

H.R. 3915: An Empty Promise
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Good Things. For the first time in federal legislation, H.R. 3915 seeks to address some of the most serious abuses in the mortgage market, including:

- racial steering;
- making loans homeowners cannot afford to repay;
- prepayment penalties which lock borrowers into high cost loans;
- binding mandatory arbitration clauses which deprive homeowners of access to court; and
- lowering the triggers for the Homeownership and Equity Protection Act, which means that more high-cost loans are subject to that Act's protections.

The heart of the bill is a requirement for lenders to evaluate a borrower's ability to repay the loan and document income, as well as to ensure that a loan used to refinance a home loan has a net tangible benefit—the core abuses in today's mortgage market.

No Meaningful Remedies Plus Preemption. Unfortunately, the remedy and preemption provisions in Title II of the bill render the promise of these key protections an illusion. The bill only permits very limited penalties against those that hold the loans (the “holders”) – who are the very parties that funded these bad loans and the only ones in a position to fix them. There are multiple hoops through which the homeowner has to jump to obtain *any* redress for violations of these new federal protections. And the remedies for these very violations generally will be wholly inadequate to enable homeowners to stay in their homes.

Worse, the bill contains a broad preemption provision that eliminates homeowners' ability to raise state claims against holders of the loans. The holder or assignee is the only relevant player when a homeowner is facing foreclosure or a problem with a mortgage loan, because originators sell almost all mortgage loans shortly after they are made. This sweeping preemption provision would prevent homeowners from asserting any other claims for ability to repay or net tangible benefit, including state common law and statutory claims that are at the heart of most current, meaningful litigation and foreclosure defense actions on behalf of consumers. **State claims preempted by the bill include fraud, unfairness, contract claims, civil rights claims, deception, unconscionability and UCC claims.** In place of these vital claims, the bill allows only limited remedies, primarily against “securitizers”—the firms who arrange the Wall Street deals—rather than against the trusts that actually hold the loans.

Even “securitizers” can shield themselves from any liability simply by engaging in due diligence on a *percentage* of loans to determine that they fall within a safe harbor. They also can completely immunize themselves without changing their business model by curing the small number of loans for homeowners who actually complain.

These safe harbors give complete protection to many loans, such as payment option ARMs extended to prime borrowers, which have caused considerable home loss across the nation. The bill also provides a very narrow remedy for the steering provision—which in combination with the preemption of state civil rights claims results in a significant loss of protections under the law.

The proponents of the bill claim that it will prevent bad loans from being made, so that remedies for consumers will be unnecessary. However, as long as the absence of meaningful remedies enables the lending industry to profit from abusive loans, the market will not change.

In order for the bill's substantive protections to make a difference, the bill must be amended to:

Provide a floor and not a ceiling. State common law and statutory claims at the heart of protecting borrowers from unaffordable loans and other related abuses must remain viable.

Provide real remedies for homeowners with unaffordable loans . Homeowners with abusive loans that violate the bill's provisions should be able to bring a claim against the party who holds their loan and can fix it—the holder—and should always have a right to defend themselves against foreclosure. They also should have the right to an alternative remedy where they are not able to tender monies due in order to obtain rescission. The steering remedy also should be amended to provide a real incentive to stop this abuse.