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# INSURANCE WEBLINING AND UNFAIR DISCRIMINATION IN CYBERSPACE

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## I. INTRODUCTION

**T**HE purpose of insurance underwriting is to use data about a risk to evaluate that risk. Specifically, factual information is used to determine whether the risk is appropriate for a company and to determine the appropriate price of the insurance for that risk. This determination is, by its very nature “discrimination,” but it is a valid and appropriate means of underwriting. However, certain data is deemed unfairly discriminatory, and its use is outlawed. “Redlining” is “charging higher rates or declining to write insurance for people who live in particular areas (figuratively, sometimes literally enclosed with red lines on a map).”<sup>1</sup>

The emergence of the Internet has brought with it a new set of questions and concerns for the insurance industry regarding redlining. Some commentators believe the opportunity to purchase insurance online will usher in a new era of equality through increased access and elimination of the need for face to face encounters. Others fear that selling policies online presents insurance companies with new opportunities for discrimination, thus breathing new life into the specter of redlining.

“Weblining” is the use of the World Wide Web to practice any form of redlining. As relevant to insurance providers, most discussions of insurance weblining address either access to the Internet or profiling potential customers. As an access issue, there is concern that underprivileged consumers who lack access to the Internet are intentionally excluded from the benefits of online rebates. “Electronic Redlining” addresses the related concern that telecommunications companies bypass disadvantaged

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1. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

neighborhoods when installing new technology that enables or enhances Internet access. The second category of weblining is the use of personal data about an individual to create a specialized customer profile and using that profile to limit a customer's access to insurance sales.

The scope of this article is to identify the types of potential allegations of weblining posed by the Internet and to discuss precautions that insurance companies can take to ensure equitable treatment and minimize the risk of a weblining allegation. Because there are no reported cases of insurance weblining, this paper explores weblining litigation in related industries.

### A. A BRIEF REDLINING PRIMER

The historic parent of weblining is redlining, a practice by which insurers literally drew a red line on a city map around neighborhoods the insurers presumed presented unacceptably high insurance risks.<sup>2</sup> Insurance companies avoided selling insurance to all residents living within the perimeter of the red line; as a result, anyone residing within the area was, as a practical matter, unable to purchase insurance.<sup>3</sup> Today the concept of redlining has expanded. It includes practices such as cancellation, or refusal to renew property insurance, based upon the location of the property<sup>4</sup> or the racial or ethnic makeup of the neighborhood.<sup>5</sup> These practices have been outlawed in all 50 states because they are based on (or at least lead to) illegal discrimination rooted in race.<sup>6</sup> Nevertheless,

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2. See *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1551 n.12 (5th Cir. 1996) (term "redlining" derives from evaluation of applications "based on a residential map where integrated and minority neighborhoods are marked off in red and designated as risk areas).

3. See *id.*

4. Insurance Information Institute, *Urban Insurance Issues*, (Nov. 2000), at <http://www.iii.org/media/hottopics/insurance/urban>.

5. See Sara K. Pratt, *The History of Insurance Redlining* (statement made at the John Marshall School of Law's conference on mortgage discrimination and insurance redlining), at [http://www.fairhousing.com/resources/general\\_resources/insurance\\_redlining.htm](http://www.fairhousing.com/resources/general_resources/insurance_redlining.htm) (last visited Aug. 8, 2001). See also *Am. Family Mut. Ins. Co.*, 978 F.2d at 291 (plaintiffs may prevail if they show that "insurer has drawn lines according to race rather than actuarial calculations").

6. Section 4(G) of the Model Unfair Trade Practices Act defines unfair discrimination as an unfair trade practice "[m]aking or permitting any unfair discrimination between individuals of the same class" and similarly situated for: rates charged in life insurance policies (§ 4(G)(1)); premium, policy and rate for accident or health insurance policies (§ 4(G)(2)); refusing to renew, issue, or canceling property coverage because of location (4(G)(2)); and refusing to renew, issue, or canceling insurance on a residential property risk (4(G)(4)). (National Association of Insurance Commissioners Unfair Trade Practices Act, Jan. 1991.) The following states have adopted either the NAIC model legislation, or similar legislation: Arizona, Arkansas, Colorado, Delaware, Washington D.C., Georgia, Guam, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia. The following states have adopted related legislation: Alabama, Illinois, Oregon, Utah, Virgin Islands, and Wisconsin. The following states have adopted a combination of the Model Regulations and related legislation: Alaska, California, Connecticut, Florida, Idaho, Missouri, South Carolina, and Wyoming.

reputable insurance companies allegedly still engage in illegal forms of redlining, such as using zip codes to target sales in affluent, non-minority neighborhoods,<sup>7</sup> paying out lower benefits based on the insured's race,<sup>8</sup> or charging "race-based additive premiums" for insurance policies.<sup>9</sup>

Due to increased awareness and state and federal statutory remedies, insurance redlining has taken on much more subtle characteristics today than in its early days, making it much more difficult to identify.<sup>10</sup> In the early 1900s, insurers openly and blatantly discriminated on the basis of race, even writing policies of racial discrimination into manuals, which contained the proverbial red lines in the maps distributed to agents.<sup>11</sup> By contrast, today redlining may only appear in the treatment of potential customers, who may not even know that they are treated differently based on their race or location.<sup>12 13</sup> As discussed below, many commentators feel that the Internet will be a tool for further subtlety in redlining

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7. See, e.g., *Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal, Inc.*, 259 Va. 8, 13 (2000) (HOME sued Nationwide Insurance in Virginia for using zip-codes to favor affluent non-minority neighborhoods. At the trial level, the Jury awarded \$500,000 in compensation and \$100 million in punitive damages. On appeal, the Virginia Supreme Court overturned the verdict for lack of standing.). The Virginia Supreme Court agreed to a rehearing on standing. Subsequently, on April 24, 1999, Nationwide announced a \$17.5 Million dollar settlement, vacating the prior decision. See *Inner City Press' Redline Reporter*, at <http://www.innercitypress.org/redliner.html> (Dec. 4, 2000) (explaining settlement). See also John L. Oberdorfer and Jeanne M. Liedtka, *Insurance Redlining: An analysis of Home, Inc. v. Nationwide Mutual Insurance Co.*, at <http://www.pattonboggs.com/news/views/1999/01/redline.html> (last visited Aug. 9, 2001) (providing detailed account and analysis of the case prior to standing decision).

8. *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1212 (11th Cir. 2001).

9. See, e.g., *Inner City Press' Redline Reporter*, at <http://www.innercitypress.org/redliner.html> (Dec. 4, 2000 update) (Florida Insurance commissioner Bill Nelson alleged that Houston-based insurer American General charged race-based additive premiums on industrial life insurance. Mr. Nelson stated, "[a]lthough many insurance companies stopped selling such policies years ago, some insurers who were charging different rates based on race did not reduce the higher premiums on existing policies when they eliminated such pricing on new policies.").

10. William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735, 737 (1997-98).

11. Pratt, *supra* note 5.

12. If an institution excels at the practice of redlining, it will not receive any applications from persons in minority areas—thus making discrimination by the insurer more difficult to spot and stop. Charles L. Nier, III, *Perpetration of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 646 (1999). See also Murray, *supra* note 10, at 738 (citing *Hearing on Homeowners Insurance Discrimination before the Senate Comm. On Banking, Housing and Urban Affairs*, 103d Cong., Sess. 1 (statement of Deval Patrick, Assistant Attorney General, Civil Rights Division)) (suggesting that the failure of insurance companies to keep records of rejected applications and to record the race of applicants compounds the difficulty of proving redlining).

13. This subtlety has perhaps inspired some commentators to suggest insurance redlining is a product of society's imagination, and perceived discriminatory trends are in fact a reflection of the economic realities of urban life. For example, Benjamin Zycher, professor of Economics at the University of California in Los Angeles, points to the laws of supply and demand as the true cause of redlining. Benjamin Zycher, *Consumers and Insurance "Redlining": Consumers Take Charge Agenda for the 104th Congress, Issue Brief*, at <http://www.consumeralert.org/issues/finance/Insure.htm> (last visited Aug. 16, 2001).

as the appearance of anonymity and the perceived facelessness of the Internet allows businesses to cloak discriminatory practices.

Insurance redlining is damaging both because it severs the essential link between insurance and the availability of housing, and because it has serious mental and emotional repercussions on the excluded. Twenty-five years ago, the National Panel on Insurance in Riot Affected Areas explained the sweeping need for insurance:

Insurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not and cannot make loans. New housing cannot be repaired. New businesses cannot expand, or even survive. Without insurance, buildings are left to deteriorate; services, goods and jobs diminish. Efforts to rebuild our nation's inner cities cannot move forward. Communities without insurance are communities without hope.<sup>14</sup>

The Seventh Circuit Court of Appeals concisely stated, “[n]o insurance, no loan; no loan, no house. . . .”<sup>15</sup>

Beyond the depressing economic effect redlining has on achieving fair housing, its exclusionary nature promotes further social and economic alienation among the disenfranchised.<sup>16</sup> Insurance redlining has a tendency to decrease employment prospects in excluded neighborhoods.<sup>17</sup> It cuts off access to needed financial services, creating an economically depressed neighborhood that ultimately mirrors the stereotypes on which the decision to redline was literally founded.<sup>18</sup> Such stigmatization decreases one's ability to “secure basic rights of citizenship.”<sup>19</sup>

Claims for insurance redlining are most often brought under the Federal Fair Housing Act, or state equivalents.<sup>20</sup> However, there is no definitive legislation or judicial decision holding that the Fair Housing Act applies to insurance.<sup>21</sup> In fact, throughout the 1980s there was a split across circuit courts regarding the reach of the Fair Housing Act.<sup>22</sup> Partially in response to a regulation from HUD which specifically proscribed

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14. Gregory D. Squires, *Insurance Redlining: Still Fact, Not Fiction*, National Health Institute Online (Jan./Feb. 1995), at <http://www.nhi.org/online/issues/79/isurred.html>.

15. *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992), cert. denied, 508 U.S. 907 (1993).

16. See Murray, *supra* note 10, at 740-42.

17. Christopher P. McCormack, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 Fordham L. Rev. 563, 599 (1986).

18. See Gregory D. Squires, *Race Politics and the Law: Recurring Themes in the Insurance Redlining Debate*, in *Insurance Redlining: Disinvestment, Reinvestment and the Evolving Role of Financial Institutions* 1, 3 (Gregory D. Squires ed. 1997).

19. *Id.*

20. Specifically, claims are typically brought under § 3604(a) and § 3605. Section 3604(a) provides that it is unlawful to “otherwise make unavailable or deny, a dwelling . . . because of race, color, religion, sex, familial status or national origin.” 42 U.S.C. § 3604(a) (1994). Section 3604(b) similarly prohibits discrimination in the provision of services in connection therewith. *Id.* at § 3604(b). See also Murray, *supra* note 10, at 747.

21. Murray, *supra* note 10, at 747.

22. *Id.*

insurance redlining under the Fair Housing Act,<sup>23</sup> the recent judicial trend is towards allowing such claims.<sup>24</sup>

Redlining in violation of the Fair Housing Act can be disastrous for insurance companies. The recent case, *HOME, Inc. v. Nationwide Mutual Insurance Co.*, was the first insurance redlining case to be decided by a jury.<sup>25</sup> HOME accused Nationwide of discriminating against minorities in marketing, advertising, agent location strategies, underwriting policies, and rating territories in violation of Virginia's Fair Housing Act.<sup>26</sup> The jury awarded Home \$500,000 in compensatory damages, and \$100,000,000 in punitive damages.<sup>27</sup> The Virginia Supreme Court reversed the jury verdict, holding that because HOME's injury was "remote," rather than "immediate," there was no standing to bring the claim.<sup>28</sup> Subsequently, the Virginia Supreme Court agreed to a re-hearing, and the parties vacated the decision, settling for a reputed \$17,500,000.<sup>29</sup> Undoubtedly, this will inspire future redlining litigation, which could prove successful in states that are not as strict about standing.<sup>30</sup>

## B. WEBLINING AS AN ACCESS ISSUE

As an access issue, Weblining is simply the practice of offering an insured a discount for purchasing a policy online. On the one hand, such discounts make good business sense. It is more efficient to sell a policy online, because it eliminates the need for regional sales offices and staff.<sup>31</sup> In fact, it is within an insurer's right to charge premiums based on the cost of distributing a policy.<sup>32</sup> The legal issue arises because there is concern that these lower rates and better deals are motivated by an insurer's desire to do business only with customers perceived as low risk. Regardless

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23. In response to *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 423 (4th Cir. 1984), HUD issued a statement that specifically prohibits insurance redlining under the Fair Housing Act. See Murray, *supra* note 10, at 747; 24 C.F.R. § 100.70(b), (d)(4) (1996).

24. See NAACP v. Amer. Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1358 (6th Cir. 1995) *cert. denied*, 516 U.S. 1140; Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209, 1214 (E.D. Pa. 1994).

25. John L. Oberdorfer & Jeanne M. Liedkta, *Insurance Redlining: An Analysis of HOME, Inc. v. Nationwide Mut. Ins. Co.*, at <http://www.pattonboggs.com/news/views/1999/01/redline.html> (last visited Sept. 14, 2001).

26. *Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal, Inc.* 259 Va. 8, 11-12 (2000).

27. *Id.*

28. *Id.*

29. See Inner City Press' Redline Reporter, December 4, 2000 Update, at <http://www.innercitypress.org/redliner.html> (last visited Sept. 14, 2001).

30. See Jeffrey W. Stempel, *Absent Express Agreement Insurer Not Permitted to Use Arbitration Award Against Policyholder; CGL Policy May be Required to Cover Claims Framed in Breach of Contract Language Rather than Tort Language*, 6 Conn. Ins. L.J. 539, 558-59 (1999-2000).

31. Joe Fry, *Is the Internet Ripe for Discriminatory Insurance Weblining?*, Insure.com: The Insurance Guide, at <http://www.insure.com/gen/weblining500.html> (last visited May 10, 2001).

32. *Id.*

of a company's motivation, there is concern that online rebates solidify the separation between the insured and uninsured, because the poor who would benefit the most from discounts are the most likely to be without awareness or access to them.<sup>33</sup> D.J. Powers, attorney for the Center for Economic Justice, a consumer advocacy group in Austin, Texas, says cheaper rates online are *de facto* "penalizing the poor for being poor."<sup>34</sup>

Answers to the complex legal questions that may arise in this area will depend partly on statistics, including data on both race and income, and on changes in Internet demographics. Do Internet sales stem from intentional discrimination? Even if an insurance company were to assume that people of a particular race were better customers, does selling its service on the web guarantee a particular clientele? Similarly, if an insurance company wished to sell only to higher income brackets, do online discounts accomplish this?

### C. THE DIGITAL DIVIDE

"Digital Divide" is the term given to the disparity in the online ranks between the rich and poor, as well as the apparent dearth of some minorities online.<sup>35</sup> As stated by the Digital Divide Network:

There has always been a gap between those people and communities who can make effective use of information technology and those who cannot. [U]nequal adoption of technology excludes many from reaping the fruits of the economy.

We use the term "digital divide" to refer to this gap between those who can effectively use new information and communication tools, such as the Internet, and those who cannot.<sup>36</sup>

The Digital Divide has been the subject of many studies and has gotten much attention from policymakers over the last few years.<sup>37</sup>

While it used to be a stark truism that a far greater number of whites were online than other ethnicities, most recent reports show this is becoming less and less true. As stated by the Pew Internet Group, "[t]he increase in online access by all kinds of Americans highlight the fact that the Internet population looks more and more like the overall population of the United States."<sup>38</sup> According to Jeffrey Cole, director of UCLA's center of Communication Policy, "[t]he Digital Divide seems to be correcting itself. People who have been on the Internet four years or more

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33. *See id.*

34. *Id.*

35. *See generally*, Todd Spangler, *Study: Digital Divide is Disappearing*, Interactive Week, (Nov. 2, 2000), at <http://www.zdnet.com/intweek/stories/news/0,4164,2649766,00.html>.

36. *Digital Divide Network, Knowledge to Help Everyone Succeed in the Digital Age*, at <http://www.digitaldividenetwork.org/content/sections/index.cfm?key=2> (last visited Aug. 15, 2001).

37. For an excellent collection of studies, and extensive documentation of policy reports, please visit [www.digitaldividenetwork.org](http://www.digitaldividenetwork.org), produced by the Benton Foundation.

38. Lee Rainie & Dan Packel, *More Online, Doing More*, The Pew Internet and American Life Project, at <http://www.pewinternet.org> (Feb. 18, 2001).

tend to be white, highly educated, and male. Among people who have been on less than a year, it's more African-American, Latino and female."<sup>39</sup>

While whites still have higher percentages of their ranks online than some minorities, all ethnic groups have made enormous gains in short periods of time. As of December 2000, 57% of whites were on the Internet, compared to 43% of blacks and 47% of Hispanics.<sup>40</sup> Each group dramatically increased their presence from June of the same year, with online whites increasing 20%, online blacks increasing at a faster 23% and Hispanics at a slower 17%.<sup>41</sup> A new report released in July 2001 by the Pew Internet Foundation reports that Hispanics have nearly achieved online representation proportional to that of the overall population and equal in percentage to that of the white population.<sup>42</sup>

However, raw access to the Internet does not necessarily tell who is likely to buy an insurance policy online. When considering the potential discriminatory effects of online discounts, it is important to observe what different groups are actually doing while they are online. According to the study from the Pew Internet group, 58% of blacks with Internet access sought health information online, jumping 6% between June and December 2000.<sup>43</sup> This is slightly higher than the 57% of the entire online population accessing healthcare information, and higher than the 51% of online Hispanics who have sought health information.<sup>44</sup> However, in June 2000, only 36% of the African-American population had bought something online, whereas 46% of the general population had done so.<sup>45</sup> By December 2000, the number of African-Americans purchasing something online rose to 48%, closing in on the 52% of the general population that had done so.<sup>46</sup> These numbers show that while the actual Digital Divide may be closing, there is still potential disparity between what whites and minorities are comfortable with and interested in doing online. If activities of different demographics online do not become more uniform, an insurer could still potentially predict the makeup of its online customer base, despite statistics that point to uniformity in access.

Disparities in income and education reveal a much greater disparity in access.<sup>47</sup> However, even the poorest and least educated are rapidly coming online.<sup>48</sup> From June to December, 2000, those making under \$30,000

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39. Spangler, *supra* note 35.

40. Rainie & Packel, *supra* note 38, at 2.

41. *Id.* at 2-3.

42. Tom Spooner & Lee Rainie, *Hispanics and the Internet*, The Pew Internet and American Life Project, 2, (Feb. 18, 2001), at <http://www.pewinternet.org>. As testament to the frustrating nature of statistics, the most recent Pew study found white and Hispanic penetration at 50%, whereas in *More Online, Doing More*, *supra* note 38, the percentage of white internet usage was surveyed at 57%.

43. Rainie & Packel, *supra* note 38, at 7.

44. *Id.* at 7.

45. *Id.*

46. *Id.*

47. *Id.* at 2.

48. *Id.*



a year increased 36%, from 28% to 38% online; those making between \$30,000 and \$50,000 increased from 50% to 64%. Those making between \$50,000 and \$75,000 increased from 67% to 72%; and those making over \$75,000 are tapering off with an increase from 79% to 82%.<sup>49</sup> In December 2000, 39% of those with a high-school diploma or less were online, compared to 71% of those with some college and 82% of those with a college degree or higher.<sup>50</sup> However, the less-educated are rapidly coming online. Those with high school or less increased to 39% in the previous six-months, compared to those with some college and college or higher, which increased to 71% and 82% respectively.<sup>51</sup>

Even though there is general agreement that the digital divide is narrowing, some studies suggest that lack of interest may slow the arrival of online equality across all demographics. A study by the Pew Internet and American Life Project, entitled "Who's Not Online," sought to discover the intentions of off-line adults to get online.<sup>52</sup> The study estimated that roughly one-half of adults in the United States, about 94 million people, were not online.<sup>53</sup> Of those not online, 32% will "definitely" not get online, and 25% probably will never venture online.<sup>54</sup> On the other end of the spectrum, only 12% of those not online say that they will "definitely" go online, and 29% say that they will "probably" get Internet access.<sup>55</sup>

Those who state they will never get Internet access are defined most strongly by their income and education. Some 82% of those having no desire to get online have a high-school diploma or less, and 43% of this group earns less than \$30,000 a year.<sup>56</sup> Those not online list a variety of reasons why they are not online, including the belief that it is dangerous, they are not missing anything, it is confusing, and it is too expensive.<sup>57</sup>

#### D. WILL THE DIVIDE EVER DISAPPEAR?

Some argue that the digital divide is misleading because of access to computers at public schools and libraries. They believe there is a new wave of cheap access that will soon trickle down. Jean-Bernard Duler, CEO of Esurance, an online seller of car insurance in San Francisco, believes there is currently universal access for those who want it.<sup>58</sup> Duler acknowledges the Digital Divide, but contends that public libraries bridge this divide by providing access for all people.<sup>59</sup> Other commentators say

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49. *Id.*

50. *Id.*

51. *Id.*

52. Amanda Lenhart et al., *Who's Not Online: 57% of Those Without Internet Access Say They Do Not Plan to Log On*, The Pew Internet and American Life Project, (Release Date Feb. 18, 2001), at <http://www.pewinternet.org>.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Fry, *supra* note 31.

59. *Id.*

that in the near future new web technology will be affordable to even the lowest stratum of society.<sup>60</sup> In particular, some look to WebTV<sup>61</sup> as a potential source of cheap access for all income levels.<sup>62</sup>

Libraries are not currently doing much to increase access. On the one hand, the percentage of libraries that are connected in North America has risen from 83% to 95%, potentially providing free access to at least 143 million people.<sup>63</sup> Despite the availability of library access, it has not been a strong force in closing the digital divide. In August 2000, only 1.9% of the population had accessed the Internet through a public library<sup>64</sup>

Cheap access is not a likely solution, at least in the short term. The Pew Internet study explored the reasoning behind those who are not online,<sup>65</sup> and 39% felt access was too expensive.<sup>66</sup> In addition, many people simply have no desire to go online, regardless of cost. Of those that express no desire to go online, only 19% felt that they were missing out on something.<sup>67</sup> Of those who are merely reluctant to go online, 60% state they don't feel like they are missing out on anything.<sup>68</sup> Other studies have made complementary findings. A UCLA Internet Report study made complementary findings. The study showed 37.7% surveyed had no terminal available, 33.3% had no interest, and only 9.1% did not access the Internet because of the financial cost.<sup>69</sup> One obvious conclusion is that if those not online have no desire to be online, they will not access the Internet from libraries or WebTV until they begin to see the Internet as an important resource.<sup>70</sup>

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60. David Blair, assistant Director of the Ohio insurance department, quoted in *An End to Redlining?*, Internet Law Group Digital Newsletter, Ed. 10, Edited by Charles Christian (June 1997), at <http://www.jgrweb.com/jgr1.0/lib/newsletr/isg1-v10.html>.

61. WebTV is a television accessory that enables internet access without a computer. For more information, visit <[www.webtv.com](http://www.webtv.com)>.

62. David Blair, assistant Director of the Ohio insurance department, quoted in *An End to Redlining?* Internet Law Group Digital Newsletter, Ed. 10, Edited by Charles Christian (June 1997), at <<http://www.jgrweb.com/jgr1.0/lib/newsletr/isg1-v10.html>>.

63. John Carlo Bertot & Charles R. McClure, *Public Libraries and the Internet 2000: Summary Findings and Data Tables*, National Commission on Libraries and Information Science, 3, (Sept. 7, 2000), at <http://www.nclis.gov/statsurv/2000plo.pdf>.

64. *Falling Through the Net: Toward Digital Inclusion*, U.S. Dep't. of Commerce, at 47, (Oct. 2000), at <http://search.ntia.doc.gov/pdf/fttn00.pdf>.

65. Leehart, *supra* note 52, at 2.

66. *Id.* at 11.

67. *Id.*

68. *Id.*

69. Jeffrey Cole, *Surveying the Digital Future*, UCLA Center for Communication Policy, 24, (Nov. 2000), at <http://www.ccp.ucla.edu/ucla-internet.pdf>.

70. Additionally, some impoverished groups do not even own the rudimentary phone lines necessary to connect to the internet. According to the FCC, of the Latino households with an income of less than \$25,000 (66% of total Hispanic households) 20% lack phone service. Additionally, in some predominantly black inner-city neighborhoods, 25% of households have no phone service. These numbers are in sharp contrast to the overall nationwide average of 94%. See Chad M. Kahl, *Electronic Redlining: Racism on the Superhighway*, (Winter 1997), at <http://alexia.lis.uiuc.edu/review/winter1997/kahl.html>.

## E. ELECTRONIC REDLINING

Access to computers and the Internet is not the sole indicator of membership in the online community. Even as the digital divide lessens in terms of raw access, the gap between those with access to broadband services and those without remains large.<sup>71</sup> Because the process of actually laying out the wiring for these services is expensive and time consuming, it can only be done in a piecemeal approach. Some broadband Internet companies have been accused of "Electronic Redlining," skirting inner-city or areas of high minority concentration when laying the foundation for this technology.<sup>72</sup> Some commentators feel that as computer ownership and access to the Internet increases electronic redlining will continue to alienate some demographics, making them less likely to feel a part of the online community and making them less likely to use the resources of the internet.<sup>73</sup>

Income and education are the demographics that most accurately characterize access to broadband technology. A recent study by the GAO found that in areas with no cable modem or DSL access, the poverty rate was 14.5%, compared to 10.2% for areas with access to both; \$35,633 median household income for those with, and \$27,822 for those without.<sup>74</sup> Broadband access is certainly not essential for purchasing insurance on the Internet. However, by systematically excluding segments of the population from access to new technology a message is sent to the less privileged that they are not part of this new age, potentially discouraging these groups from using what resources they have. Delays in broadband access have the potential of alienating entire generations of people.<sup>75</sup> Electronic redlining of inner-city residences could produce "an entire generation of lower-income Americans [that] will fall even further behind the general populace."<sup>76</sup>

An effect of this exclusion may be evident in statistics of daily usage. Of those that have access to the Internet, minorities are less likely than Caucasians to access the Internet daily.<sup>77</sup> In December 2000, 58% of Caucasians with Internet access were online "yesterday," as opposed to 44% of African-Americans and 45% of Hispanics.<sup>78</sup> This is potentially

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71. *See id.*

72. Ameritech's Video Dialtone, Pacific Telesis and Bell Atlantic have all been accused of electronic redlining. *See id.*

73. *See id.*

74. GAO report to the Ranking Minority Member, Subcommittee on Telecommunications, Committee on Energy and Commerce, House of Representatives, *Telecommunications: Characteristics and Choices of Internet Users*, 22, (Feb. 2001) at <http://www.gao.gov/new.items/d01345.pdf>.

75. *See Kahl, supra* note 70.

76. *Id.* *See also* Housatonic Cable Vision Co. v. Dep't of Public Utility Control, 622 F. Supp. 798, 808 (D. Conn. 1985) (in support of holding that cable providers are required to abide by state regulations court rely on Cable Act's prohibition against discrimination in low income areas).

77. *See Rainie & Packel, supra* note 35, at 5.

78. *Id.*

attributable to many factors, but does serve as an interesting guide for how the different demographics integrate the Internet into their lives.

#### F. LEGAL IMPLICATIONS OF WEBLINING AS AN ACCESS ISSUE

Some insurance companies have already run into legislation aimed at preventing inequalities stemming from selling discounted insurance policies over the Internet.<sup>79</sup> For example, Reliance Direct, whose customers are serviced by Kemper Auto & Home Insurance Co., offers a \$50 discount to customers in Colorado, Connecticut, Florida, Illinois, Nevada, Ohio, Oregon or Pennsylvania who purchase policies online.<sup>80</sup> However, for their online customers in California, New York and Texas, there is no discount, because it violates the rating laws of those states.<sup>81</sup> California Proposition 103 forbids such discounts because they cannot be “uniformly promoted and offered to the public.”<sup>82</sup> Similarly, New York forbids such discounts because regulators are concerned that these discounts are not available to those without access to the Internet.<sup>83</sup> Texas’ statutory language does not forbid Internet discounts *per se*, but only those discounts that are approved by the state are permissible; such plans have not yet been approved.<sup>84</sup>

In order to avoid allegations of discrimination and to steer clear of anti-rebating laws, some companies that sell insurance online abide by a “one policy, one price” philosophy, and offer the same price regardless of whether the policy is sold online or off.<sup>85</sup> A blanket policy price helps prevent even the vestiges of discrimination, leaving one company to proudly announce that “Weblining is a non-issue for us.”<sup>86</sup> Powers, of the Center for Economic Justice, states that such policies are good for the consumer in two ways. First, they inject competition into the marketplace because offline policies will need to compete in price with online policies.<sup>87</sup> Second, those without access are not punished.<sup>88</sup> Joe Frey, writing for insurance.com also notes the “tidy profit” that can be made by the insurer when such savings are not passed down to the consumer.<sup>89</sup>

#### G. THE INTERNET AS A MEANS TO ALLEVIATE DISCRIMINATION

While it is true that selling insurance online currently excludes those who are not Internet savvy, it is also important to consider the power of

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79. See Fry, *supra* note 31.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. The Ohio Casualty Group, selling insurance through QuickenInsurance.com and Allstate based in Northbrook, Ill. are just two examples of companies with a “one policy, one price” plan. See *id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

the Internet to potentially alleviate racial barriers. In a broad sense, Jerry Kang sees a possibility that through the Internet, "we may move toward 'a society in which race is no longer an axis of social division, inequality, and hatred, nor used to create a repressive social, economic, or political status.'"<sup>90</sup> Kang argues that purchasing goods and services on the Internet is currently the only way to "skirt the aggravation of wondering, 'Am I being discriminated against?'"<sup>91</sup>

Eyler of Forrester Research, applies this model to purchasing insurance online.<sup>92</sup> Eyler argues that the internet presents a great opportunity to rid the discrimination that presently exists in agent based insurance selling.<sup>93</sup> Under the current system, he argues, because it is necessary to meet face to face with an agent to purchase a policy, lower income types often get poor treatment.<sup>94</sup> By contrast, "no one is turned away from the web."<sup>95</sup>

Another problem the Internet potentially addresses is the absence of insurance agents in inner-city neighborhoods. Currently, there is no law that mandates insurance companies operate offices in minority or low-income areas, and the absence of agent's offices can have chilling effects on the availability of insurance.<sup>96</sup> For example, as "the racially integrated neighborhood of Sherman Park on Milwaukee's west side changed from 1 percent non-white to 24 percent non-white between 1970 and 1980 . . . the number of insurance agents dropped from 22 to 9."<sup>97</sup> Ohio Insurance Commissioner Covington argues that the Internet could help solve this problem, because it potentially gives inner-city communities that currently lack any insurance offices the opportunity to purchase policies.<sup>98</sup>

#### H. CUSTOMER PROFILING AS WEBLINING

Another form of weblining that may incur the displeasure of courts and regulators is customer profiling. The historical antecedent in traditional insurance redlining involved the identification of "high risk" customers based on their place of residence. Frequently, factors like income level and ethnicity affect an individual's options regarding where they live. Therefore, the practice of selecting potential customers based on geo-

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90. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1135 (Mar. 2000) (quoting Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L. J. 129, 160 (1996)).

91. *Id.* at 1133.

92. *See* Fry, *supra* note 31.

93. *Id.*

94. *Id.*

95. Gregory D. Squires, *Insurance Redlining: Still Fact, Not Fiction*, National Health Institute Online, (Jan./Feb. 1995), at <http://www.nhi.org/online/issues/79/isurred.html>.

96. *See id.*

97. *Id.*

98. *Id.*

graphic location resulted in unlawful discrimination.<sup>99</sup> This is because, by excluding specific neighborhoods, districts, and communities, insurance companies eliminated entire sectors from their potential customer base.

With the emergence of the Internet, insurance companies will have new opportunities for the old practice of excluding potential customers based on their geographic location. Accompanying this is the concern that new technologies give insurance companies access to detailed information on potential customers. Insurance companies have the ability to limit an individual's access to insurance based on these highly personal profiles. This section discusses weblining in the form of using the Internet to exclude individuals based on the location of their residence, or on their personal information.

### I. WEBLINING AS ZIP-CODE REDLINING

Insurance companies doing business online could easily exclude undesirable customers by using information as seemingly innocuous as a zip code.<sup>100</sup> For example, a web user inquiring about a special Internet offer might be required to input a certain amount of personal data in order to receive further information. The webpage then categorizes zip codes as "desirable" and "undesirable." The website then immediately links "desirable" customers to a webpage where they can purchase a policy. "Undesirable" customers are channeled to an informational site that does not give them the opportunity to apply for insurance. Similarly, a webpage could offer basic insurance to all Internet users, while also offering a "special" discount only to those within particular zip codes. Profiling can be performed so seamlessly that the potential customer doesn't know that he has been denied access or given an offer not available to others.<sup>101</sup>

New technology can make these tactics particularly surreptitious, because it is no longer necessary for an internet user to enter their zip code on that particular site or even on that day. Through the use of "cookies," websites deposit information about the Internet user on his or her hard drive.<sup>102</sup> Originally, these were readable only by the computer that placed them there, but recent technology has enabled more and more

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99. For example, when appraisers systematically decreased values in neighborhoods occupied by blacks, the count found that the Fair Housing Act was implicated. See *U.S. v. Am. Inst. Of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977).

100. The Georgetown Internet Policy Privacy Survey reported that "92.8% of the sites in the sample collected at least one type of personal identifying information (e.g. name, e-mail address, postal address). 56.8% collected at least one type of demographic information (e.g. gender, preferences, Zip-code)." Mary J. Culnan, Ph.D., *Georgetown Internet Privacy Policy Survey: Report to the Federal Trade Commission*, 1, (June 1999), at <http://www.msb.georgetown.edu/faculty/culnanm/GIPPS/mmrpt.PDF>.

101. See Robert Pitofsky, Federal Trade Commission, Bureau of Consumer Protection, *Online Profiling: A Report to Congress*, 6, available at [http://www.producersconference.com/pdf\\_files/online\\_profiling\\_one.pdf](http://www.producersconference.com/pdf_files/online_profiling_one.pdf) (June 2000).

102. A cookie is a small text file that is placed on a consumer's hard drive by a web server which they or other websites can read later. For more information on cookies, see, e.g., <http://www.cookiecentral.com>.

companies to read and share this information amongst themselves.<sup>103</sup> With this method, it is possible for a website to gather geographic information on an Internet user who is not aware it is available. For example, an Internet user might enter a zip code on an unrelated site through a purchase. The zip code could then be placed as a "cookie" on that user's hard drive. If the user then goes to an insurance company's website, the website can read this cookie, and know roughly where the user lives. Based on its categorization of zip codes, the site can then initiate pop-up windows that offer special deals and discounts to Internet users from areas the insurer thinks represent low risks.<sup>104</sup>

The same information could be used to pitch sales without the potential customer even entering an insurance website. Often Internet companies have deals with each other, exchanging banner ads on their respective sites. To exploit this, an insurance company could arrange an exchange with a health-related informational website. Whenever an Internet user whose cookies indicate an affluent neighborhood visits the site, a banner for the insurance company advertising a discount would be posted. Or the health information site could sell the user's email address to the insurance company, who could then directly contact the potential customer.

This method of targeting sales could take weblining as an access issue to new depths. In the previous section, we discussed the possibility that companies are selling insurance over the Internet with the purpose of targeting particular demographics allegedly represented by computer ownership. But as computer usage begins to spread across all demographics, Internet access weblining becomes less representative of a demographic. However, based on zip codes insurance companies can target users within the Internet, rendering the apparent closing of the Digital Divide much less significant.

There has been no litigation or allegations of insurance companies actually using these tactics. However, in related industries, watchdog groups have filed two cases alleging zip code redlining.

#### J. KOZMO.COM

Kozmo.com (Kozmo) was an Internet based service that offered one-hour delivery of movies, snacks, and CDs to parts of New York City, Boston, Atlanta, Washington D.C., San Francisco, Seattle, and Chicago.<sup>105</sup> In a case described as the first against cyber-redlining,<sup>106</sup> the Equal Rights Center (ERC) in Washington D.C., along with two residents, filed a class action suit against Kozmo for excluding service from

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103. See Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy* 53 STAN. L. REV. 1393, 1411-12 (2001).

104. See Pitofsky, *supra* note 101, at 5.

105. See Silicon Alley Daily, *Kozmo.com Accused of Racially Discriminatory Delivery Practices*, (Apr. 14, 2000), at <http://www.siliconalleydaily.com/issues/sar04142000.html>.

106. MSNBC.com, Elliot Zaret and Brock N. Meeks, *Kozmo's Digital Dividing Lines*, (Apr. 11, 2000), at <http://www.msnbc.com/news/373212.asp>.

certain communities based on race.<sup>107</sup> Ultimately, the ERC dropped the claims.<sup>108</sup> Kozmo agreed to contribute \$125,000 to a joint program with the ERC to increase minority access to the Internet, and announced plans to include more predominantly minority communities in many of the cities in which they operated.<sup>109</sup> Kozmo has since gone out of business.

Even though the Kozmo case never went to trial, it is an instructive case study in the types of legal claims that can be brought against a company that provides a service over the Internet and the difficulty of proving such claims. Commentators have noted that the specifics of the Kozmo case are of particular interest to insurance companies.<sup>110</sup> While laws cannot compel a retail store to build a location in a geographic area, this does not apply to "virtual" businesses like Kozmo, or insurance companies, because neither depend on a physical store to do business with a customer.<sup>111</sup>

The ERC presented striking factual allegations about Kozmo's service in Washington D.C. While the city is 66% black, the ERC alleged that Kozmo served neighborhoods that are 65% white and only 25% black.<sup>112</sup> Further, while nearly 350,000 of the city's 400,000 black residents live outside areas served by Kozmo, 130,000 of Washington's 170,000 white residents live within their service areas.<sup>113</sup> Kozmo's service areas seemed to "creep right up to majority black neighborhoods and stop."<sup>114</sup>

The ERC alleged that this pattern of discrimination violated two statutes. First, the lawsuit alleged that Kozmo violated a Civil War era federal law that prohibits denying contracts based on race.<sup>115</sup> Second, the complaint alleged that Kozmo's practices violated the public accommodation statute of the 1964 Civil Rights Act, which forbids denying services based on race.<sup>116</sup>

Intent to discriminate, however, must be shown, and Kozmo's defense was that they were merely serving areas with high Internet penetra-

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107. See *Equal Rights Ctr. v. Kozmo*, Complaint, Civil Action, Apr. 13, 2000.

108. See Stephanie Ernst, *Civil Rights Group Backs Down on Race-Bias Charges Against Kozmo*, DiversityInc.com (Dec. 5, 2000) at <http://www.diversityinc.com/insiderarticlepg.cfm?submenuID=330&ArticleID=2149>. Prior to ERC's decision not to refile in state court, the Federal District Court had dismissed the suit, causing both sides to claim victory. The ERC stated that they voluntarily withdrew with an intent to refile in state court, which would afford more discovery time. Kozmo claimed that the case was dismissed due to a lack of evidence. Elliot Zaret, *Kozmo's Race-Bias Suit to be Refiled*, MSNBC.com (Sept. 5, 2000), at <http://www.msnbc.com/news/455788.asp>.

109. See Greg Sandoval, *Kozmo discrimination claims rescinded by group*, Cnet.com (Dec. 5, 2000), at <http://news.cnet.com/news/o-1007-200-4005571.html>.

110. See Elliot Zaret, *Kozmo.com hit with lawsuit in wake of MSNBC.com probe*, MSNBC.com (Apr. 13, 2000), at <http://msnbc.com/news/394407.asp>.

111. *Id.*

112. *Equal Rights Ctr. v. Kozmo*, Complaint, Civil Action, April 13, 2000.

113. *Id.*

114. Elliot Zaret and Brock N. Meeks, *Kozmo's Digital Dividing Lines*, MSNBC.com (Apr. 11, 2000), at <http://www.msnbc.com/news/373212.asp>.

115. *Equal Rights Ctr. v. Kozmo*, Complaint, Civil Action, April 13, 2000.

116. *Id.*



tion.<sup>117</sup> Kozmo stated that they were a new Internet company and had to make prudent decisions with their investments to allow for potential growth.<sup>118</sup> However, ERC's attorney stated that the patterns of Kozmo's service areas clearly resembled the patterns used by banks and insurance companies before the laws changed.<sup>119</sup> "The banks used to do that," he stated, "and it's called redlining."<sup>120</sup> Further, David Berenbaum points out that there are similar service decisions in each of the cities Kozmo serves, demonstrating a national pattern of discrimination.<sup>121</sup> In December, 2000, however, after ERC decided not to pursue the claim, Berenbaum stated that further research showed race was not a factor when service areas were selected.<sup>122</sup>

#### K. WELLS FARGO

In June 2000, the Association of Community Organizations for Reform Now (ACORN), along with Ruth Isaac, filed suit against Wells Fargo<sup>123</sup> for using zip codes to segregate potential homebuyers.<sup>124</sup> Among other allegations, ACORN demonstrated that a portion of Wells Fargo's website called the "Community Calculator"<sup>125</sup> collected zip code information, and then "steered" home buyers to neighborhoods where that person's race predominated.<sup>126</sup><sup>127</sup> For example, if a person was moving from a heavily minority populated area in Chicago to Dallas, the Community Calculator would only suggest similarly populated areas in Dallas. ACORN alleged that such promotion of racial segregation violated the Fair Housing Act and claimed injuries based on a reduction in the de-

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117. Dominos Pizza used a "safety first" argument to explain their refusal to deliver to primarily black housing projects. However, Kozmo stated that when choosing delivery areas, they did not look at crime in the areas they did not serve. Zaret, *supra* note 115.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. See Greg Sandoval, *Kozmo Discrimination Claims Rescinded By Group*, Cnet.com (Dec. 5, 2000), at <http://news.cnet.com/news/o-1007-200-4005571.html>.

123. On April 17, 2000, Northwest Mortgage merged with Wells Fargo and Company, and now does business on Wells Fargo Home Mortgage. Isaac v. Northwest Mortg., No. 3:00-CV-0989-L, 2001 U.S. Dist. LEXIS 4146, at \*3 n.2 (E.D. Tex. Mar. 30, 2001).

124. *Id.* at \*3-4.

125. Wells Fargo has stated that this community search service is actually a link provided to an independently owned and operated site, [www.Homefair.com](http://www.Homefair.com), which is licensed to over 2,000 other web properties. See Ronna Abramson, *Wells Fargo Accused of Online Redlining*, The Industry Standard (June 22, 2000), at <http://www.thestandard.com/article/0,1902,16296,00.html>.

126. The other two complaints were that Wells Fargo had discouraged potential homebuyers from neighborhoods by using overt racial classifications in their descriptions, and that they were making loans on residential real estate on the basis of race or color of the residents in the areas in question. See Isaac, 2001 U.S. Dist. LEXIS 4146, at \*2-3.

127. The actual court ruling does not mention zip codes. However several articles have quoted from the actual complaint, stating that the site steers "residents of predominantly minority ZIP codes to other predominantly minority Zipcodes." See e.g., Michael Liedtke, *Cyber-redlining: Wells Fargo Accused of Promoting Housing Segregation*, THE ASSOCIATED PRESS (June 22, 2000), at [http://aolpf.marketwatch.com/source/blq/aolpf/archive/20000622/news/current/ap\\_personal.asp](http://aolpf.marketwatch.com/source/blq/aolpf/archive/20000622/news/current/ap_personal.asp).

mand for homes in their neighborhoods thus lowering the value of their real estate.<sup>128</sup>

While Wells Fargo immediately responded to other portions of the allegation,<sup>129</sup> they did not remove the link to the Community Calculator, and it is active as of this writing.<sup>130</sup> Most recently, in April 2001, a District Court in Texas denied Wells Fargo's motion to dismiss for lack of standing.<sup>131</sup> At the time of this writing, this suit is still pending.

The claims against Wells Fargo and Kozmo illustrate the potential for damaging allegations of weblining based on treatment of the geographic information of potential customers. Before an online quote is given, insurance websites already request a zip code upon entry to the home page, an understandable request since geographic location inevitably has a bearing on premiums.<sup>132</sup> It is not difficult to imagine an insurer or insurance producer using this information for similar redlining purposes.

#### L. HIGH-TECH CUSTOMER PROFILING

If geographic information presents an opportunity for insurers to web-line within internet users, new industries which specialize in profiling customers using techniques such as data-mining and Neural Networks will allow insurers to hone their specialization even further.

The practice of profiling individual customers to target sales long predates the Internet.<sup>133</sup> For years telesurveyers have asked questions about an individual's likes and dislikes, questionnaires about interests have accompanied warranty cards and magazine sales, and spending patterns have been analyzed by credit card companies. Just recently, Pizza Hut came under attack because one of its employees refused to sell to a woman who would not answer informational questions.<sup>134</sup> For years, this information has been routinely gathered and sold or traded to other companies, who then streamline the data to target sales.<sup>135</sup>

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128. See *Isaac*, 2001 U.S. Dist. LEXIS 4146, at \*3-4.

129. The complaint alleged that the Community Calculator also characterized neighborhoods using racial stereotypes. Wells Fargo immediately removed these references from their site. See Ronna Abramson, *Wells Fargo Accused of 'Redlining' on the Net*, Computerworld.com (June 23, 2000) at [http://www.security-informer.com/english/crd\\_wells\\_306905.html](http://www.security-informer.com/english/crd_wells_306905.html).

130. *Community Calculator Doesn't Compute*, Executive Times, Vol. 2, Issue 7 (July, 2000), available at <http://www.hopkinsandcompany.com/archive%5Carchive0700.htm>.

131. *Isaac*, 2001 U.S. Dist. LEXIS 4146, at \*3-4.

132. See, e.g., [www.esurance.com](http://www.esurance.com); [www.allstate.com](http://www.allstate.com); [www.prudential.com](http://www.prudential.com).

133. See Douglas J. Wood, *Protecting Online Privacy: Government Regulation or Free Market Initiative*, Washington Legal Foundation, Critical Legal Issues, Working Paper Series No. 101, available at <http://adlaw.com/pdf/wood.pdf> (Jan. 2001).

134. A spokesperson for Pizza Hut stated that the employee had overstepped the grounds of the company's data-collection policy. See Marcia Stephanek, *Washington State Plants a Stake for Online Privacy*, BusinessWeek Online (Feb. 18, 2000), at <http://www.businessweek.com/bwdaily/dnflash/feb2000/nf00218c.htm>.

135. This is practiced by such vendors as Hart, Hanks, and Acxiom, who collect and combine various information from sweepstakes entries and questionnaires and resell it to companies such as retailers and telemarketers. See *Selling is Getting Personal*, Consumer Reports, Nov. 2000.

Online profiling is basically the same practice. However, the World Wide Web has initiated a paradigm shift regarding the ease and detail of collecting, augmenting, and analyzing the necessary data.<sup>136</sup> New technology in "data mining" has made it easier for Internet based companies to accumulate data from public records and sales histories, to combine it with information on an individual's Internet usage, and to create a highly detailed profile of an individual.<sup>137</sup>

Companies can subscribe to "neural networks," which enable them to instantly access profiles of existing and potential customers.<sup>138</sup> With these profiles, companies can form sales tactics and procedures based solely on these statistics. This technology has sped up the databases to the extent that a customer service or sales representative can retrieve detailed information on a customer as they wait on the phone or as they work for an online application to process.<sup>139</sup>

Potential uses for profiling have been illustrated by the banking industry. Currently, many banks are known for assigning ranks of customers based on internally collected data of their assets and past behavior.<sup>140</sup> For example, Sanwa Bank rates their customers as "A," "B," or "C" based upon how much money each customer makes for the bank.<sup>141</sup> Those customers labeled as "A" have fees and bounced checks waived without question, whereas those labeled as "C" get the least perks.<sup>143</sup> Similarly, First Union Bank uses a computer system called Einstein to produce information on a customer within 15 seconds. The bank then uses a color coded system that aids customer service representatives in servicing customers, and directs them to offer more flexible credit card rates to higher valued customers.<sup>144</sup>

Axiom Corporation is a leading company in the stockpiling of detailed information such as names, addresses, income, race, religious affiliation and similar data. They are reputed to have profiles of over ninety-five million American households.<sup>145</sup> Database America boasts detailed information on 165 million people in 70 distinct categories.<sup>146</sup> A year ago,

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136. See generally, Leigh Jackman, *Weblining: Data Mining for Customer Profitability*, at <http://www.msb.georgetown.edu/faculty/culnanm/EC/Briefings3/jackmanl.htm> (Apr. 9, 2000). It should be noted that the collection and selling of personal data on the Internet has raised a number of privacy issues, but these are outside the scope of this article.

137. See generally, Constance Parten, *Data Mining vs. Privacy*, at <http://www.insurancejrnl.com/html/ijweb/publications/IJWest/w61200/datam-priv.htm> (last visited June 5, 2001).

138. See generally, *id.*

139. See generally, *id.*

140. See Marcia Stephanek, *Weblining*, BusinessWeek Online (Apr. 3, 2000), at [http://www.businessweek.com/2000/00\\_14/b3675027.htm](http://www.businessweek.com/2000/00_14/b3675027.htm).

141. *Id.*

142. Interestingly, in "A History of Redlining" John Little describes insurance companies labeling prospective neighborhoods "A," "B," "C," and "D" in descending order of desirability. John Little, *A History of Redlining*, at <http://www.mdcbowen.org/p2/rm/redline.html> (last visited Aug. 15, 2001).

143. See *supra* note 142.

144. *Id.*

145. *Id.*

146. See *Solve*, *supra* note 103, at 1410.

it was estimated that 23% of companies were using similar services to "micro-segment" their customers, and that number is expected to swell to over 60% within a short time.<sup>147</sup> In 1999, Axiom offered a new service called InfoBase Ethnicity System, which was described in their marketing catalogue as a "broad and precise breakdown of ethnic, religious, and minority classifications."<sup>148</sup> Companies such as Axiom and Database America then merge it with existing information collected by internet sites, and move it online for quick access.<sup>149</sup>

Axiom and its contemporaries feel that use of this data merely allows businesses to specialize their pitch through understanding and anticipation of their client's needs.<sup>150</sup> They also note that the data collected is public data, mostly based upon census information.<sup>151</sup>

Insurers can also use "neural networks" to assemble available data about an individual.<sup>152</sup> Such a profile allows an insurer to make a snap decision about who qualifies as a low-risk or high-risk potential customer. Inquiring consumers who fit an insurance company's profile of a desirable risk will receive service. Consumers who do not can be linked to an informational site and effectively denied service. Sophisticated sites can offer special discounts to those customers they determine to be the most desirable.<sup>153</sup>

Of course insurers' access to this information does not necessarily mean it will be used to exclude customers. Much like use of information that has always existed, legal issues arise when this information is used to unfairly discriminate against potential clients.

## II. CONCLUSION

Technology continues to develop new tools for the sale and marketing of insurance on the Internet. As these tools mature and proliferate, so

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147. Stepanek, *supra* note 142. Other examples of companies that use customer profiling tactics similar to weblining include CHARLES SCHWAB who tracks online purchasing and service usage to match the customers with specific promotions; WEYERHAUSER CORPORATION uses weblining to determine its most profitable customers and to rank suppliers based on performance and cost; CATALINA SUPERMARKETS segments potential customers based on what products they buy and what they pay, in order to offer high-value customers special offers and free delivery; 20TH CENTURY FOX sorts through box office receipt data to identify which films actors and story lines are most popular by region, neighborhood and specific theater; and VISA INTERNATIONAL segments customers based on patterns of fraud to flag customers that may be at risk for credit problems. See Leigh Jackson, *Weblining: Data Mining for Customer Profitability*, at <http://www.msb.georgetown.edu/faculty/culnanm/EC/Briefings3/jackman1.htm> (Apr. 9, 2000).

148. Stepanek, *supra* note 142.

149. See Solve, *supra* note 103.

150. See Parten, *supra* note 139.

151. See *id.*

152. See Leigh Jackson, *Weblining: Data Mining for Customer Profitability*, at <http://www.msb.georgetown.edu/faculty/culnanm/EC/Briefings3/jackman1.htm> (Apr. 9, 2000).

153. See generally, Robert Pitofsky, Federal Trade Commission, Bureau of Consumer Protection, *Online Profiling: A Report to Congress* 6, available at [http://www.producersconference.com/pdf\\_files/online\\_profiling\\_one.pdf](http://www.producersconference.com/pdf_files/online_profiling_one.pdf) (June 2000).

will potential opportunities for unfair discrimination to occur in cyberspace.