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URBAN HOUSING FINANCE AND THE REDLINING CONTROVERSY

I. INTRODUCTION

"REDLINING" tends to trigger a varied response from community action groups and financial institutions. The term is used by public interest and community action groups as a code word for alleged policies and practices of financial institutions that earmark certain urban neighborhoods as areas where conventional home mortgage loans are not approved. The charge is made that institutional lenders have literally or figuratively red-penciled neighborhoods into a downward spiral of blight, abandonment, and demolition. Financial institutions are genuinely concerned about the use of this vivid term to spearhead the attack on what they view as responsible lending policies and practices based on realistic appraisals of housing and credit risks in urban areas. The term is receiving rather wide usage as current legislative and legal developments bring the controversy before the public eye.

The redlining controversy must be considered from the perspective of what is happening to housing stock in older cities. Once viable urban neighborhoods have become wastelands, scarred by traces of demolished

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1 While the essence of redlining is geographical discrimination in home loans, most definitions of redlining fall into two general categories. Racial redlining refers to policies or practices by which lending institutions discriminate in the granting of, or in the setting of terms for home loans based upon the perceived racial characteristics (determined by present or projected occupants) of the neighborhood in which the borrower wishes to live. Economic redlining refers to policies and practices of lenders that consider certain geographical areas as zones of excessive economic risk, regardless of the characteristics of the individual borrower or the property involved.

2 Community action groups that emphasize racial redlining from the black perspective find support for their view in such research as THE NATIONAL URBAN LEAGUE, THE NATIONAL SURVEY ON HOUSING ABANDONMENT (1971) or R. DEVINE, W. RENNIE, & N. SIMS, WHERE THE LENDER LOOKS FIRST: A CASE STUDY OF MORTGAGE DISINVESTMENT IN BRONX COUNTY, 1960-1970 (1973). The white ethnic perspective on racial redlining is articulated in ADUBATO & KRIKUS, WHY A NEIGHBORHOOD STABILIZATION STRATEGY? (1974) and Newsletter of National Center for Urban Ethnic Affairs, Community Action on Redlining, June 1974, at 10. The major analysis of economic redlining and attendant community action strategies has been developed by the National Training and Information Center in Chicago and distributed to their network, the National People's Action on Housing, through the newsletter Disclosure. See also Organizing to Save the Cities — Savings and Loans Challenged on Redlining Issue, JUST ECONOMICS, Sept. 1974, at 6.


housing and dotted with vacant buildings. Blight and abandonment are spreading from the inner city ghettos of black and Hispanic poor to transitional, mixed areas, white ethnic working class neighborhoods, and even inner-ring suburbs. The phenomenon is not limited to a natural process of discarding used-up, unneeded shelter; safe, sound, adequate, and even attractive housing is falling into disrepair and being abandoned at a time when the housing shortage for low and middle income people is reaching an acute stage. Though urban blight involves a complex of social and economic processes, the redlining controversy focuses attention on one possible strategy to short-circuit this depressing scenario of neighborhood decline — adequate money for home improvement loans and first mortgages should be made readily available to conscientious owners and purchasers. If redlining is indeed occurring, it results in the inability of current homeowners or prospective home-buyers to get loans on reasonable terms for a house in the redlined neighborhood, despite their present or future financial status or the soundness of the building.

There is nearly universal agreement that essential to the preservation of America’s existing housing stock is the availability of home loans. The consensus collapses, however, when attempting to allocate the responsibilities and risks. Public interest and community action groups place the responsibility on financial institutions arguing that because they have taken money out of communities they are now bound to reinvest in local home loans rather than “disinvest” by financing projects outside the urban neighborhoods. Unhappy with the track record of the Federal Housing Authority (FHA), such groups have looked to the government, not for direct loan assistance, but for more effective regulation of financial institutions. Banks and savings and loan associations have resisted the application of outside definitions of “reasonable risk” in

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5 F. Case, Inner-City Housing and Private Enterprise (1972); L. Downie, Mortgaging America, From Slums to Suburbs (1975); M. Stegman, Housing Investment in the Inner City: The Dynamics of Decline (1972); Taggart, Redlining: How the Bankers Starve the Cities to Feed the Suburbs, Planning, Dec. 1974, at 14.

6 Taggart, supra note 5.

7 “Disinvestment” refers to four alleged practices of financial institutions:
   (1) Refusal to make mortgage and home improvement loans to credit-worthy people in those city neighborhoods and older suburbs which are not characterized by unusual or excessive risks. (2) Exporting of savings generated from city neighborhoods and older suburbs into other communities where they are invested in residential construction and mortgage loans without first considering the lending needs of older communities. (3) Relocation of associations’ home offices out of the older communities and into other areas, usually into newly developing suburbs or “down-town” business centers. (4) Withdrawal of opportunities for residents in older communities to save at neighborhood-based savings and loan associations.

Administrative Meeting on Racial Discrimination in Lending Before the Department of Housing and Urban Development, Hartford, Conn., May 21, 1974 (testimony of Calvin Bradford) (emphasis in original).

8 In many cities, especially in the Midwest, the FHA has been perceived as a neighborhood destroyer, and community action groups have organized to obtain “FHA paybacks” — damages to cheated families. See B. Boyer, Cities Destroyed for Cash: The FHA Scandal at HUD (1973); Senate Comm. on Banking, Housing and Urban Affairs, Report No. 187 on Home Mortgage Disclosure Act of 1975, 94th Cong., 1st Sess. 11-12 (1975); Stewart, Hard Panic Peddlers, FHA Loans Destroy Neighborhood, Chicago Press, May 15, 1974, at 1.
loanmaking and have depended on the government to cover high-risk loan prospects. Federal agencies have preferred voluntary partnerships of property owners, lenders, and local governments and the use of community development block grants to local governments to insure home loans by local financial institutions.

This note will focus upon three basic issues raised by the redlining controversy: first, whether or not redlining is in fact occurring; second, the role of government through legislation and regulatory agencies; third, emerging areas of litigation.

II. MIXED REACTIONS TO THE EVIDENCE ON REDLINING

A. Indicators of Redlining

In 1970, the problem of housing abandonment crystalized and developed into a significant national issue. A variety of causes, including tight money for rehabilitation loans, were isolated. By 1972, governmental agency surveys had documented indications of widespread redlining. University research centers have also provided sophisticated data indicating that redlining does exist.

9 "The proper approach is . . . to spread lending risks through Government mortgage insurance, rather than concentrate these risks on the particular lenders and depositors who happen to be located in deteriorating neighborhoods." S. 1281 Hearings at 808 (testimony of William A. Beasman, Jr.).

10 See letter from Robert A. Elliot (for Carla A. Hills, Secretary of Housing and Urban Development) to William Proxmire (Chairman, Comm. on Banking, Housing, and Urban Affairs), May 22, 1975, in S. 1281 Hearings at 17-19; letter from Arthur F. Burns (Chairman, Board of Governors, Federal Reserve System) to William Proxmire, May 16, 1975, id. at 20-21.


13 For an analysis of government studies in 1972 that indicated the occurrence of redlining, see Doebrman, Redlining: Potential Civil Rights and Sherman Act Violations Raised by Lending Policies, 8 Ind. L. Rev. 1045 n.3 (1975).

14 Northwestern University’s Center for Urban Affairs established the Urban-Suburban Investment Study Group.

Dr. George Sternlieb of the Center for Urban Policy Research at Rutgers University has also conducted extensive research on housing abandonment. See, e.g., G. STERNLIEB, THE URBAN HOUSING DILEMMA (1971), in S. 1281 Hearings at 547; G. STERNLIEB & R. BURCHELL, RESIDENTIAL ABANDONMENT (1973). He has concluded that “there is considerable evidence of ‘redlining.’” Sternlieb, The Urban Financing Dilemma (a staff research report prepared for the Senate Comm. on Banking, Housing and Urban Affairs), in S. 1281 Hearings at 551. Sternlieb noted, however, that studies of disinvestment attempted by researchers outside the financial institutions are hampered by inadequate access to essential data with the result that “findings are often piecemeal.” Id. at 570.

The prestigious MIT — Harvard Joint Center surveyed all relevant studies and reports available in late 1974 and concluded:

Red-lining — the unavailability of mortgages on the basis of area — although no longer “formally” practiced, nevertheless is found to be effectively present. A process of disinvestment by local thrift institutions is found to be occurring in many inner-city neighborhoods. . . .
Illinois has been in the forefront of states that have scrutinized home loan decisionmaking. Governor Dan Walker's Commission on Mortgage Practices in cooperation with the Illinois Legislative Investigating Commission conducted extensive hearings and engaged in technical research on home loan practices that resulted in the following redlining indicators: scores of serious redlining complaints by apparently creditworthy loan applicants, the testimony of banking and federal supervisory officials, technical analysis of available mortgage data by the University of Chicago, and subpoenaed records of financial institutions. The conclusion that redlining existed was tempered by the failure of some Illinois financial institutions to provide the necessary information.

California officials have been less hesitant to conclude that redlining is a widespread practice in their state. The California Business and Transportation Agency conducted hearings in the summer of 1975, in Los Angeles and San Francisco, and directed the Department of Savings and Loans to engage in research on home mortgage practices. The agency concluded that the research clearly evidenced mortgage loan deficiencies in many areas. Neighborhoods were being redlined by financial institutions because of the presence or the proximity of black or Chicano population concentrations. These indications of redlining in California are significant in understanding the national scope of neighborhood disinvestment; in contrast to the generally declining urban population centers in the Northeast and Midwest, California's urban areas are population magnets.

Local city governments have researched the phenomenon of redlining in conjunction with local efforts to stem housing abandonment. A Baltimore study, conducted by that city's Department of Housing and Community Development in 1972, found extensive redlining in integrated or racially changing neighborhoods where FHA mortgages were beginning to fill the vacuum in conventional home loans.

Community action groups have conducted and sponsored study projects on redlining that can generally be characterized as "action research" with a patently adversary stance. Rather than dispassionate, objective research, these groups usually gather evidence against financial institutions to support their organizing projects. Because the groups' adversary posture opens their findings to counterattack by the lending insti-


16 Id. at 12.

17 Memorandum from Donald E. Burns (Secretary of State of California Business and Transportation Agency) to all state-chartered savings and loan associations, Aug. 28, 1975, at 1.


19 CITY OF BALTIMORE DEPT OF HOUSING AND COMMUNITY DEVELOPMENT, HOME OWNERSHIP AND THE BALTIMORE MORTGAGE MARKET (1972), in S. 1281 Hearings at 1477.
tions, the research tends to be honest and accurate, though often oversimplified. Groups in Chicago, Milwaukee, Providence, Baltimore, Cleveland, Oakland, Indianapolis, and Cincinnati have been in the forefront of a national movement toward documenting redlining's existence in local communities. Community organizations with skilled organizers in touch with one of the anti-redlining national networks have been able to develop local research projects that point to redlining and disinvestment in specific communities.

The validity of the conclusions of these local research projects is strongly criticized by the federal regulatory agencies and by financial institutions. Outside researchers counter by charging that the "insiders," the lending institutions, and the federal regulatory agencies do not make the necessary information available to adequately determine whether or not redlining is occurring. This uncooperative attitude is viewed as further evidence that the financial institutions are attempting to cover up their disinvestment policies and practices and that the federal regulatory agencies have been captured by the institutions they are

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20 See S. 1281 Hearings at 830-34 (testimony of Grover Hansen).

21 Some community group research automatically equates higher interest rates, higher down payments, and short terms with redlining. Yet, persons in the industry realize that adroit and competitive manipulation of the "credit quartet"—down payment, length of mortgage, rate of interest, and rate of amortization—is legitimately their life blood. See A. Axelrod, C. Berger & Q. Johnstone, Land Transfer and Finance 103 (1971). Darel Grothaus of Northwestern University's Center for Urban Affairs has criticized some community action group reports as simplistic. "Rather than the conspiracy the critics make it to be, red-lining involves a number of complex forces." Quoted in Marshall, Mortgage Red-lining; The Urban Disinvestment Dilemma, Savings and Loan News, June 1974, at 43.

22 The primary anti-redlining national network is National People's Action on Housing (NPAH), based in Chicago at the National Training and Information Center, headed by Gale Cincotta and Shel Trapp. With chapters in thirty-nine states and 104 urban areas, NPAH provided the impetus behind passage of the Home Mortgage Disclosure Act of 1975. Another national network is the Movement for Economic Justice (MEJ), which emphasizes "greenlining campaigns" of community depositors while simultaneously withdrawing savings accounts from institutions allegedly involved in redlining. MEJ represents a merger of holdover Alinsky tactics with a Peace Corps mentality, since many key operatives are Peace Corps returnees. In most major cities, these networks have competing local affiliates, such as Metropolitan Area Housing Alliance (tied to NPAH) and CAP (tied to MEJ) in Chicago, or Buckeye-Woodland Community Congress (tied to NPAH) and Active Clevelanders Together (tied to MEJ) in Cleveland.

23 See, e.g., Coalition of Neighborhoods (Cincinnati), Housing Analysis in Oakley, Bond Hill, and Evanston (1974), in S. 1281 Hearings at 232; Oakland Training Institute, Housing Problems in East Oakland: Research as a Basis for Community Mobilization (1974), in S. 1281 Hearings at 433; Metropolitan Area Housing Alliance (Chicago), Savings and Lending Information (1975); St. Ambrose Housing Aid Center (Baltimore), Foreclosures in Baltimore City in 1974 (Mar. 1975); Commission on Catholic Community Action (Cleveland), You Can Bank on It: Redlining in Cleveland (1975). Public interest groups that are not involved in direct organizing tend to produce more sophisticated research on redlining. See, e.g., Citizens Planning and Housing Association (Baltimore), 1974 In Retrospect: A Review of the Baltimore Mortgage Market (Apr. 1975); The Center for New Corporate Priorities (Los Angeles), Where the Money is: Mortgage Lending, Los Angeles County (1975).
empowered to regulate. When disclosure of needed data has been mandated by governmental action, local research groups have been more successful in accurately documenting incidences of redlining. Nonetheless, even these studies have been criticized, spokesmen for the financial industry maintain that outsiders are incapable of adequately and fairly interpreting the complexities of the loan-making process.

B. Perspective of Financial Institutions

The position of the financial industry on the redlining issue is a complex one, involving at least five facets: First, as adversaries in the controversy, financial institutions maintain that redlining is not occurring and that the charges have been manufactured. Second, and at the same time, they maintain that current procedures for urban home-loan decision-making are legitimate business practices, even though some of these admitted procedures are pinpointed as steps in the redlining process. Third, private lending institutions are not responsible for saving neighborhood housing. Fourth, it would be irresponsible for lenders to change current policies and practices. Fifth, the current pressures for disclosure and for monitoring the loan-making process are perceived as an unjustified and expensive interference with an established system which may result in more controversy and may even hasten neighborhood deterioration.

The banking and lending industry has consistently maintained that the available research studies result in insufficient proof that redlining is occurring and that data has been oversimplified or misinterpreted. These studies are considered part of a conspiratorial war against financial institutions. One spokesman has characterized the available research as based on "ever more tenuous assertions — hunches, really" and has stated that the industry's position is that the charges being leveled result from a predetermined conclusion for which proof has been subsequently constructed. Consequently, it is asserted that proof of redlining is so subtle because its existence is "largely imaginary."

26 According to an analysis by the Metropolitan Area Housing Alliance in Chicago of figures released by the FHLBB as of June 30, 1973, in ZIP code 60622, $32,840,022 had been deposited in savings accounts, but only twenty-six conventional home loans were granted; this represented only one cent reinvested in the community for every ninety-nine cents invested outside the community.

27 S. 1281 Hearings at 601 (testimony of Thomas R. Bomar), 833 (testimony of Grover Hansen).

28 See text accompanying note 25 supra.

29 S. 1281 Hearings at 832 (testimony of Grover Hansen).

30 See id. at 828; Marshall, Mortgage Redlining; The Urban Disinvestment Dilemma, SAVINGS AND LOAN NEWS, June 1974, at 41.

31 See S. 1281 Hearings at 834 (testimony of Grover Hansen); see id. at 842. The redlining controversy is often cast in terms of battle by literature of anti-redlining groups. See Progress on Anti-redlining Front Reported, JUST ECONOMICS, Aug. 1975, at 7.

32 Id.
Financial industry spokesmen point out that home loans in certain urban neighborhoods involve higher administrative costs and higher risks.\(^ {35} \) Lending institutions must also be careful to avoid losses when the underlying property has little or no resale value.\(^ {36} \) Since the financial industry is a system comprised of private lending institutions, they do not feel responsible for saving neighborhood housing and that government, with access to public resources, has the responsibility for preserving housing in economically declining areas.\(^ {37} \) This sector asserts that government coercion of lending institutions to encourage approval of urban home loans that would be defined as too risky under current policies and procedures would be improper.\(^ {38} \)

The financial industry is convinced that its fiduciary duty to depositors makes it irresponsible for them to change current policies and practices.\(^ {39} \) Additionally, charters require that loans be safe and prudent.\(^ {40} \) Home loan terms and rates are determined by the market,\(^ {41} \) not by discriminatory decisions made in smoke-filled rooms. The banking industry is a highly competitive field in which competitors quickly capitalize on unwise loan decisions by attracting improperly rejected borrowers or wary depositors.\(^ {42} \) Sound business practice requires a

\(^ {35} \) S. 1281 Hearings at 812 (testimony of William A. Beasman). This is validated by independent research of Sternlieb, \textit{The Urban Financing Dilemma}, in S. 1281 Hearings at 568.

\(^ {36} \) S. 1281 Hearings at 838 (testimony of Grover Hansen). Another spokesman for the United States League of Savings Associations in testimony before a congressional committee in May 1975 stated:

\textit{Inevitably, of course, the loan underwriting process involves an appraisal of various trends affecting the neighborhood in which a particular property may be located. If these trends are adverse and are deemed a threat to the value of the property, they will be noted in the loan underwriting report and \textit{will influence the loan decisions} . . . . \textit{We will not make loans} to our risk on buildings that are falling down, to families that are unable to carry mortgages, and to neighborhoods which are blighted or, within the limits of foresight, threatened with blight. We are not social or welfare agencies.\textit{Id.} at 877 (testimony of William B. O'Connell, Public Relations Counsel to United States League of Savings Associations) (emphasis added).}

\(^ {37} \) See \textit{id.} at 819 (testimony of William A. Beasman). A spokesman for the National Savings and Loan League has stated: \textit{"Private institutions using private funds cannot undertake the making of social-purpose loans, much as these loans may have merit." \textit{Id.} at 843 (testimony of Grover Hansen).}

Through expansion of programs like FHA and VA government-insured loans and through use of voluntary cooperative projects like the Neighborhood Housing Service, the government can exercise its proper role in preserving neighborhood housing. S. 1281 Hearings at 896-97 (testimony of John H. Perkins (President, Continental Illinois National Bank & Trust Co.)). For a more detailed discussion of the Neighborhood Housing Services program see text accompanying notes 120-22 infra.

\(^ {38} \) The lending institutions are firmly opposed to credit allocation. They are concerned that anti-redlining legislation or regulations might eventually involve neighborhood loan quotas. S. 1281 Hearings at 846 (testimony of Grover Hansen); \textit{id.} at 880 (testimony of William B. O'Connell); \textit{id.} at 891 (testimony of John H. Perkins).

\(^ {39} \) \textit{Id.} at 835 (testimony of Grover Hansen). They have a fiduciary responsibility to their depositors or stockholders to make only sound loans, to show a profit in their business operations, and to maintain proper reserves.

\(^ {40} \) \textit{Id.} at 878 (testimony of William B. O'Connell).

\(^ {41} \) \textit{Id.} at 835 (testimony of Grover Hansen).

\(^ {42} \) \textit{Id.} at 812 (testimony of William A. Beasman); \textit{id.} at 844 (testimony of Grover Hansen).
diversity of investments rather than a concentration of home loans in the immediate area of loan offices. Partially for this reason and so that loan money can circulate throughout the country, the government has encouraged the development of a nationwide secondary mortgage market. Federal and state supervisory authorities carefully audit loan portfolios to ferret out unwise, risky loans, and thus it is contended (somewhat illogically) that current antidiscriminatory regulations are sufficient.

Outside pressure has been directed toward encouraging closer monitoring of the loan-making process and opening it to public scrutiny. Those exerting pressure have been perceived by the financial industry as officious intermeddlers and it has been asserted that such outsiders do not have the perspective to properly interpret information or evaluate current loan policies and procedures. Moreover, it has been argued that assembling data for public examination will be burdensome and expensive for the lending institutions and the government. Such interference, it has been further contended, can lead to needless controversy and even to further neighborhood deterioration. As the debate continues, certain legislation may bear upon the outcome.

43 Id. at 894 (testimony of John H. Perkins).

44 National policy has favored the equalization of cash supply-demand imbalances by promoting the flow of credit from "capital surplus" areas to "capital deficit" areas through federal mechanisms such as the Federal National Mortgage Association ("Fannie Mae"), the Government National Mortgage Association ("Ginnie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac").

45 S. 1281 Hearings at 878 (testimony of William B. O'Connell).

46 "It is important to note that savings associations are already subject to a body of law and regulations which effectively prohibit redlining practices." Id.; see id. at 826 (testimony of Grover Hansen).

47 It is said that without experience or justification, they are trying to interfere in the management of a very complex system. Id. at 880 (testimony of William B. O'Connell).

48 Id. at 828 (testimony of Grover Hansen); id. at 880 (testimony of William B. O'Connell).

49 Lending institutions have been able to document the costs of compliance with other recent disclosure requirements such as the Truth-In-Lending Act and the Real Estate Settlement Procedures Act. Substantial amounts of computer and personnel time are already tied up in data assembly for compliance with existing regulations. The industry has consistently contended that the cost burden will be excessive; a Senate Committee study estimated, however, that the cost of compliance with proposed disclosure requirements will level out at about $180 per institution per year. S. REP. No. 94-187, supra note 8, at 14.

50 If we introduce this "numbers game," many institutions will feel obliged to step up lending activity. In many areas, a forced increase in lending activity will mean — not stabilized values — but an acceleration of the process of neighborhood change, since a marked increase in the number of loans is interpreted as a sign of real estate "speculation" in many quarters.

S. 1281 Hearings at 879 (testimony of William B. O'Connell).

This aspect of the industry's concern was well expressed by an industry spokesman before a congressional committee:

[Disclosure] might well lead to a destabilization of some of our financial institutions and some of our neighborhoods. An improper and a narrow interpretation of the data might lead to further and destructive divisions between cities and suburbs, between neighborhoods and communities, between different racial and ethnic groups, and between rich and poor. It may even set a neighborhood against itself, creating a psychology of despair and striking at the very roots of public confidence through the endless repetition of the "redlining" litany.

Id. at 829 (testimony of Grover Hansen).
III. Legislation

A. Home Mortgage Disclosure Act of 1975

Anti-redlining measures were vigorously explored by Congress during 1975. The Senate Committee on Banking, Housing, and Urban Affairs conducted extensive hearings on the Home Mortgage Disclosure Act of 1975. The hearings and other steps of the legislative process provided an opportunity to assemble available research data and policy recommendations concerning alleged redlining. Public interest organizations and community action groups presented evidence of redlining and supported financial institution disclosure of data on savings deposits drawn from and home loans made into communities.

The Act does not use the word “redlining,” but it implicitly acknowledges its existence. The heart of the Act is the requirement that lending institutions compile and hold available for public inspection specific data on home loans, i.e., quantity, dollar amount, location, whether federally insured, whether to resident or absentee owners, and whether a home improvement loan. The Act only applies to certain types of lending institutions (commercial banks, savings banks, savings and loan associations, building and loan associations, and credit unions) which make federally related mortgage loans, have offices in metropolitan areas, and have total assets of more than ten million dollars. Insurance companies, loan companies, many mortgage brokers, real estate investment trusts, rural lending institutions, and small-scale loan associations and credit unions are exempt.

The Act requires that data on the number and total dollar amount of loans be broken down by the location of the property securing the loan — whether or not inside the loanmaking office’s Standard Metropolitan Statistical Area (SMSA), as defined by the Office of Management and


52 12 U.S.C.A. §§ 2801-2809. (Pamphlet No. 1, Mar. 1976) [hereinafter cited as HMDA]. The committee favorably reported out the bill and the Senate passed S. 1281 on September 4, 1975. A similar bill introduced in the House in May (HR 6596) went through several transformations (HR 7251, 7446, 7700), and ultimately appeared as Title III of HR 10024, a complex bill introduced by Representative St. Germain dealing with flexible regulation of interest rates and electronic fund transfers as well as home mortgage disclosure. The House passed the measure on October 31; the conference report was agreed to in mid-December; and it was signed into law by President Ford on December 31, 1975, as Pub.L.No. 94-200. Title III is cited as the “Home Mortgage Disclosure Act of 1975.”

53 See S. 1281 Hearings.

54 The Congress finds that some depository institutions have sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions.


55 Id. § 2803.

56 Id. § 2802.

57 Id. § 2803.

58 Id. § 2808.
Budget, and if within the SMSA, by census tract or ZIP code. The Board of Governors of the Federal Reserve System is to determine where data by census tracts can be made readily available at a reasonable cost and the federal regulatory agencies, lead by the Federal Home Loan Bank Board, are to engage in research to develop improved methods of reducing the cost of compliance with data retrieval requirements.

Opponents of comprehensive disclosure were able to forestall early proposals for mandatory data on savings deposits as well as loans, for more specificity of location outside the SMSA rather than simply "outside," and for mandatory census tract identification. The proposed areas requiring further research were pared down by eliminating research on the feasibility of disclosing the source of savings deposits by geographical area, the practicability of requiring disclosure of the average terms and downpayment ratios of mortgage loans by geographical location, the use to which the data is put by local government agencies and community groups, and the impact of the Act on lending patterns, defaults, or foreclosure rates. Studies on the costs of compliance and experiments to reduce expenses and difficulties for the financial institutions replaced the eliminated research topics.

Implementation of the Act is heavily dependent on the Federal Reserve Board which has the general responsibility of developing regulations to carry out its purpose. Specific emphasis has been placed on formulating regulations on availability of data for public inspection. The Board has been charged with the prevention of circumvention or evasion, and it has the discretionary power to make adjustments and exceptions for any class of transactions. Early versions of the Act, however, placed major enforcement responsibility on the Federal Trade Commission rather than the Federal Reserve Board. It is interesting to note that the official position of the Federal Reserve Board during the congressional hearings was that it did "not believe that this bill, which apparently is based on the premise that local deposits should be used essentially for local credit, is necessarily wise legislation." The Chair-

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59 Id. § 2803.
60 Id.
61 Id. § 2806.
64 Mandatory census tract identification was vigorously sought by the National People’s Action on Housing network and its affiliated local community organizations.
65 S. 1281, § 7(a)(2) as reported out of the Committee on Banking, Housing, and Urban Affairs.
66 Id. § 7(a)(3).
67 Id. § 7(b).
69 Id. § 2804.
70 Id. § 2803.
71 Id. § 2804.
72 Draft of S. 1281, 94th Cong., 1st Sess. § 5(d).
73 Letter from Arthur F. Burns, supra note 10, at 20 (emphasis in original).
man of the Board listed a number of reservations about the legislation, including a critique of disclosure: "The reporting mandated under this bill may give misleading impressions of unfair discrimination, impressions which can only be countered by the adoption of lending practices that could seriously disadvantage local depositors." 74

The Home Mortgage Disclosure Act of 1975 is not in itself a prohibition on redlining, but it does provide a mechanism for gauging and pinpointing it. 75 Public interest and community action groups will have some of the data they need to facilitate their community organizing strategies. Public officials empowered to designate institutions as depositories of public funds will be able to compare the track records of lenders on affirmative reinvestment in local communities. Although it appears that the effectiveness of this legislation will not be immediately evident, at least some positive steps have been taken to remedy the situation.

B. State Legislation

Anti-redlining legislation has been proposed in at least ten states. 76 Illinois has enacted the Financial Institutions Disclosure Act 77 covering any bank, insurance company, mortgage banking company, or savings and loan association which operates or has a place of business in Illinois. 78 As of January 1, 1976, each lending institution must file a semiannual statement of the number and aggregate dollar amount of home loan applications and of loans granted, broken down by type of loan 79 and by geographical location. 80 This information will be available for public inspection in the office of the Illinois Department of Financial Institutions and in each of the offices of reporting financial institutions. 81 The act has tough compliance measures, including the

74 Id. at 21. The Board has been given until June 29, 1976, to develop the needed regulations and other requirements of implementation before the title takes effect. HMDA, 12 U.S.C.A. § 2808 (Pamphlet No. 1, Mar. 1976).

75 The purpose of this chapter is to provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located and to assist public officials in their determination of the distribution of public sector investments in a manner designed to improve the private investment environment. HMDA, 12 U.S.C.A. § 2801 (Pamphlet No. 1, Mar. 1976).


78 Id. § 2(b).

79 (1) Loans secured by residential real estate; (2) mortgages insured by FHA; (3) mortgages insured by VA; (4) construction loans; and (5) home improvement and rehabilitation loans. Id. § 3.

80 Id. §§ 2, 3 (by county, by ZIP code, and by census tract).

81 Id. § 5.
levying of fines against recalcitrant institutions and the imposition of felony charges against any persons engaging in a false filing.  

Of the proposed anti-redlining measures being considered in state legislatures, the strongest on mandatory data disclosure is California’s Senate Bill 1003. The bill proposes to repeal a current provision in the California Financial Code prohibiting savings and loan associations from making loans within specified geographical areas when future loans would constitute an unsound business practice. The bill states that one of the causes of deteriorating housing stock in California is “the failure or refusal by mortgage lending institutions to provide adequate home financing for repair, rehabilitation and construction on a nondiscriminatory basis for all areas within this state.” Based on the policy consideration that mortgage lending institutions should serve the needs of the neighborhoods in which they are located, disclosure requirements more comprehensive than those required by the Home Mortgage Disclosure Act of 1975 are needed in California so that “knowledgeable citizens would then be able to exercise their consumer powers and invest in those institutions that are committed to the housing needs of their neighborhoods.”  

Each savings and loan association would be required to keep a loan register available for public inspection in each office. Each loan would require up to twenty-nine notations, including location of security property by census tract, amount of loan, interest, loan fees, downpayment, appraised value, age of structure, term of loan, family income, race of applicant, and service area in which property is located. The primary service area for a lending institution is a circle with a radius of one mile from offices located within an SMSA, a circle with a radius of two miles from offices located outside of SMSA, or a regional shopping center plus an area extending five miles from the perimeter of the shopping center.  

This proposed bill would require savings and loan associations to  

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82 Statements must be verified by two officers of the institution or a licensed public accountant. Id. § 4. Institutional fines are set at $500 or $100 per day of delinquency, whichever is greater. Id. § 6(a). Any persons, presumably office staff as well as officers, are regarded as guilty of a Class 4 felony for participating in the filing of a materially false or misleading statement. Id. § 6(b).  

83 CAL. FIN. CODE, § 7176 (West 1968).  


85 Id.  

86 Id.  

87 Race is classified as “Caucasian, Black, Mexican-American — Other,” id. § 5, at 8 (proposed CAL. FIN. CODE § 8731).  

88 Id. § 2, at 2 (proposed CAL. FIN. CODE § 8703.3).  

89 Id. § 5, at 6 (proposed CAL. FIN. CODE § 8728). Each institution is required to have for public inspection certain demographic statistics on the primary service area that would be useful for comparison with patterns disclosed in the institution’s loan register. Id. § 5, at 9 (proposed CAL. FIN. CODE § 8732). This section would require the following statistics on the primary service area: (1) the mean and median age of the residents; (2) the mean and median family size; (3) the mean, median, and adjusted gross income per capita per household; (4) the population; and (5) the racial, marital status, and sex composition, by percentages.
prepare a quarterly "Statement of Geographical Investment Pattern," describing the geographic sources and distributions of deposits and loans for each office in terms of economic, social, and lending factors. The statement would be a compilation of data in the loan register plus some technical analysis.\textsuperscript{90} It must be available in each office for public inspection and the already required mailing or publication of an annual financial statement would include a notice that the Statement of Geographical Investment Pattern is available to the public.\textsuperscript{91}

The data requirements of the bill are quite extensive, yet they apply only to loans granted. Rejected loan applications or pre-application discouragements are not covered by the provision. The bill lacks stiff compliance mechanisms and has no leverage over the status of financial institutions as depositaries of public funds. The real teeth of the bill are found primarily in the broad scope of data to be disclosed to consumer power-oriented Californians.

\section*{C. Local Legislation}

The prototype for municipal anti-redlining ordinances is Chicago's 1974 Ordinance\textsuperscript{92} requiring that each bid for a share as a depository of Chicago's city or school board funds be accompanied by data on an institution's loans, savings accounts, and checking accounts. Loans are classified by type (residential mortgage, construction, home improvement, consumer, or commercial) and whether conventional or FHA-VA. Data is assembled on total loan amounts, down payments, interest rates, and loan terms. The location of the security properties and the offices holding the savings and checking accounts are stated by census tract within the city of Chicago or, if outside, whether or not within the six county SMSA. The effect of this ordinance is that those who allocate public funds for deposit in local institutions have access to statistical profiles on each bidder that indicate the neighborhood sources of deposits and the locational pattern of loan-making. Each bidder is also required to submit a signed anti-redlining pledge.\textsuperscript{93}

The City Council of Cleveland, Ohio also recently enacted a redlining ordinance.\textsuperscript{94} Modelled on the Chicago prototype, the Cleveland ordinance requires the same data on loans and deposit accounts. The only difference in the reporting requirements is that locations outside the city are to be classified as inside or outside Cuyahoga County, not the larger four county SMSA.\textsuperscript{95} The Cleveland ordinance also requires a nondiscrimination pledge with each bid.\textsuperscript{96}

\textsuperscript{90} Id. § 5, at 5-9 (proposed CAL. FIN. CODE §§ 8726-31).
\textsuperscript{91} Id. § 3, at 4 (proposed CAL. FIN. CODE § 8714).
\textsuperscript{92} CHICAGO, ILL. CODE §§ 7-30 to 7-36 (1974).
\textsuperscript{93} Id. § 7-34.1.
\textsuperscript{94} Cleveland, Ohio Ordinance No. 1135-75, §§ 1.231601-1.231603, Apr. 28, 1976.
\textsuperscript{95} Chicago requires reporting on locations outside the city to be classified as within or without a six county SMSA.
\textsuperscript{96} Cleveland, Ohio Ordinance No. 1135-75, § 1.231602, Apr. 28, 1976. The pledge is identical to the Chicago pledge.
Cleveland's ordinance, however, goes further than the Chicago ordinance in two critical respects. The ordinance prevents any institution not complying with the disclosure requirements from being considered an eligible depository of city funds, whereas the Chicago Comptroller can designate depositories "as he deems advisable and for the best interests of the City." The Cleveland ordinance also recommends that the city analyze the relative internal and external proportion of deposits to home loans and if the city-suburban comparison of a particular institution "does not bear a reasonable and fair relationship," its bid should be refused as not being in the public interest.

IV. Federal Regulatory Agencies

While most states have regulatory agencies to supervise state-chartered financial institutions, the principal regulatory thrust comes from the federal agencies. The Comptroller of the Currency regulates national banks, the Federal Reserve Board regulates state-chartered commercial banks which are members of the Federal Reserve System, and the Federal Deposit Insurance Corporation regulates the remainder of the state-chartered commercial banks. The Federal Home Loan Bank Board (FHLBB) comprehensively regulates federally-chartered savings and loan associations and additionally exercises some regulatory control over state-chartered associations that insure deposits with the Federal Savings and Loan Insurance Corporation. Of all federal regulatory agencies, the FHLBB has the greatest impact upon urban home loans.

Despite the acceleration of housing and neighborhood deterioration, the growing indications of redlining, and their responsibility to further federal housing policies, federal agencies did not begin to seriously address the redlining question until prodded by public interest organizations. Although the National Urban League, frustrated by repeated blockage in its efforts to study home mortgage practices in the Bronx, New York, unsuccessfully pressured the FHLBB for assistance, their efforts brought the issue of the Board's role in the redlining controversy into the fore. In 1971, the Center for National Policy Review, representing thirteen public interest groups, invoked administrative

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97 Id. § 1.231603.
99 Cleveland, Ohio Ordinance No. 1135-75, § 1.231603, Apr. 28, 1976. This ordinance had been locked in the legislative process in Cleveland City Council due to a prolonged controversy among politicians, lending institutions, and community action groups.
100 State regulatory agencies in Illinois, Wisconsin, and Massachusetts have issued anti-redlining regulations and established investigatory procedures. For example, the Commissioner of the Illinois Savings and Loan Association in 1974, issued pointed anti-redlining regulations for state-chartered savings and loan associations requiring that each association retain all rejected loan applications with written memoranda in support of the rejection for twenty four months, allowing ample time for state auditors to review files and check for compliance with the regulations.
101 Statement of Ronald Brown (Director, Washington Bureau of National Urban League), in S. 1281 Hearings at 522.
processes by petitioning the four federal regulatory agencies in order to force them to use their rulemaking authority to develop regulations aimed at preventing discrimination in home finance.\textsuperscript{103} A remedy suggested by the petitions included a data retrieval system, the maintenance of written logs of oral inquiries about loans which do not result in a written application, a specification of loan decision criteria, affirmative action devices, and compliance guarantees.\textsuperscript{104}

While these petitions were pending, the agencies were also under pressure from the United States Commission on Civil Rights and the Civil Rights Oversight Subcommittee of the House Judiciary Committee. In response, the regulatory agencies published general nondiscriminatory policy statements.\textsuperscript{105} Frustrating delays have been documented by counsel for the Center for National Policy Review, who after two years concluded: "At first glance, it does not appear that much has been done to end discrimination in home finance,"\textsuperscript{106} but his disappointment was tempered with "cautious optimism,"\textsuperscript{107} because the entire process had demonstrated the potential of utilizing administrative law to supplement the standard civil rights strategy of litigation and legislation.

\section*{A. Federal Home Loan Bank Board Regulations}

The major result of public interest group pressure was the issuance by the FHLBB of nondiscriminatory regulations that prohibit discriminatory practices in fixing the amount, interest, and duration of home loans.\textsuperscript{108} Unequal treatment based on the racial or ethnic character of the applicant, present or prospective occupants of the dwelling, or "the present or prospective owners, lessees, tenants, or occupants of other dwellings in the vicinity" is also proscribed in application, collection, and enforcement procedures.\textsuperscript{109}

The FHLBB regulations have provided a legal basis for anti-redlining litigation.\textsuperscript{110} Additionally, General Counsel of the Board has issued a memorandum opinion on the applicability of these regulations to the practice of redlining by member financial institutions,\textsuperscript{111} stating that

\textsuperscript{103} Id. at 1120.
\textsuperscript{104} Id. at 1121-22.
\textsuperscript{105} Id. at 1129 n.96.
\textsuperscript{106} Id. at 1143.
\textsuperscript{107} Id.
\textsuperscript{108} 12 C.F.R. § 528 (1975). In an interpretive guideline, the FHLBB has declared: Refusal to lend in a particular area solely because of the age of the homes or the income level in a neighborhood may be discriminatory in effect since minority group persons are more likely to purchase used housing and to live in low-income neighborhoods. The racial composition of the neighborhood where the loan is to be made is always an improper underwriting consideration.
\textsuperscript{109} Id. § 531.8(c)(6).
\textsuperscript{111} Memorandum from Charles E. Allen (FHLBB General Counsel) to Richard Platt, Jr. (Director, Office of Housing and Urban Affairs), Mar. 21, 1974. This memorandum dealt strictly with economic redlining.
redlining violates section 528.2, even when the "ostensible reason for redlining is an apparently neutral standard applied in a discriminatory manner."\textsuperscript{112} Statistical evidence may raise a presumption that a lending institution is practicing redlining, shifting the burden of proof to the institution to establish that redlining does not exist.\textsuperscript{113}

B. \textit{Fair Housing Lending Practices Pilot Project}

In addition to compiling regulations, the federal agencies agreed to a joint Fair Housing Lending Practices Pilot Project in eighteen target metropolitan areas. The first to be released was the report of the United States Comptroller of the Currency, surveying all reported housing loan applications made from June to November 1974, in six SMSA's: Bridgeport, Connecticut; Cleveland, Ohio; Tucson, Arizona; Memphis, Tennessee; Montgomery, Alabama; Topeka, Kansas.\textsuperscript{114}

Analysis of this project discloses several critical flaws. The data gathered was of such poor quality that 31 percent of the questionnaires had to be excluded because of inconsistency or incompleteness.\textsuperscript{115} The discretion of loan officers in filing applications with the Comptroller's office remained unchecked,\textsuperscript{116} and there was no official audit to ensure compliance.\textsuperscript{117} The possibility of early discouragement of persons seeking loans was not recorded in the study; only written applications were surveyed.\textsuperscript{118} Some institutions claimed up to 100 percent acceptance rates, leaving the unavoidable implication that the records of refusal were ignored or destroyed.\textsuperscript{119}

The Comptroller's office decided not to release data on the geographical location of housing properties involved, arguing a right to privacy on behalf of the loan applicants.\textsuperscript{120} The agency's computer tapes contain the location of the properties by ZIP code and by census tract, but this information has not been made available. Locational

\textsuperscript{112} \textit{Id.} at 1 n.1.

\textsuperscript{113} Analysis of the discriminatory effects of redlining should begin with a comparison of the racial or ethnic composition of the population in the redlined neighborhood with the racial or ethnic composition of the population in the member institution's effective lending territory . . . . Whenever a substantial disparity between the population of the redlined neighborhood and that of the effective lending territory exists, the association must come forward with evidence of nondiscrimination in compliance with section 528.2(d).

\textsuperscript{114} \textit{U.S. Comptroller of the Currency, Fair Housing Lending Practices Pilot Project, Survey C Approach II.1} (1975).

\textsuperscript{115} \textit{Id.} at II.7.

\textsuperscript{116} \textit{Id.} at II.2.

\textsuperscript{117} \textit{Id.} at II.3.

\textsuperscript{118} \textit{Id.} at II.7.

\textsuperscript{119} The study admitted the suspect nature of these claims of high acceptance rates. \textit{Id.} at III.3. Indeed, the study concluded that "it cannot be assumed that all or even a majority of the forms were filled out precisely as requested." \textit{Id.} at III.2.

\textsuperscript{120} Telephone conversations with Gary C. Wilson (Project Director, Office of the Comptroller of the Currency).
data was the most frequently missed item in incomplete surveys, even though recording the addresses of property would seem to have been an easy step in completing the survey. This naturally raises the question whether the financial institutions purposely withheld sensitive information. The lack of locational information makes the study relatively worthless in determining the extent of redlining or neighborhood disinvestment in the six target cities.\(^\text{121}\)

C. Neighborhood Housing Services

The Federal Home Loan Bank Board was in need of a positive program in response to the anti-redlining pressure from public interest and community action groups. The Board was aware of a program in Pittsburgh called Neighborhood Housing Services, Inc. (NHS) that had succeeded in stimulating voluntary cooperation from lending institutions in making home loans to a deteriorating neighborhood in the city's North Side. The organization was formed in 1968 as a private, non-profit corporation to stimulate reinvestment by lending institutions in the community and to provide alternate sources of home improvement loans for neighborhood residents considered "unbankable" even by generally cooperative lending institutions. Without using confrontation tactics, NHS succeeded in reversing the deterioration trend by halting residential abandonment, improving the housing stock, and broadening lending policies of local financial institutions.\(^\text{122}\)

In 1972 the FHLBB used the Pittsburgh experience as a model for formation of NHS pilot projects in Cincinnati, Oakland, Dallas, and Washington, D.C.\(^\text{123}\)

The heart of the NHS approach is to develop positive relationships among community residents, local government officials, and lending institutions. The community must voluntarily direct its energies toward maintaining properties. In addition local governments must pledge concentrated city services and extra housing inspectors in the selected target areas while lending institutions agree to maximize home loans in the community. The FHLBB provided start-up funds, and local foundations along with the financial institutions accumulated funds for fully staffed field offices.

The formation of the Urban Reinvestment Task Force in early 1974 brought the Department of Housing and Urban Development into a cooperative arrangement with the FHLBB, wherein HUD committed a substantial funding pool for high-risk revolving loan funds in individual

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\(^{121}\) In fact, spokesmen for the federal regulatory agencies urged that anti-redlining disclosure legislation be delayed until the results of the Fair Housing Lending Practices Pilot Project were released. See, e.g., letter from Frank Wille (Chairman, Federal Deposit Insurance Corp.) to William Proxmire (Chairman, Comm. on Banking, Housing, and Urban Affairs), May 22, 1975, in S. 1281 Hearings at 19-20; id. at 594-611 (testimony of Thomas Bomar (Chairman, FHLBB)).

\(^{122}\) Dunlop, A Success Story: Pittsburgh's Neighborhood Housing Services, FOUNDATION NEWS, Oct. 1974, at 49, in S. 1281 Hearings at 776.

\(^{123}\) McNeirney, Neighborhood Housing Services, FHLBB J., May 1973, at 13, in S. 1281 Hearings at 760.
NHS projects for loans to “unbankable” residents. By mid-1975, NHS programs were operational in eleven cities, with twelve others in advanced stages of development.

The early track record of NHS is encouraging. Lending institutions have found that participation is economically sound and an aid in protecting previously made loans secured by properties in the target area. The definitions of “bankable” or “high-risk” loans are not fixed; thus, availability of the high-risk loan fund might cause institutional loan officers to absolve themselves from making some loans that ought to be made through conventional channels. It can be anticipated that pressure will grow for creation of more NHS projects, for expanded project boundaries, and for use of community development block grant funds to supplement NHS financial resources.

V. EMERGING AREAS OF LITIGATION

In addition to the legal issues raised by legislative or regulatory intervention, various litigation strategies are available to persons or groups encountering the practice of redlining. Redlining may be a violation of the civil rights of a loan applicant or of Sherman Act antitrust provisions. The use of community development block grants by local governments can also be monitored for their impact on the home loan policies and practices of lending institutions.

A. Civil Rights Violations

1. Section 1982 Actions

It is unclear whether redlining is actionable as a violation of section 1982 of the Civil Rights Act of 1866. After a century of obscurity, the Supreme Court, in Jones v. Alfred H. Mayer Co., upheld the application of section 1982 to private acts of discrimination in the sale or rental of housing. The Court stated, however, that section 1982 “does not refer explicitly to discrimination in financing arrangements,” and a split in recent circuit court decisions has clouded the issue in relation to alleged discrimination in home financing, especially when the redlining is primarily economic and only indirectly racial.

125 S. 1281 Hearings at 609 (testimony of Thomas Bomar).
126 Community action groups have generally rejected the obvious negative alternative of branding NHS as tokenism or a smokescreen and have opted for positive participation in site and staff selection and in monitoring the loan-making process.
127 “All 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.” 42 U.S.C. § 1982 (1970).
129 Id. at 413.
2. **Title VIII of Civil Rights Act of 1968**

The 1968 Civil Rights Act\(^\text{131}\) appears to be more applicable to redlining. A redlining case based on this Act now pending in Cincinnati, *Laufman v. Oakley Building & Loan Co.*,\(^\text{132}\) has been characterized as a landmark case with national implications.\(^\text{133}\)

Plaintiffs were two white couples: one, the owners, and the other, the prospective purchasers of a residential property located in a racially integrated neighborhood in Cincinnati. According to the complaint, in February 1974, plaintiffs contracted to purchase the home and were advised by agents of defendant loan association that loans with attractive terms were readily available.\(^\text{134}\) When plaintiffs made a written application for such a loan the application was rejected because of the racial composition of the neighborhood. Consequently, plaintiffs had to secure a loan elsewhere at a higher interest rate. Both the prospective purchasers and the owners filed a class action suit on behalf of themselves and all other prospective purchasers or homeowners in racially integrated or predominantly black neighborhoods in Cincinnati, alleging

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\(^\text{133}\) Cincinnati Lawsuit Attacks Redlining, TRENDS IN HOUSING, May-June 1974, at 1.

\(^\text{134}\) The agents had allegedly offered a 90% loan at 8.5% interest with 3% closing costs, which amounted to attractive terms in early 1974. Memorandum of Plaintiffs in Opposition to Defendants' Motion for Summary Judgment at 3, Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976). See also note 1 supra.
that the lending institution was engaged in the practice of refusing to lend money or requiring stricter terms for the purchase of homes in these neighborhoods.

The relief sought in the suit is a combination of compensatory and punitive damages, a declaration that the building and loan company’s alleged policy and practice are invalid, and an injunction against continuing the practice. The complaint also asks that the lending institution correct the effects of past discriminatory conduct through implementation of a comprehensive affirmative action plan to promote equal opportunities in housing.

The threshold issue in this case was whether redlining created a cause of action under the Civil Rights Acts of 1964 and 1968. The dispute crystallized as defendant lending institution filed for summary judgment claiming that the allegations in the complaint did not state a claim upon which relief could be granted. In denying the motion, the court emphasized the racial connection in redlining, linking it with “white flight” and ultimately with urban decay.

Title VIII of the Fair Housing Act of 1968 has the broad purpose of providing comprehensive prohibitions against all forms of housing discrimination, which would encompass redlining. The Supreme Court has described the Fair Housing Act as a “detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.”

Neither the term redlining, nor the phenomenon the term stands for, appears in Title VIII, nor was the practice directly confronted during the legislative development of the Fair Housing Act. After an extensive examination of the legislative history, however, the brief for the United States concluded: “[W]hile the legislative history does not specifically address the practice of racial redlining by name or direct description, it does reflect an emphatic Congressional rejection of the premise on which that practice is based.” The FHLBB brief similarly concluded that “Title VIII was intended, in part, to provide a comprehensive prohibition

135 On Feb. 13, 1976, defendants motions for dismissal and for summary judgment were denied.
136 See notes 1 and 133 supra.
137 Little imagination is required to understand that the imposition of barriers to occupancy in the form of higher mortgage-interest rates or refusals to make loans in connection with housing in changing neighborhoods works to discourage families, white or black, which could afford to purchase homes in such neighborhoods. The practical effect is to discourage whites — who may freely move elsewhere — from moving into vacancies in “changing” neighborhoods, thereby inducing “massive transition” and, ultimately, “white flight.” Thus, according to this view, redlining directly contributes to the decay of our cities.
138 Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974).
against various forms of discrimination, including redlining, in connection with home financing." 141

Judge Porter's treatment in *Laufman* of the legislative history of the 1968 Act did not explicitly reach the same conclusion, yet the opinion did seem to endorse a broad construction of the Fair Housing Act. The opinion indirectly and with some ambiguity stated that the legislative history of the Act indicates a congressional intent to prohibit redlining. 142 The court additionally chose to interpret the act broadly. 143

The relevant sections of Title VIII are three in number. The district court held that plaintiffs had stated a cause of action under section 804. 144 Subsection (a) of that section reads in part:

> [I]t shall be unlawful: (a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin. 145

The "otherwise make unavailable" clause has consistently been broadly read by courts to include practices that go beyond merely refusing to rent or sell housing because of racial discrimination. 146 The fact that plaintiffs in *Laufman* are nonminority does not disqualify them from protection under this section, since "it is immaterial under the statute whether a loan application to purchase a dwelling is turned down be-

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142 408 F. Supp. at 501.
143 Plaintiffs urge that the Fair Housing mandate of this Act be given a liberal interpretation to effectuate the purposes of Congress. Defendants argue that its terms should be construed niggardly. The plaintiffs have the more persuasive position and, accordingly, the Court will, if necessary to interpret the language used by Congress, give the provisions of the act "a generous construction."
144 If the plain meaning of § 3604 (804) is observed, it becomes clear that plaintiffs have stated a cause of action under its terms. The cost of housing being what it is today, a denial of financial assistance in connection with a sale of a home would effectively "make unavailable or deny" a “dwelling.” When such denial occurs as a result of racial considerations, § 3604(a) is transgressed.
145 408 F. Supp. at 493.
146 Section 3604 applies to racially exclusionary land use practices of a municipality, United States v. City of Parma, P-H EQUAL OPP. HOUSING REP. ¶ 13,616 (N.D. Ohio 1973); to racial steering, Zuch v. Hussey, 366 F. Supp. 553, 556-57 (E.D. Mich. 1973); to discrimination in an orphanage, United States v. Hughes Memorial Home, P-H EQUAL OPP. HOUSING REP. ¶ 13,708 (W.D. Va. 1975); to trailer park discrimination, United States v. Crooms, 348 F. Supp. 1130 (M.D. Fla. 1972); to notification of rental security deposit requirements, United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971). The language "appears to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful." United States v. Youritan Constr. Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973), modified per curiam, 509 F.2d 623 (9th Cir. 1975). This language is repeated in United States v. City of Parma, P-H EQUAL OPP. HOUSING REP. ¶ 13,616, at 14,015 (N.D. Ohio 1973).
cause of the race of the proposed borrower or because of his prospective
neighbors."\(^{147}\)

The next relevant part of Title VIII of the Fair Housing Act is section
805 which makes it unlawful for any

building and loan association . . . to deny a loan . . . to a
person applying therefor for the purpose of purchasing . . . a
dwelling . . . because of the race . . . of such person . . . or
of the present or prospective owners, lessees, tenants, or occu-
pants of the dwelling or dwellings in relation to which such loan
is to be made or given.\(^{148}\)

The *Laufman* order and opinion is the first direct judicial interpreta-
tion of section 805. While the language is ambiguous, plaintiffs argued
that it should be "generously" construed under the *Trafficante* rule,\(^{149}\)
to include prohibition of loan refusals based on the race of present or
future occupants of dwellings in the surrounding neighborhood.\(^{150}\)
Great weight was given the agencies' interpretations of this section\(^{151}\)
and the court's analysis went beyond direct racial discrimination into
the subtles of redlining, including denial of loans to nonminority persons
who wished to finance the purchase of homes in integrated neigh-
borhoods.\(^{152}\)

The court also noted enactment of the Home Mortgage Disclosure
Act of 1975 and considered what insight its passage might give on
Congress' attitude towards redlining. The court concluded that it was
consistent with their belief that the legislature was gravely concerned
about the persistence of such discrimination.\(^{153}\)

\(^{147}\) Brief of FHLBB as Amicus Curiae at 5, *Laufman v. Oakley Bldg. & Loan Co.* 408 F.
205, 212 (1972).

added).


\(^{150}\) *See Brief of United States as Amicus Curiae at 20-22, Laufman v. Oakley Bldg. &

\(^{151}\) After applying rules of statutory construction, the FHLBB concluded:
It therefore is clear that Congress intended to bar actions such as "redlining"
where a lender refuses to make a loan based on consideration of the racial char-
acteristics of the occupants of dwellings "in relation to" which the loan is to be
made, that is, of the residents of the neighborhood in which the property is lo-
cated . . . . [T]he practice of "redlining" — where race is a factor — is clearly
prohibited by § 3605 . . . .

489 (S.D. Ohio 1976), (HUD and FHLBB regulations summarized 408 F. Supp. at 491-95.

\(^{152}\) 408 F. Supp. at 492. Defendants vigorously argued that Congress had not intended
to prohibit redlining as evidenced by its failure to explicitly incorporate redlining in the
enumeration of practices prohibited by the section. *Id.* at 492.

\(^{153}\) *Id.* at 498:
We conclude that this new Act indicates at the least a grave concern with redlin-
ing and the legislative debates in both houses prior to its passage indicate a strong
disapproval of redlining where it exists. The main purpose of the Home Mort-
gage Disclosure Act of 1975 is to make visible where the practice does exist.
This purpose is not inconsistent with Congress' having intended to outlaw red-
lining earlier by passing the Fair Housing Act . . . thus, after careful analysis
Redlining might also be a violation of section 3617 of Title VIII by interfering with the right to voluntary interracial association, as protected under Trafficante and often argued in fair housing cases involving zoning and racial steering.\textsuperscript{154} The court agreed that denial of a loan to the white couple because of the racial composition of the neighborhood amounted to interference with Trafficante-protected rights of interracial association and related benefits.\textsuperscript{155}

3. Title VI of Civil Rights Act of 1964

Moreover, redlining might be actionable as violative of Title VI of the 1964 Civil Rights Act.\textsuperscript{156} An institution like defendant Oakley Building and Loan Company participates in the Federal Home Loan Bank System and thereby receives loans and advances which constitute federal financial assistance within the meaning of the Title. When race is in any way a ground for refusal of a home loan application, such a decision by a loan officer of a federally funded institution could be a violation of the Civil Rights Act.\textsuperscript{157}

Judge Porter found defendant subject to Title VI prohibitions and that plaintiffs had standing thereunder.\textsuperscript{158} He further stated that "[u]nquestionably, a denial of federal assistance to loan applicants on the basis of the racial composition of the neighborhood would constitute 'discrimination.'"\textsuperscript{159} The great significance of the Laufman case may lie in the guidance it provides for future redlining lawsuits since it indicates a wide range of possible remedies.

4. Business Necessity Defense

The most viable defense available to lending institutions facing a redlining suit based on factual practices is "business necessity." Federal courts have recognized this as an affirmative defense in employment\textsuperscript{160} ... we find it to be consistent with our foregoing interpretation of the Fair Housing Act ....


\textsuperscript{155} 408 F. Supp. at 497. \textit{See also} Smith v. Stechel, 510 F.2d 1162 (9th Cir. 1975); Tokaji v. Toth, P-H \textsc{Equal Opp. Housing Rep.} \textsuperscript{1} 13,679 (N.D. Ohio 1974).

\textsuperscript{156} No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.


\textsuperscript{157} In an education discrimination case, Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court relied on regulations and guidelines of the U.S. Department of Health, Education and Welfare pursuant to Title VI to hold that a local school board violated the civil rights of non-English speaking students. In the redlining situation, the FHLBB has issued regulations and guidelines that the practice is a civil rights violation. \textit{See} notes 108-112 \textit{supra} and accompanying text.

\textsuperscript{158} 408 F. Supp. 498-99.

\textsuperscript{159} \textit{Id.} at 499.

and housing discrimination cases. The FHLBB regulatory standards also acknowledge this defense. "A [home loan] standard which has a discriminatory effect is not necessarily improper if its use achieves a genuine business need which cannot be achieved by means which are not discriminatory in effect or less discriminatory in effect." It should be noted, however, that this is limited by the requirement that there not be alternative means available to achieve the same end with less discriminatory impact.

Lending institutions can argue that their urban home loan policies and practices are required by the necessities of the housing credit market, and that prudent underwriting requires acknowledgment that certain community conditions weaken the security for a loan afforded by the property. The proximity of abandoned buildings in a blighted community, for example, plus data on the incidence of arson in abandoned buildings in that community, could be the basis for a solid business necessity defense despite the personal financial profile of an applicant. Lending officials have been forewarned by the General Counsel of the FHLBB, however, that allowance of the business necessity defense will be restricted.

The growing presence of programs like the Neighborhood Housing Service, community development corporations, and even the very community organizations that are raising the redlining issue undercuts the business necessity defense. Cooperation in a positive voluntary partnership with local government and community groups is an alternate method available to achieve legitimate business objectives with less discriminatory impact than redlining. These cooperative programs can improve community characteristics by protecting the properties that should serve as security for home loans.

B. Redlining as a Violation of the Sherman Act

The practice of redlining may additionally violate the Sherman Act as a conspiracy in restraint of competition. Though actual application of the Sherman Act to alleged redlining has not yet occurred, features of
the redlining process can arguably fall within the coverage of the anti-trust act.166

Home mortgages or home improvement loans have been found to be within the scope of "trade or commerce."167 If lending institutions of a city operated under even a tacit agreement to restrain the granting of home loans in particular geographical areas, evidence of that concerted policy could be sufficient to establish a conspiracy with anti-competitive effect.168 Further, interstate investment flows and the nationwide secondary mortgage market could be used to establish redlining as a "conspiracy in restraint of trade or commerce among the several states."169

When scrutiny is directed toward the effect on the loan applicants, a concerted policy of refusing home loans to parties on properties in certain neighborhoods or dealing with a redlined community's present or prospective property owners only on terms of excessively high down payment, high interest, or short loan life falls within the area of group boycotts of third parties or of combined agreements to deal only on onerous terms with third parties.170 These latter activities have been held actionable under the Sherman Act.171 If scrutiny is directed toward the terms of a loan, then a concerted policy of redlining could be tested for illegal price fixing (price of credit)172 or an illegal tying arrangement (housing is tied to credit).173 The jump from commercial competition to home loan decision-making raises serious legal problems of standing.174 A litigant seeking the equitable remedy of an injunction, however, would have less difficulty establishing standing.175

If the lending institutions in a community are confronted with

166 Doehrman, supra note 130, at 1053-62.

168 Even though there is brisk competition in some phases of the savings and lending industry, institutions in a metropolitan area often organize "clearinghouses" or some other method of having regular meetings to discuss common problems and policies. If a lending institution developed a redlining policy totally within itself without sharing in an information pool or a mutual agreement with other institutions, the redlining practices would not be actionable under the Sherman Act.

169 Housing discrimination is always localized because of the fixed position of housing, but courts have held that discrimination in a local area can have enough impact on interstate commerce to meet the interstate requirement of the Sherman Act. See Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723 (6th Cir. 1967); Contract Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill. 1969).

170 Doehrman, supra note 130, at 1055-56.
171 Bratcher v. Akron Area Bd. of Realtors, 381 F.2d 723, 724 (6th Cir. 1967).

173 In dictum, the Supreme Court in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 508 (1969) stated that credit could be in a tying arrangement with a tangible commodity. See also Saliterman, supra note 167, at 128.
174 Note, Standing to Sue for Treble Damages Under Section 4 of the Clayton Act, 64 COLUM. L. REV. 570 (1964).

175 15 U.S.C. § 16 (1975); see In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 126 (9th Cir. 1973); Doehrman, supra note 130, at 1060.
Sherman Act litigation by either individual or class claimants, they have available four possible defense strategies: first, attack allegations of an anticompetitive conspiracy; second, argue that loan decisions in an individual neighborhood do not have an interstate effect; third, argue that the terms of credit are set by free market mechanisms that naturally react to community characteristics; fourth, argue the affirmative defense of business necessity.176

C. Redlining and Community Development Block Grants

Another emerging method for legally halting redlining is through the Housing and Community Development Act of 1974.177 The Act's primary objective is "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."178 Specific objectives include the prevention of neighborhood deterioration,179 revitalization of deteriorating neighborhoods,180 conservation of existing housing stock,181 and the "reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods."182 Grants are made to local governments to fund projects aimed at halting housing abandonment and neighborhood decline. During the first fiscal year of operation under the Act, many city governments used part of their community development block grants to guarantee home improvement loans made by private lending institutions.

The Act itself has a general nondiscrimination requirement.183 Regulations apply the nondiscrimination clause to private contractors receiving community development funds or loans.184 Hence, lending institutions participating in a home improvement loan guarantee program would fit in this category. Recipients are forbidden to "restrict in any way access to, or . . . the enjoyment of any advantage or privilege enjoyed by others in connection with facilities, services, financial aid or other benefits."185 Affirmative action is mandated for recipients,186 and the regulations acknowledge that recipients might have to take action "to ameliorate an imbalance in services or facilities provided to

176 See text accompanying notes 160-64 supra for the business necessity defense of civil rights violation suits.
178 24 C.F.R. § 570.2(a) (1975).
179 Id. § 570.2(a)(1).
180 Id. § 570.2(a)(6).
181 Id. § 570.2(a)(3).
182 Id. § 570.2(a)(6).
183 Section 109 of the [Act] requires that no person in the United States shall on the ground of race, color, national origin or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with community development funds. Id. § 570.601(a).
184 Id.
185 Id. § 570.601(b)(4)(iv).
186 Id. § 570.601(b)(4)(i).
any geographical area or specific group of persons." Redlining creates imbalances in loanmaking services provided to geographical areas. Further, the regulations forbid locational choices that are discriminatory or that impair the accomplishment of the objectives of the Act. Redlining practices would fall squarely within this prohibition.

If recipients do not comply with the nondiscrimination requirements, the Secretary of HUD is authorized to refer the matter to the governor of said state or other appropriate chief authority. If no action is taken within sixty days, the Secretary can turn the information over to the Attorney General with a recommendation that an appropriate civil action be instituted, or that he exercise Title VI of the Civil Rights Act of 1964. The Secretary of HUD can terminate or reduce community development block grant payments, or institute special administrative procedures tailored to resolving disputes over compliance with the nondiscrimination requirements of the Act.

Community groups concerned about redlining can monitor the use of community development block grants, especially home loan guarantee arrangements made with private lending institutions as private contractors. The data maintenance requirements of the Housing and Community Development Act of 1974 mesh with data disclosure requirements of the Home Mortgage Disclosure Act of 1975. If such monitoring results in evidence of redlining, individuals or groups may petition the Secretary of HUD to institute appropriate proceedings. If the Secretary of HUD does not take action within a reasonable time, then a civil suit is possible to force HUD to enforce the nondiscrimination requirements of the 1974 Act.

VI. Conclusion

The redlining controversy will probably intensify during the next year or two, spurred by the institutional data disclosure mandated by

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157 Id. § 570.601(b)(4)(ii) (emphasis added).
158 Id. § 570.601(b)(3).
159 Id. § 570.912.
162 A block grant recipient must maintain general demographic data on race, ethnic group, sex, age, and head of household within each census tract and maintain racial, ethnic, and gender data showing the extent of participation and benefit from programs funded under the Act. 24 C.F.R. § 570.905(f).
163 See text accompanying notes 56-61 supra. The mesh will be greater if reporting by census tract is required by regulations which the Federal Reserve Board will develop.
164 The district court dismissed an attempt to order the Secretary of HUD to implement anti-discrimination sanctions for community development funds to New Castle, New York. Evans v. Lynn, 376 F. Supp. 327 (S.D.N.Y. 1974). The appellate court in an as yet unreported opinion stated, however, that the affirmative duty of the agency is to assess the impact of grant allocations upon integration and to avoid the diversion of funds which should be used to alleviate ghettoization. Evans v. Hills, No. 74-1793 (2d Cir. June 4, 1976), aff'd sub nom. Although these community development funds were for outdoor recreation under legislation predating the 1974 Housing and Community Development Act, the process stands as a model for groups that wish to promote the anti-redlining impact of community development block grants.
recently passed or pending legislation. Community action groups can be expected to step up their efforts in three related areas: scrutiny of FHA policies and practices, monitoring the allocations of community development block grants, and general emphasis on “Neighborhoods First” during the bicentennial year, all of which will have a stimulating spillover on the anti-redlining movement. If *Laufman* is ultimately decided against the lending institution, then a rash of cases fueled by mandated data disclosure can be anticipated. Local governments will be under increasing pressure to disqualify noncooperative institutions as depositaries of public funds.

Officers of lending institutions can use their resources and influence to combat the pressures generated by the anti-redlining movement, but the scenario would probably be a series of retreating skirmishes with the specter of credit allocation hovering in the background. Regulatory agencies and public officials, though highly sympathetic to the legitimate concerns of lending institutions, have exhibited increased sensitivity to pressures from community groups and public interest organizations.

Those entrusted with the shaping of public policy must of necessity seriously consider the challenge of saving urban housing. The redlining controversy has placed private financial institutions in a crucial position in this effort. The best strategy for lending institutions may well be to voluntarily intensify affirmative action to pump home loans back into savable urban neighborhoods.

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