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## The 2008 Bankruptcy of Literacy – A Legal Analysis of the Subprime Mortgage Fiasco (Part 1)

“If you take your neighbor’s cloak as pledge, you shall return it to him before sunset, for this cloak of his is the only covering he has for his body.”<sup>1</sup>

### I. Introduction

Writing makes lawyers, as the general opinion goes. That is why a number of law schools design their programs to push students into writing early. Beginning in the first semester, they are trained to prepare briefs, office memoranda, and letters to clients.<sup>2</sup> Legal writing has become the new legal rhetoric.<sup>3</sup> This, however, comes as a surprise to those who believe that lawyers should know about the law before writing on it.<sup>4</sup> It also does not fit well with St. Paul’s remark, that “the letter kills,”<sup>5</sup> and is even more troublesome for those who think that law is more than “words, words, words.”<sup>6</sup> We believe that lawyers should know the facts they are writing about.<sup>7</sup> The Latin rule “*Da mihi facta, dabo tibi ius*” (“Give me the facts, I will give you the law”), probably expresses best what it means to be “thinking like a lawyer,”<sup>8</sup> if there is such a thing as legal reasoning beyond drawing smart conclusions.<sup>9</sup> But today, law appears to be a realm of words and – in particular – of letters.<sup>10</sup>

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1 Exodus 22:26.

2 For a good reason, as the Multistate Performance Test that is administered by many U.S. jurisdictions in connection with their state bar examination tests a candidate’s writing skills by focusing on questions covering legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization, and management of a lawyering task and communication.

3 See Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089 (1986).

4 Marcus Porcius Cato Censorius (Cato Major) already noted around 200 B.C.: “Rem tene, verba sequantur” (“If you are in control of the subject matter the words will follow”). Latin Quotes & Phrases – Q & R, [http://www.yuni.com/library/latin\\_6.html](http://www.yuni.com/library/latin_6.html). For a more recent example, see Stephen B. Cohen, *Words! Words! Words!: Teaching the Language of Tax*, 55 J. LEGAL EDUC. 600 (2005).

5 2 Corinthians 3:6. “For the letter kills, but the Spirit gives life.”

6 WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2, line 192.

7 See generally William Twining, *Taking Facts Seriously-Again*, 55 J. LEGAL EDUC. 360 (2005).

8 Academic Dictionaries & Encyclopedias: *Hodie mihi, cras tibi*, [http://dic.academic.ru/dic.nsf/latin\\_proverbs/1002/Hodie](http://dic.academic.ru/dic.nsf/latin_proverbs/1002/Hodie). Cf. Danny Priel, *Thinking Like a Lawyer*, 57 J. LEGAL EDUC. 579 (2007) (reviewing Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005)); J. Harvic Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779 (1989).

9 Priel, *supra* note 8. Cf. Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 517 (1998) (“Thinking like a lawyer is just ordinary forms of thinking clearly and well.”). See also Joseph Raz, *ETHICS IN THE PUBLIC DOMAIN: ESSAY IN THE MORALITY OF LAW AND POLITICS* 238 (rev. ed. Oxford 1994).

10 Cf. Cohen, *supra* note 4; David Dyzcnhaus, *Nicola Lacey’s A Life of HLA Hart: The Nightmare and the Noble Dream*, 55 J. LEGAL EDUC. 606, (2005) (book review). See generally Robert A. Pascal, *A Summary Reflection on Legal Education*, 69 LA. L. REV. 125 (2008).

### A. Literal Formalism

Turning to literal formalism,<sup>11</sup> lawyers gave up their competence for economics and accepted the view that economic analysis of law should reign supreme (i.e., that law should be governed by the wisdom of the markets). This idea claimed to be “in a symbiotic relation with real world transactions.”<sup>12</sup> and has spread around the world<sup>13</sup> largely due to its “intellectual fit.”<sup>14</sup> Imposing its particular vision of the world as the only valid one, the idea became a scientific ‘prison’, leading to self-deceptive rationalizations. We became “captives of formalism.”<sup>15</sup> This development was often criticized,<sup>16</sup> but so far without much success.<sup>17</sup> The enticing ideology of perfect markets has continued to hold the supreme position.

Economic analysis of law took possession of corporate law like a ‘revolution.’ It swept aside the valuable lessons from the book “The Modern Corporation and Private Property,”<sup>18</sup> by Adolf Augustus Berle and Gardiner Coit Means, and replaced them with “the confident belief that markets could self-regulate.”<sup>19</sup> Competition for incorporation revenues was hailed as the “genius of American corporate law,”<sup>20</sup> reaching a climax beyond which no further development seemed to be possible – “The End of History for Corporate Law.”<sup>21</sup>

### B. Economic Reality

But then reality caught up as we experienced Enron,<sup>22</sup> WorldCom,<sup>23</sup> and the ‘counter-revolution’ of the Sarbanes-

11 See Jean Stefanie & Richard Delgado, *HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS* (2005). See also Milton C. Regan, Jr., *Jean Stefanie and Richard Delgado, How Lawyers Lose Their Way: A Profession Fails Its Creative Minds*, 55 J. LEGAL EDUC. 454 (2005) (book review).

12 Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 348 (2005).

13 Cf. Florian Faust, *Comparative Law and the Economic Analysis of Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 837 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

14 Romano, *supra* note 12, at 351.

15 Regan, *supra* note 11, at 454-455.

16 James Boyd White, *Law, Economics, and Torture*, L. QUADRANGLE NOTES, Summer 2008, at 98, 101. (arguing with Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002)).

17 Cf. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

18 Adolf Augustus Berle & Gardiner Coit Means, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1968).

19 Richard Parker, *The Crisis Last Time*, N.Y. TIMES, Nov. 7, 2008, at 55, available at <http://www.nytimes.com/2008/11/09/books/review/Parker-t.html>.

20 Cf. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 149 (2003); Roberta Romano, *The State Competition Debate in Corporate Law*, FOUNDATIONS OF CORPORATE LAW 87 (Roberta Romano ed., 1993); Romano, *supra* note 12, at 348.

21 Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); See also Sebastian Mock, *Review Essay-Perspectives of Regulatory Competition in European Company Law*, 6 GERMAN L.J. 741, 771-792 (2005).

22 See generally CORPORATE GOVERNANCE POST-ENRON: COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Joseph J. Norton, Jonathan Rickford & Jan Kleineman eds., 2006).

23 Cf. Thomas Zaccaro, Jesse Weiss, & Michelle Reed, *Due Diligence Standards for Underwriters After WorldCom*, 13 CORP. GOVERNANCE ADVISOR, No. 2 at 1 (2005).

Oxley Act of 2002. Yet, today we are suffering from the fall-out of the subprime mortgage bubble burst. On September 17, 2008, Lehman Brothers Holdings, Inc. collapsed with assets overvalued by more than US\$ 30 billion.<sup>24</sup> On October 3, 2008, “the U.S. stock market[s] lost roughly \$1.5 trillion in value.”<sup>25</sup> From June 29, 2007, to December 31, 2008, the Federal National Mortgage Association’s<sup>26</sup> market capitalization depreciated from US\$ 63.569 billion to US\$ 4.096 billion. At the close of November 21, 2006, Fannie Mae’s shares traded at US\$ 57.89, at the close of November 21, 2007, the stock price was US\$ 29.23, and at the close of November 21, 2008, the stock price was only US\$ 30.<sup>27</sup> It is a small wonder that the concept of genius “has worn thin in recent academic work.”<sup>28</sup>

### C. Legal Analysis of Economics

But, fortunately, law is more than economics. It serves to analyze and correct the orientation of economics that cannot operate without a value system. Law and economics constantly interact with each other. Therefore, the legal analysis of economics is as important as the economic analysis of law.

A prime example for this interaction is the field of accounting, often neglected by lawyers.<sup>29</sup> As soon as financial statements are released to the public, they leave the realms of internal business administration and become a legal disclosure issue.<sup>30</sup> Another example is companies that have become “too big to [let] fail.”<sup>31</sup> The law has to either deny such growth or provide regulations that aim to prevent such companies from needing a government bailout. The same is true when economic concepts overburden markets with complexity. The law then has to provide for transparency in the interest of fair information and equal playing fields in order to achieve socially balanced results (i.e. “statistical reasoning in law”<sup>32</sup>). Our neglect, in these areas, of the legal analysis of economics contributed to the subprime mortgage fiasco.

## II. Subprime Mortgage Fiasco<sup>33</sup>

“We realized rather late [that] we were trapped in our own concepts which we took for reality.”<sup>34</sup>

The trust in letters and the refinements of literal complexity seems to have played a decisive role in the subprime mortgage crisis.<sup>35</sup> Mortgage securitization confronts us with a world built of many thousand parcels of land and buildings and many thousand contracts and disclosure documents filled with many hundred thousand words made of millions of letters. It is a formulaic, “letteral” approach painting reality as a pointillist composite.

### A. Mortgage Securitization

In the United States, borrowers typically turn to mortgage brokers.<sup>36</sup> Such brokers then place their customer’s loan application with a lender that issues the credit and receives a note secured by a mortgage in return. Unlike, for example, in Germany where mortgage lenders tend to keep the credit they extend on their books,<sup>37</sup> U.S. lenders quickly refinance themselves by selling their notes and the related mortgages to other financial institutions, typically located on Wall Street. Such institutions then pool such notes and mortgages with many other notes and mortgages in special purpose vehicles<sup>38</sup> that issue new notes to the public, thereby transforming non-liquid assets via a paper construct into exchange traded, asset-backed securities (ABS).<sup>39</sup> This process is commonly referred to as “mortgage securitization.”

It was originally developed by Ginnie Mae<sup>40</sup> in the 1970s and quickly became the ‘virtuous work’ of Freddie Mac<sup>41</sup> and Fannie Mae.<sup>42</sup> Up until 2008, the size and importance of the ABS market became enormous. At the end of 2007, there were US\$ 9.7 trillion ABS outstanding, of which US\$ 7.2 trillion were mortgage-backed securities.<sup>43</sup>

24 Jon Hilsenrath, Deborah Solomon, & Damian Paletta, *Crisis Mode: Paulson, Bernanke Strained for Consensus in Bailout*, WALL ST. J., Nov. 10, 2008, at A2, A16.

25 *Id.* As a comparison, the bursting of the 1998-2000 “Internet Bubble” was accompanied by a decline in the value of equity securities that may have reached as much as \$7.4 trillion. Charles J. Johnson, Jr. & Joseph McLaughlin, CORPORATE FINANCE AND THE SECURITIES LAWS 1-5 (4th ed. 2007).

26 Hereinafter “Fannie Mae.”

27 Deborah Solomon, James R. Hagerty, & Michael Crittenden, *Strains Mount on Bailout Plans*, WALL ST. J., Nov. 11, 2008, at A1, A14.

28 MARK J. ROE, DELAWARE’S BACKSTOP 3 (2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1304165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304165).

29 Or as Joseph McLaughlin frequently puts it in his speeches: “Accounting is too important to leave it to the accountants.” Axel Weber, President of Deutsche Bundesbank, must have remembered McLaughlin’s Words in his Opening Statement to the Panel Discussion “Finance after the Turmoil: Shape of Markets and Regulation” at the 18th Frankfurt European Banking Congress (Nov. 21, 2008), available at <http://www.bundesbank.de/download/presse/reden/2008/20081121.weber.en.php>.

30 See generally Bernhard Grossfeld, *Comparative Accounting*, 28 TEX. INT’L L.J. 233 (1993); Bernhard Grossfeld, *Lawyers and Accountants: A Semiotic Competition*, 36 WAKE FOREST L. REV. 167 (2001); Bernhard Grossfeld, *Comparative Corporate Governance: Generally Accepted Accounting Principles v. International Accounting Standards?*, 28 N.C. J. INT’L L. & COM. REG. 847 (2003); BERNHARD GROSSFELD, *Global Accounting: A Challenge for Lawyers, LAW, CULTURE AND ECONOMIC DEVELOPMENT: A LIBER AMICORUM FOR PROFESSOR ROBERTO MACLEAN* 143 (Joseph J. Norton and C. Paul Rogers III eds., 2007).

31 That is, the government would rather inject new cash in such companies than let them go out of business (bailout).

32 Cf. JOSEPH L. GASTWIRTH, I STATISTICAL REASONING IN LAW AND PUBLIC POLICY (1988).

33 Gary Gorton, *The Panic of 2007* (Aug. 4, 2008)(prepared for the Federal Reserve Bank of Kansas City Jackson Hole Conference), <http://www.kc.frb.org/publicat/sympos/2008/Gorton.08.04.08.pdf>; Gretchen Morgenson, *How the Thundering Herd Faltered and Fell*, N.Y. TIMES, Nov. 9, 2008, at 1.

34 Bernhard Grossfeld, *Global Financial Statements/Local Enterprise Valuation*, 29 J. CORP. L. 337, 361-62 (2004).

35 Regarding the importance of written (in contrast to oral) securities disclosure, see Hansjoerg Heppe, *Is There a Need for New Rule-Making: Securities Offerings, the Internet, and the SEC*, 31 SEC. REG. L.J. 50, 67 *et seq.* (2003).

36 See Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 553 (2002) (stating that mortgage brokers originate more than 60% of all residential loans in the United States).

37 And earn profit from collecting principal and interest.

38 E.g., Lehman Brothers Holdings Inc. used Structured Asset Securities Corporation to securitize its residential mortgages.

39 Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1373 (1991).

40 Formally known as the Government National Mortgage Association.

41 Formally known as the Federal Home Loan Mortgage Corporation.

42 Julia P. Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077, 1081 *et seq.* (2007); Arnold Kling, *Freddie Mac and Fannie Mae, An Exit Strategy for the Taxpayer* 5 (Cato Institute, Briefing Paper No. 106, 2008).

43 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, TABLE 1159. See also CHARLES J. JOHNSON, JR. & JOSEPH MCLAUGHLIN, CORPORATE FINANCE AND THE SECURITIES LAWS 14-3 (4th ed. 2007). The ABS market was therefore larger than the U.S. Treasury securities market (US\$ 4.5 trillion) or the US\$ 5.8 trillion corporate bond market. JOHNSON & MCLAUGHLIN, *supra* (referring to the U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, TABLE 1185).

## B. Subprime Borrowers

The crisis began when the industry started to market towards low-income borrowers. Specific subprime mortgage forms were developed for advertising and selling credit in predominantly low-income neighborhoods, often comprised of minority communities.<sup>44</sup> Typically, borrowers under such forms are less educated than non-subprime borrowers;<sup>45</sup> letters do not reign supreme in their minds. However, just as with the securitization of prime mortgages, refinancing subprime lending profited from the structured, letteral appearance of ABS issues that was enhanced by being accounted for according to generally accepted accounting principles. Positive ratings from credit-rating agencies gave subprime ABS their final touch that originally helped to sustain these ‘houses of cards.’<sup>46</sup>

## III. Systemic Analysis

The trend is to blame the actors and their greed for the subprime mortgage crisis. But that seems too simple. We doubt whether certain individuals or institutions can be responsible for a crisis of this dimension. Most of us are making our living in an environment that we do not control. We are market participants, left with little leeway for a behavior other than what the markets, in case of the subprime mortgage crisis, what the international financial markets, perceive as being good. As market participants, we will be punished if our performance is not in line with industry or general trends. Similarly, investors will not buy bonds if they do not yield a sufficient return and will sell stock if a company’s management does not sufficiently focus on shareholder value. Here again, the markets act as arbiter.

Therefore, as lawyers, we should take a ‘bottom-up’ approach and ask ourselves whether there was an intrinsic structure in our legal work that caused unreliable appearances. Were we aware of the social and economic consequences of our legal refinements? Were they too abstract to reflect reality properly? Were we trying to play the rules as effectively as possible, without seeing the statistical implications of our play? Did we sufficiently understand the transactions we were advising on? Did the enormous amount of ‘precise letters’ help to create the subprime mortgage crisis by contributing to and covering-up the complexity of the subject matter?

In this article, we will discuss these questions with regard to a mortgage product that is at the heart of the subprime mortgage crisis, the adjustable-rate mortgage (ARM) loan. Let us examine the details in a lawyerly manner.<sup>47</sup>

## IV. Structural Overview<sup>48</sup>

### A. “Social” Dreams

Over the last two decades interest rates in the United States were unprecedentedly low. One of the reasons for this de-

velopment was that the U.S. government tried to realize an American dream: Homeownership for as many people as possible.<sup>49</sup> In addition, interest paid on mortgages for primary residences is tax deductible under the U.S. Internal Revenue Code,<sup>50</sup> and Fannie Mae and Freddie Mac’s mission became to provide a continuous, low-cost source of credit to finance America’s housing.<sup>51</sup>

Initially, America’s dream seemed to become true. An unprecedented number of people applied for new or refinanced existing mortgages, having a good feeling about their interest payments because of the tax deductibility.<sup>52</sup> Demand for homes surged, leading (following the laws of supply and demand in a free market economy) to increasing real estate prices. The number of U.S. homeowners grew and U.S. homes became more expensive.

At the same time, taking inflation into account, U.S. treasury interest rates became so low, they became negative. Thus, financial institutions made a profit if they took out debt, and financial investors had to look for riskier, higher yielding returns if they did not want to lose money.

### 1. Pyramid Scheme

As hope for new business opportunities and profit potentials entered the scene, however, a pyramid scheme of gigantic proportions began to unfold.<sup>53</sup> Political philanthropy turned into an entrepreneurial venture.

Homeowners that got in early increased their asset base substantially, without significantly increasing their liabilities, by regularly moving into more expensive houses.<sup>54</sup> Other homeowners refinanced existing mortgages to pay for credit card debt<sup>55</sup> or took out so called “110% mortgages,” borrowing more money than their home was worth at the time the loan was issued. To sustain this scheme of ever-increasing real estate prices, however, ever new, lower levels of buyers had to be found. The mortgage industry facilitated this search by lowering the entrance barriers to obtain loans.<sup>56</sup> Ultimately, first time home buyers with bad credit were targeted. New products were introduced that appeared to be ‘affordable’ for low-income borrowers,<sup>57</sup> most notably ARM loans. Suddenly, bad credit made for good loan candidates.<sup>58</sup>

At the same time, the securitization of mortgage loans did not only help to provide a continuous, low-cost source of credit to refinance mortgage lenders, it changed the industry’s business

44 Eggert, *supra* note 36, at 574. See also Ricardo Guerra v. GMAC LLC, 2008 WL 3911765 (E.D. Pa. July 22, 2008)(No. 208 Civ. 01297) (describing the discrimination issue).

45 Eggert, *supra* note 36, at 576.

46 See generally WILLIAM COHAM, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET (Random House 2009).

47 See Scott Reynolds Nelson, *The Real Great Depression*, CHRONICLE REV., Oct. 17, 2008, at B9 (describing similarities between present circumstances and the 1873 crisis).

48 See generally Dustin Fisher, *Selling the Payments: Predatory Lending Goes Primetime*, 41 J. MARSHALL L. REV. 587 (2008); JOHN WIEDEMER, REAL ESTATE FINANCE (6th ed. 2002); HANDBOOK OF MORTGAGE-BACKED SECURITIES (Frank Fabozzi ed., 5th ed. 2001).

49 See generally Cathy Lesser Mansfield, *The Road to Subprime “HEL” Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473 (2000).

50 26 U.S.C. § 163 (2000).

51 See Fannie Mae, <http://www.fanniemae.com/about/index.html>; Freddie Mac, [http://www.freddie.com/corporate/company\\_profile/faqs/](http://www.freddie.com/corporate/company_profile/faqs/).

52 Note that interest on other personal loans is not tax deductible.

53 In a pyramid scheme, those near or at the top of the pyramid make a lot of money on the supplied products, but those at the bottom are left with inventories of products they cannot sell.

54 See 26 U.S.C. § 1031 (YEAR) (providing for deferral of capital gains).

55 Cf. Debbie Dragon, *Should you Refinance Your Home to Pay Off Credit Card Debt?*, <http://www.loan.com/truth-about-loans/how-to-pay-off-credit-card-debt>.

56 This took place during 2006 and 2007. Cf. Carrick Mollenkamp, Serena Ng, Liam Plevin and Randall Smith, *Behind AIG’s Fall. Risk Models Failed to Pass Real-World Test*, WALL ST. J., Nov. 3, 2008, at A1 (“... to subprime-mortgage bonds issued in the worst years of 2006 and 2007.”).

57 Based on these assumptions such products were seen as advantageous financial instruments even for financially weak customers to whom they were pretended as something “good.” See Jo Carillo, *Dangerous Loans: Consumer Challenges in Adjustable Rate Mortgages*, 5 BERKELEY BUS. L. J. 1 (2008).

58 See Douglas McGray, *Check Cashers, Redeemed*, N.Y. TIMES MAG., Nov. 9, 2008, at 36.

model by transferring default risks from the original lenders' books to the ABS investor's portfolio.<sup>59</sup> Lenders no longer earned profits from collecting principal and interest; instead, producing fees and commissions became the name of the game,<sup>60</sup> starting a severe disconnect between the person making the credit decision and the person bearing the default risk.

Making subprime home buyers the new, lowest level of the pyramid kept America's dream alive and initially rewarded everybody. On the one side, prices for new and existing homes continued to rise, but on the other, loans to subprime borrowers provided for higher default risks and therefore higher interest rates than loans to non-subprime borrowers. Because of the higher interest rates, subprime loans paid higher commissions to mortgage brokers.<sup>61</sup> Mortgage lenders, however, did not need to worry too much about the potential increase in default risks because they securitized such loans. Similarly, Wall Street intended to move most of such risks off its books by selling the subprime ABS into the international financial markets. Investors in these markets, finally, found not only comfort in the fact that – in case there were to be an event of default – the holder of the original note and mortgage could foreclose into the “backing asset.”<sup>62</sup> They also found – at least on paper – the returns they had been looking for to beat inflation.<sup>63</sup>

Thus, a seemingly perfect process provided the cash to keep the pyramid scheme growing.<sup>64</sup>

## 2. International Nightmare

Under the ‘soothing melody of perfect markets,’<sup>65</sup> however, this development did not appear as a pyramid scheme. Rising house prices made it easy to refinance and, while improving their credit history by acting in compliance with their first mortgage, borrowers with bad credit could increase their credit scores<sup>66</sup> and thereby their chances of refinancing their ARMs with fixed-rate mortgages or taking out second mortgages. Thus, subprime mortgages did not only seem to make homeownership affordable for the poor, they also fulfilled commercial hopes. And isn't this what markets are all about? Bringing together diverse and different interests?

But, unfortunately, the disconnect between the person making the credit decision and the person bearing the default risk could not be permanently ignored, as (i) high level credit liquidity cannot continue forever,<sup>67</sup> (ii) buildings wear out and need to be renovated, (iii) new recruits on the lower levels of a pyramid find it more difficult to sell their products because

there are more competing salesmen for the same product than when the scheme started, and (iv) a downward economy confronts borrowers with unemployment and makes them default on their loans. The situation became dramatic as home prices plunged from October 2007 to October 2008 by 26.6 percent in Los Angeles, by 27.3 percent in San Francisco and by 28.1 percent in Miami.<sup>68</sup> America's social dream of increased homeownership became an international financial nightmare. Its effects are tragically personal.<sup>69</sup> In 2008, investors are believed to have lost over seventeen trillion dollars (US\$ 17,000,000,000,000).<sup>70</sup>

## B. Adjustable-Rate Mortgages

One of the mortgage products marketed to low-income borrowers was the ARM loan.<sup>71</sup> Unlike traditional thirty-year fixed-rate loans that give cost certainty to borrowers until the respective loan is fully amortized, interest owed on ARM loans will change over the term of the loan according to certain parameters.

### 1. Endorsement

The impetus came when Alan Greenspan wondered out loud, why not more Americans were using ARM loans?<sup>72</sup>

American consumers might benefit if lenders provided greater mortgage product alternatives to the traditional fixed-rate mortgage. To the degree that households are driven by fears of payment shocks but are willing to manage their own interest rate risks, the traditional fixed-rate mortgage may be an expensive method of financing a home.

Mr. Greenspan apparently did not have subprime borrowers in mind, but his credibility encouraged the mortgage industry to use him as an endorsement for ARM products to all customers.

### 2. Mechanics

The first parameter that determines the interest rate payable on ARM loans is the dates on which the interest rate is reset (the Reset Dates). Up to the first Reset Date, the interest rate of an ARM loan is fixed.<sup>73</sup> Thereafter, it changes, subject to an adjustment cap (the Adjustment Cap), on each Reset Date until the loan is fully amortized.<sup>74</sup> The frequency of Reset Dates will be set forth in the note. The formula for determining the applicable interest rate of an ARM loan on a Reset Date is comprised of (i) a variable rate<sup>75</sup> as the base interest rate (the Index Rate), plus (ii) a certain percentage depending on the credit risk of the borrower (the Margin).<sup>76</sup> Typically, LIBOR<sup>77</sup> is used as the Index Rate. LIBOR is the interest rate offered for U.S. dollar deposits among certain London banks. There

59 Eggert, *supra* note 36, at 550-554.

60 Essentially themselves becoming ‘agents’ for Wall Street.

61 *Nightmare Mortgages*, BUSINESS WEEK, Sept. 11, 2006, at 1.

62 The securities were more than just paper.

63 Note that the higher interest rates on subprime loans could be passed on in the mortgage securitization process. In addition, investors at home or abroad were not offended by complexity as they relied on Wall Street's good will as financial advisers. Cf. Katharina Bart, *Swiss Banks Face a Lehman Probe*, WALL ST. J., Nov. 4, 2008, at C3.

64 This also took place during 2006 and 2007. Cf. Mollenkamp et al., *supra* note 56, at A1 (“... to subprime-mortgage bonds issued in the worst years of 2006 and 2007.”).

65 Or, to put it differently, all this was based on the “scientific” assumption that the wisdom of the markets (as Adam Smith's “invisible hand”) will prevent any abuse. Bernhard Grossfeld, *Language, Poetry and Law: Order Patents*, 10 LAW & BUS. REV. AM. 669, 670 (2004).

66 In the U.S., the “credit score” is a numerical expression based on a statistical analysis of a person's credit files, to represent the creditworthiness of that person.

67 Landon Thomas Jr. quoting William Conway Jr. who refers to the leveraged buy-out market, *Tight Credit, Tough Times for Buyout Lords*, N.Y. TIMES, Mar. 8, 2008, at C1 (“I know that this liquidity environment cannot go on forever. [...] And I know that the longer it lasts, the worse it will be when it ends.”).

68 Les Christie, *Home Prices See Another Record Plunge*, CNN MONEY, Oct. 28, 2008, at 1.

69 Cf. Kate Kelly, *His Job at Bear Gone, Mr. Fox Chose Suicide*, WALL ST. J., Nov. 6, 2008, at C3.

70 Global Equity Markets End 2008 on a Positive Note; Move Cautiously into 2009, Reuters, Jan. 6, 2009, available at <http://www.reuters.com/article/pressRelease/idUS159817+06-Jan-2009+PRN20090106>.

71 Eggert, *supra* note 36, at 574. See also Ricardo Guerra v. GMAC LLC v. United States, 2008 WL 3911765 (E.D. Pa. July 22, 2008)(No. 208 Civ. 01297) (describing the discrimination issue).

72 Benny L. Kass, *Greenspan, ARMs and What's Best for You*, WASH. POST, Mar. 6, 2004, at F10.

73 Set forth in the note.

74 Also set forth in the note.

75 Examples for such rates are the CD Rate, the CMT Rate, the Commercial Paper Rate, the Eleventh District Cost of Funds Rate, EURIBOR, the Federal Funds Rate, the Prime Rate, and the Treasury Rate or LIBOR.

76 Or, interest rate = Index Rate + Margin ≤ Adjustable Cap.

77 The London Interbank Offered Rate.

are several LIBORs depending on the maturity of the deposit.<sup>78</sup> The specific LIBOR that will be used as Index Rate will be set forth in the note.<sup>79</sup>

### 3. 2/28s and 3/27s

The ARM loans most often marketed to low-income borrowers were so called “2/28-” or “3/27-ARMs.” Just like fixed-rate mortgage loans, ARM loans typically amortize over thirty years. The difference is, however, that ARM loans are separated into two periods – here, one of two years and one of twenty eight years, or one of three years and one of twenty seven years. In a 2/28-ARM, for example, “2” shows the number of years to the first Reset Date (the Initial Period); hence, the interest rate remains fixed for two years. “28” indicates the number of years over which the rate floats according to movements of the Index Rate (the Floating Period). The Initial Period of predictable interest payments for subprime borrowers is therefore comparatively short.

### 4. Interest Rate Hikes<sup>80</sup>

To make 2/28- or 3/27-ARMs ‘affordable,’ such loans often provided for ‘teaser’ rates (i.e. interest rate discounts) during the Initial Period. At the first Reset Date, however, the low monthly payments of the teaser rate would expire and the interest rate would reset to the then current Index Rate plus Margin. Teaser rate ARM loans therefore enticed borrowers with affordable initial interest payments but – by the same token – exposed them to high future increases, limited only by the Adjustment Cap, as their interest rates become subject to the Index Rate.<sup>81</sup> As stated above,<sup>82</sup> the reason for significant Margins triggering these interest rate hikes is the high default risk of subprime borrowers.<sup>83</sup> In addition, lenders need to ‘make up’ for interest rate discounts during the Initial Period.

According to the Conference of State Bank Supervisors, the spread between the initial fixed-rate and the rate during the Floating Period typically ranges from 300 to 600 basis points.<sup>84</sup> On average, an ARM loan interest rate would therefore increase by an additional 4.5 percent after the first Reset Date. The Commonwealth of Massachusetts Superior Court reviewed 98 ARM loans where the introductory rate varied from 6.1 percent to 12.4 percent.<sup>85</sup> On the first Reset Date interest would increase on average by an additional 3 percent, with the potential of additional increases every six months.<sup>86</sup> We also found references to interest rate increases from 6.95

percent payable during the Initial Period to 11 percent and 13.95 percent payable during the Floating Period, or 7.55 percent payable during the Initial Period to 13.25 percent payable during the Floating Period,<sup>87</sup> averaging a hike of an additional 5.58 percent after the first Reset Date.

## C. Refinancing Pressure

To avoid interest rate hikes on (or after) the first Reset Date, borrowers must therefore refinance ARM loans before such date. Prepayments, however, do not square well with the securitization process because most securitizations amortize over thirty years, the term of the underlying loans. Once a pool has been securitized, all profits are locked in and will shrink if the number of prepayments becomes bigger than anticipated. The common prepayment activity of a pool and its accordance with the forecast during the amortization period is therefore an important concern for lenders and Wall Street. Let us look at the standard terms of a prepayment clause of a fixed-rate note, as well as a prepayment rider to an ARM note, to see how the industry has addressed this matter:

### 1. Standard Clause

Under a traditional fixed-rate mortgage loan, the borrower is under no pressure to refinance. A typical sample note does not, therefore, penalize the borrower’s right to prepay principal and reads as follows:<sup>88</sup>

#### BORROWER’S RIGHT TO PREPAY

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a ‘prepayment.’ When I make a prepayment, I will tell the Note Holder in writing that I am doing so.

I may make a full prepayment or partial prepayments without paying any prepayment charge. The Note Holder will use all of my prepayments to reduce the amount of principal that I owe under this Note. If I make a partial prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

### 2. Prepayment Penalties

Prepayment uncertainty is, however, an important concern for the securitization industry. Also, prepayment of principal reduces the amount of interest that a lender receives on a loan. This is especially true for teaser rate ARM loans, where discounts given during the Initial Period need to be compensated for during the Floating Period. Lenders therefore try to discourage borrowers from refinancing.

Fourteen of the ninety-eight ARM loans reviewed in Massachusetts provide for prepayment penalties of up to six months’ worth of interest if the borrower prepaid the note during the Initial Period (due to selling the home or refinancing the ARM loan).<sup>89</sup> Farris and Richardson found that less than 2 percent of prime mortgages contain prepayment penalty provisions, versus up to 80 percent of subprime mortgages.<sup>90</sup> Such penalties ranged between 1 and 6 percent of the original loan balance.<sup>91</sup> A prepayment rider to an ARM

<sup>78</sup> LIBORs are quoted from overnight to 12-month maturity.

<sup>79</sup> As well as the time and date of the quote of such LIBOR.

<sup>80</sup> See generally Kathleen C. Engel & Patricia S. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002).

<sup>81</sup> So called “exploding” ARMs. Dustin Fisher, *Selling the Payments: Predatory Lending Goes Primetime*, 41 J. MARSHALL L. REV. 587, n.55 (2008) (quoting Michael D. Calhoun). See also Hearing On “Calculated Risk: Assessing Non-Traditional Mortgage Products” Before the Senate Committee on Banking, Housing and Urban Affairs Subcommittee on Housing and Transportation and Subcommittee on Economic Policy (Sept. 20, 2006) (Testimony of Michael D. Calhoun, President, Center for Responsible Lending), available at <http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/Testimony-Calhoun092006.pdf>.

<sup>82</sup> See section above titled “Pyramid Scheme.”

<sup>83</sup> See Conference of State Bank Supervisors, Statement on Subprime Mortgage Lending, [http://www.csbs.org/Content/NavigationMenu/RegulatoryAffairs/MortgagePolicy/Final\\_CSBS-AARMR-NACCA\\_Statementon-SubprimeLending.pdf](http://www.csbs.org/Content/NavigationMenu/RegulatoryAffairs/MortgagePolicy/Final_CSBS-AARMR-NACCA_Statementon-SubprimeLending.pdf).

<sup>84</sup> *Id.* at n. 1.

<sup>85</sup> Commonwealth of MA v. Fremont Inv. & Loan, & Fremont Gen. Corp., No. 07-4373-BLS1 (Mass. Sup. Ct. Feb. 25, 2008), at 10, <http://skadden-practices.skadden.com/cfs/attach.php?uploadFileID=79>.

<sup>86</sup> *Id.*

<sup>87</sup> Calhoun, *supra* note 81.

<sup>88</sup> WILLIAM BRONCHICK, FINANCING SECRETS OF A REAL ESTATE MILLIONAIRE 151 (2003).

<sup>89</sup> *Fremont Investment & Loan and Fremont General Corp.*, *supra* note 85, at 10.

<sup>90</sup> JOHN FARRIS & CHRISTOPHER RICHARDSON, THE GEOGRAPHY OF SUBPRIME MORTGAGE PREPAYMENT PENALTY PATTERNS IN HOUSING POLICY DEBATE 687, 688 (Fannie Mae Found. 2004).

<sup>91</sup> Bronchick, *supra* note 88, at 49.

note currently in dispute before the Virginia Eastern District Court reads as follows:<sup>92</sup>

#### BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a 'Prepayment.' When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate payment as a Prepayment if I have not made all the monthly payments due under the Note.

I may make a partial prepayment without paying any prepayment charge. If I make a full prepayment within one (1) year of the date of this Note, I agree to pay a prepayment charge of 2% of the amount being prepaid; if I make a full prepayment more than one (1) year but within two (2) years of the date of this Note, I agree to pay a prepayment charge of 2% of the amount being prepaid. The Note Holder will use all of my prepayments to reduce the amount of principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes. My partial prepayment may reduce the amount of my monthly payments after the first Change Date following my partial prepayment. However, any reduction due to my partial prepayment may be offset by an interest rate increase.

#### 3. Consumer Education

Were borrowers under 2/28-ARMs aware of the price they had to pay over a twenty-eight year period for two years of low interest during the Initial Period? The Federal Real Estate Settlement Procedures Act (RESPA)<sup>93</sup> requires lenders and mortgage brokers to give their customers an information booklet called "Buying Your Home"<sup>94</sup> that is prepared by the U.S. Department of Housing and Urban Development.<sup>95</sup> "Buying Your Home" is designed to help perspective borrowers understand "the home buying, home financing, and settlement process."<sup>96</sup> The current version is twenty-two pages long. "Shopping for a Loan" is discussed in Article II on pages five to eight. Its reference to ARM loans reads as follows:

If you apply for a variable rate loan, also known as an adjustable rate mortgage ("ARM"), a disclosure and booklet required by the Truth in Lending Act will further describe the ARM.

That booklet is titled "Consumer Handbook on Adjustable Rate Mortgages" and also measures twenty-two pages. Article III of "Buying Your Home" discusses "Your Settlement Cost" on pages fourteen to twenty-two. Amongst others, there are Sections on "Sales/Broker's Commission," "Items Payable in Connection with Loan,"<sup>97</sup> "Escrow Account Deposits" and "Lead-Based Paint Inspections." We find that the booklet's overall character is best expressed by Article III's last Section:

Total Settlement Charges: The sum of all fees in the borrower's column entitled 'Paid from Borrower's Funds at Settlement' is placed here. This figure is then transferred to line 103 of Section J, 'Settlement charges to borrower' in the Summary of Borrower's Transaction on page 1 of the HUD-1 Settlement Statement and added to the purchase price. The sum of all the settlement fees paid by the seller are transferred to line 502 of Section K, Summary of Seller's Transaction on page 1 of the HUD-1 Settlement Statement.

Who, other than accountants and lawyers, understands these instructions? Thus, such booklets – written in a language from lawyers to lawyers – were of little help because "almost no one ever reads them before signing."<sup>98</sup>

#### 4. Financial Consequences

The Practising Law Institute (PLI), holding a "Subprime Institute" in September of 2008, describes the financial consequences to a borrower under a 30-year Fixed-Rate Mortgage and a 2/28-ARM loan, each in the amount of US\$ 200 thousand with the following examples:<sup>99</sup>

	Fixed-Rate Mortgage	2/28-ARM
<b>Interest Rate</b>	7.5%.	7% for Years 1-2, then adjusting to Index Rate plus Margin, subject to annual Adjustment Caps; 10% Adjustment Cap in Year 3; 11.5% Adjustment Cap in Year 4; 13% Adjustment Cap in Years 5-30.
	<b>Required Monthly Payments</b> (including \$ 200 per month for real estate tax and insurance escrow)	
<b>Years 1-2</b>	US\$ 1,598	US\$ 1,531
<b>Year 3</b>	US\$ 1,598	US\$ 1,939
<b>Year 4</b>	US\$ 1,598	US\$ 2,152
<b>Years 5-30</b>	US\$ 1,598	US\$ 2,370

If we add these numbers, we will get the following results: Under the fixed-rate mortgage, the borrower would owe the total amount of US\$ 575,280<sup>100</sup> (including certain estimated costs for real estate tax and insurance escrow) if he purchased a home. Under the 2/28-ARM, he may be exposed to a maximum total amount of US\$ 825,294<sup>101</sup> (including certain estimated costs for real estate tax and insurance escrow). Two years of lower interest payments on a loan in the amount of US\$ 200,000 may therefore be 'made up' by an amount of up to US\$ 250,014.

The Conference of State Bank Supervisors, also looking at

98 James R. Hagerly, *New Mortgages Rules Aimed at Consumer*, WALL ST. J., Nov. 12, 2008, at D3.

99 ROBERTA K. MCINERNEY, FINANCIAL INSTITUTION GUIDANCE IN PLI COURSE HANDBOOK, SUBPRIME CREDIT CRISIS: EVERYTHING YOU NEED TO KNOW 15 (Practising Law Inst. 2008). See also FDIC, Statements of Policy, <http://www.fdic.gov/regulations/laws/rules/5000-5200.html>.

100 Thirty years = 360 months. 360 x US\$ 1,598 = US\$ 575,280.

101 Years one to two = twenty-four months. 24 x US\$ 1,531 = US\$ 36,744. Year three = twelve months. 12 x US\$ 1,939 = US\$ 23,268. Year four = twelve months. 12 x US\$ 2,152 = US\$ 25,824. Years five through thirty = 312 months. 312 x US\$ 2,370 = US\$ 739,440. US\$ 36,744 + US\$ 23,268 + US\$ 25,824 + US\$ 739,440 = US\$ 825,294.

92 Statement of Undisputed Facts by Lisa Barrigan, Elite Funding, Decision One. Attach. 1 Ex. 20, Barrigan v. Elite Funding et al, No. 1:07 Civ. 0951 (E.D. Va. Sept. 20, 2007).

93 12 U.S.C. § 2601.

94 See <http://www.mortgagesfinancingandcredit.org/mortgages/buying-home-settlement/costs1.htm>.

95 Office of Housing-Federal Housing Administration.

96 See Dept. of Housing and Urban Development, <http://www.hud.gov>.

97 Such as "Credit Report Fee" or "Assumption Fee."

2/28-ARMs, came to similar conclusions.<sup>102</sup> By way of example, a 2/28-ARM loan in the amount of US\$ 200,000 with an initial fixed-rate of 7 percent may 'typically' reset to LIBOR plus percent.<sup>103</sup> Thus, if the LIBOR designated by the note at the time of the application for the loan equals 5.5 percent,<sup>104</sup> mortgage brokers and lenders should treat such loan as if it was a fixed-rate mortgage with an interest rate of 11.5 percent,<sup>105</sup> regardless of the interest rate charged during the Initial Period or any Adjustment Cap.<sup>106</sup> Similarly, the borrower would owe US\$ 1,531 per month during the Initial Period and an estimated US\$ 2,156 per month during the Floating Period on this loan, including US\$ 200 per month for real estate tax and insurance escrow during the entire amortization period.<sup>107</sup> This represents a 41 percent increase in payment amount on the first Reset Date<sup>108</sup> and would expose the borrower to a

total amount of US\$ 761,160<sup>109</sup> (including certain estimated costs for real estate tax and insurance escrow) because of his home purchase. The difference between the 'typical' and the maximum exposure in connection with a 2/28 ARM<sup>110</sup> in the amount of US\$ 200,000 is therefore US\$ 64,134, while the 'typical' exposure is still US\$ 185,880 over the total amount of a 7.5 percent fixed-rate mortgage.

In addition to determining the payment increase on the first Reset Date, the Conference of State Bank Supervisors puts the increase into perspective. The annual income of a borrower, who would 'typically' take out a loan in this amount,<sup>111</sup> is US\$ 42,000 per year.<sup>112</sup> His initial debt-to-income (DTI) ratio is therefore 44 percent; upon the first Reset Date it would increase to 62 percent.<sup>113</sup>

(Der Beitrag wird fortgesetzt)

102 Conference of State Bank Supervisors, *supra* note 83.

103 *Id.* at n. 8.

104 Six months USD LIBOR ranged from 1.75000 percent to 4.56625 percent during 2008.

105 This equals Margin plus Index Rate = 6 percent + 5.5 percent.

106 Conference of State Bank Supervisors, *supra* note 83, at n.8.

107 *Id.* at n.14.

108 *Id.*

109 Years one to two = twenty-four months. 24 x US\$ 1,531 = US\$ 36,744. Years three through thirty = 336. 336 x US\$ 2,156 = US\$ 724,416. US\$ 36,744 + US\$ 724,416 = US\$ 761,160.

110 That amortizes over thirty years.

111 The median income of all households in 2006 was US\$ 48,201.00. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, TABLE 669.

112 Conference of State Bank Supervisors, *supra* note 83, at n. 14.

113 *Id.*

Slaven Marinovic

## Commercialization of Dead and Living Celebrities in the US and Germany – Marilyn Monroe, Marlene Dietrich and Caroline von Monaco –

### Bericht vom 2. Hamburg International Media Law Forum

Im Rahmen des Internationalen Mediendialogs Hamburg lud die Deutsch-Amerikanische Juristen-Vereinigung e.V. (DAJV) am 3. 6. 2009 zum 2. „Hamburg International Media Law Forum“<sup>1</sup> in das Gästecasino des Hamburger Axel-Springer-Hauses ein. Die englischsprachige Veranstaltung wurde von Dr. Daniel Biene, LL.M. (New York), als Vertreter der DAJV und der Axel Springer AG eröffnet. Er dankte dabei vor allem dem US-amerikanischen Redner Mark Roesler, J.D. (Indiana), Chairman und CEO von CMG Worldwide,<sup>2</sup> der extra zu der von Dr. Biene und Dr. Rösler organisierten Veranstaltung aus Indianapolis angereist war.

#### I. Einführungsvortrag

Dr. Hannes Rösler, LL.M. (Harvard), wissenschaftlicher Referent am Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg, führte durch die Veranstaltung und ging in seinem Einführungsvortrag auf die zunehmende Verkommerzialisierung des deutschen Rechts und die Einwirkungen von US-amerikanischen Rechtsideen ein.

#### 1. Bedeutung von postmortalen Persönlichkeitsrechten

Dr. Rösler führte aus, dass die USA Vorreiter bei der Kommerzialisierung von Persönlichkeitsrechten Lebender und Verstorbener sind. Neben der nicht-monetären, ideellen Dimension des postmortalen Persönlichkeitsrechts spielt die Persönlichkeit als Vermögenswert eine zunehmende Rolle. Dazu ordnete Dr. Rösler dem deutschem, aber im Wandel begriffenen Recht ein eher dignitäres und immaterielles Modell zu, während das an Einfluss gewinnende US-Modell eher einen nicht-dignitären und materiellen Ansatz aufweise. Dies gelte sowohl bei der Konzeption des Persönlichkeitsrechts als auch bei den Rechtsfolgen.<sup>3</sup> Allerdings sei das US-amerikanische Recht nicht nur bei der Ermessung des Stellenwertes der Meinungsfreiheit<sup>4</sup> hilfreich, sondern auch – wegen des dualen Ansatzes der USA – bei der Differenzierung zwischen kommerziellen und nicht-kommerziellen Bestandteilen des Persönlichkeitsrechts. Dr. Rösler bezog sich – wenige Tage vor dem Tod von Michael Jackson – auf die Liste „Top-Earning Dead Celebrities

1 Vgl. zum 1. Hamburg International Media Law Forum den ausführlichen Bericht Marinovic, DAJV-NL 2008, 129.

2 CMG Worldwide mit Sitz in Indianapolis und Los Angeles ist der größte Persönlichkeitsvermarkter der USA. Zu den Kunden zählen u.a. Princess Diana, Marilyn Monroe, James Dean, Buddy Holly und Ella Fitzgerald.

3 Ausführlich zu dieser Unterscheidung im Zusammenhang mit dem deutschen und US-amerikanischen postmortalen Persönlichkeitsrecht Rösler, 26 Berkeley J. Int'l L. 153 (2008); unter dem Stichwort „Persönlichkeitsrecht“ ders., in: Basedow/Hopt/Zimmermann (Hrsg.), Handwörterbuch des Europäischen Privatrechts, 2009, S. 1151.

4 Zu den US-amerikanischen Einflüssen auf die Rechtsprechung des BVerfG seit Lüth siehe Rösler, 23 Tul. Eur. & Civ. L.F. 1 (2008).