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A CITIZEN'S GUIDE TO ATTACKING MORTGAGE DISCRIMINATION: THE LACK OF JUDICIAL RELIEF

Michael S. Little*

The size and arrangements of a people's homes are no unfair index of their condition. If, then, we inquire more carefully into these Negro homes, we find much that is unsatisfactory. All over the face of the land is the one-room cabin—now standing in the shadow of the Big House, now staring at the dusty road, now rising dark and sombre amid the green of the cotton-fields. It is nearly always old and bare, built of rough boards, and neither plastered nor ceiled. . . .

W.E.B. DuBois

I. INTRODUCTION

One of the most important and significant decisions a person can make in his or her life involves the purchase of a home. A home or household is not merely a dwelling structure; it is the foundation from which families are developed, neighborhood friendships are nurtured, and communities are born. However, for many minorities, homeownership is never realized due to the discriminatory lending practices of the nation's banks.²

Imagine the following hypothetical situation. The Boyds submit a residential loan application to Quality Western Bank to secure a mortgage for a home they have contracted to purchase. On the loan application, the Boyds reveal that they are black, and Quality Western proceeds to process the application. A credit check conducted by Quality Western indicates that the Boyds have not defaulted on any of their numerous credit accounts, but have made several late payments to some of their creditors. Nonetheless, all of the Boyds' creditors give them "1" ratings, the highest rating possible. A further evaluation shows that the Boyds' monthly housing expense to income ratio and

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* Articles Editor, Boston College Third World Law Journal.
1 The Souls of Black Folk 102–03 (2nd ed. 1990).
2 See Peter Dreier, America's Urban Crisis: Symptoms, Causes, Solutions, 71 N.C. L. Rev. 1351, 1381 n.76 (1993).
their loan to value ratio are well within Quality Western's accepted guidelines.

Unfortunately, Quality Western rejects the Boyds' loan application and the family is unable to purchase the home for which they had originally contracted. Quality Western notes the Boyds' late credit payments as the cause of their rejection. Later, the Boyds discover that at least six applications made by white couples for loans were approved by Quality Western even though their credit histories also showed late payments to creditors. The Boyds are hurt and suspect that they have been treated differently because of their race.

Several recent studies indicate that African-American and Hispanic applicants are denied home loans more than twice as often as comparable Caucasian applicants. The Federal Reserve Board, under the Home Mortgage Disclosure Act (HMDA) conducted a series of studies based on disclosed data concerning the geographic, racial, and financial distribution of home mortgage loans by the nation's banks. This study, while criticized as inconclusive, was eventually validated by a later Federal Reserve Bank of Boston survey. Both studies found that minority mortgage loan applicants were denied mortgages more frequently than comparable white applicants.

Since the early 1990s, the Justice Department has shown an emerging interest in filing claims for minority applicants who feel that they have been denied mortgage loans due to their race. However, the Justice Department's emerging concern is ineffective at providing relief for the individual litigant, since Justice Department claims can only be filed after a "pattern" of mortgage discrimination has been documented.

This Note argues, however, that the government's regulation of these lenders, as mandated by legislation, is shamefully inadequate. Further, private claims against these discriminating lenders have, until recently, been slowed or denied by the judicial system.

In Part II, this Note seeks to prove that mortgage discrimination exists and continues to be practiced by this nation's banking institutions. Part II outlines several contemporary studies and surveys concerning discriminatory mortgage lending patterns which provide evidence of discrimination in mortgage lending. Further, regulators and

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4 See id.
6 See id.
leading economists generally accept this evidence as proof of a pattern of mortgage discrimination by the nation's lenders.

Part III outlines the shortcomings of legislation in providing legal relief to minority claimants. Part IV documents the lack of success individual litigants alleging mortgage discrimination have faced in federal and state courts.

Part V analyzes the Department of Justice's response to mortgage discrimination. Although many commentators argue that the Justice Department's efforts in the Decatur Federal Savings and Loan case marked the watershed for mortgage discrimination prevention, the Decatur case fails to provide precedent for individual litigants alleging a single instance of mortgage discrimination. In light of the Decatur and subsequent Shawmut settlements, the Justice Department, on behalf of individual litigants, may only bring a cause of action after the Federal Reserve Board or a similar administrative agency has uncovered dozens of other episodes of mortgage discrimination from the same lender.

This Note concludes that the present legislative acts and federal regulatory measures are sadly incapable of eliminating discrimination in mortgage lending. Without provisions in these legislative acts for individual causes of action in the nation's courts, minorities subjected to discriminatory mortgage lending will be forced once again to swallow the "bitter pill" of inequity.

II. Evidence of Discriminatory Mortgage Lending Practices: Contemporary Studies and Surveys

Until recently, the existence of mortgage discrimination or redlining\(^7\) had not been examined or documented.\(^8\) Without strong evidence...
revealing a pattern of mortgage discrimination, federal regulators were not able to recognize discrimination as a pervasive problem in mortgage lending. The HMDA Studies of 1990 and 1991 and the Federal Reserve Bank of Boston Study of 1992 provided this evidence and support through the compilation and examination of thousands of mortgage loan applications. All three studies revealed that mortgage discrimination is a serious problem among mortgage lenders. More importantly, the studies forced the banking community and the nation to recognize the existence of mortgage discrimination and its devastating impact upon minority families.

A. The HMDA Studies

Since 1976, most banks and other depository institutions that have offices in metropolitan areas have been required, under the HMDA, to disclose to the public information about the geographic distribution of their loans for home purchase and home improvement. Both the 1990 and 1991 HMDA data, compiled by the Federal Financial Institutions Examination Council (FFIEC), have raised questions concerning the efforts of metropolitan banks to meet the credit needs of low-income and minority applicants in their communities. More importantly, the HMDA data allows federal agencies, including the Board of Governors of the Federal Reserve System, to ensure that covered institutions comply with the fair lending laws, and the Community Reinvestment Act (CRA).

In disclosure statements released to the public in October of 1991, lenders, for the first time, reported on all home loan applications they received, including the race, national origin, gender, and annual income denied than comparable white applicants. Id. The researchers speculated that differences in credit histories might have contributed to this result, but lacked the data to test this hypothesis. Id. Finally, in 1981, the MIT-Harvard Joint Center for Urban Studies published an extensive study of mortgage lending decisions in New York and California; one portion of this study focused on individual applications. Id. Mortgage application data were provided by state-regulated savings and loans in California and all state-regulated commercial banks, mutual savings banks, and savings and loans in New York. Id. Based on the information included in a very large sample of loans, the authors determined that blacks had a much greater chance of denial than white applicants with equivalent socioeconomic, property, and neighborhood characteristics. Id.

9 Canner & Smith, supra note 3, at 859.

10 See id. The study states: "The data have revealed wide variations in the number and dollar volume of loans approved across neighborhoods grouped by the income and race of residents." The 1990 and 1991 data lead many economists to believe that lenders do not treat applicants for home loans "fairly, and on a racially nondiscriminatory basis." Id.

11 Id. at 859–60. The fair lending laws refer to the Fair Housing and Equal Credit Opportunity Acts. Id. at 860.
comes of their applicants.\textsuperscript{12} The Federal Reserve Board warned, however, that the data is limited and cannot be used as conclusive evidence of discriminatory lending practices.\textsuperscript{13} Nevertheless, the most recent amendments contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989, extended the HMDA’s survey to non-depository, independent mortgage companies when identifying possible discriminatory lending patterns.\textsuperscript{14}

1. The 1990 HMDA Data

The 1990 HMDA study, conducted by the FFIEC, compiled disclosure statements from almost 9,300 financial institutions.\textsuperscript{15} The data revealed that African-American and Hispanic applicants were more likely to be denied home loans than white or Asian applicants with comparable incomes.\textsuperscript{16} Nationally, about 14.4\% of white applicants for conventional home purchase loans were denied credit in 1990, while the denial rate for African-American and Hispanic applicants was 33.9\% and 21.4\%, respectively.\textsuperscript{17} Also, the 1990 HMDA data revealed that the denial rate increased as the annual income of the applicants decreased.\textsuperscript{18} Although the 1990 HMDA data presents a statistical link

\begin{itemize}
  \item \textsuperscript{12} Id. at 859.
  \item \textsuperscript{13} See id. Foremost among these limitations is a lack of information about factors that are important in determining the creditworthiness of applicants and the adequacy of the collateral offered as security for their loans. Without taking into account such information, one cannot determine whether individual applicants or applicants grouped by a common characteristic (such as race or gender) have been treated fairly. Id.
  \item \textsuperscript{14} Id. at 860. The FIRREA amendments allowed the 1990 HMDA Study to compile lending information from more than four hundred independent mortgage companies (lenders unaffiliated with depository institutions). Id.
  \item \textsuperscript{15} Id. at 863. The Board’s approach to collecting the data is a relatively simple one that minimizes the burden on the reporting institutions and, at the same time, provides a reporting format that offers a large base of information for use by the public and the supervisory agencies. Id. at 861. Covered institutions record data for each loan application acted on and each loan purchased on a separate line of a reporting form, the Loan/Application Register (LAR). Id. at 862. At the end of the year, the institutions submit the LARs to their respective supervisory agencies, which send them to the Federal Reserve Board for processing. Id. The Board, acting on behalf of the FFIEC [Federal Financial Institutions Examination Council], produces disclosure statements and sends them to the reporting institutions for release to the public. Id. Under this system, institutions collect the required information but do not have to undertake the additional costly step of preparing their own disclosure statements, which would involve sorting and aggregating their data in multiple cross-tabulations. Id. The Federal Reserve Board processed 23,891 metropolitan statistical area (MSA) reports representing 9,281 financial institutions. Id. at 863.
  \item \textsuperscript{16} See id. at 868.
  \item \textsuperscript{17} Id. At 12.9\%, the denial rate for applicants of Asian extraction was lower than for any other racial or ethnic group. Id.
  \item \textsuperscript{18} See id. Nationwide, 78.9\% of the loan applicants whose income equaled or exceeded the median family income for their MSA (metropolitan statistical area) were approved for conven-
between an applicant's race and home loan denial, the Federal Reserve Board originally refused to present the study as evidence of systematic discriminatory lending. 19

2. The 1991 HMDA Data

Although the Federal Reserve Board was hesitant to link the findings of the 1990 HMDA study to mortgage discrimination, the 1991 HMDA study clearly confirmed the Federal Reserve Board's suspicion concerning discriminatory lending practices by the nation's banks. 20

The 1991 survey included disclosure statements from 9,358 lenders, including banks, thrifts, credit unions, and mortgage banks, and involved approximately 7.9 million applications. 21 For African Americans, the denial rate dropped slightly in 1991, yet remained nearly 2.2 times that of white applicants. 22 For Hispanics, the denial rate in 1991 rose to 1.54 times that of white applicants. 23

In response to the poor showing reported by the FFIEC, the banks involved in the study insisted that the recession's impact on lending contributed to the discouraging results, and that the late release of the 1990 data left them little time to change their ways. 24 Some banks stated that their increased outreach into minority communities drastically increased the number of low-income applicants, many of whom had to be turned down. 25

For many community activists and minority leaders, however, the 1991 HMDA data vividly documented a pattern of racial discrimination in mortgage lending that could not be absolved through claims of

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19 See id. at 873--76. As discussed in the following section, the 1990 HMDA data was attacked by mortgage lenders involved in the survey.

20 See Claudia Cummins, Fed Reports Little Change In Loan Bias, AM. BANKER, Oct. 28, 1992, at 1. The Federal Reserve Board asserted: “Despite increased attention to discrimination, mortgage lenders did not significantly improve their racial-bias record last year.” Id.

21 Id. at 1, 14.

22 Id. at 1. In 1990, the denial rate for African-American applicants was 2.35 times that of white applicants. Id.

23 Id. In 1990, the denial rate for Hispanic applicants was 1.49 times that of white applicants. Id.

24 Id. at 14. “The numbers came out so late in 1991, there really was no opportunity for the industry to analyze and correct anything [for 1991],” said David Fynn, vice-president of National City Corporation in Cleveland. Id.

25 Id. The Fed found that the number of loan applications from low-income people increased significantly in 1991, possibly reflecting lenders' efforts to reach and educate poorer communities. Id. The overall denial rate increased to 18.9% in 1991 from 16.1%. Id.
economic abnormalities and lack of notice.26 "The report really casts doubt on the integrity of the agencies," said Deepak Bhargava of the Association of Community Organizations for Reform Now (Acorn).27 While many lending institutions argue that the HMDA studies do not consider all of the financial determinants necessary for mortgage eligibility, the conclusions reached in the Federal Reserve Bank of Boston's extensive 1990 study confirmed the Federal Reserve Board's data and silenced many of the HMDA's critics.28

B. The Federal Reserve Bank of Boston Study

The Federal Reserve Bank of Boston Study (Boston Study) was initiated after a review of the 1990 HMDA data revealed that minorities in the metropolitan Boston area were 2.7 times more likely to be denied a mortgage loan than white applicants with similar incomes.29 In an attempt to appease critics of the HMDA studies, the Federal Reserve Bank of Boston sought to include many of the factors which were absent from the HMDA studies.30

The Boston Study considered a total of thirty-eight additional factors which impact lending decisions, including credit history and loan collateral.31 These variables were selected on the basis of numerous conversation with lenders, underwriters, and others familiar with the lending process.32 The 38 additional factors were placed into the following groupings: ability of applicant to support loan, risk of de-

26 See id.
27 Id. Bhargava asserted: "I think they're trying to spin the numbers and deflect attention from what has been an abominable record of enforcement over the past decade. Id. Bhargava went further to state, "They [the lenders] are trying to forestall any serious enforcement efforts by Congress and prevent both [the Department of Housing and Urban Development] and the Justice Department from intervening in fair lending enforcement." Id.
28 See id. The 1991 HMDA update follows a more comprehensive Fed study of mortgage lending in the Boston area, which dug deeper into the 1990 [HMDA] data. The Boston study showed that even after accounting for important financial characteristics not included in the HMDA data, blacks and Hispanics were still 60% more likely to be denied a mortgage than whites. Id. Because the Boston study presented a more thorough picture of the factors influencing mortgage denials, it has largely put to rest questions of the HMDA survey's validity. Id.
29 See BOSTON STUDY, supra note 8, at 1–2; see also Race-Based Loan Disparity, supra note 5, at 559.
30 See BOSTON STUDY, supra note 8, at 1.
31 Race-Based Loan Disparity, supra note 5, at 559. Critics of the 1990 HMDA study argued that credit history and loan collateral, factors not included in the HMDA's studies, were necessary to accurately assess patterns of lending discrimination. The Boston Study, whose data resembles the figures compiled by the HMDA studies, includes both credit history and loan collateral (along with 36 other factors). See id.; see also BOSTON STUDY, supra note 8, at 13.
32 BOSTON STUDY, supra note 8, at 13. Most of the variables came from standard loan application forms, while several were taken from credit reports and lenders' worksheets. Id.
fault, potential default loss, loan characteristics, and personal characteristics.  

The applicant's ability to support the loan was measured by tabulating that applicant's "obligation ratio" and wealth. The obligation ratio is comprised of the applicant's proposed housing expenses relative to income and total debt payment obligations relative to income. The obligation ratio helps to determine more clearly whether the applicant can afford the mortgage, than would an evaluation of income alone. Economists contend that wealth may also be important to the lender's decision, since substantial wealth can make debt repayment easy even when income is low and obligation ratios are high.

The applicant's risk of default was determined by considering two factors: the reliability of the borrower and the stability of the borrower's income. To determine the reliability of the borrower, the Federal Reserve Bank of Boston explored the prospective borrower's past credit history, including public record of default, foreclosure, or bankruptcy. The Federal Reserve Bank of Boston also looked at the applicant's profession, seniority, experience, age, and education to ascertain the stability of the applicant's income. Many lenders consider these factors to determine how easily the applicant will be able to carry the mortgage not only now, but also over an extended period.

The Federal Reserve Bank of Boston also understood that many lenders are concerned not only about the possibility of default, but the magnitude of the loss should default and foreclosure occur. To account for these considerations, the Boston Study tabulated the applicant's loan-to-value ratio, the ability of the applicant to obtain private mortgage insurance, and neighborhood characteristics that might affect the stability of the value of the mortgaged property.
Finally, the Federal Reserve Bank of Boston also considered various characteristics concerning the applicants and their requested loans. The loan characteristics included: the length of the loan; whether the interest rate was fixed or adjustable; whether the application was made under a program designed for low-income individuals; and whether the property was a single-family home, a condominium, or a building with two to four units. The Federal Reserve Bank of Boston also compiled personal characteristics of the applicant, including the applicant’s age, marital status, and the number of dependents. In summary, the additional variables in the Boston Study were designed to secure all the financial, employment, and demographic information that lenders may have included in their determination to approve or deny a loan application.

The Boston Study collected data from all 1,200 applications for conventional mortgage loans made by African Americans and Hispanics in 1990, and from a random sample of 3,300 applications from whites in the Boston Metropolitan area. According to the Boston Study, African-American and Hispanic applicants with the same economic and property characteristics as white applicants experienced a denial rate of 17%, compared to the denial rate of 11% for white applicants.

The Boston Study also found that minorities with unblemished credit were approved for mortgages 97% of the time; however, disparities between the denial rate of minority and white applicants developed when the respective borrowers had a less than perfect credit history and lenders were forced to use discretion in assessing compensating factors. The authors of the Boston Study state: “Lenders seem to be
more willing to overlook flaws for white applicants than minority applicants."51 This discretionary zone of compensating factors provides a breeding ground for discriminatory mortgage lending practices.52

The Boston Study also revealed how societal discrimination effects the mortgage lending process.53 If African Americans and Hispanics are discouraged from moving into predominantly white areas, they will limit their search to neighborhoods sanctioned for minorities.54 These tend to be older central cities with high-density housing, such as two- to four-family homes.55 Denial of a mortgage loan application on the basis of either of these economic or property characteristics would not be considered discriminatory for the purposes of the Boston Study.56 In addition, many minorities may be discouraged from even applying for a mortgage loan as a result of a pre-screening process.57 White applicants may also be more likely than minority applicants to be "coached" when filling out the application and will therefore have stronger applications than similarly situated minorities.58

The Boston Study provided substantial evidence that race plays an important role in mortgage lending.59 The study forced many prominent members of the banking community to recognize the existence of discriminatory mortgage lending practices by many of the nation’s banks.60 Federal Reserve Board Governor John P. LaWare stated, "This may be a bitter pill, especially for those who believe that their institu-

information and an appraisal of the property, and an evaluation of the numbers and consideration of any "compensating factors." Discrimination, due to a lending officer’s discretion, can occur at the initial review, which involves the completion of an application and an explicit denial or encouragement by the lender, or when lenders are left considerable room for subjectivity and discretion during the review of an imperfect applicant. For the imperfect applicant, "compensating factors," including a large down payment, a high level of liquid assets, and an excellent potential for future earnings based on education and training, may be used to offset negatives. See Boston Study, supra note 8, at 10–12.

51 Race-Based Loan Disparity, supra note 5, at 559. The authors of the Boston Study also write, "The results of the study suggest that given the same imperfections in mortgage applications, whites seem to enjoy a general presumption of creditworthiness that blacks and Hispanics do not." Id.

52 See id.

53 See Boston Study, supra note 8, at 43.

54 Id.

55 Id.

56 Id.

57 Id.

58 Id.

59 See Race-Based Loan Disparity, supra note 5, at 559.

60 Id. Federal Reserve Board Governor John P. LaWare addressed mortgage discrimination during an Oct. 8, 1992 conference in Denver, Colorado, asserting that the new study [Boston Study]—combined with last year’s HMDA data [1990 HMDA Study] and research by private parties—means the debate over disparate treatment in mortgage markets is essentially over. Id.
tions treat all applicants for credit equally, regardless of race. But frankly, it would be too much to assume that attitudes about race held by some in our society do not seep into the lending process."61 Federal Reserve Bank of Boston President Richard Syron cautioned that although racial disparity is reduced when additional factors are considered, "it remains significant and it must be faced directly. . .[u]nfortunately, race plays a role, perhaps an unconscious and unintentional role, but a role nonetheless, in mortgage lending decisions."62 Although the debate concerning the existence of disparate treatment in mortgage markets seemingly has concluded, the battle concerning the regulation of discriminatory mortgage lenders rages on.63

III. THE SHORTCOMINGS OF GOVERNMENTAL REGULATION: LEGISLATIVE ENACTMENTS AND THE RESTRAINT OF DISCRIMINATING MORTGAGE LENDERS

A. The Community Reinvestment Act

Congress passed the Community Reinvestment Act of 1977 (CRA)64 with the explicit purpose and intent of encouraging banks and lending institutions to help meet the financial needs of the communities in which they operate.65 Section 2901(b) of the CRA states that:

[i]t is the purpose of this [legislation] to require each appropriate [f]ederal financial supervisory agency to use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.66

In essence, the CRA was enacted to eliminate the practice of redlining.67 Under the CRA, federal regulatory agencies were required to: adopt regulations to assess banks' records of meeting the needs of their

61 Id.
62 Id.
63 See id.
65 Section 2901(a)(1) states that regulated financial institutions are required by law to demonstrate that their deposit facilities serve the convenience and needs of the communities in which they are chartered to do business. 12 U.S.C.A. § 2901(a)(1). See also Laura E. Schotsky, Developments in Banking Law: 1992, Community Reinvestment Act, 12 ANN. REV. BANKING L. 70, 70 (1993).
67 See id.
communities, examine the community served by each bank, assess whether the bank adequately served that community, and use CRA assessments to determine whether to accept a bank’s application for a deposit facility. Section 2903(a) calls for federal financial supervisory agencies to assess the institution’s record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods and to take such record into account in its evaluation of an application for a deposit facility by such an institution.

Overall, the CRA instructed regulatory agencies to “encourage” institutions to help meet the credit needs of local communities, “consistent with the safe and sound operation of such institutions.” Yet, the CRA failed to define such vital terms as “credit needs,” “local communities,” or “safe and sound operation.” Therefore, the CRA was immediately subjected to widespread criticism by commentators and banking officials who failed to ascertain the meaning of the Act’s vague language.

The nation’s banks attacked the CRA on several grounds. Bankers argued that the addition of mortgage loans, credit, and related services to satisfy community needs would jeopardize the safety and soundness principles protected by the Act. In addition, banks argued that the CRA infringed upon free market principles of supply and demand by allegedly forcing banks to make bad loans and maintain high levels of credit. Finally, banking leaders complained that CRA standards were unclear, and consequently, precluded them from complying with CRA requirements.

Despite the opposition and confusion regarding the CRA, the nation’s banks experienced little difficulty with mergers and acquisitions during the initial years of the CRA’s enactment. The CRA gives

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68 See 12 U.S.C. § 2903(a). See also Schotsky, supra note 65, at 70.
71 12 U.S.C. § 2901(b) & § 2903(a)(1). The CRA defines such terms as “appropriate Federal Financial supervisory agency,” “regulated financial institution,” and “application for a deposit facility,” yet fails to specify vital terms including “credit needs,” “local communities,” or “safe and sound operation.” 12 U.S.C. § 2902.
72 See Bennett, supra note 70, at 1145.
74 See id. at 480.
75 Id.
76 Id. at 481.
77 Id. at 481; see also Bennett, supra note 70, at 1145.
Federal financial supervisory agencies the power to consider a lending institution's record of meeting the credit needs of low- and moderate-income neighborhoods when evaluating that institution's application for a deposit facility.\(^7^8\) To satisfy section 2903, the nation's lenders simply devised lending programs, inflated by slogans of "community commitment," when CRA compliance was needed.\(^7^9\) The regulatory agencies rarely issued poor compliance ratings, let alone charter or branch application rejections.

Due to the CRA's ineffectiveness and lax regulatory enforcement, Congress decided to amend the Act in 1988. The amended Community Reinvestment Act requires banks and thrifts to meet the credit needs of their entire communities, including low- and moderate-income neighborhoods.\(^8^0\) After examining a lending institution under section 2903, the Federal financial supervisory agency must prepare a written evaluation of the institution's record of meeting the credit needs of low- and moderate-income neighborhoods.\(^8^1\) Through public reports, such as the HMDA studies, financial institutions' efforts to comply with the CRA are rated "outstanding," "satisfactory," "needs improvement," or "substantial compliance."\(^8^2\) Regulators can use these ratings to block a lender's bid to acquire other banks or build new branches.\(^8^3\) However, since 1977, some 70,000 bids for expansions, mergers and acquisitions have been scrutinized under the CRA, of which only twenty bids have


\(^{79}\) Bennett, supra note 70, at 1145.


\(^{82}\) 12 U.S.C. § 2906(b). HMDA studies apply to depository and independent institutions with assets exceeding $10 million and a home or branch office in a metropolitan statistical area. Canner & Smith, supra note 3, at 860. The written evaluations must include a public section and a confidential section. 12 U.S.C. § 2906(a)(2). The public section of the written evaluation shall: state the appropriate Federal financial supervisory agency's conclusions for each assessment factor identified in the regulations prescribed by the Federal financial supervisory agencies, discuss the facts and data supporting such conclusions, and contain the institution's rating and a statement describing the basis for the rating. 12 U.S.C. § 2906(b). The confidential section of the written evaluation must contain: all references that identify any customer of the institution, any employee or officer of the institution, or any person or organization that has provided information in confidence to a Federal or State financial supervisory agency; and any statements obtained or made by the appropriate Federal financial supervisory agency in the course of an examination which, in the judgment of the agency, are too sensitive or speculative in nature to disclose to the institution or the public. 12 U.S.C. § 2906(c).

\(^{83}\) See 12 U.S.C. § 2903(a)(2); see also Brown, supra note 80, at 48.
been rejected for poor CRA compliance.\textsuperscript{84} The CRA's enforcement power has remained dormant.

Although the CRA has been instrumental in documenting and exposing systematic discriminatory mortgage lending,\textsuperscript{85} the Act is criticized as an ineffective regulatory measure. More importantly, the CRA does not provide a cause of action or relief for private claimants.\textsuperscript{86}

\section*{B. The Fair Housing Act}

In 1968, Congress passed legislation which was intended to eliminate and restrict any impediments or conduct which would discriminatorily deny individuals "fair" housing otherwise reasonably available to others in the same position.\textsuperscript{87} The Fair Housing Act (FHA) was designed to attack a wide range of discriminatory practices in the housing and real estate industries.\textsuperscript{88} Section 3604 of the Act prohibits actions which deny minorities the right to buy, sell, or rent homes.\textsuperscript{89} Courts have found that actions not specifically outlined in section 3604 can violate the FHA if they have the effect of making housing unavailable based on a person's race.\textsuperscript{90} Section 3605 of the FHA expressly

\begin{itemize}
\item \textsuperscript{84}Brown, \textit{supra} note 80, at 48.
\item \textsuperscript{85}See Cummins, \textit{supra} note 20, at 1; see also Canner & Smith, \textit{supra} note 3, at 859.
\item \textsuperscript{88}See \textit{id}.
\item \textsuperscript{89}42 U.S.C. § 3604 reads, in part:
\begin{quote}
[I]t shall be unlawful—
\begin{enumerate}
\item To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
\item To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.
\item To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
\item To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
\item For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.
\end{enumerate}
\end{quote}
prohibits mortgage discrimination.\textsuperscript{91} Though Congress's intentions were noble, the FHA, as originally drafted, was ineffective at meeting these goals because the federal government's ability to enforce the Act's provisions were limited.\textsuperscript{92}

Under the FHA, complaints of discrimination in housing, real estate, or mortgage lending were addressed in one of two ways: the Department of Housing and Urban Development (HUD)\textsuperscript{93} conducted an investigation and sought a conciliation of the housing discrimination complaint, or the aggrieved party would file a civil action under the FHA.\textsuperscript{94} HUD's authority only extended to initiating investigations of discrimination and conciliation proceedings. HUD had no authority to take enforcement action in court.\textsuperscript{95}

Enacted as Title VIII of the Civil Rights Act of 1968, the Fair Housing Act sought to eliminate racial discrimination in the sale, rental, or financing of homes.\textsuperscript{96} On its face, the FHA appears to be a legal spearhead for civil rights claims and housing discrimination causes of action.\textsuperscript{97} However, the FHA is crippled by weak enforcement provisions which only empower the Secretary of HUD\textsuperscript{98} to pursue complaints by informal methods of conference, cooperation, conciliation, and persuasion.\textsuperscript{99} The Secretary of HUD may not initiate lawsuits against violators of the FHA\textsuperscript{100} and may refer the case to the Justice Department only when the violation involves "a pattern or practice" of discrimination.\textsuperscript{101} Most often, claims are lost between administrative channels and neglected.\textsuperscript{102} Due to this lack of enforcement, the FHA is an ineffective

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\textsuperscript{91} Section 3605(a) of the Fair Housing Act states:

\begin{quote}
It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.
\end{quote}

\textsuperscript{92} See 42 U.S.C. \S\S 3601-31.

\textsuperscript{93} See id.

\textsuperscript{94} See id.


\textsuperscript{96} See 42 U.S.C. \S 3608(e).

\textsuperscript{97} See id.

\textsuperscript{98} See 42 U.S.C. \S 3608(b).

\textsuperscript{99} See 42 U.S.C. \S 3608(e).


\textsuperscript{101} Id.

\textsuperscript{102} See Gilmore, \textit{supra} note 100, at 575.
legislative provision to seek judicial relief for mortgage discrimination.103

C. The Equal Credit Opportunity Act

Perhaps the most promising legal avenue for private mortgage discrimination claims is the Equal Credit Opportunity Act.104 Under the Equal Credit Opportunity Act, the Justice Department and private litigants have the authority to sue a financial institution if they believe that the bank or thrift has developed a pattern of discriminatory lending.105 Section 1691(a) states: "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or marital status, or age..."106 A bank’s inquiry into the applicant’s marital status or age, however, does not constitute discrimination.107

Although the Justice Department is engaged in an administrative tug-of-war with regulators concerning access to bank records and files, it has displayed a renewed interest in enforcing laws against loan discrimination under the Equal Credit Opportunity Act.108 As a result, the Justice Department, on September 17, 1992, filed the first lawsuit charging a mortgage institution, Decatur Federal Savings and Loan Association, with a pattern of discriminatory lending practices and racially biased mortgage marketing.109 However, private litigants have had a difficult time proving mortgage discrimination under the Equal Credit Opportunity Act.110

IV. The Unsuccessful Plight of Private Litigants: Claims Brought under the CRA, ECOA, and FHA

Due to the banking regulators’ inability to effectively eliminate mortgage discrimination, many mortgage applicants have been forced

103 See id.
108 See Claudia Cummins, Regulators, Justice Dept. In Turf Fight On Loan Bias, AM. BANKER, October 16, 1992, at 1. The Justice Department has been pushing for greater access to bank records while regulators have vigorously defended the confidentiality of data gathered in bank examinations. Id.
to bring private causes of action against discriminating banks and others, alleging violations of the Community Reinvestment Act, the Equal Credit Opportunity Act, and the Fair Housing Act. The federal financial supervisory agencies which have been authorized to promulgate regulations ensuring just and non-discriminatory mortgage lending, including the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, have been unable to satisfy or remedy the legitimate claims of the minority mortgage applicant who asserts that she has been denied a home loan due to her race or sex. In a statement before the Subcommittee on Consumer Credit and Insurance of the Committee on Banking, Finance and Urban Affairs, Lawrence B. Lindsey, a member of the Board of Governors of the Federal Reserve System, stated:

It is well known that regulators have faced considerable difficulties in identifying instances of discrimination. It is extremely difficult to find conclusive evidence of discrimination through inspection of individual loan files during examinations. Lenders usually can demonstrate that the applicant was denied because certain credit standards, involving such elements as debt ratios or credit history, were not met.

The regulators have simply been unable to detect and deter the discriminatory treatment of individual mortgage applicants by the nation's lenders.

Thus, individual applicants have been forced to resort to litigation. However, because of the limiting language of the Community Reinvestment Act, the Equal Credit Opportunity Act, and the Fair Housing Act, many applicants, or community organizations representing individual applicants, lack standing to bring actions alleging mortgage discrimination against mortgage lenders. Those applicants who have standing to bring a claim are usually unable to establish a prima facie case

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111 Some claims also allege a violation of several civil rights statutes, including the Civil Rights Act of 1866. See, e.g., Evans v. First Federal Savings Bank of Indiana, 669 F. Supp. 915, 917 (N.D. Indiana 1987).


113 See id.

114 See, e.g., Evans, 669 F. Supp. at 922–23.

of racial discrimination due to the vague language of the acts and their interpretation by the courts.  

A. The Question of Standing

Under the Community Reinvestment Act, the issue of standing for private litigants is quite simple; the CRA does not provide a cause of action for private individuals against banks that violate its provisions. The leading case for CRA standing is **Harambee Uhuru School, Inc. v. Kemp.**

Harambee Uhuru School, Inc., a non-profit preschool sought to solicit loans from community development block grant funds and private sources to purchase property for the school’s use. The school obtained an $81,000 loan and a $30,000 rehabilitation grant from the city, yet found that an additional $150,000 was needed to complete the renovation. Despite the school’s ability to offer real estate valued at $147,000 as collateral, the lender, Bank One, refused to loan either the requested $150,000 or any money at all. Harambee asserted that the decision was racially motivated and in violation of the CRA.

In its opinion, the **Harambee** court first looked to the language of the Community Reinvestment Act. The court was unable to find any express provisions which would authorize a private individual to file suit or to pursue other remedies for violations of its requirements. Next, the court applied the analysis laid out by the United States Supreme Court’s opinion in **Cort v. Ash** to determine whether a private right of action should be implied from the CRA. The Court emphasized that the legislative intent of the Act did not suggest that causes of action can only be established in claims alleging violations of the Equal Credit Opportunity Act or the Fair Housing Act. **Id.**

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116 See Thomas v. First Federal Savings Bank of Indiana, 653 F. Supp. 1330, 1337–41 (N.D. Indiana 1987) (suggesting that a clear definition for standing under the FHA and ECOA has not been determined by the courts).
118 Id. at *1.
119 Id.
120 Id.
121 Id.
125 1992 WL 274545 at *4. Under **Cort v. Ash**, the court must consider: (1) whether the parties seeking to assert a right of action are members of a class for whose special benefit the statute was enacted; (2) whether there is evidence of a legislative intent to create such a remedy; (3) whether a private right of action would interfere with the purpose of the statute; and (4) whether any such claim would be traditionally a matter of state rather than federal law. **Id.** at *5.
“the Act was intended to prevent racially discriminatory lending policies;” rather, the “Act [was] designed to promote sound community banking policies and to insure that low and moderate-income neighborhoods are not neglected.”

Finally, the Court reasoned that Congress intended to confer a duty upon the federal financial supervisory agencies, and that their silence in conferring a private right of action revealed their intent to prohibit these claims. Therefore, Harambee was denied standing to bring its private right of action under the Community Reinvestment Act.

Since no private right of action is recognized under the Community Reinvestment Act, private litigants are forced to seek relief from the FHA and the ECOA. Due to the enormous cost of litigation and the complexity of banking issues involved in a mortgage discrimination cause of action, many civil rights organizations and private non-profit foundations have attempted to represent these private litigants in mortgage discrimination suits. Unfortunately, many of these organizations have had difficulty establishing standing under the ECOA or the FHA.

In *Evans v. First Federal Savings Bank of Indiana*, the plaintiffs, represented by and including the Northwest Indiana Open Housing Center, Inc. (NIOHC) “allege[d] that First Federal discriminated in its lending practices by engaging in ‘mortgage redlining.’” The *Evans* court held that the Northwest Indiana Open Housing Center could not represent or join the plaintiff’s claim of mortgage discrimination, despite the organization’s commitment to the FHA and ECOA.

The defendants moved for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1), asserting that the NIOHC lacked standing.

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126 Id.
127 Id.
128 See id. at *6.
132 Id. at 917.
133 Id. at 922–23. The NIOHC is a not-for-profit corporation organized under the laws of Indiana and supported by private contributions and foundation grants. Id. at 917. The NIOHC is committed to furthering the goals of the FHA and the ECOA by providing several services for the Gary, Indiana community including: referral services, housing and financial counseling to minority homeseekers, investigation of complaints of housing discrimination, and legal representation in actions involving discrimination. Id. at 917–18.

While the NIOHC was suing on its own behalf, claiming that First Federal’s alleged redlining significantly impaired, and continues to impair, its ability to provide services to the city of Gary, the NIOHC filed its complaint with James and Juanita Evans, a couple who applied for a mortgage loan to refinance their existing mortgage. Id.
to seek relief under the ECOA because the NIOHC did not suffer any actual or threatened injury. The court, turning to Article III of the United States Constitution, determined that in order for any party to have standing to bring suit in federal court, three requirements must be met: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision. As such, the Evans court determined that the NIOHC did not personally suffer an actual or threatened injury due to First Federal's actions.

Article III's standing requirement was further limited by the Evans court when it applied a "zone of interests" standard whereby the court must "examine the language of the relevant statutory provision, the pertinent regulations, and the legislative history to discern the parameters of the relevant zone of interest and to determine whether the interest of [plaintiff] arguably falls within the zone." Citing the Code of Federal Regulations, the Evans court determined that the Board of Governors of the Federal Reserve Board has intended the ECOA to apply to "applicants" or "any person who requests or has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit." The court finally concluded that

[b]ased on the unambiguous language found in the statute, its corresponding regulations, and its legislative history, the court holds that . . . [the] NIOHC, which never applied for credit, is not an applicant for purposes of the ECOA and, thus, does not fall within the zone of protected interests contemplated by Congress when enacting the ECOA.

Similarly, in National Urban League v. Office of the Comptroller of the Currency, the court held that the National Urban League lacked standing to commence a mortgage discrimination suit on behalf of a

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134 See id. at 920–21.
135 Id. at 920 (citing Valley Forge Christian College v. Americans United to Separation of Church and State, 454 U.S. 464, 472 (1982)). In addition, Article III of the U.S. Constitution restricts the power of the federal judiciary to the resolution of "cases" or "controversies." Diamond v. Charles, 476 U.S. 54 (1986); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986).
137 Id. at 921.
138 Id. at 922 (citing 12 C.F.R. § 202.2(e)(1987)).
139 Id. at 922.
minority mortgage applicant. The National Urban League, along with ten other civil rights organizations, commenced a suit against four regulatory agencies for failing "to adopt what the coalition perceived to be appropriate examination and enforcement procedures necessary to alleviate racial discrimination by home mortgage lenders subject to federal regulation." The National Urban League explained that its objectives—improving the living and working conditions of blacks and other similarly disadvantaged minorities, fostering better race relations, and assisting black residents of low-income neighborhoods to find and finance standard housing outside such areas—were frustrated by the defendants' failure to effectively regulate mortgage discrimination. In addition, the National Urban League sought to represent one of its members, Birgit Fein, who had been denied a mortgage loan by the Bankers Trust Company for a $32,000 home she wanted to buy in Brooklyn. The bank alleged that its home mortgages were only available for applicants who earn $100,000 a year, and thereby Ms. Fein's financial situation constituted an "exceptional circumstance."

The National Urban League court was not convinced that the level of harm suffered by the National Urban League was sufficient to establish standing. Citing Warth v. Seldin, the court reasoned that Article III of the Constitution requires a plaintiff to establish that either it or its members suffered injury in fact and that this injury was the consequence of the defendants' actions, or that prospective relief will remove the harm. Here, this "irreducible constitutional minimum" was not met by the plaintiffs because the court determined that the frustration of the National Urban League's interest and commitment to the community and housing discrimination problems, no matter

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141 Id. at 547.
142 The four regulatory agencies are the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, and the Federal Reserve Board. Id. at 544.
143 Id. The National Urban League asserted that appropriate examination and enforcement procedures to combat racial discrimination by home mortgage lenders are necessary to facilitate the Fair Housing Act. See id. at 545.
144 See id. at 545-47.
145 Id. at 545.
146 Id. Ms. Fein stated that after explaining its "exceptional circumstance" exception, the Bankers Trust Company "did not ask her for any information regarding her credit record or income or the house and did not offer an application." Id.
147 Id. at 546-47.
148 422 U.S. 490, 505 (1975). The plaintiff, the National Urban League, relied upon Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), to demonstrate that suits brought under Title VIII should be defined "as broadly as is permitted by Article III of the Constitution." National Urban League, 78 F.R.D. at 546.
149 National Urban League, 78 F.R.D. at 546.
how strong, could not amount to an "injury in fact." \(^{151}\) In addition, the court held that Birgit Fein lacked standing because her allegations of discrimination lacked a sufficient causal relationship to her dealing with Bankers Trust. \(^{152}\)

**B. Judicial Standard for ECOA and FHA Claims**

In *Thomas v. First Federal Savings Bank of Indiana*, \(^{153}\) James and Rosie Thomas, African-American citizens of Gary, Indiana, applied for a loan from First Federal Savings Bank of Indiana with the intention of using the money to pay off a $6,000 balance on a conditional sales contract for the purchase of real estate property located next door to their residence. \(^{154}\) The Thomases applied for a loan in the amount of $7,100. \(^{155}\) The Thomases planned to use their home as collateral for the loan, and First Federal determined that an appraisal of their property was necessary. \(^{156}\) The Thomases showed the First Federal appraiser, Mr. Beckham, the entire house and its many renovations. \(^{157}\)

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\(^{151}\) See *National Urban League*, 78 F.R.D. at 546. The court also concluded that the National Urban League's expenditures in combating the problem of housing discrimination could not establish "injury in fact," even when the benefits of these expenditures were frustrated by home mortgage lenders who allegedly discriminate. Although the Supreme Court has never explicitly held in favor of this proposition, the court derived this questionable principle from the "implications" and "tone" of previous Supreme Court holdings. *Id.* The court states:

> Although the Supreme Court has never explicitly determined whether an organization's expenditures in combating a general problem are sufficient to establish "injury in fact" in a lawsuit on the same subject matter, the tone of its decisions indicates that they are not. In *Simon v. Eastern Kentucky Welfare Rights Organization* [426 U.S. at 40], a case in which plaintiff quite likely did expend such funds, the Court explicitly stated not only that no injury to the plaintiff institution had been shown, but that in addition no such injury could be shown. Many other cases appear also to have implicitly so held. In *Sierra Club v. Morton* [405 U.S. 727 (1972)], for example, standing was denied plaintiff despite the near certainty that the plaintiff club had previously devoted considerable funds to obtain the result sought in the lawsuit. *Id.* at 547.

\(^{152}\) *Id.* Since Birgit Fein lacked standing, the National Urban League could not sue as her representative. *Id.*

\(^{153}\) 653 F. Supp. 1330 (N.D. Ind. 1987).

\(^{154}\) *Id.* at 1333.

\(^{155}\) *Id.*

\(^{156}\) *Id.* After the Thomases paid an application fee of two hundred dollars, First Federal informed them that a real estate appraiser would be sent to their home on a particular date. After failing to arrive on two scheduled dates, the appraiser, Mr. Beckham, who was employed by First Federal as in-house and chief appraiser, finally showed up. *Id.*

\(^{157}\) *Id.* Among the many repairs and renovations listed by the Thomases were: an alarm system ($1,400); kitchen improvements ($3,000, materials alone); new thermal picture window, 18' x 15' ($1,000); storm windows throughout the house ($1,500); a new roof ($1,800); and a newly
Mr. Beckham appraised the Thomases' home at $22,000.\textsuperscript{158} Approximately two to three weeks later, the Thomases were informed that their loan application had been denied because their loan-to-value ratio had exceeded First Federal's guidelines.\textsuperscript{159} As a result, the Thomases alleged that First Federal discriminated against them due to their race and redlined their neighborhood in violation of the Fair Housing Act and the Equal Credit Opportunity Act.\textsuperscript{160}

At the trial, the Thomases offered the testimony of an independent real estate appraiser, George Wilkes, who appraised the value of their home at $40,000.\textsuperscript{161} In addition, the Thomases submitted as evidence copies of mortgage loan disclosure statements prepared by First Federal for the years 1983 and 1984 pursuant to the Home Mortgage Disclosure Act.\textsuperscript{162} The Thomases attempted to show the total number and dollar amounts of loans made by First Federal in 1983 and 1984 for neighboring communities like Gary, Hammond, and East Chicago.\textsuperscript{163} However, the court found no relevance in the mortgage loan disclosure statements.\textsuperscript{164}

Without the aid of the mortgage loan disclosure statements, the court turned to the Thomases' discrimination claim under the Fair

\textsuperscript{158} Id. at 1334.
\textsuperscript{159} Id. The Thomases had a first mortgage on their home of approximately $17,000 and they were requesting a second mortgage of $7,100. The total mortgage debt, had the loan been approved, would have been $24,100. Beckham appraised the Thomases' home at $22,000. When comparing the total mortgage debt, $24,100, to the appraised value of the property, $22,000, the loan-to-value ratio ($24,100 divided by $22,000) was over 105%. First Federal's guidelines for loan approval required that the loan-to-value ratio be 80% or less. Id.
\textsuperscript{161} Id. at 1334. Mr. Wilkes's appraisal would have given the Thomases a loan-to-value ratio of approximately 60% [$24,100 divided by $40,000]. Mr. Beckham, First Federal's appraiser, was not able to present his appraisal methods since he was deceased by the time of the trial. See id. at 1333-34. Wilkes explained that appraising was "more appropriately viewed as an art rather than an exact science" yet was not allowed to speculate as to Beckham's subjective evaluations and the discrepancies which existed between their appraisal values. Id. at 1334. Reviewing the "four corners" of Beckham's appraisal document, Wilkes disagreed with many of Beckham's methods and indicated that the low figure might have been the result of Beckham's assessment that the Thomases' home was "overimproved" for the neighborhood that it was in. Id. at 1335. Wilkes explained that when homeowners make improvements or additions to their homes they cannot always be assured that the sale price will reflect the exact dollar investment of the improvement or addition. See id. at 1335. For example, an $8,000 addition to a house valued at $30,000 does not necessarily mean the house will sell for $38,000. See id.
\textsuperscript{162} Id. at 1335.
\textsuperscript{163} Id.
\textsuperscript{164} See id. at 1340.
Housing Act.\textsuperscript{165} Under section 3605 of the Act\textsuperscript{166}, the court determined that a prima facie case of racial discrimination could only be shown if the Thomases proved (1) that they were members of a protected class; (2) that they applied and were qualified for a loan from defendant; (3) that the loan was rejected despite their qualifications; and (4) that defendant continued to approve loans for applicants with qualifications similar to those of the plaintiffs.\textsuperscript{167}

Applying this standard to the facts of the case, the \textit{Thomas} court found that elements (1) and (3) were satisfied because the Thomases were African-American citizens who were denied a loan.\textsuperscript{168} However, the court reasoned that the Thomases failed to establish a prima facie case of racial discrimination because credible evidence was not presented as to the Thomases' qualification for the loan or that First Federal made loans to other applicants who had similar qualifications.\textsuperscript{169} Although the court acknowledged that the plaintiffs need not prove actual intent to discriminate on the part of the defendant, a showing that "race was a motivating consideration in the [defendant's]
decision" to refuse the loan is necessary. The statistical evidence presented to the court through the home mortgage disclosure statements was not enough to establish that race played any part in First Federal’s decisions. Therefore, the court held that First Federal did not discriminate in violation of the Fair Housing Act.

Turning to the Equal Credit Opportunity Act claim asserted by the Thomases, the court noted that courts and regulators have found violations of the ECOA when a showing of discrimination exists, or when an applicant is treated less favorably than other applicants. Based on the evidence presented at trial, the court held that: (1) there was no indication that the Thomases were treated any differently from other loan applicants at First Federal, (2) First Federal did not intentionally discriminate against the Thomases, and (3) First Federal’s loan practices did not have an impermissible adverse impact upon black applicants.

Similarly, in Cartwright v. American Savings & Loan Association the plaintiff was unable to prove mortgage discrimination under either the Fair Housing Act or the Equal Credit Opportunity Act. On August 24, 1965, the plaintiff, Mary Cartwright, an African-American woman, obtained a mortgage loan from the defendant, American Savings, for a single-family residence. Twelve years later, in 1977, American Savings approved a second mortgage on Cartwright’s single-family residence. In 1980, Cartwright purchased several lots in an urban renewal area of East Hammond, Indiana. On August 28, 1980, Cartwright applied for a $90,000 home mortgage loan from American Savings to finance the construction of a home on the urban renewal property. Louis Green, vice-president of American Savings charged with mort-
gage loan responsibility, accepted the Cartwrights' application and application fee.\textsuperscript{180}

The testimony of Cartwright and Green differed as to the nature of their initial August meeting in 1980.\textsuperscript{181} Green asserted that American Savings and Loan began Cartwright's loan application yet could not make a decision on the loan because Cartwright failed to communicate with the bank due to "personal problems."\textsuperscript{182} Cartwright contended that she had contacted Green on numerous occasions and was assured that American Savings and Loan was "working on it."\textsuperscript{183}

The Court of Appeals upheld the trial court's conclusion that Cartwright failed to establish a prima facie case of discrimination under either the Fair Housing Act or the Equal Credit Opportunity Act.\textsuperscript{184} The trial court determined that Cartwright failed to establish a prima facie case under section 3605 of the Fair Housing Act because she failed to offer: 1) a comparison between American Savings and other lending institutions; 2) the relevant amount of total mortgage activity in all relevant areas; 3) the number of mortgage applications received by American Savings and the number of those applications rejected or withdrawn; or 4) a relationship of comparable transactions

\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 915. Green stated that upon receiving the Cartwrights' application, he conducted a credit check and attempted to appraise the Cartwrights' anticipated building venture. Id. at 914. The appraisal of the building venture was delayed because the appraiser was "having problems finding homes of comparable value in that particular area." Id. Green alleges that he next turned to Cartwright in an attempt to ascertain similar property values in that particular area. Id. According to Green, Cartwright thereafter failed to communicate the comparable housing information she had agreed to provide and that he was awaiting the information to allow American Savings's loan committee "to make a decision on the loan, to put as much information as we can get to them." Id. at 915. As a result, he was unable to submit Cartwright's 1980 loan application to American Savings's loan committee for approval or rejection. Id.

\textsuperscript{183} Id. Cartwright asserts that she never promised to provide Green with information regarding the value of comparable homes in the vicinity of Cartwright's property. Id. Cartwright also denied ever instructing American Savings and Loan to place her loan application "on hold" due to any "personal problems." Id.

\textsuperscript{184} Id. at 927. The trial court stated: American Savings' treatment of Mary and Lawrence Cartwrights' 1980 loan application was not based upon the race of Mary and/or Lawrence Cartwright and the racial character of the community in which they intended to build. American Savings' treatment of Mary Cartwright's loan inquiries in 1982 was not based upon Cartwright's race and/or sex or the racial character of the community in which she intended to build. American Savings has not engaged in the practice of "redlining" in the central Hammond area, and has in fact provided a significant number of mortgage loans in this area.

Id. at 916.
from areas other than the area where the Cartwrights intended to build.\textsuperscript{185}

Cartwright did provide information supplied by American Savings and Loan revealing that American Savings granted only two residential mortgage loans from January of 1980 through January of 1984 in the substantially black, urban area of Hammond containing Cartwright's property, while granting sixty-one residential mortgage loans in areas containing a zero to one percent black population.\textsuperscript{186} Cartwright argued that the disparity in the number of residential loans American Savings and Loan granted a minority area as opposed to a non-minority area constituted proof of redlining.\textsuperscript{187} The trial court found the data flawed because it failed to identify evidence of the number of residential loan applications American Savings and Loan received from financially qualified borrowers in any particular census tract or geographical area, and how many of those applications it rejected.\textsuperscript{188}

In addition, the trial court held that Cartwright's financing of the anticipated building venture did not satisfy the language of section 3604 which prohibits discrimination in the "sale or rental of housing."\textsuperscript{189} The trial court also concluded that Cartwright's claim was barred by the 180-day statute of limitations.\textsuperscript{190}

As to the Equal Credit Opportunity Act claims, Cartwright alleged that American Savings and Loan violated section 1691(a)(1) of the ECOA by requiring her to provide comparable housing information while refraining from imposing such a requirement on other borrowers.\textsuperscript{191} The appellate court dismissed this claim and determined that Cartwright was not required to supply such information but had volunteered to supply the comparable housing data.\textsuperscript{192} Cartwright further

\textsuperscript{185} See id. at 922–23.

\textsuperscript{186} Id. at 922. American Savings and Loan granted thirty-six residential mortgage loans in census tract number 427, and twenty-five residential mortgage loans in census tract number 404, both of which, according to the 1980 census, have a zero to one percent black population. Id.

\textsuperscript{187} Id.

\textsuperscript{188} Id. The trial court went on to say that proof of the number of applications American Savings and Loan received from financially qualified borrowers is at the very heart of any redlining allegation. Id. The court was "unmoved" by the fact that American Savings and Loan granted only two loan applications between 1980 and 1984 in the predominantly black census tract 207. See id.

\textsuperscript{189} Id. at 924.

\textsuperscript{190} Id. at 925.

\textsuperscript{191} Id. at 925–26. Section 1691(a)(1) of the Equal Credit Opportunity Act states: "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age. . . ." 15 U.S.C. § 1691(a)(1).

\textsuperscript{192} Cartwright, 880 F.2d at 926.
alleged that American Savings and Loan violated section 1691(d)(1) by failing to notify her that it either approved or rejected her loan application. Again, the appellate court dismissed Cartwright's claim asserting that Cartwright's representations to Green regarding her willingness to provide comparable housing information and her "personal problems" effectively and properly, in accepted business practice and procedure, mandated placing her application on hold, thus precluding American Savings and Loan from taking action one way or the other.

Although the appellate court in Cartwright appears extremely confident in its ruling and analysis, the practical implications of its decision leaves a great deal to be desired. Under Cartwright, a plaintiff would have to compile an enormous amount of data concerning the defendant's mortgage lending patterns to effectively state a claim under the Fair Housing Act and the Equal Credit Opportunity Act. In addition, all of this information must be compiled within or shortly after the 180 days mandated by the Fair Housing Act's statute of limitations. After considering the enormous number of hours needed to compile such daunting statistics and the plaintiff's need to rely on the allegedly discriminatory lending institution to supply much of this data, it appears unlikely that the Cartwright decision and the judicial standard for Fair Housing Act and Equal Credit Opportunity Act claims would allow plaintiffs to bring viable causes of action, even when discrimination clearly exists. The amount of statistical data on mortgage lenders needed to satisfy FHA and ECOA claims is unjustly overwhelming. This dilemma is compounded when private litigants are not allowed to use data compiled under the Home Mortgage Disclosure Act to support their causes of action.

V. A Criticism of the Justice Department's Response to Mortgage Discrimination

While private litigants have been limited in their attempts to enforce the ECOA, FHA, and CRA in court, the Department of Justice

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193 Id. Section 1691(d)(1) states: "[w]ithin thirty days . . . after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application." 15 U.S.C. § 1691(d)(1).
194 Cartwright, 880 F.2d at 926.
195 See id. at 922. As stated earlier, this data includes: a comparison between the defendant and other lending institutions; the relevant amount of total mortgage activity in all relevant areas; the number of mortgage applications received by the defendant, and the number of those applications rejected or withdrawn; or a relationship of comparable transactions from areas other than the area where the plaintiff intends to build. Id.
196 See id. at 925.
has displayed an interest in attacking financial institutions that have shown a pattern of discriminatory mortgage lending. According to Attorney General Janet Reno, racial and ethnic discrimination in the mortgage lending industry is "one of the most important civil rights issues facing this country."¹⁹⁷ As such, Attorney General Reno has made assurances that the Department of Justice will fulfill its law enforcement responsibilities in the area of fair lending.¹⁹⁸

The Fair Housing Act and the Equal Credit Opportunity Act allow the Justice Department to assert its law enforcement authority against discriminating lenders.¹⁹⁹ Under both the FHA and the ECOA, the Attorney General may bring a pattern or practice lawsuit in federal court to challenge discrimination in lending.²⁰⁰ In September of 1992, the Department of Justice, under the authority of the FHA and the ECOA, brought its first-ever pattern or practice discrimination lawsuit against a large mortgage lender, Decatur Federal Savings and Loan Association.²⁰¹ This was followed in December of 1993 by the Department of Justice’s settlement agreement with Shawmut National Corporation to compensate minorities who were unfairly denied loans by its mortgage subsidiary.²⁰²

A. The Decatur Federal Case

The Department of Justice, in September of 1992, filed its first pattern or practice race discrimination lawsuit against a large mortgage lender.²⁰³ After launching a three year probe into the lending practices of Atlanta’s Decatur Federal Savings and Loan Association,²⁰⁴ the Department of Justice found forty-eight cases in which black applicants were improperly denied home mortgages, seemingly because of their race.²⁰⁵ In the Justice Department lawsuit filed in U.S. District Court in

¹⁹⁷ Janet Reno Attorney General Department of Justice Senate Banking Fair Lending Enforcement and 1993 Home Mortgage Disclosure Act, FDCH CONGRESSIONAL TESTIMONY (FDCH), Nov. 4, 1993, at 1 [hereinafter Reno & Fair Lending Enforcement].
¹⁹⁸ Id.
¹⁹⁹ Id.
²⁰⁰ Id. The remedies available under these laws include broad injunctive relief to end discriminatory practices and ensure against their recurrence in the future, compensatory relief for the victims of past discrimination, punitive damages, and civil penalties. Id.
²⁰¹ Id.
²⁰² Id.
²⁰⁴ Decatur Federal Saving and Loan Association is one of the largest originators of home mortgages in Atlanta, Georgia. Reno & Fair Lending Enforcement, supra note 197, at 1.
²⁰⁵ King, supra note 203, at Fl. The probe was launched after a 1988 series in the Atlanta Journal-Constitution revealed that the city’s banks and S&Ls were making five times as many
Atlanta, Decatur Federal was charged with violating the Fair Housing and the Equal Credit Opportunity Acts.206 Specifically, the thrift was accused of avoiding black neighborhoods and improperly denying loans to black applicants.207 Although Decatur Federal maintained its innocence, it agreed to settle by providing $1 million208 to those forty-eight African-American applicants who were rejected for home mortgages between January 1988 and May 1992.209 In addition to paying the $1 million, Decatur Federal agreed to: expand its lending area to include all of Fulton County,210 which includes most of the city of Atlanta, advertise extensively in black-oriented newspapers and radio stations, target sales calls to real estate agents and builders active in black neighborhoods, make future decisions regarding branch locations only after considering its obligation to meet the credit needs of low- and moderate-income neighborhoods, and open a branch or regional loan office in South Fulton County, a predominantly black section of Atlanta, within one year of the date of the consent decree.211

As Attorney General Reno asserts, "[t]he suit against Decatur Federal Savings and Loan Association . . . has been characterized by many as a wake up call that mortgage lending discrimination will not be tolerated—and that the Department of Justice has the will and investigative resources to take these cases to court."212 Many of the nation's community activists share this position. Gale Cincotta, chairperson for National People's Action213 stated, "[f] or 20 years, we've been carrying the torch . . . [n]ow, finally, the government has taken this issue seriously. It's a real breakthrough."214 In a Justice Department mortgages in Atlanta’s middle-class white neighborhoods, as they were in comparable black ones. Id. The Justice Department looked at more than 4,000 loan files and determined that race was the significant factor in Decatur Federal’s loan decisions, even after accounting for possible differences in income, credit history, debt levels, and other factors. Mortgages, DOJ Settles Discrimination Suit Against Atlanta Home Mortgage Lender, DAILY REP. FOR EXECUTIVES (BNA), Sept. 18, 1992, at 182 [hereinafter Mortgages].

206 Id. at 182.

207 Id.

208 The $1 million settlement would amount to $20,833 on average for each of the forty-eight African-American applicants.


210 Prior to the settlement, Decatur Federal defined its lending market to exclude large portions of the black community in Fulton County. See Reno & Fair Lending Enforcement, supra note 197, at 1.

211 Mortgages, supra note 205, at 182.

212 Reno & Fair Lending Enforcement, supra note 197, at 1.

213 National People's Action is one of the nation's leading advocates on fair-housing issues.

214 Brenner, supra note 209, at F1. Deborah Goldberg, acting director of the Center for Community Change, which assists low-income and minority groups on housing issues stated, "This
statement, John R. Dunne, Assistant Attorney General of the Justice Department’s Civil Rights division, said that the Decatur Federal action will serve as a model for investigating mortgage lending practices at other institutions.\footnote{Brown, supra note 80, at 48.} Undoubtedly, the Decatur Federal case represents an aggressive step on the part of the Department of Justice to eradicate mortgage discrimination from the nation's financial community. However, the Decatur Federal case, including the terms of the settlement agreement, the means used to reach the settlement, and the precedential value of the case, has several important shortcomings worth noting.

The Department of Justice brought a federal case, under the FHA and ECOA, only after a three-year federal probe into mortgage lending practices in Atlanta revealed a pattern of discriminatory mortgage lending at Decatur Federal Savings and Loan.\footnote{Kenneth Cline, Decatur to Pay $1 Million in CRA Case, AM. BANKER, Sept. 18, 1992, at 14.} This approach to combating mortgage discrimination by the nation’s lenders has several limitations.

First, the Justice Department will only file federal suits against mortgage lenders whose lending practices reveal a clear and substantial pattern of mortgage discrimination.\footnote{In the Decatur Federal case, this pattern was established after the federal probe found forty-eight examples of mortgage discrimination. Id.} This approach is not helpful against small mortgage lenders who may only see three minority mortgage applications a year, yet deny all three applicants on blatantly discriminatory grounds. Also, individual applicants who have been subjected to mortgage discrimination must wait for a pattern of discriminatory lending to arise. This substantial pattern of mortgage discrimination may not manifest itself, yet the validity of the individual applicant’s claim has not diminished.

Second, the enormous amount of statistical data necessary to launch a federal suit by the Justice Department limits the number of claims which may be brought, even though the problem of mortgage discrimination is pervasive. While summarizing the lessons learned by the Department of Justice during the Decatur Federal case, Attorney General Reno stated, “statistical methods can reveal whether institutions that reject minority applicants at higher rates than white applicants have discriminated on a prohibited basis. . . . While it [statistical analysis] can be expensive and often require an analysis of large numbers of files, its power of persuasion in the courtroom cannot be
denied. 218 Administrative costs and time greatly limit the number of federal claims which may be brought by the Justice Department. The *Decatur Federal* case was only initiated after federal officials investigated mortgage lending practices in Atlanta for three years. Although the persuasive power of statistical evidence is considerable, there is no indication that the costs and manpower expended would have provided the Justice Department with a victory against Decatur in federal court.

Finally, it should be noted that the settlement agreement reached by Decatur Federal Savings and Loan and the Justice Department prohibited the establishment of precedent which may have been created if the case had been tried. The *Decatur Federal* settlement does not provide any guidance to private litigants who wish to file a suit in federal court against a discriminatory lender. In addition, the settlement precludes private litigants from determining whether statistical data, compiled during the federal probe, would be sufficient to show that "race was a motivating consideration in the [defendants'] decision" not to make the loan. 219

The actual monetary terms of the *Decatur Federal* settlement are also limited in their enforcement function. While the $1 million settlement appears substantial, its actual impact upon Decatur Federal Savings and Loan Association, a financial institution engaged in discriminatory lending practices, is minimal. Decatur Federal has assets in the amount of $2.7 billion. 220 In addition, Decatur Federal asserted that the settlement would not affect its proposed merger with Charlotte-based First Union Corporation or the price its shareholders had expected to receive from the transaction. 221 More importantly, Decatur Federal's parent corporation DFSoutheastern Inc., whose common stock is traded on the NASDAQ market, actually noted a stock increase of 75 cents to $29.50 a share, on news of the settlement. 222

After considering Decatur Federal's substantial assets, unaffected merger deal, and the stability of its parent corporation's stock, the Justice Department's assertions that the *Decatur Federal* case represents a "wake-up" call to discriminating mortgage lenders appears pretentious. Decatur Federal's $1 million "slap on the wrist" would not seem to deter many large mortgage lenders from continuing their lending

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218 *Reno & Fair Lending Enforcement*, *supra* note 197, at 1.
220 *Cline*, *supra* note 216, at 14.
221 *Id.*, *supra* note 216, at 14. 222 *Id.*
practices if they appear discriminatory. Upon reviewing the Decatur Federal settlement, Craig Taylor, executive director of Power in Atlanta, a community advocacy group, stated, "I'm glad to see this [Decatur settlement], but I wish the settlement would have been more costly to them. When you compare it to the cost of disinvestment in the black community, it's a drop in the bucket."223 The $1 million settlement pales as a substantial compensation for the forty-eight applicants who were denied an opportunity to own a home, develop their families, and nurture neighborhood friendships due to the color of their skin. Discrimination, in any form, disrupts the very moral fabric of this country. It is deplorable that the Justice Department's settlement in the Decatur Federal case could not disrupt the day-to-day business of a mortgage lender who has participated in a pattern of blatant discrimination.

B. The Shawmut Settlement

After the Decatur settlement, the Justice Department, as a result of the Boston Study, began to focus its attention on discriminatory mortgage lenders in the Boston area.224 One such lender, the Hartford, Connecticut based Shawmut National Corporation, found its lending practices under fire by the Federal Reserve Board and the Department of Justice.225 Before a federal suit could be launched, Shawmut reached a settlement with the Department of Justice.226

In December of 1993, Shawmut agreed to provide an initial compensation fund of $960,000 for minority applicants who were denied loans on the basis of race from 1990 to 1992.227 Due to the corrective action Shawmut had begun to take on its own, the settlement included compensatory, rather than punitive, damages.228 Like the Decatur Federal agreement, the Shawmut settlement was reached after the Department of Justice threatened to file a federal suit after a survey revealed a pattern of discriminatory lending by the targeted bank. Unfortu-
nately, the Shawmut settlement shares the enforcement shortcomings of Decatur Federal.

The settlement agreement reached between the Department of Justice and Shawmut Bank has two significant flaws: (1) the Justice Department's emphasis on self-imposed corrective action provides banks with an opportunity to mitigate potential damages, rather than eliminate lending discrimination, and (2) the Justice Department seemingly can only invoke its enforcement power after an extensive pattern of mortgage lending discrimination has been established by a study or survey.

In a news conference concerning mortgage discrimination, Attorney General Reno emphasized the importance of the "remedial actions taken by Shawmut long before the Justice Department came onto the scene. . . ." Due to Shawmut's remedial actions, the settlement agreement did not include punitive damages. While the Justice Department asserts that Shawmut can serve "as a guidance to the lending industry," the Shawmut settlement could also send a message to lenders that self-imposed regulatory measures will protect those lenders from punitive damages, imposed by the Justice Department. Therefore, mortgage lenders would focus on establishing self-imposed regulatory safeguards which might draw approval from the Department of Justice, rather than ensuring that these self-imposed regulatory safeguards actually help eliminate racial factors from the mortgage decision-making process.

As with the Decatur Federal case, the Department of Justice only instituted this settlement agreement after a clear and substantial pattern of mortgage discrimination was found. The enormous cost and time necessary to compile a survey like the Boston Study hinders the number of cases which may be brought by the Justice Department. As with Decatur Federal, the Shawmut settlement does not provide a precedential framework by which private litigants can determine what evidence is necessary to show that "race was a motivating consideration in the [defendant's] decision" not to make the loan.

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229 Id.
230 Id. These self-imposed remedial measures include: the conduction of formal reviews of its rejected minority applicants, teaching front line employees how to ensure that every applicant is given full and fair consideration, and the institution of random tests to determine whether its loan officers are discouraging minority applicants from applying for loans. Id.
231 Id.
VI. Conclusion

The Home Mortgage Disclosure Act studies, coupled with the Federal Reserve Bank of Boston survey, provide overwhelming statistical proof that minorities are denied home mortgages more frequently than whites because of their race. Even with firm evidence of discriminatory lending, the nation's federal agencies have not been effective in regulating and eliminating racially biased mortgage lending practices. The Community Reinvestment and Fair Housing Acts do not provide viable causes of action under which private applicants may seek relief. Only the Equal Credit Opportunity Act and its use in Decatur Federal and Shawmut offer hope for minorities who seek relief in the federal courts against financial institutions which practice discrimination in their mortgage lending. Without legislative amendments calling for more regulatory intervention through the Community Reinvestment and Fair Housing Acts and continued suits by the Justice Department under the Equal Credit Opportunity Act, it is apparent that the documented discriminatory lending practices of the nation's banks will go unpunished.