

THE SUBPRIME MORTGAGE CRISIS

Syllabus | Spring 2016

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Course overview

The subprime mortgage crisis of 2008 wreaked havoc on the U.S. and international economy, and its effects continue to be felt. This course examines the subprime mortgage crisis as a legal, social, economic, and cultural phenomenon. It will begin by examining the crisis itself, beginning with its various causal precursors and then examining in detail how the mortgage meltdown and its allied effects unfolded. It will then examine the series of legislative and doctrinal responses that Congress and courts implemented in response to the crisis. This course will engage numerous substantive areas of law including mortgage formation, foreclosure procedures, regulation of securities and derivatives, preemption, banking, corporate and securities fraud, bankruptcy, and receivership. Finally, the course will consider the ongoing legacy of the subprime mortgage crisis in terms of its social and economic impact as well as broader themes including greed, happiness, capitalism, regulation, cognitive biases, and the pursuit of the elusive American dream.

Class meetings

We will meet Mondays and Wednesdays from 2.30-3.45pm in **TBD**.

Required text

The text for this course is Malloy, *Anatomy of a Meltdown: A Dual Financial Biography of the Subprime Mortgage Crisis* (Aspen 2010). We will also read substantial portions of McLean & Nocera, *All the Devils Are Here* (Penguin Portfolio 2011).

There will be a substantial number of readings posted to the TWEN site as well, all of which will be clearly indicated as such in the reading assignment section, *infra*. I will also distribute photocopies of the course reading seriatim throughout the semester.

Class discussion

The structure of class sessions will be dialogic (though not strictly Socratic), and your participation in the discussion is both required and encouraged. I expect students to carefully prepare the assigned reading, which includes cases, statutory sections, law review articles, other academic articles, book chapters, and popular media.

To facilitate our class discussion, we will use discussion panels instead of an on-call system. You must sign up for four discussion panels. I will arrange panels using Sign Up Genius shortly after our first class meeting, and will explain how this system works in our first class meeting. If you don't sign up by Friday, January 22, I will randomly assign you to under-enrolled panels.

The panels will correspond to substantive material, which will likely (though not certainly) be covered on the day indicated in the syllabus. When we cover the material for which you are responsible, you should have prepared it extensively and should expect to be called on. And while members of each panel will be my "go-to" people for that topic, I reserve the right to call on any member of the class. Students with outstanding participation will be eligible for an upward adjustment of a partial letter grade (e.g., from B to B+).

I will make available prior to each class meeting a series of questions that will guide our class discussions. These questions should serve as a useful guide for reading and preparing for class, and also give an indication of my expectation for what we will discuss in class.

Attendance

Attendance is mandatory, and will be taken every class through distribution of an attendance sheet. If you do not personally initial the sign-in sheet during or immediately after class, you will be considered absent. This is true even if (as may well be the case) the attendance sheet does not circulate to you during class, or if you simply forget to initial the sheet. I will always have the attendance sheet at the podium after class for anyone who has not had a chance to sign it.

UHLC's Honor Code applies to initialing the attendance sheet. Students may initial only their own names, not those of other students, and initialing the name of other students is considered a violation of the Honor Code. Lack of preparation, early departure, late arrival, or inappropriate behavior may result in your being marked absent.

UHLC policy is that no student can receive credit for a class from which they have been absent more than 20% of the time. If you are absent in excess of 20% of our course meetings, I will refer the matter to the academic dean, which may result in administrative withdrawal. Substantial absences accumulated short of the 20% threshold may serve as a basis for grade reduction (see below). It is the responsibility of students to keep track of their own absences.

Examination and grading

Grading will be determined by an open-book final examination that will consist mostly of essay questions with some multiple choice.

Laptops and other electronic devices

I do not ban laptops in class, but I am concerned about the negative impact they can have on learning and class atmosphere. If I call on you and you are obviously paying more attention to the internet than to our class discussion, it may result in your being assessed as unprepared. And if you find that a classmate's use of their laptop is especially distracting, please feel free to let me know about this concern.

I will record classes and post the files online. The video files will feature PowerPoint slides with accompanying audio recording of the class. I will post information about how to access these files on Twitter & TWEN.

Office hours & open door policy

I hold office hours on Tuesdays from 1.30-3.30pm. During office hours, I will presumptively be available to talk to any students who drop by on an informal basis. If any student wants to reserve a specific fifteen-minute block to meet with me during that time, email me ahead of time and I will reserve that time to meet with that student exclusively.

Because office hours will almost certainly not be a convenient time for all students, I welcome office meetings outside normal office hours, and to set one up simply email me and we'll work out a mutually agreeable time. In order to accommodate your schedules, I can also schedule virtual meetings either by phone or Skype, including on weekends if necessary. If you want to set up one of the latter meetings, let me know and I will share my contact information with you once we have set a time.

Finally, I also have an open door policy, so that if my door is open, you should feel free to come on in to discuss issues related to class. If my door is closed, you can still knock to see if I am around, but chances are that I'll be unavailable. And as a general rule, I tend to be unavailable in the several hours before any class I teach in order to do final preparation. You are also most welcome ask me questions via email, Twitter, or post questions to the TWEN discussion boards.

TWEN & Twitter

I will maintain a course TWEN page. It will host course documents (latest updated syllabus, PowerPoint slides from class, problem sets) and provide two different forums to which you are all invited to post ("Procedural Issues" for topics related to course organization,

scheduling, and other administrative matters; and “Substantive Issues” for questions about material covered in class, recent developments in the law, and any other aspects of copyright itself). You are responsible for remaining up to date on any information posted to TWEN, so be sure to check it frequently, and consider setting up email alerts for new postings to the site.

I also maintain a course Twitter feed: @DFclasses. I use the feed to keep students up to date on issues related to class administration (i.e., if there is a change to the reading assignment) and substantive issues (i.e., passing along links and retweets relevant to the mortgage crisis and its ongoing implications). The feed is public, so you need not be a Twitter user to access it. And I expect you to be aware of any information posted to the feed, so I recommend bookmarking the URL <http://twitter.com/DFclasses> to facilitate this. You are not required to follow me on Twitter, of course, and my policy is not to follow any students.

Course Topics and Reading

I. THE GATHERING STORM

1. **Real Property and the “American Dream”**

James Truslow Adams, *The Epic of America*

Carliner, “Development of Federal Homeownership ‘Policy’”

Popular materials about mortgage interest tax deduction

2. **Government-Sponsored Entities & Mortgage Regulation**

Ellen, “The Secondary Market for Housing Finance in the U.S.”

McLean & Nocera, “The Three Amigos,” 4-20 & “The Big, Fat Gap,” 38-52

Boyd, “Bringing the GSEs Back In,” 12-18

3. **Defining securities and derivatives**

Securities overview: Choi & Pritchard, *Securities Regulation* 1-8, 95-98

SEC v. W.J. Howey Co. (U.S. 1946) (98-101)

Filler & Markham, “A Primer on Derivatives” (1-10)

The “General Custer” Case: *Justh v. Holliday* (D.C. Sup. 1883) (10-14)

Markham, “From Pharaohs to Paul Volcker,” (21-24)

4. **Regulating and Deregulating Securities and Derivatives**

Merrill Lynch v. Curran (U.S. 1982) (29-32)

Financial Crisis Report 42-59

McLean & Nocera, “The Committee to Save the World,” 100-09

CFTC Over-the-Counter Derivatives Concept Release

5. **Mortgage Origination & Sub-Prime Loans**

Nelson et al., *Real Estate Transfer, Finance & Development* 117-23, 1061-74

Financial Crisis Report 67-83

McLean & Nocera, “Ground Zero, Baby,” 27-37

6. **The Law of Foreclosure I**

Acceleration: *FHMLC v. Taylor* (Fla. App. 1975) (674-78)

Misc. foreclosure methods: Nelson, *Real Estate Finance* 694-96

7. **The Law of Foreclosure II**

Judicial foreclosure: *Murphy v. Farwell* (Wis. 1859) (696-705)

Statutory redemption: 800-04; *U.S. v. Stadium Apartments* (804-09)

II. THE BUBBLE EXPANDS—AND BURSTS

8. **The Boom I**

Investment Banks and CDOs

Barnett-Hart, *The Story of the CDO Meltdown* 5-16, 26-33

McLean & Nocera, “The Wrap,” 187-203

Mortgage Originators

McLean & Nocera, “I Like Big Bucks and I Cannot Lie,” 125-37

Financial Crisis Inquiry Report 83-100

9. **The Boom II**

Rating Agencies

McLean & Nocera, “Why Everyone Loved Moody’s,” 110-25

Nate Silver, “A Catastrophic Failure of Prediction”

Home “Owners”

John de Graaf, *Affluenza*, 28-33

“Bernanke: There’s No Housing Bubble to Go Bust”

Gerardi et al., “Reasonable People Did Disagree”

10. **The Bust**

McLean & Nocera, “I’m Short Your House” (251-66); “The Gathering Storm” (285-307); & “The Volcano Erupts” (342-57)

Ferreira & Gyourko, “A New Look at the U.S. Foreclosure Crisis”

III. REGULATORY AND JUDICIAL REACTIONS

11. **The Troubled Assets Relief Plan (TARP)**

Calomiris & Khan, “An Assessment of TARP Assistance”

John Samples, “Lawless Policy”

12. **(Massive) Corporate Bankruptcy & Bailout**

Starr International v. U.S. (Ct. Cl. 2015), 285-307, 342-57

In re Lehman Bros. (Malloy 101-14)

13. **Receivership: The Case of Washington Mutual Bank**

Malloy 114-25

Adiogo Investment Holding v. FDIC (D.D.C. 2004) (Malloy 127-30)

Washington Mutual, Inc. v. FDIC (D.D.C. 2009) (Malloy 132-35)

Punzalan v. FDIC (W.D. Tex. 2009) (Malloy 139-42)

14. **Corporate & Securities Fraud**

SEC Emergency Order (Malloy 62-65)

McLean & Nocera, “The Smart Guys,” 267-84

Levitin, “Explaining the Abacus CDO”

SEC v. Goldman Sachs & Fabrice Tourre (S.D.N.Y. 2010)

15. **The GSE Bailouts**

Frame et al., “The Rescue of Fannie Mae and Freddie Mac”

Perry Capital v. Lew (D.D.C. 2014)

Epstein, “Will Shareholders Be Able to Set Aside the Third Amendment?”

16. **Regulatory Authority and the Preemption Debate**

Watters v. Wachovia Bank (U.S. 2007) (Malloy 151-62)

Cuomo v. Clearing House Ass’n (U.S. 2009) (Malloy 173-80)

17. **Mortgage Fraud**

La Salle (N.Y. Sup. 2008) (Malloy 190-95)

Thomas v. U.S. Bank Nat’l Ass’n N.D. (8th Cir. 2009) (Malloy 196-201)

Biggins (N.D. Cal. 2009) (Malloy 201-09)

18. **Fighting Foreclosure**

U.S. Bank Nat’l Ass’n v. Ibanez (Mass. 2011)

Jesinoski v. Countrywide Home Loans (U.S. 2015)

Santarose v. Aurora Bank FSB (S.D. Tex. 2010)

Robo-signing articles

19. **Eminent Domain**

Popular articles and editorials

Brescia, "The Price of Crisis," 23-41

Thompson, "Eminent Domain for the Seizure of Underwater Mortgages," 25-32

20. **Homeowner Bailouts**

Lawson & Ramos-Chapman, "A History of Foreclosure Prevention"

Mian & Sufi, "Why Tim Geithner Is Wrong on Homeowner Debt Relief"

Levitin, "Helping Homeowners"

Braucher, "Humpty Dumpty," 735-44, 768-87

21. **Dodd-Frank and Mortgage Lending Reform**

Dodd-Frank Title XIV: Mortgage Reform & Anti-Predatory Lending Act

Lucien v. Fed. Nat'l Mortgage Ass'n (S.D. Fla. 2014)

IV. REFLECTIONS AND FUTURE DIRECTIONS

22. **Cognitive Biases**

Taleb, *The Black Swan* 38-50, 201-13

Paul Craven, "From Biases to Bubbles"

Bar-Gill, "Law, Economics, & Psychology of Subprime Mortgages," 1118-30, 1139-50

23. **Bubbles**

The Economist, "The Baseball Card Bubble"

Robert Shiller, *Irrational Exuberance*, 195-213

Tom Harkin, "Senator Warns of a Student Loan Bubble" (audio)

Bubb & Krishnamurthy, "Regulating Against Bubbles," 1607-29

24. **Greed**

Gordon Gekko, “Greed” speeches

Dolan, “Austrian Economics as Extraordinary Science”

Posner, *A Failure of Capitalism*, 234-52, 304-15

25. **Happiness**

Fagundes, “Property, Acquisition, and Happiness”

Stern, “Residential Protectionism and the Legal Mythology of Home,” 1099-1109, 1120-27, 1134-39

Levitin & Wachter, Why Housing?

26. **Review/overflow day**