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RACIAL CREDIT STEERING AS A DISCRIMINATORY CREDIT PRACTICE UNDER THE EQUAL CREDIT OPPORTUNITY ACT

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I. INTRODUCTION

IT IS A WELL established principle in the law of economic regulation that certain practices which may be perfectly lawful in some market circumstances may be regarded as illegal when market configurations change. In the field of antitrust law, whether the market structure is atomistic, oligopolistic or monopolistic is a condition which becomes an element of the legal standard and can transform otherwise unoffending conduct into a violation.1 Similarly, in the field of civil rights enforcement, the test of illegality can and often does depend upon the nature of the marketplace. For instance, where racial transition is occurring in the area, conduct which is not regarded as inherently wrong, such as heavy solicitation by real estate brokers, can be considered unlawful because it contributes to panic, resegregation and “blockbusting.”2 Likewise, with respect to racial steering by real estate brokers, the fact that the racial transition is occurring in an area is singularly important to the legal significance of the brokers’ actions.3

The test for the legality of credit practices can likewise depend upon the structure and character of the market in which the practices are carried out. Although certain practices may not be inherently harmful and may be based on an economic rather than an explicitly racial motivation, they still may be regarded as having a racially “exploitative” effect or a racially “segregative” effect depending on the demographics involved in each specific situation. Where this occurs, such practices may be regarded by plaintiffs and governmental enforcement agencies as violative of the law. Accord-

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3 See Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975). “The concept of a racially transitional neighborhood is critically important to this litigation, because it is within this context that the activities of the real estate industry, in general, and the defendants, in particular, must be scrutinized . . . if the real estate industry is allowed to operate unchecked, the pace of racial transition will be manipulated in a way that will irreparably distort any chance for normal and stable racial change.” Id. at 1033-34.
ingly, in an era of increased activism by the Home Loan Bank Board, the Department of Justice and state supervisory agents, savings associations may wish to anticipate developing areas of exposure under expanding civil rights laws.

One such area of potential exposure is racial credit steering. This can be defined as a practice by a creditor of referring loan applicants toward governmentally insured or subsidized loan programs, or away from conventional sources of financing, on the basis of the race of the applicant or the racial composition of the area where the collateral property is located. At a time when the government is placing increased pressure on associations to participate in urban lending programs as a part of their commitment to community reinvestment, it is not unlikely that some associations will be accused of credit steering, even where the practice is not engaged in deliberately or with any intention to discriminate. This is so, in part, because of the expansive nature of the rules of interpretation which enforcement agencies typically apply to civil rights laws such as Equal Credit Opportunity Act (ECOA) and, in part, because of the inadvertent patterns of behavior which emerge in the credit industry in response to economic and regulatory pressures. Thus, the following somewhat subtle practices might be viewed, in some circumstances, as examples of racial credit steering:

(a) A practice by a thrift institution of referring all or most loan applicants from certain areas to governmentally insured or subsidized sources of mortgage credit, including the lender's own service companies, where this correlates highly with the race of the applicants or the racial composition of the areas involved;

(b) A practice by a thrift institution of actively soliciting applicants for government-insured but not conventional mortgages among real estate brokers and others who operate in or are a source of loan applicants from racially transitional or predominantly nonwhite areas;

4 The Community Reinvestment Act of 1977, (CRA), 12 U.S.C. §§ 2901 et. seq. (Supp. 1978), places new emphasis on an association's record of lending in urban areas. A poor record of serving the credit needs of the community can cause an association's application for expansion or change in structure to be held-up, conditioned or delayed. See e.g., decision of Federal Home Loan Bank Board (HLBB) granting conditional approval to branch applications of First Federal Savings and Loan Association of Toledo, found in SAVINGS AND LOAN LAW - 1979, at 255 (R. Alexander ed. 1979). Under regulations issued by the HLBB, one of the twelve evaluation criteria to be considered under CRA is an association's "participation in governmentally insured, guaranteed or subsidized loan programs for housing, small business or small farms." 12 C.F.R. § 563(e) 7 (j) (1979). See Dennis, The Community Reinvestment Act of 1977: Defining "Convenience and Needs of the Community," 95 BANK. L.J. 693 (1978), and W. DENNIS & C. EMMETT, THE COMMUNITY REINVESTMENT ACT: STRATEGIES FOR COMPLIANCE, A COMPREHENSIVE MANUAL FOR MANAGING OFFICERS OF FINANCIAL INSTITUTIONS (Pottinger & Company, Washington, D.C. 1979).

(c) A practice by a thrift institution of failing to inform all applicants, including those who reside or wish to reside in a racially transitional or predominantly nonwhite area, of the availability, suitability and costs of both conventional and government-insured lending options for which they might qualify;

(d) A practice by a thrift institution of foreclosing more quickly on delinquent or defaulted-on loans secured by property located in racially transitional or predominantly nonwhite areas, than on loans secured by property in other areas.

These practices are sometimes associated with a process known as the “FHAing” of a neighborhood and are seen as violations of equal credit laws, when, either directly or indirectly, they result in:

1. Denying applicants freedom of choice in selecting the most suitable financing method, on a prohibited basis;
2. Creating higher overall lending costs or different loan terms to persons who do not have full access to conventional or privately-insured loans, on a prohibited basis; or
3. Perpetuating a segregated or racially dual housing market through creation and reinforcement of structural differences between the “white” market and the “nonwhite market,” and “exploitation” of these differences.

An entire literature has grown up describing this category of neighborhood dynamic and its asserted negative impact on local residents, loan applicants and lenders themselves. The subject has also been the frequent object of Congressional concern.

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6 Several studies undertaken by academic and community-based organizations have attempted to demonstrate the existence of the so-called “FHAing” of neighborhoods by lenders. Attacked as a form of “redlining” this process is seen as a self fulfilling prophecy in which lenders offer only or mostly FHA or VA loans in older, low income, racially integrated areas on the basis of a perception of risk which may or may not be accurate. The neighborhood is then said to obtain a “stigma.” Real estate agents and mortgage bankers even unwittingly, react to profit opportunities by trying to achieve a high volume of home turnovers and eventually abuses such “fast foreclosure” and fraudulent application procedures develop. This leads to high default rates which begin to characterize loans on properties in the area. Ultimately, whites are “steered” away from these areas while nonwhites “steered” toward these areas are left with few financing alternatives, because sources of conventional funds for homes and businesses have withdrawn. The following is a representative sampling of the literature which describes these kinds of processes: C. BRADFORD, L. RUBINWITZ & J. McGOWAN, Sample of HUD-FHA, Single Family Firm Commitments in the Chicago Metropolitan Area, in THE ROLE OF MORTGAGE LENDING PRACTICES IN OLDER URBAN NEIGHBORHOODS (Urban Investment Study Group, Center for Urban Affairs, Northwestern Univ., Chicago 1975); F. CASE, INNER CITY HOUSING AND PRIVATE ENTERPRISES (1972); A. Lyons, Conventional Redlining in Chicago: A Case Study, in THE ROLE OF MORTGAGE LENDING PRACTICES IN OLDER URBAN NEIGHBORHOODS (Urban Investment Study Group, Center for Urban Affairs, Northwestern Univ., Chicago 1975); B. ROGER, CITIES DESTROYED FOR CASH: THE FHA SCANDAL AT HUD (1973); CENTER FOR STUDY OF RESPONSIVE LAW, MORE HOLES THAN NETS: A CRITICAL EVALUATION OF HUD’S SYSTEM FOR CATCHING AND DETERRING FHA LENDER MISCONDUCT (1977); NEW YORK STATE BANKING DEPT’, MORTGAGE FINANCING AND HOUSING MARKETS IN NEW YORK STATE: A PRELIMINARY REPORT (May 10, 1977); U.S. DEPT’ OF HOUSING AND URBAN DEVELOPMENT, REDLINING AND DISINVESTMENT AS A DISCRIMINATORY PRACTICE IN RESI-
This article will explore the possible application of the Equal Credit Opportunity Act with its multiple remedies and enforcement methods to racial credit steering practices as described above.

II. THE EQUAL CREDIT OPPORTUNITY ACT AND REGULATION B

The Equal Credit Opportunity Act is the most elaborate Congressional assault against discrimination in the extension of credit. ECOA makes it unlawful for any creditor, including mortgage lenders, to engage in unlawful discrimination. The Act and its implementing regulations parallel two existing federal statutes which have been broadly construed to pro-


7 See for instance, the following hearings: Community Credit Needs, Hearings on S. 406 Before the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (1977); Proposed Amendments to the Federal National Mortgage Association Charter Act, Hearings on S.1397 Before the Senate Committee on Banking, Housing and Urban Affairs, 95 Cong., 1st Sess. (1977); Home Mortgage Disclosure and Equal Credit Opportunity, Hearings on oversight on the Home Mortgage Disclosure Act and the Equal Opportunity Act Before the Senate Committee on Banking Housing and Urban Affairs, 94th Cong., 2d Sess. (1976); Neighborhood Preservation, Hearings on the cause of neighborhood decline and the impact, positive or negative, of existing programs, policies and laws on existing neighborhoods Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976); Equal Opportunity in Lending, Hearings on oversight on equal opportunity in lending enforcement by the bank regulatory agencies Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976); Home Mortgage Disclosure Act of 1975, Hearings on S.1281 Before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975); Competition in Real Estate and Mortgage Lending, Hearings pursuant to S. Res. 32 and 256 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on Judiciary, 92d Cong., 2d Sess. (1972); Defaults on FHA-Insured Mortgages, Hearings Before a Subcommittee of the House Committee on Government Operations, 92d Cong., 2d Sess. (1972); Financial Institutions and the Urban Crisis, Hearings on Private Investment in the inner city, Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 21 Sess. (1968).

hibit all discrimination in mortgage finance: The Fair Housing Act\textsuperscript{9} and the Civil Rights Act of 1866.\textsuperscript{10} These three statutes, taken together, provide a "complete arsenal" of federal enforcement authority in the area of housing finance discrimination, with varying overlapping enforcement roles carved out for fourteen different federal agencies.\textsuperscript{11}

In general, prohibitions against discrimination provided by Congress under ECOA are sweeping. Section 701 of the Act provides:

It shall be unlawful for \textit{any} creditor to discriminate against \textit{any} applicant with respect to \textit{any} aspect of a credit transaction—

(1) On the basis of race, color, religion, national origin, sex or marital status, or age . . . ;\textsuperscript{12}

Plaintiffs can be expected to argue that this language is simpler, more direct and equally as broad as the antecedent language contained in sections 804(a) and 805 of the Fair Housing Act of 1968.\textsuperscript{13} In fact, it will be argued that it is as broad as Congress could have made it and covers all the categories and prohibitions of sections 804(a) and 805.

Regulation B,\textsuperscript{14} implementing regulations issued by the Federal Reserve Board pursuant to section 703 of ECOA,\textsuperscript{15} provides a series of definitions which, when linked together also appear to be broad.

Regulation B defines "applicant" as "\textit{any person who requests or who has received an extension of credit from a creditor}" as well as "\textit{any person}
who is or may be contractually liable," other than a guarantor and the like. Thus, a mortgagor remains an “applicant” for purposes of interpretation of ECOA after the application process is concluded and after a loan is made. Accordingly, discrimination against a current mortgagor, including discriminatory foreclosures activity, can be a violation. In fact, the phrase “credit transaction” is defined as:

[e]very aspect of an applicant’s dealings with a creditor regarding an application for, or an existing extension of, credit including, but not limited to, information requirements; investigation procedures; standards of credit-worthiness; terms of credit; furnishings of credit information; revocation, alteration or termination of credit; and collection procedures.17

Thus, differential provision of information by a creditor to an applicant is covered. Discrimination in the “terms of credit” is undefined and appears to prohibit all differentiation in terms and conditions of credit on a prohibited basis.

The language “every aspect of an applicant’s dealings with a creditor regarding an application” is likewise broad. First, under a Federal Reserve Board interpretation, an “application” can come into being a very early, informal stage of dealing.18 Second, it could be argued that a creditor’s activity designed to prevent an application from coming into being is, a priori, an “aspect” of an applicant’s dealings “regarding an application.”

It is also noteworthy that the definition of “credit transaction” in Regulation B relates to dealings which are “not limited to” those specifically described in the definition. Plaintiffs will argue that ECOA extends to a broad spectrum of activities not specifically enunciated in the Regulation. The rationale will be that this interpretation, in addition to being textually justified, is consistent with the rules of construction which apply to broad remedial civil rights statutes such as ECOA, which must be construed in light of their overriding purposes.19

Two additional provisions of Regulation B underscore its expansive scope:

17 12 C.F.R. § 202.2(m) (1979) (emphasis added).
18 12 C.F.R. § 202.5(a) (1979). See also unofficial staff letter from the Federal Reserve Board to the Federal Home Loan Bank Board (April 20, 1978). This letter was issued in response to a request by the Federal Home Loan Bank Board (HLBB) for an interpretation which would make the HLBB’s definition of application under its nondisclosure rules parallel to the Federal Reserve Board’s approach under Regulation B. The HLBB’s request and the Federal Reserve Board’s response were bases on a proposal made by the Pennsylvania League of Savings Associations in the course of rulemaking before the HLBB.
Regulation B defines "Prohibited Basis" as:

[r]ace, color, religion, national origin, sex, marital status, or age (provided that the applicant has the capacity to enter into a binding contract); the fact that all or part of the applicant's income derives from any public assistance program, or the fact that the applicant had in good faith exercised any right under the Consumer Credit Protection Act or any state law upon which an exemption has been granted by the [Federal Reserve] Board.20

This definition is expanded first in footnote three to the regulation which reads:

This first clause of the definition is limited to characteristics of the applicant. Therefore, "prohibited basis" as used in this part refers not only to the race, color, religion, national origin, sex, marital status, or age of an applicant (or of partners or officers of an applicant), but refers also to the characteristics of individuals with whom an applicant deals. This means, for example, that, under the general rule stated in section 202.4, a creditor may not discriminate against a non-Jewish applicant because of that person's business dealings with Jews, or discriminate against an applicant because of the characteristics of persons to whom the extension of credit relates (e.g., the prospective tenants in an apartment complex to be constructed with the proceeds of the credit requested), or because of the characteristics of other individuals residing in the neighborhood where the property offered as collateral is located.21

The expansion continues in footnote seven of Regulation B which formalized Congressional intent to apply the "effect test" to discrimination on a prohibited basis under ECOA:

The legislative history of the Act indicates that the Congress intended an "effects test" concept, as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), to be applicable to a creditor's determination of credit worthiness.22

Thus, Regulation B might arguably be viewed as having been deliberately designed to parallel other earlier civil rights laws in scope and breadth.

21 Id. n.3 (emphasis added).
22 12 C.F.R. § 202.6(a) n. 7 (1979). The effects test, which was developed under Title VII of the Civil Rights Act of 1964, increases the scope of prohibited activity since the inquiry is directed toward the consequences of the defendant's actions rather than merely the motivation for them. Albermarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
III. CONSTRUCTION OF ECOA AND REGULATION B
WILL PROBABLY PARALLEL THE EXPANSIVE INTERPRETATIONS UNDER OTHER CIVIL RIGHTS LAWS

Understanding how ECOA will be enforced becomes not so much a matter of “defining discrimination” as it is a matter of articulating a legal standard capable of being applied in varying factual contexts. The source of legal standards by which creditors can evaluate their compliance and potential liability under ECOA, in addition to the text of the statute, Regulation B and the legislative history of the law, is the substantial body of existing judicial precedent under a variety of other existing civil rights laws. This is particularly so with respect to laws such as the Fair Housing Act and the Civil Rights Act of 1866, which are directed at goals similar to those of ECOA.

ECOA provides:

No person by a violation of this subchapter and by a violation of section 3605 of title 42 [section 805 of the Civil Rights Act of 1968] shall recover under this subchapter and section 3612 of title 42 [section 812 of Civil Rights Act of 1968], if such violation is based on the same transaction. 23

This language fairly indicates that both ECOA and the Fair Housing Act of 1968, in addition to overlapping textually, were intended by Congress to reach many of the same practices. Thus creditors will need to deal with the body of interpretative case law which has developed under Title VIII as being directly pertinent to construction of ECOA and Regulation B.

This conclusion is also supported by the legislative history of the 1976 ECOA amendments. In its report to accompany H.R. 6516, the Equal Credit Opportunity Act Amendments of 1976, the Senate Banking Committee pointed out that “this bill is intended to prevent the kinds of credit discrimination which have occurred in the past, and to anticipate and prevent discriminatory practices in the future.” 24

Citing hearing testimony presented on the issue of racial discrimination in credit, the Committee referred to the pilot project studies of racial discrimination in mortgage credit conducted by the bank regulatory agencies under the Fair Housing Act as examples of the practices to be prohibited under ECOA. It also referred to testimony presented by the Department of Justice regarding discriminatory mortgage credit practices:

Past instances of discrimination against racial minorities were cited in the record. More recently, studies conducted by federal agencies have indicated the strong probability of race discrimination in mortgage

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credit... In its testimony, the Department of Justice also noted the emerging problems of credit discrimination as a result of the Arab oil boycott; the Department urged the inclusion of race, color, religion and national origin to parallel other civil rights legislation.\(^{25}\)

Testifying on the impact of amending the Act to prohibit race discrimination, the Department of Justice stated:

\[\ldots \]

For example, the act, if amended in this fashion, would reach the practice of “racial redlining.”

While the Department has taken the position that racial redlining is covered by sections 804, 805, and 817 of the Fair Housing Act, this issue has not been resolved by the courts. Amending the Equal Credit Opportunity Act to include discrimination on account of race would remove any possible doubt that Congress intended to proscribe racial redlining and would provide the Department with additional tool in eliminating this practice.\(^{26}\)

In urging House action on an early version of what ended up as the 1976 ECOA amendments, Congresswoman Sullivan, a principal proponent of the equal credit legislation, commented that provisions prohibiting discrimination on the basis of race, color, religion and national origin should not be considered controversial since “the government has had four years of experience under the Fair Housing Act of 1968 in banning such discrimination in housing. So it is not a new and uncharted challenge in the credit field.”\(^{27}\)

Recently two federal district courts have applied precedents under the Fair Housing Act to cases brought under ECOA. In Shuman v. Standard Oil Co. of California,\(^{28}\) the court found that the awards of damages under ECOA are conceptually similar to awards of damages permitted under the Fair Housing Act. The court stated that the analogy drawn between the two acts to be “persuasive since both acts are statutory remedies for denial of civil rights.”\(^{29}\) In a similar vein, the court in Missin v. Kellog-Citizens National Bank of Green Bay\(^{30}\) held that a jury is required under ECOA just as it is required under the Fair Housing Act.

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\(^{25}\) Id. at 3, U.S. CODE CONG. & AD. NEWS at 405 (emphasis added).


\(^{27}\) 120 CONG. REC. 34767 (1974).

\(^{28}\) 453 F. Supp. 1150 (N.D. Cal. 1978).

\(^{29}\) Id. at 1154.

Given this overlap between ECOA and prior civil rights legislation plaintiffs will ask courts to interpret ECOA with the same breadth applied to these other civil rights laws. This should be particularly so with respect to the prohibition in section 701 against discrimination on the basis of race, color, religion and national origin.

IV. RULES OF CONSTRUCTION UNDER THE FAIR HOUSING ACT WHICH WILL HAVE A STRONG INFLUENCE ON INTERPRETATION OF ECOA IN THE HOUSING CREDIT AREA

Although the interpretations given all civil rights laws may influence the interpretation of ECOA, there are several cases construing the Fair Housing Act which will be strongly influential. In *Trafficante v. Metropolitan Life Insurance Company,* the Supreme Court found that one purpose of the Fair Housing Act was to "replace the ghettos by truly integrated and balanced living patterns." The Court afforded standing to two white apartment renters on the grounds that "while members of minority groups were damaged most from the discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing as they too suffered." Under the Court's instruction, white persons who sought an integrated living environment were denied the important rights of inter-racial association, and thus were "aggrieved persons" under the Fair Housing Act. Recently, a Federal Court of Appeals and the United States Supreme Court relied on this same theory to recognize standing on the part of a township and those who live in a particular geographic area to sue real estate brokers for alleged racial steering. Thus, under the Fair Housing Act, indigenous residents of an area have standing to prevent practices which arguably result in the segregation or resegregation of their areas. Prevention of such segregation, then, is one of the prominent goals of fair housing legislation.

Plaintiffs will argue that ECOA and the Fair Housing Act extend to the same zone of interest. Regulation B expressly extends coverage of the Act to discrimination on account of the characteristics of "individuals with whom an applicant deals [including] the characteristics of other individuals residing in the neighborhood where the property offered as collateral is located." From this point of view, "steering" of a black or white person to FHA-insured financing or to nondepository sources of credit on the basis of racial composition of an area can constitute discrimination in

32 Id. at 211.
33 Id. at 210.
35 12 C.F.R. § 202.2 (z) n.3 (1979).
the housing credit transaction just as it constitutes a form of discrimination in a housing sales context. Both tend to perpetuate segregation.

More often, the courts have found discriminatory activity based upon subtle action by intermediaries which abridges the purchasers' freedom of choice. The racial nature of the conduct may be implicit, without the necessity of race being overtly mentioned at any point. As in "blockbusting" and sales steering situations, racial credit steering occurs in an atmosphere "charged with race."

A description of the role of the real estate broker in a sales steering case might be seen to strongly resemble the role which creditors might play in credit steering. For instance, in *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, the court described the significant effect which intermediaries, who act between purchaser

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56 In Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), the court described the subtlety with which steering can be achieved and the impact which it can have on freedom of choice:

Unlawful steering or channelling of a prospective buyer is the use of a word or phrase or action by a real estate broker or salesperson which is intended to influence the choice of a prospective property buyer on a racial basis. United States v. Robbins, 1974 P-H EOH ¶ 13,655 (S.D. Fla. 1974). Where choice influencing factors such as race are not eliminated, freedom of choice in the purchase of real estate becomes a fantasy. Coppedge v. Franklin County Board of Education, 273 F. Supp. 289, 298-299, (E.D.N.C. 1967), aff'd 394 F.2d 410 (4th Cir. 1968); Lee v. Macon County Board of Education, 267 F. Supp. 458 (M.D. Ala. 1967), aff'd sub. nom., Wallace v. United States, 389 U.S. 215 . . . (1967). It is the freedom of choice for the purchaser which the Fair Housing Act protects. Hence, race need not be the sole reason for the defendant's conduct if it is an element of that conduct. Williamson v. Hampton Management Co., 339 F. Supp. 1146, 1147 (N.D. Ill. 1972).

Accordingly, any action by a real estate agent which in any way impedes, delays or discourages on a racial basis a prospective homebuyer from purchasing housing is unlawful. This is in accord with the position taken in Mayers v. Ridley, 465 F.2d 630, 652-3 (D.C. Cir. 1972), where the Court of Appeals for the District of Columbia stated that the Fair Housing Act was intended to have "the broadest objectives and scope" and to prohibit not only open, direct discrimination but also all practices which have a racially discouraging effect.

It is the opinion of this Court that when a real estate agent actively undertakes an effort to influence the choice of a prospective homebuyer on a racial basis, whether on his own initiative or in response to the buyer's initiative, the agent either directly or indirectly discourages the prospective homebuyer from purchasing a home in a particular area. Where available housing has been traditionally denied to blacks because of their race, this conduct tends to perpetuate racially segregated communities. The Court, therefore, concludes as a matter of law that steering is a violation of Section 3604(a) of the Fair Housing Law.

*Id.* at 1047-48 (emphasis added).

37 One District Court described this racially charged atmosphere as follows:

In this maelstrom, the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result, there is very little cause or necessity for an agent to make direct representations as to race or as to what is going on. On the contrary both sides already know, all too well, what is going on. In short, for an agent to get a listing or make a sale because of racial tensions in such an area is relatively easy, whereas the direction mention of race in making the sale is superfluous and wholly unnecessary. United States v. Mitchell, 335 F. Supp. 1004, 1006 (N.D. Ga. 1971) (emphasis by the Court) *aff'd sub. nom.* United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

and seller, can have in preserving segregated housing patterns. The court noted that not only are the services of such intermediaries "crucial" in the buying and selling of homes but also that the influence of their actions were long lasting. Thus their efforts to maintain or extend segregated housing patterns came within the purview of Title VIII. Plaintiffs will certainly seek to apply the same reasoning in the credit context by analogizing the impact of the financial intermediary to the real estate intermediary. Further, it is the freedom of choice in the selection of credit which the Equal Credit Opportunity Act protects. Racial credit steering can be a discriminatory credit practice when it results in racially-based, choice-influencing factors being applied. In transitional neighborhoods, the steering of borrowers to FHA insured sources of credit and away from conventional sources of financing is sometimes closely tied to the racial steering in the sale of real estate and to blockbusting phenomena. Thus, it is on occasion, part of the same process of perpetuating segregation.

Lenders can anticipate that plaintiffs and government agencies will assert that such practice falls reasonably within the prohibition of Regulation B, as well as within the coverage of the Fair Housing Act. In one sense, they will assert that the practice discourages applicants from "making or pursuing" applications for conventional loans. In another, they will allege that it is discriminatory as to "information requirements," the "furnishing of credit information" from the lender to the borrower and the "terms" of credit. All of the above would be on a "prohibited basis," as that phrase is interpreted under Footnote 3 of Regulation B and the applicable rules of construction set forth in housing cases.

As noted, a comparison of the textual language of Regulation B with section 805 of the Fair Housing Act, together with indications in the legislative history of ECOA that the two Acts are directed at the same evils, suggests that the "unqualified" prohibition in ECOA will be regarded to be as broad as section 805. Accordingly, judicial interpretation of section 805 can also be seen as relevant to construction of ECOA. Three fair housing cases can be expected to have great weight in an interpretation of Regulation B.

In Harper v. Union Savings Association, the court conferred to the "unqualified" phrase "terms and conditions" in section 805 of the Fair

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39 Id. at 1075-76.
41 Id.
42 12 C.F.R. §§ 202.4 and 202.2(m).
43 Id.
45 S. REP. No. 94-589, supra note 25.
Housing Act as being “entitled to the broadest possible construction” pursuant to the Supreme Court’s admonition in *Trafficante.* On this basis, it held that discriminatory foreclosure procedures are a violation of Section 805. The second case is *Laufman v. Oakley Building and Loan Co.* Here the court characterized the text of section 805 as “blunderbuss language” and held that it prohibits “racial redlining,” or the basing of lending decisions on factors relating to the racial composition of an area. More significantly, in *Harrison v. Heinzeroth Mortgage Co.*, the court applied section 805 to a factual circumstance unique in its applicability to the kinds of contacts that typically arise between borrower and mortgage lender in transitional neighborhoods. Therein, a white plaintiff sought to purchase a home in an integrated area but was told by the defendant mortgage company that less favorable terms than those requested would be given because of the racially transitional nature of the area. The court held that such conduct clearly violated the prohibitions of the law.

Each of these decisions will be potentially useful to plaintiffs in attempting to apply to ECOA the same broad brush used under Title VIII.

Creditors should note that discrimination of the kind revealed in *Harrison* is generally regarded as “purposeful” discrimination. This is, race

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49 The Court’s description of the facts upon which liability was based is as follows:

Briefly stated, the plaintiff claims that early in the year 1974 he was living in an apartment in an area of Toledo called the Old West End, which is in general a racially mixed area. He decided to buy a house, and located one which pleased him some seven blocks from his apartment. He entered into an informal, unwritten purchase agreement with the owner, and gave the owner one hundred dollars earnest money. In order to finance the purchase, the plaintiff desired to get a conventional mortgage loan with a ten percent down payment with the assistance of the Mortgage Guaranty Insurance Corporation (hereafter MGIC). Ultimately he succeeded in doing so and purchased the property which was located at 2702 Scottwood Avenue in Toledo.

To commence his search for financing, the plaintiff looked in the classified section of the telephone book and selected the defendant Otto G. Heinzeroth Mortgage Company (hereafter defendant Company) to call. Defendant Company is a corporation and the defendant Otto G. Heinzeroth individually (hereafter defendant Heinzeroth), is its president and owner.

In his telephone call to the defendant company, the plaintiff talked with a person who identified himself as the defendant Haugh (hereafter Haugh). The plaintiff says that after he told what he wanted in a way of financing, Haugh asked where the house was, and when plaintiff told him, Haugh said that was a bad area, as it was transitional from white to black. Because of the racial problems there, the only conventional financing available was with a fifty percent downpayment. Haugh said that if the plaintiff would look for property elsewhere, he would probably be able to get the financing he wanted.

Later the plaintiff talked with Haugh on two other occasions, with similar talk about the racial character of the neighborhood. Haugh did reduce the amount of the downpayment to forty percent, and in the last conversation, which was a personal meeting on April 4, 1974, Haugh again elaborated on the racial problems. He sketched a map of the area showing the location of the house and of Scott High School, which Haugh said had ninety-nine percent black students.

*Id.* at 895-96.
50 *Id.* at 896.
was an intentional part of the loan officer's motivation. In these cases, it is not exculpatory to show:

1. that the intent was not malevolent;
2. that the intent was based on economic motivation;
3. that the intent was based on a perception of risk; or even
4. that the perception of the risk was accurate, when based on an overt racial standard.

Similar interpretations will be urged under ECOA. Thus, the standard may not be the lender's intentions but the impact of a particular course of action. As held under the Fair Housing Act, "[a]ny course of conduct or way of doing business which actually or predictably results in different treatment of whites and blacks is a discriminatory pattern or practice, irrespective of motivation." Accordingly, under this approach, even if a person's principal motivation is to make money, sell property, or make loans, a violation can result.

Further, where purposeful discrimination of the kind found in Harrison is present, it may not be a defense that dealing on a nondiscriminatory basis will actually have adverse financial consequences. In fact, even where it threatens the viability of the business, purposeful discrimination will not be upheld by the courts. Consequently, a defense based on actual adverse reaction of whites to blacks moving into a neighborhood has been held not to be a reason for allowing discrimination to occur. This result has been found by the courts to be necessary in order to effectuate the purposes of the law and is a well established principal in civil rights. Creditors should anticipate that principles announced under the Fair Housing Act will be asserted against them under ECOA. Whether they will apply with equal force in the context of credit transactions under ECOA, however, is as yet undecided.

V. RULES FOR DETERMINING THE EXISTENCE OF PRIMA FACIE CASE OF RACIAL CREDIT STEERING UNDER ECOA WILL BE BORROWED FROM OTHER AREAS OF CIVIL RIGHTS ENFORCEMENT

In proving an alleged violation such as credit steering, statistics can be expected to be important. Even where the violation attempted to be proven is purposeful rather than "effects" type discrimination, creditors

can anticipate plaintiff’s use of statistics to infer intent. In fact, in cases of racial discrimination it has been held that “statistics often tell much, and courts listen,” and “nothing is as emphatic as zero.”

Generally, in a purposeful discrimination case, statistics are important for their evidentiary role, rather than a device which shifts the burden of persuasion. Yet where statistics are highly probative, they may be regarded as shifting the burden of going forward. Thus, under the Fair Housing Act, statistics have often been held to make out a prima facie case of purposeful discrimination.

There are a variety of statistical configurations which can be probative in cases of credit discrimination. Cases under the housing and employment acts indicate that liability could be established on the basis of a statistical showing combined with a showing of the absence of objective standards to govern employee action. Thus, proof of statistical disparity combined with proof of a creditor’s failure to supplant loan officers’ discretion with objective criteria for determining whether a person qualifies for a conventional loan of FHA loan might create exposure.

Recent cases have begun to more clearly define the distinction between the rules of construction in purpose cases (disparate treatment) and effects cases (disparate impact). Generally, the rules for establishing a prima facie case of disparate treatment are governed by the decision of McDonnell Douglas Corp. v. Green and its progeny. Both a disparate treatment and disparate impact theory, however, may be applied to a particular set of facts simultaneously.

As noted, Regulation B codified the Congressional intent that the effects test apply to interpretation of Regulation B. Thus, the applicability of the test derives not from action of the Board of Governors but from the intention of Congress.

The apparent underlying reason for the adoption of the “effects test” under ECOA seems clear. As in legislating against employment discrimina-

65 Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff’d 371 U.S. 37 (1962).
69 411 U.S. 792 (1973). See also Albemarle Paper Co. v. Moody, 422 U.S. at 405.
70 Int’l Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15.
tion, Congress was not simply concerned with reforming mental attitudes or eliminating invidious bias. Rather, Congress sought to achieve equal opportunity in fact, eliminating the "built-in headwinds" which resulted from a history of racial discrimination and from systemic factors in the housing credit market which inhibit opportunity for minorities and contribute to segregation. Apparently Congress was concerned not only with the motives underlying patterns of discrimination, but also with the objective phenomenon itself. The application of the effects test in the credit area, however, can be expected to be considerably more difficult than in other contexts, due to the complex nature of a credit transaction.

At the same time, plaintiffs are likely to attempt to rely on effects test precedents established under laws such as the Fair Housing Act and Title VII, when suing under ECOA. Thus, recent precedents in this area may be used to support the argument that racial credit steering violates ECOA, though done for economic, racially neutral reasons.

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the Court of Appeals for the Seventh Circuit set forth several creative guidelines in applying the effects test to housing cases. These guidelines may be readily applicable in a housing credit context as well.

62 401 U.S. at 432.

63 Significantly, section 3 of an early version of H.R. 6516 contained language which would have limited an "effects test" construction of the Act. This section provided:

The fact that a creditor’s loans to any classification enunciated in Section 701(a) are not equal to the population percentage of such classification in the creditor’s trade area is not a violation of Section 701.

Congressman Robert Drinan (D. Mass.), a proponent of ECOA, made the following comments relative to this provision and its deletion:

Despite the praiseworthy provisions and goals of this bill two of its sections gave me a great deal of pause when H.R. 6516 was first placed on the calendar. . . . First, language in section 3 of the act appeared to diminish some of the thrust of the decision of the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In that and other cases, the courts have held that statistical evidence showing discrimination constitutes a prima facie case which casts the burden on the defendant to come forward with facts to rebut the presumption of discrimination. To undercut that evidentiary rule, which has been a part of civil rights law for many years, would be to do a great disservice to the attempts to eliminate all vestiges of discrimination in American life.

I am pleased to note, however, that . . . an amendment was agreed to which would remove the offending section from the bill.

121 CONG. REC. 16747 (1975).

Construing the phrase “because of race” in Title VIII, the court observed that:

Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment “to replace the ghettos” by truly integrated and balanced living patterns."

Holding that an “effects test” concept reasonably applies under the Fair Housing Act, the court noted that “intent, motive and purpose are elusive subjective concepts” in proving discrimination. Further since overt bigotry is now unfashionable, “evidence of intent has become harder to find” and focusing “on intent permits racial discrimination to go unpunished.”

Significantly the Court found that apparently neutral decisions about housing can produce two kinds of racially discriminatory effects. The first effect results when one racial group experiences a greater adverse impact than another. The second results when an ostensibly neutral business or governmental decision perpetuates segregation and thereby prevents interracial association. This type of effect “will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups”

According to this view, practices which perpetuate a racially dual market in themselves constitute discrimination “because of race.” This coincides with the perspective of the Supreme Court in construing the Civil Rights Act of 1866. Under this Act, the Court also looked at the impact of real estate practices on the process of “ghettoeization”: “when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.”

Thus, in the housing area, courts seem to recognize the principle that discrimination and other unlawful practices which tend to segregate or “herd into ghettos” can arise simply through the operation of a system un-

65 558 F.2d at 1289 (emphasis added).
66 Id. at 1290.
67 Id.
68 Id. (emphasis added). The Court of Appeals for the Third Circuit followed Arlington Heights in holding the effects test applicable under Title VIII. Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977). In Rizzo, the Court was persuaded by the legislative history of Title VIII which supported the conclusion that intent was not to be the sole benchmark under Title VIII. Other courts concur. In Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1977), the Court stated that “effect, not motivation, is the touchstone because a thoughtless housing practice can be just as unfair to minority rights as a willful scheme.” Id. at 233. See also, Robinson v. Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979); Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) cert. denied, 422 U.S. 1042 (1975); Kennedy Park Homes Assoc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1012 (1971). Cf. Boyd v. Lefrak, 509 F.2d 1110 (2d Cir. 1975), cert. denied, 423 U.S. 896 (1975).
concerned with its own impact: "Whatever the law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."\textsuperscript{70} This principle, in fact, these very words, has been held to support the applicability of the effects test under Title VIII.\textsuperscript{71}

When applied to ECOA these expansive concepts add flesh to the bare bones of the skeleton "effects test" mentioned in Regulation B.\textsuperscript{72} If so called racial credit steering practices have the effect of leading to the resegregation of neighborhoods, they might be viewed as discriminatory credit practices under ECOA as well as discriminatory housing practices under Title VIII. This, of course, can be significant since a plaintiff will have both procedural and substantive advantages in suing under ECOA rather than or in addition to the Fair Housing Act.\textsuperscript{73}

VI. AN "EXPLOITATION THEORY" MAY APPLY UNDER ECOA

Another related theory of discrimination developed by the courts in the housing credit and credit insurance areas seems to be applicable to construction of ECOA, and will also have an impact on the theory of the illegality of racial credit steering. In Clark v. Universal Builders, Inc.,\textsuperscript{74} the court adopted an "exploitation theory" under the Civil Rights Act of 1866. That Act, which the court found applied to financing of housing, provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."\textsuperscript{75}

In Clark, the plaintiffs were a class of black citizens who had purchased newly constructed houses in Chicago from defendants under land installment


\textsuperscript{71} United States v. City of Black Jack, 508 F.2d at 1179.


\textsuperscript{73} For instance, the Fair Housing Act has a six month statute of limitations for the filing of complaints with the Secretary. 42 U.S.C. § 3610(b) (1976). Under ECOA, the statute of limitations is two years and as long as three years in some instances. 15 U.S.C. § 1691e(f) (1976). ECOA has a ceiling of $500,000 or one percent of net worth on punitive damages in class actions, and $10,000 in individual cases. 15 U.S.C. § 1691e(b) (1976). The Fair Housing Act limits punitive damages to $1,000 42 U.S.C. § 3612(c) (1976). Further, financial need is the criterion for award of attorney fees. Id. This criterion does not exist under ECOA.

\textsuperscript{74} 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1974).

contracts during the period from 1958 to 1968. The defendants included the building contractor of the houses and the various land companies through which the houses were sold to the plaintiffs. In court, plaintiffs, claimed that as a result of intense racial discrimination in Chicago and its metropolitan area there existed a housing market for whites and a separate housing market for blacks. The latter was confined to a relatively small geographical area in the central city. The plaintiffs contended that the demand among blacks for housing greatly exceeded the supply of housing available in the black market and that the defendants exploited this situation by building houses in or adjacent to black areas and selling the houses to plaintiffs at prices in excess of the amounts which white persons paid for comparable residences in neighboring urban areas, and on terms favorable than those available to white buyers of similar properties.

Defendants contended that absent a showing of the traditional form of discrimination, namely, that defendants refused to sell to blacks because of their race, or offered to sell the same houses to whites at lower prices or on more favorable terms than they offered to sell to blacks, plaintiffs did not establish a case under section 1982 of the Civil Rights Act of 1866. The defendants asserted that the houses they sold to the plaintiffs in the black market were available to whites and would have been sold on the same terms and for the same prices as sales to black plaintiffs. Therefore, defendants argued, plaintiffs enjoyed "the same right" as enjoyed by white citizens to purchase houses in the black market. Moreover, it was urged that other sellers, and not defendants, discriminated against plaintiffs in the first instance by refusing to sell to plaintiffs housing in other urban areas and thereby excluding them from the white market. The defendants claimed that an interpretation of section 1982 proscribe their acts would be tantamount to holding defendants liable for the discrimination of others without a showing of any discrimination by them.

The court, relying on Jones v. Mayer, interpreted the Civil Rights Act of 1866 "as a broad based instrument to be utilized in eliminating all discrimination and the effects thereof in the ownership of property." This, it can be argued, is reasonably similar to the language and scope of ECOA when applied to elimination of discrimination in housing credit.

The court held, in language peculiarly well suited to the concept of racially dual credit markets:

We need not resort to a labelling exercise in categorizing certain activity as discriminatory and others as not of such character for section 1982 is violated if the facts demonstrate that defendants exploited a

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76 501 F.2d at 330.
77 392 U.S. 409 (1968).
78 501 F.2d at 330.
situation created by socioeconomic forces tainted by racial discrimination. Indeed, there is no difference in results between the traditional type of discrimination and defendants' exploitation of a discriminatory situation. Under the former situation, blacks either pay excessive prices or are refused altogether from purchasing housing, while under the latter situation they encounter oppressive terms and exorbitant prices relative to the terms and prices available to white citizens for comparable housing. 79

The court reasoned that defendants could not justify discriminatorily high prices for blacks on the theory that the defendants would have charged whites the same price.

To accept defendants' contention would be tantamount to perpetuating a subterfuge behind which every slumlord and exploiter of those banished to the ghetto could hide by a simple rubric: The same property would have been sold to whites on the same terms. 80

The court did not accept defendants' defense that others, not they, actively discriminated. Nor would it accept the argument that the economic market place produced the results since the laws of the market place "are affected by the continued market condition which is grounded in and fed upon by racial discrimination - that is, the available supply of housing is determined by the buyer's race." 81 The court concluded that the dependence of economic phenomena upon race was not a valid justification for the price and profit differentials.

Contrary to the trial court's stance, the shortage of housing here was triggered not by an economic phenomenon but by a pattern of discrimination that has no place in our society. Accordingly, neither prices nor profits - whether derived through well-intentioned, good faith efforts or predatory and unethical practices - may reflect or perpetuate discrimination against black citizens. We agree with Judge Will's statement that "there cannot in this country be markets or profits based on the color of a man's skin," Buyers League v. F&F Investment, .... Price and profit differentials between individual buyers may be justified on a multitude of grounds for example, the prospective purchaser's reputation or his financial position and potential earning power. But price or profit may not turn on whether the prospective buyer has dark or light pigmentation. 82

The practices complained of in Clark involved the substitution of installment sales financing for conventional financing in the sale of homes. The court observed that land sales contracting obviated the involvement by mortgage lending institutions who would have disclosed important appraisal

79 Id.
80 Id. at 331.
81 Id.
82 Id. at 332 (footnotes omitted).
value information to borrowers about terms of financing. Purchasers, having been denied this information, could not measure the disparity between the appraised value and sales price. 83

From the analysis in Clark, plaintiffs would argue that it is a discriminatory housing credit practice to steer applicants to a particular type of financing vehicle, where the lender is operating in a racially dual market, and a significant correlation can be drawn between the type of financing offered and the race of the applicant. In other words, where whites or buyers in white areas seem to consistently obtain conventional loans from the same lender, while nonwhites and buyers in nonwhite areas consistently receive FHA or VA loans, a strong inference, if not a prima facie case of discrimination is established. Under the reasoning of Clark, the case is also made out where the lender is operating only in the nonwhite side of the dual market, unless some overriding economic justification can be advanced to explain the racial disparity.

A similar argument is suggested in a pair of cases decided together in the Northern District of Illinois: Ortega v. Merit Insurance Co. and Hernandez v. United Fire Insurance Co. 84

In Ortega, the plaintiff alleged the presence of a discriminatory financing scheme in the sale of credit property insurance. 85 “Credit property insurance is sold, generally, in connection with retail installment credit sales of property. The insurance protects against damage or destruction to the property during the life of the contract.” 86 Two types of credit property insurance were relevant to the allegations:

1) single interest insurance, which protects only the creditor's interest, defined as the unpaid balance at the time of the occurrence of the insured risk; and
2) dual interest insurance, which purportedly protects both the creditor's and the debtor's interest, so that if the depreciated value of the property destroyed is worth more than the creditor's interest, the debtor receives the difference. Conversely, if the property destroyed is not worth more than the creditor's interest, the benefits paid under the dual interest policy will be no greater than those paid under the single interest policy. 87

The plaintiffs alleged that United sold single interest insurance in stores with predominantly Caucasian customers at a rate of $1.50 per $100 of insurance per year. In stores with predominantly non-Caucasian customers,

83 Id. at 335-36.
85 433 F. Supp. 137.
86 Id.
87 Id.
only dual interest insurance was sold. Dual interest insurance sold at the higher rate of $4.00 per $100 of insurance per year. Merit was alleged to have sold dual interest insurance at the $4.00 rate to selected stores, whose customers were primarily black or Hispanic.88

Defendant Merit moved to dismiss on the ground that there were no allegations that it "sold property insurance to different people based on race, and that none of the persons who contracted with Merit were in any way forced to contract or were unable to purchase insurance from any other person or entity."89 Merit stated that, at most, the plaintiff alleged only that it has "sold credit insurance in minority neighborhoods at high prices."90

As to Merit, the court refused to dismiss the complaint.

We recognize, as defendants have urged, that the credit consumer business is distinguishable from the residential housing market. It is also true that the Clark opinion relied upon extensive socio-economic testimony to support its findings. It is not our function at this time, however, to determine the merits of the instant controversy. Plaintiff has alleged that a de facto system of discriminatory credit insurance pricing exists, and that defendant is exploiting this system. This is sufficient to withstand the motion to dismiss.91

In refusing to dismiss the case against the other defendant, the court observed that it constitutes unlawful racial discrimination to sell only one credit insurance product in a racially dual market when the defendant know that another product might be more advantageous to the buyer/applicant.

With knowledge that dual interest insurance had no advantage to it over single interest, and with knowledge of the racial makeup of its customers and the practices of United, Aronson allegedly sold only the higher priced insurance with its goods. As we stated in Contract Buyers,

[D]efendants' position elaborated is that if property is sold to a negro above what can be demonstrated to be the usual market price, there can be no discrimination unless the same seller actually sells to whites at a lower price. It should be clear that in law this result would be obnoxious. In logic, it is ridiculous. It would mean that the 1866 Civil Rights Act, which was created to be an instrument for the abolition of discrimination, allows an injustice so long as it is visited exclusively on negroes.

In sum then, there is no reason to distinguish a refusal to sell on the ground of race and a sale on discriminatory prices and terms.96

88 Id.
89 Id. at 138.
90 Id. at 140.
91 Id. at 140-41.
92 Id. at 143-44.
The possible application of this line of reasoning to so-called credit steering practices is apparent.

G. Conclusion

While enforcement of ECOA should never proceed on the basis of a preconceived conclusion as to whether discrimination exists in a particular case, it should and does proceed upon a preconceived and clearly articulated conclusion as to what discrimination is and how it can be recognized. Lenders can anticipate and take steps to avoid future challenges by recognizing the way in which credit laws such as ECOA are likely to be interpreted in the future.

Based on precedents in the fair housing area, the concept of unlawful discrimination in mortgage lending as a legal standard under ECOA will probably apply to practices which go beyond unfavorable treatment on the basis of the personal characteristics of the borrower, and apply to an assortment of practices sometimes referred to as “redlining,” “credit steering” or “FHAing” of a neighborhood.

Like the Fair Housing Act, ECOA most likely prohibits practices which have a “segregative effect” as well as practices which have a disproportionate, negative impact on minorities. Accordingly, specific practices which contribute to or exploit a racially dual housing market or a racially dual credit market and thus inhibit freedom of choice on a racial basis will most likely be viewed as prohibited under ECOA by the enforcement community.

Like the Civil Rights Act of 1866, ECOA may be interpreted to prohibit “exploitation” of a racially dual market, even though the actions are based on economic motivations. Accordingly, practices which result in less favorable terms, conditions and availability of credit in one segment of a racially dual credit market will also be regarded as prohibited under ECOA.

Persons seeking financing to purchase homes in areas which are racially transitional or predominantly nonwhite may be denied a full and free choice of credit vehicles and financing options for which they might qualify. To the extent this occurs it may be seen as contributing to the perpetuation of certain racially dual market condition, inter alia, by “stigmatizing” neighborhoods in a way which leads to increased racial polarization and a decrease in freedom of choice. This situation affects both white and nonwhite applicants for credit in certain areas, but overall would have a disproportionately more severe impact on nonwhite applicants who comprise the majority of applicants seeking credit in the affected areas. In today’s environment of
federal pressure to have creditors reinvest in our older neighborhoods, thrift institutions should take appropriate preventive measures to anticipate these challenges.93

93 Conventional lenders who participate in governmental financing programs may wish to take steps to be certain that lending personnel do not, consciously or unintentionally, offer or promote financing programs solely or more heavily in integrated as opposed to predominantly white areas. This would include being certain that homebuyers from certain areas or those referred by certain brokers, not be presumed to be interested only in government backed financing alternatives. Conversely, conventional or privately insured financing should be offered or explained to all buyers who qualify. Lenders who have prepared written loan underwriting standards or CRA Statements may wish to include appropriate disclamatory language in these documents. Buyers from certain areas should not be automatically referred to mortgage banking service corporations or other sources of government related loans, solely on the basis of geographic location.