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COMMENTARY

**DO CITIES HAVE STANDING? REDRESSING THE  
EXTERNALITIES OF PREDATORY LENDING**

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**Abstract**

The Connecticut Law Review originally published this article in its February 2006 edition. Please cite this article as 38 Ct L Rev 355 (Feb 2006). This article contains page numbers from that edition so the Connecticut Law Review may be properly cited, i.e., [355].

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## DO CITIES HAVE STANDING? REDRESSING THE EXTERNALITIES OF PREDATORY LENDING

By  
Kathleen C. Engel \*

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### I. INTRODUCTION

Predatory lenders penetrate communities and, like polluters, leave distressed properties and desperate people in their wake. The task of cleaning up falls to cities,<sup>1</sup> yet predatory lending reduces the resources available for this clean up. Declining property values resulting from predatory lending mean reduced tax revenues just as abandoned buildings lead to increased demand for fire and police protection. City budgets are further strained when victims of predatory lending turn to cities for relief programs and protection from abusive lenders. In the language of economics, predatory lending imposes negative externalities on cities.

Lawyers across the country are pursuing claims on behalf of victims of predatory lending. Legislators are passing new laws to extend protection to borrowers, and researchers are exploring the causes of and cures for predatory lending. Yet little attention has been paid to the plight of cities.

In this Article, I analyze whether cities have standing to recover damages for the externalities that predatory lenders impose on them and whether cities have standing as *parens patriae* to protect the interests of their residents. Following this introduction, in Part II, I describe the impact of predatory lending on municipalities. In Part III, I discuss the law governing municipal standing and in Part IV, I analyze municipal standing to sue predatory lenders. In Part V, my focus turns to the particular claims cities could bring against predatory lenders. I conclude by arguing that broad grants of standing to cities to pursue claims against predatory lenders are necessary to enable [356] cities to protect residents from lender wrongdoing, to recover damages for the injuries predatory lenders impose on cities, and to force abusive lenders to internalize the externalities of their lending practices.<sup>2</sup>

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<sup>1</sup> Throughout this Article, I use the terms “cities” and “municipalities” interchangeably.

<sup>2</sup> Suits by aggrieved borrowers provide the most direct approach to holding predatory lenders responsible for their wrongdoing. However, borrowers typically do not have the financial or

## II. THE IMPACT OF PREDATORY LENDING ON CITIES

Predatory lenders<sup>3</sup> market their products to people who have little or no experience with mortgage loans and who do not have sufficient skills<sup>4</sup> to untangle the maze of contract terms and engage in meaningful assessments of their options.<sup>5</sup> Oftentimes, the borrowers are people of color<sup>6</sup> and of low [357] and

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emotional resources to bring lawsuits. Often they are on the verge of losing their homes or, in the worst cases, are among the homeless. Without the threat of litigation, predatory lenders have every incentive to continue to peddle their abusive loans, and the burden of their misdeeds falls on borrowers, neighbors and municipalities.

<sup>3</sup> I use this term to include all the various actors who play roles in originating predatory loans, including mortgage brokers and lenders.

There is no uniform definition of predatory lending. In an earlier article, Professor Patricia McCoy and I defined predatory lending as:

[A] syndrome of abusive loan terms or practices that involve one or more of the following five problems:

- (1) loans structured to result in seriously disproportionate net harm to borrowers, e.g., loans that contain unaffordable balloon payments,
- (2) harmful rent seeking, e.g., prepaid credit life insurance,
- (3) loans involving fraud or deceptive practices,
- (4) other forms of lack of transparency in loans that are not actionable as fraud, and
- (5) loans that require borrowers to waive meaningful legal redress.

Most, if not all, predatory loans combine two or more of these problems. Similarly, some abusive terms or practices fall into more than one category. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260-61 (2002).

<sup>4</sup> See Paul S. Calem et al., *Neighborhood Patterns of Subprime Lending: Evidence from Disparate Cities*, 15 HOUSING POL'Y DEBATE 603, 618 (2004) (finding that people with lower educational achievement are more likely than their more educated counterparts to choose subprime loans even when controlling for risk). Predatory loans occur almost exclusively in the subprime home mortgage market although not all subprime loans are predatory. Engel & McCoy, *supra* note 3, at 1261.

<sup>5</sup> See generally Engel & McCoy, *supra* note 3, at 1280-86 (discussing the marketing of predatory loans to unsophisticated borrowers).

<sup>6</sup> Calem et al., *supra* note 4, at 603 (noting that even when controlling for risk, subprime loans are disproportionately made to people of color); see also JIM CAMPEN, MASS. CMTY. & BANKING COUNCIL, BORROWING TROUBLE? V: SUBPRIME MORTGAGE LENDING IN GREATER BOSTON, 2000-2003 5 (Jan. 2005), <http://www.masscommunityandbanking.org/PDFs/BorrowingTrouble5.pdf> (finding that African-Americans and Latinos are more likely than whites at the same income levels to have subprime loans); RICHARD RHEY & ARI POSNER, SOUTHWEST FAIR HOUS. COUNCIL, THE AMERICAN DREAM LOST: FORECLOSURES IN PIMA COUNTY, ARIZONA 12 (Sept. 20, 2004), <http://www.swfhc.com/PimaCountyForeclosures.pdf> (finding that 34.7% of homes in foreclosure in 2002 in Pima County, Arizona involved Hispanic borrowers although only 11.9% loans in 2002 were made to Hispanic people); Elvin K. Wyly et al., *American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States* 16-17, <http://www.geog.ubc.ca/~ewyly/Research/gab05.pdf> (last visited Nov. 4, 2005) (finding that African-Americans are twice as likely as whites to have subprime loans even when controlling for income and debt).

moderate incomes.<sup>7</sup> The lenders exploit their lack of sophistication and lure them into loans they cannot afford through promises of future refinancing, misrepresentation of loan terms, and various bait and switch tactics.<sup>8</sup>

Ultimately, those borrowers with predatory loans who cannot meet their repayment obligations lose their homes to foreclosure.<sup>9</sup> In fact, many researchers are now attributing much of the recent and dramatic rise in foreclosures in the United States<sup>10</sup> to predatory lending.<sup>11</sup> Other borrowers, [358] who are struggling

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Although subprime loans are not necessarily abusive, there is compelling evidence that the great bulk of subprime loans contain predatory terms. *See, e.g.*, DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., RISKY BUSINESS--AN ECONOMETRIC ANALYSIS OF THE RELATIONSHIP BETWEEN SUBPRIME LENDING AND NEIGHBORHOOD FORECLOSURES 3 (Mar. 2004), [http:// woodstockinst.org/document/riskybusiness.pdf](http://woodstockinst.org/document/riskybusiness.pdf) (discussing studies of the incidence of predatory terms in subprime loans).

<sup>7</sup> For example, a study in the Atlanta area found a 440% rise in subprime lending in neighborhoods with incomes less than half the median for the metropolitan area between 1994 and 1998. Low-income tracts, experienced a 238% increase in subprime lending during the same time period. DEBBIE GRUENSTEIN & CHRISTOPHER E. HERBERT, ABT ASSOCS. INC., ANALYZING TRENDS IN SUBPRIME ORIGINATIONS AND FORECLOSURES: A CASE STUDY OF THE ATLANTA METRO AREA 6 (Feb. 2000) (on file with author).

<sup>8</sup> Engel & McCoy, *supra* note 3, at 1267-68.

<sup>9</sup> Other borrowers give up necessities such as health insurance, cars, heat, or childcare to avoid losing their homes.

<sup>10</sup> *See, e.g.*, ACORN FAIR HOUS., PREDATORY LENDING IN SOUTH CENTRAL PENNSYLVANIA: A REVIEW OF RISING FORECLOSURE FILINGS AND THE RELATIONSHIP TO PREDATORY LENDING 4 (Dec. 3, 2003), [http://www.acorn.org/fileadmin/Predatory\\_Lending/FINAL\\_REPORT.pdf](http://www.acorn.org/fileadmin/Predatory_Lending/FINAL_REPORT.pdf) (documenting a 186% increase in foreclosure filings in south central Pennsylvania between 1997 and 2002); STEVEN C. BOURASSA, URBAN STUDIES INST., PREDATORY LENDING IN JEFFERSON COUNTY: A REPORT TO THE LOUISVILLE URBAN LEAGUE 3 (Dec. 2003), <http://www.lul.org/foreclosed.htm> (citing a 288% increase in foreclosures in Kentucky between 1995 and 2002); AMALIA NIETO GOMEZ ET AL., NAT'L TRAINING & INFO. CTR., PREYING ON NEIGHBORHOODS: SUBPRIME MORTGAGE LENDING AND CHICAGOLAND FORECLOSURE 14 (Sept. 21, 1999), <http://www.ntic-us.org/preying/preying.html> (identifying a doubling of foreclosures in the Chicago area between 1993 and 1998); THE REINVESTMENT FUND, A STUDY OF MORTGAGE FORECLOSURES IN MONROE COUNTY AND THE COMMONWEALTH'S RESPONSE 26 (Aug. 3, 2004), <http://www.banking.state.pa.us/banking> (reporting a 242% increase in the number of foreclosures in Monroe County, Pennsylvania from 1995 to 2003); ZACH SCHILLER ET AL., POLICY MATTERS OHIO, HOME INSECURITY 2004: FORECLOSURE GROWTH IN OHIO 3 (Aug. 2004), [http:// www.policymattersohio.org/pdf/Home\\_Insecurity\\_2004.pdf](http://www.policymattersohio.org/pdf/Home_Insecurity_2004.pdf) (noting a doubling of foreclosure rates in Ohio between 1998 and 2003).

<sup>11</sup> *See, e.g.*, BOURASSA, *supra* note 10, at 9 (using select indicators to identify loans as predatory and finding that one-third of mortgage foreclosures in Jefferson County, Kentucky contained one or more of the indicators of predatory lending); ROBERT G. QUERCIA ET AL., CTR. FOR CMTY. CAPITALISM, THE IMPACT OF PREDATORY LOAN TERMS ON SUBPRIME FORECLOSURES: THE SPECIAL CASE OF PREPAYMENT PENALTIES AND BALLOON PAYMENTS 27 (Jan. 25, 2005), <http://www.kenanflagler.unc.edu/assets/documents/foreclosurepaper.pdf> (finding that "extended prepayment penalties increase the odds of foreclosure by an additional 20 percent .... [A] balloon-payment requirement increases the incremental odds of foreclosure by 50 percent"); THE REINVESTMENT FUND, PREDATORY LENDING: AN

to meet their loan obligations, may neglect needed home repairs because their disposable income is going to service their mortgage debt. Nearby homeowners, watching property values decline<sup>12</sup> and fearing further neighborhood decay, move

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APPROACH TO IDENTIFY AND UNDERSTAND PREDATORY LENDING 53, <http://www.trfund.com/policy/FordForWeb.pdf> (last visited Nov. 4, 2005) (finding that in some Philadelphia area neighborhoods, up to twenty-one percent of loan refinance transactions contained evidence of predatory lending); RICHARD D. STOCK, CTR. FOR BUS. & ECON. RESEARCH, PREDATION IN THE SUB-PRIME LENDING MARKET: MONTGOMERY COUNTY 7 (Oct. 25, 2001), <http://www.mvfairhousing.com/cber/pdf/Report.pdf> (reviewing a sample of foreclosed loans made by subprime lenders in Montgomery County, Ohio, between 1994 and 2000 and finding that up to seventy-two percent of the loans contained predatory characteristics); LYNNE DEARBORN, MORTGAGE FORECLOSURES AND PREDATORY LENDING IN ST. CLAIR COUNTY, ILLINOIS 1996-2000, 21 (July 2003) (on file with author) (using eight loan features as proxies for predatory lending and concluding that over half of the sampled foreclosure complaints in St. Clair County, Illinois had “characteristics which suggest predatory lending practices were employed”).

Other studies have found that subprime loans represent a disproportionate share of foreclosure filings. Dan Immergluck & Geoff Smith, *Measuring the Effect of Subprime Lending on Neighborhood Foreclosures: Evidence from Chicago*, 40 URB. AFF. REV. 362, 380 (2005) (finding that subprime loans were twenty-eight times more likely than prime loans to result in foreclosure); ACORN, *supra* note 10 (documenting a connection between subprime lending and foreclosures); PAUL BELLAMY, OHIO CMTY. REINVESTMENT PROJECT, THE EXPANDING ROLE OF SUBPRIME LENDING IN OHIO'S BURGEONING FORECLOSURE PROBLEM 10, <http://www.cohhio.org/projects/ocrp/SubprimeLendingReport.pdf> (last visited Nov. 4, 2005) (same); GOMEZ ET AL., *supra* note 10, at 4 (noting a connection between subprime lending and foreclosures); GRUENSTEIN & HERBERT, *supra* note 7, at iii (finding that subprime foreclosures increased by 232% in the Atlanta area between 1996 and 1999 even though overall foreclosure rates were on the decline); DEBBIE GRUENSTEIN & CHRISTOPHER E. HERBERT, ABT ASSOCS. INC., ANALYZING TRENDS IN SUBPRIME ORIGINATIONS AND FORECLOSURES: A CASE STUDY OF THE BOSTON METRO AREA (Sept. 2000), [http://www.abtassociates.com/reports/2000804000192\\_87267.pdf](http://www.abtassociates.com/reports/2000804000192_87267.pdf) (noting a connection between subprime lending and foreclosures); IMMERGLUCK & SMITH, *supra* note 6, at 1 (same); PA. DEP'T OF BANKING, LOSING THE AMERICAN DREAM: A REPORT ON RESIDENTIAL MORTGAGE FORECLOSURES AND ABUSIVE LENDING PRACTICES IN PENNSYLVANIA 25 (Mar. 15, 2005), [http://www.banking.state.pa.us/banking/lib/banking/robert/statewideforeclosure/statewide\\_forclosure\\_report.pdf](http://www.banking.state.pa.us/banking/lib/banking/robert/statewideforeclosure/statewide_forclosure_report.pdf) (noting that “60-75 percent of all sampled loans in foreclosure were originated by subprime lenders”); QUERCIA ET AL., *supra*, at 21 (finding that 20% of subprime loans foreclose within three years of origination); RHEY & POSNER, *supra* note 6, at 11 (finding that 67% of loans in foreclosure in 2002 in Pima County, Arizona were subprime); KEN ZIMMERMAN ET AL., N.J. INST. FOR SOCIAL JUSTICE, PREDATORY LENDING IN NEW JERSEY: THE RISING THREAT TO LOW-INCOME HOMEOWNERS (Feb. 2002), [http://www.njisj.org/reports/predatory\\_lending.html](http://www.njisj.org/reports/predatory_lending.html) (identifying a connection between subprime lending and foreclosures).

<sup>12</sup> See THE HOUSING COUNCIL, RESIDENTIAL FORECLOSURE IN ROCHESTER, NEW YORK 10 (2003) (on file with author) (finding that “[h]omes sold near foreclosed properties also experience decreases in market price”); see also DAN IMMERGLUCK & GEOFF SMITH, THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUESSS 9 (June 2005) (on file with author) (estimating that homes in low- and moderate-income neighborhoods in Chicago experience between a 1.44 and 1.8 percent decline in value per foreclosed home within one-eighth of a mile); Kathe Newman & Elvin K. Wyly, *Geographies of Mortgage Market Segmentation: The Case of Essex County*,

to more stable communities. Homes that were previously owner-occupied become rental housing or, worse yet, become vacant,<sup>13</sup> both of which lead to greater demands for [359] police and fire protection<sup>14</sup> and city sanitation services.<sup>15</sup> The

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*New Jersey*, 19 HOUSING STUD. 53, 54 (Jan. 2004) (arguing that “[t]he expansion of predatory [lending] practices threatens the long-overdue gains in home ownership in urban and minority communities, as mounting foreclosures sap individual equity and neighbourhood vitality”); Robert A. Simons et al., *The Value Impact of New Residential Construction and Neighborhood Disinvestment on Residential Sales Price*, 15 J. REAL EST. RESS. 147, 158-59 (1998) (finding that property tax delinquencies in a neighborhood have a negative impact on housing prices in the neighborhood--for each one percent increase in tax delinquencies, there was a corresponding sales price decrease of \$778 per home).

<sup>13</sup> See, e.g., THE HOUSING COUNCIL, *supra* note 12, at 26 (identifying ninety-two homes that had gone through the foreclosure process and finding that half were still vacant a year later). Some vacant property is actually abandoned property. For different reasons, cities and lienholders may elect not to foreclose when borrowers default and move out of their homes. For cities that are strapped for cash, the short-term costs of foreclosing on tax liens may be prohibitive even if the long-term gains exceed the foreclosure costs. For lienholders, the outstanding tax liability when coupled with the possibility of incurring fines for housing code violations or liability in nuisance claims may exceed the value of the property; this is particularly true if the property is unoccupied and in serious disrepair. Geoff Dutton, *Lenders Play the Foreclosure Game*, Columbus Dispatch, Nov. 7, 2005 (“Lenders typically don’t foreclose on a vacant house if they decide it is a bigger liability than asset. The legal responsibility then becomes even murkier, with the owner and the lender both walking away.”). It also may be the case that a non-performing property is a more valuable “book” asset than a foreclosed-upon property. See Janet Kidd Stewart, *SEC Faults Household Policies on Bad Loans: Cease-and-desist Order to Lender Part of Settlement*, CHI. TRIB., March 20, 2003, at C1, available at LEXIS, News Library, ALLNWS File (discussing how one lender restructured non-performing loans on its books to give the impression that the loans were not in default).

<sup>14</sup> See Gregory D. Squires & Charis E. Kubrin, *Privileged Places: Race, Uneven Development and the Geography of Opportunity in Urban America*, 42 URB. STUD. 47, 54 (2005) (noting a link between increases in the number of rental units and increased crime rates); Edward M. Gramlich, Governor, Fed. Reserve Bd., Remarks at the Financial Services Roundtable Annual Housing Policy Meeting (May 21, 2004), <http://www.federalreserve.gov/boarddocs/speeches/2004/20040521/default.htm> (discussing the link between subprime lending and foreclosure rates and stating that “[t]here is ... evidence of serious neighborhood blight if foreclosure rates, and abandoned properties, proliferate in a given city area”); see also ALAN MALLACH, BRINGING BUILDINGS BACK: TURNING ABANDONED PROPERTIES INTO COMMUNITY ASSETS 7-8 (May 2005) (on file with author) (citing an array of problems that arise in areas with abandoned property, including declining property values and increases in the amount of crime, the number of fires, public health problems, costs to cities to clean up deteriorated neighborhoods, and social isolation among residents); Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime* 15-16 (Jan. 31, 2005) (unpublished manuscript, on file with author) (finding that increases in neighborhood foreclosure rates result in higher rates of violent crime); WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY’S MORTGAGE FORECLOSURE BOOM 6 (May 11, 2005), <http://www.hponline.org/press/Apgar-Duda%20Study%20Final.pdf> (stating that “[f]or municipalities, foreclosures trigger significant direct expenditures for increased policing and fire suppression”).

<sup>15</sup> APGAR & DUDA, *supra* note 14, at 6; see also Olivera Perkins & Scott Hiasen, *Vacancies Costly to Cleveland: Abandoned Homes Drag Down City, but Few Owners Face Consequences*,

residents who remain are either renters<sup>16</sup> or, as homeowners, have reduced incentives to maintain and improve their communities.<sup>17</sup>

Predatory lending causes cities to lose essential property tax revenues.<sup>18</sup> Cities are hampered further as families lose their financial bearings and experience associated disruptions.<sup>19</sup> Although precise calculation of [360] the externalities predatory lenders impose on cities may be impossible,<sup>20</sup> there is no doubt that predatory lending has an impact extending beyond borrowers themselves. The ability of cities to recover these costs associated with predatory

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PLAIN DEALER, June 13, 2004, at B1, available at LEXIS, News Library, ALLNWS File (discussing the hundreds of abandoned buildings the city of Cleveland demolishes each year).

<sup>16</sup> WILLIAM M. ROHE ET AL., *THE SOCIAL BENEFITS AND COSTS OF HOMEOWNERSHIP: A CRITICAL ASSESSMENT OF THE RESEARCH* 14 (Oct. 2001), <http://www.jchs.harvard.edu/publications/homeownership/liho01-12.pdf> (noting that where there are high levels of renters--over eighty-five percent--social problems abound).

<sup>17</sup> Keith N. Hylton, *Banks and Inner Cities: Market and Regulatory Obstacles to Development Lending*, 17 *YALE J. ON REG.* 197, 219-20 (2000) (discussing homeowners' disincentives to maintain their property when surrounding properties are not maintained or are not owner-occupied); see also Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 *J. URB. ECON.* 354, 361 (1999) (finding evidence that "[h]omeownership may encourage investment in local amenities and social capital");

*HOMEOWNERSHIP AND ITS BENEFITS: URBAN POLICY BRIEF NO. 2* (Aug. 1995), <http://www.huduser.org/publications/urbaff/upb2.html> (positing that homeowners have a greater stake than renters in the well-being of their communities and the maintenance of their property).

<sup>18</sup> See APGAR & DUDA, *supra* note 14, at 7 (discussing the impact of foreclosures on municipal tax revenues).

<sup>19</sup> See Daniel Aaronson, *A Note on the Benefits of Homeownership*, 47 *J. URB. ECON.* 356 (2000) (noting that residential stability has a positive impact on educational attainment); see also ROHE ET AL., *supra* note 16, at 20-21 (citing studies that found lower rates of teen pregnancy and higher levels of educational achievement among low-income families that owned their homes than among renters).

When predatory lending results in borrowers losing their homes, low-income families also lose important vehicles for wealth accumulation, which ultimately can cause the public to bear more social welfare costs. See, e.g., THOMAS P. BOEHM & ALAN M. SCHLOTTMANN, *JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIV., HOUSING AND WEALTH ACCUMULATION: INTERGENERATIONAL IMPACTS* (Oct. 2001), <http://www.jchs.harvard.edu/publications/homeownership/liho01-15.pdf> (recognizing intergenerational benefits of parental homeownership).

<sup>20</sup> Recently, several researchers have attempted to quantify the costs to cities of predatory lending and foreclosures. One study found that the cost to municipalities when homes are vacant following foreclosure range between \$430 to \$34,199 per unit, depending on whether the property was abandoned prior to foreclosure, secured, in need of demolition, or damaged by fire. See APGAR & DUDA, *supra* note 14, at 10-15; see also FAMILY HOUSING FUND, *COST EFFECTIVENESS OF MORTGAGE FORECLOSURE PREVENTION* 16-17 (1995) (on file with author) (estimating the costs of foreclosed-upon and abandoned property to the cities of Minneapolis and Saint Paul and finding that the cities lose an average of \$2,000 in tax revenues when a home is vacant, spend \$25,000 to \$40,000 for each home they rehabilitate for sale, and \$6,000 to \$10,000 for each home they demolish). These costs are greatly reduced and sometimes even absent in neighborhoods where property values are rising. In these neighborhoods, victims of predatory lending may simply transfer their homes to willing buyers.

lending and to obtain equitable relief depends on whether they can establish standing before the courts.

### III. STANDING REQUIREMENTS FOR MUNICIPALITIES

Determining whether governmental entities have standing to bring claims against predatory lenders is not a simple calculus. The standing rules applicable to state and federal courts vary and can be outcome determinative.<sup>21</sup> To complicate matters, standing takes on new dimensions when municipalities bring claims in their capacity as *parens patriae*.<sup>22</sup> In this section of the Article, I summarize the various standing rules that apply to municipalities.

#### A. *State v. Federal Standing Rules*

Whether state or federal standing requirements govern a lawsuit depends on the forum in which they are litigated.<sup>23</sup> Plaintiffs asserting state law claims in state courts need only comply with state standing rules.<sup>24</sup> [361] Federal standing rules apply to all claims brought in federal courts, even if the claims are brought under state law and even if the state standing requirements are more liberal than

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<sup>21</sup> See, e.g., *James v. Arms Tech., Inc.*, 820 A.2d 27, 45 (N.J. Super. Ct. App. Div. 2003) (noting that New Jersey standing requirements are more liberal than their federal counterparts).

<sup>22</sup> See generally Note, *State Standing in Police-Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 883 (1982) (discussing *parens patriae* standing--where the state acts as "guardian of the well-being of its populace and economy"--in the context of police-misconduct cases).

<sup>23</sup> This is not an issue when state standing requirements parallel the federal standing rules. See Stasha D. McBride, *Civil Procedure: Time to Stand Back: Unnecessary Gate-Keeping to Oklahoma Courts*, 56 OKLA. L. REV. 177, 177 (2003) (criticizing the Oklahoma Supreme Court's adoption of Article III standing requirements for the state courts); Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 536, 550 (2004) (arguing that the Ohio Supreme Court should adhere more closely to federal standing doctrine).

<sup>24</sup> For example, although federal courts cannot render advisory opinions, many states do allow such opinions. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 48-49 (4th ed. 2003); see also Cynthia R. Farina, *Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialogue*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, 353 (Russell K. Osgood ed., 1992) (discussing advisory opinions in state courts); Helen Hershkoff, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1845-46 (2001) (documenting and discussing states that authorize their courts to give advisory opinions); Terrance A. Smiljanich, *Commentary, Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 U. FLA. L. REV. 328, 329 (1972) (examining advisory opinion rules in Florida); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WMS. U. L. REV. 207, 213-14 (1997) (examining the approach of Rhode Island and other states to advisory opinions); Margaret M. Bledsoe, *Comment, The Advisory Opinion in North Carolina: 1947 to 1991*, 70 N.C. L. REV. 1853, 1855-83 (1992) (discussing the history and functions of the advisory opinion generally and in North Carolina).

those enumerated under Article III.<sup>25</sup> When state courts hear federal claims, they can apply more liberal state law to find standing even if the plaintiffs would fail to meet federal standing requirements.<sup>26</sup> It is less clear whether state courts can apply state standing limits to deny standing to plaintiffs asserting federal claims if a federal court hearing the same claims would find standing.<sup>27</sup>

### ***B. Standing Requirements***

To establish standing,<sup>28</sup> municipalities must allege that the defendants' wrongdoing had an adverse impact on their quasi-sovereign or proprietary interests.<sup>29</sup> When they bring claims as quasi-sovereigns, cities are acting to protect and benefit their residents as *parens patriae* and must satisfy unique criteria that I describe below. When they bring suits for damages in their proprietary capacities, cities are acting to protect their own interests and must meet the traditional Article III and prudential standing requirements.<sup>30</sup>

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#### **1. Standing Based on Quasi-Sovereign Interests**

The great bulk of cases recognizing quasi-sovereign standing involve states invoking their right to protect their citizens from harm. The extent to which cities have standing as quasi-sovereigns is unsettled and not uniform. Because of this uncertainty and lack of uniformity, I begin this section by first addressing quasi-sovereign standing as it applies to states and then later consider its extension to municipalities.

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<sup>25</sup> See, e.g., *Cantrell v. City of Long Beach*, 241 F.3d 674, 677, 683-84 (9th Cir. 2001) (applying federal standing rules to a state law claim brought in federal court); *Int'l Primate Prot. League v. Adm'rs Tulane Educ. Fund*, 895 F.2d 1056, 1058 (5th Cir. 1990) (applying federal standing requirements to state law claim removed to federal court).

<sup>26</sup> *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989) (recognizing that plaintiffs in state court had standing under state law to pursue resolution of federal law claims even though they would not meet the federal justiciability requirements).

<sup>27</sup> At least one court has held that if state standing requirements are more onerous than federal requirements, the state rules yield to the federal requirements. *Barcik v. Kubiaczyk*, 895 P.2d 765, 772-73 (Or. 1995); see also Paul J. Katz, Comment, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 NW. U. L. REV. 1315, 1345 (2005) (taking the position that “[w]hen state courts raise the standing bar on federal law issues, they deny justice to plaintiffs that Congress intended to protect”). The likelihood of this scenario is slim because state standing rules tend to be more generous, rather than more onerous, than their federal counterparts. See generally Hershkoff, *supra* note 24, at 1835-37 (discussing the vagaries of state standing rules and comparing them to the Article III and prudential requirements).

<sup>28</sup> As I discussed previously, state courts may impose more or less onerous standing rules. For purposes of this Article, I focus primarily on federal standing doctrine.

<sup>29</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982).

<sup>30</sup> *Id.* at 601-02.

Article III requires states asserting standing as *parens patriae* to allege that the defendants' actions had an impact on a quasi-sovereign interest and that their actions affected a substantial portion of the population.<sup>31</sup> In addition, states' interests must be distinct from those of any individuals who suffered injuries at the hands of the defendant.<sup>32</sup> Furthermore, there is a prudential rule requiring that, for statutory claims, states must fall within the class of entities that the statutes were designed to protect.<sup>33</sup> These requirements for quasi-sovereign standing were developed in the federal courts and have been adopted by the state courts.<sup>34</sup>

#### a. Quasi-Sovereign Interests

When governmental entities assert injuries to their quasi-sovereign interests, they are not claiming a direct injury to themselves. Rather, they are suing to protect the interests of their residents.<sup>35</sup> The Supreme Court, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, defined quasi-sovereign interests as “a set of interests that the State has in the well-being of its populace,”<sup>36</sup> including the health, safety, welfare, and economic and physical well-being of their citizens.<sup>37</sup> The Court described this interest as “a judicial construct that does not lend itself to a simple or exact definition. Its nature is perhaps best understood by comparing it to other kinds of interests that a State may pursue and then by examining those interests that have historically been found to fall within this category.”<sup>38</sup> [363] The Court then illustrated the concept through examples.<sup>39</sup> Most of the illustrative

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<sup>31</sup> The Article III analysis for quasi-sovereign standing has been described as “the exact inverse” of conventional Article III analysis, which is based on individualized interests. See Karl S. Coplan, *Direct Environmental Standing for Chartered Conservation Corporations*, 12 DUKE ENVTL. L. & POL'Y F. 183, 211-12 (2001).

<sup>32</sup> *Snapp*, 458 U.S. at 607.

<sup>33</sup> See, e.g., *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 149 (D.D.C. 2002).

<sup>34</sup> Maria Gabriela Bianchini, *The Tobacco Agreement that Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 730 n.133 (1999); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1871 (2000). It is noteworthy that, although state courts do not necessarily follow federal standing rules for proprietary claims, they have adopted the same standing rules that federal courts apply for claims based on quasi-sovereign standing.

<sup>35</sup> E.g., *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976) (explaining that in some instances a state may sue to “vindicate the interests of its citizens”).

<sup>36</sup> *Snapp*, 458 U.S. at 602.

<sup>37</sup> *Id.* at 607.

<sup>38</sup> *Id.* at 601. One commentator has described the imprecise notion of “quasi-sovereign interests” as “one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether.” Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1851 (2000).

<sup>39</sup> *Snapp*, 458 U.S. at 603. These examples included: *North Dakota v. Minnesota*, 263 U.S. 365, 371 (1923) (evaluating a change in a state's water drainage system that resulted in flooding a community in the complaining state); *Pennsylvania v. West Virginia*, 262 U.S. 553, 581 (1923) (dealing with a state's laws that restricted the complaining state's access to natural gas); *New York*

cases involved claims of one state against another, in which states asserted that other states had taken actions that compromised or intended to take steps that would compromise the health, safety or welfare of their citizens.<sup>40</sup> Quasi-sovereign standing is not, however, limited to interstate claims. For example, in *Snapp*, the Court found that Puerto Rico had quasi-sovereign standing to sue private entities-- apple growers--that allegedly discriminated against the citizens of Puerto Rico.<sup>41</sup>

#### b. Numerosity

The *Snapp* Court required that the injury alleged by the state had to affect “a sufficiently substantial segment of its population.”<sup>42</sup> In describing this requirement, the Court did not “draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well.”<sup>43</sup> Applying this principle, the *Snapp* Court relied on allegations that the defendants' discriminatory hiring practices directly harmed some individuals and also indirectly affected the state's “economic and commercial interests, [and its] interest in securing residents from the harmful effects of discrimination” to find that Puerto Rico had standing.<sup>44</sup> In keeping with *Snapp*, state and federal courts have taken into account both indirect and direct injuries, and actual and potential victims, when assessing the number of people on whom the defendants' wrongdoing had an impact.<sup>45</sup> Oftentimes, the actual number of individuals

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v. New Jersey, 256 U.S. 296, 298 (1921) (reviewing a state's decision to expel waste into waters that ran into the complaining state); *Kansas v. Colorado*, 206 U.S. 46, 85 (1907) (challenging the diversion of water by one state to the detriment of the complaining state).

<sup>40</sup> *Snapp*, 458 U.S. at 601-06.

<sup>41</sup> *Id.* at 608.

<sup>42</sup> *Id.* at 607.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 609.

<sup>45</sup> *See, e.g.*, *New York v. 11 Cornwall Co.*, 695 F.2d 34, 39 (2d Cir. 1982) (taking into account potential future victims to hold that the State of New York had standing to bring a conspiracy claim against property owners whose unlawful actions directly affected at most ten mentally-impaired adults and two of their caretakers); *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 100-01 (D. Mass. 1998) (finding state standing where only fifty employees were direct victims of defendant's age discrimination, but indirect effects extended more broadly); *New York v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996) (concluding that the state had standing even though the state alleged discrimination against only eight identifiable African-Americans); *New York v. Mid Hudson Med. Group, P.C.*, 877 F. Supp. 143, 147-48 (S.D.N.Y. 1995) (holding that the State of New York had standing in a discrimination claim against a medical clinic that refused to provide translators for at most ten hearing impaired patients, based on allegations that the defendant's discriminatory actions threatened the seven percent of New Yorkers who were hearing impaired); *Support Ministries for Persons with AIDS, Inc., v. Vill. of Waterford*, 799 F. Supp. 272, 274-75, 277 (N.D.N.Y. 1992) (recognizing that the state met the *Snapp* numerosity requirement in a discrimination claim against a village that denied

directly [364] affected has been quite small, but when taking into account those indirectly affected or those potentially affected, the courts have found that the plaintiffs met the *Snapp* numerosity requirement.<sup>46</sup>

### c. Injury to State is Distinct from Injuries to Individuals

The *Snapp* court also required governmental entities asserting quasi-sovereign standing to “articulate an interest apart from the interests of particular private parties.”<sup>47</sup> This requirement can be problematic when a defendant’s actions caused injury to the health, welfare and safety of a governmental entity *and* to individual citizens. In a pre-*Snapp* decision, the Supreme Court considered the wisdom of allowing quasi-sovereign claims when citizens and a state were both injured and found standing when the individual relief would be “wholly inadequate and disproportionate” to the injury to the governmental entity.<sup>48</sup> In assessing the adequacy of individual relief, courts have taken into account the “resources and stamina” an injured individual would need for “prolonged litigation.”<sup>49</sup> They have also [365] considered the relief that is available to individual plaintiffs. For example, where a governmental entity could obtain

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zoning approval for a residence for people with AIDS that would serve up to fifteen people on the grounds that the state had an interest in protecting all people with AIDS); In re Hemingway, 39 B.R. 619, 622 (Bankr. N.D.N.Y. 1983) (reasoning that the State of New York had standing to represent six victims of consumer fraud on the grounds that “such representation is part of a much broader scheme of consumer protection”).

<sup>46</sup> See, e.g., the cases discussed *supra* note 45.

<sup>47</sup> *Snapp*, 458 U.S. at 607.

<sup>48</sup> *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (holding that “suits brought by individuals [to challenge the city of Chicago’s dumping of sewage into the Mississippi River], each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies”); see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261-64 (1947) (rejecting *parens patriae* claim for damage to economy arising from antitrust violations where individuals could seek individual relief for the same violations, creating the possibility of duplicative recovery); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 446-52 (1945) (allowing *parens patriae* standing where private entities and the state economy were injured when shippers charged discriminatory freight rates).

Although the availability of individual relief does not necessarily preclude state actions, some courts have barred individual lawsuits and class action litigation on claims that parallel existing state actions based on quasi-sovereign interests. Ratliff, *supra* note 38, at 1849 n.8.

<sup>49</sup> *Mid Hudson Med. Group*, 877 F. Supp. at 148-49; see also *Maryland v. Louisiana*, 451 U.S. 725, 737-39 (1981) (allowing *parens patriae* standing where a state imposed an unlawful tax on individual consumers that was of such small amounts that the consumers would not have an incentive to bring individual claims to contest the tax); *Puerto Rico ex rel. Quinos v. Bramkamp*, 654 F.2d 212, 217 (2d Cir. 1981) (granting standing, in part, because “[t]here is no assurance that the individual workers could bear the cost of a lawsuit that would achieve complete relief”); *Peter & John’s Pump House*, 914 F. Supp. at 813 (recognizing that it is speculative whether private victims of discrimination would “pursue costly litigation”); *Support Ministries*, 799 F. Supp. at 278-79 (holding that where private plaintiffs might elect to abandon the litigation, “the vindication of the rights of New Yorkers to be free from discrimination against the disabled cannot be made dependant on the actions and potentially limited resources of private parties”).

equitable relief that would not be available in claims by individuals, the courts have found the individual relief inadequate.<sup>50</sup>

#### d. Statutory Claims

When a governmental entity brings a *parens patriae* claim pursuant to a statute, it must also satisfy the court that the relevant legislative body intended the statute to cover the particular entity.<sup>51</sup> The analysis is effectively the “zone of interests” test that applies to direct injury claims.<sup>52</sup> Where the relevant statute is silent regarding claims by public entities, courts glean the legislative intent from the language of the statute and the legislative history.<sup>53</sup>

#### e. Municipalities as Quasi-Sovereigns

The federal courts have unequivocally held that political subdivisions cannot bring claims as *parens patriae* because their power is derivative, not

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<sup>50</sup> See, e.g., *Pennsylvania v. Porter*, 659 F.2d 306, 315-16 (3d Cir. 1981) (considering the unavailability of injunctive relief in individual lawsuits when granting *parens patriae* standing to the state); *Bull HN Info. Sys.*, 16 F. Supp. 2d at 101-02 (noting the unavailability of injunctive relief in individual lawsuits when granting *parens patriae* standing to the state); see also *Bramkamp*, 654 F.2d at 217 (finding standing on grounds that even if victims of discrimination brought a class action, there was “no assurance that ... relief against widespread and future discrimination would be actively pursued”); *Peter & John's Pump House*, 914 F. Supp. at 813 (granting state standing based on reasoning that private plaintiffs might elect money damages over injunctive relief--remedies that would not prevent future discrimination). *But see* *New York v. Holiday Inns, Inc.*, 656 F. Supp. 675, 677-78 (W.D.N.Y. 1984) (denying state standing on the grounds that individuals could obtain complete relief for them-selves and injunctive relief for future victims of unlawful employment discrimination).

<sup>51</sup> *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 149 (D.D.C. 2002).

<sup>52</sup> For a discussion of the “zone of interests” test, see *infra* the text accompanying notes 84-87.

<sup>53</sup> See, e.g., *Connecticut v. Physicians Health Servs. of Conn.*, 287 F.3d 110, 120-21 (2d Cir. 2002) (denying *parens patriae* standing in an ERISA claim where courts have “consistently” ruled that “non-enumerated parties lack statutory standing” under the operative provision in ERISA); *EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 197-98 (E.D.N.Y. 2003) (finding that states could bring suits as *parens patriae* under Title VII regardless of statutory ambiguity as to whether states' authority to sue under the statute was based on proprietary or quasi-sovereign interests); *Louisiana v. Borden, Inc.*, Civ. A. No. 94-3640, 1995 WL 59548, at \*3 (E.D. La. Feb. 10, 1995) (holding that although the statute did not grant state standing, the state could bring the action as *parens patriae* in an antitrust suit); *Mid Hudson Med. Group*, 877 F. Supp. at 146, 149 (holding that the state could bring claims as *parens patriae* under the Americans with Disabilities Act and the Rehabilitation Act even though neither act explicitly provided standing to attorneys general to bring suit); *Sclater v. Sclater*, 40 B.R. 594, 596-97 (Bankr. E.D. Mich. 1984) (allowing the attorney general to pursue a claim as *parens patriae* under state consumer protection law even though the statute was silent on the question of the attorney general's authority to bring suit). *But see* *Lubin v. Farmers Group*, 157 S.W.3d 113, 122 (Tex. App. 2004) (refusing to grant *parens patriae* standing under the state insurance code in the absence of clear legislative intent to grant such standing).

sovereign.<sup>54</sup> Thus, cities bringing claims as quasi-sovereigns in federal [366] court or whose claims as quasi-sovereigns are removed to federal court are certain to face dismissal.

The law governing *parens patriae* claims brought in state court is less certain. Only a handful of jurisdictions have reported decisions addressing municipal standing as quasi-sovereigns, leaving most cities in the dark about their ability to bring such claims.

Whether a municipality has standing as a quasi-sovereign turns on its jurisdiction's statutory and constitutional home rule provisions.<sup>55</sup> The parameters of home rule provisions are not uniform across the states.<sup>56</sup> Some cities have broad grants of home rule authority and are often deemed to have the powers of a sovereign, subject only to limitations imposed by their state legislatures and constitutions.<sup>57</sup> This expansive authority arguably enables cities to bring lawsuits as *parens patriae*. An Illinois court has gone so far as to call home rule units “quasi-sovereign entities.”<sup>58</sup>

In a typical case, a state court held that New York City's charter allowed the city to assert *parens patriae* standing based on its interest in protecting the “health, welfare and safety of her residents” to challenge a decision of the state Commissioner of Social Services.<sup>59</sup> The New York City charter states:

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<sup>54</sup> Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 53-54 (1982) (noting that our system of government “has no place for sovereign cities”); City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004) (holding that political subdivisions are precluded from suing as *parens patriae*); Colo. River Indian Tribes v. Town of Parker, 776 F.2d 846, 848 (9th Cir. 1985) (same); United States v. City of Pittsburg, Cal., 661 F.2d 783, 786-87 (9th Cir. 1981) (same); In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 131 (9th Cir. 1973) (same); Prince George's County v. Levi, 79 F.R.D. 1, 3-4 (D. Md. 1977) (same). On the same basis, federal courts have ruled that cities may not invoke sovereign immunity under the Eleventh Amendment. Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (denying Eleventh Amendment immunity to a county); see also Melvyn R. Durchslag, *Should Political Subdivisions be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577, 580-82 (1994) (discussing criticisms of Lincoln County and its progeny).

One commentator has noted that cities are often reluctant to classify their interests as quasi-sovereign even when that appears to be the basis for standing. Laura L. Gavioli, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue*, 78 TUL. L. REV. 941, 959-60 (2004). This reluctance may arise from concern that the federal courts will only grant standing when cities' claims are proprietary.

<sup>55</sup> See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2261, 2277-2334 (2003) (discussing the history of and various approaches to home rule); George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5, 29-39 (1990) (clarifying the distinctions between legislative and constitutional home rule).

<sup>56</sup> See Barron, *supra* note 55, at 2260 n.7, 2290.

<sup>57</sup> Charles B. Ferguson, Jr., *Hamlets: Expanding the Fair Share Doctrine Under Strict Home Rule Constitutions*, 49 EMORY L.J. 255, 269 (2000).

<sup>58</sup> *In re County Collector*, 774 N.E.2d 832, 846-47 (Ill. App. Ct. 2002).

<sup>59</sup> *City of New York v. Wyman*, 321 N.Y.S.2d 695, 711, 713 (N.Y. Sup. Ct. 1971).

Except as otherwise provided by law, the corporation counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof.<sup>60</sup>

[367] Other courts have reached the same conclusion.<sup>61</sup>

In contrast, more restrictive views of home rule authority typically conclude that home rule “does not confer the sovereign attributes and powers of the state on municipalities. It merely permits them to exercise their local powers free of state control.”<sup>62</sup> In these jurisdictions, courts may well reject municipal claims for quasi-sovereign standing.

There are still a few states that continue to abide by some variant of Dillon's rule,<sup>63</sup> and thus retain extensive power over municipal governments. The likelihood of courts granting cities standing as *parens patriae* in these jurisdictions approaches zero. It is worth noting, however, that many states-- even some of those that severely restrict the power of cities--do grant municipalities what could be considered quasi-sovereign standing to pursue specific types of claims. The most common example is public nuisance.<sup>64</sup>

The outcomes in city lawsuits against gun manufacturers reflect the impact that vagaries in home rule authority can have on city efforts to establish standing. The gun industry and some states have taken the position that city lawsuits against

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<sup>60</sup> *Id.* at 712.

<sup>61</sup> *See, e.g.,* City of Wilmington v. Lord, 340 A.2d 182, 183 (Del. Super. Ct. 1975) (applying Wilmington's home rule charter to hold that the city was “to be considered the sovereign for the purposes of municipal functions”); City of Urbana v. Houser, 367 N.E.2d 692, 694 (Ill. 1977) (“Home rule units ... have the same powers as the sovereign except where such powers are limited by the General Assembly.”). For a discussion of state home rule provisions, *see generally* 2 SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 21.01 (2001); *see also* Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 790-96 (1998) (surveying the intersection between grants of home rule authority and municipal power to pass anti-discrimination ordinances).

Those jurisdictions that consider municipalities *imperium in imperio* (a state within a state) are most likely to treat municipalities as sovereigns. Ferguson, *supra* note 57, at 268-82 (discussing approaches to home rule and describing municipalities with *imperium in imperio* home rule as “sovereign powers within the borders of the sovereign state”).

<sup>62</sup> City of Moraine v. Lewis, 784 N.E.2d 774, 778 (Ohio. Ct. App. 2003).

<sup>63</sup> 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 237 (5th ed. 1911) (presenting as a canon of statutory construction a rule that confers on municipalities only those powers that are clearly stated in a charter or statute and resolves any doubt concerning the existence of a municipality's power against the municipal corporation).

<sup>64</sup> For a further discussion of municipalities' standing to bring public nuisance claims, *see infra* text accompanying notes 153-58.

gun companies are unlawful attempts to circumvent state authority.<sup>65</sup> This argument has particular force in states that have retained exclusive power to regulate firearms.<sup>66</sup> Not surprisingly, it is cities [368] with broad home rule authority that have been able to survive motions to dismiss for lack of standing.<sup>67</sup>

Although there is no uniform test for determining whether a court will recognize cities as quasi-sovereigns, there are several factors that are predictive. First, the federal courts have made it clear that they will not grant cities quasi-sovereign standing.<sup>68</sup> This is true even if the relevant state court would allow cities to pursue the same claims under state standing rules.<sup>69</sup> Thus, cities would fare best by bringing *parens patriae* claims in state court and excluding claims or defendants that could subject them to removal to federal court. Cities desiring to bring claims as quasi-sovereigns in state courts clearly have the greatest chance of establishing standing if they have broad home rule powers; they have the least likelihood of success in jurisdictions that continue to adhere to Dillon's rule.

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<sup>65</sup> See, e.g., *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 16 (La. 2001) (construing a Louisiana statute as being “aimed at suits, such as the one filed by the city in the instant case, that attempt to indirectly regulate the firearms industry at the local level”); see also Gavioli, *supra* note 54, at 951 (noting that “[i]n almost every safe gun case so far, the gun industry has argued that city litigation is an attempt to circumvent the legislative process to achieve reform”); Bryce Jensen, *From Tobacco to Health Care and Beyond--A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1377-84 (2001) (discussing public policy arguments against municipalities using litigation to achieve social change).

<sup>66</sup> See, e.g., *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (dismissing a County's public nuisance lawsuit against gun manufacturers on the grounds that the state had the sole authority to regulate firearms). *But see* *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at \*11 (Mass. Dist. Ct. July 13, 2000) (holding that the State Firearms Act did not abrogate the city's right to bring common law claims against gun manufacturers). See also Eric Womack, *A Revolution in Local Government Law: Recognizing the Home Rule Implications of Municipality Suits Against Gun Manufacturers*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 255, 258-61 (2001) (noting that although home rule provisions would have prevented the city of Atlanta from requiring safety changes in the manufacturing of guns, Atlanta achieved these same changes by suing and then settling with a gun manufacturer).

Some states, in an effort to stave off real or threatened city litigation against gun manufacturers, have passed legislation explicitly prohibiting municipalities from suing gun manufacturers. See, e.g., *Sturm, Ruger & Co. v. City of Atlanta*, 560 S.E.2d 525, 527-30 (Ga. Ct. App. 2002) (holding that a state law passed five days after Atlanta filed suit against gun manufacturers, which reserved to the state the right to sue gun manufacturers, preempted the city's claim); *Morial*, 785 So. 2d at 15-19 (dismissing a city suit against gun manufacturers based on a state law enacted after the lawsuit was filed that prohibited municipalities from bringing claims against gun manufacturers).

<sup>67</sup> Tom Perrotta, *City Gun Suit Kept Alive Despite Failure of Similar State Action*, N.Y.L.J., Apr. 13, 2004, at 1, available at LEXIS, News Library, ALLNWS File (quoting trial court's decision allowing city claim against gun manufacturers to proceed: “[i]n light of the respect for local autonomy embodied in New York law, precluding the city from bringing a suit aimed at redressing the problem of gun-related violence would interfere with its authority to promote the safety and well-being of its inhabitants”).

<sup>68</sup> See *supra* note 54 and accompanying text.

<sup>69</sup> See *supra* note 25 and accompanying text.

In those jurisdictions that do permit municipalities to pursue claims as *parens patriae*, cities must still establish that they have standing, using the requirements that were developed in the federal courts and have been adopted by the states.<sup>70</sup> Specifically, they must: (1) demonstrate that they have a quasi-sovereign interest; (2) meet the numerosity test; (3) allege a distinct injury; and (4) if the claim is statutory, prove they fall within the zone of interests that the statute was designed to protect.<sup>71</sup>

## 2. Standing Based on Proprietary Interests

When municipalities bring claims in federal court to recover for injuries [369] they experienced directly, they must meet Article III standing minima and oftentimes the prudential limitations as well.<sup>72</sup> For claims in state court, the particular state's standing law may impose different requirements.<sup>73</sup> In addition, as I discussed previously, some states have restricted the ability of municipalities to bring lawsuits challenging certain activities. These restrictions apply to claims brought to protect quasi-sovereign *and* proprietary interests.<sup>74</sup>

### a. Article III Requirements

Article III prohibits the rendering of advisory opinions<sup>75</sup> and requires proof of injury, causation, and redressability.<sup>76</sup> To establish the injury prong, a plaintiff must demonstrate an actual or immediate risk of direct and real injury as a result of the defendant's wrongdoing.<sup>77</sup> Where a statute expressly or by clear implication creates legal rights, plaintiffs satisfy the Article III injury requirement by alleging that the defendant's violation of their statutory rights caused them injury.<sup>78</sup> The causation and redressability requirements, which are often considered together, require that plaintiffs establish that their injuries are "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed

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<sup>70</sup> See *supra* note 34.

<sup>71</sup> See *supra* Part III.B.

<sup>72</sup> See *supra* Part III.A.

<sup>73</sup> *Id.*

<sup>74</sup> See *supra* note 66.

<sup>75</sup> Plaintiffs satisfy the prohibition on advisory opinions by demonstrating that there is a genuine controversy between adverse parties and by showing that if they prevail, there will be a substantial likelihood that the court's decision will bring about some change or effect. See CHEMERINSKY, *supra* note 24, at 50-51. I do not discuss the prohibition against advisory opinions because this limitation is not relevant to this Article.

<sup>76</sup> *Id.* at 59-60.

<sup>77</sup> *Id.* at 61; see also *Paterson v. Texas*, 308 F.3d 448, 449-51 (5th Cir. 2002) (holding that Texas did not have standing to intervene in a class action to challenge a settlement provision permitting unclaimed funds to revert to the defendant where the state had no interest in the settlement funds).

<sup>78</sup> CHEMERINSKY, *supra* note 24, at 70.

by the requested relief.”<sup>79</sup> To meet these requirements, plaintiffs’ relief cannot be speculative,<sup>80</sup> nor can causation be indirect.<sup>81</sup>

### b. Prudential Requirements

The prudential standing limitations require that plaintiffs assert their own rights and not the rights of others.<sup>82</sup> In addition, they cannot seek redress [370] for harms that are “‘generalized grievance[s]’ shared in [a] substantially equal measure by all or a large class of citizens,” the resolution of which should lie in the hands of the legislative branch.<sup>83</sup> Lastly, the “zone of interests” requirement applies when plaintiffs seek relief pursuant to a statute, and it requires that plaintiffs show that they fall within the group the statute was intended to benefit.<sup>84</sup> Where the language of the statute makes clear that the legislature intended to grant or deny standing to governmental bodies, the zone of interests test inquiry is simple. However, statutory language that fails to specify whether public entities can bring claims creates uncertainty that courts resolve based on review of the legislative history and statutory construction.<sup>85</sup>

Plaintiffs do not have to meet the prudential standing requirements if Congress has granted an implied or express right of action to people in the plaintiffs’ class.<sup>86</sup> Thus, depending on the statutory language, people “may have

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<sup>79</sup> *Id.* at 74 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

<sup>80</sup> *See id.* at 75 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)).

<sup>81</sup> *Id.* at 77 (citing *Allen*, 468 U.S. at 757).

<sup>82</sup> *Id.* at 83. The Supreme Court has recognized exceptions to this limitation if: (1) the aggrieved parties are unlikely to be able to assert their own rights, *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984); (2) there is a close relationship between the aggrieved party and the plaintiff, *Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976); or (3) the plaintiffs are challenging a statute that does not infringe upon their own First Amendment rights but that does violate the rights of others not before the court, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980). *See generally* CHEMERINSKY, *supra* note 24, at 83-87.

<sup>83</sup> *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also* *Asarco Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (stating that claims that a state statute permitting the leasing of land held in trust for the schools undermined the educational quality in the state was an uncognizable generalized grievance).

<sup>84</sup> CHEMERINSKY, *supra* note 24, at 60. The scope and applicability of this requirement is the subject of considerable debate. *Id.* at 100-02 (discussing cases in which the Supreme Court has inconsistently applied the zone of interests test).

<sup>85</sup> *See, e.g.*, *Pennsylvania v. Kleppe*, 533 F.2d 668, 671-72 (D.C. Cir. 1976) (denying standing to Pennsylvania because the injuries alleged were not within the zone of interests protected by the Small Business Act). In *Ass’n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153-54 (1970), the Supreme Court made clear that the zone of interests test should be applied expansively. *See also* *Clarke v. Secs. Indus. Ass’n*, 479 U.S. 388, 399-400 (1987) (stating that “[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff”).

<sup>86</sup> *Warth*, 422 U.S. at 500-01; *see also* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-09 (1972) (conferring standing based on a finding that Congress intended to define standing broadly for parties aggrieved under the Fair Housing Act); *Hardin v. Ky. Util. Co.*, 390 U.S. 1, 5-6 (1968) (granting standing based on a finding that the relevant statutory provision reflected congressional

standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.”<sup>87</sup>

### 3. Summary

Cities asserting standing in their quasi-sovereign or proprietary capacities face several potential hurdles. The most formidable is federal courts' refusal to confer quasi-sovereign standing on cities. Similarly, home rule provisions can limit or preclude municipalities from bringing claims as quasi-sovereigns and state laws can restrict cities from bringing certain types of claims in any capacity. The specific requirements for each type of standing pose the final hurdle.

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## IV. ESTABLISHING CITY STANDING TO MAINTAIN CLAIMS AGAINST PREDATORY LENDERS

In this section of the Article, I apply the standing doctrine I just discussed to analyze whether cities have standing to bring claims against predatory lenders as quasi-sovereigns or in their proprietary capacities.

### C. *Quasi-Sovereign Standing*

To establish standing to bring claims against predatory lenders as *parens patriae*, cities must meet the *Snapp* quasi-sovereign interest, numerosity and distinct injury requirements and, for statutory claims, demonstrate that they fall within one of the classes the statute was designed to protect.<sup>88</sup>

#### 1. Demonstrating a Quasi-Sovereign Interest

Unquestionably, predatory lending adversely affects the “well-being”<sup>89</sup> of communities. Homeowners who are the victims of fraud and discrimination can lose their homes or may not be able to afford their upkeep, leading to neighborhood decline. The resulting reduction in tax revenue and increase in demand for city services strain city coffers, impairing the overall economic well-being of communities. These injuries all invoke cities' quasi-sovereign interests.<sup>90</sup>

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intent to protect the interests that the aggrieved party was asserting even though there was no explicit grant of standing).

<sup>87</sup> *Warth*, 442 U.S. at 501.

<sup>88</sup> *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982).

<sup>89</sup> *Id.*; *see also* Frank J. Lopez, *Examining the Viability of Bringing a Predatory Lending Class Action*, 9 J. AFFORDABLE HOUSING & COMMUNITY L. 258 (2000) (discussing the negative effects that predatory lending has on communities).

<sup>90</sup> *See, e.g., Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450-51 (1945) (granting standing to the state as *parens patriae* acting on behalf of her citizens in a price fixing action against the railroad, stating “[if] the allegations of the bill are taken as true, the economy of Georgia and the welfare of

In addition, as *parens patriae*, cities have an interest in protecting their residents from fraud<sup>91</sup> and discrimination.<sup>92</sup>

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## 2. Meeting the Numerosity Requirement

*Snapp's* second requirement is that the alleged injury had to have affected “a sufficiently substantial segment of the population.”<sup>93</sup> In so holding, the *Snapp* Court made clear that both those residents directly and those indirectly injured

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her citizens have seriously suffered as a result of this alleged conspiracy. Discriminatory rates ... may affect the prosperity and welfare of a State as profoundly as any diversion of waters from rivers .... Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, [and] retards her development”); Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 353, 353 n.6 (8th Cir. 1985) (noting that “increased responsibility for the welfare and support of its affected citizens while its available tax revenues are declining” could invoke *parens patriae* standing); Puerto Rico *ex rel.* Quiros v. Bramkamp, 654 F.2d 212, 216-17 (2d Cir. 1981) (finding allegations that defendants' discrimination against Puerto Rican migrant workers had an effect on “the health of the Puerto Rican economy” sufficient to confer *parens patriae* standing); Burch v. Goodyear Tire & Rubber Co., 554 F.2d 633, 634 (4th Cir. 1977) (holding that allegations that defendants' violations of antitrust laws injured the “general economy of the State of Maryland [were] sufficient to confer standing ... in a *parens patriae* capacity ...”); Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D. Tex. 1997) (holding that Texas has a quasi-sovereign interest in a claim against tobacco manufacturers, based on allegations that the “economy of the State and the welfare of its people [had] suffered at the hands of the Defendants”).

<sup>91</sup> See, e.g., Missouri *ex rel.* Webster v. Freedom Fin. Corp., 727 F. Supp. 1313, 1317 (W.D. Miss. 1989) (recognizing that a state has a quasi-sovereign interest in “securing an honest marketplace” and “protect[ing] its citizens from fraudulent and deceptive practices” (quoting Kelley v. Carr, 442 F. Supp. 346, 356-57 (W.D. Mich. 1977)); Alabama *ex rel.* Galanos v. Star Serv. & Petroleum Co., Inc., 616 F. Supp. 429, 431 (S.D. Ala. 1985) (concluding that Alabama had a *parens patriae* interest in “preventing unfair or dishonest competition”); *In re Sclater*, 40 B.R. 594, 597 (Bankr. E.D. Mich. 1984) (finding that Michigan had an interest in protecting citizens from fraudulent business practices at a health spa); *In re Hemingway*, 39 B.R. 619, 622 (Bankr. N.D.N.Y. 1983) (stating that “one would be hard-pressed to argue that protection against consumer fraud is not a subject of vital importance to the economic well-being of the citizens of New York State”); Louisiana *ex rel.* Ieyoub v. Bordens, Inc., 684 So. 2d 1024, 1025 (La. Ct. App. 1997) (holding that Louisiana had quasi-sovereign standing in a claim where the state alleged that the defendants rigged bids for school milk contracts).

<sup>92</sup> See, e.g., *Snapp*, 458 U.S. at 608 (recognizing Puerto Rico's quasi-sovereign interest in protecting its residents from discrimination); New York v. 11 Cornwall Co., 695 F.2d 34, 39 (2d Cir. 1982) (finding that the state had an interest in protecting its mentally retarded citizens against discrimination); Massachusetts v. Bull HN Info. Sys., Inc. 16 F. Supp. 2d 90, 98 (D. Mass 1998) (holding that the state had a quasi-sovereign interest in opposing “[d]iscrimination of any kind, whether based on age, race or handicap [because it] corrodes the social fabric and fosters intolerance and inequality. It is unambiguously in the interest of the state to stop it in its tracks.”); New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 812 (N.D.N.Y. 1996) (holding that the state had a quasi-sovereign interest in preventing discrimination based on race); New York v. Mid Hudson Med. Group, P.C., 877 F. Supp. 143, 147 (S.D.N.Y. 1996) (finding that New York had a quasi-sovereign interest in protecting its deaf citizens from discrimination).

<sup>93</sup> *Snapp*, 458 U.S. at 607.

should be included in determining numerosity.<sup>94</sup> Cities can readily meet this requirement by alleging that predatory lenders' wrongdoing directly affects the borrowers they prey upon and indirectly affects other residents, who experience declining property values and disruptions to the social fabric of their neighborhoods.<sup>95</sup>

### 3. Demonstrating Interests Separate from Those of Individuals

Cities must also demonstrate that their interests are separate from those of any private parties; i.e., the cities must be more than nominal parties.<sup>96</sup> The factors relevant to this determination include whether individual relief would be adequate to achieve the interests of the city, whether private parties would have the resources to pursue claims, and whether private individuals and the city would be entitled to the same relief.<sup>97</sup>

Victims of predatory lending frequently live close to the financial margin and lack the time, money, and emotional stamina to bring affirmative claims against lenders.<sup>98</sup> And those who do attempt to pursue claims may find it difficult to secure attorneys, who may be averse to taking cases that [373] typically generate low damage awards.<sup>99</sup> At best, borrowers may be able to find legal services lawyers or attorneys from consumer advocacy organizations to represent them. More often than not, the litigation will be defensive, in response to threatened foreclosures where the focus is on borrowers' retaining their homes. Even when borrowers have the wherewithal to bring individual claims, they are rarely entitled to relief that would prevent similar harm to future borrowers.

Class actions, which could result in significant damage awards and thus provide something approximating adequate relief, may not meet certification requirements. Borrowers in predatory lending class actions inevitably represent a variety of unique situations. Some may have already lost their homes and be seeking damages. Others may be keeping up with their loan payments but want to rescind or reform their loans. In some cases, the lenders may have engaged in fraud. In others, they may have failed to make the required disclosures. A court may conclude that the “differences” exceed the “commonalities” to an extent that precludes class certification.<sup>100</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *See supra* note 45 (identifying cases where both direct and indirect injuries satisfy the numerosity requirement).

<sup>96</sup> *Snapp*, 458 U.S. at 607.

<sup>97</sup> *Supra* notes 48-50 and accompanying text.

<sup>98</sup> *Cf. Claudine Columbres, Targeting Retail Discrimination with Parens Patria*, 36 COLUM. J.L. & SOC. PROBS. 209, 219 (2003) (discussing the same phenomenon in the context of retail discrimination claims).

<sup>99</sup> *Engel & McCoy, supra* note 3, at 1316 (discussing the disincentives for private lawyers to take on predatory lending cases).

<sup>100</sup> *See Fed. R. Civ. P. 23; Lopez, supra* note 89, at 261-64 (discussing concerns inherent in choosing an appropriate class when filing a class action lawsuit against predatory lenders); *see*

Given the difficulties victims of predatory lending encounter bringing lawsuits against predatory lenders, it is highly unlikely that private litigation would be an adequate vehicle to satisfy cities' interests in curtailing predatory lending. In addition, cities could obtain broad equitable relief that would be unavailable in individual lawsuits. It thus appears that municipalities can satisfy the *Snapp* distinct injury requirement.

#### 4. Zone of Interests

As I mentioned previously, when bringing statutory claims, cities must demonstrate that they fall within the zone of interests the statutes were intended to benefit. Because satisfaction of this element depends on the provisions of individual statutes, I have reserved the discussion of the zone of interests requirement for Part V, where I review specific causes of action.

#### 5. Summary

The above analysis demonstrates that cities filing claims as quasi-sovereigns in state courts should be able to meet the *Snapp* requirements in claims against predatory lenders if they meet the zone of interests test for any statutory claims. This assumes, of course, that their states have granted them the authority to bring claims as quasi-sovereigns.

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#### ***D. Standing to Bring Claims Based on Proprietary Interests***

When cities seek relief in federal court against predatory lenders that have injured them in their proprietary capacities, they must meet the Article III injury, causation, and redressability requirements.<sup>101</sup> Additionally, in the absence of a legislative override, cities must satisfy the prudential standing requirements.

#### 1. Injury in Fact

To demonstrate injury in fact, a city must allege that predatory lenders have caused or will imminently cause the city to experience a direct and real injury.<sup>102</sup> When predatory lending leads to abandoned and neglected homes, cities

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*also* Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) (decertifying a plaintiffs' class action that asserted fraud claims against numerous tobacco companies, in part because the court would have to individually try the "reliance" element).

<sup>101</sup> State courts apply state standing rules. *E.g.*, James v. Arms Tech., Inc., 820 A.2d 27, 45 (N.J. Super. Ct. App. Div. 2003).

<sup>102</sup> CHEMERINSKY, *supra* note 24, at 61.

It is noteworthy that several courts have imported proximate cause analysis from antitrust cases to determine injury in fact. For example, in *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 344-

experience declines in tax revenues. Some of this decline is because the owners simply cannot afford to pay the taxes. Other times, the property is abandoned and the mortgage holder has elected not to foreclose, for example, because the outstanding tax liability exceeds the value of the property. A more general reduction in tax revenue occurs when neglected homes cause widespread depreciation in home values throughout neighborhoods.<sup>103</sup> Numerous courts have held that lost tax revenues can affect governmental [375] entities' proprietary interests.<sup>104</sup>

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55, 780 A.2d 98, 118-24 (2001), the court rejected the city of Bridgeport's argument that it had standing to bring claims against entities involved with the manufacturer and sale of guns. The city had alleged that because of the defendants' wrongdoing, the city incurred added expenses for police and emergency services, pension benefits and health care. *Id.* at 344-45, 780 A.2d at 118. It also claimed that as a result of reduced productivity, the city experienced a decline in investment, economic development and tax revenues. *Id.* at 345, 780 A.2d at 118. In denying standing, the court listed the many causal links between the manufacturers' initial sales of the handguns to their distributors and the city's expenditures for added police protection, and concluded that the city's injury was remote from the defendants' wrongdoing. *Id.* at 345-46, 353-54, 363-66, 780 A.2d 118-19, 123, 129-30. The court reached this result using a proximate cause analysis, rather than constitutional standing doctrine. *See id.* at 352-53, 780 A.2d at 122-23. The court stated that it denied standing based on prudential limitations, but the authority on which it relied and the nature of its analysis suggests it was, in fact, determining whether the city had satisfied the injury in fact requirement. *See id.* at 360-62, 780 A.2d 127-28. *But see* *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 824 (N.D. Ohio 2000) (rejecting defendants' claim that proximate cause should be the basis for determining injury in fact); *James*, 820 A.2d at 44-45 (discussing and rejecting numerous decisions in which courts borrowed proximate cause analysis from antitrust cases to determine standing). *See also* *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1156 (Ohio 2002) (Cook, J. dissenting) (hesitating "to include a proximate-cause component within a conventional standing analysis").

This application of a substantive element of an underlying claim to determine standing muddies already cloudy waters and may ultimately lead courts to erroneously conclude that cities have not incurred injuries in fact.

The use of proximate cause to determine standing does not necessarily lead to a finding that a city lacks standing. *See, e.g.*, *City of Boston v. Smith & Wesson*, No. 199902590, 2000 WL 1473568, at \*4-\*7 (Mass. Dist. Ct. July 13, 2000) (using proximate cause analysis to find that the city of Boston had standing to sue gun manufacturers).

<sup>103</sup> *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110-11 (1979).

<sup>104</sup> *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (holding that Wyoming had standing to assert a commerce clause claim against Oklahoma after Oklahoma passed legislation requiring the use of some Oklahoma resources when generating power sold in Oklahoma, which caused Wyoming to suffer economic harm in the form of reduced severance taxes); *Gladstone Realtors*, 441 U.S. at 110-11 (1979) (finding, in what appeared to be a claim based on proprietary interests, that "[a] significant reduction in property values [as a result of defendants' discrimination] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services"); *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848-49 (9th Cir. 1985) (finding that a municipality challenging a tribal ordinance restricting liquor sales had a proprietary interest in its loss of tax revenues on liquor sales); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (recognizing that a state's proprietary interests can be affected when a defendant's actions result in a decline in tax revenues); *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976) (noting that a loss of tax revenues could invoke a state's proprietary interests but ultimately denying standing on the

Predatory lenders exploit municipalities' community development efforts by stripping equity that homeowners have gained as a result of city investments in neighborhoods. When predatory lenders target neighborhoods that have appreciated because of city development projects, the lenders become the third-party beneficiaries of the cities' investments. Not only do cities ultimately lose the returns on these investments--increased taxes and a reduction in the need for city services--but they also must respond to these once-stable neighborhoods crying for renewed economic development. Money has to be diverted from other worthy causes to help save neighborhoods from further decline. To the extent that lenders reap the benefits of community development and impede effective revitalization, they impose direct harms on cities.<sup>105</sup>

Whether by engaging in fraud, discrimination, or other forms of illegal activity, predatory lenders cause borrowers to become financially vulnerable. Victims of predatory lending can lose their homes to foreclosure or forego necessities like food and heat in order to keep their homes. They then turn to public agencies for assistance. Cities must meet an increased demand for homeless shelters, heat subsidies, food stamps and other relief programs. In addition, when families are dislocated, children's educations are interrupted, which can impose added costs on cities. Neighborhoods become vulnerable, too. Abandoned homes become targets for drug dealing and arson. As neighborhoods lose their cohesion, crime increases. The need for police and fire services rises in relation to neighborhood decline, further burdening city resources. The increased costs for city services directly [376] affects the proprietary interests of cities.<sup>106</sup>

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grounds that the state did not fall within the zone of interests the statute was designed to protect); *White*, 97 F. Supp. 2d at 824 (finding the city's allegation of reduced tax revenues stated an injury in fact where the claim was that defective firearms caused a reduction in productivity).

<sup>105</sup> *N.D. Fair Hous. Council v. Allen*, 319 F. Supp. 2d 972, 977 (D.N.D. 2004) (allowing nonprofit housing agency to bring a housing discrimination claim based on allegations that the agency suffered injuries in fact because the agency had to “divert[] scarce resources ... to ... counteract the effects of the Defendants' alleged discrimination”); *Support Ministries for Persons with AIDS, Inc., v. Vill. of Waterford*, 799 F. Supp. 272, 275 (N.D.N.Y. 1992) (recognizing that the state had a proprietary interest where the defendants' actions limited the ability of the state to “carry out its policy of developing community-based adult care facilities for homeless citizens with AIDS”).

<sup>106</sup> *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198-99 (9th Cir. 2004) (holding that a National Park Service development plan had an impact on the city of Sausalito's proprietary interests because the plan “would result in a detrimental increase in traffic and crowds in downtown Sausalito, affecting city-owned streets as well as municipal management and public safety functions”); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 256 (D.N.J. 2000) (reasoning that the city satisfied injury in fact because it alleged that the negligent sale and marketing of handguns increased the cost to the city of “prosecuting and punishing handgun crimes”); *White*, 97 F. Supp. 2d at 824 (finding that city of Cleveland alleged injury in fact in a complaint claiming that defective firearms caused the city to incur increased expenses for police and emergency services); *Support Ministries for Persons with AIDS*, 799 F. Supp. at 278 (finding that an allegedly unlawful zoning ordinance that had the affect of prohibiting a residence for homeless people with AIDS caused the state to incur direct economic harm because without the facilities homeless people with AIDS would be “languishing in hospitals” at greater cost to the state); *James v. Arms Tech., Inc.*, 820 A.2d 27, 45-46 (N.J. Super

## 2. Causation and Redressability

The second and third prongs of the Article III analysis require that the plaintiff's injuries be "fairly traceable" to the defendant's wrongdoing "and likely to be redressed by the requested relief."<sup>107</sup> Where a city can demonstrate that lenders have deceived borrowers into accepting loans on terms that they could not afford and, as a result, the borrowers lost or could not maintain their homes, resulting in reduced tax revenues and increased demand for city services, a court could find that the city's injuries were "fairly traceable" to the predatory lending. Furthermore, to the extent a city claimed damages for the injuries the city itself sustained and equitable relief to prevent future injury, the redressability requirement would be satisfied.<sup>108</sup>

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## 3. Prudential Limits

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Ct. App. Div. 2003) (holding, in claims against gun manufacturers, that "no other party has a more direct interest in protecting the public fisc than the City itself").

Some jurisdictions prohibit cities from recovering damages for routine services such as police and fire protection because these services are part of cities' governmental functions that are funded through taxes. *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 894 (E.D. Pa. 2000); *Baker v. Smith & Wesson*, No. 99C-09-283-FS, 2002 WL 31741522, at \*4-\*7 (Del. Super. Ct. Nov. 27, 2002); *City of Chicago v. Beretta U.S.A Corp.*, 821 N.E.2d 1099, 1143-45 (Ill. 2004). *But see White*, 97 F. Supp. 2d at 824 (allowing, under Ohio law, city's claim against defendant gun manufacturers for recovery of increased costs for municipal services); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1242-43 (Ind. 2003) (same under Indiana law); *City of Boston v. Smith & Wesson*, No. 199902590, 2000 WL 1473568, at \*7-\*8 (Mass. Dist. Ct. July 13, 2000) (allowing recovery where costs the gun manufacturer imposed on the city of Boston were "neither discrete nor of the sort a municipally can reasonably expect"); *James*, 820 A.2d at 49 (allowing, under New Jersey law, city's claim against defendant gun manufacturers for recovery of increased costs for municipal services). *See also* Andrew S. Cabana, *Municipal Litigation Against Handgun Manufacturers: Abuse of the Civil Tort System*, 9 GEO. MASON L. REV. 1127, 1162-65 (2001) (discussing the application of the municipal cost recovery rule in handgun litigation).

<sup>107</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also* CHEMERINSKY, *supra* note 24, at 74 (discussing the requirements for Article III standing).

<sup>108</sup> Few of the cases brought by public entities against gun manufacturers have addressed the causation/redressability prong of Article III standing. This is likely because so many courts dismissed the cases by analyzing injury in fact using a proximate cause standard. *See supra* note 102 and accompanying text. For the most part, where courts have found injury in fact in these cases, they have also found that the plaintiffs sufficiently alleged causation and redressability. *E.g.*, *White*, 97 F. Supp. 2d at 825 (holding that the city's allegations of a decline in tax revenues and an increase in the costs for municipal services were fairly traceable to the defendants' manufacturing of defective guns and could be redressed by a favorable judgment); *James*, 820 A.2d at 45-46 (applying New Jersey standing rules to reject the proximate cause approach to injury in fact and to find that the city of Newark had standing to sue gun manufacturers).

In addition to meeting Article III standing minima, cities must meet the prudential standing requirements: (1) they must assert their own rights; (2) they cannot bring claims that are generalized grievances; and (3) when bringing statutory claims, they must fall within the zone of interests the statute was intended to protect.<sup>109</sup> Cities can avoid these requirements if their claims are pursuant to a statute in which Congress explicitly or implicitly granted them standing.

The first two prudential requirements can be easily dispensed with. When cities sue for direct injuries in their proprietary capacity, they are seeking remedies for damages they incurred and are not asserting the rights of others.<sup>110</sup> The prohibition on generalized grievances is inapplicable to city predatory lending claims because it governs only taxpayer or citizen suits to challenge a governmental law or policy.<sup>111</sup> Whether a state satisfies the zone of interests test depends on the provisions of individual statutes, which I discuss in Part V.

#### 4. Summary

Applying the Article III and prudential limits, cities appear to have bases for standing under federal standing doctrine to pursue claims against predatory lenders when seeking damages for the direct injuries I have described so long as they meet the zone of interests test, where relevant, and, as I discussed previously, there are no state laws imposing any restrictions on their ability to bring the claims.

### V. CAUSES OF ACTION CITIES CAN BRING AGAINST PREDATORY LENDERS

The question of standing cannot be resolved without considering the underlying causes of action. In this section of the Article, I look at specific causes of action and assess whether municipalities can pursue each cause of action either in their quasi-sovereign capacity or in their proprietary capacity. The five causes of action on which I focus are fraud, consumer protection, public nuisance, and unjust enrichment under state law, and housing discrimination under federal law.<sup>112</sup> For some causes of action, [378] such as fraud and consumer protection claims, cities can only sue as *parens patriae*. Conversely, federal housing discrimination claims must be based on direct injuries to cities' proprietary interests.

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<sup>109</sup> See generally CHEMERINSKY, *supra* note 24, at 83, 89, 97-98.

<sup>110</sup> See, e.g., *White*, 97 F. Supp. 2d at 825 (finding that city's claim against gun manufacturers for its own economic losses was an assertion of the city's own rights, not the rights of others).

<sup>111</sup> CHEMERINSKY, *supra* note 24, at 89-90.

<sup>112</sup> This is not an exhaustive list of claims. For example, cities might be able to establish legal and factual support for negligent marketing and RICO claims.



The basis on which cities assert standing--quasi-sovereign versus proprietary--not only determines the applicable standing rules, but also can dictate what relief they can obtain. Generally speaking, as quasisovereigns, cities seek injunctive relief and, depending on the operative statute or common law, they may also request civil penalties, restitution and other remedies. There are, however, some exceptions. At times, courts allow public entities to recover money damages, as distinct from civil penalties or restitutionary recovery for individuals, when bringing claims as *parens patriae*.<sup>113</sup> Conversely, some courts preclude restitutionary damages in *parens patriae* actions.<sup>114</sup> When cities act in their proprietary capacities, they are typically entitled to monetary damages for the injuries they directly sustained.<sup>115</sup> It is also possible for them to obtain injunctive relief, depending on the law of the jurisdiction, the causes of action, and the facts.

Because of these vagaries, it is impossible to state with certainty the remedies to which cities are entitled for any given cause of action against predatory lenders. Just the same, in the following sections, I do attempt to specify the nature of the relief that is typically available.

### A. *Fraud Claims*

Predatory lenders employ a menu of deceptive practices to lure borrowers into accepting loans on terms they do not understand and cannot afford.<sup>116</sup> They convince borrowers that the proffered loans are in their best interests. They make false assurances that the borrowers will not have balloon payments or that they will be eligible in the future to refinance at reduced interest rates. The examples of misrepresentation by lenders are without limit. Ultimately, many borrowers enter into contracts that were obtained through fraud.<sup>117</sup>

Few courts have addressed whether governmental entities have standing [379] to bring common law fraud claims in their capacity as quasisovereigns. This is likely because state consumer protection statutes--the natural vehicles for pursuing such claims--typically grant enforcement authority to a state agency, most

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<sup>113</sup> *E.g.*, *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1101-02 (D. Me. 1973) (permitting the state to maintain a *parens patriae* claim for money damages against defendants who discharged oil into state waters).

<sup>114</sup> *E.g.*, *California v. Frito-Lay, Inc.*, 474 F.2d 774, 775 (9th Cir. 1973) (holding that *parens patriae* "has received no judicial recognition in this country as a basis for recovery of money damages for injuries suffered by individuals" because to do so would violate the requirement that the entity asserting quasi-sovereign standing suffer an injury distinct from that suffered by individuals).

<sup>115</sup> *E.g.*, *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979) (recognizing that village had standing to pursue monetary relief in its proprietary capacity in a housing discrimination claim).

<sup>116</sup> For a discussion of some of the challenges plaintiffs face in attempting to prove fraud and related claims, see *Engel & McCoy*, *supra* note 3, at 1299-1305.

<sup>117</sup> *Id.* at 1267-88 (discussing the various types of fraud and deceptive practices).

often attorneys general.<sup>118</sup> Those cases where courts have considered public entity standing to pursue common law fraud claims have involved actions by attorneys general pursuant to their common law or statutorily created authority to protect the public interest.<sup>119</sup> The remedies sought in these cases have been restitution for the aggrieved parties and injunctive relief. In common law fraud claims by municipalities, resolution of the standing issue would likely turn on the generosity of the particular state's home rule provisions. Courts in jurisdictions that give broad authority to cities would be more willing to permit cities to bring common law fraud claims as quasi-sovereigns.

The fact that cities are not parties to predatory loans prevents them from harnessing borrowers' fraud claims to obtain relief in their proprietary capacities. In general, plaintiffs state common law fraud claims if they allege that the defendants made affirmative misrepresentations that the plaintiffs relied on to their detriment.<sup>120</sup> Thus, to satisfy the injury in fact prong of Article III standing, cities would have to plead that they suffered an actual injury because of their reliance on the defendants' misrepresentations. Given that borrowers, not the cities, are the parties that rely on lenders' misrepresentations, cities do not have standing to bring fraud claims in their proprietary capacities.<sup>121</sup>

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<sup>118</sup> See, e.g., IDAHO CODE ANN. § 48-606 (LEXIS through the 2005 Legis. Sess.) (conferring enforcement power on the attorney general for consumer protection violations); N.D. CENT. CODE § 51-10-05.1 (LEXIS through 2005 Sess.) (same).

<sup>119</sup> *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 420-21 (Alaska 1982) (holding that the attorney general had “the authority to bring suit in the public interest for common law fraud to obtain restitution for defrauded land purchasers”); *Lowell Gas Co. v. Massachusetts*, 385 N.E.2d 240, 247-48 (Mass. 1979) (finding that state had standing to pursue common law fraud “in accord with the attorney general's common law duty to represent the public interest and to enforce public rights”). Although these courts did not discuss *parens patriae* standing, the language they employed makes clear that the states were suing in their quasi-sovereign capacities and not for direct injuries.

<sup>120</sup> RESTATEMENT (SECOND) OF TORTS §§ 525-26 (1977).

<sup>121</sup> See, e.g., *In re Lead Paint*, No. MID-L-2754-01, 2002 WL 31474528, at \*20-\*21 (N.J. Super. Ct. App. Div. Nov. 4, 2002) (dismissing local governments' fraud claims against lead paint manufacturers for failure to establish the reliance element).

Likewise, the doctrine of unconscionability, which permits a court to “refuse to enforce [a] contract, ... enforce the remainder of [a] contract without the unconscionable clause, or ... limit the application of any unconscionable clause,” cannot provide any relief to cities in claims brought for direct injuries because they are neither parties to nor assignees of predatory loans. See U.C.C. § 2-302(1) (2002). Although the Uniform Commercial Code governs the sale of goods, courts have applied the unconscionability doctrine to mortgage loans. Frank Lopez, Note, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 86 (1999).

## ***B. Consumer Protection Claims***

Lending practices that constitute unfair and deceptive acts or practices [380] (“UDAP”) can give rise to consumer protection claims<sup>122</sup> under state statutes.<sup>123</sup> Actions that constitute violations include failure to comply with federal disclosure laws, affirmative misrepresentations, omissions of material information, unconscionable terms and practices, and false advertising.<sup>124</sup> Some UDAP statutes have substantive limitations, for example, precluding coverage for real estate-related transactions<sup>125</sup> that make them less promising routes to pursue claims against predatory lenders.

Attorneys general typically have authority under state UDAP laws to pursue injunctions, restitution on behalf of aggrieved consumers, civil penalties,

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<sup>122</sup> Some cities have passed anti-predatory lending ordinances, giving city attorneys or specific city departments the authority to refuse to engage in financial transactions, *e.g.*, serving as depositories for city funds, with lenders who have violated the ordinances' prohibitions on predatory lending. *See, e.g.*, NEW YORK CITY, N.Y., LOCAL LAW NO. 36 (2002), *invalidated by* Mayor of N.Y. v. Council of N.Y., 780 N.Y.S.2d 266 (N.Y. Sup. Ct. 2004). Other cities have adopted anti-predatory lending ordinances that allow the cities to impose fines on predatory lenders. *See, e.g.*, DAYTON, OHIO, OHIO REV. CODE GEN. ORDINANCE § 112.43(A) (2001), *invalidated by* City of Dayton v. Ohio, 813 N.E.2d 707 (Ohio Ct. App. 2004). The District of Columbia passed an ordinance that allows the mayor to impose civil penalties, restitution, and cease and desist orders against lenders found to have engaged in specific predatory lending practices. D.C. CODE ANN. § 26-1153.03(a) (West, Westlaw through July 25, 2005). In addition, if lenders are found to have engaged in systematic predatory lending, the mayor can refuse to renew or order the suspension or revocation of any licenses issued by the mayor. *Id.* The mayor can also restrict the lenders from engaging in any activities that the mayor regulates and enjoin lenders from taking actions that violate the ordinance. D.C. CODE ANN. § 26-1153.03(b) (West, Westlaw through July 25, 2005).

In response to these efforts, the mortgage industry has filed lawsuits across the country, asking courts to declare these ordinances preempted by state law. For the most part, the industry has prevailed. *E.g.*, Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813 (Cal. 2005) (striking down Oakland's predatory lending ordinance); *Mayor of N.Y.*, 780 N.Y.S.2d at 276 (holding that federal and state banking laws preempted New York City's anti-predatory lending ordinance); *City of Dayton*, 813 N.E.2d at 727 (ruling that state's predatory lending law preempted local anti-predatory lending ordinance).

<sup>123</sup> There is a federal UDAP statute, but enforcement is vested in the Federal Trade Commission. 15 U.S.C. § 41 (2000).

<sup>124</sup> Jessica Fogel, *State Consumer Protection Statutes: An Alternative Approach to Solving the Problem of Predatory Mortgage Lending*, 28 SEATTLE U. L. REV. 435, 456-59 (2005) (discussing use of consumer protection statutes to redress predatory lending); Joseph Thomas Moldovan, Note, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509, 553-72 (1982) (describing New York's consumer protection statute).

<sup>125</sup> *Cieri v. Letecia Query Realty, Inc.*, 905 P.2d 29, 40-44 (Haw. 1995). *But see* *Polonetsky v. Better Homes Depot, Inc.*, 760 N.E.2d 1274, 1277-78 (N.Y. 2001) (allowing consumer protection claim involving house sale to go forward where ordinance did not cover real estate transactions because the defendant rendered consumer services in connection with the sale).

and other relief against people or entities that violate the statutes.<sup>126</sup> One way to understand this authority is as legislative recognition of *parens patriae* standing.<sup>127</sup> Even in the absence of express authority, some courts [381] have held that attorneys general can maintain actions under their state's deceptive trade practices statutes, seeking restitution as quasi-sovereigns protecting the economic interests of their residents.<sup>128</sup>

For cities, the most significant barrier to bringing UDAP claims is statutory language making attorneys general the exclusive public authority permitted to pursue claims. In states where this is the case, cities are barred from bringing claims because they fall outside the zone of interests the statutes were intended to benefit.<sup>129</sup> In some states, the attorney general or his or her authorized delegate can bring UDAP claims. Authorized delegates can include county attorneys<sup>130</sup> and city attorneys,<sup>131</sup> who request authority to sue from and are granted authority to sue by the attorney general. Similarly, some states give district attorneys,<sup>132</sup> county attorneys,<sup>133</sup> or county or municipal Offices of Consumer Affairs<sup>134</sup> the power to bring UDAP claims, impliedly as *parens patriae*. In the most liberal grant of power to political subdivisions, at least one state expressly allows town, city and county attorneys to bring UDAP claims.<sup>135</sup>

Some municipal ordinances allow cities to bring actions against people or entities that violate consumer protection ordinances.<sup>136</sup> For example, New York

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<sup>126</sup> *New York v. Lipsitz*, 663 N.Y.S.2d 468, 475-77 (N.Y. Sup. Ct. 1997) (permitting the state to obtain injunctive relief and restitution in an enforcement action under the state consumer protection law); *Wisconsin v. Excel Mgmt. Servs.*, 331 N.W.2d 312, 316 (Wis. 1983) (holding that in an attorney general consumer protection action, the trial court could “order restoration of pecuniary losses which [were] suffered as a result of the practices forming the basis [of] the action”).

<sup>127</sup> One court stated that when a state agency acts pursuant to its authority under a state consumer protection law, “the Division serves a quasi-sovereign interest, the presence of which confers *parens patriae* standing.” *In re Edmond*, 934 F.2d 1304, 1311 (4th Cir. 1991).

<sup>128</sup> *Minnesota v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987) (holding that the “attorney general has broad powers, which are not limited by statute” even though there was “no express statutory authority for the attorney general[]” to bring the particular action); see also *Sclater v. Sclater*, 40 B.R. 594, 596-97 (Bankr. E.D. Mich. 1984) (recognizing that attorney general had *parens patriae* standing to sue under consumer protection law).

<sup>129</sup> For a further discussion of municipal standing and the zone of interests requirement, see *supra* notes 84-87 and accompanying text.

<sup>130</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 44-1521 (West, Westlaw through 2005 Sess. year).

<sup>131</sup> *E.g.*, S.C. CODE ANN. § 39-5-130 (West, Westlaw through 2004 Reg. Sess.).

<sup>132</sup> *E.g.*, COLO. REV. STAT. § 6-1-107 (LEXIS through 2005 Supp. Sess.).

<sup>133</sup> *E.g.*, MINN. STAT. ANN. § 325F.70 (West, Westlaw through 2005 Reg. Sess.).

<sup>134</sup> *E.g.*, N.J. STAT. ANN. § 56:8-14.1 (West, Westlaw through L.2005).

<sup>135</sup> VA. CODE ANN. § 59.1-203 (West, Westlaw through 2005 Reg. Sess.). Although this statute is a good example of a generous grant of standing, other provisions in the statute preclude suits against mortgage lenders. *Id.* § 59.1-199 (West, Westlaw through 2005 Reg. Sess.).

<sup>136</sup> See, e.g., CLEVELAND, OHIO, CHARTER & CODIFIED ORDINANCES §§ 643.02, 643.11 (West, Westlaw through June 30, 2004) (allowing the city to seek injunctive relief and compensatory damages against those who engage in deceptive or unfair trade practices); MINNEAPOLIS, MINN., CODE §§ 154.10, 154.70, 156.10 (West, Westlaw through Ord. No.

City's Consumer Protection Law,<sup>137</sup> prohibits “deceptive or unconscionable trade practice(s) in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts.”<sup>138</sup> Those who violate the ordinance can be subject to civil penalties, disgorgement, injunctions, and restraining [382] orders in actions brought by the city.<sup>139</sup>

Like common law fraud claims, UDAP statutes typically restrict direct injury claims to consumers, who had relationships to the challenged transactions.<sup>140</sup> Thus, with rare exceptions,<sup>141</sup> cities are precluded from bringing UDAP claims in their proprietary capacity because they cannot establish injury in fact.

### *C. Public Nuisance*

Public nuisance claims are an age-old tool used by government entities to pursue lenders who engage in unlawful and unsavory lending practices.<sup>142</sup> In a particularly eloquent decision fifty years ago, the Alabama Supreme Court described the basis for a public nuisance claim against a small loan company:

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2005-Or-070) (allowing director of the Consumer Affairs Division to refer a finding of a violation to the city attorney for prosecution).

<sup>137</sup> NEW YORK CITY, N.Y., CODE § 20-700 (West, Westlaw through Local Law 51 of 2004 and chs. 1-755 of the Laws of N.Y. for 2004); *see also* City of New York v. Toby's Elecs. Inc., 443 N.Y.S.2d 561, 562-64 (Civ. Ct. 1981) (enforcing city ordinance against retailer).

<sup>138</sup> NEW YORK CITY, N.Y., CODE § 20-700. Although this code reflects a generous grant of city standing, it would not permit claims against predatory mortgage lenders unless the loans involved the sale of goods or services. *Id.*

<sup>139</sup> *Id.* § 20-703; *see also* Polonetsky v. Better Homes Depot, Inc., 760 N.E.2d 1274, 1275-76 (N.Y. 1997) (allowing city enforcement action against seller who “showed potential buyers substandard properties at inflated prices .... If buyers observed that the structures were in disrepair, [the defendant] would promise to perform repairs before title closed. Often, however, the repairs were done poorly, incompletely or without required permits. Further, if buyers were hesitant to go through with the sale because of the poor condition of the property, [the defendant] threatened to keep their down payments.”).

<sup>140</sup> *See, e.g.*, Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 970-71 (E.D. Tex. 1997) (holding, in a suit against tobacco manufacturers, that the state did not allege a sufficient relationship to consumers' purchase of tobacco products for the state to qualify as a consumer under the state's Deceptive Trade Practices Act).

<sup>141</sup> *See, e.g.*, Maryland v. Philip Morris Inc., No. 96122017, CL211487, 1997 WL 540913, at \*18 (Md. Cir. Ct. May 21, 1997) (permitting the state to maintain a Consumer Protection Act claim against numerous tobacco companies, seeking monetary damages as the result of the defendants' violation of the statute, even though the state did not meet the statutory definition of “consumer” and was not involved in the transaction that gave rise to the claim).

<sup>142</sup> *State ex rel. Turner v. Younker Bros., Inc.*, 210 N.W.2d 550, 554 (Iowa 1973); *State ex rel. Smith v. McMahon*, 280 P. 906, 907-08 (Kan. 1929); *State ex rel. Goff v. O'Neil*, 286 N.W. 316, 318-19 (Minn. 1939); *State ex rel. Burgum v. Hooker*, 87 N.W.2d 337, 339-40 (N.D. 1957); *State v. J.C. Penney Co.*, 179 N.W.2d 641, 655 (Wis. 1970).



[M]ost of those who ma[d]e loans from the lending company were in the lower-income brackets of life; were people of little education; some of them positively ignorant, and few of them had any idea whatever what the lawful rate of interest was in their own State, and most of them had only a faint conception, if any, what a promissory note was and what were the legal consequences affecting them when they signed one. All of the borrowers who testified had no assets except their earning power, and could not obtain loans from commercial banks ....

[T]hey [were] people who d[id] not fully understand what their legal rights [we]re. They [were] people who [could] [383] easily be imposed upon .... The testimony shows that, perhaps with one exception, every borrower applying for a loan was pressed by the need of money for the necessities of life. Sometimes loans were needed to pay ... doctors, medical and hospital bills, and funeral expenses ....

[The lenders'] business methods have created a public nuisance by their charging and collecting unlawful and unconscionable interest from their more than 1050 customers .... These actions ... present an evil and repulsive picture of oppression and intimidation; of the exaction from lowly and humble folk of unconscionable and extortionate rates of interest on small loans, of intentional flouting of the wise public policy of the State; of taking advantage of the necessities of financially distressed people, pictures which in their ugliness are hardly shown by any other record found in the books and files of this court. This court of equity in the face of the odious conditions shown by the record in this case would be unworthy of its title, "a court of conscience," if it stood idly by and failed now to use its restraining and injunctive powers to stop the oppressive practices of the loan company.<sup>143</sup>

The Restatement of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public."<sup>144</sup> Factors that "may sustain a holding that an interference with a public right is unreasonable include the following:

- (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

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<sup>143</sup> *Larson v. State ex rel. Patterson*, 97 So. 2d 776, 780-82 (Ala. 1957).

<sup>144</sup> RESTATEMENT (SECOND) OF TORTS § 821B (1979).

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”<sup>145</sup>

Predatory lending satisfies all three of these factors. Abusive lending [384] interferes with the public health, safety, comfort and peace of individuals and communities. The lenders often obtain the loans through fraud in violation of various laws. Predatory lending is not a one-time event with limited consequences. Rather, it is a lending *modus operandi* in low and moderate income communities, with devastating effects on cities that may take years to reverse. In terms of the scienter element, predatory lenders know the impact of their actions on communities.

Some states impose elements beyond the Restatement criteria. Examples include requiring that plaintiffs prove that the defendants' activities involved the use of the defendants' own property or that the defendants interfered with the public entities' use of their own property.<sup>146</sup> In jurisdictions that require either of these additional elements, cities would not be successful bringing public nuisance claims against predatory lenders.

Still other states restrict public nuisance actions to situations in which the defendant can control and abate the nuisance.<sup>147</sup> This requirement could prove problematic. Most home mortgage loans are sold on the secondary market.<sup>148</sup> Thus, the entities engaged in predatory lending oftentimes are not in a position to renegotiate the terms of loans to abate nuisances.<sup>149</sup> Similarly, because they do not hold the notes, they cannot foreclose on or rehabilitate abandoned properties.<sup>150</sup> There are times, however, when originators who sold loans for securitization ultimately “reown” the loans.<sup>151</sup> Deal provisions in securitized loans typically include recourse terms, requiring originators to repurchase non-performing

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<sup>145</sup> *Id.* Public plaintiffs, unlike private individuals bringing public nuisance claims, do not have to prove they “suffered harm of a kind different from that suffered by other members of the public.” *Id.* § 821C.

<sup>146</sup> *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 973 (E.D. Tex. 1997). At least one jurisdiction precludes public nuisance suits against “manufacturers for lawful products that are lawfully placed in the stream of commerce.” *Camden v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). This “unlawfulness” requirement would not preclude public nuisance claims against predatory lenders because most predatory loans are illegal in some respect. *See, e.g.*, IND. CODE ANN. § 24-9-4-1 (West 2005) (restricting the practices of creditors making high cost home loans); N.C. GEN. STAT. ANN. § 24-1.1E(c) (West 2001) (prohibiting certain predatory features in high-cost loans).

<sup>147</sup> *Developments: The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1761-62 (2000) (discussing recent developments in public nuisance law).

<sup>148</sup> *See* Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do with It?*, 15 HOUSING POL'Y DEBATE 715 (2004).

<sup>149</sup> *See generally id.* (discussing the securitization of home mortgage loans).

<sup>150</sup> *Id.* at 730.

<sup>151</sup> *Id.*

loans.<sup>152</sup> When this occurs, originators are in a position to control and abate any nuisances.

For the most part, attorneys general, representing the states as quasisovereigns, have brought public nuisance claims against lenders to pursue injunctive relief, including ordering lenders to abate the nuisances.<sup>153</sup> This, however, does not evince a universal preclusion of municipal standing. [385] Some jurisdictions statutorily grant cities standing to bring public nuisance claims, while others have recognized their standing through common law.<sup>154</sup> Still others are silent on the issue, leaving open the question whether municipalities in those jurisdictions can bring public nuisance claims.<sup>155</sup>

It is not always clear whether cities' standing to bring public nuisance claims is based on their proprietary or their quasi-sovereign interests.<sup>156</sup> When

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<sup>152</sup> *Id.*

<sup>153</sup> *E.g.*, *State ex rel. Turner v. Younker Bros., Inc.*, 210 N.W.2d 550, 553-54 (Iowa 1973); *State ex rel. Smith v. McMahon*, 280 P. 906, 906 (Kan. 1929); *State ex rel. Goff v. O'Neil*, 286 N.W. 316, 317 (Minn. 1939); *State ex rel. Burgum v. Hooker*, 87 N.W.2d 337, 339 (N.D. 1957); *State v. J.C. Penney Co.*, 179 N.W.2d 641, 642 (Wis. 1970).

<sup>154</sup> *E.g.*, WIS. STAT. ANN. § 823.01 (West 1994) (granting municipalities authority to maintain actions to recover damages, to abate a public nuisance, and to obtain injunctions); *Camden v. Beretta, U.S.A. Corp.*, 123 F. Supp. 2d 245, 264-65 (D.N.J. 2000) (noting that a municipality's broad statutory power to sue allows an inference to be drawn that municipalities have general statutory and constitutional standing to sue in order to abate public nuisances).

<sup>155</sup> Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Lawsuits Against the Gun Industry*, 70 GEO. WASH. L. REVV. 212, 220-21 (2002).

In the public entity litigation against gun and lead paint manufacturers, most courts have held that municipalities have standing to bring public nuisance claims. *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Dist. Ct. July 13, 2000); *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003); *City of Cincinnati v. Beretta, U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002). *See generally* John G. Culhane et al., *Defining a Proper Role for Public Nuisance Law in Municipal Suits against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287 (2001) (discussing public nuisance claims in gun litigation); Lauren E. Handler et al., *Tort of Public Nuisance in Public Entity Litigation: Return to the Jungle?*, 69 DEF. COUNS. J. 484 (2002) (discussing public nuisance claims against tobacco, lead paint, gun and asbestos manufacturers).

Those courts that have dismissed public nuisance claims brought by public entities have typically done so on the basis of lack of causation, i.e., that the number and attenuation of the causal links precluded a finding that the challenged activity was the cause in fact and proximate cause of the harm. *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 420-22 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 368-70, 780 A.2d 98, 131-32 (2001); *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 646-51 (D.C. 2005). *But see* *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 283-84 (E.D.N.Y. 2004) (holding that the city sufficiently pled cause in fact and proximate cause to defeat defendants' motion to dismiss). Other courts have held that the issue was best left to the legislative process. *Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1120-21 (Ill. 2004).

<sup>156</sup> *See Recovering the Cost of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REVV. 1521, 1522-23 (2000) [hereinafter *Recovering the Cost*] (arguing that municipal plaintiffs have conflated proprietary and quasi-sovereign standing in their public nuisance claims).

cities seek sweeping equitable relief such as injunctions and orders to abate, they appear to be invoking their quasi-sovereign interests.<sup>157</sup> Claims to recover expenses incurred abating nuisances arguably are akin to direct injury claims and thus would be based on cities' proprietary interests.<sup>158</sup> It is, however, also possible to conceive of claims for abatement [386] costs as expenditures made in furtherance of cities' *parens patriae* obligations to protect the health, safety and welfare of their residents.

#### ***D. Unjust Enrichment and Restitution***

Unjust enrichment claims offer another vehicle for cities to pursue. The elements of an unjust enrichment claim typically include: “(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so.”<sup>159</sup> Cities could allege cognizable unjust enrichment claims by stating that predatory lenders make abusive and unlawful loans that cause neighborhoods to deteriorate and increase the demand for city services. The cities then repair the damage the lenders cause, incurring costs the lenders rightfully should bear. By financially redressing the externalities that predatory lenders impose on them, cities arguably confer a benefit on the lenders, giving municipalities standing to bring claims for restitution.<sup>160</sup>

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<sup>157</sup> The Restatement of Torts states that if a plaintiff has the right to recover damages in a public nuisance claim, it has the power to seek an injunction to abate a nuisance. RESTATEMENT (SECOND) OF TORTS § 821C(2) (1979). This suggests that if a city can bring a claim in its proprietary capacity, it can obtain the equitable relief that is usually brought in *parens patriae* actions.

<sup>158</sup> For cities to recover abatement costs, they would need to avoid allegations that could lead courts to construe their claims as sounding in private nuisance. This is because interference with the plaintiffs' use and enjoyment of their own land is an element of private nuisance. See *Recovering the Cost*, *supra* note 156, at 1530-31 (noting the proof problems cities would encounter with private nuisance claims). Cities could not make such an allegation in good faith and thus could not plead injury in fact. *Id.*

<sup>159</sup> *White*, 97 F. Supp. 2d at 829.

<sup>160</sup> Similar theories in the litigation against gun, lead and tobacco manufacturers have met with mixed success. See *Maryland v. Philip Morris, Inc.*, No. 96122017, CL 211487, 1997 WL 540913, at \*16-\*17 (Md. Cir. Ct. May 21, 1997) (finding in state's claim against tobacco companies for restitution of health care expenses the state paid for the treatment of smokers through Medicaid that “bald assertions that [the State] spared Defendants thousands of individual lawsuits from Medicaid recipients [are] too speculative and remote to constitute a benefit” for the purposes of an unjust enrichment claim); see also *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 972 (E.D. Tex. 1997) (finding the state's claims that cigarette manufacturers benefited from the state paying smoking-related medical expenses “too attenuated and indirect to find support under the theory of unjust enrichment”); *James v. Arcadia Machine & Tool*, No. Esx-L-6059-99, at 23 (N.J. Super. Ct. Law Div. Dec. 10, 2001) (unpublished opinion) (rejecting an unjust enrichment claim that the city of Newark brought against gun manufacturers on the grounds that the city had not shown that the defendant had diverted assets from the city, and citing a case that required the plaintiff to allege that it “expected remuneration from the defendant at the time it performed or conferred a benefit

For the same reasons I just discussed in the section on nuisance, city unjust enrichment claims arguably could be deemed direct injury, proprietary claims or claims based on their status as *parens patriae* to obtain damages [387] they incurred protecting the health, welfare and safety of their residents.

### *E. Discrimination Claims*<sup>161</sup>

Empirical studies have found that predatory lenders target people of color, selling them loans on terms that are more onerous than those contained in loans made to whites with similar risk profiles.<sup>162</sup> These racially discriminatory lending practices fall within the ambit of the federal Fair Housing Act (“FHA”).<sup>163</sup> The FHA makes it illegal “for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”<sup>164</sup> A real estate-related transaction includes “[t]he making or

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on defendant” (citing *Cameco, Inc. v. Gedick*, 690 A.2d 1051 (N.J. Super. Ct. App. Div. 1997), *aff’d*, 724 A.2d 783 (N.J. 1999), *aff’d on other grounds*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003)). *But see White*, 97 F. Supp. 2d at 829 (denying defendant’s motion to dismiss an unjust enrichment claim and holding that the allegations that the city “ha[d] paid for what may be called the Defendant’s externalities ... [and] that Defendants [were] aware of this obvious benefit, and that retention of this benefit [was] unjust” was sufficient to state a claim for relief). *See also City of Boston*, 2000 WL 1473568, at \*18 (denying defendant’s motion to dismiss an unjust enrichment claim because the plaintiffs “allege that they have conferred a benefit upon Defendants by paying for the costs of the harm caused by Defendants’ conduct”); *City of New York v. Lead Indus. Ass’n, Inc.*, 597 N.Y.S.2d 698, 700 (App. Div. 1993) (refusing to dismiss city’s claim that it was entitled to restitution from lead manufacturers for the costs of lead abatement and treatment of victims of lead poisoning); *Rhode Island v. Lead Indus. Ass’n, Inc.*, No. 99-5226, 2001 WL 345830, at \*15 (R.I. Super. April 2, 2001) (finding allegations that the “State’s payment of lead-related costs has allowed and continues to allow the defendants to derive economic gain from their promotion and sale of lead while, at the State’s expense, avoiding responsibility for the damages it has caused” precluded dismissal of the state’s suit against lead paint manufacturers).

<sup>161</sup> *See Engel & McCoy*, *supra* note 3, at 1314-17 (discussing discrimination claims against predatory lenders).

<sup>162</sup> *See supra* note 6 (discussing the evidence of discrimination in mortgage lending).

<sup>163</sup> 42 U.S.C. §§ 3601-31 (2000). Lenders may also be in violation of state fair housing laws, a discussion of which is beyond the scope of this Article. *See infra* note 170. There are also city codes granting cities the power to bring housing discrimination claims. *See Michael H. Schill, Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 *FORDHAM URB. L.J.* 991, 1005-14 (1996) (discussing the New York City Human Rights Commission’s authority to bring housing discrimination claims).

<sup>164</sup> 42 U.S.C. § 3605(a) (2000). Federal and state laws also prohibit credit discrimination based on race; however, these statutes typically permit only applicants for credit or clearly enumerated state or federal governmental agencies to bring claims. *See, e.g.*, Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691(c)-(e) (2000) (allowing claims by aggrieved applicants for credit and specified federal agencies).

purchasing of loans or providing other financial assistance ... for purchasing, constructing, improving, repairing, or maintaining a dwelling.”<sup>165</sup>

The standing provisions in the FHA provide a cause of action to “aggrieved persons,” defined as those who “claim[] to have been injured by a discriminatory housing practice; or ... believe[] ... [they] will be injured by a discriminatory housing practice that is about to occur.”<sup>166</sup> Although the statute does not explicitly permit or preclude claims by governmental entities,<sup>167</sup> and the definition of persons does not include any public entities,<sup>168</sup> the Supreme Court, in *Gladstone Realtors v. Village of Bellwood*, [388] relied on the statute’s broad definition of aggrieved parties to evince a congressional override of the prudential standing requirements to allow cities to bring claims based on injuries to their proprietary interests.<sup>169</sup> The language limiting standing to “aggrieved parties,” however, precludes cities from bringing *parens patriae* actions.<sup>170</sup>

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<sup>165</sup> 45 U.S.C. § 3605(b)(1) (2000).

<sup>166</sup> 42 U.S.C. § 3602(i) (2000).

<sup>167</sup> At least one court has discussed the omission of governmental bodies from the FHA definition of person. In *Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca*, 952 F.2d 1183 (10th Cir. 1991), Ponca City moved to dismiss a claim by the Housing Authority—a state agency, claiming that the Authority was not an aggrieved person under the FHA. The court rejected Ponca City’s argument on the grounds that: (1) earlier Supreme Court cases had held that “those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered;” (2) the legislative history of the FHA revealed that the legislature intended that the term “aggrieved person” be given a broad definition; and (3) HUD has interpreted “aggrieved persons” to include governmental bodies. *Id.* at 1193-95 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972)).

<sup>168</sup> The statutory definition of “person” “includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries.” 42 U.S.C. § 3602(d) (2000).

<sup>169</sup> *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100, 103, 109, 111, 115 (1979).

<sup>170</sup> Under state fair housing laws, cities may be able to bring claims in their quasi-sovereign capacity. For example, California’s anti-discrimination laws provide that:

No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person’s partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

CAL. CIV. CODE § 51.5 [“Unruh Civil Rights Act”] (West 1982 & West Supp. 2005). Additional provisions state that: Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint.

When predatory lenders market abusive loans to people of color, they increase the instability of already vulnerable neighborhoods and impose direct harms on cities, in the form of increased expenses and decreased revenues. These injuries are sufficient to confer standing under the FHA. In *Gladstone Realtors*, the city alleged that the defendants' discrimination caused "a significant reduction in property values [which] directly injure[d] [the] municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services."<sup>171</sup> In a subsequent case, a court found that the city of Chicago had standing based on its allegations that:

[R]acial steering leads to resegregation, the process by which a neighborhood which is predominantly white rapidly becomes populated by racial or ethnic minorities. People who have lived in the neighborhoods become panicked and lose interest in the community. This causes a destabilization of the community and a corresponding increased burden on the City in the form of increased crime and an erosion of the tax base. Further, the City's fair housing agency has to use its scarce resources to ensure compliance with the fair housing laws (including its own fair housing ordinances). The City's fair housing [389] agency cannot perform its routine services--human relations training, community workshops, etc.--because it has to commit resources against those engaged in racial steering.<sup>172</sup>

Given that predatory lenders cause the same types of injuries described by the cities of Bellwood and Chicago, it appears that municipalities would have standing to maintain FHA claims in their proprietary capacities against predatory lenders.<sup>173</sup>

### ***F. Summary***

There are a number of claims cities could pursue to redress predatory lending either in their proprietary or quasi-sovereigns capacities. Cities that are permitted to bring claims as quasi-sovereigns can seek restitution and injunctive relief as *parens patriae* for common law fraud. Likewise, to the extent that their

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*Id.* § 52(c).

<sup>171</sup> *Gladstone Realtors*, 441 U.S. at 110-11.

<sup>172</sup> *City of Chicago v. Matchmaker Real Estate Sales Ctr.*, 982 F.2d 1086, 1095 (7th Cir. 1993) (internal citations omitted); *see also* *Heights Cmty. Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 138-39 (6th Cir. 1985) (finding sufficient allegations of a threatened injury to the city to confer standing under the FHA).

<sup>173</sup> It is theoretically possible, but highly unlikely, that a state court applying standing rules that are more restrictive than the federal rules could deny a city standing to bring a claim under the Fair Housing Act in its proprietary capacity. *See supra* note 27 and accompanying text.

state laws grant municipalities standing to bring statutory UDAP claims, cities can bring claims requesting civil penalties and other relief enumerated by statute.

Public nuisance claims may provide the best hope for city lawsuits against predatory lenders because many states, even some of those that severely restrict municipal exercise of power, have recognized that political subdivisions have standing to bring public nuisance actions. The potential remedies in public nuisance claims include injunctive relief and recovery of any costs cities expended abating the nuisance. Similarly, cities may seek restitution through claims of unjust enrichment. Although the basis for city standing in public nuisance and unjust enrichment claims is somewhat unsettled, cities would be wise to frame the claims as proprietary rather than quasi-sovereign. This is because proprietary claims can be brought in federal court and because home rule provisions are more likely to impede cities' ability to bring claims based on quasi-sovereign standing than they are to prevent claims based on proprietary standing.

Lastly, cities can bring Fair Housing Act claims in their proprietary capacities, seeking damages for their direct injuries and injunctive relief.

## VI. CONCLUSION

The law governing the standing of municipalities is a quagmire. When it comes to quasi-sovereign standing, the uncertainties outweigh the certainties. [390] Most states have never addressed whether cities have standing as quasi-sovereigns. Those that have typically relied on the amount of power the states had granted political subdivisions to determine whether their cities could sue as *parens patriae*. However, some jurisdictions that have restricted cities' home rule authority have permitted cities to pursue nuisance claims based on what could be construed as assertions of *parens patriae* authority. And, regardless of what powers particular states may have granted their cities, the federal courts have not recognized cities as quasi-sovereigns and have precluded all municipal *parens patriae* claims. Proprietary standing entails less murky waters. Cities can bring claims for direct injuries in state and federal court unless state law imposes restrictions on municipal claims against predatory lenders.

Although there are legitimate bases for municipal standing to bring claims against predatory lenders, there are also significant hurdles, especially when it comes to quasi-sovereign standing. There is also the very real possibility that states will erect additional barriers if the threat of widespread municipal litigation impels the lending and mortgage broker industries to pressure states to prevent such litigation. States may well respond by passing laws preempting municipal lawsuits against predatory lenders<sup>174</sup> and intervening in city litigation to assert that the states' power to regulate lenders prevents cities from suing lenders.

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<sup>174</sup> See *supra* text accompanying notes 66-67. In addition, to the extent that states have passed laws preempting city efforts to redress predatory lending through ordinances, they may claim that the preemption applies equally to litigation. See *supra* note 122 (discussing state preemption of local anti-predatory lending ordinances).

Communities across the country are confronting the mounting external costs of predatory lending and searching for tools to stem the tide. For cities to effectively curtail predatory lending, they need the power of quasi-sovereigns to seek broad relief against the lenders that are destroying their neighborhoods and the ability to pursue claims for direct injuries in their proprietary capacities.<sup>175</sup> Of the many social and economic issues that could justify granting cities broad powers to litigate claims, predatory lending is one of the most compelling.

Predatory lending is a local problem, and it is local governments that have the greatest interest in halting it.<sup>176</sup> This is because states do not bear [391] the financial burden of predatory lending and thus have reduced incentives, relative to cities, to pursue abusive lenders. It is also possible that predatory lending simply falls below the radar of many attorneys general, who are removed from injuries occurring in localities far from their capitals.<sup>177</sup> In addition, depending on the political winds, governors and their cabinets may be more beholden to the interests of the mortgage industry than to politically less-powerful victims of predatory lending in far-off cities.

Predatory lenders target this country's most vulnerable communities and most vulnerable people. Many victimized borrowers are ill-equipped to protect themselves from these lenders and are even less well-equipped to pursue litigation. Absent enforcement by public entities, abusive lenders often proceed unchecked. Even when aggrieved borrowers have the financial and emotional resources to litigate claims against predatory lenders, the remedies they obtain are personal to them, e.g. damages or loan rescission or reformation, and have little or no impact on lenders' practices and do not redress the externalities that predatory lending imposes on cities.

With the power to pursue claims against predatory lenders as quasi-sovereigns and in their proprietary capacities, cities could more effectively protect their citizens and recover damages for the harms predatory lenders impose on the cities themselves. Most importantly, city lawsuits have the potential to force

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<sup>175</sup> See Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 256, 272 (2004) (arguing that “the political, economic and social structure of metropolitan areas” necessitate revamping home rule statutes).

<sup>176</sup> This is not to suggest that states never take an interest in predatory lending. The Connecticut Department of Banking recently entered into a settlement agreement with Ameriquest Mortgage Company of over \$7 million, which included a civil penalty, the creation of a Housing Assistance Fund, restitution of unlawfully charged fees, and \$500 to each victim of Ameriquest's wrongful lending practices. Kenneth R. Gosselin, *Lender Agrees to Big Penalty*, HARTFORD COURANT, Jul. 15, 2005, at E1, available at LEXIS, News Library, ALLNWS File.

Although actions by the state may be effective at obtaining restitution for victims and injunctive relief, they typically do not address the externalities imposed on cities.

<sup>177</sup> See Michael J. Wittke, *Municipal Recovery of Natural Resource Damages under CERLA*, 23 B.C. ENVTL. AFF. L. REV. 921, 941-47 (1996) (discussing similar arguments in support of allowing municipalities to recover under the Comprehensive Environmental Response, Compensation and Liability Act for local environmental damage).

predatory lenders to internalize the externalities their lending creates, thereby reducing their incentives to engage in abusive lending practices.