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Race Discrimination Is Not Risk Discrimination: Why Disparate Impact Analysis of Homeowners Insurance Practices Is Here to Stay

By Stephen M. Dane

On February 15, 2013, the US Department of Housing and Urban Development (HUD) issued a final rule on implementation of the Fair Housing Act's Discriminatory Effects Standard (the Rule).[1] This regulation resolved some discrepancies among the federal courts of appeals regarding the proper analysis of disparate impact claims brought under the federal Fair Housing Act (FHA), which HUD, the US Department of Justice, and private individuals enforce through administrative and court proceedings.[2]

Although the Rule was merely intended to "formalize [HUD's] longstanding view" that disparate impact liability is available under the FHA and to establish a uniform standard for determining when a specific business practice violates the FHA, insurance publications and experts have expressed alarm that such a regulation would be applied to homeowners insurers. Industry lawyers claim that successful disparate impact claims against property insurers would "alter risk-based business practices" and "allow the government or private plaintiffs to substitute their business judgment" for that of insurers.[3] We are told that the Rule would "prevent insurance companies from using risk-based methods of rating and underwriting."[4] It is asserted that the HUD Rule "would effectively permit it to negate more than 150 years of public policy, regulatory principles, actuarial standards, and state-based regulation of insurance, and eliminate risk-based pricing of homeowners insurance."[5] This promulgation by HUD is seen as so unjustified that three property/casualty trade organizations have filed two separate lawsuits seeking to have the Rule declared void and inapplicable to homeowners insurers.[6]

One would have thought Hurricane Katrina had made a re-appearance to wreak havoc on the property insurance industry.

This article explains why these fears are utterly unfounded. For one thing, nothing radically "new" happened when HUD issued its Rule. The homeowners insurance industry has been subject to the FHA since its enactment in 1968. HUD's position that insurers are subject to FHA enforcement was formalized when it published regulations in 1989 prohibiting discrimination by homeowners insurers based on race, religion, disability, familial status, and other protected characteristics, a regulation repeatedly upheld by the courts. The FHA has been consistently interpreted by the courts to include a disparate impact basis for liability, even before HUD's most recent Rule was adopted, so the insurance industry has been subject to disparate impact claims for decades. HUD officials told Congress in 1994 that insurance company practices with a disparate impact may violate the act if they cannot meet the established test of business justification. The Department of Justice has filed or supported disparate impact claims against insurers for decades. In addition to the federal government's efforts to enforce the FHA against insurers based on a disparate impact theory of liability, private litigants have also done so successfully.

Second, disparate impact analysis is not inconsistent with "the business of insurance." Some aspects of the business of insurance, such as underwriting and rate-making, do include the classification of risk. But insurers do a lot more to run their insurance businesses than assess "risk of loss" or engage in "risk-based" practices. Insurers direct sales teams and sales agents. They have marketing departments. They employ people to design

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The author thanks his partner John P. Relman, who provided many valuable insights during the preparation of this article.

new products and add new product features. They operate claims departments. These ordinary business practices, which do not explicitly assess or classify risks, are no different for insurers than for other businesses subject to the FHA. Even those parts of the "business of insurance" involving risk assessment are compatible with disparate impact analysis. For example, nonactuarial intervention in underwriting is common, and could result in unjustified adverse impacts. Insurance actuaries who assess "risk" are constantly reviewing and modifying their algorithms, and before establishing a final pricing strategy they often take into account factors that include an element of judgment (*e.g.*, profitability levels, competitor prices, rating territory boundaries, trending assumptions, and so on). Indeed, some factors—such as race, religion, and national origin—are prohibited by state insurance laws even if they have an actuarial connection to risk of loss. There is enough flexibility in the industry's traditional assessment of risk to allow for disparate impact analysis, without conflicting with "the business of insurance."

Third, the business justification prong of the Rule itself preserves the viability of insurance business practices that are legitimately business justified. According to HUD's Rule, business practices with a disparate impact on a protected group "may still be lawful if supported by a legally sufficient justification," which is defined to include practices that are "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[7] So long as those interests cannot be served by another business practice with a less discriminatory effect—the burden of proof of which rests on the government or a fair housing plaintiff—such business practices are completely lawful under the Rule and the act. If any challenged insurance practices with no less discriminatory alternatives are based on legitimate risk-based underwriting or pricing, then they will suffer no liability under the FHA.

Fourth, many state laws allow disparate impact claims against homeowners insurers. Regardless of what HUD or the courts may think about the reach of the federal FHA, insurers in states that allow disparate impact claims as a matter of state law still remain exposed to such claims.

Finally, even when a disparate impact analysis of insurer business practices cannot, standing alone, result in liability under the federal FHA, it is still relevant to the issue of "intent" and can be used by plaintiffs and the government in fair housing enforcement actions to support claims of intentional discrimination. A business practice with a known disparate impact, supported by little or no statistical analysis prior to implementation, can be combined with other evidence of discriminatory intent to support a finding of liability.

Disparate impact analysis is here to stay, either on the federal level under HUD's Rule, or at the state level in those states that recognize the doctrine. It remains relevant to claims of intentional discrimination even in the absence of HUD's Rule. A company's self-analysis of the disparate impact of its business practices is a responsible business practice in which lenders, governments, and others in the housing industry routinely engage. Homeowners insurers would be prudent to do the same, and those who fail to do so may find themselves on the wrong end of an enforcement action, regardless of HUD's Disparate Impact Rule.

Disparate Impact Rule Reaffirms Preexisting Law

Since the FHA was amended in 1988, every court to consider the issue has held that the act prohibits acts of discrimination by homeowner's insurers.[8] Most of these decisions have gone no further than the language of 42 U.S.C. § 3604(a), which makes it unlawful "[t]o 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" a protected characteristic, such as race.[9] This is due, in part, to the link between the ability to obtain insurance and the ability to obtain housing—adequate insurance is necessary to the ownership or rental of housing.[10]

Section 3604(b) has also been interpreted to prohibit homeowners insurance discrimination. This provision makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, *or in the provision of services or facilities in connection therewith,* because of race . . . ."[11] HUD published a regulation under this section in 1989 that prohibits discrimination by homeowners insurers based on race, religion, disability, familial status, and other protected characteristics.[12] This regulation has repeatedly been

upheld by the courts.[13] The US Courts of Appeals for the Sixth, Seventh, and Ninth Circuits and several lower courts have all determined that homeowners insurance is clearly and simply a "service" rendered "in connection" with the sale or rental of a dwelling.[14] The Department of Justice has filed several enforcement actions against homeowners insurers.[15]

The 1988 amendments to the act also substantially rewrote 42 U.S.C. Section 3605 so that it, too, includes homeowner's insurance transactions. Prior to 1988, Section 3605 prohibited discrimination in mortgage "loan transactions," even those engaged in by insurers. When Congress passed the Fair Housing Amendments Act of 1988, it completely rewrote Section 3605 so that it is no longer limited only to loan transactions. That section now makes it unlawful to make unavailable, or to discriminate in the terms or conditions of, a "residential real estate-related transaction," which includes "the making or purchasing of loans or *providing other financial assistance for … purchasing, constructing, improving, repairing, or maintaining a dwelling*." The new definition makes clear that Congress intended to prohibit discrimination in transactions, like insurance, that provide financial assistance for "repairing" or "maintaining" a dwelling. Accordingly, several courts have held that homeowners insurance falls within the scope of Section 3605's protections because it "provides the financial assistance necessary" to maintain, repair, or construct a dwelling.[16] This is also HUD's view of Section 3605.[17]

The applicability of HUD's fair housing regulations to homeowners insurers and all that entails is nothing new. The Act has regulated insurance behavior for more than 45 years. In this regard, HUD's issuance of a regulation that applies to insurers should come as no surprise to anyone.

What about disparate impact? Starting in 1974 and continuing through 2014, all 11 courts of appeals to consider the issue have adopted the disparate impact standard as a basis for liability under the FHA.[18] HUD itself has a long history of interpreting the FHA to encompass disparate impact claims, including claims against insurers. HUD officials testified before Congress in 1994 that insurance company practices "neutral on their face [but] hav[ing] a disproportionate racial impact … may violate the [Act] where they cannot meet the established test" of business justification.[19] Under the new Section 3605, it is unlawful for a defendant to not "mak[e] available" a residential real-estate-related transaction because of race or any other prohibited basis. There is no implication of intent or motive in this phrase. A housing transaction can be "made unavailable" to an individual by operation of facially neutral rules just as much as by operation of rules that express their discriminatory intent. Clearly the language Congress used in the new Section 3605 could encompass practices with a disparate impact.

When HUD adopted the Disparate Impact Rule, it explicitly noted that the disparate impact standard of proof was already "well established."[20] The Rule is merely a formal adoption of the courts' and HUD's own long-held interpretation of the FHA.[21]

It should be noted here that HUD is not the only federal regulatory agency to adopt and apply the disparate impact standard of liability to financial institutions that regularly assess financial risk. Other federal agencies charged with implementing and administering the FHA have embraced the use of disparate impact analysis. Since at least 1994, all five federal financial regulatory agencies have used disparate impact analysis to assess liability under the various federal antidiscrimination laws they enforce, including the FHA.[22] Indeed, the disparate impact doctrine has been an integral part of Regulation B, which prohibits discrimination in underwriting and pricing in *lending* transactions, since it was promulgated in 1985.[23]

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 FHA. 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.

As a result, many historical homeowners insurance underwriting and pricing policies have been successfully challenged under the FHA on disparate impact grounds, including the age of the dwelling, the

minimum dwelling value, the ratio of a dwelling's market value to its replacement cost, and credit scoring.[24] The nation's largest homeowners insurers no longer use dwelling age or minimum market value as part of their underwriting processes. Many have also eliminated restrictions on the availability of full and guaranteed replacement cost policies, with companies finally making such policies available in African-American and minority neighborhoods. Insurers have abandoned explicitly race-based and geographically based marketing plans.[25]

These challenges to traditional underwriting and marketing practices have been supported both by the testing of agents conducted by fair housing organizations[26] and by statistical analyses demonstrating the racial impact of certain facially neutral criteria. Many of the challenged underwriting criteria were not supported by any company or industry empirical loss or claims data, so they could not be justified by business necessity.

Nothing radically "new" appeared when HUD issued its Disparate Impact Rule in 2013. What it announced in a formal regulation has been the law of the land, and has been applied to homeowners insurers, for decades.

Disparate Impact Is Not Inconsistent with "the Business of Insurance"

A central tenet of the industry alarm about HUD's Disparate Impact Rule is the fervent assertion that the imposition of disparate impact liability is fundamentally inconsistent with the business of insurance. The foundation of the business of insurance, and in particular underwriting and rate-making, is the classification of risk. We are told that to eliminate statistical disparities among different demographic groups, many risk-based variables would have to be eliminated from the underwriting process, and insurers would have to charge everyone the same rate regardless of risk. The expressed fear is that a disparate impact analysis will effectively negate more than 150 years of public policy, regulatory principles, actuarial standards, state-based regulation of insurance, and risk-based pricing.

One problem with these assertions is that not all homeowners insurance business practices are actuarially based, or based on an assessment of risk. For example, marketing and advertising campaigns, sales techniques, the placement of agent offices, insurance product design and benefits, the settlement of claims, renewal of policies, and other business practices are not based on actuarial analysis or modeling. Such business practices may have significantly different impacts on populations protected by the FHA, but they are not based on actuarial studies.[27]

Indeed, even insurance "underwriting guidelines," that is, those rules that determine whether an applicant is eligible to purchase homeowners insurance, may not be actuarially based:

> Today, we still find insurance companies making underwriting decisions based on all kinds of factors that have nothing to do with a statistically measured or measurable probability of risk.[28]

Underwriting 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.[29] "Historically, underwriters have relied on experience, market knowledge, intuition, and oral history more than statistical insights when evaluating risk."[30] Unlike insurance rates, insurance underwriting and eligibility guidelines are often not required to be filed, justified, or approved by state insurance regulators.[31] State insurance regulatory regimes are notorious for their lack of transparency and have actively resisted making publicly available any information regarding the availability and affordability of insurance in low-income and minority regions.[32] Several underwriting guidelines historically used by homeowners insurers were shown in the 1990s to have *not* been adopted as a result of any actuarial or other analysis of risk.[33] Accordingly, they have been largely abandoned by the industry.[34]

Nonactuarial intervention in underwriting is common. In the underwriting process, underwriters or systems assemble and review underwriting information. They then place an application into a tier. Often an underwriting score is calculated, although varying levels of review by human underwriters may also occur. The score and human review determine whether the application is accepted, rejected, or in need of further review. There is significant variation among insurers in the way this process is implemented, with agents

sometimes making case-by-case decisions, sometimes limited quality control, and the use of pooled industry data that is analyzed only to the point of meeting minimum regulatory scrutiny. Even when underwriting scores are available, half or more of underwriting decisions may be ultimately made by human underwriters.[35]

> Few, if any, underwriting decisions are truly binary. That's why insurers still need teams of people who know how to *balance the nuances of risk quality, emerging exposures, market contexts and competitive strategies as they make critical underwriting decisions*.[36]

This dependence on human judgment no doubt explains why some analyses of insurer behavior reveal questionable patterns that *cannot* be explained by risk of loss. For example, in *NAACP v. American Family Mutual Insurance Company*,[37] the government alleged that the company's loss data did *not* explain or otherwise justify its low overall market share of policies on homes in majority black census tracts in Milwaukee County, Wisconsin, nor the preponderance of repair-cost policies in those areas.[38]

Moreover, there is not agreement among actuaries as to how "risk" should be assessed in the pricing of homeowners insurance. For example, most homeowners insurance policies are sold as "all risk" policies, meaning that they cover a wide range of potential loss-causing perils, such as fire, theft, weather damage, burst pipes, and so on. Some experts contend that multi-peril rating "is critical for maintaining economic efficiency and actuarial equity," but some actuaries involved in pricing homeowners insurance are now suggesting "decomposing" the set of dependent variables by individual peril.[39] Current multi-peril rating practice is based on modeling each peril in isolation from the others, which requires an assumption that covered perils are independent from one another, and that sets of parameters from each peril are unrelated to one another. These assumptions are now being tested, however, as "it seems unlikely that perils are independent" of one another, and some studies have demonstrated a statistically significant dependence among perils. For this reason, actuaries are exploring alternative approaches to homeowners insurance rating systems.[40]

Even actuarially based insurance business practices are often derived, modified, or ignored for reasons unrelated to risk. State rate regulatory laws generally permit the rate filer to consider management's business judgment and competition in the determination of the rates to be filed and charged to insureds. The Casualty Actuarial Society's Statement of Principles Regarding Property and Casualty Insurance Ratemaking acknowledges that although the actuary's role is to derive an estimation of future costs resulting from the transfer of risk, "other business considerations are also a part of ratemaking," and include input from other disciplines such as marketing, underwriting, and finance.[41]

For example, despite what a company's actuaries may determine is a fair and reasonable rate for a specific insurance product in a specific geographic rating territory based on expected loss costs, company executives may reject that determination "for competitive reasons," that is, to beat a competitor's price and sell more policies. The actuarially determined rates might be rejected or modified by business executives to penetrate (or withdraw from) a specific market. Or they might be adjusted in response to agent input or customer responses.[42] These nonactuarial adjustments are frequently permissible under state law.

Moreover, there are some factors that can *never* be used to set prices, or to underwrite new business, *even if* those factors are shown to be "actuarially justified." Typical among these absolutely prohibited factors are race, color, religion, and national origin. Even if an insurer could prove through actuarial analysis that members of a protected racial group tended to show greater homeowner loss costs, claims, or risk—all other factors being equal—the insurer would still be prohibited by state law from refusing to sell insurance, or charging higher prices, to members of that racial population.

These absolute prohibitions are well known and have been embedded in state laws for decades. Homeowners insurers have successfully conducted "the business of insurance" by operating within these limitations, and have not gone out of business because they cannot use these factors.

It is apparent that the pricing and underwriting functions of homeowners insurers, even if based at some level on the actuarial analysis of appropriate data sets, can be and are adjusted by considerations unrelated to risk. The assertion that actuarial risk factors are the *only*

considerations that drive the "business of insurance" goes too far.

The point here is that the industry's reliance on "actuarial necessity" as the linchpin of the "business of insurance" is a cliché in this context—a sophisticated-sounding catchphrase that cannot possibly eliminate all possible applications of disparate impact analysis to homeowners insurance, such as those insurance business practices to which actuarial science does not speak, or on which actuarial science has no definitive answer. There is not, and never has been, an absolute homage to actuarial outcomes in the business or regulation of insurance. Actuarial risk assessment is certainly useful and desirable in many instances, but there are no absolutes here. HUD's Disparate Impact Rule can safely operate within traditional actuarial constraints without jeopardizing "the business of insurance." Certainly no court will rule, as a matter of law, that HUD's Disparate Impact Rule is inapplicable to all insurance business practices, especially those that are not based on actuarial or risk-based analysis.

Disparate Impact Analysis Is Consistent with Risk Assessment

In any event, the entreaty that disparate impact is "incompatible" with the business of insurance is belied by the business justification prong of the Rule itself. Business practices with a disparate impact on a protected group "may still be lawful if supported by a legally sufficient justification," which is defined to include practices that are "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[43] Specifically, a business practice that has a disparate impact on a protected group is nevertheless legal under the FHA if it "is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests" and there is no less discriminatory alternative available to achieve those interests.[44] Not every housing practice that has a disparate impact is illegal. Courts use the disparate impact framework only "to distinguish the artificial, arbitrary, and unnecessary barriers proscribed by the FHA from valid policies and practices crafted to advance legitimate interests."[45] HUD has stated that "nothing in the [FHA] requires or encourages any practice that is inconsistent with sound actuarial and underwriting principles . . . ."[46]

The terms "actuarial justification" and "actuarial necessity" certainly *sound* like quintessential "legally sufficient justifications" under this standard. Depending on the insurance practice at issue, a homeowners insurer—like any other provider of housing or housing services subject to the FHA—may indeed be in full compliance with the act even if its practice results in a disparate impact. But this can only be determined on a case-by-case basis and is dependent on the individual practice being challenged, the challenger's ability to prove some disparate impact in the first instance, the business interest at issue, and—in the case of insurers because of McCarran Ferguson[47]—the state law in which the practice arose.

Disparate impact is not a "gotcha" standard of liability intended to trap unwitting defendants, nor does it require quotas or set-asides. When an insurer, using evidence that is neither hypothetical nor speculative, can establish a legitimate, nondiscriminatory justification for a practice that may have a discriminatory effect, the insurer can prevail unless the plaintiff then demonstrates the existence of a less discriminatory alternative practice that achieves the same objective. If any challenged insurance practices with no less discriminatory alternatives are based on legitimate risk-based underwriting or pricing, then they will suffer no liability under the FHA.

It is sometimes claimed that having to live under the shadow of the Disparate Impact Rule poses an undue burden to insurers because insurers do not collect data about the race of their customers and they would therefore be required to collect demographic data that they do not currently obtain. But in this regard homeowners insurers are no different from other businesses that are subject to the FHA. Apartment managers do not record the race of housing applicants or tenants. Real estate sales agents do not record the race of their buyers. Although some lenders are required to collect and report racial and gender demographic data of loan applicants, they are not required to collect or report data about the other protected class characteristics (such as religion, disability, or familial status) to which the Disparate Impact Rule applies. In this respect there is no additional burden that is unique to "the business of insurance" that distinguishes it from any other housing industry subject to the Rule.

More fundamentally, this notion that the Disparate Impact Rule requires housing providers to collect and analyze racial or other demographic data about their

customers misconceives how many disparate impact claims are proven. For example, a challenge to an insurer's sales, marketing, or underwriting practices would require a comparison of the way a particular policy or practice will impact members of a protected class *in the relevant market* as compared to nonprotected potential customers in that market.[48]

Indeed, for disparate impact claims based solely on neighborhood racial composition, as distinct from disparate impact claims based on the race of applicants or existing customers, the relevant demographic data required for analysis is found in publicly available census and geographic data, not in customer files.[49] The race of an insurer's customers, as distinct from the racial composition of the neighborhoods within which it does business, is largely irrelevant to such geographic redlining claims.

Finally, HUD's Rule places the burden of proving disparate impact in the first instance, and a less discriminatory alternative at the back end, on the *plaintiff*, not the defendant insurer. For a plaintiff to make such a showing, the plaintiff must have a data source with the relevant demographic information (*e.g.*, race) to demonstrate the impact. If a fair housing plaintiff has a data source sufficient to prove that a specific insurance business practice has a disparate impact based on race, the insurer would also have access to the same data source. Moreover, the insurer's burden under HUD's Rule is merely to prove the "business justification" for the challenged practice. Certainly the insurer has a preexisting source of data to meet this burden, and would not have to capture "more" data *post hoc*.[50]

HUD's Disparate Impact Rule therefore does not, as many insist, impose any additional data collection burden on homeowners insurers. To the contrary, the Rule does nothing more that promote the careful analysis of existing data so that no otherwise qualified segments of the market are unnecessarily excluded by unjustified assumptions about risk.

Disparate Impact Analysis Is Alive and Well at the State Level

Another reason why disparate impact analysis is here to stay, regardless of HUD's federal Rule, is that it is embedded, implicitly or explicitly, in many state regulatory regimes. Disparate impact analysis is not exclusive to the federal government, nor does it necessarily conflict with state laws. Many state civil rights laws are in complete harmony with federal civil rights policy, not just in areas of housing, but in all segments of the economy, including employment, banking, education, public accommodations, and others. Several states allow disparate impact fair housing claims, even against insurance companies. Indeed, many state fair housing laws have been deemed "substantially equivalent" to the federal FHA[51] and would apply the principles of disparate impact to homeowners insurers to the same extent as the federal FHA.

For example, California, North Carolina, and the District of Columbia allow disparate impact fair housing claims by statute in all contexts; there are no exemptions for homeowners insurers.[52] Several 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.[53] Lower state court decisions throughout the country embrace disparate impact as a matter of state law.

In *Toledo Fair Housing Center v. Nationwide Insurance Company*,[54] a class of homeowners and a local fair housing agency sued Nationwide Insurance solely under Ohio state law for alleged redlining. Specifically, plaintiffs alleged that two of Nationwide's underwriting guidelines had a disparate impact on homeowners in African-American neighborhoods, and therefore violated the state's fair housing law. Nationwide moved for summary judgment, arguing that a disparate impact approach would "undermine the insurance business" and would "conflict with the Ohio Insurance code." The court rejected both arguments, finding that "the disparate impact approach does not unduly burden the business of selling insurance" because the theory does not impede an insurer from showing a legitimate business justification. Moreover, the court further found that disparate impact liability against an insurer "does not conflict with the Ohio insurance code."[55]

This and similar cases and state statutes refute the concern that HUD's Disparate Impact Rule "conflicts" with the state insurance law of all 50 states. There may indeed be some situations in which McCarran Ferguson will reverse preempt a federal FHA claim challenging a specific insurance business practice in a specific state. But that determination can only be made on a case-by-case basis, and until a court is presented with such

particularized facts, it will not invalidate the Rule in the abstract and immunize all insurance practices in all states.[56] The viability of disparate impact challenges to homeowner insurance practices under state law thus ensures that the concept will still be something insurers must address, regardless of the existence of HUD's Rule.

Disparate Impact Analysis Is Relevant to Claims of Intentional Discrimination

Finally, disparate impact analysis must always be a concern of homeowners insurers because, regardless of whether it might be sufficient to support fair housing liability as a stand-alone theory, it is nevertheless relevant and admissible in enforcement actions that are based on claims of intentional discrimination.

Statistical evidence has long been recognized by the US Supreme Court as an important type of circumstantial evidence that can be used to prove intent. For example, in employment discrimination cases the Supreme Court has held that statistics showing an imbalance between the racial composition of an employer's work force compared to the racial composition of the general population is often "a telltale sign" of purposeful discrimination.[57] In some cases statistical evidence alone can support a finding of intent. Housing discrimination cases premised on allegations of discriminatory intent have successfully presented statistical evidence showing substantial imbalances in the defendant's treatment of customers.[58]

Evidence that an insurer's policy or practice has a substantial disparate impact on a protected class, when combined with direct or circumstantial evidence of discriminatory motive, is therefore relevant and admissible in a fair housing enforcement action.

Conclusion

The Introduction to this article quoted a number of industry experts who decried the alleged seismic repercussions of HUD's Disparate Impact Rule, and its application to insurers. The same arguments have been rejected by courts as overly "sweeping" and "fanciful."[59]

> Essentially, [Prudential's] argument turns on the purportedly unique nature of the insurance industry, which must "discriminate" based on an assessment of risk. However, this argument is unavailing in light of the availability of the "business justification" defense. Plaintiffs do not challenge Prudential's right to evaluate homeowners' insurance risks fairly and objectively. Rather, plaintiffs allege that the underwriting policies and practices employed by Prudential are *not* purely risk-based. Furthermore, defendants cannot point to anything in the FHA itself that would justify this Court in carving out an exception for a particular type of organization.[60]

The Fifth Circuit similarly observed that the insurance industry's "ominous" description of the way that disparate impact will force federal courts to act as "super actuaries" by substituting their judgment for the judgment of each of the 50 states "although colorful, is incorrect."[61] Courts are regularly called upon to evaluate whether a practice with a disparate impact is nevertheless justified by a business necessity. "[Allstate's] attempt to distinguish the business of insurance from other businesses is unpersuasive." Moreover, supposed conflicts between disparate impact theory and state insurance laws "are entirely conjectural."[62]

The Seventh Circuit made the same observations in *NAACP v. American Family*.[63] Insurers are no different from lenders when it comes to risk assessment. Like insurers, lenders must evaluate risks, such as whether to extend credit in the first instance, and if so at what rate of interest. The FHA indisputably applies to lenders, so "it is difficult to see risk classification as a principled ground to exclude insurers" from disparate impact analysis.[64] The court in *American Family* also famously wrote, "risk discrimination is not race discrimination,"[65] a line often quoted by industry apologists who object to the application of disparate impact analysis to homeowners insurance. But in the next sentence the court cautioned that "efforts to differentiate more fully among risks may produce classifications that could be generated by discrimination."[66]

Homeowners insurers have been operating profitably for decades in a world in which every circuit court that has addressed the issue, as well as HUD, has found that disparate impact liability exists under the FHA—without the calamitous results predicted by industry pundits. Disparate impact liability does not require the abandonment of legitimate, risk-based analyses. It is

absolutely compatible with the business of insurance. Responsible insurers would be prudent to incorporate compliance with it into their basic business models. It is a concept that is here to stay.

Notes

1. 78 Fed. Reg. 11,460 (Feb. 15, 2013).
2. *See* 42 U.S.C. §§ 3610-3614.
3. P. Hancock, A. Glass, and R. Smerage, "HUD Proposal Would Impose 'Disparate Impact' Regulation on Property Insurance," *Legal Backgrounder*, Vol. 27, No. 11 (June 8, 2012), at pp.1, 3.
4. E. Tosaris, "The Disparate Impact Rule and Its Impact on State Insurance Regulation," *The Regulator* (Spring, 2013) at p.9.
5. S. Stead and L. Mirel, "Commentary: Will HUD's Disparate Impact Rule Have Say in Ratemaking?," available at *http://www.insurancejournal.com/news/national/2013/04/10/287803.htm*.
6. *American Insurance Ass'n et al. v. HUD*, Case No. 1:13-cv-00966 (D. D.C.); *Property Casualty Insurers Ass'n of America v. Donovan*, Case No. 1:13-cv-08564 (N.D. Ill.).
7. 24 C.F.R. § 100.500.
8. *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, 641-643 (W.D. Tenn. 1999); *Strange v. Nationwide Mut. Ins. Co.*, 867 F. Supp. 1209, 1212, 1213-1215 (E.D. Pa. 1994). Even before the Fair Housing Amendments Act of 1988, federal district courts had so held. *See, e.g.*, *McDiarmid v. Econ. Fire & Cas. Co.*, 604 F. Supp. 105, 107 (S.D. Ohio 1984); *Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co.*, 472 F. Supp. 1106, 1109 (S.D. Ohio 1979).
9. 42 U.S.C. § 3604(a) (emphasis added).
10. *Nationwide*, 52 F.3d at 1360 ("[T]he availability of property insurance has a direct and immediate effect on a person's ability to obtain housing."); *Nevels*, 359 F. Supp. 2d at 1119 ("Plaintiffs . . . , without liability insurance, face significant financial risk, and their ability to provide housing for disabled individuals is threatened."); *American Family*, 978 F.2d at 297-298, 300 ("No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable."); *United Farm Bureau*, 24 F.3d at 1014 n.8 ("This undoubtedly could make owning and retaining real property unavailable . . . ."); *Lindsey*, 34 F. Supp. 2d at 641-643 (FHA prohibits discriminatory refusal to underwrite homeowner's insurance); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 27 (D. Mass. 1996) ("Few, if any, banks make home loans to uninsured borrowers. Thus, property insurers in effect have the power to make housing unavailable to potential buyers.").
11. 42 U.S.C. § 3604(b) (emphasis added).
12. 24 C.F.R. § 100.70(d)(4).
13. *American Family*, 978 F.2d at 300-301, *cert. denied*, 508 U.S. 907 (1993) (regulation applying FHA to insurers is a valid exercise of HUD's authority); *Ojo*, 600 F.3d at 1208 (9th Cir. 2010) (en banc) (holding that "HUD's construction of the FHA is reasonable" in "prohibit[ing] racial discrimination in both the denial and pricing of homeowner's insurance"); *Nationwide* 52 F.3d at 1354, *cert. denied*, 516 U.S. 1140 (1996) (deferring to HUD's regulation in holding that "insurance underwriting practices are governed by the Fair Housing Act").
14. *See, e.g.*, *Ojo*, 600 F.3d at 1208; *American Family*, 978 F.2d at 298; *Lindsey*, 34 F. Supp. 2d at 642-643 (claims of discrimination by insurers in setting premiums and failing to renew policies are also covered by the Fair Housing Act, even though they do not directly affect the "availability" of housing).
15. *See, e.g., United States v. Am. Family Mut. Ins. Co.* (E.D. Wis. 1995); *United States v. Nationwide Mut. Ins. Co. et al.*, No. C2-97-291 (S.D. Ohio 1997); *United States v. Erie Insurance,* Case No. 08-cv-0945 (W.D.N.Y. 2008); *United States v. GuideOne Mutual Ins. Co.,* Case No. 3:09-cv-757 (W.D. Ky. 2009), all available at *http://www.justice.gov/crt/about/hce/caselist.php*.
16. *Prudential,* 208 F. Supp. 2d at 58; *Nevels*, 359 F. Supp. 2d at 1121-1122.
17. *See* 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 (Jan. 26, 1996) (Julian 1/26/96 Letter).
18. *See generally* R. Schwemm, *Housing Discrimination: Law and Litigation* § 10:4 (2013) (citing cases from all 11 circuits holding that the FHA allows for disparate impact liability). The most recent reaffirmation that disparate impact analysis can lead to liability under the FHA is found in *Inclusive Communities Project, Inc. v. Texas Dep't Housing and Community Affairs*, ___ F.3d ___, 2014 WL 1257127 (5th Cir. 2014).
19. *Homeowners Insurance Discrimination: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 103d Cong. 50 (1994) (stmt. of Roberta Achtenberg, Ass't Sec'y for Fair Hous. & Equal Opportunity).
20. 78 Fed. Reg. 11,460, 11461-11462 (listing examples of HUD's adjudications, published and internal guidance, and litigation in support of disparate impact (Feb. 15, 2013)).
21. 76 Fed. Reg. 70,921-70,923 and nn.11, 16 (Nov. 16, 2011).
22. *See, e.g.*, Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending,* 59 Fed. Reg. 18,266 (Apr. 15, 1994) (available at *www.occ.treas.gov/news-issuances/federal-register/94fr9214.pdf*). *See also Interagency Fair Lending Examination Procedures*, at Appendix 26–28 (available at *http://www.federalreserve.gov/boarddocs/caletters/2009/0906/09-06_attachment.pdf*). The financial regulatory agencies are the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve

System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration.

23. 12 C.F.R. § 202.6, n.2.

24. *See, e.g.*, *United States v. Nationwide Mut. Ins. Co. et al.*, No. C2-97-291 (Dep't of Justice Mar. 10, 1997) (consent decree) (available at *http://www.justice.gov/crt/about/hce/documents/nationsettle.php*) (Department of Justice (DOJ) settlement with Nationwide Insurance under the Fair Housing Act eliminating age of dwelling as an underwriting criterion); *United States v. Am. Family Mut. Ins. Co.* and *NAACP v. Am. Family Mut. Ins. Co.* (Dep't of Justice July 13, 1995) (consent decree) (available at *http://www.justice.gov/crt/about/hce/documents/amfamsettle.php*) (DOJ settlement with American Family Mutual Insurance Company under the Fair Housing Act eliminating age of dwelling as an underwriting criterion); *Toledo Fair Hous. Ctr. et al. v. Nationwide Ins. Co. et al.*, 704 N.E.2d 667, 674-676 (Ohio Com. Pl. 1997) (plaintiffs survived summary judgment because Nationwide did not provide sufficient business justification in response to the racially disparate impact of age of dwelling standard demonstrated by plaintiffs' statistical expert, minimum dwelling value, and ratio of dwelling market value to replacement cost), 705 N.E. 2d 1 (Ohio Com. Pl. 1998) (settlement); *DeHoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. 2003) (credit scoring), 240 F.R.D. 269, 276 (W.D. Tex. 2007) (settlement); *Nat'l Fair Hous. Alliance v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46 (D.D.C. 2002) (market value of home, ratio between replacement cost and market value, credit scoring).

25. For a historical discussion of the intersection between race discrimination and homeowner's insurance, *see* Carol Heimer, "The Racial and Organizational Origins of Insurance Redlining," 10 *J. Intergroup Relations* 42 (1982), and Gregory Squires, "Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas," 25 *J. Urban Affairs* 4, 391-410 (2003). For a broader discussion of the many issues surrounding race discrimination and disparate impact claims brought under the Fair Housing Act against insurers, *see* Dana Kaersvang, "The Fair Housing Act and Disparate Impact in Homeowners Insurance," 104 Mich. L. Rev. 1993 (2006).

26. "Testers" are individuals who, without an intent to purchase homeowner's insurance, pose as potential purchasers for the purpose of collecting evidence of unlawful discrimination. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). *See generally* Shanna Smith and Cathy Cloud, "Documenting Discrimination by Homeowners Insurance Companies Through Testing," in *Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (Gregory Squires ed., Urban Institute Press 1997).

27. *See, e.g.*, Robert W. Klein, "Availability and Affordability Problems in Urban Homeowners Insurance Markets," in *Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (Gregory D. Squires ed., 1997) at pp.47-48 (identifying several non-risk-related barriers that can influence the availability and affordability of homeowners insurance in urban markets, including agent bias, prejudicial views of decisionmaking personnel, adverse selection, agent commission structures, etc.); J. Schultz, "Homeowners Insurance Availability and Agent Location," in *Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (Gregory D. Squires ed., 1997) at p.83 (analyzing impact of agent locations on availability of insurance); Kaersvang, *supra,* n.33 at 2013–2017 (identifying several insurer business practices with a disparate impact that may not be justified by business necessity).

28. Testimony of J. Robert Hunter, former Texas Insurance Commissioner, before the US Senate Committee on Banking (quoted in D.J. Powers, "The Discriminatory Effects of Homeowners Insurance Underwriting Guidelines," in *Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions* (Gregory D. Squires ed., 1997) at p.119.

29. Hunter Testimony, at 125-133, 137 (identifying several common underwriting guidelines that may result in a disparate impact on protected classes).

30. G. McGiffin, "Are Underwriters Smarter Than Predictive Models?", *Insurance Innovation Reporter* (Dec. 9, 2013) (discussing improved methods of predictive modeling and suggesting that "predictive modeling and statistical analysis might replace heuristics-based analysis that has long been the standard practice in underwriting"), available at *http://iireporter.com/are-underwriters-smarter-than-predictive-models*.

31. Powers, *supra,* n.28, at p.121 (only nine states require the filing of underwriting guidelines). Rate filings typically do not include underwriting guidelines, which are generally considered secret and proprietary, and in most states are *not* subject to filing requirements. Birny Birnbaum, *Insurers' Use of Credit Scoring for Homeowners Insurance In Ohio: A Report to the Ohio Civil Rights Commission*, at pp.1–2, 10 (Jan. 2003) (in contrast to rate filings, underwriting guidelines are not typically filed with the Ohio Department of Insurance); *id*. at pp.15-16 (in most states, insurer changes to underwriting guidelines receive no regulatory scrutiny).

32. D. Schwarcz, "Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection," 61 *UCLA Law Review* 394, 396-397, 428 (2014); *see also* Annual Report of the People's Insurance Counsel Division of the Office of the Attorney General, State of Maryland, at p.5 (May 2012) (a review by Maryland's Attorney General of homeowners filings containing actuarial data determined that "in most instances [the] filings did not include adequate supporting actuarial data," and even after requesting additional information "in several cases the insurers' responses were unsatisfactory."), available at *http://www.oag.state.md.us/PIC/Annual_Report_2012.pdf*.

33. For example, one historical underwriting guideline that had been used by many large insurers like Nationwide, State Farm, and Allstate prior to disparate impact challenges prohibited the sale of dwelling replacement coverage insurance on dwellings whose "market value" was significantly less than their replacement cost. But in fact the insurers rarely retained any information on market values of homes, or any data showing higher rates of loss as the gap widened between the two values. Richard J. Ritter, "Racial Justice and the Role of the U.S. Department of Justice in Combating Insurance Redlining," in

Insurance Redlining: Disinvestment, Reinvestment, and the Evolving Role of Financial Institutions (Gregory D. Squires ed., 1997) at p.197. Moreover, the determination of "market value" was subjective, not subject to uniform standards, and was usually discarded. *Id*. *See also id*. at p.208 (the presumption that older homes pose higher risks may or may not be supported by the insurer's loss data).

34. *See supra* n.24.

35. D. Light, *Transforming Underwriting: From Risk Selection to Portfolio Management*, at pp.7, 12 (Celent, March 2004), available at *http://www.edmblog.com/weblog/files/insurance_transforming underwriting_celent_wp.pdf.*

36. McGiffin, *supra* n.30.

37. 978 F.2d 287 (7th Cir. 1992).

38. *See also* Klein, *supra* n.27 at p.73 (after studying a large dataset made available by the National Association of Insurance Commissioners, the author concludes that "the indicated relationship between race and the availability of insurance persists, *even imperfectly controlling for the risk of loss*."); Ritter, *supra* n.33 at p.198 ("[I]nsurers may not have previously analyzed their loss experiences" in order to explain disparities in market share between minority neighborhoods and white neighborhoods).

39. E. Frees, G. Meyers, and A. Cummings, "Predictive Modeling of Multi-Peril Homeowners Insurance," *Variance*, Vol. 6, No. 1, at p.12 (Casualty Actuarial Society 2012), available at *http://www.variancejournal.org/issues/?fa=article&abstrID=6918*.

40. *Id*. *See also* "How Predictive Modeling Has Revolutionized Insurance," *Insurance Journal*, June 18, 2012 (proposing the way actuaries can improve loss prediction by using more refined data analysis, for both pricing and underwriting), available at *http://www.insurancejournal.com/news/national/2012/06/18/251957.htm*; 2013 Insurance Predictive Modeling Survey (Nov. 4, 2013) (reporting survey results indicating only 37 percent of homeowners insurers use predictive analytics), available at *http://news.advizorsolutions.com/index.php/insurance-industry-must-make-investments-in-predictive-analytics*.

41. *http://www.casact.org/professionalism/standards/princip/sppcrate.pdf* at p.4. *See also* S. Dane, "The Potential for Racial Discrimination by Homeowners Insurers Through the Use of Geographic Rating Territories," 24 *J. Ins. Reg.* 21, 24-27 (2006) (discussing aspects of the homeowners insurance ratemaking function that allow for subjective and nonactuarial judgments, including but not limited to the delineation of rating territory boundaries).

42. *See, e.g.*, M. Miller and M. Golden, *Introduction to Price Optimization*, at Slides 7 and 10 (listing certain Competitive Adjustments that are often made to indicated loss costs during the rate setting process), available at *http://www.naic.org/documents/committees_c_d_auto_insurance_study_group_140317_materials.pdf.*

43. 24 C.F.R. § 100.500.

44. 24 C.F.R. § 100.500(b). Once this showing is made, a plaintiff may still prevail if he or she can prove that the legitimate nondiscriminatory business interests supporting the challenged practice could be served by another practice that has a less discriminatory effect. 24 C.F.R. § 100.500(c).

45. *Graoch Assoc. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 374-375 (6th Cir. 2007). *See also Prudential,* 208 F. Supp. 2d at 60 (insurers' ability to assess risk on legitimate grounds is preserved in light of the "business justification" element of disparate impact analysis).

46. Julian 1/26/96 Letter, *supra* n.17.

47. The McCarran Ferguson Act, 15 U.S.C. §§ 1011–1015, generally reverse preempts any law of Congress, not specifically related to insurance, that will "invalidate, impair, or supersede" state insurance codes. It has generally not prevented the enforcement of the federal Fair Housing Act because in almost all cases the courts have determined that the Act is "consistent with" the state law in which the claim arose. *See* cases cited *supra* n.8. *But see Saunders v. Farmers Ins. Exch.*, 537 F.3d 961 (8th Cir. 2008) (McCarran Ferguson reverse preempts disparate impact pricing claims in Missouri, but not necessarily claims of intentional discrimination).

48. *See, e.g.*, R. Schwemm, *Housing Discrimination: Law and Litigation* § 10:6 (2013) (plaintiff's *prima facie* case in a disparate impact case "should generally focus on the relative impact of the defendant's policy on the local population"); S. Dane, Disparate "Impact Analysis in the Mortgage Lending Context," 115 *Banking L.J.* 900, 904-905 (1998) (defining the appropriate comparison populations is critical to proper disparate impact analysis).

49. *See, e.g.*, Klein, *supra* n.27 at p.52 (using demographic data at the zip code level to measure differences in affordability and availability of insurance based on neighborhood racial composition); Ritter, *supra* n.33 at p.199 (analysis of loss data and loss ratios by census tract permits an assessment of the extent to which losses influence an insurer's market share).

50. *See* Kaersvang, *supra* n.33 at 2013 ("If accurate classification of risk is as important to the insurance business as insurers claim, it seems unlikely that insurers would rely on risk-assessment factors without knowing how those factors correlate to risk.").

51. *See* 42 U.S.C. § 3610(f) (allowing HUD to certify any state agency for referrals of complaints when the agency enforces fair housing rights that are "substantially equivalent" to the Fair Housing Act), list of equivalent state jurisdictions available at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP/equivalency.*

52. Cal. Gov't Code § 12955.8; N.C. Gen. Stat. § 41A-5(a)(2); D.C. Code § 2-1401.03. The Attorneys General from six states submitted a joint comment during HUD's rulemaking that commended disparate impact as "squarely aligned" with their states' interests in removing barriers to fair housing.

53. *See, e.g.*, *Com'n on Human Rights & Opportunities v. Sullivan Associates*, 250 Conn. 763, 792-793 (1999); *Saville v. Quaker Hill Place*, 531 A.2d 201, 205-206 (Del. 1987); *Bowman v. City of Des Moines Mun. Housing Agency*, 805 N.W.2d 790, 798-799 (Iowa 2011); *Malibu Investment Co. v. Sparks*, 996 P.2d 1043, 1050-1051 (Utah 2000); *State Civ. Rights Com'n v. County Line Park, Inc.*, 738 N.E.2d 1044, 1049 (Ind. 2000) (*dicta*).

54. 704 N.E. 2d 667 (C.P. Ohio 1997).

55. 704 N.E. 2d at 671.

56. *See, e.g.*, *Ojo,* 600 F.3d at 1208 (9th Cir. 2010) (the FHA allows disparate impact claims against insurers "in both the denial and pricing of insurance;" but McCarran Ferguson analysis must then be applied for the specific state in which the claim arose).

57. *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 340 n.20 (1977). *See, e.g.*, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (whether a practice bears more heavily on one race than another provides "an important starting point" for determining whether discriminatory intent was a motivating factor); *Carroll v. Sears, Roebuck & Co.,* 708 F.2d 183,190 (5th Cir. 1983) (gross statistical disparities, standing alone, may justify an inference of discriminatory motive).

58. *See, e.g.*, *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233-236 (8th Cir. 1976); *Jordan v. Dellway Villa of Tenn., Ltd.*, 661 F.2d 588, 589-590 (6th Cir. 1981); *Mayor of Baltimore v. Wells Fargo Bank, N.A.,* 2011 U.S. Dist. LEXIS 44013, at n.4 (D. Md. 2011); *DeKalb County v. HSBC N. Am. Holdings*, 2013 U.S. Dist. LEXIS 185976 (N.D. Ga. 2013).

59. *Prudential*, 208 F. Supp. 2d at 60; *Dehoyos*, 345 F.3d at 297 n.5.

60. *Prudential*, 208 F. Supp. 2d at 60.

61. *DeHoyos*, 345 F.3d at 297 n.5.

62. *Dehoyos* at 299, n.7.

63. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992).

64. *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992). *See generally* Kaersvang, *supra* n.33 at pp.2010-2011 (discussing the way empirical evidence undermines the argument that risk assessment by insurers differs from other risk assessment by lenders and others).

65. 978 F.2d at 290.

66. 978 F.2d at 290.