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Third Party Suits Under Section 3612 of the Fair Housing Act of 1968

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THIRD PARTY SUITS UNDER SECTION 3612 OF THE FAIR HOUSING ACT OF 1968

I. Introduction

The Fair Housing Act of 1968 (1968 Act)[1] makes it unlawful, with minor exceptions,[2] to discriminate in the sale or rental of private housing. Sections 3610[3] and 3612[4] provide for enforcement of the

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1. Civil Rights Act of 1968, §§ 801-19, 42 U.S.C. §§ 3601-19 (1970), *as amended*, (Supp. V, 1975) [hereinafter cited as the 1968 Act]. The 1968 Act was amended to cover discriminations based on sex. 42 U.S.C. §§ 3604-06 (Supp. V, 1975). The 1968 Act prohibits discriminations in the sale or rental of housing based on race, color, religion, national origin and as of 1974, sex. It is more comprehensive than 42 U.S.C. § 1982 which applies solely to discrimination based on race. *Id.* § 1982 (1970). The 1968 Act was declared constitutional as within the enforcement power granted to Congress in the thirteenth amendment to erase the "badges and incident of slavery." United States v. Hunter, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

2. The 1968 Act currently exempts units of four families or less, one of which is occupied by the owner. 42 U.S.C. § 3603(b)(2) (1970). It also exempts the owner of three or less single family houses sold without the aid of a broker or advertisements and, then, only for one sale in any twenty-four month period. *Id.* § 3603(b)(1). Religious organizations can restrict the sale or rental of their housing for non-commercial purposes to members of their religion unless membership in the religion is based on race, color, or national origin. Also, private clubs who provide lodgings on a non-commercial basis for their members can restrict the rental to their members. *Id.* § 3607. However, the Supreme Court in Jones v. Mayer, 392 U.S. 409 (1968), found that 42 U.S.C. § 1982 (1970) prohibited all discrimination against blacks in the sale or rental of personal property and extended section 1982 to purely private discrimination for the first time since the section was enacted in 1866. Combining the *Jones* decision with the 1968 Act, it is arguable that all housing in the United States is included in these prohibitions when refusal to rent or sell is based on race.

3. 42 U.S.C. § 3610 (1970). Section 3610(a) provides in pertinent part:

> Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereinafter "person aggrieved") may file a complaint with the Secretary. . . . Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory practice by informal methods of conference, conciliation, and persuasion. . . .

Id. § 3610(a).

4. *Id.* § 3612. Section 3612(a) provides in pertinent part:

> The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. . . .

Id. § 3612(a).

statute by private complainants. Section 3610 combines administrative and judicial remedies by requiring federal or state administrative agencies to attempt a conciliatory resolution of a complaint before the complainant may seek relief in federal court.[5] Complaints made under this section cannot reach the courts until all administrative remedies are exhausted.[6]

Section 3612 gives the complainant preferential access to an appropriate federal or state court without preconditions.[7] However, the 1968 Act does not state whether section 3612 is an alternative remedy to section 3610. In cases where the complainant was denied housing because of his race, the courts have held that section 3612 was independent of section 3610 and could be used as an alternative remedy to the conciliation-then-litigation approach of that section.[8]

The alternative use of these sections continues to be a question in cases where the complainant is raising the rights of third parties. In *Trafficante v. Metropolitan Life Insurance Co.*,[9] residents of an apartment complex alleged under section 3610 that management of the complex violated the 1968 Act by denying housing to black applicants. The Supreme Court found that the broad drafting of section 3610 gave complainants standing to sue.[10] The Court in *Trafficante* took no position on whether such plaintiffs could sue under section 3612. However, in *TOPIC v. Circle Realty,*[11] the Ninth Circuit denied standing to plaintiffs arguing third party rights under section 3612. Furthermore, language in *TOPIC* suggests that the sections may not provide alternative remedies even when the complainant is the direct object of private housing discrimination.[12] This Note will examine the standing and alternative use questions involving sections 3610 and 3612 of the 1968 Act.

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5. *Id.* § 3610(a).
6. *Id.* § 3610(d).
7. *Id.* § 3612(a).
8. *See, e.g.*, Howard v. W.P. Bill Atkinson Enterprises, 412 F. Supp. 610, 611-12 (W.D. Okla. 1975); Warren v. Norman Realty Co., 375 F. Supp. 478, 480 (D. Neb. 1974), *aff'd*, 513 F.2d 730 (8th Cir. 1975); Crim v. Glover, 338 F. Supp. 823, 825-26 (S.D. Ohio 1972); Johnson v. Decker, 333 F. Supp. 88, 90 (N.D. Cal. 1971); Brown v. Lo Duca, 307 F. Supp. 102, 103-04 (E.D. Wis. 1969). *See also* Comment, *The Fair Housing Act of 1968: Its Success and Failure*, 9 SUFFOLK L. REV. 1312, 1319 (1975).
9. 409 U.S. 205 (1972).
10. *Id.* at 209.
11. 532 F.2d 1273 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 160 (1977).
12. *Id.* at 1275.

II. Alternative Remedies

The administrative phase of section 3610 begins when a written, verified complaint is filed with the Secretary of Housing and Urban Development (HUD)[13] no later than 180 days after the alleged discriminatory housing practice occurred.[14] The Secretary has thirty days to investigate the complaint and determine whether it can be resolved administratively[15] by informal methods such as conferences, conciliation and persuasion.[16] However, if the Secretary determines that the state in which the alleged incident occurred has a housing law "substantially equivalent" to the 1968 Act, he must give that state the first opportunity to resolve the matter.[17] The complainant may bring suit for an additional thirty days while either the state or federal conciliation efforts are transpiring.[18] Even if conciliation fails, an action can be brought in federal district court only if there are no substantially equivalent remedies available under appropriate state law.[19] By contrast, section 3612 gives the complainant preferential access to federal district court without administrative preconditions.[20]

The 1968 Act was added as an amendment to the Civil Rights Act of 1968 (Civil Rights Act)[21] on the Senate floor,[22] and was never subjected to committee debate. Thus, there is no conclusive legislative history on the issues of whether sections 3610 and 3612 are alternative remedies and whether either section can be utilized to

13. 42 U.S.C. §§ 3610(a)-(b) (1970).

14. *Id.* § 3610(b).

15. *Id.* § 3610(d). This right is also subject to the proviso of subsection (c) requiring HUD to refer the complaint to the state involved if certain conditions exist. *Id.* § 3610(c).

16. *Id.* § 3610(a).

17. *Id.* § 3610(c).

18. *Id.*

19. *Id.* § 3610(d).

20. *Id.* § 3612(a). The complainant has 180 days from the date of the alleged incident to institute suit. *Id.*

21. The 1968 Act was Title VIII of the Civil Rights Act of 1968 (H.R. 2516). Act of April 11, 1968, Pub. L. No. 90-284, §§ 801-19, 82 Stat. 81.

22. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 152 (1969) (The author was legislative assistant to Senator Walter F. Mondale, chief sponsor of the 1968 Act in the Senate.) Senator Mondale had proposed a bill similar to the 1968 Act in 1967, but it stalled in the Banking and Currency Committee. *See* 113 CONG. REC. 7545 (1967) (remarks of Senator Mondale). The Civil Rights Act of 1968, as passed by the House, did not contain provisions for fair housing. *See* Dubofsky, *supra* at 149 n.2.

raise the rights of third parties.[23]

The original version of the 1968 Act gave HUD the power to issue cease and desist orders,[24] but there was no provision for direct access to federal court. Legal action by the complainant was permitted if HUD failed to act.[25] This version was altered by a compromise amendment which eliminated HUD's ability to issue cease and desist orders and added section 3612.[26] However, the Senate did not indicate whether this additional remedy was meant as an alternative to the administrative enforcement entrusted to HUD.

During debate of the 1968 Act in the House, several representatives noted that in addition to the administrative remedies, the 1968 Act would authorize immediate civil suits by private persons.[27] Also, the staff of the House Judiciary Committee reported that section 3612 was "apparently an alternative to the conciliation-then-litigation approach [of section 3610] . . . ."[28] The House never confirmed this view with the Senate because it voted to accept the Senate amendments[28] to the Civil Rights Act, including the 1968 Act, without a joint committee conference.[29]

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23. Mr. Justice Douglas tried to rely on the legislative history of the 1968 Act in *Trafficante*, but concluded that the history was "not too helpful." 409 U.S. at 210. Also, much of the debate over the 1968 Act concerned whether an open-housing law in any form should be passed. *See, e.g.*, 114 CONG. REC. 3757 (1968) (remarks of Senator Javits).

24. 114 CONG. REC. 2271-72 (1968) (remarks of Senator Mondale); Dubofsky, *supra* note 22, at 150.

25. 114 CONG. REC. 2272 (1968) (remarks of Senator Mondale).

26. *Id.* Senator Everett Dirksen offered this amendment which became the 1968 Act. *See Id.* at 4570 (remarks of Senator Dirksen).

27. *Id.* at 9560 (remarks of Representative Celler). Representative Celler supported the 1968 Act and interpreted the bill as authorizing immediate civil suits by private persons. *Id.* Representative Pucinski was opposed to the 1968 Act because it would culminate, in his view, in extensive federal regulation of local communities. *Id.* at 9603-04 (remarks of Representative Pucinski).

28. *Id.* at 9612; *see also Id.* at 4908 (memorandum of the Justice Department stating that section 3612 was an alternative to pursuing a section 3610 remedy).

29. Dubofsky, *supra* note 22, at 160. Many of the representatives believed that the vote by the House to accept the Senate amendments to the Civil Rights Act of 1968 was principally due to the murder of Dr. Martin Luther King during the debates. *See* 114 CONG. REC. 9603 (remarks of Representative Randall). Representative Randall deplored the assassination of Dr. King but stated that the 1968 Act or similar legislation would "not stop incidents of this kind. . . ." *Id.* Representative Latta contended that the House was "being forced to act in haste" because of the prevailing racial tension resulting from Dr. King's death. *Id.* at 9566. Representative Donohue urged the House to "avoid a rash consideration of the bill." *Id.* at 9600. Representative Dowdy believed the House was acting pursuant to the demands of "mobs" and was passing the 1968 Act out of fear. *Id.* at 9593.

Sections 3610 and 3612 have been held to be alternative remedies in cases where the complainants were directly injured by a discriminatory housing practice.[30] In *Brown v. Lo Duca*,[31] the United States District Court for the Eastern District of Wisconsin concluded that Congress enacted section 3612 as an expeditious alternative to section 3610. Plaintiff black man alleged in *Brown* that defendant corporation discriminated against him with respect to the rental of an apartment.[32] Defendant contended that the provisions of section 3610 applied to section 3612, thereby prohibiting an immediate civil action in a federal court if there were equivalent state remedies available.[33] The *Brown* court concluded that section 3612 was an alternative remedy and standing under that section was not contingent upon meeting the administrative requirements of section 3610.[34]

In concluding that sections 3610 and 3612 were alternatives, the *Brown* court relied upon the statutory language of both sections. The court noted that section 3610(f) referred to actions brought "pursuant to this section *or* section 3612."[35] It also observed that section 3612(a) referred to actions "brought pursuant to this section *or* section 3610(d)."[36] The *Brown* court held that the use of the disjunctive in both sections clearly indicated that the two sections were alternatives.[37] Moreover, the court reasoned that Congress

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30. *See* note 8 *supra*.

31. 307 F. Supp. 102 (E.D. Wis. 1969).

32. *Id.* at 102. 42 U.S.C. § 3604(a) (1970) makes it unlawful, *inter alia*, "[t]o refuse to sell or rent after the making of a bona fide offer . . . a dwelling to any person because of race. . . ." The requirement of a bona fide purchaser has been held to apply to section 3604 in situations involving the denial to rent or sell. *See* United States v. Youritan Constr. Co., 370 F. Supp. 643, 650 (N.D. Cal. 1973), *aff'd*, 509 F.2d 623 (9th Cir. 1975). A strict reading of section 3604 would appear to bar TOPIC or any of its members from bringing suit under this section since the test couples were not bona fide puchasers. In order to argue third party rights the court may have required the organization to show that the realtors had employed racial steering against bona fide pruchasers.

33. 307 F. Supp. at 103. Wisconsin has an appropriate open-housing law. *See* WIS. STAT. ANN. § 101.22 (West Supp. 1976).

34. 307 F. Supp. at 103.

35. *Id.*

36. *Id.* at 103-04. Reinforcing this view is the statutory language giving section 3612 complainants expeditious calendar treatment:

> Any court in which a proceeding is instituted under section 3612 or 3613 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited.

42 U.S.C. § 3614 (1970).

37. 307 F. Supp. at 104.

would not have included provisions dealing with time, venue, amount in controversy, and the type of relief available in both sections if it intended section 3612 to be nothing more than an adjunct to section 3610.[38]

The *Brown* court also examined the legislative history of the 1968 Act to support its conclusion. It quoted Representative Emmanuel Celler of New York who stated: "In addition to administrative remedies, the bill [1968 Act] authorizes immediate civil suits by private persons within 180 days after the alleged discriminatory housing practice . . . ."[39] The court cited other similar statements and held that the two sections were altnerative remedies.[40]

In *Johnson v. Decker*,[41] the United States District Court for the Northern District of California accepted the rationale of *Brown*,[42] and then went further by holding that there was nothing in the 1968 Act which prohibited the filing for suit under section 3612 while a section 3610 administrative proceeding was pending.[43] The *Johnson* court concluded that the two sections were separate and individual provisions which granted complementary remedies,[44] and that a

38. *Id.* at 103.

39. *Id.* at 104.

40. *Id.* The court cited similar statements by Representatives Randall and Pucinski in addition to reports submitted by the House Judiciary Committee and the Justice Department.

41. 333 F. Supp. 88 (N.D. Cal. 1971). Plaintiff black woman, with a husband and child, filed a complaint with HUD under section 3610. Seventeen days later, before the administrative procedures could possibly conclude, plaintiff filed this suit in federal court under section 3612. *Id.* at 89-90. This decision is a high water mark in the alternative use of sections 3610 and 3612.

42. *Id.* at 90.

43. *Id.* at 91-92. California has an open-housing law substantially equivalent to the 1968 Act. *See* CAL. HEALTH & SAFETY CODE §§ 35700-45 (West Supp. 1976). By allowing Mrs. Johnson to abandon section 3610 and follow section 3612, the court is effectively allowing plaintiff to circumvent the state remedy and avoid any possible administrative delay. Mrs. Johnson also sued under 42 U.S.C. §§ 1981-82 (1970) and defendants claimed the limitation in section 3610(d) also applied to these sections. The *Johnson* Court did not find defendants' argument persuasive. 333 F. Supp. at 92. With the revival of section 1982 being discussed in Congress because of the pending decision of Jones v. Mayer, 392 U.S. 409 (1968), it is unlikely that Congress would enact section 3610(d) as a comprehensive limitation on sections 1981 and 1982 without express reference to those provisions. Also, in *Jones*, the Court emphasized that passage of the 1968 Act had no limiting effect on section 1982. 392 U.S. at 413.

44. 333 F. Supp. at 91; *accord*, Crim v. Glover, 338 F. Supp. 823 (S.D. Ohio 1972). In *Crim*, a black married couple was denied rental housing in Columbus, Ohio because of their race. The state had a law substantially equivalent to the 1968 Act and, thus, plaintiff had available state remedies if the complaint had been made under section 3610. *Id.* at 825; *see* text accompanying note 17 *supra*.

complainant could proceed under both sections simultaneously.[45]

III. Third Party Suits: Section 3610

Section 3610 gives standing to sue to any "person aggrieved," and defines "person aggrieved" as "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . ."[46]

Section 3612 does not employ such a term as "person aggrieved" nor does it define the class of complainants who have standing to sue. The section merely states that "[t]he rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts . . . ."[47] Since both sections employ broad descriptions of the class of complainants entitled to relief under the 1968 Act, various courts[48] have been forced to decide whether complainants who raise the rights of third parties have standing under the statute and whether such complainants can use the two sections as independent alternative remedies.

In *Trafficante v. Metropolitan Life Insurance Co.*,[49] the Supreme Court concluded that the "person aggrieved" language of section 3610 could include complainants raising the rights of third parties. Plaintiffs, a white and a black resident of an apartment complex, alleged that defendant discriminated against third party non-white rental applicants.[50] Plaintiffs filed separate complaints with HUD under the provisions of section 3610.[51] When a voluntary agreement could not be reached, plaintiffs insituted a section 3610 suit in federal district court.[52] The district court held that plaintiffs were not "persons aggrieved" under section 3610 and denied standing.[53] The

45. 333 F. Supp. at 90-91. Defendants also claimed such a ruling required them to defend on two fronts (*i.e.*, against sections 3610 and 3612). *Id.* at 90. This is a strained argument since the violation and, thus, the defense are the same.

46. 42 U.S.C. § 3610(a) (1970).

47. *Id.* 3612(a).

48. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), *rev'g* 446 F.2d 1158 (9th Cir. 1971); Trafficante v. Metropolitan Life Ins. Co., 322 F. Supp. 352 (N.D. Cal. 1971). *See also* TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir. 1976), *rev'g.* 377 F. Supp. 111 (C.D. Cal. 1974).

49. 409 U.S. 205 (1972); For a discussion of *Trafficante*, see 51 N.C. L. REV. 1530 (1973).

50. 409 U.S. at 206-07.

51. *Id.* at 206.

52. *Id.* at 207.

53. 322 F. Supp. 352 (N.D. Cal. 1971).

Ninth Circuit Court of Appeals affirmed,[54] reasoning that Congress meant sections 3610 and 3612 for those persons "who are the objects of discriminatory housing practices."[55]

The Supreme Court unanimously reversed and granted standing.[56] Plaintiffs in *Trafficante* had alleged injury from a denial of the benefits of living in an integrated community.[57] Mr. Justice Douglas found that since plaintiffs alleged injury with "particularity," they satisfied the personal stake requirements of article III of the Constitution.[58] In reaching this conclusion, he stated that Congress had passed the 1968 Act as an expression of an equal housing policy of the highest national priority[59] and, consequently, intended to define standing as broadly as is permitted under article III.[60] Furthermore, Mr. Justice Douglas reasoned that "private attorneys general" suits were needed to protect not only the direct victims of housing discrimination, but also the indirect victims whose daily lives are affected by discriminatory management.[61] However, the *Trafficante* Court specifically stated that the "person aggrieved" language

54. 446 F.2d 1158 (9th Cir. 1971).

55. *Id.* at 1162.

56. 409 U.S. at 212. Mr. Justices White, Blackmun and Powell filed a concurring opinion emphasizing that without the 1968 Act, standing would probably not arise. *Id.* at 212 (concurring opinion).

57. *Id.* at 208.

58. *Id.* at 211. Mr. Justice Douglas found that plaintiffs had also met the traditional standing rules. *Id.* at 211, *citing* Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer given standing to challenge federal expenditure to all educational institutions in violations of the Establishment Clause).

59. 409 U.S. at 211.

60. *Id.* at 209. The Court stated: "We can give vitality to 810(a) [section 3610] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." *Id.* at 212.

61. The district court and court of appeals would not apply the "private attorneys general" concept in *Trafficante*, 446 F.2d at 1162, 322 F. Supp. at 353. Section 3613 of the 1968 Act gives the Attorney General power to institute suits to remedy "patterns and practices" of discrimination. 42 U.S.C. § 3613 (1970). Since *TOPIC* and *Trafficante* are suits that arise from several discriminatory acts occurring over a period of time, it would seem that section 3613 is the proper provision. However, Mr. Justice Douglas noted that as a practical matter, the Attorney General's office could not handle the volume of all such suits and in the interest of justice it would be appropriate to promote the "private attorneys general" concept in these situations. 409 U.S. at 211. Also, the *TOPIC* court concluded that since the racial steering of the defendants transpired over a long period of time, injunctive relief would be inappropriate and the proper channel should be through section 3613. 532 F.2d at 1276. However, under section 3613 the Attorney General's relief is restricted to injunctions. 42 U.S.C. § 3613 (1970).

granted standing only to persons within "the same housing unit."[62]

The Court did not consider whether plaintiffs could have proceeded under section 3612 to raise the rights of third parties. But Mr. Justice Douglas did state: "[m]oreover, these rights may be enforced *'by civil actions in appropriate United States district courts . . . .'*"[63] Apparently, Mr. Justice Douglas was implying that the two sections were alternative remedies at least for residents of the same housing unit.

In *Warth v. Seldin*,[64] a decision which dealt primarily with the "case or controversy" standing requirements of article III, the Supreme Court reiterated its holding in *Trafficante*. The *Warth* Court stated that section 3610 gave "residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others."[65] In its reading of *Trafficante* in *Warth*, the Court seems to be reaffirming the limitation of the "person aggrieved" language of section 3610 in third party suits to complainants who raise the rights of third parties seeking to live in the same housing unit.

IV. Third Party Suits: Section 3612

In *TOPIC v. Circle Realty*,[66] the Ninth Circuit denied standing to plaintiffs suing under section 3612 because the court found section

62. 409 U.S. at 212.

63. *Id.* at 209. The Court's opinion does not cite the source of this quote. However, the same phrase can be found in section 3612. *See* 42 U.S.C. § 3612(a) (1970).

64. 422 U.S. 490 (1975) (5-4 decision). In *Warth*, a not-for-profit corporation and eight individuals, five of whom were non-residents, argued that the zoning ordinances of a Rochester, New York suburb barring low and middle income housing operated to unlawfully exclude minority groups and inflate local taxes. Plaintiffs did not allege violation of the 1968 Act, but chose to rely on 42 U.S.C. § 1982 (1970). Thus, the complaint did not allege racial discrimination directly and merely attacked the zoning laws as indirectly discriminating againt *all* middle and low income groups. The Supreme Court denied standing because plaintiffs could not demonstrate a personal stake in the case, and in reality, were litigating third party rights. *Id.* at 504, 507, 509-10, 513 n.21, 514, 516.

65. *Id.* at 513.

66. 532 F.2d 1273 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 160 (1977). The Supreme Court reversed the Ninth Circuit Court of Appeals in *Trafficante*, 409 U.S. at 212. The court of appeals had held that third party rights could not be litigated under section 3610 and took the position that the 1968 Act could be used only by persons who were the direct objects of discrimination in housing. 446 F.2d at 1162-63. In its opinion, the court of appeals, in denying standing to plaintiffs under section 3610 stated: "Alternatively, a person may bring a civil action . . . under section 3612. . . ."; apparently, implying that the provisions were alternative remedies. *Id.* at 1161.

3612 did not authorize lawsuits vindicating the rights of third parties.[67] Plaintiffs were an interracial civil rights organization (TOPIC) and various individuals. The members of TOPIC were drawn from an area of metropolitan Los Angeles comprising 100,000 people. In 1973 TOPIC sent teams of white and black home seekers of approximately equal financial means to seventeen real estate brokers in the area. The tests indicated that the brokers were directing non-white couples to houses in non-white residential areas and directing white couples to white residential areas, a practice known as racial steering.[68] Plaintiffs claimed racial steering violated the 1968 Act and filed suit in federal district court under section 3612.[69]

The complaint alleged that plaintiffs had been denied the important social and professional benefits of living in an integrated community and were being stigmatized as residents of either black or white ghettos.[70] This allegation of injury was exactly the same as the one made by plaintiffs in *Trafficante.*

TOPIC raised the rights of third parties because the test couples were not bona fide purchasers and, thus, were not the primary victims of the alleged discriminatory practices. The question of standing was immediately raised and the district court upheld the suit based on *Trafficante.*[71]

The district court found that *Trafficante's* principle of broadly granting standing under the 1968 Act was not restricted to residents of an apartment complex or suits under section 3610.[72] The court noted that the Supreme Court in *Trafficante* clearly indicated that standing under the 1968 Act could be extended "only to tenants of a housing project complaining of discriminatory practices of the management."[73] However, the court concluded that such language

67. 532 F.2d at 1275.

68. *Id.* at 1274.

69. *Id.* The New York Times recently described the practice of racial steering in the rental of apartments in New York City. N.Y. Times, June 28, 1976, at 1, col. 1.

70. 532 F.2d at 1274. Jurisdiction was also asserted under 28 U.S.C. § 1343(4) (1970) which states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .

71. 377 F. Supp. 111 (C.D. Cal. 1974).

72. *Id.* at 114.

73. *Id.*

merely presupposed some "outer limits"[74] to a grant of standing and would not preclude a suit, such as *TOPIC*, where the situation was "so similar" to *Trafficante*.[75] The court noted that the apartment complex in *Trafficante* housed 8,200 residents and concluded that the case applied to TOPIC because the organization's membership lived in a closely settled area, patronized the same stores, attended the same churches and sent their children to the same schools.[76] In completing this analogy, the court stated: "If any of the 8,200 residents of an apartment complex can be injured by virtue of the loss of important benefits from interracial associations surely the residents of [this] community can and do suffer similar deprivations."[77]

Finally, the district court said that since *TOPIC* was brought under section 3612 and that *Trafficante* was a section 3610 case was an irrelevant distinction because it seemed "clear that the congressional intention was to define the right to sue under [section] 3612 at least as broadly as under [section] 3610(d)."[78]

The Ninth Circuit Court of Appeals reversed the district court, distinguishing *Trafficante* since it was brought under section 3610.[79] On the basis of *Warth*, the court reasoned that the Supreme Court had restricted *Trafficante* to section 3610 cases.[80] Thus *Trafficante* was not proper precedent for plaintiffs in *TOPIC*. Additionally, the court of appeals said section 3612 was meant only for plaintiffs "who are the direct objects of the practices it makes unlawful."[81] Although racial steering was outlawed by section 3612, the court concluded that none of the plaintiffs had standing under that section since they were raising the rights of third parties.[82]

The court of appeals proffered a general description of the type of complainants envisioned by the 1968 Act. It found that Congress intended the unconditional judicial relief of section 3612 for plain-

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 115 n.5.
79. 532 F.2d at 1276.
80. *Id.* at 1275.
81. *Id.*
82. *Id.*

tiffs who would "suffer grave and immediate harm,"[83] if forced to exhaust the administrative procedures of section 3610. In contrast, the court concluded that section 3612 was meant for a "broad spectrum of individuals aggrieved by discrimination"[84] who could wait for "the resolution of disputes in the slower, less adversary context of administrative reconciliation and mediation."[85] To support this position, the court stated that the "statutory pattern" of the 1968 Act would be destroyed if sections 3610 and 3612 were extended to identical plaintiffs because complainants could always avoid administrative remedies by suing under section 3612.[86]

Recently, in *Fair Housing Council, Inc. v. Eastern Bergen County Multiple Listings Service, Inc.*,[87] the United States District Court for the District of New Jersey refused to follow the Ninth Circuit's decision in *TOPIC*. Plaintiffs, white residents of a predominantly white neighborhood, brought suit under section 3612 alleging precisely the same injury as the apartment residents in *Trafficante*.[88] Relying on *Trafficante*, the district court found no reason why residents of racially segregated neighborhoods and communities are "less injured in fact" than residents of large apartment complexes which are subject to similar discrimination.[89] Consequently, the court granted plaintiffs standing to argue third party rights under section 3612.[90]

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83. *Id.* at 1275-76.

84. *Id.* at 1276.

85. *Id.*

86. *Id.* The court of appeals contended that a complainant would always avoid the administrative remedies of section 3610 and thereby diminish the value of the section. *Id. See* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 855-56 (1969).

87. 422 F. Supp. 1071 (D.N.J. 1976).

88. *Id.* at 1080-81. The suit was filed under section 3612 by the Fair Housing Council of Bergen County against four multiple listing services and five real estate brokerage agencies. The complaint alleged that defendants practiced racial steering in violation of section 3604(a) of the 1968 Act which resulted in a "distinctively shaped" segregated community. *Id.* at 1074-75. Unlike *TOPIC*, plaintiffs, although advocating the rights of third parties, represented actual home seekers who could point to a "quantum of personal injury." *Id.* at 1075, 1079-80.

89. *Id.* at 1081-82. The district court, rejecting the Ninth Circuit's analysis of *Trafficante*, stated: "The fact that the alleged injury affects a large number of people in a large geographic area does not serve to attenuate it. On the contrary, it makes the harm more severe. . . . That the *cordon sanitaire* [*i.e.*, buffer zone] has been drawn around an entire community rather than a single apartment complex does not render it lawful." *Id.* at 1081.

90. *Id.* at 1082-83. The district court concluded by rejecting the proposition that section

V. Conclusion

The Ninth Circuit held in *TOPIC*, "that the language of section 3612 does not authorize lawsuits to vindicate the rights of third parties."[91] This holding appears contrary to the trend established by the cases decided under sections 3610 and 3612 of the 1968 Act.[92] In cases brought by persons directly discriminated against in housing, the courts found sections 3610 and 3612 to be alternative remedies.[93] The Supreme Court in *Trafficante* opened section 3610 to plaintiffs arguing for the rights of third parties. On the basis of these decisions, it follows that, at a minimum, plaintiffs from "the same housing unit" can argue third party rights under section 3612.[94]

TOPIC appears to stand for the proposition that section 3610 is meant for complainants who do not require an immediate remedy and can afford to wait for administrative remedies.[95] The Ninth Circuit would prefer to restrict section 3612 to plaintiffs who needed the more expeditious remedies available under this section.[96] This construction implies that the direct victim of discriminatory housing practices, unable to show the need for an expeditious judicial remedy, would be denied standing under section 3612; a position not taken by any court previously and unsupportable by the legislative history of the 1968 Act.

In *Trafficante,* the Supreme Court stressed that plaintiffs had alleged injury with particularity, thus avoiding any article III problems.[97] The extension of *Trafficante* to include other plaintiffs arguing for the rights of third parties under the 1968 Act will probably be accomplished through a sufficient allegation of injury. Some courts have already taken this approach.[98]

3612 was meant for "direct victims" of housing discrimination, but it hesitated to rely on *Trafficante* in deciding the question of standing under that section. Instead, the court extrapolated from prior decisions of the Third Circuit to grant standing under section 3612. *Id.*

91. 532 F.2d at 1275.

92. *See* note 8 *supra*.

93. *Id.*

94. *See* text accompanying notes 49-63 *supra*.

95. 532 F.2d at 1275-76.

96. *Id.* at 1276. This position is similar to the one taken by the Ninth Circuit in *Trafficante*. 446 F.2d at 1162-63.

97. 409 U.S. at 211.

98. *See* Boyd v. Lefrak Organization, 509 F.2d 1110, 1116 (2d Cir. 1975), *cert. denied*, 423 U.S. 896 (1975) (*Trafficante* called for a generous construction of the 1968 Act and the enforcement provisions therein must be judged by that principle); Otero v. New York City

While the plaintiffs in *Trafficante* could allege specific injury under the 1968 Act, it is arguable that the *TOPIC* complainants who were not bona fide purchasers[99] were merely alleging a generalized grievance. Reliance on an injury standard for standing under the 1968 Act when third party rights are involved might be preferred over the Ninth Circuit's absolute bar to such plaintiffs. The district court in *Fair Housing Council, Inc.*[100] is the first court to follow this approach for section 3612. In the final analysis, it should be remembered that the policy of the 1968 Act is "to provide within constitutional limitations, for fair housing throughout the United States."[101]

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Housing Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (*Trafficante* was authority that the loss of important benefits from interracial association was a sufficient allegation of injury by existing tenants to meet standing requirements under section 3612); Evans v. Lynn, 376 F. Supp. 327, 331 (S.D.N.Y. 1974), *aff'd*, 537 F.2d 571 (2d Cir. 1975) (*Trafficante* was authority that the Supreme Court has declared that the Civil Rights Act of 1968 evinced a congressional intention to define standing as broadly as is permissible by article III); Fort v. White, 383 F. Supp. 949, 952-53 (D. Conn. 1974) (*Trafficante* stood for the proposition that section 3612 was not to be read narrowly when considering standing questions).

99. 532 F.2d at 1275.

100. *See* notes 87-90 *supra* and accompanying text.

101. 42 U.S.C. § 3601 (1970).