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Introduction: Why Didn't the Courts Stop the Mortgage Crisis?

Lauren E. Willis

INTRODUCTION: WHY DIDN'T THE COURTS STOP THE MORTGAGE CRISIS?

*Lauren E. Willis**

The Great Recession of 2008, and 2009, and 2010, and who knows how much longer, is upon us. Roughly 6.4 million home foreclosures were initiated between 2007 and 2009,[1] and the Federal Reserve Board predicts another 6.5 million for 2010 through 2012.[2] This means that of the 76 million home-owning households that existed at the start of this crisis, about one in six will have entered foreclosure by the end.[3] In 2009, the homeownership rate declined to about 67 percent, back to where it was in 2000,[4] and will fall lower as foreclosures continue.[5] Failures of those banks not bailed out by the taxpayers are heading toward levels last seen in the savings and loan crisis of 1986 to 1991.[6] One hundred and forty banks failed in

* Professor of Law, Loyola Law School Los Angeles.

1. Lenders began foreclosure proceedings on nearly 1.3 million properties in 2007, 2.3 million in 2008, and 2.8 million in 2009. *See RealtyTrac Year-End Report Shows Record 2.8 Million U.S. Properties with Foreclosure Filings in 2009*, REALTYTRAC, Jan. 14, 2010, http://www.realtytrac.com/content/foreclosure-market-report/realtytrac-year-end-report-shows-record-28-million-us-properties-with-foreclosure-filings-in-2009-5489.

2. *Robo-Signing, Chain of Title, Loss Mitigation and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. (2010), *available at* http://www.federalreserve.gov/newsevents/testimony/duke20101118a.htm (testimony of Elizabeth A. Duke, Governor, Federal Reserve Board) (predicting year-end numbers for 2010 and for 2011 to be 2.25 million and for 2012 to be 2 million).

3. At the start of the recession in 2007, there were about 75.6 million home-owning households in the United States. U.S. CENSUS, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2007, at 116 (2008).

4. U.S. CENSUS BUREAU NEWS, U.S. DEP'T OF COMMERCE, CENSUS BUREAU, REPORTS ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP 4 tbl. 4 (2010), *available at* http://www.census.gov/hhes/www/housing/hvs/qtr409/files/q409press.pdf.

5. ANDREW HAUGHWOUT, RICHARD PEACH & JOSEPH TRACY, N.Y. FED. RESERVE BD., THE HOMEOWNERSHIP GAP, STAFF REPORT NO. 418, at 7 (2009), *available at* http://www.newyorkfed.org/research/staff_reports/sr418.pdf (calculating that due to negative equity positions, the rate of nominal homeowners who actually own any equity in their homes is between 3.7 and 11.9 points below the nominal homeownership rate, and predicting significant declines in the nominal homeownership rate in the coming years due to this disparity).

6. *See* FEDERAL DEPOSIT INSURANCE CORPORATION, 1 AN EXAMINATION OF THE

2009,[7] and the projections are that between 500 and 750 lenders in this country will fail by the time this recession is over.[8] Unemployment now stands at 9.7 percent, meaning there are 15 million unemployed people looking for work—over 6 million of whom have been unemployed for over six months.[9] Another 9 million people are working part time but seek full-time work, while over 2 million people are no longer counted among the unemployed because they have given up looking for a job.[10]

There has been no shortage of finger pointing about who caused this crisis. "Greedy bankers . . . who basically spread the bad mortgage virus throughout the global financial system—and got rich doing so,"[11] may be the most often blamed. "[I]rresponsible borrowers" are also a common target: "[b]uyers who took out a mortgage they could never afford, buyers who tried to ride the housing wave without educating themselves well enough, buyers who committed fraud in hopes of netting a quick profit, and buyers who attempted to flip more homes than they ever could manage."[12] Also charged are corrupt rating agencies, who "pimped themselves out to the issuers, who paid them for their ratings,"[13] and the stupid investors who blindly followed the ratings and "have learned utterly nothing from the bubbles and collapses of the past decade."[14] Sleeping regulators, either in the "asleep at the switch" sense[15] or the

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BANKING CRISES OF THE 1980S AND EARLY 1990S 168–69 (1997), *available at* http://www.fdic.gov/bank/historical/history/167_188.pdf.

7. Federal Deposit Insurance Corporation, Failures and Assistance Transactions, http://www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30 (last visited July 7, 2010).

8. Eric Dash, *Investors Ease Strain on F.D.I.C.*, N.Y. TIMES, May 20, 2010, at B1 (noting that this figure is based on a total of 8100 banks).

9. Economic News Release, U.S. Bureau of Labor Statistics, Employment Situation Summary (July 2, 2010), http://www.bls.gov/schedule/archives/empsit_nr.htm.

10. *Id.*

11. Deirdre McMurdy, *Who's to Blame for the Financial Crisis?*, MSN MONEY, Feb. 28, 2009, http://money.ca.msn.com/investing/deirdre-mcmurdy/article.aspx?cpdocumentid=19417967.

12. Robert Holmes, *Who's to Blame for the Economy? Homeowners*, STREET, Mar. 11, 2009, http://www.thestreet.com/story/10470251/1/whos-to-blame-homeowners.html.

13. Dan Freed, *Who's to Blame for the Economy? Rating Agencies*, STREET, Mar. 13, 2009, http://www.thestreet.com/story/10471826/1/whos-to-blame-rating-agencies.html.

14. John Hussman, *Weekly Market Comment: Reckless Myopia*, HUSSMAN FUNDS, Nov. 30, 2009, http://www.hussman.net/wmc/wmc091130.htm.

15. *See, e.g.*, Tami Luhby, *Bank Regulators: 'Asleep at the Switch,'* CNNMONEY.COM, Mar. 4, 2008, http://money.cnn.com/2008/03/04/news/companies/senatebank/index.htm (quoting Senator Christopher Dodd: "'Again and again the question has been asked over the past year as

sleeping with the banks sense,[16] have also received a large share of criticism. From Fannie Mae and Freddie Mac[17] to China,[18] the list of those denounced as responsible for the crisis goes on.

But what about the courts? Where do the courts fit into all of this? Thus far, our legal system has largely escaped any public blame for the crisis. Which is curious, given that the legal system had a ticket for a front-row seat to many of the causes of the crisis. The mortgage boom and bust were riddled with violations of state and federal law, from fraud to discrimination to Truth in Lending Act (TILA)[19] violations. Whether in bankruptcy cases, foreclosure proceedings (which even in non-judicial states can be redirected into judicial proceedings), or ordinary civil and criminal litigation, courts could have, at least in theory, meted out justice to and deterred wrongdoing by borrowers, appraisers, mortgage brokers, lenders, investment banks, rating agencies, and investors.

So why didn't the courts stop the mortgage crisis, or at least slow it down? The five articles in this issue of the *Loyola of Los Angeles Law Review* are some of the first to address this question.

Part of the reason the courts failed to curb the crisis is the war on class actions that has occurred in this country over the past two decades.[20] Congress participated in this through the Class Action

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our credit markets have grown increasingly impaired: Where were the regulators? . . . Why didn't they do more? Were they asleep at the switch? And when the alarm went off, did they merely hit the snooze button?'").

16. *See, e.g.*, Arthur Levitt, Jr., *Regulatory Underkill*, WALL ST. J., Mar. 21, 2008, at A13 (citing as one cause of the mortgage crisis that "federal regulators turned from impartial referees to industry enablers"); *Senator: Regulators Didn't Force WaMu to Fix Problems*, USA TODAY, Apr. 16, 2010, http://www.usatoday.com/money/companies/regulation/2010-04-16-wamu-hearing_N.htm (noting that Senator Carl Levin, "[d]ecrying the cozy relationship between regulators and bankers," stated that the federal Office of Thrift Supervision "'saw the shoddy lending practices, saw the high-risk lending, saw the shoddy securitizations, understood the risk, but let the bank do it anyway'"); *see also* Charles Riley, *Reid Says Republicans 'Making Love to Wall Street'*, CNNPOLITICS, May 5, 2010, http://politicalticker.blogs.cnn.com/2010/05/05/reid-republicans-make-love-to-wall-street/ (reporting that Senator Harry Reid accused Republicans of "looking for a way to 'continue making love to Wall Street'").

17. *See, e.g.*, Charles W. Calomiris & Peter J. Wallison, *Blame Fannie Mae and Congress for the Credit Mess*, WALL ST. J., Sept. 23, 2008, at A29.

18. *See, e.g.*, Stephen Gandel, *Did Foreigners Cause America's Financial Crisis?*, TIME, Jan. 15, 2010, http://www.time.com/time/business/article/0,8599,1954240,00.html.

19. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2006 & Supp. II 2008).

20. *See, e.g.*, Alistair B. Dawson & Geoff A. Gannaway, *In Memoriam: Texas Class Actions*, ADVOCATE, Fall 2008, at 78; Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Francisco Valdes,

Fairness Act,[21] but the campaign waged by the U.S. Chamber of Commerce and other business interests against class-action plaintiffs' lawyers[22] has more broadly affected the way courts approach class certification. As Jeffrey Payne's article, *Class Retreat from Mass Deceit: Assessing Class Action Compatibility with Truth in Lending Act Rescission*, details, the courts have cut off the class-action device at its knees in the context of TILA violations. Rescission is a primary remedy for TILA violations, carrying a three-year statute of limitations,[23] rather than the one-year[24] limitations period applicable to damages suits. During the mortgage boom of the past decade, where lenders had committed repeated identical TILA violations in originating home loans, private plaintiffs in numerous cases sought declarations that all mortgages subject to the same violation committed by the same lender could be rescinded at the option of the borrowers. Nothing in the text of the statute restricts the rescission remedy in class actions, yet the appellate courts interpreted congressional silence to imply that a declaration of rescindability may not be granted on a class-wide basis in TILA actions.[25] Moreover, these courts did so despite evidence that Congress twice considered and rejected the possibility of prohibiting TILA class-action plaintiffs from seeking rescission. Congress amended TILA once to limit the scope of the remedy in TILA class actions seeking damages but not in TILA class actions seeking rescission.[26] Twenty years later, knowing full well that plaintiffs in TILA class actions frequently sought rescission,[27] Congress chose to exempt lenders

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Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective, 24 GA. ST. U. L. REV. 627 (2008) (analyzing "holy war" on class actions).

21. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

22. *See, e.g.*, Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1596–1602 (2008) (explaining CAFA's origins in distrust of class-action plaintiffs' lawyers).

23. 15 U.S.C. § 1635(f).

24. *Id.* § 1640(e).

25. Andrews v. Chevy Chase Bank, 545 F.3d 570, 578 (7th Cir. 2008); McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 427 (1st Cir. 2007).

26. Act of October 28, 1974, Pub. L. No. 93-495, 88 Stat. 1500 (codified as amended in scattered sections of 15 U.S.C.) (amending § 1640(a)(2)(B)).

27. 141 CONG. REC. 26896 (1995) (statement of Sen. D'Amato) (remarking on then recently filed TILA class actions seeking rescission).

from liability for small technical errors in TILA disclosures rather than to restrict the availability of rescission in class actions.[28]

Even more appalling, at least in hindsight, is the policy rationale these courts articulated: that because awarding the remedy of allowing borrowers in a class action to rescind loans for TILA violations might bankrupt lenders, the courts should not certify the class.[29] That is, where lenders' violations of the law were detected, the courts denied class-action certification specifically to allow those lenders to continue to live—and lend—another day. This not only ensured that problematic lenders would continue to originate mortgages, but it encouraged other lenders to follow. Secure in the knowledge that the courts would not put them out of business even if they were caught disregarding their duties under TILA, other lenders had a reduced incentive to comply with the law. Payne invites courts to return to traditional rules of statutory interpretation and to allow class actions seeking a declaration of mortgage rescindability for TILA violations common to all class members to proceed.

A related reason the courts did not check the mortgage crisis is explained in James Pulliam's article, *Good Cop, Bad Cop: Market Competitors, UDAP Consumer Protection Laws, and the U.S. Mortgage Crisis*. The history here parallels the war on class actions, although the battlefield was limited to California. With a goal of reducing consumer lawsuits, major corporations[30] waged a campaign against California's Unfair Competition Law (UCL).[31] This campaign culminated in the passage of Proposition 64, which eliminated private attorney general standing under the UCL. Traditionally in California, if one business saw a competitor engaging in unfair or deceptive practices (turning back odometers on used cars, for example), the honest business could sue the dishonest business to prevent loss of market share due to the deceptive

28. Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, sec. 3, § 1605(f), 109 Stat. 271, 272–76.

29. *McKenna*, 475 F.3d at 426.

30. Evan Halper & Marc Lifsher, *Initiative Seeks Curbs on Consumer Lawsuits*, L.A. TIMES, July 6, 2004, at A1 (listing corporate donations to the campaign to pass Proposition 64); Marc Lifsher, *Prop. 64 Backers Fight for Attention*, L.A. TIMES, Nov. 1, 2004, at C1 (noting over $15 million was spent by backers of Proposition 64).

31. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2008).

practices.[32] But after the passage of Proposition 64,[33] only those private plaintiffs who could demonstrate the direct loss of money or property caused by an unfair business practice could sue.[34] Honest mortgage brokers, good appraisers, and responsible lenders all effectively lost standing to sue to enjoin unfair competition.

In a competitive marketplace, this left businesses with little financial choice but to join in the dishonest practices. For example, if one lender were providing borrowers with lowball "good faith" estimates under the Real Estate Settlement Procedures Act,[35] telling borrowers their monthly payments would be much lower than the lender knew those payments would really turn out to be,[36] other lenders that did not engage in the same deception would lose customers. After the passage of Proposition 64, the courts could no longer assist competitors in maintaining an honest marketplace. Pulliam suggests that competitor standing under California's UCL be reinstated and that other states broaden their unfair or deceptive trade practices statutes to allow suits by competitors.

Borrowers, lenders, or investors who suffered direct harm retained standing to bring suit, but courts were unable to use their power over fraud and unfair business practices claims to reach another key factor underlying the mortgage meltdown—inflated home appraisals. The enormous economic incentives for appraisers to inflate home values simply swamped any deterrent effect of the law. This mirrored the now better-known problem of rating agencies awarding AAA bond ratings to mortgage-backed securities they knew were quite risky. Moody's, Fitch, and Standard and Poor's have all nearly admitted that their ratings were inflated, but they say that the market forced them to do it; if they awarded honest ratings, the Wall Street issuers paying for those ratings would have taken

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32. *Id.* § 17204 (providing standing under the UCL to "any person acting for the interests of itself, its members or the general public.").

33. California Proposition 64 is now codified as CAL. BUS. & PROF. CODE §§17200–17500.

34. *See id.* § 17204.

35. Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2006)).

36. *See* Kenneth R. Harney, *Mortgage Lenders Can Sidestep New Rules to Prevent Lowball Estimates*, WASH. POST, Jan. 16, 2010 (discussing ways in which lenders circumvent new federal rules designed to eliminate low-balled GFEs); *see also* Posting of Jeff Belonger to Active Rain, http://activerain.com/blogsview/1192459/good-faith-estimates-warnings-to-be-aware-of- (Aug. 12, 2009, 14:15 EST) (blog post of mortgage broker describing ways in which competing brokers create inaccurate low-balled GFEs to lure away customers from honest brokers).

their business to another rating agency.[37] The same experience befell appraisers. If they did not deliver the numbers that mortgage brokers, loan officers, and borrowers wanted, they lost business.[38] As in the rating-agency situation, once lenders planned to sell off the mortgages they originated into securities pools, no party to the transaction had an incentive to ensure accurate appraisals.[39] Therefore fraud, already a difficult claim to prove due to the inherent subjectivity of the appraisal process, could only be pursued post hoc. Moreover, just a few bad appraisers can spoil the pot. Once one or two house prices in a neighborhood are inflated, the new "comparables" that determine neighboring property values[40] will drive up all appraised values.

In *Issues in Appraisal Regulation: The Cracks in the Foundation of the Mortgage Lending Process*, J. Kevin Murray proposes that we revive an old solution to this problem. Murray suggests reintroducing the system formerly used by the Federal Housing Administration

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37. *See* Blake Ellis, *How Credit Watchdogs Fueled the Financial Crisis*, CNNMONEY.COM, Apr. 24, 2010, http://money.cnn.com/2010/04/23/news/economy/credit_rating_agencies_hearing/index.htm (reporting that executives from Standard and Poor's and Moody's acknowledged that "investment banks shop around for the best rating" and that a former vice president at Moody's admitted in testimony that "he felt constant pressure to accept deals, even if they looked risky"); Kevin G. Hall & Chris Adams, *Senate Panel: Ratings Agencies Rolled Over for Wall Street*, MCCLATCHY NEWS, Apr. 22, 2010, http://www.mcclatchydc.com/2010/04/22/92709/senate-panel-ratings-agencies.html (reporting on "e-mail records in which executives from Standard & Poor's and Moody's Investors Service acknowledge compromising the integrity of ratings to win business from big Wall Street firms").

38. In a 2007 survey, 90 percent of home appraisers said that they were pressured to inflate their appraisal numbers. OCTOBER RESEARCH CORPORATION, 2007 NATIONAL APPRAISER SURVEY: EXECUTIVE OVERVIEW 3 (2007), *available at* http://www.appraisalinstitute.org/newsadvocacy/downloads/ltrs_tstmny/2007/Ntnl_Apprsl_Srvy.pdf; *see also Legislative Solutions to Abusive Mortgage Lending Practices: Joint Hearing Before the Subcomm. on Housing and Community Opportunity and the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Servs.*, 109th Cong. 199 (2005) (testimony of Alan E. Hummel, Chief Executive Officer, Iowa Residential Appraisal Company) (citing a 2003 survey of appraisers by an independent research organization showing that 55 percent of appraisers felt pressure to overstate their appraisals). Eleven thousand appraisers signed a petition asking state and federal agencies to do something to stop this pressure. *See* AppraisersPetition.com, Petition by Real Estate Appraisers to Stop Unfair Practices, http://appraiserspetition.com/ (last visited July 9, 2010).

39. *See* DAVID CALLAHAN, DĒMOS, HOME INSECURITY—HOW WIDESPREAD APPRAISAL FRAUD PUTS HOMEOWNERS AT RISK 1–3 (2005), *available at* http://www.cheatingculture.com/home_insecurity_v3.pdf (describing how lenders and consumers both encourage or at least acquiesce in appraisal fraud).

40. For a description of the appraisal process and use of recently sold comparable properties to establish values, see UNIF. STANDARDS OF PROF'L APPRAISAL PRACTICE R. 1-1 to 4-2 (Appraisal Standards Bd. 2010).

mortgage-insurance program: the random assignment of appraisers to properties.[41] A federal agency would keep a list of qualified appraisers, coded for neighborhood and property-type expertise. When parties to a home mortgage need an appraisal, they would submit their request, along with their neighborhood and property type, to the agency to receive a randomly assigned appraiser. Appraisers with poor track records would be disqualified from the list. With no broker, loan officer, or borrower able to control whether an appraiser is hired again for future transactions, appraisers would no longer face financial pressure to inflate values and would be free to act as impartial experts.

Why else did the courts fail to curtail the mortgage crisis? As Andrew Lichtenstein's *United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class* elucidates, discrimination in mortgage lending had changed dramatically in the years leading up to the crash, and borrowers, their lawyers, and the courts failed to recognize the new shape of discrimination. Prior to the 1990s, lending discrimination consisted of denying loans to qualified minority applicants or applicants from minority neighborhoods, a practice known as redlining. When subprime lending took hold, lenders started targeting minorities for expensive and complex loan products—products that often led to foreclosure. But courts, lawyers, and even borrowers did not perceive this mutation from redlining to reverse redlining.[42] Because they equated discrimination with mortgage denial, they often failed to perceive the injury of being targeted, based on race or ethnicity, for a loan that was overpriced, overly risky, and just plain inappropriate for the borrower's financial situation.

Further, proof in reverse-redlining claims, whether brought under the Fair Housing Act[43] (FHA) or the Equal Credit Opportunity Act[44] (ECOA), typically relies on statistical data regarding the

41. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-176, HOMEOWNERSHIP: INFORMATION ON CHANGES IN FHA'S NEW SINGLE-FAMILY APPRAISAL PROCESS 2 (1997).

42. *See* Gregory D. Squires, *The New Redlining*, *in* WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING 2–3 (Gregory D. Squires ed., 2004) (explaining move from redlining to reverse redlining).

43. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)).

44. Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f (2006)).

lender's disparate lending practices toward white and nonwhite applicants.[45] This information is beyond the ken of the borrower relating his or her story to an attorney. Even if a borrower senses that she might have been a victim of disparate treatment, proving such a claim calls for statistical analyses of the lender's loan portfolio—analyses that require time and resources beyond what a typical bankruptcy attorney can devote to the case of a borrower who is about to lose her home to foreclosure. Lichtenstein recommends that the primary responsibility in this area should be moved from private plaintiffs to government agencies that are better able to track lender activities, perceive statistical patterns in loan origination data, and pursue reverse-redlining claims on behalf of victims of this new form of discrimination.

Finally, one reason the courts are not helping us get out of this crisis, despite their power to halt some of the foreclosures that result in over 3,000 lost homes each day in this country,[46] is that most courts rubber-stamp foreclosures. As Andrew Kazakes expounds in *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, in foreclosure actions the courts usually see, at most, only two of the parties affected: the servicer and the homeowner. In non-judicial foreclosure, the process can occur without any court involvement, although the homeowner can bring the matter to the attention of a state judge through a motion for preliminary injunction[47] or of a federal judge by filing for bankruptcy.[48] The servicer does not own the loan and has little interest in long-term loan performance.[49] The borrower, if she shows up at all, usually is unable to prove any defenses to foreclosure that she has, or has

45. Stephen L. Ross & John Yinger, *Uncovering Discrimination: A Comparison of the Methods Used by Scholars and Civil Rights Enforcement Officials*, 8 AM. L. & ECON. REV. 562, 571–85 (2006) (explaining proof required in disparate impact lawsuits).

46. Lenders took back a record 92,432 properties in April 2010 alone. Lynn Adler, *April Foreclosures Ebb, Suggesting High Plateau*, REUTERS.COM, May 13, 2010, http://www.reuters.com/ article/idUSTRE64C0CB20100513?type=domesticNews.

47. *See* JOHN RAO ET AL., NAT'L CONSUMER LAW CTR., FORECLOSURES § 4.2.3, at 76 (2007).

48. Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 327–28 (2007).

49. Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities* 18 (Fed. Reserve Bd., Finance & Economics Discussion Series, Working Paper No. 2008-46, 2008).

none.[50] But there is another party with an interest in this mortgage—the investors who ultimately own the loan, through the securitization conduit. Kazakes presents evidence that in a substantial number of cases, these investors would be better off if the mortgage were modified to reduce monthly payments to a manageable level for the borrower rather than foreclosed upon.[51] That is, the net present value to the investors of a foreclosure is lower than the net present value of a loan modification. Yet in most foreclosure cases, judges are blind to the interests of these investors.

So what are the courts to do about this situation, given that only the borrower and the servicer are parties to the action? In other contexts, when conducting legal proceedings in which persons not before the court have a legally cognizable interest, the courts recognize a duty to protect those absent stakeholders. For example, judges safeguard the personal and financial welfare of unnamed class members in class-action settlements,[52] parties not present in ex parte actions,[53] unborn beneficiaries in matters involving trusts and estates,[54] and minors and incompetent persons who may be affected by litigation.[55] Kazakes suggests that judges apply this same "absent stakeholder doctrine" to protect the interests of investors in

50. *See* MELANCA CLARK, BRENNAN CTR. FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 2, 4 (2009).

51. *See also* Cordell et al., *supra* note 49, at 12–13.

52. *See, e.g.*, 32B AM. JUR. 2D *Federal Courts* § 1864, Role and Discretion of Court (2010) ("[T]he district court acts as a fiduciary and as a guardian of the rights of the absent class members." (footnote omitted)); 59 AM JUR. 2D *Parties* § 92, Class Actions or Suits—Practice and Procedure: In General (2010) ("To protect the rights of absent parties, a court takes on a heightened role throughout class action litigation . . . .").

53. Adobe Sys., Inc. v. S. Sun Prods., Inc., 187 F.R.D. 636, 639 (S.D. Cal. 1999) ("Restraining order applications sought *ex parte* require the court to serve as the absent party's advocate, triggering intense judicial scrutiny of a plaintiff's claims, the relief it seeks, and most importantly, its proffered justification for proceeding *ex parte*.").

54. *See, e.g.*, Family Settlement of Testator's Estate, 29 A.L.R.3d 8, § 2a (2009) ("When the court . . . finds that [a proposed settlement of an estate] will best serve the interests of the minors and unborn or unknown beneficiaries, it may approve the contract and order that it be carried out."); A.W. SCOTT ET AL., SCOTT & ASCHER ON TRUSTS § 12.1.1 (5th ed. 2008) (noting that where a trust beneficiary is unborn, "even before the child's birth or conception, a contingent beneficial interest exists, and . . . the courts will protect it").

55. *See, e.g.*, FED. R. CIV. P. 17(c)(2) ("The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action."); 7 TEX. JUR. 3D *Attorneys at Law* § 133, Duties of Appointed Counsel (2010) ("An attorney appointed or assigned to represent an indigent or other person has a duty to act and to diligently protect all the rights of that person. . . . If the court-appointed attorney fails to discharge his or her obligation, it becomes the duty of the trial judge to take the initiative and to interpose the court's authority to protect the absent parties from injustice.").

foreclosure proceedings. Courts would condition foreclosure on proof by the servicer that foreclosure is in the best interests of investors.

In sum, all five articles shed much-needed light on why the courts failed to stop the mortgage crisis, lessons we in the legal profession need to take seriously if we want the law to function for the greater social good. The proposals here are modest and narrowly targeted:

- authorize certification of class actions pursuing rescission as a potential remedy under TILA;
- allow businesses to sue under California and other states' unfair competition laws to stop their competitors from using unfair and deceptive practices to steal market share;
- return to the old FHA insurance program's model for random assignment of qualified appraisers for home mortgage purposes;
- beef up government enforcement of the FHA and ECOA; and
- recognize the interests of absent investor stakeholders in foreclosure litigation and refuse to allow a foreclosure to take place when a loan modification would best serve those interests.

Perhaps if these changes had been made in the law earlier, they would have had only a small effect at the margins of the crisis. But that would be something. When fraud, discrimination, and other violations of the law are implicated in a national crisis, the law should not be a mere bystander.