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USING THE LAW TO BREAK DISCRIMINATORY BARRIERS TO FAIR LENDING FOR HOME OWNERSHIP

DAVID H. HARRIS, JR.*

I. INTRODUCTION.

Home ownership is the linchpin in the American Dream, the main way families accumulate and hold wealth. Americans borrow against their homes for education, for vacations, for emergencies, for retirement. The family home often forms the bulk of parents' bequests to their children.¹

For most persons, credit is necessary to own a home — or to purchase a car, or to own or operate a business. Access to credit is particularly essential for successful economic development activities to improve economically distressed communities. At the heart of this quest for economic well-being is the desire to own a home.

However, access to the credit necessary to purchase a home is severely restricted by the limited number and capacity of minority-owned/controlled lending institutions and the pervasive discriminatory practices by majority-owned/controlled banks and savings and loans associations. Discrimination in mortgage lending is an essential ingredient in the problem of housing discrimination and segregated housing patterns.²

This article examines discriminatory lending practices and their impact on home ownership. In addition, this article will discuss legal remedies and strategies available to individuals. For attorneys who

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1. Bill Dedman, *The Color of Money* (pt. 1), *THE ATLANTA JOURNAL-CONSTITUTION*, May 1, 1988, at 6.

2. For more information on segregated housing patterns, see ROBERT D. BULLARD ET AL., *RESIDENTIAL APARTHEID: THE AMERICA LEGACY* (1994); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

represent financial institutions, suggestions on how to eliminate discrimination at client institutions will also be addressed.

Discrimination by governmental agencies, such as the Farmers Home Administration,³ and discrimination in lending to minority-owned businesses, while also problematic, will not be discussed.⁴ This article focuses on discrimination in housing lending by private financial institutions.

Also pervasive, but not to be discussed in this article, is discriminatory practices by realtors in violation of the Fair Housing Act,⁵ homeowner insurance redlining, predatory practices by consumer finance companies, and discriminatory practices by private mortgage insurance companies. An informative article on homeowner insurance redlining and discriminatory practices by private mortgage insurance companies is cited in the footnote.⁶

II. DESCRIPTION OF THE PROBLEM.

From the beginning, persons of color⁷ have faced discrimination in housing and lending. For example, since the days of Reconstruction, the availability of affordable credit to raise crops, buy land, build a home, purchase seed and fertilizer to raise crops and feed animals, and acquire a business has eluded African-Americans. Historically, majority-owned banking institutions have either refused to loan money to Americans of African descent or loaned funds at very deleterious terms compared to their non-black customers — such as charging higher finance charges.⁸ Similar practices were perpetrated by owners of farm supply stores and white landowners under so called “sharecropping” arrangements. Given these and other practices, the

3. The Farmers Home Administration (FmHA), part of the United States Department of Agriculture (USDA), was a federal agency that provided, *inter alia*, loans and technical assistance to limited-resource and beginning farmers and housing loans to low to moderate income rural residents. The farm loans programs of the Farmers Home Administration were consolidated into the Consolidated Farm Service Agency. Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 226, 108 Stat. 3178 (codified as amended in scattered sections of 7 U.S.C. (1994)).

4. For information on these issues, contact the author (1-800-672-5839).

5. Pub. L. No. 100-430, 102 Stat. 1636 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)).

6. Penny Loeb et al., *The New Redlining: It's Different from the Old, But Minorities are Still Getting Shortchanged*, U.S. NEWS & WORLD REP. 51 (Apr. 17, 1995) [hereinafter *The New Redlining*].

7. For purposes of this article, the terms “persons of color,” “minority” and “minorities” will refer to all noncaucasian ethnic groups, the members of which have been subjected to racial, ethnic or cultural prejudice because of the identity of the persons as members of a group, without regard to the qualities of the members. These groups include African-Americans (blacks), Native Americans, Alaskan Natives, Latinos, Asians, and/or Pacific Islanders.

8. See generally, U.S. COMM’N ON CIV. RTS., *THE DECLINE OF BLACK FARMING IN AMERICA* 14-43 (Feb. 1982) [hereinafter *The Decline of Black Farming*].

progress blacks made towards landownership and economic self-determination by the early 20th Century, i.e., 15 million acres of land owned by black farmers by 1910,⁹ 925,710 black-owned or operated farms by 1920,¹⁰ and 50 black-owned banks by 1911,¹¹ is nothing short of miraculous.

Despite the Civil Rights movement of the 1960's and the multitude of anti-discrimination laws enacted during the 1960's and 1970's, discrimination in the availability and the terms and conditions of credit has continued almost unabated. To add insult to injury, just as the federal government has become more active in enforcing anti-credit discrimination laws, there has been a concerted effort in Congress, fueled by the banking industry, to gut anti-credit discrimination laws and obliterate the Justice Department's ability to file enforcement actions against lending institutions that violate fair lending laws.¹²

Many studies and analyses of lending data confirm that banks and thrifts continue to discriminate voraciously. For example, a 1988 study showed that whites received five times the number of loans from banks and savings and loans in Atlanta as blacks with the same income.¹³ The same study concluded that "race — not home value or household income — consistently determine[d] the lending patterns of metro Atlanta's largest financial institutions."¹⁴ This study of banks in Atlanta suggested that majority-owned banks had declination rates — the ratio of rejected loan applications — of blacks over whites of four to one. "Even lower-income white neighborhoods received more of their loans from banks than upper-middle-income black neighborhoods."¹⁵

A recent study of 1992 Home Mortgage Disclosure Act (HMDA) data of North Carolina banks showed a uniformly higher declination rate of blacks than whites in the metropolitan statistical areas surveyed.¹⁶ These areas included Asheville, Fayetteville, Charlotte, Raleigh-Durham and Wilmington, among others. In 1991, NCBN's (now NationsBank) average home mortgage rejection rate in North Caro-

9. THE BLACK LANDOWNER - ENDANGERED SPECIES — SOCIAL, POLITICAL, AND ECONOMIC IMPLICATIONS, at xvii (Leo McGee & Robert Boone eds., 1979).

10. *The Decline of Black Farming*, *supra* note 8, at 3.

11. *Id.* at 21.

12. See H.R. 1858, 104th Cong., Reg. Sess. (June 15, 1995); H.R. 1362, 104th Cong. Reg. Sess. (Mar. 30, 1995); S. 650, 104th Cong., Reg. Sess. (Mar. 30, 1995); see also John Taylor, *CRA is Finally Working - But Congress Aims to Kill It*, Reinvestment Works (National Community Reinvestment Coalition Publication), Summer 1995 at 1.

13. Dedman, *supra* note 1, at 1.

14. *Id.*

15. *Id.* at 3.

16. Peter Skillern, *An Analysis of 1992 Mortgage Lending Activity to African-American and Low-Income Households in North Carolina Metropolitan Statistical Areas* (May 10, 1994) (Appendix A) (on file with the author).

lina for upper income blacks was twelve percent higher than upper income whites, for a 1.52 denial ratio of minorities to whites. A comparison of the ratios for loan denials for minorities versus whites in some of the metropolitan areas studied revealed that denials for minorities exceeded denials for whites by a range of 16 to 100 percent.¹⁷ The 1992 HMDA data revealed that NationsBank had an average black-to-white declination rate of 2.172, a rate higher than its predecessor in the previous year. Instead of exemplifying a reduction in discrimination in lending, the data seems to show an increase in the occurrences of disparate treatment.

In that same study, the performance of North Carolina financial institutions was ranked to generate a "report card" based on indicators providing a composite score of lending patterns to low income and minority households.¹⁸ Indicators included variables such as market share by race; ratio of loans in high income census tracts to those made in low income tracts; average loan size; and percentage of FHA/VA/FmHA loans made. The overall statewide grade received for all financial institutions was "C". Only three financial institutions received overall individual grades of "A" in metropolitan statistical areas. One of those institutions is the state's largest minority-controlled financial institution, Mechanics and Farmers Bank. Of the fourteen institutions studied, eight received a grade of "C" or below. This report card demonstrates the lack of actual, aggressive effort by banks and financial institutions to eliminate the problem of illegal racial discrepancy in lending.

A 1992 magazine article reported on the findings of a study by the Boston Federal Reserve demonstrating systematic racial discrimination in mortgage lending, even after taking into account applicants' credit histories.¹⁹ The study focused on 131 financial institutions in the Boston metropolitan area and found that even when two applicants were identical in every economic respect, including credit history, a minority applicant was sixty percent more likely to be rejected than a white applicant. The study found that the system of discrimination engaged in by these institutions was not determined by the income of the applicant or by the size of the financial institution.²⁰ The results of this study sharply cut into the arguments by many bankers that federal reports on discriminatory lending were not plausible because applicants' credit histories were not considered.

17. *Id.* at 2.

18. *Id.* at Appendix B (table ranking by letter grade the performance of fourteen North Carolina financial institutions in metropolitan statistical areas).

19. Frank Shaforth, *Cities and Banking: To Reinvest or Disinvest* (pt 2), NATION'S CITIES WKLY., Nov. 16, 1992, available in LEXIS, News Library, ASAPII File.

20. *Id.*

A recently released study of 1993 mortgage lending activity involving African-American and low income households in the Durham/Raleigh, North Carolina Metropolitan Statistical Area examined the mortgage lending performance of the region's eleven largest financial institutions, the state's largest minority-controlled institution, and the state's largest credit union.²¹ Analyzing HMDA data, the study reviewed factors such as the percent of portfolio lent to black and low income groups, as well as comparing the rates of denials for black and white applicants. The results of the study clearly indicated that the lending patterns of many of North Carolina's most prominent institutions severely limit the ability of minority and low income borrowers to purchase their own homes. The report clearly shows that race and income continue to be major factors in determining whether institutions in North Carolina will approve home ownership loan applications.²²

In late 1994, *U.S. News & World Report* began a six-month investigation into banking, lending and home insurance coverage in poor and minority communities.²³ The study included data from 200 interviews conducted in twelve cities across the nation and nine sets of banking and insurance industry data, including more than twenty-four million mortgage records. The study found that the number of poor and minority homeowners who could not obtain full-coverage property insurance was nearly fifty percent greater than residents of predominately white, middle class areas. The study found banks were fleeing poor neighborhoods in even greater numbers than before, irrespective of federal laws prohibiting such action. In examining data from the Federal Deposit Insurance Corporation,²⁴ *U.S. News & World Report* discovered that in 31 percent of the nation's urban areas, the number of bank branches in white neighborhoods has tripled in the past two decades compared with the number of branches in mostly minority neighborhoods. According to this study, there are an average of thirty-eight bank branches per 100,000 residents in white areas, but only twenty-two branches per 100,000 residents in minority neighborhoods. For middle income blacks living in predominately minority areas, the rejection rate for mortgage loans was 37 percent while the rejection rate for middle income whites living in predominately white areas was 18 percent. Overall, residents of middle income white neighborhoods received 61 percent more mortgage loans than resi-

21. Peter Skillern, *An Analysis of 1993 Mortgage Lending Activity to African-American and Low-Income Households in Durham/Raleigh, North Carolina Metropolitan Statistical Area* (June 5, 1995) (Unpublished report, on file with the author).

22. *Id.*

23. *The New Redlining*, *supra* note 6, at 51.

24. *See infra* note 38.

dents of middle income minority areas. The study listed larger cities with significant minority populations that had the greatest disparity between bank branches and conventional home loans in white and minority areas.²⁵

"Redlining" is one practice that banks and thrifts use to deny loans to minority persons and businesses. "Redlining is [the] . . . practice of refusing to lend in certain neighborhoods on the basis of race, ethnic composition or any standards other than creditworthiness. The definition comes from the practice of drawing a red line on a map around certain neighborhoods to designate them as off-limits."²⁶ Despite the enactment of the Fair Housing Act, the Community Reinvestment Act, the Equal Credit Opportunity Act, and the Home Mortgage Disclosure Act, redlining continues, according to some bank officials who have admitted privately that they refuse to loan money to persons living in or near property located in certain zip codes.²⁷ As is evident from the *U.S. News & World Report* study and report, "insurance redlining" has become common practice,²⁸ further thwarting the American Dream of home ownership for many persons of color.

Credit discrimination takes other forms: the closing of branch offices in areas that become inhabited by minority or low income persons;²⁹ the refusal to open branches in black communities, including middle income black communities; requiring high minimum balances to open accounts; refusal to cash checks for non-depositors, even government checks held by persons with the proper identification; the general refusal to seek minority clients or businesses; the increasing refusal to make small loans to small businesses; and, the increasing refusal to make loans to small farm operators.³⁰

Although many reasons are given, the refusal to make mortgage loans to minorities is inexcusable. The Atlanta study showed that one black-owned bank, Citizens Trust, a bank making the bulk of the mortgage loans to blacks, had a lower default rate than the six largest banks in Atlanta.³¹

The impact of discriminatory credit practices is devastating upon communities of color. Few immigrants came to this nation with more than the shirts on their backs, and the slaves who arrived had even less. However, all immigrants, voluntary or involuntary, learned of the American Dream — the hope that "with hard work and persever-

25. *Id.* at 52.

26. Dedman, *supra* note 1, at 2.

27. *Id.* at 10.

28. *The New Redlining*, *supra* note 6, at 52.

29. *Id.*

30. *Id.*

31. *Id.*

ance, wealth and the ability to feed your family and to fully participate in the democratic process in the community can be yours." Discrimination in credit prevents attainment of this Dream.

The Atlanta Constitution article stated the dilemma best: "Without equal access to credit . . . neighborhoods slide. When people cannot borrow money to buy or fix up houses, property values decline. Real estate agents direct their best prospects elsewhere. Appraisers hedge their bets by undervaluing property. Businesses close. Homeowners sell to speculators."³² Credit discrimination is the first ingredient in the recipe for black land loss.

The cycle of poverty that permeates communities of color is also a result of this problem. Job discrimination prevents many persons of color from earning the income necessary to feed and educate their families. Credit discrimination prevents the creation and growth of minority-owned businesses that provide jobs in minority communities and increase the overall wealth of minority communities through the multiplier effect.

Housing patterns created by discriminatory housing and lending practices contribute to the problem of environmental racism. Discrimination in housing and housing lending limits the choices persons of color have of where they can live, creating segregated housing patterns that have been nearly impossible to break. A black person who makes \$50,000 per year has fewer choices in where he or she can live and thus is more segregated than an Hispanic person making \$2,500.³³ Race, not class, is the dominant determinant of where blacks are allowed to live.³⁴ Many middle class African-Americans attempting to "escape" the inner city find themselves "re-segregated into what sociologists call the 'inner ring' or 'near-in suburbs,' such as Prince George's County or Silver Spring, in Maryland, which surround Washington, D.C."³⁵ The net result is that both middle and working class blacks lack freedom of movement and end up living in defined pockets not unlike the black townships of South Africa.

Once "stuck," African-Americans and other people of color find their neighborhoods become the easy, preferable targets for hazardous waste dump sites, solid waste landfills, facilities that discharge pollutants into the air and water, and other noxious facilities. Waste-management firms find it politically expedient and economically pref-

32. Dedman, *supra* note 1, at 6 (pt 1).

33. Scott Minerbrook, *Home Ownership Anchors The Middle Class — But Lending Games Sink Many Prospective Owners*, EMERGE MAG. 42, 44 (Oct. 1993), discussing DOUGLAS S. MASEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

34. *Id.*

35. *Id.*

erable to site facilities in minority communities. A polluter will, like most things, travel the course of least resistance. Those who live in white neighborhoods, especially middle and upper income neighborhoods, have the economic resources and political clout to fight off a toxic facility planning to move into their areas. Majority white city councils enact ordinances that protect white neighborhoods, but not black neighborhoods, from noxious facilities. When all else fails, the white residents can "vote with their feet" and exodus the area.

The residents of African-American communities, on the other hand, lack the income and the political power or will to keep polluting industries from moving into their neighborhoods.

Racial and ethnic communities have been and continue to be beset by poverty, unemployment and problems related to poor housing, education and health. These communities cannot afford the luxury of being primarily concerned about the quality of their environment when confronted by a plethora of pressing problems related to their day-to-day survival.³⁶

Key factors in the siting of poisonous polluting facilities in communities of color are poverty and the lack of real community economic development activities in minority and economically distressed communities. Within this context [of discrimination and poverty], racial and ethnic communities become particularly vulnerable to those who advocate the siting of a hazardous waste facility as an avenue for employment and economic development. Thus, proposals that economic incentives be offered to mitigate local opposition to the establishment of new hazardous waste facilities raise disturbing social policy questions.³⁷

Consequently, as discrimination in housing and lending continue, and as policymakers continue their failure to develop sustainable solutions to poverty in minority and low income communities, including rural areas, these communities become prime targets of polluters. The residents lack the political power or will to fight off these polluters and to "fight city hall." Also, local residents and policymakers are tricked into embracing these polluters by the promise of job creation.

Even if they had the income, housing discrimination limits the ability of persons of color to "vote with their feet" and escape polluting facilities. Middle class blacks are also victims of housing discrimination and their neighborhoods are not immune from the nearby siting of a polluting facility.

36. Benjamin A. Goldman & Laura Fitton, *Toxic Wastes and Race in the United States, A National Report on the Racial and Social Economic Characteristics of Communities with Hazardous Waste Sites* 7, 8 (Commission for Racial Justice 1987) [hereinafter *Toxic Wastes*].

37. *Id.* at 8.

In sum, many of the problems that plague poor and inner-city communities and communities of color can be traced to economic discrimination as well as political discrimination. Discrimination in the availability, terms and conditions of credit is part of this economic discrimination. It is necessary for the survival and advancement of communities of color that the problem of credit discrimination be eliminated.

For a long time, bank regulators³⁸ tried to pretend that discrimination in banking did not exist. However, this trend is changing, starting with the Decatur Federal Savings & Loan case.³⁹

III. CONGRESSIONAL RESPONSE.

The first major congressional response to discriminatory lending practices occurred in the mid-1970's when it passed the Equal Credit Opportunity Act and the Community Reinvestment Act. This legislation, however, was preceded by the Fair Housing Act of 1968.

A. *Equal Credit Opportunity Act*

Congress first enacted Title VII of the Consumer Protection Act of 1974, known as the Equal Credit Opportunity Act (ECOA), to prohibit credit discrimination against women. Congress amended the ECOA in 1976 to also prohibit credit discrimination on the basis of race, color, religion, national origin, and age. The ECOA, as amended, provides in pertinent part:

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

38. Banking regulators are federal and state bodies that examine and supervise banking institutions for financially sound risk management based on the individual bank's charter. The regulator's role is to ensure the bank or financial institution is operating in accordance with government regulations, which include safe financial management with adequate capital, non-discriminatory lending practices, and productive community investment. There are four federal regulators: the Federal Deposit Insurance Corporation, the Office of the Comptroller of Currency, the Federal Reserve Board, and the Office of Thrift Supervision. In each state, there are state regulators that supervise that state's banks in accordance with the individual charters. The federal regulators do not supervise the state regulators but may supervise the same banks. 12 C.F.R. § 228.4(a), (b), (e) (1995). See also Federal Financial Institutions Examination Council (FFIEC), *A Citizen's Guide to the CRA* 8 (June 1992) [hereinafter referred to as "FFIEC Guide"].

39. *United States v. Decatur Fed. Sav. & Loan Ass'n*, No. 92-CV-2198 (N.D. Ga. Sept. 17, 1992) (Complaint and Consent Decree). See also *United States v. Shawmut Mortgage Co.*, No. 3:93CV2453 (AVC) (D. Conn. Dec. 13, 1993) (Complaint and Consent Decree) (on file with the author).

- (2) because all or part of the applicant's income derives from any public assistance program; or
- (3) because the applicant has in good faith exercised any right under this chapter [the Consumer Credit Protection Act, 15 U.S.C. § 1601].⁴⁰

Regulation B implements the ECOA and defines a creditor as "a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit."⁴¹ The ECOA further defines a creditor as "any person who regularly extends, renews, or continues credit."⁴² The ECOA defines credit as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment"⁴³

Regulation B and the ECOA define person as "a natural person, corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association."⁴⁴ An applicant is defined as "any person who applies to a creditor directly for an extension, renewal, or continuation of credit"⁴⁵ The ECOA, therefore, clearly applies to an individual's attempt to obtain credit from a bank to buy or improve a home.

The scope of Regulation B and the ECOA is very broad, protecting applicants in every aspect of a credit transaction, from the initial credit inquiry or request through final payment of the credit, including collections activity. The ECOA governs situations where a lender denies credit or where existing credit is terminated, or where other adverse changes occur. Regulation B defines the credit transaction as "every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration or termination of credit; and collection procedures)."⁴⁶

The ECOA was recently amended to require the creditor to provide a copy of the real estate appraisal report relied upon for any loan secured by residential real property if requested by the borrower or applicant in writing.⁴⁷ This amendment responds to congressional

40. 15 U.S.C. § 1691(a) (1988).

41. 12 C.F.R. § 202.2(l) (1995).

42. 15 U.S.C. § 1691(a)(e) (1988).

43. *Id.* at § 1691a(d).

44. 12 C.F.R. § 202.2(x) (1995); 15 U.S.C. § 1691a(f) (1988).

45. 15 U.S.C. § 1691a(b) (1988).

46. 12 C.F.R. § 202.2(m) (1995).

47. Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified at 15 U.S.C. § 1691(e) (Supp. III 1991)).

concern about indirect discriminatory lending practices through the use of biased appraisal reports.

B. *Community Reinvestment Act*

Congress enacted the Community Reinvestment Act of 1977 (CRA)⁴⁸ as an additional tool for overcoming obstacles in obtaining credit. Despite the adoption of the ECOA and the Fair Housing Act, many persons of color and low income persons continued to face discriminatory lending practices. The CRA has become an effective tool for community groups seeking fair lending and community development by permitting community groups to protest banks' lending records and win agreements for more loans.⁴⁹

The CRA, unlike other legislation, does not impose substantive restrictions on lending institutions. Rather, it emphasizes the continuing and affirmative responsibility of financial institutions to serve or meet the credit needs of the entire communities in which they are chartered to serve.⁵⁰ All federally insured commercial banks, savings banks, and savings associations that offer or provide credit to the public are governed by the CRA.⁵¹ Credit unions are the only federally insured financial institutions not covered by the CRA.

The CRA also imposes requirements on the regulators. Federal examiners must periodically examine every bank for compliance with the CRA. The exam results are published in the CRA Performance Evaluation, which the bank must make available to the public. The regulators must also take a bank's CRA performance into consideration when evaluating federal deposit insurance, branching, merger or acquisition, or holding company applications. A bank's merger application could be denied based on poor CRA performance. It is this fact, and the ability to comment on proposed changes, that give community groups leverage in forcing banks to enter into CRA agreements to improve lending, including housing lending. "For more than 15 years, CRA lending has been profitable and safe lending for banks. More important, CRA has benefitted low-, moderate- and middle-income Americans of all races by fostering home ownership and creating small businesses. All at no cost to taxpayers."⁵²

48. 12 U.S.C. §§ 2901-2907 (1988).

49. *The New Redlining*, *supra* note 6, at 51.

50. 12 U.S.C. § 2901(a) (1988).

51. *Id.* at § 2902.

52. Ames Alexander, *Banks: Bridge or Barrier to Home Ownership?*, THE CHARLOTTE OBSERVER (July 10, 1995), at A1 (quoting Irving Henderson, President of the Community Reinvestment Association of North Carolina and Board Chairman of the National Community Reinvestment Coalition).

C. Home Mortgage Disclosure Act

Originally enacted in 1975, the Home Mortgage Disclosure Act (HMDA),⁵³ was Congress' response to concerns about credit shortages in urban neighborhoods, particularly low and moderate income neighborhoods. The primary purpose of the HMDA is to provide both the regulatory agencies and the public with important data from which it may be determined whether, and to what extent, financial institutions are meeting the credit needs of their communities. The HMDA is a disclosure law that assists financial institutions and regulators in monitoring compliance with the CRA and other fair lending laws. Regulation C implements the HMDA.⁵⁴

Pursuant to the HMDA, covered institutions must report data regarding loan applications, originations, and purchases. In addition to reporting data on the location of the property and the amount of the loan, the HMDA requires lenders to report the race, sex, and income of the applicants. All financial institutions must collect and report HMDA data on mortgage lending and loan applications unless exempt because of size or location.⁵⁵ An institution is exempt from all of the requirements of the HMDA for a given year if it meets any one of the following criteria:

1. It had less than \$10 million in assets as of the end of the previous calendar year;
2. It does not have an office or branch located in a Metropolitan Statistical Area (MSA); or
3. It is state-chartered and subject to a substantially similar state law and has received an exemption from the Federal Reserve Board.⁵⁶

Non-depository, for-profit mortgage lenders are also covered by the HMDA and Regulation C unless:

1. The lender had neither a home nor branch office in an MSA; or
2. The lender's total assets combined with those of any parent corporation were \$10 million or less on the preceding December 31, and the lender originated fewer than 100 home purchase loans in the preceding calendar year.⁵⁷

For-profit mortgage lenders are considered to have an office in an MSA if they meet at least one of the following criteria:

1. Have a physical office that takes or receives applications from the public in an MSA; or

53. Pub. L. No. 94-200, title III, 89 Stat. 1125 (codified as amended at 12 U.S.C. §§ 2801-2811 (1975)).

54. 12 C.F.R. §§ 203.1-203.6 (1994).

55. *Id.* at § 203.4.

56. *Id.* at § 203.3.

57. *Id.* at § 203.3(a)(2).

2. Received applications for originating or purchasing at least five home purchase or home improvement loans on property in an MSA during the previous calendar year.⁵⁸

Loans and applications for loans of the following types are reportable under HMDA: home purchase loans; home improvement loans (whether secured or unsecured); home equity lines of credit (if the applicant indicates that the funds will be used for home improvement and is carried on the lender's books as a home improvement loan); and refinancing of the above.⁵⁹

Lenders must record the required data on loan/application registers (LARs). Covered lenders must make their LARs available to the public after removing identifying information.⁶⁰ Each year, the Federal Reserve will prepare a mortgage loan disclosure statement for each reporting institution and send it to the respective institutions. The lender must make the statement available to the public for five years and have it available at its home office and at least one branch or office in each MSA.⁶¹ Lenders must also display a sign or notice indicating the availability of the statement in each branch located in an MSA.⁶²

The HMDA has become increasingly important in the last few years, particularly as a mechanism for improving Congress' ability to oversee fair lending enforcement activity by the regulators. Regulators rely heavily on HMDA data to target banks whose mortgage lending patterns suggest racial bias. Therefore, it is extremely important for applicants to provide accurate and complete information. Given the history of racism and discrimination in our society, minorities are often reluctant to provide race information on their applications. Thus, all applicants for home loans, and especially minorities, must be encouraged to provide monitoring data (race, sex, and income) to the government.

D. *The Fair Housing Act*

The Fair Housing Act (FHA) was enacted as Title VIII of the Civil Rights Act of 1968.⁶³ The FHA committed the federal government to the goals of open housing. The FHA, as amended, prohibits discrimination in all phases of housing sales, *financing*, or rental on the basis of race, color, national origin, religion, sex, handicap, or familial sta-

58. *Id.* at § 203.2(c)(2).

59. *Id.* at § 203.4.

60. *Id.* at § 203.5(c).

61. *Id.* at § 203.5(b).

62. *Id.* at § 203.5(e).

63. Pub. L. No. 100-430, 102 Stat. 1636 (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)).

tus.⁶⁴ The credit provisions of the FHA cover all mortgage and home improvement loans and all housing lenders.⁶⁵ The following lending practices have been or likely would be found to violate the FHA: (1) redlining; (2) using excessively low appraisals; (3) using arbitrary or subjective criteria to justify a decision actually made on a prohibited basis; (4) creating a racially exclusive image by using advertising depicting persons of only one race, implying that members of other groups are not welcome; (5) discouraging applications; (6) setting excessively burdensome qualification standards; (7) imposing more onerous terms or conditions on members of one group and not another on a prohibited basis; (8) using terms or availability of insurance to deny credit; (9) racial steering; and (10) minimum mortgage loan amounts that exceed purchase price of housing stock in certain areas.⁶⁶

Both the Federal Reserve Board and the Department of Housing and Urban Development (HUD) have issued companion orders and rules, respectively, which require lenders to display the equal housing lender logo or statement in all advertisements for home purchase, construction, improvement, repair, or maintenance loans, and to ensure that all media advertisement is free of bias and discriminatory images.⁶⁷

E. *Recent Fair Lending Developments.*

1. Increased Regulatory Activities.

Fair lending enforcement has become the top enforcement priority and policy concern for the four primary financial institution regulators. On May 27, 1993, a joint letter, signed by the heads of the Federal Reserve System, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS), was sent to the chief executive officer of every bank and thrift in the country, expressing the agencies' expectations that all financial institutions do their part to ensure that lending take place on a non-discriminatory basis. The letter stated in relevant part:

The federal financial institutions supervisory agencies are deeply concerned that some minority consumers and small business owners may be experiencing discriminatory treatment in their efforts to ob-

64. 42 U.S.C. §§ 3604, 3605 (1988) (emphasis added).

65. *Id.* at § 3605(a), (b).

66. *Id.* at § 3605; Federal Reserve Regulatory Service (FRRS) 6-1483 through 6-1492 (Board of Governors of the Federal Reserve System 1994).

67. See Board of Governors of the Federal Reserve System, Board Order on Fair Housing Advertising and Poster Requirements (Mar. 21, 1989); 24 C.F.R. §§ 109.5-109.30 (1993) (HUD regulations).

tain credit from financial institutions. Discrimination in lending, on any prohibited basis, strikes at the fabric of both our political commitment to equal opportunity and our economic commitment to free and competitive markets.

Our agencies are committed to making sure that financial institutions understand their fair lending obligations and respond appropriately.

...

It is clear to the agencies that more needs to be done to assure equal access to credit by everyone in our country. We expect all financial institutions to participate in this effort.⁶⁸

HUD and the federal regulators also issued a joint policy statement on discrimination in lending to provide, in part, "guidance about what the agencies consider in determining if lending discrimination exists."⁶⁹ This statement describes how evidence of disparate impact will be used as evidence of lending discrimination.⁷⁰

The OCC and the FDIC have taken significant steps in implementing the highly touted new enforcement efforts by radically modifying exam procedures. Unlike the former exam procedures, the new fair lending exam guidelines are much more likely to detect and ferret out discriminatory lending practices, both intentional and unintentional. Several banks have and will be undergoing the new exam over the next few months. Decatur Federal Savings and Loan did not long hold the dubious distinction of being the only financial institution to have been held to have a "pattern or practice" of discrimination.⁷¹ Other enforcement actions have been filed by the Justice Department with consent decrees.⁷²

68. Letter From The Federal Reserve Board, The Comptroller of the Currency, The Office of Thrift Supervision and The Federal Deposit Insurance Corporation to all Banks and Thrifts (May 27, 1993) (on file with the agencies and the author) (*reprinted in* 1993 WL 196079 (O.C.C.)).

69. The Department of Housing and Urban Development (HUD), the Department of Justice (DOJ), the Office of Thrift Supervision (OTS), the Board of Governors of the Federal Reserve System, The Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Board (FHFB), the National Credit Union Administration (NCUA), and the Office of Federal Housing Enterprise Oversight (OFHEO), Policy Statement on Discrimination in Lending (Apr. 15, 1994) [hereinafter cited as Policy Statement on Discrimination in Lending], *reprinted in* FRRS 6-153.11 through 6-153.29.

70. FRRS 6-153.16.

71. Decatur Federal Savings and Loan ("Decatur") was the defendant in the first pattern or practice lawsuit brought by the government against a mortgage lender. The Justice Department's complaint alleged numerous violations of the ECOA and the FHA. Decatur entered into a consent decree on September 17, 1992. The consent decree is in effect for three years. *United States v. Decatur Fed. Savings & Loan Ass'n*, No. 92-CV-2198 (N.D. Ga. Sept. 17, 1992) (Complaint and Consent Decree).

72. *See United States v. Shawmut Mortgage Co.*, No. 3:93CV2453 (AVC) (D. Conn. Dec. 13, 1993) (Complaint and Consent Decree) (on file with the author).

2. CRA Regulatory Reform.

a. *Archaic/Ineffective Requirements.*

The CRA requires a covered financial institution to meet the credit needs of its entire community, including low to moderate income residents. It also imposes several technical requirements upon covered institutions. For many years, the technical requirements for banks to comply with the CRA have included:

- (1) Annual adoption of a CRA statement for each delineated community served by the bank. The CRA statement must include a map of the delineated area, a list of the types of credit products offered in the community, and a CRA notice advising the public on how to comment on the bank's CRA performance. The CRA statement must be readily available for the public to review, on request, "at the head office of the bank and at each office of the bank in the local community delineated in the Statement."⁷³
- (2) Maintenance of a CRA Public File, containing written comments from the public regarding the bank's CRA performance and a copy of the public section of the bank's most recent CRA Performance Evaluation prepared by the appropriate federal regulator.⁷⁴
- (3) Posting or displaying a public CRA Notice in the public lobby of its main office and each of its branches. The Notice must contain the following information:
 - a. Where the public may obtain copies of the CRA Statement.
 - b. Where, and to whom, the public should address its comments about the bank's CRA performance.
 - c. Where to inspect or obtain copies of the public file.
 - d. A statement that the CRA Performance Evaluation is available for public inspection and where it is located.
 - e. The name of the bank's holding company, if there is one.
 - f. A statement on how to obtain announcements from the bank's regulator of applications filed by the bank that may have CRA considerations (federal deposit insurance, branching, merger or acquisition, or holding company applications).⁷⁵

The technical requirements and the general regulatory scheme of the CRA have been criticized by banks and community reinvestment advocates alike. The banks complained that the technical requirements placed a tremendous paperwork burden on the banks. The community advocates complained that the technical requirements did not operate to improve performance and allowed banks with horrible

73. FFIEC Guide.

74. 12 C.F.R. § 228.5 (1995); FFIEC Guide at 8.

75. 12 C.F.R. § 228.6 (1995); FFIEC Guide at 9.

lending practices to obtain favorable CRA ratings. The arguments of both sides have merit.⁷⁶

During the first six months of 1993, approximately 93 percent of all institutions examined for CRA compliance received a satisfactory or better rating.⁷⁷ High ratings given to so many banks resulted in charges of grade inflation and less than sincere enforcement by the regulators. Over the first eleven months of 1994, the average rate of those institutions receiving a satisfactory rating for CRA compliance was 73.3 percent. The percentage of institutions receiving a rating of needing improvement was 7.9 percent.⁷⁸ The new regulations may address this problem; however, there is a pervasive effort to weaken or derail these new regulations. Some members of Congress are working very hard to enervate the CRA.⁷⁹

b. 1993 Public Hearings.

In late 1993, the heads of the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Reserve System, and the Office of Thrift Supervision conducted a series of field hearings on community lending by financial institutions. These hearings were held in compliance with a mandate issued by President Clinton on July 15, 1993, in which he asked the federal financial supervisory agencies to work together and consult with the public, community groups, and the banking and thrift industries in reviewing and revising regulations to make the CRA more effective.

These public hearings highlighted the dissatisfaction of the banking industry and community groups with existing CRA evaluation process in two respects: (1) the existing system was process-based, not performance-based; and (2) examiners were given too much discretion in the evaluation process.

c. First Set of Proposed New Regulations.

After conducting these hearings, the federal financial supervisory agencies issued proposed regulations in December 1993 which consti-

76. *The New Redlining*, *supra* note 6, at 56.

77. AM. BANKER, 18 (July 20, 1994).

78. Summarized analysis of information provided in the 1994 monthly OTS NEWS RELEASE OF NATIONAL CRA RATINGS by the Office Of Thrift Supervision, are available in WESTLAW, FFIN-NR Library, at 1994 WL 81215 (O.T.S.), 1994 WL 230192 (O.T.S.), 1994 WL 183273 (O.T.S.), 1994 WL 246835 (O.T.S.), 1994 WL 361692 (O.T.S.), 1994 WL 399797 (O.T.S.), 1994 WL 50357 (O.T.S.), 1994 WL 509866 (O.T.S.), 1994 WL 570036 (O.T.S.), 1994 WL 658143 (O.T.S.), 1994 WL 707542 (O.T.S.).

79. House Bill H.R. 1362 and Senate Bill S. 650.

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tuted a total rewrite of CRA requirements.⁸⁰ Some of the proposed changes included:

- (1) the replacement of the twelve factors being used to assess an institution's CRA performance with three tests based on lending, service, and investment performance in low and moderate income areas; households;
- (2) the option to submit a strategic plan that included measurable goals for meeting CRA obligations as an alternative to undergoing the three tests;
- (3) the improvement of the enforcement capacity of the supervisory agencies under the CRA by imposing sanctions, including civil monetary penalties, and issuing cease and desist orders against lenders found to be in substantial noncompliance with the law;
- (4) expanded public disclosure of lending performance data by each financial institutions; and
- (5) advance notification of CRA examinations which would enable community groups to provide examiners with meaningful information regarding lenders' CRA performance.⁸¹

The proposed regulations required additional data reporting for consumer, small business, and home mortgage loans, with provisions for disclosing that information to the public in a timely manner.

To provide incentives for strong performance, the proposed regulations clarified the way in which CRA performance would be considered in the application process. However, the regulations did not contain a "safe harbor" provision.⁸² Under the assessment system, further incentives would be provided to institutions that showed strong performance by reducing the frequency of examinations. Finally, the proposed regulations would provide a different evaluation framework for small institutions.⁸³

The proposed regulations promote performance-based CRA capture ratio, or the market share test.⁸⁴ The market share test is based on standards that measure relative market capture rates assessments of lending practices by comparing an institution's market share of loans in low- and moderate-income geographies to its share of loans in its entire service area.⁸⁵

80. 58 Fed. Reg. 67466 (to be codified at 12 C.F.R. pts. 25, 228, 345, 563e) (proposed Dec. 21, 1993).

81. *Id.*

82. A "safe harbor" provision would prevent community groups from challenging a merger or other change if a bank received a high CRA rating.

83. 58 Fed. Reg. 67466, 67472.

84. *Id.* at 67468.

85. *The New Redlining*, *supra* note 6, at 58.

This "first round" of proposed regulations met with a firestorm of protests from the banking community,⁸⁶ and opposition from even the Federal Reserve Board.⁸⁷ One major criticism to the CRA proposals was the lack of sufficient inclusion of community input and participation.⁸⁸ Another major criticism related to the provision allowing alternative assessment methods for small banks with assets under \$250 million. Banks in this category comprise nearly three-fourths of all banks. Since the activities of these banks have a substantial impact on the ability to obtain credit, especially in rural areas, critics opined that the final CRA rules should eliminate the alternative assessment option for small banks and require that all regulated financial institutions be evaluated on the same criteria. Critics blasted the failure to require full disclosure of data for non-MSA areas and the failure to give sufficient weight to the lending test in determining compliance for retail banks.

Also identified as critical issues were the lack of sufficient incentives for banks to engage in community development lending, the lack of a clear and objective definition of the market share concept, and the lack of sufficient protections for consumers under the service test. Additionally, the lack of full regulation of the non-bank financial institutions, including finance companies, insurance companies, securities brokers, and mutual funds was denounced for not addressing the realities of the 21st century credit market and leaving the door open for discrimination to many low-income and minority communities where only twenty-four percent of all loans in 1993 were issued from traditional banks. Finally, critics found the definition of small farms as "private organizations . . . with average annual gross receipts of less than \$500,000 for the calendar or fiscal year preceding the making of the loan,"⁸⁹ as overly broad.

d. *Second Set of Proposed New Regulations.*

In response to this public and private outcry against the first proposed CRA revision, the federal financial supervisory agencies pro-

86. See James Brosnan, *New Urban Loan Rules Meet Ire of Bankers*, THE WASH. APPEAL, Sunday, Mar. 27, 1994, at A1; Dee Depass, *Constant Comment Revised CRA Gets Feedback, Criticism for Community Activists and Banks*, STAR TRIBUNE (MS), Mar. 18, 1994, at O1D; David Algeo, *Banks Say New Reinvestment Rules Too Vague*, THE WICHITA EAGLE, Feb. 21, 1994, at 90; Jim King, *A Banking No Show a Hit at CRA Meeting*, THE ATLANTA CONST., Sept. 3, 1993, at D2.

87. *Reform Agency Drops Controversial Market Share Test*, HOUSTON POST, Mar. 22, 1994, at E14.

88. Having testified at one of the public hearings, and seeing the diversity of the interests represented by those who testified, the author has difficulty with this argument.

89. See 58 Fed. Reg. 67466, 67480 (to be codified at 12 C.F.R. § 25.5(n)) (proposed Dec. 21, 1993).

posed an entirely new set of proposed CRA regulations in the fall of 1994.⁹⁰ This second set of proposed regulations was substantially weaker than the original proposal, and fell far short of the President's goal of an objective and performance-based CRA.

The proposed regulations identified seven major areas that needed to be changed. First, a bank's record of lending to minority communities and individuals, as well as women- and minority-owned businesses, must be examined and evaluated under the lending test. Second, the final regulations must include the full disclosure of small business lending data by census tract (and small farm data by the smallest practical unit), and the category of minority should be broken down into distinct racial and ethnic categories (as used in the Home Mortgage Disclosure Act). Third, direct lending to local communities by lenders, rather than loans to third parties and intermediaries, must be made the primary focus of the lending test. Fourth, ATMs and cash machines, while important, should not be considered as equivalent to full service branches when assessing a lender's record of providing banking services to low and moderate-income neighborhoods. Fifth, the lending test indicators in the regulation should include more objective performance goals and standards, including ratios and benchmarks. Sixth, enforcement sanctions, such as cease and desist orders and civil money penalties, must be used by the agencies against banks with below satisfactory CRA ratings. Seventh, small banks with assets under \$250 million should not face a weaker form of CRA evaluation.

e. *Final Revised CRA Regulations.*

Collectively, the Federal Reserve, OCC, FDIC and OTS received over 7,200 written comments on the 1994 proposal. As a result, in 1995, the Federal Reserve released new and final CRA regulations.⁹¹ The new regulations retained the principles underlying the 1993 and 1994 proposals, but made changes in several important areas of these earlier proposals. Some of the changes included:

(1) A section included in the 1994 proposal that required banks and thrifts to report small business lending by the race and gender of the business was removed. However, the federal agencies announced their intention to amend the Equal Credit Opportunity Act regulations to allow banks to voluntarily report the information.

90. 59 Fed. Reg. 51232 (to be codified at 12 C.F.R. pts. 25, 228, 345, 563e) (proposed Oct. 7, 1994).

91. 60 Fed. Reg. 22156, 22158 (1995) (to be codified at 12 C.F.R. pts. 25, 203, 228, 345, 563e).

(2) The final rules do not require that lenders be primarily assessed on their direct lending. The examiner has the discretion to decide the appropriate weight between direct and indirect lending.

(3) The asset threshold for eligibility for the “streamlined” small bank CRA evaluation is affiliates of bank holding companies with \$1 billion or less in total assets. The affiliates must still be under \$250 million in assets.

(4) Under the first two proposals, banks with a rating of “substantial noncompliance” under the CRA ratings would have been subject to full enforcement powers of agencies (*e.g.*, civil money penalties or cease and desist orders). The agencies dropped this provision from the final rule, basing their action on an opinion letter by the Justice Department which maintained the agencies did not have the authority to enforce under the CRA statute.

(5) Under the 1994 proposal, the affiliates of lenders would have been assessed on their CRA performance if an agency determined that the activity of the affiliate was integral to an institution’s business. This provision was weakened under the final rules. Affiliate lending will only be considered at a lender’s option.

(6) The final rules eliminated an earlier provision that would have required the agencies to develop a formal credit needs analysis for each service area as part of the “assessment context.” The agencies will now determine the credit needs by analyzing information an institution maintains on its community as well as information obtained from community, government, civic, and other sources. Lenders will not be required to ascertain community credit needs or conduct a credit needs analysis apart from their normal business plans.

(7) The agencies will not treat ATMs the same as branches. Lenders will only be evaluated on the specific types of consumer lending they choose to report. The agencies, however, will evaluate all consumer lending if a “substantial majority” of the institution’s lending is in consumer credit. Lenders will not be required to report this data, requiring examiners to analyze a portion of the loan portfolio.

(8) The agencies have substantially changed the definition of community development lending and investments. “Community development” as defined means: (1) affordable housing (including multi-family rental housing) for low or moderate income individuals; (2) community services targeted to low or moderate income individuals; (3) activities that promote economic development by financing businesses or farmers with gross annual revenues of \$1 million or less; and/or (4) activities that revitalize or stabilize low or moderate income geographies.

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(9) The final rules replace the term "service area" with "assessment area." Assessment area represents the community within which the agencies assess an institution's record of CRA performance. The regulators will not look at the capacity and constraints of the institution in its business decision. An institution is not required to lend to all census tracts or block numbers in its service area in meeting its CRA obligations. The final rule retains the requirement that an assessment area must not be arbitrary or exclude low or moderate income variables.

(10) The final rule keeps the overall rating system for a financial institution: "outstanding," "satisfactory," "need to improve," or "substantial noncompliance." All institutions will be rated by three tests: lending, service, and investment. For each test a financial institution will receive one of five ratings: outstanding, high satisfactory, low satisfactory, needs to improve, substantial noncompliance. Institutions receiving less than a "low satisfactory" on the lending test will be unable to achieve a satisfactory or better rating on its overall CRA rating. The agencies removed from the 1994 proposal the requirement that an institution's CRA rating be downgraded automatically from "needs to improve" to "substantial noncompliance" if it received no better than a "needs to improve" rating on each of its two previous examinations.

(11) The strategic plan for the final rules is basically the same as the 1994 proposal. Financial institutions can adopt this alternative. It requires the institution to seek suggestions and publish a notice of the plan and solicit written public comment while developing the plan. The agencies will rate an institution's performance under an approved plan solely in relation to the goals set out in the plan.

Although there are still some problems with the new rules, they are a step in the right direction. However, the new rules are already under attack. During the 1995 session of Congress, Representative Bill McCollum (R-FL) introduced H.R. 317, "the Community Reinvestment Improvement Act of 1995." This legislation would provide a "safe harbor" to lenders with a satisfactory or better CRA rating against protests of CRA applications, exempt banks under \$100 million in assets and in towns under 25,000 in population, and provide a weaker examination process for most banks under \$500 million in assets. This bill was referred to the House Committee on Banking and Financial Services.

The two most dangerous efforts underway in Congress to diminish the CRA's effectiveness are House Bill 1362 and Senate Bill 650. H.R. 1362 and S. 650 contain a number of anti-consumer and anti-neighborhood provisions. Both bills would exempt small banks from

CRA coverage. Rural communities would be especially harmed by those exemptions since these areas are predominately served by small lenders. Both bills contain "safe harbor" amendments to the CRA which would eliminate public participation in the CRA process for an estimated 95% of all banks. Both bills would establish a "conclusive" CRA rating. Comments on a bank's CRA performance would be accepted during the initial stage of CRA examination but, once a rating is given, no further comments would be accepted. Both bills would prevent regulators from collecting additional information under CRA. This would override the new CRA regulation to collect information on small business lending activity. Finally, the bills provide for raising the threshold amount for reporting under the Home Mortgage Disclosure Act (HMO) from \$10 million to \$50 million in assets.

Both of the proposed bills would substantially set back the struggle for fair and equal access to credit for consumers. At the time of this writing, the House passed its bill, but it appears that the Senate bill will exclude the anti-CRA provisions. The President has threatened to veto any bill that weakens the CRA.

3. Federal Fair Lending Litigation.

The *United States v. Decatur Fed. Sav. & Loan Ass'n*⁹² case was the first of several cases filed by the Justice Department in recent years against financial institutions for patterns and practices of credit discrimination. In *Decatur*, a Justice Department investigation found that between January 1988 and May 1992, black applicants for loans were turned down by Decatur Federal at three times the rate of white applicants. "Even after checking for any differences in income, credit history, debt levels and any underwriting variables . . . [the investigators] found race was a major factor in Decatur Federal's loan decisions."⁹³ The case was resolved by a Consent Decree requiring Decatur Federal to pay \$1 million in damages to forty-eight black applicants identified as victims of discrimination. It also required Decatur Federal to take steps to attract black applicants and to insure fairness in loan underwriting. Since that time, Decatur has been acquired by Charlotte, North Carolina-based First Union Corporation.⁹⁴

Following in the wake of *Decatur*, the Justice Department launched a major investigation into the patterns of discrimination against Native Americans at Blackpipe State Bank in South Dakota. The plain-

92. No. 92-CV-2198 (N.D. Ga. Sept. 17, 1992) (Complaint and Consent Decree).

93. Carolyn Brown, *How to Fight Mortgage Discrimination . . . and Win!!*, Black Enterprise, July 1993, at 50 (quoting James P. Turner, Acting Assistant Attorney General for the Civil Rights Division of the Justice Department).

94. *Id.*

tiffs filed a complaint in November 1993, alleging that the lender discriminated against Native Americans by refusing to make loans secured by collateral located on reservations and by charging Native Americans higher interest rates and finance charges than whites. Under an agreement filed in January 1994, the lender agreed to expand its services to reservations, market its products to Native Americans, reduce interest rates and finance charges on existing discriminatory loans, and create a \$125,000 compensation fund for past rejected applicants who may be eligible for compensation.⁹⁵

The Justice Department then turned its attention to Shawmut Mortgage Company, one of the largest originators of home purchase mortgages in New England.⁹⁶ Data obtained through the 1991 HMDA revealed that Shawmut rejected black and Hispanic applicants at twice the rate of white applicants. Following a one-year investigation by the Justice Department and the Federal Trade Commission, Shawmut agreed to pay at least \$960,000 into a fund to compensate consumers allegedly unfairly denied loans on the basis of their race or national origin.⁹⁷

Broadening its approach, the Justice Department initiated its first lending discrimination suit based entirely on a bank's refusal to market its services in minority neighborhoods.⁹⁸ The case against Chevy Chase Federal Savings Bank and its wholly owned subsidiary, B.F. Saul Mortgage Company, alleged that Chevy Chase violated the Fair Housing Act and the Equal Credit Opportunity Act by redlining predominately black populated areas as off-limits for mortgage lending. The complaint alleged that the bank underwrote approximately 97% of its loans from 1976 to 1992 in predominately white areas. Under the settlement terms, Chevy Chase is required to pay \$11 million to the redlined areas through a special loan program and the opening of bank branches and mortgage offices. Chevy Chase will spend at least \$7 million by offering special home mortgage loans to all residents in predominately black areas of Washington D.C. and Prince George's County, Maryland. The bank must make home loan financing available at either 1% less than the prevailing rate to 1/2% below the market rate combined.⁹⁹

95. *United States v. Blackpipe State Bank*, No. 93-5115 (D. S.D. Jan. 21, 1994) (Consent Decree).

96. *United States v. Shawmut Mortgage Co.*, No. 3:93CV2453 (AVC) (D. Conn. Dec. 13, 1993) (Complaint and Consent Decree) (on file with the author).

97. *Id.*

98. *United States v. Chevy Chase Fed. Sav. Bank*, No. 94-1824-JG (D.D.C. Aug. 22, 1994) (Complaint and Consent Decree) (on file with the author).

99. *Id.*

In other litigation, the Justice Department joined the NAACP in March 1995 in a discrimination case against American Family Mutual Insurance Company in Milwaukee.¹⁰⁰ The lender quickly settled.¹⁰¹

IV. THE APPLICANT'S LAWYER'S ROLE.

This section will describe practical strategies attorneys can use in litigation when representing individuals victimized by discriminatory practices by banks and thrift institutions.

HYPOTHETICAL — Jane Perkins is an African-American female who moved to Raleigh, North Carolina, from Atlanta, Georgia. She is a computer engineer with IBM with an annual salary of \$100,000 after taxes. Jane is divorced and she and her nine year-old daughter live in an apartment. Jane receives \$10,000 per year in alimony payments from her ex-husband. She recently sold her home in Atlanta and now desires to buy a house in the Woodcroft subdivision of Durham, an area that is ninety-eight percent white. The sales price of the house is \$100,000. Jane has enough money to make a twenty percent downpayment and to pay closing costs.

Jane enters the Woodcroft office of the Neighborhood Bank to apply for a mortgage loan. When she first enters the bank, Jane notices a poster that states, "We gladly make home loans to up and coming families." The picture on the poster is that of a man, woman, and two children — all are white. When Jane requests a loan application, the loan officer acts rudely towards her and suggests that it would be futile for her to seek a mortgage loan. After insisting, Jane is given a home loan application. Two months after submitting the application, Jane receives a telephone call from the loan officer indicating that her home mortgage loan application was denied. The loan officer tells her that her loan application was denied because she lacked sufficient income and down payment and lacked a satisfactory credit history. The bank refused to consider Jane's alimony payments in its calculations of her income. Further, the loan officer indicates that the bank does not make mortgage loans for less than \$150,000 and that bank policy requires applicants to have enough money to pay thirty percent as downpayment, plus closing costs.

A. *Scope of the ECOA and the FHA*

Jane's problem clearly falls within the scope of the ECOA. She is an "applicant"¹⁰² and Neighborhood Bank is a "creditor," as defined

100. *The New Redlining*, *supra* note 6, at 51.

101. *United States v. American Family Mutual Insurance*, No. 95-C-327 (E.D. Wis. Mar. 30, 1995) (Consent Decree); *NAACP v. American Family Mutual Insurance*, No. 90-C-0759 (E.D. Wis. Mar. 30, 1995) (Consent Decree).

102. 15 U.S.C. § 1691a(b) (1995).

by ECOA.¹⁰³ Jane is seeking "credit" as defined by ECOA,¹⁰⁴ and she is a member of a class of persons the ECOA was created to protect.¹⁰⁵

Similarly, the FHA applies. Jane is a member of the protected class,¹⁰⁶ and the loan sought is to purchase a house. Since the credit provisions of the FHA cover all mortgage and home improvement loans and all housing lenders,¹⁰⁷ the FHA governs the actions of Neighborhood Bank.

B. *Private Right of Action*

Under the ECOA, Jane has a right to file a lawsuit in federal or state court against Neighborhood Bank for credit discrimination. The ECOA grants a private right of action against a discriminating creditor to any individual or class of individuals.¹⁰⁸ If it appears that she is not the only black and/or female potential homeowner who was denied a loan under Neighborhood Bank's policy, a class action may be possible.¹⁰⁹

Jane has the same right to sue under the FHA. She is an aggrieved person,¹¹⁰ and as such has the right to commence a civil action in federal district court or state court.¹¹¹

C. *Proof of Discrimination*

There are three recognized methods of proving discrimination under the ECOA and the FHA:

- (1) 'overt evidence of discrimination,' when a lender blatantly discriminates on a prohibited basis;
- (2) evidence of 'disparate treatment,' when a lender treats applicants differently based on one of the prohibited factors; and
- (3) evidence of 'disparate impact,' when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity.¹¹²

103. 12 C.F.R. § 202.2(l) (1995).

104. 15 U.S.C. § 1691a(d) (1995).

105. *Id.* at § 1691(a).

106. 42 U.S.C. §§ 3604-3605 (1995).

107. *Id.* at § 3605(a), (b).

108. "Any creditor who fails to comply with any requirement imposed under . . . [the ECOA] . . . shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." 15 U.S.C. § 1691e(a) (1988).

109. *Id.*

110. "An 'aggrieved person' includes any person who — (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i) (1988).

111. 42 U.S.C. § 3613(a).

112. Policy Statement on Discrimination in Lending, *supra* note 69, reprinted in FRRS 6-153.13.

All three methods of proof can be used in the hypothetical above. The rude behavior of, and statements made by, the loan officer are evidence of overt discrimination, as the acts were intended to discourage Jane from applying for a loan in the first place.¹¹³ The FHA specifically prohibits the use of actions that interfere with, or discourage a person from, applying for a housing loan. The poster specifically violates the FHA by creating and exploiting a racially exclusive image, suggesting that only white applicants are sought.¹¹⁴ The bank's refusal to consider Jane's alimony payments in its calculations of her "income" is also a violation.¹¹⁵ Given the broad coverage of the ECOA, the FHA violations also would be considered evidence of ECOA violations.

Assume that the average loan determination time for Neighborhood Bank is three days. For the bank to take two months to process Jane's application is discriminatory disparate treatment. Regulation B of the ECOA defines discrimination against an applicant to mean "to treat an applicant less favorably than other applicants."¹¹⁶ The loan officer told Jane that her loan application was denied because she lacked both sufficient income and a satisfactory credit history. By showing that the bank has approved applicants with similar income and expense conditions as Jane or with similar credit histories, she can prove discrimination by disparate treatment.

Other examples of disparate treatment violative of the ECOA and the FHA include requiring an application fee of minority applicants but not of nonminority applicants; assisting nonminority applicants in "clearing up" problems on their credit histories but not assisting minority applicants; and giving nonminority applicants assistance in filling out loan applications but not assisting minority applicants.¹¹⁷

Assuming that there are a couple of bad entries on her credit history, Jane may still show disparate treatment by the bank. If, by a comparison of the applications of denied minorities and approved whites, Jane can prove that Neighborhood Bank approved loan applications of white applicants with credit histories similar to Jane's, she can show a violation of the ECOA and the FHA by disparate treatment. Additionally, if she can show that the bank assisted white applicants with similar credit histories in clearing up their credit problems,

113. See 42 U.S.C. § 3605 (1988); FRRS 6-1481; 6-1488.

114. FRRS 6-1486 (citing *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776 (N.D. Miss. 1982)).

115. FRRS 6-1493.

116. 12 C.F.R. § 202.2(n) (1995). See also *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835 (W.D. Mo. 1981); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980); *Vander Missen v. Kellogg-Citizens Nat'l Bank*, 481 F. Supp. 742 (E.D. Wis. 1979).

117. Policy Statement on Discrimination in Lending, *supra* note 69, reprinted in FRRS 6-153.15.

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while not assisting her, she can show ECOA and FHA violations by disparate treatment.

The Federal Reserve describes the analysis for finding liability for disparate treatment as similar to the analysis used in Title VII cases:

If a lender has apparently treated similar applicants differently on the basis of a prohibited factor, it must provide an explanation for the difference in treatment. If the lender is unable to provide a credible and legitimate nondiscriminatory explanation, the agency may infer that the lender discriminated.

If the agency determines that a lender's explanation for treating some applicants differently is a pretext for discrimination, the agency may find that the lender discriminated, notwithstanding the lender's explanation When a lender's treatment of two applicants is compared, even when there is an apparently valid explanation for a particular difference in treatment, further investigation may establish disparate treatment on a prohibited basis. For example, seemingly valid explanations for denying loans to minority applicants may have been applied consistently to minority applicants and inconsistently to nonminority applicants

A pattern or practice of disparate treatment on a prohibited basis may also be established through a valid statistical analysis of detailed loan-file information, provided that the analysis controls for possible legitimate explanations for differences in treatment. Where a lender's underwriting decisions are the subject of a statistical analysis, detailed information must be collected from individual loan files about the applicants' qualifications for credit. Data reported by lenders under the HMDA do not, standing alone, provide sufficient information for such an analysis because they omit important variables, such as credit histories and debt ratios. HMDA data are useful, though, for identifying lenders whose practices may warrant investigation for compliance with fair lending laws. HMDA data may also be relevant, in conjunction with other evidence, to the determination [of] whether a lender has discriminated.¹¹⁸

Statistical data to prove disparate treatment can be obtained through discovery and possibly by examination of the HMDA data for Neighborhood Bank for Durham. Since Jane is also female and a single mother, a comparison with similarly situated females, married individuals, white males, or whites in general may be appropriate. Where examination and analysis of the HMDA data are necessary, there are organizations and statisticians who can assist the attorney in collecting and analyzing the HMDA data.¹¹⁹

118. *Id.*

119. One such individual is Peter Skillern, Executive Director of the Durham Affordable Housing Coalition ((919) 683-1185).

Bank policies which forbid making mortgage loans for less than \$150,000 and which require applicants to have enough money to pay thirty percent as a downpayment, plus closing costs, are evidence of disparate impact. "When a lender applies a policy or practice equally to credit applicants, but the policy or practice has a disproportionate adverse impact on applicants from a group protected against discrimination, the policy or practice is described as having a 'disparate impact.'"¹²⁰ Under the "disparate impact" or "effects" test, the creditor will be liable if its actions have the effect of denying credit to applicants belonging to one of the protected categories in a pattern significantly different from that of the general pool of applicants.¹²¹

Congressional reports accompanying the 1976 amendments to the ECOA show an intent to apply an effects test to prove discrimination. Senate Report No. 94-589 accompanying H.R. 6516, in the section entitled Categories of Prohibited Discrimination, stated as follows:

The prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, 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 the individual transactions. Thus, judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, [401 U.S. 424 (1971)], and *Albemarle Paper Company v. Moody*, [422 U.S. 405 (1975)], are intended to serve as guides in the application of this Act, especially with respect to the allocations of the burdens of proof.¹²²

Regulation B notes "[t]he legislative history of [ECOA] indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court in the cases of *Griggs* . . . and *Albemarle* . . . to be applicable to a creditor's determination of creditworthiness."¹²³

Using the disparate impact analysis, Jane has the initial burden of showing that the lender's credit amount or downpayment policies, although neutral or nondiscriminatory on their face, have a disparate adverse impact on persons protected under one of the nine prohibited bases enumerated in the ECOA. "Not every member of the group must be adversely affected for the practice to have a disparate im-

120. Policy Statement on Discrimination in Lending, *supra* note 69, reprinted in FRRS 6-153.16.

121. See, e.g., *Sayers*, 522 F. Supp. at 839; Policy Statement on Discrimination in Lending, *supra* note 69, reprinted in FRRS 6-153.16.

122. S. Rep. No. 589, 94th Cong., 2nd Sess. 4-5 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 406.

123. 12 C.F.R. § 202.6(a), n.2 (1994).

pact."¹²⁴ Examination of applicants' files will probably show that persons of color and women are more adversely affected by these rules than the general pool of applicants. Having made that showing, the burden then shifts to the lender to establish that its policies further a legitimate business objective. If the lender is unable to make this showing, the policies violate the ECOA. If, on the other hand, the bank can demonstrate a legitimate business objective, the burden then shifts back to Jane. She must then show that there is a less discriminatory or nondiscriminatory alternative that also furthers the lender's legitimate business objective.

In *Sayers v. General Motors Acceptance Corp.*, the plaintiff sued GMAC for refusing to grant credit privileges because of poor credit history.¹²⁵ Plaintiff met her initial burden of proof by using a disparate impact analysis. She introduced into evidence credit files of approximately twenty-five males to whom GMAC had extended credit although they, like plaintiff, had delinquent credit obligations.¹²⁶ With the plaintiff meeting her prima facie case of discrimination, the burden shifted to GMAC to articulate a legitimate, nondiscriminatory reason for not approving plaintiff's application.¹²⁷ The court held that GMAC met its burden by showing there were extenuating circumstances with regard to the male applicants that were not present in plaintiff's case: each of the twenty-five male applicants had prior dealings with GMAC and plaintiff did not.¹²⁸

Under the disparate impact test, the creditor cannot defend his or her actions on the grounds that he or she did not directly and intentionally discriminate on a prohibited basis. Evidence of discriminatory intent is not necessary to establish that a policy or practice adopted or implemented by a lender which has a disparate impact is in violation of the ECOA and the FHA.¹²⁹

D. Use of Testers

If the bank's discriminatory practices against Jane are part of a widespread pattern or practice of discrimination, it may be necessary to seek broader relief that will benefit the greater community rather than just Jane. A class action is one method of accomplishing this goal. The use of testers is another method.

124. Policy Statement on Discrimination in Lending, *supra* note 66, reprinted in FRRS 6-153.16.

125. 522 F. Supp. 835, 839 (W.D. Mo. 1981).

126. *Id.* at 839-40.

127. *Id.* at 840.

128. *Id.*

129. Policy Statement on Discrimination in Lending, *supra* note 69, reprinted in FRRS 6-153.16.

"Testers" are defined as individuals who, for the sole purpose of uncovering unlawful discriminatory hiring, housing, or credit practices, apply for employment, housing, or credit that they do not intend to accept.¹³⁰ In the housing context, testers are defined as "individuals who, with no intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."¹³¹

Testers themselves have broad standing to sue for discrimination in a variety of areas, including employment and housing. Even though the person may not intend to accept the job, or rent or purchase the home, the fact that he or she was denied the job, housing, or credit makes the person an "aggrieved person" entitled to sue the discriminating party under applicable law.¹³² Standing is interpreted broadly under Title VII in order to achieve the statute's objective of equal employment opportunity, especially since Title VII is generally enforced by private lawsuits.¹³³ All that is required is that the complainant be "aggrieved" by the illegal employment practice.¹³⁴

It is well established that testers have standing to sue under the Fair Housing Act.¹³⁵ Standing to sue under the FHA, as with other civil rights statutes, is broadly construed since testers "act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'"¹³⁶

Under the ECOA, a private right of action is granted to an aggrieved applicant.¹³⁷ A tester can be an aggrieved applicant under the ECOA, even though the tester may have no real intention of borrowing the money. Given that the purpose of testers is to further the congressional and constitutionally mandated policies against discrimination and that testers have standing to sue under virtually all civil rights statutes, including Title VII and the FHA, it is only logical that courts will allow testers standing to sue to eliminate credit discrimination practices prohibited by the ECOA.

130. M. Fix & R. Struck (Eds.) *Clear and Convincing Evidence: Testing for Discrimination in America*, 8 (1992) [hereinafter Applying Testing in Employment Discrimination]. Presented to the NAACP Legal Defense Fund Lawyers Training Institute on Oct. 10, 1992 (Fair Employment Council of Greater Washington, Inc.).

131. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

132. *Id.* at 374.

133. Applying Testing in Employment Discrimination, *supra* note 126.

134. "Section 706 of Title VII, 42 U.S.C. § 2000e-5(b), authorizes [EEOC] to accept charges of employment discrimination 'filed by or on behalf of a person claiming to be aggrieved.'" Applying Testing in Employment Discrimination, *supra* note 126.

135. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

136. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (referring to the Fair Housing Act).

137. 15 U.S.C. § 1691e(a) (1988).

In fact, to help eliminate discrimination in the industry, the Mortgage Bankers Association is now urging mortgage bankers to begin using testers to uncover discrimination within their own ranks.¹³⁸

Generally, testers are sent in pairs at different times. They have the same qualifications and go to the same real estate agent or banker to determine bias. The testers' characteristics are identical except for race, gender, or other characteristics that would form the basis of illegal discrimination. There are numerous papers on the subject of using testers¹³⁹ and there are organizations that can assist attorneys in developing a good testing program.¹⁴⁰ This author recommends these resources to attorneys representing either applicants or banks.

E. Remedies Under the ECOA and the FHA

A creditor is not liable for an ECOA violation for actions undertaken in good faith, defined as honesty in fact, and in conformity with Regulation B or official interpretations of the law.¹⁴¹ A creditor may also avoid liability for violations of certain provisions if the actions were the result of inadvertent error.¹⁴² Inadvertent error is defined as a "mechanical, electronic, or clerical error that a creditor demonstrates was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid such errors."¹⁴³ The provisions subject to an inadvertent error defense include provisions relating to the consideration of credit history, notification requirements, credit history reporting on joint accounts, record retention requirements, and federal monitoring requirements.¹⁴⁴

Pursuant to the ECOA, the prevailing applicant may recover actual damages in an unlimited amount.¹⁴⁵ Actual damages can include out-of-pocket expenses, such as the difference in interest paid, and intangible damages, such as humiliation and mental distress, injury to the

138. Paulette Thomas, *Banks are Urged to Use "Testers" to Root Out Bias*, WALL ST. J., Sept. 14, 1992, at 73.

139. See, e.g., Marc Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, (unpublished paper presented to the NAACP Legal Defense Fund Lawyers Training Institute (Fair Employment Council of Greater Washington, Inc., Jan. 1993); George Glaster, *The Use of Testers in Investigating Mortgage Lending and Insurance Discrimination*, (Sept. 26, 1991) (research paper presented at the Conference on "Testing for Discrimination in America: Results and Policy Implications," sponsored by The Rockefeller Foundation and the Urban Institute).

140. Fair Employment Council of Greater Washington, Inc. ((202) 842-4474); Fair Housing Council Of Greater Washington ((202) 289-5360).

141. 12 C.F.R. § 202.2(r) (1994). See Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I(1).

142. 12 C.F.R. § 202.2(s) (1994).

143. *Id.*

144. *Id.* at §§ 202.6(b), 202.9, 202.10, 202.12, 202.13.

145. 15 U.S.C § 1691e(a) (1988).

applicant's reputation for creditworthiness, and loss of increased purchasing power.¹⁴⁶ The Supreme Court has upheld the award of actual damages based on emotional distress with proof of injury.¹⁴⁷ Actual damages need not be proven in order for a plaintiff to seek other remedies, such as punitive damages, equitable and declaratory relief, and attorneys' fees.¹⁴⁸ Punitive damages are recoverable except against a government or governmental subdivision or agency.¹⁴⁹

The ECOA also provides that plaintiffs may obtain "such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter."¹⁵⁰ This remedy is particularly important if there is a class of individuals who are victims of discrimination.¹⁵¹ Such remedies may include an injunction prohibiting future illegal conduct and prohibiting the bank from collecting on obligations incurred in violation of the ECOA, as well as other broad remedies.

Attorneys' fees and costs will be awarded to the applicant's counsel if the court awards damages, punitive damages, or equitable or declaratory relief.¹⁵² One court held that the denial of a creditor's motion for summary judgment in an ECOA action was insufficient to warrant an interim award of attorneys' fees.¹⁵³ In an action under 42 U.S.C. § 1988, the Supreme Court ruled that prevailing civil rights litigants are entitled to attorneys' fees regardless of whether they are represented by private or nonprofit counsel.¹⁵⁴

The FHA authorizes the award of actual and punitive damages,¹⁵⁵ as well as equitable relief.¹⁵⁶ Attorneys' fees and costs are available to the prevailing party, unless the prevailing party is the government; however, the government can be held liable for attorneys' fees and costs.¹⁵⁷

F. *Statute of Limitations Under the ECOA and the FHA*

The statute of limitations to sue under the ECOA and FHA is two years from the occurrence of the violation.¹⁵⁸ A violation can occur at

146. See *Owens v. Magee Fin. Serv. of Bogalusa*, 476 F. Supp. 758 (E.D. La. 1979); *Schuman v. Standard Oil Co.*, 453 F. Supp. 1150 (N.D. Cal. 1978).

147. See *Carey v. Pipus*, 435 U.S. 247 (1978).

148. 15 U.S.C. § 1691e(b)-(d) (1988). See also *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980).

149. 15 U.S.C. § 1691e(b) (1988).

150. *Id.* at § 1691e(c).

151. *Id.* at § 1691e(b).

152. *Id.* at § 1691e(d).

153. *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979).

154. *Blum, Comm'r, N.Y. State Dep't of Social Servs. v. Stenson*, 465 U.S. 886 (1984).

155. 42 U.S.C. § 3613(c)(1) (1988).

156. *Id.*

157. *Id.* at § 3613(c)(2).

158. *Id.* at § 3613(a); 15 U.S.C. § 1691e(f) (1988).

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any time during the credit transaction, including during collection procedures. Therefore, an individual can bring an action many years after the initial loan application. However, the claim for relief does not relate back to the original application — the action must be filed within two years of the discriminatory act complained of in the complaint. The ECOA two-year limitation is not applicable when a federal administrative agency with ECOA enforcement authority or the United States Attorney General has begun its own ECOA action within two years from the date of the occurrence of the action.¹⁵⁹

In many cases, a client may seek legal counsel after the two-year statute of limitations has expired. There are still options available, such as waiver, estoppel, and equitable tolling.¹⁶⁰ Also, the attorney should research whether the continuing violation theory, as used in Title VII cases, can be used under the ECOA or the FHA to cover acts committed more than two years before the date the plaintiff files the action.¹⁶¹

Four reported cases have addressed the issue of whether a person being sued on a debt after the statute of limitations has run has the remedy of raising ECOA violations in the form of recoupment (to reduce the applicant's liability to the bank) or a counterclaim. Three courts have held that the defendant was permitted to maintain a defense of recoupment even though the statute of limitations provisions in ECOA normally would bar an action for damages.¹⁶² In *Marine American State Bank v. Lincoln*, attorneys' fees and punitive damages were awarded on a recoupment claim.¹⁶³ In another case, a court refused to consider an ECOA defense, finding that the counterclaim was barred by the statute of limitations.¹⁶⁴

G. Use of the CRA

The CRA is grossly underutilized as a strategy to attack credit discrimination. In 1992, there were 5,258 applications by banks and thrifts for approval of mergers, acquisitions, or opening new branches.¹⁶⁵ Of this number, there were only forty-six challenges based on inadequate compliance with the CRA.¹⁶⁶ Only three of the forty-six challenges resulted in the denial of an application.¹⁶⁷

159. 15 U.S.C. § 1691e(f)(2) (1988).

160. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1981).

161. No cases were discovered exploring this theory.

162. See *FDIC v. Notis*, 602 A.2d 1164 (Me. 1992); *Marine Am. State Bank v. Lincoln*, 433 N.W.2d 709 (Iowa 1988); *In re Remington*, 19 B.R. 718 (D. Colo. 1982).

163. 433 N.W.2d 709 (Iowa 1988).

164. *Ford City Bank v. Goldman*, 424 N.E.2d 761 (Ill. App. Ct. 1981).

165. *CRA Objections Blocked 3 Filings in '92*, *BANKING WK.* 10 (Mar. 29, 1993).

166. *Id.*

167. *Id.*

It is important that attorneys representing consumer groups learn to utilize the CRA as strong leverage to "convince" institutions to work with community development organizations and other groups doing economic development work. A properly negotiated CRA agreement can be of great help to the community and the bank.

HMDA data provide a means to determine noncompliance with the CRA. By drawing on HMDA data, attorneys can easily point out to financial institutions the need to change their discriminatory practices which could lead to penalties. This would allow the attorney negotiating power to work out deals to help community development organizations and minority borrowers in general.

V. BANKS' ATTORNEYS' STRATEGIES.

Attorneys who represent lenders are in a unique position to help both their clients and consumers by assisting the clients in compliance with the fair lending laws.

The attorney should recommend that the lender perform a self-assessment, focusing on compliance with all of the fair lending laws and regulations. Corrective action should be taken where violations or other problems are detected. It may be necessary to modify internal policies as a result of compliance problems detected. In any event, every lender should have a monitoring system in place to regularly and periodically evaluate the lender's compliance with fair lending laws.

A second review program may be helpful if the lender's denial rates show disparate trends based on race. The second review program should focus on missed opportunities instead of whether the decision to deny the loan request is properly or adequately documented.

The development and implementation of checklists, to be used in conjunction with all loan applications, should be considered. The checklists should address the various elements of the fair lending laws as well as the issue of assistance to marginal applicants.

All of the lender's staff should receive training, on an ongoing basis, on fair lending laws. The comprehensives of that training should vary depending on the functions or responsibilities of the individual employees. Since employees at all levels can commit fair lending violations, all employees, regardless of their position, need this training.

Finally, all of the lender's policies should be run through an effects test model to ensure that none of its policies inadvertently violate the fair lending laws.

VI. CONCLUSION.

It is only through vigilant enforcement of fair housing and fair lending laws that all individuals and communities will have fair access to the financing needed to improve their lives. This fair access benefits the consumers as well as the lending institutions themselves. “[B]anks may take some comfort from the fact that sincere efforts to eliminate bias are the right thing to do. Further, done properly, they may well prove to be good for business.”¹⁶⁸

168. William Streeter, *Toward Bias-Free Banking*, A.B.A. BANKING J., Oct. 1, 1993, at 19.