Washington and Lee Journal of Civil Rights and Social Justice

Volume 5 | Issue 1 Article 4

Spring 4-1-1999

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Recommended Citation

G. Carol Brani, *CIVIL RIGHTS AND MORTGAGE LENDING DISCRIMINATION: ESTABLISHING A PRIMA FACIE CASE UNDER THE DISPARATE TREATMENT THEORY*, 5 Race & Ethnic Anc. L. J. 42 (1999).
Available at: https://scholarlycommons.law.wlu.edu/crsj/vol5/iss1/4

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CIVIL RIGHTS AND MORTGAGE LENDING DISCRIMINATION: ESTABLISHING A PRIMA FACIE CASE UNDER THE DISPARATE TREATMENT THEORY

G. Carol Brani[1]

I. INTRODUCTION

The disincentives to pursue mortgage lending discrimination claims have rarely been more clear than in the *Latimore v. Citibank Federal Savings Bank*[2] decision, a 1998 fair-lending case heard by the United States Court of Appeals for the Seventh Circuit. Helen Latimore, a creditworthy black applicant, alleged that Citibank Federal Savings Bank discriminated against her in violation of both the Equal Credit Opportunity Act ("ECOA")[3] and the Fair Housing Act ("FHA")[4] in its denial of her home loan application.[5] Citibank's denial followed an alleged under-appraisal of the value of her residence, located in a predominately minority neighborhood.[6] Latimore appealed the district court's grant of summary judgment to the defendants.[7]

Judge Posner surprised both parties' counsel by declining to apply the *McDonnell Douglas v. Green*[8] burden-shifting framework in *Latimore*. He acknowledged that the Fifth and Eighth Circuits implemented *McDonnell*

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[2] Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712 (7th Cir. 1998).

[3] Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1500, 1521-25 (codified as amended at 15 U.S.C. §§ 1691-1691f (1994 & Supp. III 1997).

[4] Title VIII of the Civil Rights Act of 1968, Pub.L.No. 90-284, § 805, 82 Stat. 73, 81-89 (1968) (commonly known as the Fair Housing Act) (codified at 42 U.S.C. §§ 3601-3619 (1994 & Supp. II 1996)). For a discussion of subsequent amendments, *see* Robert G. Boehmer, *Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient -- Is It Time for Simplification and Incentives?* 21 HOFSTRA L. REV. 603, 607 & n.18 (1993) (hereinafter Boehmer).

[5] *Latimore*, 151 F.3d at 713. Citibank denied Latimore's $51,000 mortgage loan application. *Id.* She had applied for a loan to be secured by her home. *Id.* "The bank's appraiser . . . appraised the property at only $45,000." *Id.* Within months she applied for a loan from another lending institution. *Id.* At that time her residence was appraised at $79,000, and the bank approved her for a $46,000 loan. *Id.* She paid a 1% higher rate than she had sought from Citibank. *Id.* In preparation for this litigation, Latimore commissioned a "retrospective appraisal, that is an appraisal of the value of her home at the time that Citibank appraised it." *Id.* at 715. The appraiser valued her home at $62,000. *Id.* Nevertheless, the court concluded that " no reasonable jury could find that [Latimore] was turned down because of her race." *Id.* at 716.

[6] Latimore's property is located in a neighborhood that has a more than ninety per cent black population. Latimore v. Citibank F.S.B., 979 F. Supp. 663 (N.D. Ill. 1997).

[7] *Latimore*, 151 F.3d at 713.

[8] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). In *United States v. Badgett*, the court summarized the burden-shifting standard as follows: "'First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate undiscriminatory [sic] reason for its action. Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext.'" United States v. Badgett, 976 F.2d 1176, 1178 (9th Cir. 1992) (quoting Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987) (citations omitted)). Also, "[t]he *McDonnell Douglas* test recognizes that direct proof of unlawful discrimination is rarely available. Therefore, after a plaintiff makes a prima facie case, a presumption of illegality arises and respondent has the burden of articulating a legitimate, non-discriminatory justification for the challenged policy." *Id.*

Douglas in mortgage lending discrimination cases.[9] However, Posner found *McDonnell Douglas* inapplicable to credit discrimination cases because the mortgage loan application process lacks the "competitive situation" that exists between black and white job applicants in the employment discrimination context.[10] "[W]holesale transposition of the *McDonnell Douglas* standard to the credit discrimination context would display insensitivity to the thinking behind the standard."[11] Posner thus left the burden on Latimore to prove her case of discrimination the "conventional way," "without relying on any special doctrines of burden-shifting."[12]

Nonetheless, the Department of Housing and Urban Development ("HUD") has adopted the *McDonnell Douglas* formulation "for evaluating claims of discrimination under the Fair Housing Act."[13] Further, courts generally have imported Title VII[14] employment discrimination theories and burden-shifting schemes to mortgage lending discrimination litigation.[15] No United States Supreme Court decision binds them, and the case law in this context is scant. Therefore, courts are without interpretive guidance. Creditors remain without nationwide standards as to which lending practices may render them vulnerable to allegations of discriminatory treatment. Finally, fair housing advocacy groups and the plaintiffs' bar cannot accurately assess which mortgage lending discrimination claims are worthwhile, that is, those likely to succeed.

It is not surprising that attorneys on both sides of the aisle in *Latimore* argued under the assumption that the *McDonnell Douglas* standard would be imposed in the context of a mortgage lending discrimination claim.[16] In an earlier fair housing case, Judge Posner repeatedly analogized Title VIII cases to Title VII disparate treatment cases and stated that "[p]laintiffs in can use a method of proof similar to that which the Supreme Court in *McDonnell Douglas*. . . created for disparate treatment cases brought under Title VII."[17] Moreover, the following excerpt from a Senate report suggests that Congress intended the importation of employment discrimination standards and theories to the analysis of ECOA claims:

> In determining the existence of discrimination on . . . [prohibited] grounds, . . . courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus, judicial constructions of anti-

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[9] *Latimore*, 151 F.3d at 714 (referring to Simms v. First Gibraltar Bank, 83 F.3d 1546, 1558 (5th Cir. (1996); Moore v. USDA, 55 F.3d 991, 995 (5th Cir. 1995); and Ring v. First Interstate Mortgage, Inc., 984 F.2d 924, 926 (8th Cir. 1993)).

[10] *Latimore*, 151 F.3d at 714.

[11] *Id.*

[12] *Id.* at 715.

[13] *Badgett*, 976 F.2d at 1178 (referring to HUD v. Blackwell, 908 F.2d 864 (11th Cir. 1990)); Pinchback v. Armistead Homes Corp., 689 F. Supp. 541 (D. Md. 1988), *aff'd in part, vacated in part*, 907 F.2d. 1447 (4th Cir. 1990)).

[14] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-266 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994, Supp. II 1996 & West Supp. 1998).

[15] *See, e.g.*, Williams v. The 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1178-80 (E.D. Va. 1995); Pfaff v. HUD, 88 F.3d 739, 745 & n.1 (9th Cir. 1996) (referring to Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-35 (2d Cir.), *aff'd*, 488 U.S. 15 (1988)).

[16] *Latimore*, 151 F.3d at 714.

[17] Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1529-31 (7th Cir. 1990) (citations omitted) (referring to Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 190 (7th Cir. 1982)).

> discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, and *Albemarle Paper Company v. Moody*, are intended to serve as guides in the application of this Act, *especially with respect to the allocations of burdens of proof.*[18]

The *Latimore* decision should alert Congress that the FHA and ECOA prohibitions as to residential lending discrimination protect *no* classes of persons if inconsistent proof standards discourage private enforcement.

This Article examines the prima facie case of credit discrimination under disparate treatment analysis, specifically focusing on redlining[19] and under-appraisal[20] claims against mortgage lending institutions. Part II of this Article provides a general overview of legislative efforts to provide equal access to mortgage financing. Parts III and IV discuss and contrast the FHA and ECOA requirements, and explain the standards and terms that have been imported from Title VII to Title VIII litigation. Finally, Part V discusses decisions in which courts have applied Title VII standards to disparate treatment claims in the context of redlining and under-appraisals of property in predominately black neighborhoods.

II. BACKGROUND

Equal access to housing continues to be an elusive goal. Following the end of slavery in 1865, "racially restrictive covenants," "segregation laws," and "nationalized racially discriminatory home mortgage underwriting criteria" effectively prevented blacks from achieving home ownership.[21] Once these obstacles were removed, it became apparent that racial discrimination in home mortgage financing remained a formidable factor hindering the efforts of blacks to purchase residences.[22] Not until the 1960's did the federal government take action to encourage black home ownership and to abolish housing discrimination.[23]

Congress first addressed race as a factor inhibiting home mortgage lending with the passage of the Civil Rights Act of 1968,[24] commonly referred to as the Fair Housing Act, and the amendment of the Equal Credit Opportunity Act[25] to prohibit racial discrimination in the granting of credit. Both enactments had broader purposes than the elimination of discrimination in mortgage transactions.[26] The significance of these laws in the achievement of fair lending practices was that they provided individual home purchasers with private claims for discrimination in the denial of home mortgage loans for residential purchases. Many private defendants routinely join FHA

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[18] Evans v. First Fed. Sav. Bank, 669 F. Supp. 915, 922 n.3 (N.D. Ind. 1987) (quoting S.REP. NO. 94-589, at 4-5 (1976)) (citations omitted) (emphasis in original).

[19] *See infra* notes 109 through 134 and accompanying text.

[20] *See infra* notes 135 through 162 and accompanying text.

[21] Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REFORM. 527, 528 (1993).

[22] *Id.* at 530.

[23] *Id.* at 528-29.

[24] Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (codified as amended at 42 U.S.C. § § 3601-3619 (1994 & Supp. II 1996)).

[25] Pub. L. No. 93-495, tit. V, 88 Stat. 1500, 1521-25 (1974) (codified as amended at 15 U.S.C. §§ 1691-1691f (1994 & Supp. 1996)). The ECOA had as its original purpose the eradication of discrimination against married women in lending, and was only later amended to prohibit racially motivated credit discrimination. *Id.*

[26] Dane, *supra* note 21, at 528 n.1.

and ECOA claims in any case against a "creditor."[27]

Although federal enforcement has been aggressive in fighting racial discrimination in the sale and rental of housing, it has been noticeably lacking in the fight against home lending discrimination.[28] Consequently, private action has tended to be the *only* action enforcing the federal laws against credit discrimination on the basis of race. However, discrimination in the mortgage lending area is neither as transparent nor as identifiable as it may be in rental and sales of residences, thus hindering effective private action.[29]

Mortgage lending discrimination generally takes one of two forms: (1) denial of a home mortgage to a minority loan applicant because of his race,[30] and (2) denial of financing for the purchase or improvement of a residence located in a predominately minority or mixed-race neighborhood.[31] "[U]nder the FHA and the ECOA, the plaintiff 'must show that "race was a motivating consideration in the [defendants'] decision" not to make the loan.'"[32] She may support her claim with direct evidence of discrimination.[33] Two other theories of liability are available under either statute: (1) "disparate treatment," where indirect evidence supports an inference of discriminatory intent, and (2) "disparate impact," which originated with *Griggs v. Duke Power*.[34] Generally, a plaintiff alleging disparate impact must identify a specific practice which produces a discriminatory effect that is significant enough to merit finding the defendant(s) liable to the plaintiff(s).[35] "The accumulated . . . case law -- particularly the more recent case law -- suggests that many courts, while not requiring an overt finding of intent to discriminate, implicitly incorporate such a requirement or its functional equivalent in their application of the disparate impact standard."[36]

Despite two decades of sporadic litigation, the proof requirements of a prima facie case in the mortgage lending context remain unclear.[37] Understanding the significance of the Seventh Circuit's refusal to apply the *McDonnell Douglas* burden-shifting framework in *Latimore* initially requires an examination of the statutes upon which Latimore's claims were based.

III. THE STATUTORY FRAMEWORK OF FAIR LENDING/HOUSING ACTS

A. *Fair Housing Act*

The Fair Housing Act has as its goal

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[27] *Id. See infra* note 74 and accompanying text.

[28] Dane, *supra* note 21, at 532.

[29] *Id.*

[30] *See, e.g.*, Buycks-Roberson v. Citibank Fed. Sav. Bank, 162 F.R.D. 322, 326-27 & n.6 (N.D. Ill. 1995). Plaintiffs represented a class alleging racial discrimination in the denial of a mortgage loan. *Id.* Calvin Roberson represented "a class of plaintiffs consisting of African-Americans who were denied home loans during the class period, not class members who were African-American and lived in predominantly African-American neighborhoods." *Id.* at 326 n.6.

[31] *See, e.g., Latimore*, 151 F.3d at 712.

[32] *Latimore*, 979 F. Supp. at 664 (quoting Thomas v. First Fed. Sav. Bank, 653 F. Supp. 1330, 1338-39 (N.D. Ind. 1987) (quoting Kaplan v. 442 Wellington Coop. Bldg. Corp., 567 F. Supp. 53, 57 (N.D. Ill. 1983)); Saldana v. Citibank Fed. Sav. Bank, No. 93 C 4164, 1996 WL 332451, at *2 (N.D. Ill. June 13, 1996).

[33] *Saldana*, 1996 WL 332451, at *2.

[34] 401 U.S. 424 (1971).

[35] *Williams*, 891 F. Supp. at 1178 (citing Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986), and Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982)).

[36] Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing, and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 420 (1998) (hereinafter Mahoney).

[37] *See generally id.*

the provision of fair housing.[38] Originally, the FHA banned discrimination in the sale, rental, and financing of housing on the basis of "race, color, religion, or national origin."[39] Subsequently, Congress amended the statute to add gender, handicap and familial status to the protected categories.[40] The provisions of the FHA bar such discrimination by private as well as public parties.[41] Section 3605(a) prohibits a person[42] or entity from discriminating against a member of one of the protected categories in the "terms or conditions" of "residential real estate-transactions."[43]

1. *Residential Real Estate-Related Transactions*

Section 3605(b)(1) of the FHA defines "residential real estate-related transactions" to include "the making or purchasing of loans or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling; . . . or secured by residential real estate."[44] Appraisals, sales and brokering of residences are also included in the statutory definition.[45] All aspects of the "mortgage loan and approval process arguably are covered" transactions under the FHA definition, as well as loans for home improvements and repairs.[46] The FHA prohibitions also apply to any borrowing with residential real estate as the underlying collateral, including home equity loans used for purposes unrelated to the secured property.[47]

2. *Steering*

Section 804(a) of the FHA both defines and prohibits "steering."[48] It is unlawful to "make unavailable or deny . . . a dwelling to any person because of race."[49] The seminal case is *Village of Bellwood v. Dwivedi*, in which Raj Realty allegedly "encourag[ed] blacks to buy in Bellwood and whites to buy in" white suburbs.[50] Defendants appealed a judgment against them for "compensatory damages, attorneys' fees . . . and an injunction."[51] Judge Posner, writing for

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[38] 42 U.S.C. § 3601 (1994 & Supp. II 1996).

[39] *See infra* note 4.

[40] Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620, 1622 (codified as amended at 42 U.S.C. § 3604 (1994)). The Act was amended to prohibit gender-based discrimination in 1974. In 1988, Congress further amended the Act to prohibit discrimination on the basis of handicap or familial status. 42 U.S.C. § 3604 (1994). The Housing for Older Persons Act of 1995, Pub. L. No. 104-76, §§ 2,3, 109 Stat. 787 (codified at 42 U.S.C. § 3607(b)), also amending the Fair Housing Act, is not relevant to the discussion of this article.

[41] United States v. Henshaw Bros., Inc., 401 F. Supp. 399, 402 (E.D. Va. 1974) (referring to United States v. Hunter, 459 F.2d 205 (4th Cir. 1972)).

[42] 42 U.S.C. § 3602(d) (1994), defines "person" as "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 . . . , receivers, and fiduciaries." 42 U.S.C. § 3602(d) (1994).

[43] 42 U.S.C. § 3605(a) (1994).

[44] 42 U.S.C. § 3602(b) (1994). This section provides the definition of "dwelling" as follows: "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." *Id.*

[45] 42 U.S.C. § 3605(b)(2) (1994).

[46] Dane, *supra* note 21, at 541.

[47] *Id.*

[48] 42 U.S.C. § 3604(a) (1994). This section deems it unlawful "to refuse to sell or rent after the making of a bona fide offer or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.*

[49] *Id.*

[50] *Village of Bellwood*, 895 F.2d at 1525.

[51] *Id.*

the court, explained the manner in which steering violates the FHA:

> Suppose a real estate broker falsely states to a black customer that no homes are for sale in Village X, which is primarily white, and he does so because the customer is black, so that the statement is a deliberate, racially motivated falsity. By doing this he denies a dwelling to a person because of the person's race (§ 3604(a)), discriminates on racial grounds against the person in the provision of real estate services (§ 3604(b)), and misrepresents to the person on racial grounds that a dwelling is not for sale (§ 3604(d)). He is acting intentionally to prevent a black from buying a house in a white neighborhood. . . . This is deliberate conduct, and unquestionably it is racial steering.[52]

The court reversed the judgment and granted Raj Realty a new trial, holding that:

> (1) a real estate broker who treats customers differently from one another because of their race violates Title VIII; (2) even without direct evidence of such difference in treatment, if the broker sells blacks houses in black neighborhoods and whites houses in white ones and he can offer no noninvidious reason (such as customer preference) for this pattern, then an inference of disparate treatment can be drawn from the discriminatory effect. [53]

Moreover, the court noted that none of Raj Realty's "genuine customers" were plaintiffs.[54]

3. *Enforcement*

Private persons may bring claims of lending discrimination against developers,[55] building and land contractors,[56] banks, financial institutions and mortgage lenders.[57] Courts also have allowed claims to be brought under the FHA against secondary market purchasers of mortgage loans.[58] The secondary market is the market of resale of signed borrowers' notes in which such notes are bought, sold, assigned and transferred to third parties uninvolved in the original loan transaction.

Individuals who have been "aggrieved"[59] by mortgage lending

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[52] *Id.* at 1529.

[53] *Id.* at 1533-34.

[54] *Id.* at 1532. The plaintiffs were testers. *Id.*

[55] *See generally* Love v. DeCarlo Homes, Inc., 482 F.2d 613 (5th Cir. 1973).

[56] *See generally* Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974).

[57] *See generally* Evans v. First Fed. Sav. Bank, 669 F. Supp. 915 (N.D. Ind. 1987).

[58] *See generally* Ring v. First Interstate Mortgage, Inc., 984 F.2d 924 (8th Cir. 1993).

[59] Dane, *supra* note 21, at 543 & n.72. "The term 'aggrieved' has been interpreted by the Supreme Court to include any person who would have standing under the constitutional case or controversy standard. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372-73 (1982); Gladstone Realtors v. City of Bellwood, 441 U.S. 91, 103 (1979), Trafficante v. Metropolitan

discrimination have two options under the FHA: (1) "fil[ing] an administrative complaint with HUD,"[60] or (2) "initiat[ing] a civil action in federal or state court."[61] The applicable statute of limitations is "[two] years after the occurrence or the termination of an alleged discriminatory housing practice."[62] Section 3613 provides for the following remedies to individuals in civil proceedings: "actual and punitive damages," "permanent or temporary" injunctive relief, and a "reasonable attorney's fee and costs."[63]

The FHA assigns to the Department of Housing and Urban Development ("HUD") primary responsibility for implementation and enforcement of FHA requirements.[64] HUD conducts investigations and administrative proceedings on discrimination claims.[65] In addition, other federal departments and agencies have promulgated regulations relevant to mortgage lending as part of their administration of programs related to financial institutions.[66] Generally, both HUD and the courts have construed the language of the FHA broadly in order to provide relief to parties who have experienced mortgage-lending discrimination.[67] Both the Attorney General and private persons may also enforce the FHA.[68]

B. *Equal Credit Opportunity Act*

In 1974, the Consumer Credit Protection Act[69] was amended to include what is commonly known as the Equal Credit Opportunity Act.[70] The ECOA originally protected consumers from discrimination in consumer credit transactions on the basis of gender or marital status. Not until 1976 did Congress expand the scope of the ECOA to prohibit racial discrimination in the same context.[71] While the FHA's application to credit transactions is limited to loans for housing or those secured by real estate, the ECOA encompasses all consumer credit transactions regardless of whether they are related to home ownership.[72] The statute's prohibitions apply to "any aspect of a credit transaction," from initial intake to closing, and, arguably, foreclosure.[73] The definition of

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Life Ins. Co., 409 U.S. 205, 208 (1972)." *Id.*

[60] Dane, *supra* note 21, at 543.

[61] *Id.*

[62] 42 U.S.C. § 3613(a)(1)(A) (1994).

[63] 42 U.S.C. § 3613(c) (1994).

[64] 42 U.S.C. §§ 3608-3612 (1994 & Supp. II 1996). Specifically, administrative enforcement powers are given to HUD under § 3610. HUD regulations implementing FHA mortgage lending prohibitions are found at 24 C.F.R. § 100 (1998).

[65] *See* 42 U.S.C. § 3610 (1994).

[66] *See* 12 C.F.R. §§ 27, 338, 528, 701.31 (1998). Programs and activities related to the regulation of housing are administered by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the National Credit Union Administration. *Id.*

[67] Stackhouse v. De Sitter, 620 F. Supp. 208, 210 (N.D. Ill. 1985).

[68] 42 U.S.C. § 3614 (1994). The Attorney General may initiate claims against persons "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by" the FHA. Under § 3613(e), the Attorney General "may intervene in . . . [a] civil action" following certification that "the case is of general public importance." 42 U.S.C. § 3613(e) (1994). HUD may also refer civil actions to the Attorney General for subsequent legal action. 42 U.S.C. § 3614(b) (1994). Notably, the ECOA "authorizes the Attorney General to seek a wide range of equitable remedies, but not legal money damages. . . ." United States v. Beneficial Corp., 492 F. Supp. 682, 688 (D. N.J. 1980), *aff'd*, 673 F.2d 1302 (1981) (unpublished).

[69] 15 U.S.C. §§ 1601-1693r (1994 & Supp. III 1997).

[70] *See infra* note 3.

[71] Pub. L. No. 94-239, 90 Stat. 251 (codified as amended at 15 U.S.C. § 1691 (1994 & Supp. III 1997). Other prohibited bases included in the ECOA as amended: national origin, religion, age, and receipt of income from a public assistance program. *Id.*

[72] *See, e.g.*, 42 U.S.C. § 3605(a) (1994); 15 U.S.C. §§ 1691(a), 1691a(d) (1994).

[73] 15 U.S.C. § 1691(a) (1994).

"creditor" includes not only persons who "regularly extend[ ], renew[ ], or continue[ ] credit," but also includes "assignee[s] of an original creditor."[74] Thus, for purposes of the ECOA, a buyer of home mortgage loans on the secondary market is a "creditor" if she participates in the approval or rejection of a credit application.[75]

1. *Regulatory Scheme*

The Federal Reserve Board has promulgated Regulation B, a comprehensive implementing provision under the ECOA.[76] It provides that the ECOA applies to all methods of determining creditworthiness, whether objective or subjective.[77] Real estate agents and "secondary market participants who are not involved in" the creditor's loan rejection decision are not within the scope of the statute's prohibitions.[78]

Further, Regulation B prohibits prescreening if it is motivated by the ethnicity of the consumer.[79] "Prescreening" is a form of steering in which a lender avoids transacting business with a mortgage loan consumer by discouraging him from submitting or pursuing a loan application or encouraging that consumer to apply at another lending institution.[80] Prescreening may be implicated by the disproportionate percentage of black homeowners obtaining residential mortgages through subprime lenders.[81]

2. *Notice*

The most significant difference between the ECOA and the FHA from a practitioner's viewpoint is the ECOA notice requirement.[82] Section 1691(d) of the ECOA

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[74] 15 U.S.C. § 1691a(e) provides in relevant part: "The term 'creditor' means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." 15 U.S.C. § 1691a(e)(1994).

15 U.S.C. § 1691a defines "person" as: "a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association." 15 U.S.C. § 1691a (f) (1994).

Regulation B provides further guidance for defining the term: "Creditor means a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes a creditor's assignee, transferee, or subrogee who so participates. [The term in certain instances] also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made." 12 C.F.R. § 202.2(l) (1999).

[75] Dane, *supra* note 21, at 547.

[76] Regulation B, 12 C.F.R. § 202 (1999). While the Federal Reserve Board has promulgated the most significant regulation implementing ECOA provisions, the Federal Trade Commission ("FTC") is the "default" enforcement agency of ECOA provisions. 15 U.S.C. § 1691c(c) (1994). Further, at least nine federal agencies are tasked with oversight of various institutions engaging in consumer credit lending. 15 U.S.C. § 1691c(a)1-9 (1994 & Supp. III 1997). For further discussion of Regulation B's breadth, *see* Dane, *supra* note 21, at 557 & n.146.

[77] Regulation B, 12 C.F.R. § 202.2(p), (t) (1999).

[78] Dane, *supra* note 21, at 548 (referring to Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566, 571 (D.C. Cir. 1979)).

[79] 12 C.F.R. § 202.5(a) (1999). *See also* 12 C.F.R. § 528.3 (1998).

[80] Dane, *supra* note 21, at 537 n.37.

[81] *See infra* at notes 167-77 for recent statistics on the rate of black consumers acquiring home loans through subprime lending.

[82] *See* Regulation B, 12 C.F.R. § 202.9 (1999) for notification requirements. *See also* Dane, *supra* note 21, at 548 & n.90 (cases focused specifically on violations of the ECOA's notice requirements): "Jochum v. Pico Credit Corp. of Westbank, Inc., 730 F.2d 1041, 1046-48 (5th Cir. 1984) (finding that a creditor who refuses to fund a pending loan application must supply written notification of the reasons for the refusal); Fischl v. GMAC, 708 F.2d 143, 148 (5th Cir. 1983) (finding notice to be insufficient because it 'was

requires the creditor to notify a credit applicant of its decision within thirty days after receipt of a completed credit application.[83] Further, the creditor must provide any rejected credit applicant with "the specific reasons for the adverse action taken."[84] Although this explanation may be provided either in oral or in written form, the statute requires a creditor to advise the applicant of his right to a written statement of the reasons for denial upon request.[85] It is this affirmative duty which provides the applicant with the creditor's explanation for disapproval of her application.[86] Moreover, section 1691(e) requires that, upon the request of the applicant, creditors must provide the loan applicant with a "copy of the appraisal report used in connection with" the mortgage loan application.[87]

misleading, or at best excessively vague'); High v. McLean Fin. Corp., 659 F. Supp. 1561, 1564 (D. D.C. 1987) (stating that every creditor rendering an adverse decision must give notice); Sayers v. GMAC, 522 F. Supp. 835, 841-42 (W.D. Mo. 1981) (imposing punitive damages for the failure to give notice). *See generally* David J. Olivieri, Annotation, *Notification of Adverse Action on Credit Application Under Equal Credit Opportunity Act (15 U.S.C. §§ 1691 et seq.) and Regulations Promulgated Thereunder (12 C.F.R. Part 202),* 65 A.L.R. Fed. 906 (1983)." *Id.*

[83] 15 U.S.C. § 1691(d)(1) (1994).

[84] 15 U.S.C. § 1691(d)(3) (1994).

[85] 15 U.S.C. § 1691(d)(2), (3) (1994).

[86] John L. Culhane, Jr., *The Eye of the Beholder: Developments Under the Equal Credit Opportunity Act and Regulation B*, 46 BUS. LAW 1069 (1991).

[87] 15 U.S.C. § 1691(e) (1994). The ECOA was amended in 1991 to include subsection (e), which provides in relevant part: "Each creditor shall promptly furnish an applicant, upon written request by the applicant made within a reasonable period of time of the application, a copy of the appraisal report used in connection with the applicant's application for a loan that is or would have been secured by a lien on residential real property. The creditor may require the applicant to reimburse the creditor for the cost of the appraisal." *Id.*

3. *Standing*

Standing is considerably broader under the FHA than under the ECOA. Congress intended standing under the FHA to be as broad as Article III permits.[88] Consequently, "courts are without authority to apply their self-imposed restrictions on standing in such suits."[89] Where "the FHA protects 'any person who claims to have been injured by a discriminatory housing practice,' the ECOA . . . does not employ such broad terms, it refers specifically to 'applicants,' and only 'applicants.'"[90] Courts generally have viewed the ECOA as protecting *only* those who apply for credit.[91] Thus, ECOA claims brought by community fair housing organizations are vulnerable to dismissal for lack of standing.[92]

[88] Trafficante v. Metropolitan Life Insur. Co., 409 U.S. 205, 209 (1972); Hanson v. Veterans Admin., 800 F.2d 1381, 1384 (5th Cir. 1986). As to testers, under *Havens Realty Corp.*, a "tester to whom a real estate agent makes a misrepresentation forbidden by 3604(d) has standing to complain about the misrepresentation, because the statute creates a right to be free from such misrepresentations." *Village of Bellwood*, 895 F.2d at 1526 (referring to Havens Realty v. Coleman, 455 U.S. 363, 374 (1982)).

[89] *Hanson*, 800 F.2d at 1384.

[90] Evans v. First Fed. Sav. Bank, 669 F. Supp. 915, 923 & n.3 (N.D. Ind. 1987).

[91] *See generally id.;* Cragin v. First Fed. Sav. and Loan Ass'n, 498 F. Supp. 379, 384 (D. Nev. 1980). *See also* Dane, *supra* note 21, at 549 & n.96.

[92] *See, e.g., Evans*, 669 F. Supp. at 922. The *Evans* court dismissed the ECOA claim of the Northwest Indiana Open Housing Center Inc. for lack of standing to bring a claim under the statute. The *Village of Bellwood* court discusses agency standing under the FHA and concludes that "*Havens* makes clear . . . that the only injury which need be shown to confer standing on a fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination. These are opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the defendant's discrimination." *Village of Bellwood*, 895 F.2d at 1526 (citing *Haynes Realty*, 455 U.S. at 471-75).

IV. TITLE VII EMPLOYMENT DISCRIMINATION CLAIMS AND STANDARDS

Generally, courts have looked to Title VII employment discrimination jurisprudence for guidance in deciding Title VIII housing discrimination claims.[93] Consequently, any examination of mortgage lending claims must commence with an overview of Title VII law. If a plaintiff provides direct evidence that an employment decision was made on a prohibited basis, e.g., race or gender, she will have established a prima facie case that the employer violated Title VII.[94] Alternatively, plaintiffs support their claims by showing either "indirect evidence which establishes an inference of discrimination"[95] or evidence indicating that a neutral policy has a disproportionately adverse impact on a class of persons that come under the statutory protections.[96]

The disparate treatment doctrine permits the inference of intentional discrimination from proof of circumstantial and indirect evidence of discrimination.[97] Under the *McDonnell Douglas* burden-shifting framework,

> [o]nce the plaintiff makes a *prima facie* showing, the defendant bears the burden of rebutting the plaintiff's case. While defendants are entitled merely to rebut a plaintiff's *prima facie* evidence, . . . they rarely rest their defense exclusively on such grounds. Defendants typically also attempt to show that the challenged practice is job-related and consistent with business necessity.[98]

In *Griggs v. Duke Power Company*,[99] a unanimous Supreme Court interpreted the language of Title VII[100] to mean that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of discriminatory employment practices."[101] The resulting

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[93] Mountain Side Mobile Estates Partnership v. Secretary of HUD, 56 F.3d 1243, 1250-51& n.7 (10th Cir. 1995) (citing Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993)).

[94] McCarthy v. Kemper Life Ins. Co., 924 F.2d 683, 686 (7th Cir. 1991); Hunt v. City of Markham, No. 97 C 5620, 1999 WL 35332, at *3 (N.D. Ill. Jan. 12, 1999).

[95] Powell v. City of Norfolk, Civ. Action No. 2:97-cv-73, 1998 U.S.Dist. LEXIS 15915 at *6 (E.D. Va. Aug. 17, 1998). *See also* Notari v. Denver Water Dep't, 971 F.2d 585, 589 (10th Cir. 1992).

[96] Peters v. Lieuallen, 693 F.2d 966, 968-69 (9th Cir. 1982).

[97] *See generally McDonnell Douglas Corp.*, 411 U.S. at 792.

[98] Mahoney, *supra* note 36, at 424 (citations omitted).

[99] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[100] Title VII provides in part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

[101] *Griggs*, 401 U.S. at 430.

doctrine of disparate impact[102] has provided a theory upon which a discrimination claim in the absence of circumstantial evidence of intentional discrimination may be based.[103]

Under disparate impact analysis, a plaintiff must plead and prove three elements to establish a prima facie case: "identification, impact, and causation."[104] Generally, "a plaintiff must show that the facially neutral practice had a *significant* discriminatory impact."[105] If a practice which produced a disproportionate impact against a protected class is a "business necessity," it may be permissible.[106] On the other hand, Title VII prohibits not only those practices that are unfair in form, but also those unfair in administration.[107] Evidence of disproportionate impact "is conventionally proved by a statistical comparison of the representation of the protected class in the applicant pool with representation in the group actually accepted from the pool.[108]

V. APPLICATION OF TITLE VII CASE LAW AND THEORIES TO MORTGAGE

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[102] Such a claim is within the amendments in the Civil Rights Act of 1991, § 3(3), Pub. L. No. 102-166, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (1999)). The statute provides in part:

> An unlawful employment practice based on disparate impact is established under this title only if--
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> . . .
> (B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
> (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

42 U.S.C. § 2000e-2(k)(1)(A), (B) (1994).

[103] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) (plurality opinion). Justice O'Connor summarized disparate impact doctrine in *Watson*: "In certain cases, facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate [Title VII] without proof that the employer adopted those practices with a discriminatory intent." *Id.* The plurality opinion in *Watson* has been cited more than 1090 times, "nearly always with approval and quite frequently for the analysis contained in the plurality portion of the opinion." Mahoney, *supra* note 36, at 422 & n.39. *See, e.g.*, EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995); Johnson v. Uncle Ben's Inc., 965 F.2d 1363, 1367 (5th Cir. 1992); Shutt v. Sandoz Crop Protection Corp., 944 F.2d 1431, 1433 (9th Cir. 1991); Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1370 (2d Cir. 1989); NAACP v. Town of E. Haven, 998 F. Supp. 176, 184 (D. Conn. 1998); Barnett v. Technology Int'l, Inc., 1 F. Supp.2d 572, 579 (E.D. Va. 1998); Finch v. Hercules Inc., 865 F. Supp. 1104, 1122 (D. Del. 1994).

[104] Mahoney, *supra* note 36, at 423 (referring to *Steamship Clerks Union, Local 1066*, 48 F.3d at 601).

[105] *See* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (emphasis added). For a recent Fourth Circuit case examining disparate impact analysis under Title VII, *see Barnett*, 1 F. Supp.2d at 579-81.

[106] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

[107] Mahoney, *supra* note 36, at 421.

[108] Saldana v. Citibank Fed. Sav. Bank, 1996 U.S. Dist. LEXIS 8327, at *12-13 (N.D. Ill. June 12, 1996).

LENDING DISCRIMINATION CLAIMS UNDER THE ECOA AND FHA

Having reviewed relevant employment discrimination standards, an examination of decisions in which courts have imported Title VII standards in deciding ECOA and FHA claims is appropriate. Recent claims in the mortgage loan discrimination context have tended to be based upon allegations of redlining or under-appraisal of the would-be borrower's residence.

A. *Redlining*

The term "redlining" refers to "mortgage credit discrimination based on the [racial composition] of the neighborhood surrounding the would-be borrower's dwelling."[109] Neither the ECOA nor the FHA explicitly includes or defines "redlining."[110] Establishing a prima facie case of redlining is somewhat different from other mortgage lending discrimination claims, in that the lending institution's alleged discrimination is based on the racial character of a neighborhood rather than the race of a loan applicant.

In *Doane v. National Westminster Bank USA*,[111] the plaintiff was a white male owner of a residence in Brooklyn, New York.[112] He desired to sell his home located in Bedford-Stuyvesant, then comprised of 92.56% black residents.[113] He contracted with two creditworthy black mortgage loan applicants to sell his home for $195,000.[114] The defendant lender, NatWest appraised the house at $175,000, but said it would extend the mortgage "if plaintiff agreed to reduce the purchase price to $185,000."[115] Although Doane lowered the sale price on the residence, as suggested, NatWest denied the mortgage application.[116] An independent appraisal commissioned by the plaintiff "estimated that the value of the property . . . was $197,000."[117] The court adopted a test from a factually similar Ohio decision, *Old West End Association v. Buckeye Federal Savings and Loan*,[118] and required that Doane establish his prima facie case of mortgage lending discrimination by proving that: (1) the property was in a minority neighborhood; (2) the buyer applied for and qualified for a loan from the defendant lending institution; (3) an independent appraisal showed that the house's value equaled its sale price; and, that (4) the defendant rejected the buyer's loan application.[119] Ultimately, Doane withstood the defendant's motion to dismiss.[120]

The district court opinion in *Latimore* illustrates the challenge plaintiffs face in litigating mortgage lending discrimination claims.[121] Because a relatively small body of case law exists in this context, claimants generally argue by analogy to Title VII case

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[109] Thomas v. First Fed. Sav. Bank, 653 F. Supp. 1330, 1337 (N.D. Ind. 1987) (quoting Town of Springfield v. McCarren, 549 F. Supp. 1134, 1142 (D. Vt. 1982)). *See also* Cartwright v. American Sav. & Loan Ass'n, 880 F.2d 912, 922 (7th Cir. 1989).

[110] National State Bank v. Long, 630 F.2d 981, 986 (3d Cir. 1980) (holding that "national banks are subject to the provisions of a state antiredlining statute when federal legislation has covered some, but not all, of the field"). *Id.* at 982.

[111] Doane v. National Westminster Bank USA, 938 F. Supp. 149 (E.D.N.Y. 1996).

[112] *Id.* at 150.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987). *See also* Steptoe v. Savings of Am., 800 F. Supp. 1542, 1546 (N.D. Ohio 1992) (referring to *Old West End Ass'n*, 675 F. Supp. at 1103).

[119] *Doane*, 938 F. Supp. at 152.

[120] *Id.* at 153.

[121] *See generally* Latimore v. Citibank F.S.B., 979 F. Supp. 662 (N.D. Ill. 1997).

law. Alternatively, they advocate the adoption of standards and tests from other jurisdictions' mortgage lending discrimination decisions. However, the district court in *Latimore* explicitly rejected the *Old West End Association* test because "this particular formulation . . . has not been used anywhere besides the Northern District of Ohio."[122] Instead, the court adopted the elements of a prima facie case under Title VII, requiring that the plaintiff prove "(1) that she is a member of a protected class, (2) that she applied for and was qualified for a loan, (3) that the loan was rejected despite her qualifications, and (4) that the defendants continued to approve loans for applicants with qualifications similar to those of the plaintiff."[123]

This test, which is very similar to the *MCDonnell Douglas* test, was also adopted by the court in *Saldana v. Citibank Federal Savings Bank.*[124] In *Saldana,* an Illinois plaintiff alleged that the denial of her loan application "for an acquisition and rehab construction loan" resulted from a policy of redlining in violation of both the FHA and the ECOA.[125] Saldana argued unsuccessfully that the fourth prong of the test was irrelevant to redlining claims since the refusal to approve or deny credit depends upon the racial character of the neighborhood rather than "the race of the applicant."[126] The court found that the fourth prong was "a necessary element to prove redlining."[127] Specifically, a plaintiff alleging redlining must prove that the mortgage lender "continued to approve loans for applicants with qualifications similar to the plaintiff's."[128]

Home Mortgage Disclosure Act[129] data has proved extremely useful to both plaintiffs and community housing groups seeking evidence of redlining in minority neighborhoods.[130] Since 1975, the Home Mortgage Disclosure Act of 1975 ("HMDA"),[131] has required most lenders[132] to compile and make publicly available[133] overall approval and rejection rates as well as the number and total dollar amount of loans originated or purchased by that institution during the previous fiscal year. However, because lenders need not disclose the reasons for loan rejections, at least one court has held that "HMDA data, standing alone and without additional evidence, [does] not prove a claim of redlining."[134]

B. *Appraisals*

The importance of appraisals in the

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[122] *Id.* at 667.

[123] *Id.* at 664-65. The test originated in *McDonnell Douglas*, 411 U.S. at 824. The *McDonnell Douglas* formulation has been adopted by the following courts in mortgage lending discrimination cases: *Thomas*, 653 F. Supp. at 1338; Gross v. Small Bus. Admin., 669 F. Supp. 50, 53 (N.D.N.Y. 1987); Bell v. Mike Ford Realty Co., 857 F. Supp. 1550, 1556 (S.D. Ala. 1994).

[124] Saldana v. Citibank Fed. Sav. Bank, No. 93 C 4164, 1996 WL 332451, at *2 (N.D. Ill. June 13, 1996)

[125] *Id.* at *1-3 (referring to Milton v. Bankplus Mortgage Corp., No. 96 C 106, 1996 WL 197532, at *2 (N.D. Ill. April 19, 1996)). Saldana pursued her claim under both disparate treatment and disparate impact theories. *Saldana*, 1996 WL 332451, at *4-5. This article only discusses her disparate treatment argument.

[126] *Saldana*, 1996 WL 332451, at *3.

[127] *Id.*

[128] *Id.*

[129] 12 U.S.C. §§ 2801-2810 (1994 & Supp. III 1997).

[130] Dane, *supra* note 21, at 550.

[131] Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, tit. III, 89 Stat. 1124, 1125 (codified as amended at 12 U.S.C. §§ 2801-2810 (1994 & Supp. III 1997)). For a fuller discussion of the applicability of the HMDA to mortgage lending discrimination, *see generally Boehmer, supra* note 4, at 615-17.

[132] Generally, small lenders are exempt from the HMDA reporting requirements. 12 U.S.C. § 2808.

[133] The lending institution must make the HMDA statistical data available for inspection and copying at the home office and at least one branch office within the primary metropolitan area. 12 U.S.C. § 2803(a)(1).

[134] Dane, *supra* note 21, at 551 & n.12 (referring to *Thomas*, 653 F. Supp. at 1341).

credit extension process cannot be overestimated. "An appraised value that is less than the selling price increases the loan-to-value ratio and either disqualifies the applicant or increases the required down payment."[135] The history of racial discrimination in appraisals dates back to the 1930's at which time "the federal government became active in the residential mortgage market."[136] At that time, "it embraced and nationalized racially discriminatory home mortgage underwriting criteria."[137] As recently as 1977, *The Appraisal of Real Estate*, a widely used text, instructed appraisers to adjust downward the value of residential property located in a racially mixed neighborhood.[138] Further, "[t]he 'principal [sic] of conformity' categorized different ethnic groups according to their detrimental effect upon property values after their 'infiltration' into the neighborhood."[139] This practice ceased following the settlement of *United States v. A.I.R.E.A.*, a case brought against an association of real estate appraisers by the United States Department of Justice ("DOJ") for "encouraging the practice of taking racial make-up of neighborhoods into account in doing housing appraisals."[140]

Generally, residential market value is calculated using the "market approach."[141] An appraiser using the market approach locates existing homes recently sold which are substantially similar to the property being appraised.[142] The comparable sale prices provide the starting point from which the appraiser adjusts the calculation of the target property.[143] The calculation is adjusted based on "differences between the comparable [-sale]" properties and the subject property being appraised.[144] One piece of relevant market-value data is expressly ignored in the market-approach appraisal process: the agreed-upon selling price.[145]

If the appraisal is too low to support the applied-for mortgage based on the lender's loan-to-value ratio, the seller in the residential transaction has two choices: (1) he can accept his buyer's lower offer, that is, conform the contractual sale price to the amount the bank will lend based on the under-appraisal, or (2) he can reject a lower price and commence his search for a new buyer.[146]

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[135] Zina Gefter Greene, *Reviewing Loan Files for Evidence of Discrimination,* 28 J. MARSHALL L. REV. 351, 356 (1995). In *Latimore*, for example, "[f]or the type of loan Ms. Latimore was seeking, Citibank's lending criteria required a loan-to-value ratio of, at most, 75 percent." *Latimore*, 979 F. Supp. at 663.

[136] Dane, *supra* note 21, at 528.

[137] *Id.* For a complete discussion of the history of discrimination in residential appraisals and lending, *see* Dane, *supra* note 21, at 533-38 and accompanying references.

[138] Hanson v. Veteran's Admin., 800 F.2d 1381, 1387 (5th Cir. 1986).

[139] *Id.*

[140] Robert G. Schwemm, *Introduction to Mortgage Lending Discrimination Law,* 28 J. MARSHALL L. REV. 317, 319 & nn.11, 12 (1995) (discussing United States v. A.I.R.E.A., 442 F. Supp. 1072 (N.D. Ill. 1977)). A.I.R.E.A. agreed to adopt policies prohibiting taking into account "race, color, religion, sex or national origin" when reaching "conclusion[s] or opinion[s] of value" of property. *A.I.R.E.A.*, 442 F. Supp. at 1077.

[141] David B. Soleymani, *The New York Assessment Anomaly: Valuation Following Condominium Conversion*, 1987 COLUMBIA BUS. L. REV. 733, 735 (1987). The income approach and cost approach are the alternative appraisal methods, with the income approach generally utilized in valuing businesses and the cost approach applied to value new buildings. *Id.*

[142] Cartwright v. American Sav. & Loan Ass'n, 880 F.2d 912, 914 & n.4 (7th Cir. 1989). *See also* Hanson v. Veterans Admin., 800 F.2d 1381, 1383 (5th Cir. 1986); *Steptoe*, 800 F. Supp. at 1544 & n.3.

[143] *Hanson*, 800 F.2d at 1383.

[144] *Id.*

[145] *Id.*

[146] *Steptoe*, 800 F. Supp. at 1546. "The prospective purchaser/borrower, faced with an appraisal that will not support his loan request, is faced with two choices: (1) hope that he can renegotiate the purchase price to conform with the lowballed appraisal, or (2) withdraw his loan application as to that particular piece of property." *Id.*

When a seller selects option one, a sale is concluded for less than the originally agreed-upon selling price, or the market-produced price. Arguably, this lower sale price will become one of the "comparables" that justify a low appraisal on the next residential property sold in that neighborhood. "Discriminatory appraisal may effectively prevent blacks from purchasing or selling a home for its fair market value."[147] Plaintiffs have argued that, over time, "property values . . . continue to be artificially restrained from rising to the rate at which they would otherwise rise if left to the operation of normal market forces, in contrast to the property values in comparable white neighborhoods."[148]

Low appraisals may indicate a mortgage lender's intent to redline an area. Within the mortgage lending industry, the term "under-appraisal" refers to an appraisal estimate that is lower than the price agreed-upon by a prospective purchaser.[149] Applicants denied home mortgage loans due to an under-appraisal of the property they desire to purchase may only file a claim under the FHA.[150] Appraisers do not fall within the provisions of the ECOA, since the Act only prohibits discriminatory acts by "creditors."[151] *Hanson v. Veterans Administration*[152] typifies the difficulties inherent in proving allegations of redlining and under-appraisal in home mortgage lending. The plaintiffs were all parties who owned or sought to buy property "in the MacGregor subdivision, a predominately black, middle class neighborhood."[153] In each instance, owners of MacGregor residences entered into agreements to sell with prospective purchasers.[154] Subsequent Veterans Administration ("VA") under-appraisals "caused many of the prospective purchasers to reduce their offers or look elsewhere for a home where a 100% VA loan was available."[155] The plaintiffs utilized both disparate treatment and disparate impact analysis to support their claims that "the application of racially discriminatory appraisal practices by the VA" appraisers resulted in under-appraisals of their residential properties.[156]

Complainants sought to establish their prima facie case of disparate treatment by producing evidence that the Veterans Administration's appraisers were trained to conduct appraisals according to the "principle of conformity"[157] and "continued to apply it" in appraising the MacGregor property.[158] "[S]everal VA appraisal reports concerning MacGregor property referred to 'economic depreciation,' 'changes in the neighborhood' and 'lack of pride of ownership,' all of which [plaintiffs'] experts testified indicated racial considerations."[159] The VA countered with five local appraisers who testified that those phrases were free of racial connotation, and the district court found the testimony of the VA's witnesses to be more credible.[160] The appellate court reviewed the district court's finding and held it was not clearly erroneous.[161] Finally, the *Hanson* plaintiffs unsuccessfully argued that numerous errors in the VA appraisals, "all of which tended to justify lower appraisal," combined to "create

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[147] *Hanson*, 800 F.2d at 1386.
[148] *Id.* at 1387 n.7 (quoting appellants' argument).
[149] *Id.* at 1383.
[150] 42 U.S.C. § 3605(b)(2) (1994) (prohibiting discriminatory appraisals).
[151] *See infra* note 74 for a definition of "creditors" under the ECOA.
[152] 800 F.2d 1381 (5th Cir. 1986).
[153] *Id.* at 1383.
[154] *Id.*
[155] *Id.* at 1383 & n.4.
[156] *Id.* at 1384.
[157] *Id.* at 1387.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 1388.
[161] *Id.*

an inference of racial bias."[162] The Fifth Circuit upheld the district court's characterization of these mistakes as "independent instances of human error."[163]

VI. CONCLUSION

The rollback of affirmative action gains in the contexts of government contracting and higher education[164] has deservedly seized the attention of civil rights activists in the 1990's. Yet mortgage lending discrimination remains one of the principal civil rights issues limiting the ability of creditworthy black citizens to move into society's middle-class.[165] Federal fair housing and lending statutes continue to have little impact on statistics indicating a wide disparity in the approval rates of black and white credit applicants.

When the FHA and ECOA were enacted, racial discrimination often resulted from overtly discriminatory housing practices. Contemporary mortgage lending discrimination generally is subtle. A reporter for the Orlando Sentinel recently provided a list of tactics employed by racially discriminatory creditors:

> A low appraisal. Endless requests for more documentation and paperwork. Unexplained loan processing delays. Failure to return phone calls promptly. Unequal treatment. Discourtesy. Bait and switch. Failure to provide a loan application form. Refusal to put loan details in writing. Approval for less than the loan amount requested.[166]

These practices allow creditors to avoid making home loans to qualified applicants without actually rejecting their applications.[167]

Further, significant discrepancies in the rejection rates of minority and white mortgage applications remain.[168] Based on a survey of 14.8 million loan applications from 1996, the Federal Financial Institutions Examination Council ("the Council")[169] reported that "48.8 percent of black applicants were denied their loan applications, while only 24.1 percent of white applicants were denied."[170] While the approval rate for loans increased for all groups, loans to blacks increased only 3.1 percent.[171] Home Mortgage Disclosure Act data for the previous two years showed a decline in conventional home

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[162] *Id.*

[163] *Hanson*, 800 F.2d at 1388.

[164] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (addressing the legality of minority set-asides in the distribution of government contracts); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that the University of Texas School of Law violated the Fourteenth Amendment by giving racial preferences in its admissions process to minority applicants).

[165] Evans v. First Fed. Sav. Bank, 669 F. Supp. 915, 920 (N.D. Ind. 1987). "The financial and tax benefits that result from the purchase of a home, including the eventual accural [sic] of equity, make home ownership an attractive investment for those who can afford it. Using the equity in one's already-owned home as collateral for a loan is a valued and common practice in this country and, as such, is a significant interest associated with home ownership." *Id.*

[166] Robert Bruss, *How to Spot Mortgage Discrimination*, ORLANDO SENTINEL, January 17, 1999.

[167] *Id.*

[168] Boehmer, *supra* note 4, at 604.

[169] "The Council is a consortium of five federal financial groups." *See infra* note 170.

[170] America's Thin Red Line, http://more.abcnews.go.com/sections/us/loans805/index.html (January 7, 1999).

[171] *Id.* "At the same time, the overall approval rate for loans for all groups increased, with lending to Hispanics up 13.4 percent; Native Americans loans up 11.4 percent; loans to Asians up 8.2 percent; loans to whites up 8.1 percent." *Id.*

mortgage lending to black consumers.[172] At the same time, FHA lending to blacks has shown a substantial increase, "more than offset[ting] the decline in conventional lending."[173]

On November 24, 1998, officials at the National Community Reinvestment Coalition ("NCRC") "released a study indicating that "the gap between minorities and whites being denied home mortgages widened . . . [between] 1996 and 1997."[174] Further, much of the new lending to black consumers has consisted of subprime loans, where the interest rate "can run from over 8 percent to as high as 15 percent."[175] Comparable conventional home mortgage rates are "6.5 percent to 7 percent."[176] Fully "19 percent of all single-family home loans to blacks" were subprime loans.[177] In contrast, only "6.9 percent of loans to whites and 8.6 percent [of loans] to Hispanics" were subprime loans.[178]

Professor Robert Boehmer of the University of Georgia suggests that:

> When this long-standing prohibition of mortgage discrimination is viewed alongside a continued pattern of racial disparity in loan approval rates, the conclusion is compelled that it is time for a new approach. This approach should not water down the existing law but should recognize that, to the extent the law is so complex that it cannot be readily understood by those regulated, it is more likely to foster litigation than to achieve its goals. This fresh approach should further recognize that to the extent that a law contains inconsistencies and unnecessarily burdensome regulatory requirements, those regulated are less likely to comply voluntarily.[179]

The current ambiguity as to whether Title VII standards are imported into the mortgage discrimination lending context creates much of the inconsistency to which Professor Boehmer refers. Congress must take immediate action to eliminate this inconsistency and encourage private enforcement of the existing statutory prohibitions against redlining. Further, civil rights advocates should press for codification of the relationship between fair lending and employment discrimination case law. Finally, clarification could be obtained if the Supreme Court were to grant certiorari and hear an appeal as to mortgage lending discrimination. Doing so would provide the Court with an opportunity to establish binding precedent as to the application of employment discrimination standards to mortgage lending discrimination litigation.

Both Latimore's and Citibank's counsel presented their cases within the framework of

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[172] *Examiners Watching for FHA Loan Steering*, NATIONAL MORTGAGE NEWS, Nov. 19, 1998.

[173] *Id.*

[174] *Study Finds Blacks Paying Premium for Mortgages National Community Reinvestment Coalition Sees Wider Gap Between Minorities, Whites on Home Loans,* SAN ANTONIO EXPRESS-NEWS, Nov. 25, 1998. The Coalition analyzed data submitted by banks, thrifts and mortgage companies to the federal government. *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* The data includes mortgages, refinancings and home improvement loans.

[178] *Id.*

[179] Boehmer, *supra* note 4, at 604 (citations omitted). The "new approach" Boehmer recommends combines a reduction in the regulatorily required paperwork with "vigorous enforcement" and community reinvestment incentives. *Id.* at 605.

McDonnell Douglas. The *Latimore* decision raises doubts about the future viability of private mortgage lending discrimination claims. Congress must provide certainty to all parties to these lawsuits -- mortgage loan applicants, lending institutions, fair housing advocacy groups, plaintiffs' and defendants' counsel -- that Title VII law *is* applicable to mortgage lending discrimination claims. Otherwise, the long-term result of *Latimore* may well be an increasing reluctance on the part of plaintiffs' bar to take clients who allege mortgage lending discrimination.