

INSURING JUSTICE*

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Many landlords do not carry liability insurance, which means that many residents have little chance of recovery after being harmed by dangerous housing conditions. More disabling injuries occur in homes than in workplaces and motor vehicles combined. These risks disproportionately affect low-income, minority tenants. Because state laws do not require landlords to carry liability insurance, property owners reap the financial benefits of the long-term rental housing market while passing the risk of injury and cost of harm to their tenants. In contrast, there is a growing trend among state and local jurisdictions to require hosts on platforms like Airbnb to assume the risk of harm and carry liability insurance as a prerequisite to participate in the short-term rental market. Incongruously, in many jurisdictions a temporary resident who stays in a property for twenty-nine days has greater protection than a long-term tenant who resides at the same property for more than a month.

Analyzing racial bias in insurance regulations and juxtaposing statutory approaches to risk allocation, this Article posits that liability insurance coverage is properly understood as an access-to-justice issue that negatively affects the health of minority long-term renters. For long-term tenants who experience personal injury or property damage, prevailing in a case against a property owner often kickstarts the time-consuming and expensive process of attempting to collect on that judgment, and ultimately fails to provide relief. This Article argues that mandated liability coverage would align protections for long-term rental housing with those protections already in place for short-term rentals, affording permanent residents the same degree of protection as temporary visitors.

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INTRODUCTION

Richard Taylor and Mattie Johnson¹ are similar in many respects. Each are older adults of modest means who had limited options when exploring the rental housing market. Both entered into lease agreements with landlords who promised to make repairs to their properties. And each suffered injuries to their person and their property when their respective landlords failed to maintain their homes in conformity with the housing code. Each retained counsel to recover damages, and each filed lawsuits against their respective landlords claiming tort and contract violations for the injuries they suffered due to similar lack of proper maintenance. But that is where the similarities end.

Mr. Taylor’s landlord owned several multifamily dwellings and used the services of a management company. To protect his vast property portfolio, Mr. Taylor’s landlord paid for an insurance policy that included liability coverage. In contrast, Ms. Johnson’s home was owned by a “mom-and-pop” landlord who could barely afford to operate the property and did not carry liability insurance. This difference meant that Mr. Taylor’s injuries were covered by the landlord’s liability policy. Mr. Taylor ultimately received a five-figure settlement to compensate him for his injuries and for damage to his personal property. Mr.

1. Parties’ names have been changed to protect confidentiality.

Taylor's settlement allowed him to pay for medical care without going into debt, replace personal property damaged by the poor conditions, and secure safe replacement housing.

On the facts, Ms. Johnson's case was just as strong as Mr. Taylor's. Ms. Johnson's landlord repeatedly ignored written requests to address the nonfunctioning appliances, faulty electrical wiring, severely damaged toilet, and hole under the kitchen sink through which mice and insects could enter the home. And like Mr. Taylor, Ms. Johnson experienced a dramatic decline in her physical and mental health, as well as destruction of her personal property, as a consequence of the landlord's negligence and contract violations. But her landlord's upside-down mortgage made him essentially judgment-proof, and without liability insurance, there was no third party to pay out the damages. Despite her strong legal claims and the landlord's liability for failing to maintain the property in conformity with the local housing code, a court order could not make Ms. Johnson whole. On its own, a judgment is insufficient to pay for healthcare services, replace damaged property, or acquire new housing. Without the means of enforcement, a judgment is just a piece of paper.

Mr. Taylor and Ms. Johnson's stories highlight a common problem experienced by low-income tenants: the lack of any real means of enforcing their rights. Landlord liability insurance covers damages to tenants when a landlord is responsible for injury.² This may be the result of a landlord's actions (e.g., intentional destruction of a tenant's property) or inaction (e.g., failure to maintain the premises in conformity with the housing code) causing injury to occupants. Mr. Taylor's landlord was not obligated to carry landlord liability insurance and Ms. Johnson's landlord did not violate the law by operating rental housing without liability coverage. Juxtaposing these cases illustrates how decisions about insurance and risk allocation affect the ability of tenants to obtain relief after sustaining injuries caused by exposure to substandard housing conditions. Previous scholars have examined the access-to-justice crisis, exploring the implications of the dearth of attorneys who represent low- and middle-income clients and the difficulties of navigating the civil court system as a pro se litigant.³ This Article contributes to this rich literature by examining

2. See, e.g., *What Is Landlord Liability Insurance?*, ALLSTATE (Mar. 2018), <https://www.allstate.com/tr/landlord/landlord-liability-insurance.aspx> [https://perma.cc/7MJW-9BBR].

3. See generally Rebecca Sandefur, *What We Know and Need To Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016) (discussing how civil justice issues affect populations in the United States and other nations); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income Tenants*, 24 GEO. J. POVERTY L. & POL'Y 60 (2016) (discussing the relationship between eviction and negative health outcomes); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287 (arguing that calls to make courts more efficient might negatively affect the administration of justice); Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a*

the role of liability insurance in achieving access-to-justice goals. In doing so, it is the first to argue that liability insurance is an access-to-justice issue that disproportionately affects low-income, minority residents. Can there be justice if a judgment is entered but is virtually impossible to enforce?

This Article examines statutory mandates for liability insurance coverage and its consequences on the health of tenant-plaintiffs, proceeding in four parts. Part I provides an overview of insurance law, analyzing the economic incentives of risk allocation and categories of compulsory coverage. This part outlines the purpose of insurance, the protections insurance provides to covered parties, and the legal framework that gives states the power to regulate insurance markets. Part II examines risk allocation between landlords and tenants. This part scrutinizes common housing insurance policies to determine protections for tenants injured in rental housing. In doing so, Part II assesses the dangers of substandard housing conditions, the scope of legal liability for injury, and barriers to liability insurance protection after injury occurs. Part III provides a comprehensive analysis of statutory approaches to risk allocation in housing accommodations, comparing liability insurance mandates among long-term rental housing, short-term rental housing (for example, Airbnbs), and multifamily ownership accommodations. By juxtaposing trends across jurisdictions and between different types of housing accommodations, Part III identifies a statutory bias toward vacation renters and condominium residents, occupants that are disproportionately white and higher income, as compared to long-term renters who are disproportionately poor and from non-white communities. In response to these findings, Part IV proposes mandated liability coverage for landlords operating long-term rental housing and increased information sharing to protect long-term tenants from shouldering the health and financial risks of poor housing.

I. UNDERSTANDING INSURANCE

Insurance is designed to allocate risk. By purchasing insurance, a consumer is paying an insurance provider to assume a specific risk and provide the insured with redress after the occurrence of a future covered peril. Currently, only one jurisdiction requires landlords to maintain liability insurance in order to participate in the long-term rental market, which consists of rental accommodations for thirty days or more.⁴ As a result, the majority of landlord and tenant liability allocations depend on the risk tolerance, knowledge, and

Dangerous Thing?, 67 HASTINGS L.J. 1367 (2016) (discussing the potential harms of initiatives that aim to curb the need for legal representation); Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 DAEDALUS 93 (2019) (discussing the limits of legal technology in providing legal help to low-income populations); Jessica K. Steinberg, *A Theory of Civil Problem-Solving*, 93 N.Y.U. L. REV. 1579 (2018) (discussing the “develop[ment of] a problem-solving theory for the civil justice system”).

4. See *infra* Section III.A.

preferences of the individual parties to the rental agreement. This part examines the purpose of insurance, goals of insurance regulation, and types of compulsory insurance.

A. *Purpose and Protections*

Insurance is a tool to protect people from injury, damages, and loss from unforeseen future events. Essentially, by allocating risk to an insurer, insurance functions to mitigate risk to a policyholder. By entering into a contract, an individual can pay an insurance provider to assume or mitigate the risk of loss so that the individual is not completely personally financially liable.⁵ In instances where financial liability exceeds the policy limit, insurance offsets, rather than entirely eliminates, financial liability. Shifting risk to an insurer for a fee in exchange for the promise of indemnification should the specified risk occur allows individuals to protect themselves against uncertainties of future loss.⁶ There are two general categories of insurance: (1) first-party insurance, which protects against a loss that the insured herself experiences; and (2) third-party insurance, which protects the insured from liability for injury to another person or property for which the insured would be liable.⁷

State and federal policymakers share the responsibility of insurance regulation. In 1944, the Supreme Court reversed a seventy-five-year-old precedent and held that the Commerce Clause gives Congress the authority to regulate insurance transactions.⁸ This ruling ushered in a new era of congressional insurance oversight. Following the Court's decision, Congress enacted the McCarran-Ferguson Act ("McCarran-Ferguson"),⁹ which remains

5. See ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 9–12 (6th ed. 2018) ("In situations where risk cannot be managed sufficiently through preventive measures or through steps that reduce the effects of loss, and where assumption of the risk is not feasible, people usually cope with risk by transferring it to someone else An individual's attitude toward risk is influenced by several factors, including the probability of loss, the potential magnitude of the loss, and the person's ability to absorb the loss As the potential magnitude of loss increases, most people become more risk averse.")

6. *Homeward Bound Servs. Inc., v. Off. of the Ins. Comm'r*, 2006 WI App 208, ¶ 17, 296 Wis. 2d 380, 724 N.W.2d 380 (stating that "risk" in the insurance context "conveys the concept that there is uncertainty about the loss occurring").

7. KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION CASES AND MATERIALS 195 (7th ed. 2020) (discussing automobile liability coverage is an example of third-party insurance and providing other examples of first-party insurance: health, fire, disability, etc.).

8. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 543 (1944) *superseded by statute*, McCarran-Ferguson Act, ch. 20, § 2(b), 59 Stat. 33, 34 (codified as amended at 15 U.S.C. § 1012(b)), *as recognized in* *Barnette Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 29–30 (1996) (finding that "issuing a policy of insurance is not a transaction of commerce" and reversing *Paul v. Virginia*, 75 U.S. 168 (1869)).

9. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (1945)).

the bedrock of contemporary insurance regulation.¹⁰ Through McCarran-Ferguson, Congress “declare[d] that the continued regulation and taxation by the several States of the *business of insurance* is in the public interest.”¹¹ Moreover, “no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.”¹² However, “activities of insurers not within the ‘business of insurance’ are subject to the full reach of Congress’ authority under the Commerce Clause.”¹³

Because federal law specifically delegates regulation of the business of insurance to state authority,¹⁴ exact definitions vary across jurisdictions.¹⁵ Further, individual jurisdictions have latitude to enact mandates to purchase coverage and exercise control over the insurance market,¹⁶ typically to achieve important public policy objectives.¹⁷ For example, states regulate insurance with

10. For a more detailed history of the McCarran-Ferguson Act, see Spencer Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545 (1958); Linda M. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNS. J. 411 (1981).

11. McCarran-Ferguson Act, § 1, 59 Stat. at 33 (codified at 15 U.S.C. § 1011 (1945)) (emphasis added) (“[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.”).

12. § 2, 59 Stat. at 34 (codified as amended at 15 U.S.C. § 1012(2)(b) (1947)).

13. JERRY & RICHMOND, *supra* note 5, at 21 (“As a general matter . . . the existence of indemnification in the relationship, without more, is not enough to establish that ‘insurance’ is involved and that state regulation is authorized.”).

14. 15 U.S.C. § 1012(2)(a) (“[T]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”).

15. *See, e.g.*, WASH. REV. CODE § 48.01.040 (2022) (“Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.”); KY. REV. STAT. ANN. § 304.1-030 (Westlaw through laws effective Jan. 6, 2023 and the Nov. 8, 2022 election) (“‘Insurance’ is a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called ‘risks,’ or to pay or grant a specified amount of determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as a surety.”); VA. CODE ANN. § 38.2-100 (LEXIS through Ch. 22 of the 2022 Spec. Sess. I) (“‘Insurance’ means the business of transferring risk by contract wherein a person, for consideration, undertakes (i) to indemnify another person, (ii) to pay or provide a specified or ascertainable amount of money, or (iii) to provide a benefit or service upon the occurrence of a determinable risk contingency.”).

16. 15 U.S.C. § 1012(b) (“[N]o act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.”).

17. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 290–91, 134 S.E.2d 654, 659 (1964) (“The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by the negligence of financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save the harmless tortfeasor himself.”).

the goals of fair pricing for consumers, protecting insurer solvency, preventing unfair insurer practices, and making coverage available to consumers.¹⁸

B. *Compulsory Coverage*

Typically, the decision of whether to enter into an insurance contract is dependent on the risk tolerance of the parties involved. However, some insurance is compulsory. Regulations require individuals to carry insurance to achieve public policy objectives. Likewise, individuals can be compelled to obtain insurance as a condition to contract with a third party. The force of law at the federal and state level compels individuals to enter into insurance agreements.

1. Federally Mandated Insurance

The Federal Emergency Management Agency's ("FEMA") mandatory flood insurance purchase requirement exemplifies federal law compelling real property risk mitigation.¹⁹ Flood insurance was not always mandatory. Under the National Flood Insurance Act of 1968, the federal government offered affordable flood insurance for voluntary purchase.²⁰ The provision of optional, subsidized insurance came after the federal government determined it was more cost-effective to offer insurance than to pay for disaster relief.²¹ Insurance therefore, provided protection for property owners while at the same time, was economically expedient for the federal government.

However, Congress quickly found that "voluntary participation . . . yields too few subscribers."²² And so the mandatory purchase requirement was born. The Flood Disaster Protection Act of 1973²³ and the National Flood Insurance Reform Act of 1994²⁴ require property owners living in Special Flood Hazard Areas who either receive financing from a federal entity or are a federally

18. JERRY & RICHMOND, *supra* note 5, at 86. Interestingly the insurance industry holds itself out as a societal benefactor by using proceeds to "support the economy." See *A Firm Foundation: How Insurance Supports the Economy*, INS. INFO. INST., <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy> [https://perma.cc/UA39-C3VL].

19. Another well-known example of compulsory federal insurance is the insurance mandate under the Patient Protection and Affordable Care Act ("ACA"). For an overview of the individual insurance mandate, see Matthew Fielder, *The ACA's Individual Mandate in Retrospect: What Did It Do, and Where Do We Go From Here?*, 39 HEALTH AFFS. 429 (2020).

20. RICHARD J. TOBIN & CORINNE CALFEE, THE NATIONAL FLOOD INSURANCE PROGRAM'S MANDATORY PURCHASE REQUIREMENT: POLICIES, PROCESSES, AND STAKEHOLDERS 7–8 (2005).

21. *Id.*

22. *Id.* (citation omitted in original).

23. Flood Disaster Protection Act of 1973, Pub. L. No. 93-234, 87 Stat. 975 (codified in scattered sections of 12 and 42 U.S.C.).

24. National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325, tit. V, 108 Stat. 2255 (codified in scattered sections of 5, 12, 15, 18, 31, and 42 U.S.C.).

regulated institution to purchase and maintain flood insurance for the duration of the loan.²⁵ The federal government imposed the mandatory insurance requirement in recognition of the devastation—both to person and to property—wreaked by floods each year.²⁶ Through mandatory insurance, the federal government sought to acknowledge and reduce the risks, losses, and expenses that result from flooding.²⁷

Congress and FEMA have updated components of the mandatory purchase requirement to support these policy goals. For example, in an effort to increase compliance, the National Flood Insurance Reform Act of 1994 authorized federal entities to impose civil money penalties against any lender “that is found to have a pattern or practice of committing violations.”²⁸ Most recently, in October 2021, FEMA updated the insurance underwriting procedures to “equitably distribute premiums across all policyholders based on home value and a property’s unique flood risk.”²⁹

2. State-Mandated Insurance

While federal law mandates insurance coverage in limited instances, statutory insurance obligations more frequently occur at the state level. Mandatory automobile liability insurance is the quintessential example of a state-mandated insurance requirement to achieve policy objectives. Damages from automobile accidents can be costly. Repairs or replacement of vehicles and medical expenses can quickly exceed the financial resources of individual drivers. The driver responsible for the injury may not have the ability to pay for damages out of pocket. In the absence of liability insurance coverage, the responsible driver’s inability to pay causes the injured party to suffer the compounded harm of the financial consequences and the damage from the collision itself. Mandated automobile coverage acknowledges two important facts of contemporary society: (1) Most Americans use, or may even depend on, a car in their daily lives. According to the Bureau of Transportation Statistics,

25. Flood Disaster Protection Act, § 2(b)(4), 87 Stat. at 976 (codified at 42 U.S.C. § 4002 (1973)); National Flood Insurance Reform Act, § 522(a), 108 Stat. at 2257 (codified as amended at 42 U.S.C. § 4012a(f) (1994)).

26. TOBIN & CALFEE, *supra* note 20, at 1.

27. *Id.*; see also FED. EMERGENCY MGMT. AGENCY, 2018-2022 STRATEGIC PLAN 15-16 (2018) (outlining FEMA’s goal of expanding the number of properties covered by flood insurance in the United States; this is part of FEMA’s larger objective to build a “Culture of Preparedness”).

28. National Flood Insurance Reform Act, § 525(f), 108 Stat. at 2261 (codified as amended at 42 U.S.C. § 4012a(f) (1994)).

29. *Risk Rating 2.0: Equity in Action*, FED. EMERGENCY MGMT. AGENCY (Apr. 18, 2022), <https://www.fema.gov/flood-insurance/risk-rating#> [<https://perma.cc/89CU-S4W9>]; see also Jason Metz & Amy Danise, *Here’s Who Gets Hit Hardest by New FEMA Flood Insurance Rates*, FORBES ADVISOR (Oct. 1, 2021, 5:00 AM), <https://www.forbes.com/advisor/homeowners-insurance/fema-flood-insurance-rate-changes> [<https://perma.cc/TR4B-64CV>] (discussing the practical impact of FEMA’s updated procedure for calculating flood insurance rates).

Americans take 1.1 billion trips in a car each day, for nearly forty miles per person each day.³⁰ Eighty-five percent of Americans use a car every day to commute to work.³¹ And (2) accidents happen. They happen frequently, and they are expensive. The United States has a higher motor vehicle fatality rate and a higher percentage of risk factors for collisions (e.g., not using seat belts, speeding, driving while intoxicated) than other high-income countries.³² According to the Centers for Disease Control and Prevention, “more than 32,000 people are killed and two million are injured each year from” automobile accidents in the United States,³³ with an estimated total economic impact exceeding seventy-five billion dollars per year.³⁴

Given the prevalence of, and expenses resulting from, automobile collisions, legislatures are motivated to require drivers to carry liability insurance. States regulate the use of automobiles to ensure that “operators of vehicles . . . maintain a specified amount of liability insurance or . . . demonstrate financial responsibility if involved in an accident, and many states require each owner of a vehicle to purchase minimum levels of first-party personal injury protection.”³⁵ To fulfill this policy goal, forty-eight states and the District of Columbia require drivers to have liability insurance to operate a motor vehicle.³⁶ Only New Hampshire has no form of mandated liability

30. *National Household Travel Survey Daily Travel Quick Facts*, BUREAU TRANSP. STAT. (May 31, 2017), <https://www.bts.gov/statistical-products/surveys/national-household-travel-survey-daily-travel-quick-facts> [https://perma.cc/9AHG-R8GF].

31. Adie Tomer, *America's Commuting Choices: 5 Major Takeaways from 2016 Census Data*, BROOKINGS (Oct. 3, 2017), <https://www.brookings.edu/blog/the-avenue/2017/10/03/americans-commuting-choices-5-major-takeaways-from-2016-census-data/#:~:text=Over%2076%20percent%20of%20Americans,hitting%20American%20streets%20every%20day> [https://perma.cc/USC3-2U9N] (noting that prior to the pandemic, before many in the American workforce began working from home, “[o]ver 76 percent of Americans [drove] alone to work every day, while another 9 percent carpool[ed] with someone else . . . [and] at least 115 million cars and trucks hit[] American streets every day”).

32. See *Motor Vehicle Crash Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 18, 2016), <https://www.cdc.gov/vitalsigns/motor-vehicle-safety/index.html> [https://perma.cc/DCU7-P27X] [hereinafter *Motor Vehicle Crash Deaths*] (noting that “in 2013, the US crash death rate in the United States was more than twice the average of other high-income countries”).

33. *Id.*

34. *Cost Data and Prevention Policies*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2, 2020), <https://www.cdc.gov/transportationsafety/costs/index.html> [https://perma.cc/W3RQ-Y2LB].

35. JERRY & RICHMOND, *supra* note 5, at 61 (“The free market has proved unable to provide what our society deems minimally necessary, and our society has resorted to government regulation.”); see also, e.g., ROBERT H. JOOST, *AUTOMOBILE INSURANCE AND NO-FAULT LAW* 2D § 4:30 (2002) (discussing the evolution of insurance requirements in South Carolina); U.S. DEPT. OF TRANSP., *COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 13–25* (1985) (providing an overview of compensation for auto-accident victims and the emergence of no-fault personal injury insurance).

36. See *Background on: Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Mar. 25, 2021), <https://www.iii.org/article/background-on-compulsory-auto-uninsured-motorists> [https://perma.cc/V3KZ-BC7R] [hereinafter *Compulsory Auto/Uninsured Motorists*]; see, e.g., ALA.

insurance,³⁷ while Virginia gives drivers the option of either acquiring insurance or paying a five-hundred-dollar uninsured-motor-vehicle fee to register their vehicle.³⁸

Mandated liability insurance provides a mechanism for injured parties to be made whole after experiencing a car accident. As the Fourth Circuit noted, “Financial responsibility statutes are not simply designed to safeguard insurance companies, but serve the more general societal purpose of ensuring that those responsible for highway accidents pay the resulting losses without the necessity for cumbersome enforcement proceedings.”³⁹ The interest in safeguarding society in this way is heightened in light of the frequency and expense of automobile accidents.

While the law requires drivers to carry insurance, by and large, states do not operate their own automobile insurance marketplaces. Instead, the insurance requirement pushes drivers to enter into contractual agreements with private insurance companies. These agreements are controlled by statutes and regulatory agencies that regulate pricing, coverage, and availability. However, in limited circumstances some states provide low-cost automobile policies “for drivers who cannot afford regularly priced auto policies or who have little or no assets to protect.”⁴⁰ In New Jersey, for example, the Special Automobile Insurance Policy provides limited coverage to drivers who are enrolled in Medicaid with hospitalization.⁴¹ Policies like this are designed to provide

CODE § 32-7A-6(a) (Westlaw through the 2022 Reg. and First Spec. Sesss.) (“Every operator of a motor vehicle . . . shall carry within the vehicle evidence of insurance. The evidence shall be legible and sufficient to demonstrate that the motor vehicle currently is covered by an Alabama liability insurance policy . . .”).

37. See *Compulsory Auto/Uninsured Motorists*, *supra* note 36 (noting that in lieu of a compulsory insurance law, New Hampshire “requires that drivers demonstrate that they can provide sufficient funds in the event of an ‘at-fault’ accident”).

38. VA. MOTOR VEHICLE CODE § 46.2-706; see also *Insurance Requirements*, VA. DEP’T MOTOR VEHICLES (2022), <https://www.dmv.virginia.gov/vehicles/#insurance.asp> [<https://perma.cc/NN6D-PYY9>] (“The . . . fee, which is paid to the Department of Motor Vehicles, . . . does not provide any insurance; it only allows [a driver] to drive an uninsured vehicle at [their] own risk.”).

39. *Tomai-Minogue v. State Farm Mut. Auto. Ins. Co.*, 770 F.2d 1228, 1235 (4th Cir. 1985).

40. *Compulsory Auto/Uninsured Motorists*, *supra* note 36.

41. New Jersey’s Special Automobile Insurance uses Medicaid eligibility criteria to ensure that this car insurance policy is only available to individuals who are very low-income and without resources. See *Special Automobile Insurance Policy (SAIP)*, STATE N.J. DEP’T BANKING & INS., https://www.state.nj.us/dobi/division_consumers/insurance/saip.htm [<https://perma.cc/Y4TM-KUT8>] [hereinafter *Special Automobile Insurance Policy*]; see also *NJ Medicaid*, STATE N.J. DEP’T HUM. SERVS., <https://www.state.nj.us/humanservices/dmahs/clients/medicaid> [<https://perma.cc/ED42-EPC9>] (“Medicaid provides health insurance to parents/caretakers and dependent children, pregnant women, and people who are aged, blind or disabled. These programs pay for hospital services, doctor visits, prescriptions, nursing home care and other healthcare needs, depending on what program a person is eligible for To be eligible for New Jersey Medicaid, a person must . . . meet specific standards for financial income and resources.”).

limited coverage to drivers who would otherwise be uninsured,⁴² furthering the goal of protecting people from the financial and health consequences of automobile accidents.

3. Privately Mandated Coverage

In the absence of federal and state requirements concerning insurance and risk distribution, private parties may require insurance as a prerequisite to enter into a contract. Mortgage insurance, title insurance, and homeowners insurance illustrate this concept. If an individual homebuyer is financing the purchase of a home, a bank or mortgage company will typically require the buyer to obtain mortgage insurance, title insurance, and homeowners insurance as a condition of the loan.⁴³ Mortgage insurance is purchased by the borrower to protect the financial position of the lender.⁴⁴ If the borrower defaults on the loan, the insurance pays out the lender for any resulting financial loss that remains after foreclosure.⁴⁵

Lenders may require borrowers to secure mortgage insurance as a condition of the loan to protect their interest in the property.⁴⁶ When a lender and a homebuyer enter into a mortgage agreement, the property itself is typically used to secure the loan.⁴⁷ Securing the loan gives the lender an interest in the property, protecting the lender's financial position in the event that the

42. *Special Automobile Insurance Policy*, *supra* note 41; *see also* CAL. INS. CODE §§ 11620–11627 (Westlaw through urgency legislation through Ch. 1 of 2023 Reg. Sess.) (establishing the California Insurance Assigned Risk Plan, requiring automobile insurers to take their “equitable apportionment” of applicants who would not otherwise be able to purchase private insurance).

43. *Can I Buy a Home Without Homeowners Insurance?*, INS. INFO. INST., <https://www.iii.org/article/can-i-own-home-without-homeowners-insurance> [<https://perma.cc/AA65-7ESZ>] (stating that a lender may also require a borrower to secure insurance for specific types of threats to the home, such as flood insurance or earthquake coverage).

44. *See* David Reiss, *The Federal Housing Administration and African-American Homeownership*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. 123, 124 (2017).

45. *See id.*; *see also* *Mortgage Insurance v. Homeowners Insurance*, BANKRATE.COM (Sept. 19, 2022), <https://www.bankrate.com/insurance/homeowners-insurance/mortgage-insurance-vs-homeowners-insurance/> [<https://perma.cc/Y6PH-U9VV>] (explaining that some mortgage loans require mortgage insurance for the life of the loan, while others may allow the borrower to cancel the policy after a percentage of the loan has been paid).

46. If a borrower makes a down payment of less than twenty percent of the purchase price on a conventional loan (that is, a loan not part of a governmental program), lenders will typically require Private Mortgage Insurance (“PMI”) as an additional degree of protection. *See* *What Is Private Mortgage Insurance?*, CONSUMER FIN. PROT. BUREAU (Sept. 4, 2022), <https://www.consumerfinance.gov/ask-cfpb/what-is-private-mortgage-insurance-en-122/> [<https://perma.cc/NVH8-73SF>].

47. *See* GRANT S. NELSON, DALE A. WHITMAN, ANN M. BURKHART & R. WILSON FREYERMUTH, *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT CASES AND MATERIALS* 117 (9th ed. 2015) (“Real estate usually is considered to be excellent security for a loan. Consequently, most financing that is extended to enable the purchase of realty is secured by that same realty, commonly by means of an instrument known as a mortgage (or, where permitted by state statute, a deed of trust).”).

borrower defaults and stops making mortgage payments.⁴⁸ If that occurs, the lender can exercise their rights as a lienholder on the property, forcing a sale of the property and using proceeds from the sale to reimburse the lender for the loan.⁴⁹ Likewise, lenders will require a borrower to obtain title insurance to protect parties against defects in the property's title.⁵⁰

Additionally, many mortgage agreements require a borrower to obtain homeowners insurance. Whereas mortgage insurance reallocates risks related to nonpayment of the loan, homeowners insurance is designed to cover damage to the property itself in the event of a future disaster, like a flood, fire, or storm.⁵¹ Homeowners insurance is another form of protection for the lender's financial interest in the property.⁵² If the home is damaged or destroyed, insurance will repair or replace the property, thereby ensuring that the lender's collateral is preserved for the life of the loan.⁵³ Some landlords may be required to carry liability insurance as a condition to obtain financing. Thirty-seven percent of rental housing is owned by pass-through entities,⁵⁴ many of which receive financing from the Federal Home Loan Mortgage Corporation ("Freddie Mac"). Freddie Mac operates the secondary mortgage market in the United States, purchasing loans from lenders and pooling mortgages into securities.⁵⁵ Many large multifamily housing accommodations are financed through Freddie Mac's standard documents. The Multifamily Loan and Security Agreement provided by Freddie Mac's multifamily division requires borrowers—those that will operate multifamily rental housing—to maintain several types of insurance

48. *See id.* at 117 (describing the rights of the mortgagee when the lender defaults).

49. *Id.* at 117.

50. *See What Is Lender's Title Insurance?*, CONSUMER FIN. PROT. BUREAU (Sept. 4, 2022), <https://www.consumerfinance.gov/ask-cfpb/what-is-lenders-title-insurance-en-163/> [<https://perma.cc/2LHX-QQWL>]; *see also* *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 574 (E.D. Pa. 1974) ("It is a matter of common knowledge and experience that in the usual situation, title insurance is indispensable to the occurrence of the real estate sale: a seller would be unable to sell his property at its reasonable value if no title company was willing to insure title.").

51. *See Mortgage Insurance v. Homeowners Insurance*, *supra* note 45.

52. *Can I Buy a Home Without Homeowners Insurance?*, *supra* note 43.

53. *See id.* Likewise, building associations may require individual homeowners to carry condominium or co-operative owners insurance to protect against actions of an individual homeowner that affect others. *Id.* For example, if a condominium owner's negligence starts a fire in his own home, it could spread and damage other units, as well as building-wide systems. *See id.*

54. Scholastica (Gay) Cororaton, *Landlord Statistics from the 2018 Rental Housing Finance Survey*, NAT'L ASS'N REALTORS (Sept. 15, 2020), <https://www.nar.realtor/blogs/economists-outlook/landlord-statistics-from-the-2018-rental-housing-finance-survey> [<https://perma.cc/HLT9-84K3>] (explaining that the greater the number of units, the greater the number are owned by LLCs, LPs, or LLPs).

55. *About Freddie Mac*, FREDDIE MAC, <https://www.freddiemac.com/about> [<https://perma.cc/CW8U-H4ZH>].

on the property, including commercial general liability insurance.⁵⁶ This liability insurance is specific to “legal liability claims for personal and bodily injury, property damage, and contractual liability.”⁵⁷ Freddie Mac requires insurance of one million dollars per occurrence and only two million dollars in the general aggregate.⁵⁸ However, for a large multifamily accommodation with system-wide substandard conditions that affect tenants throughout the property (e.g., infestation, plumbing, electrical, structural elements, etc.), a two million dollar aggregate limit is insufficient to cover the scope of injury.

This section illustrates how lending institutions and homeowners leverage insurance to protect against risk of future loss. As the next part discusses, however, because many landlords—particularly those who do not receive Freddie Mac financing—are disincentivized from carrying liability coverage, tenants are often unable to obtain redress after experiencing injury in rental housing.

II. SHIFTING RISK BETWEEN LANDLORDS AND TENANTS

Renters comprise one-third of American households,⁵⁹ with low-income households and non-white families disproportionately represented in the long-term tenant population.⁶⁰ A lease agreement governs the relationship between landlords and tenants. This contract—whether written or oral⁶¹—outlines the rights and responsibilities of each party. To outline the role of liability insurance, this part discusses (A) the risk of injury and property damage posed by substandard housing conditions, (B) legal recourse for such injuries and damage, and (C) types of housing insurance, including their coverage limitations as well as barriers to acquisition.

56. See FREDDIE MAC MULTIFAMILY, MULTIFAMILY LOAN AGREEMENT § 6.10, at 37 (2023), <https://mf.freddie.com/lenders/legal/loan-documents> [<https://perma.cc/A92P-59F6> (staff-uploaded archive)] (click on the checkbox next to “Loan Agreements” and then click on the hyperlinked “Loan Agreement” with the date of February 14, 2023).

57. *Id.* § 6.10(c), at 37–38.

58. *Id.*

59. Katherine Schaeffer, *Key Facts About Housing Affordability in the U.S.*, PEW RSCH. CTR. (Mar. 23, 2022), <https://www.pewresearch.org/fact-tank/2022/03/23/key-facts-about-housing-affordability-in-the-u-s/> [<https://perma.cc/P9YF-RR4Q>]; see *Selected Housing Characteristics*, U.S. CENSUS BUREAU (2021), <https://data.census.gov/cedsci/table?q=DP04&tid=ACSDP1Y2021.DP04> (providing that of the 127,544,730 occupied housing in the United States, 44,147,742 are renter-occupied, or approximately thirty-five percent).

60. See Schaeffer, *supra* note 59.

61. A rental agreement does not need to be in writing in order to be enforceable or for the tenant to enjoy protections under the law, such as due process in eviction proceedings, conformity with applicable housing codes, etc. See, e.g., CHI., ILL., RESIDENTIAL LANDLORD & TENANT ORDINANCE § 5-12-170 (2022) (recognizing the validity of oral lease agreements and the rights that attach to such leases).

A. *Dangers of Substandard Housing Conditions*

Research consistently demonstrates that safe and habitable housing is a foundation of good health.⁶² Yet millions of families live in dire, substandard housing conditions that threaten their health and well-being, unnecessarily increasing health treatment and expenses.⁶³ These harms fall disproportionately on low-income, minority tenants,⁶⁴ exacerbating existing health disparities.⁶⁵ Moreover, rental housing stock is aging, and with that comes increased need for maintenance. Half of all rental housing stock in the United States was constructed prior to 1980, with nearly one-fifth constructed prior to 1950.⁶⁶ This longevity is reflected in the median age of rental housing units. In 1987, the average age of renter-occupied housing was twenty-five years old.⁶⁷ By 2017, the median building age had jumped to forty-three years old.⁶⁸

The level of maintenance of rental housing correlates with its ownership structure. The last twenty years have seen a decline in the percentage of rental units owned and operated by individuals.⁶⁹ While individuals own about half of all rental units, that ownership is concentrated among single family rentals and multifamily dwellings of four units or less.⁷⁰ Pass-through entities (e.g., limited liability partnerships, limited partnerships, and limited liability companies) are more likely to own large—five or more—multifamily dwellings.⁷¹ Whether a property is owned by an individual investor or pass-through entity correlates with the level, and cost, of maintenance required on the property. Single family homes and small multifamily dwellings are more expensive to maintain per unit,

62. Allison Bovell-Ammon, Diane Yentel, Mike Koprowski, Chantelle Wilkinson & Megan Sandel, *Housing Is Health: A Renewed Call for Federal Housing Investments in Affordable Housing for Families with Children*, 21 ACAD. PEDIATRICS 19, 19 (2021).

63. *Id.*

64. See, e.g., Marisa Peñaloza, *Housing Conditions in This Low-Income Neighborhood Pushed Tenants To Sue the Landlord*, NPR (July 22, 2021, 8:16 AM), <https://www.npr.org/2021/07/22/1018018025/housing-low-income-neighborhood-tenants-landlord-lawsuit> [<https://perma.cc/LH5H-J968>].

65. See generally Amaya Taylor, *The Connection Between Housing, Health, and Racial Equity*, URB. INST. (May 12, 2021), <https://housingmatters.urban.org/articles/connection-between-housing-health-and-racial-equity> [<https://perma.cc/XK3S-XRR4>] (discussing the connection between structural racism, access to quality housing, and health disparities).

66. See *Selected Housing Characteristics*, *supra* note 59 (describing that out of the 142,148,050 total housing units in the United States, 71,760,059 (50.48%) were constructed prior to 1980; 23,376,388 (16.44%) were constructed prior to 1950).

67. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *AMERICA'S RENTAL HOUSING 2020*, at 18 (2020) [hereinafter JOINT CTR. FOR HOUS. STUD., *RENTAL HOUSING 2020*], https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf [<https://perma.cc/P2AA-74M7>].

68. *Id.*

69. See *id.* at 4.

70. See *id.* at 17–18.

71. See *id.*

as there are fewer units to absorb the cost of repairs.⁷² Indeed, according to the Rental Housing Finance Survey by the U.S. Census, “two-thirds of pass-through owners reported making capital improvements to their rental housing, compared with just half of individual owners.”⁷³ Aging rental housing stock and inadequate investment in property maintenance have “left a substantial backlog of needed repairs.”⁷⁴ The Federal Reserve Bank of Philadelphia found there is more than forty-five billion dollars in outstanding repairs to rental properties across the country, affecting more than forty percent of the rental housing stock.⁷⁵ Harvard’s Joint Center for Housing estimates that these figures “are conservative in that they do not account for repair needs that are largely unobservable to occupants or inadequacies in multifamily properties that affect multiple units.”⁷⁶ Moreover, older housing stock does not benefit from evolving practices in construction that impact the health of occupants. For example, housing constructed after 1978 does not contain lead paint.⁷⁷ Older homes therefore require more repairs because they contain outdated, unhealthy construction practices in addition to the wear and tear that naturally occurs over time.

Substandard housing conditions and outstanding repairs are a danger to the health and safety of occupants. Injuries at home are a leading cause of all unintentional injuries in the United States.⁷⁸ One-third of all unintentional

72. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA’S RENTAL HOUSING 2022, at 20 (2022) [hereinafter JOINT CTR. FOR HOUS. STUD., RENTAL HOUSING 2022], https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2022.pdf [<https://perma.cc/GRN6-NEQV>].

73. JOINT CTR. FOR HOUS. STUD., RENTAL HOUSING 2020, *supra* note 67, at 18 (“31 percent of individual owners that made improvements to their rental properties in 2014 invest at least \$3,000 per unit, compared with just 14 percent of passthrough property owners.”).

74. *Id.*

75. See EILEEN DIVRINGI, ELIZA WALLACE, KEITH WARDRIP & ELIZABETH NASH, FED. RESRV. BANK OF PHILA., MEASURING AND UNDERSTANDING HOME REPAIR COSTS: A NATIONAL TYPOLOGY OF HOUSEHOLDS 7 (2019), <https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/measuring-and-understanding-home-repair-costs/0919-home-repair-costs-national-report.pdf> [<https://perma.cc/C499-G8XL>] (explaining that nearly 17.4 million renter-occupied units are in need of repair, with each requiring an average of \$2,600 in repairs).

76. JOINT CTR. FOR HOUS. STUD., RENTAL HOUSING 2020, *supra* note 67, at 18 (noting that these estimates also do not take accessibility issues into account).

77. See Emily A. Benfer, Emily Coffey, Allyson E. Gold, Mona Hanna-Attisha, Bruce Lanphear, Hellen Y. Li, Ruth Ann Norton, David Rosner & Kate Walz, *Health Justice Strategies To Eradicate Lead Poisoning: An Urgent Call to Action To Safeguard Future Generations*, 19 YALE J. HEALTH POL’Y L. & ETHICS 142, 150 (2020) (citing CPSC Announces Final Ban on Lead-Contaminated Paint, U.S. CONSUMER PROD. SAFETY COMM’N (1977), <https://www.cpsc.gov/Recalls/1977/cpsc-announces-final-ban-on-lead-containing-paint> [<https://perma.cc/8BKL-AA27>]) [hereinafter Benfer et al., *Health Justice Strategies*] (explaining that lead-based paint was banned nationwide in 1978).

78. See Wendy Shields, Eileen McDonald, Shannon Frattaroli, David Bishai, Xia Ma & Andrea Gielen, *Structural Housing Elements Associated with Home Injuries in Children*, 22 INJ. PREVENTION 105, 105 (2015).

injuries occur in the home, and it is the second most common location of fatal injuries.⁷⁹ The National Safety Council estimated that in 2008, “home-related unintentional injury deaths comprised 46% percent of all injury-related deaths,” second only to motor vehicle related deaths.⁸⁰ The number of home-based injury-related deaths has increased significantly over the last twenty years; the rate of these deaths was 250% greater in 2020 than it was in 1999.⁸¹ Furthermore, the number of disabling injuries in the home are greater than those from the workplace and motor vehicle accidents *combined*.⁸² Home injuries disproportionately affect children,⁸³ with rates varying by race; Black children are more than 1.5 times more likely to suffer fatalities from home injury than white children.⁸⁴ This is partly due to the fact that, as a result of a century of systemic racism in housing policies and chronic disinvestment from minority

79. *Id.*; see also Carol W. Runyan, Carri Casteel, David Perkis, Carla Black, Stephen W. Marshall, Renee M. Johnson, Tamera Coyne-Beasley, Anna E. Waller & Shankar Viswanathan, *Unintentional Injuries in the Home in the United States*, 28 AM. J. PREVENTATIVE MED. 73, 74 tbl.2 (2005) (explaining that between 1992 and 1999, home injuries constituted twenty percent of all unintentional injuries in the United States, and that is second only to transportation related injuries, which comprise forty-nine percent of all unintentional injuries).

80. PETER ASHLEY, J. KOFI BERKO, JR., SUSAN MARIE VIET, ALEXA FRASER, JACKSON ANDERSON, JR., JOHN R. MENKEDICK, JESSICA SANFORD & MAUREEN A. WOOTON, U.S. DEP'T OF HOUS. & URB. DEV., HEALTHY HOMES ISSUES: INJURY HAZARDS 1 (2012), https://www.hud.gov/sites/dfiles/HH/documents/HUD_Injury_Hazards_Paper_7-6-12.pdf [<https://perma.cc/BYG9-E34H>] (“Residential injuries are a significant problem, resulting in thousands of deaths and millions of hospital emergency department visits each year.”); see also *Preventable Injuries and Injury-Related Deaths in Homes and Communities, 2020*, NAT'L SAFETY COUNCIL INJ. FACTS (2022) [hereinafter NAT'L SAFETY COUNCIL INJ. FACTS 2020], <https://injuryfacts.nsc.org/home-and-community/home-and-community-overview/introduction> [<https://perma.cc/H543-8CBP>] (“In 2020, an estimated 156,300 preventable injury-related deaths occurred in homes and communities, or about 78% of all preventable injury related deaths that year. The number of deaths was up 18.9% from the 2019 total . . . [a]n additional 46,800,000 people suffered nonfatal medically consulted injuries.”).

81. See NAT'L SAFETY COUNCIL INJ. FACTS 2020, *supra* note 80. These increases have “erased the progress [in home safety] made over the last century.” *Id.* They are largely attributable to increases in unintentional poisonings and falls. *Id.* However, the data do not specify the percentage attributed to substandard maintenance. See *id.*

82. ASHLEY ET AL., *supra* note 80, at 3; see also Shields et al., *supra* note 78, at 106 (describing the twelve housing elements associated with the highest number of emergency department visits or hospitalizations: floor, stair, door, ceiling, bathtub, cabinet, window, nail, carpet, porch, fence, counter). *Id.* However, these statistics speak to home injuries broadly, and do not indicate the percentage of such injuries traceable to substandard conditions. *Id.*

83. ASHLEY ET AL., *supra* note 80, at 1 (explaining that “[t]he death rate due to residential injury is highest in children younger than 1 year and among 1 to 4 year olds compared with older children” and “[d]ata from the National Hospital Ambulatory Medical Care Survey show that injury of U.S. children in the home is the cause of 4.01 million emergency department visits and more than 70,000 hospitalizations each year,” but “[t]he overall death rate due to residential injury is highest among people 75 years and older”); see also Shields et al., *supra* note 78, at 105 (“[A]lmost 2100 children younger than 15 years of age die every year from injuries in and around the home; for every death, there are almost 1600 non-fatal home injuries.”).

84. ASHLEY ET AL., *supra* note 80, at 1.

neighborhoods,⁸⁵ minority children are more likely to live in homes containing substandard conditions.⁸⁶ For example, a recent investigation of electrical systems in Milwaukee rental housing found that suspected electrical fires are five times more likely in a predominantly Black zip code, compared to the rest of the city.⁸⁷

Compounding these harms, studies of home injuries do not typically include consequences of other common environmental hazards like pest and mold infestation, inadequate heat and cooling, or the presence of lead paint. These conditions cause a multitude of negative health outcomes for occupants, including respiratory distress,⁸⁸ lead poisoning,⁸⁹ and mental health impairments, among other disabling conditions.⁹⁰ These conditions disproportionately affect non-white children.⁹¹

85. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (discussing the history of racial discrimination, its implications, and tracing its continuation to present day).

86. Bovell-Ammon et al., *supra* note 62, at 19 (“Families with extremely low incomes, particularly Black and Latinx families, are disproportionately impacted by adverse housing circumstances further exacerbating health disparities. These disparities are rooted in a long history of discriminatory policies and practices that shape the current housing landscape in the United States.”).

87. See John Diedrich, Raquel Rutledge & Tamia Fowlkes, *Frayed Wires. Defective Lights. Fire Traps. What We Found Doing Electrical Inspections in One Milwaukee Neighborhood*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/in-depth/news/investigations/reports/2021/11/03/electrical-inspections-milwaukee-rental-homes-reveal-dangerous-risks/8272467002> [<https://perma.cc/AA99-YMF4>] (last updated Jan. 7, 2022, 11:24 AM) (reporting that 53206 is Milwaukee’s lowest income zip code and ninety-five percent of its residents are Black).

88. See COMM. ON THE ASSESSMENT OF ASTHMA & INDOOR AIR, DIV. OF HEALTH PROMOTION & DISEASE PREVENTION & INST. OF MED., *CLEARING THE AIR: ASTHMA AND INDOOR AIR EXPOSURES* 9 (2000), https://www.ncbi.nlm.nih.gov/books/NBK224477/pdf/Bookshelf_NBK224477.pdf [<https://perma.cc/DQV7-DGUK>]; Helen K. Hughes, Elizabeth C. Matsui, Megan M. Tschudv, Craig E. Pollack & Corinne A. Keet, *Pediatric Asthma Health Disparities: Race, Hardship, Housing, and Asthma in a National Survey*, 17 *ACAD. PEDIATRICS* 127, 131 (2017) (“Households with poor quality housing had a 50% higher odds of an asthma-related ED visit in the past year.”).

89. Benfer et al., *Health Justice Strategies*, *supra* note 77, at 149 (“Over thirty-seven million homes (34.9% of all housing units) in the United States have lead-based paint that will become a lead hazard if not closely monitored and maintained, and, of these, twenty-three million homes contain active lead hazards.”); *Childhood Lead Poisoning Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 30, 2022), <https://www.cdc.gov/nceh/lead/default.htm> [<https://perma.cc/E3FL-SHRN>] (discussing the negative health consequences of lead exposure); *Health Effects of Lead Exposure*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 2, 2022), <https://www.cdc.gov/nceh/lead/prevention/health-effects.htm> [<https://perma.cc/CP3T-25VA>] (discussing the negative health consequences of lead exposure).

90. See Emily A. Benfer & Allyson E. Gold, *There’s No Place Like Home: Reshaping Community Interventions and Policies To Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 *HARV. L. & POL’Y REV.* S1, S3 (2017), <https://harvardlpr.com/wp-content/uploads/sites/20/2013/11/BenferGold.pdf> [<https://perma.cc/K2ML-DWLS>] [hereinafter Benfer & Gold, *No Place Like Home*]; Gold, *No Home for Justice*, *supra* note 3, at 70–71.

91. See Gold, *No Home for Justice*, *supra* note 3, at 72.

In addition to direct physical harms to the person, injuries result in a ripple effect of economic consequences. The National Safety Council estimates that in 2020, preventable injuries and injury related deaths in homes had a combined economic impact of \$396.9 billion.⁹² Likewise, lead poisoning costs an estimated eighty-four billion dollars to the country's healthcare, education, and criminal justice systems each year,⁹³ while the impact of asthma on the U.S. economy is "more than \$80 billion annually in medical expenses, days missed from work and school, and deaths."⁹⁴

Figure 1 demonstrates the long-term consequences of outstanding housing repairs.⁹⁵ If left unaddressed, a housing problem, such as water leakage, can lead to hazards like mold growth and structural instability.⁹⁶ These hazards in turn may cause negative health consequences, such as asthma, learning disabilities, and physical injury, among others.⁹⁷ Negative health outcomes produce costs both to the individual as well as to society.⁹⁸ While Figure 1 outlines long-term consequences of water leaks, all substandard housing conditions have the potential to compound over time. If unaddressed, these issues may result in a lifetime of health problems and economic consequences.⁹⁹

92. *Costs: Societal Costs*, NAT'L SAFETY COUNCIL INJ. FACTS, <https://injuryfacts.nsc.org/all-injuries/costs/societal-costs/> [<https://perma.cc/TQK3-UYK4>]; see also ASHLEY ET AL., *supra* note 80, at 3 (describing how economic consequences include wage and productivity losses, medical expenses, home and public insurance administrative expenses, and employer costs).

93. See HEALTH IMPACT PROJECT, ROBERT WOOD JOHNSON FOUND. & THE PEW CHARITABLE TRS., 10 POLICIES TO PREVENT AND RESPOND TO CHILDHOOD LEAD EXPOSURE 2–3 (2017), https://altarum.org/sites/default/files/uploaded-publication-files/HIP_Childhood_Lead_Poisoning_report.pdf [<https://perma.cc/N55Y-XXL4>] (discussing how future benefits of preventing all lead exposure could reach eighty-four billion dollars).

94. Allison Inzerro, *CDC Study Puts Economic Burden of Asthma at More Than \$80 Billion per Year*, AJMC (Jan. 12, 2018), <https://www.ajmc.com/view/cdc-study-puts-economic-burden-of-asthma-at-more-than-80-billion-per-year> [<https://perma.cc/5XSD-SQXC>]; see also Tursynbek Nurmagambetov, Robin Kuwahara & Paul Garbe, *The Economic Burden of Asthma in the United States, 2008–2013*, 15 ANNALS AM. THORACIC SOC'Y 348, 348 (2018) ("All combined, the total cost of asthma in the United States based on the pooled sample amounted to \$81.9 billion in 2013.").

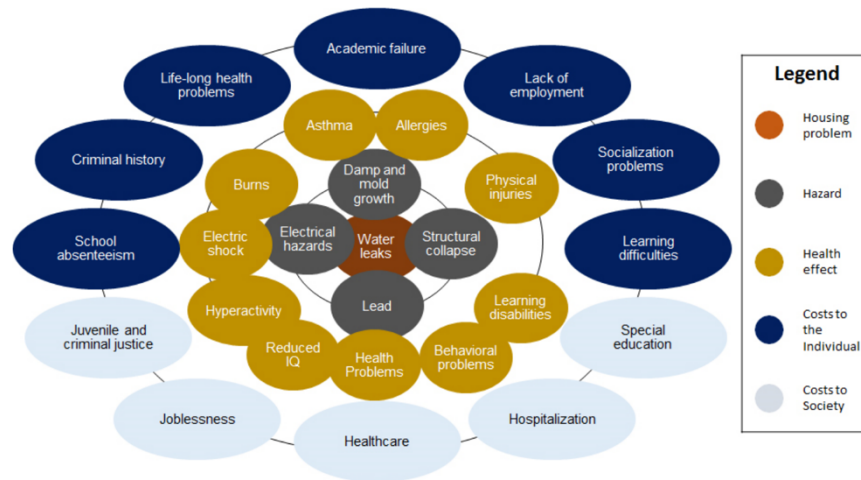
95. U.S. DEP'T OF HOUS. & URB. DEV., EVERYONE DESERVES A SAFE AND HEALTHY HOME: A STAKEHOLDER GUIDE FOR PROTECTING THE HEALTH OF CHILDREN AND FAMILIES 4 (2016), https://www.hud.gov/sites/documents/STAKEHOLDER_EDSHH.PDF [<https://perma.cc/G3YE-EAZQ>].

96. *Id.*

97. *Id.*

98. See *id.*

99. See *id.* (discussing how "a single unhealthy housing problem can lead to multiple health effects and economic impacts").

Figure 1: Long-Term Consequences of Water Leaks¹⁰⁰

Given the state of the nation’s rental housing stock, it is perhaps unsurprising that these negative health consequences are more prevalent among renters than homeowners. Rental units are more likely to be in poorer quality than those that are owner-occupied.¹⁰¹ Moreover, because minority households are overrepresented among the rental population,¹⁰² the prevalence of substandard housing conditions among rental stock exacerbates health disparities.¹⁰³ By contrast, homeownership is correlated with improved resident health.¹⁰⁴ For example, homeownership is “strongly associated with decreased rates of asthma diagnosis and [emergency room] visits.”¹⁰⁵

The fact that substandard and life-threatening housing conditions exist in so much of the nation’s rental housing stock is a consequence of housing unaffordability. The number of cost-burdened renters has increased in recent years.¹⁰⁶ Households are cost burdened when at least thirty percent of their income is used to pay the rent and utilities.¹⁰⁷ These burdens are pervasive among low-income renters and are increasing even among more affluent

100. *Id.* The image in Figure 1 was originally printed in *id.* at 4.

101. Hughes et al., *supra* note 88, at 130 (“Units that were rented rather than owned were more likely to be of poor quality.”).

102. See *Racial Disparities Among Extremely Low-Income Renters*, NAT’L LOW INCOME HOUS. COAL. (Apr. 15, 2019), <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters> [<https://perma.cc/9CW2-3ZFE>].

103. See Hughes et al., *supra* note 88, at 133.

104. *Id.*

105. *Id.*

106. See JOINT CTR. FOR HOUS. STUD., *RENTAL HOUSING 2020*, *supra* note 67, at 26.

107. See *id.*

renters.¹⁰⁸ Minority renters are more likely to be cost burdened than white renters.¹⁰⁹ The increasing cost burdens on renters are exacerbated by the shrinking supply of affordable housing—upgrades, removals, and rising rents fuel the dearth of low-cost housing units, which itself leads to increased numbers of cost-burdened households.¹¹⁰ Lack of affordable housing causes renters to be increasingly willing to accept housing in varying levels of disrepair in order to have a roof over their heads.¹¹¹ In these instances, renters compromise on habitability for basic shelter.¹¹² This tradeoff is also common among tenants who have previously experienced eviction.¹¹³ Eviction causes a downward move in housing quality.¹¹⁴ Once someone has the “Scarlet E” of eviction on their record,¹¹⁵ it is increasingly difficult for that tenant to rent safe, decent, and affordable housing, leading to a cascade of risks to person and

108. *See id.*

108. *See id.*

109. *See id.* at 29 (“Black renters had the highest burden rate in 2018, at 55 percent, followed closely by Hispanic renters at 53 percent, and then by Asian/other renters at 45 percent. In contrast, the cost-burdened share of white renter households was 43 percent . . . Even controlling for income, minority renter households have higher cost-burdened rates than white renters.”).

110. *See* ELIZABETH LA JEUNESSE, ALEXANDER HERMANN, DANIEL MCCUE & JONATHAN SPADER, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., DOCUMENTING THE LONG-RUN DECLINE IN LOW-COST RENTAL UNITS IN THE US BY STATE 13 (2019), https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_loss_of_low_cost_rental_housing_la_jeunesse_2019.pdf [<https://perma.cc/XR2F-3X75>].

111. The lack of affordable housing also places pressure on housing authorities to give landlords a pass on housing quality standard (“HQS”) violations. Every failure potentially removes a unit from the already tight housing market, one that is even tighter among landlords that are willing to accept vouchers and other public housing subsidies. For an overview of a Department of Housing and Urban Development inspection checklist, see U.S. DEP’T OF HOUS. & URB. DEV., FORM HUD-52580, INSPECTION CHECKLIST, <https://www.hud.gov/sites/dfiles/OCHCO/documents/52580.PDF> [<https://perma.cc/LX6S-8QSM>]. For an overview of enforcement in the private housing market, see Robin Bartram, *Going Easy and Going After: Building Inspections and Selective Allocation of Code Violations*, 18 CITY & CMTY. 594 (2019).

112. *See* Gold, *No Home for Justice*, *supra* note 3, at 60–61.

113. *See id.*

114. *See id.* (citing Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 119 (2012)).

115. *See* Kathryn A. Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, APPEAL (Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records/#eviction-filing-as-a-weapon> [<https://perma.cc/DM3B-CSWE>] (“Finally, and perhaps most disturbingly, tenants can get marked as undesirable simply because data collection method used by most tenant-screening bureaus includes anyone named as a defendant in an eviction case, regardless of whether any judgment is issued against them . . . A tenant can even win at trial and still lose out on future opportunities because of the court record.”). *See generally* Esme Caramello & Annette Duke, *The Misuse of MassCourts as a Free Tenant Screening Device*, 59 BOS. BAR J. 15 (2015) (describing landlords’ use of Massachusetts’ electronic filing system as a screening tool for prospective tenants).

property.¹¹⁶ Living in housing with outstanding repairs and substandard conditions puts tenants at risk of injury and property damage.¹¹⁷

B. *Liability for Substandard Housing Conditions*

Local law provides tenants with basic protections and procedures to address outstanding repairs and substandard conditions. For example, a tenant may provide a landlord with written notice of the defect and demand repairs be completed within a statutorily prescribed period of time.¹¹⁸ Some jurisdictions provide tenants the right to withhold rent until repairs are made or to apply the rent directly to the repairs.¹¹⁹ However, while these tenant remedies provide an avenue of relief for minor repairs, they are insufficient to address dangerous conditions that pose serious risks to health and safety for two reasons. First, the likelihood of a tenant receiving repairs after providing written documentation of substandard conditions is dependent on the landlord taking ameliorative action. Despite the tenant's right to demand repairs, many landlords simply disregard the notice, as it can be more cost-effective to ignore repairs, wait until the current tenant vacates the property, and re-let the premises to a replacement tenant rather than to improve the property.¹²⁰ Second, even if a tenant lives in a jurisdiction that allows her to use the rent to directly make repairs, repairs to major systems (e.g., plumbing, electrical, structural elements, etc.) can easily exceed the monthly rent, several times over.¹²¹ For these tenants, there is not

116. See Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. ON POVERTY L. & POL'Y 97, 109 (2019) [hereinafter Sabbeth, *(Under)Enforcement*].

117. See *id.* at 123–24.

118. See, e.g., COLO. REV. STAT. § 38-12-507(1)(a) (LEXIS through all legislation from the 2022 Reg. Sess. and the results of the Nov. 2022 Gen. Elec.).

119. See, e.g., CHI., ILL., RESIDENTIAL LANDLORD & TENANT ORDINANCE § 5-12-110(d) (2022) (“[In certain situations], the tenant may notify the landlord in writing of the tenant’s intention to withhold from the monthly rent an amount which reasonably reflects the reduced value of the premises.”).

120. See, e.g., Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 115–16 (2012) (describing how landlords will routinely churn through tenants rather than make repairs or invest in rental properties). See generally CLAIRE W. HERBERT, *A DETROIT STORY: URBAN DECLINE AND THE RISE OF PROPERTY INFORMALITY* 146 (2021) (describing an extreme example of this phenomenon known as “the practice of ‘milking’ a property—wherein the owner extracts as much capital as possible out of the house while letting it deteriorate and eventually abandon[ing] it,” which is common among landlords in Detroit’s landscape of urban decline); MEREDITH J. GRIEF, *COLLATERAL DAMAGES: LANDLORDS AND THE URBAN HOUSING CRISIS* 11 (2022) (“Financial precarity . . . can provide motivation [for landlord’s] to engage in illegitimate practices for economic gain, including . . . poor property upkeep.”).

121. See, e.g., Christin Perry & Samantha Allen, *How Much Does a New HVAC System Cost?*, FORBES (July 25, 2022, 12:00 AM), <https://www.forbes.com/advisor/home-improvement/new-hvac-system-cost> [<https://perma.cc/8CDU-2D5D>] (noting that the cost for an HVAC unit itself, excluding labor fees, ranges from \$4,850 to \$9,400).

enough available capital to improve the property.¹²² Taken together, this often results in tenants who have no meaningful mechanism to improve substandard conditions. Given the dearth of affordable housing options, many tenants are caught between the rock of current hazardous housing, and a hard place of replacement housing that will likely also contain substandard conditions. Both options risk their health and safety.

This pattern traps tenants in a cycle of substandard housing conditions, thereby increasing the likelihood that they will experience injury to person or property while in their homes. Tenants may suffer from falls due to poorly maintained property, become poisoned from exposure to lead paint, become injured from malfunctioning appliances, and develop or exacerbate respiratory conditions from exposure to mold and pest infestation, among other common injuries. In addition, substandard conditions lead to deterioration of tenants' personal property—it is not uncommon for mold spores to migrate from elements of the house, like the walls or bathroom, to clothes, furniture, and personal items.¹²³ The severity of a mold infestation can make it difficult to eradicate with basic household cleaners alone; severe cases may require replacement of items altogether.¹²⁴ Likewise, rodent and insect infestation, water damage, and fire can also damage personal items.¹²⁵ Expenses associated with these injuries quickly add up; hospital bills, medication, and replacing damaged property can easily exceed the financial resources of low- and moderate-income tenants, whose budgets are already stretched to their limits.¹²⁶

122. In 2019, the median income for all renter households was just \$42,000, roughly half that of homeowners, at \$81,000 median income. See JOINT CTR. FOR HOUS. STUD., RENTAL HOUSING 2022, *supra* note 72, at 13. This disparity reflects the fact that “61 percent of all renter households meet HUD’s definition of low income (earning no more than 80 percent of the adjusted area median).” *Id.* Stated another way, thirty-six percent of renters “earned less than \$30,000 in 2019, including 18 percent with incomes under \$15,000,” whereas “15 percent of homeowner households made under \$30,000, while just 6 percent made under \$15,000.” *Id.* Additionally, in 2019, the median net wealth for all renter households was \$6,300, which includes a median cash savings of \$1,400. *Id.* In contrast, in 2019, homeowners “had median cash savings of \$10,100 and non-housing wealth of \$98,500.” *Id.*

123. *Basic Facts About Mold and Dampness*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 13, 2022), <https://www.cdc.gov/mold/faqs.htm> [<https://perma.cc/EW64-UC7W>] (discussing mold growth and difficulty removing mold).

124. See *id.* (stating that some mold growth may be too extensive to remove without professional help and may require removing or replacing some property).

125. See Benfer & Gold, *No Place Like Home*, *supra* note 90, at S1 (“Hazards, such as lead, mold, pest infestation, radon, and carbon monoxide, among others, threaten individual safety and health and limit one’s ability to access opportunity in society.”).

126. See JOINT CTR. FOR HOUS. STUD., RENTAL HOUSING 2020, *supra* note 67 *passim* (explaining that “[w]ith so much of their incomes dedicated to rent, many cost burdened households struggle to pay for other essentials like food, healthcare, and energy use” and that for these households, it would be very difficult to pay for additional, unexpected expenses); see also Craig Evan Pollack, Beth Ann Griffin & Julia Lynch, *Housing Affordability and Health Among Homeowners and Renters*, 39 AM. J. PREV. MED. 515, 519 (2010) (discussing the relationship between unaffordable housing, financial trade-offs,

The likelihood, frequency, and severity of experiencing an injury or damage to property in the home raises the question: What are the remedies and who is liable? Once a tenant suffers injury on a property, she can initiate an action against the landlord. Several areas of law—including common law torts, contracts, and consumer law, among others¹²⁷—provide a basis of landlord liability. This allows a tenant-plaintiff who has experienced substandard housing conditions to file a complaint alleging the landlord committed several torts such as general negligence or nuisance. Moreover, a lease agreement establishes a contractual relationship between a landlord and a tenant. This gives tenants the ability to pursue causes of action rooted in contract law when a landlord breaches that agreement. For example, the covenant of quiet enjoyment gives the tenant the right to enjoy the leased premises without substantial interference from the landlord;¹²⁸ a landlord’s failure to provide a tenant with housing free of defects constitutes interference with enjoyment of that housing. Similarly, the warranty of habitability, implied in many lease agreements, imposes a duty on a landlord to maintain a property in “substantial compliance with . . . [a] building code.”¹²⁹

Landlords who enter into rental agreements knowing that a housing accommodation contains defects or fails to comply with the local building code may be liable for breaching the covenant of good faith and fair dealing.¹³⁰ In recognition of a landlord’s role in the housing marketplace, several jurisdictions provide consumer law remedies for tenants who experience substandard housing conditions.¹³¹ In North Carolina, a landlord who knowingly demands rent when a property contains substandard housing conditions will be liable

and decreased spending on health, and how over time, these trade-offs may have a negative effect on personal health, “for example by reducing one’s ability to successfully manage chronic conditions or decreasing the use of preventive services”).

127. This list is meant to be illustrative and is by no means meant to be exhaustive.

128. *See, e.g.*, CAL. CIV. CODE § 1927 (Westlaw through urgency legislation through Ch. 1 of 2023 Reg. Sess.) (providing an implied warranty of quiet enjoyment in residential leases).

129. *Jack Spring, Inc. v. Little*, 280 N.E.2d 208, 217 (Ill. 1972). The foundation for the warranty of habitability varies by state. In some jurisdictions it is a statutory protection, in others it is part of the common law, and in others it is established in case law. *See, e.g., id.*; *see also Glasoe v. Trinkle*, 479 N.E.2d 915, 920 (Ill. 1985) (explaining that to bring a claim in Illinois, “the defect must be of such a substantial nature as to render the premises unsafe or unsanitary, and thus unfit for occupancy”); N.C. GEN. STAT. § 42-42 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.); CAL. CIV. CODE § 1941.1 (Westlaw through urgency legislation through Ch. 1 of 2023 Reg. Sess.).

130. *See, e.g., Klazema v. Waryas*, No. DBDCV176024424S, 2020 WL 592515, at *7 (Conn. Super. Ct. Jan. 6, 2020).

131. CAL. BUS. & PROF. CODE § 17200 (Westlaw through urgency legislation through Ch. 1 of 2023 Reg. Sess.) (prohibiting “unfair competition . . . mean[ing] and includ[ing] any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by” another section of the statute).

under the state's Unfair and Deceptive Trade Practices Act.¹³² In addition to tort, contract, and consumer claims, a landlord who assigns tenants to housing with substandard conditions, or who fails to make repairs to a tenant's housing, on the basis of the tenant's race will be liable under state and federal antidiscrimination laws. The regulations implementing the Fair Housing Act expressly prohibit discrimination in "[a]ssigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building"¹³³ and in "[f]ailing [to provide] or delaying maintenance or repairs."¹³⁴

Although these causes of action exist to provide a pathway to recovery, it can be difficult to secure legal representation, particularly for low-income tenant-plaintiffs. Legal Services Corporation estimates that a staggering ninety-two percent of civil legal problems experienced by low-income individuals receive inadequate or no legal help.¹³⁵ Given the dearth of pro bono assistance, a tenant may attempt to hire counsel. Plaintiffs' attorneys are typically hired on a contingent fee basis,¹³⁶ meaning that the "lawyer needs the prospect of a substantial collectible judgment to justify undertaking the representation."¹³⁷ For low-income tenants who experience injury and damages, an award of several thousand dollars can be life changing. However, that amount is often too low to entice a lawyer to undertake representation.

Complicating matters, commercial multifamily landlords often structure their businesses in a way that shields owners from liability. Forty percent of

132. N.C. GEN. STAT. § 75-1.1(a) (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.); see, e.g., *Creekside Apartments v. Poteat*, 116 N.C. App. 26, 36–38, 446 S.E.2d 826, 833–34 (1994), *discretionary review denied*, 338 N.C. 308, 451 S.E.2d 632 (1994) (holding that consumer protection statutes apply to residential housing).

133. 24 C.F.R. § 100.70(c)(4) (2022).

134. § 100.65(b)(2); see also Sabbeth, (*Under*)*Enforcement*, *supra* note 116, at 114 ("In addition to violating the FHA, discrimination of this kind against non-white tenants could also potentially give rise to Section 1981 claims under the Civil Rights Act of 1886, which guarantees all persons in the United States the 'same right to make and enforce contracts . . . as is enjoyed by white citizens.'" (quoting 42 U.S.C. § 1981(a)(2012))).

135. The Legal Services Corporation is the largest single funder of civil legal aid for low-income Americans. MARY C. SLOSAR, LEGAL SERVS. CORP., *THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 7 (2022), <https://lsc-live.app.box.com/s/xl2v2uraitobbzrhuwtjlgioemp3myz1> [<https://perma.cc/DM2M-T35B> (staff-uploaded archive)].

136. See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 267 n.1 (1998) ("The American contingency fee is most closely associated with personal injury cases, where research shows that virtually all plaintiffs pay their lawyers on a contingency basis."); Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J.L. ECON. & ORG., 517, 517 (2003) ("[L]awyers in personal injury cases generally are paid by contingency fee.").

137. Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 966 (2020).

rental units across the country are owned by anonymous shell companies.¹³⁸ This figure marks a significant increase from thirty years ago, when only eight percent of all rental properties were owned by shell companies.¹³⁹ The “tangle of shell companies” protects multifamily real estate investors from liability, even when neglect and disrepair cause injury to their tenants.¹⁴⁰ As one advocate noted, “[B]ecause [there are] so many shell entities, it becomes very difficult to identify the direct entity owning a property, let alone the individuals behind the entity,” making it difficult for tenants to pursue legal recourse.¹⁴¹

Even if a tenant successfully prevails on a claim against the landlord, if the tenant does not have liability insurance, the judgment may be insufficient to make that tenant whole for the harms suffered. Prevailing in a courtroom is not the same as collecting a payment. An order entered in favor of a tenant is a piece of paper establishing the tenant’s right to collect payment¹⁴² from the landlord. In practice, collecting a judgment can be as difficult, or often even more so, than winning in the first place. As Robert Haig and Patricia Kahn note, “[T]he entry of a judgment is often the beginning of a different process which can be just as arduous” as getting the initial judgment.¹⁴³ In order to collect a payment, the landlord must have an asset or income that can be used to satisfy the judgment. Some jurisdictions may allow income, including income from other rental housing, to be garnished to satisfy a judgment.¹⁴⁴ However, the tenant must first locate the source of value that may be transferred from the landlord to the tenant in satisfaction of the judgment.¹⁴⁵ This process raises questions of jurisdiction—such as whether the property is located in a geographic area that is subject to the jurisdiction of the court—and may require

138. D. Victoria Baranetsky, Opinion, *You Should Have the Right To Know Your Landlord’s Name*, L.A. TIMES (Feb. 24, 2021, 3:10 AM), <https://www.latimes.com/opinion/story/2021-02-24/rental-housing-shell-companies-landlords> [<https://perma.cc/Q4C3-TDT9>] (staff-uploaded, dark archive)].

139. *Id.*

140. Ko Lyn Cheang, *Who Owns the Worst Apartment Complexes?: Advocates Say Lack of Accountability Baffling*, INDIANAPOLIS STAR (Oct. 2, 2022), <https://www.indystar.com/story/news/local/indianapolis/2022/09/30/jpc-who-owns-indianapolis-apartment-complexes/69508414007/> [<https://perma.cc/MBD6-ZHS9>] (staff-uploaded, dark archive)].

141. *Id.*

142. JASON KILBORN, EYES ON THE PRIZE: PROCEDURES AND STRATEGIES FOR COLLECTING MONEY JUDGMENTS AND SHIELDING ASSETS 3 (2019) (“Despite what many lawyers and lay people believe, a money judgment is not an order to pay; rather, it is a final determination of liability of a defendant to plaintiff To turn that judgment into money, someone has to be responsible for finding money’s worth in valuable property belonging to the [defendant] and transferring that value to the [plaintiff] to satisfy the monetary demand awarded in the judgment.”).

143. Robert L. Haig & Patricia O. Kahn, *Representing the Judgment Creditor*, 16 AM. J. TRIAL ADVOC. 1, 1 (1992).

144. *See, e.g.*, 12 OKLA. STAT. ANN. tit. 12 § 1173.4 (Westlaw through emergency effective legislation through Ch. 1 of the First Reg. Sess. of the 59th Leg. (2023)). *Contra* N.C. GEN. STAT. § 1-362 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.) (limiting the ability of nongovernmental creditors to use wage garnishment to satisfy a judgment).

145. *See* KILBORN, *supra* note 142, at 17–31.

the tenant to engage in discovery to identify collectible assets.¹⁴⁶ After identifying assets or income that may be transferred to the tenant, “[the assets] must be obtained and realized.”¹⁴⁷ This involves recording an interest in the asset or income and taking steps to enforce the judgment.¹⁴⁸ The burden of this process falls on the tenant. Collecting a judgment is time consuming and expensive. While legal aid organizations may represent the tenant in the original action against the landlord, few offer collection and enforcement services, which forces the tenant to hire an attorney to enforce the judgment. For low-income tenants, the costs associated with enforcing a judgment may significantly decrease the amount of the award realized, compromising their ability to obtain redress after suffering harm. Others may not be able to hire anyone at all.

This process is simplified if there is a liability insurance policy in place. Instead of forcing a tenant to pursue lengthy and expensive judgment collection, the insurance company instead remits payment to the tenant in the amount of the judgment. The tenant can immediately cover incurred expenses and begin to recover from the harm they experienced due to substandard housing conditions.

C. *Housing Insurance Types and Coverage*

A tenant’s ability to obtain redress after experiencing harm from dangerous housing conditions depends on whether there is an insurance policy in place and, if so, the protections and limitations of that coverage. The housing market imposes several types of insurance¹⁴⁹ and offers optional policies that property owners can purchase to shift risk associated with real estate. As Professor Daniel Schwarz notes, “[C]onsumer insurance policies in property and casualty insurance markets . . . are often described as ‘super contracts of adhesion,’” offered to consumers on a “take-it-or-leave-it basis.”¹⁵⁰ The Insurance Service Office enables shared policy and contract drafting among insurance providers.¹⁵¹ Historically, this practice led to policy standardization among insurers. Motivated by changed data availability, decreased drafting burdens, and profit maximization, today there is “substantial deviation among

146. *Id.*

147. *Id.* at 33.

148. *Id.*

149. *See supra* Section I.B (discussing privately mandated mortgage insurance as well compulsory homeowners insurance).

150. Daniel Schwarz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1264 (2011).

151. *Id.* at 1273.

carriers' policies within individual states."¹⁵² This deviation makes it impossible to capture all permutations of insurance policies. However, a general understanding of different policies is helpful for contextualizing the tools that exist to shift risk between landlords and tenants.

Figure 2 summarizes homeowners insurance policies, including the party responsible for obtaining coverage, what risks are typically covered by a policy, typical exclusions, and average cost. These policies exist for homeowners that occupy their properties.

Figure 2: Homeowners Insurance Policies (Owner-Occupied Dwellings)

Type	Purchasing Party	Coverage	Exclusions
HO-1	Homeowner	Basic “named-perils” coverage on buildings and personal property coverage due perils specifically named in the policy. ¹⁵³	Does not cover losses incurred due to any unnamed peril. Does not cover losses incurred due to liability.
HO-2	Homeowner	Coverage for more perils than named in an HO-1 policy. Broad “named-perils” coverage on buildings and personal property. ¹⁵⁴	Does not cover losses incurred due to any unnamed peril. Does not cover losses incurred due to liability.

152. *Id.* at 1275–77 (providing a detailed empirical analysis of differences in insurance policy provisions). For a detailed overview of judicial influence on standardized ISO HO3 homeowners insurance policies, see Daniel Schwarcz, *The Role of Courts in the Evolution of Form Contracts*, 46 *BYU L. REV.* 471 (2021). Moreover, state insurance commissioners offer vague guidance on rate limitations, contributing to variation; for example, in regulating homeowners' insurance policies, North Carolina law merely states that “rates shall not be excessive, inadequate, or unfairly discriminatory.” N.C. GEN. STAT. § 58-45-45(a) (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.).

153. NAT'L ASS'N OF INS. COMM'RS, DWELLING FIRE, HOMEOWNERS OWNER-OCCUPIED, AND HOMEOWNERS TENANT AND CONDOMINIUM/COOPERATIVE UNIT OWNER'S INSURANCE REPORT: DATA FOR 2020, at 3 n.2 (2022) [hereinafter NAIC, 2020 DATA], <https://content.naic.org/sites/default/files/publication-hmr-zu-homeowners-report.pdf> [<https://perma.cc/8EAN-4L5M>] (explaining that fire, lightening, hail, and others are examples).

154. *Id.*

HO-3 ¹⁵⁵ <i>The most common homeowners insurance package</i>	Homeowner	All named peril coverage on buildings and broad named-peril coverage on personal property. ¹⁵⁶	Does not cover losses specifically stated in policy as excluded, such as flood, mold, and/or damage from poor home maintenance. ¹⁵⁷ Mold is typically excluded. ¹⁵⁸
HO-5 ¹⁵⁹	Homeowner	All-risk coverage on buildings and personal property.	No exclusions.

By far, the most common homeowners insurance policy is the HO-3 policy, as HO-3 policies cover nearly eighty percent of owner-occupied exposures.¹⁶⁰ Within an HO-3 policy, there are specific subtypes of coverage. Coverage E—personal liability coverage—provides a homeowner with coverage in the event that they are legally responsible for harm to another, excluding intentional acts.¹⁶¹ Coverage F provides medical payments to others accidentally

155. HO-3 policies place the onus on the homeowner to prove the damage is covered. Reyna Gobel, *With HO5 Insurance, You're in Charge*, INVESTOPEDIA (Jan. 27, 2022), <https://www.investopedia.com/articles/insurance/09/ho5-home-insurance.asp> [<https://perma.cc/32W3-PXYL>]. HO-3 policies cover eighty percent of owner-occupied exposures. NAT'L ASS'N INS. COMM'RS, *NAIC Releases Homeowners Insurance Report*, NAIC (Jan. 13, 2021), https://content.naic.org/article/news_release_naic_releases_homeowners_insurance_report.htm [<https://perma.cc/EDD4-L2VT>].

156. This typically includes fire, hurricanes, lightning, and vandalism; damage from floods, earthquakes, and poor home maintenance is usually excluded. *Homeowners Insurance Guide: A Beginner's Overview*, INVESTOPEDIA (June 21, 2022), <https://www.investopedia.com/insurance/homeowners-insurance-guide> [<https://perma.cc/YQ9U-328S>].

157. NAIC, 2020 DATA, *supra* note 153, at 3, 12.

158. *Id.* at 12 (“Many insurers have considered mold an excluded peril, and the cost of paying for potential claims related to mold has not generally been factored into the price of most property policies. However, courts in several states have found that, in the absence of specific exclusionary language in the policy, payment for certain types of mold damage is required In response, insurers have added language to property and liability policies to explicitly exclude or limit coverage for mold. Some insurers have raised overall premiums to better reflect this exposure, while others offer mold-related coverage for an additional cost.”).

159. An HO-5 policy places the burden on the insurance company to prove that the damage is not the result of a covered event. Gobel, *supra* note 155.

160. NAIC, 2020 DATA, *supra* note 153, at 4.

161. *See, e.g.*, N.C. DEP'T OF INS., A CONSUMER'S GUIDE TO HOMEOWNERS INSURANCE 5 (2011), <https://files.nc.gov/doi/consumers-guide-to-homeowners-insurance.pdf> [<https://perma.cc/YW7J-YKKB>]. For an overview of property insurance, including a detailed look at a sample homeowners policy, see ABRAHAM & SCHWARCZ, *supra* note 7, at 195–312.

injured on the homeowner's property.¹⁶² It may appear that such coverage would provide redress to tenants injured on the property. However, this coverage is only available to homeowners in owner-occupied properties, and specifically excludes business activities. If the owner is renting out their property, the property is categorically not owner-occupied. Consequently, tenant injury on the property is not covered by Coverage E or Coverage F in an HO-3 policy. Likewise, HO-1, HO-2, and HO-5 policies are limited to owner-occupied properties. Therefore, for homeowners renting out their properties, without a separate liability policy on the property, there is no coverage for harm to tenants.

Figure 3 summarizes typical policies available for policyholders with a partial interest in a property. A partial interest is anything less than one hundred percent ownership and/or occupancy interest, such as tenants, owners in multifamily accommodations, and landlords.

Figure 3: Policies for Tenants, Landlords, Condominiums, and Cooperative Owners

Type	Purchasing Party	Coverage	Exclusions
HO-4 ¹⁶³ (<i>Renters Insurance</i>)	Tenant	Named-peril coverage for personal property of tenants in a rental accommodation. ¹⁶⁴ Some policies may also include liability coverage if a tenant or tenant's guest is	Excludes anything not included as a named peril. Does not provide coverage for the building. Does not include medical expenses for the tenant. ¹⁶⁶

162. N.C. DEP'T OF INS., *supra* note 161, at 5.

163. NAT'L ASS'N INS. COMM'RS, *supra* note 155 ("HO-4 coverage accounts for nearly 74% of the tenant and condominium/co-op exposures. Tenant and condominium/cop-op policies do not provide coverage for the building; therefore, the distribution of exposures for these types of policies is concentrated at significantly lower insurance amounts."); *see also* *What Is Renters Insurance?*, NATIONWIDE, <https://www.nationwide.com/lc/resources/home/articles/what-is-renters-insurance> [<https://perma.cc/M3BU-4ANR>] (highlighting that Nationwide's rental insurance only covers damages from specific types of peril, such as fire, lightning, windstorm, hail, frozen plumbing system, theft, vandalism, and automobile impact).

164. NAIC, 2020 DATA, *supra* note 153, at 4; *What Is Renters Insurance?*, *supra* note 163 (highlighting that Nationwide's rental insurance only covers damages from specific types of peril such as fire, lightning, windstorm, hail, frozen plumbing system, theft, vandalism, and automobile impact).

166. Michael Evans, *What Is an HO-4 Insurance Policy?*, COVERAGE (July 17, 2020), <https://www.coverage.com/insurance/home/ho-4> [<https://perma.cc/4GEV-SKEX>].

		injured on the rented property. ¹⁶⁵	
HO-6	Condominium or Cooperative Unit Owners	Named-peril coverage for personal property of condominium or cooperative unit owners. May include certain building items if the unit owner has an insurable interest. ¹⁶⁷	Excludes anything not included as a named peril. Does not provide coverage for the building.
Landlord Liability Insurance	Landlord	Physical property related to the home being rented, including the dwelling, other structures on the property, and personal property used in service of the rental. Liability portion of insurance policy may cover damage to property and personal injury damages of tenant. ¹⁶⁸	Maintenance and equipment breakdown and tenant's personal possessions (absent landlord liability). If landlord is responsible for the damages or injury, then liability portion of the policy will cover tenant's personal injury and damage to tenant's property. ¹⁶⁹
Short-term	Host	Coverage for liability, damage to property, income	Losses incurred by acts of nature, e.g., earthquakes,

165. *What Is Renters Insurance?*, *supra* note 163.

167. NAIC, 2020 DATA, *supra* note 153, at 4.

168. *What Does Landlord Insurance Cover?*, ALLSTATE (Mar. 2018), <https://www.allstate.com/tr/landlord-insurance/what-is-landlord-insurance.aspx> [<https://perma.cc/2RWD-29W7> (staff-uploaded archive)].

169. *Id.*; see also Julian Dossett, *Rental vs. Landlord Insurance*, COVERAGE (May 29, 2020), <https://www.coverage.com/insurance/renters/rental-vs-landlord-insurance/> [<https://perma.cc/D3G8-5BZM>].

Rental Insurance		loss, unexpected costs, and pet damage, caused by the occupant or guest of an occupant. ¹⁷⁰	hurricanes, and tornadoes. ¹⁷¹
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While the policies in Figure 3 are designed for parties with a partial interest in real property, they do not cover all damages resulting from exposure to substandard housing conditions. Notably, HO-4 policies, which tenants may purchase themselves to protect personal property, typically do not cover medical expenses. As such, tenants who experience personal injury as a result of exposure to substandard housing conditions cannot use renters insurance to offset those costs. Instead, these tenants must use personal health insurance to offset healthcare costs. At best, this can mean paying for a deductible and any copayments required to receive treatment. However, for the twenty-eight million people in the United States without health insurance,¹⁷² this means paying for healthcare entirely out of pocket, going into debt, or foregoing critical care.

Even for tenants who only incur property damage, relying entirely on renters insurance (an HO-4 policy) shifts the burden of substandard conditions in a way that financially rewards landlords for not maintaining their property. If the renter purchases insurance, then the landlord is disincentivized to spend money on repairs or pay for their own liability policy. Moreover, difficulties in collecting damages may decrease the ability of an insurance company to successfully subrogate¹⁷³ an insured tenant's claim. Insurance providers are typically subrogated to the insured party's rights of recovery against a third party for damages.¹⁷⁴ For example, if a property is destroyed due to negligence of a third party, the insurance company will pay out to the insured and then assert a right of action against the third party to recover the payout. If an insurance company cannot subrogate a tenant's claim, the insurance company

170. See, e.g., *Host Damage Protection Terms*, AIRBNB HELP CTR. (Feb. 10, 2022), <https://www.airbnb.com/help/article/2869/host-damage-protection-terms> [https://perma.cc/58Y5-MZLF] (outlining in sections I–II that Airbnb would insure hosts for damages caused by guests).

171. See, e.g., *id.* (outlining in sections II–III that Airbnb would not cover hosts for damage caused by guests).

172. KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2020, at 2 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-274.pdf> [https://perma.cc/2PRV-L3LN].

173. Subrogation is the ability of a party to step into the shoes of another to assert the rights of the second party. ABRAHAM & SCHWARCZ, *supra* note 7, at 287–95 (discussing subrogation in the context of property law).

174. *Id.* at 287.

will likely raise the policy rate or drop the tenant from coverage altogether. This places the financial and physical burdens of housing disrepair on the shoulders of tenants who are already overwhelmingly cost burdened and most at risk of harm.

Neither condominium and cooperative insurance (“HO-6”) policies nor short-term rental policies are designed to cover long-term tenants exposed to and injured by substandard housing conditions. Similar to an owner-occupied policy’s inclusion of all-risk coverage for buildings, HO-6 policies may cover part of the edifice itself if the purchasing party has an insurable interest. Also, like owner-occupied policies, HO-6 policies exclude liability coverage for tenant occupants in condominium and cooperative accommodations. Short-term rental insurance is designed to cover short-term accommodations—that is, properties occupied for less than thirty days—and therefore does not provide protection for long-term renters. Of the insurance types outlined in Figure 3, only landlord liability insurance covers damages to long-term tenants. However, as the next section discusses, even if parties desire to purchase a policy that provides liability coverage, systemic barriers may place access to that policy out of reach.

D. *Barriers to Insurance Protection*

Insurance can only provide protection and reallocate risk if it is attainable. For many, that simply is not the case. Discriminatory practices by insurance underwriters prevent individuals from accessing comprehensive insurance policies at affordable rates. These practices originated as “explicit bars on people of color obtaining insurance [and] have evolved into more covert forms of discrimination that still pervade our housing market.”¹⁷⁵ These practices create an insurance coverage gap that leaves many tenants without the ability to attain redress after experiencing personal injury or property damage.¹⁷⁶

175. Brief for Am. Civ. Liberties Union et al. as Amicus Curiae in Opposition to Plaintiff’s Renewed Motion for Summary Judgment and in Support of Defendants’ Cross-Motion for Summary Judgment at 8, Prop. Cas. Insurers Ass’n of Am. v. U.S. Dep’t of Hous. & Urb. Dev., Case No. 1:13-cv-08564 (N.D. Ill. July 16, 2021), <https://static1.squarespace.com/static/5871061e6b8f5b2a8ede8ff5/t/60fad243cfaaf110f69cc262/1627050564456/2021-07-16+233.PCIA+v.+HUD.Amicus+Brief.pdf> [<https://perma.cc/YBG8-MUQB>].

176. Recently, plaintiffs brought a class-action alleging that State Farm violated the Fair Housing Act by treating Black homeowners differently than homeowners of other races. Complaint at *1, *Huskey v. State Farm Fire & Cas. Co.*, No. 22-cv-7014 (N.D. Ill. filed Dec. 14, 2022). The allegations are based on a study of 800 homeowners that found “disparities between State Farm’s handling of claims filed by white homeowners relative to claims filed by Black homeowners.” *Id.* at *1–2. It alleges that State Farm treats claims filed by Black homeowners with greater suspicion, requires additional documentation for them, and that State Farm takes longer to process such claims. *Id.* at *2. These

1. Insurance Redlining

Insurance redlining describes discriminatory processes that limit the ability of minority homeowners to insure their properties. This form of redlining creates a downstream ripple effect for tenants who incur damages while living in uninsured housing. Insurance redlining takes its name from redlining, an early to mid-twentieth century real estate practice whereby mortgage lenders created risk evaluation maps to determine whether to make loans to individuals looking to buy homes in certain neighborhoods. Black neighborhoods, “even those with small [B]lack percentages,” were designated in red—a practice referred to as redlining.¹⁷⁷ Redlining and other discriminatory practices—segregation, real estate discrimination, and restrictive covenants, among others—had far-reaching effects, contributing to disparate homeownership rates¹⁷⁸ and a racial wealth gap across generations.¹⁷⁹

processing methods make predictions and decisions about whether a claim might be fraudulent, how much scrutiny it requires, and how it should be processed, and in doing so, rely on (1) biometric data that function as proxies for race, such as physical appearance, genetics, and voice; (2) intrusive behavioral data that function as proxies for race, such as geolocation, social media presence, and browser search history; and (3) historical housing and claims data that are themselves infected with racial bias.

Id. Plaintiffs also allege that State Farm’s “claims processing methods unjustifiably identify claims submitted by Black homeowners for additional scrutiny at higher rates than their white counterparts” and that “[a]s a result, State Farm’s claims processing methods have a demonstrable and widespread discriminatory impact on Black homeowners making insurance claims, in violation of the FHA.” *Id.* at *2–3.

177. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 52 (1993) (“HOLC underwriters were far more concerned about the location and movement of [B]lacks than about any other demographic trend. . . . [A] confidential 1941 HOLC survey of real estate prospects in the St. Louis area . . . repeatedly mentions ‘the rapidly increasing Negro population’ and the consequent ‘problem in the maintenance of real estate values.’”); see also Allyson E. Gold, *Redliking: When Redlining Goes Online*, 62 WM. & MARY L. REV. 1841, 1852–56 (2021) [hereinafter Gold, *Redliking*] (providing historical overview of redlining).

178. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION’S HOUSING* 2021, at 22 (2021), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf [https://perma.cc/V5S5-44QT] (“[T]he [homeownership] difference between Black and white households is especially large. The Black-white gap reached a record 30.4 percentage points in 2018 before narrowing slightly to 29.9 percentage points in 2019.”).

179. Gold, *Redliking*, *supra* note 177, at 1849 (“The racial wealth gap refers to the ‘difference in wealth holdings between the median household among populations grouped by race or ethnicity.’” (quoting LAURA SULLIVAN, TATIANA MESCHEDE, LARS DIETRICH, THOMAS SHAPIRO, AMY TRAUB, CATHERINE RUETSCHLIN & TAMARA DRAUT, INST. FOR ASSETS & SOC. POL’Y & DEMOS, *THE RACIAL WEALTH GAP: WHY POLICY MATTERS* 7 (2015), https://www.demos.org/sites/default/files/publications/RacialWealthGap_2.pdf [https://perma.cc/KM5C-PGDJ])).

Like its namesake, insurance redlining infuses discrimination into an aspect of real estate transactions.¹⁸⁰ Whereas redlining withheld home loans from Black communities, insurance redlining refers to the discriminatory practice of refusing “to issue homeowner’s insurance irrespective of the property in question and the qualifications of the applicant.”¹⁸¹ Refusing to insure property effectively prevents prospective homebuyers from acquiring a mortgage, as nearly all mortgage lenders impose compulsory insurance requirements on borrowers in order to secure the loan.¹⁸² As Judge Easterbrook astutely quipped, “No insurance, no loan; no loan, no house.”¹⁸³

Insurance redlining occurs under the guise of appropriate insurance underwriting procedures. Whereas historically insurers explicitly used race to make underwriting decisions,¹⁸⁴ today, underwriters use a variety of factors—credit scores, age, and geographic area, among others¹⁸⁵—to calculate and differentiate risk levels by cohort to correspondingly price insurance products.¹⁸⁶ The greater the calculated risk, the more expensive the insurance policy.¹⁸⁷ In practice, underwriters make determinations about risk based on

180. See generally GREGORY D. SQUIRES, STEPHEN M. DANE, ROBERT W. KLEIN, JAY D. SCHULTZ, SHANNA L. SMITH, CATHY CLOUD, D.J. POWERS, TOM BAKER, KAREN MCEL RATH, WILLIAM H. LYNCH, RICHARD J. RITTER & GEORGE KNIGHT, *THE URB. INST., INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS* (Gregory D. Squires ed., 1997) (discussing how insurance redlining contributes to discrimination in real estate transactions).

181. John Hughes Gilmore, Note, *Insurance Redlining & the Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies*, 34 CATH. U. L. REV. 563, 566 (1985).

182. *Id.* (“[M]ost lenders would never loan money without insured property as security.”); see also *supra* Section I.B.3.

183. NAACP v. Am. Fam. Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992).

184. Latonia Williams, Note, *African American Homeownership and the Dream Deferred: A Disparate Impact Argument Against the Use of Credit Scores in Homeownership Insurance Underwriting*, 15 CONN. INS. L.J. 295, 304–05 (2008); see also Robert K. Yass, *Homeowner’s Insurance and Credit Score: A Critical Race Theory Perspective*, 27 CONN. INS. L.J. 286, 289 (2020) (describing that Black applicants were explicitly viewed as uninsurable and should not be included in the same risk pool as whites).

185. See *Background on Credit Scoring*, INS. INFO. INST. (Apr. 8, 2019), <https://www.iii.org/article/background-on-credit-scoring> [<https://perma.cc/XFM8-G2S9>] (“In auto insurance, other factors are combined with insurance scores, including geographical area, previous crashes, and age and gender (in some states). In homeowners insurance, other factors include the home’s age and construction, location and proximity to water supplies for firefighting, and proximity to flood risks.”).

186. See ABRAHAM & SCHWARCZ, *supra* note 7, at 8 (“[Insurers] also use risk-based rating to ensure that premiums are commensurate with each individual policyholder’s risk level.”).

187. See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 205–08 (2012); Gilmore, *supra* note 181, at 576–77 (“Insurance underwriting is the process by which companies determine whether to accept or to reject an application for insurance coverage. Insurance companies, by their very nature, seek to accept ‘good’ risks while excluding or limiting ‘bad’ risks. In this way, a company hopes to maximize its profits. There is nothing inherently suspect about this, provided that the reasons for refusals are legitimate.”). See generally Tom Baker, *Insuring Liability Risks*, 29 GENEVA PAPERS ON RISK & INS. 128 (2004) (articulating four

statistical generalizations.¹⁸⁸ To illustrate this concept, take automobile insurance rates and pricing: demographic segments of the population that statistically cause fewer accidents will be charged less for automobile insurance than demographic segments that are more frequently involved in car accidents.¹⁸⁹ As a result of these assumptions and risk classifications, rates can—and do—vary by cohort demographics.¹⁹⁰ A study from the Consumer Federation of America found that in geographic areas where more than seventy-five percent of residents are Black, insurance premiums are seventy percent higher than areas with populations that are less than twenty-five percent Black.¹⁹¹ Auto insurance rates vary across racial lines even when other risk levels are equal. A ProPublica study on automobile insurance discrimination concluded that in jurisdictions across the country, companies charged minority drivers in “risky” zip codes up to thirty percent more than white drivers in neighborhoods with similar risk factors.¹⁹² This type of discrimination is not limited to automobile insurance.

Congressional hearings on homeowners insurance discrimination found that for decades, insurance companies deployed discriminatory practices that resulted in Black homeowners paying more for less insurance when compared to white homeowners of the same income.¹⁹³ Furthermore, discrimination

classifications of liability risks—baseline risks, developments risks, contract risk, and financing risk—and describing how they affect the insurance market and pricing).

188. See Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 198 (2014) (“Insurance companies are in the business of a particular type of discrimination . . . among their insureds. That is how insurance works. Insurers attempt to classify insureds into separate risk pools based on differences in their risk profiles.”).

189. INSURIFY, *THE INSURIFY ANNUAL REPORT 2020*, at 1, 16 (2020), https://insurify.com/static/files/insurify_annual_report_2020.pdf [<https://perma.cc/QC2C-QYPA> (staff-uploaded archive)]. “The Insurify Annual Report is a comprehensive analysis of the 2020 car insurance quoting landscape, analyzing over 25 million auto insurance premiums.” *Id.*

190. See Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 496 (1961) (“Any number of possible inequities result from the classifications used in the gathering of statistics for rate-making . . . [T]he search gets involved so easily in unrealized biases of the rate-makers.”).

191. TOM FELTNER & DOUGLAS HELLER, CONSUMER FED’N OF AM., *HIGH PRICE OF MANDATORY AUTO INSURANCE IN PREDOMINANTLY AFRICAN AMERICAN COMMUNITIES 3* (2015), https://consumerfed.org/wp-content/uploads/2015/11/151118_insuranceinpredominantlyafricanamericancommunities_CFA.pdf [<https://perma.cc/A67Y-CL5T>] (finding also that premiums are markedly higher in Black zip codes than in predominantly white zip codes).

192. Jeff Larson, Julia Angwin, Lauren Kirchner, Surya Mattu, Dina Haner, Michael Saccucci, Keith Newsom-Stewart, Andrew Cohen & Martin Romm, *How We Examined Racial Discrimination in Auto Insurance Prices*, PROPUBLICA (Apr. 5, 2017), <https://www.propublica.org/article/minority-neighborhoods-higher-car-insurance-premiums-methodology> [<https://perma.cc/BE3R-FKY7>] (studying pricing differentials based on race in the auto insurance industry and finding that “some insurers were charging statistically significantly higher premiums in minority zip codes, on average, than in similarly risky non-minority zip codes”).

193. See *Homeowners’ Insurance Discrimination Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 103d Cong. 7 (1994) (statement of Rep. Joseph P. Kennedy, II).

against tenants by insurance companies prevents prospective landlords from obtaining affordable policies. The National Fair Housing Alliance (“NFHA”) uncovered systemic discrimination against Section 8 voucher holders by Travelers Insurance, one of the largest insurance providers in Washington, D.C.¹⁹⁴ In D.C., Section 8 voucher households are disproportionately Black, headed by women, and largely concentrated in four census tracts.¹⁹⁵ Investigation by NFHA uncovered Travelers’ practice of refusing to underwrite policies for properties occupied by Section 8 voucher holders;¹⁹⁶ as one insurance broker exclaimed, “Wait a minute. Stop right there. Subsidized housing is a problem.”¹⁹⁷ Instead of Travelers, the broker suggested a secondary market insurer, though they acknowledged that this would cost more, and “would be ‘not as good a policy.’”¹⁹⁸ NFHA brought an action against Travelers alleging violations of the federal Fair Housing Act (“FHA”) and the District of Columbia Human Rights Act.¹⁹⁹ However, the case was eventually settled before a decision on the merits was reached.²⁰⁰

Unlike federal regulations governing employment, the law governing public accommodation, housing, and education does not explicitly ban race-based discrimination in private insurance markets.²⁰¹ For decades, scholars debated whether the FHA applied to housing insurance redlining.²⁰² Under the

194. Complaint ¶¶ 1–3, 9, *Nat’l Fair Hous. All. v. Travelers Indem. Co. and Travelers Cas. Ins. Co. of Am.*, 261 F. Supp. 3d 20 (D.D.C. 2017) (No. 16-928), 2016 WL 2890235 (“The federal Housing Choice Voucher program is the federal government’s major program for assisting very low-income families, the elderly, and individuals with disabilities in affording decent, safe, and sanitary housing in the private rental market.”).

195. *Id.* ¶¶ 16–17. This demographic trend is not limited to Washington, D.C. See *Who Are the Renters in America?*, USAFACTS, <https://usafacts.org/articles/who-is-renting-in-america-cares-act> [<https://perma.cc/2TND-HWZK>] (last updated Feb. 25, 2021, 12:56 PM) (“HUD-subsidized households are disproportionately occupied by minorities: 65% have heads-of-households who are Black, Native American, Asian or Pacific Islander, or Hispanic.”).

196. See Complaint ¶¶ 18–30, *Nat’l Fair Hous. All.*, 261 F. Supp. 3d 20 (No. 16-928).

197. *Id.* ¶ 27.

198. *Id.* ¶ 28.

199. *Id.* ¶ 1.

200. *National Fair Housing Alliance Settles Disparate Impact Lawsuit with Travelers Indemnity Company*, NAT’L FAIR HOUS. ALL. (Feb. 23, 2018), <https://nationalfairhousing.org/2018/02/23/travelers> [<https://perma.cc/FY4W-RJHF>].

201. Valerie K. Blake, *Ensuring an Underclass: Stigma in Insurance*, 41 CARDOZO L. REV. 1441, 1454 (2020) (citing Mary L. Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J.L. & FEMINISM 335, 341–42 (2011)). However, Professor Blake notes that “[t]he only real, significant legal protections at the federal level are in health insurance where public trends have long suggested movement away from actuarial fairness and towards mutual aid culminating in the [ACA].” *Id.*

202. See generally Sarah L. Rosenbluth, Note, *Fair Housing Act Challenges to the Use of Consumer Credit Information in Homeowners Insurance Underwriting: Is the McCarran-Ferguson Act a Bar?*, 46 COLUM. J.L. & SOC. PROBS. 49 (2012) (arguing that the McCarran-Ferguson Act should not preempt the FHA’s application to insurance); Steven Plitt & Daniel Maldonado, *Prohibiting De Facto Insurance Redlining: Will Hurricane Katrina Draw a Discriminatory Redline in the Gulf Coast Sands Prohibiting Access*

FHA, it is unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin.”²⁰³ Federal courts are split on whether the FHA’s protections extend to homeowners insurance.²⁰⁴ In 2013 the Department of Housing and Urban Development (“HUD”) endeavored to eliminate confusion when it promulgated a final rule codifying the department’s position that the FHA did indeed apply to homeowners insurance.²⁰⁵ In 2016, HUD reiterated its position, stating “[a]fter careful reconsideration . . . HUD has determined that categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with the broad fair housing objectives and obligations embodied in the [FHA].”²⁰⁶

Between 2013 and 2016, the Supreme Court confirmed that discriminatory *effects* are a proper basis for liability under the FHA.²⁰⁷ Taken with HUD’s rules on insurance, this ruling had the powerful effect of rendering discriminatory impact in insurance practices—for example, insurance redlining—a violation of the FHA. However, this was short lived. In 2020, the Trump administration released a new rule that eliminated discriminatory effect protections and added elements that would make it “far more difficult” to bring a case under the FHA.²⁰⁸ In addition to eliminating causes of action rooted in discriminatory effect, the Trump rule included a section expressly rejecting the inclusion of

to Home Ownership?, 14 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 199 (2008) (discussing whether the FHA alone bars insurance redlining and proposing an amendment to the FHA to specifically preclude it); Gilmore, *supra* note 181 (arguing that the FHA precludes insurance redlining).

203. Fair Housing Act, Pub. L. No. 90-284, § 804(a), 82 Stat. 73, 83 (1968) (codified as amended at 42 U.S.C. § 3604(a) (1968)).

204. Compare *United Farm Bureau Mut. Ins. Co. v. Metro. Hum. Relationship Comm’n*, 24 F.3d 1008, 1016 (7th Cir. 1994) (finding the FHA prohibits homeowners insurance redlining), and *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir. 1992) (finding the FHA prohibits homeowners’ insurance redlining), with *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424–25 (4th Cir. 1984) (concluding the FHA does not apply to homeowners insurance).

205. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100) (“HUD, through its longstanding interpretation of the Act, and the eleven federal courts of appeals that have addressed the issue agree that liability under the Fair Housing Act may arise from a facially neutral practice that has a discriminatory effect.”); see also *id.* at 11475 (“HUD has long interpreted the Fair Housing Act to prohibit discriminatory practices in connection with homeowner’s insurance, and courts have agreed with HUD, including in *Ojo v. Farmers Group.*”).

206. Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33593 (proposed June 25, 2021) (to be codified at 24 C.F.R. pt. 100) (citing Application of the Fair Housing Act’s Discriminatory Effects Standard to Insurance, 81 Fed. Reg. 69012, 69012 (2016) (to be codified at 24 C.F.R. pt. 100)).

207. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 545–46 (2015).

208. Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. at 33593.

insurance in FHA protections.²⁰⁹ Under the Biden administration, HUD reconsidered the 2020 rule and proposed recodifying the 2013 HUD rule, recognizing discriminatory effects as a cause of action as well as insurance as a protected category under the FHA.²¹⁰ Even once the protections of the Biden administration's proposed rule take effect, it will remain challenging for an individual to successfully prove discrimination rather than actuarial "fairness." Individual applicants often do not know they are being discriminated against. As with automobile insurance, race-neutral factors, such as credit score and zip code, often obscure discrimination against individual real estate insurance applicants.²¹¹ For this reason, insurance discrimination analysis necessarily involves cross-consumer perspectives and a large sample.

Absent further guidance at the federal level concerning when race-neutral factors affect discrimination, states have the responsibility to promote insurance antidiscrimination. With that role falling to the states, underwriting classification protections are a patchwork, varying across jurisdictions.²¹² For example, some state statutes expressly recognize the effects of insurance redlining; Illinois' antidiscrimination statute calls out insurance redlining by name, though it does not take the additional, necessary step of banning the use of zip code.²¹³ Many states take a generalized approach to insurance antidiscrimination laws: whereas many jurisdictions ban "unfair discrimination"

209. HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 84 Fed. Reg. 42854, 42860 (proposed Aug. 19, 2019) (to be codified at 24 C.F.R. pt. 100) (stating that the "Fair Housing Act does not 'specifically relate to the business of insurance'").

210. Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. at 33593.

211. Zip code is often a proxy for race and leads to disparate impact. See Oliver Rollins, Benjamin Wiggins, Joseph (Lee) Young & Jimmy English, *Proxies for Race: A Catalogue*, PRICE LAB FOR DIGIT. HUMANS. (Apr. 2017), <https://pricelab.sas.upenn.edu/projects/proxies-race-catalogue> [https://perma.cc/J85Q-KQ6X] (describing zip code as a proxy for race); Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1257 (2020) ("Proxy discrimination is a particularly pernicious subset of disparate impact. Like all forms of disparate impact, it involves a facially neutral practice that disproportionately harms members of a protected class."). For a discussion of proxy discrimination, see generally Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315, 318 (1998) (describing how in proxy discrimination, an entity "uses one identifying characteristic as a proxy for another").

212. Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 240 (2014) [hereinafter Avraham et al., *Understanding Insurance Antidiscrimination Laws*]; Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Towards a Universal Framework for Insurance Anti-Discrimination Laws*, 21 CONN. INS. L.J. 1, 50 (2014) ("Insurance regulations governing permissible forms of discrimination vary among states.").

213. See, e.g., 215 ILL. COMP. STAT. 5/522 (Westlaw through P.A. 102-1102 of the 2022 Reg. Sess.) ("This article is to make basic property insurance increasingly available to the citizens of this State, and to deter the insurance industry from geographically redlining urban areas of this State . . ."); see also MD. CODE ANN. INS. § 27-501(a)(1) (LEXIS through all legislation from the 2022 Reg. Sess. of the Gen. Assemb.; including legislation ratified by the voters at the Nov. 2022 election) ("An insurer or insurance producer may not cancel or refuse to underwrite or renew a particular insurance risk or class of risk for a reason based wholly or partly on race, color, creed, sex, or blindness of an applicant or policyholder or for any arbitrary, capricious, or unfairly discriminatory reason.").

broadly, few include particular traits or explain how the standard should be interpreted.²¹⁴

For their part, insurance companies contend that perceived discrimination is in fact the result of other, race-neutral—and properly applied—factors that are actuarially supported. Automobile insurance again provides an illustrative example. Insurers allege “that what may seem like discrimination against low-income [B]lacks is no more than cutting loss exposure in areas of high theft, vandalism and arson . . . based solely on the perceived risk of the potential policyholder.”²¹⁵ Going even further, in an attempt to uncover the effect of credit-based insurance scores on price and availability of automobile insurance and their impact on racial and ethnic minority consumers, a Federal Trade Commission report found race-neutral factors, like credit score, are “effective predictors of risk under automobile policies”²¹⁶ and “determined that, as a group, African-Americans and Hispanics tend to have lower scores than non-Hispanic whites and Asians.”²¹⁷ Tellingly, the report concluded that the use of credit scores “likely leads to African Americans and Hispanics paying relatively more for automobile insurance than non-Hispanic whites and Asians.”²¹⁸ While advocates claim these race-neutral factors promote discrimination against minority insurance policy seekers, leading to discrimination by proxy, Insurance Commissioner Joel Ario noted at a public hearing held by the National Association of Insurance Commissioners that the impact of a credit score “doesn’t fall on all populations equally, and really no factor would . . . but this particular one . . . disproportionately [affects] certain minority groups.”²¹⁹ Going further, Commissioner Ario observed that the insurance industry’s contention—that actuarial support for other factors resulted in the

214. Avraham et al., *Understanding Insurance Antidiscrimination Laws*, *supra* note 212, at 233.

215. Willy E. Rice, *Race, Gender, “Redlining,” and the Discriminatory Access to Loans, Credit and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583, 593 (1996) (citing Albert R. Karr, *Complaints That Some Insurers Are Redlining Minority Homeowners Get U.S., State Attention*, WALL ST. J. at A22. (Apr. 19, 1994)).

216. FED. TRADE COMM’N, CREDIT-BASED INSURANCE SCORES: IMPACTS ON CONSUMERS OF AUTOMOBILE INSURANCE 3–4 (2007) (outlining that despite its recognition that “credit-based insurance scores appear to have little effect as a ‘proxy’ for membership in racial and ethnic groups . . . the FTC was not able to develop an alternative credit-based insurance scoring model that would continue to predict risk effectively, yet decrease the differences in scores on average among racial and ethnic groups”).

217. Press Release, Fed. Trade Comm’n, FTC Releases Report on Effects of Credit-Based Insurance Scores (July 24, 2007), <https://www.ftc.gov/news-events/press-releases/2007/07/ftc-releases-report-effects-credit-based-insurance-scores> [<https://perma.cc/L8JQ-S4LU>].

218. *Id.*

219. NAT’L ASS’N OF INS. COMM’RS, PROPERTY AND CASUALTY INSURANCE (C) COMMITTEE MARKET REGULATION AND CONSUMER AFFAIRS (D) COMMITTEE, THE USE OF CREDIT-BASED INSURANCE SCORES PUBLIC HEARING 1 (June 15, 2009) (statement by Joel Ario), https://content.naic.org/sites/default/files/inline-files/committees_c_090615_public_hearing_transcript.pdf [<https://perma.cc/A548-V2WA>].

disproportionate impact on minority groups, rather than intentional discrimination—amounts to willful ignorance of disproportionate impacts that results in affordability and availability issues for racial minority consumers.²²⁰

Ultimately, despite its disproportionate impact, regulators allow insurance companies to use credit score as a factor when pricing insurance policies. Acknowledging the discriminatory impact of credit-based pricing of homeowners insurance, scholars urge the application of a critical race theory (“CRT”) lens to balance public interest in insurance availability with alleged actuarial fairness.²²¹ As Professor Robert K. Yass explains, “[C]onsideration of this issue from a CRT perspective empowers regulators . . . to act on credit score usage for homeowner’s insurance in a way that goes beyond . . . what otherwise would be justified as a purely actuarial decision.”²²²

Discrimination pervades insurance policies for renter-occupied properties.²²³ The effect is twofold. First, as the case against Travelers Insurance illustrates, such discrimination makes it difficult for prospective landlords to acquire homeowners insurance necessary to facilitate the initial purchase of properties.²²⁴ For prospective landlords who would otherwise operate rental housing in neighborhoods disproportionately populated by non-white residents, the use of race-neutral proxies like zip code results in insurance redlining that makes it difficult to purchase real property and operate long-term rental housing. Second, once a prospective landlord acquires a building, discrimination by insurance companies against tenant-occupied property prevents the purchase of an affordable liability policy. Therefore, given the conditions of rental housing stock, homes and occupants that are most in need of protection may be the most difficult to insure, leaving tenants vulnerable to harms from personal injury and property damage.

220. *Id.* at 2. In recognition of the discriminatory impact of the use of credit scores to insurance availability, Reps. Bonnie Watson Coleman and Rashida Tlaib introduced legislation to address discrimination by proxy, preventing insurance companies from using certain race-neutral information to determine insurance eligibility and pricing. Prohibit Auto Insurance Discrimination (“PAID”) Act, H.R. 3693, 116th Cong. (2019) (banning insurance companies from using income proxies, such as education, occupation, employment status, home ownership status, and credit score, among others, to calculate rates or eligibility for automobile insurance); Preventing Credit Score Discrimination in Auto Insurance Act, H.R. 1756, 116th Cong. (2019). States are also enacting insurance antidiscrimination law. *Important Insurance Anti-Discrimination Bill Becomes Law*, CONSUMER FED’N AM. (July 6, 2021), https://consumerfed.org/press_release/important-insurance-anti-discrimination-bill-becomes-law [https://perma.cc/7TLJ-ETG5].

221. Robert K. Yass, *Homeowner’s Insurance and Credit Score: A Critical Race Theory Perspective*, 27 CONN. INS. L.J. 286, 287 (2020).

222. *Id.* at 310.

223. *See, e.g.*, Complaint ¶¶ 1–2, Nat’l Fair Hous. All. v. Travelers Indem. Co., 2016 WL 2890235 (D.D.C. May 17, 2016) (No. 16-cv-928).

224. *Id.* ¶ 20.

2. Market Failure and the Protection Gap

Inadequacies in the insurance market make it challenging for consumers to obtain adequate protection for real property. Professor Jay Feinman observes that “[a] well-functioning market for homeowners’ insurance would offer consumers a variety of options of price, coverage, and quality, and consumers would have adequate information as to price, coverage and quality to choose insurance that is appropriate for their needs.”²²⁵

The insurance market often creates perverse incentives or a negative feedback loop that discourages policyholders from maximizing the value of their coverage. Insurance companies frequently punish policyholders for filing claims after experiencing damages by increasing rates, declining to renew, or canceling policies. This “use it and lose it” practice disincentivizes policyholders from making claims, even when there is a legitimate need,²²⁶ resulting in mere “illusory” protection.²²⁷ While insurance companies may use claim history to provide and price policies, not all information is relevant; for example, tree damage one year does not predict future damage. Despite this, information that is not “strongly correlated with future risk” may be used to increase pricing or drop policyholders, resulting in absence of protection on a property.²²⁸ Compounding these effects, insurance companies share information on national databases. This means that if a policyholder’s coverage was terminated after making a claim, other insurance companies may be reluctant to provide coverage, or only do so at unaffordable rates.²²⁹ The systemic deterrence from using insurance coverage prevents policyholders from realizing true security and risk mitigation.²³⁰ This, in turn, affects others who derive protection from a policy, such as tenants covered by a landlord’s liability coverage.

Insurance redlining, state-by-state approaches to insurance discrimination, and failures within the housing insurance market contribute to a protection gap

225. Jay M. Feinman, *Improving State Regulation of Homeowners Insurance: The Essential Protections for Policyholders Project*, 24 CONN. INS. L.J. 163, 166 (2017).

226. Get a “CLUE”: Don’t Be a Victim of “Use It and Lose It,” UNITED POLICYHOLDERS, <https://uphelp.org/buying-tips/get-a-clue-dont-be-a-victim-of-use-it-and-lose-it> [<https://perma.cc/G3J9-XYPN>].

227. RUTGERS CTR. FOR RISK & RESP., RUTGERS L. SCH., ESSENTIAL PROTECTIONS FOR POLICYHOLDERS STATE RANKINGS OF HOMEOWNERS INSURANCE PROTECTIONS: “USE IT AND LOSE IT” 2 (2017).

228. See Feinman, *supra* note 225, at 174.

229. *Id.*

230. To minimize this deterring effect, some policies allow for a periodic “free claim.” This allows an insured to make a claim on a policy during a specified period without causing rates to rise. See, e.g., *Allstate Home Extras*, ALLSTATE HOMEOWNERS INS., <https://www.allstate.com/home-insurance/allstate-home-extras> [<https://perma.cc/E9Y7-B9J7>] (staff-uploaded archive) (describing AllState’s RateGuard product). However, while policy features, like AllState’s RateGuard, prevent insureds from being penalized for utilizing their policies, they may come at a cost. *Id.* RateGuard, for example, is an a la carte add-on feature that an insured may opt into for an additional fee. *Id.*

in coverage. The insurance protection gap refers to the difference between losses that are insured and losses that could or should be insured.²³¹ This can occur when a party is entirely uninsured, has insufficient coverage—either because the policy does not cover all risks or the existing coverage amount is inadequate to cover potential losses—coverage is limited, or the claims process prevents full recovery.²³² Figures 2 and 3 illustrate the limitations of common housing insurance policies, with the most common policies notably lacking liability coverage. Consequently, there exists a gap in protection for tenant-residents.

The existence of a protection gap creates an access-to-justice problem for tenant-plaintiffs who have been injured on poorly maintained property. Insurance redlining, market failure, and the resulting protection gap affect the ability of homeowners to purchase and maintain their properties. However, these challenges cause downstream effects for tenants in several ways. First, as Judge Easterbrook noted, barriers to homeowners insurance create barriers to homeownership. Barriers to property ownership prevent prospective landlords from entering the rental housing market. This, in turn, affects the number of rental housing units available to tenants, thereby increasing competition for the already limited affordable rental housing supply. Second, lack of insurance affects the ability of homeowner-landlords to maintain their properties. Disrepair increases the likelihood of personal injury and property damage occurring in the residence. Finally, the absence of liability insurance makes it difficult for injured parties to obtain relief. Even if a tenant is successful in obtaining a judgment against a landlord, lack of insurance can prevent a tenant from being able to collect and take the steps needed to recover from the negative health consequences of poor housing.

III. STATUTORY APPROACHES TO RISK ALLOCATION IN HOUSING ACCOMMODATIONS

The dangers posed by substandard housing conditions and the difficulty in collecting a judgment after a finding of liability raise the question: Which party should bear the risks of harm, time, and expense? Under McCarran-Ferguson, states have the power to regulate insurance to achieve public policy objectives. This part juxtaposes statutory approaches to risk allocation in long-term rental housing, short-term rental housing, and multifamily homeownership—all housing accommodations occupied by residents with less

231. JAY M. FEINMAN, RUTGERS CTR. FOR RISK & RESP., *THE PROTECTION GAP IN HOMEOWNERS INSURANCE* 3 (2022) [hereinafter FEINMAN, *THE PROTECTION GAP*]; see also Kenneth S. Klein, *Minding the Protection Gap: Resolving Unintended, Pervasive, Profound Homeowner Underinsurance*, 25 CONN. INS. L.J. 34, 35 (2018) (documenting the problem and causes of underinsurance).

232. FEINMAN, *THE PROTECTION GAP*, *supra* note 231, at 4.

than a one hundred percent interest in the property. Long-term tenants have a possessory interest greater than thirty days while short-term occupants have a possessory interest of less than thirty days.²³³ Multifamily homeowners own property in shared physical structures. Comparing approaches to mandatory liability insurance among partial interest holders, this part exposes statutory bias toward property owners and short-term renters—groups that are disproportionately white and more likely to be socioeconomically privileged—when compared to long-term tenants.

A. *Long-Term Rental Housing*

Long-term renters comprise over one-third of the nation's 122.8 million households.²³⁴ Despite the large number of renters, states have done little to allocate the risk between landlords and tenants, instead leaving the issue to individuals. All jurisdictions have laws that regulate conditions that give rise to personal injury and property damage; each state has a building code and general habitability standards. However, while these laws govern liability for damages, the vast majority are silent on the issue of liability insurance,²³⁵ which can significantly affect the “collectability” of a judgment.

States do not require landlords to carry insurance to participate in the long-term rental housing market. Rhode Island is the sole exception.²³⁶ In 2022, Rhode Island became the first state to mandate liability insurance for landlords.²³⁷ Under the law, as of January 1, 2022, landlords must obtain and have in full force and effect a general liability policy of at least one hundred thousand dollars for those persons injured on the premises due to the negligence

233. See, e.g., NEW ORLEANS, LA., CODE OF ORDINANCES § 26-614 (Municode through Ordinance No. 29132, adopted August 4, 2022); NEW YORK CITY, N.Y., ADMIN. CODE § 26-2101 (American Legal Publishing Corporation through Local Law 2022/95, enacted Oct. 18, 2022).

234. See *American Community Survey*, U.S. CENSUS BUREAU (2019), <https://data.census.gov/cedsci/table?q=DP04&tid=ACSDP1Y2019.DP04> [<https://perma.cc/K8RY-WM5R> (staff-uploaded archive)] (detailing that there are 139,686,209 total housing units in the United States but only 122,802,852 are occupied, and that 44,077,990 of the total occupied units are renter-occupied).

235. Many states have adopted the long-standing Uniform Residential Landlord Tenant Act (“URLTA”) drafted in 1972 by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). See Aloun Khountham, *Landlord Tenant Laws by State: Renter's Rights & Compliance*, FIT SMALL BUS. (Sept. 6, 2022), <https://fitsmallbusiness.com/landlord-tenant-laws-by-state/> [<https://perma.cc/UH4Z-ELLN>]. Twenty-one states have enacted the URLTA, with many other state statutes being influenced by it, particularly the implied warranty of habitability. See *id.* However, the URLTA only contemplates conditions in a rental unit, and is not designed to address landlord insurance requirements. See *id.*

236. Rhode Island is excluded from this number because of the recent enactment of 34 R.I. GEN. LAWS § 34-18-22(7) (LEXIS through Ch. 422 of the 2022 Sess., including all corrections and changes by the Director of Law Revision), discussed more *infra*.

237. See 34 R.I. GEN. LAWS § 34-18-22(7) (LEXIS).

of the landlord.²³⁸ Moreover, if the landlord fails to comply, the tenant can pursue remedies, such as termination of the rental agreement, actual damages, injunctive relief, and, in some cases, reimbursement for attorney's fees.²³⁹

In contrast, Virginia²⁴⁰ and Oregon²⁴¹ allow landlords to require tenants to obtain renters insurance as a condition of their rental agreement.²⁴² Under Virginia law, a landlord may pass the cost of landlord-purchased insurance to the tenant by requiring the tenant to pay “for the cost of premiums for such renters insurance²⁴³ obtained by the landlord, in order to provide such coverage for the tenant as part of rent or as otherwise.”²⁴⁴ The statute explicitly permits landlords to add “a monthly amount as additional rent to recover additional costs of renter’s insurance premiums.”²⁴⁵

While Virginia law allows landlords to pass on the costs of liability policies to their tenants, Oregon imposes statutory limitations on landlords who require their renters to purchase liability insurance.²⁴⁶ Like Virginia, Oregon allows landlords to require a tenant to obtain and maintain renters liability insurance.²⁴⁷ However, Oregon law includes some protections for tenants.²⁴⁸ For instance, a landlord cannot require a tenant to obtain renters insurance that exceeds “\$100,000 per occurrence or the customary amount required by landlords for similar properties with similar rents in the same rental market,

238. *Id.* (LEXIS).

239. *Id.* § 34-18-28(a)–(b) (LEXIS).

240. VA. CODE ANN. § 55.1-1206(B) (LEXIS through Ch. 22 of the 2022 Spec. Sess. I) (“A landlord may require as a condition of tenancy that a tenant have renter’s insurance as specified in the rental agreement.”).

241. OR. REV. STAT. § 90.222(1) (2021) (“A landlord *may* require a tenant to obtain and maintain renter’s liability insurance in a written rental agreement.” (emphasis added)).

242. VA. CODE ANN. § 55.1-1206(B) (LEXIS); OR. REV. STAT. § 90.222(1).

243. VA. CODE ANN. § 55.1-1200 (LEXIS) (defining renters insurance under Virginia law as encompassing “insurance coverage specified in the rental agreement that is a combination multi-peril policy containing fire, miscellaneous property, and personal liability coverage insuring personal property located in dwelling units not occupied by the owner”).

244. *Id.* § 55.1-1206(B), (D) (LEXIS) (“The landlord shall recover from the tenant the actual costs of such insurance coverage and may recover administrative or other fees associated with the administration of a renter’s insurance program, including a tenant opting out of the insurance coverage provided to the tenant pursuant to this subsection.”). However, pursuant to Section 55.1-1206(C), “the total amount of all security deposits, insurance premiums for damage insurance, and insurance premiums for renter’s insurance shall not exceed the amount of two months’ periodic rent.” *Id.* § 55.1-1206(C) (LEXIS).

245. *Id.* § 55.1-1206(C) (LEXIS). It is a question for the courts as to whether a landlord can require a tenant to pay the security deposit and insurance premiums in advance and increase the monthly rental obligation to recover additional costs associated with renters insurance that exceed the two-month cap.

246. *See* OR. REV. STAT. § 90.222.

247. *Id.* § 90.222(1).

248. Additionally, a landlord may not require use of a particular insurance provider or carrier, require that a tenant name the landlord as having special status on the tenant’s insurance policy, or require waiver of the insurer’s subrogation rights. *Id.* § 90.222(7).

whichever is greater.”²⁴⁹ Additionally, a landlord may only require that a tenant maintain renters liability insurance if the landlord *also* has a “comparable liability insurance” coverage and provides the tenant with adequate documentation of such coverage.²⁵⁰ To further defray costs for already rent-burdened households, Oregon law prohibits a landlord from requiring a tenant to obtain renters liability insurance if the tenant’s household income is “equal to or less than [fifty] percent of the area median income.”²⁵¹ Oregon law also prohibits landlords from requiring renters liability insurance “if the dwelling unit of the tenant has been subsidized²⁵² with public funds.”²⁵³

Of the remaining forty-seven states and the District of Columbia, none have laws expressly governing the allocation of risk for substandard housing conditions between landlords and tenants. Instead, parties in these jurisdictions must privately bargain around the burden of obtaining and maintaining liability insurance. This puts tenants at a distinct disadvantage. Landlords are typically more sophisticated parties to the contract due to their experience and knowledge in the market. Whereas a tenant may execute a new lease agreement annually or once every few years, landlords may be parties to multiple lease agreements with different parties at one time. As repeat players in the system, they can wield their knowledge to draft agreements and shift liability in a way that is disproportionately advantageous to them. Further, as the dearth of affordable housing increases competition for an essential—yet scarce—resource, demand for safe and affordable housing far exceeds supply. For tenants, the lack of adequate housing stock creates pressure to enter into agreements with less favorable terms. Housing is a universal and essential need and securing a roof over one’s head will take priority over securing liability protection. As a result, because the law is largely silent on liability insurance for landlords, tenants are

249. *Id.* § 90.222(1).

250. *Id.* § 90.222(5). *See generally* *Testimony in Support of SB 91A: Hearing on SB 91A Before the House Comm. on Hum. Servs. & Hous.*, 77th Or. Legis. Assemb., Reg. Sess. (2013) (statement of John VanLandingham), <https://olis.oregonlegislature.gov/liz/2013R1/Downloads/CommitteeMeetingDocument/22321> [<https://perma.cc/F93V-QXC5>] (outlining that these protections are policymakers’ response to concerns about the cost of renters insurance and the inability of some tenants to obtain policies). As tenant advocates emphasized prior to this change, “[i]nsurance is often more expensive in lower-income areas, so low-income tenants get hit harder by a cost they can least afford.” *Id.*

251. § 90.222(8) (explaining that household median income is “adjusted for family size as measured up to a five-person family, as determined by the Oregon Housing Stability Council based on information from the United States Department of Housing and Urban Development”).

252. *Id.* § 90.222(9)(a) (“Including federal or state tax credits, federal block grants authorized in the HOME Investment Partnerships Act under Title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, or the Community Development Block Grant program authorized in the Housing and Community Development Act of 1974, as amended, project-based federal rent subsidy payments under 42 U.S.C. 1437f and tax-exempt bonds.”); *see also id.* § 90.222(9)(b) (“Not including tenant-based federal rent subsidy payments under the Housing Choice Voucher Program authorized by 42 U.S.C. 1437f or any other local, state or federal rental housing assistance.”).

253. *Id.* § 90.222(9).

forced to accept fewer protections and greater risk of harm to avoid experiencing homelessness.

B. *Short-Term Rental Housing*

In many states, short-term renters are afforded more protections, and short-term rental owners are held to a higher standard, than their long-term counterparts.²⁵⁴ Short-term renters—individuals who reside in a property for less than thirty consecutive days²⁵⁵—typically identify and book accommodations through short-term rental platforms like Airbnb and VRBO.²⁵⁶ While Rhode Island is an outlier in requiring landlords to maintain liability insurance for long-term rental housing, many jurisdictions have enacted legislation that requires short-term rental owners to maintain liability insurance. Massachusetts law requires short-term rental hosts to maintain liability insurance of at least one million dollars that explicitly covers bodily injury.²⁵⁷ Similarly, Washington state mandates that short-term rental owners maintain liability insurance “to cover the short-term rental dwelling unit in the aggregate of not less than one million dollars or conduct each short-term rental transaction through a platform that provides equal or greater primary liability insurance coverage.”²⁵⁸ Several cities—such as New Orleans, Louisiana;²⁵⁹ Tybee Island, Georgia;²⁶⁰ and Pinecrest, Florida;²⁶¹ among others²⁶²—also impose insurance requirements on short-term rental hosts.²⁶³ Notably none of

254. This has been motivated by concerns about tax revenue, housing inventory, and violent crime. See generally Olivia Carville, *Airbnb Is Spending Millions of Dollars To Make Nightmares Go Away*, BLOOMBERG BUSINESSWEEK (June 15, 2021, 4:00 AM), <https://www.bloomberg.com/news/features/2021-06-15/airbnb-spends-millions-making-nightmares-at-live-anywhere-rentals-go-away> [<https://perma.cc/T2ZF-FL8H>] (describing the unique challenges to “trust and safety” that Airbnb and its users face as a result of the platform’s person-to-person short-term rental model).

255. See, e.g., NEW ORLEANS, LA., CITY CODE § 26-614 (1995); NEW YORK, N.Y., RULES § 26-3101 (2022).

256. See generally Gold, *Redliking*, *supra* note 177, at 1858 (“While there are several such platforms, including Homeaway, VRBO, Flipkey, and Noirbnb, none have a greater market share than Airbnb.”).

257. MASS. GEN. LAWS ANN. ch. 175, § 4F(b) (Westlaw through ch. 230 of the 2022 2d Ann. Sess.) (“An operator shall maintain liability insurance of not less than \$1,000,000 to cover each short-term rental, unless such short-term rental is offered through a hosting platform that maintains equal or greater coverage.”).

258. WASH. REV. CODE § 64.37.050 (2022).

259. NEW ORLEANS, LA., CITY CODE § 26-618 (1995).

260. TYBEE ISLAND, GA., CODE OF ORDINANCES § 34-261 (2022).

261. PINECREST, FL. CODE OF ORDINANCES ch. 30, art. 5, div. 5.32 (2021).

262. E.g., MILPITAS, CAL., CODE OF ORDINANCES § XI-10-13.17 (2022); ORANGE, CAL., MUNICIPAL CODE § 5.94.060 (2022); BRISBANE, CAL., MUNICIPAL CODE § 17.35.030 (2022); MAITLAND, FLA., LAND DEVELOPMENT CODE § 2.5.3(g)(4)(B) (2022).

263. New Orleans for instance, enacted a statute that requires short-term rental owners to “maintain in full force and effect at all times, a minimum of \$1,000,000.00 in ‘commercial general

these jurisdictions require long-term landlords to maintain liability insurance. Liability insurance requirements for short-term rentals can be satisfied by a short-term rental platform's proprietary insurance policy.²⁶⁴ To fill this market demand, Airbnb created AirCover, marketed as "top-to-bottom protection for Hosts" that includes, among other things, up to one million dollars in coverage for host liability insurance.²⁶⁵

The short-term rental market is more regulated at the point of entry than the long-term housing market,²⁶⁶ decreasing the frequency of substandard housing conditions and attendant injuries experienced by occupants at these properties. However, if an injury occurs, the prevalence of liability insurance mandated for short-term rental operators provides redress to the damaged party. Comparing this approach with laws governing liability coverage for long-term rental accommodations, the result is a skewed system where occupant protections vary based on length of tenancy. A short-term resident who rents a property for twenty-seven days is statutorily afforded protection and access to justice, yet once the same individual rents the property for thirty-one days, they are stripped of those protections.

C. *Multifamily Homeownership*

Multifamily homeownership, such as condominium ownership, is another housing accommodation wherein multiple parties have rights to the same property. In a condominium, an individual owns a given unit, but shares an interest in the building with other condominium owners. As of 2020, there were

liability' insurance per occurrence, combined single limit, for bodily injury, personal injury, and property damage arising in any way from the issuance of the permit or activities conducted pursuant to the permit, for each dwelling unit used as a short-term rental." NEW ORLEANS, LA. CITY CODE § 26-618(a)(1) (2022). Similarly, in Tybee, Georgia, and Pinecrest, Florida, only "short-term vacation rentals" are required to have liability insurance. See TYBEE ISLAND, GA., CODE OF ORDINANCES § 34-261(c)(7) ("Proof of liability insurance shall be required along with evidence that insurance company knows the property is being used as an STVR."); PINECREST, FLA., CODE OF ORDINANCES ch. 30, art. 5, div. 5.32(g)(1)(h) (requiring owners of a vacation rental to "provide[] evidence of liability insurance covering the use of the property as a rental property").

264. See MASS. GEN. LAWS ANN. ch. 175, § 4F(b) (Westlaw through the 2022 2nd Ann. Sess.) (requiring that a short-term rental operator must have liability insurance "unless such short-term rental is offered through a hosting platform that maintains equal or greater coverage").

265. See *AirCover for Hosts*, AIRBNB, <https://www.airbnb.com/aircover-for-hosts> [<https://perma.cc/2H5L-TQ46>] (stating that AirCover also provides liability insurance for Airbnb experiences and damage protection). According to Airbnb, their policies "insure Hosts, in certain countries, for their legal liability for bodily injury or property damage to guests or others resulting from an event that happens during a guest's Airbnb Stay at the Host's Accommodation." See *Host Liability Insurance Program Summary*, AIRBNB (Jan. 12, 2022), <https://www.airbnb.com/help/article/3145/host-liability-insurance-program-summary> [<https://perma.cc/6SSD-5GE6>].

266. See Allyson E. Gold, *Community Consequences of Airbnb*, 94 WASH. L. REV. 1577, 1577 (2019) (discussing registration schema and licensing for short-term rental accommodations).

an estimated 143,000 condominium communities in the United States.²⁶⁷ A condominium is a “residential home” where individual units within a building are privately owned.²⁶⁸ Like many rental accommodations, condominiums are dwellings that share facilities and communal areas. Actions of an individual owner can affect other occupants in the property. For instance, a fire originating in Condominium A may cause damage to neighbors in Condominiums B and C, or in extreme circumstances, the entire building. Customarily, a condominium association—sometimes referred to as a homeowners association—provides the maintenance of the communal areas and outlines rules that residents are obligated to follow per their bylaws.²⁶⁹ Analysis of risk allocation in multifamily homeownership properties reveals stark differences when compared to long-term rental accommodations.

The majority of jurisdictions statutorily require condominium associations to maintain a liability insurance policy.²⁷⁰ Of these, twenty-three states require

267. See FOUND. FOR CMTY. ASS'N RSCH. & CMTY. ASS'NS INST., 2020-2021 U.S. NATIONAL AND STATE STATISTICAL REVIEW 1 (2021), https://foundation.caionline.org/wp-content/uploads/2021/07/2021StatsReview_Web.pdf [<https://perma.cc/9S4J-NR2X>] (totaling the number of community associations as of 2020 at 355,000, and estimating a total of 143,000 condominium communities since condominium communications account for thirty-five to forty percent of all community associations).

268. Bill Gassett, *Renting Condos vs. an Apartment: What Is the Difference*, RE/MAX (Apr. 19, 2021), <https://www.maxrealestateexposure.com/renting-condos-vs-apartment> [<https://perma.cc/ZYF5-5E3B>] (“A condo or condominium is a residential home within a development that can be rented to tenants.”).

269. Bill Gassett, *HOA: What Is an HOAs Meaning and Purpose*, RE/MAX (Feb. 15, 2021), <https://www.maxrealestateexposure.com/hoa-definition> [<https://perma.cc/GXA3-SNJJ>].

270. See, e.g., ALA. CODE § 35-8A-313 (Westlaw through the end of the 2022 Reg. and First Spec. Sess.); ALASKA STAT. § 34.07.400 (LEXIS through all 2022 legislation and Exec. Orders); ARIZ. REV. STAT. ANN. § 33-1253 (Westlaw through the Second Reg. Sess. of the Fifty-Fifth Leg. (2022), and includes Election Results from the Nov. 8, 2022 Gen. Elec.); COLO. REV. STAT. § 38-33.3-313 (LEXIS through Ch. 18 from the 2023 Reg. Sess. and effective as of Mar. 10, 2023); CONN. GEN. STAT. § 47-255 (2023); DEL. CODE ANN. tit. 25 § 81-313 (LEXIS through 84 Del. Laws, c. 5); D.C. CODE § 42-1903.10 (LEXIS through Mar. 9, 2023); GA. CODE ANN. § 44-3-107(a)(2) (LEXIS through the 2022 Reg. Sess. of the Gen. Assemb.); HAW. REV. STAT. § 514B-143(a)(2) (2022); 765 ILL. COMP. STAT. 605/12(a)(2) (Westlaw through P.A. 102-1143 of the 2022 Reg. Sess.); IND. CODE § 32-25-8-9(a)(2) (2022); LA. STAT. ANN. § 9:1123.112(A)(2) (Westlaw through the 2023 First Extra. Sess.); ME. REV. STAT. ANN. tit. 33, § 1603-113(a)(2) (Westlaw through emergency legislation through Ch. 4 of the 2023 First Reg. Sess. of the 131st Leg.); MD. CODE ANN., REAL PROP. § 11-114(a)(2) (LEXIS through all legislation from the 2022 Reg. Sess. of the Gen. Assemb.; including legislation ratified by the voters at the Nov. 2022 election); MINN. STAT. § 515A.3-112(a)(2) (2022); MO. ANN. REV. STAT. § 448.3-113(1)(2) (Westlaw through the end of the 2022 Second Reg. and First Extra. Sess. of the 101st Gen. Assemb.); NEB. REV. STAT. § 76-871(a)(2) (2022); NEV. REV. STAT. § 116.3113(1)(b) (2022); N.H. REV. STAT. ANN. § 356-B:43(I)(b) (Westlaw through through Ch. 1 of the 2023 Reg. Sess.); N.J. REV. STAT. ANN. § 46:8B-14(e) (Westlaw through L.2023, c. 9 and J.R. No. 1); N.M. STAT. ANN. § 47-7C-13(A)(2) (Westlaw through Ch. 3 of the 2023 First Reg. Sess. of the 56th Leg. (2023)); N.C. GEN. STAT. § 47C-3-113(a)(2) (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.); OHIO REV. CODE ANN. § 5311.16 (Westlaw through through File 1 of the 135th Gen. Assemb. (2023-2024)); 68 PA. CONS. STAT. § 3312 (2022); 34 R.I.

the liability policy to cover “all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements and any property owned or leased by the association.”²⁷¹ Three states—Georgia, Hawaii, and Illinois—mandate minimum liability coverage amounts. Hawaii and Illinois require liability coverage of a minimum amount of one million dollars. Georgia goes even further, requiring coverage “for bodily injury and property damage in an amount not less than one million dollars for a single occurrence and two million dollars aggregate.”²⁷² In specifying a minimum coverage amount, the legislature intended to guarantee that “budgetary concerns, or simple bad judgment, would not cause disproportionately low levels of insurance.”²⁷³ Specifically, for small condominium complexes, these minimums anticipate and obviate the risk that “the combination of inadequate insurance and low overall unit value [w]ould leave injured plaintiffs severely undercompensated.”²⁷⁴

Juxtaposing laws governing liability coverage reveals greater statutory protection for occupants of short-term rental accommodations and homeowners

GEN. LAWS § 34-36.1-3.13 (LEXIS through Ch. 442 of the 2022 Sess., including all corrections and changes by the Director of Law Revision); TENN. CODE ANN. § 66-27-413 (LEXIS through the 2022 Reg. Sess.); TEX. PROP. CODE ANN. § 82.111 (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Legis.); UTAH CODE ANN. § 57-8-43(b)(3) (LEXIS through 2022 Third Spec. Sess. of the 64th Legis.); WASH. REV. CODE § 64.34.352 (2022); W. VA. CODE § 36B-3-113(a)(2) (2023); WIS. STAT. § 703.17 (2021–2022). Virginia’s condominium insurance statute allows for the condominium instruments to require the association to obtain a master liability policy that provides coverage for the condominium association and “all unit owners and other persons entitled to occupy any unit or other portion of the condominium.” VA. CODE ANN. § 55.1-1963 (LEXIS through Ch. 22 of the 2022 Spec. Sess. I).

271. Unless otherwise provided, the states in this list have identical or virtually identical language as provided above. See ARIZ. REV. STAT. ANN. § 33-1253(A)(2) (Westlaw); CONN. GEN. STAT. § 47-255(a)(3); DEL. CODE ANN. tit. 25 § 81-313(a)(2) (LEXIS); D.C. CODE § 42-1903.10(a)(2) (LEXIS); GA. CODE ANN. § 44-3-107(a)(2) (LEXIS); LA. STAT. ANN. § 9:1123.112(A)(2) (Westlaw); ME. STAT. tit. 33, § 1603-113(a)(2) (Westlaw); MD. CODE ANN., REAL PROP. § 11-114(a)(2) (LEXIS); MINN. STAT. § 515A.3-112(a)(2); MO. REV. STAT. § 448.3-113(1)(2) (Westlaw); NEB. REV. STAT. § 76-871(a)(2); NEV. REV. STAT. § 116.3113(1)(b); N.J. REV. STAT. ANN. § 46:8B-14(e) (Westlaw) (“[A]gainst liability for personal injury and death for accidents occurring within the common elements whether limited or general and the defense of any actions brought by reason of injury or death to person, or damage to property occurring within such common elements and not arising by reason of any act or negligence of any individual unit owner.”); N.M. STAT. ANN. § 47-7C-13(A)(2) (Westlaw); N.C. GEN. STAT. § 47C-3-113(a)(2) (LEXIS); OHIO REV. CODE ANN. § 5311.16(A) (Westlaw) (“Liability insurance for all unit owners, their tenants, and all persons lawfully in possession or control of any part of the condominium property in an amount that it determines for personal injury or property damage arising from or relating to the common elements.”); 68 PA. CONS. STAT. § 3312(a)(2); R.I. GEN. LAWS tit. 34, § 34-36.1-3.13(a)(2) (LEXIS); TENN. CODE ANN. § 66-27-413(a)(2) (LEXIS); TEX. PROP. CODE ANN. § 82.111(a)(2) (Westlaw); UTAH CODE ANN. § 57-8-43(3)(b) (LEXIS); WASH. REV. CODE § 64.34.352(1)(b); W. VA. CODE § 36B-3-113(a)(2).

272. GA. CODE ANN. § 44-3-107(a)(2) (LEXIS).

273. Donald L. Schriefer, *Judicial Action and Condominium Unit Owner Liability: Public Interest Considerations*, 1986 U. ILL. L. REV. 255, 260.

274. *Id.*

in multifamily dwellings as compared to long-term renters. Short-term renters and owners in multifamily dwellings are disproportionately white and hold more wealth than long-term tenants, who are disproportionately low-income and non-white. In light of the demographic differences between these groups of residents, greater statutory protection for short-term renters and owners in multifamily dwellings effectuates racial bias in insurance regulations. Moreover, because of the prevalence of outstanding repairs in long-term rental housing, long-term renters are the most likely to be exposed to harmful conditions that cause injury. The lack of mandated liability coverage guarantees that low-income, minority long-term tenants are the most likely to experience injury while at the same time, the least likely to be covered by policies that could most easily provide redress and compensate them for damages.

IV. RECOMMENDATIONS

The absence of liability insurance compounds the risk of harm to long-term tenants living in substandard housing conditions. Landlords benefit financially from supplying long-term housing—an essential need. Given the dearth of affordable housing, this need provides a captive market of tenants, who are often forced to accept substandard housing or risk homelessness.

State statutes do little to shield long-term tenants from bearing the physical and financial consequences of substandard housing conditions. To protect the health and safety of long-term tenants and provide an avenue of recovery should injury occur, states can exercise their powers under the McCarran-Ferguson Act to mandate that long-term landlords carry liability insurance and require landlords to disclose information about their insurance policies to tenants to participate in the long-term rental market. While these recommendations are designed to alleviate risks to tenants, they are not a substitute for eliminating insurance redlining and market failures—barriers that prevent affordable insurance acquisition—or increasing the supply of safe and affordable housing; they are offered as complementary policies.

A. *Mandated Liability Coverage*

Requiring landlords to obtain liability coverage as a prerequisite to enter the long-term rental market protects both landlords and tenants. A liability insurance requirement insulates landlords from the financial consequences of harm to occupants. For tenants, such a policy helps close the access-to-justice gap by ensuring that they can obtain relief should they experience personal injury or property damage as a result of substandard housing conditions. Despite the much shorter occupancy duration, Airbnb hosts have more onerous

liability insurance requirements than long-term landlords.²⁷⁵ Adopting this requirement for long-term dwellings would place local residents on equal footing with tourists.

Furthermore, mandated liability insurance coverage is a natural outgrowth of front-end protections for tenants in some localities. Across the country, local governments have enacted landlord licensing requirements and mandatory pre-rental inspections for long-term rental accommodations. Several jurisdictions require landlords to obtain a rental license or officially register their property to participate in the rental housing market.²⁷⁶ For instance, the city of Denver passed the “Healthy Residential Rentals for All” legislation in May 2021, which mandates that all²⁷⁷ rental properties obtain a four-year license and undergo an inspection to ensure that rental units meet Denver’s minimum housing standards.²⁷⁸ Further, several localities also implement a pre-rental inspection (“PRI”) program to maintain housing code enforcement and protect the health of residents.²⁷⁹ For instance, Seattle’s Rental Registration and Inspection Ordinance requires that all registered properties are reported in compliance with minimum housing and safety standards at least once every five to ten years.²⁸⁰ Licensing and PRI programs seek to avert harm to tenants by requiring landlords to comply with the local housing code, essentially attempting to prevent injury before it happens.

275. See generally Carville, *supra* note 254 (discussing Airbnb’s increased potential liability for property damage and harm to guests or hosts).

276. See Katie Eastman, *All Denver Landlords Would Be Required To Have a License Under Proposed City Council Bill*, 9NEWS (Apr. 25, 2021), <https://www.9news.com/article/money/markets/real-estate/denver-city-council-president-proposes-bill-all-landlords-hold-license/73-0b31f476-0bf1-4dcb-916c-04c3315b8cbd> [<https://perma.cc/ZK6P-C5HM>]. However, not all landlord license requirements attempt to address problems within their rental stock.

277. Denver previously had passed a licensing requirement for short-term rentals prior to the enactment of this legislation.

278. *Healthy Residential Rentals for All*, DENVER CITY COUNCIL (May 3, 2021), <https://www.denvergov.org/Government/Agencies-Departments-Offices/Denver-City-Council/Council-Members/Stacie-Gilmore-Council-District-11/Healthy-Residential-Rentals-for-All> [<https://perma.cc/K3CN-VKPH>]. This policy is premised on the fact that “renters are afraid to report problems with their homes and some tenants live without leases, creating uncertainty and having limited legal recourse in the event of a rent increase.” STACIE GILMORE, “HEALTHY RESIDENTIAL RENTALS FOR ALL” RESIDENTIAL RENTAL LICENSE POLICY FREQUENTLY ASKED QUESTIONS, <https://www.denvergov.org/files/assets/public/city-council/documents/d11/faq4.12.2021.pdf> [<https://perma.cc/Z4SG-RFM5>].

279. Unlike a traditional complaint-based inspection system, in which a municipal code enforcement officer conducts a housing inspection in response to a resident complaint about a substandard housing condition, PRI programs inspect all covered rental housing on a regular basis.

280. *Rental Registration & Inspection Ordinance - About RRIO*, SEATTLE DEP’T CONSTR. & INSPECTIONS, <https://www.seattle.gov/sdci/codes/licensing-and-registration/rental-registration-and-inspection-ordinance> [<https://perma.cc/KF82-J6GZ>].

But injuries will still happen. They will happen because visual inspections alone do not uncover all threats to health and safety.²⁸¹ They will happen because inspectors may feel pressure to “pass” a unit rather than remove it from the rental housing stock.²⁸² They will happen because sometimes conditions deteriorate even if a property properly passed an initial inspection. In these situations, lack of liability insurance will jeopardize the ability of tenants to fully recover from harm. For jurisdictions that already impose licensing or PRI programs for long-term landlords, requiring liability coverage is the next logical step to mitigate the effects of substandard housing conditions. In jurisdictions that have yet to require such programs, liability insurance is a pathway to recovery for tenants.

In addition to complementing programs to protect long-term renters on the front end, requiring long-term landlords to carry liability insurance supplements existing insurance requirements for specific, costly risks. When Congress found that “voluntary participation . . . yields too few subscribers,”²⁸³ it enacted legislation requiring property owners living in areas prone to flood damage to obtain flood insurance.²⁸⁴ The move to mandate flood insurance was motivated by the economic impact of flood damage; Congress realized it is more cost effective to carry insurance than pay for damages out of pocket, and that insurance increases the ability of affected people and property to recover. Likewise, housing conditions cause serious health consequences to residents and expensive damage to property. Liability coverage for long-term rental accommodations is more cost-effective and increases the likelihood that tenants will be made whole after experiencing personal injury and property damage.

To provide meaningful recovery, compulsory insurance must be tailored to address the size and condition of the property as well as the number of residents. Freddie Mac’s boilerplate requiring liability insurance (one million dollars per occurrence and two million dollars in aggregate) does not adequately contemplate system-wide substandard conditions that affect tenants throughout a property. In Georgia, for example, an LLC landlord was found responsible for the death of an elderly resident after the landlord’s consistent neglect to the air conditioning system led to fatal heatstroke; a jury awarded the family of the

281. See Benfer et al., *Health Justice Strategies*, *supra* note 77, at 166.

282. See, e.g., Robin Bartram, *Going Easy and Going After: Building Inspections and the Selective Allocation of Code Violations*, 8 CITY & CMTY. J. *passim* (2019) (explaining incentives for inspectors to ignore inspection violations).

283. TOBIN & CALFEE, *supra* note 20, at 8 (citation omitted in original).

284. Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (codified in scattered sections of 5, 12, 18, 31, and 42 U.S.C.). While the Flood Insurance Reform Act of 2004 made updates to the 1994 law, it did not disturb the mandatory purchase requirement. Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Pub. L. No. 108-264, 118 Stat. 712 (codified in scattered sections of 42 U.S.C.).

deceased \$125 million.²⁸⁵ In Portland, a jury awarded a tenant over twenty million dollars in compensatory and punitive damages for the injury he suffered after falling through a concrete walkway on his rental property.²⁸⁶ And a Florida jury awarded a tenant over forty-eight million dollars for lost earnings, loss of capacity to enjoy life, and future medical costs after a corporate landlord failed to mitigate a toxic mold infestation.²⁸⁷ However, as discussed above, the entry of a judgment often jumpstarts an arduous process to collect. These awards do not include injuries suffered by other tenants at the properties, and far exceed the one-million-dollar occurrence and two-million-dollar aggregate limits imposed by Freddie Mac's standard agreement. These injuries should never have happened, but the harms should not be compounded by insufficient coverage. Given the potential scope of damages, compulsory insurance requirements must be sufficient to make all tenants whole.

Moreover, like motor vehicle accidents, injuries that occur in rental accommodations financially affect others, not just the party responsible. In a motor vehicle accident, a driver causes injury that affects another driver or pedestrian. Similarly, injuries in rental properties are the responsibility of the landlord but harm the tenant. As the Fourth Circuit noted when discussing mandated third-party motor vehicle insurance, these statutes "serve the more general societal purpose of ensuring that those responsible for . . . accidents pay the resulting losses without the necessity of cumbersome enforcement proceedings."²⁸⁸ Home injuries occur more frequently than motor vehicle injuries, and yet only one jurisdiction imposes a blanket liability insurance requirement on long-term landlords.²⁸⁹ Incongruously, a growing number of jurisdictions do require short-term rental hosts to carry liability policies. Mandating liability insurance coverage for long-term landlords aligns rental housing policy insurance requirements enacted to protect against specific risks and eliminate third-person injury effects while at the same time, eliminating statutory bias for occupants of short-term rental accommodations.

285. Chuck Williams, *Exclusive Video: Jury in Ralston Towers Case Awards \$125 Million to Hart's Estate*, NEWS3 (Oct. 17, 2019, 3:45 PM), <https://www.wrbl.com/top-stories/jury-in-ralston-towers-case-awards-125-million-to-harts-estate/> [https://perma.cc/C65P-6L95].

286. Rachel Monahan, *Portland Jury Awards More than \$20 Million for California-Based Landlord's Failure To Make Repairs*, WILLAMETTE WK. (May 18, 2018, 10:36 PM), <https://www.wweek.com/news/courts/2018/05/18/portland-jury-awards-more-than-20-million-for-california-based-landlords-failure-to-make-repairs/> [https://perma.cc/BFB3-Q6PM].

287. Rafael Olmeda & Brooke Baitlinger, *Woman Awarded \$48 Million After Getting Sick from Mold in Her Apartment*, S. FLA. SUN SENTINEL (Apr. 30, 2021, 6:27 PM), <https://www.sun-sentinel.com/local/broward/fl-ne-multimillion-dollar-award-ss-prem-20210430-lc4nizghwfgutb5d42yhhwfb6y-story.html> [https://perma.cc/W69F-KYV4].

288. *Tomai-Minogue v. State Farm Mut. Auto Ins. Co.*, 770 F.2d 1228, 1235 (4th Cir. 1985).

289. 34 R.I. GEN. LAWS § 34-18-22(7) (LEXIS through Ch. 422 of the 2022 Sess., including all corrections and changes by the Director of Law Revision).

Compulsory liability insurance raises concerns about increasing rental housing costs, the removal of units from the long-term rental housing market, and the possibility of illegal rentals. To date there has not been a study examining market consequences of mandated liability coverage on long-term landlords. However, a study of Rochester, New York's lead inspection law provides some insight.²⁹⁰ Rochester enacted a law imposing lead inspection of properties and requiring landlords to correct any identified lead hazards.²⁹¹ Critics argued that the law would eliminate affordable rental housing. Though, "researchers studying landlord surveys and focus groups concluded 'results suggest that the lead law has not resulted in significant additional costs to landlords nor disruption to the rental housing market.'"²⁹² However, in a study of Chicago code enforcement, sociologist Robin Bartram found that ameliorating building code violations is correlated with increased rental prices.²⁹³ These studies suggest that it is possible there may be pass-through costs to tenants, or that landlords seeking to avoid additional costs may choose to operate rental units illegally.

Pass-through costs are a legitimate concern. This issue was likewise examined when habitability laws gained traction across the country. As one study of the economic impact of habitability standards noted, "[T]he possibility thus exists that the class of persons deemed by legislatures and courts to be best able to bear the costs—landlords—may often pass on the increased costs of maintaining habitable living quarters to the class of persons—low-income tenants—deemed least able to bear the burden."²⁹⁴ However, as discussed in Section II.C, the cost of liability policies for long-term rental dwellings is relatively modest. Just as policymakers and society have determined that the warranty of habitability is worth the cost to provide basic quality standards,²⁹⁵ so too is liability insurance to protect low-income renters from dangerous housing conditions. And for the well-intentioned handwringing about the unintended economic consequences, landlords appear to be doing just fine.

290. Katrina S. Korfmacher, Maria Ayoob & Rebecca Morley, *Rochester's Lead Law: Evaluation of a Local Environmental Health Policy Innovation*, 120 ENV'T HEALTH PERSPS. 309, 310 (2012).

291. *Id.*

292. Benfer et al., *Health Justice Strategies*, *supra* note 77, at 166 (quoting Korfmacher et al., *supra* note 290, at 313).

293. Robin Bartram, *The Cost of Code Violations: How Building Codes Shape Residential Sales Prices and Rents*, 29 HOUS. POL'Y DEBATE 931, 941 (2019).

294. Werner Z. Hirsch, Joel G. Hirsch & Stephen Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1100 (1975).

295. See generally Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. UNIV. L. REV. 485 (1987) (arguing that the "warranty of habitability in leases of low income urban housing might . . . benefit low income tenants at the expense of their landlords").

Average monthly rents are soaring.²⁹⁶ But looking to modest tenant protections as the culprit obscures larger market forces. Investors purchased a quarter of single-family homes in 2021, driving up rents in the process.²⁹⁷ Systemic intervention that increases housing construction and rental subsidies programs will have a far larger effect on affordable housing stock. Tellingly, the jurisdictions with the greatest influx of investor-landlords are those with the fewest landlord-tenant regulations.²⁹⁸ When combined with systemic investment in programs for low-income residents, liability insurance protects the health of residents from substandard conditions, while also mitigating possible pass-through effects.

Housing is essential. Everyone needs a place to live. In recognition of this necessity and the risks associated with substandard housing, state and local governments can, and should, prioritize the safety of residents by offering financial assistance for liability insurance and taking other measures to increase the supply of safe and affordable housing.

B. *Increased Information Sharing*

A more modest recommendation is to require landlords to disclose the types of insurance coverage they do (or do not) carry—in layman’s terms—before tenants sign a lease agreement. The law already requires landlords to disclose conditions that affect the health and safety of tenants. For example, at the federal level, the Real Estate Notification and Disclosure Rule requires all landlords of pre-1978 residential real property to include, among other things, a “Lead Warning Statement.”²⁹⁹ States also require landlords to disclose to tenants certain conditions that affect the condition of the property. In California, landlords must notify tenants of lead-based paint, pesticides, asbestos, carcinogenic materials, methamphetamine contamination, and

296. See Aaron Gregg & Yiwen Lu, *Rents and Home Prices Are Still Soaring, but at a Slower Pace*, WASH. POST (Aug. 1, 2022, 5:10 PM), <https://www.washingtonpost.com/business/2022/08/01/home-prices-rent-inflation/> [<https://perma.cc/B5TQ-NJGA> (staff-uploaded, dark archive)].

297. Tim Henderson, *Investors Bought a Quarter of Homes Sold Last Year, Driving Up Rents*, PEW TRS. (July 22, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/22/investors-bought-a-quarter-of-homes-sold-last-year-driving-up-rents> [<https://perma.cc/DM7E-JGE8>].

298. *Id.*

299. *Real Estate Disclosure About Potential Lead Hazards*, U.S. ENV’T PROT. AGENCY (Dec. 5, 2022), <https://www.epa.gov/lead/real-estate-disclosures-about-potential-lead-hazards> [<https://perma.cc/9NNR-D2KM>] (indicating that the law requires landlords to provide a brochure on identifying and controlling lead-based paint hazards and information about known lead-based paint hazards, among other safeguards).

proximity to explosives.³⁰⁰ In Illinois, landlords must disclose environmental hazards such as radon³⁰¹ and lead.

A mandatory insurance disclosure complements existing laws intended to notify tenants about material conditions on real property that affect the health and safety of residents. Existing law is designed to give tenants information about conditions so that they can decide whether to enter into a lease agreement. Whether a landlord carries a liability policy is just as important. Information about a liability policy would apprise tenants of the likelihood of being made whole, should a tenant experience injury while residing in the premises. Mandatory insurance disclosures build on existing conditions disclosures. The presence of hazardous conditions in a property increases the risk of injury, which in turn increases the likelihood that a tenant will need to initiate an action and ultimately collect a judgment from a landlord. Taken together, these complementary policies serve to first notify tenants of the existing risks in a property and the avenues available for recovery if a tenant were to experience injury.

Increasing information sharing allows tenants to make informed decisions about their housing or even whether they want to purchase their own policy, inserting greater transparency into bargaining between landlords and tenants over an essential need. However, the affordable housing crisis limits the utility of mandatory disclosures. This is true for existing hazardous condition disclosures and would be true of insurance disclosures. For very low-income tenants, the benefits of information are illusory. In the absence of sufficient rental housing stock, the ability to select a unit based on conditions and/or insurance is a luxury. Due to the lack of affordable housing, low-income tenants do not have the same ability to comparison shop for housing that high-income tenants enjoy. Tenants frequently sign lease agreements to rent housing with known poor conditions because the alternative is homelessness. For many, it is better to have a dangerous roof than no roof at all. Mandatory disclosure, therefore, will be most effective when it is coupled with policies to increase the supply of safe and affordable housing. When there is enough supply to meet demand, tenants can meaningfully use information about liability insurance to make choices about where to live.

CONCLUSION

Access-to-justice discourse typically centers on making it easier for pro se litigants to navigate the judicial system or redistributing legal representation so

300. CAL. DEP'T OF REAL EST., CALIFORNIA TENANTS: A GUIDE TO RESIDENTIAL TENANTS' AND LANDLORDS' RIGHTS AND RESPONSIBILITIES 1, 29–30 (2022), <https://www.courts.ca.gov/documents/California-Tenants-Guide.pdf> [<https://perma.cc/4FDJ-4RMQ>].

301. 420 ILL. COMP. STAT. 46 (Westlaw through P.A. 102-1143 of the 2022 Reg. Sess.).

that it is not restricted to those with the means to hire an attorney. Absent from these discussions is what happens *after* the entry of a judgment. For tenant-plaintiffs injured by substandard housing conditions, a successful case against a property owner often catalyzes the process to collect damages and fully recover. Barriers to collection make it exceedingly difficult for a tenant to be made whole when a property owner is uninsured. Often, this requires a tenant to endure an arduous process to identify collectible assets that can be used to satisfy a judgment. Collection is time consuming and expensive; pro bono attorneys rarely, if ever, provide collection services to low-income clients. Many tenants, therefore, only realize illusory benefits of a judgment, never actually collecting damages. In contrast, the existence of a liability policy ensures that an insurance company will remit payment to the tenant in the amount of a judgment. This allows the tenant to cover any incurred expenses and recover from personal injury and property damage.

The dangers of substandard housing conditions and inability to obtain relief disproportionately fall on low-income, minority renters. Insurance redlining and market inefficiencies withhold insurance coverage from property owners who operate long-term rental accommodations in neighborhoods predominantly populated by minority residents. Moreover, the affordable housing crisis disincentivizes landlords from making repairs to properties. Housing is an essential, yet scarce, resource. Because it is so difficult for a tenant to collect a judgment, it can be more cost effective for a property owner to continuously turn over occupants than repair conditions.

But it does not have to be this way. The McCarran-Ferguson Act empowers states to enact law regulating “the business of insurance.”³⁰² And they do: all states require drivers to carry liability insurance (or demonstrate financial solvency) before becoming licensed because automobile accidents cause expensive personal injury and property damage to innocent drivers. However, more disabling injuries occur in homes than in automobile accidents;³⁰³ it follows that long-term tenants should likewise be protected from injuries caused by a property owner’s failure to maintain the premises. Despite this, as of January 1, 2022, only Rhode Island requires compulsory liability insurance coverage for long-term rental operators.³⁰⁴

302. McCarran-Ferguson Act, ch. 20, § 1, 59 Stat. 33, 33 (1945) (codified at 15 U.S.C. § 1011 (1945)) (emphasis added).

303. ASHLEY ET AL., *supra* note 80, at 1, 3 (citing NAT’L SAFETY COUNCIL INJ. FACTS 2010); *see also* Shields et al., *supra* note 78, at 106 (describing the twelve housing elements associated with the highest number of emergency department visits or hospitalizations: floor, stair, door, ceiling, bathtub, cabinet, window, nail, carpet, porch, fence, counter).

304. 34 R.I. GEN. LAWS § 34-18-22(a)(7) (LEXIS through Ch. 422 of the 2022 Sess., including all corrections and changes by the Director of Law Revision).

Conversely, a growing number of jurisdictions require operators of short-term rental accommodations (e.g., Airbnb) to carry liability insurance as a condition of participation in the short-term rental market. Unlike long-term tenants, short-term rental occupants are more likely to be white and occupy a higher socioeconomic status. The demographic differences between these groups of residents reveal racial bias in insurance regulations that negatively impact the health of minority, long-term tenants. These tenants are not only more likely to reside in homes containing substandard housing conditions, but because states allow property owners to participate in the long-term rental market without carrying a liability policy, they are less likely to recover after experiencing injury. It is time for permanent residents to have the same degree of protection as temporary visitors.