FORECLOSURES, INTEGRATION, AND THE FUTURE OF THE FAIR HOUSING ACT

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INTRODUCTION

In their seminal work, *American Apartheid*, Douglas Massey and Nancy Denton compellingly chronicle the way in which residential spatial segregation in America's cities has contributed to the growth of an African-American underclass that threatens to make urban poverty and racial injustice a permanent fixture of American society.[1] Central to their argument is the evidence that "hypersegregation," or the extreme concentration of poor blacks in inner city neighborhoods, has left many minority communities vulnerable to a socio-economic "downward spiral" at the slightest turn in the economy.[2] Relying on empirical data, Massey and Denton convincingly explain the precise manner in which spatial segregation combines negative social and economic conditions to push poor black neighborhoods beyond the threshold of stability.[3]

As we mark the fortieth anniversary of the passage of the Fair Housing Act ("FHA"),[4] the lesson of Massey and Denton's study could not be more timely. It is beyond argument that four decades after the death of Dr. Martin Luther King, we have yet to achieve anything close to the integrated living patterns that were central to both his dream and the purposes of that historic law.[5] It is equally clear, with the advent of the subprime mortgage foreclosure crisis, that we now face an economic tsunami with the potential to destroy decades of tentative progress in America's inner city black and Hispanic communities. This is true both because of the exacerbating effect of hypersegregation and because of the legacy of discrimination that has left underserved minority communities particularly vulnerable to the predatory practices of subprime lenders and the devastating consequences of foreclosure that follow close on the forced abandonment of countless homes.

Contrary to those who point to the lack of progress in achieving integration

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1. *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

2. *See id.* at 74-78, 118-30.

3. *Id.* at 118-30.

4. 42 U.S.C. § 3601-3619 (2000).

5. *See* LYNETTE A. RAWLINGS ET AL., URB. INST., RACE AND RESIDENCE: PROSPECTS FOR STABLE NEIGHBORHOOD INTEGRATION 2 (2004).

as evidence of a failure of fair housing litigation, the current economic crisis underscores the need to redouble our efforts to use creative litigation strategies to break down barriers to spatial and racial mobility, and shore up transitional minority neighborhoods struggling to hang on in the face of rising foreclosures. This is true because the problems we now face are uniquely suited—perhaps as never before—to a litigation response.

As a general matter, litigation works both as a tool for reform and as a remedy where there is a clearly identifiable pattern of illegal behavior, and the entity responsible for the violation has the means to contribute to the solution. Both of those conditions are met here. The foreclosure crisis has had a disparate effect on black and Latino neighborhoods precisely because of the illegal reverse redlining practices of clearly identifiable financial institutions who targeted these communities as a means to maximize short term profits. Those responsible for undermining the stability of these communities through their predatory lending practices have the means to provide much needed financial assistance to America's cities to help fix the problem.

The FHA is an especially effective legal weapon for attacking this problem. The four requirements for a successful outcome are all present: standing (as broad as Article III will allow);[6] liability (FHA case precedent clearly recognizes both redlining and reverse redlining or "targeting" claims);[7] powerful remedies (unlimited compensatory and punitive damages are both available, to be determined by a jury if desired);[8] and a generous statute of limitations (two years, in addition to a continuing violations theory allowing claims to stretch back indefinitely to cover the full time period of a continuing pattern of illegal conduct).[9]

More importantly, an opportunity has arisen now to harness the FHA in a way that has not been fully utilized before to promote integration. For the first time, America's cities—mayors and their city councils—have begun to recognize the power of the FHA to bring irresponsible financial institutions, the very ones who have profited at the expense of inner city black and Latino communities, to the table to remedy the injury that the *cities* have suffered.

Recently, Baltimore became the first city to bring suit against a major lender for targeting its minority communities for discriminatory lending practices that it alleges have resulted in unnecessarily high rates of foreclosure.[10] These

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6. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982) (citing Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 103 n.9 (1979)).

7. *See, e.g.*, Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

8. *See* 42 U.S.C. § 3613(c)(1) (2000) (damages); Curtis v. Loether, 415 U.S. 189, 194 (1974) (entitlement to jury trial); *see also* Preferred Props., Inc. v. Indian River Estates, Inc., 276 F.3d 790, 802 (6th Cir. 2002) (affirming jury verdict in favor of plaintiff in FHA case).

9. *See* 42 U.S.C. § 3613(a)(1)(A) (2000) (two-year statute of limitations); *Havens Realty Corp.*, 455 U.S. at 380-81 (applying continuing violation theory).

10. Complaint for Declaratory and Injunctive Relief and Damages ¶ 6, Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., No. L08CV062 (D. Md. Jan. 8, 2008), 2008 WL 117894

foreclosures, it contends, are destroying minority neighborhoods and costing the city millions of dollars in out of pocket costs and damages.[11] One can reasonably assume other cities are now contemplating similar actions.[12] This development is possible because standing under the FHA is uniquely suited to permit cities the ability to sue as an "aggrieved person" in their own right.

This legal development has the power to be truly transformative, not simply in terms of its ability to reform an industry, but in its potential to promote integration through the stabilization of transitional minority neighborhoods. Lowering the barriers to integration requires, in the first instance, stopping the downward socio-economic spiral of hypersegregated communities. The racial mobility that Massey and Denton have shown is critical to integrated living patterns cannot take place until segregated minority neighborhoods have achieved levels of stability (and ultimately prosperity) that only remedial investment can bring. The impending wave of municipal lawsuits has the potential to bring that investment and, with it, renewed hope for progress on the integration front.

As with any new litigation strategy, the tendency exists to overstate the possibilities when the ideas are fresh and untested. That risk exists here as well. What makes this moment different is the ample evidence of powerful outcomes when public bodies pool their resources to attack a problem. America's mayors have the ability to do now what State Attorneys General have many times shown to be possible when they have come together to fight a common foe—whether it be tobacco, drugs, or guns.[13]

The purpose of this Article is to discuss and explore the opportunity this new litigation initiative creates to deal with the unresolved problem of integration. The context for this discussion is Baltimore, where the first of the municipal suits has been filed.[14] Part I sets out the factual background for the Baltimore suit. Part II discusses the specific allegations against the defendant Wells Fargo and the basis for the FHA violations alleged. Part III discusses the injury to the city and the methodological means by which any city faced with similar facts can both prove and quantify the injury. Finally, Part IV explores the implications that the remedies sought by Baltimore have for the broader struggle to promote integration.

It is this last connection—that between the litigation objective and unresolved FHA objective of integration—that remains the most difficult to unravel. Explaining our failure to achieve integrated living patterns forty years after the passage of the FHA requires an understanding of American history and

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[hereinafter Balt. Complaint].

11. *Id.* ¶ 5.

12. *See*, *e.g.*, Complaint ¶ 9, City of Cleveland v. Deutsche Bank Trust Co., No. CV-08-646970 (Ohio Ct. Com. Pl. Jan. 10, 2008) [hereinafter Cleveland Complaint] (asserting public nuisance, not fair housing, claim).

13. *See, e.g.*, STATE CANCER LEGISLATIVE DATABASE PROGRAM, NAT'L CANCER INST., TOBACCO SETTLEMENT (2000), http://www.scld-nci.net/factsheets/pdf/FactSht1-00.pdf.

14. Balt. Complaint, *supra* note 10.

race relations that could fill volumes. What is clear is that the subprime mortgage foreclosure crisis has presented us with a new opportunity to take critically important steps through litigation toward stabilizing badly damaged minority neighborhoods in a way that will promote integration. They may be first steps, but they are essential if we are to continue to make progress in fulfilling Dr. King's dream, and the noble purpose of our fair housing laws.

I. BALTIMORE AS CASE STUDY: FACTUAL BACKGROUND OF *BALTIMORE V. WELLS FARGO*

A. The Foreclosure Crisis and Baltimore

Like many cities across the country, Baltimore faces an unprecedented crisis of residential mortgage foreclosures. There have been more than 33,000 foreclosure filings since 2000,[15] and the Maryland Department of Housing and Community Development reported in October 2007 that the number of foreclosure-related events in Baltimore—notices of default, foreclosure sales, and lender purchases of foreclosed properties—increased an extraordinary five-fold from the first to the second quarter of last year.[16]

Nationwide, the foreclosure crisis is worsening rapidly and is expected to deteriorate further. The number of foreclosure filings nearly doubled from the third quarter of 2006 to the third quarter of 2007.[17] One out of every seventeen mortgage holders is no longer able to make payments on time, the highest rate in over twenty years.[18] Delinquent payments are a strong indicator of near-term foreclosure filings. Equally important, approximately 150,000 adjustable rate loans are resetting to higher interest rates every month.[19] In 2008, $362 billion in subprime loans will reset to higher rates.[20] As the housing market continues to decline, many of these adjustments will result in foreclosures. The Joint Economic Committee of Congress predicts that from 2007 to 2009 there could be nearly two million foreclosures nationwide on homes purchased with subprime loans.[21]

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15. Balt. Complaint, *supra* note 10, ¶ 1.

16. MD. DEP'T OF HOUS. & CMTY. DEV., PROPERTY FORECLOSURES IN MARYLAND SECOND QUARTER 2007, at 12 (2007), http://www.dhcd.state.md.us/Website/home/document/PropForeclosEventsMaryland100407.pdf.

17. Editorial, *Spreading the Misery*, N.Y. TIMES, Nov. 29, 2007, at A30.

18. Balt. Complaint, *supra* note 10, ¶ 16; *see* Sudeep Reddy, *Home Foreclosures Surge to a New High*, WALL ST. J., Dec. 6, 2007, at 2 (5.59% delinquency rate is highest since 1986).

19. Ruth Simon, *Rising Rates to Worsen Subprime Mess—Interest Payments Set to Grow on $362 Billion in Mortgages in 2008*, WALL ST. J., Nov. 24, 2007, at A1.

20. *Id.*

21. MAJORITY STAFF OF THE JOINT ECON. COMM., 110TH CONG., THE SUBPRIME LENDING CRISIS: THE ECONOMIC IMPACT ON WEALTH, PROPERTY VALUES AND TAX REVENUES, AND HOW WE GOT HERE 12 (2007) [hereinafter THE SUBPRIME LENDING CRISIS]. Of the forty-four million active mortgages throughout the country currently tracked by the Mortgage Bankers Association

Foreclosures have multiple and far-reaching impacts on cities like Baltimore, especially when they are concentrated in distressed neighborhoods that are already struggling with issues of economic development and poverty. Foreclosures in these neighborhoods frequently lead to abandoned and vacant homes.[22] Estimates of the number of vacant homes in Baltimore range from 16,000 to 30,000.[23] Concentrated vacancies driven by foreclosures cause neighborhoods, especially ones already struggling, to decline rapidly.[24]

As discussed in Part III below, one example of how foreclosures and consequent vacancies harm neighborhoods is by reducing the property values of nearby homes.[25] In Baltimore, as in other cities, foreclosures are responsible for the loss of hundreds of millions of dollars in the value of homes. This, in turn, reduces the city's revenue from property taxes.[26] It also makes it harder for the city to borrow funds because the value of the property tax base is used to qualify for loans.

Cities with high rates of foreclosure, like Baltimore, must spend additional funds for services related to foreclosures, including the costs of securing vacant homes, holding administrative hearings, and conducting other administrative and legal procedures.[27] The funds expended also include the costs of providing

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("MBA"), approximately 343,000 entered foreclosure during the third quarter of 2007. Balt. Complaint, *supra* note 10, ¶ 15; *see* Mortgage Bankers Ass'n, National Delinquency Study, http://www.mortgagebankers.org/ResearchandForecasts/ProductsandSurveys/NationalDelinquencySurvey.htm (listing MBA sample as forty-four million) (last visited Apr. 12, 2008); Press Release, Mortgage Bankers Ass'n, Delinquencies and Foreclosures Increase in Latest MBA National Delinquency Survey (Dec. 6, 2007), http://www.mortgagebankers.org/NewsandMedia/PressCenter/58758.htm (discussing MBA survey that found 0.78% of loans entered foreclosure in third quarter). This is the highest rate of foreclosures in more than thirty-five years. *Compare* David S. Hilzenrath & Dina ElBoghdady, *Quarterly Foreclosure Rate Again Sets Record—Defaults May Hurt Home Prices, Overall Economy*, WASH. POST, Sept. 7, 2007, at D1 (stating that second quarter rate of 0.65% was highest since MBA began survey in 1972). Overall, over 740,000 properties tracked by the MBA were in some stage of foreclosure during the third quarter of 2007, up 21% from the second quarter. Press Release, *supra* (discussing MBA survey that found 1.69% of loans in the foreclosure process, up 29 basis points).

22. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 57 (2006).

23. *See* Joe Milicia, *Cities Fight Glut of Vacant Houses: Baltimore Among Cities Losing Millions in Taxes on Abandoned Homes*, BALT. SUN, Feb. 11, 2008, http://www.baltimoresun.com/business/realestate/bal-foreclosure0211,0,5826159.story (16,000); Editorial, *Taking It to the Bank*, BALT. SUN, Oct. 14, 2007, at 16A (30,000). Estimates of abandoned and vacant housing in other cities are likely even higher. In Cleveland, for example, the rate of foreclosures for 2007 has been estimated at twenty per day. Cleveland Complaint, *supra* note 12, ¶ 57.

24. Immergluck & Smith, *supra* note 22, at 59.

25. *See infra* note 110 and accompanying text.

26. *See* THE SUBPRIME LENDING CRISIS, *supra* note 21, at 16.

27. *See* ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND:

additional police and fire protection as vacant properties become centers of dangerous and illicit activities.[28]

B. The Role of Subprime Lending

The growing crisis of foreclosures in Baltimore and across the nation is due in large part to the rapid expansion of subprime lending. Subprime lending developed in the mid-1990s as a result of innovations in risk-based pricing and in response to the demand for credit by borrowers who were denied prime credit by traditional lenders.[29]

Prior to the emergence of subprime lending, most mortgage lenders made only "prime" loans.[30] Prime lending offered uniformly priced loans to borrowers with good credit.[31] Individuals with "blemished credit" were not eligible for prime loans.[32] Although borrowers with blemished credit might still represent a good mortgage risk at the right price, prime lending did not provide the necessary flexibility in price or loan terms to serve these borrowers.[33]

In the early 1990s, technological advances in automated underwriting allowed lenders to predict with improved accuracy the likelihood that a borrower with blemished credit will successfully repay a loan.[34] This gave lenders the ability to adjust the price of loans to match the different risks presented by borrowers whose credit records did not meet prime standards.[35] Lenders found that they could now accurately price loans to reflect the risks presented by a particular borrower.[36] When done responsibly, this made credit available much more broadly than had been the case with prime lending.

As the technology of risk-based pricing developed rapidly in the 1990s, so did the market in subprime mortgages. Subprime loans accounted for only 10% of mortgage loans in 1998, but within eight years grew to 23% of the market.[37] Currently, outstanding subprime mortgage debt stands at $1.3 trillion, up from

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FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 24 (2006), http://www.responsiblelending.org/pdfs/FC-paper-12-19-new-cover-1.pdf.

28. *See* Immergluck & Smith, *supra* note 22, at 59.

29. *See* John P. Relman, *Taking it to the Courts; Litigation and the Reform of Financial Institutions*, in ORGANIZING ACCESS TO CAPITAL: ADVOCACY AND THE DEMOCRATIZATION OF FINANCIAL INSTITUTIONS 55, 65 (Gregory D. Squires ed., 2003).

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See* William B. Senhauser & John P. Relman, *Reflections on the Airlie Conference*, *in* THE ROLE OF AUTOMATED UNDERWRITING IN EXPANDING MINORITY HOMEOWNERSHIP: CONFERENCE PROCEEDINGS 9, 11-12, 16 (Fannie Mae ed., 2001).

35. *See id.* at 17-18.

36. *Id.* at 15-18.

37. *See* SCHLOEMER ET AL., *supra* note 27, at 7.

$65 billion in 1995 and $332 billion in 2003.[38] These subprime loans have allowed millions of borrowers to obtain mortgages, at marginally increased prices, even though their credit profiles do not qualify them for lower-cost prime loans.[39] They have opened the door to homeownership to many people, especially low- to moderate-income and minority consumers, who otherwise would have been denied mortgages.[40] At the same time, subprime lending has created opportunities for unscrupulous lenders to engage in irresponsible lending practices that result in loans that borrowers cannot afford.[41] This, in turn, has led directly to defaults and foreclosures.

Enticed by the prospect of short-term profits resulting from exorbitant origination fees, points, and related pricing schemes, many irresponsible subprime lenders took advantage of a rapidly rising real estate market to convince borrowers to enter into loans that they could not afford. Often this was accomplished with the help of deceptive practices and promises to refinance at a later date.[42] These abusive subprime lenders did not worry about the consequences of default or foreclosure to their business because once made, the loans were sold on the secondary market.[43]

As the subprime market grew, the opportunities for abusive practices grew with it. These practices include: (a) enticing borrowers into adjustable rate loans with low "teaser rates" that would automatically reset to much higher market rates after an introductory period, often with false promises to refinance the loan before the introductory period ended; (b) encouraging borrowers to refinance loans unnecessarily for the purpose of collecting closing costs, fees, and higher interest rates; (c) charging "yield spread premiums" that allow the lender to profit from interest rates that are higher than the rate the borrower qualifies for and can actually afford; (d) ignoring traditional underwriting criteria such as debt-to-income ratio, loan to value ratio, FICO score, cash reserves, and work history, against the borrower's best interest, all for the purpose of maintaining the short term profit that comes from high loan volumes, closing costs, and transaction fees; (e) charging excessive points and fees; and (f) requiring substantial prepayment penalties to prevent borrowers with improved credit or equity from moving from a subprime to prime loan.[44]

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38. JOINT ECON. COMM., 110TH CONG., SHELTERING NEIGHBORHOODS FROM THE SUBPRIME FORECLOSURE STORM 4 (2007) [hereinafter SHELTERING NEIGHBORHOODS].

39. *See id.* at 3.

40. SCHLOEMER ET AL., *supra* note 27, at 7.

41. *See infra* note 44 and accompanying text.

42. *See* Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 16-21 (D.D.C. 2000).

43. *See* SCHLOEMER ET AL., *supra* note 27, at 6; THE SUBPRIME LENDING CRISIS, *supra* note 21, at 20.

44. *See, e.g.*, SCHLOEMER ET AL., *supra* note 27, at 5-6; SHELTERING NEIGHBORHOODS, *supra* note 38, at 1-3; THE SUBPRIME LENDING CRISIS, *supra* note 21, at 10, 20-22; U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING: A JOINT REPORT 2 (2000), http://www.huduser.org/Publications/pdf/treasrpt. pdf [hereinafter CURBING PREDATORY HOME LENDING]; *see generally* John P. Relman et al., *Designing Federal*

As long as housing prices continued to rise, the deleterious effect of these practices was delayed and, thus, hidden.[45] When the real estate bubble burst earlier in 2007, the inevitable occurred, and foreclosure rates began their dramatic rise.[46] Bent on maximizing short-term profits and protected by the ability to sell their loans on the secondary market, irresponsible subprime lenders left countless homeowners saddled with mortgage debts they cannot afford and no way to save their homes in a declining housing market.[47]

C. Foreclosure Disparities in Baltimore's African-American Neighborhoods

Nationwide, the impact of the foreclosure crisis is felt most acutely in minority communities. According to one recent report, nationwide, subprime borrowers of color will lose between $164 billion and $213 billion as a result of loans made in the past eight years, reflecting the fact that "people of color are more than three times" as likely as whites to have high cost, subprime loans.[48] The same is true in Baltimore. Citywide census tracts that are above 80% African-American account for 49% of Baltimore's foreclosure filings, even though these same tracts account for only 37% of the City's owner-occupied households.[49] Many housing advocates point to the practice of "reverse redlining" as a major cause of this disparity.[50]

As used by Congress and the courts, the term "reverse redlining" refers to the practice of targeting residents in certain geographic areas for credit on unfair terms due to the racial or ethnic composition of the area.[51] In contrast to "redlining," which is the practice of denying *prime* credit to specific geographic areas because of the racial or ethnic composition of the area, reverse redlining involves the targeting of an area for the marketing of deceptive, predatory or otherwise deleterious lending practices because of the race or ethnicity of the area's residents.[52] This practice has repeatedly been held to violate the Federal Fair Housing Act.[53]

Reverse redlining typically flourishes in cities where two conditions are met.

Legislation that Works: Legal Remedies for Predatory Lending, *in* WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING 153 (Gregory D. Squires ed., 2004).

45. THE SUBPRIME LENDING CRISIS, *supra* note 21, at 2.

46. *See* CURBING PREDATORY HOME LENDING, *supra* note 44, at 1; SCHLOEMER ET AL., *supra* note 27, at 3-4.

47. SCHLOEMER ET AL., *supra* note 27, at 3-4.

48. AMAAD RIVERA ET AL., UNITED FOR A FAIR ECONOMY, FORECLOSED: STATE OF THE DREAM 2008, at vii (2008), http://www.faireconomy.org/files/StateOfDream_01.16.08_Web.pdf.

49. Balt. Complaint, *supra* note 10, ¶ 34.

50. *See, e.g.*, *id.*

51. *See, e.g.*, Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000).

52. *See, e.g.*, *id.*

53. *See, e.g.*, Barkley v. Olympia Mortgage Co., 2007 WL 2437810, at *13-15 (E.D.N.Y. Aug. 22, 2007); *Hargraves*, 140 F. Supp. 2d at 20.

First, the practice afflicts cities where minorities historically have been denied access to credit and other banking services. The legacy of historic discrimination, or redlining, often leaves the residents of minority communities desperate for credit, and without the knowledge or experience required to identify loan products and lenders offering products with the most advantageous terms for which they might qualify. Instead, residents of underserved minority communities often respond favorably to the first offer of credit made, without regard to the fairness of the product. This makes them especially vulnerable to irresponsible subprime lenders who, instead of underwriting carefully to ensure that the loans they offer are appropriate for their customers, engage in the unscrupulous lending practices.[54]

Second, reverse redlining arises in cities where there are racially segregated residential living patterns. This means that the people who are most vulnerable to abusive lending practices are geographically concentrated and therefore easily targeted by lenders.

Both of these conditions are present in Baltimore. First, Baltimore's minority communities historically have been victimized by traditional redlining practices. Through much of the twentieth century the federal government, mortgage lenders, and other private participants in the real estate industry acted to deny homeownership opportunities and choices to the city's African-Americans.[55] The practice and effects of widespread redlining in Baltimore persisted for decades.[56] An analysis of data from the 1980s, long after much of the institutionalized governmental and corporate apparatus of discrimination had been dismantled, found that the more African-American residents in a Baltimore neighborhood, the fewer mortgage loans and dollars the neighborhood received.[57] The same study also found that while 73% of majority white census tracts received a medium or high volume of single family mortgage loans, the same was true of only 5% of majority African-American tracts.[58]

Second, the city is highly segregated between African Americans and whites. Even though Baltimore is 64% African-American and 32% white, many neighborhoods have a much higher concentration of one racial group or the

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54. *See supra* note 44 and accompanying text.

55. The Secretary of the United States Department of Housing and Urban Development admitted in 1970 that the federal government had "refus[ed] to provide insurance in integrated neighborhoods, promot[ed] the use of racially restrictive covenants," and engaged in other methods of redlining. Thompson v. HUD, 348 F. Supp. 2d 398, 466 (D. Md. 2005). The federal government even published a map in 1937 titled "Residential Security Map for Baltimore" designed to facilitate private redlining by mortgage providers. *Id.* at 471. Mortgage lenders actively engaged in redlining for decades, treating "black and [the few] integrated neighborhoods as unstable and risky." Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 319 (1983).

56. Power, *supra* note 55, at 320.

57. ANNE B. SHLAY, MD. ALLIANCE FOR RESPONSIBLE INV., MAINTAINING THE DIVIDED CITY: RESIDENTIAL LENDING PATTERNS IN THE BALTIMORE SMSA 44 (1987).

58. *Id.* at 36.

other.[59]

II. BALTIMORE'S ALLEGATIONS AGAINST WELLS FARGO

Against this backdrop of mounting foreclosures and damage to Baltimore's African-American neighborhoods, in January 2008 the City of Baltimore filed suit against one particular lender with a large presence across the city—Wells Fargo.[60] At the heart of the complaint rests the allegation that Wells Fargo has "engaged in a pattern and practice of unfair, deceptive and discriminatory lending [practices]," targeted at Baltimore's African-American neighborhoods, that has resulted in disproportionately high rates of foreclosure and consequent financial damage in these communities, as well as direct and continuing financial harm to the City of Baltimore.[61] Wells Fargo, in short, is alleged to have engaged in a practice of "reverse redlining" that violates the FHA.[62]

A. Wells Fargo's Foreclosure Rates

Baltimore's complaint raises a number of specific factual allegations about Wells's lending practices based on the type and location of its loans. First, the City contends that, as one of Baltimore's largest lenders, Wells Fargo "has made at least 1285 mortgage loans in Baltimore in each of the last three years, with a collective value of over $600 million."[63] In each of these years, it has been one of the top two mortgage lenders in the City, making loans in both the white and African-American neighborhoods of Baltimore.[64] Wells Fargo is also alleged to have "the largest number of foreclosures in Baltimore of any lender—at least 135 from 2005 to 2006."[65]

The City further alleges, however, that "[h]alf of Wells Fargo's foreclosures from 2005 to 2006 were in census tracts that are more than 80% African-American and two-thirds were in tracts that are over 60% African-American, but

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59. Balt. Complaint, *supra* note 10, ¶ 33. In its complaint against Wells Fargo, the City of Baltimore alleges, for example, that "the African-American population exceeds 90% in East Baltimore, Pimlico/Arlington/Hilltop, Dorchester/Ashburton, Southern Park Heights, Greater Rosemont, Sandtown-Winchester/Harlem Park, and Greater Govans. It exceeds 75% in Waverly and Belair Edison." *Id.* The complaint also alleges that "the white population of Greater Roland Park/Poplar, Medfield/Hampden/Woodberry, and South Baltimore exceeds 80%, and the white population of Cross-Country/Cheswolde, Mt. Washington/Coldspring, and North Baltimore/Guilford/Homeland exceeds 70%." *Id.*

60. Balt. Complaint, *supra* note 10.

61. *Id.* ¶¶ 4-5.

62. *Id.* ¶¶ 2, 4.

63. *Id.* ¶¶ 10, 35.

64. *Id.*

65. *Id.* ¶ 38. The City's complaint alleges that "[o]nly two other lenders had more than 100 foreclosures during this period"; that "[w]ith at least seventy foreclosures during the first half of 2007, the pace of Wells Fargo's foreclosures is increasing"; and that "at least 108 Wells Fargo loans in Baltimore resulted in foreclosure from 2000 to 2004." *Id.*

only 15.6% were in tracts that are 20% or less African-American."[66] According to the complaint,

> [t]he figures are virtually identical for Wells Fargo's foreclosures from 2000 to 2004, with more than half in tracts that are more than 80% African-American, 64% in tracts that are over 60% African-American, and only 14.8% in tracts that are 20% or less African-American. Wells Fargo's foreclosures during the first half of 2007 reflect a similar pattern.[67]

The complaint alleges that "[a]lmost half are in tracts that are more than 80% African-American, while only 11.4% are in tracts that are 20% or less African-American."[68]

In terms of foreclosure rates, the numbers set out in Baltimore's complaint are stark:

> While 8.2% of Wells Fargo's loans in predominantly African-American neighborhoods result in foreclosure, the same is true for only 2.1% of its loans in predominantly white neighborhoods. In other words, a Wells Fargo loan in a predominantly African-American neighborhood is nearly four times as likely to result in foreclosure as a Wells Fargo loan in a predominantly white neighborhood.[69]

In contrast, the foreclosure rate for all lenders in Baltimore is 4.5%.[70] Thus, the City alleges, "Wells Fargo's foreclosure rate for loans in African-American neighborhoods is nearly double the overall City average, while the ratio for its loans in white neighborhoods is less than half the average."[71]

B. Types of Loans Made

The disparity in foreclosure rates, the complaint argues, is explained by the manner in which Wells Fargo has targeted African-American neighborhoods in Baltimore for improper and irresponsible lending practices.[72] The City alleges that the bank's "[p]attern or practice of failing to follow responsible underwriting practices . . . is evident from the type of loans that result in foreclosure filings in those neighborhoods."[73]

According to the complaint, approximately 70% of Wells Fargo's Baltimore loans that result in foreclosure are fixed rate loans. This ratio is the same in both

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66. *Id.* ¶ 37.
67. *Id.*
68. *Id.*
69. *Id.* ¶ 39.
70. *Id.* ¶ 40.
71. *Id.*
72. *Id.* ¶¶ 41-60.
73. *Id.* ¶ 42.

African-American and white neighborhoods.[74] The complaint notes that,

> [u]nlike adjustable rate loans, where the price may fluctuate with changing market conditions, the performance of fixed rate loans is relatively easy to predict using automated underwriting models and loan performance data because monthly payments do not vary during the life of the loan. Using these sophisticated risk assessment tools, and relying on traditional underwriting criteria such as FICO scores, debt-to-income ratios, loan-to-value ratios, and cash reserves, any lender, [Baltimore argues], engaged in responsible underwriting practices designed to identify qualified borrowers can predict with statistical certainty the likelihood of default and/or delinquency. Lenders engaged in marketing fixed rate loans in a fair and responsible manner should have no difficulty sifting out unqualified borrowers, or borrowers whose loans would likely result in delinquency, default or foreclosure.[75]

Baltimore contends proper underwriting by Wells Fargo should result in comparable rates of foreclosure in both communities

> [b]ecause the percentage of fixed rate loans is so high and the same in both African-American and white neighborhoods . . . . The fact that Wells Fargo's underwriting decisions result in foreclosure nearly four times as often with respect to African-American than white neighborhoods means that it is not following fair or responsible underwriting practices with respect to African-American customers.[76]

C. Loan Characteristics and Practices

Baltimore's complaint identifies four additional aspects of Wells Fargo's loans and lending practices that it alleges support the inference that the foreclosure disparity is the result of improper targeting and irresponsible underwriting. Each is consistent with the conclusion that Wells Fargo has effectively placed an unlawful "thumb on the scale" when it underwrites loans in Baltimore's African-American neighborhoods. Moreover, according to the City, each of these factors is consistent with the conclusion that Wells Fargo is engaged in unfair and discriminatory practices in the city's black community that have the "effect and purpose" of placing inexperienced and underserved borrowers in loans they cannot afford without regard to the borrower's best interest, the borrower's ability to repay, or the financial health of underserved minority neighborhoods.[77]

First, publicly available data reported by Wells Fargo to federal regulators pursuant to the Home Mortgage Disclosure Act shows that in 2006 Wells Fargo

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74. *Id.*
75. *Id.* ¶ 43.
76. *Id.* ¶ 44.
77. *Id.* ¶¶ 4, 46.

made high-cost loans (*i.e.*, loans with an interest rate that was at least three percentage points above a federally-established benchmark) to 65% of its African-American mortgage customers in Baltimore, but only to 15% of its white customers in Baltimore.[78] In 2005, the respective rates were 54% and 14%; while in 2004, the respective rates were 31% and 10%.[79] The proportion of refinance loans that are high cost is especially pronounced. In 2004, 2005, and 2006, a Wells Fargo refinance loan to an African-American borrower was 2.5 times more likely to be high cost than a refinance loan to a white borrower.[80]

While the fact that Wells Fargo's high cost loans are more heavily concentrated in Baltimore's African-American neighborhoods does not prove price discrimination, it is consistent with such practices, as well as other types of improper underwriting often found where there is reverse redlining.[81] Within the subset of high-cost loans, however, the fact that a disproportionately large percentage of Wells Fargo's high-cost loans in African-American neighborhoods are refinance loans is particularly significant, for it is both consistent with and indicative of a deceptive and predatory subprime practice that involves encouraging minority borrowers who already have loans to refinance at excessive cost with little benefit.[82] This practice, Baltimore alleges, "increases the likelihood of foreclosure and, upon information and belief, has contributed to the disproportionately high rate of foreclosures in Baltimore's African-American communities."[83]

Second, according to a Wells Fargo pricing sheet from 2005, the bank requires a 50 basis point *increase* in the loan rate for loans of $75,000 or less, a 12.5 basis point *decrease* for loans of $150,000 to $400,000, and a 25 basis point *decrease* for loans larger than $400,000.[84] These charges and discounts are applied after Wells Fargo has supposedly priced the borrower based on creditworthiness. The City alleges that these pricing rules have a clear and foreseeable disproportionate adverse impact on African-American borrowers. Loans originated by Wells Fargo in Baltimore from 2004 through 2006 in the amount of $75,000 and less were nearly twice as likely to be in census tracts where the population is predominantly African-American than in tracts where the population is predominantly white.[85] By contrast, loans originated by Wells Fargo in Baltimore of more than $150,000 were nearly six times as likely to be in tracts that are predominantly white than in tracts that are predominantly African-American.[86] This too, the City contends, "is consistent with unfair practices associated with reverse redlining and has contributed significantly to

78. *Id.* ¶ 47.
79. *Id.*
80. *Id.*
81. *Id.* ¶ 49.
82. *Id.*
83. *Id.*
84. *Id.* ¶ 50.
85. *Id.* ¶ 51.
86. *Id.*

the disproportionately large number of foreclosures found in Baltimore's African-American communities."[87]

Third, Baltimore alleges that inferences about price discrimination based on Wells Fargo's Baltimore loan data are "consistent with findings drawn from data obtained in litigation brought against Wells Fargo in Philadelphia."[88] In that case, an expert report in a pending lawsuit based on Wells Fargo's Philadelphia loans concluded that Wells Fargo's African-American borrowers, and borrowers residing in African-American neighborhoods, paid more than comparable white residents of predominately white communities.[89]

Fourth, the complaint alleges that there is "a marked disparity with respect to the speed with which [Wells Fargo] loans in African-American and white neighborhoods move into foreclosure."[90] In Baltimore's African-American neighborhoods, the average time to foreclosure is 2.06 years. In white neighborhoods it is 2.45 years, or 19% longer.[91] The City contends that this "disparity in time to foreclosure [further] demonstrates that Wells Fargo is engaged in irresponsible underwriting in African-American communities."[92] If Wells Fargo were applying the same underwriting practices in Baltimore's African-American and white neighborhoods, and underwriting borrowers with equal care and attention to proper underwriting practices, the City argues, borrowers in African-American communities would not find themselves in financial straits significantly sooner during the life of their loans than borrowers in white communities.[93] According to the City, "[t]he faster time to foreclosure in African-American neighborhoods is consistent with underwriting practices in the African-American community that are less concerned with determining a borrower's ability to pay and qualifications for the loan than they are in maximizing short-term profit."[94]

Finally, the complaint alleges that while "2/28" and "3/27" adjustable rate loans do not represent the bulk of the Wells Fargo loans that went to foreclosure in Baltimore, a significant portion (30%) of the bank's foreclosures in African-

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87. *Id.* ¶ 52.

88. *Id.* ¶ 53.

89. *Id.* (quoting Affidavit of L. Goldstein ¶ 7, Walker v. Wells Fargo Bank, N.A., No. 05-cv-6666 (E.D. Pa. July 20, 2007)).

90. *Id.* ¶ 61.

91. *Id.*

92. *Id.* ¶ 62.

93. *Id.*

94. *Id*. The City points out that

> [t]his difference in time to foreclosure is especially important because foreclosures occur more quickly in Baltimore than in neighboring jurisdictions. For all lenders, the average time from loan origination to foreclosure in Baltimore is three years, while in Philadelphia it is four years and in New Castle County, Delaware (which includes Wilmington) it is 4.3 years. This means that the injuries that result from foreclosures in Baltimore are compounded, and therefore grow, at a faster pace.

Id. ¶ 63.

American neighborhoods involved these unusually risky and deceptive loan products.[95] The City contends that "Wells Fargo [did] not properly underwrite these loans when made to African Americans, and . . . [did] not adequately consider the borrowers' ability to repay these loans, especially after the teaser rate expires and the interest rate increases."[96] As a result, these loans resulted in delinquency, default, and foreclosure for many African-American borrowers—a result that was, or should have been, clearly foreseeable to Wells Fargo at the time the loans were made.[97]

As with the other practices identified above, Baltimore contends that the use of these risky adjustable rate mortgage products "is consistent with the practice of reverse redlining, has subjected African-American borrowers to unfair and deceptive loan terms, and has contributed significantly to the high rate of foreclosure found in Baltimore's African-American neighborhoods."[98]

III. QUANTIFYING INJURY TO THE CITY

A. Municipal Standing

As noted in Part II above, the FHA provides a clear cause of action for the lending practices in which Wells Fargo is alleged to have engaged. Since Judge Joyce Hens Green's landmark decision in *Hargraves v. Capital City Mortgage Corp.*,[99] numerous courts across the country have held that reverse redlining violates the FHA.[100] Thus, if Wells Fargo has done what Baltimore alleges, it

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95. *Id.* ¶ 55.

96. *Id.* ¶ 56.

97. *Id.*

98. *Id.* ¶ 57. With respect to the adjustable rate mortgage loan products, the City further alleges that Wells Fargo had discretion to apply different caps on the interest rates charged. *Id.* ¶ 58. "The cap is the maximum rate that a borrower can be charged during the life of an adjustable rate loan." *Id.* According to the complaint, "[t]he average cap on a Wells Fargo adjustable rate loan that was subject to foreclosure in 2005 or 2006 in predominantly African-American neighborhoods was 14.13%. The cap on such loans in predominantly white neighborhoods was only 13.61%." *Id.* ¶ 59. This disparity, the City alleges, is further evidence of a pattern or practice of unfair and improper lending in Baltimore's African-American neighborhoods that has contributed to an unnecessarily high rate of foreclosure. *See id.* ¶¶ 4, 60.

99. 140 F. Supp. 2d 7 (D.D.C. 2000).

100. *See* Munoz v. Int'l Home Capital Corp., No. C 03-01099 RS, 2004 WL 3086907, at *4 (N.D. Cal. May 4, 2004); Matthews v. New Century Mortgage Corp., 185 F. Supp. 2d 874, 886-87 (S.D. Ohio 2002); Johnson v. Equicredit Corp. of Am., No. 01 C 5197, 2002 WL 448991, at *5-6 (N.D. Ill. Mar. 22, 2002); Eva v. Midwest Nat'l Mortgage Bank, Inc., 143 F. Supp. 2d 862, 868 (N.D. Ohio 2001); *see also* Assocs. Home Equity Servs., Inc. v. Troup, 778 A.2d 529, 537 (N.J. Super. Ct. App. Div. 2001) (holding that reverse redlining violates New Jersey's Law Against Discrimination); McGlawn v. Pa. Human Relations Comm'n, 891 A.2d 757, 761 (Pa. Commw. Ct. 2006) (holding that reverse redlining violates fair housing provisions of Pennsylvania Human Relations Act).

will be held liable for violating the Act.

In this sense, the FHA provides a unique legal vehicle for attacking the practices that are of such current concern to cities across the country, like Baltimore, whose minority communities are bearing the brunt of the foreclosure crisis. The FHA, however, is uniquely positioned in other ways as well—ones that concern the related issues of standing and remedies.

Standing to sue under the FHA extends as broadly as Article III of the Constitution will allow; Congress and the courts have determined that there are no prudential limitations on standing.[101] The statute itself provides that any "person" aggrieved by conduct made illegal by the Act may bring suit.[102] The FHA defines "person" to include corporations.[103] Many cities, like Baltimore, are incorporated and thus fall directly within the definition of "person" for purposes of standing. Indeed, the plaintiff in one of the Supreme Court's relatively few FHA cases was a municipal corporation.[104] This means that where a city claims injury from the reverse redlining practices of a given lender, it has standing to pursue a federal fair housing claim against that entity.

B. Damages

When it comes to remedies, the FHA is equally useful to municipal plaintiffs like Baltimore. As originally drafted in 1968, the FHA permitted aggrieved persons to recover unlimited compensatory damages, but capped punitive damages at $1000.[105] In 1988, the Act was amended to remove the cap on punitive damages.[106] Any municipality, therefore, that brings a reverse redlining

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101. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 103 n.9, 109 (1979); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

102. 42 U.S.C. § 3613(a)(1)(A) (2000).

103. *Id.* § 3602(d).

104. *See* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 93 (1979). In the decision under review, the Seventh Circuit held that a village, as a municipal corporation, had standing as a "person" under the FHA. Vill. of Bellwood v. Gladstone Realtors, 569 F.2d 1013, 1020 n.8 (7th Cir. 1978), *aff'd in part*, 441 U.S. 91 (1979). The Supreme Court noted the Seventh Circuit's holding, but did not address the issue because it had been raised belatedly. *Gladstone Realtors*, 441 U.S. at 109 n.21; *see also* City of Chi. v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1095 (7th Cir. 1992) (finding Chicago had standing under FHA); Vill. of Bellwood v. Dwivedi, 895 F.2d 1521, 1525 (7th Cir. 1990) (Village of Bellwood had standing under FHA); Heights Cmty. Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 138-39 (6th Cir. 1985) (finding Cleveland Heights had standing under FHA).

105. *See* N.J. Coal. of Rooming & Boarding House Owners v. Mayor & Council of City of Asbury Park, 152 F.3d 217, 223 (3d Cir. 1998) (discussing limitation on punitive damages as FHA was originally enacted).

106. *See id.* at 223-24 (discussing 1988 amendment whereby Congress removed the $1000 ceiling on punitive damages); Fair Housing Amendments Act of 1988, § 8, 42 U.S.C. § 3613(c)(1) (2000) ("[T]he court may award to the plaintiff actual and punitive damages . . . .").

claim may seek unlimited punitive damages against a defendant lender—subject only to constitutional due process limitations having to do with the ratio of the size of punitive to compensatory damages.[107]

Damages, of course, must be proven. However, here too, the empirical and methodological foundation is strong for cities, like Baltimore, that seek to show the precise harm in dollar terms that they have suffered from the current wave of foreclosures.

As a general matter, foreclosures caused by discriminatory reverse redlining practices produce multiple types of injuries to a city like Baltimore. Foreclosures result in a dramatic increase in the number of abandoned and vacant homes.[108] Frequently concentrated in compact, clearly defined geographic areas, these abandoned properties become centers for squatting, drug use, drug distribution, prostitution, and other illegal activities.[109] The costs to the city are enormous: increased expenditures to secure the newly abandoned and vacant homes; increased expenditures for police and fire protection; additional expenditures to acquire and rehabilitate vacant properties, where possible; and new outlays of tax dollars to fund social programs to stabilize the affected neighborhoods and deal with the homelessness, job loss, and educational needs that inevitably flow from the displacement and relocation of residents who have lost their primary (and often only) investment.[110]

Foreclosures result in two other forms of financial damage to the city as well. First, abandoned and vacant properties in a neighborhood produce a clearly identifiable decline in the value of nearby homes, resulting in a significant decrease in property tax revenue. Cities also lose revenue from real estate transfer taxes because foreclosures depress the market for home sales. Second, there are large costs to a city associated with the processing of foreclosed properties through the city or county legal or administrative system.

Most, if not all, of these costs are fully capable of empirical quantification. Recent studies have pioneered new methodologies for calculating these damages. A study published by the Fannie Mae Foundation, using Chicago as an example, determined that each foreclosure is responsible for an average decline of approximately 1% in the value of each single-family home within an eighth of a mile.[111] A second study in Philadelphia found that each home within 150 feet of an abandoned home declined in value by an average of $7627; homes within 150 to 299 feet declined in value by $6810; and homes within 300 to 449 feet

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107. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-29 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-86 (1996).

108. Immergluck & Smith, *supra* note 22, at 57.

109. *Id.* at 59.

110. *See* WILLIAM C. APGAR ET AL., HOMEOWNER PRESERVATION FOUND., THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY 20-29 (2005), http://www.995hope.org/content/pdf/Apgar_Duda_Study_Full_Version.pdf; Immergluck & Smith, *supra* note 22, at 58-59.

111. *See* Immergluck & Smith, *supra* note 22, at 58.

declined in value by $3542.[112]

Likewise, the costs of increased municipal services that are necessary because of foreclosures have also been analyzed empirically. A recent study commissioned by the Homeownership Preservation Foundation isolated twenty-six types of costs incurred by fifteen government agencies in response to foreclosures in Chicago.[113] It then analyzed the amount of each cost based on different foreclosure scenarios, such as whether the home is left vacant, whether and to what degree criminal activity ensues, and whether the home must be demolished.[114] The study found that the total costs ran as high as $34,199 per foreclosure.[115]

The point to be made here is a simple one. For litigation purposes, the damages caused by a company like Wells Fargo's reverse redlining practices are not—as defense lawyers routinely charge—speculative or hypothetical. Baltimore has alleged that Wells Fargo's unlawful targeting practices resulted in unnecessary and avoidable foreclosures in African-American neighborhoods.[116] Expert analyses similar to the studies conducted in Philadelphia and Chicago are capable of showing the precise dollar damage resulting from these discriminatory practices by focusing on the costs that can be empirically tied to a foreclosure and then multiplying that by the number of foreclosures attributable to a given company, like Wells Fargo.

In terms of the size of the damages, the stakes for offending companies are high. Baltimore alleges that the damages and costs caused by Wells Fargo's discriminatory lending practices "are in the tens of millions of dollars."[117] There are several reasons for this. Although the statute of limitations for FHA claims is two years, the Supreme Court has applied a continuing violations theory where a pattern or practice of discriminatory acts extends into the limitations period.[118] This means that a defendant engaged in an ongoing pattern of illegal conduct will be held liable for discriminatory acts extending as far back in time as the evidence leads. Cities like Baltimore, therefore, are free to pursue damages for illegal conduct that has resulted in foreclosures over many years—in many cases going back to the incipient stages of the subprime mortgage market frenzy.

Damages are high for a second reason as well, but not one necessarily related to the absolute number of foreclosures. In many cities the foreclosures caused

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112. ANNE B. SHLAY & GORDON WHITMAN, RESEARCH FOR DEMOCRACY: LINKING COMMUNITY ORGANIZING AND RESEARCH TO LEVERAGE BLIGHT POLICY 20 (2004), http://comm-org.wisc.edu/paper2004/shlay/shlay.htm.

113. APGAR ET AL., *supra* note 110, at 1.

114. *See id.* at 23-27.

115. *Id.* at 28.

116. Balt. Complaint, *supra* note 10, ¶ 64.

117. *Id.* ¶ 70.

118. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982); *see also, e.g.*, Silver State Fair Hous. Council, Inc. v. ERGS, Inc., 362 F. Supp. 2d 1218, 1221-22 (D. Nev. 2005) (applying continuing violation doctrine to design and construction of multiple apartment buildings in violation of FHA's accessibility requirements for people with disabilities).

by reverse redlining are particularly injurious because they are concentrated in distressed and transitional neighborhoods. These are frequently communities with high vacancy rates, low rates of owner occupancy, substantial housing code violations, and low property values. These characteristics make transitional neighborhoods most vulnerable to the deleterious effects of foreclosures.

The Supreme Court has often held that the FHA "sounds basically in tort."[119] As with a personal injury cause of action, defendants must take their plaintiffs as they find them, even if the consequent injury is worse as a result of a pre-existing condition.[120] Such is the case here. If minority neighborhoods are particularly vulnerable to a company's predatory practices, with the resulting injury to the city being greater as a function of increased programmatic costs required to stabilize these transitional neighborhoods, the defendant remains liable for damages regardless of size or extent.

Suffice it to say that the potential scope of damages in municipal foreclosure cases brought under the FHA is both large and provable. The Act's generous standing and statute of limitations provisions, and the manner in which they have been interpreted by the Supreme Court—coupled with the methodological advances for proving damages highlighted in recent studies—means that this law is capable of providing cities with a powerful remedy for the destructive practices that have so badly hurt minority neighborhoods.

The extent to which these remedies will also be able to address the goal of promoting integrated living patterns is a more complicated question, but one of vital importance for the future of the FHA. It is to this question that the discussion now turns.

IV. Foreclosures and Integration: The Fight to Save a Noble Goal

A. Integration and Non-discrimination

Two broad remedial objectives underlie the FHA: non-discrimination and integration. Evidence of these twin goals can be found throughout the statute itself, the legislative history of the 1968 Act, and in Supreme Court decisions interpreting the law.

The Act's preface declares in sweeping language that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[121] The Supreme Court has interpreted this language to make clear "the broad remedial intent of Congress embodied in the Act,"[122] which in turn reflects "a strong national commitment to promot[ing] integrated housing."[123] These purposes are also reflected in the broad range of

119. Curtis v. Loether, 415 U.S. 189, 195 (1974), *see also* Meyer v. Holley, 537 U.S. 280, 285 (2003).

120. *See, e.g.*, Richman v. Sheahan, 512 F.3d 876, 884 (7th Cir. 2008).

121. 42 U.S.C. § 3601 (2000).

122. *Havens Realty Corp.*, 455 U.S. at 380.

123. Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85, 95 (1977) (citing Trafficante

discriminatory practices that the FHA outlaws,[124] and in the virtually unanimous agreement among the circuit courts of appeal that the Act, like Title VII, includes a disparate impact cause of action.[125]

For the most part these goals were viewed by the FHA's legislative sponsors as complementary. Congress adopted the Act in the wake of the highly publicized report by the National Advisory Commission on Civil Disorders, commonly known as the Kerner Report, which had warned that the "[N]ation is moving toward two societies, one black, one white—separate and unequal."[126] Removing barriers to discrimination (the non-discrimination goal), it was thought, would inevitably lead to the eradication of segregation (the integration goal). Thus, the Act's principal sponsor, Senator Mondale, explained that blacks were unable to move to white suburbs because of the "refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels."[127] Similarly, Senator Brooke noted that blacks could not move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often institutionalized by business and industry, and Government practices."[128]

Forty years after passage of the FHA, achieving the goal of integration has met with mixed results. Despite countless successful litigation challenges to discriminatory practices brought by both private parties and the government, studies show that "achieving and sustaining widespread stable racial integration remains an unmet challenge."[129] This is not to say there has not been progress; indeed, some empirical evidence supports the conclusion that "more neighborhoods in metropolitan America are shared by blacks and whites [as of 2004] than [in prior decades], and many racially integrated neighborhoods appear reasonably stable."[130] For every study showing progress, there are others that describe a continuing pattern of entrenched—and in some cases, worsening—

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v. Metro. Life Ins. Co., 409 U.S. 205 (1972)).

124. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968).

125. *See, e.g.*, Macone v. Town of Wakefield, 277 F.3d 1, 5, 7-8 (1st Cir. 2002); Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995); Jackson v. Okaloosa County, 21 F.3d 1531, 1543 (11th Cir. 1994); Keith v. Volpe, 858 F.2d 467, 482-84 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934-36 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Betsey v. Turtle Creek Ass'ns, 736 F.2d 983, 986-88 (4th Cir. 1984); United States v. City of Parma, 661 F.2d 562, 564-65, 576 (6th Cir. 1981); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-49 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974).

126. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1968).

127. 114 Cong. Rec. 2277 (1968).

128. *Id*. at 2526.

129. RAWLINGS ET AL., *supra* note 5, at 2.

130. *Id.*

segregation.[131]

The reasons for such limited progress are many and complicated. Indeed, on anniversaries of the FHA such as this, advocates regularly spend much time debating the likely causes and the conclusions to be drawn. Some of the failure is undoubtedly attributable to continuing discrimination by landlords and other housing providers. Some of it is likely due to facially neutral practices and policies of local governments that have the effect of reinforcing pre-existing residential segregation. Finally, some of the failure is clearly due to a chronic insufficiency of resources (regardless of political administrations in Washington) available for government enforcement and prosecution of the fair lending laws that both the Congress and state legislatures have worked hard over the last four decades to pass.

Dr. King himself clearly understood the unique challenges posed by the goal of integration. In a sermon he gave in 1962 entitled "The Ethical Demands for Integration," he explored the role that law could play in "legislating" an end to segregation:

> Let us never succumb to the temptation of believing that legislation and judicial decrees play only minor roles in solving this problem. Morality cannot be legislated, but behaviour can be regulated. . . . Let us not be misled by those who argue that segregation cannot be ended by the force of law.[132]

At the same time, he also understood the limitations of law in achieving integrated living patterns. Ultimately, integration would require fulfillment of an "unenforceable obligation":

> [T]he ultimate solution to the race problem lies in the willingness of men to obey the unenforceable. Court orders and federal enforcement agencies are of inestimable value in achieving desegregation, but desegregation is only a partial, though necessary step toward the final goal which we seek to realize, genuine intergroup and interpersonal living. . . . True integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.[133]

Put differently, much of the work of integration requires voluntary steps by persons of good will. The work is hard, takes time, and requires a change not just in law, but in the human heart, before it can take hold and produce results in a form that all can see.

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131. *See, e.g.*, Eric Schmitt, *Segregation Growing Among U.S. Children*, N.Y. TIMES, May 6, 2001, at 28 (citing study performed by researchers at the State University of New York at Albany showing that segregated living patterns of children worsened significantly from 1990 to 2001 in many large Northeastern and Midwestern metropolitan areas).

132. Martin Luther King, Jr., The Ethical Demands for Integration (Dec. 27, 1962), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 117, 124 (James M. Washington ed., 1986).

133. *Id.*

B. Foreclosures and Integration

Charting a full remedial course from segregation to integration is beyond the scope of this Article. That said, and recognizing the limitations of law in legislating a solution to this problem, it is still important to understand the unique role that the FHA can play at the present moment of economic crisis to preserve the gains toward integration that have been made, and position our cities for future progress.

It is here that one must return to Massey and Denton's seminal insight about the effects of hypersegregation on underserved communities.[134] Massey and Denton's work focuses on the compounding destructive effect that spatial segregation has on distressed inner city neighborhoods. Concentrated segregation, they argue, makes it far less likely that transitional neighborhoods will be able to withstand a downward spiral should economic growth flatten or slow.[135]

Reverse redlining, in the form described in Parts II and III above, contributes significantly to that effect. Targeting minority communities for discriminatory and irresponsible lending practices depletes those neighborhoods of vitally needed capital. These practices make it even less likely that communities of color will be able to survive an economic downturn. They increase the likelihood that the spiral will be steep and difficult to stop once it begins.

The current foreclosure crisis takes this problem to a new level. As noted above, recent studies suggest that subprime borrowers of color may lose over $200 billion as a result of foreclosures generated by loans taken in the last eight years.[136] This massive drain of equity from minority neighborhoods will have the effect of reinforcing barriers to integration by deepening and worsening spatial segregation. An economic downturn under these conditions could lead to a downward spiral of catastrophic proportions for many distressed and transitional communities of color.

There are two primary reasons why loss of equity will worsen spatial segregation. First, achieving integrated living patterns depends not just on the eradication of legal barriers to mobility, but on having the economic means to pursue housing choice. The current foreclosure crisis threatens to strip thousands of minority homeowners of the very equity and asset that—in a rising market—would allow them to move out of poorer, segregated neighborhoods into areas that show promise as stable, integrated communities.

At the same time that foreclosures strip those caught in segregated neighborhoods of the mobility to move out, they also raise barriers to the movement of much needed capital into segregated communities. Foreclosures mean abandoned homes; increased risks of fire, crime, and drugs; increases in homelessness and job loss; deterioration of schools; and a crippling shortage of

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134. *See generally* MASSEY & DENTON, *supra* note 1.

135. *Id.* at 74-78, 118-30.

136. RIVERA ET AL., *supra* note 48, at 1.

city funds for existing social programs.[137] Foreclosures turn these communities into a "third rail" for private investment dollars, effectively shutting down mobility of both residential buyers and business equity into these neighborhoods. Where rising property values increase the likelihood that investors will break the color line, falling property values ensure the opposite. Less mobility into transitional neighborhoods accelerates the downward spiral in a way that reinforces existing lines of racial separation.

C. The Path Forward

America's mayors and city councils see all too well what is happening to their communities of color. The foreclosure rate in most cities is expected to grow worse, not better, over the next eighteen months.[138] Taxpayer monies that have been invested in social programs designed to stabilize transitional neighborhoods over the last decade are at risk.[139] City budgets, faced with lost revenues and foreclosure-related expenses, are at risk. Most important, decades of tentative progress toward integrated living patterns are at risk. Once erased, these gains will take decades to restore.

The first step in addressing this crisis is to stop the hemorrhaging by stabilizing communities of color that have been hit the hardest. This requires an immediate investment of capital in these communities to prevent the declining spiral from accelerating. If transitional neighborhoods can ride out the foreclosure storm without succumbing to complete economic collapse, hope remains. The danger, of course, is that foreclosures will reach a tipping point in certain communities that will place them beyond repair and leave them hopelessly hypersegregated and economically deprived for years to come.

It is here, on the fortieth anniversary of its passage, that the FHA has an opportunity to play a vitally important role in furthering its noble goal of integration. The Baltimore litigation provides a template for America's cities to take the all important first step toward stabilizing communities of color that have been victimized by reverse redlining and unnecessarily high rates of foreclosure.

In a declining economy, America's cities face mounting budget deficits. Severely damaged by the foreclosure crisis, most cities do not have the funds to plow back into damaged neighborhoods. By focusing on lenders who have engaged in practices that violate the FHA, litigation of the type being pursued by the City of Baltimore has the ability to force private corporations who profited

137. *See supra* notes 108-15 and accompanying text.

138. *See The Looming Foreclosure Crisis: How to Help Families Save Their Homes: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (written testimony of Mark Zandi, Chief Economist, Moody's Economy.com) ("[R]esidential mortgage loan defaults and foreclosures are surging and without significant policy changes will continue to do so through the remainder of the decade.").

139. *See* John Leland, *Baltimore Finds Subprime Crisis Snags Women*, N.Y. TIMES, Jan. 15, 2008, at A1; Louis Uchitelle, *For Baltimore, Housing Slump Slows A Revival*, N.Y. TIMES, Oct. 4, 2007, at A1.

at the expense of taxpayers to contribute much needed capital back to the cities who have been left with the financial bill. A litigated solution is particularly just, because it precisely targets only those corporations who can be shown to have enriched themselves wrongfully at the expense of cities and their taxpayers. To the extent that America's mayors find a way to work together in addressing this problem, collective litigation efforts present powerful reasons for large financial institutions to come to the table not as adversaries looking to fight, but as partners trying to help. Some lenders clearly face the risk of exposure in multiple cities and states; the potential cost to these companies of a litigated solution—both reputational and financial—is enormous.

New investment, of course, does not guarantee integrated living patterns. It merely represents a starting point for addressing a larger problem, and at a minimum, a firewall against further losses. The lesson from Baltimore is clear: The FHA provides the standing, the cause of action, and the remedies needed for cities to play a significant role in fighting to save Dr. King's dream. We have reached a critical moment for communities of color. After forty years, it is still not too late. The moment must be seized now, or it will be lost.