

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HERBERT BROWN, ET AL :
Plaintiffs : CIVIL ACTION NO. 9051
vs :
JOHN FEDERLE, d/b/a/ :
FEDERLE REALTORS, ET AL :
Defendants :

FILED 12/18/78

Racial Steering may most simply be defined as leading a prospective buyer either to or away from a particular neighborhood because of his or her race. In practice it consists of steering blacks away from white areas to black or transitional areas and whites from black or transitional areas to white areas.

Prior to passage of the Fair Housing Act of 1968 and the Supreme Court's decision in Jones v Mayer, the usual approach was for real estate agents to tell blacks they could not show them the home or that it was not available. With the passage of fair housing laws with their expensive penalties for those who are caught, the housing industry has become aware that at least the letter of the law requires observance. As a result, steering has become the mechanism on which the dual housing market now depends for survival. As the Commission on Race and Housing pointed out some year ago "It is the real estate brokers, builders, and mortgage finance institutions which translate prejudice into discriminatory action".

For the black buyer seeking housing on the white market, steering is difficult to detect. Now that outright refusal is against the law, discrimination has become much more subtle. Although the black buyer is treated very courte-

ously in the white market, he is seldom called back by the agent nor shown anything in all-white areas unless he asks specifically to see a certain house. Often he is treated so well on the surface that he feels very pleased with the experience, even though he has not found a house he wants and can afford. While he may attribute that to the high cost of housing on the white market, the fact is that he has been effectively kept off that market.

The real estate industry's dual practices come fully to light in interracial neighborhoods - or what brokers consider to be transitional neighborhoods. These areas are literally transferred from the white market to the non-white market when it appears that a black demand for housing there has resulted in some black residents. The number of these need not be large. One Cleveland suburb found that it had been checked off, as far as area brokers were concerned, when the black population reached eight percent.

Neighborhoods in this situation face a number of drastic and disturbing changes. "For Sale" signs become prevalent; advertising by area brokers disappears from metropolitan press; mass door-to-door, telephone, and mail solicitation by real estate agents begins; loans to refinance homes are discontinued by companies holding existing mortgages; residents are told from all sides that the community will be all-black in a short time; and prospective buyers for homes in the community seem to be all black. Most disturbing of all, white homeseekers wanting to look in the area either don't receive any help by real estate agents, or are effectively discouraged.

Thus the brokers who advise white homebuyers to avoid transitional areas because they are "going black" become the instrument in fulfilling their own prophecy. If whites are steered away from a transitional neighborhood and blacks are steered into the area, then as homes are put on the market

they invariably are sold to blacks. Considering that the average homeowner keeps a home for seven years, even normal turnover will produce a segregated area in a matter of five or ten years. With the added pressures of solicitation and movement of friends from the neighborhood this process is accelerated. Thus, the evil of steering is that the neighborhoods that were integrated become racially segregated ghettos and the blacks who escaped from the downtown ghetto find that it has caught up with them.

There are legitimate forms of steering. All forms of steering that are not based on race, color, religion, national origin, or sex are legal. One of the legitimate functions of the real estate broker is to steer prospective buyers to the home that meets their qualifications. It is only when the sales agent makes assumptions along racial lines or applies his own racial belief in steering the prospective buyer to or away from a particular area that illegal, racial steering comes into play.

As previously stated, racial steering is usually so subtle most buyers are not aware that they have been steered. To determine when brokers have been steering extensive testing is required. The process consists of matching up a white and a black couple who go to the same real estate office, usually within a few days of each other. They initially inquire about the same home and then ask to be shown other homes without indicating any preferred area. They give identical requirements for homes as to price, bedrooms, basement, etc. If asked, the black couple will have a higher income and larger down payment than the white couple. Both will state employment in the same area. The testers are instructed to give no indication as to racial preference or bias. Testers are to be as similar to each other as possible so that the only difference is race.

Results of extensive testing conducted during the past year are similar to testing in other cities. Whites are shown white areas and are steered away from transitional areas with comments like the "taxes are too high", the "schools are bad", "they" are moving in, "you wouldn't want to live there". However, the same agent is quick to steer the black to the transitional area where the schools are "bad" and the "taxes are too high" by pointing out the advantage of living in a home where the "foundation has settled" and the neighbors are "compatible". When the blacks inquire about white areas they are told "you couldn't afford it", the homes are "too expensive", "you wouldn't be happy there", and the homes are all "built on slabs".

The victim of racial steering is not just the black but the white also. The white who is steered away from the transitional neighborhood suffers. The white who feels he is forced to move from his home in a transitional neighborhood suffers and both white and blacks suffer from declining property values.

THE FAIR HOUSING ACT OF 1968

The general purpose of the Fair Housing Act is set forth in Section 801: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. When Congress passed legislation to this end in 1968, it did so because of the severe damage that minority groups suffered as a result of housing discrimination.

As the court said in Mayers v Ridley 465 F.2d 630, 652 (D.C. Cir. 1972) "Congress was aware that the measure would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole character of the housing market." While it was generally recognized that members of the minority groups were damaged the most from discrimination

in housing, proponents of this legislation also emphasized that persons other than those who were the direct objects had a substantial interest in ensuring fair housing since they suffered as well. It was pointed out that to a large extent housing patterns had been imposed on home seekers - both white and non-white - and that the readiness of Americans to live in mixed neighborhoods is ahead of the policies and practices of the housing establishment.

It is the contention of the plaintiffs that racial steering is prohibited by 42 U.S.C. 3604 (a)

Section 3604(a) provides that it shall be unlawful "to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin". (Emphasis added.)

This section contains both specific and general prohibitions. The general provision makes it unlawful to "otherwise make unavailable" housing or to "deny" housing because of race. The foregoing phraseology appears to be as broad as Congress could have made it, and all practices which have the effect of making dwellings unavailable on the basis of race are therefore unlawful.

In interpreting the Fair Housing Act of 1968 the Supreme Court said "the language of the Act is broad and inclusive" and "we can give vitality to Section 810(a) only by generous construction". Trafficante v Metropolitan Life Insurance Company U.S. 93 S.Ct 364, 34 L. Ed. 2d 415 (1972). The congressional intent in enacting Title VIII is stated in 42 U.S.C. Section 3601 as follows: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Like other civil rights statutes, it is to be accorded a

broad construction in accordance with the foregoing purpose. Sullivan v Little Hunting Park, 396 U.S. 299, 90 S ct. 400, 24 L. Ed. 2d 386 (1969).

During the senate hearings it was pointed out by proponents of the Fair Housing Act that persons other than those who were the direct object of discrimination had a substantial interest in ensuring fair housing since they suffered as well. It was pointed out that to a large extent, housing patterns had been imposed on homeseekers -- both white and non-white. Senator Javits pointed out that housing discrimination adversely affected not only the person discriminated against but also the people in the community where he had chosen to live. 114 Cong. Rec. at 2706. The Secretary of H.U.D. testified that fair housing legislation was needed to stabilize neighborhoods, thus benefiting both whites and blacks in the community. Senator Mondale, one of the authors of the Act, said "there will however be the knowledge by Negroes that they are free -- if they have the money and the desire -- to move where they will; and there will be the knowledge by whites that the rapid, block by block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns". 114 Cong. Rec. at 3422 (Emphasis added.)

The courts have consistently ruled that civil rights statutes must be broadly construed to give effect to the intent of Congress. Jones v Mayer, 392 U.S. 409, 88 Sct. 2186 20 L. Ed. 1189 (1968), Daniel v Paul 395 U.S. 298, 89 S ct. 1697, 23 L. Ed. 2d 318 (1969), Griffin v Breckenridge, 403 U. S. 88, 91 S ct. 1790, 21 L. Ed. 2d 338 (1971), Trafficante v Metropolitan Life Insurance Company, supra.

In the application of Section 3604 (a) with its broad prohibition, it has been held that the failure to provide a black applicant with necessary and correct information concern-

ing what he must do to become a tenant discourages and impedes his application from apartments because of race. United States v West Peachtree Tenth Corporation, 347 F 2d 221 (5th Cir. 1971); see also United States v Reddock (No. 6541-71-P, S.D. Ala, January 27, 1972). It has also been held that the imposition of more burdensome application procedures, of delaying tactics, and of various forms of discouragement by resident managers and rental agents constitutes a violation not only by those who impose these procedural roadblocks, but also by top management and owners who fail to set forth objective and reviewable procedures for apartment application and rental. United States v Yountan Construction Company P-H EOH 13, 828.

Applying the above "principles" which were developed from 3604(a) cases it follows that steering because of race is a violation of this section. Thus, any action by a real estate agent which in any way impedes, delays or discourages a prospective homebuyer from purchasing housing on a racial basis is unlawful. This is in accord with the position taken in Mayers v Ridley, 465 F 2d 630, 652-3 (D.C. Cir. 1972) when the court of appeals for the District of Columbia stated that the Fair Housing Act was intended to have "the broadest objective and scope" and to prohibit not only open, direct discrimination but also all practices which have a racially discouraging effect.

As pointed out previously after 1968, racial steering replaced blatant discrimination and blockbusting as the means of containing blacks. The law prohibits "sophisticated as well as simple-minded modes of discrimination". Lane v Wilson, 307 U.S. 268 at 275, 59 S ct. 072 at 876, 83 L. Ed. 1281 (1939) and clearly racial steering is merely a sophisticated form of discrimination. Transitional neighborhoods are made "unavailable or denied" to whites by the simple expediency of showing

all-white neighborhoods instead. White neighborhoods are made "unavailable or otherwise denied" to blacks in a like manner and the method is so subtle that few realize they have been steered. It is not necessary that any racial remarks be made yet the effect is clearly discriminatory.

It is well settled by a long series of Supreme Court decisions that racial discrimination may be established by proof of either discriminatory purpose or discriminatory effect. As long ago as Buchanan v Warley, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917), the Supreme Court pointed out that the 14th amendment does not allow conduct which results in racially discriminatory treatment. More recently in United States v Grooms, 348 F Supp. 1130, (D.C. Fla 1972) the district court ruled "any course of conduct or way of doing business which actually or predictably results in different treatment of whites and blacks is a discriminatory pattern or practice, irrespective of motivation. See also United States v. Reddock, No. 6541-71-P (S.D. Ala, Jan. 27, 1972), United States v Medical Society of South Carolina, 298 F. Supp. 145, 152, (D. S. Car. 1969). The effect of racial steering is re-segregation. Areas that have been opened by the Fair Housing Act become new black ghettos.

To the best of our knowledge this is the first action brought solely on racial steering. The Department of Justice regards racial steering as a violation of Section 3604 (a) and has brought a number of actions where steering was one of the alleged discriminatory acts. At least one of these, United States v. E.M.E., No. C70-969 (N.D. Ohio 1973), resulted in a consent decree in which the defendants were enjoined from steering. In the only known private action which included steering as one of the alleged acts of discrimination, Zuch v Hussey, No. 38757 (E.D. Michigan 1973) Judge Damon J. Keith in a Memorandum Opinion and Order, dated October 18, 1973, ruled that racial steering was a violation of Section 3604 (a).

"It is the opinion of this court that when a real estate agent actively undertakes an effort to influence the choice of a prospective home buyer on a racial basis, the agent either directly or indirectly discourages the prospective home-buyer from purchasing a home in a particular area and fosters the perpetuation of racially segregated communities where available housing has been traditionally denied to blacks because of their race. The court, therefore, concludes as a matter of law that steering is a violation of Section 3604 (a) of the Fair Housing Law".

THE CIVIL RIGHTS ACT OF 1866

The leading case on application of the Civil Rights Act of 1866 on housing is Jones v Mayer, supra. The Supreme Court ruled "we think that history leaves no doubt that, if we are to give (the law) the scope that its origins dictate, we must accord it a sweep as broad as its language". It asked "itself whether the thirteenth amendment gave congress the power to eliminate all racial barriers to the acquisition of real and personal property" and answered in the affirmative.

The discussion on the Fair Housing Act applies equally to the Civil Rights Act of 1866. Federal Courts have consistently arrived at the same conclusions in Section 1982 cases as in Fair Housing Cases. Sullivan v Little Hunting Park, supra, Lee v Southern Home Sites Corporation, 444 F 2d 143 (5th Cir. 1971).

AFFIRMATIVE ACTION

In the case of steering, law enforcement is difficult because the practice is too widespread and too subtle. Sometimes the process is the result of a conscious intent of a realty firm to change a neighborhood and sometimes it results from the unconscious acts of salesmen who have not recognized

basic attitudinal shifts in race in housing and who presume that all their black and white clients prefer to live apart. In either case, steering is difficult to detect and harder to prove. To change the practice we must find ways of stimulating affirmative action on the part of the real estate industry - to enlist their positive effort to make certain that blacks are affirmatively offered listings in predominately white communities and that listings in changing areas are shown to whites as well as blacks -- to counter-steer in effect.

"A posture of neutrality or of mere avoidance of discrimination is not enough, either to accomplish fair housing goals or even to keep a realty firm out of trouble with the law. For it is almost impossible for a realty firm, particularly one with more than two or three salesmen, to insure that its clients are not illegally steered, since no employer can check on its salesmen closely enough to insure that all clients are treated the same. Somewhere, sometime a salesman may get into trouble and expose the firm to either a Justice Department suit, to damages by the complainant, or to possible suspension of his license. The only way a broker can be certain that he is abiding by the law is to instruct his salesmen to take positive action to insure its spirit is being fulfilled". H.U.D. Challenge, April 1973, Malcom E. Peabody, Jr., Acting Asst. Secretary for Equal Opportunity. (Emphasis added.)

In cases of racial discrimination, the court has not only the power but the duty both to enjoin future discrimination and to require the defendants to take affirmative steps which will, so far as possible, eliminate the continuing effects of past discrimination. Louisiana v United States, 380 U.S. 145, 154 (1965), United States v West Peachtree Tenth Corporation,

437 F 2d 221 (5th Cir. 1971).

Appropriate affirmative relief in a case of this kind should include

1. Actively promoting the advantages of living in integrated neighborhoods to white clients including offering to show white clients listings in transitional neighborhoods.
2. Promoting the advantages of white areas to black clients and offering to show listings to blacks in white neighborhoods.
3. Financing a testing program through an independent agency such as H.O.M.E. to insure that its sales agents no longer steer.

Respectfully submitted,



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