



# Race, Gender, “Redlining,” and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995

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## INTRODUCTION

A careful review of either privately or publicly assembled economic data discloses two “economic truths”: (1) Persistent unemployment is likely to develop among members of *any racial or socioeconomic group* when members of that group are regularly and systematically denied access to capital and credit;<sup>1</sup> and, (2) small businesses—the primary

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1. See generally Gregory D. Squires & Sally O’Connor, *Do Lenders Who Redline Make More Money Than Lenders Who Don’t?*, 21 REV. OF BLACK POL. ECON. 83-107 (1993); TIMOTHY BATES, *BANKING ON BLACK ENTERPRISE: THE POTENTIAL OF*

creators of jobs and economic opportunity—are likely to fold or abandon *any geographic area* if they are unable to secure working capital or credit from banks or other lenders. To be sure, this latter problem increases the likelihood of long-term unemployment, blight, and even more disinvestment in capital-starved neighborhoods and communities.<sup>2</sup>

Twenty years ago, congressional hearings revealed that commercial and savings banks, private-mortgage companies, and savings and loans institutions hinder job creation and stable communities when those institutions refuse to extend credit to legitimate consumers and small businesses.<sup>3</sup> More disturbing, Congress discovered that, all too often, lenders were denying credit and loans to consumers on the basis of gender, race, color, national origin, marital status, religion, and age. To help eradicate such unwarranted lending practices, Congress passed the Equal Credit Opportunity Act of 1974 (ECOA).<sup>4</sup>

Three years later, a different set of congressional hearings disclosed another disturbing phenomenon: Federally insured financial institutions' lending decisions contributed to long-term unemployment, social decay, and other pathologies in both urban and rural communities when lenders failed to serve the credit needs of communities in which they were chartered.<sup>5</sup> Some called this scheme "redlining"<sup>6</sup>—the practice of

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EMERGING FIRMS FOR REVITALIZING URBAN ECONOMIES (1993). *See also* Judith B. Henry, Comment, *Equal Credit Opportunity Act Amendments of 1976*, 12 U. RICH. L. REV. 203 (1977) ("But for the availability of credit, it would be impossible for most Americans to . . . own a home . . .").

2. *See, e.g.*, Lucinda Harper, *The Job-Creating Prowess of Small Business Is a Myth, a New Study Says*, WALL ST. J., Nov. 30, 1993, at A1 ("Economists . . . often assert that small businesses account for most new jobs, so entrepreneurs should get more access to credit, tax incentives and other perks from the federal government. [And research shows that] *smaller firms do exhibit sharply higher gross job-creation rates . . .*") (emphasis added).

3. *See generally* Equal Credit Opportunity Act of 1974, Pub. L. No. 93-495, 88 Stat. 1500 (codified as amended at 15 U.S.C §§ 1691-1691f (1994)). *See also* Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (codified as amended at 15 U.S.C. § 1691 (1994)).

4. 15 U.S.C. § 1691(a) (1996). *See also infra* notes 59-68 and accompanying text.

5. *See generally* Community Reinvestment Act of 1977, Pub. L. No. 95-128, Title VIII, § 802, 91 Stat. 1147 (1977). *See also* Griffith L. Garwood & Dolores S. Smith, *The Community Reinvestment Act: Evolution and Current Issues*, 79 FED. RES. BULL. 251 (1993):

In the mid-1970s, a prevalent view among some members of the Congress was that many financial institutions accepted deposits from households and small businesses in inner cities while lending and investing those deposits primarily elsewhere. They believed that, given this disinvestment, or "redlining," credit needs for urban areas in decline were not being met by the private sector . . .

6. *See* 123 CONG. REC. 17,630 (1977):

By redlining . . . I am talking about the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere, and they will actually or

“systematic[ally] refus[ing] to lend to many minority [and] low-income people.”<sup>7</sup> To help address these anti-consumer and anti-business practices, Congress enacted the Community Reinvestment Act of 1977 (CRA).<sup>8</sup>

Unfortunately, several post-enactment studies show that the ECOA and CRA have not achieved their stated goals. In fact, pro-consumer activists, women’s groups and civil-rights organizations continue to accuse banks, thrifts and other federally insured financial institutions of intentionally violating the ECOA. From their perspectives, lenders continue to deny loans to creditworthy consumers and practice gender<sup>9</sup>

figuratively draw a red line on a map around the areas of their city, sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black, but often encompassing a great area of their neighborhood.

*Id.* (statement of Sen. Proxmire), quoted in Jonathan P. Tomes, *The “Community” in the Community Reinvestment Act: A Term in Search of a Definition*, 10 ANN. REV. BANKING L. 225, 227 n.9 (1991). See also Joan Kane, *The Constitutionality of Redlining: The Potential For Holding Banks Liable As State Actors*, 2 WM. & MARY BILL RTS. J. 527, 528-29 (1993) (presenting several definitions of “redlining” and outlining historical developments surrounding the practice).

7. Albert R. Karr, *Effort to Fight Loan Bias Gets Conflicting Reviews*, WALL ST. J., Feb. 25, 1993, at B6.

8. 12 U.S.C. § 2901 (1996).

9. See, e.g., Constance Mitchell, *Businesswomen Say Credit Firms Still Discriminate on Basis of Sex*, WALL ST. J., June 26, 1986, at 33:

[A married female] was awarded \$3.8 million in contracts. . . . But the Chicago-based entrepreneur [could not] seem to build a relationship with her banker. She was rejected recently for a \$100,000 line of credit. Under current law, the bank wasn’t required to explain why. . . . It has been 11 years since the Equal Credit Opportunity Act (ECOA) made it easier for millions of working women to get loans and credit cards by making it illegal for lenders to discriminate on the basis of sex.

*Id.* But problems persist. Women business owners often complain about rules that exempt commercial lending from some of the ECOA’s provisions. More importantly, the Federal Trade Commission says that individual violations of the ECOA still occur.

*Id.* See also Bonnie Souleles, *Here’s How! Taking Mystery Out of Getting Credit*, L.A. TIMES, Nov. 7, 1985, at 30:

In spite of laws in recent years making it illegal to discriminate against women who are applying for credit, there are still some hurdles to overcome. . . . Today, more than 10 years later, . . . women are still often discriminated against in the credit arena. A married woman in California is entitled to have credit in her own name, and because this is a community property state, her spouse cannot be required to co-sign.

and spousal<sup>10</sup> discrimination because the political will to stop such practices does not exist.

Consumer activists also point out that banks and thrifts continue to violate the CRA when they “redline” various communities on the basis of race or the geographic location of applicants’ neighborhoods.<sup>11</sup> Moreover, activists assert that the Community Reinvestment Act has not solved a more egregious development: The nation’s top mortgage lenders are actually *unregulated private firms*.<sup>12</sup> Yet, these institutions

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10. See Minda Zetlin, *The Chilling News About Male Chauvinism*, COSMOPOLITAN, Sept. 1989, at 266:

Since 1974, the Equal Credit Opportunity Act (ECOA) has made it illegal for banks to discriminate against women customers. But that hasn’t always stopped them . . . . Until this year, ECOA’s enforcement rules did not cover commercial credit, which is why banks still routinely ask businesswomen seeking loans to have a husband, father—or any other responsible male—cosign their applications. One woman reported being asked for her husband’s signature even though she was earning ten times what he was.

*Id.*; Susan S. Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 689-90 (1981):

A post-ECOA survey . . . disclosed that . . . [o]ne-third of those persons surveyed who had been refused credit indicated that they thought age, sex, race, national origin, or marital status was involved in the creditor’s decision to deny them credit . . . . In his 1978 report to Congress . . . the Attorney General addressed the tendency of creditors to alter credit standards so as to grant credit to rejected applicants . . . thereby allowing the underlying discrimination to continue.

*Id.* See also *infra* notes 400-22 and accompanying text.

11. See, e.g., Yi-Hsin Chang, *Mortgage Denial Rate for Blacks in ‘93 Was Double the Level for Whites, Asians*, WALL ST. J., July 29, 1994, at A2 (“The rate of mortgage loan denials to blacks decreased last year, but remained more than twice as high as for whites or Asians, a government agency reported.”); Peter Pae, *Home Equity: The Community Reinvestment Act Hasn’t Been Much Help to Inner-City Businesses. That May Change.*, WALL ST. J., Feb. 19, 1993, at R14 (“Sixteen years later, most black entrepreneurs agree: For them, the law has been pretty much of a dud.”); Thomas, *Persistent Gap: Blacks Can Face a Host of Trying Conditions in Getting Mortgages*, WALL ST. J., Nov. 30, 1992, at A1 [hereinafter Paulette Thomas, *Persistent Gap*]:

According to an extensive government survey of 1991 lending, members of most minority groups continue to be much more likely to have their mortgage applications rejected than whites of similar income. . . . President-elect Clinton’s team is calling for improved enforcement of the Community Reinvestment Act, which requires banks and savings and loans to lend in all areas in which they take deposits.

*Id.*; Paulette Thomas, *Boston Fed Finds Racial Discrimination in Mortgage Lending is Still Widespread*, WALL ST. J., Oct. 9, 1992, at A3 (“A ground breaking government study found systematic racial discrimination in mortgage lending, even after taking account of applicants’ credit histories and other lending criteria.”).

12. See Ralph T. King Jr., *Skewed Marketing: Some Mortgage Firms Neglect Black Areas More Than Banks Do*, WALL ST. J., Aug. 9, 1994, at A1:

Of the nation’s top 100 mortgage lenders in terms of applications, 63 had less penetration in largely black areas than they did overall and, in most cases, significantly less. . . . The other lenders—banks and thrift institutions, two groups subject to fair-lending regulations—had a comparatively good record,

regularly discriminate on the basis of geographic location and race.<sup>13</sup> Consequently, mortgage bankers, rather than savings and loans, are significantly more likely to undermine the quality of life and the economic health of both urban and rural communities.<sup>14</sup>

Furthermore, it is generally accepted that the economic health of a local economy depends in part on the availability<sup>15</sup> and affordability<sup>16</sup>

suggesting that they have been unfairly accused of discrimination. *But many mortgage bankers doing little inner-city lending are banks' and thrifts' unregulated subsidiaries.*

*Id.* (emphasis added).

13. See *Mortgage Banks Said to be Worst in Minority Lending*, WALL ST. J., Dec. 21, 1994, at B10 ("A disproportionately high number of mortgage bankers rank among the 52 'worst lenders' to minorities, according to a report by the National Community Reinvestment Coalition, which includes advocacy groups for low-income minorities."). See also *Mortgage Bankers in Pact to Spur Minority Lending*, WALL ST. J., Sept. 14, 1994, at A5:

The Mortgage Bankers Association reached an accord with the government aimed at spurring lending in low-income, minority neighborhoods.

... [T]he agreement is voluntary . . . .

... [And it] builds on increased fair-lending efforts announced by the Mortgage Bankers group a year ago, which some minority-advocacy groups saw as an effort to ward off any congressional moves to extend the [Community] Reinvestment Act to mortgage-banking firms.

14. See King, *supra* note 12, at A1, A6.

While commercial banks and thrift institutions have been accused of redlining, an analysis of Federal Reserve Board and Census Bureau data . . . shows that *the biggest group of homes lenders*—the fast-growing mortgage bankers, which don't take deposits as banks and thrifts do—includes many of the institutions that have most assiduously avoided black areas.

... .

Mortgage bankers, although around for decades, mushroomed during the S&L debacle and the recent refinancing boom and last year *made more than half of all home loans*. Yet they are barely visible; they get most of their business through intermediaries such as real-estate brokers.

*Id.* (emphasis added).

15. See, e.g., Kenneth R. Harney, *Legislation Targets Insurance Redlining*, WASH. POST, Oct. 2, 1993, at E3 ("A major impediment to home ownership in central city neighborhoods [is] the lack of available property insurance . . . ."); Albert B. Crenshaw, *Insurers Face New Claims of Urban Area 'Redlining:' At Hill Hearing, Industry Denies Allegations of Bias*, WASH. POST, Feb. 28, 1993, at H3:

Owning a home is a major investment, the biggest one most people ever make. It can be very rewarding, both emotionally and financially. But a home is also something that wants protecting, and that means insurance.

But what if you can't get insurance?

Well . . . you probably couldn't buy the home in the first place, because most mortgage lenders require you to have insurance. . . .

... [I]nsurance plays a key role in the American dream.

of commercial-liability, property and casualty, mortgage and homeowners' insurance. In recent years, grassroots organizations,<sup>17</sup> state insurance commissioners,<sup>18</sup> and members of Congress<sup>19</sup> have accused the insurance industry of discriminating against historically, economically deprived consumers—women,<sup>20</sup> unmarried persons,<sup>21</sup> inner-city

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16. Cf. H. Jane Lehman, *Insurance Study Finds Racial Disparity: Group Says Urban Blacks Pay More for Coverage than Suburban Whites*, WASH. POST, Feb. 6, 1993, at F1 ("Lower-income and minority home buyers in urban settings pay more for homeowners insurance, find it harder to obtain a policy and receive substandard coverage compared with their more affluent, suburban white counterparts . . .").

17. Cf. Crenshaw, *supra* note 15, at H3:

[A] number of groups and experts have accused the insurance industry of writing off entire neighborhoods based on the race and income of the residents. This "redlining," they charge, is an important contributor to the decay of many inner cities and other predominantly minority areas around the country.

Residents of these areas cannot get insurance protection for their homes and cars, and small businesses cannot get protection for their stores, offices and factories, according to the charges.

Such accusations have surfaced periodically since the 1960s. . . . [V]arious academic and government studies lent credence to [the accusations]. Less attention has been paid to the issue recently, but [recently] . . . the Association of Community Organizations for Reform Now (ACORN) rekindled the debate with a study of 14 cities that shows that redlining continues.

18. See, e.g., Stuart Eskenazi, *State Accuses Insurers of Redlining*, AUSTIN AM.-STATESMAN, Aug. 30, 1994, at B1:

[A] study by the Office of Public Insurance Counsel, a [Texas] state agency representing insurance consumers, concludes that insurers are engaging in redlining.

. . . *The Office of Public Insurance defines redlining as any business practice that, intentionally or unintentionally, results in certain geographic areas being denied access to affordable insurance.* The office's use of the term goes beyond the ordinary definition of redlining, which means an insurance company has denied coverage altogether in a deteriorating neighborhood.

*Id.* (emphasis added); Susan Pulliam, *State Regulators Plan Drive to Curb Insurer Redlining*, WALL ST. J., Jun. 10, 1992, at A5 ("California insurance commissioner . . . calls initially for a group of regulators to study insurance in the inner city, where . . . redlining, or discriminating against residents of certain areas, is alleged to occur.").

19. See, e.g., Albert R. Karr, *House Panel Clears Antibias Measure Aimed at Insurers*, WALL ST. J., Sept. 23, 1993, at A7 ("The House Banking Committee voted to force insurers to give the federal government data showing who their customers are and where they live. The legislation seeks to discourage insurance 'redlining,' or discrimination against low-income or minority persons . . ."); Albert R. Karr, *House Panel Clears Measure Targeting Bias in Insurance*, WALL ST. J., Sept. 15, 1993, at A24 ("The House Energy and Commerce Committee voted to require insurance companies to report sales information on auto and homeowners' policies to help regulators spot possible discrimination.").

20. See, e.g., Albert B. Crenshaw, *Maryland Judge Rejects Equal Insurance Rates for Sexes: Decision Quashes Regulator's Recent Order on Premiums; Women's Group Says it Will Appeal*, WASH. POST, Jan. 15, 1993, at F1:

Martha Davis of the NOW Legal Defense and Education Fund. . . .

. . . said federal law forbids differential pricing based on sex in group insurance provided through employers.

businesses,<sup>22</sup> low socioeconomic applicants,<sup>23</sup> racial minorities,<sup>24</sup> and

The issue of "gender-based" rates has attracted widespread attention in recent years. Women's groups, such as the National Organization for Women, argue that using sex as a criterion for setting insurance prices discriminates against women. Although women pay less than men for life and auto coverage, that is more than offset by higher premiums for health and disability insurance . . . .

*Id.*; T. R. Reid, *Montana Implements Policy of 'Unisex' Insurance*, WASH. POST, Oct. 1, 1985, at A1:

[In Montana,] insurers may not discriminate on the basis of sex . . . in the issuance or operation of any type of insurance . . . . It comes after a furious struggle pitting state and national women's groups against state and national insurance firms. . . .

Montana is the first state to establish a unisex insurance requirement across the board. . . . [A]n insurance company may not charge male and female Montanans different rates or pay them different premiums on life, annuity, auto, medical or disability policies.

The unisex insurance issue has been a significant battleground of the "feminist revolution" because it involves a clash of fundamental principles. The insurance business is based on the "actuarial" method devised by Sir Edmund Halley, the mathematician who computed the orbit of the comet that bears his name. Under this method, rates and premiums for individual policies are based on wide group experience. But feminists argue that a woman applying for insurance should be treated as an individual, not as part of a larger statistical universe.

21. *See, e.g.,* Eskenazi, *supra* note 18, at B1:

[The Texas Office of Public Insurance Counsel's] . . . reports revealed that some insurers consider factors such as age, nationality and marital status before deciding to write a policy.

In May, [Texas] Insurance Commissioner J. Robert Hunter levied a record \$850,000 fine against Allstate Insurance Group for refusing to offer its choice auto insurance policies to unmarried people.

22. *See, e.g.,* Pulliam, *supra* note 18, at A5:

Since the Los Angeles riots ended last month, the insurance industry has been under fire for redlining. In the aftermath of the riots, many business owners have been left without insurance to cover damage to their businesses. Other business owners are finding that their insurance policies provide inadequate coverage or subject them to lengthy delays, Mr. Garamendi said.

23. *See, e.g.,* Albert R. Karr, *GEICO is Accused of Discriminating Against Blacks*, WALL ST. J., Nov. 24, 1993, at A11:

At yesterday's news conference, Charles Beckwith, a former GEICO sales trainer and underwriter, said he got several raises and promotions until he began complaining that he had to teach associates "how to discriminate." He was then criticized and soon fired . . . .

The company's underwriting guidelines . . . rank customer prospects by occupation, with Group 1 including architects and scientists. The less-regarded Group 5 includes clerks, laborers and truck drivers. Because blacks are more likely to fall into Group 5, they're less likely to get GEICO auto policies, regardless of driving records . . . .

residents of low-income neighborhoods.<sup>25</sup> Specifically, consumer advocates assert that the nation's property and casualty companies—like commercial and savings banks, thrifts, and private mortgage bankers—have an extended history of “redlining” low socioeconomic and heavily minority communities.<sup>26</sup> Quite simply, grassroots activists

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24. See, e.g., Albert R. Karr, *Complaints That Some Insurers Are Redlining Minority Homeowners Get U.S., State Attention*, WALL ST. J., Apr. 19, 1994, at A22 [hereinafter Karr, *Complaints*]:

Analyses in Chicago and Milwaukee . . . show that race is a determining factor in whether applicants get home insurance, says Gregory Squires, an urban-studies expert at the University of Wisconsin at Milwaukee.

Mr. Squires cites a 1988 directive by a sales manager with American Family Insurance Mutual . . . to agents with the firm that said, in part, “I think you write too many blacks . . . You gotta sell good, solid premium-paying white people.” A lawyer with American Family says the official was removed from his management job after writing the memo, but kept on as an agent.

*Id.*; Albert R. Karr, *Advocacy Group Accuses Allstate of Bias in Low-Income and Minority Markets*, WALL ST. J., Sep. 1, 1993, at A7 [hereinafter Karr, *Allstate*]:

Acorn said that in a recent stock-offering prospectus, Allstate said that after recent rapid market growth, it must reduce business in less-profitable areas, which Acorn contended means inner cities. The Acorn report showed that in Minnesota, Allstate's homeowner policies declined 9% in integrated and minority zip codes between 1987 and 1993, but rose 11% in mostly white zip codes.

*Id.*; Lehman, *supra* note 16, at F1:

Lower-income and minority home buyers in urban settings pay more for homeowners insurance, find it harder to obtain a policy and receive substandard coverage compared with their more affluent, suburban white counterparts, a study concludes.

The disparities were uncovered in a two-part survey conducted by the Association of Community Organizations for Reform Now (ACORN), a community activist group.

25. See, e.g., Karr, *Allstate*, *supra* note 24, at A7:

Testing by . . . the Association of Community Organization for Reform Now, or Acorn, in 14 cities and analysis of Allstate sales offices in 17 cities showed the insurer as “blatantly violating fair housing and insurance laws”.

. . .

. . . .

In its new report, Acorn said test calls to Allstate agents in 14 cities showed “a consistent pattern of discrimination” against low-income and minority homeowners. . . .

Coverage that was offered was often only for substandard policies, and was consistently at much higher rates than those charged in upper-income locations

. . . .

. . . .

In Philadelphia, for instance, *no test caller could obtain an Allstate quote on any kind of insurance in the city's low-income areas.*

*Id.* (emphasis added).

26. See, e.g., *Bias Seen In Homeowners' Insurance Rates*, DETROIT FREE PRESS, Feb. 5, 1993, at 2E (“The practice of ‘redlining’—by which banks and other mortgage lenders designate inner-city neighborhoods as high risk and refuse to grant loans there—also appears to be used in the property insurance industry, according to ACORN . . .”).



adopt the view that women,<sup>27</sup> low-to-moderate income consumers,<sup>28</sup> singles,<sup>29</sup> and racial “[m]inorities face double jeopardy with banks and insurance companies . . . . If these consumers cannot insure their property, their loan application will be rejected.”<sup>30</sup>

Expectedly, financial institutions and the insurance industry have their defenders and opposing arguments. For example, those supporting creditors and lenders maintain that commercial bankers, managers of savings and loans as well as private mortgage bankers are neither

27. See, e.g., H. Jane Lehman, *Insurer Not Exempt From Housing Law: High Court Lets Stand Ruling on Redlining*, WASH. POST, May 22, 1993, at E1, (“[T]he insurance industry is fighting the fair housing mantle because the federal law opens the door to higher penalties, stiffer accountability in many states and greater liability not only for acts of racial discrimination, but also those involving gender, religious affiliation, national origin and family composition.”) (emphasis added).

28. See, e.g., Scott Minerbrook, *Home Ownership Anchors the Middle Class: But Lending Games Sink Many Prospective Owners*, EMERGE, October 1993, at 42, 44, 46: Buying a home is not only part of the American Dream, it is essential to grasping it. But study after study reveals that those in the middle class are restricted in their choice of where to live and what to buy. They are treated differently by lending and insurance institutions simply because of the color of their skin. . . .

. . . .  
In general, scholars are finding that these patterns of disparity and limitation of economic opportunity can be laid at the doorstep of racial discrimination by the real estate, banking and insurance industries. . . .

29. Cf. David Tuller, *Gay, Straight Couples Claim Bias Standing Up for ‘Singles’ Rights*, S.F. CHRON., Oct. 15, 1990, at A1, A12 (“[A] task force convened by the Los Angeles city attorney’s office documented what it called ‘widespread’ discrimination against singles and unmarried couples in such diverse areas as housing, credit, insurance, membership groups and medical services.”).

30. James Rowley, *Urban Blacks Seen Facing Homes Insurance Bias*, BOSTON GLOBE, Feb. 5, 1993, at 58. See also, Lehman, *supra* note 27, at E1 (“Robert Hunter, president of the National Insurance Consumer Organization, said the lower court decision in *National Association for the Advancement of Colored People (NAACP) v. American Family Mutual Insurance Co.* is proper. ‘No hazard insurance, no mortgage. No mortgage, no house. The linkage is clear.’ . . .”); *Jesse Jackson Forms Group to Fight Bias by Financial Firms*, WALL ST. J., Apr. 29, 1993, at A3:

The Rainbow Commission for Fairness in the Financial Services Industry will press financial firms to invest in urban areas . . . and end redlining, the practice of discriminating against minorities in the sale of mortgage loans and insurance policies. . . .

Central to its effort will be a system to rate companies based on standards established by the commission. The group will issue the ratings based on answers to questionnaires now being sent to banks, brokerage firms, insurance companies and pension funds.

racist,<sup>31</sup> sexist nor class conscious. Instead, defenders assert that lenders are prudent business people who are genuinely concerned about the "safety and soundness" of financial institutions.<sup>32</sup>

Moreover, representatives of the finance community stressed that "[e]veryone who wants or needs credit cannot obtain it . . . . The decision to grant or deny credit is usually based on an evaluation of the applicant's creditworthiness, a process which generally involves evaluating a person's ability and willingness to repay the creditor."<sup>33</sup> Finally, those who defend depository institutions' and mortgage bankers' lending and redlining practices remind Americans that "credit is available . . . as a privilege, not as a legal right."<sup>34</sup>

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31. See, e.g., Carolyn M. Brown, *How to Fight Mortgage Discrimination . . . and Win!!! African-Americans Join Forces to End Racist Lending Practices*, BLACK ENTERPRISE, July 1993, at 48, 56-57:

Conservative theorists dismiss such cases [of discrimination]. . . . Gary S. Becker, the 1992 Nobel Laureate for Economics, wrote in *Business Week*, "The flaw in all studies of discrimination by banks in applications for mortgages is that they have not determined the profitability of loans to different groups . . . . A valid study of discrimination would calculate default rates, late payments, interest rates and other determinants of the profitability of loans."

32. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 319-20 (1993):

Advocates of the CRA often claim that depository institutions should not object to their obligations under the Act because they can lend to low-income and moderate-income neighborhoods and still make a profit. The thesis is that the banking industry has failed to recognize the numerous profit opportunities available in these communities. Thus, in this view, the CRA is not inconsistent with the safety and soundness of the banking industry because a CRA loan is not an unsafe or unsound loan. . . .

There is undoubtedly truth to the argument that profitable loan opportunities exist in low-income and moderate-income neighborhoods, and that some of these loans would not be made if it were not for the CRA. . . .

[But it] is quite evident that, despite the occasional profitable CRA loan, *the general effect of the CRA is to reduce depository institution safety and soundness.*

*Id.* (emphasis added).

33. Winnie F. Taylor, *Meeting the Equal Credit Opportunity Act's Specificity Requirement: Judgmental and Statistical Scoring Systems*, 29 BUFF. L. REV. 73, 74 (1980).

34. *Id.* at 73. See also Richard A. Givens, *The "Antiredlining" Issue: Can Banks be Forced to Lend?*, 95 BANKING L.J. 515, 517 (1978):

The dangers of the antiredlining movement surface where the pressure to stop the practice in the strict sense (restriction of credit based solely on geography without regard to creditworthiness) shades into pressure to force private lenders and investors to contribute to the rehabilitation of blighted areas—to reinvest on the basis of geography even where risk may be somewhat greater or return lower.

To be sure, representatives of the insurance industry make similar arguments. First, the industry's spokespersons assert that insurers do not permit *any single factor*—such as race, gender, marital status, or socioeconomic status—to determine whether applicants will be insured.<sup>35</sup> For instance, “[i]nsurers insist that what may seem like discrimination against low-income blacks is no more than cutting loss exposure in areas of high theft, vandalism [and] arson . . . .”<sup>36</sup> Or stated differently, the decision “to offer a policy [at a certain price is] based solely on the perceived risk of the potential policyholder.”<sup>37</sup>

35. See, e.g., Tim W. Ferguson, *Hard-Luck Insurer is Directed to Community Chest*, WALL ST. J., Sept. 20, 1994, at A23:

When the California Department of Insurance granted 20th Century Industries a minor premium boost for its auto policies . . . .  
 . . . 20th Century was told where it should do part of its investing, advertising and philanthropy. This will spread across the nation . . . . It means utility-type scrutiny and obligations for insurance and other financial services.

On the federal level, the primary vehicle in the Community Reinvestment Act for banks. Now there's talk of extending that to securities vehicles that are substitute banks, and to insurance. . . .

In the 20th Century matter, the lead intervenor was the Economic Empowerment Foundation of Oakland and its founder, Selwyn Whitehead. . . . *Ms. Whitehead, 39 and black, is the consummate advocate. . . .*

*[She] is skilled in framing financial questions in terms of "institutional racism or classism" . . . .*

. . . She argues that inner-city involvement could profit insurers, but they should be there anyway.

*This increasingly powerful woman and others like her are laying groundwork in the states, as well as with Congress and the White House, for a new day in the financial sector. Those who'd rather not see it dawn had better join the battle.*

*Id.* (emphasis added).

36. Karr, *Complaints*, *supra* note 24, at A22. “A reluctance to write policies in an area where you know you’re going to have losses’ is prudent business, not redlining, says . . . a vice president of ITT Hartford.” *Id.*

37. Eskenazi, *supra* note 18, at B1. A spokesman for the Farmers Insurance group stated that “[i]njecting the issue of race into the sale and purchase of insurance is totally inappropriate.” *Id.* And a regional vice president of the Insurance Information Institute added, “We as a business do not arbitrarily turn down good business’ . . . . ‘We try as best we can to base our decisions on the level of risk that is posed by a home or business or a consumer’s driving record.’” *Id.*

Insurers and their defenders also vehemently deny that the industry practices invidious discrimination on the basis of gender<sup>38</sup> or marital status.<sup>39</sup> They assert that sound actuarial differences exist between men and women which create different types of risks; consequently, men and women should pay different rates.<sup>40</sup> In addition, insurers maintain that discrimination on the basis of marital status “is a sound business practice justified by statistical data.”<sup>41</sup> They also declare that state laws allow

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38. See Crenshaw, *supra* note 20, at F1:

A state court judge in Baltimore has thrown out a Maryland regulation requiring insurance companies to charge the same rates for men and women.

... Circuit Judge Robert Hammerman ...

... found that Equitable had been able to justify differentiating between men and women and he ruled that regulators exceeded their authority in requiring equality of rates.

An Equitable spokesman in New York applauded the decision, saying: “Our rates are fair. They are fair to men and to women and they reflect our experience.”

*Id.* See also Susan Schmidt, *Maryland Tells Insurer To Stop Setting Rates According to Sex*, WASH. POST, May 1, 1986, at B1:

Insurance companies commonly have set different insurance rates for men and women.

[An attorney for the company] said Equitable had argued that its disability rates for women were higher because women file more claims than men.

Some clerical and other low-paid workers are unable to obtain disability insurance because carriers conclude they would be more likely to file claims with the intent of getting more money in benefits than they do in wages ...

*Id.* But see Reid, *supra* note 20, at A1:

Montana initiates a practical test of a major policy goal of the feminist movement today when it becomes the first state to implement “unisex” insurance legislation requiring that prices and benefits for all forms of insurance be the same for men and women. ...

...  
The industry explains that because women, on average, live longer than men, insurance companies can invest a woman’s premium payments longer and earn the same profit from a lower premium.

Yet, women receive lower monthly payments than men on lifetime annuity policies; because the average woman lives longer, the total payout tends to equalize.

39. See, e.g., Donna K. H. Walters, *Garamendi Urged to Fight Bias on Marital Status*, L.A. TIMES, July 28, 1993, at D1, D2:

Insurers commonly refuse to issue joint policies to unmarried couples for health, rental and auto coverage. ... [I]nsurers say that not only is it legal—at this point—to set different rates and in other ways discriminate against unmarried policy buyers, but that it is a sound business practice justified by statistical data.

Not so, insists ... a Los Angeles attorney who headed the working group on marital status ... Coleman ... says he has been fighting “pervasive” discrimination against unmarried people for 20 years, [and argues] that the insurance companies have yet to provide the statistics on which they base higher rates for the unmarried or discounts for married persons.

40. See generally Crenshaw, *supra* note 20, at F1.

41. Walters, *supra* note 39, at D2.

insurance companies to set different rates and discriminate against unmarried or single consumers.<sup>42</sup>

Assuredly, the debate surrounding redlining and discriminatory access to loans, credit, and insurance will continue. But this Article is not written to heighten that debate. Even a cursory examination of law reviews and journals uncovers an excessive number of articles either supporting or condemning lenders<sup>43</sup> and insurers<sup>44</sup> allegedly discrim-

42. *Id.*

43. Compare Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1470-72 (1994) (critiquing the relevance of the Community Reinvestment and Equal Credit Opportunity Acts and concluding that new strategies are required to end financial discrimination) and Richard Marsico, *A Guide to Enforcing the Community Reinvestment Act*, 20 FORDHAM URB. L.J. 165, 239 (1993) (accepting the view that "it is time to move beyond debating about whether unequal treatment may be taking place to discussing efforts to ensure that minorities have equal access to credit.") and Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REFORM 527, 560 (1993) ("Trying to eliminate lending discrimination with a piecemeal system is not a sensible approach. A single law that amalgamates all prohibitions and requirements relating to mortgage-lending discrimination would be immensely simpler and more efficient.") and Joan Kane, *The Constitutionality of Redlining: The Potential for Holding Banks Liable as State Actors*, 2 WM. & MARY BILL RTS. J. 527, 563 (1993) (arguing that "[by] holding banks to a constitutional standard of equal protection, the process of mortgage lending will change") and Glenn B. Canner et al., *Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets*, 58 S. ECON. J. 249, 251 (1991) (finding that "after controlling for household and locational default risk, . . . minority households are somewhat less likely to obtain conventional financing than whites") and Stephen A. Fuchs, *Discriminatory Lending Practices: Recent Developments, Causes and Solutions*, 10 ANN. REV. BANKING L. 461, 475 (1991) (reporting that "banks use 'a variety of methods in discouraging and disqualifying individuals for loans,' including: failure to advertise in black communities, on black radio, and in black newspapers") and Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 PAC. L.J. 1071, 1081 (1987) ("Geographic discrimination takes a wide variety of forms, the most obvious of which is outright refusal to consider applications for mortgage loans in particular areas. Other forms include imposition of more stringent credit terms for loans in some areas than would be required for similar loan elsewhere.") and Page Mailliard & Ken Anderson, *Women's Banks and Women's Access to Credit: Competition Between Marketplace and Regulatory Solutions to Gender Discrimination*, 20 LOY. L.A. L. REV. 771 (1987) ("During the 1970's, as more women entered the work force as managers, laborers and entrepreneurs, women's credit and financing needs intensified. Yet banks and other financial institutions persisted in discriminating against women in extending credit.") and John H. Matheson, *The Equal Credit Opportunity Act: A Functional Failure*, 21 HARV. J. ON LEGIS. 371, 373 (1984) ("Credit has become a functional substitute for cash in our economy, and consequently credit decisions can greatly influence an individual's economic choices.") and Susan S. Blakely, *Credit Opportunity*

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for Women: *The ECOA and its Effects*, 1981 WIS. L. REV. 655, 656 (stressing that creditors rationally have engaged in numerous discriminatory acts against women applicants) with Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 295 (1993) (arguing that legitimate African-American consumers and the NAACP use the Community Reinvestment Act to force banks and other lenders to adopt "hiring quotas" and "charitable giving, . . . especially gifts that fit within certain 'politically correct' categories") and David E. Cohn, *The Community Reinvestment Act—Asset or Liability?*, 75 MARQ. L. REV. 599, 619 (1992) ("[T]he mortgage gap between African Americans and whites is alarming because home ownership is a principal method of increasing wealth in the United States. Consequently, barriers to home ownership as well as to funds for commercial development only serve to prevent upward economic mobility for African Americans.") and Margaret S. Pfunder, *The Legality of Redlining Under Civil Rights Laws*, 25 AM. U. L. REV. 463, 469 (1976) ("Racial discrimination . . . does not emerge as the sole reason for the problems blacks and other minorities encounter in obtaining conventional financing. Economic and business considerations which are difficult to disentangle from racial motivations have . . . played a role in lending decisions.").

44. Compare Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 983 (1993) (arguing that "[t]he weight of the evidence supports the conclusion that race affects whites' discretionary decision making in areas as diverse as hiring and performance evaluations in employment settings; mortgage lending, [and] insurance redlining") and Peter Dreier, *American's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1381 (1993) (arguing that "redlining . . . by banks and insurance companies leads to a self-fulfilling prophecy of urban neighborhood decline.") and Gary Williams, *"The Wrong Side of the Track": Territorial Rating and the Setting of Automobile Liability Insurance Rates in California*, 19 HASTINGS CONST. L.Q. 845, 861 (1992) ("Territorial rating, as practiced by the insurance industry in California, clearly fits the definition of redlining. Insurers refuse to insure residents in low-income and predominantly minority areas of the state.") and Gregory D. Squires & William Velez, *Insurance Redlining and the Transformation of an Urban Metropolis*, 23 URB. AFF. Q. 63 (1987) (reporting that an analysis of the "distribution of homeowners insurance policies [revealed that] a strong bias in favor of suburban and white neighborhoods and against inner-city and minority communities was found.") and Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L.J. 835, 837-38 (1986) (reaffirming the notion that territorial redlining is not simply "a neutral, scientific process based on statistical differences") and Anne C. Cicero, *Strategies for the Elimination of Sex Discrimination in Private Insurance*, 20 HARV. C.R.-C.L. L. REV. 211, 217 (1985) (arguing that "[u]sing sex in underwriting often results in sex redlining . . . [because] some companies refuse to provide casualty insurance to divorced women on the theory that they are unstable or prone to family trouble, increasing the likelihood of accidents") and Robert H. Jerry & Kyle B. Mansfield, *Justifying Unisex Insurance: Another Perspective*, 34 AM. U. L. REV. 329, 367 n.141 (1985) (arguing that "[i]nsurers can circumvent race-neutral rating tables in property and liability insurance by 'red-lining'") and Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 525-26 (1983) (arguing that insurers dump "residents of certain geographic areas" into the public markets because those consumers are "not considered desirable risks") and David I. Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J. L. & SOC. PROBS. 1, 13-14 (1980) (arguing that property insurers exclude communities with certain zip codes and exclude buildings over 40 years old) and Ruthanne DeWolfe et al., *Civil Rights Implications of Insurance Redlining*, 29 DEPAUL L. REV. 315, 318 n.26 (1980) and Kevin J. Byrne, Comment, *Application of Title VIII to Insurance Redlining*, 75 NW. U. L. REV. 472 (1980) with Martin J. Katz, *Insurance and the Limits of Rational*

inatory conduct. This Article, however, will attempt to explain how state and federal courts have tried to resolve disputes involving redlining, unequal access to capital, and insurance discrimination during the period between 1950 and 1995.

As we will see, painstaking analyses of access-to-capital, access-to-insurance, and redlining debates reveal two incontrovertible conclusions: 1) Extremely complicated legal issues surround these heated disputes; and 2) prolonged media coverage of these contentions will produce a "litigation wave."<sup>45</sup> Of course, lenders and insurers will settle many claims; but litigants will ask federal and state courts to resolve an inordinately large number<sup>46</sup> of complaints. In fact, over the past forty-five years, a fairly large number of consumers have asked courts to resolve fair-lending, access-to-insurance, and geographic-redlining claims. But aggrieved consumers and their advocates as well as lenders, insurers, and their supporters either refuse to accept, fail to appreciate, or continue to disregard an unsettling truth: *Federal and state courts are financially unequipped and overburdened; therefore, they are ineffective and impractical arenas for resolving a wave of highly intricate and emotionally charged disputes involving mortgage redlining, insurance redlining, and discriminatory access to capital and insurance.* Quite simply, all interested parties should be encouraged to uncover and use

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*Discrimination*, 8 YALE L. & POL'Y REV. 436, 437, 444 (1990) (arguing that insurance redlining is simply "rational discrimination," and that "[to] maximize profits, . . . insurers will rationally discriminate, charging higher rates for black entrepreneurs than for similar white entrepreneurs.") and Christopher P. McCormack, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 597-98 (1986) ("Many of the justifications for redlining are credible. Factors present in the urban environment may objectively put repayment and collateral sufficiency at risk.").

45. Cf. Tim W. Ferguson, *The Next Lender Litigation Wave: Mortgage Bias*, WALL ST. J., May 25, 1993, at A15 ("[The] Justice [Department] last year forced a \$1 million settlement by Decatur Savings in the Atlanta area for failures to lend to minorities. The agency has been quiet since, but the banking world fears a slew of cases are in the offing. Also, class-actions filings have commenced.")

46. See, e.g., Suzanne A. Ryan & John R. Wilke, *Banking on Publicity, Mr. Marks Got Fleet to Lend Billions*, WALL ST. J., Feb. 11, 1994, at A1, A5 ("A Georgia class-action suit with 14,000 plaintiffs alleging *predatory lending* is scheduled for trial later this month.") (emphasis added); *"Redlining" Ruling Left Intact*, CHI. TRIB., May 17, 1993, at 1 ("The Supreme Court Monday let stand a precedent-setting ruling that expanded the protections under the federal fair housing law to cover racial discrimination in the *sale of homeowners' insurance*. . . . The class-action suit alleged that American Family Mutual Insurance [Company] engaged in redlining in the Milwaukee area.") (emphasis added).

forums which are more efficient and less expensive than federal and state courts.

Furthermore, even if courts are able to handle a new wave of litigation, evidence reported in this Article reveals that these tribunals are still inferior arenas because they are likely to practice race and gender discrimination themselves. Or stated differently, state and federal courts are likely to allow impermissible and prejudicial factors to influence their *procedural and substantive rulings*. For example, findings reported in this paper suggest that courts often permit consumers' race, ethnicity, gender, and class status to influence whether *procedural questions* are decided in favor of aggrieved consumers, insurers, or lenders.

There is more. Many *insurance companies* sell insurance and *make loans*<sup>47</sup> and many regulated *lending institutions* make loans and *sell insurance*.<sup>48</sup> These dual practices, therefore, produce major substantive and procedural questions for state and federal courts: Are lenders who sell insurance products engaged in the "business of insurance?"<sup>49</sup> May

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47. See, e.g., Mitchell Pacelle, *Banks and Insurers Step Up Bulk Sales of Soured Real-Estate Loans and Assets*, WALL ST. J., Mar. 28, 1994, at A2 ("[I]nsurance companies are now flooding the market with pools of soured real-estate loans and properties, trying to take advantage of . . . a seller's market."); *Delinquencies on Mortgages Held by Life Insurers Fell*, WALL ST. J., Sept. 2, 1993, at B8 ("[I]nsurance profits continue to be dragged down by soured mortgages. . . . Insurance companies hold \$206.72 billion of mortgage loans, \$12.69 billion of which are delinquent."); Linda Parham, *Commercial Developers, Seeking New Use for Skills, Turn to Asset Management*, WASH. POST, Sept. 14, 1992 at F10 ("[L]ife insurance companies . . . made loans to Washington area developers with an eye toward long-range investments.").

48. See, e.g., G. Bruce Knecht & Leslie Scism, *State-Chartered Banks in New York are Given the Right to Sell Annuities*, WALL ST. J., Mar. 31, 1994, at A2 ("In an important victory for banks, New York's highest court gave state-chartered institutions the right to sell annuities, one of the insurance industry's fastest-growing products."); Jerry Knight, *Misplaced Punctuation Didn't Void 1916 Law: Justices Uphold Banks' Right to Sell Insurance*, WASH. POST, June 8, 1993, at D1:

Putting a pair of quotation marks in the wrong place in a law is sloppy punctuation, but a "simple scrivener's error" doesn't mean a statute letting small-town banks sell insurance was accidentally repealed, the Supreme Court ruled yesterday.

. . . .  
Facing the threat that more than 100 banks that had been selling insurance for decades would have to stop, bankers, insurance agents and federal banking regulators rushed to the Supreme Court for clarification.

*Id.*; Joel G. Brenner, *Va. Bill Lets Banks, S&Ls Sell Insurance; Legislation Must be Signed by Wilder*, WASH. POST, Jan. 25, 1991, at F1 ("The Virginia General Assembly gave a boon to state-chartered banks, credit unions and savings and loans this week when it passed a bitterly contested measure that allows the institutions to sell insurance.").

49. See *infra* notes 103-10 and accompanying text. Under the McCarran-Ferguson Act, *only state insurance commissioners* have authority to regulate insurance companies and the "business of insurance." Insurance commissioners also have authority to eradicate "insurance redlining" and other forms of insurance



*state insurance commissioners* commence actions against commercial banks, savings banks, and thrifts that practice “insurance redlining?” And, if regulated lending institutions are engaged in the “business of insurance” and are practicing impermissible discrimination, may *consumers and consumer advocates* initiate private actions against insurance companies *under federal fair housing laws?*

Quite simply, as of this writing, courts are seriously grappling with these and other complex questions. More important, both federal and state courts’ access-to-credit, access-to-insurance, mortgage-redlining, and insurance-redlining decisions are despairingly strained, contradictory, divisive, and unintelligible. Once again, the purpose of this Article is to highlight the severity of these multifarious legal issues and to encourage litigants to avoid these tribunals if they cannot settle their disputes.

Part I presents a brief overview of federal and state fair-lending and anti-mortgage “redlining” statutes. Part II briefly reviews federal and state statutes that prohibit insurance discrimination and redlining. But an exhaustive analysis of both federal and state administrative enforcement activities appears in Part III. This latter section stresses that the Federal Reserve Board (Fed), the Office of Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Federal Trade Commission (FTC), the Department of Housing and Urban Development (HUD), and the Office of Thrift Supervision (OTS) are authorized to enforce federal fair-lending laws. Yet these federal agencies have not eliminated nor significantly reduced mortgage redlining and the discriminatory access to loans and credit.

Part III also reports that states’ insurance superintendents, finance commissioners, and human- and civil-rights commissions are responsible for enforcing states’ anti-redlining and equal-access-to-credit laws. But state agencies and commissions—like their federal counterparts—are not effective. Briefly stated, research findings reveal that states have not been able to prevent or eradicate either insurance or mortgage redlining.

Parts IV and V examine judicial enforcement of fair-lending, access-to-insurance, and redlining laws. Specifically, Part IV discusses the

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discrimination under state insurance law. Generally, private actions are not allowed. On the other hand, the Fair Housing Act Amendments of 1988 explicitly prohibits “insurance redlining,” which is clearly a derivative of the “business of insurance.” But the latter act permits disgruntled insurance consumers to initiate private suits in federal courts to eliminate the practice. Which body of law is superior—state insurance laws or federal fair-housing laws?

disposition of cases when federal and state agencies commence anti-redlining, access-to-capital, and access-to-insurance litigation in federal and state courts. And Part V outlines the private enforcement of anti-redlining and fair-lending laws in federal courts. The reported findings in those parts support the basic theme of this Article: Federal and state judicial proceedings are truly inferior settings for addressing these types of consumers' complaints.

Finally, Part VI presents a case study of aggrieved consumers who sued lenders and insurance companies in federal and state courts between 1950 and 1995.

## I. A BRIEF OVERVIEW OF FEDERAL AND STATE FAIR-LENDING AND MORTGAGE-REDLINING STATUTES

### A. *Federal Fair-Lending and Mortgage-Redlining Statutes*

#### 1) *Title VIII of The Civil Rights Act of 1968*

Generally, Title VIII of the 1968 Civil Rights Act<sup>50</sup>—the “Fair Housing Act of 1968”—outlaws housing discrimination. More specifically, Title VIII prohibits discrimination based on “race, color, religion, sex or national origin.”<sup>51</sup> Also, the Fair Housing Act forbids discriminatory “*residential real-estate related transactions*”,<sup>52</sup> and it prohibits discrimi-

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50. 42 U.S.C. § 3601 states: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” Also, the Fair Housing Act Amendments of 1988 became effective on March 13, 1989. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 7(b)(1)(D), 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)).

51. 42 U.S.C. § 3604(a) (1988).

52. 42 U.S.C. § 3605(a) (1988). This section states:

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 in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin. (emphasis added).

Please note: Pub. L. No. 100-430 completely revised 42 U.S.C. § 3605. The revision substituted “*Discrimination in residential real estate-related transactions*” for “*Discrimination in the financing of housing*” as the section heading. The modification also added provisions governing a whole range of residential real estate-related transactions, including the making or purchasing of loans, the providing of other financial assistance, and the selling, brokering, or appraising of residential real property. The earlier provisions only concerned the origination of real-estate loans or other financial assistance. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 1988 U.S.C.C.A.N. (102 Stat.) 1622.

natory brokerage services.<sup>53</sup> To help achieve the Act's purpose, an aggrieved individual may commence a private action<sup>54</sup> in any appropriate United States district court. The Attorney General also may commence a civil action to prevent a pattern of discrimination in residential real estate-related transactions.<sup>55</sup>

It is quite evident that the Fair Housing Act—as enacted in 1965 and as amended in 1988<sup>56</sup>—prevents insurance companies as well as regulated and unregulated lending institutions from engaging in unfair lending practices. On the other hand, whether Title VIII prohibits insurers and lenders from “redlining” certain geographical areas is unclear.<sup>57</sup> Some commentators argue that Title VIII “afford[s] the

53. Under 42 U.S.C. § 3605(b) the term “residential real estate-related transaction” 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; or (B) secured by residential real estate; [and] (2) The selling, brokering, or appraising of residential real property.”  
42 U.S.C. § 3605(b) (1988).

54. 42 U.S.C. § 3613(a)(1)(A) (1988). This section states:

An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

55. 42 U.S.C. § 3614(a) (1988). This part states:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

56. See 42 U.S.C. § 3604(a), amended by Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a), 102 Stat. 1620 (1988); 42 U.S.C. § 3605, amended by, Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(c), 102 Stat. 1622 (1988).

57. See, e.g., Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REF. 527, 545-46 (1993):

There also is uncertainty as to whether the *mortgage insurance decision* is a “residential real estate-related transaction” within the meaning of the Fair Housing Act. Other concepts related to discrimination in housing finance . . . such as pre-screening, *redlining*, foreclosure practices, and the effects test, are not clearly addressed in the Act. (emphasis added).

logical basis for a suit challenging redlining practices.”<sup>58</sup> But, as reported and discussed in Part V, this latter issue has produced sharp divisions among the federal courts of appeals.

## 2) *The Equal Credit Opportunity Act of 1974*

The Fair Housing Act of 1968 does not prevent lenders from discriminating on the basis of age and marital status. Therefore, twenty-one years ago, Congress amended Title VII of the Consumer Credit Protection Act and established the Equal Credit Opportunity Act (ECOA) of 1974.<sup>59</sup> Congress enacted ECOA to insure that lending institutions offer credit responsibly, fairly, and without regard to an applicant’s gender or marital status.<sup>60</sup> In 1976, Congress expanded ECOA’s scope of protection to include additional classes of financial consumers.<sup>61</sup> The Act presently states: “It shall be unlawful for any creditor to discriminate against any applicant . . . on the basis of race, color, religion, national origin, sex[,] . . . marital status, or age . . . .”<sup>62</sup> Furthermore, lenders and creditors cannot discriminate against applicants who receive public assistance.<sup>63</sup>

Several federal agencies<sup>64</sup>—including the Federal Trade Commis-

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58. Margaret S. Pfunder, *The Legality of Redlining Under the Civil Rights Laws*, 25 AM. U. L. REV. 463, 474 (1976); see also James J. Hartnett, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 131 (1993):

The Fair Housing Act prohibits both direct discrimination and practices with significant discriminatory effects. For example, . . . courts have construed the phrase “otherwise make unavailable or deny” in subsection [3604](a) to encompass mortgage “redlining,” insurance redlining, racial steering, exclusionary zoning decisions and other actions by individuals or governmental units which directly affect the availability of housing to minorities . . . .

*Id.* at 131 (emphasis added) (quoting *South-Suburban Housing Center v. Board of Realtors*, 935 F.2d 868, 882 (7th Cir. 1991)).

59. Pub. L. No. 93-495, 88 Stat. 1500, 1521-25 (codified as amended at 15 U.S.C. §§ 1691-1691f (1994)).

60. Section 502 of Pub. L. No. 93-495 stated: “The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. . . .”

61. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 90 Stat. 251 (codified as amended at 15 U.S.C. § 1691 (1994)).

62. 15 U.S.C. § 1619(a)(1) (1994).

63. 15 U.S.C. § 1691(a)(2) (1994).

64. See 12 C.F.R. § 202.14(a)(1) (1996), which states in pertinent part:

[The] administrative enforcement of the Act and this regulation . . . is assigned to the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Federal Deposit Insurance Corporation, Office of Thrift Supervision [acting directly or through the Federal Savings and Loan Insurance Corporation], National Credit Union Administration,

sion<sup>65</sup>—are responsible for enforcing the Act administratively. But, “[i]f an agency . . . is unable to obtain compliance with the act or [the regulations], it may refer the matter to the Attorney General of the United States.”<sup>66</sup> The Attorney General may commence an action to secure injunctive relief and damages, if she believes creditors are engaged in a pattern of discrimination.<sup>67</sup> Additionally, an aggrieved consumer may file a civil suit in federal court to recover damages.<sup>68</sup>

### 3) *The Home Mortgage Disclosure Act of 1975*

In 1975, Congress found that “some depository institutions [failed] . . . to provide adequate home financing to qualified applicants on reasonable terms and conditions.”<sup>69</sup> From congressional members’ perspective, such neglect “contributed to the [economic] decline of certain geographic areas.”<sup>70</sup> To help address the problem, Congress passed the Home

Interstate Commerce Commission, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission, Small Business Administration, and Secretary of Transportation.

65. See 12 C.F.R. § 202.14(a)(2) (1996) (“Except to the extent that administrative enforcement is specifically assigned to other authorities, compliance with the requirements imposed under the act and this regulation is enforced by the Federal Trade Commission.”).

66. 12 C.F.R. § 202.14(b)(3) (1996). This part also states:

[I]f the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, or the National Credit Union Administration has reason to believe that one or more creditors [are] engaged in a pattern or practice of discouraging or denying applications in violation of the act or this part, the agency shall refer the matter to the Attorney General. Furthermore, the agency may refer a matter to the Attorney General if the agency has reason to believe that one or more creditors violated section 701(a) of the act.

67. See 12 C.F.R. § 202.14(b)(4) (1996):

On referral, or whenever the Attorney General has reason to believe that one or more creditors [are] engaged in a pattern or practice in violation of the act or this regulation, the Attorney General may bring a civil action for such relief as may be appropriate, including actual and punitive damages and injunctive relief.

68. See 12 C.F.R. § 202.14(b)(2) (1996), which states in relevant part:

[A] civil action under the Act or this regulation may be brought in the appropriate United States district court without regard to the amount in controversy or in any other court of competent jurisdiction within two years after the date of the occurrence of the violation, or within one year after the commencement of an administrative enforcement proceeding . . . .

69. 12 U.S.C. § 2801(a) (1994).

70. *Id.*

Mortgage Disclosure Act (HMDA).<sup>71</sup> HMDA's purpose is simple: To generate reliable information, so that consumers and federal officials can determine whether federally insured lenders<sup>72</sup> are serving the credit needs of communities in which they are doing business.<sup>73</sup> The regulations require lenders to collect a variety of socioeconomic data—including applicants' race, national origin, gender, and income<sup>74</sup>—and forward the information to appropriate agencies.<sup>75</sup>

Unlike the Fair Housing Act or ECOA, the Home Mortgage Disclosure Act is exceedingly short—less than ten sentences. More important, HMDA (1) does not create any new rights for loan and credit applicants; (2) does not expand any “access-to-capital” rights, like those outlined in the Fair Housing Act and ECOA; and (3) does not allow aggrieved consumers or the Attorney General to commence any judicial or administrative actions. Yet, in recent years, HMDA-generated data have produced much controversy and virulent racial enmity.<sup>76</sup> Furthermore,

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71. Pub. L. No. 94-200, § 303, 89 Stat. 1124, 1125 (codified as amended at 12 U.S.C. §§ 2801-2811 (1994)).

72. 12 C.F.R. § 203.1(c) (1996) states:

This regulation applies to certain financial institutions, including banks, saving associations, credit unions, and other mortgage lending institutions, as defined in § 203.2(e). It requires an institution to report data to its supervisory agency about home purchase and home improvement loans it originates or purchases, or for which it receives applications; and to disclose certain data to the public.

73. See 12 U.S.C. § 2801(b) (1994): It states in pertinent part: “The purpose of this chapter is to provide the citizens and public officials of the United States with sufficient information to enable them to determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located . . . .”

74. 12 C.F.R. § 203(App. A)(IV)(A)(3) (1996) (The appropriate language states: “For all of these loans and applications, report the race or national origin, sex, and income information, unless your institution is a bank, savings association, or credit union with assets of \$30 million or less on the preceding December 31.”).

75. 12 C.F.R. § 203.1(a) (1996) (“This regulation is issued by the Board of Governors of the Federal Reserve System . . . .”). See also *Federal Financial Institutions Examination Council*, Press Release, available in WESTLAW, Magsplus Database, 1994 WL 586637 (F.F.I.E.C., Oct. 26, 1994):

The reports reflect lending activity for approximately 9,650 institutions covered by . . . [HMDA] that reported data to member agencies of the FFIEC—the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, and Federal Reserve System—and to the Department of Housing and Urban Development.

76. Compare *Letters to the Editor: The Black and White Facts of Redlining*, WALL ST. J., Sept. 29, 1994, at A13 (noting that HMDA data revealed that “[m]ore than 95%” of Chevy Chase Savings’ loans “came from white areas” and asserting that the word “‘quota’ . . . is a derisive and divisive term that . . . is used to . . . discredit civil-rights enforcement”) (Comments of Assistant Attorney General Deval L. Patrick, Department of Justice’s Civil Rights Division) with *Toward Quota Loans?*, WALL ST. J., Sept. 26, 1994, at A14 (attacking the Home Mortgage Disclosure Act’s “racial paperwork,”

fairly recent releases of HMDA data have helped to increase the "number of mortgage loans extended to blacks and Hispanics."<sup>77</sup> On the other hand, HMDA's loan-denials and redlining disclosures are causing an increasing number of disgruntled consumers to file redlining and equal-access-to-credit suits in state and federal courts.<sup>78</sup>

#### 4) *The Community Reinvestment Act of 1977*

In 1977, Congress ratified the Community Reinvestment Act (CRA),<sup>79</sup> after finding that 1) federal law requires "regulated financial institutions . . . to demonstrate that their deposit facilities [are serving] *the convenience and needs* of the communities in which they are chartered to do business,"<sup>80</sup> and 2) federal law compels lenders to act affirmatively and "help *meet the credit needs* of the local communities in which they are chartered."<sup>81</sup> Although the CRA encourages regulated financial institutions "to help meet the credit needs of the local communities in which they are chartered,"<sup>82</sup> it has a proviso: Regulated institutions' efforts and lending practices must be "safe and sound."<sup>83</sup>

In several ways, the Community Reinvestment Act resembles HMDA: The CRA is fairly short and does not create additional rights for financial consumers. Moreover, it does not enlarge the Fair Housing Act's or the ECOA's fair-lending privileges and does not permit a private right of action.<sup>84</sup> But, unlike HMDA, the CRA has an adminis-

"Justice Department's Janet Reno and Lani Guinier alternate, Deval Patrick") and Jonathan R. Macey, *Banking By Quota*, WALL ST. J., Sept. 7, 1994, at A14 (criticizing HMDA data and the Justice Department's "unprecedented' lending discrimination case against Chevy Chase Federal Savings Bank of Chevy Chase, Md.").

77. Albert R. Karr, *Minority Mortgage Loans Rose in 1993, But Denial Rate Topped that for Whites*, WALL ST. J., Oct. 27, 1994, at A2.

78. See generally Holly Bass, *Chevy Chase Federal Reaches \$11 Million Pact: Accord Settles U.S. Charges that S&L Didn't Offer Mortgages to Blacks*, WALL ST. J., Aug. 23, 1994, at A2; *Fleet Financial Group Unit Settles Lending-Bias Suit*, WALL ST. J., Mar. 17, 1994, at A7; Joe Davidson, *Two Banks Set Pacts to Settle Bias Charges*, WALL ST. J., Jan. 21, 1994, at A4; and Tim W. Ferguson, *The Next Lender Litigation Wave: Mortgage Bias*, WALL ST. J., May 25, 1993, at A15.

79. 12 U.S.C. §§ 2901-2907 (1994).

80. 12 U.S.C. § 2901(a)(1) (1994).

81. 12 U.S.C. § 2901(a)(3) (1994).

82. 12 U.S.C. § 2901(b) (1994).

83. 12 U.S.C. § 2901(b) (1994).

84. See, e.g., *Harambee Uhuru School, Inc. v. Kemp*, 1992 WL 274545, at \*4 (S.D. Ohio Sept. 30, 1992).

trative enforcement section.<sup>85</sup> Four federal supervisory agencies<sup>86</sup>—the Office of Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision—must examine financial records to determine whether lenders are “meeting the credit needs of the entire community, including low-and moderate-income neighborhoods.”<sup>87</sup> To achieve compliance, the Federal Reserve Board may deny a variety of expansion applications—e.g., acquisitions, branch openings, mergers, and relocations.<sup>88</sup>

### *B. State Statutes: Mortgage Discrimination, Financial Redlining and Equal Access to Credit and Loans*

A majority of states have passed either an anti-mortgage discrimination, an anti-financial redlining, or a fair-lending statute. Specifically, twenty-three<sup>89</sup> states have adopted the “*residential-real-estate-related-transaction*” language appearing in Title VIII of the Civil Rights Acts of 1968 and outlawed racially motivated mortgage loans. Florida’s anti-mortgage discrimination statute fairly represents this group. It reads in pertinent part:

It is unlawful for any person or entity whose business includes engaging in residential real estate related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or

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85. See 12 U.S.C. § 2901(b) (1994) (The relevant part states: “[E]ach appropriate Federal financial supervisory agency [must] use its authority when examining financial institutions, to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.”).

86. See 12 U.S.C. § 2902(1)(A)-(D) (1994).

87. *Harambee Uhuru School, Inc.*, 1992 WL 274545, at \*4.

88. See generally 12 C.F.R. § 228.1 (1996).

89. The “residential real estate related transactions” language appears in the following state statutes: ALA. CODE § 24-8-6(a)(b) (1975); ARIZ. REV. STAT. ANN. § 41-1491.20(A)(B) (1995); COLO. REV. STAT. ANN. § 24-34-502(1)(g) (West 1995); FLA. STAT. ANN. § 760.25(1)(2) (West 1995); IND. CODE ANN. § 22-9.5-5-6(a)(1)(2) (West 1995); IOWA CODE ANN. § 216.8(A)(3)(a)(b) (West 1995); KAN. STAT. ANN. § 44-1017(a)(b) (1993); LA. REV. STAT. ANN. § 51:2607(A)(B) (West 1991); MASS. GEN. LAWS ANN. ch. 151B, § 4(3)(A)(B) (West 1995); MICH. COMP. LAWS ANN. § 37.2-504(1)(a) (West 1995); MONT. CODE ANN. § 49-2-305(7)(a)(b) (1994); NEB. REV. STAT. § 20-320 (1)(2) (1994); N.C. GEN. STAT. § 41A-4(a)(1)(2) (1995); OKLA. STAT. ANN. tit. 25, § 1452 (A)(17)(a)(b) (West 1995); PA. STAT. ANN. tit. 43, § 955(8)(i) (1995); R.I. GEN. LAWS § 34-37-5.4(A)(B) (1956); S.C. CODE ANN. § 31-21-60(A)(B) (Law Co-op. 1995); TENN. CODE ANN. § 4-21-606(a)(b) (1995); TEX. PROP. CODE ANN. § 301.026 (a)(b) (West 1995); UTAH CODE ANN. § 57-21-6(1)(a)(b) (1995); VT. STAT. ANN. tit. 8, § 1211(a)(6) (1995); VA. CODE ANN. § 36-96.4(A)(B) (Michie 1992); W. VA. CODE § 5-11A-6(a)(b) (1995).



in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, [or] sexual orientation . . . .<sup>90</sup>

In addition, at least thirteen<sup>91</sup> states have enacted statutes that prohibit banking and other financial institutions from discriminating solely on the basis of *geographic location*. However, the scope of consumers' protection under these statutes is mixed. Depending upon the state, the protection can be extremely narrow or very broad. For example, New York's banking statute is fairly narrow. The applicable section states: "No banking institution . . . shall refuse to make a prudent loan upon the security of real property or otherwise discriminate . . . because of the geographic location of such property *if such property is located within the geographic area ordinarily serviced by such bank* . . . ."<sup>92</sup>

On the other hand, the scope of protection under California's and Massachusetts' anti-financial redlining statutes is substantially broader. In California, a financial institution may not consider the "*conditions, characteristics, or trends in [a] neighborhood or geographic area*" unless the lender demonstrates "that consideration of these conditions in *the particular case* is required to avoid an unsafe and unsound business practice."<sup>93</sup> Similarly, in Massachusetts, financial institutions may not deny loans solely upon the basis that a "*property is located in a specific neighborhood or geographical area*."<sup>94</sup> Instead, lenders must show that their lending decisions are based upon "a reasonable analysis of the lending risks associated with a residential mortgage transaction."<sup>95</sup>

At this juncture, it is worth mentioning that the distinction between a "neighborhood" and a "geographical area" is legally significant. As

90. FLA. STAT. ANN. § 760.25(2)(a)(b) (West 1995).

91. See ARK. CODE ANN. § 23-32-1804(4)(C)(D)(E) (Michie 1995); CAL. HEALTH & SAFETY CODE § 35810 (West 1995); CONN. GEN. STAT. ANN. § 36-52c(a) (West 1995); ILL. ANN. STAT. ch. 205, para. 635/3.8(a)(ii) (Smith-Hurd 1995); ILL. ANN. STAT. ch. 775, para. 5/4-102(D) (Smith-Hurd 1995); Iowa Code Ann. §§ 12C.6A(1), (4)(e) (West 1995); MASS. GEN. LAWS ANN. ch. 167, § 14 (West 1995); MASS. GEN. LAWS ANN. ch. 183, § 14 (West 1995); MO. ANN. STAT. § 108.470 (Vernon 1995); N.J. STAT. ANN. § 17:16F-1 (West 1995); N.Y. BANKING LAW § 9-f(1) (McKinney 1995); OHIO REV. CODE ANN. § 1111.03(C) (Anderson 1995); VT. STAT. ANN. tit. 8, § 1055(3)(I) (1995); V.I. CODE ANN. tit. 9, § 68(a)(5) (1995); WASH. REV. CODE ANN. § 30.60.010(1) (West 1995).

92. N.Y. BANKING LAW § 9-f(1) (McKinney 1995) (emphasis added).

93. CAL. HEALTH & SAFETY CODE § 35810(a) (West 1995) (emphasis added).

94. MASS. GEN. LAWS ANN. ch. 183, § 64 (West 1995) (emphasis added).

95. *Id.*

reported in Part VI, state courts are less likely to rule against lenders who allegedly redlined a large geographical area. Lenders, however, are more likely to be liable if they deny loans simply because applicants live in a particular lower-, middle- or upper-income neighborhood.<sup>96</sup>

To insure that lending institutions offer credit and loans without regard to consumers' immutable characteristics and other extralegal factors, fifteen<sup>97</sup> states have enacted statutes which are either equivalent or substantially equivalent to the Equal Credit Opportunity Act of 1974. Louisiana's,<sup>98</sup> Maryland's,<sup>99</sup> Nevada's,<sup>100</sup> and Virginia's<sup>101</sup> Equal Credit Opportunity Acts are equivalent to the federal ECOA; therefore, under these acts, lenders may not deny credit or loans solely on the basis of a consumer's race, color, religion, national origin, sex, or marital status. Finally, eight<sup>102</sup> states also have passed human- and civil-rights

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96. See discussion of Table 4 *infra* Part VI.

97. See ARK. CODE ANN. § 4-87-104 (Michie 1995) (outlawing gender and marital-status discrimination); COLO. REV. STAT. ANN. § 5-1-109 (West 1995) (outlawing race, gender and marital-status discrimination); GA. CODE ANN. § 7-6-1(a) (Michie 1995) (outlawing race, gender and marital-status discrimination); HAW. REV. STAT. § 477E-3(a)(b) (1991) (outlawing marital-status discrimination); LA. REV. STAT. ANN. § 9:3583 (West 1995) (outlawing race, gender and marital-status discrimination); MD. CODE ANN., COM. LAW. II § 12-305(a) (1990) (outlawing race, gender and marital-status discrimination); MICH. COMP. LAWS ANN. § 750.147a(1) (West 1995) (outlawing race, gender and marital-status discrimination); NEV. REV. STAT. § 207.310(1)(2) (1994) (outlawing race, gender and marital-status discrimination); N.C. GEN. STAT. § 53-180(d) (1995) (outlawing race, gender and marital-status discrimination); OKLA. STAT. ANN. tit. 14A, § 1-109(1) (1995) (outlawing gender and marital-status discrimination); R.I. GEN. LAWS § 34-37-4.3 (1995) (outlawing race, gender and marital-status discrimination); TENN. CODE ANN. § 47-18-302(a) (1995) (outlawing gender and marital-status discrimination); VA. CODE ANN. § 59.1-21.21:1 (Michie 1992) (outlawing race, gender and marital-status discrimination); VT. STAT. ANN. tit. 8, § 1211(a) (1995) (outlawing race, gender and marital-status discrimination); VT. STAT. ANN. tit. 8, § 1302(2) (1995) (outlawing gender and marital-status discrimination—credit cards); and, WIS. STAT. ANN. § 138.20(1) (West 1995) (outlawing gender and marital-status discrimination).

98. LA. REV. STAT. ANN. § 9:3583 (West 1991).

99. MD. CODE ANN., COM. LAW. II § 12-704 (1990 & Supp. 1995).

100. NEV. REV. STAT. ANN. § 598b (Michie 1994).

101. VA. CODE ANN. § 59.1-21.21:1(a)(1) (1992).

102. See ALASKA STAT. § 18.56.096(a) (1994) ("*Human Rights*"—outlawing on the basis of race, gender and familial status discriminatory loans and financial assistance); ME. REV. STAT. ANN. tit. 5, § 4582 (West 1995) ("*Human Rights*"—outlawing on the basis of race and gender discriminatory mortgage loans); MO. ANN. STAT. § 213.045 (Vernon 1995) ("*Human Rights*"—outlawing on the basis of race and gender discriminatory commercial real-estate loans and other financial assistance); N.J. STAT. ANN. § 10:5-12(i)(1)(2) (West 1993 & Supp. 1995) ("*Civil Rights*"—outlawing on the basis of race, gender and marital status discriminatory loans, credit and financial assistance); N.D. CENT. CODE § 14-02.4-13 (1991 & Supp. 1995) ("*Discrimination*"—outlawing on the basis of race, gender and marital status discriminatory mortgage loans and financial assistance); OHIO REV. CODE ANN. § 4112.02(H)(3) (Baldwin 1995) ("*Civil Rights*"—outlawing on the basis of race and gender discriminatory mortgage loans and financial assistance); OR. REV. STAT. § 659.033(2)(A) (Supp. 1994) ("*Civil*

legislation to prevent lenders and creditors from discriminating on the basis of race, gender, and marital status.

## II. A BRIEF OVERVIEW OF FEDERAL INSURANCE LAW AND OF STATES' INSURANCE-DISCRIMINATION AND INSURANCE-REDLINING STATUTES

### A. *The Role of State Insurance Commissioners and Federal Agencies Under the McCarran-Ferguson Act of 1945*

Responding to a national crisis in the insurance industry,<sup>103</sup> Congress enacted the McCarran-Ferguson Act of 1945.<sup>104</sup> Stated in the simplest terms, the Act allocates the power to regulate the "business of insurance" among the states and the federal government. Assuredly, the Act grants the greatest amount of regulatory authority to state insurance commissioners and superintendents,<sup>105</sup> however, under some very limited circumstances, the McCarran Act allows the Federal Trade Commission<sup>106</sup> to regulate the "business of insurance." Also, some federal

*Rights*"—outlawing on the basis of race, gender and marital status discriminatory mortgage loans and financial assistance); and, S.D. CODIFIED LAWS ANN. § 20-13-21 (1995) ("*Human Rights*"—outlawing on the basis of race and gender discriminatory mortgage loans and financial assistance.)

103. See Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes With the McCarran-Ferguson Act, 1941-1992*, 43 CATH. U. L. REV. 399, 401 (1994) [hereinafter Rice, *Federal Courts and the Insurance Industry*].

104. 15 U.S.C. §§ 1011-1015 (1994).

105. The Act's Declaration of Policy states:

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.*

15 U.S.C. § 1011 (1994) (emphasis added). See also 15 U.S.C. § 1012(a) (1994) ("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.").

106. See 15 U.S.C. § 1012(b), the "Federal regulation" section. It states:

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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as

courts recently examined the Act and permitted other federal agencies to regulate insurance activities within and across states' boundaries.<sup>107</sup>

There is, however, a compelling question: Does the McCarran-Ferguson Act prevent national and regional insurance companies from redlining communities and discriminating on the basis of race, gender and marital status? Regrettably, the answer is "no." Although the McCarran Act is a federal insurance statute, it neither encourages, discourages nor addresses insurance redlining and discrimination. But, there is more. In recent years, a few federal courts reviewed the McCarran Act and decided that consumers may attack insurance redlining and discrimination by invoking the federal Fair Housing Act of 1968.<sup>108</sup> The courts reached that conclusion notwithstanding the Act's clear language: Congress shall not enact any laws that "invalidate, impair or supersede"<sup>109</sup> states' insurance laws.

More important, some congressional members have introduced three bills<sup>110</sup> to help eradicate insurance redlining and discrimination. As of this writing, those federal bills have not been enacted.<sup>111</sup> On the other hand, many states have enacted statutes to combat the discriminatory access to mortgage insurance and insurance redlining. Brief discussions of those statutes appear below.

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amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b) (1994).

107. See Rice, *Federal Courts and the Insurance Industry*, *supra* note 103, at 413 nn.51-52.

108. See *infra* notes 383-97 and accompanying text.

109. 15 U.S.C. § 1012(b) (1994).

110. See Karr, *Complaints*, *supra* note 24, at A22 ("Complaints about insurance redlining are getting an increasingly sympathetic hearing in Washington and in state capitals across the nation. Congress is currently considering three bills that would require insurers to disclose new information on their policies so federal and state governments could better determine whether systematic redlining is occurring."). See also *The Insurance Consumer Protection Act of 1993*, H.R. 1257, 103rd Cong., 1st Sess. (1993); *The Anti-Redlining in Insurance Disclosure Act of 1993*, H.R. 1188, 103rd Cong., 1st Sess. (1993).

111. See Albert R. Karr, *House Passes Weaker of Two Measures Seeking Data on Possible Bias by Insurers*, WALL ST. J., July 21, 1994, at A2 ("The House voted to require homeowner and auto insurance companies to provide information that could be used to show any discriminatory 'redlining' against minorities, but rejected a stronger bill.").

*B. States' Anti-Discrimination Statutes and the Availability of Mortgage-Guaranty and Private-Mortgage Insurance*

Simply put, mortgage guaranty<sup>112</sup> or private mortgage insurance<sup>113</sup> protects the lender, not the borrower. "It guarantees that, in a default, lenders will be paid some portion of the loan balance—typically from 17%-25%."<sup>114</sup> The majority of lending institutions, therefore, force borrowers to purchase private mortgage insurance. Furthermore, it is exceedingly clear that a strong relationship exists between a borrower's ability to secure a mortgage loan and the borrower's access to affordable mortgage insurance. As Judge Frank Easterbrook of the Seventh Circuit correctly observed: "No insurance, no loan; no loan, no house."<sup>115</sup>

Of course, securing mortgage insurance is not a problem for most prospective homeowners. Recent statistics reveal that private mortgage insurers sell this product to millions of consumers and make large profits.<sup>116</sup> But, statistical evidence also discloses another disparaging truth: Insurers frequently refuse to sell mortgage insurance to a disproportionately high percentage of minority and low-income consumers.<sup>117</sup> In fact, regardless of where middle- and working-class

112. See, e.g., TEX. INS. CODE ANN. § 21.50(1)(a)(1) (West 1995) ("Mortgage guaranty insurance" means [i]nsurance against financial loss by reason of nonpayment of principal, interest and other sums agreed to be paid under the terms of any note or bond or other evidence of indebtedness . . .").

113. See Harlan S. Byrne, *MGIC Investment: Not Running Scared*, BARRON'S, Mar. 28, 1994, at 16 ("Private insurance on conventional (non-government-guaranteed) mortgages comes into play when buyers want to put down less than 20% of a home's price. In such instances, lenders usually require the purchase of mortgage insurance.")

114. *Id.*

115. See NAACP v. American Family Mutual Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993). Of course, there are other examples of situations where consumers must secure insurance before they can consummate other real-estate related transactions. See, e.g., Schwartz v. Commonwealth Land Title Ins. Co., 374 F. Supp. 564, 574 (E.D. Pa. 1974) ("It is a matter of common knowledge and experience that in the usual situation, title insurance is indispensable to the occurrence of the real estate sale: a seller would be unable to sell his property as its reasonable value if no title company was willing to insure title.") (emphasis added).

116. See Byrne, *supra* note 113, at 16 ("[Private mortgage insurance] in force, or book of new business as it's also called, has climbed sharply the past five years. At year-end 1993, it totaled almost \$86 billion, versus \$47 billion in 1988. In [1993] alone, insurance in force rose by a hefty \$14.6 billion.")

117. See, e.g., Thomas, *Persistent Gap*, *supra* note 11, at A8 ("PMI is a big-time pain," says Antonio Stringfield, a black real-estate agent who works in predominately

minorities decide to build or purchase a home, private mortgage "insurance is either unavailable or extremely difficult to obtain."<sup>118</sup> Disgruntled consumers and others assert that mortgage insurers discriminate against certain socioeconomic classes and ethnic groups because insurers are culturally biased.<sup>119</sup> Representatives of the insurance industry disagree. They argue that legitimate business and actuarial factors affect consumers' differential access to affordable private mortgage insurance.<sup>120</sup>

Unquestionably, this cultural-bias debate will continue into the near future. But presently, only three states have anti-discrimination statutes which are designed to prevent ethnic and cultural prejudice from influencing the availability and affordability of private mortgage insurance. The laws of Arizona, Kansas, and Texas are similar: An insurer may not discriminate in the issuance or extension of property or mortgage guaranty insurance on the basis of race, national origin, color, gender, creed, or marital status.<sup>121</sup>

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minority neighborhoods in Los Angeles. He steers most clients to Great Western Financial, which lends heavily in minority neighborhoods but doesn't require private mortgage insurance . . . ."); *Bias Seen in Homeowners' Insurance Rates*, *supra* note 26, at 2E ("ACORN's analysis of data from Chicago, St. Louis, Milwaukee, Minneapolis-St. Paul and Kansas City, Mo., showed disparities—sometimes wide ones—between the insurance coverage for minority and white neighborhoods with comparable median incomes. It used state regulatory data on insured homes and census data on incomes.") (emphasis added).

118. See James D. Williams, "Catch-22" *Insurance Practices*, 100 THE CRISIS 28 (1993). Cf. *Bias Seen In Homeowners' Insurance Rates*, *supra* note 26, at 2E ("Low-income homeowners in Detroit, ACORN found, pay roughly \$35 per \$1,000 of coverage compared with \$4 per \$1,000 coverage in suburbs such as Farmington Hills or West Bloomfield Township.").

119. See, e.g., Kenneth R. Harney, *Rules for Low-Income Borrowers Relaxed*, L.A. TIMES, Oct. 31, 1993, at K4:

Kurt Arehart, vice president for affordable housing of General Electric Mortgage Insurance . . . [observed that] underwriters [are] unfamiliar with cultures other than middle-class, white American.

. . . [They] apply their own cultural biases [to applications]. . . .

But GE's research and statistical data from insuring \$1.7 billion worth of loans to low-income home buyers—often ethnic or racial minority group members—suggest that such preconceptions by underwriters frequently are wrong.

120. Cf. *Bias Seen in Homeowners' Insurance Rates*, *supra* note 26, at 2E ("There is nothing inherently evil in the fact that insurance prices vary . . . , said Marc Rosenberg, the . . . [Insurance Information Institute's] vice president. 'The cost of insurance is supposed to reflect a number of factors such as theft, vandalism, arson, the quality of fire service.'"). See also Thomas, *Persistent Gap*, *supra* note 11, at A8 ("Private mortgage insurers tend to be fussy about the neighborhoods where they will put their stamp of approval. If a home buyer is seeking a mortgage in a neighborhood deemed to have 'declining values,' for example, it's trouble.").

121. See ARIZ. REV. STAT. ANN. § 20-1548(B) (1995); KAN. STAT. ANN. § 40-3510(a) (1993); and TEX. INS. CODE ANN. § 21.50(1)(a)(I) (1995).

### C. *The Geographic Location of Consumers' Property and the Enforcement of States' Anti-Insurance Redlining Statutes*

As stated earlier, consumers often claim that some insurance companies systematically redline<sup>122</sup> certain geographic areas. In particular, urban consumers assert that insurers refuse to sell mortgage or property insurance to any person residing in blighted neighborhoods; or companies refuse to sell affordable insurance to any resident who resides in specific zip codes.<sup>123</sup> Consequently, in recent years, consumer advocates have asked state legislatures to answer a fundamental question: May mortgage or property insurers discriminate against home buyers or homeowners if consumers live or own property in "undesirable" zip codes?

As of this presentation, the majority of states have not settled this question satisfactorily.<sup>124</sup> On the other hand, legislators in fourteen states and the District of Columbia have spoken more decidedly. The results among these latter jurisdictions, however, are mixed. Only the

122. See *supra* notes 25-27 and accompanying text.

123. See, e.g., Eskenazi, *supra* note 18, at B1:

[A] report compared the number of homeowners' policies with the number of owner-occupied homes in each ZIP code in six Texas cities, including Austin. . . . In Austin, the greater the minority population of a ZIP code, the less likely that an owner-occupied home in that ZIP code will be covered by standard homeowners' insurance. . . .

*Id.*; Karr, *Complaints*, *supra* note 24, at A22 ("[I]n Kansas City, a five-year study by the insurance department showed that 59% of the policies sold in postal Zip Code areas with mostly low-income minority residents offer[ed] only limited coverage.").

124. See Albert B. Crenshaw, *Insurers Face New Claims of Urban Area 'Redlining' at Hill Hearing, Industry Denies Allegations of Bias*, WASH. POST, Feb. 28, 1993, at H3 ("The insurance industry hotly denies that it redlines. . . . In the meantime, however, homeowners who cannot get insurance have little recourse beyond the FAIR plan—which stands for Fair Access to Insurance Requirements—which is available in 29 states, including Maryland[,] . . . Virginia, [and] the District."). See also Karr, *Complaints*, *supra* note 24, at A22:

Insurers note that people who don't qualify for *regular policies* can usually buy a policy in so-called 'FAIR' plans—industry pools for *high-risk insurance* that many states require the companies to fund. *But these policies are sharply limited in coverage and usually cost three to four times more than ordinary [property or mortgage] policies.*

*Id.* (emphasis added); Pulliam, *supra* note 18, at A5 ("Currently, various regulations ban redlining . . . . [R]oughly one-half of all states have pools, called 'fair plans,' that offer property insurance to inner-city residents. . . . [However,] *existing rules have not been effective . . . .*") (emphasis added).

District of Columbia allows property carriers to practice geographic discrimination or insurance redlining. In *Firemen's Insurance Co. of Washington, D.C. v. Washington*,<sup>125</sup> the Federal Court of Appeals cited federal law and held that property insurers may discriminate on the basis of geographic location in the District of Columbia. The Federal Circuit observed that Congress wanted to “assure the availability of basic property insurance” in the District.<sup>126</sup> Therefore, to achieve this goal, insurers could adopt a FAIR Plan<sup>127</sup>—an “equitable apportionment” scheme—and sell insurance *only to persons residing in specific neighborhoods or geographical areas*.<sup>128</sup>

Significantly, Georgia<sup>129</sup> and Ohio<sup>130</sup> also have adopted FAIR Plans. But Georgia, Ohio, and Connecticut have refused to import the District of Columbia's rule. In these latter jurisdictions the standard is clear: Without exception, insurers may not redline certain neighborhoods or discriminate *solely on the basis of the geographic location of*

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125. 483 F.2d 1323 (D.C. Cir. 1973). *But see* D.C. CODE ANN. § 1-2533 (1995) (“Sale of motor vehicle insurance: It is unlawful discriminatory practice for an insurer authorized to sell motor vehicle insurance in the District of Columbia to . . . [discriminate on the basis of] geographical area [within] the District of Columbia . . .”).

126. *Firemen's Insurance*, 483 F.2d at 1330. To eliminate the practice of insurance redlining

Congress enacted the District of Columbia Insurance Placement Act to provide the FAIR plan for the District. The purposes of the Placement Act . . . [are] to assure the availability of basic property insurance; . . . and . . . to provide for the equitable distribution among insurers of the responsibility for insuring qualified property in the District of Columbia . . . . All District insurers participate in FAIR [a fair access to insurance requirements plan]. . . .

*Id.* at 1330-31.

127. *See Insurance Called Bad Bargain for Poor, Minorities*, WASH. POST, Oct. 19, 1994, at G3:

Good property insurance is more expensive, harder to find and harder to keep in areas with high minority populations and low incomes . . . .

. . . [L]ow-quality policies known as “FAIR” [fair access to insurance requirements] plans account for 2.9 percent of policies in low-minority and high-income zip codes, but 18.2 percent of policies in high-minority, low-income [z]ip codes. FAIR plans, which *cost more and cover less*, are policies of last resort for homeowners who are otherwise unable to obtain insurance. (emphasis added).

128. *Firemen's Insurance*, 483 F.2d at 1331.

129. GA. CODE ANN. § 33-33-1 (1995) (“All insurers licensed to write and writing property insurance in this state on a direct basis are authorized, subject to approval and regulation by the Commissioner, to establish and maintain a Fair Access to Insurance Requirements (FAIR) Plan . . . .”).

130. OHIO REV. CODE ANN. §§ 3929.41(E)(F) (Anderson 1995) (“The purpose of this statute is to [p]rovide for the *equitable distribution* among authorized insurers of the responsibility for insuring eligible property, for which basic property insurance cannot be obtained through the normal insurance market . . . [and to] [a]uthorize the establishment of a fair plan (fair access to insurance requirements). . . .”) (emphasis added).



homeowners' property.<sup>131</sup> Similarly, eleven other jurisdictions<sup>132</sup> have decided that insurers may not discriminate solely on the basis of the geographic location of risks and consumers' property. But these latter states also have inserted extremely controversial and ambiguous restrictions into their statutes. In each state, insurers may redline various geographic areas to achieve a "business purpose,"<sup>133</sup> to preserve "the solvency of the insurer,"<sup>134</sup> or to satisfy "sound underwriting or actuarial principles."<sup>135</sup>

Again, we ask: May the nation's mortgage and property insurers redline communities or discriminate on the basis of geographic location? Unfortunately, the answer is "yes." In the majority of states, legislatures allow mortgage and property insurers to discriminate against certain

131. See CONN. GEN. STAT. § 38a-824 (1995) ("[T]he insurance commissioner shall adopt regulations . . . to ensure the availability of insurance on real property in the state by prohibiting unfair discrimination in the availability or sale of such insurance on the basis of location, age or disparity between replacement cost and market value of such property."); GA. CODE ANN. § 33-6-4(b)(8)(A)(iii) (1995) ("[I]t is unlawful to] permit[] any unfair discrimination in the issuance, renewal, or cancellation of any . . . insurance against direct loss to residential property . . . when the discrimination is based solely upon the . . . geographical location of the property. . . ."); OHIO REV. CODE ANN. § 4112.02(H)(4) (Anderson 1995):

It shall be unlawful . . .

[f]or any person to . . .

[d]iscriminate against any person in the terms or conditions of selling . . . any housing accommodations or in furnishing . . . services, or privileges in connection with the ownership . . . of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, . . . because of the racial composition of the neighborhood in which the housing accommodations are located . . .

132. See *infra* notes 132-34.

133. See ARK. CODE ANN. § 23-66-206(7)(C)(i) (Michie 1995) (outlawing insurance redlining or geographic discrimination, unless there is "a business purpose which is not a mere pretext for unfair discrimination"); HAW. REV. STAT. § 431:13-103(a)(7)(c) (1993) (same); ILL. ANN. STAT. ch. 215, para. 5/155.22 (Smith-Hurd 1993) (same); MO. ANN. STAT. § 375.936 (11)(c)(i) (Vernon 1991) (same); MONT. CODE ANN. § 33-18-210(5) (1995) (same); NEB. REV. STAT. § 44-1525(7)(c) (1993) (same); R.I. GEN. LAWS § 27-29-4(7)(iii) (1994) (same); TEX. INS. CODE ANN. § 21.21(4)(7)(c) (West 1990) (same); and, VA. CODE ANN. § 38.2-508(4) (Michie 1994) (same).

134. See N.C. GEN. STAT. § 58-63-15(7)c (1995) (outlawing geographic discrimination "unless . . . [t]he refusal . . . is for the purpose of preserving the solvency of the insurer and is not a mere pretext for unfair discrimination.").

135. See IND. CODE ANN. § 27-2-17-5(b)(2) (West 1995) ("This subsection does not preclude an insurer from refusing to issue or renew or from canceling a policy based on sound underwriting or actuarial principles reasonably related to actual or anticipated loss experience or any other sound business purpose.").

communities if insurers' redlining activities are ostensibly "actuarially sound." But a policy which continues to permit insurers to define "actuarially sound" underwriting is likely to generate consumers' outrage and undermine states' regulatory authority. As we have discovered, many alleged victims of redlining and consumer advocates do not trust insurers' judgments.<sup>136</sup> Consequently, advocates and consumers are likely to initiate a multitude of lawsuits and ask state courts to determine whether insurers' actuarial and business decisions are truly sound.<sup>137</sup>

### III. ADMINISTRATIVE ENFORCEMENT OF FEDERAL AND STATE LAWS: FINANCIAL-REDLINING, INSURANCE-REDLINING AND FAIR-LENDING STATUTES

It is important to reiterate that several federal agencies—the Fed, OCC, FDIC, FTC, HUD and OTS—are principally responsible for enforcing federal fair-lending laws and eradicating all sorts of financial redlining. In most states, these responsibilities have been given to superintendents and commissioners of banking or finance. Some states assigned these tasks to human- and civil-rights commissions.

As reported above, recent statistics confirm that federal and state authorities have failed to reduce the high incidence of mortgage redlining and other types of invidious lending practices.<sup>138</sup> Additionally, it

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136. See Karr, *Complaints*, *supra* note 24, at A22 ("Many [homeowners] contend they've been redlined out of the insurance system as a result of purposeful discrimination . . ."); *Insurance Czars See Red*, WALL ST. J., Jan. 12, 1995, at A14 ("[Even members of the National Association of Insurance Commissioners have noticed] that underwriters allocate coverage in such a way to favor some geographic or demographic categories of consumer[s] and not others. . . . The commissioners don't think [the calculations of risk] is very smart or fair.").

137. See, e.g., *City of Compton v. Bunner*, 243 Cal. Rptr. 100 (1988) (ordered not to be officially published July 21, 1988). In an action challenging an insurer's redlining practices, the court stated:

[A] discriminatory result [cannot] be accomplished by private insurers *under the guise of being supposedly based on "actuarially sound" practices* or because of supposedly being based on actual "loss experience". . . .

...  
We note that our construction of [the statute], despite the legislative intent reflected in the legislative history is in accord with the plain meaning of the disjunctive language of that statute, which in this part reads: "[N]or shall race, language, color, religion, national origin, ancestry, or *location within a geographic area of itself* constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for such insurance."

*Id.* at 127 (emphasis added).

138. See, e.g., Albert R. Karr, *Minority Mortgage Loans Rose in 1993, But Denial Rate Topped that for Whites*, WALL ST. J., Oct. 27, 1994, at A2 ("[The Federal Financial Institutions Examination Council stated that] 'wide differences in denial rates among racial groups persist[.]'. . . For conventional loans, the denial rates were 34% for black

appears that mortgage redlining and questionable loan denials are likely to increase in the near future. Therefore, we are forced to ask: Are federal and state agencies truly able to stop banks and other financial institutions from discriminating against consumers solely on the basis of consumers' race, gender, marital status, and residence? Are regulators financially equipped to stop financial redlining? Does a lack of political will prevent federal and state regulators from enforcing fair-lending laws?

Also, state insurance commissioners and superintendents are chiefly responsible for preventing insurance redlining and other forms of discrimination. But we know that insurance redlining is widespread.<sup>139</sup> Moreover, there is little indication that geographic-discrimination complaints will decrease in the immediate future.<sup>140</sup> These revelations, therefore, generate several additional questions: Are insurance commissioners intentionally ignoring insurers' redlining practices? Do states give insurance regulators adequate financial support to stop unwarranted

applicants, 25.1% for Hispanics, 15.3% for whites and 14.6% for Asians.”).

139. See, e.g., *Insurance Access is Criticized: Companies Said to Use “Redlining.”* SUN SENTINEL, Sept. 16, 1994, at 3D (“The Rev. Charles Stith, national president of the Organization of a New Equality, . . . said data indicate that insurance companies’ redlining is ‘widespread and pervasive.’ He cited a study by the Association of Community Organizations for Reform Now, a lobby group based in Washington, D.C. . . .”) (emphasis added); Kimberly Blanton, *Kennedy Targets Redlining Insurers*, BOSTON GLOBE, April 1, 1993, at 41:

The issue of a lack of insurance and the high cost of insurance in the nation’s inner cities has gained visibility . . . . Consumer groups told the [House Banking Subcommittee on Consumer Credit and Insurance] *there is widespread evidence* redlining by the industry is a national problem.

After the hearing, [Rep.] Kennedy said that . . . .

“[d]ozens of studies, going back 25 years, repeatedly suggest a nationwide pattern of redlining”. . . .

*Id.* (emphasis added). See also Sharman Stein, *Group Says Car Insurers Redlined South, West Sides*, CHI. TRIB., Feb. 12, 1991, at 1 (“Illinois Public Action, the public-interest group, contends that Allstate and State Farm are practicing *widespread redlining* . . . . Illinois Public Action, which conducted its own phone survey of insurance agents by using different addresses to request price quotes . . . .”) (emphasis added).

140. Cf. *Redlining Rules Tightened*, SACRAMENTO BEE, Apr. 23, 1994, at E15:

Insurance companies will be required to disclose the ZIP codes, ethnicity and gender of all applicants rejected for coverage, according to new anti redlining regulations.

However, the new rules . . . will do little to increase the ability of state regulators to crack down on companies when discrimination is uncovered, officials said . . . .

*Id.* (emphasis added).

insurance discrimination? Do political considerations place constraints on insurance commissioners' enforcement activities? In the following sections, we will attempt to answer these and other pressing questions.

*A. Federal Administrative Efforts to Eliminate the Financial Redlining of Certain Communities and Neighborhoods*

The Community Reinvestment Act (CRA) has been law for nearly twenty years. Even so, the Federal Reserve Board and the five regulatory agencies have halted neither mortgage redlining nor other discriminatory lending practices.<sup>141</sup> Quite frankly, federal regulators' enforcement efforts have been exceptionally poor.<sup>142</sup> Among several explanations, three are outstanding. First, regulatory agencies refuse to exercise their power.<sup>143</sup> To illustrate, since the Community Reinvestment Act's

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141. Much of the analysis in this section applies to the administrative enforcement of the Equal Credit Opportunity Act of 1975, for Fed and several other agencies are also responsible for enforcing the ECOA. See 12 C.F.R. § 202.14(a)(1) (1996):

[The] administrative enforcement of the [ECOA] and this regulation . . . is assigned to the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Board of Directors of the Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Interstate Commerce Commission, Secretary of Agriculture, Farm Credit Administration, Securities and Exchange Commission, Small Business Administration, and Secretary of Transportation.

142. See, e.g., Kenneth H. Bacon, *Clinton Expands Attack on Loan Bias as Data Show a Continuing Problem*, WALL ST. J., Nov. 5, 1993, at A2 ("[P]rogress has been slow. 'We're not encouraged by the 1992 data,' [according to] Andrew Hove, chairman of the Federal Deposit Insurance Corp. . . . He said it's becoming clear that the process will be slow and difficult. 'Changing lending patterns involves sustained, long-term commitment by depository institutions [and] regulators . . . .'); Stephen A. Fuchs, *Discriminatory Lending Practices: Recent Developments, Causes and Solutions*, 10 ANN. REV. BANKING L. 461, 479 (1991) ("Another cause of discriminatory lending practices is the lack of enforcement of the existing federal laws by the federal agencies.").

143. See Jonathan P. Tomes, *The "Community" in the Community Reinvestment Act: A Term in Search of a Definition*, 10 ANN. REV. BANKING L. 225, 229 n.16 (1991) (citing 12 U.S.C. § 2902(1) and describing the effect of Title IV of the FIRREA):

The federal financial supervisory authorities are: . . . the Comptroller of the Currency [which regulates] national banks; . . . the Board of Governors of the Federal Reserve System [that regulates] State chartered [member] banks . . . and bank holding companies; . . . the Federal Deposit Insurance Corporation [which regulates] State chartered banks and savings banks which are not members of the Federal Reserve System . . . ; and . . . the Federal Home Loan Bank Board [which regulates] institutions [whose] deposits . . . are insured by the Federal Savings and Loan Insurance Corporation and . . . savings and loan holding companies. 12 U.S.C. § 2902(1) Title IV of FIRREA abolished the Federal Savings and Loan Insurance Corporation ("FSLIC") . . . and the FHLBB . . . . It also transferred their regulatory functions . . . to the Office of Thrift Supervision ("OTS"). The Director of the OTS now enforces . . . the CRA with respect to those financial situations that were previously regulated by the FHLBB.

enactment, banks and bank-holding companies have submitted hundreds of applications to the Federal Reserve Board. Usually, the applications ask the Fed to approve bank mergers and acquisitions.<sup>144</sup> Surprisingly, the Fed has denied only a few requests.<sup>145</sup> This is quite astonishing considering that the Federal Reserve Board's and other studies show that member banks are consistently redlining certain communities.<sup>146</sup>

*Id.*: Bacon, *supra* note 142, at A2 ("A HUD official said the agency's authority covers lenders that make loans insured by the Federal Housing Administration.").

144. See Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement Is Needed*, 20 FORDHAM URB. L.J. 293, 297 (1993):

[U]nquestionably the most important feature of the CRA is that it provides implicit standing for [grassroots citizens' organizations] to intervene in lender expansion application proceedings. *Banking law, either by statute or regulation, routinely provides opportunities for public comment on pending financial institution expansion requests (mergers, acquisitions, branch openings and relocations of existing facilities). To reach a final decision, regulators have broad discretion in weighing an applicant's record . . .*

*Id.* at 297 (emphasis added); Jonathan R. Macey, *Banking by Quota*, WALL ST. J., Sept. 7, 1994, at A14 ("Besides facing the litigation costs and bad publicity associated with charges of lending bias, *banks must obtain government permission to expand, to merge, or to open or close branches.* Banks, in other words, need regulatory support to survive, and their business can be held hostage. . . .") (emphasis added); *Fed's Shawmut Ruling Stiffens Antibias Act, But Sows Uncertainty*, WALL ST. J., Nov. 17, 1993, at A8:

[S]luggish loan growth and fierce competition are rapidly dividing the banking world into two kinds of institutions: those that buy others and those that get bought. With suitors circling, *a bank denied the opportunity to grow by acquisition may find itself with languid stock performance* and little choice but to submit to takeover overtures. . . . So far this year, there have been 321 banking mergers or buyout totaling \$20.3 billion . . . .

*Id.* at A8 (emphasis added).

145. See, e.g., *Fed's Shawmut Ruling Stiffens Antibias Act, But Sows Uncertainty*, WALL ST. J., Nov. 17, 1993, at A8 ("Over the past 15 years, the Fed has denied a handful of merger applications because [banks and bank-holding companies'] failure to comply with the Community Reinvestment Act, which requires banks to assess and meet the credit needs of their service areas.").

146. See, e.g., Paulette Thomas, *Behind the Figures: Federal Data Detail Pervasive Racial Gap in Mortgage Lending*, WALL ST. J., Mar. 31, 1992, at A1:

This grim summary of racial disparities in lending on a national scale comes from data disclosed by the Federal Reserve Board. . . . *It reviewed 6.3 million 1990 applications* for mortgages and other home-related loans at *9,300 financial institutions.* The study, the most extensive the Fed has ever done, showed that across the nation, 34% of applications from blacks were turned down by lenders, but just 14% of those from whites.

*Id.* at A1 (emphasis added). But see, Albert R. Karr, *Study by Fed Challenges the Contention of Minority Bias in Mortgage Lending*, WALL ST. J., Jan. 26, 1995, at A2, A4:

Second, federal regulators are extremely ineffective because, more often than not, they do not adopt common enforcement strategies. For example, it is generally accepted that discriminatory lending is difficult to detect simply by examining individual loan applications one case at a time.<sup>147</sup> But, we also know that “testers”<sup>148</sup> can help uncover unfair geographic-lending practices.<sup>149</sup> Yet, among regulatory agencies, a serious division exists over whether “testers” should be used. Two

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A Federal Reserve Board study challenges a widely held contention that banks and other lenders discriminate against minorities by making it harder for them to qualify for home loans.

... [T]he study was an examination of *the default rates of 220,000 Federal Housing Administration mortgage loans from 1987 to 1989*. It showed that blacks defaulted about twice as often as white borrowers, with Hispanic defaulting somewhat more frequently than whites.

... The study clashes with one done by the Boston Federal Reserve Bank in 1992. . . .

... John Yinger, professor of economics and public administration at Syracuse University, said the . . . study’s default-rate approach is “very seriously flawed.” Mr. Yinger, who has extensively studied the mortgage-discrimination issue, said that even if the study were valid, it wouldn’t debunk the widely reviewed Boston Fed study.

The study, he said, didn’t take into account the attributes of blacks whose home-loan applications were rejected. . . .

In addition, . . . the study examined only loans that resulted in foreclosures. Perhaps lenders are more lenient when white borrowers default on their loans and more frequently decide against foreclosure . . . . A propensity to foreclose on blacks would boost their default rates, and would be a sign of discrimination . . . .

*Id.* at A16 (emphasis added).

147. Cf. Albert R. Karr, *Banks’ Lending Files Will Be Examined For Bias as Agency Expands Program*, WALL ST. J., Mar. 9, 1993, at B8 (“Heretofore, most examinations by the comptroller and other federal financial regulators concentrated on whether individual decisions on minority loan applications showed bias. The conclusion was usually that no bias was evident . . . .”)

148. See Willy E. Rice, *Judicial and Administrative Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate*, 27 HOW. L.J. 227, 263-65 (1984) [hereinafter Rice, *Fair Housing*] (defining “testing” and providing evidence of the important role that “testers” play in ferreting out various forms of discrimination).

149. See, e.g., *Loan Bias: HUD Takes Wider Role in Broad Focus by Regulators on Loan Bias Concerns*, BNA BANKING DAILY, Oct. 29, 1993, at 6-7:

“[T]esters” checked the lender’s practices over the telephone. One white and one minority tester called and asked for loans of \$65,000, well above the firm’s \$50,000 minimum, and both applications were processed, apparently with no problems.

The next week . . . two testers—again, one white, one minority—called and inquired about loans in the amount of \$35,000. Both were told that the firm [did] not make loans in that amount . . . .

agencies—HUD<sup>150</sup> and OCC<sup>151</sup>—endorse the use of “testers.” The Federal Reserve Board does not. In fact, the Fed “has long resisted dispatching its own testers to banks, despite pleas from community groups alleging racial bias.”<sup>152</sup>

Finally, CRA enforcement is flaccid because federal agencies do not coordinate their efforts.<sup>153</sup> For instance, “[t]he Federal Reserve Board

150. See, e.g., Paulette Thomas, *U.S., Some Bankers Sharply Boost Use of ‘Testers’ to Find Racial Bias in Loans*, WALL ST. J., May 27, 1992, at A16 (“[HUD] is going to spend \$1 million for studies that will send white and minority applicants to lenders . . . to determine if those borrowers are treated differently, a HUD official disclosed . . .”).

151. See Kenneth H. Bacon, *U.S. to Use ‘Tester’ in New Campaign on Discrimination in Mortgage Lending*, WALL ST. J., May 6, 1993, at A2 (“The Comptroller of the Currency launched a campaign against mortgage discrimination, including using ‘testers’ to determine whether banks treat minority and white applicants differently. . . . The comptroller will become the first federal bank regulator to use testers, a move that consumer groups have advocated for years.”); Paulette Thomas, *Fed Study Finds Racial Discrimination in Mortgage Lending is Still Widespread*, WALL ST. J., Oct. 9, 1992, at A3 (“[OCC] said it . . . may recommend that . . . banks send ‘mystery shoppers’ to their own institutions to test for subtle differences in service for applicants of different races.”).

152. See Paulette Thomas, *U.S., Some Bankers Sharply Boost Use of ‘Testers’ to Find Racial Bias in Loans*, WALL ST. J., May 27, 1992, at A16 (“Much of the industry still resists the use of testers. Some bankers privately say they fear that findings of the testers might be used against them in lawsuits by minority borrowers. The American Bankers Association is also skeptical that testers can prove something as subtle as racial bias. . . .”). But see, Lawrence J. White, *The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction*, 20 FORDHAM URB. L.J. 281, 290 (1993) [“The use of matched pair ‘tester’ (individuals who pose as potential customers) is likely to be a valuable tool of enforcement, to support the investigation of individual complaints and the use of statistical analysis to detect discrimination.”].

153. See Steve Cocheo, *Fair-Lending Pressure Builds*, A.B.A. BANKING J., Dec. 1994, at 46 (“Federal agencies continue to disagree on details of fair-lending enforcement. An addendum to an early 1994 interagency policy on discrimination remains mired in disagreements and is running behind schedule.”). For a classic example of how interagency conflict continues to undermine the effective enforcement of the Community Reinvestment Act, see *National Urban League v. Office of the Comptroller of the Currency*, 78 F.R.D. 543, 544 (D.D.C. 1978). Briefly, the National Urban League asserted the following: “(1) Race and sex discrimination . . . continues to exist in the home mortgage lending operations of institutions supervised by [the Federal Home Loan Bank Board, FDIC, OCC and the Federal Reserve Board]; (2) [The Fed and OCC] are obligated by statute to exercise their . . . regulatory powers to ensure against such discrimination; [and] (3) [These four regulatory agencies] have abdicated this responsibility . . .” *Id.* at 544. The Federal Home Loan Bank Board, the FDIC and the OCC entered into an arrangement with complainants and gave assurance that efforts would be made to terminate discriminatory mortgage lending. On the other hand, the Federal Reserve Board refused to cooperate with either of the other agencies or complainants. The Fed “strenuously opposed the suit from the outset” and asserted that

recently approved state-chartered Barnett Banks' acquisition of some thrift and mortgage-loan operations. . . . In doing so, the Fed rebuffed an apparent Justice Department request to [delay] those approvals because of the department's investigation."<sup>154</sup> Also, "to encourage fair lending practices, [some] regulators . . . proposed having larger banks tally their women and minority small-company borrowers and loan applicants. The idea has . . . divided bank regulators. The Treasury Department's Comptroller of the Currency backs the change. The Federal Reserve Bank's Board of Governors doesn't."<sup>155</sup>

Given federal regulators' unmentionable enforcement record, consumers and their allies have sued the Federal Reserve Board and other agencies in federal courts. In their suits, complainants accused regulators of failing to enforce community-lending laws. The Court of Appeals for the Eleventh Circuit has addressed this controversy twice. Two district courts have decided this issue once. In each instance, the court refused to grant relief.

The Eleventh Circuit's rulings are illustrative. In *Kaimowitz v. Board of Governors of the Federal Reserve System*,<sup>156</sup> "the Comptroller of the Currency . . . [had examined] First Union's national bank subsidiaries and found a number of deficiencies in the CRA performance [data]. . . ."<sup>157</sup> Nevertheless, the Fed conditionally approved First Union's application to acquire Florida National Banks. Kaimowitz, an attorney representing minority businesspersons, commenced an action against the Federal Reserve Board. The petitioner asked the court to reverse the Fed's decision because First Union had a history of redlining certain

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its enforcement activities and supervision were "adequate in all respects." *Id.*

154. See Albert R. Karr, *Barnett's Thrift Purchase is Approved, But Bank Faces Lending-Practice Probe*, WALL ST. J., Nov. 9, 1994, at A2.

155. See Jeanne Saddler & Brent Bowers, *Fair Lending Puts Focus on Race, Gender of Borrowers*, WALL ST. J., Oct. 28, 1994, at B2:

One Federal Reserve Board governor, Lawrence Lindsey, says gathering the data 'entails a veritable Pandora's box of legal, moral and social questions,' which he believes [will not] help end bias in lending. But officials in the Office of the Comptroller of the Currency say collecting the information will help lenders track their own practices and make federal examiners more effective in conducting fair-lending reviews.

*Id.* at B2.

156. 940 F.2d 610 (11th Cir. 1991).

157. *Id.* at 611.



neighborhoods.<sup>158</sup> The Eleventh Circuit dismissed the complaint for lack of standing.<sup>159</sup>

In *Washington v. Office of the Comptroller of the Currency*,<sup>160</sup> "First Georgia [National Bank] submitted an application to the OCC to merge First Savannah [State Bank] into First Georgia. . . . [T]he OCC approved the merger . . . ."<sup>161</sup> Aggrieved consumers and a group representing the banking and credit needs of working- and middle-class individuals sued the OCC. Plaintiffs asserted that OCC's decision to approve the merger violated the Community Reinvestment Act. They argued, therefore, that the court should set aside the merger until First Georgia National Bank gave adequate assurances that it would satisfy low- and moderate-income communities' credit and banking requirements.<sup>162</sup>

The Eleventh Circuit disagreed. The court observed: Although the CRA encourages the OCC "to help [banks] meet the credit needs of the local communities in which they are chartered," the CRA also gives the OCC "substantial discretion" to decide whether to approve or disapprove bank mergers.<sup>163</sup> Consequently, as long as the OCC or another regulatory agency exercises its regulatory authority rationally, the court must defer to the agency's expertise.<sup>164</sup>

158. *Id.* at 612 ("[P]etitioner argues that he is an aggrieved party because his reputation is at stake with his primarily clientele, who have been harmed by First Union's 'redlining' practices (that is, the practice of denying loans in certain neighborhoods).").

159. *Id.* at 614 (The court observed: "[I]t is apparent . . . that petitioner has not satisfied the constitutional standing requirement that he personally have suffered or will suffer some distinct and palpable injury. This petition is therefore dismissed.").

160. 856 F.2d 1507 (11th Cir. 1988).

161. *Id.* at 1509-10.

162. *Id.* at 1510.

163. *Id.* (stating that "substantial discretion is granted to the OCC.").

164. *Id.* at 1512. *See also* *Coming Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 571 F. Supp. 396, 403 (E.D. Ark. 1983), *aff'd*, 736 F.2d 479 (8th Cir. 1984) (observing that the Board may exercise "its discretion [and] deny an application due to an unsatisfactory CRA evaluation," and "find[ing] as a matter of law that the administrative record . . . is fully supportive of the Board's compliance with the CRA in its decision to approve [a bank's] branch application."). *See also* *Nat'l Urban League v. Office of the Comptroller of the Currency*, 78 F.R.D. 543, 547 (D.D.C. 1978). Complainants alleged that the Federal Reserve Board and OCC failed to enforce the CRA and prevent mortgage redlining. The district court dismissed the complaint because plaintiffs "failed to satisfy . . . Article III requirement of standing." *Id.* But the court implied that the Federal Reserve Board did not abuse its discretion. The district observed that even assuming that plaintiffs proved an injury, there was no evidence that the Board failed to regulate its members or that forcing the Board to select alternative "regulatory

Considering that federal courts are unwilling to force federal regulators—the Fed, OTC, OCC, FDIC, and HUD—to stop unfair lending practices, we must ask: Are these agencies likely to stop bickering among themselves and work to ensure that both regulated and unregulated financial institutions serve the legitimate credit needs of consumers in all geographic areas? Regrettably, the answer is “probably not.” Of course, recent evidence suggests that regulatory authorities are willing to cooperate<sup>165</sup> and adopt “new strategies”<sup>166</sup> to combat finan-

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techniques” would prevent mortgage redlining. *Id.* We also should stress that the Supreme Court has decided this issue in another context, one not involving mortgage redlining. *See, e.g., Nationsbank of N.C. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 814 n.2 (1995) (stressing that the Comptroller may exercise his discretion “within reasonable bounds.”); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (permitting the Comptroller to adjudicate matters as long as the “Comptroller’s adjudication [is not] ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”).

165. *See, e.g., Albert R. Karr, Group of Federal Agencies Fashion Concerted Policy Against Lending Bias*, WALL ST. J., Mar. 9, 1994, at A2:

A group of federal agencies signaled a stepped-up, concerted attack on lending discrimination.

... [T]he Federal Reserve Board, the Office of the Comptroller of the Currency, the Department of Housing and Urban Development and the Justice Department . . . unveiled a new ‘policy statement’ designed to fashion a more organized approach to enforcing federal credit laws.

*Id.* *See also* Kenneth H. Bacon, *Rules to Spur Bank Loans, Investments in Lower-Income Areas are Proposed*, WALL ST. J., Dec. 9, 1993, at A2, A5 (“The Clinton administration formally proposed rules to prod banks to boost lending, services and investment in low- and moderate-income areas . . . . Officials from the [OCC], the Federal Deposit Insurance Corp., the Office of Thrift Supervision and the Federal Reserve Board have worked on the regulations for months.”); Bacon, *supra* note 142, at A2 (“[T]he Justice Department and HUD have launched a joint effort to search for possible lending discrimination by independent mortgage companies, bankers that aren’t attached to banks.”).

166. *See, e.g., Gary Putka, Shawmut Unit for Mortgages is Reorganized*, WALL ST. J., Dec. 3, 1993, at B5:

Shawmut National Corp. is reorganizing its mortgage unit following a Federal Reserve Board[’s] determination that the bank failed to meet its obligations under the fair-lending laws.

... Shawmut is expected to revamp soon. . . . The Federal Reserve has requested this change, which established more direct federal-bank regulatory authority over the mortgage operation.

*Id.*; Kenneth H. Bacon & John R. Wilke, *Lending Standard: Fed Gives Bias Laws New Clout as it Blocks a Bank Acquisition*, WALL ST. J., Nov. 17, 1993, at A1:

With its decision to reject Shawmut National Corp.’s bid to acquire New Dartmouth Bank, . . . the Federal Reserve Board has put *the first real teeth into laws* aimed at . . . racial discrimination . . . .

... [S]ome observers say the toughness signaled by the Fed’s decision to reject the acquisition because of concerns over fair-lending practices amounts to a kind of *new regulatory canon*: Lend fair or die.

*Id.* (emphasis added); *U.S. Probes Bank Records For Race Bias*, WALL ST. J., May 19, 1992, at A2 (“[The] Federal Reserve[’s] approval of . . . several big bank mergers . . .

cial redlining and unfair-lending decisions. But, as we are aware, both the Community Reinvestment Act of 1973 and the Equal Opportunity Credit Act of 1975 are at least twenty years old. Yet, discriminatory access to credit and financial redlining are rampant in every region of this country. Clearly, these unwarranted practices will continue until federal regulators adopt and implement effective enforcement strategies.<sup>167</sup>

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was made contingent upon an increase in lending to low-income neighborhoods.”); Bacon, *supra* note 151, at A2, A4 (“[T]he Federal Deposit Insurance Corp., which regulates about 7,500 banks, said it is bolstering its procedures for monitoring compliance with fair-lending laws.”); *HUD Seeks Broader Power To Enforce Loan Bias Laws*, WALL ST. J., Apr. 15, 1994, at A4 (“[HUD] is seeking broader authority to fine lenders who don’t comply with laws requiring the reporting of the race, gender and income of mortgage applicants. . . . Extending HUD’s authority to impose monetary penalties ‘will help ensure consistent and effective enforcement’ . . .”) (emphasis added); Kenneth H. Bacon & Dave Kansas, *Comptroller’s Office to Use Stricter Test in Probing Mortgage Discrimination*, WALL ST. J., Nov. 8, 1993, at A2 (“[OCC] is using new procedures to determine whether [200 of 3,600 national] banks are discriminating against minority mortgage applicants by holding them to higher standards than white borrowers.”) (emphasis added); Albert R. Karr, *Banks’ Lending Files Will Be Examined For Bias as Agency Expands Program*, WALL ST. J., Mar. 9, 1993, at A2 (“[OCC] plans to expand its bank-examination process to do a better job of ferreting out mortgage-loan discrimination. . . . [E]xaminers will [try to determine] whether bank-loan officers give special treatment to white . . . [and] minority applicants with comparable records.”); Kenneth H. Bacon, *Reaching Out: Under Strong Pressure, Banks Expand Loans for Inner-City Homes*, WALL ST. J., Feb. 23, 1994, at A1:

The Clinton administration has placed high priority on [policing fair-lending laws]. . . . [T]he Treasury Department’s Office of Thrift Supervision rejected applications from four thrifts in New Jersey and Ohio to trade their federal charters for state licenses. The agency ruled that they hadn’t met the provisions of the 1977 Community Reinvestment Act . . . .

*Id.* But see, Albert R. Karr, *Bank Regulators are Softening a Plan to Boost Lending in Low-Income Areas*, WALL ST. J., Sept. 21, 1994, at A2:

[The Fed, the OCC and the FDIC], responding to bankers’ objections, are softening a plan aimed at boosting lending services and investment in low-income areas.

. . . .

. . . [B]anks were to be judged by comparing their share of the lending market in low- and moderate-income areas with their market share in their overall lending area.

That requirement has been dropped.

*Id.*

167. See also White, *supra* note 152, at 290:

[T]o the extent that racial or other types of *personal* discrimination in lending is perceived to be the problem, more vigorous enforcement of antidiscrimination laws—notably the Equal Opportunity Credit Act of 1975—is the best solution. This approach the double advantage of being more direct

*B. State Banking and Finance Commissioners' Administrative Enforcement of Financial-Redlining and Fair-Lending Laws*

Quite candidly, the majority of state banking and finance commissioners have done very little to encourage fair lending or to discourage mortgage redlining. Among other reasons, state regulators have been inactive because legislatures refuse to enact enabling legislation.<sup>168</sup> However, among states that have passed equal-access-to-credit laws, enforcement efforts are still less than impressive. Some finance commissioners have implemented a few marginally successful strategies. But the effects of various enforcement activities have been extremely mixed.

For example, commissioners in California, Illinois, New Jersey, New York, and Pennsylvania have been fairly assiduous and somewhat successful. In California, the Real Estate and Savings and Loan Commissioners' anti-mortgage redlining efforts have achieved a modicum of success. Both commissioners forced mortgage bankers, insurance companies, and credit unions to disclose the location of all neighborhoods in which they invested capital or made loans.<sup>169</sup> The effects of this policy have been positive: "[T]he number of consumer

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than the CRA and of covering all lenders, not just . . . banks and thrifts. Tougher enforcement should be combined with increased education and training of lenders' line personnel.

*Id.*

168. See *supra* notes 88-94 and accompanying text.

169. See Bradley Inman, *Law Centers on Lending Practice Discrimination*, SACRAMENTO BEE, Feb. 20, 1988, at D7:

Indeed, community activists concede that incidents of redlining may not be as brazen, but they say it still persists. . . . [C]ity/county reinvestment coordinator Jim Bliesner says 'the darker the map' the fewer the number of home loans. . . . Bliesner argues that . . . [m]any lenders don't blatantly deny loan[,] but they aren't encouraging investment in selective neighborhoods either . . . .

*Id.* See also Albert R. Karr, *Angry Lenders: Federal Drive to Curb Mortgage-Loan Bias Stirs Strong Backlash*, WALL ST. J., Feb. 7, 1995, at A1, A10:

William McDonough, president of the Federal Reserve Bank of New York . . . said he is discouraged by continuing reports about 'well-documented cases in which loan applications by racial minorities have received rude and unfavorable treatment by bankers,' and he urged banks to lend more in low-income neighborhoods.

Indeed, some banks are clearly doing just that. *In California, top executives of BankAmerica Corp., First Interstate Bank, American Savings Bank and Home Savings of America all say there's good business to be done in neglected low-income areas.*

*Id.* (emphasis added).

complaints about redlining has declined substantially since the late '70s."<sup>170</sup> Attempting to achieve similar outcomes, the Treasury of Pennsylvania has tried to withhold state deposits from financial institutions that redlined moderate- to low-income communities;<sup>171</sup> the Commissioner of Savings in Illinois petitioned the Legislature to give him power to punish lenders who practice invidious discrimination;<sup>172</sup> the Banking Commissioner of New Jersey—a former banker—severely denounced financial institutions for excluding minorities and women from ads and promotional materials;<sup>173</sup> and “[t]he New York State

170. Inman, *supra*, note 169, at D7.

171. See Steve Cocheo, *Pennsylvania Links Contracts to CRA*, 85 A.B.A. BANKING J., Dec. 1993, at 10:

Pennsylvania banks that want to hold state deposits or provide other banking services to state agencies must now jump through community reinvestment hoops.

The Office of the State Treasurer will evaluate banks' CRA record . . . .  
. . . Banks will receive points for various types of community investment and related activities. The state [will emphasize] mortgage lending and rehabilitation of low- and moderate-income neighborhoods.

. . . .  
Banks that receive “Substantial Noncompliance” ratings from the state treasury department will be barred from doing business with the state for at least two years.

172. See Mike Dorning, *New Questions Raised About Area Mortgages*, CHI. TRIB., Dec. 18, 1991, at 2:

[A study] suggests that commercial banks and S&Ls may not be fulfilling their legal mandate to help meet the credit needs in all areas, including low- and moderate-income and minority neighborhoods . . . .

. . . .  
Jack Seymour, Illinois commissioner of savings, used the study results to call on the state Legislature to grant him powers to investigate and punish mortgage discrimination. . . .

173. See Don Stancavish, *Harsh Words for N.J. Banks: Commissioner Blasts Bias*, THE RECORD, Dec. 3, 1993, at D1:

New Jersey's banking commissioner . . . lashed out at banks that ignore minorities in their marketing and advertising materials, saying the practice could be interpreted as a veiled racial reference. “Banks that never picture black or Hispanic people in their advertisements are telling people in those categories that they are not welcome as customers,” Jeff Connor told the Bank Marketing Association of New Jersey. . . . “The state of New Jersey has a large black population, a large Hispanic population, and a large number of women in the workplace. The whole state has changed, and banking has to change with it.”

*Id.* (emphasis added). But see Don Stancavish, *Last in Low-income Lending—26% of N.J. Banks Rate Poorly*, RECORD, Jan. 7, 1994, at C1:

Banking Department . . . propos[ed] changes to its banking rules that would strengthen and clarify [the parameters of a program to help increase] loans to small businesses in low-income areas.”<sup>174</sup>

By contrast, commissioners in other states have done very little to enforce anti-redlining and fair-lending statutes. In fact, some state regulators have been accused of allowing their allegedly “pro-banker bias” to undermine the effective enforcement of fair-lending laws. For instance, in Massachusetts, consumer advocates demonstrated that a history of “pro-banker” commissioners either passively or actively discouraged the enforcement of community-investment statutes.<sup>175</sup>

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*New Jersey banks and thrifts assembled the worst record in the nation in 1993 when it came to lending money to low- and moderate-income residents. . . . State Banking Commissioner Jeff Connor said the numbers seemed accurate, but doubted that they painted a true picture of the lending record of the state’s banks and thrifts. “The CRA is so subjective. This could mean a lot of different things, but it certainly doesn’t mean that our banks and thrifts are the worst in the nation and South Carolina’s are the best,” he said. (emphasis added).*

174. Peter Pae, *Home Equity: The Community Reinvestment Act Hasn’t Been Much Help to Inner-City Businesses. That May Change*, WALL ST. J., Feb. 19, 1993, at R14.

175. See Mitchell Zuckoff, *Officials Hit for Laxity on Minority Loans*, BOSTON GLOBE, Oct. 18, 1991, at 65:

Affordable housing activists yesterday accused state . . . regulators of failing to enforce laws that require banks to offer loans in minority and low-income neighborhoods.

. . . .  
[Responding to the study, state banking Commissioner Michael Hanson said:] “Too many people view community reinvestment as requiring banks to solve the social problems in their communities[.] . . . That is not what the act says. Whether it should or not is a legislative policy decision.”

*Id.*; Michael Rezendes & Peter J. Howe, *Banks, Regulators Come Under Fire*, BOSTON GLOBE, Dec. 21, 1989, at 41:

Boston banks and the regulatory agencies that oversee them came under harsh attack on several fronts yesterday following a Boston Redevelopment Authority study revealing racial disparities in mortgage lending policies.

. . . [P]olitical leaders and community activists charged that *regulators have largely failed to enforce fair credit laws . . . .*

. . . .  
Massachusetts Banking Commissioner Andrew Calamare said the situation described in the BRA report “is not good,” but defended his office’s performance.

*Id.* (emphasis added); Steve Marantz, *Dukakis to Order Scrutiny of Bank Lending*, BOSTON GLOBE, Sept. 13, 1989, at 28:

The state Division of Banks, under Dukakis, has come under fire for *passive enforcement* of the CRA. Banking Commissioner Andrew J. Calamare has approved all of the more than 400 applications for mergers, expansions or branch openings that have come before him as part of required CRA review in the last two and a half years. In the same period the Mortgage Review Board has ruled almost unanimously in favor of banks on denial appeals.

*Id.* (emphasis added); Steve Marantz, *Officials Rap Regulators on Unfair Lending*, BOSTON GLOBE, Sept. 2, 1989, at 1:

But, in Michigan, a more egregious incident occurred: The Commissioner of Banking threatened to sue another state agency if that body publicized bankers' discriminatory lending patterns.<sup>176</sup>

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A *passive regulatory approach* by the state banking commission is partly responsible for the racial pattern of home mortgage lending in Boston [according to] elected officials, city officials and community activists.

.....  
Figures show that the commission's Mortgage Review Board upheld only one of 53 appeals on mortgage denials in Boston in 1987 and 1988. During the same period, the commission denied none of the roughly 400 community reinvestment applications by banks.

*Id.* (emphasis added). *But see* Steve Marantz, *Compromise Seen Possible on Minority Lending Plan*, BOSTON GLOBE, Jan. 7, 1990, at 25:

Mayor Flynn's renewed gubernatorial ambitions, and the sinking bottom lines of Boston's banks . . . may nudge . . . a compromise solution . . . on a lending plan for minority neighborhoods and low- to moderate-income homebuyers .

.....  
At the same time, Flynn's gubernatorial intentions . . . give bankers another reason to come to terms. The prospect of a Flynn-appointed state banking Commissioner regulating Community Reinvestment Act performance is not one that bankers relish.

*Id.*; Joan Fitzgerald, *Eliot Savings Bank Denied Federal Charter*, BOSTON GLOBE, Jan. 6, 1983, at N (Economy section):

[The] board of state bank regulators . . . unanimously denied the application of Eliot Savings Bank to convert its state charter to a federal charter, citing the bank's record of community service.

At the same time the Board of Bank Incorporation granted the petitions of three other state-chartered mutual savings banks to convert to federal charters. These were Mutual Bank for Savings (Boston), Fitchburg Savings Bank, and Home Savings Bank (Boston).

.....  
The Massachusetts Urban Reinvestment Advisory Group . . . .  
. . . noted . . . that *the Eliot rejection marked the first time a charter conversion request had been denied on the basis of a bank's CRA compliance.*

*Id.* (emphasis added).

176. *See* David Everett & Teresa Blossom, *U.S. Report Criticizes Comerica's Loan Policies*, DET. FREE PRESS, June 5, 1988, at 1A:

Comerica Bank in metropolitan Detroit has been given a "less than satisfactory" federal rating for not placing sufficient emphasis on meeting local lending needs, confidential records disclosed to the Free Press indicate.

.....  
State banking Commissioner Eugene Kuthy told James Edwards, co-chairman of the Detroit Committee for Responsible Banking . . . that Comerica's confidential CRA rating was "inadvertently" included in some papers the Financial Institutions Bureau sent Edwards.

Clearly, more effective administrative remedies are required if states intend to stop financial institutions' unfair-lending practices. It appears, however, that regulators will not achieve this goal in the near future. All too often, political bickering,<sup>177</sup> an unwillingness to support both the intent and spirit of community-investment laws,<sup>178</sup> and the appearance of "pro-banker bias"<sup>179</sup> significantly undermine regulators' efforts to retard financial redlining.

C. *Insurance Commissioners' Administrative Enforcement of States' Anti-Redlining Statutes*

During the greater part of this century, most state commissioners knew that national and state insurers systematically redlined low-income and

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The Financial Institutions Bureau is the state agency that works with federal agencies in regulating banks and thrift institutions in Michigan.

.....  
*The Commissioner asked Edwards to return the report without publicizing it and threatened to seek a court injunction against him if he did not.*

*Id.* (emphasis added).

177. See, e.g., *The Test for Commissioner Mulligan*, BOSTON GLOBE, Dec. 20, 1979, at EPG:

Criticism from a departing deputy state banking Commissioner yesterday will intensify attention on the first major test of the King administration's willingness to enforce a Massachusetts requirement that banks meet the needs of low- and moderate-income communities . . . .

.....  
Among the accusations of outgoing deputy banking Commissioner Earl W. Jackson was a charge that his boss, Banking [Commissioner] Gerald Mulligan, had discouraged him from seeking bank compliance with "community reinvestment" regulations that Mulligan has promulgated. Mulligan responded that he was a strong backer of those regulations and that his warnings to Jackson were based solely on a fear that *Jackson was using his authority for political reasons.*

*Id.* (emphasis added).

178. Cf. Nancy Ross, *Plan for Chain Of Banks Gets Stiff Opposition*, WASH. POST., Aug. 9, 1983, at D1, D4:

Bankers and state banking regulators attacked [a] plan here today when the Comptroller of the Currency began a series of hearings on the proposal by Dimension Financial Corp.

.....  
A planned Dimension non-bank in Newton, Mass., an affluent suburb of Boston, led a representative of the Massachusetts Urban Reinvestment Advisory Group to charge the organizers with engaging in "cruel mockery of the spirit of the Community Reinvestment Act," which requires banks to serve the entire community, rich and poor alike.

*Id.*

179. Cf. Rezendes & Howe, *supra* note 175, at 41 ("[A] report suggested that some regulatory officials may be reluctant to confront banks because they have worked for financial institutions in the past or because they plan to work for them in the future.")



primarily minority neighborhoods.<sup>180</sup> Yet, regulators refused to implement administrative procedures to end the practice. More recently, the National Association of Insurance Commissioners (NAIC) gathered its own “redlining” data.<sup>181</sup> One finding is incontrovertible: “[P]roperty owners in inner-city neighborhoods [are denied] equal access to homeowner insurance at competitive prices.”<sup>182</sup> Notwithstanding the

180. See, e.g., J. Robert Hunter, *Insurance Redlining Under Attack in Texas, Throughout the Nation*, HOUS. POST, May 15, 1994, at C3 (Robert Hunter is the Texas Commissioner of Insurance).

“Communities without insurance are communities without hope.”

This was the conclusion reached a quarter-century ago by a special commission appointed by President Lyndon Johnson to investigate the problem of insurance discrimination.

“Without insurance, businesses are left to deteriorate; services, goods and jobs diminish . . . .”

Did we heed the warning? Have things changed for the better in 25 years?

They may have gotten worse.

*Id.* (emphasis added); L. H. Otis, *Regulators Clash Over “Redlining”*, NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT. EDITION 3 (June 21, 1993):

Rob Schneider, assistant commissioner for consumer services with the Texas Department of Insurance, said “there has been a lot of bad mouthing of state regulatory insurance agencies . . . and for the most part I agree with it.

*As regulators we’ve known for years that there are problems with insurance availability” in urban areas . . . .* Yet while most regulators in [urban] states know that problems exist, . . . insurance regulators have not prioritized, identif[ie]d under-served areas, analyz[ed] the reasons for lack of availability [or] propos[ed] ways to address these problems.

*Id.* (emphasis added). See also Thomas S. Mulligan, *Pugnacity is Garamendi’s Strength—and Weakness*, L.A. TIMES, May 12, 1994, at A1:

Brute force has been an element of [John] Garamendi’s style . . . in his dealings with the powerful industry he regulates, and he makes no apologies for it.

“My predecessors kissed the insurance industry’s butt here for 100 years, and consumers got screwed for it,” Garamendi said. “Damn right I’m confrontational. I’ve kicked butt instead of kissed it.”

*Id.* (emphasis added).

181. See, e.g., Susan Harrigan, *New York Says Bias Isn’t a Big Insurance Problem*, NEWSDAY, Oct. 28, 1994, at A59:

[A report issued] by the National Association of Insurance Commissioners [reveals] that “race matters.” . . . [The] survey, the first ever conducted on a national basis, showed a relationship between race and the availability and cost of property insurance. For instance, buildings were less likely to be insured in high-minority ZIP codes. Premiums in those areas tended to be higher, and policies more limited.

182. See Stephen Kurkjian, *Insurance Chief Withholds “Redline” Data Blocks Lawmaker Bid to Look for Bias*, BOSTON GLOBE, Feb. 7, 1995, at 30:

NAIC's discovery or the Association's efforts to stop redlining,<sup>183</sup> a substantial majority of insurance commissioners continue to ignore consumers who experience this perverse form of discrimination.

Admittedly, some regulators often have neither authority<sup>184</sup> nor political support or will<sup>185</sup> to stop insurance redlining. In addition, a few commissioners have difficulty deciding whether certain activity is insurance redlining or permissible discrimination.<sup>186</sup> Still, other

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Insurance companies in 20 states, including Massachusetts, assembled the data for a national study on discriminatory practices in the writing of homeowner insurance.

Although the study did not break down the data by state or urban center, commissioners in three of the 20 states—Missouri, Oregon, and Texas— . . . agreed to make the statistics public . . . .

*Id.*

183. Cf. Albert B. Crenshaw, *Insurance Commissioner Brings Agency to the Forefront*, WASH. POST, Apr. 11, 1994, at 7 (Magazine):

[The District of Columbia's Insurance Commissioner, Robert M. Willis] has benefited greatly from pressures brought on state regulators all over the country by the National Association of Insurance Commissioners (NAIC). Threatened with a federal takeover of insurance regulation, the NAIC has devised an accreditation system requiring states to meet certain standards.

184. See, e.g., Otis, *supra* note 180, at 3:

State regulators only enforce existing laws governing insurer activity, and the language of those laws usually prohibits "unfairly discriminatory" conduct and does not refer to redlining by name, according to Robert Willis, superintendent of insurance for the District of Columbia.

So when they are pressed to investigate and prosecute insurers for redlining practices, but don't have redlining statutes, "the regulator has some level of discomfort" . . . .

See also Part II.C. for a discussion of the influence of political restraint on enforcement activities. The District of Columbia, for example, does not have an "anti-redlining" statute because courts, the insurance industry and the industry's congressional supporters have blocked the District's efforts to enact one.

185. See, e.g., Kurkjian, *supra* note 182, at 30:

State Insurance Commissioner Linda Ruthardt yesterday refused to turn over to a powerful legislative authority sensitive data on whether insurance companies were discriminating in their sales practices in Boston's minority neighborhoods.

Ruthardt . . . says her office is conducting its own investigation . . . .

[But] Deputy Attorney General Barbara B. Anthony, who heads [a] Public Protection Bureau, questioned Ruthardt's commitment to investigating redlining because [Ruthardt] had not supported legislation in the past requiring insurance companies to disclose statistics on their sales practices.

186. See, e.g., Richard Buck, *Senn Begins State 'Redlining' Study Insurance Firms Reportedly Avoid Inner-City Policies*, SEATTLE TIMES, Sept. 18, 1993, at D1:

"Redlining is a fairly subtle kind of discrimination," said Jim Stevenson, a spokesman for [Washington's Commissioner of Insurance]. "It is illegal . . . for insurance companies . . . to discriminate on the basis of anything except differences in risks that you can document."

insurance commissioners refuse to acknowledge that redlining is a serious problem, even though the NAIC's research suggests otherwise. For example, fairly recently, insurance regulators intimated that redlining is not a problem in Minnesota because no consumer ever complained about the activity.<sup>187</sup> Similarly, "[u]sing . . . arguments of the industry it regulates, [New York State's Deputy Insurance Superintendent] told federal officials . . . that insurance discrimination based on race isn't a major problem [in that state]."<sup>188</sup> The deputy superintendent's conclusion is truly remarkable, because he admitted: "[T]he department hasn't

"You cannot refuse to sell someone insurance *because of where a person lives,*" although companies *may charge higher rates based on geography* . . .

. . . .  
[According to Insurance Commissioner Deborah Seen,] "[r]edlining is a very generic term . . . . [I]t connotes discrimination. It is *not an issue of whether people can get coverage but of the quality of coverage and the rates.*"

*Id.* (emphasis added); Otis, *supra* note 180, at 41:

[The District of Columbia's Commissioner,] Mr. Willis cautioned against relying on . . . the use of the term redlining . . . , which he said still means different things to different people.

. . . .  
"Insurance is inherently discriminatory," he said, adding that regulators must attempt to define and root out unfair discrimination in urban markets rather than focus on the term redlining, which may not properly describe consumer coverage problems.

*Id.* (emphasis added).

187. See, e.g., David Shaffer, *Bias Against Poor Alleged in Property Insurance*, ST. PAUL PIONEER PRESS, Feb. 5, 1993, at 1C:

Neighborhood activists accused the insurance industry . . . of discriminating against poor and minority-dominated Twin Cities neighborhoods in the sale of homeowners' insurance.

. . . .  
Earl Krahn, a director of the Twin Cities ACORN, said the organization isn't alleging that the insurance industry is breaking the law. But he said the industry isn't treating many city dwellers fairly.

. . . .  
Minnesota Commerce Commissioner Bert McKasy said insurance regulators will review the report. *But regulators have found no evidence of redlining and "we have never had any complaints" about it, said Mel Boynton, director of policy analysis for the state Commerce Department.*

*Id.* (emphasis added).

188. See, e.g., Harrigan, *supra* note 181, at A59:

"Without saying that the insurance industry is without bigots . . . we think that urban insurance problems are much more a function of red ink rather than redlining," Richard Hsia, New York's deputy insurance superintendent, told a federal panel . . . . "Fundamentally, it is not race, but risk, real and perceived, that animates or inhibits insurers and their underwriters."

done a study to see if redlining in residential insurance exists.”<sup>189</sup> Finally, insurance commissioners “in Maryland and Virginia [reported] . . . that they have not found credible evidence of systematic redlining. There have been occasional complaints, according to one Maryland official, but when investigated they have proved to be unfounded.”<sup>190</sup>

On the other hand, insurance commissioners in several large states concede that insurance redlining is a serious problem<sup>191</sup> and have implemented various regulatory schemes to solve it. In recent years, the most aggressive efforts have occurred in California. There, the commissioner of insurance has tried to prevent redlining by permitting insurers to make larger profit when they sell insurance in underserved areas,<sup>192</sup>

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189. See Susan Harrigan, *Locked Out—Allegations of Discrimination Against Property Owners are Dogging the Insurance Industry*, NEWSDAY, Aug. 7, 1994, at A80:

But when the State Legislature recently required a study of automobile insurance, the department found that good drivers in urban areas were being forced into that industry’s equivalent of the FAIR plan.

In the absence of solid data, the presence of FAIR policies is one way of detecting a possible redlining problem . . . .

*Id.* (emphasis added). See also Henry Gilgoff, *Auto Insurers Accused of Redlining*, NEWSDAY, July 23, 1992, at 31:

Many car owners in low-income areas of New York City pay dramatically more for auto insurance because they are dumped unfairly into an expensive plan intended for high-risk drivers . . . .

Consumer Affairs Commissioner Mark Green said the New York Auto Insurance Plan . . . “has been perverted to penalize clean drivers who happen to live in what the industry considers ‘high-risk’ neighborhoods.”

. . . .  
State regulators [acknowledged] that the overall statistics indicate a problem. “We’re acknowledging that there are far too many people who have good driving records and ought to be getting a better rate,” said Kevin Foley, deputy insurance superintendent. . . .

190. Albert B. Crenshaw, *Insurers Face New Claims of Urban Area ‘Redlining,’* WASH. POST, Feb. 28, 1993, at H3. See also Nelson Schwartz, *NAACP Says GEICO Refuses to Insure Blacks in Poor Areas of Baltimore, D.C.*, BALTIMORE SUN, Nov. 24, 1993, at 3A:

The Montgomery County chapter of the NAACP charged . . . that GEICO, the Chevy Chase-based insurance giant, systematically refuses to . . . .

. . . [write] auto and homeowner’s insurance policies for inner-city residents in Baltimore and Washington, a discriminatory practice known as “redlining.”

. . . .  
Jean Bienemann, associate commissioner for property casualty insurance for the Maryland Insurance Administration, said no charges against GEICO had been filed with the agency. “We don’t have any evidence that they redlined,” she said.

*Id.* (emphasis added).

191. See, e.g., Crenshaw, *supra* note 190, at H3 (California Insurance Commissioner John Garamendi told [a House] hearing, “I’m here to assure you that redlining is real and it is practiced day in and day out in California’s urban areas.”).

192. See Philip J. Garcia, *Plan Would Reward Unbiased Insurers: Garamendi May Limit Violators’ Profits*, SACRAMENTO BEE, May 24, 1991, at E1:

by forcing deviant insurers to pay large fines<sup>193</sup> and by requiring carriers to fully disclose the ethnic and socioeconomic characteristics of the neighborhoods in which they sell property insurance.<sup>194</sup>

Texas's and Florida's Insurance Departments also have been diligent. To help eradicate redlining, Texas's regulators have actively enforced its anti-redlining statute, lobbied the legislature for additional enforcement powers and educated the public on how to recognize more subtle

Under proposed "redlining," or anti-discrimination, regulations, Garamendi would allow higher rates of return for insurance companies that "demonstrate active outreach in certain communities."

. . . .  
. . . [C]ompanies must document any significant efforts they make to target disadvantaged areas. The information would be included annually on a Community Service Statement . . . .

[Also the] Statement would ask for information [on] . . . the number and location of offices and agents; the number and dollar amount of contracts an insurer has with minority- and women-owned businesses; and a breakdown of an insurer's agents and employees by ethnicity and the languages they speak.

193. See *Insurer Fined \$500,000 For Redlining—Areas in S.F. and L.A. Affected*, S.F. EXAMINER, Aug. 20, 1993, at B1:

Insurance Commissioner John Garamendi charged CIG with 252 violations for allegedly refusing to sell insurance in specific redlined "portions of San Francisco . . . ."

The company had been charged with discriminating against both minority and gay and lesbian communities.

CIG, which writes commercial, auto and home owners insurance, . . . was accused of setting illegal insurance rates based on geographic areas . . . .

It agreed to pay \$400,000 in fines and give another \$100,000 to minority and gay and lesbian community groups. . . .

"This agreement sends a clear message to the insurance industry that we will not condone redlining," said Garamendi in announcing *the third-largest fine ever handed down by the department*.

*Id.* (emphasis added). But see Jay Greene, *Groups Break with Gillespie*, DAILY NEWS OF L.A., Aug. 29, 1990, at B1:

Several consumer groups walked out of a Department of Insurance hearing on redlining . . . , charging that Commissioner Roxani Gillespie had no plans to abolish what they allege is an ongoing industry practice.

. . . .  
Proposition 103, the insurance rate reform initiative that voters passed in 1988, called for the Commissioner to deny rate increases to companies that discriminate against customers.

194. See Mulligan, *supra* note 180, at A20 ("He recently won approval of new anti-redlining regulations that will require insurers to file annual statements—similar to those filed by lenders—on their inner-city sales practices. Garamendi says the regulations will enable him to identify and punish discrimination.")

redlining practices.<sup>195</sup> In Florida, the Insurance Commissioner exercised his authority and ordered property and casualty insurers to stop redlining certain “high-risk” areas.<sup>196</sup> Additionally, insurance commissioners in the District of Columbia,<sup>197</sup> Georgia,<sup>198</sup> Missouri,<sup>199</sup> and Washington<sup>200</sup> have implemented comparable programs to help uncover or abolish insurance redlining.

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195. See Hunter, *supra* note 180, at C3:

More subtle redlining practices are based on underwriting guidelines or [on] . . . a simple understanding among agents or companies . . . which hit minorities and rural poor citizens the hardest.

. . . . [Commissioner Robert Hunter] recently formed a redlining task force . . . [to] develop ways to end redlining through four major avenues: enforcement against companies that redline, the adoption of anti-discrimination rules, public education and the development of legislative proposals.

196. See *Redlining Just Won't Do*, MIAMI HERALD, Dec. 5, 1992, at 24A:

Kudos to Insurance Commissioner Tom Gallagher for ordering Prudential and the Foremost Insurance Group to halt redlining and for challenging restrictions that Travelers placed on its Dade and Broward agents.

Florida, the nation's fourth most populous state, is a burgeoning, profitable insurance market. It is also a peninsula and peculiarly susceptible to redlining.

197. See, e.g., Karr, *supra* note 24, at A22 (“Robert Willis, the District of Columbia insurance commissioner, . . . start[ed] an investigation of Geico Corp. following allegations that the big insurer has discriminated against lower-income minority neighborhoods.”).

198. See, e.g., *Bill Aimed At Insurance Redlining Passes House Firms Would Report Sales Information*, ATLANTA CONST., July 22, 1994, at B2:

Insurance companies would have to document their sales in major urban areas to make it easier for the government to uncover discrimination, under a bill that passed the U.S. House . . . .

The bill reflects similar efforts taken by Georgia's insurance commissioner to prevent insurance redlining . . . .

The national legislation . . . would require the largest insurance companies to report on sales of home . . . policies in the 25 largest metropolitan areas, much as banks and mortgage companies do now on home loans.

. . . . In Georgia, similar rules are expected to take effect in the fall.

199. See, e.g., Karr, *supra* note 24, at A22 (“[T]he Missouri insurance department has taken enforcement action against Farm Bureau, charging that the firm illegally refuse[d] to sell homeowner insurance in St. Louis in the face of 17 years of state urgings.”).

200. See, e.g., Buck, *supra* note 186, at D1:

State Insurance Commissioner Deborah Senn believes companies that sell homeowners insurance routinely engage in ‘redlining’ in . . . [Washington] by discriminating against people who live in inner-city and rundown neighborhoods.

. . . . But Senn says she can't document the practice—which insurance carriers deny—and has started [a redlining study] . . . .

. . . . “Clearly this is a priority issue for this office, and . . . is dramatically different from the past,” she said.

#### IV. JUDICIAL ENFORCEMENT: FEDERAL AND STATE AGENCIES' SUITS TO ENFORCE REDLINING AND FAIR-LENDING LAWS IN FEDERAL AND STATE COURTS

In the prior discussion, three important observations about the administrative enforcement of fair-lending and insurance laws emerged: (1) Only a few banking commissioners have tried to stop financial redlining and unfair lending practices; (2) the majority of state insurance commissioners have shown little interest in reducing insurance redlining; and (3) federal administrative enforcement of fair-lending laws has been ineffective because regulators have allowed political constraints, inter-agency conflicts, and other problems to undermine their efforts.

To help promote greater compliance with fair-lending and equal-access-to-insurance laws, some state and federal regulators are increasingly asking state and federal courts for assistance. In recent years, the Department of Justice, state attorneys general, and state insurance and finance commissioners have sued a modest number of lenders and insurers to force those businesses to stop discriminating on the basis of gender, race, and the geographic location of consumers' residences. In the following sections, this Article discusses the effectiveness of judicial enforcement, and necessarily, critiques the various legal theories and arguments that federal and state officials proffer to obtain favorable outcomes.

##### *A. The Department of Justice's Mortgage-Redlining and Fair-Lending Suits*

As discussed earlier, the Equal Credit Opportunity Act and the Fair Housing Act allow the Department of Justice to sue lenders who either redline communities or discriminate on the basis of race, gender or marital status. The Attorney General may initiate suits if she thinks financial institutions are engaged in a pattern of discrimination in residential real estate-related or credit transactions.<sup>201</sup> Or federal regulators may refer mortgage-redlining and unequal-access-to-credit cases to the Justice Department for enforcement.<sup>202</sup>

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201. See *supra* notes 54, 63-67 and accompanying text.

202. See *supra* notes 54, 63-67 and accompanying text.

For years, the Civil Rights Division of the Justice Department showed little desire to enforce fair-lending laws.<sup>203</sup> But recently, an assistant attorney general told “financial regulatory agencies that the Department of Justice (DOJ) wants ‘a more aggressive enforcement program and the development of sound cases for litigation.’”<sup>204</sup> More telling, “the department’s top civil-rights official [has been] prodding bank regulators to refer cases to [DOJ] for investigation.”<sup>205</sup> Quite candidly, the needling has produced very few referrals. For example, although the Comptroller of the Currency examined more than five hundred banks, only “[f]our cases of suspected lending bias have been referred to the Justice Department for further investigation.”<sup>206</sup> More disturbing, the

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203. See, e.g., *Blacks Rejected More Often Than Whites for Home Loans, Survey Shows*, L.A. TIMES, Jan. 23, 1989, at 2:

[Evidence] suggests that . . . redlining[] may have grown worse in the 1980s as federal regulators decreased enforcement of fair lending laws.

. . . [S]everal indicators [revealed] that the Reagan Administration weakened the regulatory system built up in the 1960s and 1970s to stop redlining.

. . . .  
The Justice Department’s Civil Rights Division . . . reduced the number of attorneys and staff dealing with credit cases, and the Department of Housing and Urban Development quit collecting data on the location of FHA loans.

204. See Robert A. Rosenblatt, *U.S. to Target Bias in Mortgage Lending*, L.A. TIMES, May 20, 1992, at D3.

205. See, e.g., *L.A. Unrest Focuses on Home-Loan Bias*, USA TODAY, May 22, 1992, at 5B.

206. See Bacon & Kansas, *supra* note 166, at A2.



Fed,<sup>207</sup> FTC,<sup>208</sup> FDIC,<sup>209</sup> and HUD have referred collectively less than fifteen cases to the Department of Justice.<sup>210</sup>

207. See, e.g., *id.* ("The Federal Reserve Board . . . has referred at least one case."); Jonathan D. Glater, *Critics Say Fed is Lax on Fair-Lending Laws: Agency at Odds with Other Bank Regulators*, WASH. POST, Nov. 1, 1994, at D1:

The Clinton administration has declared war on lending discrimination—but critics say the . . . Federal Reserve[] is a conscientious objector.

The Fed has earned the enmity of consumer groups and . . . other federal regulators who say the agency has resisted enforcing both fair-lending laws . . . and the Community Reinvestment Act . . . .

. . . Fed Governor Lawrence B. Lindsey said the criticisms were unfounded. "We have taken fair lending seriously," he said. "*We refer cases to (the Justice Department) regularly, we refer cases to (the Department of Housing and Urban Development) regularly.*"

But, critics point out, the Fed has questioned a provision of proposed community reinvestment regulations . . . and *showed little concern for a Justice Department fair-lending investigation in approving a recent bank acquisition*. The failure to show support of the administration's efforts to combat lending discrimination and promote community reinvestment has created a rift between the Fed and the other bank regulators.

*Id.* (emphasis added).

208. See, e.g., Mitchell Zuckoff, *U.S. Begins Bias Probe of Shawmut*, BOSTON GLOBE, Mar. 9, 1993, at 39:

The Justice Department has begun investigating . . . a pattern of racially biased mortgage lending by Shawmut National Corp. . . .

*After four years of sustained allegations* that discrimination keeps blacks and Hispanics from obtaining mortgages, Shawmut has become the first banking corporation in New England and *only the second in the country* to come under scrutiny by federal prosecutors.

The Justice Department, working with the Federal Trade Commission, began the probe . . . based on a referral from the Federal Reserve Bank of Boston.

*Id.* (emphasis added).

209. See, e.g., Christine Dugas, *A Matter of Equity—Feds Take Aim at Lending Discrimination*, NEWSDAY, Aug. 23, 1994, at A33 ("Earlier this year, the Federal Deposit Insurance Corp. launched a sweeping probe into lending discrimination based on the 1992 HMDA data. A number of banks will be selected for an in-depth investigation, which could result in a formal enforcement action or referral to the Justice Department."); Paulette Thomas, *U.S. Intensifies its Investigation of Lending Bias*, WALL ST. J., May 15, 1992, at A2 ("[T]he Federal Deposit Insurance Corp. . . . told a House banking subcommittee . . . that [it had] referred one discrimination case to the Justice Department.") (emphasis added).

210. See, e.g., Dugas, *supra* note 209, at A33 ("In late 1992, the Justice Department asked regulators to tag institutions that should be probed for fair lending violations. Since then, it has received about a half dozen referrals. Prior to that request, it had received only one such referral ever from any regulator.") (emphasis added); Bacon, *supra* note 142, at A2 ("[T]he Justice Department, operating on referrals from bank regulators, is investigating about six lenders for possible discrimination.").

Certainly, the paucity of referrals has not prevented the Justice Department from filing suits against lenders who practice financial redlining and unfair lending solely on the basis of gender, race, and marital status. For example, in 1992, "the Justice Department . . . brought and settled its first lending discrimination suit."<sup>211</sup> "[T]he Department sued Decatur Federal Savings and Loan of Atlanta [under the Fair Housing Act and the ECOA] for allegedly discriminatory residential lending. The suit led to a consent decree providing \$1 million in damages and a promise of changes in the bank's lending practices."<sup>212</sup>

A year later, the Department of Justice commenced a similar action against Shawmut Mortgage Co., a division of Shawmut Bank in New England. The Justice Department alleged that the mortgage company violated fair-lending laws<sup>213</sup> by permitting race to influence its underwriting standards.<sup>214</sup> Shawmut settled the case with the DOJ, FTC,

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211. See Thomas, *Persistent Gap*, *supra* note 11, at A9.

212. See Brad Kuhn, *Barnett Lending Studied Part of National Bias Investigation*, SUN SENTINEL, Oct. 27, 1993, at 1D. See also, Thomas, *Persistent Gap*, *supra* note 11, at A9 ("The suit alleged . . . that white applicants who didn't exactly meet credit standards often were given special considerations that blacks were not. In 1990, in a city that is 26% black, mortgages in white census tracts accounted for fully 97% of Decatur[s] home loans.")

213. See Zuckoff, *supra* note 208, at 39:

The Justice Department has begun investigating what federal bank regulators call a pattern of racially biased mortgage lending by Shawmut National Corp.

. . .  
After four years of sustained allegations that discrimination keeps blacks and Hispanics from obtaining mortgages, Shawmut has become the first banking corporation in New England and only the second in the country to come under scrutiny by federal prosecutors.

. . . .  
The letter to Shawmut from the Justice Department and the FTC said the investigation likely would focus on possible violations of two federal laws, the Equal Credit Opportunity Act and the antidiscrimination section of the Fair Housing Act.

214. See Christina M. Gattuso, *Fair Lending: Compliance after Chevy Chase—Enforcement of Fair Lending Laws Continues to be a Priority for the Federal Government*, 10 REV. BANKING & FIN. SERV. 141 (1994), available in WESTLAW, RBFS Database, 1994 WL 2256753:

The complaint alleged that between 1990 and 1992, Shawmut's policies and practices disadvantaged minorities because minorities were subject to more stringent standards than were white applicants, were provided with fewer opportunities than white applicants to document their qualifying information and were denied loans under underwriting policies and practices that had a greater negative impact on their chances for loan approval than the approval chances for white applicants. . . .

and the Fed, agreeing to establish a \$960,000 compensation fund for the disgruntled consumers.<sup>215</sup>

During late 1993 and 1994, the Justice Department settled three additional unfair-lending suits: The first action was filed against Blackpipe State Bank of Martin, South Dakota. The Justice Department "alleg[ed] that Blackpipe refused to make loans on Native[-]American reservations and set credit requirements that [did not] apply to whites."<sup>216</sup> To settle the matter, "Blackpipe State Bank . . . agreed to create a \$125,000 fund to pay American Indians who were denied secured loans if the collateral was on an Indian reservation."<sup>217</sup> The second settlement involved the First National Bank of Vicksburg. DOJ accused the Mississippi bank of "charging higher interest rates to [African-Americans] than [to] whites on unsecured home-improvement loans."<sup>218</sup> Rather than fighting the charge, First National Bank agreed to pay compensatory and punitive damages for "pain and suffering."<sup>219</sup>

215. *See id.*:

The Shawmut case was interesting because notwithstanding that Shawmut had instituted a comprehensive fair lending policy that the DOJ and the FTC found to be an industry model, the DOJ and the FTC required Shawmut to enter into the consent decree to compensate minorities who had suffered injury in the period prior to implementation of Shawmut's fair lending policy.

216. *See Davidson, supra* note 78, A4. *See also Glater, supra* note 207, at D1 ("Blackpipe State Bank of Martin, [South Dakota] . . . settled in November 1993 after Justice accused the bank of discriminating by failing to accept as adequate collateral property located on an Indian reservation.").

217. *See Tony Munroe, Two Small Banks Settle Discrimination Suits*, WASH. TIMES, Jan. 22, 1994, at D8 (At the time, "Blackpipe [was] . . . being sold to Stockmens National Bank of Nebraska and was told by regulators the sale would not be approved if the suit wasn't settled.").

218. *Id.* ("[African-Americans] were charged interest rates of 14 percent to 21 percent, while whites were charged about 10 percent. The Office of the Comptroller of the Currency ruled that the bank violated the Fair Housing Act and the Equal Credit Opportunity Act and referred the case to the Justice Department.").

219. *Id.*

Under the agreement filed . . . in federal court in Jackson, Miss., the bank will pay about \$4,400 to 170 [African-Americans] who were charged the higher rates on loans averaging \$2,000 between January 1990 and July 1993.

. . . [T]he figure includes punitive damages and compensation for "pain and suffering" associated with discrimination.

First National also agreed to lower interest rates for all [African-Americans] who hold loans with discriminatory rates, set a goal to make at least \$1 million in loans to low- and moderate-income borrowers, train loan officers in the principles of fair lending and randomly test employees to make sure minorities

DOJ's action against Chevy Chase Federal Savings Bank is the most widely publicized suit. "[T]he Justice Department accused Chevy Chase Federal and its subsidiary B.F. Saul Mortgage Co. of discriminating against [African-American] neighborhoods in soliciting business, in its branch structure and in its commission system for loan originators."<sup>220</sup> Chevy Chase is an interesting and important case because it "marks the first time the Justice Department has brought a racial-discrimination suit against a lender for its marketing practices."<sup>221</sup> To settle the Department's allegations that it violated the Fair Housing Act and the ECOA, Chevy Chase agreed to "open three mortgage offices and at least one branch in [African-American] areas of Washington. [In addition,] [t]he company agreed to advertise its services with real-estate agents who serve [African-American] areas."<sup>222</sup>

Concluding that the Justice Department has investigated and sued only the lenders cited above would be fallacious.<sup>223</sup> Furthermore, it would be incorrect to infer that lenders accused of violating the Equal Credit Opportunity and the Fair Housing Acts are usually willing to settle DOJ's complaints. First, as of this writing, "[t]he Justice Department . . . is investigating possible mortgage-loan discrimination at Barnett Banks

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are treated the same as whites.

*Id.*

220. See Bass, *supra* note 78, at A2 ("The Justice Department said the company hadn't opened any branches in census tracts with a majority of [African-American] . . . residents, which account for 90% of the district's African-American population.")

221. *Id.* See also David Kleinbard, *Chevy Chase Case Broadens Redlining to Mean Lending Bias Against an Area*, THE COMMERCIAL APPEAL (MEMPHIS), Aug. 23, 1994, at B4 ("The Chevy Chase, [Maryland]-based bank denied it meant to discriminate against borrowers or that it violated the Fair Housing Act or the Community Reinvestment Act. The bank has \$5.1 billion in assets and 78 branches in Maryland, Virginia and the District of Columbia.")

222. See Bass, *supra* note 78, at A2. See also Robert Jackson, *Washington Thrift Settles Redlining Case Law: Chevy Chase Federal to pay \$11 Million, But it Denies it Withheld Services in Black Areas*, L.A. TIMES, Aug. 23, 1994, at D2:

The settlement is unique because previous anti-discrimination efforts by the Justice Department have targeted banks and savings and loans that redlined individual loan applicants. The Chevy Chase action charged that the bank blocked out entire neighborhoods in which it refused to market its services.

Under the first-of-its-kind settlement, the bank's \$11 million will be used to establish a special below-market loan program for residents in areas that were allegedly redlined and to open branches and mortgage offices in those neighborhoods . . .

223. See, e.g., John R. Wilke, *Home-Loan Pricing is Focus of Probe into Racial Bias*, WALL ST. J., May 1995, at C15 ("The Justice Department is probing possible racial bias in loan pricing among home-mortgage lenders. . . . The investigations . . . continue an expansion of enforcement efforts beyond evaluating racial bias in underwriting—that is, who gets a loan—to the actual rates and price or 'points' charged on a loan.")

Inc., Florida's biggest bank, and [at] Northern Trust Corp., a [large] bank in Chicago."<sup>224</sup> Second, on several occasions, lenders have refused to enter various consent decrees and settle charges levied against them; therefore, the Justice Department has asked federal courts for help, citing the Equal Credit Opportunity Act.<sup>225</sup> Expectedly, some courts have supported the Attorney General; other tribunals have not.

Courts in the Third, Fourth, and Tenth Circuits have adopted the Justice Department's ECOA arguments and granted appropriate relief. For example, in *United States v. American Future Systems, Inc.*,<sup>226</sup> the Attorney General sued the corporation, alleging that it was a creditor within the meaning of the ECOA and that certain of its business practices violated the Equal Credit Opportunity Act.<sup>227</sup> American Future asserted that it was not a "creditor" under the Act; therefore, the ECOA did not regulate its activities. In addition, American Future argued that, assuming it was a "creditor," it never discriminated on the basis of impermissible factors.<sup>228</sup> The Third Circuit accepted the Justice Department's arguments and held that the corporation violated the ECOA. The court found that American Future designed and administered a credit program on the basis of race, sex, and marital

224. See Kleinbard, *supra* note 221, at B4; Kuhn, *supra* note 212, at 1D:

The Justice Department is investigating minority lending practices at Barnett Banks as part of a national investigation of lending bias . . . .

. . . .

Associate Attorney General Webster Hubbell . . . said the department was conducting preliminary and full-fledged investigations of lending practices at a handful of banks, which he would not identify. The banks are all in metropolitan areas with significant minority populations, Hubbell told a U.S. House Banking, Finance and Urban Affairs subcommittee. Hubbell said the Justice Department intends to file lawsuits against banks found to be discriminatory.

225. See also *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp 489, 491 (S.D. Ohio 1976) (There, the Department of Justice filed an *amicus curiae* brief and adopted complainants' theory under the Civil Rights Act of 1968: Oakley Building & Loan Association redlined and refused to make loans in heavily populated minority communities.).

226. 743 F.2d 169 (3d Cir. 1984).

227. *Id.* at 171 ("[DOJ argued that the corporation] violated the ECOA by treating minorities, males and married persons less favorably than single white females in their credit programs.").

228. *Id.* ("[A]ppellants . . . argue[d] that the district court erred as a matter of law in finding them to be creditors and therefore subject to the terms of the ECOA.")

status “which were not related to the social need [the] programs sought to address.”<sup>229</sup>

A fairly similar outcome appears in *United States v. Landmark Financial Services, Inc.*<sup>230</sup> There, the Attorney General sued Landmark, arguing that the lender’s credit policies and practices discriminated against elderly applicants.<sup>231</sup> Landmark asserted that the Justice Department had no authority to commence the action. Maryland’s district court disagreed, stating that the ECOA “allows the FTC and, in turn, the Attorney General to bring [the] action” and to seek injunctive relief and civil penalties.<sup>232</sup> And, in *United States v. Blake*<sup>233</sup> an Oklahoma district court accepted the FTC and Justice Department’s theory that a five-year statute of limitations applies in ECOA cases and permitted the action to proceed on the merits.<sup>234</sup>

Contrarily, the Court of Appeals for the Ninth Circuit rebuffed the Department’s efforts to enforce the ECOA. In *United States v. ITT Consumer Financial Corp.*,<sup>235</sup> the government asserted: Lenders who extend credit and loans in equal-management, community-property states discriminate against married women by requiring wives to obtain their husbands’ signatures before securing a loan.<sup>236</sup> But the Ninth Circuit disagreed and held that “a lender [may require a] spouse’s signature when a married applicant relies on his or her spouse’s future earnings to establish creditworthiness.”<sup>237</sup>

Finally, a federal district judge in New Jersey seriously undermined the Justice Department’s endeavor to stop financial institutions from

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229. *Id.* at 182.

230. 612 F. Supp. 623 (D. Md. 1985).

231. *Id.* at 624 (“The government specifically allege[d] that Landmark[] [violated] section 701(a)(1) of the ECOA . . . and Section 202.4 of Regulation B, 12 C.F.R. § 202.4.”).

232. *Id.* at 626.

233. 751 F. Supp. 951 (W.D. Okla. 1990).

234. *Id.* at 953 (concluding that “the two-year statute of limitations applies to [s]ection 706 and the five-year statute of limitations applies to actions taken by the FTC under [s]ection 704 of the ECOA”).

235. 816 F.2d 487 (9th Cir. 1987).

236. *Id.* at 488 (“The government argue[d] that defendants discriminate[d] against married applicants when they require[d] a spouse’s signature in order to count the spouse’s future earnings toward establishing creditworthiness for a loan.”).

237. *Id.* at 491. The Ninth Circuit also observed:

We have stated that “[t]he ECOA makes it unlawful for any creditor to discriminate with respect to any credit transaction on the basis of marital status.” However, section 705 of the ECOA provides in part: “Consideration or application of State property laws shall not constitute discrimination for purposes of this subchapter.”

*Id.* at 489 (citation omitted).

violating the ECOA. In *United States v. Beneficial Corp.*,<sup>238</sup> DOJ argued "that Beneficial had discriminated against credit applicants on the basis of marital status and age. . . . To rectify [the] alleged violations, the United States [asked the court to award] injunctive relief [as well as] money damages . . . for pain and suffering, emotional harm, inconvenience, loss of civil rights, and out-of-pocket losses."<sup>239</sup> Simply put, the district court refused to accept the Justice Department's argument and held that the ECOA does not authorize the Attorney General to seek money damages.<sup>240</sup>

Without doubt, these types of judicial conflicts will become more evident as more suits are filed; and it appears that the DOJ will file additional actions against lenders.<sup>241</sup> And, of course, "lenders are counterattacking."<sup>242</sup> Therefore, at this point, the following point is

238. 492 F. Supp. 682 (D.N.J. 1980), *aff'd mem.*, 673 F.2d 1302 (3d Cir. 1981).

239. *Id.* at 683.

240. *Id.* at 688 (finding that "15 U.S.C. § 1691(e)-(h) authorizes the Attorney General to seek a wide range of equitable remedies, but not legal money damages."). *But see* *United States v. Landmark Financial Services Inc.*, 612 F. Supp. 623, 631 (D. Md. 1985) (acknowledging "that by allowing this matter to proceed under section 704(c) of the ECOA[,] [the court] will allow the government to seek those remedies (civil penalties and consumer redress) that the Third Circuit has held are unavailable under section 706 of the same act."). *See also* Albert R. Karr & Viveca Novak, *Stronger Penalties for Reinvestment Act are Ruled Illegal by Justice Department*, WALL ST. J., Dec. 16, 1994, at A6:

Walter Dellinger, an assistant attorney for the department's office of legal counsel, ruled that . . . four regulatory agencies . . . lacked legal authority, under the Community Reinvestment Act, to use the proposed stronger sanctions against banks and thrifts that don't meet the credit needs of their communities. The proposed rules would have allowed the [OCC, Fed, FDIC, and OTS] to levy penalties against the worst offenders . . . .

241. *See, e.g.*, Gattuso, *supra* note 214 ("[I]t appears that the DOJ will continue to pursue aggressively alleged fair lending violations, even under theories of liability that are untested by the courts. . . . [T]he DOJ recently announced that it was considering a lawsuit against a financial institution for racially discriminating in the risk pricing of loans.").

242. *See* Albert R. Karr, *Federal Drive to Curb Mortgage-Loan Bias Stirs Strong Backlash*, WALL ST. J., Feb. 7, 1995, at A1, A10:

America's Community Bankers, the thrift trade group, has established a \$100,000 war chest for purposes such as filing amicus briefs . . . , drafting legal defenses against the federal fair-lending drive and financing public-relations and advertising campaigns. . . .

. . . . Bankers "want someone to fight one of these cases, to test government theories in court" and to settle issues left unresolved by consent agreements such as that involving Chevy Chase. . . . Barnett Bank is a leading candidate

worth stressing: Lenders' and consumer advocates' failure to appreciate the severity of these major substantive and procedural divisions will only lead to a piecemeal enforcement of fair-lending laws and to more expensive litigation. Clearly these results do not serve the best interests of either applicants, borrowers or those who invest in various financial institutions.

*B. State Attorney Generals' and Finance Commissioners' Fair-Lending and Financial-Redlining Suits*

Over the past twenty years, only a few state attorneys general have conducted thorough, *independent investigations* to determine whether lenders are violating states' fair-lending laws or practicing mortgage redlining. In 1988, Michigan's Attorney General and a special panel investigated banks that allegedly practiced mortgage redlining in Michigan's urban areas.<sup>243</sup> A year later, the Attorney General of New York investigated four major banks who allegedly discriminated against racial minorities.<sup>244</sup> Four years later, "Pennsylvania's attorney general . . . investigat[ed] allegations that Lincoln Savings Bank of Carnegie engage[d] in discriminatory lending practices."<sup>245</sup> This latter investigation was significant because (1) it occurred in Pittsburgh, which is often presented "as a national model of cooperation between banks and

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for this role.

*Id.* at A10.

243. See, e.g., David Everett & Teresa Blossom, *Panel to Probe Detroit Bank Loan Patterns*, DETROIT FREE PRESS, July 29, 1988, at 1A:

Michigan House Speaker Gary Owen appointed a special legislative committee . . . to investigate bank lending patterns in Detroit and [in] the state's other large cities.

. . . .  
State attorney general Frank Kelley, a frequent critic of banks and their powerful lobbyists said, "I would support any reform of . . . state laws which would enable better enforcement."

*Id.*

244. See *New York Banks Charged with Bias on New Accounts*, WALL ST. J., Mar. 15, 1989, available in 1989 WL-WSJ 490431.

245. See Steve Massey, *Lincoln Savings' Loans Probed Community Group Says Institution Discriminates Against Black People*, PITTSBURGH POST-GAZETTE, Dec. 22, 1993, at C7:

[Lincoln Savings] was targeted because Lincoln failed to attempt to make loans in black neighborhoods and is representative of smaller banks and thrifts in the region.

. . . .  
Trent Hargrove, a deputy attorney general heading civil[-]rights enforcement, said in a letter to [the Pittsburgh Community Reinvestment Group] that he had reviewed its allegations and "that further review is warranted to determine if Lincoln Savings is in violation of fair lending laws by engaging in an improper difference in treatment based on race."



community groups"; and (2) "the largest disparity between loan approval rates for black[s] and white[s] . . . was not among the poor but among middle-income applicants."<sup>246</sup>

Georgia's and Massachusetts's Attorneys General also have conducted major probes to determine the breadth and severity of mortgage redlining. In 1993, the Attorney General of Massachusetts selected "three dozen banks . . . [and reviewed their] . . . residential mortgage lending decisions;"<sup>247</sup> and Georgia's Attorney General investigated Fleet Financial, a major lender in Georgia, to discover whether Fleet violated state fair-lending laws.<sup>248</sup>

Significantly, although these probes uncovered major violations, most state governments refused to file major lawsuits in state courts. "[Ten banks] reached a settlement with the Massachusetts Attorney General to settle the state's probe of possible discriminatory lending practices."<sup>249</sup>

246. *Id.*

247. See Mitchell Zuckoff, *Bias Inquiry Seen Focusing On 36 Banks*, BOSTON GLOBE, May 1, 1993, at 8 ("Three dozen Massachusetts banks have been targeted by the state attorney general for an investigation of alleged mortgage lending discrimination . . . [T]he probe is part of a larger effort by [Attorney General] Harshbarger to hold financial institutions accountable for their lending practices.").

248. See generally Shelley Emling, *Fleet Using Print Ads to Boost Image—But Favorable Ruling Not End of Legal Woes*, ATLANTA CONST., Jun. 17, 1993, at D5:

In an attempt to regain trust lost in months of charges of loan-sharking and racketeering, Fleet Finance Inc. is using a win in state Supreme Court to launch an aggressive marketing campaign.

. . . [T]he state's largest second-mortgage lender is telling borrowers "the record has been set straight" by the court, which ruled this week that Fleet had broken no laws.

But even the majority opinion of the court took the company to task for lending practices that may be "exorbitant, unethical and perhaps even immoral."

Fleet still faces two class-action lawsuits, in Cobb and Richmond counties, and an investigation by [Georgia's] Attorney General's Office.

"We will continue our investigation without letup," said Attorney General Michael J. Bowers.

249. See Gary Putka, *Shawmut Unit for Mortgages is Reorganized*, WALL ST. J., Dec. 3, 1993, at B5 ("The banks agreed to new practices that could increase their lending in low-income areas and to make as much as \$2 million in restitution for 130 minority applicants who were denied mortgages in 1990."); *Massachusetts, Banks Settle Loan Bias Fight*, 3 AM. BANKER'S WASH. WATCH, Dec. 13, 1993, 1993 WL 2772588, at 5 ("Mortgage lenders in Massachusetts reached an agreement in principle Dec. 2 with the state's attorney general in the nations nastiest batch of lending bias cases to date.") (emphasis added). But see Mitchell Zuckoff, *SJC To Hear Bias Probe Challenge*, BOSTON GLOBE, Aug. 25, 1993, at 31:

Similarly, in Georgia, Fleet Financial agreed to settle the case “to prevent the Georgia Attorney General from filing unfair-lending charges” in state court.<sup>250</sup>

Of course, a few state attorneys general have been active in a different way. Fairly recently, a small number of state banking, insurance, civil-rights, and human-rights commissioners referred redlining and unfair-lending controversies to state attorneys general for further consideration. Some attorneys general filed *amicus curiae* briefs when regulators sued insurers and lenders<sup>251</sup> in state courts. Others, however, initiated actions *on behalf of* various commissioners to resolve either state-constitutional or federal-preemption questions. As we have come to expect, these latter enforcement initiatives also have produced contradic-

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The state’s highest court has agreed to consider a challenge to Attorney General Scott Harshbarger’s investigation of Massachusetts banks for alleged mortgage discrimination.

The state Supreme Judicial Court did not set a date for hearing the case, which combines lawsuits filed against Harshbarger by 10 banks and the Massachusetts Bankers Association.

The banks claim[ed] Harshbarger’s investigation [was] outside his authority and [was] more properly the job of the Massachusetts Commission Against Discrimination.

250. See Suzanne A. Ryan, *Fleet Financial Commits \$8.5 Billion to Minorities, Low-Income Borrowers*, WALL ST. J., Feb. 9, 1994, at A2. See also Suzanne A. Ryan, *Fleet Financial Unit in Georgia Settles Complaints*, WALL ST. J., Dec. 17, 1993, at A2:

A unit of Fleet Financial Group Inc. agreed to lend \$70 million at reduced interest rates and to make up to about \$35 million in other concessions to settle complaints of unfair lending practices in Georgia.

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Fleet agreed to the Georgia settlement, according to the state’s attorney general, to prevent charges of unfair lending that otherwise would have been filed by the state.

251. See, e.g., Al Delugach, *State Suit Alleges Mortgage Firm ‘Redlined’ Blacks*, L.A. TIMES, Aug. 11, 1988, at 1 (Part 4):

The state . . . sued to revoke the licenses of First Alliance Mortgage Co. for alleged racial discrimination in lending, charging that the firm used a list of ZIP codes entitled “Never Never Land” to screen out loan applicants in predominantly black neighborhoods.

•••••  
The Corporations Department said its action is believed to be the first use of the state’s 11-year-old Holden Act outlawing . . . redlining practices. The law covers racially discriminatory real estate lending by certain types of lenders but does not include banks and savings and loans.

tory mortgage- and insurance-redlining rulings among state courts<sup>252</sup> and the federal circuits.

For example, in *Conference of Federal Savings and Loans Ass'ns v. Stein*,<sup>253</sup> California's Attorney General sued a savings and loan<sup>254</sup> on

252. It is extremely clear that brokers' as well as loan officers' "cultural biases" contribute to mortgage redlining and unfair-lending practices. *See, e.g.,* Harney, *supra* note 119, at K4 ("New changes to mortgage underwriting rules [are] being distributed to lenders . . . . The revisions direct local mortgage companies to take off their middle-class blinders . . . [and] . . . ask lenders to take a deeper look, beyond the surface stereotypes."); Alan Keyes, *Incentives to Fight Racism in Lending*, WALL ST. J., Apr. 23, 1992, at A12:

Mortgage loans are made by human beings, and human beings have a way of rationalizing [wrong] decisions . . . . If a loan officer is white and doesn't like to lend to blacks, it's not going to go down as a racist decision. The loan officer is going to look closely enough to find something wrong with the application.

*Id.* Furthermore, low-minority employment in the banking and mortgage industries is likely to decrease women's as well as minorities' access to credit and loans. *See, e.g.,* Jerry DeMuth, *Lenders Add Programs for Minorities; Industry to Address Hiring, Mortgage Policies*, WASH. POST, Oct. 30, 1993, at E1 ("The mortgage banking industry . . . is initiating programs to increase minority employment, train mortgage bankers to encourage minority home buyers and identify minority attitudes toward the home-lending application process. . . . 'Minority staff has historically been relatively low in mortgage origination areas.'"). Therefore, state finance commissioners and attorney generals have tried to prevent lenders from practicing impermissible employment discrimination and from allowing cultural stereotypes to influence credit and lending decisions. Some state supreme courts have supported these efforts; others, however, have not. *Compare* Kansas Commission on Civil Rights v. Sears, Roebuck and Co., 532 P.2d 1263, 1268-71 (Kan. 1975) (supporting the commissioner's authority to eliminate credit discrimination under Kansas Act Against Discrimination, KANSAS STAT. ANN. §§ 44-1002(h)(i) & 44-1009(c)(1) (1993)); *Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc.*, 517 P.2d 158, 167-69 (Kan. 1973) (recognizing the commissioner's authority to prevent discriminatory hiring practices on the basis of race); *W. Va. Human Rights Comm'n v. Moore*, 411 S.E.2d 702, 707 (W. Va. 1991) (holding that the commissioner of West Virginia Human Rights Commission has authority to investigate a bank's alleged discriminatory practices under W. VA. CODE § 5-11-10 and "authority to issue a subpoena duces tecum pursuant to W. VA. CODE § 5-11-8(d)(1)"); *and* *Equitable Trust Co. v. State Comm'n on Human Relations*, 399 A.2d 908, 916 (Md. Ct. Spec. App. 1979) (upholding the commissioner's authority to investigate alleged racial and gender discrimination in financing under MD. ANN. CODE art. 49B, §§ 8, 13, 15; and art. 76A, § 3(b)(i)); *with* *McKibbin v. Michigan Corp. and Sec. Comm'n*, 119 N.W.2d 557, 561 (Mich. 1963) (holding that Michigan's corporation and securities commissioner did not have authority under MICH. COMP. LAWS § 8.3a to revoke a broker's license for allegedly discriminating on the basis of race.)

253. 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980).

254. *Id.* at 1259 ("[The government sued] the West Coast Federal Savings and Loan Association in Superior Court of San Mateo County . . . . The defendant was charged with [violating the anti-redlining act] . . . . [The government] sought statutory damages

behalf of the secretary of business. The suit alleged that the lender violated California's Housing Financial Discrimination Act of 1977.<sup>255</sup> The Conference Association and the Federal Home Loan Bank Board countersued. They claimed that California's Secretary of Business did not have any authority to halt mortgage redlining because federal statutes and regulations preempted the Act.<sup>256</sup> The Ninth Circuit agreed, stating that "the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control."<sup>257</sup>

The Third Circuit also have undermined state attorneys' general attempts to prevent mortgage redlining. In *National State Bank v. Long*,<sup>258</sup> several national banks sued New Jersey's Commissioner of Banking. The bankers argued that federal laws<sup>259</sup> preempt New Jersey's anti-redlining statute;<sup>260</sup> therefore, the Commissioner could not investigate their redlining activities nor issue cease-and-desist orders. The federal district court did not accept the bankers' argument. The court stated: "[W]e conclude that the state act's prohibitory requirements are not pre-empted with respect to . . . national banks."<sup>261</sup> On appeal, the Third Circuit adopted a contrary view: "[We] [are] unable to [accept] the district court's determination that state officials have the power to issue

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in the sum of \$2500 . . . ") (citation omitted).

255. *Id.* at 1258-59 ("[The] Act . . . prohibit[ed] discrimination in lending 'due . . . to the consideration of race, color, religion, . . . or ancestry' of the borrower, or 'due . . . to the consideration of conditions . . . in the neighborhood or geographic area surrounding the housing accommodation' of the borrower, . . . commonly known as 'redlining.'").

256. *Id.* at 1259 ("[T]he Conference . . . and certain federal associations . . . sought a declaration that the Act was pre-empted by federal legislation and regulations. The Bank Board filed a cross claim against [the Attorney General], seeking to enjoin him from attempting to enforce the provisions of the state act . . .").

257. *Id.* at 1260.

258. 469 F. Supp. 1068 (D.N.J. 1979).

259. *Id.* at 1070 ("[T]he following three federal statutes have some impact on the issue of pre-emption: the [Home Mortgage Disclosure Act]; the [Community Reinvestment Act]; and the Equal Credit Opportunity Act . . . . All three statutes appear to have . . . some impact on the practice of redlining . . .").

260. *Id.* at 1072:

[New Jersey's] act's prohibitory requirements are contained in . . . N.J. STAT. ANN. [§§] 17:16F-3 & F-7 . . . [and in] . . . N.J. STAT. ANN. [§§] 17:16F-8 to F-11. Section 3 . . . prohibits depository institutions from discriminating on any basis not supported by a reasonable analysis of the lending risks associated with an applicant or by the condition of property proposed as security. . . . Under section 8, the [commissioner] has the power to investigate "any matter pertaining to this act." . . .

261. *Id.* at 1078 ("[W]e see nothing to prohibit the defendant from issuing cease and desist order for any violations of section 3 that can be discovered through the information [the banks] are required to disclose [under] HMDA.").

cease and desist order against national banks [that violate New Jersey's anti-redlining] statute."<sup>262</sup> The circuit court observed that "Congress . . . delegated [the] enforcement of statutes and regulations against national banks to the Comptroller of the Currency"<sup>263</sup> rather than to state commissioners or attorneys general.

A very different conclusion, however, is found in *Michigan Savings and Loan League v. Francis*.<sup>264</sup> In 1977, Michigan enacted an anti-redlining statute, the Michigan Mortgages Lending Act.<sup>265</sup> Shortly thereafter, "a group of federally chartered savings and loan associations . . . and the Michigan Savings and Loan League [sued for declaratory relief, arguing] that they [were] exempt from the provisions of the . . . Act."<sup>266</sup> The district court dismissed the complaint, stating: "We decline to follow the [Ninth Circuit's] decision in *Conference*. . . [W]e have no jurisdiction to proceed to the merits of plaintiffs' complaint against the . . . Commissioner."<sup>267</sup>

The Court of Appeals for the Sixth Circuit agreed, dismissing the fact that the Supreme Court affirmed the Ninth Circuit's holding in *Conference of Federal Savings and Loans Assn. v. Stein*.<sup>268</sup> The Sixth Circuit held that "[p]laintiff's assertion of federal preemption was [only] a defense to the threatened enforcement of [Michigan's anti-redlining act]. Therefore, it could not provide the basis for subject matter jurisdiction."<sup>269</sup> Obviously, the appellate court's procedural ruling

262. *National State Bank v. Long*, 630 F.2d 981, 988 (3d Cir. 1980).

263. *Id.*

264. 490 F. Supp. 892 (E.D. Mich. 1980).

265. *Id.* at 894.

The Act prohibits credit granting institutions from discriminating against borrowers on the basis of "racial or ethnic characteristics or trends in the neighborhood in which the real estate is located." [MICH. COMP. LAWS ANN. § 445.1602(1)(a)] The Act further provides that when a mortgage loan is rejected, the lending institution must furnish the rejected borrower with a written statement delineating the reasons for rejection. [MICH. COMP. LAWS ANN. § 445.1602(2), (5)]

. . . .  
". . . . "Credit granting institutions" [also are required to] post notices [in each of their offices] inform[ing] all persons . . . to file complaints concerning redlining with the . . . Commissioner . . . .

*Id.* (emphasis added).

266. *Id.* at 893.

267. *Id.* at 897.

268. *See Stein v. Conference of Fed. Sav. and Loan Ass'ns*, 445 U.S. 921 (1980).

269. *Michigan Sav. and Loan League v. Francis*, 683 F.2d 957, 960 (6th Cir. 1982).

does not prevent Michigan from enforcing a significant portion of its anti-redlining statute. In fact, the decision helps. Quite frankly, after *Francis*, the government may still order “‘credit granting institutions’ to maintain detailed records, file reports, post notices, and inform all [loan applicants] to file . . . redlining [complaints] with the . . . Commissioner.”<sup>270</sup> Without doubt, this is a powerful enforcement weapon.

C. *State Attorneys’ General and Insurance Commissioners’ Equal-Access and Insurance-Redlining Suits*

Unquestionably, an exceptional number of consumers believe state insurance commissioners are not doing enough to end redlining and the unequal access to affordable insurance.<sup>271</sup> In fact, some consumer advocates have accused commissioners of either sanctioning or fostering insurance redlining and discrimination.<sup>272</sup> Consequently, women and low-income minority advocates have sued some commissioners for failing to halt discriminatory practices. Surprisingly, state courts have ruled consistently in favor of the insurance commissioners.<sup>273</sup>

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270. 490 F. Supp. at 894.

271. See, e.g., *Insurance Czars See Red*, WALL ST. J., Jan. 12, 1995, at A18: As in banking, the supposition by activists is than an industry ignores profit opportunities because it holds to false stereotypes about blacks and Hispanics.

The National Association of Insurance Commissioners (NAIC) issued a report recently tiptoeing around that belief. . . .

. . . .

To what extent is there discrimination? A survey of blacks and Hispanics in five big cities . . . found that . . . many suspected bias . . . .

*Id.*

272. See *supra* notes 185-89 and accompanying text.

273. See, e.g., *City of Compton v. Bunner*, 243 Cal. Rptr. 100, 128 (Cal. 1988) (ordered not to be officially published July 21, 1988) (dismissing insurance consumers’ and civil-rights advocates’ redlining action against an insurer and California’s insurance commissioner because complainants failed to exhaust administrative remedies); *County of L.A. v. Farmers Ins. Exch.*, 132 Cal. App. 3d 77, 88, 182 Cal. Rptr. 879, 885 (1982) (dismissing lower-class minorities’ anti-redlining and territorial-classification suit because complainants “failed to exhaust the appropriate . . . administrative procedures and the appropriate judicial method of compelling [California’s insurance commissioner] to carry out [his] . . . duties [respecting] alleged[ly] unlawful practices . . . .”); *Women Organized for Employment v. Stein*, 114 Cal. App. 3d 133, 140, 170 Cal. Rptr. 176, 181 (1980) (“A passage in appellants’ reply brief suggest that they are charging [the] . . . [i]nsurance [c]ommissioner . . . with abusing his discretion by arbitrarily failing to collect [anti-redlining, gender and race discrimination data]. No authority is cited for the suggestion. . . . Perceiving no merit in it, we decline to consider it.”); *Prospect Area Hous. Dev. Fund Co., Inc. v. Schenck*, 337 N.Y.S.2d 662, 666 (N.Y. Sup. Ct. 1972) (dismissing low-income consumers’ rates-discrimination action against New York’s commissioner of insurance because the complaint failed to state a cognizable cause of action).

But notwithstanding consumers' perceptions, a small number of state attorneys general have sued "deviant" insurers on behalf of various commissioners who have tried to prevent race- and gender-based discrimination. The majority of these suits were filed in state courts during the 1970s. Regrettably, aggrieved consumers did not prevail. For example, in 1974, Iowa's district court decided *Homesteaders Life Insurance Co. v. Iowa State Civil Rights Commission*. In *Homesteaders*, a female employee accused her employer/insurer of practicing gender discrimination.<sup>274</sup> Iowa's Civil-Rights Commission agreed<sup>275</sup> and ordered the insurer to stop. The insurer refused, thereby forcing the attorney general to sue. The district court did not find any impermissible discrimination, held for the insurer, and ordered the Commission to dismiss the gender-discrimination complaint.<sup>276</sup>

Four years later, a lower court in New York also decided against female employees and consumers. In *Rochester Hospital Service Corp. v. Division of Human Rights of the Executive Department of New York*,<sup>277</sup> a female employee filed a complaint with the human-rights division, alleging that a health insurer discriminated on the basis of marital status.<sup>278</sup> The Division investigated the complaint, determined

274. No. 76241, 1974 WL 2785 at \*2-\*3 (Ill. App. Ct. Mar. 5, 1974).

We are alleging a violation of [IOWA CODE § 105A (1971)] regarding wages and emoluments offered to male employees and fringe benefits offered to female employees. The complaining witness was discharged . . . because of her activities in regard to this [c]omplaint and was discriminated against on the basis of sex . . . .

. . . .  
. . . . [Also,] [u]nder [a] group insurance policy maternity benefits were available . . . to dependents of male employees but were not available to female employees . . . .

275. *Id.* at \*3 ("The Commission found that Homesteaders discriminated in the pattern and practice of recruitment, hiring and placement of employees on the basis or race and sex, and in the pattern and practice concerning remuneration and promotion on the basis of sex . . . .").

276. *Id.* at \*7 ("The findings of the . . . Commission . . . that Homesteaders 'discriminates in employment' . . . should be set aside and the complaint filed with the Commission should be dismissed.")

277. 401 N.Y.S.2d 413 (N.Y. Sup. Ct. 1977).

278. *Id.* at 415. The complaint alleged that the insurer violated N.Y. EXEC. LAW §§ 292, subd. 9 & 296, subd. 2(a)(McKinney 1977). The latter subdivision "makes it an unlawful discriminatory practice for any person in charge of a 'place of public accommodation . . . to refuse, withhold from or deny . . . any of the accommodations, advantages, facilities or privileges . . . [because of the] . . . marital status' of any person." *Id.*

that it had jurisdiction, found evidence of discrimination and “scheduled a formal hearing to adjudicate the charges.”<sup>279</sup> The insurer balked and asked the court for declaratory relief. From the company’s perspective, only the insurance commissioner had authority “to control the totality of [health] insurance within the state.”<sup>280</sup> The court agreed, stating among other things that “[m]arital status [was] not listed as an unlawful discriminatory rate classification” under New York’s insurance code.<sup>281</sup> In 1978, the South Dakota Supreme Court decided *South Dakota Division of Human Rights v. Prudential Insurance Co. of America*,<sup>282</sup> whose facts closely resembled those reported in *Homesteaders* and in *Rochester*. An unmarried, female employee gave birth to a child and filed a maternity-benefits claim under her employer’s group insurance policy.<sup>283</sup> Prudential, the insurer, denied the claim. The employee “filed a complaint with the Commissioner alleging that . . . ‘marriage is not a prerequisite for pregnancy[;] [therefore, the] policy discriminate[d] against unwed mothers and married women who . . . would not list their husbands as dependents.’”<sup>284</sup> The Commissioner asserted its jurisdiction over the insurer, accepted the employee’s theory of the case and ordered Prudential to comply with the terms of South Dakota’s human-rights act.<sup>285</sup>

Prudential appealed the commissioner’s decision. The supreme court reversed in favor of the insurer. The court held that the human-rights statute “only [regulated a business’s] employment policies and practices

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279. *Id.* at 415.

280. *Id.* The insurer also asked the court to prevent “the Division from making any determinations concerning the validity of such policies and practices or the premium rates charged thereof.” *Id.*

281. *Id.* at 416. *See also* New York Comm’n On Human Rights v. Liberty Mutual Ins. Co., 352 N.Y.S.2d 466, 467 (N.Y. App. Div. 1974).

The proceeding against [Liberty Mutual] alleges that it has engaged in discriminatory practices on the basis of race, color and national origin, with respect to recruitment and promotion of its personnel. [The insurer claims] that [its] budget analyses are privileged memoranda which, if made public, could reveal sensitive financial information to competitors and further that they provide absolutely no data of employees’ race or national origins. *We feel that the Commissioner has failed to establish the relevancy of the requested budget analyses to its inquiry and we therefore reverse this provision of the order .*

*Id.* (emphasis added).

282. 273 N.W.2d 111 (S.D. 1978).

283. *Id.* at 112 (“The policy provided certain medical and hospital expense benefits to . . . employees who [were] covered individuals under the policy’s terms.”).

284. *Id.* Specifically, complainant argued “that [the] denial of maternity benefits constituted sex discrimination in employment and public accommodations . . . under the South Dakota Human Relations Act of 1972 [S.D. CODIFIED LAWS ANN. § 20-13 (1972)].” *Id.*

285. *Id.* at 112-13.



[rather than an] insurers['] . . . insurance policies . . . ."<sup>286</sup> The South Dakota Supreme Court also concluded that the maternity-benefits provision *only discriminated* on the basis of marital status; therefore, Prudential neither fostered nor practiced impermissible insurance and employment discrimination.<sup>287</sup>

Finally, at least two insurance commissioners have defended their actions against insurers who allegedly practiced insurance discrimination on the basis of race. In *British Foreign Marine Insurance Co. v. Stewart*,<sup>288</sup> New York's Superintendent of Insurance cited seven companies for violating the state's anti-redlining statute.<sup>289</sup> According to the Superintendent, the property insurers "practiced racial discrimination [when they decided to cancel commercial fire-insurance policies] in the Harlem and Bedford-Stuyvesant areas of New York City."<sup>290</sup> The insurers challenged the Superintendent's conclusion in state court, arguing that "the cancellation . . . was purely a business decision, [as defined under New York's insurance code]."<sup>291</sup> The court accepted the insurers' argument, finding "that the [s]uperintendent failed to adduce any evidence [of] . . . illegal discrimination."<sup>292</sup> The court found that the insurers only wanted to reduce their exposure to possible risks; racial

286. *Id.* at 114.

287. *Id.* at 115 ("[W]e hold that the exclusion of single persons . . . from the maternity[-]benefits coverage . . . does not constitute sex discrimination [under] the Act . . ."). Without doubt, the reasoning in *Prudential* as well as the holdings in *Homesteaders* and in *Rochester* are truly incredible. For example, the *Prudential* court correctly observed that "[a]lthough women are the only ones physically capable of pregnancy and childbirth, both men and women are legally capable of incurring responsibility and liability for bills [associated with the] expense of maternity." *Id.* But single, working parents—who are significantly more likely to be women—also incur similar bills and responsibilities. Without doubt, permitting insurers to award maternity benefits on the basis of marital status is reprehensible, because the adverse consequences associated with this policy are profoundly more likely to harm *employed, single women and their unborn children* rather than employed, married men.

288. 281 N.E.2d 149 (N.Y. 1972).

289. See N.Y. INS. LAW § 40, subd. 10 (Consol. 1970), which provides in pertinent part: "[No insurance company] shall make any distinction or discrimination between persons because of race, color, creed or national origin, as to the premiums or rates charged for insurance policies or in any other manner whatever."

290. 281 N.E.2d at 150.

291. *Id.* But the court observed: "[T]he mere fact that [insurers'] action may serve a valid commercial or economic purpose will not, in and of itself, render such action permissible, if evidence . . . demonstrate[s] that [insurers] illegally discriminate[d] against [African-Americans]." *Id.* at 152 n.4.

292. *Id.* at 150.

hostility did not influence the insurers' decision to cancel the fire policies.<sup>293</sup>

A year after *British Foreign Marine*, a state court undermined Maryland's efforts to end insurance discrimination against inner-city residents in Baltimore. In *Insurance Commissioner of Maryland v. Allstate Insurance Co.*,<sup>294</sup> consumers filed grievances with the insurance commissioner, claiming that insurers were discriminating in an arbitrary and capricious manner in violation of Maryland's statute.<sup>295</sup> The commissioner ordered the companies to stop canceling policies arbitrarily.<sup>296</sup> The insurers appealed the commissioner's orders. After examining records and citing *British Foreign Marine*, the Maryland court of appeals reversed the commissioner's orders.<sup>297</sup>

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293. *Id.* at 152.

[T]he petitioners made a calculated business decision to reduce their fire insurance business in New York. Concluding that they were over-committed in the sale of fire insurance in Harlem and Bedford-Stuyvesant . . . the petitioners decided to cancel certain insurance policies in these two areas. In short, it seems that their 'plan of action' was not based on any desire to discriminate.

*Id.*

294. 302 A.2d 200 (Md. 1973)

295. *Id.* at 201. *See id.* at 206 (citing MD. ANN. CODE ART. 48A § 234A(a) (1971)), which stated in pertinent part:

No insurer, agent or broker shall cancel or refuse to underwrite or renew a particular insurance risk or class of risk for any reason based in whole or in part upon race, color, creed or sex of an applicant or policyholder or for any arbitrary, capricious, or unfairly discriminatory reason. In the case of a cancellation of or refusal to renew a policy, provided the insured requests of the Commissioner that a review be undertaken of the insurer's action prior to the effective date of termination of the policy, and provided the Commissioner initiates action toward issuance of a finding in accord with § 234C, such policy shall remain in effect until such finding is issued.

296. 302 A.2d at 202 ("The Commissioner [found that] . . . Allstate was in violation of Art. 48A, § 234A(a) [when] it 'arbitrarily, capriciously or for unfairly discriminatory reasons' issued a notice of intent not to renew the coverages in the policy.").

297. *Id.* at 207.

In both [cases], there was no evidence either before the Commissioner or the Baltimore City Court on appeal of any arbitrary, capricious, or unfairly discriminatory reason applied by either Allstate or Aetna in declining to renew the respective policies, based upon race, color, creed or sex of the policyholders or any similar reason. The evidence established that each insurer made its decision not to renew upon its established underwriting criteria and for no other reason. The facts in each case abundantly established this and there was no evidence to the contrary.

*Id.*

V. PRIVATE ENFORCEMENT OF ANTI-REDLINING AND FAIR-LENDING  
LAWS IN FEDERAL COURTS

As we have learned, only a few state and federal regulatory agencies have tried to stop insurance or mortgage redlining. Even fewer agencies have attacked unfair-lending and discriminatory-insurance practices. We also know something else: Consumer advocates often report that insurers refuse to sell affordable insurance and lenders refuse to extend credit solely on the basis of race, gender and marital status. Therefore, given state and federal governments' inability or unwillingness to curtail these practices, some consumers and their advocates have filed several private actions against lenders and insurers.<sup>298</sup> But more important, fairly

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298. See, e.g., Armando Acuna, *Home Savings Named in Redlining Suit Buyers Claim Bias Made Loan for Inner-City Property Less Favorable*, L.A. TIMES, Jan. 1, 1987, at 3 (Part 2) ("San Diego County's director of the office of contract compliance, which monitors the hiring of women and minorities, has filed a lawsuit against Home Savings of America accusing it of discriminating against him and his wife in a loan to buy a duplex in the Golden Hill-Sherman Heights area."); Keith Henderson, *Activists Charge Insurers with 'Redlining' Poor Areas*, CHRISTIAN SCI. MONITOR, Mar. 30, 1993, at 1, 4 ("The American Family Mutual Insurance Company is the target of a class-action lawsuit in Milwaukee, alleging the firm's sales practices are designed to avoid doing business in that city's black neighborhoods."); *Business in Brief*, ATLANTA CONST., Feb. 26, 1993, at D3:

Allstate Insurance Co. executives ordered employees to take no action on applications from minorities, closed inner-city offices and routinely tacked on costly extras to policies with no notice, a former senior manager says in a California lawsuit.

Jeffrey E. Callaway's suit accuses the insurer of systematically evading Proposition 103, California's landmark 1989 insurance reform initiative, then threatening to ruin his career when he complained.

*Id.*; David S. Hilzenrath, *Bias Alleged on Loan Insurance: Group Says Policy Hurts Minorities*, WASH. POST, June 3, 1989, at E1:

A lawsuit filed in Toledo alleges that a mortgage insurance company has discriminated against minorities by refusing to insure mortgages of less than \$30,000.

The Toledo Fair Housing Center, a housing advocacy group that is a plaintiff in the suit against United Guaranty Residential Insurance Co., said the policy has continued to frustrate minority home buyers . . .

*Id.* See also Lou Cannon, *Women Win \$157 Million in Bias Suit; State Farm Insurance Agrees to Record Civil Rights Settlement*, WASH. POST, Apr. 29, 1992, at A1 ("A sex discrimination lawsuit filed 13 years ago against State Farm Insurance Companies was settled today for \$157 million, the largest damage total paid by a defendant in a civil rights case. . . . [T]he suit led to changes in State Farm's national hiring practices that improved opportunities for women . . .").

recent evidence suggests a more disturbing phenomenon: within the near future, an even larger number of disgruntled consumers will file private actions against all sorts of lenders and insurers who either violate fair-lending laws or redline communities.<sup>299</sup>

Accepting the notion that a wave of unfair-lending, redlining and unequal-access-to-insurance cases will inundate state and federal courts, all interested parties and litigants should be extremely concerned. Put simply, state and federal courts are the worst forums for deciding these types of private actions. On the basis of data reported in Part VI, not very many of these cases will be decided on the merits. Instead, a substantial majority of insurers', lenders', and consumers' financial resources will be spent trying to resolve or disentangle some extremely complex issues. Below, some of the more pressing procedural and substantive questions are discussed. And, as we will see, these issues are generating serious splits among the federal courts of appeals.

*A. The McCarran-Ferguson Act and Federal Preemption Doctrine—Preemption Issues Generated When Defendants' Discriminatory Conduct Involves Financial and Insurance-Related Activities*

Obviously, most lenders—savings and commercial banks, finance companies, loan associations, mutual funds, and mortgage companies—make loans and extend credit. But some financial institutions sell “credit life, health and accident insurance . . . to its loan customers. . . . [Often] [t]he insurance premium [is] added to the loan principal or paid . . . when the loan is made . . . .”<sup>300</sup> Furthermore, some lenders and insurance companies enter agreements which allow the insurer to sell insurance to lenders' customers. As consideration, lenders receive a

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299. See Warren L. Dennis, *The Fair Housing Act Amendments of 1988: A New Source of Lender Liability*, 106 *BANKING L.J.* 405, 414-15 (1989) (discussing the consumers' private right of action and their new weapons to fight redlining and unfair lending practices). See also *id.* at 409:

When growth in government enforcement is combined with new authority for “private” attorneys general, . . . the formula is set for a new wave of litigation. . . . Lawyers who take cases on a contingency basis, and thus are always on the lookout for lender liability cases, now have a new tool to use on behalf of their clients.

*Id.*

300. See, e.g., *First Nat'l Bank of LaMarque v. Smith*, 610 F.2d 1258, 1259-60 (5th Cir. 1980) (“A bank loan officer who is also an insurance agent . . . informs the customer of the availability of credit life insurance. If the customer desires to obtain credit life coverage, an entry is made on a loan disclosure form . . . .”). “Credit life, properly used, confers benefits upon the borrower [and] the bank . . . .” *Id.* at 1260 n.2.

percentage of the premiums paid to the insurers.<sup>301</sup> More important, *many lenders sell insurance*.<sup>302</sup>

On the other hand, a vast majority of insurance companies—commercial, life, property & casualty, title, reinsurers—only sell insurance. *But many insurers make all sorts of commercial, real-estate, and mortgage loans*.<sup>303</sup> In fact, some carriers offer premium financing as an inducement to get consumers to purchase an assortment of insurance products.<sup>304</sup> Still other companies require loan applicants to purchase credit-life, disability, or life insurance from the insurers-lenders before approving loans.<sup>305</sup> Therefore, at this point, we must ask: Are

301. *Id.* at 1260 (“Each loan officer/insurance agent has a contract with the credit life insurance company which entitles him to commissions for the sale of credit life insurance. The income accruing under the contract . . . inures . . . to the bank’s officers and principal shareholders.”).

302. *See, e.g.,* United States Nat’l Bank of Or. v. Independent Ins. Agents of Am., 113 S. Ct. 2173, 2176 (1993) (“Almost 80 years ago, Congress authorized any national bank ‘doing business in any place the population of which does not exceed five thousand inhabitants . . . [to] act as the agent for any fire, life, or other insurance company.’”); Knecht & Scism, *supra* note 48, at A2 (“The battle over whether banks can offer annuities [as well as more traditional types of insurance] is being fought in several courts around the country, and banking industry leaders assert that [the New York Court of Appeals] 6-0 decision . . . will lead to expanded bank rights in other states.”). *But see* Barry A. Abbott et al., *Banks and Insurance: An Update*, 43 BUS. LAW. 1005, 1024 (1988) (“To be sure, national banks even today have not been authorized to sell credit-related property and casualty insurance to protect loan collateral. . . . [But] [i]nsurance companies are now providing banking services and some insurance companies even own banks.”).

303. *See, e.g.,* Mitchell Pacelle, *Banks and Insurers Step Up Bulk Sales of Soured Real-Estate Loans and Assets*, WALL ST. J., Mar. 28, 1994, at A2 (“Prudential Life Insurance Co. of America, and Kentucky Central Life Insurance Co. are among the lenders currently selling large portfolios.”); *Delinquencies on Mortgages Held by Life Insurers Fell*, WALL ST. J., Sept. 1, 1993, at A5 (“The delinquency rate on mortgages held by life insurers fell to its lowest level in a year and a half . . . .”); *EARNINGS, L.A. TIMES*, Apr. 25, 1992, D4 (“Aetna Life & Casualty said its first-quarter earnings climbed 51% on gains from sales of assets and lower losses from real estate investments.”); *S&P Lowers Ratings of Five More Insurers*, L.A. TIMES, Oct. 4, 1991, at D2, D14 (“S&P said some life insurers will have to boost their reserves to cover anticipated losses on commercial mortgages, real estate and fixed-income investments.”).

304. *See, e.g.,* Premium Fin. Co., Inc. v. Employers Reinsurance Corp., Civ. A. No. 89-1240, 1992 WL 403098, \*3 (W.D. La. Mar. 2, 1992) (finding no fraudulent inducement involving premium finance agreements).

305. *See, e.g.,* Dexter v. Equitable Life Assurance Soc’y, 527 F.2d 233, 234 (2d Cir. 1975) (discussing an antitrust action which challenged Equitable’s requirement that plaintiff purchase life insurance as precondition to granting mortgage loans); *Addisi v. Equitable Life Assurance Soc’y*, 503 F.2d 725, 726 (9th Cir. 1974), *cert. denied*, 421 U.S. 922 (1975) (“Equitable requires as additional security that the prospective borrower

insurance companies involved in the business of insurance when making mortgage and commercial loans? Conversely, are lenders engaged in the business of insurance when selling insurance products?

To be sure, these are relevant questions. Because, under the McCarran-Ferguson Act, states' insurance commissioners are primarily responsible for regulating the "business of insurance."<sup>306</sup> Among other implications, this means that *aggrieved consumers may not commence private actions against institutions whose activities involve the business of insurance, even if those activities include mortgage and insurance redlining, and impermissible loan and credit discrimination.* But a clear definition of the phrase "business of insurance" does not exist.<sup>307</sup> This, therefore, has generated many intra- and inter-circuit procedural conflicts and substantially reduced the number of consumers who can sue lenders and insurers in federal and state courts.

### 1. *Inter- and Intra-Circuit Conflicts Over Whether Lenders' Activities are the "Business of Insurance"*

Before the Supreme Court decided *Group Life & Health Insurance Co. v. Royal Drug*<sup>308</sup> and *Union Labor Life Insurance Co. v. Pireno*,<sup>309</sup> the Fifth and Seventh Circuits were divided over whether finance companies' lending activities were the business of insurance. For example, in *Lowe v. AARCO-American, Inc.*,<sup>310</sup> the company would only finance the credit-insurance premiums for persons who purchased new automobiles. Members of a class of consumers accused the finance company of practicing fraudulent nondisclosures.<sup>311</sup> The Court of

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. . . purchase . . . a 'cash value' life insurance policy . . .").

306. See 15 U.S.C. § 1012(a) which states in relevant part: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States. . . ." See also Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act—1941-1993*, 43 CATH. U. L. REV. 399, 411-13 (1994) (outlining the Act's allocation of power among states, federal agencies, and courts).

307. See *SEC v. National Sec., Inc.*, 393 U.S. 453, 458-59 (1969) ("The legislative history of the McCarran-Ferguson Act offers no real assistance . . . . The debates centered on [other] issues, and the Committee reports shed little light on the meaning of the words 'business of insurance.'")

308. 440 U.S. 205 (1979).

309. 458 U.S. 119 (1982).

310. 536 F.2d 1160 (7th Cir. 1976), *overruled by* *NAACP v. American Family Mutual Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992).

311. *Id.* at 1161. Among other allegations, the class action alleged that the finance company "failed . . . to clearly, conspicuously and meaningfully disclose the amount of the finance charge, the total number of payments required, the deferred payment price, . . . and the annual percentage rate . . . in violation of the Truth in Lending Act." *Id.*

Appeals for the Seventh Circuit held that a class-action suit could not proceed against the lender because "the transaction . . . [was] the 'business of insurance' [and was, therefore,] beyond the reach of the Truth in Lending Act."<sup>312</sup> The Fifth Circuit, however, adopted a contrary view. In early 1979, this circuit decided *Cochran v. Paco, Inc.*<sup>313</sup> and its companion case, *Cody v. Community Loan Corp. of Richmond County*.<sup>314</sup> In both cases, the court held that a finance company's premium financing "does not constitute the 'business of insurance' for purposes of the McCarran Act."<sup>315</sup>

Attempting to resolve the conflicts among the circuits, the Supreme Court decided *Royal Drug* and stated in dictum that "the core of 'business of insurance'" encompasses: 1) A contractual agreement "between the insurer and the insured,"<sup>316</sup> 2) ongoing relationships between insurers and policyholders;<sup>317</sup> and 3) the issuance of reliable and enforceable insurance policies.<sup>318</sup> Clearly, this test does not concern the "business of insurers."<sup>319</sup> More important, the test may be used to assess whether financial institutions' as well as insurance companies' activities are the business of insurance, because the Supreme Court did not explain the meaning of the phrase "insurers and policyholders." Therefore, in *Independent Bankers Ass'n of America v. Heimann*,<sup>320</sup> the Court of Appeals for the District of Columbia applied the *Royal-Drug* test and concluded that national banks were not in the business of insurance.<sup>321</sup> This holding is truly remarkable because the

312. *Id.* at 1162.

313. 606 F.2d 460 (5th Cir. 1979).

314. 606 F.2d 499 (5th Cir. 1979).

315. *Cochran*, 606 F.2d at 467 (concluding that "the McCarran Act does not preclude the application of [the Truth in Lending Act's] disclosure requirements to the transactions in the cases before us."). See also *Cody*, 606 F.2d at 508 (holding that the "McCarran Act is no bar to [the Truth in Lending Act's] application here, since the lending activities of Community do not constitute the 'business of insurance.'").

316. *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, 215 (1979).

317. *Id.* at 216 (quoting *SEC v. National Sec., Inc.*, 393 U.S. 453, 460 (1969)).

318. 440 U.S. at 215-16 (quoting *National Sec.*, 393 U.S. at 460).

319. See 440 U.S. at 210-11 ("It is important . . . to observe . . . that the statutory . . . exemption is for the 'business of insurance,' not the 'business of insurers.'").

320. 613 F.2d 1164 (D.C. Cir. 1979).

321. *Id.* at 1170.

While it is true that the [McCarran] Act preserves to the states authority to regulate the relationship between the insurance company and its policyholder, . . . a rule affecting the disposition of credit life insurance income received by national bank insiders does not fall within the strictures of the statute. Nothing

financial institutions' activities satisfied each prong of the "business of insurance" test. The banks sold enforceable, "credit life insurance"<sup>322</sup> contracts to borrowers-policyholders and maintained ongoing relationships with those customers. The Fifth Circuit reached a slightly similar conclusion in *First National Bank of LaMarque v. Smith*.<sup>323</sup>

Recognizing that *Royal-Drug's* definition was generating unduly strained decisions, the Court decided *Pireno* and tried to develop a less complex definition of business of insurance. Writing for the majority, Justice Brennan held that an activity is a part of the business of insurance if the activity "transfer[s] or spread[s] a policyholder's risk."<sup>324</sup> In addition, the activity must be "an integral part" of the insurer's and the insured's relationship and "limited to entities within the insurance industry."<sup>325</sup> The Associate Justice also inserted a proviso: "[N]one of these criteria is necessarily determinative in itself."<sup>326</sup> Did the new test improve matters? Bluntly put, it did not. The *Pireno* standard also is inexact. Consequently, it has exacerbated inter-circuit divisions over whether a lender's activity is the business of insurance.

For example, the Fifth Circuit decided *Federal Trade Commission v. Dixie Finance Co., Inc.*<sup>327</sup> after *Pireno*. The finance companies in *Dixie Finance* sold "life[,] health[,] and accident insurance to their loan customers,"<sup>328</sup> they argued that the FTC could not subject the company to a consumer-fraud investigation. From the lenders' perspective, only states could regulate their activity because they were practicing the business of insurance.<sup>329</sup> The Fifth Circuit disagreed, holding that the relationship between the finance companies and their customers could not be characterized as "a relationship between insurer and insured."<sup>330</sup> In *Federal Trade Commission v. Manufacturers Hanover Consumer*

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in the McCarran-Ferguson Act was intended to affect the power of the Comptroller . . . to regulate "unsafe and unsound" banking practices of national banks. . . .

*Id.* (citation omitted).

322. *Id.* at 1168 n.9 ("The term 'credit life insurance' encompasses health, accident or life insurance coverage issued as protection for a loan.").

323. 610 F.2d 1258, 1263 n.7 (5th Cir. 1980) (accepting without deciding that the Comptroller of the Currency's informal directive and national banks' credit life insurance sales were not the business of insurance).

324. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

325. *Id.*

326. *Id.* (emphasis added).

327. 695 F.2d 926 (5th Cir. 1983).

328. *Id.* at 928.

329. *Id.*

330. *Id.* at 930 ("The 'business of insurance' intrudes upon the business of financing only [when] the borrower or his lender deal[s] with [an] insurer [about] the particulars of [a] policy [that is] purchased.").



*Services, Inc.*,<sup>331</sup> a federal district court in the Third Circuit also ruled in favor of the FTC. But the reasoning was different. The lower court noted that even though the finance companies' activity involved "risk spreading," the conduct could not be characterized as the business of insurance because the remaining *Pireno* elements were absent.<sup>332</sup>

On the other hand, the Seventh Circuit Court of Appeals refused to adopt the Fifth Circuit's *Pireno* analysis, although reaching a similar outcome. In *General Finance Corp. v. Federal Trade Commission*,<sup>333</sup> the FTC informed several finance companies that it would investigate their businesses to determine if they were using deceptive trade practices. FTC's evidence suggested that the lenders deceived customers and encouraged them to purchase unnecessary credit life insurance as a condition to obtaining credit.<sup>334</sup> The lenders sued, asking for declaratory relief and arguing that the scheduled investigation was improper because they were engaged in the business of insurance. The Seventh Circuit did not accept this argument. But unlike the Fifth Circuit, the Seventh Circuit applied *Royal Drug's* rather than *Pireno's* test. The court observed that *Royal Drug* gives the Commission some authority to investigate finance companies that use "misrepresentations to [generate] *finance business rather than . . . insurance business.*"<sup>335</sup>

To further complicate matters, the Third and Sixth Circuits have held: Although a state statute may regulate banks that sell insurance, one may not conclude that the banks' activities are the business of insurance.<sup>336</sup>

331. 567 F. Supp. 992 (E.D. Pa. 1983).

332. *Id.* at 995 ("Risk spreading is an indispensable element . . . but its presence is not determinative. Both the other criteria strongly suggest that this activity is not the business of insurance. . . . The fact that insurance is mentioned does not make . . . the transactions to be investigated . . . the business of insurance.") (citations omitted). See also *First Nat'l Bank of E. Ark. v. Eubanks*, 740 F. Supp. 1427, 1432-33 (E.D. Ark. 1989) (holding that the bank's cancellation agreements—credit life insurance contracts—did not constitute the business of insurance because the purpose of the agreements was incidental to traditional banking business), *aff'd*, 907 F.2d 775 (8th Cir. 1990).

333. 700 F.2d 366 (7th Cir. 1983).

334. *Id.* at 367.

335. *Id.* at 370 (emphasis added). It also is important to note that even after *Pireno*, the Seventh Circuit reached an incredible conclusion: "The meaning of the 'the business of insurance,' the operative phrase in both the *McCarran-Ferguson Act* and the amended section 6 of the *FTC Act*, is unsettled." *Id.* (emphasis added).

336. See *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (concluding that state law forbidding banks from being licensed as insurers "ha[d] no part in the business of insurance under *McCarran-Ferguson*"); *Owensboro Nat'l Bank v.*

But the Sixth Circuit cited *Pireno* and ruled that determining “[w]hether a particular activity is part of the ‘business of insurance’ is . . . [different from determining] whether a state law was ‘enacted . . . for the purpose of regulating the business of insurance.’”<sup>337</sup> The Court of Appeals for the Eleventh Circuit, however, refused to adopt this view. In *Barnett Bank of Marion County v. Gallagher*,<sup>338</sup> the Eleventh Circuit accepted without deciding that national banks’ subsidiaries and affiliates are insurers if they sell insurance products. This appellate court then cited *National Securities’* “relationship” test rather than *Pireno/Royal Drug* criteria and concluded that Florida designed the disputed statute “to regulate the relationship between insurers and potential policyholders.”<sup>339</sup> Therefore, the enactment of the statute, itself, is part of the business of insurance.<sup>340</sup>

## 2. *Inter- and Intra-Circuit Conflicts Over Whether Insurers’ Activities are the “Business of Insurance”*

Consider an ordinary, unsuccessful applicant who applied for either title, life, mortgage, or property insurance. If you were to ask the applicant to explain her decision to purchase either one of those products from an insurance company rather than from, say, a major department store, the question would probably extract a perplexed expression. More important, the consumer would probably say: The insurance company is in the business of selling insurance and the department store is not.

On the other hand, if you asked the federal courts of appeals the same question, you are likely to get convoluted and conflicting responses. In other words, it appears that the federal circuits are not really sure if insurance companies are truly in the business of insurance. In fact, uncertainty abounds, *even when “insurance company” appears in the companies’ names*. To be fair, one can understand lower courts’ confusion before the Supreme Court decided *Royal Drug* and *Pireno*. But, as of this writing, federal courts are still confused and the confusion is continuing to generate intra- and inter-circuit divisions.

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Stephens, 44 F.3d 388, 392 (6th Cir. 1994) (concluding that the disputed statute “was enacted for the purpose of regulating certain conduct by bank holding companies, [and] not the business of insurance”).

337. 44 F.3d at 392.

338. 43 F.3d 631 (11th Cir. 1995).

339. *Id.* at 635 (emphasis omitted).

340. *Id.* (“Statutes aimed at protecting or regulating this relationship, *directly* or *indirectly*, are laws regulating the ‘business of insurance.’” (quoting *SEC v. National Sec., Inc.* 393 U.S. 453, 460 (1969))).

For example, during the *pre-Royal Drug/Pireno* era, the Fifth Circuit and a district court in the Seventh Circuit decided that *life insurance companies were not in the business of insurance* if their activities involved 1) *premium financing agreements*,<sup>341</sup> 2) the merger of subsidiaries that benefited insureds, investors, and parent companies;<sup>342</sup> and 3) conspiracies to steal other companies' policy and marketing information.<sup>343</sup> From these tribunals' perspective, the enumerated activities simply do not involve an insurer-insured relationship, even when the phrase "life insurance" appears in a parent company's or in a subsidiary's name.<sup>344</sup> But during the same period, the Tenth Circuit and lower courts in the Third and Fifth Circuits decided that *automobile and title insurance companies were in the business of insurance* because those companies and their customers formed close relationships.<sup>345</sup>

Among post-*Royal Drug/Pireno* cases, we find similar inter-circuit conflicts. Moreover, upon careful examination of decisions involving title, life, credit-life, and premium-financing insurance companies, it

341. See *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468, 471 (5th Cir. 1979) (holding that "premium financing by an insurance company does not constitute the 'business of insurance' within the meaning of the McCarran Act.").

342. See *American Gen'l Ins. Co. v. FTC*, 359 F. Supp. 887, 896 (S.D. Tex. 1973) (concluding that merger activity was not the business of insurance), *aff'd*, 496 F.2d 197, 201 (5th Cir. 1974). The court also observed: "American General is a Texas corporation . . . It is primarily a holding company: *its subsidiaries include life insurance companies, property-liability insurance companies and financial noninsurance institutions. Fidelity and Deposit is a Maryland corporation . . . It is engaged in the business of writing property-liability insurance, primarily for commercial customers . . .*" *Id.* at 889 (emphasis added).

343. See *Center Ins. Agency, Inc. v. Colony Charter Life Ins. Co.*, No. 75 C 1289, 1976 WL 1273, at \*4 (N.D. Ill. June 10, 1976) (concluding "that the . . . challenged activities . . . did not involve the 'business of insurance'").

344. See 606 F.2d at 470-71 (5th Cir. 1979) (concluding that "[p]remium financing has virtually nothing to do with a company's reliability as an insurer, a factor that stands at the center of the insurer-insured relationship"); *American Gen'l*, 359 F.Supp. at 896 (stating that a merger "[does] not involve the relationship between the insurance company and its policyholders"); *Center Ins.*, 1976 WL 1273, \*4 (ruling that "[t]he relationship between the insurance company and its policyholders was not involved.>").

345. See, e.g., *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 78, 86 (10th Cir. 1973) (concluding that "in our view the business of title insurance is included in the phrase 'business of insurance' . . ."); *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 575 (E.D. Pa. 1974) (concluding that the close relationship between realty sellers and realty conveyance—which includes title insurance—"is part of the 'business of insurance.'"); *Sanborn v. Palm*, 336 F. Supp. 222, 227-28 (S.D. Tex. 1971) (holding that automobile tying contracts between the insurer and a purchaser of a "tying [insurance] product" is the business of insurance).

appears that the Supreme Court's "business of insurance" definitions have exacerbated the confusion. For instance, citing the *Pireno/Royal Drug* criteria, the Third and Ninth Circuits held that title insurance companies are not engaged in the business of insurance when performing escrow or title-search services.<sup>346</sup> A similar conclusion is found in another district court case that originated in the Third Circuit. For example, in *First National Bank of Pennsylvania v. Sedgwick James of Minnesota, Inc.*, the District Court for Western Pennsylvania held that credit-life insurance companies' fraudulent scheme to sell worthless, credit guaranty policies "[was] not . . . the business of insurance under the McCarran-Ferguson Act."<sup>347</sup> To buttress its holding, the district court observed that "[a] scheme to defraud plays no role in the typical policy relationship between the insurer and the insured."<sup>348</sup>

To be blunt, the Western Pennsylvania District Court's reasoning is both remarkable and strained, because this same court reached a very different conclusion in another case without even mentioning the allegedly important relationship between insurers and policyholders. In *Senich v. Transamerica Premier Insurance Co.*,<sup>349</sup> the district court simply concluded that the business of insurance encompasses any scheme that includes fraud, fraudulent misrepresentations, "illegal commissions and kickbacks," excessive premium charges, and "the fixing of premium rates."<sup>350</sup> More important, in *Richart v. Metropolitan Life Insurance Co.*,<sup>351</sup> the District Court for Eastern Pennsylvania embraced a similar position without making any reference to the insured-insurer relationship. This latter court merely held that activity designed to defraud life-insurance consumers is the business of insurance and, therefore, subject to state regulation.<sup>352</sup>

To truly appreciate the severity of the confusion surrounding cases involving fraudulent insurance practices, one need only review a fairly

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346. See *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1138 (3d Cir. 1993) (holding that "[a]lthough some insurance companies . . . provide title search and examination services, such services can be described . . . as the 'business of insurance companies' instead of the actual 'business of insurance' as determined by application of the *Pireno* factors."), *cert. denied*, 114 S. Ct. 1292 (1994); *United States v. Title Ins. Rating Bureau of Ariz., Inc.*, 700 F.2d 1247, 1252 (9th Cir. 1983) (concluding "that the application of the *Pireno-Royal Drug* criteria clearly indicates that performance of escrow services is not the 'business of insurance' for the purpose of the McCarran Act exemption."), *cert. denied*, 467 U.S. 1240 (1984).

347. 792 F. Supp. 409 (W.D. Pa. 1992).

348. *Id.* at 419 (emphasis added).

349. 766 F. Supp. 339 (W.D. Pa. 1990).

350. *Id.* at 341 (citing *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 459-60 (1969)).

351. Civ. A. No. 89-1725, 1990 WL 39268 (E.D. Pa. March 30, 1990).

352. *Id.* at \*1-\*3 (concluding that "[p]laintiffs' RICO claims must be dismissed [because] they are barred by the McCarran-Ferguson Act.").

recent appellate court decision. In *Merchants Homes Delivery Service, Inc. v. Reliance Group Holding, Inc.*,<sup>353</sup> the Court of Appeals for the Ninth Circuit held that “[o]vercharging for premiums on actual policies is part of the business of insurance.”<sup>354</sup> Conversely, “collect[ing] . . . premium[s] . . . for nonexistent policies [and] for false claims . . . [is not] . . . the business of insurance.”<sup>355</sup> Simply put, from the Ninth Circuit’s point of view, an activity cannot be part of the business of insurance unless it satisfies *the spreading-of-risk prong* of the *Pireno/Royal Drug* test.<sup>356</sup>

A final important issue must be discussed at this juncture. Both disgruntled loan applicants and defending companies should give this matter serious consideration before asking federal courts to resolve claims and counter claims involving auto and mortgage loans or credit financing. As mentioned earlier, most life insurance companies and financial institutions lend money. Some of these entities also employ “tie-in arrangements,” a system *requiring* borrowers to purchase insurance from the lender as a condition to obtaining a loan.<sup>357</sup> Still other lenders employ “force-placed insurance” practices: A lender procures and charges the borrower for additional insurance and conceals the excessive coverages and charges from the borrower.<sup>358</sup>

Before *Pireno* and *Royal Drug*, the Second and Ninth Circuits held that a tying arrangement is the business of insurance.<sup>359</sup> To the

353. 50 F.3d 1486 (9th Cir. 1995).

354. *Id.* at 1490.

355. *Id.*

356. *Id.* (asserting that “[t]he Supreme Court has made it clear that the transfer or spreading of the risk is the primary or even ‘indispensable’ characteristic of the business of insurance . . .” and observing that its “own cases . . . ‘emphasize that the primary characteristic of the business of insurance is the transferring or spreading of risk.’”).

357. *See, e.g., Fry v. John Hancock Mutual Life Ins.*, 355 F. Supp 1151, 1152-53 (N.D. Tex. 1973) (defining “tie-in” as defendants’ “requiring members of [a] class to purchase . . . life insurance policies from defendant as condition of obtaining farm loans from defendant.”).

358. *See, e.g., Gordon v. Ford Motor Credit Co.*, 862 F. Supp. 1191, 1192 n.2 (N.D. Cal. 1992) (observing that the lender did “not inform borrowers of the existence of, the terms of, or the premium charges attributable to the additional insurance coverages.”).

359. *See, e.g., Dexter v. Equitable Life Assurance Soc’y*, 527 F.2d 233, 235 (2d Cir. 1975) (“agree[ing] with the Ninth Circuit that the challenged tying arrangement is part of the ‘business of insurance’ within the meaning of the McCarran-Ferguson Act.”); *Addrisi v. Equitable Life Assurance Soc’y*, 503 F.2d 725, 726-27 (9th Cir. 1974) (finding tie-in practices and concluding that “Equitable . . . engage[s] in the real estate loan business . . . as an adjunct to its business of insurance.”). *But see DeVoto v. Pacific*

contrary, the District Court for Northern Texas decided that such tie-in plans are not part of the insurance business.<sup>360</sup> Among post-*Pireno/Royal Drug* cases, it appears that the conflict over lenders' tie-in activity is over. Two federal district courts have examined this issue and determined that tying activities are not the business of insurance.<sup>361</sup> But arguably, an even more serious conflict is developing among federal courts. In *Bermudez v. First of America Bank Champion*,<sup>362</sup> the District Court of Northern Illinois held: If a bank obtains and charges borrowers for unauthorized "force-placed insurance" to cover a borrower's potential default on a loan, the bank is not engaged in the business of insurance.<sup>363</sup> The District Court of Northern California, however, does not embrace this proposition. In *Gordon v. Ford Motor Credit Co.*,<sup>364</sup> the court held that a lender engages in the business of insurance if the lender surreptitiously procures excessive collateral-protection insurance and forces a naive borrower to pay undisclosed insurance premiums to the lender's subsidiary.<sup>365</sup>

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Fidelity Life Ins. Co., 516 F.2d 1, 2-3 (9th Cir. 1975) (holding that the "sale to mortgagors of mortgage protection insurance that guarantees payment of the mortgage [loan] . . . [is] peripheral to the 'business of insurance.'").

360. *Fry*, 355 F. Supp. at 1153 (concluding that tie-in arrangements "are not" the business of insurance).

361. *See, e.g., Homestead Mobile Homes, Inc. v. Foremost Corp.*, 603 F. Supp. 767, 772 (N.D. Tex. 1985) (observing that "[t]he tying arrangement . . . does not . . . transfer[] or spread[] a policyholder's risk[;] . . . is not an integral part of the policy relationship between the insurer and the insured[;] . . . [and] is not limited to entities within the insurance industry."); *Elliott v. ITT Corp.*, 764 F. Supp. 102, 104-05 (N.D. Ill. 1991) (stating that "the alleged misrepresentation that credit will be extended only when certain insurance is . . . purchased, . . . is not the business of insurance . . . [because] the [alleged] conduct . . . does not relate to . . . defendants 'as insurers, but as finance companies.'").

362. 860 F. Supp. 580 (N.D. Ill. 1994).

363. *Id.* at 591. According to the court, the challenged practices did not spread or transfer risk, were not an integral part of the insured-insurer relationship, and were not "limited to entities within the insurance industry." *Id.* at 590-91.

364. 868 F. Supp. 1191 (N.D. Cal. 1992).

365. *Id.* at 1192 n.2. *See also* Martha Brannigan, *Why a Mississippi Jury Found a Small Dispute Worth \$38 Million*, WALL ST. J., Apr. 12, 1995, at A1, A6:

Trustmark Bank [is] . . . a unit of Trustmark Corp., a regional bank-holding company with total assets of \$4.76 billion. But the way the bank treated this family turned out to be one of the most costly things it ever did.

. . . .  
[P]resident of Trustmark's Laurel branch . . . warned management that the "collateral protection insurance" premiums it was charging were "extremely high, almost to the point of being ridiculous [and that they would find themselves] in the middle of a class-action suit . . ." But Trustmark bosses never paid attention . . . .

Perhaps they should have. Other companies have found that sticking people with high-priced insurance payments isn't such a great idea. In 1993, Ford Motor Credit Co. paid \$58.3 million to settle class-action claims that it had

## B. *Private Redlining Actions Commenced Against Lenders and Insurers*

Assume that a federal district court accepts complainant's argument that a lender's or an insurer's activity *is not the business of insurance*, because the state insurance commissioner does not regulate the practice, or the activity does not conform to the *Pireno/Royal Drug* criteria. At that point, should the federal court permit the private action to proceed if the complainant accuses the insurer or lender of violating Title VIII of the Civil Rights Act of 1968? Among courts that have considered this question, a major division exists over whether Title VIII allows aggrieved consumers to commence private actions against lenders or insurers who allegedly practice mortgage or insurance redlining. The most critical issues surrounding this debate are presented in the next two sections.

### 1. *Inter- and Intra-Circuit Conflicts Over Whether Title VIII of the Civil Rights Act of 1968 Permits Mortgage-Redlining Actions Against Lenders*

Perhaps *Laufman v. Oakley Building & Loan Co.*<sup>366</sup> is the earliest reported mortgage-redlining case where, "[t]he complaint allege[d] that . . . defendants refused to lend the Laufmans money to purchase a house in . . . a racially integrated area of Cincinnati."<sup>367</sup> The unsuccessful borrowers sued under sections 3604 and 3605 of the 1968 Civil Rights Act (Title VIII).<sup>368</sup> The lenders argued that these sections did not explicitly prohibit mortgage redlining,<sup>369</sup> therefore, the suit should be

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overcharged customers for collateral protection insurance in California. That same year, Barnett Banks, Inc. agreed to pay \$19 million to Florida customers in a similar class-action suit. In February, NationsBank Corp., based in Charlotte, N.C., agreed to settle a class-action claim in federal court in Miami for \$6.2 million.

366. 408 F. Supp. 489 (S.D. Ohio 1976).

367. *Laufman v. Oakley Building & Loan Co.*, 72 F.R.D. 116, 119 (S.D. Ohio 1976) ("Plaintiffs also allege[d] that . . . defendants [were] engaged in the practice of refusing to lend money, or requiring stricter terms for such loans, for the purchase of houses in racially integrated neighborhoods.").

368. See *supra* notes 49-53 and accompanying text.

369. 408 F. Supp. at 492 ("Plaintiffs contend that 'redlining' is prohibited by the plain language of these provisions . . . . Defendants agree . . . but . . . read these

dismissed. The district court disagreed, ruling that the complaint stated a valid claim for relief.<sup>370</sup> Nearly twenty years after *Laufman*, the Eighth Circuit reached a similar conclusion in *Ring v. First Interstate Mortgage, Inc.*<sup>371</sup> In *Ring*, the aggrieved applicant alleged that lenders violated federal fair-housing laws when they refused “to provide long-term mortgage financing for seven apartment buildings [located] in predominantly minority St. Louis neighborhoods.”<sup>372</sup> The Eighth Circuit agreed, finding that the lenders’ “decision was based on the racial composition of . . . the neighborhood.”<sup>373</sup> Therefore, the court concluded that “*Ring* . . . stated a basis for relief under § 3605.”<sup>374</sup>

Other courts, however, have decided this controversy very differently, even to the point of generating intra-circuit confusion and amazingly poorly reasoned opinions. For example, in *Evans v. First Federal Savings Bank of Indiana*,<sup>375</sup> the loan applicants were African-Americans who resided in a predominantly minority neighborhood. They approached First Federal and applied for a home-equity loan to finance a college education and to purchase an automobile.<sup>376</sup> The bank denied the loan and the borrowers sued, accusing the bank of practicing mortgage redlining. The District Court of Northern Indiana dismissed the complaint, stating that plaintiffs had failed to state a claim under either § 3604 or § 3605. The court declared that § 3604 did not apply because “the allegations concern[ed] the availability of additional financing [rather than] the availability of housing[.]”<sup>377</sup> And, § 3605 was inappropriate since it only covers “housing-related matters” rather than a college education.<sup>378</sup>

Without doubt, *Evans*’s equity-loan holding is incredibly strained, because one finds little, if any, support for the district court’s reasoning in § 3605. A careful reading of the statute reveals that any discrimina-

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provisions not to prohibit ‘redlining.’”).

370. 408 F. Supp. at 493 (concluding that “[w]hether or not § 3604(a) is applicable, § 3605 is applicable. . . . [T]he practice of ‘redlining’ . . . fall[s] under the proscription against denial of loans and financial assistance on the basis of race . . . where the purpose of the loan was to finance the purchase of a home in an integrated neighborhood.”).

371. 984 F.2d 924 (8th Cir. 1993).

372. *Id.* at 925.

373. *Id.* at 927.

374. *Id.* at 928 (“[T]he Second Amended Complaint pleads, . . . in general terms, the elements of a Fair Housing Act cause of action.”).

375. 669 F. Supp 915 (N.D. Ind. 1987).

376. *Id.* at 917.

377. *Id.* at 923.

378. *Id.* at 924 ([This section] “covers loans made ‘for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling.’”).



tion in the “*terms or conditions of [mortgage] loans*” is outlawed.<sup>379</sup> More important, the District Court of Northern Indiana reached a different conclusion in *Thomas v. First Federal Savings Bank of Indiana*,<sup>380</sup> although the facts were similar to those reported in *Evans*. The borrowers in *Thomas* also sued First Federal who again refused to approve a home-mortgage loan.<sup>381</sup> But the court allowed the action to proceed rather than dismissing it for failure to state a claim. Quite frankly, attempting to explain the divergent outcomes in these two cases is difficult, because complainants in both *Evans* and *Thomas* alleged mortgage redlining. More disturbing, in *Cartwright v. American Savings & Loans Ass’n*,<sup>382</sup> the Seventh Circuit had an excellent opportunity to outline a simple test to help district courts determine when a *mortgage-redlining complaint* should be dismissed for failing to state a claim. It did not. Consequently, confusion persists within the Seventh Circuit and inter-circuit disagreements continue between the Eighth and Seventh Circuits.

## 2. *Inter-Circuit Conflicts Over Whether Title VIII of the Civil Rights Act of 1968 Permits Insurance-Redlining Actions Against Insurers*

In *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*,<sup>383</sup> several African-American homeowners sued an insurer for allegedly practicing insurance redlining. The insurer decided to stop selling a line of hazard insurance “to a significant portion of black homeowners and/or persons residing in predominantly black neighborhoods.”<sup>384</sup> The complainants argued that the insurer’s decision violated Title VIII of the Civil Rights Act of 1968. The federal District Court for the Southern District of Ohio concluded that 1) “insurance

379. Again, 42 U.S.C. § 3605 states in relevant part that “it shall be unlawful for any bank . . . whose business consists [of] making . . . commercial real estate loans, to deny a loan or other financial assistance . . . or to [discriminate in] other terms or conditions of such loan . . . because of . . . race.” (emphasis added).

380. 653 F. Supp. 1330 (N.D. Ind. 1987).

381. *Id.* at 1336-37 (“[P]laintiffs alleged that defendants discriminated . . . by denying their loan application on the basis of . . . race [and] . . . denied the Thomases’ loan . . . because of ‘red-lining’ . . .”).

382. 880 F.2d 912 (7th Cir. 1989) The African-American complainants alleged that the lender refused to approve an application for a home construction loan on the basis of race and gender and that the lender practiced mortgage redlining. *Id.* at 913.

383. 472 F. Supp. 1106 (S.D. Ohio 1979).

384. *Id.* at 1107.

redlining [violates] § 3604(a) and § 3617 of the Fair Housing Act” and 2) “plaintiffs [had] stated a claim upon which relief [could] be granted.”<sup>385</sup>

Five years after *Dunn*, this same court decided *McDiarmid v. Economy Fire & Casualty Co.*<sup>386</sup> and reached a similar conclusion. *McDiarmid*’s complainants alleged that the insurer “engaged in a pattern of ‘insurance redlining’” and refused to sell homeowners insurance to willing purchasers on the basis of race.<sup>387</sup> The insurer asked the U.S. District Court for the Southern District of Ohio to dismiss the action because “the McCarran-Ferguson Act . . . [prevented the court] from considering . . . [p]laintiffs’ Title VIII claims.”<sup>388</sup> The district judge refused to accept this argument and determined that allowing the Title VIII claims to proceed would not “invalidate, impair or supersede” the state’s ability to regulate the business of insurance.<sup>389</sup>

Just recently, the Court of Appeals for the Sixth Circuit formally embraced *Dunn*’s Title VIII decision. In *Nationwide Mutual Insurance Co. v. Cisneros*,<sup>390</sup> a female consumer filed a housing-discrimination suit with the Department of Housing and Urban Development, claiming that Nationwide Insurance Company practiced insurance redlining as well as gender and race discrimination.<sup>391</sup> The insurer filed an action for declaratory and injunctive relief, claiming that HUD had no authority to commence an investigation. From Nationwide’s perspective, the McCarran-Ferguson Act preempts Title VIII. Once more, the District Court for the Southern District of Ohio disagreed, and the Sixth Circuit affirmed, stating that the insurer “failed to [present] any evidence of [c]ongressional intent to preclude the application of the Fair Housing Act to insurance underwriting practices.”<sup>392</sup> The Court of Appeals for the

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385. *Id.* at 1112.

386. 604 F. Supp. 105 (S.D. Ohio 1984).

387. *Id.* at 106.

388. *Id.*

389. *Id.* at 109 (“Even assuming . . . that § 3901.21 regulates insurance redlining, . . . Title VIII does not permit anything that § 3901.21 prohibits and Title VIII does not prohibit anything that § 3901.21 permits.”)

390. 52 F.3d 1351 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 973 (1996).

391. *Id.* at 1354 (alleging that the insurer “refused . . . to reinstate her insurance policy on a residential building that was located in a predominantly black area of Toledo” because of gender, “race, and the racial make of the area.”)

392. *Id.* at 1359. The court also concluded “that the presence of additional remedies in the Fair Housing Act does not cause the Act to invalidate, impair or supersede Ohio insurance law. [Therefore], we hold that the McCarran-Ferguson Act does not preclude HUD’s interpretation of the Fair Housing Act.” *Id.* at 1363.

Seventh Circuit also has held that disgruntled insurance consumers may commence private, anti-redlining actions under Title VIII.<sup>393</sup>

For a decade, the Fourth Circuit Court of Appeals refused to embrace the Sixth and Seventh Circuits' position. In 1984, the Fourth Circuit decided *Mackey v. Nationwide Insurance Cos.*<sup>394</sup> Mackey, a former Nationwide agent, accused Nationwide of arbitrarily refusing to sell hazard insurance to consumers who resided in predominantly African-American neighborhoods.<sup>395</sup> From Mackey's perspective, Nationwide's redlining activities violated §§ 3604 and 3617 of the Fair Housing Act. The Fourth Circuit disagreed and ruled that the Act does not permit aggrieved consumers to file private, anti-insurance redlining actions.<sup>396</sup>

Of course, the problems that these decisions have produced should be obvious: Complainants *residing in the Sixth Circuit* may sue Nationwide Insurance Company under the Fair Housing Act for allegedly practicing insurance redlining. But Nationwide is *protected from such suits in the Fourth Circuit*. What compels such an unwarranted outcome? Is the culprit "judicial bias?" Clearly, neither the Fair Housing Act nor its legislative history commands such circuit-specific rulings. Considering that insurance redlining is a national problem and that the Fair Housing Act is national law, this particular intra-circuit conflict must be resolved in the very near future. Without doubt, such confusion produces an unfair level of uncertainty for national carriers who are likely to be sued in various circuits. More disturbing, it heightens insurance consumers'

393. See *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992) (holding that "[s]ection 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant.").

394. 724 F.2d 419 (4th Cir. 1984).

395. *Id.* at 420.

396. *Id.* at 423-25. The court observed:

While the statute . . . specifically prohibits discrimination in providing financial assistance, there is no mention in the Fair Housing Act of insurance. The legislative history contains no discussion of a barrier to fair housing created by the insurance industry. . . .

For these reasons, we conclude that Mackey's claim[] [is] not within the Fair Housing Act.

*Id.*

cynicism about the administration of justice in state and federal courts and generates anger toward federal judges.<sup>397</sup>

*C. Private Actions, Procedural Barriers and Inter-Circuit Conflicts  
Under the Equal Credit Opportunity Act*

To be sure, the Equal Credit Opportunity Act and its regulations prohibit “creditors”—savings and loans, savings banks, commercial banks, credit unions, finance companies, and private mortgage companies—from practicing unfair lending. However, as we have seen, some insurance companies are creditors too; but, whether the ECOA regulates insurers’ lending activities is extremely unclear. For example, the Fifth Circuit has held that “[w]hen an insurance company offers financing as an inducement for persons to purchase policies, . . . the company is a creditor.”<sup>398</sup> Therefore, it appears that the ECOA would govern these types of insurers’ lending activities. On the other hand, the Second Circuit has intimated that an insurance company is not a lender when that company requires a consumer to purchase life insurance as a condition for granting a mortgage loan.<sup>399</sup> Correspondingly, the ECOA and its regulations would not apply. Certainly, this inter-circuit ambiguity must be resolved.

However, there are two procedural issues which are seriously dividing federal courts of appeals. First, under the ECOA, only “applicants” have standing to sue “creditors” or “lenders”—either financial institutions or insurance companies—who lend money or extend credit. But, this generates a pressing question: Is every disgruntled borrower an “applicant?” Second, some lenders require females and spouses to secure a third-party’s signature before approving an application or lending money. Is this legal? Simply put, the answer is unclear. Some federal courts apply the Act’s language and get one answer. Still other courts

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397. Cf. Rob Schlegel, *There’s Something Very Wrong Here*, LAS VEGAS BUGLE, Apr./May 1995, at 13.

[T]here is something intrinsically wrong with a state which allows a minimum wage of \$4.35 [and] . . . requires auto insurance. . . . What of the individual, perhaps, a single parent, who must drive to work at a low paying job—a job which doesn’t pay enough to put food on the table for their children *and* pay the car insurance? The state fines that same person hundreds of dollars because [s/he chose] to feed their family rather than pay the car insurance. The state then arrests that person [and] . . . confines this person in jail for . . . “contempt” of the law. . . . It’s no wonder our courts have to have metal detectors to protect the “justice system” . . .

398. See *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468, 470 (5th Cir. 1979).

399. See, e.g., *Dexter v. Equitable Life Assurance Soc’y*, 527 F.2d 233, 234 (2d Cir. 1975) (holding that such tie-in arrangements are the business of insurance and are, therefore, governed by the McCarran-Ferguson Act).

examine words and phrases appearing in the Act's regulations and obtain a different answer. Brief discussions of these final issues appear below.

1. *Inter-Circuit Conflict Over Whether Aggrieved "Applicants" Have Standing to Sue Creditors Under the ECOA and Under the Act's Regulations*

To reiterate, the ECOA states in pertinent part that "[i]t shall be unlawful for any creditor to discriminate against any applicant . . . on the basis of race, color, religion, national origin, sex[,] . . . marital status, or age."<sup>400</sup> The Act defines "applicant" as "*any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.*"<sup>401</sup> But, by authority granted under the ECOA, the Federal Reserve Board established Regulation B and defined the term differently: "'Applicant' means any person who requests or who has received an extension of credit from a creditor, and includes *any person who is or may become contractually liable regarding an extension of credit. . . . [T]he term [also] includes guarantors, sureties, endorsers and similar parties.*"<sup>402</sup>

Must an aggrieved "applicant" prove she has standing to sue an allegedly discriminatory lender under both the Act and Regulation B? Among federal courts that have considered this question, only the Ninth Circuit, in an unpublished opinion, has declared that the ECOA, itself, determines whether a complainant has standing to sue.<sup>403</sup> A majority of courts have adopted the view that an aggrieved borrower may commence a private action if the borrower proves that she has standing under either the Act or the regulation.<sup>404</sup> Of course, there is an

400. 15 U.S.C. § 1691(a)(1) (1994).

401. 15 U.S.C. § 1691a(b) (1994) (emphasis added).

402. Regulation B of 1978, 12 C.F.R. § 202.2(e) (1995) (emphasis added).

403. See *Jordan v. Delon Olds Co.*, No. 88-3833, 1989 WL 123647, at \*1 (9th Cir. Oct. 3, 1989) ("Appellant argues we should adopt the more expansive definition of 'Applicant' found in 12 C.F.R. § 202.2(e). We decline to follow this regulation as 'applicant' is defined by 15 U.S.C. § 1691a(b) itself."). See also *Cragin v. First Fed. Sav. and Loan Assoc.*, 498 F. Supp. 379, 383 (D. Nev. 1980) ("The real determinant of plaintiff's standing is his status as an 'applicant' within the meaning of the Act.").

404. See, e.g., *Riggs Nat'l Bank of Wash., D.C. v. Linch*, 829 F. Supp. 163, 168 (E.D. Va. 1993) (observing that the "language of the statute and regulations demonstrates Congress' clear intent to endow credit applicants with a cause of action against discriminatory lenders" and concluding that complainant were "applicants"), *aff'd*, 36

important corollary question: Do federal courts employ a sound procedure or test to determine whether a complainant is a bona fide “applicant” under either the Act’s restrictive or Regulation B’s more expansive definition? The short answer is “no.” And the failure to apply a sound methodology has generated some very strained and conflicting rulings among federal courts.

For example, the Federal Reserve Board implemented Regulation B in 1978, which clearly states that guarantors, sureties and endorsers are “applicants.” Yet, years after the regulation’s enactment, the Ninth Circuit<sup>405</sup> and courts in the Third<sup>406</sup> and Seventh<sup>407</sup> Circuits continue to hold that guarantors and endorsers are not bona fide “applicants.” More astonishingly, one court reached this conclusion *even though the court cited the unambiguous language appearing in Regulation B’s definition*.<sup>408</sup> On the other hand, at least two courts in the First<sup>409</sup> and Fourth<sup>410</sup> Circuits have applied the latter definition and concluded that “guarantors, sureties, endorsers and similar parties” are “applicants,” and, therefore, have standing to initiate private actions. To be certain, this confusion will persist until federal courts acknowledge the severity of the problem and develop a reliable scheme to help determine who has standing to sue under the Equal Credit Opportunity Act.

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F.3d 370 (4th Cir. 1994).

405. See *Jordan*, No. 88-3833, 1989 WL 123647, at \*1 (holding that the cosigner on the application was not an “applicant” under the Act, itself).

406. See *Comas v. Equibank*, Adv. No. 80-0612, 1989 WL 69857, at \*2 (Bankr. W.D. Pa. June 9, 1989) (concluding that the guarantor was “implicitly excluded from the statutory definition [of applicant]”).

407. See *Incor Properties, Inc. v. Newton*, No. 90C 6228, 1991 WL 60585, at \*2 (N.D. Ill. Apr. 16, 1991) (holding that the guarantor of a purchase money loan was “not an applicant under the Act because she never made an application for credit.”).

408. See, e.g., *Comas*, 1989 WL 69857, at \*1-2.

There is no dispute that Mrs. Comas is obligated on the Saline loan [under] a guaranty and suretyship agreement which she signed . . . [But] [t]he issue as framed by the parties is whether [she] was a loan “applicant” under Regulation B of 1978 . . . , based solely upon her status as the spouse of Mr. Comas. . . .

. . . .

. . . Although [she] was required to sign the guarantee, she was not the applicant for the loan. *As the guarantor, she was specifically excluded from the regulatory definition of applicant.* . . .

*Id.* (emphasis added).

409. See, e.g., *Shammas v. Merchants Nat’l Bank*, No. Civ. A. 90-12217N, 1990 WL 354452, at \*3 (D. Mass. Nov. 9, 1990) (observing that under the regulation “[a]pplicant is defined to include ‘guarantors, sureties, endorsers and similar parties,’” and holding that the guarantor was “an applicant within this definition.”).

410. See, e.g., *Riggs Nat’l Bank of Wash., D.C. v. Lynch*, 839 F. Supp. 163, 165-68 (E.D. Va. 1993) (observing that the “Lynch personally guaranteed the promissory note” and concluding that they were “applicants” under the regulation).

## 2. *Inter- and Intra-Circuit Conflicts Over Whether Requiring Single or Married "Applicants" to Secure Co-Signatures Violates the ECOA or its Regulation*

[P]erhaps "the main . . . purpose of the [ECOA is] to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit."<sup>411</sup> To help accomplish this end, the Feds instituted Regulation B which states in relevant part: "*Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.*"<sup>412</sup> But discrimination on the basis of gender and marital status continues because of an alarming truth: Under some circumstances, Congress, the Federal Reserve Board as well as federal courts continue to encourage egregious gender- and spousal-based discrimination when they allow lenders to secure third-party signatures under the ECOA.<sup>413</sup>

Briefly, Regulation B allows creditors to obtain a third party's or a spouse's signature, 1) if an applicant requests unsecured credit and uses jointly-owned property as collateral,<sup>414</sup> 2) if "a married applicant requests unsecured credit and resides in a community property state,"<sup>415</sup> or 3) if a secured creditor wants to perfect collateral property agreements so that she can attach collateral property in the event of a default.<sup>416</sup> More relevant, Regulation B states in several places that a secured or an unsecured creditor may require a third party to sign any instrument that the lender "reasonably believe[s] [is] . . . necessary" to

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411. See *Markham v. Colonial Mortgage Serv. Co., Assoc. Inc.*, 605 F.2d 566, 569 (D.C. Cir. 1979) ("But granting such an assumption does not negate the clear language of the Act itself that discrimination against *any* applicant, with respect to *any* aspect of a credit transaction, which is based on marital status is outlawed.").

412. 12 C.F.R. § 202.7(d)(1) (1995) (emphasis added).

413. Cf. *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 n.2 (9th Cir. 1982) ("The Federal Reserve Board . . . held . . . that a violation of § 202.7(d) of regulation B is considered to be a serious violation of the ECOA.").

414. 12 C.F.R. § 202.7(d)(2) (1995).

415. 12 C.F.R. § 202.7(d)(3) (1995).

416. 12 C.F.R. § 202.7(d)(4) (1995).

satisfy sound lending procedures.<sup>417</sup> Of course, the regulation does not define “reasonable beliefs.” Consequently, some frustrated applicants have sued, seeking clarification and arguing that lenders’ co-signature polices were unreasonable. However, the federal circuits’ “reasonable-beliefs” rulings have been exceedingly unhelpful. In fact, among co-signature cases that involve community property, the decisions are highly strained and contradictory.

To illustrate, in *United States v. American Future Systems, Inc.*,<sup>418</sup> the Third Circuit decided: It is *unreasonable* for a “national” creditor to require only minority parents’ signatures before extending credit to *unemancipated, unmarried female college students*.<sup>419</sup> But, in *McKenzie v. U.S. Home Corp.*,<sup>420</sup> the Fifth Circuit held that it was *quite reasonable* for the lender to require an *emancipated woman* to secure the signature of her estranged husband before approving a mortgage loan, *even though the woman had filed for divorce*.<sup>421</sup> Now clearly, as long as lenders and creditors are allowed to extend or deny credit on the basis of some *subjective*, reasonable or unreasonable belief about females’ creditworthiness, we will continue to uncover bizarre and

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417. For example, Regulation B, 12 C.F.R. § 202.7(d)(2) (1995) states: “*Unsecured credit*. . . [T]he creditor may require the signatre of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary . . . .”; and 12 C.F.R. § 202.7(d)(4) (1995) states: “*Secured credit*. . . [A] creditor may require the signature of the applicant’s spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary . . . .”

418. 743 F.2d 169 (3d Cir. 1984).

419. 743 F.2d at 182 (“The district court found and we agree that the credit terms offered to minorities, married persons and males were less favorable than those credit terms offered to single white females.”).

420. 704 F.2d 778 (5th Cir. 1983).

421. *Id.*

At that time she was separated from her husband and divorce proceedings were pending. U.S. Home Mortgage . . . on the advice of counsel, told McKenzie that the loan could not be made unless either the divorce became final or McKenzie’s husband joined in signing the deed of trust. [The lender] did this . . . to insure a valid lien on the property under Texas [community property] law.

*Id.* at 779. See also *Evans v. Centralfed Mortgage Co.*, 815 F.2d 348, 351-52 (5th Cir. 1987) (“Texas is a community property state . . . . What is significant is that Centralfed reasonably believed that its policy was necessary to perfect its security interest.”)



conflicting inter-circuit and intra-circuit<sup>422</sup> rulings involving Regulation B's co-signature exceptions.

## VI. A CASE STUDY: AN HISTORICAL AND EMPIRICAL ANALYSIS OF VICTIMS WHO SUED LENDERS AND INSURERS IN FEDERAL AND STATE COURTS BETWEEN 1950 AND 1995

To repeat, federal and state anti-discrimination and equal-access-to-credit-and-insurance laws prohibit insurers and creditors from discriminating solely on the basis of consumers' race, gender, or place of residence. In addition, lenders and insurers cannot discriminate against insurance or credit applicants solely on the basis of any impermissible factors such as region of country, gender, or an applicant's educational status. In most instances, both state and federal courts are likely to condemn such discriminatory behavior and award appropriate damages to disgruntled consumers when financial institutions and insurance companies allow such impermissible variables to influence otherwise legitimate business decisions.

But in this part, we raise a fundamental question: Do federal and state judges, themselves, allow immaterial factors like a consumer's race, ethnicity, gender, neighborhood, years of formal educational, or religion to influence *procedural or substantive rulings* in cases involving insurance and financial redlining, unequal access to credit, and discriminatory access to affordable insurance? An analysis of the findings appearing below suggests that they do.

Furthermore, should the type of federal circuit or the region of country in which complainants commence their actions determine whether insurers, lenders or consumers prevail in redlining, unequal-access, or fair-lending cases? Or stated differently, should one expect credit applicants to prevail consistently on *procedural grounds* in, say, the Second Circuit, but lose regularly in, say, the Eleventh Circuit? Or

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422. Compare *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) (a community property case where the court decided that the lender discriminated against the female applicant when the lender reasonably believed that the husband's signature was required on a promissory note) with *United States v. ITT Consumer Fin. Corp.*, 816 F.2d 487, 492 (9th Cir. 1987) (a community property case where the court held that the creditors *were reasonable* and did not discriminate against female applicants when they required "a co-signer for married applicants who rely on a spouse's future earnings to qualify for unsecured credit").

should one expect insurers to succeed more often in the Midwest than in the South? Of course, the answer to these questions is "no." Yet, as reported earlier, federal- and state-court judges often allow these and other demographic factors to undermine predictably sound and unbiased rulings. Assuredly, such unwarranted practices partially explain the high incidence of inter- and intra-circuit conflicts among fair-lending and unequal-access-to-insurance decisions.

A. *Source of Data, Methodological Procedures and Demographic Attributes of Litigants*

To help support the argument that federal- and state-court judges are permitting irrelevant but damaging factors to influence their rulings, the author tried to locate every reported state and federal case that concerned either discriminatory access to insurance, unequal access to credit and loans, fair lending, insurance redlining, or financial redlining. Using both *WESTLAW* and *LEXIS* computer-assisted data retrieval systems, the search identified 134 federal-court and 65 state-court cases that were resolved between 1950 and 1995.<sup>423</sup>

For purposes discussed below,<sup>424</sup> the study includes an additional sample of 101 administrative decisions.<sup>425</sup> In these latter cases, conflicts involving redlining, fair-lending, access to credit, and loans also appear. Therefore, the following discussion is based on the analysis of 300 administrative and judicial rulings.<sup>426</sup>

Table 1 presents litigants' demographic attributes. Briefly put, one, two or three asterisks denote comparisons which are *statistically significant*.<sup>427</sup> For example, near the bottom of Table 1, two compelling findings are presented. It is clear that complainants are generally *more likely to receive unfavorable rulings in all forums*. But their probability of success is worse in federal administrative proceedings (83.2%). On the other hand, aggrieved persons are somewhat more

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423. Search of LEXIS, Genfed Library, COURTS File (May 12, 1995); search of WESTLAW, SCT and CTA databases (May 14, 1995).

424. See *infra* notes 438-39 and accompanying text.

425. Search of LEXIS, Banking library, FEDRB, FDIC, FHLBB and OCCBJ, OTS and THRIFT files (September 9, 1994); Search of WESTLAW, FAIRHOU, FFIN-FDIC, FFIN-FDICED and FFIN-FRB databases (October 16, 1994). As reported in Table 1, the searches generated the following: *One (1.0%)* Department of Housing & Urban Development's ruling; *three (3.0%)* Federal Deposit Insurance Corporation's rulings; *53 (52.5%)* Federal Reserve Board's decisions; and *44 (43.6%)* Office of the Comptroller of the Currency's holdings.

426. Willy E. Rice, *Empirical Analysis of the Disposition of Fair-Lending, Redlining, Insurance-Discrimination and Unequal-Access Claims in Federal Administrative Proceedings and in State and Federal Courts, 1950-1995* (on file with author).

427. See *infra* note 435 and accompanying text.

TABLE I. SOME SELECTED DEMOGRAPHIC CHARACTERISTICS OF COMPLAINANTS WHOSE INSURANCE-DISCRIMINATION AND FAIR-LENDING CLAIMS WERE RESOLVED IN STATE COURTS AND IN FEDERAL ADMINISTRATIVE & JUDICIAL PROCEEDINGS BETWEEN 1950 AND 1995 (N = 300)

Demographic Characteristics	Federal Administrative Decisions (N = 101)	State-Court Decisions (N = 65)	Federal-Court Decisions (N = 134)
	Percent	Percent	Percent
<b>Region of Country:</b>			
East	10.0	22.0	25.4
Midwest	33.0*	36.0*	28.0
South	25.0	3.1	15.0
Southwest	12.0	3.1	13.0
West	19.0	26.2	10.0
<b>Circuits:</b>			
Second	5.0	15.4	7.5
Third	3.0	4.6	11.2
Fourth	7.0	10.8	12.7
Fifth	12.0	3.1	11.2
Sixth	20.0*	10.8	11.9
Seventh	7.0	12.3	11.9
Eighth	15.0	9.2	6.0
Ninth	15.0	24.6*	7.5
Tenth	5.0	6.2	4.5
Eleventh	10.0	1.5	6.7
<b>Types of Plaintiffs:</b>			
Aggrieved Individuals	2.0	66.2	88.8
Grassroot Organizations	39.6	9.2	9.7
Human-Civil Rights Commissions	--	21.5	--
Small Businesses	--	23.1	5.2
Department of Justice	--	--	3.0
Department of Housing & Urban Development	1.0	--	--
Federal Deposit Insurance Corporation	3.0	--	--
Federal Reserve Board	52.5	--	--
Office of the Comptroller of the Currency	43.6	--	--
State Insurance Commissioners	--	7.7	--
<b>Types of Defendants:</b>			
Auto Finance Companies	--	--	5.2
Credit-Card Banks	--	1.5	10.4
Commercial Banks	89.0*	15.4	26.9
Savings Banks	6.0	1.5	4.5
Private Mortgage Companies	--	6.2	6.7
Insurance Companies	2.0	69.2*	24.6
Investment Firms	1.0	1.5	9.7
Savings & Loans	3.0	1.5	10.4
<b>Aggrieveds' Race/Ethnicity:</b>			
African-American	63.4*	43.1*	33.6
Anglo-American	19.8	40.0	53.7*
Hispanic or Latino	7.9	7.7	4.5
Jewish, Asian & Others	8.9	9.2	8.2
<b>Aggrieveds' Gender:</b>			
Only Female Complainants	1.0	21.5	25.4
Only Male Complainants	3.0	43.1*	35.8
Both Females & Males	96.0*	35.4	38.8

TABLE I. (Continues)

Demographic Characteristics	Federal Administrative Decisions (N = 101)	State-Court Decisions (N = 65)	Federal-Court Decisions (N = 134)
	Percent	Percent	Percent
<b>Aggrieveds' Neighborhood:</b>			
Upper Class	3.0	1.5	3.7
Upper-Middle Class	6.9	32.3	29.9
Lower-Middle Class	15.8	49.2*	49.3*
Upper-Lower Class	48.5*	4.6	11.9
Lower-Lower Class	25.7	12.3	5.2
<b>Aggrieveds' Community Size:</b>			
One Million Plus	19.8	24.6*	17.2
One Million - 500,000	11.9	15.4	17.2
499,999 - 250,000	18.8	24.6	21.6*
249,999 - 100,000	10.9	12.3	17.2
99,999 - 50,000	8.9	9.2	10.4
Less than 50,000	29.7*	13.8	16.4
<b>Aggrieveds' Legal Status:</b>			
Agent	--	6.2	7.5
Applicant - Credit	34.7	3.1	20.9
Applicant - Insurance	--	13.8	3.7
Applicant - Loan	58.4*	3.1	47.0*
Employee	--	38.5*	11.9
<b>Types of Alleged Discrimination:</b>			
No Access to Credit	55.4	9.2	32.1
No Access to Loans	81.2	9.2	48.5
*Redlining*--Insurance	--	7.7	4.5
*Redlining*--Mortgages	71.3	3.1	11.9
Employment-Discrimination	--	33.8	17.9
<b>Statutes:</b>			
Community Redevelopment Act	99.0	1.5	6.7
Equal Credit Opportunity Act	4.0	--	65.7
Civil Rights Act of 1968 (Title VIII), § 42 U.S.C. 3612	3.0	1.5	14.2
Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 & 1985	--	9.2	28.4
Home Mortgage Disclosure Act	2.0	--	2.2
State Anti-Discrimination Statutes	--	53.8	5.2
State Insurance Statutes	--	53.8	6.0
<b>Disposition of Complaints in Federal &amp; State Proceedings From Complainants' Perspectives:</b>			
Favorable Outcome	16.8	47.7***	42.5***
Unfavorable Outcome	83.2**	52.3	57.5
<b>Ground for Disposing Actions in State &amp; Federal Proceedings:</b>			
Merits	100.0	55.4***	32.1
Procedural	--	44.6	67.9***

Levels of significance for Chi Square test: \*\*\* p < .001

\*\* p < .01

\* p < .05

successful when they seek relief in state and federal courts—47.7% and 42.5%, respectively.

More surprisingly, fair-lending, redlining, and equal-access conflicts are *significantly more likely to be decided on the merits in state courts*. But, in federal district and appellate courts, these types of claims are *substantially more likely to be disposed of on procedural grounds*. The percentages are 55.4% and 67.9%, respectively.

Near the top of Table 1, other meaningful findings appear. First, *region of country* has a modest influence on whether complainants initiated their actions in state courts, or in federal administrative or judicial proceedings. To illustrate, among both federal-administrative and state-court cases, a statistically significant larger percentage of complainants resided in the Midwest<sup>428</sup>—33.0% and 38.0%, respectively—than in either the East,<sup>429</sup> South,<sup>430</sup> Southwest,<sup>431</sup> or West.<sup>432</sup> But we should note: The majority of federal-court complainants lived in the East and Midwest. The percentages are 25.4% and 28.0%, respectively.

Furthermore, among claims originating in *federal agencies and in state courts*, a significant proportion of the litigants lived in or claimed they were injured in the *Sixth and Ninth Circuits*—20.0% and 24.5%, respectively. However, among *federal-court cases*, nearly an equal number of claims originated in these circuits.

To continue, among *both state- and federal-court cases*, plaintiffs were significantly more likely to be aggrieved *individuals*. The proportions are 66.2% and 88.8%, respectively. Just as important, a significant number of *human and civil-rights commissions and small businesses* were plaintiffs in state courts. Those groups' respective proportions are 21.5% and 23.1%. On the other hand, *grassroots organizations, the Fed, and*

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428. The Midwest encompasses the following states: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota; West Virginia, and Wisconsin.

429. The East encompasses the following states: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont.

430. The South encompasses the following states: Alabama, Georgia, Florida, Mississippi, Kentucky, North Carolina, South Carolina Tennessee and Virginia.

431. The Southwest encompasses the following states: Arkansas, Louisiana, Oklahoma and Texas.

432. The West encompasses the following states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

the OCC represented the largest group of plaintiffs in the federal administrative proceedings. Their respective percentages are 39.6%, 52.5%, and 43.6%.

Table 1 also presents some important data on the aggrieved person's race, gender, neighborhood, and legal status. First, *African-Americans* are significantly more likely to be complainants in *federal-administrative proceedings*. Conversely, *Anglo-Americans* are more likely to be plaintiffs in *federal courts*. The respective percentages are 63.4% and 53.7%. However, among *state-court cases*, about an equal number of African- and Anglo-American litigants sought redress in state-courts. The percentages are 43.1% and 40.0%, respectively.

Second, among *administrative cases*, one finds no meaningful distinction between the number of female and male claimants. But among *both state- and federal-court cases*, a significant majority of the complaints listed only males as the alleged victims of discrimination; the respective percentages are 43.1% and 35.8%. Nearly a fourth of both *state and federal complaints* involved only female consumers who claimed that they were victims of insurers' and lenders' gender-based discrimination. The corresponding percentages are 21.5% and 25.4%.

Third, the data on aggrieved persons' neighborhoods<sup>433</sup> are rather revealing. All too often, jurists, commentators, lawyers, and judges suggest or conclude that "poor people"—particularly, "the poor residing in predominantly Hispanic and African-American neighborhoods"—are the "true" victims of various forms of redlining, discriminatory-lending practices, and insurance discrimination. Certainly, that proposition cannot be adequately tested here, because the present study only includes consumers who decided to do something about their alleged victimization.<sup>434</sup> Nevertheless, a close scrutiny of the percentages appearing in Table 1 shows that "*middle-class*" consumers—regardless of race or ethnicity—also complained about lenders' and insurers' discriminatory policies and practices. More important, as these numbers show, "*middle-class*" and "*upper class*" consumers are significantly more likely to seek relief in state and federal courts.

For example, among *both state- and federal-court cases*, nearly half of the complainants lived in *lower-middle-class neighborhoods*. The percentages are 49.2% and 49.3%, respectively. Furthermore, nearly a

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433. Determining whether a consumer or a consumer's neighborhood was, say, "upper-middle class," or "lower-middle class" was not too difficult. In many decisions, the opinion reported this information. In other situations, the author used complainant's reported incomes or salaries—those reported in the decisions—to help decide their class status.

434. See *infra* notes 438-39 and accompanying text.

third of the alleged victims lived in *upper-middle-class neighborhoods*—32.3% and 29.9%, respectively. Conversely, the overwhelming majority of upper-lower- and lower-lower-income complainants are concentrated among the *administrative cases*. The reported percentages are 48.5% and 25.7%, respectively.

Lastly, among *federal administrative and judicial cases*, most complainants are *credit applicants*—34.7% versus 20.9%—and *loan applicants*—58.4% versus 47.0%. But among *state-court cases*, the aggrieved are more likely to be *insurance applicants* (13.8%) and *employees* (38.5%). This latter group sued either lenders or insurers for practicing discriminatory hiring and promotions.

*B. Cross-tabulations: The Disposition of Fair-Lending, Redlining and Insurance Discrimination Actions in State and Federal Courts by Immaterial Demographic Factors*

Table 2 presents cross tabulations of demographic and other variables with the disposition of fair-lending, redlining, and unequal-access claims in federal and state courts. Without doubt, the statistically significant Chi square<sup>435</sup> coefficients reported in Table 2 are quite disturbing. Simply put, those statistics strongly suggest that federal and state courts are permitting irrelevant or extra-legal criteria to influence the disposition of these types of claims. For example, among "*state- and federal-court decisions*," plaintiffs are *significantly more likely* to receive *favorable outcomes* (60.6%) when defendants are *mortgage companies*. By contrast, complainants are *less likely to obtain a favorable decision* when defendants are either *commercial banks* (66.2%), *insurance companies* (51.3%), or "*other*"<sup>436</sup> *lenders* (65.2%).

Of course, when examining "*only federal-court decisions*," we discover that the type of defendant continues to influence the resolution of claims. But more surprisingly, the effects are not completely consistent. Assuredly, aggrieved persons still are more likely to be

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435. See Willy E. Rice, *Judicial Enforcement of Fair Housing Laws: An Analysis of Some Unexamined Problems that the Fair Housing Amendments Act of 1983 Would Eliminate*, 27 HOW. L.J. 227, 253-55 & nn.161-62 (presenting a brief explanation of "statistically significant" and a fairly simple method to compute a Chi-square statistic).

436. This category comprises a few auto finance companies, credit-card banks, savings banks, investment firms and savings and loans. See Table 1 and the categories under the variable, "*Types of Defendants*."

TABLE 2. DISPOSITION OF INSURANCE-DISCRIMINATION & FAIR-LENDING CLAIMS IN STATE & FEDERAL COURTS BY SELECTED DEMOGRAPHIC CHARACTERISTICS (N = 199)

Demographic Characteristics	Sub-Categories	Disposition of Actions from All Complainants' Perspectives		Number of Cases	Chi Square Statistics (Degrees of Freedom)
		Favorable (Percent)	Unfavorable (Percent)		
<b>Both State &amp; Federal-Court Decisions (N=199)</b>					
Defendants	Commercial Banks	33.8	66.2*	(N=65)	7.8984* (df=3)
	Mortgage Companies	60.6*	39.4	(N=33)	
	Others	48.7	51.3*	(N=78)	
Complaints	"Redlining" Other Claims	27.6	72.4*	(N=29)	3.8084* (df=1)
		47.1	52.9	(N=170)	
<b>Only State-Court Decisions (N=65)</b>					
Federal Circuits	Seventh Circuit Other Circuits	87.5**	12.5	(N=6)	5.7949** (df=1)
		42.1	57.9**	(N=57)	
Complaints	Sex Discrimination Other Claims	20.0	80.0*	(N=10)	3.6329* (df=1)
		52.7*	47.3	(N=55)	
<b>Only Federal-Court Decisions (N=134)</b>					
Statutes	42 U.S.C. § 1981 & 1992	28.9	71.1*	(N=38)	6.2657* (df=2)
	State Insurance Statute	80.0*	20.0	(N=5)	
	Other	27.5	72.5*	(N=91)	
Defendants	Commercial Banks	28.3	71.7***	(N=53)	12.5182*** (df=3)
	Mortgage Companies	60.7***	39.3	(N=28)	
	Insurance	57.6***	42.4	(N=33)	
	Other	30.0	70.0***	(N=20)	
Consumer Services	Insurance	59.4**	40.6	(N=52)	4.8760** (df=1)
	Financial	37.3	62.7**	(N=102)	

Levels of statistical significance: \*\*\*  $p \leq .001$

\*\*  $p \leq .01$

\*  $p \leq .05$



unsuccessful when they sue commercial banks and "other" lenders in federal courts. The percentages are 71.1% and 70.5%, respectively. Additionally, they are still more likely to receive favorable decisions in federal courts when defendants are mortgage companies (60.7%).

However, a review of just federal-court dispositions reveals that aggrieved persons are *significantly more likely to prevail when defendants are insurance companies (57.6%)*. This is a significant switch. Certainly, one may argue that these findings are mere flukes, considering that they are based on a relatively small number of cases. But again, the results are *statistically significant* and the sample size has been "considered" or "weighed" when the Chi square statistics were generated. Additionally, Table 2 presents additional evidence supporting the notion that these effects are not just aberrations. For example, *among federal-court cases*, disgruntled consumers are *more likely to succeed* when they complain about *insurance-related services (59.4%)*; however, when their complaints involve *financial services*, they are *less likely to prevail (62.7%)*.

One other observation is warranted at this point. There is little if any reason for an objective, disinterested jurist to be alarmed or jubilant when plaintiffs lose or win actions involving insurance redlining, mortgage redlining, insurance discrimination, or unfair lending. Quite simply, some complainants will be successful and others will not. Table 2, however, contains three other findings that compel the attention of both plaintiffs and defendants who would use federal and state courts to resolve their conflicts.

Among *"state-court decisions,"* unsatisfied consumers are *less likely to succeed* when they complain about *gender or sex discrimination (80.0%)*. On the contrary, they are *more likely to receive favorable rulings* if they complain about *"other" forms of discrimination (52.7%)*. Finally, among *"both state- and federal-court decisions"* and *without controlling* for the influence of race, gender, region of country, or type of neighborhood, consumers are *less likely to prevail*, especially when their complaints concern *"redlining" (72.4%)*.

C. *Cross-Tabulations: The Disposition of Claims by Immaterial Factors, While Controlling for the Influence of Complainants' Race or Ethnicity*

To reiterate, a painstaking survey of case law, treatises, statutes and various legislative histories failed to produce any support for the supposition: Federal and state courts must consider immaterial demographic attributes or litigants' legal status when resolving fair-lending, insurance-discrimination, or redlining claims. Yet, the present findings suggest that they do. There is, however, a more compelling question: Does race matter? Or stated differently, do federal- and state-court judges allow complainants' race to influence the disposition of claims? In light of the results illustrated in Table 3, the answer is "yes."

For instance, in Table 3, the relationship between litigants' *legal status* and the disposition of claims is presented among *African-American* and *Anglo-American* complainants who filed actions in state and federal courts, respectively. First, examine all the percentages appearing under the heading, "*state-court decisions.*" The statistically significant percentages reveal the following: (1) African-American plaintiffs who own *small businesses* are substantially *less likely to prevail* in state courts (85.7%); but "*other*" types of African-American plaintiffs have a greater likelihood of succeeding (61.9%); and, (2) African-Americans are *less likely to achieve a favorable outcome* when state-court defendants are *insurance companies* (66.7%). But if "*other*" defendants are, say, financial institutions, African Americans' probability of succeeding is *fairly substantial* (69.2%).

As it should be and as the information in Table 3 shows, *immaterial factors have no significant bearing* on the disposition of *Anglo-American claims in state courts*. Similarly, litigants' legal status *does not affect* the outcome of *Anglo-American actions in federal courts*. On the other hand, a statistically significant relationship exists between legal status and disposition among *federal claims involving African-Americans*.

For example, if African-Americans are *credit applicants* or "*other*"<sup>437</sup> types of consumers, they are substantially more likely to prevail in federal courts—66.7% and 88.9%, respectively. But if they are *loan applicants* or lenders' and insurers' *employees*, they are less likely to receive favorable results in federal courts—86.7% and 55.6%, respectively. Moreover, African-Americans are *more likely to "lose"* in federal

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437. Here, "others" would be independent agents, soliciting agents, brokers or representatives who had established contractual relationships with various lenders and insurers. See Table 1.

TABLE 3. DISPOSITION OF INSURANCE-DISCRIMINATION & FAIR-LENDING CLAIMS IN STATE & FEDERAL COURTS BY DEMOGRAPHIC CHARACTERISTICS, AMONG AFRICAN-AMERICAN & ANGLO-AMERICAN COMPLAINANTS (N = 171)

Demographic Characteristics	Sub-Categories	Disposition of Actions From African-American Complainants' Perspectives (N=73)		Disposition of Actions From Anglo-American Complainants' Perspectives (N=98)		Number of Cases
		Favorable (Percent)	Unfavorable (Percent)	Favorable (Percent)	Unfavorable (Percent)	
Plaintiffs	Small Businesses	14.3	85.7**	50.0	50.0	(N=26)
	Others	61.9**	38.1	45.0	55.0	(N=6) (N=20)
Defendants	Insurers	33.3	66.7*	45.5	54.5	(N=22)
	Others	69.2*	30.8	50.0	50.0	(N=4) (N=13)
Statutes	Insurance	20.0	80.0**	61.5	38.5	(N=13)
	"Anti-Discrimination"	66.7**	33.3	30.8	69.2	(N=13)
		State-Court Decisions (N=28)		State-Court Decisions (N=26)		
Plaintiffs	Credit Applicants	66.7***	33.3	47.8	52.2	(N=23)
	Loan Applicants	13.3	86.7****	40.0	60.0	(N=40)
	Employees	44.4	55.6****	40.0	60.0	(N=5)
	Others	88.9****	11.1	25.0	75.0	(N=4)
Defendants	Commercial Banks	11.1	88.9****	31.4	68.6	(N=35)
	Mortgage Companies	66.7**	33.3	56.5	43.5	(N=23)
	Insurers	61.5***	38.5	40.0	60.0	(N=5)
	Others	14.3	85.7****	44.4	55.6	(N=9)
		Federal-Court Decisions (N=45)		Federal-Court Decisions+ (N=72)		

Levels of statistical significance for respective (unreported) Chi square statistics: \*\*\*\* p ≤ .001 (degrees of freedom = 3)

\*\*\* p ≤ .01 (degrees of freedom = 3)

\*\* p ≤ .01 (degrees of freedom = 1)

\* p ≤ .05 (degrees of freedom = 1)

+ None of these findings were statistically significant for this group of decisions.

courts when defendants are *commercial banks* (88.9%) or “*other*” *financial institutions* (85.7%). However, when defendants are *mortgage companies or insurers*, African-Americans are *more likely* to succeed. The percentages are 66.7% and 61.5%, respectively.

D. *Cross-Tabulations: The Disposition of Claims By Immaterial Factors, Among “Middle-Class” African- and Anglo-American Complainants*

Undeniably, it is extremely troublesome to discover that federal and state courts knowingly or unwittingly allow the previously mentioned factors to influence the disposition of fair-lending, redlining, and unequal-access-to-insurance claims. But to learn that the aggrieved persons’ race or ethnicity also controls whether they will prevail or lose is quite disquieting. Of course, as stated earlier, these findings could be mere aberrations. Also, if these results are not statistical flukes, the “race effect” may be nothing more than the effect of, say, one’s class. Without doubt, African Americans are significantly more likely to be lower-class than upper- or middle-class. Of course, the converse is true for Anglo-Americans. Furthermore, it is common knowledge that the greater ones financial resources, the greater the likelihood of ones ability to purchase effective legal representation and minimize the egregious effects of extralegal variables on the disposition of claims.

Considering the general, unequal economic status of African- and Anglo-Americans, the author of the study decided to evaluate the relationship between outcome and extralegal factors *only among “middle-class” African- and Anglo-American complainants*. Arguably, this procedure can help remove or significantly reduce the influence of race, per se. Table 4 presents the comparisons and they are truly astounding.

To repeat, these findings only concern “*middle-class*” *blacks and whites* who sued in state and federal courts. More important, the reported percentages represent cases that were decided both *procedurally* and *on the merits*. Among *African-American cases* that were resolved *on procedural grounds*, only one *statistically significant* relationship appears. But that finding *does not* involve an extralegal factor. Instead, the percentage tells us that “*middle-class*” African-Americans are less likely to succeed procedurally when they file actions under states’ insurance statutes (75.0%). Of course, the converse is true when they proceed under “*other*” state and federal statutes (80.0%).

What are the findings among “*middle-class*” *Anglo-Americans* whose cases were decided *procedurally*? Are there any troublesome outcomes?

TABLE 4. DISPOSITION OF INSURANCE-DISCRIMINATION & FAIR-LENDING CLAIMS IN STATE & FEDERAL COURTS BY SELECTED DEMOGRAPHIC CHARACTERISTICS, AMONG MIDDLE-CLASS AFRICAN-AMERICAN & ANGLO-AMERICAN COMPLAINTS (N = 155)

Demographic Characteristics	Sub-Categories	Disposition of Actions From African-American Complainants' Perspectives (N=63)			Disposition of Actions From Anglo-American Complainants' Perspectives (N=92)		
		Favorable (Percent)	Unfavorable (Percent)	Number of Cases	Favorable (Percent)	Unfavorable (Percent)	Number of Cases
Defendants	Mortgage Companies Others	Procedurally (N=29)			Procedurally (N=53)		
		50.0	50.0	(N=2)	69.2**	30.8	(N=13)
		70.4	29.6	(N=27)	32.5	67.5**	(N=60)
Statutes	Insurance Others	Procedurally (N=4)			Procedurally (N=6)		
		25.0	75.0**	(N=4)	50.0	50.0	(N=6)
		80.0**	20.0	(N=25)	40.4	59.6	(N=67)
Region of Country	South Others	Procedurally (N=2)			Procedurally (N=6)		
		50.0	50.0	(N=2)	83.3**	16.7	(N=6)
		77.8	22.2	(N=27)	36.2	63.8**	(N=67)
		On The Merits (N=24)			On The Merits+ (N=39)		
Plaintiffs	Credit Applicants Others	On The Merits (N=4)			On The Merits+ (N=9)		
		75.0*	25.0	(N=4)	33.3	66.7	(N=9)
		25.0	75.0*	(N=20)	40.0	60.0	(N=30)
Statutes	Insurance Others	On The Merits (N=5)			On The Merits+ (N=13)		
		80.0**	20.0	(N=5)	53.8	46.2	(N=13)
		21.1	78.9**	(N=19)	30.8	69.2	(N=26)
Federal Circuits	Seventh Circuit Others	On The Merits (N=6)			On The Merits+ (N=2)		
		66.7*	33.3	(N=6)	50.0	50.0	(N=2)
		22.2	77.8*	(N=18)	35.1	64.9	(N=37)
*SMSA* Size	Less than 50,000 50,000 or More	On The Merits (N=4)			On The Merits+ (N=7)		
		75.0*	25.0	(N=4)	42.9	57.1	(N=7)
		25.0	75.0*	(N=20)	37.5	62.5	(N=32)

Levels of statistical significance for respective (unreported) Chi square statistics: \*\*  $p \leq .01$  (degrees of freedom = 1)

\*  $p \leq .05$  (degrees of freedom = 1)

+ None of these findings were statistically significant for this group of decisions.

Regrettably, the answer is "yes." First, "middle-class" whites are *more likely to prevail* when defendants are *mortgage companies* (69.2%) and *less likely to triumph* when defendants are "other" lenders or insurers (67.5%). Second, "middle-class" Anglo-Americans who live in the South are *more likely to "win"* on procedural grounds in state and federal courts (83.3%). But "middle-class" Anglo-Americans are *less likely to prevail procedurally* in federal and state courts if they reside in "other" regions of the country (63.8%).

What are the findings among cases decided on the merits? Among the conflicts involving "middle-class" Anglo-Americans, Table 4 reveals *no statistically meaningful associations* between outcome and extralegal variables. But it is disappointing that the same cannot be said about the disposition of African-Americans' complaints. First, among cases decided on the merits, "middle-class" African-Americans are substantially more likely to secure favorable decisions if they are 1) *credit applicants* (75.0%), 2) *initiate their actions in the Seventh Circuit* (66.7%), and 3) *reside in a community of less than fifty thousands inhabitants* (75.0%). Of course, the converse is true if "middle-class" African-Americans are, say, loan applicants, who live in communities with more than 50,000 residents and attempt to secure relief in, say, the Fifth or Eleventh Circuit. Again, we must ask: Should state and federal courts decide "middle-class" or any class of consumers' meritorious claims this way? Obviously, the correct response is "no."

*E. Multivariate Probit, Two-Stage Statistical Approach: The Disposition of Fair-Lending, Insurance-Discrimination and Redlining Complaints in State and Federal Courts, 1950-1995*

The statistically significant findings reported in the preceding sections would likely lure any fair-minded jurist, practicing attorney, or consumer into believing that state- and federal-court judges are truly biased toward either aggrieved consumers, lenders, or insurers. Or stated another way, those results may be viewed as conclusive evidence of invidious or unintentional discrimination. Again, it is fairly clear that judges do allow litigants' demographic characteristics to affect the resolution of fair-lending, redlining, and insurance-discrimination claims. But using simple Chi square statistics and cross-tabulations to reach either conclusion is less than sound. Why?

Although a Chi square coefficient can reveal whether a significant relationship exists between a *single immaterial* factor and outcomes, it cannot test for the *simultaneous and multiple effects* of demographic variables on the disposition of cases. More important, Chi square cannot

test for a condition that is commonly called "self-selectivity bias."<sup>438</sup> Therefore, to help uncover whether judges are really misbehaving, we must use a more powerful statistical tool, one that 1) tests for the presence of selectivity bias in sample data, and 2) measures the combined and simultaneous influences of demographic attributes on outcome.

All too often, researchers assume that *random sampling* removes, cancels, or minimizes the influence of various types of errors or biases in sample data. Although this assumption is fairly valid under many settings, *the assumption does not apply when sampling reported or unreported judicial cases*. Why? Some aggrieved loan and insurance applicants, for instance, *decide* to commence legal actions; but others do not. In addition, among complainants who *decide* to do something about their alleged injuries, some might *choose* an administrative forum; but others may *decide* to use state or federal trial court to secure relief. Indisputably, these various *choices* often can be a source of selectivity bias, *thereby destroying the random-sampling assumption*. Consequently, an investigator must examine judicial data extremely carefully and try to determine whether any meaningful self-selection bias is present. Failure to test for such bias will undermine anything one says about either the simultaneous or multiple effects of demographic factors on the disposition of state- and federal-court cases.

Table 5 reports the findings of a multivariate probit two-stage

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438. Much has been written about "self-selectivity bias" and "other-selectivity bias" in econometrics journals and texts. *See, e.g.*, G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, 257-71 & 278-83 (1983). More relevant, the author of the present study also has published legal articles discussing and outlining statistical procedures that test the hypothesis: Self-selectivity bias does not appear in the sample data. *See, e.g.*, Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration, and Insolvency Statutes with the McCarran-Ferguson Act—1941-1993*, 43 CATH. U. L. REV. 399, 446-48 (1994) [hereinafter Rice, *Federal Courts and the Insurance Industry*]; Willy E. Rice, *Judicial Bias, The Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1900-1991*, 41 CATH. U. L. REV. 325, 371-75 (1992) [hereinafter Rice, *Insurance & Judicial Bias*].

TABLE 5. THE EFFECTS OF SELECTED PREDICTOR VARIABLES ON COMPLAINANTS' DECISIONS TO SEEK REDRESS IN STATE & FEDERAL COURTS AND ON THE DISPOSITION OF INSURANCE-DISCRIMINATION & FAIR-LENDING CLAIMS IN STATE & FEDERAL PROCEEDINGS AMONG STATUTORY CLAIMS & AMONG RACIAL & GENDER CLASSIFICATION (N=300)

Selected Predictor Variables	Disposition of Claims			
	Decision to Initiate a Cause of Action in State or in Federal Court (N=199)	Among Complainants Who Filed Under States' Anti-Discrimination Statutes (N=42)	Disposition of Claims Among African-American Complainants (N=73)	Disposition of Claims Among Anglo-American Complainants (N=98)
	Probit Coefficients (Standard Errors)	Probit Coefficients (Standard Errors)	Probit Coefficients (Standard Errors)	Probit Coefficients (Standard Errors)
<b>Types of Complainants:</b>				
Loan Applicants	.1503 (.1957)	-.6723 (.8451)	-.8589 (.6383)	-.3042 (.3455)
Applicants' Neighborhood: Upper-Middle Class	1.2516** (.2567)	-.2863 (.5397)	.4381 (.9694)	.4505 (.4016)
<b>Types of Defendants:</b>				
Bank	-1.6444** (.3510)	4.8100*** (1.1678)	4.7016 (3.9347)	-.7449 (.7065)
Private Mortgage Company	.7356 (.5852)	4.4953*** (.6037)	.5626 (1.0397)	.3859 (.5028)
Insurance Company	-.6917 (1.324)	-4.0470*** (.4216)	-2.0640*** (.5107)	-3.9866*** (.4444)
<b>Discriminatory Services:</b>				
Financial	1.5096 (1.3493)	-8.0235*** (.4553)	2.2148 (1.1877)	3.6867*** (.8316)
<b>LAMBEA TEST</b> (*Self-Selectivity Bias* Test)				
		-.4793 (ns) (1.4425)	-4.3479 (ns) (3.4575)	-4002 (ns) (.8911)
CONSTANT	1.5096 (1.3493)	-3.9704*** (.3934)	.0788 (1.0899)	-.1289 (.5703)
				8814 (ns) (1.2673)
				-1.7163 (.7387)

Levels of statistical significance: \*\*\*\* p < .001 (Probit ÷ standard error is greater than t-statistic 4.735 at df = 7)

\*\*\* p < .01 (Probit ÷ standard error is greater than t-statistic 3.499 at df = 7)

\*\* p < .01 (Probit ÷ standard error is greater than t-statistic 3.707 at df = 6)



analysis.<sup>439</sup> This statistical technique helps answer two relevant questions: 1) whether self-selection bias appears in the sample data, and if not, 2) whether the simultaneous and multiple effects of demographic and other factors explain the *judicial disposition* of fair-lending, insurance-discrimination, and unequal-access claims.

To reiterate, a total of 300 cases (N=300) appear in the study—101 (N=101) administrative and 199 (N=199) judicial cases. Of course, none of the administrative complainants decided to commence further actions in state and federal courts. Therefore, we should ask: Are there any statistically significant differences between those who commenced actions in state and federal courts and those who did not? Or stated differently, do any demographic factors explain who is more likely to initiate court actions? The answer is “yes.”

Examine the “*decision-to-initiate-an-action*” column in Table 5. The statistically significant positive probit coefficient (1.2516) suggests that *upper-middle class applicants are more likely to initiate* actions in state and federal courts. On the other hand, the statistically meaningful negative -1.6444 coefficient implies that, in general, complainants are *less likely* to seek redress in federal and state courts *when defendants are bankers*. This latter finding is consistent with what we know: The Fed, OCC, OTS, and FDIC are more likely to represent aggrieved consumers’ interests and complaints administratively, thereby decreasing the need for, or the likelihood of, consumers suing bankers in federal courts.

It is clear, therefore, that some difference exists between those who decided not to go to court and those who did. But does this difference produce enough bias to warrant our concern? An examination of the four *Lambda terms* in Table 5 strongly suggests that no meaningful selectivity bias appears in the sample data. Each Lambda coefficient is statistically insignificant. This leads to the next question: Do state and federal judges

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439. The author of the present study has discussed this statistical procedure elsewhere. See Willy E. Rice, *Judicial and Administrative Enforcement of Individual Rights Under the National Labor Relations Act and Under the Labor-Management Relations Act Between 1935 and 1990—An Historical and Empirical Analysis of Unsettled Intercircuit and Intracircuit Conflicts*, 40 DEPAUL L. REV. 653, 733-34 & n.491 (1991) [hereinafter Rice, *Enforcement of Individual Rights*]; and Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX and Section 504: A Pre- and Post-Grove City Analysis*, 5 REV. LITIG. 219, 286-87 (1986) [hereinafter Rice, *Grove-City Analysis*].

permit irrelevant demographic variables to influence the disposition of cases?

First, consider the statistically significant probit coefficients appearing under the heading, "*Disposition of Claims Among Complainants Who Filed Under States' Anti-Discrimination Statutes.*" The findings are clear: The positive 4.4100 and 4.1953 probit values indicate that complainants are *more likely to prevail* when defendants are *bankers and private mortgage companies*. Conversely, the negative -4.0470 probit coefficient reveals that aggrieved consumers are *less likely to succeed* when defendants are *insurance companies*.

Second, we return to an earlier question: Does race matter? Again, the answer is "yes." Consider, for example, the findings reported under the heading, "*Disposition of Claims Among African-American Complainants.*" The only statistically significant probit coefficient is negative (-2.0640); and it means that African Americans are *less likely to win* when defendants are *insurance companies*. However, an analysis of the values reported under the column labeled, "*Disposition of Claims Among Anglo-American Complainants,*" reveals very different results. Anglo-Americans also are less likely to win when defendants are insurance companies. The relevant probit coefficient is the negative -3.9866. The positive 3.6967 coefficient, however, indicates that Anglo-Americans are *substantially more likely to prevail* in state and federal courts when they complain about *lenders' discriminatory financial practices or services*.

Finally, Table 5 also helps answer the question: Do courts allow gender to influence the disposition of cases? Sadly, the answer is "yes"; the supporting evidence appears in the column entitled, "*Disposition of Claims Among Female Complainants.*" The negative -3.7413 probit value means that female consumers are *extremely less likely to triumph* when defendants are *insurance companies*. However, female complainants—regardless of race or ethnicity—are *more likely to succeed* (4.2157) when they accuse lenders of awarding financial services in a discriminatory manner. And it is important to stress: These statistical results *did not appear among males* in general or among African- and Anglo-American males in particular.

## V. CONCLUSION

At the outset, we disclosed that the purpose of this Article is not to broaden the debates over two disputed issues: 1) Whether financial institutions only redline certain ethnic and minority communities and discriminate against creditworthy consumers on the basis of race, gender, or marital status; and 2) whether insurers practice insurance redlining and allow racial characteristics, gender, and marital status to determine

consumers' access to affordable mortgage, property, or homeowners' insurance. But evidence continues to support a disturbing truth: Unacceptable numbers of middle-class and creditworthy consumers continue to complain viscerally about lenders<sup>440</sup> and insurers<sup>441</sup> discriminatory business practices.

Over the past twenty years, much has been written about these problems and about ways to alleviate them. For instance, some commentators maintain that state and federal agencies should vigorously enforce fair-lending and anti-discrimination laws.<sup>442</sup> Still others argue that governments should encourage lenders and insurers to adopt voluntary measures<sup>443</sup> as a way of reducing intentional or unintentional discrimination against racial minorities, women, unmarried persons, and spouses.

440. See generally John R. Wilke, *Race is Key Factor in Some Loan Denials: Chicago Fed Study Targets Marginal Risks, Backs Earlier Disputed Report*, WALL ST. J., July 13, 1995, at A2.

441. See generally Tony Mauro, *Insurance Settlement Good News for Minorities*, USA TODAY, Mar. 31, 1995, at 3A.

442. See, e.g., Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed*, 20 FORDHAM URB. L.J. 293, 308 (1993) ("For much of its history, the CRA has been administered by regulators who have been hostile or indifferent to carrying out the law's intent . . . . Much of what is needed is tougher, more aggressive enforcement of the existing CRA law."); Stephen A. Fuchs, *Discriminatory Lending Practices: Recent Developments, Causes and Solutions*, 10 ANN. REV. BANKING L. 461, 482-83 (1991) ("[We need to consolidate] the lending laws so that one law would cover every aspect [of lending]. . . . A consolidated statute would provide the public and the regulators with a single, powerful tool to ensure fair lending, and would also make compliance easier for financial institutions."); Paul A. Renne, *Eliminating Redlining By Judicial Action: Are Erasers Available?*, 29 VAND. L. REV. 987, 1014 (1976) ("[J]udicial decrees are not the most satisfactory methods of accomplishing the elimination of redlining. Unfortunately, the lending institutions have made it clear that they are not prepared to invest in [minority communities] absent either compulsion or some reward for what they deem to be the greatest risks involved.") (emphasis added).

443. See, e.g., Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 360, 368 (1993) ("On the issue of maximizing CRA investment, it is far from clear that protests under the current regime succeed in generating significant amounts of new investment . . . . [A]ntidiscrimination suits seem similarly unsuited to achieve the corrective and affirmative goals of CRA."); Margaret S. Pfunder, *The Legality of Redlining Under the Civil Rights Laws*, 25 AM. U. L. REV. 463, 495 (1991) ("It seems necessary to weigh the benefits to be gained from applying antidiscrimination statutes in situations when lending institutions have failed to loan on racial grounds against the risks involved in labeling the actions of a lender discriminatory . . . .").

Clearly, aggrieved applicants do not think the implemented recommendations have helped them to secure either affordable insurance or loans and credit. Yet, they observe politicians spending billions of taxpayers dollars to “bail out” insurers<sup>444</sup> and lenders<sup>445</sup> who have either embezzled money, insured under-performing properties, approved unsecured loans for friends and family members, or underwritten highly questionable commercial loans. Consequently, disgruntled consumers have filed and are likely to file hundreds of private actions to end lenders’ and insurers’ discriminatory practices.

Some private efforts have been quite successful: Several large insurers and lenders have settled some lawsuits involving thousands of consumers and millions of dollars.<sup>446</sup> But, among complaints that have been resolved in state and federal courts, the results are mixed. Moreover, outcomes have not been consistent—either for consumers or defendants—because of an unwarranted judicial practice: Courts, themselves, allow race, gender and other impermissible variables to influence both procedural and substantive rulings.

Therefore, we ask: What should be done to end insurers’ and lenders’ discriminatory conduct without violating their constitutional and statutory rights? Unlike some commentators, this writer does not believe that the entire responsibility for enforcing fair-lending and anti-insurance discrimination laws should fall on the shoulders of federal and state agencies.<sup>447</sup> Why? Because those entities often are inefficient, lethargic, poorly funded, under-staffed, and highly exposed to varying political whims. But in light of the findings reported in this paper, neither

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444. See, e.g., Susan Harrigan, *STUCK: Despite a Record Bailout, the Collapse of Executive Life Has Few Happy Endings*, *NEWSDAY*, May 1, 1994, at A92:

Regulators are putting the finishing touches on what has quietly become the biggest insurance bailout in U.S. history—paid for by taxpayers and consumers, but orchestrated by the insurance industry. And as policyholders cope with the aftermath, it is becoming clear that despite the bailout’s \$2 billion price tag, tens of thousands of Americans, including many New York customers of Executive Life, will end up with losses as a result of the insurer’s failure.

*Id.* (emphasis added).

445. See, e.g., Paulette Thomas, *S&L Agency May Donate Some Homes Seized in Bailout of Failed Institutions*, *WALL ST. J.*, Mar. 21, 1991, at A5 (“The Resolution Trust Corp. will launch a new set of initiatives next week to dispose of its roughly \$150 billion in assets from failed S&Ls.”) (emphasis added).

446. See generally Jeff Bailey, *Northern Trust Settles Federal Claims That It Showed Bias in Mortgage Loans*, *WALL ST. J.*, Jun. 2, 1995, at B4; Mauro, *supra* note 440. See also *supra* notes 210-24 and accompanying text.

447. See, e.g., Fuchs, *supra* note 442, at 483 (“[I]t may be more effective to create an entirely new agency whose sole responsibility is to enforce the fair[-]lending laws. A single federal agency would ensure consistent application of guidelines, regulations, investigation procedures, enforcement and penalties.”).

aggrieved persons, insurers, nor lenders should be encouraged to resolve their disputes in state and federal courts. By now, it should be fairly obvious why these tribunals are inferior forums.

Here, we present two recommendations: One is for state and federal officials who regulate financial institutions and insurance companies; the other is for lawyers who represent either consumer advocates, loan and insurance applicants, insurers, or lenders. First, state and federal regulators should use their political power and acumen and lobby for the creation of *specialized* courts. These tribunals may be state, federal, or both; but they would resolve only claims and controversies involving insurance and financial redlining, fair lending, insurance discrimination, and unequal access to credit and loans. Ideally, the special courts would operate and exercise authority like the federal tax courts. At this juncture, it is clear that lack of political will is the major bar to the establishment of these tribunals.

Second, attorneys who represent aggrieved applicants and defend lenders and insurers must accept an inescapable fact: State and federal judges are truly permitting race, gender, geographic origin, and other immaterial factors to determine outcome in these types of discrimination suits. Therefore, attorneys must communicate this knowledge to their respective clients and encourage them to settle their disputes as quickly as possible, or 2) select alternative forums to resolve their differences. From this writer's perspective, to do less would constitute a serious violation of lawyers' professional responsibility and moral obligations.

But more important, it is fairly obvious that a failure to adopt these or other effective remedies will only nourish more racial and gender animus; more intended or unintended gender and race discrimination; more highly embittered consumers of financial and insurance products; and waves and waves of fair-lending, mortgage-redlining, insurance-discrimination and insurance-redlining suits.