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FAIR HOUSING FOR REAL ESTATE AGENTS

LINCOLN, NEBRASKA

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I. Major Federal Fair Housing Laws

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- Fair Housing Act, 42 U.S.C. 3601 et seq.
- Civil Rights Acts of 1866 and 1870, 42 U.S.C. 1981, 1982
- Equal Credit Opportunity Act, 15 U.S.C. 1691
- Rehabilitation Act, 29 U.S.C. 794

Civil Rights Act of 1866

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- 42 U.S.C. §1982
  - "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Civil Rights Act of 1866

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- 42 U.S.C. § 1981
  - "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."

Equal Credit Opportunity Act

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- Prohibits Discrimination by Creditors
- Who Might Be a "Creditor" Subject to Liability?
  - Originator
  - Secondary Market Buyer
  - Private Mortgage Insurer
  - Mortgage Broker
  - Officer of the Institution
  - Loan Review Committee
  - Loan Officer

Other Federal Statutes

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- Title VI, Civil Rights Act of 1964
  - No Discrimination (Race) in Any Program Receiving Federal Financial Assistance
    - Special Federal Programs
- § 504 Rehabilitation Act

  -- No Discrimination (Disability) in Any Program Receiving Federal Financial Assistance

Other Federal Statutes

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- Title I, Housing and Community Development Act of 1974
  - No Discrimination (Race) in Any Program Funded Under the Act

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II. A BRIEF HISTORY OF THE FAIR HOUSING ACT

Landmarks in Modern Era of Fair Housing Law

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- April 1968: Passage of Fair Housing Act
- June 1968: Supreme Court Decides Jones v. Alfred H. Mayer Co.
  - 13th Amendment allows Congress to regulate the sale of private property in order to prevent racial discrimination
- 1988: Enactment of Fair Housing Amendments Act

Prior to 1968

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Entrenched Residential Segregation Due To:

- Migration of African Americans from South to Northern Cities in Early Part of 20th Century
- Racial Zoning
- Restrictive Covenants
- Discriminatory Sales, Rental, Financing Practices
- De Jure Segregation During 1940's, 1950's, 1960's
- Second Wave of Migration Post WWII
- Blockbusting and "White Flight"

Early Efforts to Proscribe Discrimination in Private Housing Market

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- 14th Amendment Used in Challenges to Land Use Laws, Discriminatory Zoning by Municipalities (Buchanan v. Warley)
- Invalidation of Racially Restrictive Covenants as Enforced by State Courts (Shelley v. Kraemer)
- Executive Order 11063 – Nov. 20, 1962 (proscribing discrimination in sale or rental of residential property owned, operated or financed by the Federal Government)

Momentous Spring of 1968

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- National Advisory Commission on Civil Disorders (reporting on rioting taking place in U.S. cities):

  Nation is "moving toward two societies, one black, one white – separate and unequal."

- Clear That Task of Providing for Fair Housing throughout U.S. Would Be Enormous
- Consensus Develops That Federal Legislation Required
- Dr. King's Death on April 4, 1968 Serves as Catalyst for Passage of FHA Later That Month

Dual Legislative Goals Contained in FHA

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- Non-Discrimination
- Integration
- Dual Goals Can Compete:
  (U.S. v. Starrett City)

Early Supreme Court Cases

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- Trafficante v. Metropolitan Life Insurance Co. 409 U.S. 205 (1972)
- Village of Bellwood v. Gladstone 441 U.S. 91 (1979)
- Havens Realty Corporation v. Coleman 455 U.S. 363 (1982)
- All Concern Standing
- All Interpret FHA Broadly

As 1988 Approaches:

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- Mounting Frustration with Limits of Administrative Process and Government Role
- Concern About Families and Persons with Disabilities
- Desire for More Enforcement "Teeth"
- Spur to New Legislation
  1. Rise of Non-profit Fair Housing Organizations
  2. Increase in Case Filings
  3. Continued High Levels of Discrimination and Residential Segregation
  4. "Palatable" Statute for Conservatives in White House

The 1988 Amendments

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- New Protected Classes
  - Families with Children
  - Persons with Disabilities
- Expanded Statute of Limitations
  - HUD Complaint: 1 Year
  - Private Suit: 2 Years
- Unlimited Punitive Damages

Housing Discrimination and Segregation Today

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- 2000 study suggests "steering" has been on the rise
- In rental tests, White individuals were favored over Black individuals 21.6% of the time and over Hispanics 25.7% of the time
  - Margery Austin Turner, et al., The Urban Institute, *Discrimination in Metro. Hous. Markets* (2002)

Housing Discrimination and Segregation Today

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- Sample Cases:
  - *La. ACORN Fair Hous. V. Leblanc* (5th Cir. 2000)
    - Landlord told African-American applicant he did not rent to "you people" and "black, colored, Negro, whatever you call yourself, I don't rent to y'all"
  - *Harris v. Itzhaki* (9th Cir. 1999)
    - Agent told staff in front of African-American Tenant: "Owners don't want to rent to Blacks"

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III. FAIR HOUSING ACT SUBSTANTIVE COVERAGE

Overview (cont.)

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- Protected Groups
  - Race
  - Color
  - National Origin
  - Religion
  - Sex (1974)
  - Disability (1988)
  - Families with Children(1988)

Overview of Fair Housing Act

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- Codified at 42 U.S.C. §§ 3601-3619 and § 3631
- General Provisions
  1. Preamble and Definitions (3601-3602)
  2. Exemptions (3603, 3607)
  3. Preservation of State and Local Fair Housing Laws (3615)

Overview (cont.)

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- 3604
  - (a) "Otherwise Make Unavailable or Deny"
  - (b) Terms and Conditions
  - (c) Advertising
  - (d) Misrepresentation
  - (e) Blockbusting
  - (f) Disability
- 3605
  - Financing of Real Estate Related Transactions
- 3606
  - Access to Brokerage Services
- 3617
  - Interfere, Coerce, Intimidate, Threaten

Overview (cont.)

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- 3604(f)
  - (f)(1) and (f)(2)
    (track 3604(a))
  - (f)(3) (Affirmative Obligations)
    (f)(3)(A) Reasonable Modification
    (f)(3)(B) Reasonable Accommodations
    (f)(3)(C) New Construction Requirements
- 3607(b)
  - (b)(1) Occupancy Restrictions
    (b)(2) Exception for "Housing for Older Persons"

Overview (cont.)

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- Enforcement Provisions
  1. Judicial Process (Right to Trial by Jury)
  2. Administrative Process (HUD)
     - Investigation
     - Conciliation
     - Administrative or Judicial Enforcement
  3. 1 Year Statute of Limitations (HUD)
  4. 2 Year Statute of Limitations (Court)
  5. DOJ Enforcement (Pattern and Practice Only)
  6. No Exhaustion Requirement

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IV. THE STANDARDS OF PROOF ("BECAUSE OF RACE, . . .")

Proving Liability

Intent
(Disparate Treatment)

Impact or Effect
(Disparate Impact)

Window on Mind of Decision Maker

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Types of Evidence

- Direct ("Smoking Gun")
- Circumstantial
  - Historical
  - Statistical
  - Anecdotal
  - Comparative
    - Testing
    - Similarly Situated Individuals Not in Protected Group

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Order and Burden of Proof

- Prima facie Case
  - Member of Protected Class
  - Applied
  - Qualified
  - Rejected
  - Housing Remained Available or Went to Individual Not Member of a Protected Class
- Legitimate Non-Discriminatory Reason

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Pretext

- Prove the Lie
- Not the True Reason

Purpose of Circumstantial Evidence

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Disparate Impact

- Neutral Rule or Practice
- Disproportionate Adverse Effect on Members of a Protected Group
- No Less Discriminatory Alternative that Satisfies Business Need

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The Title VII Template

- Griggs v. Duke Power
- Burden to Show Less Discriminatory Alternative
- 1991 Civil Rights Act

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Likely Areas to Find Impact Claim

- Section 8
- Income Requirements
- Credit Requirements
- Insurance
- Lending
- Families with Children

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Legal Application to Title VIII (FHA)

- All Circuits Have Applied Theory, Except D.C.
- Supreme Court Has Yet to Rule
- Buckeye Hope Foundation v. City of Cuyahoga Falls

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Developments in Disparate Impact

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- New regulation issued
- Petition for Certiorari filed in Mt. Holly Citizens in Action v. Township of Mount Holly
- Supreme Court has asked for views of the United States

The Disparate Impact Standard Under the Proposed Regulation

The Disparate Impact Regulation

Effective March 18, 2013

The Need for The Disparate Impact Regulation

- Needed to formalize HUD's long held interpretation of the availability of discriminatory effects liability. 78 Fed. Reg. 11460.
- Provides a "clear, nationwide standard for litigating discriminatory effect cases under the Fair Housing Act." Id.
- Consistent with the manner in which nine other federal agencies have interpreted the FHA. Id. at 11462.
- Consistent with the manner in which HUD has historically interpreted the FHA. Id.
- All Courts of Appeals that have considered the question have held that disparate impact is cognizable under the FHA. Id.

Consistent with the Purpose and Language of the FHA

- Purpose of FHA was to combat and prevent discrimination in housing. 78 Fed. Reg. 11461.
- "Otherwise make unavailable or deny" focuses on effects of challenged action rather than motivation of the actor. Id. at 11466.
- "To discriminate" encompasses actions that may have a discriminatory effect." Id.

Disparate Impact Under the Proposed HUD Regulation

24 C.F.R. § 100.70(d)(5)

- Adds discriminatory housing practices for land use and zoning and lending
- Land use and zoning: "**Enacting** or implementing land use rules, ordinances, policies or procedures that restrict or deny housing opportunities or **otherwise make housing unavailable** or deny dwellings because of [protected classes]"

Disparate Impact Under the Proposed HUD Regulation

24 C.F.R. § 100.130(b)

- Unlawful practices include:
- "Servicing of loans or other financial assistance" . . . "in a manner that discriminates" "or providing such loans or financial assistance with other terms or conditions that discriminate."

Overview

78 Fed Reg 11460

- Burden shifting test
- Plaintiff or complainant must show that practice or policy results in or would predictably result in a discriminatory effect
- Burden shifts to defendant or respondent to show that practice necessary to achieve one or more of its substantial, legitimate non-discriminatory interests
- Plaintiff or complainant may show that interest could be served by a practice that has a less discriminatory effect

Overview

24 CFR § 100.500

- Liability may be established based on a practices discriminatory effect even if practice was not motivated by discriminatory intent. 24 C.F.R. § 100.500.
- Subsequent sections define discriminatory effect, legally sufficient justification and burdens of proof

Disparate Impact Under the Proposed HUD Regulation

- Two types of disparate impact
- Discriminatory effect
- Perpetuation of Segregation

Discriminatory Effect Defined

24 CFR § 100.500

- "A housing practice has a discriminatory effect where it *actually* or *predictably* results in a disparate impact on a group of persons or creates, increases, reinforces or perpetuates segregated housing patterns . . . because of [protected classes]." 24 C.F.R. § 100.500(a).
- Plaintiff or complainant has burden of proof. 24 C.F.R. §100.500(c)(1).

Discriminatory Effect Defined

78 Fed. Reg. at 11468-69

- Regulation does not set forth a specific standard for establishing effect because standard may vary from case to case

Discriminatory Effect

- Any facially neutral actions e.g. laws, rules, **decisions**, standards, policies, practices or procedures including those that allow for discretion or use subjective criteria may result in a discriminatory effect. 78 Fed. Reg. 11468.

Practices that May Have a Disparate Impact

Preamble to Proposed Regulation: 76 Fed. Reg. 79021, 79024-25

- Federal Register – Proposed Rule
- Zoning ordinance that limits multi-family housing
- Provision and pricing of homeowners insurance
- Mortgage pricing policies that give lenders or brokers discretion to impose additional charges or higher fees unrelated to a borrower's creditworthiness
- Credit scoring overrides
- Predatory Lending
- Land use and zoning decisions
- Residency preferences for Section 8 vouchers
- Redevelopment

Legally sufficient justification

24 CFR § 100.500(b)

- A legally sufficient justification exists where the challenged housing practice:
- (1) **Is necessary to achieve one or more *substantial*, legitimate nondiscriminatory interests of the defendant/respondent**
- A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative
- Defendant or respondent has the burden of proof. 24 CFR 100.500(c)(2)

Legally sufficient justification

- Equivalent to business necessity according to HUD. 78 Fed. Reg. 11470.
- Whether justification is legitimate is viewed under an objective test. Id at 11471.
- Justification must be genuine and not false and cannot itself discriminate based on a protected class. Id. 11470.
- Substantial interest is a core interest of the organization that has a direct relationship to the function of the organization. Id.
- Legitimate means genuine and not false, fabricated or pretextual. Id. at 11470-71

Legally sufficient justification

- Supported by Evidence requires that defendant or respondent must prove with evidence the legitimate, non-discriminatory interest and the necessity

Less Discriminatory Alternative

24 CFR § 100.500(b)(2)

- Those interests could not be served by another practice that has a less discriminatory effect
- Plaintiff or complainant has the burden of proof
- Less discriminatory alternative must serve substantial, legitimate nondiscriminatory interests and may not be hypothetical or speculative. 78 Fed. Reg. 11473.

Less Discriminatory Alternative

- Plaintiff or complainant need not show that prior to litigation the defendant knew of and rejected less discriminatory alternative. 78 Fed. Reg. 11473.

Less Discriminatory Alternative: The Burden of Proof

- Burden is consistent with burden under Title VII and ECOA. 78 Fed. Reg. 11471.
- Does not require either party to prove a negative. Id.
- Plaintiffs/Complainant can obtain discovery regarding alternatives that exist, the extent to which alternatives were considered and data for which an expert could show a less discriminatory alternative. Id.

Retroactivity

- According to HUD, regulation applies to all pending and future cases because regulation embodies HUD's longstanding interpretation of the FHA
- Remains to be seen whether courts will apply regulation where precedent differs from regulation in pending cases

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XII. RELIEF

Remedies Available

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- Monetary Damages
  - Compensatory
  - Out of Pocket Costs and Expenses (Tangible)
    - Cost of Housing (Differential)
    - Moving
    - Storage
    - Job-Related
    - Transportation
    - Medical
    - Counseling

Intangible Compensatory Damages

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- Humiliation, Embarrassment, Emotional Distress
  - Need Not Be Proved With Scientific Certainty
  - Comparable Verdicts, Settlements, Judgments
  - Testimony of Friends, Family, Co-Workers
  - Testimony of Plaintiff
  - Banai v. HUD, 102 F.3d 1203 (11th Cir. 1997)

Relief

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B. Punitive Damages

- No Cap (1988 Amendments)
- Punish and Deter (Not Compensate)

Relief

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A. Damages (cont.)

- Quigley v. Winter, (8th Cir. 2010)
- Campos v. Barney, (D. Ne. 2007)
- United States v. Veal, (W.D. Mo. 2004)

1. Recent Awards
   - Matarese v. Archstone Pentagon City, (4th Cir. 2011)
   - Parris v. Pappas, (D. Conn. 2012)

Relief

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C. Civil Penalties

1. Recent Awards
   - *HUD v. Maze*
   - *HUD v. Parker*
   - *HUD v. Riverbay Corp.*

Costs of Injunctive Relief

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- Training
- Record Keeping
- Reporting
- Monitoring
- Advertising
- Testing
- Complaint Investigation
- Affirmative Outreach and Creative Counter Steps

Relief

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D. Recent Injunctive Relief and Civil Contempt Cases
- *Matarese v. Archstone Pentagon City*
- *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*
- *Central Alabama Fair Housing Center v. Magee*
- *Sak v. City of Aurelia, Iowa*
- *Boyer v. Scott Bros. Inv. Corp.*
- *Herrin v. Lamachys Village at Indigo Lakes, Inc.*
- *Petrillo v. Schultz Properties, Inc.*
- *Taggart v. Associated Estates Realty Corp.*
- *Broadway Triangle Community Coalition v. Bloomberg*
- *Sheppard v. Zoning Bd. of Appeal of Boston*

Relief

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E. Recent Attorney's Fees and Costs
- *Fox v. Vice* [Supreme Court in non-fair housing case involving § 1988 fee award]
- *Ingram v. Oroudjian*
- *United States v. Hurt*
- *Matarese v. Archstone Pentagon City*
- *Fair Housing Council of Central California, Inc. v. Nunez*
- *McMillon v. Hawaii*
- *Parris v. Pappas*

Relief

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E. Attorney's Fees and Costs (cont.)
- *Herrin v. Lamachys Village at Indigo Lakes, Inc.*
- *Valley Housing LP v. City of Derby*
- *Miami Valley Fair Housing Center, Inc. v. Connor Group*
- *Hugee v. Kimson Apartments, LLC*

Organizational Damages

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- Diversion of Resources
- Frustration of Mission

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IV. PROPERTIES COVERED AND EXEMPTIONS

What's a "Dwelling?"

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Properties Covered and Exemptions

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A. "Dwellings" vs. Temporary Housing: § 3602(b)
- "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof"

Properties Covered (cont.)

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A. Cases
- *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*
- *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*

B. Exemptions: "Mrs. Murphy" Apartments and Others
- *Dixon v. Muchnik*
- *Oxford House, Inc. v. Town of Fayetteville, W. Va.*
- *HUD v. Maze*

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V. TRANSACTIONS COVERED: "OTHERWISE MAKE UNAVAILABLE"

Otherwise Make Unavailable

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A. Basic Transactions: § 3604(a) and § 3604(b)
- Refusals to sell or rent
  - *FHJC v. Edgewater Park Owners Cooperative* (S.D.N.Y. 2012)
- Discriminatory provision of services
  - *Zanesville*

B. Other Transactions: § 3604(a) and § 3604(b)
1. § 3604(a)'s "Otherwise Make Unavailable" Provision
   a. Steering
      - *Havens v. Realty Corp. v. Coleman* (US 1982)
      - *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011)
   b. Exclusionary Land-Use
      - *MHANY Management Inc. v. County of Nassau*
      - *St. Bernard Parish*
   c. Financial and Insurance Discrimination; Predatory Lending

Otherwise Make Unavailable

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B. Other Transactions: § 3604(a) and § 3604(b) (cont.)
1. § 3604(a)'s "Otherwise Make Unavailable" Provision (cont.)
   d. Other Practices
      - *Keller v. City of Freemont*

Otherwise Make Unavailable

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B. Other Transactions: § 3604(a) and § 3604(b) (cont.)

2. § 3604(b): Harassment, "Exploitation" Theory, and Other Practices
   - *Stevens v. Housing Authority of South Bend*
   - *Rhodes v. Advanced Property Management, Inc.*
   - *Fahnbulleh v. GFZ Realty, LLC*
   - *Gashi v. Grubb & Ellis Property Management Services, Inc.*
   - *Cooper v. Western & Southern Financial Group, Inc.*
   - *Estrella v. Sucuzhanay*
   - *Haber v. ASN 50th St. LLC*

Otherwise Make Unavailable

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2. Sexual Orientation
   - HUD's Proposed Regulations (24 C.F.R. § 100.500): 65 *Fed. Reg.* 67668 (11-18-00) HUD: No action on adopting this regulation (2001 - present)
   - HUD Regulation: *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender*, 77 Fed. Reg. 5662-01, 2012 WL 313893 (Published: Feb. 3, 2012 / Effective: March 5, 2012)
   - *In re Bank of America,* HUD No. 13-001 (Jan. 2, 2013)
     - Settlement based on allegations that borrowers seeking-FHA insured loans were denied loans based on marital status and/or sexual orientation ($7,500)
   - *Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*

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VI. TRANSACTIONS COVERED: DISCRIMINATORY TERMS AND CONDITIONS

Committee Concerning Community Improvement v. City of Modesto

583 F.3d 690 (9th Cir. 2009)

CCCI vs. City of Modesto, et al. Complaint, factual allegations

- 4 neighborhoods
- Primarily Latino (between 63% and 76%)
- Essentially urban area
- Unincorporated, annexed around (County 32% Latino)
- Surrounded by incorporated city (City 26% Latino)
- Within City's Sphere Of Influence

Complaint, factual allegations

(continued)

- Contrast unincorporated white areas and surrounding city
- Lack basic amenities
- Isolated pockets or islands of unincorporated, underserved communities
- Policies such as Measure M requiring vote on sewer expansion typically not used to assist islands and infrastructure condition
- Annexed around
- No sidewalks
- Inadequate drainage, seasonal flooding
- Lack of sewer (next to sewer treatment plant)

Complaint, factual allegations
(continued)

- Poorly maintained roads
- Few street lights
- Inadequate traffic control
- Inadequate law enforcement, response, bilingual services
- Dumping
- Dangerous at night
- Open canal

Fair Housing Act and Post-Acquisition Claims
(continued)

- 24 CFR 100.65 failing or delaying maintenance or repairs of sale or rental dwellings, limiting the use or privileges, services, or facilities associated with a dwelling
- Prima facie case of disparate impact must show discriminatory effect
- Outwardly neutral practices, significantly adverse or disproportionate impact
- Counter with legally sufficient nondiscriminatory reason

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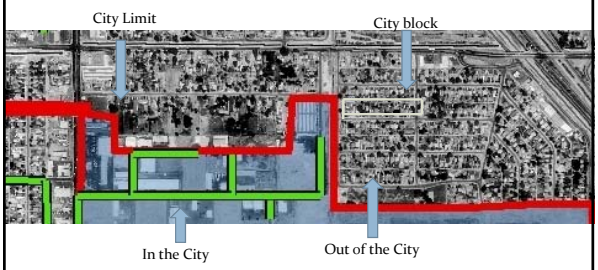
Land Use and Densities



No Man's Land, Modesto, CA
71% Latino

Excluded Hispanic Neighborhoods: City Densities
Bret Harte 1254 Housing Units

Roberson Road
A neighborhood of 1,459 people,
built on a flood plain, of lots averaging 1/5 acre.

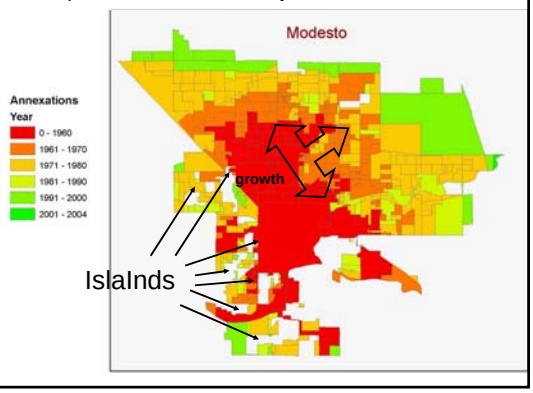
No sidewalks or stormwater management means arriving at school with soaked shoes, socks and pantlegs -- or walking in the street ....

making the choice between the stress of social isolation or risking their lives.

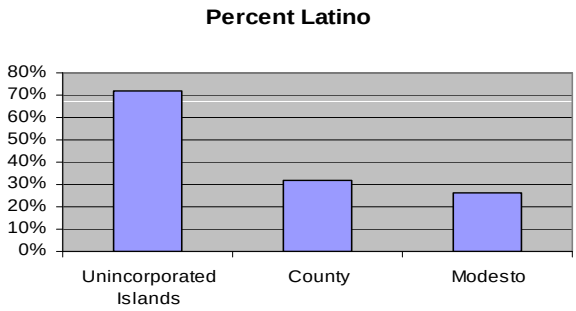
Without City Trash Pickup, the neighborhoods become a dumping ground.

Without adequate police surveillance, dumpers know they're not likely to get caught.

Disparities A Function of City's Power to Annex



"Island" residents are much more likely to be Latino than are residents of the City or the County.



Fair Housing Act and Post-Acquisition Claims

- 42 USC 3604(b) makes it unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

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Fair Housing Act and Post-Acquisition Claims

(continued)

- 24 CFR 100.65 failing or delaying maintenance or repairs of sale or rental dwellings, limiting the use or privileges, services, or facilities associated with a dwelling
- Prima facie case of disparate impact must show discriminatory effect
- Outwardly neutral practices, significantly adverse or disproportionate impact
- Counter with legally sufficient nondiscriminatory reason

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Fair Housing Act and Post-Acquisition Claims
(continued)

- Conclude that FHA reaches post-acquisition discrimination
- Privileges implicates continuing rights, such as quiet enjoyment
- Services or facilities associated with occupancy of a dwelling
- Natural reading statute encompasses claims regarding services or facilities perceived to be wanting after owner or tenant has acquired possession of dwelling

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Fair Housing Act and Post-Acquisition Claims
(continued)

- Regulations also support permitting post-acquisition
- Embrace claims about problems arising after tenant or owner has possession
- Limiting FHA to post acquisition would limit the act from reaching whole host of situations that do not amount constructive eviction but would constitute discrimination in the enjoyment of residence in a dwelling or in provision of services associated with that dwelling

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Fair Housing Act and Post-Acquisition Claims
(continued)

- FHA applies post acquisition
- Not reinstate in entirety
- Limited by stipulation (sewer, police, bilingual)
- Concluded no disparate impact sewer or infrastructure

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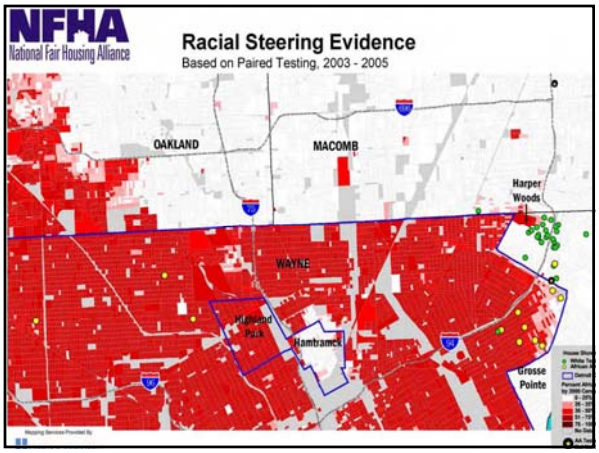
Steering



Real Estate Steering

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- Examples from testing:
- Both testers inquired about homes in Harper Woods
- White tester was shown ten homes in Harper Woods in majority White census blocks.
- African-American tester was shown three homes in Detroit in majority African-American census blocks and no homes in Harper Woods

Real Estate Steering

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- Examples from testing:
- Both testers inquired about homes in St. Claire Shores
- African-American tester was shown four homes in Detroit but none in St. Clair Shores, a predominately White town. The Century 21 Sales Associate, who is African-American, told the African-American tester that if "there are too many of us" the neighborhood goes down. The agent drove the African-American tester through a predominately White suburb and explained to the tester that the area was all White so "it of course costs more."

Real Estate Steering

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- Examples from testing:
- The same sales associate showed the White tester five homes in St. Clair Shores, Harper Woods, Eastpointe and Detroit in majority White census blocks. The agent told the White tester that a White neighborhood was very orderly and that neighbors watched to make sure that their neighbors' lawns were cut and their leaves were raked. She explained that African Americans did not like to be restricted by order and did not want someone watching over them. She told the White tester that a more integrated neighborhood was less expensive and so there were more African-American families

NAR Professional Services Model

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- Use systematic procedures
- Obtain objective information
- Let the customer set the limits
- Provide a variety of choices
- Document the service you provide

Guidelines for Real Estate Agents - Buyers

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- **What is the racial composition of this neighborhood? Or, I only want to see white (Jewish, black, etc.) neighbor**hoods.
- If the homebuyer insists on restricting the home search on the basis of race, color, religion, sex, handicap, familial status or national origin of a neighborhood's residents, you should specifically note this on the homebuyer's Equal Service Report.
- Never estimate or give an opinion of the racial, religious or ethnic composition of the neighborhood.

Guidelines for Real Estate Agents

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- **Are there high-quality schools in the area?**
- Provide the homebuyer with only reliable and authoritative information, such as student-teacher ratios, expenditures per pupil, percentage of students who go on to college, and the number of National Merit Scholars from the recent graduating class.
- Maintain the same type of information for each school; never show favoritism for one school over another.
- Never attempt to influence a housing choice with either complimentary or negative general comments about the school or give an estimate or opinion of the racial, religious or ethnic composition of the student body.

Guidelines for Real Estate Agents

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- **Would you live here?**
- Give your honest opinion, whether it's positive or negative, to this question and give a reason for your opinion.
- Never mention or volunteer information related to the racial, religious or ethnic makeup of the area.

Guidelines for Real Estate Agents - Sellers

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- **I believe that I, as a homeowner, have the right to sell my own home. A local broker told me I couldn't sell my home for the required price to the person I want. Is that true?**
- Inform the seller that there can be no discrimination on the basis of race, color, religion, sex, handicap, familial status or national origin in the sale or rental of the property.

Guidelines for Real Estate Agents - Sellers

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- **What color (religion, nationality) are the prospects**?
- This type of question should alert you to what may become a very serious problem in marketing this seller's property.

105

VII. TRANSACTIONS COVERED: DISCRIMINATORY ADVERTISING AND STATEMENTS

Advertising Provisions

106

- § 3604(c):
- Illegal to make, print or publish or cause to be made, printed or published any notice, statement, or advertisement which indicates a preference, limitation, or discrimination based on protected class status
- Applies to written or oral notices or statements

Advertising Provisions

107

C. § 3604(c): Notices, Statements, and Advertising

- Prohibits advertisements, statements, or notices that "indicate[] any preference, limitation, or discrimination" based on membership in a protected class
- It is violated by "any ad that would discourage an ordinary reader of a particular [protected group] from answering it." *Jancik v. Dep't of Hous. & Urban Dev.*
- Does not require a showing of intentional discrimination
- Prohibits advertisements that indicate a preference for or against a protected group even if the housing provider could legally discriminate against individuals in those groups. 42 U.S.C. 3603(b)

Advertising Provisions

C. § 3604(c): Notices, Statements, and Advertising

- *United States v. Hunter*, (4th Cir. 1972)
- *United States v. Space Hunter* (2d Cir. 2005)

Advertising (cont.)

109

1. Advertising in the Internet Age: Craigslist
   - The number of individuals who use online classified advertising services doubled between 2005 and 2009
   - As of May 2010, 53% of all online adults were using online classified
   - Craigslist is the "most used" website in the U.S.
   - According to 2010 National Association of Realtors Profile of Home Buyers and Sellers, 89% of home buyers used the Internet during their housing search, compared to only 36% for print newspaper ads

Sample Craigslist Housing Advertisements

110

$200 military man has extra room (newport news) best of craigslist

Reply to: [redacted]@yahoo.com [Errors when replying to ads?]
Date: 2009-04-20, 12:10PM EDT

im a 20/m military man i have 2 beagles and a son and a wife i have an etra bedroom for rent 200 dollars a month is all i ask if u want to move in all u need is to be a white single female that is ok with the idea of me being married and will have discreet sexual relations with me when shes not around if intrested text me 850-[redacted] must be white and have a good body

Sample Craigslist Housing Advertisements

111

$1 Seeking a live houseboy/houseman (Fairfax) best of craigsli

Date: 2010-03-15, 10:28AM EDT
Reply to: hous-q5ywm-1644838836@craigslist.org [Errors when replying to ads?]

Seeking a live in houseboi/houseman room with private bath/den share/kitchen/laundry close to Metro, bus, stores restaurants. Must be HWP no drugs no excessive drinking. Domestic chores/personal assistant /errands/sex on demand. in exchange for room and board

Sample Craigslist Housing Advertisements

112

Need Housing - Zombie Prepared (Salt Lake City)

Date: 2009-09-22, 1:41AM MDT
Reply to: hous-8z6x4-1386386973@craigslist.org [Errors when replying to ads?]

Single white Male seeking place, Owns guns and Zombie attack kits, is well prepared incase of the apocalypse. Excellent marksman and weapons improviser and Hunter. Portly, Prone to drink, of Irish and Scandinavian descent. Roomate must like Battlestar Galactica. Like to wear a Kevlar helmet to bed

- Location: Salt Lake City
- it's NOT ok to contact this poster with services or other commercial interests

PostingID: 1386386973

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008)

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- Housing notices on Craigslist contained statements such as "no minorities," "only Muslims" and "no children"
- The Communications Decency Act ("CDA") bars defendants from being liable as the publisher of user-provided housing listings or advertisement on its website and therefore Craigslist could not be liable for publishing discriminatory advertisements under § 3604(c)
- Craigslist was not liable under the FHA for "causing" advertisements to be made

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008)

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- Court raised questions about whether the FHA's ban on discriminatory advertisements or statements as applied to single-family homes and other exempt dwellings raises First Amendment issues
- Court noted that screening of user-generated advertisements might not be effective and would not be cost effective for Craigslist
- Fair housing organizations can use the postings to identify targets, dispatch testers, and collect damages from any landlord that discriminates or could refer cases to the attorney general for prosecution

Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (en banc)

115

- Roommates.com could be liable under § 3604(c) for mandatory questions during the registration process that required users to disclose personal

Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (en banc)

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- Roomates.com could be liable for requiring users who are seeking housing to indicate whether they are willing to live with gay males and children and requiring users listing housing to reveal whether children are present. Roommates could also be liable for channeling users away from listings where the individual offering housing has expressed preferences that are not compatible with person seeking housing.
- Roommates.com could not be held liable under the FHA for comments made in the "additional comments" section of profile pages.

Miami Valley Fair Housing Group v. Connor Group, No. 12-3284 (6th Cir.)

- "Great Bachelor Pad! . . . Our one bedroom apartments are a great bachelor pad for any single man looking to hook up"
- Does this ad facially specify a "preference" for men?
- Would this ad discourage a female applicant or an applicant with children from applying?
- Jury ruled against the Plaintiff, now on appeal

Guidelines for Real Estate Agents

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- **Avoid**:
- Using words or phrases describing the dwelling, landlord or tenants. Examples: white private home, colored home, Jewish home, Hispanic residence, adult building, or other words indicative of race, color, religion, sex, handicap, familial status or national origin.
- Conveying preference to one group over another or exclusion due to race, color, religion, sex, handicap, familial status (children under 18) or national origin.
- Using catchwords, such as restricted, exclusive, private, integrated, traditional,board approval or membership approval

Guidelines for Real Estate Agents

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- **Avoid**:
- Using symbols or logos that imply or suggest discrimination because of race, color, religion, sex, handicap, familial status (children under 18) or national origin.
- Writing out the directions to the property that refer to well-known racial, ethnic or religious landmarks or to any other major landmark that could signal a preference for a specific type of person.
- Targeting advertisements to one segment of the community.

Guidelines for Real Estate Agents

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- **Avoid**:
- Using only adult white models in advertising over a period of time.
- Using prohibited words or phrases with respect to handicapped persons or families with children, including: blind, mature persons, mentally ill, exclusive, adult building, restricted community or singles

Guidelines for Real Estate Agents

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- Avoid **Advertising In:**
- A strategically limited geographic area
- Particular editions of newspapers to reach a particular segment of the community
- Only small papers that cater to particular ethnic or religious groups rather than general circulation papers
- Only selected sales offices

122

VIII. TRANSACTIONS COVERED: MORTGAGE DISCRIMINATION

Mortgage Discrimination

123

D. Mortgage Discrimination: § 3604(a) and § 3605

1. Government Enforcement: HUD; DOJ; Others
   - *USAA Federal Sav. Bank v. Pennsylvania Human Relations Comm'n*
2. Private Litigation
   - *Henderson v. JP Morgan Chase Bank, N.A.*
   - *Silvas v. G.E. Money Bank*
   - *Rodriguez v. National City Bank*
   - *In re Countrywide Financial Mortgage Lending Practices Litigation*
   - *Center for Community Justice v. RBS Citizens, N.A.*
   - *Inclusive Communities Project v. Texas Dept. of Housing & Comm. Affairs*
   - *Grimes v. Fremont General Corp.*
   - *Bennett v. Flagstar Bank*

Mortgage Discrimination

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D. Mortgage Discrimination: § 3604(a) and § 3605 (cont.)

3. Predatory Lending
   - *Maya v. Centex Corp.*
   - *Ochoa v. Capital One NA*

E. Insurance Discrimination: § 3604(a-b)
   - *Ojo v. Farmers Group, Inc.*

F. Discriminatory Assessments: § 3604(a-b), § 3605, § 3606

"All the News That's Fit to Print"

The New York Times

Washington Edition

VOL. CLVIII ... No. 54,677 SATURDAY, MAY 16, 2009

Falling Gas Prices Deny Russia a Lever of Power

By ANDREW E. KRAMER

MOSCOW — As energy markets shrink, the same tactics that the Kremlin used to build Congress, the giant state-run gas company, into a mine economic and political power that could restore Russian influence in the world are now backfiring, slashing both its profits and its influence.

Throughout its eight years as president of Russia, Vladimir V. Putin pursued the strategic goal of dominating natural gas supplies to Europe and the pipelines that deliver them. Russia's leverage was demonstrated in January, when for the second time in three years a pricing dispute with Ukraine disrupted the flow of natural gas, leaving hundreds of thousands in Eastern Europe shivering in the deep winter cold.

But in his zeal to monopolize gas supplies, Mr. Putin, who is now Russia's prime minister, overpaid for assets and to long-term contracts with Central Asian countries for gas at a cost far in excess of current world prices. Now that the world economic crisis has sharply curtailed demand, [illegible] sales to supplies with declining world demand. In effect, a strategy that made business and political sense in a time of high and rising prices now is a drag, forcing Russia to deal for years of losses and declining influence, if energy prices fail to rebound.

"It's an extraordinary turnaround from what everybody was expecting," said Jonathan P. Stern, the director of natural gas research at the Oxford Institute for Energy Studies.

Demand for Gazprom's natural gas will plunge by about 40 billion cubic meters this year, according to Mr. Stern and other analysts in the company's traditionally guaranteed to import from the former Soviet states.

The turnaround for Gazprom has been as swift as it has been devastating to the company's business model. As recently as last September, Mr. Putin, as prime minister, flew to Tashkent, Uzbekistan, to wrap up a deal that consolidated Russia's strategic game after the war in Georgia.

Minorities Hit Hardest as New York Foreclosures Rise

On a stretch of 145th Street in Jamaica, Queens, 8 of 50 homes face foreclosure. "We are being gilleged," a city councilman said.

Blacks and Latinos Are Hit Hardest as New York Foreclosures Rise

Race and Foreclosure

Black Middle-Class Areas Feel the Pain

The New York Times

Washington Edition

VOL. CLVII No. 54,699 SUNDAY, JUNE 7, 2009 $6.00

Suit Accuses Wells Fargo of Steering Blacks to Subprime Mortgages in Baltimore

By MICHAEL POWELL

As she describes it, Beth Johnson and her fellow loan officers at Wells Fargo Bank visits the stagecoach from hell" for a tour of predatory mortgages, not blacks in Baltimore and suburban Maryland for high-interest subprime mortgages.

Three loans, Baltimore officials have contended in a federal lawsuit against Wells Fargo, lapsed into default, leading to foreclosure and cost the city tens of millions of dollars in taxes and city services.

Wells Fargo, Ms. Jacobson said in a deposition, used her and a community as fertile ground for subprime mortgages, as working-class blacks were hunted to be a part of the nation's homeownership boom. Ms. Jacobson said, pushed customers who could have qualified for prime loans into subprime mortgages. Another loan officer stated in an affidavit that Wells Fargo employees had referred to blacks as "land people" and to subprime lending as "ghetto loans."

"We just went right after them," Ms. Jacobson said of blacks and said she was once the bank's top-producing subprime loan officer nationally. "Wells Fargo mortgage had an strategy of going into predominantly targeted black churches, because I figured church leaders had a lot of influence and could convince congregants to take out subprime loans."

Ms. Jacobson's account and that of the other loan officer who gave an affidavit, Tony Paschal, both of whom have left Wells Fargo, provide the first detailed accounts of deliberate racial steering in a lawsuit brought by one of the nation's top banks.

The tell tales by such policies, Baltimore officials argue, is terrible. Data released by the city as part of the suit last week show that more than half the properties subject to foreclosure on a Wells Fargo loan from 2005 to 2008 were found vacant; and 7 percent of those are in predominantly black neighborhoods.

Judge Benson E. Legg of Federal District Court had asked the city to file the additional paperwork and has not decided whether the lawsuit can go forward.

Wells Fargo officials have denied the city's allegations. Baltimore filed suit in January 2008. In an e-mail statement on Friday, a spokesman said that only 1 percent of the city's 15,000 foreclosures came on Wells Fargo mortgages.

"We have worked extremely hard to make homeownership possible for more African-Americans and minorities," wrote Ms. Hamilton, a spokesman for Wells Fargo Home Mortgage. "We absolutely do not tolerate loan customers treating our customers or others disrespectfully or unfairly, or who violate our ethics and business standards."

Ms. and some officials across the nation have stereotyped and demonized the Wells Fargo borrowers, as 1 percent of whites in that income group held subprime loans and 30 percent of blacks.

"We've known that African-American and Hispanic and Latino homeowners were high-income loans, New York's attorney general, Andrew M. Cuomo, raised similar questions about the lending practices of Wells Fargo, JPMorgan Chase and Citigroup, in a lawsuit last year.

The N.A.A.C.P. has filed a class-action lawsuit charging systematic racial discrimination by more than a dozen banks, including Wells Fargo.

At the heart of each charge is a simple challenge, specifically marketing the most expensive and onerous loan products to black customers.

The New York Times, in a review of 2006 loan records filed in New York City, found that black households making more than $60,000 a year were nearly five times as likely to hold high-interest subprime mortgages as whites of similar or even lower incomes. (The disparity was greater for Wells Fargo borrowers, as 1 percent of whites in that income group held subprime loans and 30 percent of blacks.)

"We've known that African-American and Hispanic and Latino homeowners were high-income loans,"

Wells Fargo Foreclosure Rates by Race (2000-2009)

African American Neighborhoods (>80% African American)	White Neighborhoods (<20% African American)
17.5%	3.3%

- The foreclosure rate for African-American neighborhoods is seven times the rate for White neighborhoods.

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Overview

I. Violation of Fair Housing Act

- Reverse redlining: pattern or practice of targeting African-American neighborhoods for unfair, deceptive and discriminatory lending
- Borrowers receive loans they cannot afford; or priced higher than what they qualify for

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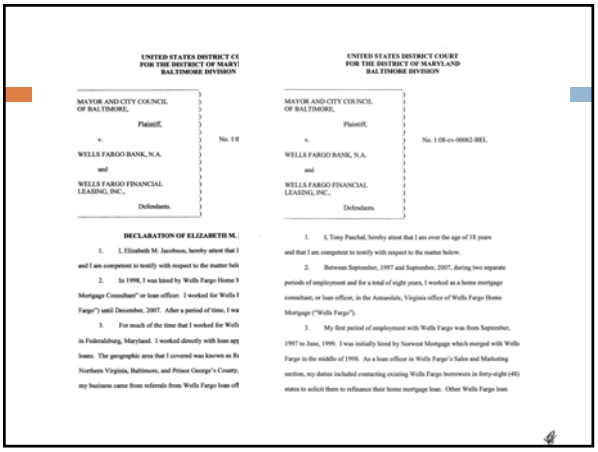
Overview

Foreseeable Consequence: Foreclosures

- Unaffordable, high priced loans lead directly and forseeably to foreclosure
- Test is plausibility and common sense



UNITED STATES DISTRICT CO
FOR THE DISTRICT OF MARY
BALTIMORE DIVISION

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff,
v.
WELLS FARGO BANK, N.A.
and
WELLS FARGO FINANCIAL LEASING, INC.,
Defendants.
No. 1:0

DECLARATION OF ELIZABETH M.

1. I, Elizabeth M. Jacobson, hereby attest that I and I am competent to testify with respect to the matter bel
2. In 1998, I was hired by Wells Fargo Home M Mortgage Consultant" or loan officer. I worked for Wells F Fargo") until December, 2007. After a period of time, I wa
3. For much of the time that I worked for Well in Fredericksburg, Maryland. I worked directly with loan ap loans. The geographic area that I covered was known as Ro Northern Virginia, Baltimore, and Prince George's County, my business came from referrals from Wells Fargo loan off

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MAYOR AND CITY COUNCIL OF BALTIMORE,
Plaintiff,
v.
WELLS FARGO BANK, N.A.
and
WELLS FARGO FINANCIAL LEASING, INC.,
Defendants.
No. 1:08-cv-00062-BEL

1. I, Tony Paschal, hereby attest that I am over the age of 18 years and that I am competent to testify with respect to the matter below.
2. Between September, 1997 and September, 2007, during two separate periods of employment and for a total of eight years, I worked as a home mortgage consultant, or loan officer, in the Annandale, Virginia office of Wells Fargo Home Mortgage ("Wells Fargo").
3. My first period of employment with Wells Fargo was from September, 1997 to June, 1999. I was initially hired by Norwest Mortgage which merged with Wells Fargo in the middle of 1998. As a loan officer in Wells Fargo's Sales and Marketing section, my duties included contacting existing Wells Fargo borrowers in forty-eight (48) states to solicit them to refinance their home mortgage loan. Other Wells Fargo loan

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Declarations Reveal Targeting

- African-American zip codes
- African-American churches
- Assigned employees based on race
- Marketing group expressly created based on race to target African American neighborhoods
- "Mud people"; "Ghetto loans"; "N-word"; "Subprime capitol"; "those people have bad credit"; "don't pay their bills"
- Marketing software with designation for African American "language"

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Overview

II. Foreclosures Directly Injure City of Baltimore

- Foreclosures result in abandoned and vacant homes
- Direct costs to City (e.g., boarding; infrastructure stabilization and repair; police and fire calls)
- Lost tax revenue resulting from decrease in property value

Case 1:08-cv-00062-JFM Document 153 Filed 04/07/10 Page 1 of 107

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MAYOR AND CITY COUNCIL OF BALTIMORE,
City Hall
100 N. Holliday St.
Baltimore, MD 21202

Plaintiff,

v.

Case No. 1:08-cv-00062-JFM

WELLS FARGO BANK, N.A.
464 California Street
San Francisco, CA 94104

and

WELLS FARGO FINANCIAL LEASING, INC.,
207 9th Street
Des Moines, IA 50307

Defendants.

SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

NATURE OF THE ACTION

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IX. TRANSACTIONS COVERED: HARASSMENT, INTERFERENCE, & RETALIATION

Harassment, Interference, & Retaliation

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G. Harassment and Interference Claims: § 3617

- "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the FHA]"
- Schwemm's Article: *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 Case Western Reserve Law Review 865 (2011), available on the internet at: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=417280

Harassment, Interference, & Retaliation

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- Against Housing Provider or Other Third Party
  - *Gonzalez v. Lee County Housing Authority*
  - *Newell v. Traditions of Hanover*
  - *Becerra v. Hammond Housing Authority*
- 1st Amendment Defense
  - *Cooper v. Western & Southern Financial Group, Inc.*

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X. TRANSACTIONS COVERED: GOVERNMENTAL DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

Governmental Discrimination and § 3608

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- HUD Proposed Regulation, *Affirmatively Furthering Fair Housing*, sent to OMB for 90-day review on Jan. 17, 2012
- *United States ex rel. Anti-discrimination Center v. Westchester County, N.Y.*
- *Broadway Triangle Community Coalition v. Bloomberg*
- *MHANY Management Inc. v. County of Nassau*

AFFH Statutory Authority

- FHA requires HUD to "administer [housing] programs…in a manner affirmatively to further the policies of [the Fair Housing Act]," including the general policy to "provide, within constitutional limits, for fair housing throughout the United States."
  - 42 USC §3608(e)(5).

"No Certification, No Money"

- 42 U.S.C. §5304(b)(2): "Any grant under [the CDBG program] shall be made only if the grantee certifies to the satisfaction of the Secretary that … the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing."

CDBG/Con Plan AFFH Regs

- A grantee is "required to submit a certification that it will affirmatively further fair housing, which means that it will (1) conduct an analysis to identify impediments to fair housing choice within the jurisdiction; (2) take appropriate actions to overcome the effects of any impediments identified through that analysis; and (3) maintain records reflecting the analysis and actions in this regard."
  - 24 C.F.R. § 570.601(a)(2)
  - 24 CFR § 91.225(a).

Preventing the Increase of Segregation

- "…the affirmative duty placed on the Secretary of HUD by § 3608(d)(5)… requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of 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 Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

Refraining From Discrimination is Not Enough

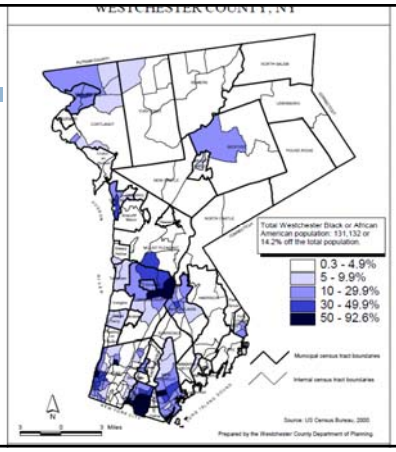
- "…every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)…This broader goal [of truly open housing] … reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."
  - *NAACP v. Sec'y of Housing and Urban Development*, 817 F.2d 149, 155 (1st Cir. 1987).

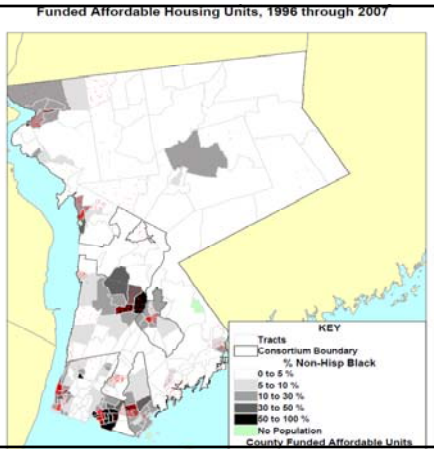
U.S. ex rel. Anti-Discrimination Center v. Westchester County

- County received $52 million+ in CDBG, HOME, ESG funds from 2000-2006
- Receipt of funds required repeated AFFH certifications
- Litigation brought under the False Claims Act: AFFH certifications were false because County did not consider race-based impediments to fair housing choice
  - Treble Damages
  - Share available to "relator"

40 Consortium Municipalities

- County as a whole has 16% African-Americans
- 40% of Consortium Municipalities have African-American populations of 1% or less
- 60% of Consortium Municipalities have African-American populations of 3% or less
- A handful of municipalities have African-American populations above 16%: Yonkers, New Rochelle, Mount Vernon, White Plains, Peekskill, Greenburgh





Westchester AI

- AIs do not identify any impediments on the basis of race, color, national origin or any other protected class, even though County is part of one of the most segregated regions in the country
- No mention of housing discrimination or residential segregation

Decision on Motion to Dismiss

- "In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of 'affirmatively further fair housing' that excludes consideration of race would be an absurd result."
  - *Westchester,* 495 F.Supp.2d 375, 387-88 (S.D.N.Y 2007)

Summary Judgment Decision

- "The County has simply not shown that it analyzed whether there were race-based impediments to housing choice independent of the problem of low income, and as such, it did not comply with the requirement to AFFH." *U.S. ex rel. Anti-Discrimination Center v. Westchester County,* (S.D.N.Y. 2009)

Summary Judgment Decision

- "[T]he County's AIs … utterly failed to comply with the regulatory requirement that the County perform and maintain a record of its analysis of the impediments to fair housing choice in terms of race. This failure is only compounded by the County's failure to follow the guidance provided by HUD." *Id.* at 563.

Settlement Terms

- County required to ensure development of 750 affordable housing units, within 7 years, in the whitest neighborhoods
  - 660 units must be built in municipalities with African-American population of less than 3% and Latino population of less than 7%
  - Additional integrative criteria at the census block group level

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XI. HANDICAP/DISABILITY

Purpose of Disability Provisions of Fair Housing Act

"[T]o protect the rights of handicapped people to live in the residence of their choice in the community"

" [A] clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."

1988 House Report on Amendments to Federal Fair Housing Act

FAIR HOUSING PRINCIPLES

- Equality - People with disabilities should have an equal opportunity to live where they want
- Integration - People with disabilities are entitled to live in communities with their neighbors
- Choice - People with disabilities are entitled to choose where they want to live
- Individuality - Housing providers must respect the unique needs and circumstances of individuals with disabilities and offer reasonable accommodations to meet these needs when requested

Definition of "Disability"

- Under the **Fair Housing Act**, you are **protected** if you:
  - **have a mental or physical impairment**…. **which substantially limits one or more major life activities, or**
  - **Have a history of such an impairment, or**
  - **Are regarded as having such an impairment**

42 USC § 3602(h)

Exceptions

- Current use of **illegal, controlled** substances, 42 USC § 3602(h)
- **Direct threat** to the health or safety of others or whose tenancy would result in physical damage to the property of others. 42 USC § 3604(f)(9)

Forms of Discrimination

- Intentional Discrimination
- Disparate Impact
- Failure to Provide Reasonable Accommodations
- Failure to Allow Reasonable Modifications
- Failure to Design and Construct Accessible Housing

Discrimination Can Occur At Any Time

- **ADMISSION AND SCREENING**
- **TERMS AND CONDITIONS DURING TENANCY**
- **EVICTION/TERMINATION**

Protected Classes

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- Disability
  - A physical or mental impairment which "substantially limits one or more major life activities". "Major life activities" are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

Handicap/Disability

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A. Definition of "Handicap": § 3602(h)

- *Matarese v. Archstone Pentagon City*
- *Johnson v. Levy*
- *A.B. ex rel. Kehoe v. Housing Authority of South Bend*
- *Payton v. Nantucket Partners, L.P.*
- *Reyes-Garay v. Integrand Assur. Co.*
- *Valley Housing LP v. City of Derby*
- *Worthington v. Golden Oaks Apartments*

Protected Classes-- Disability

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- Mental retardation
- Organic brain syndrome
- Emotional or mental illness
- Learning disabilities
- Hearing or eye impairments
- Orthopedic condition
- Cerebral Palsy
- Autism
- Epilepsy
- Muscular Dystrophy
- Cancer
- Diabetes
- Human Immuno-deficiency Virus
- Drug/Alcohol Addiction

Disability – Sample Cases

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- *HUD v. Corey,* HUDALJ No. 10-M-207-FH-27 (Aug. 15, 2012)
  - Plaintiff applied to rent house for herself and brother with autism
  - Landlord required $1 million liability policy to cover damage caused by brother and note from doctor that brother would not pose a threat to property
  - $18,000 damages and $6,000 civil penalty

Protected Classes -- Disability

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- *LaFlamme v. New Horizons, Inc.,* 605 F.Supp.2d 378 (D. Conn. 2009)
  - Defendant's mission: provide housing to persons with severe disabilities
  - Requirement of "living independently" discriminatory
  - Request for medical information too intrusive

Handicap/Disability

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B. Group Homes

- *A Society Without a Name v. Virginia*
- *HDC, LLC v. City of Ann Arbor*
- *Avalon Residential Care v. City of Dallas*
- *United States v. City of Baltimore*
- *King's Ranch of Jonesboro, Inc. v. City of Jonesboro*
- *Valley Housing LP v. City of Derby*
- *Caron Foundation of Florida, Inc. v. City of Delray Beach*
- *NHS Human Services v. Lower Gwynedd Tp.*
- *Rise, Inc. v. Malheur County*
- *Padou v. District of Columbia* (FOIA case)

What is an Accommodation?

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- **Reasonable accommodations** are **changes** in rules, policies, practices or services so that a person with a disability can participate as fully in activities related to housing as a person without a disability could.

When Accommodations Must be Provided

175

- A landlord **must** provide a requested accommodation **unless** the landlord can demonstrate that doing so would:
  - Impose an "undue burden"
  - Constitute a "fundamental alteration" in the service provided by the landlord

Accommodations Must be Requested

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- In order to get a change in a rule, policy, practice, or service, **the tenant must request it.**
- An accommodation **may be requested at any time,** including the initial application process, during the tenancy, or even when the landlord seeks to evict. landlord.
- The decision to request an accommodation is entirely that of the tenant. **A landlord may not impose an accommodation on an unwilling tenant.**

More on Accommodations

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- The tenant is entitled to an accommodation that is **effective in affording an equal opportunity to use and enjoy a dwelling**, even if it is not the one most favored by the tenant.
- A landlord who fails or refuses to provide a reasonable accommodation is subject to the same penalties under the Fair Housing Act as a landlord who intentionally discriminates on the basis of disability.

Accommodations Must be "Reasonable"

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- The "Undue Burden" Test: A landlord is not required to provide an accommodation if the landlord can show that doing so would create an "undue" financial or administrative burden.
- The "Fundamental Alteration" Test: The Fair Housing Act does not require a landlord to enact significant changes in its program or services to accommodate the special needs of tenants with disabilities.

Securing a "Reasonable Accommodation"

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- As long as the tenant has a letter or prescription from an appropriate professional, such as a therapist or physician, and meets the definition of a person with a disability, she is entitled to a "reasonable accommodation" that would allow the animal in the apartment.

Verification

Housing provider may request reliable disability-related information:

- **(1) Necessary to verify that the person has a qualified disability**
- **(2) Describes the needed accommodation, and**
- **(3) Shows the relationship between the disability and the need for the RA.**

Verification

- 1. If a person's disability is obvious or known, and the need for the requested accommodation is known, then the housing provider should not ask for any more information.
- 2. If the disability is known or obvious, but the need is not, then the housing provider should ask only for information necessary to verify the need for the accommodation.
- 3. If neither the disability nor the need for the accommodation is readily apparent, the housing provider should ask for verification of both the disability and the need for the accommodation.

Verification

Usually not necessary:

- **MEDICAL RECORDS OR DETAILED INFORMATION ABOUT NATURE OF DISABILITY**
- *Laflamme v. New Horizons*, 605 F.Supp.2d 378 (D.Conn. 2009).

Proof

Who can provide this information?

- **The disabled person (i.e. proof that under 65 & receives SSI or SSDI private disability insurance benefits)**
- **Doctor, other medical professional;**
- **peer support group, non-medical service agency, or a reliable third party in a position to know about disability**

Interactive Process

- If the initial request is denied, provider must engage in an interactive process
- Alternative accommodations that are acceptable to the tenant.
- If no resolution, will be treated as a denial of the original r.a. request.

Examples of **Reasonable Accommodations**

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- Reading the rental application to a prospective tenant with a visual impairment or a learning disability
- Helping a tenant with cognitive disabilities in filling out an application
- Changing a "no pets" rule to allow a companion dog for someone with a psychiatric disability
- Keeping laundry room door closed so that fumes do not make someone ill who has multiple chemical sensitivity (MCS)

More Examples….

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- Providing notices to tenants in large print, or calling a blind tenant to read the contents of the notice
- Sending monthly reminder on "rent day" for someone whose head injury causes memory lapses
- Adopting a policy which recognizes that "normal wear and tear" has a different meaning for a tenant who uses a wheelchair
- Allowing a reasonable extension on rent due for someone who has been hospitalized

…And Still More….

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- Using alternative pest control methods or lobby cleaners when a tenant has severe allergic responses to pesticides or cleaners being used.
- Allowing tenants with psychiatric or other disabilities have pets for therapeutic reasons, with no increase in security deposit
- Posting a "no smoking" sign in the lobby, to protect tenants with multiple chemical sensitivity or asthma

Handicap/Disability

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C. Reasonable Accommodations: § 3604(f)(3)(B)
1. General Standards and Burdens of Proof
2. Traditional Cases
   a) Animals
   - *Intermountain Fair Housing Council v. CVE Falls Park, LLC*
   - *Stevens v. Hollywood Towers and Condominium Ass'n*
   - *Bhogaita v. Altamonte Heights Condominium Ass'n, Inc.*
   - *Falin v. Condominium Ass'n of La Mer Estates, Inc.*
   - *Boyer v. Scott Bros. Inv. Corp.*
   - *Myers v. Condominiums of Edelweiss, Inc.*
   - *Gragg v. Park Ridge Mobile Home Court LLP*
   - *Meadowland Apartments v. Schumacher*
   - *HUD v. Riverbay Corp.*

Handicap/Disability

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C. Reasonable Accommodations: § 3604(f)(3)(B) (cont.)
2. Traditional Cases (cont.)
   b) Parking
   - *Shapiro v. Cadman Towers*
   - *Carpenter v. Churchville Greene Homeowners' Ass'n*
   - *Taggart v. Associated Estates Realty Corp.*
   - *United States v. WHPC-DWR, LLC*
   - *Solodar v. Old Port Cove Lake Point Tower Condominium Ass'n, Inc.*

Handicap/Disability

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C. Reasonable Accommodations: § 3604(f)(3)(B) (cont.)
2. Traditional Cases (cont.)
   c) Others
   - *Matarese v. Archstone Pentagon City*
   - *Washington v. Kass Management Services*
   - *Reyes-Garay v. Integrand Assur. Co.*
   - *Choices in Community Living, Inc. v. Petkus*
   - *Distler v. El-Ad Reserve at Lake Pointe, LLC*
   - *Gragg v. Park Ridge Mobile Home Court LLP*
   - *Scoggins v. Lee's Crossing Homeowners Ass'n*

Handicap/Disability

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C. Reasonable Accommodations: § 3604(f)(3)(B) (cont.)
2. Traditional Cases (cont.)
   c) Others (cont.)
   - *Costello v. Johnson*
   - *Marton v. Lazy Days Property Owners Ass'n*
   - *Riccardo v. Cassidy*
   - *Rodriguez v. Morgan*
   - *Sinisgallo v. Town of Islip Housing Authority*
   - *Wallace H. Campbell & Co., Inc. v. Md. Com'n on Human Relations*

Handicap/Disability

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C. Reasonable Accommodations: § 3604(f)(3)(B) (cont.)
3. Other Claims
   - *Johnson v. Levy*
   - *A.B. ex rel. Kehoe v. Housing Authority of South Bend*
   - *Worthington v. Golden Oaks Apartments*
   - *Falin v. Condominium Ass'n of La Mer Estates, Inc.*
   - *Hayden Lake Recreational Water and Sewer District v. Haydenview Cottage*
   - *Sheppard v. Zoning Bd. of Appeal of Boston*

Service and Emotional Support Animals

- The Fair Housing Amendments Act of 1988, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act protect the right of people with disabilities to keep service and emotional support animals, even when a landlord's policy explicitly prohibits "pets."

Service and Emotional Support Animals

- The Fair Housing Amendments Act of 1988, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act protect the right of people with disabilities to keep service and emotional support animals, even when a landlord's policy explicitly prohibits "pets."

Service and Support Animals are not "Pets"

- Because emotional support and other service animals are not "pets," but rather are considered to be more like assistive aids such as wheelchairs, the law will generally require the landlord to make an exception to its "no pet" policy so that a tenant with a disability can fully use and enjoy his or her dwelling.

Securing a "Reasonable Accommodation"

- As long as the tenant has a letter or prescription from an appropriate professional, such as a therapist or physician, and meets the definition of a person with a disability, she is entitled to a "reasonable accommodation" that would allow the animal in the apartment.

Section 8 Vouchers and Disability

Is acceptance of the Section 8 voucher necessary to overcome disability-caused economic barriers to tenancy.

- Is the disability the cause of the economic hardship? (Does it have to be the only cause? Law is unsettled.)

- **Some ways to think about this:**
  - Is the tenant too disabled to work to make money to pay the rent from wages?
    - --Receipt of SSI for disability
  - Is paying the rent without Section 8 a financial hardship?

Leading Cases

- *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2nd Cir. 1998)
- *Schanz v. Village Apartments*, 998 F.Supp. 784, 786 (E.D.Mich. 1998)
- *Giebeler v. M & B Associates,* 343 F.3d 1143 (9th Cir. 2003)
- *Freeland v. Sisao LLC*, 2008 WL 906746 (E. D. N. Y. Apr. 1, 2008)

Handicap/Disability

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D. Modifications of Existing Premises: § 3604(f)(3)(A)
- *Scoggins v. Lee's Crossing Homeowners Ass'n*

E. Design and Construction Requirements: § 3604(f)(3)(C)
1. Cases
   - *Miami Valley Fair Housing Group, Inc. v. Steiner and Associates, Inc.*
   - *Equal Rights Center v. Equity Residential*
   - *In re Boise County*
   - *National Fair Housing Alliance, Inc. v. S.C. Bodner Company, Inc.*
   - *McMillon v. Hawaii*
   - *United States v. JPI Construction, LP*
2. Other Issues and Initiatives

Reasonable Modification Cases

- Garza v. Raft, Fair Housing – Fair Lending ¶ 16,406 (N.D. Cal. 1999) (holding that defendant violated the FHA by conditioning approval of a ramp upon removal and granting summary judgment to plaintiff) [subsequent settlement for $140,000]
- HUD v. Twinbrook Village Apts, 2001 WL 1632533 (HUD ALJ 2008) (finding that conditioning approval of ramp upon purchase of liability insurance or removal at the end of tenancy violated the FHA and awarding three tenants a total of $135,000 and a civil penalty in the amount of $15,000)

Resources on Reasonable Modifications

- DEPARTMENT OF JUSTICE AND DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, JOINT STATEMENT OF THE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT – REASONABLE MODIFICATIONS UNDER THE FAIR HOUSING ACT (March 5, 2008)

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F. Other Disability Issues under the Fair Housing Act
- *Mazlarz v. Housing Authority of Town of Vernon*
- *Hayden Lake Recreational Water and Sewer District v. Haydenview Cottage*
- *Mancuso v. Douglas Elliman, LLC*
- *Brengle v. Greenbelt Homes, Inc.*
- *HUD v. Corey*

G. Americans with Disabilities Act: Relevance to Housing
1. Title II: State and Local Governmental Programs
   - *Vance v. City of Maumee*
   - *A Society Without a Name v. Virginia*
   - *Sak v. City of Aurelia, Iowa*
2. Title III: Public Accommodations Re: Housing
   - *Worthington v. Golden Oaks Apartments*
   - *Equal Rights Center v. Equity Residential*

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XII. FAMILIAL STATUS

Familial Status

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- Familial Status
  - "...one or more individuals (who have not attained the age of 18 years) being domiciled with"
    - A parent or another person having legal custody of the child(ren)
    - The designee of the parent or legal guardian
  - Includes persons who are pregnant or in the process of adopting

Familial Status

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A. Traditional and Group-Home Cases
B. Occupancy Standards
   - HUD, Keating Memorandum (1991)
C. Safety Defense
D. § 3604(c): Advertisements/Statements
   - *Connor Group*

Familial Status

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E. Housing-for-Older-Persons Exemption: § 3607(b)
   - *Putnam Family Partnership v. City of Yucaipa, California*
   - *Rogers v. Seibert*
   - *Waterhouse v. City of American Canyon*
F. Others
   - *Interfaith Housing Center of the Northern Suburbs v. Bernsen*

Sample Cases – Familial Status

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- *Gashi v. Grubb & Ellis Property Management*, 801 F.Supp.2d 12 (D. Conn. 2011)
  - Defendant enforced occupancy policy of 2 person per bedroom; insisted plaintiff "rectify the situation"
  - Ct: S/J granted for plaintiff on theory of disparate impact
    - Policy affected 30% of 3-person households with children, but only 10% of 3-person households without children
    - Defendant's justifications insufficient to rebut impact

Sample Cases – Familial Status

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- *Hamad v. Woodcrest Condominium Ass'n*, 328 F.3d 224 (6th Cir. 2003)
  - Policy: No children on third floor
  - Plaintiffs: Current residents
- *U.S. and FHC Oregon v. Hadlock*, 2010 WL 331772 (D. Ore. 2010)
  - Defendant: Owner of single family home
  - Testing
  - "Kids would burn up the house"

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XIII. NATIONAL ORIGIN DISCRIMINATION AND STATE AND LOCAL IMMIGRATION LAWS

National Origin and Immigration

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- Preemption and National Immigration Laws
  - *Arizona v. United States*, 132 S. Ct. 2492 (2012)
- Who Does the FHA Protect?
  - Employment regulations define national origin discrimination as the denial of an opportunity because of an individual, or her ancestor's "place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group"
  - FHA prevents discrimination based on national origin, <u>not</u> immigration status

National Origin and Immigration

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- Who Does the FHA Protect? (cont.)
  - FHA protects undocumented immigrations from being discriminated against based on their race or national origin.
  - *Plyler v. Doe*, 457 U.S. 202 (1982): "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term"

Fair Housing Act

- Covers persons regardless of immigration status
- Does not expressly protect non-citizens
- Forbids discrimination against "any person"

  ex. To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rent, or otherwise make unavailable or deny a dwelling to any person because of * * * national origin. 42 U.S.C. § 3604(a).

Fair Housing Act

- Standing: Any person injured by a discriminatory housing practice, whether or not the target, can sue to recover for his or her own injuries. *Harris v. Itzaki*, 183 F.3d 1043 (9th Cir. 1999)
- Can prove case through disparate impact or disparate treatment

Section 1981

- *All persons* within the jurisdiction of the United States have the same rights in every state and territory to make and enforce contracts, to sue, to be parties, to give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and no other

Section 1981

- Section 1981 prohibits private discrimination on the basis of citizenship. *Anderson v. Conboy*, 156 F.3d 167 (2d Cir. 1998)
- Requires proof of discriminatory intent
- Non-citizens have standing under Section 1981
- Prohibits racial discrimination but many courts recognize national origin claims as race claims. *See St. Francis College v. Al-Khazarji*, 481 U.S. 604, 613 (1987)

California Civil Code § 1940.3

- City or County may not require a landlord or his agent to: (a) inquire about or report the citizenship or immigration status of applicants or residents; (b) deny tenancy or evict based on citizenship or immigration status of an applicant or resident; (c) take any action based on citizenship or immigration status of an applicant or resident

Civil Code § 1940.3

- No landlord or agent may: (a) make any inquiry regarding or based on the immigration or citizenship status of a tenant, prospective tenant, occupant or prospective occupant of residential rental property; (b) Require that any tenant, prospective tenant, occupant or prospective occupant make any statement, representation, or certification concerning his or her immigration status

Civil Code § 1940.3

- Nothing prohibits a landlord from either (a) complying with any legal obligation under federal law or (b) requesting information or documentation necessary to determine or verify the financial qualifications of a prospective tenant or to determine or verify the identity of a prospective tenant or prospective occupant

Practical Implications

- Cannot ask for specific identification such as a government issued driver's license
- Requesting government issued photo identification such as a passport, foreign issued driver's license or other foreign identification
- Screening policy must include process for evaluating applicants who have neither a SSN or Tax Id number

Practical Concerns

- Threat of plaintiffs or complainants being reported to INS and deportation

  Sure-Tan v. NLRB, 467 U.S. 883, 886-7 (1984) (employer reported five undocumented workers after they voted in favor of union representation); *Singh v. Jutla & C.D. & R's Oil*, Inc., 214 F.Supp.2d 1056, 1057 (N.D. Cal. 2002)(employer recruited an undocumented worker and then reported him to INS after he filed an FLSA claim for unpaid wages)

Practical Concerns: Litigating Cases Involving Immigrants

- ICE Memorandum (6.17.11) : "Absent special circumstances, it is . . . against ICE policy to remove individuals in the midst of legitimate effort to protect their civil rights or civil liberties"
- Possible Solution – organizational plaintiff

Discovery of Immigration Status

- *Rivera v. Nibco*, 364 F.3d 1057 (9th Cir. 2004)
- District court correctly granted protective order against discovery into plaintiffs' immigration status
- Chilling effect discovery of immigration status could have on the bringing of civil rights actions unacceptably burdens the public interest in enforcing Title VII

Discovery of Immigration Status

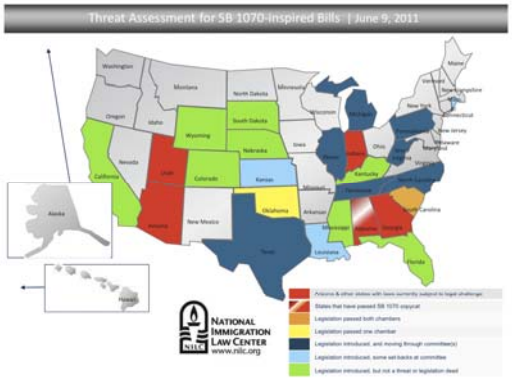
- Private plaintiffs act as private attorney generals in bringing civil rights cases

Citizenship Discrimination

- *Espinoza v. Hillwood Square Mutual Ass'n*, 522 F.Supp. 559 (E.D. Va. 1981)
- Discrimination based on citizenship may be evidence of a violation of the FHA
- Alienage is not a per se violation of the FHA
- Policy of discriminating based on citizenship may have a discriminatory effect based on national origin in violation of the FHA

Citizenship Discrimination

- Section 1981 reaches private discrimination based on alienage



National Origin and Immigration

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- *Central Alabama Fair Housing Center v. Magee* (M.D. Ala. 2011)
  - Granted TRO prohibiting enforcement of HB 56
  - Omnibus "anti-immigration" bill

Results

- Development of better, alternative site for housing
- Community building and bus stop
- Damages for CHIP and owners
- 40 units farmworker housing

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National Origin and Immigration

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- Representative Statements:
  - The bill "is designed to make it difficult for them to live here so they will deport themselves"
  - "The intent of the bill is to slow illegal immigration in Alabama through attrition"
  - Representative "like[s] Hispanic people" but thinks they are overburdening Alabama's public schools and that the "biggest part of them are illegal."
  - "The purpose of this bill is . . . These Mexican[s] . . . . [Y]ou all are trying to get as many in here out and trying to stop as many coming in [as you can]."

National Origin and Immigration

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- HB 56 that made it unlawful to enter into a "business transaction" with the state
- Made registration of mobile homes a crime

National Origin and Immigration

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- Court held that it was likely preempted and likely violated FHA
  - Statements made by legislators
  - History of discriminatory local immigration ordinances
  - Burden on school children

National Origin and Immigration

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- Other Examples of localities attempting to regulate immigration by limiting access to housing
  - *Lozano v. City of Hazleton* (M.D. Pa. 2007)
  - *Villas at Parkside Partners v. City of Farmers Branch* (5th Cir. 2010)
  - *Keller v. City of Fremont* (D. Neb. 2012)

Municipal Ordinances Banning Immigrants and Fair Housing

- Creates incentives for landlords to discriminate based on national origin in violation of the FHA
- Housing providers may avoid renting to persons who appear or sound foreign
- Private housing providers may be violating Section 1981
- May be evidence of discriminatory treatment under the FHA
- May have a disparate impact upon national origin in violation of the FHA