A REAL ESTATE PROFESSIONAL'S AND ATTORNEY'S GUIDE TO THE FAIR HOUSING LAW'S RECENT INCLUSION OF FAMILIAL STATUS AS A PROTECTED CLASS

JENNIFER JOLLY RYAN†

INTRODUCTION

As real estate transactions become increasingly complex and highly regulated, property owners, real estate professionals, and their attorneys who advise them, must become familiar with the vast number of laws that have an effect on real estate transactions. A rapidly growing area of the law deals with discrimination in housing. If fair housing practices and policies are not complied with, real estate professionals and property owners may find themselves potentially liable to consumers under agency principals, and state and federal fair housing laws. In addition to potential civil or criminal penalties imposed by the courts, real estate licensees or those engaged in real estate activities, who should be licensed under state law, may be subject to disciplinary action under state licensing law for unlawful discriminatory activity.1 Disciplinary action may include the imposition of a fine and/or suspension or revocation of the real estate professional's license.2

† Associate Professor, Salmon P. Chase College of Law, Northern Kentucky University (J.D. 1984). Member, Kentucky Commission on Human Rights. Opinions expressed in this Article, if any, are those of the author and are not those of the Kentucky Commission on Human Rights. The author thanks Julie Glazer for her invaluable research assistance. This Article is dedicated to the memory of Gene Krauss, the author's teacher, mentor, colleague, friend, and champion of civil rights.

1. See Lovett v. Estate of Lovett, 593 A.2d 382, 390-92 (N.J. 1991); Kentucky Bar Ass'n v. Burbank, 539 S.W.2d 312, 313-14 (Ky. 1976); Jean A. Mortland, Attorneys as Real Estate Brokers; Ethical Considerations, 25 REAL PROPERTY, PROBATE & TRUST J. 755 (Winter 1991) (stating that if an attorney receives a separate fee, in addition to his or her usual charge for time connected with a real estate transaction, the attorney may be considered a "broker" under the licensing law). See Tyrone v. Kelley, 507 P.2d 65, 69 (Cal. 1973). However, in most situations, an attorney engaged in a real estate transaction which is incidental to providing a legal service to a client is exempt from the licensing requirement. Ky. REV. STAT. ANN. § 324.010(1)(a) (Baldwin 1987) (providing that a property owner engaged in leasing property for others may have to obtain a real estate license). See Murray v. Doud, 47 N.E. 717, 718-19 (Ill. 1897) (noting that the failure to obtain a license, when required, may result in the denial of a commission, although it may not have any effect on the validity or enforceability of the contract of sale).

2. In Kentucky, a five-member Kentucky Real Estate Commission is charged with the responsibility of administering state statutes governing the real estate profession.
Under the licensing laws, a real estate professional is subject to disciplinary action for engaging in any type of prohibited discrimination. Moreover, the real estate professional may be held responsible for discriminatory conduct of the property owner he or she serves. Therefore, it is important that persons engaged in the real estate profession or dealing in property, as well as their respective attorneys, are familiar with both state and federal fair housing laws.

This Article broadly focuses upon the fair housing laws that property owners and real estate professionals should be aware of in their real estate dealings. Recently, the coverage of fair housing laws has been broadened, and their enforcement mechanisms have been strengthened, perhaps in response to the realization that discrimination in housing is seldom blatant, but often takes on many subtle forms. Moreover, because a property owner or real estate professional's actions are not always intended to discriminate, but are violative of the law because they are discriminatory in effect, it is imperative that real estate professionals and property owners are sensitive to the increasingly subtle issues raised by discrimination laws.

Potentially, property owners and real estate licensees may be subject to four types of fair housing laws: (1) state fair housing laws; (2) state laws regulating the practices of real estate brokers and sales people; (3) laws which criminalize discrimination in housing; and (4) state laws governing disciplinary action for violations of real estate laws.

Ky. Rev. Stat. Ann. § 324.281 (Baldwin 1987). If the Commission determines that a real estate Broker or agent has violated or failed to comply with Kentucky statutes or regulations governing the real estate profession, it may impose disciplinary action against the licensee, including suspension of a license for up to twelve months, revocation of a license, the imposition of a fine of up to five-hundred dollars, or the issuance of a formal reprimand. In addition, or alternatively, the Commission may require successful completion of academic credit hours in real estate courses. Id. § 324.160. In addition to disciplinary action, the Commission may award damages to the complainant, in an amount not to exceed twenty-thousand dollars, if it is determined that the violation involved fraud. Id. § 324.410(1).

3. Ky. Rev. Stat. Ann. § 324.160(2) (Baldwin 1987). Section 324.160(2) provides that "any conduct constituting an act of discrimination regarding a person's race, color, creed, sex, or national origin, including use of scare tactics or blockbusting, shall be considered improper conduct." Id.

4. Discriminatory conduct in regard to listing property, showing property to prospective buyers, negotiating offers, and serving the needs of buyers and sellers is not always blatant or obvious. Moreover, it is not necessary to show a discriminatory intent on the part of the broker or sales agent. A discriminatory housing practice and violation of state, federal, or local law may be proven if the particular housing practice had a discriminatory effect. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1287 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).

5. In Kentucky, the state's fair housing laws are administered by the Kentucky Commission on Human Rights, which has the power to award monetary damages against a real estate professional for actual loss, plus damages resulting from embarrassment and humiliation. Ky. Rev. Stat. Ann. § 344.230(3)(h) (Baldwin 1987).

6. For example, in Kentucky, Chapter 324 of the Kentucky Revised Statutes provides for the regulation and licensing of real estate brokers and sales people. Ky. Rev.
the federal Fair Housing Act of 1968 and its 1988 amendments passed in the federal Fair Housing Amendments Act ("FHAA").

Because many state fair housing laws are substantially equivalent to the federal fair housing laws, and most states’ licensing law encompass discrimination as a basis for disciplinary action, this Article focuses upon the federal Fair Housing Act generally, and more specifically upon the FHAA which includes familial status as a category where housing discrimination is prohibited. Familial status is a relatively new category of protected class under the Fair Housing Act; therefore, many property owners and real estate professionals are in need of direction as to what type of conduct is prohibited under the fair housing laws.

Since the adoption of the FHAA, which includes familial status as a protected class, the question of what conduct constitutes discrimination based upon familial status has been at the forefront of litigation. This Article will provide an overview of the fair housing law. The Article will also explain recent court cases and administrative decisions dealing with alleged discrimination based upon familial status. This Article offers property owners, real estate professionals, and attorneys counseling real estate licensees some practical suggestions to avoid charges of unlawful discrimination based upon familial status.

---

7. Criminal penalties are available in fair housing cases. See 42 U.S.C. § 363(a) (1988). Federal law mandates that it is a felony to willfully injure, intimidate, or interfere with, or “attempt to injure, intimidate, or interfere with any person because of his race, religion, sex, or national origin” in connection with the sale, purchase, rental, financing, or occupation of any dwelling. Id.


9. See 42 U.S.C. § 3610(f)(3)(A) (1988). The FHAA provides that any state or local fair housing agency may become certified for the referral of complaints if HUD determines that “(i) the substantive rights protected by such agency . . . ; (ii) the procedures followed . . . ; (iii) the remedies available . . . ; and (iv) the availability of judicial review of such agency’s action; are substantially equivalent to those . . . [in the Fair Housing Act].” Id. The standards and procedures for equivalency certification are contained in 24 C.F.R. § 115 (1994).

10. See KY. REV. STAT. ANN. § 324.160(2) (Baldwin 1987).


12. See id.

13. At least one author has noted that since the 1988 amendment of the Fair Housing Act, familial statutes have accounted for much of the litigation under the Act. See Robert G. Schwemm, The Future of Fair Housing Litigation, 26 J. MARSHALL L. REV. 745, 754 (1993). Schwemm notes that most of these familial status cases involved direct evidence of discrimination (e.g. advertising or statements by housing providers that on their face, indicated discrimination against children). Id. However, the author surmises that in the future, the number of familial statutes cases involving flagrant discrimination will “taper off . . . much the way most blatant forms of racial discrimination died away” and more subtle forms of discrimination will become the norm. Id.
I. OVERVIEW OF FEDERAL ENFORCEMENT OF FAIR HOUSING LAWS

Congress enacted the Fair Housing Act of 1968 in order to assure that all individuals with similar financial resources and interests in the same real estate market or housing opportunities have a similar range of property choices available to them. These choices are available regardless of race, color, religion, sex, national origin, or ancestry. In 1988, the Fair Housing Act's coverage and enforcement mechanisms were greatly expanded by the enactment of the Fair Housing Amendments Act ("FHAA"), which added familial status and disability to the more traditional protected classifications of race, color, religion, sex, and national origin.

The Fair Housing Act of 1968 and its amendments are particularly applicable to the real estate professional and property owner. The FHAA specifically provides that it is unlawful for any person or other entity whose business includes engaging in residential real estate transactions to discriminate against any person in the terms or conditions of a real estate transaction because of race, color, religion, sex, disability, familial status, or national origin. Any individual who believes that they have been discriminated against in violation of the FHAA may file a complaint with the Secretary of the United States Department of Housing and Urban Development ("HUD") within one year of the alleged discriminatory conduct.

Under the FHAA, HUD is authorized to resolve complaints of discrimination by means of investigation, conference, and conciliation. If the complaint is not resolved under these measures, the complainant may initiate a civil action in federal district court, and will be represented by the Justice Department. If successful in court, the complainant may receive actual damages and civil penalties, as well as appropriate equitable relief.

Alternatively, the complainant may elect to proceed administratively when conciliation efforts prove to be unsuccessful and a reasonable cause determination has been made by HUD. At this stage, the complainant will be represented by a HUD lawyer in a hearing before

---

16. Id. In addition, there is a specific provision which prohibits any broker or real estate organization from denying any person "membership or participation in any multiple listing service or real estate broker's organization" or discriminating against an individual in the terms or conditions of membership or participation on the basis of race, color, religion, handicap, familial status, sex, or national origin. Id.
18. Id. § 3610(a-b).
19. Id. § 3612(a), (o).
20. Id. § 3612(g)(3).
an administrative law judge ("ALJ"), within 120 days after the charge is filed.21 After hearing all of the evidence, the ALJ is empowered to award actual damages to the complainant, civil penalties not to exceed $50,000, any appropriate injunctive relief, and attorneys' fees.22

The FHAA also gives the complainant the option of foregoing the administrative process by allowing the complainant to file suit in federal district court without exhausting his or her administrative remedies.23 The United States Attorney General may also proceed with litigation in the United States District Court if there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of housing discrimination or if issues of general public importance are involved.24

II. OVERVIEW OF DISCRIMINATORY HOUSING PRACTICES

A real estate professional or property owner is subject to state, local, and federal fair housing practices in almost any real estate activity. Moreover, any broker or firm which manages real estate associates must make an effort to prevent any sales associates or employees from engaging in discriminatory conduct or making statements which could be perceived as discriminatory in intent or effect. The United States Court of Appeals for the Seventh Circuit has ruled that real estate companies are responsible for the acts of their associates and employees in fair housing matters.25 Many prohibited practices under state, local, and federal laws overlap, as they are often contained in both a state's Civil Rights Act and the federal Fair Housing Act, including the Fair Housing Amendments Act ("FHAA"). Specific prohibitions and instances of the type of conduct which they entail are outlined below.

21. Id. § 3612(b), (d), (g)(1).
22. Id. § 3612(g)(3), (p). The award may not exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory housing practice, $25,000 if there has been one other violation within five years, and $50,000, if there have been two or more violations during a seven year period ending on the date of the filing of the charge. Id.
23. 42 U.S.C. § 3613(a)(1)(A) (1988). A complainant may file a HUD complaint and a private law suit simultaneously. Id. § 3613(a)(2). The first case to reach the hearing stage will control. Id. §§ 3612(f), 3613(a)(3).
25. City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1096 (7th Cir. 1992) (holding a real estate brokerage office and its sole shareholder strictly liable for discriminatory actions of the office's agents even though neither had specifically instructed the agent not to discriminate, had written policies against discrimination, and required the agent to attend training courses on fair housing), cert. denied sub nom., Ernst v. Leadership Council for Metro. Open Communities, 113 S. Ct. 2961 (1993).
A. **Refusal to Sell or Rent Property or Negotiate, on a Discriminatory Basis; Unlawful Steering**

The FHAA prohibits a real estate professional or property owner from refusing to sell or rent to an individual or refusing to negotiate with or on behalf of an individual for the sale or rental of a residence because of that person's race, color, religion, sex, familial status, disability, or national origin.\(^26\) As in most instances of unlawful discrimination, a real estate agent or property owner is unlikely to specifically tell a prospective buyer or renter that they are refusing to sell, rent, or negotiate on the basis of race or other protected status. Rather, discriminatory conduct is usually not obvious and may be implied by an individual's conduct or statements, or may be determined through the effect of the particular conduct.

Discrimination in refusing to sell or rent to an individual most often occurs in subtle actions by the real estate professional in attempting to guide a prospective purchaser toward or away from property in particular neighborhoods on the basis of race, color, religion, sex, familial status, national origin or disability. This type of illegal conduct is called "steering," which has traditionally occurred in the area of racial discrimination and has broadly been defined by the courts as "any action by a real estate agent which in any way impedes, delays, or discourages a prospective buyer from purchasing housing on a racial basis" or other protected status.\(^27\)

Steering by real estate professionals frequently occurs when individuals are steered away from certain neighborhoods by using code words. For example, a broker may never mention race, but may refer to the neighborhood as "busted" or "transitional" in a manner that will convey to the purchaser that the population of the neighborhood is primarily minority. Discrimination on the basis of familial status may occur as a result of illegal steering if a person seeking housing is told that a particular housing area or housing complex is predominately a "single" or "family" community.

Some specific examples of the type of conduct which has resulted in a finding of discrimination on the part of real estate professionals in real estate transactions include the following:

* Agents neglecting to show available property to a prospective buyer or renter in a particular area on account of their status.\(^28\)


\(^28\) Bradley v. John M. Brabham Agency, Inc., 463 F. Supp. 27, 29-30 (D. S.C. 1978) (holding a real estate broker liable for unlawful discrimination in dissuading an African-American couple from considering a particular house in a predominantly white neighborhood by telling them that they would not be "happy" in that house and sug-
Implying that persons in one of the protected categories will be less able to obtain financing in a particular area.

* Failing to show property or dissuading prospective nonminority buyers from looking at property in integrated or minority neighborhoods.  

* Communicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development because of race, color, religion, sex, handicap, familial status, or national origin.

* Brokers or managers employing agents or sales associates who direct a nonminority prospective buyer to mostly nonminority neighborhoods, or minority prospective buyers to mostly minority or racially-mixed neighborhoods.

* Failing to accept or consider a bona fide offer because of race, color, religion, sex, handicap, familial status, or national origin.

* Imposing different sales prices or rental charges on the sale or rental of property upon any person because of race, color, religion, sex, handicap, familial status, or national origin.

* Using different qualification criteria on applications.

B. DISCRIMINATION IN THE TERMS AND CONDITIONS OF THE REAL ESTATE TRANSACTION

It is unlawful under the FHAA to discriminate against an individual in the terms, conditions, or privileges of sale or rental of a residence on the basis of race, color, national origin, religion, disability, familial status, and sex. Some examples of prohibited conduct in the terms and conditions of real estate transaction include the following:

* Using different provisions in leases or contracts of sale, such as those relating to down payments and closing requirements, security deposits, rental charges, or terms because of race, color, religion, sex, disability, familial status, or national origin.

* Failing to provide or delaying maintenance or repairs of sale or rental dwellings on the basis of a protected status.

29. Zuch v. Hussey, 394 F. Supp. 1028, 1035 (E.D. Mich. 1975) (discussing a broker's attempt to dissuade white couple from buying property in Detroit by telling the couple that the school system was poor, that the police were even afraid to live in certain areas, and his placing of X's on a map indicating minority neighborhoods which should be avoided), aff'd, 547 F.2d 1168 (6th Cir. 1977).

30. Matchmaker Real Estate, 982 F.2d at 1096.

C. Discriminatory Representations on Housing Availability

The FHAA prohibits a real estate professional or property owner from falsely representing to any person that a dwelling is not available for inspection, sale, or rental when in fact it is available, on the basis of race, color, religion, national origin, familial status, disability, or sex. Prohibited actions include providing inaccurate or untrue information about the availability of property for sale or rental such as:

* Indicating through words or conduct that property which is available for inspection, sale or rental has been sold or rented, because of the prospective buyer's or renter's protected status.
* Representing that any covenant or other deed, trust, or lease provisions which purport to restrict the sale or rental of property because of the prospective buyer's or renter's protected status precludes the sale or rental to that person.
* Limiting information, by word or conduct, regarding suitably priced property available for inspection, sale, or rental, because of the prospective buyer's or renter's protected status.

D. Discriminatory Advertisement

It is unlawful under the FHAA to publish, print, or cause to be printed any oral or written notice or statement connected with the sale of property which indicates any preference, limitation, specification, or discrimination as to race, color, religion, sex, disability, familial status, or national origin. Most real estate transactions involve the use of flyers, brochures, and the media to advertise available property and also many pre-printed forms are used in a real estate transaction.

In preparing any advertisement or documentation in the real estate transaction, it is imperative that they be thoroughly reviewed for content. Indeed, any document connected with the real estate transaction should be reviewed to make sure that no direct or indirect reference is made to race, color, religion, sex, disability, familial status, or national origin. Discriminatory advertising may occur in oral statements made directly or indirectly to a prospective buyer, or may occur

33. 24 C.F.R. § 100.65(b) (1991).
in printed or published written material. In evaluating whether a particular statement, advertisement, or other printed or published material complies with the Fair Housing Act, General Counsel for HUD will scrutinize content and substance for the following use of certain words, phrases and symbols and comparable words, phrases and symbols which indicate a possible violation of the Fair Housing Act.

37. United States v. Gilman, 341 F. Supp. 891, 903-04 (S.D.N.Y. 1972). In Gilman, a landlord made oral statements to a white tenant that an apartment was available, but if the tenant had any friends who were interested in the apartment, she should be sure that they were “white.” Id. See United States v. Hunter, 459 F.2d 205, 209 n.1 (4th Cir. 1972) (stating that a newspaper advertisement which read “FOR RENT -Furnished basement apartment. In private white home” was discriminatory in that it indicated a racial preference), cert. denied, 409 U.S. 934 (1972).

§ 109.20 Use of words, phrases, symbols, and visual aids.

The following words, phrases, symbols, and forms typify those most often used in residential real estate advertising to convey either overt or tacit discriminatory preferences or limitations. In considering a complaint under the Fair Housing Act, the Department will normally consider the use of these and comparable words, phrases, symbols, and forms to indicate a possible violation of the act and to establish a need for further proceedings on the complaint, if it is apparent from the context of the usage that discrimination within the meaning of the act is likely to result.

(a) Words descriptive of dwelling, landlord, and tenants. White private home, Colored home, Jewish home, Hispanic residence, adult building.
(b) Words indicative of race, color, religion, sex, handicap, familial status, or national origin — (1) Race — Negro, Black, Caucasian, Oriental, American Indian.
(2) Color — White, Black, Colored.
(5) Sex — the exclusive use of words in advertisements, including those involving the rental of separate units in a single or multi-family dwelling, stating or tending to imply that the housing being advertised is available to persons of only one sex and not the other, except where the sharing of living areas is involved. Nothing in this part restricts advertisements of dwellings used exclusively for dormitory facilities by educational institutions.
(6) Handicap — crippled, blind, deaf, mentally ill, retarded, impaired, handicapped, physically fit. Nothing in this part restricts the inclusion of information about the availability of accessible housing in advertising of dwellings.
(7) Familial status — adults, children, singles, mature persons. Nothing in this part restricts advertisements of dwellings which are intended and operated for occupancy by older persons and which constitute housing for older persons as defined in part 100 of this title.
(8) Catch words — Words and phrases used in a discriminatory context should be avoided, e.g., restricted, exclusive, private, integrated, traditional, board approval or membership approval.
(c) Symbols or logotypes. Symbols or logotypes which imply or suggest race, color, religion, sex, handicap, familial status, or national origin.
(d) Colloquialisms. Words or phrases used regionally or locally which imply or suggest race, color, religion, sex, handicap, familial status, or national origin.
(e) Directions to real estate for sale or rent (use of maps or written instructions). Directions can imply a discriminatory preference, limitation, or exclusion. For example, references to real estate location made in terms of racial or
Some examples of what may constitute discriminatory notices, statements, and advertisement are the following:

* Using words, phrases, photographs, illustrations, symbols, or forms which convey that a property is available or not available to particular groups of persons because of race, color, religion, sex, handicaps, familial status, or national origin.\(^{39}\)

* Expressing to agents, brokers, employees, prospective sellers, or renters a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons.\(^{40}\)

* Through selective advertisement, denying information about housing opportunities to particular segments of the housing market because of their race, color, religion, sex, handicap, familial status, or national origin.\(^{41}\)

Real estate professionals and property owners must also be careful to choose advertising media and content which will be read by all individuals with similar financial resources and interest in the same market area, regardless of their race, color, religion, sex, national origin, ancestry, disability, or familial status. For example, the exclusive use of the English language in advertising, advertisements published in the English language media alone, or the exclusive use of media catering to the majority population in an area, may indicate a violation of the Fair Housing Act if non-English language or other minority media are also available in the area. Similarly, when human models are used in advertisements of property for sale or rent, care should be

---

\(^{39}\) Gilman, 341 F. Supp. at 892-95. In Gilman, a landlord told a white tenant that there was an apartment available and that if she had any interested friends, she should make sure they were “white.” Id. In Hunter, an advertisement which stated “For Rent — Furnished Basement Apartment In Private White Home” indicated a racial preference and was held to be discriminatory. Hunter, 459 F.2d at 209 n.1. See Lotz Realty Co. Inc. v. United States Dep’t of Hous. and Urban Dev., 717 F.2d 929, 931-32 (4th Cir. 1983) (holding that christian images and slogans in an advertisement violated the law). See also 24 C.F.R. § 109.20(7) (1990) (defining familial status as adults, children, singles, mature persons).

\(^{40}\) Holmgren v. Little Village Community Reporter, 342 F. Supp. 512, 513-14 (N.D. Ill. 1971) (stating that it is unlawful to advertise a preference for a member of a particular nationality or for an individual who speaks a particular language as tenant or buyer).

taken to ensure that the use of models indicates that housing is open to all persons.42 If an advertisement uses models of members of one race, one sex, or of adults only, it may indicate a preference for one race, sex, or adults to the exclusion of children.43

E. REPRESENTING AN OWNER OF PROPERTY WHO HAS AN INTENT TO DISCRIMINATE

Although not specifically prohibited by the federal Fair Housing Act, many state fair housing laws make it unlawful for a real estate professional to offer, solicit, accept, use, or return a listing of real property for sale, rental, or lease with the understanding that the prospective buyer may be discriminated against.44 The court or state real estate commission, which may take disciplinary action against real estate licensees, specifically places responsibility on the real estate professional for the discriminatory conduct or statements of his or her client. Therefore, it is important that the real estate professional be alert to any propensity for discrimination on the part of his or her seller at the time of making any listing presentation, listing property, or in the seller's rejecting or countering of any offer. The following guidelines may provide some assistance to real estate professionals in this area:

* Listing contracts should include the fair housing clause which states: "Real Estate is available to any prospective purchaser, regardless of race, color, religion, sex, handicap, familial status, national origin, or ancestry."

* At the time of making any listing presentation or listing any property, sales associates may read to the seller the fair housing clause in the listing agreement.

* A real estate professional may refuse any listing where the sellers are not in agreement with the fair housing laws and should report the disagreement to management.

* At the time the listing contract is signed, the sales associate may distribute a brochure to their client on equal opportunity housing.

* Discriminatory acts or statements on the part of the seller in rejecting or countering an offer should be reported immediately to the broker or manager and the sales associate should seek guidance in what to reply back to the buyer prior to delivery of the rejection or counter-offer.

42. Id. § 109.25.
43. Id. § 109.25(c).
Brokers or managers should investigate the nature of the questionable acts or statements of the seller and if necessary, consult with legal counsel or other sources to gather further guidance.45

F. BLOCKBUSTING

The FHAA prohibits the practice of blockbusting.46 Blockbusting consists of inducing or attempting to induce any person to sell or rent property, for a profit, by making representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, or national origin or person or persons with a disability.47 Prohibited blockbusting practices by real estate professionals include:

[*] Engaging, for profit, in conduct . . . which conveys to a person that a neighborhood is undergoing or is about to undergo a change in the race color, religion, sex, handicap, familial status, or national origin of persons residing in it in order to encourage listing or offering the property for sale or rental.

[*] Encouraging, for profit, any person to sell or rent property by asserting that the entry or prospective entry of persons of a particular race, color, religion, sex, familial status, or national origin, or with handicaps, can or will result in undesirable consequences for the project, neighborhood or community, such as a lowering of property values, an increase in criminal or anti-social behavior, or a decline in the quality of schools or other services or facilities.48

III. THE NEW PROTECTED CLASS BASED UPON FAMILIAL STATUS

As of March 12, 1989, the effective date of the Fair Housing Amendments Act ("FHAA") of 1988, it became illegal to discriminate against individuals because of their familial status in the sale or rental of dwellings.49 The FHAA specifically prohibits discrimination against individuals in the sale, rental, or financing of housing because there are children in the family.50

The added protection of individuals based upon family status was included in the FHAA in an attempt to remedy the rampant discrimination in housing against families. In 1988, the United States De-
partment of Housing and Urban Development ("HUD") estimated that FHAA "will mean a change for the better in housing for over 2 million Americans each year." It was found that twenty-five percent of all rental units were unavailable to families with children and an additional fifty percent of all rental units were available, but with restrictions.

A. WHO IS PROTECTED UNDER THE DEFINITION OF "FAMILIAL STATUS"?

Under the FHAA, the following individuals are included within the protected class of "familial status":

One or more individuals (who have not attained the age of 18 years) being domiciled with —

(1) a parent or another person 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." Single individuals are also included under the definition of "family." However, the FHAA does not prohibit discrimination on the basis of marital status unless it can be proven that such discrimination disproportionately impacts on other specified protected classes, such as race or gender.

Congress did not confine the courts to a strict definition of familial status in determining what constitutes prohibited housing discrimination. Congress intended to extend broad standing principles under the FHAA. Section 3613 of title forty-two of the United States Code provides that "[a]n aggrieved person may commence a civil action in an appropriate court." The FHAA does not define "aggrieved person" in terms of familial status. Under the FHAA, an "[a]ggrieved person"
includes any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.”

In applying the broad standing principles of the FHAA, the United States Court of Appeals for the Seventh Circuit recently held in *Gorski v. Troy* that tenants who alleged that they were evicted from their apartments because of their attempt to qualify as foster parents, had standing to sue their landlord, even though they had not yet achieved “familial status.” The court noted that “[w]hile the [FHAA] uses the definition of familial status to define what constitutes prohibited housing discrimination, it does not limit standing to persons within the class defined by that term.”

In the Illinois case of *Gorski*, the issue was whether foster parents are protected under section 3602(k) of the FHAA. The Gorskis, who wanted to become foster parents, had signed a lease for a two-bedroom apartment owned by the Troys. The lease included a provision that children were not allowed to occupy the apartment without the prior written consent of the owners. Shortly thereafter, the Gorskis entered and successfully completed a foster care training program sponsored and required by the Illinois Department of Children and Family Services (“DCFS”) in order to be considered in Illinois for foster parenting.

At this point, the Gorskis wrote the Troys requesting permission to bring one or two foster children into the apartment. The Troys, in a written answer, refused permission on the grounds that the Gorski’s apartment was on the second floor and children were only permitted in ground-floor units. Additionally, the Troys’ letter outlined other disputes with the Gorskis and gave the couple thirty days to vacate the apartment.

The Gorskis brought an action under the FHAA, stating that they were evicted because of their “familial status.” The district court dismissed the complaint without considering whether the Gorskis were covered by the FHAA, indicating that the Gorskis did not have standing to sue as they were only licensed to house foster children and were not actually in the process of obtaining legal custody of a foster child at the time the cause of action arose. The Gorskis appealed.
On appeal, the Seventh Circuit concluded that whether foster parents are protected from discrimination based on familial status under FHAA section 3602(k) depends upon whether the foster parents are considered "designees" of a parent or other individual/organization having custody of the child. The court, looking to the plain meaning of section 3602(k)(2), determined that licensed foster parents, such as the Gorskis, would clearly be a designee of the DCFS, which under Illinois law, is the legal custodian of children placed under its care.

Additionally, the court indicated that the Gorskis did suffer an injury, and hence had standing to sue under the FHAA, stemming from their apartment eviction as a result of their attempt to become foster parents. The court noted that even if the Gorskis' were not within the class defined by "familial status," the landlord's actions discriminated against the Gorskis, who were persons within the protected class, which resulted in a distinct and palpable injury to the Gorskis. The court cautioned that it was not required to "fine tune definitively the FHAA's protection with respect to 'familial status.'"

The United States Court of Appeals for the Sixth Circuit has also applied a broad standing principle in holding that an association devoted to eliminating unlawful discrimination had standing to challenge a newspaper's advertisements which allegedly deterred potential renters from seeking housing and caused the organization to devote resources to investigate and negate the import of those advertisements.

66. Id. at 1187.

67. Id.

68. Id. at 1189.

69. Id. at 1187-88. The court relied upon historic cases of race discrimination in housing which demonstrate that a plaintiff suing pursuant to the FHAA need not be a member of the class that was the object of discrimination to satisfy the injury-in-fact requirement. Id.; see Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (involving a village and five of its residents, four of which were white, who successfully challenged unlawful steering practices of real estate brokers because they sustained injury as a result of reduced property values diminished tax base, and were deprived of the "social and professional benefit" of living in integrated neighborhoods); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (involving a non-profit organization which challenged racial steering practices by a local realtor injured because it had expanded resources to combat discrimination and such efforts were frustrated by defendant); United States Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864 (11th Cir. 1990) (involving a white tenant who was displaced as a result of an injunction prohibiting the landlord from renting or selling to anyone except a black family who had originally contracted to purchase house; the white tenant was an "aggrieved person" under 1988 amendments).

70. Id. at 1189.

As the foregoing cases demonstrate, there are many instances where individuals or entities who were not discriminated against based upon familial status could pursue a claim under the protections afforded those with "familial status." In certain circumstances, real estate licensees may file a complaint if they lose a commission or other compensation as a result of a seller's discrimination, discrimination by a mortgage lender, or redlining by an insurance provider.\(^\text{72}\)

B. WHAT TYPE OF CONDUCT IS DISCRIMINATORY ON THE BASIS OF FAMILIAL STATUS?

(1) Occupancy Standards Based Upon Familial Status

The courts have held that occupancy standards may discriminate against families. For example, a policy of an apartment complex that banned a single parent with one child from occupying a one-bedroom apartment while allowing two adults to share a one-bedroom apartment discriminated based on familial status.\(^\text{73}\) A rule of thumb to follow for occupancy is two persons per bedroom.\(^\text{74}\) However, there may be rare instances when the bedroom may be of unnecessarily small size or other occupancy considerations exist. HUD has published a regulation that specifically provides that "in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."\(^\text{75}\) The important point is that occupancy policies must be applied uniformly, regardless of the class of occupants.\(^\text{76}\)

In *United States v. Baggett*,\(^\text{77}\) the United States Court of Appeals for the Eighth Circuit held that an apartment complex policy limiting occupancy of one-bedroom apartments to one person, discriminated on the basis of familial status, even though the landlord did not blatantly refuse to rent a two-bedroom to a mother and her five-year-old daughter.\(^\text{78}\) The apartment complex had formerly been an all-adult complex that explicitly excluded families with children pursuant to a longstanding policy of limiting occupancy of one-bedroom apartments to one person.\(^\text{79}\) The leasing agent of the complex refused to show the prospective tenant a one-bedroom apartment on the ground that the

\(^{72}\) See 168 KREC REAL ESTATE NEWS (June/July 1994).


\(^{74}\) Id.


\(^{76}\) 168 KREC REAL ESTATE NEWS (June/July 1994).

\(^{77}\) 976 F.2d 1176 (8th Cir. 1992).

\(^{78}\) United States v. Baggett, 976 F.2d 1176, 1180 (8th Cir. 1992).

\(^{79}\) Id. at 1177-79.
complex did not rent one-bedroom apartments to more than one person. Although the agent mentioned the two-bedroom apartments, the agent told the prospective tenant that "the complex had no playground equipment, and no other children of the same age, so her daughter would have no playmates."

In finding that the occupancy restrictions imposed by the apartment complex violated sections 3604(a)-(d) of the FHAA, the court noted that "HUD's general rule does not mean that a single occupancy requirement is always invalid, but it does render such a requirement suspect; particularly when the single occupancy requirement is accompanied by other factors" and discourages families with children from living in the housing. In Baggett, the court found the following factors determinative: (1) The apartment complex had previously marketed itself as an "adults only" complex; (2) the leasing agent represented that it was disadvantageous for children to live in the complex; and (3) there was a significant increase in cost between a one-bedroom and two-bedroom apartment.

Similarly, in United States v. Towers, the court denied a landlord's motion for summary judgment which was made in defense to a familial status claim. The landlord testified that he had a practice of renting to no more than three persons because of the apartment's small size and admittedly "cheap and shoddy" construction. The court recognized that such reasons for denying housing may be non-discriminatory. However, in denying the landlord's motion for summary judgment, the court concluded that "there was a genuine issue of material fact 'as to whether the . . . [landlord] refused to rent to the . . . [plaintiffs] as a family or refused to rent to the . . . [plaintiffs] because of the size and construction of the apartment.'

(2) Rental Charges for Additional Occupants

Rental charges for additional occupants in excess of a specified occupancy load in a lease may have a disparate impact on families with children. Therefore, the charges may be discriminatory under

80. Id. at 1178. The complex had a policy of limiting occupancy of two and three bedroom apartments to two people. Id.
81. Baggett, 976 F.2d at 1179.
82. Id. at 1178-79.
85. Id. at *3. The landlord testified that he did not rent to more than three persons because of the inadequate insulation between the floors and walls resulting in tenant complaints about excessive noise. Id. He also cited high tenant turnover and expenses. Id.
the FHAA. HUD recently entered a permanent injunction against an
apartment complex owner and consent order, involving a case where
the apartment complex owner had a policy of charging an extra $100
rent for each additional occupant in excess of three.\textsuperscript{87}

(3) Discouraging Persons With Children From Renting or
Purchasing Housing Because of Physical Facilities

In the Maine case of United States v. Grishman,\textsuperscript{88} the issue was
whether an owner's refusal to rent a house to a couple with a four-
year-old child and eight-month-old infant, in part because there were
no other children in the neighborhood and because of the hazards
posed to children by natural and manmade features of the property,
constituted familial discrimination under FHAA sections 3604(a) and
3604(c).\textsuperscript{89}

The Grishmans owned a house in Maine which they lived in only
two and one-half months of the year and rented the other nine and
one-half months. The house contained valuables including a grand pi-
nano which the Grishmans had designed and built themselves. The
house was situated on ocean waterfront with a cliff overhanging rocky
shore. This action was brought by the United States Attorney on be-
half of the Davidson family, which included a husband, wife, and two
small children, because Mr. Grishman refused to rent them the
house.\textsuperscript{90}

The court held that whether sections 3604(a) and 3604(c) of the
FHAA had been violated depended upon whether any of the state-
ments made by the homeowner to the potential tenant indicated any
preference based on familial status. The court determined that state-
ments made by Grishman to Davidson relating to the dangers posed to
children by the property and surrounding neighborhood constituted
illegal discrimination, as nothing in the FHAA allows an owner to de-
terminate that risks and dangers make renting a home unsuitable for
potential tenants with children. This assessment of suitability is for
the tenant to make.\textsuperscript{91}

Additionally, the court cited statements made by Grishman to his
real estate agent as evidence of discriminatory preference based on
familial status. The agent stated that, though families with suitable
children should not be excluded from consideration, the property was
better suited to people without children. Hence, the court found that

\begin{itemize}
  \item \textsuperscript{87} HUD v. Rose, No. HUDALJ 09-92-1266-1, 1994 WL 270243, at *2 (H.U.D.
  \item \textsuperscript{88} 818 F. Supp. 21 (D. Maine 1993).
  \item \textsuperscript{89} United States v. Grishman, 818 F. Supp. 21, 22 (D. Maine 1993).
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} Id.
\end{itemize}
Grishman was liable for familial status discrimination under the FHAA.92

In *Soules v. United States Department of Housing and Urban Development*,93 the issues were: (1) whether a real estate agent's refusal to show an apartment to a prospective tenant with a twelve-year-old child violated the FHAA; and (2) whether a real estate agent's questions to a prospective tenant regarding the numbers and ages of the prospective tenant's children was a violation of the FHAA.94 In *Soules*, Sherry Soules was a single mother with a twelve-year-old daughter looking for a more convenient apartment location. Mary Jean Downs was a real estate agent whom the owner of a two-family home had enlisted to find tenants for the second-floor apartment. Because the first-floor residents were elderly and in poor health, the owner requested that Downs find second-floor tenants that would be considerate of the first-floor occupants' health problems.96

Soules, phoning in response to a newspaper advertisement placed by Downs regarding the apartment, became angry after Downs asked her how old her child was. Downs indicated the concerns of the current first-floor tenants. Upon meeting with Soules, Downs did not show her the apartment listed in the advertisement, but showed her a less desirable one. Soules, along with Housing Opportunities Made Equal ("HOME"), filed a complaint with HUD claiming violations of FHAA sections 3604(a) and 3604(c). An administrative law judge ("ALJ") dismissed the complaint. Soules and HOME appealed.96 The United States Court of Appeals for the Second Circuit upheld the ALJ's ruling that there was no violation under sections 3604(a) and 3604(c).97

The Second Circuit stated that whether Downs violated section 3604(a) depended upon whether her actions, in refusing to show Soules the apartment, were motivated by impermissible considerations. The court agreed that Soules had made out a prima facie case under section 3604(a).98 However, the agent's question to Soules regarding the age of Soules' child was permissible, given the need to find quiet upper-floor neighbors for the first floor tenants. The court also indicated that Downs' reason for refusing to show the apartment to Soules, triggered by Soules' hostile and combative response to Downs'
questions, was legitimate. Additionally, testimony during the hearing showed that Downs had attempted to rent the same apartment to a family with children under eighteen. Accordingly, the court rejected Soules' argument that Downs' reasons for not showing Soules the apartment were pretextual. Thus, the court held that Downs did not violate section 3604(a).\textsuperscript{99}

In regards to section 3604(c), the court reasoned that whether Downs violated section 3604(c) depended upon: (1) if an ordinary listener would consider her statements to Soules to be preferential in nature; or (2) if Downs had an actual intent to discriminate.\textsuperscript{100} The court held that Downs' statements to Soules were not facially discriminatory nor did they indicate any intent on Downs' part to discriminate against Soules' familial status.

As the preceding cases demonstrate, it is not altogether clear how far a real estate professional or property owner may go in legally describing conditions in the property or neighborhood which may have adverse consequences to children in a family. The cases of Grishman and Soules are contradictory as to whether a landlord, property owner, or real estate professional may take into account conditions in the neighborhood which are not suited for, or even inherently dangerous to families with children.\textsuperscript{101}

Moreover, the circuit courts are split on whether an intent to discriminate in a familial status case must be proven, or whether a discriminatory effect alone is sufficient to establish a violation of the FHAA. The Second Circuit, in Soules, indicated that a defendant must show only that the policy was established for a legitimate non-discriminatory business reason in order to defend a prima facie case of discrimination based upon familial status.\textsuperscript{102} In Soules, the defendant successfully offered a business justification in protecting elderly downstairs tenants from the noise caused by children.\textsuperscript{103} Similarly, two district courts which have addressed the question of burden of proof have held that a plaintiff must prove discriminatory intent to establish a prima facie case of discrimination based on familial status.\textsuperscript{104}

\textsuperscript{99.} Id. at 821-23.
\textsuperscript{100.} Id. at 818-26.
\textsuperscript{101.} Compare Grishman, 818 F. Supp. at 22-23 (holding that an owner may not take into consideration such conditions); with Soules, 967 F.2d at 821-26 (holding that an owner may consider such conditions). See also Kirschenbaum v. DiBiari, No. HUDALJ 01-90-0511-1, 1992 WL 406529, at *2 (HUD ALJ Sept. 23, 1992) (stating that lead paint is not a ground upon which to reject families with children).
\textsuperscript{102.} Soules, 967 F.2d at 823.
\textsuperscript{103.} Id.
On the other hand, the district court in Maine in the Grishman case indicated that only a few legal justifications exist to deny housing to families with children. In Grishman, a perception on the landlord's part that "both the natural and man-made features of the property would be a serious and real danger" to the prospective tenant's children was not a valid justification for denying housing. The court specifically disagreed with the Second Circuit's reasoning in Soules that a landlord may "take into account [c]onditions in the neighborhood known to be . . . inherently dangerous to occupancy by families with children" because, based on "that reasoning, landlords could exclude certain racial or ethnic groups because of a hostile neighborhood." Similarly, a district court in California recently held that proof of discriminatory intent is not required to establish a violation of the FHAA. In Fair Housing Council of Orange County, Inc. v. Ayres, the district court ruled that discriminatory intent was not a requirement in familial status cases. While noting that there is a split among the circuits on the issue of burden of proof required in fair housing cases, the court relied on recent HUD rulings which indicate that "facially neutral numerical occupancy restrictions violate the Act if they have a discriminatory effect, irrespective of intent."

C. WHAT REAL ESTATE TRANSACTIONS ARE EXEMPT UNDER THE FAIR HOUSING LAWS?

Although most real estate transactions are covered under federal laws, in limited situations, such transactions are exempt under the Fair Housing Act. The following types of real estate transactions are specifically exempt from the housing laws in certain situations.

106. Id.
107. Id. at 23 n.1 (quoting Soules, 967 F.2d at 824).
110. See Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977) (stating that "[w]e conclude that, in Title VIII cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response"), cert. denied, 435 U.S. 908 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974) (stating that "[e]ffect and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly because . . . we . . . recognize that the arbitrary quality of thoughtlessness can be disastrous and unfair to private rights and the public interest as the perversity of a willful scheme"), cert. denied, 422 U.S. 1042 (1975). But see Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 588 F.2d 1283, 1290 (7th Cir. 1977) (holding that a showing of discriminatory intent is normally required), cert. denied, 434 U.S. 1025 (1978).
(1) Housing for Older Persons

As of March 12, 1989, the effective date of the FHAA, it is illegal to discriminate against individuals because of their familial status in the sale or rental of dwellings. The FHAA now specifically prohibits discrimination against individuals in the sale, rental, or financing of housing because there are children under age eighteen in the family. However, the provisions of the FHAA regarding familial status do not apply with respect to “housing for older persons.”

The FHAA defines “housing for older persons” as:

1. Housing provided for under any federal or state program recognized by the Secretary of HUD as providing housing specifically for elderly persons; or
2. Housing intended for, and occupied solely by, persons sixty-two-years old or older; or
3. Certain housing occupied by families with at least one person fifty-five-years old or older.

In order for housing to qualify for the “housing for older persons” exemption, the following three requirements must be met:

1. The housing must have “significant facilities and services specifically designed to meet the physical or social needs of older persons,” or, if that is not practicable, the housing must be needed “to provide important housing opportunities for older persons”; or
2. At least eighty percent of the units in the housing facility must be occupied by at least one person fifty-five-years old or older; and
3. The owner or manager of the housing must publish and adhere to “policies and procedures which demonstrate an intent...to provide housing for persons” fifty-five-years old or older.

The exemption for “housing for older persons” was included in the FHAA in recognition of the impact the amendments would have on elderly residents who had bought or rented homes with the expectation that they would be able to live without the noise and hazards of children. Because of this recognition, exemplified by the exemption for “housing for older persons,” the familial status, antidiscrimination

114. Id. § 3607(b)(2)(A).
115. Id. § 3607(b)(2)(B).
116. Id. § 3607(b)(2)(C).
117. Id. § 3607(b)(2)(C)(i).
118. Id. § 3607(b)(2)(C)(ii).
119. Id. § 3607(b)(2)(C)(iii).
provisions of the FHAA have been upheld against constitutional challenges in light of the legitimate governmental purpose of curing familial status discrimination.\textsuperscript{121} Recently much of the litigation under the exemption has involved the issues that follow.

(a) What are significant facilities and services designed to meet the needs of older persons?

Significant facilities and services designed to meet the needs of older persons may "include, but are not limited to, social and recreational programs, . . . outside maintenance and referral services, an accessible physical environment, emergency and preventive health care . . . programs, congregate dining facilities, [and] transportation to facilitate access to social services."\textsuperscript{122} For example, in \textit{United States v. Keck},\textsuperscript{123} "routine park maintenance, a laundry room, cable TV, occasional distribution of a newsletter to tenants, weekly posting of items in or near the laundry room, and occasional advice and information provided on an ad hoc basis to tenants who inquired regarding transportation, local services, food programs, and other matters," were held to be insufficient to satisfy the exemption.\textsuperscript{124}

Moreover, in \textit{Rogers v. Windmill Pointe Village Club Ass'n, Inc.},\textsuperscript{125} the plaintiffs established a substantial likelihood that they would prevail on the merits of a familial status claim, where the defendant development's pool and tennis courts were not adapted in any way to accommodate the needs of older persons.\textsuperscript{126} In addition, the homes and environs of the subdivision were not equipped to be physically accessible to older persons.\textsuperscript{127} On the other hand, a newsletter showing social programs such as square dancing, bridge, line dancing, potluck suppers, horse racing, and movies, and testimony that there was a bowling league and fitness program was sufficient to establish that a defendant residential subdivision provided social and recreational programs for older persons.\textsuperscript{128}

\textsuperscript{121} Seniors Civil Liberties Ass'n, Inc. v. Kemp, 965 F.2d 1030, 1032-36 (11th Cir. 1992) (upholding statutory provisions against charges that the statute violated the First Amendment by limiting freedom of association; the Fifth Amendment by depriving persons of their liberty and property interest; the constitutional right to privacy; and the Tenth Amendment).

\textsuperscript{122} 24 C.F.R. § 100.304(b)(1) (1994).


\textsuperscript{125} 967 F.2d 525 (11th Cir 1992).

\textsuperscript{126} Rogers v. Windmill Pointe Village Club Ass'n, Inc., 967 F.2d 525, 528 (11th Cir. 1992).

\textsuperscript{127} Id.

\textsuperscript{128} Massaro v. Mainlands Section 1 and 2 Civic Association, Inc. 796 F. Supp. 1499, 1505 (S.D. Fla. 1992).
In essence, a provider of housing must offer a package of facilities and services that indicate a genuine commitment to serving the special needs of older persons in order to qualify for the exemption. Otherwise, a housing provider must rely on the default provision under the exemption which provides that he or she must prove that it "is not practicable to provide [such] significant facilities and services," and the development is necessary "to provide important housing opportunities for older persons."

(b) What type of evidence is sufficient to demonstrate that the eighty percent requirement is met?

Neither the FHAA nor the regulations address the question of what proof is sufficient to demonstrate that the eighty percent requirement has been met. However, recent case law makes clear that, in order to prove that eighty percent of the units in a residential subdivision or apartment complex are occupied by at least one person age fifty-five or older, a housing provider must show quantitative evidence. It is not enough to rely on bare testimony or allegations in the pleadings.

For example, in Rogers, a homeowners' association presented testimony "that a valid census was taken which established compliance with the [eighty percent] requirement," but failed to produce "a copy of the census or any information regarding the method or validity of the survey." The census consisted of ballots returned in a vote of the residents of the subdivision to amend the subdivision's age restrictions to limit occupancy to individuals over the age of fifty-five. The United States Court of Appeals for the Eleventh Circuit held that the invalidated census was insufficient proof of satisfaction of the eighty percent requirement.

The Eleventh Circuit has also held that the eighty percent requirement was not met in a case where the residents' ages were verified and multiple surveys were conducted. In Massaro v. Mainlands Section 1 & 2 Civic Association, Inc., the housing provider proffered three studies they conducted to demonstrate that the eighty percent requirement was met. The first study consisted of a questionnaire sent to each resident of the community. Concerned that

130. 24 C.F.R. § 100.304(b)(2) (1994).
131. Rogers, 967 F.2d at 528.
132. Id.
133. Id. at 528 n.4.
134. Id. at 528.
135. Massaro, 3 F.3d at 1478.
136. 3 F.3d 1472 (11th Cir. 1993).
the study was not valid because there was no procedure for verifying the age of the residents, the homeowners' association conducted a second study one year later. Subsequently, the association attempted to verify the results of the study through the use of social security numbers. When that effort failed, a third study was conducted, verifying the ages of the respondents through the use of a driver's license or other documents which demonstrated age.\textsuperscript{137}

In denying the exemption, the Eleventh Circuit noted that the person responsible for gathering the survey "told residents that the survey was being taken so that the [association] could prevent children from living in the community."\textsuperscript{138} The goal of the age verification procedure was therefore to exclude children rather than to provide housing for older persons. Moreover, the third survey was conducted only after the association attempted to evict two families with infants.\textsuperscript{139}

(c) What evidence is sufficient to demonstrate that the "policies and procedures" prong of the housing for older persons exemption is met?

A threshold question in examining whether the policies and procedures prong of the exemption has been met is: who is entitled to claim the exemption? The FHAA provides that in order to claim the exemption, the housing facility must publish "an intent by the owner or manager to provide housing for persons 55 years of age or older."\textsuperscript{140} The statutory language demonstrates that Congress determined that the owner or manager's intent is the dispositive factor in establishing whether a housing development seeks to provide housing for older persons.\textsuperscript{141} Moreover, the regulations discuss "the relevant factors in terms of the owner or manager's compliance with the published policies and procedures."\textsuperscript{142}

Thus far, the exemption has not been permitted in situations of a mobile home park run by a single manager, and a new housing development in which almost one-half of the lots had not been sold and were held in trust by a trustee.\textsuperscript{143} However, the courts have recently been lenient in extending the exemption to persons other than owners.

\textsuperscript{137} Massaro, 3 F.3d at 1478.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Massaro, 796 F. Supp. at 1502; see 24 C.F.R. 100.304(c)(2) (1991).
or managers. In *Massaro*, the Eleventh Circuit held that, although a homeowners’ association of a residential subdivision did not have a centralized owner or manager, the association was eligible for the exemption.\footnote{144} The association performed the functions of an owner and manager because it had the power to enforce the declaration of restrictions, limiting the subdivision to residents sixteen years of age or older. The court concluded that the declaration and association’s enforcement powers distinguished the case from that of a single-family homeowner.\footnote{145} The second question in the policies and procedures prong test is: how will the courts determine whether owners or managers have adhered to procedures and policies indicating an intent to provide housing for older persons? In essence, “the housing in question must, in its marketing to the public and in its internal operations, hold itself out as housing for persons age 55 or older.”\footnote{146} The regulations outline six nonexclusive factors which are relevant in making that determination:

The following factors, among others, are relevant . . . [under] this section:

(i) The manner in which the housing facility is described to prospective residents.
(ii) The nature of any advertising designed to attract prospective residents.
(iii) Age verification procedures.
(iv) Lease provisions.
(v) Written rules and regulations.
(vi) Actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules or regulations.\footnote{147}

Not all of the factors outlined may be relevant in a particular situation. For example, in *Massaro*, the court concluded “that the requirement concerning the manner in which the housing is described and advertised is inapplicable” because the homeowners’ association had

\footnote{144} *Massaro*, 3 F.3d at 1477.
\footnote{145} Id. *See Rogers*, 967 F.2d at 526 (holding that although the warranty deed transferred clubhouse property and responsibility for maintenance from the builder to the homeowners’ association, the agreement not to restrict the rights of owners to become members and the declarations, covenants, and restrictions stating that amendment of covenants shall not apply to age restrictions precluded the association from claiming the exemption; and therefore granting the plaintiff’s motion for summary judgment and declaring an injunction). *See United States v. City of Hayward*, 806 F. Supp. 810, 812-15 (N.D. Cal. 1992) (preventing the City from litigating exemption when rent control ordinance was enforced to require rent reduction when mobile home park converted from adult only to family park). *Id.*
\footnote{147} 24 C.F.R. § 100.304(c)(2) (1994).
no responsibility for attracting future residents. Nor did the factor concerning lease provisions apply, because the community predominately consisted of family-owned homes. However, the importance of Massaro lies with its consideration of the factors dealing with age verification procedures and the existence of written rules and regulations to demonstrate a housing provider's intent to provide housing for older persons. Significantly, the Eleventh Circuit in Massaro concluded that age verification and the adoption of written policies to provide housing for older persons, will not reap sufficient evidence of intent, if such actions are taken subsequent to alleged discriminatory actions.

(2) **Owner's Sale or Rental of a Single Home**

If a single-family house is sold or rented by its owner, such transaction is exempt from the Fair Housing Act's provisions, so long as the property is not sold or rented through the use of advertisements that indicate a preference on the basis of race, color, religion, handicap, familial status, sex, or national origin. However, this exemption does not apply if the owner utilizes the services of a real estate broker or the services of any person engaged in the business of selling or renting dwellings. If the owner is an absentee owner, he or she may not receive the benefit of the exemption more than once every twenty-four months.

Section 3603(b) of the Fair Housing Act exempts sales or rentals of single-family homes by the owner if all of the following four requirements are met:

1. the owner does not own more than three such homes at any one time;

148. Massaro, 3 F.3d at 1478.
149. Id.
150. Id.
152. Id. § 3603(c) (1988). Section 3603(c) provides:
   (c) Business of selling or renting dwellings defined
   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—
   (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
   (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 sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or
   (3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

**Id.**

(2) in the case of a sale of a dwelling where the owner was not occupying the residence at the time of the sale, or was not the most recent occupant of the dwelling, the owner has not made a similar sale within the past twenty-four months;

(3) the owner does not have a beneficial interest in any part of the proceeds from the sale or rental of more than three such dwellings; and

(4) the dwelling was sold

(A) without the use, in any manner, of the sales or rental services or facilities of a real estate agent, broker, or salesperson; and

(B) the owner did not publish, post, or mail any advertisement or written notice that included discriminatory language.154

Furthermore, section 3603(b) specifically excludes certain real estate activities of "attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title" in assisting the owner's sale or rental of a single-family house.155

Thus far, there have been no reported court cases defining the scope of the exemption as applied to families with children. However, the United States Court of Appeals for the Sixth Circuit recently applied the exemption to a real estate agent who owned and sold her single-family house to her neighbors while in the midst of negotiations with a state agency which wanted to lease her house as a group home for mentally disabled adults.156

In Michigan Protection and Advocacy Service, Inc. v. Babin,157 a couple listed their home for sale with Century 21 Town and Country Realty.158 The house was not sold after being on the market several months, so the couples' real estate agent contacted a state agency and asked if the agency would be interested in leasing the house as a group home for mentally disabled adults, if the agent purchased the house. Upon reaching an agreement with the state agency, the real estate agent purchased the house from her clients for $95,000. Although the agent paid a broker's commission to Century 21 as the buyer, the agent retained part of the commission as the real estate

154. Id. § 3603(b) (1988); see Michigan Protection & Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 342 (6th Cir. 1994).
156. Babin, 18 F.3d at 340-42.
157. 18 F.3d 337 (6th Cir. 1994).
158. Babin, 18 F.3d at 340.
agent. While awaiting state approval of the leasing arrangements, the neighbors began a campaign to stop the group home.

In the midst of controversy and the real estate agent's plea to the state agency to obtain approval of the lease arrangement, an individual offered to purchase the house for $100,000. The agent made a counter-offer of $104,000. The neighbors then made a donation to the prospective buyer in order to prevent the lease by the state agency. The offer was accepted, with the added donation. The closing was held using Century 21 pre-printed forms, signed by the owner of Century 21 as broker for the sale. The state agency and various mentally disabled persons brought suit against the owner real estate agent, Century 21 and its owner, and the neighbors who solicited funds and campaigned against the group home.

The plaintiffs in Babin contended that the real estate agent-owner violated section 3604(f)(1) of the FHAA "because she sold the house for financial gain knowing that the buyers were actively opposed to the group home." The Sixth Circuit held that the owner-agent's transaction was exempt from section 3604 by section 3603(b). The court reasoned that the owner-agent only owned two dwellings and had not made a similar sale in the past twenty-four months. Furthermore, although she had earned commissions from the sale of other homes, the court stated that the earning of commissions was not "equivalent to owning an interest in the property, or having 'title to or any right to all or a portion of the proceeds from the sale or rental of' more than three dwellings." The court concluded that to be excluded from the exemption, a person must have some claim to proceeds of a sale based on their interest in fee simple of the property.

Finally, the court reasoned that the owner-agent did not in any way use the sales or rental services or facilities of a broker, agent, or

159. Id.
160. Id. The neighbors organized a petition drive consisting of contacting several newspapers about the drive and proposed:

[A] mailing about group homes. . . . This mailing included 1) a newspaper article about a resident of a group home who had raped a nine-year old girl; 2) a list of addresses of people to write to express concern about the group home . . . 4) a sheet entitled "Group Homes: Things You Should Know" that stated that the neighborhood would no longer be safe and property values would plummet if a group home was situated in the neighborhood; and 5) form letters to send to Century 21 and . . . [the state agency] to express concern about the group home.

Id. at 341.
161. Babin, 18 F.3d at 341.
162. Id. at 342.
163. Id.
164. Id.
165. Id.
The property was not listed with Century 21 and Century 21 did not receive any commission from the sale. Moreover, although the owner-agent had used Century 21 forms, she had obtained them directly from the title company, rather than from Century 21.

As to the defendant Century 21, the court concluded that it was neither directly involved in the transaction, nor vicariously liable under the FHAA, because the owner-agent was not acting within the scope of her employment as a real estate agent. And, as to the neighbors, the court concluded that their actions in campaigning against the group home constituted “normal economic competition” which can not constitute a violation under the Act. The neighbors’ “action in collecting money to buy the house [was] not direct enough to fall within the terms of [section] 3604(f)(1).”

The Babin decision appears to be consistent with congressional intent to allow an individual owner to dispose of his or her property as he or she wishes, where there is minimal or no involvement of a real estate broker who receives no commission from the sale. However, it is clear that all four of the requirements imposed by section 3603(b) must be met in order to claim the exemption for a sale or rental of a single-family home. Moreover, the use of pre-printed forms in real estate transactions will not invalidate the single-family home exemption, at least according to the Sixth Circuit in Babin.

(3) Private Clubs

The Fair Housing Act provided an exemption to the antidiscrimination laws for the rental or sale of noncommercial accommodations owned by religious organizations or by a nonprofit organization. The FHAA incorporates this exemption. Such organizations may give preferences to individuals of the same religion,

166. Id. at 342-43.
167. Id. at 342.
168. Id. at 343.
169. Id. at 344-45.
170. Id. at 344. The court in Babin also concluded that the neighbors did not violate section 3617 by interfering with the exercise and enjoyment of the plaintiff’s right to fair housing. Id. at 344-47. The court defined the scope of section 3617 as extending only to “actors who are in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus.” Id. at 347. Examples cited were racially-motivated firebombings, sending threatening notes, deflating appraisals for discriminatory purposes, and insurance redlining. Id.
175. Id.
or may give preferences to its members, as long as membership in the organization is not restricted on account of color, race, or national origin.\textsuperscript{176}

To date, there has been only one published court decision construing the private club exemption, \textit{United States v. Columbus Country Club}.\textsuperscript{177} The issue was whether summer homes maintained by the Columbus Country Club ("Club") fell under the religious organization and/or private club exemption codified in section 3607 of the FHAA.\textsuperscript{178} The Club, which maintained a group of summer homes, had been formed in the 1920s by the Knights of Columbus ("K of C"), a Catholic men's organization. However, there was no legal relationship between K of C and the Club, which was classified as a nonprofit organization. An associate member of the Club, Anita Gualtieri, applied for annual membership so that she could purchase from her mother the leasehold on the summer home which had been in the family since the 1950s.\textsuperscript{179}

The Club refused on two separate occasions to admit Gualtieri.\textsuperscript{180} On the second occasion, the Club denied her membership allegedly because of the family's inability to get along with the Club community and their lack of interest in the Club community's religious aspects. Gualtieri notified the Civil Rights Division of the Department of Justice who then filed suit against the Club.\textsuperscript{181}

On subsequent appeal, the United States Court of Appeals for the Third Circuit recognized that whether the Club's summer homes fell within the section 3607 religious organization exemption depended upon whether the Club was controlled by or operated in conjunction with the Catholic Church in such a manner that there was a direct affiliation between the two.\textsuperscript{182} The Third Circuit determined that even though the Church gave the Club tacit consent to recite the rosary nightly and to hold weekly mass on the Club grounds during the summer, this was not enough to establish a formal relationship between the two. Thus, the court held that the Club did not meet the FHAA religious organization exemption.\textsuperscript{183}

In regards to the Private Club exemption, the court stated that whether the Club's summer homes fell within the exemption depended upon whether the summer homes were "lodging" under section 3607. The court listed five conditions that a club has to meet in order

\begin{itemize}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{United States v. Columbus Country Club}, 915 F.2d 877, 882-84 (3d Cir. 1990).
  \item \textsuperscript{178} \textit{Id.} at 878-82.
  \item \textsuperscript{179} \textit{Id.} at 879-80.
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.} at 880.
  \item \textsuperscript{182} \textit{Id.} at 880.
  \item \textsuperscript{183} \textit{Id.}
\end{itemize}
to fall under the private club exemption. These five conditions are as follows: (1) the club must be private; (2) the club must provide lodging; (3) the lodging must be temporary (the exemption only limits the rental or occupancy of the lodging); (4) the lodging must be incidental to the club's main purpose or purposes; and (5) the lodging can not be owned or operated for a commercial purpose.\textsuperscript{184}

The court only addressed conditions (2) and (3). The court concluded that condition (2) was not met because the summer homes, which could be occupied for as much as five months of the year, exceeded the time period which Congress intended for lodging to be construed as temporary occupancy and/or rental.\textsuperscript{185} The Club's summer homes for purposes of the FHAA were considered "dwellings" and not temporary "lodging."\textsuperscript{186} Condition (3) was not met because sales of the units did not fall under the exemption.\textsuperscript{187} The exemption applies only to temporary accommodations, not to summer homes.\textsuperscript{188} In summary, the court held that the Club's summer homes did not fall under either the FHAA's private club or religious organization exemptions.\textsuperscript{189}

(4) \textit{Multiple Dwellings, One of Which is Occupied by the Owner}

Dwellings containing rooms or units "containing living quarters occupied or intended to be occupied by no more than four families, living independently of each other," are exempt from the FHAA in a limited circumstance.\textsuperscript{190} The exemption applies only if the owner actually maintains and occupies one of such living quarters as his or her residence.\textsuperscript{191}

(5) \textit{Zoning Regulations}

FHAA section 3604 provides that "[n]othing in this subchapter limits the applicability of any reasonable local, [s]tate, or [f]ederal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."\textsuperscript{192} If a zoning regulation is reasonably related to legitimate state interests in controlling density, two courts have held that the regulation is exempt under the FHAA.\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{184} \textit{Id.} at 884.
\item \textsuperscript{185} \textit{Id.} at 885.
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{Columbus Country Club}, 915 F.2d at 885.
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} 42 U.S.C. \textsection 3603(b)(2) (1988).
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id.} \textsection 3607(b)(1).
\item \textsuperscript{193} \textit{Elliott v. City of Athens}, 960 F.2d 975, 984 (11th Cir. 1992); \textit{Doe v. City of Butler}, 892 F.2d 315, 318-19 (3d Cir. 1989).
\end{itemize}
However, these cases upholding zoning regulations as exempt under the FHAA, have not involved a disparate impact upon families with children.\textsuperscript{194} Although the Supreme Court has not addressed the issue, a number of courts in dicta have discussed the idea that a maximum occupancy limitation imposed by a zoning regulation would be unconstitutional if applied to families.\textsuperscript{195}

CONCLUSION

The inclusion of familial status as a protected class under the Fair Housing Amendments Act of 1988 ("FHAA") is a necessary response to years of discrimination against families with children in housing and a growing lack of adequate housing. The FHAA and its numerous exemptions are designed to cure these problems, while recognizing the rights of property owners to dispose of and maintain their property as they see fit. However, to a great extent, there can be no resolution of the conflict between those who prefer the solitude of living without children and families who are trying to place a roof over their heads. The inclusion of familial status as a protected class under the FHAA will undoubtedly have profound consequences on many real estate transactions and the manner in which real estate is managed in the future.

\textsuperscript{194} See Elliott, 960 F.2d at 982-89; Doe, 892 F.2d at 320.