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Enforcement by Federal, State and Local Administrative Agencies and Legislative Changes to the Fair Housing Act

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Enforcement by Federal, State and Local Administrative Agencies

There are more than four million instances of housing discrimination each year according to the National Fair Housing Alliance.[1] Victims of these instances of housing discrimination have the option of enforcing their rights through federal, state and local administrative agencies or through private actions filed in federal and state courts. In 1988, the Fair Housing Act ("FHA") was amended to provide an administrative enforcement system that would handle complaints quickly and inexpensively and that would impose meaningful sanctions against violators of the FHA.[2]

Administrative enforcement of the FHA has failed to live up to its promise. Administrative complaints are not processed quickly and complaints often result in low monetary settlements or awards. Relatively few administrative complaints are filed with federal, state or local administrative agencies compared to the number of incidents of housing discrimination each year. In 2007, 2,449 fair housing complaints were filed with the United States Department of Housing & Urban Development ("HUD").[3] Under the FHA, HUD is required to refer cases for investigation and determination to state and local administrative agencies that have fair housing laws that are substantially equivalent to the FHA. In 2007, 7,705 fair housing complaints were filed with state and local governments through the Fair Housing Assistance Program ("FHAP").[4]

Once an administrative complaint is filed, a complainant faces an administrative process that is plagued by slow investigations and inconsistent determinations. Results obtained in particular cases appear to result as much from the particular regional HUD office or state or local administrative agency where the complaint was filed as from the merits of the case. Certain HUD Fair Housing & Equal Opportunity ("FHEO") regional offices such as the Chicago and San Francisco offices and particular state administrative agencies such as the California Department of Fair Employment and Housing conduct effective investigations and work cooperatively with fair housing organizations to enforce fair housing laws. Others, however, have difficulty investigating cases more complex than a basic refusal to rent case. HUD charged just 31 cases in fiscal year 2007.[5]

- Example: A series of 11 sales discrimination cases filed by the National Fair Housing Alliance illustrates both positive and negative aspects of

administrative enforcement of the FHA. On April 13, 2005, NFHA filed the first of several sales discrimination cases with HUD. In that case, an Atlanta area real estate sales person told a White tester that he was "not sure what you were over the phone" and later explained that he made two sets of listings, one in the case he was white and one in case he was Black. The tester observed the agent going through a stack of listings and taking out listings in Black neighborhoods. When the tester expressed an interest in a home in a Black neighborhood, the agent told the tester that he could show the tester the house but it is in a Black neighborhood so "it's out." The real estate agent told the tester that once Blacks move in, real estate values go down and it becomes impossible to sell your home. NFHA's complaint was referred to HUD's Office of Systemic Investigations which conducted a thorough but untimely investigation. The Office of Systemic Investigation took nearly three and half years to complete its investigation and charge the case.

Another sales discrimination case involved allegations of real estate steering in Detroit and its surrounding suburbs. In a series of five tests conducted by NFHA, African-American testers were shown homes primarily in the City of Detroit while white testers were shown homes primarily in white suburban areas outside Detroit. NFHA filed complaints with HUD and the Michigan Department of Civil Rights (MDCR). MDCR conducted an extensive investigation and issued a cause determination. The charge was issued relatively quickly but not within 100 days.

A third sales discrimination case involved allegations of steering by a Chicago area real estate company. NFHA's administrative complaint alleged that agents of the real estate company steered white testers to white areas in suburban Chicago and steered Latina testers to more heavily minority areas. A white real estate agent told a white tester to find out the minority population by going online before visiting the area to view homes. The agent told the tester, "I don't care if you're a bigot. If we go to an area and you don't like it, just let me know. I can't be a bigot but you can." NFHA filed its complaint with HUD's Chicago office, an office with a good reputation within the fair housing community for conducting effective investigations. HUD's Chicago office issued a cause determination. Nevertheless, the investigation took slightly more than three years to complete.

Meanwhile, other sales discrimination cases with similar evidence filed with other HUD regional offices languish within the system more than three years after the complaints were filed or were closed with a no reasonable cause determination.

Under the Fair Housing Act, once HUD makes a cause determination, a complainant or a respondent has the option of electing to have her case heard in federal

court with the Department of Justice or proceeding with an administrative hearing. The administrative hearing process has become an ineffective means of enforcing a complainant's fair housing rights. Most complainants or respondents elect to have their case heard in federal court. In 2007, the HUD Office of Administrative Law Judges ("ALJ") issued just two decisions and held just one administrative hearing.[6] In the past, HUD administrative law judges have demonstrated a lack of understanding of fair housing laws and a lack of empathy for victims of housing discrimination.

● Example: In Lavender v. Senior Nevada Benefits Group, an elderly African-American man alleged that he was discriminated against based on his race when he moved to Las Vegas and attempted to rent an apartment. Mr. Lavender moved to Las Vegas with high hopes for re-connecting with his son and grandchildren and starting off fresh in a new city. Immediately upon arriving in Las Vegas, he telephoned the owner of an apartment complex in Las Vegas and made an appointment to view a studio apartment. When he arrived at the apartment complex with a truck full of his belongings, he introduced himself to the manager and asked to see the available apartment. The manager refused to allow him to see the apartment even though the owner had just told him that an apartment was available. The manager did not make eye contact with Mr. Lavender and treated him in a rude manner. After being denied the apartment, Mr. Lavender had difficulty finding housing and was forced to live in a homeless shelter for two weeks.

Mr. Lavender filed an administrative complaint with HUD alleging that housing was made unavailable to him because of his race. HUD eventually found reasonable cause to believe that discrimination had occurred and an administrative hearing was convened. At the hearing, Mr. Lavender described the profound effect the denial of housing had upon him. He told the administrative law judge that the manager looked at him as if he were dirt. He explained that after the incident he questioned why God made him a black man. He said that the incident caused him to distrust white people for the first time in his life. He said that he feared he would be discriminated against again. A newly appointed HUD administrative law judge awarded the complainant only $200 in emotional distress damages. The ALJ reasoned that given the difficulties that the complainant faced in his life, an act of housing discrimination would not cause him significant emotional distress. To its credit, HUD aggressively pursued the case and eventually was able to obtain a re-hearing on damages because the HUD ALJ spoke publicly about the case while the case was still pending. A Department of Labor ALJ re-heard the case and awarded Mr. Lavender $1000 in emotional distress damages.

Monetary relief obtained in HUD enforcement proceedings appears to be lower than the monetary relief obtained in private lawsuits initiated with the assistance of private fair housing organizations. One study examined settlements and awards in HUD cases from 1989 to 2000 in cases brought by African-American and Hispanic home-seekers in cities that were tested during Housing Discrimination Study 2000.[7] The average HUD award or settlement was $813 for African American-White test sites and $695 for Hispanic-Anglo test sites.[8] By contrast, the average award or settlement in private lawsuits brought with the assistance of NFHA-affiliated private fair housing organizations was $105,542.[9]

HUD has not used Secretary-initiated complaints effectively to address systemic discrimination or to fill in the gaps when private litigation cannot be brought. In Fiscal Year 2007, HUD filed just 12 secretary-initiated complaints.[10] 9 of the 12 secretary-initiated complaints involved discrimination in rental housing.[11] Three cases involved more systemic issues such as insurance discrimination, discriminatory governmental policies and discrimination in membership in real estate professional organizations.[12]

Finally, HUD has failed to issue regulations or guidance consistent with the broad interpretation that courts have repeatedly held should be afforded the FHA. For example, HUD could have issued regulations clarifying that the continuing violations doctrine applies in design and construction cases until inaccessible features are remedied.

● Example: Ms. P. is a 66 year old woman with disabilities who moved into her condominium complex in 2000. Construction on the building had been completed several years earlier. For the first few years, Ms. P stayed inside her unit because of her disabilities. In 2002, Ms. P. started responding to a change in medication and she began to feel better. She obtained a scooter that allowed her to venture outside her apartment. With a scooter, Ms. F could do her own grocery shopping and volunteer at a local non-profit organization. Once she obtained the scooter, however, she discovered that her condominium complex was inaccessible. In particular, she had difficulty maneuvering her scooter through the front gate and opening the front door to her condominium building. Ms. P injured herself repeatedly when she tried to enter the condominium complex in her scooter. She then began using the automobile entrance to access her condominium complex. On one occasion, the automatic gate fell on her back while she was on her scooter attempting to enter the condominium complex. Thereafter, Ms. P had to rely on her 85 year old father to assist her in entering the condominium complex. Ms. P filed an administrative complaint with HUD within one year of the date on which she was injured when the automobile entrance gate fell on her back but several years after construction of the condominium complex had been completed. HUD eventually informed her that her administrative complaint was untimely because she did not file it within one year of the date the building was constructed.

HUD could have promulgated a regulation or guidance that interprets a design and construction violation as a continuing violation until remedied. HUD also could have filed a Secretary initiated complaint against the owners, designers or builders of Ms. F's condominium complex requiring them to make the condominium complex accessible. Secretary-initiated complaints arguably are not subject to the same time limitations as private administrative complaints.

Forty years ago, Congress passed the Fair Housing Act. The FHA states that it "is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Supreme Court has repeatedly recognized that Congress considered this policy "to be of the highest priority." *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972) (citation omitted). Studies have shown that effective enforcement reduces the incidence of discrimination in our nation's neighborhoods.[13] While HUD and state and local administrative agencies have many talented and committed staff, administrative enforcement of the FHA has become, with notable exceptions, largely ineffective.

Policy Recommendations – Administrative Enforcement:

- Funding should be provided to HUD or a newly established independent agency that allows the agency to investigate and make determinations on administrative complaints within 100 days.

- Funding should be provided to HUD or a newly established independent agency that allows both HUD and FHAP enforcement staff to be adequately trained in investigative techniques and substantive fair housing law.

- Administrative law judges with subject matter expertise in fair housing and with broad life experiences that includes some familiarity with discrimination should be appointed.

- The Assistant Secretary for Fair Housing or the head of a newly established independent agency should use Secretary-initiated complaints to address systemic discrimination in sales, insurance, land use and lending. An independent testing program should be established at HUD or a newly established independent agency, similar to the Department of Justice's testing program, to affirmatively test housing providers, real estate companies, insurance companies and lenders for compliance with the FHA. Secretary-initiated complaints should be filed against entities or individuals found to be in violation of the FHA through the testing program. Secretary-initiated complaints should be filed against builders and owners found not to be in compliance with the design and construction requirements, particularly in cases where a bona fide complainant's claims would be barred by the statute of limitations.

● HUD should issue regulations or guidance that broadly interpret the FHA. For example, HUD should issue regulations that clarify that claims under the FHA may be proven using the disparate impact method of proof and that the continuing violations doctrine applies in design and construction cases. HUD should finalize the sexual harassment regulations that have been pending since the end of the Clinton administration.

Legislative Changes

● The FHA should be amended to explicitly allow current homeowners and renters to challenge discriminatory housing practices that affect the continued occupancy of their homes. The Seventh Circuit Court of Appeals and the Fifth Circuit have issued decisions limiting coverage of the FHA to discrimination in the "acquisition" of housing. *Halprin v. The Prarie Single Family Homes of Dearborn Park Ass'n.*, 388 F.3d 32 (7th Cir. 2004); Cox v. City of Dallas, 430 F.3d 734 (5th Cir. 2005). These decisions represent a departure from decades of precedent holding that post-acquisition claims are covered under the FHA. *See*, e.g. *Neudecker v. Boisclair Corp*., 351 F.3d 361, 364-5 (8th Cir. 2003); *Harris v. Itzhaki*, 183 F.3d 1043, 1053 (9th Cir. 1999); Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1088-90 (10th Cir. 1993). They also conflict with the Supreme Court's mandate that the FHA be broadly interpreted and Congress' goal of providing for fair housing throughout the United States.

● The Communications Decency Act ("CDA") should be amended to exclude from its coverage notices, advertisements or statements with respect to the sale or rental of a dwelling.[14] The Seventh Circuit and the Ninth Circuit have issued decisions holding that websites are immune from liability under the CDA for publishing discriminatory advertisements or statements unless the website is responsible in whole or in part for the discriminatory content. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008); *Chicaco Lawyers Comm. For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). Advertisements on the internet routinely contain blatantly discriminatory statements such as "no minorities" or "Africans and Arabians tend to clash with me so that won't work out." There is no question that such advertisements if published in a newspaper would violate the FHA. With the shift away from newspaper classifieds and the rise of online advertisements in recent years, immunity under the CDA will erode critical protections against overt forms of housing discrimination that have routinely been held illegal in the context of newspaper advertising.

● The FHA should be amended to specifically provide that the disparate impact method of proof applies to the FHA. *See* e.g. Cal. Govt. Code § 12955.8. As housing discrimination has become increasingly subtle, the disparate impact method of proof has become an even more vital tool to redress discriminatory housing practices. Although every circuit court of appeals to address the issue has held that the disparate impact method of proof applies to FHA, the Supreme Court has not yet addressed the

issue. Housing providers, lenders and insurance companies continue to argue that disparate impact claims are not cognizable under the FHA.

● The FHA should be amended to provide that violations of the design and construction provisions of the FHA constitute continuing violations and the statute of limitations does not run until inaccessible features of an apartment or condominium complex are remedied.

● The obligation to affirmatively further fair housing should be made enforceable by private parties by amending the definition of "discriminatory housing practice" to include "a failure to comply with the obligations of § 3608(e)(5)."

● The FHA should be amended to specifically provide for waiver of federal and state sovereign immunity. This can be accomplished by amending § 3613(c)(1) to provide that "the United States and all states shall be liable for actual and punitive damages to the same extent as a private person." Under present law, federal and state governments and their departments and agencies arguably are immune from lawsuits under the FHA for damages but may be sued for injunctive relief and attorneys' fees. Federal and state governments own and operate housing and administer housing programs that are subject to the provisions of the FHA. Furthermore, federal agencies and departments have an affirmative responsibility to administer their housing programs in a manner that affirmatively furthers fair housing. 42 U.S.C. § 3608(e)(5). Amending the FHA to provide for a waiver of sovereign immunity would allow damages to be awarded against the federal government and state governments, providing a greater incentive for governmental agencies and departments to comply with the FHA.

● The FHA should be amended to provide that violations of § 3605 include a failure to make reasonable accommodations. Section 3605 of the FHA prohibits discrimination in real estate related transactions. 42 U.S.C. § 3605. Section 3605 has been broadly construed to prohibit discrimination in the making of loans, the selling, brokering or appraising of residential real estate, and the provision of insurance. Courts, however, have held that § 3605 does not contain a reasonable accommodation provision. *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 (8th Cir. 2003) (holding that a lender did not violate § 3605 when it failed to provide a sign language interpreter to a loan applicant with hearing impairments as a reasonable accommodation).

[1] National Fair Housing Alliance, 2008 Fair Housing Trends Report (2008).
[2] Robert Schwemm, Housing Discrimination Law and Litigation § 24:2 (2008)
[3] NFHA, supra note 1, at 47.
[4] *Id.*
[5] *Id.* at 52.
[6] United States Department of Housing & Urban Development, The State of Fair Housing – FY 2007 Annual Report on Fair Housing (2008).
[7] University of Connecticut, Fair Housing Enforcement and Changes in Discrimination between 1989 and 2000: An Exploratory Study (2005).
[8] *Id*. at 8.
[9] *Id.*
[10] HUD, supra note 6, at 35
[11] *Id*. at 35-38.
[12] *Id.*
[13] University of Connecticut, supra note 7.
[14] Steven Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act,* 102 Nw. U. L. Rev 1471 (2008).