

## Fair Housing for All: Academy Podcast Series

### Episode 2: NFHTA Forum | Strategies for Investigating Discriminatory Residential Appraisals, September 15, 2021—Legal Standards to Establish a Claim of Discrimination in Appraisals

\*\*\*

Speakers: Cashauna Hill, Executive Director, Louisiana Fair Housing Action Center; and Steve Dane, Esq., Dane Law LLC

\*\*\*

CASHAUNA HILL [0:00:11]: Hello, welcome to the “Fair Housing for All: Academy Podcast Series”. My name is Cashauna Hill, and I am the Executive Director of the Louisiana Fair Housing Action Center. Since 2015 I have led a team working to fulfill the organization’s mission to end discriminatory housing policies and practices through litigation and policy advocacy, as well as to provide fair housing trainings and foreclosure prevention counseling.

This is episode two of the September 16, 2021, National Fair Housing Training Academy Forum, titled Strategies for Investigating Discriminatory Residential Appraisals.

In this episode, we’ll be hearing from Steve Dane of Dane Law, LLC, a nationally recognized civil rights lawyer, particularly in the areas of fair housing, fair lending, and insurance discrimination. He gives us an overview of how the Fair Housing Act and Equal Credit Opportunity Act cover, both explicitly and implicitly, appraisal discrimination. To give us a firm grip on the roots of this issues, Steve provides an eye-opening overview of some of the highly inflammatory and discriminatory language used in appraisal and underwriting literature dating back to the 1930’s through 1970’s. He speaks to how the federal government attempted to course correct for their own discriminatory policies and regulations with subsequent legal action. Using case citations, Steve elaborates on how Discriminatory Intent and Disparate Impact are relevant legal standards for proving appraisal discrimination under the Fair Housing Act and other related statutes. Finally, Steve presents the different reliefs, compensatory and affirmative, that are available for cases of appraisal bias.

I want to note that this episode features information and examples that represent the experiences of the speaker. Comments do not necessarily reflect the policies of HUD. We’ll now hear from Steve.

STEVE DANE [00:02:23]: Thank you, Cashauna, thank you, HUD, and the National Fair Housing Training Academy.

What I'm going to do is cover some of the legal aspects that are relevant to appraisal discrimination cases. I have been involved in mortgage lending discrimination and appraisal discrimination litigation since the 1980s and have quite a bit of experience in analyzing the facts and evidence that might be used to support this type of claim.

In this presentation that I will give, I'm going to cover some of the explicit coverages in law of appraisal discrimination and also we'll discuss some of the evidence that has or could be used to investigate and eventually prove a claim of appraisal discrimination.

First, the Fair Housing Act. [The Fair Housing Act prohibits any act of discrimination that might otherwise make unavailable or deny a dwelling because of race.](#) This provision of the Fair Housing Act has been interpreted by the courts to apply to discriminatory appraisal practices, even though the word "appraisal" is not mentioned in Section 3604.

Nevertheless, in another section of the Fair Housing Act, Section 3605, which prohibits discrimination in any aspect of a residential real estate related transaction, appraising of properties is explicitly covered by that section.

There is in Section 3605 what is called an appraisal exemption. I find this interesting because it doesn't say anything except the exact opposite of what was said earlier in 3605. In other words, that nothing in this section prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex, handicap, or familial status.

Now, the Fair Housing Act is not the only law that applies to discrimination in appraisal practices. [We also have the Equal Credit Opportunity Act which makes it unlawful for any credit tor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race.](#) Where does this say appraisal? It doesn't. However, the Federal Financial Regulatory agencies have implemented regulations that explicitly cover appraisal practices.

[The Comptroller of the Currency, for example, in 12 CFR Section 128.11 talks about appraisals.](#) Indicating that no regulated lender, that is regulated by the comptroller, may use or rely upon an appraisal of a dwelling which the lender knows or reasonably should know is discriminatory on the basis of age or location of the dwelling. Or is discriminatory, per se, or in effect, under the Fair Housing Act or the Equal Credit Opportunity Act.

I'm going to have a few things to say later on about discrimination in effect, or what's also called disparate impact.

[Another regulation of the Comptroller of the Currency, which is quite explicit, expressly mentions age and location factors that are prohibited.](#) I highlighted a few of the sections of this regulation that seem to be most apropos to this discussion. The restrictions are intended to prohibit the use of unfounded or unsubstantiated assumptions regarding the location or age of a dwelling or the physical or economic characteristics of an area. That, for example, would preclude an appraiser from filling out on appraisal form, making

comments about the neighborhood that cannot be substantiated by concrete facts, data, or evidence.

In addition, there are specific factors which may negatively affect the short term. Future value should be clearly documented by the appraiser. Factors which in some cases cause the market value of a property to decline or recent zoning changes, for example, or a significant number of abandoned homes in the immediate vicinity of the property however the comptroller cautions. Not all zoning changes cause a decline in property values and proximity to abandoned dwellings may not affect the market value of the property because of rehabilitation programs or affirmative lending programs going on in the community. Or because abandonment that is unrelated to risk.

Whatever is said about short term future values would have to be documented by the appraiser in order to avoid any kind of scrutiny.

[And finally on the regulatory side, the National Credit Union Administration has an explicit regulation that discusses appraisal practices.](#) National Credit Union Administration says consideration of any of the following factors in connection with real estate related transactions are not necessary to a federal credit union's business and generally have a discriminatory effect and are, therefore, prohibited. This may come as a surprise to some. The age or location of the dwelling. The zip code of the applicant's residence. Previous home ownership. The age or location of dwellings in the neighborhood of the dwelling. Or the income level of residents in the neighborhood of the dwelling.

Now, you might be asking why are the regulators - why are the laws so concerned about appraisal discrimination? What evidence is there that this has to be a problem? Or that this was a problem that has to be addressed, I should say.

Well, let me walk you through a little bit of history on this point. The 1931 edition of McMichael's Appraising Manual which was pretty much the Bible of appraisal practices in that era said, "Appraisers are advised to determine whether there were undesirable racial elements in the area being appraised." The 1932 edition of The Valuation of Real Estate, another nationally recognized appraisal training document, stated, "There is only one difference in people, namely race, which can result in a very rapid decline in real estate values."

The 1935 edition of the American Institute of Real Estate Appraisers Manual said, "To have the attributes of a good residential area, it is essential that protection be afforded against the infiltration of inharmonious racial groups."

Now, the FHA, that is the Federal Government, got in on the bandwagon. In 1938, its Underwriting Manual cautioned, "Areas surrounding a location are investigated to determine whether incompatible racial and social groups are present for the purpose of making a prediction regarding the probability of the locations being invaded by such groups. If a neighborhood is to retain stability," the FHA said, "It is necessary that

properties continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values."

In the 1950s, the McMichael's Appraising Manual got very specific on what constituted inharmonious racial and ethnic groups. In that booklet which was also a training manual used in the appraising industry, the different nationalities or ethnic backgrounds were ranked according to their impact on real estate values. You read this chart going down the left column first, then going down to the right column. So you can generally see that Western Europeans were more favored than Eastern Europeans which were more favored than Southern Europeans which were more favored than anybody with brown or black skin.

Moving on to the 1960s, the American Institute of Real Estate Appraisers manual, the Appraisal of Real Estate, continued to say racial composition of neighborhoods is important to the appraisal process. "The value levels in a residential neighborhood are influenced more by the social characteristics of its present and prospective occupants than any other factor. Therefore, the appraiser must give major consideration to the importance of social data. The causes of racial and ethnic conflicts are not the appraiser's responsibility. However, the appraiser must recognize the fact that values change when people who are different from those presently occupying an area advance into and infiltrate a neighborhood."

Okay, well, maybe the 60s was a little behind the times. At least when we get into the '70s, we're going to see some enlightenment, but I spoke too soon. The 1973 student outline of the course material states, and I quote, "Ethnological information is also significant to real estate analysis. As a general rule, homogeneity of the population contributes to stability of real estate values. Information on the percentage of native-born whites, foreign whites, and non-white population is important. And the changes in this composition have a significance." "As a general rule, minority groups are found at the bottom of the socioeconomic ladder and problems associated with minority group segments of the population can hinder community growth."

Well, at some point, finally, the United States Government got tired of this and it ended up suing the American Institute of Real Estate Appraisers [*United States v. Am. Inst. of Real Estate Appraisers, Etc.*, 442 F. Supp. 1072 (N.D. Ill. 1977)]. In that case, the United States alleged that the AIREA had promulgated standards which had caused appraisers and lenders to treat race and national origin as negative factors in determining the value of dwellings and evaluating the soundness of home loans and for failing to take adequate steps to correct the continuing effect of past discrimination. The case was ultimately settled when the AIREA agreed to develop three fundamental policy statements. Number 1, agreeing it's improper to base a conclusion or opinion of value upon the premise that the racial, ethnic, or religious homogeneity of inhabitants of an area or property are necessary for maximum value. That the racial, religious, or ethnic factors are deemed unreliable predictors of value trends or price variance. And that it is improper to base a conclusion or opinion of value or conclusion with respect to neighborhood trends upon stereotyped or biased presumptions relating to race, color, religion, sex, or national origin or upon

unsupported presumptions relating to the effective age or the remaining life of the property being appraised or the life expectancy of the neighborhood in which it is located.

Now, I'm going to discuss for the next few slides some of the relevant legal standards that apply under the Fair Housing Act and the Equal Credit Opportunity Act. One can prove a violation, that is discrimination, under either of those statutes by either showing that an appraisal or any actor, for that minority, in the housing industry engaged in behavior with discriminatory intent or that a neutral policy and practice has a disparate impact on a group protected by one of those statutes.

Now, before one can start to dig in and think about whether any discrimination has occurred, a little bit of focus is required here. There might be discrimination based upon the characteristics of the homeowner or the borrower. And that seems to be a recurring theme in recent news reports that we've heard about appraisal discrimination. Or it could be discrimination not based upon the characteristics of the homeowner or the buyer but, rather, on the location of the property in the neighborhood.

I recall a case I had back in the 1980s where my clients, who were the plaintiffs in the case, the buyer was a plaintiff. The buyers were White. The sellers were a plaintiff. The sellers were White. The real estate agent involved in the transaction was White. They were all the plaintiffs in an appraising discrimination case. They all had standing to sue because the lender had made assumptions about the neighborhood, which was predominantly Black, in which they were trying to buy the property. Basically, the lender said it had a cap on how much money it would lend in that neighborhood. But the point being all of the victims in that case were White people, but it was a Black neighborhood and the court said that my clients could sue.

So let me run through some examples of circumstantial evidence of what could be used to show an intent to discriminate. Well, any variations from established practices of the appraiser. Variations from best appraisal practices. Any unusual sequence of events in the process that was followed. Negative comments about the neighborhood that are unsubstantiated. A failure to include any positive aspects of the neighborhood. The use of inappropriate comparable properties. Excessive adjustments to comparable properties. And an intent to discriminate can in some instances also be proven solely by a statistical analysis that demonstrates an unusual variation in outcomes.

Other examples of evidence that could give rise to an inference or intent to discriminate would include the following. Looking at the accuracy and completeness of an appraisal. Are all the facts contained in the appraisal true? Does the appraisal contain all relevant facts? Or is important information missing? What comments are made about the neighborhood? Are they accurate? Are they complete? Did the appraisal mention only negative information about the neighborhood and ignore any positive developments going on in the neighborhood?

What about the appraiser's compliance with best appraisal practices? Was there the appropriate use of comparable properties? How has the appraiser or the appraisal

company conducted appraisals in different neighborhoods of different racial compositions? Are there any significant differences in how the appraisals are conducted in neighborhoods of different racial composition?

What are the contents of the appraiser's standard file regarding the subject neighborhood? Many appraisers have files they routinely call upon and use to support their appraisals based upon the characteristics of the neighborhoods. Is the information in that file complete? Is it accurate? How does it compare in completeness and accuracy to other neighborhoods as well?

Other circumstantial evidence that can be explored to determine whether there might be a problem with a particular appraiser or appraisal company. What is the reputation of that particular appraiser within the local real estate community? One could check with other realtors. Well, with realtors, often who are the most have the most experience with mortgage lending and appraisals going on in the community. Other banks and credit unions may not deal with certain appraisers because of questionable practices. How about the local community development agencies? What do they know about the appraiser under question? Has the municipal government had any experience with particular appraisers that caused or raised questions? And what is the reputation among other appraisers about the appraiser under investigation?

I wanted to give you an example of an actual case. [This is the Steptoe \[\*Steptoe v. Savings of America\*, 800 F. Supp. 1542 \(N.D. Ohio 1992\)\] case litigated back in the 1990s.](#) This case is interesting because the acts of discrimination were expressly focused on the appraisal practices used in that case. In that case, the court eventually found that there was sufficient evidence to support a prima facie inference of discrimination, based upon the facts in the case. In that case, the policies relating to the creation and review of appraisals was not followed. In that case, there was an expert who testified that the appraisal was defective in various ways. In that case, there was appraisal conducted by another company, a competitor, that supported the property sale value. In that case, there was statistical analysis suggesting there was differing treatment by the appraiser based on the racial composition of neighborhoods in the local community.

I told you I was going to talk a little bit about disparate impact. Let me explain first of all the general basic standards of a disparate impact type of fair housing or civil rights claim. This is a theory in which a facially neutral policy or practice or guideline is uniformly applied to Whites and Blacks, ethnic groups, across all neighborhoods, for example, but nevertheless, has a substantially disparate impact on one of the classes protected by the Fair Housing Act or the Equal Credit Opportunity Act.

Now, the significance of disparate impact theory is that an intent to discriminate against a particular group is not required. If the facially neutral policy has a disparate impact, then it could violate the law, but not necessarily. If a statistical disparate impact is shown, then the defendant can still defend itself by showing that the policy, practice, or guideline being



challenged is necessary in order to conduct its business and that there are no less restrictive alternatives available to the defendant to achieve the same purpose.

Now, if a successful case is brought for appraisal discrimination against the responsible parties, what kind of relief is available? Compensatory damages. There are no caps under the law. Punitive damages are available. There are no caps under the law. Attorneys' fees and litigation costs are available. I should have added to the slide there are no caps under the law. In addition, the court could order injunctive relief against the defendants, whether it's a lender or an appraiser or appraisal company or could afford affirmative relief. What kind of affirmative relief are we talking about? That could include require fair housing training. It could include the adoption of certain best practices that are not being followed, if that's the case in the matter. The court could also require the implementation of a quality control procedure or a second review process to make sure that future violations do not occur.

Some courts in the mortgage lending context have ordered or agreed to resolutions that allow the defendant to implement a self-testing program that would include the defendant, for example, hiring a qualified testing agency or organization to come in and evaluate its behavior to make sure on a neutral basis that there is no discrimination occurring.

And it could also include community relief. That is, dollars out to the local community or to the neighborhoods that have been discriminated against. All of those are possibilities. There are probably others out there and the list of affirmative relief is limited only by the creativity of those involved.

MS. HILL [00:25:39]: Thank you all for listening to this episode of the "Fair Housing for All: Academy Podcast Series", Strategies for Investigating Discriminatory Residential Appraisals. Episode 3 features Lisa Rice from NFHA discussing how to best design an investigation and strategies for effectively addressing and investigating appraisal discrimination claims. Episode 4 features Lon Meltesen from HUD, discussing the recent J.P.Morgan conciliation agreement and the major takeaways that can be applied to other discriminatory appraisal cases.