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Tainted Loans: Towards a Mass Torts Approach to Subprime Mortgage Litigation

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Abstract

A poison has entered the financial bloodstream. The subprime mortgage crisis and the wider financial crisis it has spawned have caused the erosion of trillions of dollars in wealth, destroyed whole communities and the dislocation of millions of homeowners. Yet, unlike in other situations where toxic products have caused widespread harm, to date, we have not seen an avalanche of litigation, large jury awards, massive settlements compensating victims and financial ruin for the distributors of those products. Some of this is changing, however. Litigation arising out of the present financial crisis is hitting the courts, including suits alleging discrimination in the proliferation of subprime mortgages, securities litigation, and claims under state unfair trade practices laws and common law fraud principles. Courts may soon be inundated with these cases and will need effective tools for handling them.

With some exceptions, the litigation presently underway is an incoherent collection of random cases, however. If we view the subprime mortgage crisis and the financial crisis that has followed as the result of the proliferation of toxic products, a mass tort approach to the subprime mortgage disaster would seem inevitable, one that would include the ready use of class action procedures; consolidation of related cases; global settlements; and aggregation of factual, liability and damages assessments. This article makes the case that subprime litigation should adopt the techniques utilized in mass torts cases to make the prosecution of such litigation more efficient, comprehensive and effective. It is argued that these techniques are best suited to achieve what are identified as seven goals for a legal response to the financial crisis: reducing the number of foreclosures; correcting for past illegality in the mortgage market; uncovering and spreading information about the presence of such illegality; promoting the modification of outstanding mortgage loans; strengthening and expanding voluntary efforts to overcome past abuses in the market; preserving home values; and improving oversight and regulation of this market to restore lender, investor and borrower faith in it. The article also concludes that a mass torts approach in the subprime litigation context is superior in terms of meeting these goals when compared to other potential legal responses: i.e., individual litigation, individual bankruptcy, regulation, voluntary efforts and social insurance.
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A poison has entered the financial bloodstream. We have responded by seeking to prop up the purveyors of the poison so that they do not lose their investment in it. We have allowed those who sold the poisonous product to walk away from the fallout, after reaping large profits for years. The purchasers of the product are left to languish, with the side effects draining their resources and spirits, displacing them and ruining their future economic prospects. Typically, the sale and distribution of such a product would have meant litigation, large jury awards, massive settlements compensating victims and, yes, financial ruin, but not for the purchasers of the product; instead, its creators, manufacturers and distributors would answer for their actions. In the world of the home lending market, however, we have sided with the investors and the snake oil salesmen. We have chosen to shield the lenders, many of whom have simply walked away from their businesses after swimming in cascading profits. We have allowed the product to run its course, unchecked, and asked its victims to suffer the consequences.

Some of this is changing, however. Litigation arising out of the present financial crisis is hitting the courts, including suits alleging discrimination in the proliferation of subprime

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mortgage products, securities litigation, and claims for breach of state unfair trade practices laws and common law fraud principles. Individual borrowers, municipalities, large hedge funds, sovereign wealth funds and state attorneys general are actual and potential litigants. The damages sought in these actions could reach well into the trillions of dollars. Defendants in this litigation, including investment and commercial banks and subprime lenders, already facing existential crises from within due to the weakness of their books, now face attacks from without, and many will break from this pressure. Courts may soon be inundated with these cases and will need effective tools for handling them.

With some exceptions, the litigation presently underway is an incoherent collection of random cases. If we view the subprime mortgage crisis and the financial crisis that has followed as the result of the proliferation of toxic products, however, a mass tort approach to the subprime mortgage disaster would seem inevitable, and would help to bring order to the litigation chaos. To date, however, we have not viewed the subprime crisis, and now the growing financial crisis, through this frame. Could such an approach chart a course towards strengthening the housing market in particular, and re-instilling trust in financial markets generally? Would a mass torts approach – one that used aggregative techniques to coordinate and consolidate these actions, made liability assessments and evaluated and resolved damages claims – help to bring order to this litigation in an efficient and effective way, root out the full extent of illegal conduct, prevent needless foreclosures and bankruptcies and bring about corrective justice? Would it ultimately reduce the cost of any federal bailout of homeowners, by eliminating the tainted loans and reducing the number of borrowers that ultimately need to be rescued?

This article attempts to answer these questions, and is organized as follows. In Part I, I provide a brief overview of the subprime mortgage meltdown, outlining some of the areas in
which the various players in the subprime process may have engaged in what may ultimately prove to be actionable conduct. I also attempt to identify goals for legal responses to the subprime mortgage crisis. In Part II, I lay out a definition of mass torts, and discuss the evolution of the mass torts approach to addressing wide-spread harm through litigation. I also provide an overview of different types of litigation that have arisen or may arise in the aftermath of the subprime mortgage crisis. In Part III, I assess whether the types of actions described in Part II would qualify as “mass torts” and what such a determination would mean, spelling out the relative benefits of the mass torts approach in this context. Finally, in Part IV, I test whether a mass torts approach as a legal response to the subprime mortgage crisis is superior to other potential legal responses, including individual litigation, personal bankruptcy, regulation, voluntary efforts and social insurance.

I. Overview: The Potential Goals for Legal Interventions Responding to the Subprime Mortgage Crisis.

A. How Did We Get Here?
As I have attempted to explain elsewhere, there were six features of the subprime mortgage crisis that both helped to fuel the crisis and now creates the environment in which litigation has begun to arise. These features are as follows: the presence of information asymmetries between brokers and originators and borrowers as well as broker conflicts-of-interest; the severing of the traditional, long-term borrower-lender relationship; weakening underwriting criteria; perverse incentives in the mortgage origination and securitization process; undercapitalized originators; and limits on forebearance. My purpose in this article is not to rehash the causes of the subprime mortgage crisis, however. Instead, I will confine any discussion of these features to the extent an understanding of them is necessary for a discussion of the litigation that is likely to be driven by these very features.

First, subprime brokers and loan originators possessed a wealth of information about the mortgage market, the products available within it and the mortgage terms for which prospective

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3 A loan generally considered subprime typically has several distinct features when compared to a prime loan: higher upfront costs; a higher interest rate; and an adjustable interest rate that follows a brief period of a low, introductory rate. Chomsisengphet & Pennington-Cross, supra note 2, at 32.
borrowers might qualify. This asymmetry was often exploited by brokers and originators because they were able to shift otherwise prime borrowers into subprime loans, driven, at least in part, by the higher costs and fees they could collect by steering these borrowers in this way.

Second, traditional ties between borrowers and lenders used to lead such lenders to use sensible underwriting criteria because they were committing, long-term, to a relationship with the borrower. The viability of their investment in this borrower over the length of the loan depended on effective scrutiny at the front end of the transaction. In this setting, the borrower and lender shared mutual interests in the borrower’s ability to maintain current in his or her loan payments over time. But securitization has severed this traditional relationship because the lender that originates the mortgage has little interest in the long-term viability of the borrower and is interested, instead, in finding warm bodies to serve as borrowers of mortgages: grist for the securitization mill that generated fees for the originator with each new deal, and passes the mortgage on to investors.

Making matters worse, many subprime loans were handled by mortgage brokers: players in the subprime mortgage market with unclear loyalties. One study estimated that nearly half of all subprime loans reviewed were handled by a broker, compared to only 28% of prime loans.

5Bair Testimony, supra note 1, at 2.  
6Krinsman, supra note 1, at 14.  
When looking at lending in communities of color, one study showed that 64% of African-American borrowers used a broker, while only 38% of white borrowers did so.\(^9\)

Third, as the subprime frenzy spread in the early part of this decade, lenders lowered their underwriting criteria to bring more borrowers into the fold, to feed the voracious appetite of investors in subprime securities. Unqualified borrowers received loans with no money down, and no documentation of assets or income. Maintaining a steady stream of borrowers, regardless of their qualifications, was critical to feed not only the investors’ desire for more subprime securities, but to keep the originator and broker gravy train of fees associated with each securitized loan running at full steam.\(^10\)

This drive to write as many mortgages as possible reveals a fourth relevant cause of the subprime mortgage crisis: the perverse incentives inherent in the subprime securitization process. By linking broker and originator compensation to the volume of loans they could generate for securitization, and not their long-term viability, quantity of subprime mortgages and not their quality was incentivized.\(^11\)

How did the market attempt to deal with these perverse incentives? Originators were expected to make warranties about the viability of the mortgages they were offering up for securitization, often with an added requirement that they would buy back such loans if they

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\(^10\) Krinsman, *supra* note 1, at 5-6, 15.

failed. But these protections turned out to be hollow, which led to a fifth centerpiece of the subprime mortgage collapse: undercapitalized lenders. When the mortgages they had originated went bust, the lenders were unable to make good on their promises to buy back the mortgages, and were often forced to seek bankruptcy protection because of these outstanding liabilities.\textsuperscript{12}

A final cause of the subprime mortgage crisis that features prominently in the litigation thicket growing out of the crisis is the fact that many subprime mortgages are burdened by limits on the ability of the servicer of the mortgage to modify those mortgages. Modification can offer a borrower the chance to rework his or her long-term obligations under the loan, and can include reductions in the interest rate owed on the loan, extension of the loan term to bring down monthly charges, deferral of payment obligations and outright forgiveness of certain payments and penalties.\textsuperscript{13} But securitization pooling agreements generally limit the extent to which the servicers of the underlying mortgages can modify those loans, making sensible workouts difficult to accomplish, regardless of whether such modifications are in the best interests of all parties to the transaction.\textsuperscript{14}

\textbf{B. The Impact of the Subprime Mortgage Crisis on Communities of Color}

In addition to these features of the subprime mortgage crisis, another significant phenomenon, which also calls for a legal response, is the extent to which many abuses in the subprime mortgage market were carried out disproportionately in communities of color, partly because a disproportionate share of subprime lending took place in those communities. While

\begin{itemize}
\item \textsuperscript{12}Krinsman, \textit{supra} note 1 at 16; Cole Testimony, \textit{supra} note 1, at 3.
\item \textsuperscript{13}The Role of Secondary Market in Subprime Mortgage Lending: Hearing Before the H. Subcomm. on Fin. Insts. and Consumer Credit, 110th Cong. (2007) (testimony of Warren Kornfeld, Managing Dir. of Moody’s Inv. Serv. At 17)[hereinafter Kornfeld Testimony].
\item \textsuperscript{14}Bair Testimony, supra note 1, at 4. \textit{see also} Kiff & Mills, \textit{supra} note 10, at 13.
\end{itemize}
significant gains were made in homeownership rates in such communities in the earlier part of this decade, much of this expansion was fueled by subprime loans.\textsuperscript{15} Indeed, in 2005 alone, while only twenty percent of the all mortgages issued in that year were subprime, more than half of the mortgages made to African-American families and forty percent of mortgages made to Latino families were subprime in nature.\textsuperscript{16} The factors that led to these discrepancies include that the history of lending discrimination in these communities meant there was pent up demand for home loans and fewer traditional lending options\textsuperscript{17} and there were fewer channels available to such borrowers that could offer sensible, conflict-of-interest-free and informed counseling and advice.\textsuperscript{18}

One study from the early days of the subprime mortgage market’s expansion showed that in 1998, thirty-nine percent of residents from upper income African-American neighborhoods used subprime products when refinancing their existing mortgages compared to just six percent of residents of upper income white neighborhoods. In even starker contrast, residents of low-income white neighborhoods refinanced their homes using subprime products only eighteen percent of the time. Thus, in 1998, upper-income residents of African-American neighborhoods

\textsuperscript{15} Kiff & Mills, supra note 10 at 4, n..4.
\textsuperscript{17} For a history of discrimination in the home mortgage market in particular and the housing market in general, see DAN IMMERMGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 87-108 (2004); see also Adam Gordon, The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks, 115 YALE L. J. 186, 209-11 (2005) (discussing how the regulatory system denied most African-Americans the opportunity to buy homes).
were twice as likely as residents of low-income white neighborhoods to utilize subprime refinance products.\(^{19}\)

Even within subprime lending itself there are racial and ethnic disparities in pricing and subprime terms. The Center for Responsible Lending studied HMDA data from 2004 related to subprime lending during that year, and, controlling for borrower variables like income, loan-to-value ratio and credit scores, found that African-Americans and Latinos were more likely to have higher priced subprime loans and features like pre-payment penalties than similarly situated white borrowers.\(^{20}\) The researchers there found “Latinos and African-Americans were 28 percent and 37 percent more likely, respectively, to receive a higher-rate subprime loan than whites.”\(^{21}\) With fixed-rate home purchase loans with pre-payment penalties, African Americans were 31% more likely than whites to have higher interest rates on their loans than whites in their mortgage, and 34% more likely to have higher interest rates in their refinance loans than whites.\(^{22}\) For Latinos, the figures are even more striking: for fixed-rate home purchase loans with a pre-payment penalty, Latino borrowers were 45% more likely to receive a loan with a higher interest rate than white borrowers; with fixed rate loans without a pre-payment penalty,  

\(^{19}\) HUD-TREASURY REPORT, supra note 17, at 48. More recent research on lending patterns found similar results and concluded that these patterns were likely the result of steering. See, CALIFORNIA REINVESTMENT COALITION ET AL., PAYING MORE FOR THE AMERICAN DREAM: THE SUBPRIME SHAKEOUT AND ITS IMPACT ON LOWER-INCOME AND MINORITY COMMUNITIES 4-5 (2008), available at http://nedap.org/documents/MultistateHMDAReport-Final21.pdf (analyzing activity of subprime lenders in seven metropolitan areas and finding that over 40% of the loans by these entities were in predominantly minority neighborhoods while only 10% of their loans were in predominantly white neighborhoods,”suggest[ing] that these neighborhoods were targeted by high-risk lenders . . . ”). A preliminary investigation showed that at least some subprime borrowers were otherwise qualified for prime loans, but ultimately agreed to enter into subprime loans. E Scott Reckard & Mike Hudson, More Homeowners with Good Credit Getting Stuck with Higher-Rate Loans, Los Angeles Times, October 24, 2005 (finding 20% of subprime borrowers would have qualified for prime loans).  


\(^{21}\) Id., at 8.  

\(^{22}\) Id., at 3-4.
Latino borrowers were 142% likely to have a higher interest rate than similarly situated white borrowers.\textsuperscript{23}

More recent lending data, from 2006, revealed similar discrepancies.\textsuperscript{24} For example, roughly fifty-four percent of home purchase loans made to African-Americans in that year, compared to only eighteen percent of the loans made to non-Hispanic whites, had subprime features.\textsuperscript{25} Even controlling for some borrower and lender characteristics, thirty percent of loans made to African American borrowers still had subprime features, compared to eighteen percent for whites, and thus African-American borrowers of similar economic profile to their white counterparts still took out subprime loans at nearly twice the rate as whites. Similarly, controlling for those same features, Latino borrowers took out subprime loans twenty four percent of the time, a nearly 50% higher subprime rate as compared to whites.\textsuperscript{26}

Controlling for many borrowers and lender characteristics in terms of refinance originations, subprime refinance loans were extended to blacks 33% of the time and to non-Hispanic whites 26% of the time, an unexplained difference of 7.3%,\textsuperscript{27} and Latinos received subprime refinance loans 29.7% of the time.\textsuperscript{28}

Finally, the 2007 HMDA data has recently been released and it actually shows these discrepancies improved slightly in 2007, most likely a result of the collapse of dozens of subprime mortgage lenders during that year.\textsuperscript{29} One hundred and sixty-nine institutions that

\begin{itemize}
  \item \textsuperscript{23} Id., at 4.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id. at A96.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Avery, supra note 23, at A96. Other studies confirm a disproportionate share of subprime loans going to minority borrowers, even controlling for creditworthiness and other factors. See, e.g., PAUL S. CALEM, ET AL., THE NEIGHBORHOOD DISTRIBUTION OF SUBPRIME MORTGAGE LENDING (2002); Paul S. Calem, et al., Neighborhood Patterns of Subprime Lending: Evidence from Disparate Cities, 15 HOUS. POL’Y DEBATE 603 (2004).
  \item \textsuperscript{29} See, Robert Avery, The 2007 HMDA Data, FEDERAL RESERVE BULLETIN A108-A109 (December 2008).
\end{itemize}
reported loans under HMDA in 2006 ceased operations in 2007, and the data on the lending patterns of these institutions in terms of their lending to different races is striking. These failed institutions originated subprime loans to blacks 74% of the time and to Latinos 63% of the time, compared to the industry average of 50% and 37%, respectively, for all lenders.\footnote{Id., at A126 (Table 12).}

C. Some Goals for Subprime Litigation

The impacts of the subprime mortgage crisis, and the financial crisis that has followed, are long, deep and severe. The need for radical interventions in the housing market and financial system is desperate. Litigation is a potential response to this need, and the ends that it could serve are many. Too many people face foreclosure, locked in mortgages they can ill afford, with homeowners making choices between paying the lender, putting food on the table, seeking medical attention, and investing in education. Some of these mortgages are the product of illicit conduct, from discrimination and fraud, yet for too many borrowers facing default, they will never know they might have valid defenses to their foreclosure, where they could raise the issue of misconduct in the marketing or consummation of the underlying mortgage. Many other mortgages were simply unwise investments for all involved – borrowers, lenders and the investors buying up the securities backed by them; sensible modification plans must be put in place to prevent foreclosures and its human costs, and preserve the viability of everyone’s stake in such mortgages to forestall the steep depreciation in value to those assets that follow foreclosures themselves.

When foreclosures do arise from payment delinquency, they impact not just the family whose home is in jeopardy, but they drive down neighboring property values, weaken local tax
bases, drive up the municipal costs of monitoring vacant properties.\textsuperscript{31} Facing falling property values, too many homeowners, as well as banks holding foreclosed properties, are placing homes on the market and this glut of properties further depresses home values, creating a vicious cycle. Lower property values force families whose homes are worth less than their outstanding mortgage debt place their homes on the market for sale; as more properties hit the market, the greater the downward pressure on values.

Depressed home values and mortgage defaults have, in turn, impacted the value of the subprime securities backed by these mortgages considerably, which has been at the heart of the larger financial crisis. Lending has ground to a halt, even for borrowers with good credit scores, solid credit histories, and savings that can serve as down payments. Paradoxically, at a time of lower home values, when first-time home buyers and other families who might have been waiting for the opportune moment to sell their homes and upgrade or downsize, borrowing has gotten more expensive and more difficult. Unwilling to invest in the present mortgage market for fear of a further spiral down in prices, concerned about the value of the asset-backed securities they still hold in their own balance sheets and strapped for cash themselves, banks have pulled back on the reins, unsure of the road ahead and lacking confidence in their ability to realize a reasonable rate of return from mortgage lending in the face of extreme volatility in that market.

Given this litany of issues, legal interventions, in order to be relevant and useful in the current climate, would be directed towards reducing the number of foreclosures; correcting for past illegality in the mortgage market to bring about corrective justice; uncovering and spreading

information about the presence of such illegality in the market; promoting the modification of outstanding mortgage loans; applying pressure on banks and other institutions to strengthen and expand voluntary efforts to overcome past abuses in the market; preserving home values to the greatest extent possible; and improving oversight and regulation of this market to restore lender, investor and borrower faith in it.\(^{32}\)

Legal interventions that might address these many problems could include any one of the following mechanisms: litigation, from representation of individual borrowers in foreclosure or bankruptcy proceedings to affirmative, class actions or other collective actions on behalf of borrowers or investors in subprime securities; regulatory and legal reforms that seek to shore up the legal infrastructure behind mortgage lending generally; and social insurance, that would seek to mitigate the most serious impacts of the subprime mortgage crisis: with the expensive and expansive bank interventions that have been attempted over the last six months qualifying as social insurance, though publicly, and not privately, funded.

Each of these interventions is likely necessary in many respects to address the myriad problems that arise in the face of the current financial crisis. My self-appointed task here is

\(^{32}\) Similarly, in arguing that a “duty of suitability” should attach to home mortgage lending contracts, Kathleen Engel and Patricia McCoy have argued that such a remedy would accomplish the following goals in response to the problem of predatory lending generally:

- Given these shortfalls [i.e., that contract law and consumer counseling do not address predatory lending adequately], an effective remedy must accomplish several things. It must force predatory lenders and brokers to internalize the harm that they cause and create effective disincentives to refrain from making predatory loans. It must compensate victims for their losses and grant reformation of predatory loan terms. It must outlaw predatory practices in such a way that the law is understandable, violations can be easily proven, and lenders and brokers cannot evade their obligations. At the same time, it must avoid unnecessary price regulation and excessive constraints on legitimate subprime lending. It must furnish the private bar and victims with adequate incentives to bring predatory lending claims, while avoiding incentives toward spurious claims. And it must promote the adoption of best practices by the mortgage industry.

three-fold. First, to identify the ways that, among the potential legal interventions, litigation can address these problems. Second, to determine the extent to which utilizing what I call a mass torts “approach” to this litigation would be a helpful method for addressing these issues. And, third, to determine to what extent a mass torts model might be superior to other legal interventions described above in addressing these problems: e.g., case-by-case adjudication in foreclosures and bankruptcy proceedings; regulatory, policy and statutory interventions; voluntary efforts; and social insurance.

How might litigation respond to some of the problems plaguing the home mortgage market? First, litigation could help to stem the tide of foreclosures by challenging the validity of the mortgages underlying those foreclosures. Such an effort would assess the legitimacy of those mortgages and explore legal attacks on their validity. This is already underway in affirmative, class action litigation as well as suits by states attorneys general using various theories, from violation of state consumer protection laws to federal anti-discrimination provisions. It is also being utilized in the context of affirmative litigation on behalf of classes of borrowers, but also in individual foreclosure proceedings, as defenses and affirmative counterclaims in that context.

Second, litigation could expose critical information about the legitimacy of mortgage lending practices, which, in turn, could lead to more litigation and more informed policy, regulatory and statutory reform. Disclosure through discovery of evidence of discrimination or other illegal conduct could be shared between plaintiffs’ attorneys, paving the way for new theories of recovery. The class certification process will uncover the names of potential class members, who, in turn, will receive notice of the pending litigation and the theories behind it, broadening awareness about the litigation and expanding the membership in the class. Such information would also make its way into the media, highlighting abusive lending practices and
raising awareness about such practices. This would likely encourage potential borrower-victims to come forward and seek an assessment of the viability of any claims they might have against any lenders or other actors in the mortgage process. It would also help sway public opinion to make it more favorable to borrowers in distress by creating a greater understanding of the processes at work that led to the current crisis.

Third, and related to the first two benefits of litigation, through the pressure of affirmative claims of discrimination or unfair practices in the class action context, or in the setting of a foreclosure proceeding where such claims are raised as defenses or counterclaims, borrowers may be able to exert pressure on lenders and mortgage servicers to modify the underlying mortgages to escape other penalties or damages for such claims, to make the terms of these mortgage more fair and more closely aligned with a particular borrower’s ability to pay and the present value of the home serving as collateral.

Fourth, these first three benefits that might flow from litigation in the subprime context – challenging the underlying validity of the mortgages, exposing information about predatory conduct, and applying pressure to modify mortgages – could, collectively, help to preserve home values generally because they will likely reduce the number of homes going into foreclosure and hitting the market through resale, as well as reduce the pressure on borrowers to sell their homes under the weight of oppressive mortgage terms. Reducing the supply will necessarily place less downward pressure on prices. By doing so, while home prices might not fully stabilize as a result of the effects of litigation, they will, at worst, decline less rapidly, simply through the laws of supply and demand.
Fifth, litigation could, potentially, restore some faith in the mortgage markets by making clear that predatory conduct will not stand unchecked in the face of clear violations of the law. When coupled with the value from litigation of raising awareness about predatory conduct in the market, borrower confidence that the legal and regulatory infrastructure will monitor such conduct will help bolster borrower confidence in the market generally. Conversely, however, lender distaste for lending in a market awash in litigation and monitored by plaintiffs lawyers might rise, weakening lender faith in that very same market.

Apart from this potential harmful side effect of subprime litigation, other externalities are also quite possible to arise. The most obvious is that many financial institutions may be pushed to the brink of insolvency, or over its edge, resulting in the loss of value to investors in these institutions, and the loss of the jobs of the people employed by them. Worse still, for those institutions that are insured depository institutions, insolvency would externalize the harm of the litigation and place it squarely on the federal government, and, by extension, American taxpayers: i.e., those ultimately responsible for guaranteeing the deposits held by those institutions. It could also lead to frivolous lawsuits that might shield borrowers from honoring their contractual responsibilities under their mortgages and create moral hazard by creating incentives for borrowers to disregard such obligations and attempt to raise settlement demands to lighten those obligations on baseless grounds.

Given this set of potential benefits and harmful side effects from litigation in the subprime lending context, I turn now to the modern mass torts phenomenon and a review of current litigation related to subprime lending already underway to determine the extent to which a mass torts approach to subprime litigation might serve the beneficial ends identified yet minimize the potential harms from it.
II. Mass Torts and Subprime Litigation?

A. What is a Mass Tort and what is the “Mass Torts Approach”? 

What is a mass tort? As distinct from individual tort cases (e.g., the typical pedestrian-hit-by-car case or slip-and-fall action), a mass tort action involves injuries inflicted on a wide range of people, often from a particular product, practice or action. They can include “collective personal injury actions, mass financial injuries, products liability, and pharmaceutical liability cases.” They are typically “pursued in a collective fashion - that is, as groups of cases rather than individually.” Mass tort claims are typically aggregated: multiple cases are harnessed and handled by a single judge, or a small number of judges, who issue rulings or promote settlements that will affect all parties involved in the lawsuit. Aggregation of claims has made the cost of bringing such litigation far less expensive for plaintiffs; makes them easier for judges to handle more efficiently; and can make the job of defending against these cases harder because they increase the likelihood that such cases will be brought, and brought by more people, but also offers the opportunity for peace, where all claims against a defendant can be resolved through a single process. 

Deborah Hensler has identified some of the key features of mass torts that set them apart from other types of civil litigation as follows:

Mass torts involve a common set of injuries that occurred in the same or similar circumstances -- for example, a hotel fire, a building collapse, or

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35 For the benefits of aggregation, see, infra text accompanying notes 39 to 48.
widespread product use -- and that are allegedly linked to the actions of a single or small number of defendants. Plaintiffs and defendants are represented by a small number of law firms (relative to the magnitude of the litigation), and a single or small number of judges frequently manage the litigation because of aggregative procedures such as multidistricting and class action certification.

Because of this high degree of commonality, the outcome of any one case within the litigation -- regardless of whether it has been formally grouped with other such cases -- is highly influential on the outcome of other cases. A single large plaintiff award for compensatory or punitive damages will increase the value not only of other pending cases asserting the same facts and legal doctrine but also of similar claims that may be filed in the future. A key doctrinal decision in a single case -- for example, on the availability of market share liability -- may presage the success or failure of massive litigation against particular defendants.

In addition to numerosity, commonality, and interdependence of case values, many mass personal injury torts share three other features: controversy over scientific evidence of causation, emotional or political heat, and higher than average potential for claiming by allegedly injured parties.36

According to this definition, mass torts share some of the following features: numerosity, commonality, interdependence of case values, controversy over causation, emotional or political heat and higher than average claim rate: i.e., that more claimants come forward than is typical in other personal injury settings.37

What is more important than whether a case is labeled a mass tort is how a particular matter is ultimately commenced, pursued, adjudicated and resolved by counsel for all of the parties involved and the judge or judges who ultimately preside over that matter. Class action treatment; Multi-District Litigation procedures; aggregating techniques utilized to both

37 Hensler, supra note 35, at 1598 (citations omitted). Richard Nagareda has articulated a “working definition” of mass torts as follows:

“[M]ass torts” involve allegations of tortious misconduct affecting large numbers of broadly dispersed persons. The persons, in turn, complain of injuries that may remain latent for years or even decades but, when they do emerge, present a limited set of factual variations.

RICHARD NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENTS vii (2007).
adjudicate questions of liability, causation and damages, as well as to establish mechanisms for compensating plaintiffs through settlement; plaintiffs’ and defense counsel collaborating with colleagues handling similar cases and similarly aligned to share information about claim values, relevant evidence, discovery strategy, litigation strategy, expert witnesses, and to spread and share the costs of litigation: these are, perhaps, the more important hallmarks of mass tort litigation than some of the traditional features described above that are typically utilized to identify what matters can rightly be classified as mass torts and what cannot.

Many of these features of the mass tort approach are present in mass torts litigation because significant economies of scale can be achieved through their use, making the litigation easier to prosecute for plaintiffs and their counsel, arguably beneficial for defendants and their counsel, and ultimately more efficient for courts. These benefits are best realized when cases reach “maturity”: that is, "where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions." At this stage, “little or no new

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38 Aggregation can be accomplished by the creation of a class action, with common factual or liability disputes handled on a class-wide basis, or through other types of techniques, like statistical sampling to reach determinations on these disputes. See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). For a review of statistical sampling techniques, see, Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 VAND. L. REV. 561 (1993); Michael J. Saks & Peter David Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 STAN. L. REV. 815 (1992).

39 For an overview of aggregative techniques, see, e.g., Saks & Blanck, supra note 37, at 817.


evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted."\(^{42}\)

By coordinating the claims of many individuals against a single defendant or a small number of defendants, plaintiffs and their counsel are able to spread the high cost of litigating complex and/or difficult cases over many clients and can invest greater resources into prosecuting the claims of many victims out of the belief that such an investment will garner a larger judgment or settlement amount in the aggregate. While it is an exaggeration to say that the costs to plaintiffs’ counsel of establishing certain elements of a particular mass tort are just as high when litigating one claim as they are when litigating claims on behalf of 1,000 or even 10,000 victims, but it is not that far from the mark. When litigating on behalf of a single plaintiff or a small number of plaintiffs, the high cost of proving causation for a particular injury in an area where science is evolving or of establishing a particular defendant’s liability for that injury where it might be difficult to trace can be prohibitive and result in many such claims never seeing the light of day. By bringing actions on behalf of a large number of claimants, however, plaintiffs’ counsel can invest the funds necessary to establish the elements of their clients’ claims with the hope, typically embodied in contingency fee arrangements, that, at the end of the day, the greater net monetary award will likely more than compensate plaintiffs’ counsel for the expenses necessary to obtain such relief.

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\(^{42}\) Id. For a discussion of the importance of maturity in the life cycle of a mass tort for making the most effective use of aggregative procedures, see, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 22-25 (Feb. 15, 1999)(hereinafter, Report of the Advisory Committee); Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 CORNELL L. REV. 938, 949 (1995). For an argument that maturity is not required for the use of collective procedures, see, David Rosenberg, Comment, Of End Games and Openings in Mass Torts Cases: Lessons from a Special Master, 69 B.U. L. REV. 695, 707-711 (1989). As Peter Schuck has pointed out, the maturation period can be a period of great creativity and experimentation. Schuck, supra, at 976.
Plaintiffs’ counsel, when representing large groups of claimants, also wield significantly greater leverage over defendants than any lawyer representing a single plaintiff or a small number of plaintiffs might. The threat of massive damages awards on behalf of thousands of victims, lengthy trials, embarrassing revelations, runaway juries and the prospect of an opponent with an appetite for and sufficient resources to carry out sustained combat all create what some have called “hydraulic” pressure on defendants to settle cases quickly, on terms less favorable than they might obtain dealing with certain disputes claimant-by-claimant.\textsuperscript{43} In fact, when dealing with early claimants in cases filed individually, quiet settlements, even on terms that are generous (but with strict confidentiality provisions), can eliminate the threat that such cases will raise awareness in a particular community about the viability of similar claims. Such settlements can, in turn, reduce the threat of copycat litigation, and lower net payouts made by defendants. By contrast, high profile, large-scale and very public litigation, where plaintiffs’ counsel utilize appropriate methods of advertising and client recruitment, can and does increase the claim rate in the mass torts setting as contrasted to what happens with most personal injuries: where the overwhelming majority of injured victims never sue and never seek redress for such injuries.\textsuperscript{44}

For defendants, aggregation of claims and the use of aggregating methodologies can help them as well.\textsuperscript{45} Handling multiple claims in a single matter can reduce transactions costs and can lower the risk of conflicting decisions that make claim valuation difficult. Successful motions to dismiss in aggregated cases can dispose of thousands of cases with a single motion.\textsuperscript{46} Global

\textsuperscript{43} Charles Silver, “\textit{We’re Scared to Death”}: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1358 (2003) (quoting Newton v. Merrill Lynch, 259 F.3d 154, 164 (3d Cir. 2001)


\textsuperscript{45} For the benefits of aggregation of claims for defendants, see, e.g., DEBORAH R. HENSLER, CLASS ACTION DILEMMA 102 (2000).

\textsuperscript{46} Some research also suggests that the likelihood of jury verdicts for defendants increases as the claims of more severely injured plaintiffs are aggregated with plaintiffs suffering only modest injuries. See Irwin A. Horowitz &
settlements against present and potential future claimants can give defendants peace, and give
them and their shareholders a clear picture of their ultimate legal exposure for the conduct
underlying a particular action.\footnote{John Coffee, a vocal critic of mass tort class actions, concedes that there are benefits to claims aggregation: (1) it economizes on transaction costs or permits greater financial or other resources to be assembled to counteract the typically greater resources of the defendants, (2) it threatens risk averse defendants with greater liability and so deters them from going to trial, and (3) it avoids a "race to judgment' among competing plaintiffs who fear either the impact of precedents in other related cases or that defendants' assets may be insufficient to fund the aggregate recoveries.}  As was present in the asbestos and tobacco litigation, as well as most other mass torts settings, defense counsel pool resources, and strive to present a common and united defense against the attacks lodged against them from many different quarters.

Courts too can benefit from aggregating techniques, which can help to resolve large numbers of cases on their dockets through sweeping dispositions affecting such cases, or through wide-ranging settlements, that ultimately get such cases out of their court rooms;\footnote{Rosenberg, Class Actions for Mass Torts, supra note 39, at 848 (noting additional benefit of class action treatment is that it motivates courts, as well as the parties, to invest resources in the litigation “so as to achieve optimal deterrence and insurance.”); see also Michael J. Saks & Peter David Blanck, supra note 37, 44 Stan. L. Rev. 815, 815 (1992)("Aggregation adds an important layer of process which, when done well, can produce more precise and reliable outcomes.").} unfortunately, the very success of these techniques at handling mass torts actions collectively has probably made the mass torts model more attractive to plaintiffs’ counsel, driving up the number of mass torts cases ultimately filed.\footnote{Deborah R. Hensler, The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation, 31 SETON HALL L. REV. 883, 891 (2001).}

Critics of the mass torts approach are legion, however, and they direct a range of attacks against the revolution in the courts that has led to mass aggregation in the contexts described above. According to these critics, no one is spared the harms and distortions of mass torts

\begin{quote}
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litigation: not plaintiffs, defendants, the courts nor the general public.50

For plaintiffs (and potential plaintiffs), it is argued that the mass torts approach leads to litigation strategies devised and even binding settlements reached with little input from those plaintiffs and potential plaintiffs into either. According to these critics, aggregative methods not only deny plaintiffs due process, they completely deny those parties their day in court. The mass torts approach pits the interest of class counsel, driven by a desire to reach settlements early in the litigation process and garner large contingency fees with little expenditure of resources, against claimants and potential claimants seeking larger net awards. The sheer number of plaintiffs in many mass torts cases also makes it difficult for attorneys to communicate effectively with all of their clients, makes decisionmaking difficult, and sometimes pits certain sub-classes of plaintiffs against others, particularly at the settlement stage.51

Over the last decade, the Supreme Court has addressed the issue of aggregate settlements in mass torts class actions, and, in both situations, found those settlements wanting. In Amchem Products Inc. v. Windsor,52 the Court invalidated a proposed class action settlement that attempted to settle both present and future claims against 20 asbestos manufacturers for the

50 See e.g JACk B. WEnSTEIN, I ndivi dul J ustices i n MAss tort l itiga t ion: the ef fe c t o f clas s a c t ions, Con soli d a tions, an d O ther mu ltip arty devi ces (1995) (“When an attorney undertakes what is in essence a public litigation, he or she must be prepared for financial destruction as well as glory. The issues transcend traditional one client-one attorney relationships and conflicts. They involve whole communities.”); HENRY S. COHN & DAVID BOLLIER, THE GREAT HARTFORD CIRCUS FIRE: CR EATIVE SETTLEMENT O F MA S S TORT DISASTER(S) (1991) (discussing various criticisms to mass tort claims, particularly the ethical restraints on judges); Francis E. McGovern, Toward a Cooperative Strategy for Judges in Mass Tort Litigation, 148 U. PA. L. REV. 1867, 1873 (2000). (criticizing the mass torts process and the manner in which settlements are determined).
52 521 U.S. 591 (1997);
failure on the part of the settlement to meet the strict requirements of Rule 23 of the Federal Rules of Civil Procedure. Specifically, the Court concluded that based on the large number of questions presented by several categories of class members as well as to specific individuals within each specific category, it is not possible to meet the predominance standard of Rule 23(b)(3). Furthermore, the Court found that Rule 24(a)(4) was not met since there were several conflicts of interest between the named parties and those they sought to represent. For instance, the Court noted that there was a great disparity between currently injured and exposure only plaintiffs. As a result, the settling parties achieved global compromise with “no structural assurance of fair and adequate representation for the diverse groups and individuals affected.”

Similarly, in *Ortiz v. Fibreboard Corp.*, a case in which the parties attempted to settle a so-called “limited fund” class action under FRCP 23(b)(1)(B), the Court found that the proposed settlement agreement did not meet the essential requirements of such a limited fund action. Specifically, the Court found several flaws in the agreement including: (1) a failure to demonstrate that the fund was actually limited except by the agreement of the parties, and (2) the agreement showed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) as described in the *Amchem* case. First, since all assets were not yet liquidated the Court was concerned that the defendants had not established the upper limits of the fund with sufficient specificity to comply with Rule 23(b). Second, the Court was concerned with equity among the members of the class. Two issues were important for the Court in this respect: the inclusiveness of the class and the fairness

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53 *Id.* at 624.
54 *Id.* at 625.
55 *Id.*
57 The Court noted that limited fund class actions required certain minimum characteristics, namely, (1) the existence of a “fund” with a definitely ascertained limit, (2) all of which would be distributed to satisfy those with liquidated claims based on a common theory of liability, (3) by an equitable, pro rata distribution. *Id.* at 838–841.
of distributions to those within it. As to the inclusiveness of the class, the Court found that the mandatory settlement class surely could not qualify when in the very negotiations aimed at the class settlement, class counsel agreed to exclude what could have turned out to be more than one third of all claimants.\textsuperscript{58} The Court also found that the agreement did not provide fairness to the class members since it did not have sufficient procedural mechanisms to properly award damages to dissimilarly situated class members.\textsuperscript{59} In fact, the Court noted that many of the conflicts of interests that were present in the \textit{Amchem} case, were also present in the proposed \textit{Ortiz} class settlement.

Apart from these concerns, others raise concerns about the impact of the mass torts approach on the defense side. Defendants are forced to face the prospect of massive, firm-killing judgments in cases that find themselves before juries sympathetic to the plight of representative plaintiffs. Such defendants are blackmailed into settlement on the slimmest of allegations, supported only by “junk science.” According to the critics, a major problem in mass tort cases has been the use of experts testifying to causation based upon highly questionable or incomplete data and analysis.\textsuperscript{60}

From the perspective of the judiciary, courts are overburdened by the influx of mass torts and are forced to cut procedural corners out of desperate attempts to clear their dockets. Some judges arrogate to themselves suspect powers and twist arms to convince parties to settle, regardless of the relative merits of the claims. Many have argued that mass tort cases often

\textsuperscript{58} Id. at 854.  
\textsuperscript{59} Id. at 855.  
\textsuperscript{60} David Bernstein, \textit{Out of the Fryeing Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation}, 10 REV. LITIG. 117, 120 (1990) (noting a witness brokers policy that “[i]f the first doctor we refer doesn't agree with your legal theory, we will provide you with the name of a second prospective expert”).
create a situation which fosters “managerial” judging and forced settlement.61 The numbers of litigants and claims in mass tort cases and their complexity has led to judges controlling the litigation and becoming heavily interested in settlement.62 The ability of judges to encourage settlement can potentially lead to inappropriate management of a case.63 For instance, judges have a wide variety of methods to encourage settlement including refusing to rule on dispositive motions, putting pressure on defendants due to overwhelming numbers of pending cases, ordering broad discovery into the defendants’ corporate activities, and authorizing a massive amount of depositions.64 Some have even argued that judges in a managerial capacity have bent substantive rules and gone too far to encourage settlement at the expense of litigants’ rights.65

The public at large suffers as the costs associated with paying out large judgments are ultimately passed on to the consumer in the terms of higher prices for goods by companies that find themselves on the short end of massive settlements.66 Individual parties to other litigation before courts grappling with mass torts litigation find their access the courts impaired by the time commitment required of courts handling subprime litigation.

Another concern for the public regarding mass torts is the economic dislocation on third

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62 See, e.g., Schuck, supra note 23, at 163 (“A well-meaning but overzealous judge may occasionally go too far and ‘coerce’ settlement, and [Judge] Weinstein himself has been accused of this.”).
63 Id.
64 MARK HERRMAN, FROM SACCHARIN TO BREAST IMPLANTS: MASS TORTS, THEN AND NOW 51 (1999)
65 Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 84-85 (1989) (arguing that on the eve of a mass torts trial Judge Judge Weinstein: (1) warned counsel for plaintiffs that they might be held personally responsible by their clients for rejecting the proposed $180 million settlement; (2) led the parties to settle on that figure rather than a higher one because of his opinion that similar suits should not be encouraged in the future; and (3) misled the plaintiffs into believing that a higher figure was impossible because of the attitude of the defendants).
66 Weinstein, supra note 3, at 494.
parties.\textsuperscript{67} For instance, settlements against the asbestos industry demonstrated that mass torts claims can bankrupt even large companies.\textsuperscript{68} Over the last four decades, workers claiming injuries due to exposure to asbestos have sued more than a thousand corporations in a wide range of industries.\textsuperscript{69} In fact, hundreds of thousands of claims have been brought against individual corporations.\textsuperscript{70} As a result, there has been more than $20 billion in settlements and over forty corporations have gone bankrupt.\textsuperscript{71} As a result, the public suffers: stockholders lose their capital, workers lose jobs, and state and local governments lose tax revenues.\textsuperscript{72}

According to some, another negative impact on the public from mass tort cases stems from the typical settlement agreements of the parties.\textsuperscript{73} Most mass tort cases terminate in some form of secrecy agreement.\textsuperscript{74} Typically, these agreements prevent disclosure of information relating to a defendant’s negligent or otherwise wrongful conduct, the amount of a settlement or terms of payment, and conversations among attorneys on either plaintiff’s or defendant’s side.\textsuperscript{75} Still, the societal interest in knowing what went wrong and why is great. Documents protected by settlement agreements often contain valuable information concerning product defects and other public hazards.\textsuperscript{76} Preventing disclosure of these documents can protect those who engage in misconduct, conceal the cause of injury from the victims, or even render future victims

\begin{itemize}
  \item \textsuperscript{68} Deborah R. Hensler, \textit{As Time Goes By: Asbestos Litigation After Amchem and Ortiz}, 80 \textbf{TEX L. REV.} 1899 (2002).
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} Id. at 956.
  \item \textsuperscript{73} See generally Owen M. Fiss, \textit{Against Settlement}, 93 \textbf{YALE L.J.} 1073 (1984) (arguing that settling cases, while promoting peace between the parties, does not necessarily foster justice since the parties may agree to terms acceptable to them, but not beneficial to society).
  \item \textsuperscript{74} Weinstein, supra note 50, at 510.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} Id. at 511
\end{itemize}
vulnerable.77

These pages could not possibly answer all of these critiques, but I will return to them, directly and indirectly throughout the remainder of this paper, in an attempt to assess whether they are relevant to, and might counsel against, the use of the mass torts approach in the context of litigation spawned by the subprime mortgage crisis.

Regardless of whether a mass torts approach might be beneficial to address the manner in which courts handle subprime litigation, whether we like it or not, a wave of such litigation is coming, and effective responses to this phenomenon is necessary to meet the need of the litigants, courts and the public at large. How these cases are handled, and their outcomes, will have broad ripple effects. As the nation braces for a wave of foreclosures – nearly 3 million anticipated by the end of 2010 – state court systems are struggling to develop mechanisms for coping with the steep growth in their dockets caused by the rise in foreclosure actions. Plaintiffs’ lawyers are lining up to enlist the holders of subprime securities, seeking to bring fraud actions against the issuers of those securities and the ratings agencies that blessed them. Civil rights attorneys are investigating race-conscious lending patterns in the subprime mortgage market to generate interest in and recruit plaintiffs for suits under the fair lending laws challenging discriminatory lending practices. Federal and state officials have commenced criminal investigations and filed criminal charges against mortgage scam artists from across the country, unscrupulous actors who have preyed upon unwitting borrowers, saddling them with debt they could not bear, setting them up for hardship they may not survive.

77 Id.
As is apparent from these developments, the financial crisis is about to enter a new phase; the American legal system is about to become awash in subprime litigation – from foreclosures, civil rights cases and securities litigation, to criminal prosecutions and consumer protection lawsuits.

How should the courts deal with this litigation explosion? The arguments presented in the following section stress the need for judges and litigants to take a mass torts approach to the financial crisis, one that would bring together a range of parties who might have a stake in the resolution of subprime disputes: homeowners, subprime lenders, brokers, governmental bodies, investment houses, and investors. Mortgage products would be assessed for their legality: to determine to what extent the products were marketed in a deceptive fashion or sold on discriminatory bases. Where mortgage products were themselves illegal, they should be rescinded and reformed consistent with sound lending products and on fair terms to the borrowers.

As politicians and policymakers debate ways to encourage banks to agree to modify outstanding mortgages to keep borrowers in their homes, judicial intervention could help to cut the Gordian knot of securitized mortgages, a shadow banking system, securities holders’ self-interest, and depressed home values. We should not throw good money after bad mortgages, however. Where those mortgages are tainted by illegal terms or deceptive marketing, they should be fixed, and any re-negotiation of them undertaken based on fair and legal terms, not on terms that are illegal.

A growing body of research is showing that it is not risky borrowers, but risky loan terms, that have led to the crisis. If borrowers had been given loans on terms for which they
were qualified, and which they could afford, many of the disastrous consequences of the mortgage meltdown might have been avoided.

Many of the worst abuses of the subprime mortgage crisis are actionable: they were blatantly illegal, and their illegality calls for a legal response. There are several concrete ways in which many of the mortgage products marketed, sold and securitized during the subprime mortgage markets were toxic: that is, harmful to purchaser and investors. In the following section, I will outline a series of areas in which subprime litigation has already ensued, and will then assess whether the “mass tort” label applies to each area.

B. Subprime Litigation: An Overview

1. State Law Claims against Subprime Lenders.

A host of actions have been filed by state attorneys general against different subprime lenders for violations of laws related to mortgage transactions and credit transactions and under general unfair business practices statutes. In the first series of these cases, separate actions were filed against Countrywide Financial Corporation and several other Countrywide affiliates by 11 state attorneys general on behalf of their constituent states’ populations alleging a wide range of state law claims.

Countrywide was purchased by Bank of America and these actions were

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78 The states include: Arizona, California, Connecticut, Florida, Illinois, Iowa, Michigan, North Carolina, Ohio, Texas and Washington.

79 See, Complaint in The People of the State of California v. Countrywide Financial Corporation, Complaint for Restitution, Injunctive Relief, Other equitable Relief, and Civil Penalties, June 24, 2008 (under CA law, alleging Violation of State Laws for deceptive advertising and unfair competition by pushing homeowners into mass-produced, risky loans for the sole purpose of reselling the mortgages on the secondary market); See, Complaint in State of Connecticut and Howard F. Pitkin, Commissioner of Banking of the State of Connecticut v. Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Countrywide Home Loans Servicing LP, No. 1207, August 5, 2008 (under CT law, alleging violation of the Connecticut Unfair Trade Practices Act (CUPTA), Chapter 735 of the Connecticut General Statutes, and violations of Conn. Gen. Stat. §42-110b(a) – prohibiting unfair or deceptive acts or practices, seeking civil penalties); See, complaint in The People of the State of Illinois v. Countrywide Financial Corporation, 08CH22994, June 25, 2008 (under IL law, alleging Countrywide violated Illinois law by engaging in unfair and/or deceptive practices that included: Originating mortgage loans that
settled in October 2008 in the most comprehensive, sweeping and expensive settlement to date in a predatory lending dispute.

Through the settlement, Bank of America has agreed to offer $8.4 billion in direct loan relief to an estimated 400,000 borrowers nationwide, to modify loans. The goal of the agreement is to move many borrowers into mortgages with more favorable and affordable terms. The bank will also provide financial assistance to families to assist them in relocating if they do not appear able to afford a loan even on more favorable terms. The agreement also requires borrowers assisted through the modification or relocation program to sign a general release, relieving Bank of America and Countrywide from any liability for illegality in the terms of the original mortgages written by Countrywide.\(^\text{80}\)

2. Civil Rights Actions

\(^\text{80}\) See, Stipulated Judgment and Injunction, \textit{The People of the State of California v. Countrywide Financial Corporation, LC 083076} (Filed October 14, 2008).
There is a growing awareness that a disproportionate share of subprime loans, particularly those in the latter years of the subprime mortgage market’s heyday, were marketed and sold to African-American and Latino borrowers. Standing alone, this might be cause for celebration because of the expansion in the homeownership rate in communities of color—depressed for so long due to overt and covert racism—that resulted. But when viewed in light of the fact that many of these borrowers received loan terms that were more onerous than white borrowers of similar credit risk, we see that the underlying mortgages were often priced more expensively based on the race of the borrower, and not just his or her perceived credit risk.  

Plaintiffs in a number of settings have commenced class action lawsuits to raise allegations of discrimination in subprime mortgage lending. The first decision to be generated from this recent wave of cases was the decision denying the defendants’ motion to dismiss in the case of Ramirez v. Greenpoint Mortgage Funding, Inc. Plaintiffs in this class action allege that Greenpoint had both objective as well as subjective criteria for determining the pricing of its loans. The subjective criteria granted bank loan officers the ability to increase the interest rate and fees on loans, regardless of the perceived credit risk of the borrower. The plaintiffs in Ramirez allege that increased pricing based on subjective criteria was more likely to occur in loans made to borrowers of color as opposed to white borrowers, a practice they allege violates

81 These actions typically raise claims under the Fair Housing Act (FHA), and/or the Equal Credit Opportunity Act (ECOA). The FHA makes it unlawful “to discriminate against any person in making available [any real estate related transaction], or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. §3605(a), and “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. §3604(b). The ECOA forbids discrimination “against any applicant, with respect to any aspect of a credit transaction— (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant’s income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under this chapter.” 15 U.S.C. §1691(a).

both the ECOA and the FHA.\textsuperscript{83} Through the use of a statistical analysis that compared the prevalence of increased pricing based on these subject factors in loans Greenpoint made to borrowers of color as compared to white borrowers, the trial court denied the defendants’ motion to dismiss, finding that the plaintiffs had established that the bank’s actions had a disparate impact on minority borrowers sufficient to establish plaintiffs’ prima facie case of discrimination.\textsuperscript{84}

In \textit{Miller v. Countrywide Bank, N.A.},\textsuperscript{85} the plaintiffs in a national class action there have also alleged that Countrywide Bank and its subsidiaries engaged in discriminatory pricing of loans through subjective pricing mechanisms. The district court there also recently denied the defendants’ motion to dismiss, where the plaintiffs had shown African-American borrowers were three times more likely to receive high priced home purchase loans and twice as likely to receive high-priced refinance loans than similarly situated whites.\textsuperscript{86} Although the court recognized the defense that the plaintiffs, at the motion to dismiss stage, had failed to show that the disparity was caused by any discriminatory policy carried out by the defendants, it left such issues to “later stages in the proceeding.” \textsuperscript{87}

Most recently, in \textit{Taylor v. Accredited Home Lenders, Inc.},\textsuperscript{88} plaintiffs there have raised allegations of disparate discretionary pricing by defendants. The plaintiffs in \textit{Taylor} have cited to national reports about discriminatory lending practices and local lending data which included such data from the defendants.\textsuperscript{89} Ruling on the defendants’ motion to dismiss, the court found

\textsuperscript{83} \textit{Id.} at *1-2.
\textsuperscript{84} \textit{Id.} at *5.
\textsuperscript{86} \textit{Id.} at 258.
\textsuperscript{87} \textit{Id.}
\textsuperscript{89} \textit{Id.} at *6.
that, based on this data, the plaintiff had raised allegations sufficient to establish a disparate impact on borrowers of color from the defendants’ practices.\textsuperscript{90}

3. \textit{Truth in Lending Litigation}

Similar to the class actions filed under fair lending laws, several class action cases have been filed under the federal Truth in Lending Act (TILA),\textsuperscript{91} seeking to exercise the right of rescission under that statute for loans made in violation of its terms. Courts have been unreceptive to attempts to certify class actions in such cases, however, and recent decisions out of U.S. Circuit courts have re-affirmed judicial reluctance to treat rescission claims in the class action context.

TILA was enacted by Congress in 1968 to “avoid the uninformed use of credit and protect the consumer against inaccurate and unfair credit billing and card practices.”\textsuperscript{92} In furtherance of these goals, TILA requires lenders to make certain disclosures about the terms of any credit transaction, and offers borrowers the right to rescind such credit transaction within three days of its consummation, or within three days of learning from the lender of the right to rescind, whichever is later.\textsuperscript{93} If, however, the right to rescind is never disclosed to the borrower, the rescission period extends to three years from the consummation of the transaction.\textsuperscript{94}

Recent decisions out of the Seventh and First Circuit Courts of Appeals have held that TILA rescission claims should not receive class action treatment. Most recently, in \textit{Andrews v.}

\textsuperscript{90} \textit{Id.}
\textsuperscript{91} 15 U.S.C. §1601, et seq.
Chevy Chase Bank, the Seventh Circuit found that class actions are not available to resolve TILA claims, citing the individual nature of the rescission claim and the nature of the resolution of such a claim that varies according to the nature of each underlying transaction. The court also interpreted a cap on damages in another provision of TILA as a sign that Congress intended that provision to be amenable to class action treatment, and Congress’s failure to discuss class action features in the context of the rescission remedy meant that Congress did not intend for rescission to be available in class actions. The Andrews court had relied on the First Circuit’s 2007 precedent in McKenna v. First Horizon Home Loan Corp., which had reached a similar conclusion about Congress’s intent with respect to the availability of rescission in a class action. Both circuits relied on a Fifth Circuit precedent from 1980, in which the court there found as follows: "[Rescission] is a right which the creditor has with each individual obligor. Thus the notion of a class action in this sort of context would contradict what would seem to be the Congressional intent about the nature of this action." I will return to this issue shortly.

4. Municipal Lawsuits

Several cities have initiated litigation against lenders for the harm caused by the proliferation of subprime products within their borders. To date, these suits have taken three different approaches. First, the Mayor and City Council of Baltimore, MD, have commenced litigation against Wells Fargo for what is alleged are violations of the Fair Housing Act for that bank’s marketing and sale of subprime loans to primarily African-American and Latino

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95 545 F.3d 570 (7th Cir. 2008).
96 Id. at 575 [citing 15 U.S.C. §1640(a)(2)(B)].
97 545 F.3d at 575-76.
98 475 F.3d 418 (1st Cir. 2007)
communities within Baltimore city limits. Second, the City of Cleveland, OH, has commenced a broad-side attack against a series of banks under a public nuisance theory: that these banks promoted the spread of subprime products in communities in Cleveland with the knowledge that such loans were doomed to fail, and likely to bring about tangible harm in those communities. Third, cities like Buffalo, NY, and Cincinnati, OH, have attempted a somewhat different tack, arguing that the failure on the part of certain banks to maintain their portfolio of vacant homes obtained by those banks through foreclosure violates local ordinances and/or creates a public nuisance.

Because of the harm that has flowed from the proliferation of subprime products, local governments are straining under the weight of the fallout from the mortgage collapse; these suits allege that such harm was foreseeable on the part of the lenders, and thus, their actions are subject to suit. As has become painfully obvious over the last year, foreclosures reduce neighboring property values and reduce the tax base of local communities. Foreclosed homes become a magnet for crime and create a drag on police and fire services. These forces could ultimately result in a reduction in assets and local revenues in the hundreds of billions, if not the trillions, of dollars.

These municipal cases allege that subprime lenders marketed and sold their faulty products in ways that they knew would result in a high risk of delinquency and foreclosure. Like the goals of the government plaintiffs in the tobacco litigation of the 1990s, these cities are

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100 For an overview of the Baltimore litigation, see Raymond H. Brescia, Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis, 2 Albany Gov’t L. Rev. 164, 175-179 (2009).
102 See, Brescia, Subprime Communities, supra note 2, at 168-170.
seeking to reclaim their tax revenue loss and the mounting expenditures from maintaining and policing properties abandoned due to delinquency and foreclosure. These actions are still in the early stages of litigation, but they could yield critical information about the risks of which subprime lenders were aware when they marketed their loans to certain communities.

5. Securities Litigation

A fifth potential avenue for litigation is in the area of securities lawsuits, by the holders of the securities against the investment banks that sold and packaged mortgage-backed securities and even the ratings agencies that reviewed and assessed those securities. There has been a slow growth of these actions, with the first wave stemming from the investment bank write-downs of mortgage-backed securities they issued. As of November 2008, one study showed over 200 new securities actions arising out of the subprime mortgage meltdown and the financial crisis generally have already been filed, although some have already been dismissed. While it is likely that there will be a large spike in securities litigation generally given the drastic reduction in value in the stock market, securities litigation with respect to alleged illegality in the mortgage-backed securities market is likely to crowd court dockets for the immediate future.

104 See, e.g., In re 2007 NovaStar Financial, Inc. Sec. Litig., No. 07-0139-CV-W-ODS, 2008 U.S. Dist. LEXIS 44166 (W.D. Mo. 2008)( granting defendant’s motion to dismiss securities fraud claim where plaintiff failed to meet the heightened pleading requirements of the Private Securities Litigation Reform Act); Tripp v. IndyMac Financial, No. CV07-1635, 2007 U.S. Dist. LEXIS 95445 (C.D.Ca. 2007)(dismissing a securities fraud claim for failure to meet the heightened pleading requirements of the PSLRA where plaintiff alleged that the defendant corporation maintained it was financially stable despite the economic downturn in the housing and mortgage markets).
A full analysis of this area of litigation is beyond the scope of this review. While these lawsuits will may very well threaten the viability of financial institutions that will be defendants in many of the other types of litigation outlined here, and that threat will likely figure into bank decisions whether to seek bankruptcy protection or additional forms of federal assistance, since these cases do not involve direct connections to borrowers and the mortgages that are the centerpiece of the subprime litigation around mortgages outlined generally in this article, I will leave such analysis to others. At the same time, because this article is focused on the impact of litigation on the housing and mortgage markets in particular, one form of lawsuit in the securities area worth mentioning here involves securities holders suing banks over loan modifications such banks undertake with delinquent borrowers.

It is generally recognized that hundreds of thousands of mortgages have been modified or are in line to be modified in order to preserve the asset and keep the borrower in his or her home. Typically, no one wins in a foreclosure: not the borrower, and not the lender, who must spend significant funds in attorney’s fees for pursuing the foreclosure and then in maintenance costs for upkeep of the home once they seize it. Conflicting loyalties create barriers to modification, however. The companies that now service the mortgage might have no incentive to pursue foreclosure because it is a lot of work and expensive and they will not receive compensation for doing it. Investors in subprime securities whose income from the securities they hold might benefit from certain elements of the transaction – like an income stream from pre-payment penalties – see their interests destroyed if the underlying mortgage is modified. As a result, investors holding mortgage-backed securities worry that their investments in these securities, already reduced in value, will be rendered worthless if they depend on the income streams from loans that are ultimately modified; such investors threaten to sue the banks and servicers who
might enter into loan modification agreements without their consent, and such lawsuits could ultimately sink any rescue effort.

To date, one such lawsuit has been filed. In *Greenwich Financial Services Distressed Mortgage Fund 3 v. Countrywide Financial Corporation*,¹⁰⁵ the plaintiffs, two limited liability corporations that invested in subprime securities issued by Countrywide, have filed a declaratory judgment action as a class action¹⁰⁶ seeking to prevent Countrywide, acting through its parent company, Bank of America, from reducing the value of the securities those LLCs hold as a result of meeting the obligations of the $8.4 billion settlement with various attorneys general outlined in Section II.B.1, *supra*.¹⁰⁷ The crux of the Complaint in that action is that the modifications of the loans through the settlement will necessarily reduce the value of the securities linked to those mortgages. Plaintiffs allege as follows:

Modifying a mortgage loan almost always means reducing or delaying payments due on that loan. Reducing or delaying those payments in turn entails a reduced or delayed flow of funds into the trusts to which those loans were sold in securitizations. A reduced or delayed flow of funds into those trusts reduces the value of the certificates that those trusts sold to investors. Plaintiffs believe and allege that, depending on the resolution of the questions on which they seek a declaratory judgment, the value of all certificates held by members of the plaintiff class will be affected by billions of dollars.¹⁰⁸

The plaintiffs seek a declaratory judgment that would force the bank to buy the mortgages back from the securities holders before they modify them, because, it is alleged, the agreements underlying those securities require the bank to do so before it

¹⁰⁵ The case was originally filed in New York State Supreme Court but recently removed to Federal District Court under diversity jurisdiction, and docketed under 2008 CV 11343 (S.D.N.Y)(RJH).
¹⁰⁶ The proposed class consists of “all persons or entities that own or hold certificates in one or more” of a list of hundreds of securitization transactions listed in the complaint, likely representing hundreds of thousands of mortgages. See, Complaint at ¶12.
¹⁰⁸ Complaint at ¶32.
modifies any loan. Accepting this position, the complaint appears silent as to the
purchase price at which those mortgages must be re-purchased by the bank.

It is too early to tell whether this lawsuit, or others like it in the future, will force
banks to re-purchase mortgages from the trusts they created when they securitized those
mortgages. At a minimum, the threat of such lawsuits has necessarily scared banks and
made them reluctant to modify loans, for fear that if they do so, they will face investor
lawsuits.

III. Mass Torts and Subprime Litigation

A. Subprime Litigation and the Mass Torts Paradigm

Given these different types of litigation flowing out of the subprime mortgage crisis, do
any of them fit within the mass torts paradigm? Returning to the working definition of mass
torts utilized above, mass torts involve numerosity of plaintiffs, commonality among their
claims, interdependence of their claim values, controversy over scientific evidence, emotional
and political heat, and higher than average potential for claiming by allegedly injured parties.\textsuperscript{109} The following is an analysis of the subprime litigation involving borrowers or public plaintiffs
and the extent to which such litigation exhibits the characteristics of mass torts litigation.\textsuperscript{110}

\textsuperscript{109} Hensler, \textit{A Glass Half Full, a Glass Half Empty}, supra note 35, at 1596.
\textsuperscript{110} Although some of the state law claims in the municipal litigation and those cases brought by state attorneys
general raise tort claims, not all claims of borrowers in the subprime context have their basis in tort. Nevertheless,
discrimination claims in certain contexts have been characterized as having similar characteristics as mass torts
cases generally. Geoffrey Hazard, discussing what he calls “institutional decree” litigation involving poverty and
issues of discrimination, argues as follows:
1. Numerosity

Subprime litigation, particularly the fair lending cases described above, necessarily includes numerous plaintiffs and a limited number of defendants. That some of the cases have been filed by state attorneys general, or by municipalities, does not undermine this finding. Much of the litigation around tobacco products and against gun manufacturers has been brought by similar public entities. Underlying those cases is the harm to individual victims, with those victims sometimes numbering in the millions. In the subprime context, hundreds of thousands of borrowers stand to benefit from the state attorneys general lawsuits against Countrywide that was settled by Bank of America, and, if the municipal litigation is ultimately settled as well, it is likely that some remedial program will be instituted to assist individual borrowers.

[S]chool cases and other "institutional decree" litigation can be conceived as involving mass torts. Lack of equal opportunity for an effective education is certainly a personal injury in some sense of the term. So are suffering inhumane conditions in prisons and mental institutions, homelessness, inadequate medical care, and racial discrimination in public housing. These mass tort poverty-discrimination cases have arisen in virtually every large community in the United States and in many smaller ones. Their genesis has been over the same period as the asbestos claims and other mass personal injury torts.

The litigation in the mass tort poverty-discrimination cases resembles the mass tort personal injury cases in yet other ways, including those discussed by Judge Weinstein: multiple party joinder of plaintiffs and respondents; use of the class suit device as the procedural structure; novel roles for counsel, court, parajudicial officers, experts, and community representatives; complex problems of causation and evidence, for example, differentiating the significance of race, class, and family structure on educational achievement and assessing the significance of "de facto" desegregation in the public schools; and problems of communication, community, participation, and individual dignity and autonomy.


Furthermore, mass financial harm cases, although not recognized by some as traditional mass torts, Report of the Advisory Committee, supra note 41, at 10-11, and where some commentators have argued that they typically do not have the same scale of damages as more traditional mass torts cases, see Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 101, 177-178 (2008), in the subprime context, because of the potential for damages in these cases reaching into the hundreds of billions, if not trillions of dollars, the scale of financial harm that could arise in the context of subprime litigation is staggering, warranting its consideration for inclusion in the pantheon of mass torts. For a discussion of the commonality between mass financial harm cases and mass torts generally, see DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 51-62 (2000).
2. **Commonality**

Turning to the issue of commonality, whether subprime litigation will find commonality among claims and issues will turn on the nature of the particular practice challenged in any particular action. For the discrimination cases described above, where quantifiable differences can be found in the conduct of lenders, and where such conduct was undertaken against a particular class of borrowers across the board, there will be sufficient commonality of issues. Similarly, where a lender may have used a particular practice against a particular class of borrowers, like using a standard form notice of loan terms that was, defective on its face, or advertised generally in a false or deceptive way, those exposed to such product or advertising would share common issues of fact for resolution. Where a particular practice brought about particular harms – higher interest rates or hidden charges – borrowers could bring claims against such lenders and such claims would share a core of commonality.

There are certainly cases where commonality is not present, and such cases will likely not lend themselves to aggregative techniques or the mass torts approach generally. One example would be where a particular mortgage broker may have engaged in illegal steering with respect to some borrowers of color, but not all. Where the particular oral communications he or she used in each transaction are in question, it is hard to envision aggregative techniques helping except where a number of borrowers can show or allege that the same communications or tactics were used on them collectively. Even there, unless the broker was a prolific salesperson, it is unlikely the number of borrowers impacted by that single broker would meet the “numerosity” element described above. Where, as in this example, the particular communications of particular actors within the chain of the mortgage transaction or a series of mortgage transactions are at issue,
which would require testimony by each plaintiff individually, it is unlikely that aggregative
techniques will be helpful, and the mass torts analogy will not apply.

3. **Interdependence of Claim Values**

The next characteristic of mass torts is their interdependence of claim values. In the
subprime context, with respect to subprime borrowers, there are three basic categories of
borrower-claimants: those who have already lost their homes, those who are delinquent in their
payments and at risk of foreclosure; and those who may be saddled with debt that is the product
of illegal and actionable conduct but who are, at present, current on their mortgages. For public
plaintiffs, they often seek compensation for borrowers, or for the losses government entities face
due to subprime practices.

For borrowers, the market has yet to mature for the losses associated with foreclosure.
Already ousted borrowers will face different harms, and, thus, different damages. Did foreclosed
borrowers have another place to live upon eviction? Did they have to spend a premium on
motels or other temporary housing? Did they have to spend time in shelters on the streets? Did
they lose employment or were illnesses contracted or exacerbated due to the stress of foreclosure
and dislocation or exposure to the elements due to homelessness? These claims will necessarily
vary by individual, and, short of useful settlement “grids”, and some method for monetizing
these different harms, aggregation of damages assessments will prove difficult until some market
for these harms is established.

For borrowers still in their homes, however, the value of their claims might actually be
relatively easy to establish. The greatest problem for subprime borrowers is the interest rate of
their mortgage. And for subprime borrowers improperly steered into subprime loans when
lenders should have offered them prime loans, identifying the prime rate and terms at the time the loan was consummated should actually be relatively easy. Once a prime loan rate is established, the borrower’s loan can be reset at that rate, and any payments he or she may have made beyond what the loan rate at that point in time will become his or her damages. When coupled with a rescission of the underlying loan, and reformation under the prime rate and on prime terms, the borrower’s past damages are determined, and future damages are avoided.

For municipal litigants seeking to recover damages for the impact of lender activity in their communities, this, too, is a market that has not yet matured. One of the biggest sources of harm in the municipal litigation context is the overall drop in property values, with the potential and concomitant loss in tax base revenue. Teasing out the extent to which a particular lender may have contributed to this drop in tax revenues will be difficult. While studies exist on the impact of foreclosures on property values, litigants have yet to quantify the harm derived from a particular community, from a particular lender’s conduct. That is not to say it cannot be done, however. Moreover, municipalities should be able to quantify their costs due to maintenance or demolition of foreclosed homes, and any drop in tax revenue they have received from a particular property tied to a particular lender’s loans.

4. **Controversy over Scientific Evidence**

It is unlikely that many questions about scientific evidence will arise in the context of subprime litigation. While some may look at questions of behavioral economics to suggest ways to promote better mortgage products in the future, disputes over hard sciences, as occurred in the context of asbestos litigation and other traditional mass torts, will not be in play in subprime litigation.
5. Emotional and Political Heat

Fallout from the subprime mortgage market has generated a great deal of emotional and political heat. At present, the question of who is to blame for the subprime mortgage crisis is hotly debated. Did liberal politicians, who passed statutes like the Community Reinvestment Act and promoted the activities of the government sponsored entities, Fannie Mae and Freddie Mac, push responsible lenders to make risky loans to risky borrowers? Did the Bush Administration’s laissez-faire policy towards regulatory oversight encourage predatory lending practices? Did Alan Greenspan’s policies at the Federal Reserve inflate the housing bubble, causing a frenzy of speculative conduct, ultimately leading to rapid explosion and steeper drop in price values, precipitating the financial crisis? Should taxpayers, who played by the rules and lived within their means, spend trillions to pump up irresponsible banks and delinquent borrowers? These are the burning emotional and political questions of the day. It is hard to think of an issue that burns hotter in the court of public opinion at present.

6. Higher than Average Potential for Claiming

At present, the litigation pending in the subprime area is merely the tip of the proverbial iceberg. There are hundreds of municipalities, in California and Florida alone, that might find themselves pursuing claims similar to those raised by the cities of Baltimore, Cleveland, Buffalo and Cincinnati if those cities are successful in their cases. Similarly, hundreds of thousands of borrowers, if not millions, could find themselves exploring potential avenues for litigation if they learn that the brokers they used or the lenders who wrote their mortgages may have engaged in illegal conduct in the subprime market. Press attention to the pending actions should a critical mass of these cases prove successful, communications from investigators in the offices of state
attorneys general or municipal attorneys, word-of-mouth of neighbors and family members, these could all alert borrowers to the fact that they may have been the victims of predatory conduct. Such information will likely lead many to pursue their own claims, or, as is more likely, join with others already pursuing such litigation.

There is no question that we are witnessing the opening salvos in the litigation war that will likely ensue from the fallout of the collapse of the subprime mortgage market. And many combatants will likely join the fray if given the opportunity.

Given these many features of subprime litigation that appear to line up well with the features typically present in mass torts cases generally, it is safe to conclude that subprime litigation shares many of these features and thus may warrant the treatment given by litigants and the courts to mass torts generally. The next sections explore the potential implications of a mass torts approach to subprime litigation and then identifies some of the barriers the implementation of such an approach might face.

B. The Value of a Mass Torts Approach to Subprime Litigation

The preceding sections have discussed several of the different types of cases that have arisen in the fallout from the subprime mortgage crisis and assessed whether the term “mass torts” is an appropriate one to use when describing these actions. Although it does not necessarily matter whether these cases are considered mass torts cases or not, what does matter is whether the techniques utilized in mass torts cases in the past might be helpful to in the management and disposition of subprime litigation at present and in the future. Furthermore, given the goals of subprime litigation described above, would mass torts techniques help to
further these goals, and would they prove superior to other options available for dealing with claims arising in this context? To review the goals of subprime litigation, I have identified seven: reducing the number of foreclosures; correcting for past illegality in the mortgage market; uncovering and spreading information about the presence of such illegality in the market; promoting the modification of outstanding mortgage loans; applying pressure on banks and other institutions to strengthen and expand voluntary efforts to overcome past abuses in the market; preserving home values; and improving oversight and regulation of this market to restore lender, investor and borrower faith in it. To gauge whether a mass torts approach to subprime litigation would be an effective tool to address some of these needs, it is helpful to look at other contexts in which litigation has impacted policy making in a given area.

My colleague, Timothy Lytton, has reviewed the success of litigation in both the firearms and clergy abuse scandals, and identified critical results from litigation in these areas and compared the relative success of lawsuits in both areas in influencing policy making. In this way, he has been able to identify what has “worked” and what has not with respect to such efforts. Lytton identifies what he describes are the “six distinct ways that litigation influences policy making”:

(1) framing issues in terms of institutional failure and the need for institutional reform; (2) generating policy-relevant information; (3) placing issues on the agendas of policy-making institutions; (4) filling gaps in statutory or administrative regulatory schemes; (5) encouraging self-regulation; and (6) allowing for diverse regulatory approaches in different jurisdictions.111

Lytton’s assessment of litigation in these two areas is that the clergy litigation had a greater deal of success in having its intended effects – i.e., seeking compensation for victims,

weeding out abusers among the clergy in the Catholic Church and encouraging the church
hierarchy to police its ranks – than litigation against the firearm industry. When measured by the
their relative success by the six ways litigation can influence policy making, clergy abuse
litigation was far more successful in bringing about the outcomes desired than litigation against
the firearms industry. Notably, the clergy litigation was successful in framing the issue as one of
both personal and institutional failure. By generating information that was not otherwise
available and raising the profile of the issue with policy makers, it filled gaps in the regulatory
scheme and achieved legislative changes in certain areas that helped to facilitate greater access to
the courts for clergy victims, encouraged the church hierarchy to investigate and respond to the
allegations through internal efforts, and cross-jurisdictional conflicts did not arise as “[m]ore
stringent laws or enforcement in one jurisdiction do not interfere with approaches in other
jurisdictions that grant greater leeway to Church officials to resolve the problem internally.”\(^\text{112}\)

By contrast, firearms litigation has not, by itself, framed issues surrounding the danger of
firearms in ways that had not already been utilized by earlier gun control advocates, and,
Furthermore, might have strengthened the efforts of gun control opponents in obtaining statutory
immunity from different types of lawsuits and sharpened these opponents’ rhetoric in debates
concerning the meaning of the Second Amendment.\(^\text{113}\) Firearms litigation did not reveal much in
the way of “smoking gun” information about the firearms industry, and has led to greater
competition between jurisdictions over the proper role of legislation and regulation in policing
the firearms industry, sometimes resulting in the granting of immunity from suit and sometimes
resulting in lax enforcement of laws already on the books.\(^\text{114}\)

\(^{112}\) Id., at 1861-1862.
\(^{113}\) Id., at 1858-1859.
\(^{114}\) Id., at 1860-1861.
Lytton further identifies four features of the clergy sexual abuse litigation that helps to “explain why it has such a beneficial impact on policy making.” First, an “especially scandalous narrative” that had “an especially high degree of cultural resonance.” Second, the plaintiffs’ success in the clergy-sexual-abuse litigation “sparked national press coverage, encouraged additional victims to come forward, and in turn fueled more litigation.” This attention made it more politically palatable for law enforcement officials to engage in aggressive investigation and prosecution of allegations of clergy sexual abuse. Third, the failure on the part of victims to come forward prior to 1984, and the reluctance of the Church to recognize the problem within it before then (and long afterwards), built up pressure for litigation to have a “dramatic” impact on policy making in this area. Fourth, instead of creating conflicts between regulatory bodies and jurisdictions, “[l]itigation enabled…other institutions to address the problem of clergy sexual abuse more effectively, and without it, it is highly unlikely that any of them would have had the will or the knowledge necessary to do so.”

Informed by this analysis, whether the subprime approach can be utilized to further the goals I have identified is what I will turn to next. Whether it is superior to other potential responses to subprime litigation is an issue I will address in section IV.

1. Reducing the Number of Foreclosures, Correcting for Past Illegality in the Market and Promoting Mortgage Modifications

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115 Id., at 1863.
116 Id.
117 Id., at 1864. Lytton asserts that as lawyers become more experienced with the litigation and skilled in uncovering the facts necessary to establish their claims. Moreover, judges became more skeptical of church opposition to discovery. “Litigation thus produced more clients, better lawyering skills with which to pursue their claims, a growing supply of attorneys to bring the claims, and increasing sympathy among judges.” Id.
118 Id., at 1864.
119 Id., at 1865.
120 Id.
The most important goal that subprime litigation could achieve would be to reduce the number of foreclosures taking place. Apart from voluntary modifications, described below, one of the best strategies for doing this will involve assessing whether the mortgages securing those homes for those homeowners were the products of illegal conduct. As described above, borrowers and state attorneys general are bringing actions based on federal anti-discrimination statutes, state common law and state unfair trade practices statutes. These efforts have already produced the Bank of America settlement described above through which as many as four hundred thousand borrowers will receive modifications to their loans on favorable terms, terms that those borrowers can afford.

A comprehensive review of the relative merits of the potential claims outlined above should be undertaken to determine whether any potential suits are viable. Where actionable industry- or community-wide practices can be identified, suits should pursue such claims in a comprehensive fashion, using aggregative techniques in their pursuit, prosecution and settlement. At the same time, there may be instances where individual borrowers were subject to abuses in isolated incidents. Pursuing lawsuits on behalf of individual borrowers might be worthwhile, but they are not consistent with a mass torts approach to the subprime problem. Rather, a sober assessment of market practices from all quarters – broker activity, lender misconduct, investment bank activities and ratings agency actions – should be undertaken in a comprehensive way, to identify conduct that might lead to broad-ranging litigation that, in turn, could prevent tainted loans from leading to foreclosures and bring about constructive modifications of such loans along terms that are fair and affordable.

Where borrowers are saddled with loans made on illegal terms, and the value of those underlying loans exceeds the value of the properties backing them, those mortgages would have
to be re-written on fair terms and consistent with the current value of the underlying properties. Everyone involved – the borrowers, holders of the note and holders of the securities should take an equal loss. Instead of destroying all of the equity of the borrower in the home first, equity and principal would be reduced by an equal percentage, based on the percentage loss in the value of the home. A home that was purchased at $400,000, with a 5% down payment and a loan of $380,000 in a community in which property values have declined 25% would have the principal of the loan written down by 25%, and the equity slashed by an equal amount. To the extent a particular borrower has already made payments under the prior mortgage and its illegal terms, the difference between what he or she paid, and what should have been paid, could go towards reducing the principal on the mortgage, which would also help to bring the total debt outstanding even further below the current value of the house.

Comprehensive litigation that roots out illegal behavior and identifies tainted loans will force banks to modify the loans that were the product of such illegal behavior upon terms that are fair, affordable and legal. Depending upon the degree of actionable behavior in the market, removing the ability to foreclose on tainted loans will greatly reduce the number of foreclosures, identify and combat illegal behavior and promote loan modifications, achieving three of the identified goals for subprime litigation.

2. **Uncovering Information about Illegality in the Market**

As stated above, one of the key differences Lytton identifies between clergy sexual abuse litigation and firearms litigation was the ability of litigants in the former setting to develop an “especially scandalous narrative” with “an especially high degree of cultural resonance.”121 This

121 *Id.*
narrative, in turn, led to press coverage and more litigation. The fallout from the subprime mortgage crisis has yet to develop a narrative that identifies subprime borrowers as victims of “scandalous” behavior in a way that resonates in the broader culture. If the YouTube popularity of the rant of CNBC’s Rick Santelli about the Obama foreclosure rescue plan is any indicator of whether popular sentiment views borrowers as victims of predatory conduct or “losers”, there is still a lot of heavy lifting that must be done to shape public opinion about the causes of the subprime meltdown and the financial crisis that has followed. The discovery process in subprime litigation could yield critical information in this area.

As in other settings, where internal memoranda and other information from different industries were revealed through discovery and exposed in the popular press, public opinion was swayed in favor of plaintiffs and turned against those industries. This was especially true in both the tobacco and clergy sexual abuse settings where knowledge of harm long before the public was generally aware of danger was covered up and potential corrective steps were ignored, when they could have been taken earlier to prevent incalculable suffering.

Will the discovery process in subprime litigation yield this kind of scandalous material? Will it show that brokers and originators were aware that they were using questionable tactics on unsuspecting borrowers, or that they were targeting certain communities for costlier loans on account of the race of those communities? Only time will tell. Should discovery yield such information, and it is discovered that some of the most abusive loan terms were the product of intentional, predatory and illegal conduct, it is likely to sway public sentiment in favor of aggressive interventions to assist borrowers in distress.

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122 Id., at 1864. Lytton asserts that as lawyers become more experienced with the litigation and skilled in uncovering the facts necessary to establish their claims. Moreover, judges became more skeptical of church opposition to discovery. “Litigation thus produced more clients, better lawyering skills with which to pursue their claims, a growing supply of attorneys to bring the claims, and increasing sympathy among judges.” Id.
A further benefit from such actions is that reducing the number of foreclosures will
necessarily drive down the ultimate cost of any federal interventions to assist borrowers in
distress. If fewer borrowers need federal assistance, the overall cost of such assistance will be
reduced as a result, perhaps dramatically, a point I shall also return to shortly.

3. Promoting Voluntary Efforts to Overcome Past Abuses in the Market

As described more fully below,\textsuperscript{123} to date, voluntary efforts to modify mortgages have not
had the most successful track record. Modifications undertaken by banks on a voluntary basis
have not resulted in major changes to the underlying mortgages, nor have they produced greater
savings for borrowers or an assessment of the illegality of those loans. If litigation challenging
the legality of subprime mortgages gets fully underway, leads to findings of liability and
judgments against banks for such illegality, and generates the type of information that could help
sway public opinion about lender misconduct during the subprime mortgage frenzy, pressure will
grow on banks to undertake comprehensive and wholesale modifications of loans voluntarily and
on more meaningful terms that are likely to lead to more successful outcomes. While voluntary
efforts already underway have led to modifications, they have not generated the type of robust
and comprehensive changes to the underlying loans that would be more consistent with both
corrective justice (i.e., the need to compensate borrower-victims for illegal terms), and a need to
reflect, going forward, fairer loan terms.

Voluntary efforts undertaken by banks to modify mortgages, when made under the threat
of litigation, will likely result in changes to loan terms, reductions in principal balances,

\textsuperscript{123} Infra, Section IV.D.
reduction in interest rates and reductions in monthly payments. Such voluntary efforts would have greater viability than the current modifications being undertaken without the threat of litigation, where many of these new agreements have resulted in borrowers becoming delinquent once again. ¹²⁴

The use of aggregative methods to identify borrowers who were the victims of predatory loan terms and to engage in wholesale modifications of those terms, as was done in the Bank of America settlement, will likely have the spillover effect of generating voluntary responses from banks. Seeking to avoid similar lawsuits, they will likely pursue similar approaches to modifications for many of their borrowers. In this way, the mass torts approach to subprime litigation will improve voluntary efforts directed at generating more comprehensive and effective loan modifications

4. Preserving Home Values and Restoring Faith in Markets

As described above, at present, there are literally hundreds of lawsuits pending that take aim at allegedly illegal conduct that arose during the subprime mortgage market’s heyday. But the sum of all of these lawsuits is far less than the whole. Such piecemeal litigation will likely burden banks and other lending institutions to the breaking point, if they are not already bankrupt (as many mortgage lenders already are). Moreover, lenders entering into settlements regarding the claims of borrowers could get whipsawed, facing not only liability for faulty loans but also litigation by securities holders for packaging those same loans into securities. Apart from criminal investigations, the federal government has no present role in these lawsuits, yet is

¹²⁴ See, id.
currently on the hook for hundreds of billions of dollars in the financial bailout and is committing tens of billions of dollars towards correcting at least some of the problems of borrowers in default.

A mass torts approach to this litigation would seek to bring some order to the chaos by consolidating these actions in rational ways, ways that will help to sort out the interests of all of the respective parties, and create efficient mechanisms for developing factual bases for the claims and evaluating claim values. Borrowers’ actions would be consolidated with the actions by securities holders against originators and the issuers of subprime securities. If the underlying mortgages are found to have been issued on illegal terms or in an illegal manner, they will need to be rescinded, but this would leave investors in subprime securities left with the proverbial bag, their investments rendered worthless.

In order to protect the investors to a certain extent, and insulate lenders and the issuers of securities from satellite litigation that threatens to undermine settlements with borrowers, effective and global settlement negotiations would take into account the nature of the claims of the borrowers as well as the securities holders. While there are many different potential features of settlements of subprime litigation -- including payment of damages awards to borrowers, reimbursing investors, assistance to localities watching their tax base disintegrate -- the most useful approach to settlement of borrower actions against lenders (and collateral investor attacks on those lenders and the issuers of subprime securities) would involve a re-evaluation of the underlying loans, along the lines described above, one that would reset mortgage interest rates, reduce outstanding principle and correctly appraise the value of the underlying home.
Any securities holder would have the value of its interest in the securities backed by the mortgage on that home similarly devalued. Both the mortgage and the securities would be re-issued, reflecting the new valuation. The commitment of all parties to the health of these relationships – the relationships between the borrower and the property, the borrower and the lender, the lender and securities holder – would all be re-affirmed, with a proper valuation placed on each.

Such an outcome would help to stabilize the residential real estate market and free up the securities to trade once again. If a borrower wants to sell the home, he or she could do so, now that his or her equity stake has been revived, the property’s value re-established and the outstanding principal on the loan modified to reflect the present value of the home. Potential investors will feel re-assured that they can invest these securities once again because they will have been purged of their toxic qualities. Bank ledgers will be more transparent and credible, having had proper valuations made of their underlying assets.

Mass torts techniques will advance these efforts as quickly and efficiently as possible. Resolving questions of the legality of the underlying mortgages, and evaluating the worth of the securities backed by them, will help to bring some stability to the mortgage and securities markets generally. Where mortgage terms are reset through these processes to affordable levels, the foreclosure rate will likely drop. The weight of illegal and unconscionable loans on the mortgage market will be lifted. Lenders will have a sense of a path to loan modifications that will not raise the specter of litigation from investors that presently chills voluntary efforts, where a new valuation can be made of those underlying investments consistent with the new value of the mortgages backing them. Press attention and advertising will raise awareness about the presence of illegal conduct in the market, bringing borrowers out of the shadows and altering
public opinion about whether borrowers are worthy of federal assistance. The courts will step into the regulatory breach, and help to chart a course for the new regulatory and legal infrastructure that needs to be put in place to promote healthy lending in the future.

C. Barriers to the Implementation of the Mass Torts Approach

While a mass torts approach may be valuable in the context of the current crisis, such an approach would face procedural and doctrinal barriers and would require litigants and courts to address such barriers in creative and effective ways. Such barriers include the following: problems of proof that may not lend themselves to aggregative methods, a problem identified above; the fact that the holder in due course doctrine may be invoked by the issuers and holders of subprime securities; whether rescission of the underlying mortgage is a potential remedy; the standing of municipalities to bring subprime litigation; the so-called “futures” problem; and the likelihood that many lenders and banks face insolvency in the face of large judgments and the fact that many originators are already bankrupt or near bankrupt. While a full dress response to each of these potential barriers is beyond the scope of this article, I do not dispute that they are legitimate barriers that must be addressed as they arise, and I have attempted to do so, at least briefly with respect to the five of these six barriers, below. Following that brief discussion, I address, at greater length, the six barrier: the problem of distressed and insolvent defendants and the tools necessary to deal with this issue.

1. Problems of Proof
As stated earlier, there are potential claims that will not lend themselves to aggregative procedures. Where complaints in subprime litigation include allegations of wrongdoing by particular brokers or loan officers in the offices of particular loan originators, wrongdoing that hinges on the oral communications made by such actors to particular borrowers, such claims will not necessarily be amenable to aggregative procedural mechanisms. To the extent that there are allegations of typical representations, or written forms containing generic, template language that is itself illegal, courts can utilize discovery and fact-finding mechanisms en masse. Otherwise, it is unlikely that aggregative procedures will be helpful in these contexts. While damages and other disputed issues might still lend themselves to aggregative methods, findings of fact on liability in these contexts where allegations of individualized conduct are alleged will need to be done on a case-by-case basis, and such proceedings will not benefit from the economies of scale that can be achieved through the mass torts approach.

Similarly, unless claims of borrowers already displaced through foreclosure can reach maturity, and the value of the claims of such borrowers determined through a series of trials on such issues or some other methodologies, the individualized nature of such harm will impede the use of aggregative methods to determine the value of such claims. The nature of these borrowers’ claims will necessarily be personal to them, and some will have suffered more as a result of foreclosure than others. Until the value of these claims can be properly assessed, litigants and the courts will be hard pressed to aggregate such claims for settlement or findings with respect to the value of their damages.

2. *Holder in Due Course Doctrine*
Some have raised concerns that the holder in due course doctrine may shield some purchasers of subprime loans from liability for the potentially nefarious actions of the brokers and lenders. The holder in due course defense protects certain buyers of commercial interests from claims against the seller of that interest of which the buyer is unaware. Such a defense, if viable, might shield such buyers from claims of borrowers that the underlying mortgages were consummated under discriminatory or other illegal terms. Yet there are many exceptions to this defense, several statutes such as TILA and HOEPA have exemptions from the doctrine, and many have argued that this doctrine should be inapplicable in the context of subprime lending. For example, investors in the mortgage securitization chain might attempt to claim protected status as holders, but many are not holders of the underlying mortgage; rather, they are investors in bonds backed by those securities. Furthermore, courts will have to make factual determinations as to whether present holders of the interest in the mortgage knew or had reason to know about whether borrowers have defenses to the mortgages based on their alleged underlying illegality. Because so many securitizing entities worked closely with originators, whether they had reason to know that some of the more exotic mortgages were being promoted

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126 See, e.g., Christopher L. Peterson, Predatory Structured Finance, 28 Cardozo L. Rev. 2185, 2235-2238 (2007) (describing exceptions to holder in due course doctrine and successful attempts at enforcing such exceptions).


and executed outside the bounds of the law and propriety is an issue courts and litigants will have to explore.

Even a finding that particular downstream investors are shielded by the holder in due course status will not shield originating lenders, even if they no longer have an interest in the mortgage (although many of these lenders are now insolvent). If rescission of the mortgage is the relief that is ultimately granted, however, downstream investors might have to enforce any claims they have against the entity that securitized the mortgage, not the borrowers benefiting from the rescission. Finally, some lenders still have an interest in the underlying mortgage, even after securitization, and thus cannot be shielded from claims of the borrowers by any downstream transaction that might have occurred.

3. Rescission as a Remedy

As described above, several federal appellate courts have ruled that rescission is not an available remedy to class action plaintiffs under TILA. But other statutes, notably the FHA and ECOA have broad grants of authority to courts to employ any effective remedy to combat illegal discrimination.\(^\text{129}\) Even assuming for the sake of argument that TILA does not provide the

\(^{129}\) The relevant portion of the Fair Housing Act, 42 U.S.C. 3613 provides in part as follows:

(c) Relief which may be granted.

(1) In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals. Relief granted under this section shall not
remedy of rescission to class action plaintiffs, aggregated claims of individual plaintiffs could still proceed for rescission, and, class actions under TILA could still be settled affording plaintiffs the relief of rescission in an effort on the part of defendants to avoid damages awards that are still viable under TILA. Furthermore, the common law claims that undergird many of the municipal and attorneys general cases afford courts the flexibility to craft remedies consistent with, or that approximate, rescission. At the end of the day, better than facing the prospect of large damages awards for the prospective harm to borrowers who have not yet made mortgage payments under illegal mortgages with inflated interest rates, mortgage rescission and reformation on fair terms is actually in the best interests of all of the parties and would bring about stability in the housing market that is so desperately needed.

4. The Standing of Municipalities

The Supreme Court and several lower courts have recognized a municipality’s cognizable interest under the FHA in challenging practices that reduce the local tax base. Generally

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<td>affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this title. The relevant portion of ECOA provides that “upon application by an aggrieved applicant, the appropriate United States District Court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this subchapter.” 15 USC 1691e(c).</td>
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130 See, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)(recognizing municipality standing where racial steering in housing allegedly reduced property values and diminished the local tax base); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1525 (7th Cir. 1990)( recognizing municipality standing in a case of racial steering in light of “settled” nature of the issue as a result of Court’s ruling in Gladstone, supra); Heights Cnty. Congress v. Hilltop Realty Inc., 774 F.2d 135, 138-139 (6th Cir. 1985)(citing Gladstone, supra, and recognizing municipality standing in case alleging racial steering in housing that resulted in diminution in the tax base from such practice). For a contrary argument, seeJonathan L. Entin & Shadya Y. Yazback, City Governments and Predatory Lending, 34 FORDHAM URB. L.J. 757, 762-69 (2007) (arguing against municipality standing to pursue claims the lenders engaged in predatory lending against local residents).
speaking, however, the strength of government claims of standing was solidified in the recent Supreme Court decision in *Massachusetts v. EPA*. They, the State of Massachusetts brought an action against the U.S. Environmental Protection Agency for its failure to promulgate regulations under the Clean Air Act regarding greenhouse gas emissions from motor vehicles. By failing to regulate these emissions, it was alleged, the EPA contributed to global warming and endangered the Massachusetts coastline, which was, in part, owned by the commonwealth itself.

Writing for the majority, Justice Stevens, recognized the Congressional grant of authority to bring the type of suit in question: i.e., a challenge to a failure on the part of the EPA to issue regulations under the CAA. The Court cited its prior decision in *Lujan v Defenders of the Wildlife*, for the elements of standing that a plaintiff must establish to satisfy the “Cases of Controversies” requirement of Article III: that there has been an actual or imminent injury that is traceable to the defendant and redressable by the court. The majority went on to recognize that the “injury in fact” element was met by the commonwealth; because it owned “a substantial portion of the state’s coastal property” it had “alleged a particularized injury in its capacity as a landowner.” Turning to causation, the EPA argued that its failure to act to regulate greenhouse gas emissions contributed “insignificantly” to the harms the plaintiffs were alleging. The Court found, however, that even “a small, incremental step” to mitigate an injury

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132 Under CAA, the EPA has authority to issue regulations concerning control of “air pollutants.” The EPA had chosen not issue rules with respect to these gases, and had failed to provide reasons for that decision, in the face of Massachusetts’s express request that the EPA generate such rules. In seeking compliance with the CAA’s terms, Massachusetts was seeking, first, that the EPA make a determination that greenhouse gas emissions were, in fact, pollutants; and, second, assuming that the EPA found that they were, issuing regulations pertaining to their emissions.
133 Id., at 1452-1453, citing 42 U.S.C. 7607(b)(1).
135 Id., at 1456 (citation omitted).
136 Id, at 1457.
is subject to judicial review. With respect to redressability, the Court found the plaintiffs’ arguments had merit, noting that a even “reduction in domestic emissions [of greenhouse gases] would slow the pace of global emissions increases, no matter what happens elsewhere.”

Whatever the impact of the Massachusetts decision on standing law generally, and scholars have begun to debate its effects, there is no doubt that governmental standing to bring suits alleging harms to their interests, either as property owners or in their representational capacity for their constituents was recognized, squarely, in this decision. Municipalities seeking to claim damages from predatory loan products can no doubt argue that these products reduced property values to a degree sufficient enough to confer standing on those municipalities, especially where the municipality itself owns property impacted by foreclosures of subprime loans.

5. The Futures Problem

In the wake of Amchem and Ortiz, discussed above, an acceptable approach to the problem of how to evaluate the damages of future claimants has proven somewhat elusive. In the subprime context, however, the futures “problem” is, in fact, not a problem at all. In this context, the sooner someone is identified as being a likely victim of predatory conduct in the mortgage transaction, the lower their damages. If mortgages can be rescinded and reformed on terms that are fair, the future damages such claimants might have otherwise suffered evaporate.

Effective aggregative techniques can be utilized to evaluate past harms along the lines that have

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137 Id.
138 Id., at 1458.
been suggested here: i.e., rewrite old mortgages on fair terms and reduce principal owed by the amount of excess payments already made and in accordance with present property values proportionally. With rescission and effective reformation of the underlying loans, the futures problem completely disappears because there are no future harms until borrowers make payments on loans that are illegal. Where they never make those payments, they have suffered no future harm.

6. Defendant Insolvency

A significant barrier to compensation and meaningful resolution of some subprime litigation is the insolvency, or near insolvency, of many would-be defendants. First, nearly 170 subprime lenders left the field from 2006 through 2007, in that they were no longer reporting HMDA data. As described above, a highly disproportionate share of the subprime loans of these institutions were made to African-Americans and Latinos, even higher than the already skewed percentages of the subprime market generally. Much of the worst abuses of the subprime market were likely carried out by these lenders directly, and now they have already dissolved, or have entered the bankruptcy process.

For many other financial institutions that might have some legal liability for misconduct during the subprime market’s heyday, whether for claims raised by subprime borrowers or investors, they are on the brink of insolvency and bankruptcy, and the pursuit of claims against them would be an existential threat. Even such institutions as Citigroup and Bank of America have sought and received substantial assistance from the federal government. A finding of
liability in any subprime litigation could depress share prices even further and drive many institutions to the shelter of bankruptcy.

As in other mass torts settings, claims against mass torts defendants could certainly be resolved in bankruptcy court, and what remains of bank assets could be liquidated and the proceeds distributed to claimants, borrowers and investors alike. For subprime originators already in bankruptcy, subprime plaintiffs should intervene in those proceedings and get in line for satisfaction of their claims. But for those institutions still holding on, it is likely that pursuing claims against these entities to purse the goal of compensation for claimants would likely work at cross purposes with the goal of restoring faith in the housing and mortgage markets. It would likely lead to a further reduction in confidence in financial markets, destroy any remaining value of share prices of these institutions and make credit even tighter: with fewer entities to lend, and the threat of future litigation scaring those entities that remain. Larger, healthier banks are unlikely to purchase the assets, and assume the liabilities, of these institutions.

Due to the fact that many subprime lenders have already entered bankruptcy proceedings and may have few assets to liquidate to compensate creditors, and litigation might threaten the health of presently viable institutions, federal funds might be needed to “backstop” the defendants in subprime litigation, this strategic use of federal funds could encourage settlements and fund sensible resolution of these actions, including providing insurance for mortgage refinance agreements carried out through such settlements.

Such an approach would target the use of federal funds only where necessary: i.e., to preserve the viability of defendant-institutions where the cost of potential judgments against them would threaten their financial existence, or where, if in bankruptcy or already dissolved,
there are few assets to satisfy any potential judgments, or to finance sensible settlements. While such an effort would prove costly, it would necessarily reduce the need for and cost of the more general borrower bailout plan currently being formulated. Indeed, the Obama Administration’s current plan is to use nearly $300 billion to encourage the refinancing of mortgages, regardless of the legality of the underlying mortgages.

Most mortgages could be classified into four categories: first, those mortgages that were consummated legally, but require refinancing to keep the borrower in his or her home; second, those mortgages that had illegal terms, and where defendant-institutions might be insolvent or near insolvent, such that they are unable to finance meaningful settlements; third, those mortgages written by lenders already in bankruptcy proceedings, the remaining assets of which would not satisfy the cost of any settlement that might arise from those institutions’ misconduct; and, fourth, those mortgages that should be rescinded due to underlying illegality but where a defendant-institution liable for such illegality has funds sufficient to finance a meaningful settlement of the claims against it.

By removing those loans in the fourth category – where the defendant can finance settlement – it will likely reduce the cost of the overall bailout. The creative use of federal funds in the second category of cases, perhaps through the use of low-interest loans to these near insolvent institutions to help finance the settlements to which they might join, would likely reduce the long-term costs associated with the broader borrower bailout by leveraging what funds those institutions might have to fund those settlements, and promising the repayment of what federal funds those institutions might borrow. Where lenders are already in bankruptcy proceedings, such institutions’ assets should be liquidated and the financing raised through that process should be used, at least in part, to help fund aggregated settlements in cases filed against
those institutions. Federal funds could be used to meet any shortfall, but at least the ultimate cost of rewriting the mortgages impacted by these institutions’ conduct would be reduced by the value of the assets that are the subject of the bankruptcy proceeding.

IV. Value of the Mass Torts Approach When Compared to Alternatives

I turn now to whether the mass torts approach to subprime litigation would be superior to other legal responses.

A. Individualized Litigation

In *Ortiz v. Fibreboard Corp.*, *supra.*, the Supreme Court invalidated a settlement agreement because the Justices’ were suspicious of the apparent lack of protection of the rights of members of the plaintiff class during the settlement process. The Court praised the ideal in American culture of the individual litigant’s day in court. Mass tort settlements, the Court cautioned, threaten this ideal, and tend to endanger the interest of members of the class, particular those interests of future claimants, whose claims, the contours of which have not yet materialized or taken shape, may not be protected by class counsel anxious to reward the present members of the class. But does such an ideal really make sense in the present context of subprime litigation? Would individual litigants really be able to pursue their claims, as individuals, and protect their interests adequately, litigating on their own?

The value of aggregative techniques in the subprime arena, and the mass torts approach generally in this context, is that they can move cases forward quickly, can get relief to plaintiffs
as soon as possible, can produce results in a time-frame that will preserve home values and
prevent them from deteriorating further, will raise awareness about the illegal conduct
underlying many mortgage transactions in a way that would only arise with a market-wide view
of such conduct, and will make bringing such cases possible economically for plaintiffs’ counsel.

Without such a systemic response that takes into account conduct across the market
broadly, individual litigants will languish: unrepresented, uninformed about their potential claims
and the likelihood that other similarly situated borrowers may have been the victim of predatory
conduct. Without representation, few borrowers, if any, will bring affirmative actions on their
own to challenge the legality of their mortgages. If they are fortunate enough to be in a state that
requires judicial action to carry out a foreclosure, they will be able to attempt to challenge their
mortgage in the foreclosure action, if they are able to find a lawyer to represent them; if they are
not able to afford their mortgage payments, however, it is unlikely they will afford an attorney to
defend them in the foreclosure proceeding.

Even assuming individual litigants were able to find lawyers willing to accept a case on
contingency fee, and were able to make out claims challenging their mortgages in affirmative
actions on an individual basis, would the federal courts, the home of many of the discrimination

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140 Studies of the unmet legal needs of the poor in the United States repeatedly highlight the failings of the legal
profession to meet an overwhelming percentage of legal problems faced by the indigent. Most studies conclude that
an estimated eighty percent of the legal needs of the indigent are not met, while forty to sixty percent of the legal
needs of the middle class are unmet. See, e.g., LEGAL SERV. CORP., SERVING THE CIVIL LEGAL NEEDS OF
LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS (2000) (describing unmet legal needs of the
poor); Houseman, supra note 85, at 371-72; ABA, AGENDA FOR ACCESS: THE AMERICAN
PEOPLE AND CIVIL JUSTICE (1996) (describing legal needs of moderate income Americans); ROY W. REESE
& CAROLYN A. ALDRED, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME
It is also likely that these studies underestimate the actual legal needs of low- and moderate-income individuals
because such individuals may not even be aware that they have legal problems that need to be, or could be,
addressed. Rhode, Connecting Principles to Practice, supra note 82, at 380. Deborah Rhode, Access to Justice:
Connecting Principles to Practice, 17 GEO. J. LEGAL ETHICS 369, 387-88 (2004); Deborah Rhode, Access to Justice,
cases that might arise, really be capable of handling hundreds of thousands of new, individual lawsuits? If the response to such hypothetical facts is to say that, indeed, few individual litigants will find their way to the courts, regardless of the merits of any potential claims, really satisfactory? Where claims will never come to light, patterns of conduct never revealed and harm never prevented, is the individualized approach really an option? Can we, in the name of due process, honestly cling to an ideal of individualized adversarial proceedings when that ideal ultimately denies the likelihood that hundreds of thousands, if not millions, of claims will ever see the light of day?\textsuperscript{141} It is obvious that an aggregative approach to subprime litigation stands a much better chance of realizing the goals of the legal responses to the subprime mortgage crisis than an individualized approach ever could.

\textbf{B. Regulation}

In their recent work,\textsuperscript{142} Professors Oren Bar-Gill and Elizabeth Warren argue that regulation with respect to credit products is superior to judicial intervention after the fact because courts are not competent as institutions to handle disputes regarding credit transactions, there are significant doctrinal limitations in the law applicable to such

\textsuperscript{141}The majority opinions in \textit{Amchem Products v. Windsor}, supra, and \textit{Ortiz v. Fibreboard Corp.}, supra, have been met strong criticism for their nostalgic view of individualized adjudication. \textit{See, e.g.}, Deborah R. Hensler, \textit{As Time Goes By Asbestos Litigation after Amchem and Ortiz}, 80 TEX. L. REV. 1899, 1923-24 (2002)(arguing majority opinions in Amchem and Ortiz actually puts interests of future claimants at risk); Samuel Issacharoff, \textit{“Shocked”: Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz}, 80 TEX. L. REV. 1925, 1930 (2002)(describing reality of asbestos litigation after \textit{Amchem} and \textit{Ortiz} as one in which “the economics of litigation and the sophistication of the bar in this area have combined to leave far behind such nostalgic renditions of the Aristotelian world of simple dispute resolution.”) Bruce Hay & David Rosenberg, \textit{“Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy}, 75 NOTRE DAME L. REV. 1377, 1380, n. 8 (2000)(arguing majority opinion in \textit{Ortiz} “establishes a conception of individualism that in operation will make all plaintiffs individually worse off”).

\textsuperscript{142}Bar-Gill & Warren, supra note 109, at 170-179.
transactions, and procedural barriers lead to judicial restraint. With respect to institutional competence, Bar-Gill and Warren argue that regulatory agencies have better access to relevant information in the credit context than courts faced with information on an individual case-by-case and consumer-by-consumer basis, including information about the broader business practices of particular credit issuers as well the functioning of the broader market. They echo concerns of others who favor regulation to litigation in the context of consumer contracts generally.

A second Bar-Gill and Warren critique is of the primary legal doctrines at the disposal of judges seeking to assess the validity of consumer credit transactions: unconscionability. They argue that this doctrine is too narrow and is not crafted to address the many ways that potentially harmful credit transactions go awry. Furthermore, a more robust approach to unconscionability would require a “fact-intensive inquiry of market conditions and practices” and would likely result in an expansion of the doctrine generally into “markets that may not suffer from the same defects” as the consumer credit market.

Finally, Ben-Gill and Warren argue that significant procedural barriers prevent courts from serving as an effective check on abuse consumer practices. They argue that the “high-probability, low-magnitude” nature of harms flowing from consumer transactions (i.e., that many consumers will suffer relatively low damages) means that

\[\text{143 Id., at 174.}\]
\[\text{145 Ben-Gill & Warren, supra note 109 at 175-176.}\]
few consumers will come forward to press their claims and it will be harder for them to obtain attorneys who will not deem it cost-effective to press such clients’ claims.\textsuperscript{146}

Admittedly, Ben-Gill and Warren’s arguments are prospective in nature; they argue that, from the outset, an \textit{ex ante} regulatory regime is superior to one that uses judicial controls to monitor conduct after the fact. In the subprime context, we are faced with problems that have occurred in the past, even where they continue to cause problems into the future, as subprime borrowers continue to pay excessive rates and the prospect of more foreclosures extends beyond the horizon. Still, the arguably illegal conduct at issue in the subprime context did occur in the past, at a time when regulators failed to police potentially predatory conduct, and federal regulators even stepped in to pre-empt state regulators from doing the same. Any new regulatory regime that Congress or state legislatures might put in place would be ill-equipped to engage in \textit{ex post facto} controls on prior conduct, thus, judicial responses are likely superior to regulatory controls of actions that took place in the past. Moreover, on the three gauges by which Ben-Gill and Warren measure the relative strength of regulation and litigation – the ability to develop information relevant to the regulatory issue, the doctrinal limitations of judicial controls, and the procedural barriers to such controls – the mass torts approach in the subprime context seems well suited to the task of policing this frontier.

The discovery process in the pending litigation will likely generate information related to discriminatory pricing, the extent to which borrowers of color were steered towards subprime loans when they qualified for prime mortgages, and evidence of other intentional acts on the part of lenders to carry out predatory conduct. It is unlikely that regulators could generate the same sort of information or would have the appetite or the budgets to pursue such information to the

\textsuperscript{146} Id., at 176-177.
same extent, and with the same vigor, that plaintiffs’ counsel might. Moreover, should such information turn up in discovery, once in the hands of plaintiffs’ counsel, they are in a strong position to make such information public, thereby alerting the general public to the information which, in turn, will both raise public awareness about the issue and likely encourage other potential plaintiffs to come forward.

As to doctrinal limitations, the discussion in Part II.B., supra., attempts to identify the different areas in which subprime litigation is beginning to unfold. While it is too early to gauge the ultimate success of such efforts, it is clear that state common law theories, federal discrimination statutes and other federal laws all offer some channels for measuring the legality of the conduct of actors in the mortgage transaction process. The doctrines underlying these claims certainly have their limits, but plaintiffs are not as constrained as Ben-Gill and Warren believe.

Similarly, while there are barriers to the mass torts approach in subprime litigation, as described in Part III.C., supra., the main barrier identified by Ben-Gill and Warren – that the damages often recovered in consumer cases are so minimal many consumers will not pursue such claims – does not seem to hold true in the subprime context. Moreover, the prospect of aggregated claims, whether they involve claims of discrimination or other common law theories, with the potential for rescission of mortgages that could promise borrower savings of hundreds of thousands of dollars per mortgage, will likely encourage plaintiffs to come forward and plaintiffs’ lawyers to undertake these cases.

Accordingly, given the fact that subprime litigation as presently conceptualized seeks to remedy prior acts of predatory conduct that occurred at a time when regulations and regulators
were not up to the task, and where subprime litigation seems suitable to address the issues of access to information, doctrinal limitations and procedural barriers raised by Ben-Gill and Warren, such litigation, using the mass torts approach, seems an appropriate fit for the problems at hand.

C. Individual Bankruptcy

As this article goes to print, the Obama Administration is rolling out a new foreclosure prevention policy, the details of which have yet to be revealed, the goal of which being to strengthen and expand opportunities for loan modifications. A critical piece of this initiative is to work with Congress to amend the bankruptcy code to permit delinquent borrowers to have their loans modified through the bankruptcy process. But such an alternative leaves much to be desired as a mechanism for bringing about the modification of millions of distressed mortgages. Bankruptcy is a cumbersome, time-consuming and expensive process, even with an attorney. Without an attorney, the process is daunting and extremely difficult to navigate. Furthermore, filing for individual bankruptcy destroys a debtor’s credit rating, even more so than having a foreclosure action filed against him or her. It is seen by many as an absolute last-

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148 Id.
151 Compare, Posting of Justin Harelik, to Bankrate.com (Oct. 10, 2006) (explaining the effects of post-bankruptcy ghost credit which permanently mire the credit rating of someone who has filed for bankruptcy) with Beth
resort, if an option at all. Whether it is for these or other reasons, “relatively few consumers pass through the doors of the bankruptcy court.”

From the banking industry’s perspective, permitting borrowers to seek modifications through the bankruptcy process would likely drive up the cost of home loan borrowing, generally. That industry argues that such a mechanism would make lenders even more reluctant to lend if they fear their contracts are essentially unenforceable if a borrower can seek modification through bankruptcy.

In contrast, the mass torts approach to identify illegal mortgages and restructuring them through aggregative methods would not threaten the viability of mortgage lending, provided the determinations of illegality have legitimacy.

D. Voluntary Modifications

Many banks, encouraged by federal and state programs designed to promote loan modifications, have voluntarily entered into loan modificacion agreements with their borrowers. A series of federal initiatives have led the way in this regard. First, the HOPE NOW alliance was created in October of 2007 as a voluntary effort to improve contact between servicers and borrowers with the goal of increasing the number of loan modifications and avoiding

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Fitzgerald, Ask the Biz Brain, STAR-LEDGER (Newark, N.J.), Sept. 20, 2007, at 55 (noting that a borrower who has had a home foreclosed on in the past may have to pay a 33% higher rate on a subsequent mortgage).

Ben-Gill & Warren, supra note 109 at 178.

According to program estimates, more than one million foreclosures have been avoided due to the efforts of participants. Second, the Housing and Economic Recovery Act of 2008 became law in July of 2008, which offers the prospect of broad relief for an estimated 400,000 borrowers in distress through the availability of up to $300 billion in loan guarantees to finance workable refinance arrangements. Third, the federal takeover of Fannie Mae and Freddie Mac means the federal government has a greater ability to influence millions of mortgages that are still owned by those entities. Finally, at present, the Obama Administration is planning to roll out a new foreclosure prevention policy to strengthen and expand opportunities for loan modifications. But the success of these efforts, all voluntary, has been elusive.

As the Comptroller of the Currency, John C. Dugan, recently noted, many borrowers in voluntary loan modifications have defaulted again on their modified loans. Alan White’s

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160 Remarks by John C. Dugan, Comptroller of the Currency, Before the Office of Thrift Supervision’s 3rd Annual National Housing Forum, Washington, D.C. (December 8, 2008)(noting that six months after loan modification, 58 percent of borrowers were more than 30 days past due on their mortgage payments), available at: http://www.occ.treas.gov/ftp/release/2008-142a.pdf

Dugan did not have a definitive reason for the high re-default rate, and asked the following questions:

The question is, why is the number of re-defaults so high? Is it because the modifications did not reduce monthly payments enough to be truly affordable to the borrowers? Is it because consumers replaced lower mortgage payments with increased credit card debt? Is it because the mortgages were so badly underwritten that the borrowers simply could not afford them, even with reduced
recent analysis of loan modifications gives some reasons why these efforts have met with only partial success. He has shown that many voluntary loan modifications executed to date do not actually result in a reduction of the monthly payments borrowers must pay. If borrowers were paying more than they could afford before the modifications, it is unlikely that modifications that do not bring down the monthly costs to the borrowers will likely bring about any real chance those borrowers can stay current on their payments even after modifications.\footnote{Id. See, Alan M. White, Deleveraging the American Dream: The Failure of 2008 Voluntary Mortgage Contract Modifications, ___ CONN. L. REV. ___ (2009)(forthcoming), presently available at http://ssrn.com/abstract=1325534.}

It is easy to conclude, then, that banks, left to their own devices, are not engaging in the types of modifications that must take place in order to stabilize the housing and mortgage markets. Litigation that requires meaningful reductions in payments and balances owed stands the best chance of bringing about meaningful and effective modifications. As the previous discussion shows, such litigation must utilize the mass torts approach, and not leave individual borrowers to their own devices to attempt to exact concessions from lenders.

\section*{E. Social Insurance}

Litigation and regulation are not the only means of achieving distributive justice, however. Under a social insurance model, a victim of accidental injury need not prove fault or causation to recover compensation so long as the claimant can establish injury.\footnote{John Fabian Witt, Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement, 114 Harv. L. Rev. 690, 691 (2001).} In certain
sectors, the U.S. system utilizes social insurance models: e.g., worker’s compensation systems, no-fault insurance plans, Medicare, and Social Security Disability. Still, social insurance programs have been designed individually to meet particular needs and, therefore, do not represent the dominant force addressing injury or illness in the United States. As a result, there is currently no uniform system for compensating victims and claimants must resort to both tort law and large programs of public and private insurance for assistance.

Commentators have argued that there are a variety of benefits to a comprehensive social insurance program in the United States, including the following: the reduction in transactions costs associated with attorney’s fees that arise in the prosecution of and defense against claims; the fact that a critical element of compensation is often the wealth of the victim, such that tortfeasors are punished less when they injure poorer with fewer resources to pursue their claims; that where one of a series of joint tortfeasors is insolvent, the remaining actors can be found 100% liable for their victim’s injuries.

Although many proposals for tort reform have centered around implementing a comprehensive social insurance model to replace the existing tort system, these approaches do not consider the complexities arising from the overlap of market forces, tort law, existing social insurance systems, and other factors.

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164 Id.
165 Id. at 75.
167 Id. at 1401.
168 Abraham & Liebman, supra note 161, at 115.
insurance programs, and government regulation. Part of what would make implementation of a comprehensive social insurance program difficult is that each of these systems currently operates independently. As a result, some have argued not for a complete abolition of the current tort law, but for a system which has a mix of market incentives, tort liability, social insurance, and regulation.

Whether we like it or not, in the financial sector, we are moving towards a model of social insurance, one that is completely taxpayer funded, does not seem to concern itself with prior illegal conduct, and one that will be terribly, terribly expensive. The superiority of a mass torts approach to a social insurance approach in this context is that the federal taxpayer bill for creating a safety net under the banks may be a lot lower if bank conduct is assessed, mortgages are re-written along lines that are affordable and legal, and bank assets are utilized, as appropriate, to fund these activities.

An approach that seeks to identify the extent to which problem loans were the product of illegal conduct and modify them first upon terms that are fair might just reduce the number of loans in the government cue, presently waiting for the life boats. It could ultimately lower the cost of the homeowner bailout significantly, and insulate such modifications from investor lawsuits, at least those lawsuits aimed at the regulators and homeowners.

Yet a simple reduction in the cost of a bailout will not go far enough, however. Instead, federal funds should be deployed, strategically, to help grease the wheels of the settlements pursued in this array of cases that will ultimately make their way to the courts. Probably the

\[\footnote{170}{W. Kip Viscusi, Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety, 6 Yale J. on Reg. 65 (1989).} \] \[\footnote{171}{Id.} \] \[\footnote{172}{See, e.g., Id.} \]
most efficient use of the federal bailout dollars would be to create a “Failed Institutions Fund” that would help to compensate investors to a certain extent for their losses in the mortgage-backed securities market. This would help to offset some of these losses so that the modifications that will result from the array of lawsuits described above will not fall disproportionately on innocent investors. Where there are solvent institutions responsible for illegal conduct, compensation for investors should come from them, to the extent they were liable for any underlying misconduct. Where the entities responsible for actionable legal conduct are no longer in existence, or have few assets that could be utilized to compensate investors, the Fund could kick in to help make loan modification more palatable to them. Like the approach with the September 11th Victims Compensation Fund, investors could seek some compensation from the Failed Institutions Fund, or pursue their claims against the failed institutions themselves, where they are unlikely to see much in return anyway. Let the investors choose which path they wish to pursue.

**Conclusion**

A mass torts approach to the subprime mortgage meltdown and the financial crisis that has ensued will help to bring some order to the crisis, and enlist the courts in crafting meaningful and helpful solutions to it. Just as in other settings, where a toxic product was released into the market, the courts have played a critical role in sorting out the harms and assigning liability for them. At times, the federal government has stepped into the breach to help minimize the extent to which the harm from toxic products or illegal practices might fall on innocent parties or where the cost of compensating for such products and practices might destroy businesses and the
livelihood they provide to their employees. As the pages of this article argues, a mass torts approach to the subprime mortgage crisis might just help resolve the harms, assign the liability, and dispense the compensation in a coherent, efficient and meaningful way. In this way, the whole of the subprime litigation already underway, and that will most certainly ensue in the coming years, will be greater than the sum of the parts.