LITIGATING THE FINANCIAL CRISIS

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INTRODUCTION

TWO of the three branches of government responded to the financial crisis; this Article asks why the third one did not. The President and

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his Treasury Secretary organized bailouts of automakers, money market funds, and most of the large banks in the country.[1] Congress passed rescue and stimulus statutes in the thick of the crisis and the Dodd-Frank Wall Street Reform Act after it.[2]

But the courts have had almost nothing to say about either the crisis or what the other two branches of government did during it.[3] Courts are meant to put the policies of presidents and congresses to the test of judicial review, to evaluate decisions by the executive to sanction someone for wrongdoing, and to resolve disputes between private parties. During this crisis, the government has rarely been challenged for its own crisis-related conduct and has hesitated to prosecute the financial executives in place during the crisis, while private litigation over losses sustained during the crisis has been slow to develop and quick to settle.[4]

Those who believe that blame for the financial crisis should be apportioned—at least to some degree—through verdicts and judgments have found the role of the courts to be disappointing.[5] Judge Jed Rakoff has

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[1] See Diya Gullapalli & Shefali Anand, The Financial Crisis: Bailout of Money Funds Seems to Stanch Outflow, Wall St. J., Sept. 20, 2008, at A2 (noting the impact of federal intervention on money market funds); John D. McKinnon & John D. Stoll, U.S. Throws Lifeline to Detroit, Wall St. J., Dec. 20, 2008, at A1 (discussing the federal aid to automakers); David E. Sanger, U.S. Bank and Trust?, N.Y. Times, Jan. 26, 2009, at A1 (discussing the Obama administration's response to the crisis).

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 137 (2010); American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115; see also Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (expanding federal regulatory authority over government-sponsored enterprises such as Freddie Mac and Fannie Mae).

[3] There has been near silence from the judiciary other than the distantly related way that the courts have policed the implementation by agencies of Dodd-Frank; this, however, has not given the courts a crisis role, but rather, involved them in the effort to make sure that the next financial crisis does not resemble the last one.

[4] It is worth acknowledging now, as I will do later, that some of the basis for the judicial silence is not the fault of the courts. The U.S. Supreme Court may not hear a crisis case for years, if at all, given the complexities of its appellate jurisdiction. The lower courts have to wait for crisis cases to come to them. See infra Parts II and III for a discussion.

[5] See, e.g., Gretchen Morgenson, The British, at Least, Are Getting Tough, N.Y. Times, July 8, 2012, at B1 (urging more enforcement actions); Gretchen Morgenson & Louise Story, A Financial Crisis with Little Guilt, N.Y. Times, Apr. 14, 2011, at A1; John C. Coffee, Jr., SEC Enforcement: What Has Gone Wrong?, CLS Blue Sky Blog (Jan. 2, 2013), http://clsbluesky.law.columbia.edu/2013/01/02/sec-enforcement-what-has-gone-wrong/ (characterizing enforcement actions as "issuing modest parking tickets for major frauds"); Jesse Eisinger, In Hunting for Fraud, a Timid S.E.C. Misses the Big Game, N.Y. Times DealBook (Dec. 15, 2011, 3:10 PM), http://dealbook.nytimes.com/2011/12/14/in-hunt-for-securities-fraud-a-timid-s-e-c-misses-the-big-game/ (demanding more efforts from the SEC).

argued that "the failure of the government to bring to justice those responsible for such colossal fraud bespeaks weaknesses in our prosecutorial system . . . ."[6]

This Article sympathizes with those concerns. It offers recommendations for how Congress and the courts can ensure a more substantial role for the judiciary in the next crisis, without making it an overweening one. For Congress, that could mean the addition of specific short-fused review provisions to controversial government actions, such as bailouts. For the courts, a broader vision of standing might subject the government's actions to more scrutiny, especially in light of the financial industry's unwillingness to serve as plaintiffs while being bailed out.

But the quiet judicial role in the crisis is only partly regrettable. The turn away from criminal prosecutions of businesspeople during economic downturns is defensible, if not yet well-defended by the government, especially if paired with other sorts of law enforcement. Moreover, as a descriptive matter, the quiet judicial response to the economic crisis tells us what courts are good at doing and what they do less well—a subject of particular interest given the list of scholars who have bemoaned judicial quiescence over the war on terror,[7] and other scholars, exemplified by Eric Posner and Adrian Vermeule, who have argued that, in a crisis,

Eisinger won the Pulitzer Prize for national reporting in 2011, and Morgenson won the Pulitzer Prize for beat reporting in 2002.

[6] Hon. Jed Rakoff, The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?, N.Y. Rev. Books (Jan. 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/.

[7] See, e.g., David Cole, No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint, 75 U. Chi. L. Rev. 1329, 1342 (2008) ("[T]here is good reason to believe that executive decisionmaking in times of emergency is particularly unlikely to strike an appropriate balance."); Amanda Frost, The State Secrets Privilege and Separation of Powers, 75 Fordham L. Rev. 1931, 1952 (2007) (arguing that Congress and the courts have a duty "to police the activities of the executive branch," even in times of national crisis); Harold Hongju Koh, Setting the World Right, 115 Yale L.J. 2350, 2379 (2006) (arguing that, "Even the critical importance of maintaining 'energy in the executive' in a time of terror cannot justify rewriting the Constitution to endorse unchecked executive power"); David Luban, On the Commander in Chief Power, 81 S. Cal. L. Rev. 477, 487 (2008) (characterizing as a mistake "the courts' deference to the president on nonmilitary decisions"); cf. Bruce Ackerman & Oona Hathaway, Limited War and the Constitution: Iraq and the Crisis of Presidential Legality, 109 Mich. L. Rev. 447, 450 (2011) (arguing that a precedent of executive overreach, unchecked by Congress, was established by the Bush administration during the war on terror and has continued during the Obama administration, and that it will allow future presidents to transform limited wars into open-ended conflicts).

the executive must take the lead in response and the other branches of government can, and should, defer.[8]

For these reasons, this Article considers the actual practice of courts and enforcement officials quite carefully, offering a first draft of the history of the financial crisis in the courts. A useful way to think about that practice is to divide the action into categories: where the government was sued, where the government did the suing, and where private parties were involved.

The Government as Defendant. The government's dramatic response to the financial crisis has received little scrutiny from the courts, and the scrutiny it has received has come through largely untraditional means, which seems like the very thing Congress did not intend given the lengths to which it went to make the government's bailout-related activities reviewable.[9] The government did not have to defend its actions in court in the midst of the crisis and has not been subject to much post-crisis review. It is defending its bailouts of AIG, General Motors ("GM"), and Chrysler against shareholders or franchisees of these firms who argue that their property was seized in the restructurings that followed the cash infusions, in violation of the Takings Clause,[10] and the

[8] See Eric Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 4, 30 (2011) (emphasizing the role of the executive in times of crisis). For further discussion of the authors' thesis, see also Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, *in* The Constitution in Wartime: Beyond Alarmism and Conspiracy 55, 57–58 (Mark Tushnet ed., 2005); Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. Chi. L. Rev. 1613 (2010) [hereinafter Posner & Vermeule, Crisis Governance]. Their theory of judicial noninvolvement hearkens back to some of the judicial modesty praised by scholars and judges such as Alexander Bickel and Learned Hand. See Alexander M. Bickel, The Least Dangerous Branch 69 (2d ed. 1986) (arguing that courts ought to exercise "judicial modesty" in assessing the constitutionality of most sorts of government action); Learned Hand, The Bill of Rights 15 (1958). For discussions of Bickel and Hand, see Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 336 (2002); Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153, 231 (2002).

[9] Congress rejected the Bush Administration's initial bailout proposal in part because the proposal included no provision for judicial review, and Congress added such a provision to the bailout statute it ultimately passed. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 119, 122 Stat. 3782, 3787–88 (codified at 12 U.S.C. § 5229 (2010)). For a discussion, see Steven Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 Admin. L. Rev. 463, 520 (2009).

[10] The takings cases will be discussed in detail in Section II.B, but, briefly, the claims argue that the property of AIG shareholders and various auto dealers were taken without process (and the bailouts were, in fact, orchestrated very quickly), leaving the shareholders and franchisees disproportionately on the hook for government action that should have been

government faced a bit of litigation during the bankruptcy proceedings of those companies.[11] It has also faced an administrative law action over the way it has treated shareholders of Fannie Mae and Freddie Mac, the mortgage finance giants that also required rescues, which the government realized by taking over the putatively private firms.[12]

But generally, this sort of litigation has been minimal.[13] The stimulus package meant to revive the economy after the financial collapse has received no judicial review, the various takeovers engineered by the government were not subject to any shareholder suits, and the bailouts are being contested creatively, rather than through traditional resort to, say, the Administrative Procedure Act ("APA"), which is the usual way that government action is evaluated by the courts.

borne more equally by taxpayers. The takings cases have met with some favor in the courts. See Alley's of Kingsport, Inc. v. United States, 103 Fed. Cl. 449, 453–54 (Fed. Cl. 2012) (denying the government's motions to dismiss for failure to state a claim and lack of subject matter jurisdiction in a case where an automobile dealership is suing the federal government, asserting a takings claim arising from administration of the Troubled Asset Relief Program ("TARP"), even though the court acknowledged that the plaintiff's theory did "not fit neatly into a normal takings framework"); Emily Maltby & Angus Loten, Car Dealers Fight On—Auto Franchises Cut in 2009 Bailout Continue to Take on Constitutionality Issue, Wall St. J., Apr. 26, 2012, at B1 (describing lawsuits filed by auto dealerships and observing that the cases had survived the government's motions to dismiss). But see Eagle Auto Mall Corp. v. Chrysler Grp., No. CV 10-3876, 2011 U.S. Dist. LEXIS 147963 (E.D.N.Y. Dec. 23, 2011) (granting the government's motion for summary judgment).

[11] This litigation came from two Indiana state pension funds invested in the automakers. For a discussion, see infra Section II.A.

[12] Steven M. Davidoff & David Zaring, Hedge Fund's Suit on Fannie and Freddie May Spell Trouble for U.S., N.Y. Times DealBook (July 29, 2013, 2:46 PM), http://dealbook.nytimes.com/2013/07/29/hedge-funds-suit-on-fannie-and-freddie-may-spell-trouble-for-u-s/ (discussing a suit by Perry Capital against the federal government).

[13] Many commentators have bemoaned the lack of convictions in this area. See Joe Nocera, Biggest Fish Face Little Risk of Being Caught, N.Y. Times (Feb. 25, 2011), http://www.nytimes.com/2011/02/26/business/economy/26nocera.html ("Two and a half years after the world's financial system nearly collapsed, you're entitled to wonder whether any of the highly paid executives who helped kindle the disaster will ever see jail time—like Michael Milken in the 1980s, or Jeffrey Skilling after the Enron disaster. Increasingly, the answer appears to be no."); Matt Taibbi, Why Isn't Wall Street in Jail?, Rolling Stone (Feb. 16, 2011), http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216 ("[F]ederal regulators and prosecutors have let the banks and finance companies that tried to burn the world economy to the ground get off with carefully orchestrated settlements . . . ."). See generally Charles Ferguson, Heist of the Century: Wall Street's Role in the Financial Crisis, The Guardian (May 20, 2012, 3:00 PM), http://www.theguardian.com/business/2012/may/20/wall-street-role-financial-crisis ("The Obama government has rationalised its failure to prosecute anyone (literally, anyone at all) for bubble-related crimes by saying that while much of Wall Street's behaviour was unwise or unethical, it wasn't illegal. With apologies for my vulgarity, this is complete horseshit.").

The Government as Plaintiff. Usually, after a financial disaster, someone goes to jail. But the handling of this crisis suggests that the government has changed its approach from one seeking prison time to one satisfied with corporate fines, usually extracted through settlements paired with so-called deferred prosecution agreements ("DPAs"), which are commitments by the companies that settle to change their internal practices in a way that limits the potential for future law breaking. Ever since the acquittal of the failed Bear Stearns hedge fund managers Ralph Cioffi and Matthew Tannin for criminal fraud in 2009,[14] federal prosecutors have been remarkably reluctant to go after Wall Street or the mortgage industry criminally for actions related to the way financiers treated their customers. While the received wisdom of what caused the financial crisis has looked to the collapse of the housing market, the risks improperly priced into collateralized debt obligations on which many financial firm balanced sheets depended, and also the efforts of various mortgage bankers to put people in homes they could not afford, the government has passed on prosecutions of sub-prime mortgage bundlers par excellence like Angelo Mozillo of Countrywide,[15] structured product salesmen like Goldman Sachs Abacus trader Fabrice Tourre,[16] and almost everyone else.[17] Even civil efforts to single out particular executives have not gone particularly well.[18]

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[14] Zachery Kouwe, Bear Stearns Managers Acquitted of Fraud Charges, N.Y. Times DealBook (Nov. 10, 2009, 3:29 PM), http://dealbook.nytimes.com/2009/11/10/2-ex-fund-managers-found-not-guilty-of-fraud.

[15] Peter Lattman, Criminal Inquiry of Countrywide Chief Has Ended, N.Y. Times DealBook (Feb. 19, 2011, 12:39 AM), http://dealbook.nytimes.com/2011/02/19/criminal-investigation-of-countrywide-chief-ends.

[16] Henry Blodget, Fraud Fallout: Fabrice Tourre Is Toast, Goldman Will Be Fine*, Business Insider (Apr. 16, 2010, 11:23 AM), http://www.businessinsider.com/henry-blodget-fraud-fallout-fabrice-tourre-is-toast-goldman-will-be-fine-2010-4.

[17] The distinguished former secured transactions professor, and now U.S. Senator, Elizabeth Warren, complained to the Chair of the Securities and Exchange Commission ("SEC") and Office of the Comptroller of the Currency ("OCC") that, "If [actors on Wall Street and in the mortgage industry] can break the law and drag in billions in profits and then turn around and settle paying out of those profits, then they don't have much incentive to follow the law . . . . The question I really want to ask is about how tough you are." Ben Protess, At Senate Hearing, Warren Comes Out Swinging, N.Y. Times DealBook (Feb. 14, 2013, 5:13 PM), http://dealbook.nytimes.com/2013/02/14/at-senate-hearing-warren-comes-out-swinging.

[18] Citigroup executive Brian Stoker was cleared of his role in selling a complicated one billion dollar mortgage fund deal. Peter Lattman, S.E.C. Gets Encouragement from Jury that Ruled Against It, N.Y. Times DealBook (Aug. 3, 2012, 5:23 PM), http://dealbook.nytimes.com/2012/08/03/s-e-c-gets-encouragement-from-jury-that-ruled-against-it/. The SEC's fraud case against the Bent family, who oversaw the Reserve Primary

This is a frankly surprising dearth of individual penalties.[19] During the last housing crisis, the savings and loan crisis of the 1980s ("S&L crisis"), over one thousand financial executives were convicted of crimes.[20] And in the wake of the dotcom collapse in 1999–2000, a similar number paid a criminal price.[21]

During this crisis, individual responsibility has been eschewed; instead, the government has, after a lengthy period of quiet, gotten to work against financial institutions only when it reached the end of its statutes of limitations, and it has done so civilly and unconventionally.[22]

These civil suits have relied on a mix of statutes—that is, they did not all turn on violations of the securities laws or on other fraud claims. With various agencies in action, and various bases for litigation, the best way to characterize the government's civil enforcement strategy is to think of it as a diversified portfolio. Some cases were brought under the False Claims Act ("FCA")—the idea was that the principal sin was the fraud committed against the government, rather than systematic fraud committed by mortgage originators and packagers against their counterparties, clients, or the mass of American homeowners caught up in the housing bubble. Some states have filed claims. Other cases have been brought under the Financial Institutions Reform, Recovery, and En-

Fund, which broke the buck, also ended up in personal victories for the Bents. Peter J. Henning, Mixed Results for S.E.C. in Financial Crisis Cases, N.Y. Times Dealbook (Nov. 19, 2012, 3:36 PM), http://dealbook.nytimes.com/2012/11/19/mixed-results-for-s-e-c-in-financial-crisis-cases/ (noting that the SEC "has been able to pursue the large institutions but does not bring cases against senior managers overseeing those companies").

[19] Peter Lattman, Looking at Ken Lay and the Lack of Financial Crisis Cases, N.Y. Times Dealbook (July 5, 2011, 4:15 PM), http://dealbook.nytimes.com/2011/07/05/looking-at-ken-lay-and-the-lack-of-financial-crisis-cases/.

[20] See Bruce A. Green, After the Fall: The Criminal Law Enforcement Response to the S&L Crisis, 59 Fordham L. Rev. S155 (1991), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2925&context=flr (describing the enforcement actions that followed the S&L crisis of the 1980s).

[21] Lattman, supra note 19.

[22] For example, and as will be discussed in detail infra at Section III.B, Fannie Mae's and Freddie Mac's government supervisor has sued almost twenty banks for making false representations in the products sold to the housing giants. FHFA (and OFHEO) Legal Filings, Fed. Hous. Fin. Agency, http://www.fhfa.gov/Default.aspx?Page=110 (last visited Mar. 6, 2013). Wells Fargo and other banks have been sued under the federal False Claims Act for the mortgages insured by the Federal Housing Authority. Press Release, U.S. Att'y's Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Files Mortgage Fraud Lawsuit Against Wells Fargo Bank, N.A. Seeking Hundreds of Millions of Dollars in Damages for Fraudulently Certified Loans (Oct. 9, 2012), available at http://www.justice.gov/usao/nys/pressreleases/October12/WellsFargoLawsuitPR.html.

forcement Act of 1989 ("FIRREA"),[23] a heretofore little used statute with a focus on financial institutions, a long statute of limitations, the prospect of fines, and a civil burden of proof.[24] With all non-FIRREA statutes of limitations having run, it appears that the eclectic approach taken by the government is likely to be the definitive one for the crisis.[25]

The FIRREA enforcement actions have been late-breaking but significant, at least if one measures significance by the dollar value of the settlements. Each bank is paying a substantial penalty, headlined by America's largest bank, Bank of America, paying the largest such fine ever, amounting to, at least as a headline number, $16.65 billion.[26] Some of

[23] Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 101 Stat. 183 (1989).

[24] See Kevin LaCroix, Regulatory Enforcement: Using FIRREA to Prosecute Financial Fraud, D&O Diary (Aug. 27, 2013), http://www.dandodiary.com/2013/08/articles/failed-banks/regulatory-enforcement-using-firrea-to-prosecute-financial-fraud/ (describing the use of FIRREA in financial crisis prosecutions).

[25] The worst of the crisis occurred in 2008, and the relevant statutes of limitation are six years. 1 Civil Actions Against the United States, Its Agencies, Officers and Employees § 1:27 (2013) ("[A] civil action against the United States is barred unless the complaint is filed within six years after the right of action first accrues."). Takings cases are also subject to a six-year statute of limitations. Sargent Shriver Nat'l Ctr. on Poverty Law, Federal Practice Manual for Legal Aid Attorneys § 2.5 (Jeffrey S. Gutman ed., 2013), available at http://federalpracticemanual.org/node/12 (last visited Sept. 20, 2013). For the relevant Federal Tort Claims Act provision, see 28 U.S.C. § 2401 (2012). The same six-year statute of limitations applies for any APA claims, absent specific judicial review provision for agency actions. 2 Civil Actions Against the United States, Its Agencies, Officers and Employees § 6:31 ("[T]he general six-year statute of limitations for actions against the United States provided by 28 U.S.C.A. § 2401(a) applies to actions brought under the Administrative Procedure Act."); see also Am. Bar Ass'n, The Law of Environmental Justice: Update Service (June 20, 2012), http://www.americanbar.org/groups/environment_energy_resources/publications/books_related_products/ejupdates/ejweb.html. A suit brought under state law—for instance, a claim against the U.S. government for a breach of fiduciary duty in conducting the bailout—might be subject to the applicable state law statute of limitations. AIG shareholders and executives filed suit against the U.S. government and the Federal Reserve Bank of New York under Delaware corporate law. Liam Pleven & Serena Ng, Greenberg Sues U.S. over AIG Rescue, Wall St. J. (Nov. 22, 2011), http://online.wsj.com/article/SB10001424052970204443404577051983133404566.html (noting that the suit for breach of fiduciary duty against the Federal Reserve Bank faces a statute of limitations of three years under Delaware corporate law).

[26] See Press Release, U.S. Dep't of Justice, No. 14-884, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading Up to and During the Financial Crisis (Aug. 21, 2014), available at http://www.justice.gov/opa/pr/2014/August/14-ag-884.html. For an interesting contemporaneous consideration of what the parade of fines means, see Matt Levine, Bank of America Adds a Mortgage Settlement to Its Collection, Bloomberg View (Aug. 21, 2014), http://www.bloombergview.com/articles/2014-08-21/bank-of-america-adds-a-mortgage-settlement-to-its-collection.

this money will go to investors, but FIRREA also includes provisions for penalties to the government. The resulting list of FIRREA settlements—approximately one per large bank, in an interesting parallel to the approximately one securities fraud settlement with the Securities Exchange Commission ("SEC") per bank—looks like real money.[27]

Nonetheless, despite the newly respectable-looking number of fines paid, this record is quite inconsistent with prior practice. Practicing finance during a recession should not necessarily be a criminal offense, but holding no executives responsible during this collapse in the housing market, while imprisoning hundreds of them during earlier downturns, smacks of arbitrariness, or, even worse, a different standard for Wall Street and Main Street financiers. It is this reason why the defensible switch away from criminal enforcement, and the more surprising resort to unconventional civil statutes for penalties, appears to be so unjustified. Fraud used to be the paradigmatic kind of case to bring; that is no longer the case.

Private Litigation. Instead, much of the judicial action will be comprised of suits between private parties. Many of these disputes have taken the form of securities class actions against the financial institutions that originated mortgages that were packaged and transformed into the toxic assets that felled so many banks, or the monolines and other institutions that facilitated their packaging and sale.

Some shareholders have also sued companies such as AIG, Bear Stearns, and Merrill Lynch with some success thus far. And a number of pension plan beneficiaries have sued their financial employers for imprudent investments in their employer's stock; Merrill Lynch and Countrywide have settled lawsuits on these grounds already. Add to that a few breach of contract suits and you have a civil docket that will keep many lawyers busy for a long time—even if it does not amount to the flood of litigation that one sees from, say, a natural disaster.[28]

This litigation is a going concern. But there is a cost to delegating responsibility in the financial crisis to the private sector. If the courts are

[27] For example, the settlement agreed to by Citi is also substantial. See Press Release, U.S. Dep't of Justice, No. 14-733, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (July 14, 2014), available at http://www.justice.gov/opa/pr/2014/July/14-ag-733.html.

[28] See, e.g., Jay Root, Years After Hurricane, Political Storm Still Blows over Claims, N.Y. Times (Mar. 8, 2014), http://www.nytimes.com/2014/03/09/us/years-after-hurricane-political-storm-still-blows-over-claims.html (discussing litigation following Hurricane Ike).

focused on the resolution of disputes between private parties, we will likely see settlements instead of opinions on the legality of what the banks did during and before the crisis, and what the government did to mitigate it, depriving us of the expressive value of these sorts of opinions. Moreover, the settlements will likely benefit investors in the toxic securities that led to the crisis—that is, rich people—even though every American paid a price for the financial crisis and many of those who suffered not were not wealthy at all.

The judiciary's modest role in the financial crisis and its aftermath tells us something useful about what we can hope for in our courts. The courts do not excel at crisis response (though their role in this signature sort of government action could be improved), but they do have the potential to play a real role in the more considered evaluation of executive action, either through enforcement or ex post review, possibly for damages. We can also learn something about the way the executive branch has turned to the courts; rather than using the courts to find and highlight individual wrongdoing that contributed to the crisis, the government has focused its law enforcement efforts on corporations, hoping, it appears, that a combination of fines and civil settlements with private plaintiffs will deter financial players from risky behavior that could lead to a future crisis.

I will begin, in Part I, with a discussion of the costs and benefits of court participation in events with the scale and systemic impact of the financial crisis. While some observers argue that courts should not play any role in examining the emergency measures of the government, I disagree. Because we look to courts to police government overreach, and because of the expressive functions that courts serve, I conclude that their lack of participation in the crisis is both something to regret and not inevitable. In Part II, I will review the extent to which the government's response to the financial crisis has been exposed to judicial supervision. That supervision has been limited, and surprisingly so, given that the government's bailout statute included provisions explicitly calling for judicial review. Much of the explanation for this can be attributed to our standing rules, which have meant that those inclined to force the government to justify its actions in court have been unable to do so, while those that can do not want to. In Part III, I will review the government's own efforts to hold individuals and firms accountable for financial crisis wrongdoing, which reflects a real change in its perspective about the value of targeted expressive sanctions designed to deter future wrongdoing. In Part IV, I will sketch the landscape of the private litigation that has occurred in the wake of the crisis, and conclude that this litigation is unlikely to serve as an adequate substitute for litigation involving the government. I will then briefly conclude.

I. WHAT IS THE PROPER JUDICIAL ROLE?

Should courts play central roles in crises? The answer to the question turns in part on the nature of the role. Courts can check executive overreaching—an adversarial role—and can provide a forum for the expressive sanctioning of serious misconduct if the executive files complaints—an arbitral role.[29] One's view about the absence of judicial oversight depends in part on what the courts are doing, though in the wake of the financial crisis, as we shall see, the courts have not been doing too much either adversarially or arbitrally. There are debates in the literature about whether courts are good at crisis response, and whether the rush to prosecution in the wake of economic disasters turns courts into mechanisms for scapegoating rather than for assigning responsibility. The view proffered here is that courts can play a useful role as a check on the government if they play a role more like the last, rather than the first, responder to an emergency, and that their role in sanctioning misconduct can be a useful, expressive one, rather than an arbitrary, scapegoating one, if done right.

A. Courts as Last Responders

In crises, and often simply in general, legal scholars prefer to rely on presidents, whether on the left or the right. Justice Elena Kagan set the stage for a celebration of the presidency with her paean to presidential administration in 2001,[30] while Eric Posner and Adrian Vermeule have made their strong case for the ineffectuality of Congress and the courts in emergency situations in the wake of the war on terror, an analysis they have extended to the financial crisis itself.[31]

[29] However, there has been plenty written on the emergency responses of other elements of government. See Babbette E.L. Boliek, Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers, 81 Fordham L. Rev. 3339, 3341–42 (2013) (discussing the emergency rule-making procedure of state and federal agencies).

[30] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2246 (2001).

[31] Posner & Vermeule, Crisis Governance, supra note 8, at 1615.

Kagan's story is one about the value of presidential control of the administrative state, and is accompanied by a request that courts defer when the White House has acted; she views the advantages of this deference as the benefits of electoral accountability and administrative coherence—advantages often cited when the President's role is examined. As Kagan argued, "[I]n comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."[32]

Posner and Vermeule's vision is more focused on crisis response. They argue that the President is best suited to react quickly to a crisis and, indeed, because of our governance traditions, the only government body positioned to adequately respond to a dramatic shock.[33] They argue that, "In the modern administrative state, it is practically inevitable that legislators, judges, and the public will entrust the executive branch with sweeping power to manage serious crises . . . [for] other actors have no real alternative."[34] Accordingly, they view the radical steps taken by the executive branch during the financial crisis as almost by definition appropriate (or, at the very least, inevitable), for no alternative institution for the taking of such steps exists. The coordinate branches "rationally submit[] to executive leadership because a crisis can be addressed only by a leader."[35]

The presidentialist view, however, is not consistent with some cherished constitutional traditions. The *Steel Seizure* case is one of the most celebrated in constitutional law, and it was, at bottom, a judicial declaration that emergency powers seized by the executive would be subject to more, rather than less, scrutiny.[36] In that case, the U.S. Supreme Court held that President Truman lacked the power to seize steel production

[32] Kagan, supra note 30, at 2252.

[33] Posner & Vermeule, Crisis Governance, supra note 8, at 1679–81 (arguing that when a crisis occurs, "legislatures lack time, information, and the institutional mechanisms that are necessary for useful deliberation," while "[t]he pattern of a strong executive with primacy during financial crises was established [during Roosevelt's New Deal response to the Great Depression], and it has lasted to this day. It is the normal mode of crisis governance in the administrative state").

[34] Id. at 1614.

[35] Id. at 1665.

[36] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 588–89 (1952).

facilities in order to avoid a strike, even though the war was cited as a basis for action.[37]

Moreover, the Posner and Vermeule super-deference approach was conceived as a defense of the executive prerogative displayed during the war on terror. But many observers have decried executive unilateralism during the war and have called for stronger, rather than more deferential, judicial oversight of the government's emergency measures.[38]

These critics have accordingly bemoaned recent decisions such as last year's *Clapper v. Amnesty International USA*,[39] in which the Supreme Court held that potential subjects of government cross-border eavesdropping investigations did not, without more, have standing to challenge the constitutionality of the eavesdropping.[40] (One critic, Steven Vladeck, described that decision as "'the coffin . . . slamming shut on the ability of private citizens and civil liberties groups to challenge government counterterrorism policies."[41])

In a crisis where the government's response quite literally destroyed fortunes, it is reasonable to expect that courts might usefully provide a check on executive overreach; that would be consistent with the *Steel Seizure* principle. This response need not come in the form of immediate injunctions. Especially where money is at stake, money is almost always a sufficient remedy, and monetary remedies can even be obtained through the ordinary process of APA review, if the relief offered is a return of property, for example. And where dramatic, irreversible action is

[37] Id. at 583, 588–89.

[38] See, e.g., Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029, 1051–52 (2004) (arguing for oversight committees during crisis periods, chaired by a member of the minority party in order to ensure they are not "lap dogs for the Executive"); Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314, 2348 (2006) (arguing for the return from an "extremely powerful executive branch . . . to a tradition of divided government that has served our country well"); Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259, 1267 (2002) (arguing for more congressional involvement to provide transparency in times of crisis).

[39] Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

[40] Adam Liptak, Justices Reject Legal Challenge to Surveillance, N.Y. Times, Feb. 27, 2013, at A1; see also Lyle Denniston, Opinion Recap: Global Wiretap Challenge Thwarted, SCOTUSblog (Feb. 26, 2013, 5:34 PM), http://www.scotusblog.com/2013/02/opinion-recap-global-wiretap-challenge-thwarted/ (lamenting the Supreme Court trend of "insulating highly secret government war programs from judicial review in the regular federal court system").

[41] Vladeck's observation graced the *New York Times*. Adam Liptak, Justices Turn Back Challenge to Broader U.S. Eavesdropping, N.Y. Times (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html.

on the table, strictly targeted review schemes can also allow courts to supervise without rendering them blockades to quick action.

B. Are Courts Vehicles for Vindictiveness?

If the presidential deference school has looked, at times, excessively committed to executive discretion, those who have sought more litigation, and particularly more prosecutions, have looked capable of vindictiveness. These observers are surprised, perhaps (as am I), at how rarely the government has sought to impose individual responsibility on financiers for conduct that led to the crisis, given how frequently that has been a feature of the standard toolkit for responding to prior crises.[42]

But the prosecution proponents have not always done a good job of explaining *why* more judicial involvement would be so great. Occasionally, this sort of critique has seemed like anger at bankers for receiving disproportionate rewards for what turned out to be exceptionally risky behavior, while socializing the expense of the downside,[43] or inchoate suspicions that the executive branch has been captured by financial interests,[44] rather than a preference for judicial involvement.

Those calling for more cases must respond to an objection about criminal prosecution widely held among corporate legal scholars, who have viewed it in the past as an unattractive and random scapegoating of business leaders that caters to mob sentiments and often is used to mask the lack of effective regulation that should have prevented the risky behavior before the fact.[45] Corporate scholars have come to expect that in

[42] See generally Jesse Eisinger, The Trade: In JPMorgan Scrutiny, Critical Questions Left Unasked, N.Y. Times, May 17, 2012, at B4 ("As a society, we have thrown up our hands at Too Big to Prosecute financial fraud.").

[43] See, e.g., Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, at xvii, xix (2011), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (finding that the financial crisis "was the result of human action and inaction, not of . . . computer models gone haywire," and that "[c]ompensation systems—designed in an environment of cheap money, intense competition, and light regulation—too often rewarded the quick deal, the short-term gain—without proper consideration of long-term consequences").

[44] Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class 304–05 (2011); Simon Johnson & James Kwak, 13 Bankers: The Wall Street Takeover and the Next Financial Meltdown 185–89 (2011).

[45] See, e.g., Peter J. Henning, Making Sure "The Buck Stops Here": Barring Executives for Corporate Violations, 2012 U. Chi. Legal F. 91, 104 ("The criminal law has come to be

the aftermath of a collapse in a particular firm or even in a marketplace, criminal sanctions will follow, and many have bemoaned this as over-criminalization of corporate law.[46] Christine Hurt has characterized it as an even more profound undercivilization of the regulation that should have made after-the-fact scapegoating unnecessary.[47]

A stronger case for the role of the judiciary would focus on its example-making function, even as it allows for some disquiet at some headline news prosecutions.[48] The theory here is that the uniquely ceremonial nature of a judicial proceeding followed by a verdict makes it ideal for regulation that seeks to reform by example rather than by consistency.[49] The example-making story about enforcement would have tolerance for convictions of egregious conduct committed by many but prosecuted only in a few instances. It might understand the limitations of prosecutorial and judicial resources to require this sort of cherry-picking and it would make peace with the idea that limited enforcement might have an *in terrorem* effect on potentially non-compliant unprosecuted peers.

seen by many, including legislators, as just another tool to police business practices that were usually not subject to the scrutiny of law enforcement, and the logical result is to look for a few scapegoats to be thrown in jail."); Richard Lieberman, Corporate Governance Lessons from the 2008 Financial Crisis: Assessing the Effectiveness of Corporate Governance Through a Look at Troubled Companies, 64 Consumer Fin. L.Q. Rep. 425, 425 (2010) (asking whether it is appropriate to blame corporate boards of directors for the financial crisis).

[46] See Richard Bierschbach & Alex Stein, Overenforcement, 93 Geo. L.J. 1743, 1771–75 (2005) (describing problems related to the overenforcement of corporate criminal liability); Geraldine Szott Moohr, Prosecutorial Power in an Adversarial System, Lessons from Current White Collar Cases and the Inquisitorial Model, 8 Buff. Crim. L. Rev. 165, 168 (2004) (noting the "quasi-inquisitorial process" of white-collar prosecutions); see also Richard A. Bierschbach & Stephanos Bibas, Notice-and-Comment Sentencing, 97 Minn. L. Rev. 1, 13 (2012) (arguing that "prosecutorial discretion is standardless and opaque" and does not always serve society's best interests).

[47] Christine Hurt, The Undercivilization of Corporate Law, 33 J. Corp. L. 361, 365–67 (2008).

[48] See, e.g., Joseph Karl Grant, What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008–2009 American Capital Markets Crisis, 73 Alb. L. Rev. 371, 419 (2010) (suggesting that sometimes it is important to "mete out tough love," and that it may be useful at times to "make[] an example of one or a handful of risk takers who get in over their heads," although it is important to consider the potential impact on the overall economy).

[49] See Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1531 (2000) (discussing an "expressive theory of law (or morality) as a comprehensive theory of legal (or moral) wrongs").

II. GOVERNMENT AS DEFENDANT

The government acted radically during the financial crisis, and even encouraged the courts to do some typical administrative law supervision of that action. However, such supervision has been almost singularly absent. This Part makes that case, and in so doing offers a comprehensive account of how the administrative law of the financial crisis has developed.

It, and the other Parts along with it, is meant to be a first draft of the judicial history of the crisis. The Part concludes with some proposals that would enhance the judicial role in the future, if economic crises happen and courts are called to respond modestly to what the executive is doing about them.

During the crisis, the government rescued some financial institutions, arranged mergers with others, shuttered some others, and eventually used a funding statute from Congress to bail out most of the banks of any size in the financial sector. It also rescued automakers and money market funds, and even extended massive credit to foreign governments. In none of these cases were these actions subject to judicial review.

This is not to say there will never be an opportunity to test the government's financial crisis response in a court of law. Sometimes it takes time before government policy receives a judicial airing. The constitutionality of the Public Company Accounting Oversight Board ("PCAOB"), a reform occasioned by the dotcom crisis, was only resolved definitively by the Supreme Court eight years after its creation.[50] But at this point, with statutes of limitations for potential causes of action against the government expired or close to expiring, it is unlikely that the picture will change.

This Part reviews the administrative law role that the courts could have played, but did not play, in the aftermath of the financial crisis. It recounts the fate of suits against the government; one interesting fact about those suits is that there are so few of them. Another is that they are

[50] The Sarbanes-Oxley Act, which created the PCAOB, was enacted in 2002. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–109, 116 Stat. 745, 750–53 (codified at 15 U.S.C. §§ 7201–7219 (2012)). The Supreme Court did not rule on the constitutionality of the PCAOB's removal provisions until 2010. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010) (holding that the removal process for the PCAOB's members contravened Article II of the Constitution).

creative, with almost no traditional administrative lawsuits against the government.

The lawsuits that have been filed are an interesting and disparate group, raising largely constitutional challenges to what the government did. The creativity of these challenges suggests that, for a variety of reasons, the courts have not been able to perform the sort of ordinary administrative law role that we ordinarily expect in cases where the government devises a broad new regulatory program.

There are practical reasons for this dog that did not bark: standing; the financial industry's lack of attempts, with few exceptions, to take the government to court; and courts' tendency to avoid passing judgment on policies pursued by leading financial regulators.

This is disappointing, though not a judicial outrage, and so the prescription offered in this Article is modest, though it would likely do some good. If the courts want to do a better job of policing government excesses during the next financial crisis, they should reevaluate some of the standing doctrines that deter many potential plaintiffs from pursuing administrative law claims and cautiously embrace (as they are beginning to do) the possibility that takings claims could perform a useful disciplining of ad hoc forced bankruptcies and mergers. Congress could also set up specific short-fused review provisions if it would prefer earlier judicial review of government action.

A. TARP and Rescue Lawsuits

Congress hoped for more judicial review of the government's action during the rescue than it got—the final version of the bailout statute, the Emergency Economic Stabilization Act ("EESA"), provided for judicial review[51]—and the difference between what it authorized and what the

[51] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 119, 122 Stat. 3782, 3787 (codified at 12 U.S.C. § 5229 (2012)). Congress provided in § 119 of the EESA that, "Actions by the Secretary pursuant to the authority of this Act shall be subject to chapter 7 of title 5, United States Code, including that such final actions shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law." Id. § 119(a)(1). For what it is worth, the meaning of this seemingly clear judicial review provision became the subject of some controversy in the academic literature. The problem was that Congress confusingly added that, "No injunction *or other form of equitable relief* shall be issued against the Secretary for actions pursuant to section 101 [the power granting section] . . . other than to remedy a violation of the Constitution." Id. § 119(a)(2)(A) (emphasis added). But because arbitrary and capricious review under the Administrative Procedure Act is generally thought of as equitable relief, it was never entirely clear what ex-

courts actually ended up hearing is striking. Congress's insistence on some judicial review did not, in the end, result in much actual supervision.

As the crisis was ongoing, the judicial silence was palpable; judicial review was limited to a somewhat political claim against the auto bailout, in which the government expensively provided emergency funds to General Motors and Chrysler to avoid their impending bankruptcies. Some dissident Chrysler debt holders, including a state of Indiana pension fund managed by Republican officeholders, unsuccessfully argued that the Troubled Asset Relief Program ("TARP"), which was the program defining how the EESA funds were spent, should not be used for auto manufacturers.[52] The plaintiffs claimed that Chrysler was not a "financial institution" under any normal understanding of the term, but the court did not reach that question, deciding that the pension fund was unable to allege injury.[53] The Chrysler challenge, however, never reached a federal appellate court for consideration on the merits, and it was rare.

The remaining litigation arising under TARP was filed by unlikely and poorly advised plaintiffs. Pro se homeowners, for example, eyeing mortgage relief, tried to argue that TARP obligated the banks to re-

actly Congress wanted the courts to do when reviewing an admittedly broad swath of the Treasury's bailout implementation actions. For more on this, see Davidoff & Zaring, supra note 9, at 520; Posner & Vermeule, Crisis Governance, supra note 8, at 1634 (suggesting that "Congress merely intended to bar parties from obtaining advance relief against the secretary's decisions, while still allowing parties to obtain relief after the fact"); William Perdue, Note, Administering Crisis: The Success of Alternative Accountability Mechanisms in the Capital Purchase Program, 29 Yale L. & Pol'y Rev. 295, 312 (2010) (noting that the "second provision effectively eliminates all judicial review conferred by the first provision").

[52] This claim was dismissed, somewhat bizarrely, for lack of standing. In re Chrysler, Inc., 405 B.R. 79, 83 (Bankr. S.D.N.Y. 2009) (dismissing a claim that TARP could not be used to bail out an auto manufacturer).

[53] Id. at 82–83. For more on why the Chrysler plan was anti-investor, see Adam J. Levitin, David A. Skeel, Jr. & Stephen J. Lubben, Legislative Update: Is Government "Abusing" Lenders?, 31 Am. Bankr. Inst. J. 10, 71 (2012) (debating whether investors in the "old" Chrysler were harmed (although the court held the pension fund was not harmed and thus had no standing) because the sale price of the assets was too low, "siphoning off value from the creditors of Old Chrysler . . . to the owners of New Chrysler"); see also Stephen J. Lubben, No Big Deal: The GM and Chrysler Cases in Context, 83 Am. Bankr. L.J. 531, 539–47 (2009) (arguing that the academic criticism of the Chrysler and GM bankruptcies by Skeel and others does not stand up to careful scrutiny).

finance their loans.[54] Pro se taxpayers brought their own creative claims against the legality of TARP. These claims uniformly failed.[55]

The most traditional challenge to the American government's bailout policies has come in the form of the suit brought by various hedge funds over the way the government has treated the remaining shareholders of Fannie Mae and Freddie Mac, the mortgage insurers that collapsed with the collapse of housing prices, requiring a massive government bailout.[56] In July 2013, the hedge fund Perry Capital filed suit against the Treasury Department and the Federal Housing Finance Agency ("FHFA") under the APA and the Housing and Economic Recovery Act ("HERA"), seeking reversal of a new dividend payout plan that, it alleged, had been imposed arbitrarily.[57] Others have since joined the litigation.

During the crisis, the government took over the giant firms and appointed the FHFA conservator, meaning that the agency was charged with preserving as much as it could of the institutions. It had one hundred percent of the governance of the housing giants, but did not, somewhat mysteriously, take over one hundred percent of the shares. At first,

[54] Guthrie v. Bank of Am., Civ. No. 12-2472 ADM/LIB, 2012 WL 6552763, at *8 (D. Minn. Dec. 14, 2012) (denying a pro se plaintiff a private right of action under the EESA against a foreclosing lender); First Citizens Bank & Trust Co. v. Spirakis, No. 4:11-CV-02895-RBH, 2012 WL 1952677, at *3–4 (D.S.C. May 30, 2012) (dismissing claim for equal protection and due process violations arising out of a foreclosure for not providing the homeowner with financial assistance under the EESA); Mangosing v. Wells Fargo Bank, N.A., No. CV-09-0601-PHX-FJM, 2009 WL 1456783, at *1 (D. Ariz. May 22, 2009) (dismissing a pro se claim that the EESA obligated the bank to renegotiate a mortgage); see also Santos v. Countrywide Home Loans, No. Civ. 2:09-02642 WBS DAD, 2009 WL 3756337, at *5 (E.D. Cal. Nov. 6, 2009) (dismissing the case because the complaint did not contain "a single claim upon which relief could be granted"); Ramirez v. Litton Loan Servicing LP, No. CV-09-0319-PHX-GMS, 2009 WL 1750617, at *1 (D. Ariz. June 22, 2009) (dismissing the case for lack of a "cognizable legal theory"); Farrell v. United States, No. 09-209C, 2009 WL 3719211, at *1 (Fed. Cl. Oct. 30, 2009) (dismissing the claim that "various governmental agents conspired to . . . destroy the housing market and deliver a windfall bailout to various financial institutions which participated in the conspiracy").

[55] See Murray v. Geithner, 624 F. Supp. 2d 667 (E.D. Mich. 2009) (denying a motion to dismiss a taxpayer claim that the bailout of AIG, which has Sharia-compliant products, violated the Establishment Clause); Murray v. U.S. Dep't of Treasury, 681 F.3d 744 (6th Cir. 2012) (affirming the grant of a motion for summary judgment in a later proceeding in the same case); see also Eric Thayer, Supreme Court Rejects Taxpayer Challenge to AIG Bailout, Reuters (Dec. 10, 2012, 10:09 AM), http://www.reuters.com/article/2012/12/10/us-usa-court-taxpayer-aig-idUSBRE8B90P120121210 (describing the *Murray* case).

[56] See Davidoff & Zaring, supra note 12 ("The government's failure to cleanly deal with Fannie and Freddie is coming back to haunt it with Perry Capital's suit.").

[57] Complaint and Prayer for Declaratory and Injunctive Relief at 32–33, Perry Capital LLC v. Lew, No. 1:13-cv-1025 (D.D.C. July 7, 2013).

these shares seemed valueless, as Fannie and Freddie required truly massive government support. But as the housing market improved, the finances of the institutions did as well, to the point where they generated substantial profits. At that point, the government restructured the companies' dividend programs to provide that the Treasury receive all of the companies' declared dividends without any reduction or increase in its stock holdings.[58] The plaintiffs claim that such an arrangement allows the Treasury to siphon off all of the companies' earnings at the expense of private sector shareholders—thus amounting to arbitrary and capricious action in violation of the APA and in possible disregard of HERA requirements that exercise of the powers in that statute be done in a way "necessary to (1) provide stability to the financial markets; (2) prevent disruptions in the availability of mortgage finance; and (3) protect the taxpayer."[59]

The controlling shareholder of a privately held company would not be able to take such actions against minority shareholders in most cases, and so the nature of the plaintiffs' administrative law claims is that government action when in the same position is arbitrary and capricious.[60]

B. Takings Challenges

Although the constitutional claims against the government's action during the financial crisis have also been few and far between, there have been some creative efforts to contest what has happened.

Perhaps the most interesting claims against the government have been made under the Takings Clause; these are the claims most likely to result in judicial review of the government's crisis response—but even there,

[58] Joe Schneider & Clea Benson, Perry Capital Sues U.S. Treasury over Fannie Mae Takeover, Bloomberg (July 7, 2013), http://www.bloomberg.com/news/2013-07-07/perry-capital-sues-u-s-treasury-over-fannie-mae-takeover.html ("Treasury amended the terms of the bailout and began taking all of Fannie Mae and Freddie Mac's quarterly profits instead.").

[59] 12 U.S.C. § 1719(g)(1)(B) (2012); Complaint and Prayer for Declaratory and Injunctive Relief, supra note 57, at 32–33.

[60] Consolidated Amended Class Action and Derivative Complaint at 43, In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs., No. 1:13-mc-1288-RLW (D.D.C. Dec. 3, 2013); Complaint at 33, Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency, No. 1:13-cv-1053-RLW (D.D.C. July 10, 2013); Complaint and Prayer for Declaratory and Injunctive Relief, supra note 57, at 26; Complaint at 33, Fisher v. United States, No. 1:13-cv-608-MMS (Fed. Cl. Aug. 26, 2013); Complaint at 27, Fairholme Funds, Inc. v. United States, No. 1:13-cv-465-MMS (Fed. Cl. July 8, 2013).

the litigation is creative, unorthodox, and by no means assured of a result.

Three takings challenges are of particular note. One was filed by the former CEO of AIG over the government's takeover of that company. Auto dealers whose franchises were revoked after the bailout and bankruptcy of GM and Chrysler brought a second. A third has been pursued by investors in Fannie Mae and Freddie Mac. We have seen their view of the government conduct as a matter of administrative law, but some of these Fannie Mae and Freddie Mac plaintiffs have brought takings claims as well.

These takings suits are, essentially, the only way that the government's action during the crisis will be evaluated by the courts—but that fact alone is noteworthy, because the takings theories are unconventional.

1. GM and Chrysler Franchisees

In the wake of the collapse of the economy in 2008, two American automakers warned the government that they would be unlikely to survive the downturn in demand for their cars. The government bailed out these automakers—GM and Chrysler—but it extracted some substantial conditions in exchange for its agreement to do so. Chrysler was paired off with an Italian automaker, General Motors was forced to fire its chief executive, and both companies were ordered to rid themselves of a number of their franchisees—auto dealers across the country that sold GM and Chrysler cars, but at inefficient amounts.[61]

The owners of franchises whose relationships with GM and Chrysler were terminated in the wake of the bailout of those two companies have sued the government under the Takings Clause; their theory was that the government made the takeover decisions in contravention of that clause's just compensation requirement.[62] The franchisees survived motions to dismiss and an interlocutory appeal, suggesting a colorable

[61] As part of the order, the automakers terminated a little under two thousand franchise dealerships. Nick Bunkley, G.M. Tells 1,100 Dealers It Plans to Drop Them, N.Y. Times (May 15, 2009), http://www.nytimes.com/2009/05/16/business/16auto.html ("The letters to [1100] G.M. dealers arrived just one day after Chrysler sent similar notices to 789 dealers. . . . 'They're dealerships that [were] in most cases hurting, losing money and in danger of going out of business anyway.'" (quoting GM's vice president for North American sales and marketing, Mark LaNeve)).

[62] See Maltby & Loten, supra note 10.

claim, and while the litigation, as of this writing, has not yet concluded, the government has taken the risk seriously. One problem was that the franchisees had been deprived of something valuable, but not *all* of the value of their businesses, which is one way to make a regulatory takings claim stick; they held on to their real estate, their franchises with other non-nationalized manufacturers, their service bays, and so on.[63]

However, the way the bailouts were handled—with no pre-deprivation notice, no process, and little post-deprivation opportunity to appeal—certainly appeared to implicate the Takings Clause.[64] It was this sort of factual predicate that met with judicial receptiveness: The trial court was bothered by "the possibility that plaintiffs' loss of personal property was the direct, natural, or probable result of the Government's actions, . . . and 'regulation by deal.'"[65] The Federal Circuit agreed.[66]

Takings doctrine might look like a promising way of disciplining the federal government without enjoining it in the middle of desperate times, and one of the claims made in this Article is that it indeed could be. But under present doctrine, these sorts of cases face hurdles. One involves the role of the bankruptcy court; a suit concerned with the action of a court would likely not have been possible until recently, as it depends on the automaker's bankruptcy process being akin to a judicial taking, which the Supreme Court only recently recognized as possible.[67]

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[63] Colonial Chevrolet Co. v. United States, 106 Fed. Cl. 619, 622 (Fed. Cl. 2012).

[64] See David T. Zaring, A Lack of Resolution, 60 Emory L.J. 97, 134–35 (2010) (explaining that lack of pre-deprivation notice and the opportunity to have a fair hearing leads to a need to apply the three-part test in *Matthews v. Eldridge*, 424 U.S. 319 (1976), to determine if a taking without due process has occurred).

[65] Alley's of Kingsport v. United States, 103 Fed. Cl. 449, 454 n.6 (Fed. Cl. 2012) (citing Davidoff & Zaring, supra note 9, at 536, 541 ("[R]egulation by deal is yet another example of administration through an alternative to the traditional administrative law . . . . [I]n future emergencies the government may manage its authority limitations through regulation by other means when it is unable to turn to a legislative response due to political, timing, or other constraints. This may be regulation by deal.")).

[66] A & D Auto Sales v. United States, 748 F.3d 1142, 1153 (Fed. Cir. 2014) ("[S]uch actions may give rise to takings liability depending on the circumstances.").

[67] See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010) (plurality opinion) (holding that a decision by a court allocating property rights between parties could constitute an unconstitutional taking); see also Case Comment, Takings Clause—Judicial Takings, 124 Harv. L. Rev. 299, 300–02 (2010) (discussing *Stop the Beach Renourishment, Inc.*).

The relationship between bankruptcy and takings, however, poses other problems to the plaintiffs.[68] Bankruptcy, after all, is a solution to a collective action problem. The justification for bankruptcy is that it doesn't make anyone worse off, and if the auto dealers would not have been worse off in the absence of the rescue—say, if the company would have totally collapsed without the government intervention—then their property has not been taken. "[T]here can be no regulatory taking without a showing of but-for decline in value," as the Federal Circuit said in the case.[69] And given that GM and Chrysler sought the bailout, there is some evidence that this may have been the case.

On the other hand, as the *Steel Seizure* case showed, just because there is an emergency does not mean that it is time for willy-nilly nationalization. It is likely that future takings cases brought in the wake of government crisis responses will turn on the sort of difficult counterfactuals that ask a court to decide what would have happened if the government had not intervened.

2. The AIG Cases

When the country's largest insurance company, AIG, collapsed, the depth of the financial crisis grew stark; the government quickly stepped in to take over the company and make good on the credit default swaps that had driven AIG to ruin.[70] But in doing so, it rendered the stock of

[68] See James Steven Rogers, The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause, 96 Harv. L. Rev. 973, 997–98 (1983) (arguing that it is the Bankruptcy Clause, and not the Fifth Amendment, that limits congressional power in this area of legislation); David A. Skeel, States of Bankruptcy, 79 U. Chi. L. Rev. 677, 682 (2012) (noting that "[l]aws that alter the parties' nonbankruptcy entitlements are likely to be subject to more searching scrutiny under the Contracts and Takings Clauses of the Constitution, for instance, if they are not enacted under the Bankruptcy Clause"); see also David A. Skeel & Thomas H. Jackson, Transaction Consistency and the New Finance in Bankruptcy, 112 Colum. L. Rev. 152, 155 (2012) (noting the exemption of "derivatives, repos, and other financial innovations" from the conventional bankruptcy scheme).

[69] *A & D Auto Sales*, 748 F.3d at 1157.

[70] As part of "the most radical intervention in private business in the central bank's history," the Federal Reserve committed $85 billion to rescue the insurance company. Edmund L. Andrews et al., Fed's $85 Billion Loan Rescues Insurer, N.Y. Times (Sept. 16, 2008), http://www.nytimes.com/2008/09/17/business/17insure.html?pagewanted=all&_r=0; Matthew Karnitschnig et al., U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up, Wall St. J. (Sept. 16, 2008, 11:59 PM), http://online.wsj.com/news/articles/SB122156561931242905. For a pictorial presentation of the major events, see Steve

the company all but worthless. AIG's largest shareholder, Starr International, a firm headed by former AIG CEO Maurice Greenberg, sued the government, arguing that some provisions of the government's bailout violated the Takings Clause.[71] Starr hired the well-known lawyer David Boies to handle the case, a statement of intent.[72]

Starr, like the auto dealers, has a volunteer problem.[73] Because AIG's management consented to (and indeed, even hoped for) the bailout,[74] the question arises as to whether its consent should also bind shareholders like Starr.[75]

Since the shares were not taken from Starr (though they declined in value substantially), the *Starr* case, like those of the auto franchisees, is not a categorical takings claim as in *Lucas v. South Carolina Coastal Council*.[76] Instead, it implicates the three-factor *Penn Central* test, which considers (1) the economic impact of the government action on property, (2) the extent to which the government action undermined "investment-backed expectations," and (3) the character of the government action.[77] The government has, in the past, found this test forgiving.[78]

Schaefer, AIG: Bailout in Brief, Forbes, http://www.forbes.com/pictures/eddk45fdkmh/aig-bailout-in-brief/ (last visited Feb. 18, 2014).

[71] Jonathan Stempel, Greenberg Sues U.S. for $25 Bln over AIG Takeover, Reuters (Nov. 21, 2011, 7:23 PM), http://www.reuters.com/article/2011/11/22/aig-greenberg-lawsuit-idUSN1E7AK20520111122.

[72] Gretchen Morgenson, Greenberg Sues U.S. over A.I.G. Takeover, N.Y. Times, Nov. 22, 2011, at B2.

[73] See Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (holding that the "element of required acquiescence" is key to a takings claim (quoting FCC v. Fla. Power Corp., 480 U.S. 245, 252 (1987))).

[74] Edmund L. Andrews, Michael J. de la Merced & Mary Williams Walsh, Fed in an $85 Billion Rescue of an Insurer Near Failure, N.Y. Times, Sept. 17, 2008, at A1.

[75] Liam Pleven & Serena Ng, Greenberg Sues U.S. over AIG Rescue, Wall. St. J., Nov. 22, 2011, at C3.

[76] Morgenson, supra note 72. A categorical taking occurs where regulations "compel the property owner to suffer a physical 'invasion' of his property" or "den[y] all economically beneficial or productive use of land." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

[77] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[78] Ilya Somin, Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law 14–15 (George Mason Law & Econ. Research Paper Series, Paper No. 08-53, 2008), available at http://ssrn.com/abstract=1247854; see also J.W. Verret, Treasury, Inc.: How the Bailout Reshapes Corporate Theory and Practice, 27 Yale J. on Reg. 283, 309–10 (2010) (explaining that all three prongs have historically been difficult for plaintiffs to meet); Ilya Somin, Takings Issues in the AIG Bailout Litigation, Volokh Conspiracy (Nov. 27, 2011, 9:28 PM), http://www.volokh.com/2011/11/27/takings-issues-in-the-aig-litigation/ (discussing this issue in the context of the AIG takings suit).

And even if the shares were taken, there is the question of damages. Citizens victimized by takings are entitled to fair market value compensation for their property,[79] but it is difficult to make that sort of calculation for the stake of a company teetering on the edge of insolvency.[80] (Starr has, nonetheless, asked for twenty-five billion dollars.[81])

Still, there is some meat to these sorts of suits, few though they have been. One court has concluded that "a shareholder would have some damages remedy in the event a Federal Reserve Bank grossly abused its duties after taking control of the bank."[82] AIG's lawyer has rated Starr's chance of success as at least one in five (and a twenty percent chance at a twenty-five billion dollar claim has a substantial expected value),[83] and Starr won some early joy from the courts in its efforts.[84]

AIG's bailout terms were tougher than those received by other financial institutions, as the government itself has recognized. In 2009, the Federal Reserve lowered the rather punitive interest rate on a large loan it made to AIG, which the company said would save it approximately one billion dollars per year. The Treasury's exchange of forty billion dollars in preferred shares for new ones that came without a dividend also represented leniency—it perhaps saved the insurer an estimated twenty billion dollars.[85] Starr argued that this relaxation of the tough initial

[79] See United States v. 564.54 Acres of Land et al., 441 U.S. 506, 510–11 (1979) (holding that the just compensation clause of the Fifth Amendment requires an awareness of fair market value when a taking is shown).

[80] See Huntington Towers, Ltd. v. Franklin Nat'l Bank, 559 F.2d 863, 868 (2d Cir. 1977) (holding that giving government bailout funds to a bank in danger of insolvency is a matter within the concerned public officials' competence and authority, and was the type of action contemplated by Congress in creating the Federal Reserve System).

[81] Tom Schoenberg, Greenberg's Starr Sues U.S. for $25 billion on AIG Bailout, Bloomberg (Nov. 21, 2011, 6:34 PM), http://www.bloomberg.com/news/2011-11-21/starr-international-files-suit-in-court-of-claims-clerk-says.html.

[82] Starr Int'l Co. v. Fed. Reserve Bank of N.Y., 906 F. Supp. 2d 202, 251 n.39 (S.D.N.Y. 2012).

[83] See Arthur D. Postal, AIG Sees Low Chance of Greenberg Lawsuit Success, LifeHealthPro (Jan. 24, 2013), http://www.lifehealthpro.com/2013/01/24/aig-sees-low-chance-of-greenberg-lawsuit-success (quoting AIG counsel's advice to the company board).

[84] It prevailed on a motion to dismiss, most notably. See Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 62, 66–87 (Fed. Cl. 2012) (finding that the plaintiff met the standing requirements and sufficiently alleged a takings claim). The Court of Federal Claims later denied the government's motion for reconsideration. See Starr Int'l Co. v. United States, 107 Fed. Cl. 374, 376 (Fed. Cl. 2012).

[85] AIG, of course, had to consider whether to take up the lawsuit proffered by Starr and Greenberg. Shareholder derivative suits require demand to be made on the company, and the company board is required under Delaware law to consider that suggestion. Stephen Bain-

terms of the takeover compared unfavorably with the one hundred cents on the dollar bailout that the company's counterparties received for the credit insurance they bought from AIG.

The government also relied on corporate shenanigans that intimate that the courts might use the Takings Clause to review *how* the government went about the rescue process. After AIG's non-Treasury shareholders rejected a vote to convert the Treasury's preferred stock to common stock, the government allegedly forced a second vote, by a broader class of shareholders, which permitted the conversion and seriously diluted the stakes of those who had voted down the original conversion.[86] In corporate law, this would likely constitute shareholder oppression; it is also part of Starr's case against the government.

3. Fannie and Freddie

Shareholders of Fannie Mae and Freddie Mac have some hope that the Takings Clause can benefit them, in that the United States may have taken their property by regulation and arguably impaired their contractual rights—the rights encompassed by their shares—with the firm by refusing to pay dividends.

The regulatory taking is more straight-forward to understand but never easy to win. In cases where a regulatory scheme does not involve a physical invasion or occupation of property, the Supreme Court "has generally been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action" result in a compensable taking.[87] The Court, however, has identified three factors to consider when determining whether a governmental action has exceeded "regulation" to become a "taking." Those factors are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[88]

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bridge, Corporate Law 203–04 (2d ed. 2009). The possibility that AIG might sue the government after the government bailed it out caused some hesitation, and the company elected not to participate.

[86] See John Carney, Why AIG Suing America Isn't as Crazy as You Think, CNBC (Jan. 8, 2013, 3:51 PM), http://www.cnbc.com/id/100364058.

[87] Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)) (internal quotation marks omitted); accord Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295–96 (1981) (applying the "economically viable use" test in determining the existence of a regulatory taking).

[88] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

Banks, as institutions rather like government-sponsored enterprises ("GSEs"), have never had much luck arguing that seizures of their assets via the Federal Deposit Insurance Corporation's ("FDIC") resolution authority implicate the Takings Clause. The Federal Circuit has held that, "Given the highly regulated nature of the banking industry, . . . the [federal regulators' seizure of the bank] could not possibly have interfered with a reasonable investment-backed expectation on the part of [the owners of a bank]."[89] Accordingly, "The Federal Circuit has never upheld a claim that a seizure of a financial institution under the statutes and regulations designed to insure safe and secure banking institutions constituted a taking."[90]

Nonetheless, in *First Hartford Court Pension Plan and Trust v. United States*, the Federal Circuit held that the shareholders of the failed thrift might be able to raise a takings claim against the FDIC if, after the thrift passed through receivership and was reconstituted, there was money left over in the corporate shell of the original thrift.[91] Critically, the court in *First Hartford* held not only that the shareholders had standing but also that they could proceed despite the FDIC's assumption of all of the shareholders rights because of the FDIC's manifest conflict of interest and refusal to sue.[92]

C. Conclusion

The administrative law role played by the courts in the wake of the financial crisis has turned out to not be much of a role at all. Instead, it is only a set of idiosyncratic constitutional law cases that promise to hold up the actions of the executive branch and Congress to judicial scrutiny. As hard as it is to imagine that an important government program like the crisis response could receive so little review in other contexts, the combination of finance, emergency, and standing has denuded the field of potential plaintiffs and resulted in only a modest amount of scrutiny from the courts.

To be sure, reviewing the government's conduct during the financial crisis was never going to be easy, which may explain the creativity of

[89] Golden Pac. Bancorp v. United States, 15 F.3d 1066, 1074 (Fed. Cir. 1994).
[90] Franklin Sav. Corp. v. United States, 46 Fed. Cl. 533, 535 (Fed. Cl. 2000), aff'd, 97 F. App'x. 331 (Fed. Cir. 2004).
[91] 194 F.3d 1279, 1287–88 (Fed. Cir. 1999).
[92] Id. at 1295.

the efforts to subject it to judicial review, such as the Takings Clause claims and other constitutional challenges. The standing problems were always difficult, and the financial industry was reticent to stand on every jot and tittle of its rights as the government bailed it out. On the other hand, however, the statute authorizing the bailout did provide for judicial review, and that review has rarely been exercised.

The lack of suits against the government is partly attributable to the legal standing requirements that often trip up would-be litigants in cases against the government. The standing formula announced in *Lujan v. Defenders of Wildlife* requires every plaintiff to establish "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court.'"[93]

Although the EESA provided for judicial review, identifying an injury that would serve to ensure that standing could be satisfied is not easy to do—separating losses into those attributable to government interventions, as opposed to general market declines, is not simple. Many of the most logical plaintiffs—injured by onerous government requirements of stress testing, required to borrow from the government in the midst of the emergency, and affected, both competitively and as standalone institutions, by the rescues and forced mergers during the crisis—received substantial bailout funds and might have had their silence, in this way, purchased.

By the same token, the redressability question posed by sovereign immunity and other problems could have deterred disgruntled shareholders from bringing the kind of suits brought in the AIG context. With limited sovereign immunity waivers, damages are restricted and difficult to obtain.

There are some steps that the courts can take to rectify these problems in the future. Injury in these kinds of suits needs to be more broadly understood to include competitive injury (defined not just to include banks, but other industries that provide financial services), injury to shareholders, and possibly even injury to depositors. There is also room for a change in mood; when Congress offers broad jurisdictional waivers, the courts must put a thumb on the scale on the side of addressing the claims

[93] 504 U.S. 555, 560 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

of plaintiffs—something that might help shareholders or depositors bring claims related to future bailouts or forced deals.

Future plaintiffs may be found among the activist hedge funds, like Perry Capital, that hold, as a matter of course, bank stock, bonds, and the derivatives that reference them. These hedge funds would seemingly be well-placed to meet the standing requirements posed by future bailouts—if those requirements can contemplate injury shown by the decline in value of a broad array of financial instruments without requiring demand on the board of directors or other limitations that can bedevil would-be corporate and securities law plaintiffs.[94] Courts could facilitate these kinds of claims by taking a more liberal approach to empty voting, assessing injury through the impairment of futures and derivatives, and developing a generous perspective on financial injury.[95]

Congress could also usefully distinguish between emergency government action, for which the courts may indeed be ill-suited to intervene with injunctions and emergency temporary restraining orders, and more long-dated review, which might be more within their areas of expertise, where they find facts, assess blame, and condone or reject the government's action. There is no reason to leave this work to blue-ribbon commissions alone. Litigating cases, brought by those with skin in the game, is another way to test the legality of what the government did. In some ways, the takings cases exemplify the advantages of ex post review, which may explain why they went further than almost every other case filed to contest the executive branch's administration of the response to the crisis.

[94] Former SEC commissioner Troy Paredes believes that there may be a role for the devil's advocate in ordinary corporate governance. He has argued that:

> [A]ppointing a devil's advocate as part of corporate decisionmaking is the strong form of the consider-the-opposite strategy, and it could both reduce CEO overconfidence, meaning better decisionmaking in the first place before proposals reach the board, as well as embolden the board to veto or at least restructure ill-conceived projects that might otherwise be approved based on the CEO's endorsement.

Troy A. Paredes, Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance, 32 Fla. St. U. L. Rev. 673, 742–43 (2005).

[95] For a discussion of empty voting and phenomena like it, see Henry T.C. Hu & Bernard Black, The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership, 79 S. Cal. L. Rev. 811, 815 (2006) ("[T]he derivatives revolution in finance, especially the growth in equity swaps and other privately negotiated ('over-the-counter' or 'OTC') equity derivatives, and related growth in the share lending market, are making it easier and cheaper to decouple economic ownership from voting power.").

Long-dated sanctions are best suited toward monetary damages rather than injunctions aimed at long-past administrative action. It is these sorts of causes of action that could be authorized to permit the courts to review the government at some point, without necessarily limiting courts' emergency freedom of action. If injunctive relief is the only realistic option, then shorted-fused review provisions could also permit courts to provide a quick, but real, review of dramatic government efforts.

III. GOVERNMENT AS PLAINTIFF AND PROSECUTOR

We have become accustomed to seeing prosecutions in the wake of a financial crisis—sanctions meted out for the excesses of the last boom, often singling out particularly egregious cases of misconduct. The dot-com bust, for example, had its poster children in the Enron and WorldCom prosecutions.[96] The S&L crisis has its Keating Five.[97] And in the wake of the stock market crash of 1929, Ferdinand Pecora's commission named names and set blame.[98]

But almost none of this has happened in the wake of the current crisis. There have been almost no prosecutions. The quiet has led historian Ron Chernow to ask, "Where is our Ferdinand Pecora?"[99]

We have had a Pecora-the-plaintiff in lieu of a Pecora-the-prosecutor. In this Part, I document the government's efforts, such as they have been, to hold individuals responsible in court for misconduct during the crisis. They reflect a 180-degree change in post-crisis policy. Rather than using criminal prosecutions and the mail and wire fraud statutes, the government has instead looked to a mixed bag of civil sanctions, including some securities enforcement, FIRREA, and the False Claims

[96] See Ken Belson, Ex-Chief of WorldCom Convicted of Fraud Charges, N.Y. Times (Mar. 15, 2005), http://www.nytimes.com/2005/03/15/business/15cnd-ebbers.html?_r=0 (reporting on the sentencing of WorldCom's former CEO); John R. Emshwiller et al., Lay, Skilling Are Convicted of Fraud, Wall St. J., May 26, 2006, at A1 (describing the verdict in the case of Enron executives).

[97] See Richard L. Berke, Ethics Unit Singles Out Cranston, Chides 4 Others in S. & L. Inquiry, N.Y. Times, Feb. 28, 1991, at A1, available at http://www.nytimes.com/1991/02/28/us/ethics-unit-singles-out-cranston-chides-4-others-in-s-l-inquiry.html ("Senator Alan Cranston engaged in an impermissible pattern of conduct that might warrant disciplinary action by the full Senate." (internal quotation marks omitted)).

[98] Mark J. Roe, A Political Theory of American Corporate Finance, 91 Colum. L. Rev. 10, 38 (1991) (explaining that "the Pecora hearings were a conduit for populist sentiment to punish Wall Street").

[99] Ron Chernow, Op-Ed., Where Is Our Ferdinand Pecora?, N.Y. Times, Jan. 6, 2009, at A25, available at http://www.nytimes.com/2009/01/06/opinion/06chernow.html.

Act, a fraud statute ordinarily used against government contractors. It has preferred settlements paired with deferred prosecution agreements to lawsuits in almost every potential criminal case. In what follows, I review what we have learned from the government's enforcement practices in the wake of the crisis and the judicial response to them. I conclude with a consideration of whether the case for civil, rather than criminal, enforcement has been made.

A. Prosecutor

The prosecution story is a story of a dog that did not, and, at this point, almost certainly will not, bark.[100] Because the absence of criminal prosecutions was never the pre-financial crisis norm, it suggests a new policy on the part of the Justice Department—one cautious about pursuing white-collar crime as a sanction for risky behavior that both contributed to and came a cropper during a financial crisis.

There are good and bad reasons to cease using white-collar crime to regulate corporate misconduct during a disaster. It is a severe sanction and one that has, in the past, had some degree of mob justice. It has never been entirely predictable which wrongdoers would be subject to imprisonment, and whether their wrongdoing was substantially worse than that of others who were not prosecuted.[101] The interest of the govern-

[100] See A. Conan Doyle, The Hound of the Baskervilles (1902) (a story in which the legendary fictional detective Sherlock Holmes solves a mystery by learning that the local dogs did not bark when the crime was thought to have taken place).

[101] In the Enron prosecutions, for example, it was never clear whether Jeffrey Skilling, the CEO, and Kenneth Lay, the company Chairman, who both failed to detect the misconduct of Andrew Fastow, the CFO, should have received more severe sentences than Fastow and no opportunity to enter a plea bargain. See Ellen S. Podgor, White Collar Innocence: Irrelevant in the High Stakes Risk Game, 85 Chi.-Kent L. Rev. 77, 83 (2010) ("Fastow reached a plea with the government . . . that called for his extensive cooperation. . . . At sentencing, however, with no objection from the government, Fastow received a sentence of six years . . . [which] is a sharp contrast to the twenty-four plus years initially given to Jeffrey K. Skilling."). And some corporate law scholars still view the conviction and lifetime ban of Michael Milken from the securities industry with regret, given his central role in creating the still active "junk" bond market. See Daniel Fischel, Payback: The Conspiracy to Destroy Michael Milken and His Financial Revolution 167–78, 190–91 (1995) (arguing that Milken's role in developing innovations like junk bonds and leveraged buyouts was key in restructuring an outdated Wall Street system, and that Milken was unfairly targeted); Peter Truell, Milken Settles S.E.C. Complaint for $47 Million, N.Y. Times, Feb. 27, 1998, at A1, available at http://www.nytimes.com/1998/02/27/business/milken-settles-sec-complaint-for-47-million.html (reporting that Milken served twenty-two months in prison and is barred from the securities industry for life).

ment in perp walks, the handcuffing of executives for parades before the press, has seemed political and unseemly on occasion.[102] And the sentences are severe—disproportionately so, given the nature of the crimes, in the view of many.[103]

On the other hand, corporate executive prosecutions express, even if in a ham-handed way, intense dissatisfaction with business conduct that has led to broader economic suffering. After calamitous collapses in the financial markets, followed by an expensive rescue, intense dissatisfaction does not seem out of place. Moreover, criminal law has always proceeded by making examples of the few and deterring the rest, rather than by discovering and sanctioning every last bit of misconduct; in this sense it is hardly surprising that some financial executives might be held more accountable than others, if only because of the problems involved in allocating scarce prosecutorial resources.

Taking cases to the courts provides an opportunity to both publicly carry out a postmortem of the crisis and do it through a means in which the parties to the proceeding have skin in the game. Courts serving this function act—and always have acted—as our "truth and reconciliation" commissions, which we use to sort through our beliefs about the cri-

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[102] See, e.g., Caldarola v. Cnty. of Westchester, 343 F.3d 570, 572 (2d Cir. 2003) (observing that, "A recent surge in 'executive perp walks' has featured accused white collar criminals in designer suits and handcuffs"); United States v. Fastow, 292 F. Supp. 2d 914, 918 (S.D. Tex. 2003) (noting that government officials refused to let white-collar Enron defendants surrender in order to allow the government to "orchestrate[] a 'perp walk'"); Lauro v. City of N.Y., 39 F. Supp. 2d 351, 357 (S.D.N.Y. 1999) (describing how a detective was called by his superiors and instructed to take an accused on a "perp walk" since the media was interested, resulting in the accused being taken from the police station to a car, which circled the block before the accused was paraded before the media); Hannah Shay Chanoine, Clarifying the Joint Action Test for Media Actors when Law Enforcement Violates the Fourth Amendment, 104 Colum. L. Rev. 1356, 1360–61 (2004) (describing "perp walk" cases and the interest by both media and law enforcement in these parades).

[103] See Ellen S. Podgor, Throwing Away the Key, 116 Yale L.J. Pocket Part 279, 281 (2007), http://thepocketpart.org/2007/02/21/podgor.html (arguing that recent white-collar sentences have been unnecessary or too harsh); Andrew Ross Sorkin, How Long to Jail White-Collar Criminals?, N.Y. Times, Sept. 16, 2005, at C1 (arguing that the sentences given to corporate officers have been excessive); Neil Weinberg & Mary Ellen Egan, Criminal Injustice System, Forbes, Apr. 26, 2004, at 42–43 (arguing against harsh sentences for white-collar crime and reporting that those convicted of voluntary manslaughter routinely receive lesser sentences than CEOs); see also Peter J. Henning, Prior Good Works in the Age of Reasonableness, 20 Fed. Sent'g Rep. 187, 187 (2008) (reporting the "double digit" sentences meted out to Bernie Ebbers of WorldCom, Jeffrey Skilling of Enron, John Rigas of Adelphia, Sanjay Kumar of Computer Associates, and Walter Forbes of Cendant).

sis.[104] Even better, unlike those commissions, the cases before the courts are sharpened by the real consequences faced by the defendants, making the judgment more battle-tested, and, presumably, of higher quality.

It is this expressive role that has been eschewed by the government, while the critique of the efficacy and fairness of white-collar crime has, apparently, found favor.

1. The Prosecution Record

The choice is exemplified by the fact that the criminal cases have been few and far between. The failed Eastern District of New York prosecution of Ralph Cioffi and Matthew Tannin, two Bear Stearns employees who ran a hedge fund that failed and was ultimately bailed out by Bear Stearns in one of the very first signs of instability in the financial markets, appears to have been tremendously dismaying to government prosecutors.[105] Since that case, in which the jury returned its not guilty verdict in November 2009, the government has shied away from prosecutions.

There have been a handful of cases, however, and describing them provides a full account of how limited the government's criminal enforcement strategy has been. The Department of Justice brought a case against two former brokers at Credit Suisse, accusing the brokers of committing securities fraud by misleading clients about their purchases in the auction rate securities market, a market whose collapse was tangentially precipitated by the financial crisis.[106] The prosecution accordingly does not strike at the heart of the crisis, but was one of the few cases in which convictions were obtained. One of the brokers was sen-

[104] See, e.g., James W. McCarty III, Nonviolent Law? Linking Nonviolent Social Change and Truth and Reconciliation Commissions, 114 W. Va. L. Rev. 969, 973–74 (2012) (explaining that Truth and Reconciliation Commissions are "usually government-sponsored bodies commissioned with the tasks of discovering the truth about extreme injustices and human rights violations that occurred during a previous government regime, identifying the role of various parties and actors in the conflicts"); Angelika Schlunck, Truth and Reconciliation Commissions, 4 ILSA J. Int'l & Comp. L. 415, 417 (1998) (noting that a Truth and Reconciliation Commission "focuses on the past" but "does not concentrate on a specific event in the past but attempts to paint an overall picture" (quoting Priscilla B. Hayner, Fifteen Truth Commissions—1974–1993: A Comparative Study, *in* 1 Transitional Justice: How Emerging Democracies Reckon with Former Regimes 225, 227–28 (Neil J. Kritz ed., 1995)) (internal quotation marks omitted)).

[105] See supra note 12 and accompanying text.

[106] Jenny Anderson, Two Indicted over Sale of Securities, N.Y. Times, Sept. 4, 2008, at C1.

tenced to five years in prison and assessed a $5.25 million fine, and the other was sentenced to five years in prison as well.[107] This has been the high water mark of prosecutions during the financial crisis—indeed, the *New York Times* characterizes it as the only one involving a top banker.[108]

Colonial Bank, its partners, and a number of their executives were prosecuted in 2010 for a scheme to issue false mortgages in order to obtain money from Freddie Mac and later to fraudulently pursue federal bailout funds.[109] Six executives pleaded guilty in that scheme. The most prominent one was Lee B. Farkas, the former chairman of a financial intermediary, who was sentenced to thirty years in prison.[110] This was, however, a prosecution not about conduct that led to the crisis, which many critics have urged, but about misconduct that occurred during the rescue.

And that is it. None of these defendants are high-ranking officers of the firms most associated with the crisis. (Cioffi and Tanin ran a fund at Bear Stearns, but were not senior executives at the firm.[111])

There has not been a single conviction of a bailed-out bank, or a single senior executive who ran one. The SEC, as we will see, has alleged that there were pockets of fraud related to the sale of complex financial products, housing-related assets, and the reluctance to reveal just how tied a bank could be to the housing market. But none of it, apparently, reached a criminal level.

The moment for criminal financial crisis prosecutions looks to have passed, making a change in course, at this point at least, unlikely. For

[107] Jessica Dye, Ex-Credit Suisse Broker Sentenced in $1 Bln Fraud, Reuters (June 7, 2011, 5:44 PM), http://www.reuters.com/article/2011/06/07/creditsuisse-tzolov-idUSN0716559920110607; Patricia Hurtado, Ex-Credit Suisse Broker Butler Gets Five-Year Prison Sentence, Bloomberg (Jan. 23, 2010, 12:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ao3g1KEa21x4.

[108] Jesse Eisinger, Why Only One Top Banker Went to Jail for the Financial Crisis, N.Y. Times Mag. (Apr. 30, 2014, 2:07 PM), http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html.

[109] Floyd Norris, After Years of Red Flags, a Conviction, N.Y. Times, Apr. 22, 2011, at B1.

[110] Tom Schoenman, Ex-Taylor Bean Chief Farkas Gets 30-Year Prison Sentence, Bloomberg (June 30, 2011, 7:45 PM), http://www.bloomberg.com/news/2011-06-30/ex-taylor-bean-chairman-farkas-sentenced-to-30-years-in-prison.html.

[111] Andrew J. Ceresney, Gordon Eng & Sean R. Nuttall, Regulatory Investigations and the Credit Crisis: The Search for Villains, 46 Am. Crim. L. Rev. 225, 251 (2009) (providing a lawyerly analysis, including by an author who went on to a high ranking position in the SEC, of the Cioffi and Tanin prosecutions).

more general mail and wire fraud prosecutions, the five-year statute of limitations for almost all crisis-related activity has now passed.[112] By the same token, the general federal default statute of limitations for criminal cases has essentially run.[113] It is reasonable to conclude, as Peter Henning did, that after the Department of Justice dropped its investigation of Goldman Sachs, the prosecutorial effort to sanction banks in the wake of the financial crisis is basically over,[114] though the government has some flexibility on timing for certain matters closely related to finance.[115]

The criminal dearth is all the more surprising given that the list of potential defendants is not hard to compile. The government gave up on the idea of prosecuting Angelo Mozilo, the head of Countrywide, despite an array of civil fraud charges made against him and his bank.[116] It decided not to bring charges against the chief executive of the Financial Product Unit at AIG, which collapsed and ruined the company so spectacularly, requiring the largest bailout ever.[117] And plenty of people have called for extreme sanctions to be deployed against Lloyd Blankfein, the head of the bailout-taking, structured-products-dealing Goldman Sachs.[118] None of these potential defendants has been singled out, even though the harsh expression of disapprobation presented by a criminal case might seem to be appropriate given the intense nature of the carnage.[119]

[112] See 18 U.S.C. § 3282(a) (2012) (providing that, "Except as otherwise expressly provided" no one may be prosecuted except "within five years next after such offense shall have been committed").

[113] See id.

[114] Peter J. Henning, Is That It for Financial Crisis Cases?, N.Y. Times DealBook (Aug. 13, 2012, 11:22 AM), http://dealbook.nytimes.com/2012/08/13/is-that-it-for-financial-crisis-cases.

[115] See 18 U.S.C. § 3293 (2012).

[116] E. Scott Reckard, U.S. Drops Criminal Probe of Former Countrywide Chief, L.A. Times, Feb. 19, 2011, at A1, available at http://articles.latimes.com/print/2011/feb/18/business/la-fi-mozilo-20110219.

[117] Gretchen Morgenson, Case Is Said To Conclude Against Head of A.I.G. Unit, N.Y. Times, May 23, 2010, at A15.

[118] See, e.g., Kevin Sieff, Protesters Lash Out at Goldman, Fin. Times (Nov. 16, 2009, 10:16 PM), http://www.ft.com (reporting on protestors converging on Goldman's office with "wanted" signs bearing the face of Blankfein); Matt Taibbi, The Great American Bubble Machine, Rolling Stone, July 2009, at 52, available at http://www.rollingstone.com/politics/news/the-great-american-bubble-machine-20100405 (comparing Goldman Sachs to "a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money").

[119] And the kinds of prosecution that may yet be ramped up—time and statute of limitations willing—will probably have little to do with lenders and more to do with borrowers

Although there have been hardly any prosecutions of executives of large financial institutions for misconduct during the financial crisis, there have been a spate of actions against community bank directors, often for how they handled TARP, along the lines of the Colonial Bank prosecutions but on a smaller scale.[120] In Illinois, for example, the state's Attorney General, along with the Special Inspector General for TARP, brought charges against former executives of Premier Bank for defrauding the program of $6.8 million and costing the FDIC $64.1 million when the bank failed in March 2012.[121] The indictment also included allegations of criminal bribery against two of the directors; specifically, it alleged that one of the directors had demanded ownership interests for his children in a chain of local grocery stores in exchange for extending credit to the stores.[122]

Similarly, in an incident in Missouri, a former bank chairman pleaded guilty to receiving $1 million in TARP funds and using $381,000 of it to purchase a condo in Florida.[123] The former chairman was banned from the banking industry for life,[124] as was the former chief credit officer of a failed North Georgia bank, who was accused of making out loans to

who fraudulently represented that they had the capacity to pay for new houses, if the prosecutions amount to anything. The most recent Federal Bureau of Investigations ("FBI") report on mortgage fraud indicated that 3,129 mortgage fraud investigations were pending in 2010, and that 336 convictions were obtained through "Operation Stolen Dreams," a coordinated takedown of "mortgage fraudsters." Fed. Bureau of Investigation, 2010 Mortgage Fraud Report: Year in Review 12, 23 (2011), available at http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010. The report indicates that many of the perpetrators are individual real estate and mortgage industry workers and organized crime rings. Id. at 5. In this crisis, Congress passed the Fraud Enforcement and Recovery Act which, among other things, gave $165 million to the FBI and Justice Department to investigate financial crimes, though that number was reduced to $30 million. See Morgenson & Story, supra note 5 (reporting that, during the 1980s, special task forces put over eight hundred bank officials in jail in connection with the S&L crisis; more recently, the Justice Department left the "complex cases understaffed and poorly funded, and only much later established a more general financial crimes task force").

[120] Ralph F. MacDonald III et al., Criminal Actions Against Failed Bank Executives, Jones Day (Apr. 14, 2011), http://www.jonesday.com/criminal-actions-against-failed-bank-executives-04-14-2011/.

[121] Press Release, Ill. Att'y Gen., Madigan Announces Charges Against Premier Bank Board of Directors in $70 Million Criminal Fraud Scheme (Aug. 6, 2013), available at http://www.illinoisattorneygeneral.gov/pressroom/2013_08/20130806.html.

[122] Id.

[123] Peter Lattman, Bank Executive Admits to Using Bailout Money to Buy Condo, N.Y. Times DealBook (Aug. 27, 2013, 2:45 PM), http://dealbook.nytimes.com/2013/08/27/bank-executive-admits-to-using-bailout-funds-to-buy-condo/?_r=0.

[124] Id.

straw purchasers and separately originating loans in relatives' names without their knowledge.[125]

It is strikingly different from the 1990s, when bank regulators made thousands of criminal referrals in the wake of the S&L debacle. In all, by 1992 there had been 1100 criminal prosecutions of individuals involved in major S&L fraud, with 839 convictions, and, in total, 5490 criminal investigations opened by the FBI. It is more than the handful of prosecutions we have seen during this crisis.[126] And that crisis was much smaller than this one: It cost only around $100 billion to "resolve" (that is, to survive bankruptcy while making good on the deposits) and involved 747 thrift failures, most of which were quite small.[127] TARP, of course, amounted to a $700 billion bailout, and the stimulus passed by Congress in the wake of the crisis was one of the largest ever.

2. Getting to Why

What explains the lack of criminal prosecutions in the wake of the financial crisis? Three factors, intertwined in some ways, have played a role. First, there appears to be a newfound belief on the part of the government that these cases are too hard to win. Second, there has been some concern about the consequences of winning criminal cases against high-level executives, or even more influentially, entire companies. Third, there appears to have been an under-justified belief that civil penalties best capture the wrongdoing implicated by the crisis, or, at least, that they serve as a passable substitute for the criminal alternative.

Some have argued that it is simply too hard to win financial crisis cases because the crisis affected every institution in the financial sector, making it difficult to establish that any single individual or company did

[125] J. Scott Trubey, FDIC Slaps Ban on Ex-Georgia Bank Executive, Atlanta J.-Const., Mar. 25, 2011, at A10, available at http://www.ajc.com/news/business/fdic-slaps-ban-on-ex-georgia-bank-executive/nQrx9/.

[126] Two Financial Crises Compared: The Savings and Loan Debacle and the Mortgage Mess, N.Y. Times, Apr. 13, 2013, at B10–11, available at http://www.nytimes.com/interactive/2011/04/14/business/20110414-prosecute.html.

[127] John M. Broder, Looking for Lessons from Agency that Mopped Up 1980s Thrift Mess, N.Y. Times, Sept. 20, 2008, at C3 (reporting that 747 thrifts failed, and that the government entity formed to dispose of them, the Resolution Trust Corporation, disposed of their assets at a total cost of $120 to $140 billion).

something distinctively rash to either cause it or respond to it.[128] Samuel Buell, for example, has observed that it cannot be a conspiracy if everybody was in on it.[129] In such a world, as the *New York Times* has stated, "[P]rosecutors struggle to pinpoint where risky dealings cross the line into illegality."[130] In light of this phenomenon, it is not difficult to make the case to a jury that the singling out of executives for misconduct during a general downturn in the economy is not fair. Moreover, as one litigation observer has written, attributing responsibility to the executives of bailed-out banks is not easy, for "[o]ne also needs to isolate the effect of the alleged misconduct by comparing what the failed bank's financial position would have been but for the alleged misconduct with the bank's actual financial position."[131]

These struggles are only exacerbated when confronted with a target with well-resourced opposing counsel—meaning that "prosecutors sometimes hesitate to charge top executives, who have the money to fight rather than settle."[132]

Of course these sorts of problems are not unique to this financial crisis. Bankers often have more resources than government lawyers, and corporate lawyers have long commented on the singling-out problem.

Another factor is likely a reluctance that might be attributed to the "Andersen Effect." Arthur Andersen was the outside accounting firm for Enron that admitted to shredding key documents in the government's investigation against the energy giant. The crime was, in other words, not

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[128] Marian Wang, Why No Financial Crisis Prosecutions? Ex-Justice Official Says It's Just Too Hard, ProPublica (Dec. 6, 2011, 3:08 PM), http://www.propublica.org/article/why-no-financial-crisis-prosecutions-official-says-its-just-too-hard.

[129] See Loren Steffy, Looking at Markets in a New Light, Hous. Chron., Oct. 12, 2008, at B1, available at http://www.chron.com/business/steffy/article/Looking-at-markets-in-a-new-light-1606897.php (quoting Buell as saying, "It's not a conspiracy if everybody's in on it . . . . In order to have a fraud conspiracy, you've got to have some effort by one group to deceive another group.").

[130] Ben Protess & Susanne Craig, Inside the End of the U.S. Bid to Punish Lehman Executives, N.Y. Times DealBook (Sept. 8, 2013), http://dealbook.nytimes.com/2013/09/08/inside-the-end-of-the-u-s-bid-to-punish-lehman-executives/?_r=1.

[131] Abe Chernin et al., Applying Past Lessons to Present, Future FDIC Suits, Law360 (Mar. 30, 2012, 1:07 PM), http://www.cornerstone.com/getattachment/ff1ec741-a510-4314-8d9e-f9412a57994c/Applying-Past-Lessons-to-Present,-Future-FDIC-Suit.aspx.

[132] Protess & Craig, supra note 130. Some of these lawyers, of course, will be former colleagues of the prosecutors investigating the executive, given the revolving door between U.S. Attorneys' Offices and white-collar criminal defense practices. For a discussion (and an argument that this fact is not necessarily problematic), see David Zaring, Against Being Against the Revolving Door, 2 U. Ill. L. Rev. 507, 508–16 (2013).

the countenancing of fraud, but the obstruction of justice based on the possibility that those shredded documents (which Andersen argued were shredded as part of a standard company document retention policy) contained relevant evidence.[133] Arthur Andersen was indicted and, in the months leading up to its conviction in June 2002, collapsed, affecting the tens of thousands of Andersen employees who had nothing to do with auditing Enron's books.[134] To make things even worse, the U.S. Supreme Court vacated the conviction as an overbroad effort by the Department of Justice to expand the reach of the mail and wire fraud statutes.[135]

Prosecutors appear to have adopted different tactics in the wake of the Andersen debacle. Instead of prosecuting large companies, the DOJ has elected to favor deferred prosecution agreements and non-prosecution agreements.[136] Then-DOJ Assistant Attorney General Lanny Breuer alluded to the fall of Arthur Andersen in noting:

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[133] Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797, 805 (2013).

[134] Id. at 805 n.38 (noting that, although the Supreme Court reversed the conviction in 2005 due to erroneous jury instructions and the Department of Justice decided not to retry the case, it was too late to resurrect the defunct accounting firm).

[135] Arthur Andersen LLP v. United States, 544 U.S. 696, 705–06 (2005) (reversing the U.S. Court of Appeals for the Fifth Circuit's affirmance of the Arthur Andersen conviction and holding that ordering destruction of documents could not be considered "knowing corruption" within the meaning of the federal statute in question unless the party imparting the order to destroy documents had the requisite knowledge that his conduct was illegal).

[136] See, e.g., Markoff, supra note 133, at 802 (examining whether the "corporate death penalty" is a real phenomenon and finding it to be unsupported by data); Erik Paulsen, Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements, 82 N.Y.U. L. Rev. 1434, 1436 (2007) ("The use of [DPAs] exploded after the demise of the corporate accounting giant Arthur Andersen. When Andersen collapsed after its indictment, federal prosecutors realized that prosecution alone could destroy even the most established of companies."); Peter Spivack & Sujit Raman, Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements, 45 Am. Crim. L. Rev. 159, 159 (2008) (stating that "[d]eferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are proliferating," as evidenced by the fact that prosecutors and big companies entered into twice as many of these arrangements between 2002 and 2005 as they did in the preceding ten years combined); David M. Uhlmann, Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability, 72 Md. L. Rev. 1295, 1311 (2013) (noting that "[t]he Justice Department responded to criticism of the Andersen prosecution by developing revised guidance regarding the prosecution of corporations in January 2003" in the "Thompson Memo," which for the first time introduced the possibility of deferred prosecution for corporations).

> I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that . . . must play a role in responsible enforcement.[137]

United States Attorney General Eric Holder, while speaking to the Senate Judiciary Committee in March 2013, also expressed concern "that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy."[138]

Some have argued that the reluctance to turn to criminal policing of corporate organizations because of a downturn in the stock market is arguably attractive, or at least not wholly unattractive.[139] Others take a more cynical view—that it is fine to convict Main Street thrift operators of widespread fraud, but that the same rules do not apply to Wall Street executives.[140] This is essentially a capture theory of the government, and has been urged by those most dissatisfied by the story of the crisis.

This third aspect of the government's approach to criminal prosecutions is, in my view, not necessarily unjustified, but it certainly is underjustified. Why this crisis for the change in policy? What prompted it—the Andersen effect? Something else? All government officials have suggested is that they are still interested in high-level misconduct, but they simply have not found it. The suggestions indicate continuity when, quite clearly, change is the more accurate way to describe the paradigm. The new reluctance to pursue criminal consequences has not been broad-

[137] Lanny A. Breuer, Assistant Att'y Gen. for the Crim. Div., U.S. Dep't of Justice, Speech at the New York City Bar Association (Sept. 13, 2012), available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

[138] Andrew Ross Sorkin, Realities Behind Prosecuting Big Banks, N.Y. Times Dealbook (Mar. 11, 2013, 9:15 PM), http://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/.

[139] See, e.g., Larry E. Ribstein, The Perils of Criminalizing Agency Costs, 2 J. Bus. & Tech. L. 59, 59–60 (2007) (discussing questions of when "an agent's unfaithfulness . . . cross[es] the line to criminal" conduct, and when to regulate it, and noting that "jail-time and disgrace are much worse than plummeting stock prices").

[140] See supra notes 68–80 and accompanying text.

ly shared by all parts of society; it is a surprising part of society where decriminalization has begun.

B. Plaintiff

In lieu of the criminal effort, the government's civil campaign against the parties that contributed to the housing crisis has not been as quiescent as its criminal effort. But the approach has been disparate, involving various agencies, statutes, and classes of defendants, with little sense of coordination. Nonetheless, civil enforcement has been the leading sort of enforcement by the government. One notable feature has been a paucity of enforcement efforts by actual banking regulators, who have not pushed the Department of Justice to bring court cases on their behalf; the sole exception here has been the FDIC. A second feature of the government's civil enforcement is the government's use of the False Claims Act, not the mail and wire fraud statutes that used to be the standards for government efforts. The FCA is ordinarily deployed against government contractors, but because of a long period of government intervention in the housing market, it works surprisingly well against financiers.[141] The government has also turned to the little-used FIRREA and state law to make cases.

Some argue that this amounts to far too many different legal avenues, especially given the multiple lawsuits brought by private parties on multiple theories.[142]

It certainly looks like the government, apart from the SEC, has been exploring unconventional legal angles in its civil suits, and it is not clear what the coordinated theory of crisis responsibility is here. What we can also see is an SEC that is taking a nuanced view about the widespread nature of fraud during the crisis. Indeed, given its focus on the insider

[141] See Richard Moberly, Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later, 64 S.C. L. Rev. 1, 48–49 (2012) (describing large-scale *qui tam* litigation related to mortgage loans); see also Press Release, U.S. Dep't of Justice, No. 11-1665, Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011), available at http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html ("In November 2009, President Obama established the Financial Fraud Enforcement Task Force to hold accountable the individuals and corporations who contributed to the crisis as well as those who would claim illegal advantage through false claims for funds intended to stimulate economic recovery.").

[142] See Law and Disorder: Financial Systems Are Vulnerable to Investigation, Prosecution and Litigation from Every Direction, Economist (Oct. 13, 2012), http://www.economist.com/node/21564565 (arguing for more coordination of litigation related to the financial crisis).

trading prosecutions of hedge funds, it is not clear that policing crisis-related fraud is the agency's first priority.[143]

Other federal agencies stepped into that gap, as well as state agencies, most notably the attorneys general of New York and Massachusetts, along with some coordinated efforts by state attorneys general. These agencies are policing the financial crisis, albeit orthogonally—that is, they are not, at least not in every respect, punishing misconduct related to the sale and packaging of housing assets or in the treatment of home-owners.

Instead, much of the enforcement is related to statements made to the government. There are those going after institutions for their relationships with Fannie Mae, Freddie Mac, and the Federal Housing Agency. The theory here is one of false claims: Lies told to government entities have been subject to prosecution since the Civil War.[144]

Some of the actions by state officials have, indeed, pursued heart-of-the-crisis mortgage fraud.[145] However, even the most active state attorneys general have not been the scourges of Wall Street that some of their predecessors aspired to be.[146]

These civil cases are worth amalgamating because they are a strange mix of approaches, but they are hard to evaluate as a whole, other than to suggest that they represent a change in approach; the statutes resorted

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[143] See, e.g., Jonathan R. Macey, The Distorting Incentives Facing the U.S. Securities and Exchange Commission, 33 Harv. J.L. & Pub. Pol'y 639, 645, 668 (2010) (reporting that in 2008, the Commission brought the highest number of insider trading cases in its history and, followed by the Raj Rajaratnam case, the largest hedge fund insider trading case ever).

[144] See 1 John T. Boese, Civil False Claims and Qui Tam Actions § 1.01 (4th ed. 2011) (reporting that the FCA was enacted in 1863 to prosecute those who defrauded the government with false documents during the Civil War); John Terrence A. Rosenthal & Robert T. Alter, Clear and Convincing to Whom? The False Claims Act and Its Burden of Proof Standard: Why the Government Needs a Big Stick, 75 Notre Dame L. Rev. 1409, 1423 (2000) (noting that the FCA was originally enacted to combat widespread fraud among defense contractors).

[145] Wendy Gerwick Couture, White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable, 72 Alb. L. Rev. 1, 17, 19 (2009) (writing that the Martin Act, N.Y. Gen. Bus. Law §§ 352–353 (McKinney 1996), both "criminalizes conduct that is not civilly actionable" and has "broad reach"); Lydie N.C. Pierre-Louis, Hedge Fund Fraud and the Public Good, 15 Fordham J. Corp. & Fin. L. 21, 35 (2009) (explaining that "the Martin Act has evolved into a broad sweeping investigative statute").

[146] Jonathan R. Macey, Wall Street in Turmoil: State-Federal Relations Post-Eliot Spitzer, 70 Brook. L. Rev. 117, 133 (2004) (arguing that through his state policing of the securities markets, Spitzer engineered a "'hostile takeover' of the SEC, hijacking its agenda").

to are new, and the SEC and banking regulators have not been particularly active.

One theme—also probably under-justified by the government—is a sense that some of the conduct that could be subject to enforcement is difficult to distinguish from the bad luck of doing business during an economic disaster. Even juries have been persuaded by this, meaning that the SEC, in the fraud cases that it did bring, could not count on victory, particularly when it was pursuing individual financial executives rather than corporations.

1. The SEC

When financial crises arise, the SEC often receives a great deal of criticism, and then, paradoxically, more sweeping statutory powers and a larger budget, so that it does a better job in the next crisis.[147] In the wake of this crisis, consistent with the usual routine, the agency has been given new regulatory powers through the Dodd-Frank Wall Street Reform Act and a larger budget to pursue enforcement actions.[148]

Those extra resources have not yet evidenced themselves in a robust series of enforcement actions against the financial industry.[149] Instead, the agency has proceeded narrowly, eschewing cases broadly aimed at large-scale Wall Street misconduct and instead making one or two cautious examples out of certain defendants, most notably Goldman Sachs.[150] Indeed, some have speculated that the agency has followed an "each bank pays one large settlement" policy that identifies representative wrongdoing, but does not attempt to comprehensively sanction financial intermediaries.[151]

[147] Stuart Banner, What Causes New Securities Regulation? 300 Years of Evidence, 75 Wash. U. L.Q. 849, 850 (1997) (explaining that "most of the major instances of new securities regulation in the past three hundred years of English and American history have come right after crashes"); Larry E. Ribstein, Bubble Laws, 40 Hous. L. Rev. 77, 79–81 (2003) (describing a "cycle" of "[b]usts and ensuing regulation").

[148] See Ben Protess, Patrolling Wall Street on the Cheap, N.Y. Times, May 4, 2011, at B1 (reporting that the SEC's budget was increased six percent from 2010 to 2011 and was triple what it had been ten years earlier, and calling for additional increases).

[149] Coffee, supra note 5.

[150] See infra notes 153–154 and accompanying text.

[151] Levine, supra note 26.

The SEC's enforcement actions against financial institutions can roughly be divided into four kinds of claims.[152] The agency certainly faced setbacks in its civil enforcement cases, not all of which settled on favorable terms or went to a verdict that favored the agency. The agency did, however, settle a number of suits, and went to trial, albeit not successfully in a few cases.

Collateralized Debt Obligation ("CDO") Creation Suits. The first sort of these enforcement actions proceeds from CDOs and other complex structured products sold by financial institutions to investors. This category of claims has featured in a variety of cases but few big fish. CDO creation suits penalize financial institutions for failing to adequately disclose the risks involved in investing in CDOs. Broadly speaking, these securities, especially if they were tied to the housing market, proved to be very risky indeed. They were, however, generally marketed as products subjected to complicated financial engineering designed to all but ensure their safety, or so the SEC alleged in these cases. The challenge for the SEC in these suits has been to distinguish between assets that failed because of improper engineering that was inadequately disclosed and those that failed because of the general downturn in the economy.

The best-known example of this kind of lawsuit is the agency's suit against Goldman Sachs, which the firm settled for $550 million.[153] The SEC alleged in that case that Goldman had sold a financial product tied to subprime mortgages without disclosing that the product had been developed with the input of John Paulson, a now-famous hedge fund manager, who presciently wished to short the housing market.[154]

The SEC filed a similar suit against Citigroup, although the suit fared much more poorly.[155] JPMorgan was also sued for similar charges of structuring and marketing a CDO without disclosing the role of a hedge

[152] Indeed, the SEC itself divides its enforcement actions up this way. U.S. Sec. & Exch. Comm'n, SEC Enforcement Actions: Addressing Misconduct that Led to or Arose from the Financial Crisis (Dec. 12, 2013), http://www.sec.gov/spotlight/enf-actions-fc.shtml.

[153] Press Release, U.S. Sec. & Exch. Comm'n, No. 2010-123, Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), available at http://www.sec.gov/news/press/2010/2010-123.htm.

[154] Id.

[155] Chad Bray & Jean Eaglesham, Loss in Citi Case Deals Blow to U.S., Wall St. J., Aug. 1, 2012, at C3.

fund that helped build the portfolio and had a short position in many of the CDO assets.[156]

The other suits along these lines were against important players in the financial markets, but for small sums. Wells Fargo paid comparatively small fines to the SEC for a case that it inherited from Wachovia and one of its own cases—$11 million and $6.5 million, respectively, to settle claims related to their own structured products.[157] The SEC filed a settled action against a subsidiary of H&R Block, Option One Mortgage Corporation, in connection with offerings of subprime residential mortgage-backed securities.[158] In June 2012, the SEC settled with Oppenheimer Funds in connection with allegedly inadequate disclosure about two of its funds in 2008.[159] In September 2011, the SEC settled proceedings against RBC Capital Markets in connection with allegedly negligent sale of CDOs.[160]

Finally, prominently, in November 2011, the SEC and Citigroup submitted a settlement, related to the sale of a collateralized debt obligation, to the U.S. District Court for the Southern District of New York for approval.[161] Although Judge Jed Rakoff initially denied the settlement on the grounds that the SEC had not indicated what the defendant had done wrong, the Second Circuit reversed the judge and permitted no-admission settlements to go forward.[162]

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[156] Press Release, U.S. Sec. & Exch. Comm'n, No. 2011-131, J.P. Morgan to Pay $153.6 Million to Settle SEC Charges of Misleading Investors in CDO Tied to U.S. Housing Market (June 21, 2011), available at http://www.sec.gov/news/press/2011/2011-131.htm.

[157] See Ben Protess, Wells Fargo Settles a Securities Case, N.Y. Times, Aug. 15, 2012, at B7 (reporting $6.5 million Wells Fargo settlement); Edward Wyatt, Wells Fargo Settles Case Originating at Wachovia, N.Y. Times, Apr. 6, 2011, at B3 (reporting $11 million Wachovia settlement).

[158] Press Release, U.S. Sec. & Exch. Comm'n, No. 2012-76, H&R Block Subsidiary Agrees to Pay $28.2 Million to Settle SEC Charges Related to Subprime Mortgage Investments (Apr. 24, 2012), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488676#.U3Oj362zCpc.

[159] Press Release, U.S. Sec. & Exch. Comm'n, No. 2012-110, Oppenheimer Funds to Pay $35 Million to Settle SEC Charges for Misleading Statements During Financial Crisis (June 6, 2012), available at http://www.sec.gov/news/press/2012/2012-110.htm.

[160] Andrew Ackerman & Joan E. Solsman, RBC Settles CDO Charges, Wall St. J., Sept. 28, 2011, at C2.

[161] SEC v. Citigroup Global Mkts., 827 F. Supp. 2d 328, 329–30 (S.D.N.Y. 2011).

[162] SEC v. Citigroup Global Mkts., 673 F.3d 158, 160–61 (2d Cir. 2012).

This is a relatively comprehensive list of financial institutions; though not everyone rushed to settle with the agency on similar terms, many large institutions paid something.[163]

CDO Exposure Cases. The second kind of SEC enforcement actions consisted of cases against banks for failing to disclose how exposed they were to the mortgage market. These cases, somewhat surprisingly, generally featured small fines and small institutions, given that almost every bank of any size teetered dramatically during the crisis. But the exposure suits did target individuals slightly more than did the CDO creation litigation, perhaps a sign that the SEC thought that the misconduct in disavowing CDO disclosure (or, more often, failing to mention it) was serious enough to warrant individual penalties instead of corporate fines.[164]

The headline suits in this category were those against individuals at Bank of America, Citigroup, Countrywide, and Fannie and Freddie. In each of these cases, executives were targeted for failing to make adequate disclosures to investors.

The Bank of America case concerned the bank's ill-fated merger with Merrill Lynch. The Commission sued over the bank's failure to disclose its agreement that Merrill would pay its employees large year-end bonuses and its failure to disclose that Merrill had sustained extraordinary losses in October and November 2008.[165] Bank of America settled the case for $150 million.[166]

The Citigroup case was somewhat similar; it alleged that Citi had failed to disclose its exposure to subprime mortgage-related assets.[167] Citi paid a $75 million penalty to settle the charges, and two of its senior officers were also charged.[168]

[163] See Rick Rothacker & Aruna Viswanatha, Wells Fargo Says It Won't Face SEC Action on Mortgages, Reuters (Nov. 28, 2011, 6:49 PM), http://www.reuters.com/article/2012/11/28/us-wellsfargo-sec-idUSBRE8AR1G920121128.

[164] See U.S. Sec. & Exch. Comm'n, supra note 152 (charging only executives in nine of the fourteen actions listed in this category).

[165] Press Release, U.S. Sec. & Exch. Comm'n, Litigation Release No. 21377, SEC Charges Bank of America for Failing to Disclose Extraordinary Losses at Merrill Lynch Prior to Merger (Jan. 12, 2010), available at http://www.sec.gov/litigation/litreleases/2010/lr21377.htm.

[166] See SEC v. Bank of Am., No. 10 Civ. 0215 (JSR), 2010 U.S. Dist. LEXIS 54171, at *3–6 (S.D.N.Y. Apr. 6, 2010) (order approving proposal for disbursement of the $150 million settlement).

[167] See Randall Smith & Matthias Rieker, Citi Pays for Subprime Feint—Bank Settles with SEC for $75 Million for Failing to Disclose Its Exposure, Wall St. J., July 30, 2010, at C1.

[168] Id.

The Countrywide executives charged with fraud were alleged to have misled investors about their exposure to the subprime market.[169] In addition, CEO Angelo Mozilo was charged with trading on inside information about the company's stock.[170] Mozilo settled the charges for $22.5 million in penalties and $45 million in disgorgement, and he agreed not to serve as an officer or director of a publicly traded company again.[171]

As for Fannie and Freddie, the action was largely in the mold of the Countrywide case. The former executives were charged with falsely claiming that they had minimal exposure to subprime loans.[172] Six high-ranking executives were sued, all former top executives of both government-sponsored enterprises.[173]

Housing-Related CDOs. The other housing-market-related set of cases involved claims that the financial institutions had concealed the extent of mortgage-related investments in financial products that they sold to others. This category ranged from the Reserve Primary Fund's failure to disclose to investors the Fund's exposure to Lehman Brothers, which, in turn, was overexposed to the domestic housing market, to other name brand institutions, including State Street, Charles Schwab, and Bear Stearns, which peddled housing-referenced products without disclosing how housing-related these products were.[174]

In these cases, few individuals paid much of a price, and the Bear Stearns-related enforcement action was in the aftermath of the failed prosecutions of two Bear Stearns executives, Cioffi and Tannin. In the cases of the two executives, the SEC settled for $1 million in fines and industry bars against the defendants.[175] The SEC case against the Re-

[169] Press Release, U.S. Sec. & Exch. Comm'n, No. 2009-129, SEC Charges Former Countrywide Executives with Fraud (June 4, 2009), available at http://www.sec.gov/news/press/2009/2009-129.htm.

[170] Id.

[171] Gretchen Morgenson, Lending Magnate Settles Charges for $67 Million, N.Y. Times, Oct. 16, 2010, at A1.

[172] Azam Ahmed & Ben Protess, Ex-Fannie and Freddie Chiefs Accused of Deception, N.Y. Times, Dec. 17, 2011, at B1 (noting that one of the former Freddie Mac executives even told investors at a conference that "the company had 'basically no subprime business'").

[173] Id.

[174] See U.S. Sec. & Exch. Comm'n, supra note 152.

[175] Press Release, U.S. Sec. & Exch. Comm'n, Litigation Release No. 22398, Court Approves SEC Settlements with Two Former Bear Stearns Hedge Fund Portfolio Managers;

serve Primary Fund failed to get any individuals, while State Street paid $300 million to settle its charges.[176] JPMorgan and Credit Suisse were charged with misleading investors who purchased residential mortgage-backed securities from them. JPMorgan agreed to pay $296.9 million to settle the charges, and Credit Suisse agreed to pay $120 million.[177]

Most of these, as with most of the financial cases brought by the SEC, settled. But when cases went to trial, the agency could not count on victory. Consider the story of the Reserve Primary Fund. Reserve Primary is the mutual fund that broke the buck during the financial crisis, and the SEC sued it and the Bent family that ran it for fraud and negligence in 2009.[178] The fraud suit was predicated on the usual nondisclosure of information that could lower the value.[179]

The key, though, appears to be that the Fund did not reveal the extent of its exposure to Lehman Brothers. The defendants were there "for failing to provide key material facts to investors and trustees about the fund's vulnerability as Lehman Brothers Holdings, Inc. sought bankruptcy protection," as the SEC put it.[180] Since Reserve Primary did tell everyone about its exposure the day after Lehman folded, the allegation appears to be that the twenty-four hour delay was fraudulent.[181]

But the jury failed to find that either of the Bents had committed fraud.[182] Once again, the agency found itself in the difficult position of pursuing executives for trying to calm the passengers as the ship was going down.

SEC Bars Managers from Regulated Industries (June 25, 2012), available at http://www.sec.gov/litigation/litreleases/2012/lr22398.htm.

[176] See Press Release, U.S. Sec. & Exch. Comm'n, No. 2010-21, SEC Charges State Street for Misleading Investors About Subprime Mortgage Investments (Feb. 4, 2010), available at http://www.sec.gov/news/press/2010/2010-21.htm; see also Nathaniel Popper & Jessica Silver-Greenberg, Mixed Verdict on Fraud at a Money Market Mutual Fund, N.Y. Times, Nov. 12, 2012, at B1.

[177] Press Release, U.S. Sec. & Exch. Comm'n, No. 2012-233, SEC Charges J.P. Morgan and Credit Suisse with Misleading Investors in RMBS Offerings (Nov. 16, 2012), available at http://www.sec.gov/news/press/2012/2012-233.htm.

[178] Complaint, SEC v. Reserve Mgmt. Co., No. 09 CV 4346 (S.D.N.Y. May 5, 2009), available at http://www.sec.gov/litigation/complaints/2009/comp21025.pdf.

[179] Id. at 23, 35.

[180] Press Release, U.S. Sec & Exch. Comm'n, No. 2009-104, SEC Charges Operators of Reserve Primary Fund with Fraud (May 5, 2009), available at http://www.sec.gov/news/press/2009/2009-104.htm.

[181] Complaint, supra note 178, at 35.

[182] Popper & Silver-Greenberg, supra note 176.

The jury did find one Bent to be negligent, in addition to finding the company (as opposed to its managers) guilty of fraud.[183] Most observers considered this case as yet another loss for the government.[184]

Auction Rate Securities. The fourth kind of enforcement action of note presided over by the agency is a bit issue specific and far more comprehensive than the other forms of post-crisis enforcement. Indeed, it is so comprehensive, and yet narrow, that it is not clear that it should be categorized with the rest of the financial crisis suits. Indeed, the SEC itself does not do so.[185] Nonetheless, it is not unrelated to the crisis. The agency settled with most Wall Street banks for misrepresenting the liquidity of so-called Auction Rate Securities ("ARS"), which became extremely illiquid during the financial crisis. These securities were "'long-term, variable-rate instruments that have their interest rates reset at periodic and frequent auctions.'"[186] By issuing ARS, banks were able to adjust their credit spreads over time by means of the frequent auctions, unlike traditional fixed- or variable-rate instruments.[187] Investors in ARS sought "a cash-like investment that pays a higher yield than a money market fund or certificate of deposit."[188] Although the underlying securities were long-term bonds, investors saw them as short-term vehicles because historically they could be sold at the weekly or monthly auctions.[189] However, the market for these instruments collapsed in Febru-

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[183] Id.

[184] See id. (quoting a former senior counsel for the SEC's Division of Enforcement as stating that "'[t]here is no other way to read this than as a significant loss for the S.E.C.'").

[185] Testimony Concerning the SEC's Recent Actions with Respect to Auction Rate Securities: Hearing Before the H. Comm. on Fin. Servs., 110th Congress (2008) (statement of Linda Chatman Thomsen, Director, U.S. Securities and Exchange Commission Division of Enforcement), http://www.sec.gov/news/testimony/2008/ts091808lct.htm (discussing the auction rate securities enforcement actions as being separate from the financial crisis).

[186] Olufunmilayo B. Arewa, Risky Business: The Credit Crisis and Failure (pt. 3), 104 Nw. U. L. Rev. Colloquy 398, 443 (2010) (quoting Stephanie Lee, NERA Econ. Consulting, Auction-Rate Securities: Bidders Remorse? (2008), available at https://www.mmc.com/knowledgecenter/NERA_PUB_Auction_Rate_Securities.pdf).

[187] Id.

[188] Norman S. Poser, Why the SEC Failed: Regulators Against Regulation, 3 Brook. J. Corp. Fin. & Com. L. 289, 314 (2009).

[189] Aaron Pressman, The Investment 'Albatross' at UBS, Bus. Wk., Aug. 8, 2008, at 22; Aaron Pressman, UBS: Auction-Rates Securities Collapse, Bus. Wk. (July 29, 2008), http://www.businessweek.com/stories/2008-07-29/ubs-auction-rates-securities-collapse [hereinafter, Pressman, UBS]; see also Richard A. Booth, Things Happen, 55 Vill. L. Rev. 57, 64 (2010) (explaining that ARS can become due if there are "no buyers at the next auction," which is "equivalent to foreclosure for a homeowner"); Amod Choudhary, Auction Rate Securities = Auction Risky Securities, 11 Duq. Bus. L.J. 23, 23–24 (2008) (displaying

ary of 2008.[190] To make matters worse, in the aftermath of the collapse, evidence surfaced that showed that even as they saw signs of the $330 billion ARS market grinding to a halt, banks heavily pushed ARS instruments on investors while the managers themselves liquidated their own holdings of the securities.[191] The SEC settled lawsuits with almost every player in this market.

Perhaps it is ironic that this product, rather than the CDOs or other housing-related securities, was the one for which Wall Street paid the highest systematic price as a result of the financial crisis. Nonetheless, it provides a rare example of the SEC intervening on behalf of an entire category of products, and forcing almost every purveyor of that product to make good on what it concluded were serious misrepresentations.

Conclusion. The numbers involved in the SEC's effort here amount to far fewer cases than the smaller dotcom crisis. Excluding ARS settlements, as of February 1, 2013, the SEC in total charged 154 entities and individuals, 65 of whom were senior corporate officers, for financial-crisis-related misconduct. There have been suspensions or bars from the industry for 36 defendants, and $1.53 billion in penalties and $756 million in disgorgement and prejudgment interest.[192] The total recovery is $2.68 billion, counting additional monetary relief in the amount of $400 million.[193] And, as the agency's enforcement director has said, that total will not get any bigger: "We have a few we're finishing up. But for the most part, we're done."[194]

evidence that banks had marketed ARS as "'cash equivalent,' 'cash alternatives,' 'cash management,' 'highly liquid securities,' . . . 'money market funds,' . . . 'floaters,' 'seven-day papers,' 'weekly money market investments,' 'seven day CDs,' and 'short-term rolls'"); Jill E. Fisch, Top Cop or Regulatory Flop? The SEC at 75, 95 Va. L. Rev. 785, 801–02 (2009) (describing the collapse of the ARS market); Michael C. Macciarola, Beware of Risk Everywhere: An Important Lesson from the Current Credit Crisis, 5 Hastings Bus. L.J. 267, 303–06 (2009) (explaining the mechanism behind the failure of the auctions in 2008).

[190] Poser, supra note 188, at 314–15.

[191] Pressman, UBS, supra note 189.

[192] U.S. Sec & Exch. Comm'n, supra note 152.

[193] Id.

[194] Dina Elboghdady, Here's How the SEC is Preparing for Life After Financial Crisis, Wash. Post Wonkblog (Jan. 29, 2014, 9:00 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/29/sec-enforcement-chief-gears-up-for-post-financial-crisis-era/.

2. The Department of Justice's Civil Suits

The Department of Justice, rather than pursuing claims criminally, has opted to use civil enforcement to hold banks accountable for the financial crisis. The model legal move so far—but the Department's cases brought under FIRREA could still grow, given its longer statute of limitations—has been to go after banks pursuant to the False Claims Act,[195] which applies because government entities such as Fannie, Freddie, and the U.S. Department of Housing and Urban Development ("HUD") underwrote all the mortgages sold by the banks. If these entities fraudulently misrepresented the quality of the mortgages, or their oversight of the same, that could be a false claim made against the government. So far, False Claims Act suits have been filed against Countrywide, since it was bought by Bank of America, and Wells Fargo.[196]

False Claims. The false claim statute, passed during the Civil War, has nineteenth-century breadth.[197] It sanctions false statements made to a government entity; for example, the statute sanctions a defendant who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[198] It includes provisions for treble damages.[199]

For example, the government has argued that the failed mortgage bank Countrywide's "Hustle" program, started when the housing market collapsed and the company needed some mortgage-related revenue, removed underwriting and compliance checks from its screening process, even for stated income loans.[200] (That is, the loans were based on the borrower just naming her income; the bank did not verify it.)

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[195] David Zaring, Understanding US v. Wells Fargo, The Conglomerate (Oct. 10, 2012), http://www.theconglomerate.org/2012/10/understanding-us-v-wells-fargo.html.

[196] Ben Protess, U.S. Accuses Bank of America of a 'Brazen' Mortgage Fraud, N.Y. Times DealBook (Oct. 24, 2012, 12:35 PM), http://dealbook.nytimes.com/2012/10/24/federal-prosecutors-sue-bank-of-america-over-mortgage-program/?hp.

[197] See U.S. Dep't of Justice, The False Claims Act: A Primer 1 (2010), available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf.

[198] 31 U.S.C. § 3729(a)(1)(A) (2012).

[199] Id. § 3729(a)(1) (providing that a violator "is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person").

[200] Complaint, United States v. Bank of Am., No. 12 Civ. 1422 (JSR) (S.D.N.Y. Oct. 24, 2012), available at http://www.nytimes.com/interactive/2012/10/24/business/dealbook/20121025-bank-documents.html.

But lowering standards for making loans is not fraud against the government—the fraud lies in doing so and not telling the government entity insuring the mortgages about the new program.[201]

These claims, moreover, are paired with the rather unique *qui tam* process, and the turn to *qui tam*—sometimes thought of as a disreputable form of litigation—is another innovation of the financial crisis.[202] The False Claims Act allows private litigants to bring a suit in both their own names and in the name of the United States Government.[203] To be liable as a defendant in a *qui tam* action, a person or entity must have submitted a false claim of payment to the government, conspired to induce the government into paying the false claim, or used a false statement to reduce liability to the government. The *qui tam* defendant may be liable for a penalty of up to $11,000 as well as triple the amount of damages sustained by the government due to the false claim.[204] The *qui tam* plaintiff gets a portion of any recovery, which can range from fifteen percent to thirty percent of the judgment.[205] It was recently reported that the Justice Department had recovered almost $5 billion under the False Claims Act in fiscal year 2012, including "an unprecedented $1.4 billion" related to housing and mortgage fraud.[206] This indicates that private recoveries related to the financial crisis could be in the hundreds of millions of dollars.[207]

[201] One legal wrinkle here might turn on whether Fannie and Freddie *are* government entities pursuant to the False Claims Act. The colorable argument to the contrary has been successful in some cases. See Roberts v. Cameron-Brown Co., 556 F.2d 356, 358–60 (5th Cir. 1977) (holding that Fannie Mae's acts are private action); State ex rel. Hager v. Countrywide Home Loans Servicing, LP, 812 F. Supp. 2d 1211, 1217 (D. Nev. 2011) ("Fannie Mae and the federal government have not become so interdependent with each other as to make Fannie Mae's actions the actions of the federal government."); see also A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543, 633–34.

[202] See U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits (2010), available at http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf (explaining the Department of Justice's options for participating in whistleblower cases).

[203] 31 U.S.C. § 3730(b)(1).

[204] Peter J. Henning, How Bank of America Could Fight a Government Lawsuit, N.Y. Times DealBook (Oct. 29, 2012, 11:40 AM), http://dealbook.nytimes.com/2012/10/29/how-bank-of-america-could-fight-a-government-lawsuit/.

[205] 31 U.S.C. § 3730(d).

[206] Press Release, U.S. Dep't of Justice, No. 12-1439, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), available at http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.

[207] For more on *qui tam*, see generally Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 49 n.280 (2002) (stating that *qui tam* litigation occurs when "attorneys and law

The DOJ also has filed a civil fraud suit against Wells Fargo claiming that the bank processed a lot of HUD-insured mortgages with fraudulently lackluster diligence.[208]

HUD's Federal Housing Authority ("FHA") arm insures mortgages for low-income homebuyers,[209] and somewhat surprisingly, did not suffer the problems that Fannie and Freddie or the private insurers suffered during the financial crisis. It still lost money, however, and that fact is behind the enforcement action against Wells Fargo.

Some of the allegations made against Wells Fargo are the kinds of allegations that could be made against any number of banks. As the government said: "WELLS FARGO aggravated its widespread underwriting violations by: . . . [inter alia,] failing to provide its inexperienced staff with proper training; [and] paying improper bonuses to its underwriters to incentivize them to approve as many FHA loans as possible . . . ."[210]

The DOJ has brought five other such claims over FHA misstatements,[211] suggesting that this is a relatively wide-ranging investigation.

The federal civil fraud statute is broad in scope and reach. Nonetheless, it does not produce the sort of lawsuit that threatens a company with death upon a loss, as with Arthur Andersen.[212] Big, reputable companies fall afoul of the statute frequently and yet continue to do business with the United States. Companies that have paid damages under the Federal Claims Act include Pfizer,[213] Eli Lilly,[214] Glax-

firms . . . discover fraud in the course of representing clients in other matters"); David Freeman Engstrom, Harnessing the Private Attorney General: Evidence from Qui Tam Litigation, 112 Colum. L. Rev. 1244 (2012); David Freeman Engstrom, Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act, 107 Nw. U. L. Rev. 1689 (2013).

[208] Press Release, U.S. Att'y's Office for the S. Dist. of N.Y., supra note 22.

[209] The Federal Housing Administration, U.S. Dept. of Housing and Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last visited Feb. 19, 2014).

[210] Press Release, U.S. Att'y's Office for the S. Dist. of N.Y., supra note 22.

[211] Id.

[212] See supra notes 133–134 and accompanying text.

[213] Margaret Cronin Fisk, Pfizer Settles Whistle-Blower Suit over Detrol Marketing, Bloomberg Bus. Wk. (Oct. 20, 2011), http://www.businessweek.com/news/2011-10-20/pfizer-settles-whistle-blower-suit-over-detrol-marketing.html.

[214] Press Release, U.S. Dep't of Justice, No. 09-038, Eli Lilly and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-Label Promotion of Zyprexa (Jan. 15, 2009), available at http://www.justice.gov/opa/pr/2009/January/09-civ-038.html.

oSmithKline,[215] Northrop Grumman,[216] Boeing,[217] Quest Diagnostics,[218] and Alliant Techsystems.[219] The DOJ-HUD partnership has made these suits a centerpiece of its financial crisis civil enforcement strategy, along with enhanced policing of mortgage fraud more generally.[220]

Credit Ratings. The government has investigated, and in one case sued, the credit ratings agencies in a coordinated effort led by the DOJ and joined by state attorneys general.[221] These agencies were the institutions that rated the housing-related derivatives that blew up so spectacularly during the crisis. Most of these derivatives had triple-A ratings, making them, in the eyes of the credit ratings agencies at least, as safe as U.S. Treasury bonds.[222] The ratings company that was sued characterized the suit against it as an indictment for "failing to predict" the mortgage or financial crisis.[223] In a September 2013 filing in the case, the company also accused the government of filing suit as "retaliation for its

[215] Press Release, U.S. Dep't of Justice, No. 12-842, GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), available at http://www.justice.gov/opa/pr/2012/July/12-civ-842.html.

[216] Christopher Drew, Military Contractor Agrees to Pay $325 Million to Settle Whistle-Blower Lawsuit, N.Y. Times, Apr. 2, 2009, at B4.

[217] Press Release, U.S. Att'y's Office for the E. Dist. of Pa., United States Settles with Boeing over Improper Billing (Jan. 20, 2012), available at http://www.justice.gov/usao/pae/News/2012/Jan/boeing_release.htm.

[218] Press Release, U.S. Dep't of Justice, No. 09-350, Quest Diagnostics to Pay U.S. $302 Million to Resolve Allegations that a Subsidiary Sold Misbranded Test Kits (Apr. 15, 2009), available at http://www.justice.gov/opa/pr/2009/April/09-civ-350.html.

[219] Press Release, U.S. Dep't of Justice, No. 12-520, ATK Launch Systems Inc. Settles False Claims Product Substitution Case for Nearly $37 Million (Apr. 23, 2012), available at http://www.justice.gov/opa/pr/2012/April/12-civ-520.html.

[220] Brady Dennis, U.S. Charged 530 in Mortgage Scams in Past Year, Wash. Post, Oct. 10, 2012, at A18.

[221] Allison Frankel, S&P: State AGs Trying to Usurp Federal Regulation of Rating Agencies, Reuters (Apr. 8, 2013), http://blogs.reuters.com/alison-frankel/2013/04/08/sp-state-ags-trying-to-usurp-federal-regulation-of-rating-agencies/ ("[W]hen the Justice Department announced its $5 billion suit against S&P in February, seven state AGs were in attendance to announce their own parallel state-court claims that the rating agency lied about its independence and objectivity . . . .").

[222] See generally Jeffrey Manns, Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability, 87 N.C. L. Rev. 1011 (2009) (giving an overview of credit ratings agencies and the problems with their ratings of subprime-backed assets before the crisis).

[223] Frankel, supra note 221.

downgrade of the U.S. debt [in 2011]."[224] Three aspects of the suit are particularly interesting.

The first relates to the government's insistence on an admission of liability from Standard & Poor's ("S&P"). Such admissions are costly to extract and are often viewed as unnecessary—ordinary people do not admit guilt when they get divorced or pay up after auto accidents, after all, even where the fault is clear.

Perhaps for this reason, the Securities and Exchange Commission has not required such admissions in the past, much to the consternation of some observers and at least one judge. Judge Rakoff of the district court in Manhattan reacted with horror to the SEC's non-admission settlements with Citigroup and Merrill Lynch over wrongdoing related to the financial crisis. The S&P suit shows that at least part of the government has come around to Judge Rakoff's way of thinking, as does the SEC's new receptiveness to settlements that require admissions of responsibility.[225] If this trend continues, we should expect to see fewer settlements and more court cases in the future.

A second aspect of the litigation offers context. It is always difficult to know whether the multimillion-dollar fines imposed on financial institutions are a hardship or a slap on the wrist with the costs quickly passed on to the customers. In this case, the government apparently asked S&P to pay one billion dollars, which was too high a price for peace for the credit rating agency. The company apparently protested that the sum amounted to its parent company's yearly profit, a ratio that it could not abide.[226] The case provides some evidence of how much will strike a defendant—even a well-heeled financial defendant—as too much.

The final interesting aspect of the lawsuit is constitutional. S&P will likely defend its ratings as protected by the First Amendment's right to

[224] Edvard Pettersson, Geithner Said U.S. Would Respond to Downgrade, S&P Says, Bloomberg (Jan. 21, 2014), http://www.bloomberg.com/news/2014-01-21/geithner-said-u-s-would-respond-to-downgrade-s-p-says.html (discussing the company's assertion that it has evidence that "will support its claim that the government filed a fraud lawsuit against it last year in retaliation for its downgrade of the U.S. debt two years earlier").

[225] Peter J. Henning, Behind Rakoff's Rejection of Citigroup Settlement, N.Y. Times DealBook (Nov. 28, 2011, 5:14 PM), http://dealbook.nytimes.com/2011/11/28/behind-judge-rakoffs-rejection-of-s-e-c-citigroup-settlement/.

[226] Andrew Ross Sorkin & Mary Williams Walsh, U.S. Accuses S. & P. of Fraud in Suit on Loan Bundles, N.Y. Times DealBook (Feb. 4, 2013, 2:38 PM), http://dealbook.nytimes.com/2013/02/04/u-s-and-states-prepare-to-sue-s-p-over-mortgage-ratings/.

free expression. The First Amendment does not give anyone a right to commit fraud, as Steven M. Davidoff and Peter J. Henning have observed, and the sort of commercial speech that covers credit ratings is entitled to somewhat less protection than core political speech.[227]

But S&P, founded by a journalist offering information to investors about railroads, has successfully invoked a "reporter's privilege" to fend off lawsuits claiming that its ratings were issued negligently.[228]

To be sure, that privilege has always been an uncertain one. Federal courts in California, where the suit against S&P was filed, have not always recognized the reporter's privilege, even for newspaper and television reporters involved in criminal investigations, and plenty of other courts have dismissed its extension to credit ratings agencies.

Still, if S&P is singled out for ratings that were matched by the other ratings agencies, the government's case might look like an exercise favoring certain speakers over others, and that might be a problem. It might even encourage the government to file lawsuits against other ratings agencies.[229]

FIRREA. FIRREA was passed in 1989 in response to the costly bailout required to arrest the savings and loan crisis.[230] The statute imposes hefty civil fines for committing any of a list of offenses, including mail and wire fraud, in a way "affecting a federally insured financial institution."[231] The government has recommended that prosecutors "be creative" in their use of the law, and creative they have been.[232] Bank of New York Mellon, Countrywide Financial, and Wells Fargo have all been sued because, essentially, they defrauded themselves through their

[227] Peter J. Henning & Steven M. Davidoff, Justice Department Faces Uphill Battle in Proving S. & P. Fraud, N.Y. Times DealBook (Feb. 5, 2013, 1:16 PM), http://dealbook.nytimes.com/2013/02/05/justice-department-faces-uphill-battle-in-proving-s-p-fraud/.

[228] Richard Sylla, A Historical Primer on the Business of Credit Ratings 8–9 (March 1–2, 2001) (prepared for the World Bank conference on "The Role of Credit Reporting Systems in the International Economy"), available at http://www1.worldbank.org/finance/assets/images/Historical_Primer.pdf.

[229] David Zaring, S.&P. Lawsuit Draws New Line in the Sand, N.Y. Times DealBook (Feb. 11, 2013, 10:34 AM), http://dealbook.nytimes.com/2013/02/11/s-p-lawsuit-draws-new-line-in-the-sand/.

[230] See generally 1 Div. of Research and Statistics, Fed. Deposit Ins. Corp., History of the Eighties—Lessons for the Future 100–02 (1997), available at https://www.fdic.gov/bank/historical/history/87_136.pdf (outlining legislative history of FIRREA).

[231] 12 U.S.C. § 1833a (2012).

[232] Nick Timiraos et al., U.S. Steps Up Loan Scrutiny, Wall St. J., May 21, 2011, at B1 ("The Justice Department has instructed federal prosecutors to be creative in adapting decades-old laws to take action against Wall Street . . . .").

exposure to various risky assets (thus, the federal insured institution affected by the fraud was itself).[233]

Armed with FIRREA, the government may have the ability to pursue these suits for some time, given the ten-year statute of limitations applicable to claims under the Act.[234] Indeed, the government's first financial crisis suit against S&P was brought under FIRREA, signaling its willingness to resurrect this S&L-era weapon.[235] So were a string of suits that led to large settlements paid by the biggest financial institutions left in America.[236] FIRREA's late-breaking use may be a function of the fact that the suits have been difficult to build, but they also presumably reflect an increased willingness of banks to settle with the government after the possibility of follow-on civil litigation by the private plaintiffs' bar has been timed out. Nonetheless, the ensuing settlements—$7 billion for Citigroup, almost $17 billion for Bank of America, and $13 billion for JPMorgan—are certainly large, as far as these settlements go.[237]

3. The Banking Regulators

Of all of the banking regulators, only the FDIC has added an enforcement dimension to its supervisory efforts in the wake of the crisis, much to the consternation of some observers, such as Senator Elizabeth

[233] Amanda Johnson, The Use of FIRREA to Prosecute Financial Institutions for "Affecting" Themselves (2014) (working paper) (on file with author).

[234] See supra notes 23–24 and accompanying text.

[235] Press Release, Dep't of Justice, No. 13-156, Department of Justice Sues Standard & Poor's for Fraud in Rating Mortgage-Backed Securities in the Years Leading Up to the Financial Crisis (Feb. 5, 2013), available at http://www.justice.gov/opa/pr/2013/February/13-ag-156.html; see also Antonio F. Dias et al., FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud, Jones Day (May 2013), http://www.jonesday.com/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud/ (suggesting possible advantages to the DOJ of utilizing FIRREA in financial crisis suits due to its broad scope and lower standard of proof).

[236] See infra note 26 and accompanying text.

[237] See Press Release, Dep't of Justice, supra note 26; Press Release, Dep't of Justice, No. 14-733, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (July 14, 2014), available at http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement; Press Release, Dep't of Justice, No. 12-1237, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), available at http://www.justice.gov/opa/pr/2013/November/13-ag-1237.html.

Warren.[238] Banking regulators enjoy close relationships with banks, and the whole gestalt of banking regulation is quite non-adversarial and rarely results in litigation. But bank supervisors have awesome enforcement powers, and might be expected to deploy them in the event of a once-in-a-generation crisis.

The FDIC has played a role in the civil enforcement paradigm, in particular with a pair of suits against the executives of the two largest thrifts to fail during the crisis. The FDIC sued in its receivership capacity, which gives it the right to pursue all of the bank's claims, including its claims against bank executives.[239]

The most dramatic example of this sort of enforcement would likely be its civil lawsuit against Kerry Killinger, which settled for $64 million in 2011 even though the FDIC initially sought to recover $900 million. This lawsuit represents, along with the suit against IndyMac executives, one of the few large-scale efforts against a bank executive.[240] Killinger was the chief executive officer who took Washington Mutual, the country's largest thrift at the time of its demise, from modest northwestern roots to country-spanning substantiality, albeit all at the cost of a substantial commitment to the continued health of the housing market.[241] Washington Mutual's chief executive and two of his top lieutenants were sued by the FDIC for safety and soundness violations.[242]

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[238] See supra note 17.

[239] See 12 U.S.C. § 1821 (2012); Complaint at 6, FDIC v. Killinger, No. 2:11-cv-459 (W.D. Wash. Mar. 16, 2011), available at http://graphics8.nytimes.com/packages/pdf/business/conformedcomplaint.pdf. The Washington Mutual ("WaMu") complaint alleged negligence under Washington state law, breach of fiduciary duty, and fraudulent transfer under Washington's Uniform Fraudulent Transfer Act. Complaint, supra, at 46–57.

[240] Louise Story, Ex-Bank Executives Settle F.D.I.C. Lawsuit, N.Y. Times, Dec. 14, 2011, at B5; see also Floyd Norris, Eyes Open, WaMu Still Failed, N.Y. Times, Mar. 25, 2011, at B1 (reporting that should Killinger be prosecuted, he would be "the rare banker to be penalized for making disastrously bad loans").

[241] See Roger Lowenstein, Op-Ed., Kerry Killinger, the Man Who Destroyed WaMu, L.A. Times, Apr. 16, 2010, at A27 (reporting that Killinger took over the "medium-size and conservatively run thrift" in 1990 and built it "into a behemoth with 2,200 outlets"); see also Gretchen Morgenson, Slapped Wrists at WaMu, N.Y. Times, Dec. 18, 2011, at B1 (characterizing the settlement as "small potatoes" and reporting that almost all of the settlement was fully paid by directors and officers ("D&O") insurance policies, although the executives were each required to contribute some personal cash and to forego claims in the WaMu bankruptcy proceedings).

[242] See Complaint, supra note 239, at 1 (charging that the officers acted "with reckless disregard for WaMu's longer term safety and soundness").

Second best in this competition would go to the agency's suit against IndyMac, another thrift that failed due to the collapse in California housing prices.[243] The FDIC sued a number of IndyMac executives for negligence in approving loans, charging that the executives violated bank safety standards in an effort to reach bonus targets.[244]

Although the authority for bringing suit came from the FDIC's receivership role, as in the WaMu litigation, the litigation strategy differed.[245] The IndyMac complaint alleged negligence and other breaches of duty in causing thirty-three individual loans, each named in the complaint, to be made. On December 7, 2012, a jury in federal court awarded the government a total in excess of $168 million against three IndyMac executives.[246] The FDIC also filed a separate suit against the former CEO of IndyMac, Michael Perry, which alleged a single count of negligence.[247] The agency has also brought claims against 158 individuals at about twenty small banks that failed during the crisis.[248]

These suits are prominent examples of a common trend in the wake of bank failures, where the FDIC tends to file suit against the executives in charge during those failures. Because a significant number of very small banks failed during the financial crisis, a significant number of the directors of these banks have been taken to task by the FDIC. As the litigation consulting firm Cornerstone Research has observed:

> Of the 140 financial institutions that failed in 2009, the directors and officers of 64 (or 46 percent) either have been the subject of an FDIC lawsuit or settled claims with the FDIC prior to the filing of a lawsuit.

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[243] See Renae Merle, New Model Is Forged in Bank's Wreckage, Wash. Post, Nov. 1, 2008, at A1 (reporting that most of IndyMac's 700,000 loans were "in the hardest-hit parts of the country, including Southern California and Florida").

[244] E. Scott Reckard, Former IndyMac Execs Told to Pay FDIC $169 Million, L.A. Times, Dec. 8, 2012, at B3.

[245] Complaint at 1, FDIC v. Van Dellen, No. CV-10-4915 DSF (CWx) (C.D. Cal. July 2, 2010).

[246] See Verdict Form, FDIC v. Van Dellen, No. 10-CV-4915 DSF (CWx) (C.D. Cal. Dec. 7, 2012), available at http://clients.oakbridgeins.com/clients/blog/imverdict.pdf; Reckard, supra note 244.

[247] Reckard, supra note 244*;* see also Complaint, FDIC v. Perry, No. 11-cv-05561-ODW-MRW (C.D. Cal. July 6, 2011) (alleging only a single claim for common law negligence).

[248] Eric Dash, F.D.I.C. Sues Ex-Chief of Big Bank that Failed, N.Y. Times, Mar. 18, 2011, at B6.

> Of the 157 institutions that failed in 2010, 53 (or 34 percent) have either been the subject of a lawsuit or have settled with the FDIC.[249]

The other critical sort of banking regulatory suits are those cases where the regulators have stepped into the shoes of failed institutions and have, as bankruptcy trustees might in other contexts, sued their counterparties wherever a claim might be colorable. For example, in 2011, the Federal Housing Finance Agency, acting as conservator for Fannie Mae and Freddie Mac, sued seventeen large banks over losses sustained by Fannie Mae and Freddie Mac from "different mortgage-related products."[250] The FHFA sued UBS and other defendants (including four former UBS executives) over their investments in the firm's securities, alleging false statements in the securities' registration statements.[251] That case settled for $885 million, and the outcome was representative of litigation with the FHFA.[252]

The National Credit Union Administration ("NCUA") made a similar claim in September 2013 against Morgan Stanley and eight other banks, alleging the defendants made misrepresentations in connection with the underwriting and sale of nearly $2.4 billion in mortgage-backed securities, leading to the collapse of two credit unions.[253] The NCUA has said that five credit unions in total have failed due to the purchase of faulty mortgage-backed securities.[254]

4. States

The states have generally not stepped in where the federal agencies have feared to tread, though this is often thought to be a potential check on failure to regulate on the national level. In the wake of the financial

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[249] Cornerstone Research, FDIC D&O Lawsuits Surge in 2013 (Feb. 13, 2014), http://www.cornerstone.com/Publications/Press-Releases/FDIC-D-O-Lawsuits-Surge-in-2013.

[250] Protess, supra note 196.

[251] Complaint at 88–95, Fed. Housing Fin. Agency v. UBS Americas Inc., No. 11 Civ. 5201 (S.D.N.Y. July 27, 2011).

[252] Clea Benson & Elena Logutenkova, UBS to Pay $885 Million to Settle U.S. Mortgage Suit, Bloomberg (July 26, 2013, 4:20 AM), http://www.bloomberg.com/news/2013-07-25/ubs-agrees-to-pay-885-million-to-settle-u-s-securities-suit.html.

[253] Varun Aggarwal & Stephen Coates, Regulator Sues Morgan Stanley, Eight Others over Faulty Securities, Reuters (Sept. 23, 2013, 10:58 PM), http://www.reuters.com/article/2013/09/24/us-morganstanley-creditunion-lawsuit-idUSBRE98N02E20130924.

[254] NCUA Sues Morgan Stanley and Eight Others over Faulty Securities, Nat'l Credit Union Admin. (Sept. 23, 2013), http://www.ncua.gov/News/Pages/NW20130923Lawsuits.aspx.

crisis, the state attorneys general, though occasionally sputtering with outrage, have not moved aggressively to regulate the banks in concert.

A number of states have won some settlements for crisis-related misconduct, however. Occasionally, the states have policed the financial sector collectively, as was the case for the collective efforts against oppressive mortgage servicing practices by the banks—a rare case of litigation designed to help homeowners hurt by the collapse of the housing market. Bank of America, Citigroup, JPMorgan Chase, Ally Financial and Wells Fargo eventually reached a "landmark" settlement with forty-nine state attorneys general and federal agencies in early 2012 in which the banks agreed collectively to pay $25 billion to settle the claims against them.[255]

An example of the sort of things that individual states can do is provided by the comparatively aggressive work of the Massachusetts attorney general. That office can only pursue claims on behalf of Massachusetts residents, rather than protect the rights of or enforce wrongs committed against citizens of other states. But it has moved somewhat aggressively on the basis of state antifraud powers to go after financial institutions that issued "unfair" mortgages within its jurisdiction. Massachusetts settled a case against the Royal Bank of Scotland for $52 million, against a subsidiary of H&R Block for $115 million, and against Morgan Stanley for $102 million.[256] The attorney general also participated in a nationwide suit against Countrywide whereby attorneys general received $3 billion in mortgage modifications nationally.[257] Massachusetts pursued these kinds of mortgage modification claims against other financial institutions and even engaged in an SEC-like settlement with State Street Bank, involving allegations that the financial intermediary misled investors on its exposure to sub-prime mortgages.[258]

[255] State Attorneys General, Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs, Nat'l Ass'n of Att'ys Gen. (Feb. 9, 2010), http://naag.org/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php; see also Daniel Fisher, Here's What's in the $25 Billion Mortgage Settlement, Forbes (Feb. 9, 2012, 10:30 AM), http://www.forbes.com/sites/danielfisher/2012/02/09/states-feds-to-announce-25-billion-mortgage-settlement/ (breaking down distribution of settlement into pools of funds for differing classes of claimants).

[256] Addressing the Foreclosure Crisis, Mass. Office of the Att'y Gen., http://www.mass.gov/ago/news-and-updates/initiatives/addressing-the-foreclosure-crisis/ (last visited Feb. 19, 2014).

[257] Id.

[258] Id.

Massachusetts is one of the leading states attempting to pursue financial crisis remedies, but it is not the only one. The New York Attorney General recently filed suit against JPMorgan under the state's feared Martin Act.[259] The Martin Act is a fraud statute, and it used to be used to go after penny-ante mountebanks.[260] Elliot Spitzer, former New York Attorney General, however, turned the Act into a cudgel that could be used against Wall Street, aided by the fact that the Martin Act doesn't require intent or reliance, as federal fraud statutes do, even for crimes (which is surprising, and would raise visions of due process challenges to convictions).[261] One New York court has observed that the Act "includes all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public."[262] That means the prosecuting agency only needs to show that a material misstatement or omission occurred.

The suit alleged that Bear Stearns (now JPMorgan) systematically failed to inspect the quality of the mortgages it put into its mortgage-related products, residential mortgage-backed securities ("RMBS"), which it then sold to investors.[263]

Parts of the complaint read like a political document. Consider a portion charging that, "Faced with the promise of immediate, short-term profits and no long-term risks, originators began to increase their vol-

[259] Gretchen Morgenson, JPMorgan Unit Is Sued over Mortgage Security Pools, N.Y. Times, Oct. 2, 2012, at B1; Michael J. De La Merced, In J.P. Morgan Case, the Martin Act Rides Again, N.Y. Times DealBook (Oct. 2, 2012, 12:06 PM), http://dealbook.nytimes.com/2012/10/02/in-jpmorgan-case-the-martin-act-rides-again.

[260] N.Y. Gen. Bus. Law § 353 (Consol. 2012) (permitting suits against anyone who "has engaged in, is engaged or is about to engage in any of the transactions heretofore referred to as and declared to be fraudulent practices"); see also Roberta S. Karmel, Appropriateness of Regulation at the Federal or State Level: Reconciling Federal and State Interests in Securities Regulation in the United States and Europe, 28 Brook. J. Int'l L. 495, 544 n.272 (2003) (reporting that the Martin Act was rarely used "except to prosecute local scams" for many years, until Spitzer decided to start using the Act against investment banks).

[261] See Karmel, supra note 260, at 521 (observing that "[i]n the New York Attorney General's view, in contrast to the requirements of the federal securities laws, no purchase or sale of stock is required, nor are intent, reliance or damages required elements of a violation [of the Martin Act]").

[262] State v. 7040 Colonial Rd. Assocs. Co., 671 N.Y.S.2d 938, 941–42 (N.Y. Sup. Ct. 1998); see also Dechert LLP, New York State's Martin Act: A Primer, Fin. Servs., Jan. 15, 2004, available at http://www.dechert.com/files/Publication/a4def5dd-77bf-48ae-bead-491bfcb9142c/Presentation/PublicationAttachment/dbeb2852-2e00-49d6-971f-4c2db9674658/FS_2004-04.pdf (explaining the elements of a violation of the Martin Act).

[263] Complaint at 1–2, People v. J.P. Morgan Sec., LLC (N.Y. Sup. Ct. Oct. 1, 2012), available at http://graphics8.nytimes.com/packages/pdf/business/108632018-nyagvjpmc.pdf.

ume of home loans without regard to prospective borrowers' creditworthiness—including their ability to repay the loan."[264] It all sounds rather contentious, as do statements like this one contained in the complaint: "In fact, numerous originators who were top contributors to Defendants' RMBS were on the Comptroller of the Currency's 'Worst Ten' mortgage originators in the 'Worst Ten' metropolitan areas due to their loans' high rate of foreclosures during the period 2005 to 2007."[265]

The complaint spends a great deal of time (paragraphs thirty-three to sixty-nine of an eighty-five paragraph complaint) arguing that the due diligence the bank made into its RMBS was insufficient, suggesting that the defense will turn on this issue.[266]

And part of the complaint relies on the fact that JPMorgan sued and settled with mortgage originators but failed to share the settlement proceeds with RMBS investors.[267]

These suits are high profile because they have been relatively rare. State attorneys general, particularly in New York, serve as a check against federal quiescence and may goad federal enforcement actions, or substitute for them, as, for example, the state did in its enforcement efforts before the financial crisis against various alleged misdeeds at AIG.[268] But there is little indication that something similar is going on here. New York has limited its Martin Act suits since the high water mark of the last decade, and seems to have little appetite to be the financial market policeman where the federal government has declined to act.

IV. PRIVATE LITIGATION

One could argue that suits between private parties should be the heart of the way that the financial crisis finds itself subject to resolution in the courts. If it was indeed the case that toxic securities were being sold under false representations about the care with which they were selected, then one might expect the investor community to be particularly energized with policing those representations, leading to in-court contests between "buyer beware" and "seller be truthful." The courts have been

[264] Id. at 7–8.
[265] Id. at 8.
[266] Id.
[267] Id. at 25.
[268] Greenberg, the former AIG CEO, had little good to say about these suits. See Maurice R. Greenberg & Lawrence A. Cunningham, The AIG Story (2013) (arguing that the Spitzer investigations of Greenberg were both unwarranted and counterproductive).

quite willing to entertain such suits, even as agencies have only sanctioned a few institutions for this sort of fraudulent conduct.

However, there are reasons to regret the purely private nature of the outcome. Owen Fiss famously decried the settlement culture as inimical to public values.[269] His vision—of no settlements—goes impractically too far. But though it cannot be the case that no cases should settle, the public values supposedly fostered by the court system will be hard to identify if *every* case settles, or even if such a large number of settlements result that the verdicts and opinions released about financial crisis responsibility evolve from a random set of obscure facts coming from unpredictable and likely obscure corners of what was a very large event.[270]

The private sector cases can roughly be divided into two categories: the almost contemporaneous, but entirely unsuccessful merger and acquisition ("M&A") lawsuits filed by dissident shareholders in the wake of government takeovers during the crisis, and the post-crisis, reimbursement-oriented lawsuits. The contemporaneous suits, if anything, bolster the Posner and Vermeule theory about the weaknesses of courts in a crisis; despite being entirely plausible in various particulars, these cases went nowhere.

The post-crisis lawsuits, one might have expected, would be a boon for private sector lawyers for years to come. They have kept many busy, though now, statutes of limitation may be bringing this era of financial crisis litigation to a close. As the litigation consultancy firm Cornerstone has observed, because of the statutes of limitation, 2012 was "marked by the end of new filings related to the credit crisis."[271] It makes sense to review them, even as not every settlement has yet been concluded (and will not be for many years).

The question is whether this private sector litigation, which benefits wealthy holders of securities, is a worthy substitute for the public alter-

[269] Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1075 (1984).

[270] See Hillary A. Sale, Judges Who Settle, 89 Wash. U. L. Rev. 377, 410 (2011) ("[T]he high rate of settlements in these cases contributes to the inability to predict trial outcomes. Simply put, not enough cases proceed to trial to allow for robust predictions.").

[271] Cornerstone Research, Accounting Class Actions Filings and Settlements—2012 Review and Analysis 1 (2013), available at http://www.cornerstone.com/getattachment/283891a0-5bc2-4aa5-802a-2b3133f577bc/Accounting-Class-Action-Filings-and-Settlements%E2%80%9420.aspx. Recently, a law firm memo reported a steep drop-off. Gibson Dunn, 2013 Mid-Year Securities Litigation Update (July 16, 2013), available at http://www.gibsondunn.com/publications/pages/2013-Mid-Year-Securities-Litigation-Update.aspx#_toc361745793.

native. In what follows, the sorts of lawsuits between private parties that have arisen out of the crisis are itemized and considered, although the object is more to identify representative suits than to cover the waterfront as comprehensively as we have done for litigation involving the public sector.

A. Crisis Corporate Litigation

Few areas of law were less availing than the lawsuits brought, rarely and without conviction, by dissident shareholders after government takeovers or forced sales during the crisis. These cases were brought against the management of the firm, occasionally claiming that these managers had failed to observe corporate formalities we have come to expect to see in corporate M&A, such as go-shop provisions, considered board evaluations of the bid and potential competitors, and almost anything else that is usually assumed to be required in a sale, but was jettisoned during the financial crisis emergencies.

For these reasons, seemingly blockbuster litigation soon fizzled. Citigroup pursued some relatively halfhearted litigation against Wells Fargo for slipping in a high bid, with the Treasury Department's blessing, before it could consummate its proposed merger with Wachovia.[272] Citigroup had thought that it was coming to the rescue, much as JPMorgan had quickly bought up WaMu with the Treasury Department's blessing. Hours before Wachovia was to be seized by regulators, Citigroup reached a deal with government assistance. Citigroup claimed that if it had not stepped in, Wachovia "would have 'failed the following day . . . with potentially devastating implications for the stability and security of the financial markets.'"[273] After the litigation—initially seeking $60 billion in damages for violating the exclusivity agreement—went nowhere, Citigroup and Wells Fargo reached a settlement paying Citi

[272] Wachovia Corp. v. Citigroup, Inc., 634 F. Supp. 2d 445, 459 (S.D.N.Y. 2009) (denying Citigroup's motion for judgment on the merger and holding that EESA could retroactively disrupt an exclusivity agreement between the parties); Citigroup, Inc. v. Wachovia Corp., 613 F. Supp. 2d 485, 496 (S.D.N.Y. 2009) (holding that the bank's state law claims against two competitors were not completely preempted by EESA).

[273] David Benoit, Jilted in Deal, Citi Will Get $100 Million, Wall St. J., Nov. 20, 2010, at B1.

$100 million to resolve the claims that Wells Fargo had unfairly pulled Wachovia away from the proposed merger.[274]

Before TARP, some Bear Stearns shareholders pursued state court litigation, in Delaware and New York, against Bear Stearns itself for the way that it accepted its Treasury-urged, but very low-priced, sale.[275] But this, too, was unavailing. Although the deal was arguably invalid under state law, the Delaware courts deferred to the New York litigation. Similarly, state courts in New York resisted efforts to get them to deploy basic principles of corporate governance to police the mergers encouraged by the Treasury Department, applying Delaware law and deciding that the directors' decision to complete the deal was protected by the business judgment rule.[276]

B. Post-Crisis Private Sector Litigation

Private litigants have not, in the end, hesitated to sue financial institutions for their actions during the financial crisis, and creative plaintiffs have found ways to cover the waterfront of potential wrongdoing, devising suits against the banks themselves, their lawyers, and the ratings agencies that scrutinized the securities the banks sold.[277] The list is comprehensive; the outcomes have overwhelmingly been settlements when there have not been successful motions to dismiss.

There are reasons to find this sort of disciplining acceptable. It relies on those most injured by bank misconduct to bring suits; fans of small

[274] See *Wachovia*, 634 F. Supp. 2d at 445, 448; *Citigroup*, 613 F. Supp. 2d at 485; Eric Dash, Wells Fargo to Pay Citigroup $100 Million for Wachovia Claims, N.Y. Times DealBook (Nov. 19, 2010, 2:09 PM), http://dealbook.nytimes.com/2010/11/19/wells-to-pay-citi-100-million-for-wachovia-claims/.

[275] See, e.g., In re Bear Stearns Cos. S'holder Litig., C.A. No. 3643-VCP, 2008 WL 959992 (Del. Ch. Apr. 9, 2008); In re Bear Stearns Litig., 870 N.Y.S.2d 709 (N.Y. Sup. Ct. 2008).

[276] See Davidoff & Zaring, supra note 9, at 535 ("[T]hose state officials with the capacity to act . . . either got[ ] out of the way of or cooperated with federal officials."); Marcel Kahan & Edward Rock, How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity, 58 Emory L.J. 713, 739 (2009) (noting that Delaware rarely defers to other states on matters of Delaware corporate law, but arguably did so here to avoid halting federal action viewed as essential); Matthew R. Shahabian, Note, The Government as Shareholder and Political Risk: Procedural Protections in the Bailout, 86 N.Y.U. L. Rev. 351, 382 (2011) (describing the state court litigation).

[277] Kevin M. LaCroix, Subprime and Credit Crisis-Related Lawsuit Settlements, Dismissals and Denials, D&O Diary (Apr. 30, 2013), http://www.dandodiary.com/2007/04/articles/securities-litigation/counting-the-subprime-lender-lawsuits/index.html.

government might prefer this sort of discipline to that which could be provided by a government agency.

But, as we have observed, these cases have settled for the most part, meaning that the courts still have not played any expressive role in highlighting unacceptable forms of misconduct. More generally, the financial crisis hurt everyone, not just the purchasers of unsafe financial products; but it is those well-heeled purchasers who have taken the most advantage of the opportunity to sue. In what follows, I discuss just how broad and diverse the claims by the private sector have been, before offering a brief assessment of their implications.

1. Claims

A number of financial institutions, as well as individual plaintiffs, have taken up the charge of suing banks in the aftermath of the financial crisis, primarily for their securitization practices. These suits, then, are not unlike the SEC suits that also targeted banks for the way they put together and sold investment products to their counterparties. Some plaintiffs allege fraudulent behavior on the part of the banks in inaccurately disclosing the risk of the security and quality of the underlying assets. Others claim breaches of contract—either in the form of misrepresentations or failure to honor obligations. And still others assert some variant of the material omission and market manipulation violations of the federal securities laws regarding the conflicting practices of banks in betting against the very securities that they were selling to investors.

Asset-backed securities and mortgage-backed securities ("MBS") have inspired more lawsuits than any other financial product implicated in the crisis.[278] These suits often involve other financial intermediaries, and are ultimately straightforward breach of contract suits over very complex financial instruments. For example, insurance companies have brought suits against sellers and underwriters of MBS transactions on allegations of fraud and breach of contract.[279] A monoline insurer (mon-

[278] Faten Sabry, Eric Wang & Joseph Mani, Credit Crisis Litigation Update: It Is Settlement Time 14 (2013) [hereinafter NERA Settlement Report], available at http://www.nera.com/publications/archive/2013/credit-crisis-litigation-update-it-is-settlement-time.html.

[279] MBIA Ins. Corp. v. Patriarch Partners VIII, LLC, No. 09 Civ. 3255, 2013 WL 2480244 (S.D.N.Y. June 10, 2013) (finding that fund manager did not breach agreements); Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, 892 F. Supp. 2d 596, 599 (S.D.N.Y. 2012) (considering suit brought by bond insurer of RMBS against bank for breach of contractual representations); Assured Guar. Corp. v. EMC Mortg., LLC, 39 Misc. 3d 1207(A) (N.Y. Sup. Ct.

oline insurers offer only one insurance product; many of the monolines who suffered most in the crisis were bond insurers) brought suits against two separate MBS offerings, positing that the banks and underwriters were aware of the high-risk nature of the underlying loans but lied about the risks to induce the firm to insure the product.[280] Eighteen such suits settled in 2013,[281] often for substantial amounts.[282] The headline settlement in this context involved the failed monoline MBIA, which settled claims against the mortgage bank Countrywide for $1.7 billion, in a combination of cash and debt instruments.[283]

The purchasers of packaged securities have also filed their share of lawsuits. Cases in this area have been quite active in recent years—eight cases settled in 2012 and another seventeen settled in 2013.[284] An emblematic claim was brought by a number of institutional investors against Countrywide and other mortgage banks. The investors sued over MBS certificates that were backed primarily with problematic loans originated by Countrywide.[285]

Other similar disputes involved claims that the banks masked the true risk of underlying assets through securitizations or that they failed to

2013) (considering suit by a monoline insurer of RMBS against the underwriter and seller alleging fraudulent inducement and breach of representations and warranties, as well as a number of other claims); MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 34 Misc. 3d 895, 897 (N.Y. Sup. Ct. 2012), aff'd 105 A.D.3d 412 (N.Y. App. Div. 2013) (considering an eventually settled suit for misrepresentations regarding whether the quality of underlying loans induced MBIA's issuance of insurance policies).

[280] In *Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB*, the plaintiff's expert found a significant number of material breaches in an examination of a random sample of eight hundred loans—"ranging from serious instances of fraud to Flagstar's multiple failures to adhere to its underwriting guidelines and standard industry practices." 892 F. Supp. 2d 596, 600 (S.D.N.Y. 2012). In addition to these deficiencies, the bank also failed to carry out its duties as the servicer of the securitization transaction. Id.

[281] NERA Settlement Report, supra note 278, at 6.

[282] See Structured Fin. Litig. Team, Flagstar to Pay $105 Million to Settle Assured RMBS Lawsuit, Structured Fin. Litig. Blog (June 21, 2013), http://www.structuredfinancelitigation.com/2013/06/21/flagstar-to-pay-105-million-to-settle-assured-rmbs-lawsuit/; Structured Fin. Litig. Team, UBS to Pay Assured Guaranty $358 Million to Settle RMBS Claims, Structured Fin. Litig. Blog (May 6, 2013), http://www.structuredfinancelitigation.com/2013/05/06/ubs-to-pay-assured-guaranty-358-million-to-settle-rmbs-claims/.

[283] NERA Settlement Report, supra note 278, at 6.

[284] Id.

[285] Investors and Countrywide Agree to Landmark $500 Million MBS Settlement, Wall St. J. Market Watch (Apr. 17, 2013, 7:25 AM), http://online.wsj.com/article/PR-CO-20130417-906873.html.

properly underwrite the underlying mortgages.[286] A number of investors also brought suit against the major investment banks for the way they packaged their CDOs before and during the financial crisis.[287]

If the financial instrument suits involved various breach of contract claims, other cases alleged traditional intentional torts. Cases have been brought in both state and federal courts asserting fraud, most commonly. In one representative case, a Chinese bank brought suit against Morgan Stanley in the state of New York on claims of "common law fraud, fraud in the inducement and fraudulent concealment in the sale of an investment product."[288]

In addition, the unraveling of CDO transactions has given rise to a number of suits under the anti-fraud components of the federal securities laws, largely based on the same factual circumstances underpinning the aforementioned common law claims. Indeed, plaintiffs often assert both causes of action in the same suit. Both individual and institutional investors have brought class actions against investment banks and their officers under Section 10(b) of the Securities Exchange Act of 1934, and the related Rule 10b-5, for alleged misrepresentation, manipulation, and fraud.[289] Several plaintiffs have pointed to the way banks lowered their own risk exposure by selling off particularly risky assets to others. The claim is that the failure "to disclose such a strategy to investors" was a

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[286] See Jonathan Stempel, Judge Revives Dexia's Lawsuit vs. JPMorgan, Reuters (May 17, 2013, 9:24 PM), http://www.reuters.com/article/2013/05/18/us-jpmorgan-dexia-lawsuit-idUSBRE94G0TX20130518; see also Complaint, Royal Park Inv. SA/NV v. Credit Suisse AG, No. 653335/2013 (N.Y. Sup. Ct. Sept. 25, 2013) (alleging material omission in the offering documents for failing to disclose the fact that Credit Suisse was betting against the securities that it was offering to the plaintiff).

[287] See Jesse Eisinger, Financial Crisis Suit Suggests Bad Behavior at Morgan Stanley, N.Y. Times Dealbook (Jan. 23, 2013, 12:00 PM), http://dealbook.nytimes.com/2013/01/23/financial-crisis-lawsuit-suggests-bad-behavior-at-morgan-stanley/?_r=1 (noting the bankers' disregard for the riskiness of the asset-backed securities and the practice of profiting at the expense of "unsuspecting buyers").

[288] China Dev. Indus. Bank v. Morgan Stanley & Co., 86 A.D.3d 435, 436 (N.Y. App. Div. 2011) (allegations sufficiently particularized to survive motion to dismiss); see also Complaint, Northern Rock (Asset Management) PLC v. UBS Inv. Bank, No. 650623/2013 (N.Y. Sup. Ct. Feb. 25, 2013) (alleging fraudulent statements regarding quality of CDO's underlying assets, the independence of the collateral advisor, and the collateral evaluation process); Complaint, CIMB Thai Bank PCL v. Morgan Stanley, No. 653777/2-12 (N.Y. Sup. Ct. Oct. 26, 2012) (asserting similar claims of fraud and misrepresentations in the sale of Arosa, Hunter, ACES, ELAN, and Elva CDOs). For a complete list of cases based on CDO transactions arising out of the financial crisis, see CDO Litigation 2011–2013, PF2 Sec. Evaluations, http://www.pf2se.com/Content.aspx?Type=LitigationCases (last visited Mar. 4, 2014).

[289] Dodona I, LLC v. Goldman, Sachs & Co., 847 F. Supp. 2d 624, 635 (S.D.N.Y. 2012).

material omission in the representations made to those investors to induce them to purchase the securities.[290]

A different set of allegations is found in a number of shareholder suits that have been brought directly against issuer companies and their executives under the federal securities laws. Executives at both financial and non-financial firms have been sued for taking excessive risks in the run-up to the crisis[291] and failing to accurately disclose the condition of the firm to investors surprised by the disastrous downturn in stock values when the crisis was at its depth.[292] Relatedly, the suits allege that once the true exposure of the firms to risky assets became known, the firms' share prices fell drastically.[293] One of the largest suits in the category was brought by Bank of America shareholders against the company's directors and executives for making misleading statements regarding the health of the bank and Merrill Lynch at the time of acquisition. This suit

[290] Id. at 641–44; see also IBEW Local 90 Pension Fund v. Deutsche Bank AG, No. 11 Civ. 4209(KBF), 2013 WL 1223844, at *1 (S.D.N.Y. Mar. 27, 2013) (alleging violations of § 10(b) of the Securities Exchange Act when Deutsche Bank and its senior management team schemed "to inflate the company's stock price and maximize profits" by repackaging risky assets into CDOs); Richman v. Goldman Sachs Grp., 868 F. Supp. 2d 261, 268 (S.D.N.Y. 2012) (alleging material misrepresentation for failing to disclose Goldman's role in the CDO transaction and its conflicts of interest).

[291] See, e.g., Kirsten Grind, Accord Reached in Reserve Fund Lawsuit, Wall St. J. (Sept. 8, 2013, 4:02 PM), http://online.wsj.com/article/SB10001424127887323623304579060962278180206.html (settlement reached in class action lawsuit against the co-managers of the Reserve Primary Fund for mismanagement of the fund).

[292] See, e.g., Citigroup Agrees to Pay $590M in Shareholder Suit, Associated Press (Aug. 29, 2013, 1:45 PM), http://bigstory.ap.org/article/citigroup-agrees-pay-590m-shareholder-suit (discussing a suit against the executives for misleading shareholders "about the bank's growing problems before the financial crisis," which eventually settled); Jonathan Stempel, GE Settles Crisis-Era Shareholder Lawsuit for $40 Million, Reuters (Apr. 30, 2013, 10:20 AM), http://www.reuters.com/article/2013/04/30/us-generalelectric-settlement-idUSBRE93T0P820130430 (discussing a shareholder suit against GE for misleading investors about company's health and risk exposure during the crisis).

[293] A similar suit was brought against Moody's, the rating agency, for "false statements about the independence and objectivity of its credit ratings." Jonathan Stempel, Lawsuit Challenging Moody's Ratings Independence Is Dismissed, Chi. Trib. (Aug. 23, 2013), http://articles.chicagotribune.com/2013-08-23/business/sns-rt-us-moodys-lawsuit-20130823_1_constant-proportion-debt-obligations-credit-ratings-moody. For the complete decision, see *In re Moody's Corp. Securities Litigation*, No. 07 Civ. 8375(GBD), 2013 WL 4516788, at *12 (S.D.N.Y. Aug. 23, 2013) ("Plaintiffs fail to establish a connection between the loss-causing events and the actual share price declines as required to survive summary judgment with respect to loss causation.").

recently resulted in the second-largest settlement in financial crisis litigation thus far.[294]

Shareholders have also brought suits under Section 11 of the Securities Act of 1933 for false disclosures in registration statements, suits under Section 12(a)(2) of the Securities Act for similar misstatements in prospectuses, and, of course, catch-all claims against the firm under Section 10(b) of the Securities Exchange Act for the misleading statements and material omissions that ultimately resulted in investor losses as well as Section 15 claims against firm executives.[295] The picture painted in these lawsuits ranges from the desire to conceal bad news to stronger allegations of nefarious scheming.[296] The number of such suits has been in decline in recent years.[297]

But while several of the suits have been settled, none of the settlements has resulted in admissions of wrongdoing by executives.[298] The settlements, to be sure, have been substantial; the total amount of settlements in the shareholder class action area makes up over twenty percent

[294] NERA Settlement Report, supra note 278, at 6.

[295] The increasingly risky investment strategy of the Reserve Primary Fund was especially problematic in light of the fact that the fund was marketed to investors as a safe and "boring" investment vehicle. The conservative nature of the fund was cited in various promotional materials and securities filings which investors relied on in making their investment decisions. Consolidated Class Action Complaint, In re The Reserve Primary Fund Sec. & Derivative Class Action Litig., No. 08-cv-8060-PGG (S.D.N.Y. Jan. 5, 2010). For another example, see Second Consolidated Class Action Complaint, In re Gen. Elec. Co. Sec. Litig., No. 09-1951 (S.D.N.Y. Mar. 3. 2009) (alleging material omissions and misleading statements regarding "GE and GE Capital's financial strength and value of its assets, risk exposure and the substantial portion of . . . 'junk' grade commercial loans in the GE Capital portfolio").

[296] See, e.g., IBEW Local 90 Pension Fund v. Deutsche Bank AG, No. 11 Civ. 4209(KBF), 2013 WL 1223844 (S.D.N.Y. Mar. 27, 2013) (in a suit against the bank for problematic RMBS and CDO transactions, plaintiffs alleged that the bank and "its senior management oversaw a scheme to inflate the company's stock price and maximize profits").

[297] NERA Settlement Report, supra note 278, at 10. Claims under § 11 and § 12 were included in only one of thirty cases filed in the first half of 2013, down from thirty cases in 2012. Id.

[298] Citigroup finally agreed to settle a case that was first filed in 2008 for $590 million. See Jonathan Stempel, Citigroup Settles Shareholder CDO Lawsuit for $590 Million, Reuters (Aug. 29, 2012, 7:14 PM), http://www.reuters.com/article/2012/08/29/us-citigroup-settlement-idUSBRE87S0UA20120829. For other cases, see supra note 263; see also Jonathan Stempel, U.S. Judge OKs Citigroup $730 Million Bondholder Settlement, Reuters (Aug. 20, 2013, 12:16 PM), http://www.reuters.com/article/2013/08/20/us-citigroup-settlement-idUSBRE97J0LY20130820 (discussing the settlement between the bank and holders of its bonds and preferred stock).

of the total settlement value in the credit crisis litigation settlements from January 2007 to October 2013.[299]

In addition to securities laws actions, shareholders have also filed state law derivative suits against the executives of a number of banks for breaches of fiduciary duty and mismanagement.[300] Whether submitted to the court as part of a larger shareholder suit against the bank or a standalone cause of action, these cases found issue with some of the decisions made by the executives leading up to or during the financial crisis. They have, on the whole, not met with success in the courts, which have dismissed many of them.[301]

Investors have leveled other, rather novel charges against investment banks and others involved in the securities transactions. Recently, a number of foreign pension funds joined together to sue the major banks, alleging Sherman Act violations for "unreasonably restrain[ing] competition in the trading of" credit default swaps ("CDS") that resulted in "tens of billions of dollars" of damages to the plaintiffs.[302] According to the complaint, the banks commonly controlled key aspects of CDS trading and acted in concert to prevent entry of independent parties to reduce competition in the market and to overcharge customers.[303] A similar suit by two domestic financial institutions followed a few weeks later, citing similar allegations.[304]

The financial crisis has also inspired its fair share of early lawsuits under the Employee Retirement Income Security Act ("ERISA").[305] Typically in these cases, plaintiffs leveled charges of mismanagement

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[299] NERA Settlement Report, supra note 278, at 4.

[300] See, e.g., Pirelli Armstrong Tire Corp. Retiree Med. Benefit Trust v. Stumpf, No. C 11–2369 SI, 2012 WL 424557, at *1 (N.D. Cal. Feb. 9, 2012) (alleging "breach of fiduciary duty, abuse of control, gross mismanagement, and corporate waste" against the board of directors of Wells Fargo); In re Bank of Am. Corp. Sec., Derivative, and ERISA Litig., 757 F. Supp. 2d 260, 346 (S.D.N.Y. 2010) (dismissing derivative claims).

[301] For the cases that remain, see LaCroix, supra note 277.

[302] Complaint at 2–3, Unipension Fondsmaeglerselskab A/S v. Bank of Am. Corp., No. 1:13CV04979 (N.D. Ill. July 11, 2013) (citing ongoing antitrust investigations by the Department of Justice and the European Union antitrust authority).

[303] Id. at 1.

[304] Katy Burne, Banks Face More Suits over Swaps, Wall St. J. (July 30, 2013, 6:07 PM), http://online.wsj.com/article/SB10001424127887323854904578637831287508810.html.

[305] See Kivanc Kirgiz, Trends in ERISA Stock Drop Litigation, InsideCounsel (Aug. 20, 2012), http://www.insidecounsel.com/2012/08/20/trends-in-erisa-stock-drop-litigation (citing findings by Cornerstone Research and Vanguard Research); see also NERA Settlement Report, supra note 278, at 10 (noting the lack of ERISA claims in lawsuits filed in 2012 and 2013).

and breach of fiduciary duties against plan fiduciaries—usually large banks or company executives—for purchasing bad stocks for the plan and making imprudent investment decisions.[306] While a significant portion of these claims did not survive the motion to dismiss, some have been settled.[307]

Investors have also brought suits against the rating agencies for enabling the banks' bad behavior, both domestically and abroad.[308] The suits largely revolve around the optimistic ratings that Standard & Poor's and Moody's had granted risky investment vehicles during the crisis. Investors asserted claims of fraud and negligent misrepresentation against the ratings agencies, as well as the arranger and placement agent of the transactions, for the inaccurate ratings.[309] Here too, the ratings agencies have settled without admitting wrongdoing.[310]

It appears that there is blame to spare when it comes to the financial crisis. While issuers and underwriters remain the most popular defend-

[306] See, e.g., David Bario, 'Presumption of Prudence' Not Enough to Block Fannie Mae ERISA Class Action, Judge Rules, AmLaw Litig. Daily (Oct. 23, 2012), http://www.americanlawyer.com/digestTAL.jsp?id=1202576021499 (discussing the denial of a motion to dismiss in an ERISA action against Fannie Mae); Dan Prochillo, Pension Fund Hits BNY with ERISA Suit over $16M Losses, Law360 (June 19, 2013), http://www.law360.com/articles/451311/pension-fund-hits-bny-with-erisa-suit-over-16m-losses ("The bank allegedly used the benefit plan's funds to invest heavily in Lehman Brothers Holdings Inc. a year before the 2008 financial crisis and refused to offload the unwise investment even as it became clear the company was headed for bankruptcy.").

[307] LaCroix, supra note 277; see also, e.g., Abigail Rubenstein, TierOne Execs to Pay $4.5M to End ERISA Action, Law360 (Oct. 15, 2012), http://www.law360.com/articles/386683/tierone-execs-to-pay-4-5m-to-end-erisa-action ("The settlement agreement notes that the defendants are not admitting liability.").

[308] See, e.g., Shankar Ramakrishnan & John Weavers, S&P Faces Second Lawsuit in Australian Federal Court, IFR Asia (Apr. 20, 2013), http://www.ifrasia.com/sp-faces-second-lawsuit-in-australian-federal-court/21080774.article (noting that Australia's Federal Court recently "found S&P responsible for about A$30m of losses incurred by 12 Australian councils that were sold constant proportion debt obligations in 2006 from ABN AMRO's Rembrandt programme," and future suits against the rating agencies are expected in the Netherlands and the U.K.).

[309] See, e.g., Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 431, 440 (S.D.N.Y. 2012). The suit was eventually settled. Jeannette Neumann, S&P, Moody's Settle Ratings Lawsuit, Wall St. J. (Apr. 26, 2013, 9:04 PM), http://online.wsj.com/news/articles/SB10001424127887323789704578447561293487032 (noting that the terms of settlement remain confidential).

[310] William Amofah, Moody's, S&P Settle Lawsuits, Claim Innocence, CFO Insight (Apr. 29, 2013), http://www.cfo-insight.com/markets-economy/capital-markets/moodys-sp-settle-lawsuits-claim-innocence/.

ants,[311] private plaintiffs have also brought suit against auditors and accounting firms involved with mortgage originators and failed investment banks for failing in their auditing functions or actually assisting in the alleged fraud.[312] There was a major drop in filings that named an accounting firm as one of the defendants in 2010, and several major suits have been settled since.[313] One of the main suits arose from the bankruptcy of New Century Financial, one of the largest mortgage originators. Creditors filed a billion-dollar lawsuit against KPMG for "grossly negligent audits" as well as aiding and abetting New Century executives' breaches of fiduciary duty.[314] Supported by the bankruptcy court examiner's findings of "improper accounting strategies" and questionable practices, the plaintiffs questioned KPMG's independence and level of care in conducting its audits of New Century Financial.[315] Similar suits were recently filed against Deloitte & Touche for its audits of Taylor, Bean & Whitaker, and against Ernst & Young for its role in the Lehman debacle.[316] The suits were all eventually settled without major investigation into the audit firms' practices.[317]

[311] NERA Settlement Report, supra note 278, at 11.

[312] See Francine McKenna, Can Private Litigation Redeem the Accounting Profession?, Advocate for Institutional Investors (Bernstein Litowitz Berger & Grossman LLP, New York, N.Y.), Spring 2013, available at http://www.blbglaw.com/news/publications/data/00159/_res/id=File1/AdvSpring2013_McKenna.pdf. Another report found that allegations of GAAP violations were a recurring theme in credit crisis related litigation against accounting firms. Cornerstone Research, supra note 271, at 18.

[313] Jordan Milev, Robert Patton & Svetlana Starykh, NERA Econ. Consulting, Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review 6 (July 26, 2011), available at http://www.nera.com/nera-files/PUB_Mid-Year_Trends_0711(3).pdf.

[314] Complaint for Declaratory Relief, New Century Liquidating Trust v. KPMG LLP, 2009 WL 890197 (Cal. Sup. Ct. Apr. 1, 2009) (No. BC410846).

[315] In re New Century TRS Holdings, 390 B.R. 140 (Bankr. D. Del. 2008), available at http://pdfserver.amlaw.com/ca/newcentury01_0327.pdf; see Peg Brickley & Amir Efrati, KPMG Aided New Century Missteps, Report Says, Wall St. J. (Mar. 27, 2008, 12:01 AM), http://online.wsj.com/news/articles/SB120658573750067861 (noting that the Justice Department is also looking into individuals at the accounting firm as part of its investigation into New Century's bankruptcy).

[316] Complaint at 1, In re Lehman Bros. Equity/Debt Sec. Litig., No. 08-CV-5523-LAK (S.D.N.Y. Apr. 23, 2010), available at http://www.lehmansecuritieslitigation.com/pdf/2010-04-23%20Lehman%20Third%20Amended%20Complaint.pdf.; Complaint at 1–2, Luria v. Deloitte & Touche LLP, 2011 WL 4469524 (Fla. Cir. Ct. Sept. 26, 2011) (No. 11-30967CA31) (suit by bankruptcy trustee alleging that the defendant certified "completely false" financial statements and performed "grossly negligent audits").

[317] Sophia Pearson, Deloitte & Touche Settles Suits over Taylor Bean Collapse, Bloomberg (Oct. 3, 2013, 5:18 PM), http://www.bloomberg.com/news/2013-10-03/deloitte-touche-settles-suits-over-taylor-bean-collapse.html; Michael Rapoport, Ernst & Young Agrees to

Even lawyers have been unable to escape the litigious shareholders who lost money in the financial crisis, though very few suits have been brought against law firms.[318] The claims varied depending on the relationship of the plaintiffs to the law firm. In one emblematic case, an investment company sued a law firm for malpractice, alleging that the firm failed to inform the company of a key contractual provision, which caused the company to sustain massive losses when the deal was eventually canceled.[319] It remains unclear how strong these claims against law firms are. After all, "[law] firms base their opinions on facts they receive from their clients . . . . '[I]f the facts on a document are wrong, that's the client's fault.'"[320]

Outside of the traditional court system, there has also been a flood of Financial Industry Regulatory Authority ("FINRA") arbitration cases brought by investors against their broker dealers.[321] Plaintiffs often prefer to bring cases under the FINRA arbitration process because it is con-

Pay $99 Million in Lehman Settlement, Wall St. J. (Oct. 18, 2013), http://online.wsj.com/news/articles/SB10001424052702304384104579143811517891526; Jonathan Stempel, Judge OKs $125mln New Century Lawsuit Settlement, Reuters (Aug. 10, 2010, 11:54 PM), http://www.reuters.com/article/2010/08/11/newcentury-settlement-idUSN1018298820100811 (noting that KPMG agreed to pay $44.75 million as part of the settlement in the class action lawsuit by New Century's former shareholders). A recent research report on the topic of accounting cases noted that accounting suits have a higher likelihood of settlement than other lawsuits. Cornerstone Research, supra note 271, at 11.

[318] Claire Zillman, Coming Home to Roost? Law Firms Have Avoided Blame for Financial Crisis—Until Now, Am. Law. (Feb. 29, 2012), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202543064066; see also Anthony P. Spain, Mendes & Mount LLP, Possible Impact of the Current Economic Downturn on Lawyers' Professional Liability Claims 4 (2009), available at http://www.cnapro.com/pdf/LargeLawyersEconomicDownturnLPLClaims_4-24-09.pdf ("The global economic crisis surely will create some increase in the frequency and severity of professional malpractice suits.").

[319] Plaintiff's Original Petition, Highland CDO Opportunity Master Fund L.P. v. Orrick, Herrington & Sutcliffe LLP, No. DC-12-00891 (Tex. Dist. Ct. Jan. 25, 2012) (alleging "Orrick's negligence in connection with a proposed multimillion-dollar collateralized debt obligation transaction between Highland . . . and Royal Bank of Scotland" in 2008). The suit eventually settled. Jess Davis, Orrick Resolves $95M Malpractice Claims over CDO Deal, Law360 (Nov. 30, 2012), http://www.law360.com/articles/392748/orrick-resolves-95m-malpractice-claims-over-cdo-deal ("Orrick blamed the loss on risks Highland chose to take, not legal advice.").

[320] See Zillman, supra note 318 (quoting Jonathan Macey, a law professor at Yale Law School).

[321] Suzanne Barlyn, COMPLY-Crush of Arbitration Cases from Financial Crisis Eases, Reuters (July 18, 2013, 7:59 AM), http://www.reuters.com/article/2013/07/18/finra-arbitration-idUSL1N0FL0QZ20130718.

sidered faster, and thus less costly, than to bring a suit in court. However, courts have not been entirely receptive to this alternative method.[322]

2. Implications

Although these private sector cases have covered much of the waterfront of allegations about what went wrong during the financial crisis, the turn to using the private sector to discipline financial intermediaries through the courts has some implications for the way that blame is apportioned during the crisis.

Private litigation is of course an important way to discipline financial misconduct. Although many complain about plaintiff-side security lawyers, few disagree that paired with the SEC, they contribute to a stronger level of securities law enforcement in the United States than would be possible if the agency acted without the private sector competition. By the same token, many of the private cases are being brought by well-heeled plaintiffs, many of whom are financial intermediaries themselves, complaining about the disclosures made for housing-related products or complex securities that blew up during the crisis. There are some end-user consumers behind these suits, especially the class actions, and they face the prospect of some relief. But a case by an insurance company against an investment bank has less obvious redistributive implications.[323]

However, private sector litigants are extremely likely to settle; the incentive structures, as many observers have noted, encourage settlement rather than a judicial airing of claims.[324]

[322] See Nate Raymond, Judge Blocks Auction Rate Arbitration Against Citigroup, Chi. Trib. (May 6, 2013), http://articles.chicagotribune.com/2013-05-06/business/sns-rt-us-citigroup-arbitrationbre9450rb-20130506_1_auction-rate-arbitration-finra-financial-industry-regulatory-authority ("For the second time in a week, a federal judge has blocked a securities arbitration against Citigroup, Inc.").

[323] A list of the largest settlements during the financial crisis reveals plaintiffs that are largely corporate, rather than individual. See Financial Crisis Was a Windfall for Plaintiffs' Law Firms, Law360 (Sept. 10, 2013, 8:00 PM), http://www.law360.com/articles/471586/financial-crisis-was-windfall-for-top-plaintiffs-firms.

[324] See, e.g., Dale A. Oesterle, Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability, 1983 Wis. L. Rev. 513, 580–81 (observing that the risk-reward calculus for directors "encourages settlement" of derivative lawsuits); see also Aaron Tang, Double Immunity, 65 Stan. L. Rev. 279, 321 (2013) (observing that in private securities class actions, "defendant corporate directors have an inherent incentive to settle even baseless suits in order to avoid personal liability").

CONCLUSION

The courts have played an unsubstantial role in the government's response to the financial crisis. Courts are the critical and traditional mechanism for assigning blame and making sense of prior crises. We rely on them to supervise government actions and police administrative excess. It is, in fact, their purpose in our system of divided government.

However, in the case of the financial crisis, because of a sea change in enforcement policy, difficult suitability and standing issues, and a financial industry that—with the exception of the former head of AIG—has been generally happy with the government's interventions, has led to a situation where a signal government operation has been achieved with almost no judicial participation.

During the next crisis, a loosening of the procedural barriers to suit, more aggressive law enforcement, and a judicial interest in getting involved would ensure that the judicial acquiescence is not permanent. But for this crisis, none of these factors has worked in favor of the government.

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