1990

Litigating a Fair Housing Case in the 90's

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Original Citation

Kenneth J. Kowalski, Litigating a Fair Housing Case in the 90's, 1 The Practical Litigator 41 (May 1990) (with E. Kramer)

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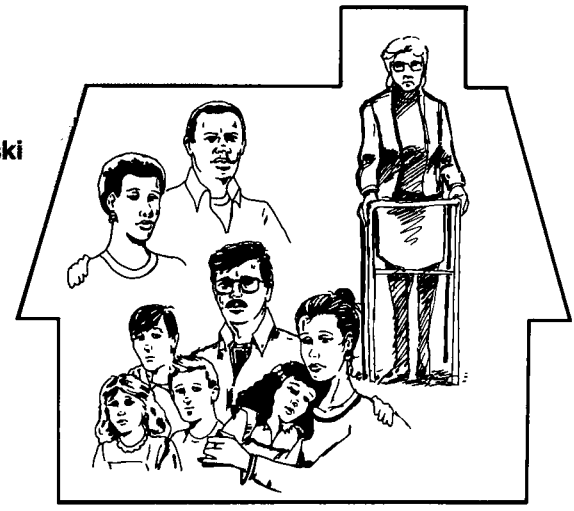

Ensuring equal access to housing for all Americans is closer to reality with the passage of the Fair Housing Amendments Act.

RECENT STATUTORY AMENDMENTS to the Federal Fair Housing Act of 1968, 42 U.S.C. §§3601 et seq. ("Act") will be the impetus for substantial litigation in this decade. The Fair Housing Amendments Act

of 1988 ("Amendments"), which was enacted on September 13, 1988, and became effective on March 12, 1989:

- Established new protected classes;
- Created an administrative law judge system to enforce the law; and
- Strengthened many of the original provisions of the Act.

The addition of new protected classes increases the already substantial need for attorneys experienced in litigating housing discrimination cases.

Many of the litigation strategies used before the Amendments remain sound today. *See* Kramer and Kowalski, *An Overview of Fair Housing Litigation (Part 2),* 3 The Practical Real Estate Lawyer 77 (March 1987). This article will review the Amendments, their impact on litigating a fair housing case, and recent case law in the area.

An important source for the most recent judicial decisions and administrative interpretations is Prentice Hall's Fair Housing-Fair Lending Reporter. A monthly bulletin reviewing federal, state and local cases and related matters on fair housing is essential to keep the litigator on the cutting edge of this subject.

A REVIEW OF THE AMENDMENTS • The Amendments broadened the prohibitions against discriminatory financing by using the term "residential, real estate-related transaction." The statute defines the term "residential, real estate-related transaction" to mean any of the following:

> "(1) The making or purchasing of loans or providing other financial assistance —
>
> (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or
>
> (B) secured by residential real estate.
>
> (2) The selling, brokering, or appraising of residential real property."

§3605(b). (All section references are to 42 U.S.C. unless otherwise indicated.)

Further, Congress required the Secretary of the U.S. Department of Housing and Urban Development ("HUD") to report annually on the nature and extent of progress in eliminating discriminatory housing practices. §3608(e).

The Amendments also expanded the definition of "discriminatory housing practice" to include coercion, intimidation, threats, or interference related to a person's exercise of fair housing rights. The change in this definition is important in that it eliminates any question that individuals may file private lawsuits based on section 3617. There were some court decisions that questioned whether a private right existed. The three most important Amendments, however, relate to:

- The changes in the enforcement of the law;
- Prohibitions of discrimination against the handicapped; and
- Prohibitions of familial status discrimination.

Amendments
Strengthen Enforcement

The Act created three methods for its enforcement. The Amendments established a new administrative procedure to assist in resolving housing discrimination complaints. Now, the Secretary ("Secretary") of HUD or the aggrieved party may file a complaint within one year of the alleged discrimination. §3610(a).

Administrative Procedure

Under this statutory scheme HUD has 100 days to conduct an initial investigation. The Secretary can issue subpoenas and pay witness fees. §3611(b). If a party refuses to appear at the administrative hearing the law imposes a one-year imprisonment and up to a $100,000 fine. §3611(c). During this initial 100 days HUD may commence conciliation to settle the dispute. The Secretary must either dismiss the complaint or file a charge if the case is not settled through the conciliation process. §3610(g).

A complainant, respondent, or other aggrieved party may elect to have the matter determined in federal court by notifying HUD within 20 days of the issuing of the charge. §3612(a). If a private lawsuit to enforce rights protected by this section is not filed, the matter will be decided by an administrative law judge. The hearing must commence within 120 days of the issuance of the charge. 42 U.S.C. §3612(b), (g)(1).

In December 1989 the first decision by a HUD administrative law judge was rendered under this new enforcement scheme. The victim of discrimination was awarded a total of $65,000. The defendant had to pay an additional $10,000 civil penalty and sell the house to the black couple at the original contract price of $92,000. *HUD v. Blackwell,* No. HUDALJ 04-89-0520-1 (Heifetz ALJ 12-21-89); V Fair Housing-Fair Lending Bulletin 1-3 (February 1990). The size of the award and completeness of the relief granted are sure to encourage more complainants to use the administrative enforcement avenue to obtain relief.

Private Lawsuit

Unlike the case of employment discrimination under Title VII of the Civil Rights Act of 1964, section 2000e et seq., victims of housing bias may simply avoid the administrative process by filing a lawsuit under section 3613. One of the changes under the amended statute is that a person can bring a suit within two years of the alleged discrimination rather than the previous 180 days. *See* §3613(a)-(1)(A).

The Supreme Court has held that pre-Amendments section 3613 pro-

vided an independent remedy that could be pursued at the same time HUD was investigating a section 3610 complaint. *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 109 (1979). It is not likely that this interpretation will change under the Amendments. Note, however, that the limitations period is tolled while HUD administrative proceedings are pending. *Tabrizi v. Village of Glen Ellyn,* 883 F.2d 587, 593 (7th Cir. 1989). Also, under the new law a private lawsuit is barred if the case has already started before the administrative law judge. *See* §3613(a)(3).

Lawsuit by Attorney General

The last method of enforcement is the institution of litigation by the Attorney General of the United States. §3614. To file a lawsuit under the previous provisions the Justice Department had to prove that a "pattern or practice" of housing discrimination was occurring that raised "an issue of general public importance. . . ." *United States v. Pelzer Realty Co., Inc.,* 484 F.2d 438, 444 (5th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). For an excellent discussion on the legislative history of this phrase, see *United States v. Mitchell,* 327 F. Supp. 476, 480-83 (N.D. Georgia 1971).

Now the Attorney General can also institute suit in non-pattern-and-practice cases that are referred by HUD. Under the amended provision the Justice Department must bring an action based on cases referred by HUD within 18 months from the alleged discrimination. §3614(b)(1)(B). Also, now the federal Government is subject to a statute of limitations for bringing this action. This was not the case under the original statute. *United States v. Sommerlin,* 310 U.S. 414 (1940); *United States v. Mitchell,* supra, at 485.

The Justice Department filed its first lawsuits under the Amendments on March 13, 1989, the date the law took effect. Both cases involved alleged practices of property owners or managers that expressed limitations, preferences, and other discriminatory choices based on race. *U.S. v. Klinker,* Case No. 4-89-CIV-210 (D.Minn filed 3-13-89); *U.S. v. Rent America, Inc.,* Case No. 89-6188-CIV-Paine (S.D. Fla. filed 3-13-89); IV Fair Housing-Fair Lending Bulletin 4-5 (May 1989)

Handicapped Discrimination

The Act now defines a person with disabilities as one who:

"(1) [has] a physical or mental impairment which substantially limits one or more of such person's major life activities,
(2) [has] a record of having such an impairment, or
(3) [is] regarded as having such an impairment,
but such term does not include current, illegal use of or addiction to a controlled substance. . . ." §3602(h).

In its final rules to interpret "Implementation of the Fair Housing

Amendments Act of 1988," 54 F.R. 3232, 3245 (January 23, 1989), HUD cited the legislative history as requiring a liberal interpretation of the term "handicap." This interpretation would include individuals with the AIDS virus or tuberculosis, alcoholics, the mentally ill, and former drug abusers. However, nothing in the statute requires that a person rent or sell property to a handicapped person who would "constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." §3604(f)(9). *See* 24 C.F.R. §100.201 (1989).

Reasonable Modification

The law does require that a handicapped person be able to rent if reasonable modifications to the existing dwelling would permit the individual to reside there and he pays for the modification. §3604(f)(3)(A). *See also* 24 C.F.R. §100.204 (1989). For example, if a blind prospective tenant could live in the rental property by having a seeing eye dog, the apartment's rule prohibiting pets cannot be used to deny this handicapped person the right to rent the unit.

Accessibility of Multifamily Dwellings

The Amendments also make it unlawful to make multifamily dwellings inaccessible to persons with handicaps if they are to be occupied for the first time after March 13, 1991. §3604(f)(3)(C). The exact requirements necessary to meet this obligation have not yet been determined. HUD has requested comments from the public before adopting a substantive regulation for this area.

Preemption

Note that the statute specifically denies a federal preemption claim. The law states that "[n]othing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this title shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this title." §3604(f)(8).

Inquiring About Handicaps

Landlords or real estate agents are limited in what they can ask about a person's handicap. They cannot ask about the nature or severity of a handicap, nor inquire about whether some person associated with the buyer or potential tenant is handicapped. However, HUD has indicated that the following inquiries can be made as long as all applicants are asked the same questions:

- Whether the applicant can meet the requirements of ownership or tenancy;
- Whether an applicant is qualified for a dwelling available only to per-

sons with handicaps or to persons with a particular type of handicap;

- Whether an applicant for a dwelling is qualified for a priority available to persons with handicaps or to persons with a particular type of handicap;
- Whether an applicant for a dwelling is a current illegal abuser or addict of a controlled substance; and
- Whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance. 24 C.F.R. §100.202(c) (1989).

Handicap Discrimination Litigation

To determine whether the evidence of handicap discrimination makes a prima facie case, you must apply the standard of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973):

- The complainant is handicapped as defined in the statute;
- The complainant was a qualified prospective buyer or tenant;
- The complainant was denied the rental unit or home; and
- When applicable, the unit was later rented or sold to a non-handicapped person. *Quaker Hill Place v. State Human Relations Commission,* 498 A.2d 175, 183 (Del. Super. 1985).

Effect on Zoning Ordinances

The most significant effect of the handicapped discrimination prohibition may well be on local zoning ordinances. Although the Amendments do not specifically prohibit zoning laws that prevent handicapped housing, they do make it illegal to discriminate "in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of" the buyer's or renter's handicapping condition, or "the handicapping condition of any person associated with the buyer or renter." 42 U.S.C. §3604(f)(1). Courts have in the past determined that this language applies to zoning regulations, and the legislative history supports this interpretation. *U.S. Code Congressional and Administrative News,* No. 8, p.2185 (November 1988).

The law has already been used successfully to attack a city's refusal to issue a special permit to allow the remodeling of an existing building to house AIDS patients. The developer was able to obtain injunctive relief ordering the community to take the necessary action to permit the remodeling of the facility. *Baxter v. City of Belleville, Ill.,* 720 F. Supp. 720 (S.D. Ill 1989). Also, the U.S. Department of Justice has filed a lawsuit against a community that had refused to permit the construction of a group home for 15 mentally retarded adults based on the amended Act. *U.S. v. Chicago Heights,* Case No. 89 C 4938 (N.D. Ill. filed 6-20-89); IV Fair Housing-Fair Lending Bulletin 3-5 (August 1989)

Familial Status Now Protected

The Amendments added protection against discrimination for families with children, prohibiting discrimination in the sale or rental of housing because of "familial status." This generally means the presence of children under 18. §3607(k).

The Department of Justice has filed several lawsuits alleging family-status discrimination. The first case, *U.S. v. LaFonge Associates,* Case No. 89-1729 (D.N.J. filed 4-18-89) was settled for $33,000 within two months of filing. IV Fair Housing-Fair Lending Bulletin 18 (August 1989) For a more comprehensive review of both the legislative history and possible legal impact see Comment, *The Fair Housing Amendments Act of 1988: A Critical Analysis of "Familial Status",* 54 Mo. L. Rev. 393 (1989).

"Housing for Older Persons" Exempted

However, the Act provides an exemption from this prohibition for housing which qualifies as "housing for older persons." §3607(b). The statutory definition of "housing for older persons" comprises three categories of housing:

- Housing provided under any state or federal program that is specifically designed and operated to assist elderly persons, as determined by the Secretary of HUD;
- Housing intended for, and solely occupied by, persons 62 or older; and
- Housing intended for and occupied by at least one person 55 years of age or older per unit, provided certain criteria, spelled out in 24 C.F.R. Part 100.34 (1989) are met.

Simply labeling an apartment complex or housing development as housing for senior citizens will not be enough. To merit the exemption, the housing will have to be either:

- Solely intended for, and occupied by, persons over 62; or
- Intended and operated for occupancy by at least one person over 55 per unit.

To meet the latter requirement, 80 per cent of the units must have at least one resident over 55. In addition the complex must provide significant facilities and services specifically designed to meet the needs of older persons or demonstrate that it is not practicable to provide such services and demonstrate that the honsing facility is necessary to provide important housing opportunities for older persons.

The legislative history of the amendments indicates that these exceptions are to be narrowly construed. 134 Cong. Rec. H6498 (daily ed. August 8, 1988)

Housing that did not meet the requirements for housing for older persons as of the date of enactment of the Amendments could still qualify as long as new occupants of that housing meet the age requirements. §3607(b)(3).

Restrictions on Number of Occupants Exempted

The other significant exemption involves restrictions on the number of persons permitted to occupy a dwelling unit. The Amendments do not limit the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants per dwelling unit. §3607(b)(1). This provision is intended to allow reasonable governmental limitations on occupancy to continue in effect as long as they are applied to all occupants and do not operate to discriminate on a prohibited basis. *See* H.R. Report No. 711, 100th Congress, 2d Sess. 31 (1988).

This exemption will not automatically save all zoning restrictions. For instance, in *Doe v. City of Butler,* 892 F.2d 315 (3d Cir. 1989), the Third Circuit remanded for more thorough consideration a claim that a city's six-person limit on transitional housing would adversely affect battered women seeking shelter because the limit would make it difficult for women with children to use transitional dwellings.

Comments to the regulations first proposed by HUD to implement the new Amendments raised questions about this exemption. Some urged HUD to dctermine what occupancy standards could be applied to sale or rental of dwellings, even to the extent of developing a national occupancy standard. This HUD declined to do, interpreting the Amendments to express congressional deference to state and local guidelines. The agency noted that while HUD promulgated occupancy standards for use by participants in HUD housing programs, these gnidelines may not be reasonable for other dwellings.

As indicated in HUD's interpretation of the occupancy standards exemption, the word that will probably generate litigation in connection with this exemption is "reasonable."

Occupancy restrictions instituted by a private owner or manager of dwellings in the absence of any state or local occupancy code should be subject to greater scrutiny. First of all, there is the question of whether a private party can take advantage of tlie exemption at all in such a situation. The statute only mentions "local, state or federal restrictions" and does not seem to make provision for an owner of, for example, a mobile home park to promulgate occupancy limits when there are no state or local restrictions. How the courts answer this question remains to be seen.

HUD has indicated that, at least as far as it is concerned, in appropriate circumstances owners and managers may develop and implement reasonable occupancy requirements based on factors such as number of sleeping rooms and the overall size of the unit. HUD goes on to say that it will carefully examine such privately promulgated restrictions to determine if they unreasonably exclude families with children.

You may find guidance on likely judicial interpretations by reviewing decisions of state courts involving seemingly conflicting provisions of the new federal Amendments and state laws. For instance, the California Supreme Court recently held that the ability of a mobile home park to bar adults under the age of 25, as allowed by California law, was not affected by the Amendments. *Schmidt v. Superior Court of Santa Barbara County,* 48 Cal. 3d 370, 256 Cal. Rptr. 750, 769 P.2d 932 (1989). Thus, it would seem that discrimination against persons over 18 would not be prohibited.

If there is a conflict between the federal Act and a state law, however, the Act controls.

Definition of "Dwelling"

The definition of "dwelling" is extremely broad and essentially covers all housing:

- Apartments or other rental units;
- Single family housing;
- Cooperatives;
- Condominiums; and
- Mobile home parks.

Housing providers should also be aware that the prohibition against refusing to rent to families with children will almost certainly be interpreted to forbid the formerly common practice of segregating units by age or family status. The courts have consistently outlawed the practice of limiting the number or particular sections of an apartment complex available to minorities. *See, e.g., United States v. Starrett City Assoc.,* 660 F. Supp. 668 (E.D. N.Y. 1987), *aff'd,* 840 F.2d 1096 (2d Cir. 1988), *cert. denied,* 109 S. Ct. 376 (1989); *United States v. Mitchell,* 580 F.2d 789 (5th Cir. 1978).

SECTION 1981 AND 1982 LITIGATION • Two statutes often used in conjunction with the Act were enacted soon after the Civil War. One of these concerned the right of a citizen to own and control property. That section, now codified at section 1982, provides that all citizens shall have the same right as enjoyed by white citizens to "inherit, purchase, lease, sell, hold and convey real and personal property."

In 1870, Congress passed another civil rights act to further extend to nonwhite citizens the rights of citizenship. This broader act provided that "all persons . . . have the same right . . . to make and enforce contracts . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." These laws received relatively little attention until the landmark U.S. Supreme Court decision *Jones v. Mayer,* 392 U.S. 409 (1968). The Court held that section 1982 prohibited both public and private discrimination in the sale or rental of property. The Court further held that the statute was a valid exercise of congressional power

under the thirteenth amendment to the United States Constitution.

These statutes were used extensively to overcome the limitations of the Act in the areas of punitive damages and attorneys' fees. Since the Amendments and recent case law permit punitive damages and attorneys' fees these statutes may be of limited use to plaintiffs.

The *Patterson* Case

The U.S. Supreme Court in *Patterson v. McLean Credit Union,* 109 S.Ct. 2363 (1989), found that a suit against an employer claiming racial harassment did not state a valid claim under section 1981. The rationale was that section 1981 did not apply to post-formation contract situations.

Effect on Lower Court Decisions

It is uncertain what effect, if any, *Patterson* may have on lower court decisions holding that section 1981 furnishes a cause of action for racially retaliatory evictions of tenants. Justice Kennedy, who wrote the 5-4 majority opinion in *Patterson,* affirmed the importance of section 1981. "The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension." *Id.* at 2379. This type of language does not support a narrow interpretation of the law.

It is interesting that the Fourth Circuit decision in *Patterson v. McLean Credit Union,* 805 F.2d 1143, 1145 (4th Cir. 1986), supports a claim under section 1981 for racially discriminatory discharge. Since the decision in *Patterson* there have been decisions both affirming and denying that section 1981 protects employees from racially discriminatory firings. *Birdwhistle v. Kansas Power and Light Co.,* 723 F. Supp. 570 (D.C. Kan. 1989); *Booth v. Terminix International Inc.,* 722 F. Supp. 675 (D. Kan. 1989); *Padilla v. United Air Lines,* 716 F. Supp. 485 (D. Colo. 1989). *Cf. Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1312 (7th Cir. 1989). *Contra Thompson v. Johnson Mgmt. Information Center,* 725 F. Supp. 826, 827 (D.N.J. 1989).

Until a Circuit Court or the Supreme Court rules on the subject a claim should still be raised for racially discriminatory or retaliatory evictions under section 1981. However, you should still be aware of the protections accorded non-white citizens by section 1982. The language of this statute differs substantially from that of section 1981. Further, the rights implicated by section 1982 are not just contractual, but instead deal with the right to own, lease, or hold property. Thus *Patterson* should have no effect on it. On this reasoning a racially discriminatory eviction, since it denies the right to "hold . . . property," would arguably still be actionable under section 1982.

Finally, the effect of the *Patterson* decision is also limited in fair housing litigation except when the Act's exemptions might prevent bringing a

suit. This would occur when the owner of the property in question is exempted under section 3603.

PROVING INTENT • Noticeably absent from the Amendments is any indication as to whether a showing of intent is necessary to prove a violation of the Act. Under the most common theory of proving a fair housing violation, the disparate treatment theory, the plaintiff will attempt to show that her treatment by the defendant was caused by a prohibited motive.

Plaintiffs have successfully used another theory in a number of fair housing cases. It is known as the disparate impact or discriminatory effects theory. Under this theory a plaintiff may succeed in proving a violation without proof of discriminatory intent. The underpinning for this theory is that the Act was meant to outlaw practices that result in excluding members of protected classes regardless of the motivation behind the practice. The use of this theory or some variant has been upheld consistently by the federal courts of appeals. *See, e.g., Huntington Branch NAACP v. The Town of Huntington,* 844 F.2d 926 (2d Cir.), *aff'd,* 109 S. Ct. 276 (1988); *Betsey v. Turtle Creek Associates,* 736 F.2d 983 (4th Cir. 1984); *Arthur v. City of Toledo,* 782 F.2d 565 (6th Cir. 1986).

The disparate impact or effects theory was adopted from litigation involving employment discrimination under Title VII of the Civil Rights Act of 1964, §2000e et seq. Because of the similarity between some of the language and, more importantly, the goals of Title VII and the language and goals of the Act, the courts have freely borrowed from Title VII precedent in analyzing fair housing cases. Schwartz, *The Fair Housing Act and "Discriminatory Effect": A New Perspective,* 11 Nova L. Rev. 71 (1986).

The Elements of Disparate Impact

Under disparate impaet, if a plaintiff can present evidence that a policy has a greater adverse impact on a protected class of persons or perpetuates segregation, the defendant must then prove that the policy is justified by an important and rational business reason. *Betsey v. Turtle Creek Associates,* 736 F.2d 983 (4th Cir. 1984).

Effect of Wards Cove *Decision*

Since the disparate impact or effects test is so closely modeled on Title VII law, the Supreme Court's decision last term in the case of *Ward's Cove v. Atonio,* 109 S. Ct. 2115 (1989), which changed the ground rules for Title VII disparate impact cases, might affect fair housing disparate impact cases. In *Ward's Cove* the Court first held that plaintiffs attempting to show the discriminatory impact of a hiring policy must be specific and show what particular part of the selection procedure adversely affected the plaintiffs. It is no longer sufficient to simply point to a disparity in the work force. The court then went on to hold that once the

plaintiff does establish a prima facie case of disparate impact, the defendant must only meet a burden of production—not proof—of evidence that the policy in question was justified by a substantial business reason.

Although the effects of the *Ward's Cove* decision on future employment litigation are difficult to predict, it is even harder to assess the decision's likely effect on fair housing cases. The Court's pronouncement on the specificity necessary to establish the plaintiff's prima facie case will probably not make a great difference in fair housing cases since plaintiffs in fair housing cases can almost always readily identify a specific policy which is causing a disparate impact. Almost all disparate impact fair housing cases concern a single policy which results in the disparate impact.

In employment cases the question of whether a justification put forward by the employer for the discriminatory policy is adequate may be a close one. Thus the burden of proof issue would be crucial to the outcome. In fair housing cases, however, the justification offered by a housing provider for a policy that adversely affects a protected group is not usually as complex. A clear-cut decision as to the validity of the justification will be easier to reach. Thus, whatever the burden of proof on the housing provider once the disparate impact is shown, it is not likely that the litigation strategies of the parties nor the decision of the court would vary.

Beware of Rule 11 Sanctions

You must be sensitive to attacks based on the filing of frivolous lawsuits or pleadings. Fed.R.Civ. P. 11. The increased willingness of federal courts to sanction attorneys for filing pleadings for an improper purpose, or to cause unnecessary delay or needlessly increased litigation costs is now a serious concern for civil rights lawyers. Good faith filing is no defense.

In at least one instance, the fact that HUD had administratively found that discrimination had occurred was sufficient to deny Rule 11 sanctions. The court had dismissed the lawsuit and the successful defendant had requested $14,000 for the cost of the litigation. *Tabrizi v. Village of Glen Ellyn,* 883 F.2d 587 (7th Cir. 1989). The district court had found that HUD's investigation, not vexatious intent, had been the catalyst to the suit. It therefore refused to impose sanctious on the plaintiffs or their counsel.

CONCLUSION • The Amendments to the Fair Housing Act offer opportunities to promote equal access to housing for millions of Americans. Litigators will play an important role in obtaining the necessary judicial interpretations to translate the objectives of the Act into reality.