

# Report for Congress

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## **The Fair Housing Act: A Legal Overview**

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## Summary

The Fair Housing Act (FHA) was enacted "to provide, within constitutional limitations, for fair housing throughout the United States."<sup>1</sup> The original 1968 Act prohibited discrimination on the basis of "race, color, religion, or national origin" in the sale or rental of housing, the financing of housing, or the provision of brokerage services.<sup>2</sup> In 1974, the Act was amended to add sex discrimination to the list of prohibited activities.<sup>3</sup> Likewise, in 1988 the Act was amended to prohibit discrimination in housing on the additional grounds of physical or mental handicap, as well as familial status.<sup>4</sup>

The FHA may be enforced by the Attorney General, the Department of Housing and Urban Development (HUD), and by victims of discrimination. Since enactment, the Act's coverage has been extended to "residential real estate-related transactions," which include both the making and the purchasing of loans secured by residential real estate, and the "selling, brokering, or appraising of residential real property."<sup>5</sup> Over the years, the FHA has also been construed to apply to discrimination in property and hazard insurance. Although the FHA has been amended by a series of smaller laws in recent years, there has not been a major overhaul of the Act since 1988.

In the 108<sup>th</sup> Congress, only one bill that would amend the FHA has been introduced. That bill, H.R. 214, would amend the FHA to prohibit discrimination on the basis of affectational or sexual orientation. Under the proposed legislation, "affectational or sexual orientation" would be defined as "male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults."

This report will be updated as warranted.

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<sup>1</sup> 42 U.S.C. § 1301.

<sup>2</sup> *Id.* at §§ 3604-06.

<sup>3</sup> Pub.L. No. 93-383.

<sup>4</sup> Pub. L. No. 100-430.

<sup>5</sup> 42 U.S.C. § 3605.

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# The Fair Housing Act: A Legal Overview

## I. Introduction

The Fair Housing Act (FHA) was enacted "to provide, within constitutional limitations, for fair housing throughout the United States."<sup>6</sup> The original 1968 Act prohibited discrimination on the basis of "race, color, religion, or national origin" in the sale or rental of housing, the financing of housing, or the provision of brokerage services.<sup>7</sup> In 1974, the Act was amended to add sex discrimination to the list of prohibited activities.<sup>8</sup> Likewise, in 1988 the Act was amended to prohibit discrimination on the additional grounds of physical or mental handicap, as well as familial status.<sup>9</sup>

The FHA may be enforced by the Attorney General, the Department of Housing and Urban Development (HUD), and by victims of discrimination. Since enactment, the Act's coverage has been extended to "residential real estate-related transactions," which include both the making and the purchasing of loans secured by residential real estate, and the "selling, brokering, or appraising of residential real property."<sup>10</sup> Although the FHA has been amended by a series of smaller laws in recent years, there has not been a major overhaul of the Act since 1988.

In the 108<sup>th</sup> Congress, only one bill that would amend the FHA has been introduced. That bill, H.R. 214, would amend the FHA to prohibit discrimination on the basis of affectational or sexual orientation. Under the proposed legislation, "affectational or sexual orientation" would be defined as "male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults."

In general, the FHA applies to all sorts of housing, public and private, including single family homes, apartments, condominiums, mobile homes, and others. However, the Act includes some exemptions. For example, it does not apply to a single family house sold or rented by a private owner without the use of a real estate agent, provided that, among other conditions, the owner does not own more than

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<sup>6</sup> 42 U.S.C. § 3601. The FHA, 42 U.S.C. §§ 3601 et seq, was originally enacted as Title VIII of the Civil Rights Act of 1968.

<sup>7</sup> *Id.* at §§ 3604-06.

<sup>8</sup> Pub..L. No. 93-383.

<sup>9</sup> Pub. L. No. 100-430.

<sup>10</sup> 42 U.S.C. § 3605.

three single family houses at any one time.<sup>11</sup> The Act also does not apply to rooms or units in a dwelling containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner occupies one of the living quarters.<sup>12</sup>

The Act contains three additional exemptions from its coverage. First, religious organizations or nonprofit institutions owned by religious organizations may not be prevented "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 preferences to such persons, unless membership in such religion is restricted on account of race, color, or national origin."<sup>13</sup> Second, private clubs may bar nonmembers or give preference to members in the rental or occupancy of lodgings that they own or operate for other than a commercial purpose.<sup>14</sup> Third, "housing for older persons," as the term is defined by the Act, may exclude families with children.<sup>15</sup>

Finally, the FHA provides that nothing in the act "limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."<sup>16</sup> Concerned that occupancy limits may conflict with the prohibition against familial status discrimination, Congress enacted section 589 of the Quality Housing and Work Responsibility Act of 1998.<sup>17</sup> This legislation required HUD to adopt the standards specified in the March 20, 1991 Memorandum from the General Counsel,<sup>18</sup> which states that owners and managers have discretion to establish reasonable occupancy standards based on factors such as the number and size of bedrooms and the overall size of the housing unit.<sup>19</sup> In general, HUD concluded that "an occupancy policy of two persons in a bedroom... is reasonable" under the FHA.<sup>20</sup> For more information about state and local restrictions on occupancy limits, see the "Group Homes" section.<sup>21</sup>

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<sup>11</sup> *Id.* at § 3603(b)(1). Other requirements include the condition that the house be sold or rented without a broker and without advertising. However, HUD regulations that implement the FHA provide that the exemptions specified in 42 U.S.C. § 3603(b) do not apply to advertising. In other words, advertising that indicates a discriminatory preference or limitation is prohibited even when such discrimination itself is not. 24 C.F.R. § 100.10(c).

<sup>12</sup> 42 U.S.C. § 3603(b)(2).

<sup>13</sup> *Id.* at § 3607(a).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at § 3607(b). *See also supra* notes 84-90 and accompanying text.

<sup>16</sup> *Id.* at § 3607(b)(1).

<sup>17</sup> Pub. L. No. 105-276.

<sup>18</sup> *Id.* at § 589.

<sup>19</sup> *See* 63 Fed. Reg. 70,982, 70,984 (Dec. 18, 1998), which adopted the 1991 Memorandum.

<sup>20</sup> *Id.*

<sup>21</sup> *Infra* at CRS-16.

## II. Housing Practices in Which Discrimination Is Prohibited

As amended, the FHA prohibits discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin in the sale or rental of housing, the financing of housing, the provision of brokerage services, or in residential real estate-related transactions. The HUD regulations elaborate upon the types of housing practices in which discrimination is prohibited and provide illustrations of such practices.<sup>22</sup> Under the regulations, the housing practices in which discrimination is prohibited include the sale or rental of a dwelling;<sup>23</sup> the provision of services or facilities in connection with the sale or rental of a dwelling;<sup>24</sup> other conduct which makes dwellings unavailable to persons;<sup>25</sup> steering;<sup>26</sup> advertising or publishing notices with respect to the sale or rental of a dwelling;<sup>27</sup>

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<sup>22</sup> 24 C.F.R. Part 100.

<sup>23</sup> *Id.* at § 100.60. Prohibited actions under this section include: (1) failing to accept or consider a bona fide offer; (2) refusing to sell or rent a dwelling, or to negotiate for a sale or rental; (3) imposing different sales prices or rental charges for the sale or rental of a dwelling; (4) using different qualification criteria or applications; or (5) evicting tenants because of their, or their guests', race, color, religion, sex, handicap, familial status, or national origin.

<sup>24</sup> *Id.* at § 100.65. Such discriminatory conduct includes: (1) using different provisions in leases or contracts of sale; (2) failing or delaying maintenance or repairs of a dwelling; (3) failing to process an offer of a dwelling or communicate an offer accurately; (4) limiting the use of privileges, services, or facilities associated with a dwelling; or (5) denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors.

<sup>25</sup> *Id.* at § 100.70. Such discriminatory conduct includes: (1) discharging or taking other adverse action against an employee, broker, or agent who refused to participate in a discriminatory practice; (2) employing codes or other devices to segregate or reject applicants, purchasers, renters, or refusing to deal with certain real estate brokers or agents because they or their clients are of a particular race, etc.; (3) denying or delaying the processing of an application made by a purchaser or renter, or refusing to approve such person for occupancy in a cooperative or condominium; or (4) refusing to provide (or providing differently) municipal services or property or hazard insurance for dwellings.

<sup>26</sup> *Id.* Steering practices include: (1) discouraging any person from inspecting, purchasing, or renting a dwelling; (2) discouraging the purchase or rental of a dwelling by exaggerating drawbacks or failing to inform any person of desirable features of a dwelling or of a community; (3) communicating to any prospective purchaser that he or she would be comfortable or compatible with the residents of the existing community or neighborhood because of race, etc.; or (4) assigning any person to a particular section of a community, or to a particular floor of a building.

<sup>27</sup> *Id.* at §§ 100.75. Discriminatory advertisements or notices include: (1) using words, phrases, photographs, illustrations, or symbols (*e.g.*, "white private home," "colored homes," "Jewish home," "Hispanic residence," "adult building"); (2) expressing to agents, brokers, employees, or any other persons a preference for or limitation on any purchaser or renter; (3) selecting media or locations for advertising which deny particular segments of the housing market information about housing opportunities, such as the use of English

(continued...)

misrepresentations as to the availability of a dwelling;<sup>28</sup> blockbusting;<sup>29</sup> and the denial of access to membership or participation in any multiple-listing service, real estate brokers association, or any other service relating to the sale or rental of a dwelling.<sup>30</sup>

The Act also covers "residential real estate-related transactions," which include both the making and the purchasing of loans secured by residential real estate, and the "selling, brokering, or appraising of residential real property."<sup>31</sup> Thus, the provisions of the FHA extend to the secondary mortgage market.<sup>32</sup>

In 1996, Congress added a section to the FHA that is designed to enhance fair lending practices in residential real estate-related transactions.<sup>33</sup> Enacted in section 2302 of the Omnibus Consolidated Appropriations Act,<sup>34</sup> the new provision established "a privilege for lender-initiated self-tests of residential real estate-related

<sup>27</sup> (...continued)

language media alone when non-English language media is available in the area; or (4) refusing to publish advertising or requiring different charges or terms for such advertising. *See also* 22 ALR Fed 359.

<sup>28</sup> *Id.* at § 100.80. Illustrations of this prohibited activity include: (1) indicating through words or conduct that a dwelling has been sold or rented; (2) representing that covenants or other deed, trust, or lease provisions which purport to restrict the sale or rental of a dwelling because of race, etc., preclude the sale or rental of a dwelling; (3) enforcing such covenants or other deed, trust, or lease provisions; (4) limiting information, by word or conduct, regarding suitably priced dwellings; or (5) providing false or inaccurate information regarding the availability of a dwelling to any person, including testers who are not actually seeking housing.

<sup>29</sup> *Id.* at § 100.85(b). The HUD regulations define "blockbusting" to mean "for profit, to induce or attempt to induce a person to sell or rent a dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race," etc. (24 C.F.R. § 100.85(a)). For blockbusting to be established, profit does not have to be realized, as long as profit was a factor for engaging in the activity.

<sup>30</sup> *Id.* at § 100.90. Such prohibited actions include: (1) setting different fees for access to or membership in such an organization; (2) denying or limiting benefits accruing to members in such an organization; (3) imposing different standards or criteria for membership in a real-estate sales or rental organization; or (4) establishing geographic boundaries or office location or residence requirements for access to or membership or participation in any multiple listing service.

<sup>31</sup> 42 U.S.C. § 3605. *See also*, 24 C.F.R. §§ 100.110 - 100.135. Discrimination in lending is also prohibited by the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f, which makes it unlawful for creditors to discriminate against any applicant for commercial or consumer credit on the basis of race, color, religion, national origin, sex or marital status, or age (providing the applicant is not a minor), or because all or part of the applicant's income derives from any public assistance program. The ECOA provides that an aggrieved person may not recover under both the ECOA and the FHA. 15 U.S.C. § 1691e(i).

<sup>32</sup> H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 30 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2191.

<sup>33</sup> 42 U.S.C. § 3614-1.

<sup>34</sup> Pub. L. No. 104-208.

lending transactions.”<sup>35</sup> Under self-tests, lenders conduct studies of their lending practices and procedures to determine their level of compliance with the FHA. If a lender discovers possible FHA violations but takes appropriate corrective action, then the results of the self-test are privileged and generally cannot be used against the lender in civil proceedings.<sup>36</sup> The purpose of this provision is to encourage lenders to monitor and correct potentially discriminatory practices on their own initiative.

Yet another FHA provision prohibits coercive behavior, making it unlawful to intimidate or interfere with an individual who has either exercised his or her rights under the FHA or aided another person in the exercise of his or her rights.<sup>37</sup>

Finally, because sexual harassment is recognized as a form of discrimination on the basis of sex, the FHA also prohibits such harassment. Although HUD does not currently have regulations governing sexual harassment in housing, the agency has issued proposed rules that would establish the standards that HUD intends to use in sexual harassment cases.<sup>38</sup> Under these proposed regulations, an individual would be allowed to bring a sexual discrimination claim under the FHA when “submission to unwelcome sexual advances and requests for sexual favors is made a term or condition of housing” or when a person’s “unwelcome [sexual] conduct is sufficiently severe or pervasive that it results in the creation of an environment that a reasonable person . . . would find intimidating, hostile, offensive, or otherwise significantly less desirable.”<sup>39</sup>

## Disparate Impact Discrimination

In addition to outlawing direct discrimination against individuals on the prohibited grounds mentioned above, the federal courts have generally agreed that the FHA prohibits policies that have a substantial disparate impact on minority applicants.<sup>40</sup> For example, in *Bronson v. Crestwood Lake Section I Holding Corp.*, a federal district court issued an injunction against an apartment complex's policy of refusing to lease apartments to applicants whose annual income did not equal three

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<sup>35</sup> 62 Fed. Reg. 66,424, 66,424 (Dec. 18, 1997).

<sup>36</sup> 42 U.S.C. §3614-1(a).

<sup>37</sup> *Id.* at § 3617. Violations of this section include: (1) coercing to deny or limit the benefits provided in connection with the sale or rental of a dwelling or in connection with a residential real estate-related transaction; (2) threatening, intimidating, or interfering with persons in their enjoyment of a dwelling; (3) threatening an employee with dismissal or adverse action, or taking adverse action, for any effort to assist a person seeking access to any residential real estate-related transaction; (4) intimidating or threatening any person because that person is engaged in activities designed to make others aware of their fair housing rights; or (5) retaliating against any person because that person made a complaint, testified, assisted, or participated in a proceeding under the Act. 24 C.F.R. § 100.400.

<sup>38</sup> 65 Fed. Reg. 67,666 (Nov. 13, 2000).

<sup>39</sup> *Id.* at 67,666.

<sup>40</sup> See generally, Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J.409 (1998).



times the annual rent.<sup>41</sup> The court found that, "[u]sing alternative statistical approaches, plaintiffs have demonstrated the challenged application policies utilized by the defendants do indeed have a substantial disparate impact on minority persons."<sup>42</sup>

As commentators have noted, "Two kinds of discriminatory effects may result from a facially neutral decision regarding housing. First, the decision may have a greater impact on one racial group than another. . . . A second discriminatory effect . . . can extend to the entire community," by, for example, perpetuating segregation and thereby preventing interracial association.<sup>43</sup> It does not follow, however, that all discriminatory effects are therefore prohibited. Courts take into account various factors to determine whether discriminatory effects are sufficient to make otherwise legal acts illegal. In *Phillips v. Hunter Trails Community Association*, for example, the Court of Appeals for the Seventh Circuit "deemed four factors of critical importance":

(1) strength of the plaintiff's statistical showing; (2) the legitimacy of the defendant's interest in taking the action complained of; (3) some indication -- which might be suggestive rather than conclusive -- of discriminatory intent; and (4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of, the defendant.<sup>44</sup>

Another practice that is not necessarily aimed at individual members of a minority group but that may have a disparate impact on such persons is "redlining," which is the denial of home loans or home insurance coverage based on the characteristics of the neighborhood in which a home is located.<sup>45</sup> Courts have consistently held that redlining violates the FHA. For example, in *Dunn v.*

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<sup>41</sup> 724 F. Supp. 148 (S.D.N.Y. 1989).

<sup>42</sup> *Id.* at 154.

<sup>43</sup> Joseph G. Cook and John L. Sobieski, Jr., 3 CIVIL RIGHTS ACTIONS ¶ 19.07, p. 19-19 (1994), quoting *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). *See also*, Bonnie P. Tucker and Bruce A. Goldstein, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 11-35 (1992).

<sup>44</sup> 685 F.2d 184, 189-190 (7th Cir. 1982). In *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988), the Court of Appeals for the Second Circuit struck down a racial quota plan that had caused minority applicants to have to wait ten times longer than white applicants for an apartment, rejecting the defense that the intention behind the plan was benign because it was designed to prevent "white flight" that would lead to a predominantly minority resident population. *See*, Cook and Sobieski, *supra* note 43, at p. 19-23.

<sup>45</sup> *See*, Annotation, "Redlining," *Consisting of Denial of Home Loans or Insurance Coverage in Certain Neighborhoods, as Discrimination in Violation of §§ 804 and 805 of Fair Housing Act* (42 USCS §§ 3605, 3605), 73 ALR Fed 899.

*Midwestern Indemnity Mid-American Fire and Casualty Co.*,<sup>46</sup> a federal court held that, if the plaintiff homeowners could prove their claim that their homeowners' insurance coverage had been terminated because the defendant insurance company's business portfolio included "a significant portion of black homeowners and/or persons residing in predominantly black neighborhoods," then they would establish a violation of the FHA. The court reasoned that "the availability of appropriate insurance is a necessary predicate to the availability of financing, and financial assistance is a precondition to securing availability of adequate housing."<sup>47</sup>

On the other hand, in *Thomas v. First Federal Savings Bank of Indiana*, a case in which the black homeowner plaintiffs claimed that the defendant financial institution had redlined the plaintiffs' neighborhood by refusing the plaintiffs' application for a second mortgage, the court held:

plaintiffs' statistical evidence is not sufficient as a matter of law to establish a violation of section 3605. Plaintiffs' attorneys offered no explanation of the meaning of these figures. . . . Although section 3605's red-lining prohibition makes it illegal to discriminate on the basis of certain characteristics of the plaintiff's neighborhood (*e.g.*, race, color, religion, sex or national origin), there are numerous legitimate business factors that go into a decision to make a loan which do not form the basis of a violation under section 3605.<sup>48</sup>

In addition to the credit worthiness of the borrower, these legitimate business factors include "the marketability, the salability of the security property, including the neighborhood in which it's located which has a bearing on the salability, [and] the diversification of the institution's assets."<sup>49</sup>

### **III. Enforcement of the Fair Housing Act**

Under the FHA, the Secretary of HUD, the Attorney General, and victims of discrimination may all take action to enforce the prohibition against discrimination. Typically, HUD has primary enforcement through agency adjudication, but the Department of Justice and aggrieved individuals may also bring actions in federal court under certain circumstances.

#### **Enforcement by the Secretary**

Within one year after an alleged discriminatory housing practice has occurred or terminated, an aggrieved person may file a complaint with the Secretary, or the

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<sup>46</sup> 472 F. Supp. 1106, 1107 (S.D. Ohio 1979).

<sup>47</sup> *Id.* at 1109. For a more detailed description of the prohibition against discriminatory insurance practices, see "The Fair Housing Act and Insurance" section later in this report.

<sup>48</sup> 653 F. Supp. 1330, 1340 (N.D. Ind. 1987).

<sup>49</sup> *Id.*

Secretary may file a complaint on his own initiative. When a complaint is filed, the Secretary must, within ten days, serve the respondent – the party charged with committing a discriminatory practice – with notice. The respondent must then answer the complaint within ten days.<sup>50</sup>

From the filing of the complaint, the Secretary has 100 days, subject to extension, to complete an investigation of the alleged discriminatory housing practice.<sup>51</sup> During this time, the Secretary must, "to the extent feasible, engage in conciliation with respect to" the complaint.<sup>52</sup> Agreements arising out of such conciliation are subject to the Secretary's approval. Such agreements may provide for binding arbitration, which may award appropriate relief, including monetary relief, to the aggrieved party.<sup>53</sup> The Secretary may also authorize a civil action for temporary or preliminary relief, pending final disposition of the complaint.<sup>54</sup>

At the completion of the investigation, the Secretary must determine whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. If he finds no reasonable cause, then he must dismiss the complaint. If he finds reasonable cause, then he must issue a charge on behalf of the aggrieved person, unless he has approved a conciliation agreement.<sup>55</sup>

If the Secretary issues a charge, then he, or any party to the dispute, may elect to have the case heard in a federal district court.<sup>56</sup> Otherwise, the case shall be heard by an administrative law judge (ALJ). In such a hearing, each party is permitted to

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<sup>50</sup> 42 U.S.C. § 3610(a)(1).

<sup>51</sup> *Id.* at § 3610(a)(1)(B)(iv). If the Secretary discovers that the complaint is within the jurisdiction of either a state or local public agency that the Secretary has certified, he must refer the complaint to that agency before taking any action. If the agency fails to commence the proceedings within 30 days after referral, or having commenced them fails to carry them forward with reasonable promptness, or if the Secretary determines that the agency no longer qualifies for certification, then the Secretary may take further action. *Id.* at § 3610(f). HUD published a final rule regarding certification and funding of state and local housing enforcement agencies at 61 Fed. Reg. 41,282 (Aug. 7, 1996).

<sup>52</sup> *Id.* at § 3610(b)(1).

<sup>53</sup> *Id.* at § 3610(b). If the Secretary has reasonable cause to believe that the respondent has breached a conciliation agreement, the Secretary must refer the matter to the Attorney General with a recommendation that a civil action be filed to enforce the agreement. *Id.* at § 3610(c).

<sup>54</sup> *Id.* at § 3610(e)(1). Upon receipt of such authorization, the Attorney General must promptly commence and maintain such an action.

<sup>55</sup> *Id.* at § 3610(g)(2).

<sup>56</sup> *Id.* at § 3612(a). Upon such an election the Secretary must authorize a civil action, which the Attorney General (within thirty days) must commence and maintain on behalf of the aggrieved person, who may intervene as of right in that civil action. Here, if the federal court finds discriminatory practices, it may award actual and punitive damages to the extent it would in a civil action commenced by a private person. *Id.* at § 3612(o).

appear in person, be represented by counsel, cross-examine witnesses, and issue subpoenas.<sup>57</sup>

The ALJ must commence a hearing within 120 days after the issuance of the charge, unless it is impracticable to do so. He also must make findings of fact and conclusions of law within 60 days after termination of the hearing, unless it is impracticable to do so. If the ALJ finds that the respondent has engaged or is about to engage in a discriminatory housing practice, he may order relief, which may include actual damages and injunctive or other equitable relief. The ALJ may also impose a civil penalty of up to \$11,000 for a first offense or more if it is not a first offense.<sup>58</sup>

The Secretary may review any finding, conclusion, or order issued by an ALJ.<sup>59</sup> Parties may appeal such orders to the federal courts.<sup>60</sup> The Secretary may also seek enforcement of an administrative order.<sup>61</sup> The court of appeals may affirm, modify, or set aside, in whole or in part, the order, or remand it to the ALJ for further proceeding. The court can also grant any party, including intervening parties, "such temporary relief, restraining order, or other order as the court deems just and proper."<sup>62</sup>

In any administrative proceeding or any civil action brought in lieu of an administrative proceeding, the ALJ or the court, as the case may be, "may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs."<sup>63</sup>

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<sup>57</sup> *Id.* at § 3612(c).

<sup>58</sup> *Id.* at § 3612(g).

<sup>59</sup> *Id.* at § 3612(h).

<sup>60</sup> *Id.* at § 3612(i).

<sup>61</sup> *Id.* at § 3612(j).

<sup>62</sup> *Id.* at § 3612(k).

<sup>63</sup> *Id.* at § 3612(p). *See also* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598 (denying attorneys' fees to plaintiffs who tried to claim prevailing party status under the rejected "catalyst theory"). In addition, the United States is liable for such fees and costs to the extent provided by the Equal Access to Justice Act (EAJA), which makes the United States liable for the prevailing party's attorneys' fees if the United States fails to prove that its position "was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1), 28 U.S.C. § 2412(d)(1)(A). In most cases it is to be expected that the United States, even if it loses a case, will be able to prove that its position was "substantially justified," *i.e.*, "reasonable," and therefore will not be liable for fees. If the United States is liable for fees under the EAJA, such fees may not be "in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee." 5 U.S.C. § 504(b)(1), 28 U.S.C. § 2412(d)(2)(A). A court may, however, award reasonable attorneys' fees without regard to the \$75 per hour ceiling if it finds that the United States has acted in bad faith.

## Enforcement by the Attorney General

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 the FHA, or that any group of persons has been denied any right granted by the Act and such denial raises an issue of general public importance, he may commence a civil action in any federal district court.<sup>64</sup>

The Attorney General may also bring an action for appropriate relief with respect to a discriminatory housing practice or breach of a conciliation agreement referred to him by the Secretary.<sup>65</sup> In a civil action brought by the Attorney General, the court may award preventive relief, such as an injunction or a restraining order, assess civil penalties not to exceed \$50,000 for the first violation and \$100,000 for the second violation, and award such other relief as the court may deem appropriate, including monetary damages and reasonable attorneys' fees and costs.<sup>66</sup>

## Enforcement by Private Persons

An aggrieved person may commence a civil action, in a federal district court or in a state court, within two years after the occurrence or the termination of an alleged discriminatory housing practice or the breach of a conciliation agreement.<sup>67</sup> If the Secretary has filed a complaint, an aggrieved person may still bring a private suit, unless the Secretary has obtained a conciliation agreement or an ALJ has commenced a hearing.<sup>68</sup> The Attorney General may intervene in a private suit if he determines that the suit is of general public importance. If the court finds that a discriminatory practice has occurred or is about to occur, it may award to the plaintiff actual and punitive damages, a permanent or temporary injunction, a temporary restraining order, or other order, including such affirmative action as may be appropriate.<sup>69</sup> The court may also "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 same extent as a private person."<sup>70</sup>

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<sup>64</sup> 42 U.S.C. § 3614(a). Upon timely application, an aggrieved person may intervene in a civil action commenced by the Attorney General. *Id.* at § 3614(e).

<sup>65</sup> *Id.* at § 3614(b).

<sup>66</sup> *See supra* note 63.

<sup>67</sup> 42 U.S.C. § 3613(a)(1). An "aggrieved person" is defined as any person who claims to have been injured by a discriminatory housing practice or believes that such a practice is about to occur. 42 U.S.C. § 3602(i). The computation of the two year period does not include any time during which an administrative proceeding was pending.

<sup>68</sup> *Id.* at §§ 3613(a)(2)-(3).

<sup>69</sup> *Id.* at § 3613(c).

<sup>70</sup> *Id.* at § 3613(c)(2). As with other provisions authorizing awards of attorneys' fees in civil rights actions brought by private persons, this provision has been interpreted to contain a dual standard for plaintiffs and defendants. A successful plaintiff should ordinarily recover an attorney's fee unless special circumstances would render an award unjust, but a  
(continued...)

## IV. The Fair Housing Act and Insurance

The FHA does not explicitly address the issue of housing insurance, but language in sections 804 and 805 of the Act has been construed to apply to insurance. Section 804 makes it unlawful --

(a) To refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race [or the other prohibited categories].

(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 [or the other prohibited categories].<sup>71</sup>

Section 805 makes it unlawful to discriminate on the basis of any of the prohibited categories in --

The making or purchasing of loans or providing other financial assistance.<sup>72</sup>

HUD regulations prohibit the refusal to provide "property or hazard insurance for dwellings or providing such . . . insurance differently because of race, color, religion, sex, handicap, familial status, or national origin."<sup>73</sup> The regulations do not elaborate upon this prohibition against insurance discrimination. Although HUD originally announced its intent to issue regulations expanding on this prohibition in 1994,<sup>74</sup> the agency suspended its proposed rulemaking one year later.<sup>75</sup> No new regulations have been issued subsequent to this suspension, although the general prohibition against discrimination in property insurance remains in effect.

Over the years, the federal courts have addressed the question of whether the FHA covers insurance discrimination. Several early district court precedents established that the FHA does indeed apply to insurance discrimination.<sup>76</sup> A majority

<sup>70</sup> (...continued)

successful defendant should recover fees only if the court finds that the plaintiff's action was "frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so." *Brooks v. Center Park Associates*, 33 F.3d 585, 587 (6th Cir. 1994).

<sup>71</sup> 42 U.S.C. § 3604.

<sup>72</sup> *Id.* at § 3605.

<sup>73</sup> 24 C.F.R. § 100.70(d)(4).

<sup>74</sup> *Discrimination in Property Insurance Under the Fair Housing Act; Advance Notice of Proposed Rulemaking*, 59 Fed. Reg. 41,995 (Aug. 16, 1994).

<sup>75</sup> Gregory D. Squires, *Why an Insurance Regulation to Prohibit Redlining?*, 31 J. Marshall L. Rev. 489, 489 (1998).

<sup>76</sup> *See, e.g., McDiarmid v. Economy Fire & Casualty Co.*, 604 F. Supp. 105 (S.D. Ohio (continued...))

of the circuit courts have upheld this result in subsequent decisions.<sup>77</sup> For example, in *N.A.A.C.P. v. American Family Mutual Insurance Co.*, the Court of Appeals for the Seventh Circuit held that §§ 804(a) and 804(b), quoted above, cover insurance.<sup>78</sup> Specifically, the court found that, by refusing to write policies, an insurer makes a dwelling "unavailable" under § 804(a), and that property insurance is a "service" rendered "in connection" with the sale of a dwelling under § 804(b).

Furthermore, in *American Family*, the Seventh Circuit rejected the reasoning in *Mackey v. Nationwide Insurance Companies*, the only circuit court decision to conclude that the FHA did not apply to insurance discrimination. According to the Seventh Circuit, the post-*Mackey* 1988 amendments to the FHA gave HUD the authority to make rules to enforce the Act and that the regulations prohibiting insurance discrimination that HUD promulgated pursuant to this authority are entitled to judicial deference.<sup>79</sup> Therefore, even if *Mackey* had been correct at the time it was decided, "[e]vents have bypassed [it]."<sup>80</sup>

The most recent court of appeals case on the subject, *Nationwide Mutual Insurance Co. v. Cisneros*, agreed with the Seventh Circuit that the FHA applies to insurance.<sup>81</sup> It also noted "that many courts have applied § 3604 to a number of parties and practices not mentioned in §§ 3604(b) and 3605," including imposing building height limitations, issuing zoning permits, rezoning property intended for a low-income housing project, and denying sewer hook-ups.<sup>82</sup>

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<sup>76</sup> (...continued)

1984); *Dunn v. Midwestern Indem. Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979).

<sup>77</sup> See, e.g., *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351 (6<sup>th</sup> Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996); *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7<sup>th</sup> Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). *But see* *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4<sup>th</sup> Cir. 1984).

<sup>78</sup> 978 F.2d 287 (7<sup>th</sup> Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

<sup>79</sup> *Id.* at 300.

<sup>80</sup> *Id.* at 301.

<sup>81</sup> 52 F.3d 1351 (6<sup>th</sup> Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996)..

<sup>82</sup> *Id.* at 1357 (citations omitted). The courts of appeals in *Mackey*, *American Family*, and *Nationwide* all agreed that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, does not preclude application of the FHA to insurance. The McCarran Ferguson Act provides, in pertinent part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance," 15 U.S.C. § 1012(b). The courts of appeals agreed that "No Act of Congress" includes the FHA, and that the FHA does not "specifically relate to the business of insurance." Therefore, the FHA may not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." However, the courts also agreed that the FHA does *not* invalidate, impair, or supersede any law in the state in question in each case, noting that the presence of a general state regulatory scheme does not show that any particular state law would be invalidated, impaired, or superseded by application of the FHA.

In contrast, a federal district court has held that the FHA does not prohibit discrimination in connection with mortgage disability insurance, because section 805 prohibits discrimination in the provision of housing-related "financial assistance" and mortgage disability insurance, unlike property and hazard insurance, is not a prerequisite to obtaining financing and thus is not a form of "financial assistance."<sup>83</sup>

## V. Familial Discrimination and Housing for Older Persons

The Fair Housing Amendments Act of 1988 added "handicap" (physical or mental) and "familial status" (living with children under 18) to the bases upon which discrimination in housing is prohibited.<sup>84</sup> One exception to the 1988 law barring familial status discrimination, however, is that housing for older persons may discriminate against families with children. In addition, the Housing for Older Persons Act of 1995 further amended the familial status provision of the FHA to make it easier for housing for older persons to discriminate against families with children.<sup>85</sup>

The committee report that accompanied the 1988 amendments states, with respect to the familial status provision:

In many parts of the country families with children are refused housing despite their ability to pay for it. Although 16 states have recognized this problem and have proscribed this type of discrimination to a certain extent, many of these state laws are not effective. . . . The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizen[s] in retirement type communities. The Committee appreciates the

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<sup>83</sup> *Doukas v. Metropolitan Life Insurance Co.*, 882 F. Supp. 1197 (D.N.H. 1995).

<sup>84</sup> The statute (42 U.S.C. § 3602(k)) and the regulation (24 C.F.R. § 100.20) both define "familial status" as follows:

"Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with --

- (1) a parent or another individual having legal custody of such individual or individuals; or
- (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.

<sup>85</sup> Pub. L. No. 104-76.



interest and expectation these individuals have in living in environments tailored to their specific needs.<sup>86</sup>

The FHA provisions regarding familial status do not "apply with respect to housing for older persons," a term that has three alternative definitions. Although "housing for older persons" was originally defined in the 1988 amendments, a portion of this definition proved controversial and was later amended in 1995.<sup>87</sup> As amended, "housing for older persons" is defined as housing that is (1) provided under any state or federal housing program for the elderly, (2) "intended for and solely occupied by persons 62 years of age or older," or (3) "intended and operated for occupancy by persons 55 years of age or older."<sup>88</sup>

Under the last category of housing for the elderly, there are three additional requirements that must be met in order for the housing to meet the statutory definition of housing for older persons. First, at least 80 percent of the occupied units must be occupied by at least one person who is 55 years of age or older. Second, the housing facility or community must publish and adhere to policies and procedures that demonstrate that it is intended to be housing for the elderly. Third, the housing facility must comply with HUD rules for the verification of occupancy.<sup>89</sup> Despite the complexity of these requirements, an individual who believes in good faith that his or her housing facility qualifies for the familial status exemption will not be held liable for money damages, even if the facility does not in fact qualify as housing for older persons.<sup>90</sup>

## VI. Discrimination Based on Handicap<sup>91</sup>

In addition to prohibiting discrimination on the grounds discussed above, the FHA also prohibits discrimination in housing on the basis of handicap. The Act defines "handicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."<sup>92</sup> The definition of handicap, however, does not include the current, illegal use of or addiction to a

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<sup>86</sup> H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 19, 21 (1988); *reprinted in* 1988 U.S.C.C.A.N. 2180, 2182.

<sup>87</sup> Pub. L. No. 104-76 (codified as amended at 42 U.S.C. § 3607(b)(2)(C)).

<sup>88</sup> 42 U.S.C. § 3607(b)(2).

<sup>89</sup> *Id.* at § 3607(b)(2)(C). The HUD rules that implement the requirements for the third category of housing for older persons are found at 24 C.F.R. §§ 100.304-07.

<sup>90</sup> *Id.* at § 3607(b)(5).

<sup>91</sup> The generally accepted term is now "individual with a disability." However, since the FHA still uses the term "handicapped," that term is retained here in the discussion of the FHA.

<sup>92</sup> *Id.* at § 3602(h).

controlled substance.<sup>93</sup> Since this exclusion does not apply to former drug users, the definition of handicap thus includes individuals who have drug or alcohol problems that are severe enough to substantially impair a major life activity, but who are not current illegal users or addicts. As a result, recovering alcoholics or addicts are protected under the FHA.

The Americans with Disabilities Act (ADA),<sup>94</sup> which was enacted subsequent to the 1988 FHA amendments, does not apply to housing, although it does cover "public accommodations," including "an inn, hotel, motel, or other place of lodging except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor."<sup>95</sup> The ADA also covers "commercial facilities," which it defines as facilities intended for nonresidential use whose operations affect commerce. The term excludes, however, "facilities that are covered or expressly exempted from coverage under the Fair Housing Act." In other words, the ADA leaves to the FHA the determination as to which statute applies to any particular facility.

The Department of Justice's comments on its ADA rules address mixed use facilities, such as large hotels that have separate residential apartment wings. The comments explain that the residential wing would be covered by the FHA even though the rest of the hotel would be covered by the ADA. However, "[i]f a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility. Such determinations will need to be made on a case-by-case basis. . . . A similar analysis would also be applied to other residential facilities that provide social services, including homeless shelters, shelters for people seeking refuge from domestic violence, nursing homes, residential care facilities, and other facilities where persons may reside for varying lengths of time."<sup>96</sup>

Discrimination on the basis of handicap under the FHA includes refusal to permit a handicapped person, at his own expense, reasonable modifications of existing premises, if the modifications are necessary to afford the handicapped person full enjoyment of the premises.<sup>97</sup> Nevertheless, a landlord may condition permission for a modification on a handicapped renter's agreeing to restore the interior of the premises to its former condition. A landlord, however, may not increase the security deposit of a handicapped person because of such modifications, although he may negotiate as part of a restoration agreement a provision requiring that the

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<sup>93</sup> *Id.* at § 3602(h).

<sup>94</sup> *Id.* at § 12101 et seq. For a more detailed discussion of the ADA, see CRS Report 98-921A.

<sup>95</sup> *Id.* at § 12181(7)(A).

<sup>96</sup> 56 Fed. Reg. 35,552 (July 26, 1991).

<sup>97</sup> 42 U.S.C. § 3604(f)(3)(A).

handicapped person pay into an escrow account a reasonable amount of money not to exceed the cost of restorations.<sup>98</sup>

Discrimination against a handicapped person also includes "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 the dwelling."<sup>99</sup> In addition, it includes, in connection with the design and construction of a covered multifamily dwelling for first occupancy after March 13, 1991, a failure to design and construct those dwellings in such manner that they are readily accessible to and usable by handicapped persons.<sup>100</sup>

It is also unlawful to inquire whether an applicant for a dwelling has a handicap or to inquire as to the severity of a handicap. However, landlords may make certain inquiries concerning handicaps, provided the inquiries are made of all persons regardless of whether they are handicapped.<sup>101</sup> The FHA's protection for handicapped persons does not require "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."<sup>102</sup>

Several other federal laws also protect individuals with disabilities from housing discrimination. Under section 504 of the Rehabilitation Act of 1973, discrimination against individuals with disabilities is prohibited in any federally funded or federally conducted program or activity,<sup>103</sup> and under the Architectural Barriers Act of 1968,

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<sup>98</sup> 24 C.F.R. § 100.203(a).

<sup>99</sup> 42 U.S.C. § 3604(f)(3)(B)). As examples of reasonable accommodations required by the Act, the regulations state that seeing eye dogs must be permitted even if a building otherwise prohibits pets, and handicapped parking spaces must be made available even if spaces are otherwise assigned on a first-come-first-served basis. 24 C.F.R. § 100.204(b).

<sup>100</sup> 42 U.S.C. § 3604(f)(3)(C). "Covered multifamily dwellings" have four or more dwelling units. 24 C.F.R. § 100.201. In 1991, HUD published final Fair Housing Accessibility Guidelines to provide builders and developers with technical guidance on how to comply with the accessibility requirements of the FHA that are applicable to certain multifamily dwellings designed and constructed for first occupancy after March 13, 1991. 56 Fed. Reg. 9,472 (Mar. 6, 1991). In 1994, HUD published a supplement to these guidelines. 59 Fed. Reg. 33,362 (June 28, 1994).

<sup>101</sup> 24 C.F.R. § 100.202(c). Such inquiries may include: (1) an applicant's ability to meet the requirements of ownership or tenancy, (2) whether an applicant qualifies for housing reserved for handicapped persons, (3) whether an applicant is qualified for priority housing available to persons who are handicapped, (4) whether an applicant is a current illegal abuser or addict of a controlled substance, or whether an applicant has been convicted of the illegal manufacture or distribution of a controlled substance.

<sup>102</sup> 42 U.S.C. § 3604(f)(9).

<sup>103</sup> 29 U.S.C. § 794(a).

certain publicly owned residential buildings and facilities must be accessible to individuals with physical disabilities.<sup>104</sup>

## Group Homes and Zoning Restrictions

The FHA's prohibition against discrimination on the basis of handicap extends to protect group homes for the disabled from discrimination via state or local zoning laws. Nevertheless, some municipalities have attempted to restrict the location of group homes for disabled individuals by enacting zoning ordinances that establish occupancy limits for group homes.<sup>105</sup> Typically established to maintain the residential character of certain neighborhoods, such occupancy limits frequently operate to restrict group homes for recovering drug users or other disabled individuals. As a result, these limits continue to be the subject of controversy and legal challenges under the FHA.<sup>106</sup>

Indeed, in 1995, the Supreme Court considered the issue of zoning restrictions on group homes for the handicapped. In *City of Edmonds v. Oxford House, Inc.*, a group home for 10 to 12 adults recovering from alcoholism and drug addiction was cited for violating a city ordinance because it was located in a neighborhood zoned for single-family residences.<sup>107</sup> The ordinance that it was charged with violating defined "family" as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons."<sup>108</sup>

The group home acknowledged that it was in violation of the ordinance, but claimed that it was entitled to be in the neighborhood anyway because the FHA required the city to "make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling."<sup>109</sup> The city responded that it was not required to accommodate the group home because the FHA exempts from

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<sup>104</sup> 42 U.S.C. §§ 4151-57.

<sup>105</sup> Discrimination against group homes for the disabled is prohibited not only by the FHA, but by the Constitution, to the extent that such discrimination is found to be irrational. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court held unconstitutional a zoning ordinance that allowed group homes generally but prohibited them for mentally retarded individuals. The basis for the decision was that the ordinance was based on irrational prejudice; *i.e.*, the discrimination failed a "rational basis" test under the equal protection clause of the Fourteenth Amendment.

<sup>106</sup> Michael J. Davis, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 Kan. L. Rev. 777 (1998).

<sup>107</sup> 514 U.S. 725 (1995).

<sup>108</sup> *Id.* at 728.

<sup>109</sup> 42 U.S.C. § 3604(f)(3)(B).

its coverage "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."<sup>110</sup>

The Supreme Court held that this exemption did not permit the city's zoning ordinance because the ordinance's definition of family was not a "restriction regarding the maximum number of occupants permitted to occupy a dwelling."<sup>111</sup> According to the Court, the FHA "does not exempt prescriptions of the family-defining kind, *i.e.*, provisions designed to foster the family character of a neighborhood. Instead, § 3607(b)(1)'s absolute exemption removes from the FHA's scope only total occupancy limits, *i.e.*, numerical ceilings that serve to prevent overcrowding in living quarters."<sup>112</sup> Because the ordinance set a numerical ceiling for unrelated occupants but not related occupants, it was clearly designed to preserve the family character of neighborhoods, not to place overall occupancy limits on residences. As a result, the Court held that the ordinance was not exempt from the FHA's prohibition against disability discrimination, thus rendering vulnerable to legal challenge under the FHA any zoning ordinance not based on neutral, overall occupancy limits for all types of residences. Of course, the decision does not prevent zoning ordinances from being applied to restrict group homes occupied by student fraternities or others who are not protected by the FHA.<sup>113</sup>

Furthermore, although the Court held that the ordinance was not exempt from the FHA, it did not decide whether or not the ordinance actually violated the FHA. Under the statute, a violation occurs only if (1) the ordinance unlawfully discriminates against handicapped individuals, and (2) the city refuses to grant the group home an exemption from the ordinance as a "reasonable accommodation" necessary to afford handicapped persons "equal opportunity to use and enjoy a dwelling."<sup>114</sup> The Supreme Court sent the case back to the lower court to decide these questions. In subsequent cases, the Courts of Appeals have reached a variety of results when considering these issues with regard to non-uniform occupancy limits and other non-uniform requirements imposed on group homes for the handicapped.

Under *Edmonds*, zoning ordinances that fail to impose uniform conditions on all residences may be challenged under the FHA for facially discriminating against group homes. The Courts of Appeals are split with regard to whether non-uniform conditions such as occupancy limits discriminate on their face against handicapped individuals. In *Oxford House-C v. City of St. Louis*, for example, the Eighth Circuit held that an ordinance that limited the number of group home occupants to eight residents did not facially discriminate against the handicapped because the ordinance also capped other types of housing for unrelated individuals and was therefore neutral

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<sup>110</sup> *Id.* at § 3607(b)(1).

<sup>111</sup> *Edmonds*, 514 U.S. at 731.

<sup>112</sup> *Id.* at 728.

<sup>113</sup> Joan Biskupic, *Court Acts in Housing Bias Dispute: Zoning Can't Be Used to Exclude Group Homes for Disabled, Justices Say*, Washington Post, May 16, 1995, at A3.

<sup>114</sup> 42 U.S.C. § 3604(f)(3)(B).

with regard to handicap.<sup>115</sup> Since the ordinance was deemed neutral, the Eighth Circuit held that the city need only provide a rational basis for enacting the ordinance, a requirement which was satisfied by the city's demonstration of an interest in preserving residential neighborhoods.<sup>116</sup> Furthermore, the Eighth Circuit held that the city "did not fail to accommodate the Oxford House as the Act requires" because the group home refused to apply for a variance for higher occupancy limits and therefore never gave the city the opportunity to grant such accommodation.<sup>117</sup>

In contrast, other federal Courts of Appeals have concluded that non-uniform conditions discriminate on their face. In *Larkin v. Department of Social Services*, for example, the Sixth Circuit addressed a state licensing requirement that group homes for the handicapped may not be spaced within a 1,500 foot radius of other such group homes and must notify the communities in which the group homes are to be located.<sup>118</sup> The court ruled that these spacing and notification requirements discriminated on their face, holding that "statutes that single out for regulation group homes for the handicapped are facially discriminatory."<sup>119</sup> Once the court ruled that these non-uniform conditions were facially discriminatory, the test shifted from a rational basis test to a more demanding test that "requires the defendant to show that the discriminatory statutes either (1) are justified by individualized safety concerns; or (2) really benefit, rather than discriminate against, the handicapped, and are not based on unsupported stereotypes."<sup>120</sup> Holding that the state had failed to meet either one of these burdens, the Sixth Circuit never needed to reach the question of reasonable accommodation.

Although group home advocates have successfully challenged certain special conditions imposed on group homes, they have been less successful when attacking ordinances on reasonable accommodation grounds. For example, advocates have sued in some cases where state or local governments have refused to waive uniform occupancy limits in order to allow larger group home facilities.<sup>121</sup> In *Gamble v. City of Escondido*, for example, the Ninth Circuit held that the city's refusal to grant a conditional use permit for construction of a large facility for the handicapped did not violate the FHA's reasonable accommodation provision.<sup>122</sup> Other Courts of Appeals have reached similar conclusions.<sup>123</sup> Ultimately, these and other legal issues

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<sup>115</sup> 77 F.3d 249, 251-52 (8<sup>th</sup> Cir. 1996).

<sup>116</sup> *Id.* at 252.

<sup>117</sup> *Id.* at 253.

<sup>118</sup> 89 F.3d 285 (6<sup>th</sup> Cir. 1996).

<sup>119</sup> *Id.* at 290.

<sup>120</sup> *Id.* See also *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-04 (10<sup>th</sup> Cir. 1995).

<sup>121</sup> Michael J. Davis, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 Kan. L. Rev. 777, 786-87 (1998).

<sup>122</sup> 104 F.3d 300 (9<sup>th</sup> Cir. 1997).

<sup>123</sup> See, e.g., *Bryant Woods Inn v. Howard County*, 124 F.3d 597 (4<sup>th</sup> Cir. 1997); *Elderhaven* (continued...)

surrounding group homes for the handicapped continue to be among the most heavily litigated areas of the Fair Housing Act.

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<sup>123</sup> (...continued)

Inc. v. City of Lubbock, 98 F.3d 175 (5<sup>th</sup> Cir. 1996). *But see* Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3<sup>rd</sup> Cir. 1996).