

Civil Rights Actions

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CIVIL RIGHTS ACTIONS

VOLUME 7

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Consent Order to Action Allowing the

Final Disposition by Final Estate

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Civil rights in housing are secured primarily by the provisions of 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. §§ 3601-3619, otherwise known as title VIII of the Civil Rights Act of 1968.¹ Title VIII was amended by the Fair Housing Amendments Act of 1988.² As amended, title VIII prohibits discrimination in the sale, rental, financing and advertising of housing on the basis of race, color, religion, sex, familial status, national origin³ and handicap.^{3a} Title VIII provides for the enforcement of its terms through a variety of administrative and private mechanisms.^{3b} Section 1982 applies solely to racial discrimination.^{3c} However, unlike title VIII, it is applicable against all private and public property owners.^{3d}

Prior to the 1988 amendments to title VIII, § 1982 was viewed as a means of "circumventing" title VIII in cases involving racial discrimination since it permitted the recovery of attorneys' fees under 42 U.S.C. § 1988.^{3e} Although the Fair Housing Act made some provision for attorneys' fees, recovery was limited to those showing financial need.^{3f} Further, § 1982 does not contain any cap on punitive damages such as existed under the Fair Housing Act.^{3g}

¹ See 2 J. Cook & J. Sobieski, *Civil Rights Actions*, ¶¶ 6.01-6.08[E] (1988).

² Pub. L. 100-430, enacted September 13, 1988, has an effective date of 180 days following enactment.

³ 42 U.S.C. §§ 3604(a)-(c) and 3605.

^{3a} 42 U.S.C. §§ 3604(f) and 3605.

^{3b} 42 U.S.C. §§ 3610-3613.

^{3c} 2 J. Cook & J. Sobieski, *Civil Rights Actions*, ¶ 6.05. As will be discussed *infra*, racial discrimination may encompass ethnicity or national origin discrimination where that discrimination is tantamount to racial discrimination. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 604, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987) (persons of Jewish ancestry were a protected class since they were considered a distinct race at the time Congress passed § 1982).

^{3d} 2 J. Cook & J. Sobieski, *Civil Rights Actions*, ¶ 6.06, 6.07. Title VIII contains exemptions in §§ 3603 and 3607 pertaining to owner-occupied dwellings and private clubs and religious organizations.

^{3e} Kushner, *The Fair Housing Act Amendments of 1988: The Second Generation of Fair Housing*, 42 Vand. L. Rev. 1049, 1078 (1989).

^{3f} 42 U.S.C. § 3612(c) (1982).

^{3g} *Id.* (punitive damages limited to \$1,000).

TITLE VIII FOLLOWING THE FAIR HOUSING AMENDMENTS ACT OF 1988

PROCEDURE

Prior to the 1988 amendments, title VIII provided three avenues of enforcement: conciliation agreements negotiated by the Department of Housing and Urban Development (HUD) or a state or local agency certified by HUD to have substantially equivalent remedies; private litigation initiated in federal district court; and enforcement actions instituted by the Attorney General in cases where there was "reasonable cause to believe" the offending party was engaged in a "pattern or practice" of discrimination.^{3h} The Fair Housing Amendments Act leaves these enforcement mechanisms in place but expands HUD enforcement powers, provides alternate judicial proceedings for Attorney General enforcement, introduces administrative law judge hearings, changes the time in which a private action may be instituted from 180 days to two years, and permits the recovery of attorneys' fees and punitive damages.³ⁱ

- ☐ An aggrieved party will not be foreclosed from pursuing one avenue of relief over another. However, once actual administrative law proceedings or litigation has begun, other remedial mechanisms will be foreclosed.

HUD, State or Local Conciliation. Section 3610 provides for the initiation of the conciliation procedure which may be conducted by HUD or a certified state or local agency. Following referral from HUD, a state or local agency has thirty days in which to start proceedings. There follows a 100-day period for investigation during which conciliation may be attempted. If at any time during this period, HUD finds immediate judicial action is necessary to protect the complainant's rights, the case may be referred to the Attorney General for prompt litigation.^{3j} If the matter is not resolved through conciliation, HUD may dismiss the complaint or file a charge of discrim-

^{3h} *Recent Developments: Fair Housing Amendments Act of 1988*, 24 Harv. C.R.-C.L. L. Rev. 249, 254 (1989).

³ⁱ *Id.* at 255.

^{3j} 42 U.S.C. § 3610(e); Kushner, *The Fair Housing Act Amendments of 1988: The Second Generation of Fair Housing*, 42 Vand. L. Rev. 1049, 1089 (1989).

ination for hearing before an administrative law judge pursuant to § 3612.

- ☐ At any time during the conciliation procedure, the complainant has the right to institute a private action in federal district court. Furthermore, should the complainant await HUD determination, the two year limitation period will not begin to run until after that determination. If the complainant has initiated suit, HUD may not issue a charge if the trial on the matter has commenced.^{3k}

HUD Enforcement Through Litigation. Section 3612 governs the procedures for HUD enforcement through litigation.

- ☐ Once HUD has filed a charge of discrimination, the complainant, the respondent or other aggrieved party has twenty days in which to elect whether to have the matter tried in federal district court. If a party elects to pursue the federal court remedy, HUD must authorize the Attorney General to commence a civil suit within thirty days of the election.^{3l}

If no party elects the federal court remedy, the matter is put before an administrative law judge who must commence a hearing within 120 days of the charge's filing.^{3m} The administrative law judge must issue a decision within sixty days of the conclusion of the hearing.

- ☐ If a private action under § 3613 or state law has been initiated and trial has begun prior to the administrative hearing, the administrative law judge may not proceed.

The administrative law judge may make an order awarding actual damages, injunctive and other equitable relief and may assess civil penalties against the respondent.³ⁿ In addition, the administrative law judge may award attorney's fees to the complainant.^{3o} If HUD fails to enforce the order following the review and enforcement peri-

^{3k} 42 U.S.C. § 3610(b).

^{3l} 42 U.S.C. § 3612(o).

^{3m} *Id.* § 3612(g)(1).

³ⁿ *Id.* § 3612(g)(3).

^{3o} *Id.* § 3612(p).

od, any person entitled to relief may petition the court of appeals to enforce the order.^{3p}

Attorney General Enforcement. Section 3614 pertains to the enforcement mechanisms available to the Attorney General acting through the Department of Justice to remedy "pattern and practice" discrimination, that is those cases where the Attorney General has "reasonable cause to believe" that a person "has engaged in a pattern or practice of resistance to full enjoyment of any rights" included in title VIII, or that a "group of persons has been denied any rights granted by" title VIII and the denial is a matter of "public importance." This section also provides for the enforcement of HUD negotiated conciliation agreements.

- ☐ Aggrieved parties may intervene in these proceedings and the court may award attorneys fees to the parties other than the Department of Justice or other federal agencies.^{3q}

The relief available in § 3614 proceedings include injunctive relief, damages to the aggrieved parties and civil penalties.^{3r}

Private Litigation. Section 3613 provides the mechanism for enforcement of title VIII rights through private litigation.^{3s} The plaintiff has two years in which to initiate the action, however, the two-year period does not include any periods during which administrative proceedings were pending under §§ 3610 or 3612.

- ☐ An action under § 3613 may be commenced even if an administrative complaint has been filed, regardless of the status of the complaint.^{3t}

There are two events that will act as a bar to private litigation. The first is where the plaintiff has previously consented to a conciliation agreement negotiated by HUD or a certified state or local agen-

^{3p} *Id.* § 3612(m).

^{3q} *Id.* § 3614(d).

^{3r} *Id.*

^{3s} It should be noted that the Attorney General may intervene where he timely certifies that the case concerns a matter of "general public importance." *Id.* § 3613(e). In that event, the Attorney General may seek the same relief as is available under § 3614.

^{3t} *Id.* § 3613(a)(2).

cy. The second is where an administrative law judge has commenced a hearing on the record.

In the event of financial need, the federal district judge is authorized to appoint an attorney for the plaintiff and waive the payment of fees, costs or security.³⁰

In a private action pursuant to § 3613, the court may award the following relief to the plaintiff where it is determined that a discriminatory practice has occurred or is about to occur:

- ☐ actual damages;
- ☐ punitive damages;
- ☐ injunctive relief, including orders for affirmative action;
- ☐ reasonable attorneys' fees and costs.

Transactions Occurring Prior to Judicial or Administrative Relief. Section 3613(d) provides that real estate transactions that were consummated before the granting of relief and that involved a bona fide purchaser, encumbrancer or tenant will not be affected absent actual notice that a complaint has been filed with HUD or a civil action commenced.³¹

42 U.S.C. § 1982 AND THE DEPRIVATION OF PROPERTY RIGHTS—REQUISITES

Section 1982⁴ protects the right of all citizens to acquire, hold and transfer property on an equal basis with white persons. In general terms, a plaintiff in an action for deprivation of property rights under § 1982 must allege the following:

- ☐ that the plaintiff is a citizen of the United States;
- ☐ that the plaintiff's property rights have either been denied or interfered with, depriving the plaintiff of the same rights as are enjoyed by white citizens; and

³⁰ *Id.* § 3613(b).

³¹ *Id.* § 3613(d).

⁴ The text of 42 U.S.C. § 1982 appears in 2 J. Cook & J. Sobieski, *Civil Rights Actions*, Ch. 6.

- ☐ that the deprivation of property rights was the result of discrimination on the basis of race.

In order to establish a prima facie case under § 1982 for racial discrimination in the sale or rental of property, a plaintiff must prove the following:

- ☐ that the plaintiff is a member of a racial minority;
- ☐ that the plaintiff applied for and was qualified to purchase or rent certain property or housing;
- ☐ that the plaintiff's application was rejected; and
- ☐ that the housing or rental opportunity remained available thereafter.⁵

Although racial motivation may be involved, it is not an element of the § 1982 prima facie case since only a demonstration of racial impact is required.⁶

Shifting Burdens. If the plaintiff can establish a prima facie case of discrimination under § 1982, the burden shifts to the defendant to come forward with a legitimate, non-discriminatory reason for the action that is being challenged. If the defendant is able to do so, then the burden shifts back to the plaintiff to prove that the defendant's explanation is, in fact, a pretext for discrimination.⁷

DISCRIMINATION REMEDIED BY § 1982

Section 1982 is applicable only to claims of discrimination on the basis of race.⁸ Originally construed to bar state laws establishing or

⁵ *Phiffer v. Proud Parrot Motor Hotel*, 648 F.2d 548 (9th Cir. 1980).

⁶ *Id.*

⁷ *Jimenez v. Southridge Cooperative, Section I, Inc.*, 626 F. Supp. 732 (E.D.N.Y. 1985) (citing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979)).

⁸ *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 107 S. Ct. 2019, 95 L. Ed. 2d 594 (1987) (although subjective racial perceptions of discrimination are insufficient to support a charge of racial discrimination, plaintiffs were members of a protected class since persons of Jewish ancestry were considered a distinct race at the time § 1982 was passed); *Occhino v. Northwestern Bell Tel.*, 675 F.2d 220 (8th Cir.), cert. denied, 457 U.S. 1139, reh'g denied, 458 U.S. 1133 (1982); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669 (N.D. Ill. 1984); See also *Saint Francis*

supporting racial discrimination in the sale or rental of property, the statute has subsequently been applied to prohibit all racial discrimination, private as well as public, relating to property interests.⁹

- ☐ To be actionable under § 1982, the complaint must contain factual allegations supporting the conclusion that race was a factor in the denial of the plaintiff's property rights. For example, it is of no significance for § 1982 purposes that the plaintiffs are dark-skinned, being of Indian origin, where the refusal to sell property to them was not based in any part upon the plaintiffs' race or color.¹⁰
- ☐ It is no defense under § 1982 that race was not the sole reason for a denial of housing. The plaintiff need only prove that race was one significant factor in the defendant's dealings with him in order to establish a violation of § 1982.¹¹
- ☐ Although § 1982 requires proof of racial discrimination, it is not necessary to demonstrate that the defendant's action was racially motivated. The plaintiff need only prove that the conduct of the defendant actually or predictably has a racially discriminatory effect.¹²
- ☐ Under certain circumstances, an inference of racial discrimination may arise as a matter of law. For example, where statistics show that all of the lots in a development have been sold to whites, and a black prospective buyer satisfies the objective requirements of a real estate developer, a *prima facie* inference of discrimination is created if his offer to purchase is refused. The discrimination becomes established if the defendant is un-

College v. Al-Khazraji, 481 U.S. 604, 107 S. Ct. 2022, 2028, 95 L. Ed. 2d 582 (§ 1981; person of Arabic ancestry could state a claim of racial discrimination where he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin or his religion).

⁹ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968).

¹⁰ *Patel v. Holley House Motels*, 483 F. Supp. 374 (S.D. Ala. 1979).

¹¹ *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982).

¹² *Wainwright v. Allen*, 461 F. Supp. 293 (D.N.D. 1978), *aff'd mem.*, 605 F.2d 1209 (8th Cir. 1979).