Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act

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Abstract

For generations, mortgage lending has always been the gateway to the American dream of homeownership, and, historically, has also been characterized by widespread discrimination against racial and ethnic minorities and their communities. Mortgage discrimination in the modern era has often been accomplished through a technique known as discretionary pricing, in which lenders allow their loan officers and brokers to increase borrowers' costs from an objectively determined base rate. In the past decade alone, discretionary pricing has cost minority homeowners billions of dollars in extra payments, which, in turn, has led these minorities to suffer higher foreclosure rates than whites and has reversed recent gains in their homeownership rates.

This Article explores the civil rights implications of discretionary pricing, which is currently being challenged in a series of nationwide class-action lawsuits based primarily on the federal Fair Housing Act. We begin with some background on the mortgage industry's performance in recent years and a survey of the evidence of the discrimination that has existed within this industry. We then review current legal responses to this discrimination, with a particular focus on the series of FHA-based class actions that have focused on the racial impact of discretionary pricing. We conclude with a discussion of non-litigation reforms that are also needed to ensure that the home-finance industry provides a less discriminatory marketplace in the future.
Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act

By
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I. INTRODUCTION

The American home mortgage market's performance in recent years has been a story of hea dy successes followed by spectacular failures. This article focuses on a widespread practice within the mortgage industry--discretionary pricing--in which lenders allow their loan officers and brokers to increase borrowers' costs above an objectively determined “par” rate. Specifically, we consider whether this practice has a racially discriminatory impact that violates the federal Fair Housing Act (“FHA”)1 or other civil rights laws.

[376] The importance of this issue can hardly be overstated. Apart from the role that discretionary pricing may have played in exacerbating the collapse of the country's home-finance system,2 this practice has resulted in widespread discrimination against African American and Latino borrowers.3 These minorities

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2 These failures, in turn, led to a recession of epic proportions, perhaps the worst since the Great Depression of the 1930s. See infra Part II.B.

3 Other racial groups may also be affected by discretionary mortgage pricing. As a general matter, Asians seem to be treated similarly as whites, but two other groups--American Indian/Alaska Native and Native Hawaiian/Other Pacific Islander--do suffer some discrimination, albeit not to the same degree as blacks and Hispanics. See, e.g., Federal Reserve reports cited infra note 134. Reflecting such research, and the FHA litigation that has challenged discretionary pricing, this Article focuses primarily on mortgage discrimination against blacks and Hispanics.
have often been charged substantially higher interest rates and closing costs than comparable white borrowers, resulting in blacks and Latinos incurring billions of dollars in extra payments for their mortgages; this, in turn, has caused them to suffer higher foreclosure rates than whites and has reversed recent gains in their homeownership rates, thereby substantially reducing minorities' overall wealth.4

Discretionary pricing is now being challenged in a series of class-action lawsuits that are pending in various federal courts throughout the country.5 The ultimate resolution of these cases --and particularly how they interpret the FHA--will establish the regulatory framework for fair lending in the mortgage industry for years to come. Whether as a result of these cases or otherwise, new ways must be found to eliminate the cancer of racial discrimination in the home-finance system.6 Our purpose here is to find these new approaches through detailed examination of the litigation and regulatory responses to discretionary mortgage pricing, with the ultimate goal of securing the right of Americans of all racial and ethnic backgrounds to pursue the dream of homeownership through fair and non-discriminatory financing techniques.

We begin with some background in Part II, first on the mortgage industry's evolution and performance in recent years and then with a review of the evidence of discrimination that has existed within this industry. Part III deals with the modern legal response to this discrimination, with a particular focus on the series of FHA-based class actions that are now challenging the [377] racial impact of discretionary pricing policies used by many large mortgage lenders. Part IV discusses non-litigation reforms that will be needed--regardless of how these class action cases are resolved--to ensure that the home-finance industry provides a less discriminatory marketplace in the future.

II. DISCRIMINATION AND OTHER PROBLEMS IN THE HOME MORTGAGE MARKET

A. This Decade's Boom-and-Bust Housing Market

Over the past decade, America's housing market has gone from boom to bust. Until 2000, average prices for single-family homes rose in line with median

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4 See infra notes 42-47 and accompanying text. The importance of the issue of mortgage discrimination is also highlighted by the fact that “the minority share of households [in the United States] is projected to increase from 29 percent in 2005 to 35 percent in 2020.” See Joint Ctr. for Hous. Studies of Harvard Univ., The State of the Nation's Housing: 2009, at 5 (2009) [hereinafter 2009 Housing].
5 See cases cited infra notes 159-166.
6 For a discussion of some non-litigation ideas on this point, see infra Part IV.
household incomes and general price inflation.\textsuperscript{7} Then, in the boom period of 2000-2005, house-price appreciation shot ahead of these benchmarks, outstripping income growth more than six-fold.\textsuperscript{8} The national homeownership rate, which fell in the 1980s and early 1990s, rose 4.6 percentage points in the ten-year period ending in 2005\textsuperscript{9} to an all-time high of 69.2%.\textsuperscript{10} Rates for minorities, which have always been substantially below those for whites,\textsuperscript{11} did particularly well during this boom period.\textsuperscript{12}

In 2005, U.S. housing prices were rising at their fastest pace since 1978,\textsuperscript{13} but then began to stagnate or decline in much of the country.\textsuperscript{14} From October of 2005 to January of 2009, the median price of a home fell by 29.8%,\textsuperscript{15} and the declines continued in the first half of 2009.\textsuperscript{16} Meanwhile, the homeownership rate lost almost two percentage points from its 2005 [378] peak and fell to 67.3% in the first quarter of 2009, erasing all of the gains since 2000.\textsuperscript{17}

The boom's latter phase was fueled by an easing of traditional credit standards.\textsuperscript{18} For example, in the two-year period ending in 2005, interest-only home-loans (i.e., loans in which principal payments are deferred for a set number of years) went from being virtually nonexistent to an estimated 20% of the dollar

\textsuperscript{8} Id.
\textsuperscript{9} See 2009 Housing, supra note 4, at 13.
\textsuperscript{11} See infra note 43 and accompanying text.
\textsuperscript{13} 2006 Housing, supra note 7, at 7. In 2005, inflation-adjusted house prices were up 9.4%, the largest gain in over forty years. Id. at 7-8.
\textsuperscript{15} 2009 Housing, supra note 4, at 8.
\textsuperscript{17} 2009 Housing, supra note 4, at 16.
\textsuperscript{18} See, e.g., GAO Mortgage Report, supra note 14, at 41-42, 44.
value of all loans and 37% of adjustable rate mortgages. Furthermore, payment-option loans (i.e., loans in which borrowers make minimum payments that are even lower than the interest due and roll the balance into the overall amount owed) accounted for nearly 10% of loan originations in 2005. Lenders also required less documentation of borrowers' income and assets.

The first half of this decade also saw a dramatic increase in “subprime lending.” Subprime loans generally refer to first-lien home-loans that have an annual percentage rate (“APR”) of at least three percentage points above the rate on U.S. Treasury securities of comparable maturity. Subprime loans, which had accounted for less than 5% of all home-loan originations in 1994, made up 23% of the total mortgage market in 2006. During the 2001-2006 period, subprime mortgage originations grew from $210 billion to $640 billion, with the comparable figure being only $35 billion in 1994.

[379] Some of these subprime loans included such egregious terms that they were virtually impossible for the borrowers to repay and became known as

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19 2006 Housing, supra note 7, at 1, 17. Adjustable rate loans accounted for one-third of home mortgages in 2004. 2009 Housing, supra note 4, at 19.
20 2006 Housing, supra note 7, at 1-2.
21 See, e.g., 2006 Housing, supra note 7, at 17; GAO Mortgage Report, supra note 14, at 41-42, 44. Among the new loan products that mortgage lenders introduced during the boom years were the “stated income” (or “low-doc”) loan and the no-document (or “no-doc”) loan. These loans charged a premium to borrowers to dispense with traditional creditworthiness verifications (e.g., a pay stub or a tax return). Stated-income loans generally required only that borrowers verbally verified their employment status and income, while no-document loans, as their title suggests, dispensed with virtually all verification of income and assets.
22 See infra notes 130-132 and accompanying text; Kochhar et al., supra note 12, at 13 n.2.
23 Fed’s New HMDA Report, supra note 3, at 349 (reporting the 1994 figure); Brian M. McCall, Learning from Our History: Evaluating the Modern Housing Finance Market in Light of Ancient Principles of Justice, 60 S.C. L. Rev. 707, 710 (2009) (reporting the 2006 figure); see also Amaad Rivera et al., Foreclosed: State of the Dream 2008 4-5 (2008) (“Starting in the early 1990s as a small niche market, by 2006 the subprime mortgage industry rose to 20.1% of the market, growing from a $35 billion to a $665 billion-a-year-business.”). For more on the history of subprime mortgage lending, see Kenneth Temkin et al., Subprime Markets, the Role of GSEs, and Risk-Based Pricing 7-12 (2002).
24 See Keith Ernst et al., Steered Wrong: Brokers, Borrowers, and Subprime Loans 6 (2008) (providing the 2006 figure); 2006 Housing, supra note 7, at 18 (providing the 2001-2005 figures); McCall, supra note 23, at 710 (providing the 1994 figure); see also Examining the Making Home Affordable Program: Hearings Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Servs., 111th Cong. 4 (2009) (testimony of Ellen Harnick, Senior Policy Counsel at the Center for Responsible Lending) (subprime and other nonprime lending “constituted 33.6% of all mortgage production” at its high point in 2006), available at http://financialservices.house.gov/hearings_all.shtml. GAO Mortgage Report, supra note 14, at 18 (reporting that, in the 2003-2006 period, subprime loans grew in dollar terms from about 9% to 24% of mortgage originations).
“predatory” loans. Why would a mortgage lender make loans that borrowers could not repay? Two reasons suggest themselves. First, as long as the value of the underlying homes was appreciating, borrowers could be counted on to re-finance their loans later (with the lender receiving additional fees in connection with the second loan) or, if foreclosure did result, the lender would take possession of properties that might well exceed the amount of the original loans. Second, lenders could sell many of their loans to financial institutions in the secondary market, thereby passing on to others the risk of non-payment by the borrowers.

Use of this latter technique—in which subprime loans were pooled by large secondary buyers for ultimate re-sale to investors as residential mortgage-backed securities (“RMBS”)—became known as “securitization.” The securitization system allowed for virtually any mortgage to be sold by the originating lender in the secondary market. Government-backed purchasers played a large role in this process, but private investors' market share grew rapidly during the boom years, ultimately surpassing that of the governmental entities by 2005.

25 A precise definition of a “predatory” loan is somewhat elusive, but it generally involves one or more highly egregious terms. See, e.g., Kathleen C. Engel & Patricia A. McCoy, A Tale of Three Markets: The Law and Economics of Predatory Lending, 80 Tex. L. Rev. 1255, 1260 (2002) (describing predatory lending as “a catalogue of onerous lending practices, which are often targeted at vulnerable populations” and listing five practices and terms that, either alone or in combination, mark a loan as predatory). Predatory lending occurs most frequently, but not exclusively, in subprime loans. Id. at 1261.

26 See, e.g., U.S. Dept of Justice, Civil Rights Div., Fair-Lending Enforcement Program (2001), http://www.usdoj.gov/crt/housing/bll_01.php [hereinafter Justice Enforcement] (“Some lenders ... make loans to borrowers whose income level is insufficient to meet the new debt obligations; these loans will inevitably lead to foreclosure or another refinancing transaction that takes even more equity.”); Kristen David Adams, Homeownership: American Dream or Illusion of Empowerment?, 60 S.C. L. Rev. 573, 606 (2009) (“Lenders knew that most of these [subprime adjustable-rate mortgages originated in 2006] were unsustainable at the reset rate and never intended them to perform at that rate; instead, lenders approved the loans with the expectation that they would be refinanced prior to the time of reset.”).

27 See, e.g., GAO Mortgage Report, supra note 14, at 52-53 (“Until the 1990s, lenders held most loans on their balance sheets, so the same entity that originated the loan and created the risk bore the risk[, but in] recent years, lenders and mortgage brokers originated loans that were quickly sold down a chain of aggregators and investors.”).

28 For descriptions of how the modern mortgage securitization system worked, see Engel & McCoy, supra note 25, at 1273-74; Kathleen C. Engel & Patricia A. McCoy, Turning a Blind Eye: Wall Street Finance of Predatory Lending, 75 Fordham L. Rev. 2039, 2045-48 (2007).

29 See, e.g., GAO Mortgage Report, supra note 14, at 19, 49. The government-backed purchasers operating in the secondary mortgage market were the Government National Mortgage Association (a government agency commonly known as “Ginnie Mae”) and two government-sponsored enterprises (“GSEs”), the Federal National Mortgage Association (commonly known as “Fannie Mae”) and the Federal Home Loan Mortgage Corporation (commonly known as “Freddie Mac”). See id. at 3.

30 See id. at 49; see also id. at 38 (noting that “private label securitized mortgages [represented] about 56 percent of RMBS issuances in 2006”).
than-prime loans accounted for much of this growth in private securitization; for example, from 2002 to 2006, “the share of private label RMBS comprised of subprime and Alt-A loans increased from 43 percent to 71 percent by dollar volume.”

Also during the boom, the role of independent mortgage brokers grew. By one estimate, the number of such brokerage firms rose in the 2000-2004 period from about 30,000 to 53,000, up from only about 7,000 in 1987. In 2005, brokers accounted for about 60% of originations in the subprime market and about 25% in the prime market. Unlike mortgage lenders, mortgage brokers “do not fund loans; they simply identify potential customers, process the paperwork, and submit the loan application to a wholesale lender, which underwrites and funds the mortgage.” Also unlike mortgage lenders, brokers are generally not subject to federal regulation.

31 Id. at 48. “Alt-A” refers to a middle category of loans between prime and subprime. Id. For 2006, one estimate put the amount of subprime mortgage debt held in securities at $825 billion, with an additional $722 billion held in securities backed by Alt-A mortgages. See Eric S. Belsky & Ren S. Essene, Harvard Univ. Joint Ctr. for Hous. studies, Consumer and Mortgage Credit at a Crossroads: Preserving Expanded Access while Informing Choices and Protecting Consumers 21 (2008), available at http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-1_belsky_essene.pdf.


33 GAO Mortgage Report, supra note 14, at 53. Increasingly during this period, subprime lenders came to rely on brokers for mortgage originations. See, e.g., Keith Ernst et al., supra note 24, at 6 (reporting that the portion of subprime loans originated by brokers grew from 48% in 2003 to 63%-81% in 2006); Mortgage Bankers/Brokers, supra note 32, at 10 (noting that, at the height of the housing boom, “70 to 80 percent of nonprime loans are estimated to have been mortgage broker originations”). By 2007, one commentator remarked, “Mortgage brokers have become the face of the mortgage lending industry and are often the only person a borrower will ever actually meet in the lifetime of a loan.” Christopher L. Peterson, Predatory Structured Finance, 28 Cardozo L. Rev. 2185, 2281 (2007).

34 Apgar & Calder, supra note 32, at 105. For a further description of the differences between mortgage brokers and lenders, see Mortgage Bankers/Brokers, supra note 32, at 12-23.

35 See, e.g., U.S. Gov't Accountability Office, Fair Lending: Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts 28-30, 34-35, 63 (2009) [hereinafter GAO Fair Lending Report]. States may regulate mortgage brokers, but state regulatory and licensing requirements vary substantially. See, e.g., Belsky & Essene, supra note 31, at 40 (noting “the lack of serious licensing standards for loan brokers in many states”); Ernst et al., supra note 24, at 8 (describing a typical state licensing regime for mortgage brokers and concluding that, while all states license brokers, “the breadth and depth of state broker regulation varies considerably”); Mortgage Bankers/Brokers, supra note 32, at 7, 24-25
When the housing bubble burst, a huge rise in defaulted mortgages and foreclosures occurred. For example, in 2005, there were some 847,000 foreclosures; in 2009, the number reached 2,400,000, and worse times were predicted to follow. In 2007, the overall default rate grew to “almost a 28-year high.” It was worse in 2008, with a 3.3% of all first-lien loans in foreclosure, an increase of 62% in one year. The increase in defaults and foreclosures “has been concentrated among subprime loans.” Apart from the devastating human cost represented by these statistics, the financial cost to American households was staggering, as real home equity fell by $2.5 trillion in both 2007 and 2008.

The reversals have been particularly hard on African American and Latino families and their communities. In 2009, minority homeownership rates fell for...
blacks to 46.0% (from a peak of 48.6% in 2005) and for Hispanics to 48.1% (from a peak of 50.1% in 2007).\textsuperscript{43} Moreover, subprime [382] home loans, and thus foreclosures, “are heavily concentrated in low-income minority neighborhoods.”\textsuperscript{44}

To make matters worse, the poverty and unemployment rates of minorities are continuously higher than those of whites,\textsuperscript{45} and home equity accounts for a disproportionately high portion of the overall wealth of minority families.\textsuperscript{46} A

\textsuperscript{43} See Census-Homeownership, supra note 10, at 8. The white homeownership rate in 2009 fell to 74.5% from its high of 76.0% in the 2005-2008 period. Id.

\textsuperscript{44} 2009 Housing, supra note 4, at 29. Additionally, “HUD estimates indicate that the median share of high-cost loans issued between 2004 and 2006 in low-income minority census tracts was nearly one-half, while the median share in low-income white neighborhoods was one-third.” Id.; see also GAO Mortgage Report, supra note 14, at 18 (reporting that, in the 2003-2006 period, “the subprime share of the market for home purchase mortgages grew most rapidly in census tracts with lower median incomes and higher concentrations of minorities”); G. Thomas Kingsley et al., The Impacts of Foreclosures on Families and Communities 13-15 (2009), available at http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf [hereinafter Foreclosure Impacts] (providing measures showing that the density of subprime lending in predominantly black and Hispanic neighborhoods was much higher than in predominantly white neighborhoods in 2004-2006); Rivera et al., supra note 23, at vii (“people of color are more than three times more likely to have subprime loans: high-cost loans account for 55\% of loans to Blacks, but only 17\% of loans to Whites”); Chris Mayer & Karen Pence, Subprime Mortgages: What, Where, and to Whom? 3 (Fed. Reserve Bd. Staff, Working Paper No. 2008-29, 2008), available at http://www.federalreserve.gov/pubs/feds/2008/200829/200829pap.pdf (finding that subprime mortgages in 2005 were “concentrated in locations with high proportions of black and Hispanic residents, even controlling for the income and credit scores of these Zip codes”); Justice Enforcement, supra note 26, at 7 (reporting on studies conducted by HUD, Fannie Mae, Freddie Mac, and others showing that: (1) subprime loans are five times more likely in African American neighborhoods than in white neighborhoods; (2) in 1998, subprime loans accounted for 51\% of home loans in predominantly African American neighborhoods compared with only 9\% in predominantly white areas; and (3) these differences hold regardless of income level (citing, inter alia, U.S. Dep't of Hous. & Urban Dev., Unequal Burden: Income and Racial Disparities in Subprime Lending in America (2000), available at http://archives.hud.gov/reports/subprime/subprime.cfm (reporting that, in low-income neighborhoods, 54\% of African American borrowers, but only 18\% of white borrowers, obtained subprime loans; in moderate-income neighborhoods, the figures were 44\% for African Americans and 10\% for whites; and in upper-income neighborhoods, the figures were 39\% for African Americans and 6\% for whites)).

\textsuperscript{45} See, e.g., 2009 Housing, supra note 4, at 19-20. For example, in November 2009, the unemployment rates were 9.3\% for whites, 15.6\% for blacks, and 12.7\% for Hispanics. See News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Unemployment in November 2009 (Dec. 4, 2009), available at http://stats.bls.gov/opub/ted/.

\textsuperscript{46} See, e.g., George Lipsitz & Melvin L. Oliver, Integration, Segregation, and the Racial Wealth Gap, in The Integration Debate: Competing Futures for American Cities 153 (Chester Hartman & Gregory D. Squires eds., 2009) (noting that home equity accounts for 63\% of the total average net worth of black households compared with 38.5\% for whites and that blacks “possess just 7 cents for every dollar of net worth that whites possess”); Alan M. White, Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing, 60 S.C. L. Rev. 677, 679-80 (2009) (noting the substantial gap in net worth between black and Hispanic households compared to whites and the fact that the “smaller wealth endowment of minority families is also much more concentrated in home values and equity”). In other words, because African Americans and Latinos rely on home equity for their net worth to a far greater extent than whites who have more diverse
2008 report concluded that “subprime borrowers of color will lose between $164 billion and $213 billion for loans taken during the past eight years,” and that this represents “the greatest loss of wealth for people of color in modern US history.”

B. The Resulting National Recession and Tightening Credit Markets

The bursting of the housing bubble had a devastating impact on home-lending institutions and, ultimately, the entire national economy. In 2007, credit rating agencies changed their evaluation methodologies to reflect the worsening performance of subprime loans, which introduced uncertainty about the credit quality of subprime RMBS. By 2009, investors, “[s]tung by the horrible performance of subprime mortgage pools, . . . essentially stopped buying any mortgage-backed securities that [were] not guaranteed by Fannie Mae, Freddie Mac, or Ginnie Mae.”

In 2007, home-loan applications fell 22% and loans fell 25%, while an unprecedented number of mortgage originators “ceased operations because of a bankruptcy or other adverse business event.” The next year was even worse, as

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47 Rivera et al., supra note 23, at vii, 17.
48 GAO Mortgage Report, supra note 14, at 50-51.
49 2009 Housing, supra note 4, at 17; see also id. (reporting that “[b]etween 2006 and 2008, the Fannie and Freddie share of new mortgage-backed security issuances soared from 40 percent to 74 percent, while the Ginnie Mae share jumped from 4 to 22 percent” and concluding that these three organizations, along with the Federal Housing Administration, “now dominate the market”); Robert B. Avery et al., The 2008 HMDA Data: The Mortgage Market during a Turbulent Year, 95 Fed. Res. Bull. 7 (2009), available at http://www.federalreserve.gov/pubs/bulletin [hereinafter Fed 2008 HMDA Report] (reporting that subprime loans sold through the private securitization process fell “from about 10 percent of sold loans in 2006 to less than 1 percent in 2008”).
51 Id. at 2; see also supra note 32 and accompanying text; California Reinvestment Coalition et al., Paying More for the American Dream: The Subprime Shakeout and Its Impact on Lower-Income and Minority Communities 3 (2008), available at http://www.calreinvest.org/system/assets/125.pdf [hereinafter Paying More] (reporting that, from late 2006 through early 2008, 228 mortgage lenders that had made over a million loans nationally “imploded” (i.e., closed, went bankrupt, or were sold)). In early 2008, the Federal Trade Commission “went so far as to develop a consumer fact sheet called, ‘How to Manage Your Mortgage If Your Lender Closes or Files for Bankruptcy.’” Id. For examples of specific mortgage companies that suffered major financial difficulties during the housing bust, see infra notes 54-56, 159, 163.
loan applications and originations fell sharply from their 2007 levels.\footnote{Fed 2008 HMDA Report, supra note 49, at 2. The decline in loan originations continued into 2010. See, e.g., David Streitfeld & Javier C. Hernandez, New-Home Sales Plunged to Record Low in January, N.Y. Times, Feb. 25, 2010, at B8 (reporting that applications for home-purchase loans dropped in February of 2010 “to the lowest level in 13 years”).} In 2008, subprime loan originations fell to $23 billion, down 88% from the 2007 amount.\footnote{Fed 2008 HMDA Report, supra note 49, at 3; see also id. at 30 (describing data “reflecting the collapse of the subprime market” between 2006 and 2008, including the fact that the percentage of borrowers with higher priced loans fell from 20.3 to 3.3 in this two-year period); Mortgage Lending Reform: A Comprehensive Review of the American Mortgage System: Hearings Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs., 111th Cong. 3 (2009) (statement of Julia Gordon, Senior Policy Counsel, Center for Responsible Lending) (testifying in early 2009 that “the subprime mortgage market ... has virtually disappeared” and that all forms of nonprime lending had fallen to only 2.8% of all mortgage production by the fourth quarter of 2008), available at http://www.house.gov/apps/list/ hearing/financialsvcs_dem/gordon_testimony_3-11-09_final.pdf.}

[384] Losses on subprime loans and other debt-related investments pushed several large financial institutions into bankruptcy, including Lehman Brothers and Countrywide (at one time, the nation's largest originator of subprime home-loans).\footnote{As for Lehman, see, e.g., Andrew Ross Sorkin, Lehman Files for Bankruptcy; Merrill Is Sold, N.Y. Times, Sept. 14, 2008, at A1. As for Countrywide, after a decade of stunning growth peppered by numerous lawsuits around the country, it imploded in 2007 as many of its mortgage loans went into default, and it was acquired a year later by Bank of America. See Ctr. for Responsible Lending, Unfair and Unsafe: How Countrywide’s Irresponsible Practices Have Harmed Borrowers and Shareholders 1 (2008), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/unfair-and-unsafe-countrywide-white-paper.pdf. Bank of America soon thereafter accepted some $45 billion in federal bailout funds. See, e.g., Louise Story, Bank of America Ready to Refund Federal Bailout, N.Y. Times, Dec. 3, 2009, at B1. Also filing for bankruptcy in 2007 was the nation's second largest subprime lender, New Century Financial Corporation. See, e.g., Zachery Kouwe, Civil Suit Says Lender Ignored Own Warnings, N.Y. Times, Dec. 8, 2009, at B1. Among the financial institutions that ceased operations in 2008 were three banks and twelve independent mortgage companies that had accounted in 2007, in the aggregate, for about 5% of all conventional first-line home loans. See Fed 2008 HMDA Report, supra note 49, at 5.} Without the unprecedented infusion of federal funds that occurred, more
surely would have gone under. The federal government took Fannie Mae and Freddie Mac into conservatorship.

Problems emanating from the housing market forced financial institutions to take massive write-downs on their mortgage portfolios, igniting a broader credit crisis. The results for the overall national economy were devastating.


57 See, e.g., 2009 Housing, supra note 4, at 2.

58 Entire books have been written about the economic crisis of 2008-2009. See, e.g., Daniel Gross, Dumb Money (2009); Gillian Tett, Fool's Gold (2009); David Wessel, In Fed We Trust: Ben Bernanke's War on the Great Panic (2009). More are sure to come. The depth of this crisis is illustrated by following facts:
- The year 2008 saw a $5.3 trillion plunge in the real value of stocks and mutual funds held by households. See 2009 Housing, supra note 4, at 13.
- “[P]ersonal bankruptcies nearly doubled from 600,000 in 2006 to 1.1 million in 2008.” 2009 Housing, supra note 4, at 3.
- In 2009, iconic American companies Chrysler and General Motors were reorganized in bankruptcy proceedings, see, e.g., U.S. Gov't Accountability Office, Troubled Asset Relief Program: Continued Stewardship Needed as Treasury Develops Strategies for Monitoring and Divesting Financial Interest in Chrysler and GM, GAO-10-151 (2009), available at http://www.gao.gov/products/GAO-10-151, while numerous state and local governments flirted with it (the most dramatic example being California, which resorted in mid-2009 to issuing “IOUs” to pay its suppliers and employees), see Jesse McKinley, Budget Deal Ending Need for I.O.U.'s in California, N.Y. Times, Aug. 14, 2009, at A10.
- By 2009, the recession turned back the clock on Americans' personal wealth to 2004 and wiped out a staggering $1.3 trillion as home values shrank and investments withered, with net worth declining by 2.6% in the first three months of the year. Associated Press (June 12, 2009) (re: Federal Reserve announcement on 6-11-09).
- By October of 2009, the overall unemployment rate had risen to 10.2%, the highest since the early 1980s, with the unemployment-plus-underemployment rate of 17.5% being the highest since the Great Depression of the 1930s, see David Leonhardt, Jobless Rate Hits 10.2%, With More Underemployed, N.Y. Times, Nov. 7, 2009, at A1, making this “the only recession since the Great Depression to wipe out all jobs growth from the previous business cycle,” Peter S. Goodman, Joblessness Hits 9.5%, Deflating Recovery Hopes, N.Y. Times, July 3, 2009, at A1.
The economic crisis also resulted in an extreme tightening of available credit for housing. After years of record-breaking home-loan originations, proliferation of new products, and tolerance of low underwriting standards, mortgage lending did an about-face beginning in 2007. In 2008, home-loan originations fell by 33% in real terms and by 62% from their 2003 level. By 2009, most of the subprime market had dried up, and new tight mortgage rules excluded even many potential homebuyers who would have been considered good credit risks by traditional standards a decade ago.

C. Discrimination in the Home Mortgage Market

1. Background: Home-Loan Discrimination in the 20th Century

Racial discrimination has been pervasive within the home-finance industry for much of the twentieth century. In the 1930s, the federal government adopted policies that discouraged Savings and Loan Associations (“S&Ls”) from lending in minority neighborhoods. For decades thereafter, S&Ls and other lending institutions refused to provide home loans in these areas or provided them only on the most egregious terms. In addition, appraisal standards explicitly required that the presence of minorities in a neighborhood be viewed as a negative factor in evaluating homes for purposes of securing mortgage loans.

The 1968 FHA and then also the 1974 Equal Credit Opportunity Act (“ECOA”) banned home-loan discrimination based on race, national origin, and certain other factors. Passage of these laws, however, did not end such
discrimination. For example, the American Institute of Real Estate Appraisers continued to promulgate race-based appraisal standards until the Department of Justice ("Justice Department") challenged this practice in a FHA suit concluded in 1977.68

The Justice Department did not file any mortgage discrimination cases in the 1970s and 1980s, and few private cases were brought during this time.69 Proof of illegal mortgage discrimination was difficult to obtain. Unlike FHA rental and sales cases where "testers" could be used to demonstrate discriminatory behavior by landlords and sales agents,70 testing in lending cases is severely limited by the fact that federal law prohibits misrepresenting information on a mortgage application.71 Thus, unless there [387] was direct evidence of discrimination (e.g., a loan officer's race-based comments), a minority plaintiff could only prove discrimination by showing that a lender treated bona fide white applicants better,
a daunting task given that the information necessary to make such a showing was usually not readily available to such a plaintiff.

Even if a FHA plaintiff managed to obtain sufficient information to file a complaint and proceed to discovery, there was no guarantee that evidence could be obtained from the defendant-lender's files or other sources to show that the defendant had made loans to comparable white applicants. In the absence of such evidence, courts generally ruled against such a plaintiff's discrimination claim. A classic example was Simms v. First Gibralter Bank, where the Fifth Circuit held that a rejected mortgage applicant's proof failed to show intentional discrimination because, although the defendant-bank had clearly treated the plaintiff poorly, there was no "evidence that similar 'non-protected' applications [had] received dissimilar treatment." Put another way, a lending institution's bad treatment of racial minorities does not violate the FHA, absent proof that it approved loans for similarly situated whites while rejecting the plaintiff.

For its part, the Justice Department, prompted by a series of newspaper articles, finally filed its first mortgage discrimination case against Atlanta's Decatur Federal Savings & Loan Association in 1991. Thereafter, the Justice Department's activity in this area accelerated, as it brought sixteen "pattern or practice" cases involving race or national origin discrimination against home lenders in the 1990s. These cases tended to involve three distinct issues: (1) "redlining," in which the defendant-lenders were accused of refusing to make loans in minority areas that were comparable to white areas where they did business; (2) "underwriting discrimination," in which defendant-lenders like Decatur Federal were accused of denying loans by applying their credit standards

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72 83 F.3d 1546 (5th Cir. 1996).
73 Id. at 1559.
74 See, e.g., id. at 1558 (holding that the plaintiff's evidence of the bank's "arbitrary and unreasonable" conduct toward him was insufficient to create an inference of intentional discrimination, because "he presented absolutely no evidence that other, 'non-protected' applicants or applications were treated any differently around the time of Simms' rejection"). Post-Simms cases have followed this same general approach. See infra note 244. For a recent critique of how such "comparable" evidence has been used in intent-based employment discrimination cases, see Charles A. Sullivan, The Phoenix from the Ash: Proving Discrimination by Comparators, 60 Ala. L. Rev. 191 (2009).
75 See Yinger, supra note 64, at 64 (describing Bill Dedman, The Color of Money, Atlanta J.-Constitution, May 1-5, 1988).
76 See United States v. Decatur Fed. Sav. & Loan Assoc., Case No. 1 92-CV-2198-CAM (N.D. Ga. 1992), described in Justice Enforcement, supra note 26, at 3 (noting that this case involved "[d]iscrimination in underwriting--the process of evaluating the qualifications of credit applicants" and was based in part on evidence discovered in the defendant's loan files that "bank employees were providing assistance to white applicants that they were not providing to African American and Hispanic applicants" such as not helping "minority applicants explain negative information on their credit reports and document all of their income").
77 See, for instance, cases described in Justice Enforcement, supra note 26, at 2-6.
more stringently against minorities than whites; and (3) “pricing discrimination,” in which the defendant-lenders were accused of allowing their loan officers and brokers to charge discretionary rates and fees that were higher for minorities than similarly creditworthy whites.78 All of these Justice Department-initiated cases were resolved before trial through consent decrees.79

Much of the increased litigation activity in the 1990s could be traced to data produced by lenders pursuant to 1989 amendments to the Home Mortgage Disclosure Act (“HMDA”).80 The 1989 HMDA amendments required most financial institutions to make yearly reports on the number and dollar amount of their mortgage loans and applications “grouped according to census tract, income level, racial characteristics, and gender.”81 The first year for which such data was produced (1990) showed much higher rejection rates for blacks and Hispanics than for whites,82 a pattern that continued in the succeeding years.83 Racial disparities in rejection rates shown by these HMDA data, however, could not by themselves prove illegal discrimination. This is because the HMDA data did not measure many of the characteristics of loan applicants that might legitimately be considered in determining creditworthiness, such as their indebtedness and credit history.84

[389] Nevertheless, HMDA data did provide a way for enforcement agencies and private litigants to focus on lending institutions whose high disparate

78 Id.
79 See id. The same is true for the few mortgage cases that Justice has filed in the 2000s. See Schwemm, supra note 67, § 18:2 n.24 and accompanying text (discussing Justice's lending litigation during the recent Bush Administration).
84 See Canner & Smith, supra note 82, at 875-76; infra notes 136-138 and accompanying text.
denial rates suggested the need for more inquiry. As the Justice Department noted with respect to the defendants in its underwriting cases: “Our attention was focused on these institutions by [HMDA] statistics showing that African-American and Hispanic applicants were rejected for mortgage loans at significantly higher rates than were white applicants.”

Furthermore, in 1992, an influential study published by the Boston Federal Reserve Bank showed that, even when all of these other legitimate factors were held constant, the rejection rates for blacks and Hispanics were significantly higher than for whites. In 1999, the Urban Institute undertook a comprehensive review of the existing studies to determine whether the fact that minorities were denied mortgages and obtained them on less favorable terms than whites resulted from discrimination or minorities' lower creditworthiness. This lengthy review concluded that “minority homebuyers in the United States do face discrimination from mortgage lending institutions.” The Urban Institute report noted that mortgage lending is a multi-stage process, which includes advertising and outreach; pre-application inquiries; loan approval or denial; terms and conditions; and loan administration.

85 Among the privately initiated FHA cases that relied on HMDA data to accuse a particular mortgage lender of racial discrimination during the 1990s was Buycks-Robertson v. Citibank Federal Savings Bank, 162 F.R.D. 322 (N.D. Ill. 1995). In that case, the plaintiffs' pivotal allegation was that Citibank gives its loan originators considerable discretion when making loan decisions” and that such “subjective decisionmaking” resulted in the discriminatory denial of “home loans to over 780 African-Americans between 1992 and 1993.” Id. at 329-30. The HMDA data provided to the court showed that in two years, “the percentage of loan applications approved by Citibank was far lower in areas where the racial composition of the neighborhood was predominantly African-American than it was in areas where the composition of the neighborhood was predominantly White.” Id. at 327. “Plaintiffs' theory was that the HMDA data show that ‘as the percentage of minorities in an area increases, the percentage of loans approved decreases, regardless of income.’” Id. at 327 n.8. Based on these allegations, the court decided to certify the case as a class action. Id. at 328-38. The plaintiffs' lawyers included Barack Obama. See id. at 325.

86 Justice Enforcement, supra note 26, at 3.

87 See Alicia H. Munnell et al., Mortgage Lending in Boston: Interpreting HMDA Data (Fed. Reserve Bank of Boston Working Paper No. 92-7, 1992) (finding that the home-loan rejections rates for blacks and Hispanics were 56% higher than for whites in the Boston area, even when all significant nonracial variables were held constant). This study has been severely criticized, but its key findings about the statistical significance of minority status in producing higher home-loan denial rates have been supported by subsequent research. See, e.g., Stephen L. Ross & John Yinger, Does Discrimination in Mortgage Lending Exist? The Boston Fed Study and Its Critics, in Mortgage Lending Discrimination: A Review of Existing Evidence 43-83 (Margery Austin Turner & Felicity Skidmore eds., 1999), available at http://www.urban.org/UploadedPDF/mortgage_lending.pdf.


89 Id. at 5-7; see also Turner et al., supra note 70, at i.
may take [390] different forms at different stages.”90 In subsequent years, additional government and private HMDA-based studies continued to find evidence that minorities and minority communities were much more likely to receive subprime loans, ever after controlling for borrowers' income and other risk-related factors.91

2. Changing Focus: Credit Scoring, Reverse Redlining, and Other Pricing Issues

As noted above, the home-loan industry underwent numerous changes in the 1990s and the early years of the 21st century, including significant growth in subprime loans and other types of products offered, in the number of independent mortgage brokers, and in the securitization of mortgage loans.92 Another major change was the growing use of automated credit scoring systems to evaluate would-be borrowers and, with it, the rise of “risk-based pricing,” in which lenders would vary rates and fees for individual loans based on the particular risks that a borrower presented.93 Credit scoring-- and the resulting individualized pricing system--contrasted with the earlier era, in which:

lenders offered consumers a relatively limited array of products at prices that varied according to the characteristics of the loan and property but not according to the creditworthiness of the borrower. Effectively, borrowers either did or did not meet the underwriting

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90 Turner et al., supra note 70, at i; see also Turner & Skidmore, supra note 88, at 5 (“Home mortgage lending is a complex process, composed of many different decision points and institutional policies. The potential for discrimination exists at any one or more points along the way.... [A] finding of little or no discrimination at one stage in the process does not necessarily prove the absence of discrimination in the process as a whole.”); id. at 7-15 (summarizing what then was known about discrimination at each of these stages of the mortgage process).
92 See supra notes 18-35 and accompanying text.
93 "Perhaps the most important of these changes [in modern credit markets] is the shift from a credit rationing to a risk-based pricing system. Prior to 1990, the lending industry rationed credit to prime borrowers using tight underwriting guidelines to assess and control risk. Today, far fewer applicants are denied credit. Instead, they are offered credit at higher prices intended to reflect the greater risk posed by these loans.... With these new risk pricing and management tools, subprime lending in the mortgage industry skyrocketed after 2003.” Belsky & Essene, supra note 31, at 16-17. For more on the evolution of risk-based pricing in home loans, see Temkin et al., supra note 23, at 27-32.
criteria for a particular product, and those who met the criteria paid about the same price.  

[391] Among other things, risk-based pricing meant that borrowers whose credit flaws might well have disqualified them under traditional underwriting standards could often obtain mortgages, albeit at higher prices than borrowers with better credit scores.

These changes, in turn, shifted the focus of discrimination problems within the industry. Whereas earlier discrimination had generally taken the form of denying credit to minorities and their communities, the new system had the potential of greatly expanding credit availability, and with less discrimination. As the Justice Department noted in 2001, “[c]redit scoring systems hold out the promise of promoting fairer lending practices because they purport to use objective, mathematical models for identifying and measuring those factors that demonstratively predict credit performance in place of discretionary decision-making that can be infected by bias and discrimination.”

This new system, however, could be misused. For one thing, the automated credit models themselves might be based on factors that unfairly impacted minorities. Even if the objective systems were nondiscriminatory, they generally allowed loan officers to “override” their conclusions. While such overrides might be justified in certain situations, the Justice Department in 2000 sued a large southern bank for violating the FHA by allowing its “individual branch loan officers to ‘override’ automated underwriting decisions [with the

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94 Fed's New HMDA Report, supra note 3, at 349; see also Belsky & Essene, supra note 31, at 19 (noting the “increasing reliance on statistical credit scores” in modern credit markets and the fact that the “use of credit scores traces back to the 1970s in the case of credit cards, the mid-1990s in the case of auto loans, and the 1990s in the case of mortgage loans, with each taking a number of years before the majority of loan origination decisions involved these scores”).
95 See, e.g., Justice Enforcement, supra note 26, at 6 (“responsible subprime lending serves an important role in the economy by providing access to credit at higher prices to borrowers whose past credit performance or current debt and income status make them higher risks for lenders”).
96 See supra notes 62-79 and accompanying text.
97 Justice Enforcement, supra note 26, at 4.
98 See id. (“Those who develop and use credit scoring models should take care to determine whether individual credit scoring factors or the overall systems have a disparate adverse impact on minority and other borrowers in protected classes and, if they do, whether other factors or formulations with lesser impact can be used with similar capability to predict creditworthiness.”); see also infra note 278.
99 See, e.g., Justice Enforcement, supra note 26 (providing the denial of a second loan “to a borrower who previously defaulted on a loan with the bank, even though a passing credit score indicates that the borrower does not currently pose a greater risk of default than other borrowers to whom the bank is lending” as an example of a legitimate reason for an override).
result that] African-American applicants were more than three times as likely to be rejected as similarly situated white applicants.”100

[392] Another “modern” type of mortgage discrimination involved targeting minorities and minority neighborhoods for predatory loans. This practice, which came to be known as “reverse redlining,” was first the subject of FHA litigation in private suits. For example, in Hargraves v. Capital City Mortgage Corp.,101 the minority plaintiffs alleged that the home loans they received from the defendant not only included predatory terms, but that the defendant focused these loans on African Americans and made a much greater portion of its predatory loans in heavily black areas.102 In an amicus brief, the Justice Department supported the plaintiffs' view that this behavior violated the FHA,103 and the district court agreed in a 2000 opinion.104 The case was then settled,105 but its conclusion that “reverse redlining” violates the FHA was ultimately endorsed in a number of other decisions, which upheld FHA claims based on lenders' directing their predatory loans to racial minorities, their neighborhoods, or both.106

100 Id. (discussing the Justice Department's lawsuit of Deposit Guaranty National Bank, which resulted in a $3 million settlement); see also Settlement Agreement, United States v. Deposit Guar. Nat'l Bank, No. 3:99CV670 (S.D. Miss. 1999), available at http://www.justice.gov/crt/housing/documents/dgnbsettle.php. Based on this type of case, the Justice Department concluded that:
lenders must be careful in allowing overrides. Where disproportionate numbers of white applicants are approved for credit despite a failing credit score or disproportionate numbers of minorities are denied credit even with a passing credit score, there is a concern that discrimination may be at work. The concern is heightened when a lender is not documenting the reasons for the overrides or has a large number where no specific rationale is given for an override decision.

Id. For a description of other Justice cases alleging FHA violations based on discriminatory overrides, see infra notes 110-115 and accompanying text.


102 See id. at 20-21. Based on many of the same facts alleged in Hargraves, the defendant there was also sued by the Federal Trade Commission in 1998 for a variety of unfair trade practices. See Justice Enforcement, supra note 26.

103 See id.; Hargraves, 140 F. Supp. at 22.

104 See id. at 20-22.

105 Interview with John P. Relman, Plaintiffs' Counsel in Hargraves (Jan. 10, 2010).

As the Hargraves opinion held, predatory lending does not violate the FHA unless it is targeted at a class of persons protected by the statute. Thus, as the Justice Department has noted: “Predatory lending practices sometimes violate the fair lending laws, sometimes violate state and federal consumer [393] protection laws, and sometimes violate both.” An example of both was a 2001 suit by the Justice Department, HUD, and the Federal Trade Commission against subprime-lender Delta Funding Corporation, where the defendant was accused of violating the FHA, ECOA, and consumer protection laws by “underwriting and funding home mortgage loans with higher mortgage broker fees for African-American females than for similarly situated white males, paying kickbacks to brokers to induce them to refer loan applicants to Delta, and approving loans without regard to the borrower's ability to repay.”

Unlike earlier forms of discrimination, “reverse redlining” does not involve the denial of credit to minorities, but involves “too much easy access to high-cost credit.” The practice of lenders making loans to minorities at higher prices than to whites was also at issue in three other FHA cases brought by the Justice Department in the mid-1990s. All three involved the discriminatory application of “overages,” a pricing system in which a lender gives discretion to its “employees or brokers to charge rates higher than the lender’s set rates, for which the employees receive additional compensation.” In two of these cases, the Justice Department alleged that the defendants’ “loan officers were charging African-American and/or Hispanic borrowers higher up-front fees for home mortgage loans than they were charging to similarly situated white borrowers.”


109 Justice Enforcement, supra note 26 (emphasis in original).

110 Id.; see also supra note 101 and accompanying text.

The third case, which continues to have significance for current lending litigation,\(^\text{112}\) alleged that California's Long Beach Mortgage Company:

allowed both its employee loan officers and its independent loan brokers the discretion to charge borrowers up to 12% of the loan amount above the lender's base price. . . . Younger white male [394] borrowers got the lowest rates, and older, African-American, single women fared the worst. White females, African-American males and Hispanics fell somewhere in between. The discrimination was evident with loans made by Long Beach's own officials, but was even more marked with loans that came through some of its mortgage brokers. Because Long Beach ultimately was responsible for underwriting all of the loans and allowed the brokers to charge the discriminatory prices, we asserted that Long Beach was liable, not only for the alleged discrimination of its own employees, but also for that of the brokers.\(^\text{113}\)

Also during this period, the Justice Department made similar claims of discriminatory pricing in consumer loan cases based on the ECOA.\(^\text{114}\)

Most mortgage lenders pay their loan officers commissions based upon both the volume of loans and the net dollar amount of “overages” that the loan officer generates. Certain cost adjustments (e.g., those associated with extending a lock-in period or converting a product to a stated income or no-document loan, see supra note 21, or increases in the loan amount and interest rate to cover closing costs) produce additional income to the lender that may then be split between the loan officer (as a commission) and her branch office.

\(^{112}\) See infra notes 180-187 and accompanying text.

\(^{113}\) Justice Enforcement, supra note 26 (discussing Department of Justice lawsuit against Long Beach Mortgage Co. in the Central District of California in 1960, which resulted in a settlement requiring the defendant to change its pricing policies and to pay $3 million to 1,200 borrowers who had been given higher-priced loans). See also Settlement Agreement and Order Thereon, United States v. Long Beach Mortgage Co., No. CV-96-159DT (CWx) (C.D. Cal. 1996), available at http://www.justice.gov/crt/housing/documents/longbeachsettle.php.

Long Beach Mortgage was later taken over by Washington Mutual, one of the nation's biggest subprime lenders, which in turn was eventually put into receivership by the FDIC and taken over by JPMorgan Chase Bank. See Paying More, supra note 51, at 5-6; Eric Dash & Andrew Ross Sorkin, Government Seizes WaMu and Sells Some Assets, N.Y. Times, Sept. 25, 2008, at A1.

\(^{114}\) See Justice Enforcement, supra note 26 (discussing three such cases). In addition, the Justice Department addressed the “overages” issue in an amicus brief filed in a private, ECOA-based suit against Nissan Motor Acceptance Corporation, where the plaintiffs alleged that defendant's “practice of permitting auto dealers, at their discretion, to set finance charges independent of risk has resulted in African Americans paying higher finance charges.” Id. Justice's amicus brief argued that “a lender has a non-delegable duty to comply with ECOA, and, thus, is liable under ECOA for discriminatory pricing in loans that it approves and funds.” Id. (describing Brief of the United States in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment as Amicus Curiae, Cason v. Nissan Motor Acceptance Corp., No. 3-98-0223 (M.D. Tenn. Aug. 1, 2000)). The Cason case is further discussed infra notes 193 and 247.
These pricing cases demonstrated the growing importance of the issue of whether minorities were receiving loans on equal terms with their white counterparts. As the Justice Department commented in 2001 with respect to the “overages” problem: “The use of an employee or broker incentive program such as an overage system is not unlawful per se, but it becomes unlawful if applied in a manner to extract higher prices from minorities or women because of their race, national origin or gender.”

More generally, the focus of mortgage discrimination cases was shifting from access issues to pricing issues. As one commentator recently put it: “In the contemporary United States mortgage loan market, the predominant fair lending issue is no longer denial of loan applications; it is instead the fact that minority homeowners pay much more in interest rates and are much more likely to get risky subprime mortgages that lead to foreclosure.” The next section focuses exclusively on pricing issues and on the principal industry technique--discretionary pricing--that became a primary facilitator of discriminatory mortgage rates.

3. The Role of Discretionary Pricing in Modern Home-Loan Discrimination

Much of the recent discrimination in the home-loan industry can be traced to a technique called “discretionary pricing.” As discussed in the previous section, the Justice Department as early as 1996 charged a California mortgage lender with FHA violations that allegedly resulted from the lender's discretionary pricing system in which it allowed loan officers and brokers to add charges above the defendant's base price. Despite the obvious dangers of such a system, discretionary pricing became a common practice in which many large mortgage lenders engaged. In a 2005 report, the Federal Reserve described this practice as follows:

Discretionary pricing. Many creditors provide their loan officers and agents working on their behalf (for example, mortgage brokers) with rate sheets that indicate the creditors' minimum prices by product (for example, for conventional loans of various

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115 See, e.g., Belsky & Essene, supra note 31, at 26 (noting that, while in the past, “discrimination and unfair treatment took the almost exclusive form of discouraging or denying loan applicants[, n]ow consumers can be victims of discrimination or unfair treatment without ever having been denied a loan”).
116 See supra note 46, at 678; see also Paying More, supra note 51, at 1 (“In the past, the concern was whether all borrowers were able to obtain loans, and analysis focused on the fact that loan applicants of color were more likely to be denied home loans. Today, with credit more widely available, the concern is whether certain groups pay more for their loans.”).
117 See supra note 113 and accompanying text.
types or with various types of government backing), loan characteristics (for example, term to maturity and LTV ratio), and borrower creditworthiness (for example, credit history score and debt-to-income ratio). . . . A loan officer may quote a prospective borrower a price above the rate sheet (sometimes referred to as an “overage”), and if the consumer accepts the price without demanding cash back to offset loan fees or other closing costs, the contract interest rate or loan fees on such “overaged loans” will be higher than they might otherwise have been.119

The following steps are involved in this process: First, a mortgage lender provides its loan officers and affiliated brokers with the training and forms necessary to complete a loan; these include the lender's rate sheets, which list the available prices for specific loan products and for borrowers with particular credit attributes.120 Next, the lender evaluates a prospective [396] borrower's risk of default based on objective information in the loan-application file (e.g., the borrower's credit score) and determines that the borrower qualifies for a certain risk-based interest rate; this is known as the “par rate,” which is the rate at which the lender is willing to make the loan with no additional payment from the borrower.121 Finally, the lender authorizes its loan officers and brokers to impose

120 For examples of rate sheets, see Ernst et al., supra note 24, at 37-38 (providing a Countrywide rate sheet from September 2007); Susan Woodward, A Study of Closing Costs for FHA Mortgages 6 (2008), available at http://www.urban.org/publications/411682.html (providing a typical rate sheet from 2000).
121 See supra text accompanying notes 95-97. The par rate may differ depending on whether the loan is generated by the lender's own loan officers or by outside brokers; in the latter situation, the par rate may be lower, reflecting the lender's lower costs in not having to use its own employees and facilities, but the borrower in a broker-generated loan will have to pay a fee to the broker, either up-front or through a “yield spread premium” that is built into the amount financed.

A yield spread premium:

is a payment by a lender to a broker based on the extent to which the interest rate on the loan exceeds a base or ‘par’ rate. The lender's payment of a yield spread premium to the broker, and the broker's imposition of a higher interest rate, are unrelated to the borrower's creditworthiness.

Steele v. GE Money Bank, No. 08 C 1880, 2009 WL 393860, at *1 n.2 (N.D. Ill. Feb. 27, 2009) (quoting Ware v. Indymac Bank, FSB, 534 F. Supp. 2d 835, 839 (N.D. Ill. 2008)); see also Ernst et al., supra note 24, at 8 (describing a yield spread premium as “an extra payment that brokers receive from lenders for delivering a mortgage with a higher interest rate than that for which the borrower qualifies”); Mortgage Bankers/Brokers, supra note 32, at 16 (describing yield spread premiums as “payments made from the mortgage banker to the broker for origination services ... based on the rate of the loan and/or other loan pricing features ..., [which] consumers pay ... through higher interest rates and higher monthly payments”). For an example of how a yield spread premium works, see Ernst et al., supra note 24, at 37-38, app. 1.

“‘Yield spread premium’ is a term usually reserved for brokered transactions. In loans wholly originated by a lender, the same type of premium is usually referred to as an ‘overage.’”

Gruenstein Bocian et al., supra note 91, at 45 n.40. For more on overages, see supra notes 100, 110-113 and accompanying text.
additional charges to this objectively determined par rate. A 2008 decision upholding a FHA challenge to Countrywide's version of this system described the defendant's pricing policy as follows:

    Countrywide obtains customers' credit information through its loan officers, brokers, or correspondent lenders. Based on these objective criteria, Countrywide computes a "par rate." Agents, brokers, or correspondent lenders at the point of sale, however, are allowed to impose additional charges, fees, and rates that are unrelated to objective risk factors. Countrywide communicates not only the applicable par rates, but also the additional authorized discretionary charges to its loan officers, brokers, and correspondent lenders through regularly published "rate sheets."

Allowing discretionary add-ons to the par rate results in a pricing system that elevates lender profit and broker compensation above what is justified by economic risk, as loan officers and brokers are incentivized to increase unsuspecting borrowers' costs above par rates. Both lenders and brokers profit when borrowers pay inflated discretionary rates and fees: the lenders lock

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122 Lenders that use discretionary pricing carry out this policy by, inter alia: (1) providing training, marketing support, loan-related forms, and instructions to help their employees and brokers implement the policy; (2) evaluating and monitoring the brokers' compliance and rewarding them financially for successfully steering clients into loans with higher interest rates; (3) pricing all loans according to this policy; and (4) assuming part or all of the risk on these above-par loans. See, e.g., Steele, 2009 WL 393860, at *6.
123 Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 254 (D. Mass. 2008). As this quote indicates, a lender's mortgages may be originated through "correspondent lenders" as well as through in-house loan officers and independent brokers. With respect to the former: Correspondent lenders typically are smaller financial institutions that operate much like retail lenders in that they take applications and underwrite and fund mortgages. Although loans are funded in the name of the correspondent, they are later sold to a wholesale lender under prearranged pricing and loan delivery terms and in compliance with established underwriting standards. Brokers, by contrast, do not fund loans; they simply identify potential customers, process the paperwork, and submit the loan application to a wholesale lender, which underwrites and funds the mortgage.

Apgar & Calder, supra note 32, at 105. In the Miller case, the named defendants included one of Countrywide's correspondent lenders, Summit Mortgage LLC. See infra note 160.
124 Discretionary pricing not only allows loan officers and brokers to mark-up the interest rate but also to tack on other discretionary fees and terms such as prepayment penalties. See, e.g., Steele, 2009 WL 393860, at *8 (describing a minority borrower that paid "a $4,900 origination fee and a $995 processing fee to her broker ... and a $950 administrative fee" to her lender). These additional fees and costs are often folded into the principal being borrowed, so they do not seem as if they are being paid "out-of-pocket" by the borrower. See, e.g., U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of the Treasury, Curbing Predatory Home Mortgage Lending 9 (2000), available at http://www.huduser.org/portal/publications/hsgfin/curbing.html [hereinafter HUD-Treasury Report] ("Financing points and fees may disguise the true cost of credit to the borrower, especially for high interest rate loans.").
borrowers into higher-than-par interest rates (which, inter alia, may raise their commission-paid loan officers' compensation and increase the value of the loans on the secondary market); and brokers get paid higher fees, up to the maximum amount authorized by the lender. The extra, unjustifiable charges lead not only to financial hardship for the borrowers, but also to a substantially increased risk of default and foreclosure. And it is the rare borrower who has the time or sophistication necessary to comparison shop for lower costs after having once gone through the difficult process of applying for a residential loan.

[398] This is an inherently unfair system, and one that is designed to steer borrowers with prime credentials into worse-than-prime loans. Furthermore, discretionary pricing predictably leads to racial minorities being charged higher rates and fees for mortgages than similarly-creditworthy whites, as shown by numerous studies dating back to at least 2000. What is more, similar discretionary pricing practices by the car-finance industry were challenged as

125 See, e.g., Belsky & Essene, supra note 31, at 4, 27-28, 41-43 (noting ways in which the mortgage market, due to consumers' relative lack of information, falls short of the competitive ideal, resulting in borrowers often paying more than they would in a fairly competitive market); Ernst et al., supra note 24, at 7 (same); Apgar & Calder, supra note 32, at 118-21 (same). One reason underlying the basic unfairness of this market is, as the Federal Reserve Board recently noted in commenting on proposed changes to its consumer protection rules, that borrowers “generally lack expertise in complex mortgage transactions because they engage in such mortgage transactions infrequently.” Truth in Lending, 74 Fed. Reg. 43282 (proposed Aug. 26, 2009) (to be codified at 12 C.F.R. § 226). Racial minorities as a group are particularly susceptible to this source of unfairness, because they tend to have less consumer knowledge and experience than whites. See, e.g., Robert B. Avery et al., Higher-Priced Home Lending and the 2005 HMDA Data, 84 Fed. Reserve Bull. A123, A127 (2006), available at http://www.federalreserve.gov/pubs/bulletin/2006/hmda [hereinafter Fed. 2005 HMDA Report] (noting that discretionary pricing has a greater impact on “borrowers with less experience in the mortgage market, such as first-time homebuyers, ... [which] may be correlated with race ... [because] minorities are disproportionately first-time homebuyers”).

126 As early as 1996, a Freddie Mac study found that 10 to 35% of borrowers who received subprime mortgages may have actually qualified for a prime-rate loan. See HUD-Treasury Report, supra note 124, at 23 n.6. See generally Peterson, supra note 33, at 2214-15 n.176 (describing sources showing that a significant percentage of recent subprime borrowers actually qualified for prime loans). According to the Justice Department, the figures in the Freddie Mac study “suggest that conventional lenders are either not fairly serving minority communities and are engaged in redlining or marketing discrimination, or that they are not fairly underwriting loan applications from minorities.” Justice Enforcement, supra note 26, at 7.

127 See HUD-Treasury Report, supra note 124, at 23-24 (concluding, in a 2000 report, that many people of color could qualify for more affordable loans than they were allowed to receive); see also Michael S. Barr et al., Harvard Univ. Joint Ctr. for Hous. Studies, Behaviorally Informed Home Mortgage Credit Regulation 31 (2008), available at http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-12_barr_mullainathan_shafrir.pdf (describing a 2001 study showing that “within the group of borrowers paying yield spread premiums, African Americans paid $474 more for their loans, and Hispanics $590 more, than white borrowers”); infra notes 133-135 and accompanying text (describing studies showing that mortgage lenders gave high-cost loans to minorities at a significantly higher rate than they did to comparable white borrowers).
being racially discriminatory in a series of ECOA-based class actions earlier in this decade.  

For its part, the Federal Reserve commented on the risk of such discrimination in a 2005 report:

Discretionary pricing can be a legitimate business practice and can help ensure that markets allocate resources in the most efficient [399] way. However, when loan officers are permitted latitude in establishing prices, the lender runs the risk that differential treatment on a basis prohibited by law may arise. Obtaining overages more often, or in higher amounts, from minority borrowers or targeting only minorities for overaging may constitute a fair lending violation unless some legitimate, nondiscriminatory reason exists for the result.

When the Fed published this report in 2005, it had good reason to be concerned about pricing discrimination in the home-loan industry. Three years earlier, the Fed had amended its HMDA regulations to require that, beginning in 2004, mortgage lenders report certain information about their loan prices. These amendments required reporting of certain “rate-spread” information regarding a specified set of loans, i.e., first-lien loans where the difference between the loan's APR and the return on Treasury certificates of comparable maturity exceeded 3% and second-lien loans where this spread exceeded 5%. In covering only these “higher-priced” loans, the Fed's regulation was designed

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129 Fed's New HMDA Report, supra note 3, at 369-70; see also Fed 2005 HMDA Report, supra note 125, at A128-29 (noting that, due to its potential for differential treatment of minorities, discretionary pricing has been identified as a “risk factor” by federal regulators charged with determining whether lenders are engaging in illegal price discrimination).

130 See Home Mortgage Disclosure, 67 Fed. Reg. 43218 (June 27, 2002) (to be codified at 12 C.F.R. § 203.4) (requires lenders to report the lien status of a loan or application and requires lenders to ask applicants their ethnicity, race, and sex in applications taken by telephone); Home Mortgage Disclosure, 67 Fed. Reg. 30771 (May 8, 2002) (to be codified at 12 C.F.R. § 203.4) (postponing implementation date to ensure faithful industry compliance and requiring reporters to use 2000 census data instead of 1990 census data to ensure report accuracy and usefulness); Home Mortgage Disclosure, 67 Fed. Reg. 7222 (Feb. 15, 2002) (to be codified at 12 C.F.R. § 203.4) (requires lenders to report the difference between the APR and the Treasury yield, whether a loan is covered by the Home Ownership and Equity Protection Act (“HOEPA”), and whether an application or loan involves a manufactured home).

not to require reporting of the great majority of prime loans but “would require reporting for about 98 percent of the subprime loans.”\textsuperscript{132}

The data produced pursuant to this new requirement have been analyzed by the Fed staff in yearly reports covering 2004-2008. For each of these years, the Fed studies show that black and Hispanic borrowers were far more likely than whites to receive high-cost loans.\textsuperscript{133} This was true even after controlling for the borrowers' income and a variety of other non-racial factors.\textsuperscript{134} Numerous private studies have confirmed that these minorities,\textsuperscript{400} compared to similarly situated white borrowers, were more likely to receive higher-priced loans and mortgages with subprime characteristics, such as prepayment penalties and balloon payments.\textsuperscript{135}

\textsuperscript{132} Fed's New HMDA Report, supra note 3, at 349-50. Effective October 1, 2009, the Fed made some changes to the definition of the “higher priced” loans required to be reported, based on the agency's view that this adjusted definition was needed to more effectively capture the subprime market. See Home Mortgage Disclosure, 73 Fed. Reg. 63329 (Oct. 24, 2008) (to be codified at 12 C.F.R. § 203.4).

\textsuperscript{133} See Fed 2008 HMDA Report, supra note 49, at 31-34.

\textsuperscript{134} For the years 2004-2007, see Fed 2007 HMDA Report, supra note 50, at A139 (concluding that, for conventional home-purchase loans in the second half of 2007, “the gross mean incidence of higher-priced lending was 29.5 percent for blacks and 9.2 percent for non-Hispanic whites” and the results for Hispanics “are similar,” though when controlling for borrower-related factors (income, loan amount, location of the property or metropolitan statistical area, presence of a co-applicant, and sex), these differences are reduced by less than 50%); Robert B. Avery et al., The 2006 HMDA Data, 93 Fed. Res. Bull. A73, A95 (2007) (reporting that, on conventional home-purchase loans, the gross mean incidence of higher-priced lending was 36.0 percentage points higher for African-Americans (53.7%) than for whites (17.7%) and the difference between these two racial groups for refinancing was 27.1 percentage points, with these differences being reduced by less than one-fifth when certain borrower-related factors other than race and lender characteristics were controlled for); Fed 2005 HMDA Report, supra note 125, at A159 (concluding that, on conventional home-purchase loans, the gross mean incidence of higher-priced lending was 54.7% for blacks versus 17.2% for whites, with the difference being reduced by only about one-fifth when certain borrower-related factors other than race were controlled for, and reporting similar race-based differences for refinancing loans); Fed's New HMDA Report, supra note 3, at 376-84, 393 (concluding that, for conventional first-lien home-purchase loans, “the mean unadjusted incidence of higher-priced lending was 32.4 percent for blacks and 8.7 for non-Hispanic whites” and that one-fourth of this difference could not be explained by differences in these groups' economic characteristics).

The methodology used by the Fed to analyze this issue changed somewhat in its study of the 2008 data, but the basic result was the same. See Fed 2008 HMDA Report, supra note 49, at 62-63 (reporting that, on conventional home-purchase loans, the gross adjusted mean incidence of higher-priced lending was 6.8% higher for African Americans (10.5%) than for whites (3.7%), and the difference between these two racial groups for refinance loans was 15.6%, with these differences being reduced by only about 2% when certain borrower-related factors other than race were controlled).

\textsuperscript{135} See, e.g., Debbie Gruenstein Bocian et al., Race, Ethnicity and Subprime Home Loan Pricing, 60 J. Econ. & Bus. 110 (2008); see also GAO Fair Lending Report, supra note 35, at 3 (noting that various HMDA-based research reports “indicate that on average, African-American and Hispanic mortgage borrowers may pay substantially higher interest rates and fees than similarly situated
However, as with the earlier HMDA data, the price-related HMDA data cannot, standing alone, show unlawful discrimination. This is because, as the Fed staff regularly points out, many of the factors that affect an individual's creditworthiness and a loan's price (e.g., the borrower's credit score) are not captured or reported in the HMDA data. Because the HMDA data “are not sufficient by themselves for drawing conclusions about . . . the activities of any individual lender,” the Fed has insisted that reliance on the “raw data . . . can lead to inaccurate conclusions, which in turn may be unfair to particular institutions.”

Nevertheless, as with earlier HMDA studies, the recent HMDA-based studies dealing with price disparities, while not by themselves establishing unlawful discrimination, might well suggest that certain lenders' pricing behavior warrants further investigation. Indeed, in the wake of its analysis of the 2004 non-Hispanic white borrowers”). Other recent private studies that support these conclusions include:

- A 2009 study of fourteen major lenders based on the 2006 HMDA data showed that, among high-income borrowers, “African Americans were three times as likely as whites to pay higher prices for mortgages - 32.1 percent compared to 10.5 percent. Hispanics were nearly as likely as African Americans to pay higher prices for their mortgages at 29.1 percent.” Andrew Jakabovics & Jeff Chapman, Unequal Opportunity Lenders? Analyzing Racial Disparities in Big Banks' Higher-Priced Lending 1 (2009), available at http://www.americanprogress.org/issues/2009/09/pdf/tarp_report.pdf.
- A 2008 study based on the 2006 HMDA found that middle- and upper-income African Americans were at least twice as likely as comparable whites to receive high cost loans in 71.4% of the metropolitan areas examined, and this was also true among low- and moderate-income borrowers in 47.3% of the areas examined. National Community Reinvestment Coalition, Income is No Shield Against Racial Differences in Lending II: A Comparison of High-Cost Lending in America's Metropolitan and Rural Areas 3 (2008), available at http://www.ncrc.org/images/stories/pdf/research/income%20is%CC20no%CC20shield%20ii.pdf.
- A 2007 study of the nation's top residential mortgage lenders by the Association of Community Organizations for Reform Now found that, nationally, African American home purchasers were 2.7 times more likely and Latinos were 2.3 times more likely than white borrowers to be issued a subprime loan. See Ass'n of Community Organizations for Reform Now, Foreclosure Exposure: A Study of Racial and Income Disparities in Home Mortgage Lending in 172 American Cities 3 (2007), available at http://www.acorn.org/fileadmin/HMDA/2007/HMDAreport2007.pdf. For refinance loans, this study found that, nationally, African Americans were 1.8 times more likely and Latinos were 1.4 times more likely than white borrowers to be issued a subprime loan. Id. These racial disparities were found to persist even among borrowers of the same income level. Id.

137 Id. at 393.
138 See Fed 2008 HMDA Report, supra note 49, at 31 (noting that, while it is impossible “to determine from HMDA data alone whether racial and ethnic pricing disparities reflect illegal discrimination ... [an]alysis using the HMDA data can account for some factors that are likely related to the lending process ... [and can] be viewed as suggestive”); see also id. at 36 (noting that, because differences in loan prices may “be due to discriminatory treatment of minorities or
HMDA data, the Fed asked about 200 individual mortgage lenders for explanations of their pricing disparities, and the Justice Department followed up with letters to a number of these lenders seeking further information, although no government-initiated lawsuits ever resulted from these inquiries.

In addition, one private study combined the 2004 HMDA data with another data set that did take into account borrowers' credit scores and other relevant underwriting factors and found that, for many types of loans, blacks and Latinos “were more than 30 percent more likely to receive a higher rate loan than white borrowers, even after accounting for differences in risk.” This study posited several possible causes for these disparities, one of which was “the considerable leeway mortgage originators have to impose charges beyond those justified by risk-based pricing.”

Other private studies also focused on specific lenders' HMDA data. According to one of these, the 2005 HMDA data of seven large national lenders that originated a substantial volume of both prime and subprime loans--Citigroup, Countrywide, GMAC, HSBC, JP Morgan Chase, Washington Mutual, and Wells Fargo-- showed that these lenders, both individually and as a group, provided blacks and Latinos with higher-cost loans far more often than they provided such loans to whites. Such large lenders have accounted for a huge share of the

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140 See Schwemm, supra note 67, § 18:2 text accompanying nn.18-19.
142 Gruenstein Bocian et al., supra note 91, at 3.
143 Id.
144 Id. at 5.
145 See Paying More, supra note 51, at i (reporting that, for these seven lenders in the six metropolitan areas studied, “the percentage of total home purchase loans to African Americans that were higher-cost was 6 times greater than the percentage of higher cost home purchase loans to whites in the same cities (41.1 percent vs. 6.9 percent). The percentage of total home purchase loans to Latinos that were higher-cost was 4.8 times greater than the percentage of higher cost home purchase loans to whites (32.8 percent vs. 6.9 percent). In each of the cities examined, the seven lenders combined showed larger African American/white and Latino/white disparities than those exhibited for the overall lending market.”).
overall subprime mortgage market. As we shall see, many of these same lenders ultimately became the principal defendants in privately initiated class actions challenging their discriminatory pricing.

III. THE LEGAL RESPONSE TO DISCRIMINATORY PRICING

A. Overview

As mortgage defaults and home foreclosures accelerated in recent years, a variety of legal theories were used to try to protect borrowers from losing their homes. These included state consumer protection and fraud laws to challenge predatory loans and federal statutes designed to protect borrowers against unfair lending practices. Some complaints alleged race or national origin discrimination in violation of the FHA, ECOA, and their state-law counterparts. Often a borrower would include multiple claims, some involving civil rights laws and others not requiring a showing of discrimination.

For the most part, these cases pitted individual borrowers against their lenders, with the litigation seeking to block a foreclosure, rescission or reformation of the loan, and/or other individualized relief. A few cases alleged that predatory lenders engaged in “reverse redlining” by targeting minority neighborhoods, but even these cases generally sought only relief from the

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146 See, e.g., Fed 2005 HMDA Report, supra note 125, at A146 (reporting that, in 2005, “the ten lenders with the largest volume of higher-priced loans extended 59 percent of all such loans, a share that had increased from 38 percent in 2004”).

147 See infra notes 159-166 and accompanying text.

148 See, e.g., cases cited in Schwemm, supra note 67, § 18:1 n.34; see also Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548 (Mass. 2008) (enjoining lender's foreclosure proceeding based on state unfair trade law, Massachusetts Predatory Home Loan Practices Act, in case involving an alleged predatory loan); Engel & McCoy, supra note 28, at 2090-93 (describing state and local anti-predatory lending statutes and ordinances).

149 See, e.g., Schwemm, supra note 67, § 18:1 n.35 (describing cases that included claims under the Truth in Lending Act (“TILA”), the Real Estate Settlement Procedures Act, the Home Ownership and Equity Act (“HOEPA”), the Credit Repair Organizations Act, and the Racketeer Influenced and Corrupt Organizations Act).


151 See, e.g., Whitley v. Taylor Bean & Whitacker Mortgage Corp., 607 F. Supp. 2d 885 (N.D. Ill. 2009) (upholding most of black homeowners' claims of predatory lending under a variety of federal statutes and state-law theories).
particular loans involved and prohibitory injunctions against the specific lenders that had made them.  

Civil rights litigation seeking institutional relief in this area has been rare. Apart from the class actions discussed below, only a handful of major private suits have been filed; these include two directed at race-based predatory lending and one accusing two major lenders of forcing blacks into subprime mortgages while giving lower rates to similarly situated whites. For its part, the Justice Department brought far fewer FHA mortgage cases during the recent Bush Administration than in the 1990s. Thus, the class actions appear to be the principal effort designed to bring about nationwide systemic change in the modern home-finance industry, at least apart from non-litigation efforts such as legislative reform relating to this industry. These class-action lawsuits are examined in detail in the remainder of Part III, while non-litigation efforts are discussed in Part IV.

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152 See, e.g., “reverse redlining” cases described in Schwemm, supra note 67, § 18:3 n.13.
156 For examples of such legislative activity, see infra notes 281-282 and accompanying text.
B. Class Action Cases Challenging Discretionary Pricing

1. The Basic Claim

Beginning in 2007, a series of lawsuits challenging the discretionary pricing policies of many of the largest mortgage lenders were brought in various federal courts throughout the country. All of the suits are putative nationwide class actions brought on behalf of African American and Hispanic homeowners that allege the defendants engaged in race and national origin discrimination in originating, funding, acquiring, and servicing residential mortgage loans in violation of the FHA and ECOA. The basic allegations are similar in all of the cases, but each was brought against only a single lender (sometimes along with its affiliated corporate partners). The lenders sued include Accredited Home Lenders; Countrywide; GE [405] Money Bank; GMAC; GreenPoint

157 See cases cited infra notes 159-166. The earliest of these suits was filed on July 12, 2007. See Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 261 (D. Mass. 2008). Most of the rest were filed later in 2007 or in early 2008, but at least one was filed as late as April of 2009. See Watson v. Homecomings Financial, LLC, No. 09-859 (DWF/JJG), 2009 WL 3517837, at *2 (D. Minn. Oct. 23, 2009).

158 For a representative complaint, see Class Action Complaint, Guerra v. GMAC LLC, No. 2008CV01297 (E.D. Pa. July 22, 2008) [hereinafter Guerra Complaint]. The specific provisions in the FHA and ECOA that ban mortgage discrimination are described supra note 67.


161 See Steele v. GE Money Bank, No. 08 C 1880, 2009 WL 393860 (N.D. Ill. Feb. 17, 2009). The principal defendant in this case, GE Money Bank, “is a wholly owned subsidiary of GE Consumer Finance, Inc., a consumer lending unit of General Electric Company.” Id. at *1. A second defendant, WMC Mortgage, LLC, “is a successor in interest to WMC Mortgage Corporation ... which, along with] its parent company, WMC Finance Co., were acquired by ... GE Consumer Finance[ ] in 2004.” Id.

162 See Guerra v. GMAC LLC, No. 2:08-cv-01297-LDD, 2009 WL 449153 (E.D. Pa. Feb. 20, 2009). The principal defendants in this case are GMAC LLC and certain of its subsidiaries,
Mortgage Funding; HSBC North American Holdings and its lending subsidiaries; H & R Block’s two mortgage subsidiaries, H & R Block Mortgage Corp. and Option One Mortgage Corp.; and Wells Fargo.

These cases allege FHA and ECOA violations based solely on a disparate impact theory. Plaintiffs allege that the policy of all of these defendant-lenders in allowing discretionary pricing, although facially neutral, has an adverse effect on minority borrowers compared to similarly situated whites. In short, they claim that minority borrowers pay more discretionary charges, both in frequency and amount, than whites with similar credit backgrounds.

Most of the defendant-lenders in these cases responded to the complaints by filing motions to dismiss. In each such case, the trial court upheld the plaintiffs’ basic claims. As a result, all of these cases are now in the pre-trial discovery stage.


See Ramirez v. GreenPoint Mortgage Funding, Inc., 633 F. Supp. 2d 922 (N.D. Cal. 2008). There is only one defendant named in this case. See id. at 922. GreenPoint, which was once one of the nation’s largest originators of Alt-A mortgages, was shut down in 2007 less than a year after being taken over by Capital One Financial Corp. See E. Scott Reckard, Sub-prime Chaos Claims 500 Jobs at Countrywide, L.A. Times, Aug. 21, 2007, at C4.


See Barrett v. H & R Block, Inc., 652 F. Supp. 2d 104 (D. Mass. 2009); Hoffman v. Option One Mortgage Corp., 589 F. Supp. 2d 1009 (N.D. Ill. 2008). In the former case, the principal defendants are H & R Block Mortgage Corporation and Option One Mortgage Corporation, which are described as wholly owned subsidiaries of H & R Block, Inc. Barrett, 652 F. Supp. 2d at 107. H & R Block, Inc. was also named as a defendant, but the court dismissed it for lack of personal jurisdiction. Id. at 113-16. In the Hoffman case, H & R Block Mortgage Corp. was also described as “Option One Mortgage Services, Inc.” Hoffman, 589 F. Supp. 2d at 1009.

See In re Wells Fargo Residential Mortgage Lending Discrimination Litigation, No. M:08-CV-1930 MMC, 2009 WL 2473684 (N.D. Cal. Aug. 11, 2009). Wells Fargo has also been sued in a number of other discriminatory pricing cases. See supra notes 149, 153, and 154 and infra note 255.

See cases cited supra notes 159-166. Some decisions dismissed particular defendants or otherwise granted parts of the defendants’ motions to dismiss. See, e.g., supra note 165 and infra notes 185-187 and accompanying text.
2. Three Strategic Issues

These class action lawsuits raise three major strategic questions for plaintiffs. The first is whether to employ an intentional discrimination theory of liability, as opposed to a disparate impact theory. The second is whether to base the claims on the individual plaintiff-borrower's race or national origin or on that of the borrower's neighborhood as a whole. Finally, the third is whether to add the mortgage brokers, rather than simply the mortgage lenders, as defendants. This section examines each of these issues in turn.

First, plaintiffs face a strategic choice whether to adopt an intentional discrimination theory of liability. In other mortgage lending cases based on similar facts, minority plaintiffs have accused their lenders of intentional discrimination.\(^{168}\) This raises the question of why the class action cases do not include an intent-based count, along with their disparate impact claim. After all, assuming that the lender-defendants' discretionary pricing policies do negatively impact minorities and that these lenders knew or should have known of this disparate impact,\(^{169}\) such a scenario would present strong evidence of intentional discrimination.\(^{170}\)

The answer seems to be a matter of litigation strategy. While it is true that evidence of intentional discrimination is lurking in these cases,\(^{171}\) proving [407] it might be a daunting and distracting task. It would require producing evidence--in

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\(^{169}\) The cases actually present a “hybrid” impact/intent claim, because the defendant-lenders’ “neutral” policies that produced racially disparate impacts (i.e., granting discretion to their loan officers and brokers to increase charges above levels necessary to account for credit risk) allowed these agents to intentionally discriminate even if the lenders did not specifically intend for such discrimination to occur. Cf. Ho v. Donovan, 569 F.3d 677, 680 (7th Cir. 2009) (ruling against a FHA defendant who was described as having “behaved like an ostrich,” and commenting that “[c]onscious avoidance of information is a form of knowledge”); Mathews v. Gov’t Emp. Ins. Co., 23 F. Supp. 2d 1160, 1164 (S.D. Cal. 1998) (holding that for purposes of determining whether a Fair Credit Reporting Act (“FCRA”) violation is sufficiently willful to justify punitive damages, it is enough to show that defendants recklessly disregarded any of their FCRA responsibilities and that they cannot evade such liability “by sticking their heads in the sand and pleading ignorance”).
addition to the HMDA-based studies showing racial and national origin disparities—that some policy-maker for each defendant-lender directed that minority borrowers be targeted for higher cost loans. This type of evidence has surfaced occasionally, for example from whistle-blowers who once worked for a lender, but it is not easy to find such witnesses and convince them to testify. Furthermore, a disparate impact case poses fewer hurdles. For example, once statistically significant disparities are proven in a disparate impact case, the focus turns to the issues of the defendant's business justifications and the existence of less discriminatory alternatives, issues for which the defendants may have the burden of proof. Finally, as a matter of equity as well as legal theory, the plaintiffs believe the defendant-lenders should be held responsible for the discriminatory results of their policies, whether or not they can be shown to have intended those results.

The second strategic choice made by plaintiffs in these lawsuits is to base their claims entirely on the plaintiff-borrowers' race and national origin, as opposed to the race or national origin of the borrowers' neighborhoods, as would be the case in “redlining,” “reverse redlining,” and other types of area-focused claims of mortgage discrimination. In individual cases, evidence may be produced that a particular lender-defendant has a record of other types of financial discrimination, including neighborhood-based discrimination, but this is not the specific focus of these cases. Rather, the focus is the negative impact of the defendants' discretionary pricing policy on minority borrowers, regardless of where they live.

172 It is worth noting that, in one of the few cases where both impact and intent claims were alleged, the trial court upheld the impact claim, but dismissed as “speculative” allegations based on discriminatory intent. See Garcia v. Countrywide Fin. Corp., No. EDCV 07-1161-VAP (JCRx), 2008 U.S. Dist. LEXIS 106675, at *40-42 (C.D. Cal. Jan. 17, 2008).
173 See, e.g., Mayor of Baltimore, 631 F. Supp. 2d at 704 (referring to plaintiffs' having submitted affidavits of two of defendant's former employees in support of plaintiffs' FHA claims of discriminatory lending). For a further description of the whistle-blower testimony in this case, see Michael Powell, Suit Accuses Wells Fargo of Steering Blacks to Subprime Mortgages in Baltimore, N.Y. Times, June 7, 2009, at A15.
174 See infra notes 237-238 and accompanying text.
175 Intent-based claims might also add to the difficulties of class-action certification. See infra notes 192-193 and accompanying text. Because these cases involve hundreds of thousands of loans, defendants might argue that the Rule 23 requirements of commonality and typicality are lacking (e.g., because the class members dealt with different brokers, different loan officers, or purchased different loan packages from a given lender than did the representative plaintiffs). Some courts have, in fact, opined that the Rule 23 requirements are more easily satisfied in a disparate impact case than an intent case. See, e.g., Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 n.10 (4th Cir. 1980).
176 For discussions of redlining and reverse redlining, see, respectively, supra note 64 and accompanying text and supra notes 101-106 and accompanying text.
The third strategic choice made by plaintiffs in these lawsuits is generally not to add as defendants the mortgage brokers who, presumably, were the initial cause of the higher rates and fees to which plaintiffs were subjected, [408] at least for the loans they originated. The issue of whether a lender should be liable for the discriminatory acts of the mortgage brokers with whom it deals is a difficult one. In 2003, the Supreme Court held in Meyer v. Holley\textsuperscript{177} that “traditional vicarious liability rules” govern FHA claims and that these rules “ordinarily make principals and employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.”\textsuperscript{178} In Meyer, this meant that the discrimination of a real estate salesman could be attributed to his employer-corporation, “but not the owner or officer [of the corporation],” because only the corporation was the salesman's “principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents.”\textsuperscript{179}

Under Meyer, it is clear that lenders are vicariously liable for the discriminatory acts of their own loan officers and other employees. As for a lender's liability for its brokers' FHA violations, however, Meyer may require that a principal-agent relationship exist between the lender and these brokers. The defendant-lenders maintain that brokers act only on behalf of borrowers, not the lender who ultimately makes the loan.\textsuperscript{180} Thus, argue the lenders, if a broker discriminates unlawfully against its customers, Meyer instructs the victims to sue the broker, but it does not authorize lender liability for such FHA violations.

The plaintiffs respond that a lender should be held responsible for all of its discriminatory loans, regardless of who originally generated them.\textsuperscript{181} It is each

\textsuperscript{177} 537 U.S. 280 (2003).
\textsuperscript{178} Id. at 285.
\textsuperscript{179} Id. at 286.
\textsuperscript{180} Indeed, laws in some states establish a fiduciary relationship between a broker and its borrowers. See, e.g., Ky. Rev. Stat. Ann. § 286.8-270 (2009) (imposing, in Kentucky statute passed in 2008, fiduciary duties on mortgage loan brokers in favor of borrowers); see also Mortgage Bankers/Brokers, supra note 32, at 25 (“Some state laws hold that a broker must act as an agent of the borrower. In other states, courts have ruled that agency relationships exist based on the broker's conduct. Other states have concluded there is no agency relationship implied.”). For more on the issue of whether brokers represent borrowers, see infra note 289 and accompanying text.

\textsuperscript{181} Plaintiffs point to the large degree of control that the defendant-lenders exerted over their affiliated brokers as showing that the lenders' policies caused the discriminatory impact at issue. Each lender screened and approved individual brokers before allowing them to offer the lender's loan products. A lender's chosen brokers were given internet and intranet access to the lender's proprietary underwriting databases and were required to adhere to wholesale-lending manuals prepared and administered by the lender. Because lenders were required to keep HMDA data for all broker-initiated loans, each instructed its brokers on how to report that data to the lender. Each lender issued daily rate sheets for all of its products to its brokers, and most capped the fees that their brokers could charge (e.g., between 3% and 5% of the loan). Finally, each lender had the ability to monitor broker activities and to suspend or bar particular brokers from carrying its products. See also supra text accompanying notes 120-123.
lender's pricing policies—and its failure to adequately monitor the consequences of those policies—that have led to the racial disparities challenged by these cases. Furthermore, even if Meyer is a problem with respect to FHA liability, it does not govern claims under the ECOA, which does authorize lender liability for broker-initiated loans.

The plaintiffs also have a strategic rationale for suing only the lenders. The plaintiffs view mortgage brokers—who are often small operations and notoriously elusive, going into and out of business very quickly—as simply a distraction in the overall problem of discretionary loan prices. The fact that such brokers exist at all, much less that they have engaged in this type of pricing discrimination, is ultimately due to the lenders, which set up and maintained this system. A major goal of this litigation is to end the overall system of discretionary pricing in mortgage loans, and this can be accomplished by suing only the lenders. To also name the individual brokers would involve a colossal effort, with very little reward.

To date, one trial court in these cases has agreed in part with the defendant-lenders' position in ruling on a preliminary motion. This court held that the plaintiffs' allegations do not support an inference that the defendant lenders had the ability to control the manner and method in which the brokers carried out their work. Because the existence of an actual or apparent agency relationship is based entirely on speculation, the

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182 Cf. Dunn v. Washington County Hosp., 429 F.3d 689, 691 (7th Cir. 2005) (holding employer liable under Title VII even though the discriminatory terms and conditions complained of were initiated by a third party, on the ground that, because “liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee [or] an independent contractor .... Ability to ‘control’ the actor plays no role.... This is, by the way, the norm of direct liability in private law as well: a person ‘can be subject to liability for harm resulting from his conduct if he is negligent or reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.’ Restatement (second) of Agency § 213(d).”).

183 Under the ECOA, a lender is responsible for the entire loan price, including elements of the price that are set by third parties. See Coleman v. General Motors Acceptance Corp., 220 F.R.D. 64, 93 (M.D. Tenn. 2004) (noting, in ECOA case challenging discretionary pricing by a car finance company, that plaintiffs “make a much stronger case for GMAC’s liability under ECOA’s definition of creditor or assignee than under the agency theory”); 15 U.S.C. § 1691a(e) (2009); see also 12 C.F.R. § 202.2(l) (2009) (defining a “creditor” for purposes of ECOA liability as anyone who “participate[ ] in a credit decision”); see also supra text accompanying note 113 (setting forth Justice Department’s position that, because a lender is ultimately responsible under ECOA for all of its loans, a lender should be liable “not only for the alleged discrimination of its own employees, but also for that of the brokers”).

184 See supra notes 32-35 and accompanying text; infra note 28 and accompanying text.

185 Steele v. GE Money Bank, No. 08 C 1880, 2009 WL 393860, at *5-7 (N.D. Ill. Feb. 27, 2009).
portions of the complaint which rest on an agency theory between the defendants and the brokers are dismissed.\textsuperscript{186} 

However, the court noted that this ruling does not affect the plaintiffs' claim against the lender defendants based on their own actions. . . . An agency relationship between a lender and a broker need not exist for a lender to direct a broker to take a specified action in order for that broker to do business with that lender. [Given the plaintiffs' allegations that this] second kind of relationship existed, . . . the court's dismissal of any claims based on an agency theory does not require dismissal of claims based merely on alleged directions to brokers provided by the defendant lenders.\textsuperscript{187}

3. Other Issues: Relief Requested; Class Certification; Timeliness

Plaintiffs in these cases seek both equitable and monetary relief. As for the former, the complaints pray for an equitable decree that, inter alia, would: enjoin the defendant-lenders' from engaging in subjective decision-making in the pricing of future home loans; bar defendants from continuing to collect any non-risk charges resulting from unlawful discrimination; disgorge and provide restitution regarding all such charges; and reform the above-par loans currently held by defendants to the risk-related rates that the plaintiff-borrowers should have had on the dates their loans closed.\textsuperscript{188} Plaintiffs also seek damages as authorized by the FHA and ECOA.\textsuperscript{189}

These cases have been brought as class actions,\textsuperscript{190} in part to provide some equalizing of the litigation resources on the plaintiffs' side against the huge

\textsuperscript{186} Id. at *6. 
\textsuperscript{187} Id. at *7; see also Anderson v. Wells Fargo Home Mortgage, Inc., 259 F. Supp. 2d 1143, 1148 (W.D. Wash. 2003) (noting, in similar circumstances, that agency relationship may not be required “to sustain an FHA claim” to the extent plaintiff “can maintain such a claim directly against Wells Fargo”).

The Steele court went on to conclude that the absent brokers with whom the plaintiffs had dealt were necessary parties under Fed. R. Civ. P. 19(a)(1), and therefore that “the plaintiffs must join the brokers if they wish to proceed with this action.” Steele, 2009 WL 393860, at *9. For contrary rulings in similar cases, see In re Wells Fargo Residential Mortgage Lending Discrimination Litig., No. M:08-CV-1930 MMC, 2009 WL 2473684 (N.D. Cal. Aug. 11, 2009); Jackson v. Novastar Mortgage, Inc., 645 F. Supp. 2d 636, 642-43 (W.D. Tenn. 2007).

\textsuperscript{188} See, e.g., Guerra Complaint, supra note 158, at “Prayer” after P 162. 
\textsuperscript{189} See id.; FHA, supra note 1, § 3613(c); ECOA, supra note 66, § 1691(a)-(b).

\textsuperscript{190} A typical class is defined as including: [a]ll minority persons in the United States who obtained a residential mortgage loan from [Defendants] between January 1, 2001 and the present and were harmed by Defendants' racially discriminatory policies and/or practices.... By “minority,” Plaintiffs refer to “any and all non-
national finance companies that are the defendants. In addition, class actions are the only cost-effective way of prosecuting the borrowers' tens of thousands of claims, the individual prosecution of which “would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs.”

None of the trial judges in these cases has yet decided whether a class action should be certified. While class certification is essential to the success of these cases, it is a procedural matter that is tangential to the substantive issues we are discussing in this Article. However, it is worth noting that cases alleging race discrimination generally lend themselves to class action treatment and these particular cases seem to be appropriate candidates for class certification.

Caucasian/White racial groups protected under the [ECOA] and the [FHA], including, without limitation, African-Americans and Latinos.”


A class action in federal court must meet all four of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). See Fed. R. Civ. P. 23(a)-(b). It seems fairly obvious that these cases meet 23(a)'s first two requirements (numerosity and common questions). See, e.g., Cason v. Nissan Motor Acceptance Corp., 212 F.R.D. 518, 520 (M.D. Tenn. 2002); Rodriguez v. Ford Motor Credit Co., No. 01 C 8526, 2002 WL 655679, at *2-3 (N.D. Ill. Apr. 19, 2002). The requirements of typicality and adequate representation are generally fact-based determinations, but the complaints have presumably identified lead plaintiffs and claims in such a way that these elements are also likely to be satisfied. Cf. Cason, 212 F.R.D. at 520; Rodriguez, 2002 WL 655679, at *3.

Certification under 23(b)(2) is likely to be appropriate since these claims allege that the defendants discriminated against a class of people and the primary relief sought is injunctive. See, e.g., Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1174 (9th Cir. 2007); see also Buycks-Robertson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322, 325 (N.D. Ill. 1995) (certifying a (b)(2) class action in a mortgage discrimination case that is further described supra note 85). Courts have routinely certified (b)(2) classes alleging disparate impact claims. See, e.g., Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975). See generally Amchen Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997) (“Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of (b)(2) class actions].”). The major issue regarding (b)(2) certification is likely to be whether such certification is jeopardized by the fact that the plaintiffs are also seeking monetary damages. See, e.g., Coleman v. General Motors Acceptance Corp., 296 F.3d 443, 447 (6th Cir. 2002) (holding (b)(2) certification inappropriate in ECOA-based challenge to discretionary pricing in car loans, because the injunctive relief requested “does not predominate over the monetary damages”). Note, however, that after the Sixth Circuit's decision in Coleman, the trial court on remand and a different court in Cason both certified (b)(2) classes after the plaintiffs abandoned their claims for monetary damages. See Coleman v. General Motors Acceptance Corp., 220 F.R.D. 64, 100 (M.D. Tenn. 2004); Cason, 212 F.R.D. at 523.

A (b)(3) certification may also be appropriate for these cases, because common questions “predominate” and a class action is the “superior” way to adjudicate this controversy. In particular, superiority is demonstrated where “class-wide litigation of common issues will reduce litigation
As for timeliness, the relevant statute-of-limitations period for both the FHA and ECOA is two years,\(^{194}\) and some members of the plaintiff-classes were exposed to the defendants' illegal policies and given discriminatory loans more than two years before the cases were filed. Plaintiffs assert, however, that these claims, as well as those of the named plaintiffs and other class members whose loans were issued within the limitations period, are [412] timely under the "continuing violation theory."\(^{195}\) This theory was endorsed for purposes of the FHA by the Supreme Court in 1982 in Havens Realty Corp. v. Coleman,\(^{196}\) and it has also regularly been applied in ECOA cases.\(^{197}\)

Post-Havens decisions make clear that "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred."\(^{198}\) The class action complaints allege a practice of lending discrimination that was the defendants' standard operating procedure, which means that the continuing violation theory should make the claims of all class members timely."\(^{199}\) Thus far, all of the trial courts that have reviewed this issue at the

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194 See FHA, supra note 1, § 3613(a)(1)(A); ECOA, supra note 66, § 1691e(f).
195 See, e.g., cases cited infra notes 197-198, 200. In addition to the continuing violation theory, plaintiffs have asserted other theories that would justify including class members whose loans were obtained beyond the limitations period. See, e.g., Taylor v. Accredited Home Lenders, Inc., 580 F. Supp. 2d 1062, 1066 (S.D. Cal. 2008) (noting, but avoiding decision on, plaintiffs' discovery and fraudulent concealment theories); Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 262-63 (D. Mass. 2008) (discussing, but avoiding decision on, plaintiffs' discovery theory).
197 See, e.g., ECOA cases cited infra note 200; Davis v. General Motors Acceptance Corp., 406 F. Supp. 2d 698, 705-06 (N.D. Miss. 2005) (applying the continuing violation doctrine to ECOA claims alleging racially discriminatory mark-ups on auto loans).
pleading stage have agreed. The application of the continuing violation theory is also likely to be an on-going point of dispute among the parties. With these issues in mind, we will move on to a discussion of the merits of these cases.

C. Analyzing the Prototypical Impact Case Against a Single Lender

1. Impact Theory under the FHA/ECOA: Overview and Elements

A preliminary issue is whether the FHA and ECOA even include an impact standard. Throughout the history of these statutes, the lower courts have consistently upheld impact claims under both laws. Furthermore, in 1994, the Justice Department, HUD, and eight other federal regulatory agencies took the position that lending practices that produced disparate impacts could result in FHA/ECOA liability. Still, the Supreme Court has never endorsed this standard in a FHA or ECOA case, and defendants in modern lending cases invariably raise this issue in their motions to dismiss, arguing that the Court's 2005 decision in an


201 For the FHA, see, e.g., cases cited in Schwemm, supra note 67, § 10:4, nn.18-35, 41; for the ECOA, see, e.g., Haynes v. Bank of Wedowee, 634 F.2d 266, 269 n.5 (11th Cir. 1981); Smith v. Chrysler Fin. Co., LLC, No. Civ.A. 00-6003(DMC), 2003 WL 328719, at *5-6 (D. N.J. Jan. 15, 2003); cases cited infra note 204. See also 12 C.F.R. § 202.6(a) n.2 (2010) (commenting, in the Fed's ECOA regulations, that the ECOA "may prohibit a creditor practice that is discriminatory in effect because it has a disproportionately negative impact on a prohibited basis," based, inter alia, on the fact that the "effects test" doctrine, as developed in Title VII cases, was intended by Congress to "apply to the credit area"); infra note 202.


For a list of the ten agencies that joined the U.S. Policy Statement above, see 59 Fed. Reg. 18266 (Apr. 15, 1994). The fact that HUD and Justice joined is particularly significant for purposes of the FHA, because these agencies have FHA enforcement responsibilities, and their interpretations of the statute are therefore entitled to deference by the courts. See Schwemm, supra note 67, § 7:5.
employment-age discrimination case suggests that it would not allow impact-based liability under either the FHA or ECOA. Thus far, this defense has been unanimously rejected by the trial courts, including those in the discretionary pricing cases discussed here.

The issue of whether the FHA includes an impact standard goes well beyond the scope of our discussion here because it would apply to a variety of housing discrimination cases in addition to those alleging mortgage discrimination. As a result, we will move on to how that impact standard should be applied to the cases alleging discrimination as a result of discretionary pricing in home financing. We will also assume that, whatever the proper liability standards are under the FHA, those same standards would also govern ECOA claims, although we recognize that a particular court might decide to give a broader interpretation to one statute or the other, which is presumably why the

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In Smith, the Supreme Court held that an impact theory--albeit one less favorable to plaintiffs than Title VII's--is available in cases under the 1967 Age Discrimination in Employment Act, 544 U.S. at 233-41, 43-47, and then went on to rule against the particular claim in this case both because the plaintiffs had failed to identify a specific employment practice that produced a disparate impact and because the defendant had sufficiently justified its challenged behavior under the relevant standard. Id. at 241-43.


205 For example, the ECOA regulations explicitly recognize that liability may be based on a disparate impact theory. See supra note 201 (describing 12 C.F.R. § 202.6(a)(2)). Under the FHA, the impact theory has been uniformly endorsed by the courts, but without the benefit thus far of a regulation from HUD. The presence of such a regulation might be helpful, should this issue ever reach the Supreme Court. See, e.g., Smith v. City of Jackson, 544 U.S. at 243-45 (Scalia, J., concurring) (relying on an EEOC regulation to hold, based on Chevron deference, that an impact standard is appropriate under the Age Discrimination in Employment Act).

Another potential difference between these two statutes arises from the fact that the ECOA and its implementing regulations seem clear that lenders are liable for their brokers' discrimination, whereas such derivative liability is more of an open question under the FHA. See supra notes 177-187 and accompanying text.
plaintiffs in the discretionary pricing class actions have made claims under both statutes.206

In consistently interpreting the FHA to include an impact standard, the lower courts have generally agreed that three elements must be considered in analyzing an impact case under the FHA.207 First, the plaintiff must identify a policy or practice of the defendant that is neutral on its face but is shown to have caused a substantially greater negative impact on a protected class than on others. If this is done, then the defendant has the burden of showing that its policy or practice is justified by legitimate business considerations. Finally, whether the defendant can satisfy this burden of justification depends somewhat on whether there exists a less discriminatory alternative that would serve the defendant's needs as well as the challenged policy or practice does.208 The same three elements were also identified in the 1994 policy statement issued by HUD, Justice, and eight other federal agencies that regulate mortgage lenders.209 The

206 The ECOA has a provision that bars recovery for conduct that violates both the ECOA and the FHA “based on the same transaction,” see 15 U.S.C. § 1691(i) (2009), but this only bars double recovery, not the right of plaintiffs to bring suit under both statutes. See, e.g., Ameriquest Mortgage Co., 635 F. Supp. 2d at 1105; Taylor, 580 F. Supp. 2d at 1069; Ware v. Indymac Bank, 534 F. Supp. 2d 835, 840 (N.D. Ill. 2008).

207 See, e.g., Budnick v. Town of Carefree, 518 F.3d 1109, 1118 (9th Cir. 2008); Graoch Associates # 33 v. Louisville/Jefferson County, 508 F.3d 366, 374 (6th Cir. 2007); Reinhart v. Lincoln County, 482 F.3d 1225, 1229 (10th Cir. 2007); Oti Kaga, Inc. v. S.D. Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); Lapid-Laurel, LLC v. Zoning Bd. of Adjustment of Twp. of Scotch Plains, 284 F.3d 442, 466-67 (3d Cir. 2002).

208 With respect to the last two elements, some differences exist in how the appellate decisions have articulated the parties' respective burdens. This matter is further discussed infra notes 234-238 and accompanying text.

209 See U.S. Policy Statement, supra note 202. The three elements are described in this U.S. Policy Statement as follows:

[P]roof of lending discrimination using a disparate impact analysis encompasses several steps.... The existence of a disparate impact must be established by facts. Frequently this is done through a quantitative or statistical analysis. Sometimes the operation of the practice is reviewed by analyzing its effect on an applicant pool; sometimes it consists of an analysis of the practice's effect on possible applicants, or on the population in general. Not every member of the group must be adversely affected for the practice to have a disparate impact. Evidence of discriminatory intent is not necessary to establish that a policy or practice adopted or implemented by a lender that has a disparate impact is in violation of the FH Act or ECOA....

[When] a lender's policy or practice has a disparate impact, the next step is to seek to determine whether the policy or practice is justified by “business necessity.” The justification must be manifest and may not be hypothetical or speculative. Factors that may be relevant to the justification could include cost and profitability.

Even if a policy or practice that has a disparate impact on a prohibited basis can be justified by business necessity, it still may be found to be discriminatory if an alternative policy or practice could serve the same purpose with less discriminatory effect.
next section analyzes how these three elements apply to the discretionary pricing class actions.

2. Three Elements of an Impact-Based Challenge to Discretionary Pricing

In addressing the three elements of an impact-based challenge to a mortgage lender's discretionary pricing, we first consider, in section 2.a, whether this is the type of policy that may be challenged under the disparate impact theory and whether statistical proof exists to show that this policy has caused a negative impact on minorities. Section 2.b then deals with justifications for this policy and whether less discriminatory alternatives are available.

a. Discriminatory Impact of the Policy

i. Identifying the Policy

The first step in a disparate impact case is for the plaintiff to identify a defendant's policy or practice that, although neutral on its face, has a more negative impact on minorities than whites. The specific policy being challenged here is discretionary pricing by mortgage lenders, a policy that was [416] described earlier. To repeat the salient points, this is a practice through which mortgage lenders provide financial incentives to their loan officers and brokers to mark up interest rates and add on other charges to home loans, resulting in borrowers paying rates substantially more than they should based on objective credit standards. As Judge Gertner put it in upholding the plaintiffs' claim in the Countrywide case:

The “specific and actionable policy” that plaintiffs challenge is Countrywide's discretionary pricing policy, which allows Countrywide's retail salesmen, independent brokers, and correspondent lenders to add various charges and fees based on subjective non-risk factors, and which, in turn, has a racially discriminatory impact on African-American borrowers. . . . Plaintiffs have identified the practice at issue: establishing a par rate keyed to objective indicators of creditworthiness while simultaneously authorizing additional charges keyed to factors unrelated to those criteria.

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Id. at 18269.

210 See supra notes 119-123 and accompanying text.

Over two decades ago in Watson v. Fort Worth Bank and Trust, the Supreme Court made clear in the employment discrimination context that subjective or discretionary practices, akin to the defendant-lenders' pricing policies here, are impermissible if they have a disparate impact. According to the Watson opinion:

[D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices . . . . If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible and intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply . . . . We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

Under Watson, disparate impact analysis is applicable to an employer's facially neutral policy that is applied subjectively by those to whom the employer gives authority under the policy. Any other conclusion, the Court reasoned, would permit an entity required to comply with anti-discrimination laws to "insulate" itself from legal responsibility by "refrain[ing] from making standardized criteria absolutely determinative." This theory has been accepted in financing cases under the ECOA.

The plaintiffs' theory in the mortgage cases is that the defendant-lenders' discretionary pricing policies allowed racial bias to infect their loans. As noted above, numerous studies have demonstrated the adverse impact of discretionary pricing on black and Latino borrowers, resulting in countless minority families paying thousands of dollars more for their home loans than comparable whites. As Judge Gertner wrote in upholding the plaintiffs' claim against Countrywide, this is "a classic case of disparate impact," because “[w]hite homeowners with identical or similar credit scores pay different rates and charges than African-

\[\text{212 487 U.S. 977, 990-91 (1988).}\\
\text{213 Id.}\\
\text{214 Id. at 990.}\\
\text{216 See supra notes 133-135 and 142-144 and accompanying texts.}
American homeowners, because of a policy that allows racial bias to play a part in the pricing scheme.”217

The defendants counter that their discretionary pricing systems do not amount to a sufficiently specific policy or practice for purposes of disparate-impact analysis. They point out that the Supreme Court in Watson required that when a defendant “combines subjective criteria with the use of more rigid standardized rules or tests,” the plaintiff must “isolat[e] and identify[ ] the specific . . . practices that are allegedly responsible for any statistical disparities.”218 Thus, according to the defendants, while the Court has allowed disparate-impact challenges to certain subjective employment standards, its decisions do not authorize the plaintiffs' generalized attack on discretionary pricing in mortgage loans here.219

The plaintiffs respond that the defendant-lenders--by designing, disseminating, controlling, implementing, and profiting from the discretionary pricing policies--are indeed being charged with a sufficiently specific pattern of behavior.220 The lenders created and maintained these pricing systems, thereby allowing and encouraging their loan officers and brokers to carry out a policy that the lenders must have known would result in disproportionately higher charges to minorities.221 Thus far, all of the trial judges [418] in these cases, in responding to defendants' motions to dismiss, have upheld the claims with respect to the required element of identifying a sufficiently specific policy.222

218 Watson, 487 U.S. at 994.
219 See id. at 990; see also Smith v. City of Jackson, 544 U.S.228, 241 (2005) (“it is not enough to simply ... point to a generalized policy that leads to such an impact. Rather, the [plaintiff] is responsible for isolating and identifying the specific ... practices that are allegedly responsible for any observed statistical disparities.”) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S.642, 656 (1989)).
220 For a description of some of the acts that the defendant-lenders employ to carry out their discretionary pricing policies, see supra note 122 and accompanying text and note 181.
221 Once again, Judge Gertner's opinion in the Countrywide case is instructive:
Where the allocation of subjective decision-making authority is at issue, the “practice” Countrywide has enacted effectively amounts to the absence of a policy, an approach that allows racial bias to seep into the process. Allowing this “practice” to escape scrutiny would enable companies responsible for complying with anti-discrimination laws to “insulate” themselves by “refrain[ing] from making standardized criteria absolutely determinative.”
ii. Proof of the Policy's Discriminatory Impact

Assuming that a sufficiently specific practice has been identified, the next step in the disparate impact analysis is for plaintiffs to prove that a defendant's discretionary pricing policy has a more negative impact on minorities than whites. The HMDA data and other reports described earlier show loan-price disparities between minorities and whites for the industry as a whole and for each of the defendant-lenders. The defendants claim, however, that these reports fail to prove any race-based impact, because, as pointed out earlier, HMDA-based studies cannot, by themselves, prove discrimination; factors other than race or national origin (e.g., credit scores) might account for the disparities.

The plaintiffs respond that the HMDA-based studies often do control for many objective risk-based differences, and significant racial price disparities still remain. Furthermore, the HMDA data are the best information available to the public; in other words, if the lenders claim that other factors justify their record of giving higher-priced loans to minorities, it is only fair that they be required to produce the evidence supporting this claim. Plaintiffs also note that the discovery phase will provide them with access to each of the defendant's loan files, where additional evidence of the defendants' records of disparate pricing may be revealed. Historically, lenders have claimed that this is proprietary information and have kept it secret from the public. Now that these lawsuits have moved beyond the motion-to-dismiss stage and into discovery, plaintiffs expect to be able to gather further data that will advance their showing of disparate impact (e.g., based on a statistical analysis of each defendant's loan portfolio that will determine whether that lender has indeed charged minority borrowers higher discretionary rates and fees than comparable white borrowers).

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223 See supra notes 133-135 and 139-145 and accompanying texts.
224 See supra notes 136-138 and accompanying text.
225 See supra notes 134-135 and 142-144 and accompanying texts.
226 Cf. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-58 (1989) (noting, in response to a perceived objection that the Court was unduly burdening Title VII plaintiffs asserting impact claims, that “liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims .... Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force ...”).
227 For more on such statistical analyses, see infra notes 254-256 and accompanying text. For examples of mortgage discrimination cases in which discovery was ordered of the defendant's loan files, see Hurt v. Dime Sav. Bank, 151 F.R.D. 30 (S.D.N.Y. 1993); Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116 (S.D. Ohio 1976). See also Noland v. Commerce Mortgage Corp., 122 F.3d 551, 553 (8th Cir. 1997) (suggesting that plaintiff was entitled to properly focused discovery of defendant's loan files).
Defendants point out that, in addition to showing the existence of a specific policy and evidence that minorities received more expensive loans, plaintiffs must prove that this policy caused the discriminatory result. Otherwise, as the Supreme Court has noted, the disparate impact theory could “result in [defendants] being potentially liable for the myriad of innocent causes that may lead to statistical imbalances.” Here, the lenders argue that the required causal link between their discretionary pricing policy and whatever racial disparities exist cannot be shown.

Plaintiffs respond that the racial disparities in the defendants' loans did not happen by chance. Rather, they are the direct result of each defendant's adopting and maintaining a discretionary pricing policy that was readily amenable to racial bias, thereby causing minorities to pay more for home loans than comparable whites. Simply put, discretionary pricing inevitably leads to minority borrowers being charged higher rates and fees. Furthermore, the fact that discretionary pricing has a substantial adverse impact on minority borrowers has long been known in the mortgage industry. Thus, the defendant-lenders knew, or certainly should have known, that the financial incentives they were offering their loan officers and brokers would result in their steering minorities to loans involving higher rates and fees.

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229 See, e.g., Carpenter v. Boeing Co., 456 F.3d 1183, 1198-1204 (10th Cir. 2006) (rejecting Title VII impact claim challenging defendant's supervisors' exercise of discretion on the ground that plaintiffs' evidence failed to establish the required causation because it did not take into account all relevant variables that might explain the admittedly large gender disparities involved in the case).
230 In addition, as Judge Gertner pointed out in the case against Countrywide, minority borrowers "are more likely than white borrowers to apply for credit from Countrywide through its sub-prime subsidiary, Full Spectrum, or from an authorized broker or correspondent lender, which are on average more expensive than loans obtained directly from Countrywide." Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 254 (D. Mass. 2008).
231 See, e.g., studies described supra notes 133 and 142-144 and accompanying texts. Knowledge concerning the significant discriminatory impact of commission-driven, discretionary credit-pricing systems has been available to the lending industry for many years, at least since the mid-1990s, as a result of numerous high profile cases brought by the Justice Department. See “Pricing Discrimination” cases discussed in Justice Enforcement, supra note 26, at 5-6; supra notes 110-114 and accompanying text.
232 On the other hand, such knowledge has generally been hidden from the borrowing public. Thus, the plaintiffs in these cases allege that they did not know and reasonably could not have discovered that the defendant-lenders were charging them higher rates or fees than similarly creditworthy whites. See, e.g., Guerra Complaint, supra note 158, PP 83-88. According to the plaintiffs, the defendants actively concealed the fact that their rates and fees were discretionary and that plaintiffs were being assessed higher costs than comparable whites. Id. This is another reason why the defendants' efforts to block some of the plaintiff-class members' claims on statute of limitations grounds should fail. See supra note 195 and accompanying text. “[T]here is a difference between being aware that you got a bad deal and being aware that you were discriminated against in a systemic fashion.” Barkley v. Olympia Mortgage Co., No. 04 CV 875(RJD)(KAM), 2007 WL 2437810, at *17 (E.D.N.Y. Aug. 22, 2007) (quoting Phillips v. Better
Plaintiffs' allegations concerning the necessary causal element have thus far been upheld. Thus, all of the trial judges in these cases, in responding to defendants' motions to dismiss, have held that the complaints adequately allege that the defendants' discretionary pricing policies have caused a sufficiently negative impact on minorities to satisfy the disparate impact theory.233

b. Discriminatory Impact of the Policy

Justifications for the Policy and Less Discriminatory Alternatives

The parties differ as to which side in an impact case has the burden of persuasion on the issue of the defendant's justification and what exactly that justification standard is. The defendant-lenders argue that the parties' respective burdens and the appropriate standard should be governed by the Supreme Court's Title VII decision in Wards Cove Packing Co. v. Atonio,234 under which a defendant “bears only the burden of production, not the burden of persuasion” and an impact-producing practice is “permissible so long as it ‘serve[d], in a significant way, the legitimate employment goals of the employer.’”235 For their part, the plaintiffs can point to FHA precedents, both before and after Wards Cove, holding that, once disparate impact is shown, a defendant may prevail only if it proves that its challenged practice [421] is justified by “business necessity.”236 In fact, the FHA appellate decisions, while generally eschewing the Wards Cove standards, have often used different phrases in dealing with these points from circuit to circuit.237 Therefore, it seems likely that the individual trial

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236 See, e.g., Pfaff v. HUD, 88 F.3d 739, 747 (9th Cir. 1996); Mountain Side Mobile Estates P'ship v. HUD, 56 F.3d 1243, 1254 (10th Cir. 1995); Betsey v. Turtle Creek Ass'ns., 736 F.2d 983, 988 (4th Cir. 1984); see also supra note 202.

237 See Schwemm, supra note 67, § 10:6 nn.15-19 and accompanying text; infra note 238.
courts in the various mortgage class actions will simply follow whatever position has been adopted in prior FHA cases by their respective courts of appeals.\textsuperscript{238}

As for the substance of these matters, the defendant-lenders have not yet been called upon to articulate a rationale for why they use discretionary pricing, but we presume that, once this happens, their reasons will all relate to competition of one form or another. First, an individual lender would claim to be at a competitive disadvantage if it were forced to abandon discretionary pricing on its own, because it could not compete for potential borrowers who are offered more attractive terms from a competing lender.\textsuperscript{239} All such business would presumably be lost, a result that would not only harm the lender, but also would mean that borrowers would be deprived of the opportunity to secure more favorable loans through price competition among lenders. Another type of competitive disadvantage for a lender forced to give up discretionary pricing unilaterally would be its inability to retain loan officers, who would be tempted to move to other companies that continue to use this practice and thus might offer them better compensation.

Plaintiffs respond that the history of civil rights enforcement is replete with claims by companies using discriminatory practices that they would suffer a competitive disadvantage if they were required to stop discriminating.\textsuperscript{240} This claim has generally been highly exaggerated, and, in any event, it cannot be allowed to justify ongoing discrimination.

[422] There is good reason to believe that this fear is not well-founded in the mortgage industry. The fact is that some lenders have now eliminated

\textsuperscript{238} The class action cases are pending in the First, Third, Seventh, and Ninth Circuits. See supra notes 159-166. The governing FHA precedents in these circuits are provided, respectively, by: Langlois v. Abington Hous. Auth., 207 F.3d 43, 51 (1st Cir. 2000) (“a demonstrated disparate impact in housing [must] be justified by a legitimate and substantial goal of the measure in question”); Betsey, 736 F.2d at 988 (adopting “business necessity” standard); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) (adopting multi-factor approach to FHA impact cases); and Pfaff, 88 F.3d at 747 (adopting “business necessity” standard for most FHA cases). To the extent that these courts have ruled on the issue of which party has the burden of persuasion on this issue, they have put this burden on the defendant. See, e.g., Betsey, 736 F.2d at 988; Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 302 (2d Cir. 1998).

\textsuperscript{239} Similarly, with respect to broker-initiated loans, individual lenders claim they cannot require their affiliated brokers to abandon discretionary pricing, because these brokers would simply take their customers to other lenders.

\textsuperscript{240} See, e.g., Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1530-31 (7th Cir. 1990) (noting, in an opinion by Judge Posner, that a merchant who refuses to hire blacks not out of personal prejudice but in response to others' threatened action (e.g., customers' threats to take their business elsewhere if blacks are hired) is nevertheless engaged in intentional discrimination in violation of Title VII and applying this principle to FHA cases involving racial steering).
discretionary pricing.\textsuperscript{241} If they can do it without suffering severe economic consequences, then the individual defendants in the class action cases can too. Because the system of discretionary pricing is inherently discriminatory against minority borrowers, it should be eliminated entirely. If this cannot be done industry-wide, then it should be done lender-by-lender. Thus, according to the plaintiffs, while the defendants in these cases may be able to “articulate” some reasons for continuing to employ discretionary pricing, there are ready alternatives that would produce significantly less discrimination. This means under traditional disparate impact analysis, the defendants have violated the FHA and ECOA.\textsuperscript{242}

\textbf{D. Summary and Anticipated Results}

The class action cases challenging discretionary pricing are exploring new ground. As far as we can tell, no discriminatory lending case based on the disparate impact theory has ever gone to trial. Indeed, even with respect to intent-based lending cases under the FHA, only a small number have been tried, and few of these have been successful.\textsuperscript{243} As noted earlier, for plaintiffs to prevail in a FHA lending case, they generally must show that the defendant has given more favorable loans to “comparable” white borrowers than to the minority plaintiffs.\textsuperscript{244} Defendants in these cases invariably offer [423] non-racial reasons


\textsuperscript{242} See supra notes 208-209 and accompanying text.

\textsuperscript{243} See supra notes 69-74 and accompanying text; cases cited infra note 244.

\textsuperscript{244} See supra notes 72-74 and accompanying text. Most intent-based lending cases under the FHA have been analyzed under the prima facie case approach, in which a key first step is for the minority plaintiff to show that the defendant-lender treated similarly situated white borrowers more favorably than the plaintiff. See, e.g., Boykin v. Bank of Am. Corp., 162 Fed. Appx. 837, 839-40 (11th Cir. 2005); Hood v. Midwest Sav. Bank, 95 Fed. Appx. 768, 778-79 (6th Cir. 2004); Rowe v. Union Planters Bank of Se. Mo., 289 F.3d 533, 535 (8th Cir. 2002); Noland v. Commerce Mortgage Corp., 122 F.3d 551, 553 (8th Cir. 1997). This step usually requires an analysis of the defendant's loan files showing that whatever racial disparities exist are not readily explainable by legitimate factors. Id. If a prima facie case is thus established, the burden shifts to the defendant to articulate a legitimate reason for the race-based disparities. See, e.g., Boykin, 162 Fed. Appx. at 839. Legitimate reasons may exist, see, e.g., id. at 840, although a lender will be hard pressed to provide them if it has not kept good records that justify the reasons for its loan-pricing decisions. See, e.g., Simms v. First Gibraltar Bank, 83 F.3d 1546, 1551 (5th Cir. 1996) (observing that the defendant's lack of a “contemporaneous written record of its handling of [plaintiffs' refinancing] proposal or its reasons for the rejection” meant that it had to rely exclusively on its loan officer's memory and credibility). This justification stage essentially gives the defendant a second opportunity to offer legitimate explanations for its racial price disparities. If the defendant fails to produce a legitimate justification or if the justification offered is shown to be pretextual, then intentional discrimination may be found. See, e.g., Boykin, 162 Fed. Appx. at 839.
why the selected white borrowers' credit profiles were different enough to justify better treatment.\textsuperscript{245}

Thus, while the impact theory of the class action plaintiffs in the current mortgage cases appears sound--as demonstrated by the fact that all trial courts to consider this claim have denied the defendant-lenders' motions to dismiss\textsuperscript{246}--difficult issues of proof remain.\textsuperscript{247} The pre-trial stage will require substantial discovery, some of which is likely to be contentious.\textsuperscript{248} When discovery finally ends, each defendant-lender is likely to move for summary judgment. Given the trial courts' prior rulings at the motion-to-dismiss stage and pursuant to the law-of-the-case doctrine,\textsuperscript{249} the defendants will not be able to challenge the plaintiffs' use of the impact theory nor the fact that the defendants' discretionary pricing policies are an appropriate target for this theory.\textsuperscript{250} Each will, however, claim that the plaintiffs' evidence is insufficient to establish that illegal race or national origin discrimination has occurred in its loans as a result of this policy.\textsuperscript{251}

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\item\textsuperscript{245} See, e.g., Boykin, 162 Fed. Appx. at 840; Rowe, 289 F.3d at 535; Noland, 122 F.3d at 553; case described supra notes 72-74.
\item\textsuperscript{246} See supra notes 222, 233 and accompanying texts.
\item\textsuperscript{247} In addition, as noted supra Part III.B.3, the cases also present difficult procedural issues, particularly those involving class-action certification. The defendant-lenders will surely oppose class certification, see, e.g., Decision One Settlement, supra note 241, P 3.1, and the trial courts are required to decide this issue at "an early practicable time." See Fed. R. Civ. P. 23(c)(1)(A).
\item\textsuperscript{249} The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Arizona v. California, 460 U.S. 605, 618 (1983). The subsequent stages of litigation covered by this doctrine include when "[a] trial court [rules] on a matter of law and then the same legal question [is] raised a second time in the same trial court." Allan D. Vestal, Law of the Case: Single-Suit Preclusion, 11 Utah L. Rev. 1, 4 (1967). Thus, under this doctrine, "a district court's discretion to reconsider its own decisions is limited, at least absent an intervening change of law, to circumstances in which new evidence is available, an error must be corrected, or manifest injustice would otherwise ensue." Stichting Ter Behartiging Van De Belangen v. Schreiber, 407 F.3d 34, 44 (2d Cir. 2005).
\item\textsuperscript{250} See, respectively, supra notes 204, 222 and accompanying texts.
\item\textsuperscript{251} See supra notes 136-138, 228-229 and accompanying texts.
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An examination of some earlier mortgage and car-finance cases suggests how this argument will unfold. The starting point for evaluating evidence of discrimination in virtually all prior lending cases has been a statistical analysis of the particular defendant's loan files. Based on HMDA data and related studies, the plaintiffs in the current class actions will probably be able to show that each of the defendant-lenders has charged minorities more for their mortgages than it has whites. The defendants will counter that these disparities are explainable by non-racial factors, such as differences in the borrowers' credit scores.

Each side will no doubt hire experts to do regression analyses on the defendants' loan files to support their respective positions. This type of loan-file analysis has been used in FHA lending cases since at least the mid-1990s. A modern example of this technique occurred in a recent case against Wells Fargo.

252 See supra notes 73-75, 248 and accompanying texts.
253 See supra notes 133-135, 139-145 and accompanying texts.
that is described in a 2009 article by the plaintiffs' lawyer.\footnote{See White, supra note 46, at 694-98. Here, the author, now a law professor, describes in detail the conflicting expert reports submitted in the case, Walker v. Wells Fargo Bank, N.A., No. 05-cv-666 (E.D. Pa. dismissed pursuant to settlement Feb. 29, 2008), which involved allegations of both intent- and impact-based discrimination in the defendant's pricing of mortgage loans. Professor White notes that the defendant's expert used regression analysis to evaluate "whether legitimate business factors could adequately explain the disparities in pricing between all black and all white borrowers in Wells Fargo's portfolio," with the expert finding, unsurprisingly, that "credit scores and debt-to-income ratios were the major drivers of interest rates, and race was not a statistically significant factor." Id. at 696. This expert initially limited her analysis to a subset of Wells Fargo loans that the defendant had identified "as belonging to a channel, i.e., its wholesale lending division, and within that division, to a product category known as Home Credit Solutions." Id. at 696-97. In response to the plaintiff's expert's criticisms of this narrow focus, the defendant's expert submitted a second report dealing with a wider set of the defendant's loans, which, again, concluded that the race-based price disparities could be explained almost entirely on the basis of the borrowers' credit scores and other legitimate variables. Id. at 697. This case was settled before the court could evaluate these conflicting expert reports. Id. at 695. Still, Professor White concludes the discovery was revealing in that it showed "that within a large financial institution such as Wells Fargo, mortgage prices for borrowers with similar credit scores and qualifications vary widely according to channels and products." Id. at 698. He notes that lenders like Wells Fargo could conceivably "offer cost-driven business justifications for charging different prices for loans made through different channels," id., but concludes that it would be difficult for such a lender to justify "selling the same product ... at different prices [just by] using different names." Id.}

\footnote{See, e.g., Reports of Dr. Mark A. Cohen (for plaintiffs) and Dr. Laurentius Marais (for defendants), referred to in Brief of Defendants Regarding Proposed Remedy, Borlay v. Primus Auto. Fin. Serv., Inc., No. 3-02-0382, 2005 WL 4132590 (M.D. Tenn. 2005); Report of Dr. Calvin P. Bradford (for plaintiffs) in Borlay v. Primus Auto. Fin. Serv., Inc. (on file with author).}

\footnote{Summary judgment in federal court is appropriate only when the discovery and other materials on file in the case "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). “[T]he substantive law will identify which facts are material,” and “a material fact is ‘genuine’ ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Thus, summary judgment should be denied if the key factual issues “may reasonably be resolved in favor of either party”; that is, if “reasonable minds could differ as to the import of the evidence.” Id. at 250.}

\footnote{See, e.g., Budnick v. Town of Carefree, 518 F.3d 1109, 1118-19 (9th Cir. 2008); Reinhart v. Lincoln County, 482 F.3d 1225, 1229-32 (10th Cir. 2007); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555-56 (5th Cir. 1996).}
We cannot predict how the various trial judges will rule on the defendants' summary judgment motions. Given that the evidence will differ somewhat in each defendant-lender's case, it is certainly possible that some courts will deny summary judgment, while others may grant it. A denial is a non-appealable order, which means these cases would then be ready for trial. Conversely, a ruling in favor of summary judgment would end the case in the defendant's favor at the trial court level, and would presumably result in the plaintiffs filing an appeal. This would provide the appellate court with an opportunity to rule, in a case of first impression, on the nature of the evidence required to support an impact-based lending case under the FHA. As a result, a potential Supreme Court case might well be in the making.

Regardless of how the summary judgment motions are decided, the most likely result for all of these cases is that, like most civil litigation in federal court, they will be settled. Although these class actions are certainly not run-of-the-mill cases, it is instructive that their close cousins in the car-finance field were all settled before trial. If, indeed, this is also the ultimate fate for the mortgage cases, then the plaintiffs will presumably achieve some, but not all, of their litigation goals. Furthermore, the opportunity for judicial guidance beyond that provided by the trial courts' decisions will be lost.

These class action cases have already accomplished much of what they originally sought in terms of injunctive relief, in that some of the defendant-lenders have now abandoned their discretionary pricing policies and others may soon be forced to do so by regulatory changes. Whether the individual minority

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259 Presumably, despite the similarities in their discretionary pricing policies, the defendant-lenders did not all behave the same way towards blacks and Latinos in pricing their loans. See, e.g., Jakabovics & Chapman, supra note 135, at 2 (identifying, for each of fourteen major mortgage lenders, substantially different rates of providing higher-priced loans among various racial groups); Paying More, supra note 51, at 3 (identifying Wells Fargo as having the highest black/white disparity ratio among seven major lenders studies and HSBC as having the largest Latino/white disparity ratio).

260 See Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics: March 31, 2008 Table C-4 (2008), http://www.uscourts.gov/caseload2008/tables/C04Mar08.pdf (noting that, of all civil cases terminated in the U.S. District Courts in the year ending March 31, 2008, only 4.1% reached the trial stage, with the figure being even smaller (1.3%) for civil rights cases of the kind involved here).


262 At least one of these cases has already resulted in a settlement agreement, approval of which is currently pending before the court. See Decision One Settlement, supra note 241.

263 For a description of the relief originally sought by the plaintiffs, see supra notes 188-189 and accompanying text.

264 See infra notes 270-272 and accompanying text.
plaintiffs who have been victimized by the defendants' alleged discrimination will ultimately be compensated through these cases is harder to predict. Apart from the possibility of settlement, the plaintiffs could only achieve this result by prevailing on a long and daunting list of procedural and substantive issues. Given the defendant-lenders' vast litigation resources, and thus the likelihood of their seeking full appellate review on all key issues resolved against them at the trial-court level, it would seem that the plaintiffs would need many years and a few breaks along the way to achieve ultimate success on the merits.

Still, continuing prosecution of this litigation seems eminently worthwhile. One reason is that it is likely to produce a wealth of heretofore non-public data concerning how the individual defendant-lenders priced their loans. In addition, the guidance that would result from judicial decisions in these cases might be helpful in clarifying the law and/or in indicating the need for corrective amendments to the FHA and other civil rights statutes.

IV. OTHER IDEAS FOR REFORM BEYOND LITIGATION

In this part, we provide some broader thoughts on the class action cases discussed in Part III and look beyond this particular litigation to consider non-litigation reforms necessary to ensure that discrimination in the home-finance industry can be reduced in the future. The class actions are challenging mortgage practices whose discriminatory results have continued to block our Nation's promise, implicit in the Thirteenth Amendment and explicit in our civil rights laws, that “a dollar in the hands of a Negro will purchase the [427] same thing as a dollar in the hands of a white man.”

265 See supra notes 226-227, 254-256 and accompanying texts. This is not guaranteed, however, in light of the fact that much of modern discovery in large civil rights cases is subject to protective orders that prohibit public disclosure of what thereby becomes viewed as confidential information. See generally Bond v. Utreras, 585 F.3d 1061 (7th Cir. 2009) (rejecting efforts by a journalist and public officials to gain access to such information in a settled § 1983 action alleging police misconduct).

266 Over forty years ago, in the same year that the FHA was passed, the Supreme Court, in upholding the constitutionality of another federal statute that also guarantees equal property rights, stated:

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom--freedom to “go and come at pleasure” and to “buy and sell when they please” --would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white may can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.
regulated in the past decade, mortgage lenders exploited the American dream of homeownership by charging a premium to minority borrowers because they could get away with it. This exploitation is just as wrong—and should be just as illegal—as redlining and other blatant forms of mortgage discrimination.\textsuperscript{267}

The financial exploitation of minority consumers is nothing new in our society. When government fails to act to remedy this exploitation, private litigation has often paved the way for reform.\textsuperscript{268} This is the tradition in which the lending discrimination cases fit. The fact that some large mortgage lenders have now eliminated discretionary pricing shows that this litigation effort is succeeding.

As noted above, lenders claim they would face competitive problems in eliminating the practice of discretionary pricing on an individual basis,\textsuperscript{269} which suggests that a solution should be industry-wide. Indeed, on August 26, 2009, the Federal Reserve Board published a proposed set of regulations that will have the effect of banning most forms of discretionary pricing.\textsuperscript{270} This new rule would prohibit mortgage lenders from compensating brokers\textsuperscript{428} and loan officers based on a loan's terms or conditions,\textsuperscript{271} thereby eliminating both “yield spread

\textsuperscript{267} For a discussion of redlining and other such blatantly discriminatory practices, see supra Part II.C.1.

\textsuperscript{268} Private enforcement of the FHA has resulted, over time, in curbing such discriminatory tactics as restrictive covenants, blockbusting, and discriminatory zoning regulations. See private cases cited in Schwemm, supra note 67, at, respectively, § 3:3 nn.4, 9, 17 (restrictive covenants), § 17:2 nn.6, 8, 14 (blockbusting), and § 13:9 nn.14 and § 13:10 nn.2-5 (discriminatory zoning); cf. cases cited supra notes 128, 261 (private ECOA litigation challenging discriminatory markups charged by car-finance companies). For a recent example of how private litigation can—and was needed to—prompt federal agencies to take steps to prevent systematic violations of the FHA, see Sam Roberts, Westchester County Agrees to Desegregate Housing in Mostly White Towns, N.Y. Times, Aug. 11, 2009, at A14 (describing the settlement in the case of United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009)).

\textsuperscript{269} See supra note 239 and accompanying text.


\textsuperscript{271} See id. at 43233, 43279-85, 43331-32 (proposing new 12 C.F.R. § 226.36(d)(1)). As used here, a loan's “terms or conditions” include “the interest rate, annual percentage rate, or the existence of a prepayment penalty.” Id. at 43283. Compensation for loan originators could, however, be based on “the originator's loan volume, the performance of loans delivered by the originator, or hourly wages.” Id.

The new regulations would also prohibit mortgage brokers and loan officers from steering consumers “to transactions that are not in their interest in order to increase the mortgage broker's or loan officer's compensation.” Id. at 43233; see also id. at 43285-86, 43332-33 (proposing new 12 C.F.R. § 226.36(d)(1) or (e)(1)).
premiums” on broker-initiated loans and “overages” on in-house loans.\textsuperscript{272} The Fed proposal would not eliminate all pricing discretion,\textsuperscript{273} but it would remove some of the incentives for loan-originators to impose higher prices.

Eliminating the practice of discretionary pricing on an industry-wide, rather than an individual, basis would be the preferred solution. Statutory and regulatory changes, such as the Fed's proposal, may help eliminate the temptation of some lenders to extract larger profits from the more vulnerable segments of our society. Regulatory reform, however, is not a substitute for--but rather should go hand in hand with--private enforcement of existing civil rights laws.

One clear lesson from the recent housing crisis is that self-regulation by the mortgage lending industry is not sufficient. The temptation to make quick and large profits off an unsuspecting public in the multi-trillion-dollar home-finance market can be too great for many to resist. Some subprime lenders and their predatory practices may have disappeared, but they--or others like them--will soon return if the threat of effective litigation, as well as regulation, does not exist.\textsuperscript{274}

Now that the Nation has entered a period of restrictive credit, mortgage lenders may find it easy to eschew discretionary pricing, but the class actions are intended to make an impression that will also last through times of plenty. Hopefully, verdicts and/or consent orders in these cases, coupled with regulatory reforms, will help ensure that future innovative credit practices are applied equally to consumers of all races and national origins.\textsuperscript{275}

\textsuperscript{272} For descriptions of “yield spread premiums” and “overages,” see, respectively, supra note 121 and notes 110-113 and accompanying text.

\textsuperscript{273} For example, the Fed proposal recognizes “that loan originators may need to expend more time and resources in originating loans for consumers with limited or blemished credit histories” and thus paying “an originator based on the time expended would be permissible under the proposed rule.” Truth in Lending, supra note 270, at 43283.

\textsuperscript{274} There is evidence that such predatory lenders may already be returning, with some now claiming to be helpful “advisors” to homeowners in need of mortgage work-outs, foreclosure rescues, or other types of credit counseling. See, e.g., Peter S. Goodman, Cashing In, Again, on Risky Mortgages: Subprime Brokers Resurface as Dubious Loan Fixers, N.Y. Times, July 20, 2009, at A1; Carrick Mollenkamp, Subprime Resurfaces As Housing-Market Woe, Wall St. J., July 9, 2009, at C1.

\textsuperscript{275} Responsible innovations in home financing should be encouraged in order to provide opportunities for borrowers with blemished credit. This must be done, however, with a strong emphasis on equality and transparency. Neutral policies employed by lenders must be validated to ensure that they are related to credit risk and have no unreasonable discriminatory impact. See, e.g., Temkin et al., supra note 23, at 48; cf. 29 C.F.R. § 1607 (2009) (EEOC's employment discrimination guidelines). When a discriminatory impact is found, less discriminatory alternatives must be explored. And all of this should be done before the practice is imposed on an unsuspecting public.
Attacking the discrimination problems posed by discretionary pricing can be difficult, but we must remember that these problems are only one part of the complex mosaic of discrimination that blacks and Latinos face in the home-finance process. Just as lenders have often steered individual minority borrowers to worse loans than their credit records justify, so too have they regularly targeted minority neighborhoods for predatory loans. Moreover, as credit becomes tighter, a new era of discriminatory loan refusals, not merely price discrimination, may re-emerge. These types of intent-based discriminatory practices are clearly illegal, but it remains an open question whether private litigation challenging them is able to achieve anything more than sporadic and individualized relief.

276 It was easier to detect discrimination when a common set of underwriting rules was embraced with small deviations by all lenders. It is far more difficult to do so when lenders underwrite using very different rules, at a wide range of prices based on the experience of their own loan portfolios, and on the basis of particular loan conditions and terms. Detecting patterns of unfair or discriminatory treatment on the basis of price, fees, terms, and conditions occurs in the complicated context of an industry that has yet to agree on common practices and prices. It also raises the important question of whether a geographically segmented and differentiated strategy for originating and servicing loans in underserved markets may constitute unfair treatment in and of itself. Belsky & Essene, supra note 31, at 26.

277 See, e.g., Jackson v. Novastar Mortg. Inc., 645 F. Supp. 2d 636, 646-47 (W.D. Tenn. 2007) (upholding FHA and ECOA claims based on intentional discrimination in targeting minorities and minority neighborhoods for high priced loans); Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996) (discussed supra notes 72-73 and accompanying text); underwriting cases described supra notes 77-78 and accompanying text.

278 Another issue we have not addressed is whether the credit models used to implement “risk-based” pricing, see supra text notes 121, 123 and accompanying text, are fair to minority borrowers. These models rely on computer programs written by human beings who inevitably have their own biases, and the controlling factors written into these programs are generally kept secret from the public. Under these circumstances, there is no guarantee that risk-based pricing—which the class action cases challenging discretionary pricing have assumed are “objective” and therefore non-discriminatory—does, in fact, treat racial and ethnic minorities as well as whites. See, e.g., Zamudio v. HSBC North Am. Holdings Inc., No. 07 C 4315, 2008 WL 517138, at *1-2 (N.D. Ill. Feb. 20, 2008) (upholding FHA/ECOA-based complaint alleging that mortgage lender's “automated underwriting and credit scoring systems ... have a discriminatory impact on minority mortgage applicants” due to “discriminatory assumptions ... embedded in the statistical formulas used to analyze credit information and ultimately form underwriting decisions”); Temkin et al., supra note 23, at 47-48 (advising HUD to monitor automated underwriting systems to determine if they have a disproportionate adverse effect on protected classes of borrowers); White, supra note 46, at 698, 702-05 (concluding that one of the “potential culprits in racial mortgage price disparities” --in addition to lenders' price-discretion policies--is “the fundamental question of the validity of the risk-based pricing models themselves” and describing flaws in some of these models); cf. Ojo v. Farmers Group, Inc., 600 F.3d 1205 (9th Cir. 2010) (en banc) (per curiam) (upholding, subject to possible McCarran-Ferguson Act preemption, FHA-based complaint alleging that defendant-insurance companies used a number of undisclosed factors in their credit-scoring system that disparately impact minorities); Lumpkin v. Farmers Group, Inc., No. 05-2868 Ma/V, 2007 WL 6996584, at *4 (W.D. Tenn. Apr. 26, 2007) (upholding class action complaint alleging that credit scoring system used by defendant to set its home-insurance rates had a disparate impact on minorities in violation of the FHA).
As for non-litigation ideas for reform, we would start by criticizing the federal agencies that are charged with regulating mortgage lenders. From a civil rights perspective, their performance over the past decade has been appalling. In particular, the Federal Reserve, which knew from its own studies as early as 2005 of large-scale discrimination in home-loan pricing, did virtually nothing to effectively challenge this discrimination. The Fed may simply be incapable of enforcing its civil rights mandate because it is primarily concerned with monetary policy and lenders' financial soundness. We therefore support pending legislation that would create a new federal Consumer Financial Protection Agency and provide it with a strong civil rights mandate. Additional legislative changes being considered by the current Congress might also help improve federal oversight of the mortgage industry. Regardless of which agencies are involved, there is no reason why federal regulators should continue to allow mortgage lenders to keep secret their data concerning race and national origin disparities in their loan prices. The failure to make such information

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279 See supra note 134 and accompanying text.
280 According to a former member of the Fed's Consumer Advisory Council: “I would hear Federal Reserve staff talk about serving their ‘clients.’ I initially thought clients meant the taxpayers but then I was shocked to learn that clients meant banks that were ‘members' of the Federal Reserve System.” Taylor Testimony, supra note 141, at 2; see also id. at 16 (quoting two former Federal Reserve governors as doubting that a central bank designed to regulate financial institutions can also effectively perform consumer-protection duties); Community and Consumer Advocates' Perspective on the Obama Administration's Financial Regulatory Reform Proposals: Hearing Before the H. Financial Services Comm., 111th Cong. 2 n.2 (2009), (testimony of Nancy Zirkin, Executive Vice President of the Leadership Conference on Civil Rights), available at http://financialservices.house.gov/hearings_all.shtml (describing how then-Fed Chairman Alan Greenspan rebuffed efforts by fellow-governor Edward Gramlick to have the Fed take action against the growing danger of risky mortgages, as an example of the refusal of the Fed and other bank regulators to listen to concerns of civil rights and consumer advocates).
282 Bills that were the subject of committee hearings by the 111th Congress in 2009, but were not enacted by the close of 2009, include: the Mortgage Reform and Anti-Predatory Lending Act of 2009 (H.R. 1728 and S. 2452), which would ban or limit a number of problematic mortgage practices (e.g., prepayment penalties for subprime loans); the Community Reinvestment Modernization Act (H.R. 1479), which would expand the CRA's coverage in various ways (e.g., by requiring inclusion of mortgage company affiliates of banks in CRA exams); the Foreclosure Rescue Fraud Act of 2009 (H.R. 1231 and S. 117); the Fairness for Homeowners Act of 2009 (H.R. 1782); and the Housing Fairness Act (H.R. 476).
public seems to be at the [431] heart of the dispute in the class action cases over whether legitimate factors can explain such disparities. It is unseemly for lenders to guard this as proprietary information and then criticize FHA-enforcement efforts for relying on the “limited” data that is made available to the public, particularly when many of these lenders now owe their very existence to huge infusions of public money.

We would also suggest that mortgage brokers be subjected to similar licensing and regulatory restrictions as mortgage lenders. The large role that brokers seem to have played in discriminatory loan pricing, combined with the defendant-lenders’ claim that brokers’ discrimination is beyond the lenders’ control or legal responsibility, makes for an unacceptable situation. Someone must be held accountable when brokers discriminate. The claim that brokers “represent” their customers is belied by economic theory as well as actual

In addition, federal regulators should update HMDA requirements to mandate reporting of certain crucial information that lenders now claim might legitimately “explain” their race-based price disparities. See, e.g., Gruenstein Bocian et al., supra note 91, at 26 (recommending that “HMDA should be modified to include the disclosure of factors such as loan-to-value ratios and credit scores of borrowers” along with certain other information); Paying More, supra note 51, at 13 (calling for the Fed to “add data fields to those currently in use under HMDA [that would, inter alia,] include information on whether or not a loan was originated through a broker; ... borrower credit score; ... debt to income ratios; and loan to value ratios”); see also H.R. 3126, 111th Cong. (2009) (a bill that would create a new Consumer Financial Protection Agency, described supra note 281, and mandate a number of enhancements to the HMDA data).

At the very least, it would seem appropriate for every mortgage lender to have to certify that it is in compliance with the anti-discrimination mandates of the FHA and ECOA and to spell out the basis for its making this certification. Currently borrowers are required to swear on penalty of perjury that the information they are supplying to mortgage lenders is truthful, see supra note 71 and accompanying text, and requiring similar truthfulness from the lenders seems only fair. If such a lender's oath were required, enforcement thereof might be accomplished, inter alia, by privately initiated qui tam actions under the False Claims Act. Cf. United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County, No. 06 Civ. 2860 (DLC), 2009 WL 455269 (S.D.N.Y. 2009) (described supra note 248).

See, e.g., Ernst et al., supra note 24, at 35-36 (calling for regulation that would significantly increase the bonding requirements for mortgage brokers and place on them a duty to recommend only products that are appropriate for their customers or at least a duty of good faith and fair dealing); Mortgage Bankers/Brokers, supra note 32, at 32 (advocating “rigorous and appropriate licensing standards” for all loan originators, including brokers); Paying More, supra note 51, at 12 (calling for legislation that would “adequately regulate mortgage brokers”); Peterson, supra note 33, at 2280-81 (suggesting that Congress amend the consumer-protection mortgage laws “to explicitly govern the behavior of mortgage brokers, even where those brokers are not the party to whom a note is initially payable”). See supra notes 177-182 and accompanying text.
experience; the fact is, they represent themselves. Additionally, because there are few barriers to entry, mortgage brokers can go into and out of business at a moment's notice without the slightest proven awareness of applicable civil rights or consumer-protection laws. Given the serious harm that brokers can inflict on would-be borrowers, they must be made more accountable.

Finally, we would advocate that lenders, brokers, and everyone else who deals with mortgage applicants be required to offer, among other options, a “standard” mortgage product (e.g., a thirty-year fixed-rate loan). A new HUD regulation, which became effective on January 1, 2010, and is designed to eliminate “unfair junk fees” that often surprise borrowers at closing, requires loan-originators to use forms that, for the first time, allow customers to “easily compare their estimated loan offer with the one to which they actually agree.” If this type of comparison can be required, it should be possible—and even more effective—to mandate that borrowers be given the opportunity to choose, at the outset, a loan product that their lender or broker is currently making available to

289 “The mortgage broker is not the borrower's agent... Their goal as profit maximizers is to find the cheapest wholesale terms and charge what the market will bear.” Woodward, supra note 120, at 4; see also Barr et al., supra note 127, at 31 (noting that mortgage brokers “are compensated for getting borrowers to pay higher rates than those for which the borrower would qualify”); Ernst et al., supra note 24, at 9 (noting that their “compensation structure encourages brokers to originate as many loans as possible at the highest prices possible”); Apgar & Calder, supra note 32, at 6 (concluding that, given how they are compensated, brokers “do not work on behalf of the borrower” or anyone else and that, as a result, “borrowers who receive funding through the broker channel are charged a premium over apparently similar borrowers who receive their loans through retail channels”). Because mortgage brokers act merely as intermediaries between a lender and a prospective borrower and represent their own financial interests, their role is different from, say, a real estate broker who typically acts as an agent for a seller or buyer and thus is subject to fiduciary and ethical duties to represent the interests of its principal. This distinction is often not apparent to would-be borrowers, who may reasonably, but erroneously, assume that mortgage brokers are obligated to find them the best deal available. Because state regulations often require little, if any, education or experience for mortgage brokers, see supra note 35, borrowers who rely on brokers to be knowledgeable about civil rights and consumer-protection laws governing loan products may be misled.

290 See supra note 32; Mortgage Bankers/Brokers, supra note 32, at 23 (“Entering the mortgage brokerage business requires fewer resources and less operational capacity [than mortgage lending].... Mortgage brokers generally are not required to have funding sources or net worth except in nominal amounts.”); Engel & McCoy, supra note 28, at 2077 n.187 (noting that very little capital is required to become a mortgage broker).


similarly creditworthy customers and that does not have any “unfair junk fees” or other added costs.

Determining which of these legislative and regulatory reforms will be most effective in reducing racial disparities in mortgage lending is not an easy task, but we offer these observations. So long as our home-finance system relies primarily on profit-seeking lenders, it is naïve to believe that these firms will voluntarily put a high value on conforming with civil rights laws if discrimination appears to offer the prospect of more profits. This suggests that substantially more governmental oversight is the answer, but experience has shown that such oversight is only helpful if regulators have the interest, will, and resources to enforce their anti-discrimination and consumer-protection [433] powers. Thus, we favor those reforms that provide the greatest degree of public information and transparency in the mortgage process. Private litigation will always be a necessary supplement to governmental regulation in this area, and neither can succeed without making much of what the mortgage industry has heretofore regarded as proprietary information available to the public. An additional value of heightened disclosure and transparency is that, in a market economy, one must ultimately rely on informed consumers to make choices that will not allow lenders to engage in the types of predatory and discriminatory behavior that have too often resulted from discretionary mortgage pricing.

V. CONCLUSION

We have examined the principal litigation response to the racial and ethnic discrimination that has characterized the home mortgage industry in recent years: a series of nationwide class actions based primarily on the Fair Housing Act alleging that the discretionary pricing policies of individual defendant-lenders resulted in unjustifiably higher rates and fees for minority borrowers. These discretionary pricing policies have been at the heart of the key fair-lending issue in the past decade: that is, how home-loans are priced, particularly in the boom times when the easy securitization of such loans encouraged lenders to reduce credit standards.

By focusing attention on this industry-wide pricing system, the pending class actions have already gone a long way toward ending this particular practice, but whether they can also secure relief for the tens of thousands of minority families placed in less-than-prime mortgages as a result of this practice remains to be seen. This litigation involves some of today's most challenging FHA issues, along with many difficult procedural questions. Indeed, one unmistakable insight demonstrated by our detailed discussion of these cases is that litigation is a chancy, albeit often necessary, technique for achieving fair-lending reform.
Whether this particular litigation response to recent discrimination problems in the mortgage industry ultimately proves successful or not, it must be seen as just one part of a much broader effort designed to eliminate unlawful discrimination from the home-finance system. This ongoing effort includes other private litigation based on both anti-discrimination and consumer-protection laws, government enforcement through litigation and regulation, and perhaps new legislation.

Mortgage lending has always been the gateway to the American Dream of homeownership, and, historically, it has also been characterized by widespread discrimination against racial and ethnic minorities and their communities. As the nation becomes increasingly more diverse and as better economic times return, there is no more important civil rights issue than making the process of buying and financing a home more open, fair, transparent, and available to all.
South Suburban Chicago Foreclosure Crisis Case Study:
Where the Dots Connect

John Petruszak

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South Suburban Chicago Foreclosure Crisis Case Study: Where the Dots Connect

By
John Petruszak*

Historic Demographic Patterns of Segregated Residential Housing

South Suburban Housing Center (SSHC) is the private, non-profit, regional fair housing and housing counseling agency serving more than 100 communities in the southern Chicago metropolitan region since 1975. The suburbs that comprise SSHC’s service area are the most racially diverse, outside the city limits of Chicago, in the entire metropolitan area. However, this sub-region’s housing patterns contains a wide spectrum of diverse inclusiveness, economic disparities, high mortgage default and foreclosure rates, as well as segregated neighborhoods and communities.

The racial, ethnic, and other demographic characteristics for the 50 south/southwest suburban Cook County communities that make up SSHC’s primary service area display two distinct living patterns. Thirty suburban communities directly south of Chicago from the Indiana border on the east, to approximately Interstate 57 on the west, and Will County on the south, are generally known as Chicago’s “South Suburbs”. These communities have a collective majority-minority population of 261,925 or 62.3 percent of the overall population of 420,789 (U.S. Census data1 from 2000, more recent estimated figures for the entire sub-region are not available). The percentages of minority group residents in the South Suburbs break down as follows: African-Americans 52.7 percent; Hispanics (any race) 9.4 percent; and all other races 0.2 percent. During the decade of the 1990s the white population of this area shrank dramatically from a majority of 62.6 percent in 1990 to 37.6 percent in 2000. A 2002 report published jointly by Roosevelt University (Chicago) and Northern Illinois University (NIU),2 concluded that Chicago’s suburban communities continue to experience a high degree of racial separation. Over the last two full decades, the report observes that the South Suburban sub-region had undergone the most thorough racial change in the metropolitan area. In the 1990s, the south suburban region lost 96,336 white residents while increasing its African-

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1 U.S. Census Bureau, data obtained and analyzed by SSHC from (May 2008) searches at Quick Facts, http://quickfacts.census.gov, for this and all subsequent references to the U.S. Census in this section.
American population by 86,347. The Roosevelt/NIU study documents the decline of white populations in Chicago and suburban Cook County, which coincides with the rise of black, Latino, and Asian populations. The rise in the white populations of the further out collar counties, over this same time is also noted by the report. A relatively low constant percentage of black and other minority group populations for the collar counties is documented for the last two decades while the white populations of the collar counties is growing at a rate of 20 percent.

The 23 communities directly west of the South Suburbs is an area of suburban Cook County generally known as the “Southwest Suburbs”. These communities have been traditionally perceived to be "closed" by African-Americans, who comprised at the last census, only 3.4 percent of the population or 14,062 of 419,611 total municipal inhabitants. The Latino and other minority race population of 44,852 (10.6 percent of total) is three times the African-American population of this area. During the 1990s, the minority African-American, Hispanic (any race), and all other race numbers combined, grew at the same rate of the previous decade. Continuing growth and development in this sub-region since 2000 will probably show these minority populations leveling off or decreasing in percentage by the time of the 2010 census.

Will County to the immediate south and southwest of Cook County presents a more traditional example of segregated housing patterns. The population center of this county is the small older industrial city of Joliet. Practically all of the African-American and other minority group residents, mainly Latinos, are segregated in the older neighborhoods of Joliet. Newer developing western areas of Joliet, suburban communities located around the perimeter of this urban center, as well as immediately adjacent to the county, borders with south and southwest Cook County, are, with only a few exceptions, exclusively white. The remainder and overwhelming majority of the territory outside this population center is rural farmland. Will County's census estimated population in 2006 was 70.7 percent white, 10.7 percent African-American, 13.8 percent Latino and 4.8 percent all other races. This county experienced a 128,000 increase in residents over the decade of the 1990s that calculated out to a 36 percent growth rate, making Will, at that time, the fastest growing county in Illinois. While this county’s white population percentage has decreased from 77.5 percent in 2000 to the estimated 70.7 percent in 2006, the African-American percentage has remained level, increasing little from 10.3 percent to 10.7 percent over that same period. Latino origin populations have increased the most from 8.7 percent to 13.8 percent. The City of Joliet had a substantial 12.3 percent Latino population based on the 1990 census that grew to 18.4 percent in 2000, making Latinos the fastest growing minority group in that municipality.
Cook County and Will County have both prepared consolidated plans with analysis of impediments to fair housing choice, which were examined or prepared with input from SSHC. Some of the impediments cited by the Cook County Consolidated Plan,3 most relevant to the proposed project, included: 1) historical patterns of segregated housing that are still in place; 2) scarce resources limit the ability of municipalities to address fair housing issues; 3) the segregation of households that use rental housing choice vouchers; 4) subprime and predatory lending; and 5) despite progress, discrimination in housing persists. Will County’s Analysis of Impediments4 addresses an overall lack of resources devoted by municipalities to “disseminating fair housing information and responding to fair housing complaints” and “a lack of on-going dialogue between public and private entities on fair housing issues.” The plan recommended evaluating the need for a locally based fair housing agency.

**Racially Segregated Housing Patterns and Concentrations of Predatory Lending Lead to the Heightened Mortgage Foreclosure Crisis**

SSHC’s own fair housing enforcement testing program results revealed that individuals in the sales market have been historically steered by race. Statistical data from the program shows that African-Americans seeking to purchase homes in the SSHC service area are likely to be steered or offered options in communities that are already racially diverse or that are predominantly African-American. By the late 1990s, complaints received by SSHC’s fair housing compliance program and studies conducted by the Chicago based National Training and Information Center (NTIC), established a sharp increase in predatory lending practices throughout the Chicago metropolitan region. The current national mortgage foreclosure crisis has had devastating effects on the housing markets in many communities of the South Suburbs magnified by the high degree of racial segregation. The clear correlation between areas of substantial minority homeownership, the clustering of high cost subprime lending, and high rates of default/foreclosures in the South Suburbs is extremely dramatic. This is where the dots connect.

Several recent academic publications highlight these striking relationships. Data from extensive Home Mortgage Disclosure Act analysis conducted by the Woodstock Institute, which was published in their 2006 Chicago Area Community Lending Fact Book,5 shows that 17 of the top 20 mortgage lenders issuing loans in South Suburban Cook were “higher cost share” subprime lenders.

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4 County of Will, Illinois, Analysis of Impediments to Fair Housing, www.willcountylanduse.com/CommDev/A_1_Will County_Final Dec 05 version.pdf.
Another analysis by Woodstock, of mortgage foreclosure data for 2008, shows that the South Suburban Cook had the highest rate of foreclosure at 46 per 1,000 loans in the entire metropolitan area. The rate in the City of Chicago was next highest at 36 per 1,000 with the average for the entire region at 25 per 1,000. This is the second straight year South Suburban Cook has led the area in the rate of foreclosures. Studies relate the high rate of new foreclosures (75 percent in 2007) to be associated with Adjustable Rate Mortgages (ARMs) and mortgage products featuring balloon payments. The use of exotic ARM and balloon mortgage products and predatory lending practices has been directly linked with the current astronomical increase in mortgage foreclosures throughout the Chicago area. Data revealing racially differential mortgage product steering practices by lenders began being released in the late 1990s. A 1999 study linked and analyzed the dramatic rise in predatory lending with the correlation of the race of the homeowners. Key findings of this study show that 58 percent of refinance loans in the Chicago area’s predominantly African-American neighborhoods were made by subprime lenders, while less than 10 percent of the loans made in predominantly white neighborhoods were subprime. The report concludes that failure to adapt federal regulations for subprime lending markets has resulted in the de facto deregulation of mortgage lending in African-American communities with white communities being served by more regulated and responsible lenders.

High rates of foreclosure destabilize neighborhoods already vulnerable to disinvestment, blight, and economic problems. The effects of a foreclosed property on the cumulative property values of homes on the same block in the Chicago area has been estimated at a $159,000 decrease per foreclosure. With this loss of property value and wealth to individual homeowners in the area, the community is also gravely affected by the decrease of tax revenues and consequent inability to maintain the level of services.

Families of color caught up disproportionately with mortgage delinquency/foreclosure problems also find it harder to obtain mortgage modification and refinance remedies from lenders who have tightened up access to these types of credit. In 2008, the share of refinance loans in major metropolitan areas in predominantly white communities was four times greater than in neighborhoods of color, and in Chicago, from 2006-2008, mortgage

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refinance lending increased by 10 percent in predominantly white communities while declining by 49 percent in communities of color.9

The rising foreclosure rates have not only affected the single family home and sales markets, but have profoundly impacted the rental markets in the south Chicago area. One notable consequence has been a tightening and increase in demand throughout the rental market, especially for “affordably priced” units caused by the overall displacement of households from foreclosed properties. Where demand for scarce units is heightened, so is the opportunity for discriminatory practices, and the need for monitoring by fair housing testing of those markets.

**Housing Counseling and Fair Housing Enforcement Programs Address the Obvious Need to Affirmatively Further Fair Housing**

SSHC’s Department of Housing and Urban Development (HUD) certified housing counseling program is designed to directly address the impediments to fair housing described and to affirmatively promote diversity. Aside from offering traditional pre-purchase housing and rental counseling, the program is designed to expand individual clients: 1) housing choice options; 2) home mortgage product options and 3) homeownership capabilities. Fair housing, predatory lending, and mortgage fraud awareness education is an important component of each one-on-one and group counseling session. The housing counselors work with clients individually to expand options to include the total marketplace, and to avoid any limitations based on race or membership in any protected class. Broadening housing options and loan product information and providing education counteracts the discriminatory forces described that are primary causes of the default/foreclosure crisis.

SSHC also implements a full-service fair housing enforcement program receiving HUD Fair Housing Initiatives Program (FHIP) funding for the last 20 years. SSHC’s housing counseling program works hand in hand with its fair housing enforcement programs to provide fair housing (including fair lending), predatory lending, mortgage fraud, and mortgage rescue fraud awareness training and information at all group and in individual counseling sessions held. Last year, SSHC provided these services making 471 households aware of potential discriminatory practices. One of the major objectives of SSHC’s homeownership counseling efforts are directed at providing information that will prevent families from becoming caught up in predatory lending scams and to avoid default and foreclosure problems.

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As a FHIP funded, Qualified Fair Housing Organization, with fair housing enforcement programs, SSHC has the direct capacity to do intake of fair housing complaints, investigate the validity of the fair housing claims using testing techniques, and if evidence of discriminatory practices are found, has the ability to process formal legal and administrative complaints to be filed with HUD, local FHAPs (both in Illinois and northwest Indiana), or federal court. Individuals receiving housing counseling who indicate that they may be experiencing some form of discrimination can be immediately referred to SSHC’s fair housing enforcement program, get a legal analysis of the issues from the attorney on staff, and receive assistance.

SSHC’s organizational mission to eliminate discriminatory housing practices and foster integrated living patterns dictates the embracing of affirmative marketing practices. SSHC, in the mid-1980s, along with several local municipalities, brought ground breaking federal court litigation that recognized the importance of affirmative marketing activities to expand the options of individuals in the housing markets, to prevent the growth of segregated communities. Given this legacy, all of SSHC’s counseling efforts utilize some form of affirmative marketing effort to make clients aware of all of their options and to encourage them to expand their options.

Pre-purchase counseling stresses the importance of getting information about several different mortgage products from different lenders before making a decision and looking at several different homes and communities throughout the area before making a choice. Rental counseling efforts incorporate, advise, and assist, lower-income African-American clients, who make up 85 percent of the individuals served, to locate rental options in mobility areas where job growth, educational, and community service amenities are optimal.

SSHC advocated for and helped establish the first mobility counseling program in the Chicago metropolitan area aimed at assisting low-income Housing Choice Voucher families in suburban Cook County. An early 1990s study that SSHC commissioned showed that 70 percent of the voucher families (90 percent African-American) administered by the local public housing authority, Housing Authority of Cook County (HACC), were concentrated in six south suburban communities. Cook County is comprised of 210 municipalities. SSHC and other fair housing groups pressured HACC to fund mobility counseling efforts to address this pervasive segregation of voucher families. The result was a contract in 1996 to fund Housing Choice Partners (HCP) of Illinois to conduct mobility counseling efforts for HACC issues certificate families. Over the first eight years

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10 SSHC, et. al., v. Greater South Suburban Board of Realtors, et. al., 935 F.2d 868 (7th Cir.1991), cert. denied, 112 S. Ct. 917 (1992).
of operation HCP of Illinois assisted 2,200 families in making mobility moves. SSHC remains actively involved in HCP through continuous service since the organization’s inception, by serving on its board of directors, and by providing fair housing training and complaint assistance for HCP. SSHC’s rental counseling services work closely with HCP to encourage and refer eligible certificate holding families to seek mobility assistance.

Recommendations to address these south Chicago area fair housing impediments that cause a magnified impact of the mortgage foreclosure crisis include the following:

1. Addressing segregatory housing forces through the strengthening of federal authority requiring the “affirmatively furthering” of fair housing by all local government units accepting federal housing dollars.

2. Increasing funding for fair housing enforcement monitoring to document and remedy the most blatant discriminatory practices, and provide additional resources to development more involved techniques to monitor mortgage brokerage and lending industry practices.

3. Prioritizing resources to allow for the recovery of communities hardest hit by the mortgage lending crisis. Offering increased redevelopment incentives, but also providing additional relief directly to homeowners by putting pressure on mortgage lenders to modify a higher percentage of loans and provide resources for counseling assistance for victims of predatory practices that led to mortgage delinquency problems.

4. Strengthening the regulation of mortgage lending practices through the establishment of a federal consumer protection agency with authority over all mortgage lenders that complement existing state and federal banking regulators.
Thirty Years of Fair Housing

Liz Keegan

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Thirty Years of Fair Housing

By
Liz Keegan∗

Introduction

The Fair Housing Center of West Michigan has a unique origin, of which its board and staff are rightfully proud (the Center). The Center was started by a grassroots group of active and engaged citizens who were concerned that Grand Rapids, Michigan, and its surrounding neighborhoods were losing the progress and promise of the civil rights movement. Like most metropolitan areas in the 1970’s, Grand Rapids experienced a tremendous amount of “white flight” to the suburbs. As a result, the racial and ethnic composition of many neighborhoods and consequently, the schools, changed. The Grand Rapids Public Schools (GRPS) recognized the need to maintain and even increase integration in their schools. When deciding on a strategy, they concluded that instead of using busing to accomplish this end, which was being tried without much success in other communities, the GRPS would focus on integrating the neighborhoods, thereby integrating the schools. As such, committees were formed to study how best to address the problem of segregated neighborhoods and schools. GRPS sponsored a conference entitled “Improving Education and Human Services in Grand Rapids: A Planning Laboratory” in September 1979. One of the priorities identified during the conference was “to provide adequate housing for everyone.”

A committee was established to gather resources that dealt with housing, including representatives from two cities, the Grand Rapids Community College, and area realtors. As the committee began to gather community resources that dealt with housing, they decided to visit the already well-established Fair Housing Center of Metropolitan Detroit to learn more about providing equal housing opportunity. The committee realized that fair housing was a tool to help them meet their goal of integrating neighborhoods by helping residents exercise their right to choose where they want to live free from illegal discrimination. Therefore, the committee borrowed and adapted the Detroit center’s by-laws and method of operations in order to create a fair housing center in Grand Rapids. The committee brought the model back to Grand Rapids, worked to gather community support, and secured $1,500 of “seed money” from the Dyer-Ives Foundation to open the Fair Housing Center of Greater Grand Rapids. The Center was incorporated on September 4, 1980, with a mission to “support and encourage equal opportunities in the Greater Grand Rapids area.” To obtain this aim, the Center sought to “provide assistance to individuals pursuing legal rights and

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remedies related to fair housing, offer housing assistance and counseling, provide community education, promote community involvement, perform research in the area of housing, and promote good working relations with other housing agencies.”

Throughout its 30-year history, the Center has built upon its grass-roots and community-oriented beginnings to build strong relationships with the housing industry. The Center has also been committed to providing fair housing services in areas that would otherwise go without. In 2005, the Center changed its name to reflect this commitment and a new 11-county service area, becoming the Fair Housing Center of West Michigan. The Center also adopted a new mission: to eliminate practices of housing discrimination and promote open, diverse communities through education and advocacy. The Center subsequently merged with existing all-volunteer fair housing efforts along the lakeshore, and has maintained a strong relationship with a very active and engaged Lakeshore Advisory Board. All of these partnerships resulted in a new home for the Center in 2006. Bank One (now Chase) donated a previous bank branch to the center, and helped the board and staff kick off its first ever capital campaign, “Housing Fair Housing.” The donation of the expanded space came at a critical time for the Center as it was experiencing an ever-increasing demand for fair housing education and services. With the increased capacity allotted by the new space, the Center was able to create a full-time education and outreach position to meet the increasing demands. The new building also enabled the Center to offer training and education on-site in its first-ever classroom.

**Outreach**

In 2009, the Center provided fair housing education and outreach services to more than 15,000 people throughout western Michigan. These services included three major events hosted by the Center, 33 trainings for community members and housing industry representatives, 15 fair housing book club meetings, and distribution of educational materials in other meetings and events. More than 800 housing industry representatives received in-depth fair housing training, including advertisers, property managers, lenders, and maintenance staff, among others. As a result of these efforts, the center empowered more than 1,200 people throughout western Michigan with knowledge of fair housing rights and laws.

The Center is committed to its partnerships across the region, with an emphasis on providing education on new challenges and opportunities in providing housing and equal housing opportunity. In its seventh year, the Center partnered with the City of Grand Rapids to further fair housing in the community. On April 2, 1987, the City of Grand Rapids Equal Opportunity Department co-sponsored a Fair Housing Workshop with the Center. The event opened with a
welcome from Grand Rapids City Commissioner William Blickley, who noted with obvious pleasure that “Fair housing is on the rise in our community.” More than 70 people attended the day-long event, which included a keynote address by Thomas Higginbothan, Director of the Chicago Regional Office of Fair Housing and Equal Opportunity (FHEO) of the Department of Housing and Urban Development (HUD). His remarks included his enthusiasm for the accomplishments of and future progress of organized efforts such as those demonstrated in the Grand Rapids area. A full-day workshop covered fair housing laws, programs, enforcement, recent court decisions from experts and a mock administrative hearing of a housing discrimination complaint. The workshop was led by Ruth Featherstone, Director of HUD Detroit District Office of FHEO and Attorney Frederick Gruber of the Michigan Department of Civil Rights (MDCR). This event, the Annual Fair Housing Luncheon & Workshop Series, is now about to enter its 24th year, and has become one of the premier fair housing events in the country. Each year, the Board and staff have highlighted relevant and emerging fair housing issues while bringing together national and local experts as well as industry and community people. The 2010 event marked yet another successful year for the Center as more than 375 people came to hear keynote speaker John Trasvina (HUD Assistant Secretary for Fair Housing & Equal Opportunity) discuss Fair Housing in the 21st Century as well as workshops on foreclosure, discriminatory advertising and fair, affordable housing. The Center has also begun to offer other events as well, including a series of popular Fair Housing Book Clubs, an annual Lakeshore Friends of Fair Housing Breakfast and an annual Friends & Members of Fair Housing Luncheon. All of these educational events broaden the net of those engaged in furthering fair housing in west Michigan and beyond.

**Testing**

In its first year of existence, the Center conducted 130 tests at 105 locations, which resulted in the investigation of 21 complaints. In 2009, the Center conducted 386 matched pair tests in more than 20 cities throughout western Michigan. From January to October 2010, the Center conducted 247 matched tests of residential rental properties, of which 204 produced conclusive results. The Center found some evidence of discriminatory practices in 53 percent of the tests (108 out of 204). The Center primarily tested for discrimination on the bases of race and familial status, finding evidence of racial discrimination in 65 out of 120 tests, and finding evidence of familial status discrimination in 27 out of 55 tests. The Center also conducted a smaller sample of tests for discrimination on the bases of age, disability, income source, marital status, national origin, religion, and sex. Notably, the Center found evidence of income source discrimination in seven out of 11 tests.
Enforcement Actions

In 2008 and 2009, the Center’s staff facilitated 168 and 301, respectively, complaints alleging housing discrimination. Of the 301 complaints received in 2009, 170 were based on familial status, 41 on sex, and 28 on race, among others. Since the Center’s inception, race had been the major basis for housing complaints. However, as evidenced by the complaints received in 2009, the Center has seen a marked increase in cases based on the presence of children largely due to discriminatory advertising by landlords, rental agents, and/or homeowners using online resources to market their properties. These advertisements contained statements such as, “only one adult and no children,” “sorry no pets or children,” and “perfect apartment for a single person or a couple,” among many others. The practice of discriminatory advertising online grows increasingly prevalent and represents a major impediment to equal housing choice for the residents of western Michigan. The Center has had to adapt its advocacy, enforcement and education efforts as the housing market and industry has changed significantly as well over the last 30 years.

In 2010, the Center entered into more than 25 settlement agreements that were facilitated by HUD or MDCR. Some of the more noteworthy cases follow.

First, the complainant, a mother of six children, sought to flee an abusive marriage and living situation and inquired about a three-bedroom town home for her family. The complainant was asked how many people were in her family, and she replied that there were seven. The agent immediately stated that they would be unable to rent the 1,669-square-foot town home to the family because they have a strict two person per bedroom policy, and denied her the opportunity to complete an application. The complainant appealed to the manager, who also denied her opportunity to apply. The complainant sought assistance from the Center, and the Center’s subsequent investigation revealed that the town home community enforced a two person per bedroom policy, but it did not reveal any business justification for such policy. The complainant, with the Center’s assistance, filed a complaint, alleging familial status discrimination with HUD. HUD forwarded the complaint to MDCR for investigation. MDCR confirmed that the town home community did not have a business justification for the occupancy policy, and its investigation of local standards and other factors affecting occupancy limitations revealed that seven people could reside within the town home in question. On August 5, 2010, the complainant entered into a settlement agreement facilitated by MDCR to resolve her allegations. The settlement provided for $5,500 in damages for the mother, revision of the occupancy policy to be in compliance with fair housing law, and mandatory fair housing training for all agents of the town home community.
Second, a male of Mexican national origin (the complainant) attempted to obtain a loan modification from GMAC Mortgage. The GMAC representative made a comment to the complainant that if the loan modification did not go through he could return to Mexico and work in the fields picking cabbage. The GMAC representative also referred to the man as a “Mexican jumping bean” on multiple occasions, including in front of several witnesses at a forum held by Michigan’s attorney general. The complainant’s loan modification request was delayed, and subsequently denied. The complainant contacted the Center with an allegation of national origin discrimination, alleging discriminatory statements and discriminatory refusal to modify the loan. The Center assisted the complainant in filing a complaint with HUD, which was forwarded to MDCR for investigation. MDCR confirmed the complainant’s allegations. On August 18, 2010, the complainant entered into a private settlement agreement with GMAC to resolve his allegations, which included $7,000 in damages.

Third, on June 21, 2010, the Center entered into a settlement agreement with a local apartment complex to resolve an allegation of illegal housing discrimination on the basis of race. The Center received an anonymous complaint from a social worker, wherein she alleged that her African-American clients, whom she referred to the apartment complex, received different rental rates and specials than her Caucasian clients that she also referred to the complex. The Center’s testing supported the allegation and revealed differences in treatment on the basis of race, including different rental rates, as well as specials and incentives offered to potential tenants. The Center filed a complaint with HUD that was forwarded to MDCR for investigation. The settlement agreement provided for fair housing training for all staff of the apartment complex; revision of all forms, applications, leases, and marketing to include equal housing opportunity language and/or logos; follow-up compliance testing; and damages in the amount of $8,500 to compensate the Center and to cover the costs of future training and compliance testing required under the agreement.

Finally, on August 31, 2010, the Center entered into a settlement agreement with a local condominium association to resolve allegations of illegal housing discrimination on the basis of familial status. The condominium association bylaws had limited occupancy to three persons within the two-bedroom condominiums. The Center’s testing confirmed the enforcement of this bylaw by the association, and did not reveal any legitimate business justification for the occupancy restriction. The Center’s complaint with HUD, ultimately resulted in an investigation and settlement. The settlement agreement provided for fair housing training of the condominium association’s board, revision of the occupancy policy within the bylaws to be in compliance with fair housing law, and damages in the amount of $1,850.
Foreclosure Prevention

The Center is a member of Foreclosure Response of Kent County, and also provides and office space for Foreclosure Response’s staff person. Foreclosure Response is a non-profit effort that connects residents with a variety of community resources, and advocates for changes to stop foreclosures. Foreclosure Response involves more than forty groups, including non-profit housing and service agencies, neighborhood organizations, foundations, city and county governments, legal aid resources, and banks and real estate professionals throughout Grand Rapids and Kent County. Foreclosure Response seeks to educate and engage the community related to foreclosure issues; mitigate losses to the community caused by high foreclosure rates; coordinate advocacy efforts that include preventing predatory and deceptive lending, and facilitate neighborhood reinvestment.

Conclusion

The theme for the Center’s 2010 Fair Housing Luncheon & Workshop Series was “Removing Barriers & Creating Opportunities: Building on 30 Years of Fair Housing in West Michigan.” It acknowledges that barriers and challenges still exist. However, with 30 years of experience and commitment and thanks to the strong foundation of partners, support and history upon which the Fair Housing Center of West Michigan is built, the Center is poised to effectively address those challenges working with the region to eliminate practices of housing discrimination and to promote diverse, open communities through education and advocacy.
Give Me Shelter:
The Foreclosure Crisis and its Effect on America’s Animals

Stacy Nowicki

The Stanford Journal of Animal Law and Policy will publish this article in an upcoming edition. Once available, we will provide the appropriate citation and pagination.

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Give Me Shelter:
The Foreclosure Crisis and its Effect on America’s Animals

By
Stacy Nowicki*

Introduction

Riley’s house went into foreclosure.1 Max also lost his home.2 Priscilla and Presley suddenly found themselves living in a shelter.3 These stories sound familiar, as people across the country are faced with payments they cannot afford. But Riley, Max, Priscilla, and Presley were never responsible for a mortgage. They are pets. America’s animals have become the innocent victims of the modern mortgage crisis.

Home ownership is an American ideal.4 Owning one’s home reaps tangible benefits, such as tax breaks and freedom from a landlord’s rules.5 Home ownership also increases one’s social status and benefits society through improved property values.6 But today’s housing market has turned the American dream upside down. From 2007 to 2009, banks foreclosed on between five to six million homes.7 Many homeowners owe more on their homes than they are worth, which prevents them from refinancing.8 Many of these unfortunate homeowners must leave their homes behind and give up their animals as well; people dealing with foreclosure often turn to rental housing, relatives, or homeless shelters, all of which may provide impediments or preclusions.9

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2 Profile: Populations in Animal Shelters Exploding as More People Turn in Pets they Can’t Afford (NBC Nightly News television broadcast Mar. 21, 2009).
5 Id. at 589-90.
6 Id. at 591-94.
This article focuses on the effect of the current foreclosure crisis on animals in American society. Part II deals with the effect of the mortgage crisis on family pets and large animals, including relinquishment, abandonment, and euthanasia. Part III considers legislation passed and pending in the wake of the foreclosure crisis, and Part IV outlines help available for American families and their animals.

Foreclosing on Fido: America’s Animals in the Mortgage Crisis

For several years, pet owners have cited moving and housing limitations as significant reasons for relinquishing cats and dogs to animal shelters. A 1999 National Council on Pet Population study of 12 animal shelters throughout the United States shows that moving is the most common reason for relinquishing dogs and the third most common reason for relinquishing cats. However, since 2007 the foreclosure crisis seems to have exacerbated this issue. Newspapers and news websites have been filled with first-hand accounts of families forced to move out of their homes and to give up their pets. Even real estate websites and websites dealing with foreclosures include postings acknowledging this problem. CNN revealed the “Sad Puppy Indicator,” a guide that joins the “Starbucks Indicator” and the “McDonalds Indicator” as an illustration of a

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struggling economy. The problem is so pervasive that Wikipedia includes an article about it, and a number of nonprofits now focus on helping pets and their owners affected by foreclosure.

Many foreclosed homeowners find themselves moving to a smaller home, rental, or relative’s house that cannot accommodate pets. These pet owners tend to deal with their animals in one of three ways. Some relinquish their pets to shelters, others abandon their pets in their foreclosed homes, and a few owners decide to euthanize their animals because they cannot afford to care for them.

A. Animal Relinquishment

There are no national statistics dealing with pet relinquishments at animal shelters. Consequently, it is also impossible to tell how many owner relinquishments resulted from foreclosures. Further, shelters may not be aware of the reasons owners relinquish their animals. Pet owners are not always honest when relinquishing an animal to a shelter, or only indicate that they are moving without suggesting that the economy is to blame.

Despite the lack of statistics, many animal shelters report that the number of intakes rose proportionally to the number of foreclosures. For example, the Sacramento Society for the Prevention of Cruelty to Animals in California saw an increase in the number of pets in the shelter in December 2007: 176 pets compared to 78 in 2006. In Kent County Michigan, the Kent County Animal Shelter saw a 9 percent increase in abandoned dogs and a 20 percent increase in

20 Waters, supra, note 13.
abandoned cats in 2009. The Massachusetts Society for the Prevention of Cruelty to Animals in Boston took in 900 animals in 2008, an increase of about 300 animals since the previous year, and also reported an increase in the number of people citing financial difficulties as the reason for giving up their animals. The Cleveland Animal Protective League also reported an increase in abandoned pets due to foreclosures. Chicago-area animal shelters reported a spike in pet intakes during 2007, and Florida animal shelters also reported an increase in the number of relinquished pets in 2007 and 2008.

This increase in intakes has caused some animal shelters to overflow. Stephen L. Zawistowski, executive vice president for national programs and science adviser for the American Society for the Prevention of Cruelty to Animals, contends that animal rescues and shelters suffer most in the states where the real estate crisis hit the hardest, such as California, Florida, Nevada and Arizona. This assertion is certainly borne out in California. In Santa Cruz County, California, shelters were packed in 2008 and saw fewer adoptions. At San Joaquin Animal Shelter in Stockton, California, in 2008, there was a 50 percent chance a relinquished pet would be euthanized because of space needs. In Fresno, California, owners gave up 50 percent more dogs in 2009 than in 2008. And in Michigan, the state with the nation’s highest unemployment rate in 2009, metro Detroit shelters also overflowed with animals relinquished because their owners had lost their jobs and houses. Though some shelters have made progress in reducing euthanasia rates in recent years, that progress may be slowed or reversed due to the number of animals shelters now see.

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25 Susan R. Miller, Pets Become Victims of Foreclosure, PALM BEACH POST, Mar. 3, 2008, at 1B.
27 Pittman, supra note 17.
28 Nieves, supra note 9.
29 Benjamin, supra note 26.
31 Benjamin, supra note 26.
This all comes at a time when many shelters and animal control agencies are forced to cut their budgets as costs rise. Some animal shelters succumbed to the financial pressure themselves. After losing about a quarter of its endowment in a declining stock market, the Massachusetts Society for the Prevention of Cruelty to Animals closed three of its shelters: Springfield, Brockton, and Martha’s Vineyard. Ultimately, other animal rescue organizations moved in to revive operations. And farms that are large animal sanctuaries are also facing foreclosure issues, creating an uncertain future for the animals they once rescued. For instance, Haley Hills Farm in White Lake, Michigan, cared for 31 injured and abandoned horses through its Equine State Foundation horse sanctuary. The sanctuary took in horses from other farms that went through foreclosure, then faced foreclosure itself in 2009. Though demand for horse rescues was high—the sanctuary received requests to take in 260 horses between 2008 and 2009—the farm itself faced declining donations and rising costs. Similarly, in Rhode Island, Dan MacKenzie lost the animal sanctuary Bonniedale Farm to foreclosure in 2008. The 136 animals left behind (including dogs, cats, horses, pigs, goats, sheep, and chickens) did not receive food or water from Wells Fargo, the bank that owned the property. MacKenzie filed a lawsuit to force the bank to feed and water his animals. Ultimately the Rhode Island Society for the Prevention of Cruelty to Animals and veterinary students from the University of Rhode

32 Id.
36 Id.
37 Id.
40 Id.
Island are caring for the animals while the matter is pending in court. Wells Fargo donated $25,000 for their care.

Animal shelters across the country are reporting a rise in relinquishments at the same time owners face unemployment and foreclosure. Even if the mortgage crisis is not a direct cause, it is at least intensifying the problem.

B. Animal Abandonment

The first animal abandonment law in the United States appeared over 150 years ago, and abandoning pets or livestock remains illegal in most states. However, some homeowners do not take their pets to shelters and instead choose to abandon them in their foreclosed homes. This often has dire consequences for the animals, which were once beloved pets.

Even though the euthanasia rates at many shelters are high, most sheltered animals are cared for at the end of their lives with food, water, and a humane euthanization. In contrast, abandoned animals are left with little or no resources and spend the last days of their lives alone, some eating carpet and wallboard to stay alive. Some animals abandoned in colder climates freeze to death, others starve. Many abandoned pets are found in filthy rooms filled with feces and urine. Some animals end up on the streets only to die from disease or hunger. Property inspectors and real estate brokers are often the first people to

41 Id.
42 Buford, supra note 38.
43 Carla Baranauckas, A Patchwork of Food Assistance for Pets, N.Y. TIMES, Nov. 12, 2009, at F12.
45 The first animal abandonment law was passed in New York in 1866. David Favre & Vivien Tsang, The Development of Anti-Cruelty Laws During the 1800’s, 1993 DET. C.L. REV. 1, 15 (1993); Lior J. Strahilevitz, The Right to Abandon, 158 UNIV. PA. L. REV. 355, 398 (2010); see also Nieves, supra note 9.
46 Thompson, supra note 21; Peters, supra note 19. Just as there are no national statistics on pets relinquished to shelters, there are no national statistics for abandoned pets or the number of pets found in foreclosed or vacant houses. Waters, supra note 13; Martelle, supra note 19; see also Nieves, supra note 9. The website PetAbuse.com includes a database in which one can search for cases of abandoned animals, including those reportedly abandoned in foreclosed homes. PetAbuse.com, http://www.pet-abuse.com/ (last visited Aug. 31, 2010).
47 Nieves, supra note 9.
48 Nieves, supra note 9; Umberger, supra note 24.
49 Thompson, supra note 21.
50 Foreclosures Lead to Rise in Abandoned Pets in Cleveland, supra note 23.
enter an abandoned house, and therefore are often the first to encounter these animals either dead or alive.\footnote{Nieves, supra note 9.}

There are several theories why homeowners leave their animals to fend for themselves. These pets could be part of the “revenge process,” where homeowners deliberately try to destroy their foreclosed home, making it difficult for the mortgage company to clean up the property.\footnote{Foreclosures Lead to Rise in Abandoned Pets in Cleveland, supra note 23; Michael M. Phillips, Buyer’s Revenge: Trash the House After Foreclosure, WALL ST. J., Mar. 28, 2008, at A1, available at http://online.wsj.com/article/NA_WSJ_PUB:SB120665586676569881.html.} Others may be abandoned in foreclosed homes because their owners were too embarrassed by the foreclosure to take them to a shelter,\footnote{Umberger, supra note 24; Martelle, supra note 19.} or feel too guilty that their pet could face euthanasia in a shelter.\footnote{See Stephanie S. Frommer & Arnold Arluke, Loving Them to Death: Blame-Displacing Strategies of Animal Shelter Workers and Surrenderers, 7 SOC’Y & ANIMALS 1, 13 (1999), available at http://www.animalsandsociety.org/assets/library/386_s711.pdf.} Some owners believe that their abandoned pets will eventually be discovered and cared for,\footnote{See Umberger, supra note 24; Ginger Christ, Family Pets Often Victims of Tough Economic Times, TIMES-GAZETTE.COM (Ashland, Ohio), Aug 15, 2008, http://www.times-gazette.com/news/article/4243451.} which they feel is a better option than a shelter where adoption rates are low and euthanasia rates are high.\footnote{See generally DALLAS ANIMAL SERVICES AND ADOPTION CENTER OPERATIONS, ANIMAL CONTROL STRATEGIES 6 (2007), http://www.dallascityhall.com/committee_briefings/briefings0907/QOL_092407_AnimalServices.pdf (reporting that the shelter’s “euthanasia rate is high and adoption rate is low” in 2007); Nieves, supra note 9 (stating that at California’s San Joaquin Animal Shelter there is a “50-50 chance the animals might be put down”).}

Additionally, and more ironically, pet owners may choose to abandon their pets because they encounter a lack of compassion from the shelters themselves. Some shelter officials blame overcrowding and high shelter euthanasia rates on negligent and uncaring pet owners.\footnote{Christie Keith, Foreclosure Pets in the Crossfire: How Shelter Philosophies Affect their Lives, SFGATE.COM, Sept. 4, 2008, http://articles.sfgate.com/2008-09-04/living/17120087_1_pet-owners-peninsula-humane-society-mandatory-spay.} Instead of being offered help, some pet owners turning to shelters are told that their pets will be euthanized or lectured on their irresponsibility.\footnote{Id.} This does little to encourage pet owners to relinquish their pets.\footnote{Id.} In the context of the foreclosure crisis, some shelter workers point out that the same people who do not plan ahead for re-homing their pets did not plan ahead when they signed the mortgage on their now-foreclosed house.\footnote{Id.; Nieves, supra note 9.} This philosophy from some animal shelters, coupled with animals being turned away
from overcrowded animal rescue organizations, may be discouraging pet owners from contacting shelters in the first place.

Further, some shelters impose another barrier to owner relinquishment: fees imposed on owners giving up their pets for adoption. The Central California Society for the Prevention of Cruelty to Animals, for example, recently imposed a $10 fee for each pet and $25 fee for each litter brought to the shelter by their owners. Drops in donations and funding from Fresno City and Fresno County created financial difficulties that prompted the fees. Some people bringing pets to the shelter may try to avoid the fees by claiming their pet is actually a stray, for which the shelter does not charge. But the fees may have a more chilling effect: people may simply abandon their pets instead of taking them to the shelter.

Horses are particularly vulnerable to abandonment. Unlike animals raised for slaughter or breeding that can be sold at auction and generate capital—such as pigs and cattle—horses have less utility to banks that foreclose on farms. And, though society considers horses to be a kind of livestock, some recognize that horses occupy a middle ground between cattle and domestic animals. Nowhere has this been clearer than in the debate over the federal ban

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63 Id.
64 Id.
65 Id.
66 Id.
69 “[L]ivestock such as cows, horses, and pigs are of substantial economic value, while pets such as dogs and cats provide essential companionship for households and families.” Restatement (Third) of Torts: Liab. for Physical Harm § 23 cmt. b (Proposed Final Draft No. 1, 2005).
70 Mary Battiata, How Much Is a Pet’s Life Worth, SEATTLE TIMES, at A3 (Sept. 6, 2004), available at http://seattletimes.nwsource.com/html/nationworld/2002027448_petmeds06.html (noting that “horses have gone from being farm workers to people’s companions”); Sheila J. Bryant, Saving Flicka and Her Friends, 11 J. AGRIC. & FOOD INFORMATION 262, 264 (2010); At least one court contemplated that “a clear line cannot always be drawn between animals kept for economic reasons and those kept as pets. Many people who keep livestock become emotionally attached to individual animals. Conversely, dogs may be owned primarily or solely for their economic value as work dogs or breeding stock. And there are animals that fall somewhere in between, such as pleasure horses—livestock that are not kept for their economic value, but are, in effect, large pets.” Morgan v. Kroupa, 702 A.2d 630, 636 (Vt. 1997) (Gibson, J., dissenting); see Darian M. Ibrahim, The Anticruelty Statute: A Study in Animal Welfare, 1 J. ANIMAL L. & ETHICS 175, 186-87 (2006), available at http://www.law.arizona.edu/faculty/FacultyPubs/Documents/Ibrahim/ALS0606.pdf.
that closed the last of the horse slaughterhouses in the United States in 2007. Further, some state anti-cruelty statutes regard horses as livestock, and others protect them as pets. Living in limbo between pet and livestock means that horses, as large expensive animals, enjoy neither the utility of cattle nor the more affordable cost of smaller companion animals.

This may be why horse rescue organizations around the country report an increase in horse abandonment. According to a recent study from the University of California at Davis, 83.9 percent of horse rescue organizations reported an increase in requests to accept horses since January 2008. Newspapers report horses wandering the Florida Everglades, Kentucky coal mines, and central Minnesota fields because their owners set them free to survive differentiating between horses and other livestock, the Equine Species Working Group pointed out that horses are the most long-lived of any livestock species, are generally more individually valuable, participate in internationally recognized competitions such as the Olympics, and are transported more often and for greater distances. EQUINE SPECIES WORKING GROUP, NAIS RECOMMENDATIONS TO USDA AUGUST 1, 2006, 2 (2006), http://www.equinespeciesworkinggroup.com/images/ESWG_Recommendations_-_August_1,_2006.doc (last visited Aug. 31, 2010).


73 See Bryant, supra note 70, at 263 (noting that horses require 15 to 30 pounds of food and 5 to 16 liters of water per day).


75 Holcomb et al., supra note 71, at 15. According to this study, the most common reason for owner relinquishment was financial hardship and the owner’s physical ability to care for the horse. Id., at 11.
on their own. Some horse owners erroneously believe that their tame horses will be adopted by wild herds.

The economy is certainly a large factor in the increase of horse abandonment and relinquishment. Many owners give up their horses due to the sluggish economy and increasing costs of hay. Another major reason seems to be the federal horse slaughterhouse ban. These slaughterhouses were once an option for horse owners with few alternatives and paid owners per horse. The ban has resulted in some unwanted horses being sold to slaughterhouses in other countries that use inhumane slaughtering methods, an outcome predicted in a 2006 study prepared for the Animal Welfare Council. The increase in horse abandonment has also prompted legislators in some states, such as Missouri, Montana, and South Dakota, to reconsider reviving the horse slaughter industry in the United States.

Further, horse rescue organizations face different challenges than dog and cat shelters, which may impact the current high number of unwanted horses. Horses are more expensive to keep than a cat or dog, and they live longer, an average of 30 years. This limits the number of animals for which each sanctuary can provide. These are also fewer suitable adopters for these large animals since not every household can afford an expensive animal for several decades. And there are fewer horse sanctuaries than companion animal rescues—a recent study estimated that in 2009 there were approximately 408 equine rescue

77 Bryant, supra note 70, at 264.
78 UNWANTED HORSE COALITION, supra note 74; Economic Downturn Sees Increase in Neglect, Abandonment of Horses, supra note 74; Anastasi, supra note 74; Giles, supra note 74.
79 Holcomb et al., supra note 71, at 15; Beth Quimby, No More Room at the Stable, PORTLAND PRESS HERALD (Portland, Me.), May 8, 2009, at A1. Groups like the Humane Society of the United States and People for the Ethical Treatment of Animals disagree that the slaughterhouse ban has had an impact on horse abandonment in the United States. Bryant, supra note 70, at 265.
80 McKinney, supra note 76.
83 Katie Zezima, Surge in Abandoned Horses Renews Debate Over Slaughterhouses, N.Y. TIMES, Apr. 7, 2009, at A16. These were three of 27 states considering laws and resolutions to bring horse slaughter back to the United States as a response to the federal ban. See Chad Livengood, Legislative Vignettes, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), May 16, 2010, at A3.
84 Quimby, supra note 79, at A1.
85 Id.; Bryant, supra note 70, at 263.
and sanctuary nonprofits in the United States, while the Humane Society of the United States estimates 3,500 private and government-sponsored shelters for cats and dogs. These issues create a difficult climate for horse owners and may shape their behavior when they find themselves with horses they can no longer provide care.

Whatever the reason, there are a great number of animals abandoned in foreclosed homes or turned loose to fend for themselves. Some of these pets have been saved and adopted, while others are not so lucky. Though not a new problem, the pet abandonment issue has certainly become worse with the rise in foreclosures across the country.

C. Economic Euthanasia

When a financial crisis hits and shelters are not an option, some people who would otherwise treat their animals for an injury or illness can no longer afford to do so and are choosing to euthanize their pets instead of incur the cost of veterinary care. This phenomenon is termed “economic euthanasia.” There are no national statistics, but reports by media outlets, humane organizations, and veterinarians show a rise in economic euthanasia since the recent foreclosure crisis. And when PurinaCare Pet Health Insurance compiled the biggest news stories of 2009 in relation to pets, the country’s hard financial times and economic euthanasia topped the list.

Though economic euthanasia rates seemed to decline between 1997 and 2003, it now appears to be on the rise. For example, Mark Kumpf, president

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87 Thompson, supra note 21; Peters, supra note 19; Waters, supra note 13.
88 Jennifer Harmon, Group Rescues Pets Left Behind in Foreclosed Homes, 175 AM. BANKER 7 (2010).
94 Tremayne, supra note 91; Lorie Huston, Pet Euthanasia, Unwanted Pets Increasing as Economic Downturn Affects Pet Owners, EXAMINER.COM, June 14, 2009,
of the National Animal Control Association and director of an animal shelter in Ohio, described a 20 percent rise in owner requests to euthanize their pets during 2009. Some veterinarians report that many of their clients do not provide preventative treatment or in-need care for their pets, which is likely to result in economic euthanasia. Other owners choose to take their pets home to die instead of incurring euthanasia and other veterinary costs.

Horses are also suffering from the consequences of economic euthanasia—some owners are even choosing to euthanize otherwise healthy animals. In Minnesota, a horse owner euthanized over 80 of her horses due to the rising cost of hay and her own failing health. The owner of the horses, mostly Shetland ponies, could no longer afford to spend $2,000 per month on feed and did not trust anyone else to take care of them properly.

Some pet owners even choose to euthanize their animals themselves. In Colorado, Paula Harding first poisoned then shot her sick 15-year-old terrier/poodle mix because she could not afford to take it to the veterinarian. Though officials arrested her for felony animal cruelty, the district attorney did not press charges because he could not prove that Harding tortured, mutilated, or knowingly and needlessly killed her dog. The district attorney reasoned that in rural areas it was common and lawful for owners to euthanize their animals through shooting them, and that the ill dog would have been euthanized in any case, so its killing was not “needless.”

These cases show that the economic crisis is affecting animals just as much as it is affecting humans. For animals, not only does the current economy mean the difference between having a home and being homeless, but it might also mean the difference between life and death. Fortunately for animals large and
small, laws are now emerging that directly address animal welfare in the foreclosure crisis.

**Legislation Related to Animals and the Foreclosure Crisis**

In response to the foreclosure crisis, some legislators have acted to help animals in need. Recognizing that animal abandonment has become increasingly prevalent with the recent housing crisis, lawmakers in California, Oregon, and New York introduced bills that address animal abandonment in foreclosed properties.

**A. California**

In 2008, California Assembly Member Mark DeSaulnier, the California Animal Association (CAA), and the American Society for the Prevention of Cruelty to Animals (ASPCA) co-sponsored Assembly Bill 2949. This bill makes abandoning a live animal on vacated or foreclosed property an “involuntary deposit” and requires the property’s owners (including banks, real estate companies, and other corporations) to notify animal control immediately. Proponents of the bill argued that requiring property owners to notify animal control would ensure proper care for more abandoned animals and lead to a decrease in animal neglect and increase in adoptions.

Governor Arnold Schwarzenegger signed the bill into law on August 4, 2008. Before this legislation was passed in California, Animal Control officers had to wait 24 to 72 hours before they could take a dog or cat from property after posting a note on the home. According to the CAA, some banks went a step further and prohibited employees from feeding or caring for abandoned animals found on foreclosed property. The California law now makes individuals and corporations that own property responsible for animals abandoned on the property. This helps animal control to more efficiently deal with abandoned pets, and allows pets to receive care more quickly, potentially saving their lives.

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B. Oregon

In Oregon, lawmakers introduced Senate Bill 304, legislation similar to the California bill. The Oregon Humane Society requested the introduction of this bill, which was backed by Senator Suzanne Bonamici. The bill required a mortgagor taking possession of real property to provide minimum care for abandoned pets or livestock and to arrange for law enforcement, animal control, or an animal shelter to take custody of the abandoned animal. Failure to do so would be a misdemeanor, and escalates to a felony if the animal is injured or dies because it is not treated. The bill also authorized an animal shelter taking custody of an abandoned animal to petition for legal ownership. Oregon’s Senate Consumer and Public Affairs Committee held a public hearing on the bill, but the bill died in committee.

But Oregon’s legislature did pass a bill that included horses and other equine animals in its animal abandonment law. Since 2008, Oregon has seen an increase in horses abandoned by owners who could no longer care for them. Before the law went into effect, horses were defined as “livestock” and their owners could legally abandon them. Oregon Senate Bill 398 included equines (a horse, pony, donkey, mule, hinny, zebra, or any hybrid of these) in its animal abandonment law, making it a misdemeanor to abandon either a domestic animal or equine without providing for its minimum care.

113 Id.
114 Id.
115 Oregon Humane Society, supra note 111.
118 Steves, supra note 117.
C. New York

According to New York’s current animal abandonment law, an owner or possessor of an animal is guilty of a misdemeanor if he or she “abandons such animal, or leaves it to die in a street, road or public place, or…allows such animal, if it become disabled, to lie in a public street, road or public place more than three hours after he receives notice that it is left disabled….”120 Assembly Bill 2164, introduced in 2009 by Assemblyman John McEneny, is the latest of several New York bills introduced since 1999 to more clearly define this idea of “animal abandonment.”121 These bills turn the statute’s focus from the abandoned animal lying in the street to the owner’s failure to transfer ownership and intention not to reclaim the animal.122 Like the statute it would replace, this bill makes animal abandonment a misdemeanor.123

Though the New York Legislature has yet to pass any of the bills clarifying the definition of animal abandonment, Assemblywoman Linda Rosenthal introduced a bill specifically dealing with animal abandonment in foreclosed properties.124 Assembly Bill 11033 requires anyone encountering an animal found in a property “vacated through lease termination, property foreclosure or abandonment” to notify animal control immediately.125 It also adds to the current statute’s definition of an “abandoned animal” to include animals “found in a property that has been vacated through lease termination, property foreclosure, or abandoned by the tenant or owner.”126 In May 2010 this bill was referred to the Committee on the Judiciary.127

Federal Government

The Federal government even considered a bill that would give tax breaks to pet owners. The “Humanity and Pets Partnered Through the Years (HAPPY) Act” would amend the federal tax code to allow a deduction for some pet care

120 N.Y. AGRICULTURE & MARKETS LAW § 355 (McKinney 2004).
123 Id.
125 Id.
126 Id.
costs. Introduced by Representative Thaddeus McCotter, the HAPPY Act would allow pet owners to deduct up to $3,500 per year in “qualified pet expenses,” including pet food and medical expenses. This would give American pet owners the opportunity for more affordable food and veterinary care for their animals, possibly saving their lives. On the other hand, critics of the bill point out that it is most likely to benefit those who itemize their expenses and have higher incomes. And if financially strapped pet owners do not earn enough to pay taxes, those households would not benefit at all. The House referred the bill to its Committee on Ways and Means.

The proposed and passed legislation discussed above demonstrates that legislators are recognizing the animal welfare problem during the current foreclosure crisis. Though not every bill has been successful, some states are making progress in helping animals in need. As the next section shows, private nonprofit groups are also assisting pet owners who are finding it difficult or impossible to keep their animals.

**Help Available**

The rise in foreclosure rates and its effect on animals has spurred several individuals and organizations to take action. Several new nonprofits have emerged to help pet owners facing foreclosure. For example, ForeclosurePets.org is a free online service that helps homeowners find new or temporary homes for their pets. The Foreclosure Cats Project is a collaboration among several cat rescues that began after 63 cats were abandoned in a Cincinnati home and local artists began selling portraits of the rescues on eBay to pay for their care. No Paws Left Behind manages a website where financially strapped pet owners can find pet-friendly housing or a “no-kill” shelter. The Houston-based organization started a grant program in June 2008 to help animal shelters

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129 Id.
132 Id.
nationwide run pet food bank programs.\textsuperscript{137} And the Lost Our Home Pet Foundation, based in Arizona, is a “nonprofit group of real estate professionals who rescue pets left behind due to foreclosures or other financial hardship.”\textsuperscript{138} The group has rescued over 400 dogs and cats in 2009, all given up by owners with financial difficulties.\textsuperscript{139}

Pet food bank programs have also surfaced. In Michigan, the Humane Society of Huron Valley in Ann Arbor created the Bountiful Bowls Program to help supplement pet food costs.\textsuperscript{140} The program enrolls over 100 families in Washtenaw County, Plymouth and Canton, Michigan.\textsuperscript{141} Similarly, the Dearborn Animal Shelter created its Operation Feed Fido program to keep pets with their families and out of shelters.\textsuperscript{142} As of April 2010, this program partnered with a local PETCO store as part of the PETCO Foundation’s “We are Family, Too” Fund that helps provide needy pets and their families with pet food and supplies.\textsuperscript{143} Even pet food bank programs that have provided assistance for decades are seeing an increase in need.\textsuperscript{144} The Tree House Humane Society in Chicago, for example, has provided pet food bank services for over 30 years and saw demand double in 2009 from the previous year.\textsuperscript{145}

In addition, the Humane Society of the United States (HSUS) began its nationwide Foreclosure Pets Grant Program in March 2008 to help animal control agencies and shelters cope with the economic downturn.\textsuperscript{146} Grants ranged from $500 to $2,000 per organization and were intended to “help establish, expand, or

\begin{itemize}
  \item \textsuperscript{137} Taylor, \textit{supra} note 30.
  \item \textsuperscript{138} Lost Our Home Pet Foundation, http://www.lostourhome.org/ (last visited Aug. 30, 2010).
  \item \textsuperscript{140} Humane Society of Huron Valley, Bountiful Bowls, http://www.hshv.org/BountifulBowls.htm (last visited Aug. 30, 2010); Taylor, \textit{supra} note 30.
  \item \textsuperscript{141} Taylor, \textit{supra} note 30.
  \item \textsuperscript{142} Dearborn Animal Shelter, Operation Feed Fido, http://www.dearborn-animals.com/Programs%20and%20Services/Feed%20Fido/Friends_Fo the_Dearborn_Animal_S halter_-_Operation_Feed_Fido.htm (last visited Aug. 30, 2010); Taylor, \textit{supra} note 30.
  \item \textsuperscript{143} Dearborn Animal Shelter, \textit{supra} note 142.
  \item \textsuperscript{144} Baranauckas, \textit{supra} note 43.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Hirshey, \textit{supra} note 1; Humane Society of the United States, Financial Crisis: Assistance for Families and Pets, May 4, 2009, http://www.hsus.org/pets/pets_related_news_and_events/foreclosure_pets_grant_fund07162008.html [hereinafter HSUS Assistance]. While applauded by many, the U.S. Sportsmen’s Alliance objected to a pet photo contest fundraiser by Meijer grocery stores that would benefit the HSUS Foreclosure Pets Fund, complaining that the HSUS opposed hunting and contributions to the Fund would free up funding for the HSUS anti-hunting campaign. \textit{Hunters Hit Foreclosed Pets}, \textit{supra} note 11; Dave Golowenski, \textit{Sportsmen's Alliance, Humane Society at Odds}, \textit{COLUMBUS DISPATCH} (Ohio), at 13C. Meijer withdrew its support for the program. \textit{Id.}
\end{itemize}
publicize services or programs that assist families in caring for their pets during the current economic crisis.147 Unfortunately, the HSUS suspended the program in May 2009 because of financial constraints.148 However, HSUS is also collaborating with fair housing groups, such as the Regional Human Rights and Fair Housing Commission in California, to help pet owners find local shelters and pet friendly rentals.149

Finally, in an effort to combat economic euthanasia, the American Animal Hospital Association (AAHA) Foundation created the Helping Pets Fund in 2005.150 This fund provides financial assistance for pets whose owners are facing financial hardship as well as emergency and non-elective treatment of abandoned pets.151 In April 2009, the Foundation temporarily suspended its grants because of a surge in requests, which tripled in 2008.152 Fortunately, AAHA reinstated the fund after a donation from Veterinary Pet Insurance (VPI).153

As these examples show, many local and national groups are concentrating their efforts on assisting pet owners in financial need. Some rescue animals while others concentrate on running pet food banks, education, assisting pet owners with finding pet-friendly housing, or helping people re-home their pets. As the foreclosure crisis persists, these groups will continue to assist pets and their owners through a difficult economy and living conditions.

**Conclusion**

It is inevitable that our pets suffer when we suffer in lean economic times. The foreclosure crisis has created widespread animal shelter overload, an increase in animal abandonment cases, and an uptick in economic euthanasia. Farm

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147 HSUS Assistance.
148 Id.
151 AAHA Foundation, supra note 150.
animals and livestock, especially horses, have not been immune to the problems created during this lean economy. Fortunately, lawmakers have begun to recognize these issues by creating legislation that assists animals affected by foreclosure, and nonprofit groups are helping with pet food, supplies, and housing resources. Until the mortgage crisis resolves, however, America’s animals will continue to suffer the consequences.