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United We Stand, Disparate We Fall: Putting Individual Victims of Reverse Redlining in Touch with Their Class

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UNITED WE STAND, DISPARATE WE FALL:
PUTTING INDIVIDUAL VICTIMS OF
REVERSE REDLINING IN
TOUCH WITH THEIR CLASS

Andrew Lichtenstein*

Reverse redlining is a form of illegal lending discrimination in which lenders target minority communities for unfair, overpriced loans. It gives rise to a private right of action under the Fair Housing Act and Equal Credit Opportunity Act. Most often, plaintiffs bring reverse-redlining claims under a disparate impact theory, which does not require the plaintiff to show discriminatory intent and instead relies on a showing of statistical disparities to state a prima facie case. However, because this theory is predicated on abstract statistical information instead of facts from the plaintiffs’ actual experiences, plaintiffs and their attorneys often fail to recognize reverse-redlining claims. Also, plaintiffs who do recognize their claims lack the resources to successfully do the detailed and extensive statistical analysis required to state a prima facie case. Therefore, legislative action is needed to shift the primary burden of preventing reverse redlining from private plaintiffs to government agencies better equipped to investigate and pursue reverse redlining.

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I. INTRODUCTION

Responding to an advertisement mailed to his residence, Mr. Borrower, an African-American, goes to see Mr. Broker to refinance his mortgage. Despite the fact that Mr. Broker routinely gives price quotes on request, Mr. Broker refuses to give Mr. Borrower a quote until Mr. Borrower allows Mr. Broker to run his credit report.\(^1\) Mr. Broker routinely provides customers with information on several loan products, but he only gives Mr. Borrower details on one. Despite the fact that Mr. Borrower’s income and credit score qualify him for a prime loan, Mr. Broker offers him a costly subprime mortgage.\(^2\) However, because Mr. Borrower is unfamiliar with Mr. Broker’s routine business practices, he does not know that he has received different treatment.

Mr. Borrower’s new loan is an adjustable-rate mortgage (ARM) with an interest rate that could rise to 11.625 percent.\(^3\) While Mr. Borrower’s initial monthly payments are capped at $2,420, the interest rate soon rises to the point where the payment does not cover the interest due each month. This results in negative amortization—which means that the amount of unpaid interest is added to the loan’s principal.\(^4\) Eventually, the loan reaches the recast point at which Mr. Borrower’s payments must adjust in order for him to fully repay the principal by the end of its thirty-year term.\(^5\) Payment caps do not apply to this adjustment,\(^6\) resulting in his monthly payment spiking to $3,996. This sudden payment increase puts Mr. Borrower in imminent danger of foreclosure.

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1. See Margery Austin Turner et al., The Urban Inst., All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions 26 (2002). The above hypothetical is loosely based on real-life accounts in that report.

2. A “subprime loan” is a loan with more burdensome terms than those of a “prime loan” and is designed for a borrower who lacks the income or credit score to qualify for a prime loan. See Edward M. Gramlich, Subprime Mortgages: America’s Latest Boom and Bust 17 (2008).


5. Id. at 14.

6. Id.
Hoping to prevent this fate, Mr. Borrower goes to see a bankruptcy attorney. Unbeknownst to Mr. Borrower or his attorney, the facts indicate that Mr. Borrower is a victim of “reverse redlining,” an illegal practice by which lenders target certain racial groups for loans with particularly unfair terms.\(^7\) Under the Fair Housing Act of 1968 (FHA)\(^8\) and the Equal Credit Opportunity Act (ECOA),\(^9\) Mr. Borrower may have a cause of action that can compensate him for the financial loss he has suffered due to this illegal activity. To state a claim for reverse redlining, Mr. Borrower would have to show that a business practice of his lender has resulted in a disproportionately number of African-Americans receiving overly costly loans.\(^10\)

Mr. Borrower has no idea whether his lender has engaged in a practice of originating high-cost subprime loans to other African-Americans who qualified for prime mortgages. Moreover, bankruptcy proceedings are based on each debtor’s personal situation—his debts, his assets, his potential for future income—rather than on his membership in a class. Listening to Mr. Borrower’s tale of financial woe, the bankruptcy attorney does not recognize Mr. Borrower’s cause of action for reverse redlining.

This Article contends that a disconnect between the facts within a plaintiff’s knowledge and the information necessary to successfully state a reverse-redlining claim thwarted civil enforcement of the FHA and ECOA in the years leading up to the current home mortgage crisis for two reasons. First, potential plaintiffs and their lawyers failed to recognize reverse-redlining claims from the nature of the plaintiffs’ individual injuries. Second, even if potential plaintiffs realized they might have valid discrimination claims, the requirement for plaintiffs to allege facts beyond their individual experiences amounted to a heightened pleading standard that could only be surmounted by costly pre-discovery investigations. Both of


these factors have recently prevented any private plaintiffs from successfully pursuing individual reverse-redlining claims.  

While Congress intended the FHA and ECOA to be enforced primarily through private litigation, this approach is unrealistic in the reverse-redlining context. New legislation must provide federal agencies with new powers and a new mandate to eliminate lending discrimination, shifting enforcement of the FHA and ECOA from private litigants to government actors better positioned to investigate and pursue illegal reverse-redlining activities.

Part II of this Article will discuss the current state of reverse-redlining law, focusing on disparate impact theory as the primary tool for confronting lending discrimination. Part III will explain that a great number of potential plaintiffs have failed to recognize their legal claims. Part IV will demonstrate the formidable fact-finding obstacles plaintiffs face in the pleading stage. Part V will recommend legislative action to enhance enforcement of the FHA and ECOA and examine the costs and benefits of such action. Part VI will conclude that while more effective enforcement is a start, the ultimate goal of the FHA and ECOA is for there to be no need for enforcement at all. Unfortunately, that day is a long way off.

II. AN UNEASY UNION: DISPARATE IMPACT THEORY AND REVERSE REDLINING

The mortgage meltdown has disproportionately injured communities of color. African-American and Latino borrowers were far more likely than whites to receive overpriced loans. While differences in income and credit histories may explain some of these irregularities, objective underwriting criteria cannot explain the wide discrepancies between loan products sold to minority and white


borrowers.\textsuperscript{15} The disparities in the credit terms extended to minority and white borrowers correlate with the differences in foreclosure rates between these communities.\textsuperscript{16} Reverse redlining has caused this crisis to fall hardest on minorities, producing an unprecedented foreclosure crisis in these communities.\textsuperscript{17}

Courts have struggled to apply existing law to the problem of reverse redlining for several reasons.\textsuperscript{18} First, reverse redlining is more subtle than traditional lending discrimination. Second, courts currently juggle two tests for determining the validity of a prima facie reverse-redlining case, applying one or the other depending on whether the case is brought by an individual plaintiff or as a class action. Third, demonstrating reverse redlining requires statistical information, but the only public source of this data available to most private plaintiffs omits key facts, requiring courts to sustain or dismiss claims of discrimination based on conjecture. Finally, complicated administrative enforcement and public litigation procedures under the FHA and ECOA further confuse reverse-redlining adjudication.

\textit{A. Reverse Redlining: The New Face of Lending Discrimination}

The term “redlining” describes a particular type of discriminatory practice where lenders systematically exclude certain


\textsuperscript{17} Mayor & City Council of Balt. Complaint, supra note 15, at ¶ 4 (“Wells Fargo’s disproportionately high foreclosure rate in Baltimore’s African-American neighborhoods is the result of reverse redlining.”); Aleo & Svirsky, supra note 15, at 1 (describing how reverse redlining has led to the foreclosure crisis in minority communities); Gerardi & Willen, supra note 15 (“[H]omes purchased with [subprime] mortgages are lost to foreclosure much more frequently than those purchased with prime mortgages.”).

\textsuperscript{18} See Brescia, supra note 13, at 198 (“[T]rial courts are challenged by the fact that reverse redlining requires an approach to the anti-discrimination jurisprudence that might not square with its traditional frames . . . .”); Willis, supra note 7, at 831 (describing the chasm between borrowers and the law).
communities from their services. Inversely, “reverse redlining” is the practice by which lenders target these communities for loans with particularly onerous and unfair terms. Because discrimination is manifested in the terms of credit proffered rather than in a flat denial, it is more subtle.

The hypothetical at the beginning of this Article represents a common scenario. Mr. Borrower responded to a mailed advertisement to refinance his mortgage, and Mr. Broker steered him into a subprime product. However, Mr. Borrower could not prove that Mr. Broker targeted him based on these facts alone. In order to succeed with a legal claim, Mr. Borrower would have to provide evidence that Mr. Broker treated him differently than other similarly situated borrowers.

B. Disparate Impact Theory: Confronting New Wrongs with Old Rights

Because proving discriminatory intent is difficult, plaintiffs who sue under civil rights statutes usually base their claims on the “effects” of the alleged discrimination rather than on circumstantial evidence of discriminatory purpose. Congress has codified this strategy, known as disparate impact theory, in the amendments to Title VII of the Civil Rights Act of 1991. Courts recognized this doctrine long before its congressional enactment, and references to an “effects test” appear in the ECOA’s legislative history.

1. Two Prima Facie Cases for Two Types of Plaintiffs

Recently, courts have struggled to apply the disparate impact framework that Congress developed for Title VII employment

20. Id.; Willis, supra note 7, at 733.
discrimination claims to reverse redlining.\textsuperscript{25} In \textit{Matthews v. New Century Mortgage},\textsuperscript{26} in which four elderly plaintiffs alleged that their lender had targeted them for overpriced loans because of their sex and marital status,\textsuperscript{27} the court developed a four-part test to assess the plaintiffs’ reverse-redlining claims. Under the “\textit{Matthews test},” the plaintiff must show: (1) he or she is a member of a protected class; (2) he or she applied for a loan and was qualified for that loan; (3) he or she received a loan on grossly unfair terms; and (4) the lender continued to give loans to similarly qualified applicants on significantly better terms.\textsuperscript{28} Also, if the plaintiff presents “direct evidence” that the defendant specifically targeted on the basis of race, the plaintiff is not required to show that the lender gave more favorable loans to others.\textsuperscript{29}

However, in \textit{Ramirez v. GreenPoint Mortgage Funding, Inc.}\textsuperscript{30} and similar class-action cases,\textsuperscript{31} courts applied a framework that emphasized the injury to the class as a whole rather than to individual plaintiffs. Under the “\textit{Ramirez test},” a plaintiff must demonstrate: (1) there was a significant disparate impact on a protected class, and (2) the impact was caused by an identified lending practice.\textsuperscript{32} After the plaintiff establishes a prima facie case, the burden shifts to the defendant to prove the disputed practice is “consistent with business necessity.”\textsuperscript{33} In reverse-redlining cases, the business justification most commonly offered by lenders is that the

\begin{itemize}
\item[25.] Brescia, \textit{supra} note 13, at 187 (“The reverse redlining problem raises a new challenge for the Title VII/Title VIII framework . . . .”).
\item[26.] 185 F. Supp. 2d 874 (S.D. Ohio 2002).
\item[27.] Id. at 887.
\item[29.] \textit{See Matthews}, 185 F. Supp. 2d at 886–87.
\item[30.] 633 F. Supp. 2d 922 (N.D. Cal. 2008).
\item[32.] \textit{Ramirez}, 633 F. Supp. 2d at 927.
alleged disparities are consistent with differences in creditworthiness among classes of borrowers.\textsuperscript{34}

The Ramirez test, with its focus on class-wide effects, better suits plaintiffs seeking class-wide relief. Proving that the loan of each class member is "grossly unfair," as required by the Matthews test, is not feasible. However, individual plaintiffs may have more success under the Matthews model. Under this scheme, individual plaintiffs could satisfy the first three elements—(1) that they are members of a protected class, (2) that they were qualified for and received a loan, and (3) that they received a loan on grossly unfair terms—with their own credit histories and loan documents. The standard also does not require plaintiffs to point to a specific lender’s policy as the source of the discrimination.

Even so, the Matthews framework still poses considerable problems for individual plaintiffs. The fourth prong necessitates that individual plaintiffs compare their loans to those of other similarly qualified borrowers. While plaintiffs may avoid this requirement by demonstrating intentional targeting based on race, this alternative provides no benefit to plaintiffs who do not uncover smoking-gun evidence of intentional racial targeting. Thus, for those plaintiffs without direct evidence of racial animus, the Matthews test still calls for considerable investigation into facts beyond the plaintiff’s knowledge.

2. Utilizing Statistics to Demonstrate Disparate Impact

Both of the standards outlined above require the plaintiff to provide statistical evidence to state a claim.\textsuperscript{35} Under the Ramirez approach, this quantitative support is necessary to establish "a significant disparate impact on a protected class . . . ."\textsuperscript{36} Under the Matthews approach, statistics prove that "the lender continues to provide loans to other applicants with similar qualifications, but on significantly more favorable terms."\textsuperscript{37}

\textsuperscript{34} See Brescia, supra note 13, at 210–11.

\textsuperscript{35} See Aleo & Svirsky, supra note 15, at 27 ("Proving that a certain policy has broad discriminatory effects without statistics is obviously quite difficult.").

\textsuperscript{36} Ramirez, 633 F. Supp. 2d at 927.

a. The history of the Home Mortgage Disclosure Act

Typically, the only source of relevant data outside of the lender’s own files is provided for by the Home Mortgage Disclosure Act (HMDA), which requires mortgage lenders to disclose certain data on the loans they generate.\(^{38}\) Congress enacted the HMDA in 1975 to curb redlining by depository banks that took deposits from low-income customers but neglected to reinvest that money in the form of loans to those same communities.\(^{39}\) Under the first reporting requirements, lenders had to disclose the geographical locations and dollar amounts of the loans they generated.\(^{40}\) In the 1980s, as regional and nationwide non-depository lenders took over much of the mortgage market, regulators’ concerns shifted from reinvestment to racial discrimination.\(^{41}\) Hence, since 1989 the HMDA has required lenders to report data on the racial composition of their applicants and borrowers.\(^{42}\)

b. The current HMDA data

With the rise of reverse redlining, Congress amended the HMDA again.\(^{43}\) Starting in 2004, the HMDA mandated that lenders disclose the number of first-lien mortgage loans\(^{44}\) extended to each racial group with annual percentage rates (APR)\(^ {45}\) that are at least three percentage points higher than the interest rate paid to holders of U.S. treasury securities with comparable maturity periods.\(^ {46}\) Banks are not required to report loans with interest rates below this threshold.


\(^{40}\) Id. at 190.

\(^{41}\) Id.

\(^{42}\) Id. at 195–96.

\(^{43}\) Id.

\(^{44}\) A first-lien mortgage loan has priority over all other liens on the property that secures the mortgage. Second-lien mortgage loans are only secured by the amount that the value of the property exceeds the amount owed on the first-lien mortgage.

\(^{45}\) APR is the total cost of a loan manifested as a yearly percentage rate. FED. RESERVE BD., supra note 4, at 27. It includes interest, fees, and mortgage insurance premiums. Id.

\(^{46}\) See Aleo & Svirsky, supra note 15, at 18; see also Fed. Fin. Insts. Examination Council, About the Rate Spread Calculator (2009), http://www.ffiec.gov/ratespread/oldcalchelp.aspx (providing guidelines for calculating the rate spread in order to comply with HMDA reporting requirements). The spread triggering reporting for second liens is five points above the comparable U.S. treasury securities. Aleo & Svirsky, supra note 15, at 18.
The data are categorized by loan type (purchase loans, refinances, etc.) and are amassed both on a nationwide scale and for each geographical area the lender services. The data for a single type of loan in a particular geographical area are arranged in a table that lists the following for each borrower racial group: the number of loans without price reporting (because the rates are not three percentage points higher than comparable U.S. securities); the number of loans with price reporting; and the number of loans with APRs that fall within each specified range above the margin. The table below, which is based on Wells Fargo Bank, N.A.’s (“Wells Fargo”) 2005 data for the Los Angeles area, provides a simplified illustration.

**WELLS FARGO BANK, N.A.**
**REFINANCE LOANS, FIRST LIEN LOS ANGELES 2005**

<table>
<thead>
<tr>
<th>Race</th>
<th># without price</th>
<th># with price</th>
<th>3–3.99%</th>
<th>4–4.99%</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>629</td>
<td>73</td>
<td>35</td>
<td>25</td>
</tr>
<tr>
<td>White</td>
<td>7479</td>
<td>218</td>
<td>141</td>
<td>59</td>
</tr>
<tr>
<td>Hispanic</td>
<td>2515</td>
<td>193</td>
<td>115</td>
<td>60</td>
</tr>
</tbody>
</table>

The data in the table indicate that over 10 percent (73 out of 702) of the African-American borrowers represented received loans costly enough to qualify for price reporting, while under 3 percent (218 out of 7697) of the white borrowers received such loans.

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49. *Id.*

50. The actual reports include data on loans with APRs up to 8 percent over the applicable U.S. security, several more racial groups, and other factors such as borrower income and residential census tract.

51. To do the math, first add the number of loans without price reporting (column one) and the number of loans with price reporting (column two) in the “African-American” row to get the total number of loans extended to African-Americans in 2005: 702. Then divide the number of loans with price reporting by 702 to get the percentage of African-American loans with interest rates that fell within the price reporting range: 10.4 percent. Repeating the same steps for white borrowers yields 2.8 percent.
While these data help establish a disparate impact, they still omit important information like borrowers’ FICO scores and their mortgage loan-to-value ratios.\(^2\) This is significant because reverse-redlining plaintiffs must demonstrate a disparate impact among similarly situated persons: people with similar incomes and creditworthiness.\(^3\) Also, if the burden shifts to the defendant to present its business necessity defense, the HMDA data cannot controvert any evidence that the disparities resulted from objective underwriting criteria.\(^4\) Still, the HMDA data are the most obvious place for the reverse-redlining plaintiff to start building a claim, and they play an important role in most plaintiffs’ briefs and pleadings.\(^5\)

C. The Second Front: Government Enforcement of the FHA and ECOA

In addition to enforcement by private litigants, the FHA and ECOA both have provisions that enable federal agencies to enforce the acts.\(^6\) The FHA designates the U.S. Department of Housing and Urban Development (HUD) as the primary agency responsible for administering the law.\(^7\) Under the FHA, HUD must investigate and resolve complaints of alleged victims of housing discrimination;\(^8\) HUD also may, but is not required to, investigate discriminatory housing practices on its own accord.\(^9\) In reality, administrative enforcement of the FHA is primarily driven by complaints filed by private citizens.\(^10\)


\(^4\) See Brescia, supra note 13, at 210–11.


\(^7\) 42 U.S.C. § 3608(a).

\(^8\) Id. § 3610(a)(1)(B)(iv).

\(^9\) Id. § 3610(a)(1)(A)(iii).

The ECOA's public enforcement provisions are more troublesome because they fail to specify a single comprehensive agency for handling complaints. Rather, ten different federal agencies enforce the Act depending on which type of financial institution a complainant alleges has engaged in lending discrimination. In addition, the ECOA does not contain its own enforcement provision. Instead, regulators' powers to enforce the ECOA stem from one of several other laws, again dependent on the type of lender implicated. This complicated enforcement scheme can result in great confusion for reverse-redlining victims who wish to file complaints alleging ECOA violations.

The Department of Justice (DOJ) may file its own action under the FHA or ECOA, but only in limited circumstances, such as when the DOJ has reasonable cause to believe that a lender has engaged in a "pattern or practice" of housing discrimination. Courts have defined "pattern or practice" as "an intentional, regular, or repeated violation of . . . the Act." If the court finds that a pattern or practice is likely, the DOJ will have standing to bring the suit.

Regardless of the procedure employed, federal agencies that bring reverse-redlining actions must prove the same prima facie case as individual plaintiffs. In addition, to the extent that individual complaints drive agency enforcement, the process suffers from the same claim-recognition problems that impede private litigants, described below.

62. See id.
63. See id.
III. MISSING THE FOREST FOR THE TREES—WHY INDIVIDUAL PLAINTIFFS FAIL TO RECOGNIZE REVERSE-REDLINING CLAIMS

Despite the administrative-enforcement and public-litigation provisions described above, legislative history indicates that Congress intended the FHA and ECOA to be enforced primarily by individual plaintiffs. However, the FHA and ECOA have failed to eliminate reverse redlining because victims of this practice often do not realize they have legal recourse. There are several reasons for this failure. First, psychological barriers to perceiving discrimination are heightened in the reverse-redlining context. Next, the confusing world of mortgage lending dilutes and obfuscates facts that could aid borrowers in recognizing discrimination. Finally, the traditional legal-consultation model has prevented attorneys from easily detecting the reverse-redlining claims of their clients.

A. Psychological Barriers to Recognizing Reverse-Redlining Claims

In general, discrimination claims are litigated far less than other grievances. Reverse redlining is likely to mirror this broader under-complaining trend. First, most reverse-redlining plaintiffs are in the midst of personal financial crises, and their hardships prevent them from perceiving a widespread injury to their racial group. Second, the individualism inherent in home ownership discourages potential plaintiffs from identifying with others similarly situated. Finally, the isolation of “subprime communities” deprives reverse-redlining victims of the perspective necessary to compare their own situations to those of more advantaged groups.


1. Individual Financial Woes Supersede Those of the Class

Most people do not even consult lawyers until they face a crisis like the foreclosure of their home.71 Furthermore, personal calamities are incompatible with the mindset it takes to recognize and assert a reverse-redlining claim. Basic tenets of psychology reveal that people in the midst of crises do not consider how their personal predicaments relate to the tribulations of others. Psychologist Abraham Maslow, in his theory popularly known as the “hierarchy of needs,” established that human beings must first satisfy basic needs such as food and shelter before pursuing loftier goals such as love and community.72 When potential plaintiffs’ primary concern is as basic as keeping their homes, most would not even contemplate a system of widespread discrimination. When an individual faces foreclosure, the individual’s thoughts are understandably focused on his or her own predicament and not on that of similarly situated class members.73

2. The Rewards and Responsibilities of Home Ownership Conflict with Class Identification

People have a drive to believe that the world is fundamentally fair—a meritocracy.74 The meritocracy worldview allows people to


73. Julia Scelfo, After the House Is Gone, N.Y. TIMES, Oct. 23, 2008, at D1 (“When you don’t have a home . . . [a]ll you think about is when I’m going to have a home again?”); see Lauren E. Willis, Will the Mortgage Market Correct? How Households and Communities Would Fare If Risk Were Priced Well, 41 CONN. L. REV. 1177, 1189 (2009) (“Foreclosure include[s] loss of a household’s autonomy, social status, community networks, and sense of stability.”); see also Stephanie M. Stern, Residential Protectionism and the Legal Mythology of Home, 107 MICH. L. REV. 1093, 1095 (2009) (“Involuntary dislocation wreaks psychological devastation . . . .”).

74. Deborah Brake, Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives That Obscure Gender Bias, 16 COLUM. J. GENDER & L. 679, 688 (2007);
feel that they have control over their lives and that they alone are responsible for their successes and failures.\textsuperscript{75} Those who adopt this worldview are often averse to perceiving themselves as the victims of discrimination.\textsuperscript{76} In addition to believing that they alone control their destinies, they perceive themselves as individuals unaffiliated with a class, especially if their class endures stigma and prejudice.\textsuperscript{77}

While this ideology presents an obstacle to any disparate impact claim, it is especially potent when combined with the American cultural narrative of home-ownership, which emphasizes on individualism.\textsuperscript{78} For minorities who, despite racism, ascend in society to the point where they can own their own homes, individualism provides them with the perception that they earned their success.\textsuperscript{79} Home ownership has psychologically set them apart from their class. But when they default, the same philosophy instructs them that they alone are responsible for their predicaments.\textsuperscript{80} Their fall, like their rise, must be borne alone.

3. Reverse-Redlining Victims Lack the Perspective to Notice the Disparity Between Themselves and the Favored Class

Perception of discrimination depends on victims comparing themselves to people of other classes.\textsuperscript{81} In the reverse-redlining context, without knowing that other groups have enjoyed more advantageous loans, victims have no way of understanding how grossly unfair their own loans are in comparison. However, people

\begin{flushleft}
\textit{Aaron Kay et al., Victim Derogation and Victim Enhancement as Alternate Routes to System Justification}, 16 PSYCHOL. SCI. 240, 240 (2005).


76. Brake, supra note 74, at 690.

77. Id.


79. See Kaiser & Major, supra note 75, at 807.

80. See id. at 808.

81. See Brake, supra note 74, at 693; Alexandra F. Comming, \textit{Self-Esteem as a Moderator Between Perceived Discrimination and Psychological Distress Among Women}, 49 J. COUNSELING PSYCHOL. 117, 118 (2002).
\end{flushleft}
tend to compare themselves to members of their own racial group. This phenomenon is perpetuated by patterns of lending discrimination and segregation. Because victimized borrowers often live in the same communities, their only points of reference are other victims of the same practice.

Targets of on-site employment discrimination usually have coworkers that belong to more privileged groups that enable them to gauge their own salaries and promotional opportunities. Admittedly, bias may not be as evident when the problem is the denial of a job rather than discrimination that occurs at work. However, a single job interview might provide applicants with some idea of the racial makeup of the workplace they are attempting to access. In contrast, reverse redlining occurs in particular communities that are relatively isolated from the rest of the world.

B. Informational Asymmetries and Financial Illiteracy Keep Borrowers in the Dark

In addition to a potential plaintiff lacking personal knowledge of the operative facts of a reverse-redlining claim, the complex nature of mortgage transactions renders any clues to the plaintiff’s rights either inaccessible or incomprehensible. First, reverse-redlining victims face huge information gaps between themselves and their lenders. Second, many borrowers’ financial illiteracy inhibits them from understanding the facts that are available. Finally, current mandated disclosures only serve to confuse borrowers more.

The term “[i]nformation asymmetries” describes the imbalance of information that sometimes exists between market participants. A

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82. Cf. Brake, supra note 74, at 693–94 (discussing intra-social group comparisons in the context of women in professional jobs).

83. See, e.g., Mayor & City Council of Balt. Complaint, supra note 15, at ¶ 2.


85. See Michael Selmi, The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law, 57 OHIO ST. L.J. 1, 16 (1996) (stating that in 1992 only 17.8 percent of EEOC cases involved discriminatory hiring claims).

86. See Emily B. White, Comment, How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program, 28 BERKELEY J. EMP. & LAB. L. 269, 293–94 (2007) (acknowledging that knowing the racial composition of the workplace to which one has been denied access is essential to detecting a failure-to-hire discrimination claim).

significant informational asymmetry between lenders and borrowers further aggravates plaintiffs' difficulties. For example, lenders have no obligation to tell borrowers their credit scores or inform them about other loan products for which they would have qualified. Even if borrowers do obtain their credit reports, they usually do not know how their scores translate into the estimates of risk and loan performance that form the basis of loan pricing. Without this information, many borrowers with good credit who received subprime loans assumed these loans were the best loans available to them and blamed themselves for the inability to pay their mortgages.

Federally mandated disclosures only cause greater confusion to borrowers. Not only do the documents exclude several important loan costs, but until recently, borrowers also received those costs too late in the negotiating process to take them into account in making a decision. In addition, understanding these disclosures requires familiarity with numerous esoteric terms. Meanwhile, mortgagors have no incentive to clarify the terms. Instead, mortgagors maintain these information asymmetries so that they may exploit them at the borrowers' expense.

The confusion caused by the mortgage transaction wreaks havoc beyond the origination of the loan. If borrowers do not understand the terms of their own loans, then they cannot compare themselves to other similarly situated borrowers. Furthermore, even when the prospect of foreclosure and bankruptcy compel a reverse-redlining

88. See Brescia, supra note 13, at 171.
89. See Kenneth R. Harney, Past Credit Woes Don't Have to Haunt High-Rate Borrowers, WASH. POST, Apr. 27, 2002, at H1.
90. Willis, supra note 7, at 808.
91. See Miller Class Action Complaint, supra note 55, at ¶ 69; Willis, supra note 7, at 730 (stating that nearly half of borrowers with subprime loans could have qualified for prime credit).
92. Scelfo, supra note 73, at D1 ("His consumption is consumed by guilt over the foreclosure.").
94. Amendments to the Truth in Lending Act, which became effective in July 2009, now require lenders to mail disclosures to customers within three days of receiving their loan application. See 12 C.F.R. § 226.19(a) (2009).
95. Willis, supra note 7, at 749.
96. Id. at 752–53.
97. See id. at 797 (describing a lender who did not explain the disclosures to a borrower with only a sixth-grade education or give him time to review the papers).
98. See id. at 808.
victim to seek the assistance of a lawyer, the lawyer will also often fail to see the victim’s claim.

C. Legal Consultations Fail to Bring Reverse-Redlining Victims’ Claims to Light

As shown in the earlier hypothetical, even when Mr. Borrower sought the advice of a bankruptcy attorney, the attorney failed to detect his claim. Indeed, the traditional legal consultation paradigm will usually miss claims based on class-wide injuries. This problem is furthered by bankruptcy and real-estate attorneys’ general lack of familiarity with civil rights law. Further, individuals seeking legal advice tend to want immediate appraisal of their legal rights, which discourages lawyers from performing the necessary statistical research to discern viable reverse-redlining claims.

During the initial attorney-client interview, the attorney attempts to develop legal theories based on the facts provided by the potential client.99 Because the key facts that compose a reverse-redlining claim—namely statistics that show that the client’s lender offered less advantageous credit terms to the client’s racial class than to other similarly situated borrowers—are outside the client’s personal knowledge, this process inevitably misses this cause of action.100

To add another obstacle, attorneys often employ checklists of potential legal claims and defenses common to their practice areas. These attorneys utilize this method to quickly identify courses of action from the facts offered by their clients.101 However, checklists often “fail to include such matters as the unusual cause of action or

99. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 38 (1977) ("To help clients find satisfactory solutions to their problems, lawyers will typically need to gather information about . . . the facts which comprise the past transactions from which the problem arises . . . ."); Telephone Interview with Peter M. Lively, Owner, Law Office of Peter Lively (Dec. 30, 2009) (explaining that the debtor’s income, property assets, and amount of secured and unsecured debt are among the facts he seeks in the initial client consultation); Telephone Interview with Steven Schwaber, Owner, Law Offices of Steven Schwaber (Dec. 30, 2009) (explaining that in an initial consultation he obtains the information required to complete the schedules on a bankruptcy petition).

100. Telephone Interview with Peter M. Lively, supra note 99 (“Very few bankruptcy attorneys handle litigation.”); Telephone Interview with Steven Schwaber, supra note 99 (revealing that he has never pursued lender liability on behalf of a client nor referred a client to another attorney to litigate a claim against a lender).

101. See BINDER & PRICE, supra note 99, at 90; Telephone Interview with Steven Schwaber, supra note 99 (stating that he uses a form to determine what questions to ask a client in the initial consultation).
defense."\textsuperscript{102} They also reinforce the idea that determining a potential client's legal position is a matter of simply applying the elements of various legal doctrines to the facts relayed by the client.\textsuperscript{103} Therefore, these trappings of legal practice result in a disservice to those with viable reverse-redlining claims.

Also, a victim of reverse redlining often seeks the advice of a bankruptcy or real-estate attorney whose areas of expertise do not include civil rights law.\textsuperscript{104} The plaintiff's own account of the facts does nothing to inform the attorney of possible causes of actions outside the attorney's expertise. Moreover, in situations where the potential client is on the verge of foreclosure,\textsuperscript{105} the thoughts of all the parties are on defenses, not on affirmative claims.\textsuperscript{106}

Even if an attorney is familiar with enough civil rights law to understand the basics of disparate impact theory, the client's facts alone are insufficient to ascertain the viability of a reverse-redlining claim. The attorney would need to adjourn the meeting without apprising the potential client of his or her legal position in order to investigate whether the client's lender made similar loans to other class members. However, "[a] client will typically expect an immediate explanation of his/her legal rights,"\textsuperscript{107} and ending the meeting without fulfilling this expectation is at odds with an attorney's desire to win the client's business. Thus, even in the rare situations when attorneys recognize reverse-redlining claims, there

\begin{itemize}
  \item \textsuperscript{102} Binder & Price, supra note 99, at 90.
  \item \textsuperscript{103} Id. ("When such lists are relied upon . . . without independent research of the law, important substantive areas may not be investigated.").
  \item \textsuperscript{104} Barry K. Tagawa, Collection and Bankruptcy Practice: The Third Highest Area of Malpractice Exposure, 3 No. 2 LEGAL MALPRACTICE REP. 1, 15 (1992) (discussing the specialized nature of bankruptcy practice); Telephone Interview with Steven Schwaber, supra note 99 (revealing that he is unfamiliar with the term "reverse redlining").
  \item \textsuperscript{105} See Matthews v. New Century Mortg. Corp., 185 F. Supp. 2d 874, 877–81 (S.D. Ohio 2002) (adjudicating the claims of four joint plaintiffs and mentioning that at least three of the four were facing foreclosure). It could safely be assumed that most reverse-redlining plaintiffs are in similar situations. See, e.g., Singh v. Wells Fargo Bank, N.A., No. C-09-2035 SC, 2009 WL 2365881, at *1 (N.D. Cal. July 30, 2009); Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F. Supp. 2d 1039, 1041 (N.D. Cal. 2009); Williams Complaint, supra note 71, at ¶ 43 ("Mr. Williams received a letter from Bank of America stating that it was going to foreclose . . . ."); Barkley Complaint, supra note 3, at ¶ 158 ("As a result of the property flipping scheme . . . [Ms. Barkley] is at risk of losing her home."); Hargraves Complaint, supra note 71, at ¶ 35 ("Defendants . . . obtained an order from the bankruptcy court permitting defendants to foreclose . . . .")
  \item \textsuperscript{106} See supra note 100.
  \item \textsuperscript{107} Binder & Price, supra note 99, at 100.
\end{itemize}
are incentives for them to focus on other options that provide potential clients with more immediate satisfaction. 108

Psychological obstacles, informational asymmetries, and shortcomings in the legal profession have deprived the courts of the opportunity to enforce the FHA and ECOA’s prohibitions of reverse redlining. However, claim recognition is not the whole problem. As discussed below, even when plaintiffs and their lawyers realize that such claims exist, they still must overcome the substantial burden of stating a prima facie case.

IV. GOOD FACTS ARE HARD TO FIND:
HOW A PLEADING STANDARD THAT REQUIRES UNAVAILABLE INFORMATION THWARTS REVERSE-REDLINING PLAINTIFFS

In addition to preventing recognition of reverse-redlining claims, the disconnect between a plaintiff’s knowledge and the facts essential to his or her claim makes drafting a complaint more onerous. As discussed above, an individual reverse-redlining plaintiff must establish the prima facie elements established in Matthews v. New Century Mortgage: (1) he or she is a member of a protected class; (2) he or she applied for a loan and was qualified for that loan; (3) he or she received a loan on grossly unfair terms; and (4) either (a) the lender continued to give loans to similarly qualified applicants on significantly better terms, or (b) the lender intentionally targeted the plaintiff because of his or her race. 109 Unless plaintiffs can prove that they were intentionally targeted, they must pursue extensive investigation beyond their own experiences, often including complicated statistical analysis, to show disparities between their loan terms and those of similarly situated borrowers.

Reverse-redlining litigation imposes several burdens on the plaintiff that are not experienced by a litigant pursuing a traditional claim. First, utilizing existing sources of statistical data to demonstrate disparate impact is fraught with difficulties. Second, the pre-discovery investigation required of reverse-redlining plaintiffs is time-consuming and expensive. Finally, the persuasiveness of the plaintiff’s case suffers from the disconnect between the plaintiff’s own injury and his or her offer of proof. These challenges have led

108. Id.
many individual plaintiffs to reject prong four of the Matthews model altogether, opting to plead intentional targeting rather than disparate impact.  

**A. Struggling to Use the HMDA Data to Solve the Discrimination Equation**

Again, the most accessible source of statistics for reverse-redlining plaintiffs is the HMDA data. However, to fully utilize the HMDA data, plaintiffs must first analyze the information for their particular loan and lender, then compare this data to statistics for other types of loans, and then compare those numbers to data reported by other lenders. Ultimately, even this may not be enough because the HMDA data do not contain information necessary to control for differences of creditworthiness.

1. Comparing Different Loan Types to Expose Latent Disparities

Let’s return to the Wells Fargo 2005 HMDA data for first-lien refinance loans generated in the Los Angeles area. The illustration below is simplified.

<table>
<thead>
<tr>
<th>Race</th>
<th># without price</th>
<th># with price</th>
<th>3.00–3.99%</th>
<th>4.00–4.99%</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>629</td>
<td>73</td>
<td>35</td>
<td>25</td>
</tr>
<tr>
<td>White</td>
<td>7479</td>
<td>218</td>
<td>141</td>
<td>59</td>
</tr>
<tr>
<td>Hispanic</td>
<td>2515</td>
<td>193</td>
<td>115</td>
<td>60</td>
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</tbody>
</table>

The table reveals that the percentage of African-Americans who received expensive refinance loans in 2005 was nearly four times the percentage of whites. However, to get the complete picture of

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11. FED. FIN. INSTS. EXAM. COUNCIL, supra note 48.

12. See supra note 51 and accompanying text (stating that 10.4 percent of loans to African-Americans qualified for price reporting compared to only 2.8 percent of loans to whites).
statistical discrepancies, plaintiffs must analyze loan data outside their particular loan categories. A plaintiff would not know it by looking at only the refinance loan data, but the price disparities between Wells Fargo’s white and minority borrowers were greater than the table above indicates. The next illustration represents Wells Fargo’s home purchase loans for 2005.113

WELLS FARGO BANK, N.A.
HOME PURCHASE LOANS, FIRST LIEN LOS ANGELES 2005

<table>
<thead>
<tr>
<th>Race</th>
<th># without price</th>
<th># with price</th>
<th>3.00–3.99%</th>
<th>4.00–4.99%</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>176</td>
<td>13</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>White</td>
<td>3765</td>
<td>49</td>
<td>37</td>
<td>10</td>
</tr>
<tr>
<td>Hispanic</td>
<td>831</td>
<td>43</td>
<td>33</td>
<td>8</td>
</tr>
</tbody>
</table>

Here, the discrepancies are even more pronounced. Rounded to the nearest tenth, 6.9 percent of African-Americans received expensive purchase loans from Wells Fargo in 2005 while only 1.2 percent of white borrowers received such loans. Thus, plaintiffs whose claims related to refinance loans in 2005 would not know the full extent of existing statistical disparities if they only analyzed data pertaining to their types of loans.

In addition, the type of loan a borrower receives—whether a home purchase loan, second mortgage, refinance loan, or home equity line of credit (HELOC)114—affects the loan’s price.115 Therefore, a plaintiff must not only analyze the terms received by borrowers of the same type of loan, but he or she must also investigate the racial makeup of borrowers in different loan categories. For example, another interesting pattern emerges by comparing the two Wells Fargo tables, reprinted below.

114. A HELOC is usually a second mortgage, but instead of the borrower receiving the principal up front, the lender promises to advance funds up to a certain amount at the time of the borrower’s choosing. See Jack M. Guttentag, Mortgage Glossary (2009), http://www.mtgprofessor.com/glossary.htm.
115. See infra text accompanying note 116.
The tables above indicate that minority borrowers received a greater proportion of the refinance loans generated in 2005 than of home-purchase loans. Specifically, African-Americans received 6.3 percent of the refinance loans represented in the table while they received only 3.8 percent of the home-purchase loans. Hispanics follow the same pattern. They account for 24.5 percent of the refinance loans represented but only 18 percent of the home-purchase loans. Meanwhile, with whites, the pattern is reversed. White borrowers received 69.2 percent of the refinance loans illustrated above and 78.2 percent of the home-purchase loans.

Significantly, the data above also show that Wells Fargo’s refinance loans are considerably more expensive than its home-purchase loans. While 4.4 percent of refinance loans had interest rates high enough to reach the HMDA reporting range, only 2.2 percent of home-purchase loans hit that mark. These findings might imply that Wells Fargo targeted borrowers from disadvantaged groups for more costly refinance loans while neglecting to offer them home-purchase products. Worse, the findings could indicate refinance schemes in which loan officers repeatedly persuaded borrowers to refinance, all the while generating more and more fees.116 Most importantly, the findings add a new dimension to the price disparities discovered in the first matrix.

116. Willis, supra note 7, at 734–35 (“I did not understand that every time I did a new loan, I was being charged a bunch of fees.”).
Thus, plaintiff's counsel should not only analyze the price discrepancies for the plaintiff's particular loan category, but also assess the racial constitution of each loan product's borrowers. As illustrated, this is no easy feat. Further, even this level of data-crunching may not be enough. Loan disparities can have many causes, including income and credit-score differences between different types of borrowers. Moreover, as discussed below, sometimes this analysis fails to uncover any disparities at all, even though the plaintiff was a victim of reverse redlining.

2. Comparing the Data of Prime and Subprime Lenders to Detect Steering

Using the HMDA data is even less effective when the discriminatory practice at issue is steering. Steering is the practice by which brokers and loan officers direct minority borrowers to lenders that deal predominantly in subprime loans.\textsuperscript{117} The HMDA data for a lender who primarily sells subprime products will not reflect disparities because most of its loans are expensive. Rather, the discrimination occurs before the loan is originated, when brokers refer African-American and Hispanic borrowers to these subprime lenders. The situation can get even more confusing when a lending institution that deals predominately in prime lending products creates a subprime affiliate.\textsuperscript{118} The principal company and the subsidiary often have the same or similar names. This scenario can greatly confuse plaintiffs trying to amass the essential data to state a reverse-redlining claim.\textsuperscript{119}

For instance, the result of the statistical analysis is considerably different when the source of the HMDA data is Wells Fargo's subprime subsidiary, Wells Fargo Financial (WFF).\textsuperscript{120} The table

\textsuperscript{117} See id. at 802; Brescia, supra note 13, at 193.
\textsuperscript{118} Brescia, supra note 13, at 202–03.
\textsuperscript{119} Consider, for example, Countrywide Bank, FSB, Countrywide Home Loans, Countrywide KB Home Loans, and Countrywide Real Estate Finance. See FFIEC.gov, Home Mortgage Disclosure Act, Disclosure Report, http://www.ffiec.gov/hmdaadwebreport/DisWelcome.aspx (enter "Countrywide" under "Institution Name" and click "retrieve institutions") (last visited Apr. 10, 2010).
\textsuperscript{120} Thomas Lee, Subprime: And in This Corner . . . As the Subprime Loan Market Begins Hammering Lenders, Can Wells Fargo Avoid a Body Blow?, STAR TRIB. (Minneapolis), Mar. 18, 2007, at D1 (“[Wells Fargo] was one of the first mainstream banks to enter the subprime business . . . , establishing a . . . subsidiary, Wells Fargo Financial, to handle such lending.”).
below represents WFF’s 2005 HMDA data for first-lien refinance loans originated in the Los Angeles area.\textsuperscript{121}

\textbf{WELLS FARGO FINANCIAL (WFF)}
\textbf{REFINANCE LOANS, FIRST LIEN LOS ANGELES 2005}

<table>
<thead>
<tr>
<th>Race</th>
<th># without price</th>
<th># with price</th>
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<th>4.00--4.99%</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>214</td>
<td>62</td>
<td>46</td>
<td>12</td>
</tr>
<tr>
<td>White</td>
<td>753</td>
<td>200</td>
<td>159</td>
<td>33</td>
</tr>
<tr>
<td>Hispanic</td>
<td>470</td>
<td>125</td>
<td>100</td>
<td>20</td>
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It appears that there are no significant pricing disparities. While 22 percent of the African-Americans represented in the table received loans classified as expensive, 21 percent of whites received such loans. The results are the same for Hispanic borrowers. A reverse-redlining plaintiff suing WFF may feel he or she has hit a dead end at this point. However, the picture changes when one compares WFF’s data illustrated above with the Wells Fargo data analyzed in the previous pages.

\textbf{WELLS FARGO FINANCIAL (WFF)}
\textbf{REFINANCE LOANS, FIRST LIEN LOS ANGELES 2005}

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\textbf{WELLS FARGO BANK, N.A.}
\textbf{REFINANCE LOANS, FIRST LIEN LOS ANGELES 2005}

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A comparison of the data between the two Wells Fargo lenders reveals huge disparities in the racial constitution of the prime lender’s and subprime affiliate’s customers. According to the figures above, African-Americans received 19.2 percent of WFF’s refinance loans while they only received 6.3 percent of Wells Fargo’s

\textsuperscript{121} FED. FIN. INSTS. EXAM. COUNCIL, \textit{supra} note 48.
refinance loans. More than three times as many African-Americans in the Los Angeles area were customers of WFF, the subprime subsidiary, than of Wells Fargo, which produces mostly prime mortgages. As expected, WFF's loans have a much greater likelihood of having a high enough APR to require price reporting. Twenty-six percent of WFF's loans reached this pricing threshold compared to only 4.4 percent of Wells Fargo's loans.

The analysis above illustrates the type of synthesis and explication of data that is often required of reverse-redlining plaintiffs. Disparities may not always be apparent to plaintiffs or the attorneys who represent them when these borrowers' brokers steered them to subprime lenders or spread the cost of their loans among several loan products. Not only must plaintiffs compare the prices received by racial groups for a specific loan sold by a particular lending institution, but they must compare the statistics for different types of loans and for prime and subprime lenders. These challenges undermine much of the usefulness of the HMDA data.

B. The Prohibitive Costs of Disparate Impact Analysis

Even if individual plaintiffs effectively scrutinize and delineate the HMDA data, courts may still dismiss their claims. Because the HMDA data do not control for creditworthiness factors, lenders argue that the data do not reflect discriminatory lending decisions. Anticipating this argument, well-funded class-action plaintiffs and government litigators amass additional empirical studies that account for legitimate underwriting risk factors. For example, two plaintiffs—the City of Baltimore in its action against Wells Fargo and the NAACP in its lawsuit against Ameriquest Mortgage—supplemented explication of the HMDA data with empirical studies

124. See Letter from Steven I. Zeisel, Senior Counsel, Consumer Bank Ass'n, to Jennifer J. Johnson, Sec'y, Bd. of Governors of the Fed. Reserve Sys. (Apr. 12, 2002), available at http://www.cbanet.org/files/FileDownloads/HMDA_4-12-02.pdf ("Without knowing the factors known to the creditor, one cannot assess the reason why any consumer may get a particular APR.").
that utilized credit-scoring data obtained from credit bureaus. In addition, both of these plaintiffs retained experts to do the statistical analysis.

In contrast, individual plaintiffs lack both the time and resources for such in-depth investigation. Reverse-redlining litigation is very expensive, imposing significant costs even on adequately financed litigants. The cost of hired experts becomes even more burdensome because plaintiffs require their services at the pleading stage, when a settlement or jury award is still far off. In response, most individual plaintiffs have decided simply to plead their own facts and hope they create a strong enough inference of discrimination.

C. Choosing Emotional Impact over Disparate Impact

Another reason that individual plaintiffs choose to plead intentional targeting rather than disparate impact is because statistics lack emotional appeal. A few individual reverse-redlining plaintiffs have successfully combined persuasive stories of intentional racial targeting with statistical evidence of disparate impact, pleading both


126. Brendan Kearney, U.S. District Judge J. Frederick Motz Hears Wells Fargo’s Motion to Dismiss ‘Reverse Redlining’ Suit, DAILY REC. (Balt.), Dec. 14, 2009 (contrasting Baltimore’s “expert statistical analysis” in its case against Wells Fargo with failed reverse-redlining cases by other cities); Telephone Interview with Angela Ciccolo, Gen. Counsel, NAACP (Sept. 11, 2009).

127. See Kearney, supra note 126 (explaining that Baltimore citizens have criticized the mayor of Baltimore because the cost of the city’s case against Wells Fargo may exceed any jury award).

theories in the alternative.\textsuperscript{129} However, numerous individual plaintiffs have focused exclusively on racial targeting.\textsuperscript{130}

When an individual plaintiff's case focuses on class-wide injuries reflected in abstract statistics and equations, the personal story behind the lawsuit disappears. As Roman philosopher Cicero said, "[M]en decide far more problems by hate, or love, or lust, or anger, or rage, or sorrow, or joy, or hope, or fear . . . than by reality, or authority, or any legal standard, or judicial precedent, or statute."\textsuperscript{131} This maxim is clearly true for reverse-redlining plaintiffs. However, plaintiffs must present particularly shocking facts to provoke such feelings in a judge.

In \textit{Matthews v. New Century Mortgage}, four elderly female plaintiffs alleged intentional, class-based targeting.\textsuperscript{132} They were successful partially because the facts of the case were so egregious: lenders inflated the plaintiffs' incomes on loan application forms, lied to the plaintiffs about the actual amounts of their loans, and neglected to give the plaintiffs copies of the loan documents.\textsuperscript{133} In addition, Matthews and the other plaintiffs made sympathetic claimants.\textsuperscript{134}

Even the City of Baltimore recognized the value of emotional impact in its case against Wells Fargo.\textsuperscript{135} Pleading both disparate impact and intentional targeting, the city presented the affidavits of former Wells Fargo employees who had personal knowledge of the inner workings of the lender. These affidavits revealed very disturbing conduct by Wells Fargo management and loan officers, including regularly referring to minority neighborhoods as the "subprime ghetto" and publishing promotional materials in a

\begin{itemize}
\item\textsuperscript{129} Hargraves \textit{v. Capital City Mortg. Corp.}, 140 F. Supp. 2d 7, 21–22 (D. D.C. 2000).
\item\textsuperscript{130} \textit{See supra} note 128.
\item\textsuperscript{132} \textit{Matthews}, 185 F. Supp. 2d at 877–82.
\item\textsuperscript{133} \textit{Id}.
\item\textsuperscript{134} \textit{See id.} Similarly, in \textit{Munoz \textit{v. International Home Capital Corp.}}, lenders took advantage of Hispanic borrowers' limited English language skills to trick them into a predatory lending scheme. \textit{See Munoz \textit{v. Int'l Home Capital Corp.}}, No. C 03-0199 RS, 2004 WL 308907 (N.D. Cal. May 4, 2004).
\item\textsuperscript{135} \textit{Mayor & City Council of Balt.} Complaint, \textit{supra} note 15, at ¶ 71.
\end{itemize}
vernacular they dubbed “African-American.” These facts added a visceral dimension to an already well-pled complaint.

Other plaintiffs have not had as much success. In Williams v. 2000 Homes Inc., the plaintiff focused on intentional targeting while alleging disparate impact only as a simple recitation of the fourth prong of the Matthews model. But without the objectively outrageous facts alleged in Matthews or Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., the court dismissed the plaintiff’s targeting and disparate impact claims. The court stated that the complaint failed “to suggest that the terms of those loans were influenced by Williams’s race.”

Although the facts of Williams did not have the same shock value as those in Matthews, they at least suggested that the defendant targeted the plaintiff based on his race. In the complaint, the plaintiff described a photo album “conspicuously” placed on the coffee table in the defendant’s reception area. The photo album contained photos of happy home owners posing as the defendant’s customers. All of the people in the photos were African-American. The complaint also alleged that the defendants roped the plaintiff into a “property-flipping” scheme, a practice whereby lenders have properties fraudulently over-appraised in order to sell them at “artificially inflated value[s].” The complaint described the lender showing the plaintiff several of these over-appraised properties. All of the properties were in predominately minority neighborhoods.

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136. Id. at ¶¶ 70–71.
138. Williams Complaint, supra note 71, at ¶ 74 (“[The loans] were made on less favorable terms than loans defendants brokered or made to Caucasian individuals.”).
141. Id.
142. Williams Complaint, supra note 71, at ¶ 27.
143. Id.
144. Id.
145. Id. at ¶ 1.
146. Id. at ¶ 31.
147. Id.
These are facts from which a fact finder might infer racial targeting, but they did not have as much dramatic effect as the plaintiffs’ stories in Matthews. The plaintiff in Williams did not offer enough objective evidence or enough pathos to survive a motion to dismiss. To be successful, he needed to supplement his facts with outside data of his lender’s other customers.

For plaintiffs without facts clearly indicating direct evidence of class-based targeting,148 proving intentional targeting is even more difficult than proving disparate impact.149 At least when plaintiffs plead disparate impact, they have the possibility of finding the essential facts to state their claims. However, a plaintiff basing his or her case entirely on intentional targeting either has this “direct evidence” or does not. Thus, many plaintiffs who have taken this route have had their cases dismissed.150

While Congress explicitly intended private litigants to shoulder most of the burden of enforcing the FHA and ECOA,151 only class actions, government entities, and large public-interest organizations like the NAACP have had any consistent success litigating reverse-redlining claims.152 This implicates serious enforcement problems. Congress’s emphasis on individual plaintiffs enforcing these laws153 is at odds with the serious difficulties of successfully litigating reverse-redlining claims. Without legislative action to ensure that these laws are enforced, reverse-redlining claims will go unaddressed, which will perpetuate perverse incentives and the lack

149. See Aleo & Svirsky, supra note 15, at 21 (noting the difficulty of proving intent).
of accountability that brought about the current mortgage crisis and its disparate impact on minority communities.

V. FILLING THE INFORMATION GAP: 
PUTTING VICTIMS OF REVERSE REDLINING IN TOUCH WITH THEIR CLASS

Due to the problems individual plaintiffs face in recognizing and litigating reverse-redlining claims, the FHA and ECOA are ineffective at stopping discriminatory lending. In order for Congress to realize its goal of eradicating housing discrimination in the United States, Congress must bolster enforcement of the FHA and ECOA on all fronts. First, new legislation should require the federal agencies currently responsible for implementing the FHA and ECOA to conduct extensive audits of lenders for indicators of reverse redlining. Additionally, the law should require the DOJ to file civil-enforcement actions on behalf of aggrieved classes against any lenders responsible for significant price disparities. In addition, the new FHA and ECOA should require federal agencies to publish the audit results so that private plaintiffs can utilize the data in litigation. Finally, the law should compel HUD to launch an intensive public-education campaign informing the public about reverse redlining and borrowers’ rights under the FHA and ECOA.

A. Federal Agencies Should Audit Lenders for Signs of Disparate Impact

Access to information is the greatest impediment to the enforcement of the FHA and ECOA against reverse redlining. The regulatory scheme described below mandates government agencies to conduct orderly investigations of lenders’ business practices at the lowest possible costs to mortgagors and taxpayers. An effective auditing scheme would require consistent application and aggressive oversight. Selection criteria for audits would have to be unambiguous and provide lenders with notice of compliance requirements. This would require a specific test to identify which lenders should be audited. In addition, a disinterested government body should oversee the auditing agencies to ensure that these agencies fulfill their new duties.
1. Overview of the Lender Audit

The audit system would function as follows. Before conducting a full audit of any lender, federal agencies would regularly analyze existing sources of data including the HMDA reporting figures, census information, and complaints filed with the agencies. From this information, these agencies would identify disparities significant enough to warrant further scrutiny. Where indicated, these agencies would then conduct audits consisting of examinations of statistically representative, stratified samples of mortgage transactions, followed by a more detailed loan-level review if necessary. The audits would only focus on lenders whose initial reviews uncovered significant (not simply incidental) disparities in loan prices among racial groups.

2. Selection Criteria

Currently, courts and regulators must choose among various tests to measure statistical disparities for indicators of disparate impact discrimination. In the employment context, regulators commonly use the “four-fifths rule.” Simply stated, this rule uses a 20-percent disparity between racial groups as the statistical benchmark for establishing disparate impact. The logic behind this test is that a 20-percent disparity is large enough to eliminate the possibility that it occurred by chance. In the lending context, the four-fifths rule could be applied either to differences in the average APRs that a lender offered to different racial groups or to disparities in the percentage of the loans extended to each group that were priced high enough to qualify for price reporting under the HMDA.

Unfortunately, this approach presents several problems. First, in order to effectively use the formula, regulators would have to control for creditworthiness factors. While a 20-percent disparity in an employer’s hiring rate may be considered large enough to allow for the possibility of other causal variables, it does not leave enough

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156. 41 C.F.R. § 60-3.4(D) (2009).
158. See Greenberger, supra note 157, at 312.
room to compensate for the multitude of legitimate factors that inform loan underwriting.159 Meanwhile, expanding the audit-selection phase to include consideration of variables like credit scores would defeat the purpose of the audits themselves—to get the information necessary for thorough statistical analysis directly from lenders. Finally, because the four-fifths rule only focuses on a single firm, it would not catch discriminatory practices, such as steering,160 and racial targeting, of lenders who exclusively sell subprime mortgages.161

A better option would be to compare loan pricing across several lenders. This approach would entail pooling,162 data from several lenders serving the same market and identifying significant deviations from the typical credit terms offered to particular communities.163 Social scientists consider disparities more than two standard deviations from the mean statistically significant,164 and courts have applied this standard in discrimination cases.165 Under a pooling method, if the average APR offered by a specific lender for a particular community is more than two standard deviations from the mean for the other lenders serving the same community and market (i.e., the pool), the lender would be audited.

This approach should be effective as long as data pools consist only of lenders with similar market niches.166 Regulators would have to take special care not to pool prime and subprime lenders together.

159. STEPHEN ROSS & JOHN YINGER, THE COLOR OF CREDIT 325–26 (2002) ("Under such a standard . . . a prima facie case for disparate-impact discrimination could be built against the majority of lenders in the nation."). Inversely, this standard may also condone discrimination that results in less than a 20 percent disparity. Id. at 326.

160. See supra Part IV.A.2.

161. See Ross & Yinger, supra note 155, at 576–77 ("[A] sample cannot control for firm characteristics . . . ").

162. Id. at 606.

163. See id. at 594.

164. MARION G. CRAIN ET AL., WORK LAW 565 (2005). The standard deviation is the average distance from the mean for any given data set. See Christopher L. Peterson, Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits, 92 MINN. L. REV. 1110, 1144 (2008). Two standard deviations is twice this measurement. In a typical distribution, only 5 percent of observations would fall outside two standard deviations of the mean. Michael C. Macchiarola, Beware of Risk Everywhere: An Important Lesson from the Current Credit Crisis, 5 HASTINGS BUS. L.J. 267, 281 n.56 (2009).


Otherwise, disparities would be indicative only of the markets they serve. However, if all lenders in a data pool serve customers with similar credit characteristics and the sampling is large enough, significant deviations from the norm could be powerful evidence of disparate impact.\textsuperscript{167}

Admittedly, this method focuses on outliers while allowing the average level of discrimination to continue undisturbed.\textsuperscript{168} However, eliminating overt discrimination will decrease the overall disparate impact in the pool. Statistically, this will translate into a lower standard deviation from the mean and a closer baseline for establishing disparate impact. Thus, even lenders who are currently safely within the status quo may eventually become the targets of audits if they do not take measures to avoid practices that cause disparate impact.

No matter which test they apply, regulators would need to establish clear guidelines of what constituted “significant disparities” so as to give lenders notice and allow them to implement self-testing. If a lender does trigger an audit, investigators would delve into the company’s operating procedures, attempting to identify a causal link between lending practices and the disparate effects. If investigators discover evidence of discrimination, they would immediately forward their findings to the DOJ.

3. Oversight of Federal Agencies

New legislation must also require oversight of federal agencies to ensure that they implement these directives. In recent years, HUD’s performance in processing and investigating discrimination complaints has been notoriously poor.\textsuperscript{169} Amendments to the FHA and ECOA must impose consequences on federal agencies for enforcement failures. If the agencies responsible for implementing the FHA and the ECOA fail to fulfill their duties, Congress should revoke those agencies’ jurisdiction over civil rights matters and

\textsuperscript{167} See Ross & Yinger, supra note 155, at 608.

\textsuperscript{168} Id. at 603–05 (“If all firms practice disparate impact discrimination . . . it will be buried . . . .”); see also id. at 593 n.28 (“[I]f all groups of officers discriminate equally against a protected class . . . this discrimination will not change the intergroup rankings of treatment and performance.”).

create a new agency to monitor and prevent discrimination in lending.

B. Combining Public and Private Litigation to Deter Discriminatory Lending

This new legislation would also bolster enforcement through litigation. After receiving evidence of reverse redlining, the new laws would require the DOJ to initiate a civil enforcement action against the lender on behalf of the aggrieved class. In addition, federal agencies would publish the results of audits to aid private plaintiffs and inform future customers. Meanwhile, the government should initiate a public education campaign to teach citizens about reverse redlining and their rights under the FHA and ECOA. In addition to addressing the enforcement problems identified in the previous sections, collaboration between the government and other litigants would lessen the fiscal burden of public litigation.

1. The DOJ at the Helm: The Advantages of Public Litigation

Previous sections indicated that municipalities and class actions accounted for most of the successful reverse-redlining plaintiffs. Beyond their obvious advantage in resources over individual plaintiffs, these bodies are best situated to claim injury for a widespread class because they represent the class itself. Thus, when a class or government body brings a disparate impact claim, there is no disconnect between the injury and the facts necessary to state the claim. The injury is the disparate impact. The federal government, as the representative of the people, is another natural litigant of reverse-redlining claims.

In addition, the federal government is the only entity with the resources and expertise to litigate against large financial institutions. Because lenders know the DOJ has the resources to win these cases, most of the DOJ's civil rights cases against lenders settle,170 avoiding the expense of drawn-out lawsuits and accomplishing the main goal of deterrence.

Finally, because the government would bring these actions on behalf of the public, the DOJ could pursue remedies tailored to the

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170. Of the hundreds of discrimination cases listed on the DOJ website, all but a handful have settled. See Housing & Civil Enforcement Section, U.S. Dep't of Justice, Fair Housing Cases, http://www.justice.gov/crt/housing/fairhousing/caseslist.htm (last visited Apr. 5, 2010).
public interest rather than to the financial needs of individuals. For example, rather than seeking pecuniary damages, the DOJ could seek foreclosure stays and injunctions compelling liable lenders to modify the mortgages of borrowers who are on the verge of default.\textsuperscript{171} While some borrowers not in the protected class may experience a windfall, these remedies would provide the greatest benefit to minority communities since these communities suffer disproportionately from foreclosures.\textsuperscript{172} Not only would injunctions and foreclosure stays make victims whole and deter lending discrimination, but they would also serve the public good.

2. The Second Front: Equipping Private Plaintiffs with the Data They Need to Win

In order to involve private plaintiffs in enforcing the FHA’s and ECOA’s prohibitions of reverse redlining, federal agencies must provide them with the data they need to reach discovery. Therefore, federal agencies should publish audits that illustrate which lenders’ policies result in disparate impacts. Rather than publishing audit results in the complicated form of the HMDA reporting data, regulators should take the approach of the agencies that grade banks for compliance with the Community Reinvestment Act (CRA).\textsuperscript{173} Similar to the HMDA, the CRA was enacted by Congress in 1977 to combat redlining and compel banks to reinvest in the communities from which they received deposits.\textsuperscript{174} However, unlike the HMDA, which only focuses on reporting, under the CRA regulators enforce the law by examining and grading banks on their compliance.\textsuperscript{175} These grades affect whether lenders receive approval for certain

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\textsuperscript{172} See supra note 17.


\textsuperscript{175} Brescia, supra note 174, at 628–29. The ratings assigned are “outstanding,” “satisfactory,” “needs to improve,” or “substantial noncompliance.” 12 C.F.R. § 345.28(a) (2009).
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transactions.\textsuperscript{176} The grades are also disclosed to the public, clearly conveying lenders’ records for providing equal access to credit without any need for the inquirer to engage in additional analysis.

Likewise, regulators auditing for disparate impact should reduce publication of each audit finding to an abstract containing a simple expression of a conclusion about whether a lender is responsible for significant disparities. The abstract should also provide a ratio representing the disparities in the average APRs offered to the targeted racial class and whites. This would eliminate the expensive and painstaking analysis likely to discourage individual plaintiffs and their counsel at the pleading stage. The actual calculations should be available in addition to a clear step-by-step explanation of the analysis undertaken, but the abstract alone should constitute strong evidence of disparate impact.\textsuperscript{177}

Accordingly, as other litigants have more success, the strain on taxpayers imposed by public litigation will decrease. Also, the threat of multiple lawsuits may be just what lenders need to push them to examine their practices for disparate impact and reform those practices when disparities are found. Finally, by implementing these changes, Congress’s vision that individual plaintiffs play an important role in enforcing the FHA and ECOA would endure.

3. Educating Reverse-Redlining Victims About Their Rights

In order to take part in this enforcement effort, reverse-redlining victims must first realize that they have legal claims. Thus, federal agencies should crusade to educate the public about reverse redlining. The government has previously embarked on similar public-education campaigns, including in the area of employment discrimination.\textsuperscript{178} The Equal Employment Opportunity Commission (EEOC) has been especially effective in educating the public about the rights of employees and the responsibilities of employers under Title VII. In addition to televised conferences, films, and public

\textsuperscript{176} 12 C.F.R. § 345.29; Brescia, \textit{supra} note 174, at 635.

\textsuperscript{177} It also should be admissible through the public records exception to hearsay. See \textit{Fed. R. Evid.} 803(8).

presentations, the EEOC has made its presence universally known in America’s workplaces by requiring its imprimatur on job applications and mandating employers to display posters in the workplace informing employees of their rights.

There is no reason why lenders should not be required to display similar information on loan applications and at branch locations. HUD should also require lenders to distribute informational pamphlets to new customers informing them of their rights under the FHA and ECOA, including the prohibition of lending activities that have an adverse impact on protected classes. In addition, HUD should reach out to community organizations, as the EEOC did to labor and civil rights groups in the 1960s and '70s, and make presentations about reverse redlining at community-sponsored events. Finally, HUD should utilize the power of the Internet, making special use of social-networking sites and chat rooms to introduce information about reverse redlining. This would help connect individual reverse-redlining victims with each other.

Finally, if amendments to the FHA and ECOA strengthen the acts’ public-enforcement mechanisms, the public’s awareness of its rights under these laws will follow naturally. As classes become less marginalized, they obtain greater awareness of their entitlements and become more willing to take action. Armed with this new awareness and with the facts necessary to state claims, individual plaintiffs will one day lead the way in enforcing the FHA and ECOA, just as Congress intended.

C. Addressing the Consequences

This proposal will undoubtedly have its costs. Some of these costs can be mitigated, as discussed below. Those costs that cannot be avoided are likely to be outweighed by the benefits of greater enforcement.


182. See Kaiser & Major, supra note 75, at 807–08.
1. Over-Deterrence

The most serious concern is that stepped-up enforcement of laws prohibiting lending discrimination will ironically lead to more lending discrimination. Fear that originating higher-cost loans would lead to audits could cause lending institutions to stop offering subprime products, limiting the availability of credit for less-qualified borrowers.183 For this reason, audits would only focus on lenders whose initial reviews uncovered significant disparities or deviations rather than incidental variations. Reserving audits for only those lenders responsible for significant disparities would allow lenders to continue serving borrowers who pose a legitimate credit risk. In addition, with clear guidelines to follow, lenders would likely conclude that the benefits of transacting with this broad segment of the market outweigh the costs of eliminating disparate impact from their underwriting models and loan-marketing practices.

Also, diminishing the diversity of lending products currently available may not be such a terrible consequence. By limiting the subprime credit available to customers, the market will purge many of the exotic loan products that have caused so much confusion. This may help level some of the informational imbalances between lenders and consumers.184 Furthermore, this proposal does not aim to redress the woes of borrowers with low incomes or credit scores. On the contrary, the objective of this Article is to address the problem faced by borrowers who were qualified for prime credit but received more costly loans because of their race. Other policy solutions must be pursued to serve the credit needs of less-qualified borrowers.

2. Fiscal Concerns

Admittedly, the economic costs of the program will be significant. However, it is important to compare this expense with the costs of reverse redlining. Predatory lending, including reverse redlining, sparked a financial crisis that has already cost American taxpayers more than a trillion dollars.185 Cities are strewn with foreclosed and abandoned homes, a great portion of them in

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183. See Willis, supra note 7, at 829 ("[I]t is unsurprising that part of the solution to mortgage overpricing will require reducing loan structure choices.").
184. Id. at 826–30.
185. See The Crisis, a Year Later, N.Y. Times, Sept. 9, 2009, at A28 ("[T]he final tab to taxpayers will approach $1.2 trillion.").
communities of color. Credit is unavailable, unemployment hovers around 10 percent, and the economy has shrunk for more than two years. Would all of this have happened without reverse redlining? Perhaps it would have. But if lenders were more cognizant of the impact their predation had on the public—whether that impact was disparate or homogeneous across the board—maybe we could have avoided this financial catastrophe.

VI. CONCLUSION

Let us return to the hypothetical that began this Article. However, imagine that a year before Mr. Borrower’s default, Congress amended the FHA and ECOA, implementing every suggestion made in this Article. Since then, Mr. Borrower attended a church event at which HUD officials educated him about reverse redlining. He also read a newspaper article about a crackdown by the DOJ on lenders for the same discriminatory activities HUD referred to at its presentation. Now, unable to pay his mortgage and believing he may be a reverse-redlining victim, Mr. Borrower consults with a civil rights attorney.

The lawyer is well-versed in the new amendments to the FHA and ECOA and quickly checks to see if Mr. Borrower’s lender has been audited. He discovers that government regulators audited Mr. Borrower’s lender just last month and discovered significant disparities negatively affecting African-American borrowers. After some more statistical research, the attorney informs Mr. Borrower that he seems to have a viable reverse-redlining claim.

Mr. Borrower’s situation is now much better than it was at the beginning of this Article. However, it still does not represent the best of all possible worlds. Mr. Borrower should never have been a victim of discrimination at all.

The Fair Housing Act begins as follows: “It is the policy of the United States to provide . . . for fair housing throughout the United States.” Congress’s intent is to eliminate discrimination, not merely redress it. Relieving Mr. Borrower’s injury is the means, not the end. Ironically, while the scarcity of reverse-redlining plaintiffs

today may signify that the FHA and ECOA are not adequately enforced, the same indicator may one day announce that this form of discrimination has been largely eliminated. However, the government, the courts, and private individuals all must play an important role in getting us there.