Civil Rights Implications of Insurance Redlining

Ruthanne DeWolfe

Gregory Squires

Alan DeWolfe

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol29/iss2/3

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
CIVIL RIGHTS IMPLICATIONS OF INSURANCE REDLINING

Ruthanne DeWolfe,* Gregory Squires,** and Alan DeWolfe***

In a recent study of insurance redlining the Midwestern State Advisory Committees to the United States Commission on Civil Rights determined that Chicago communities with predominantly minority populations were the principal victims of adverse underwriting decisions. In this article, the authors, focusing on Illinois, discuss various theories of liability for insurance redlining.

With increasing frequency, residents of urban areas are complaining that they cannot obtain essential property insurance at affordable rates through the voluntary market. These complaints are being registered with community organizations, state insurance regulatory officers, and city, state, and federal legislative committees. In many cases, the complaints go beyond individual grievances and charge that entire neighborhoods are unable to obtain property insurance. This practice of denying insurance to residents of a particular geographic area has come to be known as insurance “redlining.”

* Regional Counsel, U.S. Commission on Civil Rights, Midwestern Regional Office. B.A., Heidelberg College; M.S., Ph.D., Northwestern University; J.D., DePaul University College of Law.
** Research/Writer, U.S. Commission on Civil Rights, Midwestern Regional Office. B.S., Northwestern University; M.A., Ph.D., Michigan State University.
*** Professor of Psychology, Loyola University, Chicago, Illinois. B.A., Oberlin College; M.S., Ph.D., Northwestern University.

3. B. Soldwisch, testimony presented before the Finance Committee of the City Council, Chicago, Ill. (Jan. 12, 1978).
5. Rights and Remedies of Insurance Policyholders: Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., pts. 1, 31, 53, 61, 67 (1978) (testimonies of Barbara Pertz (Cleveland), Morton Olshan (real estate investor), Grace Evans (St. Louis), and James McBride (Chicago)) [hereinafter cited as Rights and Remedies Hearings].
7. Insurance redlining, for purposes of this article, is defined as refusing, because of the geographic area within which property is located, to insure or refusing to continue to insure, or varying the amount or type of insurance coverage, or varying the terms or conditions under which insurance coverage is available to homeowners or tenants.
This article discusses insurance redlining within the framework of federal antitrust and selected federal and state constitutional and statutory civil rights laws that afford an aggrieved person a cause of action.\(^8\) State statutes regulating insurance companies\(^9\) are not reviewed except to the extent that state regulatory law is germane to federal law.\(^10\) Further, this article examines the potential impact of state constitutions on redlining abuses. Particular emphasis is placed on the Illinois Constitution because of its unique provision concerning the rights of "all persons" to buy and sell property,\(^11\) a provision that echoes federal civil rights law\(^12\) and that must surely include insurance. It should be noted that no civil rights statutes have been enacted, at least in Illinois, that specifically prohibit racial discrimination in the sale of property, including insurance.

**The Problem**

Insurance companies generally have responded to redlining complaints by denying that they use factors associated with a geographic area, such as neighborhood racial or ethnic composition, as determinants of insurability.\(^13\) Insurers typically have maintained that geographic redlining is

---


\(^11\) Ill. Const. art. I, § 17. This provision states:

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.


\(^12\) 42 U.S.C. § 1982 (1976) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

\(^13\) Rights and Remedies Hearings, supra note 5, at 200, 202 (testimony of Stephen I. Morton, Vice President, The Hartford Group). Martin stated that the automobile insurance industry does not discriminate on basis of race, color, creed, national origin, or religion but rather uses a rating system composed of objective criteria such as territory, place of garaging, age of driver, sex, marital status, use of motor vehicle, driver education completion, age, make and model of vehicle, and traffic violations. He further stated that the objective of such an underwriting system is to limit loss, which the Hartford Group placed at $162.3 million over the period 1972-76 for personal automobile underwriting. Finally, since many legislative acts in the various states (unspecified) inhibit underwriting practices, his company discourages new business in those areas.
merely a misperception of misinformed insurance consumers, and that underwriting decisions are based strictly on objective, reliable, loss-related rating classifications.\textsuperscript{14} Such classifications, it is maintained, include the factors of construction, occupancy, fire protection and exposure\textsuperscript{15} but not, for example, whether a neighborhood is racially changing or is principally composed of ethnic minorities.\textsuperscript{16}

Nonetheless, geographic redlining by property insurers has been documented by many investigators. Their reports reveal that insurers' techniques have included: selectively placing agents only in certain areas; formally or informally instructing agents to refuse to accept applications from residents of certain neighborhoods; and varying underwriting standards and requirements or selectively pricing property insurance according to geographic area.\textsuperscript{17}

Areas that allegedly have been redlined are principally older urban areas.\textsuperscript{18} Occasionally, these areas are already in economic decline when the apparent decision to redline is made.\textsuperscript{19} In other cases, the areas are not yet declining but instead represent racially or ethnically changing neighborhoods or stable but principally minority areas.\textsuperscript{20} The unavailability of essential

\textsuperscript{14} Allstate Insurance Company, for example, claims to have identified 12 Chicago postal zones with adverse loss ratios in which it applies more stringent underwriting procedures and six Chicago rating territories based upon loss experience. Valukas & Bollow, \textit{supra}, note 2, at 59, 67; Address by L. Jordan, General Counsel, State Farm Insurance Company, Insurance Redlining and Reinvestment: Directions for Change Conference (Chicago, Ill., Mar. 23, 1979).

\textsuperscript{15} U.S. DEP'T OF JUSTICE, THE PRICING AND MARKETING OF INSURANCE 189 (1977) [hereinafter cited as \textit{PRICING AND MARKETING}].

\textsuperscript{16} \textit{See Rights and Remedies Hearings, supra} note 5, at 174-77 (statement of James R. Faulstich, Vice President, Industry Relations, and C. Robert Hall, Vice President, National Association of Independent Insurers). This was a joint statement in which they indicated that the objective of risk classification is to reflect the degree of risk posed. Their remarks dealt with real property insurance where the effect of inflation is that replacement cost far exceeds worth in some areas and, consequently, insurers do not want to, and in many instances have stopped, insuring in those areas. They stated that risk assessment should not be restricted. They also noted that the insurance industry makes no moral judgments; it merely seeks to equate risk with degree of loss and to make a profit.


\textsuperscript{18} Essential Insurance, \textit{supra} note 4, at 5-7.

\textsuperscript{19} \textit{Rights and Remedies Hearings, supra} note 5, at 98-99 (testimony of Richard D. Rodgers, Deputy Director, Consumer Division, Illinois Department of Insurance); C. Levin, Homeowners' Insurance in Detroit: A Study of Redlining Practices and Discriminatory Rates app. 12 (1976).

\textsuperscript{20} U.S. COMM'N ON CIVIL RIGHTS, \textit{INSURANCE REDLINING: FACT NOT FICTION} 10 (Feb. 1979) [hereinafter cited as \textit{INSURANCE REDLINING}]; Note, \textit{Property Insurance and the American
insurance to an area, of course, almost certainly guarantees that economic decline will follow.\textsuperscript{21} Furthermore, the impact of insurance redlining on those least able to afford the consequences, those who for economic or other reasons are restricted to certain neighborhoods,\textsuperscript{22} is patently unfair and economically destructive.

In a recent study of the availability of property insurance to risks located in urban areas, in particular the availability to those risks located in urban areas with large minority populations, the Midwestern State Advisory Committees to the United States Commission on Civil Rights (MSAC), focusing on Chicago, analyzed the underwriting practices of insurers writing residential property insurance.\textsuperscript{23} According to the report, Chicago was targeted because it was the only Midwestern state in which the data essential to a statistical analysis were available. Further, at the time of the study, only Illinois had enacted legislation requiring property/casualty insurers to disclose routinely to the chief state regulatory officer the number of new policies written, policies renewed, policies cancelled, and policies non-renewed.\textsuperscript{24} These data were available from the Illinois Department of Insurance.\textsuperscript{25} Thus, the study did not depend on obtaining the necessary data from individual insurers.

Not only did the study analyze activity in the voluntary insurance market, but it also looked at the involuntary or residual insurance market—the Fair Access to Insurance Requirements (FAIR) plan.\textsuperscript{26} That plan was selected...
for study as a measure of the past adverse underwriting decisions of insurers that had forced insurance consumers into the involuntary, residual market.\textsuperscript{27} The decision to analyze FAIR plan data was based in part on a 1977 report prepared for the Illinois Department of Insurance.\textsuperscript{28} That work indicated that certain areas of Chicago and in some cases the entire city had been written-off by insurers in the recent past. Thus, the availability of insurance through the voluntary market was limited. To study only current underwriting activity in the voluntary market would not have revealed whether certain areas of the city with older housing, lower incomes, and higher minority compositions were continuing to suffer from these past adverse underwriting practices. By looking at the FAIR plan, as well as the voluntary market, the impact of past underwriting decisions as well as current underwriting activity could be evaluated. Furthermore, at the time the MSAC data were collected, coverage available in the Illinois FAIR plan, limited to fire and extended coverage,\textsuperscript{29} still was far less comprehensive than property insurance available through the voluntary market. Thus, it was reasonable to assume that individuals would not voluntarily seek coverage in the FAIR plan but rather would accept coverage under that plan only when they had been unable to purchase insurance through the voluntary market or had found such insurance priced beyond their reach.

Analysis of the data revealed that in the voluntary market and in the FAIR plan, minority composition of the Zip code was the factor correlated most highly with underwriting activity.\textsuperscript{30} In the voluntary market, the lower the minority composition of a Zip code, greater was the availability of insurance.\textsuperscript{31} In the FAIR plan, the opposite relationship prevailed; the higher the minority composition of a Zip code, greater was the concentration of FAIR plan policyholders.\textsuperscript{32}

Further, the data were analyzed to determine if, when differences in fire and theft rates between Zip codes were held constant, minority composition remained a significant predictor of underwriting activity. In both the volun-

---

\textsuperscript{27} Telephone interview with R. Gossrow, Property and Casualty Actuary, Illinois Dep't of Insurance (Oct. 2, 1978).

\textsuperscript{28} Valukas & Bollow, supra note 2, at 2.

\textsuperscript{29} Homeowners insurance did not become available under the Illinois FAIR plan until August 1978. See ILL. REV. STAT. ch. 73, § 1065.70 (Smith-Hurd) (West Supp. 1979).

\textsuperscript{30} In other words, minority composition was the single most important factor in explaining underwriting activity. The correlation between minority composition (percent minority in population) and voluntary market activity (new and renewed homeowners policies minus cancellations and nonrenewals per 100 housing units) was -.78 (probability (p) < .001). The correlation between minority composition and involuntary market activity (new and renewed FAIR plan policies per 100 housing units) was + .72 (p < .001). INSURANCE REDLINING, supra note 20, at 35-36.

\textsuperscript{31} Id.

\textsuperscript{32} Id.
tary and involuntary insurance markets, even with the effect of differences in fire and theft eliminated, minority composition remained a significant predictor of underwriting practices. When the intercorrelation between minority composition and income was controlled, minority composition still was found to be a significant predictor of underwriting activity in both the voluntary and involuntary property insurance markets. Thus, the effect of minority composition on underwriting activity was not solely the inadvertent result of individual economic factors but rather was a significant predictor of underwriting activity independent of income.

The MSAC report concluded that minority composition of an area is a significant predictor of whether residential property located in that area will be insured through the voluntary insurance market or whether the property owner will be forced to seek coverage in the residual, involuntary market. The study stopped short of concluding that insurers intentionally use either the minority status of the applicant or the neighborhood as a basis for determining eligibility for property insurance. Thus, the report leaves unanswered the crucial inquiry: have insurers deliberately refused to insure residential property because of the minority status of the owner or neighborhood or have insurers used racially and ethnically neutral underwriting criteria that have had the effect of denying essential property insurance to members of those racial and ethnic minorities? Because liability under several of the laws to be discussed in the subsequent sections of this article requires proof of intentional racial discrimination, the difference is significant.

33. The part correlation between minority composition and voluntary market activity after removing the effects of fire and theft was -.36 (p < .05). The part correlation between minority composition and involuntary market activity after removing the effects of fire and theft was -.41 (p < .01). Part correlations permit calculation of the relationship between a predictor variable (e.g., minority composition) and a criterion variable (e.g., voluntary or involuntary market activity) after eliminating the interrelationship between a predictor variable and another predictor variable (e.g., minority composition with fire or theft). Second order part correlations in which the interrelationship between minority composition and both fire and theft were eliminated were calculated. INSURANCE REDLINING, supra note 20, at 36.

34. The correlation between minority composition and voluntary market activity after eliminating the relationship between minority composition and income was -.39 (p < .01). The correlation between minority composition and involuntary market activity after eliminating the relationship between minority composition and income was .34 (p < .05). INSURANCE REDLINING, supra note 20, at 36-37.

35. Id. at 60.

36. Both 42 U.S.C. § 1985 and 15 U.S.C. § 1013(b) clearly require an element of intent because both are based on conspiratorial agreement. 42 U.S.C. § 1985(c) provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat,
statistical disparities revealed by the MSAC study are sufficiently suggestive of intentional policies and practices that, whether by design or effect, are foreseeably racially discriminatory.\textsuperscript{37}

**THE McCARRAN-FERGUSON ACT**

The business of insurance initially was considered to be a contractual concern that involved only insurer and insured.\textsuperscript{38} By the nineteenth century, states had become actively involved in monitoring and regulating the practices of insurers in order to protect insureds from insolvent companies.\textsuperscript{39} In 1914, the German Alliance Insurance Company challenged the right of the Kansas Insurance Commissioner to regulate and control rates and premiums.\textsuperscript{40} The company argued that the business of insurance was like any other commercial enterprise.\textsuperscript{41} The cost of insurance was, according to the company, a matter to be determined solely by the parties to the transaction, the insurer, and the insured.\textsuperscript{42} The United States Supreme Court dis-
agreed with the company’s arguments and indicated that the business of insurance has “a reach of influence and consequences beyond and different from that of ordinary businesses in the commercial world.”  

Stressing the unique importance of insurance to the public interest, the Court inferred that the business of insurance must be regulated for the common good. Therefore, liberty of contract was held not to preclude state regulation.

Subsequent to 1914, the insurance industry became subject to increasing state regulation. Simultaneous federal regulation did not occur, however, because insurance transactions were considered to be solely matters of intrastate commerce. In 1944, a revolutionary decision by the Supreme Court brought the federal government into the business of insurance for the first time. In United States v. South-Eastern Underwriters Association, a case in which a number of insurance companies were found to have conspired to fix rates to drive other insurers out of business, the Court determined that insurance is interstate commerce subject to federal regulation, including federal antitrust laws. The Court implied that Congress might exempt insurance from the antitrust laws, however, if it deemed such action to be appropriate.

The following year, Congress, in response to South-Eastern Underwriters, passed what is popularly known as the McCarran-Ferguson Act. Under that Act, insurance companies are exempt from federal antitrust laws to the extent that they are regulated by state law.

---

43. Id. at 414.
44. Id. at 413.
45. Id.
47. 322 U.S. 533 (1944). Appellees, which consisted of over 200 fire insurance companies and 27 individuals, were indicted for violation of the Sherman Act in that they conspired to fix rates, monopolize trade, and used boycotts, force, and coercion to compel non-member insurance companies to become members of their association in certain southeastern states. Id. at 534. Appellees’ demurrer was sustained by the district court on the ground that the fire insurance business did not constitute interstate commerce and was, therefore, exempt from federal regulation. Id. at 536. The Supreme Court held: (1) the Sherman Act was intended to apply to fire insurance companies; and (2) the business of fire insurance did cross state lines so as to bring it within the definition of interstate commerce. Id. at 553. The Court distinguished Paul v. Virginia and subsequent cases relying on it because in those cases the Court was not confronted with a situation where there was a federal statute passed by Congress and intended to apply to fire insurance. Id. at 545. In the earlier cases, had the Court accepted the argument that, because there was no applicable state law, the federal government and not the states should regulate insurers, the insurers would have been virtually unregulated. The Court in South-Eastern adopted the position that state and federal regulation of fire insurers was concurrent, with federal law applying to those aspects of the business that are interstate in character, e.g., conspiracies across lines in restraint of trade. Id. at 553.
48. Id.
49. Id. at 561.
51. Id. § 1012 (1976) provides:
(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
Whether regulated by state law or not, however, insurers are subject to federal antitrust laws prohibiting boycotts, coercion, or intimidation. Thus, even if state law prohibits an insurer from engaging in a boycott, such conduct also is actionable at the federal level under the Sherman Act.

Historically, the proscription against boycotts, coercion, or intimidation in the McCarran-Ferguson Act generally had been interpreted to protect insurers from the actions of other insurers; individual policyholders and applicants for insurance were beyond the scope of the Act. In the spring of 1978, however, the Supreme Court was confronted with *St. Paul Fire & Marine Insurance Co. v. Barry*, in which an individual applicant for medical malpractice insurance, denied insurance by several companies, alleged that the denials constituted a boycott. The insurers argued that the prohibition against boycotts, coercion, and intimidation protected only other insurers and did not provide a cause of action for individuals. The Court disagreed. In a seven to two decision, the Court held that the concerted refusal of insurers to deal with individuals constituted a boycott prohibited under the Sherman Act. The Court was careful to qualify its decision, however, by indicating, on the one hand, that conduct by a single actor cannot constitute a boycott and, on the other hand, that not all concerted activity between insurers violates the Sherman Act. How far the Court intends to extend the reach of the Sherman Act to insurance company practices awaits resolution.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

52. Id. § 1013(b). For text of § 1013(b), see note 36 supra.
55. 438 U.S. 531 (1978). Respondents, licensed physicians, sued, on a class action basis, four Rhode Island insurance companies, alleging that three of the companies refused to deal with them as a means of compelling the doctors to deal with the fourth on terms unfavorable to them. Id. at 533. The district court dismissed the complaint, which alleged Sherman Act violations, on the ground that the antitrust claim was barred by the McCarran-Ferguson Act. *Id.* The court of appeals reversed, *id.* at 534, and the Supreme Court affirmed. The Court stated that the provision of the Sherman Act that prohibits boycotts, coercion, or intimidation was applicable unless specifically exempted and the McCarran-Ferguson Act provided no such exemption. *Id.* at 550-51. The Court found that the type of conduct alleged by respondents constituted a boycott under the Sherman Act. *Id.* at 552-55.
56. *Id.* at 535.
57. *Id.* at 536.
58. *Id.* at 552-55.
59. *Id.* at 555. In regard to the agency relationship between agents and insurers, see notes 105 and 125 infra.
future litigation. Nonetheless, the Barry decision represents a significant shift in traditional interpretation; at least some joint action by insurers that denies insurance coverage to individual applicants is now violative of the Sherman Act.

Does insurance redlining constitute a violation of the Sherman Act under the Barry rationale? It is clear that a decision by a single insurer or agent to redline an area or deny insurance to a single applicant does not constitute a violation of the Act. If two insurers agree to decline insurance applications or limit the amount or type of coverage available to applicants in a specific geographic area, however, such agreements probably would violate the Act as currently interpreted by the Supreme Court. A more likely situation to trigger insurer liability would arise when an insurer and an independent agent or broker agree to avoid a given geographic area. In fact, many complaints have been registered addressing the refusal of Chicago agents, on instructions from the company, to attempt to place insurance with a particular company because it no longer writes in a given neighborhood. If these agreements between insurer and independent agent are tantamount to a concerted "refusal to deal" arrangement, they are prohibited by the Sherman Act.

In Barry, however, the Court indicated that its boycott discussion did not apply to concerted activity between insurers, or between insurers and others, that is "compelled or specifically authorized by state regulatory policy." In recognizing the legitimacy of such state action, the Court followed the rationale set forth in Parker v. Brown. In that case, the Court held that anticompetitive conduct becomes insulated from antitrust laws, even where competition is displaced by regulation or monopoly, when the conduct occurs as a result of state action. For purposes of the McCarran-Ferguson Act, federal courts repeatedly have held that the state's power to control rates constitutes such insulating state action under the prevailing Parker doctrine. The power to regulate rates both directly and indirectly through adversary proceedings provides this antitrust insulation. For example, under the Parker doctrine an agreement between an insurer and independent agent or between two insurers to accept only preferred risks or to limit coverage to repair cost would be exempt from federal antitrust laws when the insurer has filed those policies with the chief insurance regulatory officer and received necessary authorization.

60. See Valukas & Bollow, supra note 2, at 12-23.
63. 317 U.S. 341, 350-52 (1943) (state agricultural marketing program that operated to restrict competition and to regulate sale and distribution of agricultural commodities held not within the scope of, and thus not a violation of, the Sherman Act).
64. Id. at 350-52.
Parker leaves open the question whether state action would insulate an insurer if it were alleged that the chief regulatory officer was a joint participant with the insurer in a “concerted refusal to deal,” i.e., a boycott, rather than exercising his or her proper governmental function. If the state is not carrying out a legitimate governmental function but instead is a culpable joint participant, the insurer could be stripped of its exemption from antitrust law.\footnote{66} The congressional intent behind the Sherman Act should determine whether the state itself would be liable in such a situation. The legislative history of the Act indicates that the Congress did not intend that law to apply to such acts by a state.\footnote{67}

The allegation often is made that there is a revolving door between the insurance industry and the office of the chief state insurance regulatory officer.\footnote{68} The implication, of course, is that the latter’s decisions are made in the self-interest of the officer and insurer, not in the public interest. The Parker doctrine is premised on the state’s exercising a proper governmental role.\footnote{69} Thus, if a regulatory officer’s decision could be shown to exceed the bounds of his or her statutory authority, and to be in his or her limited pecuniary or other interest or that of an insurer, such misuse of discretion could be sufficient to remove the shield of antitrust protection, at least from the insurer.\footnote{70} Such a situation might exist where it could be proved that the chief regulatory officer agreed with an insurer’s decision to remove its business from a geographic area in return for a promise of future employment. Problems of proof, of course, abound. Nonetheless, those problems should not obscure the potential for liability when the regulatory officer permits an insurer to withdraw its business totally or permits the insurer to withdraw more desirable or comprehensive forms of coverage from an urban community.

Because a boycott requires an agreement between at least two parties, the applicability of the Sherman Act to decisions of the state regulatory officer will be crucial when the challenged activity is an agreement between a single insurer and the regulatory officer. It is not necessary, however, to

\footnote{66. See notes 51-53 and accompanying text supra.} \footnote{67. See 21 CONG. REC. 2457, 2459, 2461, 2562 (1889). See also Parker v. Brown, 317 U.S. 341, 351 (1943) (legislative history suggests that Congress did not intend to include states within reach of the Sherman Act); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493-95 n.15 (1940) (Sherman Act covers only business combinations).} \footnote{68. Address by Eleanor Lewis, Ass’t Insurance Commissioner, New Jersey, Discrimination Against Minorities and Women in Pensions and Health, Life and Disability Insurance Consultation, U.S. Comm’n on Civil Rights (Wash., D.C., April 26, 1978).} \footnote{69. 317 U.S. at 351-52 (reliance on state as sovereign entity).} \footnote{70. Whether the chief regulatory officer will enjoy sovereign immunity from personal liability for acts not entered into in good faith or for acts not representing a proper governmental function is beyond the scope of this article. The Supreme Court, however, in Scheuer v. Rhodes, 416 U.S. 232, 247-49 (1974), determined that government officers are entitled only to a qualified immunity, not an absolute immunity for discretionary acts. Further, the Court recently upheld Scheuer in Butz v. Economou, 438 U.S. 478 (1978) (executive officials charged with constitutional violations enjoy a qualified immunity, although there are some officials whose special functions require absolute immunity).}
prove a racial or ethnic basis for the agreement.\textsuperscript{71} Thus, the hurdle of proving intentionality or foreseeability of racially adverse consequences is eliminated under this statutory vehicle.

\textit{The Impact of the McCarran-Ferguson Act
Upon Access to the Courts for Civil Rights Violations}

Alternative state and federal courts were not always available to individuals aggrieved by racial or ethnic discrimination. Prior to the Civil War, Congress relied solely on the states to vindicate individual rights to personal security.\textsuperscript{72} When the Civil Rights Acts were enacted following that war,\textsuperscript{73} Congress altered its established policy and placed primary responsibility for protecting individual civil rights on the federal level. Thus, until enactment of the McCarran-Ferguson Act of 1945,\textsuperscript{74} there would have been no question that federal courts were open to complaints of civil rights violations in regard to insurance.

Since 1945, however, the McCarran-Ferguson Act has exempted the business of insurance from federal law to the extent that state law regulates the subject.\textsuperscript{75} The Act, however, does not define the "business of insurance." Recently, in \textit{St. Paul Fire \& Marine Insurance Co. v. Barry},\textsuperscript{76} the Supreme Court distinguished between the "business of insurance," which is exempt under the Act, and the "business of insurance companies," which lies within the scope of the federal antitrust laws. The "business of insurance," according to the Court, refers to the essence of insurance itself, that is, the spreading and distribution of risk.\textsuperscript{77} Ultimately, this function is manifest in the contract between insurer and insured. Thus, the "business of insurance" is only that part of the insurer's activities that is related to risk assessment and marketing. Clearly, basic underwriting decisions represent the "business of insurance."

\textsuperscript{71} The McCarran-Ferguson Act does not distinguish between a boycott grounded in commercial as against racial or other invidious discrimination. See 15 U.S.C. \textsection{} 1013(b) (1976). For the text of \textsection{} 1013(b), see note 36 \textit{supra}.

\textsuperscript{72} T. E\textsc{emerson}, D. H\textsc{aber}, \& N. D\textsc{orsen}, \textsc{Political and Civil Rights in the United States} 1375-76 (3d ed. 1967). Prior to the enactment of the thirteenth, fourteenth, and fifteenth amendments, individual civil rights were virtually the exclusive concern of state law. Since 1833, the Bill of Rights had been held to constrain the federal government but not state, municipal, or private conduct. Barron \textit{v. Mayor of Baltimore}, 32 U.S. (7 Pet.) 242, 248 (1833). Furthermore, blacks were not considered "persons" entitled to such federal constitutional protections as did exist until the passage of the Civil Rights Acts. Scott \textit{v. Sandford}, 60 U.S. (19 How.) 393, 404 (1856).

\textsuperscript{73} The thirteenth, fourteenth, and fifteenth amendments to the U.S. Constitution and the statutes passed to enforce them form the core of federal protection against racial and ethnic discrimination in the public (state and municipal) and private spheres. 42 U.S.C. \textsections{} 1981-1983, 1985 (1976). See notes 96-125 and accompanying text \textit{infra}.

\textsuperscript{74} 15 U.S.C. \textsections{} 1011-1015 (1976).

\textsuperscript{75} \textit{Id.} \textsection{} 1012 (unless a federal law relates specifically to business of insurance).


\textsuperscript{77} \textit{Id.} at 551. The Court did not define the "business of insurance companies."
Further, it would seem, on the basis of the McCarran-Ferguson Act, that even if individuals are denied insurance because of their race or ethnicity, they will be denied redress in the federal courts because (1) the "business of insurance" is reserved to state regulation, and (2) virtually all states forbid by statute or regulation unfair discrimination in the issuance or termination of insurance. The McCarran-Ferguson Act cannot deprive individuals of their rights to complain to the federal courts that their federally guaranteed rights in regard to insurance have been violated. Access to the federal courts is available even where state law provides a remedy for the very acts upon which the civil rights violation is grounded. Thus, an insurer's decision not to insure an individual because of his or her race or national origin or that of neighbors, while constituting an underwriting decision—part of the "business of insurance," remains subject to federal civil rights laws.

Moreover, were the McCarran-Ferguson Act to be interpreted as depriving an individual of a federal forum, the Act would represent a unique withdrawal of protection in favor of a single industry. There is nothing in the legislative history of the Act to indicate that Congress intended such a result. In addition, the Civil Rights Acts of the nineteenth century created new federal civil rights. Because Congress does not create hypothetical rights or substantive rights with hypothetical remedies, it is unlikely that Congress would have enacted these civil rights statutes without ensuring continuing federal remedies for their violation.

79. E.g., Ill. Rev. Stat. ch. 73, § 1031(3) (1977) provides:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(3) Making or permitting, in the case of insurance of the types enumerated in Classes 2 and 3 of Section 4, any unfair discrimination between individuals or risks of the same class or of essentially the same hazard and expense element because of the race, color, religion or national origin of such insurance risks or applicants. [citation omitted].


81. H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945), reprinted in [1945] U.S. Code Cong. Serv. 670, 672. This report indicates that the purpose of the McCarran-Ferguson Act is to permit the continued regulation and taxation of insurers by the states. The authority of the states to regulate and tax had been drawn into question by the South-Eastern Underwriters Ass'n case. 322 U.S. 533 (1944).

82. Of the rights that were created, 42 U.S.C. §§ 1981-1982 are particularly germane to this discussion. For text of § 1981, see note 87 infra. For text of § 1982, see note 12 supra.
83. See, e.g., Cannon v. University of Chicago, 99 S. Ct. 1946 (1979) (private right of action maintainable for alleged sex discrimination in medical school admission under Title IX although
The McCarran-Ferguson Act should be interpreted to exempt only the “business of insurance” qua “business of insurance” from federal law. Those aspects of such business that represent civil rights violations should remain subject to federal scrutiny. Such an interpretation permits the Act and relevant civil rights law to exist in harmony while each retains its distinct purpose and authority.

Federal Civil Rights Law

Those engaging in insurance redlining could be found liable under the several federal civil rights laws. The thirteenth amendment states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” The Civil Rights Acts of 1866 and 1870, and a portion of the Act of 1871, were passed to enforce the provisions of the thirteenth amendment and thereby to provide a number of fundamental protections of individual rights. Under section 1981, “all persons” are guaranteed equal rights to make and enforce contracts. Under section 1982, “all persons” possess equal rights to buy and sell real and personal property. Finally, under section 1985, “all persons” are protected by federal law from conspiracies to interfere with their civil rights.

that Act provides only an administrative remedy); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (stockholders’ action for redress of corporation’s alleged violation of the Securities Exchange Act of 1934 maintainable although the Act provided no private cause of action); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977) (class action brought by mobility-disabled persons who were unable to use public transportation system established a private cause of action to vindicate rights).

84. U.S. CONST. amend. XIII, § 1.
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
89. 42 U.S.C. § 1985(a)-(b) (1976) provides:
   If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;
These statutes provide the causes of action through which a private citizen may seek redress for a violation of protected rights in the federal courts. The persons to whom the protections extend, however, are limited to members of racial minorities. Unlike section 1983, these statutes enacted under the thirteenth amendment have been construed to retain their essential initial purpose to protect blacks from invidious discrimination. Where a classification based on membership in an ethnic minority, such as Mexican or Hispanic, is tantamount to classification on the basis of race, the courts have expanded the ambit of these laws to include members of such ethnic groups.

Unlike section 1983, which was promulgated to enforce the commands of the fourteenth amendment, the foregoing civil rights statutes enacted under

(b) Obstructing justice; intimidating party, witness or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attending or testified, or to influence the verdict, presentment, or indictment or any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror, or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

For the text of 42 U.S.C. § 1985(c), stating the sanction for violations of subsections (a) and (b), see note 36 supra.

90. 28 U.S.C. §§ 1343(1), (2), & (4) provide the jurisdictional bases for these actions.
91. 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

While the fourteenth amendment was originally enacted to protect blacks, by 1866 the equal protection clause was being applied not only to other racial groups but also to some economic institutions as corporations. See, e.g., Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969).

92. Only racial or quasi-racial discrimination lies within the purview of these civil rights laws based on the thirteenth amendment. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976) (private school may not discriminate in admissions on basis of race); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (employer may not discriminate with respect to seniority rules and job assignments on basis of race); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (object of thirteenth amendment to free blacks from slavery and not to impede the states in the proper exercise of their police power).

93. See, e.g., Ortega v. Merit Ins. Co., 433 F. Supp. 135 (N.D. Ill. 1977) (persons of Hispanic origin have standing to bring an action alleging racial discrimination in the sale of installment credit property insurance).
the thirteenth amendment are applicable to the conduct of private persons. 94 Thus, an individual acting solely on his or her private capacity is potentially liable under sections 1981, 1982, and 1985. Consequently, the conduct of private insurance companies, agents, and brokers is cognizable under these statutes. 95

Section 1981

Section 1981 forbids private persons from refusing to enter into contracts with individuals because of their race. Insurance contracts have been held to be contract within the purview of section 1981. 96 Thus, under that section, a member of a racial minority may not be denied insurance, that is, a contract of insurance, or offered only limited insurance coverage, because of his or her race. In addition, because section 1981 protects both members or racial minorities and whites from discrimination against the former, 97 a white who is denied insurance because of the minority composition of his or her neighborhood also has a cause of action.

The coverage provided under an insurance contract varies according to the type of policy. A homeowners policy, for example, may cover all perils or it may exclude certain perils such as the collapse of a building due to the weight of snow. 98 A fire policy only on building and contents severely limits coverage by excluding theft, vandalism, and malicious mischief. 99


97. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (white employees brought action alleging racial discrimination in that they were discharged for misappropriating goods but a Negro employee, charged with the same offense, was not discharged); Tillman v. Wheaton-Haven Ass'n, Inc., 410 U.S. 431 (1973) (preference rights to use of recreational facilities within a designated geographic area may not be denied a resident of that area on the basis of race); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (transferability of a membership share in a private recreational facility may not be impeded on account of race where such share is an integral part of a real property lease or sale).


99. Id. at 13.
Also, some personal lines, and property/casualty insurance policies offer coverage only to the cost of repair rather than full replacement cost. To the extent that any of these limitations are imposed on an applicant for racial reasons, they, along with the outright refusal to insure, are prohibited by section 1981.

Further, exclusive or "captive" agents are employees of a particular insurance company. If such an agent refuses to accept an application for insurance because of the applicant's race, the agent subjects both the agent and the principal company to potential liability under section 1981. In such a case, the act of the agent is the act of the principal. Many companies operate through independent agents who are not employees of the company but instead have contractual arrangements with a number of companies for placing insurance. Their function is to accept (or reject) applications for insurance and decide which of a number of insurers with whom they have a contractual arrangement will best serve the client's insurance needs. An insurance broker is even more removed from the insurer. He or she operates without a contract and merely places applications for insurance with one or another insurer. An independent agent or broker is, however, no less than the exclusive agent an integral part of the sequence of events culminating in an insurance contract. An application for insurance constitutes an offer. If a broker or independent agent refuses to accept an application for insurance, he or she effectively interferes with contract formation. If the refusal to accept the application is based on race, such refusal would be actionable under section 1981.

With the independent agents and brokers, however, the question of the liability of the insurer itself is not as straightforward as it is with exclusive

100. Repair cost policies are being developed particularly for dwellings where replacement cost exceeds market value of the property by 150%, although there are certain limitations. For example, to determine the policy coverage, the market value of the property is reduced by 20% to account for land value. After this reduction, the remaining market value of the dwelling is increased by 150%, thereby reflecting the actual maximum replacement cost covered by the policy. A policyholder, however, should be aware that the actual replacement cost of the dwelling may exceed the coverage of the policy. This anomaly can occur if the product of the dwelling's square footage and the replacement cost per square foot (current replacement costs are $40 to $45 per square foot) exceeds the maximum policy coverage using the 150% formula. Allstate Insurance Company pioneered the development of this type of coverage. Conversation with Joseph Bellissimo, Senior Account Agent, Allstate Insurance Company (March 17, 1980).


102. Ordinary agency principles apply to the exclusive agent-company relationship. Thus, an agent acting in the scope of his or her employment subjects the principal, in this case the employing insurer, to liability under the well-established doctrine of respondeat superior. See Restatement (Second) of Agency §§ 216, 219(1) (1958).

103. Fireman's Fund Insurance Companies and United States Fidelity and Guaranty Company both utilize independent agents.

agents. Nonetheless, independent agents are agents of the insurer and subject it to liability to the same extent as do exclusive agents. With brokers, however, it would probably be necessary to find that the racial discrimination underlying the denial of insurance occurred as the direct result of insurer authorization. In that case, the insurer would be liable directly for its express refusal to accept offers from applicants because of the applicant’s race. In appropriate circumstances, the link between insurer and broker should not be difficult to find. There has been considerable testimony, for example, that some insurers have instructed brokers and agents not to accept insurance applications on property located in certain areas of the city. As discussed in the first section of this article, certain areas within Chicago are readily identifiable as areas with high and low minority compositions. Also, the MSAC study reported that residents of high minority areas are far less likely to find property insurance available in the voluntary market than residents of predominantly white areas. Thus, to the extent that geographic area is a subterfuge for race, the refusal to accept the application for insurance because of area of residence would be prohibited under section 1981.

The question of the potential liability of insurers operating through agents and brokers may turn on findings that insurers instructed the brokers to restrict their activity in certain areas and that such restriction was racially motivated. As to the latter determination, the statistical disparities in voluntary and involuntary market activity in the white and minority Zip codes reported by the MSAC study should be sufficient to establish a prima facie case of racial discrimination. The burden then would shift to the insurer

---

105. Independent agents and brokers for insurance purposes are considered agents of the insurer. 16 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8672, at 137-38 (1968). Agency principles hold that a principal is liable for the consequences of an agent’s conduct resulting from the former’s direction. RESTATEMENT (SECOND) OF AGENCY § 212 (1958). But see discussion, note 125 infra.

106. INSURANCE REDLINING, supra note 20, at 6.

107. Id. at 8.


109. INSURANCE REDLINING, supra note 20, at 9.

110. Disparate impact has been sufficient to establish a prima facie case of racial discrimination in several areas. See, e.g., the discussions in regard to Title VII in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) and in regard to Title VI in Lau v. Nichols, 414 U.S. 563, 568 (1974).

Two federal appellate courts have adopted the discriminatory effect standard for plaintiff cases arising under Title VIII. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978). In Arlington Heights, the
to prove that some loss-related factor, e.g., arson rates or a ratio of replacement value to market value above 150%, and not race, was the basis for its action.

Support for the finding of a prima facie case is found in Clark v. Universal Builders and Ortega v. Merit Insurance Co. In both of those cases, the defendants were exploiting the consequences of racially segregated neighborhoods. In Clark, the Seventh Circuit decision which became the basis of Ortega, the court stated that a prima facie case was established upon showing that prior racial segregation created a dual housing market and that defendants had taken advantage of that market by demanding prices and terms for blacks in excess of what was being required of whites. Having

Court of Appeals for the Seventh Circuit held that a Title VIII violation may be proved by showing a disproportionate effect on minorities of a government housing policy. 558 F.2d at 1289. The Arlington Heights court reasoned that the result of the defendant's action in refusing to zone for low- and middle-income housing in a virtually all-white area, regardless of its motive, would be to discriminate upon the basis of race. Id. This result frustrated the national goal of integrated housing, and thus it perpetuated segregation. Id.

The Court of Appeals for the Third Circuit also adopted the discriminatory effect standard for the prima facie case in the Rizzo decision. The Rizzo court held that the Philadelphia Housing Authority and the Redevelopment Authority of Philadelphia violated Title VIII because their actions, in converting an integrated area into an all-white area, had a discriminatory effect on minorities by denying them housing on the basis of race. 564 F.2d at 149-50. Rizzo and Arlington Heights demonstrate that the discriminatory effect standard is appropriate under Title VIII and that the prima facie case is a powerful evidentiary weapon in situations where the defendant has all the information and the plaintiff lacks access to the information, which is the case in insurance redlining.

In addition, statistics often have been used with judicial approval to establish a prima facie case of discrimination. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 339, (1977) (employment discrimination); Turner v. Fouche, 396 U.S. 346, 360 (1970) (jury selection). Recently, the Supreme Court granted certiorari only to dismiss subsequently for mootness a case that would have decided whether § 1981 requires strict proof of intent to discriminate or whether proof of disparate impact will suffice to establish liability. The court of appeals had held that Title VII and § 1981 standards with regard to proof of racial discrimination are the same; both require proof of disparate impact only. Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), cert. granted, 437 U.S. 903 (1978), vacated as moot, 99 S. Ct. 1379 (1979) (action by black and Mexican-American fire department applicants alleging discrimination in hiring by use of a height requirement not shown to be job related. Furthermore, race need not be shown to be the sole or even the primary factor underlying a refusal to issue a contract (in this case of insurance) to establish liability under § 1981. The use of race even as one among many other factors is impermissible. See note 37 supra. For an excellent discussion of the prima facie case, see Schwemm, Discriminatory Effect and the Fair Housing Act, 54 Notre Dame L. Rev. 159 (1978); Comment, Applying the Title VII Prima Facie Case to Title VIII Litigation, 11 Harv. C.R.-C.L. L. Rev. 128, 157 (1976).

111. The "business necessity" defense is discussed at note 207 infra.


113. 501 F.2d at 334. See note 94 supra. The court appears to have assumed that the racial segregation underlying the dual housing market occurred as a result of intent rather than sheer happenstance. However, the Clark defendants did not themselves create the segregated residential pattern but merely used that pattern to their own pecuniary advantage.
established those two factors, the burden of persuasion then shifted to the defendants to articulate some legitimate, non-discriminatory reason for their conduct.

With insurance redlining, it seems reasonable to suggest that a prima facie case is established upon a showing that geographic areas have a disproportionate concentration of minority residents caused by prior racial segregation and that insurers are restricting their general business in predominantly black areas, are charging excessive premiums, are requiring special terms and conditions, are limiting the extent of individual coverage, or are engaging in other discriminatory conduct.

Section 1982

A contract of insurance also creates a property right. A contract of property insurance is a chose in action and is in itself a personal property right distinct from the building or contents that are insured. The property right thus created is protected under section 1982. An insurer's refusal to issue property insurance for reasons of race would unlawfully deny an individual the right to purchase personal property and thus would be actionable under section 1982.

Further, the historical relationship between section 1981 and section 1982 suggests that the two sections reasonably may be similarly construed. To reiterate a similar discussion of section 1981 earlier, the data analyzed by the MSAC report revealed that residents of high minority communities had been denied insurance for reasons either based directly on race or associated with race. Thus, it seems likely that the statistical disparities set forth in the study would sustain a prima facie case of racial discrimination under section 1982 where an applicant has been denied an insurance contract and alleges a racial basis for the denial.

Section 1985(c)

Section 1985 prohibits conspiracies between private persons to deprive a member of a racial minority of his or her civil rights. The right of con-
tract and the right to purchase property are both protected civil rights. Therefore, this section prohibits agreements between insurers or with others to deny insurance on account of race.

Insurers customarily meet to discuss insurance practices only under the direction of the National Association of Insurance Commissioners (NAIC) or under the direction of their individual state insurance commissioners. This policy is not in response to section 1985 but rather to avoid liability under that part of the Sherman Act from which insurers are not exempt under the McCarran-Ferguson Act. Nonetheless, insurers are careful to avoid even the perception that they act in concert without state authorization.

As stated earlier, insurers regularly conduct their affairs through agents and brokers. Independent agents and brokers are not employees of a particular insurer while exclusive agents are. An insurer who agrees with an exclusive agent to refuse insurance to individuals for racial reasons cannot be held liable for a conspiracy because one cannot conspire with oneself. An independent agent or broker, however, legally may be capable of participating in a conspiracy with an insurer where both agree to refuse insurance because of the race of the applicant. Such agreements are precisely what is prohibited by section 1985.

In line with earlier discussions, the MSAC report indicates that racial factors may be contributing significantly to the unavailability of insurance in the voluntary market. To the extent that insurers have agreed with independent agents or brokers or with each other to restrict insurance availability in areas with large minority population through the voluntary market, those agreements are unlawful under section 1985.

---

121. Because all persons have an equal right to buy property (§ 1982) and make contracts (§ 1981) and these are federally protected rights, a conspiracy to deprive an individual of these rights for reason of race constitutes an offense under § 1985.

122. The NAIC was founded in 1871. It is composed of the chief insurance regulatory officers of the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The organization meets twice a year to discuss matters of common interest including proposed legislation. The purposes of the NAIC include promoting uniformity in insurance law and regulation and preserving "to the several states the regulation of the business of insurance." NAIC CONST. art. 2.

123. See notes 60-61 and accompanying text supra.

124. Section 1985 embodies the well-established principle that a conspiracy requires at least two persons: "If two or more persons . . . ." For the text of § 1985, see notes 89 and 36 supra. See United States v. Santa Rita Store Co., 16 N.M. 3, 9-10, 113 P. 620, 621 (1911), for an early discussion of agency issues in prosecutions for conspiracies in violation of federal antitrust laws.

125. See note 105 supra. However, the insurance agent is considered an agent of the insurer to protect the applicant. That is, because the insurance agent is the agent of the insurer as opposed to the agent of the applicant, the latter is able to rely on the agent's representations in regard to the insurer. For purposes of § 1985, however, it would be reasonable to consider the insurance agent an independent contractor acting as agent of the applicant instead of insurer in order to carry out the underlying purpose of the principles relevant here, i.e., protection of the applicant.

126. INSURANCE REDLINING, supra note 20, at 60.
Title VIII

The Fair Housing Act of 1968 also was promulgated under the authority of the thirteenth amendment.\(^{127}\) In addition to prohibiting racial discrimination in the sale and rental of housing or in associated services, the Act prohibits such discrimination based upon other factors, including national origin.\(^{128}\) The Act also expressly prohibits discrimination in the issuance of real estate and home improvement loans, but does not expressly protect insurance transactions. Insurance is a prerequisite to obtaining a mortgage, however, and no mortgagee would be willing to lend money to a potential home buyer without having his or her interest in the property protected.\(^{129}\)

Further, some financial companies maintain subsidiary property/casualty insurance businesses.\(^{130}\) It undoubtedly would be unlawful for a financial company to deny an application for a real estate loan because of the applicant's failure to obtain insurance after the subsidiary had denied that insurance based on racial or ethnic considerations. Most insurers, however, are not directly affiliated with lending institutions and are not operating under express agreement with such institutions. In this case, denying an application for a real estate loan because the applicant could not obtain insurance is probably an activity too indirect to be reached by the present Act.

---

128. 42 U.S.C. § 3604 (1976) provides:
   As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
   (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
   (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
   (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.
   (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
   (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.
129. See, e.g., U.S. President's Nat'l Advisory Panel on Insurance in Riot-Affected Areas, Meeting the Insurance Crisis of Our Cities 1 (1968).
130. Talman Federal Savings and Loan Association of Chicago, Illinois, is one such company that maintains a subsidiary property insurance business through the Talman Services Corporation General Insurance Division.
The more important question, however, is whether the Fair Housing Act as it now stands is broad enough to reach the practices of insurers themselves by prohibiting insurance redlining based on the minority composition of the neighborhood or minority status of the insurance applicant. Sections 3604(a), 3604(b), and 3617 of the Act do not refer to insurance at all but rather limit their prohibitions to certain discriminatory acts that make dwellings “unavailable,” to discrimination in the provision of “services and facilities” in connection with the sale or rental of dwellings, or to interferences with rights protected under, inter alia, section 3604.

Insurance could be considered beyond the scope of the present Act for two reasons. First, the denial of insurance in the voluntary market does not make dwellings as such unavailable. Such redlining may render mortgages unavailable, although in twenty-eight states essential property insurance is available to all objectively insurable risks through the FAIR plan. In fact, the FAIR plan was enacted independently of the Fair Housing Act to ensure that mortgages would not become unavailable to inner city residents because of their inability to secure essential property insurance. Denial of residential property insurance through the voluntary market in these states does not render even mortgages unavailable.

Secondly, insurance is not a “service or facility” in connection with the sale or rental of the dwelling. Furthermore, the sketchy legislative history of the Act is too inadequate to sustain a clear determination that Congress intended to reach such independent ancillary services as insurances.

131. 42 U.S.C. §§ 3604(a), (b), 3617 (1976). Section 3617 provides:
Interference, coercion, or intimidation; enforcement by civil action
It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

132. Id.

133. 12 U.S.C. §§ 1749bbb-3 to -10 (1976). The FAIR plan was established by Title XII of the Housing and Urban Development Act of 1968. Id. See note 26 supra.

134. INSURANCE CRISIS, supra note 17, at 4-5.

135. In a recent case, however, a federal district court held that denial of insurance for racial reasons constituted a violation of § 3604(a) by making housing unavailable. Having determined a claim under § 3604(a), the court declined to reach the issue of services under § 3604(b). Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co., 472 F. Supp. 1106 (S.D. Ohio 1979).

136. 42 U.S.C. § 3604 (1976). Prohibited practices include, inter alia, real estate appraisal, steering, denial of multiple listing services, discriminatory application procedures, refusal of representation by a real estate broker, and imposing disparate appraisal values. Id.

Nonetheless, by administrative decision \(^{138}\) and by developing case law, \(^{139}\) it is being determined that the Fair Housing Act is indeed broad enough to bring insurance companies within its ambit. Whether these decisions will be supported by higher courts remains unresolved. Assuming that the Fair Housing Act as it is presently written does prohibit insurance redlining based upon racial factors, the same section 1981 arguments would apply to ban discrimination against whites as well as racial and ethnic minorities who live in a particular area. \(^{140}\)

Furthermore, it would not be necessary to demonstrate that race was the only factor underlying the denial of insurance. Rather, it would be sufficient to establish liability if race, an impermissible factor under Title VIII, was shown to be merely one factor underlying the denial of insurance. \(^{141}\) Such proof that race was a basis for denying insurance, would, of course, satisfy any intent requirement imposed upon Title VIII.

With regard to the question of intent, the Seventh Circuit, on the remand of the Arlington Heights case, indicated that "at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent." \(^{142}\) These circumstances would seem to include conduct whose "natural, probable and foreseeable" consequences result in racial discrimination. \(^{143}\) Thus, (assuming that the present Fair Housing Act does reach insurance company practices) an insurance company that redlines an area with a high concentration

---

\(^{138}\) Proposed Amendments, supra note 137, at 2; Memorandum of the General Counsel of Housing and Urban Development to Chester McGuire, Assistant Secretary for Equal Opportunity (Aug. 15, 1978).


\(^{140}\) See Traficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (tenants alleged landlord had denied them the rights derived from living in an integrated apartment complex by refusing to rent to minorities); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489 (S.D. Ohio 1976) (plaintiffs' allegation that they were denied a home mortgage because of defendants' redlining practice stated a cause of action under the Fair Housing Act of 1968).

The meaning of the term "minority" is now reasonably consistent in federal legislation. See, e.g., 42 U.S.C. § 6705 (Supp. 1 1977) (Negroes, Spanish-speaking persons, Orientals, Indians, Eskimos, and Aleuts); 41 C.F.R. § 60-211(a) (1979) (Blacks, Spanish-surnamed Americans, American Indians, and Orientals).


\(^{142}\) 558 F.2d at 1290.

INSURANCE REDLINING

of minority residents, either through the outright refusal to sell insurance or by imposing special terms or conditions, could be held to violate Title VIII.

Congress may, of course, expressly amend the Fair Housing Act to include insurance company practices within the ambit of the Act's protections. Denial of property insurance does make the possibility of obtaining ownership of real property more difficult, particularly in states without a FAIR plan. To the extent that discrimination in the sale of insurance frustrates the purpose of the Fair Housing Act, those practices should be expressly prohibited. At the present time, a bill to amend the Fair Housing Act pending before a House subcommittee would prohibit, inter alia, an insurer from refusing to enter into an insurance contract because of the race, color, or national origin of persons living in or near the dwelling at risk. No final action has been taken although hearings before the subcommittee concluded in June of 1979.

The Federal Insurance Administration

Apart from these statutory remedies, the federal government is not without current authority to initiate studies of insurance industry practices. As part of its responsibilities under the National Insurance Development Program, the recently created Federal Emergency Management Agency (FEMA) is empowered to study a variety of insurance company practices through the Federal Insurance Administration. At the present time, the Federal Insurance Administration is authorized to investigate underwriting techniques, insurance and marketing methods, and practices of private insurers that affect the availability of essential property insurance in urban areas. For example, an insurer's return on its investments contrib-


145. Section 804 of the Fair Housing Act would be amended by adding a new section (f). Thus, 42 U.S.C. § 3604 would be amended by making it unlawful for "a person in the business of insuring against hazards to refuse to enter into or discriminate in the terms, conditions or privileges of a contract of insurance against hazards to a dwelling because of race, color, religion, sex, handicap, or national origin of persons owning or residing in or near the dwelling." H.R. 5200, 96th Cong., 1st Sess. § 804(f) 1980).

146. Originally, H.R. 5200 was proposed during the 95th Congress as H.R. 3504. Hearings on H.R. 3504 were concluded in July, 1978.

147. The Federal Insurance Administration was transferred to the Federal Emergency Management Agency from the Department of Housing and Urban Development on April 1, 1979.


150. The statutory responsibilities of FIA, HUD, have been transferred in toto to FEMA. Those duties relevant to this discussion are set forth in 12 U.S.C. § 1749bbb-16 (1976).
utes to that company's surplus. That surplus in turn determines in significant part the amount of insurance an insurer legitimately may write (with due regard to solvency concerns). To the extent that investments control underwriting, therefore, the Federal Insurance Administration would seem to have the present authority to investigate practices.

The authority of the Federal Insurance Administration to initiate studies of practices to determine the availability of property insurance in urban areas is part of its authority to carry out the purposes of the federal FAIR plan and the federal crime insurance program. Such studies, however, are not authorized under the Fair Housing responsibilities of the Department of Housing and Urban Development. Thus, any sanctions available under the Fair Housing Act are not available to the Federal Insurance Administration even if a study of insurer practices concludes that insurers are engaging in investment practices the effect of which is to disproportionately deny insurance to members of racial minorities unless the Fair Housing Act itself can be legitimately construed to include insurance practices.

The FAIR plan does not require any certification of nondiscrimination by participating insurers in their voluntary market practice. Under the FAIR plan, of course, no risk may be refused essential property insurance unless the property itself fails to meet reasonable underwriting standards as determined by inspection. Violation of the federal requirements for a state fair housing program would subject the entire FAIR plan to withdrawal of the approval of the Federal Insurance Administration and, consequently, render participating insurers ineligible for riot reinsurance. There appear to be no sanctions directly available to the Federal Insurance Administration under its present authority to investigate insurer practices in the voluntary market, however, even where such investigations reveal either intentional or effective racially discriminatory practices.

The Fourteenth Amendment

The fourteenth amendment states in the pertinent part of section 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal pro-
Thus, both the due process and equal protection clauses protect individuals against the misuse of power by the states. That protection does not extend, however, to the actions of private persons. It consistently has been held that to find ostensibly private conduct to be violative of either clause, a threshold finding of "state action" must be made.

Where the challenged action is the positive act of the state itself, the presence of state action is clear. Thus, in *Skinner v. Oklahoma*, for example, where the state enacted legislation authorizing "habitual criminals" to be sterilized, the conduct that allegedly violated the equal protection clause of the fourteenth amendment was unequivocally "state action." In other cases, the acts complained of were not those of the state but rather those of individuals bearing some special relationship to the state. It was in this area of private conduct that the Supreme Court first expanded and subsequently constricted the scope of "state action."

Prior to the early 1970's, the Court developed several theories under which, to varying degrees, it held the conduct of private individuals to be tantamount to "state action" under the fourteenth amendment. In *Marsh v. Alabama*, the Court determined that the activities of a privately owned company town were "functionally equivalent" to those of a municipality. Therefore, those acts were held to constitute "state action" under the fourteenth amendment. Subsequently, in *Shelley v. Kraemer*, the Court found that restrictive covenants in real estate contracts between private persons, upheld by a state court, constituted private action backed up or enforced by "state action."

The parameters of "state action" were expanded further in *Burton v. Wilmington Parking Authority*, when the Supreme Court found "state action"

---

160. Id. (struck down Oklahoma sterilization statute covering habitual felons as violative of the equal protection clause).
161. Id. at 541.
162. 326 U.S. 501 (1946). This case involved an action for violation of first amendment free speech rights caused by the management of a company town. The Court found state action to be present as a result of its comparison of the town services to those of municipality.
163. Id. at 508.
164. Id. at 506.
165. 334 U.S. 1 (1948). In *Shelley*, the petitioners claimed judicial enforcement of restrictive covenants denied them access to housing in violation of the fourteenth amendment. Id. at 7. The Court held: "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." Id. at 14.
166. Id. at 13-14.
167. 365 U.S. 715 (1961). In this case, the plaintiff was denied service because of his race by a restaurant located in a publicly owned parking facility. He claimed that the denial violated the equal protection clause. Id. at 716. The Court held:
in a "symbiotic relationship" between a private business and a publicly-owned service.\textsuperscript{168} This case involved racial discrimination by a private restaurant that leased space from a public parking garage.\textsuperscript{169}

Another theory on which the Supreme Court based its expansion of "state action" was set forth in \textit{Reitman v. Mulkey}.\textsuperscript{170} There, California had amended its constitution to bar the state and local municipalities from legislatively prohibiting racial discrimination in housing.\textsuperscript{171} The Supreme Court held that this state constitutional provision violated the federal Constitution because it "encouraged and supported" private racial discrimination,\textsuperscript{172} and as such was "state action."

The development of situations in which the "nonobvious involvement of the State in private conduct"\textsuperscript{173} was sufficient to become cognizable state action ended abruptly in 1972 with the \textit{Moose Lodge No. 107 v. Irvis}\textsuperscript{174} decision. Justice Rehnquist, writing for the six-man majority, emphasized that the Moose Lodge was a genuinely private club and that such clubs could discriminate in the selection of members with impunity.\textsuperscript{175} The Court held that the granting of a state liquor license to a private club did not constitute "state action" under the fourteenth amendment.\textsuperscript{176} Accordingly, the state was found not to be jointly participating in the racially discriminatory practices, nor encouraging them, nor existing in a symbiotic relationship with the club through its issuing of the liquor license.\textsuperscript{177} Therefore, the club's racially discriminatory practices were held not to be those of the state.\textsuperscript{178}

Finally, in 1974, in \textit{Jackson v. Metropolitan Edison Co.},\textsuperscript{179} the Court further restricted the circumstances in which it would find state action. The

\begin{flushleft}
Addition of all these activities, obligations, and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. \\
\textit{Id.} at 724.
\end{flushleft}

\textsuperscript{168.} \textit{Id.} at 723-26.

\textsuperscript{169.} \textit{Id.} at 716. The mutual benefit theory developed in \textit{Burton} recently was applied by the Michigan Supreme Court to that state's no-fault insurance act. \textit{Shavers v. Kelley}, 402 Mich. 554, 267 N.W.2d 72 (1978), \textit{cert. denied} sub. nom. \textit{Allstate Insurance Company v. Kelley}, 99 S. Ct. 2869 (1979). The court determined that the state was carrying out a general welfare scheme through insurance companies with the legislative no-fault plan and found state action in the challenged policies of the insurer. \textit{Id.} at 597, 267 N.W.2d at 86.

\textsuperscript{170.} 387 U.S. 369 (1967).

\textsuperscript{171.} \textit{Id.} at 371.

\textsuperscript{172.} \textit{Id.} at 376-81.

\textsuperscript{173.} \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. at 722.

\textsuperscript{174.} 407 U.S. 163 (1972).

\textsuperscript{175.} \textit{Id.} at 171, 175.

\textsuperscript{176.} \textit{Id.} at 177.

\textsuperscript{177.} \textit{Id.} at 175-77.

\textsuperscript{178.} \textit{Id.}

\textsuperscript{179.} 419 U.S. 345 (1974).
defendant utility company had discontinued service to an individual for alleged nonpayment of bills without prior notice, even though the company’s tariff filed with the state provided that service could be discontinued only on reasonable notice.\footnote{180} Thus, the company had violated its own procedures and the state had failed to bring the company into conformance with its own tariff approved by the state regulatory agency. Justice Rehnquist, again writing for a six-man majority, determined that the state must be significantly involved in the \textit{particular} actions under attack.\footnote{181} There must be, in the language of the Court, “a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”\footnote{182} Extensive state regulation, according to the Court, even a state grant of monopoly status to a company, does not, standing alone, constitute such a sufficiently close nexus.\footnote{183} In the earlier cases—in Burton, for example—the Court had required a less direct connection between the alleged state involvement and the challenged conduct. In the \textit{Jackson} opinion, the Court held that the state’s conduct must be, in effect, the challenged conduct. Furthermore, with \textit{Jackson}, the state’s passive acquiescence to the challenged conduct is insufficient to constitute encouragement of that conduct by the state for purposes of finding “state action.” Thus, the Court has made it considerably more difficult for a litigant to pass beyond the threshold issue of the presence of state action.

The \textit{Jackson} case also limited the reach of the fourteenth amendment by declaring that providing essential public services is not equivalent to state action.\footnote{184} According to \textit{Jackson}, grocers, physicians, and many others provide essential services.\footnote{185} To hold that the acts of such providers become those of the state would effectively destroy the important and well-established dichotomy between state and private action. In addition, the \textit{Jackson} opinion pointed out that all corporations are creatures of state law and subject to varying degrees of state regulation.\footnote{186} To hold that state regulation itself involves the state in allegedly prohibited conduct also would destroy the public-private distinction. Thus, \textit{Moose Lodge} and \textit{Jackson} clearly suggest that the scales are not likely to shift in favor of a threshold finding of “state action” in private conduct in the near future.

In analyzing whether challenged conduct violates the due process or equal protection clauses of the fourteenth amendment, the Court first will look at the threshold issue of state action. Only when state action has been found in the substantive challenged conduct itself will that conduct be scrutinized under the various due process or equal protection tests. Therefore, in con-
considering whether insurance company practices may be challenged as violative of the fourteenth amendment, it is necessary first to look at the involvement of the state in those practices. Only if the state is significantly involved in the discriminatory or unfair practices themselves would the Court be likely to judge those practices against the traditional fourteenth amendment standards. This threshold question requires an analysis of the relationship between the private insurance industry and the state within the currently applicable theoretical framework being utilized by the Supreme Court.

Equal protection constraints on insurance redlining

Insurance companies are subject to heavy regulation by the states in which they are licensed to do business.187 The Supreme Court, in 1869, expressly recognized the power of the states to so regulate in the crucial case of Paul v. Virginia.188 Since that time, federal and state regulators, insurers, and insurance-related organizations all have pushed for a continuation of state control.189

By contrast, as noted earlier, the federal government consistently has backed away from regulation of the insurance industry. In 1944, however, the Supreme Court determined for the first time that the business of insurance was a matter of interstate as opposed to exclusively intrastate commerce.190 As a result, insurance company practices necessarily became subject to federal antitrust laws. The following year, Congress accepted the judicial invitation to exempt insurance companies from federal antitrust laws and enacted the McCarran-Ferguson Insurance Regulation Act.191 Under this Act, insurance companies became exempt from antitrust laws to the extent of state regulation. Thus, the federal government through an act of positive law expressly relegated the regulation of the insurance industry to the states.

State regulators also have acted to keep the power of regulation over the insurance industry in their hands. For example, the constitution of the National Association of Insurance Commissioners (NAIC) lists as one of the organization's purposes: preserving to the "States the regulations of the business of insurance."192 Also, the NAIC routinely promulgates model uniform insurance provisions that are submitted to state legislators across the country for enactment.

188. 75 U.S. (8 Wall.) 168 (1869). See note 38 supra.
189. Article 2 of the NAIC Constitution states that one of its principal purposes is to promote national uniformity in insurance law and regulation.
192. NAIC Const. art 2.
Thus, almost every aspect of the insurance business, from rates and investments through policy forms, is regulated at the state level.\textsuperscript{193} Further, many states have legislatively created a residual insurance organization such as the FAIR plan.\textsuperscript{194} In addition, the states have enacted unfair trade practices acts that make certain discriminatory conduct such as discrimination based on race, national origin, sex, or marital status unlawful.\textsuperscript{195}

In Illinois, for example, the refusal to provide homeowners insurance solely on the basis of geographic location now is a prohibited trade practice.\textsuperscript{196} In addition, the refusal to renew a fire and extended coverage property insurance policy in effect for five years or more is prohibited unless the refusal is based upon misrepresentation or fraud in securing the contract, a measurable increase in the risk originally accepted by the insurer, or at least sixty days prior notice of the insurer's intent not to renew.\textsuperscript{197} Discrimination between individuals or between similar risks based on race, color, religion, or national origin also is barred.\textsuperscript{198}

A review of state insurance and public utility codes reveals many similarities between the respective practices that are regulated by the states.\textsuperscript{199} In both cases, there is extensive statutory and administrative regulation of the conduct of the companies, both of their internal financial policies and of their practices in regard to consumers. Of the two types of industries, however, the insurance industry is probably subject to more express state prohibitions against racial discrimination than are the public utilities. State action, therefore, has not created, through legislative or regulatory enactment, racially discriminatory conduct of the kind prohibited by the fourteenth amendment.\textsuperscript{200}

\textsuperscript{193} Illinois is the only state that is currently lacking a rating law. See ILL. REV. STAT. ch. 73, § 1065.18-1 to .34 (1971); ILL. INS. REGS. 7A. 04 (1972).

\textsuperscript{194} In Illinois, see ILL. REV. STAT. ch. 73, §§ 1065.69-77 (1977). The purpose of the plan is: to make basic property insurance available in urban areas and to public educational institutions through the establishment of an Industry Placement Facility for administering a FAIR plan (Fair Access to Insurance Requirements), and a Joint Reinsurance Association for the equitable distribution and placement of risks among companies transacting property insurance business in the State of Illinois. Id. § 1065.69.

\textsuperscript{195} In Illinois, see id. § 1031(3). For the text of § 1031(3), see note 79 supra.

\textsuperscript{196} Id. § 767.22 (Supp. 1978). In addition, a policy of fire and extended coverage may not be nonrenewed, inter alia, because of the location of the property. Id. § 755.21a(b) (1977).

\textsuperscript{197} Id. § 755.21.1 (Supp. 1978). A complementary provision provides that nonpayment of premiums, fraud and misrepresentation, or any act that measurably increases the risk initially accepted are the only bases for cancellation of fire and extended coverage policies in effect for one year. Id. § 755.21 (1977).

\textsuperscript{198} Id. § 1031(3). In addition, a policy of fire and extended coverage may not be nonrenewed, inter alia, for reasons of race, color or national ancestry. Id. § 755.21a(c).

\textsuperscript{199} E.g., id. chs. 73, 111 2/3.

\textsuperscript{200} Rights and Remedies Hearings, supra note 5, at 201 (testimony of Stephen I. Martin, Vice President, The Hartford Group). Michigan, for example, expressly prohibits refusing to insure, refusing to renew or limiting the amount of coverage based on race. MICH. COMP. LAWS § 500.2027 (MICH. STAT. ANN. § 24.12027 (Callaghan Supp. 1979)). Minnesota and Wis-
Further, according to the analysis set forth in *Jackson*, in order to implicate a state in allegedly unconstitutional private conduct, a significant "nexus" must be demonstrated between the precise conduct attacked and the actions of the state. The state's involvement in the private sector through general regulation is insufficient to meet the "nexus" test. Thus, if a private insurance company is discriminating against applicants for insurance on the basis of race, the state will be involved for the purpose of finding "state action" only if the state can be shown to be involved in the racially discriminatory practices themselves, either directly through positive order or indirectly through support and encouragement.

In the majority of jurisdictions, it would be possible to show only the state's acquiescence to racially discriminatory practices. Whether the failure of state regulatory officers to overturn discriminatory actions of insurers qualifies as "state action" is a delicate question. In *Jackson*, the Supreme Court determined that a state's passive acceptance did not constitute "state action." That holding was premised, however, on a finding that the acceptance "amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired." In most states, racial discrimination is unlawful and in some states, including Illinois, geographic redlining is illegal. Therefore, if the state regulator permits such prohibited discriminatory practices to continue without taking proper action to restrain such insurers acting outside the law, it could be argued that the state is encouraging and authorizing this conduct.

The theory may in fact be difficult to sustain. First, insurers do not maintain express racial classifications. Instead, they classify property risks on such bases as age of structure, type of construction, and other factors allegedly associated with loss experience. Thus, it is possible for insurers to discharge classification of risks based on race. Minn. Stat. § 70A. 05(2) (1976); Wis. Stat. § 625.12(2) (1977). In almost all states, unfair discrimination, i.e., discrimination based on other than loss related factors, is prohibited.

201. 419 U.S. at 350-51.
202. Id.
203. Id. at 357.
204. See note 196 supra.
205. See Reitman v. Mulkey, 387 U.S. 369 (1967). This case involved a constitutional referendum in California in which an amendment to the state constitution was ratified. The amendment stated:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

*Id.* at 371. The United States Supreme Court affirmed the California Supreme Court's judgment that this amendment violated the fourteenth amendment equal protection clause because the provision would make it permissible to discriminate a basic policy of the state. Thus the state would be involved in the encouragement of private discrimination. *Id.* at 381.

206. PRICING AND MARKETING, supra note 15, at 189. In addition, Illinois prohibits geographic redlining only to the extent that location of risk may not be the sole basis for refusing to insure. Ill. Rev. Stat. ch. 73, § 767.22 (1977). This section provides:
guise racial or geographic redlining that itself masks racial discrimination by developing classifications that bear a direct relationship to loss experience and an indirect relationship to racial or ethnic factors. Thus, as in Jackson, a regulator’s failure to restrain the practices culminating in discrimination against minorities would at most be a determination that he or she found the conduct permissible under state law.

After Jackson, the state’s failure to overturn indirectly discriminatory practices, except where the regulator knows the insurer is violating state law and fails to restrain the violation, probably will be insufficient to implicate the state in those practices for purposes of the “state action” doctrine. Furthermore, even the essential nature of insurance, the unique relationship between the insurance industry and the public interest recognized in German Alliance Insurance Co. v. Lewis will not sustain a “state action” requisite. As stated in Jackson, “affected with the public interest” means only that an industry is subject to state control. The phrase does not mean that such businesses are “state actors.”

No company authorized to transact in this State the kinds of business described in Classes 2 and 3 of Section 4 shall upon proper application refuse to provide homeowners insurance solely on the basis of the specific geographic location of the real property or building sought to be insured. “Homeowners insurance,” for purposes of this Section, means the personal multi-peril property coverage commonly known as homeowners insurance.

In addition, location, age of property, and race or ethnicity may not be the bases of a decision to nonrenew a contract of property insurance. Id. § 755.21a. The section provides:

Nonrenewal of fire and extended coverage policy—Grounds. A policy of fire and extended coverage insurance, as defined in Section 143.13(b), may not be nonrenewed for any of the following reasons:

(a) age of property,
(b) location of property,
(c) age, sex, race, color, ancestry or occupation of occupants.

Varying terms and conditions on the basis of location, however, is not prohibited.

207. Address by L. Jordan, General Counsel, State Farm Insurance Company, Insurance Redlining and Reinvestment: Directions for Change Conference (Chicago, Ill., Mar. 23, 1979). The “business necessity” defense that underlies this argument, of course, is valid only where racial discrimination is an inadvertent effect and not the purpose of the challenged conduct and where the challenged conduct is itself essential to accomplish a compelling business purpose.


Because private insurers practicing overt racial or ethnic discrimination have not been ordered or permitted by the state to do so, and because states expressly prohibit invidious racial discrimination, the requisite element of "state action" would seem to be absent from a claim that the equal protection clause has been violated. Therefore, the substantive question of whether racial discrimination in the sale of insurance violates that clause will not be reached. It seems likely that as long as the theoretical underpinnings of Jackson prevail, an equal protection claim of racial discrimination in cases of geographic redlining by insurers will fail.

A different conclusion, however, was reached in Stern v. Massachusetts Indemnity & Life Insurance Co., where the plaintiff alleged sex discrimination in violation of the fourteenth amendment. In that situation state law specifically authorized discrimination between insureds based on sex. Unlike the use of race as a basis for underwriting decisions in property insurance at issue here, the sex discrimination in Stern occurred directly as a result of legislation. Clearly the initiative for the challenged sex discrimination came from the state, who had "put its own weight on the side of the proposed practice by ordering it." That is the level of state involvement that is likely to pass the Jackson hurdle.

Due process constraints on declinations and terminations of property insurance

The threshold question of "state action" is the same under the due process clause as under the equal protection clause. The Jackson case was in fact a challenge to the procedures employed by the public utility in terminating service, while Moose Lodge was grounded in the equal protection clause. In both cases, by addressing the "state action" question first, the Court never reached the question whether a property right to which constitutional due process protections attached had been violated.

Were it not for the Jackson rationale, it would seem reasonable to argue that when a state such as Illinois mandates that insurance cannot be declined, terminated, or nonrenewed except for limited reasons, the state has created a "legitimate claim of entitlement" to property insurance. That is, the state by positive act of law created a constitutionally cognizable property interest. Given such a property interest, the procedures enacted or pur-

212. 365 F. Supp. 433 (E.D. Pa. 1973) (allegation that insurance company refused to sell disability insurance to women under the same terms and conditions available to men, solely on the basis of sex, was sufficient to state a cause of action based on a violation of equal protection).
213. Id. at 438.
215. Id. at 348.
217. Perry v. Sindemen, 408 U.S. 593, 602 (1973) (state college instructor who was dismissed without an explanation or hearing was entitled to show he had "a legitimate claim of entitlement to job tenure").
sued by the state to protect that interest would be entitled to review by the courts to determine their adequacy for purposes of the due process clause. However, as in Jackson, it is unlikely that "state action" would be found in cancellation and nonrenewal procedures by insurers sufficient to meet the threshold requirement.

Recently, however, in a suit against, inter alia, private insurers challenging the Michigan no-fault automobile insurance law, the Michigan Supreme Court held that the Act violated federal due process protections. In Shavers v. Kelly,218 the court determined, first, that "state action" was present because the state was carrying out a general welfare scheme through private insurance companies under the no-fault insurance act. Second, the court found that the total absence of procedures whereby an individual could complain about placement in the Act's mandated, involuntary "Automobile Placement Facility" violated the due process clause of the fourteenth amendment.219 That is, under the Michigan no-fault provision, no legal remedy whatsoever had been established for an individual to grieve the refusal of a private insurer to provide insurance coverage. The Shavers case, because of its unique facts, apparently skirted the Jackson hurdle.

STATE CONSTITUTIONAL LIMITATIONS

State constitutions should not be overlooked as potential bases on which to ground an action challenging the racially discriminatory practices of property insurers. Each state constitution approaches issues of racial discrimination uniquely. There is, however, enough uniformity among the states to permit at least a brief discussion here.

A number of state constitutions echo the language of the Declaration of Independence concerning the inalienable rights of persons, including the right to acquire, possess, and protect property.220 More importantly, several states guarantee that no person shall be deprived of the equal protection of the law and/or that no person shall be deprived of property without due process of law.221 As discussed earlier, insurance contracts are personal

218. 402 Mich. 554, 267 N.W.2d 72 (1978), cert. denied sub. nom Allstate Ins. Co. Kelly, 99 S. Ct. 2869 (1979) (where one may not be licensed to drive unless a participant in state's no-fault insurance program, all persons are entitled to such insurance protection because the operation of an automobile is crucial to an individual's day-to-day living).

219. Id. at 604-05, 267 N.W.2d at 89-90.

220. See, e.g., Ark. Const. art. 2, § 2; Cal. Const. art. 1, § 1; Colo. Const. art. 2, § 3; Hawaii Const. art. 1, § 2; Idaho Const. art. 1, § 1; Ky. Const. § 1; La. Const. art. 1, § 4; Me. Const. art. 1, § 1; Mass. Const. pt. 1, art. 1; Mont. Const. art. 3, § 3; Nev. Const. art. 1, § 1; N.H. Const. pt. 1, art. 1; N.J. Const. art. 1, § 1; N.M. Const. art. 2, § 4; N.D. Const. art. 1, § 1; Ohio Const. art. 1, § 1; Pa. Const. art. 1, § 1; S.D. Const. art. 6, § 1; Utah Const. art. 1, § 1; Vt. Const. ch. 1, art. 1; Va. Const. art. 1, § 1; W. Va. Const. art. 3, § 1.

221. See, e.g., Ala. Const. art. 1, §§ 1, 7; Alaska Const. art. 1, §§ 1, 7; Ariz. Const. art. 2, §§ 4, 13; Ark. Const. art. 2, §§ 3, 21; Cal. Const. art. 1, § 1 (equal protection and due process clauses); Colo. Const. art. 2, §§ 6, 25; Conn. Const. art. 1, §§ 10, 20; Fla.
Therefore, the right to purchase a contract of property insurance is a property right that should be within the scope of state constitutional due process protections.

The likelihood that the conduct of private insurers lies outside the sphere of activity protected by the fourteenth amendment as currently interpreted by the Supreme Court already has been reviewed. It is the necessity for finding active state involvement in the challenged conduct itself that has recently defeated claims against private persons and businesses based upon federal civil rights law enacted under the fourteenth amendment. The federal and state parameters of due process and equal protection, however, are not necessarily the same. One significant difference lies in the absence of express language in most state constitutions prohibiting only state action.

It is entirely possible under state constitutional interpretation that racially discriminatory conduct by private insurers left uncorrected by state law violates state guarantees of due process and/or equal protection. This is so because courts interpreting state strict liability constraints are not limited by the Jackson rationale requiring active state involvement in the allegedly violative private conduct itself. Thus, racially discriminatory conduct by private insurers that is either prohibited by state law and uncorrected by the insurance regulatory officer, or permitted by state law in its failure to prohibit the conduct, may be violative of state equal protection and/or due process guarantees based on general state legislative and regulatory responsibility regarding insurers.

Illinois recently has moved even further than other states in protecting the right to property. Since 1970, Illinois has constitutionally forbidden discrimi-

\footnotesize{\textit{Const.} art. 1, §§ 2, 9; Ga. \textit{Const.} art. 1, § 1, ¶ 1, & § 2; Hw. \textit{Const.} art. 1, § 4 (equal protection and due process clauses); Ill. \textit{Const.} art. 1, § 2 (equal protection and due process clauses); \textit{Ind. Const.} art. 1, §§ 12, 23; Ia. \textit{Const.} art. 1, §§ 1, 9; Ky. \textit{Const. amend.} 14, § 1 (equal protection and due process clauses); La. \textit{Const.} art. 1, §§ 2, 3; Me. \textit{Const.} art. 1, § 6-A (equal protection and due process clauses); Md. \textit{Const.} art. 23 (due process clause); Mass. \textit{Const. pt.} 1, arts. 1, 10; Mich. \textit{Const.} art. 1, §§ 2, 17; Minn. \textit{Const.} art. 1, §§ 2, 7; Miss. \textit{Const.} art. 3, § 14 (due process clause); Mo. \textit{Const.} art. 1, §§ 2, 10; Mont. \textit{Const.} art. 3, §§ 3, 27; Neb. \textit{Const.} art. 1, §§ 1, 3; Nev. \textit{Const.} art. 1, §§ 1, 8; N.H. \textit{Const. pt.} 1, arts. 1, 15; N.J. \textit{Const.} art. 1, § 1 (equal protection and due process clauses); N.M. \textit{Const.} art. 2, § 18 (equal protection and due process clauses); N.Y. \textit{Const.} art. 1, §§ 6, 11; N.D. \textit{Const.} art. 1, §§ 1, 13; Okla. \textit{Const.} art. 2, § 7 (due process clause); Ore. \textit{Const.} art. 1, §§ 10, 20; Pa. \textit{Const.} art. 1, § 1 (due process and equal protection clauses); S.C. \textit{Const.} art. 1, § 3 (due process and equal protection clauses); S.D. \textit{Const.} art. 4, §§ 2, 18; Tenn. \textit{Const.} art. 1, § 8 (due process clause); Tex. \textit{Const.} art. 1, §§ 3, 19; Utah \textit{Const.} art. 1, §§ 7, 24; Va. \textit{Const.} art. 1, § 11 (due process clause); Wash. \textit{Const.} art. 1, §§ 3, 12; W. Va. \textit{Const.} art. 3, § 10 (due process clause); Wyo. \textit{Const.} art. 1, §§ 3, 6.}

\footnotesize{222. See notes 115-16 and accompanying text supra.}

\footnotesize{223. See notes 187-219 and accompanying text supra.}

\footnotesize{224. See notes 182-83 and accompanying text supra.}

nation on the basis of race, color, creed, national ancestry, and sex in the sale of property.\textsuperscript{226} The legislative history of the Illinois provision indicates that all property, real and personal, lies within the ambit of the constitutional protection.\textsuperscript{227} Refusal to sell an item of personalty to an individual, for example, because the individual is black or Hispanic clearly violates the Illinois Constitution. The constitution thus would appear to prohibit racial discrimination in the sale of property insurance. There is no Illinois case law whatsoever determining whether for purposes of the Illinois Constitution a contract of property insurance lies within its ambit.\textsuperscript{228} However, the sweep of the Illinois constitutional provision as indicated by its legislative history does suggest that all property rights will be afforded protection. It seems reasonable to conclude, therefore, that property rights created by contracts of property insurance will receive constitutional protection in Illinois.\textsuperscript{229}

**CONCLUSION**

Insurance redlining has clear racial and ethnic overtones. The practice exists in urban communities with large minority populations. Because of the relationship between geographic redlining and minority composition of that area, the practice is prohibited indirectly by a number of federal laws as well as state constitutions. No federal law and no state constitution, however, expressly prohibits the practice of geographic redlining. Instead, federal civil rights laws and some state constitutions prohibit invidious racial and ethnic discrimination in contract formation and in the sale of property. Because an insurance policy is both a contract and property, invidious discrimination in the sale of property insurance is prohibited by these laws. In addition, federal antitrust laws probably prohibit geographic redlining, at least where the redlining decision involves an insurer and at least one other person independent of the insurer.

That the consequences of redlining are serious cannot be realistically underestimated. Even where residential property insurance is available through the FAIR plan, economic decline is likely to follow. Placement in the FAIR plan is a stigma, a badge of inferiority that can be a signal for disinvestment by other organizations. Therefore, the practice of geographic redlining must be stopped, either voluntarily by cooperation of insurers or involuntarily by litigation when insurance regulators fail to exercise their administrative powers to stop the practice. This article has discussed several of the more significant theories of liability in the hope of contributing to the end of urban insurance redlining.

\textsuperscript{226} Ill. Const. art. 1, \$ 17. See text accompanying note 11 supra.
\textsuperscript{228} Id. at 306.
\textsuperscript{229} It should be noted that there are no Illinois statutes prohibiting racial or ethnic discrimination in the sale of property. Id. at 296.