35
6.5	Practice Tip: Evaluating Refinancing As a Way Out of Real Estate Mortgage Foreclosure . . . . .	35

Chapter 7                      **Hidden Interest**

7.2	Payments for Lender Services: What Is Interest? . . . . .	37
7.2.1	Fees Based on the Creditor’s Expenses . . . . .	37
7.2.4	Delinquency Charges . . . . .	37
7.2.4.1	Introduction . . . . .	37
7.2.4.2	Late Fees As Interest . . . . .	37
7.2.4.2.2	Late fee statutes . . . . .	37
7.3	Payments for Third Party Services . . . . .	37
7.3.2	Broker Fees . . . . .	37
7.3.3	Attorney Fees . . . . .	38
7.3.3.2	Attorney Fees upon Default . . . . .	38
7.5	Hidden Interest in “Non-Credit” Transactions . . . . .	38
7.5.2	Sale and Repurchase or Leaseback Agreements: Secured Credit Disguised As an Outright Sale . . . . .	38
7.5.2.1	Equitable Mortgages . . . . .	38
7.5.2.2	Personal Property . . . . .	39
7.5.2.3	Auto Title Loans . . . . .	40
7.5.2.3.1	Overview . . . . .	40
7.5.2.3.3	Auto title “pawns” . . . . .	40

7.5.2.3.5	Auto title loan statutes . . . . .	40
7.5.3	Credit Sales Disguised As Leases: Rent-To-Own. . . . .	41
7.5.3.1	General . . . . .	41
7.5.3.2	Rent-to-Own Contracts Described . . . . .	41
7.5.3.3	Trends in the RTO industry. . . . .	41
7.5.3.4	History of Legal Challenges to RTO contracts . . . . .	41
7.5.3.5	Industry-Friendly RTO Legislation . . . . .	41
7.5.3.6	Legal Challenges to RTO in Light of the Legislative Reality . . . . .	41
7.5.3.6.2	Unconscionability and RTO pricing . . . . .	41
7.5.3.6.5	Repossession tactics . . . . .	42
7.5.4	Tax Refund Schemes . . . . .	42
7.5.4.2	Refund Anticipation Loans (RALs) . . . . .	42
7.5.5	Payday Loans/Check Advancement Loans . . . . .	43
7.5.5.1	Introduction . . . . .	43
7.5.5.2	Payday Lending: Big Business. . . . .	43
7.5.5.3	The Lenders and the Loans Described . . . . .	44
7.5.5.4	Types of Abuses . . . . .	44
7.5.5.5	State Regulation of Payday Lending. . . . .	44
7.5.5.6	Legal Claims . . . . .	45
	<b>7.5.5.7 Bank Partnerships, “Rent-a-Finance” Company, and Other Arrangements . . . . .</b>	<b>45</b>
7.5.6	Bank Bounce Loans . . . . .	47
7.5.8	Income Buyers. . . . .	47
7.5.8.2	Assignment of Government Income . . . . .	47
7.5.8.3	Litigation Finance Companies . . . . .	47

*replacement subsection*

## Chapter 8

### Credit Insurance

8.1	Introduction . . . . .	49
8.2	Economic Incentives; Market Failures . . . . .	49
8.2.3	Excessive Cost of Credit Insurance . . . . .	49
8.2.3.1	Reverse Competition; Market Failures . . . . .	49
8.3	Credit and Credit-Related Insurance Products . . . . .	49
8.3.2	Credit-Related Insurance . . . . .	49
8.3.2.1	Private Mortgage Insurance. . . . .	49
8.3.2.2	Title Insurance . . . . .	51
8.3.2.3	Debt Cancellation and Debt Suspension Agreements. . . . .	52
8.4	Types of Regulation . . . . .	53
8.4.1	Sources of Regulation. . . . .	53
8.4.1.3	Consumer Credit Laws Regulating Credit Insurance . . . . .	53
8.4.1.5	Federal Laws . . . . .	53
8.4.1.5.1	Truth in Lending . . . . .	53
8.4.1.5.2	Bank Holding Company Act and the Gramm-Leach-Bliley Act. . . . .	53
8.5	Common Abuses and Possible Remedies . . . . .	53
8.5.2	Voluntariness . . . . .	53
8.5.2.1	General: The Law and the Practice. . . . .	53
8.5.2.3	Compulsory Insurance and Usury. . . . .	54
8.5.2.3.1	General . . . . .	54
8.5.2.4	Proving Coercion. . . . .	54
8.5.2.7	Antitrust; McCarran-Ferguson Act . . . . .	54
8.5.2.7.2	Effect of the McCarran-Ferguson Act on antitrust challenges to credit insurance practices . . . . .	54
8.5.3	Excessive Cost of Credit Insurance . . . . .	55
8.5.3.1	Calculating Credit Insurance Charges . . . . .	55

8.5.3.1.1	Introduction	55
8.5.3.3	Excess Coverage As Illegal Overcharge	55
8.5.3.3.2	Amount of coverage	55
8.5.4	Insurance Packing	55
8.5.4.1	Overview	55
8.5.4.4	Unnecessary Collateral, Duplicative Insurance	55
8.5.5	Post-Claim Underwriting, Ineligibility	55
8.5.5.1	Challenging the Sale of Insurance to Borrowers Unlikely to Benefit	55
8.5.5.3	Collecting the Benefits of the Insurance Bargain	55
8.5.5.3.3	Theories of recovery against the creditor	55
8.6	Rebates	56
8.7	Remedies	56
8.7.4	Unfair and Deceptive Acts and Practices	56
8.7.5	Unconscionability	56

Chapter 9

The Statute: Determining the Applicable Statute and Principles of Statutory Construction

9.2	Which Usury Statute Applies?	57
9.2.1	Nature of Distinctions Among Statutes; General Principles of Coverage	57
9.2.1.6	Substance Not Form Dictates Nature of Transaction	57
9.2.2	Is the Loan for Consumer or Business Purposes?	57
9.2.2.1	Introduction	57
9.2.2.5	Intermediaries; Refinancing	57
9.2.3	Distinctions Based on the Type of Credit	57
9.2.3.3	Loans v. Credit Sales; Body-Dragging	57
9.2.3.4	Land Installment Contracts	57
9.2.4	Distinctions Based on the Type of Creditor	58
9.2.4.2	Frequency Standard, or “In the Business” of Extending Credit	58
9.2.4.5	Non-Depository Creditors	58
9.2.5	Distinctions Based on Loan Size; Loan-Splitting and Loan-Packing To Evade Regulation	58
9.2.5.3	Loan Packing	58
9.2.7	Criminal Usury Statutes; Unconscionability Standards to Regulate the Cost of Credit	58
9.2.9	Choice of Laws	58
9.2.9.5	Contractual Choice of Law Clauses	58
9.2.10	Formal Requirements for Electronic Credit Transactions and the Interplay Between State and Federal Law	59
9.2.10.2	Overview of E-Sign and UETA	59
9.2.10.8	Validity and Enforceability of Electronic Contracts and Signatures Under E-Sign and UETA	59
9.3	Statutory Construction	59
9.3.1	Applying General Rules of Interpretation	59
9.3.1.1	Broad vs. Narrow Construction of Usury Statutes: Invoking the History and Purpose of Usury Statutes	59

Chapter 10

The Trial: Jurisdiction; The Right to a Jury Trial; Elements of a Prima Facie Case; Creditor Defenses and Borrowers’ Remedies

10.2	Long-Arm Jurisdiction over Out-of-State Lenders	61
10.2.1	Constitutional and Statutory Standards	61
10.2.2	Jurisdiction over Internet-Based Lenders	61

*replacement subsection*

10.2.3	Personal Jurisdiction over Securitization Trusts . . . . .	61
10.2.3.1	Overview . . . . .	61
10.2.3.2	General Jurisdiction . . . . .	62
10.2.3.3	Specific Jurisdiction When Claim Relates to Property in Forum State . . . . .	62
10.2.3.4	Specific Jurisdiction When Unsecured Debts Have Been Assigned to a Trust . . . . .	62
10.3	The Enforceability of Arbitration Agreements . . . . .	63
	<b>10.3.2 That Contract Is Void Ab Initio Is No Longer Basis to Challenge in Court an Arbitration Clause . . . . .</b>	<b>63</b>
10.3.3	Where a Contract Was Never Finalized: “Yo-Yo” and Other Condition Precedent Contracts. . . . .	63
10.3.5	Where the Parties to a Dispute Are Not Parties to the Arbitration Agreement. . . . .	63
10.3.5.1	Are Co-signers and Other Non-signatories Bound by Arbitration Agreement? . . . . .	63
10.3.5.2	Can a Party Not Named in the Arbitration Agreement Force the Consumer to Arbitrate Claims? . . . . .	64
10.3.6	Special Rules for Insurance Transactions . . . . .	64
10.3.6.1	General . . . . .	64
10.3.6.3	Does State Insurance Law Restrict the Enforceability of Arbitration Agreements? . . . . .	64
10.5	Elements of a Prima Facie Case . . . . .	65
10.5.1	General. . . . .	65
10.5.1.1	Overview of Elements . . . . .	65
10.5.1.2	Burden of Proof. . . . .	65
10.5.1.3	Contract Construction. . . . .	65
10.5.2	Loan or Forbearance . . . . .	65
10.5.2.1	Introduction . . . . .	65
10.5.2.2	Credit Sales and the Time-Price Doctrine . . . . .	65
10.5.2.2.1	Time-price exception to usury laws. . . . .	65
10.5.2.2.2	The erosion of the time-price doctrine: direct regulation of consumer credit sales and RISAs . . . . .	66
10.5.2.3	Forbearance and Detention . . . . .	66
10.5.3	Absolute Obligation to Repay Principal . . . . .	66
10.5.4	Interest Overcharge. . . . .	67
10.5.4.3	“Interest” or Regulated Charge . . . . .	67
10.5.4.4	Proving the Charge Is Excessive . . . . .	67
10.5.5	Intent . . . . .	67
10.5.5.2	Usury Apparent on Face of Contract; Bona Fide Error . . . . .	67
10.5.5.3	Usury Not Apparent on Face of Contract. . . . .	67
10.5.5.4	Inference of Intent . . . . .	67
10.6	Creditor Defenses . . . . .	68
10.6.1	Defenses of Assignees and Holders in Due Course . . . . .	68
10.6.1.1	Overview of General UCC Rules and Consumer Exceptions. . . . .	68
10.6.1.2	Consumer Exceptions to the Holder-in-Due-Course Doctrine: State Limitations, the FTC Holder Rule, and High-Cost Mortgages . . . . .	68
10.6.1.2.2	State laws and the FTC Rule . . . . .	68
10.6.1.2.3	Assignee liability for high-cost mortgages . . . . .	68
10.6.1.3	UCC Principles . . . . .	69
10.6.1.3.1	Basic prerequisites . . . . .	69
10.6.1.3.2	Is the assignee a holder? . . . . .	69
10.6.1.3.3	Is there a negotiable instrument? . . . . .	69

	10.6.1.3.4 Did the holder acquire the instrument in good faith, for value, and without notice? . . . . .	69
	10.6.1.3.8 Showing that a holder did not take usurious note in good faith and without notice of defenses . . . . .	69
<i>new subsection</i>	<b>10.6.1.3.11 MERS: problems posed by securitization for holder-in-due-course status.</b> . . . . .	70
	10.6.3 Standing to Assert Usury . . . . .	72
	10.6.4 Estoppel and Waiver . . . . .	72
	10.6.4.2 Borrower's Knowledge . . . . .	72
	10.6.4.4 Waiver . . . . .	73
	10.6.5 Voluntary Payment Defense . . . . .	73
	10.6.6 Res Judicata. . . . .	74
	10.6.7 Statutes of Limitations. . . . .	74
	10.6.8 De Minimis Violations . . . . .	74
	10.6.9 Industry Custom and Usage . . . . .	74
	10.6.10 Usury Saving Clauses . . . . .	74
<i>new subsection</i>	<b>10.6.12 Administrative Remedies</b> . . . . .	74
	10.7 Special Defenses of Federal Receivers: <i>D'Oench</i> and Related Doctrines . . . . .	75
	10.7.2 Does § 1823(e) Preempt <i>D'Oench</i> and the Federal Holder-in-Due-Course Doctrine? . . . . .	75
	10.7.3 <i>D'Oench</i> . . . . .	75
	10.7.3.1 Overview of the Doctrine . . . . .	75
	10.7.4 12 U.S.C. § 1823(e) . . . . .	75
	10.7.4.4 Requirement That the Agreement Tend to Diminish or Defeat FDIC's Interest in an Asset . . . . .	75
	10.7.4.6 Differences Between § 1823(e) and <i>D'Oench</i> . . . . .	75
	10.8 Remedies for Illegal Overcharges; Traditional Usury Remedies . . . . .	75
	10.8.1 Introduction . . . . .	75
	10.8.2 State Statutory Remedies . . . . .	76
	10.8.2.1 Overview; Implying a Remedy When Statute Is Silent. . . . .	76
	10.8.2.2 Forfeiture of Creditor's Right to Recover Principal, Interest, Other Illegal Overcharges, or to Collect Attorney Fees . . . . .	76
	10.8.2.2.1 Statutes that void the contract interest or other charges. . . . .	76
	10.8.2.2.2 Statutes that void the entire obligation. . . . .	76
	10.8.3 Equitable Remedies. . . . .	76
	10.8.4 Consumer Remedies for Creditor's Failure to Obtain a License . . . . .	76
	10.8.4.1 Unlicensed Lending . . . . .	76
	10.8.5 Federal Remedies . . . . .	77
	10.8.5.3 RICO. . . . .	77
	10.8.5.3.3 Alleging a RICO claim based on the collection of an unlawful debt. . . . .	77
	10.8.5.3.5 RICO and creditor overcharges. . . . .	77

Chapter 11

The Credit Marketplace and a Sampling of Abuses *Du Jour*

11.1 Market Forces—Market Rationales—Market Failures . . . . .	79
11.2 Barriers: Information, Understanding, Choice, and Steering . . . . .	79
11.3 High Rate and High Risk: Myth or Fact? . . . . .	80
11.4 Fuel for the Subprime Market: Securitization. . . . .	82
11.5 Home-Secured Credit. . . . .	84
11.5.2 Home Improvement Credit. . . . .	84
11.5.3 Refinancing/Debt Consolidation . . . . .	84
11.5.4 Loan Brokers/Mortgage Brokers . . . . .	85
11.5.4.1 The Role of the Loan Broker. . . . .	85
11.5.4.2 Legal Status of Brokers . . . . .	85

*new subsection*

11.5.4.3	Range of Legal Claims Arising from Broker Involvement . . . . .	86
11.5.5	Post-consummation Profiteering . . . . .	87
11.5.6	Property Flipping and Appraisal Fraud . . . . .	88
<b>11.5.7</b>	<b>Foreclosure Rescue Scams . . . . .</b>	<b>92</b>
<b>11.5.7.1</b>	<b>Introduction . . . . .</b>	<b>92</b>
<b>11.5.7.2</b>	<b>Phantom Help . . . . .</b>	<b>92</b>
<b>11.5.7.3</b>	<b>Deed Theft . . . . .</b>	<b>93</b>
<b>11.5.7.3.1</b>	<b>Bait and switch . . . . .</b>	<b>93</b>
<b>11.5.7.3.2</b>	<b>Bailouts . . . . .</b>	<b>93</b>
11.6	Used Car Financing . . . . .	96
11.6.2	Lender-Imposed Financing Costs: Discounts and Acquisition Fees . . . . .	96
11.6.2.1	Burying Credit Costs in Inflated Cash Prices . . . . .	96
11.6.2.2	Related Problems: Loan Packing or Shoddy Cars . . . . .	96
11.6.3	Negative Equity: Driving “Upside Down” . . . . .	96
11.6.5	Yo-Yo Deals, a.k.a. Spot Delivery . . . . .	97
11.6.6	Yield Spread Premiums . . . . .	97
11.6.7	What’s in a Name? Who’s Who in a Vehicle Retail Installment Sale? . . . . .	97
11.7	Credit Cards: Background, Abuses, and State Law Claims . . . . .	97
11.7.1	The Rise of the Credit Card . . . . .	97
11.7.1.1	The Massive Credit Card Debt Burden . . . . .	97
11.7.1.2	Escalating Debt Loads Caused by Industry Practices . . . . .	98
11.7.2.2	Junk Fees and Fee Income . . . . .	98
11.7.2.2.1	Introduction . . . . .	98
11.7.2.2.3	Over-limit fees . . . . .	98
11.7.2.2.4	Balance transfer fees . . . . .	99
11.7.2.2.5	Currency conversion fees . . . . .	99
11.7.2.3	Other Abuses . . . . .	99
11.7.2.3.1	Penalty rates and universal default . . . . .	99
11.7.2.3.3	Late payment practices and posting cut-off policies . . . . .	99
11.7.2.3.4	Tiny minimum monthly payments . . . . .	100
11.7.2.3.7	Payment allocation order . . . . .	100
11.7.2.3.8	Debt collection abuses . . . . .	100
11.7.2.3.9	Use of mandatory arbitration clauses . . . . .	102
11.7.2.4	Unilateral Change in Terms Provisions . . . . .	102
<b>11.7.2.5</b>	<b>Subprime and Secured Credit Cards . . . . .</b>	<b>103</b>
11.7.3	Challenging Credit Card Abuse . . . . .	105
11.7.3.1	Breach of Contract . . . . .	105
11.7.3.2	State UDAP Statutes . . . . .	105
11.7.3.3	Other Claims . . . . .	105

*new subsection*

**Chapter 12**                      **Beyond Usury: Statutory and Common Law Challenges to Overreaching Credit**

12.2	Federal and State Statutes Relating to Real Estate Secured Credit . . . . .	107
12.2.1	The Real Estate Settlement Procedures Act (RESPA) . . . . .	107
12.2.1.2	Cost Disclosure Provisions . . . . .	107
12.2.1.3	Servicer Obligations . . . . .	107
12.2.1.4	Escrow Limitations . . . . .	108
12.2.1.5	Prohibition Against Kickbacks and Referral Fees . . . . .	108
12.2.1.5.1	Introduction . . . . .	108
12.2.1.5.2	Lender-paid broker fees and pre-HUD policy statement court decisions . . . . .	108
12.2.1.5.5	HUD’s second policy statement and its domino effect upon the courts . . . . .	108

	12.2.1.5.6 Broker kickback practice issues . . . . .	108
	12.2.1.6 Excessive, Unearned, and Duplicative Fees . . . . .	109
	12.2.1.8 Preemption . . . . .	110
	12.2.1.10 Practice Issues . . . . .	110
	12.2.2 Home Ownership and Equity Protection Act of 1994 . . . . .	110
	12.2.2.1 Overview and Remedies . . . . .	110
	12.2.3 State High-Cost Mortgage Statutes . . . . .	111
	12.4 Federal and State Credit Repair Statutes . . . . .	112
	12.4.2 Federal Credit Repair Organizations Act . . . . .	112
	12.4.2.1 Coverage . . . . .	112
	12.4.3 State Credit Repair Laws . . . . .	112
	12.4.3.1 Coverage . . . . .	112
	12.5 Unfair and Deceptive Acts and Practices (UDAP) Statutes . . . . .	112
	12.6 RICO As a Remedy for Overreaching and Fraud . . . . .	113
	12.7 Unconscionability . . . . .	113
	12.7.1 Overview . . . . .	113
	12.7.2 Unconscionability As Outer Limit on Price of Credit . . . . .	114
	12.7.3 Improvident Lending As Unconscionable . . . . .	114
	12.7.4 Challenging Terms Other Than Interest Rate as Unconscionable . . . . .	114
	12.7.5 Remedy for Unconscionability . . . . .	115
	12.8 Duty of Good Faith and Fair Dealing . . . . .	115
	12.9 Fiduciary or Quasi-Fiduciary Duty . . . . .	116
	12.9.3 Creditors' Fiduciary or Quasi-Fiduciary Role . . . . .	116
	12.9.4 Intentional Interference with a Contractual Relationship . . . . .	116
	12.10 Fraud and Misrepresentation . . . . .	116
	12.10.1 Parties Liable . . . . .	116
	12.10.2 Substantive Conduct Subject to Fraud and Misrepresentation Claims . . . . .	117
	12.10.2.3 Fraud in Home Sales and Refinancing . . . . .	117
	12.10.2.5 Falsification and Forgery . . . . .	117
	12.10.2.7 Effect of Credit Documents That Contradict Oral Misrepresentations . . . . .	118
	12.11 Other Lender Liability Theories . . . . .	119
	12.11.2 Estoppel . . . . .	119
	<b>12.11.3 Unjust Enrichment . . . . .</b>	<b>119</b>
	<b>12.11.4 Conversion . . . . .</b>	<b>119</b>
	12.12 Liability Chart: Lender and Assignee Liability . . . . .	120
Appendix A	State Lending Statutes . . . . .	121
Appendix B	State Mortgage Broker Laws . . . . .	125
Appendix C	National Bank Act	
	C.2 Selected Regulations . . . . .	127
	C.3 OCC Interpretive and Advisory Letters . . . . .	128
Appendix D	Home Owners' Loan Act	
	D.2 Selected Regulations . . . . .	131
Appendix E	Federal Credit Union Act	
	E.3 NCUA Interpretive Letters . . . . .	133

*new section*

	<b>E.4 Formal Statements of Interpretation and Policy</b> . . . . .	133
Appendix F	Federal Deposit Insurance Act	
	F.3 FDIC Letters, Opinions, and Advisories. . . . .	135
Appendix L	Sample Pleadings, Discovery, and Expert Witness Evidence	
	L.6 RESPA Pleadings. . . . .	137
	Index. . . . .	139
	Quick Reference to Consumer Credit and Sales Legal Practice Series. . .	179
	About the Companion CD-Rom . . . . .	193