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Damage Awards in Fair Housing Cases Through Basic Tort
Litigation Tactics**

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Abstract

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From One Dollar to \$2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases Through Basic Tort Litigation Tactics

By
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Introduction

[*29] The Federal Fair Housing Act¹ ensures all persons, regardless of their color, race, religion, or national origin, the right to choose and to purchase housing within their financial means. In spite of this authority and the legal protections that the drafters of the Act aspired to provide, housing discrimination remains a constant, prevalent force. Although courts have compensated victims of housing discrimination by awarding damages, discrepancies exist in the amount of damage awards given. One jurisdiction awarded only one dollar, while another awarded \$2.4 million.²

The inequity arising out of the extensive fluctuation of damage awards signifies the need for narrowing the spectrum and for ensuring fair and adequate damage amounts to redress the wrongs suffered by housing discrimination victims. Plaintiff Carrie J. Timus, commenting upon her recent \$2.4 million award remarked, “I just took a stand. The law says you should be allowed to live wherever you can afford to live.”³ However, many plaintiffs have not been as adequately compensated as Timus. Admittedly, the discriminatory circumstances of each fair housing case do vary and provide justification for a fluctuation in damage awards. Nonetheless, [*30] many plaintiffs experience hardship in eliciting and fully conveying to the trier of fact those underlying circumstances. Consequently, fair housing plaintiffs frequently do not receive damage awards which adequately reflect the degree of discrimination suffered.

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¹ 42 U.S.C. §§ 3601-3619 (1988).

² See, e.g., *Marr v. Rife*, 545 F.2d 554 (6th Cir. 1976) (\$1); *Fort v. White*, 530 F.2d 1113 (2d Cir. 1976) (\$1); *Johnson v. Snyder*, 470 F. Supp. 972 (N.D. Ohio 1979), *aff'd*, 639 F.2d 316 (6th Cir. 1981) (\$1); *Parker v. Shonfeld*, 409 F. Supp. 876 (N.D. Cal. 1976) (\$20,000); *McNeil v. P-N & S, Inc.*, 372 F. Supp. 658 (N.D. Ga. 1973) (\$2500); *Seaton v. Sky Realty Co.*, 372 F. Supp. 1322 (N.D. Ill. 1972), *aff'd*, 491 F.2d 634 (7th Cir. 1974) (\$500); *Timus v. Davis, Inc.*, No. 90-AA-465, 1992 D.C. App. LEXIS 201 (Aug. 4, 1992) (per curiam) (\$2.4 million).

³ Christine Spolar, *\$2.4 Million Awarded in Housing Bias Suit*, THE WASH. POST, July 15, 1992, at B1.



To close the wide range of fair housing damage awards, attorneys must vigorously and effectively litigate a fair housing case. This Article provides suggestions on how to enhance a damage award in a fair housing case by utilizing basic tort tactics. These tactical considerations will enable fair housing plaintiffs to increase their ability to obtain damages and gradually to achieve a more controlled fluctuation of fair housing damage awards.

The Fair Housing Act and its evolving body of case law make available both compensatory and punitive damages for aggrieved parties in fair housing litigation.⁴ Included within compensatory damages are tangible, economic damages such as out-of-pocket expenses and intangible, non-economic damages taking the form of mental distress, embarrassment, and emotional injury.⁵ Attorneys must take several factors into consideration when they first anticipate litigation, to ensure that the subsequent damage award will be commensurate with the degree of discrimination their client suffered.

I. Plaintiff's Choice of Forum Affects the Size of the Fair Housing Damage Award

A fair housing plaintiff must select the forum in which to file the complaint and to litigate the fair housing case. A plaintiff must be aware of the social and legal climate within each available forum to determine which forum will fully comprehend and appreciate the nature of the plaintiff's cause of action. For example, Chicago lawyers who routinely practice in Cook County find it beneficial to their clients to file their actions in the Circuit Court of Cook County rather than the United States District Court for the Northern District of Illinois. In the state court system, potential jurors are selected from the voting registry for Cook County.⁶ However, [*31] in the federal court system, potential jurors are chosen from a wider geographical area.⁷ Consequently, potential jurors in the federal district court system will include jurors from suburban communities who tend to be less attuned to and compassionate about the problems a plaintiff

⁴ See 42 U.S.C. § 3613 (c)(1), (2) (Supp. 1991) (authorizing punitive damages, actual damages, injunctive relief, and attorney's fees and costs). *But see* United States v. Pelzer Realty Co., 377 F. Supp. 121 (M.D. Ala. 1974) (declining to award damages when pleading sought no damages and plaintiff was unable to afford housing sought).

⁵ See ROBERT G. SCHWEMM, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83,90 (1981) (describing housing discrimination claims as "sounding in tort" and observing that compensation principles applicable to tort law, especially compensation for "dignitary torts" govern fair housing damage awards, including damages for economic loss and intangible loss for emotional distress and harm to one's personality).

⁶ ILL. REV. STAT. ch. 78, para. 25 (1991). See also COOK CO. CIR. R. 0.4.

⁷ In the federal system, jurors for the Eastern Division of the Northern District of Illinois are drawn from the City of Chicago, balance of Cook County, Lake County, DuPage County, Grundy County, Kendall County, Will County, LaSalle County, the City of Aurora, and the balance of Kane County. Plan for the Random Selection of Jurors, Approved by the Council of the Seventh Circuit, Feb. 1991, at 2.

experiences in the city. As a result, juries recruited from the suburban communities have proven to be more conservative in awarding damages.

This forum selection strategy is beneficial in the fair housing context. It is crucial that both judge and jury understand the extent of housing discrimination in a particular area. Otherwise, the judge and the jury may minimize the degree of hardship, humiliation, and emotional trauma experienced by victims of discrimination. Accordingly, a fair housing plaintiff will find it beneficial to file an action in the forum where a court will comprehend and adequately compensate the plaintiff. Consequently, a plaintiff must investigate and analyze the demographics of a particular forum before filing the cause of action.

II. Plaintiff Must Recognize the Strategy in Naming Parties to a Fair Housing Case

A plaintiff should consider making individual claims for each member of the family who sought residence in the dwelling. Fair housing courts permit damage awards on an individual basis for husband, wife and each individual child who is a member of the family intending to live in the dwelling.⁸ Individual claims enable plaintiffs to present an itemized verdict form and to seek an individual verdict from the jury for compensatory damages for each one of the plaintiffs.

Another matter of strategy involves the order in which plaintiffs name the defendants to a housing discrimination action. Corporate defendants should be named first and all individual defendants should be named last and separately. The image of an individual plaintiff battling a large corporation has a psychological effect on a jury which is beneficial to the plaintiff. If the plaintiff seeks punitive damages, the attorney must also consider introducing evidence of the net worth of both the corporate defendants and individual defendants. When a substantial net worth is present, the plaintiff can argue for a percentage of the net worth as an award to [*32] deter the defendant and others from committing similar conduct in the future.

III. Plaintiff Should Evaluate a Claim For Intentional Infliction of Emotional Distress

A fair housing plaintiff should also contemplate an additional claim for intentional infliction of emotional distress where the conduct of the defendants is so egregious that it supports such a theory of recovery. Courts have recognized that the Fair Housing Act encompasses an emotional distress component in a racial discrimination context.⁹

⁸ See, e.g., *Douglas v. Metro Rental Serv., Inc.*, 827 F.2d 252 (7th Cir. 1987); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184 (7th Cir. 1982).

⁹ See *Baumgardner v. HUD ex rel. Holley*, 960 F.2d 572, 581 (6th Cir. 1992) (quoting *Stewart v. Furton*, 774 F.2d 706, 710 (6th Cir. 1985)); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d

Phillips v. Hunter Trails Community Association,¹⁰ illustrates the effectiveness of making the additional claim of intentional infliction of emotional distress. In that housing discrimination case, the defendant association accepted the Phillips' offer of \$675,000 for a house and the Phillips' deposit on the house. The defendant then set a closing date for a few weeks later. A few days before that date, the defendant refused to close the sale on the home and forced the Phillips family, who had sold and moved out of their previous home, to assume a nomadic existence for nearly a month. The court found that the defendant's conduct was motivated by the race of the Phillips family.¹¹ The court also found defendant's conduct so egregious that each family member subjected to this racial animus was entitled to recover \$10,000 for emotional distress, in addition to \$2,675 for actual expenditures and \$100,000 for punitive damages.¹² The additional claims for emotional distress bolstered the size of the damage award which more accurately reflected the degree of discrimination experienced.¹³

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IV. Plaintiff Must Exercise Prudence in Selecting a Jury

The importance of jury selection should be underscored. A plaintiff must act prudently and diligently to assemble a jury that will take its responsibility seriously and make fair, reasonable decisions on the factual issues of the case. A plaintiff must choose a jury that will listen to and assess the evidence using its common sense and that will disallow any individual biases to interfere with its informed assessment of the evidence. Attorneys must gear their questions during

184 (7th Cir. 1982); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *Littlefield v. Mack*, 750 F. Supp. 1395 (N.D. Ill. 1990), *recons. denied*, 752 F. Supp. 1417 (N.D. Ill. 1990), *aff'd*, 954 F.2d 1337 (7th Cir. 1992).

¹⁰ 685 F.2d 184.

¹¹ *Id.* at 189 (concluding that Community Association's veto of black owner of car wash chain could "only be based on race").

¹² *Id.* at 191 (reducing compensatory damages for humiliation and embarrassment from \$25,000 each to Mr. and Mrs. Phillips to \$10,000 each and affirming awards of \$2,675 for out-of-pocket expenses and \$100,000 in punitive damages, reflecting the egregious nature of the Association's conduct).

¹³ *See also Littlefield*, 750 F. Supp. 1395 (N.D. Ill. 1990) (defendants' conduct so egregious that a separate cause of action for intentional infliction of emotional distress was pled and the jury awarded \$50,000 compensatory and \$100,000 for punitive damages).

Other victims of discrimination have attempted to include a claim for "loss of civil rights" in addition to a claim for intentional infliction of emotional distress. *See, e.g., Baumgardner*, 960 F.2d at 580-81. The presumption underlying this type of claim is that damages for deprivation of a civil right, although abstract, unconditionally emerge from the abridgement of that significant civil right. *Id.* In *Baumgardner*, the court refused to allow this type of claim, finding a loss of civil rights claim an "unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case. We have presumed some damages for intangible dignitary interests. . . [including emotional distress] . . . in the total amount of \$1500." *Id.* at 583. The court intimated that even if it were to acknowledge the viability of a "loss of civil rights" claim, that claim had to be independently substantiated, not automatically presumed. *Id.*

voir dire examination toward uncovering those values which hold significance in the lives of the potential jurors, those prejudices that potential jurors may harbor, and those similarities that jurors may share with the plaintiff. Crucial to the successful litigation of a fair housing case is procuring a jury that will be keenly attuned to the potential for discriminatory practices within the plaintiff's surroundings.¹⁴

V. Plaintiff Must Choose Evidence Which Will Most Firmly Secure the Jury's Return of an Adequate Damage Award

A fair housing plaintiff's primary objective is to receive a damage award commensurate with the degree of discrimination experienced. In furtherance of this goal, the plaintiff must determine whether to present out-of-pocket damages.¹⁵ Routinely in plaintiffs' tort cases, where the economic out-of-pocket damages are nominal and the non-economic damages are substantial, parties do not present evidence of the economic loss to the jury. The rationale underlying this tactical move is that a small out-of-pocket request will tend to limit the amount of money awarded by the jury on the non-economic elements of damage. For example, a family seeking housing who suffers emotional stress from racial discrimination resulting [*34] in psychological counseling for a substantial period of time, but who has only a small, \$2,000 out-of-pocket loss, would be seeking substantial non-economic damages for the emotional distress experienced. In that situation, the plaintiff would benefit more by dropping the \$2,000 out-of-pocket damage claim and arguing instead for a substantial non-economic award itemized separately for each family member. A plaintiff may even want to request punitive damages itemized separately for each family member which would be in addition to the non-economic damage award. Therefore, from a tactical standpoint, a fair housing plaintiff should not request compensation for a small economic loss where the non-economic loss is substantial.

Fair housing plaintiffs must give great consideration to witnesses and sources of proof. While it is imperative that each plaintiff testify concerning the emotional stress suffered as a result of the discrimination,¹⁶ the plaintiff should present other witnesses to offer testimony in support of these claims. These other witnesses may include relatives, friends, co-workers, teachers, treating physicians

¹⁴ The Rodney King trial potently illustrates this point. See Mark Hansen, *Different Jury Different Verdict?: A Rehearing on Change of Venue*, A. B. A. J., Aug. 1992, at 54. See also Don DeBenedictis, *Cop's Second Trial in L.A.: Judge Who Sent King Beating Trial to Simi Valley Denies Venue Change*, A. B. A. J., July 1992, at 16.

¹⁵ Out-of-pocket damages are actual or compensatory damages. See STEVEN H. GIFIS, LAW DICTIONARY 114 (2d ed. 1984) (defining actual, compensatory, and general damages as monetary compensation awarded to one "who has been injured by the act of another").

¹⁶ *Crumble v. Blumthal*, 549 F.2d 462, 467 (7th Cir. 1977) (extent of intangible harms may be established by testimony of the plaintiff).

and counselors who can describe the changes in the plaintiff's behavior and activities which may be attributable to the discriminatory conduct.¹⁷

Expert testimony should be presented whenever available. A plaintiff should tender psychologists who have examined the plaintiff and who can testify about the plaintiff's emotional strain, the requirements for treatment, and the treatment's impact upon the plaintiff's life. Sociologists also must be presented to render expert testimony on the effects of discrimination in society, its impact upon the plaintiff, and its effect on the plaintiff's status in society as a member of a particular racial group. Courts have acknowledged that sociologists qualify as expert witnesses and must be permitted to testify.¹⁸ A sociological perspective is crucial to a fair housing case since it explains to the jury how racial discrimination feeds upon itself, how it fosters additional racial discrimination, how it tends to reduce the value of persons discriminated against in the eyes of those who commit the discriminatory acts and how it lowers the self-esteem of those suffering from the discrimination.

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VI. Plaintiff Must Effectively Cross-Examine the Defendant

Effective cross-examination is a powerful facet of litigation which, in a fair housing context, can destroy the defendant's credibility, expose ingrained racial prejudices, and demonstrate the defendant's inevitable use of those prejudices in housing practice.¹⁹ The forcefulness of cross-examination hinges on the extent of pretrial preparation. The defendant's discovery deposition becomes a cornerstone from which to launch an attack on the defendant's credibility at trial. During the discovery deposition, a plaintiff's attorney should carefully phrase questions in a simple and concise manner so that an unequivocal conclusion can be drawn from the answers given. Also, a plaintiff should pose questions which not only will allow the plaintiff to prove the elements of the fair housing case, but also, will impeach the credibility of the defendant, if the defendant attempts to offer different testimony at trial.

At the fair housing trial, the same concise questions should be asked and impeachment performed when the witness gives contrary answers to those given at the deposition. Impeachment forcefully undermines the credibility of the defendant's testimony. As in any tort case, counsel for the fair housing plaintiff must exercise complete control over the defendant during cross-examination,

¹⁷ See, e.g., *Littlefield*, 750 F. Supp. at 1397 (plaintiff called her brother-in-laws, friends, and co-workers as witnesses to illustrate the existence and the extent of defendant's discrimination).

¹⁸ *Bradley v. Milliken*, 484 F.2d 215,269 (6th Cir. 1973), *cert. granted*, 414 U.S. 1038 (1973), *rev'd on other grounds*, 418 U.S. 717 (1974). See also *In re Malone*, 592 F. Supp. 1135 (E.D. Mo. 1984), *aff'd*, 794 F.2d 680 (8th Cir. 1986); *Yarborough v. City of Warren*, 383 F. Supp. 676, 682 (E.D. Mich. 1974).

¹⁹ See, e.g., *Littlefield*, 750 F. Supp. at 1397-401 (stating that to "put it mildly," the defendant had major credibility problems; plaintiff effectively accentuated that on cross-examination).

requiring the defendant to answer the questions directly and restraining the defendant from offering additional, self-serving, non-responsive answers. Counsel should always make objections and motions to strike non-responsive portions of the answers, as well as requests of the court to instruct the witness to answer the questions directly.

VII. Plaintiff Must Consider Additional Strategies Which Can Affect the Size of the Fair Housing Damage Award

Attorneys in fair housing cases should consider additional strategies to increase the jury award. Plaintiff's counsel should recognize the familiar tenet that the lawyer who is best prepared will be most successful at trial. Discovery in the form of interrogatories, production requests and depositions is one manner to assure optimal trial preparation. Counsel should conduct these discovery procedures thoroughly and expeditiously so that all beneficial evidence which supports the plaintiff's claim will be discovered rapidly. [*36] Plaintiff and counsel may then evaluate the case and formulate a useful strategy to enhance and to expedite trial preparation.

At the trial stage, counsel should always offer jury instructions in a form which attempts to personalize a plaintiff's claim. Generic forms of instruction which use the terms "plaintiffs" and "defendants" should be avoided where possible and the names of the plaintiffs and defendants inserted. Obviously, counsel must make appropriate objections to instructions offered by opposing counsel in order to preserve the record for appeal.²⁰

Finally, the plaintiff's closing argument can be the most powerful weapon a fair housing plaintiff possesses. Although, trial lawyers disagree on how the closing argument affects the jury's verdict, all trial lawyers will agree that a complete command of the evidence and the facts in the case has a profound impact upon the persuasive nature of the closing argument. Counsel should have elicited testimony from fact witnesses, the plaintiff, and third-party witnesses concerning the impact of the emotional distress upon the plaintiff's life. This testimony will then form the basis for expert opinions rendered by psychologists and sociologists. Use of all of this testimony enables plaintiff's counsel to present a creative, dynamic closing argument which accentuates the extreme degree of the plaintiff's distress, the duration of the plaintiff's distress, and the egregious nature of the defendant's conduct which led to that distress. Counsel must argue all of these factors convincingly so that when the plaintiff requests a substantial award for the non-economic aspect of the injury, the plaintiff's credibility will not be negatively impacted by the amount requested. The plaintiff who requests the jury to render a substantial award, but who presents a weak evidentiary foundation for

²⁰ "No party may raise on appeal the failure to give an instruction unless he shall have tendered it." ILL. REV. STAT. ch. 110A, para. 366(b)(2)(i) (1991).

that request, will lose credibility. Without credibility, the plaintiff's chance of receiving an adequate damage award is significantly reduced.

Conclusion

The Federal Fair Housing Act and its progeny unequivocally acknowledge the right of every individual to live wherever that individual can afford to live. Against this backdrop, the countless incidents of housing discrimination which have ensued since the inception of the Act, demonstrate that for many individuals the Act embodies only an empty right. As the drafters of the Act contemplated when establishing the Act's remedies for private civil suits,²¹ both compensatory and punitive damage awards carry immense potential [*37] for seizing the attention of those who practice discrimination and for demonstrating that those discriminatory acts will not go unchecked.

Housing discrimination will be deterred through the use of financial penalties only when damage awards in fair housing litigation are large enough to reflect the harshness of the discrimination committed. Presently, the highly-fluctuating spectrum of damage awards denotes that some fair housing plaintiffs are being adequately redressed for the indignities directed at them, whereas others still suffer from deficient damage awards. The trial tactics discussed in this Article will enable fair housing plaintiffs to enhance these deficient damage awards to an amount that fairly compensates them for the humiliation, emotional trauma, and ill-will that they have endured.

²¹ See 1988 U.S.C.A.N. 2173, 2176 (1988) (amending Fair Housing Act to eliminate \$1,000 cap on punitive damages and to provide more effective means of enforcement on grounds that "limited means for enforcing the law" represents "primary weakness" in 1968 Act).