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Homeowner Insurance in Omaha and the Fair Housing Act: Seeds of Redlining: A Legal Analysis

Center for Public Affairs Research (CPAR)
University of Nebraska at Omaha

STATE OF NEBRASKA

EQUAL OPPORTUNITY COMMISSION

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HOMEOWNER INSURANCE IN OMAHA AND THE FAIR HOUSING ACT: SEEDS OF "REDLINING" ?

A LEGAL ANALYSIS

A Report to the Nebraska Equal Opportunity Commission Based on Data and Information Provided by the:

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I. INTRODUCTION

The function of this study is to render a legal determination as to whether or not the data developed by the University of Nebraska's Center for Urban Affairs is sufficient to state a claim under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 et seq., commonly known as the Fair Housing Act.[1]

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[1]The desire of the State of Nebraska'a Equal Opportunity Commission is, according to the contract it has entered into, "to determine whether or not and/or to what extent Redlining is being practiced." This judgment is to be based in part upon the responsibility of the contractor "[t]o analyze and submit a written report" essentially based upon the data provided to the contractor by the Center for Applied Urban Research (CAUR) of the University of Nebraska. While the essential analysis is provided in the context of Title VIII, it warrants mention that the Nebraska's fair housing act has been considered substantially equivalent by the United States Court of Appeals for the Eighth Circuit. Warren v. Norman Realty Company, 513 F. 2d 730 (8th Cir. 1975). Nebraska Revised Statutes §§20-105-20-125 provide in relevant part:

> Sec. 20-105. Civil rights; policy of state. It is the policy of the State of Nebraska that there shall be no discrimination in the acquisition, ownership, possession, or enjoyment of housing throughout the State of Nebraska in accordance with Article I, section 25, of the Constitution of the State of Nebraska.
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> * * * *
>
> Sec. 20-107. Unlawful acts enumerated. Except as exempted by section 20-110, it shall be unlawful to:
>
> (1) Refuse to sell or rent after the making of a bono fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, or to refuse to show, or to refuse to receive and transmit an offer for, a dwelling to any person because

(footnote continued)

Specifically, based upon information provided to the Commission by the Center for Applied Urban Research, a research institute of the University of Nebraska (CAUR), the commission seeks to determine if the existing data is sufficient

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of race, color, religion, or national origin;

(2) Discriminate against any person in the terms, conditions or priveleges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin;

(3) Make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination;

(4) Represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available;

(5) Cause to be made any written or oral inquiry or record concerning the race, color, religion, or national origin of a person seeking to purchase, rent, or lease any housing;

(6) Include in any transfer, sale, rental, or lease of housing any restrictive covenants, or to honor or exercise or attempt to honor or exercise any restrictive covenant pertaining to housing;

(7) Discharge or demote an employee or agent or discriminate in the compensation of such employee or agent because of such employee's or agent's obedience to

(footnote continued)

to establish a violation of the provisions of the Fair Housing Act which outlaw racially discriminatory lending or insurance practices generally falling under the umbrella of "redlining."[2]

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the provisions of section 20-105 to 20-125, 48-1102, and 48-1116;

(8) Induce or attempt to induce, for profit, any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

Sec. 20-108. Denial of loan because of race, color, religion, or national origin; unlawful. It shall be unlawful to any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against the applicant in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of race, color, religion, national origin or sex or such person or of any person associated with the applicant in connection with such loan or other financial assistance or of the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given; provided, that nothing

(footnote continued)

In November, 1982, CAUR submitted to the commission a paper suggesting procedures which could be employed to investigate mortgage lending and residential insurance practices in Omaha in determining whether or not and/or to what extent redlining is being practiced. A primary thrust (outside the scope

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> contained in this section shall impair the scope or effectiveness of the exceptions contained in section 20-110.

[2]CAUR and others have generally investigated the following types of subtle discrimination generally relied upon in support of the proposition that redlining is being practiced.

> (1) Required down payments of a higher amount than are usually required for financing comparable properties in other areas.
>
> (2) Fixing loan interest rates in amounts higher than those set for all or most other mortgages in other areas.
>
> (3) Fixing loan closing costs in amounts higher than those set for all or most other mortgages in other areas.
>
> (4) Fixing loan maturities below the number of years to mature set for all or most other mortgages in other areas.
>
> (5) Refusing to lend on properties above a prescribed maximum number of years of age.
>
> (6) Refusing to make loans in dollar amounts below a certain minimum figure, thus excluding many of the lower-priced properties often found in neighborhoods where redlining is practiced.
>
> (7) Refusing to lend on the basis of presumed "economic obsolescence" no matter what the condition of an olde property may be.
>
> (8) Stalling on appraisals to discourage

(footnote continued)

of the analysis provided herein) was an analysis of home mortgage date derived from Home Mortgage Disclosure Act (HMDA)[3] data, as well as Community Reinvestment Act (CRA) data. While such a thrust was clearly merited, such data by and large would not test mortgage lending nor insurance practices. Yet, such data from a statistical analysis of overall practices would be important (see Section II(c) of this report dealing with the role of statistics in determining violations of Title VIII).

With regard to insurance practices, the 1982 CAUR proposal contemplated resolving the question of whether or not barriers exist to the availability of property insurance in different Omaha community areas. Conceding that the development of relevant data would be "difficult," CAUR identified various methods employed in redlining.[4]

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potential borrowers.

This analysis, of course, simply focuses not on the studies themselves, but rather the legal sufficiency of evidence gathered at the present time.

[3]CAUR has compiled an excellent synopsis which identifies much of the important writings on this topic. Ruff, "A Review of Literature Related to Uses of Home Mortgage Disclosure Act data, Residential Disinvestment, and Homeowner Insurance Cost and Access" (Sept. 30, 1983).

[4]Among the redlining techniques identified by others were:

> (1) Placing agents selectively in order to reduce the opportunity to secure business in certaina areas;
>
> (2) Terminating 'unprofitable' agents and nonrenewing terminated agents' books of business;
>
> (3) Requiring insurance to replacement cost value and refusing to insure dwellings with a substantial disparity

(footnote continued)

The project sought to create three reports, the first analyzing data sources and the second to be a gathering of information based upon insurance industry interviews. The third report, key to this analysis, would be to provide an analysis of the differences between paired areas of the community. Factors such as percentages of people insured, differences in amount of

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between replacement cost and market value. . .;

(4) Refusing, limiting, or varying insurance availability solely because of age of structure;

(5) Refusing, limiting, or varying insurance availability due to subjective evaluation by agents or by inspectors that certain areas are 'deteriorating' or 'changing';

(6) Refusing, limiting, or varying insurance availability due to subjective perceptions of 'adverse factors' such as the race or sex of an applicant or the racial composition of the geographic area in which the risk is located;

(7) Requiring inspections in certain locations within a state but not within other locations;

(8) Applying territorial classifications in certain locations of a state but not in others;

(9) Pricing insurance at such high levels that, for all practical purposes, it is unavailable;

(10) Informally instructing or formally requiring agents to avoid certain areas;

(11) Varying underwriting practices solely by ZIP code;

(12) Refusing to accept an application because it was previously rejected by another company or because the risk was previously insured under a FAIR plan.

type of coverge as well as premium amounts and customer treatments were to be considered. The third report, particularly in the context of the first two reports, represented an extraordinarily ambitious proposed undertaking.[5]

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[5]The organization of the CAUR effort was broken down in its proposal by "phases" as follows:

> Analyze existing insurance data and other relevant data.
>
> (A) Review state insurance department records and procedures e.g., rate increase applications.
>
> (B) Analyze state level records to determine differences between insurance zones (the zones are very large--about four for the entire state--but the data might suggest differences and the need for smaller zones).
>
> (C) Gather records from "cooperative" insurance agents and/or companies.
>
> (D) Plot location of insurance offices and agents.
>
> (E) Analyze police and fire data to determine patterns of losses.
>
> Select and intereview 50 insurance agents, underwriters, and executives.
>
> (A) Review underwriting standards.
>
> (B) Evaluate marketing efforts and programs.
>
> (C) Solicit views on insurance problems in minority areas.
>
> (D) Solicit views on policy options to reduce risk.
>
> Interview community leaders and lenders.
>
> Select 100 test and 100 control

(footnote continued)

The primary resultant documents utilized in the legal analysis were a 72-page document entitled "Homeowner Insurance Availability and Cost in Omaha, Nebraska" prepared by Peggy Coffin with Jack Ruff on September 30, 1983[6] and a 64-page[7] report entitled "An Analysis of Mortgage Lending Patterns in Omaha."

In order to provide context, however, independent investigation was undertaken by the contractor, including interviews to individuals concerned with housing discrimination. Moreover, the contractor requested and obtained additional data, primarily prepared by CAUR, including information relative to Omaha residential sales patterns, the growth of housing prices in Omaha, and Omaha area demographic change between 1970 to 1980.

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parcels.

(A) Send letters to households

(B) Conduct initial screening interview.

(C) Conduct interviews.

Use of testers.
Write report on the nature and uses of existing data.
Write a report on insurance industry views.
Write a report measuring the differences between target and control households.

[6]On January 9, 1984, the contractor received an additional report, "A Comparison of Real Estate Transfers in Three Omaha Areas" prepared by Jack Ruff. Although the samples are small, the results, if not legally significant in terms of Title VIII, are interesting, but had no effect on the conclusions drawn.

[7]Excluding the appendix.

II. REDLINING: DEFINITIONS IN LEGAL CONTEXT UNDER TITLE VIII

The word "redlining" does not appear in the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, et seq. However, through some limited interpretations of Title VIII, we recognize that racially discriminatory lending or insurance practices are covered. This, of course, must be distinguished to a certain degree from geographic disparities, which may or may not be racial, and which may often be considered based on HMDA and CRA data. That type of redlining is not the focus of this legal analysis. We simply limit our analysis to the data provided within the context of Title VIII.

Of course, it can be effectively argued that redlining systematically discriminates against the urban core and its residents because older structures and "undesirable" neighborhoods are disproportionately located there. The refusal to write policies may constitute de facto discrimination against blacks who represent more than twenty-two percent of the urban population nationwide and a much larger percentage in several major cities. Furthermore, HUD has concluded that industry practices have:

> an undeniable [intra-city] racial component. Redlined areas often coincide with nonwhite neighborhoods ... [Redlining] extends far beyond blighted urban areas into many otherwise healthy neighborhoods . . . . The tentacles of these crises [i.e., availability and affordability] reach into diverse areas of mortgage financing and property appraisals thereby denying credit and sealing the doom of today's vital urban neighborhoods.

Disinvestment and building abandonment in redlined areas are accelerated by skyrocketing maintenance and operating costs. Families with the means to do so flee redlined areas, leaving behind the higher insurance costs and the stigma of the residual market. Hard-pressed owners who have foregone property insurance coverage lack the financial capacity to rebuild after a fire. White flight, which accompanies disinvestment, almost invariably leads to accelerated racial and economic segregation.

Moreover, underwriting preconceptions are reinforced by an underwriter's or agent's contact with his or her counterparts throughout the industry. The firm functions in an industry that rewards conservatism. The consumer is not always fre to avoid the discriminating supplier; insurance is necessary for mortgage credit.

When Congress enacted the Fair Housing Act, it was well-aware of the problems of urban deterioration and unrest that had been caused in part by redlining practices, and of the impact of these practices in limiting housing opportunities for the poor and urban minorities. Congress enacted a broad prohibition in section 804(b) of the Act, making it unlawful to "refuse to sell or rent after the making of bona fide offer, or refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race or color.

The courts have given great sweep to these provisions. In Trafficante v. Metropolitan Life Insurance Co., the Supreme Court stated that the Act is an attempt to replace the ghettos with "truly integrated and balanced living patters." The

statute was intended to protect all persons, white as well as black, from the "loss of important benefits of racial association." In Jones v. Alfred H. Mayer Co., the Court described the Fair Housing Act as a "detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."

Courts have held that the Act regulates not only the direct sale and rental of housing, but also a wide variety of other practices which collectively "make unavailable or deny" housing opportunities and thus frustrate the goal of racially integrated neighborhoods.[8] These activities include racial steering,[9] blockbusting,[10] and discriminatory appraisal

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[8] In Trafficante, the Supreme Court asserted that he Fair Housing Act is to be accorded a "generous" construction so that it could accomplish the "enormous" task that Congress contemplated for it. 409 U.S. at 211, 212. See also Park View Heights Corp. v. City of Black Jack, 605 F. 2d 1033, 1036 (8th Cir. 1979). In Otero v. New York City Hous. Auth., 484 F. 2d 1122, 1134 (2d Cir. 1974), the Second Circuit stressed the importance of the Act's goals and held that they supersede the otherwise racially neutral tenant assignment practices of the City Housing Authority. In Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 111 n. 24 (1979), the Supreme Court also explicitly noted the relationship between housing integration and the achievement of school integration.

[9] United States v. Mitchell, 580 F. 2d 789, 791 (5th Cir. 1978); Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486, 488-89 (E.D.N.Y. 1977); United States v. Real Estate One, Inc., 433 F. Supp. 1140, 1144, 1152 (E.D. Mich. 1977); Fair Hous. Council v. Eastern Bergen County Multiple Listing Serv., Inc., 422 F. Supp. 1071, 1075-76 (D.N.J. 1976); Zuch v. Hussey, 394 F. Supp. 1028, 1047-49 (E.D. Mich. 1975), aff'd 547 F. 2d 1168 (6th Cir. 1977).

[10] United States v. Bob Lawrence Realty, Inc., 474 F. 2d 115, 119-22 (5th Cir.), cert. denied, 414 U.S. 826 (1973); Zuch v. Hussey, 394 F. Supp. 1028, 1940-50 (E.D. Mich. 1975), aff'd 547 F. 2d 1168 (6th Cir. 1977).

practices.[11]

In 1976, two district courts held that the Fair Housing Act prohibits the refusal to lend, or the imposition of less favorable mortgage loan terms or conditions, because of a neighborhood's racial composition.[12] In Laufman v. Oakley Building & Loan Co., the court examined at length the factors that prompted the Act's passage: the violent 1967 riots and the report of the National Advisory Commission on Civil Disorders.[13] The Commission's report detailed the roles of white flight and institutional disinvestment in the creation of ghettoes of despair and the incitement of disorder.[14] "The practical effect [of redlining] is to discourage whites--who may freely move elsewhere--from moving into vacancies in 'changing neighborhoods,' thereby inducing "massive transition' and ultimately 'white flight'.[15] Further, "the cost of housing being what is is today, a denial of financial assistance in connection with the sale of a house would effectively 'make unavailable or deny a dwelling.' When such denial occurs as a result of racial considerations, [section 804(b) of the Act, 42 U.SC.§ §3604 is transgressed."[16]

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[11] United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1978-79 (N.D. Ill. 1977).

[12] Harrison v. Heinzeroth, 414 F. Supp. 66 (N.D. Ohio 1976); Laufman v. Oakley, 408 F. Supp 489 (S.D. Ohio 1976).

[13] 408 F. Supp. at 496-97.

[14] NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, 244, 245 (1968) quoted in 408 F. Supp. at 496.

[15] 408 F. Supp. at 497.

[16] Id. at 493. In Laufman, the court also found that plaintiffs stated a cause of action under 42 U.S.C. §3605 (1976) (footnote continued)

The court examined both the legislative history and the plain meaning of the statute and found Title VIII violations.

It was only a short leap from the premise that denial of financial assistance is a violation of the Act ot the assertion that making property insurance unavailable or unaffordable on the basis of race or national origin is a violation. In Dunn v. Midwestern Indemnity Co.,[17] plaintiffs were black homeowners, residing in a predominantly black neighborhood, whose coverage was not renewed when their agent's business portfolio was terminated. Plaintiffs alleged that their loss of homeowners' insurance was directly related to the location of their residence in a predominantly black neighborhood, the fact that they were black, and to the racial composition of their agent's portfolio of homeowners' insurance. The court observed that the language "otherwise make unavailable or deny" has been construed to be "as broad as Congress could have made it".[18] Noting the connection drawn in Laufman between financing and the availability of suitable housing, the district court continued:

> the availability of appropriate insurance is a necessary predicate to the availability of financing, and financial assistance is a precondition to securing availability of adequate

(discrimination in the financing of housing) and §3617 (unlawful interference with the exercise of rights under §§3603-3606). The Harrison opinion was not explicit as to precise protection being infringed.

[17] 472 F. Supp. 1106 (S.D. Ohio 1979).

[18] 472 F. Supp. 1108, citing United States v. Youritan Constr. Co., 370 F. Supp. 643, 648 (N.D. Cal. 1973), aff'd as modified, 509 F. 2d 623 (9th Cir. 1975) and Zuch v. Hussey, 366 F. Supp. 553, 557 (E.D. Mich. 1973).

> housing. [Thus,] a discriminatory denial of insurance would prevent a person economically able to do so from buying a house. Consequently, although insurance redlining is not expressly proscribed by the Act, it is encompassed by both the broad language of §3604(a) and the legislative design of the Act which seeks to eliminate discrimination within the housing field.

The Court also relied heavily on HUD's interpretation of insurance redlining as a Title VIII violation.

Since at least a few federal courts have held that certain kinds of either insurance or lending practices may be unlawful under Title VIII, it is important before we review the Omaha data to understand the governing fair housing legal principles as they would apply to the data. Once the impact of these principles is understood (i.e., the use of testers, how "much" need race be a factor, statistics, etc.), we can more thoughtfully draw our conclusions concerning the legal sufficiency of the data in a Title VIII context.

A. Tester Evidence Is A Valid Measuring Tool Of Home Insurance

Any evidence of disparate treatment is probative and the courts unanimously accept tester testimony.[19] We may

[19] Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979), aff'g in part, 569 F.2d 1013 (7th Cir. 1978); Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081 (7th Cor. 1982); Price v. Pelka, 690 F.2d 98 (6th Cir. 1982); Kinney v. Rothchild, 678 F.2d 658 (6th Cir. 1982) (per curiam); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548 (9th Cir. 1980); McDonald v. Verble, 622 F.2d (footnote continued)

therefore legally conclude that the experiences of the so-called "researchers" in posing as homeseekers during the inquiring of available insurance policies would be a valid and proper element of evidence in the context of Title VIII. It is clear that the researchers, actually testers in a fair housing context, need not

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1227 (6th Cir. 1980); Grant v. Smith, 574 F.2d 252 (5th Cir. 1978); Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978); Meyers v. Pennypack Woods Home Ownership Assn, 559 F.2d 894, 897-98 (3rd Cir. 1977); Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977); Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977); United States v. Warwick Mobile Home Estates, Inc., 537 F.2d 1148 (4th Cir. 1976); Smith v. Anchor Bldg Corp., 536 F.2d 231, 234 n 2 (8th Cir. 1976); Marr v. Rife, 503 F.2d 735 (6th Cir. 1974); Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1973); Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973); Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973); Education-Instruccion, Inc. v. Copley Mgmt & Dev. Corp., Equal Opportunity Hous (P-H) ¶15,453 (D Mass. Oct. 14, 1982); Darden v. Nebilak, Equal Opportunity Hous (P-H) ¶18,037 (S.D.N.Y. Nov. 18, 1982); Sherman Park Community Ass'n v. Wauwatosa Realty Co., 486 F. Supp. 838 (E.D. Wis. 1980); United States v. Welles-Bowen Co., Equal Opportunity Hous (P-H) ¶15,314 (N.D. Ohio Oct. 19, 1979), aff'd mem, 673 F.2d 1331 (6th Cir. 1981), opinion published, Equal Opportunity Hous (P-H) ¶15,411 (6th Cir. Dec. 22, 1981); Wainwright v. Allen, 461 F. Supp. 293 (D.M.D. 1978), aff'd mem. 605 F.2d 1209 (8th Cir. 1979); Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486, 488 (E.D.N.Y. 1977); Burris v. Wilkins, 2 Equal Opportunity Hous (P-H) ¶15,219 (N.D. Tex. June 21, 1977), aff'd, 544 F.2d 891 (5th Cir. 1977); United States v. Real Estate One, Inc., 433 F. Supp. 1140 (E.D. Mich. 1977) (inept techniques used); Dillon v. AFBIC Dev. Corp., 420 F. Supp. 572 (S.D. Ala. 1976), aff'd, 597 F.2d 556 (5th Cir. 1979); Elazer v. Wright, 2 Equal Opportunity Hous (P-H) ¶15,197 (S.D. Ohio 1976) (rented to white person acting as agent for rejected minority); Adams v. Hempstead Heath Co., 1 Equal Opportunity Hous (P-H) ¶13,781 (E.D.N.Y. Sept. 30, 1976); Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975) aff'd per curiam, 547 F.2d 1168 (6th Cir. 1977); Lyles v. Hampton, 1 Equal Opportunity Hous (P-H) ¶13,738 (S.D. Ohio Dec. 5, 1975); Hawkins v. Hogue, 1 Equal Opportunity Hous (P-H) ¶13,711 (S.D. Ohio May 14, 1975); Walker v. Fox, 395 F. Supp. 1303 (S.D. Ohio 1975); Collins v. Spasojcevic, 1 Equal Opportunity Hous (P-H) ¶13,654 (N.D. Ill. May 17, 1974); Guillory v. Bryan, 1 Equal Opportunity Hous (P-H) ¶13,642 (S.D. Tex. Feb. 19, 1974); United States v. Youritan Constr. Co., 370 F. Supp. 643, 647 (N.D. Cal. 1973); aff'd as modified, 509 F.2d 623 (9th Cir. 1975) (per curiam); Williamson v. Hampton Mgmt Co., 339 F. Supp. 1146, 1148 (N.D. Ill. 1972); Martin v. John C. Bowers & Co., 334 F. Supp. 5 (N.D. Ill. 1971); Brown v. Ballas, 331 F. Supp. 1033, 1035 (N.D.

(footnote continued)

actually be required to seek coverage of any sort. It is sufficient under the Fair Housing Act that the representation be made and that the responding party have some belief that the inquirer is seeking the benefit of information. On the assumption that this occurred, it may be concluded that the data gathered in this fashion may be admissible under the standards enunciated by the courts and that this element of the research project is a permissible and authentic method of data-gathering.

Furthermore, it would also be proper to conclude that the legal impact of the data gathered may properly be measured.

Findings

The specific evidence reflects a series of telephone surveys of residents within specific blocks at three different locations. The "matched block" methodology sought to control the survey based on the concept that the exclusive block difference was solely racial. The survey sought to answer the questions (a) if people "have different insurance policies" based on the racial difference of an area and (b) if more or less insurance is provided based on the race of an area.

Tex. 1971); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969); Harris v. Jones, 296 F. Supp. 1082 (D. Mass. 1969); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407 (S.D. Ohio 1968).

The three block groups (Number 5 of Census Tract 61.02 in North Omaha, Number 1 of Census Tract 30.00 in South Omaha and Number 3 of Census Tract 52.00, the Bemis Park area) were the subject of 85 attempted telephone contacts. For various reasons, a net 39 responded.

Bemis Park residents had less homownership and generally lived in housing of older stock.

A key finding was a correlation between length of insurance to length of ownership, irrespective of race. The actual numbers reflecting "ease" of obtaining insurance was not significantly variant based on race of the residents. Visits to the property by agents were further not significantly diverse based on rase. Furthermore, the coverage issue is difficult to decipher in terms of Title VIII in that Bemis Park residents received information, for example, setting forth liability coverage up to nearly $64,000 to $74,000, while some residents in North and South Omaha received limitations of amounts to the extent that the coverage ranged in the lesser amounts to between $39,000 to in excess of $63,000. While the lowest amount ($11,000) was in the Bemis area and the amount highest was in North Omaha ($203,900), it would be difficult to conclude that race was the variable.

The amounts of premium figures are not matched against the limits of liability. For example, one Bemis Park resident pays $108, while a North Omahan pays $36. No information is provided in tis match-up as to value of house, nature of coverage, and other factors which are not reflected in the

controls. Where claims arise, the homeowner's perception of "fairness" further showed no racial diversity. Perception was somewhat important concerning the topic of why a claim was not filed. Only in the Bemis Park area was there any showing that the belief of the resident that rates would increase justified not filing a claim. No empirical evidence, however, exists in the report. Finally, it is clear that all telephoned residents received coverage. As the report itself concedes in the first part, it is unclear if the homeowner initiated inquiry concerning broader coverage.

B. Factors Other Than Race In The Decision-Making Process In Granting Home Insurance or Granting a Loan

Under Title VIII, courts are faced with a dilemma where there are two or more motivations or considerations for the alleged discriminatory act. Race can be the sole motivating factor or one that is dominant, partial,[20] or significant,[21] but it need not be the sole reason for the action,[22] and the presence

[20] Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974).

[21] Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982); Marable v. H. Walker & Assocs., 644 F.2d 390 (5th Cir. 1981); Burris v. Wilkins, 544 F.2d 891 (5th Cir. 1977); United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

[22] Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982); Marable v. H. Walker & Assocs., 644 F.2d 390 (5th Cir. 1981); Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979); Robinson rejects an earlier Second Circuit case, Duckett v. Silberman, 568 F.2d 1020, 1023 (2d Cir. 1978), which suggested the race factor had to be the sole motivating factor, as all cases decided and found by the court established a violation where evidence indicated race as one part of motivation. Race was not found to be a partial motivator in Duckett. See also Payne v. Bracher, 582 F.2d 17 (5th Cir. 1978); Metropolitan Housing Dev. (footnote continued)

of some valid justification does not make a decision valid where it is partially motivated by race.[23] The majority of courts, including the federal court of appeals which jurisdiction includes Omaha, takes the position that, despite the presence of valid jurisdiction for rejecting an applicant, if race is a factor in the decision-making process, the action is unlawful.[24]

Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977); cert. denied, 434 U.S. 1025 (1978); Burris v. Wilkins, 544 F.2d 891 (5th Cir. 1977); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970); United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969) (race found to be the sole motivation). The difficulty of measuring bias has prompted the Supreme Court to rely on lower court findings. Rogers v. Lodge, 102 S. Ct. 3272 (1982) (maintenance of at-large voting found intentionally racially discriminatory by lower federal court); Crawford v. Board of Educ., 102 S. Ct. 3211 (1982) (state court found antibusing initiative not racially motivated).

[23]United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

[24]Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982); Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2nd Cir. 1979); Taylor v. Fletcher Properties, Inc., 592 F.2d 244 (5th Cir. 1979); Miller v. Poretsky, 595 F.2d 780 (D.C. Cir. 1978); Payne v. Bracher, 582 F.2d 17 (5th Cir. 1978); Sorenson v. Raymond, 532 F.2d 496 (5th Cir. 1976); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975); Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), cert. denied, 419 U.S. 1021 (1974); Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1974) (per curiam); Haythe v. Decker Realty Co., 468 F.2d 336, 338 (7th Cir. 1972); Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055 (7th Cir. 1972); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970); United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982); Oliver v. Shelly, 538 F. Supp. 600 (S.D. Tex. 1982); Hope, Inc. v. County of DuPage, Equal Opportunity Hous (P-H) ¶15,404 (N.D. Ill. Oct. 1, 1981); McHaney v. Spears, 526 F. Supp. 566 (W.D. Tenn. 1981); Normal v. St. Louis Concrete Pipe Co., 447 F. Supp. 464 (E.D. Mo. 1978); Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976); Drain v. Friedman, 422 F. Supp. 366 (N.D. Ohio 1976); Hampton v. Roberts, 386 F. Supp. 609 (W.D. Va. 1974); Clemons v. Runck, 402 F. Supp. 863 (S.D. Ohio 1975); Lyles v. Hampton, 1 Equal Opportunity Hous (P-H) ¶13,738 (S.D. Ohio Dec. 5, 1975); Branch v. Deaver, 1 Equal Opportunity Hous (P-H) ¶13,689 (N.D. Cal. Aug. 2, 1974); Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974); Williamson v. Hampton Mgmt. Co., (footnote continued)

The rule that race may not be a factor applies where the rights of many are at stake[25] or where just the rights of one person are affected.[26]

Findings

The "policy/premium" aspect of the report was the most legally significant. The objective was to determine housing location and amount of premium quoted. It was clear that housing age, based on the response of insurance agents, is an important factor, but it could not be established that race necessarily controlled the "age" policy. The report concludes that "[l]ittle variation was noted in the premium price among . . . three locations ...." Moreover, for older housing, so-called "standard" policies were offered. While the findings show a clear disparity in the type of coverage and the cost of coverage, the disparity, again, appears to relate to age, not clearly race.

What was significant was the difference in quality of coverage. A house in North Omaha, for example, was not offered the same coverage as the same housing in West Omaha. It is clear that there is a need for additional data.

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339 F. Supp. 1146 (N.D. Ill. 1972); United States v. Reddoch, 1 Equal Opportunity Hous (P-H) ¶13,569 (S.D. Ala. Jan. 27, 1972), aff'd per curiam, 467 F.2d 897 (5th Cir. 1972); Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969) ("motivating reason").

[25]Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 1 (1977); Metropolitan Housing Dev. Corp., v. Village of Arlington Heights, 588 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

[26]Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970).

C. Statistics On Housing Discrimination Generally In Omaha And Their Impact On The Insurance Study

Although statistical evidence is relevant to a claim of discrimination, the federal court of appeals affecting Omaha and other federal appeals courts have held that it is not necessarily decisive.[27] Courts do take judicial notice of patterns of segregation,[28] and evidence that a practice will perpetuate existing segregation[29] or actions which can injure an integrated community[30] will often satisfy the prima facie case requirement. For example, the total absence of minorities from a large area is often powerful evidence.[31] A prima facie case can

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[27] Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n. 19 (1973); Williams v. Matthews Co., 499 F.2d 819, 827 (8th Cir.), cert. denied, 419 U.S. 1021 (1974).

[28] Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), cert. denied, 419 U.S. 1070 (1974); §§3.42 (discrimination in terms of sale or lease), 7.01 (dual housing markets).

[29] Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982); McHaney v. Spears, 526 F. Supp. 566 (W.D. Tenn. 1981).

[30] Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), cert. denied, 435 U.S. 908 (1978).

[31] Here, the role of statistics become particularly significant. To cite an example, from a population 20% black, a ratio of disproportion of 2:1 would mean that 40% of the disadvantaged class was black. A ratio of 1:1 would mean that 20% of the disadvantaged class was black, which would equal their percentage of the total population and would indicate the action involved had no disproportionate impact on blacks. The ratio is similar to population-work force disparities in employment discrimination. See B. Schlei & P Grossman, EMPLOYMENT DISCRIMINATION LAW ch. 36 (2d ed Supp. 1979). Using this method in a community with a 20% black population, an apartment complex or subdivision with 5 blacks out of 100 would have a ratio of 4:1. Only one black in

(footnote continued)

often be based on a delay or avoidance.[32]

Statistical evidence of disparate effect of a practice on a protected minority is highly probative.[33]

Findings

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that project would carry a 20:1 ratio. E.g., Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982) (blocking public housing fell more harshly on blacks by a ration of 2.65:1); Jordan v. Dellway Villa of Tennessee, Ltd., 661 F.2d 588 (6th Cir. 1981), cert. denied, 455 U.S. 1008 (1982) (of 1622 applications for new subsidized housing, 70.9% were black, yet rented to only 18% blacks for a ratio of 3.9:1). For an analysis of how to identify the relevant housing market, see Bogan & Falcon, supra. See also D. Baldus & J. Cole, supra. Such a ratio is a starting place and provides excellent evidence to aid in establishing a prima facie case. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975) (ratio of 8:1 in employment challenge to standardized tests); Griggs v. Duke Power Co., 401 U.S. 424, 429, 430 n. 6 (1971) (ratio of 2.8:1 from high school diploma requirement; 8:1 sufficient as to barriers from standardized test); United States v. City of Chicago, 549 F.2d 415, 428, 439 (7th Cir.), cert. denied, 434 U.S. 875 (1977) (3.4:1 sufficient with respect to employment discrimination under the revenue sharing nondiscrimination provisions); Green v. Missouri Pac. RR, 523 F.2d 1290, 1294 (8th Cir. 1975) (2.3:1 sufficient in employment case based on refusal to hire any with criminal record); Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974), rev'g on other grounds, 335 F. Supp. 16, 20 (E.D. Mich. 1971) (5:1 sufficient with respect to Title VI challenge to urban renewal displacement); Castro v. Beecher, 459 F.2d 725, 729 (1st Cir. 1972) (2.6:1 sufficient); Chance v. Board of Examiners, 458 F.2d 1167, 1171-73 (2d Cir. 1972) (1.5:1 sufficient); Larry v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (2.25:1 sufficient in Title VI challenge to segregated classes resulting from IQ test placement policy); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978) (3.6:1 sufficient in challenge to municipal services allocation under revenue sharing program); Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982) (never had black tenant); Marable v. H. Walker & Assoc., 644 F.2d 390 (5th Cir. 1981) (no blacks ever accepted); Wright v. Salisbury Club, Ltd., 623 F.2d 309 (4th Cir. 1980) (only rejections by club were of blacks); United States v. Reddoch, 467 F.2d 897 (5th Cir. 1972) (96 apartments and 100% turnover per year in three years yet never a black tenant); United States v. Henshaw Bros., Inc., 401 F. Supp. 399 (E.D. Va. 1974) (no black ever resided in development); United States v. Raymond, 1 Equal Opportunity Hous (P-H) ¶13,618 (M.D. Fla. Sept. 5, 1973) (all white); United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972) (never rented to blacks before admitted); United States v.

(footnote continued)

No statistical disparity is evident based on the data provided. Another dimension of the study, for example, inquiries of insurance companies. Seven (7) callers made sixty-two (62) contacts with companies. The so-called "shopper's survey" actually was based upon 55 completed questionnaires. The

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Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972) (satisfied prima facie test); Cf. United States v. Hinds County Bd. of Educ., 417 F.2d 852, 858 (5th Cir.), ("nothing is more emphatic than zero"), supplemented, 423 F.2d 1264 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970).

[32]Stevens v. Dobs, Inc., 483 F.2d 82 (4th Cir. 1973) (per curiam); United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972); Miller v. Apartments & Homes of New Jersey, Inc., 646 F.2d 101 (3d Cir. 1981); Marable v. H. Walker Assocs., 644 F.2d 390 (5th Cir. 1981); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970); Elazer v. Wright, Equal Opportunity Hous (P-H) ¶15,197 (S.D. Ohio 1976); Brown v. Lo Duca, 307 F. Supp. 102 (E.D. Wis. 1969); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977); Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977); Dillon v. Bay City Constr. Co., 512 F.2d 801 (5th Cir. 1975); United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971); Dennis v. Bethune, 1 Equal Opportunity Hous (P-H) ¶ 13, 719 (S.D. Miss. June 3, 1975); United States v. Reddoch, 1 Equal Opportunity Hous (P-H) ¶ 13,569 (S.D. Ala. Jan 27, 1972), aff'd per curiam, 467 F.2d 897 (5th Cir. 1972); Brown v. Lo Duca, 307 F. Supp. 102 (E.D. Wis. 1969).

[33]Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) ("figures speak and when they do courts listen") (municipal equalization of services) citing Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), cert. denied, 386 U.S. 975 (1967), Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962). See generally Harper v. Hutton, 594 F.2d 1091 (6th Cir. 1979) (50 units and one black tenant in 10 years); Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976); Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), cert. denied, 419 U.S. 1070 (1974); Weathers v. Peters Realty Corp., 499 F.2d 1197, 1201-02 (6th Cir. 1974); Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir.), cert. denied, 406 U.S. 950 (1972) (employment); Young v. Parkland Village, Inc., 460 F. Supp. 67 (D. Md. 1978) (opened in 1940's, first black tenant 1975, at trial, 7 of 59 units); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), aff'd as modified, 509 F.2d 623 (9th Cir. 1975) (per curiam) (20% of 1133 units rented to blacks and of 11 buildings, 6 never had blacks, a statistic sufficient to satisfy the prima facie case requirement). See generally D. Baldus & J. Cole, STATISTICAL PROOF OF DISCRIMINATION (Shepard's/McGraw-Hill 1980); Bogan & Falcon, The Use of Racial Statistics in Fair Housing Cases, 34 Md. L. Rev. 59 (1974).

callers all had similar housing. Four callers living in "good to excellent" housing, and three in "poor" condition housing. An "insurability" formula was devised based on the questions and responses and the diversity (one caller lived in an area which was 85% black and another caller lived in an area in excess 99% white) sought to control factors with the exception of race. The report accurately concludes that location of housing reflects no question of insurance disparity based upon race.

II. METHODOLOGY IN LEGAL ANALYSIS: THE FACTS

The essential pieces of information utilized in the study were the Center's September, 1983 studies entitled "Homeownership Insurance Availability and Cost in Omaha, Nebraska" and "An Analysis of Mortgage Lending Patterns in Omaha."

A. Preliminary Considerations

The Center's original effort was to develop data regarding both homeowner insurance availability and lending institution data. Only the first aspect was successful because of the unavailability of information concerning lending data on the basis of race.

It is important to preface the analysis by emphasizing the protections embraced by the Fair Housing Act. Any form of race discrimination relating to any aspect of housing is outlawed. Starting with this premise, the next step was to review the existing data provided by the Center and make a judgment as to

whether or not, first, the data provided any evidence of disparity in homeowner insurance relating to race and, second, whether the information provides sufficient evidence to state a claim.

It is further important to acknowledge that the data cannot be viewed in a vacuum. Consideration was given to other information regarding issues of race discrimination in the Omaha area, particularly information which would provide a basis for concluding that housing bias was prevalent. In this regard, other data was utilized (see Section III).

Mention is further warranted that Title VIII at the present time has been interpreted to cover insurance practices. These interpretations are opinions written by a limited number of federal district courts throughout the country. Neither any federal appeals courts nor the United States Supreme Court has addressed the issue. However, Title VIII, while being silent on the issue of this type of coverage, is to be broadly construed. Hence, reliance is made on the broad construction which is to be afforded Title VIII and upon a limited number of federal decisions which have addressed the issue of homeowner insurance and the Fair Housing Act. Finally, reliance has been made upon the limited number of lending cases in which Title VIII has been analysed. It is noteworthy that the present session of Congress has before it several amendments to the Fair Housing Act which would expressly include lending and insurance practices. Therefore, this study may not only assist in a determination of where insurance practices as they exist violate fair housing law, but may also

provide a basis to encourage the Congress to take the appropriate steps absent the ability to measure properly whether the law has been violated.

IV. CONSIDERATIONS OF FUTURE METHODS

Audit procedures must be more specifically utilized in the examination of homeowner insurance practices. While telephonic inquiry may be valuable in terms of statistical analysis, there must be clearer objective manifestation, for example, that the inquirer would be known by a company representative as being a member of a minority class. While, again, it would be compelling to analyze the statistics of responses based on the agent's knowledge of neighborhoods, this is, as the present data exists, an evidentiary variable. From a legal sufficiency vantage, the question would be: what information is available that would establish that the agent was aware of the racial composition of the neighborhood? While it is clear that a violation of Title VIII may be established by determining if an adverse impact on minorities results, it is further clear that, in an evaluation of a likelihood of prevailing under Title VIII, more evidence is simply necessary.

This may be achieved in several ways. First, it may be feasible for auditors to set up appointments with insurance agents and share with the agents certain controlled characteristics (race of inquirer, knowledge of neighborhood, age of housing and other characteristics of housing shared with the agent, etc.). The test results of that would clearly be more

meaningful and determinative. This resolves the problem of a strictly statistical approach because of the assumptions which have to be inferred relative to race. Those assumptions, of course, include knowledge on the part of the insurance agent of the racial composition of the neighborhood and may also assume knowledge on the part of the agent of the caller's race. These are factors which must be controlled in order to validate a Title VIII claim.

While the role of statistics should not be down played, prevailing under Title VIII, however, would probably require more.

Another area of investigation worthy of consideration would be interviews of ex-insurance agents who might explain the "realities" of the provision (or non-provision) of homeowner insurance. Obviously, most past and present salespersons in the insurance field would be either reluctant to discuss the issue or would simply refuse. In Title VIII litigation, however, pursuit in this area has proved fruitful and important. The interview of insurance agents, either presently or previously in the business, serves to provide crucial data in a Title VIII context. For example, agents will share their understanding of the underwriting rationale in the provision of homeowner insurance. Often, materials which are provided to agents will be shared. Furthermore, even more importantly, the oral instructions from supervisory and other management personnel to the agents can be crucial. In addition, notwithstanding the materials provided by management to sales personnel, if management

expresses a personal preference based on racial make-up of a neighborhood, that information would be more telling than any body of statistics.

The resources to undertake this type of data gathering would not be substantial. It would be essentially required for at least one staff pair to conduct investigations insofar as agent contact. The starting point would be a person's own present or former insurance agent.

V. CONCLUSION

The monitoring of homeowner insurance practices is significantly more complex than the auditing of conventional real estate practices. There are certain similarities between insurance audits and real estate audits. First, there are a never-ending numbers of agents. Second, the appropriate random sampling of either will, at one point or another, probably evoke some sentiments of racial preference by an agent. Third, while most real estate brokers or insurance managers would disavow racial preferences, liability to them often turns on the actions of the individual agent. Moreover, the long history of apartheid in America provides the logical base from which the vestiges of discrimination in housing are maintained. All aspects of housing are infected with racist attitudes which ultimately lead to unlawful denial of housing benefits, including benefits of homeowner insurance. The sorry history of race discrimination in the Greater Omaha area has been borne out by real estate audits and by liability of the school board for educational segregation

found by the United States District Court in Omaha. There can be no logical basis to assume that the area of home insurance has not been equally affected with a strain of racism which has been found to be so prevalent in other aspects of the community.

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Notwithstanding, establishing actual Title VIII violations concerning availability of homeowner insurance or lending practices may be a relatively difficult task. Unlike conventional Title VIII violations, usually seen in real estate or property management practices, the development of data concerning insurance practices becomes significantly more challenging and complex.

The Center's study regarding homeowner insurance practices represents a valid start and what will necessitate a more intensive scrutiny of insurance availability in the Omaha area. While it is clear that a violation may be established either through purposeful conduct or the effect of conduct (see Section II), more data is clearly necessary. One technique may be the actual meeting between purported homeowner insurance seekers and agents. Often in conventional Title VIII matters, the potential respondent will admit a racial bias. This technique may be undertaken with relative ease, assuming the resources are available. Another technique may be through the interview of ex-insurance personnel who are on occasion candid about such practices. This, again, is a time-tested technique in monitoring unfair housing practices in real estate and property management.

Deciphering the existing data in terms of its potential Title VIII ramifications has been an unsettling task in that the rudiments of the ultimate question exist: that is, there appears to be some base of information on which the practices uncovered may either have a racial predicate or have the effect of the denial of insurance based on race. With this foundation and assuming the resources, further study in employing the techniques as set forth above could demonstrate a clearer picture if race is at all a factor in the availability of homeowner insurance. No doubt exists that a disparity in availability has been demonstrated. The issue, however, is whether there is sufficient evidence to demonstrate that racial considerations prevail to the extent that the law requires. Without begging the question, it is certain that additional data development is required.

It should further be considered that there is a likelihood that the Congress will amend Title VIII in 1984 to expressly include insurance practices. This statutory change, however, will not vitiate the requirement of sufficient evidence. It will merely codify what has evolved as the existing correct interpretation of the law, bearing in mind that the liberal judicial decisions concerning insurance and lending practices have only been rendered at the federal district court level and no higher court in America has ruled inconsistent with those judgments.

There is little question that insurance and lending practices are a fundamental diminsion on the issue of housing availability and housing opportunity. It is furthermore

understood that isolating discriminatory insurance practices requires a more sophisticated investigation. Even the reported cases (Dunn, Laufman, etc.) involved more blatant and obvious kind of actions.

The Center's efforts have been important preliminary undertakings to what should serve as the base for future study. The technique suggested herein should be considered. Once the data is developed, consideration may given to the means by which discriminatory insurance practices, if found, can be eradicated.

Since the Nebraska Attorney General does not appear to have the breadth of power afforded his federal counterpart, the issue of a pattern and practice of discrimination may also require state legislative changes in the existing state equal opportunity law. Nebraska's deficiency in this regard should require appropriate legislative modification anyhow. As housing availability becomes increasingly difficult in the mid-1980's, the Nebraska Equal Opportunity Commission can address this potentially serious problem through appropriate legislative action in bringing lenders and insurers expressly under its coverage.

Given the history of racial discrimination in the Omaha area, documented by studies by the Center, housing organizations and findings in the federal court relative to school segregation, it would be illogical to assume that race is not a factor in insurance or lending practices. The Center's study represents the first effort to isolate the seeds of redlining. The employment of some of the suggested techniques may be a means of securing the necessary relevant data to determining whether lenders and insurers have participated with other actors in the housing market to deprive housing choice because of race and color.

Disclosure data from insurers and lenders would, of course, do much to aid in this investigation of such practices. At one time, HUD was proposing anti-redlining regulations in reference to lenders and insurers. While the draft of these regulations surfaced in late 1980, the effort was abandoned with the new Administration and no regulation whatsoever is even being considered. The monitoring process is, therefore, extremely difficult, relying almost exclusively on such studies as those done by the Center. This is simply not enough. It would be difficult to determine if Title VIII has been violated solely on disclosures made under HMDA or CRA. The difficulty is exacerbated by Constitutional considerations on lending regulation which limits state authority[39] in light of federal disclosure law under the Supremacy Clause.

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[39]United States Constitution, Article IV, Clause 12. Michigan Savings and Loan League v. Francis, 683 F. 2d 857 (6th Cir. 1982).

The job in uncovering these practices, which may have such a devastating effect on a community, is still in the early stages. While it cannot be concluded that the evidence presented can establish a violation of the Fair Housing Act, it can further be concluded that the first efforts warrant continued study.

Respectfully submitted,

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