I. Introduction

Over the past decade, increased environmental awareness has led to new financial products aimed at making it easier for homeowners to make energy efficient home improvements, such as solar panel systems and air conditioning units. While the goals have been laudable, the aggressive marketing of such home improvements and financial products to pay for them has resulted in unfortunate consequences for many vulnerable homeowners who have been saddled, often unwittingly, with the burden of paying back inflated and unaffordable home improvement loans and credit lines. In many cases, vulnerable and protected minority and senior homeowners are targeted for such products. While a number of consumer protection statutes and contract-based claims exist to vindicate violations by unscrupulous home improvement contractors and financers, these do not specifically address the targeting of protected communities or the disparate impact these products have on those communities. This presentation addresses the key statutes that advocates can use to address these types of claims, with a focus on federal and California law, and suggests ways that consumer protection attorneys can incorporate them into their practices.

II. Reverse Redlining – a decades old form of discrimination

Redlining is the discriminatory practice of excluding certain communities, typically low-income minority neighborhoods, from eligibility for financing and credit. Reverse redlining is the targeting of those same communities with predatory financial products, including loans that are given on unfair terms.¹

As early as the 1993, Congress specifically recognized the growing problem of reverse redlining, highlighting that “certain communities were ‘being victimized . . . by second mortgage lenders, home improvement contractors, and finance companies who peddle high-rate, high-fee home equity loans to cash-poor homeowners.’ ”² In 2000, the U.S. Department of Housing and Urban Development (HUD) and the U.S. Treasury Report released a joint report that highlighted the continued prevalence of this practice, which sounds eerily familiar in the context of the current wave of home improvement targeting:

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Predatory lenders often engage in “reverse redlining” – specifically targeting and aggressively soliciting homeowners in predominantly lower-income and minority communities who may lack sufficient access to mainstream sources of credit…. Predatory lenders often target people that are “house rich but cash poor,” usually the elderly. Elderly homeowners are likely to have built up significant equity in their homes, the values of which may have appreciated substantially over time. Some elderly homeowners living on fixed incomes need cash for medical and other expenses, but lack an adequate understanding of the complexities of financial transactions, the usual cost of home repairs, or their own credit-worthiness. Some elderly are widows who may have little or no experience with finances prior to the death of a spouse. In addition, some elderly borrowers suffer from medical problems, diminished faculties, and isolation that impair their ability to understand loan terms and/or make them especially vulnerable to aggressive sales tactics. Frequently unable to perform household repairs, some elderly appear to be specifically targeted by predatory lenders engaged in home improvement scams. Because of these particular vulnerabilities, predatory lenders may charge these homeowners rates that do not correspond to their levels of risk, or convince them to take out loans that are larger than necessary or inappropriate for their needs.3

In the years leading up to the financial crisis of 2008 and afterward, victimized homeowners challenged predatory loans, including those made to finance home repairs and improvements, under both consumer protection statutes and fair lending laws.4 Many of these cases continue in litigation to this day. In June 2016, in the first reverse redlining case ever to be tried in federal court, African American and Hispanic borrowers secured a liability verdict against Emigrant Mortgage Co. for targeting them for loans designed for borrowers with poor credit but significant equity in their homes.5

III. Déjà vu all over again – Another Wave of Reverse Redlining

New financial products have developed since the financial crisis that are not traditional mortgages or home equity lines of credit, and lenders and their agents show strikingly similar patterns of targeting vulnerable communities with predatory home improvement loans. These include loans that are solicited by home improvement contractors, such as Property Assessed Clean Energy (PACE) programs and credit lines to fund green projects. PACE financing is particularly risky because it creates a first-priority lien on a homeowner’s property paid back through an assessment added to property taxes that can result in foreclosure if the homeowner

3 HUD-Treasury Report, HUD No. 00-142 (2000) at 72.
defaults. In addition, other products have been developed to finance home improvements that may result in a UCC lien recorded on the property to give notice of a security interest in the home improvement itself, as in the case of solar panels. In the case of PACE loans, the cost of financing can be nearly double other home equity loan products. In both cases, the financing is typically solicited by the home improvement contractor, which has a vested interest in maximizing its profit on the transaction.

Consumer advocates across the country have reported the targeting of vulnerable homeowners, including low-income seniors and non-English speakers, for costly and unaffordable home improvement loans with little to no consideration of their ability to repay the loan. For example, California did not require PACE programs to consider a borrower's ability to repay the loan until April 2018. This gave contractors a perverse incentive to sign homeowners up for loans they could not afford, get paid, and then disappear even if the work was not completed.

In the recent wave of home improvement targeting, contractors and their salespeople have marketed their products to Spanish-speakers with advertising and social media, made presentations to African American churches, and canvased low-income and minority neighborhoods door-to-door. This in turn has led to vulnerable homeowners being pushed into unnecessary and overpriced home improvement financing often through misrepresentations about the program itself (e.g., “this is a free government program”) or the terms of the financing (e.g., misrepresenting the monthly payments, not disclosing administrative fees, not disclosing the lien placed on the property). Lenders that authorize contractors and their salespersons to solicit financing applications on their behalf face liability for the unlawful actions of those agents. While advocates have largely addressed these problems by pursuing traditional contract-based and consumer protection claims, antidiscrimination laws may also provide vulnerable homeowners with relief where discernible patterns and practices of reverse redlining emerge.

IV. The Fair Housing Act

Courts recognize reverse redlining as an actionable claim under the federal Fair Housing Act, 42 U.S.C. § 3601, et seq. While the Fair Housing Act prohibits various types of housing

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6 See Pizor, supra, at 2.
7 Id. at 5.
10 See Pizor, supra, at 3-4.
11 See FORM 10-K of GreenSky, Inc. For the fiscal year ended December 31, 2018, SEC File Number: 001-38506 at 16 (“The ability to identify and eliminate neutral practices that have ‘disparate impact’ is complicated by the fact that often it is our merchants, over which we have limited control, that implement our practices.”).
12 See, e.g., cases cited above in n. 4; see also Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017); Steed v. EverHome Mortg. Co., 308 F. App'x 364, 369 (11th Cir. 2009); Horne v.
discrimination, reverse redlining claims concerning home improvement targeting tend to fall under Section 3605 of the Act:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin. 13

“Residential real estate-related transaction” includes “[t]he making or purchasing of loans or providing other financial assistance … for purchasing, constructing, improving, repairing, or maintaining a dwelling; or … secured by residential real estate.”14 “The loan does not have to come from the entity doing the selling, building, or improving,” nor does it “have to be secured by the dwelling.”15

“Aggrieved persons” may pursue claims under the Fair Housing Act. An “aggrieved person” is any person who claims to be injured by a discriminatory housing practice or believes he or she will be injured by a discriminatory housing practice that is about to occur.16 This broad definition covers individuals who are not members of a protected class where the consideration of a prohibited basis caused them injury, as in the case of interracial married couples or non-minorities indirectly injured by discrimination against minority applicants.17 Fair housing organizations that incur diversion of their resources or frustration of their mission as a result of assisting other aggrieved persons are also considered “aggrieved persons” themselves with standing to file claims under the Fair Housing Act.18 In addition, a number of municipalities have sued lenders engaging in predatory lending practices and courts have found they also have standing to bring Fair Housing Act claims where they are injured by discriminatory lending practices, including harm to minority neighborhoods and decreased property tax revenues.19

Liability for Fair Housing Act violations can extend beyond the lender that offered the predatory and unfair credit to also include “arrangers, brokers, and others providing financial assistance.”20 In the context of home improvement targeting, this may include not only the creditor, but also


14 Id.
15 See National Consumer Law Center, Credit Discrimination (7th ed. 2018) (“NCLC”) § 2.3.2.2.1, updated at www.nclec.org/library (citing 42 U.S.C. § 3605(b)(1)).
16 42 U.S.C. § 3602(i); 24 C.F.R. § 100.20.
17 See NCLC § 3.93.
19 See City of Miami, 137 S. Ct. at 1303-05.
the salesperson or contractor who solicited and/or arranged the financing, and in the case of PACE financing, the PACE program administrator and public entity providing the PACE financing.

Remedies for violations of the Fair Housing Act include actual and punitive damages, equitable relief, and attorney fees and costs.\(^\text{21}\)

The Fair Housing Act prohibits both intentional discrimination, and facially neutral practices that have a disparate impact on a protected class.\(^\text{22}\)

### A. Reverse Redlining - Intentional Targeting Claims

The key elements of an intentional reverse redlining case are that homeowners were (1) intentionally targeted by defendants on the basis of race, color, religion, sex, handicap, familial status, or national origin, (2) for real-estate related transactions containing unfair and predatory loan terms.\(^\text{23}\)

Unlike other types of intentional discrimination where it must be shown that plaintiffs were treated differently than similarly situated people outside of their protected class, courts in reverse redlining cases have held, “if the plaintiff presents direct evidence that the lender intentionally targeted her for unfair loans on the basis of [membership in a protected class], the plaintiff need not also show that the lender makes loans on more favorable terms to others.”\(^\text{24}\)

#### 1. Intentional Targeting

Plaintiffs must show that the defendants targeted members of a protected class. In a typical home improvement reverse redlining case, a salesperson or contractor affirmatively reaches out to a particular community or neighborhood to solicit the predatory product. Any evidence of such outreach can support the intentional targeting element. Some examples of targeting that courts and advocates have identified in past reverse redlining cases include:

- Statements by salespeople that they serve a particular minority community;\(^\text{25}\)

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\(^{21}\) 42 U.S. Code § 3613(c).


\(^{23}\) *Hargraves*, 140 F. Supp. 2d 7, 20 (D.D.C. 2000), on reconsideration, 147 F. Supp. 2, 1 (D.D.C. 2001). See also *Steed*, 308 F. App'x at 368; *Horne*, 2018 U.S. Dist. LEXIS 111954, *11; United States v. Auto Fare, Inc.*, 2014 U.S. Dist. LEXIS 86381 (W.D.N.C. Apr. 16, 2014). Some courts have also stated that the borrower must have been qualified for the financing, but is adapted from cases where credit was denied and does not make sense in the reverse redlining context where borrowers are targeted for unaffordable loans. See NCLC § 8.5.4, updated at www.nclc.org/library. (“There is no reason to limit the consumer’s rights when the lender knew the consumer could not afford a loan and still offered the loan, either to strip out the consumer’s equity in the home or to earn a quick profit.”).

\(^{24}\) *Matthews*, 185 F. Supp. 2d at 886-87 (citing *Hargraves*, 140 F. Supp. 2d at 20); *Steed*, 308 F. App'x at 368-69.

• Placing advertising in minority media (newspapers, magazines, radio, television);\textsuperscript{26}
• Marketing and mailing materials in Spanish that claim the company is helping the Hispanic community;\textsuperscript{27}
• Soliciting brokers or salespeople who operate in predominantly minority communities;\textsuperscript{28}
• Word of mouth advertising “designed to reach the primarily African–American residents of communities” where defendants transacted;\textsuperscript{29}
• Distributing flyers and advertisements in predominantly African American communities;\textsuperscript{30}
• Placing offices in African American communities;\textsuperscript{31}
• Live sales presentations (e.g., in senior centers, ethnically oriented churches and community centers);
• Promotional videos (e.g., on YouTube);
• Canvassing low-income and minority neighborhoods;
• Obtaining lists of customers who made purchases on credit at businesses in African-American neighborhoods.\textsuperscript{32}

Consumer advocates have identified similar techniques in the current wave of predatory home improvement targeting. As noted above, contractors and their salespeople, acting as agents and arrangers for financers and creditors, have marketed their products to Spanish-speakers with advertising and social media, made presentations to African American churches, and canvased low-income and minority neighborhoods door-to-door to peddle predatory loans and credit for overpriced and often unnecessary home improvements. Elderly homeowners are also “being targeted by financial lenders to take energy-efficiency home improvement loans that become impossible to repay.”\textsuperscript{33} Any of the above listed practices could support a claim that defendants targeted homeowners based on their membership in a protected class.

2. Unfair and Predatory Terms

Plaintiffs must also show that the terms defendants offered to members of the protected class were unfair and predatory. Courts have recognized a number of lending terms to be unfair and predatory in the context of reverse redlining claims, many of which are strikingly similar to terms presented to homeowners in the recent wave of home improvement targeting, including:

\begin{itemize}
  \item offering loans that the borrower cannot afford;
\end{itemize}

\textsuperscript{28} See NCLC § 8.5.2.
\textsuperscript{29} \textit{Horne}, 304 F. Supp. 3d at 1341.
\textsuperscript{30} \textit{Hargraves}, 140 F. Supp. 3d at 22.
\textsuperscript{31} \textit{Id}.
\textsuperscript{33} Amita Sharma, “Lenders target California seniors with costly clean-energy loans,” San Jose Mercury News (Dec. 8, 2018).
• equity stripping, i.e., lending based on the value of the home rather than a borrower's ability to repay, thereby depleting the equity in the homes;
• loans with undisclosed fees and higher repayment terms than originally explained;
• exorbitant interest rates, particularly when in excess of the borrower’s credit risk (e.g., charging interest rates above the prevailing interest rate);
• excessive fees and points;
• excessive loan origination costs;
• prepayment penalties;
• misrepresenting borrowers’ income or qualifications for the loan or failing to properly underwrite the borrowers to ensure creditworthiness;
• refinancing lower rate mortgages into higher rate ones.34

A lender’s profit margin that is higher than those earned by lower-risk lenders may also provide evidence indicating that terms are unfair and predatory.35

"[W]hether the practices alleged occurred, and whether the practices were unfair and predatory, is a jury question."36

The recent wave of home improvement targeting has saddled unwitting homeowners with many similar unfair terms. At the outset, the pricing of the home improvements themselves are often inflated at prices far above normal market values. In addition, financing to pay for the improvements is also commonly unaffordable and made (at least prior to April 2018 for PACE financing in California) without regard to the homeowner’s ability to repay the loan. Interest rates for home improvement financing through PACE and other credit lines offered by contractors are often significantly higher than those available in connection with personal loans and other lending programs. Another predatory and unfair circumstance that may satisfy this factor is where, as noted above, the home improvement financing is obtained through misrepresentations about the terms, such as representing a lower monthly cost than the actual payments, not disclosing hidden fees or the placement of a lien on the property.

B. Reverse Redlining - Disparate Impact Claims

Unlike an intentional discrimination claim, “where a plaintiff must establish that the defendant had a discriminatory intent or motive, a plaintiff bringing a disparate impact claim challenges practices that have a disproportionately adverse effect on minorities and are otherwise unjustified

35 See NCLC § 8.5.3.
36 Steed, 308 F. App'x at 369.
by a legitimate rationale.”37 Disparate impact claims may be brought under the Fair Housing Act.38

Courts apply a burden-shifting test for disparate impact claims:

- First, the plaintiff must make out a *prima facie* case that a policy or practice results in a discriminatory effect based on a protected characteristic;
- If plaintiff does so, then the burden shifts to defendant to show that the practice is necessary to achieve “substantial, legitimate, nondiscriminatory interests”;
- If defendant satisfies that burden, then liability may still be established by showing that those interests can be achieved by alternatives that have “less discriminatory effect.”39

Under the U.S. Supreme Court’s interpretation of the disparate impact test in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*,40 plaintiffs “must identify defendant’s policy or policies causing that disparity” and must show a “robust causal connection” between the policy and the disparity.41

Courts have recognized loan origination procedures, pricing and marketing policies, and equity stripping loans as discrete policies that may cause a disparate impact on members of a protected group.42 “[E]ven if a lender is not targeting minorities, its targeting of a minority community [i.e., a particular neighborhood that is predominantly minority] can have a disparate impact on minorities.”43

Unlike intentional targeting claims, disparate impact claims almost necessarily require an expert to provide a statistical comparison of consumers in the protected class with those outside of the class. “This data can be supplemented with census data, for example, to show the racial composition of particular neighborhoods and to show that predatory lenders target those areas for the highest-price credit products.”44 For example, in *Hargraves v. Capital City Mortgage Corp.*, plaintiffs sufficiently established their *prima facie* showing of disparate impact by “statistical evidence that, in the District of Columbia, Capital City made a greater percentage of its loans in majority black census tracts than other subprime lenders, and made an even more disproportionately large number of loans in neighborhoods that are over 90 percent black.”45 Similarly, in *City of Memphis v. Wells Fargo*, the lender charged higher interest on homes valued at $75,000 or less, which were three times more likely to be situated in predominantly African

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37 Inclusive Communities Project, Inc., 135 S. Ct. at 2513 (quotations omitted). See also Reyes v. Waples Mobile Home Park Limited Partnership, 903 F.3d 415, 424 (4th Cir. 2018); Prince George’s Cty., 397 F. Supp. 3d at 766.

38 Inclusive Communities Project, Inc., 135 S. Ct. at 2513.

39 Id. at 2514-15 (citing HUD regulations at 24 C.F.R. § 100.500(c)(1)-(3)).


41 Id. at 2522-23.


43 NCLC § 8.5.2 (emphasis added).

44 NCLC § 4.3.2.4.3 (citing Horne, 304 F. Supp. 3d 1332; Hargraves, 140 F. Supp. 2d 7).

45 Hargraves, 140 F. Supp. 2d at 20.
American areas of the city, but discounted rates on homes valued at $150,000 or more.46 This resulted in the lender making high-cost loans to 63% of its African American borrowers in the city, compared to only 26% of its white borrowers. This in turn led to a higher rate of foreclosures between the two groups.47 The court concluded that these statistical allegations were sufficient to state a disparate impact claim.48

Pre-litigation data regarding some forms of home improvement financing may be difficult to come by, as lenders are not required to collect and report data for home improvement loans that are not closed-end mortgage loans or dwelling-secured open-end lines of credit.49 Thus, PACE programs and unsecured credit lines to fund home improvement projects do not report data. At the time of this article, at least one PACE program administrator made the location of the residential projects it financed available online, which, combined with census tract data, would provide insight into the demographic composition of the neighborhoods in which it has borrowers.

C. Limitations Period

Fair Housing Act claims must be filed in court by an aggrieved party within two years from the occurrence or termination of the discriminatory practice.50 Although there is no administrative exhaustion requirement, an aggrieved party may initiate an administrative complaint with the U.S. Department of Housing and Urban Development (HUD) in lieu of litigation, but must do so within one year from the occurrence of termination of the discriminatory practice.51 Claims brought under a “continuing violations” theory are timely so long as the “last asserted occurrence” of that practice “continues into the limitations period.”52

V. The Equal Credit Opportunity Act

Reverse redlining claims are also recognized under the Equal Credit Opportunity Act (ECOA). ECOA broadly prohibits credit discrimination:

47 Id. at *50-*51.
48 Id. at *51.
49 See Home Mortgage Disclosure Act (HMDA) regulations, 12 C.F.R. § 1003.2 (i) and Official Interpretation of. Reverse redlining claims for predatory mortgages are able to draw support from HMDA data. The HMDA requires mortgage lenders to disclose certain information about each mortgage loan originated or purchased in a fiscal year, including the race and ethnicity of the borrowers, characteristics of each mortgage, and the census tract in which the home associated with each mortgage loan is located. Plaintiffs have used this data to support statistical analysis showing that minorities are more likely to receive high-cost loans.
50 42 U.S.C. § 3613(a)(1)(A). The computation of the 2-year period shall not include time where an administrative proceeding was pending. 42 U.S.C. 3613(a)(1)(B).
It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)…. 53

ECOA defines “credit” broadly as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 54 In addition, to traditional financing and credit, personal property leases may fall within ECOA’s definition as well where the consumer is obligated to make a total payment over the lease term that is deferred through monthly installment payments.55 This is significant in the home improvement context because consumers have been targeted for unfair and costly solar panel leases.

A “credit transaction” includes “not only the extension of credit itself, but also terms of credit,” and courts have found that reverse redlining cases can be brought under ECOA even though credit was not denied because the claim is discrimination in the terms of credit based on membership in a protected class.56

ECOA defines “creditor” broadly, to include “any person who regularly extends, renews, or continues credit” and “any person who regularly arranges for the extension, renewal, or continuation of credit.”57 Regulations implementing ECOA define “creditor” to include persons who serve as intermediaries between the borrower and the creditor:

Creditor means a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. The term creditor includes a creditor’s assignee, transferee, or subrogee who so participates. For purposes of § 202.4(a) and (b), the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made.58

In addition, the comment to the regulatory definition of “creditor” states specifically that, for certain purposes, “the term creditor includes persons such as real estate brokers, automobile dealers, home builders, and home-improvement contractors who do not participate in credit decisions but who only accept applications and refer applicants to creditors, or select or offer to select creditors to whom credit requests can be made.”59 Courts have thus applied ECOA to those who participate in credit decisions by arranging credit and acting as liaisons between the borrower and lender.60

55 Bros. v. First Leasing, 724 F.2d 789, 792 (9th Cir. 1984).
56 See Matthews, 185 F. Supp. 2d at 887.
58 12 C.F.R § 1002.2(f).
60 See, e.g., Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971 (7th Cir. 2004) (car dealership acting as intermediary between credit applicant and creditor); Jefferson v. Briner Inc.,
Courts considering reverse redlining claims apply similar standards to claims brought under ECOA as they do to claims brought under the Fair Housing Act. A plaintiff must show that she is a member of a protected group, applied for credit, and was “discriminated against in the terms of [her] credit based on [her membership in a protected group].” Disparate impact claims are also available under ECOA.62

ECOA provides for actual damages and recovery of punitive damages up to a maximum of $10,000 in individual actions and the lesser of $500,000 or 1% of the net worth of the creditor in class actions, as well as equitable and declaratory relief and attorneys’ fees and costs.63

VI. California State Law Claims

A. Fair Employment and Housing Act

California’s Fair Employment and Housing Act (FEHA), California Government Code section 12900, et seq., prohibition against discrimination in real estate-related transactions is analogous that of the Fair Housing Act.64 However, FEHA covers additional protected classes not included with the scope of the Fair Housing Act, providing:

For any person or other organization or entity whose business involves real estate-related transactions to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, source of income, familial status, disability, veteran or military status, or genetic information.65

Exhaustion of administrative remedies is not required, but the time limit to file an administrative complaint with the California Department of Fair Employment and Housing is one year after the occurrence or termination of the alleged discriminatory practice,66 and a civil complaint must be filed within the later of two years after the discriminatory practice or breach of administrative conciliation agreement.67

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61 Matthews, 185 F. Supp. 2d at 887.
62 See 12 CFR Part 1002 Supp. II Sec. 1002.6(a)-2.
63 15 U.S. Code § 1691e(a)-(d).
64 See Cal. Govt. Code § 12955(i). Similar to the Fair Housing Act, “real estate-related transactions “include … [t]he making or purchasing of loans or providing other financial assistance that is for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or that is secured by residential real estate.” Cal. Govt. Code s 12927(h).
65 Cal. Govt. Code § 12955(i).
66 Cal. Govt. Code § 12980(b).
Courts apply the same standards to FEHA housing discrimination claims, including reverse redlining claims, as they do to federal Fair Housing Act claims. As under the Fair Housing Act, disparate impact claims are available under FEHA, and remedies for FEHA violations include actual and punitive damages, equitable relief, and attorney fees and costs.

B. The Unruh Civil Rights Act

The Unruh Civil Rights Act (“Unruh Act”), California Civil Code section 51, provides:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Courts have held that the Unruh Act’s protections may apply to arbitrary discrimination based on other personal characteristics, such as families with children and persons under 18. Courts may recognize such a claim where the classification is “based on a personal characteristic similar to those listed in the statute,” upon consideration of “whether the alleged discrimination was justified by a legitimate business reason” and “the consequences of allowing the claim to proceed.”

An Unruh Act claim based on a category enumerated in the statute may be defeated “where public policy warrants [the challenged] differential treatment” or where “a compelling social policy support[s]” it.

The disparate impact theory is not available under the Unruh Act; plaintiffs must proceed under an intentional discrimination theory. Courts considering intentional lending discrimination claims applied the Fair Housing Act’s standards to Unruh Act claims.

The Unruh Act does not contain a statute of limitations and courts are split on the appropriate period. Some courts find that the two-year statute of limitations for personal injury contained in California Code of Civil Procedure section 335.1 applies, and others find the three-year statute of limitations of Code of Civil Procedure section 338(a) for actions upon a liability created by statute applies if the particular provision did not evolve from common law prohibition on

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70 Cal. Govt. Code § 12989.2.
74 Harris, 52 Cal. 3d at 1149.
75 See Cabrera v. Alvarez, 977 F. Supp. 2d 969, 975 (N.D. Cal. 2013) (“The provisions of . . . the Unruh Act . . . protect substantially the same rights as the FHA provisions at issue and are subject to the same analysis.”)
arbitrary discrimination in public accommodations. Arguably, reverse redlining claims evolved from federal law prohibitions on discrimination in real estate-related and credit transactions, and not from the common law related to public accommodations, and the three-year statute of limitations should apply.

Victims of discrimination may also file an administrative complaint with the California Department of Fair Employment and Housing (DFEH) one year of the date of the alleged discriminatory act. Remedies for violation of the Unruh Act include damages up to a maximum of three times the amount of actual damage and no less than four thousand dollars ($4,000), as well as injunctive relief and attorney's fees and costs.

VII. Incorporating Fair Housing Claims Into Your Practice

Consumer advocates representing homeowners who have been targeted for predatory financial products should consider whether their clients have viable reverse redlining claims. Pursuing such claims may provide additional avenues of relief for consumers and have a broader impact on the adversely affected communities.

Prior to filing litigation, consumer advocates can include reverse redlining claims in their pre-litigation discussions and demands. In addition to subjecting the opposing parties to additional exposure, including such claims in discussions may also serve as an incentive for bad actors to curb reverse redlining practices and to highlight bad acting contractors and salespersons to the financial institutions that authorized them to solicit applications and cause them to improve their training and monitoring of such agents.

Consumers can also consider filing an administrative complaint with the appropriate agency (e.g., HUD for Fair Housing Act complaints and the DFEH for FEHA and Unruh Act complaints; while the CFPB has enforcement authority under the ECOA it does not have a system to investigate every complaint). Agency adjudication of these complaints typically leads to a free dispute resolution or conciliation process prior to any findings by the agency, and this could provide an opportunity to settle the clients’ claims. An administrative complaint will also allow the agency to uncover any additional evidence of discrimination prior to any litigation by the claimant or the agency. Filing administrative complaints also allows the agencies to discern and pursue patterns and practices of discrimination by particular bad actors that may not be known to individual complainants and consumer advocates.

A complaining party can generally opt to pursue his or her own lawsuit during the pendency of the investigation. If the agency finds discrimination, then the agency may proceed with an enforcement action on behalf of the claimant and other aggrieved parties, where a pattern and

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77 See the DFEH website at https://www.dfeh.ca.gov/resources-2/frequently-asked-questions/business-establishments-public-accommodations-faqs/
78 Cal. Civ. Code §§ 52(a), 52(c)(3).
practice is alleged. In such cases, the claimant may also move to intervene in the action in order to directly represent his or her interests in coordination with the enforcement agency.

Of course, reverse redlining claims can also be included in litigation, both as direct claims under the Fair Housing and lending statutes and as predicate acts under an unfair and deceptive practices act, such as California’s Unfair Competition Law.

80 See, e.g., Cal. Govt. Code § 12989.1 (FEHA).
81 Cal. Bus. & Prof. Code § 17200 et seq.