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Prohibiting De Facto Insurance Redlining: Will Hurricane Katrina Draw a Discriminatory Redline in the Gulf Coast Sands Prohibiting Access to Home Ownership?

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PROHIBITING *DE FACTO* INSURANCE REDLINING: WILL HURRICANE KATRINA DRAW A DISCRIMINATORY REDLINE IN THE GULF COAST SANDS PROHIBITING ACCESS TO HOME OWNERSHIP?

Steven Plitt and Daniel Maldonado***

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There's no disaster that can't become a blessing, and no blessing that can't become a disaster.

— Richard Bach

Redlining is a discriminatory practice that prohibits certain individuals from acquiring property.[1] Traditionally, redlining has been described as "credit discrimination based upon the characteristics of the neighborhood surrounding the borrower's dwelling."[2] "A neighborhood becomes redlined when a lending institution presumes the area is no longer economically stable because of age, race, composition or other characteristics."[3] Redlining occurs when "entire blocks of neighborhoods are simply declared off-limits for lending, either by having a line drawn around them, or by custom and practice."[4] Redlining has a devastating effect because the presumption becomes a self-fulfilling prophecy.[5]

Although redlining is traditionally seen in the context of financial lending, it can be seen in other contexts, as well. As an example, "insurance redlining" is the discriminatory unavailability of insurance.[6] Insurance redlining

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1 *See, e.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 328–29 (7th Cir. 2004) (describing "redlining" as the practice of denying the extension of credit to specific geographic areas based upon the income, race, or ethnicity of its residents); Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 892 (N.D. Ill. 2000) ("Redlining is the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents."). In addition to mortgage redlining and insurance redlining, the FHA prohibits racial steering, exclusionary zoning decisions, and other actions by individuals or governmental units that directly affect the availability of housing to minorities. Southend Neighborhood Improvement Ass'n. v. County of St. Clair, 743 F.2d 1207, 1209–10 n.3 (7th Cir. 1984) (describing court holdings on the meaning of "otherwise make available or deny" in section 3604(a) of the Fair Housing Act, 42 U.S.C. §§ 3601–3619 (1978)).

2 Conference of Federal Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1258 (9th Cir. 1979).

3 Edward Larkin, Note, *Redlining: Remedies for Victims of Urban Disinvestment*, 5 FORDHAM URB. L.J. 83, 83–84 (1976).

4 Daniel Searing, *Discrimination in Home Financing*, 48 NOTRE DAME L. REV. 1113, 1113 (1973).

5 *See* David I. Badain, *Insurance Redlining in the Future of the Urban Core*, 16 COLUM. J.L. & SOC. PROBS. 1, 5 (1980) (describing the "cycle of disinvestment" that occurred in urban areas as a result of suburban out-migration).

6 *See, e.g.*, *id.* at 4 ("In its traditional definition, 'redlining' is the outright refusal of an insurance company or lending institution to provide services solely on the basis of a property's geographical location.").

impairs the ability of individuals of a protected class to acquire property because procuring insurance is a prerequisite to obtaining a mortgage.[7]

Insurance redlining can take on the characteristics of a corporate chameleon which is difficult to identify and then regulate. Insurance underwriting practices, as an example, focus upon demographic risk factors which are mathematically modeled upon actual loss criteria.[8] The higher potential for loss in minority-dominated geographic areas is predictable based upon fundamental principles of risk that are at the center of insurance theory and practice.[9]

Concerns over insurance redlining have been thrust into the political arena in the aftermath of Hurricane Katrina. Insured losses for Hurricane Katrina covered by private insurance carriers are estimated at $40 to $60 billion, with total damages estimated at $200 billion.[10] Hurricane Katrina is expected to exceed Hurricane Andrew and the terrorist attack of September 11, 2001, as the highest insured loss from a single event in the history of the United States.[11] As a result, insurance companies will develop plans to reduce their exposure to loss in the disaster-prone Gulf Coast areas. Such plans will be deemed necessary to protect remaining policyholders who would otherwise be left without coverage if a company became insolvent due to another catastrophic hurricane. These types of plans may include significant cancellations and non-renewals of existing homeowner policies, or, in the case of some of the hardest-hit insurers, withdrawal from the state's residential property and casualty insurance marketplace.

Because of the racial demographics of coastal Alabama, Mississippi and Louisiana, mass policy cancellations, non-renewals, or the withdrawal of insurance companies from the state's residential property and casualty insurance marketplace in the aftermath of Hurricane Katrina threatens to create de facto redlining.

Minorities had higher levels of property damage from Hurricane Katrina in Alabama, Mississippi, and Louisiana compared to whites, largely because of segregated housing in older and more poorly constructed homes.[12] Black

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7 *See, e.g.*, Dana L. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowner's Insurance*, 104 MICH. L. REV. 1993, 1995 (2006) ("The unavailability of homeowners insurance in black neighborhoods contributes to the gap in homeownership rates.").

8 *See generally* Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403 (1985) (discussing the methods insurers use to classify potential insureds and the possibilities for discrimination).

9 *See generally id.*

10 Rawle O. King, *Hurricane Katrina: Insurance Losses & National Capacities for Financing Disaster Risk*, CRS Report for Congress, at CRS-4 (Sept. 15, 2005).

11 *See id.* at CRS-5, tbl.1 (stating that Hurricane Andrew resulted in insured property losses in excess of $15.5 billion, and the 9/11 attack on the World Trade Center resulted in insured property losses of $18.8 billion).

12 *See Gulf Coast Recovery Act: Hearing on S. 1761 Before the Subcomm. on Superfund and Waste Management of the S. Comm. on Environment and Public Works*, 109th Cong. (2005) [hereinafter *Hearings*] (statement of Dr. Beverly Wright, Director, Deep South Center for Environmental Justice, Xavier University)

families were also less likely to have purchased insurance to cover property damage and temporary living expenses resulting from a disaster like Hurricane Katrina.[13]

Generally, black families were less likely than white families to have purchased insurance with major insurance companies, largely because of decades of insurance redlining.[14] A side effect of "insurance redlining," for example, is that black families were more likely than white families to receive insufficient settlement amounts after Hurricane Katrina because of limited coverages available from insurance companies that did issue policies.[15] As a result, black families may be less likely to rebuild after Hurricane Katrina,[16] which would significantly reduce black ownership in the affected coastal areas. Those individuals who can obtain insurance at what will likely be a higher insurance premium are those individuals that knowingly chose to forego full insurance coverage in light of the future risks, and will rebuild. Consequently, the indirect effect of redlining is that the demographics of the areas devastated by Hurricane Katrina in Alabama, Mississippi and Louisiana may change drastically.[17]

(noting differences in property damage because of housing demographics).

13 *Id.*

14 *Id.* (stating that black were less likely to have insurance because of redlining). For a discussion of the environmental and discriminatory effect of Hurricane Katrina, see generally MANUEL PASTOR ET AL., IN THE WAKE OF THE STORM: ENVIRONMENT, DISASTER AND RACE AFTER KATRINA (2006).

15 *See Hearings, supra* note 12 (testimony and statement of Dr. Beverly Wright, Director, Deep South Center for Environmental Justice, Xavier University) (noting the difference in settlement amounts of whites and blacks).

16 This is because they were either uninsured, underinsured, or otherwise did not have the funds to rebuild.

17 On January 9, 2006, the Equal Justice Society (EJS), a national advocacy organization that advances social and racial justice through law and public policy, along with thirty-six other American civil society organizations submitted a collaborative memorandum to the United Nations Human Rights Committee detailing various human rights concerns, including, among others, the United States government's failure to "guarantee equal and effective protection against racial discrimination in the context of disaster rescue, relief and reconstruction efforts" in the aftermath of Hurricane Katrina. Memorandum of U.S. Civil Society Organizations and Advocates to the Members of the United Nations Human Rights Committee, List of Concerns for the Review of the U.S. Second and Third Periodic Report 38 (Jan. 9, 2006) (on file with the author). EJS asserted that the United States government was in violation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR). *Id.* The ICCPR was adopted by the United Nations General Assembly on December 16, 1966, and ratified by the United States Senate in 1992. 138 CONG. REC. S4781-01 (1992) (noting that the ratification was subject to a number of reservations, understandings, and declarations). Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 14668.

In addition, the federal government has an affirmative duty to protect the right to freedom of movement and residence within the border of a State and the right to housing free from discrimination on the basis of race.

International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Nov. 20, 1994, 660 U.N.T.S. 195. EJS has demanded that Congress insist that Katrina victims have a right to return and a right to funds to rebuild their homes and lives and that FEMA develop a plan to make return possible. Equal Justice Soc'y et al., Petition to President George W. Bush, United States Congress, Department Of Homeland Security, Federal Emergency Management Agency and the United Nations, 15 (Nov. 14, 2005) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

The U.S. Senate has declared that articles 1 through 27 of the ICCPR are not self-executing. 138 CONG. REC. S4781–84 (1992); Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001) ("Neither the American Declaration nor the International Covenant is self-executing, nor has Congress enacted implementing legislation for either agreement."); Beazley v. Johnson, 242 F.3d 248, 267–68 (5th Cir. 2001) (citing cases and other sources indicating that the ICCPR is not self-executing). The Senate has also declared that the ratification of the ICCPR does not create a private cause of action in American Courts. S. EXEC. REP. No. 102–23, at 15 (1992); *see also* Sei Fujii v. State, 242 P.2d 617, 619–22 (1952) (holding that if a treaty or covenant is not self-executing and Congress has not implemented the treaty with legislation, no private right of action is created by ratification).

Thus, while the ICCPR is binding upon the United States as a matter of international law, it does not form part of the domestic law of the United States. United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979) (holding that not every treaty to which the United States is a party acts to limit the jurisdiction of American courts and that the treaty affects the law of the United States only when the treaty is given effect by congressional legislation or if the treaty by its nature is self-executing) (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987) ("Courts in the United States are bound to give effect to international law and to international agreements, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority."). Because the United States has yet to adopt the ICCPR's Optional Protocol that provides individual claimants with direct access for the adjudication of claims to the United Nations Human Rights Committee once domestic remedies are exhausted, the Inter-American Commission on Human Rights of the Organization of American States (OAS) may arguably be the only international forum that American citizens can utilize for claims arising under the ICCPR involving individual complaints of human rights violations. *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, Arts. 44–51, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights]. Article XVII of the American Declaration of the Rights and Duties of Man which was approved by the Ninth International Conference of American States in 1948 provides, "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights." American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) [hereinafter American Declaration]. Article XXIII provides, "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." *Id.* Any person or nongovernmental entity legally recognized in a member state of the OAS may submit petitions to the Commission with regard to alleged violations of a human right recognized in the American Declaration of the Rights and Duties of Man or the American Convention on Human Rights. *See* Rules of Procedure of the Inter-American Court of Human Rights, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.9 (2003).

Courts have held that the "American Declaration . . . is an aspirational document which . . . did not on its own create any enforceable obligations on the part of any of the OAS member nations." *See, e.g.*, Garza v. Lappin, 253 F.3d 918, 923 (7th Cir. 2001). Although the OAS developed the American Convention on Human Rights, which creates an Inter-American Court of Human Rights whose decisions are potentially binding on member nations, the United States signed the American Convention, but has not ratified it. *Id.* at 925. Consequently, the American Convention does not yet qualify as a "treaty" of the United States that creates binding obligations. *Id.*

While the ICCPR was not originated by the OAS, however, the Inter-American Commission on Human Rights, as well as the Inter-American Court of Human Rights, is able to administer any international agreement to which an OAS member state is subject. *See* American Convention on Human Rights, *supra* note 17, art. 64(1). The Inter-American Commission on Human Rights authority under Article 64 would include interpreting the ICCPR, the Geneva Conventions, and other international instruments. *See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Op. OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10 (July 14, 1989), *reprinted in* 11 HUM. RTS. L.J. 118, 126 (1990); *see also* Mark Wojcik, *Using International Human Rights Law to Advance Queer Rights: A Case Study of the American Declaration of the Rights and Duties of Man*, 55 OHIO ST. L. J. 649, 654 (1994). Because the United States is a member state of the OAS and a signatory of the OAS Charter, This article discusses Federal and State remedies available to potential victims of redlining. Specific emphasis is placed upon the issue of de facto insurance redlining which may arise in the aftermath of Hurricane Katrina in the minority-dominated geographic coastal areas of Alabama, Mississippi, and Louisiana. Part I of the article discusses the federal regulatory scheme prohibiting discriminatory redlining. It first addresses the civil rights legislation passed by Congress as embodied in the Thirteenth and Fourteenth Amendments pertaining to the property rights of minorities. Part I also discusses the Federal Housing Act and other federal statutes as a means to proscribe "mortgage redlining." Part I then addresses the possible utilization of the Fair Housing Act as a means to proscribe "insurance redlining."

Part II of the Article discusses various state constitutional provisions, statutes, regulations, and case law that may proscribe "insurance redlining." This patchwork of assorted proscriptions is not uniform among the states. Part III of the Article discusses the states' regulatory authority in proscribing "insurance redlining." Part III briefly covers the McCarran-Ferguson Act, which allowed the state regulation of insurance to prevail over general federal statutes. Part III then discusses whether the McCarran-Ferguson Act preempts the proscription of insurance redlining by the Federal Housing Act ("FHA"). The article answers this question by asserting that the FHA does proscribe "insurance redlining" in order to further the goal of equal access to housing.

Part IV of the article discusses, briefly, the emergency rules issued by the Louisiana Department of Insurance to prevent insurance company conduct which could contribute to de facto redlining in the aftermath of Hurricane Katrina. The state of Florida used a similar "moratorium" on policy cancellations and non-renewals in the aftermath of Hurricane Andrew. A moratorium approach to de facto redlining has inherent constitutional hurdles which have to be overcome. Part IV discusses the various constitutional challenges that insurance companies may pursue as a result of any moratorium legislation, including Takings Clause, Contract Clause, and Due Process Clause claims.

The authors conclude this analysis by proposing an amendment to the FHA which would specifically preclude insurance redlining. Although the FHA may be an ineffective legislative mechanism to prevent housing discrimination in

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the United States is bound to respect the interpretive decisions of the Inter-American Commission relating to the United State's obligations with respect to human rights. Charter of the Organziation of American States, 2 U.S.T. 2394, T.I.A.S. No. 2361; *amended effective* 1970, 21 U.S.T. 607, T.I.A.S. No. 6847, arts. 53, 106 & 145. Under these auspices, should a Katrina victim decide, after exhausting any judicial remedies in American courts, that their human rights as enumerated in the ICCPR were violated and not remedied, they could file a petition with the Inter-American Commission to determine whether their human rights were violated.

general, amending the FHA to include insurance redlining would nevertheless bring a national approach to the problem.[18]

I. An Overview of Federal Regulatory Authority Prohibiting Discriminatory Redlining

A. History of Civil Rights Legislation Relevant to Redlining

In order to better understand the proscription of discriminatory housing practices, including redlining, one must first start with an understanding of the system of American government. The United States was formed as a dual sovereignty system—the states and the federal government.[19] As a republican form of government, it is the duty of the states to protect the quality of rights of its citizenry.[20] The federal government's purpose is to ensure that the states do

[18] Although not specifically addressing the issue of redlining, there are other federal laws which may be available to Katrina victims to protect them from discrimination. For example, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121–5206 (1988), and its implementing regulations, 44 C.F.R. §§ 206.31–206.48 (1988), provide the statutory framework for the President to declare an emergency or a major disaster. Section 308 of the Stafford Act prohibits discrimination on the basis of race, color, religion, nationality, age, or economic status in the administration of disaster assistance programs. Section 309 also prohibits all private relief organizations who participate in the response and recovery effort from engaging in discrimination.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. "Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in federally assisted programs including, of course, public housing programs." Hills v. Gautreaux, 425 U.S. 284, 301–02 (1976). Title VIII of the Civil Rights Act of 1968 expressly directs the Secretary of Housing and Urban Development (HUD) to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" the Act's fair housing policy. 42 U.S.C. § 3608(d)(5). If HUD officials are aware that a municipality's urban renewal program results in the removal of a substantial portion of the municipality's minority population but approves urban renewal housing project which displaces minority residents and the officials know of the nonexistence of relocation programs for minority residents, HUD has violated Title VI prohibiting discrimination under federally assisted programs and Title VIII. Garrett v. City of Hamtramck, 503 F.2d 1236, 1246 (6th Cir. 1974).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, precludes discrimination against individuals with disabilities in all programs receiving funds from the federal government or programs operated by the federal government. For a discussion of the rights and remedies under Section 504, *see generally* Steven Plitt, Valerie J. Fasolo & Daniel Maldonado, *The Struggle to Define The Rights and Remedies For Claims Brought Under The Rehabilitation Act*, 47 N.Y.L. SCH. L. REV. 269 (Fall 2003). Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(d), prohibits discrimination against persons with disabilities in regard to federally operated technology systems.

[19] *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (stating that States possess sovereignty concurrent with the federal government, subject only to limitations imposed by the Supremacy Clause of the United States Constitution). For the advantages and disadvantages of the dual sovereignty system, *see generally* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987); Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988).

[20] *See* United States v. Cruikshank, 92 U.S. 542, 555 (1875) ("The equality of the rights of citizens is a principle of republicanism. Every republican government is duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.").

not deny these rights to its citizens.[21] The right to purchase and own a home is a fundamental part of citizenship.[22] Slaves, however, could not own anything, could not enter into any contracts, and could not hold or transfer any property.[23] The Civil War was, in part, a result of the Union's efforts to ensure that slavery was abolished in the southern states.[24]

After the Civil War ended in 1865, Congress adopted the Thirteenth and Fourteen Amendments which were equally binding upon all the states.[25] The Thirteenth Amendment abolished slavery in the United States and gave Congress the power to enforce the amendment by appropriate legislation.[26] The Fourteenth Amendment provided, among other things, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United . . . [and no State shall] deny to any person . . . the equal protection of the laws."[27] Although a principal purpose of the Fourteenth Amendment was to protect persons of color, the United States Supreme Court has interpreted the broad language of the Amendment as sufficient to protect all persons, regardless of race, against discriminatory legislation by the states.[28] The Fourteenth Amendment, however, does not prohibit private discriminatory conduct.[29]

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21 *See id.* (describing the purpose of federal government). Under the Constitution, blacks were not intended to be included as citizens, but were considered property and "regarded as beings of an inferior order . . . , altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

22 *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."); McDonald v. Verble, 622 F.2d 1227, 1232 (6th Cir. 1980); State v. Joseph, 68 So. 211, 211 (La. 1915) (noting that the Thirteenth Amendment was enacted to allow all races to enjoy fundamental rights including the right to inherit, purchase, lease, sell, and convey property).

23 *See generally* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 10 (1964).

24 *Cf. Ex parte* Commonwealth of Va., 100 U.S. 339, 363 (1879) ("The institution of slavery in a portion of the country was the cause of constant irritation and crimination between the people of the States where it existed and those of the free States, which finally led to a rupture between them and to the civil war.") (Field and Clifford, JJ., dissenting); Slaughter-House Cases, 83 U.S. 36, 90 (1872) (noting that the Civil War owed its existence to slavery).

25 *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 75–76 (1917) (stating that Thiteenth and Fourteenth Amendments "have become an integral part of that instrument, equally binding upon all the states and fixing certain fundamental rights which all are bound to respect.").

26 *See* U.S. CONST. amend. XIII. Section 1 of the Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.* § 1.

The Thirteenth Amendment not only authorized Congress to outlaw all forms of slavery and involuntary servitude, but also to eradicate the last vestiges and incidents of slavery by securing to every race and color, "the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." The Civil Rights Cases, 109 U.S. 3, 22 (1883). The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Id.* at 20 (holding that by its own unaided force and effect the Thirteenth Amendment abolished slavery and "established universal freedom").

27 U.S. CONST. amend XVI; *see also* Buchanan v. Warley, 245 U.S. 60, 79 (1917) (holding that the

Section 5 of the Fourteenth Amendment gave Congress the discretion to determine the enforcement mechanism to prohibit discrimination by the Legislature, the Executive, and the Judiciary.[30] The Civil Rights Act of 1866 was enacted subsequent to the adoption of the Fourteenth Amendment.[31] When Congress considered enacting the Civil Rights Act of 1866, the commonly held perception that the plight of southern blacks was not resolved by the adoption of the Thirteenth Amendment was growing.[32] Individual southern States had enacted the "Black Codes,"[33] which did not technically resurrect slavery, but were viewed by the Republican Congress as a large step in that backward

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Fourteenth Amendment was enacted so that people of color could acquire property without state legislation discriminating against them solely because of their race).

[28] *See id.* at 76 (noting that the Fourteenth Amendment is not limited to race). In *Strauder v. West Virginia*, 100 U. S. 303 (1879), the Supreme Court held:

> The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.

Id. at 310. *See, e.g.*, Schneider v. Bahler, 564 F.Supp. 1449, 1455–56 (N.D. Ind. 1983) ("It is quite correct that it is possible for persons of the white race to state a claim for racial discrimination under § 1982."); Hollander v. Sears, Roebuck & Co., 392 F.Supp. 90, 95 n.4 (Conn. 1975) ("As Congress clearly has the power to protect whites from involuntary servitude and slavery, there can be little doubt that it also has the power to protect whites from 'all badges and incidents of slavery.'").

[29] *See generally The Civil Rights Cases*, 109 U.S. at 11; Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[30] *See* Virginia v. Rives, 100 U.S. 313, 318 (1879) (relating Section 5 of the Fourteenth Amendment). Congress has various constitutional powers to enact legislation to eliminate racial discrimination. *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964) (detailing Congress' power to eliminate discrimination under the Commerce Clause); Griffin v. Breckenridge, 403 U.S. 88 (1971) (discussing the Thirteenth Amendment's grant of power to Congress' to eliminate racial discrimination); Katzenbach v. Morgan, 384 U.S. 641 (1966) (describing Congress' power to eliminate racial discrimination under the Fourteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (describing Congress' power to eliminate racial discrimination under the Fifteenth Amendment).

[31] *See, e.g.*, Hurd v. Hodge, 334 U.S. 24, 31 n.7 (1948). The Civil Rights Act of 1866 was enacted on April 9, 1866. It was originally passed under Congress' enforcement powers pursuant to the Thirteenth Amendment and was re-enacted after the adoption of the Fourteenth Amendment. *Buchanan*, 245 U.S. at 78. The Fourteenth Amendment passed the House of Representatives on June 13, 1866 and the Senate on June 8, 1966. CONG. GLOBE, 39th Cong., 1st Sess. 3148–49, 3042 (1866). One of the primary purposes for many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 2465 & 2459 (1866) (comments of Reps. Thayer & Stevens)

[32] *See* Memphis v. Green, 451 U.S. 100, 131–32 (1981) (White, J., concurring) (quoting S. EXEC. DOC. No. 2, 39th Cong., 1st Sess., 38 (1865)) (relating the history of the Civil Rights Act). President Andrew Johnson had assigned Major General Carl Schurz the task of traveling through several Southern States to gather information and make observations of postwar conditions found in that region. The Schurz report was concerned that the South's loyalty to the Union would be questionable if it was permitted to rebuild based upon another "peculiar institution" that conflicted with the fundamental principles of the nation's political system. S. EXEC. DOC. No. 2, 39th Cong., 1st Sess., 46 (1865).

[33] For a description and compilation of the "Black Codes," *see generally* E. MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 29–44 (1871).

direction.[34] Congress also found evidence that the white majority subjected former slaves to serious abuses.[35] The "Black Codes" precluded blacks from, among other things, owning property and residing in certain areas.[36] The "Black Codes" even had counterparts in some northern states.[37] The Civil Rights Act of 1866 was specifically designed to overturn this oppression.[38] "The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites."[39] Consequently, allowing African-Americans to buy and sell real property removed one of many badges of slavery.[40]

Section 1982 of the Civil Rights Act of 1866[41] addresses the property rights of citizens.[42] Section 1982 provides in pertinent part:

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[34] *See Green*, 451 U.S. at 132 (citing H. FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT 11–54 (1908)) (relating the history of the Black Codes).

[35] *See id.* (citing the Joint Committee on Reconstruction, H.R. REP. No. 30, 39th Cong., 1st Sess., xvii (1866)) (relating the history of the Black Codes).

[36] *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 672 & n.2 (1987) (Brennan, J., concurring in part and dissenting in part) ("Before the Thirteenth Amendment, slaves could not own property, and after emancipation the southern states enacted Black Codes to perpetuate this disability. This was the 'incident of slavery' which the 1866 statute was aimed at, relying for its enforcement on the Thirteenth Amendment.") (quoting B. SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835–1877 193 (1973) and H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW 319 (1982)).

[37] *See Goodman*, 482 U.S. at n.36. The Northern counterparts of the "Black Codes" usually prohibited African-Americans from moving into the state, imposed *Jim Crow* in public facilities, or prohibited African-Americans from voting. *Id.* (quoting H. HYMAN & W. WIECEK, *supra* note 36, at 320).

[38] *See, e.g.*, General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386 (1982) ("The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen.").

[39] Virginia v. Rives, 100 U.S. 313, 318 (1879).

[40] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 444 (1968) (Douglas, J., concurring) (discussing various badges of slavery).

[41] 42 U.S.C. § 1982. Section 1982 is patterned after Section 1981 of the Civil Rights Act of 1866 which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

Because Sections 1981 and 1982 were derived from Section 1 of the Civil Rights Act of 1866 and their wording and legislative histories are identical, courts construe them similarly. *See generally* Runyon v. McCrary, 427 U.S. 160, 171–73 (1976); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 440 (1973) (same). In contrast, Section 1983 has been construed differently. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 676 n.8 (1987) (discussing the unsettled law in the Third and other Circuits regarding the statute of limitations in § 1983 cases, despite clear precedent regarding the statute of limitations in § 1981 and § 1982 cases).

[42] In addition to Section 1982, Congress also enacted: 42 U.S.C. § 1981, which protects the right of all citizens to enter into and enforce contracts; 42 U.S.C. § 1985(3), which protects people from conspiracies to deprive people of color of "the equal protection of the laws, or of equal privileges and immunities under the laws; 42 U.S.C. § 1994, which prohibits peonage; and 18 U.S.C. § 1581 which provides for criminal

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1982 was specifically designed to prevent an individual from being denied the opportunity to purchase a home solely because of the individual's race or color.[43] Section 1982 guaranteed that "a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."[44] In *Jones v. Alfred H. Mayer Co.*, the Supreme Court concluded that Section 1982 was authorized by the Enabling Clause of the Thirteenth Amendment, and based upon its legislative history, prohibited private discrimination.[45]

B. Federal Regulation of Mortgage Redlining

1. The Fair Housing Act and Redlining

Section 1982 is not a comprehensive housing law because it deals only with discrimination based upon race.[46] In contrast, the Fair Housing Act (FHA)[47] prohibits discrimination in the sale or rental of housing based on race,

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punishment of individuals who impose conditions of peonage on any person. Peonage is a form of involuntary servitude. Taylor v. Georgia 315 U.S. 25, 29 (1942).

[43] For example, in *Hurd v. Hodge*, 334 U.S. 24, 34 (1948), white citizens agreed to exclude African-Americans from a residential area by including a restrictive covenant that precluded them from renting, leasing, selling, transferring or conveying their property to any person of color. *Id.* The white property owners went to federal court to get an injunction to enforce the agreement. *Id.* The Court held that the federal courts could not enforce a restrictive covenant that would violate the Constitution. *Id*; *see also* Harmon v. Tyler, 273 U.S. 668 (1927) (invalidating a New Orleans ordinance that gave legal force to private discrimination by forbidding people of color from establishing a home in a white community, or any white person from establish a home in a black community); Shelley v. Kraemer, 334 U.S. 1, 12 (1948) (judicial enforcement of racially discriminatory restrictive covenant violated Fourteenth Amendment).

[44] *Jones*, 392 U.S. at 443.

[45] Section 1982 and the Thirteenth Amendment differ significantly from the Fourteenth Amendment in that the Fourteenth Amendment, as implemented by 42 U.S.C. § 1983, prohibits only official action taken under color of state law. Section 1982, however, is directly applicable to private parties. Memphis v. Greene, 451 U.S. 100, 119–20 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (Brennan, J., concurring in part and dissenting in part) ("[A] person may be deprived of a right secured by the Constitution and 42 U.S.C. § 1982 by a private person acting completely independently of state government."); District of Columbia v. Carter, 409 U.S. 418, 442 (1973) (stating that Section 1982 is "an 'absolute' bar to all such discrimination, private as well as public, federal as well as state").

[46] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (describing 42 U.S.C. § 1982). In addition, Section 1982 does not specifically address discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling, prohibit advertising or other representations that indicate discriminatory preferences, refer explicitly to discrimination in financing arrangements or in the provision of brokerage services, and does not empower a federal administrative agency to assist aggrieved parties and makes no provision enforcement by the Attorney General. *Id.* at 413–14. Nevertheless, Section 1982 does not preclude a court from fashioning an effective equitable remedy. *Id.* at 414 n.3. A remedy enforcing a federal right is available in the state court if that court is empowered to grant injunctive relief generally. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238 (1969).

[47] 42 U.S.C. § 3601 [hereinafter FHA].

color, religion, sex, and national origin.[48] The preparatory language of the Act states: "It is the policy of the United States to provide, within Constitutional limitations, for fair housing throughout the United States."[49] The FHA was promulgated under the authority of the Thirteenth Amendment.[50] The FHA was enacted in part because only private litigants could enforce Section 1982. Congress was concerned that, notwithstanding the ability of private citizens to enforce Section 1982, Congress still needed to enact a mechanism whereby the federal government could enforce equal housing rights.[51]

Enacted as Title VIII of the Civil Rights Act of 1968,[52] the FHA seeks to eliminate racial discrimination in the sale, renting, or financing of homes.[53] More specifically, Section 3604 of the FHA prohibits discrimination in refusing to sell or rent or refusing to negotiate with an individual because of any protected class status, among other things.[54] The FHA also forbids the making, printing, or publishing of any notice or advertisement that indicates a preference for any particular protected class member.[55] The FHA also prohibits individuals from inducing any person to sell or rent any dwelling by representing that a particular race, color, religion, sex, or national origin will enter the neighborhood.[56] Essentially, the FHA is designed to ensure that individuals are not denied the right to live where they choose because of discriminatory reasons.[57] Thus, the

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48 Similar to Section 1981, a white individual can file a lawsuit for violations of the FHA. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (white tenant of apartment complex has standing under the FHA to challenge his landlord's racially discriminatory practices); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (white residents have standing under the FHA to challenge racial steering occurring in their neighborhood).

49 42 U.S.C. § 3601.

50 *See* United States v. Hunter, 459 F.2d 205, 214 (4th Cir. 1972) (noting the basis for the FHA).

51 *See id.* at 415–16 (relaying Congressional concerns).

52 Civil Rights Act of 1968, Pub. L. 90-284, tit. VIII Fair Housing, § 801–19, 82 STAT. 81–89 (codified as amended at 42 U.S.C. §§ 3601–3619 (2000)).

53 *Id.*

54 *See id.* § 3604(a) (declaring it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

55 *Id.* § 3604(c).

56 *See id.* § 3604(e). The First Amendment protects an individual who files a lawsuit or otherwise publicly speaks about a neighbor, even if that conduct is motivated by discriminatory animus. *See, e.g.*, White v. Lee, 227 F.3d 1214, 1232–37 (9th Cir. 2000) (holding that First Amendment protected neighbors from FHA investigation unless they threatened imminent lawless action or filed objectively baseless lawsuits); Advocacy Center for Persons with Disabilities, Inc. v. Woodland Estates Ass'n, 192 F.Supp.2d 1344, 1350 (M.D. Fla. 2002) (holding no First Amendment protection for a frivolous lawsuit). *See also* United States v. Wagner, 940 F.Supp. 972, 980 (N.D. Tex. 1996) (finding that First Amendment protections do not extend to suits with discriminatory intent that lack a sound legal basis); Michigan Protection Servs. v. Babin, 799 F.Supp. 695, 717–22 (E.D. Mich. 1992), *aff'd on other grounds*, 18 F.3d 337 (6th Cir. 1994) (interpreting § 3604 to apply only to owners and their agents, and that free speech protections apply absent a clear and present danger).

57 *See* Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209–10 (7th Cir. 1984) (defining racial steering as the practice of directing homebuyers away from certain locations for the purpose of maintaining patterns of segregation); Heights Cmty. Cong. v. Hilltop Realty, Inc., 774 F.2d 135, 139–40 (6th Cir. 1985) (approving the definition of racial steering given in *Southend*) (citing Havens Realty

FHA addresses problems of housing availability, but does not address problems of housing habitability.[58]

Although the FHA was designed to proscribe various discriminatory practices in the housing and real estate markets, courts have expanded the reach of the FHA, concluding that actions not specifically proscribed in Section 3604 can violate the FHA if they have the effect of making housing unavailable based on a person's protected class status.[59] On its face, the FHA may be considered a useful tool in housing discrimination cases.[60] The FHA, as originally drafted, however, was ineffective at preventing housing discrimination because the federal enforcement mechanisms were limited.[61] It has been observed that passage of the FHA was the "result of a political compromise, a product more of the desire for passage than a desire for a rational scheme for uprooting discrimination."[62]

Administrative responsibility for the FHA resides with the Secretary of Housing and Urban Development.[63] The Secretary is only empowered[64] to pursue complaints by informal methods of conference, cooperation, conciliation, and persuasion.[65] Because of these weak enforcement mechanisms, the Department of Housing and Urban Development (HUD) may not initiate lawsuits or request a federal court to issue an injunction or restraining order.[66]

Corp. v. Coleman, 455 U.S. 363, 366 n.1 (1982)); Hamad v. Woodcrest Condominium Ass'n, 328 F.3d 224, 233 (6th Cir. 2003) (summing up the state of current law regarding racial steering).

[58] *See* Clifton Terrace Assocs. v. United Technologies Corp., 929 F.2d 714, 719 (D.C. Cir. 1991) (finding no cause of action against residential maintenance company, as FHA reaches "only discrimination that adversely affects the availability of housing"); *see also Southend*, 743 F.2d at 1210 (stating that the FHA does not protect "intangible interests in . . . already-owned property").

[59] *See, e.g.*, United States v. City of Parma, 661 F.2d 562, 573 (6th Cir. 1981) (finding that cities count as persons in regard to the FHA); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir. 1979) (noting that in order to establish a *prima facie* case of housing discrimination, a party must establish: (1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers); United States v. City of Blackjack, 508 F.2d 1179, 1188 (8th Cir. 1974) (holding that city zoning laws count as discrimination under the terms of the FHA if their effect unfairly burdens a protected class); United States v. American Inst. of Real Estate Appraisers, 442 F.Supp. 1072, 1072–79 (N.D. Ill. 1977) (discovering that property valuations based in part upon race serve to discriminate in housing under the FHA); *see also* Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003) (affirming the test articulated in *Robinson*); Mencer v. Princeton Square Apartments, 228 F.3d 631, 635 (6th Cir. 2000) (same).

[60] *See infra* note 59 and accompanying text.

[61] *See* Joseph D. Rich, *Enforcement of the Fair Housing Act, As Amended, by the Department of Justice*, 46 BUS. LAW 1335, 1335 (1995) (documenting the early failures of the Federal Government to successfully implement the FHA). For a summary of the behind-the-scenes machinations in the Senate, *see generally* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and Perspective*, 8 WASHBURN L.J. 149 (1969).

[62] Note, *Discrimination in Employment and Housing: Private Enforcement of the Civil Rights Act of 1964, 1968*, 82 HARV. L. REV. 834, 835 (1969).

[63] *See* 42 U.S.C. § 3608 (2000) (establishing the administrators of the Fair Housing Act).

[64] *See id.* § 3608(c) (2000) (defining the powers of the Secretary of Housing and Urban Development).

[65] *See id.* § 3608(e) (2000) (outlining the duties of the Secretary of Housing and Urban Development).

[66] *See* John H. Gilmore, Note, *Insurance Redlining and the Fair Housing Act: The Lost Opportunity*

Complaints of housing discrimination are addressed either because: (1) HUD conducts an investigation and seeks a conciliation of the housing discrimination complaint, or (2) the aggrieved party files a lawsuit alleging a violation of the FHA.

The Secretary may refer the case to the Justice Department only when the violation involves "a pattern or practice" of discrimination.[67] The Justice Department is also authorized to pursue violators if the denial of the individual's federal rights raises an issue of "general public importance."[68] If the Justice Department files a lawsuit on behalf of aggrieved individuals, a court may award the identical relief that could be granted in a private enforcement action, including actual and punitive damages.[69] If a state agency enforces rights and

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of Mackey v. Nationwide Insurance Companies, 34 CATH. U. L. REV. 563, 574–75 (1985) (summing up the hamstrung enforcement provisions of the FHA); *see also* Charles M. Lamb, *Congress, the Courts and Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115, 1116–27 & 1133–34 (1982) (analyzing the shortcomings of the FHA enforcement provisions).

[67] 42 U.S.C. §§ 3611(g) & 3614(a) (2000). The phrase "pattern or practice" is intended to encompass more than an "isolated or accidental or peculiar event." *See Hearing on H.R. 10327 Before the H. Comm. on the Judiciary*, 86th Cong. 13 (1960) (statement of Deputy Attorney General Walsh) (asserting that a "pattern or practice" exists when the discrimination is part of the regular procedure or the usual situation); United States v. Hunter, 459 F.2d 205, 217 (4th Cir. 1972) (explaining that the phrase "pattern or practice" connotes intentional, regular, or repeated violations of the rights granted by the FHA); United States v. Ramsey, 331 F.2d 824, 837 (5th Cir. 1964) (noting that the number of violations is not determinative); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 123 (5th Cir. 1973) (holding that the FHA is also intended to reach the illegal activities of a group of individuals even if the individual members of the group are not engaged in an "individual pattern or practice" of housing discrimination).

[68] 42 U.S.C. § 3613 (2000). Congress intended that a case of "general public importance" is one where "the points of law involved in it are of major significance or . . . the particular decision will constitute a precedent for a large number of establishments. . . ." *Hunter*, 459 F.2d at 217 (quoting 110 CONG. REC. 12713 (daily ed. June 4, 1964) (statement of Sen. Humphrey)).

[69] *See* United States v. Scott, 809 F.Supp. 1404, 1406 (D. Kan. 1992) (explaining that 42 U.S.C. § 3612(o)(3) (2000) provides for the identical remedies for private enforcement contained in 42 U.S.C. § 3613). Some Circuits have held that a court may not presume emotional distress damages as a result of housing discrimination. *See, e.g.*, United States v. Balistrieri, 981 F.2d 916, 931 (7th Cir. 1992) (stating that emotional distress damages do not automatically attach to housing discrimination). If a plaintiff seeks damages for emotional distress caused by the housing discrimination, the plaintiff need not submit medical or other similar empirical evidence of emotional distress. *See generally* Morgan v. Sec'y of HUD, 985 F.2d 1451, 1459 (10th Cir. 1993) (noting that damages from emotional distress may be inferred from circumstances beyond the ordinary, in addition to being proven by testimony); *Balistrieri*, 981 F.2d at 931–32 (awarding damages to black testers who posed as apartment seekers although testers' testimony regarding emotional distress was somewhat general and conclusory); Baumgardner v. HUD, 960 F.2d 572, 581 (6th Cir. 1992) (affirming emotional distress damages when the only evidence was plaintiff's own testimony regarding the incident's emotional impact). In addition, emotional distress damages need not be amenable to precise calculation. *Id.*

Similarly, punitive damages are not automatically awarded in housing discrimination cases. The defendant must have acted wantonly and maliciously and in willful disregard of the plaintiff's rights. *See* Marr v. Rife, 503 F.2d 735, 744 (6th Cir. 1974) (awarding punitive damages to plaintiff where defendant willfully disregarded plaintiff's right to freedom from housing discrimination). Pursuant to the federal civil rights punitive damages statute, 42 U.S.C. § 1981a(b), these terms generally mean that the person had knowledge that he was acting in violation of federal law. *Cf.* Ngo v. Reno Hilton Resort Corp., 140 F.3d 1299, 1304 (9th Cir. 1998) (requiring in practice a heightened standard of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases); Turic v. Holland Hospitality, 85 F.3d 1211, 1216 (6th Cir. 1996) (same). The court may also, in its discretion, award attorneys' fees and costs to the prevailing party, remedies that are substantially similar to the FHA, then HUD must refer the complaint to the local agency.[70] Claims are often misplaced and neglected because of the administrative bureaucracy.[71] Because of inadequate enforcement mechanisms, the FHA is an ineffective legislative scheme to prevent housing discrimination.[72]

Despite the enactment of the FHA, "more than half of African Americans and Latinos seeking to rent or buy a home are treated differently than whites with the same qualifications."[73]

2. *Other Federal Acts Prohibiting Redlining*

In addition to the FHA, Congress has enacted other civil rights statues that address specific problems of borrowers experiencing discrimination in the extending of credit and granting of home loans. Congress found "that depository institutions have sometimes contributed to the decline of certain geographic areas . . . [because they failed] to provide adequate home financing to qualified applicants on reasonable terms and conditions."[74] In 1975, Congress enacted the Home Mortgage Disclosure Act (HMDA),[75] so that information can be compiled to determine whether depository institutions were serving the housing needs of the communities and neighborhoods where they were located.[76] The HMDA authorizes enforcement against banks by the Comptroller of the Currency.[77]

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other than the United States. 42 U.S.C. § 3612(p) (2000). For a discussion of attorneys' fee awards, *see generally* Ann K. Wooster, Annotation, *Award of Attorney's Fees to Prevailing Parties in Actions Under Fair Housing Act, 42 U.S.C.A. § 3613(c)(2)*, 159 A.L.R. FED. 279 (2000). The court can also award injunctive relief. *See* 42 U.S.C. §§ 3614(d)(1)(A), 3602(i), 3613(a), 3613(c)(1) (2000) (authorizing a court to grant injunctive relief if party brings lawsuit based upon a practice that has occurred or is about to occur).

70 *See* 42 U.S.C. § 3610(d) (2000) (providing for local agency referral of housing discrimination claims if a local agency is in place).

71 *See* Gilmore, *supra* note 66, at 575 (highlighting the inefficiency of administrative bureaucracy within the claims processing arena).

72 *Id.*

73 Presidential Memorandum: Federal Leadership of Fair Housing, 59 Fed. Reg. 8513, 8513 (Jan. 17, 1994) (discussing the pervasiveness of residential segregation, describing the barriers between whites and minorities in terms of home ownership and issuing Executive Order 12,892 to attempt to remedy past and current racial discrimination in housing availability).

74 12 U.S.C. § 2801(a) (2000).

75 12 U.S.C. § 2801.

76 *See* 12 U.S.C. § 2801(b) (2000) (establishing that the purpose of §2801 is to "provide citizens . . . with sufficient information to enable them to determine whether depository institutions are fulfilling their obligations to serve the housing needs of communities and neighborhoods"). Originally, the HMDA expired on June 28, 1980 by it own terms. *See* 12 U.S.C. § 2809, Pub.L. 94-200, Title III, § 310, Dec. 31, 1975, 89 Stat. 1128. The old self-termination provision, 12 U.S.C. § 2809, was repealed by Pub.L. 96-399, Title III, § 340(b), Oct. 8, 1980, 94 Stat. 1658.

77 *See* 12 U.S.C. § 2804(b)(1)(A) (2000) (cataloging the agencies bound by the provisions of 12 U.S.C. § 2801 and against whom enforcement can be sought).

Congress also enacted the Community Reinvestment Act of 1977,[78] which requires the appropriate federal supervisory agency "to assess an institution's record of meeting the credit needs of its entire community," including low and moderate income neighborhoods.[79] Congress also enacted The Equal Credit Opportunity Act (ECOA).[80] ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, . . . on the basis of race, color, religion, national origin, sex or marital status, or age."[81] The purpose of ECOA is "to promote the availability of credit to all creditworthy applicants without regard to [their protected-class status]. . . ."[82] ECOA does not simply protect applicants who were rejected, but also prohibits discrimination regarding the terms of credit, including the refusal to increase the credit limit or the unfavorable modification of terms.[83] Like the FHA, ECOA provides for a private right-of-action.[84] If the same discriminatory act constitutes a violation of both ECOA and state law, "the aggrieved party must elect to proceed under either ECOA or state law."[85] ECOA has been described as an example of where federal and state regulation co-exist.[86]

In 1994, Congress enacted the Home Ownership and Equity Protection Act of 1994 ("HOEPA").[87] HOEPA amended the Truth in Lending Act

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[78] 12 U.S.C. § 2901.

[79] 12 U.S.C. § 2903(a)(1) (2000).

[80] 15 U.S.C. § 1691. To establish a *prima facie* case of a violation of ECOA, a plaintiff must show: (1) that he is a member of a protected class; (2) that he applied for credit from the defendant; (3) that he was qualified for the credit; and (4) that the credit application was denied despite his qualifications. Mays v. Buckeye Rural Elec. Coop., 277 F.3d 873, 877 (6th Cir. 2002). Because of the similar purposes of ECOA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, courts have utilized the burden-allocation system of federal employment discrimination cases as an analytical framework for claims of credit discrimination. *Id.* at 876. *See also* Lewis v. ACB Bus. Servs., 135 F.3d 389, 406 (6th Cir. 1998) (evaluating the legislative history supporting the application of the Title VII burden-shifting framework to ECOA); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000) (applying Title VII burden-shifting to an ECOA discrimination claim). *But see* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 715 (7th Cir. 1998) (refusing to apply *McDonnell Douglas* burden-shifting framework to ECOA cases).

[81] 15 U.S.C. § 1691(a) (2000).

[82] 12 C.F.R. § 202.1(b) (2000). ECOA was specifically enacted to eradicate credit discrimination against women, especially married women because creditors traditionally refused to consider married women for individual credit. *See Mays*, 277 F.3d at 876 (setting out the test necessary to establish a *prima facie* case under the ECOA); Anderson v. United Fin. Co., 666 F.2d 1274, 1277 (9th Cir. 1982) (citing Markham v. Colonial Mortgage Serv. Co., 605 F.2d 566, 569 (D.C. Cir. 1979)) (discussing the original purposes of the ECOA).

[83] *See* Hargraves v. Capital City Mortgage Corp., 140 F.Supp.2d 7, 23 (D.D.C. 2000) (pointing out that the inclusion of the language "any aspect of a credit transacton" in 15 U.S.C. § 1691 supports a finding that extensions of credit, modifications of terms and other matters qualify under ECOA); *see also* 12 C.F.R. § 202.2(m) (2000) (defining credit transaction to include terms, negotiations, and assumption of credit).

[84] *See* 15 U.S.C. § 1691(d) (2000) (defining and clarifying the reasons for adverse actions against creditors).

[85] Nat'l State Bank v. Long, 630 F.2d 981, 984 (3d Cir. 1980).

[86] Nat'l State Bank v. Long, 630 F.2d 981, 984 (3d Cir. 1980) (citing 15 U.S.C. § 1691d(f) and stating that the "Equal Credit Opportunity Act, therefore, is an example of a situation where federal and state regulation co-exist").

[87] Home Ownership Equity Protection Act of 1994, Pub. L. No. 103-325, § 151, 108 Stat. 2190 (1994) (codified at 15 U.S.C. § 1601 (2000)).

("TILA")[88] and added new disclosure requirements and consumer protection restrictions for certain home mortgage loans. Congress enacted HOEPA, in part, to restrict the practice of "reverse redlining" where lenders made high cost mortgage loans to individuals from certain geographical areas without regard to income and cash flow.[89] For example, HOEPA proscribed "equity stripping" a method of property acquisition that occurs when a lender issues a loan designed to fail so that the lender could profit by acquiring the property through default, rather than by receiving loan payments.[90] An assignee of a HOEPA loan can also be liable for the original mortgage creditor's violations.[91] Remedies available for a HOEPA violation include: (1) termination of the creditor's security interest; (2) statutory damages if the lender fails to properly respond to a rescission demand; (3) a penalty that at a minimum allows the borrower to recoup the remaining unsecured claim based upon the original TILA disclosure violations; (4) elimination of all finance charges; (5) if equitable, elimination of the borrower's entire obligation to the lender; (6) recovery of all payments made; and (7) recovery of reasonable attorneys' fees and costs.[92]

A. *Federal Regulation of Insurance Redlining.*

The previous section discussed what is typically termed "mortgage redlining." It is clear that "mortgage redlining" is prohibited by the FHA.[93] "Mortgage redlining," however, is not the only type of discrimination forbidden

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88 Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1665 (2000)).

89 *See* Hargraves v. Capital City Mortgage Corp., 140 F. Supp. 2d 7, 20 (D.D.C. 2000) (describing the purpose of HOEPA and defining reverse redlining). To qualify as a "HOEPA loan," the loan must satisfy five requirements: (1) the loan must be a "consumer credit transaction"; (2) the loan must be a consumer credit transaction with a "creditor"; (3) the loan must be secured by the "consumer's principal dwelling"; (4) the loan must be a second or subordinate residential mortgage, not a "residential mortgage transaction," a "reverse mortgage transaction," or a transaction under an "open credit plan"; and (5) either the annual percentage rate of interest for the loan transaction exceeds certain levels or the total "points and fees" payable by the borrower at or before closing will exceed the greater of 8% of the total loan amount, or $400. *See also* Lopez v. Delta Funding Corp., 1998 WL 1537755 *5 (E.D.N.Y. 1998) (citing various provisions of HOEPA).

90 *See, e.g., Hargraves*, 140 F. Supp. at 20–21 (considering predatory lending practices under HOEPA legislation).

91 *See In re* Rodrigues, 278 B.R. 683, 688 (Bankr. D. R.I. 2002) ("[A]ssignees of High Cost Mortgages are subject to all claims and defenses, whether under Truth In Lending or other law, that could be raised against the original lender."); *see also In re* Murray, 239 B.R. 728, 733 (Bankr. E.D. Pa. 1999) (citing the due diligence requirements of 15 U.S.C. § 1641(d)). The due diligence requirement of HOEPA, section 1641(d), places the burden on the mortgage assignee to prove, by a preponderance of the evidence, that the assignee could not reasonably determine, could not determine, or did not know that the loan was a HOEPA loan. 15 U.S.C. § 1641(d) (2000).

92 *In re* Murray, 239 B.R. at 733 (describing the remedies available to debtors that had a valid recession of their loans resisted by their lenders).

93 *See* Laufman v. Oalkley Bldg. & Loan Co., 408 F. Supp. 489, 493 (D.C Ohio 1976) (relying upon 42 U.S.C. § 3605 for the proposition that mortgage redlining is prohibited by the FHA).

by the FHA.[94] Insurance can also prevent individuals from acquiring property. Because insurance is a precondition to adequate housing, a discriminatory denial of insurance may prevent a financially-capable individual from purchasing a home.[95] Buyers who can pay cash for the full purchase price of property are a rare exception and an individual cannot purchase a home without securing property insurance because mortgage companies require borrowers to insure the property.[96] The buyer's failure to maintain a homeowner's insurance policy constitutes a default of the mortgage obligations.[97] Consequently, an insurance carrier's denial of homeowner's insurance effectively prevents the buyer from purchasing the home.[98]

Prior to the enactment of the FHA, riots and civil disturbances of the 1960's resulted in the appointment of the National Advisory Panel on Insurance in Riot-Affected Areas.[99] The Advisory Panel examined the causes and effects

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[94] The FHA also prohibits other types of discrimination that directly affect the availability of housing to minorities. *See, e.g.*, DiCenso v. Cisneros, 96 F.3d 1004, 1008 (7th Cir. 1996) (analyzing a hostile environment sex discrimination claim under the FHA where a landlord sexually harrassed the tenant); Honce v. Vigil, 1 F.3d 1085, 1088 (10th Cir. 1993) (examining gender-based discrimination in rental of dwelling under the FHA); Sofarelli v. Pinellas County, 931 F.2d 718, 722 (11th Cir. 1991) (alleging violation of civil rights under the FHA where neighbors attempted to prevent plaintiff from selling his home to a minority purchaser); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184 (2d Cir. 1987) (finding that the City engaged in a pattern and practice of confining subsidized housing to minority areas which intentionally enhanced racial segregation in violation of the FHA); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982) (challenging discriminatory rental decisions in violation of the FHA); Smith v. Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982) (holding that a town's racially-motivated decision to withdraw from multi-municipality low-income housing authority violated the FHA); United States v. Parma, 661 F.2d 562, 568 (6th Cir. 1981) (finding that a city's rejection of public and low-income housing and adoption of restrictive land use ordinances violated the FHA); Marable v. H. Walker, 644 F.2d 390, 397 (5th Cir. 1981) (prohibiting landlord's discriminatory application of rental criteria); Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977) (finding Village had an obligation under the FHA to not implement zoning policies that effectively prevented the construction of low-cost housing); United States v. Mitchell, 580 F.2d 789, 791 (5th Cir. 1978) (affirming that racial steering of blacks tenants to a particular section of apartment complex violated the FHA); United States v. Am. Inst. of Real Estate Appraisers, 422 F.Supp. 1072, 1076 (N.D. Ill. 1977) (assigning lower appraisal values to homes in racially integrated neighborhoods); United Farmworkers of Fla. Hous. Project, Inc. v. Delray Beach, 493 F.2d 799, 811 (5th Cir. 1974) (alleging city's refusal to permit proposed housing project's connection to municipal sewage treatment was racially discriminatory under the FHA); United States v. Hughes Mem'l Home, 396 F.Supp. 544, 551 (W.D.Va. 1975) (rejecting a noncommercial orphanage of minority orphans); Mayers v. Ridley, 465 F.2d 630, 634 (D.C. Cir. 1972) (prohibiting the recorder of deeds from accepting for filing instruments that contain racially restrictive covenants); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 112 (2d Cir. 1970) (alleging City had deliberately rezoned property that plaintiffs had selected for low-income and minority family housing in violation of the FHA).

[95] Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F.Supp. 1106, 1109 (S.D. Ohio 1979) ("Since a discriminatory denial of financing violates [the Fair Housing Act], a discriminatory failure or refusal to provide property insurance on dwellings must also violate [the Fair Housing Act].").

[96] *See* United Farm Bureau Ins. Co. v. Metropolitan Human Relations Comm'n, 859 F.Supp. 323, 328 (N.D. Ind. 1993) (citing JOHN P. WIEDEMER, REAL ESTATE FINANCE 89–90 (1990)) (describing the impact a lack of insurance will have on a potential homebuyers ability to secure financing).

[97] *See id.* (describing the effect of a lapsed homeowner's insurance policy on the mortgage contract).

[98] For a discussion of insurance redlining on the Internet, *see generally* Gary A. Hernandez et al., *Insurance Weblining & Unfair Discrimination in Cyberspace*, 54 SMU L. REV. 1953 (Fall 2001).

[99] See Badain, supra note 5, at 2 (explaining the events leading up to the creation of the Hughes Panel).

of inner city insurance unavailability and devised a solution.[100] Although riots were one factor resulting in insurance unavailability, the Panel documented "[w]idespread refusals to insure . . . even where there had been no riots and where none were threatened. These were based primarily upon neighborhood characteristics, most significantly racial composition, without regard to the merits of the particular risk."[101] In addition, during this period of civil disturbances, the insurance industry exaggerated losses and incorporated that exaggerated risk into its underwriting policies.[102]

The Advisory Panel predicted there would be "white flight" from urban areas affected by the riots and also predicted that remaining residents would less likely purchase insurance unless affordable insurance was available.[103] Further, the Panel found that inner city business owners and residents were either uninsured or underinsured.[104] The Advisory Panel aptly described the impact of insurance on housing as follows:

> Insurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not and cannot make loans. New housing cannot be constructed and existing housing cannot be repaired. New business cannot be opened and existing businesses cannot expand, or even survive.[105]

Because the Advisory Panel believed that the main cause of insurance unavailability was the fear of catastrophic loss due to rioting, the Panel recommended that the government provide guarantees so that insurance companies would continue to provide basic property insurance.[106] As a result, the Panel proposed that the federal government offer non-cancelable, low-cost riot

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[100] *See* PRESIDENT'S NATIONAL ADVISORY PANEL ON INSURANCE IN RIOT-EFFECTED AREAS, MEETING THE INSURANCE CRISIS OF OUR CITIES 1 & 29 (1968) [hereinafter Hughes Panel].

[101] Badain, *supra* note 5, at 6.

[102] *See* Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1111 (S.D. Ohio 1979) (explaining how the Urban Property Protection and Reinsurance Act of 1968 helped create two insurance markets).

[103] Hughes Panel, *supra* note 100, at 8 (outlining the findings of the President's National Advisory Panel).

[104] *See Dunn*, 472 F. Supp. at 1111 (listing some of the specific findings of the Advisory Panel).

[105] *See id.* at 1111; *see also* NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297–98 (7th Cir. 1992) (summarizing plaintiff's argument that insurance redlining is proscribed by the FHA as: "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."); United States v. Mass. Indus. Fin. Agency, 910 F. Supp. 21, 27 (D. Mass. 1996) ("Few if any, banks make home loans to uninsured borrowers. Thus, property insurers in effect have the power to make housing unavailable to potential buyers."); McDiarmid v. Econ. Fire & Cas. Co., 604 F. Supp. 105, 107 (S.D. Ohio 1984) ("It is elementary that without insurance, mortgage financing will be unavailable, because a mortgage lender simply will not lend money on the property. Without mortgage financing, homes cannot be purchased.").

[106] *See* Hughes Panel, *supra* note 100, at 2–7 (describing unavailability of insurance in inner city neighborhoods).

insurance to companies that participated in a "Fair Access to Insurance Requirements" (FAIR) plan.[107]

Congress reacted by adopting the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA"), in the same year the FHA was enacted.[108] Congress enacted UPPRA to address the problem of the unavailability of hazard insurance in some urban areas.[109] However, the FAIR plan was at a higher rate to that compared to the voluntary market.[110] The purposes of the FHA and UPPRA are different. UPPRA "was enacted to protect private insurance companies from the risk of catastrophic losses which resulted from riots or civil disorders" but did not "expressly address the issue of discriminatory insurance redlining based on race."[111] The riot reinsurance program terminated on November 30, 1983.[112]

II. An Overview of State Regulatory Authority Which May Support a Prohibition of Insurance Redlining

In addition to the FHA, state constitutional provisions, statutes, regulations, and decisional law[113] may restrict redlining. Such laws may regulate housing, insurance, or discrimination in general.[114] Some states have enacted constitutional provisions that impact insurance redlining or similar discrimina-

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107 *See id.* at 7–8 (making recommendations for creating affirmative programs to provide insurance coverage).

108 Urban Property Protection and Reinsurance Act of 1968, PUB. L. 90-448, Title XI, 82 STAT. 555 (1968) (codified as amended in scattered sections of 5, 12, 15 & 42 U.S.C.).

109 *See Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1358 (6th Cir. 1995) (explaining the enactment of UPPRA).

110 *See* Badain, *supra* note 5, at 9 (describing the ultimate resolution of the tension between urban and rural interest regarding the spreading of insurance costs).

111 *Id.* (quoting Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F.Supp. 1106, 1111 (S.D. Ohio 1979)).

112 *See* Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 452(a)(1), 97 Stat. 1230 (codified as amended at 12 U.S.C. § 1749bbb(b)(1) (2000)).

113 Where a statute prohibits "unfair discrimination" but fails to explain what that means, it may be up to the court to interpret what conduct is proscribed. See Lans v. Mut. Life Ins. Co. of N.Y., 699 P.2d 1299, 1302 (Ariz. Ct. App. 1984) ("[T]he fact that other statutes specifically prohibit sex discrimination does not mean that the use of sex as a classification in disability insurance cannot be unfair discrimination, or, put another way, is fair discrimination.").

114 *See, e.g.*, Mich. Comp. Laws § 500.1209 (2008) (prohibiting termination of an insurance agent's employment based on geographic location of the agent's insurance business or the agent's actual or expected loss experience). At the same time, an insurance agent suing for wrongful termination typically does not have standing under redlining statutes. *See* Novak v. Nationwide Mut. Ins. Co., 599 N.W.2d 546, 555 (Mich. Ct. App. 1999) (holding that insurance agents, who lost their jobs allegedly due to the poor economic status of their clients, cannot allege race discrimination under Civil Rights Act on behalf of their clients); *see also* R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 773 A.2d 1132, 1147 (N.J. 2001) (finding that insurance agents were not members of class protected by Fair Automobile Insurance Reform Act, and thus, agent who alleged wrongful termination because of high loss ratio of policies sold by him did not have private right of action under Act).

tion. For example, at least fourteen state constitutions have an Equal Rights Amendment or comparable provisions banning discrimination based on sex or other factors.[115] Such provisions may restrict state action,[116] including local governments and school districts,[117] or they may extend to private persons, businesses, and institutions.[118] These provisions have been used to strike down sex-based restrictions on student housing,[119] and to justify an insurance commissioner's disapproval of auto insurance rate differentials.[120] One could argue that these constitutional provisions also regulate rate differentials in home insurance or other restrictions based upon certain protected class statuses.

State housing laws may restrict redlining in both the sale[121] and rental

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[115] *E.g.*, ALASKA CONST. art. 1, § 3; COLO. CONST. art. 2, § 29; CONN. CONST. art. 1, § 20; HAW. CONST. art. 1, § 3; ILL. CONST. art. 1, § 18; MD. CONST., Declaration of Rights, art. 46; MASS. CONST. art. 1; MONT. CONST. art. 2, § 4; N.H. CONST. art. 2; N.M. CONST. art. 2, § 18; PA. CONST. art. 1, § 28; TEX. CONST. Art. 1, § 3a; VA. CONST. art. 1, § 11; WASH. CONST. art. 31, § 1.

[116] *See, e.g.*, N.H. CONST. art. 2 ("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.").

[117] *See, e.g.*, ILL. CONST. art. 1, § 18 ("The equal protections of the laws shall not be denied or abridged on account of sex by the State or its units of local governments and school districts.").

[118] *See, e.g.*, MONT. CONST. art. 2, § 4 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.").

[119] *See* Texas Woman's Univ. v. Chayklintaste, 521 S.W.2d 949, 951 (Tex. Civ. App. 1975), *rev'd on other grounds*, 530 S.W.2d 927 (Tex. 1975) (holding that Texas Woman's University had unconstitutionally discriminated against male students by not arranging on-campus housing for them although female students enjoyed such accommodation; the Court further held that the University had also unconstitutionally discriminated against female students by not granting them permission to live off-campus although male students were granted this permission).

[120] *See* Hartford Accident & Indem. Co. v. Ins. Comm'r of Commonwealth of Pa., 442 A.2d 382, 386 (Pa. 1982) (finding that the Insurance Commissioner of the Commonwealth of Pennsylvania was acting within his statutory authority and considered all actuarial factors when determining that an insurer was acting in an "inherently unfairly discriminatory" manner by determining auto insurance rates based on the gender of the applicants).

[121] For state provisions that prohibit redlining, *see, e.g.*, California Housing Financial Discrimination Act, CAL. HEALTH & SAFETY CODE § 35800 (2006) (describing the harmful effects of redlining and providing for measures to prevent it); Michigan Mortgages Lending Act, MICH. COMP. LAWS § 445.1601 (2008) (prohibiting discrimination against borrowers on basis of "racial or ethnic characteristics or trends in the neighborhoods in which the real estate is located."). For other examples of state sources prohibiting or providing authority against redlining, see Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., 94 Ohio Misc. 2d 151 (Ohio Ct. C.P.1997) (holding that the Fair Access to Insurance Requirements Plan does not permit redlining against homeowners who have been unable to secure insurance); *see also* C.T. Foster, Annotation, *Restrictive Covenants, Conditions, or Agreements in Respect of Real Property Discriminating against Persons on Account of Race, Color, or Religion*, 3 A.L.R.2d 466 (2006) (describing how state and federal courts have struck down as unconstitutional, those state and local regulations that have imposed racial restrictions on the purchase or occupancy of real estate).

For the question whether federal housing laws preempt state housing laws, *see, e.g.*, Raija H. Bettauer, *Federal and State Anti-Redlining Laws: Must National Banks Comply with Both?*, 97 BANKING L.J. 329 (Apr. 1980) (explaining that state laws do not apply to national banks if they are directly or indirectly inconsistent with pertinent federal laws).

contexts.[122] Cities have also enacted ordinances banning discriminatory housing practices.[123] State insurance statutes restrict redlining and similar discriminatory practices by regulating differences in rates,[124] premiums,[125] coverage,[126] services or benefits under the policy,[127] rejection of an application for a policy,[128] refusal to issue or renew a policy,[129] differences in sales commissions,[130] backdating of policies,[131] deductibles,[132] and so forth. Other statutes prevent insurers from offering a discount or rebate to one class of insureds while denying it to a similarly situated class.[133] Insureds must have direct contact with an insurer or

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[122] *See generally* Joel E. Smith, Annotation, *Prohibition, Under State Civil Right Laws, of Racial Discrimination in Rental of Privately Owned Residential Property*, 96 A.L.R.3d 497 (2006) (describing how state and federal courts have adjudicated on the validity of state civil rights laws that bar racial discrimination in the rental of privately owned residential property).

[123] *See* Porter v. Oberlin, 205 N.E.2d 363, 366 (1965) (holding that a city's police power included power to prevent discrimination in sale/rental of housing on basis of race, creed, or color); *see generally* K.H. Larsen, Annotation, *Power of Municipal Corporation to Enact Civil Rights Ordinance*, 93 A.L.R.2d 1028 (2006).

[124] *E.g.*, CAL. INS. CODE §§ 10140–10145.4 (2006); CONN. GEN. STAT. § 38a-488 (2007); MASS. GEN. LAWS ch. 175, § 120 (2007); N.Y. INS. LAW § 2606(a)(1) (McKinney 2008); OR. REV. STAT. § 737.310 (2007); S.C. CODE § 38-55-50 (2007); WIS. STAT. 625.11(4) (2008) ("One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses."); *see* Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042 (9th Cir. 2000) (finding violation of California's Insurance Code and California Unruh Civil Rights Act where rating was not based on experience); *see also* Int'l Patrol & Detective Agency, Inc. v. Aetna Cas. & Sur. Co., 396 So. 2d 774 (Fla. Dist. Ct. App. 1981) (holding that excessive rates were discriminatory); Ins. Comm'r for the State v. Engleman, 692 A.2d 474 (Md. 1997) ("Unfair discrimination, as the term is employed by the Insurance Code, means discrimination among insureds of the same class based upon something other than actuarial risk.").

[125] *E.g.*, CAL. INS. CODE §§ 10140–10145.4 (2006); CONN. GEN. STAT. § 38a-488 (2007); MASS. GEN. LAWS ch. 175, § 120 (2007); N.Y. INS. LAW § 2606(a)(1) (McKinney 2008); S.C. CODE § 38-55-50 (2007); A.B. 387, 98th Leg., Reg. Sess. (Wis. 2007); *see also* Anzinger v. O'Connor, 440 N.E.2d 1014 (Ill. App. Ct. 1982) (finding medical malpractice carrier's premiums were excessive and discriminatory against emergency physicians); *see generally* 5 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 69:43 (3d ed. 2007) (describing the various methods by which insurers are barred from discriminating against the insured on the basis of age, sex, residence, or handicap).

[126] *E.g.*, CAL. INS. CODE §§ 10140–10145.4 (2006); A.B. 387, 98th Leg., Reg. Sess. (Wis. 2007); McCarter v. Glacier Gen. Assur. Co., 546 P.2d 249 (Mont. 1976) (finding that offset of coverage benefits by amount paid by government insurance was discriminatory, where similarly situated insured received greater coverage for same premium).

[127] *E.g.*, CAL. INS. CODE §§ 10140–10145.4 (2006); S.C. CODE § 38-55-50 (2007); McCarter v. Glacier Gen. Assur. Co., 546 P.2d 249 (Mont. 1976) (holding that violation of a statute occurred where insurer reduced crop loss payments to insured farmer by proportion of loss paid under government crop insurance, while similarly situated insured who did not have other insurance received full payment for loss).

[128] *E.g.*, CAL. INS. CODE §§ 10140–10145.4 (2006); N.Y. INS. LAW § 2606(b)(1) (McKinney 2008).

[129] *E.g.*, CAL. INS. CODE § 675 (2006) (cancellation or failure to renew certain property insurance); N.Y. INS. LAW § 2606(b)(2) (McKinney 2008); Lange v. Rancher, 56 N.W.2d 542 (Wis. 1953) (finding that the state commissioner of insurance could not summarily exclude all African Americans from state life insurance program merely because of higher mortality rate of African Americans generally).

[130] *E.g.*, N.Y. INS. LAW § 2606(b)(3) (McKinney 2008).

[131] *See generally* 5 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 69:43 (3d ed. 2007).

[132] *See* Yourman v. People's Sec. Life Ins. Co., 992 F. Supp. 696, 699 (D.N.J. 1998) (holding that insured could bring an action against insurer for issuing a policy with an excessive deductible under New Jersey's Consumer Fraud Act ("CFA") but not under New Jersey's Law against Discrimination ("LAD")).

[133] *See* Homestead Supplies, Inc. v. Executive Life Ins. Co., 147 Cal. Rptr. 22, 26 (Cal. Ct. App. 1978)

its agents in order to have standing to sue over redlining practices; it is not enough that the individual is deterred from seeking insurance because of knowledge of an insurer's redlining practices.[134]

State statutes may prohibit discrimination based on various classifications including race, color, creed, marital status, sex, national origin, age, residence, disability, lawful occupation, and location of the risk.[135] States

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(discussing good-faith in quoting insurance prices as it relates to unfair discrimination among policyholders by charging different premiums or terms of coverage); Mut. of Omaha Ins. Co. v. Gold, 795 So. 2d 119, 121 (Fla. Dist. Ct. App. 2001) (finding insurance policy invalid where it requires the holder of a group insurance policy to apply a dividend, premium refund, rate reduction, commission, or service fee on a basis which precludes individual selection and unfair discrimination); Katt v. Ins. Bureau, 505 N.W.2d 37, 39 (Mich. Ct. App. 1993) (upholding constitutionality of state anti-rebate statutes); Comm'r of Ins. v. Jackson Prod. Credit Ass'n, 377 So. 2d 1047, 1052–53 (Miss. 1979) (holding that the Insurance Commissioner of Mississippi could not validly deny the application of certain product credit association for incorporated insurance agency license when other financially related services could obtain the same license); *see generally* Tracy A. Bateman, Annotation, *Insurance Anti-rebate Statutes: Validity and Construction*, 90 A.L.R.4th 213 (2006) (explaining how state and federal Courts have dealt with litigation related to the validity of state statutes that prohibit rebates in the insurance industry). *But see* Assoc. Cal., Loggers Inc. v. Kinder, 168 Cal. Rptr. 67, 69 (Cal. Ct. App. 1980) (holding that there shall be no rebate where insureds provided administrative services to insurer in exchange for reimbursement).

A legitimate, nondiscriminatory dividend is not considered an illegal rebate. *See* Keniston v. Am. Nat. Ins. Co., 107 Cal. Rptr. 583, 588 (Cal. Ct. App. 1973) (holding that insurer was not liable to class action plaintiffs since it did not charge excessive premiums or refund the lender based on lender's costs); *see also* W. Wood Moulding & Millwork Producers, Inc. v. Argonaut Ins. Co., 572 P.2d 1004, 1005 (Or. 1977) (holding that California law allows insurers to permit premium rebates and payments of dividends by insurers under certain circumstances).

[134] *See* McClain v. Am. Econ. Ins. Co., 424 F.3d 728, 733 (8th Cir. 2005) (holding that Article III standing is proper only for those plaintiffs who had direct contact with the insurer or its authorized agent when claiming that they were denied insurance on the basis of their minority status).

[135] *See, e.g.*, ARIZ. REV. STAT. § 20–1548(B) (2008) (prohibiting mortgage guaranty insurance companies from discriminating on the basis of applicant's sex, age, marital status, creed, race, color, or national origin when issuing or extending mortgage guaranty insurance); KAN. STAT. § 40–3510(a) (2006) (same); MICH. COMP. LAWS 500.2027 (2008) (same); McNeil v. Time Ins. Co., 1997 WL 182274 at *2–3 (N.D. Tex. Apr. 3, 1997) (concluding that insurer's limitation on AIDS coverage did not violate state statute that prohibited discrimination against handicapped); Detroit Auto. Inter-Insurance Exch. v. Comm'r of Ins., 326 N.W.2d 444, 447 (Mich. Ct. App. 1982) (upholding fine for underwriting practice which restricted sale of automobile insurance to those under age twenty-one); Williams v. Nat'l Cas. Co., 132 S.W.3d 244, 246 (Mo. 2004) (finding violation of statute prohibiting discriminatory insurance practices on the basis of sex, where insurer excluded coverage for loss or expense resulting from or caused by any disease or disorder of the prostate); *see also* Lee v. Life Ins. Co. of N. Am., 829 F. Supp. 529, 541–42 (D.R.I. 1993) (finding no violation of Equal Protection Clause of U.S. Constitution where university provided coverage for obstetrical and gynecological expenses in effect subsidized by male students); *see generally* Francis M. Dougherty, Annotation, *Propriety of Automobile Insurer's Policy of Refusing Insurance, or Requiring Advanced Rates, because of Age, Sex, Residence, or Handicap*, 33 A.L.R.4th 523 (2006) (analyzing how state and federal courts have treated the validity of automobile insurance companies denying insurance or increasing insurance premiums for customers based on their age, sex, residence, or physical handicap). *But see* Abuzant v. Shelter Ins. Co., 977 S.W.2d 259, 261 (Ky. Ct. App. 1998) (finding no unlawful discrimination based on national origin, where automobile insurer denied coverage to person of Palestinian descent but no evidence indicated insurer provided coverage to persons of other national origin); Telles v. Comm'r of Ins., 574 N.E.2d 359, 360–61 (Mass. 1991) (holding that State Insurance Commissioner did not have authority to prohibit life insurance underwriting which discriminated on the basis of sex, because applicable statute allowed "fair" discrimination for groupings based on substantially similar risks); Rochester Hosp. Serv. Corp. v. Div. of Human Rights of Exec. Dep't., 401 N.Y.S.2d 413, 416–17 (N.Y. Sup. Ct. 1977) (finding health insurance rates based in part on marital status not "unfairly discriminatory").

generally do not consider rate differences to be discriminatory if they are based on sound actuarial principles or legitimate rating factors.[136] In some cases, however, even sound actuarial reasons are not enough to justify differences in treatment.[137] Of course, insurance policies may provide different features or benefits if premiums or similar elements are adjusted accordingly.[138] A statute may require a state agency to offer insurance to certain disadvantaged groups that private insurers might refuse to cover.[139] A number of state regulations also prohibit redlining or address related problems.[140]

If an insurer charges discriminatory or excessive rates, the insured may be entitled to a rate refund.[141] Courts tend to find that redlining statutes do not

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[136] N.Y. INS. LAW § 2606(d) (McKinney 2008) (requiring "sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience"); WIS. STAT. § 625.11(4) (2008) (stating that "[r]ates are not unfairly discriminatory because different premiums result for policyholders with like loss exposures but different expense factors, or like expense factors but different loss exposures, so long as the rates reflect the differences with reasonable accuracy."). The Wisconsin statute further states that "[r]ates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise or blanket policy." *See also* Goldman v. Standard Ins. Co., 341 F.3d 1023, 1036 (9th Cir. 2003) (stating that California Insurance Code provision that allows denial of coverage so long as such denial is based on "sound actuarial principles" or is related to "actual and reasonably anticipated experience" provides safe harbor from claim of unfair business practices); Rogers v. Dep't. of Health & Envtl. Control, 174 F.3d 431, 439 (4th Cir. 1999) (determining that the State of South Carolina had not violated the Americans with Disabilities Act ("ADA") by providing long-term disability until age sixty-five for employees with physical disabilities, but only for one year for those employees with mental disabilities); Hogue v. United Olympic Life Ins. Co., 39 F.3d 98, 100 (5th Cir. 1994) (finding that health insurance company was acting legally in dividing its policyholders into two separate groups based on financial metrics such as their paid/loss ratios); Craner v. Northwestern Mut. Life Ins. Co., 12 F. Supp. 2d 1234, 1242 (D. Utah 1998) (establishing that an insurer's decision to reject risk "must not be arbitrary or capricious, and must be based upon and measured by objective standards, such as rules and standards set forth in NML's Underwriting Manual"); El-Hajj v. Fortis Benefits Ins. Co., 156 F. Supp. 2d 27, 32 (D. Me. 2001) (requiring coverage on same terms and conditions unless sound actuarial evidence justifies difference); British & Foreign Marine Ins. Co. v. Stewart, 281 N.E.2d 149, 152 (N.Y. 1972) (upholding insurers' decisions to reduce business and cancel policies in certain areas of New York, because such decisions were based on underwriting and business reasons rather than racial hostility).

[137] *See* Bartholomew *ex rel.* Bartholomew v. Foster, 541 A.2d 393, 398 (Pa. Commw. 1988) (finding that actuarially sound rates based in part on driver's sex violated Pennsylvania's Equal Rights Amendment).

[138] *See* Jameson v. Mut. Life Ins. Co., 415 F.2d 1017, 1020–21 (5th Cir. 1969) (applying a Louisiana anti-discrimination statute to policies with different premiums, dividends, and reserve structures).

[139] *See* State *ex. rel.* Human Res. Dev. & Employment, Inc. v. Bd. of Risk & Ins. Mgmt. of W. Va., 2003 WL 22762065 (W. Va. 2003) (requiring State Board of Risk and Insurance Management to offer liability policy to a non-profit agency which owned, operated, and managed apartment complexes to provide subsidized housing for elderly, disabled, or low-income citizens).

[140] *See, e.g.*, MO. CODE REGS. ANN. tit. 4 § 85-2.010 (2008) (outlining specific criteria for business firms' and neighborhood organizations' proposals for "Neighborhood Assistance Programs"); N.Y. COMP. CODES R. & REGS. tit. 11, ch. IX, pt. 218 (prohibiting insurers "from engaging in redlining practices through refusal to issue or renew, or from canceling policies based on the geographic location of the risk; or by terminating or canceling contracts or accounts of agents or brokers based on their geographic location or the geographic location of the risks or properties for which coverage is being provided by such producers"); WYO. RULES & REGS., INS. GEN. ch. 33, § 2 (identifying specific acts or practices of unfair discrimination considered to be insurance "redlining").

[141] *See* Marshall Durbin Food Corp. v. Equitable Life Assur. Soc., 834 F.2d 949, 950 (11th Cir. 1987) (upholding jury determination of retroactive rate refund); *see also* Int'l Patrol & Detective Agency, Inc. v. Aetna Cas. & Sur. Co., 396 So. 2d 774, 776 (Fla. App. 1981) (noting that the Department of Insurance may order a refund where insurer charges excessive rates).

grant a private right of action to the insured, however, leaving enforcement to the state insurance commissioner or similar authority.[142] Courts will not void a contract for insurance where there has been an illegal discrimination or rebate, because this would allow the insurer to take advantage of its own wrong.[143] An agreement to provide a discriminatory rebate, however, is often deemed unenforceable.[144] Additionally, insurers, agents, brokers, and like parties who violate redlining laws will be sanctioned in various ways, usually by the governing state agency.[145]

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[142] *See* N.A.A.C.P. v. Am. Family Mut. Ins. Co., 978 F.2d 287, 302 (7th Cir. 1992) (holding there is no private right of action in eth relevant statutes in the Wisconsin Fair Housing Act); El-Hajj v. Fortis Benefits Ins. Co., 156 F. Supp. 2d 27, 32 (D. Me. 2001) (finding no private right of action under Maine law); Sparkes v. Morrison & Foerster Long-Term Disability Plan, 129 F. Supp. 2d 182, 185–88 (N.D.N.Y. 2001) (finding no private right of action under New York insurance law); Dryden v. Sun Life Assur. Co. of Canada, 737 F. Supp. 1058, 1064 (S.D. Ind. 1989) (finding no private right of action under the Unfair Competition Article of Indiana's Insurance code); Perez *ex rel.* Perez v. Blue Cross Blue Shield of Texas, Inc., 127 S.W.3d 826, 834 (Tex. App. 2003) (concluding that violation of state insurance statute provided only administrative remedies that insurance commissioner could initiate); Safie Enterprises, Inc. v. Nationwide Mut. Fire Ins. Co., 381 N.W.2d 747, 752 (Mich. App. 1985) (finding statute authorizing Commissioner of Insurance to investigate complaints of refusing to insure or limiting coverage on basis of race, color, creed, marital status, sex, or national origin does not create right a private cause of action against insurer); Retail Clerks Welfare Fund. v. Continental Cas. Co., 176 A.2d 524, 526 (N.J. Super. Ct. App. Div. 1961) (holding that statutes regulating insurance trade practices and forbidding unfair discrimination are not read into contracts of insurance to create a private cause of action for breach of contract for individual policyholder). *But see* Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000) (determining that a violation of Insurance Code's discrimination provisions could form the basis for a private cause of action under separate unfair competition statute).

Courts are more amenable to finding a private right of action pursuant to a general civil rights statute, even where the legislature has created an administrative agency to enforce the statute. *See* Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., 703 N.E.2d 338, 338–40 (Ohio C.P. 1993) (finding that African American homeowners and prospective homeowners stated an actionable claim against insurer under Ohio Civil Rights Act where the insurer allegedly "avoid[ed] writing insurance policies, charg[ed] different rates, offer[ed] inferior policies, discourag[ed] applications, impos[ed] different terms and conditions of coverage, or cancell[ed] or [failed to review] policies"); *see generally* Annotation, *Recovery of Damages as Remedy for Wrongful Discrimination Under State or Local Civil Rights Provisions*, 85 A.L.R.3d 351 (2006).

[143] *See* Homestead Supplies, Inc. v. Exec. Life Ins. Co., 147 Cal. Rptr. 22, 28 (Cal. Ct. App. 1978) (citing 5 COUCH, CYCLOPEDIA OF INSURANCE LAW § 30:64, pp. 583–84 (2d ed. 1960)); Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 215 S.E.2d 162, 165 (N.C. Ct. App. 1975) ("[T]he insurer cannot say that the contract of insurance is void because of a violation of an antirebate statute for the purpose of defeating the insured, and thus take advantage of its own wrong."); *see generally* COUCH ON INSURANCE 3D § 69:47.

[144] *See, e.g.*, Johnson v. Am. Nat'l Ins. Co., 613 P.2d 1275, 1281 (Ariz. Ct. App. 1980) (noting that such an agreement would be unenforceable); Mountain Fir Lumber Co. v. Employee Benefit Ins. Co., 679 P.2d 296, 299 (Or. 1984) (explaining that the distinction between the terms "void" and "unenforceable" in the contract setting is significant). In the contract setting, "void" often evokes overly broad connotations thus, for example, rendering an agreement to have no legal effects. *Id.* "Unenforceable," on the other hand, may often permit the victimized party to retain their legal benefits while prohibiting the insurer from benefiting from its illegal actions.).

[145] *See, e.g.*, 18 DEL. CODE § 2304 (2006); *see also Homestead Supplies, Inc.*, 147 Cal. Rptr. at 30 (1978) (explaining that "while administrative remedies and penalties are provided for an insurer's making an unfair discrimination in rates . . . , no penalty or other sanction is imposed for the purchase or acceptance of a policy the premium for which constitutes an unfair rate discrimination") (footnote omitted); *Hyde Ins. Agency, Inc.*, 215 S.E.2d at 165 (N.C. Ct. App. 1975) (noting that although the relevant statutes sanctions for insurers for violations of the antirebate provisions, such statutes do not render the violative provisions void); *see generally* Southern States Life Ins. Co. v. McCauley, 464 P.2d 404 (N.M. 1970) (holding generally that where penalties for statutory violations exist, they are exclusive and courts do not have the right to impose other

In addition to laws specifically dealing with insurance or housing, such as those dealing with general consumer protection and unfair competition,[146] states may, though do not necessarily, restrict redlining through laws dealing with general laws against discrimination,[147] state civil rights statutes,[148] and other laws.[149]

Some state court rulings have been based upon the desire to avoid insurance discrimination. For example, some courts have adopted the "filed rate doctrine," which provides that any rate that has been approved by the governing regulatory agency is "per se reasonable and unassailable in judicial proceedings brought by ratepayers."[150] One purpose of this doctrine is to "avoid[] retroactive relief that would lead to discrimination in rates such that a victorious plaintiff would end up paying less than similarly situated nonsuing customers."[151] In one case, insureds could not recover a refund of homeowners and farm insurance policy surcharges allegedly based on the age of the dwelling, where the insurer had already satisfied the requirements of the state Department of Commerce.[152]

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penalties upon the parties).

146 *See, e.g.*, N.M. STAT. § 59A-1-1 to 59-A-53-17 (1985) (prohibiting certain unfair methods of competition and unfair or deceptive acts or practices in the business of insurance); CAL. BUS. & PROF. CODE § 790.03 (2002) (defining unfair methods of competition and unfair and deceptive acts and practices in the business of insurance).

147 *See, e.g.*, Yourman v. People's Sec. Life Ins. Co., 992 F. Supp. 696, 704 (D.N.J. 1998) (applying N.J. STAT. ANN. § 10:5–1 (1968) and finding that New Jersey's anti-discrimination laws were inapplicable to a health insurer's alleged discrimination). In *Yourman*, the insurance company refused to issue a policy to an insured with children suffering from cystic fibrosis unless she accepted a higher deductible than that issued to other insureds without such sick children. *Id.* The court reasoned that an application of the anti-discrimination law to the insurer would subject the insurance industry to a type of "multiple regulation" that would result in conflict. *Id.*

148 *See, e.g.*, Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., 704 N.E.2d 667, 669 (Ohio C.P. 1997) (challenging redlining through the Ohio Civil Rights Act); *see also* Annotation, *Recovery of Damages as Remedy for Wrongful Discrimination Under State or Local Civil Rights Provisions*, 85 A.L.R.3d 351 (2006).

149 *See generally* Jane M. Draper, Annotation, *State Civil Rights Legislation Prohibiting Sex Discrimination in Housing*, 81 A.L.R.4th 205 (2006); Caroll J. Miller, Annotation, *What Constitutes Illegal Discrimination Under State Statutory Prohibition Against Discrimination in Housing Accommodations on Account of Marital Status*, 33 A.L.R.4th 964 (2006); Caroll J. Miller, Annotation, *Construction and Effect of State Legislation Forbidding Discrimination in Housing on Account of Physical Handicap*, 28 A.L.R.4th 685 (2006); Erwin S. Barbre, Annotation, *Validity and Construction of Anti-blockbusting Regulations Designed to Prevent Brokers from Inducing Sales of Realty Because of Actual or Rumored Entry of Racial Group into Neighborhood*, 34 A.L.R.3d 1432 (2006); R.M. Garcia, Annotation, *Suspension or Revocation of Real-estate Broker's License on Ground of Discrimination*, 42 A.L.R.3d 1099 (2006).

150 Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2d Cir. 1994); *accord.* Schermer v. State Farm Fire & Cas. Co., 702 N.W.2d 898, 906 (Minn. App. 2005).

151 *Schermer*, 702 N.W.2d at 906.

152 *Id.* at 907.

III. The Interface Between the Federal Regulatory Authority Through the FHA and the State Regulatory Authority Through the McCarran-Ferguson Act

Whether the practice of "insurance redlining" that results in making housing unavailable is proscribed within the meaning of Section 3604(a) of the FHA is subject to more recent judicial activity. Although the FHA does not expressly proscribe insurance redlining, some courts have held that the broad language of Section 3604(a) and the legislative design of the FHA to eliminate discrimination within the housing and real estate industries encompasses "insurance redlining."[153] Other courts have concluded otherwise. The Fourth Circuit Court of Appeals, for example, held that the FHA does not proscribe insurance redlining because the Congress that enacted the FHA was not unaware of the problem of the unavailability of hazard insurance in some urban areas, but approached the issue differently by enacting the Urban Property Protection and Reinsurance Act of 1968.[154] In contrast, the Seventh Circuit Court of Appeals held that Congress could enact overlapping statutes that provide for relief for the same wrong.[155]

The rationale of these cases is more specifically analyzed below. For a better understanding of the legal analysis underpinning the courts rationale, it is valuable at the outset to have a basic understanding of the history of insurance regulation and the McCarran-Ferguson Act.[156]

A. The McCarran-Ferguson Act

In order to project future losses to establish accurate and appropriate premiums, insurance companies began pooling prior-loss experience data which allowed for carriers to set rates that were more aligned with predictive losses.[157]

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[153] United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n, 24 F.3d 1008, 1015 (7th Cir. 1994) (holding insurance redlining is prohibited by FHA); United States v. City of Hayward, 36 F.3d 832, 835 (9th Cir. 1994) ("'Interference' ranges from racially motivated firebombings, to exclusionary zoning, and insurance redlining.") (citations omitted); Michigan Protection & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 347 (6th Cir. 1994) (same); *see also generally* NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992); Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106, 1109 (S.D. Ohio 1979) (same); Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 58 (D.D.C. 2002). *But see* Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423–24 (4th Cir. 1984) (holding that the FHA does not proscribe insurance redlining).

[154] *Mackey*, 724 F.2d at 424. For a general discussion of the Urban Property Protection and Reinsurance Act of 1968, *see supra* text accompanying notes 109–113.

[155] *See Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (holding the same).

[156] 15 U.S.C. § 1011 (1945). The operative portion of the McCarran-Ferguson Act provides: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance. . . ." 15 U.S.C. § 1012(b).

[157] *See generally* Gary Keith Nedrow, Comment, *The McCarran Act's AntiTrust Exemption for "The*

Pooling resulted in the creation of state-licensed rating bureaus that provided loss experience data to subscribing carriers.[158] The rates and classifications of policies were subject to control by the States' Director or Commissioner of Insurance.[159]

State discrimination in favor of domestic insurers necessarily implicated questions regarding the relevance of the Commerce Clause,[160] which gives Congress authority to "regulate the use of the channels of interstate commerce."[161] A restriction implicit in the Commerce Clause, however, precludes States from burdening the free flow of commerce.[162] The Supreme Court has cited the Commerce Clause as an example of a constitutional provision that authorizes Congress to regulate interstate commerce directly; but does not authorize Congress to regulate state governments' regulation of interstate commerce.[163] As early as 1868, foreign insurance carriers challenged state regulations as violative of the Commerce Clause of the United States Constitution.[164] Originally, the United States Supreme Court held in *Paul v. Virginia* that the business of insurance was not conducted in interstate commerce and, therefore, the Commerce Clause was inapplicable.[165] "Consequently, the regulation of insurance transactions was thought to rest exclusively with the States."[166] States then had exclusive dominion over the insurance industry.[167]

Following the Court's decision in *Paul v. Virginia*, Congress enacted sweeping antitrust legislation, including the Clayton Act,[168] the Sherman Act,[169] and the Federal Trade Commission Act.[170] In analyzing the consequences of

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Business of Insurance": A Shrinking Umbrella, 43 TENN L. REV. 329, 335–36 (1976); Davis J. Howard, *Uncle Sam v. The Insurance Commissioners: A Multi-Level Approach To Defining The "Business Of Insurance" Under The McCarran-Ferguson Act*, 25 WILLAMETTE L. REV. 1, 21 (1989).

158 *See generally* Durham & Stegler, *The Insurance Industry: A Case Study in the Workability of Regulated Competition* 107 U. PA. L. REV. 199, 204–11 (1958); Dominick Vetri, *The Integration of Tort Law Making in The New Age*, 66 OR. L. REV. 277 (1987).

159 *See generally, e.g.*, Owens v. Aetna Life & Cas. Co., 654 F.2d 218, 226 (3d Cir. 1981).

160 U.S. CONST, art. I. § 8, cl. 3 ("The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .").

161 United States v. Lopez, 514 U.S. 549, 558 (1995).

162 *See generally* Massachusetts v. United States, 435 U.S. 444, 462 (1978).

163 *See generally* New York v. United States, 505 U.S. 144, 166 (1992).

164 *See generally* Howard, *supra* note 157, at 20.

165 *See generally* 75 U.S. 168, 183 (1868); Kevin J. McKeon, *Insurance Law—Scope of McCarran-Ferguson Exemption for the "Business of Insuranc"—Meaning of Boycott*, 33 DUQ. L. REV. 957, 968 (Summer 1994) (opining that the Supreme Court was reluctant to hold that the business of insurance was interstate commerce because such a holding could result in the complete deregulation of the insurance industry); Howard, *supra* note 157, at 22.

166 SEC v. Nat'l Sec. Inc., 393 U.S. 453, 458 (1969).

167 *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539 (1978) (nothing that the assumption following the *Paul v. Virginia* decision was "that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry.").

168 15 U.S.C. § 12.

169 *Id.* § 1.

170 *Id.* § 41.

expanded federal antitrust laws and regulations over interstate commerce, the Supreme Court in *United States v. South-Eastern Underwriters' Association* overruled *Paul v. Virginia* and held that all commercial enterprises that conduct their activities across state lines are subjected to the regulatory power of Congress pursuant to the Commerce Clause.[171] The Court refused to make an exception for the business of insurance.[172] The Court held that an insurance company conducting a substantial portion of its business across state lines was engaged in interstate commerce and, therefore, subject to congressional regulation under the Commerce Clause.[173]

In response to the decision, in 1945, Congress enacted the McCarran-Ferguson Act.[174] The purpose of the McCarran-Ferguson Act was "to restore the supremacy of the states in the realm of insurance regulation."[175] The McCarran-Ferguson Act also granted certain exemptions from antitrust laws to insurance companies.[176] The McCarran-Ferguson Act allowed for the continued regulation by the States of the business of insurance for the good of the public interest.[177] Congress also explained that silence on its part "shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."[178] At its core, the McCarran-Ferguson Act confirmed that no "act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance."[179] Consequently, the McCarran-Ferguson Act removed all Commerce Clause limitations on the authority of the states to regulate the business of insurance[180] so long as contradictory federal legislation did not specifically relate to the business of insurance.[181] "The McCarran-Ferguson Act established a form of 'inverse preemption,' letting state law prevail over general federal rules that do not specifically relate to the business of insurance."[182]

Before the McCarran-Ferguson Act bars the application of federal law, three conditions must be present: (1) the federal statute at issue must be a

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171 *See* 232 U.S. 533, 553 (1944) (stating the same).

172 *See id.* (not providing an exception).

173 *See id.* (holding the same); *see also* Ohio AFL-CIO v. Ins. Rating Bd., 451 F.2d 1178, 1181 (6th Cir. 1971) (applying the rule established in *Southeastern Underwriters*).

174 15 U.S.C. § 1011 (1945).

175 Barnett Bank of Marion County NA v. Nelson, 517 U.S. 25, 39 (1996) (citing 15 U.S.C. § 1011).

176 *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218 (1979) (noting the same).

177 McCarran-Ferguson Act, 15 U.S.C. § 1011 (1994).

178 *Id.*

179 15 U.S.C. § 1012(b) (1994). The McCarran-Ferguson Act does not apply when the conflicting federal statute "specifically relates to the business of insurance." *Id.*

180 *See* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 653 (1981) ("Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act.").

181 *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430–31 (1946) (noting the exception).

182 NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 293 (7th Cir. 1992).

"general" statute that does not specifically relate to the "business of insurance"; (2) the state statute at issue was enacted for the purpose of regulating the "business of insurance";[183] and (3) application of the federal statute would "invalidate, impair or supercede" the state statute.[184]

B. *McCarran-Ferguson Act Challenges to the FHA*

1. *Preemption of the FHA*

In 1988, the FHA was amended, authorizing HUD to issue rules to implement the Act.[185] HUD issued regulation 24 C.F.R. § 100.70, reflecting its interpretation of the FHA's application to insurance companies. 24 C.F.R. § 100.70 defined "other prohibited sale and rental conduct" to include property and hazard insurance.[186] Courts have upheld as reasonable HUD's interpretation that the FHA proscribes insurance redlining.[187]

Parties have challenged whether the McCarran-Ferguson Act inversely preempts FHA's application to insurance redlining. In *Mackey v. Nationwide* Insurance Company,[188] for example, the Fourth Circuit Court of Appeals held that insurance redlining was not prohibited under the FHA.[189] The lower court had found that the McCarran-Ferguson Act[190] shielded the alleged redlining practices from challenges under the Sherman Act,[191] the FHA, and the Civil Rights Acts of 1866[192] and 1871.[193] The district court specifically ruled that the FHA does not prohibit "insurance redlining." The Fourth Circuit found that the

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183 United Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). The Supreme Court identified the following factors to determine whether a practice constitutes the business of insurance: (1) whether the practice has the effect of transferring or spreading the policyholders' risks; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. *Id.*

184 *See* United States Dep't of Treasury v. Fabe, 508 U.S. 491, 500–01 (1993) (noting the exception).

185 Housing for Older Persons Act of 1995, 42 U.S.C. § 3614a (2000).

186 24 C.F.R. § 100.70(d)(4). The regulation provides in pertinent part: "Refusing to provide municipal services or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." Id.

187 *See, e.g.*, Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995) (upholding HUD's interpretation of the FHA); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 301 (7th Cir. 1992) (same); Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636, 642 (W.D. Tenn. 1999) (same); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209, 1214 (E.D. Pa 1994) ("Given the deference that is due an agency's congressionally delegated and plausible construction of a statute, the existence of this regulation supports plaintiffs' position that Section [3604] applies to the business of insurance.").

188 Mackey v. Nationwide Ins. Co., 724 F.2d 419 (4th Cir. 1984).

189 *See id.* at 423 (holding that § 804 does not permit the insurance redlining practice).

190 15 U.S.C. § 1011.

191 *Id.* § 1.

192 42 U.S.C. §§ 1981, 1982, and 1985(3).

193 *See Mackey*, 724 F.2d at 420 (stating the District Court's holding). The court also addressed the issue of whether the North Carolina Unfair Trade Practices Act, N.C.G.S. § 75-1, applied to insurance redlining.

McCarran-Ferguson Act barred the application of the Sherman Act, but concluded that the McCarran-Ferguson Act did not foreclose the claims brought under the Fair Housing Act and the Civil Rights Acts of 1866 and 1871.[194]

In so ruling, the Fourth Circuit noted that the carrier had not pointed to any law enacted by the State that would be "impaired" by applying the FHA or federal civil rights legislation as would have triggered the McCarran-Ferguson Act.[195] The court held that the presence of a general federal regulatory scheme did not establish that any particular state law would be invalidated, impaired or superseded.[196] The Fourth Circuit, however, concluded that the FHA does not proscribe insurance redlining.[197]

Other courts have held that the McCarran-Ferguson Act was not enacted to address the problems of insurance redlining, which is within the special province of the FHA.[198] Courts have also held that the McCarran-Ferguson Act does not apply to federal civil rights legislation.[199] These courts have reasoned that, based on the historical context, the legislative history, and judicial interpretations of the McCarran-Ferguson Act, Congress enacted the legislation primarily to resolve the conflict between state regulation of insurers and the federal antitrust laws.[200] When the McCarran-Ferguson Act was enacted in the

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[194] *See id.* at 421 ("The plaintiff's Sherman Act claim falls squarely within the exemption provided by the McCarran-Ferguson Act," but "the McCarran-Ferguson Act bars the plaintiff's claims under the Fair Housing Act and the Civil Rights Acts.").

[195] *See id.* (noting the plaintiff's failure to point to any North Carolina law).

[196] *See id.* ("The presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act and the Civil Rights Acts."). The Supreme Court has held that the term "invalidate" ordinarily means "to render ineffective, generally without providing a replacement rule or law." Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999). In addition, the term "supersede" ordinarily means "to displace (and thus render ineffective) while providing a substitute rule." *Id.* The term "impair" means "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Id.* at 309–10 (quoting Black's Law Dictionary 752 (6th ed. 1990)).

[197] *See* Mackey, 724 F.2d at 424 (finding "that § 804 does not proscribe the alleged hazard insurance redlining practice"). The Fourth Circuit Court of Appeals noted that, since the enactment of the FHA in 1968, several attempts were made in 1978, 1979 and 1980 to amend the FHA to specifically refer to insurance, but those attempts failed. *See id.* The Fourth Circuit also noted that the congressional debates seeking to amend the FHA included statements that the FHA should not include insurance and, therefore, there was no consensus that the 1968 Congress intended to proscribe discrimination in providing insurance when enacting the FHA. *See id.* (citing Congressman Butler and Representative McClory). The Fourth Circuit held that, since there is no reference to insurance in the 1968 statute or in its legislative history, the failure of the proposed amendments to include insurance as part of the FHA supported its conclusion that the FHA does not proscribe "insurance redlining." *Id.*

[198] *See, e.g.*, Dunn v. Midwestern Indemn. Mid-Am. Fire & Cas. Co., 472 F.Supp. 1106, 1111 (S.D. Ohio 1979) ("[T]he McCarran Act . . . [was] not intended to, address the problems of insurance redlining; rather, this issue is the especial province of the Fair Housing Act.").

[199] *See, e.g.*, NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 294–95 (7th Cir. 1992) (holding that the McCarran-Ferguson Act does not apply to federal civil rights legislation); Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1064–66 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), *reinstated as modified*, 735 F.2d 23 (2d Cir. 1984) (same).

[200] *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 218 n.18 (1979) ("The

1940s, federal civil rights legislation had yet to be enacted until 1957.[201] By doing so, Congress did not intend that subsequently enacted federal civil rights legislation would be inapplicable to all activities of an insurance company that is classified as "the business of insurance."[202]

In *NAACP v. American Family Mutual Insurance Company*,[203] for example, noting that the McCarran-Ferguson Act states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance," the Seventh Circuit held that the phrase "[n]o Act of Congress" is exceedingly broad and does not differentiate federal civil rights legislation or restrict the application of the McCarran-Ferguson Act solely to legislation previously enacted.[204] The Seventh Circuit held that the McCarran-Ferguson Act applied to all federal laws, past and future.[205] The Court noted that the general principle is that federal laws that do not conflict with or supersede state rules are always enforceable.[206] Federal laws that are inconsistent with state laws are only enforceable if Congress specifically states so directly.[207] The FHA, however, does not even obliquely contain statutory language that it is enforceable despite possible inconsistencies with

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McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack."); SEC v. National Securities, Inc., 393 U.S. 453, 458–59 (1969) ("Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies.").

201 *See Am. Family Mut. Ins. Co.*, 978 F.2d at 294 ("Congress had no intention in the 1940s of curtailing the scope of laws yet to be enacted-indeed, inconceivable at the time. (After southern states regained representation in the Senate following the Civil War, no civil rights laws were enacted until 1957. . .).").

202 *Spirt*, 691 F.2d at 1065.

203 NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992).

204 *See id.* at 294–95 (holding a narrower view for the phrase "No Act of Congress").

205 *See id.* ("The McCarran-Ferguson Act creates a rule of construction applicable to all other federal laws, a 'plain statement' approach. . . . Congress did not tie its hands; instead it prescribed the consequences of silence and specificity in other acts past and future."). In contrast to the Fourth Circuit's discussion regarding the failed attempts to amend the FHA as a rationale for the FHA not proscribing insurance redlining, the Seventh Circuit noted that proposed legislation can fail for many reasons. The Seventh Circuit stated:

> Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the "clarification" into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated. No surprise, therefore, that the Supreme Court repeatedly reminds us that unsuccessful proposals to amend a law, in the years following its passage, carry no significance. Were it otherwise, one House of Congress could change the meaning of a law by refusing to approve a change in the text. Yet Congress may change the law only by bicameral action, which implies that the refusal of one chamber to assent to a proposed amendment cannot alter the meaning of the law on which both chambers agreed in prior years.

Id. at 299–300 (citations omitted).

206 *See id.* at 295 ("Federal laws that do not conflict with or supersede state rules always apply.").

207 *See id.* (stating the same).

state law. Nevertheless, in rejecting the carrier's contention that the McCarran-Ferguson Act inverse-preempted the FHA, the Seventh Circuit held that the FHA is an "'Act of Congress' that does not 'specifically relate . . . to the business of insurance'" and "therefore does not 'invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.'"[208]

The Seventh Circuit is not alone in its conclusion that the McCarran-Ferguson Act does not inversely preempt the FHA.[209] Other courts have held similarly in other civil rights contexts.[210] Indeed, although not in the context of the FHA, the United States Supreme Court has concluded that Congress did not intend to cede the field of insurance regulation to the states.[211] The McCarran-Ferguson Act seeks to protect state regulation primarily against inadvertent federal intrusion, but does not insulate state insurance regulation from federal regulation.[212] The Supreme Court has rejected the contention that all federal law is inversely preempted unless the statutory scheme expressly states otherwise.[213] Adopting a similar argument put forth by the Seventh and Ninth Circuits, the Supreme Court has held that if Congress meant to preempt generally the field of insurance law for the states, the McCarran-Ferguson Act could have stated: "No federal statute [that does not say so explicitly] shall be construed to apply to the business of insurance."[214] The high court noted that Congress alternatively

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[208] *Id.*

[209] *See, e.g.*, Dehoyos v. Allstate Corp., 345 F.3d 290, 297 (5th Cir. 2003) (noting that the MFA does not inverse-preempt the FHA); Moore v. Liberty Nat. Life Ins. Co., 267 F.3d 1209, 1222 (11th Cir. 2001) (stating that McCarran-Ferguson did not inverse-preempt §§ 1981 and 1982); Merchants Home Delivery Serv. v. Frank B. Hall & Co., 50 F.3d 1486, 1491–92 (9th Cir. 1995) (holding that the application of a federal statute prohibiting acts which are also prohibited under a state's insurance laws does not "invalidate, impair, or supersede" the state's laws under § 26 of the MFA); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1360–61 (6th Cir. 1995) ("Thus, because the Fair Housing Act does not mention insurance, it is covered by the McCarran-Ferguson Act and cannot be construed in such a way as to invalidate, impair, or supersede any state law enacted to regulate the business of insurance.").

[210] *See, e.g.*, Women of City Gov't United v. City of New York, 515 F.Supp. 295, 306 (S.D.N.Y. 1981) (holding that McCarran-Ferguson did not preclude the application of Title VII of the Civil Rights Act to the use of a sex differentiated actuarial table); EEOC v. Wooster Brush Co., 523 F. Supp. 1256 (N.D. Ohio 1981), *reversed in part on other grounds*, 727 F.2d 566 (6th Cir. 1984) (holding that McCarran-Ferguson was inapplicable in a Title VII action alleging a discriminatory denial of pregnancy-related disability benefits); Ben v. General Motors Acceptance Corp., 374 F.Supp. 1199 (D. Colo. 1974) (stating that McCarran-Ferguson does not bar claims under 42 U.S.C. §§ 1982 and 1985); Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702 (5th Cir. 2002) (stating that McCarran-Ferguson does not inverse-preempt the Federal Arbitration Act, 9 U.S.C. § 1, and did not preclude arbitration clause contained in that consumer loans that included the purchase of credit life and credit disability insurance). *But see* Does v. Mutual of Omaha Ins. Co., 179 F.3d 557 (7th Cir. 1999) (finding an interpretation of the ADA that would proscribe capping medical insurance policy benefits for AIDS was preempted by McCarran-Ferguson Act).

[211] *See* Humana Inc. v. Forsyth, 525 U.S. 299, 308 (1999) (addressing inverse-preemption of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961).

[212] *See* Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 39 (1996) (setting out the purpose of the MFA).

[213] *See id.* at 40 (noting that Federal Statutes need not explicitly state that State laws are pre-empted).

[214] *Id.* at 39 (adopting the argument put forth by the Seventh and Ninth Circuits); Merchants Home Delivery Serv. Inc. v. Frank B. Hall & Co., Inc., 50 F.3d 1486, 1492 (9th Cir. 1995).

could have provided that federal legislation generally, or a particular statutory scheme, would be "applicable to the business of insurance [only] to the extent that such business is not regulated by State Law."[215] The Supreme Court has also rejected a view that the McCarran-Ferguson Act allowed for federal regulation of insurance whenever the federal law does not directly conflict with state regulation.[216] In construing the most sensible interpretation, the Supreme Court held that the McCarran-Ferguson Act does inverse-preempt federal law that is not directly in conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a state's administrative regime.[217]

2. *Failure to Enforce the State Fair Housing Laws*

The McCarran-Ferguson Act purports to prohibit federal causes of actions when a State has enacted laws regulating insurance.[218] Generally, courts will not inquire into whether the state is actually enforcing its insurance laws.[219] The Sixth Circuit Court of Appeals, for example, has refused to examine whether state statutes were being adequately enforced.[220] The court held that for the McCarran-Ferguson exemption to apply, all that needed to be shown was that the state had "generally authorized or permitted certain standards of conduct."[221] The court observed:

> We find no support for the appellant's argument that the court in this case should inquire into the question as to whether the statutes of Ohio have been effectively enforced in accordance with their terms. . . . [T]here is nothing in the language of the McCarran Act or in its legislative history to support the thesis that the act does not apply when the state's scheme of regulation has not been effectively enforced.[222]

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[215] Barnett Bank of Marion County, N.A., 517 U.S. at 39 (noting that Congress did so in the Sherman, Clayton, and Federal Trade Commission Acts, 15 U.S.C. § 1012(b)).

[216] *Id.*

[217] *Id.*

[218] 15 U.S.C. § 1012(b).

[219] *See* Ohio AFL-CIO v. Ins. Rating Bd., 451 F.2d 1178, 1184 (6th Cir. 1971) (reviewing a lawsuit alleging that State insurance regulation was a "sham" and a "mere pretense").

[220] *See id.* (refusing to examine enforcement of state statute).

[221] *Id.* at 1182 (citing Cal. League of Indep. Ins. Producers v. Aetna Cas. & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959)).

[222] *Id.* at 1184; *see also* Seasongood v. K & K Ins. Agency, 548 F.2d 729, 734 (8th Cir. 1977) (stating that McCarran-Ferguson Act applies despite the fact that the state does not provide for a private right of action); Am. Family Life Assurance Co. v. Planned Mktg. Assocs., 389 F. Supp. 1141, 1148 (E.D. Va. 1974) (finding the McCarran-Ferguson Act not applicable because the claim was not part of the business of insurance).

Unfortunately, this indifference acts as a shield for insurance companies from anti-discrimination laws.[223] Furthermore,

> [s]tate power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the State sees fit. The McCarran-Ferguson Act clearly contemplates that where a State undertakes to regulate the business of insurance, it has the power to permit practices which would otherwise violate federal antitrust laws; if the exemption is only to apply when state law squarely prohibits all acts which would, absent the exemption, violate the antitrust laws, the state regulation which the McCarran-Ferguson Act aims to foster, 15 U.S.C. §§ 1011, 1012(a), would be a nullity.[224]

3. Federal Responsibilities When A State Condones Insurance Redlining

An interesting issue was tangentially discussed by the Seventh Circuit in *NAACP v. American Family Mutual Insurance Co.*[225] As previously discussed, the Seventh Circuit held in NAACP that the McCarran-Ferguson Act did not inversely preempt a FHA lawsuit challenging insurance "red-lining" based upon race.[226] The Seventh Circuit noted that if the State of Wisconsin wanted to authorize redlining it only needed to enact a statute explicitly allowing such practice.[227] The Seventh Circuit noted that the insurance carrier had not argued that there were any laws, regulations, or case law in Wisconsin that required redlining, condoned the practice, committed to insurers all decisions about redlining, or held that redlining did not violate state law whether it was a result of discriminatory intent or disparate impact.[228] The Court also noted that no Wisconsin official appeared in the litigation contending that a remedy under the FHA would frustrate any state policy.[229] The Court held that the McCarran-Ferguson Act gave states the final word on the regulation of insurance unless Congress specifically overrode those choices.[230] Wisconsin law, the Seventh Circuit held, was consistent with the FHA.[231]

In light of the federal government's role to ensure that states do not deny their citizens' fundamental rights guaranteed by the Constitution, the Seventh

[223] *See, e.g.*, Peters v. Wayne State Univ., 691 F.2d 235, 238 (6th Cir. 1982), *vacated by*, 103 S.Ct. 3566 (1983) (holding that an insurer is not bound by Title VII because it furnishes services to a Title VII employer).

[224] Dexter v. Equitable Life Assur. Soc., 527 F.2d 233, 236 (2d Cir. 1975).

[225] NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992).

[226] *See id.* at 295 (finding that the FHA could apply to allegations of racially discriminatory redlining).

[227] *Id.* at 297.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.*

Circuit's analysis is fundamentally flawed. Both the federal government and the states must ensure equal protection under the laws.[232] The Thirteenth and Fourteenth Amendments were intended as limitations on a state's power and enlargements of Congress' power.[233] The Seventh Circuit's rationale suggests that Congress can disavow its constitutional duties under the Thirteenth and Fourteenth Amendments and forgo enforcing those Amendments by enacting legislation; namely, the McCarran-Ferguson Act, that would not preclude states from allowing badges and incidents of slavery to exist, from abridging the privileges or immunities of its citizens, or from denying equal protection of the laws. The enforcement provisions of the Thirteenth and Fourteenth Amendment do not grant Congress the power to dilute equal protection rights and do not grant Congress the power to restrict, abrogate, or dilute the constitutional guarantees contained therein:[234] "Congress may not authorize the States to violate the Equal Protection Clause."[235] Nor can Congress abdicate its duties under the Thirteenth and Fourteenth Amendments.[236] Congress must enact legislation that respects the rights guaranteed under these Amendments.[237] More importantly, any state legislation that would violate these constitutional guarantees, such as the hypothetical Wisconsin statute condoning insurance redlining, is void ab initio.[238] Therefore, states may choose to enact legislation

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[232] *See* U.S. CONST. amend. V (stating that the Fifth Amendment precludes the federal government from depriving any person of "life, liberty, or property, without due process of law"); Bloom v. Illinois, 391 U.S. 194, 195 (1968) (stating that the Due Process clause of the Fifth Amendment applies to the federal government); Mathews v. de Castro, 429 U.S. 181, 182 (1976) ("It is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles."); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process.") (quotations and modifications omitted); United States v. Pollard, 326 F.3d 397, 406 (3d Cir. 2003) (citing Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954)) (finding that the equal protection guarantees under the Due Process clause of the Fifth Amendment is similar to the guarantees under the Fourteenth Amendment).

[233] *See Ex parte* Commonwealth of Va., 100 U.S. 339, 345 (1879) (stating that the constitutional federalism of the United States was adopted to protect "fundamental liberties" and not as a mechanism to forgo those liberties).

[234] *See* Miranda v. Arizona, 384 U.S. 436, 491 (1966) ("Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.").

[235] Shapiro v. Thompson, 394 U.S. 618, 641 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974) ("Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause."); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution.").

[236] *Cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("But no State may effectively abdicate its responsibilities [under the Fourteenth Amendment] by either ignoring them or by merely failing to discharge them whatever the motive may be."); Georgia Power Co. v. City of Decatur, 281 U.S. 505, 508 (1930) ("The state may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment.").

[237] *See* Saenz v. Roe, 526 U.S. 489, 508 (1999) ("[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."); Hill v. State of Texas, 316 U.S. 400, 406 (1942) ("Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand.").

[238] *See* Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It nullifies and makes void all state legislation, and

that proscribes insurance redlining; however, the enactment of such regulation would not preclude the federal government from enforcing the FHA or any other type of similar legislation that would proscribe insurance redlining.

IV. Preventing De Facto Redlining by Imposition of a Moratorium on Policy Renewals

In the aftermath of Hurricane Katrina, the Louisiana Department of Insurance issued emergency rules requiring insurance companies to give policy holders affected by Hurricanes Katrina or Rita an automatic extension of time to pay their insurance premiums without incurring any late fees, penalties, cancellation, or non-renewal.[239] The emergency rules also preclude insurance companies from canceling or non-renewing policies solely because the insured submitted a claim because of Hurricane Katrina.[240] Mississippi[241] and Alabama[242] also enacted moratoriums on cancellations and non-renewals. The

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state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws."); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 346 (1935) (determining that courts cannot uphold statutes that violate the constitution); Wolff v. City of New Orleans, 103 U.S. 358, 365 (1880) ("Legislation producing this latter result . . . is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land.").

[239] *See* Emergency Rules 15, 16 & 17, LA. ADMIN CODE tit. 37, § 2700 (2005) (mandating compliance with state-imposed procedures to ensure coverage in the wake of Hurricanes Katrina and Rita). On September 19, 2005, Governor Kathleen Babineaux Blanco signed an executive order giving the Commissioner of Insurance the temporary authority to implement certain emergency insurance rules in the wake of Hurricane Katrina and it aftermath. Exec. Order KBB 2005–40, § 4. The Commissioner issued Emergency Rules 15, 16, and 17, that included, among other things, that an insurance carrier cannot cancel or now-renew policies for certain affected parishes because of a Hurricane Katrina claim. LA. ADMIN CODE tit. 37, § 2700 (2005). Louisiana also adopted Emergency Rule 23, which suspended the rights of any admitted insurer or surplus line insurer to cancel or non-renew any personal residential, commercial residential, or commercial property insurance policy that sustained damage as a result of Hurricanes Katrina or Rita until sixty days after substantial completion of the repair and/or reconstruction of the policy or December 11, 2006. *Id.*

[240] *See id.* (stating the same).

[241] Beginning on September 15, 2005, the Mississippi Insurance Department ("MID"), for example, imposed a moratorium on cancellations because of the failure to pay premiums during the sixty days following August 29, 2005. MID Bulletin 2005-7 (2005). The moratorium was extended for an additional sixty days on October 26, 2005. MID Bulletin 2005–12 (2005). The MID issued a directive on November 4, 2005 limiting cancellations to property damaged by Hurricane Katrina for which repairs have not yet been completed. The directive precluded insurers from canceling or refusing to renew a "personal or commercial residential property policy" covering a dwelling or residential property in Mississippi that has been damaged by Katrina for a period of sixty days after the property has been repaired. MID Bulletin 2005–13 (2005). Bulletin 2005–13 was amended on January 27, 2006 to include cancellations/non-renewals of commercial property. MID Bulletin 2005–13 (2006).

[242] Even before Hurricane Katrina made landfall on August 28, 2005, Alabama had in place a policy prohibiting cancellations and non-renewals of automobile or property insurance policies based solely on claims arising from a catastrophe, natural disaster, act of nature, or weather related cause. Bulletin dated July 20, 2004 from Walter A, Bell, Commissioner of the Alabama Department of Insurance. More recently, the Alabama Department of Insurance issued a bulletin on January 3, 2007 requiring written notice to the Commissioner and to the insured of non-renewal of coverage based upon the insurer's desire to reduce its exposure to potential catastrophic events, including but not limited to a hurricane. An insurer's failure to comply with either bulletin

insurance non-cancellation and non-renewal moratorium utilized in Louisiana, Mississippi and Alabama is less comprehensive than the moratorium approach used by the Florida Department of Insurance in the aftermath of Hurricane Andrew.[243]

This patchwork approach of state legislation may be ineffective when disasters such as Hurricane Katrina are regional in nature and not contained to one state. Moreover, their impact may not only affect the residents of the state but also residents in states not affected by the particular natural disaster. Hence a comprehensive, national legislative approach is more advisable and would allow a uniform solution to the problem.

In 1992, Hurricane Andrew caused unprecedented physical, economic and social damage.[244] Andrew's 150–180 mph winds destroyed more than 60,000 homes, leaving as many as a quarter million people homeless.[245] The storm caused between $16 to $18 billion in property damage, making it one of the costliest natural disasters in United States history.[246] Insurance companies had underappreciated the potential destruction of a hurricane such as Andrew.[247] Shoddy construction practices and significant violations of South Florida building codes were unearthed as homes, which should have remained substantially intact, collapsed like matchboxes.[248] The monetary losses from Andrew were twice the value of collected premiums in Florida for the preceding twenty years.[249] The hurricane immediately bankrupted ten of Florida's insurance companies which reported that the claims of policyholders exceeded the capital surplus and reinsurance set aside for the mounting claims.[250] Those

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is considered an unfair trade practice.

243 *See infra* notes 251–258 and accompanying text.

244 *See* Larry Rohter, *Hurricane Andrew: Supplies Flow In for Stricken Areas, but Delivery is Slowed by Wreckage*, N.Y. TIMES, Aug. 27, 2002, at B9 (discussing the extent of damages that Hurricane Andrew inflicted).

245 *See id.* (stating the same).

246 *See* Thomas S. Mulligan, *Quake Payout to the Insurers Third Highest*, L.A. TIMES, Feb. 7, 1994, at 1A (noting the cost of damage, in dollars, for different natural disasters. Unlike Katrina's destructive wrath in New Orleans, Andrew managed to spare the greater Miami area from major damage which insurance companies estimated could have tripled Andrew's price tag. *See* Carl Hiaasen, *Government Can't Be Trusted to Enforce Codes*, MIAMI HERALD, Dec. 30, 1993, at B1.

247 *See Insurance Companies Retrench in Wake of Disasters*, L.A. TIMES, Sept. 22, 1993, at D9 (noting past insurance company mistakes).

248 *See* Hiaasen, *supra* note 246, at B1 (discussing the realities of a system where the government prescribed building codes are virtually unenforceable).

249 *See* Christina Sherry, *Florida Homeowner's Feel Pinch as Insurance Companies Bail Out*, WASH. POST, June 13, 1993, at A3 (noting that an estimated $10.8 billion in premiums were collected from Florida homeowners, but $18 billion were incurred as losses).

250 *See* Albert D. Crenshaw, *Insurance Firms Curbing Coverage for Homeowners-Coastal Areas Most Affected by Retrenchment*, WASH. POST, May 8, 1993, at E1 (detailing the financial ramifications for insurance companies caused by Hurricane Andrew). Several insurance companies escaped permanent insolvency because of large capital infusions from their parent corporations. As an example, Prudential Property & Casualty Corporation had a capital base of $575 million when Andrew struck and eventually paid out claims of more than

insurance companies that survived reanalyzed their potential risks of hurricane originating catastrophic losses and developed new underwriting models that reassessed and recalculated an acceptable level of exposure.[251]

Because insurance companies had over-exposed themselves to excessive risk in the coastal regions of hurricane prone South Florida, they began to retreat from offering insurance in that area.[252] The insurance companies began developing catastrophic loss prevention plans calling for significant cancellations and non-renewals of existing homeowner policies and, in some instances, withdrawal from the Florida's residential property and casualty insurance marketplace altogether.[253]

The Florida Department of Insurance (FDOI) reacted quickly to the impending and anticipated wave of policy cancellations and non-renewals. Initially the FDOI issued emergency rules limiting the number of permissible cancellations or non-renewals of homeowner insurance policies in the hardest hit counties, Dade and Broward.[254] The FDOI then issued the emergency Rule 4ER93–18, which imposed a six month moratorium on the non-renewal or cancellation of homeowner's insurance policies, due to the risk of hurricane loss.[255] This emergency moratorium was an attempt to temporarily stabilize the residential homeowner's insurance marketplace. The Florida Legislature codified the emergency regulation.[256] This moratorium law contains a provision

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$1.3 billion. *See* David Satterfield, *Prudential Sues to Drop 25,000-Insurer Challenges State's Moratorium*, MIAMI HERALD, June 30, 1993, at A1. The losses from Andrew effectively bankrupted Prudential Property & Casualty Corp. *Id.* Were it not for a capital infusion of $900 million from its parent corporation, Prudential Insurance Company of America, Prudential Property & Casualty would have failed and its policyholders would have been left empty-handed to the tune of more than $600 million. *Id.*

251 *See Insurance Companies Retrench in Wake of Disasters*, *supra* note 247 (discussing post-disaster insurance company business strategies).

252 *See* Phillip Longmore, *The Politics of Wind: How Tallahassee's $36 Billion Dollar Insurance Scheme Could Blow You Away*, FLORIDA TREND, Sept. 1994, at 36 (discussing driving causes of insurance companies actions).

253 Insurance companies will often develop plans to reduce their exposure in catastrophic loss prone areas which will be deemed necessary to protect the remaining policyholders throughout the state and across the nation from a company's insolvency in the event of another catastrophic hurricane. These types of plans can call for significant cancellations and non-renewals of existing homeowner policies or, in the case of some of the hardest hit insurers, withdrawal from the state's residential property and casualty insurance marketplace.

254 *See* 4ER92–2, 18 Fla. Admin. Weekly 5371 (Sept. 11, 1992); 4ER92–3, 18 Fla. Admin. Weekly 5490 (Sept. 18, 1992); 4ER92–8, 18 Fla. Admin. Weekly 6223 (Oct. 16, 1992); 4ER92–14, 18 Fla. Admin. Weekly 6929 (Nov. 13, 1992); 4ER92–24, 18 Fla. Admin. Weekly 7517 (Dec. 4. 1992).

255 *See* 4ER93–18, 19 Fla. Admin. Weekly 3079 (June 4, 1993). This emergency rule, however, was legally valid for only ninety days. *See* 120.54(9)(c), FLA. STAT. However, the Florida Legislature enacted Ch.apter 93–401, Laws of Florida, which essentially imposed a six-month moratorium upon the cancellation or non-renewal of homeowner's insurance policies based on the risk of hurricane claims. The preamble to Ch.apter 93–401, Laws of Florida, provides as its justification that "the enormous monetary impact to insurers of Hurricane Andrew claims has prompted insurers to propose substantial cancellation or non-renewal of their homeowner's [policies]." In November 1993, when the initial moratorium was scheduled to expire, the Florida Legislature met in a special session and approved a three-year extension. and subsequent phase out of the moratorium. *See* Ch. 93–410, 1993 Fla. Laws 7; Ch. 93–411, 1993 Fla. Laws 46.

256 *See* Ch. 93–401, Section 4, 1993 Fla. Laws 2881. The Florida legislature enacted Chapter 93–401,

providing for potential insolvency. In order to avoid an unreasonable risk of insolvency, however, insurance companies had to affirmatively demonstrate that any proposed cancellation or non-renewal was necessary to avoid an unreasonable risk of insolvency.[257] The law also had a business phase-out provision.[258] Insurers sought relief from the denial of an administrative application for an exemption by appealing the decision in court.[259]

Florida also had a withdrawal statute which authorized insurance companies to surrender their Certificates of Authority and withdraw from the state or from a specific line of insurance upon proper notice.[260] The FDOI construed the phase-out statute, however, as superceding an insurer's right to surrender its Certificate of Authority and withdraw its business from the state's residential property insurance market pursuant to Section 624.430.[261]

The Florida Legislature then created Section 215.555, which provided for the Florida Hurricane Catastrophe Trust Fund.[262] The Florida Hurricane

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Laws of Florida, which essentially imposed a six-month moratorium upon the cancellation or non-renewal of homeowner's insurance policies based on the risk of hurricane claims.

257 *See id.* In reaching a determination that the insurance company is facing an unreasonable risk of insolvency, the FDOI must consider the insurer's size, its market concentration, its general financial condition, the degree to which personal lines residential property insurance companies insurance comprises its insurance business within the state of Florida, and the way in which those factors impact on the risk of the insurer's insolvency in relationship to its probable maximum loss in the event of a hurricane. An insurance company, however, is not required to risk more than its total surplus to an objectively defined maximum loss resulting from one Florida hurricane loss event.

258 *See* FLA. STAT. 18C, § 627.7013 (repealed 2002) (providing that in any twelve month period, an insurance company may not cancel or non-renew more than five percent of its homeowners' policies, mobile home owners' policies or personal lines residential policies within the state, and may not cancel or non-renew more than ten percent of its homeowners' policies, mobile home owners' policies or personal lines residential policies within a given county, to reduce the insurer's exposure to hurricane claims). FLA. STAT. 18C, § 627.7013 also provided that any insurance company seeking to exceed these limits on cancellation or non-renewals within a given year must file a phase-out plan with the FDOI and obtain the FDOI's approval before implementing the plan. *Id; see also* 20 Fla. Admin. Weekly 531 (February 4, 1994) (stating that the exception of the phase-out statute has been narrowed by the FDOI's liberal interpretation of the statute so that any reason given by an insurance company for canceling or nonrenewing a particular homeowner's policy can be deemed to be related to the risk of hurricane loss. As an example, in Proposed Rules 4-141.020(9)(a) and 4-141.021(3)(a)(3), the FDOI asserts that the statutory word "unrelated" must be construed in a "liberal, wide-reaching manner." Consequently, to be exempted from the phase-out statute's moratorium limits, a non-renewal of a residential policy "must be completely unrelated, directly or indirectly, to reduction of risk of loss from hurricane exposure.").

259 *See* Prudential Prop. & Cas. Ins. Co. of Indiana v. Dep't of Ins., 626 So.2d 994, 999 (Fla. Dist. Ct. App. 1993) ("We conclude that, by virtue of section 120.68(1), Florida Statutes, rule 9.030(b)(1)(C), Florida Rule of Appellate Procedure, and Article V, section 4(b)(2), of the Florida Constitution, we have jurisdiction to review the department's decision in its August 10 letter denying the requested exemption.").

260 FLA. STAT. 18A, § 624.430 (2004).

261 *See* 20 Fla. Admin. Weekly 531, 534 (February 4, 1994) (discussing the interpretation of § 627.7013 and stating that the moratorium law, on its face, only applied to insurance companies that chose to remain in the residential property insurance market and did not affect an insurer's right to cancel or non-renew such policies in connection with its formal withdrawal from the market, regardless of whether that withdrawal and resulting cancellations or non-renewals were related to the risk of hurricane loss).

262 The Florida Hurricane Catastrophe Trust Fund was established by Chapter 93–430, which was codified in section 215.555. *See* FLA. STAT. 10C, § 215.555 (2005).

Catastrophe Trust Fund requires the Fund to "reimburse the insurer for 75% of their losses from covered losses in excess of two times the insurer's gross direct written premium from covered policies."[263] A mandatory assessment upon all insurers is used to capitalize the Fund, which theoretically will act as a buffer for hurricane catastrophes which inflict damages in excess of the insurer's collective ability to pay.[264]

Similar to what occurred in the State of Florida after Hurricane Andrew, insurance companies issuing policies in Alabama, Louisiana, Mississippi and other Gulf States affected by Hurricane Katrina may cancel existing policies or non-renew policies to reduce their financial exposure in the affected region.[265] Such a withdrawal from the region may constitute de facto insurance redlining because of the demographics impacted.[266] Alternatively, similar to what occurred after the 1960s riots, because of the minority demographics in Gulf States, insurers may exaggerate potential losses sustained from future natural or man-made disasters occurring after Hurricane Katrina and incorporate exaggerated risks into their underwriting policies, resulting in substantially increased premiums.[267] As a consequence of these higher premium rates, residents of the Gulf States may remain or become uninsured or underinsured, which could negatively affect the rebuilding efforts in the Gulf.[268]

Requiring that insurers participate in the region, notwithstanding the financial risks from future storms, may cause insurers to become insolvent—an inadvertent result which would not only affect Gulf States residents, but also residents of non-Gulf States who may, as a result of insolvency, have no insurance coverage.[269] Alternatively, insurers may simply raise premiums significantly to offset the losses due to exposure in the region.[270] As a result, the minority population in the region may decide to remain uninsured or under-

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263 *See id.* § 215.555 (4)(b).

264 *See id.* § 215.555 (6)(b).

265 *See generally* Victoria McGrane, *Insurers Under Siege*, CQ WEEKLY, May 4, 2007 (discussing the legal battle between a Gulf Coast resident and two major insurance companies).

266 *See generally* NATIONAL FAIR HOUSING ALLIANCE, THE CRISIS OF HOUSING SEGREGATION 30 (2007), http://www.nationalfairhousing.org/resources/newsArchive/2007%20Fair%20Housing%20Trends%20Report.pdf (discussing the homeowners insurance discrimination in the area).

267 *See generally* Paul Greenberg, *Insurance: The Hidden Story of Post-Katrina*, Apr. 06, 2007, http://www.hurricane-katrina.org/2007/04/insurance_the_h_1.html (last visited Apr. 9, 2008) (discussing the high homeowners insurance premiums post Hurricane Katrina) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

268 *See id.* (stating that the homeowners are not able to rebuild houses because of high insurance cost).

269 *See generally* Seth Dunn & Christopher Flavin, *Destructive Storms Drive Insurance Losses Up, Will Taxpayers Have to Bail Out Insurance Industry*, Mar. 26, 1999, http://www.worldwatch.org/node/1648 (last visited Apr. 9, 2008) (discussing destructive storms place insurance industry in danger of insolvency) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

270 *See generally id.* (discussing how insurance companies deal with losses because of destructive storms).

insured, which itself results in de facto insurance redlining.[271] Because losses are potentially staggering and the market may only bear limited premium increases, insurers may attempt to spread the risk of loss in the Gulf region to all of its policyholders.[272] Consequently, policyholders in non-Gulf States could also potentially experience increased premiums because of a single state regulation.[273]

Insurers and policyholders alike may not be without recourse.[274] A moratorium or similar statute or regulation enacted by Gulf States may violate several provisions of the United States Constitution, including the Takings Clause of the Fifth Amendment,[275] the Contract Clause,[276] and the Due Process Clause under the Fourteenth Amendment.[277]

A. The Taking Clause

The Takings Clause of the Fifth Amendment provides, in pertinent part: "[N]or shall private property be taken for public use, without just compensation."[278] "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[279] Although the prohibitions contained in the Fifth Amendment are addressed to the federal government, the Fifth Amendment also applies to the states through the Fourteenth Amendment.[280] An insurance contract can constitute property subject to an unconstitutional taking under the Fifth Amendment.[281]

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271 *See* Greenberg, *infra* note 267 (stating that some residents in the region decided not to buy insurance because of financial difficulties).

272 *See* Joseph B. Treaster, *Gulf Coast Insurance Expected to Soar*, N.Y. TIMES, Sept. 24, 2005, at C1 (stating that premiums are expected to rise in areas of the United States far from the Gulf Coast as well).

273 *See generally* PR Newswire, *Consumers Oppose State Insurance Regulation That Encourage More Risky Driving and Help Wealthy Homeowners*, June 20, 2007, http://www.insuranceheadlines.com/Auto-Insurance/3407.html (last visited Apr. 9, 2008) (stating that state regulations make consumers pay higher insurance premiums) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

274 RAWLE O. KING, HURRICAN KATRINA: INSURANCE LOSSES AND NATIONAL CAPACITIES FOR FINANCING DISASTER RISK 2 (2005), http://www.fpc.state.gov/documents/organization/53683.pdf (discussing federal policy alternatives to build national capacities for disaster risk management).

275 U.S. CONST. amend. V.

276 U.S. CONST. art. I, § 10.

277 U.S. CONST. amend. XIV, § 1.

278 U.S. CONST. amend. V.

279 Armstrong v. United States, 364 U.S. 40, 49 (1960).

280 *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 121–23 (1978) (holding that the Takings Clause also applies to the states).

281 *See* Lynch v. United States, 292 U.S. 571, 579 (1934) (indicating that valid contracts are property); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003–04 (1984) (holding that the company's interest in its health, safety, and environmental data is cognizable as a trade-secret property right and that property right is protected by the Takings Clause); Armstrong v. United States, 364 U.S. 40, 44, 46 (1960) (stating that lien provided under the state law should be protected by the Takings Clause); Louisville Joint Stock Land Bank v.

Although the Takings Clause applies to physical invasions of property,[282] certain invasions of private property are deemed a "per se taking" without regard to the state's interest in possessing or otherwise using the property.[283] Thus, a "per se taking" would occur, for example, if a statute effectuates an actual government takeover of a private insurance company.[284]

The Takings Clause also requires compensation where a statutory regulation denies all economically beneficial or productive use of property.[285] When the legislation disregards or destroys existing contractual rights (for example, the right to cancel an insurance contract), that does not automatically transform the regulation into a taking in violation of the Fifth Amendment.[286] The factors used to determine whether a regulatory taking exists are:[287] (1) the economic impact of the challenged rule, regulation, or statute on the insurer; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the nature of the challenged action.[288] Insurers can challenge statutes or regulations enacted by Gulf States as "facially" unconstitutional[289] or unconstitutional "as applied."[290]

Radford, 295 U.S. 555, 596–602 (1935) (holding the property of individual mortgagees should be protected by the Takings Clause).

[282] *See* Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1015 (1992) (holding that the Taking Clause requires compensation for "regulations that compel the property owner to suffer a physical 'invasion' of his property"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 & 436 (1982) (stating that when the character of "the governmental action" is a permanent physical occupation of property, a taking to the extent of the occupation is uniformly found, and such an occupation is qualitatively more severe than a regulation of the use of property).

[283] "In addition to physical invasions of property, the Supreme Court has also accorded 'categorical [per se] treatment,' invariably requiring compensation, to cases 'where regulation denies all economically beneficial or productive use of land.'" New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1089 (1996).

[284] *See, e.g.*, United States v. Pewee Coal Co., 341 U.S. 114 (1951) (holding that the Takings Clause is applied when the government took total, direct control of a private business); United States v. United Mine Workers, 330 U.S. 258 (1947) (stating that when the government totally controls a private business, the Takings Clause is applied).

[285] *See Lucas*, 505 U.S. at 1015 (indicating that categorical treatment is appropriate when the regulation denies all economically beneficial or productive use of land); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (stating that while property may be regulated to a certain extent, "if regulation goes too far it will be recognized as a taking").

[286] *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986) (indicating that the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking).

[287] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–25 (1978) (stating that in determining whether the government conduct constitutes a taking requires that the court engage in an ad hoc, factual inquiry and discuss the variety of interests involved and to be considered in a takings case). "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981).

[288] *See Connolly*, 475 U.S. at 224–26 (indicating the three factors which are particularly significant when determining whether there is a taking).

[289] *See* Agins v. City of Tiburon, 447 U.S. 255, 259–61 (1980) (discussing if the zoning ordinances on their face violated the Takings Clause).

[290] *See Penn Cent. Transp. Co.*, 438 U.S. at 127 (discussing whether any restriction imposed on

Insurers can assert that they will sustain substantial financial losses as a result of any prohibition of withdrawal from the Gulf States. Moreover, insurers can assert that any statutory or regulatory scheme precludes them from allocating company's resources as they see fit and forces them to suffer net economic losses both in and outside of the Gulf, resulting in a taking of their "property" without just compensation in violation of the Fifth Amendment. The compulsory nature of any statutory or regulatory scheme that would hypothetically mandate all insurance companies currently doing business in the Gulf states to remain in those states' insurance markets, however, would likely not result in a regulatory taking, unless the insurer can show that it was denied all beneficial use of "property"; namely, the insurance contract. Any "compelled" insurance contract will likely still belong to the insurer. Insureds will likely still pay the insurer all required premiums. The insurer would likely still be able to cancel or non-renew any policies for non-hurricane related reasons and the insurer will likely still be able to apply for rate increases. Consequently, the insurer may initially have a difficult time establishing that it was denied all beneficial use of the insurance contract.

To establish that the insurer has been denied all beneficial use of the insurance contract, the insurer would need to provide evidence of the specific economic loss in the Gulf market as result of any moratorium. The insurer may need to provide evidence of its rate of return in the Gulf market since any moratorium was put into existence and whether that return is reasonable. The insurer could show that its applications for rate increases have been denied and that any potential for future rate increases would not alleviate the insurer's ongoing economic loss, especially if previous rate increases have been applied for and denied. The insurer could also argue that any hypothetical moratorium may end on a specific date, but that there is no assurance that the moratorium will not be extended beyond the scheduled expiration date and, therefore, the full extent of the economic impact on the insurer remains to be determined until the moratorium has indeed expired.

Interference with investment-backed expectations occurs when the earlier regulation does not provide companies with sufficient notice that they may be subject to the new or additional regulation.[291] When a statutory or regulatory scheme has been previously amended, however, then a business is on notice that the legislation may be amended in the future such that there will be additional financial obligations.[292] An insurer could argue that the hypothetical

individual landmarks pursuant to the regulation is a taking).

291 *See Connolly*, 475 U.S. at 226–28 (stating the same).

292 *See id.* at 227 (quoting FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve

moratorium statute interferes with its reasonable investment-backed expectations because whatever regulation the insurer may have anticipated based upon previous amendments in effect while they conducted business in the Gulf market, the insurer could not have anticipated that withdrawal from that market would be prohibited.

The proposed moratorium is not simply an additional regulation as a condition of doing business. The moratorium itself requires that the insurer continue doing business in the market. As such, different principles apply. In *Yee v. City of Escondido*,[293] for example, mobile home park owners filed a lawsuit against the municipality, alleging that a local rent control ordinance amounted to a taking under the Fifth Amendment and entitled them to compensation. The U.S. Supreme Court held that there was no taking because the ordinance did not compel landlords to rent their mobile homes; instead, landlords were free to evict their tenants.[294] The U.S. Supreme Court noted, however, that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."[295] Courts have also recognized that "[w]hile [a state's] police power may limit and restrict the uses to which an owner may put his property, it may not compel him to use such property for a particular purpose if he prefers to abandon such a use thereof."[296] Because a moratorium compels insurers to continue business in the market against their wishes, it interferes with their investment-backed expectations.[297]

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the legislative end.").

293 Yee v. City of Escondido, 503 U.S. 519 (1992).

294 *See id.* at 527–28 (holding the same).

295 *Id.* at 528; *see also* People *ex rel.* Lewis v. Safeco Ins. Co. of Am., 98 Misc.2d 856, 861, 414 N.Y.S.2d 823 (N.Y. Sup. Ct. 1978) ("[T]his law expressly requires that . . . insurance companies, like the defendants, renew automobile insurance policies and, accordingly, it warrants careful review.").

296 Dep't of Pub. Works v. City of San Diego, 10 P.2d 102, 105 (Cal. Ct. App. 1932).

297 *See* People *ex rel.* Lewis v. Safeco Ins. Co., 98 Misc.2d 856, 867 (N.Y. Sup. Ct. 1987) (finding that insurers could not be denied permission to give up writing all of their lines of insurance after sustaining continuing losses writing automobile insurance); Brooks-Scanlon Co. v. R.R. Comm'n of La., 251 U.S. 396, 399 (1920) ("A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage."). A state may constitutionally require, however, that a provider of a vital public service provide that service to a part of its market even though it is not profitable for the business. *See, e.g.*, Sheeran v. Nationwide Mut. Ins. Co., 404 A.2d 625, 629 (N.J. 1979) (sustaining the constitutionality of legislation that compelled automobile insurers to renew policies because the statute reflected "a clear legislative intent that companies which choose to write automobile policies in the state maintain their fair share of coverage"); Continental Air Lines, Inc. v. Dole, 784 F.2d 1245, 1251 (5th Cir. 1986) (finding that an airline may be compelled to operate one small route at a loss for a limited period of time); Md. Cas. Co. v. Comm'r of Ins., 363 N.E.2d 1087 (1977) (establishing that a state may constitutionally suspend an insurer's license to sell profitable lines of insurance until it has complied with mandatory renewal requirements applicable to its line of automobile insurance). The state cannot compel an insurer licensed in the state to enter a specialized field in which the insurer has no experience. *See* Hartford Acc. & Indemn. Co. v. Ingram, 226 S.E.2d 498, 507 (N.C. 1976) (finding a violation of the State and Federal constitutions for an act requiring a company to engage in another business as a condition to its right to continue to carry on an entirely different business which it wants to be, and is, engaged in). But the State can constitutionally enact legislation compelling insurers to provide

With regard to the nature of the government act and whether it supports a taking claim, the compulsory nature of the legislation alone does not result in a taking because all government regulation is compulsory by nature.[298] The nature of the state's interest is critical in determining whether a taking has occurred.[299] When the legislation serves important public interests, a taking is less likely to have occurred.[300] As previously discussed in Section III (A), the general regulation of insurance is within state police powers.[301] As such, the state may enact a moratorium for the specific purpose of preventing insurance redlining in the hurricane-affected areas. Preventing discrimination is undoubtedly an important public interest and mandated by the Fourteenth Amendment.[302] In addition, after Hurricane Katrina, several insurance companies may become insolvent and unable to pay claims under their policies. Other companies may seek to withdraw altogether from the Gulf States' insurance market. This withdrawal could have serious negative effects on Gulf States' real estate markets as well as their economies. Any moratorium similar to the moratorium imposed after Hurricane Andrew may be intended as a stabilizing force in the market, and may be considered within the state's police power.[303]

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related coverage for lines it already provides in the state. *See* Health Ins. Ass'n of Am. v. Harnett, 376 N.E.2d 1280, 1284–1285, (N.Y. 1978) (requiring health insurers to provide maternity coverage); New Hampshire-Vermont Health Serv. v. Whaland, 410 A.2d 642, 645–646 (N.H. 1979) (finding statute compelling Blue Cross to provide insurance for mental disorders does not violate Due Process or the Commerce Clause).

[298] *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986) ("[I]t cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").

[299] *See id.* (analyzing state interests).

[300] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (noting that when the government acts within the public's interest, the governmental action is less likely to be perceived as a taking).

[301] *See* 15 U.S.C. § 1012 ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."); Sheeran v. Nationwide Mutual Ins. Co., 404 A.2d 625, 636 (N.J. 1979) ("It is well established that the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare."); Cal. State Auto. Ins. Ass'n v. Maloney, 341 U.S. 105, 109–10 (1951) (noting that the legislature's broad discretion in adopting police power regulations to promote the public welfare "is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation.'"). One leading treatise has described the state's power as follows:

> A state has the unquestioned power to regulate insurance companies and the method of conducting that kind of business. The business of insurance is considered not to be merely a private right, but a matter of public concern—a franchise subject to regulation by the state for the public good. And in such regulation, the legislatures are considered to have large powers and wide discretion.

19 APPLEMAN, INSURANCE LAW & PRACTICE § 10321 at 1-3 (1982).

[302] *See supra* text accompanying notes 233–238.

[303] *See* Vesta Fire Ins. Corp. v. State of Florida, 141 F.3d 1427, 1433 (11th Cir. 1998) (noting that the moratorium imposed after Hurricane Katrina was within the state's police power).

Thus, whether an insurer can pursue a viable taking claim may depend on the specific statutory scheme imposing the moratorium, the nature and length of the moratorium, and the economic impact the moratorium has on the insurer.

B. The Contract Clause

The Contract Clause of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."[304] By its terms, the Contract Clause does not apply to the federal government.[305] The Contract Clause limits a state's power to modify its own contracts as well as to regulate contracts between private parties.[306] Not every modification of a contractual promise impairs an obligation of contract such that there is a violation of the Contract Clause.[307] For example, the Contract Clause does not prohibit the states from repealing or amending statutes generally, or from enacting legislation with retroactive effect.[308] Nor does a state statute unconstitutionally impair the obligations of a contract when the contract is formed after its enactment.[309]

"Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'"[310] In evaluating a Contract Clause claim, courts will consider the following three factors: (1) whether the law substantially impairs a contractual relationship; (2) whether there is a significant and legitimate public purpose for the law; and (3) whether the adjustments of rights and responsibilities of the contracting parties are based upon reasonable conditions and are of an appropriate nature.[311]

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304 U.S. CONST. art. 1, § 10.

305 *See* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 n.9 (1984) (citing 5 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 546 (2d ed. 1876) and 2 M. FERRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 619 (1911) ("It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government.").

306 *See* U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 (1977) (citing Fletcher v. Peck, 6 Cranch 87, 137–39, 3 L.Ed. 162 (1810) and Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629 (1819)) ("It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties.").

307 *See* City of El Paso v. Simmons, 379 U.S. 497, 507–08 (1965) ("For it is not every modification of a contractual promise that impairs the obligation of contract under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause.").

308 *See id.* (stating the same).

309 *See* Chicago, Burlington & Quincy R.R. Co v. Cram, 228 U.S. 70, 85 (1913) (finding that a state statute did not unconstitutionally impair the obligation of contracts made after its enactment).

310 Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983); *see also* Veix v. Sixth Ward Building & Loan Ass'n of Newark, 310 U.S. 32, 38–39 (1940) (noting that all contracts are made subject to the paramount authority of the state to regulate health, morals and safety as well as the economic needs of society).

311 *See Energy Reserves Group*, 459 U.S. at 410–13 (discussing the factors to be applied in a Contract Clause analysis).

"Total destruction of contractual expectations is not necessary for a finding of substantial impairment."[312] Even though state regulation may restrict a party to gains it reasonably expected from the contract, that does not necessarily constitute a substantial impairment.[313] In determining the extent of the impairment, a court will consider whether the government has previously regulated the industry of the party asserting the Contract Clause claim.[314]

In asserting a Contract Clause claim, an insurer must make a sufficient showing that any moratorium legislation substantially impaired its insurance contracts between the carrier and its insureds. An insurance policy provides coverage for a specified risk for a specified policy period, typically one year. At the end of the policy period, the insurer reevaluates the risk and decides whether to remain subject to the risk or to cancel the policy altogether. Under any moratorium legislation, the legislation would likely force an insurer to continue the contractual relationships that it could otherwise terminate pursuant to the contract terms. The forced continuation of a contract that normally would expire constitutes a substantial impairment of the insurer's contractual rights.

If the insurer can establish a substantial impairment to its contracts, the state must have a significant and legitimate public purpose behind the moratorium legislation. As previously discussed, the state may be able to demonstrate a legitimate public purpose—precluding insurance redlining and the protection and stabilization of the state's economy, particularly the housing market.[315] Furthermore, the courts do not require that the public purpose address an emergency or temporary situation.[316]

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[312] *Id.* at 411; *see also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978) ("The severity of the impairment measures the height of the hurdle the state legislation must clear."); Campanelli v. Allstate Life Ins. Co., 322 F.3d 1086, 1098 (9th Cir. 2003) ("The more severe the impairment, the more searching the examination of the legislation must be.").

[313] *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 31 (1977) (citing City of El Paso v. Simmons, 379 U.S. 497, 515 (1965)) (stating that a state may "restrict a party to those gains reasonably to be expected from the contract").

[314] *See* Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."); Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.").

[315] *See, e.g.*, *Spannaus*, 438 U.S. at 249–51 (finding Minnesota's Private Pension Benefits Protection Act, which subjected an employer to a "pension funding charge" if the employer terminated the pension plan or closed a Minnesota office, violated the Contract Clause because it had a narrow focus as opposed to being directed at a broad, generalized economic or social problem); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 444–46 (1934) (determining that the Minnesota Mortgage Moratorium Law which temporarily postponed foreclosure sales and extended the periods of redemption after an emergency was declared did not violate the Contract Clause because the State had the legitimate purpose of protecting the welfare of its residents affected by the housing shortage).

[316] *See Energy Reserves Group*, 459 U.S. at 412 (noting that while the state must offer a significant and legitimate purpose for the regulation, courts have recognized justifications that address broader social problems and not merely emergency situations).

Because a court would likely determine that the enactment of moratorium legislation constitutes a legitimate purpose, it would then need to determine whether the state's modification of the contract's rights and responsibilities are based upon reasonable conditions, and are appropriate.[317] "Unless the State itself is a contracting party . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[318] Because, in general, the state is not a party to the insurance contract, a court would likely defer to the legislature's judgment and conclude that a moratorium does not constitute an unconstitutional impairment in violation of the Contract Clause.[319]

C. The Due Process Clause

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[320] The Due Process Clause not only guarantees fair process, but also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[321] The right to enter into contracts is a liberty interest guaranteed by the Constitution.[322] Property rights and contract rights are normally matters of private concern, and in general, should be free from governmental interference.[323] However, "neither property rights nor contract rights are absolute."[324] The constitutional guarantee of liberty does not require that the state withdraw from legislative supervision over contracts, or preclude the government from enacting restrictive safeguards, reasonable regulations and prohibitions imposed in the interests of the community.[325] Instead, the guarantee of the constitutionally protected liberty interest implies the absence of arbitrary restraint.[326]

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317 *See id.* at 412–13 (discussing modification of contracts by states).

318 *Id.*

319 *See, e.g.*, Vesta Fire Ins. Corp. v. Florida, 141 F.3d 1427, 1434 (11th Cir. 1998) (giving deference to Florida's enactment of the Moratorium Phaseout Statute).

320 U.S. CONST. amend. XIV, § 1.

321 Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Washington v. Glucksburg 521 U.S. 702, 719 (1997)); *see also,* Daniels v. Williams 474 U.S. 372, 331 (1986) (noting that the substantive component of the Due Process Clause protects individuals from "certain government actions regardless of the fairness of the procedures used to implement them").

322 *See* Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 566–67 (1911) (observing that a line of cases have held that the Constitution protects a right to contract; specifically finding the right embraced in the conception of liberty).

323 *See* Nebbia v. New York, 291 U.S. 502, 523 (1934) (acknowledging that neither the right to contract nor property rights are absolute despite their general private nature).

324 *Id*; *see also* Frisbie v. United States, 157 U.S. 165, 166 (1895) ("It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts.").

325 *See McGuire*, 219 U.S. at 567 (discussing states' constitutional obligations towards contracts).

326 *Id.* (discussing states' constitutional obligations towards contracts); *see also* Liberty Warehouse Co.

The Due Process Clause is no longer used by courts to strike down state laws regulating business "because they may be unwise, improvident, or out of harmony with a particular school of thought."[327] Legislation affecting economic interests is presumed constitutional and the burden is on the complaining party to establish that the legislature acted in an arbitrary and irrational way.[328] The constitutionality of state regulation of the insurance business has been upheld under the Due Process Clause.[329] To prove a due process violation, an insurer must establish that the applicable moratorium legislation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[330] This rational-basis review is highly-deferential.[331] In order for legislation that does not implicate a fundamental right to violate the requirements of substantive due process, it must be "utterly lacking in rational justification."[332] Rational-basis review permits a court to consider any conceivable justifications for enacting the legislation.[333] As previously discussed, a state will likely have enacted moratorium legislation to preclude insurance redlining or to prevent economic disaster in its real estate market, so it cannot be said that the moratorium legislation lacks any rational justification. Consequently, an insurer is unlikely to succeed when asserting a due process claim.[334]

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v. Burley Tobacco Growers' Co-op. Mktg. Ass'n, 276 U.S. 71, 97 (1928) ("The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint-not immunity from reasonable regulation to safeguard the public interest."); Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963) ("It is well settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'").

327 Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

328 *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (discussing the burden of proof in a Due Process claim when constitutionality is presumed).

329 *See* California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 110–11 (1951) (determining that the diminution in value of the insurer's business because it was less prosperous as result of governmental regulation was not a taking of property without due process of law); *id.* at 110 n.2 (citing numerous cases in which the Court has upheld insurance regulations against Due Process challenges).

330 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). In contrast, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993).

331 *See* Turner v. Glickman, 207 F.3d 419, 426 (7th Cir. 2000) (noting the high degree of deference given in a rational-review test).

332 Brown v. Mich. City, 462 F.3d 720, 733 (7th Cir. 2006) (citing *Turner*, 207 F.3d 419, 426).

333 *See* Gallo v. U.S. Dist. Court for Dist. of Ariz., 349 F.3d 1169, 1181 n.6 (9th Cir. 2003) ("[I]t is well-established that rational basis scrutiny permits the court to consider any *conceivable* justifications for enacting the law.").

334 *See* Vesta Fire Ins. Corp. v. State of Florida, 141 F.3d 1427, 1430 n.5 (11th Cir. 1998) (deciding that the State of Florida did not lack a rational basis for passing moratorium legislation after Hurricane Katrina and summarily dismissing insurer's Substantive Due Process claim with little discussion). *But see* People *ex rel.* Lewis v. Safeco Ins. Co. of Am., 98 Misc.2d 856, 866 (N.Y. Sup. Ct. 1978) (finding that the statutory provision as applied to defendant insurers conscripted and compelled them to continue doing business at a loss in the state in violation of their due process rights under the Fourteenth Amendment); CJS CONST. LAW. § 2023 ("[A]n insurance company which elects to terminate doing business in a state may be required to do . . . without

V. Conclusion

In its traditional definition, "[insurance] 'redlining' is the 'outright refusal of an insurance company . . . to provide services solely on the basis of a property's geographical location.'"[335] Because of the denied access to a voluntary market, many individuals in the inner city were treated as second-class consumers who paid more for less insurance coverage than their suburban counterparts.[336]

Some commentators believe that "[t]he unavailability of insurance coverage stemming from redlining has contributed to the deterioration of American urban centers and has effectively frustrated attempts at urban revitalization."[337] Although the deterioration of the inner city is a complex process, no one disagrees with the idea that insurance redlining contributes to and accelerates the deterioration process.[338] The effect of redlining is the cessation of investment in the redlined area. With no investment, the growth, repair, or sale of housing is halted because attempts to improve the community are precluded by a lack of funding. This is disinvestment.[339] Thus, the denial of property insurance effectively precludes maintenance and improvement of property. Redlining of the neighborhood guarantees that economic decline will follow. The net effect of redlining and disinvestment is to spread ghettos.[340] In that regard, redlining has been characterized as a "self-fulfilling prophecy."[341] "[T]he right to open housing means more than the right to move from an old ghetto to a new ghetto. Rather, the goal of our national housing policy is to 'replace the ghettos' with 'truly integrated and balanced living patterns' for

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unnecessary disruption, it may not be required, under the due process clause of the Fourteenth Amendment, to continue to do business in a state indefinitely.").

335 Badain, *supra* note 5, at 4.

336 *See* Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F.Supp. 1106, 1111 (1979) (discussing a similar argument made by the Department of Housing of Urban Development in 1978).

337 Comment, *Application of Title VIII to Insurance Redlining*, 75 NW. U. L. REV. 472, 472 (1980). *See also* David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenge of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 494 (2000) (arguing that limited access to affordable insurance is a barrier to economic growth); David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 16 (2000) (noting that lack of access to insurance both creates and perpetuates ghetto neighborhoods); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 352 (1999) (arguing that insurance redlining contributes to the marginalization of inner-cities).

338 *See* Badain, *supra* note 5, at 5 (discussing the roots of the redlining problem).

339 *See* Marianne M. Jennings, *Preemption and State Anti-Redlining Regulations: The Need for Clarification*, 11 FORDHAM URB. L.J. 225, 227–28 n.6 (1980) (explaining the distinction between redlining and disinvestment).

340 *See* Badain, *supra* note 5, at 34–37 (advocating solutions to counter the effects of insurance redlining). The commentator lays the blame for the decline of neighborhoods in part at the feet of insurance companies. *Id.* at 36.

341 *See, e.g.*, *id.* at 6 (discussing the Hughes Panel's findings).

persons of all races.'"[342] "Insurance redlining" should not be utilized to prohibit or undermine that goal and, therefore, should be proscribed by the FHA.[343]

Insurance companies deny using racially discriminatory factors in the underwriting process and maintain that they use only objective, reliable criteria as part of the underwriting process.[344] Risk discrimination is not race discrimination. By its nature, the insurance underwriting process seeks to accept "good" risks while excluding or limiting "bad" risks. At its core, insurance underwriting tends to be "unfair" in that basic underwriting considerations reflect generalizations rather than true statistical evidence of risk. Underwriting guidelines assist the insurance company in maximizing profits and protecting policyholders against insolvency. There is nothing inherently suspect about this process.

Efforts by the insurance industry to legitimately differentiate among risks, however, may produce classifications that effectively discriminate on the basis of race or some other protected class status.[345] One commentator claims that race is the true factor that insurance companies use to set rates and terms or to deny insurance all together.[346]

Absent discovery of a "smoking gun" that reveals an illegitimate corporate decision-making process to exclude minorities from insurance risk pools, redlining can exist as a chameleon throughout an otherwise seemingly legitimate underwriting process. The current state systems of regulations that prohibit insurance redlining are based upon the presumption that an insurance

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342 Barrick Realty v. City of Gary, 491 F.2d 161, 164 (7th Cir. 1974) (quoting Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972)).

343 *See* William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735, 740 (1998) (discussing enacting a federal law that specifically defines and prohibits insurance redlining as a solution).

344 *See* Ruthann DeWolfe, Gregory Squires & Alan DeWolfe, *Civil Rights Implications of Insurance Redlining*, 29 DEPAUL L. REV. 315, 316–17 (1980) (asserting insurance companies' claims in defense of redlining). *But see* William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735, 737 (1998) (discussing how insurance carrier utilizes underwriting practices to redline).

345 *See, e.g.*, United Farm Bureau Ins. Co. v. Metro. Human Relations Comm'n, 859 F.Supp. 323, 329 (N.D. Ind. 1993) (holding that the Indiana Civil Rights agency had subject matter jurisdiction to investigate complaints that homeowners' insurer had engaged in prohibited racial discrimination through redlining). A plaintiff can make out a prima facie case of discrimination under the FHA either on a theory of disparate impact or disparate treatment. *See* Fair Housing in Huntington Comm. Inc. v. Town of Huntington, 316 F.3d 357, 366 (2d Cir. 2003); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Scotch Plains, 284 F.3d 442, 466 (3d Cir. 2002); Macone v. Town of Wakefield, 277 F.3d 1, 5 (1st Cir. 2002); Gamble v. City of Escondido, 104 F.3d 300, 304–05 (9th Cir. 1997). A facially neutral practice may violate civil rights laws if it has a "significantly discriminatory" impact upon minorities or perpetuates discrimination. *Cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645–46 (1989) (analyzing disparate impact claim under Title VII); Paige v. California, 291 F.3d 1141, 1145 (9th Cir. 2002) (same); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir. 1983) (same).

346 *See* Robert Yaspan, Note, *Property Insurance in the American Ghetto: A Study in Social Irresponsibility*, 44 S. CAL. L. REV. 218, 233, 236 (1971) (summarizing the insurance industry's effective segregation of ghetto areas).

company's underwriting risk profiling is legitimate, absent specific evidence to the contrary. This presumption devalues state governmental concern and has sustained a disjointed patchwork of inconsistent state regulation that haphazardly proscribes insurance redlining with little practical efficacy.

To state regulators, there is a disconnect between the theoretical social phenomenom of insurance redlining and the real world practice of modern insurance underwriting. Debate over insurance redlining is little more than an echo in the halls of academia. Recently, however, the catastrophic aftermath of Hurricane Katrina, which devastated minority-dominated geographic areas in three states, has given rise to real-life concerns over de facto redlining because of the potential for massive cancellations or non-renewals of homeowner insurance policies within the affected states. Attempts to regulate this type of de facto redlining are idiosyncratic and, in the past, have taken the form of insurance moratoriums to stabilize the insurance marketplace. This is only a partial solution. Uniformity in regulating insurance redlining can be achieved by expanding the scope of the FHA.

Holding insurance companies captive to a state insurance marketplace can have significant national impact. When catastrophic losses occur from natural disasters and the natural disaster is potentially recurring, insurance companies that are required to stay on the "bad" risk may face insolvency.[347] The insolvency and ultimate bankruptcy of multi-state insurance companies creates substantial disruption in the insurance marketplaces of other states. Typically, state legislatures have put in place guaranty funds to protect against insolvency of insurance companies.[348] The legislative objective of these acts is to make the guaranty fund liable to the same extent that an insolvent insurer would be liable under the policy.[349] State government funds typically limit fund exposure, however, to less than the coverage limits of the policy.[350]

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[347] *See infra* notes 244–250 and accompanying text; *see also* Albert D. Crenshaw, *Insurance Firms Curbing Coverage for Homeowners—Coastal Areas Most Affected by Retrenchment*, WASH. POST, May 8, 1993, at E1 (reporting that several insurance companies escaped permanent insolvency because of large capital infusions from their parent corporations).

[348] *See generally* LA. REV. STAT. § 22:1376 (2007).

[349] *See* State-Wide Ins. Co. v. Curry, 372 N.E.2d 31, 31 (N.Y. 1977) ("While the Resources Insurance Company became insolvent after the accident, the insurance policy itself survived, and the obligations owed its insured were assumed by the Security Fund for the full amount of the policy. . . ."); Oregon Ins. Guar. Ass'n v. Hall, 113 P.3d 452, 455 (Or. Ct. App. 2005) (holding that the guaranty fund steps into the shoes of an insolvent insurer only if the claim is a "covered claim"); Gallagher v. Sidhu, 109 P.3d 840, 842 (Wash. Ct. App. 2005) ("The objective [of the guaranty fund] is to place both the claimant and the insured in the same position that they would have been in had the insurer been solvent.").

[350] *See* Goodyear Tire & Rubber Co. v. Dynamic Air, Inc., 702 N.W.2d 237, 243 (Minn. 2005) (noting that Minnesota's guaranty fund does not provide the same level of protection to insureds that the policy issued by the insolvent insurer); Carrozza v. Greenbaum, 866 A.2d 369, 375 n.6 (Pa. Super. 2004) (noting that Pennsylvania's guaranty fund "becomes a 'guarantor' with a limit of liability of $300,000 per claimant for covered claims"). West Virginia Ins. Guar. Ass'n v. Potts, 550 S.E.2d 660, 666 (W. Va. 2001) (noting that

If a regional or national insurance company becomes insolvent because of another catastrophic hurricane, then all policyholders are affected in all states where the company has been admitted to do or has written business. For example, suppose an insurance company issues policies in two states that have separate and distinct geographic profiles, such as Arizona and Florida. Arizona may not be subject to the catastrophic events of hurricanes, yet its residents will be impacted directly by a hurricane or other catastrophic event in Florida when, by legislative fiat, a moratorium is enacted by the Florida legislature that causes the insolvency of the insurance company. Florida's residents would seek protection from the insolvency by looking for payment from Florida's guaranty fund.[351] Meanwhile, Arizona's residents would lose the security for which they bargained in purchasing their policies should they experience a covered loss because the insurance company is now insolvent. The only recourse Arizona residents would have is Arizona's guaranty fund.[352]

When a catastrophic loss like Hurricane Katrina or Hurricane Andrew occurs, the affected state has a vested interest in protecting its citizens' property, usually without regard to how its legislation impacts citizens of other states. This vested interest in one state must be balanced against the interests of policyholders in other states when a regional or national insurance company is involved. The only effective way to balance all of these interests is to "federalize" these types of catastrophic losses so that the interests of all affected states can be balanced and protected.

In response to the riots in the 1960s, Congress enacted UPPRA.[353] The federal government can react similarly to the catastrophic events of recent hurricanes by enacting legislation that would ensure the availability of insurance in areas prone to natural disasters. The most effective way to manage that

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claim presented to guaranty fund is "subject to the statutory per claim limit of $300,000 up to the maximum liability of the insurance policy issued by the insolvent insurer").

351 *See Gallagher*, 109 P.3d at 842 (noting that the objective of a guaranty fund is to place both the claimant and the insured in the same position that they would have been in had the insurer been solvent).

352 Arizona's guaranty fund presents as a typical guaranty fund. Generally, six requirements must be met before the guaranty fund is obligated to participate in a claim: (1) the claimant or insured must be residents of the State at the time of the loss or the property involved must be permanently located in the Sate; (2) the carrier must be authorized to transact business in the State either when the policy was issued or the loss occurred; (3) the carrier must be adjudged insolvent by a court of competent jurisdiction; (4) the claim amount must be in excess of a particular minimum, e.g., $100; (5) the loss must be covered by the insolvent carrier's policy; and (6) the claim must arise within a statutorily proscribed period. *See, e.g.*, ARIZ. REV. STAT. § 20-661(3) & (5) (2001), ARIZ. REV. STAT. § 20-667(A)(1)–(3) (2001), and ARIZ. REV. STAT. § 20-667(B). The maximum amount of compensation from the fund is capped, typically at $299,999.99 per "covered claim," but not to exceed the face amount of the policy from which the claim arises. ARIZ. REV. STAT. § 20-667(B). If any other insurance policy is applicable to the claim, the insolvent carrier's policy (and, hence, the guaranty fund) is considered by statute to be "excess" coverage. ARIZ. REV. STAT. § 20-673(C) (2001).

353 *See, e.g.*, Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F.Supp. 1106, 1111 (S.D. Ohio 1979).

situation and to protect against de facto redlining would be to expand the scope of the FHA to include the regulation of insurance redlining.

Utilization of the FHA not only helps to bring uniformity to the regulatory landscape but also would assist with the unusual situation that has occurred in the Gulf States where large losses may lead to the enactment of moratoriums that threaten the insolvency of insurance carriers. Only federal legislation can take into consideration multi-state boundaries and protect all policyholders in all states. This would require amendment of the McCarran-Ferguson Act to permit federal intervention,[354] as well as a comprehensive amendment to the FHA regarding the prohibition of insurance redlining.[355]

As Richard Bach observed, a disaster can become a blessing, and a blessing can become a disaster.[356] The recent disasters have brought to the forefront the potential issues of insurance redlining. The authors have presented a cogent discussion of the historical events and statutory enactments prohibiting discrimination in order to draw out a debate on the issue of insurance redlining. While the issue of de facto insurance redlining is now prominent in the aftermath of Hurricane Katrina, typically it is a chameleon within the legitimate context of insurance underwriting and difficult to discern. To that extent, the disasters have become a blessing by bringing to the public debate the concerns of de facto redlining.

The blessing can become a disaster, however, if moratoriums are used as the sole mechanism to preclude the wholesale withdrawal of carriers from state residential property and casualty markets as a means to rectify the situation. Although arguably an imperfect enforcement mechanism, federalizing prohibit-tions against insurance redlining would bring consistency throughout the states regarding insurance underwriting practices that could violate the FHA. Further-more, any FHA amendments should include provisions that would prohibit individual insurance carriers from engaging in underwriting that would prevent minorities located in geographical areas prone to natural disasters from obtaining insurance, which would, in turn, preclude them from obtaining the American dream of owning a home. Finally, the amendment should include provisions that would regulate or preclude states from enacting moratorium legislation that would place policyholders in other states at risk by increasing the potential for

354 *See* 15 U.S.C. § 1011 (1997). The operative portion of the McCarran-Ferguson Act provides: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance. . . ." 15 U.S.C. § 1012(b) (1997).

355 Clarification to the FHA with regard to whether it permits or prohibits insurance redlining would be necessary. Presently, there exists a split of authority on the question of whether the FHA prohibits insurance redlining. *See, e.g., United Farm Bureau Mut. Ins.Co.*, 24 F.3d at 1015 (holding insurance redlining is prohibiting by FHA). *But see*, Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423–24 (4th Cir. 1984) (stating that the FHA does not proscribe insurance redlining).

356 RICHARD BACH, ONE 121 (Dell Publishing 1989) (1989).

insurance company insolvencies which, in turn, could potentially preclude others from obtaining the American dream as well.