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Private Enforcement and the Fair Housing Act

Robert G. Schwemm*

The first section of the Fair Housing Act¹ declares that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”² If the United States has been officially committed to providing for fair housing for the past 20 years, why is segregated housing still the prevailing norm throughout our nation? Why does discrimination still regularly occur when minority homeseekers venture into white areas? Why are the opportunities for living in stable, integrated neighborhoods only marginally better now than they were a generation ago in the days of Lyndon Johnson, Everett McKinley Dirksen, and Martin Luther King, Jr.? In short, why has the Fair Housing Act accomplished so little?

This conference is an attempt to address these important questions. Earlier panels discussed the roles of federal, state, and local governments in enforcing the Fair Housing Act. This panel will examine what private people and private organizations can do and why their roles are so crucial. In many ways, private efforts under the Act have been more successful than governmental enforcement. A recounting of the impressive isolated achievements of private persons and local fair housing organizations, however, must not lull us into a sense of complacency. The fundamental question remains: can a law that relies so heavily on private enforcement ever succeed in systematically attacking the widespread patterns of discrimination and segregation in America’s housing?

I. Methods of Enforcement

The Fair Housing Act is designed to rely primarily on private enforcement. The Act provides for three different methods of challenging discriminatory housing practices: (1) suits by the Attorney

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1. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982 & Supp. 1987).

2. *Id.* at § 3601.

General in “pattern or practice” and “general public importance” cases under section 813;³ (2) administrative complaints to the Department of Housing and Urban Development (HUD) filed by aggrieved persons pursuant to section 810, which may lead to proceedings in state or local “referral” agencies and, eventually, to federal court suits by the complainants;⁴ and (3) direct court actions brought by private plaintiffs under section 812.⁵ A fourth category of litigation generated by the Act—private suits against HUD for violating its affirmative fair housing duties under section 808⁶—is not explicitly authorized by the statute, but can be pursued under the Administrative Procedure Act.⁷

The power of the federal government to challenge discriminatory housing practices is limited. The Act authorizes the Attorney General to sue only when the defendant has engaged in a “pattern or practice” of discrimination, or when a group of persons has been discriminated against in a way that “raises an issue of general public importance.”⁸ These phrases limit the Justice Department to prosecuting cases that have “a measurable *public* impact.”⁹ According to the Supreme Court, the role of the Attorney General in enforcing fair housing is “minimal.”¹⁰ This characterization was made at a time in the early 1970s when the Justice Department had assigned some two dozen lawyers to the task and was strongly committed to enforcing the Fair Housing Act. During the Reagan Administration, the Justice Department has all but abandoned civil litigation under the Act. Last year, the Attorney General filed 17 suits under section 813, the most for any year in this administration, and the Justice Department won two cases at the trial court level.¹¹ These are nationwide statistics. “Minimal” has become a generous word for the role of section 813 suits in fair housing enforcement in the 1980s.

3. *Id.* at § 3613.

4. *Id.* at § 3610.

5. *Id.* at § 3612.

6. *Id.* at § 3608.

7. *E.g.*, NAACP, Boston Chapter v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987). See generally Schwemm, Housing Discrimination Law 212-26 (1983); Schwemm, Housing Discrimination Law 57-64 (Supp. 1986).

8. 42 U.S.C. § 3613.

9. *United States v. Hunter*, 459 F.2d 205, 217 (4th Cir.), cert. denied, 409 U.S. 934 (1972); see generally Schwemm, *supra* note 7, at 281-86 (1983).

10. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).

11. DOJ Civil Rights Division Sum up FY '87, Fair Hous.-Fair Lending Rep. (P-H) ¶ 9.6 (Mar. 1, 1988). The two trial victories were both in unusual cases: one challenged the use of pro-integration quotas at Starrett City, a large apartment complex in a racially-mixed area of Brooklyn, New York, and the other involved a northern Michigan town accused of providing discriminatory municipal services to American Indians.

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By way of contrast, the number of section 810 complaints received by HUD has grown in recent years. In 1979, over 2,800 administrative complaints were filed.¹² This figure has increased by 60% in the past eight years.¹³ HUD refers many of these complaints to the 36 states and 72 localities whose fair housing laws are “substantially equivalent” to Title VIII¹⁴ and processes the rest. Under section 810, HUD has 30 days to investigate a complaint, after which it may attempt to resolve the dispute, but only by using “informal methods of conference, conciliation, and persuasion.”¹⁵

This limitation is significant. It was inserted into section 810 as a result of the famous “Dirksen Compromise.”¹⁶ In the original version of the bill proposed by Senator Mondale, HUD could issue “cease and desist” and other affirmative orders. Senator Dirksen’s support, which was needed to pass the bill, was gained in exchange for abandoning these powers and replacing them with merely “conference, conciliation, and persuasion” powers. The Dirksen Compromise has resulted in an agency procedure that provides for absolutely no sanctions against a recalcitrant defendant. In its first review of this statute, the Supreme Court concluded that “HUD has no power of enforcement.”¹⁷

Nevertheless, thousands of persons aggrieved by discriminatory housing practices bring their complaints to HUD every year. Their reasons for using section 810 cannot be the option of ending up in a state or local agency or, if all else fails, in federal court, because these options are available directly, without the need for a prior section 810 complaint. From a litigator’s point of view, the advantages of a section 810 proceeding are hard to fathom.¹⁸ However, most people are not litigators. They may not know what their most effective legal options are. They may fear the expense and hassle of consulting a lawyer and prosecuting a lawsuit. In comparison, filing a

12. U.S. Department of Housing and Urban Development, 1979 Statistical Yearbook, at 43.

13. Wall Street Journal, Feb. 26, 1988, at 8.

14. 42 U.S.C. § 3610(c). For a list of those states and localities whose fair housing laws have been determined by HUD to be substantially equivalent to Title VIII, see 52 Fed. Reg. 15304.

15. 42 U.S.C. § 3610(a).

16. The legislative maneuvering that led to the enactment of the Fair Housing Act is described in Dubofsky, Fair Housing: A Legislative History and a Perspective, 8 Washburn L.J. 149 (1969).

17. *Trafficante*, 409 U.S. at 210.

18. “Given the advantages to the claimant of proceeding under § 812, it is hard to imagine why anyone would *voluntarily* proceed under § 810 if both routes were equally available.” Gladstone, *Realtors v. Village of Bellwood*, 441 U.S. 91, 125 (1979) (Rehnquist, J., dissenting).

complaint with HUD appears simple and easy. Whatever the reason, the statistics on section 810 complaints present a sad irony—the weakest of the Fair Housing Act's three enforcement methods is the one most often used.

The third enforcement method authorized by the Act is a court action under section 812. This provision is independent of section 810. A victim of discrimination may proceed directly to court without first filing a HUD complaint or otherwise pursuing his administrative remedies.¹⁹ A section 812 suit may be brought in federal or state court, and the court may award equitable relief, actual damages, punitive damages up to \$1,000, and costs and attorney's fees if the plaintiff is financially unable to assume them.²⁰ The availability of these remedies makes section 812 actions a much more effective enforcement technique than section 810 proceedings.

Thus, by design, enforcement of the Fair Housing Act is primarily dependent on private litigation. The Supreme Court has agreed, concluding that "complaints by private persons are the primary method of obtaining compliance with the Act."²¹ The experience of the past 20 years has confirmed this view. The vast majority of reported cases dealing with the Fair Housing Act have been brought by private plaintiffs, not by the federal government. Indeed, all of the Title VIII cases decided by the Supreme Court have involved private plaintiffs.²²

This means that privately-initiated litigation has been responsible for most of the major decisions concerning the meaning of the Fair Housing Act. In general, these decisions have given a generous interpretation to the statute, and private litigants deserve much of the credit for creating this strong body of precedent. For example, privately-initiated cases have established (1) that the "otherwise make unavailable" provision of section 3604(a) prohibits steering,²³ exclusionary zoning,²⁴ redlining,²⁵ and a variety of other discrimina-

19. *E.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 394, 394 n.3 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983); *Royster v. Martin*, 562 F. Supp. 623, 624 (S.D. Ohio 1983); *Oliver v. Foster*, 524 F. Supp. 927, 929 (S.D. Tex. 1981). *See also Gladstone*, 441 U.S. at 104-06.

20. 42 U.S.C. § 3612(a), (c).

21. *Trafficante*, 409 U.S. at 209.

22. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone*, 441 U.S. at 91; *Curtis v. Loether*, 415 U.S. 189 (1974); *Trafficante*, 409 U.S. at 209.

23. *E.g.*, *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139-41 (6th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd mem.*, 547 F.2d 1168 (6th Cir. 1977).

24. *E.g.*, *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 145-50 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Housing Development Corp. v. Village of Ar-*

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tory practices;²⁶ (2) that housing display advertisements featuring only white models can violate the ban on discriminatory advertising in section 3604(c);²⁷ (3) that homeowners and real estate firms are liable for the discriminatory acts of their agents and employees;²⁸ (4) that proof of discriminatory effect, as well as discriminatory purpose, can violate the Act;²⁹ (5) that a defendant is liable if a prohibited motivation was simply a contributing factor, and not the entire reason, for his behavior;³⁰ (6) that substantial damages for humiliation and other intangible injuries can be inferred from the mere fact of being discriminated against;³¹ and (7) that broad remedial orders may be appropriate in private actions as well as in "pattern or practice" suits brought by the Justice Department.³² In helping to establish these precedents, private litigants have acted "not only on their own behalf but also as private attorneys general."³³

II. Limitations of Private Enforcement

There are some serious drawbacks to the concept of relying on private litigants for enforcement of the Fair Housing Act. Part of the problem is that victims of housing discrimination often do not

lington Heights, 558 F.2d 1283, 1287-94 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

25. *E.g.*, Harrison v. Otto G. Heinzeroth Mtg. Co., 430 F. Supp. 893, 896 (N.D. Ohio 1977); Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489, 492-93 (S.D. Ohio 1976).

26. *E.g.*, Betsey v. Turtle Creek Associates, 736 F.2d 983 (4th Cir. 1984) (discriminatory evictions); McDiarmid v. Economy Fire & Casualty Co., 604 F. Supp. 105 (S.D. Ohio 1984) (insurance redlining).

27. Saunders v. General Services Corp., 659 F. Supp. 1042, 1057-59 (E.D. Va. 1987); *but see* Spann v. Colonial Village, Inc., 662 F. Supp. 541, 543-47 (D.D.C. 1987).

28. *E.g.*, Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 352 (W.D. Tenn. 1982); Marr v. Rife, 503 F.2d 735, 740-42 (6th Cir. 1974); Bradley v. John M. Brabham Agency, Inc., 463 F. Supp. 27, 31-32 (D.S.C. 1978).

29. *E.g.*, Betsey, 736 F.2d at 986-88; Rizzo, 564 F.2d at 146-48; *Village of Arlington Heights*, 558 F.2d at 1287-90.

The Justice Department, which had been an effective advocate of the effect theory in the 1970s (*e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)), has chosen to abandon this theory as a matter of policy during the Reagan Administration. *See* Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Enforcement*, 17 U.C.D. L. Rev. 445, 474 n.128, 486 n.193 (1984).

30. *E.g.*, Payne v. Bratcher, 582 F.2d 17, 18 (5th Cir. 1978); Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975).

31. *E.g.*, Marable v. Walker, 704 F.2d 1219, 1220-21 (11th Cir. 1983); Seaton v. Sky Realty Company, Inc., 491 F.2d 634, 636-38 (7th Cir. 1974). *See also* sources cited *infra* notes 34 & 37.

32. *E.g.*, Rogers v. 66-36 Yellowstone Boulevard Cooperative Owners, 599 F. Supp. 79, 81-87 (S.D.N.Y. 1984); Davis v. Mansards, 597 F. Supp. 334, 348-49 (N.D. Ind. 1984); Marable, 704 F.2d at 1221.

33. *Trafficante*, 409 U.S. at 211.

even realize that they have been treated unfairly. A homeseeker may have no reason to question the apartment manager who tells him that no units are available or the realtor who shows him homes only in neighborhoods where his own race predominates. In this regard, housing is different from employment, for example, where someone who has been fired or who has lost a promotion to a less qualified applicant will have no difficulty recognizing that something bad has happened to him.

Even if a victim of housing discrimination understands what has happened, he may not want to sue. As noted above, the prospect of hiring a lawyer and filing a lawsuit is not appealing to many people, and this problem is especially acute in the housing field. The very fact that an individual or a family is in the market for new housing often means that their lives are in a state of flux that makes pausing to file a federal lawsuit a practical impossibility. By contrast, a victim of employment discrimination usually is able to contemplate his legal options in circumstances that are less disruptive.

The nature of litigation is also more difficult in the housing field. Statistical evidence of the kind that may help prove an employment discrimination claim is rarely significant in the typical housing case, because housing suppliers are usually small, local entities that do not control large numbers of units. The key to success in most housing cases is the proof supplied by "testers," who are sent to try to deal with the defendant shortly after the plaintiff has been discriminated against. Persuasive tests require fast action, careful planning, trained personnel, and organization—resources that a homeseeker who has just been discriminated against may not have.

Even if a discriminatory practice can be proved, the rewards are usually small. Unlike employment discrimination cases, the out-of-pocket damages in most housing cases are *de minimus*. Awards for humiliation and other intangible injuries are available, but have rarely exceeded \$20,000.³⁴ Punitive damages under the Fair Housing Act are limited to \$1,000,³⁵ a provision that serves to protect the most egregious violators from feeling the full force of an appropri-

34. See, e.g., *Douglas v. Metro Rental Services, Inc.*, 827 F.2d 252, 256-57 (7th Cir. 1987) (reducing compensatory damage award for each plaintiff's mental and emotional distress from \$10,000 to \$2,500); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190-91 (7th Cir. 1982) (reducing compensatory damage award for each plaintiff's mental and emotional distress from \$25,000 to \$10,000); see generally Schwemm, *Compensatory Damages in Fair Housing Cases*, 16 Harv. C.R.-C.L. L. Rev. 83 (1981).

35. 42 U.S.C. § 3612(c).

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ate judgment.³⁶ Because housing markets are local by nature, defendants are usually small or modest-sized firms that generally make for less lucrative targets than the defendants sued in employment cases. In the housing discrimination field, class actions are rare, and large verdicts are virtually nonexistent.³⁷

The result is that relatively few fair housing cases are filed. The total number of reported federal court decisions involving housing discrimination is now about 400. Over a twenty-year period, that works out to about twenty reported cases per year, or less than two each month. The number of reported employment discrimination decisions runs five to ten times that amount.

III. Two Sources of Encouragement for Private Litigation

The situation would be even worse but for two significant developments that have encouraged private fair housing litigation over the past twenty years. The first is the growth of local, private fair housing organizations that provide the necessary resources, particularly counseling, testing, and legal services, to enable victims of housing discrimination to assert their rights in court. These organizations have become absolutely essential to the effective enforcement of the Fair Housing Act.

One measure of the importance of these local organizations is the uneven distribution of housing discrimination cases throughout the country. Cities that have private fair housing organizations generate a much higher incidence of reported cases. For example, Chicago has produced a disproportionate number of important fair housing decisions, because that city's Leadership Council for Metropolitan Open Communities has provided free legal services to victims of housing discrimination since Title VIII was enacted. The same is

36. Defendants whose Fair Housing Act violations also are covered by the Civil Rights Act of 1866 (42 U.S.C. § 1982) may be assessed punitive damages that are not limited by Title VIII's \$1,000 cap. *E.g.*, *Phillips*, 685 F.2d at 191; *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 110-11 (3d Cir. 1981). However, some courts have held that the \$1,000 limit in Title VIII may be considered as a guide for an appropriate award even in these cases, thereby serving to dampen a full punitive award for section 1982 claims as well. *E.g.*, *Fountila v. Carter*, 571 F.2d 487, 491-95 (9th Cir. 1978).

37. There are some noteworthy exceptions to this general rule. *E.g.*, *Grayson v. Rotundi & Sons Realty Co.*, (E.D.N.Y. 1984) *Fair Hous.-Fair Lending Rep.* (P-H) ¶ 15,516 (Sept. 23, 1985) (upholding jury verdict of \$65,000 in compensatory damages and \$500,000 in punitive damages for two plaintiffs); *Phillips*, 685 F.2d at 191 (out-of-pocket damages of \$2,675, emotional distress damages of \$10,000 to each of two plaintiffs, and punitive damages of \$100,000 against each of two defendants); *Pollitt v. Bramel*, 669 F. Supp. 172, 176-77 (S.D. Ohio 1987) (compensatory damages of \$25,000 and punitive damages of \$25,000).

true in Cleveland, Cincinnati, Richmond, and other cities that have active fair housing organizations. In recent years, the Washington, D.C., area has become a major source of fair housing cases primarily because of the efforts of the Washington Lawyers' Committee for Civil Rights under Law.

The other significant development is the Supreme Court's willingness to define standing to sue under the Fair Housing Act as broadly "as is permitted by Article III of the Constitution."³⁸ In three of its four Title VIII decisions,³⁹ the Court has addressed standing questions and, in all three, has made clear that proper plaintiffs under the Act include not only direct victims of housing discrimination, but virtually anyone who is injured in any way by conduct that violates the statute. These decisions have expanded the list of potential "private attorneys general" under the Act to include: residents of an apartment complex or community whose racial make-up has been affected by the defendant's discrimination against outsiders;⁴⁰ municipalities whose housing stock is being marketed by realtors in a discriminatory way;⁴¹ fair housing organizations whose mission is being frustrated by the defendant's discrimination;⁴² and housing testers who are given false information because of their race.⁴³ The significance of these decisions is that the private enforcement scheme on which the Fair Housing Act relies is no longer solely dependent on actual homeseekers who are the targets of discrimination. As explained above, these direct victims may not always be able or willing to sue. The standing decisions mean that the burden of enforcing the Act can be shared by indirect victims of discrimination, including private fair housing organizations whose knowledge and resources allow them to be more effective adversaries of would-be discriminators.

In its first Fair Housing Act case, the Supreme Court wrote that the policy of the Act—to provide for fair housing throughout the United States—was one "that Congress considered to be of the highest priority."⁴⁴ The Court also noted the "enormity" of this

38. *Trafficante*, 409 U.S. at 209 (citations omitted); see also *Havens Realty*, 455 U.S. at 372.

39. See *Gladstone*, 441 U.S. at 109; sources cited *supra* note 38.

40. *Gladstone*, 441 U.S. at 111-15; *Trafficante*, 409 U.S. 205. See also *Havens Realty*, 455 U.S. at 375-378.

41. *Gladstone*, 441 U.S. at 109-11.

42. *Havens Realty*, 455 U.S. at 378-79.

43. 455 U.S. at 373-75.

44. *Trafficante*, 409 U.S. at 211.

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task.⁴⁵ Surely there can be no dispute about the latter point. The nation's housing was heavily segregated in 1968, and racial discrimination was a widespread and accepted practice in the real estate industry. Housing was then and still is the last great frontier of civil rights and the area most resistant to legal change. Against this background, the Congress of 1968 chose an enforcement scheme that relies almost exclusively on private complainants. The Supreme Court's standing decisions have correctly interpreted the Congressional intent to be that a wide range of private complainants are entitled to sue under the Act. Congress could not have been so cynical as to put the burden of accomplishing this enormous task of the highest national priority entirely on the shoulders of the individual victims of discrimination.

The recognition that fair housing organizations and testers may sue on their own behalf has led not only to more litigation, but also to more effective non-litigation strategies and more voluntary compliance with the Act. Housing suppliers simply behave differently if they are operating in an area with an active fair housing organization that is engaged in extensive testing and general compliance monitoring. In addition, local organizations can make a vital contribution to the public's understanding of and support for the concept of fair housing; in the long run, this may be more important than litigation in eradicating housing discrimination. As important as these non-litigation strategies are, however, they generally require at least the threat of effective litigation to back them up. Therefore, the key to effective fair housing enforcement in a given area has usually been the existence of a vigorous private organization that can support litigation. Some localities in the United States are blessed with such organizations; others are not.

IV. Some Concluding Observations

Ultimately, in light of the limited changes in the nation's housing patterns over the past 20 years, one has to ask whether the Fair Housing Act can ever generate a systematic and effective attack on housing discrimination in this country. Experience suggests that the answer is "No." The strange enforcement scheme of the Act severely limits the role of even a committed federal government. Individual victims of discrimination are given some legal tools to challenge isolated instances of discrimination, but the tools are

45. 409 U.S. at 211.

blunted, the victims too often lack the will and resources to carry out the fight, and individual litigation victories rarely can address large-scale patterns and practices of discrimination. Local fair housing organizations can play a helpful role, but, aside from the legal precedents their cases establish, their influence is generally limited to particular geographic areas, leaving large parts of the country with no effective enforcement program. The result is that widespread housing discrimination continues, now victimizing a whole new generation of homeseekers who were mere children when Title VIII was enacted 20 years ago.

If the Congress made a promise in 1968 that the Fair Housing Act cannot keep, then Congress must now remedy the situation. Currently, both the House and the Senate are considering amendments to the Act that would strengthen its enforcement mechanisms by providing for a more effective federal agency procedure, eliminating the \$1,000 cap on punitive damages, and implementing other needed changes.⁴⁶ Passage of the Fair Housing Amendments Act is essential. Coupled with the Supreme Court's generous standing decisions and a new administration likely to be more sympathetic to civil rights values, a revitalized Fair Housing Act could go a long way toward building an effective challenge to housing discrimination in this country. Then, and only then, will our people have a real opportunity to decide whether they want to live in a truly integrated society.

46. S. 558, 100th Cong., 1st Sess. (1987); H.R. 1158, 100th Cong., 1st Sess. (1987).