A Uniform Solution to Insurance Redlining: Problem or Possibility?

I. INTRODUCTION

Some homeowners claim that they cannot obtain hazard insurance simply because of their zip codes or geographic location.[1] These homeowners allege that insurers deny them insurance coverage based upon an arbitrary classification system known as "redlining." Redlining is traditionally defined as the "outright refusal of an insurance company or lending institution to provide services *solely* on the basis of a property's geographical location."[2]

The effect of geographical redlining is to create "de facto discrimination against Blacks" and other minorities who constitute a large portion of urban neighborhoods.[3] A redlining insurer neglects to inspect the individual building or residence to determine the actual hazard involved. Consequently, many beautiful, well-tended older homes adjacent to high risk areas are unable to obtain affordable hazard insurance.[4] Without property insurance, an individual cannot maintain his existing property. When an older home is physically damaged, the cost of repairs may be too exorbitant for an individual homeowner and the result is that the property deteriorates. The physical scarring of one building can lead to the decline of the entire neighborhood. The downward spiral of the neighborhood may be increased due to the abandonment of property by those persons who have left the area. The property cannot be purchased by other lower and middle income individuals because mortgagors demand property insurance before financing a home purchase.[5] Those persons who can afford to relocate may move to escape the blight. Those who remain may be financially unable to maintain the neighborhood. Further financial pressures on the neighborhood may be inflicted by insurers who can use the blighted premises as a reason not to insure any surrounding buildings. This perpetuates the neighborhood's decline.

The National Advisory Panel on Insurance in Riot-Affected Areas succinctly summarized the importance of insurance by stating that:

Insurance is essential to revitalize our cities. It is a cornerstone of credit.

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1. Foran, *A Fine Line: Citizens Groups, Insurers Differ on Inner-city Underwriting*, Milwaukee Business-Journal, Apr. 3, 1989, at 6, col. 1.

2. Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J.L. & SOC. PROBS. 1, 4 (1980). A broader definition of redlining "encompasses all institutional practices which have the effect of limiting the availability or affordability of these services in certain neighborhoods usually in older urban areas, except to the extent there is a direct causal relationship to an increased probability of loss." *Id.* This definition is not universally accepted; the National Association of Insurance Commissioners Task Force on Redlining excludes an adverse underwriting decision "when such action [is] based on sound underwriting and actuarial principles reasonably related to actual or anticipated loss experience." *Id.* at 4 n.16. This definition turns solely on economic considerations without taking into account social policy concerns.

3. *Id.* at 34.

4. *See* Foran, *supra* note 1, at 7. Community groups argue that a central city risk which is, in every respect except location, identical to a suburban risk pays a higher premium under the present classification system. This disparity arises because the central city supports other urban risks not present in the suburbs. Badain, *supra* note 2, at 16.

5. *See* Badain, *supra* note 2, at 5 (citing Fed. Ins. Admin. U.S. Dep't Hous. & Urban Dev., *Ins. Crisis in Urban America*, at 5 (1978)).

> Without insurance, banks and other financial institutions will not and cannot make loans. New housing cannot be constructed and existing housing cannot be repaired. New business cannot be opened and existing businesses cannot expand, or even survive.[6]

Of the two possible solutions — federal or state — to the redlining problem, the insurance industry has supported a state legislative remedy.[7] Other parties have maintained that a federal remedy is required to resolve redlining,[8] but the industry has argued that no federal remedy exists nor is one necessary to deter redlining practices.[9] According to the industry, there is little or no evidence that redlining exists.[10] Currently, nationwide statistics do not exist as to the nature and degree of alleged redlining practices;[11] however, redlining cases have been filed and others are currently being prepared.[12]

This note will explore the validity and value of the two solutions. The first issue to be examined is what federal regulatory measures exist to prevent insurance redlining. This discussion will encompass the history of the anti-redlining provision within the 1988 Fair Housing Amendments (FHA) Act, the HUD regulations enacting the 1988 FHA Act, and whether these regulations can withstand judicial review. Secondly, the inadequacies of available state solutions will be illustrated by the Texas Insurance Code and Deceptive Trade Practices Act. Finally, this note will investigate whether the existing state or federal remedy provides the best deterrent to future redlining practices.[13]

II. RANGE OF FEDERAL AUTHORITY

The insurance industry contends that a federal anti-redlining provision

6. *Id.* at 2. Dunn v. Midwestern Indem. Mid-Am. Fire & Casualty Co., 472 F. Supp. 1106, 1111 (S.D. Ohio 1979)(quoting President's National Advisory Panel on Insurance in Riot-Affected Areas, Meeting the Insurance Crisis of Our Cities) [hereinafter *National Advisory*].

7. *See* Badain, *supra* note 2, at 20.

8. *Id.* at 23.

9. In 1968 the Fair Access to Insurance (FAIR) plan was created to provide insurance to individuals who could not obtain insurance through the voluntary market. This program will not be discussed in this note as the authors feel that the program is an inadequate national remedy. Many states, for example, Texas, do not have such a program. Additionally, where a program does exist, the cost of coverage is prohibitive and the scope of coverage is limited. For further discussion *see* Badain, *supra* note 2, at 8-12.

10. Through 1979 the insurance industry found that the Department of Housing and Urban Development (HUD) had not registered a single complaint. *See Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess., 700 (1987) [hereinafter *House Hearings*] (Letter of Peter A. Lefkin, Counsel, American Insurance Association, to Representative Don Edwards).

11. Discussions by authors on October 3, 1989 with the Department of Housing and Urban Development - San Antonio, Texas regional office failed to produce any relevant statistics.

12. *See* Foran, *supra* note 1, at 6-7; Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984); McDiarmid v. Economy Fire & Casualty Co., 604 F. Supp. 105 (S.D. Ohio 1984); Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co., 472 F. Supp. 1106 (S.D. Ohio 1979).

13. Whether federal action in the insurance redlining area is preempted by the McCarran-Ferguson Act exceeds the scope of this article. Courts have found that "unless a federal statute specifically relates to the business of insurance, . . . 'no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulation the business of insurance.' " *Mackey*, 724 F.2d at 421 (citing 15 U.S.C.A. 1012(b)); *McDiarmid*, 604 F. Supp. at 109. For further discussion of this issue, *see* AMERICAN ENTERPRISE INSTITUTE, FEDERAL-STATE REGULATION OF THE PRICING AND MARKETING OF INSURANCE 14-18 (1977), D. CADDY, LEGISLATIVE TRENDS IN INSURANCE REGULATION 25, 37, 40-45 (1986).

does not exist nor is one necessary. However, a federal remedy is available in the 1989 HUD fair housing regulations.[14] The issue is whether this provision can withstand judicial review.

The HUD anti-redlining provision was included in a detailed listing of prohibited acts of housing discrimination. The provision prohibits persons from:

> *Refusing* to provide municipal services or *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.[15]

In order to determine if a regulation can withstand judicial review, it is necessary to analyze the legislative history and judicial interpretations of those regulations. If Congress has clearly spoken on the issue in question, the agency must "give effect to the unambiguously expressed intent of Congress"[16] when it promulgates a related regulation. To determine if Congress has clearly spoken, the courts will look to the statute itself and to the statute's legislative history.[17] If Congress has not spoken on the issue, the courts have in recent years deferred to the greater agency expertise. The courts "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administration of an agency."[18]

A. *Legislative History of the 1988 Fair Housing Amendments Act*

The real question is whether the anti-redlining provision can be attacked on the grounds that HUD exceeded its rulemaking authority. The legislative history of the 1988 Fair Housing Amendments Act does not speak clearly on the issue.

Currently neither Title VIII of the 1968 Civil Rights Act, addressing housing discrimination, nor the Code of Federal Regulations,[19] promulgated in response to the 1968 Act, expressly prohibits insurance redlining. An explicit provision prohibiting redlining was included in the proposed 1987 Fair Housing Amendments (FHA) Act.[20] The final version of that act, the 1988 FHA Act, did not contain the express anti-redlining section.[21] The act's legislative history fails to disclose why the provision was discarded.[22]

B. *Pre-1988 Judicial Interpretations of Title VIII Legislative History*

Previous attempts by the courts to resolve the question of whether Title

14. Regulation 100.70(d)(4), 54 Fed. Reg. 3285 (1989) (emphasis added).
15. *Id.*
16. Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).
17. *Id.* at 845.
18. *Id.* at 844.
19. *See* Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 24 C.F.R. Subtitle B).
20. Later adopted as Fair Housing Amendments (FHA) Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (excluding the provision quoted *infra* note 21, at 805(b)(2)).
21. "It removes reference to hazard, mortgage and title insurance." H.R. Rep. 711, 100th Cong., 2d Sess., at 12 (1988) [hereinafter *H.R. Rep.* 711].
22. Badain's article, *supra* note 2, was included in the Senate Report. *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Session, 876 (1987) [hereinafter *Senate Hearings*]. No public testimony was recorded in either the Senate or House Report. *House Hearings, supra* note 10.

VIII contained an anti-redlining provision were inconsistent and inconclusive. Two 1984 cases illustrate the contradiction.

In *Mackey v. Nationwide Insurance Co.*,[23] a Black insurance agent, Mackey, brought suit against his former employer alleging redlining as a cause of action. Mackey charged that he lost business due to his employer's refusal to underwrite predominately Black neighborhoods.[24] The court refused to find that redlining was within the reach of Title VIII. The court stated:

> The legislative history contains no discussion of a barrier to fair housing created by the insurance industry. . . . If section 804 was designed to reach every discriminatory act that might conceivably affect the availability of housing, section 805's specific prohibition of discrimination in the provision of financing would have been superfluous.[25]

The court relied extensively on the legislative history of the proposed 1980 FHA Act. The proposed 1980 Act included a provision prohibiting redlining. This provision was removed prior to the act's defeat.[26]

The court cited the 1980 Congressional Record to support its holding. During the debate on the final passage, Senators Heflin and Hatch voiced the opinion that insurance redlining did not come within the scope of Title VIII.[27] Senator Hatch spoke out against any attempt by HUD to promulgate regulations banning redlining:

> HUD's proposed regulations may attempt to accomplish by administrative fiat what Congress has rightly declined to do—namely, amend title VIII to cover the so-called business of insurance . . . . Such regulations would be clearly ultra vires. HUD has the authority to enforce title VIII as it stands, not to expand its substantive coverage.[28]

These are the only legislative views reported on the subject of insurance redlining in the floor debate on the proposed 1980 FHA Act.[29] The legislative history of the 1968 Civil Rights Act contained no opinions on this subject. The *Mackey* court inferred from the 1980 discussions that the Congressional intent in 1968 was to exempt insurance redlining from Title VIII.

Contrary to *Mackey*, in *McDiarmid v. Economy Fire and Casualty Co.*,[30] the court held that insurance redlining was prohibited by Title VIII. The plaintiffs alleged they were denied homeowner's insurance based on their race. The defendants sought a dismissal arguing that insurance redlining did not violate Title VIII.[31] The *McDiarmid* court denied the defendants' motion to dismiss[32] and declined to follow the *Mackey* court's reliance on the legislative history of the proposed 1980 FHA Act.[33]

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23. 724 F.2d 419 (4th Cir. 1984).
24. *Id.* at 420.
25. *Id.* at 423.
26. *Id.* at 424.
27. 126 CONG. REC. 32,991-32,992 (1980).
28. *Id.* at 32,992 (statement of Sen. Hatch).
29. *But see* Dunn v. Midwestern Indemnity Mid-American fire & Casualty Co., 472 F. Supp. 1106, 1110 (S.D. Ohio 1979). The court cites a House Report which indicates that the House sponsor introduced the bill to clarify an existing law.
30. 604 F. Supp. 105 (S.D. Ohio 1984).
31. *Id.* at 106.
32. *Id.* at 107.
33. Note that at the time of both the *Mackey* and *McDiarmid* decisions, the HUD regulations, 24 C.F.R. 107, did not explicitly enumerate discriminatory practices. *See McDiarmid*, 604 F. Supp at 107-08.

> This Court is not willing to rely on the subsequent, after the fact, actions of Congress as a means to divine the legislative intent in Title VIII as of the time of its enactment. . . . [T]he Court has no way of knowing why the proposed amendments were rejected. . . . [I]t is equally likely that Congress perceived the amendments to be unnecessary because insurance or insurance redlining was already within the coverage of Title VIII.[34]

The *McDiarmid* court further declared that "the availability of housing is likewise dependent on the availability of insurance. It is elementary that without insurance, mortgage financing will be unavailable. . . ."[35]

C. *Judicial Review of the 1989 HUD Anti-Redlining Provision*

Prior to the 1989 HUD regulations, judicial review had been inconsistent. It therefore fails to provide a clear precedent for future judicial interpretation. Although HUD has the power to prevent housing discrimination, without a clear precedent, the HUD anti-redlining provision may be challenged in the courts as exceeding HUD's rulemaking authority.

Despite the past inconsistent court decisions, the 1989 anti-redlining provision should withstand such a judicial review. The 1989 regulations are not arbitrary and capricious, that is, beyond the scope of the agency's authority or clearly erroneous.[36]

A court may find a regulation to be arbitrary and capricious if the agency relied on factors which Congress did not intend the agency to consider.[37] When it passed the 1988 FHA Act, the 100th Congress did not directly express a view on the redlining issue.[38] However, the 1988 FHA Act clearly empowered HUD to promulgate regulations to prevent housing discrimination.[39] Insurance redlining will result in such discrimination. Without hazard insurance, an individual may not be able to obtain a mortgage. The individual will have a difficult time selling the property in a redlined area because no buyer will be able to obtain hazard insurance.[40] HUD regulations do prevent housing discrimination due to mortgage redlining. Even though mortgage redlining is specifically prohibited in the 1988 FHA Act[41] and insurance redlining is not, the result of the two practices is the same—housing discrimination.[42] Therefore HUD should have the power to prevent housing discrimination whether it results from mortgage or insurance redlining.[43]

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34. *Id.*

35. *Id.* at 107.

36. 5 U.S.C.A. 706(2)(A).

37. Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

38. While the 1980 Congressional Record included a 4-2 vote to omit the provision, this vote only indicated the attitude of the 1980 Congress. 126 CONG. REC. 32992 (1980). These views were not incorporated in Title VIII since the proposed 1980 FHA Act was not adopted. If the views as expressed in 1980 had been in the House Report on the 1988 FHA Act, the record would show that insurance is outside the amended act's scope.

39. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 805, 102 Stat. 1619, 1622 (1988).

40. *See National Advisory, supra* note 6, at 1.

41. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 805(b)(1), 102 Stat. 1619, 1622 (1988).

42. "[D]iscrimination in the provision of those services and facilities which are prerequisites to obtaining dwellings, including . . . hazard insurance . . . render housing unavailable in violation of the Fair Housing Act." Comments, 54 Fed. Reg. 3240 (1989).

43. It should be noted that Congress has not published any rationale for the omission of the anti-

A court could view a HUD action as arbitrary and capricious if the agency action was so implausible that it could not be a product of agency expertise,[44] or if the agency failed to examine an important aspect of the housing discrimination problem.[45] The courts are likely to uphold the anti-redlining regulations as being within HUD's expertise since the courts have deferred to HUD in areas of housing discrimination in the past.[46] As previously stated, the practice of insurance redlining results in housing discrimination. While it can be argued that insurance is outside HUD's expertise, the same claim may be made about real estate advertising. HUD has the authority to prevent discriminatory real estate advertising.[47]

After examining the important aspects of housing discrimination, HUD has determined that insurance redlining is one of them. Arguments can be made that HUD has failed to examine the full ramifications of its regulations since preventing redlining may negatively impact some individuals and companies. Individuals and companies may pay higher insurance premiums as the insurance companies charge higher rates in anticipation of greater losses in the previously redlined areas. However, if there is no anti-redlining provision, the urban blight will grow. As it grows, those same individuals and companies will bear the increased societal costs of spreading poverty and homelessness. HUD may have determined that the cost incurred in higher premiums would be dwarfed by the magnitude of societal costs.

The HUD regulation should withstand judicial scrutiny as it is not arbitrary and capricious. Furthermore, such a regulation is necessary. Some courts have declined to provide a judicial remedy without clear statutory authority, and thereby have allowed redlining to continue unchecked in their districts. The result is a fragmented patchwork of remedies at the state level with a few districts allowing potential federal relief. Since the HUD regulation is valid under the arbitrary and capricious test, a uniform federal remedy is now available to victims of insurance redlining.

III. STATE SOLUTION

The insurance industry has maintained that a sufficient remedy for insurance discrimination is available at the state level. The National Association of Insurance Commissioners (NAIC) developed a Model Unfair Practices Act in 1974. The basic proposition of the model act was to prohibit unfair discrimination by insurers to persons of the same risk or hazard. The model act covers the issuance, renewal, and cancellation of insurance policies and limits the amount of coverage.[48]

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redlining provision from the 1988 FHA Act. The only available legislative history is that of the failed 1980 FHA Act. The courts may view this repeated omission of an insurance section from the 1980 FHA Act and the enacted version of the 1988 FHA Act in a manner similar to the *Mackey* court, inferring a Congressional intent to omit insurance discrimination from the scope of the act. If so, the provision would be stricken.

44. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

45. *Id.* at 43.

46. *See McDiarmid v. Economy Fire and Casualty Co.*, 604 F. Supp. 105 (S.D. Ohio 1984).

47. Lavelle, *Stiffer Housing Law Gets Results*, The Nat'l L.J., Oct. 2, 1989, at 3.

48. The Model Unfair Practices Act prohibits:

d. Making or permitting any unfair discrimination between individuals or risks of the same class and or essentially the same hazards by *refusing to issue*, refusing to renew, cancel-

This provision has been widely adopted. By 1980, nearly forty states had adopted some form of this provision.[49] If enforced properly, the insurance industry believes such provisions will provide adequate protection to redlining victims.

IV. TEXAS INSURANCE CODE AND DECEPTIVE TRADE PRACTICES ACT

A. *What Redlining Practices are Prohibited?*

In Texas, the Insurance Code offers a *possible* remedy for redlining practices, but this remedy is inadequate due to its limited scope and ambiguous terms.

The remedy is found in the definition of an unfair method of competition and unfair or deceptive act in insurance:

> (7)(c) Making or permitting any unfair discrimination between individuals or risks of the same class and essentially the same hazards by refusing to renew, cancelling or limiting the amount of coverage on a policy covered by Subchapter C, Chapter 5 [art. 5.13] of this code because of geographic location of the risk unless:
> (1) the refusal, cancellation or limitation is for a business purpose that is not a mere pretext for unfair discrimination; or
> (2) the refusal, cancellation or limitation is required by law or regulatory mandate.[50]

This provision is identical to the NAIC Model Unfair Practices Act of 1974 in all but one aspect. The Texas statute omits one of the more important provisions - *refusing to issue*.[51] This raises the possibility that not all redlining practices are prohibited in Texas. The issuance of insurance needs to be addressed. On its face, the Texas law would cover only present policyholders. Persons attempting to obtain coverage could still face discrimination. Effectively, this omission means that no house can be sold because the purchaser cannot assume the seller's existing property insurance. Without the issuance of a new policy, no mortgage can be obtained.

Issuance of insurance may be covered by the Texas Deceptive Trade Practices Act (DTPA). A violation of the Texas Insurance Code is a violation of the DTPA.[52] Under the DTPA, a consumer is defined as an individual who is seeking goods or services as well as one who is actually purchasing such goods or services.[53] The DTPA definition expands the class of persons covered under the Texas Insurance Code. The Texas Insurance Code coupled with the DTPA should encompass the issuance of insurance since it is equivalent to seeking a service. Thus all insurance customers suffering dis-

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ling or limiting the amount of insurance coverage on a residential property risk, or the personal property contained therein, because of the age of the property, unless:
(1) The refusal, cancellation, or limitation is for a business purpose which is not a mere pretext for unfair discrimination, or
(2) The refusal, cancellation or limitation is required by law or regulatory mandate.

126 CONG. REC. 32,995 (1980)(statement of the Alliance of American Insurers inserted by Sen. Hatch) (emphasis added).

49. *Id.*
50. TEX. INS. CODE ANN. art. 21.21(4)(Vernon 1987).
51. For full text of the NAIC Model Unfair Practices Act, see *supra* note 48.
52. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4)(Vernon 1987).
53. *Id.* at § 17.45(4).

crimination due to insurance redlining should be able to bring an action under both of these codes.

B. *What is Unfair Discrimination*

Even in those areas where redlining is conclusively prohibited, unfair discrimination is a difficult element to prove. The Texas statute allows some bias in the categorization of risks where such differentiation is for a business purpose: the business purpose should not be a mere pretext for unfair discrimination.[54] This distinction is rather nebulous.

The underlying purpose of insurance is for the consumer to pay the insurer for protection against the risk of property loss. The insurer devises rates which are proportional to the risk that the insurer presumes is involved in the transaction. These rates are not customized for the individual; rather, the insurer develops rate schedules for groups of similarly situated consumers.[55] Insurers have wide latitude in defining these categories.[56] The principal objective of a rating system is to minimize the costs to insurer and consumer. As the number of categories the insurer creates increases, the cost to the consumer also increases.[57] The insurer, therefore, tries to maintain as broad a classification system as possible. Within such a broad system, discrimination may result as different risks are grouped together.

While the Texas Insurance Code bans unfair discrimination based upon essentially the same hazard, there is a great amount of liberty in defining what is a hazard. This liberty is found in the definition of "business purpose."[58] Insurance companies have carte blanche in defining rate classifications. The rates must not be unfairly discriminatory, but the insurer may still categorize on a reasonable basis.[59] Under Texas rules, an insurer would argue that building a classification scheme on geographic location does not overly burden any consumer group.[60] By using geographic location, the insurer has actually minimized the cost to all consumers. At the same time, the insurer must be

54. TEX. INS. CODE, art. 21.21, § 4(7)(c)(1).

55. J. APPLEMAN, 12 INSURANCE LAW & PRACTICE 132, § 7029 (Supp. 1989).

56. KEETON & WIDISS, INSURANCE REGULATION 964-965 (1988).

> [T]he generality of this objective leaves substantial leeway for evaluative determinations regarding the number and nature of categories employed by insurers in a rating system for a given type of insurance. . . . In most situations, it is not desirable to attempt to create a system that seeks to maximize the number of classes for different magnitudes of risk that the obtainable data would support. The cost of gathering the data and administering the resulting rating system (including marketing expenses) would be so great that even the policyholders in the most favored rating classes would almost certainly need to be charged more than they would pay under a system with fewer and less precise classes.

57. *Id.*

58. TEX. INS. CODE. art. 5.14 (Vernon Supp. 1990).

59. *Id.* All rates shall be made in accordance with the following provisions:

> (1) Due consideration shall be given to the past and prospective loss experience within and outside the State, to catastrophe hazards, if any, to expenses of operation, to a reasonable margin for profit and contingencies, and to all other relevant factors, within and outside the state.
>
> (2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. . . .
>
> (3) Rates shall be reasonable, adequate, not unfairly discriminatory, and non-confiscatory as to any class of insurer.

60. *cf.* Prospect Area Hous. Dev. Fund Co. v. Schenck, 71 Misc. 2d 931, 933-34, 337 N.Y.S.2d 662, 665 (N.Y. Sup. Ct. 1972) (upholding fire insurance rate increases in a geographic area proven to be at risk).

able to maintain a sufficient profit margin; otherwise, the insurer will not be able to survive in a competitive market system.

Notwithstanding the insurer's argument, a class of consumers does suffer as a result of these broad classifications. Texas courts should realize that redlining is unfairly discriminatory[61] to the class of consumers in the "wrong" zip code or geographic location. Hypothetically, one consumer may obtain insurance at a reasonable rate whereas another consumer of the same hazard would be denied coverage solely on the basis of the consumer's zip code.[62] Insurance can be provided to these individuals with a minimal increase in the cost to all those insured.

The Texas statute is inadequate. By failing to include the issuance of insurance as a deceptive act, the statute loses much of its effectiveness. The vague rating provision allows insurers to redline. The insurance industry cannot realistically say that all state solutions are adequate.

V. REMEDIES

If one assumes state and federal remedies are available,[63] the state remedy is still inadequate both for the individual plaintiff and society as a whole.

A. *Texas Insurance Code and Deceptive Trade Practices Act*

The consumer may bring suit under either the Texas Insurance Code[64] or Deceptive Trade Practices Act (DTPA).[65] The Texas DTPA provides the consumer more relief than the Texas Insurance Code.[66] Using the DTPA, if the property insurance costs $500 per year, the aggrieved party would receive at most $1500.[67] If the property insurance cost $1100, the aggrieved party would receive $3100 if the act was committed unknowingly, or $3400 if the act was committed knowingly.[68]

The Texas courts are virtually powerless to stop redlining. Although the DTPA combined with the Texas Insurance Code may provide adequate resti-

61. Various courts have denounced other discriminatory "[u]nderwriting practices which improperly exclude a class of prospective insureds . . . ." J. APPLEMAN, *supra* note 55, § 10556.

62. *See* Badain, *supra* note 2, at 14.

63. This section assumes that the HUD regulations withstand judicial review and that the Texas courts construe the Insurance Code to incorporate an anti-redlining provision.

64. TEX. INS. CODE. art. 21.21, § 16.

65. TEX. BUS. & COM. CODE. § 17.50(a)(4).

66. The plaintiff may recover "the amount of actual damages plus court costs and reasonable and necessary attorneys' fees. If the trier of fact finds that the defendant knowingly committed the acts complained of, the court shall award, in addition, two times the amount of actual damages." TEX. INS. CODE art. 21.21, § 16(b)(1).

67. DTPA awards the following:

> the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1000.

TEX. BUS. & COM. CODE § 17.50(b)(1). For $500, this results in an award of $500 (actual) + 2 x $500 = $1500.

68. The damage figures were computed as follows:

Not knowingly: $1100 (actual) + 2 × $1000 = $3100
Knowingly: $1100 (actual) + 2 × $1000 + 3 × ($1100 − $1000) = $3400

"Knowingly" is defined as "actual awareness of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim." TEX. BUS. & COM. CODE § 17.45(9).

tution to the individual, the fine is not large enough to act as a deterrent to future redlining. The insurance company can actually calculate probable damages for the potential plaintiffs, and from that calculation be able to determine when redlining would be a sound business practice.

A court can order any non-monetary relief it deems proper; however, the court does not have the authority to revoke or suspend the license of the insurer.[69] Since the Texas State Insurance Board regulates the licensing and operation of insurance companies, they have the sole authority to revoke or suspend the license of any offending insurer.[70] As long as the insurer has an insurance license and the monetary fine is not prohibitive, redlining will continue.

B. *Existing HUD Regulations*

The original federal enforcement powers of Title VIII suffered from impediments similar to the Texas Insurance Code.[71] The purpose behind the 1988 Fair Housing Amendments Act was to strengthen the enforcement powers of HUD and the Department of Justice in housing discrimination cases.[72] With these strengthened powers, HUD can actually eliminate housing discrimination—the purpose behind the original act.

The strength of the new regulations is twofold: HUD's strengthened prosecuting power and the court's power to access monetary damages. The basic procedure is organized so that HUD must investigate every complaint. Conciliation will be attempted where appropriate. If conciliation is unsuccessful or inappropriate, HUD's General Counsel may prosecute the charge in the administrative court, or the Attorney General may prosecute the charge in a civil court.[73] Private attorney general actions are also available.[74]

If the offending insurer is found guilty of housing discrimination, the monetary damages are substantial.[75] An individual complainant may recover for both actual and emotional damages. Additionally, "to vindicate the public interest," a civil penalty may be assessed against the offending insurer.[76] This penalty may range from $10,000 for the first offense to a $50,000 penalty for

69. "The court may not revoke or suspend a license to do business in this state . . . if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license." *Id.* at § 17.50(b)(4).

70. TEX. INS. CODE, art. 1.10, § 7. In some states, the insurance board may consist of persons who have worked for insurance companies. D. CADDY, *supra* note 13, at 34-35. This may lessen the probability that the insurance board would revoke an insurer's license.

71. "[T]he average compensatory award was $1500 in all 46 reported fair housing cases that went to trial from 1968 to 1980." *See* Lavelle, *supra* note 47, at 3. For additional weaknesses in the original act, *see H.R. Rep.* 711, *supra* note 21, at 16.

72. "Despite the present law, discrimination persists and highly segregated housing patterns still exist across the Nation. It is incumbent upon us, therefore, to strengthen this important weapon in the battle against discriminatory housing. The Fair Housing Amendments Act will provide that strength." *House Hearings, supra* note 10, at 43 (statement of Representative Peter Rodino). "The Fair Housing Amendments Act puts 'teeth' into the fair housing law. It grants the Department authority to take action against those who commit acts made unlawful by the Fair Housing Act." Comments to Enforcement Procedure, 54 Fed. Reg. 3277 (1989).

73. *See* 54 Fed. Reg. 3295-3297, subpart D-F (1989).

74. Regulation 103.45(d), 54 Fed. Reg. 3294(c) (1989).

75. A $1000 punitive cap was removed. Since the 1988 FHA Act was passed, settlements have been reached in several housing discrimination cases, including a record settlement for $325,000, which has opened the door to higher settlements. Lavelle, *supra* note 47, at 3.

76. Regulation 104.910(b)(3), 54 Fed. Reg. 3306 (1989).

the third violation of any housing discrimination law within seven years.[77] The court may also grant injunctive relief to remedy the situation.[78] Since potential loss cannot be easily estimated, insurers cannot predict when redlining will be a sound business practice.

The federal remedy provides greater relief to the complainant and a stronger deterrent to the insurer. Even without the awards granted to the complainant, the civil penalties are over three times the illustrated DTPA awards.[79] This potential for greater monetary damage awards and penalties should discourage future redlining practices.

VI. CONCLUSION

Insurance redlining is an invidious form of discrimination—hard to recognize and even harder to cure. Redlining speeds neighborhood decline due to the lack of money to repair and improve damaged property as well as through the subsequent abandonment of such property.

The federal remedy under today's HUD regulations provides the consumer greater relief and thereby increases the punitive and deterrent effect on insurers. This remedy can withstand judicial review. Although the Texas statutes are ineffective, this ineffectiveness may not be true of all other state statutes. The problems with a state regulatory scheme, however, lessen the possibility of eliminating insurance redlining nationwide. With varying state enforcement, there is little deterrent effect to large, nationwide insurers.

Using either remedy, it may be hard for a single individual to prove that an insurer is redlining. State and federal agencies must begin to gather data in this area. Such data should be available to the general public so that they may become more aware of the problem. Furthermore, it may be necessary for individuals suffering from insurance redlining to utilize class action suits. This method may ease the burden of proof on individual plaintiffs.

The strengthened 1989 HUD regulations will decrease redlining practices. Insurers should deny coverage based on the actual condition of the premises not on an arbitrary categorization. Despite insurance industry statements that redlining is best controlled by state regulation, a federal remedy is available and necessary.

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77. *Id.* The violation may be of the Fair Housing Act or a state or local housing act involving housing discrimination.

78. Regulation 104.910(b)(2), 54 Fed. Reg. 3306 (1989).

79. DTPA relief is $3400 and HUD penalties are $10,000 + actual damages of $1100 + "possible" emotional damages. *See supra* notes 67-68, and accompanying text.