THE AGING POPULATION AND MATURING MORTGAGE LOANS: ENSURING A SECURE FINANCIAL LIFELINE FOR THE ELDERLY THROUGH MORTGAGE LENDING

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During the economic boom of the 1990s and 2000s, the home mortgage industry underwent a significant evolution when the Emergency Home Finance Act created the secondary market for mortgage loans. As a result, individuals, including senior citizens, rushed to capitalize on a greater availability of funds so they could purchase new homes or gain access to the equity in homes already purchased. Lenders were anxious to lend these individuals money, regardless of risk, as they would be compensated for the loans made by selling them on the secondary market, eliminating their exposure. Many borrowers, however, entered into loans they could not sustain, leading to the much-publicized credit crisis in 2008 and causing many citizens, especially seniors, to lose their homes. This Note discusses the rise of the credit market, the multiple loan options, and how the evolution of this economic arena led to the mortgage crisis. Specifically, this Note focuses on the effect of this evolution on seniors and how their signing onto variable rate mortgages while on fixed incomes has led to significant personal financial difficulties. The Note analyzes arguments for and against a fiduciary duty to borrowers being placed on prospective lenders, and then concludes that, at least in the case of elderly borrowers, such a duty is needed. The Note concludes by proposing how this duty would be applied in a way that would protect elderly borrowers while minimizing the legal and economic burden on the lenders.

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I. Introduction

Many people view homeownership as the heart of the American dream, and studies consistently emphasize that "homeownership will make you happier, healthier and wealthier."[1] Some even claim that "homeowners vote more, join more voluntary associations, take better care of their residences and have better educated kids."[2] For those who take on mortgage loans that they are unable to afford, however, the consequences of foreclosure and a ruined credit rating can be devastating.[3] After the enactment of the Emergency Home Finance Act (EHFA), which established the secondary market for mortgage loans,[4] lenders were no longer dependent on borrowers to repay principal and interest on mortgage loans over time to earn their return on investment. Instead, these loans could be almost instantaneously repackaged and sold in the secondary market.[5] As a result, lenders became less concerned with the financial qualification of borrowers and more interested in earning loan-initiation fees by churning volumes of mortgage applications.[6] In turn, these mortgages could be sold for a quick return in the secondary market, thus generating cash to issue more loans.[7] The change in market dynamic between lenders and borrowers, coupled with the increased availability of nontraditional mortgage products, has opened the floodgates for many borrowers who previously lacked access to financing and the American dream of homeownership.

At first glance, easier access to mortgage loans theoretically appears to be a positive.[8] This is not the case, however, for many elderly

1. Elizabeth Eaves, *The American Dream: Don't Buy That House*, FORBES, June 26, 2007, http://www.forbes.com/2007/06/26/home-ownership-negatives-biz-dream0607_cx_ee_0626house.html. The media has promoted homeownership as the "pillar of family life" and the greatest American value. *Id.*

2. *Id.*

3. Integrity Foreclosure Prevention Service, http://integrityforeclosure.com/ (last visited Sept. 8, 2008).

4. Fannie Mae, About Fannie Mae: Our Charter, http://www.fanniemae.com/aboutfm/charter.jhtml (last visited Sept. 8, 2008).

5. *See* Peter M. Carrozzo, *Marketing the American Mortgage: The Emergency Home Finance Act of 1970, Standardization and the Secondary Market Revolution*, 39 REAL PROP. PROB. & TR. J. 765, 774 (2005).

6. Florida Mortgage Corporation, Mortgage Turmoil, http://www.floridamortgagecorp.com/mortgage_turmoil.htm (last visited Sept. 8, 2008).

7. *See* Carrozzo, *supra* note 5, at 775.

8. Shirley Chiu, *Nontraditional Mortgages: Appealing but Misunderstood*, PROFITWISE NEWS & VIEWS, Dec. 2006, at 4, *available at* http://www.chicagofed.org/community_development/files/12_2006_pnv_nontraditional_mortgages.pdf. "Between 1990 and 2006, the homeownership rate in the United States increased

borrowers who are either purchasing a home for the first time or taking out a second mortgage in order to take care of other expenses while, at the same time, transitioning to a fixed income. For these elderly borrowers, many of the mortgage products that are marketed to them by lenders are poisonous apples that can easily lead to the demise of their financial future and the crippling of their American dream. Moreover, although the Equal Credit Opportunity Act (ECOA) prohibits discrimination in lending based on the applicant's age,[9] the law does allow lenders to inquire about the age of the applicant to assess the applicant's ability to repay the loan.[10] In the absence of a fiduciary duty to the borrower,[11] a lender's right under the law to make these inquiries and reject elderly applicants who will likely be unable to fulfill their obligations under the loan agreement is in gross conflict with the lender's desire to collect loan-initiation fees and sell the loans in the secondary market.[12] Thus, under the current state of the law, little protection exists for elderly borrowers who, as a whole, are one of the most economically vulnerable groups in society.[13]

This Note analyzes the reasons why lenders and elderly borrowers enter into mortgage loan agreements when it is unlikely that the borrowers will have the financial means to fulfill their obligations under the contract. This Note then presents arguments for and against imposing fiduciary duties on lenders and seeks to determine whether the law can serve to protect elderly borrowers from the disastrous financial consequences that result from entering into unaffordable mortgage loan agreements. Part II presents a brief history of how the secondary mortgage market came into being, provides an overview of

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from 64 percent to 68.7 percent. According to the Federal Reserve's Flow of Funds data, the value of residential real estate assets held by households increased from $10.3 trillion in 1999 to $20.4 trillion in 2006." *Id.*

9. Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2000).

10. *Id.* § 1691(b)(2).

11. Peter G. Miller, *Lender Malpractice—Is There Such a Thing?*, FHA MORTGAGE GUIDE, Oct. 29, 2007, http://www.fhaloanpros.com/2007/10/lender-malpractice-is-there-such-a-thing.

12. ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS 382 (Vicki Been et al., Aspen Publishers 3d ed. 2007); Miller, *supra* note 11.

13. Cathleen Jo Faruque, *The Economically Vulnerable and Elderly Poor American*, SELFHELP MAG., May 13, 1998, http://www.selfhelpmagazine.com/articles/aging/mythnfacts.html. "According to the U.S. Bureau of Census, approximately 8 million elderly Americans fall into the 'economically vulnerable' category. . . . The plain and simple fact is that millions of elderly American's [sic] live on the edge as marginal members of society. This accounts for a majority of the total American elderly population." *Id.*

the array of mortgage products available to borrowers, and addresses the effects of the current subprime mortgage crisis. Additionally, Part II summarizes the current state of the law regarding discrimination in mortgage lending to elderly borrowers and provides detail as to the number of elderly borrowers potentially in the market for mortgage products. Part III examines the reasons why lenders enter into mortgage agreements knowing that the borrower is unlikely to be able to fulfill the obligation and why elderly borrowers enter into loan agreements that they run the risk of defaulting on, and summarizes the debate on imposing fiduciary duties on lenders. Part IV proposes that a degree of regulation is necessary to protect elderly borrowers from high-risk mortgage products and suggests a way that the law can offer this protection.

II. Background

The current disparity between the interests of lenders and borrowers is attributable to the changes that have occurred in the mortgage-lending industry since the 1960s. Section A of this Part provides some background as to how the secondary mortgage market came into being. Next, Section B presents a brief analysis of the emergence of a wide variety of mortgage products available to borrowers, and Section C provides an overview of how the current subprime mortgage crisis emerged. Section D discusses the current state of the law regarding discrimination in mortgage lending to elderly borrowers. Finally, Section E enumerates the growing financial problems of elderly Americans, who are increasingly carrying mortgage debt later into life, and concludes that a degree of regulation is in order.

A. Evolution of the Secondary Mortgage Market

As late as the 1960s, the only mechanism for achieving the American dream of homeownership was to come up with a down payment that was at least 20% of the cost of the home, go to a local savings and loan institution, and apply for one of the few mortgage products available.[14] In most cases the mortgage product consisted of

14. *See* Seattle Metropolitan Credit Union, How Do I Save Enough for a Down Payment to Buy a House?, http://www.fuzeqna.com/SMCU/consumer/kbdetail.asp?kbid=1960 (last visited Sept. 8, 2008).

a fixed-rate mortgage for a fifteen- or thirty-year term.[15] Given the stringent requirements to qualify for a mortgage loan, many of the loan products issued were at or near the prime interest rate, depending on the risk of the borrower.[16] Savings and loan institutions maintained a portfolio[17] of fixed-rate long-term loans, which was kept in-house.[18] Lenders' mortgage investment portfolios were only representative of the local real estate market and carried a substantial risk that depended on fluctuations in the local economy.[19] By holding onto these fixed-rate loans for the entire term, the lender assumed the entire risk of market rate increases throughout the life of the loan.[20] This meant that, in instances of market rate increases, the lender was unable to enjoy returns at the higher market rate.[21] Additionally, a lender's access to funds used to make mortgage loans was directly linked to the amount of savings in the local community.[22] Throughout the 1960s, individuals looking to maximize return on their money were investing in corporate and government securities that offered higher rates of return than local savings and loan institutions.[23] Eventually, shortages in mortgage funds resulted in higher interest rates for borrowers.[24] This made housing less affordable and consequently resulted in a depressed real estate market.[25]

15. Lending Tree, *Step 3: Finding the Best Mortgage for You*, LENDINGTREE.COM, Aug. 7, 2007, http://www.lendingtree.com/beta/mortgage-loans/advice/guide-to-mortgages/finding-the-best-mortgage.

16. Florida Mortgage Corporation, *supra* note 6.

17. In the mortgage context, *portfolio* is defined as a collection of mortgage loan agreements held for servicing or investment. *See* Arrowhead Mortgage Financial Services, Glossary, http://www.arrowheadmortgagellc.com/site/misc/glossary.aspx (last visited Sept. 8, 2008).

18. *See* Robert Van Order, *The Structure and Evolution of American Secondary Mortgage Markets, with Some Implications for Developing Markets*, HOUSING FIN. INT'L, Sept. 30, 2001, at 16, 19.

19. *See* Robin Paul Malloy, *The Secondary Mortgage Market—A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991, 994 (1986). In the past, when lenders were dependent on local housing markets to generate funds in order to make loans, the lender faced liquidity risks when individuals in the community began to spend more and save less, and also faced duration mismatches when long-term mortgages were issued but deposits were short-term. *See* Van Order, *supra* note 18, at 16.

20. *See* Malloy, *supra* note 19, at 996.

21. *Id.*

22. Carrozzo, *supra* note 5, at 766.

23. *Id.* at 767.

24. *Id.*

25. *Id.*

In response to declining local real estate markets, Congress passed the Emergency Home Finance Act (EHFA) in 1970.[26] The EHFA created the quasigovernmental Federal Home Loan Mortgage Corporation, which is commonly known as "Freddie Mac."[27] The purpose of Freddie Mac was to fuel the development of a secondary market for conventional fixed-rate mortgages and alleviate the burden on local lenders of keeping low-rate long-term mortgages in-house.[28] Fannie Mae, which had been operative since the 1930s, received equivalent authority to deal in conventional mortgages.[29] The EHFA authorized Freddie Mac and Fannie Mae to take advantage of economies of scale.[30] These entities were able to bundle and sell conventional mortgage loans and mortgage loans guaranteed by the Federal Housing Administration and the Veterans Administration to investors in the secondary market in the form of pass-through securities.[31] Fannie Mae and Freddie Mac then made these securities available to private investors across the country and around the world.[32]

The two primary objectives of the secondary mortgage market were to provide lenders with diversified investment opportunities and to bring new money into the real estate market by breaking down barriers to investment by insurance companies, pension funds, and individual investors.[33] The creation of the secondary market for mortgage loans produced three distinct benefits to lenders. First, the secondary market facilitated the free flow of capital among real estate markets throughout the country, directing funds to areas with the highest demands for loan money.[34] Second, the secondary market created uniformity of mortgage documents across the United States,[35]

26. *Id.* at 794–97.
27. *Id.* at 772.
28. *Id.* at 773.
29. *Id.* at 771. Fannie Mae was established in the 1930s as a secondary market for newly issued Federal Housing Administration (FHA) loans, which the government issued during the Great Depression. *Id.* Fannie Mae acted as a national savings and loan institution by issuing its own debt to gather funds and buying government-insured mortgages, which allowed it to accept very little credit risk. *Id.*
30. *Id.* at 774.
31. *Id.* at 767.
32. *Id.* With a pass-through security, the monthly payment of principal and interest on each of the underlying mortgages merely passes from the party servicing the loans, less a fee for servicing, to the investors. *Id.*
33. MALLOY & SMITH, *supra* note 12, at 382.
34. *Id.*
35. *Id.*; *see also* Carrozzo, *supra* note 5, at 776.

which helped move the real estate market in the direction of other commercial markets.[36] The standardization of mortgage documents also reduced transaction costs and made investment opportunities available to an increasing number of individuals and groups.[37] Third, the secondary mortgage market changed the nature of lending activities so that most lenders now sell their long-term fixed-rate loans directly to investors in secondary mortgage markets.[38] This allows the lender to avoid the risk of fluctuations in interest rates and provides them with access to a continuous flow of cash.[39] This cash is then available for lenders to issue more loans.[40] Currently, the largest buyers on the secondary market are Freddie Mac, Fannie Mae, the Government National Mortgage Association ("Ginnie Mae"), and private financial institutions, such as banks, insurance companies, and private investors.[41]

The expansion of mortgage lending into secondary markets has had several implications on the dynamics of the real estate market. As a result of the lender's ability to sell fixed-rate mortgages to investors in the secondary mortgage market, lenders currently generate most of their profits from charging loan-origination fees, commonly known as "points," and loan-servicing fees.[42] Thus, lenders no longer hold loans as long-term investments and are less dependent on borrower repayment of principal and interest to earn returns.[43] As a result, primary lenders have become more focused on the needs and concerns of secondary market investors rather than the needs of particular borrowers.[44]

B. The Increased Variety of Mortgage Options Available to Borrowers

While the creation of the secondary mortgage market has provided lenders with opportunity for increased liquidity and profit po-

36. MALLOY & SMITH, *supra* note 12, at 382.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. William Bronchick, *Understanding the Mortgage Loan Market*, TOTAL REAL EST. SOLUTIONS, http://www.totalrealestatesolutions.com/articles/disp.cfm?aid=226&typeid=1&winpop=0&nav=1 (last visited Sept. 8, 2008).
42. MALLOY & SMITH, *supra* note 12, at 383.
43. *Id.*
44. *Id.* at 381.

tential, the market for residential mortgages has also evolved with respect to the variety of mortgage products available to borrowers. In the past, borrowers were limited to a narrow range of mortgage products that mainly consisted of fixed-rate long-term mortgages that fully amortized[45] throughout the life of the loan.[46] Today, borrowers can choose from a wide variety of products, such as the adjustable-rate mortgage and the level-payment adjustable-rate mortgage.[47] With an adjustable-rate mortgage loan, the interest rate on the mortgage adjusts after a predetermined period of time throughout the life of the loan.[48] With a level-payment adjustable-rate mortgage, the borrower's payment remains the same throughout the life of the loan, but the interest rate is subject to change.[49] Thus, increases in the market rate of interest may result in the borrower's fixed monthly payment being insufficient to cover the amount of interest due.[50] This results in an increase in the total amount owed by the borrower and is referred to as negative amortization.[51]

Another aspect of the increasingly flexible payment structure is the length of the mortgage payment period. Traditionally, mortgages were offered for fifteen- or thirty-year terms.[52] In the 1980s, however, the forty-year mortgage was born, and, just recently in 2006, the fifty-year mortgage came into being.[53] These extended-term loans are beneficial to borrowers because monthly mortgage payments are reduced.[54] Yet, lenders compensate for the increased risk of extended

45. A fully amortized loan provides for a monthly payment that results in a zero balance at the conclusion of the loan term you agreed to. A 30 year fully amortized loan therefore requires a payment of principal and interest necessary to pay your loan balance in full at the end of thirty years.

JMO Mortgage, Inc., Frequently Asked Questions, http://www.jmoloans.com/faq.shtml (last visited Sept. 8, 2008).

46. *See* ARMFixed, Adjustable Rate Mortgage History, http://www.armtofixed.com/adjustable-rate-mortgage-history/ (last visited Sept. 8, 2008).

47. MALLOY & SMITH, *supra* note 12, at 394–99.

48. *Id.* at 394.

49. *Id.* at 396–97.

50. *Id.* at 397.

51. *Id.*

52. Steven Phillips, *Selecting the Right Mortgage*, 177 J. ACCT. 67, 72 (1994).

53. *The 50 Year Mortgage Is Introduced in California*, MORTGAGE NEWS DAILY, May 16, 2006, http://www.mortgagenewsdaily.com/5162006_50_Year_Mortgage.asp; Liz Pulliam Weston, *Mortgages That Outlive You*, MSN MONEY, http://articles.moneycentral.msn.com/Banking/HomeFinancing/MortgagesThatOutliveYou.aspx (last visited Sept. 8, 2008) [hereinafter *Mortgages That Outlive You*].

54. *See Mortgages That Outlive You*, *supra* note 53.

payback periods with heightened adjustable interest rates.[55] Specifically, "[r]ates for 50-year mortgages tend to be about 25 to 50 basis points higher than the rates on 30-year fixed-rate mortgages . . . . A basis point is one-hundredth of a percent."[56] Although high interest rates on both the forty- and fifty-year mortgage products result in a very slow build up of equity for borrowers,[57] these products are slowly gaining in popularity.[58] Approximately 5% of new mortgages in the United States carry forty-year terms,[59] and the fifty-year mortgage is slowly catching the eye of borrowers in expensive real estate markets such as California.[60]

The emergence of the subprime banking industry in the early 1990s also increased accessibility of mortgage loans to borrowers.[61] The subprime mortgage market has increased from 5% of all mortgages in 1994 to nearly 20% of new mortgages in 2005,[62] growing at an annual rate of 25% between 1994 and 2005.[63] This growth is largely attributed to changes in federal laws that allowed financial institutions such as insurance companies and stock brokers to offer mortgages.[64] These institutions began aggressively competing with traditional commercial lenders, which created a wide array of new mortgage products on offer to consumers.[65]

Home mortgages are indexed to the prime rate, which is "the interest rate that commercial lenders charge their most creditworthy

55. *See id.*

56. Dana Dratch, *50-Year Mortgages: Low Payments, Low Equity*, BANKRATE.COM, Jan. 25, 2007, http://www.bankrate.com/brm/news/mortgages/20070125_50_year_mortgages_a1.asp.

57. *Id.* For example, five years of payments on a thirty-year fixed-rate mortgage at an interest rate of 6.72% will have created $18,467 in equity for the borrower, where the same payments on a fifty-year hybrid at a 6.97% interest rate will have created a mere $3,983. *Mortgages that Outlive You*, *supra* note 53.

58. *Mortgages That Outlive You*, *supra* note 53. This percentage is likely to increase because Fannie Mae recently began buying forty-year mortgage products. *Id.*

59. *Id.*

60. Dratch, *supra* note 56.

61. Agarwal Sumit & Calvin T. Ho, *Comparing the Prime and Subprime Mortgage Markets*, CHICAGO FED LETTER (Fed. Reserve Bank of Chicago, Chicago, Ill.), Aug. 2007, at 2, http://www.chicagofed.org/publications/fedletter/cflaugust2007_241.pdf.

62. Tony Favro, *US Subprime Mortgage Crisis Hurts Individuals and Whole Communities*, CITY MAYORS, Apr. 14, 2007, http://www.citymayors.com/finance/us-subprime.html.

63. *Id.*

64. *Id.*

65. *Id.*

customers."[66] Lenders offer subprime mortgages to borrowers who do not meet the credit standards required for borrowing in the prime market.[67] Many of the borrowers who do not qualify for loans in the prime market are low-income borrowers, many of whom are elderly.[68] Specifically, it is estimated that "[t]he typical senior household survives on $23,118 per year, and nearly 40% of seniors are classified as 'low-income' or below."[69]

The loans to subprime borrowers are more expensive in terms of higher interest rates, loan-origination fees, application fees, appraisal fees, and other continuing costs, such as mortgage insurance payments.[70] These heightened costs and fees are designed to compensate the lender for the increased risk of lending to less creditworthy borrowers.[71] Additionally, many subprime loan packages contain "introductory rates," whereby the borrower gets the benefit of a low interest rate for the initial two or three years of the loan.[72] After the introductory period is over, however, the interest rates rise, resulting in increased monthly payments.[73] These payments may become too much

66. *Id.*

67. Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, FED. RES. BANK OF ST. LOUIS REV., Jan./Feb. 2006, at 31, 31–32, *available at* http://research.stlouisfed.org/publications/review/06/01/ChomPennCross.pdf; Favro, *supra* note 62. FICO scores range from 300 to 850, with 850 being the most creditworthy and 300 being the least. FAIR ISSAC CORP., UNDERSTANDING YOUR FICO SCORE 5 (2007), *available at* http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. Individuals with credit scores of 620 are typically eligible for subprime mortgage loans, and "[b]orrowers with FICOs below 600 are finding it difficult to obtain financing at any interest rate." Elizabeth Weintraub, *Subprime Mortgage Lenders—Why Subprime Mortgage Lenders Crashed*, ABOUT.COM, http://homebuying.about.com/od/findingalender/qt/0307subprime.htm (last visited Sept. 8, 2008).

68. Faruque, *supra* note 13 (describing the poor economic conditions of the elderly of the United States); *see* Sumit & Ho, *supra* note 61, at 1–2 (stating that subprime borrows generally have weak financial conditions).

69. HEATHER C. MCGHEE & TAMARA DRAUT, RETIRING IN THE RED: THE GROWING OF DEBT AMONG OLDER AMERICANS 4 (2004), *available at* http://www.demos.org/pubs/Retiring_2ed.pdf.

70. Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295, 305–07 (2005) (noting that origination fees and interest rates are higher for subprime loans); Christine Daleiden, *Understanding Subprime Mortgages*, 12 HAWAII B.J. 6, 6–7 (2008) (noting that appraisal fees, application fees, mortgage insurance, and other fees are higher for subprime mortgages).

71. Favro, *supra* note 62.

72. *Id.*

73. *Id.*

for the borrower to handle, putting the borrower at risk of foreclosure.[74]

While these nontraditional mortgage products present a risk for all borrowers, these products are especially dangerous for elderly borrowers. This is because elderly borrowers are more likely to be living on a fixed stream of income with little hope of realizing increased earnings in the future.[75] Ironically, it is these same elderly borrowers who are more likely to be desperate to take a second mortgage so they can use some of the equity built up in their home to pay for unexpected living expenses and medical bills.[76]

C. Overview of the Subprime Mortgage Crisis

In 2005, when interest rates began increasing after nearly a decade of stagnation, borrowers who took on variable-rate subprime mortgages were slapped with dramatic increases in their monthly mortgage payments.[77] Such increases put an estimated 2.2 million homeowners in the United States at risk of defaulting on their subprime loans and losing their homes.[78] Furthermore, investors in the secondary mortgage market throughout the United States and around the world "have taken hits because they purchased bonds, or risk related to bonds, backed by bad home loans, often bundled into financial instruments called collateralized debt obligations."[79]

74. *See id.*

75. *See* Sarah D. Kirby & Edwina Douglas, *Improving Independent Living for Older Americans*, 33 J. EXTENSION 4 (1995), *available at* http://www.joe.org/joe/1995august/iw5.html.

76. *See* Carl Bloice, *The Debt Crisis Is Deep and Ominous*, ZNET, Aug. 31, 2007, http://www.zmag.org/znet/viewArticle/14590. "It is true that . . . seniors make up a disproportionate share of those affected by the current mortgage crisis." *Id.* "[T]he failure of some people to meet their escalating adjustable mortgage rates, in many cases, has been the result of unexpected medical expenses." *Id.*

77. Favro, *supra* note 62.

78. *Id.* The Consumer Federation of America "estimates that as many as 2.2 million of the 69 million homeowners in the US are at risk of defaulting on their subprime loans and losing their homes." *Id.* In the mortgage loan context, *default* is defined as the failure of a borrower from meeting a financial obligation under a mortgage loan agreement. Arrowhead Mortgage Financial Services, *supra* note 17. When a loan is in default, the borrower runs the risk of the lender foreclosing on the loan in order to minimize its losses in the defaulted loan. Favro, *supra* note 62.

79. Jenny Anderson & Heather Timmons, *Why a U.S. Subprime Mortgage Crisis Is Felt Around the World*, N.Y. TIMES, Aug. 31, 2007, at C1. Many of the collateralized debt obligation products have proven to be extremely problematic as the subprime mortgages that are the underlying assets have gone into default. *Id.* This has revealed "dangerous amounts of leverage in . . . securities that few people could value." *Id.*

Essentially, a decade of low interest rates created an increased demand for mortgage loans by borrowers, many of who had weak credit.[80] Many of these less creditworthy borrowers took on adjustable-rate subprime mortgage loans, leaning on the speculation that interest rates would remain low into the foreseeable future.[81] Lenders then took these mortgage loans, pooled them, and sold them in the secondary market in more specialized pieces.[82] This "offered investors higher returns at a time when traditional fixed income, or debt-related products, were producing low returns."[83]

To offset the risks of lending to borrowers with high credit risk, banks issued "bonds backed by pools of mortgages or other income-producing assets, like student loans, auto loans, and credit card receivables,"[84] creating collateralized debt obligations.[85] When interest rates began to rise and the rate of subprime mortgage foreclosures began to skyrocket, over 100 subprime mortgage lenders filed for bankruptcy or went out of business.[86] Even the nation's second largest subprime lender, New Century Financial Corporation, filed for bankruptcy.[87] The demise of these subprime lending companies caused the prices in the $6.5 trillion mortgage-backed securities market to plummet, threatening the stability of the U.S. housing market and the overall economy.[88] JP Morgan Chase estimates that there are currently between $500 billion to $600 billion in collateralized debt obligations backed by subprime mortgage loans that are likely to default, leaving investors to endure the consequences.[89]

80. *Id.*
81. Sham Gad, *The Skinny on Subprime*, MOTLEY FOOL, July 10, 2007, http://www.fool.com/investing/value/2007/07/10/the-skinny-on-subprime.aspx.
82. Anderson & Timmons, *supra* note 79.
83. *Id.*
84. *Id.*
85. *Id.*
86. ERIC STEIN, CTR. FOR RESPONSIBLE LENDING, STRAIGHTENING OUT THE MORTGAGE MESS: HOW CAN WE PROTECT HOME OWNERSHIP AND PROVIDE RELIEF TO CONSUMERS IN FINANCIAL DISTRESS 1 (2007), http://www.responsiblelending.org/pdfs/judiciary-subcommittee-statement-10-07-edits-am-845a.pdf.
87. *New Century Files for Chapter 11 Bankruptcy*, CNN MONEY, Apr. 3, 2007, http://money.cnn.com/2007/04/02/news/companies/new_century_bankruptcy. According to the Mortgage Bankers Association, subprime loans amounted to 20% of the nation's mortgage lending and about 17% of home purchases in 2006. *Id.* "Financial firms and hedge funds likely own more than $1 trillion in securities backed by subprime mortgages." *Id.*
88. *See id.*
89. Anderson & Timmons, *supra* note 79.

D. Discrimination in Mortgage Lending to Elderly Borrowers

Undoubtedly, extended-term mortgages, adjustable-rate financing options, and subprime loans gave more individuals access to mortgage loans, bringing them one step closer to the American dream of homeownership.[90] However, these liberalized credit standards have had devastating effects on millions of borrowers who took the bait and used these unconventional mortgage products to purchase beyond their means.[91] What is of greater concern is that, under the current state of the law, these extended-term adjustable-rate subprime loans must be made available to those who can least afford it: elderly borrowers.[92] In fact, these loans remain available to elderly borrowers who are living on a fixed income when it is anticipated that interest rates will increase over time.[93] Additionally, these loans remain available to elderly borrowers who will not reasonably live as long as the mortgage term.[94] Specifically, the Equal Credit Opportunity Act (ECOA) provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . age (provided the applicant has the capacity to contract)."[95] The ECOA also provides that

> [i]t shall not constitute discrimination . . . to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount of probable continuance of income levels, credit history, or other pertinent element of creditworthiness.[96]

Due to the shift in market dynamics where lenders' main source of income is derived from investors in the secondary market, lenders currently have an increased incentive to issue subprime mortgage loans and obtain the up-front origination fees without concern for borrowers' actual ability to pay.[97] Although some may consider this practice predatory lending,[98] under current law, issuing a mortgage

90. Eaves, *supra* note 1.
91. *Id.*
92. *See* MCGHEE & DRAUT, *supra* note 69, at 6–9.
93. *See* Weintraub, *supra* note 67.
94. Jennifer Bayot, *As Bills Mount, Debts on Homes Rise for Elderly*, N.Y. TIMES, July 4, 2004, at 1.
95. 15 U.S.C. § 1691(a)(1) (2000).
96. *Id.* § 1691(b)(2).
97. *See* MALLOY & SMITH, *supra* note 12, at 382.
98. JAMES H. CARR & LOPA KOLLURI, FANNIE MAE FOUNDATION, PREDATORY LENDING: AN OVERVIEW 4 (2001), *available at* http://www.mplp.org/Resources/mplpresource.2006-06-13.4751698248/getFile.

loan is a transaction in which the lender does not have a fiduciary duty to the borrower.[99] In the absence of a fiduciary duty to the borrower, the lender is not required to consider whether the mortgage is in the borrower's best financial interest.[100] In fact, "[w]hile a lender must serve its customers fairly, and the industry has done much to assure high professional standards, a lender owes a duty to its shareholders and investors[,]"[101] and the lender does not "have a fiduciary obligation to get the best possible rates and terms for borrowers."[102] In certain circumstances, a borrower may have a claim under the Home Owner and Equity Protection Act (HOEPA).[103] HOEPA is largely a disclosure act, however, requiring lenders to clearly inform the buyer of the terms of the mortgage loan contract with respect to elements such as the annual percentage rate and the consequences of default.[104] Furthermore, HOEPA does not provide for a cause of action against a lender for merely issuing a mortgage that is a bad deal for the borrower.[105]

E. Assuming and Carrying Mortgage Debt Later in Life

The increasing availability of credit options such as nontraditional mortgages and credit cards, coupled with rising living expenses, increasing cost of medical care, and decreasing incomes, has lead to a debt problem among the elderly that has sparked much attention among the media and economists.[106] For many elders, "Social Security and pension income are no longer sufficient to meet day-to-day needs[,]"[107] and "[s]ince elders are disproportionately homeowners, many are tapping into home equity to alleviate financial pressures

99. Miller, *supra* note 11.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *See* Home Owner and Equity Protection Act, 15 U.S.C. § 1639 (2000). Among other things, this Act provides that the lender must inform the borrower that a lender has a mortgage on the home and that in the event of default the lender may foreclose and the borrower may lose the home. *Id.* § 1639(a)(1)(B).
105. *See id.* § 1639. HOEPA is silent on the issue of lender fiduciary duties to borrowers. *See id.*
106. *See* Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 168–72 (2007).
107. *Id.* at 167.

later in life."[108] The enticing "teaser rates" associated with adjustable-rate subprime mortgages and the lower monthly payments associated with extended-term mortgages present borrowers with a great risk of default and foreclosure.[109] Additionally, the lack of lender fiduciary duties to borrowers and the existence of incentives for lenders to issue mortgages in high volumes is especially troublesome with respect to elderly borrowers because many elderly borrowers are living on a fixed income and do not have the means to bounce back from financial disasters such as foreclosure.[110]

Although it is estimated that approximately 80% of all heads of households over the age of sixty-five are homeowners,[111] each generation seems to be carrying mortgage debt later in life.[112] Specifically, "only 41 per cent of owner households with head aged 55 to 64 in 2001 had paid off their mortgages, compared with 54 per cent of their same counterparts in 1989."[113] "Consistent with the general trend to substitute mortgage debt for nonmortgaged debt, in 2001 home mortgage debt accounted for 70 per cent of the total debt of owners aged 65 and older—up nearly 20 percentage points since 1989."[114] Moreover, nearly 5.1 million seniors whose income falls in the lowest 20% of the income distribution have completely paid off their mortgages.[115] Yet these seniors pay over 50% of their annual income in housing costs attributed to property taxes, utilities, and other home maintenance costs.[116]

108. *Id.*
109. *See* Favro, *supra* note 62.
110. *See* Miller, *supra* note 11.
111. WILLIAM C. APGAR & ZHU XIAO DI, JOINT CTR. FOR HOUS. STUDIES HARVARD UNIV., HOUSING WEALTH AND RETIREMENT SAVINGS: ENHANCING FINANCIAL SECURITY FOR OLDER AMERICANS 3 (2005).
112. *Id.* at 4. In 2000, homeowners in the fifty-five to sixty-four age group had an average of $70,000 of housing debt, compared to under $30,000 for the same age group in 1990. *Id.* "Looking ahead 10 years, it is likely that the oldest baby boomers . . . will have a median housing debt well in excess of $100,000," and the youngest boomers will have an average housing debt of $120,000 when they are forty-five to fifty-four years old. *Id.*
113. APGAR & ZHU, *supra* note 111, at 4.
114. *Id.* at 5.
115. *Id.* at 16.
116. *Id.* Moreover, "[a]ccording to the 2000 Census, the average owner household with a mortgage paid almost $800 more in monthly housing costs compared to households without housing debt." GEORGE S. MASNICK ET AL., JOINT CTR. FOR HOUS. STUDIES HARVARD UNIV., EMERGING COHORT TRENDS IN HOUSING DEBT AND HOME EQUITY 2 (2005).

Studies have shown that, compared to other age groups, people over age sixty-five have the fastest growing mortgage debts and bankruptcy filing rates.[117] For example, six years ago, at ages seventy-one and seventy-seven, retired teachers James and Doris Stevenson sought their American dream by purchasing a home overlooking the Rio Grande.[118] To afford the purchase, the couple took on a $75,000 mortgage loan and used two-thirds of their retirement fund to furnish a $35,000 down payment.[119] The couple still has twenty-nine years left on their mortgage, which has necessitated Mr. Stevenson to occasionally coach high school sports teams and serve as a church pastor to make the payments.[120] At one point, the mortgage payments rendered the couple unable to meet their credit card payments, causing them to enter credit counseling to structure a two-year repayment plan.[121] While the couple has since paid down their credit card debt, Mr. Stevenson suffered a heart attack in the process due to stress.[122]

The small percentage of elderly borrowers who purchase a home and take on a mortgage loan for the first time is not the only group that has contributed to these changes. As the baby boomers approach retirement age and the number of equity-rich but cash-poor homeowners dramatically increases,[123] it is anticipated that many elderly homeowners will turn to second mortgages to cover unexpected bills, such as home repair costs, medical bills, and other cost-of-living expenses.[124] Many of the loans that these individuals qualify for will undoubtedly be subprime adjustable-rate loans, which will expose them to the risk of default and foreclosure in the event of future rate increases.[125]

Mary Caspermeyer, a sixty-seven-year-old widow from O'Fallon, Missouri, embodies the devastating financial state that is

117. Bayot, *supra* note 94.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *See id.*
124. *Id.* "A survey of borrowers that took cash out when they refinanced in 2001–2002 found that the most common reported use was to payoff a second mortgage (45 percent)." MASNICK ET AL., *supra* 116, at 27. Forty percent were found to have used the money for home improvements. *Id.* Additionally, approximately 35% of the proceeds were spent on home improvements, 16% on consumer expenditures, and the rest paying off home mortgage debts. *Id.*
125. APGAR & ZHU, *supra* note 111, at 16–17.

haunting many elderly Americans.[126] Ms. Caspermeyer's mortgage and car payments currently consume almost all of her income, which is derived from a small pension, Social Security payments, and the hourly wages that she earns from working as a medical technician.[127] Ms. Caspermeyer and her husband had already refinanced their first mortgage and taken out a second mortgage in order to pay off credit card debt and help their children with various expenses.[128] However, when her husband passed away and his monthly Social Security check of $1400 stopped coming, Ms. Caspermeyer was left with bills secured by her home that she could not continue to afford.[129] With her home and livelihood at risk, she is currently in a state of disarray as to how to proceed.[130] She insists, "I don't want to file for bankruptcy . . . I don't know if I can work the rest of my life. And I don't think anybody wants to be a burden to their kids."[131]

In the absence of a predatory lending claim, under current law many elderly borrowers like the Stevensons and Ms. Caspermeyer have no recourse in the event of foreclosure.[132] Borrowers lack recourse because lenders do not currently have the fiduciary duty to ensure that mortgage loans are financially viable decisions for their borrowers.[133] If enough of these elderly borrowers suffer foreclosure, a parallel to the current subprime crisis could occur in the future, especially in markets dominated by elderly homeowners. Thus, given that the market offers lenders incentives to act in ways that are not always consistent with the best financial interests of borrowers,[134] a degree of regulation is in order with respect to elderly borrowers. Such regulation would serve to maintain the current state of the law under the ECOA that prevents discrimination in lending based on age. At the same time, a degree of regulation would serve to protect vulnerable elderly borrowers, who often find themselves in situations where they

126. Bayot, *supra* note 94.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. Miller, *supra* note 11.
133. *Id.*
134. Lloyd T. Wilson, Jr., *Effecting Responsibility in the Mortgage Broker-Borrower Relationship: A Role for Agency Principles in Predatory Lending Regulation*, 73 U. CIN. L. REV. 1471, 1501 (2005).

need to borrow against the equity in their home to meet current financial obligations.

III. Analysis

In light of the evolving market for mortgage loans and the elderly's increased dependency on credit to afford daily living expenses, Section A of this Part details the motivating factors for lenders who are often willing to enter into mortgage agreements with borrowers who have risky financial profiles. Section B of this Part discusses a few of the major reasons why borrowers are regularly keen on entering into mortgage agreements that they are likely to default on in the future. Section C presents the arguments in favor of imposing fiduciary duties upon lenders, and Section D details the arguments against instituting lender fiduciary obligations. Finally, this Part concludes that a degree of protection is in order, especially with respect to financially vulnerable groups of borrowers such as the elderly.

A. Why Lenders Enter into Mortgage Contracts with Unqualified Applicants

The increased variety of subprime mortgage products and the emergence of the secondary mortgage market allowed millions of applicants who would not have qualified for a mortgage loan in the past to gain access to financing.[135] In fact, many lenders that are not the traditional local savings and loans institutions market their products towards higher risk applicants.[136] For example, services such as E-Loan.com and LendingTree.com have lured in applicants with low income and less-than-perfect credit with slogans such as "Radically Simple"[137] and "When Banks Compete You Win."[138]

What is perplexing about these marketing tactics is that they are not a sham; lenders really have been competing to issue mortgage loans to higher risk customers.[139] The reason why these lenders are

135. Noelle Knox & Mindy Fetterman, *Need to Keep House Payments Low? Try a 50-Year Mortgage*, USA TODAY, May 9, 2006, at 1B.
136. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1283 (2002).
137. E-Loan, http://eloan.com (last visited Sept. 8, 2008).
138. Lending Tree, http://www.lendingtree.com/beta (last visited Oct. 17, 2008).
139. *See* Engle & McCoy, *supra* note 136, at 1261.

jumping at the opportunity to issue mortgage loans to borrowers who have a high risk of default is not because the lenders desire to foreclose on these properties in the future.[140] Rather, in issuing these mortgage loans, lenders are seeking returns on investment from sources outside of traditional borrower interest payments.[141] These additional sources of income include collecting up-front fees from borrowers,[142] selling loans in the secondary market to institutional and private investors,[143] and speculating that home value will remain great enough so that, in the event of foreclosure, the lender will be able to cover foreclosure costs and avoid losses from the sale of the home.[144]

1. PROFITING FROM SUBPRIME MORTGAGE UP-FRONT FEES

In the prime mortgage market, the most creditworthy borrowers incur loan-origination fees that range from a mere one to two points.[145] A point is equal to one percent of the amount of the loan.[146] Conversely, when issuing subprime loans, lenders typically are able to generate loan-origination fees ranging from four to six points—sometimes even higher—charged against the gross amount of the loan to compensate for the extra risk of lending to less creditworthy borrowers.[147] This means, for example, on a $200,000 mortgage loan in the prime market, a lender would earn a mere $2000 to $4000, whereas in the subprime market, the same lender could earn anywhere from $8000 to $12,000.[148] Although the increased loan-origination fees are presumably justified due to the higher risk profile of subprime bor-

140. *See* Desiree Hatcher, *Foreclosure Alternatives: A Case for Preserving Home Ownership*, PROFITWISE NEWS & VIEWS, Feb. 2006, at 2, http://www.chicagofed.org/community_development/files/02_2006_foreclosure_alt.pdf.
141. *See* Ron Nixon, *Study Predicts Foreclosure for 1 in 5 Subprime Loans*, N.Y. TIMES, Dec. 20, 2006, at C4.
142. David P. Butler, *Riding the "Paper" Tiger: The Subprime Disaster*, CRE ONLINE, http://www.creonline.com/articles/art-310.html (last visited Sept. 8, 2008).
143. *Id.*
144. MALLOY & SMITH, *supra* note 12, at 382.
145. David Reed, *Mortgage Fees and Points: Did You Pay Too Much?*, REALTY TIMES, May 5, 2006, http://realtytimes.com/rtcpages/20060505_toomanypoints.htm.
146. *Id.*
147. Butler, *supra* note 142.
148. *See id.*

rowers, lenders often embrace the benefits of the high up-front fees while selling off the risks in the secondary mortgage market.[149]

2. SELLING LOANS IN THE SECONDARY MORTGAGE MARKET FOR QUICK RETURNS

Once a lender has entered into a mortgage loan agreement with a high-risk borrower and collects its loan-origination fee, the lender is no longer bound to assume the risk of borrower default.[150] Instead of holding the mortgage in-house and awaiting borrower payments of principal and interest, the lender can package and sell the loan in the secondary market as a high-risk, high-return investment option.[151] By selling mortgage loans on the secondary market, lenders realize the two distinct benefits of cash flow and commissions on the sale.[152]

First, the more cash that a lender is able to generate, the more loans a lender is able to make, which in turn leads to greater returns.[153] Given that most mortgages are for thirty-year terms, the lender's money would normally be tied up for this period of time.[154] But lenders need to have large enough pools of cash on hand in order to make new loans to borrowers.[155] For example, if a lender issued $50 million of mortgage loans over a period of ten years, the lender would have needed to start out with half a million dollars of cash and would need to generate additional cash in order to continue the lending cycle.[156] While lenders used to depend on local savers for cash flow, the emergence of the secondary mortgage market has allowed lenders to sell their mortgage loans to investors and generate the cash flow needed to more readily continue their lending practices.[157]

Second, while lenders are alleviated from the risk of collecting monthly principal and interest payments from high-risk borrowers, lenders also make a commission when they sell the loan to buyers in

149. IBM BUS. CONSULTING SERVS., SO MANY BORROWERS, SO LITTLE TIME 8 (2003), http://www-935.ibm.com/services/uk/igs/pdf/esr-so-many-borrowers-so-little-time.pdf.
150. *See id.* at 5.
151. *Id.* at 2.
152. Credit Info Center, Why Do the Banks Keep Selling My Loans?, http://www.creditinfocenter.com/mortgage/sellloans.shtml (last visited Sept. 8, 2008).
153. *Id.*
154. Harold D. Hunt, *Lordy, Lordy, Look What's 40 . . . and Even 50*, TIERRA GRANDE, Oct. 2006, at 1, *available at* http://recenter.tamu.edu/pdf/1792.pdf.
155. Credit Info Center, *supra* note 152.
156. *Id.*
157. *Id.*

the secondary market.[158] For example, if a lender earns a point from selling a package of loans worth $1 million, the lender will earn $10,000 in instant profit from immediately selling the loans.[159] By selling the $1 million in loans, the lender frees up $1 million that it can then relend to other borrowers.[160] The lender will earn additional loan origination fees and points by selling these new loans as well.[161] Extending this example to project the lenders earnings from reselling loans throughout the course of a year, if a lender sells $1 million worth of loans each month for one point, the lender would earn $120,000 from the points earned from the sales alone.[162] If the same lender held these loans in-house, the lender would have to be earning an interest rate of a steep 12% annually to produce the same return.[163] Thus, by charging high-risk borrowers steep origination fees and then selling these loans in the secondary markets, lenders are able to alleviate much of the risk while reaping the benefits of increased cash flow and greater returns on investment.[164] Because lenders are able to have the carrot without the stick, it is not surprising that they have become more willing to issue loans to less creditworthy borrowers.[165]

3. LENDER SPECULATION ON PROPERTY VALUE

Besides the profits that lenders generate from up-front fees and from selling loans in the secondary market, lenders may also choose to keep the loans that they issue in-house.[166] Most of the time, the loans that are kept in-house are those with adjustable interest rates and for which the lender believes that it can depend on the value of the home to cover costs of foreclosure in the event of borrower default.[167] In these rare cases, the lender has almost always issued an adjustable-rate mortgage with a high interest rate to a risky borrower, allowing the lender to benefit from a high rate of return if the bor-

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *See id.*
165. MALLOY & SMITH, *supra* note 12, at 382.
166. Jack Guttentag, *One Lender for Life: Appealing, but Elusive*, WASH. POST, Aug. 23, 2008, at F10.
167. *Id.*; George J. Paulos, *The Conjoined Twins of Real Estate*, Aug. 28, 2002, http://www.gold-eagle.com/editorials_02/paulos090102.html.

rower does not default.[168] Yet, the lender has speculated that, if the borrower does default, the value of the mortgaged home would be sufficient, upon sale, to cover the costs of foreclosure.[169] Coincidentally, it is areas with inflated home prices where extended forty-year and fifty-year mortgages are becoming increasingly prevalent.[170]

Although some lenders rely on property value as a way to hedge against the risk of foreclosure, lenders generally prefer to avoid foreclosure altogether.[171] Foreclosure can be a time-consuming and expensive process for the lender.[172] Generally, lenders view the foreclosure process as a deviation from normal profit-generating activities,[173] especially when the lender can sell risky loans in the secondary market for quick returns.[174] Although most lenders carry insurance that covers major foreclosure losses, in most cases this insurance does not cover certain types of expenses, such as those relating to holding and maintaining the property in the intermittent period before the property is sold.[175] Also, lenders face greater losses for loans that do not meet conventional underwriting criteria, many of which are variable-rate loans to less creditworthy borrowers that insurance companies refuse to cover.[176] When a lender is forced to foreclose on these uninsured loans, the lender must absorb the full loss of outstanding principal; accrued interest; legal fees; costs of holding, maintaining, insuring, and marketing the property; and real estate broker fees.[177]

Moreover, speculating on property value can be an extremely high-risk decision for a lender to make.[178] This is especially true in today's housing market, where foreclosures have increased the supply of housing nationwide and, in turn, driven down prices.[179] For this

168. Guttentag, *supra* note 166.
169. Paulos, *supra* note 167.
170. *The 50 Year Mortgage Is Introduced in California*, *supra* note 53.
171. See Jonathan A. Goodman, *Foreclosure FAQs*, http://www.frascona.com/resource/jag105foreclosurefaq.htm (last visited Oct. 17, 2008).
172. Hatcher, *supra* note 140, at 1.
173. *Id.*
174. Credit Info Center, *supra* note 152.
175. Hatcher, *supra* note 140, at 1. "For public lenders, major foreclosure losses are absorbed by loan servicers and mortgage insurers," but private lenders are often forced to absorb at least some of the costs of foreclosure. *Id.*
176. *Id.*
177. *Id.*
178. MALLOY & SMITH, *supra* note 12, at 381.
179. Dean Baker, *The Housing Bubble: A Time Bomb in Low-Income Communities?*, SHELTERFORCE ONLINE, May/June 2004, http://www.nhi.org/online/issues/135/bubble.html.

reason, even lenders who were once relying on property value as a hedge against risky mortgage loans are now likely to first attempt to work with the borrower to restructure payments, as opposed to jumping right into the foreclosure process.[180] Therefore, given the increased risk to the lender of speculating on property value as a cushion in the event of foreclosure and the emergence of the secondary mortgage market, this method has been less successful in hedging against foreclosure risks than in the past.[181]

B. Why Borrowers Enter into Risky Nontraditional Mortgage Agreements

Given the risks involved for borrowers in entering into a subprime mortgage loan agreement with an adjustable rate, the question remains: why would borrowers place their homes and financial futures in jeopardy by agreeing to a loan that is collateralized by their home on such risky terms? Although there may be an infinite number of answers to this question, there are several common reasons why borrowers have used to justify taking on such a risky endeavor. These reasons include misunderstanding the terms of the mortgage obligation, misperceptions about tax benefits and deductions associated with homeownership, and the desperation of some individuals to take out a second mortgage against the equity in their home in order to pay daily living expenses.

1. MISUNDERSTANDING THE COSTS ASSOCIATED WITH THE MORTGAGE OBLIGATION

Although the federal Truth in Lending Act (TILA) protects consumers in credit transactions by requiring clear disclosures of costs and charges in lending agreements,[182] borrowers can be confused about the terms of mortgage obligations. A study completed in 2005 by the Federal Trade Commission uncovered that "many borrowers were confused by current mortgage cost disclosures and 'did not un-

180. Liz Pulliam Weston, *Your Lender Doesn't Want Your House*, MSN MONEY, http://articles.moneycentral.msn.com/Banking/HomeFinancing/YourLenderDoesntWantYourHouse.aspx (last visited Oct. 19, 2008). Lenders will often negotiate with borrowers for forbearance, which allows the borrower to skip a few payments; reduced payments for a period of time; or loan modification, where the term may be stretched out for a few more years or where the remaining balance on the loan may be paid out over an extended period of time. *Id.*

181. *See* Baker, *supra* note 179; Weston, *supra* note 180.

182. *See* Truth in Lending Act, 15 U.S.C. §§ 1601–1681x (2000).

derstand important costs and terms of their own recently obtained mortgages.'"[183] After assuming the mortgage obligation, many borrowers realized that the costs associated with the loan were greater than they initially believed and that the loans contained restrictions, such as prepayment penalties, that dramatically increased the cost of the loan.[184] Another study by the Federal Reserve Board of Governors indicated that one term that is poorly understood among borrowers is how much interest rates on adjustable-rate mortgages can change and that "borrowers with adjustable-rate mortgages appear to underestimate or not understand the extent of possible rate increases."[185]

While borrowers who enter into mortgage obligations misunderstanding their ability to pay become stuck with the burden of the obligation and the risk of foreclosure, lenders have taken the position that they are not responsible for misunderstandings among borrowers.[186] Lenders hold firm that they make lending decisions according to a number of factors, which include assessing the risk of the borrower.[187] Further, lenders assert that they are not responsible for borrower decisions to accept the terms of the mortgage agreement offered.[188] So long as the lender follows all applicable laws as to lending and disclosures under TILA and the Home Mortgage Disclosure Act, this common contention among lenders currently holds true, leaving borrowers with little recourse in the event of default.[189]

2. MISPERCEPTIONS OF TAX BENEFITS AND DEDUCTIONS ASSOCIATED WITH HOMEOWNERSHIP

A common factor that is considered by many borrowers in making the decision to enter into subprime mortgage obligations is the false perception that the tax benefits of homeownership will help

183. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

184. *Id*.

185. Brian Bucks & Karen Pence, *Do Borrowers Know Their Mortgage Terms?*, J. URB. ECON., July 24, 2008, http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=karen_pence.

186. Brooks & Simon, *supra* note 183.

187. *Id*.

188. *Id*.

189. Under TILA, lenders are required to make certain disclosures to borrowers regarding the terms and costs of their mortgage obligation. 15 U.S.C.S. § 1601(a) (LexisNexis 2005). They are also required to make price and other information about home loans available under the Home Mortgage Disclosure Act. 12 U.S.C. § 2081 (2000). However, lenders are not currently agents and have no fiduciary duties to borrowers. *See* Miller, *supra* note 11.

compensate for the increased risk.[190] While it is true that homeowners can deduct interest payments on mortgage loans, property taxes, and points paid as loan-origination fees,[191] these amounts are deducted as itemized deductions.[192] A borrower may only elect to use itemized deductions if the total of all itemized deductions is greater than the standard deduction,[193] which was $5,350 for a single individual in 2007.[194] Thus, the benefit of the deduction for mortgage interest and property taxes to borrowers who have insufficient itemized deductions to exceed the standard deduction is zero.[195] Moreover, none of these provisions apply to individuals who do not earn enough money to owe taxes, making the tax benefit to low-income individuals, such as many elderly borrowers, nonexistent.[196]

The chance that an elderly borrower would benefit from these itemized deductions and reap the benefits of the deduction allowed for mortgage interest and property taxes is less than that of the rest of the population.[197] Specifically, "fewer than two-thirds of all persons aged sixty-five or older file tax returns, only about half of them have any income tax liability, and fewer than one-third have itemized deductions."[198] In addition, the standard deduction is increased by $1050 to $6500 for a single individual over the age of sixty-five and by an additional $1050 if the individual is blind.[199] Therefore, unless an elderly borrower has itemized deductions that total over $6500, the tax benefit derived from the ability to deduct mortgage interest payments and property taxes is zero.

190. Tania Davenport, *An American Nightmare: Predatory Lending in the Subprime Mortgage Industry*, 36 SUFFOLK U.L. REV. 531, 537–38 (2002).

191. Carol Appleton, *Winning the Deductibility on Game Points*, CPA J. ONLINE, Feb. 1992, http://www.nysscpa.org/cpajournal/old/12106207.htm. Points for second mortgages must be amortized (deducted in equal portions) over the life of the loan. *Id.*

192. JOHN GIST, AARP PUB. POLICY INST., A PROFILE OF OLDER TAXPAYERS 1 (2002), *available at* http://assets.aarp.org/rgcenter/econ/dd76_taxpayers.pdf; *see also* I.R.C. § 162 (2000).

193. I.R.C. § 162.

194. *Id.* § 63(b).

195. GIST, *supra* note 192, at 1.

196. *Id.*

197. *Id.*

198. *Id.*

199. I.R.C. § 63(f).

3. NEED FOR CASH TO PAY DAILY LIVING EXPENSES

Although people of all ages encounter situations where they need to borrow money to pay bills and other daily living expenses, the practice of taking second mortgages to cover expenses has become increasingly prevalent among the elderly, who tend to be equity rich and cash poor.[200] While financial obligations of the elderly are increasing as people live longer, the elderly hold mortgages later into life,[201] out-of-pocket medical costs continue to grow,[202] and property taxes steadily rise.[203] At the same time, incomes among the elderly population have been declining.[204] The combination of these factors has put greater financial strain on the elderly.[205] As access to second mortgages and other forms of credit have become more prevalent, elderly borrowers have increasingly turned to their most important asset, their home, as a means of covering their day-to-day expenses by taking out a second mortgage.[206]

Already, average self-reported credit card debt among the elderly has increased 89% between 1992 and 2001 to $4041.[207] This trend of growing debt among the elderly is further accentuated by a finding that seniors between the ages of sixty-five and sixty-nine, the newly

200. Karen Martin Gilber & Joseph Rabianski, *Elderly Interest in Home Equity Conversion*, 4 HOUSING POL'Y DEBATE 565, 565 (1993), *available at* http://www.mi.vt.edu/data/files/hpd%204(4)/hpd%204(4)%20gibler.pdf.

201. Loonin & Renuart, *supra* note 106, at 171. "[M]ortgage debt owed by senior households almost quadrupled between 1989 and 2001, by which time mortgage debt accounted for 70% of the total debt of owners aged sixty-five and older, up nearly 20% from 1989." *Id.* at 171–72.

202. *Id.* at 172. "Older consumers averaged more than $3500 in out-of-pocket health care expenses in 2002, an increase of 45% since 1992." *Id.*

203. *Id.* at 173. "Housing prices in the United States increased dramatically between 1995 and 2005. As housing prices surged, so did homeowners' property tax bills." *Id.*

204. *Id.* at 170. "The fact that the percentage of people over the age of sixty-two who receive more than half of their income from sources other than Social Security is shrinking 'suggests that people are not saving enough to reduce reliance on Social Security in retirement.'" *Id.*

205. *Id.*

206. Gilber & Rabianski, *supra* note 200, at 566. There are also other options for elderly borrowers who wish to extract equity from their homes, such as reverse mortgages. *See* AARP, A New Kind of Loan: In Reverse, http://www.aarp.org/money/revmort/revmort_basics/a2003-03-21-newloan.html (last visited Oct. 19, 2008). These options are often met with skepticism, however, because they often lead to forfeiture of the home to the lender upon death rather than passing of the home to family members as an inheritance. Debt Free, Dangers of Reverse Mortgages, http://opportunitiesaplenty.com/Debt_Blog/2008/05/_dangers_of_reverse_mortgages.html (last visited Oct. 19, 2008).

207. MCGHEE & DRAUT, *supra* note 69, at 1.

retired, realized an increase in credit card debt of 217% to an average of $5844.[208] Given the advantages of securing financing through "home equity debt,"[209] as opposed to credit cards,[210] which typically bear interest at rates far beyond those of even the most risky subprime mortgage loans,[211] equity-rich elderly borrowers have begun turning to the lesser of the two evils.[212] This has unfortunately led many elderly borrowers to dangle their homes out as bait for lenders, who can foreclose in the event of default on the mortgage obligation.[213]

C. Arguments for Imposing Fiduciary Duties to Borrowers on Lenders

Given that the interests of lenders have become misaligned with the interests of borrowers and that subprime and other nontraditional mortgage products pose significant financial risk to borrowers, consumer advocacy organizations argue that the current laws and regulations inadequately protect borrowers.[214] These groups argue that lenders must be assigned the affirmative fiduciary duty to determine if a mortgage loan product is appropriate for a particular borrower.[215] Consumer advocates argue that many borrowers are unsophisticated and do not understand the array of complex mortgage terms and

208. *Id.*

209. Home equity debt is also referred to as a second mortgage. Anne Balcer Norton, *Reaching the Glass Usury Ceiling: Why State Ceilings and Federal Preemption Force Low-Income Borrowers into Subprime Mortgage Loans*, 35 U. BALT. L. REV. 215 n.16 (2005).

210. Advantages of home equity debt over credit card debt includes the ability of taxpayers to deduct interest payments on the mortgage loan as itemized deductions. *See* I.R.C. § 163(h) (2000). As discussed above, this may or may not apply to elderly borrowers. *See supra* Part III.B.2.

211. Vincent Di Carmine, *Delta Financial: A Gem Among Subprime Lenders*, SEEKING ALPHA, Sept. 17, 2006, http://seekingalpha.com/article/17022-delta-fianancial-a-gem-among-subprime-lenders.

212. Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 1 (2000).

213. *Id.*

214. MORTGAGE BANKERS ASS'N, A POLICY PAPER SERIES POLICY PAPER 2007-1: SUITABILITY—DON'T TURN BACK THE CLOCK ON FAIR LENDING AND HOMEOWNERSHIP GAINS 17 (2007). In 2006, the National Consumer Law Center recommended that a "duty of good faith and fair dealing" be imposed on lenders "to address 'irresponsible underwriting, unsuitable loans, and steering' in the nonprime market." *Id.*

215. *Id.* at 18.

products available.[216] Additionally, they argue that borrowers often do not understand that mortgage brokers are not their agents.[217] Instead, these advocates assert that lenders are often acting in their own economic interests, which are not necessarily aligned with those of the borrower.[218] Consumer advocates further argue that even when lenders provide borrowers with products that they can afford, these products often have "onerous and unfair terms and cost significantly more than other available better-priced products."[219] Thus, consumer advocates argue that because lenders are generally more knowledgeable than borrowers, lenders should be obligated to "act as a 'trusted advisor,' with a fiduciary duty to act in the borrower's best interest."[220] This would mean that lenders would have the duty to determine the best loan with the lowest cost for which the borrower may qualify.[221]

These groups suggest adoption of a "suitability standard," similar to the standard imposed on the securities industry.[222] The suitability standard proposed by consumer advocate groups consists of three elements: a "borrower benefit" test, a repayment ability test, and a fiduciary duty of lenders to borrowers.[223] The first two prongs mean that "a loan is not suitable unless it provides a reasonable benefit to the borrower and the borrower can repay it."[224] Under the fiduciary duty element, the lending industry would serve as fiduciaries and bear the responsibility for ensuring that its products are suitable and reasonably advantageous for particular borrowers.[225] In turn, borrow-

216. Wright H. Andrews, *Is 'Suitability' Suitable for Mortgage Lending?*, NAT'L MORTGAGE NEWS ONLINE, http://www.nationalmortgagenews.com/plus/?show=plus186.htm (last visited Oct. 19, 2008).
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. MORTGAGE BANKERS ASS'N, *supra* note 214, at 17. In the securities industry, the suitability standard, commonly referred to as the "Know Your Customer Rule," prevents a stock broker from selling a customer a product until the broker learns the client's financial status, investment objectives, risk tolerance, and prior investment experience. John T. Reed, *The Ethical Standard of Suitability in Real Estate*, http://www.johntreed.com/suitability.html (last visited Oct. 19, 2008); *see also* NASD MANUAL R. 2810 (2008). The broker obtains this information via a questionnaire that must be reviewed by an executive officer or general partner of the firm prior to conducting any transactions. Reed, *supra.*
223. Andrews, *supra* note 216.
224. *Id.*
225. MORTGAGE BANKERS ASS'N, *supra* note 214, at 18; *see also Home Mortgage Data: Hearing Before the H. Subcomm. on Financial Institutions & Consumer Credit*,

ers would have a private right of action against a lender who sold them a product that was unsuitable to their financial situation, thus placing the risk of default on the lender.[226] While lenders and consumer groups generally agree that the first two elements should be written into legislation, the third proposed element, requiring a lender to bear a fiduciary duty to borrowers, remains debated.[227]

D. Arguments Against Imposing Fiduciary Duties to Borrowers on Lenders

Already, several states have enacted legislation imposing an explicit duty of good faith and fair dealing on lenders and mortgage brokers.[228] In response to consumer advocate proposals in favor of instituting lender fiduciary duties under the suitability standard, and in light of the few states that have enacted legislation imposing heightened duties on lenders and brokers, lenders have been quick to spell out a laundry list of arguments as to why imposing fiduciary duties is an inapt solution to the current problems in the lending industry.[229] The reasons for lender opposition to fiduciary duties range from the inability of lenders to adequately conduct an assessment of borrowers' ability to pay to concern over increased allegations of discrimination in lending.[230]

First, lenders argue that the rigid prescribed underwriting standards that would be required for lenders to sufficiently assess the financial credentials of each individual borrower could result in the denial of credit to individuals who have a reasonable expectation of higher income in the future.[231] Second, lenders argue that imposing fiduciary duties would lead to an enormous increase in legal claims, the cost of which would ultimately be passed down to the borrower.[232] Specifically, lenders assert that they should not be the ones responsi-

109th Cong. (2006) (statement of Keith Ernst, Senior Policy Counsel for Center for Responsible Lending).

226. MORTGAGE BANKERS ASS'N, *supra* note 214, at 18.

227. Andrews, *supra* note 216.

228. MORTGAGE BANKERS ASS'N, *supra* note 214, at 18. For example, "effective January 1, 2007, the Ohio mortgage broker licensing and usury law requires lenders and mortgage brokers to make 'reasonable efforts' to obtain financing that is 'advantageous' to the borrower in terms of rates." *Id.*

229. *See* Andrews, *supra* note 216.

230. *See id.*

231. MORTGAGE BANKERS ASS'N, *supra* note 214, at 17–19.

232. *See* Andrews, *supra* note 216.

ble for making what would often be a subjective determination about which loan product is best for a particular borrower.[233] Lenders contend that requiring them to make these determinations would lead to increased allegations of discrimination in lending.[234]

Furthermore, lenders stress that the suitability standard is too broad and would open the floodgates for borrowers to file claims alleging that loans are not "suitable."[235] Lenders argue that allowing these claims would essentially be the equivalent of alleging that "unfair or deceptive acts or practices" (UDAP) were involved in the lending process.[236] Lenders further assert that it would be an unstable public policy to allow a private right of action under a federal UDAP provision because it would drastically increase compliance costs for lenders and invite frivolous litigation.[237]

In addition, lenders contend that a suitability standard in mortgage lending would significantly change the arms-length debtor-creditor relationship and that the standard would go against the responsibility of borrowers to assume personal responsibility for making their own financial decisions.[238] Lenders also emphasize that the process of administering mortgage loans is different from the securities sales process because securities sales are more complex, securities dealers tend to have a longer-term relationship with their customers, and securities disputes must be resolved by arbitration, not in court.[239] Finally, the lenders stipulate that they would have to gather extensive amounts of personal information about a potential borrower's personal circumstances to provide a sufficient basis for their decision.[240] This extra research would increase the costs of lending, which borrowers would ultimately bear.[241]

Both sides present valid arguments over whether fiduciary duties should be imposed upon lenders in the form of a suitability standard, but it is clear that some degree of regulation is necessary. This

233. MORTGAGE BANKERS ASS'N, *supra* note 214, at 20–21.
234. *Id.*
235. *See* Andrews, *supra* note 216.
236. *Id.*
237. *Id.* Currently, under section 5 of the Federal Trade Commission Act, only the Federal Trade Commission and other regulatory agencies are allowed to enforce violations including UDAP. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*

regulation is especially important for financially vulnerable elderly borrowers, who increasingly rely on lines of credit to make ends meet in their daily lives.[242] With increasing expenses and decreasing income levels, it is necessary to protect the elderly in lending transactions where they risk their home, the asset that represents their life achievement of the American dream, to meet their daily financial obligations. However, it is also clear that the regulation imposed must also consider the best interests of the lending industry, which may become overwhelmed with the costs of legal claims if the rights of redress are too broadly extended.

IV. Recommendation

Lenders' arguments against imposing fiduciary duties on the lender-borrower relationship are outweighed by the growing debt problem among the elderly, the wide variety of risky adjustable-rate mortgage products available, and the misalignment of lender incentives from those of the borrower. These factors make it clear that a degree of regulation with respect to elderly borrowers is in order. This Part argues that fiduciary duties in the form of a suitability standard should be imposed upon lenders with respect to elderly borrowers. Further, this Part proposes that an affirmative defense should be made available to lenders to avoid liability based on a showing that reasonable lending procedures were followed.

This Part considers the main arguments presented by lenders as outlined in Part III.D and demonstrates why each argument is either inapplicable or applicable to a lesser degree with respect to elderly borrowers. Section A considers the argument that imposing fiduciary duties would deny credit to borrowers who can reasonably expect increased income in the future and asserts that this argument is inapplicable to elderly borrowers. Section B addresses the argument that imposing lender fiduciary duties will force lenders to make subjective determinations and will result in increased claims alleging discrimination in lending. The Section then proposes that a private right of action to protect elderly borrowers and an affirmative defense to protect lenders is in order. Section C refutes the argument that instituting a suitability standard will deprive borrowers of the right to take personal responsibility for their own financial decisions. Section D rejects

242. Loonin & Renuart, *supra* note 106, at 168.

the argument that a suitability standard is inappropriate for the mortgage-lending industry based on the increased complexity of mortgage-lending products. Section E considers the argument that the suitability standard will create increased information-gathering costs and burdens for lenders that will ultimately be borne by the borrower. The Section then determines that protection of elderly borrowers outweighs the potential information-gathering costs and burdens that will be placed on lenders. Finally, Section E concludes that an exception to the antidiscrimination laws under ECOA should be carved out. The proposed exception would impose a fiduciary duty upon lenders with respect to elderly borrowers to ensure that mortgage loans extended to the elderly are suitable to their unique needs and restrictions.[243] Further, Section E argues that a reasonable affirmative defense should be included to protect lenders from the possibility of unwarranted discrimination claims as well as claims of product unsuitability.

A. Assessing Elderly Borrowers' Ability to Pay

First, lenders argue that the imposition of fiduciary duties would ultimately deny credit to borrowers who have reasonable expectations of increased income in the future.[244] While this argument may apply to younger individuals who are in the beginning or middle stages of growing careers and appreciating investments, this argument does not apply to the elderly, who are often retired and living on fixed incomes. Additionally, given that the elderly are more likely to be living off of a fixed income than other groups of borrowers, it would be relatively simple for lenders to project their ability to afford the payments under various mortgage obligations.

B. Private Right of Action to Protect Elderly Borrowers and an Affirmative Defense to Protect Lenders

Lenders also argue that the imposition of fiduciary duties would force lenders to make subjective determinations as to which mortgage product would best fulfill the needs of each individual borrower.[245]

243. For the purpose of this recommendation elderly borrowers are those ages sixty-five and up.
244. *See* MORTGAGE BANKERS ASS'N, *supra* note 214, at 19.
245. Andrews, *supra* note 216.

Lenders predict that this would result in increased legal claims alleging discrimination in lending and would effectively, against the aims of Congress, allow for a private right of action under a federal UDAP provision.[246] Lenders further assert that the increased costs associated with defending against these claims would ultimately be endured by borrowers, who would end up paying more for their loans.[247]

Lenders would likely face more lawsuits if these fiduciary duties are imposed on them. However, outside of the lending community, this can hardly be seen as a negative consequence, as this would permit a much-needed redress for elderly borrowers who suffer financial hardship due to lender disinterest in mortgage product suitability. Under current law, in the absence of lender fraud, borrowers who lose their homes to foreclosure as a result of taking on unaffordable mortgage obligations have no mechanism for redress.[248] Even if the costs of increased claims against lenders would be passed to the consumer, spreading this cost among borrowers throughout the market as an upfront cost of taking on a mortgage obligation would be far less burdensome on borrowers than losing their homes to the foreclosure process.

Yet, in instances of foreclosure, part of the blame can undoubtedly be placed on the unwise and uneducated decisions made by borrowers who agreed to enter into risky mortgage obligations. However, the majority of borrowers are not financial experts, have little knowledge about real estate, and often mistakenly look to professionals, the lenders, to sell them a financially viable product.[249] The arms-length relationship between buyers and sellers may work in industries such as used car sales and retail, but where a commercial agreement has the capability of destroying an individual's financial future and livelihood beyond repair, a higher standard of liability and a consumer right of redress is a necessity.

Lender concern over increased discrimination claims can be addressed by a suitability standard that includes an affirmative defense to age-based discrimination claims for breach of fiduciary duty by

246. MORTGAGE BANKERS ASS'N, *supra* note 214, at 20–21; *see also* Andrews, *supra* note 216.

247. Andrews, *supra* note 216.

248. Laurence E. Platt et al., *Consumers Clog Courts with Codified Care Claims*, MORTGAGE BANKING & CONSUMER CREDIT ALERT, Jan. 30, 2008, http://www.klgates.com/newsstand/Detail.aspx?publication=4260. Under current law, lenders do not owe fiduciary duties to borrowers. *Id.*

249. *See* Andrews, *supra* note 216.

showing that a reasonable procedure was followed to assess credit-worthiness of the borrower and suitability of the mortgage product. This affirmative defense would serve to shield lenders from wrongful claims of discrimination in lending and breach of fiduciary duty where the lender could show that its decision was made after collecting a reasonable amount of information and following a reasonable procedure. As for lender concerns over private rights of action under UDAP statutes, nothing in the proposed suitability standard would suggest that imposing fiduciary duties on lenders would create a private action under this federal law that has, to date, been off-limits to claims brought by individuals.

C. Responsibility of Elderly Borrowers for Financial Decisions

Lenders assert that instituting a suitability standard would alter the arms-length debtor-creditor relationship and strip borrowers of personal responsibility for their own financial decisions.[250] Yet, it is not the case that the suitability standard would deprive borrowers of their rights to make financial decisions. The intent of the suitability standard is to realign the incentives of lenders and borrowers, which have been estranged with the emergence of the secondary market and the increased number of mortgage products available. The suitability standard would impose a fiduciary duty on lenders to ensure that the mortgage products that they offer to borrowers are appropriate, given the borrower's financial situation. In turn, borrowers would be able to make more confident decisions as to whether or not to enter into the mortgage obligation based on the lender's properly analyzed assessment and recommendation. Thus, imposing fiduciary duties under a suitability standard would not strip elderly borrowers of their right to make financial decisions. Rather, this standard would provide even the least-educated borrowers greater assurance that the decisions they make are financially viable. Further, this standard would offer elderly borrowers rights of redress if the product that they chose was not suitable to their financial needs as a result of the lender failing to follow proper procedure.

250. *Id.*

D. Complexity of Mortgage Lending and the Extent of the Lender-Borrower Relationship

Lenders claim that imposing a suitability standard in the mortgage-lending industry that is modeled after the standard imposed on securities dealers is inappropriate because securities sales are more complex and securities dealers have a longer-term relationship with their customers.[251] Although securities sales are complex, the variety of available mortgage products has increased greatly in the past thirty years.[252] In fact, it is this increase in complexity in the mortgage industry that has led borrowers to enter into loan agreements when they do not wholly understand the terms of the agreement and the risks involved.

Additionally, lenders argue that the suitability standard as it exists in the securities industry is inappropriate in the realm of mortgage lending because of the shorter-term relationship between lenders and borrowers. However, this assertion pinpoints the exact problem that the imposition of a suitability standard is aimed to extinguish. Prior to the emergence of the secondary market for mortgage loans and the emergence of the subprime lending industry, the interests of lenders were very much aligned with those of the borrower. The ability to package and sell loans in the secondary market has shortened the term of the relationship between the lender and borrower to the point where the lender has less incentive to ensure the suitability of the loan product offered.[253] Reconnecting this relationship for the long-term by imposing a fiduciary duty upon lenders under the suitability standard would serve to protect elderly borrowers from misaligned lender incentives. In the future, this would also serve to protect communities that are largely populated by the elderly from a small-scale subprime crisis.

251. *Id.*

252. *See* ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N OF AM., EXOTIC OR TOXIC? AN EXAMINATION OF THE NON-TRADITIONAL MORTGAGE MARKET FOR CONSUMERS AND LENDERS 3 (2006), *available at* http://consumerfed.org/pdfs/exotic_toxic_mortgage_report0506.pdf.

253. *See* MALLOY & SMITH, *supra* note 12, at 381.

E. Protection of Elderly Borrowers Outweighs the Burden on Lenders to Gather Information to Assess Suitability

Lenders assert that the suitability standard would create increased costs and inefficiencies in that, to comply with the suitability standard, they would be required to gather extensive amounts of personal information about the particular circumstances of each individual borrower in order to create an adequate basis for their decision.[254] Lenders further state that the costs of this additional research will ultimately be borne by the borrower.[255] However, as seen with the collapse of the real estate market in the wake of the subprime crisis, the lack of fiduciary duties and the failure to assess the suitability of mortgage products for individual borrowers has proven financially catastrophic to lenders and borrowers alike. Moreover, it is likely that lenders would be able to gather the required information by means of a simple form that is filled out by the borrower, similar to the way that securities dealers gather information from their clients. The remainder of the research process could be accomplished by the lender being aware of and knowledgeable about the mortgage products offered, the risks associated with those products, and making a suitable recommendation based on the information gathered from the borrower. If the lender followed reasonable procedures and made a suitable recommendation based on the information at hand, then the lender would be protected from claims of discrimination and breach of fiduciary duty by the affirmative defense of reasonable procedure.

Additionally, imposing fiduciary duties on lenders under a suitability standard with respect to the elderly, who are only a narrow subset of borrowers, would result in significantly fewer costs to lenders than if the standard was imposed with respect to *all* borrowers. Further, the costs of gathering information would likely be spread among the entire industry of borrowers. This would make the cost increase to individual borrowers minute while instituting a great degree of protection for financially vulnerable elderly borrowers.

Although the imposition of fiduciary duties on lenders with respect to elderly borrowers under a suitability standard and the institution of an affirmative defense of reasonable procedure for lenders could be extended to encompass all borrowers rather than just elderly

254. Andrews, *supra* note 216.
255. *Id.*

borrowers, a small step is needed before a giant leap. Elderly borrowers are in greater need of statutory protections in the arena of mortgage lending because they represent a financially vulnerable group who are less likely than their younger counterparts to be able to recover from financially devastating events such as foreclosure. Moreover, the elderly are a group that is growing rapidly in number as the baby boomers age and retire. Thus, it is important that the law act as a preventative aide to help the elderly keep their homes and their nest eggs safe while ensuring that they are able to use the equity in their homes with minimal risk for their ever-increasing living expenses if the need arises.

V. Conclusion

With the emergence of secondary markets in mortgage lending and the increased variety of mortgage products available to borrowers, the interests of lenders and borrowers have become dangerously detached. Additionally, the increasing costs of various living expenses has resulted in heightened levels of debt among the elderly, many of whom have been forced to turn to the equity in their homes to alleviate these costs. Unfortunately, for elderly borrowers who either have taken out mortgage loans for the first time in pursuit of the American dream of homeownership or have turned to second mortgages as a means of generating cash flow to cover living expenses, the loan agreements that they enter into have increasingly turned out to be unaffordable. Under current law, in the absence of fraud, elderly borrowers who are at risk of losing their homes to foreclosure because they were sold unaffordable mortgage products have little opportunity for recourse against lenders, who currently lack fiduciary duties to borrowers.

In the wake of the subprime crisis, which left many elderly borrowers at risk of foreclosure, it is clear that a degree of regulation is needed in order to protect members of this financially vulnerable group from losing their greatest asset. Therefore, an exception to the antidiscrimination laws under the ECOA should be carved out to impose fiduciary duties upon lenders under a suitability standard with respect to elderly borrowers. This standard should include a private right of action to ensure that the mortgage loans extended to elderly borrowers are suitable to their needs and ability to pay. On the other hand, in order to protect lenders from the possibility of unwarranted claims of discrimination and breach of fiduciary duty, the duty should be accompanied by an affirmative defense based on a showing of reasonable analysis and the following of proper procedures.

This degree of protection for elderly borrowers would undoubtedly serve as a safety net and a degree of assurance for elderly borrowers seeking to enter into mortgage loan obligations by alleviating some of the fear that the mortgage obligation entered into might eventually lead to financial demise. On the other hand, the inclusion of an affirmative defense would serve to protect lenders from unwarranted claims of borrowers. With lender fiduciary duties and a suitability standard in place, equity-rich and cash-poor elderly borrowers would be afforded a greater degree of confidence that, if the need to borrow against the equity in their homes arose, the mortgage products offered would be a result of a professional assessment of their ability to pay. In turn, the suitability standard in mortgage lending with respect to elderly borrowers would serve as a preventive measure against future foreclosures resulting from inability to meet loan obligations, alleviate a degree of risk for investors in the secondary markets, and help to increase the investment stability that has recently been stripped from real estate markets.