



Unusual Suspects

Who can sue and who can be sued under the Fair Housing Act

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Fair Housing Act: Structure

- [§ 3601. Declaration of policy](#)
- [§ 3602. Definitions](#)
- [§ 3603. Effective dates of certain prohibitions](#)
- [§ 3604. Discrimination in the sale or rental of housing and other prohibited practices](#)
- [§ 3605. Discrimination in residential real estate-related transactions](#)
- [§ 3606. Discrimination in the provision of brokerage services](#)
- [§ 3607. Religious organization or private club exemption](#)
- [§ 3608. Administration](#)
- [§ 3608a. Collection of certain data](#)
- [§ 3609. Education and conciliation; conferences and consultations; reports](#)
- [§ 3610. Administrative enforcement; preliminary matters](#)
- [§ 3611. Subpoenas; giving of evidence](#)
- [§ 3612. Enforcement by Secretary](#)
- [§ 3613. Enforcement by private persons](#)
- [§ 3614. Enforcement by Attorney General](#)
- [§ 3614-1. Incentives for self-testing and self-correction](#)
- [§ 3614a. Rules to implement subchapter](#)
- [§ 3615. Effect on State laws](#)
- [§ 3616. Cooperation with State and local agencies administering fair housing laws; utilization of services and personnel; reimbursement; written agreements; publication in Federal Register](#)
- [§ 3616a. Fair housing initiatives program](#)
- [§ 3617. Interference, coercion, or intimidation](#)
- [§ 3618. Authorization of appropriations](#)
- [§ 3619. Separability](#)

Example of Substantive Provision

- As made applicable by [section 3603 of this title](#) and except as exempted by sections [3603\(b\)](#) and [3607](#) of this title, it shall be unlawful—
- **(a)** 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, sex, familial status, or national origin.

Enforcement: HUD, DOJ, or Private Persons

- 3613(a) CIVIL ACTION(1)(A)

An [aggrieved person](#) may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

Definitions

- “Aggrieved person” includes any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.
- “Discriminatory housing practice” means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.

Who can be sued under FHA?

- NOT like Title VII (generally must have 15 employees for at least 20 weeks in past year for private employee... whether employer is covered is complicated!)

- Again:

it shall be unlawful—

- (a) 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, sex, familial status, or national origin.

**So, who can be sued
under the FHA?**



Who can be sued under the FHA?

- Anyone who did the dirty deed. That is, violated ANY provision.
- You need to understand the substantive provisions.
 - What is a Dwelling?
 - It includes shelters, assisted living, nursing homes, college dorms, migrant housing
 - What is Deny?
 - What is Otherwise Make Unavailable?
 - What can you squish into Interference, Intimidation, and Coercion?

What do we mean by “unusual suspects?”

- Particular type of person or entity who causes discriminatory effects in connection with some facet of housing...
- But fair housing enforcement against that person or entity may be uncommon (or unheard of)



How far can you go?

- Plaintiffs must have standing.
 - Recent Supreme Court decision, *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017)
 - Sets out liberal, broad – but important – parameters.
 - Zone of Interest:
 - Wrong is of the kind intended to be addressed by the statute
 - Under the FHA, possibly congruent with Constitutional standing
 - Also called prudential or cause of action standing.
 - Robust Causality

Causality and Tort Liability Concepts

- Causality – BOA v Miami con't
 - Causation – “In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires.” “Rather, proximate cause under the FHA requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’ ‘A damages claim under the statute “is analogous to a number of tort actions recognized at common law.’
- Tort Liability concepts also provide opportunities and limitations to holding bad actors accountable
 - See 24 CFR Sec. 100.600 Quid Pro Quo and Hostile Environment Harassment

Examples of FHA cases with Unusual Suspects

- Cities suing Banks to recover harm to their tax base, money spent resulting from segregation, based on banks racially discriminatory lending to individual homeowners and redlining of neighborhoods.
- Applicants to individual Supported Living Facilities (rental housing with supportive services) sued State of Illinois Department of Health and Office of Aging because it designed its Supported Housing Program Medicaid Waiver Program for people with physical disabilities or over the age of 62, but excluded them if they also had mental disabilities or diagnoses.
- Residents in Medicaid funded and regulated adult homes/assisted living in NYC sued NYS for a regulation barring those who use wheelchairs.

Edwards v. Johnson County Health Dept.

- Grower provided grossly substandard housing for migrant workers
- County health department issued permits for the housing
- Farmworkers sued the health department under FHA
- Theory:
 - Availability of the substandard housing deterred other housing from being made available to farmworkers
 - Had JCHD properly denied the permits, then either (i) the growers would have had to offer proper housing, or (ii) another supplier would have
 - Failure to enforce health code in connection with FW housing had disparate impact on Latinos, who disproportionately comprised FW population
- Sadly, case failed due to screwy statistical analysis, 885 F.2d 1215

Do companies that provide residential tenant-screening services need to comply with the Fair Housing Act?



42 U.S. Code § 3604. Discrimination in the sale or rental of housing and other prohibited practices

- (a) 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, sex, familial status, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Discrimination in facilities and services therewith....



- Is tenant-screening a “facility or service” in connection with housing?
- How might a tenant-screening company discriminate in the provision of such services?

Arroyo v. Corelogic Rental Property Solutions

- Applicant suffers profound injuries in an accident; after awaking from coma, is unable to walk, speak, or care for himself
 - Mother becomes applicant's conservator as he undergoes recovery
 - When applicant ready for discharge, mother submits applicant's application
- Application denied due to background check
 - Mother requests copy of the background check, but denied b/c not the applicant
 - Mother explains applicant is conserved, unable to speak or make legal decisions
 - Screening company agrees to provide report if mother obtains power of attorney
 - Mother provides proof of conservatorship, explains applicant cannot give POA
 - Screening company refuses to make disclosures because no POA

Disability discrimination: elements

“For purposes of [42 U.S.C. § 3604(f)] discrimination includes—

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling”

- Disability (actual, perceived, or historical impairment to major life activity)
- Disability-related need for accommodation (nexus)
- Existence of potential accommodation (not unreasonable)
- Request for accommodation
- Failure to make accommodation (requested or alternative)

Questions:

- Did the applicant have a disability?
- Did the applicant have a disability-related need for accommodation?
- Was a (reasonable) accommodation possible here?
- Did the screening company have a duty to make the accommodation?

Duh.

***Arroyo v. Corelogic*: screener argues Fair Housing Act does not apply to its conduct**

So what about that other thing you said? "Otherwise make housing unavailable," was it?



Tenant-screening reports: automated

CREDIT PLUS INC.
31550 Wintersville Parkway, Salisbury, MD 21801
(800) 250-4467 FAX (800) 250-3077

IMPLR CR
Report #
[Date Received] [Date Issued] [Report]

Provided

LANDLORD REFERENCE CHECK FORM

Printed Name: [] MFL Project # []
Applicant/Resident: [] SSN: []

TO:
Name: **RPA Rental Protection Agency®** ULTIMATE National Check
Address: [] Records Division BACKGROUND REPORT
City: []

My signature: []

Applicant/Tenant

StarPoint Nationwide Eviction Search
Byrne, Jennifer

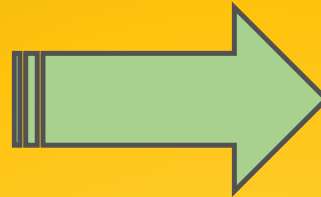
File #: 12370 Date: 05-15-2008 08:14
Customer: BlueCo Compliments Start: A. Johnson

Records Found

RUNNING BROOK ASSOC. vs. BYRNE, JENNIFER
Case Number: L710001907
File Date: 2008-10-20
Court: Superior Court
State: NJ
County: Essex
Result: EVICTION DISMISSED
Defendant: Byrne, Jennifer
Address: 11 Whitfield St. Apt. 1st Fl.
City, State, Zip: Caldwell, NJ 07008
Parish#: Running Brook Assoc.

Records Found

RUNNING BROOK ASSOC. vs. BYRNE, JENNIFER
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City, State, Zip: Caldwell, NJ 07008
Parish#: Running Brook Assoc.



MY RENTAL HISTORY Dashboard Address History Eviction

PREPARED FOR: **James T. Kirk** LOCATION: All States DATE: 8 January 2018 STATUS: Completed

Overview

The following information is used by Property Managers and Landlords.

There are 4 main components that are evaluated when assessing whether to rent a property: Home & Rental History, Eviction History, Criminal Records History, and Credit History

HISTORY	HISTORY	HISTORY	HISTORY
Home & Rental	Eviction	Criminal	Credit
86/100	65/100	100/100	52/100

Rental Score & Recommendation

Computer Screening

- Landlord establishes admission criteria
- Computer matches applicant data to criteria
- Produces score & recommendation



Individuals

Ability to Pay Rent

Minimum Monthly gross income-to-rent ratio

Factor

Importance

2.4

Extremely

Monthly minimum net income (after rent and debt obligations)

a fixed amount:

\$750.00

Extremely

Credit History

[what's this?](#)

Maximum percentage of past due negative accounts

number of derogatory accounts:

25.0%

Moderately

Do not consider foreclosures, but cap the overall score. Score Cap: 6.9

Do not consider mortgages in default, but cap the overall score.

Do not consider warnings, but cap the overall score.

Maximum balance of unpaid collections (includes past due accounts)

\$500.00

Moderately

Bankruptcy permitted

If Cleared

Pass/Fail

Residency History

[what's this?](#)

No landlord tenant court records or unpaid landlord collections

Any number

Ever

Pass/Fail

Ignore dismissed or satisfied records.

Criminal History

[what's this?](#)

May not have had a misdemeanor conviction ([Specify Exceptions](#))

Any number

In the last 3 years

Pass/Fail

Consider pending cases as well as convictions. (Not applicable in KY, CA, NM, NY, and WA)

May not have had a felony conviction ([Specify Exceptions](#))

Any number

Maximum allowable by law

Pass/Fail

Consider pending cases as well as convictions. (Not applicable in KY, CA, NM, NY, and WA)

May not be a registered sex offender

Pass/Fail

- Housing provider enters admission criteria on website
- Software compares applicant data to admission criteria to produce score and decision
- Housing provider follows computer-generated decision



US007376619B1

(12) **United States Patent**
Jones et al.

(10) **Patent No.:** US 7,376,619 B1
(45) **Date of Patent:** May 20, 2008

(54) **METHOD AND SYSTEM FOR RAPID TENANT SCREENING, LEASE RECOMMENDATION, AND AUTOMATIC CONVERSION/TRANSCRIPTION OF DATA INTO LEASE DOCUMENTS**

2004/0138997 A1* 7/2004 DeFrancesco et al. 705/38

OTHER PUBLICATIONS

SafeRent Upgrades Applicant Screening Service With New Features And Simplified Interface; Renovation Includes New Branding and Look/Feel, Mar. 1, 2001, p. 1-2.*
Gehrlein, William and Wagner, Bret. A two-stage least cost credit scoring model. Annals of Operations Research 74(1997) p. 159-171.*
Uhlund, Vicky. SafeRent Take Guess out of Rental Approval. Rocky Mountain News. Mar. 11, 2001, p. 1-3.*
SafeRent Secures \$4.25 Million in Convertible Debt Financing Investment Funds Total \$12 Million for 2000. Dec. 15, 2000. p. 1-2.*

* cited by examiner

Primary Examiner—James P. Trammell
Assistant Examiner—Jamie Swartz
(74) *Attorney, Agent, or Firm*—Dorsey & Whitney LLP

(57) **ABSTRACT**

System, method, computer program and computer program product, and business model for rapid tenant screening, recommendation, and conversion of data to lease documents. Provides structure and method for entering data from application to rent real estate for rapidly acquiring credit and screening from servers for the prospective tenant, passing information through a computer program that evaluates financial criteria, and presenting decision whether or not to accept tenant. Manager enters information about property and terms of lease, and automatically converts tenant credit information into leasing for signatures that will serve as legal basis for tenancy. Lease and credit information are all stored on central computer, remotely accessible for both on-site and off-site management to view, and controlled by access security protocol. Tenant rent and lease information is automatically entered into tenant files, viewable remotely so that there is a real-time view of tenant status for those with permission to access information.

28 Claims, 4 Drawing Sheets

(75) **Inventors:** **Scott A. Jones**, San Jose, CA (US); **Thomas E. Harrington**, Los Altos, CA (US); **Kevin W. Adams**, Mountain View, CA (US); **Jonathan T. Harrington**, New York, NY (US)

(73) **Assignee:** **On-Site Manager, Inc.**, Los Altos, CA (US)

(*) **Notice:** Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 1458 days.

(21) **Appl. No.:** 10/040,961

(22) **Filed:** Dec. 28, 2001

(51) **Int. Cl.**
G06Q 40/00 (2006.01)

(52) **U.S. Cl.** 705/38; 705/35; 715/530

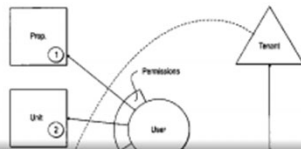
(58) **Field of Classification Search** 705/38, 705/1, 39, 10, 35; 703/2; 706/11; 715/530
See application file for complete search history.

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2004/0030640 A1 * 2/2004 Mahnken et al. 705/39

A system for performing rapid tenant screening and lease recommendation... includes determining a value for each of said plurality of acceptance criteria [and] a score for each of said plurality of acceptance criteria based on said value [and] combining said scores into one composite score for a tenant by taking a weighted average of scores for said plurality of acceptance criteria according to the expression:
$$y = \sum i = n y_i [2 \pi^2 + (y_i - 7)^2] \sum i = n [2 \pi^2 + (y_i - 7)^2]$$
wherein i represents an index of said plurality of acceptance criteria, pi represents an importance rating for each acceptance criteria, yi represents a score for each acceptance criteria, and y represents said composite score; and determining said recommendation based on said composite score.



Admission Decisions

- Three typical outcomes:
 - **Admit**
 - **Deny**
 - **Admit w/ conditions:**
 - Extra security deposit
 - Cosigner/guarantor
- Most housing providers routinely defer to screening company's recommendation



HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016)

- Denial or lease termination based solely on dismissed arrest (i.e., no conviction) violates Fair Housing Act
- Blanket exclusions are highly suspect
- “Individualized review” is appropriate
 - Relevant factors: Nature of crime, relationship to housing, time since the offense, evidence of rehabilitation, etc.



Automated decision-making by 3P screener

- Housing provider doesn't actually make the admission decision
 - May not even know the basis for the decision
 - If basis for decision is known, not aware of details
 - What use is this product if LL doesn't abide by its decisions?
- Effects on individualized review:
 - Can the housing provider reconsider the decision in a meaningful way?
 - Does screening service have a role in conducting or facilitating individualized review?
- Fair to say the screener makes housing unavailable (if it reports the existence of disqualifying criminal history?)

Corelogic's "Registry CrimSAFE"

- Registry CrimSAFE®

This automated tool processes and interprets criminal records and notifies leasing staff when criminal records are found that do not meet the criteria you establish for your community.

Corelogic's "Registry CrimSAFE"

- Automated Adverse Action Letter

Take the worry out of complying with the adverse action requirement with the Automated Adverse Action Letter. This solution will automatically email an adverse action letter to applicants with a decline or accept with conditions decision, thus taking the manual work out of the hands of your leasing professional. There is also a mail backup feature in case of email failure so you can feel confident you are meeting your FCRA requirements for adverse action notification.

Some more *Arroyo v. Corelogic*

- Rental applicant denied admission based on arrest record
 - Minor shoplifting charge (“summary offense”)
 - Charge was pending at time of application but later dismissed
- Individualized review would likely have resulted in admission
 - Tenant had become profoundly disabled in an accident
 - Individualized review not possible due to lack of available information
- Corelogic: Fair Housing Act does not apply to our conduct

The greatest trick the devil ever pulled was convincing a federal judge that tenant-screening companies don't make rental admission decisions.



Art. 22, EU General Regulation on Data Protection

“1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;

(b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or

(c) is based on the data subject's explicit consent.

3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision...”

Who is creating discriminatory housing barriers in your community?

- Perhaps...
 - Habitability (FHA claims against slumlords?)
 - Public services (transit, food, police/fire/EMS, water, banking, etc)
 - Schools (link between educational quality and housing)
- Brainstorming