

THE FAIR HOUSING ACT AND INSURANCE: AN UPDATE AND THE QUESTION OF DISABILITY DISCRIMINATION

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“It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”¹

I. INTRODUCTION

Little imagination is needed to understand the paramount importance of eliminating unfair discrimination in housing. To combat such discrimination, Congress passed the Fair Housing Act (“FHA”)² over thirty years ago. Although the FHA has been in effect since 1968, unfair discrimination in the insurance industry persists and has been well-documented.³ Almost from the start, the application of the FHA to insurance underwriting practices has sparked a contentious debate

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1. 42 U.S.C. § 3601 (1994).

2. *See id.* §§ 3601-3631.

3. *See, e.g.*, C. Heimer, *The Racial and Organizational Origins of Insurance Redlining*, 10 J. INTERGROUP REL. 42, 53 (1982); William E. Murray, Note, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735, 737 (1998); Gregory D. Squires, *Why An Insurance Regulation to Prohibit Redlining?*, 31 J. MARSHALL L. REV. 489, 496-98 (1998) (discussing numerous studies); Douglas Wissoker et al., Urban Institute, *Testing for Discrimination in Home Insurance*, available at http://www.urban.org/housing/hud_es.html (last visited Mar. 30, 2001). *See also generally* NAIC, *Redlining: Discrimination in Insurance*, <http://www.naic.org/1library/reference/subjects/redlining.htm> (2001-02) (collecting articles regarding insurance discrimination).

between fair housing advocates and defenders of the insurance industry that remains as strong as ever today.⁴

The debate will certainly continue for the foreseeable future. However, several recent judicial decisions have provided some much-needed guidance to both plaintiffs and insurers as to what the FHA does and does not require of insurance companies. These decisions have answered several of the questions long debated by fair housing advocates and insurers—whether the FHA applies to insurance at all, whether state regulations governing insurance take precedence over the FHA, and whether a disparate impact theory is cognizable under the FHA against insurers. In addition, these decisions have expounded on a previously unexplored topic—the relevance of disability discrimination in insurance in the provision of homeowners' insurance.

As fair housing advocates become more encouraged by the results of these recent decisions (as well as past successes in fair housing/insurance lawsuits), one may expect additional litigation in the fair housing/insurance context. Indeed, many of the lawsuits that have challenged insurance practices under fair housing laws have, in fact, challenged insurance practices that have been in effect for decades, and which are undoubtedly still being used by many insurers.

The sociological benefits of ensuring fairness in insurance have been thoroughly discussed by other commentators,⁵ and will not be repeated here. Rather, this article attempts to delineate exactly what is required to demonstrate a violation of the FHA for both race and

4. See, e.g., ANDREW L. SANDLER ET AL., CONSUMER FINANCIAL SERVICES §§ 2.01-02 (2002); Robert R. Detlefsen, *When the Discrimination Police Come Calling, Insurers Need to Be Ready*, METROPOLITAN CORP. COUNS., June 2000, at 36; Willy E. Rice, *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*, 33 SAN DIEGO L. REV. 583, 671-74 (1996); Christopher P. McCormack, Note, *Business Necessity in Title VIII: Importing An Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 598-601 (1986); Jane McGrew et al., *Fair Housing: An Agenda for the Washington Lawyers' Committee for Civil Rights*, 27 HOW. L.J. 1291, 1304-09 (1984); Kevin J. Byrne, Comment, *Application of Title VIII to Insurance Redlining*, 75 NW. U. L. REV. 472, 473-84 (1980); Ruthanne DeWolfe et al., *Civil Rights Implications of Insurance Redlining*, 29 DEPAUL L. REV. 315, 336-39 (1980); David I. Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J. L. & SOC. PROBS. 1, 34-46 (1980); Marianne M. Jennings, *Redlining—Now Insurers Are Guilty of It, Too*, 8 REAL EST. L.J. 323, 329-30 (1980); Robert Yaspan, Note, *Property Insurance and the American Ghetto: A Study in Social Irresponsibility*, 44 S. CAL. L. REV. 218, 268-69 (1971). See also generally Squires, *supra* note 3; Murray, *supra* note 3; John Hugh Gilmore, Note, *Insurance Redlining & The Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies*, 34 CATH. U. L. REV. 563 (1985); Leo J. Jordan, *Property Insurance and Fair Housing*, 18 FORUM 223 (1982).

5. See generally articles cited *supra* note 4.

disability discrimination in the insurance context. Part II of this Article discusses some background to insurance and identifies the substantive provisions of the FHA as applicable to insurance. Part III of this article recounts the development of the FHA, and traces the administrative and judicial decisions that have interpreted the FHA's relationship to insurance as applicable to insurance practices. Part IV discusses some of the more frequent (albeit entirely unsuccessful) threshold defenses made by insurers when faced with an FHA lawsuit. Part V discusses all three possible theories for setting forth an FHA claim in the insurance context, and explains how an FHA plaintiff can meet his or her burden when challenging unfair discrimination against an insurer, and also how insurers can defend against the plaintiffs' claims.

II. BACKGROUND TO THE FHA AND INSURANCE

A. *Unfair Discrimination in Insurance*

Broadly speaking, insurance underwriting has been defined as “the process by which companies determine whether to accept or to reject an application for insurance coverage.”⁶ The FHA seeks to eliminate unfair discrimination such as illegal redlining, the practice of either declining to write insurance or charging higher rates for people who live in particular areas, especially those with large or growing minority populations.⁷ The term originates from insurers' and mortgage lenders' historical practice of drawing “red lines” on maps and dividing covered areas (which invariably were “white” neighborhoods) from other areas where coverage would not be available (which invariably were minority neighborhoods).⁸ Redlining has since evolved to encompass the refusal to underwrite a dwelling for reasons other than the quality of the dwelling or the qualifications of the individual applicant.⁹ Indeed, “unfair discrimination” within the context of the FHA can be understood today to mean any differentials in insurance classifications based upon

6. Gilmore, *supra* note 4, at 576.

7. *See, e.g.*, NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992).

8. *See* Daniel A. Searing, *Discrimination in Home Finance*, 48 NOTRE DAME LAW. 1113, 1113 (1973).

9. *See, e.g.*, Badain, *supra* note 4, at 13-15 (interpreting redlining beyond geographical limitations, encompassing all institutional practices that have the effect of limiting the availability or affordability of housing insurance); Gilmore, *supra* note 4, at 566.

membership in a protected class that have no grounding in sound actuarial data.¹⁰

Insurers have generally been loath to concede that the FHA has any application to the insurance industry, and many deny it to this day.¹¹ Indeed, although several insurers have settled FHA lawsuits in recent years,¹² they did so while stubbornly insisting that the FHA does not apply to insurance practices.¹³ The following comment, made by the National Association of Independent Insurers in 1978, exemplifies the insurance industry's historical approach to the fair housing laws: "The insurance industry refrains from moral pronouncements about its customers. We measure risk as accurately as we can, applying experience and objective criteria refined for more than two centuries. We leave it to others to speak of discrimination and other such moral terms."¹⁴

However, as set forth in the following sections, insurers' resistance against the FHA's application to insurance practices have been largely unsuccessful.

B. *The Goals of the FHA and the Protected Classes*

The FHA was first enacted as Title VIII of the Civil Rights Act of 1968.¹⁵ In its original form, the FHA prohibited discrimination on

10. See Badain, *supra* note 4, at 15 & n.76 ("these practices may be justified to the extent that they are supported by sound actuarial data—this is the distinction between *fair* and *unfair discrimination*") (emphasis in original).

11. See, e.g., Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint, *Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am.*, No. 1:10CV02199 (EGS) (D.D.C. Jan. 9, 2001) (arguing that the FHA has no application to underwriting guidelines) (on file with author); Memorandum of Law in Support of Defendant's Motion for Summary Judgment, *Koontz v. Grange Mut. Cas. Co.*, No. C2-98-318 (S.D. Ohio Oct. 2, 2000) (same) (on file with author); Press Release, National Association of Mutual Insurance Companies, NAMIC Opposes Applying Fair Housing Act to Insurance, June 19, 2000 (on file with author), available at <http://www.namic.org>; Carl Horowitz, *Legislation Aims Fair Housing Laws at Insurance Firms*, INVESTOR'S BUS. DAILY, Feb. 6, 1998, at A5 (quoting representatives from the Alliance of American Insurers and the American Insurance Association as disavowing any application the FHA has on insurance); Russ Banham, *Insurers, Housing Groups Clash on Bias Law*, J. COM., Nov. 6, 1997, at 11A (quoting representative from National Association of Independent Insurers as denying that the FHA applied to insurance).

12. See *infra* notes 212-13 and accompanying text.

13. See Squires, *supra* note 3, at 490 & n.7 (noting that the federal government has settled FHA lawsuits against American Family, State Farm, Allstate, and Nationwide although the insurers "persist[ed] in rejecting HUD's interpretation of the basic jurisdictional issue").

14. Gregory Squires, *Policies of Prejudice: Risky Encounters with the Property Insurance Business*, CHALLENGE, July-Aug. 1996, at 45, 47 (quoting National Association of Independent Insurers).

15. Pub. L. 90-284, 82 Stat. 73 (1968).

grounds of race, color, religion, or national origin.¹⁶ When it was passed, the FHA's goal was not only to increase housing opportunities for racial minorities, but also to promote integration for the benefit of all Americans.¹⁷ The Supreme Court has recognized that the FHA promotes a "policy that Congress considered to be of the highest [national] priority."¹⁸

Congress has expanded the FHA's anti-discrimination provisions on two occasions. In 1974, the FHA was amended to include sex as a protected class.¹⁹ Very little legislative history accompanied the 1974 amendment, but one commentator has suggested that Congress intended that the FHA's "ban on sex discrimination would end housing practices based on sexual stereotypes."²⁰ In 1988, Congress again increased the FHA's scope when it passed the Fair Housing Amendments Act ("FHAA").²¹ The FHAA banned housing discrimination on the basis of familial status and of handicap.²²

Although it was largely silent regarding the goal of proscribing discrimination on the basis of familial status,²³ Congress did give some indication regarding the new amendments barring discrimination on the basis of disability. The purpose, according to the legislative history, was "to end the unnecessary exclusion of persons with handicaps from the American mainstream."²⁴ Congress determined the right to be free from housing discrimination to be "essential to the goal of independent living."²⁵ Both federal and state courts have emphasized the Congressional purpose of integrating persons with disabilities "into the mainstream of society."²⁶ In addition, Congress expressed its

16. See *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 n.1 (1995) (citing FHA).

17. See generally ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2:3 (2002) (recounting legislative history of FHA); Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969) (same).

18. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

19. See Fair Housing Amendment of 1974, Pub. L. 93-383 § 808(b), 88 Stat. 633, 729 (1974).

20. SCHWEMM, *supra* note 17, § 11C:1.

21. Pub. L. 100-430, 102 Stat. 1619 (1988).

22. See *id.* at 1622.

23. The motivation of the familial status discrimination proscriptions "was said to be to protect families with children from discrimination in housing, without unfairly limiting housing choices for elderly persons." SCHWEMM, *supra* note 17, at § 11E:1 (citations omitted). It also appears that the familial status provisions served to combat exclusionary rules that had a disproportionate effect on minority households that might have had a large number of children. See *id.*

24. H.R. REP. NO. 100-711, at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

25. *Id.*

26. See, e.g., *United States v. Scott*, 788 F. Supp. 1555, 1561 n.5 (D. Kan. 1992); *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484, 486 (S.C. 1991) ("The [FHAA] articulates the

understanding that “because of their special needs, handicapped persons are often denied equal opportunities when they are treated like all other non-handicapped persons.”²⁷

C. Substantive Provisions of the FHA as Applicable to Insurance

As far as substantive provisions of the FHA are concerned, section 3604 of the FHA prohibits discrimination in the provision of insurance. That section makes unlawful conduct which “make[s] unavailable or den[ies], a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”²⁸ The section further makes it unlawful

[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—
(A) that buyer or renter[;] (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
(C) any person associated with that buyer or renter.²⁹

The other FHA provision that potentially implicates insurance is section 3605, which makes it “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.”³⁰

In interpreting the FHA, courts must be mindful that “Congress intended [the FHA] to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class.”³¹ Consistent with the principle that the FHA is to be given a “generous construction,” courts have recognized that the “make unavailable or deny” language of section 3604 is “as broad as Congress could have made it.”³² The phrase reaches “every private and public

public policy of the United States as being to encourage and support handicapped persons’ right to live in a group home in the community of their choice.”)

27. Parish of Jefferson v. Allied Health Care, Inc., CA Nos. 91-1199, 1200, 3959, 1992 U.S. Dist. LEXIS 9124, at *19 (E.D. La. June 10, 1992); *see also* H.R. REP. NO. 100-711, at 24-27.

28. 42 U.S.C. § 3604(a) (1994).

29. *Id.* § 3604(f)(1) (citation omitted).

30. *Id.* § 3605(a).

31. Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1359 (6th Cir. 1995) (quoting Mich. Prot. & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 344 (6th Cir. 1994)).

32. *See, e.g.*, United States v. Bankert, 186 F. Supp. 2d 623, 628 (E.D.N.C. 2000) (quoting United States v. Hughes Mem’l Home, 396 F. Supp. 544, 549 (W.D.Va. 1975)); Steptoe v. Beverly Area Planning Ass’n, 674 F. Supp. 1313, 1318 (N.D. Ill. 1987) (quoting Zuch v. Hussey, 366 F. Supp. 553, 557 (E.D. Mich. 1973)); United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 726 (S.D. Ala. 1980); Dunn v. Midwestern Indem. Mid-Am. Fire & Cas., 472 F. Supp. 1106, 1108

practice that makes housing more difficult to obtain on prohibited grounds,”³³ and “may not be easily discounted or de-emphasized.”³⁴ Indeed, courts have uniformly rejected defendants’ arguments that, to demonstrate a violation of the FHA, a plaintiff must show that housing was actually denied.³⁵ As the *Fowler* court aptly stated: “[T]he FHA is directed at the elimination of discriminatory conduct, not merely discriminatory results.”³⁶

Section 3604 also prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”³⁷ Again, the same protections apply to disabilities, as the FHA makes it unlawful

“[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—(A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person.”³⁸

Finally, the FHA provides that “discrimination includes . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”³⁹ The Department of Housing and Urban Development’s (“HUD”) regulations bolsters the FHA by providing:

It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.⁴⁰

(S.D. Ohio 1979); *Heights Cmty. Cong. v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1, 3 (N.D. Ohio 1975); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973).

33. *Tyus v. Robin Constr. Corp.*, No. 92 C 2423, 1992 U.S. Dist. LEXIS 16736, at **22-23 (N.D. Ill. Nov. 2, 1992) (quoting *Chickasaw*, 504 F. Supp. at 726).

34. *See, e.g., Bankert*, 186 F. Supp. 2d at 628 (quoting *Hughes Mem'l Home*, 396 F. Supp. at 549).

35. *See, e.g., Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 610-11 (D.N.J. 2000) (citing numerous cases).

36. *Id.* at 611.

37. 42 U.S.C. § 3604(b) (1994).

38. *Id.* § 3604(f)(2).

39. *Id.* § 3604(f)(3)(B).

40. 24 C.F.R. § 100.204(a) (2002).

In sum, the FHA, in defining unlawful conduct in the context of housing practices, “creates the legal right to be free of injuries caused by various, specific forms of discriminatory conduct.”⁴¹ Despite the relative paucity of legislative history behind the FHA, courts have routinely recognized that the FHA’s anti-discrimination provisions are to be given a liberal construction in order to effectuate their remedial purposes.⁴² Emphasizing this point, numerous courts have recognized that “all practices which have the effect of denying dwellings on prohibited grounds are therefor unlawful.”⁴³ The FHA moreover prohibits “sophisticated modes of discrimination as well as the obvious method of discrimination.”⁴⁴

As already mentioned, insurers have long contended that the FHA does not apply to insurance. Among other arguments, insurers often (and accurately) point out that insurance is not expressly mentioned in the FHA, and that several attempts to amend the FHA to explicitly include insurance have been rejected by Congress.⁴⁵ Nevertheless, as early as 1978, HUD’s general counsel asserted that the FHA applies to insurance, because “[a]dequate insurance coverage is often a prerequisite to obtaining financing. Insurance redlining, by denying or impeding coverage makes mortgage money unavailable, rendering dwellings ‘unavailable’ as effectively as the denial of financial assistance on other

41. *United States v. Bankert*, 186 F. Supp. 2d 623, 627 (E.D.N.C. 2000).

42. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (the FHA anti-discrimination provisions are to be given a “generous construction”); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) (collecting cases holding that FHA is to be interpreted broadly); *Snyder v. Barry Realty, Inc.*, 953 F. Supp. 217, 219 (N.D. Ill. 1996) (“It has long been recognized that to give full measure to the Congressional purpose behind the FHA, courts have given broad interpretation to the statute.”) (quoting *Baxter v. Belleville*, 720 F. Supp. 720, 731 (S.D. Ill. 1989)); *United States v. Real Estate One, Inc.*, 433 F. Supp. 1140, 1144 (E.D. Mich. 1977) (“The Fair Housing Act implements a policy to which Congress has accorded the highest national priority, and it is to be liberally construed in accordance with that purpose.”).

43. *See, e.g., Bankert*, 186 F. Supp. 2d at 628 (quoting *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 548 (W.D. Va. 1975)); *accord United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1291 & 1292 (S.D.N.Y. 1985) (FHA prohibits “every practice which has the effect of making housing more difficult to obtain on prohibited grounds”) (quoting *United States v. City of Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980)); *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 726 (S.D. Ala. 1980); *United States v. Am. Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977); *Heights Cmty. Cong. v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1, 3 (N.D. Ohio 1975); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973).

44. *Bradley v. John M. Brabham Agency, Inc.*, 463 F. Supp. 27, 31 (D. S.C. 1978); *cf. McDonald v. Verble*, 622 F.2d 1227, 1234 (6th Cir. 1980); *Williams v. The Matthews Co.*, 499 F.2d 819, 825 (8th Cir. 1974).

45. *See Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (4th Cir. 1984).

grounds.”⁴⁶ In 1989, HUD promulgated regulations interpreting the FHA. In those regulations, HUD took the position that the FHA makes illegal the act of “[r]efusing to provide . . . property or hazard insurance for dwellings or providing such services or insurance differently because of [protected status].”⁴⁷ And as will be discussed in the next section, courts have overwhelmingly interpreted the FHA as applying to insurance practices.

III. JUDICIAL INTERPRETATION OF THE FHA AS APPLYING TO INSURANCE UNDERWRITING PRACTICES

With one exception, courts have been in general agreement that the FHA applies to insurance practices. While FHA/insurance cases rarely are tried to judgment, these decisions make clear that plaintiffs can challenge unfair discrimination by insurers under the FHA.

A. Cases Involving Race Discrimination

The first court to consider whether the FHA applies to insurance was *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*⁴⁸ *Dunn* involved allegations of classic racial redlining—the plaintiffs (African-American homeowners) asserted that the defendant insurance company refused to renew the plaintiffs’ homeowner’s insurance because the houses were located in predominately African-American neighborhoods.⁴⁹ The defendant insurers moved to dismiss, contending that the FHA was not intended to apply to insurance practices.⁵⁰ The *Dunn* court rejected this argument, holding that:

[s]ince insurance is a precondition to adequate housing, a discriminatory denial of insurance would prevent a person economically able to do so from buying a house. Consequently, although insurance redlining is not expressly proscribed by the Act, it is encompassed by both the broad language of § 3604(a) and the

46. Memorandum of The General Counsel of Housing and Urban Development to Chester C. McGuire, Assistant Secretary for Equal Opportunity (Aug. 15, 1978), at 2; *see also* *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas.*, 472 F. Supp. 1106, 1109 (S.D. Ohio 1979) (quoting same).

47. 24 C.F.R. § 100.70(d)(4) (2002).

48. 472 F. Supp. 1106 (S.D. Ohio 1979).

49. *See id.* at 1107.

50. *See id.* at 1108.

legislative design of the Act which seeks to eliminate discrimination within the housing field.⁵¹

A few years after *Dunn*, the Fourth Circuit reached the opposite conclusion in *Mackey v. Nationwide Insurance Cos.*,⁵² and held that the FHA does not prohibit unfair discrimination in insurance. In *Mackey*, an African-American insurance agent brought an action against an insurer, challenging the insurer's redlining practice as a violation of the agent's civil rights and the FHA.⁵³ The Fourth Circuit concluded that the FHA does not reach insurance essentially because (1) Congress explicitly prohibited discrimination by financial institutions, but failed to mention insurance companies in the FHA, and (2) legislative efforts to get insurance explicitly mentioned in the FHA following *Dunn* failed.⁵⁴

Emboldened by the *Mackey* decision, two insurance companies in separate redlining lawsuits immediately asked Judge Rice in the Southern District of Ohio to reconsider *Dunn*'s application of the FHA to insurance.⁵⁵ However, Judge Rice reaffirmed *Dunn*'s holding that the FHA's provisions apply to the insurance industry.⁵⁶ In particular, Judge Rice agreed with *Dunn* that "the availability of insurance and the ability to purchase a home go hand in hand and vary, in direct proportion, to one another."⁵⁷ Judge Rice also criticized *Mackey*'s reliance on unsuccessful post-*Dunn* legislative efforts to amend the FHA to specifically refer to insurance, noting that "[r]elying on this type of after the fact legislative history is speculative at best, because the Court has no way of knowing why the proposed amendments were rejected."⁵⁸

In 1992, the Seventh Circuit, in *NAACP v. American Family Mutual Insurance Co.*,⁵⁹ similarly rejected *Mackey* and held that the

51. *Id.* at 1109.

52. 724 F.2d 419 (4th Cir. 1984).

53. *See id.* at 420.

54. *See id.* at 423-25. For a discussion of the efforts to have insurance explicitly mentioned in the FHA, see Badain, *supra* note 4, at 34-46.

55. *See* *McDiarmid v. Econ. Fire & Cas. Co.*, 604 F. Supp. 105, 106 (S.D. Ohio 1984); *Pierce v. Metro. Prop. & Liab. Ins.*, No. C-3-82-004, 1984 U.S. Dist. LEXIS 24653, at *2 (S.D. Ohio Aug. 1, 1984). Judge Rice presided over both the *McDiarmid* and *Pierce* cases, although a different judge had decided *Dunn*.

56. *See* *McDiarmid*, 604 F. Supp. at 107-08; *Pierce*, 1984 U.S. Dist. LEXIS 24653, at **3-7. Undoubtedly in the interests of judicial economy, Judge Rice issued identical opinions in *McDiarmid* and *Pierce*.

57. *McDiarmid*, 604 F. Supp. at 107; *Pierce*, 1984 U.S. Dist. LEXIS 24653, at *5.

58. *McDiarmid*, 604 F. Supp. at 108; *Pierce*, 1984 U.S. Dist. LEXIS 24653, at *6.

59. 978 F.2d 287 (7th Cir. 1992). For an extensive and humanistic chronicle of the facts of the *American Family* case, see Jack Norman, *Homeowners Ensure Company Does Right Thing With American Family Settlement, Seven People "Make A Lasting Difference,"* MILWAUKEE J. SENTINEL, Nov. 26, 1995, (Wisconsin Magazine), at 12.

FHA applies to insurance underwriting.⁶⁰ The Seventh Circuit set forth the plaintiffs' allegations against the defendant-insurer as follows:

Plaintiffs contend that a mortgage loan usually is essential to home ownership, and that lenders are unwilling to provide credit unless the borrower obtains insurance on the house that serves as security for the loan. Higher premiums price some would-be buyers out of the market; a refusal to write insurance excludes all buyers. If insurers redline areas with large or growing numbers of minority residents, that practice raises the cost of housing for black persons and also frustrates their ability to live in integrated neighborhoods. Even if they achieve their goal, they pay extra.⁶¹

The district judge followed *Mackey* and dismissed the suit.⁶² The Seventh Circuit reversed the district court's holding that the FHA did not reach insurance.⁶³ In a well-reasoned opinion, the Seventh Circuit refuted the *Mackey* court's reasoning point-by-point. First, the Seventh Circuit noted that, although the FHA does specifically refer to "financing" but not insurance, there was no reason why the FHA could not apply to both.⁶⁴ Second, the Seventh Circuit rejected *Mackey*'s argument that insurers are inherently involved in risk-assessment and must be allowed to conduct such assessments without regard to the FHA.⁶⁵ Third, the Seventh Circuit observed that financial lenders are as much in the risk assessment business as are insurers, yet Congress did not exempt them from the provisions of the FHA.⁶⁶ And because section 3604 was written in general terms and did not specifically apply to any particular persons or industry, the court concluded that it would be

60. See *American Family*, 978 F.2d at 301.

61. *Id.* at 290.

62. See *id.*

63. See *id.* at 301.

64. See *id.* at 298. Indeed, numerous courts have likewise found that a range of practices are covered by the FHA, even though they are not expressly mentioned in the statute. See, e.g., *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 143-44 (6th Cir. 1985) (finding that racial steering violates the FHA); *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1209 (7th Cir. 1984) (stating that section 3604(a) has been construed to "encompass mortgage 'redlining,' insurance redlining, racial steering, exclusionary zoning decisions, and other actions . . . which directly affect the availability of housing to minorities"); *United States v. City of Parma*, 661 F.2d 562, 576 (6th Cir. 1981) (finding exclusionary zoning ordinances "which have a racially discriminatory effect . . . violate the [FHA]"); *Mayers v. Ridley*, 465 F.2d 630, 660 (D.C. Cir. 1972) (holding that registration of deeds containing racially restrictive covenants violated the FHA); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 28 (D. Mass. 1996) (holding that denial of tax-exempt bond financing for school for emotionally disturbed students violated the FHA).

65. See *American Family*, 978 F.2d at 298-99.

66. See *id.*

untenable to create a special exemption for insurers out of a whole cloth.⁶⁷ Fourth, as did Judge Rice in *McDiarmid* and *Pierce*, the Seventh Circuit concluded that Congress's failure to pass subsequent amendments was irrelevant to determining the original congressional intent embodied in section 3604.⁶⁸ Finally, the Seventh Circuit noted that HUD promulgated regulations after *Mackey* that interpreted the FHA as applying to insurance.⁶⁹ Noting that HUD's interpretation of the FHA was entitled to great deference,⁷⁰ the Seventh Circuit concluded that the promulgation of 24 C.F.R. § 100.70(d)(4) effectively overruled *Mackey*.⁷¹

Although *Mackey* has not yet been repudiated by the Fourth Circuit, one commentator has opined that the *American Family* opinion in will "settle the matter of § 3604(a)'s coverage to insurance redlining."⁷² Indeed, since *American Family*, every court to consider the issue has held that the FHA applies to insurance. The Seventh Circuit reaffirmed *American Family* in *United Farm Bureau Mutual Insurance Co. v. Metropolitan Human Relations Commission*.⁷³ The following year, in *Nationwide Mutual Insurance v. Cisneros*,⁷⁴ the Sixth Circuit held that an action for discriminatory redlining may be brought under the FHA.⁷⁵ Several district courts have likewise followed *Dunn* and *American Family* in holding that the FHA applies to insurance in race discrimination cases.⁷⁶

67. *See id.*

68. *See id.* at 299-300 (noting that subsequent amendments may fail for any number of reasons).

69. *See id.* at 300 (citing 24 C.F.R. § 100.70(d)(4)).

70. *See id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Under the "*Chevron* doctrine" when Congress has expressly spoken to the precise question at issue, the court must give effect to the express intent. *See Chevron*, 467 U.S. at 842-43. However, "if the statute is silent or ambiguous," the court must defer to the agency's interpretation if it is reasonable. *Id.* at 843.

71. *See American Family*, 978 F.2d at 301.

72. SCHWEMM, *supra* note 17, § 15 at 13-62.

73. 24 F.3d 1008, 1015-16 (7th Cir. 1994).

74. 52 F.3d 1351 (6th Cir. 1995).

75. *See id.* at 1357-60.

76. *See, e.g.*, *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 56 (D.D.C. 2002) (observing that the "'split' of authority on [whether the FHA applies to insurance] is not as divided as the defendants portray it to be"); *Nat'l. Fair Hous. Alliance v. Travelers Prop. Cas. Corp.*, No. 00-1506 (JR), at 1-2 (D.D.C. Jan. 9, 2001) (unpublished opinion on file with author) (denying defendant's motion for reconsideration from denial of motion to dismiss in FHA race discrimination case against insurer); *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999) (finding that the FHA prohibits discriminatory refusal to renew property insurance); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 27 (D. Mass. 1996) ("Few, if any, banks make home loans to uninsured borrowers. Thus, property insurers in effect have the power to

All of the foregoing cases involved application of section 3604. Until recently, courts were generally in agreement that section 3605 did not reach insurance practices, holding generally that the section was limited to institutions engaged in the making of commercial real estate loans.⁷⁷ However, the latest word on the issue is from the *National Fair Housing Alliance* court, which held that “it is reasonable to conclude the Congress intended that homeowners insurance fall within the scope of section 3605’s protections.”⁷⁸ The court noted that because section 3605 defined a real estate-related transaction as one involving a loan or “‘other financial assistance,’” the section indicated that “‘financial assistance’” should be broadly read to cover insurance as well.⁷⁹ The *National Fair Housing Alliance* decision should resuscitate the previously moribund debate over whether section 3605 applies to insurance.

B. Cases Involving Disability Discrimination

FHA/insurance cases have not been limited to race discrimination. Although discrimination on the basis of disability is not “redlining” in the traditional sense, certain underwriting rules for housing insurance have the same effect on people with disabilities that redlining does on

make housing unavailable to potential buyers.”); *Canady v. Allstate Ins. Co.*, P-H Fair Housing-Fair Lending Reporter, ¶ 16,120 (W.D. Mo. 1996); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1213-15 (E.D. Pa. 1994) (deferring to HUD’s position that FHA applies to insurance). See also *Toledo Fair Hous. Ctr. v. Farmers Ins. Group*, Nos. CI99-1339 & CI00-2981, at 13-19 (Ohio C.P. Mar. 29, 2001) (unpublished opinion on file with author) (allowing race discrimination redlining claim brought under state fair housing laws to proceed); *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 703 N.E.2d 338, 339 (Ohio C.P. 1993) (same).

Indeed, given the documented examples of unfair discrimination in the insurance industry, see *supra* note 3 and accompanying text, one wonders why more FHA lawsuits have not been filed against the insurers. There are theories explaining why there have been relatively few challenges to insurance redlining under the FHA. First, because of a lack of resources, fair housing organizations did not begin to seriously investigate the insurance industry for compliance with the FHA until the late 1980s. In addition, although pre-FHA redlining was blatant, insurers rarely, if ever, openly admit that they refuse to underwrite on the basis of race or other protected class. See *Murray*, *supra* note 3, at 737-38 (noting that redlining and unfair discrimination in insurance have become far more subtle in recent years). Also, insurance companies generally do not retain records of dwellings that were denied coverage, which would enable a plaintiff to demonstrate a pattern of unfair discrimination. See *id.* at 738. Relatedly, any underwriting data is controlled by the insurer, so plaintiffs—even assuming that they are aware that they have been discriminated against—cannot assess their claims until after a lawsuit is actually filed. See *id.* at 744-45.

77. See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) (holding section 3065 does not encompass homeowners insurance); *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas.*, 472 F. Supp. 1106, 1110 (S.D. Ohio 1979) (same).

78. *Nat’l Fair Hous. Alliance, Inc.*, 208 F. Supp. 2d at 58.

79. *Id.*

minorities: they can effectively result in higher premiums, inferior coverage, or the deprivation of insurance altogether.⁸⁰

In *Wai v. Allstate Insurance Co.*,⁸¹ and *Koontz v. Grange Mutual Casualty Co.*,⁸² courts held for the first time that FHA claims alleging “disability redlining” are actionable.⁸³ In both cases, the plaintiffs operated “group homes” for persons with disabilities.⁸⁴ *Wai* involved two different and independent landlords.⁸⁵ One of the plaintiff/landlords rented her home to a group of moderately retarded women.⁸⁶ The other plaintiff/landlord in *Wai*, and the plaintiff/landlords in *Koontz* both operated “Oxford Houses”—homes for recovering substance abusers and alcoholics.⁸⁷ In both *Wai* and *Koontz*, the plaintiff/landlords were

80. Although the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.*, is considered the most comprehensive anti-disability discrimination statute, the ADA has proved to be ineffective against the insurance industry. *See generally* Jesse A. Langer, Note, *Combating Discriminatory Insurance Practices: Title III of the Americans with Disabilities Act*, 6 CONN. INS. L.J. 435 (2000). Unlike the FHA, however, the ADA contains a “safe harbor” provision for insurance companies. *See* 42 U.S.C. §§ 12201(c)(1)-(2). Because of this distinction, insurers faced with FHA claims cannot take solace in ADA decisions that have been interpreted in the insurance industry’s favor.

81. 75 F. Supp. 2d 1 (D.D.C. 1999).

82. No. C2-98-318 (S.D. Ohio Mar. 31, 1999) (unpublished decision on file with author).

83. The president of the National Association of Independent Insurers noted that the disability discrimination lawsuits “brings [the insurance industry] into new territory.” Jack Ramirez, *Fair Housing Council’s Lawsuit: Another Shot in a Widening Battle*, NAT’L UNDERWRITER: PROP. & CAS./RISK & BENEFITS MGMT. EDITION, July 28, 1997, at 23. Consistent with the insurance industry’s historical resistance to FHA compliance, Mr. Ramirez was extremely critical of the lawsuits and encouraged the defendants “to mount an aggressive defense to accusations we consider groundless and without merit.” *Id.* at 27. Other prominent attorneys for financial lenders and insurers have predicted that “it is reasonable to anticipate further litigation on the provision of insurance for properties that house disabled residents.” SANDLER ET AL., *supra* note 4, at § 2.02[3][c], at 2-27.

84. *See Wai*, 75 F. Supp. 2d at 2; *Koontz*, No. C2-98-318, at 2.

85. *See Wai*, 75 F. Supp. 2d at 2-3.

86. *See id.* at 3.

87. *See id.*; *Koontz*, No. C2-98-318, at 2. A comprehensive description of an Oxford House is discussed in *Tsombanidis v. City of West Haven*, 180 F. Supp. 2d 262, 273 (D. Conn. 2001). Under the Oxford House model, residents must be employed and pay rent to support the house, limiting the level of government support and building vital self-esteem for the residents. *See id.* Indeed, Oxford House’s mission has been specifically recognized and endorsed by Congress. As one court noted:

Through its enactment of the [FHAA] and the Federal Anti-Drug Abuse Act of 1988, Congress has expressed a strong public policy favoring an end to discrimination in housing on the basis of handicap and favoring the establishment of housing programs for recovering drug addicts and alcoholics. Indeed, the Anti-Drug Abuse Act’s provision encouraging the establishment of revolving loan funds by states to make start-up loans to help establish group homes for recovering drug addicts and alcoholics was based specifically on the model of Oxford House. *See* 134 CONG. REC. E 3732 (daily ed. Nov. 10, 1988) (remarks of Rep. Madigan). Thus, Congress has directly endorsed Oxford House itself as an organization worthy of public support because of its role in helping to stem the national epidemic of alcohol and drug abuse.

initially able to procure insurance from an insurance broker.⁸⁸ However, after the broker learned that the tenants were people with disabilities, the insurance was withdrawn and the insurance companies either refused to underwrite the homes altogether, or demanded significantly higher premiums from the landlord.⁸⁹ The insurers in both *Wai* and *Koontz* moved to dismiss the respective complaints, but both courts held that the allegations were actionable under the FHA.⁹⁰

C. Beyond Property/Hazard Insurance

As discussed *supra*, both section 3604(b) and HUD's regulations prohibit discrimination "in the provision of services . . . in connection" with the sale or rental of a dwelling.⁹¹ Some courts have relied on the fact that banks often require property or hazard insurance for a mortgage in holding that insurance is a "service" necessary for housing. As the *American Family* court bluntly put it: "No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."⁹²

Insurers may argue that, even if the FHA applies to insurance, the law is thus limited to property or hazard (as opposed to homeowner's or liability) coverage. Insurers reason that, because homeowners' or liability insurance is not necessary for financial procurement of a home, only a denial of property insurance makes housing "unavailable" under the FHA.⁹³ In addition, insurers highlight the fact that the language of the relevant HUD regulation only refers to property insurance.⁹⁴

No court has ever accepted these arguments. Rather, insurers must remain mindful in FHA cases that "[t]he critical determination is whether defendant's conduct could hinder the ability of members of a minority group to acquire a dwelling."⁹⁵ At least two courts have readily

Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 465 (D.N.J. 1992) (emphasis added).

88. See *Wai*, 75 F. Supp. 2d at 3; *Koontz*, No. C2-98-318, at 2.

89. See *Wai*, 75 F. Supp. 2d at 3; *Koontz*, No. C2-98-318, at 2-3.

90. See *Wai*, 75 F. Supp. 2d at 5-8; *Koontz*, No. C2-98-318, at 2-4. Both the *Wai* and *Koontz* cases settled before trial.

91. 42 U.S.C. § 3604(b) (1994); see also 24 C.F.R. § 100.70(b) (2002).

92. NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992); accord *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1360 (6th Cir. 1995) ("the availability of property insurance has a direct and immediate affect on a person's ability to obtain housing"); *Wai*, 75 F. Supp. 2d at 7-8.

93. See *United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n*, 24 F.3d 1008, 1014 n.8 (7th Cir. 1994).

94. See 24 C.F.R. § 100.70(d)(4).

95. *Tyus v. Robin Constr. Corp.*, No. 92 C 2423, 1992 U.S. Dist. LEXIS 16736, at *25 (N.D. Ill. Nov. 2, 1992).

applied the FHA to homeowners' and liability insurance, concluding that the availability of housing can certainly be affected by discrimination in liability coverage.

In *United Farm Bureau*, the Seventh Circuit upheld an FHA claim against an insurer after the insurer declined to renew the plaintiff's homeowner's policy because he lived in a racially mixed neighborhood with a perceived high crime rate.⁹⁶ The insurer argued that, because only property insurance is *pro forma* necessary for a mortgage, alleged discrimination in homeowners' insurance should not be actionable under the FHA.⁹⁷ The court rejected this argument:

We are not persuaded by [the insurer's] argument. By refusing to issue a homeowner's insurance policy, the cost of owning a home or real property is increased, perhaps prohibitively. The property owner would be required to carry the risks and bear the costs for all injury, loss, or damage other than for the limited situations covered by hazard insurance. This undoubtedly could make owning and retaining real property unavailable; simply preventing foreclosure is not sufficient to make housing "available."⁹⁸

Similarly, the *Wai* court explained:

If, in order to rent to disabled persons, a landlord must risk losing her home through loss of mortgage financing, *loss of catastrophe insurance, and loss of liability insurance*, she will be disinclined to rent to disabled persons. Such powerful disincentives to rent to disabled persons, make housing unavailable to them.⁹⁹

Surely, a loss of liability insurance tends to make housing "unavailable" within the meaning of the FHA, even if a homeowner might still obtain the basic hazard insurance required for a mortgage.¹⁰⁰

96. See *United Farm Bureau*, 24 F.3d at 1010.

97. See *id.* at 1014 n.8.

98. *Id.*

99. *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 6 (D.D.C. 1999) (emphasis added); see also *Lindsey v. Allstate Ins. Co.*, 34 F. Supp. 2d 636, 641-43 (W.D. Tenn. 1999) (finding that the FHA prohibits discriminatory refusal to underwrite homeowners' insurance); *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas.*, 472 F. Supp. 1106, 1109, 1112 (S.D. Ohio 1979) (same).

100. On a related point, insurers have been known to argue in FHA cases (quite cynically) that housing has not been made unavailable because the plaintiff could still purchase the desired coverage from another company. It scarcely requires authority to say that an insurer should not be allowed to excuse its own discriminatory conduct by contending that the plaintiff would not encounter discrimination elsewhere. Cf. *McDonald v. Verble*, 622 F.2d 1227, 1233 (6th Cir. 1980) (allowing FHA suit to proceed against real estate brokers who preferred "'not to sell the property to blacks,'" even though plaintiffs ended up purchasing property). See also *Tyus v. Robin Constr. Corp.*, No. 92 C 2423, 1992 U.S. Dist. LEXIS 16736, at **22-23 (N.D. Ill. Nov. 2, 1992) (quoting

Insurers' arguments that the FHA is limited to property insurance only also run counter to the principle that "all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful."¹⁰¹

IV. INSURERS' THRESHOLD DEFENSES AGAINST FHA SUITS

Insurers have not accepted application of the FHA to their business lightly. In addition to generally denying that the FHA applies to insurance, insurers usually attempt other threshold defenses to avoid application of the FHA to underwriting practices. Most often, insurers contend that the McCarran-Ferguson Act, the doctrine of primary jurisdiction, or the filed-rate doctrine preclude FHA lawsuits against insurers. None of these arguments have been successful.

A. *The McCarran-Ferguson Act*

One of insurers' favorite threshold defenses in FHA cases is that the FHA is preempted by the McCarran-Ferguson Act.¹⁰² This argument has been rejected so many times, one wonders why insurers continue to pursue such a fruitless and time-wasting argument in FHA cases.¹⁰³ The time may not be far off when a court imposes sanctions against an insurer for raising a McCarran-Ferguson defense against an FHA lawsuit.

1. Background to the McCarran-Ferguson Act

Prior to 1944, it was accepted that insurance regulation was solely the province of the states, because insurance was not considered to be interstate commerce.¹⁰⁴ States thus enjoyed unfettered power to tax and regulate the insurance industry. In *United States v. South-Eastern Underwriters Ass'n*,¹⁰⁵ the United States Supreme Court held for the first time that insurance was a transaction of interstate commerce subject to

United States v. Hous. Auth. of Chickasaw, 504 F. Supp. 716, 726 (S.D. Ala. 1980)) (stating that the FHA prohibits all conduct that has the effect of "mak[ing] housing more difficult to obtain on prohibited grounds"); cases cited *supra* note 32.

101. See *supra* note 43 and accompanying text.

102. 15 U.S.C. §§ 1011-15 (2000).

103. One fair housing advocate has likened the McCarran-Ferguson Act defense in FHA cases to the "emperor's new clothes"—it "simply does not exist." See Stephen M. Dane, *Letter to the Editor: McCarran-Ferguson a Naked Defense*, NAT'L UNDERWRITER: PROP. & CAS./RISK & BENEFITS MGMT. EDITION, Nov. 13, 1995, at 31.

104. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868).

105. 322 U.S. 533 (1944).

federal regulation (specifically, federal antitrust law).¹⁰⁶ In response to the *South-Eastern Underwriters* decision, Congress passed the McCarran-Ferguson Act, thus reaffirming the primacy of state regulation of insurance.¹⁰⁷

The McCarran-Ferguson Act provides that “[t]he 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.”¹⁰⁸ With respect to federal regulation, the Act continues in pertinent part: “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance.”¹⁰⁹

Because the McCarran-Ferguson Act is an exemption from the antitrust laws, it is to be narrowly construed.¹¹⁰ Similarly, in order to promote federal statutory and regulatory interests, courts likewise afford the term “business of insurance” as narrow an interpretation as possible.¹¹¹

2. Judicial Interpretation of McCarran-Ferguson in FHA Cases

As discussed *supra*, the FHA has been construed to apply to the sale of homeowners’ insurance.¹¹² Also, it is true that the FHA does not specifically refer to insurance.¹¹³ Therefore, the McCarran-Ferguson Act would bar an FHA claim only if application of the FHA to conduct that constitutes the “business of insurance” would thereby “invalidate, impair, or supersede” a state statute.¹¹⁴

Insurers typically present their McCarran-Ferguson defenses in FHA cases with the following logic: virtually every state requires that

106. *See id.* at 560-62.

107. *See generally* Gilmore, *supra* note 4, at 568-69 (describing development of McCarran-Ferguson). For a general argument of the inefficiencies of state regulation of insurance, see Badain, *supra* note 4, at 19-20.

108. 15 U.S.C. § 1012(a) (2000).

109. *Id.* § 1012(b).

110. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Duane v. Gov’t Employees Ins. Co., 784 F. Supp. 1209, 1220 (D. Md. 1992) (“When considering the effect of the McCarran-Ferguson Act, courts have concluded with near uniformity that the preemptive reach of the Act must be narrowly construed.”), *aff’d*, 37 F.3d 1036 (4th Cir. 1994).

111. *See, e.g.*, Anglin v. Blue Shield of Va., 693 F.2d 315, 320 (4th Cir. 1982) (“it is readily apparent that the courts, including this one, have often given a narrow interpretation to the term [business of insurance]”); Cochran v. Paco, Inc., 606 F.2d 460, 467 (5th Cir. 1979).

112. *See supra* notes 59-79 and accompanying text.

113. *See supra* note 64 and accompanying text.

114. 15 U.S.C. § 1012(b).

insurers file insurance policy forms and rating rules, along with the proposed rates to be charged, with the state insurance regulatory department prior to their sale to the public. Insurers are usually forbidden under state law to deviate from their filed policy forms, rating rules, and rates without express approval and consent from the state insurance regulators. Therefore, insurers reason that any change in their underwriting rates necessarily usurps the power of state regulators to approve underwriting rates.

Insurers also proffer a similar argument as to why the FHA violates state insurance laws. Virtually every state prohibits “unfair discrimination” in insurance rates.¹¹⁵ Insurers often argue that anything other than neutral underwriting rates will conflict with state laws against unfair discrimination in insurance, because (so the argument goes) providing favorable rates to one insured over another is inherently “unfair.”¹¹⁶

Although insurer/defendants have made these arguments nearly every time they have faced an FHA claim,¹¹⁷ no court has ever applied McCarran-Ferguson to the FHA. In fact, every court that has considered the issue has concluded that McCarran-Ferguson does not affect the FHA.¹¹⁸ The reasoning of these cases is quite simple: the McCarran-

115. See SANDLER ET AL., *supra* note 4, at § 2.03[1][a][ii][E], at 2-42.

116. See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1361 (6th Cir. 1995).

117. See, e.g., *Squires*, *supra* note 3, at 495 (noting that insurers frequently rely on the McCarran-Ferguson Act to avoid FHA lawsuits). In a recent lawsuit filed in the federal district court in the District of Columbia alleging unfair discrimination, the defendant/insurer did not set forth a McCarran-Ferguson defense in its (ultimately unsuccessful) motion to dismiss. See Memorandum of Law in Support of Defendant’s Motion to Dismiss Complaint, *Nat’l Fair Hous. Alliance v. Prudential Ins. Co.*, No. 1:10CV02199 (EGS) (D.D.C. Jan. 9, 2001) (on file with author). Prudential’s motion may signal that insurers have given up on the McCarran-Ferguson defense in FHA cases.

118. See, e.g., *Nationwide*, 52 F.3d at 1363 (finding that the FHA would not conflict with Ohio insurance law); *United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm’n*, 24 F.3d 1008, 1016 (7th Cir. 1994) (FHA would not conflict with Indiana insurance law); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) (Wisconsin law); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir. 1984) (North Carolina law); *Dehoyos v. Allstate Corp.*, No. SA-01-CA-1010-FB, at 4-7 (W.D. Tex. Apr. 5, 2002) (unpublished decision on file with author) (Texas and Florida law); *Koontz v. Grange Mut. Cas. Co.*, No. C2-98-318, at 10-11 (S.D. Ohio Jan. 21, 2000) (Ohio law); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 5 (D.D.C. 1999) (Maryland law); *Canady v. Allstate Ins. Co.*, P-H Fair Housing-Fair Lending Reporter, ¶¶ 16,120, 16,120.4-.5 (W.D. Mo. 1996) (Missouri law); *McDiarmid v. Econ. Fire & Cas. Co.*, 604 F. Supp. 105, 108-09 (S.D. Ohio 1984) (Ohio law); *Pierce v. Metro. Prop. & Liab. Ins.*, No. C-3-82-004, 1984 U.S. Dist. LEXIS 24653, at **7-13 (S.D. Ohio Aug. 1, 1984) (Ohio law); *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co.*, 472 F. Supp. 1106, 1111-12 (S.D. Ohio 1979) (Ohio law). See also *Moore v. Liberty Nat’l Life Ins. Co.*, 267 F.3d 1209, 1222-23 (11th Cir. 2001) (holding that applying 42 U.S.C. §§ 1981-82 against alleged discrimination by life insurer would not affect Alabama insurance law).

Ferguson Act only preempts federal statutes that are in direct conflict with state insurance laws.¹¹⁹ In addition, courts note that, while underwriting may constitute the business of insurance, unfair (and hence, illegal) discriminatory underwriting does not.¹²⁰

It is not enough for insurers to point to state insurance laws proscribing “unfair discrimination” and claim that McCarran-Ferguson thus precludes an FHA suit. At best, the FHA only provides the same federal proscription against unfair discrimination in insurance as do states. As the Seventh Circuit bluntly explained, “[d]uplication is not conflict.”¹²¹ Indeed, arguments that application of the Fair Housing Act is in “direct conflict” with state laws preventing *unfair* discrimination in insurance are facially illogical. Common sense suggests that states’ policies of preventing unfair discrimination in insurance are “likely to be furthered, not frustrated, by the application of the FHA.”¹²² No insurer has identified a state law that is in direct conflict with the FHA, and the author of this Article is not aware of the existence of such a law. Nor has there been an instance in which a state has intervened in an FHA/insurance case to argue that the FHA is at odds with that state’s insurance laws.¹²³

Also complicating matters for insurers wishing to assert McCarran-Ferguson defenses is the fact that the majority of states (and the District of Columbia) have enacted fair housing laws that parallel the mandates of the FHA.¹²⁴ It is difficult (if not impossible) for insurers to contend

119. One commentator has urged that the “direct conflict” test is inconsistent with the original purpose of the McCarran-Ferguson Act, and should be disregarded in favor of a less stringent standard. *See generally* Farrokh Jhabvala, *The “Direct Conflict” Test for First Clause McCarran-Ferguson Cases*, 33 TORT & INS. L.J. 1147 (1998). No court has ever adopted this reasoning, and it appears that the “direct conflict” test is well-settled among courts.

120. *See, e.g.,* Duane v. Gov’t Employees Ins. Co., 784 F. Supp. 1209, 1221 (D. Md. 1992). In *Duane*, there was a “failure to demonstrate a positive relation between the policy of refusing to underwrite [a protected class] and the general practice of underwriting and ratemaking.” *Id.* As such, the court held that McCarran-Ferguson was not applicable. *See id.*

121. *American Family*, 978 F.2d at 295; *accord* *McDiarmid*, 604 F. Supp. at 109 (concluding that the FHA “does not permit anything that [state law] prohibits and [the FHA] does not prohibit anything that [state law] permits”); LEE R. RUSS, COUCH ON INSURANCE 3D § 4:5, at 4-12 (1996) (“Application of the Fair Housing Act is not subject to McCarran preemption merely because of an existing state insurance law banning discrimination.”).

122. *Wai*, 75 F. Supp. 2d at 5 n.4.

123. *See American Family*, 978 F.2d at 297 (noting that state did not intervene in the *American Family* case to argue that the federal law at issue would frustrate its scheme of insurance regulation); *cf. Moore*, 267 F.3d at 1222 (stating the same in section 1983 lawsuit against insurers for racial discrimination).

124. Using Ohio as an example, the Ohio Civil Rights Act prohibits discrimination in homeowner’s insurance on the basis of handicap, *see* OHIO REV. CODE ANN. § 4112.02(H)(4) (Anderson 2001), and also mandates “reasonable accommodations” when necessary to make

that the nondiscrimination and reasonable accommodations mandates of the FHA “conflict” with state insurance law and are therefore preempted when the state has adopted the same mandates as has the FHA.

Nor can insurers take any solace in the fact that the most prominent of the McCarran-Ferguson/FHA cases have involved allegations of racial redlining, or intentional discrimination, as opposed to disparate impact or reasonable accommodation claims. Based on the reasoning of the redlining cases, there is no reason to believe that a plaintiff asserting a disparate impact theory or a reasonable accommodation theory is precluded from doing so by the McCarran-Ferguson Act, absent a conflicting state insurance law or regulation.¹²⁵ Several courts have recognized disparate impact and reasonable accommodation theories in FHA cases.¹²⁶

Nor have courts been receptive to arguments that the remedies provided by the FHA would generally “upset” a state regulatory scheme. Many states do not allow for a private right of action to enforce state

housing available. *See id.* § 4112.02(H)(19). As of 1988, the following states had laws that were “substantially equivalent” to the FHA: Alaska, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington, West Virginia, Wisconsin, and the District of Columbia. *See Implementation of The Fair Housing Amendments Act of 1983*, 53 Fed. Reg. 44,992, 45,019-20 (Nov. 7, 1988). Since that time, Georgia, Ohio, Texas, Utah, and Vermont have enacted fair housing legislation. *See SCHWEMM, supra* note 17, at Appendix C.

125. It is also highly questionable whether McCarran-Ferguson can apply in such a piecemeal fashion. The author is not aware of any decision in which a court held that a certain portion of a federal statute was preempted by the McCarran-Ferguson Act whereas other portions of the same statute were not. In any event, courts have rejected McCarran-Ferguson defenses in disparate impact claims and reasonable accommodation claims. *See Canady v. Allstate Ins. Co.*, P-H Fair Housing-Fair Lending Reporter, ¶¶ 16,120, 16,120.3-.5 (W.D. Mo. 1996) (rejecting defense as to disparate impact claim)); *Wai*, 75 F. Supp. 2d at 5 (rejecting as to both types of claims).

126. *See supra* notes 80-90 & *infra* notes 211-22 and accompanying text. Indeed, courts have also noted that their states’ insurance scheme have little to do with civil rights laws, but instead are only concerned with the “minutia of running an insurance company.” *See Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 667, 671 (Ohio C.P. 1997) (holding that Ohio insurance scheme “addresses the minutia of running an insurance company; it does not deal with such broader topics as the civil rights implications of offering certain types of insurance to certain groups of people”). In addition, in both *McDiarmid* and *Pierce*, Judge Rice specifically considered whether application of the FHA would “invalidate, impair or supersede” OHIO REV. CODE ANN. § 3901.21(M)—which prohibits “unfair” discrimination in insurance. *See McDiarmid*, 604 F. Supp. at 108-09; *Pierce v. Metro. Prop. & Liab. Ins.*, No. C-3-82-004, 1984 U.S. Dist. LEXIS 24653, at **9-12 (S.D. Ohio Aug. 1, 1984). After examining the legislative history of the statute, Judge Rice concluded that O.R.C. § 3901.21(M) did *not* address insurance redlining, but rather was to “eliminat[e] . . . sex discrimination in the business of insurance.” *McDiarmid*, 604 F. Supp. at 109; *Pierce*, 1984 U.S. Dist. LEXIS 24653, at *11. Accordingly, McCarran-Ferguson posed no bar to the FHA claim.

“unfair discrimination” insurance laws. The insurers in both *Nationwide* and *American Family* contended that allowing private remedies against insurers under the FHA would impair state insurance schemes.¹²⁷ Both the Sixth and Seventh Circuits rejected these arguments, reasoning that the difference in types of remedies offered by the FHA and states is not sufficient to warrant preemption.¹²⁸ As the Sixth Circuit later explained in a non-FHA case, “[a] party seeking to invoke McCarran-Ferguson cannot simply point to additional procedural measures included in a federal law without identifying some substantive aspect of the state law that is being invalidated, impaired or superseded.”¹²⁹

This is not to suggest that the McCarran-Ferguson Act can never apply to an FHA case. As the Seventh Circuit noted in *American Family*, states are free to enact insurance laws or regulations that authorize insurance redlining or otherwise endorse the use of underwriting methods that would be prohibited by the FHA.¹³⁰ Hence, if a state-authorized housing underwriting criteria that would result in a disparate impact on groups protected under the FHA, then McCarran-Ferguson would preempt any recourse that a plaintiff had under the FHA. Given that many states already mandate fair housing under state law, such circumstances are extremely unlikely.

B. *The Primary Jurisdiction Doctrine*

Closely related to the McCarran-Ferguson defense is the “primary jurisdiction” defense. As explained by the Eighth Circuit:

Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency. It is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. This doctrine is often confused with the doctrine of exhaustion of administrative remedies. The exhaustion doctrine ordinarily requires a plaintiff to pursue relief, when available, from an administrative agency before proceeding to the courts. Until

127. See *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1531, 1363 (6th Cir. 1995); *American Family*, 978 F.2d at 297.

128. See *Nationwide*, 52 F.3d at 1363; *American Family*, 978 F.2d at 297.

129. *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 392 (6th Cir. 1996).

130. *American Family*, 978 F.2d at 297 (“If Wisconsin wants to authorize redlining, it need only say so.”); Raymond A. Guenter, *Rediscovering the McCarran-Ferguson Act’s Commerce Clause Limitation*, 6 CONN. INS. L.J. 253, 349 (2000) (stating “that if a state insurance law did authorize racial discrimination, the Act would cause such a law to prevail over the [FHA]”).

that recourse is exhausted, suit is premature and must be dismissed. The doctrine of primary jurisdiction requires a court to enable a referral to an agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.¹³¹

Thus, insurers argue, because all states have departments of insurance overseeing insurance practices, any complaints of unfair discrimination in underwriting are the province of state administrative agencies, rather than federal courts.

Like the McCarran-Ferguson Act, the primary jurisdiction doctrine has not been availing as a defense against FHA lawsuits. The problem with the primary jurisdiction defense is that it was never intended to abrogate plaintiffs' federal statutory rights in favor of administrative enforcement of state insurance regulations. Federal civil rights statutes such as the FHA take precedence over state administrative remedies. The Supreme Court has long held that it would defeat the purposes of providing a federal remedy for discrimination if the "assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."¹³² At least four courts have rejected a primary jurisdiction defense in FHA cases.¹³³

C. The Filed Rate Doctrine

Another argument sometimes made by defendant insurers is that their policy forms and rating rules must necessarily be lawful because they have been filed and approved with the state insurance regulators. Although this argument is usually conflated with an argument that the FHA does not recognize a disparate impact theory against insurers,¹³⁴ it is actually a derivation of the so-called "filed rate doctrine." Typically,

131. Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1455-56 (8th Cir. 1995) (internal citations and quotations omitted).

132. McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 672 (1963).

133. See, e.g., Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 61 (D.D.C. 2002); Canady v. Allstate Ins. Co., P-H Fair Housing-Fair Lending Reporter, ¶¶ 16,120, 16,120.5-6 (W.D. Mo. 1996); Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., 704 N.E.2d 667, 671 (Ohio C.P. 1997) (finding that the Ohio legislature did not intend the Superintendent of Insurance to have primary jurisdiction over insurance redlining claims); Toledo Fair Hous. Ctr. v. Farmers Ins. Group, Nos. CI99-1339 & CI00-2981, at 19-21 (Ohio C.P. Mar. 29, 2001) (unpublished opinion on file with author).

There are other reasons why the primary jurisdiction doctrine does not apply in FHA cases. For example, primary jurisdiction does not exist when an administrative agency is without authority to grant the relief requested. See Barbara v. NYSE, 99 F.3d 49, 57 (2d Cir. 1996). Often, if not always, state insurance agencies have no authority to award compensatory damages (as are usually sought in FHA cases against insurers). See, e.g., D.C. CODE ANN. § 35-2709 (2002).

134. See *infra* notes 192-93 and accompanying text.

the filed rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's "filed rate" is too high, or otherwise unfair or unlawful.¹³⁵ However, the doctrine is most appropriate to entities that operate a monopoly (such as public utilities), or at least are required to charge a fixed rate.¹³⁶ To date, the filed-rate doctrine has never been applied in the homeowners' or property insurance context where the insurance product at issue is a specific type of policy.¹³⁷ Indeed, the *Canady* court specifically rejected as "nonsensical" a filed-rate doctrine attack on the FHA.¹³⁸

Even assuming that the filed-rate doctrine was applicable to homeowners' insurance, if defendant insurers are going to attempt to take advantage of the filed-rate doctrine to argue that they are immune from an FHA disparate impact analysis, plaintiffs ought likewise to be able to utilize the recognized defenses to the doctrine in rebuttal. Typically, the filed-rate doctrine has been held inapplicable in the insurance context because (1) few state insurance schemes allow for review of the approved rates, and (2) plaintiffs rarely have any alternative remedies to challenge unfair underwriting rates.¹³⁹ The Ninth Circuit, for example, has held that, unless insurers can demonstrate that their filed rates were subject to meaningful review rather than mere "approval" by state regulators, the fact that the rates were approved—

135. The doctrine was first recognized by the Supreme Court in *Keogh v. Chicago & Northwestern Railway, Co.*, 260 U.S. 156 (1922), which dismissed allegations of antitrust violations against the defendant's shipping rates that had been submitted to and approved by the Interstate Commerce Commission. The "filed rate doctrine" is sometimes known as the "filed tariff doctrine" or the "*Keogh* doctrine."

The filed rate doctrine has been subject to much criticism, and has been attacked as outdated. *See, e.g.*, *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1352-64 (2d Cir. 1985) (Friendly, J.); *Cellular Plus, Inc. v. Superior Court*, 18 Cal. Rptr. 2d 308, 317-20 (Cal. Ct. App. 1993).

136. *See* Allan Kanner, *The Filed Rate Doctrine and Insurance Fraud Litigation*, 76 N.D. L. REV. 1, 27 (2000).

137. *See id.*

138. *Canady*, P-H Fair Housing-Fair Lending Reporter, at ¶ 16,120.7. The court also noted that the "vast majority of cases applying the filed-rate doctrine have dealt with the transportation industry or disputes involving utilities." *Id.* The court ultimately rejected the filed-rate doctrine attack on the FHA because, in the insurance industry, "there is no one set price charged for all persons desiring insurance." *Id.*

139. *See* Kanner, *supra* note 136, at 11-18. Kanner reports that "[g]enerally, efforts to use the filed rate doctrine in the insurance context have been unsuccessful, since its doctrinal foundations make little sense in the insurance context. Therefore, the overwhelming majority of federal and state courts . . . have never applied the filed rate doctrine to insurance." *Id.* at 2. *But see* SANDLER ET AL., *supra* note 4, § 2.02[3][a][ii][C], at 2-21 (arguing that filed rate doctrine is applicable to insurance).

without more—does not preclude a federal challenge to the rates.¹⁴⁰ As such, as dubious as it is to apply the justifications of the filed-rate doctrine to underwriting criteria that have been “approved” by the state, this type of frontal attack against an FHA claim is especially vulnerable if the particular state does not have an intense insurance regulatory scheme.

V. THEORIES OF LIABILITY UNDER THE FHA

There are three possible theories upon which a plaintiff can assert an FHA claim: (1) intentional discrimination/disparate treatment; (2) disparate impact; and (3) reasonable accommodation. Most often, plaintiffs predicate their FHA claims on either an intentional discrimination/disparate treatment theory, or a disparate impact theory.¹⁴¹ The remaining theory—that the defendant failed to provide the plaintiff with a reasonable accommodation¹⁴²—is only applicable in the context of disability discrimination.

140. In *Brown v. Tigor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), the Ninth Circuit considered allegations that the defendant-insurers violated federal antitrust laws. The defendants argued for application of the filed rate doctrine because the rates had been approved by state regulators. The Ninth Circuit rejected this argument:

In the present case, Tigor makes much of the fact that the filed rates are the only rates which it may legally charge in Arizona and Wisconsin. However, if those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge. The absence of meaningful state review allows the insurers to file any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action.

Id. at 393-94. However, at least one court has applied the filed rate doctrine in circumstances identical to those in *Tigor Title* because it found that its state insurance scheme was comprehensive enough to justify application of the doctrine. See *Amundson & Assocs. Art. Studio, Ltd. v. Nat'l Council on Compensation Ins., Inc.*, 988 P.2d 1208 (Kan. Ct. App. 1999). The *Amundson* court based its decision at least partially on the fact that the state insurance scheme was enacted after the state antitrust laws, and applied the “settled rule of statutory construction that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication; the later enactment must prevail.” *Id.* at 1212. Thus, even assuming *arguendo* that the “filed rate doctrine” can be applied to underwriting criteria as opposed to a single rate (as was the case in both *Tigor Title* and *Amundson*), most, if not all, states have enacted fair housing laws that parallel the federal FHA. See *supra* note 124. It seems virtually certain that every state fair housing statute post-dates the enactment of its counterpart state insurance scheme, and accordingly, must be deemed controlling pursuant to the same canons of statutory construction as those cited in *Amundson*.

141. See, e.g., *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 460 (D.N.J. 1992).

142. See 42 U.S.C. § 3604(f)(3) (1994).

A. *Intentional Discrimination/Disparate Treatment*

Proving intentional discrimination under the FHA “is not usually a heavy burden.”¹⁴³ It has been said that cases alleging intentional discrimination “account for most of the litigation under Title VIII.”¹⁴⁴ At least so far, such has been true for FHA insurance cases as well, although disparate impact and reasonable accommodation cases are certainly making headway in that regard. Courts accept proof of intentional discrimination by both direct and indirect evidence. Each will be discussed in turn.

1. Direct Evidence in FHA/Insurance Cases

a. In General

In most cases, proving an FHA violation by means of direct evidence will be fairly straightforward. Intentional discrimination in the housing insurance context can result when an insurer cancels its insured’s homeowner’s policy because of the insured’s protected status, refuses to offer a policy, offers a policy providing less coverage, and/or charges a higher premium because of the applicant’s protected status. It makes no difference whether the disparate treatment was conducted by the insurer itself or its agents—courts have consistently held that defendants cannot escape FHA liability by distancing themselves from their agents.¹⁴⁵

It is not necessary to show that the protected status was the sole reason that the defendant discriminated against the plaintiff—one need only show that the protected status was a significant factor.¹⁴⁶ Moreover,

143. *O’Neal v. Ala. Dep’t of Pub. Health*, 826 F. Supp. 1368, 1374 (M.D. Ala. 1993).

144. SCHWEMM, *supra* note 17, § 10:2.

145. *See, e.g., Alexander v. Riga*, 208 F.3d 419, 433 (3d Cir. 2000) (citing numerous cases); *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 141 (6th Cir. 1985) (noting that attempts to distinguish between principal and agent has “consistently been rejected in Fair Housing Act cases”). *But see* Andrew L. Sandler et al., *The Liability of Insurers for Alleged Discriminatory Conduct of Independent Agents*, 17-3 J. INS. REG. 327, 334-35 (1999) (arguing that whether or not insurer had control over agent is a fact-specific inquiry).

146. *See, e.g., Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (“To prove discriminatory intent, a plaintiff need only show that the handicap of the potential residents [of a group home] . . . was in some part the basis for the policy being challenged,” in other words, disability discrimination) (quoting *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 (D. Md. 1993)); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982) (showing race discrimination); *O’Neil*, 826 F. Supp. at 1374 (citing race discrimination and stating “it is not necessary to show that the defendant acted out of malice or ill will or even that the defendant was solely motivated by a proscribed animus—it is sufficient to show that the discrimination was meant to occur and that it occurred”).

it is not necessary for the plaintiff to demonstrate that the insurer acted with an “evil” motive.¹⁴⁷ Courts deciding FHA claims occasionally equate “evil motive” with “animus,” which can lead to apparently inconsistent results.¹⁴⁸ This apparent inconsistency is illusory, however.¹⁴⁹

147. As one court explained in rejecting an “evil motive”/animus standard:

A person who attempts to prevent a black family from buying the house next door because the presence of a black family on the block will decrease property values violates the Fair Housing Act just as assuredly as a person who attempts to prevent a black family from buying the house next door because that person dislikes all black people.

United States v. City of Birmingham, 538 F. Supp. 819, 830 (E.D. Mich. 1982), *aff’d as modified*, 727 F.2d 560 (6th Cir. 1984). The “no evil motive” rule of intentional discrimination is applicable to other classes protected under the FHA. *See, e.g.*, United States v. Lepore, 816 F. Supp. 1011, 1021 (M.D. Pa. 1991) (“A refusal to rent based on familial status contravenes the Fair Housing Act regardless of whether the refusal is based on some sort of personal animus toward children.”); United States v. Reece, 457 F. Supp. 43, 48 (D. Mont. 1978) (landlord’s excuse that he did not want to rent to women for fear that they may be raped amounted to intentional discrimination despite lack of ill will toward women).

148. *Compare Bangerter*, 46 F.3d at 1501 (“Specifically with regard to housing discrimination, a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHAA in a different manner than others”), *O’Neal*, 826 F. Supp. at 1374 (finding ill will or discriminatory animus are not required for intentional discrimination), *and* United States v. Scott, 788 F. Supp. 1555, 1561 (D. Kan. 1992) (finding the same), *with* Smith & Lee Assocs. Inc. v. City of Taylor, 102 F.3d 781, 794 (6th Cir. 1996) (dicta requiring a showing of animus in FHA disability discrimination case), *and* Sofarelli v. Pinellas County, 931 F.2d 718, 723 (11th Cir. 1991) (“Because Sofarelli concedes that he ‘is not aware of and does not allege’ any claims that the Pinellas County Sheriff acted with racial animus . . . Sofarelli fails to state a claim under the Fair Housing Act.”) (citation omitted).

149. The differences in the above opinions as to whether “animus” is necessary to prove a disparate treatment claim is attributable to variation in the definitions that courts use for the term “animus.” The Second Circuit, for example, has held that “animus” is not synonymous with “ill will,” but rather describes a person’s “basic attitude or intention.” *See, e.g.*, N.Y. State Nat’l Org. for Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989); *accord* Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 269-70 (1993) (defining “animus” standard in gender discrimination case as having “a purpose that focuses upon women by reason of their sex . . . directed specifically at women as a class”) (emphasis omitted). Black’s defines “animus” as “mind; soul; intention; disposition; design; will; [or] that which informs the body.” BLACK’S LAW DICTIONARY 87 (6th ed. 1990). This definition is consistent with the definitions of *Terry* and *Bray*. However, witnesses before Congress defined “animus” as a hostile or malevolent intention. *See, e.g.*, *Hearing on H.R. 1133 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Crimes of Violence Motivated by Gender*, 103d Cong. 101 (1993) (prepared statement of James Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice) (quoting Webster’s dictionary as defining “animus” as “prejudiced and often spiteful”). Webster’s itself provides several definitions of the term, including both the *Terry/Bray* definition as well as the ill will. *See* WEBSTER’S THIRD NEW INT’L DICTIONARY 86 (1986) (“animus” definitions include (1) “pervading and characteristic approach or treatment . . . dominant tone” . . . (3) “ill will, antagonism . . .”).

Courts that say animus is not required to establish an FHA violation may be understood as holding only that “ill will” is not required.¹⁵⁰ Conversely, decisions holding that animus *is* required to establish an FHA violation may be understood as holding only that, when the defendant makes housing unavailable, he or she takes the potential homeowner or resident’s protected status into account. So long as the plaintiff suffered discrimination because of any protected status, an FHA violation has occurred.

b. In Disability Discrimination Cases

A few words should be said about disparate treatment against people with disabilities. Courts considering FHA disability discrimination cases must recognize that disability discrimination is not perfectly analogous to race discrimination.¹⁵¹ The Supreme Court has noted that discrimination against the handicapped is “most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”¹⁵² This view is consistent with the FHAA’s legislative history, as the House Report accompanying the FHAA states:

The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.¹⁵³

150. See *supra* note 146.

151. Courts have often cautioned against automatically applying rules involving race discrimination to the disability context. See, e.g., *Smith v. Barton*, 914 F.2d 1330, 1339 n.13 (9th Cir. 1990) (noting that disability cases present “novel legal issues”); *Howard v. City of Beavercreek*, 108 F. Supp. 2d 866, 872 n.1 (S.D. Ohio 2000) (stating that the application of “employment” standards to FHA disability discrimination cases “is an imperfect fit”); *Fink v. Kitzman*, 881 F. Supp. 1347, 1368-69 (N.D. Iowa 1995); *Garrity v. Gallen*, 522 F. Supp. 171, 206 (D.N.H. 1981) (“[A]ttempting to fit the problem of [disability] discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole.”).

152. *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (interpreting Rehabilitation Act of 1973, 29 U.S.C. § 701-97 (2000)).

153. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 (citation omitted).

One court applying the FHA in the zoning context emphasized the point by observing that, “because of their special needs, handicapped persons are often denied equal opportunities when they are treated like all other non-handicapped persons.”¹⁵⁴ While it is certainly conceivable that an insurer would refuse to underwrite a home and/or cancel a policy because the occupants possessed disabilities, such circumstances are probably rare.

Courts should therefore be especially hesitant to apply an “animus” standard for an FHA case alleging intentional disability discrimination.¹⁵⁵ In applying other disability discrimination statutes—namely, the Americans with Disabilities Act¹⁵⁶ and the Rehabilitation Act of 1973¹⁵⁷ (“Rehabilitation Act”)—courts have generally accepted a “deliberate indifference” standard rather than an “animus” standard for intentional discrimination. In particular, under these federal anti-discrimination statutes, intentional discrimination is established when the defendant acts with a “deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights.”¹⁵⁸

The legislative history of the FHAA states that the same standards as were developed under the Rehabilitation Act are to be used in FHA disability discrimination claims.¹⁵⁹ Therefore, the “deliberate indifference,” rather than “animus,” standard should be alleged in support of an FHA disability discrimination claim. The distinction may

154. *Parish of Jefferson v. Allied Health Care, Inc.*, Nos. 91-1199, 1200, 3959, 1992 U.S. Dist. LEXIS 9124, at *19 (E.D. La. June 10, 1992).

155. At the very least, as with race, the “animus” standard in FHA disability discrimination does not require an “evil motive”—it only requires disparate treatment. *See, e.g.*, *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 696 (E.D. Pa. 1992). *But see* *Smith & Lee Assocs. Inc. v. City of Taylor*, 102 F.3d 781, 794 (dicta suggesting that animus is required in FHA disability discrimination case).

156. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-213).

157. 29 U.S.C. §§ 701-97.

158. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999); *accord* *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *Bravin v. Mount Sinai Med. Ctr.*, 58 F. Supp. 2d 269, 273 (S.D.N.Y. 1999); *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 828 (D. Md. 1998); *Ferguson v. City of Phoenix*, 931 F. Supp. 2d 688, 697 (D. Ariz. 1996), *aff'd and remanded*, 157 F.3d 668 (9th Cir. 1998).

159. Congress stated that it intended to use the “same definitions and concepts” of the Rehabilitation Act when it extended the FHA’s protections to persons with disabilities. *See* H.R. REP. NO. 100-711, at 17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2178; *see also* *Howard v. City of Beavercreek*, 108 F. Supp. 2d 866, 872 n.1 (S.D. Ohio 2000) (stating that standards for discrimination in FHAA handicap discrimination cases are to follow the Rehabilitation Act of 1973).

be crucial in FHA/insurance cases, because the “animus” standard is more difficult to meet than the “deliberate indifference” standard.

Group homes illustrate the difference between the standards. Suppose an Oxford House rents a home to a group of unrelated adults in recovery from substance abuse. The Oxford House applies for homeowner’s insurance and is told that the home does not qualify for a homeowner’s policy because it is considered a “boarding” house. Although, for the people who live there, an Oxford House or other group home is like a family,¹⁶⁰ the insurer nonetheless invokes an exclusion for dwellings with the “no more than five roomers or boarders” rule as a basis for denying homeowner’s insurance. As a factual matter, residents of Oxford Houses are not “roomers or boarders” in the usual sense of the term.¹⁶¹

160. See *infra* note 161.

161. Courts have held that the question of whether or not a home is sufficiently akin to a family setting to qualify for a policy is a question of fact. See, e.g., *Group House v. Bd. of Zoning*, 380 N.E.2d 207, 211 (N.Y. 1978); accord *Cherry Hill Township v. Oxford House, Inc.*, 621 A.2d 952, 962 (N.J. App. 1993) (finding that an Oxford House was substantially different from a halfway house facility). Generally speaking, the simple definitions are as follows: roomers rent rooms; boarders rent rooms and meals; tenants rent an entire house. In all Oxford Houses, the residents/tenants rent the use of the entire house, and not individual rooms or any meals. Thus, under usual underwriting criteria, these occupants must be viewed as “tenants,” and not as “roomers or boarders.” Courts have ruled, on point, that residents of an Oxford House are *not* “roomers or boarders,” and that an Oxford House is not a “rooming” or “boarding” house. As one federal court explained in describing an Oxford House:

The residents share more than “household responsibilities” and meals. The residents make all house decisions in a democratic fashion. But even more importantly, the support they lend each other is therapeutic, in the same manner as that of a well-functioning family. The relationship between the resident-plaintiffs herein is not analogous to that between residents of a boarding house.

Oxford House-Evergreen v. City of Plainfield, 769 F. Supp. 1329, 1335 (D.N.J. 1991). Another district court similarly found:

Oxford Houses are not health care facilities, rehabilitation centers, or supervised halfway houses. They are simply residential dwellings rented by a group of individuals who are recovering from alcoholism and drug addiction . . . Unlike a boarding house, where a proprietor is responsible to run and operate the premises, at Oxford House, the residents are responsible for their own food and care as well as for running the home. Because the house must be self-supporting, each of the residents needs a source of income to pay his or her fair share of the expenses.

Oxford House, Inc. v. Township of Cherry Hill, 799 F. Supp. 450, 452 (D.N.J. 1992); see also *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 284 (D. Conn. 2001) (rejecting city’s position that Oxford House was a “boarding house”); *Martin v. Constance*, 843 F. Supp. 1321, 1325 (E.D. Mo. 1994) (“The group home would be more closely akin to a family residence, than a business or boarding house with transient occupants.”); *United States v. Borough of Audubon*, 797 F. Supp. 353, 355 (D.N.J. 1991) (“Oxford Houses are not health care facilities, rehabilitation centers, or supervised halfway houses,” but rather “are simply residential dwellings that are rented by a group of individuals who are recovering from alcoholism or drug addiction.”); *Cherry Hill Township*, 621 A.2d at 962 (stating that Oxford Houses resemble “ordinary residences”).

Under the “animus” standard, there is no FHA violation, because the insurer never took the tenants’ disabilities into account when denying coverage. However, under the “deliberate indifference” standard for intentional discrimination, an insurer would almost certainly be liable under the FHA if it acts adversely upon an insured’s application on the basis that the group home is a “boarding house,” rather than a family situation, where the facts do not support the insurer’s application of a “roomers or boarders” rule.¹⁶² Indeed, a defendant is liable under the “deliberate indifference” standard even when its belief that it has not violated the federal disability anti-discrimination statutes is a “miscalculation.”¹⁶³

It may be argued that applying anything other than an “animus” standard for intentional discrimination in disability FHA cases would conflate an intentional discrimination claim with a “reasonable accommodation” claim. After all, the “deliberate indifference” standard is tantamount to alleging that the defendant simply ignored the disabled plaintiff’s request for an accommodation. At least one court has adopted this reasoning, holding that a “failure to reasonably accommodate” theory cannot support an intentional discrimination claim under the FHA.¹⁶⁴

Nevertheless, the FHAA’s legislative history is clear that the standards for discrimination under the Rehabilitation Act are to be used in FHA cases. Until courts definitively resolve the issue, insurers should be aware that refusing to underwrite a home because a plaintiff’s disability prevents him from satisfying an underwriting rule could constitute intentional discrimination under a “deliberate indifference” theory.

Lest there be any doubt as to whether Oxford House residents are “roomers” or “tenants,” courts should keep in mind that the terms are usually not defined in homeowners’ policies, and it is an elementary principle of insurance law that all ambiguous terms of a policy must be construed in favor of the insured. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Thompson*, 372 F.2d 256, 258 (9th Cir. 1967).

162. The above argument will fail if it cannot be shown that the residents with disabilities are, in fact, living in a family situation. If, for example, the residents in question are living in what is essentially a traditional nursing facility, there seems little doubt that the “no more than five roomers or boarders” rule would apply.

163. *See Procter v. Prince George’s Hospital Ctr.*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (citation omitted); *Davis v. Flexman*, 109 F. Supp. 2d 776, 791 (S.D. Ohio 1999) (stating that defendant intentionally discriminated against plaintiff when he “had not read” the law and “continued to insist that the law did not require him to provide” an accommodation for the plaintiff).

164. *See Schanz v. Vill. Apts.*, 998 F. Supp. 784, 789 (E.D. Mich. 1998).

2. Indirect Evidence

Courts have acknowledged that FHA defendants are unlikely to admit openly that they discriminated on the basis of race (or any protected status for that matter).¹⁶⁵ After all, only a foolhardy insurer would acknowledge today that it refused to underwrite a home because of the applicant's protected status,¹⁶⁶ and it is admittedly rare that an FHA plaintiff can produce such direct evidence of discrimination against an insurer.¹⁶⁷

For this reason, courts have allowed FHA plaintiffs to prove cases of intentional discrimination through indirect or circumstantial means rather than explicit direct proof. In particular, FHA plaintiffs can also demonstrate intentional discrimination through use of the "burden-shifting" method set forth in *McDonnell-Douglas Corp. v. Green*.¹⁶⁸ A prima facie housing discrimination case is shown when the plaintiff proves: (1) that he or she is a member of a racial minority, (2) that he or she applied for and was qualified to rent or purchase certain property or housing, (3) that he or she was rejected and/or treated differently, and (4) that the housing or rental property remained available thereafter.¹⁶⁹ Most times, the prima facie case will not be difficult for the plaintiff to prove against an insurer.

165. See, e.g., *United States v. Real Estate Dev. Corp.*, 347 F. Supp. 776, 783 (N.D. Miss. 1972) ("The Court recognizes that 'most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro Race.'") (quotation omitted). More recent decisions also are cognizant of the fact that explicit discriminatory intent is exceptionally difficult to prove. See *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000) ("[I]t is unusual that a [FHA defendant] will openly reveal that he or she acted on the basis of discriminatory intent.") (quotation omitted).

166. Such has been known to happen. In the *American Family* case, for example, a sales manager instructed an agent in a tape-recorded conversation, "You write too many blacks . . . You got to write good, solid, premium-paying white people." Squires et al., *The Unavailability of Information on Insurance Unavailability: Insurance Redlining and the Absence of Geocoded Disclosure Data*, HOUS. POLICY DEBATE 347, at 350 (2001) (citation omitted) (available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1202_squires.pdf).

167. See SCHWEMM, *supra* note 17, at § 10:2 ("Most modern Title VIII cases have had to rely heavily, if not exclusively, on circumstantial evidence for proof of the defendant's discriminatory motive."). Of course, "a fair housing plaintiff is always well advised to produce proof of intentional discrimination if he can." Robert G. Schwemm, *Discriminatory Effect and The Fair Housing Act*, 54 NOTRE DAME LAW. 199, 205 (1978).

168. 411 U.S. 792 (1973) (setting forth burden of proof in Title VII cases). See, e.g., *Selden Apts. v. HUD*, 785 F.2d 152, 159 (6th Cir. 1986) (applying burden-shifting method to FHA case); SCHWEMM, *supra* note 17, § 10:2 n.25 (citing decisions from nearly every circuit applying *McDonnell-Douglas* test in FHA cases). Of course, if a plaintiff is able to demonstrate direct intentional discrimination under the FHA, the "burden shifting" test is unnecessary. See, e.g., *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 n.16 (10th Cir. 1995).

169. See *Selden*, 785 F.2d at 159; SCHWEMM, *supra* note 17, § 10:2.

The defendant, in turn, must show some legitimate, nondiscriminatory reason for the disparate treatment.¹⁷⁰ In response, the plaintiff must show that the proffered reason is a pretext that masks discrimination.¹⁷¹ Whether the purported nondiscriminatory reason for the disparate treatment is a pretext is a factual issue for the court.¹⁷²

To date, the author is aware of only one court that has applied the *McDonnell-Douglas* test in an FHA insurance case.¹⁷³ By adjusting the *McDonnell-Douglas* factors to fit the insurance context,¹⁷⁴ the plaintiffs must show: (1) that they belong to a protected class; (2) that they applied for and were eligible for housing-related insurance that was available; (3) that the plaintiffs' insurance application was rejected; and (4) that the housing-related insurance remained available after the rejection.¹⁷⁵

It bears emphasis that the legitimate reason must exist at the time of the disparate treatment; a *post hoc* rationalization of the discriminatory conduct will not suffice.¹⁷⁶ For example, suppose a home owned by an African-American family is more than fifty years old, and the potential policy contains an exclusion for homes over fifty years old. When the family applies for property insurance, the agent asks several questions in processing the application, but does not ask the age of the home. The agent denies the application. When the family/applicants sue, the insurer cannot defend on the grounds that the home would not have been covered anyway.¹⁷⁷

170. See, e.g., *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993).

171. See *Selden*, 785 F.2d at 160.

172. See *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir. 2001).

173. See *Toledo Fair Hous. Ctr. v. Farmers Ins. Group*, Nos. CI99-1339 & CI00-2981, at 13-15 (Ohio C.P. Mar. 29, 2001) (unpublished opinion on file with author) (allowing race discrimination redlining claim brought under state fair housing laws to proceed).

174. Professor Schwemm cites many FHA cases that have applied the *McDonnell-Douglas* factors. Most often, the scenario involves a landlord denying an apartment to a prospective renter. See SCHWEMM, *supra* note 17, § 10:2 n.25 (collecting cases).

175. See, e.g., *Toledo Fair Hous. Ctr.*, Nos. CI99-1339 & CI00-2981, at 14.

176. See, e.g., *United States v. Grooms*, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972); cf. *Alexander v. Local 496, Laborers Int'l Union*, 778 F. Supp. 1401, 1419 (N.D. Ohio 1991) (finding that in Title VII case "[p]ost hoc rationalizations [for discriminatory conduct], however persuasive, will not suffice").

177. See *Grooms*, 348 F. Supp. at 1133. The insurer could, in appropriate circumstances, seek to void the policy on the grounds that the insured committed a material misrepresentation in not disclosing or misrepresenting the age of his house. Some states explicitly place the burden on the insurer to demonstrate such a misrepresentation. See, e.g., *Parsaie v. United Olympic Life Ins. Co.*, 29 F.3d 219, 220 (5th Cir. 1994); *Middlesex Mut. Assurance Co. v. Walsh*, 590 A.2d 957, 964 (Conn. 1991); *Fuller v. Dir. of Fin.*, 694 P.2d 1045, 1048 (Utah 1985). However, such an age restriction could still be vulnerable to a FHA charge based on disparate impact. See *infra* notes 178-79 and accompanying text.

Presumably, the key question would be whether or not the plaintiffs were “qualified” for the insurance in question. Take, for example, the dispute described above as to whether Oxford House residents are living in a family situation, or classified as “roomers or boarders.” Defendant insurers will contend that the plaintiffs either didn’t make out a prima facie case, or alternatively, that the legitimate nondiscriminatory reason for the rejection of the application was because the plaintiffs were not qualified for the insurance product.

Even if the court ultimately decides that an eligibility rule against five “roomers or boarders” is a legitimate nondiscriminatory reason for denying a group home’s insurance application, the reason may be deemed “pretextual.” If, for instance, the defendant insurer has made exceptions with other applications for dwellings consisting of five or more unrelated adults living together (for example, college students renting a house), the defendant insurer would potentially be liable under the FHA if it decides to strictly enforce the rule when presented with a group home’s application for homeowner’s insurance.¹⁷⁸ Evidence that the defendant insurer has made exceptions to other underwriting rules could also support a claim that the invocation of the “roomers or boarders” rule is pretextual, and that the insurer simply does not want to underwrite a home for people with disabilities.

B. Disparate Impact

Under a disparate impact theory, a facially neutral policy may violate the FHA if it has a disproportionate effect on members of a protected class. Although there is nothing in the FHA’s statutory language or legislative history discussing the disparate impact theory,¹⁷⁹ virtually every jurisdiction has held that the “disparate impact” discrimination analysis is appropriate in FHA cases.¹⁸⁰ As one court

178. Cf. *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 278 (D. Conn. 2001) (noting that zoning commissioner had never inspected for alleged “boarding house” violation or enforced prohibition in eleven and a half years).

179. As Professor Schwemm explained: “Intentional discrimination was a way of life in the real estate business, and it was to this situation that the proponents of the Fair Housing Act primarily addressed themselves.” Schwemm, *supra* note 167, at 209.

180. To date, every circuit except the District of Columbia Circuit (which has not spoken on the issue) has held that the disparate impact theory is actionable under the FHA. *See, e.g.*, *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Mountain Side Mobile Estates P’ship v. HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir. 1988); *Keith v. Volpe*, 858 F.2d 467, 482-84 (9th Cir. 1988); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986);

explained, “the necessary premise of the disparate impact approach is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”¹⁸¹

1. Insurance Practices That Are Vulnerable to an FHA/Disparate Impact Claim

a. In Race Discrimination Cases

Underwriting rules in insurance policies that can have a disparate impact on protected classes include the setting of minimum value (i.e., refusing to insure dwellings valued at less than \$50,000) or maximum age requirements (i.e., refusing to insure dwellings at least thirty years old) for homes eligible for coverage.¹⁸² Such rules tend to

Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982); United States v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 147-48 (3d Cir. 1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974). Among other jurisdictions, see, e.g., Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 58-60 (D.D.C. 2002) (applying disparate impact to FHA/insurance case); Samaritan Inns v. District of Columbia, 93 CV 2600, 1995 WL 405710 (D.D.C. June 30, 1995) (approving a disparate impact claim), *aff'd in part and rev'd in part* (approving on other grounds), 114 F.3d 1227 (D.C. Cir. 1997); *In re Township of Warren*, 622 A.2d 1257, 1267 (N.J. 1993) (approving on other grounds and collecting numerous cases); HUD v. Ross, Fair Hous.-Fair Lend. Rptr., ¶ 25,075 (HUD ALJ 1994); HUD v. Carter, Fair Hous.-Fair Lend. Rptr., ¶ 25,029 (HUD ALJ 1992).

In June 2002, the Supreme Court granted certiorari in *Cuyahoga Falls v. Buckeye Community Hope Foundation*, No. 01-1269, 70 U.S.L.W. 3788 (June 24, 2002). Among other questions presented, the Court will consider “In light of constitutional freedom of political expression, can [a] disparate impact claim under [the] Fair Housing Act be maintained against [a] municipal corporation for alleged impact of filing of facially neutral and judicially upheld referendum petition?” *Id.* In *Buckeye Community Hope*, the plaintiffs introduced comments made by neighborhood residents who opposed the establishment of an affordable housing complex at a city council meeting as evidence of discrimination. See *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 640-41 (6th Cir. 2001). The Supreme Court's decision was not available at the time this article went to press, but it is possible that the Court will speak on the application of disparate impact claims in FHA cases.

181. *Mountain Side*, 56 F.3d at 1250-51 (quotation and parenthetical omitted).

182. In a lawsuit filed against Travelers and Aetna in the District of Columbia, it was alleged that the age restrictions shut out 61% of the homes in minority neighborhoods, but only 23% in largely white areas. See Bill Miller, *Insurer Faces Lawsuit Claiming D.C. Bias*, WASH. POST, June 27, 2000, at B3. The suit also alleged that the minimum value requirements shut out 94% of homes in predominately minority neighborhoods, but only 23% of homes in largely white areas. See *id.*

It should be noted that a dwelling's minimum value for underwriting purposes is typically described as \$40,000 or \$50,000. See Jim Gallagher, *Allstate Insists It's Changing, Critics Say Insurer Unfair to Urban Poor*, ST. LOUIS POST-DISPATCH, Aug. 17, 1996, at 3C. The article notes that a 30-year underwriting age restriction would prevent coverage to 69 percent of urban Missouri homes, and 90% of minority-owned homes. See *id.* Likewise, a company with a \$50,000 minimum

disproportionately affect racial minorities and prevent people in such homes from obtaining adequate insurance. The point was illustrated as follows:

Homes valued at less than \$50,000 or built before 1950 often do not qualify for insurance, or only qualify for limited policies like basic fire or market value policies rather than full replacement cost policies. These practices have a clear adverse impact on racial minorities because among owner-occupants in single family dwellings, Black households are more than twice as likely as white households . . . to reside in homes that are valued at less than \$ 50,000. Similarly, 40 percent of black households but only 29 percent of white households live in homes that were built prior to 1950.¹⁸³

Other underwriting mechanisms that potentially limit coverage for homes in predominately minority neighborhoods may exist. For example, refusals to underwrite homes that contain lead paint would obviously affect only older homes, and should not be treated any differently from maximum age restrictions for FHA purposes if such rules tend to limit coverage for homes in predominately minority neighborhoods. Defense lawyers for insurers and lenders have likewise cautioned that the use of credit scores and credit histories could potentially violate the FHA for the same reasons.¹⁸⁴ Insurers have also reached settlement agreements precluding the insurers from limiting coverage of a dwelling because of an adjacent property or property in the surrounding neighborhood, unless that property was shown to pose a specific hazard to the dwelling seeking coverage.¹⁸⁵

value for a dwelling would exclude 80% of the state's minority homeowners and two thirds of rural homes. *See id.*

183. *Hearing on Homeowners' Insurance Discrimination Before the Senate Comm. On Banking, Housing, and Urban Affairs*, 103d Cong. 51. (1994) (statement of Roberta Achtenberg, Assistant Secretary, Dep't of Hous. & Urban Dev.) [hereinafter *Hearing on Homeowners Insurance Discrimination*]; *see also* Badain, *supra* note 4, at 13-15 (contending dwelling maximum age underwriting restrictions are unlawful); Squires, *supra* note 3, at 496 & n.43 (citing study demonstrating disparate impact on minority communities as a result of maximum age and minimum value underwriting guidelines). Even defense lawyers for lenders and insurers have conceded that "underwriting criteria that are based solely and directly on the age of a dwelling or its market value may subject an insurer to unwanted scrutiny." SANDLER ET AL., *supra* note 4, § 2.02[4][b], at 2-30. These lawyers counsel insurers instead to base underwriting criteria on more specific criteria, such as "condition of the roof, heating, wiring or plumbing systems of a house." *Id.*

184. *See* SANDLER ET AL., *supra* note 4, § 2.02[4][b][ii], at 2-31; *cf. Nat'l Fair Hous. Alliance*, 208 F. Supp. 2d at 48 (stating that FHA plaintiffs alleged that defendants improperly used "factors such as credit history to determine eligibility for homeowners insurance").

185. *See* SANDLER ET AL., *supra* note 4, § 2.02[4][b][iii], at 2-31 (quoting *Nationwide and American Family* consent decrees).

Furthermore, insurance companies often refuse to provide coverage sufficient to replace a home if the cost of replacement exceeds the market value of the home by a certain percentage.¹⁸⁶ Such underwriting criteria could have a disparate impact on racial minorities. In support of these underwriting practices, insurers claim that covering a home for more than its market value creates an incentive to destroy the home (i.e., “moral hazard”).¹⁸⁷ Because housing prices in older, minority neighborhoods are likely to be low relative to replacement cost, the unavailability of mortgage and insurance in such neighborhoods depresses home values still further, resulting in a downward spiral that can devastate vast expanses of urban landscape, rendering the housing there unavailable to anyone. Fair housing advocates have argued that such guidelines are based on stereotypes and not on actuarial experience.¹⁸⁸

b. In Disability Discrimination Cases

Similar rules may befall persons with disabilities. Insurers might refuse to provide a homeowner’s policy to a dwelling that houses more than five unrelated adults. Insurers reason that, if there are more than five unrelated adults, the house is considered a “boarding” house, that is, a commercial enterprise (and, thus, a higher insurance risk than an ordinary home).

The “no more than five unrelated adults” rule has a manifest discriminatory effect on “group homes” for people with disabilities. Again, taking Oxford Houses as an example, it is extremely common—if not the norm—for group homes to have more than five unrelated adults. Indeed, when Congress passed the Anti-Drug Abuse Act of 1988, it required states wishing to receive federal block grant funds for the prevention and treatment of substance abuse to establish or assist in establishing group homes comprised of groups of no fewer than six individuals for recovering alcoholics and drug abusers.¹⁸⁹ Courts have specifically recognized that group homes such as Oxford Houses require

186. See Badain, *supra* note 4, at 13-14.

187. See *id.* at 14.

188. See, e.g., *id.* at 13-15. One also wonders just how strong the “moral hazard” arguments are grounded into reality. For example, it cannot be disputed that most people have a strong emotional attachment to their homes. As one of the plaintiffs from the *American Family* case put it, “Some insurance companies say, ‘They’ll just burn down their houses to get the insurance,’ Listenbee said. ‘That really angers me. Your house is the biggest investment you’ll ever make. Why would you want to burn it down?’” Norman, *supra* note 59, at 12.

189. See 42 U.S.C. §§ 300x-21, 25 (1994).

more than five people in order to provide an optimally appropriate environment for recovery.¹⁹⁰

But a rule limiting covered dwellings to no more than five roomers might make it financially impossible to run an Oxford House.¹⁹¹ Application of the “no more than five unrelated adults” rule forces owners of such homes to purchase “commercial” insurance—which often provides less coverage than a homeowners’ policy—at a higher cost. In contrast, “no more than five unrelated adults” rules have a far less significant impact on those who are not otherwise disabled. Such people have many housing choices and alternatives, and the impact of their having to choose among housing alternatives is minimal compared to that for persons with disabilities.

2. Disparate Impact as Cognizable in FHA/Insurance Cases

Many insurers adamantly insist that “disparate impact” is not actionable in the fair housing/insurance context. Insurers contend that their compliance with state insurance regulations proves that their underwriting standards are fair. In addition, insurers argue that increased cost and decreased availability of homeowners’ insurance accurately reflects the increased risk of marketing insurance in urban communities or to a group of unrelated individuals. As the Seventh Circuit put it in *American Family*, “[r]isk discrimination is not race discrimination.”¹⁹² Insurers also rely upon the Sixth Circuit’s decision in *Nationwide*, which noted that HUD (for reasons not explained in the opinion) opted not to argue for the disparate impact theory in the case.¹⁹³ Furthermore, some courts and commentators have suggested that it is inherently unfair for private defendants to be subjected to a disparate impact analysis in fair housing cases, reasoning that private defendants (unlike government entities) cannot be expected to consider how their decisions could

190. See, e.g., *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1331 (D.N.J. 1991).

191. See, e.g., *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 290 (D. Conn. 2001) (finding that Oxford Houses could not be run with “three or less residents” and that at least six residents were necessary to provide supportive environment necessary for residents’ recovery); *Groome Res., Ltd., v. Parish of Jefferson*, 52 F. Supp. 2d 721, 724 (E.D. La. 1999) (“trial evidence convinces the Court that the artificial limit of four unrelated persons living in a single group home will make it economically unfeasible for plaintiff to operate the [group] home”); *ReMed Recovery Care Ctrs. v. Township of Williston*, 36 F. Supp. 2d 676, 686 (E.D. Pa. 1999) (finding evidence that group home could not be operated with only five residents).

192. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992).

193. See *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1362 (6th Cir. 1995).

disproportionately impact the entire community.¹⁹⁴ Insurers bolster this contention by lamenting that HUD has failed to provide guidelines as to what constitutes permissible underwriting, and what does not, for FHA purposes.¹⁹⁵

Facial attacks against application of the disparate impact theory against an insurer in a fair housing case should fail. First, every federal jurisdiction has approved a disparate impact theory of liability in FHA suits brought in contexts other than insurance.¹⁹⁶ There is absolutely nothing in the statutory language or legislative history of the FHA that could plausibly support an argument exempting insurers from disparate impact claims. There was no such special insurance exemption when Congress enacted the FHA in 1968, nor when Congress extended the FHA's protections to more classes through the amendments in 1974 or 1988. If Congress had wished to exempt the insurance industry from disparate impact claims brought under the FHA, it undoubtedly would have said so.¹⁹⁷

Second, arguments that it is inherently unfair for a private

194. See *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1533 (7th Cir. 1990) ("It is one thing to require a municipal government to consider the impact of its zoning decisions on the racial composition of the municipality, another to require an individual broker to consider and take steps to prevent the aggregate impact of many brokers' efforts to give individual customers what those customers want individually, though not collectively."); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106, 1115-16 (D.D.C. 1987) (expressing similar sentiments and refusing to impose disparate impact liability on private defendant absent a showing of discriminatory intent); Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 449-50 (1998) (suggesting that the disparate impact doctrine currently applied to public defendants under Title VIII cannot sensibly be applied to private defendants); Detlefsen, *supra* note 4, at 36 (arguing that applying disparate impact liability to insurance is unfair, but conceding that HUD recognizes the theory); see also Squires, *supra* note 3, at 499 (advocating "disparate impact" theory in FHA/insurance cases, but acknowledging that at the time of writing, it was unclear whether courts would accept theory); Murray, *supra* note 3, at 742-46 (stating virtually the same).

195. This type of argument first appeared in the Ninth Circuit's decision in *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996). In *Pfaff*, private landlords (a retired couple in their 70s) were sued under the FHA after they refused to rent to prospective tenants because their family had five members, and the landlords had an occupancy limit of four tenants. See *id.* at 742-43. The house in question was apparently "very small." See *id.* at 749. HUD agreed with the plaintiffs that the four-person occupancy limit had a disparate impact on the basis of familial status, and thus violated the FHA. See *id.* at 743-45. Among other reasons for reversing HUD's decision, the Ninth Circuit concluded that HUD had failed to give any guidelines as to how "landlords like the Pfaffs" could determine just how they could enforce occupancy limitations without running afoul of the FHA. See *id.* at 749.

196. See cases cited *supra* note 180.

197. Congress has demonstrated that it knows how to create exemptions from the reach of the FHA. See, e.g., 42 U.S.C. § 3602(h) (1994) (excluding current drug users); *id.* § 3602: Transvestism (excluding transvestites); *id.* § 3607(a) (excluding religious organizations); *id.* § 3607(b) (excluding housing for older persons).

defendant to be expected to be aware of the discriminatory effects its practices may have on protected classes are not convincing. Any such distinction between private defendants and governmental entities cannot be found in the FHA's language or legislative history.¹⁹⁸ Indeed, regardless of the views of certain courts and commentators,¹⁹⁹ most circuits have held that the FHA disparate impact theory is applicable to private defendants.²⁰⁰

Third, virtually the same argument can be made when a person with a disability requests a reasonable accommodation from an insurer under the FHA. In fact, the Seventh Circuit observed that reasonable accommodations and disparate impact "for all practical purposes [are] the same thing."²⁰¹ Surely it is beyond question that reasonable accommodation FHA claims apply to private defendants.

Fourth, insurers cannot legitimately take comfort in the *Pfaff* opinion, which sharply criticized HUD for not promulgating guidance as to what sort of occupational limits would be permissible under the FHA.²⁰² Unlike the retired couple in *Pfaff* who rented a single house, insurers are sophisticated business entities fully capable of determining whether particular occupancy rules and/or dwelling age limits will or

198. See *Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 59 n.7 (D.D.C. 2002) (noting that any distinction between governmental and nongovernmental bodies for disparate impact purposes "finds no support in the language of the [FHA] or in the legislative history"); see also *supra* note 43 for cases holding "all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful" under the FHA.

199. See *supra* note 194. Some commentators have criticized the view that it is unfair to apply disparate impact theory to private defendants in FHA cases, charging that such a view "disregards the private defendant's role in the development of the policy or practice in question, and [its] power to modify for a less discriminatory result." Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 79 (1998). The *National Fair Housing Alliance* court agreed with this reasoning. See *Nat'l Fair Hous. Alliance*, 208 F. Supp. 2d at 59, (rejecting argument that disparate impact can never apply to private defendant because a large insurer "clearly has control over the practices and policies at issue here").

200. See, e.g., *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996) (stating that an FHA plaintiff can show discriminatory effect when defendant's "policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class"); *Mountain Side Mobile Estates P'ship v. Sec. of HUD*, 56 F.3d 1243, 1250-52 (10th Cir. 1995) (analyzing disparate impact claim in familial status discrimination case against private defendant); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986-89 (4th Cir. 1984) (same); *Robinson v. 12 Lofts Realty Inc.*, 610 F.2d 1032, 1036 (2d Cir. 1979) (applying disparate impact analysis in racial discrimination case against private defendant); *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978) (applying disparate impact as a way to prove unlawful steering where evidence suggested an apartment owner confined blacks to a specific area of the complex); *Williams v. The Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974) (same).

201. *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999).

202. See *Pfaff v. HUD*, 88 F.3d 739, 749 (9th Cir. 1996).

will not result in business hardships.²⁰³ If courts apply disparate impact liability under the FHA against mortgage lenders,²⁰⁴ then surely the same must be true for insurance defendants. In addition, while HUD guidelines delineating exactly how insurers could avoid disparate impact claims might be helpful,²⁰⁵ a large part of the blame for HUD's failure to promulgate such regulations falls upon the insurance industry itself. The insurance industry has lobbied against HUD taking any such action, stubbornly insisting that the FHA does not apply to insurance (notwithstanding numerous judicial decisions to the contrary).²⁰⁶ For insurers to argue that they have no guidance from the federal government while opposing promulgation of such regulations that would provide guidance is as unpersuasive as a patricide defendant's begging for judicial leniency because he is an orphan.

203. See *supra* note 199 for authority and commentators following this view.

204. See, e.g., *Old W. End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100, 1105-06 (N.D. Ohio 1987).

205. See generally Squires, *supra* note 3 (urging HUD to promulgate regulations to clarify FHA's application to property insurance).

206. The insurance industry's efforts to avoid FHA application to underwriting practices have been consistent and widespread. In 1980, attempts were made to amend the FHA to make the law specifically applicable to insurance. Many insurance groups opposed the amendment, which was ultimately unsuccessful. See Badain, *supra* note 4, at 44-45 & n.248 (noting that several insurance groups filed statements at hearings opposing inclusion of insurance to FHA). In the mid-1990s, the insurance industry successfully prevented HUD from promulgating guidelines for property insurance, as President Clinton had mandated in a 1994 Executive Order. See Kirk M. Herath & Tammy L. Rader, *The Redlining Fire Continues to Burn*, BEST'S REV.—PROP. CAS. INS. EDITION, Feb. 1995, at 62. In 1997, the insurance industry has fought to get HUD's appropriations budget reduced in hopes of preventing investigations regarding FHA violations against the insurance industry. See Banham, *supra* note 11, at 11A (noting insurance industry's lobbying efforts "to encourage Congress to cut HUD's appropriations"). These efforts were successful. See *HUD to Lose Money to Investigate Insurers' Redlining*, BESTWIRE (July 31, 1998). In 2000, Congress rejected legislative proposals that would have provided federal reinsurance contracts through the Treasury Department for state programs covering catastrophic losses on residential properties. The proposals contained language that would have explicitly prohibited insurance redlining. Insurance companies lobbied extensively to prevent the anti-redlining provision of H.R. 21 from becoming law. See Press Release, National Association of Mutual Insurance Companies, *NAMIC Opposes Applying Fair Housing Act to Insurance* (June 19, 2000) (on file with the author), available at <http://www.namic.org>; *Financial Services Modernization Legislation Won't Work Without Preserving State Regulation of Insurance Activities*, PR Newswire (Oct. 30, 1997) (quoting representative of the National Association of Independent Insurers as opposing legislation that would have recognized FHA's application to insurance). Similarly, a spokeswoman from NAMIC was quoted as saying "'Right now, HUD believes it is their business to develop regulations [on insurance] and they cite the Fair Housing Act as the reason why. But we firmly believe that they are over-reaching their boundaries. There is no reason for HUD to get involved [in FHA enforcement against insurers].'" David Reich-Hale, *NAMIC Targets Grass-Roots Political Action*, NAT'L UNDERWRITER: PROP. & CAS./RISK & BENEFITS MGMT EDITION, Sept. 27, 1999, at 5 (quoting Pamela Allen, NAMIC's vice president of federal affairs); see also *supra* note 11 for various insurance groups' statements insisting that the FHA does not apply to insurance practices.

Fifth, even though HUD declined to pursue a disparate impact theory against the defendant insurer in the *Nationwide* case,²⁰⁷ HUD has since taken the position that it will apply disparate impact liability to insurance/fair housing cases.²⁰⁸ At congressional hearings on the subject of insurance discrimination, HUD's Assistant Secretary testified that "[t]he standards to determine discrimination [in insurance—]as in all other covered areas—will be based on the principles of overt discrimination, disparate treatment, and disparate impact."²⁰⁹ Moreover, in 1994, then-Attorney General Janet Reno reaffirmed the federal government's commitment to use the disparate impact test.²¹⁰ Accordingly, the *Nationwide* decision should be of no comfort for insurers seeking to avoid a disparate impact analysis. If HUD has not done so already, there can be little doubt that HUD will apply a disparate impact analysis in a future FHA/insurance discrimination case.

Finally—and perhaps most importantly—since the Sixth Circuit's decision in *Nationwide*, at least six courts have approved a disparate impact theory in fair housing/insurance cases, and two others resulted in a consent decree forbidding discriminatory effect.²¹¹ In 1995, following the Seventh Circuit's decision in *American Family*, the parties entered into a consent decree that required the defendant/insurer to refrain from discrimination by "intent or effect."²¹² The following year, the parties in *Nationwide* entered into a similar decree.²¹³

207. Much like Congress' decision not to adopt an amendment explicitly mentioning insurance, HUD's strategy for not pursuing a disparate impact claim in the *Nationwide* case may have justification. HUD's inaction therefore has no persuasive value.

208. See Detlefsen, *supra* note 4, at 36.

209. *Hearing on Homeowners Insurance Discrimination*, *supra* note 183, at 52. Some insurers have resigned themselves to the reality that HUD recognizes disparate impact theory in FHA cases. See, e.g., Detlefsen, *supra* note 4, at 36 (begrudgingly conceding that HUD recognizes the disparate impact theory although expressing opinion that application of theory to insurers is unfair).

210. See *Reno Approves "Disparate Impact" for Housing Cases*, 4 No. 2 DOJ ALERT 5, 6 (Feb. 7, 1994).

211. See, e.g., *Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 63 (D.D.C. 2002); *Canady v. Allstate Ins. Co.*, P-H Fair Housing-Fair Lending Reporter, ¶¶ 16,120, 16,120.4-5 (W.D. Mo. 1996).

212. *United States v. American Family Mut. Ins. Co.*, No. 90-C-0759, at 4 (E.D. Wis. 1995), available at <http://www.usdoj.gov/crt/cases/amfam.txt> (consent decree). The *American Family* case settled for \$14.5 million. See *id.* at 35. The decree also required American Family to terminate its minimum value restrictions, which were alleged to disparately impact minorities. See SANDLER ET AL., *supra* note 4, § 2.02[2][a], at 2-12 (discussing *American Family* consent decree).

213. The *Nationwide Mutual Insurance Co. v. Cisneros* case settled for \$13.2 million, and Nationwide likewise agreed to eliminate age and market value of a home from its underwriting criteria. See *Nationwide Earmarks \$20 Million for Housing*, BESTWIRE (June 2, 1997); see also SANDLER ET AL., *supra* note 4, § 2.02[2][a], at 2-12, 2-13 (discussing *Nationwide* consent decree). Other settlements against insurers in FHA cases include *Toledo Fair Housing Center. v. Nationwide*

The first case resulting in a judicial opinion that endorsed the disparate impact theory in an FHA case against an insurer was *Canady v. Allstate Insurance Company*.²¹⁴ *Canady* involved allegations nearly identical to those in *Dunn* and *American Family*, contending that insurers in Missouri were refusing to underwrite homes fairly in predominately minority neighborhoods.²¹⁵ Along with allegations of disparate treatment, the plaintiffs also challenged the defendants' use of "age" and "location" of a home in their underwriting criteria, contending that use of such facially neutral factors resulted in a disparate impact on minorities.²¹⁶ The defendants countered that allowing a disparate impact theory to proceed would "directly contradict" state insurance regulations that explicitly allowed the use of such criteria "as long as such criteria are either used for a business purpose and not as a pretext for discrimination."²¹⁷ The *Canady* court rejected the defendants' arguments, noting that the *American Family* and *Nationwide* courts had themselves rejected similar arguments from insurers that the FHA would conflict with state laws.²¹⁸

The following year, in *Toledo Fair Housing Center v. Nationwide Mutual Insurance Co.*,²¹⁹ an Ohio state court allowed the plaintiffs to proceed to trial against an insurer on the disparate impact theory under Ohio's state fair housing law.²²⁰ In *Toledo Fair Housing Center*, the

Mutual Insurance Co., 705 N.E.2d 1, 3 (Ohio C.P. 1998) (approving settlement agreement calling for establishment of Claim Fund and awarding almost \$1.9 million in attorneys' fees and costs in a fair housing/insurance discrimination case). Nationwide also agreed to invest \$3.5 million into city neighborhoods as a result of the *Toledo Fair Housing Center* lawsuit as well as \$500,000 in Lexington, Kentucky, and Cincinnati, Ohio, respectively in similar lawsuits. See Jennifer Scott, *Jury Orders Nationwide to Pay in Bias Lawsuit*, COLUMBUS DISPATCH, Oct. 27, 1998, at 1A. In April 2000, Nationwide settled an FHA redlining case brought in Richmond, Virginia, alleging systematic racial discrimination for \$17.5 million following a jury verdict of \$100 million. See Amanda Levin, *Nationwide Settles Virginia Redlining Suit*, NAT'L UNDERWRITER: PROP. & CAS./RISK & BENEFITS MGMT. EDITION, May 1, 2000, at 2. In 1999, Liberty Mutual agreed to pay \$18 million to the National Fair Housing Alliance and three fair housing groups to settle discrimination charges. See Miller, *supra* note 182.

214. See P-H Fair Housing-Fair Lending Reporter, ¶ 16,120, 16,120.4-5 (W.D. Mo. 1996).

215. See *id.* ¶ 16,120.1.

216. *Id.* ¶ 16,120.5.

217. *Id.*

218. See *id.*

219. 704 N.E.2d 667 (Ohio C.P. 1997).

220. The plaintiffs in *Toledo Fair Housing Center* based their claim on the Ohio Civil Rights Act, which contains various housing anti-discrimination provisions that closely resemble the anti-discrimination provisions of the FHA. The Ohio Act makes it illegal (1) to otherwise make housing unavailable on the basis of race, color, religion, sex, familial status, ancestry, handicap, or national origin or because of the racial composition of the neighborhood in which the housing accommodations are located; (2) to discriminate in the terms of homeowners insurance on the basis of handicap; and (3) to refuse to make reasonable accommodations when necessary to allow a

plaintiffs alleged that the insurer's minimum dwelling value and maximum dwelling age underwriting rules had a disparate impact on homeowners in African-American neighborhoods.²²¹ In support of its motion for summary judgment, the insurer argued that the disparate impact theory was inapplicable in the insurance/fair housing context because, *inter alia*, such an analysis would "undermine[] the insurance business."²²² The court rejected this argument, and held that it was relevant only as a "business necessity" defense, not as a frontal attack on the applicability of the disparate impact theory itself.²²³

3. Burdens of Proof for an FHA Disparate Impact Claim

To establish a *prima facie* disparate impact case, a plaintiff must establish that the defendant insurer's practices actually or predictably had a discriminatory effect on the protected class. In assessing whether plaintiffs have met this burden, courts have borrowed the disparate impact test developed in employment litigation. The Ninth Circuit, for example, has stated that, in order to make a *prima facie* case under the FHA, the plaintiff must show "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."²²⁴

FHA litigation differs from employment disparate-impact cases in one regard, however. Unlike in the employment context, courts deciding FHA cases generally place the burden on the *defendant* to demonstrate

handicapped person equal opportunity to enjoy a dwelling. See OHIO REV. CODE ANN. §§ 4112.02(H)(1), (4), (19) (Anderson 2001). There does not appear to be any reason for which the *Toledo Fair Housing Center's* disparate impact analysis would not also be applicable in an FHA case.

221. See *Toledo Fair Hous. Ctr.*, 704 N.E.2d at 669 & n.3.

222. *Id.* at 670.

223. See *id.* at 670-71. There are four remaining decisions, of which the author is aware, that rejected an insurer's frontal attack of the disparate impact analysis in the fair housing context. See *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 58-60 (D.D.C. 2002) (rejecting insurer's argument that disparate impact cannot apply to private defendants); *Nat'l Fair Hous. Alliance v. Travelers Prop. Cas. Corp.*, No. 00-1506 (JR), at 1-2 (D.D.C. Jan. 9, 2001) (unpublished order on file with author) (allowing disparate impact claim to proceed against FHA defendant-insurer); *Koontz v. Grange Mut. Ins. Co.*, No. C2-98-318 (S.D. Ohio Jan. 21, 2000) (unpublished opinion on file with author) (denying insurer's motion to dismiss); *Toledo Fair Hous. Ctr. v. Farmers Ins. Group*, Nos. CI99-1339 & CI00-2981, at 19 (Ohio C.P. Mar. 29, 2001) (unpublished opinion on file with author) (holding that insurer's underwriting guidelines that allegedly prevented 93% of homeowners in African-American neighborhoods, but only 61% of homeowners in white neighborhoods, from obtaining replacement cost coverage stated a disparate impact claim under state fair housing laws).

224. *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997) (quotation omitted).

that no less discriminatory alternatives exist to the disputed housing practices. In *Resident Advisory Board v. Rizzo*,²²⁵ a case involving allegations of racial discrimination against the City of Philadelphia over the city's failure to develop low-income housing, the Third Circuit determined that the defendant should bear the burden of proving a business necessity, including proof that no less burdensome alternatives to the disputed practice exist.²²⁶ *Rizzo* noted that it is much easier to quantify job-related qualities that might bar prospective employees from employment than it is to make analogous distinctions in the housing context.²²⁷ Bluntly stated, "the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot."²²⁸ This approach has been followed by most courts applying the FHA.²²⁹ Accordingly, it is the insurer—not the plaintiffs—that must demonstrate that there are no alternatives available to lessen the discriminatory effect of its housing policies in FHA cases.

Some jurisdictions apply a multi-factor approach in considering disparate impact claims. These courts balance (1) the strength of the plaintiff's showing of discriminatory effect; (2) evidence of the defendant's discriminatory intent; (3) the defendant's interest in taking the challenged action; and (4) whether the plaintiff seeks to compel the defendant affirmatively to provide housing or merely to refrain from

225. 564 F.2d 126 (3d Cir. 1977).

226. *See id.* at 148-49.

227. *See id.* at 148.

228. *Id.* at 148-49 (quotation omitted).

229. *See* *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000) (adopting *Rizzo* approach); *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 440-41 (7th Cir. 1999) ("If a measure just happens quite without evil purpose to bear more heavily on a protected group than on other people, the defendant may be required to show that the measure is essential to his business and the discriminatory effect an unavoidable byproduct."); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504-05 (10th Cir. 1995) (following *Rizzo*); *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988) (finding that an FHA defendant must prove "bona fide and legitimate justifications for its action with no less discriminatory alternatives available"), *aff'd in part*, 488 U.S. 15 (1988); *Corp. of the Episcopal Church v. W. Valley City*, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (citing similar language); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1296 (D. Md. 1993) (same; citing several other cases); *Thornton v. City of Allegan*, 863 F. Supp. 504, 510 (W.D. Mich. 1993) (same); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993) (same); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 461 (D.N.J. 1992) (same); *Ramos v. Proulx*, CA No. 82-0422-F, 1984 U.S. Dist. LEXIS 19030, at *13 (D. Mass. Feb. 29, 1984) (same); *United States v. City of Parma*, 494 F. Supp. 1049, 1055 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981) (same).

interfering with others who wish to provide housing.²³⁰ A strong showing on all four factors is not necessary.²³¹

One federal judge recently remarked that, because of these competing standards, “the relevant standards for a disparate impact claim under the Fair Housing Act are, at the moment, rather fluid.”²³² Another judge deemed the standards “inchoate” and “increasingly incoherent.”²³³ However, as a practical matter, it does not appear that the two standards of proof differ in any material respects. Both approaches generally require the plaintiff to demonstrate a discriminatory effect and, if that is shown, require the defendant to justify its practices.²³⁴ Indeed, Professor Schwemm has observed that “it is unlikely that these two methods of analysis will produce substantially different results.”²³⁵

Two aspects of the burden of proof in FHA cases remain unsettled. Prior to 1989, all courts required the defendant in FHA cases to provide a “business necessity” for its practices that resulted in discriminatory effects on members of protected classes.²³⁶ In 1989, the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*²³⁷ threw disparate impact jurisprudence into disarray. In *Wards Cove*, the Court rejected the traditional “business necessity” test and instead required defendants to demonstrate a far less burdensome “business justification” to rebut a prima facie case of disparate impact discrimination.²³⁸

230. See *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Keith v. Volpe*, 858 F.2d 467, 483 (9th Cir. 1988); *Arthur v. City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

231. See, e.g., *Keith*, 858 F.2d at 483.

232. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 92 & n.1 (2d Cir. 2000) (Moran, J., dissenting in part) (citing several commentators discussing FHA disparate impact standards), cert. denied, 534 U.S. 888 (2001). Judge Moran’s impressive and scholarly compilation on the development of disparate impact jurisprudence in FHA cases is highly recommended by the author for readers wishing to explore the topic in greater detail. See *id.* at 93-102 (recounting FHA disparate impact cases).

233. *Langlois*, 207 F.3d at 52 (Stahl, J., dissenting) (quotation omitted).

234. See, e.g., *Keith*, 858 F.2d at 484 (rejecting city’s attempts to justify its discriminatory housing practices).

235. SCHWEMM, *supra* note 17, § 10:7.

236. See, e.g., *Hack*, 237 F.3d at 93 (Moran, J., dissenting) (retracing development of FHA burden of proof). The “business justification” test was derived from the standard burden of proof in Title VII cases. See *id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971)). Courts generally considered the “business necessity” test to be “strict.” See, e.g., *Sagers v. Yellow Freight Sys., Inc.*, 529 F.2d 721, 730 n.18 (5th Cir. 1976).

237. 490 U.S. 642 (1989).

238. See *id.* at 659.

Two years later, Congress overruled *Wards Cove* by enacting the Civil Rights Act of 1991.²³⁹ Congress disapproved of the more lenient “business justifications” test of *Wards Cove*, and ordered disparate impact defendants to prove a “business necessity” for their challenged practices.²⁴⁰ A degree of uncertainty exists in FHA disparate impact law because some courts applied the *Wards Cove* standard to FHA cases during the 1989-1991 gap.²⁴¹ Although post-1991 cases seem to be in agreement that the “business necessity” test prevails in FHA cases,²⁴² the 1989-1991 cases have not been disavowed by any court, and counsel should be aware of these cases.

Second, courts are split as to whether the defendant is required to show a “compelling” business necessity to justify its practices in order to rebut a prima facie showing of disparate impact. The Fourth Circuit, HUD, and several district courts within the Ninth Circuit require that the defendant’s business necessity be “compelling.”²⁴³ Courts adopting this view justify it on the basis that any more lenient standard would “undermine the protections provided by the [FHA].”²⁴⁴ The Second and

239. 42 U.S.C. § 2000e-2(k)(1)(A) (1994); see *Hack*, 237 F.3d at 94-95 (Moran, J., dissenting); *Lanning v. Southeastern Pa. Transp. Auth.*, 181 F.3d 478, 486-89 (3d Cir. 1999); *Ass’n of Mexican-Am. Educators v. California*, 937 F. Supp. 1397, 1403-05 (N.D. Cal. 1996).

240. See *Hack*, 237 F.3d at 94-95 (Moran, J., dissenting); *Ass’n of Mexican-Am. Educators*, 937 F. Supp. at 1405.

241. See, e.g., *Edwards v. Johnston County Health Dep’t*, 885 F.2d 1215, 1223-24 (4th Cir. 1989); *Bronson v. Crestwood Lake Section 1 Holding Corp.*, 724 F. Supp. 148, 154 n.7 (S.D.N.Y. 1989); *Miko v. Comm’n on Human Rights & Opportunities*, 596 A.2d 396, 402 & n.8 (Conn. 1991). See also SCHWEMM, *supra* note 17, § 10:5.

242. See, e.g., *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 667, 673-74 & n.7 (Ohio C.P. 1997) (collecting authorities); *In re Township of Warren*, 662 A.2d 1257, 1268 (N.J. 1993) (noting that *Wards Cove* has no bearing on fair housing cases in light of Civil Rights Act of 1991); *HUD v. Mountain Side Mobile Estates*, P-H Fair Housing-Fair Lending Reporter, ¶¶ 25,053, 25,493 (HUD 1993) (refusing to apply *Wards Cove* in FHA disparate impact case because Congress had overruled it), *rev’d on other grounds*, 56 F.3d 1243 (10th Cir. 1995).

243. See, e.g., *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1292 (C.D. Cal. 1997) (citing *U.S. v. M. Westland Co.*, CV 93-4141, Fair Housing-Fair Lending ¶ 15,941.1 (HUD ALJ 1994)); *Fair Hous. Council of Orange County v. Ayres*, 855 F. Supp. 315, 318 (C.D. Cal. 1994); *United States v. Weiss*, 847 F. Supp. 819, 831 (D. Nev. 1994). See also *Murray*, *supra* note 3, at 744 (“In order to show business necessity, the defendant-insurer must show both a compelling need for the allegedly discriminatory policy and the lack of an alternative policy with a less disproportionate impact.”).

244. *Ayres*, 855 F. Supp. at 318. Although *Ayres* relied on the statute to justify application of the “compelling” standard, the “compelling” standard may be limited to discrimination on the basis of race or religion. *Ayres*, *Betsey*, *Weber*, and *Weiss* all involved race discrimination. Another case involving application of the “compelling” standard involved allegations of religious discrimination. See *Wilson v. Glenwood Intermountain Props., Inc.*, 876 F. Supp. 1231, 1241-42 (D. Utah 1995), *vacated on other grounds*, 98 F.3d 590 (10th Cir. 1996).

Of all the statuses protected by the FHA, only race and religion qualify for strict scrutiny under an equal protection analysis. In addition, the Supreme Court has held that housing is not a

Third Circuits have applied a substantive equivalent of the “compelling” test, holding that the defendant must present bona fide and legitimate justifications for its policy and practice, and must demonstrate that there are no less discriminatory alternatives available in FHA cases.²⁴⁵

On the other hand, a divided Tenth Circuit panel rejected the “compelling” standard, partly because the standard had never been endorsed by the Supreme Court in disparate impact cases.²⁴⁶ The Tenth Circuit instead required the necessity to bear a “manifest relationship” to the defendant’s business practices.²⁴⁷ Similarly, the Ninth Circuit in *Pfaff* also rejected the “compelling” standard when it was applied to the specific facts of the case before it.²⁴⁸ Rather, the *Pfaff* panel held that the

fundamental right within the meaning of the federal constitution. *See Lindsey v. Normet*, 405 U.S. 56, 79 (1972); *but see Boyd v. Lefrak Org.*, 517 F.2d 918, 919 (2d Cir. 1975) (Oakes, J., dissenting from denial of rehearing en banc) (suggesting that by passing the FHA, Congress deemed housing to be a “fundamental right”). Plaintiffs bringing a disparate impact FHA suit on grounds other than racial or religious discrimination would most likely have to argue that other fundamental rights (such as the right to association and right to privacy) are implicated in order to require defendants to demonstrate a heightened “compelling” business necessity. *See, e.g., Dubreuil v. W. Winds Mobile Lodge*, 213 Cal. Rptr. 12, 25 (Cal. Ct. App. 1985) (Staniforth, J., dissenting) (arguing that discrimination in housing implicates other fundamental rights; citing numerous commentators urging same).

245. *See Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977). The *Ayres* court suggested that the Second Circuit’s “business necessity” standard is something less than the “compelling” test. *See Ayres*, 855 F. Supp. at 318. However, that seems wrong. At least one other court has failed to see a distinction between *Huntington* and the “compelling” test. *See CHRO v. J.E. Ackley, LLC*, CV-99550633, 2001 Conn. Super. LEXIS 2004, at **9-16 (Conn. Super. July 20, 2001) (equating *Huntington* with the “compelling” tests of *Betsey*, *Ayres*, and *Weiss*); accord Angel M. Traub, Comment, *The Wall is Down, Now We Build More: The Exclusionary Effects of Gated Communities Demand Stricter Burdens Under the FHA*, 34 J. MARSHALL L. REV. 379, 403 (2000) (describing *Huntington* as the “strictest, test for the defendant’s burden” in FHA cases).

246. *See Mountain Side Mobile Estates P’ship v. HUD*, 56 F.3d 1243, 1254-55 (10th Cir. 1995). The *Mountain Side* panel also remarked that the “compelling” standard would be “almost impossible to satisfy.” *Id.* at 1255. Such an overbroad and wholly unnecessary statement is entirely unconvincing. Merely because a “compelling” standard is difficult to satisfy is hardly a reason to discard it in FHA cases. Other defendants have met the standard. *See, e.g., Wilson*, 876 F. Supp. at 1241-42 (D. Utah 1995) (finding a “compelling” business necessity when landlord would have been forced out of business if it complied with FHA request), *vacated on other grounds*, 98 F.3d 590 (10th Cir. 1996); *McCauley v. City of Jacksonville*, 739 F. Supp. 278, 282 (E.D.N.C. 1989) (finding a “compelling” business necessity when construction of apartment building would have violated moratorium on development precipitated by sewage crisis).

247. *See Mountain Side*, 56 F.3d at 1255-57 (holding that occupancy limits at mobile home park had a “manifest relationship” to business necessity because of sewer capacity limitations and concerns over quality of park life, and therefore did not discriminate under familial status provisions of FHA). The dissenting judge refused to consider the issue, because he would have found discrimination even under the “manifest relationship” standard adopted by the majority. *See id.* at 1258 n.1 (Henry, J., dissenting).

248. *See Pfaff v. HUD*, 88 F.3d 739, 747 (9th Cir. 1996). For a discussion of the *Pfaff* opinion, see *supra* note 195.

defendant could rebut a prima facie disparate impact case by demonstrating that its proffered necessity was “reasonable.”

It is highly unlikely that the lenient standard enunciated in *Pfaff* will control future FHA cases. Many aspects of the Ninth Circuit’s decision suggest that it is limited to the facts before it.²⁴⁹ In addition, the *Pfaff* court made reference, with no apparent disapproval, to the *Betsey* case and other cases applying the “compelling” standard under other civil rights laws.²⁵⁰ If the *Pfaff* court intended to reject the “compelling” standard in all cases, it might have explicitly repudiated the district court cases (*Weiss* and *Ayres*) within its jurisdiction in which the “compelling” test was approved. For that matter, no other court has suggested that *Weiss* and *Ayres* are anything but good law. In addition, a post-*Pfaff* district court in the Ninth Circuit applied the “compelling” test without any reference to the *Pfaff* decision.²⁵¹

4. Plaintiff’s Case

As discussed *supra*, the FHA is violated when an allegedly “neutral” policy has the effect of making housing unavailable to a member of a protected class. Courts are nearly unanimous in holding that unfair discrimination in insurance has the effect of making housing unavailable.

a. Race and Statistics

Housing practices that “actually or predictably result in discrimination” are actionable under the FHA.²⁵² The most accepted

249. *Id.* at 747 (“Even if the appropriate standard of rebuttal in disparate impact cases normally requires a compelling business necessity, the record in this case leads us to the conclusion that it would be fundamentally unfair to hold the Pfaffs to this standard given HUD’s truly appalling conduct in this matter.”) (footnote omitted). The Ninth Circuit’s reversal (and rejection of the “compelling” standard for business necessity) was based on several factors. As already noted, the Ninth Circuit was sharply critical of HUD for not promulgating guidelines that would allow landlords to determine which occupancy limits are permissible under the FHA and which are not. *See id.* at 749. In addition, the Ninth Circuit noted that HUD announced the “compelling” standard in 1993, whereas the conduct in question occurred in 1992, and the standard was “prospective in application.” *Id.* at 748.

At least one other commentator agrees that *Pfaff* is limited to its own facts and should have no bearing on future FHA cases considering the proper standard of business necessity required to rebut *prima facie* cases of disparate impact under the FHA. *See Mahoney, supra* note 194, at 446.

250. *See Pfaff*, 88 F.3d at 747 n.3.

251. *See Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1292 (C.D. Cal. 1997).

252. *See, e.g., Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir. 1988) (under disparate impact analysis, “a prima facie case is established by showing that the challenged practice of the defendant ‘actually or predictably results in . . . discrimination’”); Oxford

method of showing a disparate impact on racial minorities is to demonstrate that an underwriting rule or guideline excludes from coverage (or provides for inferior coverage, or requires higher premiums for) a significantly higher percentage of homes in minority neighborhoods.

Professor Schwemm said that the “key to proving a disparate impact claim is statistical evidence showing that the defendant’s policy or practice has a greater impact on protected class members than on others.”²⁵³ No one disputes that, if available, statistical evidence is the most efficient way to prove a disparate impact claim. Exactly how much statistical evidence is required to demonstrate a disparate impact is uncertain, because “the fair housing decisions as a group [let alone fair housing/insurance cases] have not yet produced any precise mathematical formula for making this determination.”²⁵⁴ Even if one assumes that statistical data regarding race is available, statistical data for other protected classes such as (for example) persons with disabilities does not exist in the insurance and housing industry.²⁵⁵

House, Inc., v. Township of Babylon, 819 F. Supp. 1179, 1182 (E.D.N.Y. 1993) (practices that “actually or predictably result[] in discrimination” violate the FHA).

253. SCHWEMM, *supra* note 17, § 10:6. *See, e.g.,* *Huntington Branch*, 844 F.2d at 938 (zoning decision that affected 28% of area’s minorities compared to 11% of whites “create[d] a strong prima facie showing of discriminatory effect”); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (prima facie case established where 74.9% of the minorities were affected, while only 26.4% of the whites were affected); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (finding that showing of racially discriminatory effect where defendant’s action “had twice the adverse impact on minorities as it had on whites”); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064-65 (4th Cir. 1982) (decision which “fell 2.65 times more harshly on [the] black population than on the white [population]” left “no doubt” of adverse impact). *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971) (disparity between whites with high school diplomas (34%) and blacks with such diplomas (12%) was substantial and established a prima facie case of employment discrimination).

254. SCHWEMM, *supra* note 17, § 10:6. In the only reported decision dealing with the merits of a disparate impact claim in the fair housing/insurance context, the court found that material issues of experts’ data precluded the insurer’s motion for summary judgment. *See Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 704 N.E.2d 667, 674-75 (Ohio C.P. 1997). In that case, the plaintiffs contended that the insurer’s “minimum insurance” rule excluded 82.9% of homes in African-American neighborhoods, but only 31% of homes in white neighborhoods. *See id.* at 674. The plaintiffs also contended that the insurer’s “maximum dwelling age” rule excluded 92.6% of homes in African-American neighborhoods, but only 61.3% of homes in white neighborhoods. *Id.* The insurer’s expert disputed these numbers, and the court denied the summary judgment motion. *See id.* at 675; *see also* *Toledo Fair Hous. Ctr. v. Farmers Ins. Group*, Nos. CI99-1339 & CI00-2981, at 19 (Ohio C.P. Mar. 29, 2001) (unpublished opinion on file with author) (holding that insurer’s underwriting guidelines that allegedly prevented 93% of homeowners in African-American neighborhoods, but only 61% of homeowners in white neighborhoods, from obtaining replacement cost coverage stated a disparate impact claim under state fair housing laws).

255. The FHA only protects people with disabilities when there is a “nexus” between the disability and the need for housing. *See discussion infra* notes 256-67 and accompanying text. Hence, even if some data did exist regarding the relationship between housing and people with

Recognizing the unfairness that may result from forcing plaintiffs to produce nonexistent data, courts have held that, in disparate impact cases, “[t]he plaintiff is not required to prove [its] case by statistics.”²⁵⁶ In an unpublished opinion, the Ninth Circuit explained that statistical evidence is *not* an absolute requirement to support a disparate impact claim:

Statistics are, however, only one factor that may assist a plaintiff in establishing a discriminatory impact case. *Robinson v. Adams*, 847 F.2d 1315, 1318 (9th Cir. 1988) (proof of disparate impact is “usually accomplished by statistical evidence”) (emphasis added), *cert. denied*, 490 U.S. 1105, 104 L. Ed. 2d 1018, 109 S. Ct. 3155 (1989); *Lowe v. City of Monrovia*, 775 F.2d 998, 1004 (9th Cir. 1985) (summary judgment appropriate where plaintiff had not produced “affidavits or documentary evidence” to support her disparate impact claim), *amended*, 784 F.2d 1407 (9th Cir. 1986). Therefore, a plaintiff is not precluded from making a prima facie case on the basis of other evidence. Plaintiff in this case has done so by showing she was terminated because she failed to meet a facially neutral requirement that could be expected to have a disparate impact on women because of an identifiable physical difference.²⁵⁷

At least one court has held that “statistics are not always necessary” to establish a disparate impact in the fair housing/insurance context.²⁵⁸ There is simply no reason to allow insurers to avoid a disparate impact claim under the FHA merely because relevant statistical evidence does not exist. Rather, courts will accept expert testimony in lieu of statistical evidence in disparate impact cases.²⁵⁹

disabilities, it would most likely be of little relevance because of its relatively small numbers. *See, e.g., Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 50 (1st Cir. 2000) (noting that statistical formulations in disparate impact cases are “less reliable” when the numbers are small).

256. *Jurs v. Eaton Corp.*, No. K86-322, 1987 U.S. Dist. LEXIS 15377, at *19 (W.D. Mich. Oct. 14, 1987); *see also Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (stating that statistics are not essential in proving disparate impact); *Thomas v. Wash. County Sch. Bd.*, 915 F.2d 922, 926 (4th Cir. 1990) (finding that statistics are “neither the exclusive nor a necessary means of proof” in disparate impact cases); *Lynch v. Freeman*, 817 F.2d 380, 387-88 (6th Cir. 1987) (rejecting defendant’s argument that “‘numerical disparity’ is the key in a disparate impact case” and finding that plaintiff established disparate impact through expert testimony); *Carpenter v. Bd. of Regents of Univ. of Wis. Sys.*, 728 F.2d 911, 914 (7th Cir. 1984) (citing *Dothard*, 433 U.S. at 330, when noting that “a court may, in an appropriate case, project a disparate impact from non-statistical evidence”).

257. *Pumphrey v. City of Couer D’Alene*, No. 92-36748, 1994 U.S. App. LEXIS 3892, at **4-5 (9th Cir. Feb. 24, 1994).

258. *Toledo Fair Hous. Ctr.*, 704 N.E.2d at 673.

259. *See, e.g., Pumphrey*, 1994 U.S. App. LEXIS 3892, at **3-5; *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1183 & n.6 (E.D.N.Y. 1993) (relying on expert testimony to show disparate impact).

b. Disability and “Nexus”

Unlike the situation concerning race, there are no predominately “handicapped” neighborhoods in the country. Accordingly, for FHA cases involving disparate impact on those with a disability, courts have adopted a somewhat different approach.²⁶⁰

In order to demonstrate that they have been discriminated against “because of” a disability, plaintiffs in FHA cases are required to demonstrate that a correlation (a “nexus”) exists between their handicap and a need for housing beyond the ordinary.²⁶¹ Otherwise, in FHA insurance cases, the alleged discrimination is only against those who cannot afford the charged rates (i.e., “economic discrimination”), rather than against those with a disability.²⁶² As the Seventh Circuit put it in *Hemisphere Building Co. v. Village of Richton Park*,²⁶³ only disparate impact (and reasonable accommodation) claims under the FHA concerning neutral rules that affected people with disabilities “by reason of their handicap” would be actionable.²⁶⁴ Other courts have adopted similar “nexus” or “correlation” requirements between (1) the disability, (2) the need for housing, and (3) the challenged policy in FHA cases.²⁶⁵

In order for a claimant to state an FHA case against an insurer, she must demonstrate a nexus between her disability and the type of housing that the insurer will not cover (or to which the insurer will only provide inferior coverage, etc.). The most obvious nexus is found in group homes. Simply put, when people with disabilities *need* to live together because of their disabilities, the requisite “nexus” between disability and housing is established in an FHA disparate impact case.

260. Again, courts have recognized that employing traditional rules of race discrimination to disability cases generally results in an “imperfect fit.” See *supra* note 147.

261. See Robert L. Schonfeld & Seth P. Stein, *Fighting Municipal Tag-Team: The Federal Fair Housing Amendments Act and Its Use In Obtaining Access To Housing For Persons With Disabilities*, 21 FORDHAM URB. L.J. 299, 311 (1994).

262. The FHA was never intended to guarantee housing to those who cannot afford it. See Schwemm, *supra* note 167, at 247 & n.359 (citing 114 CONG. REC. 3421 (1968) (remarks of Sen. Mondale)).

263. 171 F.3d 437 (7th Cir. 1999).

264. *Id.* at 440 (emphasis in original). In *Hemisphere Building*, the Seventh Circuit considered an FHA claim brought by a developer who wished to build houses for wheelchair-users. See *id.* at 238. The development ran into opposition from the village because of zoning laws regarding the number of residences (as opposed to residents) per acre. See *id.* at 438-39. The Seventh Circuit rejected the FHA claim because the zoning laws did not affect the availability of housing for people with disabilities any more than it did for people without disabilities. See *id.* at 440 (“a zoning ordinance that merely raises the cost of housing hurts everyone who would prefer to pay less and forgo whatever benefits the higher cost confers, and so need not be waived for the handicapped”).

265. See *discussion infra* notes 266-68 and accompanying text.

For example, several federal courts have specifically recognized the correlation between the handicap of recovering alcoholism/substance addiction and the need to live in a supportive, group home environment.²⁶⁶ These courts each held that a proffered “facially neutral” policy had an impermissible disparate impact on group homes for recovering substance abusers and alcoholics. As one court explained (in a zoning case):

Applying § 213-1 of the Town Code to evict plaintiffs would discriminate against them because of their handicap. Recovering alcoholics or drug addicts require a group living arrangement in a residential neighborhood for psychological and emotional support during the recovery process. As a result, residents of an Oxford House are more likely than those without handicaps to live with unrelated individuals. Moreover, because residents of an Oxford House may leave at any time due to relapse or any other reason, they cannot predict the length of their stay. Therefore, a finding of a violation of the Town Code leading to the town’s eviction of plaintiffs from a dwelling due to the size or transient nature of plaintiffs’ group living arrangement actually or predictably results in discrimination.²⁶⁷

Several other courts have similarly recognized the fact that recovering alcoholics and substance abusers have a greater need to live in group homes than do non-handicapped persons, and have found a disparate impact of a neutral rule against alcoholics and recovering substance abuse addicts.²⁶⁸

266. The standard relapse rate of recovering alcoholics and substance abusers when left to their own devices is estimated at as high as 90%. *See* DENNIS C. DALEY & MIRIAM S. RASKIN, *TREATING THE CHEMICALLY DEPENDENT AND THEIR FAMILIES* 131-33 (1991) (providing for a survey of studies on relapse rates among recovering addicts and alcoholics and indicating relapse rates from 60% to 90%). Relapse frequently occurs when addicts who have completed a detoxification program are unable to get into effective outpatient treatment or a recovery-home setting due to overcrowding. *See id.* at 155.

267. *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1183 (E.D.N.Y. 1993) (footnote omitted).

268. *See, e.g., Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 287 (D. Conn. 2001) (“As recovering alcoholics and drug addicts, the John Doe plaintiffs need to live in a safe, supportive, and drug-and alcohol-free living environment during their recovery period.”); *Conn. Hosp. v. City of New London*, 129 F. Supp. 2d 123, 129 (D. Conn. 2001) (“As part of their treatment, plaintiffs need to live in a safe, ‘mutually-supportive,’ and drug-free living environment during the recovery period.”); *Samaritan Inns v. Dist. of Columbia*, CA No. 93 cv 2600 RMU, 1995 U.S. Dist. LEXIS 9294, at **90-92 (D.D.C. June 30, 1995) (“As former abusers of drugs and alcohol who had advanced control over their addiction, the intended residents of Tabitha’s House were in dire need of an element critical to their productive social reintegration, affordable housing.”), *aff’d in part, rev’d in part on other grounds*, 114 F.3d 1227 (D.C. Cir. 1997); *Oak Ridge Care Ctr., Inc. v. Racine County*, 896 F. Supp. 867, 874 (E.D. Wis. 1995) (“Under the disparate impact theory, if the zoning combined with the denial of conditional use permits prevents alcoholics

It cannot seriously be disputed that otherwise “neutral” underwriting guidelines for homeowners’ insurance may have a disparate effect on group homes for recovering alcoholics and substance users. If an insurer refuses to underwrite homeowner’s insurance when the dwelling in question holds more than five unrelated adult residents, all group homes of unrelated adults either are refused insurance or are placed into very expensive commercial categories. This rule has an indisputable disparate impact on those in recovery from addiction, who have a greater need to live together in such group situations.

Identifying a “nexus” might not always be easy. Consider, for example, Gallaudet University in Washington, D.C., which is the nation’s only college for deaf students.²⁶⁹ Gallaudet, like most colleges, recognizes numerous fraternity and sorority organizations among the student body. If several members of a Gallaudet fraternity or sorority decided to live together in a house, they would certainly be “handicapped” within the meaning of the FHA—after all, they are all deaf. The fraternity house student-residents would undoubtedly have to pay more expensive commercial rates for insurance coverage if more than five student-residents were living in the house.

However, the Gallaudet students would most likely not be entitled to challenge a “no more than five boarders” rule because they would not be living together *because of* their handicaps. There is nothing that distinguishes these students from fraternity or sorority residents at other schools other than the happenstance that they are all deaf.

Courts have refused to find a disparate impact when there is no evidence that the residents with disabilities derive any out-of-ordinary benefit from the housing in question. For example, in *Gamble v. City of Escondido*,²⁷⁰ the Ninth Circuit considered an FHA zoning challenge involving a “complex” facility for “elderly disabled adults.”²⁷¹ From the facts of the case, it appeared that there was little to distinguish the

from living in group homes, then the policy disproportionately affects the handicapped.”); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168, 1175-76 (N.D.N.Y. 1993) (finding the same); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 456 (D.N.J. 1992) (finding that “it is crucial for recovering alcoholics and substance abusers to have a supportive, drug and alcohol free living environment,” which “substantially increases an individual’s chances for recovery”); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991) (finding disparate impact; noting that “if the exclusionary effect of the City’s actions were upheld, and were duplicated state-wide, no Oxford Houses could exist in New Jersey”).

269. See [Homepage, Gallaudet University, available at http://www.gallaudet.edu/choosegallaudet.htm](http://www.gallaudet.edu/choosegallaudet.htm) (last visited Oct. 25, 2002).

270. 104 F.3d. 300 (9th Cir. 1997).

271. See *id.* at 303-04.

facility from a traditional nursing home.²⁷² There was no indication that the residents were living in a “family situation” by sharing household responsibilities and common living areas. Moreover, the residents apparently possessed a wide variety of disabilities. The Ninth Circuit made clear that, because there was no “correlation” between the disabilities and the need for housing, no FHA claim was viable.²⁷³

It should be pointed out that a minority view rejects the “nexus” requirement in FHA cases and appears much more lenient in allowing a plaintiff to demonstrate a disparate impact FHA claim. In *United States v. City of Philadelphia*,²⁷⁴ a charitable organization wanted to convert a commercially zoned building to residential use for operation as a group home for the mentally impaired.²⁷⁵ The zoning regulation in question required that houses in the area have a rear yard.²⁷⁶ The city argued that application of the zoning ordinance did not violate the FHA because there was no “causal nexus” between the ordinance’s provision (the rear yard requirement) and the prospective residents’ handicaps.²⁷⁷ The court rejected this argument and held that “the language of § 3604(f) does not suggest that to establish a Fair Housing Act violation, a plaintiff must show a ‘causal nexus’ between the challenged provision and the handicaps of the prospective residents.”²⁷⁸ However, the prevailing view among courts seems to require a “nexus” between the disability and a need for housing out of the ordinary in order to distinguish “disability” discrimination from “economic” discrimination.

5. Insurers’ Defenses to Disparate Impact FHA Claims

Insurers’ insistence that they apply the same underwriting rules to everyone regardless of race/handicap is entirely irrelevant in the disparate impact context (and in the reasonable accommodation context for that matter). For example, in *United States v. California Mobile*

272. *See id.*

273. Specifically, the Ninth Circuit stated: “If a significant correlation exists between being disabled and living in group homes, a disparate impact on group housing could conceivably establish a prima facie disparate impact claim. No evidence has been presented, however, that establishes a significant correlation between being disabled and living in group housing.” *Id.* at 307 n.2.

274. 838 F. Supp. 223 (E.D. Pa. 1993); *see also* *Hill v. Cmty. of Damien*, 911 P.2d 861, 875 (N.M. 1996) (following *City of Philadelphia* in interpreting federal FHA).

275. *See City of Philadelphia*, 838 F. Supp. at 225.

276. *See id.* at 226.

277. *See id.* at 229.

278. *Id.* The court explained that subsection 3604(f)(3) contains an independent definition of “discrimination,” one which, unlike subsections 3604(f)(1) and (2), is not modified by the phrase “because of . . . handicap.” *See id.*

Home Park Management Co.,²⁷⁹ the Ninth Circuit held that imposition of a guest parking fee on all residents could have a disproportionate effect on residents with disabilities, who were more likely to have attendants and other visitors than are residents without disabilities.²⁸⁰ The Ninth Circuit specifically rejected the defendant's argument that imposition of fees on everyone, on an even-handed basis, can never violate the FHA. The court stated that, "[a]lthough defendants argue that any fee which is generally applicable to all residents of a housing community cannot be discriminatory, the [FHA] itself is concerned with facially neutral rules of all types."²⁸¹

In considering the defendant's attempts to rebut prima facie disparate impact claims in FHA cases, courts must "view skeptically subjective rationales concerning why [the defendant] denied housing to members of protected groups"²⁸² and be mindful that "clever men may easily conceal their motivations."²⁸³ However, "[t]here is less reason to be wary of subjective explanations, though, where a defendant provides objective evidence indicating that truth lies behind his assertions of nondiscriminatory conduct."²⁸⁴ Of course, if the defendant fails to produce a reason for the discriminatory effect of its policies, courts can assume that no justification for the discrimination exists.²⁸⁵

Uncertainty exists as to whether defendants are required to demonstrate a "compelling" business necessity, or merely a "manifest relationship" to the business practice to justify practices that result in a disparate impact on protected classes in FHA cases.²⁸⁶ In the insurance context, however, the debate may be largely academic, and will be of little practical difference.

In other FHA cases, courts have accepted concerns regarding traffic, sewer capacities, overcrowding, and safety as bona fide justifications for business practices that result in disparate impact on

279. 29 F.3d 1413 (9th Cir. 1994).

280. *See id.* at 1416-18 & n.4.

281. *Id.* at 1417. *See also, e.g.,* Hill v. Cmty. of Damien, 911 P.2d 861, 873 (N.M. 1996) (reversing lower court's dismissal of disparate impact claim and rejecting lower court's rationale that no FHA violation occurred because restrictive covenant on property "was equally applicable to all group homes, for both the handicapped and non-handicapped").

282. Soules v. HUD, 967 F.2d 817, 822 (2d Cir. 1992).

283. *Id.* (quoting United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974)).

284. *Id.*

285. *Cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) (regarding a disparate impact case in a Title VII action); *Lynch v. Freeman*, 817 F.2d 380, 389 (6th Cir. 1987) (same).

286. *See supra* notes 243-51 and accompanying text.

protected groups.²⁸⁷ For insurers, however, it is difficult to imagine that anything short of data reflecting actuarial principles would satisfy a “business necessity” (be it “compelling” or something less) test justifying a disparate impact against protected classes under the FHA. As one commentator noted fifteen years ago, “[a]t the very least, the defendant insurer should be held to a significant burden of demonstrating some relationship between its underwriting criteria and protection of the interests it urges as matters of business necessity.”²⁸⁸ Thus, anytime the insurer offers inferior coverage, has an exclusion, or charges higher premiums as a result of an underwriting rule that results in a disparate impact on groups protected under the FHA, the insurer must justify such disparities with actuarial data.

Conceivably, the “business necessity” standard may make a difference when the insurer refuses to underwrite an area or market altogether. One can imagine that an insurer’s refusal to underwrite an area or market due to losses amounting to ten percent may be enough to meet a “manifest relationship” business necessity standard, but not a “compelling” standard. However, if any discriminatory basis is implied by a refusal to underwrite an area or market, it will be race discrimination. Because race is a constitutionally suspect class, the “compelling” standard would most likely be the appropriate burden in such cases.

Insurers have yet to produce an alternative standard for a defense to charges of disparate impact other than justification by sound actuarial data. Typically, insurers have instead proffered some variation of their mainstay argument that disparate impact is inapplicable as a theory in insurance cases. For example, insurers may protest that common sense dictates that, the older a house is, the more susceptible it is to damage; or the more unrelated people live in a house, the more likely an accident

287. See, e.g., *Fair Hous. Advocates Ass’n v. City of Richmond Heights*, 209 F.3d 626, 636 (6th Cir. 2000); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996); *Mountain Side Mobile Estates P’ship v. HUD*, 56 F.3d 1243, 1255-56 (10th Cir. 1995).

288. McCormack, *supra* note 4, at 601. The author further contends (and the author of the instant article agrees): “The decision to insure or not to insure must be based on sound underwriting principles. This supposedly objective analysis should support a refusal to insure if it exposes a connection to actual or anticipated loss experience.” *Id.* at 598-99; accord William H. Lynch & Gregory Squires, *Time to Deal With, Not Fight, Fair Housing Act*, NAT’L UNDERWRITER: PROP. & CAS./RISK & BENEFITS MGMT. EDITION, Mar. 18, 1996, at 23 (“[I]f an insurer can show a policy or practice would result in unacceptable losses and is associated with risk, and no other practice will equally serve that legitimate business objective, there is no [FHA disparate impact] violation.”); Badain, *supra* note 4, at 15 (“[T]hese practices may be justified to the extent that they are supported by sound actuarial data—this is the distinction between *fair* and *unfair discrimination*.”) (emphasis in original).

may occur. But without supporting actuarial data or other expert testimony, it is difficult to see how this type of argument is much different from a blanket contention that the disparate impact theory should not apply to FHA claims against insurers.²⁸⁹

As discussed *supra*, the insurers' contention that disparate impact is inapplicable to insurance is a losing argument.²⁹⁰ Fair housing advocates have long charged that insurers expend so much effort attempting to avoid application of the FHA to the industry because they are guarding empty cupboards. Indeed, the industry's adamant insistence that the FHA is not applicable to insurance can be explained partly (if not primarily) by the fact that—despite assurances that insurers “measure risk as accurately as [they] can”—the industry generally does not possess the data that statistically justifies disparities in housing underwriting.²⁹¹ So long as insurers are in the homeowners' underwriting lines, they must underwrite homes fairly within the meaning of the FHA.

Moreover, as discussed *supra*, the argument that insurers are handcuffed by state insurance regulations from ever deviating from underwriting guidelines is unpersuasive.²⁹² In holding that the McCarran-Ferguson Act does not bar FHA claims,²⁹³ the federal courts have made clear that state regulations and FHA compliance are independent of each other. In addition, the insurer must still demonstrate that no alternatives exist to lessen the discriminatory effects that its policies may have on protected classes. Insurers can and often do make exceptions and deviations to their underwriting rules and guidelines, including by making necessary filings with the state regarding “rules.”²⁹⁴ National insurance organizations such as the Insurance Services Office, Inc. (“ISO”),²⁹⁵ can assist insurers in amending any discriminatory

289. Cf. *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 291 (D. Conn. 2001) (rejecting city's “nondiscriminatory explanation” that it was attempting to enforce the zoning code to prevent operation of Oxford House in single-family neighborhood; court had already ruled that zoning code was not exempt from FHA mandates).

290. See discussion *supra* notes 192-95 and accompanying text.

291. See Squires, *supra* note 14, at 47.

292. See discussion *supra* notes 115-17 and accompanying text.

293. See *supra* note 118 and accompanying text.

294. Cf. *Tsombanidis*, 180 F. Supp. 2d at 297-98 (deciding a zoning/FHA case and stating “the Court is not persuaded by the Fire District's excuse that it did not have the power to modify the Fire Safety Code”); see also *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (rejecting PGA's argument that it could not consider granting an exception to its rules because the rules did not provide for exceptions); *Wis. Corr. Serv. v. City of Milwaukee*, 173 F. Supp. 2d 842, 853 (E.D. Wis. 2001) (city cannot exempt itself from compliance with disability anti-discrimination laws).

295. ISO is a national insurance industry service organization that develops and files coverage

policies. Of course, to demonstrate that no less discriminatory alternatives to the underwriting policies in question exist, insurers should be required to demonstrate that a state would refuse to approve the changes to underwriting guidelines that the plaintiffs propose.²⁹⁶

C. Reasonable Accommodations

The final theory of liability under the FHA is failure to make a reasonable accommodation. Obviously, this theory is only applicable if the homeowner or resident has a disability. No court has yet considered an FHA/reasonable accommodation claim on the merits in the insurance context, although the *Wat*²⁹⁷ and *Koontz*²⁹⁸ courts have denied defendant insurers' motions to dismiss in such circumstances.²⁹⁹

Although no court has so ruled directly in an FHA case, insurers should be expected to make modifications to their underwriting criteria and to adjust the premiums charged as an accommodation for a person covered by the FHA. There is no question that the FHA is to be afforded a generous construction, and that there exists no special exemption for insurance companies under the FHA.³⁰⁰ In addition, courts have rejected arguments that FHA accommodations are limited to "trivial" modifications (such as relaxation of a "no pets" rule),³⁰¹ and have also noted that reasonable accommodations under the FHA "can and often will involve some costs."³⁰²

1. Plaintiff's Case

Granting a "reasonable accommodation" has been defined as "changing some rule that is generally applicable to everyone so as to

forms, promulgates advisory loss costs, and performs other services for and on behalf of its member companies. It is the leading supplier of statistical, actuarial, and underwriting information for and about the *property/casualty insurance industry*. For more information about ISO, see generally at <http://www.iso.com> (2002).

296. See, e.g., *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1269 n.11 (11th Cir. 2000) (rejecting insurers' laments that any changes to policies would require state approval because "there is nothing to indicate that approval would be withheld").

297. 75 F. Supp. 2d 1 (D.D.C. 1999).

298. No. C2-98-318 (S.D. Ohio Jan. 21, 2002) (unpublished decision on file with author).

299. See *Wai*, 75 F. Supp. 2d at 5-8; *Koontz*, No. C2-98-318, at 2-4.

300. See *supra* notes 30-35, 65-66 & 177-78 and accompanying text.

301. See *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995).

302. *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) (quoting *Shapiro*, 51 F.3d at 335); see also *United States v. Cali. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417 (9th Cir. 1994) (reasonable accommodation mandate "contemplates *some* financial burden resulting from accommodation").

make its burden less onerous on the handicapped individual.”³⁰³ Courts are currently split as to whether the plaintiff or the defendant has the burden of demonstrating that an accommodation under the FHA is reasonable. The Fourth, Fifth, and Sixth Circuits place the burden on the plaintiff.³⁰⁴ In contrast, the Third Circuit places the burden on the defendant.³⁰⁵

The author believes that the sensible solution would be to adopt the burden of proof applicable under the Americans with Disabilities Act as set forth in the First Circuit’s decision in *Reed v. Lepage Bakeries, Inc.*³⁰⁶ The *Reed* court determined that the plaintiff bore the burden making a preliminary showing that his proposed accommodation was necessary and reasonable.³⁰⁷ The defendant, in turn, bore the burden of establishing that the proposed accommodation would result in an undue burden.³⁰⁸

The *Reed* court specifically relied in part on statutory language of the ADA that explicitly places the burden of demonstrating an undue hardship on the defendant.³⁰⁹ Although the FHA does not contain such language, the concept of “reasonable accommodation” seems the same under both statutes.³¹⁰ The burden of proof should likewise be similar. Common sense dictates that plaintiffs are best situated to know what type of accommodation they need to enjoy equal opportunity in housing, and that defendants are best situated to know whether the proposed accommodation would result in an undue burden on their business practices. Furthermore, it would be inconsistent to require the insurer in FHA cases to bear the burden of justifying a disparate impact, but require the plaintiff to bear the same burden for reasonable accommodation, where the inquiry is essentially the same.

An FHA plaintiff “must show that, absent the requested reasonable accommodation, handicapped persons will be unable to live in the particular dwelling of their choice in a particular neighborhood of their

303. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992); *see also* *Keys Youth Servs., Inc. v. City of Olathe*, 38 F. Supp. 2d 914, 924 (D. Kan. 1999); *N. Shore-Chicago Rehab. Inc. v. Vill. of Skokie*, 827 F. Supp. 497, 499 (N.D. Ill. 1993).

304. *See* *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039, 1045 (6th Cir. 2001); *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 603-04 (4th Cir. 1997); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996).

305. *See* *Hovsons*, 89 F.3d at 1103.

306. 244 F.3d 254 (1st Cir. 2001).

307. *See id.* at 259.

308. *See id.* at 258-59.

309. *See* 42 U.S.C. § 12112(b)(5)(A) (1994).

310. *Cf. Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 283 (D. Conn. 2001) (noting that legal analyses under FHA and ADA “are essentially the same”).

choice.”³¹¹ As is the case with disparate impact, courts have generally required plaintiffs to demonstrate a nexus between the disability and the need for housing out of the ordinary. Merely having a disability does not entitle a homeowner or resident to an accommodation from an insurer or any other defendant in an FHA case. If there is no such “nexus,” then the person with a disability is not seeking a reasonable accommodation, but is instead trying to obtain special treatment that puts him in a better position than that of nondisabled members of the public.

For example, as discussed *supra*, Gallaudet fraternity brothers would not be entitled to any “reasonable accommodation” in insurance premiums for their fraternity house, because they are not living together because of their handicaps.³¹² In contrast, it has been widely acknowledged and accepted that residents of Oxford Houses (i.e., recovering alcoholics and substance abusers) do live together because of their handicaps.³¹³ Such evidence conclusively demonstrates that an accommodation to alleviate the burden of living together caused by their handicaps is necessary under the FHA.³¹⁴

Again, the distinction between residents living together because of their handicap (Oxford House) and residents living together who all happen to have a disability (Gallaudet fraternities) may not always be clear. In *Salute v. Stratford Greens Garden Apartments*,³¹⁵ individuals with unspecified disabilities who qualified for “Section 8 housing assistance from the federal government” brought an FHA lawsuit against a landlord who refused to accept “Section 8” tenants.³¹⁶ A divided

311. *ReMed Recovery Care Ctrs. v. Township of Willistown*, 36 F. Supp. 2d 676, 685 (E.D. Pa. 1999); *see also* *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1105 (6th Cir. 1996) (stating that the FHAA was intended to prohibit regulations that deny handicapped individuals the right “to live in the residence of their choice in the community”) (emphasis omitted); *City of Edmonds v. Wash. St. Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (“Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community.”), *aff’d*, 514 U.S. 725 (1995); *Oxford House, Inc., v. Town of Babylon*, 819 F. Supp. 1179, 1185-86 n.10 (E.D.N.Y. 1993) (stating that “a handicapped individual must be allowed to enjoy a particular dwelling, not just some dwelling somewhere in the town”) (emphasis omitted).

312. *See supra* note 269 and accompanying text.

313. *See supra* notes 189-90 and accompanying text.

314. *See, e.g., Groome Res., Ltd., v. Parish of Jefferson*, 52 F. Supp. 2d 721, 724 (E.D. La. 1999) (accommodation necessary when “trial evidence convinces the Court that the artificial limit of four unrelated persons living in a single group home will make it economically unfeasible for plaintiff to operate the [group] home”); *ReMed Recovery Care Ctrs.*, 36 F. Supp. 2d at 686 (evidence that group home could not be operated with only five residents demonstrated that accommodation was necessary).

315. 136 F.3d 293 (2d Cir. 1998).

316. *Id.* at 295.

Second Circuit panel rejected the FHA claim, reasoning that refusing to accept “Section 8” tenants amounted to “economic discrimination” rather than disability discrimination under the FHA.³¹⁷ Although the Second Circuit acknowledged that there may be a “need of people with certain handicaps to live together in order to share support personnel and to reinforce each other’s efforts in creating and maintaining a home,”³¹⁸ the court was not persuaded by expert testimony that people with disabilities were three times as likely to be eligible for Section 8 status as were people without disabilities.³¹⁹

The *Salute* majority’s decision can perhaps be read as holding that only specific types of disabilities may support the requisite “nexus” between disability and housing, as opposed to disabilities in general.³²⁰ It will be of paramount importance for plaintiffs to demonstrate that the requested accommodation is necessary for the person with a disability to enjoy an equal opportunity in housing.

2. Insurers’ Defenses

Once the plaintiff has demonstrated that he is entitled to a reasonable accommodation against an insurer in an FHA case, very few defenses exist for an insurer. Insurers will get nowhere contending that risk pools must be strictly defined and adhered to in order to ensure uniformity and fairness in rates and underwriting. That is simply another way of saying that insurance should be exempted from the FHA’s mandates altogether.³²¹

The entire point of a “reasonable accommodation claim is that a [FHA] defendant must make an affirmative change in an otherwise valid

317. See *id.* at 302; accord *Williams v. 5300 Columbia Pike Corp.*, Nos. 95-2964, 3091, 1996 U.S. App. LEXIS 31004, at **10-11 (4th Cir. Dec. 3, 1996) (finding that a plan to convert cooperative association into condominium regime did not have the effect of making housing “unavailable” to people with disabilities).

318. *Salute*, 136 F.3d at 302.

319. See *id.* at 312 n.24 (Calebresi, J., dissenting). For additional discussion as to whether discrimination against “Section 8” recipients should be actionable under the FHA, see generally Kim Johnson-Spratt, Note, *Housing Discrimination and Source of Income: A Tenant’s Losing Battle*, 32 IND. L. REV. 457 (1999).

320. See *Salute*, 138 F.3d at 301-02.

321. In any event, plaintiffs can easily respond to such an argument by noting that “strict adherence to a rule which has the effect of precluding handicapped individuals from residing in the residence [of their choice] was precisely the type of conduct which the Fair Housing Amendments Act sought to overcome.” *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1106 (3d Cir. 1996) (quoting *United States v. Vill. of Marshall*, 787 F. Supp. 872, 879 (W.D. Wis. 1991)).

law or policy.”³²² Therefore, any arguments that the insurer is not discriminating because it has treated the plaintiff with a disability the “same” as any other policyholder would be ineffective against a claim alleging failure to provide a reasonable accommodation. As the *Wai* court explained:

If a dwelling is made unavailable to a person with a disability, that person is denied an “equal opportunity to use and enjoy” the dwelling. If a reasonable accommodation in “rules, policies, practices, or services” is necessary to avoid that situation, refusal to provide that accommodation is discrimination under the clear language of the FHA.³²³

It is also no response for an insurer to contend that its underwriting rules are exempt from the reasonable accommodation mandates simply because a particular underwriting guideline has been in place for decades (as they often are). The legislative history of the FHAA anticipated this type of argument and rejected it:

A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a

322. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-02 (10th Cir. 1995); *see also* *Parish of Jefferson v. Allied Health Care, Inc.*, CA Nos. 91-1199, 1200, 3959, 1992 U.S. Dist. LEXIS 9124, at *19 (E.D. La. June 10, 1992).

323. *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 8 (D.D.C. 1999). Numerous judicial decisions have applied § 3604(f)(3)(B)'s “reasonable accommodation” mandates to FHA defendants’ otherwise facially neutral policies. *See, e.g.*, *United States v. Cali. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1381 n.3 (9th Cir. 1997) (citing cases pertaining to exceptions to zoning ordinances that would allow disabled people to live in residential neighborhoods); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 177 (5th Cir. 1996) (regarding an elderly care facility requiring special exception from single-family zoning ordinance); *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 894-95 (7th Cir. 1996) (stating that a parking space was needed to accommodate sufferer of multiple sclerosis); *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (finding that even though a prohibition of pets in apartments is common, facially neutral, and indeed reasonable, the FHA requires a relaxation of it to accommodate a hearing dog for a deaf person); *Green v. Hous. Auth. of Clackamas County*, 944 F. Supp. 1253, 1256 (D. Or. 1998) (same); *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992), *aff’d mem.*, 995 F.2d 217 (3d Cir. 1993); *Vill. of Marshall*, 787 F. Supp. at 876-79; *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344-45 (D.N.J. 1991); *United States v. Commonwealth of Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991); *Boulder Meadows v. Saville*, 2 P.3d 131, 138 (Col. Ct. App. 2000) (requiring landlord to waive otherwise generally applicable maintenance fee for handicapped tenant under FHA and state fair housing law).

person with handicaps an equal opportunity to use and enjoy a dwelling.³²⁴

Indeed, once the plaintiff demonstrates that he qualifies for a reasonable accommodation from an insurer, the only remaining question would be whether or not the change in premium constitutes a “reasonable accommodation” within the meaning of the FHA. Generally, “[a]n accommodation is reasonable when it imposes no ‘fundamental alteration in the nature of a program’ or ‘undue financial and administrative burdens.’”³²⁵

“Undue burden” or “undue hardship” is not defined in the FHAA. However, courts would most likely find guidance from the ADA, which defines “undue hardship” as “requiring significant difficulty or expense,” taking into consideration several listed factors such as the cost of the accommodation, the financial resources of the business, and the characteristics of the operations.³²⁶

Finally, in order to assess the reasonableness of an accommodation, the cost to the defendant and benefit to disabled community should be considered and weighed together.³²⁷ Courts have repeatedly recognized the “very strong public policy” favoring the right of handicapped individuals to live in congregate living arrangements in traditional residential community settings.³²⁸

Under these standards, insurers are left with no real argument to avoid application of the “reasonable accommodation” provision to their underwriting criteria if the plaintiff can meet his own burdens. In the first place, insurers often make exceptions and deviations for a variety of

324. H.R. REP. NO. 100-711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2186. *See, e.g.,* Shapiro v. Cadman Towers, Inc., 51 F.3d 328, 333 (2nd Cir. 1995); *Vill. of Marshall*, 787 F. Supp. at 879 (“[S]trict adherence to a rule which has the effect of precluding handicapped individuals from residing in the residence was precisely the type of conduct which the [FHAA] sought to overcome with the enactment of § 3604(f)(3)(B).”).

325. *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039, 1044 (6th Cir. 2001).

326. 42 U.S.C. § 12111(10) (1994). One court interpreting the ADA has defined “undue hardship” as a “concept approaching financial ruin.” *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 781 (E.D. Tex. 1996). Although this standard seems high, it is not inconsistent with the statutory definition. No circuit court has rejected the *Anderson* standard.

327. *See Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996); *United States v. City of Chicago Heights*, 161 F. Supp. 2d 819, 836-37 (N.D. Ill. 2001).

328. *See, e.g., Hill v. Cmty. of Damien*, 911 P.2d 861, 874 (N.M. 1996); *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484, 486 (S.C. 1991) (it is “the public policy of the United States . . . to encourage and support handicapped persons’ right to live in a group home in the community of their choice”). One federal court noted that it would be “hard-pressed to deny the significance of the public interest in supporting efforts like Oxford House to assist in and encourage the recovery of alcoholics and drug addicts.” *Oxford House, Inc., v. Township of Cherry Hill*, 799 F. Supp. 450, 465 (D.N.J. 1992).

reasons, and a request for a reasonable accommodation is no different from these situations. There is a process in place for doing so, including by making necessary filings with the state regarding “rules.” ISO assists in such amended filings, and could assist in amending this very rule about roomers or boarders.³²⁹

In addition, application of the reasonable accommodation provisions of section 3601(f)(3)(B) is unlikely to have any impact on an insurer’s balance sheet. Insurers have been known to set forth apocalyptic prophecies that offering insurance to all applicants with disabilities regardless of whether they meet the purportedly neutral eligibility requirements would be catastrophic. Even ignoring the fact that insurers generally have no statistical data to support these types of arguments, insurers must remember that very few of such potential applicants could meet the criteria of section 3601(f)(3)(B) as interpreted by the courts. Again, the hypothetical Gallaudet fraternity house or the nursing facility in *Gamble* would not qualify for a reasonable accommodation under section 3601(f)(3)(B), and should therefore not be considered in the insurer’s estimates of the potential costs of complying with the FHA. Any suggestions from insurers that adjusting their underwriting criteria would be too costly should be scrutinized carefully to ensure that they are only considering potential applicants that, in fact, meet FHA criteria.

Moreover, it would be disingenuous for an insurer to contend that a reasonable accommodation to an underwriting guideline would constitute a “fundamental alteration” of that guideline. Most of the time, the applicant will be seeking the exact same line of insurance, with only an alleviation of the particular rule that is precluding the applicant from obtaining the insurance without the accommodation. Without any evidence in the guise of actuarial data that alleviating the rule would pose increased risks in a section 3601(f)(3)(B) situation,³³⁰ insurers’ claims of “fundamental alteration” ring completely hollow.

329. See *supra* note 295 and accompanying text.

330. Sometimes it can be argued that the house in question actually poses *lower* risks for underwriting purposes. In *Oxford Houses*, for example, the residents are expected to abide by strict rules of conduct or face expulsion from the residence. Under these circumstances, it is difficult to imagine exactly how an Oxford House with ten residents poses a greater risk than another house with five unrelated adults. Cf. *Tsombanidis v. City of W. Haven*, 180 F. Supp. 2d 262, 291 (D. Conn. 2001) (finding no evidence in a zoning case that Oxford House “would effect a fundamental change in the nature of the neighborhood”).

VI. CONCLUSION

Insurers have historically been reluctant to acknowledge that the FHA is applicable to insurance practices. Rather than work with HUD and/or fair housing advocates to reach agreeable standards governing the FHA's application to underwriting, insurers have instead preferred to litigate FHA claims, asserting numerous arguments denying that the FHA covers insurance.

The insurers' strategy has been unsuccessful, and any continued efforts to evade the FHA's province altogether will most likely result in unnecessary waste. With the exception of *Mackey*—which has never been followed and most likely never will be—courts have unanimously held that the FHA is applicable to insurance. Although no case has proceeded to trial and judgment, recent decisions have clarified exactly what is needed to prove an FHA claim challenging unfair discrimination by an insurer.

Insurers would be well-advised to either re-examine many of their long-standing practices that could potentially be vulnerable to FHA claims, or else be prepared to produce statistical data justifying any disparities in coverage that affect protected classes. Fair housing advocates should be encouraged by successes in FHA/insurance suits, and most likely will continue to utilize the FHA as a means of combating unfair discrimination in insurance.