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*263 PROTECTIONS FOR THE LOW-INCOME CUSTOMER OF UNREGULATED UTILITIES: USING FEDERAL FUEL ASSISTANCE AS MORE THAN CASH GRANTS

Roger D. Colton [FNa]
Doug Smith [FNaa]

I. INTRODUCTION

Ever since the first public utility commission was created in New York in 1907, [FN1] the oversight of utility activity has become largely the job of regulatory agencies. [FN2] Perhaps most commission action is thought of as ratemaking. However, issues such as the control of service disconnections for nonpayment, [FN3] the collection of deposits [FN4] and the imposition of late charges [FN5] have spawned much litigation for state utility commissions.

The problem with relying only on state administrative regulation to gain customer service protections for payment troubled customers is that public utilities such as Rural Electric Cooperatives (RECs) are often not within the jurisdiction of state public utility commissions. [FN6] For these unregulated co-ops, the reasons for imposing regulatory constraints on public utilities still exist, i.e. these RECs provide essential public services, most often under monopoly circumstances, just as their regulated investor-owned counterparts. [FN7]

***264** Despite the lack of administrative oversight of RECs, it is important for low-income REC customers to gain protections from the threatened or actual disconnection of service. The use of public utilities pervades the life of every individual. Each time a person eats food that has been either refrigerated or cooked, uses a light, or watches television, that person is likely relying on some sort of public utility. Electricity, natural gas, telephone, water and sewer companies are all among the types of "public utilities" extant in today's world. [FN8] Because of this continuing need for oversight, courts should assume jurisdiction where state administrative agencies are not empowered to provide such oversight.

Largely because of the essential nature of these services, public utilities have been made subject to an array of state "customer service regulations." [FN9] Regulations, for example, constrain the timing and reasons for the disconnection of service, prescribe shutoff notice requirements, and dictate procedures for allowing a scheduled shutoff to be disputed as unjustified. [FN10] In addition, customer service regulations govern the collection of deposits, the imposition of late payment charges and the offer of deferred payment plans for arrears. [FN11]

Because the state regulation of public utilities is often limited simply to investor-owned utilities, innumerable unregulated companies exist. There are, for example, over 1000 RECs [FN12] and 2100 local public power agencies [FN13] in the United States today. Utility service to more than 27.5 million customers is provided by these unregulated companies. [FN14] Nearly ***265** twenty percent of all electric customers in the country are served either by public power agencies or by RECs. [FN15] These companies are generally not subject to regulation by state public utility commissions. [FN16]

This article advances one theory under which low-income residential customers of RECs can seek protections from unfair disconnections, deposit and late payment charge practices, and the like. The article posits that recipients of federal fuel assistance through the Low-Income Home Energy Assistance Program (LIHEAP) [FN17] can, by using a third party beneficiary contract theory, invoke the nondiscrimination provisions of the LIHEAP statute in a private cause of action to challenge unfair and unreasonable REC customer service practices and practices that have an unreasonable impact upon protected classes. [FN18] The reasoning advanced in the following pages applies not only to RECs but also to other utilities as well as to vendors of deliverable fuels such as fuel oil, propane and the like. However, RECs are chosen as the point of analysis because of their otherwise unregulated status.

II. RURAL INABILITY-TO-PAY: AN OVERVIEW OF RECS AND POVERTY

Exempting RECs from regulation as a public utility in the early days of the Rural Electric Cooperative movement did not contravene any overriding public policy. Courts held that because the co-ops were owned by the members themselves no need arose to provide consumer protections through regulation. [FN19] As one commentator noted in 1946:

In the cooperative, the mutuality of consumer and owner replaces the conflict inherent in the relationship of vendor-vendee ordinarily associated with public service companies. There is no need for protecting the members of the cooperatives from themselves. [FN20]

The Inland Empire [FN21] decision well represents this reasoning. According to the Washington Supreme Court, the Inland Empire Co-op did not have ***266** any of the attributes of a public utility. [FN22] It did not engage in business "for profit ... at the expense of a consuming public which has no voice in the management of its affairs...." [FN23] The Co-op's members did not "stand in the relation of members of the public needing the protection of the public service commission in the matter of rates and service supplied by an independent corporation." [FN24] The Co-op did typify "an arrangement under and through which the users of a particular service and the consumers of a particular product operate the facilities which they themselves own." [FN25] In short, the Inland Empire court held, " t here is a complete identity of interest between the corporate agency supplying the service and the persons who are being served." [FN26]

However, this rationale for freeing RECs from regulatory oversight of their customer service practices no longer remains valid in the contemporary world. [FN27] RECs are no longer small groups of individuals who have banded together to serve themselves. They have instead become large complex organizations that are often far removed from the needs of their less fortunate members. There is thus a need to gain formalized customer service protections for those households which are unable to pay their bills in a consistent, timely and complete fashion. [FN28]

The potential for conflict between the payment troubled customer and the REC is not hypothetical. As a result of their far-reaching presence, the nation's RECs have come face-to-face with the plight of the rural poor. According to one study, by 1987, "a person living in a nonmetropolitan area ... [was] almost as likely to be poor as someone living in the central city of a metropolitan area." [FN29]

These rural poor tend to include the elderly and families with children. ***267** Children in nonmetropolitan areas "have poverty rates nearly as high as the poverty rates for children living in central cities." [FN30] The nonmetro elderly (those sixty-five and older) also experience poverty rates "as high or higher than their central city counterparts." [FN31]

The payment problems that accompany a household's poverty status can threaten the health, safety, and perhaps

even life of low-income individuals. The availability of public utility services has been judicially recognized as essential not only to modern convenience, but to modern health and welfare as well. The U.S. Supreme Court noted in Craft v. Memphis Light, Gas and Water Division [FN32] that "utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." [FN33] Similarly, an Ohio federal district court has stated that " t he lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal." [FN34] The poor in particular have long been found to be vulnerable to the loss of utility service. [FN35]

Because of these adverse impacts on the poor, actions of an REC - or any other public utility for that matter - that may threaten the continuing access of the poor to essential electric service should be reviewed to ensure that such action does not implicate prohibited discrimination. [FN36] The potential for such discrimination is high. In general, the average resident of the non-urban areas in the South, Midwest, and West, where most RECs are situated, tend to be older, poorer, and less healthy than residents of other areas. [FN37] Out of this population, the rural poor are disproportionately ***268** black or Hispanic, [FN38] elderly, [FN39] handicapped or infirm, [FN40] and uneducated, even as compared to the urban poor. [FN41]

With this overview, the types of protections that can be obtained through a creative use of the LIHEAP statute are discussed in more detail below.

III. EXAMPLES OF POTENTIAL DISCRIMINATION PRACTICES

The use of LIHEAP's nondiscrimination provision will never provide the framework within which a low-income household can find a comprehensive set of customer service protections. [FN42] As a general approach, the LIHEAP statute states that " n o person shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available under ... LIHEAP ." [FN43] The section also prohibits discrimination based on age or handicapped status. [FN44] The term "program or activity" is to be construed as including not only the government agency disbursing the funds, but the private entity actually receiving the funds as well. [FN45]

This LIHEAP statutory provision represents a strong tool that customers ***269** can use to challenge a wide range of customer service abuses. As with so many civil rights theories, the usefulness of LIHEAP's nondiscrimination provision is bounded only by the imagination and creativity of the advocate. With this in mind, the analysis set forth below is in two parts. The first part posits several examples of situations that might be ripe for challenge. The purpose of this part is not to raise specific challenges, rather, the part is designed to demonstrate how customer service challenges can be crafted in the form of discrimination analysis. The second part examines the legal issues that might arise when raising specific LIHEAP discrimination challenges.

A. Utility Situations Ripe for Challenge

Utility situations arise that can be made subject to challenge under the nondiscrimination provision of LIHEAP. Consider the following:

1. Equal Monthly Payment Plans for Arrears

A utility offers deferred payment plans to its customers through which customers may retire arrears. The utility, for whatever reason, insists that the customer make equal monthly payments over the term of the plan. The advocate represents a class of minority customers who are largely involved with seasonal labor. The requirement that class members make the same payment during cold weather months (which is also the season of unemployment) that they make during warm weather months (which is the season of employment) should be subject to challenge. Such a challenge would posit that, because of the disparate impact on minority households, the requirement represents a prohibited discriminatory action.

2. Seasonal Budget Billing for Current Bills

It may be possible to extend this same analysis to current bills as well. Many utilities offer "budget billing plans"

that permit customers to pay their current bills in equal monthly installments over the course of twelve months. Under such a plan, the fact that the winter bills might be less than current consumption is disregarded so long as the total annual bill is paid through the 12 monthly installments. Given winter heating consumption, winter bills would be expected to be substantially greater than non-winter bills. Under a budget billing plan, however, monthly bills are leveled, with the sum of the 12 monthly bills being equal to the total annual consumption. For the seasonal laborer, however, equal monthly budget billing plans offer no more solace for current bills than for arrears. A utility's refusal to enter into "budget billing plans" on anything other than an equal monthly basis should be subject to challenge. The grounds for the challenge would allege that such a refusal creates a disparate impact on the basis of race, a prohibited class. The sought-after relief would be higher ***270** bills during the season of employment with lower bills during the season of unemployment.

3. Restriction of Providing Service to Landowners

Many utilities refuse to provide service to tenants. Under such customer service regulations, only the owners of property may apply for and receive service. It is not unreasonable, however, to believe that a restriction of service to owners alone may well create disparate impacts on the basis of race. Low-income status is often associated with tenancy, and race is often associated with low-income status. An argument could thus be made that this refusal is, in effect, an unacceptable burden on low-income minorities.

4. Imposition of Increased Collection Activity

In order to avoid bad debt and in an effort to reduce arrears public utilities often seek to identify "potentially payment-troubled" customers for separate credit and collection practices. [FN46] Whether it be disconnecting service for a lesser bill, or the requiring an additional deposit, or invoking some other credit and collection device, the potential for abuse arises in what factors the utility uses to identify "potentially payment troubled."

This issue might arise as follows: most utilities allow a billed amount to reach some minimum threshold before the bill merits collection activity. This amount is sometimes referred to as a "treatment amount" (with credit and collection activity being referred to as "account treatment"). Often, for example, this "treatment amount" may indicate that disconnections will not occur for bills below $50 (or some other predetermined level of arrears). [FN47] Under the objectionable scheme, however, households with characteristics that mark them as "potentially payment troubled" might be disconnected with an arrears of $25 rather than the $50 for everyone else. [FN48]

The factors that can be deemed to mark the household as "potentially ***271** payment-troubled," however, may well be neither gender neutral nor racially neutral. The receipt of public assistance, [FN49] the experience of certain types of employment (such as part-time employment), [FN50] and the lack of continuing residence at one address, [FN51] are examples of such factors. As a result, unless the REC can offer compelling arguments on the legitimacy of these attributes as a predictor of nonpayment, the more stringent collection techniques are vulnerable to challenge on the basis of violation of nondiscrimination doctrine.

5. Billing Dates and Late Payment Fees

The imposition of late payment fees on households who do not pay by a designated date, coupled with the refusal by a utility to adjust a billing date to match the receipt of public assistance, may create a cause of action under a number of different theories. The problem arises when a household routinely receives a bill for service with a "due date" before the date on which that household will receive a public assistance check. This combination of factors may be subject to challenge on race, gender and age grounds. Under such a challenge, the advocate would argue that the fact that households routinely receive public assistance checks, or Social Security checks, after an arbitrarily set "due date" provides no basis for the imposition of a late fee. The class of challengers might involve households who do indeed pay, but merely pay late. [FN52] For such households, the imposition of a late fee represents a non-cost-based penalty based on attributes that are associated with their source of income. For example, age with Social Security, or gender with public assistance.

The issues of poverty and race, poverty and gender, and poverty and ***272** age, are too often intertwined for the

advocate to ignore the potential of nondiscrimination doctrine as a means to challenge oppressive credit and collection techniques by RECs. The LIHEAP nondiscrimination provision [FN53] can be read to proscribe a range of discriminatory actions, either intentional or unintentional. In considering ways in which to challenge objectionable REC behavior, the advocate should assess the utility practice with an eye toward identifying potentially discriminatory impacts. The option of raising a discrimination challenge should always be assessed and REC activities reviewed with that option in mind.

IV. SEEKING NONDISCRIMINATION THROUGH LIHEAP

A. The Basics of the LIHEAP Process

In 1981, Congress responded to the ongoing inability of low-income households to pay [FN54] their skyrocketing energy bills [FN55] by enacting the Low-Income Home Energy Assistance Act (LIHEAP). [FN56] Under this program, which still exists today, the Department of Health and Human Services (HHS) provides funds to states in the form of block grants to help low-income households cope with rising energy costs. [FN57] Federal law provides eligibility for fuel assistance to households receiving Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Food Stamps or a veteran's pension, [FN58] as well as to households with incomes that do not exceed 150 percent of poverty level for a state or 60 percent of ***273** the state's median income. [FN59] Despite being constantly hampered with limited funds, [FN60] LIHEAP funds were distributed to 5.9 million households (about 20 percent of those eligible nationally) in fiscal year 1990. [FN61]

The states are given significant discretion in how to implement their LIHEAP programs. Beginning in fiscal year 1981, the emphasis in the LIHEAP program was to make the program a block grant, thus providing more discretion to the states on implementation issues. [FN62] Indeed, HHS was prohibited in 1981 from promulgating any detailed regulations on how the program was to operate. [FN63] When LIHEAP was reauthorized in 1981, the only requirement Congress maintained was the general requirement that the highest level of benefits be provided to "those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size...." [FN64] Congress said that LIHEAP may be provided for either heating or cooling needs [FN65] or to provide "crisis" benefits. [FN66] It is this fact - that LIHEAP is a block grant - that provides the basis for much of the analysis of the LIHEAP nondiscrimination provision below.

B. The Nondiscrimination Mandate of LIHEAP

1. The General Rule Against Discrimination

Various nondiscrimination requirements were attached to assorted federal funding programs throughout the 1970s. [FN67] In the 1980s, despite a ***274** Reagan-administration-inspired divestiture of federal control over funding programs, federal nondiscrimination assurances were retained. [FN68] When LIHEAP was converted to a block grant program in 1981 a nondiscrimination proviso was attached specifically addressed to race, color, national origin, age, handicap and sex discrimination. [FN69]

LIHEAP borrows the regulations enacted for its predecessor statutes. Legislative history [FN70] indicates that regulations to implement the nondiscrimination provision were intended to be consistent with the regulations already enacted to enforce Title VI, [FN71] Title IX, [FN72] Section 504 [FN73] and the ADA. [FN74] While no regulations specifically defining sex discrimination have appeared to date pursuant to LIHEAP, absent more specific indicators, a court is compelled to look to Title IX regulations for guidance. [FN75]

LIHEAP broadly bans discrimination based on race, color, national origin and sex. [FN76] It also specifically extends ADA and Section 504 protections - together with their limitations - to beneficiaries of LIHEAP funding and provides for enforcement by the Attorney General's office. [FN77] While there have been no reported decisions under the LIHEAP statute, ***275** the broad language of the statute indicates that a disparate impact standard was intended. [FN78]

A disparate impact model addresses nonpurposeful discrimination. [FN79] The disparate impact model may be viewed as a definition of discrimination irrespective of the perpetrator's intent. [FN80] Many describe disparate

impact analysis as an alternate means to prove intentional discrimination. Indeed, taking action without regard to the effects it will have on minority populations is within the traditional framework of purposeful discrimination as explained by the Supreme Court. [FN81]

The explicit reference in the statute and the legislative history to the standards and procedures available under the predecessor statutes seems to bolster this interpretation. [FN82] The legislative history indicates an intent that Title VI and Section 504 implementing regulations would supply the standard of discrimination. Indeed, the sparse legislative history demonstrates that the provision was inserted to ensure that the Federal nondiscrimination provisions of Title VI, Section 504, ADA, and Title IX would apply to all recipients of block grants, although the funding is directed through the state. [FN83] More importantly, absent specific regulations implementing this statute, Section 8625 is explained by the HHS regulations for Title VI, Section 504, and the ADA. [FN84]

***276** 2. A Private Cause of Action Under LIHEAP

LIHEAP's nondiscrimination provision contains language patterned after Title VI and Title IX, language that the Supreme Court has found conducive to an inferred private cause of action. [FN85] Moreover, Section 8625 was adopted by Congress and patterned after Title VI and Title IX at a time when it was well-established that these provisions provided a private cause of action.

Accordingly, the legislative history of the provision favors inferring a private cause of action. Section 8625 was one of a series of nondiscrimination provisions attached to state block grant programs as part of the 1981 Omnibus Budget Reconciliation Act (OBRA). [FN86] While the Committee report which recommended OBRA does not specifically discuss the provision which became Section 8625, [FN87] it does address other analogous nondiscrimination provisions attached to comparable block grant funding programs as part of the same legislation which created Section 8625. [FN88]

The legislative history indicates that a private cause of action against non-governmental recipients was contemplated and that exhaustion of administrative remedies was not to be a prerequisite to obtaining judicial relief. [FN89] The intent of the section was clearly to extend protections similar to Title VI and Section 504 to LIHEAP recipients, direct or indirect. The legislative history urges that Title VII remedies should be made available to remedy discrimination under Title VI and Section 504 by block grant recipients. [FN90] The intended reach was to include any program receiving funds, under the block grant, within the nondiscrimination provisions of Section 504, Title VI and ADA, as well as to extend a prohibition on sex discrimination. The block grants, "while routing Federal dollars differently, are still Federal programs.... Nondiscrimination provisions have been inserted to make certain that Federal dollars will be made available...to those entities receiving funds from states that comply with Federal prohibitions against discrimination." [FN91]

The Committee report explains that "this includes any grantees or contractors...as well as the states and their grantees and contractors that are funded, in whole or in part, [by federal funds]." [FN92] Specifically, "the ***277** Committee does not intend to preclude the right of any individual to bring suit in Federal District Court to seek remedy for any alleged discrimination, nor would exhaustion of administrative remedies be required." [FN93]

3. The Reach of the Nondiscrimination Provision

If a private cause of action, in fact, exists under LIHEAP Section 8625, it should lie against utility recipients of LIHEAP grants as well as states and their direct sub-grantees. Any narrower reach for the private cause of action would violate the broad promise of nondiscrimination in "any program or activity funded in whole or in part with funds made available under... [LIHEAP]." [FN94]

The announcement introducing the final regulations for block grant programs reflects the Congressional objective of turning over to the states responsibility for administering certain federal funding programs, while retaining the federal role in assuring nondiscrimination by program recipients. [FN95] The Department of Health and Human Services regulations envisioned programs receiving block grant funds as subject to the regulations implementing Title VI, Section 504, Title IX and the ADA, and for this reason no regulations specific to LIHEAP Section 8625

have been promulgated. [FN96]

Health and Human Service regulations define recipients of federal funding to include any public or private entity or individual to whom federal financial assistance is extended, directly or through another recipient for any program "including any successor, assignee or transferee thereof, but not including any ultimate beneficiary under any such program." [FN97] An REC receiving LIHEAP funding would appear to fit nicely within this definition. Like a hospital or an individual doctor receiving Medicare or Medicaid reimbursements for services, [FN98] an REC accepting LIHEAP funds, at least where it accepts direct vendor payments, should be considered a recipient of federal funding bound by the mandates of Title VI and its progeny. Similarly, an REC accepting LIHEAP funds is subject to the nondiscrimination provision of LIHEAP's Section 8625, the intent of which was to ensure that federal nondiscrimination provisions, such as Title VI, ***278** would not be cast aside when control over disbursements was transferred to the States. [FN99]

An REC which receives LIHEAP funds is an intended recipient of federal funds disbursed by the program. Courts have shied away from extending the nondiscrimination requirement beyond those entities which are aware of the nondiscrimination proviso attached to the acceptance of federal monies - and which sign assurances to that effect - or entities in direct association with an entity which signed on to the nondiscrimination assurances. [FN100] However, the language of LIHEAP Section 8625, as well as of Title VI and its progeny, is broad enough to encompass direct cash payments to clients to be distributed to the REC. Where the REC is not on notice of the federal source of the funds it accepts, a court is unlikely to find that nondiscrimination provisions apply. This lack of notice, however, cannot be the case in the instance of directly vendored LIHEAP payments. [FN101]

4. Private Cause of Action

Fifteen years ago there was doubt as to whether a private individual - even of the class the government sought to benefit by extending the federal funding - had any private cause of action for violation of nondiscrimination assurances other than pursuing administrative enforcement. [FN102] Today, a private cause of action to obtain at least injunctive and other equitable relief is well-established under Title VI, Title IX and related statutes. [FN103]

Also, ample authority exists for implying a private cause of action directly ***279** under regulations implementing a statute. Regulations within the scope of the agency's license are federal law. [FN104] Accordingly, rather than premising a disparate impact claim directly on the statute the careful litigant should expressly premise the claim on the agency regulations thus bringing the case squarely within the scope of Lau v. Nichols, [FN105] which held that the school district had a duty to comply with Title VI of the Civil Rights Act because it received federal funding. [FN106]

5. The Standard to be Applied

Given the reliance of a LIHEAP litigant on Title VI precedent, it is important to understand the genesis and development of the disparate impact model in Title VI cases. In the 1980s, court decisions established a schism between the scope of Title VI and that of its implementing regulations regarding the legitimacy of the disparate impact approach to proving discrimination, a schism that has never been completely resolved. On the one hand the Supreme Court held in Lau that practices which have a disparate impact on protected ethnic groups violate Title VI, based in part on the implementing regulations of the Department of Health, Education and Welfare [FN107] that specifically proscribed nonpurposeful discrimination. [FN108] Just four years later, however, in Bakke, [FN109] a bare majority of the Court found that Title VI reached no further than the constitutional prohibitions against discrimination. [FN110] Two years earlier, the Court had held that the Fourteenth Amendment proscribed only purposeful discrimination. [FN111] In Guardians Association v. Civil Service Commission, [FN112] the Supreme Court set out to clarify the proper standard under Title VI. The Guardians Court also ***280** sought to bridge the Lau/Bakke schism, and to settle the disputed issue of whether a private cause of action for damages exists under Title VI. Unfortunately, the Court failed to do either, rendering an indecisive accumulation of six separate opinions and leaving the state of the law in complete disarray. [FN113] Lower courts not only have been unable to agree on how to apply the decision, but have even failed to agree on what the opinions say. [FN114]

This much is clear: one majority in Guardians found that Bakke had overruled Lau on the issue of the applicable standard, holding that Title VI reached no further than the Constitutional prohibitions. [FN115] However, a different majority held that, at least as against a state governmental recipient, a private action could be maintained on a disparate impact (non-purposeful discrimination) theory, a result that Constitutional analysis would not support. [FN116]

The opinions supporting the conclusion that private actions lie against state governments are both confused and confusing. Justices White [FN117] and Marshall, [FN118] in separate opinions, found that Title VI itself proscribes nonintentional discrimination. White found that Lau remained competent authority for the proposition that Title VI prohibited activities with disparate impacts, finding no inconsistency in applying lesser scrutiny to affirmative ***281** action programs designed to help minorities based on laws designed to help minorities. [FN119] In contrast, three other members of the Court (in an opinion authored by Justice Stevens) held that, governed by Bakke, Title VI does not prohibit nonintentional discrimination. [FN120] However, not even these Justices would have left the door closed to a claim based on nonintentional discrimination - such a claim simply could not be brought pursuant to Title VI. [FN121] These Justices would allow private individuals to maintain Section 1983 suits based entirely upon violation of HEW's implementing regulations, which incorporate a disparate impact model. [FN122]

Of course, Section 1983, by its terms, provides a remedy only against state and local governmental entities. [FN123] Accordingly, the approach endorsed by the Stevens contingent leaves open the question of whether there is any private remedy against a nongovernmental recipient of federal funding on the disparate impact theory. [FN124] At first glance it would appear not to do so. However, an anomaly would be created if there were no remedy for victims of nonpurposeful discrimination by private entities. Title VI was, after all, designed to extend existing limitations on discrimination applicable to governmental entities to private recipients of federal funding. [FN125]

This confusion has not since been clarified. The few post-Guardians cases addressing the issue provide no definitive guidance. In Butts v. NCAA, [FN126] the Third Circuit concluded that plaintiffs had made out a prima facia disparate impact claim under Title VI but nevertheless upheld the district court's denial of relief. Similarly, in Paisey v. Vitale, [FN127] the district court ***282** found a cause of action against a private recipient based on Title VI implementing regulations without explaining the source of this right.

The distinction between actions against private and public defendants may lose some significance in actions against RECs. RECs may well be held subject to Section 1983 as quasi-governmental entities. [FN128]

In any event, when the litigant considers the doubts which still remain after Bakke, customers challenging REC actions should add a third party beneficiary contract count based upon violation of the REC's contract of assurance with the LIHEAP agency. [FN129] A court vested with the discretion afforded by the third party beneficiary doctrine may be moved to provide a Title VI remedy to customers of RECs who would otherwise be denied a remedy by reason of the Lau/Bakke conflict. [FN130]

6. Damages

Given the absence of litigation directly under the LIHEAP nondiscrimination provision, the advocate must look to the predecessor statutes for guidance. The usual relief requested in response to a violation of Title VI, [FN131] Title IX, [FN132] Section 504 [FN133] or ADA, [FN134] as in much public utility litigation for discriminatory service or termination, is a prospective injunction curing the discriminatory practice. By contrast, the ultimate relief available in administrative cases is a termination or partial termination of federal funding, or in the general case, compliance with federal objectives obtained through judicious application of the threat of the same. [FN135]

***283** While the commonly accepted thinking is that damages are available in a private action against a recipient only upon a showing of intentional discrimination, [FN136] the availability should be much broader than this. [FN137] Neither the remedy of injunctive relief nor the remedy of the termination of federal funding will always be sufficient (or advised), to remedy past discrimination, to deter such practices in the future or to make the victims whole. Permitting damage actions will help accomplish each of these goals.

This support for permitting the imposition of damages, purportedly based on the authority of Guardians, in fact draws little support from that source. Guardians did not squarely hold that damages are available in a Title VI action. [FN138] Indeed, several recent cases have held, contrary to the flavor if not the holding of Guardians, that damages are never available under Title VI, [FN139] even as a remedy for purposeful discrimination. The majority interpretation that damages are available only upon proof of purposeful discrimination is based upon an equally skewed reading of Guardians. Indeed, this position was endorsed by only two Justices, and upon the questionable rationale that it is not fair to impose liability for damages upon a recipient for discriminatory conduct of which it is not aware. [FN140]

In Guardians, Justice White, joined by Justice Rhenquist, found that in cases where intentional discrimination occurs, there is no question but that the recipient was aware of his violation of the statute. [FN141] However, conscious awareness, much less foreseeability, is not a required element of the disparate treatment model. [FN142] Particularly where liability is premised upon a respondeat theory, the recipient may not even be aware of the violation. [FN143] By contrast, the discriminatory effects of practices may be foreseeable, ***284** even inevitable. [FN144] Indeed, much disparate impact litigation involves practices adopted precisely to achieve discriminatory effects. This was almost certainly the case in the seminal case of Griggs v. Duke Power Co. [FN145] as well as the voting rights cases upon which Griggs was based. [FN146]

More basically, the remedial dichotomy distinguishing damages from equitable relief is premised on a debatable proposition. The distinction posits that it is somehow unfair to impose damages as a remedy for nonpurposeful discrimination in the Title VI context (where the recipient has agreed to abide by that law) while such imposition is permissible in the Title VII context (where the obligation is imposed on all covered employers irrespective of their knowledge of the statute). Nevertheless, a majority in Guardians appears to have favored a damages remedy for all violations of the Title VI, and a later Court decision has endorsed this reading. [FN147] In Guardians, Justices Marshall, Brennan, Stevens and Blackman, all indicated they would allow damages to be available on a disparate impact theory. [FN148]

Justice O'Connor, whose opinion has since been variously read, [FN149] clearly showed her disapproval of Justice White's remedial dichotomy, but would have found no violation of Title VI absent proof of intentional discrimination. [FN150] Presumably, having found herself on the losing side of the intent/effects issue, Justice O'Connor would now, bound by the precedent of Guardians, find a private cause of action for all damages for all violations of Title VI. [FN151]

A unanimous Court removed doubt when it read Guardians as having approved retroactive relief for all discrimination, intentional or unintentional, in Consolidated Rail v. Darrone. [FN152] Nevertheless, there remains a stinginess among the lower courts toward allowing a damages remedy for even a purposeful violation of the spending clause nondiscrimination statutes ***285** and lingering doubts as to whether there is a private cause of action to challenge nonpurposeful discrimination by nongovernmental recipients. Accordingly, a count based on a common law third party beneficiary theory may be included in each complaint. [FN153]

7. Attorney's Fees

Attorneys fees are available to prevailing plaintiffs to redress violations of the ADA, [FN154] Section 504, [FN155] Title IX and Title VI. [FN156] The LIHEAP statute is silent on the issue. However, 42 U.S.C. Section 1988, which expressly allows attorneys fees for Title VI and Title IX, also grants fees to litigants who prevail based on any nondiscrimination statute attached to an expenditure of federal funds. [FN157]

Litigation premised on a fee-generating statute, as well as a common law third party claim, may entitle the claimant to fees although relief is granted based on the non-fee-generating ground only. [FN158] General principles developed under Section 1988 will control in all instances.

V. STATE THIRD PARTY BENEFICIARY CONTRACT REMEDIES

Regulatory schemes require that recipients of federal aid and recipients and subrecipients of federal block grants sign contracts of assurance incorporating nondiscrimination regulations as a condition to receipt of federal aid. [FN159]

Contractual leverage over non-regulated RECs appears in those instances where states make "direct vendor payments" of benefits. [FN160] If the state chooses to pay home energy suppliers directly the vendor must enter into an agreement with the state wherein the vendor provides assurances that it will not discriminate against the recipients of assistance either in the cost of the goods or in the provision of service. [FN161] A copy of the agreement ***286** wherein the vendor makes these assurances must be made part of the LIHEAP state plan each year. [FN162] Direct vendor payments can be made for the basic LIHEAP grant, for the crisis grant, or for both.

Payment of LIHEAP benefits can be made in one of two alternative ways: direct client payments or direct vendor payments.

First, payment can be made in the form of direct cash assistance to clients. [FN163] This type of direct client payment is generally based on formula eligibility. [FN164] Such a mechanism might, for example, make AFDC recipients automatically eligible for LIHEAP. LIHEAP payments would then simply be attached to the AFDC benefit check.

Alternatively, a vendor payment entails a payment made directly from the LIHEAP agency to the energy provider. [FN165] Annual payments can be paid either once at the beginning of the heating season or in increments over the course of the heating season. [FN166]

Two party checks are a hybrid of these two systems. Two-party checks were initially designed to promote the development of some type of relationship between the client and the fuel vendor. [FN167] Two-party checks involve an individual check made out to each LIHEAP recipient. In contrast, where direct vendor payments are made, payments can be aggregated and made to the vendor in one lump sum check. In addition to the recipient's signature needed for cashing the check, however, the vendor's signature is required as well. [FN168] As a result, each vendor must make at least one contact with each customer to effect the transfer of the check.

Under common law third-party beneficiary doctrine, REC customers may assert claims based upon a breach of this assurance contract by the REC as intended beneficiaries of an agency's contract with the REC. [FN169] ***287** These third party suits may be brought in state or federal courts as a state remedy to enforce a federal right, or as pendent to a federal statutory claim. [FN170] Third party beneficiary doctrine instructs that a party is an intended beneficiary of a contract when recognition of the third party's right to obtain performance is appropriate to effect the intention of the parties and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. [FN171] The third party need not be identified by name, rather, it is sufficient if the contract defines a third party by description of a class. [FN172]

In government contracts, a more restrictive analysis is applied, requiring that (1) the purpose of the contract be to benefit a class of persons distinct from the general public; and (2) recognizing such a right of enforcement would not be inconsistent with the legislative scheme. [FN173] Non-discrimination provisions in federal assurance contracts fall comfortably within this model. Thus, " f ederal courts have not hesitated to permit third parties to enforce non-discrimination provisions in funding agreements." [FN174]

Civil rights statutes such as Title VI expressly identify discrete classes which Congress intended to benefit. In Cannon v. University of Chicago, [FN175] for example, the Court, in the context of a Title IX suit by a woman seeking admission to a medical school stated that Title IX, like Title VI, evidences an "unmistakable focus" on an identified class. [FN176] It could reasonably be argued, therefore, that LIHEAP Section 8625 does indeed expressly identify a benefitted class.

Moreover, implying a third party right in this context is not only consistent with the regulatory purpose, it is in many instances necessary to effect the spirit and language of the regulatory scheme. [FN177] Indeed, under the LIHEAP statute, a contract action would serve the legislative purpose of ***288** primary state implementation of the

program within established federal parameters, [FN178] whereas a federal enforcement scheme may not. LIHEAP was intended to preserve the integrity of the block grant as to state administration while addressing concerns of state accountability in effecting federally mandated objectives. [FN179]

In Lau v. Nichols, [FN180] the Court held that non-English speaking children were entitled to enforce HEW (now HHS) guidelines regarding bilingual education because the school district had contractually agreed to comply with HEW standards. [FN181] While some holdings of Lau were impliedly overruled by Bakke, this portion of the opinion remains valid precedent. [FN182]

The leading case on the issue of third-party enforcement of federal nondiscrimination provisions in assurance contracts is Bossier Parish School Board v. Lemon, [FN183] a case which has been cited with glowing approval by the Supreme Court. [FN184] In Bossier, a Fifth Circuit panel comprised of Chief Judge Brown, future Chief Justice Burger, and Judge Wisdom [FN185] (who wrote for the unanimous panel), found that the plaintiff class could sue to enforce assurance agreements that required that school facilities constructed with federal monies be made available on a non-discriminatory basis. [FN186]

Similarly, the right of third parties to enforce federal assurance contracts has been found in regard to Title VI assurance contracts in NAACP v. Wilmington Medical Center, Inc., [FN187] to V.A. and HUD nondiscrimination agreements with a real estate broker, [FN188] and to Section 8 housing standards assurance agreements with landlords. [FN189]

Despite this favorable authority, the advocate may face two arguments opposing a third party beneficiary claim. First, the REC may posit that any state common law claim has been preempted by the administrative scheme ***289** established pursuant to the federal statute. However, in light of recent restrictive application of preemption doctrine by a Supreme Court forced to confront its adherence to notions of federalism, preemption is unlikely to be a successful counter-strategy. [FN190] The second argument that allowing a private cause of action for damages would be counterproductive to administrative objectives, should be put to rest by the endorsement of private actions against recipients directly under the statute. [FN191]

An interesting case in response to these arguments is Fuzie v. Manor Care, Inc., [FN192] wherein a district court held that although there is no private cause of action under Medicaid and its implementing regulations, a plaintiff may bring a private cause of action on a third party beneficiary theory. [FN193] Holding that Ohio law "has long recognized that 'a third person for whose benefit a promise has been made by another party may maintain an action thereon at law in his own name," [FN194] the Ohio district court held that the obligations imposed upon the care provider "under the state and federal law and regulations are contractual." [FN195]

> Insofar as the provisions of the federal regulations... and ... [the state] Medicaid Handbook, reflect a duty owed to Ohio Medicaid patients by the state and by the participating providers of their care, enforceable by them within the administrative structure of the program ..., such recipients may maintain an action under a provider's agreement in accordance with the law of Ohio. [FN196]

VI. SUMMARY

The nondiscrimination provision of the federal fuel assistance program can be an important source of customer service protections for low-income customers of Rural Electric Cooperatives. This statute provides a remedy for discrimination against certain disadvantaged groups, whether resulting from invidious motives, subconscious stereotypes or insensitivity ***290** to the special obstacles faced by the disadvantaged. Even if no cause of action lies directly under the federal statute, a cause of action based on a third party beneficiary contract theory would lie in state courts. The goal of the advocate is to press judges and administrative officials to require the REC to fulfill its promise of fair treatment to all customers.

[FNa]. B.A., 1975, Iowa State University; J.D., 1981, University of Florida. Mr. Colton is a staff attorney with the National Consumer Law Center in Boston, Massachusetts.

[FNaa]. B.A., 1982, University of Massachusetts; J.D., 1987, University of Texas. Mr. Smith is the Clinical

Director of the Suffolk University Legal Assistance Bureau, Housing Unit.

[FN1]. Francis X. Welch, The Effectiveness of Commission Regulation of Public Utility Enterprise, 49 GEO. L.J. 639, 643 (1961).

[FN2]. See generally ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 19-36 (1941); ELIOT JONES & TRUMAN BIGHAM, PRINCIPLES OF PUBLIC UTILITIES 163-74 (1933).

[FN3]. See generally David M. Shelton, The Shutoff of Utility Services for Nonpayment: A Plight of the Poor, 46 WASH. L. REV. 745 (1971).

[FN4]. See generally Note, Public Utilities and the Poor: The Requirement of Cash Deposits from Domestic Consumers, 78 YALE L.J. 448 (1969); Comment, Cash Deposits-Burdens and Barriers in Access to Utility Services, 7 HARV. C.R.-C.L. L. REV. 630 (1972).

[FN5]. See generally Warren Samuels, Commentary: Utility Late Payment Charges, 19 WAYNE L. REV. 1151 (1973); Susan Goering, Determining the Reasonableness of Public Utility Late Payment Charges, 26 KAN. L. REV. 595 (1978).

[FN6]. CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES THEORY AND PRACTICE 561 (1984).

[FN7]. See e.g., Western Colo. Power Co. v. Public Util. Comm'n, 411 P.2d 785, 795 (Colo. 1966) (an electric consumer "located in an area exclusively served by such co-operative must take ... [the co-op's] service if indeed service is to be received at all. The form of organization delivering service makes no difference whatever to these consumers....").

[FN8]. The definition of a "public utility" has long been the subject of debate. Among the other industries historically defined to be public utilities at one time or another include: inn-keepers, ferriers and the like. See generally Jacob Geffs, Statutory Definitions of Public Utilities and Carriers (pts. 1 & 2), 12 NOTRE DAME LAW. 246, 373 (1937).

[FN9]. In contrast to these "service" regulations there are also "rate" regulations. Rate regulations are designed to ensure that the price of the public utility service is "just and reasonable." JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES 68-82 (2d ed. 1988); KEITH M. HOWE & EUGENE F. RASMUSSEN, PUBLIC UTILITY ECONOMICS AND FINANCE 62 (1982).

[FN10]. See NATIONAL ASS'N OF REGULATORY UTILITY COMM'RS, SURVEY OF ELECTRIC AND NATURAL GAS UTILITY UNCOLLECTIBLE ACCOUNTS AND SERVICE DISCONNECTIONS FOR 1990, at 96 (1992) (a survey of the disconnect policies of each state including whether utilities are required to issue notice prior to the disconnection of service, how many predisconnect notices must be issued, the type of predisconnect contact that must be made (e.g., personal, telephone, or mail), the number of days notice that must be provided, and whether a customer has a right to designate a third party to receive any notice of a pending disconnection). See also NATIONAL CONSUMER LAW CTR., MODEL RESIDENTIAL UTILITY SERVICE REGULATIONS (1984) [hereinafter MODEL REGULATIONS] (discussion of the substantive law of utility shutoffs).

[FN11]. See MODEL REGULATIONS, supra note 10.

[FN12]. RURAL ELECTRIFICATION ADMINISTRATION, U.S. DEP'T OF AGRIC., 1990 STATISTICAL REPORT, RURAL ELECTRIC BORROWERS at XIX (1991) [hereinafter 1990 STATISTICAL REPORT]. As of August 1991, there were 1053 RECs which have borrowed funds from the REA. Id.

[FN13]. U.S. Electric Utility Statistics, PUB. POWER, Jan.-Feb. 1992, at 56.

[FN14]. See 1990 STATISTICAL REPORT, supra note 12, at IX (noting that RECs serve roughly 11 million customers, of which 9.961 million are residential). See also PUB. POWER, supra note 13, at 56 (noting that public power agencies provide electric service to roughly 16.321 million ultimate customers (i.e., those not involving sales for resale)).

[FN15]. James F. Fairman and John C. Scott, Competition in the Electric Utility Industry, 28 HASTINGS L.J. 1159, 1162 n.18 (1977).

[FN16]. See supra note 6 and accompanying text.

[FN17]. 42 U.S.C. § § 8621-8629 (1988 & Supp. II 1990).

[FN18]. 42 U.S.C. § 8625 (1988).

[FN19]. See e.g., Alabama Power Co. v. Cullman County Elec. Membership Corp., 174 So. 866, 872 (Ala. 1937); In re White Mountain Power Co., 71 A.2d 496 (N.H. 1950); see generally Antonia L. Chayes, Restrictions on Rural Electrification Cooperatives, 60 YALE L.J. 1434, 1439 (1951); see also Isreal Packel, Commission Jurisdiction over Utility Cooperatives, 35 MICH. L. REV. 411, 429-31 (1937).

[FN20]. Hamilton Treadway, The Public Utility Status of Rural Electrification Cooperatives in Illinois, 40 NW. U. L. REV. 515, 526 (1946).

[FN21]. Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv., 92 P.2d 258 (Wash. 1939).

[FN22]. Id. at 263-64.

[FN23]. Id.

[FN24]. Id.

[FN25]. Id.

[FN26]. Id.

[FN27]. See generally MURRAY D. LINCOLN, VICE PRESIDENT IN CHARGE OF REVOLUTION 131-48 (1960).

[FN28]. See Dairyland Power Coop. v. Brennan, 82 N.W.2d 56 (Minn. 1957). Noting that need to protect the supply of electric energy to rural America, the Minnesota Supreme Court observed:

Today farmers and other persons living and producing goods in rural areas are largely dependent upon a reliable supply of electric energy for their living and for the production of goods and income. Modern water and sewage systems have been installed. Persons in rural areas depend upon an uninterrupted and reliable supply of electricity to heat their homes, to cook their food, to provide light, to pump water, to grind feed for their cattle, to milk their cows, to rapidly cool their milk so that it can meet health standards imposed by urban markets, and to do the numerous other things that are done today on modern farms and in modern homes and industries through the use of electricity.

Id. at 65.

[FN29]. KATHRYN H. PORTER, CENTER ON BUDGET AND POLICY PRIORITIES, POVERTY IN RURAL AMERICA, A NATIONAL OVERVIEW 3 (1989). Porter noted that: "In 1987, the poverty rate was 16.9 percent in nonmetro areas - higher than the 12.5 percent poverty rate in metropolitan areas and almost as high as the 18.6 percent poverty rate in central cities." Id.

[FN30]. Id. at 9. "In nonmetro areas, nearly one-quarter of all children (23.1 percent) are poor, compared to a

poverty rate of nearly three out of ten (29.6 percent) among children living in central cities." Id.

[FN31]. Id. at 10. "In 1987, the poverty rate among elderly people living in nonmetro areas - 15.6 percent - was not significantly different from the poverty rate for elderly people in central cities - 14.3 percent." Id.

[FN32]. 436 U.S. 1 (1978).

[FN33]. Id. at 18.

[FN34]. Palmer v. Columbia Gas Co. of Ohio, 342 F.Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); see also Stanford v. Gas Serv. Co., 346 F.Supp. 717, 720 (D. Kan. 1972)(citing Palmer). An excellent canvass of cases is found in Montalvo v. Consolidated Edison Co. of New York, 441 N.Y.S.2d 768, 776 (Sup. Ct. 1981).

[FN35]. See generally NATIONAL CONSUMER LAW CTR., ENERGY AND THE POOR: THE FORGOTTEN CRISIS (1989); NATIONAL CONSUMER LAW CTR., COLD-NOT BY CHOICE (1985).

[FN36]. See 42 U.S.C. § 8625(a) (1988).

[FN37]. Hoyt Gimlin, The Continuing Decline of Rural America, 1 CONG. Q. EDITORIAL RES. REP. 414 (1990) [hereinafter GIMLIN]. See U.S. DEP'T OF AGRIC. & U.S. DEP'T OF COMMERCE, SERIES P-20, No. 446, RESIDENTS OF FARMS AND RURAL AREAS: 1989 (1990); U.S. DEP'T OF AGRIC. & U.S. DEP'T OF COMMERCE, SERIES P-20, NO. 439, RURAL AND RURAL FARM POPULATION: 1988 (1989); Catherine Norton & Margaret McManus, Background Tables on Demographic Characteristics, Health Status, and Health Services Utilization, 23 HEALTH SERVICE RES. 726 (1989) (hereinafter Background Tables).

[FN38]. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 48, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1973 (1974).

[FN39]. Background Tables, supra note 37, at 729, 734; GIMLIN, supra note 37, at 417.

[FN40]. Background Tables, supra note 37, at 746.

[FN41]. GIMLIN, supra note 37, at 417; see e.g., NATIONAL CONSUMER LAW CTR., ENERGY AND POVERTY IN NORTH CAROLINA: COMBINING PUBLIC AND PRIVATE RESOURCES TO SOLVE A PUBLIC AND PRIVATE PROBLEM (1991) (North Carolina's poor tend to be black households and households headed by females).

[FN42]. One commentator similarly noted as early as 1977 with regard to Due Process and Equal Protection constitutional challenges, that:

> Due process and equal protection challenges, although presenting certain avenues of relief for consumers faced with utility terminations, do not adequately protect the consumers' interest. Even if the Court is satisfied that the fourteenth amendment applies, judicial relief seems likely to be quite limited in depth and scope. Courts now seem inclined to require only minimal pre-termination procedures as a matter of procedural due process.
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> ....
>
> A strictly constitutional analysis cannot adequately deal with the individual problems of the consumer. Circumstances such as indigency, illness, financial hardship, or extreme weather conditions, which would make the consequences of utility termination particularly severe, cannot be adequately addressed in a constitutional analysis of the problem. As a matter of public policy utility consumers should have greater protection of their interests than courts have provided; that is, more than minimal notice procedures and prohibition of more than only the most blatantly arbitrary utility practices.

John C. O'Brien, Protecting the Consumer in Utility Service Terminations, 21 ST. LOUIS U. L.J. 452, 473 (1977) (citation omitted).

[FN43]. 42 U.S.C. § 8625(a) (1988).

[FN44]. Id.

[FN45]. See e.g., 29 U.S.C. § 794(b) (1988).

[FN46]. See e.g., BUREAU OF CONSUMER SERVS., PENNSYLVANIA PUBLIC UTIL. COMM'N, INVESTIGATION OF UNCOLLECTIBLE BALANCES (1991) "Existing tracking and referral programs can be utilized for the early identification of potentially payment troubled customers." Id. at 105. "One of the proposals was an early identification program which uses customer information regarding income and ability to pay to segment customer groups for tailored outreach and collection strategies." Id. at 105-06. "For example, customers known to be low income would have more sensitive thresholds for collection attention because of their limited ability to reduce arrearages." Id. at 106.

[FN47]. See e.g., Direct Testimony and Exhibits of Nancy Brockway Before the Kentucky Public Utilities Commission at 16-17, In re. Kentucky Power Company Request for Increased Rates (No. 91-066) (July 29, 1991) (no collection unless arrears are $20 or 60 days old); Direct Testimony and Exhibits of Roger Colton Before the Kentucky Public Service Commission at 66, In re. Union Light Heat and Power Company Request for Increased Rates (No. 90-041) (July 9, 1990) (no collection activity unless arrears exceed $100).

[FN48]. See BUREAU OF CONSUMER SERVS., supra note 46, at 106 (even Pennsylvania's PUC Bureau of Consumer Services recommends a "more sensitive thresholds for collection attention" for those customers "known to be low income.").

[FN49]. See e.g., id. at 40.

The identification of potentially payment troubled customers is important to utility companies because it gives companies the opportunity to reduce payment problems by helping eligible customers receive assistance from public agencies, private agencies, or company programs.... During these contacts, companies should ask customers about their primary source of income and/or participation in programs such as LIHEAP, AFDC, unemployment, welfare, etc. In this way, companies can obtain information that can help to determine whether a customer is potentially payment troubled.

Id.

[FN50]. See generally NATIONAL CONSUMER LAW CTR., EQUAL CREDIT OPPORTUNITY ACT § 6.5.1 (2d ed. 1988 & Supp. 1991) (discrimination based on sexually-defined occupations); Id. § 6.5.2 (discrimination based on income sources generally associated with women).

[FN51]. BARBARA LINDEN & ANNE WICKS, NATIONAL SOCIAL SCIENCE AND LAW CTR., RESIDENTIAL MOBILITY AND THE LOW-INCOME CONSUMER 6 (1985) (Households who move tend to be poor, female-headed or minority.).

[FN52]. See e.g., Jones v. Kansas City Gas & Elect. Co., 565 P.2d 597, 606 (Kan. 1977); see also State ex rel. Guste v. Council of New Orleans, 297 So.2d 518, 524 (La. Ct. App. 1974), rev'd, 509 So.2d 290 (1975); see generally Susan Goering, Determining the Reasonableness of Public Utility Late Charges, 26 UNIV. KAN. L. REV. 595, 603-06 (1978).

[FN53]. 42 U.S.C. § 8625 (1988).

[FN54]. See NATIONAL CONSUMER LAW CTR., COLD-NOT BY CHOICE 2 (1984). Predictably, for low-income households, skyrocketing energy prices in the late 1970's were devastating to personal finances. Id. at 2-3. By 1984, for households living on Supplemental Security Income (SSI), after paying home energy bills during the three coldest winter months, in 47 states plus the District of Columbia, there was $61 or less remaining each week for all other living expenses. Id. at 19-23. For households receiving unemployment compensation, in 32 states, less than $100 remained per week after all other living expenses. Id.

[FN55]. See U.S. GEN. ACCOUNTING OFFICE, DISCONNECTION OF NATURAL GAS SERVICE TO RESIDENTIAL CUSTOMERS 6 (1983) With the enactment of partial deregulation through the Natural Gas Policy Act of 1978, the price of natural gas increased significantly. National average residential gas prices were 27 percent higher in January 1983 than in January 1982 and 50 percent higher than January 1981. Id. That period, too, witnessed the completion of a new generation of central station generation, with a fly-up in electric rates accompanying that as well. Home energy bills began to reach toward $1,000 per year. NATIONAL CONSUMER LAW CTR., COLD-NOT BY CHOICE 1 (1984). NCLC found that by the winter of 1983-1984, in 21 states plus the District of Columbia, home energy bills exceeded $1,000; in an additional 19 states, home energy bills exceeded $800. Id. In only three states were annual costs below $700. Id.

[FN56]. 42 U.S.C. § § 8621-8629 (1988 & Supp. II 1990).

[FN57]. Id. The low-income energy crisis continued into the late-1980s and early 1990s. See e.g., NATIONAL CONSUMER LAW CTR., THE CRISIS CONTINUES (1986); NATIONAL CONSUMER LAW CTR., LOSING THE FIGHT IN UTAH: RISING ENERGY PRICES AND THE POOR (1989); NATIONAL CONSUMER LAW CTR., ENERGY AND THE POOR: THE FORGOTTEN CRISIS (1989); NATIONAL CONSUMER LAW CTR., POVERTY AND ENERGY IN NORTH CAROLINA (1991).

[FN58]. 42 U.S.C. § 8624(b)(2)(A) (1988).

[FN59]. Id. § 8624(b)(2)(B). While states are given discretion to establish eligibility guidelines, federal law provides that eligibility cannot be set at less than 110 percent of the poverty level. Id.

[FN60]. These limited funds can be seen in the Department of Health and Human Services' annual reports about LIHEAP. U.S. DEP'T OF HEALTH AND HUMAN SERVS., LOW INCOME HOME ENERGY ASSISTANCE PROGRAM, REPORT TO CONGRESS FOR FISCAL YEAR 1981[-90] [hereinafter LIHEAP REPORT TO CONGRESS FOR FISCAL YEAR 19-] (These reports show that while LIHEAP was authorized at an initial funding level of $3.1 billion in Fiscal Year (FY) 1981, the appropriations for LIHEAP hovered between $1.85 billion and $1.975 billion annually for FY 1981 - FY 1983. The LIHEAP appropriation reached $2.075 billion in 1984, but has been declining ever since).

[FN61]. LIHEAP REPORT TO CONGRESS FOR FISCAL YEAR 1990, at 22. This is down from 6.9 million households (36 percent) in FY 1983. LIHEAP REPORT TO CONGRESS FOR FISCAL YEAR 1983, at 26. HHS reports that roughly 25.4 million households live below the federal maximum LIHEAP standard. LIHEAP REPORT TO CONGRESS FOR FISCAL YEAR 1990, at 22.

[FN62]. See e.g., 42 U.S.C. § 8624(b) (1988) (requiring states to provide assurances of compliance with a range of subjects); 42 U.S.C. § 8624(c)(1) (1988)(requiring states to develop plans covering certain essential issues, such as outreach, administration, and the like); 42 U.S.C. § 8624(a)(2) (1988)(requiring states to provide for public hearings); 42 U.S.C. § 8624(c)(2) (1988)(requiring states to provide a general opportunity to comment).

[FN63]. 42 U.S.C. § 8624(b) (1988).

[FN64]. 42 U.S.C. § 8624(b)(5) (1988).

[FN65]. 42 U.S.C. § 8622(3) (1988).

[FN66]. 42 U.S.C. § 8623(c) (1988). Congress defined "energy crisis" to mean "weather-related and supply shortage emergencies." 42 U.S.C. § 8622(1) (1988).

[FN67]. See e.g., 42 U.S.C. § § 6101-6107 (1988) ("[I]t is the purpose of this chapter to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance."); 42 U.S.C. § 5309 (a) (1988)(no discrimination allowance based on race, color, national origin, sex, age or handicapped status for Community Development funds); 20 U.S.C. § 1071(a)(2) (1988)(discrimination prohibited in Robert Stafford Student Loan

Program); 20 U.S.C. § 1142 (1988)(institutions of higher education receiving federal financial assistance prohibited from discrimination); 12 U.S.C. § 1735f-5(a) (1988)(discrimination on sex prohibited in federal mortgage loan, federal insurance, guaranty or other assistance).

[FN68]. Jane Varon, Passing the Bucks: Procedural Protections Under Federal Block Grants, 18 HARV. C.R.-C.L. L. REV. 231, 248-49 (1983).

[FN69]. 42 U.S.C. § 8625 (1988).

[FN70]. See CONG. REC. infra note 82 and accompanying text.

[FN71]. 42 U.S.C. § 2000d (1988) (Title VI of the Civil Rights Act of 1964).

[FN72]. 20 U.S.C. § 1681 (1988) (Title IX of the Educational Amendment Act of 1972).

[FN73]. 29 U.S.C. § 794 (1988) (Section 504 of the Rehabilitation Act of 1973). This statute broadly prohibits discrimination based on "handicap" in covered programs. This term is a misnomer, as it comprehends physical and mental conditions which disturb an individual's major life activities in society as presently constructed, as well as conditions, attributes or characteristics which do so only because of the prejudice of others as opposed to the societal barriers creating the disability. 45 C.F.R. § 84.3(j)(2)(iv)(B) (1991); see Janet H. Leader, Running from Fear Itself: Analyzing Employment Discrimination Against Persons with AIDS and Other Communicable Diseases under Section 504 of the Rehabilitation Act of 1973, 23 WILLAMETTE L. REV. 857, 872-874, 902, 920-921 (1987); see generally Note, Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance, 100 HARV. L. REV. 2035 (1987). Nevertheless, the statutory term is used for purposes of consistency. The Department of Agriculture, which oversees the Rural Electrification Administration, has issued regulations that specifically include within the definition of "physical or mental impairment" alcohol and drug abuse, AIDS and conditions affecting appearance. 7 C.F.R. 15b.3(j) (1991).

[FN74]. Age Discrimination Act, 42 U.S.C. § § 6101-6107 (1988).

[FN75]. See 45 C.F.R. 80 (1990) (Health and Human Services); HHS final regulations for the block grant programs indicate that block grant recipients will be bound by standards established under Title VI, Title IX, § 504 and the ADA, and thus no specific block grant nondiscrimination regulations will issue. 47 FED. REG. 29,472-29,480 (1982).

[FN76]. 42 U.S.C. § 8625(a) (1988).

[FN77]. Id.

[FN78]. See Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), rev'd on other grounds, 490 U.S. 829 (1989).

[FN79]. See generally David C. Hsia, The Effects Test: New Directions, 17 SANTA CLARA L. REV. 777 (1977); Elliot M. Mineberg, Applying the Title VII Prima Facie Case to Title VIII Litigation, 11 HARV. C.R.-C.L. L. REV. 128 (1976); Sara E. Burns, Note, Credit Scoring and the ECOA: Applying the Effects Test, 88 YALE L.J. 1450 (1979).

[FN80]. See e.g., General Elec. Co. v. Gilbert, 429 U.S. 125, 155 (1976) (Brennan, J., dissenting); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 587 (2d Cir. 1976); United States v. Hughes Memorial Home, 396 F.Supp. 544, 548 (W.D. Va. 1975); United States v. Reddoch, 467 F.2d 897 (5th Cir. 1972).

[FN81]. See Mark Kelman, Concepts of Discrimination in "General Ability" Job Testing, 104 HARV. L. REV. 1159, 1166-67 n. 23 (1990). Griggs and the Voting Rights case upon which Griggs was based, involved facially

neutral action intentionally designed to exclude minority participation. In this view, the disparate impact model merely excludes proof of intent as an element of plaintiff's case.

[FN82]. 42 U.S.C. § 8625(b) (1988). See 127 CONG. REC. H5805-5806 (daily ed. July 31, 1981). HHS regulations document the similar agency position that no regulations specific to § 8625 are necessary, as Title VI, Tile IX, § 504 and ADA regulations are fully applicable to LIHEAP recipients. 47 FED. REG. 29,480 (1982).

[FN83]. See 127 CONG. REC., supra note 82.

[FN84]. See 45 C.F.R. part 86 (1991) (Health and Human Services) (Title IX regulations, by their terms, apply only to educational institutions, but are the primary source of guidance for this provision.); 45 C.F.R. 86.21 (1991) (implementing impact standards under Title IX) (Health and Human Services). The HHS statement introducing its final block grant regulations stated that the Department considered block grant recipients bound by Title VI, Section 504, Title IX, and the ADA and that the policies and procedures developed under those provisions would control claims brought pursuant to Section 8625. 47 FED. REG. 29,480 (1982).

[FN85]. Cannon v. University of Chicago, 441 U.S. 677 (1979); see also Organization of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R., 579 F.Supp. 574, 592 (N.D. Ill. 1983) (construing nearly identical provision in Railroad Revitalization and Regulatory Reform Act (4R Act), 45 U.S.C. § 803, and finding a private cause of action).

[FN86]. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

[FN87]. Id. tit. XXVI, § 2606, 95 Stat. 900.

[FN88]. Id.

[FN89]. H.R. REP. NO. 158, 97th Cong., 1st Sess., vol. II, at 38-39, 64-65 (1981).

[FN90]. Id. at 37-39, 63-66.

[FN91]. 127 CONG. REC. H5765, 5805-06 (daily ed. July 31, 1981) (remarks of Rep. Waxman). See H.R. REP. NO. 158, supra note 89, at 37, 63.

[FN92]. H.R. REP. NO. 158, supra note 89, at 63.

[FN93]. Id. at 39, 63.

[FN94]. 42 U.S.C. § 8625(a) (1988).

[FN95]. 47 FED. REG. 29,480 (1982).

[FN96]. Id.

[FN97]. 45 C.F.R. 80.13(i) (1991) (Health and Human Services). See also 45 C.F.R. part 80, App. B (1991) (Health and Human Services) (definition of recipient includes the program or entity which receives Federal assistance, or which benefits from such assistance, such as a board of education, an administrative board, a public or private high school, or college, but not including students as the ultimate beneficiaries of the assistance).

[FN98]. Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991). Frazier v. Board of Trustees of Northwest Miss. Hosp. Regional Medical Ctr., 765 F.2d 1278, 1290 (5th Cir. 1985); United States v. Baylor Univ. Medical Ctr., 736 F.2d 1039 (5th Cir. 1984).

[FN99]. See supra note 91.

[FN100]. In contrast, in Grove City College v. Bell, 465 U.S. 555 (1984), the Court held that Basic Educational Opportunity Grants directly to students rather than to the college still created the necessary federal nexus to require the college's compliance with federal nondiscrimination provisions. Id. at 563-70. The Court instructed that there is no distinction between direct and indirect aid and there is no basis in the statute [Title IX in that instance] for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation. Id. at 564. The much derided holding of this case is now largely of only historical interest. In Grove City, the Court limited the application of Title IX to the specific part of the program receiving the Federal assistance. Id. at 571. In that case the court held that the receipt of BEOG student grants subjected the school to Title IX requirements, but only as to its financial aid program. Id. at 571, 574-575. Congress legislatively overruled this holding in the Civil Rights Restoration Act of 1988. See 42 U.S.C. § 2000d-4a; 20 U.S.C. § 1687 (providing that nondiscrimination requirements apply to the entire program or geographically distinct part thereof when any part of the program receives Federal assistance.) See also Irvin Molotsky, House and Senate Vote to Override Reagan Veto on Rights, N.Y. TIMES, March 23, 1988, at A1.

[FN101]. For an explanation of direct vendor payments, see infra notes 160 and 165-166 and accompanying text.

[FN102]. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Cases on this issue prior to Bakke are set forth at note 16 of Justice Powell's opinion for the court. Id. at 282 n.16; See also Cort v. Ash, 422 U.S. 66, 78 (1975).

[FN103]. See supra note 85 and accompanying text.

[FN104]. See e.g., Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); see also Lewis v. Western Airlines, Inc., 379 F. Supp. 684 (N.D. Cal. 1974) (allowing private suit for damages under Executive Order 11246 and pursuant regulations); Farmer v. Philadelphia Elect. Co., 329 F.2d 3 (3d Cir. 1964).

[FN105]. 414 U.S. 563 (1974). In Lau, the plaintiff class challenged the San Francisco school system's failure to provide bilingual instruction. The court considered such practices alleged to disproportionately affect students of Chinese ancestry in the area, relying in part on an administrative regulation requiring a school to engage in affirmative action where an English language disability excludes ethnic groups from full participation in the educational program. Id. at 564-65. The Court held that the school district had "contractually agreed to 'comply with title VI of the Civil Rights Act of 1964...and all requirements imposed by or pursuant to the Regulation' of HEW (45 C.F.R. part 80)..." Id. at 568-69. In upholding the cause of action, the Court stated that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed." Id. at 569.

[FN106]. 414 U.S. at 568-69.

[FN107]. The Department of Health, Education and Welfare has since been changed to the Department of Health and Human Services.

[FN108]. See 45 C.F.R. § § 80.1-.13 (1991) (Dep't of Health and Human Services).

[FN109]. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[FN110]. Id. at 287 (Powell, J. writing for majority with Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

[FN111]. Washington v. Davis, 426 U.S. 229 (1976).

[FN112]. 463 U.S. 582 (1983) (Hispanic and black police officers sued the New York City Police Department attacking the department's "last-hired, first-fired" policy. The plaintiffs argued that because of their lower test scores, they were hired later than white police officers).

[FN113]. Justice White announced the judgment of the Court and delivered an opinion in Parts I, III, IV and V, in which Justice Rhenquist joined. 463 U.S. at 584. Justice Powell filed an opinion concurring in the judgment in which Chief Justice Burger joined, and in Part II which Justice Rhenquist joined. Id. at 607. Justice Rhenquist filed an opinion concurring in the judgment. Id. at 612. Justice O'Connor also filed an opinion concurring in the judgment. Id. at 612. Justice Marshall filed a dissenting opinion. Id. at 615. Justice Stevens filed a dissenting opinion in which Justice Brennan and Justice Blackmun joined. Id. at 635.

[FN114]. See HOWARD C. EGLIT, AGE DISCRIMINATION § 6.40 (Supp. 1987). The lower courts have construed Justice O'Connor's opinion to support irreconcilable points of law. Compare Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 621 (11th Cir. 1990) (Justice O'Connor's opinion construed as finding no damages available under Title VI) with Organization of Minority Vendors v. Illinois Cent. Gulf R.R., 579 F.Supp. 574, 594-95 n.10 (N.D. Ill. 1983) (Justice O'Connor's opinion construed as expressing no opinion on whether damages were available under Title VI). A later Supreme Court decision, an unanimous opinion, attributed yet another meaning to her opinion. Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (Justice O'Connor stated a damage remedy available for all violations of Title VI).

[FN115]. 463 U.S. at 610-11 (Powell, Burger and Rhenquist, JJ.); Id. at 612 (O'Connor J.); Id. at 639-42 (Stevens, Brennan and Blackmun, JJ.). Only Justice White, id. at 589-90, and Justice Marshall, id. at 623-24, found otherwise. Neither Justice White nor Justice Marshall, both of whom were part of the five member Bakke majority which established the rule that Title VI reaches no further than the Constitutional definition of discrimination, would have held that Bakke had wider implications than the specific affirmative action plan at issue in that case.

[FN116]. 463 U.S. at 584 n.2.

[FN117]. 463 U.S. at 589-93. Justice White, however, would limit the remedy to injunctive relief where the violation is based on a disparate impact theory. Id. at 598.

[FN118]. 463 U.S. at 615. Justice Marshall would defer to the regulations of the implementing agencies who had been entrusted with the task of defining discrimination under Title VI. Id. at 621-28.

[FN119]. Id. at 590.

[FN120]. 463 U.S. at 635 (opinion of Stevens in which Brennan and Blackman, JJ., joined).

[FN121]. Id. at 644-45.

[FN122]. Id. at 645.

[FN123]. 42 U.S.C. § 1983 (1988). A person may pursue agency remedies, which include a private complaint, but may not become a party to a suit. See 45 C.F.R. 80.3 (1991)(Dep't of Health and Human Services) (implementing Title VI). The applicable regulations allow the complainant at best, the status of amicus, without ability, as of right, to participate at the administrative hearing or to decide upon the terms upon which the complaint will be settled.

[FN124]. 463 U.S. at 645 n.18.

[FN125]. Soberal-Perez v. Heckler, 717 F.2d 36, 38 (2d Cir. 1983).

[FN126]. 751 F.2d 609 (3d Cir. 1984). In Butts, plaintiff basketball player sued to enjoin an NCAA rule counting years played by high school players over the age of 18 against their college eligibility. Id. at 610-11. The case proceeded on a disparate treatment age discrimination claim as well as a disparate impact Title VI claim bottomed on facts showing a disproportionate number of the players affected by the rule were black. Id. The court upheld the dismissal of the case on the merits because the NCAA had carried its burden of advancing appropriate nondiscriminatory reasons legitimizing the rule. Id. at 613-14. Cf., Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984) (NCAA not a state actor).

[FN127]. 634 F.Supp. 741, 745 (S.D. Fla. 1986), aff'd on other grounds, 807 F.2d 889 (11th Cir. 1986); accord Petock v. Thomas Jefferson Univ., 630 F. Supp. 187 (E.D. Pa. 1986) (ADA claim for retaliation arising solely under regulations); Doe ex rel. Doe v. St. Joseph's Hosp., 788 F.2d 411, 419-21 n.18 (7th Cir. 1986) (Title VI). Paisey is notable in its lack of conviction. The opinion is introduced by a disclaimer and concluded with an invitation to the 11th Circuit to review its holding. The Circuit Court affirmed without reaching this issue.

[FN128]. The significance of this is diminished by the fact that there is, in any event, an alternative route to gaining redress. Many RECs will be subject to LIHEAP's nondiscrimination provision where the distinction is not important. But see NLRB v. Randolph Elect. Membership Corp., 343 F.2d 60, 62 (4th Cir. 1965)(North Carolina RECs formed under the Electric Corporation Membership Act of North Carolina are political subdivisions of North Carolina).

Moreover, the federal courts, in a variety of circumstances, have held that RECs are instrumentalities of the federal government. See e.g., Rural Electrification Administration v. Central La. Elect. Co., 354 F.2d 859, 864 (5th Cir. 1966) (noting that because REC was established and funded under a federal act it should be considered a federal instrumentality); Cass County Elect. Coop. v. Wold Properties, Inc., 249 N.W.2d 514 (N.D. 1976)(same); Alabama Power Co. v. Alabama Electric Coop., 394 F.2d 672 (5th Cir. 1968) (same); Salt River Project Agric. Improvement and Power Dist. v. Federal Power Comm'n, 391 F.2d 470 (D.C. Cir. 1968)(same).

[FN129]. See infra notes 159-162 and accompanying text.

[FN130]. See NAACP v. Wilmington Medical Ctr., Inc., 453 F.Supp. 280, 329 (D. Del. 1978) (plaintiffs had an independent right to enforce Title VI assurance contract as third party beneficiary); see also Daniel Solomon, Constraints on Damage Claims Under Title VI of the Civil Rights Act, 3 LAW & INEQ. J. 183, 198 (1985) (the need to compensate those injured by discrimination should encourage courts to uphold third party claims).

[FN131]. 1 CHESTER J. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 317 (2d ed. 1980 & Supp. 1991).

[FN132]. Id. § 319N.

[FN133]. Id. § 323S-323U.

[FN134]. Id. § 326X.

[FN135]. See, e.g., NAACP v. Wilmington Medical Ctr., Inc., 453 F.Supp. 280, 293 (D. Del. 1978). "[T]he suspension of federal aid was a sword which Congress cautioned the agencies to wield judiciously; it was envisioned as a weapon of last resort, designed to provide government agencies with 'leverage' in their efforts to secure compliance with the statute." Id.

[FN136]. See ANTIEAU, supra note 131, at § § 312-17; see also Craft v. Board of Trustees of Univ. of Ill., 793 F.2d 140, 142 (7th Cir. 1986); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (damages available in response to a violation of Title IX, but only upon a showing of purposeful discrimination).

[FN137]. See e.g., Alexander v. Choate, 469 U.S. 287, 294-95 n. 11 (1985).

[FN138]. See infra notes 147-51 and accompanying text. All seven Justices who reached this question strongly indicated that damage would be available for at least some violations. In addition to the five Justices' opinions discussed below, the opinion of Justice White, joined by Justice Rhenquist, implies in several respects that damages would be available in a disparate treatment case. Guardians, 463 U.S. at 601-02.

[FN139]. Shinault v. American Airlines, 738 F.Supp. 193, 198 (S.D. Miss. 1990); Davis v. Spanish Coalition for Jobs, Inc., 676 F.Supp. 171, 172 (N.D. Ill. 1988); Franklin v. Guinnett County Pub. Sch., 911 F.2d 617, 622 (11th Cir. 1990).

[FN140]. Guardians, 463 U.S. at 595-97.

[FN141]. Id. at 597.

[FN142]. See generally Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), rev'd on other grounds, 490 U.S. 829 (1989) (fact that partners were unaware of discrimination neither alters the fact nor excuses it); Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (respondeat liability exists under Section 504).

[FN143]. See supra note 142.

[FN144]. See Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

[FN145]. 401 U.S. 424 (1971).

[FN146]. In Griggs, an employer with a long history of intentional discrimination prior to the enactment of Title VII adopted the challenged qualifications, including a high school diploma, shortly after the effective date of that Act. 401 U.S. 424; see also Kelman, supra note 81, at 1167 ("An employer who uses such statistically invalid tests may in fact want to exclude minorities. Because title VII prohibits him from openly following a discriminatory policy, the employer may conceal his bias through the use of substitute indicators of race.")

[FN147]. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984).

[FN148]. Guardians, 463 U.S. at 635 (Marshall J. dissenting at 615-34, Stevens, Brennan, Blackman J.J. dissenting at 635-45).

[FN149]. See supra note 114.

[FN150]. Guardians, 463 U.S. at 612 n.1 (O'Connor J. concurring).

[FN151]. Justice O'Connor's strict adherence to stare decisis is evidenced in Guardians as her opinion on the reach of the statute was based wholly on the limiting precedent of Bakke. Guardians, 463 U.S. at 612-15. "[W]ere we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination." Id. at 612.

[FN152]. 465 U.S. 624, 630-31 n.9 (1983); see also Smith v. Robinson, 468 U.S. 992, 1020 n.24 (1984) (damages under Section 504 favorably commented upon).

[FN153]. See discussion infra notes 159-192 and accompanying text. For more detailed discussion, see Solomon, supra note 130, at 197 (breach of the assurance of compliance may provide the basis for a third-party claim by the victim of discrimination. Such a claim is contractual rather than statutory and compensatory remedies are appropriate).

[FN154]. 42 U.S.C. § 6104(e)(1) (1988).

[FN155]. 29 U.S.C. § 794a(b) (1988).

[FN156]. 42 U.S.C.A. § 1988(b) (West Supp. 1992).

[FN157]. Id.

[FN158]. Maher v. Gagne, 448 U.S. 122, 130-31 (1980); Smith v. Robinson, 468 U.S. 992, 1002, 1006-07 (1984).

[FN159]. For contents of assurance contracts, see 42 U.S.C. § 8624(b)(7)(D) (1988) (states must sign assurance for feds; vendors who receive direct LIHEAP payments must sign assurances with state). See also 3 RICHARD B.

CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS 240-41 app. 19-G (Supp. 1991).

[FN160]. See infra notes 162-164 and accompanying text for comparison of other means of making payments.

[FN161]. 42 U.S.C. § 8624(b)(7)(D) (1988). Moreover, the vendor must provide assurances that no households receiving assistance will be treated adversely under applicable state law or public regulatory requirements. 42 U.S.C. § 8624(b)(7)(C) (1988). The vendor must also provide assurances that the supplier will charge the eligible households only the difference between the LIHEAP payment and the actual cost of the delivered energy. 42 U.S.C. § 8624(b)(7)(B) (1988).

[FN162]. 42 U.S.C. § 8624(c)(1)(E) (1988).

[FN163]. DIVISION OF ENERGY ASSISTANCE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., STATE CATALOG OF FISCAL YEAR 1991 LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CHARACTERISTICS 9-10 (1992) [hereinafter 1991 CATALOG].

[FN164]. North Carolina, for example, only makes direct client cash payments. 1991 CATALOG, supra note 163, at 24.

[FN165]. 1991 CATALOG, supra note 163, at 10.

[FN166]. Id. Each year, the respective states are to prepare a "state plan" in which they set forth the means by which they will implement the LIHEAP program 42 U.S.C. § 8624(c) (1988). The statute specifically provides that the "Secretary [of HHS] may not prescribe the manner in which the provisions of this subsection" shall be implemented. 42 U.S.C. § 8624(b) (1988).

[FN167]. 1991 CATALOG, supra note 163, at 24. Vermont, for example, uses two party checks. The "normal benefit payment" in Vermont is a "modified 2- party check, made out to the client and an unspecified fuel provider." Id. at 24-25.

[FN168]. Id. at 10.

[FN169]. CHARLES A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 17 (3d ed. 1976); see also Miree v. Dekalb County, 433 U.S. 25, 32-33 (1977) (state law determines contract rights where obligations of United States not at issue).

[FN170]. WRIGHT, supra note 169.

[FN171]. RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981).

[FN172]. Minority Vendors, 579 F.Supp. at 579; see also Michael A. Wolff, Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973, 22 ST. LOUIS U. L.J. 25, 58-60 (1978) (discussing third-party beneficiary claims under § 503).

[FN173]. RESTATEMENT (SECOND) OF CONTRACT § 313 (1981); see also Solomon, supra note 130, at 203-04 (Courts generally find third-party rights in federal contracts either where the governing statute expressly or implicitly recognizes a private cause of action or where the contract explicitly identified the claimant class to receive benefits. Title VI assurances satisfy both conditions).

[FN174]. Minority Vendors, 579 F.Supp. at 600; see Arthur Block, Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries, 18 HARV. C.R.-C.L. L. REV. 1, 23 - 31 (1983).

[FN175]. 441 U.S. 677 (1979).

[FN176]. Id. at 691, 694.

[FN177]. See 42 U.S.C. § 2000d(1) (1988) (compliance with [Title VI] may be effected by any other means authorized by law); but see Guardians, 463 U.S. at 603 n. 24 (noting that third-party beneficiary theory may violate congressional intent).

[FN178]. See 1987 U.S.C.C.A.N. 934 (LIHEAP was intended to preserve the integrity of the block grant as to state administration while addressing concerns of state accountability in effecting federally mandated objectives.).

[FN179]. Id.

[FN180]. 414 U.S. 563 (1974).

[FN181]. Id. at 568-569.

[FN182]. See Guardians, 463 U.S. at 616-17 (Marshall, J., dissenting) (noting that part of Lau still valid).

[FN183]. 370 F.2d 847 (5th Cir. 1967).

[FN184]. See e.g., Bakke, 438 U.S. at 419 (citing Lemon for authority that the courts have "unanimously concluded... that a private action may be maintained under Title VI."); Cannon, 441 U.S. at 696 (noting that Lemon has been "repeatedly cited with approval").

[FN185]. 370 F.2d at 849.

[FN186]. Id. at 850-51.

[FN187]. 453 F.Supp. 280, 329-30 (D. Del. 1978).

[FN188]. Dillon v. AFBIC Development Corp., 420 F.Supp. 572, 581 (S.D. Ala. 1976), modified, 597 F.2d 556 (5th Cir. 1979).

[FN189]. Ayala v. Boston Hous. Auth., 536 N.E.2d 1082 (Mass. 1989); see also City of Inglewood v. City of Los Angeles, 451 F.2d 948, 956 (9th Cir. 1971); Holbrook v. Pitt, 643 F.2d 1261, 1271 (7th Cir. 1981).

[FN190]. See Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99 (1987); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 412-13 (1988); English v. General Electric, 110 S.Ct. 2270, 2276-2281 (1990); but see generally Howard v. Uniroyal, 719 F.2d 1552 (11th Cir. 1983).

[FN191]. Courts, however, may limit relief according to the standards established under Title VI. See e.g., Concerned Tenants Ass'n v. Indian Trails Apartments, 496 F.Supp. 522 (N.D. Ill. 1980). The court found that it could exercise pendent jurisdiction over tenants' third party claim for breach of Title VI assurance contract. Id. at 528. Furthermore, the exhaustion of administrative remedies was not required. Id. at 526. The court continued, however, to find that only equitable relief may be awarded based on this theory. Id. at 528. See also Anthony J. Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 HARV. L. REV. 1109, 1178 (1985). ("claimants have been able to employ the third party beneficiary rule where an action on the statute would have failed.").

[FN192]. 461 F.Supp. 689 (N.D. Ohio 1977).

[FN193]. Id. at 697.

[FN194]. Id. (citation omitted).

[FN195]. Id. at 698.

[FN196]. Id.

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