UIC Law Review

Volume 28 | Issue 2 Article 2

Winter 1995

Introduction to Mortgage Lending Discrimination Law, 28 J. Marshall L. Rev. 317 (1995)

Robert G. Schwemm

INTRODUCTION TO MORTGAGE LENDING DISCRIMINATION LAW

ROBERT G. SCHWEMM*

INTRODUCTION

In this Symposium are people from all over the country who have widely differing levels of experience with lending discrimination cases; many of these authors have litigated many of these cases. Many of these authors are nationally prominent speakers on this subject. I would like to present a broad overview of where we are in this field today and how we got there, along with some basic ideas about what goes into proving a lending discrimination case, in order to provide some background for the outstanding authors who will follow me.

I. A BRIEF HISTORY OF MODERN LENDING DISCRIMINATION

Mortgage lending discrimination is one of the principal civil rights issues facing the country today. It was not always so. In fact, much of the awareness of this problem and most of the litigation directed against it have occurred only recently. One of the nice things about this situation for a Symposium like this is that even people who are not too experienced in this field can become quite well-versed in a short period of time.

A. The 1968-1988 Period

The basic law that prohibits discrimination in housing finance has been on the books since 1968. That is the federal Fair Housing Act (FHA), also known as Title VIII of the Civil Rights Act of 1968.[1] The Fair Housing Act was produced in the wake of the urban riots of 1967, which in turn produced the Kerner Commission Report.[2] The Kerner Commission's analysis of the racial divisions in America included a good deal of material on the formation and maintenance of racial ghettos and residential segrega-

* Wendell H. Ford Professor of Law, University of Kentucky College of Law; B.A., Amherst College; J.D., Harvard Law School.

1. 42 U.S.C. §§ 3601-3619 (1992).

2. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REP. OF THE NAT'L ADVISORY COMM'N ON CIV. DISORDERS (1968). For a description of this Report's relevance to the enactment and interpretation of the Fair Housing Act, see Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 496-97 (S.D. Ohio 1976).

tion, and listed among its housing recommendations an expanded program of low-interest loans for lower income areas.[3]

Since 1968, there have been a number of noteworthy events in this field, but only a few reported cases. Most of these cases have occurred in recent years, some two decades after passage of the Fair Housing Act. In other words, the FHA did not instantly produce a body of mortgage lending discrimination cases, as it did, say, in the sales and rental areas. Why there was such a dearth of lending cases in the early years of the Fair Housing Act is an interesting question. It seems likely that there was at least as much discrimination by home loan institutions then as there is today, but, whatever the level of discrimination, it was rarely challenged in court.[4]

In 1974, Congress passed the Equal Credit Opportunity Act (ECOA),[5] which bans discrimination in all types of credit transactions, including home mortgages. Originally, the ECOA outlawed only sex and marital status discrimination, but in 1976, it was amended to cover race, color, religion, and a number of other bases of discrimination.[6] So, by 1976, there were two sepa-

---

3. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *supra* note 2, at ch. 6 ("The Formation of Racial Ghettos") and 475-77 (low-interest loan program). In an early mortgage discrimination case, the court took note of the Commission's material on ghetto formation and concluded that:

> [T]he imposition of barriers to occupancy in the form of higher mortgage-interest rates or refusals to make loans in connection with housing in changing neighborhoods works to discourage families, white or black, which could afford to purchase homes in such neighborhoods. The practical effect is to discourage whites — who may freely move elsewhere — from moving into vacancies in "changing" neighborhoods, thereby inducing "massive transition" and, ultimately, "white flight."

Laufman, 408 F. Supp. at 496-97.

4. As an aside, I might note that almost all of the mortgage lending cases reported in the first two decades after the Fair Housing Act took effect were brought either in the greater Chicago metropolitan area or in the state of Ohio. See *infra* notes 9, 43 for a number of cases in these regions. *See also* Cartwright v. American Sav. & Loan Ass'n, 880 F.2d 912 (7th Cir. 1989); Watson v. Pathway Fin., 702 F. Supp. 186 (N.D. Ill. 1988); Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330 (N.D. Ind. 1987); Evans v. First Fed. Sav. Bank of Ind., 669 F. Supp. 915 (N.D. Ind. 1987); Harper v. Union Sav. Ass'n, 429 F. Supp. 1254 (N.D. Ohio 1977). The only plausible explanation that I can come up with for this phenomenon is that the Chicago area and the state of Ohio boasted some of the more aggressive private fair housing organizations in the country, and these organizations had the interest, resources, and energy to bring lending discrimination cases when very few others could do so.

5. 15 U.S.C. § 1691(a)-(f) (1992).

6. *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (1976). The ECOA's prohibited bases of discrimination are race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), the fact that the applicant's income derives from public assistance programs, and the fact that the applicant has in good faith exercised any

rate federal statutes in place that were available to challenge mortgage discrimination.[7]

In 1975, Congress passed the Home Mortgage Disclosure Act (HMDA).[8] This law requires financial institutions to report certain data about their home loans, but it is not a nondiscrimination law. You cannot sue under HMDA. And in 1975, it only required reporting of home loan data by census tracts, which was not really very helpful in determining whether a lending institution was engaged in illegal discrimination.

Continuing chronologically, the first reported judicial decision in this field was a case called *Laufman v. Oakley Building & Loan Co.*,[9] which was decided in 1976, some eight years after enactment of the Fair Housing Act. The plaintiff in *Laufman* was a white individual who bought a house in a racially diverse area of Cincinnati and felt that the defendant did not provide equal loans in that area. He brought what is called a "redlining" case. That is, he claimed that he was discriminated against not because of his race, but because of the racial make-up of the area where he wanted to buy a house. The court upheld the theory of this lawsuit by rejecting the defendant's motion for summary judgment. So, whites as well as blacks are permitted to make claims under the Fair Housing Act if they allege racial discrimination that has an impact on them.[10]

A year after *Laufman*, a case was reported by the name of *United States v. A.I.R.E.A.*,[11] where the Justice Department accused the national appraisal organizations of encouraging the practice of taking the racial make-up of neighborhoods into account in doing housing appraisals. In that era, appraisers thought that properties should be appraised down if they were located in racially mixed areas compared to all-white areas. Indeed, this practice was a matter of the ethics of the appraisal industry — appraisers could be sanctioned for not following it — for years after enactment of the Fair Housing Act until the *A.I.R.E.A.* litigation put an end to it.[12]

---

right under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a) (1992).

7. State and local antidiscrimination laws may also prohibit mortgage discrimination.

8. 12 U.S.C. §§ 2801-2810 (1992).

9. 408 F. Supp. 489 (S.D. Ohio 1976).

10. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979) (holding that anyone may sue under Title VIII who is "genuinely injured by conduct that violates *someone's* . . . rights"); Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987); Harrison v. Otto G. Heinzeroth Co., 414 F. Supp. 66 (N.D. Ohio 1976).

11. 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

12. The *A.I.R.E.A.* litigation was settled by a consent decree. *See id.* Thus, like

One of the themes that I want to establish here is that the passage of the Fair Housing Act by itself did not change things automatically in the home mortgage field. Industries were used to doing things a certain way, and they continued to behave in that certain way. The appraisers fought the Justice Department lawsuit on the theory that the Fair Housing Act did not cover their activities, but the court held that it did, and the appraisal industry began to change in 1977.

Also in 1977, Congress passed the Community Reinvestment Act (CRA),[13] which, like HMDA, does not support a private cause of action, but rather, requires financial institutions to serve the credit needs of the community in which they operate, including low- and moderate-income neighborhoods.[14] The performance of a financial institution as judged by the CRA standards can be important background information for those prosecuting a lending discrimination case.[15]

By 1980, a number of published academic studies, both nationwide and on a regional or metropolitan-wide basis, examined whether race was a factor in the mortgage lending decisions of financial institutions.[16] Virtually all of these studies concluded that it was. Some of the studies were criticized by professional statisticians or economists on technical grounds, but there remained a general sense that the discriminatory lending problems that the 1968 Fair Housing Act attempted to address were still continuing.

Still, throughout most of the 1980s, only a few mortgage

---

the *Laufman* case, it was not fully litigated all the way through to a decision on the merits. Indeed, even up through today, there are only a handful of mortgage lending cases that have been tried on the merits, and very few of these have been won by plaintiffs. This means that much of the guidance to be gained from the reported cases in this field is derived from decisions that have dealt with preliminary motions or have been settled with consent decrees.

13. 12 U.S.C. §§ 2901-2905 (1992).

14. *See id.* § 2903.

15. "[L]ending institutions are required to serve all communities of their service area, and if their failure to comply is correlated with the race of the underserved neighborhoods, intentional discrimination, in violation of the Fair Housing Act and the Equal Credit Opportunity Act, can be inferred." *Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs Concerning Mortgage Lending Discrimination*, 103d Cong., 1st Sess. 534 (1993) (statement of Acting Asst. Att'y Gen. James P. Turner, Civil Rights Div., U.S. Dep't of Justice) [hereinafter *Discrimination Hearings*].

16. *See, e.g.*, A. THOMAS KING, DISCRIMINATION IN MORTGAGE LENDING: A STUDY OF THREE CITIES (Fed. Home Loan Bank Bd. Working Paper No. 91, 1980); DAVID LISTOKIN & STEPHEN CASEY, MORTGAGE LENDING AND RACE (Rutgers Univ. Ctr. for Urban Pol'y Research 1980); ROBERT SCHAFER & HELEN LADD, EQUAL CREDIT OPPORTUNITY IN MORTGAGE LENDING (Joint Ctr. for Urban Studies 1980). *See generally* George C. Galster, *Research on Discrimination in Housing and Mortgage Markets*, 3 HOUS. POL'Y DEBATE 639 (1992).

lending cases were brought. Very little was being done at this time in the way of litigation or enforcement. More than two decades after Title VIII's enactment, the basic problem of mortgage discrimination was not being addressed.

B. The Modern Era

Toward the end of the 1980s, the era that we are in today began. The initial triggering mechanism was a series of newspaper articles written in 1988 by a reporter named Bill Dedman in the *Atlanta Journal & Constitution*.[17] Dedman analyzed how the Atlanta financial institutions were lending money and where they were lending money. The gist of his articles was that the Atlanta institutions were heavily investing in housing loans in white areas and avoiding areas that were heavily African-American. Dedman's series had a tremendous effect, but again not immediately through litigation. The Atlanta financial institutions professed to be shocked to find out that this was happening, and a number of them committed substantial funds to loan programs in minority areas.

Then Congress became interested in this subject. All of a sudden, the earlier studies that I mentioned, which were out there gathering dust, were of interest to members of Congress. And laws began to be passed again. Another wave of legislation occurred. For example, in 1988, the Fair Housing Amendments Act strengthened and broadened the provisions of the 1968 Fair Housing Act that prohibited lending discrimination.[18]

An even more important event was the passage in 1989 of the Financial Institutions Reform, Recovery, and Enforcement Act.[19] This law, which basically tried to bolster the financial institutions in an era in which a number of savings and loans were experiencing difficulties, also included a provision amending the Home Mortgage Disclosure Act to require reporting of home loans and applications "grouped according to census tract, income level, racial characteristics, and gender."[20] As a result, beginning in 1990, financial institutions subject to HMDA were required to file annual reports of their home loan applications and their rejection and acceptance rates by race as well as by census tract and the other statutorily required factors.

Beginning in 1991, studies were published analyzing the

---

17. Bill Dedman, *The Color of Money*, ATLANTA J. & CONST., May 1-16, 1988.

18. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988). In particular, the 1988 amendments broadened the coverage of the section of the FHA that explicitly banned mortgage discrimination. *See* 42 U.S.C. § 3605 (1992).

19. Pub. L. No. 101-73, 103 Stat. 183 (1989).

20. *See* 12 U.S.C. § 2803(b)(4).

1990 HMDA data, which showed significant differences in the rejection rates of black and white applicants. For example, a nationwide study conducted by researchers for the Federal Reserve Board found that about thirty-four percent of black applicants for home mortgage credit were rejected versus about fourteen percent of the white applicants.[21]

Now, as the financial institutions are quick to point out, that fact alone does not prove a case of discrimination. It doesn't prove it as to any individual financial institution, because these are nationwide statistics. But even if one focuses on the statistics of an individual lender, disparate rejection rates would not by themselves prove discrimination, because there could be other factors that might explain that result. For example, a lending institution might claim that it has special outreach programs for minorities, which means that it attracts more minority applicants than white applicants, with the result that its black applicants tend to have more credit problems than do its white applicants. So, the fact that this institution rejects a larger percentage of minorities than whites does not by itself prove that it is applying discriminatory standards. It could be applying exactly the same credit standards across the board.

But these HMDA results were the kinds of statistics that at least had to be explained. They called for some kind of response. And one of the types of responses that occurred was that Congressional committees with oversight responsibility for the federal agencies that regulate financial institutions began to ask these agencies what they were doing to find out whether these statistics did indeed reflect illegal discrimination. In addition, HUD, Fannie Mae, and other interested groups began to hold major national conferences on the subject of lending discrimination.

Then, in 1992, the Department of Justice concluded a yearlong investigation and brought the most significant case it had ever instituted in this field, *United States v. Decatur Federal Savings & Loan*.[22] Decatur Federal is an Atlanta institution; that case grew directly out of the series of articles written by Bill Dedman. The Justice Department looked at all of the Atlanta financial institutions in light of the HMDA data and eventually focused on Decatur Federal.

Now, if you are a small practitioner representing a single individual or couple who think they have been discriminated against in a home loan situation, you will find some good news and some bad news in the *Decatur Federal* case. The good news is that some of the areas that you might look into have already been

21. Glenn B. Canner & Delores S. Smith, *Home Mortgage Disclosure Act: Expanded Data on Residential Lending*, 77 FED. RESERVE BULL. 859 (1991).

22. 2 Fair Hous.-Fair Lending Rep. (P-H) ¶ 19,377 (N.D. Ga. 1992).

demonstrated to be useful by the Justice Department's investigation. The bad news is that this case took a year and over a $1 million for the Justice Department to investigate. And even within that year, months and months went by before anyone in Justice was confident that this would turn out to be a legitimate, provable case. Accordingly, if your focus is a little more modest, and you are unwilling to spend one million and a full year investigating your first case, you might approach *Decatur Federal* as a source of ideas rather than a model for your own litigation.

Nevertheless, *Decatur Federal* is a very significant case, because it captured the attention of the country with respect to this problem. It showed how HMDA data could be used to help build a case. And the terms of the consent decree[23] — it was settled almost immediately after being filed — are a model for what a financial institution can be asked to do to remedy past discrimination.

Also in 1992, the Federal Reserve Bank in Boston published a significant study dealing with the HMDA data for financial institutions in the Boston area.[24] This study is important because it addressed the problem I mentioned earlier that HMDA data does not necessarily prove discrimination because other, nonracial factors might be at play in lending decisions. The Boston Fed study tried to eliminate all of these other variables, such as the applicants' credit history and their debt load. Some fifty variables other than race were identified and eliminated. The result was that, even without considering these other variables, the disparities in rejection rates for minorities and whites remained high.[25] This has been a very controversial study, subject to both attack and counter-attack on technical grounds.[26] But the general sense that it has left is that the factors other than race do not fully explain the disparities in rejection rates. Race remains a key decision-making factor.

There were other studies that were published at this time. Ralph Nader's group did one.[27] His people focused primarily on redlining as opposed to individual case studies. Using the HMDA

---

23. *See id.*

24. ALICIA H. MUNNELL ET AL., MORTGAGE LENDING IN BOSTON: INTERPRETING THE HMDA DATA (Fed. Reserve Bank of Boston Working Paper No. 92-7, 1992).

25. The Boston Fed study found that the home loan rejection rates for blacks and Hispanics were 56% higher than for whites in the Boston area, even when all significant nonracial variables were held constant. *Id.*

26. *See, e.g.*, JAMES H. CARR & ISAAC F. MEGBOLUGBE, THE FEDERAL RESERVE BANK OF BOSTON STUDY ON MORTGAGE LENDING REVISITED (Fannie Mae Office of Hous. Research Working Paper 1993).

27. JONATHAN BROWN, RACIAL REDLINING: A STUDY OF RACIAL DISCRIMINATION BY BANKS AND MORTGAGE COMPANIES IN THE UNITED STATES (Essential Info., Inc. 1993).

data, the Nader study identified sixteen cities where they found institutions with discriminatory lending patterns. In the Chicago area, for example, the study identified eight institutions that appeared to be engaged in racial redlining. If you have an individual case, it might be worth your while to get this study and see whether your defendant is on this list.

Earlier this year, most of the federal agencies that regulate financial institutions joined together in a project called the Interagency Task Force on Fair Lending that produced a "Policy Statement on Discrimination in Lending."[28] This statement was published in the Federal Register and provides a good deal of guidance as to what these agencies think mortgage discrimination is and is not and what they will consider in investigating institutions for discrimination. This action indicates a degree of seriousness of purpose among these agencies that is quite different from the attitudes of the 1970s and 1980s. These days, Washington regulators want to be seen as taking the problem of mortgage lending discrimination very seriously.

Also this year, a jury in Houston in a case called *Simms v. First Gibraltar Bank*[29] returned a $3.2 million verdict for the plaintiffs in a private lending discrimination case. This is one of the few lending cases in which plaintiffs have won a decision on the merits in the entire history of the Fair Housing Act, and its record-setting verdict is sure to draw additional attention to this field.

To sum up, we have had laws on the books for more than a quarter of a century that ban mortgage discrimination. Although there was a flurry of related legislative activity and academic studies during the 1970s, very little litigation occurred during this time, apart from a few cases in isolated parts of the country. This meant there was little guidance on how to prosecute a successful case, and large portions of the country had no enforcement or litigation experience at all.

During this period, however, some basic principles of law were being established, such as the difference between redlining and individual cases.[30] As we shall see in subsequent sections, the 1970s and 1980s also produced precedents in related fields that would ultimately come to be used in the mortgage lending area. But it was not until the late 1980s that public attention and the HMDA amendments set the stage for the period of accelerat-

---

28. *See* 59 Fed. Reg. 18, 266-74 (1994).

29. No. H-91-3367 (S.D. Tex. 1994), *reported in* Fair Hous.-Fair Lending Rep. (P-H) ¶11.1 (May 1, 1994).

30. Although these claims are quite different analytically, both may be brought in the same case. *See, e.g.*, Cartwright v. American Sav. & Loan Ass'n, 880 F.2d 912 (7th Cir. 1989).

ing litigation that we find ourselves in today.

II. OVERVIEW OF THE FAIR HOUSING ACT AND THE EQUAL CREDIT OPPORTUNITY ACT

This section provides an overview of the Fair Housing Act and the Equal Credit Opportunity Act, the two laws that are available to challenge mortgage discrimination. Basically, in order to make out a case under the Fair Housing Act, there must be four elements present. First, the case must involve a property that is covered by the statute. The Fair Housing Act covers only "dwellings."[31] Dwellings are homes to which people intend to return on a semi-permanent basis. Cases involving temporary residences have caused some difficulty with respect to this element, but it is an easy one to satisfy in most home mortgage cases.

Second, the specific transaction must be covered. This is easy in the lending area, too, because there is explicit language covering financial discrimination in the Fair Housing Act,[32] and there is also general coverage in another portion of the Act that deals with transactions that "otherwise make unavailable" housing, which the courts have read to include mortgage discrimination.[33]

Third, there must be an illegal basis of discrimination. The Fair Housing Act includes seven: race; color; religion; sex; national origin; familial status; and handicap.[34] If the plaintiff proves that one of these illegal bases of discrimination was the reason for a covered transaction being denied in a situation involving a dwelling, then the plaintiff wins. If the plaintiff fails to prove this, then the defendant wins, no matter how silly his real reason may be. For example, if the lender proves that the lending officer had just lost a lot of money on a football bet and, as a result, didn't treat people appropriately, but the lending officer wasn't engaged in racial discrimination (i.e., he was treating all applicants in the same inferior way that day), then the defendant wins. It may be bad behavior. Your client may be upset. Your client didn't get a loan he should have gotten. But being upset and winning a discrimination case are two different thing. You lose on the allegation of discrimination. The only way for the plaintiff to win is if the defendant's behavior is *because* of one of those seven illegal bases.

---

31. *See* 42 U.S.C. §§ 3603-3606, 3617 (1992). The definition of "dwelling" is contained in 42 U.S.C. § 3602(b).

32. § 3605.

33. § 3604(a); Harrison v. Otto G. Heinzeroth Mort. Co., 430 F. Supp. 893, 896 (N.D. Ohio 1977); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 492-93 (S.D. Ohio 1976). *See generally* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 13.4(4) (1994).

34. *See* 42 U.S.C. §§ 3604-3606, 3617.

Fourth is the standard of proof as to this "because" element, that is, what must be shown in order to prove that the defendant's behavior toward the plaintiff was indeed because of one of these seven bases. There are many cases under the Fair Housing Act that deal with this, although they usually involve rentals and sales of housing rather than lending situations, but the principles are the same. Basically, the plaintiff can satisfy this element by proving intentional discrimination or by proving that the defendant was applying a policy that had an unjustified discriminatory effect. This fourth element, which is the key to winning or losing most mortgage discrimination cases, will be dealt with in greater detail in Part IV.

So, from a substantive point of view, the Fair Housing Act is not too difficult. Just establish these four elements. However, the FHA can be very complicated from an enforcement point of view. If your client has been aggrieved by a Fair Housing Act violation, you have a number of forums to choose from, each with its own different types of relief. This Article will not cover this subject, but readers should at least be aware of the options that are available.[35]

With respect to the Equal Credit Opportunity Act, the principal point I want to make has to do with the illegal bases of discrimination. All forms of credit are covered by the ECOA, including housing credit, so coverage there is no problem. However, the statute does have a different set of illegal bases of discrimination than the FHA. Both cover race, color, religion, national origin, and sex. But familial status and handicap are not covered by ECOA, so you would only be able to use the FHA for these types of cases. On the other hand, ECOA has four additional bases that do not appear in the Fair Housing Act; these are marital status, age, having one's income derive from public assistance, and retaliation for exercising rights under the Consumer Credit Protection Act.[36] So, for example, if people are being discriminated against because of their marital status, you could bring that under the ECOA, but not under the Fair Housing Act.[37]

---

35. An aggrieved person under the FHA has essentially three enforcement options: (1) he can file an individual suit in court without waiting for an administrative process to be completed; (2) he can also file a claim with HUD and follow the administrative route, in which case additional options are presented, including having the case referred to a state or local civil rights agency or having it re-routed to federal court; and (3) he can call the matter to the attention of the Justice Department if a pattern or practice of discrimination is involved. *See generally* SCHWEMM, *supra* note 33, at chs. 24-26. In all of these situations, equitable relief is available and the aggrieved person may be awarded actual damages; in some situations, punitive damages, limited civil penalties, and attorney's fees are also available. *Id.*

36. See *supra* note 6 for a list of ECOA's prohibited bases of discrimination.

37. Also be aware that state and local antidiscrimination laws applicable to

The Equal Credit Opportunity Act has its own enforcement and relief provisions.[38] You do not follow the Fair Housing Act provisions with an ECOA claim. In a race or national origin case, you may very well decide to bring a two-count complaint in federal court under both of these laws, but as a general matter, you do have to keep in mind the differences between these laws in terms of forums and relief available.

III. EXAMPLES OF ILLEGAL MORTGAGE DISCRIMINATION

What form does mortgage lending discrimination take? Here are some examples that are taken from the Policy Statement on Discrimination in Lending that was issued by the federal Interagency Task Force on Fair Lending earlier this year:

(1) Failing to provide information or services or providing different information or services regarding any aspect of the lending process, including credit availability, application procedures, or lending standards;

(2) Discouraging or selectively encouraging applicants with respect to inquiries about or applications for credit;

(3) Refusing to extend credit or using different standards in determining whether to extend credit;

(4) Varying the terms of credit offered, including the amount, interest rate, duration, or type of loan;

(5) Using different standards to evaluate collateral; and

(6) Treating a borrower differently in servicing a loan or invoking default remedies.[39]

It is clear from these examples that discrimination may take many forms in addition to an outright refusal to extend credit. An outright refusal is certainly one type of potential violation, but there are also many others. For example, discrimination could take the form of a difference in the terms and conditions of a loan, such as asking a minority applicant to make a greater down payment or to pay higher interest rates.

Even a difference in the level of encouragement or information supplied may be a violation. In the *Decatur Federal* case, for example, the Justice Department found that in comparing the treatment accorded black and white applicants, virtually all of the qualified applicants — black as well as white — were approved by Decatur Federal. Similarly, applicants of both races with poor credit were turned down. There was little or no discrimination as to either of these groups. However, where the Justice Department

---

mortgage lending may have a list of prohibited bases of discrimination that is different from either the FHA or the ECOA.

38. *See* 15 U.S.C. § 1691(e) (1992).

39. 59 Fed. Reg. 18,268 (1994).

found a substantial amount of discrimination was in the case of marginally qualified applicants.[40] Someone would come in and just barely miss qualifying for a loan, because, for example, he had too much credit card debt. What often would happen then is that a white loan officer, seeing this situation with a white applicant, would suggest that the applicant pay down some of his credit card debt, which would then allow his home loan to be approved. But the loan officer was not giving this advice to similarly qualified black applicants. This difference in treatment may even have been subconscious on the part of the loan officers, but that is irrelevant. There was a clear pattern of discrimination.

So, do not think you are just looking for outright turndowns or blatant forms of different terms and conditions. A variety of other situations might be illegal as well.

IV. PROVING ILLEGAL MORTGAGE DISCRIMINATION

Next, I would like to lay out how one goes about proving that a particular transaction — to keep it simple, I will use an outright rejection of a home loan — was based on race or some other illegal factor as opposed to one of the myriad nonillegal factors that a defendant may claim it was based on. In this regard, the basic law under the Fair Housing Act is the same as it is under the Equal Credit Opportunity Act.

A. Intent Cases

In most of these cases, the plaintiff will be attempting to prove intentional discrimination. Intentional discrimination may be shown in two ways. The first is by direct evidence. For example, a witness comes forward who says that he was in the conference room when loan applications were being discussed and the person in charge said, "I don't think we ought to approve this loan because it's in a black neighborhood." This would be discouraging from the point of view of the goals of the antidiscrimination laws, but it would be absolutely wonderful from the point of view of someone having to prosecute the case. If you ever find that kind of witness, you are a lucky litigator.

But this rarely happens. Defendants are more sophisticated now. They just don't talk in these terms much anymore. So, it's rare that you are going to get that kind of direct evidence.

The more typical situation is that you are going to have to prove intent by what has come to be called the "prima facie case" method.[41] In order to do this, the plaintiff initially must estab-

40. *See Discrimination Hearings*, *supra* note 15, at 535-36.

41. The law on this subject is derived from Supreme Court decisions in the employment discrimination field under Title VII, such as St. Mary's Honor Ctr. v.

lished a few basic elements. For example, in a case where the claim is that the plaintiff was turned down because of his race, a prima facie case will be made out if the plaintiff proves that: (1) he is a member of a minority race; (2) he applied for a home loan from the defendant; (3) the defendant rejected the plaintiff, knowing of the plaintiff's race; and (4) the defendant approved loans for white applicants with qualifications similar to the plaintiff's.[42] In a redlining case, the list of factors is somewhat different because the focus in this type of case is on the race of the neighborhood rather than on the race of the applicant.[43]

Once the plaintiff has established these elements, he has shown enough to win if the defendant does nothing. It's like a tennis match; the ball is now in the defendant's court. But, of course, the defendant always has a response. He is going to try to meet his burden of rebuttal by articulating some nonillegal reason, such as the lending officer was too concerned with his bad football bet that day or the plaintiff has too much credit card debt.

Now the ball is back in the plaintiff's court. In virtually all of these cases, the ultimate result boils down to whether the plaintiff can rebut the defendant's articulated reason and show that the particular excuse is a pretext for discrimination because it was not applied to similarly situated white applicants.

In the traditional fair housing case, this proof is often supplied by testing. If a black person is rejected for an apartment allegedly because he has a pet, this excuse can be shown to be a pretext if the defendant is willing to rent to a white tester who has a pet.

But testing in the mortgage lending field is fairly new.[44] It has not been done much, at least until quite recently. It is more difficult than traditional rental testing, and there may even be legal constraints that prevent a tester from signing an application

---

Hicks, 113 S. Ct. 2742 (1993); Texas Dept. of Community Aff. v. Burdine, 450 U.S. 248 (1981); and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a discussion of how the principles of these cases have been applied to fair housing claims, see SCHWEMM, *supra* note 33, at § 10.2.

42. *See, e.g.*, Hickson v. Home Fed. of Atlanta, 805 F. Supp. 1567, 1571-72 (N.D. Ga. 1992); Watson v. Pathway Fin., 702 F. Supp. 186, 188 (N.D. Ill. 1988); Thomas v. First Fed. Sav. Bank of Indiana, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987).

43. The factors in a redlining case include: (1) the house is in a minority neighborhood; (2) the plaintiff applied for a loan from the defendant; (3) the appraisal showed that the house's value equaled its price; (4) the plaintiff was creditworthy; and (5) the defendant rejected the plaintiff's application. *See, e.g.*, Steptoe v. Savings of Am., 800 F. Supp. 1542, 1546 (N.D. Ohio 1992); Old West End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987).

44. *See generally* George C. Galster, *Use of Testers in Investigating Discrimination in Mortgage Lending and Insurance*, *in* CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA, ch. 7 (Michael Fix & Raymond J. Struyk eds., Urban Inst. Press 1992).

for a mortgage using false information. Some mortgage testing is now being done, particularly at the initial in-take stage. The National Fair Housing Alliance is in the process of doing a major study involving testing in this area. The Justice Department is beginning to do mortgage testing. We are on the threshold of finding out whether testing can be effectively used in these cases. If it can be, it has the potential to provide very dramatic and effective evidence of discrimination.

In the absence of testing, however, the key will be to find similarly situated white applicants who were treated more favorably than the minority plaintiff. This can be a difficult task. It will usually require a detailed examination of the defendant's loan files. The Justice Department was able to gain access to these files in the *Decatur Federal* case as part of its pre-complaint investigation, but private plaintiffs may not have this kind of leverage and may have to wait until formal discovery after filing their complaint.

While the key to proving an individual case is comparing the treatment accorded specific black and white applicants, there are other sources of evidence that may be used to establish intentional discrimination inferentially. As mentioned earlier, one source is the basic HMDA data for the particular institution, which would show whether its rejection rate of minority applicants was much higher than its rejection rate of whites. Another idea mentioned above is checking how a potential defendant has defined its effective service area under the Community Reinvestment Act and then determining whether the boundaries of its lending activity correlate with racial residential patterns.

In addition, the Justice Department in *Decatur Federal* looked at the defendant's marketing and advertising practices and found evidence of discrimination there. For example, Decatur Federal did not advertise in the Atlanta media that focused on the black community. In terms of marketing, the loan officers were encouraged to contact certain types of people, like up-scale realtors and appraisers, to spread the word about their loan products, and these contacts turned out to be almost exclusively in white communities. In addition, Decatur Federal had more than forty branch offices, and it placed virtually all of these in white areas; indeed, the only one that served a black area was being closed at the time of the suit.[45]

---

45. Another practical advantage that the Justice Department had in litigating the *Decatur Federal* case was that the defendant there was about to be taken over by another financial institution, which made it anxious to avoid being the target in a long, drawn-out discrimination case prosecuted by the federal government. This may have had some influence on its willingness to agree to an early settlement that provided for $1 million to the identified discrimination victims and a series of

It might also be worth noting whether the defendant's loan officers are all or virtually all white persons. And whether the appraisers who are being used are always white. As mentioned earlier, much of the discrimination that may be going on can be explained simply by the fact that white employees feel more comfortable giving a little extra service to those applicants of their own race.

B. Effect Cases

In addition to this type of basic intent case, both the Fair Housing Act and the Equal Credit Opportunity Act may be violated if the defendant has a practice that disproportionately burdens protected class members and there is not a good business reason justifying that practice.[46] These are called "disparate impact" or "discriminatory effect" cases.

In these cases, the plaintiff must identify a lending practice that has a disproportionate impact on minorities. For example, one practice may be a mortgage company's policy against making loans under a certain dollar amount, such as $60,000. Statistical evidence is the key to proving disparate impact. You find out what percentage of minority individuals are excluded by that policy versus what percentages of whites are excluded; if the former is significantly higher than the latter, then the plaintiff has established a prima facie case.

Now, what is the defendant's burden of rebuttal in a disparate impact case? The law on this subject in lending cases is not yet firmly established.[47] It is still being worked out. In any event, it is a tough burden for the defendant to satisfy. The defendant basically has to show that there is a necessary business

---

dramatic changes in its marketing, hiring, and training practices. Other financial institutions that are in the process of seeking regulatory approval for a take-over, merger, or some similar development may also be inclined to negotiate a settlement, even with a private plaintiff, that includes reform-type equitable relief as well as monetary damages.

46. In establishing this proposition, the lower courts have again applied the Supreme Court's decisions under Title VII, Griggs v. Duke Power Co., 401 U.S. 424 (1971), and its progeny, to fair housing cases. As to the FHA, see Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-37 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). *See generally* SCHWEMM, *supra* note 33, § 10.4(1). As to the ECOA, see Cherry v. Amoco Oil Co., 490 F. Supp. 1026, 1030 (N.D. Ga. 1980). As to both laws, see 59 Fed. Reg. 18,268-70 (1994).

47. *See, e.g.*, 59 Fed. Reg. 18,269 (1994); SCHWEMM, *supra* note 33, at § 10.4(2). HUD has announced that it will soon issue a regulation on the discriminatory effect theory of proving a violation under the Fair Housing Act, which will include addressing the issue of the defendant's burden of rebuttal in such cases. This regulation is likely to be influential in subsequent judicial decisions dealing with this matter. *See, e.g.*, NAACP v. American Fam. Mut. Ins. Co., 978 F.2d 287, 300-01 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993).

reason for this policy and that there is no less discriminatory way to achieve this business goal.[48] Sometimes defendants have won under this standard, but rarely. Usually, if the statistics show a significant disproportionate impact, the plaintiff is likely to win.

The Nader report identifies six examples of lending practices that have potentially illegal discriminatory effects.[49] These include minimum loan thresholds and a high down payment requirement. A minimum loan policy was also used by the federal Interagency Task Force on Fair Lending as an example of a policy that might be challenged under the disparate impact theory.[50]

CONCLUSION

Although mortgage lending discrimination and the laws that forbid it have been a part of the American landscape for over two decades, it has only been in recent years that this subject has captured the attention of the public, Congress, and federal enforcement officials. The result has been a tremendous upsurge in interest in this field. Still, there are relatively few cases that have been litigated to a conclusion on the merits, and fewer still that have resulted in plaintiff's victories. Thus, we find ourselves in an exciting period of great potential, but as yet not fully realized accomplishment, as far as lending litigation is concerned. This Symposium will provide one more building block for what could well be some major breakthroughs in the enforcement of the fair lending laws in the upcoming years.

48. *See, e.g.*, 59 Fed. Reg. 18,269.
49. BROWN, *supra* note 27, at 27.
50. 59 Fed. Reg. 18,269.