Winter 1998


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WHY AN INSURANCE REGULATION TO PROHIBIT REDLINING?

GREGORY D. SQUIRES*

In January 1994 President Clinton issued an executive order mandating that the U.S. Department of Housing and Urban Development (HUD) promulgate a regulation clarifying the application of the Federal Fair Housing Act to the property insurance industry.¹ However, in the summer of 1995, the Assistant Secretary for Fair Housing and Equal Opportunity at HUD announced the Department would temporarily suspend its rulemaking activity. This temporary hiatus persists, to the detriment of consumers, insurers, state regulators and others seeking solutions to insurance redlining problems.²

Consumers in the property insurance market continue to be subject to unfair discrimination. At the same time, many insurers are attempting to respond to urban insurance availability and discrimination problems. In some cases, these insurers have been targets of lawsuits and administrative complaints resulting in costly and time-consuming litigation for all parties involved.³

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2. Redlining is the practice of unfair discrimination by the property insurance industry against a particular geographic locale. ROBERT W. KLEIN, AVAILABILITY AND AFFORDABILITY PROBLEMS IN URBAN HOMEOWNERS INSURANCE MARKETS, 43 (Gregory D. Squires ed., 1997) [hereinafter AVAILABILITY AND AFFORDABILITY]. Insurance coverage is either denied or underwriting and marketing practices are varied so as to effectively deny insurance coverage to potential customers within that locale for reasons unrelated to risk. Id.

State regulators have also taken a variety of actions, often in conjunction with insurers and consumer groups, towards addressing those problems.  

However, ambiguity persists as to precisely what the Fair Housing Act prohibits, permits and requires. A regulation would eliminate much of that ambiguity, reduce the costs of legal activity, and protect the rights of consumers while recognizing the central role of the states in regulating the insurance industry and its legitimate business concerns. Almost thirty years of contentious debate accompanied by expensive litigation and complaint investigation provide perhaps the most compelling case for promulgating a regulation that clarifies the application of the Fair Housing Act to the property insurance industry. HUD, as the nation's primary Fair Housing Act law enforcement authority, is well situated to, and indeed obligated to, ameliorate prevailing ambiguity and conflict by issuing such a regulation. 

Recent settlements of fair housing complaints filed with HUD and the U.S. Department of Justice against American Family, State Farm, Allstate, and Nationwide indicate that the Fair Housing Act can be an effective tool for addressing several urban insurance related issues. These companies have taken innovative and aggressive steps to ameliorate unlawful discrimination and to nurture reinvestment in older urban neighborhoods, even while persisting in rejecting HUD's interpretation of the basic jurisdictional issue.

In addition, several other insurers and trade associations (describing various administrative complaints and lawsuits targeted against insurers).

4. See e.g., AVAILABILITY AND AFFORDABILITY, supra note 2, at 76 (providing examples of measures state insurance departments have taken to address the redlining problem); GEORGE KNIGHT, WHAT'S WORKING: INSURANCE AS A LINK TO NEIGHBORHOOD REVITALIZATION, 227, (Gregory D. Squires ed., Press 1997) (describing programs sponsored by state regulators designed to educate consumers about property insurance and similar programs to educate insurers as to business opportunities in previously neglected areas).

5. HUD is statutorily charged and provided with the responsibility and authority to administer the Fair Housing Act. 42 U.S.C. § 3608 (1994).

6. See, e.g., Sam Friedman, HUD Will Stay in Your Face on Redlining, NAT'L UNDERWRITER, Apr. 24, 1995, at 23 (describing a consent decree, entered into by American Family Mutual Insurance and investigations by HUD and the Department of Justice, as setting a new standard for the conduct of the insurance industry); Treaster, supra note 3, at D1 (describing vast changes in the national insurance sales practice of State Farm as a result of a discrimination complaint filed by the National Fair Housing Alliance).

7. See, e.g., Friedman, supra note 6, at 23 (examining plans by State Farm to offer up to $2.2 billion in insurance coverage to inner-city residents of Compton and Los Angeles); Treaster, supra note 3, at D1 (discussing similar expansion efforts by State Farm in the Harlem neighborhood of New York City).
have taken voluntary initiatives, often in partnership with community groups and state insurance commissioners, to address these same problems.\textsuperscript{8} The National Association of Insurance Commissioners (NAIC) has produced several research reports and guidebooks focusing on the nature of, and solutions to, discrimination and urban insurance availability problems. Many individual state commissioners have conducted their own studies,\textsuperscript{9} offered consumer education seminars,\textsuperscript{10} and developed regulatory initiatives in response to charges of redlining and discrimination.\textsuperscript{11}

The media has also helped considerably in keeping these issues in the public eye. New studies, court decisions, state regulatory initiatives, and voluntary reinvestment programs by insurers are regularly featured in national newspapers and industry trade publications. Almost each issue of the National Underwriter in recent years has contained such stories\textsuperscript{12} and they frequently appear in national and local newspapers including the New York Times,\textsuperscript{13} Chicago Tribune,\textsuperscript{14} Atlanta Journal-Constitution,\textsuperscript{15} and Milwaukee Journal-Sentinel.\textsuperscript{16}

\textsuperscript{8} See, e.g., Treaster, supra note 3, at D1 (providing examples of cooperation between the Association of Community Organizations for Reform Now (ACORN) and Prudential and Travelers/Aetna to provide homeowners insurance in previously neglected areas of Philadelphia and Baltimore).

\textsuperscript{9} See, e.g., AVAILABILITY AND AFFORDABILITY, supra note 2, at 76 (reporting on efforts by state insurance regulators to conduct informational studies on property insurance and to make this research available to interested parties so as to better educate insurers as to business opportunities).

\textsuperscript{10} See, e.g., id. (examining a program by the Illinois Department of Insurance designed to educate homeowners as to how to buy property insurance).

\textsuperscript{11} See, e.g., KNIGHT, supra note 4, at 227 (showing how Illinois has enacted an antidiscrimination statute, among other regulations, with the purpose of increasing fairness and availability of homeowner insurance).

\textsuperscript{12} See, e.g., Friedman, supra note 6, at 23 (discussing recent settlements and reinvestment programs); L. H. Otis, Lacking Insurer Cooperation HUD Ends Rulemaking Effort, NAT'L UNDERWRITER, Aug. 28, 1995, at 1, 34 (discussing the suspension of rulemaking efforts).

\textsuperscript{13} See, e.g., Treaster, supra note 3, at D1 (outlining one such voluntary reinvestment program).

\textsuperscript{14} See, e.g., H. Jane Lehman, Insurance Ruling to Open Floodgates, CHI. TRIB., Nov. 15, 1992, (Real Estate), at 2B (reporting the ruling from one such case); Flynn McRoberts, Minorities Say Property Insurance Bias Persists, CHI. TRIB., Aug. 19, 1994, (Chicagoland), at 3 (reporting on a federal hearing concerning property insurance held in Chicago).

\textsuperscript{15} See, e.g., Shelley Emling, HUD Hears From Black Residents, Insurers, ATL. J.-CONST., Oct. 19, 1994, at C1 (reporting a similar federal hearing held in Atlanta to address that city's housing insurance problems).

\textsuperscript{16} See, e.g., Eugene Kane, Insurers Need to Adjust Attitudes as Well as Practices, MIL. J.-SENTINEL, Sept. 14, 1997, at 3 (discussing a number of housing insurance complaints from the Milwaukee area); Jack Norman, Advocates Accuse Insurers of Bias; Prudential, Liberty, Travelers Deny Allegations, MIL. J.-SENTINEL, Sept. 12, 1997, at 3 (describing complaints of local fair housing advocates).
Nevertheless, ambiguity still persists in terms of what the law in general, and the Fair Housing Act in particular, require. In recent years Congress has not been particularly open to civil rights regulatory initiatives. The first Democratic President to be re-elected since Franklin D. Roosevelt declared “the era of big government is over.” Renewed discussions of “reinventing government” generally focus on reduced rather than increased regulatory initiatives. Therefore, an insurance regulation would appear to be counter to these trends. However, redlining and unfair discrimination by the property insurance industry persist and public debate over what to do about such behavior continues.

Motives for responding to charges of redlining and discrimination are mixed, no doubt. For many insurers, the objectives include reduction of litigation, exploitation of previously untapped but profitable markets, along with a desire to contribute to the revitalization of distressed neighborhoods and perhaps many others. Insurance commissioners are striving to forestall federal enforcement activity, manage discontent among consumers in selected communities, and solve problems they perceive in their states. Despite the broader political climate and regardless of the motives (and perhaps because of the diversity of motives) the time is ripe for a clarifying regulation.

There is no single quick fix for the complex problems connected to insurance redlining and discrimination debates. Organizing by community groups, innovative responses to market realities by insurers, effective regulation by state insurance commissioners and other steps are all essential. But one critical piece of the puzzle is a federal regulation that clarifies the application of the Federal Fair Housing Act.

For several reasons, HUD should proceed with rulemaking in the area of property insurance. First, HUD has an obligation to issue regulations clarifying those statutes it is mandated to enforce, including the Fair Housing Act. Second, unfair discrimina-

18. See Stephen Barr, Gore Shares Tales of Better Bureaucracy; Next Chapter of ‘Reinventing Government’ May Be Harder to Write, WASH. POST, Apr. 8, 1997, at A13 (reporting that President Clinton’s promise to reinvent government was not designed to increase regulatory measures, but rather to cut regulations and reduce the size of government by streamlining and overhauling the federal bureaucracy).
19. See Friedman, supra note 6, at 23 (quoting one State Farm executive as proclaiming that company’s objectives as avoiding costly litigation and bad public relations while increasing new business opportunities).
20. See id. (noting that state insurance regulators are aiming to avoid having federal interference in the regulation of property insurance, party because these regulators do not want to be seen as “ineffective or insensitive to their own constituencies”).
ion remains a reality in the property insurance market. Third, important guidance can be provided to insurers, consumers, regulators, and others by a rule that clarifies the provisions of the Act as it applies to insurance. Finally, there is momentum to find solutions to problems of redlining and discrimination and such a rule can contribute to those efforts. The time for HUD to act is now.

I. HUD'S TITLE VIII ENFORCEMENT OBBLIGATIONS

The Federal Fair Housing Act prohibits discrimination in the provision of property insurance, contrary to the assertions of many within the industry that the McCarran-Ferguson Act exempts this industry from the statute. The statute itself, current regulations, case law, and the principal federal fair housing law enforcement officials, such as HUD and the U.S. Department of Justice, have consistently so indicated. HUD is the only entity with authority to promulgate regulations under the Fair Housing Act and President Clinton's 1994 Executive Order explicitly calling for HUD to issue a regulation clarifying the application of the Act to the property insurance industry. HUD has an obligation to promulgate a clarifying regulation and proceed without further

22. Both Nationwide Mutual Insurance Company and American Family Mutual Insurance have recently asserted, unsuccessfully, that § 1012(b) of the McCarran-Ferguson Act exempts the insurance industry from the Fair Housing Act. Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1360-63 (6th Cir. 1995); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 296 (7th Cir. 1992). Section 1012(b) provides 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." 15 U.S.C. § 1012(b).
23. See Nationwide Mut. Ins. Co., 52 F.3d at 1360 (interpreting the Fair Housing Act as applying to the insurance industry); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209, 1214 (E.D. Pa. 1994) (holding the same); American Family Mut. Ins. Co., 978 F.2d at 301 (reaffirming that the Fair Housing Act applies to the property insurance industry); Hearing on Homeowners Insurance Discrimination Before the Senate Committee on Banking, Housing and Urban Affairs, 103rd Cong. 1 (1994) (statement of Roberta Achtenberg, Assistant Secretary, Department of Housing and Urban Development) [hereinafter Achtenberg Statement] (reaffirming HUD's belief that the Fair Housing Act does indeed apply to the insurance industry); Hearing on Homeowners Insurance Discrimination Before the Senate Committee on Banking, Housing and Urban Affairs, 103rd Cong. 2-3 (1994) (statement of Deval Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice) [hereinafter Patrick Statement] (reaffirming the same belief by the Department of Justice).
25. Section 3608 of the Fair Housing Act provides that HUD shall have the authority and responsibility for administering the Act. 42 U.S.C. § 3608. President Clinton’s January 1994 Executive Order directed the Department to apply these regulations specifically to the property insurance industry. Exec. Order No. 12,892, 59 Fed. Reg. 2939.
delay.

It is unlawful under the Fair Housing Act to “otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” It is also unlawful to “discriminate . . . in the provision of services or facilities in connection therewith . . . .” Regulations implementing the Fair Housing Amendments Act of 1988 prohibit, “[r]efusing to provide . . . property . . . insurance . . . or providing such . . . insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.” Courts have consistently cited these sections of the statute and concluded that McCarran-Ferguson does not bar application of the Fair Housing Act to insurance.

As the courts and other law enforcement officials have observed, refusing to make insurance available makes mortgage financing, and therefore housing, unavailable for the majority of homeseekers. Denying insurance, in other words, constitutes acts which “otherwise make unavailable or deny, a dwelling” and discriminate “in the provision of services or facilities in connection therewith . . . .” As the Seventh Circuit stated in the NAACP v. American Family Mutual Insurance Co. case, “[l]enders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable.”

HUD and Justice have consistently, through Republican and Democratic administrations, interpreted the Fair Housing Act as applying to the property insurance industry going back at least as far as a HUD general counsel opinion in 1978. More recently, it was during President Bush’s Administration that regulations implementing the Fair Housing Amendments Act of 1988, including the section explicitly prohibiting insurance discrimination, were issued. In formal testimony presented to the Senate Banking Committee, and in several subsequent statements, the leadership at HUD and Justice have explicitly reinforced this interpretation of the Act.

27. Id. § 3604(b).
29. See Nationwide Mut. Ins. Co., 52 F.3d at 1360 (holding that the McCarran-Ferguson Act does not bar application of the Fair Housing Act to the insurance industry); American Family Mut. Ins. Co., 978 F.2d at 301 (holding likewise that the McCarran-Ferguson Act does not bar the application of the Fair Housing Act).
30. 42 U.S.C. § 3604(a) & (b).
31. 978 F.2d 287 (7th Cir. 1992).
32. Id. at 297.
33. 24 C.F.R. § 100.70(d)(4) (1989).
34. See Achtenberg Statement, supra note 23, at 1 (reaffirming HUD’s be-
Despite these various rulings and opinions, the insurance industry has generally disagreed with this interpretation of the Fair Housing Act, frequently pointing to McCarran-Ferguson and particularly those sections barring any federal statute that may "invalidate, impair, or supersede" state law unless that statute refers specifically to insurance.35 A key industry concern is that application of the Fair Housing Act, particularly if a detailed regulation were promulgated, would duplicate efforts of state insurance commissioners and undermine state regulation of insurance generally.

Applying the Fair Housing Act, however, does not impair, invalidate, or supersede state law and would not duplicate the fundamentals of state insurance regulation.36 Approval of rate filings, establishment of licensing procedures, determination of solvency standards, and other essential services currently provided by state regulators would remain intact. A HUD rule could affect selected industry practices that are subject to state regulation. For example, discriminatory pricing of insurance products would be covered by the Fair Housing Act. But these matters would be affected only to the extent that they relate to that Act. A HUD rule would define discrimination under the Fair Housing Act and provide clarification of the Act's jurisdiction and how it would be applied. In fact, as the only agency with authority to issue such regulations HUD has a responsibility to do so. But it would not supplant state regulation of the insurance industry.

State insurance laws and regulations do address some forms of discrimination covered by the Fair Housing Act. But there are significant gaps between state requirements and this federal law. The Fair Housing Act provides broader coverage, including protected classes not included in several state laws. It offers broader procedural rights including a private cause of action in the federal courts, an investigation by HUD to determine if there is reason-

35. A number of insurance companies continue to claim, without success, that the Fair Housing Act does indeed apply to the insurance industry; Patrick Statement, supra note 23, at 2-3 (reaffirming the same belief by the Department of Justice); Letter from Henry G. Cisneros, Secretary, United States Department of Housing and Urban Development, to Christopher S. Bond, United States Senator, 1 (June 27, 1996) (voicing the opinion of the Secretary that the Fair Housing Act applies to the property insurance industry).

36. See American Family Mut. Ins. Co., 978 F.2d at 295 (holding that the Fair Housing Act does not function to impair, invalidate, or supersede state law).
able cause to believe that a violation has occurred, and representation by the federal government in an administrative hearing or before a federal court. The federal statute also allows for more comprehensive remedies, such as civil penalties and punitive damages, that are not available in many state and local ordinances. Consequently, the Fair Housing Act provides additional protection to, rather than duplication of, state and local laws. As the Sixth Circuit ruled in Nationwide Mutual Insurance Co. v. Cisneros, "[w]e conclude that HUD's interpretation of the Fair Housing Act is consistent with goals of the Fair Housing Act and a reasonable interpretation of the statute." The court further held "that the McCarran-Ferguson Act does not preclude HUD's interpretation of the Fair Housing Act."

II. PERSISTENCE OF DISCRIMINATION

HUD's obligation is not just a paper commitment dictated by the formalities of legal construction. Real, substantive problems need to be addressed. Research by community organizations, insurance commissioners, academics and others has established the persistence of unlawful discrimination in the provision of insurance products and services. Some of the documented unlawful practices include, but are not limited to: refusal to provide an insurance policy, charging different prices and requiring different terms and conditions for policies that are offered, overtly discriminatory marketing practices, underwriting and pricing rules that have an adverse disparate impact, and discriminatory claims adjustments.

For example, an American Family sales manager wrote to an agent, "[q]uit writing all those blacks!!" That same sales manager was tape-recorded instructing an agent, "[y]ou gotta start writing good, solid premium-paying white people." Researchers in Texas documented that ninety percent of the market in their state is served by insurers who utilize underwriting guidelines, such as maximum age and minimum value requirements that have a clear disparate impact on minority communities.

39. Id. at 1363.
40. See, e.g., SHANNA L. SMITH & CATHY CLOUD, DOCUMENTING DISCRIMINATION BY HOMEOWNERS INSURANCE COMPANIES THROUGH TESTING, 100 (Gregory D. Squires eds., 1997) (providing a number of examples of these practices).
41. Achtenberg Statement, supra note 23, at 3.
42. Id.
43. TEXAS OFFICE OF PUBLIC INSURANCE COUNSEL, A REVIEW OF
The Missouri Department of Insurance found that residents of low-income minority areas in St. Louis paid fifty percent more for comparable coverage as residents of low-income white areas, even though losses had been higher in the white neighborhoods for the previous five years. These findings resulted, in part, from the utilization of underwriting practices unrelated to risk.

The National Association of Insurance Commissioners found in a study of forty-seven urban markets in thirteen states that residents of minority communities faced greater difficulties in obtaining insurance and paid more for it than residents of other areas even after controlling for age and value of housing, household income, employment status, other demographic variables, and, most importantly, loss costs. An economist and former staff member of the Missouri Department of Insurance found, similarly, that there are more agents in white than non-white neighborhoods in St. Louis, Missouri and that the association between agent location and neighborhood racial composition remained statistically significant even after controlling for loss costs.

Paired testing by fair housing groups in nine cities found evidence of discrimination in over half of all tests and in some cases in over ninety percent of tests within particular metropolitan areas.

A University of Miami law professor and sociology professor found that in the wake of Hurricane Andrew, claims settlements with Hispanics took much longer than those for Anglos, in part because substantially more information was requested from Hispanics to verify their losses.

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5-9 (1994) (reporting findings showing that over 90% of the Texas property insurance market are served by companies with highly subjective underwriting guidelines, such as living conditions and moral of the customer).

44. See **MISSOURI DEPT OF INSURANCE, HOMEOWNERS INSURANCE IN MISSOURI** 4-5 (1993) (summarizing findings of costs and underwriting guidelines in the St. Louis area).

45. See *generally id.* (reporting some of the underwriting criteria used).

46. See ROBERT W. KLEIN, NATIONAL ASSN OF INSURANCE COMMISSIONERS, THE IMPACT OF LOSS COSTS ON URBAN HOMEOWNERS INSURANCE MARKETS 3-4 (1995) [hereinafter INSURANCE MARKETS] (concluding that "the association between minority concentration and average premiums remains positive and statistically significant even when loss costs are included in the equation.").

47. See JAY D. SCHULTZ, HOMEOWNERS INSURANCE AVAILABILITY AND AGENT LOCATION, 92-93 (Gregory D. Squires ed., 1997) (concluding that fewer agents are located in minority areas, with this correlation persisting even after other variables were considered).

48. SMITH & CLOUD, *supra* note 40, at 97-117. The following is the list of cities which participated in the national testing project and their results: Chicago (83%); Atlanta (67%); Toledo (62%); Milwaukee (58%); Louisville (56%); Cincinnati (44%); Los Angeles (44%); Akron (37%); and Memphis (32%). *Id.*

49. TOM BAKER & KAREN MCELRATH, INSURANCE CLAIMS DISCRIMINATION
Several factors contribute to the racial disparities found in these studies: differences in risk exposure, uneven knowledge of insurance on the part of consumers and unfamiliarity with urban markets within the industry, market failures due to selected state regulatory initiatives and other factors, are all at work. But unlawful discrimination remains a factor in the property insurance market and constitutes a significant contributor to availability and affordability problems.

III. CLARIFICATION AND GUIDANCE

The insurance industry, consumers, state regulators, and others concerned with insurance availability and urban revitalization would all benefit from a clarifying regulation. Such a rule would identify general areas of the business of insurance, such as underwriting and pricing, that are covered by the Act and specific policies and practices that the statute prohibits, requires, or permits. Consistency in interpreting the law and stability in the conduct of insurance business would be enhanced. A rule would facilitate the identification of discriminatory practices and cost-effective remedies for the benefit of insurers and consumers alike. It would reassure competitors that all are held to a consistent standard even if they operate in different regions of the country that fall under the jurisdiction of various state and federal courts. The rule would, in effect, provide national guidance on an important set of policy issues. And it would do so in a manner that minimizes the costs, in terms of time and resources, that are inherent in court case determinations which occur in ad hoc and often unpredictable ways as diverse parties pursue various issues through litigation.

The American Family, State Farm, Allstate, and Nationwide cases noted above,50 and the many other cases currently working their way through the courts, illustrate the kinds of costs, for plaintiffs and defendants, this rule would alleviate. Discovery proceedings, depositions, fees for experts and related items associated with litigation for both sides, and many of the expenses incurred under agreements or judicial decrees can be minimized with a rule that provides appropriate guidance on the requirements of the Fair Housing Act as it applies to insurance.

A regulation can resolve many of the pending legal questions and it can do so in a far more efficient manner than ad hoc occurrences of lawsuits. If the consensus of case law and agency interpretations today is that the Fair Housing Act applies to insurance, several issues remain unresolved. Are particular underwriting or pricing factors prohibited? Do any marketing practices violate the

141-56 (Gregory D. Squires ed., 1997).

50. See supra note 9 and accompanying text for a discussion of recent settlements involving these companies.
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law? Is the location of agents or claims practices covered by the Fair Housing Act? Should there be exceptions for niche marketers?

A particularly contentious issue is the question of whether or not the disparate impact standard of discrimination applies to insurance.\(^5\) In other areas of Fair Housing law the disparate impact standard of discrimination has generally been accepted in almost every circuit,\(^6\) which suggests it would also apply to insurance. But at least one court has sent mixed signals on this matter. In the Sixth Circuit’s decision in *Nationwide*, the court stated “it is not clear that HUD will apply a disparate impact analysis to its regulation governing insurance providers in the future... Accordingly, we conclude that plaintiffs’ challenge to HUD’s regulation as applied under a disparate impact approach is not ripe for review.”\(^5\) While not rejecting a disparate impact standard, this decision clearly leaves this matter in some doubt.

Even the fundamental jurisdictional question may not have been finally resolved. The Supreme Court has yet to speak, although on two occasions, the *American Family*\(^5\) and *Nationwide*\(^5\) cases, it chose not to hear appeals requested by the insurers. The current regulation implementing the Fair Housing Amendments Act of 1988, which prohibits discrimination in the provision of property insurance but provides little additional guidance, has been an important factor in lower court decisions applying the Fair Housing Act to insurance.\(^6\) In *American Family*, the Seventh Circuit dismissed the only negative decision on jurisdiction, concluding that “[e]vents have bypassed Mackey.”\(^5\) The court based its statement on HUD’s 1988 regulation that explicitly prohibited discrimination in hazard insurance.\(^5\) As Paul Hancock stated at the 1995 national conference of the National Fair Housing Alliance, a key to what he referred to as the two recent insurance victories (*American Family* and *Nationwide*) was HUD’s regulation.\(^5\)

52. *Id.*
54. 113 S. Ct. 2335 (1993).
55. 113 S. Ct. 1051 (1993).
56. Under the Fair Housing Act, HUD was authorized to promulgate interpretive regulations. *Dane*, supra note 51, at 32. In its final promulgation on January 23, 1989, HUD interpreted § 3604(a) and (b) of the Fair Housing Act as prohibiting “[r]efusal to provide... 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.” 24 C.F.R. § 100.70(d)(4) (1989).
58. *Id.* at 300-01.
59. Paul Hancock, Address at the *National Fair Housing Alliance’s Na-
observed that both cases relied heavily on the regulation and concluded, "HUD deserves credit - they saved the day." A regulation clarifying specifically how the Fair Housing Act applies to insurance would likely solidify the basic jurisdictional interpretation and provide further detailed guidance to all parties.

These issues, and others, could be resolved through the courts. However, it would be an expensive and time-consuming effort to resolve these issues district by district and circuit by circuit, up to the Supreme Court. Furthermore, it is more likely that such decisions would deliver a series of mixed messages and contradictory rulings rather than consistent guidance. A ruling prohibiting certain practices in one circuit could be followed by a ruling permitting those same practices in another circuit. Pricing might be viewed as falling under the purview of the Act in one circuit but excluded from coverage in another. Certain niche marketing practices, such as targeting specific occupational groups, could be interpreted as violating the law in one circuit, perhaps because of a disparate impact on a protected class, but consistent with the statute in another. Rulings on agent location, claims practices, marketing, and many more issues could all generate inconsistent interpretations. Obviously, such a pattern in the development of the law would not serve the interests of any party to this debate. A regulation can mitigate this kind of ambiguity and the many associated costs.

A regulation would apply nationwide, of course, while court decisions hold only within selected districts or circuits, at least until the Supreme Court rules. A regulation can address any number of policies and practices, while in litigation, only those issues presented at trial are addressed by the courts. For a variety of reasons a regulation can cast a large net which, in conjunction with case law, can generate effective and efficient development of the law yielding positive, systemic changes in industry practice, again benefiting insurers and consumers alike.

HUD would have to be sensitive to expressed concerns of fair housing groups, state regulators, and the insurance industry. Some fair housing advocates worry that a rule could restrict the flexibility of litigators. However, the Department would not go forward with a proposed regulation that experienced fair housing litigators found seriously flawed. Neither would HUD proceed if its own General Counsel or Office of Investigations found fault with the rule. Nor would HUD proceed if the Civil Rights Division at Justice found the rule unacceptable.

A HUD rule would also have to be coordinated with state regulations. Insurance commissioners, individually and through the NAIC, have critical expertise that HUD would have to utilize.

tional Conference (Mar. 1995).
60. Id.
in its rulemaking.

At the same time, an effective rule would respect the legitimate concerns of the insurance industry. Risk-based underwriting and loss-based pricing are objectives shared by the fair housing community. Prohibiting unfair discrimination would remain the touchstone.

HUD is unlikely, of course, to draft a rule that would be entirely satisfactory to all parties. Nor should HUD attempt to address every eventuality in its rulemaking. A balance can be struck, however, between the current legal climate where little guidance is available on what the law permits and prohibits and an overly ambitious effort to interpret all possible scenarios that could arise. In fulfilling this public interest, HUD is not solely a fair housing advocate, a regulatory agency, or a guardian of the insurance industry. It is a law enforcement agency. The Department itself is in the best position, with the advice of all parties to this debate, insurers, state regulators, fair housing advocates, consumers, to determine what would constitute an effective rule. It should be driven, in this regard, by its own expertise in the enforcement of the Federal Fair Housing Act. (See Appendix for a Model Regulation.)

IV. MOMENTUM FOR REGULATION

Pressure to respond to insurance redlining and discrimination problems has been building in recent years and many insurers, trade associations, regulators, and other public officials have initiated concrete steps in efforts to ameliorate these problems. While these voluntary actions may have been motivated, at least in part, by a desire to forestall a Fair Housing regulation, they reflect a climate in which solutions are being sought and a clear HUD rule would reinforce those efforts.

As has been reported on in the trade press and mass media, several insurance companies, trade associations, and state regulators, have launched a variety of voluntary initiatives, frequently in partnership with community groups, to address mutual concerns. These efforts include educational programs to help consumers shop for insurance and to inform insurers about business they

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61. See, e.g., Treaster, supra note 3, at D1 (illustrating how Allstate and State Farm have decided to increase the number of urban offices, and to provide full replacement cost as insurance coverage).

62. See, e.g., KNIGHT, supra note 4, at 215-33 (describing how an independent, public non-profit organization named the ‘Neighborhood Reinvestment Corporation’ has drawn residents, property insurance companies, the National Association of Insurance Commissioners, the Illinois Department of Insurance, and Neighborhood Housing Services of Chicago, Los Angeles, New York, Philadelphia and St. Louis together into a partnership to deal with the property insurance issues).
have been missing in older urban neighborhoods, recruitment and mentoring of minority agents, fire prevention and crime reduction programs to increase the insurability of inner city homes, and development of new insurance products tailored to the particular needs of property owners in previously underserved communities.  

In addition to reporting on these developments, the media have also supplied some of the pressure to create them. The editor of the National Underwriter, the major weekly insurance newspaper, wrote an article entitled that, "HUD Will Stay In Your Face On Redlining," and urged the industry to respond positively. Two attorneys who represented American Family urged, in "Another Perspective" column in that same newspaper, that the industry minimize subjective underwriting, eliminate underwriting guidelines that have a disparate impact on racial minorities, charge minimum premiums rather than require a minimum value, apply guidelines consistently, and validate underwriting guidelines. Fair housing groups have advocated, and insurers had previously ridiculed, these same positions for years.

The New York Times recently reported that some insurers are now finding profitable business in Harlem and other inner city neighborhoods around the country. Despite the turnaround reported for a few companies, this story concluded that "disparities [in coverage] persist" and "the vast majority of the 1,100 American companies that sell homeowner insurance are still on the sidelines."

Promulgation of a regulation applying the Fair Housing Act to property insurance will never be the favored approach by many fair housing advocates, insurers, and state regulators. But given the momentum building on several fronts to address issues of redlining and discrimination, the resistance to such a rule may become more malleable.

Fueling that momentum is the capacity HUD has developed and the steps it has taken to lay the groundwork for effective rulemaking. In a fiscal climate of retrenchment, HUD has added staff with substantial insurance expertise. And it has taken extraordinary efforts to both communicate its concerns with, and to learn from, all parties to these debates.

In 1994 HUD created an Insurance Unit which hired a licensed underwriter with substantial experience in the insurance industry and an economist who had worked for several years in a

63. Id.
64. Friedman, supra note 6, at 23.
66. Treaster, supra note 3, D1.
67. Id.
state insurance commissioner's office.68 HUD retained four different law firms, each with a unique set of knowledge and experiences in addressing insurance discrimination matters, to provide consulting services.

Following the January 1994 Executive Order69 calling for HUD to develop an insurance regulation, HUD engaged in wide-ranging fact-finding activities to work with and learn from insurance companies, agents, professional associations, state regulators, elected officials, fair housing advocates, community groups, and others.70 In order to solicit comments on its rulemaking activity HUD issued an Advanced Notice of Proposed Rulemaking (ANPR) in February and again in August. In May, the Assistant Secretary for Fair Housing and Equal Opportunity testified before the Senate Banking Committee on HUD's rulemaking and other insurance related activities.71

These public announcements were followed that year by four public meetings around the country (Chicago, Atlanta, San Francisco, and Boston) conducted by the Assistant Secretary at which HUD's rulemaking was widely debated.72 HUD officials then held several more informal meetings with representatives of individual national insurance companies as well as regional and niche marketers, trade associations and statistical agencies, state insurance commissioners, and fair housing and consumer advocacy groups. In 1995 Secretary Henry Cisneros testified before a Senate Subcommittee on Appropriations regarding HUD's preparation of the insurance rule. Throughout these months, HUD officials spoke before diverse audiences and were interviewed by the media which published several reports on the rulemaking activities.

In the summer of 1995, the Assistant Secretary announced that the Department would suspend its rulemaking.73 She indicated that HUD would monitor legal developments and perhaps reconsider a clarifying regulation at some future time.74 Comments in the trade press suggested that the industry fully expected the Department to initiate rulemaking in the near future. For example, Michael Duncan, Senior Vice President for the National Association of Independent Insurers stated, "I don't consider

68. Achtenberg Statement, supra note 23, at 5.
71. Id. at 5.
72. McRoberts, supra note 14, 3.
73. See supra note 2 and accompanying text for a discussion of the suspension of rulemaking.
74. See Letter from Henry G. Cisneros, Secretary, U.S. Dept. of Housing and Urban Development, to Christopher S. Bond, Senator, U.S. Senate (June 27, 1996) (reiterating that the Department would continue the rulemaking after observing the future court decisions and development of the law in the field of property insurance).
this at all a victory, I consider it a tactical measure." He went on to characterize HUD's attitude as "let's wait for a better day, and do it again." HUD should not disappoint Mr. Duncan.

Property insurance is a relatively new area for HUD. That is why the Department has taken unprecedented steps to obtain the expertise required to undertake this rulemaking activity. More than in any previous regulatory initiative, the Department has consulted closely with all parties to be affected by the rule. Through the ANPR, public meetings, informal meetings with insurers and industry trade associations along with fair housing advocacy groups, many letters and telephone conversations, advice from legal experts, and other communications, the Department has taken every conceivable step to assure that all credible information would be carefully considered in the rulemaking process.

The objective would be to promulgate a rule that will effectively apply the Fair Housing Act to property insurance in a manner that protects consumers, recognizes the role of state insurance commissioners as the principal regulator of insurance, and respects the legitimate business interests of the industry. Given the attention that issues of insurance redlining and discrimination have attracted in recent years, and particularly in light of diverse and collaborative efforts to find solutions, this objective can be accomplished.

V. THE IMPERATIVE OF TIMELY ACTION

Consumers, insurers, regulators, and all parties concerned with urban revitalization stand to benefit from the promulgation of a regulation that clarifies the application of the Federal Fair Housing Act to the property insurance industry. The principal factors that compel HUD to act on a timely basis include the following: 1) as the nation's primary Fair Housing Act law enforcement agency it is obligated to provide essential clarification of the law; 2) unfair discrimination persists in the property insurance market; 3) a rule would provide guidance regarding what the law prohibits, requires, and permits; and 4) there is momentum for responding to redlining and unfair discrimination problems and promulgation of such a rule will facilitate those problem-solving initiatives.

HUD can produce a regulation that meets these objectives. The rulemaking process itself can have important positive effects, and indeed it already has. By proceeding, with the assistance of all affected parties, a rule can be produced that will clarify how the Fair Housing Act applies to insurance in a manner that furthers vital fair housing interests consistent with the central regulatory functions of state government while respecting the legitimate

75. Otis, supra note 12, at 1.
76. Id.
business interests of the insurance industry.
APPENDIX

MODEL REGULATION CLARIFYING THE APPLICATION OF THE
FEDERAL FAIR HOUSING ACT TO PROPERTY INSURANCE

Title ??—Housing and Urban Development
Chapter ??—Office of the Assistant Secretary
for Fair Housing and Equal Opportunity
Department of Housing and Urban Development
Subchapter ?? - Fair Housing
[?? CFR Part ??]
[Docket No. ____________]
Fair Housing - Prohibitions Against Discrimination
SUBPART ??—Property Insurance Activities
AGENCY: Department of Housing and Urban Development
ACTION: Proposed Regulation

Background and Justification for Regulation

Discrimination in the provision of property insurance based on race, color, religion, sex, handicap, familial status, or national origin violates Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988, (the Federal Fair Housing Act, hereafter referred to as "the Act"). The U.S. Department of Housing and Urban Development (HUD) is the federal agency charged with primary responsibility for administering and enforcing this law. The purpose of this regulation is to provide more detailed guidance on the specific practices that violate the Act and the circumstances under which a violation exists.

The Act, current regulations, and case law require HUD to investigate and adjudicate matters pertaining to discrimination in the provision of property insurance. Under the Act it is 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... (42 U.S.C. Section 804 (a)).

It is also a violation of the Act to:

discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith because of race... (42 U.S.C. Section 804 (b)).

77. This Model Regulation was initially published in Squires (1997) and is reproduced with permission of the Urban Institute Press.
In addition, under the Act:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person because of race . . . "residential real estate-related transactions" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance

(a) For purchasing, constructing, improving, repairing or maintaining a dwelling; . . . (42 U.S.C. Sections 805)

Because property insurance is required to secure a mortgage loan, which is generally required to purchase a dwelling, denying insurance due to membership in a protected class effectively makes housing unavailable in violation of Section 804(a). Similarly, because insurance is a service clearly connected with purchasing a dwelling, discrimination in the provision of this service due to membership in a protected class violates Section 804(b). Property insurance is also required to maintain a dwelling, and, therefore, to enjoy the full benefits and privileges of homeownership. Therefore, discrimination in the provision of property insurance constitutes discrimination in residential real estate-related transactions in violation of Section 805.

HUD, in its capacity as the nation's chief fair housing law enforcer, has promulgated regulations defining as prohibited conduct "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." (24 C.F.R. Section 100.70(d)(4)).

Act. The Seventh Circuit in the 1992 American Family case, in finding that insurance is covered, found the reasoning of that 1984 decision unpersuasive stating that “events have bypassed Mackey” and found the regulations to be controlling, based upon the Department’s statutory authority to issue them and the weight such regulations are accorded.

The primary purpose of this regulation is to clarify the Federal Fair Housing Act as it applies to property insurance. Providing insurance is a most complex undertaking. No rule can anticipate every situation, changes in the marketplace, and potential disputes. Specific cases will be dealt with on a case-by-case basis with the totality of the factual circumstances examined serving as the basis for any Departmental decision.

The principles articulated in this regulation, however, will inform insurers and others on what is permitted and prohibited, and will guide HUD as it carries out its responsibilities under the Act.

Authority

This regulation is issued under the authority of the Secretary of Housing and Urban Development to administer and enforce Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (the Fair Housing Act).

Scope

It is the policy of the United States to provide within constitutional limitations, for fair housing throughout the United States. No person shall be subjected to discrimination because of race, color, religion, sex, handicap, familial status, or national origin, or because of the representation of members of these protected classes within a neighborhood (e.g. the racial composition of an area), in the provision of property or hazard insurance for dwellings. Provision includes the availability of insurance, terms and conditions under which insurance is available, and services associated with property insurance. These rules apply to all insurance companies, brokers, agents, insurance services of other financial institutions, rating organizations, regulatory agencies, and other entities engaged in the sale, marketing, or distribution of insurance and insurance related services.

Exemptions

This part does not limit the applicability of any reasonable state law or regulation pertaining to discrimination, unfair trade practices, redlining, or related matter. It does not require any sales, pricing, marketing or any other practice related to the provision of insurance or insurance related services that would conflict with current requirements of state insurance laws or unfair trade practices acts. It would not require any such practice incon-
sistent with sound actuarial and underwriting principles including but not limited to the requirement that prices not be excessive, inadequate, or unfairly discriminatory.

Discriminatory Practices

It shall be unlawful to:

(1) Refuse to sell insurance, cancel or non-renew an insurance policy, or in any way refuse to provide or make unavailable insurance or insurance related services because of race, color, religion, sex, handicap, familial status, or national origin (this prohibition also applies to the race, color, religion, sex, handicap, familial status or national origin of other residents in the area, e.g. the racial composition of a community);

(2) Vary the terms or conditions (e.g. premium, coverage, type of policy, exclusions, terms of payment, deductible requirements, application procedures) under which an insurance policy or insurance related service is available because of race, color, religion, sex, handicap, familial status, or national origin; (this prohibition also applies to the race, color, religion, sex, handicap, familial status or national origin of other residents in the area, e.g. the racial composition of a community);

(3) Establish different qualifications, requirements, or standards (e.g. income, credit rating, inspections) for making insurance or insurance related services available because of race, color, religion, sex, handicap, familial status, or national origin; (this prohibition also applies to the race, color, religion, sex, handicap, familial status or national origin of other residents in the area, e.g. the racial composition of a community);

(4) Offer different services, facilities, or privileges (e.g. advice and counseling, claims processing, access to agents) in the provision of insurance or insurance related services because of race, color, religion, sex, handicap, familial status, or national origin; (this prohibition also applies to the race, color, religion, sex, handicap, familial status or national origin of other residents in the area, e.g. the racial composition of a community);

(5) Utilize different sales and marketing practices (e.g. underwriting and pricing guidelines, advertising, appointment and location of agents) because of race, color, religion, sex, handicap, familial status, or national origin; (this prohibition also applies to the race, color, religion, sex, handicap, familial status or national origin of other residents in the area, e.g. the racial composition of a community); or

(6) Otherwise make insurance or insurance related services unavailable or to make them available on different terms or conditions because of race, color, religion, sex, handicap, familial status, or national origin; (this prohibition also applies to the race, color, religion, sex, handicap, familial status or national origin of
other residents in the area, e.g. the racial composition of a community).

Standards of Discrimination

A variety of underwriting, inspection, marketing, agent assignment, claims processing, and other practices are prohibited under the Act. Violations may occur due to overt discrimination where an insurer or provider of an insurance related service openly discriminates against an individual because he or she is a member of a protected group. Violations may occur due to disparate treatment when an insurer or provider of an insurance related service treats people differently because those people are members of a protected class. Violations may also occur due to disparate impact when an insurer or provider of an insurance related service uses a particular practice that causes a disparate impact on the basis of race, color, religion, sex, handicap, familial status or national origin and either:

(1) the respondent fails to demonstrate that the challenged practice is related to the risk of loss and constitutes a business necessity (which generally must be established with statistical or other empirical evidence; subjective judgment, experience, or speculation are generally insufficient); or

(2) a less discriminatory alternative that would serve the business purpose is available and the respondent refuses to adopt such an alternative.

The industry practices listed above are meant to be illustrative, but not exhaustive, of the kinds of practices that are prohibited. The commission of one incident of a particular practice does not, in and of itself, necessarily constitute a violation of the fair housing act. A violation may result from one practice or from a combination of individual or repeated occurrences of a collection of the above cited or related practices. Each case will be addressed on a case-by-case basis with the totality of fact patterns determining whether or not a violation of the Act has occurred.

In addition, the determination that a particular practice is prohibited does not require that the practice in question was the sole reason for the action taken. If an action was taken in part because of a prohibited practice, that can be sufficient to find a violation of the fair housing act. For example, if an insurer denies a policy in part because of the racial composition of a neighborhood, that denial would constitute a violation of the fair housing act even if other non-prohibited practices and considerations entered into the decision.

Nothing in these rules should be interpreted as restricting affirmative efforts to eliminate unlawful discrimination or the discriminatory effects of historical and contemporary practices. Such
affirmative efforts may include placing agents in minority neighborhoods underserved by the industry, incentives to agents to increase their business in underserved areas, revision of underwriting standards to increase the availability of insurance, advertisements directed to minority audiences, affirmative action to increase the number of minority agents, and related steps.