

THE LAW OF MORTGAGE LENDING and INSURANCE DISCRIMINATION

A substantive and procedural manual for attorneys

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TABLE OF CONTENTS

Introduction

Chapter 1: The Law Governing Mortgage Lending Discrimination

Chapter 2: The Law Governing Insurance Discrimination

Chapter 3: Litigation Procedures

INTRODUCTION

This manual is designed to provide basic substantive and procedural information to attorneys litigating mortgage lending or insurance discrimination cases. Chapter 1 discusses the substantive law governing mortgage lending discrimination. Chapter 2 details the law on insurance discrimination. Chapter 3 provides an overview of the procedures involved in litigating one of these cases. This manual is not intended to be a comprehensive treatise on fair housing law generally. For a broader overview of fair housing law and litigation procedure, we suggest John P. Relman, *Housing Discrimination Practice Manual* (5th ed. 1998), and Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (7th ed. 1997). Questions regarding any information contained in this manual should be directed to Nina E. Vinik, Fair Housing Project Director, Chicago Lawyers' Committee for Civil Rights Under Law, Inc., (312) 630-9744.

CHAPTER 1: THE LAW GOVERNING MORTGAGE LENDING DISCRIMINATION

This chapter provides an overview of the substantive law in the area of mortgage lending discrimination. In general, there are three types of discrimination by mortgage lenders: (1) intentional discrimination against an applicant based on her protected status; (2) redlining, or "mortgage credit discrimination based on the characteristics of the neighborhood surrounding" the applicant's property⁽¹⁾; and (3) discrimination in the terms and conditions under which a loan is offered. Part A describes and discusses the principal laws that apply to mortgage lending discrimination. Part B details how these laws have been applied by the courts.

A. Relevant Laws

The Fair Housing Act contains a number of provisions that have been applied to lending discrimination:

Discrimination in the sale or rental of housing and other prohibited practices. . . .[I]t shall be unlawful -

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604.

Discrimination in residential real estate-related transactions.

- (a) In General. It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms and conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.
- (b) Definition. As used in this section, the term "residential real estate-related transaction" means any of the following:
 - (1) The making or purchasing of loans or providing other financial assistance
 - (A) for purchasing, constructing, improving, repairing or maintaining a dwelling; or
 - (B) secured by residential real estate.

42 U.S.C. § 3605.

While section 3605 explicitly proscribes discrimination in mortgage lending, some courts have expressly found that section 3604 also applies to financing. *See, e.g., Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1337 (N.D. Ind. 1987); *Evans v. First Savings Bank of Indiana*, 669 F. Supp. 915, 923-5 (N.D. Ind. 1987). It is important to note that section 3604 would appear to apply only to financing for new purchases (that "make unavailable" a dwelling), while section 3605 would also apply to financing on previously-acquired homes (for "improving, repairing, or maintaining" a home).

Courts also have required defendants to have directly participated in the alleged discriminatory housing practice to be held liable under the Fair Housing Act. *Jones v. Office of the Comptroller*, 983 F. Supp. 197 (D.D.C. 1997). In *Jones*, the court held that the impact of alleged discriminatory lending practices by banks that the Office of the Comptroller of the Currency (OCC) supervises cannot be attributed to the OCC itself. As the court emphasized, "defendant has provided neither housing nor housing-related services to consumers, or to plaintiff in particular; it therefore could not have denied housing or made it unavailable to anyone." *Id.* at 202.

The Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691, also prohibits discrimination in mortgage lending:

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

15 U.S.C. § 1691(a). Though an attorney may bring a case under both the Fair Housing Act and ECOA, she should be aware that the two laws include different bases for discrimination. Unlike the Fair Housing Act, ECOA does not cover familial status or handicap as bases for a claim. However, ECOA does cover four bases which the Fair Housing Act does not: marital status, age, public assistance-based income, and retaliation for seeking relief under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a).

Quite often in cases where plaintiffs bring Fair Housing Act or ECOA claims, they also refer to 42 U.S.C. §§ 1981 and/or 1982. Section 1981 protects the rights of all citizens to make or enforce contracts. 42 U.S.C. § 1981. Section 1982 gives every citizen the right to buy or sell property. 42 U.S.C. § 1982. However, these statutes require that the plaintiffs show that the defendants intentionally discriminated against them whereas the Fair Housing Act and ECOA allow for claims based on intentional discrimination **or** disparate impact, *infra*. 42 U.S.C. § 1981a; *Latimore v. Citibank, F.S.B.*, 979 F. Supp. 662, 664 (N.D. Ill. 1997), *aff'd*, 151 F.3d 712 (7th Cir. 1998). For cases allowing § 1981 and § 1982 claims when Fair Housing Act or ECOA claims already have succeeded, *see Steptoe v. Savings of America*, 800 F. Supp. 1542, 1547 (N.D. Ohio 1992); and *Phillips v. Hunter Trails Community Association*, 685 F.2d 184, 190 (7th Cir. 1982).

B. Cases

Credit must be given to the United States Department of Justice for bringing the majority of cases challenging discriminatory lending practices. These cases have resulted in a number of sizable settlements.⁽²⁾ For a variety of reasons, far fewer cases have been brought by private litigants, although such litigation is growing.

1. Individual Applicant Discrimination

a. Disparate Treatment Claims

Absent direct evidence of intentional discrimination, in cases alleging a discriminatory denial of a mortgage loan based on the race (or other protected class) of the plaintiff, plaintiffs must prove the following in order to state a prima facie case of discrimination:

- 1) they are members of a protected class;
- 2) they applied and were qualified for a loan;
- 3) they were rejected for the loan; and
- 4) defendants continued to approve loans for other applicants with similar qualifications.

Noland v. Commerce Mortgage Corp., 122 F.3d 551, 553 (8th Cir. 1997); *Milton v. Bancplus Mortgage Corp.*, 1996 WL 197532 (N.D. Ill. 1996); *Watson v. Pathway Financial*, 702 F. Supp. 186, 188 (N.D. Ill. 1988); *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1338 (N.D. Ind. 1987). It has been particularly difficult for plaintiffs to establish the fourth prong of the formula: that the lender continued to approve loans for other similarly qualified applicants. *See, e.g., Latimore v. Citibank, F.S.B.*, 151 F.3d 712, 715-16 (7th Cir. 1998); *Hickson v. Home Federal of Atlanta*, 805 F. Supp. 1567, 1572 (N.D. Ga. 1992), *aff'd without opinion*, 14 F.3d 59 (11th Cir. 1994); *Davidson v. Citicorp/Citibank*, 1990 WL 96991 (S.D.N.Y. 1990); *Thomas* at 1338. However, in *Watson* plaintiffs were successful where they demonstrated that the defendant approved six loans for white applicants with similar qualifications to the plaintiffs, whereas the plaintiffs were denied. 702 F. Supp. at 188-89.

From there, the burden shifts to the defendant, which loses if it cannot offer a legitimate non-discriminatory reason for its adverse decision. Plaintiffs must then prove this reason is merely a pretext for discrimination. If they cannot prove this, then the defendant prevails.

This formula for the prima facie case is derived from the employment discrimination context,⁽³⁾ and had for several years been accepted as the standard for a prima facie case of discrimination based on denial of a loan due to the protected status of the applicant. In a recent Seventh Circuit decision, however, this formula was called into question. In *Latimore v. Citibank, F.S.B.*, 151 F.3d 712 (7th Cir. 1998), the plaintiff challenged the

bank's denial of her application to refinance her mortgage loan. The defendant claimed that it denied her loan because the appraised value did not satisfy the bank's loan-to-value standards. The plaintiff submitted to the bank an alternate appraisal that had been done less than a year earlier that reflected an appraised value well within the bank's guidelines. When the lender again denied the plaintiff's loan, the plaintiff sued under both the Fair Housing Act and ECOA, claiming that the denial was based on the plaintiff's race. The court examined the *McDonnell Douglas* formulation of the prima facie case, and considered whether it made sense to apply it to the plaintiff's claims.

The court concluded that a rote transfer of the *McDonnell Douglas* test to the lending discrimination context was unjustified, because it lacked "any comparison between the treatment of blacks and the treatment of whites." *Id.* at 715. Thus, according to the court, the burden-shifting analysis derived from *McDonnell Douglas* was not appropriate. *Id.* The court gave the following example in which such analysis would be justified based on a comparison between similarly-situated black and white applicants:

Suppose, for example, that Latimore and Eromital (who is white), apply at roughly the same time for roughly the same-sized loan from the same Citibank office. The two prospective borrowers are equally creditworthy and the collateral they offer to put up is appraised at the same amount. Both applications are forwarded to Ms. Lundberg and she turns down Latimore's application and approves Eromital's. The similarity in the situations of the white and the black would be sufficient to impose on Citibank a duty of explaining why the white was treated better. No effort at making such a comparison was attempted here.

Id. at 715. In Latimore's case, the plaintiff did argue that Citibank exhibited favoritism toward white applicants who were similarly situated, but the court rejected this claim, finding that the evidence showed that in fact Latimore received the same treatment as similarly-situated white applicants whose property had the same appraised value. *Id.* at 715-16.

The impact of the *Latimore* decision remains to be seen.⁽⁴⁾ While the court explicitly rejects use of the *McDonnell Douglas* formulation, it does not offer an alternative for lending discrimination cases. Moreover, its example, quoted above, does not appear to be inconsistent with the *McDonnell Douglas* test. Attorneys should be mindful that a comparison between the plaintiff and similarly-situated white applicants is critical.

b. Disparate Impact

The disparate impact test is used to challenge a lender's generally applicable policy that has a disproportionate impact upon racial minorities or other protected persons. "The relevant question . . . is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater discriminatory impact on members of a protected class." *Simms v. Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir.), *cert. denied*, 117 S. Ct. 610 (1996); *Saldana v. Citibank, Federal Savings Bank*, 1996 WL 332451 (N.D. Ill. 1996). The plaintiff can demonstrate a prima facie case of disparate impact by showing

with statistical evidence that the challenged policy has a significantly greater adverse effect on protected persons. *Simms*, 83 F.3d at 1555; *Saldana*, 1996 WL 332451 (N.D. Ill. 1996).

Often plaintiffs will argue that a lender's decision is both intentional discrimination and the product of a policy with a disparate impact on minorities. As in the disparate treatment scenario, the courts require that a plaintiff must specify which practice is having an racial impact in order to make this claim. When a plaintiff believing a lending agency did not want to finance a minority-run co-op brought a suit, the court rejected his claim because he did not point to which act of the agency was having a negative impact. *Simms v. First Gibraltar Bank*, 83 F.3d at 1555.

Once the plaintiff has established a prima facie case of disparate impact, the burden shifts to the defendant to demonstrate a business necessity for the practice. *See, e.g., Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

Some courts have listed four criteria for evaluating a claim based on a policy's disparate impact:

- 1) strength of the plaintiffs' statistical showing;
- 2) defendants' legitimate interest in the action;
- 3) some indication of discriminatory intent; and
- 4) possible relief obtained if another practice would be used.

Thomas at 1340; *Phillips* at 190. There is no precise mathematical formula for determining how disparate a policy must be for the plaintiff to prevail.

The disparate impact claim has garnered mixed results for plaintiffs in housing discrimination cases. On the one hand, the plaintiffs in *Betsey v. Turtle Creek Associates* were able to argue that an adults-only rule would have a harsher effect upon racial minorities than whites. *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988 (4th Cir. 1983). On the other hand, a court rejected the Home Mortgage Disclosure Act statistics which one plaintiff offered as evidence. *Thomas* at 1338. Courts have also rejected statistics if they felt a better number or pool was available. *Cherry v. Amoco Oil Company*, 490 F. Supp. 1026, 1031 (N. Dist. Ga., 1980) (stating a comparison between income-qualified white and black applicants would have been better than the offered comparison of race by zip code); *Cartwright v. American Savings & Loan Association*, 880 F.2d 912, 921-2 (7th Cir., 1989) (stating the better pool would have been based on applicants rather than acceptees). In *Williams v. 5300 Columbia Pike Corporation*, 103 F.3d 122 (unpublished disposition), 1996 WL 690064 (4th Cir. 1996), plaintiffs alleged that the defendant's condo conversion plan disproportionately injured African-Americans and disabled persons. The court held that while the neutral criterion of price may

disparately impact African-Americans and the handicapped, this type of injury extends beyond the scope of the Fair Housing Act as a matter of law.

2. Redlining

The procedures in bringing a redlining case are similar to other lending discrimination cases. The basis for a redlining claim is the racial composition of the plaintiff's neighborhood, rather than the individual race of the applicant. Thus, whites living in predominantly minority or racially changing neighborhoods may bring claims based on redlining. *See, e.g., Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 927-28 (8th Cir. 1993); *Cartwright v. American Savings & Loan Ass'n*, 880 F.2d 912, 922-24 (7th Cir. 1989); *Doane v. National Westminster Bank USA*, 938 F. Supp. 149, 151-52 (E.D.N.Y. 1996); *Old West End Ass'n v. Buckeye Federal S & L*, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987). In practice, many lending discrimination claims are brought under both individual applicant discrimination and redlining theories.

For a prima facie case of mortgage redlining, the plaintiff is required to prove as follows:

- 1) the house sought to be secured was in a minority or integrated neighborhood;
- 2) an application was submitted and an acceptable appraisal supported the sales price;
- 3) the loan was rejected, and
- 4) the applicants were qualified for the loan.

Old West End Ass'n v. Buckeye Federal S & L, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987); *See also Saldana v. Citibank, Federal Savings Bank*, 1996 WL 332451 (N.D. Ill. 1996). Again, the racial composition of the neighborhood must be a factor in the negative decision.

If the plaintiff proves these elements, the burden shifts to the defendant to demonstrate a legitimate business justification for the denial. *Old West End Ass'n*, 675 F. Supp. at 1103. If the defendant does so, the plaintiff must prove that the defendant's reason was a pretext for discrimination. *Id.* Typically, the plaintiff will offer statistical evidence of the defendant's lending patterns in minority and white neighborhoods. *See, e.g., Cartwright*, 880 F.2d at 922; *Old West End Ass'n*, 675 F. Supp. at 1105-06; *Thomas*, 653 F. Supp. at 1340-41. In the past, courts have been deferential to lenders' asserted business justification for denying the loan, even when that justification turns on the characteristics of the neighborhood. *See, e.g., Cartwright*, 880 F.2d at 923; *Thomas*, 653 F. Supp. at 1340-41.

3. Other Discriminatory Conduct/Terms and Conditions

Attorneys should bear in mind that an applicant need not be denied a loan in order to have standing to complain of discrimination by the lender. HUD's regulations include as actionable conduct

[f]ailing or refusing to provide . . . information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, because of race [or other prohibited ground].

24 C.F.R. § 100.120(b).

Another type of claim that need not rise to the level of an outright denial of a loan is discrimination in the terms and conditions imposed by the lender on the basis of the applicant's protected class. For example, if a lender charges a higher interest rate or fees to a minority applicant for a similar loan than they charge to a similarly-qualified white applicant, the lender may be guilty of unlawful discrimination. *See* 24 C.F.R. § 100.130(b)(2). In addition, HUD regulations list the following examples of discriminatory terms and conditions in the lending context:

- (1) Using different policies, practices, or procedures in evaluating or in determining creditworthiness of any person in connection with the provision of any loan or other financial assistance covered by § 3605 because of race [or other prohibited ground];
- (2) Determining the type of loan or other financial assistance to be provided with respect to a dwelling, or fixing the amount, interest rate, duration, or other terms for a loan or other financial assistance covered by § 3605 because of race [or other prohibited ground].

Likewise, if a lender pursues foreclosure more aggressively against a minority borrower than a similarly-situated white borrower, the borrower may be a victim of discrimination. *See, e.g., Hickson*, 805 F. Supp. 1567.

CHAPTER 2: THE LAW GOVERNING INSURANCE DISCRIMINATION

This chapter discusses the Fair Housing Act and its applicability to homeowners' insurance. In general, insurance discrimination may take one or both of two forms: First, insurers may discriminate based on the protected status (e.g. race) of the victim. Second, insurance companies might engage in unlawful redlining. Insurance redlining occurs when insurance companies restrict availability of insurance to people in particular geographic areas, particularly those areas with large or growing minority populations.⁽⁵⁾ The applicable sections of the Fair Housing Act under which a plaintiff may file a claim due to insurance discrimination are highlighted and discussed below. This is followed by a discussion of the courts' interpretation of those statutory provisions. Attorneys should be aware that there are relatively few judicial opinions involving alleged insurance discrimination.

A. Background and Statutory Language

The following sections of the Fair Housing Act are pertinent to homeowners insurance discrimination:

*** 42 U.S.C. § 3604(a):**

It shall be unlawful to refuse to sell or rent after the making of a bona fide offer or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

*** 42 U.S.C. § 3604(b):**

It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Attorneys should also be aware of the following provision of the Code of Federal Regulations:

*** 24 C.F.R. § 100.70(d)(4):**

Prohibited activities relating to dwellings . . . include, but are not limited to: . . . (4) Refusing to provide . . . hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin.

B. Fair Housing Act Applied to Insurance Discrimination

This section examines the cases analyzing each applicable component of the Fair Housing Act to insurance discrimination. The reasoning and rationale of the various courts are discussed.

1. 42 U.S.C. § 3604

Several courts generally have interpreted Title VIII as having a "broad scope and broad objectives." *See, e.g. John McDiarmid v. Economy Fire & Casualty Company*, 604 F. Supp. 105, 107 (Dist. Ct. Ohio 1984). Nonetheless, in most every case alleging insurance discrimination, defendants have challenged the applicability of the Fair Housing Act to homeowners insurance. As explained below, with one notable exception,⁽⁶⁾ these arguments have not succeeded. Most courts to consider this question have held that despite the fact that insurance is not specifically mentioned in the Fair Housing Act, it is included in the broad scope of the Act and the "legislative design of the Act which seeks to eliminate discrimination within the housing field". *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Company*, 472 F. Supp. at 1109.

There have been three principal arguments advanced by insurance companies challenging the Fair Housing Act's applicability to homeowners insurance. These arguments tend to be raised in case after case, and despite their lack of success, lawyers should be prepared to counter them.

First, it has been suggested that failed attempts to amend the Fair Housing Act specifically to prohibit insurance redlining imply that insurance discrimination is not encompassed within the Fair Housing Act. *See, e.g., Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351, 1358 (6th Cir. 1995); *NAACP v. American Family*, 978 F.2d at 299; *Mackey v. Nationwide Insurance Co.*, 724 F.2d at 424; *McDiarmid*, 604 F. Supp. at 107-08; *Dunn*, 472 F. Supp. at 1110.

The courts have rejected the argument that the "failed" amendment attempts indicate legislative intent not to prohibit insurance discrimination under the Fair Housing Act. The courts have stated that the amendments were attempts of clarification, not attempts to create a new prohibition. *American Family*, 978 F.2d at 299; *Nationwide*, 52 F.3d at 1358; *Dunn*, 472 F. Supp. at 1110; *McDiarmid*, 604 F. Supp. at 107-08. Further, determining legislative intent after the fact is speculative. Congress could have rejected the amendments for any number of reasons. *McDiarmid*, 604 F. Supp. at 108, *Nationwide*, 52 F.3d at 1359.

Second, insurers have also argued that since Congress enacted the Urban Property Protection and Reinsurance Act of 1968 ("UPPRA") in the same year it enacted the Fair Housing Act, the UPPRA was apparently created to remedy the lack of hazard insurance in some urban areas. Therefore, Congress would not have intended for insurance redlining to be separately covered by the Fair Housing Act. *Nationwide*, 52 F.3d at 1358.

In *Nationwide Mutual Insurance Co. v. Cisneros*, the court rejected this argument and stated that the purpose of the UPPRA was to protect private insurance companies from "the risk of catastrophic losses which resulted from riots or civil disorders." *Id.* at 1538.

Thus, the objectives of the UPPRA and the Fair Housing Act are different. The UPPRA does not "expressly address the issue of discriminatory insurance redlining based on race." *Id.* Moreover, the UPPRA does not shed any light on the congressional intent underlying the Fair Housing Act. *Id.* See also *Dunn*, 472 F. Supp. at 1111.

Third, insurers have argued that the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), preempts federal laws relating to insurance.⁽⁷⁾ They claim that general federal laws, such as the Fair Housing Act, that do not specifically relate to the business of insurance fall under the McCarran-Ferguson Act, and cannot be construed to invalidate, impair or supersede any state law regulating insurance. Insurers argue that state insurance laws in the state where the suit is brought would be invalidated, impaired or superseded by applying the Fair Housing Act to insurance.⁽⁸⁾ This argument has been rejected by every court to consider it. See, e.g., *Nationwide*, 52 F.3d at 1363; *Mackey*, 724 F.2d at 421.

As indicated above, the Fourth Circuit is the lone court to accept the argument that the Fair Housing Act does not cover discrimination by property insurers. In *Mackey v. Nationwide Insurance Co.*, 724 F.2d 419 (4th Cir. 1983), the court based its conclusion on four factors: (1) the Act and its legislative history lack any reference to insurance; (2) because section 805 of the Fair Housing Act explicitly applies to discrimination in financing of housing, section 804 should not be read to apply to every conceivable aspect of housing absent specificity; (3) Congress did not intend to interfere with the insurance industry's classification of risk; and (4) failure to amend to include insurance suggests it is not included. 724 F.2d at 423-24. Since the Fourth Circuit's decision in *Mackey*, no other court has followed this reasoning, and *Mackey* is generally regarded as an anomaly.⁽⁹⁾

The Seventh Circuit expressly rejected the *Mackey* court's reasoning in *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 503 U.S. 907 (1993), outlining five reasons for its disagreement with the Fourth Circuit: (1) section 804 was written in general terms and was not limited to any particular industry or category of persons; (2) there was no reason sections 804 and 805 could not overlap; (3) financial institutions also classify risk, and Congress clearly included them in the Act's coverage; (4) Congress' failure to enact amendments was irrelevant; and (5) HUD's regulation explicitly stating that property insurance was covered by the Act was entitled to deference.⁽¹⁰⁾

978 F.2d at 298-300. Three years later the Sixth Circuit agreed with the Seventh Circuit, and held that section 804 of the Fair Housing Act clearly applies to homeowners insurance. *Nationwide Mutual Insurance Co. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996).

Aside from expressly declining to follow *Mackey*, the Seventh Circuit went on affirmatively to find that discrimination in the provision of insurance "otherwise makes unavailable" housing in violation of section 804. "Lenders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable." 978 F.2d at 297. *See also Nationwide*, 52 F.3d at 1360. The *American Family* court stated definitively that "Section 3604 applies to discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant." 978 F.2d at 301.

Two years later, in *United Farm Bureau Mutual Insurance Co., Inc. v. Metropolitan Human Relations Commission*, 24 F.3d 1008 (7th Cir. 1994), the Seventh Circuit considered a case brought by a white plaintiff challenging the insurer's refusal to renew his policy, allegedly because he lived in a racially mixed neighborhood. The *United Farm Bureau* decision, in which the court allowed the case to go forward, is significant for two reasons: (1) The court makes a definitive statement that the race of the person complaining of impermissible redlining is irrelevant. In other words, a white plaintiff can challenge unlawful redlining based on the racial composition of his neighborhood. 24 F.3d at 1015. (2) The court assumes, without expressly deciding, that a failure to renew a policy is actionable. *Id.* at 1014 n.8. Recently, in *Lindsey v. Allstate Insurance Company*, 34 F. Supp.2d 636 (W.D. Tenn. 1999), the court expressly held that discrimination in the renewal of an insurance policy is actionable under the Fair Housing Act.

A few courts have distinguished between section 804(a) and section 804(b) in their analysis of whether the Fair Housing Act applies to insurance discrimination. In *Canady v. Allstate Insurance Co.*, 1996 Fair Housing-Fair Lending Rptr. ¶16,120 (W.D. Mo. 1996), the court held that only section 804(b) applies to insurance.[\(11\)](#)

C. Proving Insurance Discrimination

In general, cases brought under the Fair Housing Act may be proved using either of two theories: (1) that the defendant intentionally discriminated against the plaintiff on the basis of race or other protected status; or (2) that the defendant applied a policy having a disparate impact on a protected class of persons, i.e., racial minorities. In the case of discrimination by property insurers, the question of whether the disparate impact approach applies is unsettled.

In *American Family*, the Seventh Circuit included a lengthy discussion of the nature of the insurance industry -- in short, it is the business of differentiating among risks. 978 F.2d at 290. However, "[r]isk discrimination is not race discrimination." The court posed, but did not answer, the following question:

No insurer openly used race as a ground of ratemaking, but is a higher rate per \$1,000 of coverage for fire insurance in an inner city neighborhood attributable to risks of arson or to racial animus?

Id. at 291.

The distinction between these two theories is critical. In a case of alleged intentional discrimination, or disparate treatment based on race, the burden of proof falls on the plaintiff. *Id.* By contrast, once a plaintiff has alleged a policy by the defendant with a disparate impact on minorities, the burden of proof shifts to the defendant to demonstrate a legitimate business justification for that policy. *See generally, American Family* at 291; *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988 (4th Cir. 1984).

Nonetheless, the Seventh Circuit did clearly hold that refusing to insure a home, or setting a price for insurance, on the basis of race, are actionable under the Fair Housing Act. *Id.* at 301. And, after *United Farm Bureau*, failure to renew on the basis of race is also actionable. 24 F.3d at 1016. *See also Lindsey v. Allstate Insurance Co.*, 34 F. Supp.2d 636 (W.D. Tenn. 1999).

D. Recent Results of Insurance Discrimination Complaints.

Since the Seventh Circuit's decision in *American Family* in 1993, a number of insurance companies (starting with American Family) have agreed to drastic changes in their underwriting and sales practices to resolve pending charges of discrimination.

The settlement of the American Family case, entered into in 1995, was ground-breaking. The company agreed to dispense with many of the practices that were at the heart of the plaintiffs' case. For example, American Family agreed to issue a non-discrimination statement, do away with practices that disqualified homes based on their age or value, and provide a new policy type that would make replacement cost coverage more widely available. The company also agreed to pay over \$16 million as part of the settlement.

Then, beginning in 1996, State Farm, Allstate and Nationwide separately agreed to sweeping reforms to settle administrative complaints against them. These agreements also included doing away with maximum age and minimum value guidelines that were alleged to discriminate against inner city properties.[\(12\)](#)

To be sure, these agreements have changed the insurance industry for the better, at least for people living in minority communities. Nonetheless, many other companies continue to do business without these reforms, and all companies engage in risk-based pricing that may also include some degree of race-based pricing. This is the future of insurance litigation.

Finally, it is worth noting a recent jury verdict in the only case alleging insurance redlining to date to go to trial. In a suit filed by Housing Opportunities Made Equal, Inc. against Nationwide Mutual Insurance Co., a Richmond, Virginia state court jury awarded the plaintiff \$500,000 in compensatory damages and \$100 million in punitive damages in the fall of 1998.

CHAPTER 3: LITIGATION PROCEDURES

OVERVIEW

A victim of mortgage lending discrimination or insurance redlining has a number of enforcement options available at the federal, state, and local levels. This manual will focus on the options at the federal level, while touching briefly on state and local alternatives. At the federal level, a plaintiff can turn to the Department of Housing and Urban Development (H.U.D.), seek enforcement through the Department of Justice (D.O.J.), and/or initiate a private civil action in federal court. State and local human rights agencies may also have authority to consider lending or insurance discrimination complaints. The victim, therefore, may require guidance when deciding how and where to seek relief. The decision will affect, among other things, the nature of the relief available, the type of proceeding, and the statute of limitations.

Attorneys should keep the following in mind when advising clients about their available options:

- What are the distinguishing procedural elements of the different enforcement options?
- What are the advantages and disadvantages to filing a complaint in each forum?

Since enforcement options for mortgage lending and insurance discrimination cases are nearly identical to those available for traditional housing discrimination violations, an attorney should consult practice manuals on housing discrimination claims for greater detail. 13

THE FEDERAL LEVEL - AVAILABLE OPTIONS

I. Fair Housing Act - Title VIII with 1988 Amendments

The three enforcement options of Title VIII are separate and independent of each other. A defendant who has violated the Act by mortgage credit discrimination or insurance redlining may be subject to a complaint to H.U.D., a direct court action, and/or enforcement by the D.O.J., separately or concurrently.

A. Complaints to the Department of Housing and Urban Development (H.U.D.), §§ 3610-12

1. Administrative Process

a. Initial Procedures

(1) Time Period/Standing/Proper Parties: A complaint may be filed by an "aggrieved person" with H.U.D. up to 1 year after the discriminatory housing practice has occurred or terminated. 24 C.F.R. § 103.15.

An "aggrieved person" is defined as any individual who "claims to have been injured by a discriminatory housing practice," or "believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i); 24 C.F.R. § 103.9. Suit cannot be brought under the Act unless some action has been taken that implicates one of the protected "classes" enumerated in the Act: race, color, religion, sex, national origin, disabled persons and families with children under the age of 18. As for disabled persons, the definition covers persons with communicable diseases (including people infected with HIV or AIDS), 24 C.F.R. § 100.201, as well as recovering alcoholics and substance abusers. "Families with children" extends to pregnant women and persons in the process of acquiring legal custody of children under the age of eighteen. *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991). If the aggrieved person falls within any one of these protected classes, and the action complained of concerns their membership in that protected class, that person will be able to assert a claim under the Act.

A complaint may be filed against any person who has engaged or is about to engage in a discriminatory housing practice, or any person who directs or controls the conduct of a person who has committed or is about to commit a discriminatory housing practice. 24 C.F.R. § 103.20(a)-(b).

(2) Filing Procedures: The aggrieved person can write to, fax, or call H.U.D.'s main office in Washington, DC, or H.U.D.'s regional office for the state where the complaint arose.

The Region V office, which includes Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin is located at:

Ralph H. Metcalfe Federal Building
77 West Jackson Boulevard, Room 2101
Chicago, IL 60604-3507
312-353-7776 (voice)
800-765-9372 (tollfree)
312-353-7143 (TDD)

The main office is located at:

451 7th Street, S.W., Room 5204
Washington, DC 20410-2000
202-708-0836 (voice)
800-669-9777 (tollfree)
800-927-9275 (TDD)

Although H.U.D. has developed a form to use when filing housing discrimination complaints, H.U.D. will accept any written statement that contains the allegations of a discriminatory housing practice, provided that the following information is included in the complaint:

- 1) Complainant's name and address;
- 2) Respondent's name and address;
- 3) A description and address of the dwelling which is at issue; and
- 4) A concise statement of the violation, including the relevant facts and dates.

24 C.F.R. § 103.30(b).

The complaint should be signed and affirmed by the aggrieved person, or by the Assistant Secretary if H.U.D. files the complaint. 24 C.F.R. § 103.30(a). Complaints can be "reasonably and fairly" amended at any time to cure technical inadequacies, such as the failure to sign or the failure to clarify the allegations.

Once H.U.D. has received the complaint, H.U.D. must notify the complainant about all procedural requirements and deadlines, as well as the right to pursue a civil action under section 3616 of the Act. Moreover, H.U.D. must advise the complainant that retaliation against any person for filing a complaint or assisting in the filing of complaint is a discriminatory housing practice.

Within 10 days after receiving the complaint, H.U.D. must serve the respondent with a copy of the complaint, and permit that person to file an answer within 10 days after having received notice. 24 C.F.R. § 103.50. The answer must be signed and affirmed by the respondent. 42 U.S.C. § 3610(a)(B) (iii); 24 C.F.R. § 103.55(a).

A person not originally named as a respondent, but who is later identified in the course of investigation as a person engaging in, or about to engage in a discriminatory practice, may be joined as an additional or substitute respondent. Notice will be served upon that party within 10 days of the identification. 24 C.F.R. § 103.50(a).

(3) Referrals to "Substantially Equivalent" State and Local Agencies: If the complaint alleges a discriminatory housing practice in a state where H.U.D. has certified a "substantially equivalent" state or local agency, H.U.D. will automatically refer the complaint to this agency, which will process the complaint unless the agency has obtained a moratorium from H.U.D. *See* 42 U.S.C. § 3610(f); 24 C.F.R. § 103.100-110. (At this time, the Illinois Department of Human Rights is not certified as a substantially equivalent agency.) H.U.D. is required to then: (1) notify the complainant and the respondent of the referral, (2) advise the parties of the complainant's right to pursue a civil action, not later than two years from the occurrence of the discriminatory act. Computation of the two-year period excludes any time during which a proceeding is pending before a substantially equivalent agency.

H.U.D. may reactivate a complaint referred to a substantially equivalent agency if: (1) the state or local agency does not commence proceedings within 30 days of receiving the referral; (2) the agency fails to proceed with "reasonable promptness"; (3) the agency no longer qualifies for certification as a substantially equivalent agency; or (4) the agency consents to or requests reactivation. 24 C.F.R. §103.110. H.U.D. will notify the agency and the parties of the reactivation.

Complaints not referred to "substantially equivalent" state or local agencies must be investigated by H.U.D. within 100 days to determine whether "reasonable cause" exists to believe a discriminatory housing practice has occurred.

b. Investigation and Issuance of Charge

H.U.D. must complete its investigation within 100 days after the complaint is filed, "unless it is impracticable to do so." 42 U.S.C. § 3610(a)(1)(B)(iv). If H.U.D. is unable to complete the investigation in a timely manner, the parties will be notified of the delay and the reasons for delay. 24 C.F.R. § 103.225.

H.U.D. may conduct discovery using the same methods and to the extent permitted in an administrative proceeding before an administrative law judge. H.U.D. has the power to issue subpoenas in support of the investigation, or at the request of the respondent. 24 C.F.R. § 103.215(b).

At the conclusion of the investigation, H.U.D. will prepare a final investigative report (F.I.R.) containing: (1) the names and dates of contacts with witnesses; (2) a summary of correspondence; (3) a summary description of pertinent records; (4) a summary of witness statements; and (5) answers to interrogatories. 24 C.F.R. § 103.230.

H.U.D. will also notify the parties when the F.I.R. is complete and it will be provided upon request. Non-parties can request a copy by filing a Freedom of Information Act (F.O.I.A.) request with H.U.D., as well.

The F.I.R. is then submitted to H.U.D.'s General Counsel, for a determination as to whether there is "reasonable cause" to believe that a discriminatory practice has occurred or is about to occur. 42 U.S.C. § 3610(g)(2). This determination must be made within 100 days of the filing of the complaint. 24 C.F.R. § 103.400(c)(1).

If H.U.D. determines that no reasonable cause exists, the complaint will be dismissed. 24 C.F.R. § 103.400(a)(1). H.U.D. will issue a short statement of the facts, and notify parties of the dismissal. 24 C.F.R. § 103.400(a)(1).

If H.U.D. determines that reasonable cause exists, it must issue a charge on behalf of the aggrieved person. The charge consists of a concise statement of facts discovered during the investigation that support the determination. 24 C.F.R. § 103.405(a). H.U.D. must then notify the parties, and serve the charge upon each. 24 C.F.R. § 103.405(b).

c. Conciliation

During the investigatory period, H.U.D. is obligated to attempt to conciliate the case by negotiating with the aggrieved party and the respondent. H.U.D. will not attempt to conciliate if: (1) the respondent fails to confer with H.U.D.; (2) either party fails to make a good faith effort to resolve the conflict; or (3) H.U.D. determines that a voluntary agreement is unlikely.

If conciliation is successful, both parties will execute a conciliation agreement describing the resolution of the complaint or providing for binding arbitration. The Secretary of H.U.D. must approve the agreement. 24 C.F.R. § 103.310.

During the conciliation process, injunctive or other equitable relief, monetary damage awards, and attorney's fees are available. 24 C.F.R. § 103.315-320. The regulations do not "preclude the possibility of seeking punitive or exemplary damages in an appropriate situation." *See* 24 C.F.R., subtitle B, ch.1, subch. A., app. I, 103.315 (1992).

Once conciliation has been approved, neither H.U.D. nor the parties may pursue further litigation.

d. Election of Administrative Proceeding

If a charge is issued, either party has within 20 days to decide if they would like the case to be prosecuted by the D.O.J. H.U.D. must then authorize the Attorney General to commence a civil action on behalf of the aggrieved person in a U.S. district court. 24 C.F.R. § 103.410. This court action must be filed not later than 30 days after the election is made.

If neither party elects to have the claims adjudicated in federal court, H.U.D.'s General Counsel will prosecute the charge on behalf of the aggrieved person before an administrative law judge (A.L.J.).

e. Adjudication before the A.L.J.

The administrative hearing must be held within 120 days after the charge is filed. 42 U.S.C. § 3612(g)(1). Parties may conduct discovery in a manner comparable to that permitted under the Federal Rules of Civil Procedure. *See generally*, 42 U.S.C. §3612(d).

The hearing itself must follow the procedures set forth in the Administrative Procedure Act. Each party may be present at the hearing, offer evidence in accordance with the Federal Rules of Evidence, cross-examine witnesses, and issue subpoenas. 42 U.S.C. § 3612(c).

The Complainant can be represented by both H.U.D. and his/her own individual counsel if he/she chooses to do so. It is important to note that H.U.D., and not the aggrieved individual, will be designated the complainant. The aggrieved party can become a

complainant by intervening in the suit, otherwise his/her role will be that of a complaining witness.

The A.L.J. has 60 days to issue a decision and findings of fact. If the A.L.J. determines that a discriminatory practice has been committed, relief including compensatory damages, injunctive or equitable relief, and civil penalties may be ordered to "vindicate the public interest." 42 U.S.C. § 3612(g)(3). The maximum penalties are \$10,000 for a first offense, and \$50,000 for more than two offenses within 7 years.

A 30 day review period follows the issuance of the decision in which the Secretary has the right to review the ruling and remand the case back to the A.L.J. for further proceedings. If no action is taken, the decision will become final.

f. Judicial Review and Enforcement

A party adversely affected by a final decision may file a petition for review within 30 days in the U.S. Court of Appeals for the judicial circuit in which the discriminatory practice occurred. 42 U.S.C. § 3612(i). H.U.D.'s General Counsel may petition the U.S. Court of Appeals to enforce the final decision. 42 U.S.C. § 3612(j). If no petition for review is filed within 60 days after the final decision is entered and H.U.D. has not sought enforcement of the order, any person entitled to relief under the final decision may petition for a decree to enforce the order in an appropriate U.S. Court of Appeals. 42 U.S.C. § 3612(m).

2. The Advantages and Disadvantages of HUD Enforcement

a. Advantages:

(1) Free legal representation.

(2) Speed of proceedings. Regulations governing the process require that the entire proceeding, in theory, should take place within approximately 280 days (depending upon the length of the hearing itself). However, in practice, this process may take far longer to complete.

(3) H.U.D.'s services as mediator in conciliation attempts. Conciliation is a good option for the victim; consent can be withheld until the respondent makes an acceptable offer. The processing of the complaint will continue until or unless the complainant accepts an offer.

(4) Available relief. The availability of attorneys' fees, damages and up to \$50,000 in civil penalties means that a complainant's chances of winning large compensatory damages are not put into danger by filing with H.U.D.

(5) Flexibility of proceedings. Rules of procedure and evidence are not as strictly enforced in an administrative hearing as they are in federal court.

(6) Specialized judges. A.L.J.s are more experienced than federal judges in fair housing cases.

(7) Availability of emergency relief is maintained.

b. Disadvantages:

(1) Punitive damages unavailable.

(2) Jury unavailable.

(3) Statute of limitations. It is one year shorter than the statute of limitations available for private suits filed in federal court, which must be filed within 2 years of accrual.

(4) Potential Conflict of Interests. Should the A.L.J. not rule in favor of the victim, or not grant all the relief sought, the General Counsel is not required to seek reconsideration from the Secretary on behalf of the complainant, or pursue an appeal regardless of the complainant's wishes.

(5) Collateral estoppel. Precedent drawn from employment discrimination cases suggests that once findings of fact and conclusions of law have been issued in a H.U.D. proceeding, plaintiff may be collaterally estopped from proceeding on the same claims and facts in federal court. *See, e.g., Elliot v. University of Tennessee*, 478 U.S. 788 (1986) (collateral estoppel barred §1981 claim in federal court where state agency made findings of fact after parties had adequate opportunity to litigate).

B. Private Suit Filed in Federal Court

1. Procedure

a. Time Period/Standing/Proper Parties: An "aggrieved person" may commence a civil action under 42 U.S.C. § 3613. A complaint must be filed within 2 years of the alleged discriminatory housing practice, or the breach of a conciliation agreement, whichever occurs last. 42 U.S.C. § 3613(a)(1)(A). (See the discussion of standing and "aggrieved" persons under the section on H.U.D.).

b. Relief: If either a court or jury finds that a discriminatory practice has occurred, it may award compensatory and punitive damages. No statutory limit exists on the punitive damages. The court may award temporary or permanent injunctive relief pursuant to Fed. R. Civ. P. 65. It may also award attorneys' fees. 42 U.S.C. § 3613(c). Either party may request a jury trial under the Act.

2. The Advantages and Disadvantages of Private Enforcement

a. Advantages:

(1) Preserves options. Filing a private suit early on preserves the plaintiff's options. A plaintiff can observe a H.U.D. or state agency investigation, and be comfortable in knowing that the opportunity to seek damages and injunctive relief from a jury has not been foreclosed. Also, filing a private suit does not foreclose the possibility of D.O.J. enforcement. Once the H.U.D. investigation has been completed and the charge has been filed, the plaintiff can stay or dismiss the private suit and request the D.O.J. to file suit. Or, the plaintiff may request that the D.O.J. intervene in a pending private suit at any point in the proceedings. 42 U.S.C. § 3613(e).

(2) Punitive damages available.

(3) Jury trial available.

(4) Statute of Limitations. The two-year statute gives an attorney more time to investigate the case carefully before deciding how or whether to proceed.

b. Disadvantages:

(1) Financial cost. Private litigation can be very costly, and many discrimination victims cannot afford to pay these expenses.

(2) Time consuming process.

(3) Less flexible proceedings.

(4) Less specialized judges.

C. Enforcement by the D.O.J.⁽¹³⁾

1. D.O.J. Enforcement Process

a. Procedure: When H.U.D. files a charge against a respondent, the parties have 20 days to elect to have their claims heard in federal district court or in an administrative hearing before H.U.D. If either party elects the option to proceed in federal district court, the H.U.D. Secretary must authorize the Attorney General to commence a civil action on behalf of the aggrieved person within 30 days from the time the election is made. 24 C.F.R. § 103.410(d). Any aggrieved person may intervene as a matter of right in the action. 42 U.S.C. § 3612(o)(2).

If the complaint is referred to a substantially equivalent agency, the D.O.J. option is not available.

b. Relief: If the court finds that the defendant violated the F.H.A., it may grant any relief available under a private enforcement action. One difference between the D.O.J. option and a private action is that the aggrieved party need not be the plaintiff. If the aggrieved

party does not intervene, then the plaintiff is the United States, and the aggrieved person is the chief complaining witness.

In cases where action must be taken immediately to avoid potential irreparable harm to the victim, the D.O.J. may seek prompt judicial action, at the request of H.U.D. 42 U.S.C. § 3610(e); 24 C.F.R. § 103.500.

2. The Advantages and Disadvantages of Enforcement through the D.O.J.

a. Advantages:

(1) Unlimited investigative and financial resources.

(2) Jury trial available.

(3) Punitive damages available.

b. Disadvantages:

(1) Time consuming process.

(2) Less flexible proceedings.

(3) Less specialized judges.

(4) Conflict of Interests. Like H.U.D., the D.O.J. does not view its relationship with the complainant as that of attorney-client. To preserve rights of appeal, the complainant may wish to retain private counsel and intervene as a party.

II. Civil Rights Act of 1886 - 42 U.S.C. § 1981 and 42 U.S.C. § 1982

A. Time Period/Standing/Proper Parties: A person who believes he or she was subjected to redlining and other forms of financial discrimination may also file a private civil action under Sections 1981 and 1982.

Under these statutes, there is no provision for a uniform statute of limitations. The Supreme Court has held that the limitations period for Section 1981 and 1982 actions is the limitations period used for personal injury actions in the state where the cause of action arises. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

Standing is generally broader under Title VIII than under these sections. Section 1982 only protects citizens. In addition, both Sections 1981 and 1982 apply only to conduct undertaken because of considerations of race. Neither applies to persons who have been discriminated against because of their sex, religion, national origin, familial status, or handicapped status.

B. Relief: Unlimited compensatory damages and punitive damages, as well as temporary and preliminary injunctive relief, are available. Attorney's fees and costs are also available under 42 U.S.C. § 1988. A jury trial may also be requested.

STATE LAW - ILLINOIS PROCEDURES

Illinois Human Rights Act (H.R.A.) -- 775 I.L.C.S. 5/3-101 et seq.

The Illinois Human Rights Act prohibits discrimination in real estate transactions. The definition of "real estate transaction" includes: "the making or purchasing of loans or providing other financial assistance: (1) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (2) secured by residential real estate." 775 I.L.C.S. 5/3-101.

It is a civil rights violation for any person to do any of the following on the basis of unlawful discrimination: 1) refuse to engage in a transaction or discriminate in making available the transaction, 2) differ in the terms and conditions or in the furnishing of facilities or services, 3) refuse to receive or transmit a bona fide offer, and 4) refuse to negotiate. 775 I.L.C.S. 5/3-102.

A victim of a violation of the H.R.A. faces a choice of forums. He or she may file a charge with the Illinois Department of Human Rights (I.D.H.R.) within one year of the violation and/or file a private action. If I.D.H.R. determines that there is substantial evidence of a violation, the Illinois Human Rights Commission will handle the complaint. Further information concerning complaint procedures with the I.D.H.R. are available from the Chicago Lawyers' Committee for Civil Rights Under Law, or by contacting the Department directly at:

State of Illinois Center
100 W. Randolph Street, Suite 10-100
Chicago, IL 60601
312-814-6200 (voice)
312-263-1579 (TDD)

Stratton Building
Room 623
Springfield, IL 62706
217-785-5100 (voice)
217-785-5125 (TDD)

THE LOCAL DIMENSION - COOK COUNTY AND CHICAGO

Both Cook County and the City of Chicago prohibit discrimination by mortgage lenders and insurance companies. Complaints should be directed to the Cook County Commission on Human Rights or the Chicago Commission on Human Relations, respectively.

I. Cook County Human Rights Ordinance

Article VI of the Ordinance provides that:

No person shall make any distinction, discrimination, or restriction in the price, terms, conditions, or privileges of any real estate transaction, including the decision to engage in or renew any real estate transaction, on the basis of unlawful discrimination.

The definition of "real estate transaction" includes:

the making, purchasing, or guaranteeing of loans, or mortgages or providing any other financial assistance either (a) for purchasing, constructing, improving, repairing, or maintaining a dwelling or (b) secured by residential real property.

Complaints may be filed within 180 days of the alleged violation with the Cook County Commission on Human Rights. Detailed information on Commission rules are available from the Chicago Lawyers' Committee for Civil Rights Under Law, or by contacting the Commission directly:

118 N. Clark Street, Room 624
Chicago, IL 60602
312-603-1100 (voice)
312-603-1101 (TDD)

II. Chicago Fair Housing Ordinance, Muni. Code 5-8-010:

The Chicago Fair Housing Ordinance (F.H.O.), enacted May 6, 1990, provides that:

"It shall be an unfair housing practice . . . D. To discriminate or to participate in discrimination in connection with borrowing or lending money, guaranteeing loans, accepting mortgages or otherwise obtaining or making available funds for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any residential housing unit or housing accommodation in the city of Chicago because of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status." F.H.O. 5-8-030.

Complaints under the Chicago Fair Housing Ordinance should be filed within 180 days of the violation with the Chicago Commission on Human Relations. Procedural information is available from the Chicago Lawyers' Committee for Civil Rights Under Law, or by contacting the Commission directly:

500 N. Peshtigo Ct.
6th Floor
Chicago, IL 60611
312-744-2852 (voice)
312-744-1088 (TDD)
312-744-1081 (fax)

1. *Cartwright v. American Savings & Loan*, 880 F.2d 912, 913 n.1 (7th Cir. 1989) (quoting *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1337 (N.D. Ind. 1987)).

2. See, e.g., *United States v. Albank*, Prentice-Hall Fair Housing-Fair Lending Rptr. ¶19,401 (N.D.N.Y. 1997); *United States v. First National Bank of Dona Ana County*, Prentice-Hall Fair Housing-Fair Lending Rptr. ¶19,395 (D.N.M. 1997); *United States v. Fleet Mortgage Corp.*, Prentice-Hall Fair Housing-Fair Lending Rptr. ¶19,391 (E.D.N.Y. 1996); *United States v. The Northern Trust Co.*, Prentice-Hall Fair Housing-Fair Lending Rptr. ¶19,388 (N.D. Ill. 1995); *United States v. Decatur Federal Savings & Loan Ass'n*, Prentice-Hall Fair Housing-Fair Lending Rptr. ¶19,377 (N.D. Ga. 1992).

3. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

4. In *Matthiesen v. Banc One Mortgage Corporation*, 1999 WL 123009 (10th Cir. 1999), the court noted the *Latimore* decision, but still used a hybrid of the *McDonnell Douglas* analysis. The court held to establish a prima facie case plaintiff was required to show: 1) she is a member of a protected class; 2) she applied for a loan; 3) she was qualified for the loan; and 4) despite being qualified her loan application was denied.

5. *Dunn v. Midwestern Indemnity Mid-American Fire and Casualty Company*, 472 F. Supp. 1106, 1107 (D. Ohio 1979). See also *National Association for the Advancement of Colored People v. American Family Mutual Insurance Company*, 978 F.2d 287, 290 (7th Cir. 1992); *Lindsey v. Allstate Insurance Company*, 34 F. Supp.2d 636 (W.D. Tenn. 1999); *Riley v. Transamerica Insurance Group Premier Insurance Co.*, 923 F. Supp. 882, 889 (D. La. 1996).

6. *Mackey v. Nationwide Insurance Companies*, 724 F.2d 419 (4th Cir. 1984).

7. 7 The McCarran-Ferguson Act states in relevant part:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance

. . . unless such Act specifically relates to the business of insurance[.]

15 U.S.C. § 1012(b).

8. 8 In *American Family*, the court agreed that the McCarran-Ferguson Act did apply to the Fair Housing Act claim, but found that Wisconsin state law was not invalidated, impaired or superseded by application of the Fair Housing Act. The court stated that only in a case where a state law "requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law" would the McCarran-Ferguson Act preempt a Fair Housing Act claim. 978 F.2d at 297.

9. 9 See, e.g., Robert Schwemm, *Housing Discrimination* § 13.4(4) at 13-46.

10. 10 In 1988, Congress amended the Fair Housing Act authorizing HUD "to make rules

. . . to carry out this subchapter." Pursuant to this authority, HUD promulgated a regulation defining "other prohibited sale and rental conduct" to include "refusing to provide . . . property or hazard insurance for dwellings. . . differently because of race, color, religion, sex, handicap, familial status or natural origin." 24 C.F.R. §100.70(d)(4).

11. 11 Another provision of the Fair Housing Act that arguably applies to homeowners insurance is 42 U.S.C. § 3605, which provides:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

While many plaintiffs have asserted claims for insurance discrimination under section 3605, which clearly applies to financing transactions, the Seventh Circuit has held that section 3605 **does not** apply to homeowners insurance. *American Family*, 978 F.2d at 297. See also *Dunn*, 472 F. Supp. at 1110.

12. 12 Copies of the *American Family* consent decree and the State Farm, Allstate and Nationwide settlements are available from the Chicago Lawyers' Committee for Civil Rights Under Law, Inc.

13. 13 The D.O.J. is authorized to initiate its own enforcement actions under § 3614 in pattern or practice cases or cases of general public importance. This chapter will not address these actions.