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ARTICLES

FAIR HOUSING IN THE 1990's: AN OVERVIEW OF RECENT DEVELOPMENTS AND PROGNOSIS OF THEIR IMPACT

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I. INTRODUCTION

On Sunday, March 12, 1989, the Fair Housing Amendments Act of 1988 became the law of the land.¹ The new law and the extensive Fair Housing Act Regulations, promulgated January 23, 1989,² are expected to dramatically change the law of fair housing.³ The most apparent and important additions to the Act include provisions for enforcement by the Department of Housing and Urban Development ("HUD") through an administrative procedure of investigation, conciliation, discovery and a hearing before a HUD Administrative Law Judge ("ALJ")⁴ and coverage of discrimination against

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1. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (to be codified at 42 U.S.C. §§ 3601 - 3619) [hereinafter 1988 Act]. This Act amends the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 - 3619 (1982).

2. Implementation of the Fair Housing Amendments Act of 1988. §§ 14.115, 100.1 - 100.400, 103.1 - 103.515, 104.10 - 104.955, 106.1 - 106.2, 109.5 - 109.30, 110.1 - 110.25, 115.1 - 115.11, 121.1 - 121.1, 54 Fed. Reg. 3231-3317 (1989) (including introductory material) (to be codified at 24 C.F.R.) [hereinafter Fair Housing Regulations].

3. 134 CONG. REC. H4603 (daily ed. June 22, 1988) (statement of Rep. Rodino) ("the Fair Housing Amendments Act of 1988, one of the most important civil rights proposals presented this year, would mark a turning point in our nation's commitment to nondiscrimination in housing.").

4. 1988 Act, *supra* note 1, §§ 810, 812, at 1625-28, 1629-33 (outlines rules for

handicapped persons⁵ and familial (families with children 18 years of age and younger) discrimination.⁶

These significant changes, as important as they may be, are only part of the overall revamping of the statute that will reshape thinking with respect to all kinds of discrimination in this nation's housing market.⁷ In addition to the expanded coverage and lengthened statute of limitations, (for HUD complaints, one year), provisions also give new and additional powers and duties to the Justice Department,⁸ including the ability to obtain emergency relief when directed to do so by HUD,⁹ and authority to seek damages for individuals who have been injured by discrimination in housing.¹⁰

The rule set forth in *Trafficante v. Metropolitan Life Ins. Co.*,¹¹ that "complaints brought by private persons are the primary method of obtaining compliance with the Act," is maintained and somewhat enhanced by the lifting of the limit on punitive damages¹² and the extension of the statute of limitation to two years.¹³ The private attorney's role is expanded at various stages in the enforcement process¹⁴ to include not only the private suit¹⁵ but also intervention in administrative law judge proceedings¹⁶ and certain ac-

administrative proceedings).

5. *Id.*, § 804(f), at 1620-22. See also Fair Housing Regulations, *supra* note 2, § 100.200 - 100.205, at 3287-90.

6. 1988 Act, *supra* note 1, § 804(a)-(e), at 1622. See also, Fair Housing Regulations, *supra* note 2, § 100.300 - 100.304, at 3290-92 (housing for older persons exemption).

7. The housing market includes vacant land investment and sale, financing, development, marketing, building, listing, selling, mortgaging, insuring and any other conceivable service or facility that goes into providing affordable housing.

8. The Justice Department is given several additional responsibilities under the new Act. See 1988 Act, *supra* note 1, § 810(e)(2), at 1626-27 (license revocation); Fair Housing Regulations, *supra* note 2, § 103.500, at 3298 (same); 1988 Act, *supra* note 1, § 810(g)(2)(C), at 1628 (overall responsibility for zoning matters by direct referral from HUD); *id.* § 812(o), at 1632-33 (commencing of civil actions on behalf of individual complainants, and duties to consult with HUD regarding such legal action); *id.* § 814(e), at 1635 (power to intervene in civil cases).

9. *Id.*, § 813(a)1(A), at 1633 (injunction by Justice Department).

10. *Id.*, § 812(o), 814(d)1(B), at 1632-35. These sections replace prior court decisions that had precluded the Justice Department from pursuing damages for individual victims of discrimination. See, e.g., *United States v. Long*, 537 F.2d 1151, 1155 (4th Cir. 1975), *cert. denied* 429 U.S. 871 (1976) ("in a suit brought by the Attorney General . . . general monetary damages may not be awarded to the individual victims of discrimination.").

11. 409 U.S. 205, 209 (1972).

12. 1988 Act, *supra* note 1, § 813(c)(1), at 1633.

13. *Id.* § 813(a)1(A), at 1633.

14. See, e.g., *id.*, § 813(c)(1), at 1633-34 (attorney can obtain a temporary restraining order or preliminary injunction to hold the unit during administrative proceedings).

15. *Id.*, § 813, at 1633-34.

16. *Id.*, § 812(c), at 1629; Fair Housing Regulations, *supra* note 2, § 104.30, at 3301 (private parties may intervene in administrative proceedings).

tions commenced by the attorney general as well.¹⁷ The framework of the Act¹⁸ is maintained with the 1988 amendments and expands upon the 1968 act. There were two alternate and separate avenues to a remedy under the 1968 Act. Now there are three. Although the three remedies interlock in some respects, and there is crossover through intervention and election of forum and remedy, Sections 810,¹⁹ 812,²⁰ 813²¹ and 814²² remain separate and alternate remedies. The extensive regulations dealing with procedure²³ appear unnecessarily complicated at first blush. This is not the case, however.²⁴ Except for some overlap in definitions, the sections of the regulations can be easily reconciled in the application to specific problems.

Despite these many improvements, passage of the Act did not come without opposition. The question of whether an ALJ system could exist where damages could be awarded, but where an opportunity for trial by jury is not afforded, posed some difficulty. The accepted answer among most commentators was that it could not. Various proponents of change, therefore, sought to create a method of meeting the need for ALJ enforcement while at the same time meeting constitutional requirements. A unique procedural set-up, reached by compromise among various advocates, made passage of the Act possible.²⁵ The result was the creation of an election whereby a complainant or respondent can, under Section 812(a),²⁶ elect to go to court and have a jury.²⁷

Additionally, although some may have believed that certain aspects of the existing law, specifically attacked as oppressive to the real estate industry, were meant to be changed by the Act,²⁸ Con-

17. 1988 Act, *supra* note 1, § 814(e), at 1635 (private parties may intervene in suit by Justice Department).

18. The Act is really composed of two or three separate and distinct statutes providing alternate remedies. *Brown v. LoDuca*, 307 F.Supp. 102, 104 (E.D. Wis. 1969).

19. 1988 Act, *supra* note 1, § 810, at 1625-28.

20. *Id.* § 812, at 1629-33.

21. *Id.* § 813, at 1623-34.

22. *Id.* § 814, at 1634.

23. Fair Housing Regulations, *supra* note 2, at 3292-3308 (Parts 103 and 104).

24. Part 100 designates what is unlawful. *Id.* at 3283-92 ("Discriminatory Conduct Under the Fair Housing Act"). Part 103 covers Department of Housing and Urban Development (HUD) procedures. *Id.* at 3292-98. Part 104 pertains to administrative hearings. *Id.* at 3298-3308. Parts 106, 109, 110, 115 and 121 deal with other specific matters and are self-explanatory. *Id.* at 3308-3317.

25. A. Heifetz (Chief ALJ for HUD) and R. Butters (General Counsel, National Association of Realtors), remarks at the Fair Housing-Fair Lending Legal Seminar for Attorneys and Officials of Lending Institutions (January 25-26, 1989) (available in the John Marshall Law School library) [hereinafter *The John Marshall Seminar*].

26. 1988 Act, *supra* note 1, § 812(a), at 1629.

27. The Attorney General shall commence and maintain these civil actions. *Id.* § 812(o), at 1632-33.

28. President Reagan made the following remarks upon signing P.L. 100-430 on September 13, 1988:

gress had no such intent.²⁹ The Regulations clearly state, for example, that HUD does not interpret the statute or the Regulations to make any change in the law with respect to intent.³⁰ Rather, the statute and the Regulations are neutral in this regard.³¹

A unique element of the 1988 amendments is the mandated requirement for HUD to promulgate regulations explaining and effectuating the act within 180 days.³² HUD, in the some 20 years of enforcement efforts under the 1968 Act, had sporadically sought to issue regulations with only limited success. Apparently, Congress did not want a repeat of that experience. As a result, extensive proposed regulations were published on Monday, November 7, 1988.³³

In response to the extensive draft regulations, HUD received some 6,500 comments,³⁴ approximately 4,000 of which expressed concern about the regulations dealing with familial discrimination.³⁵ The explanatory material accompanying the final regulations³⁶ make clear the fact that the regulations are not meant to resolve disputes with respect to existing case law.³⁷ For example, the regulations do

I want to emphasize that this bill does not represent any congressional executive branch endorsement of the nation, expressed in some judicial opinions, that Title VIII violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. Title VIII speaks only to intentional discrimination.

Remarks on signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1140 (Sept. 13, 1988).

29. Senator Edward Kennedy made the following remarks the next day: Unfortunately, President Reagan used that historic occasion (signing of the bill) to announce an interpretation of the Act that is flatly inconsistent with Congress's understanding of the law. The President suggested that the act should read as requiring proof of discriminatory intent in order to establish a violation of the fair housing laws . . . As the principal Senate sponsor of the 1988 Act, I can state unequivocally that Congress contemplated no such intent requirement.

134 CONG. REC. S12449 (daily ed. Sept. 14, 1988) (statement of Senator Kennedy).

30. For a discussion of the current law with respect to the appropriate evidentiary standard, see J. KUSHNER, FAIR HOUSING §§ 3.01-3.15 (1984); R. SCHWEMM, HOUSING DISCRIMINATION LAW 403-16 (1983); Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAWYER 199 (1978). Note, *Housing Discrimination - The Appropriate Evidentiary Standard For Title VIII of the Civil Rights Act of 1968 - Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977) cert. denied, 435 U.S. 908 (1978), 51 Temp. L.Q. 929 (1978).

31. Fair Housing Regulations, *supra* note 2, at 3232-35 (introduction to regulations with explanatory material).

32. 1988 Act, *supra* note 1, at 1636.

33. Implementation of the Fair Housing Amendments Act; Proposed Rules, 53 Fed. Reg. 44992 (1988).

34. H. Carey (Attorney in the HUD General Counsel's office) remarks at the Fort Lauderdale Conference of Warren Gorham & Lamont and The Institute for Professional and Executive Development (February 5 and 6, 1989) [hereinafter Florida Conference].

35. C. Fisher, remarks at the Florida Conference, *supra* note 34.

36. Fair Housing Regulations, *supra* note 2, at 3232.

37. *Id.* at 3235.

not change the case law with respect to proof of impact or effect,³⁸ or the rules relating to vicarious liability.³⁹ Additionally, the issue which is sometimes called "integration maintenance" has been left to further hearings and subsequent Congressional action.⁴⁰

II. OVERVIEW

This article briefly reviews certain pertinent parts of the history of the fair housing statutes and decisions⁴¹ that shaped the law and led to passage of the 1988 Act, with a discussion of the role of special interest groups, including the real estate industry, action groups and governmental agencies.⁴² The coverage, procedure and available remedies⁴³ are discussed in some detail. Problems that have surfaced and obvious areas of disagreement with respect to the meaning of the Act are suggested. Finally, a prognosis of possible short and long term impact is given.

III. HISTORICAL CONTEXT

The roots of housing discrimination date to the establishment of the permanent Jamestown Colony where, in 1627, differences in the treatment of white and black indentured servants developed.⁴⁴ The culture and economy of the new country required large amounts of cheap labor⁴⁵ and the exodus of persons from the old world was not sufficient to supply needed laborers, particularly in the south where large plantations predominated.⁴⁶ The European settlers found people of African descent to be an easy mark for slavery because of color, non-Christianity and numerosity. Of course, early laws then evolved to permit such a practice.

38. *Id.* ("these regulations are not designed to resolve the question of whether intent is or is not required to show a violation. . .").

39. *Id.* at 3236.

40. 134 CONG. REC. H4903 (daily ed. June 29, 1988) (statement of Rep. Edwards).

41. Fair housing laws include the Civil Rights Laws, 42 U.S.C. §§ 1981, 1982 (1982), The Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1982), and Fair Lending Laws, 15 U.S.C. § 1691(a) (1982).

42. In addition to fair housing and real estate industry groups, the Justice Department, HUD, the HUD General Counsel, and the HUD Fair Housing and Equal Opportunity Department, took strong positions on who should be responsible for certain tasks such as issuing the charge, prosecution, and decision making with respect to prosecution. See, Fair Housing Regulations, *supra* note 2, at 3234.

43. See *infra* notes 128 - 161 and accompanying text (coverage), 168 - 186 and accompanying text (procedure) and 191-192 and accompanying text (remedies) for a discussion of these topics.

44. L. BENNETT, BEFORE THE MAYFLOWER, A HISTORY OF BLACK AMERICA, 35-39 (Penguin, 1984).

45. *Id.*

46. *Id.*

Later, The Preamble to the United States Constitution, stating the peoples' desire "to form a more perfect union" proved to be an empty promise to African Americans who were counted only as 3/5ths of a person, subject to extradition if they escaped slavery.⁴⁷ Moreover, the slave syndrome could be and was enforced because the slave trade was not curtailed. Though blacks played a large role in the American Revolution,⁴⁸ the promise of freedom did not extend to African Americans.⁴⁹

Courts have also been unreceptive to the rights of African Americans until, arguably, very recently. In *Dred Scott v. Sanford*,⁵⁰ the Supreme Court stated that a black man had "no rights which the white man was bound to respect. . . ." Abolitionists cried out for an end to the practice of slavery, and the decline of the economics of the slave based economy eroded the system to some extent.⁵¹ With the Civil War came Lincoln's emancipation proclamation⁵² and the 13th Amendment.⁵³ Practices did not die easily,⁵⁴ however, and the fourteenth amendment and⁵⁵ and the Civil Rights Acts⁵⁶ were passed to aid in the elimination of the badges and incidents of slavery.

There followed a period of neglect, with little development in housing law⁵⁷ and little attention to housing rights as such.⁵⁸ The cases that did surface show the nature of the problem,⁵⁹ and the similarities in several areas.⁶⁰ There were counterproductive forces⁶¹ both in the private sector⁶² and in government. The Federal Housing Administration ("FHA") manual, for instance, instructed the FHA staff and appraisers to take into account the racial makeup of

47. U.S. CONST., preamble.

48. 16 ENCYCLOPEDIA BRITANNICA, *Negro, American*, 188-201 (1967).

49. L. BENNETT, *supra* note 44, at 226.

50. 60 U.S. (19 How.) 393, 407 (1856).

51. L. BENNETT, *supra* note 44, at 160.

52. P. FINDLEY, A. LINCOLN: THE CRUCIBLE OF CONGRESS, 252-56 (1979).

53. U.S. CONST., amend. XIII.

54. See, e.g., M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS 12-17 (discusses the Mississippi Black Codes).

55. U.S. CONST., amend. XIV.

56. 42 U.S.C. §§ 1981, 1983, 1985 (1982).

57. But see Slaughter House cases, 83 U.S. (16 Wall.) 36 (1872) (thirteenth amendment specifically designed to eliminate slavery).

58. See Civil Rights cases, 109 U.S. 3 (1883) (restrictive interpretation of the Civil Rights Act and the thirteenth and fourteenth amendments as they related to public accommodations).

59. Buchanan v. Warley, 245 U.S. 60 (1917) (fourteenth amendment forbids ordinance prohibiting blacks from occupying homes).

60. Harmon v. Tyler, 273 U.S. 668 (1927) (group home ordinance).

61. See generally, R. HELPER, RACIAL POLICIES & PRACTICES OF REAL ESTATE BROKERS (1969).

62. ADVISORY COMMITTEE TO THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FREEDOM OF CHOICE IN HOUSING (1972) (outlining the need for behavioral and attitudinal change).

a neighborhood.⁶³

The priorities that were making discrimination possible were under attack,⁶⁴ with some success,⁶⁵ but the issue was still one that gave leaders pause.⁶⁶ In fact, municipalities⁶⁷ and states⁶⁸ were ahead of the federal government in enacting housing laws. Except for a few forward looking members of Congress,⁶⁹ the leaders were fairly timid.

Then, in 1968, two events changed the course of fair housing. In the fateful month of April, 1968, shortly after *Jones v. Alfred H. Mayer*⁷⁰ was argued in the Supreme Court, Martin Luther King was assassinated. A flurry of activity followed and the 1968 Fair Housing Act became law on April 11, 1968.⁷¹ The second event happened two months later when the Supreme Court finally decided *Jones*,⁷² ruling that Section 1982 of the 1866 Civil Rights Act covers all housing discrimination, both public and private.⁷³ Then action began in earnest.⁷⁴

At the time of the passage of the Fair Housing Act in 1968, many areas of the country had active fair housing groups. Chicago, for example, had a strong fair housing organization called the Leadership Council for Metropolitan Open Communities, which had been formed as a result of the marches of Martin Luther King of the Southern Christian Leadership Conference and the Chicago Freedom Movement in 1966.⁷⁵ In other communities, such as Cleveland, Boston, Atlanta, St. Louis and the Bay area of California, strong, privately funded or partially privately funded groups with experienced leadership were acting as lobbyists, and served as a catalyst in promoting change in the housing patterns in these areas.⁷⁶

63. R. HELPER, *supra* note 61, at 202-03.

64. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

65. *Shelly v. Kramer*, 334 U.S. 1 (1948) (racially restrictive covenant).

66. President Kennedy issued an executive order on November 20, 1962, directing all federal agencies to end discrimination in federally owned property. EXEC. ORDER No. 11,063, 27 Fed. Reg. 11527 (1962).

67. See, e.g., CHICAGO, ILL. MUNICIPAL CODE §§ 198.7B-1 - 198.7B-13 (1984) (Chicago Fair Housing Ordinance was originally passed Sept. 11, 1963).

68. See, e.g., MASS. ANN. LAWS ch. 151B, §§ 1 - 10 (Law Co-op. 1976) (Act originally passed in 1946).

69. Senators Mondale and Javits played important roles in the passage of the original Fair Housing Act. For a general legislative history of the Act, see 1968 U.S. CODE CONG. & ADMIN. NEWS 1837.

70. 392 U.S. 409 (1968).

71. 42 U.S.C. §§ 3601 - 19 (1982).

72. *Jones*, 409 U.S. at 436.

73. *Id.*

74. See, CHICAGO URBAN LEAGUE, BLACK HOMEOWNERS IN TRANSITION AREAS (1981) (illustrates the process of racial change and the problems that still exist).

75. See *infra* notes 96-99 and accompanying text for a discussion of the role of these various fair housing groups.

76. See J. KUSHNER, *supra* note 30, § 10.02 (fair housing groups have enjoyed

These groups, along with such groups as the League of Women Voters, local NAACP chapters, Urban Leagues, and legal assistance organizations continued their agenda on behalf of those persons who were being denied housing because of race, color, religion, or national origin.⁷⁷ The Leadership Council For Metropolitan Open Communities, for example, developed a strong legal action program, providing testing and auditing and representation for persons complaining of discrimination in housing.⁷⁸ At the same time, agencies of the cities, such as Chicago, Illinois and its surrounding communities of Evanston, Park Forest, Park Forest South, Oak Park and others, and similar communities throughout the country, beefed up their ordinances and provided assistance through their corporation counsels in enforcing fair housing laws.⁷⁹

Organized real estate industry groups were in direct conflict with fair housing and legal action groups, cities, villages and states. Prior to the passage of the Fair Housing Act, apparently many individuals within the real estate industry were under the impression that there were no laws particularly precluding differences in treatment based on race, color, religion and national origin. Therefore, with *Jones*, and the passage of new laws, changes had to be made which the industry was slow to adopt.⁸⁰

The initial disputes arose when fair housing groups, supporting individuals seeking housing, filed lawsuits. These lawsuits were heavily resisted by individual brokers and salespersons, as well as by owners and managers of rental property.⁸¹ While opposition from the organized real estate industry has subsided to some degree,⁸² tension still exists. Real estate and financial institution spokespersons complain that they have been put in the middle, or made responsible for solving the ills of society.

In the beginning there also existed a considerable amount of divisiveness within federal departments and among the various state agencies. Differences of opinion with respect to priorities, coverage

considerable success in fighting housing discrimination); F.W. Caruso, Remarks at The John Marshall Seminar, *supra* note 25.

77. Fair Housing Regulations, *supra* note 2, at 3234.

78. See, Legal Times, August 19, 1985, at 6 - 7 (discusses the successes of the Leadership Council For Metropolitan Open Communities).

79. See J. KUSHNER, *supra* note 30, § 8.35 (discusses state and local laws).

80. The real estate industry consists of real estate brokers, licensed by the various states and sometimes by local government as well, builders, developers, the banking industry or financing industry, appraisers, insurance providers and any support groups, such as rehabbers. F.W. Caruso, Remarks at the John Marshall Seminar, *supra* note 25.

81. See *Blockman v. Sandalwood Apartments*, 613 F.2d 169 (7th Cir. 1980) (alleging interference with contract).

82. See NATIONAL ASSOCIATION OF REALTORS, AFFIRMATIVE MARKETING HANDBOOK 5 (1975) (handbook designed to clarify realtor responsibility).

needed and penalties evolved, causing conflict in the various state legislatures and local governments, private fair housing groups, and those charged with implementing the law. Private organizations and state and local governments were often at loggerheads on the way laws should be enforced.

At the federal government level,⁸³ HUD was charged with the administration of the Fair Housing Act and the Justice Department had certain responsibilities under the Act.⁸⁴ At the outset, the Justice Department effort was led in the Civil Rights division by Frank Schwelb, who was active in filing fair housing cases and prosecuting them with a strong staff throughout the country. However, the number of cases filed by the Justice Department from 1968 through 1988, although it had a staff of about 30 people, apparently never exceeded 29 cases per year.⁸⁵ This is in contrast with the Leadership Council, which in one year filed 62 federal cases, and over a period of time from 1970 through 1988 filed a number of cases averaging approximately 45 federal cases per year.

In addition to the limiting effect on enforcement of the Justice Department's comparatively small caseload, HUD was limited in its enforcement impact because it could only conciliate, with no powers of enforcement. HUD found early on that defendants or respondents often would not deal with HUD. HUD and the Justice Department, the fair housing groups and enforcement agencies at state and local levels, each with particular limitations, sought to enforce the law. Other agencies within the various political subdivisions were protecting or supporting the real estate industry. Some HUD FHA sections, state licensing agencies and zoning boards, were in direct conflict with enforcement efforts on many occasions.⁸⁶

The early fair housing cases brought to light the issues that the Fair Housing Act raised but did not resolve. For instance, the interests of the fair housing groups and the enforcement people were to expand the law and make it more enforceable. The effectiveness of such efforts is evidenced in *Trafficante v. Metro. Life Ins. Co.*, in which the court gave deference to HUD's opinion.⁸⁷ The Leadership

83. See generally, D. FALK & L. H. FRANKLIN, *EQUAL HOUSING OPPORTUNITY: THE UNFINISHED FEDERAL AGENDA* (1976); G. ORFIELD, *FEDERAL POLICY, LOCAL POWER, AND METROPOLITAN SEGREGATION* (1975) (available through the Brookings Institution).

84. 42 U.S.C. § 3608 (1982) (HUD responsibilities); *Id.* § 3613 (Attorney General responsibilities).

85. See J. KUSHNER, *supra* note 30, § 10.01 n.2 (300 suits filed between 1968 and 1980).

86. See, e.g. *Amicus Curiae* Brief of the National Association of Realtors In Support of Petitioners, *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (No. 77-1493) ("the testing experience is premised on pretense[.], . . . lawyer manipulated [and] involves an inherent bias.").

87. 409 U.S. 205, 210 (1972) (administrative construction of the Act is "entitled to great weight.").

Council For Metropolitan Open Communities, and agencies like it were doing testing and auditing,⁸⁸ and filing lawsuits. In an effort to obtain rulings on liability, agency, and damage issues, state and local agencies were making efforts to expand coverage and standing, and obtain larger damages and stronger injunctive relief.

On the other hand, the interests of the real estate industry, banks, and appraisers, were to try to limit the Act and make it as difficult as possible for such actions to be filed. The issues that arose between these competing groups included questions of procedure, interpretation, burdens of proof, and issues relating to who could sue and whom they could sue. The steering cases, such as *Village of Bellwood v. Gladstone Realtors*,⁸⁹ are good examples of cases with vigorously disputed issues. *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, and its progeny, dealt with questions concerning whether a plaintiff, in a Fair Housing Act case, has the burden of proving or showing evidence that the defendant acted intentionally.⁹⁰

Another problem surfaced that caused concern for fair housing groups and governmental agencies. That is, while in places such as Chicago, Atlanta, Boston, St. Louis, Denver and the Bay area of California, lawyers were often available to file fair housing suits,⁹¹ in outlying areas lawyers were often scarce or sometimes reluctant to buck the system. As a result, lawyers for the Leadership Council For Metropolitan Open Communities, for instance, were called upon to practice in southern Illinois on cases as far south as Danville, and also participated in cases in Oklahoma City and in other states throughout the nation. These fair housing groups, and HUD, argued that without enforcement, much of the country, and a large percentage of the potential fair housing actions, would not be covered. As such, one of the major issues that these groups pursued was the establishment of broadened enforcement power of HUD.⁹²

The real estate industry, and special interest groups related thereto, were more concerned about eliminating the perceived situation that, whatever happened, they were to be held responsible for the existence of discrimination. Arguments arose as to the issues of managed integration, affirmative action, when a real estate person was required to recognize a local fair housing group that was inter-

88. See, Comment, *Fair Housing — The Use of Testers to Enforce Fair Housing Laws — When Testers Are Sued*, 21 St. Louis U.L.J. 170 (1977).

89. 569 F.2d 1013 (7th Cir. 1978) modified, 441 U.S. 91 (1979).

90. 558 F.2d 1283 (7th Cir. 1977), cert. denied 434 U.S. 1025 (1978). See also Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. F. 961.

91. See, *supra* note 76 and accompanying text discussing these groups.

92. These enforcement powers are now, in fact, in existence. Fair Housing Regulations, *supra* note 2, at 3232.

ested in maintaining integration, and when such integration maintenance became segregation or discrimination.⁹³ The question of intent versus effect, as it relates to the plaintiff's burden of proof, became important to real estate industry groups because the practices of discrimination were so ingrained in real estate development and sales, that even if a person was neutral, he might participate in something that would result in discrimination.⁹⁴

On particular issues, organizations concerned about handicapped individuals and families with children also played a large role in adding provisions to the new fair housing law. These included the Children's Defense Fund, the American Civil Liberties Union and the Mental Health Law Project. These groups and others were influential in expanding the coverage of the Act, and also influenced HUD in its promulgation of regulations.⁹⁵

IV. GENERAL SUMMARY OF THE 1988 ACT

A. *How the 1988 Changes Will Fit-In*

In these jurisdictions where strong fair housing groups have been organized and sustained, fair housing and fair lending laws have provided speedy and effective means for obtaining relief when discrimination in housing and lending occurs. In the Chicago area and Northwest Indiana, the Leadership Council For Metropolitan Open Communities⁹⁶ and the Northwest Indiana Open Housing Center⁹⁷ have filed and successfully prosecuted a large number of cases. Other areas with strong fair housing groups have shared that experience.⁹⁸ The 1988 amendments provide new ways in which such support organizations can spread information, encourage individuals to seek relief and continue to train and support local private attorneys who will take fair housing cases at all levels.⁹⁹

93. The new regulations speak to the issue of whether affirmative fair housing activities are permissible. *Id.* at 3235.

94. See *supra* notes 28-31 and accompanying text discussing the requisite standard of proof as it relates to intent under the Act.

95. Fair Housing Regulations, *supra* note 2, at 3234; H. Carey, Remarks at the Florida Conference, *supra* note 34.

96. The Leadership Council For Metropolitan Open Communities, serving the six counties of the Chicago area, was formed in 1966 as a result of the efforts of Dr. Martin Luther King in Chicago.

97. The Northwest Indiana Open Housing Center in Gary, Indiana, was organized with the help of the Leadership Council with local support, both public and private.

98. Other similar organizations exist in Milwaukee, Cincinnati, Cleveland, New York and the San Francisco Bay area. Some groups in other areas have been unable to sustain their strength as government and private source financing has dried up.

99. Provisions for fees and costs, as well as the well established rules relating to standing encourage private sector involvement in the enforcement process.

The new law relates to every kind of housing discrimination¹⁰⁰ and provides relief for all persons, municipalities and organizations, including, under the 1988 Act, the Secretary of HUD.¹⁰¹ Standing is interpreted broadly, and all injured persons may sue, including, for example, whites denied rights or otherwise injured because of racial discrimination,¹⁰² victims of steering,¹⁰³ and those exposed to the dissemination of false information, including testers.¹⁰⁴ Two new categories of protected groups are added: handicapped persons and families with children, and these groups will also have standing.¹⁰⁵

Comprehensive mandatory injunctive relief and significant damages have been regularly available in federal and state courts and in some state administrative agencies.¹⁰⁶ Injunctive relief can be obtained as the administrative action progresses under the 1988 Act. In the HUD administrative process, a HUD Administrative Law Judge can award actual damages.¹⁰⁷ Moreover, the Justice Department can obtain actual and punitive damages for private persons, as well as injunctive relief under Section 814.¹⁰⁸ Damages are regularly awarded to compensate injured parties for actual injury, such as embarrassment and emotional distress, and punitive damages serve as an example to others, deterring future discriminatory acts.¹⁰⁹ Attorney's fees and costs are part of the remedy and are awarded as a matter of course to a prevailing plaintiff under Section 813.¹¹⁰ Successful parties, including defendants, may also recover fees under Section 1988 of the 1866 Civil Rights Act.¹¹¹

In essence, the 1988 Fair Housing Act is a comprehensive law which makes all discrimination in housing for covered classes unlaw-

100. The new fair housing laws will continue to provide a remedy to victims of sexual harassment, a pervasive problem in the housing market. See, Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061.

101. 42 U.S.C. § 3610(a)(1)(A)(i), The Secretary may file on the Secretary's own initiative.

102. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969); See also, Schoenberger, *A Prolegomena to Reviving the Civil Rights Act of 1866: White Standing Under Section 1981 - A Federal Common Law Right to Contract*, 8 LOY U. CHI. L.J. 81 (1976)(applies to housing cases as well).

103. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

104. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

105. 1988 Act, *supra* note 1, § 804, at 1620 - 22. See generally, Stanley, *Age Restrictions in Housing: The Denial of the Family's Right to Its Integrity*, 19 HARV. C.R.-C.L. L. REV. 61 (1984); Travaglio, *Suffer the Little Children — But Not in My Neighborhood: A Constitutional View of Age - Restrictive Housing*, 40 OHIO ST. L.J. 295 (1979) (discussing pervasive problems of familial discrimination).

106. *Davis v. The Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984).

107. 1988 Act, *supra* note 1, § 812(g)(3), at 1630.

108. *Id.* § 814, at 1635-35.

109. *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982).

110. 1988 Act, *supra* note 1, § 813(c)(2), at 1634. The Secretary may also file on the Secretary's own initiative. *Id.* § 810(a)(1)(A)(i), at 1625.

111. 42 U.S.C. § 1988 (1982). See, *Williamsburg Fair Hous. Comm. v. Ross-Rodney Hous. Corp.*, 599 F. Supp. 509 (S.D. N.Y. 1984).

ful and provides a method of vindicating a "policy that Congress considered to be of the highest priority."¹¹² It builds on the 1866 Civil Rights Act which prohibits discrimination in the sale or rental of housing, both public and private.¹¹³ These laws are meant to eliminate the badges and incidents of slavery and its burdens and disabilities.¹¹⁴ Fair lending laws add to fair housing law provisions which prohibit discrimination in lending.¹¹⁵ The 1988 Act also expands coverage to include all real estate related transactions, which pertains to the making or purchasing of loans.¹¹⁶

These laws, and the regulations, provide a workable framework for dealing with and eliminating most discrimination as it relates to housing and lending. A sound understanding of the design and reach of these laws as amended by the 1988 Act is needed to assess any particular fact situation and to provide advice to clients with respect to legal rights and remedies. The practitioner should continue to seek clarification and direction from HUD and state and local agencies and publications in the field.¹¹⁷

B. Specific Provisions of the New Act

Section 801 of the Fair Housing Act,¹¹⁸ stating the Act's policy, is not affected by the Fair Housing Amendments Act. This stated policy is significant because it shows the continued intent of Congress to provide a broad remedial law to provide for fair housing throughout the United States. It will be the continuing obligation of the courts to follow this policy.

Section 802 sets forth definitions of certain terms used in the Act. The definitions are particularly important in instances where new issues are raised by additional coverage,¹¹⁹ particular exemptions¹²⁰ and new procedural avenues,¹²¹ or where technical defenses

112. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

113. 42 U.S.C. § 1982 (1982).

114. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

115. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

116. 1988 Act, *supra* note 1, § 805, at 1622; Fair Housing Regulations, *supra* note 2, §§ 100.110-100.135, at 3286-87.

117. See Equal Opportunity in Housing (P-H) (contains federal and state statutes, consent decrees, unreported cases, state cases and administrative regulations); J. KUSHNER, *supra* note 30; R. SCHWEMM, *supra* note 30. Pamphlets are also available through the Leadership Council For Metropolitan Open Communities and F. Willis Caruso, including such topics as fair housing practice, testing and auditing, expert witnesses, jury trials, and a matrix of fair housing cases.

118. 42 U.S.C. § 3601 (1982).

119. See, e.g., 1988 Act, *supra* note 1, § 802(h) at 1619 (defining "handicap"); Fair Housing Regulations, *supra* note 2, § 100.201, at 3287-88 (various definitions including "handicap").

120. See, e.g., 1988 Act, *supra* note 1, § 807(b)(2)(B) at 1623; Fair Housing Regulations, *supra* note 2, § 100.303, at 3290 (housing solely for persons 62 years old and

may appear to be available to a party charged. The term "dwelling," for example, is not changed, and includes vacant land "which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof".¹²² With respect to the term "handicap," the definition is taken from that found in the Rehabilitation Act,¹²³ and the term "covered multifamily dwellings" is newly defined in regard to the new provisions relating to handicap discrimination.¹²⁴

The term "aggrieved person" is not limited, but includes, for example, corporations, fair housing groups, trustees, testers, legal representatives, and the Secretary of HUD.¹²⁵ The term also includes municipalities.¹²⁶ The definition of "Discriminatory Housing Practice" is now expanded to include intimidation.¹²⁷

Sections 804 and 805 of the Act outline the types of activities it covers. In essence, the new Fair Housing Act covers every kind of commercial activity and almost every conceivable private transaction, with few exemptions. The exemptions most commonly raised are usually described as the sale of a private residence by the owner without the use of a real estate agent and rental of a unit in an owner occupied apartment building of four units or less.¹²⁸ However, the 1968 Act included other significant exemptions and the new Act adds different ones.¹²⁹ Such exemptions are not applicable to a Section 1982 case, however.¹³⁰ Some of the exemptions or similar ones may also exist under other federal, state or local laws which prohibit discrimination.¹³¹

Section 804 makes discrimination in the sale or rental of hous-

older); 1988 Act, *supra* note 1, § 807(b)(2)(C), at 1623; Fair Housing Regulations, *supra* note 2, § 100.304, at 3290-91 (qualifying housing for persons over 55 years of age).

121. See, e.g., 1988 Act, *supra* note 1, § 802(e) at 1620 (defining "conciliation").

122. 42 U.S.C. § 3602(b) (1982).

123. 29 U.S.C. § 706(7) (1982).

124. 1988 Act, *supra* note 1, § 804(f)(7) at 1622 (including buildings with elevators and ground floor units in other buildings with 4 or more units).

125. 1988 Act, *supra* note 1, § 802(i), at 1619.

126. *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd as modified*, 441 U.S. 91 (1979).

127. 1988 Act, *supra* note 1, § 802(f), at 1619 (includes Section 818 (old Section 817) regarding intimidation and is now enforceable by HUD).

128. 42 U.S.C. § 3603(b) (1982).

129. See, e.g. 1988 Act, *supra* note 1, § 807(a) at 1623 (existing religious exemption); *Id.* § 807(b), at 1623 (housing for older persons); *Id.* § 804(f)(9), at 1622 (substantial physical damage to property); Fair Housing Regulations, *supra* note 2, § 100.202(c)(1)-(5) and (d), at 3288 (permissible inquiries).

130. *Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974).

131. State and local laws may have to be brought into compliance to remain substantially equivalent after 40 months. Fair Housing Regulations, *supra* note 2, § 115, at 3311.

ing unlawful in general and describes certain unlawful acts.¹³² The first clause sets forth the most obvious act of discrimination. That is, it is unlawful to refuse, on a prohibited basis, to sell or rent after an individual makes a bona fide offer.¹³³ The prohibition against discrimination because of handicap is not included in the blanket prescriptions of Sections 804(a) through 804(d). Handicap discrimination is subject to certain "reasonableness" tests under the statute and regulations.¹³⁴

An individual's refusal to complete a sale or to accept a bona fide offer to lease or buy is often subtle, and couched in other language. The Act covers subtle and simple minded discrimination as well as that which is blatant. Race simply may not be a factor in any decision concerning housing. For instance, in *Smith v. Sol D. Adler Realty Co.*,¹³⁵ the defendant claimed the sublessor was not acceptable for a series of reasons, including credit. The court ruled, however, that despite the laundry list of other supposed reasons, the plaintiff could not be turned down where race was a factor in the denial.¹³⁶ Similarly, in *Moore v. Townsend*,¹³⁷ Mr. Moore made a bona fide offer and, under the circumstances, race was a factor in denial of the housing. In that instance, the part of the contract calling for the seller's signature was torn off and the seller claimed the contract had not been signed. The court found there was a denial of housing based on race and affirmed the district court's order of specific performance, requiring that the seller convey the property to Mr. Moore.¹³⁸

It is also unlawful to refuse to negotiate for sale or rental.¹³⁹ A seller or landlord may try to deny housing by refusing to negotiate at some point in the sale or rental process. Landlords have often hidden, or refused to answer the door when a black person comes to the apartment.¹⁴⁰ It is more likely, however, that such refusals to negotiate will come later in the process. In *Williamson v. Hampton Management Co.*,¹⁴¹ for example, two black sublessees found they were unable to contact representatives of management and, when they could reach someone at the management office, these repre-

132. 42 U.S.C. § 3604 (1982).

133. "Prohibited basis" under this section includes race, color, religion, national origin and now familial status. 1988 Act, *supra* note 1, § 804(a), at 1622.

134. See, e.g., *id.* § 804(f)(3)(B), at 1621; Fair Housing Regulations, *supra* note 2, § 100.204(a), at 3289 ("reasonable accommodations").

135. 436 F.2d 344 (7th Cir. 1970).

136. *Id.* at 349, citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

137. 525 F.2d 482 (7th Cir. 1975).

138. *Id.* at 485.

139. 42 U.S.C. § 3604(b) (1982).

140. *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981).

141. 339 F. Supp. 1146 (N.D. Ill. 1972).

sentatives refused to deal with them. Similarly, in *Crumble v. Blumthal*,¹⁴² the defendant created a ruse, claiming that a check did not clear.

If the acts which deny housing do not clearly fall within any of the words or phrases referred to above, then they are covered by the general clause "*otherwise make unavailable or deny*."¹⁴³ This language makes it unlawful to deny housing for a prohibited reason and covers more sophisticated methods of denying housing such as steering,¹⁴⁴ combinations of steering and panic methods,¹⁴⁵ and abuses in the real estate marketing system.¹⁴⁶ The "otherwise unavailable" clause also covers redlining¹⁴⁷ and zoning practices which have the effect of denying housing.¹⁴⁸

Section 804(b) prohibits discrimination in the terms, conditions or privileges of sale or rental.¹⁴⁹ This pertains to any practice that makes purchase or rental more difficult or expensive because of a prohibited reason. For example, requiring blacks to pay closing costs whites are not required to pay,¹⁵⁰ or charging higher fees to blacks, if shown, constitutes a fair housing violation.¹⁵¹

Section 804 (c) prohibits discrimination in advertising, specifically commercial advertising.¹⁵² The prohibition against publishing prohibits officials from recording real estate documents that contain racially discriminatory language¹⁵³ and prevents title companies from including a racial covenant objection in title reports. Racially selective advertising is also prohibited.

142. 549 F.2d 462 (7th Cir. 1977).

143. 42 U.S.C. § 3604(a) (1982) (emphasis added).

144. *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), modified 441 U.S. 91 (1979).

145. *Zuch v. Hussey*, 366 F. Supp. 553 (E.D. Mich. 1973) *aff'd* 547 F.2d 1168 (6th Cir. 1977).

146. *Fair Housing Council of Bergen County, Inc., v. Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071 (D. N.J. 1976).

147. *Harrison v. Otto G. Heinzerth Mortgage Co.*, 430 F. Supp. 893 (N.D. Ohio 1977); *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

148. *Metro. Housing Dev. Corp. v. Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980). See generally, Caruso, *The History Beyond the Village of Arlington Heights v. Metropolitan Housing Development Corp. Case*, 55 LAW & HOUSING J. 47 (1977).

149. 42 U.S.C. § 3604(b) (1982).

150. *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438 (5th Cir. 1973) *cert. denied* 416 U.S. 936 (1974).

151. *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974, *cert. denied* 419 U.S. 1070 (1974)).

152. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) (prohibition of discriminatory advertisements does not violate first amendment when it pertains only to "commercial speech"); *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972) (Civil Rights Act prohibition of discriminatory advertising is constitutional), *cert. denied* 409 U.S. 934 (1972); *Holmgren v. Little Village Community Reporter*, 342 F. Supp. 512 (N.D. Ill. 1971) (language preference in advertisement violates Act).

153. *Mayers v. Ridley*, 465 F.2d 630 (D.C. 1972).

It is further unlawful to represent that a unit is not available when it is, in fact, available. This is probably the most common way people deny housing. Panic peddling and similar practices are also specifically unlawful.¹⁵⁴

Discrimination in lending and financing practices¹⁵⁵ are now covered in Section 805 of the new Fair Housing Act and are defined as "Real Estate Related Transactions."¹⁵⁶ Such acts are also covered by Section 708 of the Equal Credit Opportunity Act.¹⁵⁷ These prohibitions relate to all types of practices that have the effect of discriminating with respect to financing.¹⁵⁸

The refusal to allow access or membership in broker and other real estate organizations such as multiple listing services, is prohibited by Section 806 and the 1989 regulations make this violation more clear.¹⁵⁹ Denial of entry into such a real estate board or multiple listing service is actionable regardless of the reasons or motives for the desired membership.¹⁶⁰ Injury in fact from denial of membership establishes standing.¹⁶¹ Refusal to co-broker in retaliation for filing a suit under Section 806 constitutes a violation of Section 817 as well.

In addition to the new coverages under the 1988 Act, it also confers new specific obligations on HUD.¹⁶² Such requirements create an affirmative obligation upon HUD and other departments of government.¹⁶³ These provisions take on new importance with the

154. 42 U.S.C. § 3604(d) (1982). *See, e.g.*, *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1973); *United States v. Mitchell*, 327 F. Supp. 476 (N.D. Ga. 1971); *Brown v. State Realty Co.*, 304 F. Supp. 1236 (N.D. Ga. 1969).

155. Section 805 is expansive, and indicates a congressional intent to cover all incidents related to financing. 1988 Act, *supra* note 1, § 805, at 1622-23; Fair Housing Regulations, *supra* note 2, §§ 100.110 - 100.130, at 3286-87. *See also* 134 CONG. REC. S10549 (daily ed. August 2, 1988) (statement of Sen. Susser) (factors justified by business necessity are permissible).

156. 1988 Act, *supra* note 1, § 805, at 1622-23.

157. 15 U.S.C. § 1691 (1982) (creditors cannot discriminate in any credit transaction). *See also*, *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

158. *See, e.g.*, *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977) (standards causing appraisers to use race as a negative factor makes housing "otherwise unavailable") *appeal dismissed* 590 F.2d 242 (7th Cir. 1978); *Harper v. Union Savings Ass'n.*, 429 F. Supp. 1254 (N.D. Ohio 1977) (discrimination in manner in which defaulted mortgager are foreclosed violates Act).

159. Fair Housing Regulations, *supra* note 2, § 100.90, at 3286 (regulations list separate actions which violate the Act).

160. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982) (those receiving untruthful information have standing).

161. *Id.*

162. 1988 Act, *supra* note 1, § 808, at 1623-24.

163. *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970) (black residents have standing to sue HUD for funding subsidized housing project perceived as potentially increasing concentration of low-income blacks in the area).

1988 amendments.¹⁶⁴ The Fair Housing Amendments Act contemplates efforts with respect to education generally, as well as prescribing specific studies to show the nature and extent of discrimination. HUD will also have the primary responsibility for administering the new provisions found in Sections 810¹⁶⁵ and 812.¹⁶⁶ The new and expanded powers make it possible for HUD to enforce the law rather than merely try to persuade persons to follow it.¹⁶⁷

The framework of Section 810 allows individuals or the Secretary to file a complaint with HUD within one year of the alleged discriminatory housing practice.¹⁶⁸ The Secretary then has the duty to serve notice on both the aggrieved party and the respondent.¹⁶⁹ The respondent may then file an answer to the complaint.¹⁷⁰

The Secretary must then initiate an investigation, which is designed to be completed within 100 days of the date on which the complaint was filed.¹⁷¹ HUD has, among other things, broad subpoena powers to facilitate this investigation.¹⁷² During the investigatory time period, the Secretary also has a duty to engage in conciliation.¹⁷³ This is designed to culminate in a conciliation agreement between the parties which will bind the parties and spare judicial resources.¹⁷⁴ At the end of the investigation, the Secretary must then prepare a final investigative report.¹⁷⁵

At this time, the Secretary must also make a determination, if no conciliation agreement has been reached, of whether there is "reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur."¹⁷⁶ If the Secretary answers this question affirmatively, the Secretary must then issue a charge and then proceed pursuant to Section 812.¹⁷⁷ Otherwise, the Secretary must dismiss the complaint.

If a charge is issued, section 812 then shifts the decisional bur-

164. The new Act places new obligations on HUD to report its activities and those of other agencies and, therefore, requires HUD to be more proactive in providing for fair housing. Fair Housing Regulation, *supra* note 2, § 121.2, at 3317.

165. 1988 Act, *supra* note 1, § 810, at 1625-29.

166. *Id.* § 812, at 1629-33.

167. 134 CONG. REC. S10550 (daily ed. August 2, 1988) (statement of Sen. Sanford) ("[w]ith an effective enforcement system in place, we will truly be able to eliminate discriminatory practices in the sale and rental of housing.").

168. 1988 Act, *supra* note 1, § 810(a)(1)(A)(i), at 1625.

169. *Id.* § 810(a)(1)(B)(i),(ii) at 1625.

170. *Id.* § 810(a)(1)(B)(iii), at 1625.

171. *Id.* § 810(a)(1)(B)(iv), at 1625.

172. *Id.* § 811, at 1628.

173. *Id.* § 810(b), at 1626.

174. *Id.* § 810(b)(1)-(4), at 1626.

175. *Id.* § 810(b)(5)(A), at 1626.

176. *Id.* § 810(g)(1), at 1627-28.

177. *Id.* § 810(g)(2), at 1628. Under the regulations, the responsibility for review and issuance of a charge is delegated to the General Counsel.

den to the aggrieved party. That is, the aggrieved party may then elect to have the Attorney General commence a civil action in federal district court on behalf of the aggrieved party.¹⁷⁸ Otherwise, the matter will proceed to an ALJ hearing.¹⁷⁹

Section 812 prescribes that the ALJ hearing begin within 120 days of the date on which the charge was issued.¹⁸⁰ The ALJ must make findings of fact and conclusions of law within 60 days after the hearing ends.¹⁸¹ The ALJ may award actual damages and large civil penalties.¹⁸²

In addition to the administrative procedures set forth in Sections 810 and 812, Section 813 also allows aggrieved persons to file complaints directly in federal district court.¹⁸³ The enforcement process has remained substantially the same as under the old act. Among some of the noteworthy provisions of Section 813 include the waiver of the jurisdictional amount, the two year limitation of actions,¹⁸⁴ and the tolling of the limitation period during the pendency of administrative actions.¹⁸⁵ If an ALJ hearing has begun, however, one may no longer file in district court.¹⁸⁶ Additionally, the findings of the ALJ are likely to be held to act as *res judicata* or collateral estoppel upon the parties.

Under Section 813 (old section 812), courts have provided a broad construction to standing, and who may sue and whom a plaintiff may sue is almost unlimited when the Fair Housing Act and the 1866 Civil Rights Act are read together.¹⁸⁷ For example, white parents and their black child may sue for denial of housing in a cooperative apartment,¹⁸⁸ as may persons who are victims of redlining,¹⁸⁹ and individuals who have been the victims of racial steering. In fact, almost everyone connected with a violation of the Act may sue, including, for example, testers and fair housing groups. Those whom these persons may sue include, in a sale case, the owner, the real estate sales person and the broker, each being liable for the discriminatory acts of the other on the basis of actual authority, agency and

178. *Id.* § 812(a), at 1629.

179. *Id.* § 812(b), at 1629.

180. *Id.* § 812(g)(1), at 1630.

181. *Id.* § 812(g)(2), at 1630.

182. *Id.* § 812(g)(3), at 1630.

183. *Id.* § 813, at 1633-34.

184. *Id.* § 813(a)(1)(A), at 1633.

185. *Id.* § 813(a)(1)(B), at 1633.

186. *Id.* § 813(a)(3).

187. See Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1 (1980).

188. *Pughsley v. 3750 Lake Shore Drive Coop Bldg.*, 463 F.2d 1055 (7th Cir. 1972).

189. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

respondeat superior.¹⁹⁰ The relief sought includes injunctive relief, damages¹⁹¹ and attorney's fees, and now, under the 1988 Act, unlimited punitive damages.¹⁹²

Attorney General enforcement also enjoys broadened powers.¹⁹³ The Attorney General may file suit where there is a pattern or practice of discrimination or a denial of rights to a group of persons raising issues of general public importance, and may be initiated as a result of an election under Section 812.¹⁹⁴ Additionally, the Attorney General has the power to enforce subpoenas and conciliation agreements, and is responsible for enforcing the law with respect to state or local zoning or land use matters.

V. PROBLEMS WITH THE NEW ACT

Despite the many changes in the Act, some problems remain, and new problems have been created. At seminars, including those put on by Kenneth L. Holbert,¹⁹⁵ and exchanges between fair housing groups, experts have identified many expected problems in the implementation of the law. Among experts in the field there are differences of opinion as to what the law means and how it will be interpreted.¹⁹⁶ Therefore, one can expect that over the next few years, HUD, the Justice Department, private attorneys, judges and state and local agencies will be interpreting and clarifying this law. These issues, though varied, can generally be divided into four categories of issues: (1) administration of the Law; (2) procedure; (3) substantive rights; and (4) remedies.

190. *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

191. Available damages include compensation for emotional distress. See KENTUCKY COMMISSION ON HUMAN RIGHTS, *DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES* (March 1982) (Staff Reports 82-1 and 82-8).

192. See *Phillips v. Hunter Trails Community Ass'n.*, 685 F.2d 184, 191 (7th Cir. 1982) (affirming award of \$200,000 in punitive damages).

193. 1988 Act, *supra* note 1, § 814, at 1634.

194. *Id.* § 812(a), at 1629.

195. Since 1970, Kenneth L. Holbert, from HUD, has organized over 120 Fair Housing and Fair Lending seminars, an average of 5 per year, held for the most part at major law schools or with the sponsorship of those law schools. The speakers at such seminars have been the leaders in the fair housing legal community.

196. Differences of opinion between litigators, such as Robert Laufman and F. Willis Caruso, include issues of form, procedure and questions of substantive law. John Knapp, former General Counsel of HUD, questions the efficacy of the res judicata or collateral estoppel effect on an ALJ hearing. Dean Ivan Bodenstein of Valparaiso Law School, in Indiana, on the other hand, believes issue preclusion, res judicata and collateral estoppel defenses arising from ALJ decisions are likely to prevail. See generally *The John Marshall Seminar*, *supra* note 25 and the Florida Conference, *supra* note 34.

A. Administration of the Law

The issues with respect to administration include the following: (1) Who will do certain tasks and be charged with the responsibility for performance; (2) what will be done by HUD,¹⁹⁷ the states,¹⁹⁸ and the Justice Department; and (3) how and when will these things be done.

For example, one issue which is frequently discussed is the question of what the relationship will be between HUD and the state and local agencies. The new Act does not provide for direct selection or retention of cases by HUD, but rather allows HUD to retain cases in jurisdictions that have laws which are substantially equivalent to the Act when there is consent or when the equivocal agency is not meeting certain requirements.¹⁹⁹ This issue is important because if HUD does not handle a significant number of cases, and state and local agencies are not bound by the statutory framework,²⁰⁰ then the Act's promise of speedy and inexpensive handling of cases will not be kept.

Similarly, the question exists as to whether HUD will investigate on its own or retain all handicap and familial status cases until state and local agencies attain substantial equivalency on such coverage under the new act. Additionally harassment and interference cases under Section 818 may now be sent to states and local agencies.²⁰¹ In the past, intimidation cases were not handled by HUD and not sent to state and local agencies. Unlike familial and handicap discrimination, however, the right to protection from intimidation existed prior to 1988. As such, it would seem that Section 818 will probably be handled similarly to cases concerning other rights

197. 1988 Act, *supra* note 1, § 810, at 1625 - 28. The initial investigation will be done by the Fair Housing & Equal Opportunity staff at HUD. However, if effective investigations are to be done, as time progresses the General Counsel and the Justice Department will likely play a larger role in designing, supervising and even conducting certain parts of the investigation, unless the General Counsel's office of HUD is expanded and the Fair Housing & Equal Opportunity staff is substantially increased in size and expertise.

198. *Id.* The role of states, cities, and villages, such as Illinois, and its cities and villages of Chicago, Evanston and Bellwood, where amendments and statutes are already before the legislatures, will increase. However, the grandfather period of 40 months is elusive and it is likely few states will provide adequate funding and staff. As a result, in most states, if effective investigation, processing and enforcement is done, it will be by HUD and the Justice Department.

199. *Id.* § 810(f), at 1627.

200. *Id.* § 810(f)(3)(A), at 1627 (outlines necessary elements for certification of agencies).

201. The new regulations require that certification will not be available unless the local law in question has a provision prohibiting coercion or intimidation of persons exercising their rights. Fair Housing Regulations, *supra* note 2, § 115.3(a)(5)(vii), at 3312.

in existence prior to the 1988 Act.²⁰² If that is the case, Section 818 cases can go to state and local agencies.

As HUD progresses with its decisions as to which state and local agencies will be given or retain substantial equivalency,²⁰³ the issue will be how much HUD will require and how strict HUD will be in reviewing the new ordinances and statutes. HUD has previously approved 36 states and 76 local agencies.²⁰⁴

An attendant issue is whether Congress will allocate enough money and whether state and local legislators will commit funds to the enforcement of these laws. If HUD does not have an adequate staff, then one would expect that a majority of the cases will go to state and local agencies.

B. Procedural Issues

Procedural issues include not only the mechanical steps that are established by statute and regulations,²⁰⁵ but how procedural questions will be decided. One of the first questions is whether proper procedures were followed when HUD adopted the regulations.²⁰⁶ If the procedure to adopt the regulations was adequate, then the judiciary should recognize them.²⁰⁷

HUD has already used the Act and its adopted procedure set forth in the regulations in deciding whether to seek emergency relief as needed when the complaint is filed.²⁰⁸ Generally, HUD will take the complaint at the field level and then the general counsel will make a prompt decision as to whether a temporary restraining order or preliminary injunction is needed. Then, in consultation with the Justice Department, HUD will arrange to take such steps as may be

202. See *id.* at 3259 ("legislation not affecting vested rights must be applied to any claim cognizable under the prior law that is pending on the effective date or that is filed thereafter.").

203. *Id.* § 115.1 - 115.11, at 3311 - 3316.

204. *Id.* at 3277.

205. Procedures under the new law are found mostly in Sections 810, 812 and 813 of the Act, and Parts 103, 104 and 106 of the regulations. 1988 Act, *supra* note 1, §§ 810, 812, at 1625 - 33 (administrative); *id.* § 813, at 1633 - 34 (private enforcement); Fair Housing Regulations, *supra* note 2, §§ 103.1 - 103.515, at 3292 - 98; *id.* §§ 104.10 - 104.955, at 3298 - 3308; *id.* §§ 106.1 - 106.2, at 3308.

206. The general requirements for agencies promulgating regulations are found in 5 U.S.C. § 601 (Supp. 1987).

207. *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 - 42 (1976) ("Opinions of the Administrator . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

208. See Williams & Draeger, *Judge Orders Landlord To Take Tenant Who Has Kids*, Chicago Sun Times, April 21, 1989, at 7 (HUD Secretary Jack Kemp quoted as saying: "Hud will act promptly to ensure that the housing rights of all Americans are protected . . .").

needed.²⁰⁹ The Justice Department prefers to give any defendant a chance to settle, but if the respondent does not so agree, then court action will be taken.²¹⁰

The HUD investigators will also be developing new procedures and methods in investigations. Some of the questions which present themselves in this regard include whether respondents will give the same information to HUD investigators they have in the past without a subpoena;²¹¹ what the procedure for obtaining and enforcing subpoenas will be;²¹² and what the nature of conciliation efforts will be.²¹³ Also, HUD must decide when it will be necessary to stop an investigation or, in effect, take the investigator-conciliator off the case.²¹⁴ When the investigator's report is completed, moreover, questions will remain as to its contents, specifically, whether it will make recommendations directly or indirectly to the general counsel.²¹⁵

Accordingly, the statute and regulations require a complete investigation so the General Counsel can use the same sort of test that private counsel will use in deciding whether to file a charge.²¹⁶ It is not clear what will be expected from the HUD investigation in order for the General Counsel to decide. It should be noted that, although there are clear and strict time requirements for investigations (100 days) and making decisions, there is no clear provision for enforcing time limits or sanctions if they are not met.

When a charge is issued, the individual complainant or respondent must then decide whether to go with an ALJ proceeding or go to federal district court with the Justice Department.²¹⁷ No provision is made for legal advice or help to such a person, if needed, in making that election.²¹⁸ As the case proceeds in court or before the

209. Fair Housing Regulations, *supra* note, § 103.510, at 3298.

210. *Id.* § 103.500, at 3298.

211. 1988 Act, *supra* note 1, § 811(a), at 1628 (Secretary has broad subpoena powers).

212. The regulations set forth certain procedures, but time only will tell what HUD's actual practices will be. Fair Housing Regulations, *supra* note 2, § 104.590, at 3304.

213. The regulations also discuss HUD conciliation procedures. *Id.* §§ 103.300 - 103.335, at 3296 - 97. Again, however, the question remains whether HUD will be perceived as having sufficient power to convince parties to conciliate.

214. *See, e.g., id.* § 103.205, at 3295 (systematic processing).

215. The statute and the regulations both enumerate some items which must be contained in the final investigative report. 1988 Act, *supra* note 1, § 810(b)(5), at 1626; Fair Housing Regulations, *supra* note 2, § 103.230, at 3296. Neither, however, states whether the report should contain recommendations.

216. Fair Housing Regulations, *supra* note 2, § 103.400, at 3297 ("General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in [f]ederal court.").

217. 1988 Act, *supra* note 1, § 812(a), at 1629.

218. *See, e.g.,* Fair Housing Regulations, *supra* note 2, § 103.410, at 3297 (regulations concerning election of civil action do not provide for independent advice).

ALJ, moreover, the parties, and in some cases the Justice Department, must decide whether to intervene in the case.²¹⁹ Unless such intervention is done quickly, the law will have to be developed to determine who may intervene, when, on what terms, and on what basis one may intervene.

In addition to these problems, there are other particular issues, such as what depositions may be taken and what kinds of discovery are reasonable before the ALJ.²²⁰ Courts must also decide, for example, how they will interpret regulations such as the one regarding payment of costs of deposition, and whether a person seeking to take a deposition must pay all the costs of all parties.²²¹

Some additional problems surface with regard to the ALJ hearing. Specifically, there is a question as to whether an ALJ hearing or trial starts with the swearing of the first witness,²²² and what happens if the ALJ hearing does not start within the prescribed time.²²³ It has not been decided whether there are any acceptable excuses for not doing so. At the end of the hearing, if an ALJ or judge assesses penalties, then she must also decide how much is needed to vindicate the public interest,²²⁴ what sanctions are necessary, and to whom they will apply.²²⁵

When the ALJ has decided that there will be a review by the Secretary, although the statute is not specific, some suggest that such review will be the same as under other similar federal statutes, such as when the Chairman of the National Labor Relations Board reviews findings.²²⁶ Questions will remain as to who is an aggrieved party on appeal, and what relief may be sought on appeal.²²⁷

In cases brought by the Justice Department, the proper measure of relief must be determined. Specifically, the question will be raised as to whether the United States Constitution limits punitive damages.²²⁸ As the cases proceed, issues will also arise as to whether

This omission creates an apparent conflict. That is, HUD has an interest, for funding purposes, to retain as many cases as possible. It may be in the best interest of an aggrieved party, however, to elect to go to federal court in a particular case.

219. 1988 Act, *supra* note 1, § 812(c), at 1629.

220. Fair Housing Regulations, *supra* note 2, §§ 104.500 - 104.580, at 3301 - 3304 (discovery); A. Heifitz, Remarks at The John Marshall Seminar, *supra* note 25.

221. *Id.* § 104.510(e), at 3302.

222. This issue has particular significance because, once a hearing begins, the parties may no longer file an action in federal court. 1988 Act, *supra* note 1, § 813(a)(3), at 1633.

223. The statute states that the hearing *shall* commence no later than 120 days the charge was issued, but does not state the consequences for failure to begin the hearing within this timeframe. *Id.* § 812(g), at 1630.

224. *Id.* § 812(g)(3), at 1630.

225. *Id.*

226. See 29 U.S.C. § 153 (1982).

227. Fair Housing Regulations, *supra* note 2, § 104.930(a), at 3307.

228. See *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986)

a particular decision acts as res judicata or collateral estoppel as to other issues or decisions.²²⁹

C. Substantive Rights and Remedies

The 1988 Act creates new substantive rights, and courts and ALJs will be called upon to decide the breadth of these new provisions. For example, in the handicap field, courts must decide what is a reasonable accommodation.²³⁰ Guidance in deciding this issue may be found in employment cases, for example.²³¹ Additionally, courts must decide how local ordinances and other standards will be applied. The interrelated questions between handicap and familial discrimination will also present questions. For example, there is a question as to whether a 62 year old who needs a 30 year old live-in nurse removes a housing unit from the exception.²³² Moreover, if local ordinances preclude discrimination against all people who are over 40, there is a question as to whether this will nullify exemptions for 55 and 62 year old housing.²³³ Finally, with respect to handicap discrimination, the scope of the term must be defined. For instance, courts will face the unfortunately inevitable question of whether AIDS is a handicap for purposes of the Act.²³⁴

In regard to familial housing discrimination, there are similar unresolved issues. Specifically, with respect to the question of how many people can live in a unit, courts must decide what is reasonable and whether local ordinances are reasonable.²³⁵ In this regard, courts must also wrestle with interpreting HUD regulations.

With respect to handicap and familial discrimination, it seems clear that these provisions will not be applied retroactively.²³⁶ This

("[t]hese arguments [constitutionality of punitive damages] raise important issues which, in an appropriate setting, must be resolved.").

229. Res judicata and collateral estoppel will apply only if the administrative procedure has provided a fair and thorough forum. *Int'l Harvester Co. v. Occupational Safety and Health Review Comm'n.*, 682 F.2d 982 (7th Cir. 1980) (res judicata); *Nasem v. Brown*, 595 F.2d 801 (D.C. Cir. 1979) (collateral estoppel).

230. 1988 Act, *supra* note 1, § 804(f)(3)(B), at 1621. See also Schwemm, *Handicap Discrimination Under the New Fair Housing Act*, TRENDS IN HOUSING 5 (Feb. - Mar., 1989).

231. See, Seng, *Discrimination Against Families With Children and Handicapped Persons Under the 1988 Amendments to the Fair Housing Act*, 22 J. MARSHALL L. REV. 541 (1989).

232. Seng, *supra* note 231, at 546.

233. See, Schwemm, *Familial Discrimination Under the New Fair Housing Act*, TRENDS IN HOUSING 3 (Feb. - Mar., 1989) (discusses housing for older persons exemption).

234. See Seng, *supra* note 231, at 554.

235. The Act permits "reasonable" restrictions on occupancy. 1988 Act, *supra* note 1, § 807(b)(1), at 1623.

236. Fair Housing Regulations, *supra* note 2, at 3259 (handicap and familial status discrimination create new legal duties, prohibiting retroactive application).

is in contrast to all the other provisions of the new Act which are likely to be applied retroactively.²³⁷ This view is directly supported by HUD.²³⁸

VI. PROGNOSIS

There has already been a flurry of activity at HUD and the Justice Department in training, establishing procedures, intaking complaints and filing in federal court. If Congress recognizes the need for more staff people at HUD and the Justice Department, then these efforts can proceed at this pace. However, if funds are not available, then it is unlikely that such a pace can continue. At the same time, the decrease in funding experienced by fair housing groups over the last eight years means that activity by such groups is likely to stay at its present level. New statutes have been passed, or are in the process of becoming law, in South Carolina, Iowa and Minnesota. In Illinois, a law has passed both the House of Representatives and the Senate. State and local agencies have, however, experienced a similar history with respect to funding and even with the stronger laws it is unlikely that such funds will be increased substantially.

It was the expectation of Congress, HUD, the National Association of Realtors, National Association of Home Builders, the Leadership Conference for Civil Rights, fair housing groups, and others that the new statute would result in prompt delivery of services without cost to the complainant and quick adjudication of disputes.²³⁹ As of this date, however, it is not possible to determine if the Act will effectuate a change over the common practices of discrimination in housing.

In the long term, the Act will have a significant impact because of the expanded coverage and the changes which allow recovery of much larger damages. It appears that over the long pull, persons who would otherwise not be able to obtain help because they are in a remote place or because their matter is difficult or is unlikely to yield large damages and fees will now obtain help. The complaint docket of the federal, state, and local agencies will grow in number and significance. Moreover, HUD's reports to the congress will add to the growing store of knowledge, both as to discriminatory practices and the need for new laws and funnels to deal with these issues.

It appears the role of private attorneys will change as well. To

237. *Id.* (all other amendments create no new legal duties or responsibilities).

238. *Id.*

239. R. Butters, Remarks at the John Marshall Seminar, *supra* note 25.

begin with, the pressure to commit valuable time to hard cases, and those cases that are not economic, will be reduced because those areas will best be handled by the administrative process.²⁴⁰ Further, the prompt and professional investigation by HUD and the new visibility of the law is likely to generate more cases and cases that will involve larger damages and more significant issues. Simply stated, private attorneys are likely to be dealing with higher impact cases under the new Act.

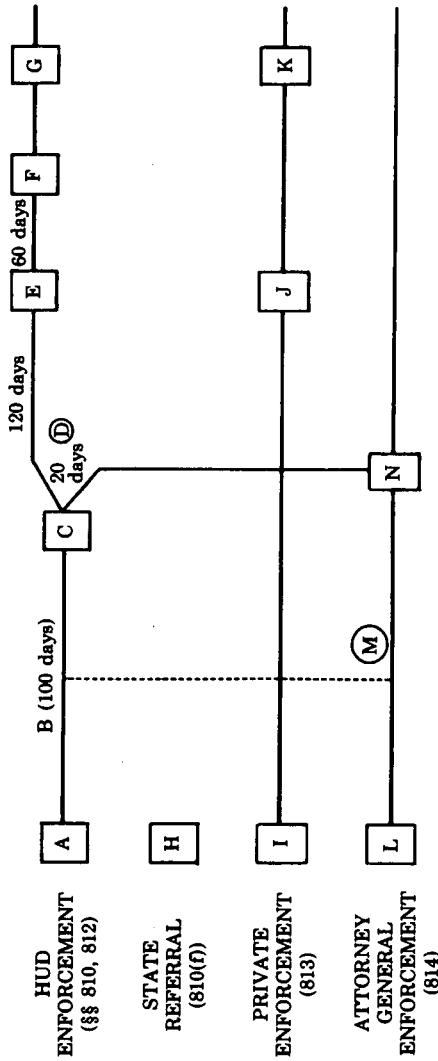
VII. CONCLUSION

Congress has taken an important step forward by passing the Fair Housing Amendments Act of 1988. The burden of eliminating discrimination in housing, however, is one that all must bear. That is to say, Congress must continue with its commitment by allocating sufficient resources to successfully implement the Act. Courts, the legal community, and civil rights groups must be aggressive and utilize the available tools of the Act and the regulations to interrupt and prohibit discrimination. HUD, the Justice Department and other governmental agencies must be diligent in enforcing the law. It is now painfully clear that housing discrimination in this country will not die easily.²⁴¹ This new legislation, however, will help those who are willing to continue to fight to end it.

240. This is now possible because of the strengthened enforcement mechanisms. Fair Housing Regulations, *supra* note 2, at 3232.

241. See generally, A. SCHNARE, *THE PERSISTENCE OF RACIAL SEGREGATION IN HOUSING* (1978) (available through the Urban Institute); Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U.L. REV. 874 (1988) (illustrates persistence of housing segregation).

APPENDIX A



- A. An aggrieved party may file a complaint with the Secretary within one year of a discriminatory housing practice occurrence. § 810(a).
- B. Section 810(A)(1)(B)(iv) prescribes that the Secretary make an investigation. Section 810(b) requires that the Secretary engage in conciliation during this period.
- C. Within 100 days of the filing of the complaint the Secretary must determine whether reasonable cause exists to issue a charge or whether to dismiss the complaint. § 810(g).
- D. After a charge is issued, a party may elect to have the Attorney General file a complaint on that party's behalf in federal court, or that party may elect an ALJ hearing. § 812(a).
- E. The ALJ must commence a hearing within 120 days of the issuance of the charge. § 812(g).
- F. Within 60 days of the end of the hearing, the ALJ is to make findings of fact and conclusions of law. The ALJ may order appropriate relief, including actual damages, equitable relief and large civil penalties. § 812(g)(2) & (3).
- G. Any party may appeal a final order to the appropriate federal appellate court. § 812(i). That court may also enforce ALJ orders. § 812(j).
- H. The Secretary must refer complaints to certified state or local public agencies, if such an agency exists. § 810(f).
- I. Section 813 permits aggrieved parties to file actions directly in federal court within two years of an occurrence.
- J. An aggrieved party may no longer file a civil action once an ALJ hearing begins. § 813(a)(3).
- K. Appeal is to the appropriate federal appellate court.
- L. Attorney General may file a complaint on behalf of the United States when there is reason to believe that a pattern or practice of discrimination exists. § 814(a).
- M. The Secretary may refer proceedings to the Attorney General in pattern or practice cases, to enforce subpoenas § (810(c)(2)), and in matters involving zoning. § 810(g)(2)(c).
- N. If election is made after charge is issued, Attorney General must commence a civil action on behalf of the aggrieved party in federal district court. § 812(o).

FAIR HOUSING ACT MATRIX

1968 - 1988

WITH COMMENTS

INTRODUCTION

The Fair Housing Amendments Act (FHAA) of Sept. 13, 1988, Pub.L. No. 100-430, 1988, U.S. Code Cong. & Admin. News (102 Stat. 1619) (to be codified at 42 U.S.C. §§ 3601 et seq.) was introduced on June 22, 1988 in the House of Representatives. H.R. 1158, 100th Cong., 2d Sess. (1988). At that time Mr. Rodino summarized the history of fair housing efforts beginning with the failed effort in 1966. President Johnson's 1968 message to Congress sought such a measure and the Dirksen Compromise Amendment allowed it to pass the Senate. The assassination of Martin Luther King on April 4, 1968 resulted in passage of the law on April 11, 1968. The Act, coupled with the decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (case argued on April 1 and 2, 1968), changed the face of the law with respect to housing discrimination.

The Dirksen compromise made it possible for the bill to pass but subsequent events and the persistence of housing discrimination generated efforts to amend and strengthen the law. Unsuccessful efforts were made to amend the law in 1979 and 1980 even though it was then undisputed that segregation continued to be a pervasive problem in housing. The 1988 act was passed to strengthen the law. 134 Cong. Rec. H-4604 (daily ed. June 22, 1988) (statement of Rep. Rodino).

The 1988 amendments are meant to expand coverage and enhance enforcement, thereby protecting or covering additional classes, such as families and handicapped individuals, strengthening the powers of the Department of Housing and Urban Development (HUD), and providing swifter and more effective relief at less cost and burden to the persons discriminated against through the use of Administrative Law Judges (ALJs) and Justice Department enforcement. The amendments are also designed to preserve the benefits of the present system which provides substantial equivalency of state and local agencies, grandfathered for 40 months and up to another 8 months if circumstances justify, to provide time to amend state and local laws. See Section 810(f)(4). The right of an individual to file suit in federal court is also preserved and expanded. The effectiveness of the new law, which was signed by President Reagan on Sep-

tember 13, 1988 and became effective March 12, 1989, will depend on (1) how Congress acquits itself with respect to the law, i.e., whether it provides adequate funding, (2) enforcement, education, intake, and investigation, (3) the quality of the regulations, directives and procedures prepared by HUD, and (4) the funding of the activities prescribed under the law and the quality of persons who ultimately are hired, trained and charged with implementing the law.

OVERVIEW

This Comparison Chart is designed to provide the practitioner with easy access to the old Act (Column Number 1), and new legislation (Column Number 2), with new provisions underlined for purposes of comparison and evaluation.

Column Number 3 sets forth comments on the changes, additions or deletions in the new act and proposed regulations and suggests the issues raised thereby and by the Congressional Record. 134 Cong. Rec. H4603-4614 (daily ed. June 22, 1988); 134 Cong. Rec. H4673-4692 (daily ed. June 23, 1988); 134 Cong. Rec. S10454-10520 (daily ed. August 1, 1988); 134 Cong. Rec. S10544-10568 (daily ed. August 2, 1988); 134 Cong. Rec. H6491-6501 (daily ed. August 8, 1988).

Proposed regulations as found in Department of Housing and Urban Development, Fair Housing; Implementation of the Fair Housing Act of 1988; Proposed Rules; 53 Fed. Reg. 44991 (1988)(to be codified at 24 C.F.R. § 100.1 et seq.) are meant to implement the new act and are included. The 1988 Fair Housing Act required the Secretary of Housing and Urban Development to develop regulations implementing the statute within 180 days of the signing of the act. These regulations are significant with respect to the interpretation and implementation of the act in particular circumstances.

The HUD Regulations that apply specifically to the implementation of the Fair Housing laws will be found in Title 24 of the Code of Federal Regulations. It should be noted that such regulations are required to be judicially noticed (44 U.S.C. § 1507 (1982)) and that the code of Federal Regulations is *prima facie* evidence of the text of the original documents (44 U.S.C. § 1510 (1982)).

SUMMARY OF THE ACT AND REGULATIONS

The 1988 Fair Housing Act expands the coverage of Title VIII to include handicapped persons and familial discrimination in addition to, formerly covered (1968 Law), race, color, religion, sex or national origin. It adds an administrative enforcement action to the

court action by private persons or the Attorney General may take and provides for monetary penalties in the administrative process and eliminates the cap on punitive damages in court actions. Attorneys fees are provided for to prevailing parties. New proposed regulations include several parts: Part 100, describing unlawful conduct (previous Part 100 is revised as Part 121); Part 103 covering investigations under the 1988 Act (Part 105 covers investigations under the 1968 Act); Part 104, establishing procedures for administrative hearings; Part 106, Fair Housing Administrative Meetings; Part 109, Advertising Regulations; Part 110, Fair Housing Poster; Part 115, Recognition of state and local agencies, and substantial equivalency; and Part 121, revised requirements for keeping data.

In response to comments, HUD clarified the following: (1) The regulations do not change the standards for liability, i.e. effects are sufficient notwithstanding intent (*see, MHDC v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977)); (2) regulations do not make affirmative action unlawful (Congress is holding hearings on these-called "integration maintenance," or "race conscious" or "quota" systems in housing or financial assistance programs, and there may be additional legislation on this subject); (3) fair housing laws are based on the Commerce Clause, as well as the 13th and 14th Amendments (114 Cong. Rec. S2536-37 (daily ed. September 7, 1968)); (4) there is no change in the judicially established rules as to persons liable for discrimination (*See Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975)); and (5) the 1988 Act will apply to all complaints pending on or after March 12, 1989, and the Act will have retroactive application except as to handicap and familial discrimination (*Bradley v. Richmond School Board*, 416 U.S. 696, 715-16 (1974)). Seminars have already been presented during the first two months of 1989. At these seminars, experts have given their analysis of the new Act and the accompanying regulations. At the Fair Housing and Fair Lending Seminar, at The John Marshall Law School In Chicago, Illinois, HUD, Justice Department, Home Loan Bank Board and National Association of Realtors representatives made presentations, along with fair housing trial lawyers. Fair Housing - Fair Lending Seminar For Attorneys and Officials of Lending Institutions (January 26-27, 1989) (available in The John Marshall Law School Library) (hereinafter John Marshall Seminar). In Fort Lauderdale, Florida, on February 6 and 7, 1989, HUD attorneys and private sector experts in housing discrimination, handicap and familial rights, spoke on the interpretation and implementation of this law. Conference of Warren Gorham & Lamont and The Institute for Professional and Executive Development (February 5 and 6, 1989) (Fort Lauderdale, Florida) (hereinafter Florida Conference). Their remarks will be referred to herein where appropriate.

Fair Housing Act
April 11, 1968

EXCERPTS FROM THE CIVIL RIGHTS ACT OF 1968

Public Law 90-284
90th Congress, H.R. 2516
April 11, 1968

The 1968 Fair Housing Act 42 U.S.C. § 3601 (1982) (68 FHA), and the 1866 Civil Rights Act, 42 U.S.C. K1982 (1982) have been held to cover almost any conceivable method of discrimination based on race, color, religion, sex or national origin. Any person who is injured may sue, including whites injured because of discrimination against African Americans. *Williamson v. Hampton Mgt. Co.*, 339 F. Supp. 164 (N.D. Ill. 1972). The case law has established that the 1968 act did not amend or repeal the 1866 law. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). It is also well estab-

Fair Housing Act
September 13, 1988

Effective March 12, 1989

New language is underlined.

Deleted language is noted hereunder as appropriate. The language of introduction may be added as appropriate.

The 1988 Fair Housing Amendments Act of Sept. 13, 1988, Pub.L. No. 100-430, 1988, U.S. Code Cong. & Admin. News (102 Stat. 1619) (to be codified at 42 U.S.C. §§ 3601 et seq.), will be implemented in the same way as the 1968 Act. The addition of handicapped persons and families with children (familial status) as protected classes will, for the most part, have little impact on existing interpretive case law. However, these new categories will raise new issues and require courts to fashion new models for deciding such new issues.

Comments

Statutes and Regulations

The Fair Housing Regulations, which are to be codified in Title 24 of the Code of Federal Regulations, Parts 14, 100, 103, 104, 105, 106, 109, 110, 115 and 121 were signed on the 19th day of January, 1989, and published in the Federal Register, Vol 54, No. 13 on the 23rd day of January, 1989, pages 3232 through 3316. The statute will become effective on March 12, 1989. In summary, the Parts of the Final Rule include the following: Part 100, meant to spell out and explain what is unlawful; Part 103, telling the HUD staff how to investigate and set guidelines for their work; and Part 104, telling the administrative law judge and the parties how hearings will be conducted. The other parts

lished that the act is entitled to a broad interpretation which is designed and expected to be enforced in good measure by private attorneys general (private clients) and their private attorneys. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). 42 U.S.C. §§ 3610, 3612, and 1982 are separate and distinct statutes, and may be pursued independently and concurrently. See *Jones*, 392 U.S. at 409. Similarly, other avenues may be used, such as Ch. 42 U.S.C. § 3613 which pertains to Justice Department enforcement, and 42 U.S.C. § 3605 which pertains to housing finance.

* * *

The existing case law is not amended or overruled by the new statute. Rather, the body of law is expanded and made more effective. The structure of the law remains substantially similar to the old law. New Section 810 concerns the administrative processes of investigation and conciliation, as did old Section 810. New Section 812 provides for an Administrative Law Judge hearing. New Section 813 replaces old Section 812, providing for a private suit, and new section 814 replaces old Section 813 regarding action brought by the Attorney General.

Other laws, such as ch. 42 U.S.C. § 1982 (1982), are not affected by passage of the 1988 act. The new act does not change the fact that all three methods of enforcement (Sections 810, 812 (Administrative), 813 (Private Suit), and 814 (Attorney General)) may go forward simultaneously. It appears that the only limits are

have particular application to state and local agencies, ads, posters, data and meetings. A comparison of the 1968 and 1988 Acts shows there are significant changes meant to strengthen enforcement.

The regulations are meant to explain the statute so as to facilitate its implementation. Changes include regulations explaining the following parts of the statute:

1. Administrative enforcement (Sec. 812) providing damages (actual), penalties and attorney's fees;
2. representation in civil action in federal court by U.S. Attorney (Sec. 813);
3. one year to file at HUD, two years in court, including incidents before March 12, 1989;
4. broader coverage of all real estate market activities (Sec. 805);
5. handicap, familial status (children);
6. HUD investigation completed in 100 days, hearing held in 120 days (220 day total); and

those found in new Section 812(f) which provides that the administrative process must stop when trial starts in a civil suit, and new Section 813(g)(3) which provides that a civil suit cannot be started if a hearing has commenced in an administrative proceeding. One commentator has expressed a caveat that courts may question whether an election to opt for an Administrative Law Judge hearing may interrupt a § 813 private suit. Speech by Harry Carey, Florida Conference.

7. limited exemptions of the 1968 Act plus elderly housing exemptions and cost protections with respect to modifications for handicapped persons.

The supplemental material at page 44995, Vol. 53, No. 215, of the Federal Register, November 7, 1988 states the examples in the regulation are just that, and the interpretations of the cases since 1968 are still controlling.

Another issue was raised by John Knapp, former General Counsel of HUD, that even though the Administrative Law Judge cannot award punitive damages, and in cases of state and local agencies actual damages may even be limited, some persons may argue that an ALJ decision acts

as collateral estoppel or res judicata. Speech by John Knapp, Florida Conference.

This commentator has elaborated, however, indicating that collateral estoppel and res judicata will not operate unless the process and remedies are in fact the same. *Id.*

TITLE VIII - FAIR HOUSING

[1968]

Sec. 800. (1968 Act did not have section with short title).

Policy

Sec. 801. It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Definitions

Sec. 802. As used in this subchapter - 802(a) "Secretary" means the Secretary of Housing and Urban Development.

802(b) "Dwelling" means 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.

802(c) "Family" includes a single individual.

TITLE VIII - FAIR HOUSING ACT

[1968]

Sec. 800. *Short Title*

This title may be referred to as the "Fair Housing Act".

Sec. 801. *Declaration of Policy*

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

Sec. 802. *Definitions*

As used in this subchapter—

802(a) "Secretary" means the Secretary of Housing and Urban Development.

802(b) "Dwelling" means 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.

802(c) "Family" includes a single individual.

Comments - Regulations

Sec.800. Establishes Title of Act.

I. Sec. 801. Same in old and new statute. It appears there was no intent to change policy.

Sections 12-14 of the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619(1988) state that the Act does not preempt other acts; the effective date of the act is 180 days after its enactment (enacted Sept. 13, 1988, effective March 12, 1989), and that the various provisions of the Act are separable.

II. Definitions (subpart A) 54 Fed. Reg. 3283 (1989) (to be codified at 24 C.F.R. §100.201).

II(a) The "Secretary" of the Department.

II(b) "Dwelling". The regulations definition is the same. HUD and the Courts have interpreted "dwelling" broadly to include: Mobile home parks, trailer courts, condominiums, cooperatives, time shares and the like.

II(c) "Family" definition same as

- 802(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries.
- 802(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.
- 802(f) "Discriminatory housing practice" means an act that is unlawful under section [804, 805, or 806] of this title.
- 802(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.
- 802(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 of the United States Code, receivers, and fiduciaries.
- 802(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.
- 802(f) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of this title.
- 802(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.
- 802(h) "Handicap" means, with respect to a person—
- 802(h) (1) a physical or mental impairment which substantially limits
- statute.
- II(d) "Person" under the FHA is given broad interpretation to include corporate or organizational groups who may sue or be sued.
- II(e) "To Rent" includes any method of providing housing for consideration.
- II(f) "Discriminatory Housing Practice" includes intimidation, etc. Sec. 818 (formerly Sec. 817). It allows enforcement under Sections 810-812, 813 and 814, and the definition is important because it allows HUD enforcement.
- II(g) "State" covers D.C., Puerto Rico and territories.
- II(h) The new definitions of "handicap" include subject explained in 24 C.F.R. §100.201. The term "handicap" does not include individuals solely because they are transvestites. P.L. 100.430 (Sec. 6).
- II(h)(1) Adds the definition of handicapped persons. See 24 C.F.R. §100.201. This definition is broad, and

one or more of such person's major life activities,

802(h) (2) a record having such an impairment, or

802(h) (3) being regarded as having such an impairment, but such terms does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

802(i) "aggrieved person" includes any person who—

802(i)(1) claims to have been injured by a discriminatory housing practice; or

802(i)(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

802(j) "Complainant" means the person (including the Secretary) who files a complaint under Section 810. 802(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being

includes walking and thinking, for example. Speech by David Enzel, Florida Conference.

II(h)(2) History of record of impairment. See 24 C.F.R. §100.201.

II(h)(3) Does not include current, illegal use of drugs.

II(h)(4) The provision relating to "Transvestite" in Section 6(b)(3) appears to be similar to h(3) and it has been suggested this is the most logical position for that provision.

II(i) "Aggrieved Person." HUD and the courts have given broad interpretation to who may sue, including: fair housing groups, homeowners, testers, municipalities, and representatives. See, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Village of Bellwood v. Gladstone*, 569 F.2d 1013 (7th Cir. 1978).

II(j) "Complainant" refers to Sec. 810. It is expected that complaints initiated by the Secretary of HUD will play an important role in enforcement.

domiciled with—

802(k)(1) a parent or another person having legal custody of such individual or individuals; or

802(k)(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

802(1) "Conciliation" means the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary.

II(k) "Familial Status" covers discrimination against families with children. A limited number of Federal cases and state cases have established criteria for measuring such discrimination. Rules that exclude families with children violate this prohibition. II(k)(1) Legal Custody will apparently be, in accordance with state law, by court order or otherwise.

II(k)(2) Apparently, a court proceeding is not necessary to establish standing. This section will cover adoption or attempts to evict because of pregnancy.

II(l) "Conciliation" is meant to go on during the investigation. Well established HUD conciliation practices include anything from casual contacts and discussions in the field, to informal meetings at HUD that are structured and in which a substantial amount of additional facts are discussed and significant negotiations and arm twisting are part of the effort.

802(m) "Conciliation agreement" means a written agreement setting forth the resolution of the issues in conciliation.

802(n) "Respondent" means—

802(n)(1) the persons or other entity accused in a complaint of an unfair housing practice; and

802(n)(2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under Section 810(a).

802(o) "Prevailing party" has the same meaning as such term has in section 722 of the Revised Statutes of the United States (42 U.S.C. 1988).

II(m) "Conciliation Agreement" is an enforceable settlement agreement. Civil Enforcement - Sec. 813(9)(1)(A). Attorney General - Sec. 814(b).

II(n) New HUD regulations provide a non-exclusive definition of one kind of respondent "Broker." Such definition does not change the law that the principal is liable for the acts of his agent under respondeat superior and the duty to follow the law is non-delegable. The word "includes" means that all else is covered as well.

II(n)(1) The HUD definition of "respondent" includes anyone accused of violating the law, without limitation.

II(n)(2) The new statute makes it easier to add additional respondents who may have been missed at first.

II(o) 42 U.S.C. §1988 provides:

See Special Note, Column 1.

(Sec. 803 of the 1968 Act remains the same and is set forth in Column 2 only).

(Sec. 803(a) covering the period from enactment to December 31, 1968 (mainly government owned or aided) is not reproduced here and is merely historical).

Special Note

§1988. Proceedings in vindication of civil rights: attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as mod-

Sec. 803. Effective dates of certain prohibitions. - (a) Subject to the provisions of subsection (b) of this section and section 807 of this title, the prohibitions against discrimination in the sale or rental of housing set forth in section 804 of this title shall apply: 803(a)(1) Upon enactment of this subchapter, to—

803(a)(1)(A) dwellings owned or operated by the Federal Government;

803(a)(1)(B) dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government under agreements entered into after November 20, 1962, unless payment due thereon had been made in full prior to April 11, 1968;

803(a)(1)(C) dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the Federal Government under agreements entered into after November 20, 1962, unless payment thereon has been made in full prior to

III. The key dates now are the date the law becomes effective (March 12, 1989) and the effective date of the new regulations (January 19, 1989). Other important dates include the 40 month grandfathering clause for state agencies and certain dates relating to handicap requirements.

Special Note

ified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

See, *Larsen v. Sielaff*, 702 F.2d 116, 117 (7th Cir. 1983) (failure to obtain "clear victory" does not preclude recovery of attorney fees); *Morrison v.*

April 11, 1968: Provided, That nothing contained in subparagraphs (B) and (C) of this subsection shall be applicable to dwellings solely by virtue of the fact that they are subject to mortgages held by an FDIC or FSLIC institution; and

803(a)(1)(D) dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under loan or grant contracts entered into after November 20, 1962.

803(a)(2) After December 31, 1968, to all dwellings covered by paragraph (1) and to all other dwellings except as exempted by subsection (b) of this section.

803(b) Nothing in section 804 of this title (other than subsection (c)) shall apply to—

803(b)(1) any single-family house sold

III(a)(2) *Limited Exemptions*. Part A, 24 C.F.R. §100.10. The 1968 FHA contained at least seven (here listed a-e) limited exemptions. The 1988 FHA adds at least four more exemptions of general application, here listed as f through g. There are also several specific limitations dealing with age and handicap related issues which are not spelled out here. FHA exemptions do not apply to 42 U.S.C.

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Ayoub, 627 F.2d 669, 671 (3d Cir. 1980) (necessity of counsel relationship between action and relief for recovery of attorney fees); *Hughes v. Repko*, 578 F.2d 483, 488 (3d Cir. 1978) (financial inability not necessary); *Haythe v. Decker Realty Co.*, 468 F.2d 336, 340 (7th Cir. 1972) (defendant must prove that plaintiff did not act in good faith to recover attorney's fees); *Skomorucha v. Wilmington Housing Authority*, 518 F. Supp. 657, 658-59 (D. De 1981) (calculation of amount).

or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by the subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from

§§ 1981, 1982, 1983, 1984, and 1985 (1982). All but the listed exemptions of the 1968 act ended on December 31, 1968.

III(b)(1) *Single Family Houses*. *Applies to persons who have an interest in less than three houses at one time. If not resident or last resident then only one sale in 24 months is permitted. Exemption applies only if sale is (a) without Agent; and (b) without advertising. (Sec. 803(b)(1); 24 C.F.R. §100.10(c)(1)(i),(ii)).*

III(b)(2) *Multiple Family*. *Mrs. Murphy exemption-Owner occupied 4-flat. (Sec. 803(b)(2); 24 C.F.R. §100.10(c)(2)).*

III(c)(1) A sale is not exempt if it is aided by a person (presumably including an owner) who is in the business of selling or renting dwellings. See, Sec. 803(b)(1), lines 29-30. One is "in the business" if that person has been a principal in three or more sales within the last twelve months.

III(c)(2) A person is in the business if

the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without advertisement or written notice in violation of section 804(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

803(b)(2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarter as his residence.

that person was an agent for two or more sales or rentals of a dwelling, or had any interest therein, within that twelve month period.

III(c)(3) A person is "in the business" if he owns a building that is occupied by, or intended for occupancy, by five or more families.

III(d) *Religious Exemption.* Sales or rentals limited to persons of the same religion, if religion does not discriminate on race, color, or national origin are exempt. Sex, handicap, and familial status are not included. (Sec. 807(a); 24 C.F.R. §100.10(a)(1)).

III(e) *Private Club Exemption.* Allows a private club not open to the public to limit rental of lodgings to members. (Sec. 807(a); 24 C.F.R. §100.10(a)(2)).

III(f) *Familial Exemption: Maximum Occupancy.* Reasonable federal, state or local restrictions on maximum number of occupants may limit rental to families with children. Sec. 807(b)(1); 24 C.F.R. §110.10(a)(3). If

803(c) For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if—

803(c)(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

803(c)(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sale or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

803(c)(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by five or more families.

Sec. 804. Discrimination in sale or rental of housing and other prohibited practices. As made applicable by section 803 of this title and except as exempted by Sections 803(b) and 807 of

no such restrictions are applicable, then reasonable restrictions of a landlord will meet the requirements of the act. Remarks of Robert Butters, The John Marshall Law School Seminar. III(g) *Familial Exemption: Housing for Older Persons.* Housing designed and/or occupied by older persons under certain circumstances is exempted. Sec. 807(b)(2)(B); 24 C.F.R. §100.300(62); Sec. 807(b)(2)(c); 24 C.F.R. §100.304(55 or older). All housing actually for persons 62 years old and older, and certain other qualifying units or buildings with persons 55 years old and older are exempt.

The 1988 Act is meant to allow reasonable limitations with respect to occupancy, either public or privately initiated, that do not discriminate based on race, color, religion, sex, handicap, familial status or national origin. H.R. Rep. No. 711, 100th Congress, 2d Sess (1988). HUD will test restrictions to determine if they operate to unreasonably limit families.

Discrimination in the sale of housing

Sec. 804. As made applicable by section [803] of this title and except as exempted by sections [803(b) and 807] of this title, it shall be unlawful-

this title, it shall be unlawful—

804(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

804(b) 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, or national origin.

804(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimina-

804(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex *fa-milial status*, or national origin.

804(b) 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, *fa-milial status*, national origin.

804(c) To make, print, or publish, or cause to be made, printed, or pub-

III(h) Handicap: Illegal drug use is not included. Sec. 802(h)(3).

III(i) No person is required to rent to a person if it would be dangerous to others, or to property. Sec. 804(f)(9).

III(j) The handicap exceptions do not apply to "transvestites."

III(k) Conduct directed to a person because of conviction for manufacture or distribution of a controlled substance, as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. §802, is not prohibited by this act.

III(l) Housing designed for occupancy before March, 1991, is exempt from design requirements. This includes housing for which the first permit for such completion was obtained by January 13, 1990. If plans change, however, this protection may be gone. Speech by John Knapp, former HUD General Counsel, Florida Conference.

IV. *Unlawful Conduct.* The HUD Regs. are meant to give HUD's position, which will be favorably consid-

tion based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

804(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

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

lished any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, *handicap*, *familial status*, or national origin, or an intention to make any such preference, limitation, or discrimination.

804(d) To represent to any person because of race, color, religion, sex, *handicap*, *familial status*, or national origin that any dwelling is not available for inspection, sale or rental when such rental when such dwelling is in fact so available.

804(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, *handicap*, *familial status*, or national origin.

804(f)(1) To discriminate in the sale or rental, or to otherwise make un-

ered by the courts because HUD is the interpreter of the act. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). See, e.g., 24 C.F.R. §100.50 (real estate practices prohibited). Subpart (a) provides the Department's interpretation of conduct that is unlawful housing discrimination under Sec. 804 and Sec. 806 of the Fair Housing Act. In general, the prohibited actions are set forth under sections of this subpart which are most applicable to the discriminatory conduct described. However, an action illustrated in one section can constitute a violation under other sections in the subpart. For example, the conduct described in §100.60(b)(3)-(5) would constitute a violation of §100.65(a), as well as §100.60(a). IV(a) 24 C.F.R. §100.50(b)(1) corresponds with Sec. 804(a), first part. See also 24 C.F.R. §100.60 (different prices, evicting tenants, etc.); 24 C.F.R. §100.70 (steering, restrict choices, limiting information); Sec.

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IV(f)(1) Sec. 100.201 Definitions:

As used in this subpart:

"Accessible" means that the public or common use areas of the building can be approached, entered, and used by individuals with physical handicaps.

IV(f)(1)(a) A public or common use area that complies with the appropriate requirements of ANSI A117.1 or "accessible" within the meaning of this paragraph.

IV(f)(1)(b) "Accessible route" means a continuous unobstructed path connecting accessible elements and spaces in a building or within a site.

IV(f)(1)(c) "ANSI A117.1" means the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people.

IV(f)(1)(d) "Building" means a structure, facility or the portion thereof that contains or serves one or more dwelling units.

IV(f)(1)(e) "Building entrance on an

available or deny, a dwelling to any buyer or renter because of a handicap of—

804(f)(1)(A) that buyer or renter,

804(f)(1)(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

804(f)(1)(C) any person associated with that buyer or renter.

804(f)(2) 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 with such dwelling, because of a handicap of—

804(f)(2)(A) that person; or

804(f)(2)(B) a person residing in or intending to reside in that dwelling after it is so sold, rented or made available; or

804(f)(2)(C) any person associated with that person.

804(f)(3) For purposes of this subsection, discrimination includes—

804(f)(3)(A) a refusal to permit, at

804(a), second part, (otherwise unavailable firing employees, telling people they are incompatible).

IV(b) Terms and conditions include such things as larger downpayments or higher closing costs.

IV(c) 24 C.F.R. §§100.50, 100.75 (all written material, photos, illustrations).

IV(d) 24 C.F.R. §§100.50(b), 100.80 (untrue information, limiting information). See, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

IV(e) 24 C.F.R. §100.50(b)(6) refers to Sec. 804(e), panic peddling, and calls it block busting, and is covered by Sec. 804. See also, 24 C.F.R. §100.85 (uninvited solicitations, claiming increase of criminal or antisocial behavior). See, *U.S. v. Mitchell*, 580 F.2d 789 (5th Cir. 1978); *Zuch v. Hussey*, 394 F. Supp. 1028 (E.D. Mich. 1972).

IV(f) Handicap, 24 C.F.R. §100.20(1) — generally: 1(A) buyer or renter, 1(B) household member, etc. Congress intended for handicap to be in-

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accessible route" means an accessible entrance to a building that is connected by an accessible route.

IV(f)(1)(f) "Common use areas" means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof.

IV(f)(1)(g) "Controlled substance" means any drug or other substance, or immediate precursor included in the definition in Section 102 of the Controlled Substances Act (21 U.S.C. §802).

IV(f)(1)(h) "Covered multifamily dwellings" means buildings consisting of 4 or more dwelling units if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of 4 or more dwelling units.

IV(f)(1)(i) "Dwelling unit" means any building, structure or portion thereof

the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises, except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

804(f)(3)(B) *a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or*

804(f)(3)(C) *in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after the date of enactment*

interpreted in a manner consistent with regulations under Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. AIDS or HIV infected persons are covered. 134 Cong. Rec. H4922 (daily ed. June 29, 1988) (statement of Rep. Owens).

IV(f)(2) It is unlawful to discriminate in the sale or rental of a handicap of: IV(f)(2)(a) That buyer or renter;

IV(f)(2)(b) A person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

IV(f)(2)(c) Any person associated with that person or to make an inquiry to determine whether an applicant for a dwelling has a handicap or to make inquiry as to the nature or severity of a handicap of such a person. However, this paragraph does not prohibit reasonable inquiries that do not invade privacy. Speech by David Enzel, Trial Attorney, U.S. Dept. of Housing and Urban Development, Washington, D.C., Florida Confer-

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which is occupied as, or designed or intended for occupancy as, a residence by one person or family.

IV(f)(1)(j) There are also definitions for entrance, exterior, first occupancy, ground floor, handicap, major life activity, modification and site.

of the Fair Housing Amendments Act of 1988, a failure to design and construct those dwelling in such a manner that—

804(f)(3)(C)(i) *the public use and common use portions of such dwelling are readily accessible to and usable by handicapped persons;*

804(f)(3)(C)(ii) *all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and*

804(f)(3)(C)(iii) *all premises within such dwellings contain the following features of adaptive design:*

804(f)(3)(C)(iii)(I) *an accessible route into and through the dwelling;*

804(f)(3)(C)(iii)(II) *light switches, electrical outlets thermostats, and other environmental controls in accessible locations;*

804(f)(3)(C)(iii)(III) *reinforcements in the bathroom walls to allow later installation of grab bars; and*

ence. The applicant questionnaires, however, must be the same for all applicants. Speech by Bonnie Milstein, Senior Staff Attorney, Mental Health Law Project, Washington, D.C., Florida Conference.

IV(f)(3)(a) It shall be unlawful for any person to refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises. 24 C.F.R. §100.203.

IV(f)(3)(b) Reasonable accommodations. It is unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoyment of a dwelling unit, including public and common use areas. 24 U.S.C. §100.204(a).

IV(f)(3)(c) Covered multifamily dwellings for first occupancy after March 13, 1991 shall be designed and constructed to have at least one building entrance on an accessible

804(f)(3)(C)(iii)(IV) usable kitchens and bathrooms such that an individual in a wheel chair can maneuver about the space.

804(f)(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii). 804(f)(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

804(f)(5)(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph

route unless it is impractical to do so because of the terrain or unusual characteristics of the site. The burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility. Sec. 804(f)(3)(C); 24 C.F.R. §100.205.

IV(f)(4) The American National Standard guidelines, commonly called ANSI A117.1 are generally accepted as providing accessibility for handicapped persons, if followed.

IV(f)(5)(A) State and local laws which adopt protections will suffice. The question that arises is whether such a local ordinance can be or must be retroactive. As it applies to rehab or repair, such a regulation could be oppressive.

IV(f)(5)(B) Provides powers to local government to enforce the law.

(3)(C) are met.

804(f)(5)(C) *The Secretary shall encourage, but may not require, State and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirement of paragraph (3)(C).*

804(f)(5)(D) *Nothing in this Title shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph (3)(C).*

804(f)(6)(A) *Nothing in paragraph (5) shall be construed to affect the*

IV(f)(5)(C) *It is the policy of HUD to encourage states and units of general local government to include, in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraphs (a) and (c).*

IV(f)(5)(D) *The Secretary is not required to develop procedures or do local review.*

IV(f)(6)(A) *Local authority to review plans, pass ordinances and promul-*

authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 810(f)(3) of this Act to receive and process complaints or otherwise engage in enforcement activities under this Title

gate rules does not interfere with HUD receiving or filing complaints or enforcement.

804(f)(6)(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this Title.

804(f)(7) As used in this subsection, the term "covered multifamily dwellings" means—

804(f)(7)(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

804(f)(7)(B) ground floor units in other buildings consisting of 4 or more units.

IV(f)(7) Redefines "covered dwelling" to include buildings with 4 or more units that have an elevator, and ground floor units in building with 4 or more units.

IV(f)(8) Federal law does not preclude local requirements that are

804(f)(8) Nothing in this title shall be construed to invalidate or limit any law of a state or political subdivision of a State, or other jurisdiction

in which this title shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this title.

804(f)(9) *Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.*

Discrimination in financing of housing

Sec. 805. After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchas-

stricter with respect to handicap access.

IV(f)(9) Nothing in this subpart requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. 24 C.F.R. §100.202. It appears there may be a "one bite rule" under Section 804(f)(9).

V. *Real Estate Related Transactions* Part C.

V(a) All persons whose business includes engaging in selling, brokering, appraising, making or other financial assistance are covered. Sec. 805(a); 24 C.F.R. §100.110.

Sec. 805. *Discrimination in Residential Real Estate-Related Transactions.*

805(a) *In General—It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or condi-*

ing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section [803(b)] of this title.

tions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.
 805(b) *Definition*—As used in this section, the term “residential real estate-related transaction” means any of the following:

V(b) Transactions include not only financing of purchases, construction, repair, or maintenance of a dwelling but all loans secured by residential real estate. Sec. 805(b); 24 C.F.R. §100.115. Any discrimination is prohibited by 24 C.F.R. §100.120(a), such as denying information regarding availability, application requirements, or assistance (24 C.F.R. §100.120(b)). Discriminatory credit worthiness standards are prohibited by 24 C.F.R. §100.130(a)(b).

V(b)(1) Discrimination in making and purchasing loans includes refusing to purchase (Sec. 805(b); 24 C.F.R. §100.125(a)), basing decision on neighborhood (24 C.F.R. §100.125(b)(1)), pooling or packaging based on race (24 C.F.R. §100.125(b)(2)), imposing different conditions on marketing or sales (24 C.F.R. §100.125(b)(3)). This does not,

805(b)(1) *The making or purchasing of loans or providing other financial assistance—*

805(b)(1)(A) *for purchasing, constructing, improving, repairing, or maintaining a dwelling; or*
 805(b)(1)(B) *secured by residential real estate.*

805(b)(2) *The selling, brokering, or appraising residential real property.*

805(c) *Appraisal Exemption.* — *Nothing in this title prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.* Sec. 806. *Discrimination in provision of brokerage services.* — After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, handicap, familial status, or national origin.

Sec. 807. *Exemptions.* — 807(a) Nothing in this subchapter shall prohibit a religious organization, association, or society, or any non-

Discrimination in the provision of brokerage services

Sec. 806. After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin.

Religious organizations or private club exemptions

Sec. 807. Nothing in this subchapter shall prohibit a religious organization, association, or society, or any non-profit institution or organization operated, supervised or controlled by or in

however, preclude decisions based upon business necessity. 134 Cong. Rec., H10549 (daily ed. August 2, 1988) (statement of Rep. Sasser).

V(c) Generally discrimination in appraising and brokering is unlawful. Sec. 805(b)(2); 24 C.F.R. §100.135(a). When appraiser gives estimate or opinion of value, oral or written (24 C.F.R. §100.135(b)), the appraiser may consider factors that are not prohibited (Sec. 805(c); 24 C.F.R. §100.135(c)); but appraisal cannot be used if persons knew or should have known factors were based on race, etc. 24 C.F.R. §100.135(d).

VI(a) Brokerage services generally.

VI(b) Prohibited actions under this section include, but are not limited to: VI(b)(1) Setting different fees for access to or membership in a multiple listing service based on race, color, religion, sex, handicap, familial status, or national origin. 24 C.F.R. §100.90(b);

VI(b)(2) Denying or limiting benefits

conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

profit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion unless membership in such religion is restricted on account of race, color, and national origin. Nor shall anything in this subchapter prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

807(b)(1) *Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in*

accruing to members in a real estate brokers' organization because of race, color, religion, sex, handicap, familial status, or national origin;

VI(b)(3) Imposing different standards or criteria for membership in real estate or rental organization based on race, color, religion, sex, handicap, familial status, or national origin;

VI(b)(4) Establishing board or MLS boundaries, residence or office, location or other membership requirements which have the effect of excluding persons from membership because of race, color, religion, sex, handicap, familial status or national origin.

VII(a) The 1988 act maintains the limited religious and private club exemption of the 1968 act. See *U.S. v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975).

VII(b)(1) The housing facility must also have significant facilities and services specifically designed to meet the physical and social needs of older per-

this title regarding familial status apply with respect to housing for older persons. 807(b)(2) As used in this section "housing for older persons" means housing —

sons. "Significant facilities and services specifically designed to meet the physical or social needs of older persons" include an accessible physical environment, congregate dining facilities, social and recreational programs, emergency and preventive health care or programs, continuing education, welfare, information and counseling, recreational, homemaker, outside maintenance and referral services, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them (the housing facility need not have all of these features to qualify for the exemption under this subparagraph).

VII(b)(2)(A) Generally there is an exemption in the Fair Housing Amendments Act of 1988 that relates to housing for older persons. Sec. 807(b)(1); 24 C.F.R. §100.301.

VII(b)(2)(B) The provisions regarding familial status in this part shall not

807(b)(2)(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program; or 807(b)(2)(B) intended for, and solely occupied by, persons 62 years of age or older; or

807(b)(2)(C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:

807(b)(2)(C)(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

807(b)(2)(C)(ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

807(b)(2)(C)(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

Sec. 807(b)(2)(B); 24 C.F.R. §100.303.

VII(b)(2)(C) The provisions regarding familial status also shall not apply to housing intended and operated for occupancy by at least one person 55 years of age or older per unit. Sec. 807(b)(2)(C); 24 C.F.R. §101.304.

VII(b)(2)(C)(i) If it is not practicable to provide significant facilities and services designed to meet the physical and social needs of older persons, the housing facility must provide important housing opportunities to older persons; and

VII(b)(2)(C)(ii) At least 80% of the units in the housing facility must be occupied by at least one person 55 years of age or older per unit, except that a newly constructed housing facility for first occupancy after March 12, 1989, need not comply with this paragraph until 25% of the units in the facility are occupied; and

older.

807(b)(3) *Housing shall not fail to meet the requirements for "housing for older persons" by reason of:*

807(b)(3)(A) *persons residing in such housing as of the date of enactment of this Act who do not meet the requirements of Section 2(b) or (c), provided that new occupants of such housing shall meet the age requirements of sections 2(B) or (C); or*

807(b)(3)(B) *unoccupied units: Provided, that such units are reserved for occupancy by person who meet the age requirements of 2(B) or (C)*

807(b)(4) *Nothing in this title prohibits conduct against a person because such person has been convicted by any court of competent jurisdiction of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).*

VII(b)(2)(C)(iii) The owner or manager of a housing facility must publish and adhere to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. The following factors, among others, are relevant in determining whether the owner or manager of a housing facility has complied with the requirements of paragraph (c)(2):

- (a) The manner in which the housing facility is described to prospective residents;
 - (b) the nature of any advertising designed to attract prospective residents;
 - (c) age verification procedures;
 - (d) lease provisions;
 - (e) written rules and regulations;
 - (f) actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations;
- VII(b)(3)(A), (B) Sections 807(b)(3)(A) and (B) preserve the

Administration

808 (a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

808(b) The Department of Housing and Urban Development shall be provided an additional Assistant Secretary.

808(c) The Secretary may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this title. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344,

Sec. 808. Administration

808(a) The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.

808(b) The Department of Housing and Urban Development shall be provided an additional Assistant Secretary.

808(c) The Secretary may delegate any of his functions, duties and power to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, conciliating, hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter under this subchapter. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department of Housing and Urban Development in compliance with sections 3105, 3344,

units though unoccupied. VII(b)(4) Section 807(b)(4) is the "drug dealer" exemption.

VIII(a),(b) The overall responsibility for implementing the Fair Housing Act remains with HUD. Although the regulations delegate certain duties to the General Counsel of HUD with respect to issuing a charge and dealing with legal matters in accordance with Section 808(c), the Assistant Secretary provided for in Section 808(b) has the major responsibility. The 1988 act gives HUD more powers, more authority and also more exposure under the theories developed in *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), and later cases.

VIII(c) Section 808(c) allows the Secretary to delegate functions, and these functions have been delegated to certain central office staff, as well as personnel in the field.

5362, and 7521 of title 5 of the United States Code. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

808(d) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this title and shall cooperate with the Secretary to further such purposes.

808(e) The Secretary of Housing and Urban Development shall—

808(e)(1) make studies with respect to the nature and extent of discriminatory housing practices in representa-

5372, and 7521 of Title 5 of the United States Code. Insofar as possible, conciliation meetings shall be held in the cities or other localities where the discriminatory housing practices allegedly occurred. The Secretary shall by rule prescribe such rights of appeal from the decisions of his hearing examiners to other hearing examiners or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

808(d) All executive departments and agencies shall administer their programs and activities related to housing and urban development (*including any Federal agency having regulatory or supervisory authority over financial institutions*) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

808(e) The Secretary of Housing and Urban Development shall—

VIII(d) The responsibilities of HUD have been specifically expanded to include financial institutions. Although, as a result of litigation, certain financial regulatory agencies agreed to require banks and savings & loans to maintain certain records and, under fair housing laws, other data has been gathered. Such efforts, however, have not been uniform, nor consistently or vigorously pursued in cooperation with HUD. The new authority in Section 808(d) will provide HUD with authority to change the situation.

In addition to the Shannon court, there are other courts that support the view that if HUD fails to act, it can be brought to task. See, e.g., *Cli- (8th Cir. 1983); Jorman v. V.A.*, 579 F. Supp. 1407 (N.D. Ill. 1984) (applied to HUD as well); *NAACP v. Harris*, 567 F. Supp. 637 (D. Mass. 1983).

VIII(e)(1) Section 808(e)(1) allows the Secretary to make studies, provided funds are available. The Secretary has

tive communities, urban, suburban, and rural, throughout the United States;

808(e)(2) publish and disseminate reports, recommendations, and information derived from such studies;

808(e)(3) cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices; 808(e)(4) cooperate with and render such technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices; and 808(e)(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title.

808(e)(1) make studies with respect to the nature and extent of discriminatory housing practices in representative communities, urban, suburban, and rural, throughout the United States;

808(e)(2) publish and disseminate reports, recommendations, and information derived from such studies, including an annual report to the Congress—

808(e)(2)(A) *specifying the nature and extent of made nationally in eliminating discriminatory housing practices and furthering the purposes of this title, obstacles remaining to achieving equal housing opportunity, and recommendations for further legislative or executive action; and*

808(e)(2)(B) *containing tabulations of the number of instances (and the reasons therefor) in the preceding year in which—*

808(e)(2)(B)(i) *investigations are not completed as required by section*

made such studies, and one is in progress now to determine the nature and extent of discrimination.

VIII(e)(2)(A),(B) The report to Congress could be significant by showing the need for more staff and budget, showing federal agencies, if any, that refuse to fail to cooperate, and by indicating where agencies of, or those that are supported by the government add to the problem rather than help to solve it.

*[810(a)(1)(B)] of this title;
808(e)(2)(B)(ii) determinations are
not made within the time specified in
section [810(g)] of this title; and
808(e)(2)(B)(iii) hearings are not
commenced or findings and conclu-
sions are not made as required by
section [812(g)] of this title;*

808(e)(3) cooperate with and render
technical assistance to Federal, State,
local, and other public or private
agencies, organizations, and institu-
tions which are formulating or carry-
ing on programs to prevent or elimi-
nate discriminatory housing practices;
808(e)(4) cooperate with and render
such technical and other assistance to
the Community Relations Service as
may be appropriate to further its ac-
tivities in preventing or eliminating
discriminatory housing practices;

808(e)(5) administer the programs
and activities relating to housing and
urban development in a manner af-
firmatively to further the policies of
this subchapter; and

VIII(e)(3) Section 808(e)(3) elimi-
nates any barrier that may have been
thought to exist in regard to HUD
working directly with state and local
agencies.

VIII(e)(4) Section 808(e)(4) estab-
lishes a direct link with the Commu-
nity Relations Service.

808(e)(6) annually report to the Congress, and make available to the public, data on the race, color, religion, sex, national origin, age, handicap, and family characteristics of persons and households who are applicants for, participants in, or beneficiaries or potential beneficiaries of, programs administered by the Department to the extent such characteristics are within the coverage of the provisions of law and Executive orders referred to in subsection (f) which apply to such programs (and in order to develop the data to be included and made available to the public under this subsection, the Secretary shall, without regard to any other provision of law, collect such information relating to those characteristics as the Secretary determines to be necessary or appropriate).

808(f) The provisions of law and Executive orders to which subsection (e)(6) applies are—

808(f)(1) title VI of the Civil Rights

VIII(e)(6) Section 808(e)(6) in effect gives HUD the authority and appears to mandate that HUD does, to some extent, what the Civil Rights Commission did in the past, i.e., advise the public of problems and statistics relating to discrimination in housing and lending.

VIII(e)(7)-(12) The list of statutes and executive orders to be monitored that appear in Section 808(f) is, in effect, a list that must be followed if the 1988 law is to provide fair housing. Section 808(f)(12) provides HUD with broad powers to expand this list by promulgating regulations.

Act of 1964 [42 U.S.C. § 2000d et seq.];
808(f)(2) *title VIII of the Civil Rights Act of 1968 [42 U.S.C. § 3601 et seq.]*;
808(f)(3) *section 794 of Title 29 (otherwise known as section 504 of the Rehabilitation Act of 1973)*;
808(f)(4) *the Age Discrimination Act of 1975 [42 U.S.C. § 6101, et seq.]*;
808(f)(5) *the Equal Credit Opportunity Act [15 U.S.C. § 1691, et seq.]*;
808(f)(6) *section 1982 of this title*;
808(f)(7) *section 6379a) of Title 15 (otherwise known as section 8(a) of the Small Business Act)*;
808(f)(8) *section 1735f-5 of Title 12 (otherwise known as section 527 of the National Housing Act)*;
808(f)(9) *section 5309 of this title (otherwise known as section 109 of the Housing and Community Development Act of 1974)*;
808(f)(10) *section 1701a of Title 12 (otherwise known as section 3 of the Housing and Urban Development Act*

of 1968;
 808(f)(11) *Executive Orders 11063, 11246, 11625, 122250, 12259, and 12432* (citations omitted); and
 808(f)(12) *any other provision of law which the Secretary specifies by publication in the Federal Register for the purpose of this subsection.*
Sec. 809. Education and consultations; conferences and consultations; reports.

Education and conciliation;
 conferences and consultations;
 reports

Sec. 809 Immediately after April 11, 1968, the Secretary shall commence such educational and conciliatory activities as in his judgment will further the purposes of this subchapter. He shall call conferences of persons in the housing industry and other interested parties to acquaint them with the provisions of this title and his suggested means of implementing it, and shall endeavor with their advice to work out programs of voluntary compliance and of enforcement. He may pay per diem, travel, and transportation expenses for persons attending such conferences as provided in section 5703 of title 5 of the United States Code. He shall consult with

Immediately after April 11, 1968, the Secretary shall commence such educational and conciliatory activities as in his judgment will further the purposes of this subchapter. He shall call conferences of persons in the housing industry and other interested parties to acquaint them with the provisions of this subchapter and his suggested means of implementing it, and shall endeavor with their advice to work out programs of voluntary compliance and of enforcement. He may pay per diem, travel, and trans-

State and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their State or locality, and whether and how State or local enforcement programs might be utilized to combat such discrimination in connection with or in place of, the Secretary's enforcement of this subchapter. The Secretary shall issue reports on such conferences and consultations as he deems appropriate.

Enforcement

Sec. 810. (a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of

portation expenses for persons attending such conferences as provided in section 5703 of Title 5. He shall consult with State and local officials and other interested parties to learn the extent, if any, to which housing discrimination exists in their State or locality, and whether and how State or local enforcement programs might be utilized to combat such discrimination in connection with or in place of, the Secretary's enforcement of this subchapter. The Secretary shall issue reports on such conferences and consultations as he deems appropriate.

Sec. 810 *Administrative Enforcement; Preliminary Matters.* —

810(a) *Complaints and Answers.* — 810(a)(1)(A)(i) *An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file*

X. Sec. 810(a) - Sec. 810(b)(2) (complaints); 24 C.F.R. §103.30 (investigations, charges).

X(a) After 3/12/89 complaints for:

X(A)(1)(A)(i) claims based on race, color, religion, sex, or national origin must be brought within one year of the date of the incident (retroactive). 24 C.F.R. §103.1(b)1. Claims based on handicap, familial status, or for incidents occurring after 3/12/89 must be

such a complaint, the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in

such a complaint. 810(a)(1)(A)(ii) *Such complaints shall be in writing and shall contain such information and be in such form as the Secretary requires.* 810(a)(1)(A)(iii) *The Secretary may also investigate housing practices to determine whether a complaint should be brought under this section.* 810(a)(1)(B) *Upon the filing of such a complaint —* 810(a)(1)(B)(i) *the Secretary shall serve notice upon the aggrieved person acknowledging such filing and advising the aggrieved person of the time limits and choice of forums provided under this title;* 810(a)(1)(B)(ii) *the Secretary shall, not later than 10 days after such filing or the identification of an additional respondent under paragraph (2), serve on the respondent a notice identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents*

brought within one year from the date of the incident (not retroactive). 24 C.F.R. §103.1(b)(2). Complaints filed when information received and reduced to writing by HUD, or otherwise continuing violations, must be brought one year from last occurrence. 24 C.F.R. §103.40(a,b,c) (liberal amendment); 24 C.F.R. §103.42. For definitions of "by aggrieved person," and "assistant secretary," see 24 C.F.R. §103.9 and 103.15. X(a)(1)(A)(ii) The complaint may cause action to be taken by HUD or other agencies where the complained of actions violate other laws, rules, orders or regulations, for example, Title VI. 24 C.F.R. §§103.5, 103.10(a)(b). X(a)(1)(A)(iii) The Assistant Secretary may investigate practices presumably by private testing, or otherwise, to determine if a complaint should be filed. Sec. 810(a)(1)(A)(iii); 53 Fed. Reg. 25576, July 7, 1988. X(a)(1)(B)(i) The Definitions under Sec. 103 of the regulations are similar

violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year.

under this title, together with a copy of the original complaint;
 810(a)(1)(B)(iii) *each respondent may file, not later than 10 days after receipt of notice from the Secretary, an answer to such complaint; and*
 810(a)(1)(B)(iv) *The Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within (A) 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2), within 100 days after the commencement of such further action), (B) unless it is impracticable to do so.*

810(a)(1)(C) *If the Secretary is unable to complete the investigation within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant*

to those found in the statute, 24 C.F.R. §100, or are generic. See Definitions 1-15, 24 C.F.R. §103.5. Service is by personal service or certified mail. 24 C.F.R. §103.5.

X(a)(1)(B)(ii) Complaints may be filed against all those liable for housing discrimination. See, *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975), including both the principal or agent who is engaged, has engaged, or is about to engage in discrimination. 24 C.F.R. §103.20(a)(b). Complaints may be filed in Washington or any listed office or equivalent agency and will be dual filed, in person or by mail. 24 C.F.R. §§103.25(a)(1-3), 103.50. Notice must be given to aggrieved person. 24 C.F.R. §103.45.

X(a)(1)(B)(iii) Sworn answer due is in 10 days. 24 C.F.R. §103.55.

X(a)(1)(B)(iv) Investigation will obtain information, document practices (24 C.F.R. §103.200), and compile factual data, including going beyond complaint to systemic investigation.

810(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

810(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to

and respondent in writing of the reasons for not doing so.

810(a)(1)(D) Complaints and answers shall be under oath or affirmation, and may be reasonably and fairly amended at any time.

810(a)(2)(A) A person who is not named as a respondent in a complaint, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent upon written notice, under paragraph (1), to such person, from the Secretary.

810(a)(2)(B) Such notice, in addition to meeting the requirements of paragraph (1), shall explain the basis for the Secretary's belief that the person to whom the notice is addressed is properly joined as a respondent.

810(b) Investigative report and conciliation. —

810(b)(1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the

24 C.F.R. §103.205. HUD does not currently do testing or fund groups to do it but it is permitted under Fair Housing Initiatives Program legislation. The Assistant Secretary may issue subpoenas (24 C.F.R. §104.326(b)), subject to General Counsel review for legal correctness. HUD intends to upgrade the agreement with other agencies to assure HUD will obtain information; Sec. 808(d) and (e); Ex. Ord. 12259; 24 C.F.R. §103.220.

X(a)(1)(c) HUD is to complete the investigation in 100 days or notify parties why it has not. 24 C.F.R. §103.225. The General Counsel cannot issue a charge until investigation is completed. 24 C.F.R. §103.400(c)(1).

X(a)(2)(B) Notice to respondent will identify alleged discriminatory practice (24 C.F.R. §103.50(b)(1)), procedural rights (24 C.F.R. §103.50(b)(3)) and state time limits for aggrieved persons to sue the tolling of time limits. 24 C.F.R. §103.50(b)(4). Retalia-

constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgement, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

810(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved

Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

810(b)(2) *A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.*

810(b)(3) *A conciliation agreement may be provided for binding arbitration of the dispute arising from the complaint. Any such arbitration agreement results from a conciliation agreement may award appropriate relief, including monetary relief.*

tion is unlawful. 24 C.F.R. §103.50(b)(6).

X(b)(1) Conciliation is to be fair remedy violation and eliminate Practices. 24 C.F.R. §103.300(a)(b). HUD persons engaged in investigation are not supposed to participate (24 C.F.R. §103.300(c)), but investigator may suspend fact finding and engage in conciliation.

X(b)(2) Agreement must be executed by complainant and respondent with approval of the secretary. 24 C.F.R. §103.310. Assistant Secretary may execute Secretary's charge if there are too many aggrieved people to obtain approval. 24 C.F.R. §103.310(2).

X(b)(3) Suggested forms of relief are spelled out in 24 C.F.R. §103.315, and must be in the public interest. 24 C.F.R. §103.320. Conciliation may cease if agreement seems unlikely, if there is failure of cooperation, or trial in a civil suit starts. 24 C.F.R. §103.325.

may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint: Provided, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount of controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has

810(b)(4) *Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the Secretary determines that disclosure is not required to further the purposes of this title.*
 810(b)(5)(A) *At the end of each investigation under this section, the Secretary shall prepare a final investigative report containing—*
 810(b)(5)(A)(i) *the names and dates of contacts with witnesses;*
 810(b)(5)(A)(ii) *a summary and the dates of the correspondence and other contacts with the aggrieved person and the respondent;*
 810(b)(5)(A)(iii) *a summary description of other pertinent records;*
 810(b)(5)(A)(iv) *a summary of witness statements; and*
 810(b)(5)(A)(v) *answers to interrogatories.*
 810(b)(5)(B) *A final report under this paragraph may be amended if additional evidence is later discovered.*

X(b)(4) Even if terms of conciliation are not disclosed, tabulation of results may be provided. 24 C.F.R. §103.325.
 X(b)(5)(A) The Assistant Secretary may exclude from the investigative reports names of witnesses which may be obtained through administrative or court discovery. 24 C.F.R. §103.230.
 X(b)(5)(B) Allows amendment of the Final Report. If the Attorney General is concerned about Rule 11, then consultation under 24 C.F.R. §103.410 could result in amending the Final Report.

occurred or is about to occur, the court may, subject to the provisions of section [812] of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

810(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

810(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section [812] of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

810(c) *Failure to comply with Conciliation Agreement.*—Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 814 for the enforcement of such agreement.

810(d) *Prohibitions and Requirements with Respect to Disclosure of Information.*—

810(d)(1) *Nothing said or done in the course of conciliation under this title may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned.*

810(d)(2) *Notwithstanding paragraph (1), the Secretary shall make available to the aggrieved person and the respondent, at any time, upon request following completion of the Secretary's investigation, information derived from an investigation*

X(c) Whenever the Secretary has reasonable cause to believe respondent breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under Sec. 814(b)(2). 24 C.F.R. §103.335.

X(d)(1) Nothing said or done in the course of the conciliation agreement may be made public or used as evidence without written consent of all persons concerned. 24 C.F.R. §103.330(a).

X(d)(2) The Secretary will make available to both parties information derived, as well as the final investigation report. Is that report signed by the Secretary? What is the legal purport of that report? 24 C.F.R. §103.330(b). Rule 408 of Federal Rules of Evidence, providing for the exclusion of otherwise discoverable evidence, does not operate when evidence is revealed in the course of compromise efforts.

and any final investigative report relating to that investigation.

810(e) Prompt Judicial Action.—

810(e)(1) *If the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this title, the Secretary may authorize a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint under this section. Upon receipt of such authorization, the Attorney General shall promptly commence such an action. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with the Federal Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the initiation or continuation of administrative proceedings under this section and section 812 of this title.*

X(e) Prompt Judicial Action

X(e)(1) The Secretary, at any time, may authorize a civil action for temporary or preliminary relief. The Secretary will promptly notify the Attorney General. The Attorney General shall commence action. The commencement of a civil action does not affect the initiation or continuation of administrative proceedings under this section or Section 812 or section 24 C.F.R. §104.10, et seq. HUD may also start debarment, implement Title VI, Executive Order 11063 or other action. 24 C.F.R. §103.510.

X(e)(2) Whenever the HUD General Counsel believes there is a basis for commencement of proceedings against any respondent under Sections 814(a) and 814(c), or for proceedings by any licensing or supervisory authorities, the General Counsel shall transmit the information upon which belief is based to the Attorney General or to such other authorities. 24 C.F.R. §103.500.

810(e)(2) Whenever the Secretary has reason to believe that a basis may exist for the commencement of proceedings against any respondent under section 814(a) and 814(c) or for proceedings by any governmental licensing or supervisory authorities, the Secretary shall transmit the information upon which such belief is based to the Attorney General, or to such authorities, as the case may be.

810(f) Referral for State or Local Proceedings.—

810(f)(1) Whenever a complaint alleges a discriminatory housing practice—

810(f)(1)(A) within the jurisdiction of a State or local public agency; and

810(f)(1)(B) as to which such agency has been certified by the Secretary under this subsection;

the Secretary shall refer such complaint to that certified agency before taking any action with respect to such complaint.

X(f) Referral for State or Local Proceedings.

X(f)(1) Whenever a complaint alleges a discriminatory practice within the jurisdiction of a state or local agency and which agency is certified by the Secretary, the Secretary shall refer the complaint to that agency. 24 C.F.R. §103.100(a). The aggrieved person shall be notified of any such referral. 24 C.F.R. §103.100(b).

X(f)(2)(A) Except with consent of the agency, the Secretary shall take no further action unless the agency has failed to commence proceedings before the 30th day. This procedure apparently adds 30 days to the 100 days for investigation. During the period after 1968, in cases in which substantial equivalency has been granted, the equivalent agencies have agreed, on a cooperative basis, that HUD could handle particular matters because of HUD's particular expertise, the need for particular action, or the

810(f)(2) *Except with the consent of such certified agency, the Secretary, after that referral is made, shall take no further action with respect to such complaint unless—*

810(f)(2)(A) *the certified agency has failed to commence proceedings with respect to the complaint before the end of the 30th day after the date of such referral;*

810(f)(2)(B) *the certified agency, having so commenced such proceedings, fails to carry forward such proceedings with reasonable promptness; or*

810(f)(2)(C) *the Secretary determines that the certified agency no longer qualifies for certification under this subsection with respect to the relevant jurisdiction.*

810(f)(3)(A) *The Secretary may certify an agency under this subsection only if the Secretary determines that—*

810(f)(3)(A)(i) *the substantive rights protected by such agency in the ju-*

existence of a temporary imbalance in available staff. It can be expected that this practice will continue.

X(f)(2)(B) HUD may also take action if the agency fails to carry forward the proceedings with reasonable promptness. This could apparently mean 100 days at the state and 100 days at HUD. What is meant by reasonable promptness? Who decides? When? Fifty days? Seventy-five days? What if impracticable?

X(f)(3)(A)(1) Certification by Secretary is allowed only if the substantive rights protected by such agency in the jurisdiction with respect to which certification is to be made are substantially equivalent to those created by this statute. 24 C.F.R. §115.1 - 115.11.

X(f)(3)(A)(1)(i) Substantive rights issues include whether there exists an ability to do the following: 1) assess large fines; 2) award actual damages; 3) award attorney's fees; 4) provide for conciliation agreements that are parallel; 5) provide for enforcement;

jurisdiction with respect to which certification is to be made;

810(f)(3)(ii) the procedures followed by such agency;

810(f)(3)(iii) the remedies available to such agency; and

810(f)(3)(iv) the availability of judicial review of such agency's action; are substantially equivalent to those created by and under this title.

(B) Before making such certification, the Secretary shall take into account the current practices and past performance, if any, of such agency.

810(f)(4) During the period which begins on the date of the enactment of the Fair Housing Amendments Act of 1988 and ends 40 months after such date, each agency certified (including an agency certified for interim referrals pursuant to 24 C.F.R. 115.7) for the purposes of this title on the day before such date shall for the purposes of this subsection be considered certified under this subsection with respect to those matters for which

6) provide a private cause of action; 7) provide for representation; 8) provide a parallel discovery process; 9) provide adequate staffing; 10) provide for ALJ or equivalent; 11) provide review process. Other questions concern 12) the department's previous track record, 13) whether there is the opportunity for civil enforcement by aggrieved person in court (24 C.F.R. §115.3(g)), and 14) the award of penalties or punitive damages in place of penalties.

X(f)(4) Each agency certified during the period from the date of the enactment of the FHAA of 1988, and ending 40 months later, shall be considered certified. This period could be extended by the Secretary for up to not more than 8 months.

such agency was certified on that date. If the Secretary determines in an individual case that an agency has not been able to meet the certification requirements within this 40-month period due to exceptional circumstances, such as the infrequency of legislative sessions in that jurisdiction, the Secretary may extend such period by not more than 8 months.

810(f)(5) Not less frequently than every 5 years, the Secretary shall determine whether each agency certified under this subsection continues to qualify for certification. The Secretary shall take appropriate action with respect to any agency not so qualifying.

810(g) Reasonable cause determination and effect.

810(g)(1) The Secretary shall, within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2) with respect to a complaint, within

X(f)(5) Every five years or less, the Secretary will determine whether each agency continues to qualify.

X(g)(1) The General Counsel of HUD, within 100 days, shall determine whether reasonable cause exists. The General Counsel will determine, from the totality of the factual cir-

100 days after the commencement of such further action), determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint (or, when the Secretary takes further action under subsection (f)(2), with respect to a complaint, within 100 days after the commencement of such further action), the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

810(g)(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practices has occurred or is about to occur, the Secretary shall, except as

circumstances known at the time of the decision, whether reasonable cause exists to believe discrimination has occurred or is about to occur. 24 C.F.R. §103.400. The standard is whether the charge is well grounded in the facts and the conduct appears to constitute a violation of the act.

X(g)(2)(A) If the General Counsel determines that reasonable cause exists, the General Counsel shall, except for (c), issue a charge for further proceedings.

provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 812.

810(g)(2)(B) Such charge—

810(g)(2)(B)(i) shall consist of a short and plain statement of the facts upon which the Secretary has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

810(g)(2)(B)(ii) shall be based on the final investigative report; and
810(g)(2)(B)(iii) need not be limited to the facts or grounds alleged in the complaint filed under section 810(a).

810(g)(2)(C) If the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 814, instead of issuing such charge.

810(g)(3) If the Secretary determines that no reasonable cause exists to be-

X(g)(2)(B) Such charge shall give a short statement of facts.

X(g)(2)(B)(ii) The charge shall be based on the final investigative report. Whether the complaint must track the report will be an issue, but it need not be limited to facts under Section 810(a).

X(g)(2)(C) If it involves state or local zoning or other law or ordinance, the Secretary shall immediately refer the matter to the Attorney General. 24 C.F.R. §103.400(2).

X(g)(3) If there are no grounds, or reasonable cause exists, then the Sec-

Evidence

Sec. 811. (a) In conducting an investigation the Secretary shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation: Provided, however, That the Secretary first complies with the provisions of the Fourth Amendment relating to unreasonable searches and seizures. The Secretary may issue subpoenas to compel his access to or the production of such materials, or to the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in the United States dis-

lieve that a discriminatory housing practice has occurred or is about to occur, the Secretary shall promptly dismiss the complaint. The Secretary shall make public disclosure of each such dismissal.

810(g)(4) *The Secretary may not issue a charge under this section regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.*

810(h) *Service of Copies of Charge.* — *After the Secretary issues a charge under this section, the Secretary shall cause a copy thereof, together with information as to how to make an election under section 812(a) and the effect of such an election, to be served—*

810(h)(1) *on each respondent named in such charge, together with a notice of opportunity for a hearing at a*

retary shall promptly dismiss the complaint.

X(g)(4) *The General Counsel may not issue a charge under this section after the beginning of the trial of a civil action commenced by the aggrieved party. One issue concerns what the Secretary can do if the trial begins. Is the option to simply close the file and dismiss?*

X(h) *Relates to service on the parties. 24 C.F.R. §§103.405, 104.410(c). Section 810(h) provides for notice of how*

trict court for the district in which the investigation is taking place. The Secretary may administer oaths.

811(b) Upon written application to the Secretary, a respondent shall be entitled to the issuance of a reasonable number of subpoenas by and in the name of the Secretary to the same extent and subject to the same limitations as subpoenas issued by the Secretary himself. Subpoenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at this request.

811(c) Witnesses summoned by subpoena of the Secretary shall be entitled to the same witness and mileage fees as are witnesses in proceedings in United States district courts. Fees payable to a witness summoned by a subpoena issued at the request of a respondent shall be paid by him.

811(d) Within five days after service of a subpoena upon any person, such person may petition the Secretary to

time and place specified in the notice, unless that election is made; and

810(h)(2) *on each aggrieved person on whose behalf a complaint has been filed.*

Sec. 811. *Subpoenas; Giving of Evidence.—*

811(a) *The Secretary may, in accordance with this subsection, issue subpoenas and order discovery in aid of investigations and hearings under this title. Such subpoenas and discovery may be ordered to the same extent and subject to the same limitations as would apply if the subpoenas or discovery were ordered or served in aid of a civil action in the United States district court for the district in which the investigation is taking place.*

811(b) *Witness Fees — Witnesses summoned by a subpoena under this title shall be entitled to same witness and mileage fees as witnesses in proceedings in United States district*

to make an election under section 812(g), which can be made by either the aggrieved person or the respondent.

XI(a) In general, the Secretary may issue subpoenas and other discovery. The Act broadens discovery substantially to follow rules of administrative hearings and civil procedure of United States District courts.

XI(b) Witnesses shall be entitled to the same witness and mileage fees as witnesses in the U.S. District courts. Act requires parties to pay except when unable to do so.

revoke or modify the subpoena. The Secretary shall grant the petition if he finds that the subpoena requires appearance or attendance at an unreasonable time or place, that it requires production of evidence which does not relate to any matter under investigation, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

811(e) In case of contumacy or refusal to obey a subpoena, the Secretary or other person at whose request it was issued may petition for its enforcement in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

811(f) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if in his power to do so, in obe-

courts. Fees payable to a witness summoned by a subpoena issued at the request of a party shall be paid by that party or, where a party is unable to pay the fees, by the Secretary.

811(c) Criminal Penalties —

811(c)(1) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents, or other evidence, if it is in such person's power to do so, in obedience to the subpoena or other lawful order under subsection (a), shall be fined not more than \$1,000,000 or imprisoned not more than one year, or both.

811(c)(2) Any person who, with intent thereby to mislead another person in any proceeding under this title—

811(c)(2)(A) makes or causes to be made any false entry or statement of fact in any report, account, record, or other document produced pursuant

XI(c) Criminal Penalties.

XI(c)(1) Any person who willfully fails to comply, if it is in that person's power to do so, shall be fined not more than \$100,000 or imprisoned not more than 1 year or both. The new act increases penalties.

dience to the subpoena or lawful order of the Secretary, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. Any person, who with intent thereby to mislead the Secretary, shall make or cause to be made any false entry or statement of fact in any report, account, record, or other document submitted to the Secretary pursuant to his subpoena or other order, or shall willfully neglect or fail to make or cause to be made full, true, and correct entries in such reports, accounts, records, or other documents, or shall willfully mutilate, alter, or by any other means falsify any documentary evidence, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

811(g) The Attorney General shall conduct all litigation in which the Secretary participates as a party or as amicus pursuant to this Act.

to subpoena or other lawful order under subsection (a);
 811(c)(2)(B) willfully neglects or fails to make or to cause to be made full, true, and correct entries in such reports, accounts, records, or other documents; or
 811(c)(2)(C) willfully mutilates, alters, or by any other means falsifies any documentary evidence;
 shall be fined not more than \$100,000 or imprisoned not more than one year, or both.

Sec. 812. Enforcement by Secretary.—
 812(a) Election of Judicial Determination. — When a charge is filed under section 810, a complainant, a respondent, or an aggrieved person on whose behalf a complaint has been filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (c) in lieu of a hearing under subsection (b). The election must be

XI(c)(2)(A) Any person who, with intent to mislead, makes a false entry or statement;

XI(c)(2)(B) willfully neglects or fails to make or cause to be made full, true, and correct entries (appears to establish a burden to disclose - not "neglect" language);

XI(c)(2)(C) willfully mutilates, alters, or by any other means, falsifies any documentary evidence, shall be fined not more than \$100,000 or imprisoned not more than one year, or both.

XII. Enforcement - Election
 The respondent or the aggrieved person has an election for 20 days after the charge to have an administrative hearing or to require the Attorney General to file in federal court. If election is to go to court, ALJ proceeding is dismissed (24 C.F.R. §104.900). 24 C.F.R. §103.410(e) provides for consultation by the Attorney General with HUD General Counsel that could cause (1) more investiga-

Enforcement by private persons

Sec. 812. (a) The rights granted by sections [803, 804, 805, and 806] of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: Provided, however, That the court shall continue such civil case brought pursuant to this section or section [810(d)] of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action

made not later than 20 days after the receipt by the electing person of service under section 810(h) or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates.

812(h) *Administrative Law Judge Hearing in Absence of Election. — If an election is not made under subsection (a) with respect to a charge filed under section 810, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge issued under section 810. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of title 5, United States Code. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is al-*

tion or change the Final Investigation Report (Sec. 810(b)(5)(B)), (2) changes in the charge, or (3) voiding of the charge ab initio. Notice of an election must be filed within 20 days with the Chief Docket Clerk of the Administrative Law Judges. 24 C.F.R. §103.410(b).

XII(b) *ALJ Hearing. If an election is not made, the General Counsel will maintain an action before the ALJ. 24 C.F.R. §103.410(c); 5 U.S.C. §3105; 24 C.F.R. §104.10.*

in court: And provided, however, That any sale, encumbrance, or rental contract order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

812(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

812(c) The court may grant relief, as it deems appropriate, any permanent

leged to have occurred or to is about to occur.

812(c) *Rights of Parties.* — At a hearing under this section each party may appear in person, be represented by counsel, present evidence, cross-examine witnesses, and obtain the issuance of subpoenas under section 811. Any aggrieved person may intervene as a party in the proceeding. The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.

812(d) *Expedited Discovery and Hearing.* —

812(d)(1) *Discovery in administrative proceedings under this section shall be conducted as expeditiously and inexpensively as possible, consistent with the need of all parties to obtain relevant evidence.*

812(d)(2) *A hearing under this section shall be conducted as expeditiously and inexpensively as possible,*

XII(c) Each party may appear at the ALJ hearing and may be represented by counsel. The Regulations, under 24 C.F.R. §104.20, contain 16 definitions which follow the statute. Generally, "hearing" is defined as a proceeding that involves submission of evidence. 24 C.F.R. §104.20.

XII(d) Time calculations are in 24 C.F.R. §104.30. Time begins the day following the Act and includes the last day, except Saturdays, Sundays or federal holidays, when it includes the next business day. Saturdays and Sundays are excluded for periods under seven days. 24 C.F.R. §104.30. The period is three days for mail ads. 24 C.F.R. §104.30 (d).

XII(d)(1)(2) The discovery and hearings before administrative law judges are to be conducted expeditiously and inexpensively. 24 C.F.R. §104.500.

or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

consistent with the needs and rights of the parties to obtain a fair hearing and a complete record.

812(d)(3) *The Secretary shall, not later than 180 days after the date of enactment of this subsection, issue rules to implement this subsection.*

812(e) *Resolution of Charge.* — Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued. 812(f) *Effects of Trial of Civil Action on Administrative Proceedings.* —

An administrative law judge may not continue administrative proceedings under this section regarding any alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved party under an Act of Congress or a State law, seeking relief with respect to that discriminatory housing practice.

812(g) *Hearings, Findings and Conclusions, and Order.* —

XII(d)(3) The Regulations are per statute.

XII(e) The aggrieved person must approve settlement.

XII(f) If civil trial starts, administrative proceeding stops. Sec. 812(f); 24 C.F.R. §104.900(b). Actions for TRO or Preliminary Injunction under Sec. 810(e) or Sec. 813(c)(1) are not affected in the same way. Before hearing, the parties shall file prehearing statements (24 C.F.R. §104.600(a)) with issues ((b)(1)), stipulated facts, disputed facts, witnesses, law, conclusions, and estimated time. There will be a prehearing conference. 24 C.F.R. §104.610(a). Settlement Judge may be appointed. 24 C.F.R. §104.620.

Special Notes

XII(d)(1) Discovery Regulations. Except where ALJ hearing regulations conflict with federal rules, Federal Rules of Discovery apply. 24 C.F.R. §104.500(a). Voluntary discovery is encouraged. 24 C.F.R. §104.500(b). Discovery must be completed 15 days before the date scheduled for hearing (165 days or less). 24 C.F.R. §104.500(3). Depositions generally follow Federal Rules. 24 C.F.R. §104.510(a)(b)(c). Objections in depositions must be presented to ALJ immediately. 24 C.F.R. §104.510(d). Person requesting deposition shall bear all costs. 24 C.F.R. §104.510(e). Depositions may be used at hearing as in federal courts (24 C.F.R. §104.520), and if unavailable otherwise. *Id.* If part of a deposition is introduced, any party may require that it all be introduced. 24 C.F.R. §104.520(5). Written interrogatories are limited to 20 without leave of ALJ. 24 C.F.R.

812(g)(1) *The administrative law judge shall commence the hearing under this section no later than 120 days following the issuance of the Charge, unless it is impracticable to do so. If the administrative law judge is unable to commence the hearing within 120 days after the issuance of the charge, the administrative law judge shall notify the Secretary, the aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.*

812(g)(2) *The administrative law judge shall make findings of fact and conclusions of law within 60 days after the end of the hearing under this section, unless it is impracticable to do so. If the administrative law judge is unable to make findings of fact and conclusions of law within such period, or any succeeding 60-day period thereafter, the administrative law judge shall notify the Secretary, the*

XII(g)(1) The hearing will start 120 days from charge (24 C.F.R. §104.700(a)), and in the vicinity. 24 C.F.R. §104.700(b). The hearing will be conducted in accordance with the Administrative Procedures Act, 5 U.S.C. §§551-59. 24 C.F.R. §104.710. 24 C.F.R. §104.720 governs waivers of appearance. The Federal Rules of Evidence apply. 24 C.F.R. §104.730. 24 C.F.R. §§104.750-104.810 governs exhibits, records, etc.

XII(g)(2) Decision is due 60 days after oral hearing or briefs are due. The Administrative Law Judges are the functional equivalent of federal judges in preparing findings of fact or conclusions of law.

The ALJ shall issue an initial decision within 60 days of the end of the hearing, or 60 days after any remand from the Secretary after any review. 24 C.F.R. §104.910(d).

Special Note

§104.530(a). Answers or objections are due in 15 days. 24 C.F.R. §104.530(b). Requests for production must be objected to or answer filed in 15 days. 24 C.F.R. §105.540(c). Request for admissions is admitted unless denied or noncompliance within 15 days is explained. 24 C.F.R. §104.550.

Admission is for this proceeding only and cannot be used elsewhere. 24 C.F.R. §104.550(d). Protective Orders are governed by 24 C.F.R. §104.570, and Compel - Sanctions by 24 C.F.R. §104.580. Subpoenas, service, fees, mileage, and motions to quash are governed by 24 C.F.R. §104.590.

aggrieved person on whose behalf the charge was filed, and the respondent, in writing of the reasons for not doing so.

812(g)(3) *If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent—*

812(g)(3)(A) *in an amount not exceeding \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice;*

812(g)(3)(B) *in an amount not exceeding \$25,000, if the respondent has been adjudged to have committed one other discriminatory practice*

XII(g)(3) In the regulations, the order entered by the ALJ is called an Initial Decision because it is reviewable by the Secretary apparently (24 C.F.R. §104.910(b)), including actual damages and injunction.

XII(g)(3)(A) "Adjudged" includes state or local fair housing laws, administrative or court, licensing or regulatory proceeding. 24 C.F.R. §104.910(b)(3)(i)(A); Sec. 812(g)(3)(A), (B) and (C). Fines include \$10,000 for the first offense, \$25,000 for the second within 5 years, and \$50,000 for the third within 7

Special Note

Administrative Law Judges

ALJs are appointed under 5 U.S.C. §3105. 24 C.F.R. §104.100. See also: 24 C.F.R. §104.110 (full power); 24 C.F.R. §104.120(a) (disqualification); 24 C.F.R. §104.120(b) (motions for recusal); 24 C.F.R. §104.130(a)-(c) (ex parte communications are prohibited).

No officer, employee or agent of the federal government engaged in investigations, conciliation or prosecution in the proceeding may participate in hearing or advise ALJ. 24 C.F.R. §104.140.

during the 5-year period ending on the date of the filing of this charge; and

812(g)(3)(C) in an amount not exceeding \$50,000 if the respondent has been adjudged to have committed 2 or more discriminatory housing practices during the 7-year period ending on the date of the filing of this charge;

except that if the acts constituting the discriminatory housing practice that is the object of the charge are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory housing practice, then the civil penalties set forth in subparagraphs (B) and (C) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

812(g)(4) No such order shall affect any contract, sale, encumbrance, or lease consummated before the issu-

years. Id.

These time limits do not apply to Natural persons. 24 C.F.R. §104.910(b)(3)(ii). If two persons are in violation, each may be fined. 24 C.F.R. §104.910(b)(3)(iii).

XII(g)(4) An order does not affect preexisting contracts. Sec. 812(g)(4). The initial decision will be served on

Special Note

Parties

Parties are governed by Parts 103 and 104. 24 C.F.R. §103.405; 24 C.F.R. §104.200(a)(1) (HUD); 24 C.F.R. §103.405; 24 C.F.R. §104.200(a)(2) (respondent); 24 C.F.R. §104.430; 24 C.F.R. §104.200(a)(3) (intervenor); 24 C.F.R. §104.200(b) (right to counsel); 24 C.F.R. §104.210(b)(2) (parties may represent partnership); 24 C.F.R. §104.210(b)(3) (officer may represent corporation or trust); 24 C.F.R. §104.220 (standards under which ALJ may exclude parties).

Special Note

Pleadings

Pleadings are governed by Part 104. 24 C.F.R. §104.400(a)(form); 24 C.F.R. §104.400(b) (signature is certification); 24 C.F.R. §104.410 (the charge generally); 24 C.F.R. §104.410(a) (filed by General Counsel with ALJ Clerk and served within 3

ance of such order and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the charge filed under this title.

812(g)(5) *In the case of an order with respect to a discriminatory housing practice that occurred in the course of a business subject to a licensing or regulation by a governmental agency, the Secretary shall, not later than 30 days after the date of the issuance of such order (or, if such order is judicially reviewed, 30 days after such order is in substance affirmed upon such review)—*

812(g)(5)(A) *send copies of the findings of fact, conclusions of law, and the order, to that governmental agency; and*

812(g)(5)(B) *recommend to the governmental agency appropriate disciplinary action (including, where appropriate, the suspension or revocation of the license of the respondent).*

812(g)(6) *In the case of an order*

all parties and become final in 30 days if no action is taken by the Secretary. 24 C.F.R. §104.920. Any time before final decision, the parties may settle if approved by the General Counsel. 24 C.F.R. §104.925.

XII(g)(5) *If a final decision relates to business that is subject to licensing or regulation, the General Counsel sends findings of fact, conclusions of law, and order to agency or agencies (24 C.F.R. §104.935(a)(1)(ii)) for revocation etc., or to Attorney General if there was another adjudication within five years. Sec. 812(g)(6).*

days); 24 C.F.R. §104.400(b) (must be clear and concise); 24 C.F.R. §104.410(b)(1) (rights relating to 20 day election, but if election not made, then ALJ hearing proceeds); 24 C.F.R. §104.410(b)(3) (notice must be given to purchase of lessee); 24 C.F.R. §104.420 (answer); 24 C.F.R. §104.440 (amendments); 24 C.F.R. §104.810 (amendment evidence following hearing).

Note: Intervention Motion after 30 days will be considered.

against a respondent against whom another order was issued within the preceding 5 years under this section, the Secretary shall send a copy of each such order to the Attorney General.

812(g)(7) If the administrative law judge finds that the respondent has not engaged or is not about to engage in a discriminatory housing practice, as the case may be, such administrative law judge shall enter an order dismissing the charge. The secretary shall make public disclosure of each such dismissal.

812(h) Review by Secretary: Service of final order. —

812(h)(1) The Secretary may review any finding, conclusion or order issued under subsection (g). Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final.

812(h)(2) The Secretary shall cause

XII(g)(7) If initial decision is for respondent, the charge is dismissed. 24 C.F.R. § 104.910(c).

XII(h) The Secretary may review within 30 days and affirm, modify or set aside in whole or part or remand for further proceedings, in which case the ALJ may take additional evidence and render a decision within 60 days from the end of any hearing. 24 C.F.R. §§104.910(d), 104.930(a) & (b). Otherwise, the ALJ must explain why he has not rendered a decision within 60 days. Id.

the findings of fact and conclusions of law made with respect to any final order for relief under this section, together with a copy of such order, to be served on each aggrieved person and each respondent in the proceeding.

812(i) *Judicial Review.* —

812(i)(1) *Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain a review of such order under chapter 158 of title 28, United States Code.*

812(i)(2) *Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred, and filing of the petition for review shall be not later than 30 days after the order is entered.*

812(j) *Court Enforcement of Administrative Order Upon Petition by Secretary.* —

812(j)(1) *The Secretary may petition*

XII(h)(1) *The review of the Secretary is discretionary and will be reserved for these cases with significant impact. It is likely that the Secretary will elect not to review in most cases, and in those cases where review is undertaken, it will be done promptly. If the Secretary elects to review, the Secretary must give reasons for any decisions either to approve, modify or send back to the Administrative Law Judge. It appears that such a decision will be applicable to the Court of Appeals. Remarks of Alan Heiftz, HUD Chief Administrative Law Judge, John Marshall Law School Seminar.*

XII(i)(1) *Review of final decisions (24 C.F.R. §104.930) is to take place in the appropriate U.S. Court of Appeals. Sec. 812(i)(1); 24 C.F.R. §104.950(a). Petition for review may be sought by any person adversely affected within 30 days. Sec. 812(i)(2).*

any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business for the enforcement of the order of the administrative law judge and for appropriate temporary relief or restraining order, by filing in such court a written petition praying that such order be enforced and for appropriate temporary relief or restraining order.

812(j)(2) The Secretary shall file in court with the petition the record in the proceeding. A copy of such petition shall be forthwith transmitted by the clerk of the court to the parties to the proceeding before the administrative law judge.

812(k) Relief Which May Be Granted. —

812(k)(1) Upon the filing of a petition under subsection (i) or (j), the court may—

812(k)(1)(A) grant to the petitioner,

XII(j)(2) Procedure for Enforcement. When the order is final (45 days), the General Counsel of HUD may start proceedings in the Court of Appeals of the Circuit where the act occurred. However, under §812(j)(i), the General Counsel may seek temporary relief during the period in which the order may be appealed.

There appears to be no concurrent power on behalf of any individual. It might be appropriate, however, for the ALJ to enter an injunction which will have the same effect if violated.

or any other party, such temporary relief, restraining order, or other order as the court deems just and proper;

812(k)(1)(B) affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and

812(k)(1)(C) enforce such order to the extent that such order is affirmed or modified.

812(k)(2) Any party to the proceeding before the administrative law judge may intervene in the court of appeals.

812(k)(3) No objection not made before the administrative law judge shall be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

812(l) *Enforcement of Decree in Absence of Petition for Review.* — If no petition for review is filed under subsection (i) before the expiration of 45 days after the date the administra-

XII(1) If no petition for review is filed, the order is conclusive with respect to enforcement. 24 C.F.R. §104.950(b). Enforcement shall be in the Court of Appeals. 24 C.F.R. §104.955(a).

tive law judge's order is entered, the administrative law judge's findings of fact and order shall be conclusive in connection with any petition for enforcement—

812(l)(1) which is filed by the Secretary under subsection (j) after the end of such day; or

812(l)(2) under subsection (m).

812(m) *Court Enforcement of Administrative Order Upon Petition of Any Person Entitled to Relief.* — If before the expiration of 60 days after the date the administrative law judge's order is entered, no petition for review has been filed under subsection (i), and the Secretary has not sought enforcement of the order under subsection (j), any person entitled to relief under the order may petition for a decree enforcing the order in the United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred.

XII(m) If the General Counsel does not seek enforcement within 60 days, any person entitled to relief may petition the U.S. Court of Appeals. Sec. 812(m); 24 C.F.R. §104.995(b).

812(n) *Entry of Decree.* — *The clerk of the court of appeals in which a petition for enforcement is filed under subsection (1) or (m) shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary, the respondent named in the petition, and to any other parties to the proceeding before the administrative law judge.*

812(o) *Civil Action for Enforcement When Election Is Made for Such Civil Action.* —

812(o)(1) *If an election is made under subsection (a), the Secretary shall authorize, and not later than 30 days after the election is made the Attorney General shall commence and maintain, a civil action on behalf of the aggrieved person in a United States district court seeking relief under this subsection. Venue for such civil action shall be determined under Chapter 87 of title 28, United States Code.*

XII(o)(1) *If election is made under Sec. 812(a), the Attorney General must bring suit in federal district court within 30 days.*

812(o)(2) Any aggrieved person with respect to the issues to be determined in a civil action under this subsection may intervene as of right in that civil action.

812(o)(3) In a civil action under this subsection, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant as relief any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section 813. Any relief so granted would accrue to an aggrieved person in a civil action commenced by that aggrieved person under section 813 shall also accrue to that aggrieved person in a civil action under this subsection. If monetary relief is sought for the benefit of an aggrieved person who does not intervene in the civil action, the court shall not award such relief if that aggrieved person has not complied with discovery orders entered by the court.

812½ *Attorney's Fees.* — *In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.*

Sec. 813. *Enforcement by Private Persons*

813(a) *Civil Action.* —

813(a)(1)(A) *An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered*

XIII½ *Attorney's fees will be awarded in ALJ hearings, after final order, to prevailing party by initial decision of ALJ which may be reviewed or become final after 30 days, either with or without review. 24 C.F.R. §104.940. HUD is liable only as provided in 5 U.S.C. §504 and Part 14 of Chapter 24 of the Code of Federal Regulations. An intervenor is liable for attorney's fees only to the extent his participation was vexatious or frivolous. 24 C.F.R. §104.940(a). *Hughes v. Rowe*, 449 U.S. 5, 11 (1980); *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). An intervenor may not recover attorney fees irrespective of whether he was a prevailing party if he made no contribution to the proceedings. *Donnell v. U.S.*, 682 F.2d 246, 247 (D.C. Cir. 1982). There are two standards for recovery. The first is for private attorneys where the usual rules apply, and the second is against the government where statutory rules apply.*

Enforcement by the Attorney General. . .

Sec. 813. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

813(a)(1)(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this title was pending with respect to a complaint or charge under this title based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

813(a)(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 810 (a) and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such

XIII(a)(1) The two year statute runs from the last or continuing violation. See, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

XIII(a)(1)(B) The Justice Department has determined that the time does not run while the complaint is being processed at HUD. Remarks of Paul Hancock, Justice Department, Civil Rights Division, John Marshall Law School Seminar.

aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

813(a)(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this title with respect to such charge.

813(b) Appointment of Attorney By Court. — Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may —

813(b)(1) appoint an attorney for such person; or

813(b)(2) authorize the commencement or continuation of a civil action under subsection (a) without the payment of fees, costs, or security, if

in the opinion of the court such person is financially unable to bear the costs of such action.

813(c) Relief Which May Be Granted.

813(c)(1) *In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).*

813(c)(2) *In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such*

XIII(c)(1) The 1988 statute, Section 813(c) is substantially similar to Section 812 of the 1968 Act, and there is nothing in the published debates that would indicate Congress meant to change the well established judicial interpretation of 42 U.S.C. §3612, except that the cap on punitive damages is now same. Remarks of Stewart S. Manela, Florida Conference.

XIII(c)(2) There is no requirement under Section 813(c)(2) that a litigant be indigent to receive an award of fees. The award of fees will follow the settled rule of Christenburg Garment, that fees will be awarded to a plaintiff as a matter of course, but to defendants only when the plaintiffs acted in bad faith.

fees and costs to the same extent as a private person.

813(d) *Effect on Certain Sales, encumbrances, and Rentals. — Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this title.*

813(e) *Intervention by Attorney General. — Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 814 (e) in a civil action to which such section applies.*

Sec. 814. *Enforcement by the Attorney General*

XIII(d) Actual notice requires that, as part of temporary relief, defendants notify plaintiffs of any negotiations for sale.

XIII(e) Applications to intervene must be timely to prevent any last minute disruptions of the painstaking work done by the parties and the Court. *United States v. Metro. Dist. Comm. of Town of Hull*, 865 F.2d 2 (1st Cir. 1989).

XIV(a) There are two kinds of "pattern or practice" cases. First, one may sue any individual or corporate defendant who has engaged in a "pattern and practice" of discrimination. An individual "pattern and practice" is where the defendant's conduct is more than an isolated, peculiar, or atypical departure from generally nondiscriminatory practices. *United States v. Pelzer Realty Co.*, 484 F.2d 438, (5th Cir. 1973), cert. den. 416 U.S. 939 (1974); *United States v. Real Estate Development Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972). A pat-

Expedition of proceedings

Sec. 814. Any court in which a proceeding is instituted under section [812 or 813] of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited.

814(a) Pattern or Practice Cases. — Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

814(b) *On Referral of discriminatory Housing Practice or Conciliation Agreement for Enforcement.* —

814(b)(1)(A) *The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under section 810 (g).*

tern and practice may be found even though the defendant did not uniformly discriminate, provided that his violations have not been isolated, peculiar or atypical. *United States v. Reddoch*, P.H.E.O.H. Rptr. para. 13,569 (S.D. Ala. 1972), *aff'd* per curiam 467 F.2d 897 (5th Cir. 1972). The Attorney General may also sue, where a number of defendants have engaged in a "group pattern or practice." A "group pattern or practice" is where the cumulative impact of the activities of several defendants brings about substantial violations of the Act, even though there has been no conspiracy or coordinated action between the participants. *United States v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir. 1973), *cert. den.* 414 U.S. 826 (1973).

The Attorney General may also bring suit where he has reasonable cause to believe (1) that there has been a denial of equal housing opportunity to a

814(b)(1)(B) A civil action under this paragraph may be commenced not later than the expiration of 18 months after the date of the occurrence or the termination of the alleged discriminatory housing practice.

814(b)(2)(A) The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to breach of a conciliation agreement referred to the Attorney General by the Secretary under section 3610(c) of this title.

814(b)(2)(B) A civil action may be commenced under this paragraph not later than the expiration of 90 days after the referral of the alleged breach under section 3610(c) of this title.

814(c) Enforcement of Subpoenas. — The Attorney General, on behalf of the Secretary, or other party at whose request a subpoena is issued, under this title, may enforce such

group of persons, and (2) that such denial raises an issue of general public importance, even if the acts of discrimination are isolated and the victims of discrimination unidentified. *United States v. Hunter*, 459 F.2d 205, 217, 218, n.17 (4th Cir. 1972), cert. den. 409 U.S. 934 (1972); *United States v. Real Estate Development Corp.*, 347 F. Supp. at 776. The Attorney General's determination of general public importance is conclusive, and not subject to judicial review. *United States v. Northside Realty Associates*, 501 F.2d 181 (5th Cir. 1974), reh. den. 518 F.2d 884 (5th Cir. 1975), cert. den. 424 U.S. 977 (1976), 44 U.S.L.W. 3525 (March 23, 1976); *United States v. Bob Lawrence Realty Co.*, 474 F.2d at 115.

XIV(b) In actions brought by the Department of Justice, a violation is established even without proof of discriminatory intent or motive, if the defendant's conduct had a substantial racially segregative effect. *United*

subpoena in appropriate proceedings in the United States district court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business.

814(d) Relief Which May Be Granted in Civil Actions Under Subsections (a) and (b). —

814(d)(1) In a civil action under subsection (a) or (b), the court—

814(d)(1)(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this subchapter;

814(d)(1)(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and

814(d)(1)(C) may, to vindicate the public interest, assess a civil penalty against the respondent—

States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. den. 422 U.S. 1024 (1975); *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973), cert. den. 416 U.S. 939 (1974). The Act prohibits sophisticated, as well as simple-minded modes of discrimination. *United States v. Real Estate Development Corp.*, 347 F.Supp. 776 (N.D. Miss. 1972); *United States v. Northside Realty Associates*, P.H.E.O.H. Rptr. para. 13,620 (N.D. Ga. 1974), aff'd per curiam 501 F.2d 181 (5th Cir. 1974), reh. den. 518 F.2d 884 (5th Cir. 1975), cert. den. 424 U.S. 977 (1976). XIV(d)(1)(A) Relief may be granted not only to end present discrimination but also to rectify the effects of past discrimination. *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 229 (5th Cir. 1971). In *United States v. Trump Management Co.*, P.H.E.O.H. Rptr. para. 18,005 (E.D. N.Y. 1975) (Con-

814(d)(1)(C)(i) in an amount not exceeding \$50,000 for a first violation; and

814(d)(1)(C)(ii) in an amount not exceeding \$100,000, for any subsequent violation.

814(d)(2) In a civil action under this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the extent provided by section 2412 of title 28.

814(e) Intervention in Civil Actions.

— Upon timely application, any person may intervene in a civil action commenced by the Attorney General under subsection (a) or (b) which involves an alleged discriminatory housing practice with respect to which such person is an aggrieved person or a conciliation agreement to which such person is a party. The court may grant such appropriate relief to any such intervening party as

sent Decree) for example, the defendant was required to provide the Urban League with listings and keep apartments in certain white buildings off the market until the Urban League had a chance to fill vacancies. In several cases, the Justice Department has obtained damages for individual plaintiffs. See, for example, *United States v. Fogelman*, P.H.E.O.H.

Effects on state laws

Sec. 815. Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid.

Cooperation with state and local agencies administering fair housing laws . . .

Sec. 816. The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies

is authorized to be granted to a plaintiff in a civil action under section [813] of this title.

Sec. 815. Rules to implement subchapter

The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter. The Secretary shall give public notice and opportunity for comment with respect to all rules made under this section.

Sec. 816. Effect on State Laws

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory hous-

and their employees and, not withstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this title. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register.

Interference, coercion, or
intimidation

Sec. 817. It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his 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 sections [803, 804, 805, or 806] of this title. This section may be enforced by appropriate civil action.

ing practice under this subchapter shall to that extent be invalid.

Sec. 817. Cooperation with State and local agencies administering fair housing laws; utilizing of services and personnel; reimbursement; written agreements; publication in Federal Register.

The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this subchapter. In furtherance of such cooperative efforts, the Secretary may enter into written agreements thereof shall be published in the Federal Register.

Sec. 818. Interference, coercion, or intimidation; enforcement by civil action.—It shall be unlawful to coerce,

XVII. Interference, Coercion and Intimidation. The regulations reiterate that it is unlawful on a prohibited basis to:

1. deny or limit benefits in connection with a sale or rental;
2. interfere with enjoyment of a right;
3. threaten an adverse employment action;
4. threaten otherwise; or
5. retaliate. *Sec. 818; 24 C.F.R. §100.400.*

§1988. Proceedings in vindication of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not

Authorization of Appropriations

Sec. 818. There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this subchapter.

Separability of provisions

Sec. 819. If any provisions of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

TITLE IX

42 U.S.C. § 3631 (1982)

(Subchapter II)

Prevention of intimidation (Fair housing cases)

Sec. 901. Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts

intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his 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 section 3603, 3604, 3605, or 3606 of this title.

Sec. 819. Authorization of appropriations.—There are hereby authorized to be appropriated such sums as are necessary to carry out the purpose of this subchapter.

Sec. 820. Separability of provisions.—If any provision of this subchapter or the application thereof to any person or circumstances is held invalid, the remainder of the subchapter and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Title IX, Section 901 (42 U.S.C. 3631). Violations; bodily injury;

adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

See, *Larsen v. Sietlaff*, 702 F.2d 116, 117 (7th Cir. 1983) (failure to obtain

to injure, intimidate or interfere with—

(a) any person because of his race, color, religion, sex, or national origin and because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class persons from—

(1) participating, without discrimination on account of race, color, religion, sex, or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

death; penalties.—Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with—with, or attempts to injure, intimidate or interfere with—

(a) any person because of his race, color religion, sex, *handicap (as such term is defined in section 802 of this Act and which is understood to include, with regard to individuals who have not attained the age of 18 years, persons before birth)*, or national origin and because he is or has been selling, purchasing, renting, financing or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwelling; or

(b) any person because he is or has been, or in order to intimidate such person or any other person or any class or persons from—

(1) participating, without discrimination on account of race, color, religion,

“clear victory” does not preclude recovery of attorney fees); *Morrison v. Ayoub*, 627 F.2d 669, 671 (3d Cir. 1980) (necessity of counsel relationship between action and relief for recovery of attorney fees); *Hughes v. Repko*, 578 F.2d 483, 488 (3d Cir. 1978) (financial inability not necessary); *Haythe v. Decker Realty Co.*, 468 F.2d 336, 340 (7th Cir. 1972) (defendant must prove that plaintiff did not act in good faith to recover attorney's fees); *Skomorucha v. Wilmington Housing Authority*, 518 F. Supp. 657, 658-59 (D. De 1981) (calculation of amount).

sex, handicap (as such term is defined in section 802 of this Act and which is understood to include, with regard to individuals who have not attained the age of 18 years, persons before birth), or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section; or

(2) affording another person or class of persons opportunity or protection so to participate; or

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to discriminate on account of race, color, religion, sex, handicap (as such term is defined in section 802 of this Act), familial status (as such term is defined in section 802 of this Act and which is understood to include, with regard to individuals who have not attained the age of 18 years, persons before birth), or national origin, in any of the activities, services,

(c) any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex, or national origin, in any of the activities, services, organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate- shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than \$10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

TITLE X - CIVIL OBEDIENCE
18 U.S.C. §§ 231 et. seq. (1982)

Short title

Sec. 1001. This title may be cited as

the "Civil Obedience Act of 1968".

Sec. 231. Civil Disorders

(a)(1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function; or

(2) Whoever transports or manufactures for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder; or

(3) Whoever commits or attempts to commit any act to obstruct, impede,

organizations or facilities described in subsection (a) of this section, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than \$10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

AMENDMENTS TO TITLE 28,

UNITED STATES CODE

Section 2341. Definitions —

As used in this chapter -

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—

Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) Nothing contained in this section shall make unlawful any act of any law enforcement officer which is performed in the lawful performance of his official duties.

Sec. 232. Definitions

For purposes of this chapter:

(1) The term "civil disorder" means any public disturbance, involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage

(3) "agency" means -

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture;

(C) the Administration, when the order was entered by the Maritime Administration; and

(D) the Secretary, when the order is under section 812 of the Fair Housing Act.

Section 2342. Jurisdiction of court of appeals—

The court of appeals (other than the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-

(1) all final orders of the Federal

or injury to the property or person of any other individual.

(2) The term "commerce" means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; or (C) wholly within the District of Columbia.

(3) The term "federally protected function" means any function, operation, or action carried out, under the laws of the United States, by any department, agency, or instrumentality of the United States or by an officer or employee thereof; and such term shall specifically include, but not be limited to, the collection and distribution of the United States mails.

(4) The term "firearm" means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon.

Communications Commissions made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under section 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations or final orders of-

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841(a), and

(B) the Federal Maritime Commission issued pursuant to-(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 876); (ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876) (iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C. App. 844, 845, 845a, or 845b); (iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); (v) section 2(d) or 3 (d)

- (5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, firebomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.
- (6) The term "fireman" means any member of a fire department (including a volunteer fire department) of any State, any political subdivision of a State, or the District of Columbia.
- (7) The term "law enforcement officer" means any officer or employee of the United States, any State, any political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any
- of the Act of November 6, 1966 (46 U.S.C. App. 817(d) or 817e(d)); (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
- (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and fall final orders of such Commission made reviewable under section 1190(j)(2) of title 49, United States Code; and
- (6) *all final orders under section 812 of the Fair Housing Act.*
- Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia; and such term shall specifically include, but shall not be limited to, members of the National Guard, and defined in section 101(9) of title 10, United States Code, members of the organized militia of any State, or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, not included within the definition of National Guard as defined by such section 101(9), and members of the Armed Forces of the United States, while engaged in suppressing acts of violence or restoring law and order during a civil disorder.

Sec. 233. Preemption

Nothing contained in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which any provisions of the chapter operate to the exclusion of State or local laws on the same

subject matter, nor shall any provision of this chapter be construed to invalidate any provision of State law unless such provision is inconsistent with any of the purposes of this chapter or any provision thereof.

