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The Second Circuit Holds That an Anti-Discrimination Provision of the Fair Housing Act Applies to Human Models in Advertisements

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Recent Cases

The Second Circuit Holds That An Anti-Discrimination Provision Of The Fair Housing Act Applies to Human Models in Advertisements

In ***Ragin v. New York Times,*** 923 F.2d 995 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit held that section 3604(c) of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1988), which prohibited publication of advertisements suggesting racial preference, applied to human models in real estate advertisements published in newspapers. The court also held that application of section 3604(c) of the Fair Housing Act to newspapers did not violate the first amendment.

Background

Luther M. Ragin, Jr. ("Ragin") and other individuals were black persons who sought housing in the New York metropolitan area. The Open Housing Center, Inc. ("Open Housing"), an equal housing organization, joined Ragin and the other individuals in a suit against the New York Times Co. ("the Times"), publisher of *The New York Times.* Ragin and Open Housing asserted that real estate advertisements in the Sunday editions of *The New York Times* violated the Fair Housing Act, 42 U.S.C. §§ 3604(a) and (c) (1988), the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1988), the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1988), and the thirteenth amendment.

The complaint stated that during the twenty year period since the Act was passed, the Times published advertisements containing thousands of human models, virtually none of whom were black. Furthermore, while the white human models depicted potential homeowners and tenants, the few black models in the advertisements usually represented maintenance workers, small children, or cartoon characters.

In addition, Ragin and Open Housing claimed that the Times published advertisements targeted to certain racial groups which indicated a preference on the basis of race. Ragin and Open Housing stated that the Times incorporated all-white models in advertisements directed to white communities. Similarly, the few advertisements that depicted black human models as potential homeowners or tenants were for real estate located in predominantly black communities. Ragin and Open Housing sought declaratory judgment, injunctive relief, and compensatory and punitive damages.

The Times moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The district court partially granted the motion and dismissed the claims based on the thirteenth amendment, sections 1981 and 1982 of the Civil Rights Act, and section 3604(a) of the Fair Housing Act.

The district court, however, denied the motion for the claim based upon section 3604(c) of the Fair Housing Act. The lower court concluded: (1) proof at trial of the alleged advertising patterns would adequately support a finding that the Times violated the Fair Housing Act, (2) the first amendment did not protect illegal commercial speech, (3) requiring the press to monitor advertisements would not impose an unconstitutional burden, and (4) the statute provided constitutionally adequate notice of the prohibited conduct. The Times appealed the decision to the United States Court of Appeals for the Second Circuit.

The Appellate Court's Opinion
Statutory Issues

The Second Circuit first addressed the arguments of the Times under section 3604(c) of the Fair Housing Act. Section 3604(c) provides that it is unlawful to publish real estate advertisements which indicate any racial preference. The court found that the statute banned advertisements which suggested racial preference to an ordinary reader. The ordinary reader, the court concluded, was one who was neither overly suspicious nor insensitive. Furthermore, the appellate court maintained that section 3604(c) prohibited racially biased advertisements, regardless of the advertiser's intent. The court recognized that although intent may be necessary for factual determinations, it was irrelevant in determining the advertisement's general message.

The court next defined the situations in which section 3604(c) applied. The court agreed with the Times that liability may not be based on an aggregation of different advertisers. Instead, the court found the Fair Housing Act applied only to individual advertisers. Additionally, section 3604 of the Fair Housing Act encompassed human models in advertisements since the statute did not limit the prohibition to racial messages conveyed by particular means. The court noted that nothing in the statute's text or legislative history showed congressional intent to exclude subtle methods of indicating racial preference.

The appellate court rejected the Times's argument that application of section 3604(c) to newspapers would promote racial quotas. The court noted that the choice of models for advertisements involved very different considerations from those relating to selection of persons for employment opportunities, the usual forum for the quota controversy. The court found that since advertisers arbitrarily determined everything in their "make-up-your-own-world" of advertisements, the inclusion of a black model where necessary was

not an overwhelming burden to the newspaper. Also, because the number of black models used would be entirely discretionary, such requirements would not impose a "quota" on the inclusion of black models. Furthermore, the court held that inclusion of such models would not significantly burden the numerous arbitrary decisions made in every advertisement. Based on the standards above, the court held that the complaint could not be dismissed for failure to state a claim, as the complaint alleged a longstanding pattern in real estate advertisements indicating racial preference.

Constitutional Issues

The Times also argued that section 3604(c) was void for vagueness. The court noted that regardless of whether the vagueness doctrine applied to civil actions, the ordinary reader standard provided constitutionally sufficient notice of the prohibited conduct. Thus, the statute did not fail on the basis of vagueness.

Next, the Times claimed that application of section 3604(c) to newspapers violated the first amendment. The court noted that the first amendment gave less protection to commercial speech than to other constitutionally protected speech. The first amendment did not protect commercial speech relating to illegal activity. The court noted that the Fair Housing Act prohibited advertisements displaying racial preferences. Therefore, the first amendment did not protect advertisements which violated section 3604(c) and promoted illegal activity, discrimination in the sale or rental of real estate.

The court also addressed the supposed unconstitutional burdens imposed on the Times by section 3604(c). First, the court reviewed the Times's argument that application of the Fair Housing Act to newspapers would disrupt the function of the free press. Citing Supreme Court precedent, the court concluded that section 3604(c) would not compromise the unique position of the free press.

The Times also argued that section 3604(c) would unconstitutionally burden newspapers by compelling them to enforce the law under the Fair Housing Act. The appellate court, however, rejected this argument. The court held that the "would-be regulators" were not the publishers, but the offended readers, such as Ragin and Open Housing. These readers bore the burden of proving racial preference in the advertisements. Therefore, the court concluded that section 3604(c) did not place an unconstitutional burden on the publishers.

Lastly, the court dismissed the Times's argument that the publisher was "ill-equipped" to monitor the advertisements. The court noted that advertisements were routinely and extensively reviewed before they were published in the newspaper. Therefore, monitoring the advertisements for racial messages did not impose an unconstitutional burden upon the publisher.

The Second Circuit accordingly affirmed the district court's decision and held that section 3604(c) of the Fair Housing Act applied to human models and that its application to newspapers did not violate the first amendment.

Richard E. Nawracaj

No Strict Liability For Manufacturer of Unavoidably Unsafe Blood-Clotting Agent Which Gave Woman AIDS

In ***Jane Doe and John Doe v. Miles Laboratories, Inc, Cutter Laboratories Div.,*** No. 90-2605 (4th Cir. March 7, 1991)(WESTLAW), the United States Court of Appeals for the Fourth Circuit held that Koyne, a blood-clotting agent manufactured by Miles Laboratories, Inc., Cutter Laboratories Division ("Miles"), was unavoidably unsafe, and therefore, Miles was not subject to strict liability in tort. The court also held that Miles met the applicable standard of care and had no duty to warn of the possible dangers associated with Koyne; therefore, Miles was not negligent.

Background

In September of 1983, after the delivery of her child, Jane Doe ("Mrs. Doe") began suffering from excessive vaginal bleeding. After substantial amounts of blood components failed to control Mrs. Doe's bleeding, her physician administered Koyne, a blood-clotting agent comprised of highly concentrated Factor IX. Factor IX was an essential blood-clotting component derived from thousands of human blood plasma donations and was very effective in stopping uncontrolled bleeding. Mrs. Doe's Koyne was distributed by Miles in January of 1983, which was prior to the availability of an approved test to identify the presence of the human immunodeficiency virus ("HIV"), the virus responsible for the deadly acquired immunodeficiency syndrome ("AIDS"). Mrs. Doe was subsequently diagnosed as having been infected with HIV, and she possessed no AIDS high risk factors that could otherwise account for her infection.

On August 14, 1986, the Does sued Miles in the United States District Court for the District of Maryland based on strict liability and negligence. They asked the court to hold Miles strictly liable based upon a finding that blood and blood products were unreasonably dangerous products. The Does also asserted that Miles was negligent in two ways: (1) by failing to assure adequately the safety of their product, and (2) by failing to warn adequately those who administered the product of the risk that it may transmit AIDS.

The District Court's Decision

In *Doe v. Miles Laboratories, Inc,* 675 F.Supp. 1466 (D. Md. 1987), the district court initially held that Miles was subject to strict liability in tort as a manufacturer of blood or blood products, and denied Miles's motion for summary judgment. However, the district court then reconsidered and certified to the Maryland Court of Appeals the issue of whether a supplier of blood or blood products was subject to strict liability in tort.

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