

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. Throughout, the course will consider blackletter principles of the many areas of law implicated by the crisis, including mortgage formation, foreclosure procedures, fraud, corporate governance, securities regulation, and fiduciary duties. 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*.

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 materials, including cases, case notes, and statutory sections. If you are

unprepared when called on, I will mark you absent, and will hold you responsible for substantial class participation the subsequent day. More than one instance of unpreparedness will result in a reduction of your course grade.

I understand that you will not always be able to prepare completely for class. If you are not able to prepare for class on a particular day, you can avoid being called on by notifying me by email or otherwise prior to the start of class (this includes, for example, simply mentioning to me just before class that you are unprepared and would like to take a pass). You can choose to opt out of class participation a total of three times this semester. Please feel free to take these passes for any reason, and you need not explain or justify the basis for your decision to take a pass on a given day. Taking a free pass will not, of course, result in your being charged with an absence.

Please take note that it is your responsibility to inform me ahead of class of your desire to take one of these three free passes. If I don't get reasonable notice of your desire to take a pass, then you will be assessed as unprepared should I call on you. One suggestion: if you decide to take a pass only a few minutes before class starts, please notify me in person rather than sending me an email, since I likely will not be checking email shortly before class starts.

I will make available a week 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 expectations during class. Basically, what it means to be prepared is to have thoughtful, evidence-based answers to the discussion questions for each class. I may also structure class discussion by assigning panels of students to be responsible for particular readings on specific days. Information about this will be forthcoming.

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 strictly applies the ABA requirement 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 a combination of a final examination and class participation. Final details on grading policies are forthcoming.

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.

Generally, I allow students to audio record classes on two conditions: first, that you ask me for permission so I am aware the recording is being made; and second, that you agree not to post the recording online or make it public in any way, such as posting it on the internet.

Office hours & open door policy

I hold office hours on **TBD**. 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*

Merrill & Smith, *Federal Land Policy & the Homestead Acts*

Howard, “The Rush to Oklahoma”

Optional: *Johnson v. M’Intosh* (U.S. 1823)

2. **Home Boosterism**

Carliner, “Development of Federal Homeownership ‘Policy’”

Mortgage interest tax deduction, 26 U.S.C. § 163(h)

Loewenstein, “Who Needs the Mortgage Interest Tax Deduction?”

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

McLean & Nocera, “The Three Amigos” & “The Big, Fat Gap”

Financial Crisis Report 38-42

Mortgage regulation and GSEs: Nelson, et al., 1061-82

4. **The Birth of Mortgage-Backed Securities**

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

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

Financial Crisis Report 42-45

5. **Derivatives: the Basics**

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]

Regulating derivatives: *Merrill Lynch v. Curran* (U.S. 1982) [29-32]

6. **(De)regulating Derivatives (and the LTCM Debacle)**

Financial Crisis Report 52-59

McLean & Nocera, “The Committee to Save the World,” 100-109

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

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

Financial Crisis Report 67-83

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

8-9. **The Law of Foreclosure**

Acceleration: *FHMLC v. Taylor* [674-78]

Misc. foreclosure methods [694-95]

Judicial foreclosure: 696-97, *Murphy v. Farwell* [700-05]

Statutory redemption: 800-04; *United States v. Stadium Apartments* [804-09]

Anti-deficiency legislation: *DeBerard Properties, Ltd. v. Lim* [827-33]

II. THE BUBBLE EXPANDS—AND BURSTS

10. **Investment Bankers (and GSEs) Gone Wild!**

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

McLean & Nocera, “Goldman Envy” & “The Fannie Follies,” 159-86

11. **Mortgage Originators Gone Wild!**

McLean & Nocera, “I Like Big Bucks and I Cannot Lie,” “The Carnival Barker,” 125-50

Financial Crisis Inquiry Report 83-101, 104-13

12. **Rating Agencies Gone Wild!**

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

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

13. **Consumers Gone Wild!**

John de Graaf, *Affluenza*

Buzz Bissinger, Friday Night Lights

“Guest Contribution: Housing Bubble Fueled Consumer Spending”

“Housing Bubble—or Bunk?”

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

“Be Warned: Mr. Bubble’s Worried Again”

14. **The Collapse**

Malloy 71-91

Ferreira & Gyorko, A New Look at the U.S. Foreclosure Crisis

15. **The Fallout**

Immergluck, The Local Wreckage of Global Capital

Squires, “Do Subprime Loans Create Subprime Cities?”

Mortgage crisis stories

III. REGULATORY AND JUDICIAL REACTIONS

16. **(Massive) Corporate Bankruptcy & Receivership**

In re Lehman Bros.

17. **Corporate & Securities Fraud**

The Goldman Sachs Abacus CDO—Dealbook

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

18. **Regulatory Authority & the Preemption Debate**

Watters v. Wachovia Bank (U.S. 2007)

Cuomo v. Clearing House Ass’n (U.S. 2009)

19. **Mortgage Modification and Consumer Bankruptcy**

Levitin, Helping Homeowners

20. **Mortgage Fraud**

Malloy: cases and materials

21. **Fighting Foreclosure**

Hunt, Should the Mortgage Follow the Note?

The MERS System

Levitin, The Paper Chase

22. **Regulatory responses**

The Dodd-Frank Act (2010)

Levitin, The CFPB: An Introduction

Levitin, Pavlov, & Wachter, The Dodd-Frank Act and Housing Finance

IV. REFLECTIONS AND FUTURE DIRECTIONS

23. **Cognitive Biases and Limitations**

Nate Silver, "A Catastrophic Failure of Prediction"

Taleb, The Black Swan

Paul Craven, From Biases to Bubbles

24. **Bubbles**

Mark Cuban, How Stocks Are Like Baseball Cards

Robert Shiller, Irrational Exuberance

Tom Harkin, "Senator Warns of a Student Loan Bubble"

Ryan Bubb, "Regulating Against Bubbles"

25. **Greed**

Gordon Gekko, "Greed is Good" speech

Austrian School of Economics

Ayn Rand, The Fountainhead

Richard Posner, A Failure of Capitalism

26. **Happiness**

Dave Fagundes, "Property, Acquisition, and Happiness"

Stephanie Stern, "Residential Protectionism and the Legal Mythology of Home"

Dunn & Norton, Happy Money

Levitin & Wachter, Why Housing?