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MORTGAGE LENDING: CONFUSING IN EVERY LANGUAGE

Greg Jones *

INTRODUCTION

Over the past several years, the American economy and the mortgage services industry have taken large hits.¹ Indeed, housing prices have dropped by approximately one third.² Both locally and abroad, the mortgage industry and housing market are suffering from the volume of defaults in the floundering economy.³ As such, numerous issues have arisen relating to the granting, servicing, and repayment of mortgage loans. A multitude of issues surround the actions of not only the banks providing these loans, but also the loan servicers who foreclose on mortgages and the mortgagors who take on these debt burdens without fully appreciating the implications of the mortgage document. Thus, both borrowers and lenders are to blame for the issues currently plaguing the mortgage industry.

Banks have made a concerted effort in the last several years to attract more business from minority borrowers.⁴ However, there is a strange dichotomy between the banks' selective targeting tactics toward minority borrowers and the banks' later refusal to accommodate such borrowers. For example, despite advertising in a borrower's language, banks refuse to provide translations of the

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¹ *House of Horrors, part 2*, THE ECONOMIST, Nov. 26, 2011, available at <http://www.economist.com/node/21540231> (explaining that U.S. home prices fell by 34% from 2006 to early 2011).

² *Id.*

³ *Id.*

⁴ *Bank of America Launches New Spanish Television Ads to Attract New Checking Accounts, Mortgages*, HISPANICBUSINESS.COM (Aug. 11, 2003), http://www.hispanicbusiness.com/2003/8/11/bank_of_america_launches_new_spanish.htm.

mortgage documents in that language. As a result, minority borrowers are in a special class of consumers who can easily be taken advantage of by the banks. Non-English speakers' inability to read the documents binding them to an agreement places them at a significant disadvantage when, down the road, issues arise over the terms of the agreement.

This note will address the current state of the mortgage industry in America and provide an analysis of the consumer issues implicated in the mortgage documents themselves, paying special attention to minority borrowers having English as their second language. For the purposes of this article, Latinos, and other primarily Spanish-speaking Americans, will serve as the primary case study.⁵ As the largest minority group in the United States,⁶ Latinos provide a large amount of information and statistical data from which to draw inferences about the plight of the minority borrower at large in the mortgage services industry. Furthermore, Latinos provide an interesting example of a minority borrower who cannot speak the language, but, because of the growing size of the minority⁷ and its concurrent greater borrowing ability,⁸ banks have specifically targeted to receive their business.

In this note, section one will focus on the current state of the entire loan industry, and section two will focus primarily on relevant federal laws. Section three will examine the common borrower, while section four examines the plight of the minority borrower, including banks' targeted advertising and discriminatory lending practices towards minorities. Section five will discuss examples of progress in disclosing terms to minority borrowers in different jurisdictions, including other countries. Finally, section six will discuss the implications of requiring banks to provide a translation of mortgage documents to the borrowers, the pros and cons of such a requirement, and the reasons why the government should adopt the requirement.

I. THE STATE OF THE MORTGAGE INDUSTRY: A HOUSE DIVIDED

The mortgage industry, practically speaking, is in a state of chaos. Traditionally, the housing market has comprised a large

⁵ The terms "Latino" and "Hispanic" will be used interchangeably.

⁶ Neil J. Morse, *The 'Emerging' Market*, MORTGAGE BANKING, Sept. 1, 2005, available at <http://www.allbusiness.com/finance/3596528-1.html>.

⁷ *Id.*

⁸ *Id.*

portion of GDP when other housing-related costs are included.⁹ However, the housing market recently has declined as housing prices fell 34% from 2006 to early 2011,¹⁰ and recently the five largest lenders and forty-nine states reached the biggest settlement involving a single industry since a tobacco settlement in 1998.¹¹ Moreover, states have sued other mortgage companies over their past lending practices,¹² and further action could be taken by the states against lenders not included in the National Mortgage Settlement. Banks continue to face public backlash over their lending practices, particularly for lending to individuals who could not afford to repay their loans, as well as for charging excessive and unjustified fees to those who defaulted on their loans.¹³

Questionable bank lending practices during the recent crisis have resulted in serious consequences. For example, foreclosure rates tripled from 2007 to 2009.¹⁴ In the beginning of 2010, nearly one-fourth of homeowners with mortgages were “underwater,” meaning that the borrower owes more on the loan than his or her home is worth.¹⁵ As foreclosure rates have increased, the aggressive processing of foreclosures has also come under intense scrutiny. Banks allegedly did not verify the debts upon which they were foreclosing, and sometimes even forged signatures on documents in order to speed the foreclosure process.¹⁶ The settlement reached by

⁹ Housing-related costs include the purchase of furnishings, rents, etc. Such a high percentage of the United States’ GDP indicates that housing accounted for a large portion of the goods and services produced within the nation in a given year. NAT’L ASS’N OF HISP. REAL ESTATE PROFESSIONALS, STATE OF HISPANIC HOMEOWNERSHIP 2 (2010), http://issuu.com/nahrep/docs/state_of_homeownership?mode=embed&layout=http://skin.issuu.com/v/color/layout.xml&backgroundcolor=27336F&showFlipBtn=true (stating that since 1947, housing has constituted around 21% of the United States’ GDP) [hereinafter *State of Hispanic Homeownership*].

¹⁰ *House of Horrors*, *supra* note 1.

¹¹ Derek Kravitz, *\$25 billion settlement reached with 5 largest mortgage lenders over foreclosure abuses*, CANADIAN BUSINESS, Feb. 9, 2012, available at <http://www.canadianbusiness.com/article/70131--states-reach-25-billion-settlement-with-5-largest-mortgage-lenders-over-foreclosure-abuses> (lenders party to the National Mortgage Settlement include Bank of America, Wells Fargo, JPMorgan Chase, Citigroup, and Ally Financial).

¹² Susan Haigh, *Conn. sues Countrywide over lending practices*, USA TODAY (Aug. 6, 2008 3:20PM), http://www.usatoday.com/money/economy/housing/2008-08-06-connecticut-sues-countrywide_N.htm.

¹³ *Id.*

¹⁴ *State of Hispanic Homeownership*, *supra* note 9 at 10.

¹⁵ *Id.*

¹⁶ See Kravitz, *supra* note 11.

state governments with the five largest lenders primarily resulted from these types of foreclosure practices.¹⁷

One question that arises out of these problems, then, is how did the borrower not foresee these fees or the likelihood of default? It is doubtful that anyone would enter into a mortgage agreement knowing that they would default and would be charged excessive fees thereafter. But how, then, are these banks able to insert such fees without any protests from the borrower?¹⁸ It is likely that the mortgage documents, with their confusing and voluminous language, are to blame.

Congress has attempted to address mortgage lending issues through various means, including the Truth in Lending Act (“TILA”),¹⁹ the Real Estate Settlement Procedures Act (“RESPA”),²⁰ the Cranston-Gonzalez National Affordable Housing Act,²¹ and the Dodd-Frank Act,²² among others. These acts attempt to both regulate disclosures that the banks make in the lending documents,²³ as well as provide some sort of relief to the borrowers who are in default.²⁴ However, as will be discussed further, these required disclosures often fail to reveal all the terms of the transaction. Instead, these disclosures only reveal certain terms that do not fully apprise a borrower of the entire burden placed on them by the mortgage agreement. Such knowledge would only arise with the careful study of the mortgage documents themselves.

II. FEDERAL LAWS GOVERNING THE LENDING TRANSACTION

Traditional contract law states that a person who signs a contract without learning the contents will be bound, and ignorance of the terms will not relieve a party of their obligations under the

¹⁷ *Id.*

¹⁸ Haigh, *supra* note 12 (stating that Countrywide charged unjustified fees causing some borrowers to default).

¹⁹ Truth in Lending Act, 15 U.S.C. § 1601 (2012).

²⁰ Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 (2012).

²¹ Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. § 203 (2012).

²² Bradley K. Sabel, *Mortgage Lending Practice after the Dodd-Frank Act*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Nov. 16, 2010, 10:03 AM), <http://blogs.law.harvard.edu/corpgov/2010/11/16/mortgage-lending-practice-after-the-dodd-frank-act/>.

²³ See generally Truth in Lending Act.

²⁴ See generally Cranston-Gonzalez National Affordable Housing Act.

contract.²⁵ In fact, courts have specifically held that, in an international economy, contracts between parties speaking different languages are common and the parties to such contracts, even if written in a different language, will be bound to the terms of the agreement.²⁶ U.S. federal courts have placed the burden on the person signing the agreement to apprise themselves of the contract's terms, even when in a different language.²⁷ Such a burden would, in the case of Spanish-speaking mortgagors, require the Latino borrower to find a translator or another means of translating the document. If Spanish-speaking borrowers do not do so, they run the risk of being taken advantage of by terms that they did not know existed or knowingly agree to. However, in the case of many Latinos, hiring a translator to translate the mortgage documents is simply impracticable due to economic constraints. As a result, Latinos are bound by documents they cannot fully understand, and must rely upon the word of a bank that may not have the Latino borrower's best interests in mind.

In juxtaposition to standard contract law, however, the federal government has taken some steps to regulate the mortgage services industry in order to make the terms of agreements clearer for the participants. TILA was one such creation. As Congress imagined it, TILA was created to enhance economic stabilization through the informed use of credit that would result from a consumer's understanding of the costs.²⁸ It requires the bank to disclose to the borrower a number of different charges and other rate-related information.²⁹ The bank must make these disclosures before the consummation of the agreement, and must make them "clearly and conspicuously in writing, in a form that the consumer may keep."³⁰ However, those disclosures, made clearly and conspicuously, are not required to be given in a language that the borrower can understand.³¹

RESPA has the same general purpose as TILA. RESPA, however, was put in place to reform the settlement process between banks and borrowers.³² RESPA forces the lender to provide the borrower with both a good faith estimate of the total cost of the

²⁵ *Paper Express, Ltd v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992).

²⁶ *Id.*

²⁷ *Id.*

²⁸ 15 U.S.C. § 1601 (2012).

²⁹ 12 C.F.R. § 226.6 (2010) (for instance, requiring disclosure of the finance charge, variable rates, some relevant dates, annual percentage rate, etc.).

³⁰ 12 C.F.R. § 226.17 (2009).

³¹ *Id.*

³² 12 U.S.C. § 2601 (2012).

mortgage³³ and an informational booklet concerning the home equity loan process and requirements.³⁴ The purpose of these advanced disclosures is to educate borrowers regarding the costs of settlement.³⁵ The Cranston-Gonzalez Act, an amendment to RESPA, serves largely the same purpose.³⁶

A more recent piece of legislation, the Dodd-Frank Act, also serves to improve the position of the borrower in all loan transactions, including mortgage transactions.³⁷ Primarily, the act prohibits unfair lending practices, requires some additional disclosures by banks, establishes penalties for irresponsible lending, and most of all, forces lenders to ensure that the borrower can repay their loan.³⁸ Notably, the act also created the Consumer Financial Protection Bureau (“CFPD”) to consolidate the consumer protection functions of other agencies and empowered the agency to write rules to protect consumers.³⁹ The CFPD also collects consumer complaints in order to investigate and prevent any fraud or other issues that might occur.⁴⁰ The Dodd-Frank Act required increased disclosure to borrowers but additionally, the CFPD is now actively policing the financial services sector to ensure that lenders do not take advantage of borrowers.⁴¹ As a result, any unfair and deceptive practices toward consumers should be substantially more difficult to practice due to the CFPD and disclosure requirements.

The federal government has also implemented programs in

³³ 24 C.F.R. § 3500.7 (2010).

³⁴ 24 C.F.R. § 3500.6 (2010).

³⁵ 12 U.S.C. § 2601 (2012).

³⁶ See 42 U.S.C. § 12703 (2012).

³⁷ UNITED STATES SENATE COMMITTEE ON BANKING, HOUSING, & URBAN AFFAIRS, BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2011), available at http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Stephanie Valencia, *What the Consumer Financial Bureau Means for Latinos*, WHITE HOUSE OFFICE OF PUBLIC ENGAGEMENT BLOG (July 22, 2011, 12:06 PM), <http://www.whitehouse.gov/blog/2011/07/22/what-consumer-financial-protection-bureau-means-latinos>.

⁴¹ *Learn about the Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Feb. 14, 2011) (according to their website, the bureau takes consumer complaints, restricts unfair and deceptive practices, enforces federal consumer financial protection laws, promotes financial education, and monitors financial markets for new risks to consumers, among other things.).

order to aid borrowers after they have agreed to their mortgage and, thereafter, have defaulted. The previously discussed statutes and agencies play a role in moderating the foreclosure and debt-servicing industry. The Making Home Affordable program, alternatively, is notable for the steps it takes to alleviate the effects of the mortgage crisis for the individual borrower. This program allows certain homeowners to lower their monthly mortgage payments, provides some with a way out of the home while avoiding foreclosure, and provides limited assistance to borrowers who owe more than the home is worth.⁴²

The legislative relief afforded to mortgage borrowers is perhaps due to the special role that home ownership plays in the “American dream,” or because the housing industry makes up such a large part of the United States’ GDP.⁴³ While traditional contract law would bind parties to the terms of the agreement, the United States federal government seems to consider mortgage agreement unique. That is, in opposition to traditional contract law, mortgage borrowers are not bound to the terms of the agreement if certain disclosures are not provided. By contrast, the government’s special treatment of mortgage agreements is also evident in its efforts to help borrowers after default, as well as its implementation of other targeted consumer protection strategies.

Whatever the reason, it is clear that the government has afforded unique treatment to transactions in the mortgage industry. However, to date the government has failed to adequately protect the largest minority, Latinos. There is a noted disparity between the active steps the federal government has taken to ensure disclosure of key financial terms in a mortgage and the fact that those disclosures are not required to be in a language that the borrower can even understand.

III. STATE OF THE COMMON BORROWER

The housing market has declined in the past decade. In 2010, 66.9% of all households owned a home.⁴⁴ This figure has been steadily decreasing since 2004 when as many as 69% of households owned a home.⁴⁵ Obviously, the economic downturn in the United

⁴² *What is Making Home Affordable?*, MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/about-mha/Pages/what-is-mha.aspx> (last updated Dec. 23, 2011, 10:17 AM).

⁴³ *State of Hispanic Homeownership*, *supra* note 9 at 6.

⁴⁴ *State of Hispanic Homeownership*, *supra* note 9 at 11.

⁴⁵ *Id.* (stating the 2004 percentage of homeownership was at a high point for

States played a large role in these changing statistics. These statistics also demonstrate that a large number of homes in America were foreclosed upon in the past several years. Also troubling is that, today, the average homeowner is less likely to apply for a loan at all, much less own a home.⁴⁶ As a result of the declining applications for loans, the issuance of loans has also fallen off.⁴⁷

In fact, over the course of the past ten years, the typical family has actually become poorer.⁴⁸ The median income of American households fell 7% since 2000.⁴⁹ The number of people living in poverty also rose, hitting the highest level since 1993.⁵⁰ As a by-product of these poor economic conditions, families have begun to move back in together and stay together longer.⁵¹ Children of all ages move back in with their parents, and vice versa, in order to save money on housing, further harming the housing market.⁵² Also, an increasing number of college students plan on moving back in with their parents upon graduating.⁵³ The progression toward such a move is relatively simple: an individual household falls on hard times, fails to meet their mortgage or rent payments, and moves in with a relative. Notably, it's not just single individuals opting for such arrangement, but families with multiple children are also moving in with the older generation.⁵⁴ Logically, with fewer individuals and families looking to purchase or live in homes, there are fewer new mortgages originated or existing mortgages serviced via rents, and

the period of 1994 to 2010).

⁴⁶ RAKESH KOCHHAR ET AL., PEW HISPANIC CENTER, THROUGH BOOM AND BUST: MINORITIES, IMMIGRANTS, AND HOMEOWNERSHIP § IV (2009) <http://www.pewhispanic.org/2009/05/12/through-boom-and-bust/> (stating from 2006 to 2007, the nationwide number of applications for loans decreased 25.2%).

⁴⁷ *Id.* (stating the number of loans originated dropped by 25%).

⁴⁸ Dennis Cauchon & Barbara Hansen, *Typical U.S. Family Got Poorer During the Past 10 Years*, USA TODAY (Sept. 14, 2011, 11:49 AM), <http://www.usatoday.com/news/nation/story/2011-09-13/census-household-income/50383882/1>.

⁴⁹ *Id.*

⁵⁰ *Id.* (the percentage of people living in poverty hit 15.1% in 2010).

⁵¹ *Id.* ("Hard times are forcing people to 'double up' – live with their parents or other family members").

⁵² *Id.* (the number of households "doubling up" increased to 21.8 million in 2011 from 19.7 million in 2007).

⁵³ *Financial Literacy Statistics, Best Practices in Financial Education*, NAT'L FIN. EDUCATOR'S COUNCIL, <http://www.financialeducatorsCouncil.org/financial-literacy-statistics.html> [hereinafter *Financial Literacy Statistics*].

⁵⁴ *Id.* (reporting that a car salesman and his family moved in with his mother-in-law when his income dropped from around \$100,000 to \$30,000).

the mortgage industry and housing market will continue to slump.

Around 12% of mortgages are currently at least one payment past default.⁵⁵ Despite the rates of foreclosure, there is some measure of hope to be found in the percentages of mortgage defaults that are cured, wherein the borrower is allowed to meet its past-due mortgage obligations without resorting to foreclosure. According to one study, 42% of non-recourse mortgages were cured and 57% of recourse mortgages were cured.⁵⁶ Therefore, there is more hope that a mortgagor will be able to cure their default if they are personally liable for the loan.

Furthermore, the economic literacy of the borrower is especially important to their understanding of the mortgage documents. Such an understanding can prevent borrowers from entering into an agreement on unfavorable terms. However, too many borrowers lack this basic financial education. In fact, many of those who do not deal with banks on a regular basis can be forced into predatory lending schemes because they are not aware of viable alternatives.⁵⁷ As one recent study indicated, around 84% of files of properties subject to foreclosure contained clear violations of the law.⁵⁸ As a result, borrowers' failure to fully understand the terms of their mortgage and their own rights can, and often does, allow banks to take advantage of them.

Economic literacy does not seem likely to increase after consideration of the general education trends of borrowers. Around 40% of "unbanked" households, those who do not have an existing checking or savings account, have attained less than a high school degree.⁵⁹ In fact, "unbanked" college graduates are the smallest group

⁵⁵ Amy Hoak, *Mortgage Delinquencies, Foreclosures Fall*, MARKETWATCH (Feb. 16, 2012, 10:18 AM), <http://www.marketwatch.com/story/mortgage-delinquencies-foreclosures-fall-2012-02-16> (noting that 12.63% of mortgages were at least one payment past due in the fourth quarter of 2011).

⁵⁶ Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Evidence from U.S. States*, 23 (Federal Reserve Bank of Richmond Working Paper No. 09-10R, 2011).

⁵⁷ See Morse, *supra* note 6, at 69.

⁵⁸ Gretchen Morgenson, *Audit Uncovers Extensive Flaws in Foreclosures*, N.Y. TIMES, Feb. 15, 2012, available at http://www.nytimes.com/2012/02/16/business/california-audit-finds-broad-irregularities-in-foreclosures.html?_r=1 (noting that two thirds of the documents examined contained at least four violations or irregularities).

⁵⁹ FDIC UNBANKED/UNDERBANKED SURVEY STUDY GROUP, FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 18 (2009), http://www.fdic.gov/householdsurvey/full_report.pdf.

of “unbanked.”⁶⁰ While most schools do not provide a financial education course and most students claim that their parents are the source of their financial education,⁶¹ these education trends lead to the inescapable conclusion that the financial education of “unbanked” households, who the banks tend to target, is of poor quality. With less education, borrowers face a greater risk for confusion when entering into mortgage agreements. Furthermore, this confusion may not be alleviated by disclosure forms, even in a language the borrower can read, because the borrowers do not understand the underlying financial concepts which form the basis of their agreement.

IV. THE MINORITY BORROWER

A. State of the Minority Borrower in the United States

Immigrant and minority borrowers are a growing portion of the American borrower demographic. Generally speaking, minority households are growing dramatically in size: by 2020, the Asian - American population is expected to grow by 94%, the African-American population by 64%, and the Hispanic-American population by 111%.⁶² Latinos are currently the largest minority group,⁶³ making them a target for lending banks. In addition, Latinos have a median age of about twenty-eight years, making the group as a whole the ideal age for a first-time home purchase.⁶⁴ Thus, from a numbers standpoint, the Latino mortgage market seems to be growing in size. Latinos are also growing in purchasing power.⁶⁵ Notably, however, many Latinos do not have a relationship with a bank,⁶⁶ and less than 50 percent of Latino households own their homes.⁶⁷

⁶⁰ *Id.* at 45.

⁶¹ See *Financial Literacy Statistics*, *supra* note 53 (reporting that while 87% of teens indicate that their parents are the main source of their financial education and a majority of college students indicate the same, only 34% of parents have even taught their children how to balance their checkbook).

⁶² Morse, *supra* note 6.

⁶³ *State of Hispanic Homeownership*, *supra* note 9, at 9.

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* (noting that by 2008, Latino purchasing power had surpassed one trillion dollars).

⁶⁶ See Morse, *supra* note 6 (reporting that in 2008, only 40% of Latinos had an existing relationship with a bank).

⁶⁷ See *State of Hispanic Homeownership*, *supra* note 9, at 11 (reporting that in 2010, 47.5% of Hispanics owned their own homes as opposed to 74.5% of White, non-Hispanics, 45.4% of African Americans, and 66.9% of all households); See also Morse, *supra* note 5 (reporting that in 2005, in areas like Los Angeles, only

Minority groups are not only growing in size, but also are becoming more optimistic in their outlook on the future. National surveys revealed that higher percentages of Latinos, compared to all Americans, thought their financial situation would improve over the next year, want to buy a home in the next three years, believe that owning a home is a good way to build wealth, and consider owning a home a symbol of success.⁶⁸ Studies have even shown that when offered Federal Housing Authority loans as opposed to subprime loans, Hispanics outperform other borrowers in their repayments of the loan.⁶⁹

All of these factors point to a large and growing market of potential homeowners that had not been targeted by large banks until a few years ago. Indeed, with a vast, untapped market desirous of homeownership, any bank that did not seek out minority business would have lost out on a sizeable potential revenue.

Despite the positive demographic trends, Latinos have applied for fewer loans over the course of the past few years, and at higher interest rates when compared to the average.⁷⁰ In fact, Latinos' application rate has decreased by more than twice the corresponding Caucasian application figure.⁷¹ Despite the huge potential the Latino market offers, something is preventing Latino borrowers from taking out the home loans that banks should want to give them and that they seemingly desire themselves.

For guidance on this inconsistency, the purchasing ability of individual Latino households must be taken into account. From 2005 to 2009, the net worth of Latino households decreased 66%, a significantly larger figure than the 16% decrease experienced in Caucasian households.⁷² The median income of minorities also dropped more in the last decade than that of non-Hispanic whites.⁷³ Thus, while the Latino minority, as a whole, has acquired more

25% of Latinos owned their homes).

⁶⁸ See *State of Hispanic Homeownership*, *supra* note 9, at 8.

⁶⁹ *Id.* at 15 (observing that from 2001 to 2005 Latinos had fewer payment difficulties than other borrowers).

⁷⁰ See KOCHHAR, *supra* note 46 (reporting that Latino applications fell 38.2% and the average nationwide was 25.2%).

⁷¹ *Id.* (noting that the number of loan applications from those considered white fell 18.9%, less than half of the Latino rate drop of 38.2%).

⁷² Christine Dugas, *Minority Seniors Hit Harder By Economic Issues*, USA TODAY, Aug. 5, 2011, http://www.usatoday.com/money/perfi/retirement/2011-08-04-older-minorities-financial-study_n.htm.

⁷³ See Cauchon & Hansen, *supra* note 48 (reporting that the median income for black households fell 3.2%, while non-Hispanic white incomes fell only 1.3%).

purchasing power due to population growth and other factors, the individual Latino household's income has actually decreased. At an individual level, then, Latinos are less able to purchase homes. Because houses are bought by individuals and not entire segments of population, it makes sense that Latino applicants applied for fewer loans. With declining funds and spending ability at the household level, it is likely that Latinos have been wary of taking out a mortgage and incurring the costs of home ownership.

In general, many of the same problems afflicting other groups of borrowers also affect the Latino borrower. For instance, Latino borrowers are also generally deemed to be uneducated when it comes to the mortgage agreements into which they are entering.⁷⁴ As with other borrowers, Latino borrowers are at risk of being forced into higher rate loans than they actually qualify for simply because the borrower does not realize there are other alternatives.⁷⁵ In addition, while the drop in income affects both minorities and the majority alike, the drop appears to have affected minorities disproportionately.⁷⁶ Therefore, while Latinos face many of the same problems of other borrowers, they also face discrimination and a language barrier that other groups do not.

B. Banks' Selective Targeting of the Minority

The minority borrower has been particularly affected by the predatory lending practices of banks. Banks specifically target minority borrowers to gain their business. From ads written⁷⁷ and websites accessible in Spanish,⁷⁸ to geographic marketing,⁷⁹ to

⁷⁴ Some banks have used creative ways to educate Spanish-speaking borrowers. Amilda Dymi, *Mortgage 'Edutainment,'* NAT'L MORTGAGE NEWS 31 (Oct. 2, 2006), http://www.nationalmortgagenews.com/nmn_issues/31_1/-444133-1.html?zkPrintable=true.

⁷⁵ See Morse, *supra* note 6, at 69.

⁷⁶ See Cauchon & Hansen, *supra* note 48.

⁷⁷ See, e.g., *Bank of America Launches New Spanish Television Ads to Attract New Checking Accounts*, HISPANICBUSINESS.COM (Aug. 11, 2003), http://www.hispanicbusiness.com/2003/8/11/bank_of_america_launches_new_spanish.htm [hereinafter *New Spanish TV Ads*]; *Bank of America*, YOUTUBE (uploaded Sept. 7, 2009), <http://www.youtube.com/watch?v=fzuwpKeBSZI> (showing a Bank of America Spanish television ad).

⁷⁸ See, e.g., BANK OF AMERICA, https://www.bankofamerica.com/homepage/overview.go?request_locale=es_US (last visited Mar. 10, 2012) (Bank of America's traditional homepage written completely in Spanish); CITIBANK, <https://online.citibank.com/US/JRS/pands/detail.do?ID=Spanish> (last visited Mar.

having translators ready to translate documents,⁸⁰ to working with Spanish television,⁸¹ banks have persistently targeted Spanish-speaking Americans. In 2005, in some areas of the United States, only 40% of immigrant and minority households had a relationship with a bank.⁸² Given the percentage of untapped banking consumers, as well as the large size of the Latino minority itself, banks had a vast market awaiting their business.

In order to appeal to this market, banks changed their tactics to account for cultural differences.⁸³ For instance, banks began advertising in a very targeted way toward Latinos. It is now common for banks to advertise to Latinos in a language that they can understand. Some banks even stress their extensive relationships with Latinos throughout their history.⁸⁴ Likewise, it is uncommon today to find a bank with a website that does not either have an alternative Spanish page or extensive amounts of text in Spanish.⁸⁵ Banks also changed the way in which they market themselves to Latinos. For example, banks offer mortgages with less paperwork and free checking in order to attract Latinos because, as one Bank of America representative put it, “so many Hispanics have remaining trust issues with banks from their home countries.”⁸⁶

Also, the economic structure of some Latino families does not correspond to the traditional structure banks consider in determining a borrower’s repayment capacity.⁸⁷ For example, some minority borrowers use money pooled from multiple family members, making a traditional credit report unsuitable to determine an applicant’s risk of default.⁸⁸ The banks have been unable to use traditional means of

10, 2012); WELLS FARGO, <https://www.wellsfargo.com/spanish/> (last visited Mar. 10, 2012) (Wells Fargo’s homepage translated in Spanish).

⁷⁹ *New Spanish TV Ads*, *supra* note 77 (noting that in 2003, for instance, Bank of America launched Spanish ads in Los Angeles, Oakland, Miami, Phoenix, Dallas, Atlanta, and Las Vegas, among others).

⁸⁰ Mortgage Line, *Realtors Target Non-English Speakers*, MORTGAGE SERVICING NEWS Vol. 12 (July 24, 2008).

⁸¹ Dymi, *supra* note 74.

⁸² Morse, *supra* note 6.

⁸³ *Id.*

⁸⁴ *Our Latino Heritage*, WELLS FARGO HISTORY, <http://www.wellsfargohistory.com/history/latino.htm> (last visited Feb. 13, 2012).

⁸⁵ See Wells Fargo, *supra* note 78.

⁸⁶ *New Spanish TV Ads*, *supra* note 77.

⁸⁷ See Morse, *supra* note 6.

⁸⁸ *Id.* (noting that for some minority borrowers, “[t]here is no traditional bank account, and they can’t show a 90-day trail of seasoned funds”).

determining suitability for mortgages,⁸⁹ perhaps leading these banks to enter into mortgages that they should not have entered into. Some practices provide flexible underwriting that would overlook traditional credit histories, in order to address such issues.⁹⁰

It is clear that banks are catering to Spanish-speaking Latinos. From advertising in Spanish, to changing the way they determine suitability for a loan, banks have actively pursued the Latino market. However, there is no general requirement in the United States that mortgage documents be translated into the language of the borrower. To date, banks have opted not to provide translated mortgage documentation. This decision is particularly difficult to understand given the great lengths to which the banks have gone in order to attract Latino business. Furthermore, this disparate treatment only creates opportunities for fraud and abuse on the part of the bank. Why, then, do all banks not provide the Spanish-speaking borrower with a Spanish copy of the mortgage?

C. Discrimination of the Minority: Predatory Lending Prevails

As demonstrated above, a Latino borrower could communicate with a bank completely in Spanish, yet have an English agreement binding the borrower to its terms. Likewise, the borrower may see a bank's television commercial in Spanish, observe other bank advertisements in Spanish, speak to bank representatives regarding the terms of the mortgage in Spanish and, even still, end up with a mortgage contract written exclusively in English. Thereafter, when additional charges accrue, a Spanish-speaking borrower is left to wonder about the origin of the charges and why he is liable.

For minority borrowers, the language barrier diminishes their ability to understand any of the documents that they fill out, execute, and retain from their mortgage transaction. Without spending money to understand and then contest these charges, which may not be an option due to financial constraints, the borrower is left liable for charges that they cannot anticipate or calculate, often leading to the payment of excessive fees.⁹¹ The measures imposed by various congressional acts are not effective for borrowers who do not know the relevant laws well enough to recognize if there has been a violation by the bank. Therefore, the Latino borrower is in an especially vulnerable position in that there is a higher chance that they will not know their responsibilities or rights due to the language

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Kravitz, *supra* note 11.

barrier.

Language barriers and cultural differences may have led to the disparate treatment of minority borrowers, and there is no question that banks have had a tumultuous lending relationship with minorities.⁹² Now, banks are facing legislative and public backlash as to their lending practices regarding minorities. Latinos felt the mortgage crisis in the United States disproportionately as a result of the high-priced loans that they received.⁹³ In 2009, mortgages to Latinos had decreased by a staggering 63%, more than any other group.⁹⁴ While loans to African Americans comparatively dropped by 60%, loans to non-Latino white borrowers declined by a relatively small 17%.⁹⁵ Banks became targets of investigations for the practices used to assign interest rates to their borrowers. Numerous state Attorneys General have sued different banks for misleading borrowers by pushing them into loans they could not afford.⁹⁶ Such allegedly misleading transactions beg the question, how were minority borrowers taken advantage of by the bank? The answer seems to be the lack of knowledge by these borrowers that there were other alternatives.⁹⁷ The next question seems to then be, what can be done about that lack of knowledge among minority borrowers to make the lending fair to both parties? Some interesting developments offer the beginnings of guidance on such issues.

V. THE BEGINNINGS OF A KNOWING ACCEPTANCE: EXAMPLES OF PROGRESS

Positive steps toward increasing transparency in the lending process and increasing the financial education and literacy of borrowers have already been made. The Consumer Financial Protection Bureau (“CFPB”), created by the Dodd-Frank Act,⁹⁸ is creating regulations to protect the minority borrower, especially the

⁹² See Morse, *supra* note 6 (noting that in 2002, more than 40% of mortgages to Latinos were high cost mortgages, although half of those borrowers might have been prime-rate borrowers).

⁹³ *State of Hispanic Homeownership*, *supra* note 9, at 10.

⁹⁴ *Id.*

⁹⁵ Kenneth Cooper, *Study finds 62% drop in home mortgages to minorities*, DENVERPOST (Feb. 10, 2011, 1:00 PM), http://www.denverpost.com/nationworld/ci_17344247?IADID=Search-www.denverpost.com-www.denverpost.com.

⁹⁶ Haigh, *supra* note 12.

⁹⁷ *Id.*

⁹⁸ 12 U.S.C. §5301 (2010).

Latino borrower.⁹⁹ The overall mission of the law is to protect consumers and enforce the laws regarding mortgage debt and other loans.¹⁰⁰ The CFPB is actively pursuing enforcement of fair lending practices, particularly by simplifying mortgage disclosures.¹⁰¹ So far, one of the CFPB's main initiatives has been the "Know Before You Owe" campaign. This campaign seeks to create a two-page mortgage disclosure form that sets forth the primary terms of the agreement, specifically the complete cost of the mortgage.¹⁰² And, in a step forward, the disclosure form will be available in both English and Spanish.¹⁰³ Furthermore, the CFPB will offer educational materials to further financial education in both languages.¹⁰⁴ Such a disclosure form would enable Latinos to understand, at least, some of the costs of entering into a proposed mortgage agreement. However, such a document assuredly cannot apprise the borrower of all the terms of the mortgage agreement. Only the mortgage document, as the legally-binding agreement itself, can do so, and only if in a language understood by the borrower.

Looking to other countries facing the same concerns about language barriers, the United Kingdom has also taken some steps to ensure a non-English speaker will still be a knowledgeable borrower. In 2002, the U.K.'s Mortgage Code Compliance Board ("MCCB") began publishing its mortgage guide in seven different languages in an effort to assist borrowers who do not speak English as their first language.¹⁰⁵ This change was the result of a study indicating the vulnerability of minorities as consumers.¹⁰⁶ In many ways, it seems quite similar to the CFPB's "Know Before You Owe" campaign. The MCCB's guide gives specific details about the borrower's and lender's obligations to one another, as well some additional information about issues to consider when taking out a mortgage.¹⁰⁷ As the MCCB's chief executive stated, the translation of the guide

⁹⁹ Stephanie Valencia, *What the Consumer Financial Protection Bureau Means for Latinos*, OFFICE OF PUBLIC ENGAGEMENT (July 22, 2011, 12:06PM), <http://www.whitehouse.gov/blog/2011/07/22/what-consumer-financial-protection-bureau-means-latinos>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *MCCB Mortgage Guide Now in Seven Languages*, MONEY MARKETING (July 25, 2002), <http://www.moneymarketing.co.uk/mccb-mortgage-guide-now-in-seven-languages/60947.article>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

into multiple languages is a huge step toward making homebuyers aware of their rights.¹⁰⁸ Such a translation can only serve to increase transparency and understanding of the mortgage process by non-English speaking borrowers.

Finally, and most notable for the purposes of this note, California passed a bill requiring that all loan contracts, other than those secured by real property, be supplied to a borrower in the language in which the contracts were negotiated.¹⁰⁹ However, few real estate contracts have this requirement.¹¹⁰ Most significantly, for mortgages, California requires banks to furnish to the borrower a form summarizing the terms of the loan, but not the entire contract, in the language in which the negotiations took place.¹¹¹ However, the translation requirement is only for the top five languages spoken in California other than English.¹¹²

The California summary disclosure requirement is akin to both the “Know Before You Owe” campaign by the CFPB and the regulations enacted by the U.K.’s MCCB. The current trend, then, is to give the borrower a translated document summarizing the main points of the mortgage agreement. But, if the document only summarizes the main points, what happens to all the other terms of the agreement? Do they not matter?

VI. FULL DOCUMENT TRANSLATION: NOT THE SOLUTION, BUT NECESSARY

A full translation of every mortgage document is a necessary next step in improving the transparency of the mortgage lending industry and in further protecting minority consumers. Due to economic difficulties, the past several years have been a rollercoaster for all borrowers. Minority borrowers, and especially Latino borrowers, have been more negatively impacted than others.¹¹³ Therefore, as a consumer group, they are especially vulnerable and should be afforded special treatment by the various consumer

¹⁰⁸ *Id.*

¹⁰⁹ CAL. CIV. CODE § 1632 (West 2009).

¹¹⁰ CAL. CIV. CODE § 1632 (West 2009). Real estate loans used for family purposes do have this requirement, but are subject to other notable requirements depending on the situation, such as if a broker acts as an agent during the loan. *See, e.g.*, CAL. BUS. & PROF. CODE § 10240 (West 2002) (mandating that a broker has to make some disclosures if they act as an agent in arranging the loan).

¹¹¹ CAL. CIV. CODE § 1632.5 (West 2010).

¹¹² CAL. CIV. CODE § 1632 (West 2009).

¹¹³ *See Dugas, supra* note 72.

protection statutes and programs the federal government has created.

Despite traditional tenets of contract law holding parties liable to the agreement, U.S. legislators have taken a generally softer stance towards enforcement of mortgages. Congress has afforded consumers with numerous statutes requiring the disclosure of seemingly all relevant terms of the mortgage agreement,¹¹⁴ and providing assistance even if the borrower defaults on their obligations.¹¹⁵ If all the aforementioned legislation has been put into place to protect consumers, and the CFPB was created to do the same, then what is the driving factor keeping the government from requiring lenders to provide mortgage borrowers with a translation of the entire mortgage document in a language that the borrower can understand? Furthermore, how can a bank fairly bring in a borrower through an advertisement and negotiation process conducted entirely in one language, and then provide a binding document for that transaction in a completely different language? If, on the other hand, banks are not negotiating with Spanish-speakers in their language, and not providing mortgage agreement documents written in Spanish, then the borrower can not possibly know the terms of the agreement that they are entering in to. If the allegations against banks are true and they have committed numerous discriminatory lending practices, is it safe to allow banks to bind non-English speakers with agreements that those borrowers cannot read? A borrower simply cannot understand the entirety of a contractual agreement if they are unable to read the binding documents.

Obviously, improving the understanding of the borrower is the key to addressing the multitude of problems that arise from mortgage documents, and this is especially true for minority borrowers. While disclosure forms are significant, and necessary, to emphasize and explain some of the key details of any mortgage, they do not adequately substitute for the mortgage document itself. The borrower might not be aware of the implications of terms in the mortgage agreement but not in the discovery, including terms outlining when default and foreclosure proceedings can occur. Thereafter, a borrower who received only the disclosures instead of the entire mortgage document would be confused when faced with default proceedings or any other contractual dispute. The disclosure forms cannot replace the mortgage document itself. The mortgage

¹¹⁴ See 12 C.F.R. § 226.6 (2011); 12 C.F.R. § 3500.7 (2010).

¹¹⁵ *What is Making Home Affordable?*, MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/about-mha/Pages/what-is-mha.aspx> (last updated Dec. 23, 2011, 10:17 AM).

documents contain all the relevant terms and serve as an invaluable resource to the borrower for current and future dealings with the lender.

To help borrowers better understand what they are agreeing to, while at the same time giving them all the terms of the agreement for their own reference, a complete translation of all the mortgage documents should be given to the borrower as well as a simple disclosure form such as the one the CFPB is currently drafting. Such a combination would allow the borrower to better understand the mortgage itself and the specifics of the agreement they entered. By cross-referencing the documents, a proactive borrower can educate himself as to the document and can better comprehend the sections of the mortgage that may be enforced against him. Furthermore, the two documents would most likely give the borrower at least some semblance of security, knowing the bank is being held to the terms of an agreement that the borrower understands in his own language and can reference if needed.

On the other hand, there are potential problems that could arise from a translation requirement, which might negatively affect the bank issuing the documents. First, banks might fear inaccuracies in the translations that could lead borrowers to a different understanding of the agreement than the bank intended. Such differences are easy to correct, however. For instance, a bank can hire a translation service with knowledge of financial jargon to accurately translate the document. Also, by checking the document with a number of linguists,¹¹⁶ any inaccuracies or inconsistencies between the translations can be removed or minimized. Furthermore, if there are any inaccuracies that cannot be edited out, the bank can still force the English copy to be binding. The translated copy merely provides a resource for the borrower to reference and upon which to base any disputes they might have. Of course, the two documents must still be almost identical; otherwise, they would serve no more purpose than a standard disclosure.

Second, banks might be wary of the costs associated with providing a translated copy of the mortgage to borrowers. However, banks have already spent large sums catering to the Latino market through Spanish advertising and providing Spanish-speaking negotiators. Thus, the imposition of such a rule would not be excessive when compared to the amount of business that is being

¹¹⁶ George Rimalower, Editorial, *A Mortgage Found- Not Lost-in Translation*, MORTGAGE SERVICING NEWS (Feb. 1 2011), available at <http://www.highbeam.com/doc/1G1-248095644.html>.

generated. From an advertising standpoint, a completely translated mortgage would be just another positive in each bank's sales pitch to Latino consumers. Furthermore, if the cost was prohibitive, the potential benefits in decreased foreclosures and litigation would likely offset that cost by allowing borrowers to execute mortgages they can afford. The costs would be minimal, fair in comparison to the other language expenses the bank incurs, and a positive selling point for each bank.

Finally, banks might fear the extensive number of languages in the United States. American diversity simply amplifies the fears of inaccurate translations and excessive costs relating to the mortgage documents. To compromise between the two sides, only the larger, non-English speaking minorities in each state would need to be provided such a translated document. Just like the California law, the top five minorities in each state could be afforded these translated documents.¹¹⁷ Thereby, banks would not have to create translations for every single minority group, and large numbers of consumers would be better protected by the translated terms of the deal.

As a result, little stands in the way of the federal government forcing banks to translate their mortgage documents for most non-English speakers. The United States does not have a national language and, even if it did, providing translations would do nothing but help increase transparency and borrower understanding at a minimal cost for banks. In the case of Latinos, banks have already invested large amounts into translating documents into Spanish in order to sell the mortgage. If the complete mortgage agreement were adopted, they would be required to translate only one more document. To protect the consumer, and continue to give homeowners special protection, the government should require banks to provide a written translation of the full mortgage agreement before the borrower signs the document so the borrower can understand what the terms of the agreement are and have a means of reference if disputes arise down the road.

¹¹⁷ CAL. CIV. CODE § 1632 (West 2009).