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## An Overview of Fair Housing

Kenneth J. Kowalski

*Cleveland-Marshall College of Law, Cleveland State University, k.kowalski@csuohio.edu*

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JANUARY 1987

## An Overview of Fair Housing Litigation (Part 1)

Edward G. Kramer  
Kenneth J. Kowalski



*Almost any lawyer with real estate clients can find himself in the middle of a fair housing suit.*

**T**HE PURPOSE OF THIS ARTICLE is to give an overview of federal fair housing laws and their impact on the real estate industry. This article will

limit its review to three principle federal statutes affecting equal-housing opportunities: Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601

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*et seq.* (hereinafter cited as the "Act" or "Title VIII") and the 1866 and 1870 Civil Rights Acts, 42 U.S.C. §§1981, 1982 (respectively "section 1981" and "section 1982"). A review of the substantive provisions of the statutes, methods of enforcement, and judicial interpretations are included. The article also discusses specific evidentiary issues, defenses, remedies, and awards of attorneys' fees.

**HISTORICAL IMPACT** • To understand the broad coverage and liberal judicial interpretation of these laws, one must examine the causes and impact of housing segregation in the United States. The causes include general societal bias, government policies, and, not incidentally, real estate industry practices. For example, until 1950 the National Association of Real Estate Boards' Code of Ethics prohibited realtors from making sales to blacks in white areas. See *Zuch v. Hussey*, 394 F. Supp. 1028, 1055 (E.D. Mich 1975), *modified on other grounds*, 547 F.2d 1168 (6th Cir. 1977). For a review of the role government played in this area, see Kramer, *Promises, Promises: A New Day for Open Housing*, 21 N.Y. L.F. 537 (Spring 1976). Appraiser manuals as recently as 1975 continued to rank race and nationality as factors affecting land values. See McMichaels, *Appraisal Manual* (Prentice-Hall, New York City, 1975); *United States v. Am. Inst. of Real Estate Appraisers, Etc.*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977).

It is not surprising that our racially segregated housing market often has been cited as limiting opportunities for minorities to obtain a decent education and job. Our metropolitan areas have been described as "the racial shape of a donut with the Negroes in the hole and with mostly whites occupying the ring." *United States v. City of Black Jack Missouri*, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). See *Keyes v. School District*, 413 U.S. 189, 201-202 (1973); *Banks v. Perk*, 341 F. Supp. 1175, 1178 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973). It was in this context of an "America rapidly becoming two societies: one white the other black—separate and unequal" that Congress and the Courts grappled with fair housing in 1968. *Report of the National Advisory Commission on Civil Disorder 1* (Bantam Books, New York City, 1968).

**FAIR HOUSING LEGISLATION** • At this crucial period of our history, Congress passed the comprehensive Civil Rights Act of 1968. Title VIII of the law was enacted "to provide, within Constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. Later that same year, the United States Supreme Court rediscovered a seldom-used law passed immediately after the Civil War. The court declared that the law prohibited all housing discrimination, private as well as public, based on race.

### The Civil Rights Acts of 1866 and 1870

Following the Civil War and the abolition of slavery, Congress enacted the 1866 Civil Rights Act in an attempt to extend to the newly freed slaves the rights of citizenship enjoyed by white persons. One of the provisions of that act concerned the right of a citizen to own and control property. That section, now codified at 42 U.S.C. § 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 felt the necessity to pass another Civil Rights Act to extend further the rights of citizenship to nonwhite citizens. In the 1870 Act, Congress included a broader provision providing 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 Supreme Court decision in *Jones v. Mayer*, 392 U.S. 409 (1968).

In *Jones*, a black plaintiff had claimed a violation of section 1982 due to a refusal of a private property owner to sell him a home solely on racial grounds. The Eighth Circuit had held that section 1982 applied only to state action. The Supreme Court reversed, holding that the statute prohibited both public and private

discrimination in property sales or rentals. The Court held further that the statute was a constitutional exercise of congressional power under the thirteenth amendment.

### Section 1982

Of the two statutes, section 1982 is used most often by fair housing attorneys. Section 1981, the broader civil rights law, is generally relied on in housing litigation when there are no specific discriminatory practices involved. *Fair Housing-Fair Lending*, ¶3152 (P-H) (1985). Section 1982, however, is used more often to attack specific discriminatory practices. For instance, section 1982 has been held to prohibit:

- A refusal to sell lots to black people. *McHaney v. Spears*, 526 F. Supp. 566 (W.D. Tenn. 1981);
- A homeowners' association's discriminatory interference with the sale of a home to a black person. *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982);
- Racial-based steering. *Fair Housing Council of Bergen County, Inc. v. E. Bergen County Multiple Listing Serv., Inc.*, 482 F. Supp. 1071 (D. N.J. 1976);
- Selection procedures. *Jordan v. Dellway Villa of Tennessee Ltd.*, 661 F.2d 588 (6th Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); and

- Racially motivated opposition to the construction of low-income housing. *Bendetson v. Payson*, 534 F. Supp. 539 (D. Mass. 1982).

Often, section 1982 is used in conjunction with the Act or section 1981. See, e.g., *Marable v. H. Walker & Assocs.*, 644 F.2d 390 (5th Cir. 1981); *Gentry v. Northeast Management Co., Inc.*, 472 F. Supp. 1248 (N.D. Tex. 1979); *Young v. Pierce*, 544 F. Supp. 1010, 1019 (E.D. Tex. 1982).

Section 1982 is not, however, coextensive with the Act. First, it prohibits only discrimination based on race or color and does not apply to cases of discrimination based on religion, sex, or national origin. Second, unlike the Act, it contains no exemptions. There are other differences, which will be discussed below, concerning such issues as:

- Standing;
- The statute of limitations;
- Limits on punitive damages; and
- A showing necessary for an award of attorneys' fees.

Although section 1982 deals only with discrimination because of race or color, claims under the statute are not limited to black plaintiffs. Many courts have held that a white person who is the victim of racially discriminatory acts may seek redress under section 1982. For instance, a section 1982 claim can be made for the eviction or attempted eviction of white

tenants who entertain black guests, or the denial of housing to a white person because of his spouse's or roommate's race. See *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982); *Bills v. Hodges*, 628 F.2d 844 (4th Cir. 1980); *Rupe v. Fourman*, 532 F. Supp. 344 (S.D. Ohio 1981); *Bishop v. Pecosok*, 431 F. Supp. 34 (N.D. Ohio 1976); *Oliver v. Shelly*, 538 F. Supp. 600 (S.D. Tex. 1982); *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976).

Yet, although a white person can raise a claim under section 1982, such a claim will not stand unless some racially motivated discrimination is alleged. Thus in *Schneider v. Bahler*, 564 F. Supp. 1449 (N.D. Ind. 1983), a section 1982 claim by white plaintiffs alleging nonracial discrimination was dismissed.

### Title VIII

The 1960s saw significant progress in the attainment of civil rights for minorities. Particularly as a result of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.*, progress was made in opening public accommodations to minorities, the dual school systems began to be desegregated, and more employment opportunities became available. Housing discrimination, however, was openly practiced in many communities.

Finally, with the strong backing of President Lyndon Johnson, Congress addressed the problem of housing discrimination with a federal fair housing

law, passed as Title VIII, which is now codified at 42 U.S.C. § 3601 *et. seq.*

### **Purpose**

It has been observed that the Act was intended to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973). Recognizing the strong commitment to open housing voiced by Congress, other courts have held that the Act must be broadly interpreted. *See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977) and cases cited therein.

### **Prohibited Conduct**

Title VIII contains comprehensive prohibitions against discrimination. Section 3604 of the Act prohibits discrimination in the sale or rental of housing on the basis of race, color, religion, sex, or national origin, including:

- Refusing to sell or rent after a bona fide offer has been made;
- Discriminating on the terms, conditions, or privileges of a sale or lease or in providing services or facilities;
- Indicating any preference based on race or other like criteria in advertisements for housing;
- False representations as to the availability of a dwelling unit; and

- Attempting to persuade owners to sell or rent dwellings by making representations about the entry into the neighborhood of persons of a certain race.

Exempted from the foregoing prohibitions, except for that concerning advertising, are single-family homes sold or rented without the use of a broker and rooms or units in dwellings for less than four families if the owner resides in one of the rooms or units. 42 U.S.C. §3603(b). The latter exemption for the owner-occupied dwelling is known as the "Mrs. Murphy" exception. *See, e.g., U.S. v. Hunter*, 459 F.2d 205 (4th Cir.1972), *cert. denied*, 409 U.S. 934 (1972). Also exempted is the sale or rental of dwellings by a religious organization to its members as long as membership in the religion is not discriminatory. 42 U.S.C. §3607.

The Act prohibits discrimination in the financing of housing, including loans for purchasing, constructing, improving, repairing, or maintaining a home. 42 U.S.C. §3605. Also prohibited is discriminatory denial of access to or membership in a multiple-listing service or real estate broker organization. 42 U.S.C. §3606.

The Act makes it unlawful to coerce, intimidate, threaten, or interfere with a person exercising rights or aiding or encouraging another in the exercise of rights granted or protected by the Act. 42 U.S.C. §3617. Attorneys with clients in the real estate busi-

ness should also be aware of the possibility of criminal charges that can be brought under Title IX of the 1968 Civil Rights Act, 42 U.S.C. §3631, for intimidation by the use of force or threat of force against activities protected by Title VIII.

Finally, the United States Supreme Court has recognized that a claim under the Act can be tried by a jury. *Curtis v. Loether*, 415 U.S. 189 (1974). In drafting either the fair housing complaint or answer, the lawyer must decide whether to demand a trial by jury.

Experience in this area indicates that the request for a jury is usually demanded by the defense. This reliance may well be misplaced, however, considering the substantial verdicts in fair housing cases often rendered by all-white juries. Friedman, *Damages in Housing Bias Litigation*, 21 N.Y. L. F. 551, 554-558 (1976).

#### **State Laws and Local Ordinances**

As of March 1986, 44 states had enacted fair-housing laws. In addition, hundreds of localities now have fair-housing ordinances. State fair-housing laws vary considerably, but most are very comprehensive. Generally, discrimination in both the sale and rental of housing is prohibited, as is discrimination in the financing of residential properties.

Many states have administrative agencies armed with the authority to receive and investigate complaints and to undertake conciliation efforts.

Usually these agencies have been authorized to issue cease and desist orders after a hearing and to seek court enforcement of those orders.

Local fair-housing ordinances vary considerably both in what is covered and how they are enforced. Some are very comprehensive, others cover only certain activities of brokers. Many simply prescribe criminal penalties and make no provision for administrative enforcement.

#### ***The Effect of the Act***

Of importance to the practitioner is the way the Act is affected by the relevant state law or local ordinance. Section 3610(c) of the Act provides that whenever a state or local fair-housing law provides rights and remedies for alleged discriminatory housing practices that are "substantially equivalent" to the rights and remedies supplied by the Act, the United States Department of Housing and Urban Development ("HUD") is to refer any complaint filed to the appropriate state or local agency. 42 U.S.C. §3610(c). If the state or local agency commences action on the complaint within 30 days, HUD is to take no further action.

More importantly, under section 3601(d) of the Act the complainant can bring a civil action in federal court if HUD has been unable to obtain voluntary compliance within 30 days. 42 U.S.C. §3610(d). If, however, the complainant has a judicial remedy under a "substantially equivalent" state or local

law, he is precluded from proceeding in federal court and is relegated to the state or local remedies.

Whether the state or local law is substantially equivalent to the Act is not always easily determined. Because it has been charged with making such a determination, HUD has developed a procedure for recognizing substantially equivalent laws. The determination is based on two separate inquiries:

- Whether the state or local law on its face provides rights and remedies that are substantially equivalent; and
- Whether the administration of the state or local law is such that, in fact, complainants are provided equivalent rights and remedies. 24 C.F.R. §115.2 (1986).

HUD publishes a list of those states and localities whose fair housing laws it has determined to be substantially equivalent. As of the latest revision, the laws of 39 states and 57 localities had been determined to be substantially equivalent. 24 C.F.R. §115.11 (1986).

Although HUD's determination concerning any particular state or local law is not binding upon a court, it is entitled to great weight, especially when it has been consistently maintained over a long period of time. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982).

**ENFORCEMENT** • The Act created three methods for its enforcement. The statute establishes an administrative procedure to assist in the conciliation of housing discrimination complaints. 42 U.S.C. §3610. The Secretary of HUD is charged with handling these complaints, which must be in writing. 42 U.S.C. §3610(a).

Under this statutory scheme HUD has 30 days to:

- Conduct an initial investigation;
- Decide if conciliation can settle the dispute; and
- Notify the parties of its intent to resolve the complaint. *Id.*

The statute provides that a complainant may file a private lawsuit to enforce rights protected by this section between the thirty-first and sixtieth day after the filing of the complaint with HUD. 42 U.S.C. §3610(d). Failure to take this action will result in the loss of the right to file suit under section 3610(c) of the Act. *Waters v. Provident Nat'l Bank*, 521 F. Supp. 1025 (E.D. Pa. 1981); *Tatum v. Myrick*, 425 F. Supp. 809 (M.D. Fla. 1977). It is possible to extend the 180-day statute-of-limitations period under the Act. By filing the HUD complaint on the one-hundred-eightieth day, section 3610 of the Act permits a party to file a federal lawsuit 240 days after the housing discrimination occurred.



### The Conciliation Process

The conciliation process is fairly informal. Usually a HUD investigator will get the parties, who may or may not be represented by attorneys, together to discuss the nature of the complaint and the strength of the evidence supporting it. Generally, no witnesses are present besides the complainant and the respondent. There is no testimony as such and the meeting is not recorded.

The purpose is to try to reach a settlement prior to the filing of a court action. Such a settlement can consist of an apology, a monetary settlement, or affirmative action (that is, agreement by the respondent to have its staff undergo fair housing training, to market affirmatively, to pay for future auditing, and the like), or all of the above. If HUD is unable to resolve the matter successfully, the complainant may proceed to file a federal court action—assuming the statute-of-limitations period has not been exceeded.

Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, dealing with employment discrimination, victims of housing bias may simply avoid the administrative process by filing a lawsuit under section 3612 of the Act. The Supreme Court has held that section 3612 provides an independent remedy which may be pursued at the same time HUD is investigating a section 3610 complaint. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109



(1979). See 42 U.S.C. § 3612(a), however, which requires a court to stay legal action prior to any trial, if it appears that HUD's conciliation efforts are likely to be successful. This is consistent with section 3610(f) requiring HUD to terminate all efforts to conciliate a complaint when the matter comes to trial.

The last method of enforcement is the institution of litigation by the Attorney General of the United States. 42 U.S.C. §3613. To file a lawsuit under this provision, the Justice Department must prove that a "pattern or practice" of housing discrimination is occurring that raises 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). The Attorney General need not, however, meet this requirement to enforce HUD-approved conciliation agreements. See *United States v. Reece*, 457 F. Supp. 43, 47 (D. Mont. 1981).

One important consideration is that the 180-day statute-of-limitation

provision does not apply to the United States. *United States v. Sumnerlin*, 310 U.S. 414 (1940); *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978). Therefore, a crucial defense concerning a limitation period is not available when the Government is bringing the action against the landlord or seller.

**PROHIBITED PRACTICES** • The statutes outlined above broadly prohibit discrimination in housing. Some of the specific acts and practices prohibited are enumerated in the statutes; others have been defined through litigation. Since 1968, the year the Act was passed and *Jones v. Mayer Co.*, 392 U.S. 409 (1968), was decided, the courts have had ample opportunity to interpret many of the provisions of the federal laws prohibiting housing discrimination.

The primary lesson for practitioners to be drawn from the case law since 1968 is that these statutes, especially Title VIII, are to be construed broadly. As stated by the Eighth Circuit Court of Appeals in a passage often quoted by other courts:

“Recent cases make clear that the statutes prohibit all forms of discrimination, sophisticated as well as simple-minded, and thus disparity of treatment between white and blacks, burdensome application procedures, and tactics of delay, hinderance, and special treatment must receive short

shrift from the courts.” *Williams v. Mathews Co.*, 499 F.2d 819, 826 (8th Cir.1974)

As is shown in the cases discussed in the following sections identifying specific prohibited practices, the courts have become adept at looking “beyond the form of a transaction to its substance” and finding and proscribing “practices which actually or predictively result in racial discrimination, irrespective defendant’s motivation.” *Id.*

### Refusal To Sell or Rent

The most obvious form of housing discrimination, and the first practice to be prohibited in Title VIII, is the refusal to sell or rent or to negotiate for a sale or rental on the basis of prohibited criteria. Clearly, the apartment manager who tells a black apartment seeker that he cannot become a tenant because he is black violates the law. Such a fact situation is rare.

More common is the situation in which the apartment seekers are not told the real reason and, at trial, the apartment manager offers “business reasons” that, for some reason, do not seem to disqualify whites. *Harper v. Hutton*, 594 F.2d 1091, 1092 (6th Cir. 1979) (which held that a refusal to rent to a black couple was due not to “business reasons” but to the fact that the couple was black and poor). Such a refusal to rent to a bona fide home-seeker violates Title VIII and section 1982. Note that section 3604(a) pro-

vides a cause of action only for the refusal to sell or rent after the making of a bona fide offer. A tester, not being a bona fide homeseeker, has no cause of action under that subsection.

A refusal to rent to an interracial couple is also a violation of Title VIII and section 1982, even assuming the refusal to be based on a good-faith belief that interracial marriages lead to tension and thus to disturbances. *Oliver v. Shelly*, 538 F. Supp. 600 (S.D. Tex. 1982). As long as race is a factor in the decision not to rent, there is a violation.

#### ***Disguised Refusals***

A refusal to sell a home on the basis of race of the buyer, no matter how disguised, is also a violation. Thus, a builder who signs sham contracts and puts up "sold" signs in order not to have to renegotiate for the sale of homes to blacks, violates the law, as does a realtor who describes a list price for a condominium as firm to blacks but as negotiable to whites. *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438 (5th Cir.1973); *Hobson v. Humphreys, Inc.*, 563 F. Supp. 344 (W.D. Tenn. 1982). A discriminatory refusal to allow the purchase of a part of a co-operative building is similarly prohibited. *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979).

#### ***Discriminatory Impact***

A discriminatory refusal to sell will also be found when certain conditions

are set for a sale and those conditions will necessarily have a discriminatory impact on minorities. For instance, there are two remarkably similar decisions concerning the sale of lots with restrictions as to particular builders permitted to construct homes on those lots. *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.1974); *McHaney v. Spears*, 526 F. Supp. 566 (W.D. Tenn. 1981). In both cases, the courts found that the policy discriminated against blacks.

Of course, not every refusal to sell or rent to a minority will be found to be discriminatory. As long as the decision is not in any way racially motivated, liability should not exist. *Kaplan v. 442 Wellington Cooperative Corp.*, 567 F. Supp. 53 (N.D. Ill. 1983).

#### **To Otherwise Make**

##### **Unavailable or Deny Rental or Sale**

Section 3604(a) of the Act not only prohibits an outright refusal to sell or rent, but also states that it is unlawful to "otherwise make unavailable or deny, a dwelling to any person" for a discriminatory reason. 42 U.S.C. §3604(a). This "catch-all" phrase seems to be as broad as Congress could have made it and, consequently, "all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful." *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd*, 509 F.2d 623 (9th Cir. 1975). Thus not only is an outright re-

fusal to sell or rent illegal, but any practice that may have that effect is also forbidden, such as:

- The use of more burdensome application procedures;
- The use of delaying tactics; or
- Supplying prospective black tenants with incomplete information. *Id.*

In short, housing suppliers should be aware that differential treatment of any housing seeker on prohibited grounds can result in liability.

#### Other Prohibited Practices

One of the practices that has been held to fall under this prohibition is the "grudging acceptance" of blacks as compared to enthusiastic acceptance or solicitation of whites. *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973); *United States v. Treasure Lakes, Inc.*, 1 EOH §13,600 (W.D. Pa. 1973).

Also prohibited by section 3604(a) is the refusal to finance housing in racially integrated neighborhoods, a practice commonly referred to as "redlining." *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio); *Harrison v. Otto G. Heinzeroth Co.*, 414 F. Supp. 66 (N.D. Ohio 1976); 430 F. Supp. 893 (N.D. Ohio 1977). In the latter case, the court held that white plaintiffs could assert such a claim and further found that the practice of requiring a much higher down payment for a home in

an integrated area also violated sections 3604(c) and 3617 of the Act. Redlining also violates section 3605.

Whether insurance redlining also violates the "otherwise makes unavailable" provision is an open question. Compare *Dunn v. Midwestern Indem.*, 472 F. Supp. 1106 (S.D. Ohio 1979); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419 (4th Cir. 1984). It should be noted that in *Mackey*, the court, while holding that insurance redlining was not covered under the Act and that the plaintiff, a black insurance agent, did not have standing to raise a claim under sections 1981 and 1982, did state that the homeowners involved, as the direct victims of the alleged discrimination, may have a cause of action under sections 1981 and 1982. In the same vein, it has been held that Act section 3604(a) does cover racially discriminatory home appraisals. *United States v. Am. Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

Some other practices that have been held to come under this particular prohibition are:

- The lockout of black tenants on the basis of race;
- The interference with black neighbors' access to their property; and
- Racially motivated attempts to intimidate and interfere with the development of low-income housing

through allegedly groundless objections at administrative hearings and appeals. *Shaw v. Cassar*, 558 F. Supp. 303 (E.D. Mich. 1983); *Evans v. Tubbe*, 657 F. 2d 661 (5th Cir.1981) (a white neighbor erected a gate denying access to the only road leading to the property of black neighbors and gave the keys to the whites but not to the blacks); *Bendetson v. Payson*, 534 F. Supp. 539 (D. Mass. 1982).

#### Attorneys' Advice

In light of the broad reach of the statute, attorneys advising realtors or landlords should counsel them to avoid any behavior that is or could be considered discriminatory. In fact, positive steps can be taken ahead of time both to insure against acts of discrimination and to minimize the potential damages should these acts occur.

First, all realtors and landlords should develop standardized methods of selecting and treating tenants and prospective purchasers. Employees should be instructed and trained to apply those methods to all persons, regardless of race or sex. Realtors and owners of large rental properties may want to consider having staff undergo training by fair housing agencies. That training would not only help to educate employers, but would also identify any practices that could have a discriminatory impact. Furthermore, evidence of participation in that training could reduce the likelihood or amount of an award of puni-

tive damages should discrimination occur and be proven in a lawsuit. *McDonald v. Verble*, 622 F.2d 1227 (6th Cir. 1980).

In the same manner, an affirmative marketing agreement entered into with HUD or a local municipality, or both, may be helpful in avoiding litigation. At the very least the fair housing logo showing that the renter or broker provides housing to all persons on an equal basis should be prominently displayed at rental and sales offices.

#### Racial Steering

Another practice that has been held to make housing unavailable and, therefore, unlawful, is "racial steering," defined by the Supreme Court as: "A practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1. (1982).

Any word, phrase, or action of a realtor that may have the effect of steering or channelling a prospective buyer into a particular area, regardless of whether the attempt is successful, is unlawful. *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1975),

*aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1975). Steering tenants to particular apartments is similarly unlawful. *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *United States v. Henshaw Brothers, Inc.*, 401 F. Supp. 399 (E.D. Va. 1974). Proof of steering alone is sufficient to sustain a finding of discrimination. *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975).

The kind of practices that may result in a finding of unlawful steering include:

- Selective listing and viewing of properties;
- Misleading statements;
- Limited and selective advertising;
- Discriminatory treatment or assignment of black sales agents; and
- Discriminatory treatment of brokers who regularly deal with black clients. See *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D. N.J. 1976); *United States v. Real Estate One, Inc.*, 433 F. Supp. 1140 (E.D. Mich. 1977).

In addition to direct proof of discriminatory treatment of actual home-seekers or testers, census data can also be of use in determining whether steering has taken place. There is a wide range of data sources for population and housing characteristics easily available from the United States Departments of Labor and Commerce. See, e.g., U.S. Bu-

reau of Labor Statistics, Department of Labor, Bulletin No. 1879, *Directory of Data Sources of Racial and Ethnic Minorities* (1975). The United States Department of Commerce has established the Standard Metropolitan Statistical Areas (SMSA), which are economic areas to be used for the comparison of census data.

### **Discrimination in Terms and Conditions**

Section 3604(b) proscribes discrimination in the terms, conditions, or privileges of sale or rental or in the provision of services or facilities in connection with housing. Covered by this provision and by section 1982 are practices such as charging blacks higher prices for property or services than would be charged to whites, or even requiring blacks but not whites to pay closing costs. *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974); *Hobson v. Humphreys, Inc.*, 563 F. Supp. 344 (W.D. Teun. 1982); *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974). Also prohibited is unequal maintenance and upkeep for black residents. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *reversed and remanded*, 461 F.2d 1171 (5th Cir. 1972) (liability under the fourteenth amendment).

### **Advertising**

It is unlawful to make, print, or publish any discriminatory notice,

statement, or advertisement with respect to the sale or rental of a property. 42 U.S.C. §3604(c). The provision has been upheld against first amendment challenge and applied to media carrying such advertisements as well as the persons who place them. *United States v. Hunter*, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972). Implicitly, as well as explicitly, discriminatory advertisements are prohibited. *Id.*

Instructions to employees to discriminate are also covered by this section, as are the recording and distribution of racially restrictive covenants. *United States v. Reddoch*, 1 EOH ¶13,569 (S.D. Ala. 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972); *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972).

Selective advertising on the basis of race is also prohibited by this section as well as by Act section 3604(a), since that practice has the effect of steering. *United States v. Real Estate One, Inc.*, 433 F. Supp. 1140 (E.D. Mich. 1977).

### **Misrepresentations Regarding Availability**

Under Act section 3604(d) it is unlawful to represent for a discriminatory reason that a property is unavailable for sale or rental if it is available. Prohibited are simple false statements to blacks that property is unavailable as well as more subtle methods of misinformation, such as placing "sold" signs in front of houses that have not actually been sold for the purposes of not having to deal with

blacks. *United States v. Reddoch*, 1 EOH ¶13,569 (S.D. Ala. 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972); *United States v. Pelzer Realty*, 484 F.2d 438 (5th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

### **Block Busting**

Another practice that is specifically prohibited is "block busting." Section 3604(e) of the Act states that it is unlawful:

"For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin."

The purpose of this section is to prevent realtors from "preying upon the fears of property owners in racially transitional areas" to induce panic selling. *Zuch v. Hussey*, 394 F. Supp. at 1049. The statute has been upheld against first amendment challenge since it prohibits conduct, not speech. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1971).

### **Analyzing Block Busting**

To determine whether particular solicitations would constitute a "block busting" violation, the section can be broken down to its elements:

- Whether the solicitations are made for profit;

- Whether the solicitations were intended to induce the sale of property; and
- Whether the solicitations would convey to a reasonable man, under the circumstances, that members of a particular race are moving into the neighborhood. *Zuch v. Hussey*, 394 F. Supp. at 1049.

The "for-profit" requirement does not mean that the solicitor intended to buy the property and sell it at a higher price. Instead, the term has its ordinary meaning and covers the normal activity of a real estate broker. *United States v. Mintzes*, 304 F. Supp. 1305 (D. Md. 1969); *Sanborn v. Wagner*, 354 F. Supp. 291 (D. Md. 1973).

The second element of the subsection, the intent to induce a sale, is a question of fact in each particular case. Whether a representation made in response to a question of a homeowner can be held unlawful will probably depend on the circumstances and

the content of the answer. *United States v. Saroff*, 377 F. Supp. 352 (E.D. Tenn. 1974), *aff'd*, 516 F.2d 902 (6th Cir. 1975); *But see Zuch v. Hussey*, 394 F. Supp. at 1051.

The third element is governed by a "reasonable man" test. Because representations may be either obvious or subtle, the problem is to determine whether the representation made "would convey to a reasonable person in the solicited area that blacks were seeking to move into the neighborhood." *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 142 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1206 (1986). This determination may require a careful inquiry into the conditions and atmosphere in the particular neighborhood solicited. *See United States v. Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971), in which the court indicates the types of questions that should be asked.

(To be continued)

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The first black family entering an all-white neighborhood tends to pay more for the housing than would be paid by white families purchasing the identical house. Then because of the fears generated, the perception of white residents in the area causes a great many white people to put up a great many houses for sale within a very short period of time. This flooding of the market tends to have a negative effect on the price stabilization of the housing in that area.

You may also achieve social and psychological stability when a neighborhood becomes black because what you have done is re-segregated the neighborhood and the process of change, of transition, is already in the past.

*Zuch v. Hussey*, 394 F. Supp. 1028, 1032 (1975), *modif. on other grds*, 547 F.2d 1186 (6th Cir. 1977)



*For Further Study*

**ALI-ABA Books**

**Condominium and Homeowner Association Practice: Community Association Law**, by Wayne S. Hyatt (1981).

**The Practical Lawyer's Real Property Law Manual No. 2** (1983).

**The Practical Lawyer's Real Property Law Manual** (1974).

**Resource Materials: Condominium, Planned Unit Development and Conversion Documents** (2d ed. 1983).

**Resource Materials: Modern Real Estate Transactions** (2 vols., 6th ed. 1985).

**Sales of Real Property**, by Samuel A. Goldberg (1971).

*Articles in The Practical Real Estate Lawyer*

**Avoiding the Special Problems in Public-Private Real Estate Development Partnerships (with Forms)**, by Flora Schnall, THE PRACTICAL REAL ESTATE LAWYER, September 1985, p. 61.

**Why All-Adult Housing Policies May Violate the Fair Housing Laws**, by J. Michael McGuinness, THE PRACTICAL REAL ESTATE LAWYER, November 1985, p. 53.

**Some Considerations in Establishing a Planned Community**, by Mark B. Davis, THE PRACTICAL REAL ESTATE LAWYER, January 1985, p. 71.

*Articles in The Practical Lawyer*

**The Nature of Property Interests**, by William Parsons, THE PRACTICAL LAWYER, June 1983, p. 61.

*Outlines in The ALI-ABA Course Materials Journal*

**Comparative Statistics in Title VII Litigation**, by Lawrence Allen Katz and Susan Gaylord Gale, THE ALI-ABA COURSE MATERIALS JOURNAL, Vol. 9, No. 3, p. 81.

**Recovering for the Deprivation of Constitutional and Statutory Rights under Section 1983**, by Martin A. Schwartz, THE ALI-ABA COURSE MATERIALS JOURNAL, Vol. 8, No. 1, p. 49.