Not Worth the Risk: The Legal Consequences of the Refusal to Insure Properties with Section 8 Tenants

By Jean M. Zachariasiewicz

The willingness of insurance providers to issue policies to landlords who accept tenants using Section 8 vouchers[1] is an issue at the intersection of fair housing and the insurance industry that is gaining prominence. Private investigation and action around this issue is taking place across the country, as evidenced by lawsuits in state and federal court, and complaints filed with the federal Department of Housing and Urban Development (HUD).[2] These federal and administrative complaints allege that, once insurance providers become aware of the presence of Section 8 tenants at an insured property, they have either canceled the existing property insurance policy or required a higher premium to continue coverage, and that these actions have a disparate impact on protected groups, such as racial minorities and people with disabilities, thereby violating the Fair Housing Act (FHA).

Despite this new focus on insurance industry practices related to subsidized housing, there is little information available on the subject. The actuarial statistics used by underwriters in measuring the risk presented by Section 8 voucher-holders—if such statistics even exist—are not publicly available.[3] Although much has been written about the reasons landlords refuse to participate in the Section 8 program, no studies or commentaries exist regarding similar decisions within the insurance industry.

This article explains why a refusal to insure properties with Section 8 tenants, or charging higher rates for coverage of such properties, creates potentially costly risks for insurance companies. First, these insurance practices likely violate the FHA under a disparate impact theory of liability, due to the demographic statistics regarding voucher-holders versus the US population as a whole. Second, such policies open insurance companies up to liability under an ever-changing assortment of state and local laws that prohibit source-of-income discrimination in the rental market. Finally, based on the reasons landlords and communities give for refusing Section 8 tenants, it is likely that insurance companies are using Section 8 status as a proxy for other forms of discrimination, such that these policies function like traditional redlining, which has long been illegal under the FHA. Accordingly, the insurance industry would better serve itself, its customers, and the goal of integrated housing by ceasing to consider the presence of Section 8 tenants when performing risk assessments and making underwriting decisions.

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The Section 8 Program

Congress established the Section 8 program as part of the Housing and Community Development Act of 1974.[4] The program's intent is to "aid[] low-income families in obtaining a decent place to live and ... promot[e] economically mixed housing."[5]

Under the Section 8 program, HUD enters into annual contracts with local public housing authorities (PHAs) to fund Section 8 vouchers. Housing assistance is then provided to families or individuals, and the participants are able to find their own housing in the private market. Generally, to be eligible for a voucher, a family's income may not exceed 50 percent of the median income for the metropolitan area or county in which the family lives. With Section 8 assistance, renters pay between 30 percent and 40 percent of their incomes for rent, and federal funding pays the remaining amount of rent to landlords.[6] At least 75 percent of the vouchers issued by PHAs must be given to families who are "very low income," meaning they make 30 percent or less of the area median income.[7]

Multiple levels of screening determine who qualifies for a Section 8 voucher. As an initial step, the PHA verifies that the applicant family's income does not exceed the maximum threshold for that area.[8] Due to the high demand for vouchers, and the limited number available, most PHAs maintain waitlists for Section 8 vouchers, so if a family is deemed income-eligible, it is placed on the waitlist. The PHA then has the right to apply local preferences if it has established any, such as a preference for working families, in selecting families from the waitlist.[9]

When a family is selected from the waitlist, both the PHA and the property owners participating in the Section 8 program have discretion to further screen the applicants. The PHA can choose whether to conduct additional screening according to an established plan, while the property owner may screen a family for "family behavior or suitability for tenancy," on the basis of rental history factors such as "payment of rent and utility bills," "caring for a unit," and "compliance with other essential conditions of tenancy."[10] Often, both PHAs and property owners look into an applicant's credit history and criminal background.[11]

If an applicant family meets all eligibility criteria and reaches mutually acceptable lease terms with the landlord, then the PHA inspects the unit to ensure that it meets the applicable health and safety requirements and that the rent is reasonable. Two contracts are executed: the lease between the voucher-holder and landlord and a housing assistance payment contract between the landlord and PHA.[12] Then, the family moves into the unit and assumes the responsibilities of any tenant—to pay the rent on time, to keep the unit in good condition, etc.—and the PHA assumes the responsibility of providing the housing subsidy on time every month.

The Section 8 program was intended to decrease segregated housing patterns and the concentration of poverty by opening up areas of opportunity to low-income families.[13] Studies show that it has been only moderately successful in achieving these goals. Exclusionary zoning in opportunity areas, landlord disinclination to accept vouchers, and voucher-holders' preferences have all been found to contribute to Section 8 users remaining concentrated in poor, racially segregated neighborhoods.[14] Further, there is some evidence that low-income families using vouchers are actually more segregated by race and income, and more concentrated in specific census tracts, than a comparable group of low-income families without vouchers.[15] However, in jurisdictions with source-of-income protection laws, voucher-holders tend to live in less racially segregated areas, and are less clustered together within certain census tracts.[16]

Disparate Impact Liability under the Fair Housing Act

As explained in a previous article in this publication, disparate impact liability under the FHA is nothing new,[17] and neither is the applicability of the FHA to the insurance industry. As a federal district court recently noted, "HUD…has long interpreted the FHA as prohibiting discrimination in the provision of homeowners insurance."[18] Indeed, HUD has issued a regulation that explicitly prohibits "[r]efusing to provide…property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin."[19] A multitude of federal courts, too, have held since the Fair Housing Amendments Act of 1988 that the FHA prohibits such discrimination.[20] In addition, every federal court of appeals to consider the question has held that the FHA provides for disparate impact liability,[21] and for decades HUD has taken the position that insurers are subject to disparate impact claims.[22] At least two federal courts have held that the FHA allows for disparate impact claims against insurers, as well.[23] It bears repeating: disparate impact liability, and specifically its application to the insurance industry, is nothing new.[24]

Despite the longstanding consensus among the courts and HUD regarding disparate impact liability under the FHA, when HUD recently promulgated a new regulation regarding the Fair Housing Act's Discriminatory Effects Standard (the Rule), the insurance industry erupted in protest.[25] The Rule, which went into effect on February 15, 2013, codifies the proper analysis of disparate impact claims brought under the FHA using a burden-shifting framework.[26] First, a plaintiff must demonstrate that a housing practice has a disparate effect on a protected group or perpetuates racial segregation in housing. The burden then shifts to the defendant to prove that its challenged policy or practice has a valid business justification. If the defendant does so, the burden shifts back to the plaintiff to prove that there are other, less discriminatory means by which the defendant can serve the same interests.[27]

During a notice and comment period prior to the Rule's implementation, the insurance industry, represented by three trade groups, submitted comments to HUD about the Rule.[28] These comments expressed concern about the Rule's application to insurance practices on multiple bases, including that the regulation could interfere with state regulation of insurance, that a disparate impact standard of proof is inappropriate in the context of insurance, due to the fact that "insurance is risk-based and often based on a multivariate analysis," and that the burden of proof in the regulation would be especially difficult for insurers to meet.[29] The industry also asked that insurance pricing be exempt from the rule altogether, or that safe harbors be created "for certain risk-related factors."[30]

HUD rejected the insurance industry's concerns, and confirmed the applicability of the Rule to insurance practices as they relate to the provision of housing.[31] The Rule, and HUD's actions in issuing it, are now under attack in the courts (including in a case granted certiorari by the Supreme Court).[32] Most pertinent here, an insurance industry trade group, the Property Casualty Insurers Association of America, Inc. (PCIA), filed suit against HUD in the US District Court for the Northern District of Illinois, seeking to "invalidate the Rule as it relates to homeowners insurance … and to enjoin HUD from applying the Rule to the homeowners insurance industry."[33] In a recent ruling on motions to dismiss and for summary judgment filed by both PCIA and HUD, the court in effect split the baby. The court upheld the burden-shifting framework in the disparate impact regulation, rejecting PCIA's contention that it is contrary to law.[34] However, the court also ruled that HUD had acted arbitrarily and capriciously by failing to adequately respond to the insurance industry's comments, in violation of the Administrative Procedure Act.[35] Accordingly, the court remanded the case to HUD "for further explanation."[36]

Although the *PCIA* decision represents a setback for HUD's enforcement of the Rule, it also confirms the viability of disparate impact liability generally, and of the Rule's burden-shifting framework specifically.[37] Moreover, the court simply held that HUD's rulemaking had a procedural defect, not that the Rule was substantively defective. Finally, by remanding the case to HUD, rather than simply ruling in PCIA's favor, the court gave the agency an opportunity to more clearly and convincingly respond to the insurance industry's challenges to disparate impact liability. Thus, HUD now has a second chance not only to prevail against PCIA's challenge, but also to strengthen the Rule's ability to withstand future challenges.

Assuming that HUD is able to adequately respond to the insurance industry's criticisms of the Rule, it will apply equally to the provision of homeowners insurance as it does to other practices related to housing. In addition, even if the Supreme Court ultimately holds that disparate impact is no longer a viable theory of liability under the federal FHA, it will not be the end of disparate impact liability for insurers. Many states have civil rights laws, including fair housing laws, that recognize disparate impact liability.[38] Indeed, some states allow disparate impact fair housing claims by statute, and several other state supreme courts have found that disparate impact claims are implicitly encompassed by state fair housing laws.[39] Further, courts have held the type of statistical information used in making out a *prima facie* case of disparate impact liability to be probative of intentional discrimination.[40] Thus, as has been said before, "[d]isparate impact analysis is here to stay."[41]

It is therefore clear that property insurers run the risk of eliciting private and public enforcement actions when they use underwriting criteria that result in coverage decisions that have a disparate impact on protected groups. The refusal to insure properties with Section 8 tenants, or the provision of such insurance on less favorable bases, are just such criteria. An analysis of this practice under HUD's disparate impact Rule, using current enforcement actions as examples, demonstrates why.[42]

As explained earlier, the first step in the burden-shifting framework of the Rule is for a plaintiff to show that a policy or practice has a disparate effect on a protected group, or perpetuates racial segregation. In the four cases mentioned at the start of this article—*Jones v. Travelers*, *Viens v. American Empire Surplus Lines Insurance Co., Fair Housing Continuum v. International Catastrophe Insurance Managers, LLC,* and *Brevard Neighborhood Development Coalition v. International Catastrophe Insurance Managers, LLC*—the plaintiffs have alleged that the defendant insurance companies failed to renew, canceled, or raised the premium for property insurance policies for multiunit apartment buildings after discovering that the plaintiff landlords rented apartments to tenants participating in the Section 8 program, and that this practice has a discriminatory effect on protected groups.[43] These allegations are supported through statistical information on the demographic profile of Section 8 voucher-holders compared to the demographic profile of the local or state population as a whole.[44] Similar comparisons can be made nationwide. For instance, for the protected categories of race and disability, the US population is approximately 13.2 percent Black or African American[45] and 12.1 percent disabled,[46] but Section 8 voucher-holders are 48 percent Black or African American and 21 percent disabled.[47] These statistics demonstrate the disparate impact that a refusal to insure buildings with Section 8 tenants, or the insurance of such buildings on less favorable terms, has on federally protected groups. Such an underwriting guideline discourages landlords from accepting Section 8 vouchers, ultimately making housing unavailable to Section 8 voucher-holders, in violation of the FHA.

After a plaintiff has borne the burden of showing the disparate effect of an insurers' policy or practice, the burden shifts to the defendant insurance company to prove that there is a valid business justification for that policy or practice. As none of the defendant insurers in the federal or HUD cases explored here have yet had to respond to the allegations against them or engage in discovery, one can only speculate as to what their given justifications will be. Additionally, as previously noted, actuarial opinions are often considered by insurers to be confidential and privileged, and thus not publicly available.[48]

However, some insight may be gained by looking at the validity of the underwriting guidelines that have been used by insurers in the provision of homeowners' insurance. Traditionally, insurers have used a variety of underwriting guidelines to justify the failure to insure homes in inner-city and majority African-American neighborhoods. These include guidelines based on the age of the home, the location of the home, the lifestyle of the home's occupants, their credit history, and employment stability.[49] But as it turns out,

> [u]nderwriting guidelines are typically not the result of careful, statistical studies. Rather, they are often based on hunches and subjective stereotypes about classes of consumers and types and geographic location of property. When underwriting guidelines have been challenged, insurers rarely have had data or actuarial analyses to support their underwriting guidelines.[50]

If so many of the underwriting guidelines traditionally used by homeowners insurers bear no relationship to risk, then one must question whether the same can be said of the underwriting guidelines used to justify the decision not to insure properties with Section 8 tenants. Minimal research is available on the risks, if any, posed by the presence of Section 8 tenants.[51] Some studies do indicate that voucher-holders pose no higher risk of crime than any other renter.[52] For instance, there is evidence that any apparent link between the number of Section 8 voucher-holders in an area and an increasing crime rate results from voucher-holders moving into neighborhoods where crime rates are high or rising, rather than voucher-holders causing the increased crime.[53] This is a logical pattern, because rents in such neighborhoods are likely to be more affordable. As is so often the case, correlation does not equal causation.[54]

In addition, the defenses that have been successfully used by landlords in Section 8 disparate impact cases do not hold for insurers sued on the same basis. In jurisdictions without source-of-income protections, plaintiffs have attempted to charge landlords who choose not to participate in the Section 8 program with discrimination, alleging that their refusal to accept Section 8 vouchers denies housing to protected groups on a disparate basis.[55] But courts have held that nonparticipation in the Section 8 program is a legitimate reason for refusing to accept Section 8 tenants, because the program is voluntary.[56] Landlords have also cited the red tape and requirements of the Section 8 program as a reason for choosing not to accept vouchers.[57] However, when a landlord has made the decision to accept Section 8 vouchers, the program's voluntary nature has no bearing on an insurance company's decision whether to insure the landlord's property. Similarly, insurers bear no burden of additional requirements or regulations as a result of insuring a property that accepts Section 8 tenants. If a landlord chooses to participate in the Section 8 program, the reasons that would support nonparticipation simply do not justify an insurers' refusal to insure that landlord's property.

Should the defendant insurers successfully prove a valid business justification for their refusal to provide insurance for properties with Section 8 tenants, or the provision of such insurance on less favorable terms, then the plaintiffs will still bear the ultimate burden of proving that there is a less discriminatory means by which insurers could serve the same interests. Again, it is too early to speculate here what the plaintiffs might put forward, as it will be dependent on the business justification provided by the defendant insurers, as well as information obtained during discovery in the case. However, considering the subjective nature of many underwriting guidelines, it seems that the plaintiffs should be able to identify objective actuarial standards that would allow insurers to properly measure risks, and their associated costs, without also having such a discriminatory impact on protected groups.

This analysis of some insurers' differential treatment of properties with Section 8 tenants demonstrates how such a practice translates into disparate impact liability under the FHA. Although it is possible that defendant insurers will provide a valid business justification for such discrimination, it seems unlikely, given the history of such suits against homeowners insurers and the lack of information pointing to any risks associated with the presence of Section 8 voucher-holders.[58]

State and Local Statutes Outlawing Source-of-Income Discrimination

Although the term "housing discrimination" immediately leads most people to think of the federal Fair Housing Act, many states, counties, cities, and other jurisdictions have statutes outlawing various forms of housing discrimination, as well. Often, these statutes contain even greater protections than the Fair Housing Act. For instance, at least 12 states plus the District of Columbia prohibit discrimination in housing based on sexual orientation.[59] Some major cities, including New York, Atlanta, Chicago, and Seattle, have added sexual orientation as a protected characteristic, as well.[60] Similarly, some jurisdictions have extended their fair housing laws to prevent discrimination based on a tenant's lawful source of income.[61] In most cases, "source of income" is defined to include use of a Section 8 voucher in rental payments.[62]

In a jurisdiction outlawing discrimination based on source of income (where a Section 8 voucher is considered a form of income), the refusal to insure a property based on the presence of Section 8 tenants would constitute straightforward discrimination. Therefore, any insurance company employing such underwriting criteria opens itself up to litigation on that basis.

Already, in Connecticut, a state court has held that an insurer's imposition of different terms and conditions of insurance based on the presence of Section 8 voucher-holders violates the state's source of income law.[63] In *Francia v. Mt. Vernon Fire Insurance Co.*, a landlord seeking liability insurance for one of his rental properties received two quotes from Mt. Vernon – one premium if his property did not have any tenants participating in the Section 8 voucher program, and a higher premium if it did.[64] In addition, Mt. Vernon told the plaintiff that it would not provide insurance at all if the percentage of Section 8 tenants at the property increased beyond 20 percent.[65] The court held that Connecticut's fair housing law applied to general liability insurance providers, drawing on federal case law holding that the FHA applies to the discriminatory pricing or denial of liability insurance to landlords, as well as the public policy underlying the Connecticut fair housing law.[66] Because source of income is a statutorily protected category under that law, the court held that "the plaintiff's allegations against the defendants come within the ambit of the Connecticut fair housing laws."[67]

The *Francia* decision demonstrates the risk insurance companies run when they institute different terms and conditions for insuring properties that have Section 8 tenants in states and localities with source-of-income discrimination laws.[68] To avoid this risk, insurers must remain on top of which states, cities, counties, and other jurisdictions have such laws—a list that is ever-changing. For instance, in 2014, the Housing Choice Act went into effect in Oregon, amending the state discrimination law to include federal rental assistance payments as a "source of income."[69] Additionally, Hawaii, Maryland, and New York all had proposed legislation to include Section 8 vouchers under the definition of "source of income," but in each state the legislation has been carried over to the next session or referred to committee.[70] Similarly, in March 2014, the New Hampshire state House approved such a bill, but it has thus far failed to pass the state Senate.[71] Moreover, although the definition of "source of income" usually covers Section 8 vouchers, in some localities, such as California, the source-of-income discrimination law does not include Section 8 within its purview.[72] Thus, not only do insurance companies need to constantly track the shifting list of source-of-income discrimination laws, but they must dig even deeper to analyze and understand how each law applies to insurance underwriting decisions.

It would be more efficient and less costly to simply do away altogether with discrimination against Section 8 voucher-holders in the provision of insurance. In addition, based on the evidence indicating that the presence of Section 8 voucher-holders at a property poses no risk, doing away with this type of discrimination is a rational underwriting decision that would increase insurers' business opportunities.[73]

Section 8 Discrimination as a Proxy for Other Forms of Discrimination

There is little to no literature regarding the insurance industry's treatment of properties that accept Section 8 vouchers. However, much has been written regarding the discrimination faced by Section 8 voucher-holders among landlords, as well as residents of the opportunity areas to which the program is intended to give them access.[74] These fears about increased risks posed by Section 8 voucher-holders tend to be based on negative stereotypes about the type of people who receive Section 8 assistance. Landlords worry that Section 8 voucher-holders bring undesirable tenant behavior, or they worry about the stigma attached to a program that serves the poor, while residents of the neighborhood fear that the presence of Section 8 tenants will cause property values to decrease.[75]

Often, this discrimination against voucher-holders is the result of intertwined negative stereotypes about poverty and race, rather than actual evidence that voucher-holders bring crime with them or cause property deterioration.[76] For instance,

> [i]n Boston, St. Louis, Baltimore, Chicago, and Philadelphia, opposition to Section 8 has flared up in neighborhoods where residents claimed that recipients were responsible for rising rates of crime and disorder. In many cases, further investigation revealed that the disruptive families were not Section 8 recipients.[77]

Thus, Section 8 discrimination is often simply race discrimination in disguise. As one researcher has put it,

> [d]iscrimination against Section 8 voucher holders can be used as a proxy for racial discrimination because many recipients are minorities. Discrimination against the poor and discrimination against minorities are intertwined.[78]

This connection between the term "Section 8" and race is unsurprising, given the history in the United States of the use of code words to express racially motivated community opposition to particular programs. In the housing context, courts have recognized that terms like "ghetto," "crime," "blight," and "shared values" are "nothing more than 'camouflaged racial expressions.'"[79] Similarly, courts have held that fears about "jeopardized safety and falling property values,"[80] and greater burdens on community services and public schools, are coded racial discrimination.[81] Politicians, too, have used racial code words such as "states' rights," "forced busing," and "welfare queen" to win elections and foment popular support for conservative economic programs.[82] When a landlord or community expresses opposition to "Section 8," then, they could just as easily be expressing opposition to living among the *people* that tend to use Section 8 vouchers, that is, nonwhites.

If the attitudes of landlords and community members towards Section 8 voucher-holders are largely based on unfounded assumptions and negative stereotypes, and are simply veiled racial bigotry, then it is conceivable that insurers' refusal to insure properties with Section 8 tenants is the result of the same biases.[83] Such a conclusion lends further credence to the hypothesis that there is no actuarial justification for underwriting guidelines that consider Section 8 tenants an uninsurable risk. As noted earlier, other evidence indicating that there is no actuarial justification includes:

- the insurance industry's history of racial discrimination generally;
- the historical use by housing industries of supposedly "non-racial" factors to discriminate against racial minorities;
- the fact that many insurance underwriting guidelines do not have statistical support;
- the lack of industry trade literature on the subject generally;

- social science research refuting any connection between crime and Section 8; and
- the lack of research suggesting any connection between Section 8 and the most common insurance losses, such as fire, weather, and water.

Additionally, discrimination against Section 8 in the provision of insurance does not appear to be common, indicating that there is no objective basis for the practice.

If Section 8 discrimination has no valid actuarial justification, and is actually a proxy for other forms of unlawful discrimination, and if Section 8 voucher-holders tend to be concentrated in segregated, low-income areas, then insurers' practices bear a striking resemblance to traditional redlining.[84] No longer is an insurance company assessing the risk of a specific property and making an underwriting decision on that basis, but instead deciding that an entire neighborhood is largely uninsurable. As discussed previously, such practices have long been illegal under the FHA. Cloaking them under the guise of "legal" Section 8 discrimination does not relieve insurers from liability.

Conclusion

Though the Section 8 program began with lofty goals of giving low-income families access to safe, affordable housing and increasing integration, the program has not fully delivered on that promise. Voucher-holders are often stymied by landlords who do not participate in the program, communities who do not want them, and the discomfort of being "pioneers" in opportunity areas.

Insurers' refusal to insure properties that accept Section 8 tenants adds to these difficulties. Even landlords who may be willing to deal with the bureaucracy and oversight involved in participating in the Section 8 program will be deterred from doing so if it means forgoing the ability to insure their properties. Voucher-holders will thus remain limited in their choices, stuck with less scrupulous landlords in neighborhoods that have been left behind and ignored. It is a race to the bottom.

Moreover, such practices open insurers up to liability on multiple fronts. Disparate impact, whether at the federal or state level, is here to stay, and Section 8 discrimination has a disparate effect on protected classes. It is also highly questionable whether there is any valid business justification for underwriting guidelines that deem Section 8 tenants an uninsurable risk. The refusal to insure properties with Section 8 tenants violates a list of constantly changing source-of-income protection laws in multiple states and localities, as well. In addition, Section 8 discrimination is likely a proxy for other forms of illicit discrimination which, if uncovered, could lead to charges of intentional discrimination.

For all of these reasons, insurers would do well to reevaluate their policies regarding the Section 8 program. Not doing so invites avoidable, potentially costly risks. More importantly, it further limits the options of people who have few options already. Rather than buttress economic and racial segregation in the United States, property insurers would benefit themselves, their clients, and Section 8 participants by doing away with such discrimination.

Notes

1. The Section 8 Existing Housing Program, also known as the Housing Choice Voucher Program, is a federal rental assistance program operated by the Department of Housing and Urban Development. *See* 42 U.S.C. §§ 1437F and 1437(o). It will be referred to in this article as "Section 8."
2. Jones v. Travelers Cas. Ins. Co. of Am., No. 5:13-cv-02390-LHK-PSG (N.D. Cal. 2013); Viens, et al. v. American Empire Surplus Lines Ins. Co., et al., No. 3:14-cv-00952-JBA (D. Ct. 2014); Fair Housing Continuum, Inc. v. Int'l Catastrophe Ins. Managers, LLC, et al., HUD File No. 04-14-0859-8; Brevard Neighborhood Development Coalition, Inc., et al. v. Int'l Catastrophe Ins. Managers, LLC ("ICAT"), et al., HUD File No. 04-14-0858-8.
3. Indeed, the National Association of Insurance Commissioners (NAIC) has developed a model law regarding property and casualty actuarial opinions that has a section on confidentiality. *See* National Association of Insurance Commissioners ML-745, Property and Casualty Actuarial Opinion Model Law, § 3(B)(1), available at *http://www.naic.org/store/free/MDL-745.pdf,* last accessed Oct. 28, 2014 ("Documents, material or other information in the possession or control of the Department of Insurance that are considered an Actuarial Report, workpapers or Actuarial Opinion Summary provided in support of the opinion, and any other material provided by the company to the commissioner in connection with the Actuarial Report, workpapers or Actuarial Opinion Summary, shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil

action.). According to the NAIC, as of April 2014, 28 states had adopted the Model Regulation. *Id*.

4. Pub. L. No. 93-383, Title II, § 201(a), 88 Stat. 653, 662-66, now codified at 42 U.S.C. § 1437f and Housing Community and Development Act of 1987, Pub. L. No. 100-242, § 143, 101 Stat. 1814, 1850 (1988), codified as amended at 42 U.S.C. § 1437f(o); *see also* 24 C.F.R. §§ 982.1 *et seq*.
5. 42 U.S.C.A. § 1437f (a).
6. A full explanation of the Section 8 program can be found at *HUD.gov*, Housing Choice Vouchers Fact Sheet, available at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ hcv/about/fact_sheet* (last access Oct. 28, 2014).
7. 24 C.F.R. § 982.201(b)(2)(i); HUD.gov, Housing Choice Vouchers Fact Sheet, *supra* n.6.
8. 24 C.F.R. § 5.609; *see also* US Department of Housing and Urban Development, Housing Choice Voucher Program Guidebook, Chapter 5: Eligibility and Denial of Assistance, at 5-2 (2001), available at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook* last accessed Oct. 28, 2014.
9. 24 C.F.R. § 982.207.
10. 24 CFR § 982.307.
11. *See* Megan Haberle, Ebony Gayles & Philip Tegeler, Accessing Opportunity: Affirmative Marketing and Tenant Selection in the LIHTC and Other Housing Programs, Poverty & Race Research Council, at 40 (2008).
12. *See generally* Andrew J. Greenlee, "More Than Meets the Market? Landlord Agency in the Illinois Housing Choice Voucher Program," *Housing Policy Debate,* 24:3, 500, 512–15 (2014).
13. Paula Beck, "Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier," 31 *Harv. C.R.-C.L. L. Rev.* 155, 158 (1996). "Areas of opportunity" are "places where jobs are relatively plentiful and access to education, healthcare, and other amenities is close at hand." PD&R Edge, Equity Mapping and the Geography of Opportunity, available at *http://www.huduser.org/portal/pdredge/pdr_edge_featd_article_042114.html*, last accessed Oct. 28, 2014.
14. Molly W. Metzger, "The Reconcentration of Poverty: Patterns of Housing Voucher Use, 2000–2008," Housing Policy Debate 24:3, 544, 544–45 (2014) (citing Popkin, S. J., Galster, G. C., Temkin, K., Herbig, C., Levy, D. K., & Richer, E. K., "Obstacles to desegregating public housing: Lessons learned from implementing eight consent decrees," Journal of Policy Analysis and Management, 22, 179–199 (2003); Rosenblatt, P., & DeLuca, S., "'We don't live outside, we live in here': Neighborhood and residential mobility decisions among low-income families," City and Community, 11, 254–284 (2012)); *see also* Lisa M. Krzewinski, "Section 8's Failure to Integrate: The Interaction of Class-Based and Racial Discrimination," 21 *B.C.* Third World L.J. 315, 320-21 (2001).
15. Metzger, *supra* n.14 at 545.
16. *Id*.
17. *See* Stephen M. Dane, "Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis of Homeowners Insurance Practices Is Here to Stay," Banking & Financial Services Policy Report, 33:6, at 1 (June 2014). The article gives a full history of disparate impact liability under the FHA, as well as a detailed analysis of why disparate impact analysis is consistent with the business of insurance.
18. *PCIA*, 2014 WL 4377570, at *3.
19. 24 C.F.R. § 100.70(d)(4).
20. *See, e.g.*, Ojo v. Farmers Group, Inc., 600 F.3d 1205, 1208 (9th Cir. 2010); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1360 (6th Cir. 1995), cert. denied, 516 U.S. 1140 (1996); United Farm Bureau Mut. Ins. Co. v. Metro. Human Relations Comm'n, 24 F.3d 1008 (7th Cir. 1994); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 301 (7th Cir. 1992); Lumpkin v. Farmers Grp., Inc., No. 05-2868 Ma/V., 2007 WL 6996777, at *2 (W.D. Tenn. July 6. 2007); Nevels v. Western World Ins. *Co.*, 359 F. Supp. 2d 1110, 1117–1122 (W.D. Wash. 2004); National Fair Housing Alliance v. Prudential Ins. Co., 208 F. Supp. 2d 46, 55–59 (D.D.C. 2002); Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636, 641–43 (W.D. Tenn. 1999); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209, 1212, 1213–15 (E.D. Pa. 1994). With the 1988 amendment to the FHA, § 3605 of the Act was rewritten to prohibit discrimination in "residential real estate-related transactions," including those that provide financial assistance for "repairing" or "maintaining" a dwelling, such as insurance transactions. 42 U.S.C. § 3605(c); *see also* Letter from Elizabeth K. Julian, HUD Acting Ass't Secretary for Policy and Initiatives, to Richard D. Rogers, Deputy Director, Illinois Dep't of Insurance, at 2 (Feb. 26, 1996) (on file with the author); National Fair Housing Alliance v. Prudential Ins. Co. of America, 208 F. Supp. 2d 46, 58 (D.D.C. 2002).
21. *See generally* R. Schwemm, Housing Discrimination: Law and Litigation § 10:4 (2013) (citing cases from all 11 circuits holding that the FHA includes a discriminatory effects standard); *PCIA*, 2014 WL 4377570, at *3 n.1 (same).
22. Dane, *supra* n.17 at 3 ("Moreover, disparate impact liability has been the basis for fair housing enforcement actions against insurers long before HUD issued its Rule. Over the past two decades the homeowners insurance industry has been the subject of significant private and public enforcement actions under the Fair Housing Act. Virtually all of the major carriers, and several smaller ones, have been the subject of fair housing complaints based on claims of race discrimination in the underwriting, marketing, advertising, and sale of their products."); *see also* 78 *Fed. Reg.* at 11,475 ("HUD has long interpreted the Fair Housing Act to prohibit discriminatory practices in connection with homeowner's insurance.").
23. *See* Ojo, *supra* n.20; NFHA v. Prudential, *supra* n.20.
24. It should also be noted that many state regulatory regimes recognize disparate impact liability, as well. *See* Dane, *supra* n.17 at 7–8.
25. *Id*. at 1 (describing the outcry among insurance industry publications and experts regarding the Rule's application to homeowners insurance).

26. 78 *Fed. Reg.* 11,460 (Feb. 15, 2013), *codified at* 24 C.F.R. § 100.500.

27. 24 C.F.R. § 100.500.

28. Property Casualty Insurers Association of America v. Donovan, --- F.Supp.2d ----, 2014 WL 4377570, at *7 (D.D.C. Sept. 3, 2014) (hereinafter *PCIA*).

29. 78 *Fed. Reg.* at 11,474–75.

30. 78 *Fed. Reg.* at 11,475.

31. *See Fed. Reg.* at 11,474–75.

32. *PCIA,* 2014 WL 4377570; Inclusive Communities Project, Inc. v. Texas Dept. of Housing, 747 F.3d 275 (5th Cir. 2014), *cert. granted* No. 13-1371 (Oct. 2, 2014). In early November 2014, shortly before the publication of this article, the federal District Court for the District of Columbia upheld another challenge by the insurance industry to the new Rule. Due to time constraints, however, the author was unable to discuss that decision in this article. See American Insurance Assoc. v. United States Dep't of Housing and Urban Dev., --F. Supp. 3d --, 2014 WL 5802283 (D.D.C. Nov. 7, 2014).

33. *PCIA*, 2014 WL 4377570, at *1.

34. *PCIA*, 2014 WL 4377570, at *25.

35. *PCIA*, 2014 WL 4377570, at *23.

36. *Id.* at *23.

37. In *Open Communities*, as well, the US Court of Appeals for the Fifth Circuit adopted the burden-shifting framework in the Rule as the appropriate method for governing burdens of proof in disparate impact cases. 747 F.3d 275.

38. Dane, *supra* n. 17, at 7 (noting that "disparate impact analysis is not exclusive to the federal government," and that "[s]everal states allow disparate impact fair housing claims, even against insurance companies").

39. Dane, *supra* n. 17, at 7 (stating that "California, North Carolina, and the District of Columbia allow disparate impact fair housing claims by statute in all contexts," and that "[s]everal state supreme courts have interpreted their state fair housing laws to encompass disparate impact claims, even when their statutes do not explicitly use the term").

40. *See*, *e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) (using statistics showing racial disparity in the employment context); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977) (same, in the housing context); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 190 (5th Cir. 1983); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 235 n.7 (8th Cir. 1976); Jordan v. Dellway Villa of Tenn., Ltd., 661 F.2d 588, 589-90 (6th Cir. 1981); Weathers v. Peters Realty Corp., 499 F.2d 1197, 1201-02 (6th Cir. 1974); Mayor of Baltimore v. Wells Fargo Bank, N.A., No. CIV. JFM-08-62, 2011 WL 1557759, at *4 n.4 (D. Md. Apr. 22, 2011).

41. Dane, *supra* n.17, at 2.

42. For purposes of clarity and efficiency, this article employs the burden-shifting approach adopted by HUD in the Rule. However, the analysis would be similar under the slightly different frameworks adopted by various federal courts prior to HUD's implementation of the Rule, as well as by states that recognize disparate impact. As HUD noted, "HUD has long recognized, as have the courts, that the Act supports an effects theory of liability," and the Rule is simply "a formal interpretation of the Act that clarifies the appropriate standards for proving a violation under an effects theory." 78 *Fed. Reg.* at 11,474.

43. In Jones v. Travelers, the plaintiffs alleged that Travelers policy and practice regarding Section 8 tenants has a disparate impact on the basis of sex, race, disability, familial status, and age. Jones Complaint ¶ 1, *supra* n.2. The *Jones* plaintiffs have also alleged that Travelers policy and practice creates, increases, reinforces, or perpetuates segregated housing patterns. *Id.* ¶ 22. In Viens v. American Empire, a disparate impact on the basis of race and national origin is alleged. *Viens* Complaint ¶ 3, *supra* n.2. Finally, in the two HUD complaints against International Catastrophe Insurance Managers, a disparate impact on the basis of race and disability is alleged. FHC and BNDC Complaints ¶ 4.

44. *See* Jones v. Travelers Complaint ¶¶ 23-24, *supra* n.2; Viens v. American Empire Complaint ¶¶ 20-21, *supra* n.2 Fair Housing Continuum and Brevard Neighborhood Development Coalition v. ICAT, HUD Complaint ¶ 7 *supra* n.2.

45. U.S. Census Quick Facts, 2013 Estimate, available at *http://quickfacts.census.gov/qfd/states/00000.html,* last accessed Oct. 28, 2014.

46. Cornell University 2012 Disability Status Report, available at *http://www.disabilitystatistics.org/ StatusReports/2012-PDF/2012-StatusReport_US.pdf?CFID=14862183&CFTOKEN=d5fea07e7da6cc49-2EFADDD2-5056-B400-0D6FCD17DC453D5B&jsessionid=84308a0ea7154ba698141b18721443177375).*

47. HUD Picture of Subsidized Households 2013, available at *http://www.huduser.org/portal/ datasets/picture/yearlydata.html.*

48. *See* NAIC, *supra* n.3; *see also*, *e.g.*, Johnson v. Allstate Ins. Co., No. 07-CV-0781-MJR, 2008 WL 4279992, at *2–3 (S.D. Ill. Sept. 17, 2008) (granting defendant's motion to classify pricing information as trade secrets subject to a protective order); Goshawk Dedicated Ltd. v. Am. Viatical Servs., *LLC*, No. 1:05CV2343-RWS, 2007 WL 3492762, at *1 (N.D. Ga. Nov. 5, 2007) (ordering defendant to produce a copy of its database containing actuarial information, with all copies of the database treated as "Highly Confidential" per an earlier confidentiality order); D.J. Powers, "The Discriminatory Effects of Homeowners Insurance Underwriting Guidelines," in Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions, at 129 (Gregory Squires ed., Urban Institute Press 1997) (noting that "insurers vigorously oppose any efforts to publicly reveal the data necessary to" analyze overall losses in "high-crime" neighborhoods, as compared to other neighborhoods).

49. Powers, *supra* n.45, at 126–132.

50. Powers, *supra* n.45, at 137.

51. The author was unable to locate any research focusing specifically on any connection between Section 8 tenancy and the most common property insurance losses, such as fire, weather, and water damage, or property-related crime, such as burglary.

52. Even an underwriting guideline with such a focus on general crime in an area may be unjustifiable. A high crime rate may have no real bearing on the risk associated with the homeowners policy. Instead, any use of crime data should focus on risks, such as break-ins, that generate losses covered by the policy at issue. In addition, the underwriting guidelines must "identify a factor associated with higher *overall* losses on the policy," not just a factor, such as crime, that may be associated with only a small percentage of overall losses. Powers, *supra* n.45, at 129.

53. *See* Ellen, et al., "Memphis Murder Story Revisited: Do Housing Vouchers Cause Crime?," HUD Office of Policy Development and Research, at 12 (Feb. 2011), available at *http://www.huduser.org/publications/pdf/ellen_memphismurder_assistedhousingrcr07_v2.pdf*; "Investigating the Relationship Between Housing Voucher Use and Crime," Furman Center and Moelis Institute Policy Brief, (Feb. 2013), available at *http://furmancenter.org/files/publications/FurmanCenter-HousingVoucherUseCrime.pdf*; Michael C. Lens, "The Impact of Housing Vouchers on Crime in US Cities & Suburbs," *Urban Studies* 1, 12 (2013),.

54. In fact, one study posited that "[i]f there is a relationship at all, these data suggest that there is a weak, negative relationship between vouchers and crime in large cities and there is no relationship at all between vouchers and crime in suburban areas." Lens, *supra* n.50, at 14. In another study, "[l]andlords overwhelmingly described positive relationships with their voucher-subsidized tenants." Greenlee, *supra* n.12 at 500, 515.

55. *See*, *e.g.*, Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998); Knapp v. Eagle Property Management Corp., 54 F.3d 1272 (7th Cir. 1995).

56. *Salute*, *supra* n.52 at 301 ("[T]he landlord is not required to articulate any justification for a policy of refusing Section 8 certificates. Under the Act, that refusal is a landlord's prerogative."); *Knapp*, *supra* n.52 at 1280.

57. *Salute*, *supra* n.52 at 301 ("A landlord may consider that participation in a federal program will or may entail financial audits, maintenance requirements, inspection of the premises, reporting requirements, increased risk of litigation, and so on."); Beck, *supra* n.13, at 159 (1996) ("Many landlords also refuse to accept Section 8 tenants because they do not want to deal with the attendant government requirements, which include signing a one-year lease, removing lead-based paint from apartments, and meeting specified housing quality standards.")

58. Though not covered here, it should also be noted that many states recognize disparate impact liability under their own fair housing laws. *See generally* Dane, *supra* n.17, at 7–8.

59. *See* Fair Housing Laws: Renters' Protection from Sexual Orientation Discrimination, FindLaw (2013), available at *http://civilrights.findlaw.com/discrimination/fair-housing-laws-renters-protection-from-sexual-orientation.html,* last accessed Oct. 28, 2014.

60. *See* New York City Human Rights Law, § 8-107(5); City of Atlanta Code of Ordinances § 94-92; Municipal Code of Chicago § 5-8-020; Seattle Municipal Code § 14.08.020(M).

61. The Poverty and Race Research Action Council (PRRAC) has produced a comprehensive report compiling the state and local laws barring source-of-income discrimination, which was updated in May 2014. PRRAC, State, Local, and Federal Laws Barring Source-of-Income Discrimination (May 2014), available at *http://www.prrac.org/pdf/AppendixB.pdf*, last accessed Oct. 28, 2014.

62. *See*, *e.g.*, Conn. Gen. Stat. Ann. § 46a-63 (defining source of income to include federal and state housing vouchers); Montgomery County, Maryland Code, Ch. 27 (defining "lawful source of income" to include "housing assistance"); New York City Human Rights Law N.Y., Code § 8-107 (stating that "'lawful source of income' shall include income derived from … housing assistance including section 8 vouchers").

63. Francia v. Mt. Vernon Fire Insurance Co., 2012 WL 1088544 (Conn. Super. Mar. 6, 2012).

64. *Francia*, 2012 WL 1088544, at *1.

65. *Id.*, *1.

66. *Id*, at *4–6.

67. *Id.*, at *9.

68. In fact, because the *Viens* case is being litigated in Connecticut, the plaintiffs there have alleged a violation of Conn. Gen. Stat. Ann. § 46a-63, as well as the federal Fair Housing Act. *See Viens v. Great American* Complaint ¶ 3, *supra* n.2.

69. Or. Laws Ch. 740.

70. PRRAC, *supra* n.58.

71. *See* Gary Rayno, "NH House Roundup: Bill Prohibits Housing Discrimination against Section 8 Tenants," New Hampshire Union Leader, Mar. 13, 2014, available at *http://www.unionleader.com/article/20140313/NEWS0621/140319389*, last accessed Oct. 28, 2014; *see also http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=2393&sy=2014&sortoption=&txtsessionyear=2014&q=1*, last accessed Oct. 28, 2014 (showing that as of May 23, 2014, the bill remained in the Senate Conference Committee).

72. *See SABI v. Sterling*, 183 Cal. App. 4th 916 (2010).

73. *See* Property Casualty 360, "State Farm Settlement Puts Heat on Industry," Aug. 12, 1996, available at *http://www.propertycasualty360.com/1996/08/12/state-farm-settlement-puts-heat-on-industry*, last accessed Oct. 28, 2014 (noting that "writing insurance in urban and minority neighborhoods isn't charity, but can be good and profitable business").

74. *See*, *e.g.*, Beck, *supra* n.13,, at 166;

75. *Id.*; Metzger, *supra* n.14 at 557 (2014). As with the association between the presence of Section 8 voucher-holders and rising crime, studies indicate that rather than lower property values, voucher-holders may tend to move to areas that already have lower-than-average property values. Margery Austin Turner, Susan Popkin, Mary Cunningham, "Section 8 Mobility and Neighborhood Health," *Urban Institute*, at 17 (2000), available at *http://www.urban.org/publications/309465.html*, last accessed Oct. 28, 2014.

76. Rebecca Tracy Rotem, "Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program," 78 *Fordham L. Rev.* 1971, 1981 (2010); Krzewinski, *supra* n.14, at 322.

77. Turner, *et al.*, *supra* n.72 at 15.

78. Rotem, *supra* n. 73. *See also* Turner, *et al.*, *supra* n.72 at 15

79. Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, 641 F. Supp. 2d 563, 571–72 (E.D. La. 2009) (quoting Smith v. Town of Clarkton, 682 F.2d 1055, 1066 (4th Cir.1982)). Many courts have held the term "ghetto" to be a term associated with race. *See, e.g.*, Turner v. Baylor Richardson Medical Center, 476 F.3d 337, 348 (5th Cir.2007); Harrington v. Disney Regional Entm't, Inc., 276 Fed.Appx. 863, 876–877 (11th Cir.2007); Clark ex rel. T.M.J. v. Pielert, 2009 WL 35337 (D.Minn.2009).

80. Innovative Health Sys. v. City of White Plains, 117 F.3d 37, 42 (2d Cir. 1997).

81. *See* Smith, 682 F.2d at 1066–67; Sunrise Dev., Inc. v. Town of Huntington, 62 F. Supp. 2d 762, 768, 775 (E.D.N.Y. 1999).

82. Ian Hany López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism & Wrecked the Middle Class, Oxford University Press, Ch. 3 (2014).

83. Indeed, as noted earlier (*supra* n.40), the statistics used in disparate impact cases can also help to establish a prima facie intentional discrimination case, and investigation of a disparate impact case may reveal evidence of intentional discrimination, as well. *See* Michael G. Allen, Jamie L. Crook, John P. Relman, "Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective," 49 Harvard Civil Rights-Civil Liberties Law Review 155, 162 (2014); Dane, *supra* n.17 at 8.

84. In one documented instance, a member of an urban housing task force obtained access to an insurance company's underwriting guidelines, which instructed company underwriters not to write homeowners risks involving "low income-slash-subsidized housing." The task force member defined such a practice as redlining. Otis, L.H., "Availability Woes Documented in PA.," Property Casualty 360, Sept. 3, 1997, available at *http://www.propertycasualty360.com/1997/09/03/availability-woes-documented-in-pa*, last accessed Oct. 28, 2014.