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**Separating the Objective, the Subjective, and the Speculative:  
Assessing Compensatory Damages in Fair Housing Adjudications**

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**Abstract**

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## **Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications**

**By**  
**Alan W. Heifetz\* and Thomas C. Heinz\*\***

### **Introduction**

[\*3] With the passage of the Fair Housing Act<sup>1</sup> (“Act”) in 1968, Congress prohibited housing discrimination based on race, color, religion, sex, or national origin. In March of 1989, when the Fair Housing Amendments Act of 1988<sup>2</sup> became effective, Congress extended the protections of the Act to persons with handicaps and families with children. The 1988 amendments not only broadened the substantive reach of the Act, but also created an alternative procedure for resolving individual housing discrimination complaints. Under the original legislation, a federal district court was the exclusive forum for resolving Fair Housing Act issues. Now, parties to a housing discrimination complaint may adjudicate their dispute either before a federal district court or before a federal administrative law judge.

First, this article briefly discusses the nature of adjudicatory responsibility under the Administrative Procedure Act.<sup>3</sup> The article next outlines pertinent provisions of the Fair Housing Amendments Act of 1988. Finally, the article discusses the assessment of damages in housing discrimination cases from the perspective of administrative law judges adjudicating cases under the provisions of [\*4] both the Administrative Procedure Act and the Act.<sup>4</sup>

### **I. The Administrative Adjudicatory Process**

Each year, federal executive departments and independent agencies conduct hearings and make decisions in hundreds of thousands of cases that directly affect the rights and obligations of private parties. Administrative

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<sup>1</sup> 42 U.S.C. §§ 3601-3619 (1968) (Title VIII of the Civil Rights Act of 1968).

<sup>2</sup> Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

Hereinafter, “the Act” and “the Fair Housing Act” refer to the Fair Housing Act as amended by the Fair Housing Amendments Act of 1988.

<sup>3</sup> 5 U.S.C. §§ 551-559 (1988).

<sup>4</sup> This article assumes, *arguendo*, a finding of liability for unlawful discrimination. However, the authors do not presume to catalog every category and type of damage that may support a damage award under the Fair Housing Act.



adjudication is designed to synthesize subject matter expertise and decisional efficiency. Some courts have described administrative bodies as a “fourth branch” of government that may affect more people, principles, and values through administrative decisions than all of the judicial courts combined.<sup>5</sup> Congress enacted the Administrative Procedure Act to ensure that objectivity and judicial capability of presiding officials in formal administrative proceedings. To that end, the Administrative Procedure Act provides that administrative law judges are to preside over all agency adjudications “required by statute to be determined on the record after opportunity for an agency hearing . . . .”<sup>6</sup> To ensure that administrative law judges remain independent in their decisions and to protect them from any undue influence or pressure, the Administrative Procedure Act provides that agencies may appoint administrative law judges only after the applicants have passed a rigorous “merit selection” examination administered by the Office of Personnel Management.<sup>7</sup> The Office of Personnel Management also has the duty and authority, independent of agency recommendation or rating, to set the pay level of each administrative law judge position and the qualifications for appointment to each level.<sup>8</sup>

Administrative law judges are required by the Administrative Procedure Act to be assigned to cases “in rotation so far as practicable.”<sup>9</sup> They may not perform functions “inconsistent with their duties and responsibilities,”<sup>10</sup> and may not be “responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”<sup>11</sup> They are exempt from agency performance appraisals, [\*5]<sup>12</sup> and are subject to discipline and removal only for good cause as determined after a hearing on the record before the Merit Systems Protection Board.<sup>13</sup> As presiding officials, they have authority to administer oaths, issue subpoenas, hold conferences, regulate the course of discovery and hearings, rule on procedural matters, make decisions, and take actions authorized by agency rule.<sup>14</sup>

Decisions of administrative law judges must contain findings and conclusions, with supporting reasons regarding “all the material issues of fact, law, or discretion presented on the record.”<sup>15</sup> Decisions must also explain any “rule, order, sanction, relief, or denial thereof.”<sup>16</sup> Administrative law judges are bound to apply the published rules and policies of the agencies to which they are

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<sup>5</sup> F.T.C. v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

<sup>6</sup> 5 U.S.C. § 554(a) (1988).

<sup>7</sup> 5 U.S.C. § 1104(a)(2) (1988).

<sup>8</sup> 5 U.S.C. § 5372 (1988).

<sup>9</sup> 5 U.S.C. § 3105 (1988).

<sup>10</sup> *Id.*

<sup>11</sup> 5 U.S.C. § 554(d)(2) (1988).

<sup>12</sup> 5 U.S.C. § 4301(2)(D) (1988).

<sup>13</sup> 5 U.S.C. § 7521 (1988).

<sup>14</sup> 5 U.S.C. § 556(c) (1988).

<sup>15</sup> 5 U.S.C. § 557(c) (1988).

<sup>16</sup> *Id.*

assigned; therefore, an agency's decision to reverse or modify an administrative law judge's initial decision<sup>17</sup> must be adequately justified in its final decision.<sup>18</sup> Unless a specific statute provides for *de novo* review, a reviewing court will base its factual review on the substantial evidence test; that is, the court will uphold the administrative law judge's decision if there is substantial evidence to support it.<sup>19</sup>

The United States Supreme Court has recognized that the administrative law judge's role is "functionally comparable" to a trial judge conducting civil proceedings without a jury.<sup>20</sup> The Supreme Court and federal courts of appeal have repeatedly concluded that the federal administrative adjudicatory process is fair, and that the Administrative Procedure Act adequately protects due process rights.<sup>21</sup> As one Senate committee observed; "In essence, individuals [\*6] appointed as ALJ's hold a position with tenure very similar to that provided for Federal judges under the Constitution."<sup>22</sup>

## II. Administrative Adjudication Under the Fair Housing Amendments Act of 1988

To create a mechanism by which the federal government could take an active role in enforcing the law, Congress provided for administrative adjudication of fair housing complaints when the Department of Housing and Urban Development is unable to conciliate the conflict between the parties.<sup>23</sup> The Fair Housing Amendments Act of 1988 recognizes the economy and efficiency of administrative proceedings as well as the Administrative Procedure Act mandate to provide due process and a fair hearing.

The Act requires that discovery and a hearing be conducted as expeditiously and inexpensively as possible, consistent with the needs and rights

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<sup>17</sup> In some cases, the administrative law judge's initial decision is final as to findings of fact and conclusive if supported by substantial evidence. *See Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 90-92 (D.C. Cir. 1983) (proceeding before the Federal Mine Safety and Health Review Commission).

<sup>18</sup> "It is hornbook law that an agency must set forth clearly the basis of reaching its decision." *Caroline Power & Light Co. v. FERC*, 716 F.2d 52, 55 (D.C. Cir. 1983).

<sup>19</sup> Evidence that supports a different decision must also be considered. 5 U.S.C. § 706(2)(E) (1988). For an explication of the substantial evidence test, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

<sup>20</sup> *Butz v. Economou*, 438 U.S. 478, 513 (1978).

<sup>21</sup> *See e.g.*, *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (judge's "impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime"); *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 527-28 (3d Cir. 1981) (giving reasons why administrative law judges are sufficiently independent and competent) (Aldisert, J., concurring), *cert. denied*, 455 U.S. 940 (1982); *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980) (administrative law judge given standing in case where judicial independence was infringed upon by agency policies; *Benton v. United States*, 488 F.2d 1017 (Ct. Cl. 1973) (administrative law judges are entitled to the Administrative Procedure Act's procedural protections before being involuntarily retired).

<sup>22</sup> S. REP. NO. 697, 95th Cong., 1st Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 496, 497.

<sup>23</sup> H. R. REP. NO. 711, 100th Cong., 1st Sess. (1988).

of the parties to obtain evidence and a fair hearing.<sup>24</sup> To meet these requirements, the Department of Housing and Urban Development issued rules of practice governing administrative hearings that provide an alternative to lengthy, formal trials.<sup>25</sup> Full discovery is allowed, including depositions,<sup>26</sup> interrogatories,<sup>27</sup> production of documents,<sup>28</sup> and requests for admissions;<sup>29</sup> however, all discovery must be completed fifteen days before the date scheduled for the hearing. This is usually by the 105th day after the charge of discrimination is issued.<sup>30</sup> Prehearing conferences may be scheduled, and to avoid delay, they may be held by telephone.<sup>31</sup> Finally, to encourage and facilitate alternate dispute resolution, the rules provide for the appointment of a settlement judge on the motion of any party or on the initiative of the presiding administrative law judge.<sup>32</sup>

An administrative hearing must begin no later than 120 days after the charge of discrimination is issued unless any party elects [\*7] to have the claims adjudicated in a civil action in lieu of an administrative hearing.<sup>33</sup> The Federal Rules of Evidence apply as they would in any civil action in a United States district court.<sup>34</sup> An administrative law judge must issue a decision within sixty days after the end of the hearing, and any agency discretionary review of that decision must be completed not later than thirty days after the decision is issued.<sup>35</sup>

Upon finding that a respondent has engaged in, or is about to engage in, a discriminatory housing practice, the administrative law judge must issue an order for appropriate relief, “which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief.”<sup>36</sup> In addition, the administrative law judge may, “to vindicate the public interest, assess a civil penalty against the respondent.”<sup>37</sup>

### III. Administrative Law Judges’ Perspective on Damages

Since passage of the Fair Housing Act in 1968, judges have had a difficult and uncertain task in assessing damages to victims of housing discrimination.

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<sup>24</sup> 42 U.S.C. § 3612(d) (1988).

<sup>25</sup> 24 C.F.R. § 104 (1992). “The administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings . . . .” *Id.* § 104.110.

<sup>26</sup> *Id.* § 104.510 (1992).

<sup>27</sup> *Id.* § 104.530 (1992).

<sup>28</sup> *Id.* § 104.540 (1992).

<sup>29</sup> *Id.* § 104.550 (1992).

<sup>30</sup> 24 C.F.R. § 104.500 (1992).

<sup>31</sup> *Id.* § 104.610 (1992).

<sup>32</sup> *Id.* § 104.620 (1992).

<sup>33</sup> 42 U.S.C. § 3612(g) (1988).

<sup>34</sup> 42 U.S.C. § 3612(c) (1988).

<sup>35</sup> 42 U.S.C. § 3612(g)(2) (1988).

<sup>36</sup> 42 U.S.C. § 3612(g)(3) (1988). On the other hand, if the administrative law judge finds that the respondent has not engaged in, or is not about to engage in, a discriminatory housing practice, the judge must enter and order dismissing the charge. *Id.* at 42 U.S.C. § 3612(g)(7) (1988).

<sup>37</sup> 42 U.S.C. § 3612(g)(3) (1988).

This uncertainty has been blamed on a number of factors. These factors include the considerable variation in the size of damage awards in district courts over the years, a history of cases with no apparent nexus between evidence of actual injury and the award of damages to the complainant, the difficulty of quantifying intangible injuries, and a paucity of published opinions explaining the basis for the awards.<sup>38</sup>

Administrative adjudication under the Administrative Procedure Act and the Fair Housing Act reduces the uncertainty of assessing housing discrimination damages because litigants in the administrative forum not only have the right to be heard, but also the right to hear why the judge rendered a particular decision. The requirement for an administrative law judge to state a rationale for findings, conclusions, and orders applies equally to the assessment of damages, as it does to the issue of liability. Fully reasoned written decisions facilitate judicial review, give the parties a sense of satisfaction or vindication, and contribute to the predictability of [\*8] the law.<sup>39</sup> Unfortunately, district court judges who issue opinions after bench trials often do not fully explicate their damage awards,<sup>40</sup> and juries in civil trials do not, and have no responsibility to, articulate reasons for their judgments.<sup>41</sup> Court decisions, therefore, have provided little guidance for assessing damages. Too often, courts have awarded damages without separating discrete categories of injury, or have justified damage awards by merely referring to the general range of damages awarded by other courts.<sup>42</sup> As a result, assessing damages can be a troublesome responsibility, especially where emotional distress or other forms of intangible harm are at issue.

Because administrative law judges are obligated by the Administrative Procedure Act to explain the basis for their decisions, including their assessment of damages, they face the often difficult task of rationally measuring the various

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<sup>38</sup> Robert G. Schwenn, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83 (1981).

<sup>39</sup> Carefully reasoned written decisions also help to save counsel from the wrath of disappointed clients who had not been disabused of unrealistic expectations before the decision was issued.

<sup>40</sup> While there is no empirical evidence to explain the occasional absence of rationale in district court opinions, it is generally acknowledged that district courts are overburdened with criminal cases and that they do not have the luxury of specializing in discrete areas of civil litigation. Indeed, in order to speed the administration of justice, one federal district judge has proposed, *inter alia*, assignment of specialized cases to judges proficient in that specialty, creation of more specialized Article I courts, and elimination of the requirement in written opinions of findings of fact and conclusions of law. Stanley Sporkin, *End Findings, Begin Fees, Stop Frivolity*, LEGAL TIMES, Apr. 20, 1992 at 26. Creation of the administrative adjudicatory process for housing discrimination cases is congruent with Judge Sporkin's call for greater effectiveness and efficiency in the disposition of cases that, while important to citizens, overburden the judicial system.

<sup>41</sup> At least one writer recently has suggested that the United States' jury system is failing, and that its growing dysfunction might be addressed by abandoning it, at least in civil cases, as has been done in England. He opines that "today, the jury is arguably more the tool of wealthy individuals and corporations than of the common man." Franklin Strier, *The U.S. Jury System is Failing*, NAT'L L. J., Apr. 12, 1992, at 15.

<sup>42</sup> See Schwemm, *supra* note 38, at 83-84.

elements of damages. Principles from the general law of damages, civil rights precedents in general, and housing discrimination precedents in particular, form the background for determining an appropriate damage award. Against that background, judges must analyze and resolve any inconsistencies in the evidence of record, recognize the hyperbole that may characterize victim testimony, and at the same time, hold steady against the current of their own emotional reactions to the case.

The objective criteria used to analyze and measure damages are not in themselves sufficient to determine an appropriate damage award. Even after completing a careful evaluation of purely objective criteria, judges must still transform inherently qualitative facts [\*9] into quantitative relief. That is, at best, an intuitive undertaking. However, it is not a leap into the realm of chance, free from the restrictions of reason. Rather, judges arrive at a final assessment of damages by synthesizing their legal knowledge, understanding, and experience, together with the weight of the evidence in the particular case. The process by which the judge maximizes the use of reason and minimizes the use of intuition is an integral component of the art and science of judging.

#### IV. Assessment of Actual Damages

Actual damages in the administrative forum are synonymous with “compensatory” damages.<sup>43</sup> They may be divided into two broad categories: economic or tangible damages (including “out-of-pocket” damages) and intangible damages. Compared to intangible damages, economic damages are generally small, although they can amount to a considerable sum on occasion.<sup>44</sup> On the other hand, intangible damage awards for dignitary injuries – that is, injuries to the personality,<sup>45</sup> – can be substantial, as shown below. The “actual” damages that administrative law judges<sup>46</sup> and the courts<sup>47</sup> may award are distinguishable from punitive damages. Punitive damages focus on the discriminator’s conduct rather than on the victim’s reaction to the conduct. Two basic principles govern the assessment of actual damages: the complainant has a

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<sup>43</sup> Cf. *United States v. Rent America Corp.*, 734 F.Supp. 474, 482 (S.D. Fla. 1990) (“monetary damages” in 42 U.S.C. § 3614(d)(1)(B) means actual damages, damages for emotional distress, and punitive damages).

<sup>44</sup> See, e.g., *Phillips v. Hunter Trails Community Ass’n*, 685 F.2d 184, 190 (7th Cir. 1982) (\$2,675 out-of-pocket expenses for hotel accommodations and furniture storage incurred because house was made unavailable); *Davis v. Mansards*, 597 F.Supp. 334 (N.D. Ind. 1984) (\$4,280 for unspecified out-of-pocket expenses); *HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034 (HUD A.L.J. Aug. 26, 1992) (\$6,931 awarded for cost of alternative housing, increased commuting, and pursuit of remedy); *HUD v. George*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,010 (HUD A.L.J. Aug. 16, 1991) (\$4,350 awarded to nonprofit organization for diversion of resources).

<sup>45</sup> See DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 7.1 (1973).

<sup>46</sup> 42 U.S.C. § 3612(g)(3) (1988).

<sup>47</sup> 42 U.S.C. §§ 3612(c) and 3614(d) (1988).

right to be compensated for actual injuries suffered because of the unlawful acts of a respondent, but the complainant is not entitled to reap a financial windfall at the respondent's expense.

The amount of money damages the complainant claims obviously plays a role in the court's determination of the amount awarded. By specifying a particular dollar amount in a prayer for damages, the complaint not only notifies the defendant of the size of the claim, thereby affording an opportunity to mount an appropriate [\*10] defense, but it also places the complainant's evidence in perspective.

### A. *Economic or Tangible Damages*

#### 1. *In General*

Economic damages are the total of all out-of-pocket and other tangible expenses caused by defendant's denial of housing. Such expenses include, but are not limited to, the increased cost of alternative housing; wages or other income lost during the time spent looking for alternative housing; moving, storage, or packing costs, including any extra security or casualty costs occasioned by the need to acquire alternative housing; temporary housing costs; any costs of commuting to and from work in excess of those that would have been incurred commuting to and from the denied housing;<sup>48</sup> and medical and psychological counseling expenses caused by housing discrimination.<sup>49</sup> Although some administrative law judges have awarded these types of expenses based merely on unchallenged testimony, other judges have denied relief in the absence of documentary evidence to corroborate the testimony, or upon a showing that the expenses claimed were reasonable.<sup>50</sup> Administrative [\*11] law judges have also

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<sup>48</sup> See, e.g., *HUD ex rel. Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (specified repacking and relocating costs); *Thronson v. Meisels*, 800 F.2d 136, 140 (7th Cir. 1986) (rent on former apartment plaintiffs would not have incurred had they been able to move into defendants' apartment and sublet the former apartment); *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985) (moving and temporary housing costs); *Phillips*, 685 F.2d at 190 (moving and storage costs); *Steele v. Title reality*, 478 F.2d 380, 383-384 (10th Cir. 1973) (telephone, moving and storage costs); *Lamb v. Sallee*, 417 F.Supp. 282, 287 (E.D. Ky. 1976) (\$12.50 for lost wages); *HUD v. Lewis*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,035, 25,371 (HUD A.L.J. Aug. 27, 1992) (trash collectors, water services, and telephone transfer costs); *HUD v. Wagner*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,302, 25,337 n.13 (HUD A.L.J. Aug. 27, 1992) (extra month's rent charged when complainant could not timely move out of old housing, plus costs of inducing occupant of the new apartment to move); *HUD v. Carter*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,029, 25,320-21 (HUD A.L.J. May 1, 1992) (lost profit on sale of home precluded by respondent's discriminatory policy); *HUD v. Murphy*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,002, 25,054-55 (HUD A.L.J. July 13, 1990) (advertising costs for forced sale of mobile home).

<sup>49</sup> See, e.g., *Jones v. Rivers*, 732 F.Supp. 176, 178 (D.D.C. 1990) ("damages for therapy . . . are appropriate").

<sup>50</sup> See, e.g., *HUD v. Tucker*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,349 (HUD A.L.J. Aug. 24, 1992) (no award for loss of sale of equipment or for lost wages in absence of evidence of sale

denied damages when the complainant has failed to prove a direct causal link between the claimed harm and the respondent's discriminatory conduct.<sup>51</sup> In addition, contrary to the "American rule,"<sup>52</sup> several cases have awarded damages to complainants for their travel costs, lost wages, and other incidental expenses associated with preparation for, and participation in the hearing.<sup>53</sup>

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price of equipment and salary or hourly wage rate); *HUD v. TEMS Ass'n*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,028, 25,311 (HUD A.L.J. Apr. 9, 1992) (complainants bound to pay mortgage, taxes, and association dues whether a tenant lived in house or not); *HUD v. Rollhaus*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,019, 25,250 (HUD A.L.J. Dec. 9, 1991) (items for which loss of use claimed not specifically identified, and value questionable because complainant ultimately disposed of them); *HUD v. Edelstein*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,018, 25,240 (HUD A.L.J. Dec. 9, 1991) (higher rent differential requested denied as unsupported by evidence); *HUD v. Gaultney*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,013, 25,194 (HUD A.L.J. Sept. 27, 1991) (in absence of evidence of business expenses, lost profits cannot be reasonably calculated); *HUD v. Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009, 25,150-51 (HUD A.L.J. Aug. 5, 1991) (greater amount of lost wages denied as "unsupported . . . and obviously exaggerated"); *HUD v. Jerrard*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,005, 25,091 (HUD A.L.J. Sept. 28, 1990) (complainant should have recouped her utility deposit when she moved); *Murphy*, 2 Fair Hous.-Fair Lend. (P-H) at 25,055 (no "reasonable certainty" that complainants would qualify for mortgage or realize any appreciation on house they intended to buy); *HUD v. Blackwell*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,001, 25,011 (HUD A.L.J. Dec. 21, 1989) (full amount of repacking and relocating expenses requested not shown to be reasonable), *aff'd*, F.2d 864 (11 Cir. 1990).

<sup>51</sup> See RESTATEMENT (SECOND) OF TORTS § 912 (1979). See also *HUD v. Williams*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,007, 25,125 (HUD A.L.J. Mar. 22, 1991) (moving costs denied because discriminatory conduct not shown to have "played a role" in complainant's decision to vacate); *HUD v. Guglielmi*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,004, 25,077 (HUD A.L.J. Sept. 21, 1990) (complainant's inability to sell home not shown to have been caused by respondent's discriminatory conduct).

<sup>52</sup> To the extent that damages have been awarded for the costs of litigation, the award would appear to contravene the "American rule" that in the absence of a specific statute each party bears its expenses of litigation. See 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: § 1331 (1987) (stating that under the "American rule even litigants who are defeated in court do not face the risk of having to bear their opponent's expenses, as they would be in Great Britain and most other countries").

<sup>53</sup> *TEMS Ass'n*, 2 Fair Hous.-Fair Lend. (P-H) at 25,311 (complainant awarded litigation expenses incurred in separate but related litigation in another forum); *Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) at 25,150 (complainant awarded costs for missing four days of work, including two days for hearing and two days for travel to and from hearing); *Murphy*, 2 Fair Hous.-Fair Lend. (P-H) at 25,054 (complainant entitled to lost wages, babysitting fees, and travel expenses incurred to attend hearing); *Blackwell*, 2 Fair Hous.-Fair Lend. (P-H) at 25,010 (complainant entitled to lost wages for time consulting attorneys and attending hearing on temporary restraining order and hearing before administrative law judge); but see *Hodge v. Seller*, 558 F.2d 284, 287 (5th Cir. 1977) (upheld trial court decision not to award airfare to and from trial, but would not rule out such an award if appropriately made within broad discretion of trial judge, citing "strong policies which lie behind remedial civil rights legislation, and the need to ensure that those who defend their rights are not financially penalized").

The Act also authorizes an award of attorney's fees and traditional litigation costs to a prevailing respondent or intervenor after the decision becomes final. 42 U.S.C. § 3612(p) (1988). See, e.g., *HUD v. Dedham Hous. Auth.*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,031, 25,331 (HUD A.L.J. May 26, 1992) (complainant/intervenor awarded \$6,193 in attorney's fees and \$17 in costs).

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## 2. *Alternative Housing*

To date, the largest recovery in the administrative forum for purely economic loss has been for the difference between the cost of housing unlawfully denied a complainant and the cost of the alternative housing the complainant was constrained to acquire.<sup>54</sup> In order to recover the increased cost of alternative housing, the complainant must demonstrate a reasonable effort to “cover” by seeking comparable housing; that is, the discrimination victim is obliged to try to avoid economic waste and to minimize damages.<sup>55</sup> If a complainant fails to cover, the court precludes recovery for the greater cost of alternative housing.<sup>56</sup>

To the extent that alternative housing is comparable to the denied housing, yet more expensive, the complainant should recover the greater expense of the alternative housing. Numerous factors determine comparability, such as cost, size, style, composition, structural integrity, location, and proximity to transportation, schools, and cultural facilities. Even though the alternative housing in a particular case costs more than the denied housing, this does not necessarily mean that the alternative housing is not comparable. The value of many housing amenities is objectively determined in the marketplace for housing; that is, the market determines a value upon which a willing buyer and a willing seller would agree.<sup>57</sup> Aggrieved parties may subjectively value other amenities. Complainants may recover for the deprivation of those characteristics of the denied housing of particular value to them when their subjective valuation of those characteristics is greater than the market’s.<sup>58</sup> [\*13] A complainant may also recover the greater cost of alternative housing even if the alternative housing was superior to the

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<sup>54</sup> See *HUD v. Morgan*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, 25,142 (HUD A.L.J. July 25, 1991) (complainant awarded \$7,362.49 for increased carrying cost from purchase date to decision date).

<sup>55</sup> Professor Dobbs describes the jinder of the concepts of damage minimization and economic salvage as “avoidable consequences rules.” DOBBS, *supra* note 45, at 188-89. He also cites two related rules that pertain to the burden of proof. *Id.* at 189. The first is that the plaintiff has the burden of proving damages; the second is that the defendant has the burden of proving that the plaintiff should have minimized those damages. *Id.*

<sup>56</sup> See, e.g., *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 234-35 n.4 (8th Cir. 1986) (the fact that plaintiff declined defendant’s offer of apartment was relevant as to damages); *Young v. Parkland Village, Inc.*, 460 F. Supp. 67, 71 (D. Md. 1978) (complainant failed to mitigate damages by declining apartment). Cf. *HUD v. George*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,010, 25,166 (HUD A.L.J. Aug. 16, 1991) (respondents’ illegal refusal to sell did not *per se* force complainant to buy a more expensive property; furthermore, complainant passed on its increased costs of alternative housing to a nonprofit agency that operates the homes).

<sup>57</sup> Where a contract or lease has been signed, the document will, at least presumptively, reflect a market value. Where there is no such document, other evidence, such as an appraisal, will have to be introduced to demonstrate objective market value.

<sup>58</sup> *HUD v. Wagner*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,032, 25,337-38 (HUD A.L.J. June 22, 1992) (\$350 awarded for deprivation of features of denied housing particularly valued by complainant). See discussion of “lost housing opportunity” in Part IV *infra*.

denied housing, provided the record shows that the complainant was unable, with reasonable effort, to find comparable housing at a comparable price.<sup>59</sup>

However, the issue becomes more complicated when one property is rental and the other is purchased. For example, if a rental was denied, should the measure of damages be the difference between the rental cost of the denied housing and the rental cost of housing the complainant *could have* obtained if he or she had not purchased alternative housing? If not, and the complainant is awarded the difference between the mortgage payment for the alternative housing and the rental payment for the denied housing, should the respondent be entitled to a reduction in the damages based on the capital appreciation of the alternative property since its purchase by the complainant? Regardless of the answers to these kinds of questions, a housing discrimination victim is not entitled to shop for alternative housing with a blank check. Complainants must demonstrate that they attempted to minimize their damages.

Cases raising alternative housing cost issues also require a judge to determine the proper period over which the costs of the alternative housing should be measured. Consistent with the complainant's duty to minimize damages and avoid economic waste, the period during which the complainant's damages may accrue must have a reasonable cutoff point. To date, in those cases where both the denied housing and the alternative housing were rental, damages have been measured by the difference in the total amount of rent, including utilities, from the date the victim would have moved into the denied housing until the date of the hearing, or until the expiration date of the alternative housing lease.<sup>60</sup> Because the complainant should be compensated for the greater cost of alternative housing that had to be obtained as a result of the respondent's actions, the first date the complainant is no longer obligated to remain in the alternative housing and is free to occupy the denied housing, or the first date the complainant is able to occupy comparable housing [\*14] at a comparable cost,<sup>61</sup> would appear to be a reasonable cutoff point for the accrual of damages. However, a respondent may question

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<sup>59</sup> See, e.g., *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 112 (3d Cir. 1981) (plaintiffs forced to pay more for substantially same value thereby had less money available for other purposes); *HUD v. Morgan*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, 25,138-39 (HUD A.L.J. July 25, 1991) (less expensive available alternative housing provides ceiling on damages where complainant purchased more expensive alternative housing).

<sup>60</sup> See, e.g., *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985) (additional rent); *Miller*, 646 F.2d at 112 (plaintiffs awarded difference in rent and utilities); *Parkland Village, Inc.*, 460 F. Supp. at 71 (differences on rent awarded).

<sup>61</sup> Cf., *United States v. Keck*, No. C89-1664C, 1990 U.S. Dist. LEXIS 19309, at "16 (W.D. Wash. Nov. 15, 1990) (plaintiffs awarded damages from effective date of the Fair Housing Amendments Act of 1988 until date they actually moved in); *Parkland Village Inc.*, 460 F. Supp. at 71 (time period from date housing should have been available to date defendant actually offered apartment).

whether the term of the alternative housing lease is reasonable or comparable to the term of the denied housing lease.<sup>62</sup>

If the denied housing was for sale and comparable alternative housing was purchased, the issue becomes whether the respondent should be liable for the increased gross cost of the alternative property, if any, or, if there is a mortgage, the higher carrying cost of the mortgage. If the latter, then should the respondent be liable for the higher cost of the mortgage over its entire life, or for some shorter period?<sup>63</sup> Regardless of the methodology used to determine actual damage, the complainant is not entitled to a windfall recovery at the expense of the respondent.

### 3. *Diversion of Resources for Fair Housing Organizations*

Fair housing organizations have been established throughout the nation with various goals and purposes, but the primary purpose of most is to help ensure equal housing opportunities for everyone living within the geographical area the organization serves. In pursuit of that purpose, the typical fair housing organization engages in several functions, including the following: (1) educating the general public, housing providers, and tenants; (2) counseling individuals who believe they have been subjected to unlawful discrimination; (3) investigating housing discrimination complaints; and (4) pursuing legal remedies when necessary.<sup>64</sup>

In order to have standing to assert claims in its own right, a fair housing organization must allege a “concrete and demonstrable injury” to its activities with a “consequent drain on [the organization’s] resources,” and not “simply a setback to the organization’s [\*15] abstract social interests.”<sup>65</sup> The organization may demonstrate the requisite injury by showing that an act of unlawful

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<sup>62</sup> See, e.g., *Biggs v. Missouri Comm’n on Human Rights*, 830 S.W.2d 512, 516 (Mo. Ct. App. 1992) (Commission awarded difference in rents from date complainant moved into new residence until date of hearing. Court upheld trial court’s limitation of actual damages to the duration of the 12-month lease for the proposed tenancy, stating, “absent an additional agreement, complainant’s right to possession would have ceased at the end of the one-year period . . . Respondent cannot be said to have caused complainant’s expenses beyond the initial lease period. . .”).

<sup>63</sup> In *HUD v. Morgan*, respondent was ordered to pay the increased carrying cost of the more expensive alternative housing from the date of purchase until the date of decision. *Morgan*, 2 Fair Hous.-Fair Lend. (P-H) at 25,139.

<sup>64</sup> See, e.g., *HUD v. Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009, 25,142-43 (HUD A.L.J. Aug. 5, 1991).

<sup>65</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organization must be able to demonstrate that its role facilitating open housing was impaired); see also *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990) (organizations had standing in alleging “concrete drains on their time and resources”); *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139 n.2 (6th Cir. 1985) (claimed expenditures “were too speculative to support damage award”; nominal damages of \$1 affirmed); *Berry v. John Doe Managers*, No. 91-2891, 1991 U.S. Dist. LEXIS 10159, at \*7 (E.D. Pa. July 22, 1991) (organizational standing determined by whether a “distinct and palpable injury” exists, not by “geographical definitions”).

discrimination adds a new burden to the workload of the organization, in addition to the burden of seeking redress for the discrimination.

For example, the federal district court in *Saunders v. General Services Corp.*,<sup>66</sup> relying on *Havens Realty Corp. v. Coleman*,<sup>67</sup> awarded a nonprofit fair housing corporation \$2,300 for diversion of resources measured by the time and overhead costs attributable to pursuing its Fair Housing Act claim, and \$10,000 for “frustration of its equal housing mission.”<sup>68</sup> The \$10,000 award was based on a finding that the defendant’s large-scale discriminatory advertising had caused a subtle but substantial impact on the corporation’s mission to ensure equal housing opportunities, thereby forcing the organization to devote significant resources to identifying and counteracting the effects of such advertising.<sup>69</sup>

Similarly, a fair housing organization may recover the “opportunity costs” of discrimination by demonstrating that the defendant’s conduct caused the organization to divert its resources from fulfilling some of its usual functions, such as providing counseling and referral services, to fulfilling other purposes, such as testing and seeking redress for the defendant’s discriminatory conduct.<sup>70</sup> [\*16] In addition to recovering for past investigation and litigation costs,<sup>71</sup> fair housing organizations have also received awards for prospective expenses, such as monitoring records, auditing sales practices, testing respondent’s housing operation, and training respondent’s employees in the requirements of Fair Housing law.<sup>72</sup>

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<sup>66</sup> *Saunders v. General Serv. Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987).

<sup>67</sup> *Havens Realty*, 455 U.S. at 379.

<sup>68</sup> *Saunders*, 659 F. Supp. at 1061.

<sup>69</sup> *Id.* at 1052, 1054, 1060-61; *see also* Spann, 899 F.2d at 27 (fair housing organization had standing based on allegations that a defendant’s advertising for housing that showed racial preference compelled the organization to expend resources to neutralize the adverse impact of the defendant’s advertising on the local housing climate); *contra* *Omni House, Inc. v. Cromwell Fountain Assoc.*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 15,747, 16,889 n.4 (D. Md. Apr. 7, 1992) (“With due respect for Judge Merhige, this Court does not agree with his reading [in *Saunders v. Gen. Serv. Corp.*] of *Havens Realty, supra*, which would permit damages for an organization’s impairment of objectives and diversion of resources.”).

<sup>70</sup> *See, e.g.*, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (stating “[t]hese are opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the . . . discrimination”); *Saunders*, 659 F. Supp. at 1060 (\$2,300 for “diversion of resources”); *Davis v. Mansards*, 597 F. Supp. 334, 348 (N.D. Ind. 1984) (\$1,000 to the housing center for frustration of mission and \$4,280 for costs incurred as a result of the defendant’s conduct); *HUD V. George*, 2 Fair Hous.-Fair Lend. ¶ 25,010, 25,166 (HUD A.L.J. Aug. 16, 1991) (discriminatory conduct “caused CIL [organization] to divert some of its resources from the development of group homes for the mentally handicapped to pursuing a legal remedy for Respondent’s unlawful conduct”).

<sup>71</sup> *See Saunders*, 659 F. Supp. at 1060 (“While plaintiff may not be entitled to recover such investigative costs, such costs offer a reasonable guideline for ascertaining the value of plaintiff’s ‘diversion of resources’ element of damage, and such sum is thereby awarded.”).

<sup>72</sup> *See, e.g.*, *City of Chicago v. Matchmaker Real Estate*, No. 88-C9695, 1991 U.S. Dist. LEXIS 4435, at \*11 (N.D. Ill. Apr. 5, 1991) (\$3,000 awarded for investigatory audits, \$5,000 for monitoring; \$6,000 for continued auditing; \$16,500 total compensation for diversion of resources

Although the terms “frustration of purpose,” “frustration of mission,” and “impairment of role”<sup>73</sup> have all been used to describe the type of injury that causes a fair housing organization to divert its resources from one activity to another or to pursue a Fair Housing Act claim, it is clear that a claim for damages under any one of these rubrics should not be successful to the extent that it duplicates a claim for diversion of resources. Damages should not be awarded twice for the same injury.<sup>74</sup> Moreover, the rule in *Havens Realty* teaches that these or similar terms cannot denote a mere abstract injury.<sup>75</sup> For a complainant to recover, the injury must be “actual.” Accordingly, there is no compelling authority for the proposition that damages for “frustration of purpose” or “frustration [\*17] of mission” of a fair housing organization are distinct from damages for injuries that drain or divert the resources of the organization.

### ***B. Intangible Damages***

Actual damages in housing discrimination cases are not limited to tangible economic or out-of-pocket losses, but may also include damages for intangible injuries, including such psychic harm as embarrassment, humiliation, and emotional distress. In recognizing a “dignitary” interest that is subject to damage by a discriminatory act, the United States Supreme Court in *Curtis v. Loether*<sup>76</sup> made it clear that housing discrimination law was intended to redress harm to the person, as well as harm to the victim’s ability to contract for housing. Intangible

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from other purposes and \$16,500 for frustration of purpose); *NAACP v. ITT Community Dev. Corp.*, 399 F. Supp. 366, 371 (D.D.C. 1975) (consent order required defendant to pay \$2,750 for costs incurred by plaintiff’s participation in conciliation negotiations).

<sup>73</sup> *Saunders*, 659 F. Supp. at 1060.

<sup>74</sup> *See, e.g.*, *HUD v. Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009,25,148-49 (HUD A.L.J. Aug. 5, 1991); *George*, 2 Fair Hous.-Fair Lend. (P-H) at 25,167. *Cf. Matchmaker*, 1991 U.S. Dist. LEXIS 4435, at \*9 (magistrate awarded \$16,500 to fair housing organization for diversion of resources to cover costs of investigating case, monitoring defendant’s records, auditing defendant’s sales practices, and conducting training seminars; magistrate then defined “frustration of purpose” in terms of diversion of resources from other purposes, found it reasonable to believe that such diversion “from other purposes must have been in approximately the same amount” as the other resources diverted, and awarded another \$16,500).

<sup>75</sup> *But cf. Davis v. Mansards*, 597 F. Supp. 334, 348 (N.D. Ind. 1984) (award of \$1,000 to nonprofit organization for frustration of goals, as well as \$4,280 for unspecified out-of-pocket expenses). In *Davis*, the court based its “frustration of purpose” award on findings that the lawsuit frustrated one of the organization’s stated goals (enhancing cooperation between the Center and local landlords), while at the same time advancing another goal (promoting equal housing opportunities). Cryptically, the court stated that, “[i]n light of this dual effect, actual damages specifically awarded for frustrating the Center’s mission will be limited to \$1,000.00.” *Id.* at 348. Because the court cited *Havens* in finding that the organization had standing, presumably the award of \$4,280 was for costs incurred in bringing the lawsuit and the award of \$1,000 was for diversion of resources necessary to combat the effects of the defendant’s conduct.

<sup>76</sup> *Curtis v. Loether*, 415 U.S. 189, 195-96 and n.10 (1974).

damages have also been awarded for “loss of civil rights” and for “lost housing opportunity.”<sup>77</sup>

### *I. Damages for Emotional Injuries*

Because emotional injuries are by nature subjective and difficult to quantify, courts have awarded damages for emotional harm without requiring the impossible: proof of the exact dollar value of the injury.<sup>78</sup> Under the Fair Housing Act, humiliation can be inferred from the circumstances, as well as established by testimony,<sup>79</sup> even in the absence of evidence of economic or financial [\*18] loss or medical evidence of mental or emotional impairment.<sup>80</sup> The amount of the award is intended to compensate the complainant for the

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<sup>77</sup> To recover for loss of civil rights or for lost housing opportunity, complainant must describe any injury with specificity and show that claims for damages under such headings are discrete from any damage claim for emotional distress. *See* HUD v. Tucker, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,350 n.23 (HUD A.L.J. Aug. 24, 1992).

<sup>78</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (evidence of injury must support damage award, “although there need be no evidence which assigns an actual dollar value to the injury”); HUD *ex rel.* *Herron v. Blackwell*, 908 F.2d 864,872-73 (11th Cir. 1990) (“that the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered”); *Phillips v. Hunter Trails Community Ass’n*, 685 F.2d 184, 190 (7th Cir. 1982) (“Injuries [for mental and emotional distress] are by their nature difficult to prove. A reviewing court will not demand more precision than is feasible.”); *Lauden v. Loos*, 694 F. Supp. 253, 255 (E.D. Mich. 1988) (amount of damages “lies in the sound discretion of the court and is essentially intuitive”); *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344, 353 (W.D. Tenn. 1982) (“it is difficult to measure emotional and mental distress in monetary terms”); *Hughes v. Dyer*, 378 F. Supp. 1305, 1310 (W.D. Mo. 1974) (even if such damages are incapable of exact measurement, complainant is still entitled to recover).

<sup>79</sup> *See, e.g.*, *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992); *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir.1977); *Bradley v. Carydale*, 730 F. Supp. 709, 726 (E.D. Va. 1989); *Harrison v. Otto G. Heinzerth Mortgage Co.*, 430 F. Supp. 893, 897 (N.D. Ohio 1977); HUD v. *Murphy*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,002, 25,055 (HUD A.L.J. July 13, 1990); HUD v. *Blackwell*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,001, 25,011-13 (HUD A.L.J. Dec. 21, 1989), *aff’d*, 908 F.2d 864, 872-73 (11th Cir. 1990). *But cf.* *Douglas v. Metro Rental Serv.*, 827 F.2d 252 (7th Cir. 1987) (reduction of award based solely on victim’s testimony).

<sup>80</sup> *See, e.g.*, *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (damages for emotional distress may be established by testimony or inferred from the circumstances); *Blackwell*, 908 F.2d at 874 (testimony of victims support award of damages for emotional distress); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 236 (8th Cir. 1976) (damages for emotional distress may be awarded, even though any award for out-of-pocket damages is limited); *Seaton v. Sky Realty*, 491 F.2d 634,636 (7th Cir. 1974) (unnecessary to provide “evidence of economic or financial loss, or medical evidence of mental or emotional impairment, for an award of compensatory damages arising from humiliation); *Lauden*, 694 F. Supp. 253, 255 (complainant’s testimony of humiliation and embarrassment support award of damages); *Lamb v. Sallee*, 417 F. Supp. 282, 287 (E.D. Ky. 1976) (damages for humiliation and emotional and mental anguish based on testimony and inferences from circumstances).

damage inflicted by the discrimination. As in all civil cases, the damage award should make the victim whole.<sup>81</sup>

Judges have wide discretion in determining what amount of money will make a complainant whole.<sup>82</sup> This does not mean, however, that damage awards for intangible injuries are necessarily grounded on unsubstantiated conclusions or the whims and biases of the fact-finder. Every decision is extremely fact-specific. Past damage awards under the Fair Housing Act have influenced adjudicators, but those precedents are not always a helpful guide because they vary widely depending on the circumstances, ranging in the administrative forum from \$150 to one complainant in *HUD v. Murphy*<sup>83</sup> to a total of \$100,000 to a couple in *HUD v. Tucker*,<sup>84</sup> or to more than \$400,000 in the judicial forum.<sup>85</sup> While judges view damage awards in other housing discrimination cases as benchmarks, their reference merely to the size of those awards does not provide a reliable standard of measurement any more than the appraisal of a painting of one size is a valid standard by which to appraise an [\*19] other painting of the same size. Because the Administrative Procedure Act requires administrative adjudicators to explain and justify damage awards in written opinions, administrative determinations of damage awards must rest firmly on factors demonstrated by the evidence of record.

Without doubt, the most important factor in determining a damage award for intangible injuries is the testimony of the victim. If the victim of housing discrimination is not completely credible, there is little likelihood that the trier of fact will award substantial damages for emotional distress or other subjective complaints. Moreover, it is not enough for an attorney to ask the complainant: “How did you feel when you were discriminated against?”; elicit the response: “I felt embarrassed and humiliated”; and then announce: “Your witness!”<sup>86</sup> The

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<sup>81</sup> See, e.g., *Blackwell*, 2 Fair Hous.-Fair Lend. (P-H) at 25,013 (amount of damages awarded should compensate for the injury suffered so as to make the injured party whole, and should not provide the injured party with a windfall). See also *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982) (district court instructed to award plaintiffs an amount that would fairly compensate them for emotional distress); *Rogers v. Loether*, 467 F.2d 1110, 1122 (7th Cir. 1972) (“The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses - tangible and intangible - which plaintiff has suffered by reason of a breach of duty by defendant.”), *aff’d sub nom.*, *Curtis v. Loether*, 415 U.S. 189 (1974).

<sup>82</sup> See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 25.3(2)(c) (1990).

<sup>83</sup> *Murphy*, 2 Fair Hous.-Fair Lend. (P-H) at 25,057.

<sup>84</sup> *HUD v. Tucker*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,351 (HUD A.L.J. Aug. 24, 1992).

<sup>85</sup> *Timus v. William J. Davis, Inc.*, No. 91-0882 (D.D.C. July 13, 1992) (jury also awarded \$2 million punitive damages). See generally, SCHWEMM, *supra* note 82, § 25.3(2)(b) & nn.84 & 85.

<sup>86</sup> When evidence of emotional distress amounts to no more than a few lines of testimony from the victim, counsel appear to have focused their energies primarily on liability issues to the neglect of remedy issues, which are often the primary, if not exclusive, reason the case progressed to trial. Full and effective development of damage evidence requires complainant’s counsel to have a thorough knowledge of the theory of the case, and familiarity with all facts known to the client, as

strongest cases for the complainant utilize details and incidents from the victim's life to paint a detailed, fully-shaded, and believable picture of the injuries caused by the discrimination. The picture should show the impact of the respondent's discriminatory conduct on the victim's activities of daily living, such as eating, sleeping, playing, and working.<sup>87</sup>

When evidence is adduced to contrast the complainant's physical, mental, and emotional state before and after the act of discrimination, the effects of discrimination may be demonstrated through any changes in the victim's relationships with family members, friends, and co-workers. The general emotional state of an individual may be described by identifying points on a continuum between, for example, happiness and sadness, activity and lethargy, confidence and insecurity, and self-esteem and self-depreciation.<sup>88</sup> An individual may at one time manifest an "eat, drink and be merry" enjoyment of life; and, at another, become anhedonic, incapable of [\*20] enjoying life.<sup>89</sup> A victim may exhibit anger, frustration, resentment, humiliation, or shame. Depression may be evidenced by hostility, irritability, or indecision. Mortification in the presence of others and fear of recurrence of the discriminatory conduct may lead the victim to withdraw from contact or diminish emotional involvement with family, friends, or colleagues. Other physical symptoms of mental distress may include indigestion, ulcers, nervousness, loss of appetite or unusual weight gain, loss of sleep or sleep disturbance, impotence, nausea, and intensified allergic reactions.<sup>90</sup>

The credibility of the victim's emotional distress testimony will be enhanced by the credible testimony of any individuals to whom the victim communicated contemporaneous feelings of mental distress. Corroboration witnesses can demonstrate not only the nature and extent of the victim's injuries, but also the impact of the victim's injuries on other people in the victim's life, such as family, friends, and co-workers. Although the victim cannot recover for injuries suffered by third parties<sup>91</sup> caught in the fall-out from respondent's

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well as everything contained in the investigatory file and in the possession of the opposition that bears on the issue of damages. Similarly, full preparation requires that respondent's counsel know, before the hearing begins, the complainant's theory of damages, the exact amount of the demand for damages, the damage evidence the complainant intends to introduce, and the shape of any necessary rebuttal case.

<sup>87</sup> See, e.g., HUD v. Kelly, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,362-63 (HUD A.L.J. Aug. 26, 1992); and HUD v. Tucker, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,350-51 (HUD A.L.J. Aug. 24, 1992).

<sup>88</sup> See generally, KENTUCKY COMMISSION ON HUMAN RIGHTS, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES II, § 2 (Staff Report 82-8, 1982).

<sup>89</sup> See, e.g., HUD v. Tucker, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,351 (HUD A.L.J. Aug. 24, 1992).

<sup>90</sup> For a checklist of elements of damage that may be used to establish mental distress in discrimination actions compiled from decided cases, various treatises, and the testimony of expert witnesses, see *id.* at 40-42.

<sup>91</sup> Emotional distress damages have been awarded directly to third parties, such as spouses of discrimination victims. See, e.g., Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977) (\$500 awarded to black husband; "at least nominal damages" must be awarded to white wife); Lamb v. Sallee, 417

conduct, the fact that the victim's injuries affected other people helps to prove the existence and severity of the victim's injuries.<sup>92</sup> Moreover, corroboration witnesses can supply descriptive evidence for victims who are unable to articulate their own feelings. Finally, corroboration witnesses tend to dispel the unavoidably self-serving aura surrounding victim testimony.

[\*21] Testimony regarding emotional damages is sometimes discounted or disregarded because the evidence fails to demonstrate the causal link between the respondent's conduct and the victim's distress.<sup>93</sup> Expert testimony, while not always necessary, is valuable in many cases to establish this causation convincingly.<sup>94</sup> Of course, in cases where intervention by health-care

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F. Supp 282 (E.D. Ky. 1976) (both spouses of interracial marriage awarded damages arising from eviction when landlord discovered wife was black).

<sup>92</sup> See, e.g., *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (defendant threatened sister of plaintiff and made harassing telephone calls to family members as well as to plaintiff); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982) (plaintiffs' embarrassment and humiliation evidenced by strained relationships at work and among acquaintances); *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 104 n.3 (3d Cir. 1981) (loss of consortium); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977) (district court ordered to consider any distress occasioned by mother's inability to enroll child in school until family moved into house, and by her moving children into a house that had been vandalized); *Davis v. Mansards*, 597 F. Supp. 334, 347-48 (N.D. Ind. 1984) (wife-tester's relationship with husband and family hampered; husband-tester suffered through wife's depression); *Tucker*, 2 Fair Hous.-Fair Lend. (PH) ¶ 25,350 (complainants compensated individually for damage to their relationship as a couple); *HUD v. Morgan*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, 25,140 n.27 (HUD A.L.J. July 25, 1991) (complainant could be compensated to the extent that his wife's suffering affected him).

<sup>93</sup> See, e.g., *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974) (complainant had a prior history of ulcers, and admitted to eating pickles and sauerkraut shortly before onset of pain); *HUD v. Rollhaus*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,019, 25,250 (HUD A.L.J. Dec. 9, 1991) (no medical evidence showing that stress was related to the discrimination); *HUD v. Dedham Hous. Auth.*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,015, 25,214 (HUD A.L.J. Nov. 15, 1991) (respondent's refusal to assign handicapped tenant a reserved parking space not shown to have caused complainant's fall and subsequent hospitalization), *recons'd on other grounds*, ¶ 25,023 (Feb. 4, 1992); *HUD v. Williams*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,007, 25,126 (HUD A.L.J. Mar. 22, 1991) (respondent's actions found to have caused complainant AIDS sufferer emotional distress, but not to have been the sole cause of weight loss, nervousness, and other symptoms of the disease). Cf. *HUD v. Carter*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,029, 25,321 (HUD A.L.J. May 1, 1992) (while other factors contributed, respondent's actions were "undoubtedly a major cause of Complainant's stress and anxiety").

<sup>94</sup> See, e.g., *HUD v. Edelstein*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,018, 25,241 (HUD A.L.J. Dec. 9, 1991) (in absence of testimony from daughter, teacher, or other expert, overly speculative to conclude that respondent's conduct caused change in daughter's behavior when she moved to a different school in a different school district, and by extension, caused the reported damages claimed by complainant as a consequence of her daughter's behavior). See also *HUD v. Cabusora*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,026, 25,291 (HUD A.L.J. Mar. 22, 1992) (expert testimony lacking to establish cause of complainant's headaches, stomach pains, and other physical ailments requiring hospitalization and treatment); *Dedham Hous. Auth.*, 2 Fair Hous.-Fair Lend. (P-H) at 25,214 ("Expert testimony is necessary to prove the cause of Complainant's physical condition, a wholly scientific matter that is far removed from the usual and ordinary experience of the average man.").

professionals became necessary and medication was prescribed, complainant's counsel would want to introduce the relevant facts into the record. This kind of evidence may go a long way towards dispelling any doubts the judge has about the severity of the claimed injuries.<sup>95</sup>

Housing discriminators must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable or by an ordinary person.<sup>96</sup> Put otherwise, [\*22] judges must take into consideration the susceptibility of the victim to injury. This rule can work either to the respondent's financial advantage or disadvantage.<sup>97</sup> If the complainant's emotional reaction to the discrimination was more extreme than might be expected from the ordinary person, complainant's counsel will attempt to prove pre-existing conditions that made the complainant more susceptible to injury. Conversely, defense counsel may attempt to reduce damages by proving that the complainant has an imperturbable personality and therefore, is incapable of experiencing significant emotional distress.

Although the focus in determining an appropriate damage award for intangible injuries must be on the complainant's reaction to the discrimination, the conduct of the discriminator is often relevant to that determination.<sup>98</sup> In many

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<sup>95</sup> *Rollhaus*, 2 Fair Hous.-Fair Lend. (P-H) at 25,250 (complainant's breakdown, hospitalization, and confinement in a "stress center" occurred more than a year after the discrimination, and there "was no medical evidence showing that the stress was related to" the discrimination).

<sup>96</sup> *Williams v. Flannery*, No. 89-CV-73, 1989 U.S. Dist. LEXIS 14589, at \*17 (N.D.N.Y. Dec. 7, 1989) (plaintiff's troubled past has "some bearing on the proper assessment of the harm suffered by him."); *Stewart v. Crosson*, 1 Fair Hous.-Fair Lend. (P-H) ¶ 15,596 (D. Tenn. June 3, 1988) (plaintiff was poor, powerless and suffered deeply); *HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,362 (HUD A.L.J. Aug. 26, 1992) (damage award gave consideration to fact that complainant was sensitized by past racial discrimination); *HUD v. Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009, 25,152 (HUD A.L.J. Aug. 5, 1991) (damage award gave consideration to fact that complainant was eight and one-half months pregnant at time of discriminatory act); *HUD v. Jerrard*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,005, 25,091 (HUD A.L.J. Sept. 28, 1990) (complainant's "pre-existing emotional problem" taken into consideration in determining damages for emotional distress).

<sup>97</sup> *Steele v. Title Realty*, 478 F.2d 380, 384 (10th Cir. 1973) (previous discrimination relevant to determining amount of compensation for emotional distress); *Davis v. Mansards*, 597 F. Supp. 334, 347-48 (N.D. Ind. 1984) (wife-tester, "deeply affected" and "decimated emotionally," was awarded \$5,000, while husband-tester who was "much less profoundly affected," and displayed a "degree of cynicism," was awarded \$2,500); *Harrison v. Otto G. Heinzerth Mortgage Co.*, 430 F. Supp. 893, 897 (N.D. Ohio 1977) (complainant awarded \$5000 in compensatory damages because "upset and troubled" by defendant's employee's actions); *Gray v. Serruto Builders*, 265 A.2d 404, 416 (N.J. Super. Ct. Ch. Div. 1970) (plaintiff awarded only \$500 because "he is a man not likely to be bowled over by a single set-back"); *Zamantakis v. Commonwealth Human Relations Comm'n*, 308 A.2d 612, 616 (Pa. Commw. Ct. 1973) (no award for mental damages because the plaintiff did not place his feelings on the record).

<sup>98</sup> While emotional injury is compensable in the absence of egregious conduct, the discriminator's temperate conduct may be considered a mitigating circumstance. See *Littlefield v. McGuffey*, 954 F.2d 1337, 1347-49 (7th Cir. 1992) (defendant's actions support punitive and compensatory damages awarded); *Steele*, 478 F.2d at 384 (defendant's discrimination which was done in a

cases, there will be a rough equivalence between the egregiousness of the respondent's behavior and the seriousness of the damage inflicted by that behavior. A judge will ascertain whether, at one extreme, respondent's conduct was malicious, blatant, public, and intended to injure,<sup>99</sup> or at the [\*23] other extreme, polite, circumspect, and without rancor.<sup>100</sup> Similarly, a judge will analyze the complainant's response to that behavior to determine whether it was proportionate to the stimulus. If the complainant's reaction to the respondent's conduct seems inordinate, but counsel has not shown that the complainant was especially vulnerable to extreme emotional distress, then the complainant's credibility is put in doubt. On the other hand, if the complainant's reaction to allegedly egregious conduct appears minimal, but the complainant does not otherwise appear to be thick-skinned, then the egregiousness of respondent's conduct is put at issue. By analyzing the complainant's reaction to the discriminatory conduct, the court places the complainant's behavior in perspective, and promotes an objective assessment of intangible damage.

The egregiousness of the respondent's behavior is one of several factors considered by an administrative law judge in determining an award for intangible injuries. However, it cannot by itself fix the size of such an award.<sup>101</sup> If it did, then an emotionally stolid complainant could reap a windfall award from a

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courteous manner and not vindictive or abusive may be considered as a mitigating circumstance); *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344, 353 (W.D. Tenn. 1982) (in awarding compensatory damages for humiliation and mental anguish, court noted that "plaintiffs were victims of intentional racial discrimination"); *Hughes v. Dyer*, 378 F. Supp. 1305, 1310 (W.D. Mo. 1974) (plaintiff's right to recovery exists even if the discrimination was "perpetrated in a courteous manner and not vindictive or abusive); *but see Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 191 (7th Cir. 1982) (defendant's egregious behavior should be reflected in the punitive award but not in the award for actual damages).

<sup>99</sup> *Littlefield*, 954 F.2d at 1341 (defendant made death threats, harassed plaintiff at work, frightened plaintiff's sister, and left a menacing note at plaintiff's residence); *Seaton v. Sky Realty*, 491 F.2d 634, 636 (7th Cir. 1974) (humiliation in the presence of the victim's children); *HUD v. Tucker*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, 25,351 (HUD A.L.J. Aug. 24, 1992) (discrimination was public, blatant, and egregious).

<sup>100</sup> *See, e.g., Serruto Builders*, 265 A.2d at 415 (finding that public and rude acts of discrimination cause more severe humiliation and anguish than polite or entirely private forms of discrimination); *Kelly*, 2 Fair Hous.-Fair Lend. (P-H) at ¶ 25,362 (respondent's claimed their "one child per bedroom" policy was formulated merely to comply with occupancy standards in city building code). But query whether subtle acts of discrimination can cause even greater emotional distress than overt discrimination when the hidden motive is finally exposed and victims discover they have been deceived as well as discriminated against?

<sup>101</sup> Although egregiousness of the respondent's conduct governs the assessment of punitive damages by a district court, it is not the sole determinant of civil penalties assessed by an administrative law judge. Determining the size of an appropriate civil penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (4) respondent's financial resources; and (5) the degree of respondent's culpability. *See H.R. REP. NO. 711, 100th Cong., 2d Sess., at 37 (1988).*

respondent whose conduct, while flagrant, caused little actual harm.<sup>102</sup> On the other [\*24] hand, the so-called “eggshell” complainant, who is extremely vulnerable, would not be fully compensated for grievous injuries caused by subtle or insidious conduct.

## 2. *Inconvenience*

At this point in the development of the law of damages under the Fair Housing Act, the term “inconvenience” has been used to lump a variety of damage elements into a catchall. Complainants have sought both tangible and intangible damages under the heading of “inconvenience,” often duplicating elements of claims made in other categories. One administrative decision treated “inconvenience” as a tangible element of damages by compensating a discrimination victim for the costs of additional household moves and additional travel associated with alternative housing. In contrast, some decisions have deemed “inconvenience” a separate category of intangible injury consisting of a variety of elements; others have treated it merely as another description of strictly emotional damage.<sup>103</sup> In *Baumgardner v. HUD ex rel. Holley*,<sup>104</sup> the Sixth Circuit

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<sup>102</sup> See *Baumgardner v. HUD ex rel. Holley*, 960 F.2d 572, 581 (6th Cir. 1992) (court affirmed administrative law judge award of \$500 for emotional distress, noting that complainant “did not appear to the A.L.J. to be a man of vulnerable constitution who could be easily driven to distress. He felt hurt and angry, but it was kind of easy to get over.”); *HUD v. Murphy*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,002, 25,056 (HUD A.L.J. July 13, 1990) (although complainants felt “bad,” their testimony did not establish that “the feelings were sufficiently damaging to justify anything but the award of a nominal sum”; complainants awarded \$800 for emotional distress and loss of civil rights); *HUD v. Blackwell*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,001, 25,013 (HUD A.L.J. Dec. 21, 1989) (\$10,000 award supported by complainants’ testimony and co-workers’ testimony that complainants were very private people; soft spoken and reserved manner of testifying lent credence to how deeply they were affected by the prominent publicity and media attention). See also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII case).

<sup>103</sup> *HUD v. Wagner*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,032, 25, 337 n.13 (HUD A.L.J. June 22, 1992) (separate award denied because inconvenience is included in emotional element of damages); *HUD v. Frisbie*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,030, 25,327 (HUD A.L.J. May 6, 1992) (\$500 for inconvenience of separation from son while living with friends, and later move to alternative housing); *HUD v. TEMS Ass’n*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,028, 25,311-12 (HUD A.L.J. Apr. 9, 1992) (award for emotional distress included inconvenience of re-renting house because of association’s discriminatory policies); *HUD v. Leiner*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,021, 25,268-69 (HUD A.L.J. Jan. 3, 1992) (complainant awarded \$1,500 for inconvenience of extended search for alternative housing, interim living arrangements with “nerve-racking” relative, transportation costs, and time and effort for prosecution of case); *HUD v. Jeffre*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,020, 25,257 (HUD A.L.J. Dec. 18, 1991) (complainant awarded \$500 for inconvenience of remaining in uncomfortable living conditions, searching for suitable housing, and participating in litigation of claim); *HUD v. Edelstein*, 2 Fair Hous.-Fair Lend. ¶ 25,018, 25,241-42 (HUD A.L.J. Dec. 9, 1991) (award of \$1,000 included damages for complainant’s inconvenience of prosecuting case and searching for alternate housing, in addition to damage for emotional distress); *HUD v. Holiday Manor Estates Club*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,016, 25,231 (HUD A.L.J. Nov. 26, 1991) (complainant awarded \$750 for inconvenience: \$300 for each of two moves and \$150 for mileage to son’s school), *recons’d on*

[\*25] Court of Appeals considered “inconvenience” to be an intangible injury and questioned whether separate claims should lie for both “inconvenience” and “emotional distress” damages.<sup>105</sup>

To date, the decisions suggest that none of the litigants in any of the cases has articulated a rationale for a distinct category of damages under the heading “inconvenience.” If inconvenience is to be considered a tangible element of damages, it will have to be distinguished from other tangible opportunity costs in order to avoid a duplicative claim. For example, if a complainant is constrained to acquire alternative housing that increases commuting time and expenses, the complainant cannot recover separately for both increased commuting time and expense, as well as for “inconvenience,” unless “inconvenience” is defined strictly in terms of an intangible, emotional injury. Similarly, if as a part of the claim for emotional distress, a complainant seeks compensation for the intangible emotional toll of a longer commute, then an “inconvenience” damage claim should address only the tangible elements of the injury resulting from the longer commute.

### 3. *Lost Housing Opportunity*

Complainants in several administrative cases have sought damages for what has been styled as “lost housing opportunity.” The nature of the claim has varied from case to case, and most have been unsuccessful for want of proof.<sup>106</sup>

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*other grounds* ¶ 25,025 (Feb. 21, 1992), *aff’d on other grounds* ¶ 25,027 (HUD Office of the Secretary Mar. 23, 1992); HUD v. Dedham Hous. Auth., 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,015, 25,216 (HUD A.L.J. Nov. 15, 1991) (handicapped tenant awarded \$500 for inconvenience of having to contact State Office of Handicapped continually for assistance in voiding parking tickets caused by respondent’s repeated refusal to reserve him a parking space); HUD v. Denton, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,014, 25,205 (HUD A.L.J. Nov. 12, 1991) (complainants awarded \$3,000 for inconvenience of having to move, giving up comfort and security of former residence, and experiencing aggravation of finding new apartment suitable to their particular needs), *recons’d on other grounds*, ¶ 25,024 (Feb. 7, 1992); HUD v. Properties Unlimited, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009, 25,151-53 (HUD A.L.J. Aug. 9, 1991) (complainant awarded \$2,500 for emotional distress as well as inconvenience of confronting housing problems when she was eight and one-half months pregnant, moving unnecessarily, living in uncomfortable quarters, and prosecuting her claim, which entailed extensive public transportation with a small child); HUD v. Morgan, 2 Fair Hous.-Fair Lend. ¶ 25,008, 25,140 (HUD A.L.J. July 25, 1991) (complainants’ preclusion from living in mobile home park in home of their choice found to be an inconvenience that affected quality of life); Blackwell, 2 Fair Hous.-Fair Lend. (P-H) at 25,010 (award of \$5 a day for 164 days for inconvenience of not having a second car made necessary by location of alternate housing).

<sup>104</sup> *Baumgardner*, 960 F.2d 572.

<sup>105</sup> *Id.* at 581 n.8.

<sup>106</sup> *Leiner*, 2 Fair Hous.-Fair Lend. (P-H) at 25,268 (no evidence of any missed housing opportunities or of inferior alternative housing); *Edelstein*, 2 Fair Hous.-Fair Lend. (P-H) at 25,242 (no evidence of any discrete category of damage to justify award of “lost housing opportunity”); *Dedham Hous. Auth.*, 2 Fair Hous.-Fair Lend. (P-H) at 25,216 (award denied on lack of evidence of lost housing opportunity); *Denton*, 2 Fair Hous.-Fair Lend. (P-H) at 25,205

Although there is no consensus in the decisions as to precisely what a “lost housing opportunity” is, one thing is clear: it cannot properly be defined as damage resulting from deprivation of the right to choose housing free of [\*26] discrimination, per se. That definition merely describes the abstract civil right conferred by the Fair Housing Act as a whole.<sup>107</sup> In other words, that definition summarizes the cause of action created by the Fair Housing Act; it does not define a distinct category of damage separate from other categories of damage.

This is not to suggest, however, that a discrete category of damage cannot be justified under the heading of “lost housing opportunity.” On the contrary, potential elements of this category could include a variety of intangible factors that are not reflected in the market price of denied housing or otherwise addressed in the prayer for damages. If the denied housing had a location, amenities, aesthetic properties, or other characteristics of particular or uncommon value to the complainant, the loss of such features would be more injurious to the complainant than to the average homeseeker.<sup>108</sup> For example, the proximity of housing to elderly parents may be of prime importance to a complainant, but that factor would not be reflected in the market price of the property. In such a case, if the complainant’s recovery were limited to the difference between the costs of the denied housing and the alternative housing (a calculation based on market prices), the fundamental purpose of the litigation would be frustrated because the award would not make the complainant whole. Similarly, the complainant should recover damages for having to live in inferior housing if the evidence shows that housing comparable to the denied housing was unavailable. Of course, as in every category of potential damages under the Fair Housing Act, a “lost housing opportunity” claim must not duplicate the elements of other damages requested, such as those claimed for emotional distress injuries.

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n.24 (award denied because nature of relief requested not made clear); HUD v. George, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,010, 25,167 (HUD A.L.J. Aug. 16, 1991) (no distinct and palpable injury shown); *Morgan*, 2 Fair Hous.-Fair Lend. (P-H) at 25,139 (no evidence of loss of housing opportunity).

<sup>107</sup> See discussion *infra* section 4, *Loss of Civil Rights*.

<sup>108</sup> HUD v. Kelly, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992) (\$3,500 awarded for emotional distress and loss of housing opportunity caused by denial of home located near parents, friends, direct bus route to work, drug or convenience store, library, and park); HUD v. Wagner, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,032, 25,337-38 (HUD A.L.J. June 22, 1992) (\$350 awarded for deprivation of features of denied housing particularly valued by complainant); HUD v. Holiday Manor Estates Club, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,016, 25,232 (HUD A.L.J. Nov. 26, 1991) (\$500 awarded for lost housing opportunity because complainant was denied home located near her parents that would have allowed her to escape abusive husband), *recons’d on other grounds* ¶ 25,025 (Feb. 21, 1992), *aff’d on other grounds* ¶ 25,027 (HUD Office of the Secretary Mar. 23, 1992).

#### 4. *Loss of Civil Rights*

In many of the early Fair Housing Act cases tried administratively, the complainant requested more than nominal damages for “loss of civil rights,” in addition to compensation for other types of injury. Support could be found for those requests in a line of cases [\*27] that presumed damage from the denial of a constitutional right without requiring evidence of pecuniary loss or emotional distress.<sup>109</sup> However, it is doubtful whether more than a nominal award for loss of civil rights in a housing discrimination case would survive scrutiny by the United States Supreme Court. In the 1978 case of *Cary v. Phipus*,<sup>110</sup> an action under 42 U.S.C. section 1983 against school officials where students were found to have been suspended without procedural due process, the Supreme Court held that because the right to procedural due process is “absolute,” its denial is actionable for nominal damages without proof of actual injury. The Court recognized that by vindicating deprivations of such “absolute” rights not shown to have caused actual injury through the award of nominal sums of money, “the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury . . . .”<sup>111</sup> Eight years later in *Memphis Community School District v. Stachura*,<sup>112</sup> another case brought under 42 U.S.C. section 1983 for, *inter alia*, an alleged violation of First Amendment rights, the Supreme Court specifically held that where the basic statutory purpose of awarding damages is to compensate persons for injuries caused by the deprivation of constitutional rights, in the absence of actual damages, only nominal damages may be awarded for the vindication of a lost civil right. The Court ruled that a trier of fact may not award damages based on “subjective perception of the importance of constitutional rights as an abstract matter.”<sup>113</sup> The Court noted that the jury could award both compensatory and punitive damages to the plaintiff, but that damages based on the abstract value or importance of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution:

History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections. Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular

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<sup>109</sup> *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919); *see also* *Hodge v. Seiler*, 558 F.2d 284, 287-88 (5th Cir. 1977) (wife should be awarded punitive damages since husband was); *Bradley v. John M. Brabham Agency*, 463 F. Supp. 27, 32 (D.S.C. 1978) (plaintiffs awarded \$2,000 for emotional distress and \$5,000 for loss of civil rights).

<sup>110</sup> *Cary v. Phipus*, 435 U.S. 247 (1978).

<sup>111</sup> *Id.* at 266.

<sup>112</sup> 477 U.S. 299 (1986).

<sup>113</sup> *Id.* at 308. *See generally*, SCHWEMM, *supra* note 82, § 25.3(2)(b).

defendants . . . Such damage would be too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages . . .<sup>114</sup>

[\*28] Relying heavily on *Stachura*, the Sixth Circuit Court of Appeals in *Baumgardner v. HUD ex rel. Holley*<sup>115</sup> set aside a \$2,500 award by an administrative law judge for loss of civil rights. The court held that the award was “an unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case.”<sup>116</sup> Since the *Baumgardner* decision was handed down, no discrimination charge has requested damages for “loss of civil rights.”

### Conclusion

The 1988 amendments to the Fair Housing Act extended protection from housing discrimination to two new classes of persons, and conferred upon administrative law judges the authority to adjudicate individual complaints of housing discrimination. Because the administrative adjudicatory process requires administrative law judges to issue written opinions to support their decisions, administrative decisions have been making significant contributions to the development of housing discrimination law. This is particularly true for damage issues, which before 1989 received relatively little explication in the reported decisions. Nevertheless, fundamental issues in the law of damages under the Fair Housing Act remain unresolved. As the law develops, separating objective from subjective elements of damage, and speculative from substantive claims of damage should become easier for both the practitioner and the adjudicator.

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<sup>114</sup> *Stachura*, 477 U.S. at 310.

<sup>115</sup> 960 F.2d 572, 583 (6th Cir. 1992). The *Baumgardner* court also concluded that the Government’s failures to observe statutory procedures during the investigation of the case, while not a denial of due process, nevertheless had “an adverse effect with regard to ascertaining fair and reasonable damages . . .” 960 F.2d at 579. The exact import of that conclusion is unclear, because the court’s discussion appears to confuse civil penalties, which are payable only to the Government, with punitive damages, which are awarded only to plaintiffs. The decision correctly states that “42 U.S.C. § 3613 authorizes ‘actual and punitive’ damages as well as injunctive relief.” 960 F.2d at 580. But section 3613 does not apply to administrative proceedings in which punitive damages may not be awarded. *Cf.* 42 U.S.C. § 3612. The decision reveals similar confusion in a subsection entitled “Civil Penalty—Punitive Damages” where the court concludes “that an award in excess of the allowed compensatory damages of \$1500 for a civil penalty would be excessive, unjust, and improper. We, therefore, adjust the *civil penalty damage* award to \$1500. *Total damages*, therefore, are determined to be \$3000.” 960 F.2d at 583 (Emphasis added). Although the text of the decision combines the civil penalty with the compensatory award and refers to the combination as “damages,” the court ordered the respondent to pay the complainant only \$1,500, and to pay HUD the remaining \$1,500. Accordingly, despite the decision’s apparent confusion of civil penalties with punitive damages, we interpret the decision to hold that the Government’s procedural irregularities may affect the amount of a penalty payable to the Government, but not the amount of damages payable to a complainant. *See HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,363 n.26 (HUD A.L.J. Aug. 26, 1992).

<sup>116</sup> *Id.*