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NOTE

THE STATUTE OF LIMITATIONS IN THE FAIR HOUSING ACT: TRAP FOR THE UNWARY

The Fair Housing Act of 1968¹ was enacted "to provide, within constitutional limitations, for fair housing throughout the United States."² The original intent of the statute was to prohibit, with certain limitations and exceptions,³ racial discrimination in housing; the scope of the Act has since been extended to proscribe sex discrimination.⁴

The Act provides for enforcement by any person who believes he will be irrevocably injured by a discriminatory housing practice. The person aggrieved may file a written complaint with the Secretary of Housing and Urban Development (HUD)⁵ or may file a civil action in any appropriate state, local, or federal district court.⁶ In either case, the complaint must be filed within 180 days of the alleged discrimination.⁷ If the person complains to HUD under section 3610, the Secretary may attempt to resolve the complaint "by informal methods of conference, conciliation, and persuasion."⁸ Since HUD is restricted to seeking voluntary compliance, section 3610(d) preserves the complainant's right to commence a civil action in federal district court if the Secretary has not obtained voluntary compliance within thirty days.⁹

This note concerns conflicting judicial and administrative interpretations of that portion of section 3610(d) which describes the time limitation in which a complainant may institute a civil action after first seeking the aid of HUD. That section provides, in pertinent part:

1. Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3619, 3631 (1970)).

2. 42 U.S.C. § 3601 (1970).

3. See notes 46-49 and accompanying text *infra*.

4. Pub. L. No. 93-383, § 808(b), 88 Stat. 729 (1974).

5. 42 U.S.C. § 3610 (1970).

6. *Id.* § 3612.

7. *Id.* § 3610(b); § 3612(a).

8. *Id.* § 3610(a). If a state or local fair housing law provides rights and remedies which are "substantially equivalent" to those provided by the Fair Housing Act, the Secretary must refer the complaint to the appropriate state or local administrative agency and take no further action unless he determines that "the protection of the rights of the parties or the interests of justice" so require. *Id.* § 3610(c).

9. *Id.* § 3610(d). No civil action may be brought in federal district court if "substantially equivalent" rights and remedies are available under state or local law. *Id.* This restriction does not apply to a plaintiff who elects to bypass administrative aid in prosecuting his claim and goes directly to the federal district court. *Id.* § 3612. These provisions have been criticized for penalizing the complainant who seeks administrative help. See Note, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289, 301-03 (1973). See also Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 855-59 (1969).

(d) If within thirty days after a complaint is filed with the Secretary . . . the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, *within thirty days thereafter*, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter¹⁰

The section appears to state that the right to file an action in court arises thirty days after the date when the complainant files his complaint with HUD, and remains viable for only thirty days. Stated another way, the section requires that a complainant who first seeks help from HUD must file his civil action, if at all, between the thirty-first and sixtieth days following the date he files with HUD.

HUD regulations suggest a very different conclusion:

The person aggrieved shall be notified in writing by registered or certified mail when the Assistant Secretary has determined that he is unable to obtain voluntary compliance through informal methods of conference, conciliation, or persuasion. The 30 days provided in section 810(d) [42 U.S.C. § 3610(d)] title VIII within which a civil action may be commenced shall be deemed to begin upon the receipt of such notice.¹¹

The regulation reflects a recognition that HUD's investigation of the complaint and subsequent activities seeking voluntary compliance are unlikely to produce a result within thirty days. Unless Congress intended that HUD's conciliatory measures be conducted concurrently with the complainant's court action, HUD's participation would be meaningless in most cases if the complainant were required to file his civil action between the thirty-first and sixtieth days following the filing of his complaint with HUD. The effect of the regulation is to delay the beginning of the period in which the complainant may file his action in the federal district court until he receives notification that HUD has been unable to obtain voluntary compliance.

Five reported cases, all in federal district courts,¹² have discussed whether the HUD regulation properly interprets the statute. *Brown v. Ballas* and *Logan v. Richard E. Carmack & Associates* interpreted

10. 42 U.S.C. § 3610(d) (1970) (emphasis added).

11. 24 C.F.R. § 105.34 (1976).

12. *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976); *Brown v. Blake & Bane, Inc.*, 402 F. Supp. 621 (E.D. Va. 1975); *Logan v. Richard E. Carmack & Assocs.*, 368 F. Supp. 121 (E.D. Tenn. 1973); *Young v. AAA Realty Co.*, 350 F. Supp. 1382 (M.D.N.C. 1972); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971).

section 3610(d) to mean that a suit brought pursuant to that section must be filed within thirty days of the plaintiff's receipt of notice that HUD has terminated efforts to obtain voluntary compliance.¹³ *Sumlin v. Brown, Young v. AAA Realty Co.*, and *Brown v. Blake & Bane, Inc.* held that the statute was not susceptible of that interpretation. Instead, the latter decisions ruled that civil actions must be filed, if at all, no less than thirty and no more than sixty days after the complaint is filed with HUD—regardless of whether HUD has terminated its conciliation efforts or whether HUD has notified the plaintiff of termination.¹⁴

Read together, the *Ballas* and *Logan* cases offer three reasons for holding that the HUD regulations properly interpret section 3610(d): (1) plaintiffs should not be penalized for the failure of administrative agencies to follow statutory mandates; (2) the limitations of section 3610(d) are analogous to the limitations contained in former 42 U.S.C. § 2000e-5(e),¹⁵ previously a portion of the Fair Employment Practices Act; and (3) Congress did not intend that administrative and judicial proceedings pursuant to the Fair Housing Act should proceed simultaneously. None of these reasons withstands analysis.

The primary fault with the first reason is that the time limits in section 3610(d) do not relate to any notice which HUD is required to give the plaintiff. Rather, the date of reference is the date when the complaint was filed with the Secretary.¹⁶ Section 3610 requires HUD to give notice to a complainant only if the Secretary determines, within thirty days of receiving the complaint, that HUD will not seek to resolve the complaint;¹⁷ the statute does not require notice that HUD has terminated its conciliatory efforts. Nevertheless, HUD does advise complainants that they will receive notice of termination and that they may file suit under section 3610(d) within thirty days of receipt of the notice.¹⁸

One court has reasoned that plaintiffs should be able to rely on such communications, and in any case should not be penalized for

13. The *Ballas* court went even further, requiring the defendant to bear the burden of showing that plaintiff received notice from HUD more than thirty days before filing suit. 331 F. Supp. at 1035-36.

14. See *Brown v. Blake & Bane, Inc.*, 402 F. Supp. 621, 622-23 (E.D. Va. 1975).

15. (1970).

16. See note 10 and accompanying text *supra*. Section 3610(d) also refers to "any period of reference under subsection (c) of this section." Subsection (c) concerns referral of the complaint to local or state agencies. See note 9 *supra*. The reference to subsection (c) has no impact on the legal issues, although in practice the limitation period might be affected. In order to simplify this discussion, the date of filing with HUD will be treated as the reference date in all cases.

17. 42 U.S.C. § 3610(a) (1970).

18. Letter from HUD to Lt. Otis Sumlin (Dec. 2, 1975) (copy on file with court in *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976)).

properly following directions.¹⁹ Acceptance of that argument, however, effectively allows an administrative agency to repeal, through rule-making, a legislatively mandated statute of limitations upon which defendants should be entitled to rely.²⁰ That is not a valid purpose of interpretative rulemaking.²¹ Furthermore, decisions such as *Ballas* and *Logan* serve to perpetuate HUD's erroneous interpretation of the statute, an interpretation which has the long-term effect of diminishing plaintiffs' rights under the statute.²²

The *Logan* court attempted to justify its holding by drawing an analogy between section 3610(d) and the limitation period imposed on claims brought under the Fair Employment Practices Act prior to its amendment in 1972.²³ Under those provisions, the Equal Employment Opportunity Commission (EEOC) was required to give notice to the complaining party if it failed to achieve voluntary compliance within thirty days after the complaint was filed; the complaining party could, "within thirty days thereafter," institute a civil action.²⁴ This was interpreted to mean only that the complaining party must bring suit, if at all, within thirty days of receiving notice that EEOC failed to obtain voluntary compliance, and not that he must bring suit within sixty days of filing his complaint with EEOC.²⁵ Former section 2000e-5(e) required EEOC to give notice of termination. The

19. *Brown v. Ballas*, 331 F. Supp. 1033, 1036 (N.D. Tex. 1971).

20. For example, in the *Sumlin* case, plaintiffs received their "right to sue" letter nearly nineteen months after filing their complaint with HUD. See note 38 and accompanying text *infra*.

21. See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.05 (1958).

22. See text accompanying notes 35-38 *infra*.

23. *Logan v. Richard E. Carmack & Assocs.*, 368 F. Supp. 121, 122-23 (E.D. Tenn. 1973). The pre-1972 version of the Fair Employment Practices Act provided in pertinent part:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Act of July 2, 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 260 (1964) (current version at 42 U.S.C. § 2000e-5 (1976)).

24. *Id.*

25. *Miller v. Int'l Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Cunningham v. Litton Indus.*, 413 F.2d 887 (9th Cir. 1969).

courts were unwilling to restrict the rights of complainants because the agency failed to fulfill its statutory duty.²⁶

The analogy would be persuasive if section 3610(d) contained a requirement that HUD give notice of failure to obtain voluntary compliance within a given period of time. The section does not, however, contain such a requirement.²⁷ As noted above, the only notice requirement in section 3610 is the requirement that HUD notify the complainant within thirty days whether the agency intends to attempt to resolve the matter.²⁸ As Judge Warriner remarked in *Brown v. Blake & Bane, Inc.*:

[T]he notice required by § 2000e-5(e) is a notice that the government has tried and failed and thus has terminated its efforts at conciliatory compliance. The notice in 3610(a) is a notice that the government intends to *commence* conciliatory intervention. Thus, notice under the Fair Employment Practices Act carries an import just the opposite of the notice under the Fair Housing Act.²⁹

The cases which hold that HUD has properly interpreted section 3610(d) assume that it would be irrational—at least that Congress did not intend—for a civil action under the Fair Housing Act to proceed concurrently with administrative proceedings concerning the same complaint.³⁰ Several portions of the act indicate, however, that simultaneous proceedings are exactly what Congress intended. Section 3610(f) provides that HUD must terminate its efforts to obtain voluntary compliance when an action filed pursuant to either section 3610 or section 3612 comes to trial.³¹ Section 3610(f) therefore contemplates that HUD's activities may proceed throughout the pretrial stages of the civil action. Section 3612(a) further provides that an action brought pursuant to that section or section 3610(d) may be continued by the

26. Delay in sending notice could occur without any breach of duty by EEOC. Although former § 2000e-5(e) required that notice be given if voluntary compliance was not obtained within thirty days, the statute did not specify a period of time in which the notice must be sent. See note 23 *supra*; *Miller v. Int'l Paper Co.*, 408 F.2d 283, 286 n.12 (5th Cir. 1969).

27. See note 10 and accompanying text *supra*.

28. See note 17 and accompanying text *supra*.

29. *Brown v. Blake & Bane, Inc.*, 402 F. Supp. 621, 623 (E.D. Va. 1975) (emphasis in original).

30. See *Logan v. Richard E. Carmack & Assocs.*, 368 F. Supp. 121, 123 (E.D. Tenn. 1973).

31. 42 U.S.C. § 3610(f) (1970). Thus the federal district courts need not be burdened with cases which they expect to be settled by HUD, but complainants need not wait long periods of time before being allowed to enforce their claims in court. See *Young v. AAA Realty Co.*, 350 F. Supp. 1382, 1386 (M.D.N.C. 1972); *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976).

court "if the court believes that the conciliation efforts of the Secretary . . . are likely to result in satisfactory settlement [of the discriminatory housing practice]" ³²

Proponents of the HUD regulation have suggested that if complainants are allowed to file suit within sixty days of filing their complaints with HUD, the agency's activities regarding the complaint will become "meaningless formalities."³³ The suggestion assumes that alleged violators will be less willing to comply voluntarily with the Fair Housing Act once an action has been filed.³⁴ The *Sumlin* court concluded that the opposite was true: the plaintiff's opportunity to file his action thirty days after complaining to HUD—and the actual filing—would serve as an incentive for voluntary compliance.³⁵ The trial judge reasoned that

[a]llowing the plaintiff to file suit while HUD continues to seek voluntary compliance ensures that a defendant cannot delay resolution of the dispute indefinitely by refusing to cooperate with HUD, secure in the knowledge that the plaintiff cannot seek legal redress until HUD has abandoned the case. The present case provides ample evidence that such delays could be substantial. Plaintiffs filed their complaint with HUD on May 29, 1974; they received their "right to sue" letter on December 24, 1975—over 1½ years later.³⁶

Since section 3610(d) provides no limits on the length of time HUD may expend in seeking voluntary compliance, a complainant who requested HUD's assistance would be wholly unable to control the progress of his complaint if he could not file his action in court before HUD terminated its activities. A skillful defendant might be able to delay proceedings for years through manipulation of his negotiations with HUD.

The argument comes full circle; the rationale behind the *Ballas* decision becomes the rationale for the opposite conclusion. The *Ballas* court concluded that a plaintiff is unfairly penalized because of administrative misinterpretation of the statute if his Fair Housing Act claim is dismissed because it is brought too late as a result of following HUD's instructions. But all Fair Housing Act plaintiffs are penalized

32. 42 U.S.C. § 3612(a) (1970); see *Young v. AAA Realty Co.*, 350 F. Supp. 1382, 1386 n.3 (M.D.N.C. 1972).

33. *Young v. AAA Realty Co.*, 350 F. Supp. 1382, 1385 (M.D.N.C. 1972).

34. *Id.*

35. *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976).

36. *Id.* at 82.

if HUD's regulation is allowed to control, because defendants can use the regulation to delay the proceedings.

A plaintiff may bring his Fair Housing Act claim directly to court without first complaining to HUD,³⁷ thereby avoiding the delays implicit in the regulation. Thus a plaintiff might be placed at a disadvantage as a result of seeking administrative help in resolving his claim. Since that help is provided to avoid the expense and delay of trial,³⁸ it makes little sense to discourage resort to the administrative process. That is, however, precisely the long-term effect which the HUD regulation appears to have.

The immediate legal effect of dismissing a claim brought under section 3610(d) for failure to comply with the time limitations of the section will be minimal in most cases. As both the *Young* and *Sumlin* courts noted,³⁹ dismissal of the claim brought under the Fair Housing Act does not affect the validity of the same claim when it is subsequently brought pursuant to 42 U.S.C. § 1982.⁴⁰ Less than three months after the passage of the Fair Housing Act, the United States Supreme Court held in *Jones v. Alfred H. Mayer Co.*⁴¹ that section 1982 prohibits private as well as public racial discrimination in the sale or rental of property.⁴² The *Jones* Court further held that the remedies available under section 1982 and the Fair Housing Act are independent of each other, and that the Fair Housing Act does not limit the scope of the earlier statute.⁴³ In subsequent decisions the courts have specifically ruled that the limitations period of section 3610(d) does not apply to an action brought under section 1982.⁴⁴

With the exception of sex discrimination, the coverage and remedies of section 1982 are generally broader than those of the Fair Housing Act.⁴⁵ The Fair Housing Act does not apply to transactions involving

37. 42 U.S.C. § 3612 (1970).

38. See *Sumlin v. Brown*, 420 F. Supp. 78 (N.D. Fla. 1976).

39. *Young v. AAA Realty Co.*, 350 F. Supp. 1382, 1387 (M.D.N.C. 1972); *Sumlin v. Brown*, 420 F. Supp. 78, 82 (N.D. Fla. 1976).

40. 42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

41. 392 U.S. 409 (1968).

42. *Id.* at 413. The statute was construed as enforcing the thirteenth amendment, thus avoiding the fourteenth amendment requirement of state action.

43. *Id.* at 416 n.20.

44. *Hickman v. Fincher*, 483 F.2d 855 (4th Cir. 1973); *Hampton v. Roberts*, 386 F. Supp. 609 (W.D. Va. 1974). The limitation period applicable to § 1982 suits is the state statute of limitations which would be applied to a similar action brought in state court. *Hickman v. Fincher*, 483 F.2d at 857; *Warren v. Norman Realty Co.*, 513 F.2d 730, 733 (8th Cir. 1975).

45. See Note, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 756-60. But see Note, *Jones v. Mayer: The Thirteenth*

single-family dwellings sold or rented by an owner,⁴⁶ or to transactions involving portions of "dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other" if the owner lives in such a building.⁴⁷ Religious organizations and private clubs are likewise exempt.⁴⁸ Section 1982 recognized no exemptions. Under the Fair Housing Act, punitive damages are limited to \$1,000;⁴⁹ punitive damages are not limited by section 1982. A plaintiff may not sue in federal district court under the Fair Housing Act if he first complains to HUD and substantially equivalent relief is available under local law.⁵⁰ This restriction does not apply to a plaintiff who brings his suit pursuant to section 1982.

Although the Fair Housing Act authorizes the award of attorney's fees to a prevailing plaintiff,⁵¹ section 1982 is silent on the subject. Attorney's fees under the Fair Housing Act, however, are available only when the court determines that the plaintiff is financially unable to pay them.⁵² Until recently courts have awarded attorney's fees in section 1982 suits under their equity powers.⁵³ Congress has now specifically authorized the award of attorney's fees in section 1982 suits in the Civil Rights Attorney's Fees Awards Act of 1976.⁵⁴

The availability of section 1982 ameliorates the disadvantage suffered by most plaintiffs as a result of reliance on the HUD regulation. But sex discrimination, which is explicitly covered by the Fair

Amendment and the Federal Anti-Discrimination Laws, 69 COLUM. L. REV. 1019, 1031 (1969), which suggests that incidental aspects of real estate transactions might be covered by the Fair Housing Act but remain outside the scope of § 1982. Examples include brokerage contracts, advertising of discriminatory preferences, and financial arrangements. These incidents are specifically within the contemplation of the Fair Housing Act but may not be "property" for the purposes of § 1982. The Fair Housing Act also explicitly prohibits blockbusting, which may or may not be within the reach of § 1982. See *id.* at 1032; Note, *Blockbusting*, 59 GEO. L.J. 170, 175-76 (1970); Note, *Legal Control of Blockbusting*, 1972 URBAN L. ANN. 145.

46. 42 U.S.C. § 3603(b)(1). The Fair Housing Act does apply, however, if the owner owns more than three such houses or, after December 31, 1969, if the sale or rental involves a real estate broker or salesman. *Id.*

47. *Id.* § 3603(b)(2).

48. *Id.* § 3607.

49. *Id.* § 3612(c).

50. *Id.* § 3610(d); see note 9 *supra*.

51. *Id.* § 3612(c).

52. *Id.*

53. See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). But see *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 270 n.46 (1975) (dictum), in which the Supreme Court specifically disapproved the "private attorney general" theory used to support the award of attorney's fees in *Lee*.

54. Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988).

Housing Act,⁵⁵ is not prohibited by section 1982.⁵⁶ In states without statutes that prohibit sex discrimination in the sale or rental of housing,⁵⁷ the Fair Housing Act provides the only avenue for bringing a sex discrimination claim. If such a claim is extinguished through failure to file a court action within the time limits of section 3610(d), HUD's advice concerning those time limits is no longer harmlessly misleading. The plaintiff will have lost substantial legal rights through administrative misinterpretation of the statute.

Further, even for those plaintiffs who retain the right to pursue their claims under section 1982, the regulation tends to convert HUD's administrative aid from a help into a hindrance.⁵⁸ The effect of the regulation is to prolong the process of resolving the complaint and to remove, for a time, the pressure for out-of-court settlement which a plaintiff may apply by threatening court action.⁵⁹ The Fair Housing Act instructs HUD to facilitate the resolution of housing discrimination complaints.⁶⁰ That purpose is poorly served by a regulation which leads complainants into unintentional loss of their claims.

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55. Pub. L. No. 93-383, § 808(b), 88 Stat. 729 (1974).

56. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Justice Stewart emphasized that § 1982 deals solely with racial discrimination in the sale or rental of property. *Id.* at 413.

57. See Note, *Pioneering Approaches to Confront Sex Bias in Housing*, 24 CLEV. ST. L. REV. 79, 84 n.27 (1975).

58. See text accompanying notes 33-38 *supra*.

59. See text accompanying note 36 *supra*.

60. See 42 U.S.C. § 3608 (1970).