

3-1-2006

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Recommended Citation

Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases under the Fair Housing Act*, 40 U. Rich. L. Rev. 753 (2006).
Available at: <https://scholarship.richmond.edu/lawreview/vol40/iss3/3>

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BARRIERS TO ACCESSIBLE HOUSING: ENFORCEMENT ISSUES IN “DESIGN AND CONSTRUCTION” CASES UNDER THE FAIR HOUSING ACT

Robert G. Schwemm *

I. INTRODUCTION

In the Fair Housing Amendments Act of 1988 (“FHAA”),¹ Congress added “handicap”² to the bases of discrimination outlawed by the federal Fair Housing Act (“FHA”)³ and also enacted three special provisions to further insure equal housing opportunity for persons with disabilities.⁴ One of these special provisions—§ 3604(f)(3)(C)⁵—mandates that all new multi-family housing be designed and constructed with seven specified accessibility features.⁶

Despite the accessibility requirements of § 3604(f)(3)(C)—and similar requirements in scores of state and local fair housing laws⁷—a great deal of the multi-family housing built since §

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1. Pub. L. No. 100-430, 102 Stat. 1619.

2. *Id.*; see also *infra* note 15 and accompanying text.

3. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89.

4. See *infra* notes 18-20 and accompanying text. Although the FHAA used the term “handicap,” its definition of this word in 42 U.S.C. § 3602(h) is identical to the definition of “disability” in two other principal federal statutes that ban discrimination based on this factor. See 29 U.S.C. § 705(9) (2000); 42 U.S.C. § 12102(2) (2000). Even with respect to the FHAA, the term “disability” is often used instead of “handicap.” See, e.g., *Giebler v. M & B Assocs.*, 343 F.3d 1143, 1146 n.2 (9th Cir. 2003). For these reasons, this article uses the terms “handicap” and “disability” interchangeably and often uses the term “disability” with respect to the FHAA’s coverage of “handicap” discrimination.

5. 42 U.S.C. § 3604(f)(3)(C) (2000).

6. *Id.* For a list of these features, see *infra* text accompanying note 24.

7. The prohibitions of the FHA as amended by the FHAA are mirrored in “substantially equivalent” fair housing laws in some thirty-six states and sixty-four localities. For a list of these states and localities, see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION app. C (2005).

3604(f)(3)(C) became effective has failed to include the features mandated by this provision. While the precise degree of noncompliance with the FHAA's "design and construction" requirements is hard to pin down, it is clearly substantial. Virtually every § 3604(f)(3)(C) testing program has found that the vast majority of multi-family complexes contacted do not comply with the FHAA's accessibility requirements, and other evidence, including studies commissioned by the United States Department of Housing and Urban Development ("HUD"), also confirms the high degree of noncompliance.⁸ Meanwhile, in the years since the FHAA's accessibility requirements have been in effect, hundreds of thousands of new multi-family units have been constructed, and a quarter million more are being built every year.⁹ To the extent that these units do not comply with § 3604(f)(3)(C), they not only amount to discrimination against the tens of millions of Americans with disabilities,¹⁰ but they also stand as lawsuits waiting to happen.

Litigation involving § 3604(f)(3)(C) was slow to develop, but its pace has accelerated in recent years.¹¹ From a substantive perspective, much of this litigation is fairly simple—either a multi-family housing complex has the features mandated by §

8. See *infra* Part III.

9. In the 1992–2001 period, some 3,333,000 units of rental housing were built, slightly over half of which (1,682,000 units) were in structures with five or more units and thus potentially subject to § 3604(f)(3)(C). See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING: 2004, at 40 tbl.A-11 available at <http://www.jchs.harvard.edu/publications/markets/son2004.pdf> (last visited Feb. 22, 2006). In 2002 and 2003, multi-family rental starts amounted to 275,000 and 262,000 units, respectively. See *id.* at 20; see also ROBERT BENNEFIELD & ROBERT BONNETTE, U.S. DEPT OF COMMERCE, STRUCTURAL AND OCCUPANCY CHARACTERISTICS OF HOUSING: 2000, at 1–3 (2003) (noting that over twenty million housing units in the United States in 2000 were in buildings with five or more apartments, although recognizing that many of these were constructed before § 3604(f)(3)(C) became effective), available at <http://www.census.gov/prod/2003pubs/c2kbr-32.pdf> (last visited Feb. 22, 2006).

10. According to the 2000 Census, 49.7 million people in the United States (19.3% of the nation's total civilian noninstitutionalized population aged five or older) had some type of long-lasting condition or disability. See JUDITH WALDROP & SHARON M. STERN, U.S. DEPT OF COMMERCE, DISABILITY STATUS: 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-17.pdf> (last visited Feb. 22, 2006). The subset of persons with mobility impairments, which is the particular concern of § 3604(f)(3)(C), included many of the 21.2 million persons who had "a condition limiting basic physical activities, such as walking, climbing stairs, reaching, lifting, or carrying," and the 6.8 million persons who had "a physical, mental, or emotional condition causing difficulty in dressing, bathing, or getting around inside the home." See *id.*

11. See *infra* text accompanying notes 84–89. For examples of specific cases, see *infra* notes 83 and 136–39.

3604(f)(3)(C) or it does not.¹² The real difficulty in these cases has turned out to be three other issues that may be raised by builders and owners of noncompliant dwellings. These issues are:

- (1) Who are proper defendants in an action based on a building's noncompliance with § 3604(f)(3)(C)?
- (2) Who are proper plaintiffs in such an action? and,
- (3) When does the statute of limitations expire on such an action?

The courts have occasionally ruled for defendants on the basis of these issues, particularly the statute-of-limitations defense, thereby providing "repose" for some illegally constructed buildings and also encouraging the multi-family housing industry to continue to ignore the requirements of § 3604(f)(3)(C). The result has been the frustration of Congress's intent that virtually all modern multi-family housing be made accessible to people with disabilities.

This article addresses the problems encountered in litigation involving the FHAA's accessibility requirements. Part II sets forth the requirements of § 3604(f)(3)(C) and related laws mandating accessibility in housing and also surveys the relevant enforcement provisions of the FHA. Part III reviews the evidence of noncompliance with § 3604(f)(3)(C) and examines some of the reasons for this noncompliance. Part IV analyzes the three main enforcement issues that arise in § 3604(f)(3)(C) litigation and offers suggestions for how they should be resolved.

II. THE ACCESSIBILITY REQUIREMENTS OF THE FAIR HOUSING ACT

A. *The FHA's Prohibitions of "Handicap" Discrimination*

The original FHA, passed in 1968, banned discrimination only on the basis of race, color, religion, and national origin.¹³ "Sex" was added as a prohibited basis of discrimination in 1974,¹⁴ and "familial status" and "handicap" were added by the FHAA in

12. Cf. *infra* notes 116-20 and accompanying text.

13. See 42 U.S.C. §§ 3604-06, 3617 (1970).

14. See Pub. L. No. 93-383, § 808, 88 Stat. 633, 728-29.

1988.¹⁵ The FHAA's ban on handicap discrimination was intended to be "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."¹⁶ Furthermore, Congress believed that "[t]he right to be free from housing discrimination is essential to the goal of independent living."¹⁷

Congress sought to achieve this goal in two ways. First, it added "handicap" to all of the FHA's basic substantive prohibitions.¹⁸ Second, it enacted three special provisions to further ensure equal housing opportunity for persons with disabilities. One is § 3604(f)(3)(C), the subject of this article. The other two require that persons with disabilities be allowed to make any "reasonable modifications" necessary for their "full enjoyment of the premises"¹⁹ and that "reasonable accommodations" be made "in rules,

15. See Pub. L. No. 100-430, 102 Stat. 1619, 1619-20. In addition to adding handicap and familial status to the prohibited bases of the FHA, the 1988 FHAA made some alterations to the statute's substantive provision dealing with home financing and also made substantial changes in the FHA's enforcement procedures. See 42 U.S.C. §§ 3605, 3610-14 (2000).

16. H.R. REP. NO. 100-711, at 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 [hereinafter 1988 HOUSE REPORT]. This House Report, along with the floor debates, is the principal source of legislative intent for the FHAA, because the Senate did not produce a committee report for this statute. For a description of the FHAA's legislative history, see SCHWEMM, *supra* note 7, § 5:4.

17. 1988 HOUSE REPORT, *supra* note 16, at 18.

18. See 42 U.S.C. §§ 3604(c)-(f), 3605-06, 3617 (2000). Actually, although Congress did add "handicap" to the list of prohibited bases of discrimination in §§ 3604(c)-(e), 3605-06, and 3617, it chose a different technique with respect to the FHA's two other major substantive prohibitions, § 3604(a)'s ban on discriminatory refusals to deal and § 3604(b)'s ban on discriminatory terms and conditions. Rather than adding "handicap" to these provisions, the FHAA copied their basic prohibitory language into two new provisions—§ 3604(f)(1) and § 3604(f)(2)—that banned discrimination "because of a handicap" of any buyer, renter, or person residing or associated with such a buyer or renter. See *infra* note 22. The reason for treating handicap discrimination in this special way apparently was to make clear that the amended FHA would not condemn housing that is made available especially for people with disabilities (i.e., that the statute does not authorize "reverse discrimination" suits against such housing by nonhandicapped persons). See, e.g., 1988 HOUSE REPORT, *supra* note 16, at 23-24 (describing § 3604(f)(1) and § 3604(f)(2) as prohibiting discrimination "against" handicapped persons); 54 Fed. Reg. 3246 (Jan. 23, 1989) (noting in HUD's commentary on its FHAA regulations that the statute "does not prohibit the exclusion of non-handicapped persons from dwellings").

19. 42 U.S.C. § 3604(f)(3)(A) (2000). The modifications authorized by § 3604(f)(3)(A) may be made to a building of any age and at any time during a tenancy, see 54 Fed. Reg. 3248 (Jan. 23, 1989), and the "premises" that may be modified include lobbies, main entrances, and other common-use areas as well as the interior of a disabled tenant's unit. See 24 C.F.R. § 100.201 (2005) (defining "[p]remises"); *id.* § 100.203(a); 54 Fed. Reg. 3247-48 (Jan. 23, 1989); see also *Garza v. Raft*, No. C-98-20476-JF-PVT, 1999 WL 33882969, at *3 (N.D. Cal. Nov. 30, 1999). Only a few cases dealing with § 3604(f)(3)(A) have been reported, perhaps because the modifications authorized by this provision must be made "at

policies, practices, or services, when such accommodations may be necessary to afford [a handicapped person] equal opportunity to use and enjoy a dwelling.”²⁰

Failure to comply with these three provisions was declared by Congress in the FHAA to be discrimination “[f]or purposes of this subsection.”²¹ The referenced subsection—§ 3604(f)—has only two substantive prohibitions: § (f)(1) makes it unlawful to discriminate in the sale or rental of a dwelling because of a buyer’s or renter’s handicap; and § (f)(2) makes it unlawful to discriminate “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling” because of a person’s handicap.²² Thus, the

the expense of the handicapped person.” 42 U.S.C. § 3604(f)(3)(A) (2000). All of the reported cases have been brought by mobility-impaired residents who sought to install a wheelchair ramp or similar device in order to enhance the accessibility of their units. *See Garza*, 1999 WL 32882969, *1; *Elliott v. Sherwood Manor Mobile Home Park*, 947 F. Supp. 1574, 1576 (M.D. Fla. 1996); *United States v. Country Club Garden Owners Ass’n*, 159 F.R.D. 400, 401 (E.D.N.Y. 1995); *Hunter v. Trenton Hous. Auth.*, 698 A.2d 25, 26 (N.J. Super. 1997); *SCHWEMM*, *supra* note 7, § 11D:7, n.4 (citing relevant cases).

20. 42 U.S.C. § 3604(f)(3)(B) (2000). Examples of required accommodations under § 3604(f)(3)(B) are waiver of an apartment complex’s “no pet” rule to allow a blind tenant to have a seeing-eye dog and waiver of a “first come/first served” rule concerning parking spaces to allow a mobility-impaired resident to park near his unit. *See* 24 C.F.R. § 100.204(b) (2005). Determining whether a particular accommodation is mandated by § 3604(f)(3)(B) is a “highly fact-specific” endeavor requiring a “case-by-case” determination. *See, e.g., Dadian v. Vill. of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001); *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994). The test is a practical one that often requires balancing the cost of the requested accommodation to the housing provider against its benefit for the claimant. *See, e.g., Bronk v. Ineichen*, 54 F.3d 425, 428–29 (7th Cir. 1995). It is clear, however, that housing providers need not make accommodations that impose “undue financial or administrative burdens” on them or require a “fundamental alteration” in the nature of their programs. *See, e.g., Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1157 (9th Cir. 2003); *Groner*, 250 F.3d at 1044.

21. 42 U.S.C. § 3604(f)(3) (2000).

22. *See id.* § 3604(f)(1)–(2). There are other subparts of § 3604(f), but they do not involve substantive prohibitions of discrimination. *See id.* § 3604(f)(4)–(9). The full text of § 3604(f)(1) provides that it shall be unlawful:

To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

- (A) that buyer or renter,
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that buyer or renter.

Section 3604(f)(2) provides that it shall be unlawful:

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

- (A) that person; or

FHAA's accessibility requirements and the other two special provisions of § 3604(f)(3) "augment the general prohibitions under (f)(1) and (2)."²³

B. *The FHA's Accessibility Requirements*

The FHAA's accessibility provision—§ 3604(f)(3)(C)—provides that illegal discrimination under § 3604(f) includes:

in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

- (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
- (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
- (iii) all premises within such dwellings contain the following features of adaptive design:

- (I) an accessible route into and through the dwelling;
- (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
- (III) reinforcements in bathroom walls to allow later installation of grab bars; and
- (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.²⁴

For purposes of this provision, "covered multifamily dwellings" means elevator buildings containing four or more units and ground-floor units in non-elevator buildings with four or more units.²⁵ The thirty-month grace period provided in § 3604(f)(3)(C)

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

For more on these provisions, see *supra* note 18.

23. 1988 HOUSE REPORT, *supra* note 16, at 24.

24. 42 U.S.C. § 3604(f)(3)(C) (2000). Although this provision is constructed in a way that suggests it imposes six requirements—one each in subparts (i) and (ii) and four in subpart (iii)—it has been interpreted by HUD to impose seven requirements, with the additional mandate of an "[a]ccessible building entrance on an accessible route" being recognized as a separate requirement implicit in subparts (i) and (iii)(I). See, e.g., 56 Fed. Reg. 9472, 9503–15 (Mar. 6, 1991) (providing HUD's guidelines for meeting these seven requirements).

25. 42 U.S.C. § 3604(f)(7) (2000). For the FHA's definition of "[d]welling," see *id.* §

means that its requirements apply only to units constructed for first occupancy after March 13, 1991.²⁶

The House Report supporting the FHAA set forth the rationale for the design-and-construction requirements mandated by § 3604(f)(3)(C):

Because persons with mobility impairments need to be able to get into and around a dwelling unit (or else they are in effect excluded because of their handicap), the bill requires that in the future covered multifamily dwellings be accessible and adaptable. This means that doors and hallways must be wide enough to accommodate wheelchairs, switches and other controls must be in convenient locations, most rooms and spaces must be on an accessible route, and disabled persons should be able to easily make additional accommodations if needed, such as installing grab bars in the bathroom, without major renovation or structural change.²⁷

The House Report also noted: "A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying 'No Handicapped People Allowed.'"²⁸ Furthermore, the accessibility features mandated by the FHAA were seen as "essential for equal access and to avoid future de facto exclusion of persons with handicaps."²⁹

Congress viewed the accessibility requirements imposed by § 3604(f)(3)(C) as "modest."³⁰ It did not intend to impose "unreasonable requirements" or a "standard of total accessibility,"³¹ but rather saw the "basic features" required by § 3604(f)(3)(C) as amounting to "minimal standards" that would be "easy to incor-

3602(b).

26. See 24 C.F.R. § 100.205(a) (2005). The purpose of this thirty-month delay, as explained by one of the FHAA's sponsors, was to "allow architects and builders adequate time to finish building projects already under way and make design modifications that will be adequate in the future." 134 CONG. REC. S10,544-02 (Aug. 2, 1988) (statement of Sen. Hatch).

27. 1988 HOUSE REPORT, *supra* note 16, at 18.

28. *Id.* at 25. This point was also made in the Senate floor debates. See 134 CONG. REC. S10,491 (1988) (statement of Sen. Simon) (noting that the architectural barriers that § 3604(f)(3)(C) would eliminate cause the "physical exclusion" of individuals with disabilities from much of the nation's housing stock and "are like 'Keep Out' signs to a substantial part of our populations").

29. 1988 HOUSE REPORT, *supra* note 16, at 27.

30. *Id.* at 18, 25.

31. *Id.* at 26-27.

porate in housing design and construction.”³² Furthermore, according to the House Report, the § 3604(f)(3)(C) requirements could be met without making new multi-family housing “look unusual” and without “significant additional costs.”³³

The FHAA directed HUD to promulgate regulations to implement this statute and in particular to provide technical assistance to help achieve its accessibility requirements.³⁴ Pursuant to these directives, HUD issued implementing regulations in 1989 that expounded on the FHAA’s design-and-construction requirements.³⁵ Two years later, HUD issued a set of “Fair Housing Accessibility Guidelines,” which became effective on the same date—March 13, 1991—as the accessibility requirements themselves.³⁶ These Guidelines provided detailed technical assistance about how designers and builders could comply with each of the § 3604(f)(3)(C) requirements.³⁷ Though not mandatory, the HUD Guidelines were intended to provide a “safe harbor” by describing minimum standards of compliance with the FHAA’s accessibility requirements.³⁸ In 1996, HUD published another “safe-harbor” document entitled “Fair Housing Act Design Manual,” which was updated in 1998.³⁹ As the agency charged by Congress with en-

32. *Id.* at 27.

33. *Id.* at 18; *see also* 134 CONG. REC. H4898-04 (1988) (statement of Rep. Shumer) (noting, as a supporter of the bill, that the FHAA’s accessibility requirements “present a reasonable framework for tearing down longstanding barriers to discrimination at minimal cost” and amount to “a carefully crafted compromise . . . [that] strikes the correct balance between the needs of the handicapped and the costs to society of accommodating these individuals”); 134 CONG. REC. S10,464 (1988) (statement of Sen. Harkin) (noting, as a supporter of the bill, that the FHAA’s accessibility requirements “are the result of lengthy negotiations between the disability community and architects, builders, and managers to achieve a reasonable balance between meeting the intent of the bill, to assure equal opportunity in housing for individuals with handicaps, while minimizing both construction costs and potential issues of marketability”).

34. *See* 42 U.S.C. §§ 3601 note, 3604(f)(5)(C), 3614(a) (2000); *see also infra* text accompanying note 240.

35. *See* 24 C.F.R. § 100.201 (2005) (listing relevant definitions); *id.* § 100.205 (listing substantive design-and-construction requirements); 54 Fed. Reg. 3243–44, 3249–52 (Jan. 23, 1989).

36. 56 Fed. Reg. 9472–9515 (Mar. 6, 1991) [hereinafter HUD Accessibility Guidelines]. Three years later, HUD supplemented this guidance with additional information on this subject. *See* 59 Fed. Reg. 33,362–68 (June 28, 1994) [hereinafter HUD Questions and Answers].

37. *See, e.g.*, 56 Fed. Reg. 9472–74 (Mar. 6, 1991).

38. *See id.* at 9472–73, 9476.

39. OFFICE OF FAIR HOUS. AND EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. AND URBAN DEV., FAIR HOUSING ACT DESIGN MANUAL (1988) [hereinafter HUD DESIGN MANUAL], available at <http://www.huduser.org/publications/destech/fairhousing.html> (last visited

forcing the FHA-FHAA, HUD's views encompassed in these regulations and other materials are entitled to substantial deference in applying the statute.⁴⁰

Reflecting the FHAA's legislative history, HUD's accessibility regulations recognize that certain conditions (e.g., a hilly terrain) may justify not complying with some of the FHAA's design-and-construction requirements in specific cases.⁴¹ However, because the FHA-FHAA is remedial civil rights legislation that is to be accorded a generous construction,⁴² the courts have made clear that exemptions from this statute are to be narrowly construed,⁴³ and defendants who claim the benefit of such an exemption bear the burden of proving that their situation qualifies for the particular

Feb. 20, 2006). By 2005, HUD had recognized a total of seven different documents as safe harbors for compliance with § 3604(f)(3)(C). See 70 Fed. Reg. 9740 (Feb. 28, 2005).

40. See, e.g., *Meyer v. Holley*, 537 U.S. 280, 287–88 (2002). See generally *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984) (holding that an agency's regulations interpreting a statute are to be followed so long as they are "a permissible construction of the statute").

HUD interpretations of the FHA, even when not encompassed in a regulation, have historically been accorded substantial deference by the Supreme Court of the United States. See, e.g., *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 107 (1979) (stating that the fact that HUD "consistently has treated [the issue presented here in a certain way] . . . commands considerable deference"); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972) (stating that a long-standing interpretation of the FHA by HUD fair housing staff "is entitled to great weight"). See generally *United States v. Mead Corp.*, 533 U.S. 218, 228–31 (2001) (describing the degree of deference owed to an agency's non-regulation interpretations of the statutes it enforces).

Cases that have accorded deference to HUD's accessibility regulations or guidelines include: *United States v. Edward Rose & Sons*, 384 F.3d 258, 263 n.4 (6th Cir. 2004); *Memphis Ctr. for Indep. Living v. R. & M. Grant Co.*, 3 Fair Hous.-Fair Lending Rep. ¶ 16,779, at 16,779.3-9 (W.D. Tenn. Apr. 27, 2004); *Fair Housing Council v. Vill. of Olde St. Andrews*, 250 F. Supp. 2d 706, 718–19 (W.D. Ky. 2003). But see *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1142–43 (D. Idaho 2003) (refusing to follow the view expressed in the HUD Design Manual concerning the timeliness of § 3604(f)(3)(C) claims, see *infra* note 415 and accompanying text, on the ground that this view does not deserve the same degree of deference as a HUD regulation).

41. See 1988 HOUSE REPORT, *supra* note 16, at 27 (recognizing "the possibility that certain natural terrain may pose unique building problems" justifying noncompliance with the FHAA's accessibility requirements because of "the need to protect the physical integrity of multi-family housing that may be built on such sites"); 24 C.F.R. § 100.205(a) (2005) (waiving § 3604(f)(3)(C)'s "accessible route" requirement where "it is impractical to [provide such a route] because of the terrain or unusual characteristics of the site"). Cases dealing with the "impracticable site" defense are cited *infra* note 118.

42. See, e.g., *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731–32 (1995); *Trafficante*, 409 U.S. at 205, 212; see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (noting the "broad remedial intent of Congress embodied in the Act").

43. See, e.g., *City of Edmonds*, 514 U.S. at 731–32; see also SCHWEMM, *supra* note 7, at § 9:3, n.4 (providing examples of such cases).

exemption claimed.⁴⁴ These principles apply to § 3604(f)(3)(C) cases,⁴⁵ and courts have also held that housing providers whose dwellings depart from the HUD Guidelines have the burden of showing that their construction features nonetheless comply with § 3604(f)(3)(C).⁴⁶ In short, absent proof justifying an individualized exemption, *all* covered multi-family dwellings constructed after March 13, 1991, must contain *each* of the accessibility features mandated by § 3604(f)(3)(C).⁴⁷

C. Other Laws Requiring Accessible Housing

Congress explicitly provided in the FHAA that this statute does not "invalidate or limit any [other law] . . . requiring dwellings to be designed and constructed in a manner that affords . . . greater access than is required by § [3604(f)(3)(C)]."⁴⁸ As noted above, scores of state and local fair housing laws impose substantially equivalent requirements to those in § 3604(f)(3)(C).⁴⁹ In addition, two other federal statutes barring disability discrimination apply

44. See, e.g., SCHWEMM, *supra* note 7, at § 9:3, n.2 (referencing such cases).

45. See 24 C.F.R. § 100.205(a) (2005) (providing that, in FHAA design-and-construction cases, "[t]he burden of establishing impracticality because of terrain or unusual site characteristics is on the person or persons who designed or constructed the housing facility"); see also *infra* note 118 (citing cases that reject the "impractical site" defense).

46. See, e.g., *Memphis Ctr. for Indep. Living v. R. & M. Grant Co.*, 3 Fair Hous.-Fair Lending Rep. ¶ 16,779, at 16,779.3 (W.D. Tenn. 2004); *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1154; *United States v. Hallmark Homes, Inc.*, No. CV01-432-N-EJL, 2003 WL 23219807, at *8 (D. Idaho Sept. 29, 2003).

47. That § 3604(f)(3)(C)'s accessibility requirements apply to *all* covered multi-family dwellings is underscored by fact that in both the House and Senate floor debates on this provision, efforts to limit its requirements to only a certain percentage of covered units were overwhelmingly rejected. See 134 CONG. REC. H4898-4902 (1988) (rejecting by a 330-78 vote in the House an amendment offered by Rep. McCollum that would have permitted housing providers to construct only ten percent of covered multi-family dwellings in such a manner that they are, or can be adapted to be, accessible and usable by handicapped persons); 134 CONG. REC. S10,532-42 (1988) (rejecting by a 84-12 vote in the Senate an amendment offered by Sen. Humphrey that would have limited the design-and-construction requirements to only twenty percent of the units or in the case of multiple building units, twenty percent of the buildings). In advocating his amendment, Sen. Humphrey regularly noted that the bill as proposed—and ultimately enacted—provided for "100 percent" coverage of the units in new multi-family housing. See *id.* at S10,533, S10,536.

48. See 42 U.S.C. § 3604(f)(8) (2000).

49. See *supra* note 7 and accompanying text.

to certain types of housing and include some accessibility requirements of their own.⁵⁰

One is § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against people with disabilities in any program or activity receiving federal financial assistance.⁵¹ This law covers municipal housing authorities and other housing providers that receive financial assistance from HUD or some other federal agency.⁵² HUD regulations promulgated under § 504 impose accessibility requirements on the housing covered, at least for some units.⁵³

The other relevant federal statute is the Americans with Disabilities Act of 1990 ("ADA"),⁵⁴ which includes two titles that may apply in some housing cases. Title II of the ADA applies a § 504-like mandate to services, programs, and activities of state and local governments,⁵⁵ which includes housing facilities that receive

50. In addition to the two statutes discussed in the text, under the authority of the Architectural Barriers Act of 1968 ("ABA"), 42 U.S.C. §§ 4151-56 (2000), HUD has issued regulations requiring that United States-constructed, -leased, and -financed residential structures containing fifteen or more housing units "be designed, constructed or altered to ensure that physically handicapped persons have access to, and use of, these structures." 24 C.F.R. § 40.4 (2005). This requirement may be satisfied by complying with the specifications contained in the Uniform Federal Accessibility Standards. *Id.* ABA cases involving housing are rare. For one example, see *Indep. Hous. Servs. v. Fillmore Center Assocs.*, 840 F. Supp. 1328, 1342-43 (N.D. Cal. 1993) (holding that the subject property was not covered by the ABA).

51. 29 U.S.C. § 794(a) (2000).

52. See, e.g., *Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of the City of Pittsburgh*, 382 F.3d 412, 416-17 (3d Cir. 2004); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1006-07 (W.D.N.Y. 1990).

53. These regulations, which went into effect on June 2, 1988, require that at least five percent of the total dwelling units in newly constructed or substantially rehabilitated multi-family housing projects meet the Uniform Federal Accessibility Standards ("UFAS") for people with mobility impairments, and that an additional two percent of such units be made fully accessible to people with hearing or vision impairments. See 24 C.F.R. §§ 8.22, 8.23 (2005); see also 53 Fed. Reg. 20,233 (June 2, 1988). Furthermore, when one or more dwelling units in an existing facility are altered—but the alterations do not rise to the level of substantial alterations—the units must be made accessible to the mobility impaired, until five percent of the units in the facility are accessible. See 24 C.F.R. § 8.23(b)(1) (2005). In addition, accessible dwelling units must, to the "maximum extent feasible," be distributed throughout projects. *Id.* § 8.26. And they must "be available in a sufficient range of sizes and amenities so that a qualified individual with handicaps' choice of living arrangements is, as a whole, comparable to that of other persons eligible for housing assistance under the same program." *Id.* In addition to these construction requirements, the HUD regulations require all existing § 504-covered housing to make reasonable modifications to units and common areas so that the housing is "readily accessible to and usable by individuals with handicaps." *Id.* § 8.24; see also *id.* § 8.33.

54. 42 U.S.C. §§ 12101-213 (2000).

55. *Id.* § 12132.

assistance from such governments.⁵⁶ Title III of the ADA prohibits disability discrimination in public accommodations.⁵⁷ Facilities covered by Title III generally do not include housing units subject to the FHA,⁵⁸ but this part of the ADA may nevertheless be relevant to housing matters in two ways: (1) it applies to housing developments' sales and rental offices that might not be covered by the FHA;⁵⁹ and (2) its coverage extends to homeless shelters, nursing homes, and similar establishments whose provision of temporary-stay lodging may or may not be subject to the FHA.⁶⁰ Public accommodations covered by Title III must comply with that statute's accessibility standards, which require that covered facilities designed and constructed for first occupancy after January 26, 1993, or substantially altered after that date, must comply with the ADAAG standards.⁶¹ Title III also requires removal of "architectural barriers . . . in existing facilities . . . where such removal is readily achievable."⁶²

Thus, depending on factors such as the nature of the facility involved and whether it receives government assistance, a housing complex may be covered by § 504 and/or the ADA as well as

56. See, e.g., *Indep. Hous. Servs.*, 840 F. Supp. at 1343-44. Under federal regulations implementing Title II, units in housing facilities covered by this law and constructed after January 26, 1992, must comply with UFAS or the ADA's Accessibility Guidelines for Buildings and Facilities ("ADAAG"). See 28 C.F.R. § 35.151 (2005); see also *id.* pt. 36, app. A (setting forth the ADAAG standards). In addition, alterations to existing Title II-covered housing must, to the "maximum extent feasible," be done "in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities." *Id.* § 35.151(b). A further requirement applicable to existing Title II-covered housing is that it must be operated so that, "when viewed in its entirety," it "is readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(a).

57. See 42 U.S.C. § 12182(a) (2000).

58. See 28 C.F.R. § 36.104 (2005) (providing the definition of "commercial facilities").

59. See 42 U.S.C. § 12181(7)(E) (2000) (providing that Title III's coverage includes a "sales or rental establishment"); see, e.g., *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1149-50 (holding that apartment complex's ground-floor unit which had been converted into a rental office is covered by Title III); *Sapp v. MHI P'ship*, 199 F. Supp. 2d 578, 583-87 (N.D. Tex. 2002) (holding that housing development's sales office in model home is covered by Title III).

60. See 42 U.S.C. § 12181(7)(A), (F), (K) (2000) (providing that Title III's coverage includes any privately owned "place of lodging" (other than those with five or fewer rooms for rent where the proprietor resides), "hospital, or other service establishment," and any "senior citizen center, homeless shelter, . . . or other social service center establishment"); 28 C.F.R. pt 36, app. B, at 683 (2005) (providing that nursing homes that provide certain services may be covered by the ADA's Title III).

61. See 42 U.S.C. §§ 12182(a), 12183(a)(1) (2000); 28 C.F.R. §§ 36.401-406 (2005).

62. 42 U.S.C. § 12182(b)(2)(A)(iv) (2000).

the FHA. Indeed, a number of cases have been reported where *both* the FHA and one of these other laws were held to apply.⁶³

While a given design-and-construction case may thus support claims under a variety of laws, the focus of this article is the FHA because it is the most comprehensive of all federal laws dealing with disability discrimination in housing. The FHA is also the model for most state and local fair housing laws, many of which impose housing accessibility standards identical to or stronger than those of the FHA.⁶⁴ Furthermore, as described more fully in the next section, the FHA's enforcement provisions are generally superior to other federal laws barring disability discrimination, because the FHA provides for a full range of relief for a wide variety of potential plaintiffs against an unlimited class of defendants⁶⁵ while under the other federal disability statutes the relief available and proper parties may be substantially narrower.⁶⁶

D. *The FHA's Enforcement Procedures*

The FHA provides for three methods of enforcement. First, pursuant to § 3613, a civil action may be brought by any "aggrieved person . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice."⁶⁷ The class of potential plaintiffs covered by the phrase "aggrieved

63. See, e.g., *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 781–87 (7th Cir. 2002); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 45–55 (2d Cir. 2002); *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 836–41 (7th Cir. 2001); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002, 1006 (W.D.N.Y. 1990); see also 28 C.F.R. pt. 36, app. B, at 682–83 (2005) (providing that nursing homes and other "mixed use" facilities may be covered by both the FHA and ADA).

64. See *supra* note 7 and accompanying text.

65. See *infra* Part II.D.

66. See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (holding that punitive damages may not be awarded in private suits under the ADA's Title II or § 504 of the Rehabilitation Act); *Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of the City of Pittsburgh*, 382 F.3d 412, 430–31 (3d Cir. 2004) (holding that private plaintiffs may not sue to enforce HUD's accessibility regulations promulgated under § 504); *United States v. Forest Dale, Inc.*, 818 F. Supp. 954, 969–70 (N.D. Tex. 1993) (holding that the wife of a disabled person may sue under the FHA but not under § 504); *infra* note 162 (noting that only injunctive relief is available in private suits under Title III of the ADA and describing Title III's restrictive language concerning the types of entities that may be sued).

67. 42 U.S.C. § 3613(a) (2000). The FHA's definition of "aggrieved person" is provided *infra* note 273. For purposes of § 3613 and the FHA's other enforcement techniques, a "[d]iscriminatory housing practice" is defined as "an act that is unlawful" under the FHA's substantive provisions (i.e., 42 U.S.C. §§ 3604-06, 3617). See *id.* § 3602(f). For a detailed description of § 3613 actions, see SCHWEMM, *supra* note 7, at ch. 25.

person" includes all individuals and entities who are injured in any way by an FHA violation,⁶⁸ with standing to sue extending to the outer limits allowed by Article III of the Constitution.⁶⁹ Section 3613 does not specify who may be named as a defendant, which means that anyone who is responsible under general tort principles for an FHA violation is a proper defendant.⁷⁰ Relief available in a § 3613 case includes actual and punitive damages, injunctions and other orders, and attorney's fees.⁷¹

The second method of enforcing the FHA is an administrative proceeding pursuant to §§ 3610-3612.⁷² Such a proceeding is initiated by the filing of a complaint with HUD "not later than within one year after an alleged discriminatory housing practice has occurred or terminated" by an "aggrieved person," a phrase that covers the same broad class of potential complainants as in § 3613 cases.⁷³ HUD itself may also file such a complaint on its own initiative.⁷⁴ FHA complaints to HUD may end up being referred to a "substantially equivalent" state or local agency;⁷⁵ being taken to court where the case will be prosecuted by the Department of Justice (or its state or local equivalent) and may result in the same types of relief being awarded to the aggrieved person as in a § 3613 action;⁷⁶ or tried before an administrative law judge who may award actual (but not punitive) damages to the aggrieved person, injunctive relief, and civil penalties of up to \$55,000.⁷⁷

68. "Person" is defined in the FHA to include "corporations," "associations," and many other entities. See 42 U.S.C. § 3602(d) (2000); see also *Havens*, 455 U.S. at 378-79 & n.19 (applying this definition to include a non-profit corporation).

69. See, e.g., *Havens*, 455 U.S. at 372; *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972). Article III requires three elements: (1) the plaintiff must have suffered some actual, particularized "injury in fact" (2) that is causally connected ("fairly . . . traceable") to the defendant's challenged action and (3) that is likely to be "redressed by a favorable decision." *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted).

70. See *infra* note 132 and accompanying text.

71. See 42 U.S.C. § 3613(c) (2000).

72. *Id.* §§ 3610-12. For a detailed description of such administrative proceedings, see SCHWEMM, *supra* note 7, at ch. 24.

73. See 42 U.S.C. § 3610(a)(1)(A)(i) (2000); see *Gladstone*, 441 U.S. at 100-09 (holding that standing to sue is equally broad under the FHA's direct-suit and complaint-to-HUD provisions).

74. See 42 U.S.C. § 3610(a)(1)(A)(i) (2000).

75. See *id.* § 3610(f).

76. See *id.* § 3612(a), (o).

77. See 24 C.F.R. § 180.670(b)(3) (2005).

The third method of FHA enforcement is a civil action brought by the Attorney General pursuant to § 3614.⁷⁸ This provision may be invoked only if the defendant has “engaged in a pattern or practice of resistance” to FHA rights or if a “group of persons has been denied any [FHA] rights . . . and such denial raises an issue of general public importance.”⁷⁹ Such a case may result in injunctive relief, monetary damages to aggrieved persons, and civil penalties of up to \$110,000.⁸⁰ The FHA itself does not provide a statute of limitations for such § 3614 actions; under these circumstances, courts have generally allowed § 3614 claims for injunctive relief at any time, but have imposed a three-year limitations period for § 3614 claims for monetary damages and a five-year limitations period for § 3614 claims for civil penalties.⁸¹

Overall, therefore, the FHA’s three enforcement methods provide for a full range of monetary and injunctive relief to the widest possible group of potential plaintiffs in a variety of tribunals. Furthermore, the FHA, unlike some other civil rights statutes, generally does not limit the types of defendants who may be held responsible for its substantive violations.⁸² Finally, and of particular importance for purposes of this article, the FHA’s authorization of injunctive relief has been held to include orders requiring such defendants to retrofit inaccessible housing units or otherwise correct their § 3604(f)(3)(C) violations.⁸³

While the FHA thus provides for a generally strong enforcement system, the reality is that compliance with the FHA’s accessibility requirements has proven to be a serious problem. The de-

78. 42 U.S.C. § 3614(a) (2000). For a detailed description of § 3614 actions, see SCHWEMM, *supra* note 7, at ch. 26.

79. 42 U.S.C. § 3614(a) (2000). For FHA design-and-construction cases that have been held to satisfy § 3614(a)’s “pattern or practice” and “group denial of rights” requirements, see, respectively, *infra* notes 431 and 280.

80. See 42 U.S.C. § 3614(d)(1); 28 C.F.R. § 85.3(b)(3) (2005).

81. See *infra* notes 381–85 and accompanying text.

82. See *infra* note 122 and accompanying text.

83. See, e.g., *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1148; *United States v. Pac. Nw. Elec., Inc.*, No. CV-01-019-S-BLW, 2003 U.S. Dist. LEXIS 7990, at *46 (D. Idaho Mar. 19, 2003); *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 465–67 (D. Md. 2000); *Balachowski v. Boidy*, No. 95-C-6340, 2000 WL 1365391, at *14–15 (N.D. Ill. Sept. 20, 2000); *HUD v. Perland*, Fair Hous.-Fair Lending Rep. ¶ 25,136, at 26,128–30 (HUD ALJ 1998); see also *United States v. Quality Built Constr., Inc.*, 358 F. Supp. 2d 487, 490–91 (E.D.N.C. 2005) (discussing defendant’s claim that proposed retrofits would be too costly).

gree of noncompliance with § 3604(f)(3)(C) and some of the reasons proffered for such noncompliance are explored in Part III.

III. THE DEGREE OF NONCOMPLIANCE WITH THE FHA'S ACCESSIBILITY REQUIREMENTS AND SOME REASONS THEREFOR

A. *Early Testing Studies and Litigation*

The degree of noncompliance with the FHA's accessibility requirements appears to be substantial, although precise estimates are difficult to come by. Virtually no § 3604(f)(3)(C) litigation occurred in the 1991–1995 period.⁸⁴ During this period, however, the first serious effort to test for § 3604(f)(3)(C) violations occurred when a Baltimore fair housing organization investigated fifty-seven multi-family developments in its area, determined that forty-four were noncompliant, and eventually brought suit against six of these developers.⁸⁵ In 1996, the Department of Justice, in cooperation with a Chicago disability-rights group, investigated some forty-nine multi-family housing developments in the Chicago metropolitan area and determined that only one was in full compliance with the FHA's accessibility requirements.⁸⁶ In August of 1998, a review of some fifty multi-family developments in Idaho found that none complied with § 3604(f)(3)(C)'s accessible-front-entrance requirement.⁸⁷ In June of 1999, a disabled minister in Denver looked at the nine apartment complexes in her area that claimed to have accessible units in her price range and

84. The only case reported during 1991–1995 that the author has been able to find is *Van Rafelghem v. Gunn*, 2 Fair Hous.-Fair Lending Rep., ¶ 19,378 (S.D. Ohio May 4, 1993), where the plaintiff-couple settled with the defendant-builder for modifications to the plaintiffs' unit, one dollar in damages, and attorney's fees. This case did not produce a decision on the merits.

85. See *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 460 n.5 (D. Md. 2000). The BNI testing program began in 1993, *id.* at 460, and resulted in a number of reported decisions in addition to the one involving LOB. See, e.g., *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700 (D. Md. 1999); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661 (D. Md. 1998); *Baltimore Neighborhoods, Inc. v. Cont'l Landmark*, Fair Hous.-Fair Lending Rep. ¶ 16,236 (D. Md. 1997).

86. See *Justice in Fair Housing Enforcement Act of 1999: Hearing on H.R. 2437 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 10–11 (1999) [hereinafter *1999 House Hearings*] (statement of William J. Malleris, President, Maple Court Development, Inc.).

87. See *id.* at 27, 29.

found that none met the FHA's accessibility requirements.⁸⁸ More recent studies continue to find a high degree of noncompliance with § 3604(f)(3)(C).⁸⁹

B. The HUD Conformance Study

In 1997, HUD commissioned a study to estimate conformance with its 1991 Fair Housing Accessibility Guidelines.⁹⁰ This study examined a randomly selected sample of 397 multi-family developments constructed in various parts of the country between 1991 and 1997.⁹¹

One of the oddities of this study is that it made no effort to determine whether these developments complied with § 3604(f)(3)(C) and therefore did not provide any measure of "the degree of overall conformance" with the FHA's accessibility requirements.⁹² Rather, it identified for each of the seven FHA requirements a number of subsidiary elements and then gave each development a score of 0 to 100 for each of these 291 identified elements.⁹³ The developments' scores were then added together to

88. See *id.* at 62.

89. See, e.g., OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEPT OF HOUS. AND URBAN DEV., DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP 3, 42, 51 (2005) (finding, based on 2004 testing program, that over one-third of advertised rental dwellings in the Chicago area were not accessible for wheelchair users to visit), available at http://www.huduser.org/publications/pdf/DDS_Barriers.pdf (last visited Feb. 22, 2006). In 2005, a study in Cedar Rapids, Iowa, found that *none* of the sixty-five multi-family complexes contacted fully complied with the § 3604(f)(3)(C) mandates (copy on file with the author).

90. See OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEPT OF HOUS. AND URBAN DEV., MULTIFAMILY BUILDING CONFORMANCE WITH THE FAIR HOUSING ACCESSIBILITY GUIDELINES, at v (2003) [hereinafter HUD CONFORMANCE STUDY], available at <http://www.huduser.org/publications/fairhsg/multifamily.html> (last visited Feb. 20, 2006). The 1991 Guidelines are cited *supra* note 36. The HUD Conformance Study was prompted in part "because evidence from the field, complaints filed with HUD, and private litigation suggested that some architects, contractors, and building owners . . . were building multi-family projects that did not comply with the [FHA's] design and construction requirements." *Id.* at v.

91. HUD CONFORMANCE STUDY, *supra* note 90, at v, vi, 2. The data gathering, which included physical inspections of the developments, was done in 1998–99. *Id.* at 2–3.

92. *Id.* at v. The study acknowledged that its determination not to focus on § 3604(f)(3)(C) compliance meant that it was not usable "for enforcement purposes." *Id.* at 3.

93. See *id.* at vi–viii. For example, § 3604(f)(3)(C)'s accessible-route requirement was considered to involve five such subsidiary elements, and a multi-family housing unit conforming to all five of these elements received a score of 100, while a unit conforming to four received a score of eighty, one conforming to three received a score of sixty, and so on down. *Id.* at vii. For a detailed description of most of the 291 subsidiary items, see *id.* at

produce a composite score for each element, thereby supposedly giving a "broad national view of conformance."⁹⁴ The study concluded that "[o]ver 80 percent of surveyed elements were in conformance for a large majority of buildings."⁹⁵

From an enforcement perspective, the relevance of this and other conclusions reached in this study is hard to fathom. The FHA mandates the inclusion of seven specified accessibility features, not a certain percentage of their perceived subsidiary elements. Thus, it is quite possible for a development to be found in violation of *each* FHA requirement even though it complies with over eighty percent of the subsidiary elements surveyed in the HUD study. Furthermore, § 3604(f)(3)(C) requires that *all* seven of its requirements be included; it is no defense in an individual case for a developer to show that its building complies with some, or even most, of these requirements.⁹⁶

34-46.

94. *Id.* at v; *see also id.* at iii (claiming that this study provides a "useful baseline assessment of conformance levels at a national level").

95. *Id.* at iii. Overall conformance scores were also produced for each of the seven FHA requirements. The study characterized these scores as "uniformly high" for Requirements 1, 2, 3, and 4 (in the 76-98 range); "somewhat lower" for Requirements 5 and 7 (in the 72-97 range); and "lowest overall" for Requirement 6 (in the 73-85 range). *Id.* at ix, 28-33 (presenting the composite conformance scores for each of the measures).

96. *See, e.g.,* United States v. Edward Rose & Sons, 384 F.3d 258, 263-65 (6th Cir. 2004) (holding that builder-owner's violation of the first requirement of § 3604(f)(3)(C) is sufficient for liability justifying preliminary injunctive relief); *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *41-42 (determining that defendants are liable for violating only some of § 3604(f)(3)(C)'s requirements); *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 463 (D. Md. 2000) (determining that developer is liable for violating the grab-bar-reinforcement requirement of § 3604(f)(3)(C)(iii)(III)); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 713-14 (D. Md. 1999) (determining defendants' liability based on evaluation of each of the seven § 3604(f)(3)(C) requirements).

Thus, even if one were to believe that *each* of § 3604(f)(3)(C)'s seven requirements was complied with by ninety percent of all developments—a conclusion that the HUD study manifestly did *not* reach—this would not indicate an overall rate of *total* FHA-compliance of ninety percent unless the same ten percent of developments accounted for *all* of the noncompliance. Indeed, in this scenario, the overall rate of full FHA-compliance could be as low as forty-eight percent if there were no overlap among those developments that failed to comply with Requirement 1, those that failed to comply with Requirement 2, those that failed to comply with Requirement 3, and so on, so that the overall figure for *some* noncompliance among all developments would be derived by multiplying ninety percent by itself seven times, which equals just under forty-eight percent.

This exercise shows that what might appear at first blush to be an impressively high figure for compliance with individual requirements can mask a fairly high degree of overall noncompliance, given that the statutory mandate in § 3604(f)(3)(C) is that *all* requirements be complied with. The exercise also serves to reinforce the need to understand that the HUD study's findings of "high" levels of conformance with most of § 3604(f)(3)(C)'s re-

C. *Some Excuses for Noncompliance and the Role of Local Building Codes*

By 1999, the combination of a growing number of enforcement suits and what was perceived to be a high degree of noncompliance so alarmed the multi-family housing industry that it sought to have the FHA amended to bar application of § 3604(f)(3)(C) to all current buildings that had been constructed after receiving a building permit (i.e., to virtually all existing multi-family housing).⁹⁷ The proposed amendment did not pass, but in House hearings on it, representatives of the National Association of Home Builders and other builder advocates provided some reasons for the high degree of noncompliance with § 3604(f)(3)(C). The principal reason they cited was lack of awareness by builders of the FHA's accessibility requirements.⁹⁸ Two related justifications were that HUD's guidance and other educational efforts concerning these requirements had been inadequate and that because the process of obtaining a building permit was thought to guarantee compliance with *all* legal requirements, and not just those of the local building code, builders in areas where the local code did not incorporate the FHA's accessibility requirements were often surprised to learn after construction was completed that their dwellings did not comply with § 3604(f)(3)(C).⁹⁹

quirements, *see supra* note 95, do not establish a similarly high level of full compliance among all those developments subject to this provision.

97. The proposed amendment was in the form of a bill, H.R. 2437, introduced by Congressman Walter Jones, providing that the requirements of § 3604(f)(3)(C) would not apply to any building designed for first occupancy on the date of the enactment of this bill that had "received a building permit or other similar approval from the relevant State or local building authorities as meeting the requirements of the applicable building code." *See 1999 House Hearings, supra* note 86, at 3. Because virtually all multi-family housing is constructed with a building permit, this bill would have "effectively immunize[d] from federal enforcement all noncompliant buildings constructed in the last eight years," a period in which "hundreds of thousands of housing units [were] built." *Id.* at 51 (statement of Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, U.S. Dep't of Justice).

98. *See 1999 House Hearings, supra* note 86, at 15 (statement of Mark Ellis Tipton, builder and past president of the National Association of Home Builders) (stating that "[t]he problem clearly is a lack of awareness"); *id.* at 37 (citing study concluding that "77 percent of the people still don't know about [the FHA accessibility requirements]"). Furthermore, in litigation conducted years after this hearing, builders and architects accused of violating § 3604(f)(3)(C) continued to cite lack of awareness of this provision as the reason for their failure to incorporate the FHA's accessibility features in newly constructed housing. *See, e.g., Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1137, 1151-52; *Hallmark Homes, Inc.*, 2003 WL 232119807, at *7; *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 767.

99. *See 1999 House Hearings, supra* note 86, at 5 (statement of Len Tozer, Tozer

These points were hotly contested by disability advocates, the Department of Justice, and even some individual builders who had constructed FHA-compliant developments.¹⁰⁰ These witnesses suggested that some builders deliberately ignored the § 3604(f)(3)(C) requirements, even to the point of not following the accessibility features provided for in their buildings' architectural plans, and that many others consciously avoided learning about the FHA's requirements.¹⁰¹

Even if the reason many builders fail to comply with § 3604(f)(3)(C) is good faith ignorance of its mandates, it is clear that such ignorance is not a sufficient legal excuse to avoid liability for violating this provision.¹⁰² Nor does HUD's perceived failings in educating the building industry legally justify the latter's noncompliance with this provision.¹⁰³ Indeed, as a general matter, a defendant's state of mind is simply not relevant to the liability issue in § 3604(f)(3)(C) cases, and in particular, a showing that

Builders, Inc.); *id.* at 14 (statement of Mark Ellis Tipton, builder and past president of the National Association of Home Builders).

100. *See id.* at 19–20, 27, 56, 58, 62 (statements of disability advocates); *id.* at 50–52 (statements of a representative of the Dep't of Justice); *id.* at 10–11 (statement of an individual builder).

101. *See id.* at 11, 19–20, 27, 56, 58, 62; *see also id.* at 52 (noting that the Department of Justice has seen "situations where a builder simply ignored the accessible features of an architect's design plan"); HUD CONFORMANCE STUDY, *supra* note 90, at 48 (finding that architectural "[p]lans consistently show higher conformance with the Guidelines than completed buildings").

102. *See Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1137; *Hallmark Homes, Inc.*, 2003 WL 232119807, at *7; *see also* 1999 House Hearings, *supra* note 86, at 37 (statement of Rep. Frank) (noting the applicability to § 3604(f)(3)(C) cases of the "old principle" that "ignorance of the law is no excuse"); *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 761–62 (holding that builder cannot escape § 3604(f)(3)(C) liability based on reliance on its architect's assurance of FHA compliance); *Quality Built Constr., Inc.*, 358 F. Supp. 2d at 490 (holding that perceived lack of need for accessible housing in the area is irrelevant to and thus provides no defense for builder's liability under § 3604(f)(3)(C)). *See generally* *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) ("[P]ersons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."); *id.* at 532 n.25 ("All persons are charged with knowledge of the provisions of statutes. . . .") (quoting *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925)); *Fed. Crop Ins. Co. v. Merrill*, 332 U.S. 380, 384 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large. . . .").

In a related point, courts have made clear that § 3604(f)(3)(C)'s requirements are not too "vague" to be enforced. *See Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1150–51; *Hallmark Homes, Inc.*, 2003 WL 232119807, at *6–7.

103. *See Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1151–53; *Hallmark Homes, Inc.*, 2003 WL 232119807, at *7; *cf. Quality Built Constr., Inc.*, 309 F. Supp. 2d at 761 (holding that builder can not escape § 3604(f)(3)(C) liability based on prior approval of its plans by local HUD officials).

the defendant was motivated by discriminatory intent is not required in such cases.¹⁰⁴

The one point made by noncompliant builders that has generated some positive response is the need to have local building codes better reflect the FHA's accessibility requirements. Throughout the 1990s, there was no clear relationship between local building codes and the § 3604(f)(3)(C) requirements. In some states and localities, these codes included § 3604(f)(3)(C)-like requirements, and indeed some did so even before this provision became effective.¹⁰⁵ Many other jurisdictions, however, did not include such requirements.¹⁰⁶ Thus, the tens of thousands of building codes throughout the country lacked anything like a national accessibility standard,¹⁰⁷ and indeed there were even four different "model" codes—the International Building Code, the Standard Building Code, the Uniform Building Code, and the code of the Building Officials and Code Administrators, International, Inc. (BOCA).¹⁰⁸

A number of steps have been taken to have building codes better reflect the FHA's accessibility requirements. In 1997, the De-

104. See *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 760, 762; *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *46–48; cf. *Good Shepherd Manor Found. v. City of Momence*, 323 F.3d 557, 562 (7th Cir. 2003) (noting that "[f]ailure to reasonably accommodate" in violation of § 3604(f)(3)(B)—which, like § 3604(f)(3)(C), is declared by the statute to be illegal "discrimination" under § 3604(f)—is "an alternative theory of liability" separate from intentional discrimination); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 707 (D. Or. 1997) (holding that the defendant's mental state (i.e., whether its violations were intentional, negligent, or innocent) is generally irrelevant to the issue of liability in a design-and-construction case under Title III of the ADA). This factor, however, may be relevant to punitive damages and/or civil penalties. See *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 760, 766–67.

105. See, e.g., *1999 House Hearings*, *supra* note 86, at 19 (statement of Brian D. Black, Director of Building Codes and Standards, Eastern Paralyzed Veterans Association) (referring to "many State and local jurisdictions [that] have enforced building codes that meet or exceed the construction requirements of the Fair Housing Act," including New York, New Jersey, and Philadelphia); *id.* at 60 (letter from Kathleen L. Wilde, Oregon Advocacy Center) (referring to "many states [where] the federal standards regarding adaptable multi-family housing have been incorporated into the state building code" and in particular to Oregon where this was done in 1993); *id.* at 61 (letter from Joy Weeber, Ron Mace Center for Disability Community Development) (referring to a North Carolina building code that pre-dated § 3604(f)(3)(C)).

106. See, e.g., *id.* at 41 (statement of William J. Malleris, developer of accessible housing) (referring to municipalities that opted not to include an accessibility provision in their local building codes).

107. In 1999, there were over 40,000 state and local jurisdictions that had adopted and were enforcing building codes. See *id.* at 24.

108. See *id.* at 52; HUD CONFORMANCE STUDY, *supra* note 90, at v.

partment of Justice, HUD, and a number of state attorneys general wrote to local permitting officials urging them to provide notice of the FHA's accessibility requirements.¹⁰⁹ For its part, Congress, in its fiscal year 2000 appropriations, directed HUD to review the various model building codes to determine whether their accessibility provisions were consistent with HUD guidance on the § 3604(f)(3)(C) requirements,¹¹⁰ a review that was completed in 2000.¹¹¹ In the meantime, officials responsible for the various model building codes undertook, through the creation of the International Code Council, to produce a single document governing multi-family housing accessibility requirements.¹¹² In 2000, the ICC produced an "International Building Code" whose accessibility provisions met or exceeded § 3604(f)(3)(C)'s requirements and which is now regarded by HUD as an additional "safe harbor" for § 3604(f)(3)(C) compliance.¹¹³

While these code-based efforts to achieve compliance with § 3604(f)(3)(C) will no doubt be helpful, they provide no guarantees. For one thing, there are still many places in the country that have not adopted a modern building code as part of their housing permitting process.¹¹⁴ For another, individual jurisdictions that have adopted such a code may not include all of the accessibility features mandated by § 3604(f)(3)(C) in their particular version of the code.¹¹⁵ Finally, even if by some future time all multi-family housing proposals would be denied building permits unless they were to comply with § 3604(f)(3)(C)—so that only "rogue" builders would not be adhering to the FHA accessibility requirements—the question of what to do with the millions of noncompliant units built between 1991 and this future full-compliance date would still remain.

109. See 1999 House Hearings, *supra* note 86, at 52.

110. See *id.*

111. See Final Report of HUD Review of Model Building Codes, 65 Fed. Reg. 15,740–94 (Mar. 23, 2000).

112. See 1999 House Hearings, *supra* note 86, at 22.

113. See *id.* at 25; HUD CONFORMANCE STUDY, *supra* note 90, at 3; see also Final Report of HUD Review of the Fair Housing Accessibility Requirements in the 2003 International Building Code, 70 Fed. Reg. 9738 (Feb. 28, 2005) (providing HUD's grant of conditional safe harbor approval to the 2003 edition of this Code and anticipating similar approval for the 2006 edition).

114. For a list of the states and localities that have adopted the International Building Code since its promulgation in 2000, see the International Code Council's website at <http://www.iccsafe.org/government/adoption.html> (last visited Feb. 20, 2006).

115. See, e.g., 1999 House Hearings, *supra* note 86, at 41 (referring to municipalities that opted not to include an accessibility provision in their local building codes).

IV. LEGAL BARRIERS TO ENFORCING THE FHA'S ACCESSIBILITY REQUIREMENTS

A. Overview: Substantive vs. Other Defenses

As noted in the previous section, a variety of “lack-of-bad-intent” and “partial compliance” defenses have been asserted in § 3604(f)(3)(C) cases, all of which have failed, at least with respect to the basic issue of liability.¹¹⁶ The only other substantive defenses in these cases are that the dwellings involved are not covered by § 3604(f)(3)(C)¹¹⁷ or that noncompliance is excused due to an “impractical site.”¹¹⁸ These substantive defenses must be evaluated on a case-by-case basis, but, as a general rule, they have failed in most reported § 3604(f)(3)(C) cases.¹¹⁹ Once all such substantive excuses have been rejected, there is little left for a developer to do beyond accepting responsibility for its noncompliant building, either through a settlement or an adverse court ruling.¹²⁰

Of course, a successful § 3604(f)(3)(C) lawsuit requires a proper defendant, a proper plaintiff, and a timely claim. Defendants accused of violating this provision have on occasion questioned the presence of one or more of these three elements. Indeed, given the substantive clarity of § 3604(f)(3)(C) as outlined above,¹²¹ a challenge to these elements is often the only possible defense to liability in such a case. These elements are dealt with in the next three sections.

116. See *supra* notes 102–04 and accompanying text.

117. See, e.g., *Fair Hous. Council v. Vill. of Olde St. Andrews*, 250 F. Supp. 2d 706, 716–19 (W.D. Ky. 2003); see also *supra* notes 25–26 and accompanying text (describing the dwellings covered by § 3604(f)(3)(C)).

118. See *supra* note 41 and accompanying text for a description of the “impractical site” defense; see also *Memphis Ctr. for Indep. Living v. R. & M. Grant Co.*, 3 Fair Hous.-Fair Lending Rep. ¶ 16,779, at 16,779.4-6 (W.D. Tenn. 2004) (rejecting the “impractical site” defense); *Montana Fair Hous. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1066 (D. Mont. 1999) (rejecting the “impractical site” defense); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 706–07 (D. Md. 1999) (rejecting the “impractical site” defense); *HUD v. Perland*, Fair Hous.-Fair Lending Rep. ¶ 25,136, at 26,125–27 (HUD ALJ 1998) (rejecting the “impractical site” defense).

119. See *supra* notes 117–18.

120. See, e.g., *Hallmark Homes, Inc.*, 2003 WL 23219807, at *8; *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *47.

121. See *supra* notes 24–26, 41–47 and accompanying text.

B. *Identifying Proper Defendants: Who May be Sued for § 3604(f)(3)(C) Violations?*

1. The Basic Liability Standard and Obvious Defendants

Unlike some other federal civil rights statutes, the Fair Housing Act's substantive prohibitions generally do not specify the types of persons or entities that may be held liable for engaging in the discriminatory practices outlawed.¹²² Specifically with respect to the FHA's accessibility requirements, § 3604(f)(3)(C) makes the "failure to design and construct" multi-family dwellings with the required features "discrimination" for purposes of § 3604(f)(1) and § (f)(2),¹²³ provisions which simply outlaw disability discrimination in certain housing transactions without specifying who may be held accountable for such a violation.¹²⁴

The "failure to design and construct" language of § 3604(f)(3)(C) might be thought to limit the targets of this provision to those who "design" or "construct" covered multi-family dwellings, but this interpretation seems wrong. As one court has observed, § 3604(f)(3)(C) "is not a description of *who* is liable. Rather, it is a description of what actions constitute discrimination."¹²⁵

122. See, e.g., *infra* notes 128–29. By way of contrast, Title VII, the principal federal employment discrimination statute, limits its prohibitions to "employers," "labor organizations," and two other specified entities. See 42 U.S.C. § 2000e(a)-(d); see also *id.* §§ 12111(2), 12112(a) (limiting the ADA's employment provisions to "employer[s]," "labor organization[s]," and two other specified entities); *id.* §§ 12181(7), 12182(a) (limiting the ADA's public accommodations provisions to "any person who owns, leases (or leases to), or operates" certain specified types of private entities).

One exception to the FHA's general approach of not identifying specific types of potential defendants is 42 U.S.C. § 3605(a), which prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions" from discriminating in such a transaction. *Id.* § 3605(a). This provision, however, is not relevant to the § 3604(f)(3)(C) cases that are the subject of this article.

123. See *supra* notes 18–23 and accompanying text.

124. See, e.g., *infra* note 125; *Baltimore Neighborhoods, Inc. v. Cont'l Landmark, Fair Hous.-Fair Lending Rep.* ¶ 16,236, at 16,236.4 (D. Md. 1997) ("The FHA does not specify who may be held liable for violations of these [accessibility] provisions"). As discussed *supra* note 18, the texts of § 3604(f)(1) and § 3604(f)(2) are patterned after § 3604(a) and § 3604(b), which, as Judge Easterbrook has observed in another context, are written "in the passive voice—banning an outcome while not saying *who* the actor is, or *how* such actors bring about the forbidden consequence." *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 298 (7th Cir. 1992); see also *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (noting that the FHA "focuses on prohibited acts").

125. *Doering v. Pontarelli Builders, Inc.*, No. 01-C-2924, 2001 WL 1464897, at *4 (N.D. Ill. Nov. 16, 2001); see also *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F.

Some § 3604(f)(3)(C) defendants have argued that the phrase “design *and* construct” means that only someone who does *both* of these tasks can be held liable for violating this provision (e.g., that an architect who only designs, but does not also construct, a noncompliant building should escape liability). The courts have generally rejected this view,¹²⁶ noting that its acceptance would essentially mean that *no* single entity could then be held responsible for a “failure to design and construct” (i.e., because *neither* the “designer” *nor* the “constructor” did both functions).¹²⁷

In rejecting this defense, one court suggested an alternative interpretation of Congress’s use of the conjunction in the “design *and* construct” phrase—that is, that it requires both acts for a violation, albeit not necessarily by the same party, so that, for ex-

Supp. 2d 661, 664 (D. Md. 1998) (the “design and construct” phrase “addresses” but “[b]y its own terms . . . does not specify the parties who may be held liable”); Brief for United States, as Amici Curiae Supporting Petitioner, in *Baltimore Neighborhoods, Inc. v. T.R. Seven Oaks*, No. 1:96-cv-02071-WEB (D. Md. 1997), available at <http://www.usdoj.gov/crt/housing/documents/amicus1.htm> (last visited Feb. 20, 2006) (noting that “[t]he focus of [§ 3604(f)(3)(C)] is on the failure to achieve the desired legislative goal, not on the identities of parties responsible for that failure”).

126. See, e.g., *Doering*, 2001 WL 1464897, at *1, 4; *Montana Fair Hous. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1062, 1068–69 (D. Mont. 1999); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 662, 664–65 (D. Md. 1998); *United States v. Hartz Constr. Co.*, No. 97C8175, 1998 WL 42265 (N.D. Ill. Jan. 28, 1998). But see *Whitaker v. West Vill. Ltd. P’ship*, No. Civ. A. 3:03-CV-0411-P, 2004 WL 2046771, at *1 (N.D. Tex. Sept. 10, 2004) (accepting this argument and dismissing § 3604(f)(3)(C) claim against a builder who was not also accused of designing the subject property).

A similar defense has been accepted in some cases under the ADA’s Title III (public accommodations). See, e.g., *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1033–36 (9th Cir. 2001); *Whitaker*, 2004 WL 1778963, at *2–3; *Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng’rs*, 945 F. Supp. 1–2 (D.D.C. 1996). But see *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1177–78 (S.D. Fla. 1997) (upholding Title III claim against architect); *United States v. Days Inns of Am.*, 151 F.3d 822, 824–27 (8th Cir. 1998) (holding that Title III liability may extend to motel owner’s franchisor if it exercised a significant degree of control over the design and construction of the owner’s inaccessible motel). The basis for accepting this defense, however, is specific language in Title III that differs from that used in the FHA and is therefore not persuasive in § 3604(f)(3)(C) cases. See *infra* note 162; *Barker v. Emory Univ.*, 3 Fair Hous.-Fair Lending Rep. ¶ 16,712, at 16,712.2 (N.D. Ga. June 24, 2003); *Doering*, 2001 WL 1464897 at *3–4; *Rommel Builders, Inc.*, 3 F. Supp. 2d at 664.

127. See *supra* note 126. As Judge Shadur observed in an early decision on this point, “the notion that each of two parties working together, one performing the first function and the other performing the second function, is thereby insulated from liability is a frank absurdity.” *Hartz Constr. Co.*, 1998 WL 42265, at *1; see also *Rommel Builders, Inc.*, 3 F. Supp. 2d at 664 (“Defendant’s narrow interpretation of the ‘design and construct’ provision would defeat the purpose of the FHAA by allowing architects and builders who are involved in either the design or construction, but not both, to escape liability. . . .”). But see *Whitaker*, 2004 WL 1778963, at *4 (assuming that both actions must be done by a particular defendant, but upholding claim against architect accused of both designing and supervising construction).

ample, "a nonconforming design that was never constructed" would not violate § 3604(f)(3)(C).¹²⁸ According to this opinion, "the statute should probably be read to imply that for discrimination to occur, there must be both nonconforming design and nonconforming construction; an architect who designs a nonconforming building that is never constructed should probably escape liability."¹²⁹

In any event, the general view has emerged that a wide range of participants in the "design-and-construct" process may be named as proper defendants in § 3604(f)(3)(C) cases. Thus, according to one influential district court opinion: "When a group of entities enters into the design and construction of a covered dwelling, all participants in *the process as a whole* are bound to follow the FHAA In essence, any entity who contributes to a violation of the FHAA would be liable."¹³⁰ HUD and the Department of Justice have agreed with this approach.¹³¹

128. *Doering*, 2001 WL 1464897, at *4.

129. *Id.* This is also the position taken by the Department of Justice, which has argued: Had Congress used the word "or," the Act would have made unlawful the mere "design" of an inaccessible dwelling, even where actual construction was never contemplated or achieved. Congress was concerned with a "failure to design and construct . . . [accessible] dwellings," 42 U.S.C. § 3604(f)(3)(C), not the mere drafting of blueprints for dwellings that never get built.

Brief for the United States as Amicus Curiae, supporting petitioners, *T.R. Seven Oaks*, No. 1:96-cv-02071-WEB (D. Md. 1997) (alterations in original).

On the other hand, where a building is designed in conformance with § 3604(f)(3)(C) but is not built with the mandated accessibility features, a violation by the builder would presumably occur. *See infra* note 141 and accompanying text.

130. *Rommel Builders, Inc.*, 3 F. Supp. 2d at 665 (emphasis in the original). *Accord Quality Built Constr., Inc.*, 309 F. Supp. 2d at 761 (quoting the *Rommel Builders* standard set forth in the text); *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1149 (quoting the *Rommel Builders* standard set forth in the text); *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *43 (quoting the *Rommel Builders* standard set forth in the text); *Montana Fair Hous. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1069 (D. Mont. 1999) (quoting *Rommel Builders* standard set forth in the text); *see also Doering*, 2001 WL 1464897, at *4 (stating that "those who are wrongful participants [in such discrimination] are subject to liability for violating the FHAA"); *cf. Days Inns of Am.*, 151 F.3d at 826 (interpreting similar provision in Title III of the ADA to extend liability to anyone possessing a "significant degree of control over the final design and construction of a facility").

131. *See* HUD DESIGN MANUAL, *supra* note 39, at 22 ("[R]esponsibility for complying with the law rests with any and all persons involved in the design and construction of covered multi-family dwellings. This means [that the] complaint could be filed against all persons involved in the design and construction of the building, including architects, builders, building contractors, the owners, etc."); Brief for the United States as Amicus Curiae, supporting petitioners, *T.R. Seven Oaks*, No. 1:96-cv-02071-WEB (D. Md. 1997) (providing that § 3604(f)(3)(C) "requires *all* parties involved in that 'design and construction' process to conform their involvement, whatever its scope, to the requirements of the Fair Housing

This seems correct, as least for those entities whose contribution to the design-and-construction process is substantial. The Supreme Court of the United States has made clear that an FHA violation is essentially a tort and that FHA claims are to be governed by ordinary tort principles absent explicit instruction to the contrary in the statute.¹³² Under ordinary tort principles, an actor is liable for harm to another if the actor's tortious conduct is a "legal cause" of that harm (i.e., is a "substantial factor" in bringing about the harm).¹³³ Thus, each entity whose participation in the design-and-construction process of a multi-family housing complex could reasonably be seen as a substantial factor in causing a § 3604(f)(3)(C) violation should be liable.

This would obviously include a single company that owns the underlying land and also develops the project, builds the physical structure, and becomes landlord to the building's tenants.¹³⁴ Some or all of these functions, however, may be carried out by separate entities. It is not uncommon, for example, for a builder to be employed by the landowner/developer and have "no right to work on the development outside of its contractual relationship with the owner/developer."¹³⁵ Still, the cases generally assume that the

Act").

132. See *Meyer v. Holley*, 537 U.S. 280, 285–91 (2003); *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974).

133. See RESTATEMENT (SECOND) OF TORTS §§ 430-31 (1965) [hereinafter SECOND TORTS RESTATEMENT]. These provisions of the Torts Restatement deal with negligent conduct, but a more recent version of this Restatement makes clear that the "legal cause"—"substantial factor" standard deals with all types of tortious conduct. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY §§ 1, B18 cmt. c (2000) [hereinafter APPOINTMENT RESTATEMENT] (noting that, for all tort claims, the basic requirement for an actor's liability is "legal cause," which means that the actor's tortious conduct "must be a factual cause of the plaintiff's injury and a substantial factor in bringing about the plaintiff's damages" (citing SECOND TORTS RESTATEMENT § 431, cmt. a)); see also *id.* §§ A18 cmt. C, C18 cmt. c, D18 cmt. e, E18 cmt. f (citing SECOND TORTS RESTATEMENT § 431, cmt. a).

A "substantial" cause, according to the cited Comment a in § 431 of the Second Torts Restatement, means that "the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense" and distinguishing this concept from causes that are "so insignificant that no ordinary mind would think of them as causes." SECOND TORTS RESTATEMENT § 431, cmt. a.

134. Builder-landlords are mentioned in the modern Torts Restatement as examples of entities whose contribution to harm suffered by another as a result of a defect in the building is assumed to be substantial enough to make them liable. *E.g.*, APPOINTMENT RESTATEMENT, *supra* note 133, § 22 cmt. f, illus. 8 (describing a builder-landlord that is assumed to be liable for defects in construction); see also *id.* § B19 cmt. k, illus. 5 (describing a landlord that is assumed to be liable for furnace explosion along with furnace's manufacturer and installer).

135. *Rommel Builders, Inc.*, 3 F. Supp. 2d at 665.

builder is liable for a project's § 3604(f)(3)(C) violations¹³⁶ along with the owner/developer,¹³⁷ perhaps because the builder and owner/developer are often part of a single corporate entity or perhaps because the builder's participation in the design-and-construction process is so substantial. As for other entities, § 3604(f)(3)(C) claims have also been maintained, consistent with the "substantial participant" standard, against architects¹³⁸ and a variety of other participants in the design-and-construction process.¹³⁹

Of course, not every participant in this process should be liable when the resulting dwelling violates § 3604(f)(3)(C). Only those entities that design or construct in violation of the statute (i.e., behave tortiously) would be held responsible.¹⁴⁰ Thus, for exam-

136. Many cases exist where § 3604(f)(3)(C) claims have been brought against builders. See *Edward Rose & Sons*, 384 F.3d at 260; *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 758-59, 762; *Moseke v. Miller and Smith, Inc.*, 202 F. Supp. 2d 492, 493-94 (E.D. Va. 2002); *Montana Fair Hous.*, 81 F. Supp. 2d at 1059-60; *Rommel Builders, Inc.*, 3 F. Supp. 2d at 662-65; see also 56 Fed. Reg. 9495 (Mar. 6, 1991) (providing that the builder must bear "[a]ll costs associated with incorporating the new design and construction requirements of the Fair Housing Act").

137. Many cases exist where § 3604(f)(3)(C) claims have been brought against owner/developers. See *Edward Rose & Sons*, 384 F.3d at 260; *Quality Built Constr. Inc.*, 309 F. Supp. 2d at 762; *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1148-49; *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 459-60 (D. Md. 2000); *Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 205 (E.D.N.Y. 2001) (claim against original developer); see also 24 C.F.R. § 100.205(b), (d) (2005) (giving examples of FHA accessibility requirements that focus on the role of the "real estate developer" or "developer").

138. See, e.g., *Edward Rose & Sons*, 384 F.3d at 260 n.1; *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 758-59, 765; *Hallmark Homes, Inc.*, 2003 WL 23219807, at *7; *Barker v. Emory Univ.*, 3 Fair Hous.-Fair Lending Rep. ¶ 16,712 (N.D. Ga. June 24, 2003); *Moseke*, 202 F. Supp. 2d at 493-94; *Doering*, 2001 WL 1464897, at *1; *Montana Fair Hous.*, 81 F. Supp. 2d at 1059-60.

139. See, e.g., *Memphis Ctr. for Indep. Living v. R. & M. Grant Co.*, 3 Fair Hous.-Fair Lending Rep. ¶ 16,779, at 16,779.1 (W.D. Tenn. 2004) (maintaining claims against engineers); *Whitaker*, 2004 WL 1773704, *1 (maintaining claims against civil engineer); *Eastern Paralyzed Veterans Ass'n*, 133 F. Supp. 2d at 205 (maintaining claims against designer-builder of pre-fabricated units used in the development); *Baltimore Neighborhoods, Inc. v. Cont'l Landmark, Fair Hous.-Fair Lending Rep.* ¶ 16,236, at 16,236.4 (D. Md. 1997) (maintaining claims against real estate firm that exercised authority over condominium's "Architectural Review Board" which "had considerable influence over a myriad of features arguably relevant to FHA compliance").

140. See APPOINTMENT RESTATEMENT, *supra* note 133, §§ 1, A18, B18, C18, D18, E18 (providing that, for liability in all tort claims, an actor's "independent tortious conduct" must be a legal cause of the plaintiff's injury); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 324 (5th ed. 1984) [hereinafter PROSSER & KEETON]:

[It is] essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent

ple, if the architect's plans call for accessible entrance ways and the builder deviates from those plans in violation of the FHA, then the architect would not be liable because he was not a "wrongful participant."¹⁴¹ Furthermore, "entities such as subcontractors and individual workers who do not participate in the wrongful conduct resulting in a [§ 3604(f)(3)(C)] violation" would also not be liable.¹⁴² On the other hand, "if an architect draws up plans with noncomplying entrance ways, and a builder follows the plan resulting in a covered dwelling with an inaccessible entranceway, both entities would be liable as both were wrongful participants."¹⁴³

2. Effect of Sale of the Property

a. Overview: "Piercing the Veil" and "Successor Liability" Theories

How would the sale of a multi-family dwelling constructed without the features mandated by § 3604(f)(3)(C) affect the potential liability of its new owner and the original owner-developer-builder?¹⁴⁴ Little has been written about this issue, but it is ex-

requisite to committing a tort, or with negligence. One who innocently, and carefully, does an act which happens to further the tortious purpose of another is not acting in concert with the other.

141. See *Rommel Builders, Inc.*, 3 F. Supp. 2d at 665 n.2; see also *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 762 n.2, 765 (noting that liability was not sought regarding non-compliant outside features against architect who was only responsible for designing the units' interiors). The scenario described in the text is apparently not an unusual one. See *supra* note 101 and accompanying text.

142. *Rommel Builders, Inc.*, 3 F. Supp. 2d at 664; *Days Inns of Am.*, 151 F.3d at 826 (interpreting similarly worded provision in Title III of the ADA not to cover those persons who are only "tangentially or remotely connected with" the design-and-construction process).

This is not to say that employees or other agents of a proper defendant who carry out orders in violation of the FHA cannot also be held liable, for indeed they can. See, e.g., *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 562-63 (5th Cir. 1979); *Jeanty v. McKee & Poague, Inc.*, 496 F.2d 1119, 1120-21 (7th Cir. 1974). The assumption of the *Rommel Builders* statement quoted in the text, however, is that such agents did not actually play a substantial role in the design-and-construction violation alleged. To the extent that they do, then even subcontractors and workers may be liable along with their builder-employers.

143. *Rommel Builders*, 3 F. Supp. 2d 661 at 665 n.2; see also *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 761-62 (rejecting builder's argument that it is shielded from liability because its architect was responsible for designing the units properly). For a discussion of indemnification, contribution, and other claims between defendants in § 3604(f)(3)(C) cases, see *infra* Part IV.B.4.

144. For purposes of this section, "builder" will be used to connote the entity primarily responsible for the original design-and-construction process, although it is recognized that

tremely important, because virtually all of the millions of non-compliant units constructed since 1991 will eventually be sold, and some multi-family developments, such as condominiums, are built with the intention of being sold promptly. If only the original builder is responsible for bringing a development into compliance with § 3604(f)(3)(C)—and then only for so long as the builder is involved with that development—the chances of this responsibility actually being fulfilled will fade over time. Furthermore, the continued status of the development as inaccessible housing will mean that persons with disabilities are discouraged from living there indefinitely unless the current owner is also responsible for correcting the facility's § 3604(f)(3)(C) violations.

Few courts have considered this issue. What opinions there are have generally concluded that the original builder remains liable even after the property is sold,¹⁴⁵ but that the new owner is not liable,¹⁴⁶ although little helpful analysis is offered to buttress these conclusions. For example, in *Silver State Fair Housing Council v. ERGS, Inc.*,¹⁴⁷ the court upheld a § 3604(f)(3)(C) claim against the original builder of an apartment complex completed some years earlier under a "continuing violation" theory,¹⁴⁸ but refused to apply this theory against the current owner, a wholly-owned subsidiary of the builder that had taken no part in the design-and-construction process of the complex.¹⁴⁹ *Silver State*, however, was essentially concerned with statute-of-limitations issues, a separate matter that is considered later in Part IV.D. Most other opinions that have commented on the effect of an inaccessible development's sale have involved condominiums, where the purchasers were seen primarily as consumers rather than business ventures intent upon offering their newly acquired units to the public for profit.¹⁵⁰ This latter situation (e.g., the sale of an apartment building to a commercial buyer) is the one most likely

such an entity might also be the developer, landowner, or other such participant. *See supra* notes 134–35 and accompanying text.

145. *See infra* notes 147–48; *Balachowski v. Boidy*, No. 95-C-6340, 2000 WL 1365391, at *15 (N.D. Ill. Sept. 20, 2000) (holding that the original builder is the "appropriate" entity to be ordered to retrofit and pay damages because he caused the violations and should have corrected them).

146. *See infra* notes 147, 191.

147. 362 F. Supp. 2d 1218 (D. Nev. 2005).

148. *Id.* at 1220–22. For a discussion of the "continuing violation" theory, see *infra* Part IV.D.2.b.

149. 362 F. Supp. 2d at 1220.

150. *See infra* notes 188–91 and accompanying text.

to raise difficult and important issues as to who is responsible for the building's § 3604(f)(3)(C) violations.

Before proceeding, it should be noted that sales to companies closely related to the builder would not significantly alter § 3604(f)(3)(C) liability in two particular situations. One is where the property is sold to a subsidiary corporation that is so clearly just a shell of the builder that a court would be justified in "piercing" the subsidiary's "corporate veil" to hold the builder responsible for the sub's liabilities. The veil-piercing doctrine, being a "fundamental principle of corporate law,"¹⁵¹ can certainly be invoked in FHA cases.¹⁵² Thus, for example, a builder that has constructed an inaccessible apartment complex might create a subsidiary to which it sells this property, which is what occurred in *Silver State*.¹⁵³ If the subsidiary is a well-funded company that observes the corporate formalities, then this arrangement is likely to shield the parent from the subsidiary's liabilities, but the absence of these factors could well make the parent liable through veil-piercing where the subsidiary's corporate form has been misused to accomplish a wrongful purpose.¹⁵⁴

151. *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

152. *See, e.g., Holley v. Crank*, 400 F.3d 667, 674–75 (9th Cir. 2005). *See generally Meyer v. Holley*, 537 U.S. 280, 285–91 (2003) (holding that FHA claims are generally to be governed by traditional legal principles).

153. *See* 362 F. Supp. 2d at 1220. Another typical scenario involving a parent-sub relationship in a § 3604(f)(3)(C) setting would be for a large development company to create a subsidiary corporation to build the parent's new apartment complex. Under these circumstances, the question raised by the potential applicability of the veil-piercing doctrine would be whether the parent, along with its builder sub, would be liable for the latter's § 3604(f)(3)(C) violations. *Cf. Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1176 (S.D. Fla. 1997) (holding the parent of a construction company that had no officers or directors to be a proper defendant in a design-and-construction case under Title III of the ADA).

154. *See, e.g., Bestfoods*, 524 U.S. at 61–64. One of the oddities of the *Silver State* opinion was that it referred to veil-piercing as a way to impose liability on a subsidiary for the wrongs of its parent, *see* 362 F. Supp. 2d at 1220, an upside-down approach that ignores the fact that this doctrine is used to impose liability on parent-shareholders for the wrongs of their subsidiary corporations. *See, e.g., Bestfoods*, 524 U.S. at 62–63 (describing veil-piercing principles in CERCLA case); *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940–41 (7th Cir. 1999) (describing how *Bestfoods* veil-piercing principles apply in Title VII cases to potentially hold parent liable for the discriminatory acts of its subsidiary corporation); *Johanson*, 963 F. Supp. at 1176. Thus, while the veil-piercing doctrine is certainly available to attribute liability to a parent for its subsidiary's § 3604(f)(3)(C) violations, this theory presumably could not be used, as *Silver State* suggested, to impose liability on a subsidiary corporation that purchases an inaccessible development from its parent. *See* 362 F. Supp. 2d at 1222.

A second type of sale that will not allow related entities to avoid liability is when a builder of inaccessible housing sells all of its assets to, or merges or consolidates with, another company. Under traditional "successor liability" principles, the purchaser (successor) company would ordinarily be liable for the harm caused by its predecessor's defective products if the sale "constitutes a consolidation or merger with the predecessor" or "results in the successor becoming a continuation of the predecessor."¹⁵⁵

Successor liability principles have been applied in civil rights and other federal statutory actions,¹⁵⁶ and they would presumably govern FHA cases as well.¹⁵⁷ These principles would justify attributing a builder's liability to its successor company where, for example, the new company, as a result of a merger or consolidation with the builder or the purchase of all of the builder's assets, simply amounts to a continuation of the builder's business.¹⁵⁸ This is not, however, the typical § 3604(f)(3)(C) situation. Presumably in most cases where a builder constructs an inaccessible multi-family dwelling and sells it to another, the builder remains in business and is only selling this one particular property. When such a "piecemeal" sale of assets is involved, the purchaser ordinarily does not succeed to the builder's liability, absent an agreement for the assumption of such liability or a fraudulent conveyance designed to shield the builder from liability.¹⁵⁹ How-

155. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12(c), (d) (1998) [hereinafter PRODUCTS LIABILITY RESTATEMENT]. The other two circumstances provided in this rule for successor liability are when the sale "is accompanied by an agreement for the successor to assume such liability" or "results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor." *Id.* § 12(a), (b). Imposing liability on successor companies is considered appropriate in the four situations listed in § 12(a)-(d), because a contrary result would "unfairly deprive future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor." *Id.* § 12 cmt. b. On the other hand, successor liability is not deemed appropriate when another's assets are acquired "piecemeal, other than as part of a going concern, [because the purchaser] cannot, by that fact alone, be said to have either manufactured or sold defective products." *Id.*

For a discussion of whether an inaccessibly constructed multi-family dwelling is a "defective product" under modern tort principles, see *infra* notes 172-78 and accompanying text.

156. See, e.g., *Worth v. Tyler*, 276 F.3d 249, 260-61 (7th Cir. 2001) (applying successor liability principles in Title VII case); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245-47 (6th Cir. 1991) (holding that traditional successor liability principles govern CERCLA cases); *EEOC v. Vucitech*, 842 F.2d 936, 944-46 (7th Cir. 1988) (applying successor liability principles in Title VII case).

157. See *supra* note 132 and accompanying text.

158. See *supra* text accompanying note 155.

159. See *supra* note 155 and accompanying text.

ever, where the purchasing company acquires and continues to operate another firm's entire product line (e.g., all of the apartment complexes of a large building company that has other businesses), some courts have held the acquiring company liable for the selling company's defective products.¹⁶⁰

b. Continuing Liability of the Original Builder

In *Silver State*, the court clearly felt that the original builder was fully responsible for the § 3604(f)(3)(C) violations alleged and concluded that, as a policy matter, it would be inappropriate to allow such a defendant to "evade FHA liability simply by offloading the property after completion."¹⁶¹ To support this conclusion, the court cited certain features of the FHA, such as its provision for punitive damages to punish violators and the absence of any statutory language limiting the types of entities that may be sued.¹⁶² According to the *Silver State* opinion: "If Congress had

In the absence of the circumstances described in Subsections (a) through (d), a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or otherwise distributed by the predecessor prior to the successor's acquisition of assets. When the assets are purchased piecemeal, the alleged successor did not "sell or distribute" the product under the liability rule stated in § 1 [the basic products liability rule]; and attempts to establish continuation of the corporate entity are recognized only under the terms set forth in this Section.

PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 12 cmt. c.

160. See DAN B. DOBBS, THE LAW OF TORTS § 375, at 1040 (2000) [hereinafter DOBBS]; cf. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170–71, 181–85 (1973) (applying this principle to a labor law case). In *Golden State Bottling*, the Supreme Court upheld an NLRB reinstatement order against the purchaser of one of the businesses of another company that had earlier engaged in unfair labor practices. See 414 U.S. at 172. The Court refused to limit the doctrine of successor liability to situations involving sale of all of a predecessor's assets, because, "so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application." *Id.* at 183 n.5.

161. 362 F. Supp. 2d at 1222.

162. *Id.* Although not mentioned in the *Silver State* opinion, the contrast between the FHA on these two points and the design-and-construction provision in the ADA's Title III (public accommodation) is noteworthy. First, while privately initiated FHA cases can yield actual and punitive damages and all other appropriate relief, see *supra* notes 71 and 76–77 and accompanying texts, relief in such cases under Title III is generally limited to equitable orders to make the facility accessible, see 42 U.S.C. § 12188 (2000), which means that such relief can only be "meaningful against the person currently in control of the building." *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001). Second, while the FHA does not limit the class of persons who may be sued, see *supra* notes 68–69 and 73 and accompanying texts, Title III's prohibitions are explicitly limited to "any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (2000). Indeed, the legislative history of Title III, which was enacted two years

wished to remove liability for construction-based discriminatory housing practices upon the sale or transfer of the offending property, it could have said so."¹⁶³

Reliance on the absence of statutory language, however, is not an entirely satisfactory basis for determining whether a former owner remains liable for § 3604(f)(3)(C) violations. As noted above, the Supreme Court has made clear that congressional silence in the FHA should be interpreted as a directive from Congress to apply traditional tort principles in determining who is a proper defendant under this statute,¹⁶⁴ and *Silver State* did not consider these principles.

Two sets of traditional tort principles are relevant to the problem of assessing liability in the sale-of-an-inaccessible-dwelling situation: (1) those governing the liability of a vendor of real property; and (2) those governing products liability. As to the first, the basic rule is that a vendor of real property is ordinarily permitted to

shift all responsibility for the condition of the land to the purchaser. . . . Thus, in the absence of express agreement or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusions as to the condition of the land; and the vendor is, in general, not liable for any harm resulting to him or others from any defects existing at the time of transfer.¹⁶⁵

The main exception to this rule is that "the vendor is under a duty to disclose to the vendee any hidden defects which he knows or should know may present an unreasonable risk of harm to persons on the premises, and which he may anticipate that the

after the 1988 FHAA, shows that, while it was originally proposed without a limitation on who could be sued, the "owns, leases (or leases to), or operates" language was later added as a restriction on the types of entities that could be named as defendants. See *Lonberg*, 259 F.3d at 1035 n.7. This limiting language is the reason some courts have held that Title III claims cannot be brought against architects and others who, while participating in the design-and-construction process, do not own, lease, or operate the resulting facility. See, e.g., *id.* at 1033-36; *supra* note 126 (citing other Title III cases). In any event, the *Silver State* opinion appropriately pointed to the more expansive provisions of the FHA in justifying its holding that the original builder there could be made liable for noncompliance with § 3604(f)(3)(C).

163. 362 F. Supp. 2d at 1222.

164. See *supra* note 132 and accompanying text.

165. PROSSER & KEETON, *supra* note 140, § 64, at 446-47. See also DOBBS, *supra* note 160, § 376, at 1043 (noting that, traditionally, a builder was subject neither to strict liability nor liability even for negligence once it had turned over improved real property to a new owner).

vendee will not discover.”¹⁶⁶ Even if a § 3604(f)(3)(C) violation could be considered a “hidden defect” triggering this exception—hardly an obvious conclusion given that most § 3604(f)(3)(C) violations are not “hidden” from anyone and indeed would presumably be quite apparent to disabled residents¹⁶⁷—this exception only requires the vendor to disclose such defects to the purchaser in order to avoid liability. Even if this is not done, the vendor’s liability is still subject to some time limit, usually expiring “once the vendee has had a reasonable time to discover and remedy the condition.”¹⁶⁸ Under this set of principles, therefore, the builder of an inaccessible dwelling could expect to avoid liability for such defects by simply “offloading” the property after its completion.

Tort principles dealing with liability for defective products, however, do point toward continuing liability for the original builder. The basic rule in this field is that an entity “engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.”¹⁶⁹ This is basically a rule of strict liability,¹⁷⁰ and it applies not only to a product’s manufacturer but also to all other commercial entities that sell or distribute the product.¹⁷¹ Furthermore, courts have, begin-

166. PROSSER & KEETON, *supra* note 140, § 64, at 447. Another exception deals with the risk of harm to those outside of the premises, *id.* at 448, but this presumably is less relevant in § 3604(f)(3)(C) cases than the risk to persons on the premises.

167. *See, e.g.*, *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1103 (9th Cir. 2004) (noting apartment builder’s contention that accessibility barriers and other § 3604(f)(3)(C) violations “would be readily apparent to anyone attempting to rent or buy”). One exception might be the requirement in § 3604(f)(3)(C)(iii)(III) of “reinforcements in bathroom walls to allow later installation of grab bars.” *See generally* SECOND TORTS RESTATEMENT, *supra* note 133, § 353(1) (describing a hidden defective condition in real property that might lead to a vendor’s liability as being when “(a) the vendee does not know or have reason to know of the condition or the risk involved, and (b) the vendor . . . has reason to believe that the vendee will not discover the condition or realize the risk”).

168. PROSSER & KEETON, *supra* note 140, at 449.

169. PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 1.

170. *See, e.g.*, *id.* § 1 cmt. a (describing the evolution of products liability since the 1960s as strict liability in tort); DOBBS, *supra* note 160, § 353, at 974–75 (describing the evolution of manufacturers’ liability for their defective products as dating from the “strict liability” holding in *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1963)).

171. *See* PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 1 cmt. e (noting that the basic strict liability rule for defective products “provides that all commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective”); *see also id.* § 2 cmt. o (noting that strict liability extends to nonmanufacturing sellers such as wholesalers and retailers). However, such liability only covers *commercial* entities that “are engaged in the business of selling or otherwise distributing the type of product that

ning in the 1960s, come to include many types of housing among the products subject to this rule,¹⁷² overcoming the traditional view described in the previous paragraph that a vendor of improved real estate is not liable for defects in the property after it is sold.¹⁷³ Under modern products liability rules, therefore, multi-family housing builders along with other manufacturers of defective products remain liable after their products are sold for harm caused by defects in the products.

There are three principal ways in which a product may be held to be defective, one of which is when it is "defective in design," i.e., "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, . . . and the omission of the alternative design renders the product not reasonably safe."¹⁷⁴ The concept of a "reasonable alternative design" in design-defect cases generally requires courts to apply "a risk-utility test to determine whether a harmful design is also a

harmed the plaintiff. The rule does not apply to a noncommercial seller or distributor of such products. Thus, it does not apply to . . . the private owner of an automobile who sells it to another." *Id.* § 1 cmt. c.

172. See *id.* § 19 cmt. e, at 281-82. The *Restatement* rule dealing with whether improved real property should be considered a product is inconclusive, providing an affirmative answer only "when the context of [the real property's] distribution and use is sufficiently analogous to the distribution and use of tangible personal property that it is appropriate to apply [products liability rules]." *Id.* § 19. The commentary on this rule, however, suggests that most multi-family housing complexes subject to § 3604(f)(3)(C) would be considered products. This commentary notes that, while courts historically were reluctant to view a contractor that builds and sells one house at a time as a mass producer of manufactured products, this reluctance has been overcome "in a number of contexts," including those involving mass builders, prefabricated homes, and, of particular importance here, in cases where strict liability is imposed "for defects in construction when dwellings are built . . . on a major scale, as in a large housing project." *Id.* § 19 cmt. e; see also APPORTIONMENT RESTATEMENT, *supra* note 133, § 32 cmt. f, illus. 8 (builder-landlord assumed to be liable for defects in construction). The commentary dates the beginning of this shift toward viewing housing as a product to a 1965 case, *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965), and notes numerous cases and articles from the 1980s and 1990s that extended the new strict-liability standard to builders of individual houses and condominiums. PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 19 reporters' note.

173. See *supra* notes 165-68 and accompanying text.

174. PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 2(b). Alternatively, a product is defective if it "contains a manufacturing defect when the product departs from its intended design," *id.* § 2(a), or if "inadequate instructions or warnings" have been given in certain circumstances. *Id.* § 2(c). The former basis for finding a multi-family housing development defective would presumably occur when the building's plans called for all of the features required by § 3604(f)(3)(C) but the builder departed from those plans, a situation that apparently has occurred with some frequency. See *supra* note 101 and accompanying text.

defective design."¹⁷⁵ In § 3604(f)(3)(C) cases, this has presumably already been done by Congress through its enactment of this provision.¹⁷⁶ Thus, assuming that § 3604(f)(3)(C) can be seen for purposes of products liability law as a safety statute,¹⁷⁷ a builder of inaccessible multi-family housing, like any other manufacturer of a defective product, would be liable for the harm caused by its housing even after the property is sold to another. Such a builder's liability might eventually be excused by the expiration of the FHA's statutes of limitations, but this would be equally true for a builder that held on to the property.¹⁷⁸

c. Subsequent Owners' Liability

i. Overview: Connection to the § 3604(f)(3)(C) Violation

Does § 3604(f)(3)(C) liability extend to entities that have purchased inaccessible multi-family dwellings? This would certainly be possible in those situations, discussed above, where the new owner is simply the corporate alter ego of the builder or is a commercial entity whose sole function is to sell the builder's

175. DOBBS, *supra* note 160, § 355, at 980. See also PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 2 cmt. d:

[Deciding] whether the [product's] specifications themselves create unreasonable risks . . . requires reference to a standard outside the specifications. . . . [T]he test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe.

176. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 4 (dealing with the significance in defective design cases of noncompliance with product safety statutes); DOBBS, *supra* note 160, § 360, at 992 (dealing with the significance in defective design cases of noncompliance with product safety statutes).

177. The fact that § 3604(f)(3)(C)'s mandated design features are primarily intended to expand housing opportunities for persons with disabilities does not bar it from being seen as a safety statute for purposes of products liability law. Indeed, it is clear that accessibility requirements like those in § 3604(f)(3)(C) do protect the health and safety of persons with mobility impairments, as a number of cases have demonstrated. See, e.g., *Sapp v. MHI P'ship*, 199 F. Supp. 2d 578, 581 (N.D. Tex. 2002) (granting summary judgment to disabled homeseeker who allegedly "sustained serious injuries to her shoulder and elbow" from being propelled out of her wheelchair as a result of the defendant-builder's sales area being inaccessible in violation of the ADA); *Balachowski v. Boidy*, No. 95-C-6340, 2000 WL 1365391, at *3-6 (N.D. Ill. Sept. 20, 2000) (noting that the inaccessible features of plaintiff's apartment caused her to, *inter alia*, be in "constant fear" of serious injuries, feel "extremely unsafe," fear that she would "flip" her wheelchair and land underneath it, and be injured on several occasions, some of which required emergency-room care).

178. Statute-of-limitations issues are discussed *infra* in Part IV.D.

flawed product.¹⁷⁹ The focus here, however, is purchasers that are genuinely independent from those responsible for the design-and-construction process. Such a subsequent owner, having not participated in the "failure to design and construct" as mandated by § 3604(f)(3)(C), would presumably argue that it has not acted in any way that violates the FHA.

This is not entirely obvious, however, given the manner in which the FHA deals with § 3604(f)(3)(C)-based violations. As noted above, the FHA makes the failure to design and construct in accordance with § 3604(f)(3)(C) "discrimination" for purposes of § 3604(f)(1) and § 3604(f)(2)—provisions that ban disability discrimination in, respectively, "the sale or rental" of a dwelling and "the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such a dwelling."¹⁸⁰ Thus, the FHA violation that noncompliance with § 3604(f)(3)(C) leads to is disability-based discrimination in the sale or rental of a dwelling. Obviously, the entity that is most clearly engaged in such a sale or rental would be the building's current owner.¹⁸¹

179. See *supra* notes 151–54 and accompanying text (explaining corporate alter ego); *supra* note 171 and accompanying text (describing liability rules applicable to commercial sellers and distributors of defective products).

180. See *supra* notes 21–22 and accompanying text. The full texts of § 3604(f)(1) and § 3604(f)(2) are set forth *supra* note 22.

181. The FHA's statutory structure described in the text is similar to that employed in the ADA's Title III, which has a general rule banning disability discrimination in public accommodations and then provides in subsequent provisions that certain activities, including the failure to design and construct new facilities so that they are readily accessible, amounts to discrimination within the general rule. See 42 U.S.C. §§ 12182(a), 12183(a)(1) (2000) (respectively, the general rule and design-and-construct provision). Case law dealing with who is a proper defendant under Title III is not particularly helpful in analyzing the comparable problem under the FHA, however, because, unlike the FHA, Title III's general rule is explicitly limited to "any person who owns, leases (or leases to), or operates" a place of public accommodation. See *supra* note 162.

In addition, the specific issue dealt with in the text—whether a subsequent purchaser of an inaccessibly constructed property should be liable under the FHA—has rarely been important in Title III litigation. This is probably because Title III has other provisions that make current owners of public accommodations liable for, *inter alia*: denying their disabled customers the same opportunity "to participate in or benefit from . . . [the] accommodations" as is afforded other individuals; "fail[ing] to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services"; and "fail[ing] to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." See 42 U.S.C. §§ 12182(b)(1)(A)(i), (b)(2)(A)(iii), (b)(2)(A)(iv) (2000). Liability under these provisions exists whether or not the owner participated in the accommodation's design and construction, which means that a disabled customer may successfully sue the current owner of an inaccessible facility with-

Consider the situation in which the owner-landlord of a non-accessible apartment building is visited by a mobility-impaired prospective tenant. According to the Congress that passed the 1988 FHAA, such a prospect is “just as effectively excluded from the opportunity to live in [that] particular dwelling by [its] lack of access . . . as by a posted sign saying ‘No Handicapped People Allowed.’”¹⁸² The assumption of this statement is that such a sign would clearly violate the FHAA as a form of discriminatory exclusion by the current landlord, and the thrust of the statement is that the same conclusion should result from the building’s inaccessible features. This would be so even if a prior owner originally put up the “No Handicapped People Allowed” sign or constructed the building’s inaccessible features. If either the sign or the absence of mandated accessibility features are still in place, Congress assumed that the current landlord was responsible for excluding mobility-impaired tenants.

Furthermore, even if the inaccessible features do not literally “make unavailable” a dwelling to the disabled prospect in violation of § 3604(f)(1), they would surely violate § 3604(f)(2), which bars discrimination against persons with disabilities in, *inter alia*, the “privileges of sale or rental of a dwelling” and in the “facilities in connection with such dwelling.”¹⁸³ The analogy here would be not to a sign excluding disabled persons, but to a landlord’s policy of forbidding them to use certain facilities or enjoy certain privileges that are made available to non-disabled persons. A policy of not allowing persons with disabilities to use, say, the public areas of an apartment building would be a blatant vio-

out having to rely on the design-and-construction provision. *See, e.g.*, *Spector v. Norwegian Cruise Line*, 125 S. Ct. 2169, 2179–81 (2005); *Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063, 1064 n.1, 1069–70 n.15 (5th Cir. 1995); *Brother v. CPL Invs., Inc.*, 317 F. Supp. 2d 1358, 1369–70 (S.D. Fla. 2004).

The FHA does not include such additional accessibility-related provisions, and, in particular, its “reasonable modifications” provision puts the financial burden for making additional structural changes on disabled persons, not building owners. *See supra* note 19 and accompanying text; *see also infra* notes 210–14 (discussing the interplay between the FHA’s “reasonable modifications” and “design and construction” provisions). The result is that, unlike Title III, the FHA’s mandates concerning physical accessibility are primarily, if not exclusively, defined by its design-and-construction provision, making the issue of whether subsequent owners are proper defendants with respect to this provision uniquely important to this law’s enforcement.

182. *See supra* text accompanying note 28.

183. 42 U.S.C. § 3604(f)(2) (2000); *see Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1104 (9th Cir. 2004) (noting that (f)(2) “prohibits a broader set of behavior” than (f)(1)).

lation of § (f)(2) by the current landlord¹⁸⁴ and one that presumably could not be defended on the ground that it had originated with a prior owner. If, as Congress insisted, the failure to have the accessibility features mandated by § 3604(f)(3)(C) can effectively exclude disabled persons from a building, then such a failure can surely amount to discrimination in "privileges" and "facilities" in violation of § (f)(2) regardless of whether the current owner was initially responsible for the building's improper construction.

A current owner's responsibility for the relevant FHA violation would seem even more clear in the case of a non-disabled tenant who later becomes mobility-impaired, say due to a stroke or car accident. Now for the first time suffering discrimination as a result of his building's inaccessible features, this newly disabled tenant would surely look to the current landlord as the one responsible for limiting his "privileges of rental" in violation of § (f)(2). Indeed, no one *other than the current landlord* has control of the rental terms that are the focus of § (f)(2).¹⁸⁵

This is not to say that a disabled tenant or would-be tenant might not also have an FHA claim against the original builder or that the current owner against whom a § (f)(1)-(2) claim is brought may not be able to seek contribution or other relief from that builder.¹⁸⁶ But these possibilities do not bar the concept of a § 3604(f)(3)(C)-based § (f)(1)-(2) claim against the current owner.¹⁸⁷ Indeed, placing some responsibility on current owners to bring their dwellings into compliance with § 3604(f)(3)(C) might be necessary to achieve this provision's fundamental goal of insuring that all multi-family housing built after 1991 contain the mandated accessibility features.

184. See, e.g., *Schroeder v. De Bertolo*, 879 F. Supp. 173, 175-78 (D.P.R. 1995) (upholding § 3604(f)(2) claims on behalf of mentally disabled resident who was prohibited from using the common areas of her condominium building); see also 1988 HOUSE REPORT, *supra* note 16, at 23 (noting that § 3604(f)(2) guarantees "that an individual could not be discriminatorily barred from access to recreation facilities, parking privileges, cleaning and janitorial services and other facilities, uses of premises, benefits and privileges made available to other tenants").

185. Cf. *Lonberg v. Sanborn Theaters, Inc.*, 259 F.3d 1029, 1036 (9th Cir. 2001) (commenting that retrofit orders in design-and-construction cases under Title III of the ADA can only be "meaningful against the person currently in control of the building").

186. Contribution among multiple defendants in § 3604(f)(3)(C) cases is discussed *infra* in Part IV.B.4.

187. Cf. APPORTIONMENT RESTATEMENT, *supra* note 133, § B19 cmt. k, illus. 5 (assuming that landlord would be strictly liable for furnace explosion along with furnace's manufacturer and installer).

In determining whether to impose liability on new owners for their dwellings' noncompliance with § 3604(f)(3)(C), it may be useful to distinguish those owners who have acquired the property as homeowner-consumers (e.g., in condominium situations) from those commercial entities that have purchased multi-family developments as business ventures with the intention of renting or selling their units to the public. These two categories of new owners are discussed separately in the next two sections.

ii. Condominium Purchasers

Thus far, courts have been reluctant to impose liability on new owners of condominiums for § 3604(f)(3)(C) violations. For example, in *HUD v. Perland*,¹⁸⁸ HUD's Chief Administrative Law Judge held the developers of a condominium complex liable, but assumed that relief could not also extend to the buyer of an individual unit or the condominium association that had become owner of the common areas, an assumption apparently shared by HUD as the charging party which had not named these entities as defendants.¹⁸⁹ Similarly, in a series of decisions involving a Baltimore-area condominium development, the court held that, while an effective retrofit order against the original builder required the joinder of the association that now held title to the common areas as a party necessary for complete relief,¹⁹⁰ such an

188. Fair Hous.-Fair Lending Rep. ¶ 25,136, at 26,124-30 (HUD ALJ 1998).

189. *Id.* at 26,128 (citing HUD's brief in support of the proposition that the developers' transfer of ownership of the individual unit and common areas bars injunctive relief affecting the non-party purchasers of these properties).

190. See *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 471-73 (D. Md. 2000); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 705, 712 (D. Md. 1999); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 662 (D. Md. 1998); see also *1999 House Hearings*, *supra* note 86, at 54-56 (statement of the National Association of Realtors) (opposing liability of subsequent purchasers of inaccessible buildings while recognizing the appropriateness of naming them as parties for the purpose of effectuating retrofit relief). See generally SECOND TORTS RESTATEMENT, *supra* note 133, § 211 ("A duty . . . imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty . . . in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled."). In *Rommel Builders*, the court concluded that it was "appropriate to keep LGGCI [the condominium association] in the case so long as it represents the owners of the common areas with alleged violations," noting that "LGGCI's presence as a party in the suit appears imperative in order to afford full relief." 40 F. Supp. 2d at 712.

owner was not liable for any other relief or for any substantive violation of § 3604(f)(3)(C).¹⁹¹

It seems to be the sense of these condominium decisions that the homeowner-buyers of inaccessible properties have not only not participated in the flawed design-and-construction process, but, as final consumers of a defective product, are among the victims, rather than the perpetrators, of whatever FHA violations exist in their homes. Furthermore, as long as such purchasers simply live in their units and do not offer them for sale or rent, the theory of liability outlined in the previous section—that a § 3604(f)(1)-(2) claim may lie against a new owner for the sale or rental of a dwelling not built in compliance with § 3604(f)(3)(C)—would not apply.¹⁹² However, whether a condominium owner who sells or rents his inaccessible dwelling may thereby be subject to a § (f)(1)-(2) claim is obviously a more difficult issue, as will be seen when the obligations of a non-builder landlord are explored in the next section. Even in these situations, however, application of traditional tort principles would not extend the same degree of liability to noncommercial sellers and renters of defective prod-

191. See *Rommel Builders*, 40 F. Supp. 2d at 712 (recognizing that condominium association that now owns inaccessible common areas “bears no financial obligation to plaintiffs in this case”).

192. Another possible source of protection for such individual condominium buyers is 42 U.S.C. § 3613(d), a provision that protects bona fide home purchasers from having their contract rights disrupted by the relief ordered in private FHA lawsuits. See also 42 U.S.C. § 3612(g)(4) (2000) (providing virtually identical restriction in FHA cases resulting from complaints to HUD). See generally *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (noting that § 3613(d) precludes courts from ordering “innocent white tenants to vacate apartments to remedy discrimination against blacks or other minorities by the apartment management”). In *Rommel Builders*, the condominium association argued that § 3613(d) barred a retrofit order relating to the common areas it controlled, but the court disagreed. 40 F. Supp. 2d at 711–12. According to the *Rommel Builders* opinion:

In this case, plaintiffs are not seeking an order to retrofit individual units owned by bona fide purchasers, but rather for an order establishing a fund for retrofitting common areas This relief sought is akin to the relief ordered in [*Simovits v. Chanticleer Condominium Ass'n*, 933 F. Supp 1394, 1407–08 (N.D. Ill. 1996)] where the sales of individual units were not voided, but some aspect of bona fide purchasers' property rights were affected.

Id. at 712. Thus, the *Rommel Builders* court, while believing that § 3613(d) did not bar the relief requested there, did suggest that it might be invoked to protect individual purchasers of condominium units from retrofit orders in § 3604(f)(3)(C) cases. Thus far, however, no court has so ruled, and indeed none has held that § 3613(d) has any applicability beyond protecting bona fide residents from being ousted from their homes. In addition, it should be noted that this provision only limits equitable relief, not also damage awards, in private FHA suits, and that it does not apply at all in FHA cases brought by the Attorney General pursuant to 42 U.S.C. § 3614.

ucts as to those who distribute such products as part of a business venture.¹⁹³ Still, once a purchaser of a condominium unit offers it for re-sale or rental, the nondiscrimination commands of § (f)(1)-(2) would apply,¹⁹⁴ and, for its part, the condominium association that controls the common areas would presumably be subject to liability based on the inaccessible features of those areas to the same degree that the individual selling or renting his unit would be for the inaccessible features of that unit.¹⁹⁵

iii. Commercial Purchasers

This section deals with entities independent of the builder that purchase inaccessibly constructed multi-family dwellings as a business venture with the intention of renting their units to the public. As will be shown, based on traditional tort principles dealing with a landlord's liability for defects in its property, such purchaser-landlords might well be liable under § 3604(f)(1)-(2) for their dwellings' noncompliance with § 3604(f)(3)(C) despite their lack of participation in the flawed design-and-construction process.

Historically at common law, a landlord bore no responsibility "either to the tenant or to others entering the land for defective conditions existing at the time of the lease."¹⁹⁶ In the decades leading up to enactment of the 1988 FHAA, however, virtually every state abandoned this position in favor of a rule imposing a

193. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 1 cmt. c (providing that the private owner of an automobile who sells it to another is not subject to the same rule of strict liability for the product's defects as is a commercial seller of that product).

194. The statute would apply subject to the FHA's "Mrs. Murphy" and single-family-house exemptions in 42 U.S.C. § 3603(b). For a description of these exemptions, see SCHWEMM, *supra* note 7, at § 9:4.

195. Indeed, a condominium association might even be sued in these circumstances by one of its own homeowner-members if, for example, that person becomes disabled or his ability to sell his unit is hampered by the lack of accessible features in the overall development. *Cf. Simovits v. Chanticleer Condo. Ass'n*, 933 F. Supp. 1394, 1403-05 (N.D. Ill. 1996) (rejecting condominium association's defenses of estoppel, laches, unclean hands, and waiver in connection with individual owner's suit based on his attempt to sell his unit encumbered by an age-restrictive covenant that violated the FHA's ban on familial status discrimination); *HUD v. Guglielmi*, Fair Hous.-Fair Lending Rep. ¶ 25,004 (HUD ALJ 1990) (ruling for mobile home owner whose landlord prevented the sale of her home to a family with children); *HUD v. Murphy*, Fair Hous.-Fair Lending Rep. ¶ 25,002, at 25,018-19, 25,053-58 (HUD ALJ 1990) (ruling similarly for multiple complainants).

196. PROSSER & KEETON, *supra* note 140, § 63, at 435; see also DOBBS, *supra* note 160, § 240, at 625-26, § 376, at 1044-45.

duty of reasonable care on landlords in the management of their residential properties, a rule that included an obligation to maintain leased dwellings in a habitable condition.¹⁹⁷ This duty of reasonable care with its implied warranty of habitability means that a landlord is subject to liability "for conditions of which he is aware, or of which he could have known in the exercise of reasonable care."¹⁹⁸ Furthermore, a landlord is under a duty to "inspect[] the rental dwelling and correct[] any defects disclosed by that inspection that would render the dwelling uninhabitable,"¹⁹⁹ and is ordinarily "chargeable with notice of conditions which existed prior to the time that the tenant takes possession."²⁰⁰ Importantly for purposes of this article, this duty to reasonably inspect and repair the premises includes complying with applicable housing laws, and the failure to do so may constitute negligence per se.²⁰¹

197. See, e.g., RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT ch. 17, at 155-56, § 17.6 cmt. c, at 233 (1977) [hereinafter LANDLORD AND TENANT RESTATEMENT] (noting that the position of landlord nonliability set forth in the 1965 RESTATEMENT (SECOND) OF TORTS was being replaced by a rule holding landlords liable "to tenants and others on the leased property on the basis of the general law of negligence" and taking the position that "there is an implied warranty of habitability by the landlord in regard to residential property"); see also *Peterson v. Superior Court*, 899 P.2d 905, 909-10 (Cal. 1995) (reviewing various states' positions); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 297 (1987) (noting that "[i]n the 1960s and 1970s nearly all states imposed on landlords an obligation to maintain the habitability of leased premises"). According to the Supreme Court of California's opinion in *Peterson*, replacing "the outmoded common law doctrine" of no duty with a rule "that every lease of a dwelling contains an implied warranty of habitability" was "more in line with the modern reality," reflecting an awareness of "the typical inequality in bargaining positions of the landlord and tenant," that "landlords were usually better positioned to make needed repairs," and "the public policy concern over the quality of the nation's housing stock." 899 P.2d at 915-16 (quoting Freyfogle, *supra*, at 297-99).

198. LANDLORD AND TENANT RESTATEMENT, *supra* note 197, § 17.6 cmt. c. "Where the landlord is able to discover the condition by the exercise of reasonable care, he is subject to liability after he has had a reasonable opportunity to discover the condition and to remedy it." *Id.*

199. *Peterson*, 899 P.2d at 917; see also *id.* at 918 n.13 (noting that "a landlord's responsibility . . . to maintain residential rental property in a habitable condition gives rise to a duty to inspect the property"); cf. PROSSER & KEETON, *supra* note 140, at 449 (noting that harm caused by defects in real property would traditionally result in liability attaching to the new owner, at least once the new owner "acquires notice of the condition and fails within a reasonable time thereafter to act reasonably to rectify it").

200. LANDLORD AND TENANT RESTATEMENT, *supra* note 197, § 17.6 cmt. c. In addition, a landlord must repair "promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable." *Peterson*, 899 P.2d at 917. Furthermore, a landlord who makes repairs negligently so as to make the leased property more dangerous or give it a deceptive appearance of safety is also subject to liability for any harm resulting therefrom to the tenant or others. See LANDLORD AND TENANT RESTATEMENT, *supra* note 197, § 17.7.

201. See *Peterson*, 899 P.2d at 916-17 & n.10; DOBBS, *supra* note 160, § 241, at 628. See

The fact that the tenant is aware of the defective condition does not excuse the landlord's liability.²⁰²

The duty of a landlord who purchases an apartment building from another has been likened to that of a seller of used machinery,²⁰³ i.e., such a person is generally not subject to strict liability for defects in the property,²⁰⁴ unless he "rebuilds or reconditions the product and thus assumes a role analogous to that of a manufacturer."²⁰⁵ Thus, while structural defects in an apartment complex would presumably justify holding the original builder strictly liable,²⁰⁶ a landlord who purchases such a complex may only be held liable for injuries resulting from defects in the premises if he has breached the applicable negligence standard.²⁰⁷

The point here is not to establish that a post-construction purchaser of an inaccessible apartment complex would be liable for the property's § 3604(f)(3)(C) violations based on state negligence law, although this is a real possibility.²⁰⁸ Rather, the point is to

generally SECOND TORTS RESTATEMENT, *supra* note 133, §§ 286-288C (describing the circumstances under which violation of a legislative enactment amounts to negligence per se).

202. LANDLORD AND TENANT RESTATEMENT, *supra* note 197, § 17.6 cmt. b.

203. See *Peterson*, 899 P.2d at 914. A commercial seller of a defective used product is liable for harm caused by the defect if the defect arises either from the seller's "failure to exercise reasonable care" or from the product's noncompliance "with a product safety statute or regulation applicable to the used product." PRODUCTS LIABILITY RESTATEMENT, *supra* note 155, § 8(a), (d).

204. See *Peterson*, 899 P.2d at 907-11, 914-16; DOBBS, *supra* note 160, § 241, at 628-29. But see APPORTIONMENT RESTATEMENT, *supra* note 133, § B19 cmt. k, illus. 5 (assuming landlord to be strictly liable for furnace explosion along with the furnace's manufacturer and installer).

205. *Peterson*, 899 P.2d at 914.

206. See *supra* notes 169-78 and accompanying text. As a result, in those cases where the landlord participated in the construction of the building, strict liability might attach to such a landlord "based on the landlord's status as a builder who is engaged in the business of constructing (i.e., manufacturing) rental properties." *Peterson*, 899 P.2d at 914; see also APPORTIONMENT RESTATEMENT, *supra* note 133, § 22 cmt. f, illus. 8 (assuming builder-landlord is strictly liable for defects in construction).

207. *Peterson*, 899 P.2d at 920-21. Bringing an action for negligence against the landlord does not, of course, bar an injured tenant from also asserting a strict liability claim against the manufacturer of the building. See *id.* at 921.

208. Cf. *Saedi v. Kriz*, No. B167250, 2004 WL 2537568 (Cal. Ct. App. Nov. 10, 2004) (upholding \$250,000 jury verdict based on negligence per se theory against landlord who failed to reasonably accommodate disabled tenant in violation of state law equivalent of the FHA's § 3604(f)(3)(B)). See generally *Grable & Sons Metal Prods. Inc. v. Darue Eng's & Mfg.*, 125 S. Ct. 2363, 2370 (2005) ("The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings."); PROSSER & KEETON, *supra* note 140, § 36, at 221 n.9 (noting that "the breach of a federal statute may support a negligence per se claim as a matter of state law"); see *supra* note 201 and accompanying

show that well established tort principles, which were in place at the time of the 1988 FHAA's enactment and which continue in force today, provide for liability for residential landlords based on their property's defects, even if such a landlord had no role in causing those defects and so long as he has had sufficient time to discover and correct the defects. Based on these principles, it is surely plausible to conclude that Congress intended for landlords to be liable to disabled residents and prospective residents under § 3604(f)(1)-(2) as a result of their offering rental units that do not comply with § 3604(f)(3)(C).

Nor is this conclusion inconsistent with the decision in *Silver State*, which, in ruling for the defendant-purchaser of an inaccessible apartment complex on statute-of-limitations grounds, did not address the issue of whether such a purchaser could be made liable to disabled prospective tenants through timely claims based on § 3604(f)(1)-(2).²⁰⁹ Indeed, no court has yet ruled on this issue, but the nature of the FHA violation prompted by noncompliance with § 3604(f)(3)(C) and the congressional goal in enacting this provision suggest that current landlords of inaccessible dwellings may well be liable.

A final note is in order concerning the responsibilities of current landlords of inaccessible multi-family dwellings. Apart from the design-and-construction mandates of § 3604(f)(3)(C), the FHA in § 3604(f)(3)(A) requires all landlords, regardless of the age of their buildings or who constructed them, to allow disabled tenants, at their own expense, to make "reasonable modifications . . . necessary [to afford them] full enjoyment of the premises."²¹⁰ The interplay between this reasonable-modifications provision and the FHA's design-and-construction requirements has not yet been the subject of any judicial opinion, but it has been addressed by HUD. In commenting on who is responsible for the costs of making dwellings accessible, HUD's 1991 Accessibility Guidelines noted that, while the costs of the design-and-construction requirements are to be "borne by the builder," a tenant who needs to make additional modifications to make a particular unit accessible "for that person's particular type of disability . . . would in-

text (describing negligence per se theory based on landlord's failure to comply with applicable housing laws).

209. See *supra* notes 147-49 and accompanying text.

210. See *supra* note 19 and accompanying text.

cur the cost of this type of modification.”²¹¹ Thus, according to HUD:

For dwellings subject to the statute’s accessibility requirements, the tenant’s costs would be limited to those modifications that were not covered by the Act’s design and construction requirements. (For example, the tenant would pay for the cost of purchasing and installing grab bars . . . [but not for] the costs associated with adding bathroom wall reinforcement [which is required by § 3604(f)(3)(C)].)²¹²

However, if the dwelling is not subject to § 3604(f)(3)(C) (e.g., because it was constructed prior to 1991), “the tenant would pay the cost of all modifications necessary to meet his or her needs.”²¹³

This commentary does not address the responsibilities of post-construction purchasers of multi-family dwellings built in violation of § 3604(f)(3)(C), but it does purport to protect tenants in such dwellings from having to incur the costs of making their units comply with this provision. Consider the situation of a mobility-impaired individual who, though not deterred from moving into a building that fails to comply with § 3604(f)(3)(C), now wants to make his dwelling fully accessible. According to HUD, such a tenant should be financially responsible only for those modifications that go beyond what is required by § 3604(f)(3)(C) (i.e., someone else must pay for the § 3604(f)(3)(C)-mandated modifications).²¹⁴ The HUD commentary says that this someone else should be the builder, but this may not be a realistic possibility if the builder has departed after selling the development to a new owner-landlord.

In these circumstances, a tenant who is entitled to have his costs limited to those modifications not covered by § 3604(f)(3)(C) might well accuse a landlord that tries to put all of these costs on the tenant of discriminating in the “privileges of . . . rental of a dwelling” in violation of § (f)(2).²¹⁵ Obviously, if such a tenant is required to pay for the entire cost, then he is worse off than a comparable tenant in a § 3604(f)(3)(C)-compliant building. This

211. See 56 Fed. Reg. 9495 (Mar. 6, 1991), in HUD Accessibility Guidelines, *supra* note 36.

212. *Id.* at 9495–96.

213. *Id.* at 9496.

214. See *id.* at 9495–96.

215. See 42 U.S.C. § 3604(f)(2) (2000) see also *Baltimore Neighborhoods, Inc. v. Sterling Homes Corp.*, 1999 WL 1068458, at *5 (D. Md. Mar. 25, 1999) (holding that § (f)(2) prohibits a provider of housing covered by § 3604(f)(3)(C) from charging “a premium for accessibility features required by the FHAA”).

seems a perverse result. It not only puts the financial burden for § 3604(f)(3)(C) compliance on the very class of persons that this law was intended to help, it also provides an additional barrier against persons with disabilities moving into or remaining in noncompliant buildings. While this perspective does not inevitably lead to the conclusion that new owner-landlords should bear the costs of § 3604(f)(3)(C)-mandated modifications—the builder may, after all, continue to be available as a source of funds—it does suggest an additional argument for this result that is based both on equity to disabled tenants and on the congressional goal of having all post-1991 multi-family dwellings comply with § 3604(f)(3)(C).²¹⁶

3. Other Potential Defendants

a. Those Making or Failing to Make Renovations or Repairs

The previous section argued that there may be a duty on current owners of noncompliant buildings covered by § 3604(f)(3)(C) to provide the features mandated by this law. If so, the natural follow-up question, addressed here, is whether that duty extends to making whatever renovations or repairs may be necessary to maintain such compliance. For purposes of this section, therefore, it is assumed that the buildings involved are covered by § 3604(f)(3)(C) and have at one time contained the required features, either through proper initial design and construction or through post-construction improvements.

A necessary preliminary step in cases involving new work is to determine whether § 3604(f)(3)(C) even applies to the buildings involved; that is, are they “covered multi-family dwellings for first

216. Apart from the question of who is responsible for the costs of accessibility-enhancing modifications, it would at least seem clear that current landlords of noncompliant buildings would be required to approve all § 3604(f)(3)(A)-based modification requests that simply seek to provide the accessibility features mandated by § 3604(f)(3)(C) (i.e., that all such requests would be considered “reasonable modifications” as a matter of law). *See, e.g.*, 24 C.F.R. § 100.203(c), ex. 2 (2005) (providing that a landlord must, pursuant to § 3604(f)(3)(A), allow a tenant to widen the bathroom doorway so that the tenant’s wheelchair could pass through); *cf. Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 494–95, 510 (E.D. Va. 2002) (noting that disabled plaintiff still retains a reasonable accommodation claim under § 3604(f)(3)(A) against her condominium association despite the court’s dismissal of her § 3604(f)(3)(C)-based claims against entities involved in the property’s original construction on statute-of-limitations grounds).

occupancy after [March 13, 1991]”?²¹⁷ The quoted language means that some types of work after the triggering date are not covered. For example, an older building that was used for a nonresidential purpose (e.g., a warehouse) and that has been converted post-1991 to multi-family housing is apparently not subject to § 3604(f)(3)(C), because HUD has interpreted the phrase “first occupancy” to mean “a building that has never before been used for any purpose.”²¹⁸ Furthermore, as to housing built before 1991, § 3604(f)(3)(C) “does not require any renovations to [such] existing buildings.”²¹⁹ However, when a post-1991 “addition is built as an extension to an existing building, the addition of four or more units is regarded as a new building and must meet the design requirements of [§ 3604(f)(3)(C)]. . . . If, for example, an apartment wing is added to an existing hotel, the apartments are covered.”²²⁰

Assuming that a structure is covered by § 3604(f)(3)(C) and has at one time included the features mandated by this law, does its current owner have a duty to maintain these features without facing liability under § 3604(f)(1)-(2)? No court has addressed this issue, and the signals given by HUD are mixed, although traditional tort principles do suggest that there may be an on-going duty of repair.²²¹

As for HUD, it announced just prior to § 3604(f)(3)(C)’s effective date in 1991 that “alteration, rehabilitation or repair of covered multifamily dwellings are not subject to the Act’s accessibility requirements.”²²² Some years later, however, in its Accessibility Design Manual, HUD opined that the corridor space in an accessible

217. See *supra* text accompanying notes 24 and 26.

218. 24 C.F.R. § 100.201 (2005) (providing definition of “first occupancy”); see also HUD Accessibility Guidelines, *supra* note 36, at 56 Fed. Reg. 9477 (“Existing facilities that are converted to dwelling units are not subject to the Act’s accessibility requirements.”); HUD Questions and Answers, *supra* note 36, at 59 Fed. Reg. 33,362, 33,365 (indicating in Question and Answer No. 9 that buildings converted from nonresidential purposes are not covered). However, where only the facade of such a building is preserved, § 3604(f)(3)(C) does apply if “the interior of the building, including all structural portions of floors and ceilings is removed, and a new building is constructed behind the old facade” that would otherwise be covered. HUD DESIGN MANUAL, *supra* note 39, at 11.

219. HUD DESIGN MANUAL, *supra* note 39, at 12.

220. *Id.* at 11.

221. Apart from the duty-of-repair question, it would seem clear that a landlord should at least have the duty to avoid taking action that would un-do existing features mandated by § 3604(f)(3)(C), as, for example, by putting in a new sidewalk that transforms a previously accessible front entrance to an inaccessible one.

222. HUD Accessibility Guidelines, *supra* note 36, at 56 Fed. Reg. 9477.

route "must be free of hazardous protruding objects that project from walls and posts,"²²³ implying that a continuing duty exists with respect to at least some of § 3604(f)(3)(C)'s requirements.²²⁴

As for traditional tort principles, the modern view is that a residential landlord has a duty to reasonably inspect and repair the rental premises, which includes complying with applicable housing codes, and that a breach of this duty should result in liability to tenants and others for harm resulting from defects in the property.²²⁵ If this duty is sufficient to make a current landlord liable under § 3604(f)(1)-(2) for the absence of § 3604(f)(3)(C)-mandated features to disabled tenants and prospective tenants as discussed above in Part IV.B.2.c, then it would seem a necessary corollary that such a landlord would also have to take all reasonable steps to maintain these features.

b. Real Estate Agents and Other Facilitators of Sales and Rentals of § 3604(f)(3)(C)-Covered Dwellings

Real estate agents often play a key role in housing transactions, making them a natural target for liability when such transactions involve FHA violations,²²⁶ but thus far, no reported case has considered their potential liability for facilitating the sale of a building constructed in violation of § 3604(f)(3)(C). The threat of such liability does exist, however, as demonstrated by the fact that the National Association of Realtors ("NAR") in 1999 sought, unsuccessfully, to have Congress amend § 3604(f)(3)(C) to specify that realtors would not be liable "for brokering a transaction involving a property which was designed and constructed improperly."²²⁷ According to the NAR, one such claim had been filed with HUD, which ultimately "exonerated the real estate agents" involved and provided "verbal assurances" to the NAR that HUD would not charge such cases in the future.²²⁸ HUD has not formally taken this position, however, and even if it did, pri-

223. HUD DESIGN MANUAL, *supra* note 39, at 2.13.

224. See also text accompanying note 435 (noting that the requirements of § 3604(f)(3)(C) are written in the present tense).

225. See *supra* text accompanying notes 197-202.

226. See, e.g., SCHWEMM, *supra* note 7, at § 12B:2 n.5.

227. 1999 House Hearings, *supra* note 86, at 56.

228. *Id.* at 55.

vate litigants would remain free to bring such claims under § 3613.²²⁹

Realtor liability could arise in two types of situations.²³⁰ One is where a real estate agent represents the buyer of a multi-family dwelling that lacks the features mandated by § 3604(f)(3)(C), and the buyer is subsequently sued for disability discrimination as a result of the absence of these features. Whether such a buyer could be made liable under the FHA is an open question, but, as discussed above in Part IV.B.2.c, an affirmative answer is a distinct possibility. A buyer who is sued in these circumstances might be expected to bring a claim against his realtor if the latter had failed to point out the building's noncompliance with § 3604(f)(3)(C) and/or the buyer's potential liability for such noncompliance.²³¹

The other situation in which a real estate agent might risk liability in connection with a noncompliant building is where the agent represents a disabled homeseeker. Presumably, a competent agent will notice and point out to his client the absence of § 3604(f)(3)(C)-mandated features in any dwelling being considered. An agent failing to do so might be liable for whatever damages the client suffers as a result of moving into such a unit, although, as in the situation discussed in the preceding paragraph, such liability would be based on the agent's violation of his state-law duties and not on the FHA.

The competent agent, however, may risk FHA-based liability if care is not taken in how the § 3604(f)(3)(C) information is conveyed to the client. In an analogous situation, real estate agents who volunteered racial information in an effort to influence their clients' housing choice have been held liable for illegal steering under the FHA.²³² The corresponding problem in accessibility

229. See text accompanying notes 67–71.

230. Realtors may also prosecute their own FHA-based claims in § 3604(f)(3)(C) cases. See *infra* text accompanying notes 369–71.

231. Not surprisingly, therefore, the NAR's position is that buyers not involved in the design-and-construction process should not be liable under the FHA based on their buildings' noncompliance with § 3604(f)(3)(C). See *1999 House Hearings, supra* note 86, at 54–56. If they are liable, then their realtors could face derivative liability, although the latter would presumably be based on the realtors' violation of their state-law duties rather than on the FHA.

232. See, e.g., *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529–34 (7th Cir. 1990) (opining that the FHA prevents agents from trying to mold their customers' preferences in favor of choosing segregated housing, but that the law allows agents to serve customers'

cases would be agents who assume that their clients would choose (or reject) housing based on its § 3604(f)(3)(C) status and therefore steer them illegally instead of simply providing information and allowing the clients to decide for themselves.

In addition to real estate agents, other facilitators of housing transactions involving dwellings covered by § 3604(f)(3)(C) may be targets of suit. The FHA prohibits disability-based discrimination in the insuring, financing, and appraisal of housing.²³³ Thus, for example, in situations where the features mandated by § 3604(f)(3)(C) are present, an insurance company's decision to treat such features negatively (e.g., through a refusal to insure or higher rates) would presumably violate the FHA.²³⁴ A similarly-based negative decision by a mortgage provider or appraiser might also violate the FHA, at least if it made housing unavailable in violation of § 3604(f)(1) or resulted in discriminatory terms or conditions in violation of § 3604(f)(2).²³⁵ With regard to

preferences by providing racial information requested by them). See generally SCHWEMM, *supra* note 7, at §§ 13:5-13:7.

233. Home insurance is not explicitly mentioned in the FHA, but a HUD regulation and many judicial decisions have held that insurance discrimination violates § 3604(a)/§ 3604(f)(1) and § 3604(b)/§ 3604(f)(2). See 24 C.F.R. § 100.70(d)(4) (2005); SCHWEMM, *supra* note 7, at § 13:15; text accompanying notes 13-32 (discussing cases under § 3604(a) and § 3604(b)); see also *infra* note 234 (listing disability cases under § 3604(f)(1) and § 3604(f)(2)).

Housing-related financial discrimination is explicitly outlawed by the FHA's § 3605 and may also violate § 3604(f)(1) and § 3604(f)(2). See, e.g., *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 22 (D.D.C. 2000) (upholding race-based claims under § 3604(a) and § 3604(b)); *United States v. Mass. Indus. Fin. Agency*, 910 F. Supp. 21, 27-29 (D. Mass. 1996) (upholding claims under § 3604(f)(1) and § 3605); SCHWEMM, *supra* note 7, at § 13:15 n.4 (citing cases upholding § 3604(a) claims).

Appraisal discrimination is explicitly outlawed by § 3605 and may also violate § 3604(f)(1). See *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) (upholding claim based on § 3604(a)); *United States v. Am. Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977); SCHWEMM, *supra* note 7, at §§ 18:-1, 18:7-18:8.

234. See, e.g., *Nevels v. Western World Ins. Co.*, 359 F. Supp. 2d 1110, 1117-20 (W.D. Wash. 2004) (upholding § 3604(f)(1) and § 3604(f)(2) claims based on defendant's refusal to insure long-term-care facilities that housed many disabled residents); *Wai v. Allstate Ins. Co.*, 75 F. Supp. 2d 1, 5-7 (D.D.C. 1999) (upholding § 3604(f)(1) and § 3604(f)(2) claims based on defendant's refusal to provide standard insurance at ordinary rates to landlords with disabled tenants).

235. Financing and appraisal claims based on § 3604(f)(3)(C) may be somewhat more difficult to maintain than those against insurance companies. This is because the FHA provision most clearly applicable to financial and appraisal discrimination (i.e., § 3605), see *supra* note 233, is not one for which noncompliance with § 3604(f)(3)(C) is considered discrimination. See *supra* text accompanying notes 19-23; cf. *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056-57 (8th Cir. 2003) (holding that a mortgage lender accused of violating § 3605 was under no obligation to provide reasonable accommodations pursuant to § 3604(f)(3)(B)); *Webster Bank v. Oakley*, 830 A.2d 139, 152 (Conn. 2003) (agreeing with

those buildings that do not have the features mandated by § 3604(f)(3)(C), insurance companies and other housing facilitators could presumably treat this fact as a negative without violating the FHA, so long as they do not do so in a way that discriminates against persons with disabilities (e.g., by charging higher rates to disabled individuals who live in a noncompliant building than are charged to non-disabled tenants in the same building).²³⁶

c. Local Governments and Building Officials

Before any multi-family housing development may be built, it must go through a review-and-approval process by a unit of local government, whose officials are charged with determining whether it meets the requirements of that government's building code and other applicable laws. Put another way, every dwelling constructed in violation of § 3604(f)(3)(C) was once approved by local building officials. This fact, which the home-building industry contends is one of the principal reasons for the high degree of noncompliance with § 3604(f)(3)(C),²³⁷ suggests that local officials bear at least some responsibility for violations of this statute. As noted above, proper defendants in § 3604(f)(3)(C) cases generally include anyone whose conduct is a substantial factor in causing a

Gaona that § 3604(f)(3)(B)'s reasonable accommodations requirement does not apply to § 3605 claims). As to § 3604's coverage of discriminatory financing, some courts have held that this provision, unlike § 3605, applies only where financing is sought in connection with "acquiring a home" and not also to loans "for maintaining a dwelling previously acquired." *Webster Bank*, 830 A.2d at 152 (quoting *Eva v. Midwest Nat'l Mortgage Bank, Inc.*, 143 F. Supp. 2d 862, 886 (N.D. Ohio 2001)). *But see Hargraves*, 140 F. Supp. 2d at 22 (noting the argument made by the United States as amicus curiae that § 3604 as well as § 3605 applies to home equity loans and concluding that this "appears to be a close issue"). In any event, this problem does not exist in insurance cases, because the main source of the FHA's condemnation of insurance discrimination is § 3604, *see supra* note 233, thereby making § 3604(f)(3)(C) available.

236. *See, e.g., HUD v. Country Manor Apartments*, 2A Fair Hous.—Fair Lending Rep. (Aspen L. & Bus.) ¶ 25,156, at 26,248, 26,252–54 (HUD ALJ 2001) (holding that defendant's policy of requiring tenants who used motorized wheelchairs to obtain special liability insurance violates the FHA's ban on discriminatory terms and conditions in rentals); *see also Avalon Residential Care Homes, Inc. v. GE Fin. Assurance Co.*, 72 F. App'x 35, 36–37 (5th Cir. 2003) (finding no FHA violation where defendant offered equal insurance coverage to disabled and non-disabled persons); *cf. McNeil v. Time Ins. Co.*, 205 F.3d 179, 186–87 (5th Cir. 2000) (interpreting ADA provision forbidding businesses from denying people with disabilities "the full and equal enjoyment of [its] goods [and] services" as requiring that insurance companies offer the disabled access to the same products offered to others).

237. *See supra* notes 98–99 and accompanying text.

violation of this provision,²³⁸ and it could certainly be argued that local building officials fit within this category.

The problem is that this general standard and the torts principles on which it is based only govern FHA cases if Congress has not explicitly provided to the contrary,²³⁹ and the 1988 FHAA does include some explicit provisions relating to the role of local governments vis-a-vis § 3604(f)(3)(C). In one such provision, Congress directed HUD to "encourage, but . . . not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with [§ 3604(f)(3)(C)]."²⁴⁰ This provision, which gives local governments the option of ignoring § 3604(f)(3)(C)'s requirements in their review-and-approval procedures, implies that such governments should not be made liable for § 3604(f)(3)(C)-related violations based on their building codes' failure to include the FHA-mandated features.²⁴¹

A more difficult question, however, would be presented where a local government's building laws *do* include the § 3604(f)(3)(C)-mandated features, but municipal officials mistakenly approve a proposed development that fails to include these features. Congress in the FHAA was aware of this possibility, but provided only limited guidance as to what legal consequences should follow. Thus, where a local government has incorporated in its laws accessibility requirements equivalent to § 3604(f)(3)(C), the FHAA specifies that compliance with such laws "shall be deemed

238. See *supra* note 133 and accompanying text.

239. See *supra* note 132 and accompanying text.

240. 42 U.S.C. § 3604(f)(5)(C) (2000).

241. Even traditional tort principles might support this result, for ordinarily:

[F]ailure to object to [the commission of a wrong] is not enough to charge one with responsibility. It is, furthermore, essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with the intent requisite to committing a tort, or with negligence. One who innocently, and carefully, does an act which happens to further the tortious purpose of another is not acting in concert with the other.

PROSSER & KEETON, *supra* note 140, § 46, at 323-24 (citations omitted). Cf. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 195 (2003) (holding that city engineer's decision as to whether to issue a building permit was, being controlled by local law, merely a "nondiscretionary ministerial act" and thus could not be the basis for a finding of discriminatory intent in violation of the Equal Protection Clause).

to satisfy the requirements of [§ 3604(f)(3)(C)],”²⁴² and local officials are invited to review proposals for new multi-family developments “for the purpose of making determinations as to whether the design and construction requirements of [§ 3604(f)(3)(C)] are met.”²⁴³ The statute makes clear, however, that such local compliance determinations “shall not be conclusive in [FHA] enforcement proceedings.”²⁴⁴

This latter provision shows Congress’s awareness that local officials might err in their evaluation of a proposed development’s compliance with § 3604(f)(3)(C), but it does not say what the legal implications of such an occurrence should be. For its part, HUD has commented that it “is reluctant to assume that State and local jurisdictions, by performing compliance reviews, will subject themselves to liability under the Fair Housing Act.”²⁴⁵ But HUD’s being “reluctant to assume” is not a guarantee, much less an authoritative interpretation of the statute. Thus, if a local government approves a multi-family housing proposal in violation of its own § 3604(f)(3)(C)-like building laws and thereby negligently permits construction of a dwelling that violates § 3604(f)(3)(C), traditional torts principles might well suggest that this conduct, being a substantial factor in producing the violation, is sufficient to make such a government and its responsible officials proper defendants in a § 3604(f)(3)(C) suit.²⁴⁶

4. Liability Issues Among Potential Defendants

Thus far, Part IV.B has established that a variety of different entities might be liable for § 3604(f)(3)(C)-based violations, and indeed many reported cases have named multiple defendants based on a single development’s noncompliance with §

242. 42 U.S.C. § 3604(f)(5)(A) (2000).

243. *Id.* § 3604(f)(5)(B).

244. *Id.* § 3604(f)(6)(B).

245. HUD Accessibility Guidelines, *supra* note 36.

246. See *supra* note 133 and accompanying text. Historically, the common law provided immunity for local governments and their officials from most tort actions. See DOBBS, *supra* note 160, § 269, at 718–19. In recent decades, however, this immunity has generally been abandoned, although it still applies in certain situations. See SECOND TORTS RESTATEMENT, *supra* note 133, §§ 895C, 895D. FHA claims have always been considered appropriate against local governments, although their officials have occasionally been granted immunities from damage claims similar to those applicable in § 1983 suits. See SCHWEMM, *supra* note 7, at § 12B:5.

3604(f)(3)(C).²⁴⁷ This section discusses how liability should be apportioned in multiple-defendant cases and the extent to which an individual defendant may have a right of contribution against other potentially liable entities. As with most other issues concerning proper defendants and their respective liabilities under the FHA, this matter is not explicitly dealt with in the statute and thus must be resolved by resorting to traditional tort principles.²⁴⁸

Once it is determined that a particular defendant is liable in a § 3604(f)(3)(C) case, the question becomes, "Liable for what?" (The related question of "Liable to whom?" is dealt with below in Part IV.C.) As noted earlier, the FHA provides for a full range of monetary and equitable relief in § 3604(f)(3)(C) cases,²⁴⁹ but the statute does not say whether each proper defendant should be responsible for all of the relief ordered. In one early § 3604(f)(3)(C) opinion, a district court seemed to find unpersuasive the plaintiffs' argument that "all entities involved in" a § 3604(f)(3)(C) violation "should be liable as joint tortfeasors,"²⁵⁰ but it later did hold three of the defendants "jointly and severally liable."²⁵¹ Neither opinion, however, provided any real analysis of how liability might be apportioned among multiple defendants nor how traditional tort principles might resolve this question.

Thereafter, in 2003, in *Norfolk & Western Railway Co. v. Ayers*,²⁵² the Supreme Court dealt with contribution issues in a Federal Employers' Liability Act ("FELA") case. In *Ayers*, the Court ruled unanimously that a FELA defendant was not entitled to have its liability reduced based on the contribution of others to the plaintiffs' injuries,²⁵³ a ruling that was justified in part because "joint and several liability is the traditional rule."²⁵⁴ Thus,

247. See, e.g., *United States v. Edward Rose & Sons*, 384 F.3d 258, 260 & n.1 (6th Cir. 2004); *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 771; *Fair Hous. Council v. Vill. of Olde St. Andrews*, 250 F. Supp. 2d 706, 708-09 (W.D. Ky. 2003).

248. See *supra* note 132 and accompanying text.

249. See *supra* notes 71, 77, 80, and 83 and accompanying texts.

250. *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 662 (D. Md. 1998).

251. *Id.* at 664-65; *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 460 (D. Md. 2000).

252. 538 U.S. 135 (2003).

253. *Id.* at 159-66.

254. *Id.* at 163. The modern meaning of joint and several liability is that:

(1) the plaintiff may sue each tortfeasor, A or B, separately; (2) the plaintiff

the Court in *Ayers* employed the same technique of statutory construction that it had earlier held was appropriate for the FHA—that is, interpreting statutory silence as an indication that Congress intended the statute to be governed by traditional tort principles.²⁵⁵

It seems likely, therefore, that joint and several liability should be the rule in FHA cases. Certainly this would be appropriate in those situations where the potential defendants are involved in a “joint enterprise,” as, for example, where a builder and developer work together in the design and construction of a multi-family structure.²⁵⁶ But even in situations where the potential defendants have not worked together (e.g., where the original developer has sold the property to an unrelated entity that is now the landlord), the traditional rule of joint and several liability would probably govern pursuant to *Ayers*.²⁵⁷

may sue both tortfeasors in a single action; (3) the plaintiff may obtain a judgment against one tortfeasor alone and enforce it against that one; (4) the plaintiff may obtain a judgment against both tortfeasors and enforce it against both; but (5) the plaintiff may not actually collect more than one full compensation.

DOBBS, *supra* note 160, § 170, at 413.

255. See *Meyer v. Holley*, 537 U.S. 280, 285–91 (2003); *supra* note 132 and accompanying text. In *Ayers*, the Court responded to the defendant’s argument that the modern trend is to apportion damages between multiple tortfeasors by first noting that “the more important inquiry” in interpreting the FELA would be the state of the law when that statute was enacted (i.e., in 1908). 538 U.S. at 145, 164. This suggests that the proper focus in a § 3604(f)(3)(C) case would be 1988 when the FHAA was enacted, but even with this later perspective, joint and several liability would probably be the proper rule. Citing the modern Torts Restatement on apportionment, the *Ayers* opinion noted that “many States retain full joint and several liability, even more retain it in certain circumstances, and most of the recent changes away from the traditional rule have come through legislative enactments rather than judicial development of common-law principles.” *Id.* at 164–65 (citations omitted). Significant here to the Court’s decision to apply the traditional rule was the fact—also true for the FHA—that Congress “has not amended the FELA” to reflect a new view of apportionment. *Id.* at 165. The *Ayers* opinion also found support for applying the traditional joint-and-several-liability rule in the fact that requiring apportionment among potential defendants “would handicap plaintiffs and could vastly complicate adjudications.” *Id.*

256. For purposes of tort law, a joint enterprise is a form of joint venture in which “two or more persons tacitly or expressly undertake an activity together” and share a pecuniary interest. DOBBS, *supra* note 160, § 340, at 933. Thus, “persons who act in concert, pursuant to a common plan or design, to commit a . . . tort are true joint tortfeasors; each is liable for harm done by the others involved.” *Id.* § 170, at 413.

257. The textual conclusion here is limited by “probably” because *Ayers* recognized that this issue must be answered for each statute based on its own structure, purpose, and time of enactment. See 538 U.S. at 165 n.22 (rejecting the analogy of decisions holding that apportionment of liability is appropriate under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, because that statute’s “structure, purpose, and

Joint and several liability means that each proper defendant may be held fully responsible for all appropriate relief in a § 3604(f)(3)(C) case.²⁵⁸ It does not mean, however, that such a defendant is barred from recouping some of its liability by asserting a right of contribution against other responsible entities.²⁵⁹ Although there was no right to contribution at common law, that rule had been changed in most American jurisdictions by 1988 when § 3604(f)(3)(C) was enacted.²⁶⁰ As the Court in *Ayers* pointed out in 2003, its holding that a FELA defendant was subject to joint and several liability still allowed such a defendant to identify "other responsible parties and demonstrat[e] that some of the costs of the injury should be spread to them."²⁶¹

While *Ayers* strongly suggests that a right of contribution should be recognized in § 3604(f)(3)(C) cases, there is a counter argument based on the Court's 1981 decision in *Northwest Airlines, Inc. v. Transport Workers Union*,²⁶² which held that no such right exists for employers in Title VII cases. Noting that Title VII did not expressly create such a right, *Northwest Airlines* rejected the idea that a right of contribution should be implied for this statute, principally because it was clear that Title VII was not created for the benefit of the employers who would be claiming such a right.²⁶³

more recent vintage may differentiate that measure from the FELA in ways relevant to the question presented").

258. See *supra* note 254.

259. "Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 87-88 (1981).

260. See *id.* at 87-88 & n.17 (noting in 1981 that thirty-nine states and the District of Columbia had come to recognize some right to contribution among joint tortfeasors). The trend in favor of contribution has continued. In 2000, Professor Dobbs observed "a right of contribution is now a generally accepted part of the joint and several liability system" for all except intentional torts (i.e., for negligent tortfeasors and those who are strictly liable). DOBBS, *supra* note 160, § 386, at 1078-80; see also *id.* § 170, at 413 ("If the plaintiff collects all her damages from one tortfeasor [who is jointly and severally liable], most states today permit the defendant who paid more than his just share of liability to recover contribution or indemnity from the other tortfeasor.").

261. 538 U.S. at 165. Furthermore, according to *Ayers*, such defendants "may be able to implead third parties and thus secure resolution of their contribution actions in the same forum as the underlying FELA actions." *Id.* at 165 n.23.

262. 451 U.S. 77 (1981).

263. *Id.* at 91-92. Furthermore, since Title VII itself did not intend to create such a right, the Court in *Northwest Airlines* felt that it would be inappropriate to establish this right as part of the judiciary's power to create federal common law. *Id.* at 95-99.

Lower courts, including one in a § 3604(f)(3)(C) case, have read *Northwest Airlines* to bar FHA defendants from asserting a right to contribution.²⁶⁴ The § 3604(f)(3)(C) case is *United States v. Quality Built Construction, Inc.*,²⁶⁵ where a district court held that the builders had no claim for either contribution or indemnification against their architect under the FHA.²⁶⁶ The *Quality Built* court felt that *Northwest Airlines* governed the contribution issue, because the FHA, like Title VII, is silent on this matter and the parties asserting the right of contribution (i.e., the builders) clearly were not the intended beneficiaries of § 3604(f)(3)(C).²⁶⁷

At this stage, therefore, the contribution issue in § 3604(f)(3)(C) cases must be considered unresolved. The only case on point is *Quality Built*, and the district court there did not consider *Ayers*, which the Supreme Court had decided just a few months earlier. For its part, *Ayers* neither made clear whether the defendant's right of contribution recognized therein was to be based on the federal statute, federal common law, or state law, nor did it show any awareness of *Northwest Airlines*, much less discuss whether this old Title VII precedent was being distinguished or disapproved. The fact that, in the same year as *Ayers*, the Supreme

264. See, e.g., *United States v. Yonkers Bd. of Educ.*, 594 F. Supp. 466, 473–75 (S.D.N.Y. 1984).

265. 309 F. Supp. 2d 767, 778–79 (E.D.N.C. 2003).

266. “Indemnity differs from contribution. While contribution contemplates that two defendants will share in the ultimate liability, indemnity contemplates that one will fully repay the other. Indemnity was and is permitted in only a few situations [in the joint and several liability system].” DOBBS, *supra* note 160, § 386, at 1079.

267. 309 F. Supp. 2d at 778–79. Although *Quality Built Construction* held that there was no right of contribution under the FHA, it did recognize that the builders there might have state law claims against the architect. *Id.* at 779; see also *Options Ctr. for Indep. Living v. G & V Dev. Co.*, 229 F.R.D. 149 (C.D. Ill. 2005) (upholding defendant-developer's cross claims against defendant-architect based on the latter's alleged breach of contract and professional malpractice in § 3604(f)(3)(C) case).

In *Quality Built Construction*, the builders' state law claims were apparently not based on the state law of contribution, but rather on the architect's alleged negligence and breach of contract. See 309 F. Supp. 2d at 779. The court refused to exercise supplemental jurisdiction over these claims, dismissing them without prejudice so that the builders could file them in state court. *Id.* With respect to the builders' claim for indemnification based on state law, the court dismissed this on the merits, holding that

to allow a wrongdoer to shift the entire liability to another party “would run counter to the basic policy” of the [federal] statute designed to regulate or restrict specific behavior. To allow [the builders] to seek indemnity from [the architect] would run counter to the purpose of the FHAA and undermine the regulatory goal by allowing the builder to escape any liability for violating the Act.

Id. (quoting *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989) (citation in omitted)).

Court held that liability issues under the FHA should generally be governed by traditional torts principles hardly clarifies the matter, because the "common law" of contribution has changed substantially in modern times. Fairness considerations do support the idea that a single defendant—among the many who might be sued for a particular § 3604(f)(3)(C) violation—should be able to make the other responsible entities bear their share of the liability. This factor, however, was also present in *Northwest Airlines*, and the Court simply responded that it was up to Congress, not the judiciary, to determine whether to include such considerations in Title VII law.²⁶⁸

Thus, while the parameters of *how* the § 3604(f)(3)(C) contribution issue should be decided can be set forth here, its ultimate resolution requires further judicial or congressional attention. Furthermore, a related, though distinct, issue—the degree to which the settlement of a plaintiff's § 3604(f)(3)(C) claim against one or more joint tortfeasors is to be credited in favor of the non-settling defendants—also remains in an uncertain state.²⁶⁹

268. See *Northwest Airlines*, 451 U.S. at 88–89, 97–98; see also *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) (declining to provide a right of contribution under either the Sherman Act or the Clayton Act on the ground that "regardless of the merits of the conflicting [policy] arguments, this is a matter for Congress, not the courts, to resolve").

269. Compare *Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101, 108–10 (3d Cir. 1981) (holding that nonsettling defendants in a fair housing case are entitled to a *pro tanto* reduction in the judgment against them for the amount that other defendants have settled for), with *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1453 (4th Cir. 1990) (holding that nonsettling defendant in a fair housing case is not entitled to any reduction in its judgment as a result of plaintiff's settlement with other defendants).

In the one § 3604(f)(3)(C) case to deal with this issue, the court in *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 474–75 (D. Md. 2000), held that it was bound by *Pinchback* to deny any reduction in the judgment against the nonsettling defendant for the plaintiffs' earlier settlement with other defendants. The *LOB* opinion noted that this "permits the seemingly peculiar result of allowing the plaintiffs to recover more than the total amount of the judgment," a result that "contradicts the 'almost universally held principle that there can only be one satisfaction for an injury or wrong.'" *Id.* at 474 (quoting *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 596 (4th Cir. 1996)); see also *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 208 (1994) ("It is generally agreed that when a plaintiff settles with one of several joint tortfeasors, the nonsettling defendants are entitled to a credit for that settlement."). Furthermore, the *LOB* court identified a number of decisions in addition to *Miller* that permitted some credit to nonsettling defendants where civil rights plaintiffs had settled with other defendants. See 92 F. Supp. 2d at 475 n.19. Nevertheless, *LOB* noted that "there is no federal statute addressing a joint tortfeasor's right to a setoff" and that "[t]he law contains no rigid rule against over-compensation." *Id.* at 475 (quoting *McDermott*, 511 U.S. at 219). Thus, if felt bound to follow *Pinchback's* no-setoff rule.

Even if one were able to resolve apportionment, contribution, and setoff issues among § 3604(f)(3)(C)-liable entities, two difficult questions would remain concerning the assessment of liability in these cases: (1) what types of plaintiffs can recover? and (2) how long does a defendant's liability continue? These questions are dealt with next in Parts IV.C and IV.D.

C. Identifying Proper Plaintiffs: Standing to Sue

1. Overview and Government-Initiated Claims

As described above in Part II.D, the FHA provides for enforcement by HUD- and Department of Justice-initiated actions and by private claims brought by any "aggrieved person."²⁷⁰ Even before the 1988 amendments added the disability prohibitions to the FHA,²⁷¹ the Supreme Court had decided three cases holding that persons aggrieved under the FHA extended well beyond the direct targets of a defendant's discrimination to include a variety of other individuals and entities.²⁷² The Congress that passed the 1988 FHAA endorsed these decisions and actually expanded the definition of "aggrieved person" for purposes of the amended FHA.²⁷³

The accessibility mandates of § 3604(f)(3)(C) do not specify who would be proper plaintiffs in litigation based on this provision. As

270. 42 U.S.C. §§ 3610(a), 3613(a)(1)(A) (2000). See *supra* notes 67–69, 73–74 and 78 and accompanying texts.

271. See *supra* notes 15–23 and accompanying text.

272. See *Havens*, 455 U.S. at 372–79 (upholding standing of fair housing organization and minority tester to challenge racial steering by real estate firm); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109–15 (1979) (upholding standing of community residents and municipality to challenge defendants' racial steering); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208–12 (1972) (upholding standing of white residents of apartment complex to challenge their landlord's discrimination against minority applicants).

273. As a result of the 1988 FHAA, the FHA now defines "aggrieved person" as "any person—who (1) claims to have been injured by a discriminatory housing practice; or . . . (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i) (2000). "Discriminatory housing practice" here means any act that is unlawful under the FHA's substantive provisions. See *id.* § 3602(f). The comparable pre-1988 definition was similar but more narrow with respect to the second element as a result of inclusion of the word "irrevocably" to describe the injury required (i.e., a "person aggrieved" was defined as "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur"). See *id.* § 3610(a) (1970) (*amended* by Pub. L. No. 100-430, 102 Stat. 1619 (1988)).

noted above, § 3604(f)(3)(C) simply identifies certain behavior—failure to design and construct covered multi-family dwellings in specified ways—as “discrimination” for purposes of § 3604(f)(1) and § 3604(f)(2).²⁷⁴ True, one of these referred-to provisions—§ 3604(f)(2)—is directed against discrimination “against any person” in the terms or conditions of a housing transaction “because of a handicap of that person” or of someone residing or associated with that person.²⁷⁵ Therefore, a person with a disability who is seeking housing and applies for a unit that is built without the § 3604(f)(3)(C)-mandated features would be a proper plaintiff,²⁷⁶ as would anyone residing or associated with that person.²⁷⁷ In addition, other types of “aggrieved persons” injured by a § 3604(f)(3)(C)-based violation may be entitled to sue, along with HUD and the Department of Justice in certain circumstances.

To date, HUD has not initiated any of these cases,²⁷⁸ but the Department of Justice has filed quite a few actions pursuant to its authority under § 3614 of the FHA.²⁷⁹ In § 3614 cases, the De-

274. See *supra* notes 21–22 and accompanying text.

275. See *supra* note 22 (quoting 42 U.S.C. § 3604(f)(2) (2000)).

276. See *infra* note 282.

277. The fact that § 3604(f)(1) and § 3604(f)(2) outlaw discrimination against buyers and renters who reside or are associated with disabled persons means that these provisions were intended to “prohibit not only discrimination against the primary purchaser or named lessee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.” 1988 HOUSE REPORT, *supra* note 16, at 24; see also 134 CONG. REC. S10,539, S10,541 (Aug. 2, 1988) (statement of Senator Kennedy) (noting, as a principal sponsor of the FHAA, the value of § 3604(f)(3)(C) for nondisabled tenants who want to have visitors with disabilities).

Just how far the “associated with” phrase in subsections (f)(1) and (f)(2) goes is unclear. Even without the benefit of this phrase, courts have long held that white tenants who are discriminated against because they entertain black guests have a cause of action under § 3604(a) and/or § 3604(b). See SCHWEMM, *supra* note 7, at § 13:16, n.5, § 14:3, n.29. It seems probable, therefore, that a tenant who could not have a mobility-impaired guest visit him because the tenant’s building does not comply with § 3604(f)(3)(C) would have standing to sue. Cf. 24 C.F.R. § 100.60(5) (2005) (providing HUD regulation outlawing the eviction of tenants “because of the . . . handicap . . . of a tenant’s guest”). One race case even held that the black guest in this situation has standing to challenge the landlord’s discriminatory policy. See *Lane v. Cole*, 88 F. Supp. 2d 402, 406 (E.D. Pa. 2000). The theory in *Lane* was that the black visitor suffered a distinct and palpable injury as a result of the landlord’s unlawful policy of conditioning rentals on exclusion of minority guests. If *Lane* were extended to § 3604(f)(3)(C) cases, then standing could be recognized in disabled would-be guests who are deterred by a building’s inaccessible features from visiting there.

278. HUD lawyers have, however, prosecuted § 3604(f)(3)(C) cases on behalf of private complainants in administrative proceedings. See, e.g., *HUD v. Perland*, Fair Hous.-Fair Lending Rep. ¶ 25,136 (HUD ALJ 1998).

279. See *supra* notes 78–79 and accompanying text. The Department of Justice has also prosecuted some § 3604(f)(3)(C) cases pursuant to its authority to handle cases that are

partment of Justice must prove either a “group denial of rights” or a “pattern or practice,” but this has not been a significant obstacle in § 3604(f)(3)(C) cases, because courts have invariably found a “group denial of rights” in such cases²⁸⁰ and have also recognized the possibility of a “pattern or practice” in these cases.²⁸¹

2. Privately Initiated Claims

Thus far, most privately initiated § 3604(f)(3)(C) cases have been brought by one of three types of “aggrieved persons:” (1) disabled homeseekers; (2) disabled testers; and (3) advocacy organizations. The first two groups will be considered next; advocacy organizations will be dealt with in the following section; and a final section will consider other potential plaintiffs.

a. Disabled Homeseekers and Testers

The right to sue of disabled homeseekers would seem rather obvious,²⁸² although it has been questioned on occasion when such

elected to court out of the HUD administrative process. *See supra* note 76 and accompanying text; *see infra* note 431 (listing cases).

280. *See, e.g., Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1138–39, 1153; *Hallmark Homes, Inc.*, 2003 WL 23219807, at *4–6; *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *33–36; *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 760–61 (quoting *United States v. Hartz Constr. Co.*, No. 97C8175 1998 WL 42265, at *2 (N.D. Ill. Jan. 28, 1998)).

281. *See infra* note 431 (citing cases).

282. *See, e.g., Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 703, 713–14 (D. Md. 1999) (ruling in favor of a disabled individual “who uses a wheelchair for mobility” and fair housing organization). *See generally supra* notes 67–69 and 73 and accompanying texts.

Because § 3604(f)(3)(C) seems particularly intended to benefit persons with mobility impairments and certain other kinds of disabilities, there may be some question whether homeseekers with disabilities that do not benefit from the mandated features (e.g., persons with mental disabilities) should have standing to bring § 3604(f)(3)(C)-based claims. Some of the features mandated by this provision are indeed specifically addressed to the needs of individuals with mobility impairments. *See* 42 U.S.C. § 3604(f)(3)(C)(ii), (iii)(IV) (2000) (requiring, respectively, that doors be “sufficiently wide to allow passage by handicapped persons in wheelchairs” and that kitchens and bathrooms be “such that an individual in a wheelchair can maneuver about the space”). The other mandated features, however, do not include such language, and one of them by its terms covers all persons with disabilities. *See id.* § 3610(f)(3)(C)(i) (specifying that public and common use areas must be “readily accessible to and usable by handicapped persons” without limiting the latter phrase).

The FHA’s enforcement provisions do not exclude persons with certain types of disabilities from making § 3604(f)(3)(C)-based claims, and no case has thus far raised this issue.

plaintiffs were not actually ready, willing, and financially able to live in the defendant's housing.²⁸³ For example, in an unpublished 1996 decision, the Ninth Circuit in *Ricks v. Beta Development Co.*²⁸⁴ held that a paraplegic individual who had alleged "merely a general interest in . . . accessible housing" lacked standing to bring a § 3604(f)(1) claim against the developer of a condominium complex that was built in violation of § 3604(f)(3)(C).²⁸⁵ According to *Ricks*, standing to assert such a claim requires a disabled plaintiff to show that "but for the architectural barriers in the condominium, he would purchase a unit"²⁸⁶ or at least that he was "a prospective buyer"²⁸⁷ with an interest in the condominium.²⁸⁸ *Ricks* also held that standing was barred by the plaintiff's "failure to allege that he had sufficient financial means to purchase a condominium,"²⁸⁹ both because this failure meant there was no "actionable causal relationship between [defendant's] alleged discriminatory action[] and [plaintiff's] asserted injury"²⁹⁰ and because "a court order directing the removal of architectural barriers will not remedy his problem,"²⁹¹ i.e., "it is his financial inability, rather than any action on the part of the developers and designers, which prevents Ricks from obtaining a condominium."²⁹²

Still, it may be that courts will insist that a homeseeker-plaintiff present proof of a "qualifying" disability to invoke § 3604(f)(3)(C). In any event, for present purposes, this section's conclusion that a disabled homeseeker has standing to bring a § 3604(f)(3)(C)-based claim assumes that the disability involved is one that would benefit from the § 3604(f)(3)(C)-mandated features.

283. See *Nat'l Alliance for the Mentally Ill v. St. Johns County*, 376 F.3d 1292, 1295 (11th Cir. 2004) (denying standing for disabled persons who alleged that they "might" live in the particular housing involved and holding that such persons must instead show that they were "qualified" and "sought [to live there]"); *Whitaker v. West Vill. Ltd. P'ship*, 2004 WL 2008502, at *4-5 (N.D. Tex. Sept. 8, 2004) (dismissing claims by disabled individuals who had no interest in seeking units at defendant's complex); *Montana Fair Hous., Inc. v. Am. Cap. Dev., Inc.*, 81 F. Supp. 2d 1057, 1064 (D. Mont. 1999) (questioning standing of disabled homeseeker whose application to defendant's housing complex may have been denied because of his income); *infra* notes 284-92 and accompanying text (discussing *Ricks v. Beta Dev. Co.*, Fair Hous.-Fair Lending Rep. ¶ 16,107 (9th Cir. 1996)).

284. Fair Hous.-Fair Lending Rep. ¶ 16,107 (9th Cir. 1996).

285. *Id.* at 16,107.2.

286. *Id.*

287. *Id.*

288. *Id.* at 16,107.1-2.

289. *Id.*

290. *Id.* at 16,107.3.

291. *Id.*

292. *Id.* at 16,107.2.

Although *Ricks* is clearly a restrictive holding, its importance in limiting standing on behalf of disabled homeseekers and even disabled testers is limited by the fact that it only considered a claim under § 3604(f)(1)'s refusal-to-sell provision and not also under § 3604(f)(2)'s guarantee of nondiscriminatory terms and conditions.²⁹³ Thus, an internal HUD memo responding to *Ricks* concluded that, while § 3604(f)(1) complaints based on § 3604(f)(3)(C) noncompliance "should be dismissed where the complainant did not have the interest in living in and/or the financial means to live at the housing. Such complaints should be investigated as possible violations of [§ 3604(f)(2)]."²⁹⁴ More importantly, the Ninth Circuit itself eight years after *Ricks* held that a disabled tester with no interest in purchasing or renting particular housing had standing to bring a § 3604(f)(2) claim based on a development's noncompliance with § 3604(f)(3)(C) in *Smith v. Pacific Properties & Development Corp.*²⁹⁵

The plaintiffs in *Smith* were a polio victim who used a wheelchair (Smith) and a disability rights organization ("DRAC") on whose behalf Smith had visited various properties to test for compliance with § 3604(f)(3)(C).²⁹⁶ The plaintiffs concluded that five of the defendant's properties did not comply with § 3604(f)(3)(C), and they brought suit alleging that these developments violated their rights under § 3604(f)(2).²⁹⁷ The district court dismissed, holding that § 3604(f)(2) "requires that a disabled person have an interest in actually renting or purchasing a dwelling in order to allege a violation,"²⁹⁸ but the Ninth Circuit reversed. Noting that § (f)(2) prohibits "a broader set of behavior" than §

293. See *supra* note 22 for the text of these provisions.

294. Memorandum from Sara Pratt, Director, Office of Investigations, Fair Housing and Equal Opportunity, to HUD Fair Housing Enforcement Center Directors and Program Operators and Compliance Center Directors, *Standing in Accessibility Cases in Light of Ricks v. Beta Development Co.*, available at <http://www.fairhousing.com/index.cfm?method=page.display&pageID=273> (last visited Feb. 22, 2006). Pursuant to this memo, HUD investigators of (f)(1)-based accessibility claims were instructed to ask the complainant "to provide evidence showing that he/she actually was interested in purchasing a unit and could afford to do so." *Id.* The memo concluded, however, that an (f)(2)-based claim may be brought by "[a] complainant who is not actually interested in purchasing, or able to purchase, a unit . . . against a respondent for the latter's failure to design and construct housing so as to be accessible." *Id.*

295. 358 F.3d 1097, 1104-06 (9th Cir. 2004).

296. *Id.* at 1099.

297. *Id.* at 1100.

298. *Id.* at 1101.

(f)(1),²⁹⁹ the court of appeals rejected the lower court's view that injury to a tester making an § (f)(2) claim "must arise from something more than merely observing a discriminatory architectural feature."³⁰⁰ According to the Ninth Circuit:

To read an additional standing requirement into [§ 3604(f)(2)] beyond mere observation . . . ignores that many overtly discriminatory conditions, for example, lack of a ramped entryway, prohibit a disabled individual from forming the requisite intent or actual interest in renting or buying *for the very reason* that architectural barriers prevent them from viewing the whole property in the first instance.³⁰¹

The Ninth Circuit then went on to make what it considered an even stronger point:

More importantly, the district court's reasoning fails to recognize the dignitary harm to a disabled person of observing such overtly discriminatory conditions.

Interpreting § 3604(f)(2) to exclude these individuals from enforcing their right to be free from discrimination undermines the specific intent of the FHAA, which is to prevent disabled individuals from feeling as if they are second-class citizens. The district court therefore erred as a matter of law in interpreting § 3604(f)(2) to preclude tester standing, and as a consequence, DRAC's representational standing.³⁰²

Smith's recognition of tester standing for § (f)(2) claims based on a defendant's noncompliance with § 3604(f)(3)(C) was based on

299. *Id.* at 1104.

300. *Id.*

301. *Id.* (emphasis in original).

302. *Id.* (internal citations omitted). Because *Smith* died while the case was pending, the parties and the Ninth Circuit treated the issue of his standing as whether DRAC had representational standing based on the injuries that its members with disabilities, including *Smith*, suffered when they encountered § 3604(f)(3)(C)-based violations while testing. *Id.* at 1100–02. This was appropriate pursuant to *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). It is not true, however, that an individual's FHA claim dies with him, for such a claim may be prosecuted on behalf of his estate. See SCHWEMM, *supra* note 7, at § 12:1 n.5 and accompanying text. *Smith's* death may have mooted his estate's claim for injunctive relief, but not for damages. See, e.g., *Havens*, 455 U.S. at 371; cf. *Tandy v. City of Wichita*, 380 F.3d 1277, 1285, 1289 (10th Cir. 2004) (holding that a disabled plaintiff's death moots his ADA claim for prospective relief, but not his claim for damages). Indeed, the Ninth Circuit implicitly recognized that testers like *Smith* would have such a damage claim by pointing out the dignitary harm they may suffer while testing a prospective defendant's noncompliant properties. See 358 F.3d at 1104. Still, to secure injunctive relief in *Smith*, DRAC needed to have standing, and the Ninth Circuit held that it did, both in its representational capacity, *id.* at 1101–04, and, in a later part of the opinion, on its own behalf. *Id.* at 1104–06.

its view of the Supreme Court's 1982 decision in *Havens Realty Corp. v. Coleman*.³⁰³ In *Havens*, the Court unanimously held that a minority tester who had been falsely told by the defendants that no units were available in their apartment complexes had standing to sue under the FHA's § 3604(d).³⁰⁴ This provision, the Court noted, makes it unlawful "[t]o represent to *any person* because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," meaning that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing."³⁰⁵ The Court also found significant that Congress in § 3604(d) "plainly omitted" the requirement "that there be a 'bona fide offer' to rent or purchase," which it did include in § 3604(a).³⁰⁶ The congressional determination in § 3604(d) to give all persons "an enforceable right to truthful information concerning the availability of housing"³⁰⁷ was the key to the Court's recognition that tester claims could satisfy Article III standing requirements. Because "[t]he actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'"³⁰⁸ *Havens* held that the minority tester there suffered "specific injury" from the defendants' misrepresentations to her, and thus "the Article III requirement of injury in fact is satisfied."³⁰⁹

303. 455 U.S. 363 (1982).

304. *Id.* at 373-74.

305. *Id.* at 373 (citing 42 U.S.C. § 3604(d) (2000)).

306. *Id.* at 374. The Court's reading of § 3604(a) in *Havens*, while not wrong, amounted to a half-truth. That provision makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or other prohibited ground]." 42 U.S.C. § 3604(a) (2000). Thus, the "bona fide offer" phrase modifies only the first prohibition and not also the prohibitions against discriminatory refusals to negotiate and discriminatory practices that make housing "otherwise . . . unavailable." Indeed, at least one court after *Havens* has suggested that testers have standing to sue under § 3604(a) based on the latter parts of this provision. See *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525, 1527 (7th Cir. 1990).

307. 455 U.S. at 373. The Art. III standing requirements are identified *supra* note 69.

308. 455 U.S. at 373 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

309. *Id.* at 374. The Court went on to reject the standing of a white tester who had received truthful information from the defendants about their available units. *Id.* "As such, [the white tester] has alleged no injury to his statutory right to accurate information concerning the availability of housing. . . . [B]ecause [he] does not allege that he was a victim of a discriminatory misrepresentation, he has not pleaded a cause of action under [§ 3604(d)]," and therefore his claim was ordered dismissed. *Id.* at 375.

Extending *Havens'* precise holding to disability claims is both easy and unhelpful. Clearly, *Havens* means that a disabled tester has standing to bring a § 3604(d) claim if a housing provider falsely tells him that no units are available. But such a § 3604(d) claim is not what occurred in *Smith* nor could it be the basis for claims challenging noncompliance with § 3604(f)(3)(C), which, by its terms, defines discrimination only for purposes of § 3604(f)(1) and § 3604(f)(2) (i.e., the disability equivalents of § 3604(a) and § 3604(b)),³¹⁰ and not also § 3604(d). The real problem in *Smith* and in other cases dealing with a disabled tester's right to challenge § 3604(f)(3)(C) noncompliance is whether *Havens* should be extended beyond § 3604(d) to include claims under § 3604(f)(2).

Two Seventh Circuit decisions have read *Havens* to authorize tester claims under § 3604(b), the non-disability counterpart of § (f)(2).³¹¹ However, the problem with these decisions—and with the Ninth Circuit's reliance on them to recognize a disabled tester's standing in *Smith*³¹²—is that they too readily conclude that §§ 3604(b), (f)(2) confer substantive rights on non-home-seekers. It is true that these provisions outlaw discrimination against "any person," which does contrast with § 3604(f)(1)'s language banning discrimination toward "any buyer or renter."³¹³ But § 3604(f)(2)'s use of the "any person" phrase is quite different from how this phrase is used in § 3604(d). The latter provision defines the pro-

310. See *supra* note 18.

311. See *United States v. Balistreri*, 981 F.2d 916, 929 (7th Cir. 1992); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526–27 (7th Cir. 1990); see also *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D.N.Y. 1977) (finding, in a pre-*Havens* decision, that testers have standing under § 3604(b) to challenge racial steering directed against them).

In the *Dwivedi* case, Judge Posner noted that "Congress can create new substantive rights, such as a right to be free from misrepresentations [referring to *Havens* and § 3604(d)], and if that right is invaded the holder of the right can sue without running afoul of Article III, even if he incurs no other injury." 895 F.2d at 1526–27. *Dwivedi* was a case in which testers and other plaintiffs challenged racial steering by a real estate firm under § 3604(a), § 3604(b), and § 3604(d), and the court concluded that, while no misrepresentations had been proved, the testers had standing because "the logic of *Havens* embraces discrimination in the provision of services, [which is] forbidden explicitly by section 3604(b) and implicitly by section 3604(a)." *Id.* at 1527. Two years later in *United States v. Balistreri*, another Seventh Circuit panel held that black testers who were offered apartments at higher rental rates than their white counterparts had standing to receive damage awards under § 3604(b) because *Havens'* "logic also extends to § 3604(b), which prohibits discrimination against 'any person' in the terms or conditions of rentals, and, like § 3604(d), does not require a bona fide offer." 981 F.2d at 929.

312. See 358 F.3d at 1103.

313. For the text of § 3604(f)(1) and § 3604(f)(2), see *supra* note 22.

hibited behavior as making a misrepresentation "to any person,"³¹⁴ whereas § 3604(f)(2) bans discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling."³¹⁵ The implication is that the "any person" protected by § (f)(2) must suffer discrimination in a sale or rental, suggesting that § (f)(2) confers rights only on those persons who have an interest in buying or renting a dwelling.³¹⁶

It is important here to note that the key to *Havens'* interpretation of § 3604(d) as including tester standing was not merely, or even primarily, the "any person" phrase in that provision, but rather the fact that Congress made clear in § 3604(d)—by banning misrepresentations "to any person"—that this provision confers on all persons the substantive right to be free from discriminatory misrepresentations. This is shown by *Havens'* additional holding that the white tester there, who had not been given false information, lacked standing to state a "cause of action under [§ 3604(d)]," even though he was obviously covered by the "any person" phrase just as much as his black counterpart.³¹⁷

The key, therefore, to determining whether *Havens* should be extended to § 3604(f)(2) is to decide what substantive rights are conferred on the "any person" of this provision and in particular whether Congress intended to provide a cause of action under § (f)(2) for non-homeseekers. As pointed out in the previous paragraph, § (f)(2)'s language does not compel an affirmative answer, which suggests that the Ninth Circuit in *Smith* may have erred in allowing disabled individuals to sue under it without having an interest in actually buying or renting housing.

Certainly one questionable part of *Smith's* analysis is its conclusion that "the dignitary harm to a disabled person of observ-

314. 42 U.S.C. § 3604(d) (2000) (emphasis added).

315. *Id.* § 3604(f)(2) (emphasis added).

316. Further support for this view occurs in a later part of (f)(2), which provides that the discrimination banned includes that based on the disability of "a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." *Id.* § 3604(f)(2)(B). This same language also appears in (f)(1). *Id.* § 3604(f)(1)(B).

317. See *supra* note 309. Because FHA standing extends to the outer limits of Art. III, see *supra* note 69 and accompanying text, the issue of whether a particular plaintiff has standing to sue under a specific FHA provision is, as the textual quote from *Havens* suggests, essentially the same as the issue of whether that plaintiff has a substantive cause of action under that provision. See Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 OHIO ST. L.J. 1, 23–25, 56–58, 66–67 (1980).

ing" a development's inaccessible conditions could serve as an independent basis for upholding tester standing.³¹⁸ It is true that a proper FHA plaintiff is entitled to compensation for the dignitary harm of being the target of illegal discrimination,³¹⁹ and testers may receive such awards.³²⁰ But to say that a tester who has been sufficiently injured to have standing (e.g., by being the target of a § 3604(d) misrepresentation) may collect for the dignitary harm illegal discrimination causes is far different from saying that dignitary harm itself creates a sufficiently particularized injury in testers to establish standing. The standing issue, as already noted, turns on whether § 3604(f)(2) was intended to confer legal rights on testers who merely observe inaccessible housing. On an analogous point—whether the FHA's ban on discriminatory advertising in § 3604(c) was intended "to confer a legal right on all individuals to be free from indignation and distress" caused by merely seeing a discriminatory ad—a 1990 opinion by then-Circuit Judge Ruth Bader Ginsburg suggested a negative answer,³²¹ although some courts have endorsed such claims.³²² As in these § 3604(c) cases,³²³ the concern in accessibility-based tester claims brought under § 3604(f)(2) is that a particularized injury to the plaintiff must be shown and that the harm suffered by an individual who merely observes a building's noncompliance with §

318. See *supra* text accompanying note 302.

319. See SCHWEMM, *supra* note 7, § 25:5.

320. See, e.g., *United States v. Balistreri*, 981 F.2d 916, 930–33 (7th Cir. 1992); *Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984).

321. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 n.2 (D.C. Cir. 1990) (questioning individual plaintiff's standing who "alleged only that he 'incurred indignation' and 'distress' as a result of the [defendants' § 3604(c)] violation," while opining that an individual would "no doubt" have standing if she "alleged and later proved that an advertisement indicating a racial preference deterred her from seeking housing in the advertised property").

322. E.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993) (upholding § 3604(c) claim by minority individuals who were not actively looking for housing when they saw defendant's ads, because there is "no significant difference between the statutorily recognized injury suffered by the tester in *Havens* and the injury suffered by the [plaintiffs here], who were confronted by advertisements indicating a preference based on race"); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1053 (E.D. Va. 1987) (holding that, "[u]nder the *Havens Realty* rationale," a minority individual's mere receipt of "an unlawful advertisement indicating a tenant preference based on race" is sufficient to violate § 3604(c) and establish her standing).

323. The appropriateness of using § 3604(c) cases to reason by analogy in accessibility cases is supported by Congress's recognition that noncompliance with § 3604(f)(3)(C) is the functional equivalent of a sign saying "No Handicapped People Allowed." See *supra* text accompanying note 28.

3604(f)(3)(C) cannot be distinguished from that of countless other potential claimants who may be similarly exposed.³²⁴

Smith's other identified source of injury to disabled individuals who inspect inaccessible housing, however, is legitimate. This is the notion that a building's lack of § 3604(f)(3)(C)-mandated features would deter such an individual from developing a specific interest in buying or renting at this particular property.³²⁵ This is the same concept that Congress recognized when it identified the absence of some § 3604(f)(3)(C) features in terms of discouraging disabled homeseekers as the functional equivalent of a sign saying "No Handicapped People Allowed."³²⁶ It is also similar to the kind of deterrence by a specific property that was seen by Justice Ginsberg as clearly sufficient to confer standing on a minority homeseeker who observes discriminatory ads.³²⁷

Thus, while a disabled individual may have to be in the market for housing to pursue a § (f)(2) claim, he should not be required to have formed a specific interest in the defendant's development, so long as the development's noncompliance with § 3604(f)(3)(C) can be shown to have deterred him from further pursuing a housing opportunity in that development. This might even be true for § (f)(1) claims as well—*Ricks* to the contrary notwithstanding—because the development's lack of accessible features means that such an individual is being discouraged from negotiating for or otherwise becoming a prospective buyer or renter by the defendant's noncompliance with the FHA.

Thus, while *Ricks* may have been correct that a disabled individual needs to be "a prospective" buyer or renter with an "interest" in the defendant's development,³²⁸ it was wrong in thinking that a second reason for denying standing was that the plaintiff was financially unable to close the deal.³²⁹ This might be a relevant factor if the plaintiff had sought only injunctive relief (e.g., a

324. See *Ragin v. N.Y. Times, Inc.*, 923 F.2d 995, 1005 (2d Cir. 1991) (noting in a § 3604(c) advertising case that "a multitude of plaintiffs," each claiming to be a newspaper reader who "was substantially insulted and distressed by a certain ad," could lead to "large numbers of . . . damage awards," but nevertheless allowing such claims based on the view "that courts will be able to keep such awards within reason").

325. See *supra* text accompanying note 301.

326. See *supra* text accompanying note 28.

327. See *supra* note 321.

328. See *supra* text accompanying note 288.

329. See *supra* text accompanying note 292.

specific performance order requiring the defendant to sell to Ricks or an order directing the removal of architectural barriers). Apparently the Ninth Circuit in *Ricks* presumed this was the case, for it held that Ricks's standing was barred by the absence of the required elements of causation and redressibility because "it is his financial inability, rather than any action on the part of the developers and designers, which prevents Ricks from obtaining a condominium."³³⁰ But Ricks's financial situation was irrelevant to his ability to bring a damage claim, which would have been appropriate if he was sufficiently interested in the defendant's housing to have standing and if he suffered the kind of dignitary harm that *Smith* recognized could result from contact with the defendant's inaccessible building.³³¹

The *Ricks* opinion shows no awareness of the fact that such a damage claim is available to a proper FHA plaintiff.³³² Thus, *Ricks* was wrong to suggest that standing for *all* claims by disabled homeseekers require a showing that they are financially able to buy or rent a unit at the defendant's inaccessible property. The only requirements for such homeseekers to bring at least a damage claim are that they be prospective buyers or renters with an actual interest in seeking housing generally and that their housing search brought them in contact with the defendant's inaccessible building (i.e., that they were ready and willing to proceed to form a specific interest in the defendant's housing and might have done so but for its noncompliance with § 3604(f)(3)(C)). This would certainly be enough for a damage claim under § (f)(2) and probably should be enough for such a claim under § (f)(1) as well.

330. *Id.*

331. *See supra* text accompanying note 302.

332. *See supra* text accompanying notes 319–20. The *Ricks* opinion does not indicate whether the plaintiff's complaint included such a claim. In cases where only equitable relief is sought, such as those brought under Title III of the ADA, *see supra* note 162, recognizing tester standing is obviously more difficult than it is in FHA cases where damages as well as injunctive relief are sought. *See generally* Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69 (2004). For a case showing how tester-standing issues are treated differently for injunctive and damage claims under the ADA's Title II, which does allow both types of relief, *see Tandy v. City of Wichita*, 380 F.3d 1277, 1286–90 (10th Cir. 2004).

b. Advocacy Organizations

The Ninth Circuit in *Smith* not only upheld the tester's claim, and therefore the standing of organizations whose members include such individuals, but it also recognized the standing of DRAC, a disability rights organization, to sue on its own behalf.³³³ The latter holding was based on DRAC's allegations that the defendant's § 3604(f)(3)(C)-based violations had frustrated DRAC's mission and caused it to divert resources.³³⁴ These allegations were similar to the allegations in the *Havens* case, where the Supreme Court upheld the organization's standing.³³⁵

In *Havens*, a fair housing organization named HOME alleged that the defendants' FHA violations had "frustrated . . . its efforts to assist equal access to housing through counseling and other referral services . . . [causing HOME] to devote significant resources to identify and counteract the defendant's [*sic*] racially discriminatory steering practices."³³⁶ The Court held that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes" sufficient injury to establish the standing "of the organization in its own right."³³⁷

In the wake of *Havens*, numerous organizations have been allowed to bring FHA claims on their own behalf based on the allegations that their efforts have been frustrated and/or their resources diverted as a result of the defendant's illegal practices.³³⁸ The standing of such organizations to bring § 3604(f)(3)(C)-based

333. See *Smith*, 358 F.3d at 1101–04 (discussing DRAC's representative standing), 1104–06 (discussing DRAC's organizational standing).

334. *Id.* at 1104–06.

335. *Id.*

336. *Havens*, 455 U.S. at 379.

337. *Id.*

338. See, e.g., SCHWEMM, *supra* note 7, at § 12A:5, n.6 (citing cases in which fair housing organizations have been allowed to sue on their own behalf). In the post-*Havens* era, some issues may still be disputed about organizational standing, such as whether the necessary diversion-of-resources injury can be based solely on litigation-related expenses prompted by a particular defendant's FHA violation. See SCHWEMM, *supra* note 7, at § 12A:5, text accompanying notes 12–14 (describing a circuit split over this issue). If an organization's injuries are like those claimed by HOME, however, *Havens* establishes that it satisfies the injury part of the requirements of standing. *Havens*, 455 U.S. at 378–79.

claims has also been regularly recognized, both before and after the Ninth Circuit's decision in *Smith*.³³⁹

Clearly *Havens* establishes that an advocacy organization may suffer injury sufficient to allow it to sue, but this answers only part of the standing problem in a § 3604(f)(3)(C) case. The other part is whether a § 3604(f)(3)(C)-based violation caused the organization's injury. As noted earlier, the FHA authorizes suit by anyone who "claims to have been injured by a discriminatory housing practice"³⁴⁰ (i.e., by "an act that is unlawful"³⁴¹ under the FHA's substantive provisions).³⁴² Thus, according to the Supreme Court, standing in FHA cases extends to anyone who suffers actual injury "as a result of the defendant's [FHA-prohibited] conduct."³⁴³ Notably, the plaintiff organization in *Havens* alleged that its injuries resulted from the "defendants' racial steering practices,"³⁴⁴ which were claimed to be "violative of § [3604]."³⁴⁵

For an organization to be able to bring a § 3604(f)(3)(C)-based claim, therefore, its injury (e.g., diversion of its resources) would have to be caused by the defendant's FHA violation. If—as argued earlier—a defendant's noncompliance with § 3604(f)(3)(C) results only in a potential § 3604(f)(1)-(2) violation and such a violation occurs only when an actual homeseeker with a disability is exposed to such noncompliance,³⁴⁶ then an organization that has diverted resources in response merely to becoming aware of the defendant's inaccessible property (e.g., through the reports of its

339. See, e.g., *Eastern Paralyzed Veterans Ass'n, Inc. v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 210–12 (E.D.N.Y. 2001); *Baltimore Neighborhoods, Inc. v. Cont'l Landmark, Fair Hous.-Fair Lending Rep.* ¶ 16,236, at 16,236.2–3 (D. Md. 1997); see also *Silver State Fair Hous. Council, Inc. v. ERGS, Inc.*, 362 F. Supp. 2d 1218, 1219–21 (D. Nev. 2005) (assuming that fair housing organization is a proper plaintiff); *Hallmark Homes, Inc.*, 2003 WL 23219807 (assuming that fair housing organization is a proper complainant in election case); *Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F. Supp. 2d 456, 464–68 (D. Md. 2000) (awarding damages to fair housing organization and assuming it may seek prospective relief); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 703, 713–14 (D. Md. 1999) (ruling in favor of fair housing organization); *HUD v. Perlman, Fair Hous.-Fair Lending Rep.* ¶ 25,136, at 26,128–31 (HUD ALJ 1998) (awarding damages and other relief to organizational plaintiff).

340. 42 U.S.C. § 3602(i)(1) (2000).

341. *Id.* § 3602(f).

342. See *supra* notes 67, 273 (quoting, respectively, 42 U.S.C. § 3602(f) and § 3602(i)).

343. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979); see also *infra* note 362 and accompanying text (discussing this standard in greater detail).

344. *Havens*, 455 U.S. at 379.

345. *Id.* at 366.

346. See *supra* text accompanying notes 180–85 and 310–24.

testers) lacks a necessary element for standing to sue. In other words, such an organization's diversion-of-resources injury cannot be claimed to have been *caused* by an FHA violation.

This seems an unfortunate result. Making an organization's standing turn on its awareness of an actual homeseekers' encounter with the defendant's building would presumably call into question its ability to sue at an early stage of construction when noncompliance could be more easily corrected.³⁴⁷

In an analogous situation, the Department of Justice has been allowed to sue at the pre-occupancy stage. For example, in *United States v. Edward Rose & Sons*,³⁴⁸ the Sixth Circuit upheld a Justice-secured preliminary injunction halting further construction of the defendants' noncompliant dwellings because their plans called for an inaccessible front entrance in violation of § 3604(f)(3)(C)(i).³⁴⁹ The suggestion implicit in *Edward Rose* is that in-progress construction of dwellings designed not to comply with § 3604(f)(3)(C) is a violation of the FHA, even before these dwellings are offered to actual homeseekers. In other words, a defendant's failure to design and construct dwellings as required by § 3604(f)(3)(C) may by itself violate the FHA, whether or not it also violates any individual's rights under § (f)(1) or § (f)(2). The Department of Justice certainly takes this view, for its complaints in *Edward Rose* and other § 3604(f)(3)(C)-based cases often allege violations of § 3604(f)(3)(C) as well as § (f)(1) and § (f)(2).³⁵⁰ Also,

347. The Congress that passed § 3604(f)(3)(C) understood "that it is cheaper to make housing available and accessible to the handicapped when it is being constructed, rather than making modifications later on." 134 CONG. REC. S10,536 (1988) (statement of Sen. Kennedy).

348. 384 F.3d 258 (6th Cir. 2004).

349. *Id.* at 260.

350. See First Am. Compl. at para. 16, *United States v. Edward Rose & Sons*, 246 F. Supp. 2d 744 (E.D. Mich. 2002) (No. 02-73518), available at <http://www.usdoj.gov/crt/housing/documents/rosemichamendcomp1.htm> (last visited Feb. 22, 2006). The complaint alleged that the defendants "have failed to design and to construct the covered dwelling units" and thereby have:

- a. Discriminated in the rental of, or otherwise made unavailable or denied, dwellings to persons because of handicap, in violation of 42 U.S.C. § 3604(f)(1);
- b. Discriminated against persons in the terms, conditions, or privileges of rental of a dwelling, or in the provision of services or facilities in connection with the rental of a dwelling, because of handicap, in violation of 42 U.S.C. § 3604(f)(2); and
- c. Failed to design and construct dwellings in compliance with the requirements mandated by 42 U.S.C. § 3604(f)(3)(C).

the Department of Justice has been able to establish a "group denial of rights" in its § 3604(f)(3)(C)-based cases without having to show that any actual homeseekers encountered the defendant's housing, because courts thought it "obvious that housing that is inadequately designed and constructed to serve persons with disabilities denies that class of persons rights granted by the [FHA]."³⁵¹

Apart from whether noncompliant housing is itself an FHA violation or whether the Department of Justice's ability to bring pre-occupancy claims should be extended to private advocacy organizations,³⁵² an additional argument for "early" organizational standing is based on the fact that the FHA authorizes suit not only by those injured by a discriminatory housing practice, but also by those who believe they "will be injured by a discriminatory housing practice that is about to occur."³⁵³ This provision applies to situations where, if a potential complainant takes an action, it is clear that the complainant "will be subjected to a discriminatory act which will result in an injury."³⁵⁴ HUD has consistently interpreted this provision to permit complaints by organizations that "allege[] that a discriminatory housing practice . . . is about to occur and which will result in an injury to them."³⁵⁵ Because an inaccessible building is always "about to" discriminate against disabled homeseekers in violation of § (f)(1) and/or § (f)(2)—thereby triggering sufficient organizational in-

Id. at para. 17. The same basic allegations are made in other Department of Justice complaints in § 3604(f)(3)(C)-based cases. *See, e.g.*, Complaint at para. 24, in *United States v. Cedar Builders, Inc.*, No. 05-478 (E.D. Wash. Sept. 14, 2005), available at <http://www.usdoj.gov/crt/housing/documents/cedarcomp.htm> (last visited Feb. 22, 2006) (containing the same allegations of FHA violations as quoted above in the *Edward Rose* complaint).

351. *Hallmark Homes, Inc.*, 2003 WL 23219807, at *6 (quoting *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *35).

352. Such an extension is supported by the Supreme Court's observation that private FHA complainants "act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting the Solicitor General).

353. 42 U.S.C. § 3602(i)(2) (2000); *see, e.g.*, *Gorski v. Troy*, 929 F.2d 1183, 1190 (7th Cir. 1991) (holding that the defendants' acts of "informing the [plaintiffs] of their discriminatory policy and of their intention to enforce it" against the plaintiffs "provides the [plaintiffs] with standing" under the "about to occur" language of § 3602(i)(2)).

354. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3238 (Jan. 23, 1989) (to be codified at 24 C.F.R. § 100.20).

355. *Id.*

jury—an organization might well be permitted to sue before such an encounter based on the FHA's "about to occur" provision.³⁵⁶

Finally, even if an actual homeseeker's encounter with the defendants' building is required for an advocacy organization to have standing, such an organization will always be able to challenge any dwelling built without the features mandated by § 3604(f)(3)(C) eventually (i.e., after such an encounter and based on the organization's properly alleged and proven injuries). What's more, as *Havens* and *Smith* make clear, a proper organizational plaintiff may sue on its own behalf with or without other plaintiffs and regardless of whether its own testers have standing. This means that every potential defendant with an inaccessible building may be subject to a privately initiated claim under the FHA, even if, as suggested in the previous section, disabled testers lack standing in such a case.

c. Other Potential Plaintiffs

In addition to minority testers and fair housing organizations, the Supreme Court has recognized FHA standing in two other types of "indirect" victims of housing discrimination: local residents and municipalities. In 1972 in *Trafficante v. Metropolitan Life Insurance Co.*,³⁵⁷ the Court held that current residents of a large apartment complex had standing to sue their landlord for its discrimination against minority applicants, which allegedly deprived the plaintiffs of the social, professional, and economic benefits of living in an integrated community. Seven years later in *Gladstone, Realtors v. Village of Bellwood*,³⁵⁸ the Court upheld a similar claim by a municipality and four of its residents who alleged that local realtors were destroying integration in their community by steering white and black homeseekers to different neighborhoods.³⁵⁹ *Havens* also recognized the standing of local

356. Cf. *Lonberg v. Sanborn Theaters Inc.*, 259 F.3d 1029, 1036 n.9 (9th Cir. 2001) (noting that similar "about to be subjected" to discrimination language in the ADA's Title III authorizes proper plaintiffs to sue for injunctive relief during the pre-construction phase of a public accommodation that is likely to be built without the accessibility features mandated by this statute); *Johanson v. Huizenga Holdings, Inc.*, 963 F. Supp. 1175, 1177 (S.D. Fla. 1997) (holding the same as that of the *Lonberg* court).

357. 409 U.S. 205 (1972).

358. 441 U.S. 91 (1979).

359. *Id.* at 109–15.

residents to complain about racial steering in their area,³⁶⁰ in addition to upholding the claims of the minority tester and the fair housing organization as discussed above.³⁶¹ The general rule underlying these decisions is that standing extends to anyone who is “genuinely injured by conduct that violates *someone’s* [§ 3604] rights.”³⁶²

Thus far, few reported § 3604(f)(3)(C) cases have been brought by either a local resident or municipality,³⁶³ but these types of plaintiffs would seem to have the right to do so in a proper case. With respect to local residents, the basic *Trafficante* theory of injury based on lack of associational contacts seems easily transferable to disability cases.³⁶⁴ This would mean that any non-disabled resident of a housing complex built in violation of § 3604(f)(3)(C) could sue based on his loss of the benefits of living near disabled individuals,³⁶⁵ assuming this injury could be traced to the defendant’s violation of the FHA.³⁶⁶

For a municipality to bring such a claim might be more difficult. The injury to the village recognized in *Gladstone* flowed from the “adverse consequences attendant upon a ‘changing’ neighborhood,” which included “an exodus of white residents” and the resulting “reduction in property values” that “directly injures a mu-

360. *Havens*, 455 U.S. at 375–78.

361. See *supra* notes 303–09 and accompanying text (minority tester), notes 336–37 and accompanying text (fair housing organization).

362. *Gladstone*, 441 U.S. at 103 n.9. Thus, a plaintiff’s standing does not depend on whether he has been “granted substantive rights” by the FHA nor on “who possesses the legal rights protected by [§ 3604].” *Id.* Rather, standing is recognized “as long as the plaintiff suffers actual injury as a result of the defendant’s [FHA-prohibited] conduct.” *Id.*

363. See, e.g., *Options Ctr. for Indep. Living v. G & V Dev. Co.*, 229 F.R.D. 149, 150 (C.D. Ill. 2005) (noting that a variety of individual and organizational plaintiffs sought damages for, *inter alia*, “the community’s deprivation of a diverse group of residents”); *Baltimore Neighborhoods, Inc. v. Cont’l Landmark*, Fair Hous.-Fair Lending Rep. ¶ 16,236, at 16,236.3 (D. Md. 1997) (upholding an organization’s representational standing based on the fact that two of its members lived in the defendants’ allegedly inaccessible housing and were thereby deprived of “living in a diverse community that includes persons who use wheelchairs”).

364. See *Ventura Vill., Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 826–27 (D. Minn. 2004), *aff’d*, 419 F.3d 725 (8th Cir. 2005) (recognizing *Trafficante*-type claim in FHA disability case); cf. *Hamad v. Woodcrest Condo. Ass’n*, 328 F.3d 224, 231–34 (6th Cir. 2004) (applying *Trafficante* theory in FHA familial status case).

365. A resident of a building that does not comply with § 3604(f)(3)(C) might also have a claim based on the fact that he is unable to entertain mobility-impaired guests. See *supra* note 277.

366. See *supra* text accompanying notes 343–56 for a discussion of the need to link the plaintiff’s injury to the defendant’s FHA violation in § 3604(f)(3)(C) cases.

nicipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.³⁶⁷ Whether similarly dire consequences could be shown by a municipality as a result of a housing complex's § 3604(f)(3)(C)-based violations is an open question.³⁶⁸ The *Gladstone* theory of municipal standing, however, is at least potentially available.

Another potential set of plaintiffs in § 3604(f)(3)(C) cases is real estate agents. For example, a realtor representing the owner of an individual condominium unit whose sale is blocked because the prospective buyer objects to the fact that the common areas are not accessible may have a damage claim against those responsible for this FHA violation.³⁶⁹ Furthermore, a realtor representing a homeseeker who would have purchased or rented a unit but for the building's noncompliance with § 3604(f)(3)(C) may have an FHA-based claim.³⁷⁰

Presumably, such realtor claims would only be for the monetary damages caused by the defendant's FHA violation (e.g., the realtor's lost commission).³⁷¹ This serves as a reminder of the fact that every proper plaintiff in a § 3604(f)(3)(C) case does not necessarily have standing to seek all forms of relief authorized by the FHA.³⁷² Retrofitting relief, for example, may be inappropriate for certain types of claimants. However, the availability of monetary damages in FHA cases—and in particular the fact that actual damage awards may include an element for intangible injuries such as dignitary harm and the loss of associational benefits—means that establishing standing in a variety of potential plain-

367. *Gladstone*, 441 U.S. at 110–11. The *Gladstone* opinion also recognized “[o]ther harms flowing from the realities of a racially segregated community,” including the fact that school segregation is often “linked closely to housing segregation.” *Id.* at 111 & n.24.

368. In addition to showing sufficient injury, a municipal plaintiff would also have to show that this injury was caused by the defendant's § 3604(f)(3)(C)-based violations. See *supra* text accompanying notes 346–56 for a discussion of the latter issue in the context of claims by advocacy organizations.

369. *Cf.* HUD v. Hope, Fair Hous.-Fair Lending Rep. ¶ 25,160, at 26,284–85 (HUD ALJ 2002) (ruling for realtor of would-be house seller where sale was blocked by neighbors' race-based discrimination).

370. *Cf.* *Crumble v. Blumthal*, 549 F.2d 462, 465, 468–69 (7th Cir. 1977) (endorsing claims for lost commissions by realtors who brokered house purchase for minority couple that was blocked by sellers' racial discrimination); *Williams v. Miller*, 460 F. Supp. 761 (N.D. Ill. 1978) (endorsing claim for lost commission by realtor who brokered house purchase for minority couple that was blocked by sellers' racial discrimination).

371. See, for example, *supra* note 370 for a listing of such cases.

372. See *supra* note 302 and text accompanying notes 330–32.

tiffs should not be difficult' in § 3604(f)(3)(C) cases. Of course, standing will be recognized and actual damages will be awarded only if a plaintiff proves that the defendant's FHA violation caused the plaintiff a particularized injury, but this is true for all FHA plaintiffs, including those who are the more "direct" victims of § 3604(f)(3)(C)-based violations.³⁷³

D. *Timeliness Issues*

1. The FHA's Statutes of Limitations and the Basic Problem

When is a § 3604(f)(3)(C) claim timely? This seemingly simple question turns out to be quite difficult to answer. What's more, its answer may well raise the biggest challenge to enforcement of the FHA's design-and-construction requirements through the possibility that noncompliant housing may ultimately be deemed acceptable by virtue of the running of the FHA's statutes of limitations. This may be illustrated by considering the following hypothetical:

On February 1, 2000, Developer *D* purchases land for a multifamily housing development and hires Architect *A* to draw up plans for the development, which are completed on July 1. By October 1, *D* has secured the necessary zoning and other land-use approvals from the local municipality and has hired Builder *B*, who obtains a building permit on November 1, and completes the project on April 1, 2002, when it receives a certificate of occupancy. Throughout the first half of 2002, *D* seeks tenants and rents the final unit on June 30, 2002. On July 1, 2004, an individual who uses a wheelchair (*P*) inspects a unit whose original tenant has decided to move and observes that the unit/development does not comply with one or more of the requirements of § 3604(f)(3)(C). On August 1, 2004, *P* files an FHA claim against *A*, *B*, and *D*.

In determining whether *P*'s claims are timely, the first step is to identify *which* of the FHA's multiple statutes of limitations applies. For privately initiated claims, the two possibilities are the one-year statute for administrative complaints to HUD under § 3610 and the two-year statute for direct lawsuits under § 3613.³⁷⁴

373. See *supra* notes 69, 362 and accompanying text, and text accompanying note 343.

374. See *supra* text accompanying note 73 (§ 3610) and note 67 (§ 3613). Section 3610 provides that "[a]n aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary [of HUD] alleging such discriminatory housing practice." 42 U.S.C. § 3610(a)(1)(A)(i)

Apart from the different time periods in these provisions, their basic texts are virtually identical; that is, the limitations period runs from when "an alleged discriminatory housing practice occurred or terminated" in § 3610 and "after the occurrence or the termination of an alleged discriminatory housing practice" in § 3613.³⁷⁵ A "discriminatory housing practice" here means "an act that is unlawful" under the FHA's substantive provisions.³⁷⁶ Thus, the statute-of-limitations question for both § 3610 and § 3613 raises the issue of whether a § 3604(f)(3)(C)-based violation should be seen as having "occurred" or "terminated" at a particular time or for as long as the building continues to be noncompliant and, if the former, at what particular time.

While the difference between the one- and two-year limitations periods in § 3610 and § 3613 might be crucial in some cases, it is not in the hypothetical, for *P* has filed promptly (within one month) after first encountering the defendants' building. On the other hand, if the triggering date for these limitations periods is when the defendants completed their design-and-construction work, then *P*'s claims are too late even if brought under § 3613, because suit was filed over two years after the last act in the development process.

Of course, one could adjust the hypothetical's dates to make the results differ for the individual defendants. For example, if *P* were one of the initial prospective tenants and thus sued earlier, say on August 1, 2002, then his claim would be within § 3613's two-year period after *D* completed its work, but beyond this period as to *A*'s completion of the architectural work. Indeed, as to *D*, there may be an issue as to when its work was completed (e.g., when the building's construction was finished; when the certificate of occupancy was issued; when the first tenant was rented to;

(2000). Section 3613 provides that "[a]n aggrieved person may commence a civil action . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." *Id.* § 3613(a)(1)(A). With respect to HUD-initiated complaints under § 3610, no limitations period is specified in the statute, but HUD has interpreted the law to require it to file within the same one-year period that applies to private complainants. *See Who May File Complaints*, 54 Fed. Reg. 3293 (Jan. 23, 1989) (promulgating former 24 C.F.R. § 103.15). The filing of a timely § 3610 claim tolls § 3613's two-year limitations period during the time that the administrative proceeding is pending (i.e., that time is not included in calculating the two-year period). 42 U.S.C. § 3613(a)(1)(B) (2000); *see, e.g., Mitchell v. Cellone*, 389 F.3d 86, 90 n.5 (3d Cir. 2004); *Tabrizi v. Vill. of Glen Ellyn*, 883 F.2d 587, 593 (7th Cir. 1989).

375. *See supra* note 374.

376. *See supra* note 67.

or when the last of the initial rentals occurred). And perhaps if *P* files early enough so that his claim against *D* is considered timely, then the claims should also be allowed against *A* and *B*, for their participation in the overall "design and construction" process could be seen as not being completed until *D*'s last act.

The original hypothetical, however, serves to demonstrate the key problem for privately initiated § 3604(f)(3)(C) claims: whether the FHA's limitations periods begin to run when the defendants' work in the design-and-construction process ends or not until an individual with a disability is injured as a result of encountering their noncompliant building. If the answer is the former—a position thus far taken by a number of courts³⁷⁷—then inaccessible buildings will be able to achieve "repose" two years after their construction is completed, and future disabled homeseekers will never be able to bring timely § 3604(f)(3)(C) claims regardless of how promptly they file their claims. On the other hand, if claims may be brought so long as a building remains out of compliance with § 3604(f)(3)(C)—the position taken by HUD and some courts³⁷⁸—then no potential defendant will be able to enjoy repose, at least until the required accessibility features are added.

It must also be noted that § 3614, which is the FHA's third enforcement technique and which authorizes the Department of Justice to bring "pattern or practice" and "group denial of rights" actions,³⁷⁹ presents an additional set of its own statute-of-limitations issues. Such § 3614 actions may seek three different types of relief (equitable orders, monetary damages to persons aggrieved, and civil penalties),³⁸⁰ and each of these types of relief is governed by a different limitations period.

Section 3614 does not specifically provide for a statute of limitations for "pattern or practice" or "group denial of rights" actions. In these circumstances, courts have uniformly held—both in § 3604(f)(3)(C) and in other types of FHA cases—that such actions seeking equitable relief are not subject to any time limit.³⁸¹ On

377. See *infra* notes 418–19.

378. See *infra* notes 415–16.

379. See *supra* note 79 and accompanying text.

380. See *supra* note 80 and accompanying text.

381. See, e.g., *Quality Built Constr., Inc.*, 309 F. Supp. 2d at 761 (rejecting "laches" defense in a § 3604(f)(3)(C) case); *Hallmark Homes, Inc.*, 2003 WL 23219807, at *4 (rejecting statute-of-limitations defense in a § 3604(f)(3)(C) case); *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 257, 262 (E.D. Mich. 1997); *United States v. Incorp. Vill. of Island*

the other hand, § 3614 claims for monetary damages for persons aggrieved are subject to the three-year limitations period provided in 28 U.S.C. § 2415(b),³⁸² and those for civil penalties must be “commenced within five years from the date when the claim first accrued.”³⁸³ To make matters even more complicated, the former contains an explicit discovery rule,³⁸⁴ while the latter does not and has generally been interpreted in § 3604(f)(3)(C) cases not to be extendable by a discovery rule.³⁸⁵

Applying these various rules to the hypothetical, the § 3614 claim for civil penalties could be brought against *D* any time up through at least April 1, 2007 (i.e., five years after construction was completed and the building received its certificate of occupancy), which would be well beyond the period in which *P* could file under § 3613. With respect to the § 3614 claim for monetary relief for persons aggrieved—which presumably would include *P* even if his own § 3613/§ 3610 claims are time-barred³⁸⁶—the Department of Justice could sue up to three years after its key official became aware of the facts material to this claim (e.g., within three years after *P* sends his complaint to Justice, if this is how the responsible Justice official first learns of the defendants’ §

Park, 791 F. Supp. 354, 364–67 (E.D.N.Y. 1992); *United States v. City of Parma*, 494 F. Supp. 1049, 1094 n.63 (N.D. Ohio 1980). See generally SCHWEMM, *supra* note 7, at § 26:5, nn.4–8 and accompanying text.

382. 28 U.S.C. § 2415(b) (2000) (providing that “every action for money damages brought by the United States or an officer or an agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues”). Design-and-construction cases applying this statute to monetary claims in § 3614 actions include *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1144–47, and *Hallmark Homes, Inc.*, 2003 WL 23219807, at *3.

383. 28 U.S.C. § 2462 (2000). Design-and-construction cases applying this statute to civil penalty claims in § 3614 actions include *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1143–44, *Hallmark Homes, Inc.*, 2003 WL 23219807, at *2–3, and *United States v. Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *8–9 (D. Idaho 2003).

384. See 28 U.S.C. § 2416(c) (2000) (providing that, for purposes of computing § 2415’s limitations periods, “there shall be excluded all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances”).

385. E.g., *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1143–44 (holding that this limitations period is triggered on the date “the design or construction was completed”); *Hallmark Homes, Inc.*, 2003 WL 23219807, at *3 (holding that this limitation period is triggered on the date “the design and/or construction is completed”); *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *28 (holding that this limitations period is triggered on the date “the design and/or construction is completed”). For more on the discovery rule in privately initiated cases, see *infra* Part IV.D.2.a and note 443.

386. See, e.g., *Hallmark Homes, Inc.*, 2003 WL 23219807, at *1–3 (holding timely a § 3614 claim for monetary damages for, *inter alia*, an individual complainant whose § 3610 claim was held not timely).

3604(f)(3)(C) violations).³⁸⁷ Expansive as these time periods are for the Department of Justice's claims for civil penalties and monetary relief, they will eventually expire, but this is not true for the § 3614 claim for equitable relief. That claim, not being subject to any time limit, may be brought indefinitely into the future so long as the development does not include the features mandated by § 3604(f)(3)(C). And because equitable relief in § 3604(f)(3)(C) cases includes retrofit orders,³⁸⁸ the specter of this major type of relief will continue for as long as the building remains out of compliance with this provision.

As complicated as this may seem, the situation presented in the hypothetical is obviously a relatively simple case. Given the potential for additional defendants and plaintiffs identified above in Parts IV.B and IV.C, the building involved could produce many more types of claims (e.g., by a local fair housing organization against a subsequent owner). In addition, the Department of Justice or an organizational plaintiff may want to sue early in the design-and-construction process well before any units are available for sale or rental, so as to insure that the development is built in compliance with § 3604(f)(3)(C) rather than having to be retrofitted later,³⁸⁹ which raises the issue of how early—rather than how late—such a claim may accrue.³⁹⁰

The remaining parts of this section deal with these problems as follows: Part IV.D.2 considers the relevant doctrines, court deci-

387. It is not clear whether the triggering date for this time period is when the Department of Justice first receives such notice or sometime later (e.g., when Justice officials have obtained sufficient facts to make them aware that a "pattern or practice" or "group denial of rights" case under § 3614 is appropriate). See, e.g., *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *27 (considering Department of Justice's argument that discovery rule in § 3614 action should not begin until the Attorney General "has actual notice" of a "pattern or practice" or "group denial of rights" violation); *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1133-34, 1145-47 (holding that § 2416(c)'s discovery rule was not triggered when HUD first received the § 3610 claim, but only when HUD completed its investigation and referred this case to the Department of Justice).

388. See *supra* note 83 and accompanying text.

389. See *supra* text accompanying notes 347-56.

390. Defendants in reported § 3604(f)(3)(C) cases have yet to object that the claim was being brought too soon, perhaps because they prefer to learn early whether their planned developments are going to be seen as violating the FHA. In any event, such an objection would probably fail, because the FHA defines those persons who are sufficiently aggrieved to sue as including not only those who "have been injured" by FHA-banned discrimination, but also those who "believe [they] will be injured" by a violation "that is about to occur." See *supra* notes 273 and 353 (referring to 42 U.S.C. § 3602(f)(2) (2000)); cf. *supra* note 356 (providing citations to ADA cases).

sions, and HUD guidance concerning how the FHA's statutes of limitations in privately initiated cases should apply to a case like the original hypothetical (i.e., one involving a single homeseeker with a disability as plaintiff); Part D.3 provides a suggested approach for dealing with this basic, but crucial, issue; and Part D.4 reviews some of the additional issues that might arise in more complicated types of claims based on noncompliance with § 3604(f)(3)(C).

2. Two Doctrines Justifying Later Claims and the Courts' Responses

a. The Discovery Rule

Both § 3613's two-year statute of limitations and § 3610's one-year period specify that the triggering event is the occurrence or termination of the "alleged discriminatory housing practice."³⁹¹ The focus thus seems to be on the defendant's violation of the FHA, rather than when the plaintiff became aware of this violation. If a "discovery rule," however, were followed in § 3604(f)(3)(C) cases, all of *P*'s claims in the original hypothetical would be timely.³⁹²

Courts in a number of privately initiated FHA cases based on provisions other than § 3604(f)(3)(C) have held that the claims were timely if brought within the relevant time period after the plaintiff first discovered the defendant's violation.³⁹³ The theory of

391. For the text of these provisions, see *supra* note 374.

392. The discovery rule serves to extend the time from which the limitations period starts to run until "the plaintiff knows both the existence and the cause of his injury." *United States v. Kubrick*, 444 U.S. 111, 113 (1979) (discussing the Federal Tort Claims Act); see also *id.* at 120–21 n.7 (quoting SECOND TORTS RESTATEMENT, *supra* note 133, § 899, cmt. e (1979), to the effect that the statute of limitations in medical malpractice cases is often held not to start until the plaintiff has "discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it"); *Urie v. Thompson*, 337 U.S. 163, 168–71 (1949) (holding that plaintiff's claim under the Federal Employers' Liability Act did not accrue until his disease was diagnosed). For more on the discovery rule, see *infra* notes 394, 443.

393. See, e.g., *Jersey Heights Neighborhood Ass'n v. Glendenning*, 174 F.3d 180, 187 (4th Cir. 1999) (holding in civil rights case that included an FHA claim that "[u]nder federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action"); *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 938–39 (6th Cir. 1999) (holding that FHA claim only arises when plaintiffs "knew or should have known of [defendant's] allegedly discriminatory conduct"); *Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 956 (W.D. Tenn. 2003) (noting

such a discovery rule is that it would be unfair to destroy the claim of a plaintiff who was not responsible for the delay in filing it.³⁹⁴

Using a discovery rule in § 3604(f)(3)(C) cases would mean that a noncompliant building could never be finally protected by the FHA's statutes of limitations. If, for example, the hypothetical plaintiff above did not first visit the development until many years after it was completed, say April 1, 2010, but then promptly filed suit on May 1, 2010, a discovery rule would deny defendants statute-of-limitations protection even though all of their unlawful activities took place many years before the suit was filed. And if the discovery rule allows this plaintiff's claim, then it would also presumably make timely the claims of other future disabled homeseekers, even if brought decades in the future.³⁹⁵ Indeed, given the many different types of potential plaintiffs in such cases—including fair housing organizations and non-disabled current residents as well as homeseekers with disabilities³⁹⁶—it will always be possible to find *some* plaintiff whose discovery of a defendant's violation is "new."³⁹⁷

Courts have given a mixed reception to the discovery theory in § 3604(f)(3)(C) cases. The leading case opposing this theory is *Moseke v. Miller & Smith, Inc.*,³⁹⁸ a decision that dismissed as untimely a § 3613 claim filed in 2001 where the defendants completed construction in 1995 but at least one of the plaintiffs did

in fair housing case that "[a] federal civil rights claim accrues when a plaintiff knows or has reason to know of the injury that is the basis of the plaintiff's action"); cf. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7, 123–24 (2002) (suggesting, in both the Court's opinion and Justice O'Connor's partially concurring opinion, that some version of the discovery rule should apply to discrete-act claims brought under Title VII of the Civil Rights Act of 1964).

394. See, e.g., *Urie*, 337 U.S. at 169–70. See generally James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589, 594–610 (1996) (discussing the discovery rule's development and rationale).

395. See *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *27–28 (D. Idaho 2003) (noting that adoption of the discovery rule in a § 3604(f)(3)(C) case "would mean that twenty, thirty, fifty, even one-hundred years could pass between the completion of the design and construction of covered housing and the date a cause of action . . . would accrue").

396. See *supra* Part IV.C.2.

397. See, e.g., *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 509 n.19 (E.D. Va. 2002) (noting that, while one plaintiff's claim here would be too late under the discovery theory, the other plaintiff's claim would be timely because the second plaintiff learned of defendants' § 3604(f)(3)(C) violations later than first plaintiff).

398. 202 F. Supp. 2d 492 (2002).

not learn of the § 3604(f)(3)(C) violations until 2000 (i.e., within the applicable two-year limitations period).³⁹⁹ According to *Moseke*, § 3613's statute of limitations should not be extended by a discovery rule, because it is written to be triggered by "the occurrence or the termination" of an illegal practice.⁴⁰⁰ *Moseke* viewed this language as focusing on a defendant's actions, in contrast to differently worded statutes of limitations that either specifically provide for a discovery rule or are vague enough to permit such a rule by focusing on when the plaintiff's claim "accrues" or "arises."⁴⁰¹ Thus, *Moseke* rejected a discovery rule in favor of holding that the limitations period begins to run when the defendants' final act of construction occurs,⁴⁰² a decision at odds with two earlier opinions,⁴⁰³ but one that was soon followed by other trial courts faced with statute-of-limitations challenges to § 3604(f)(3)(C) claims.⁴⁰⁴

b. The Continuing Violation Theory

i. *Havens* and the FHA's Use of the Continuing Violation Theory

A second way that § 3604(f)(3)(C)-based claims filed years after a building's completion might be seen as timely is under the "continuing violation" theory, which is a well-established part of the FHA. In 1982 in the *Havens* case,⁴⁰⁵ the Supreme Court endorsed this theory for purposes of dealing with the statute of limitations for private lawsuits under the FHA.⁴⁰⁶ The plaintiffs in *Havens*

399. *Id.* at 501, 509.

400. *See supra* note 374.

401. 202 F. Supp. 2d at 509.

402. *Id.*

403. *See Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 212 (E.D.N.Y. 2001) (assuming that the date when plaintiff "became aware" of defendants' § 3604(f)(3)(C) violations triggers § 3613's limitations period, but deciding case on other grounds); *Mont. Fair Hous., Inc. v. Am. Cap. Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999) (assuming that the date when disabled plaintiffs moved into defendant's complex—and thus its § 3604(f)(3)(C) violations "were apparent" to them—would be the earliest that the § 3613 limitations period could be triggered, but deciding case on other grounds).

404. *See Hallmark Homes, Inc.*, 2003 WL 23219807, at *2 (following *Moseke* in rejecting discovery rule in case originally filed as an administrative complaint under § 3610); *Taigen & Sons, Inc.*, 303 F. Supp. 2d at, 1143–44 (rejecting discovery rule in § 3614 claim for civil penalties).

405. *Havens*, 455 U.S. 363.

406. *Id.* at 380–81.

accused a real estate firm and one of its agents of illegal racial steering, citing five specific incidents in which black and white testers were directed to homes in different areas.⁴⁰⁷ Although only one of these incidents occurred within the applicable limitations period, the Court held that most of the plaintiffs' claims were timely, stating that:

a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in [the FHA] are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears. [Defendants'] wooden application of [the FHA's statute of limitations], which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act. . . . [W]e therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.⁴⁰⁸

Applying this principle in *Havens*, the Supreme Court held timely the claims of two of the individual plaintiffs who had alleged that defendants' "continuing pattern, practice, and policy of unlawful racial steering has deprived them of the benefits of interracial association arising from living in an integrated neighborhood."⁴⁰⁹ These claims were seen by the Court as "based not solely on isolated incidents involving the two [defendants], but a continuing violation manifested in a number of incidents—including at least one" that occurred within the limitation period.⁴¹⁰ On the other hand, the Court held that another individual plaintiff in *Havens* could not take advantage of the continuing violation theory, because her claim was that "on four isolated occasions"—all of which occurred prior to the limitations period—the defendants had given her false information in violation of the

407. *Id.* at 366–68.

408. *Id.* at 380–81 (citations omitted). At the time of *Havens*, the FHA provided for a 180-day limitations period. *See id.* at 380. This limitation period was changed to one year for administrative complaints and two years for private lawsuits by the 1988 Fair Housing Amendments Act. *See* 42 U.S.C. §§ 3610(a)(1)(A), 3613(a)(1)(A) (2000).

409. *Havens*, 455 U.S. at 381.

410. *Id.* In addition, *Havens* held timely the claims of the organizational plaintiff, whose alleged injury stemmed not from certain dated incidents, but also "from a continuing policy and practice of unlawful racial steering that extends through the last alleged incident." *Id.*

FHA.⁴¹¹ Six years after *Havens* when Congress passed the FHAA, it not only lengthened the limitations periods for filing private lawsuits and administrative complaints,⁴¹² it also endorsed the applicability of the continuing violation theory to these new limitations periods.⁴¹³

Thus, under *Havens* and the FHAA, the continuing violation theory may be invoked where the defendant is accused of an ongoing unlawful “policy” or “practice” that extends into the limitations period, but this theory is not appropriate where “isolated occasions” or “one incident” or a “discrete act of discrimination” is alleged. For purposes of § 3604(f)(3)(C) cases, then, the question becomes whether a defendant’s FHA violation is a “discrete act of discrimination” ending with the completion of the design-and-construction process or an ongoing “unlawful practice” that continues as long as a building remains inaccessible.

ii. HUD and Judicial Responses to the Continuing Violation Theory in § 3604(f)(3)(C) Cases

Judicial opinions—thus far, virtually all at the trial court level—are divided over whether the continuing violation theory may significantly extend the limitations period in § 3604(f)(3)(C) cases.⁴¹⁴ For its part, HUD has endorsed an expansive view of this

411. *Id.*

412. See *supra* note 408.

413. This was done by identifying the starting time for these statutes of limitations as either when a discriminatory housing practice “occurred” or when it “terminated.” See *supra* note 374 (quoting 42 U.S.C. § 3610(a) and § 3613(a) (using “occurrence” or “termination”). According to the FHAA’s key congressional report, the use of the term “terminated” here was “intended to reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice.” 1988 HOUSE REPORT, *supra* note 16, at 33, reprinted in 1988 U.S.C.C.A.N. 2173, 2194.

HUD regulations promulgated shortly after the FHAA’s enactment also endorsed the continuing violation theory. The regulation governing the timeliness of an administrative complaint under § 3610 originally provided: “Where a complaint alleges a discriminatory housing practice that is continuing, as manifested in a number of incidents of such conduct, the complaint will be timely if filed within one year of the last alleged occurrence of that practice.” See 54 Fed. Reg. 3293 (Jan. 23, 1989) (promulgating 24 C.F.R. § 103.40(c)). The current version of this regulation provides: “If you indicate that there is more than one act of discrimination, or that the discrimination is continuing, we must receive your information within one year of the last incident of discrimination.” 24 C.F.R. § 103.35 (2005).

414. See *infra* notes 416–19 (citing cases). To date, the only appellate decision dealing with this issue is *Alliance for Disabled in Action, Inc. v. Renaissance Enters, Inc.*, 853 A.2d

theory in design-and-construction cases, opining that § 3604(f)(3)(C) complaints may be filed “at any time that the building continues to be in noncompliance, because the discriminatory housing practice—failure to design and construct the building in compliance—does not terminate.”⁴¹⁵ Some courts have agreed.⁴¹⁶

The leading case rejecting this view is again *Moseke*. There, Judge Lee, noting that the continuing violation theory requires at least one unlawful act within the limitation period and not merely the continuing effects of an old violation,⁴¹⁷ held that the last unlawful act in a § 3604(f)(3)(C) case—and therefore the time when § 3613’s statute of limitations begins to run—is when construction is completed on the noncompliant building.⁴¹⁸ A number of subsequent decisions have agreed with the *Moseke* analysis.⁴¹⁹

334 (N.J. Super. Ct. App. Div. 2004); see *infra* note 419 (discussing *Renaissance Enters.*). The Sixth and Ninth Circuits are currently considering cases that raise this issue. See *Fair Housing Council v. Village of Olde St. Andrews*, No. 05-5862 (6th Cir. 2006) (reviewing 250 F. Supp. 2d 706 (W.D. Ky. 2003)); *Thompson v. Gohres Construction Co.*, No. 06-15042 (9th Cir. 2006) (reviewing unreported decision from D. Utah in *Thompson v. Rancho Del Norte Villas, Inc.*); *Garcia v. Brockway*, No. 05-35647 (9th Cir. 2006) (reviewing unreported decision from D. Idaho).

415. HUD DESIGN MANUAL, *supra* note 39, at 22; see also U.S. Department of Housing and Urban Development, Handbook 8024.01: Title VIII Complaint Intake, Investigation, and Conciliation Handbook, CHG-1, at 3–5 (1995) (providing that a person aggrieved by a § 3604(f)(3)(C) violation may file a “continuing violation” complaint with HUD “regardless of when construction of the building was completed”), available at http://www.hudclips.org/sub_nonhud/cgi/hudclips.cgi (last visited Feb. 20, 2006).

416. See *Eastern Paralyzed Veterans Ass’n v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 205–06, 212–13 (E.D.N.Y. 2001) (holding that claim that 438-unit development violated § 3604(f)(3)(C) in numerous ways so as to be “unavailable to wheelchair users” describes “an unlawful practice that began on November 17, 1993, and has continued to the present day” and is therefore timely under the continuing violation theory); *Mont. Fair Hous. Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999) (relying on the “termination” language of § 3613’s statute of limitations to hold that defendants’ § 3604(f)(3)(C) violations continue, at least until a “cure” occurs); cf. *Ohio Civil Rights Comm’n v. Jupiter Realty Corp.*, No. 05-CVH-02-1638 (Ohio Common Pleas 2005) (applying the continuing violation theory to uphold accessibility claims under the Ohio fair housing law on the ground that the “fact that violations have not been remedied and remain in place indicates that they are continuing in nature”) (copy on file with the author).

417. *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 506–07 (E.D.Va. 2002) (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557–58 (1977)). For further discussion of this point, see *infra* notes 470–77 and accompanying text.

418. *Moseke*, 202 F. Supp. 2d at 507–09.

419. See *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1139–42; *Hallmark Homes, Inc.*, 2003 WL 23219807, at *2; *Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990, at *9–20; see also *Renaissance Enters., Inc.*, 853 A.2d at 342–44 (agreeing with *Moseke* that limitations period starts on the date construction is completed, but finding that this date *was* within limitations period here); *infra* note 427 (describing cases).

Moseke and its progeny do not, of course, reject the fact that the continuing violation theory is available in FHA cases, a fact that is firmly established by *Havens*, the 1988 FHAA, and HUD regulations.⁴²⁰ Rather, their view is that the “discriminatory housing practice” in a § 3604(f)(3)(C) case is limited to the defendants’ design-and-construction activities, thereby occurring and terminating at a definitive time.

Some courts taking this view have been willing to extend the triggering date to a slightly later time based on the particular facts involved. For example, in *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*,⁴²¹ the court held timely a complaint against a condominium development whose construction was completed before § 3613’s two-year time period, but whose last unit was not sold until within this period, because the court viewed the defendants’ illegal acts as including the sale of their improperly designed-and-constructed dwellings.⁴²² Having thus determined that “at least one incident of alleged discrimination occurred during the limitations period,” the *Olde St. Andrews* court held that, under the continuing violation theory, all of the defendants’ acts pertaining to this development could be challenged in this suit.⁴²³ A limited version of the continuing violation theory was also employed in *Silver State*,⁴²⁴ which held timely a complaint against a developer of two apartment complexes, one of which had been completed many years earlier, because the court viewed the completion of that project and the beginning of the second project, which was still under construction when this suit was filed, as “seamless in time” and involving “the same or similar FHA violations.”⁴²⁵ Because “the development of multiple FHA-violating apartment complexes” was seen as a single illegal practice that “can ensnare discriminatory occurrences that took place outside of the two-year statute of limitations,” the *Silver*

420. See *supra* text accompanying notes 405–11 and note 413 and accompanying text.

421. 250 F. Supp. 2d 706 (W.D. Ky. 2003).

422. *Id.* at 718–19.

423. *Id.* at 719; accord *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 40 F. Supp. 2d 700, 709–10 (D. Md. 1999) (relying on the continuing violation theory to hold timely a complaint against a condominium development where the defendants offered to sell at least one of their newly constructed units within the applicable limitations period).

424. 362 F. Supp. 2d 1218.

425. *Id.* at 1220–22.

State court held that the suit was timely as against both projects under the continuing violation theory.⁴²⁶

In both *Olde St. Andrews* and *Silver State*, however, the courts made clear that they did not think the continuing violation theory could be used in § 3604(f)(3)(C) cases to prolong liability indefinitely.⁴²⁷ Thus, while these courts used the continuing violation theory to extend the limitations period in the particular circumstances presented (i.e., where first-time sales occur beyond the construction-completion date and where similar developments are constructed in a serial fashion), their views are consistent with *Moseke* in that a noncompliant development's time period does eventually begin to run, thus rendering it safe from suit at some point.

iii. Further Analysis of the Continuing Violation Theory in § 3604(f)(3)(C) Cases

Though not spelled out in the cases, there are essentially three arguments in favor of viewing a § 3604(f)(3)(C) violation as continuing indefinitely. The first argument contends that § 3604(f)(3)(C)-based claims are challenging, in the words of the Supreme Court's opinion in *Havens*, "an unlawful practice that continues into the limitations period" rather than merely an "isolated incident."⁴²⁸ Cases such as *Silver State* that involve the same developer producing a series of buildings with the same de-

426. *Id.* at 1221–22; accord *Memphis Ctr. for Indep. Living v. Makowsky Constr. Co.*, No. 01-2069 D/Pha, 4–7 (W.D. Tenn. 2003) (relying on the continuing violation theory to hold timely a complaint against three apartment complexes—only one of which was completed within § 3613's two-year time period—that were constructed by the same developer using essentially the same design plans and were therefore seen as amounting to a single "pattern or practice" of illegal discrimination) (unpublished opinion) (copy on file with the author).

In the *Silver State* case, the court did dismiss a claim against the subsequent owner of the first-completed development on the ground that this new owner was "an independent entity" which took no part in the design and construction of this development and which had no connection with the second development. 362 F. Supp. 2d at 1220. This part of the *Silver State* opinion is discussed *supra* text accompanying notes 147–49 and 153.

427. The *Olde St. Andrews* opinion specifically rejected the plaintiffs' argument that "the statute of limitations never begins it [sic] run so long as the offending buildings remain non-compliant." 250 F. Supp. 2d at 719 n.11. Similarly, the court in *Silver State* noted that there had to be some "outer limits of the 'continuing violation' doctrine in FHA construction claims" and made clear its agreement with *Moseke* that an "open-ended period of liability" would "read the statute of limitations right out of existence." 362 F. Supp. 2d at 1222.

428. See *supra* text accompanying note 408–10.

sign flaws have concluded that such a developer's acts may amount to an ongoing illegal "practice" justifying use of the continuing violation theory to capture older as well as recent violations.⁴²⁹

The argument based on *Havens*' use of the term "practice" can be taken farther than this, however. Even a single building designed and constructed in violation of § 3604(f)(3)(C) may be seen as an unlawful "practice" rather than simply a single "isolated incident." There is some support for this view in § 3604(f)(3)(C) cases brought by the Department of Justice under its "pattern or practice" authority pursuant to § 3614.⁴³⁰ The Department of Justice regularly alleges that it may proceed against a single building because the design-and-construction violations there amount to a "pattern or practice" of FHA violations, and a number of courts have accepted this argument, some in cases that began simply as private claims under § 3610.⁴³¹ All of these cases, however, have involved sizeable developments with numerous design-and-construction violations, and the courts have generally concluded that, while a "pattern or practice" may exist in such a situation, the resolution of this issue depends on the particular facts of the case.⁴³² In other words, the argument that a design-and-construction violation is an ongoing "practice" for purposes of the *Havens* continuing violation theory, while appropriate for some single-development claims, would not succeed in all § 3604(f)(3)(C) cases.⁴³³

429. See *supra* notes 424–26 and accompanying text.

430. See *supra* note 79 and accompanying text.

431. See *Hallmark Homes, Inc.*, 2003 WL 23219807, at *5 (holding, based on the size of defendants' single apartment complex, the length of time it took to construct, and the number of alleged violations, that sufficient evidence exists to create a fact issue as to whether defendants engaged in a § 3614 "pattern or practice" of discrimination); *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1135, 1138 (holding, in case involving single apartment complex with 86 units in four buildings, that whether defendants engaged in a § 3614 "pattern or practice" of discrimination in constructing this complex is a question of fact not appropriate for summary judgment resolution); see also *Quality Built Constr., Inc.*, 309 F. Supp. 2d at, 760 (holding that alleged violations consisting "of numerous features planned and constructed in over one hundred units at two separate developments . . . clearly indicate a regular or repeated violation of the protections afforded by the [FHA]" sufficient to establish a § 3614 "pattern or practice" of discrimination).

The *Hallmark Homes* and *Taigen & Sons* cases began as private claims under § 3610. See *Hallmark Homes, Inc.*, 2003 WL 23219807, at *1; *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1133.

432. See *supra* note 431.

433. It may also be argued that a "pattern or practice" of discrimination for purposes of

The second argument for viewing design-and-construction violations as continuing is based on § 3604(f)(3)(C)'s description of the unlawful activity as "a failure to design and construct" covered multi-family dwellings in a certain manner.⁴³⁴ The argument is that while the acts of design and construction may have occurred at specific times in the past, the "failure" that is the essence of a § 3604(f)(3)(C) violation is inherently an ongoing concept (i.e., one that continues as long as the improperly designed-and-constructed dwelling fails to meet the statute's specified requirements). This view finds some support in the fact that the language used to describe the features mandated by § 3604(f)(3)(C) is in the present tense (e.g., that a dwelling's common areas "are readily accessible").⁴³⁵ Thus, the argument goes, when a decision like *Moseke* concludes that no "discriminatory act" has occurred within the limitations period,⁴³⁶ it is applying too narrow an understanding of the nature of the "act" barred by § 3604(f)(3)(C).

The problem with this argument is that the term "failure" does not always connote an ongoing activity. A common dictionary definition of this word—the "omission of performance of an action or task; *esp.*: neglect of an assigned, expected, or appropriate action"⁴³⁷—suggests that a "failure" may indeed be tied to a specific time period (i.e., when the "omission of performance" takes place). This might seem particularly so for purposes of § 3604(f)(3)(C), which speaks in terms of "a failure" to properly design and construct, thereby suggesting that the offending behavior is seen as an isolated event. Furthermore, courts dealing with other civil rights claims based on a defendant's failure to act have generally not been receptive to viewing the violation as ongoing, noting that

justifying a Department of Justice action under § 3614 is not the same as a discriminatory "practice" under *Havens* for purposes of justifying use of the continuing violation theory. See, e.g., *Taigen & Sons, Inc.*, 303 F. Supp. 2d at 1138–43 (holding in single-development case that sufficient violations may exist to justify a § 3614 "pattern or practice" action and also that the continuing violation theory is inapplicable here). But see *Wallace v. Chicago Hous. Auth.*, 321 F. Supp. 2d 968, 971–75 (N.D. Ill. 2004) (applying the continuing violation theory on the ground that the plaintiffs were essentially alleging a "pattern or practice" of FHA violations).

434. 42 U.S.C. § 3604(f)(3)(C) (2000); see *supra* note 24 (quoting § 3604(f)(3)(C)).

435. 42 U.S.C. §§ 3604(f)(3)(C)(i)–(iii) (using "are" and "contain").

436. *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 505 & n.15 (E.D. Va. 2000); see *supra* notes 417–19 and accompanying text (discussing *Moseke*).

437. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 815 (unabridged ed. 1986); see also THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 692 (unabridged ed. 1987) (defining "failure" as "nonperformance of something due, required, or expected").

the continuing negative effects of an unlawful failure are not sufficient to justify use of the continuing violation theory.⁴³⁸

The third argument for using the continuing violation theory derives from the fact that the FHA is written so that a failure to design and construct in accordance with § 3604(f)(3)(C) is declared to be unlawful "discrimination" for purposes of § 3604(f)(1) and § 3604(f)(2), the FHA's bans on discriminatory sales and rentals, and discriminatory terms, conditions, privileges, and facilities.⁴³⁹ The fact that housing built in violation of § 3604(f)(3)(C) is a form of illegal discrimination in sales and rentals under § (f)(1) may underlie decisions like *Olde St. Andrews*, which hold that the limitations period does not begin to run until the last unit in an illegally designed-and-constructed building is first sold or rented.⁴⁴⁰

Seeing a plaintiff's § 3604(f)(3)(C)-based suit as a claim under § (f)(1)-(2) would, however, take the relevant time period even farther than this moment, because the discriminatory sales and rental practices outlawed by § (f)(1)-(2) are those based on a handicap of "any buyer or renter." This language suggests, in a

438. *E.g.*, *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 939-41 (6th Cir. 1999); *see also Middlebrook v. City of Bartlett*, 341 F. Supp. 2d 950, 957 n.5 (W.D. Tenn. 2003), subsequent decision, 103 Fed. Appx. 560 (6th Cir. 2004) (quoting *Tolbert*, 172 F.3d at 942, for the proposition that "[p]assive inaction . . . does not support a continuing violation theory" in holding that this theory does not apply to claims by a black property owner that defendant failed to provide him with city water and sewer services in violation of federal civil rights laws); *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 892-95 (N.D. Ohio 1999) (applying the continuing violation theory to an ADA claim based on the defendant's failure to install curb ramps in streets and sidewalks worked on over many years only because some of this work was done within the limitations period). *But see Palmer v. Bd. of Educ.*, 46 F.3d 682, 686 (7th Cir. 1995) (applying the continuing violation theory in a race discrimination claim based on defendant's closure of a black school and subsequent failure to assign students to it on the ground that "each year's decision to leave the building shuttered is a new violation").

Tolbert was a race discrimination case brought under the FHA and other civil rights laws by residents of a poor black area who alleged that the defendant-officials failed to provide the same degree of noise protection from a nearby interstate highway to plaintiffs as they did to a similarly situated white neighborhood. The Sixth Circuit refused to apply the continuing violation theory, noting that the basic allegation of discriminatory failure to provide equal public amenities could not justify this theory because "[p]assive inaction . . . does not support a continuing violation theory." 172 F.3d at 940. The *Tolbert* opinion distinguished the Seventh Circuit's decision in *Palmer*, noting that the defendants there had regularly revisited their decision to close the school and concluding that the continuing violation theory does not apply to cases challenging discriminatory failures to act absent such a systematic and repeated revisiting by the defendant of its original action. *Id.* at 940-41.

439. *See supra* text accompanying notes 21-22, 180-85.

440. *See supra* text accompanying notes 421-23.

condominium situation such as *Olde St. Andrews*, that the prohibited discrimination is not merely the initial sale of units, but also subsequent offers of sale to *any* disabled prospect. And even if the "any buyer or renter" phrase in § (f)(1) might be considered ambiguous enough to justify limiting that provision to initial purchasers and tenants, this cannot also be true for § (f)(2), which specifically bans discrimination "against any person" in, *inter alia*, the "privileges of sale or rental of a dwelling" and in the "facilities in connection with such dwelling."⁴⁴¹ Given that a failure to design and construct in accordance with § 3604(f)(3)(C) is a type of discrimination banned by § (f)(2), and that § (f)(2) bans discrimination in the "privileges" and "facilities" of rental, it is certainly arguable that a nonconforming building amounts to an ongoing discriminatory denial of "privileges" or "facilities" to disabled tenants and homeseekers regardless of how many years have passed since the building was completed.⁴⁴²

This argument has some traction, as will be further explained in the next section. For now, it need only be noted that the success of this argument on behalf of *P* in the original hypothetical—as well as all other disabled homeseekers regardless of their date of contact with the defendant's building—does not require either the discovery rule or the continuing violation theory. The discovery rule is not needed because for a disabled homeseeker asserting a "new" § (f)(1)-(2) claim, the date of his injury and resulting cause of action is the same as the date he became aware of this injury (i.e., when he first encountered the defendant's inaccessible housing).⁴⁴³ The continuing violation theory, which focuses on the defendant's behavior rather than the plaintiff's discovery to

441. See *supra* notes 22 and 183 and accompanying text.

442. See also *supra* text accompanying notes 183–85.

443. See *supra* note 392. Thus, the only potential applicability of the discovery rule here might be the disabled homeseeker's argument that the time period should not begin to run until he first learns that the inaccessible features of the defendant's building violate the FHA, which might be after his first encounter with the building. This argument is likely to fail, however, because the discovery rule serves only to extend the limitations period to the time when "the plaintiff knows both the existence and the cause of his injury" and not also to a later time when he learns "that the acts inflicting the injury may constitute" unlawful behavior. *United States v. Kubrick*, 444 U.S. 111, 113 (1979). According to *Kubrick*, the equitable factors favoring a plaintiff who is ignorant "of the fact of his injury or its cause" do not extend to "ignorance of his legal rights," because if a plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury," he is "no longer at the mercy of the [defendant]. There are others who can tell him if he has been wronged, and he need only ask." *Id.* at 122.

trigger the limitations period,⁴⁴⁴ is not needed because the discriminatory housing practice alleged is the defendant's *current* isolated violation of the plaintiff's § (f)(1)-(2) rights, not a continuous series of violations that date back to the time of the building's original construction.

3. A Suggested Approach to Statute-of-Limitations Problems

a. Seeing the Basic Claim as a "New" (f)(1)-(2) Violation

As noted above, the FHA declares that a failure to design and construct in accordance with § 3604(f)(3)(C) is "discrimination" for purposes of § 3604(f)(1) and § (f)(2).⁴⁴⁵ Thus, a building constructed without the features mandated by § 3604(f)(3)(C) does not by its mere existence violate the FHA; a statutory violation occurs only when the discrimination embodied in the building violates someone's rights under § (f)(1)-(2). This means that, while such a building may be a potential source of § (f)(1)-(2) claims, a *particular* homeseeker with a disability such as *P* in the hypothetical has no FHA claim *until* his § (f)(1)-(2) rights are violated by, for example, visiting the building and encountering its inaccessible features. As with all FHA violations, a § (f)(1)-(2) claim brought by such a homeseeker requires a showing that this particular plaintiff was injured as a result of the defendant's FHA-prohibited behavior.⁴⁴⁶

Also as noted above, the Supreme Court requires that the FHA be governed by ordinary tort principles absent explicit instruction to the contrary in the statute.⁴⁴⁷ Traditionally in tort claims, the limitations period begins to run "when the plaintiff's claim accrued."⁴⁴⁸ Thus, for example, a negligence claim does not accrue and therefore the statutory clock does not start to run "until (a)

444. See, e.g., DOBBS, *supra* note 160, § 220, at 561.

445. See *supra* text accompanying notes 21–22, 180–85.

446. This causal connection between the plaintiff's injury and the defendant's behavior is a basic requirement both for a substantive cause of action under the FHA and for the plaintiff to have Article III standing to bring an FHA claim. See *supra* notes 69, 317 and accompanying text.

447. See *supra* note 132 and accompanying text.

448. DOBBS, *supra* note 160, § 217, at 553.

the defendant ha[s] committed a negligent act and (b) it ha[s] caused legally cognizable harm."⁴⁴⁹

Consistent with this approach, the Supreme Court has made clear that a limitations period "ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.'"⁴⁵⁰ Furthermore, "[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."⁴⁵¹ Thus, as Judge Easterbrook has observed in rejecting a statute-of-limitations defense in another civil rights context: "A wrongful act does not mark the accrual of a claim . . . ; the time begins with the injury rather than with the act that leads to the injury."⁴⁵²

Applying this insight to § 3604(f)(3)(C) cases, a disabled homeseeker's cause of action does not become complete until he personally encounters the defendant's inaccessible building. This encounter creates the claim-triggering injury, which may take the form of the homeseeker being denied access to a particular unit or having his intent to rent blocked "*for the very reason* that archi-

449. *Id.*; see also *United States v. Kubrick*, 444 U.S. 111, 120 (1979) (noting that the "general rule under the [Federal Tort Claims] Act has been that a tort claim accrues at the time of the plaintiff's injury").

450. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 195 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

451. *Bay Area Laundry*, 522 U.S. at 201; see also *Graham County Soil & Water Conservation Dist. v. United States*, 125 S. Ct. 2444, 2450 (2005) ("We have repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" (quoting *Bay Area Laundry*, 522 U.S. at 201); *Bay Area Laundry*, 522 U.S. at 201 ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.")) (quoting *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)). The *Graham County* opinion also quoted with approval Justice Scalia's concurrence in *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001), to the effect that "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff" may apply to the court for relief. 125 S. Ct. at 2451.

452. *Palmer v. Bd. of Educ.*, 46 F.3d 682, 685 (7th Cir. 1995) (ruling on a § 1983 case). In *Palmer*, Judge Easterbrook distinguished two cases—*Delaware State College v. Ricks* and *United Air Lines, Inc. v. Evans*—that did not find ongoing violations. *Id.* at 685–86 (noting that the premise of those cases was "that the employer took one dispositive act. Like punching someone in the nose, this act may lead to injury in the future, but when there is only one wrongful act the claim accrues with the first injury."). See *infra* notes 470–77 and accompanying text (discussing *Ricks* and *Evans*). Based on this analogy, a disabled homeseeker complaining about an apartment building's noncompliance with § 3604(f)(3)(C) has not been "punched in the nose" until he first encounters this building.

tectural barriers prevent [him] from viewing the whole property in the first instance."⁴⁵³

If a disabled homeseeker's § (f)(1)-(2) rights are not violated until his first encounter with the defendant's building, then a complaint filed promptly thereafter is timely, regardless of how old the building is. Furthermore, as noted above, the continuing violation theory is not needed to uphold such a claim.⁴⁵⁴ Of course, from the point of view of a defendant who constructed this building years ago, allowing such an individual to sue now may *feel* like being subjected to a continuing violation charge. But this is inherent in the way Congress wrote § 3604(f)(3)(C): a violation of this provision is "discrimination" but is only *actionable* discrimination if and when it violates the rights of an aggrieved person under § (f)(1)-(2).⁴⁵⁵

The situation is somewhat analogous to *Bazemore v. Friday*,⁴⁵⁶ a Title VII case that challenged the use of different salary schedules which paid black employees less than whites. The pay schedules dated back to before the time Title VII applied to the *Bazemore* defendants, and they argued that their behavior was excused by the fact that they had not engaged in any new discrimination. The Court disagreed, concluding that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."⁴⁵⁷ Like a building constructed without the § 3604(f)(3)(C)-mandated features, the salary structure in *Bazemore* was discriminatory, but only actionable when applied to specific employees. The Court in *Bazemore* distinguished this situation from the one in *United Airlines, Inc. v. Evans*,⁴⁵⁸ where only the consequences of an old violation were now occurring, noting that the employer in *Evans* was simply not engaged in a discriminatory

453. See *supra* text accompanying note 301 (quoting *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1104 (9th Cir. 2004)).

454. See *supra* text accompanying note 444.

455. Cf. *Bay Area Laundry*, 522 U.S. at 204 (rejecting an argument based on the concern that choosing a particular triggering date for the statute of limitations here would "improperly plac[e] the running of the limitations period in the control of the plaintiff" on the ground that "that is an unavoidable consequence of the scheme Congress adopted").

456. 478 U.S. 385 (1986).

457. *Id.* at 395-96.

458. 431 U.S. 553 (1977). *Evans* is also discussed *supra* note 452 and *infra* note 473.

practice that currently violated Title VII.⁴⁵⁹ On the other hand, the focus in *Bazemore* was properly "on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure."⁴⁶⁰ Just as a new black employee in *Bazemore* would have a current Title VII claim even though his inferior wages were based on a previously adopted pay structure, so too would a new homeseeker with a disability have a current § (f)(1)-(2) claim even though the housing discrimination he is subjected to is based on a previously constructed dwelling.

A number of policy reasons support the idea of allowing a current disabled homeseeker to bring a prompt § (f)(1)-(2) claim even though the building involved was constructed some years before. First, focusing on the rights to nondiscriminatory sales and rentals guaranteed by § (f)(1)-(2) provides a reminder that the whole point of § 3604(f)(3)(C) is to help insure equal access to housing opportunities for people with disabilities. As Congress noted in enacting § 3604(f)(3)(C), its required features are "essential for equal access" by mobility-impaired people and their absence can "just as effectively exclude[such people] from the opportunity to live in a particular dwelling . . . as by a posted sign saying 'No Handicapped People Allowed.'"⁴⁶¹

Second, to bar a disabled homeseeker who files promptly after first encountering the defendant's building because of the building's age would, by making it impossible for such a person ever to assert a claim involving this building, be inconsistent with the key goal of § 3604(f)(3)(C)—to make all post-1991 multi-family dwellings accessible—and the FHA's reliance on private complainants to enforce the statute.⁴⁶² Supreme Court decisions dealing with federal statutes' limitations periods invariably interpret these provisions in light of the legislative intent underlying the substantive statute involved.⁴⁶³

Third, equitable considerations favor a disabled homeseeker who files suit promptly after first visiting an inaccessible build-

459. 478 U.S. at 396 n.6.

460. *Id.* at 397 n.6.

461. See *supra* text accompanying notes 27-28.

462. See *supra* text accompanying notes 16-17, 27-29 and 352 (quoting *Trafficante*, 409 U.S. at 209, 211).

463. See, e.g., *supra* text accompanying note 408 (quoting *Havens*, 455 U.S. at 380 (1982)); *United States v. Kubrick*, 444 U.S. 111, 117-20, 125 (1979).

ing, regardless of that building's age.⁴⁶⁴ Certainly, one major reason given for barring tardy claims—that the plaintiff has not been diligent in asserting his rights⁴⁶⁵—does not exist here. In addition, two major justifications for statute-of-limitations dismissals—courts' preference for dealing with evidence whose quality has not been unduly diminished by the passage of time and potential defendants' entitlement to eventual repose⁴⁶⁶—are weak or nonexistent here. The preference for fresh evidence is rarely a concern in § 3604(f)(3)(C)-based cases for, as one court has noted, because this provision “requires no showing of intent, defendant's architectural plans and apartment complexes can themselves speak to the alleged construction violations.”⁴⁶⁷ And potential § 3604(f)(3)(C) defendants can never achieve full repose from FHA liability, because a § 3614 action by the Department of Justice for retrofits and other equitable relief may always be brought against them.⁴⁶⁸

A final point needs to be made about *Moseke* and other decisions that have held untimely a § 3604(f)(3)(C)-based claim because they saw the plaintiff as merely complaining about the current “effects” of the defendant's “prior discriminatory acts.”⁴⁶⁹ These decisions ignore the fact that the *only* unlawful act involving this particular disabled individual—the discriminatory denial of housing access and privileges to him in violation of § (f)(1)-(2)—

464. Cf. *Del. State Coll. v. Ricks*, 449 U.S. 250, 256 (1980) (noting in Title VII cases that “limitations periods . . . guarantee[] the protection of the civil rights laws to those who promptly assert their rights”). The *Ricks* case is further discussed *infra* text accompanying notes 470–77.

465. See, e.g., *Kubrick*, 444 U.S. at 123 (noting that the purpose of the FELA's statute of limitation “is to require the reasonably diligent presentation of tort claims against the Government”). See generally DOBBS, *supra* note 160, § 216, at 551 (noting that one of the reasons for a limitations system is that plaintiffs who delay in bringing suit may be considered to have “waived” their claims).

466. See, e.g., *Del. State Coll.*, 449 U.S. at 256–57 (noting in Title VII case that “limitations periods . . . protect employers from the burden of defending claims arising from employment decisions that are long past”); *Kubrick*, 444 U.S. at 117 (noting that statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise”). See generally DOBBS, *supra* note 160, § 216, at 551–52 (identifying as two of the major justifications for a limitations system that “[e]vidence will deteriorate” and “[t]he defendant . . . is entitled at some point in time to peace of mind”).

467. *Silver State Fair Hous. Council v. ERGS, Inc.*, 362 F. Supp. 2d 1218, 1222 n.1 (D. Nev. 2005).

468. See *supra* note 381 and accompanying text.

469. See *supra* notes 417–19 and accompanying text.

is happening *now*. This situation is fundamentally different from those in which the Supreme Court has ruled against the continuing violation theory because only discriminatory "effects" occurred within the limitations period.

The principal Supreme Court decision on this point is *Delaware State College v. Ricks*,⁴⁷⁰ a Title VII case in which a college professor claimed that he was denied tenure for discriminatory reasons. After the college's Board of Trustees denied Ricks tenure, he was given a standard one-year "termination" contract before being discharged, and he also pursued internal grievance procedures. The question for the Supreme Court was whether Title VII's limitations period began to run when the Trustees denied Ricks tenure or at a later date, either when this decision was affirmed at the end of the grievance proceedings or when Ricks was ultimately discharged. The Court held that the earlier date controlled, because only the tenure-denial decision was claimed to be based on discrimination.⁴⁷¹ Ricks's loss in the internal grievance procedure and his ultimate dismissal were not alleged to have been prompted by discrimination and thus were seen by the Court as merely the "effects" of the denial of tenure.⁴⁷² "[T]he proper focus," according to *Ricks*, "is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful."⁴⁷³

The *Ricks* opinion made two other points that are important for purposes of § 3604(f)(3)(C) claims. First, having based its decision on the fact that Ricks was complaining only about his tenure de-

470. 449 U.S. 250 (1980).

471. *Id.* at 257-58.

472. *Id.* at 258.

473. *Id.* (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (9th Cir. 1979) (emphasis added by the Supreme Court)). Another case relied on in *Ricks* was *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), where the Court rejected the continuing violation theory in a Title VII case brought by a female plaintiff who alleged that, having been discharged by the defendant some years earlier based on a discriminatory policy, her later rehire without retroactive seniority should be seen as a continuing violation. The *Evans* opinion recognized that the defendant's "seniority system does indeed have a continuing impact on [plaintiff's] pay and fringe benefits," *id.* at 558, but concluded that:

the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. [Plaintiff] has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation.

Id.

nial, the Court noted that employment termination cases can “present widely varying circumstances” and that therefore “application of the general principles discussed herein necessarily must be made on a case-by-case basis.”⁴⁷⁴ Thus, even in Title VII cases involving faculty terminations, the determination of the triggering date for statute-of-limitations purposes depends on when the defendant’s discrimination against a particular plaintiff occurred. In a § 3604(f)(3)(C)-based case brought by a homeseeker with a disability, this will presumably be when he first encounters the inaccessible features of the defendant’s building and is thus denied equal opportunity there in violation of § (f)(1)-(2).

The *Ricks* opinion also made a point to recognize that “limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes.”⁴⁷⁵ The Court held, however, that *Ricks* could not benefit from this concern, since he was “abundantly forewarned” in this case (e.g., because the Trustees’ tenure-denial decision was simply the customary response to the faculty’s earlier “no tenure” recommendations and was therefore “entirely predictable”).⁴⁷⁶ *Ricks*’s situation is in stark contrast to that of a disabled homeseeker, who is likely to have had no prior contact with the defendant’s building and whose encounter with its illegal features may well be his only interaction with the defendant. Indeed, as noted above, an individual homeseeker with a disability simply has no FHA claim *until* he encounters a dwelling that fails to comply with § 3604(f)(3)(C).⁴⁷⁷

b. Variations on the Basic Theory

The previous section argued that a disabled homeseeker’s § 3604(f)(3)(C)-based claim does not occur until that individual personally encounters, and is thereby injured by, a building’s inaccessible features. If, indeed, the proper triggering date for the FHA’s statutes of limitations in privately initiated cases is when a plaintiff first sustains injury, then it is clear that a disabled homeseeker’s complaint brought within the applicable limitations

474. 449 U.S. at 258 n.9.

475. *Id.* at 262 n.16.

476. *Id.*

477. See *supra* text accompanying notes 445–53.

period after his first encounter with the defendant's building would be timely, regardless of the building's age.

As noted above in Part IV.C, a number of other types of plaintiffs may have claims as a result of a building's noncompliance with § 3604(f)(3)(C), and resolution of the statute-of-limitations problem for these claims may be more difficult, even if the date-of-first-injury theory is conceded to govern. This section deals with these more complicated cases in two categories: (i) claims that may later be made by disabled tenants and those individuals associated with them; and (ii) claims by other types of plaintiffs.

i. Additional Claims by Disabled Tenants and Persons Associated with Them

Assume that a homeseeker with a disability who visits a housing development that does not comply with § 3604(f)(3)(C) decides not to sue, but rather moves into the building despite its inaccessible features. After living there for a time that is longer than the applicable limitations period, he then decides that these features are unacceptable and files a claim under the FHA's ban on discriminatory "terms and conditions" in § 3604(f)(2).

While § (f)(2) does provide a cause of action for current residents,⁴⁷⁸ the reported cases have rarely discussed the timeliness of such claims, perhaps because they have generally been brought promptly in response to the defendant's challenged behavior.⁴⁷⁹ Thus, there is little guidance on when a § (f)(2) claim by a current tenant accrues.

Unlike the situation where a homeseeker with a disability files promptly after first encountering an inaccessible building, a current tenant's delayed § (f)(2) claim does not seem to be complaining about any "new" discrimination experienced by him. Rather, the complaint is about the painful consequences of a violation of his § (f)(2) rights; in other words, the very situation where plaintiffs are not permitted to invoke the continuing violation the-

478. See, e.g., *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 363–65 (8th Cir. 2003). See generally SCHWEMM, *supra* note 7, at § 14:3.

479. Cf. *Neudecker*, 351 F.3d at 363 (holding timely tenant's (f)(2) claim of disability harassment based on the continuing violation theory, where the harassment allegedly occurred throughout the latter years of plaintiff's tenancy up to within the FHA's limitations period).

ory.⁴⁸⁰ One reason that mere consequences of a violation are insufficient to extend a limitations period is that they could go on indefinitely, thereby essentially negating a statute of limitations. Allowing a current tenant to file a § (f)(2) claim whenever he decides that the building's discriminatory features have become intolerable seems to be a classic example of this problem. Nor would the discovery rule help such a tenant, for he was in a position to and probably did know all of the facts relevant to his potential claim early in his tenancy.⁴⁸¹ Furthermore, because this individual has been on notice of his building's inaccessible features for some time, the equitable considerations, which helped lead to the conclusion that a homeseeker with a disability should be allowed to sue promptly after first encountering a building's inaccessible features,⁴⁸² are absent here. Finally, even if a disabled tenant in these circumstance might succeed in arguing that his claim is not barred by the statute of limitations, a defense based on the related doctrine of laches might block this claim.⁴⁸³

Assuming that a disabled tenant's § (f)(1)-(2) claim is time barred in this situation, the same might not be true for an individual who is associated with him. The rights protected by both § (f)(1) and § (f)(2) extend not only to buyers and renters with disabilities, but also to those buyers and renters who either reside or are associated with a disabled person.⁴⁸⁴ Presumably, this means that such an associated person would be injured at the same time as his disabled companion, with the result that such a person's §

480. See *supra* notes 471-73 and accompanying text.

481. See *supra* notes 392-94 and accompanying text; see also *supra* note 443.

482. See *supra* text accompanying notes 464-65, 475-77.

483. See, e.g., *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002), where the Court, in dealing with statute-of-limitations issues under Title VII, noted that courts have discretionary power to reach "a just result" to protect employers "when a plaintiff unreasonably delays filing a charge" and that, in addition to other equitable defenses, "an employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant." According to *Morgan*, a laches defense "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Id.* at 121-22 (quoting *Kansas v. Colorado*, 514 U.S. 673, 687 (1995)).

A potential problem with the laches defense in § 3604(f)(3)(C) cases is that establishing the second element might be difficult. This element is usually shown by proof that the plaintiff's delay has caused the defendant to lose valuable evidence, see, for example, *Costello v. United States*, 365 U.S. 265, 282-83 (1961), but, as noted above, the key evidence in § 3604(f)(3)(C) cases usually remains available for an indefinite period of time. See *supra* text accompanying note 467.

484. 42 U.S.C. § 3604(f)(1)-(2) (2000).

(f)(1)-(2) claim would occur at the initial encounter with an inaccessible building and similarly would be time barred to the same extent as the disabled tenant's in the previous paragraph. But what if the person residing or associated with a disabled resident leaves and is replaced by another individual? This new renter-associate would not only seem to have a § (f)(2) claim, but his claim would be "new" (i.e., his first injury and thus the occurrence of his claim would not take place until he started to reside or associate with the disabled person). Thus, absent proof that this new arrangement was created simply to manufacture the necessary recent injury-claim—which might result in its dismissal based on some equitable doctrine⁴⁸⁵—the theory of first-injury argued for in the previous section would make this § (f)(2) claim timely, so long as it is brought within the limitations period after the new companion begins his association with the disabled person.

Finally, what if a non-disabled tenant moves into an inaccessible building, lives there for a number of years, and then becomes mobility-impaired due to a car accident or other cause? He then brings an FHA claim, either under § (f)(1) because the inaccessible features make the dwelling "unavailable" to him (i.e., he has to move) or under § (f)(2) because a "terms-and-conditions" violation affects his current residency. Even assuming that he knew or reasonably should have known of the building's noncompliance with § 3604(f)(3)(C) when he first moved in, the issue is whether this knowledge triggered his § (f)(1)-(2) claim. Such knowledge may have allowed the tenant during his period of non-disability to assert a lack-of-association claim—an issue dealt with further in the next section—but not a § (f)(1)-(2) claim as a disabled renter. For the latter claim, the plaintiff's disability is a necessary pre-requisite,⁴⁸⁶ which means that this claim could not accrue until the tenant's disability occurs. Only upon becoming disabled, and thereby suffering an injury to his § (f)(1)-(2) rights, is this tenant in the same position as the homeseeker with a disability, whose claim does not occur until he encounters a noncompliant

485. See *supra* note 483.

486. See, e.g., *Burgess v. Alameda Hous. Auth.*, 98 F. App'x 603, 605–06 (9th Cir. 2004) (noting that the plaintiff's disability is a necessary element of his § 3604(f)(1) claim based on the defendant's failure to reasonably accommodate under § 3604(f)(3)(B)); *Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245, 1254–55 (D. Haw. 2003) (reaching same conclusion for a plaintiff's § 3604(f)(2) claim).

building. Based on the nature of his injury and the equities of this situation, the newly disabled tenant should have as long to file his claim as a disabled homeseeker does after his first encounter with an inaccessible building.

ii. Claims by Other Types of Plaintiffs

As shown in Part IV.C.2, a building that lacks the features mandated by § 3604(f)(3)(C) may be the target of claims not only by disabled homeseekers and their associates, but also other plaintiffs, such as testers, local residents, and fair housing organizations. The timeliness of claims by these other types of plaintiffs is considered here.

With respect to testers, it was argued in Part IV.C.2.a that, despite a recent Ninth Circuit decision to the contrary, they should not have standing to bring § 3604(f)(3)(C)-based claims.⁴⁸⁷ That argument was based on the view that testers lack substantive rights under § (f)(1)-(2). Here, it is noted that an additional reason for questioning testers' claims is that they could raise serious equitable issues with respect to timeliness.

If, as argued in Part IV.D.3.a, a disabled homeseeker's § 3604(f)(3)(C)-based claim does not begin for statute-of-limitations purposes until he first encounters an inaccessible building, then presumably the same would be true for a disabled tester with such a claim. Assuming for present purposes that testers do have standing based on injury to their § (f)(1)-(2) rights caused by encountering such a building, they could presumably generate an endless series of such injuries by repeated visits to the building. These injuries would not just be the consequences of the violation that occurred during the first visit. If a single encounter violates a tester's substantive rights under § (f)(1)-(2), then a second encounter would be an independent violation of these rights creating a "new" cause of action, as would a third, a fourth, and so on, indefinitely. Eventually, the limitations periods would run on the claims based on the earlier encounters,⁴⁸⁸ but the tester could always start a new clock by returning to the building.

487. See *supra* text accompanying notes 295-327.

488. See *Havens*, 455 U.S. at 381 (holding that a tester's claims were based only on those "isolated occasions" when the defendants gave her false information and therefore could not "take advantage of the 'continuing violation' theory").

The problem may not seem inherently different from that of an actual homeseeker who makes repeated visits to an inaccessible building, but it is. An actual homeseeker may make additional visits to further evaluate the building as a potential place to live, although further visits for other purposes, such as evidence-gathering for potential FHA claims, would not be in the role of an actual homeseeker. Thus, subsequent homeseeking visits would simply involve being subjected to the on-going consequences of the discrimination suffered in the original visit, which would not extend the limitations period for this claimant.

In any event, there can be no doubt that an actual homeseeker has § (f)(1)-(2) rights and therefore standing to sue. Tester standing is problematic, however, and the specter of difficult statute-of-limitations problems in testers' claims provides an additional reason to avoid recognizing their standing in the first place.

The problem is different when considering the timeliness of claims by non-disabled residents, fair housing organizations, and other "indirect" victims of FHA violations caused by an inaccessible building. Recall that for these types of plaintiffs, while an injury sufficient to satisfy Article III is required, it need not be an injury based on violation of their own substantive FHA rights; their standing is established if they are "genuinely injured by conduct that violates *someone's* [§ 3604] rights."⁴⁸⁹ In § 3604(f)(3)(C) cases, the rights being violated are those under § (f)(1)-(2), which belong to disabled buyers and renters and those associated with them. A violation of such rights may cause sufficient injury in another to create standing, but the question for statute-of-limitations purposes is *when* the clock begins to run on this other plaintiff's claim.

For non-disabled residents who make a *Trafficante*-type lack-of-association claim because of their building's noncompliance with § 3604(f)(3)(C),⁴⁹⁰ this would probably be when they first moved in or otherwise became aware of the building's inaccessibility. The nature of this claim is that the plaintiffs are being deprived of the ability to associate with disabled persons in an inte-

489. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979).

490. *See supra* text accompanying notes 357-66.

grated setting generally, not with a specific disabled person who may have applied on a particular date, as *Havens* recognized.⁴⁹¹

In *Havens*, where the defendants' alleged violation was racial steering, the Court held that the plaintiffs making an associational claim could invoke the continuing violation theory, because at least one of the incidents manifesting the defendants' steering occurred within the limitations period.⁴⁹² This part of *Havens*, however, does not translate easily to § 3604(f)(3)(C)-based claims, where a defendant's discrimination is not manifested in specific incidents, but in its building's lack of accessibility features. The building's very status is what is depriving current residents of the opportunity to associate with people with disabilities. That injury—to the extent it can be shown to be caused by noncompliance with § 3604(f)(3)(C)—presumably began for each individual resident when he moved into the building. The harm may continue throughout an individual's tenancy, but this will probably be seen as merely the consequences of the building's noncompliance, thus barring a resident from invoking the continuing violation theory. *Havens*, however, does leave open the possibility that a recent incident of a disabled homeseeker being deterred from moving into the building because of its inaccessibility could allow a current resident to use this theory.⁴⁹³ In any event, each new resident will have his own individual lack-of-association claim, so barring the claims of older tenants on statute-of-limitations grounds will not protect a building from generating these types of claims in the future.

As with the residents' claims, the Court in *Havens* recognized that the injury of the organizational plaintiff was "not only from the incidents involving [specific individuals who dealt with the defendants], but also from a continuing policy and practice of unlawful racial steering that extends through the last alleged incident."⁴⁹⁴ Because this last incident occurred within the limita-

491. See *Havens*, 455 U.S. at 381 (holding that plaintiffs' associational claims "are based not solely on isolated incidents" of the defendants' discrimination against individual applicants, but rather on the defendants' "continuing violation manifested in a number of incidents").

492. *Id.*

493. In addition, to the extent that a current resident has a § 3604(f)(3)(C)-based claim for his inability to entertain a specific mobility-impaired guest, see *supra* notes 277 and 365, this claim would presumably not occur until that particular guest was deterred from visiting by the building's inaccessible features.

494. *Havens*, 455 U.S. at 381.

tions period, *Havens* held that the organization's claim was timely based on the continuing violation theory.⁴⁹⁵ Again, however, § 3604(f)(3)(C)-based claims by advocacy organizations raise some special timeliness problems.

To sue on its own behalf under *Havens*, an organization must divert some resources or have its mission frustrated by the defendant's discrimination.⁴⁹⁶ Since an organization will not have standing to sue unless it suffers such an injury, it has no claim until this occurs. In the typical situation, a fair housing organization learns of a building's noncompliance with § 3604(f)(3)(C) either through a complaint by a homeseeker with a disability or the organization's own testing program, after which it diverts some resources to deal with this problem.⁴⁹⁷ The resources whose diversion is the key to an organization's standing obviously will not be spent until after the organization becomes aware of a building's noncompliance. Thus, the trigger for the limitations period applicable to this claim will occur some time after this initial awareness date.

What's more, new complaints against this building and therefore the need to devote additional resources may always occur, potentially creating fresh claims for the organization and thus extending its time to sue.⁴⁹⁸ This situation, like that of the testers discussed earlier, has some potential for self-generated injuries designed simply to create "new" claims. Unlike testers, however, organizations clearly have standing in a proper § 3604(f)(3)(C) case. Of course, the possibility of a laches or other equitable defense to an organization's complaint filed well after it first learned of a building's noncompliance with § 3604(f)(3)(C) always exists.⁴⁹⁹

495. *Id.*

496. *See supra* text accompanying notes 336–37.

497. *See, e.g.*, Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 250 F. Supp. 2d 706, 709–10 (W.D. Ky. 2003); Moseke v. Miller & Smith, Inc., 202 F. Supp. 2d 492, 495, 499–500 (E.D. Va. 2002); Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Assocs., 133 F. Supp. 2d 203, 207–08, 211–12 (E.D.N.Y. 2001).

498. In *Havens*, the Court recognized that the injury of the fair housing organization there was "based not solely on isolated incidents involving [specific individuals who dealt with defendants]," but also from a "continuing pattern, practice, and policy of unlawful racial steering" that extends through the last alleged incidents, which occurred within the limitations period. *See* 455 U.S. at 381.

499. *See supra* note 483.

V. CONCLUSION

In order to help guarantee persons with disabilities equal access to housing, Congress in the 1988 Fair Housing Amendments Act provided in § 3604(f)(3)(C) that virtually all new multi-family housing be designed and constructed with certain accessibility features. Scores of states and localities quickly followed suit by amending their fair housing laws to include the same requirement. Despite these provisions, a large portion of the millions of multi-family units built since § 3604(f)(3)(C) became effective do not include the mandated features.

A “failure to design and construct” under § 3604(f)(3)(C) is not excused by ignorance of the law, lack of discriminatory intent, or any other defense, except for a very narrow one involving unsuitable terrain. Thus, every noncompliant dwelling is not only a lawsuit waiting to happen, but is also a lawsuit that generally cannot be defended on the merits.

This leaves three questions: (1) who are proper defendants in § 3604(f)(3)(C) cases; (2) who are proper plaintiffs; and (3) when are § 3604(f)(3)(C)-based claims timely. These questions are not merely “procedural.” They go to the very heart of what is at stake in § 3604(f)(3)(C); that is, defining the rights Congress intended to create in this law and determining whether these rights can be effectively enforced.

The FHA does not specify who may be sued for § 3604(f)(3)(C)-based violations. The most obvious defendants are developers, architects, and builders, whose activities are specifically targeted by the “failure to design and construct” language in § 3604(f)(3)(C). The Supreme Court’s determination to interpret the FHA according to traditional tort principles, however, suggests other proper targets, including engineers, subcontractors, and anyone else who is a substantial participant in the design-and-construction process.

Perhaps the most important issue involving potential defendants is how the sale of a noncompliant dwelling will affect the potential liability of the original builder and the new owner. The original builder’s liability probably continues, based on the analogy to modern products liability law. The new owner, despite not having participated in the faulty design-and-construction process, may also be liable. This is because the FHA makes noncompliance

with § 3604(f)(3)(C) discrimination for purposes of § 3604(f)(1) and § 3604(f)(2). These provisions ban disability discrimination in sales, rentals, and the provision of a dwelling's privileges and facilities, and are obviously directed toward housing providers. Furthermore, holding a current landlord liable for its building's failure to provide the features mandated by § 3604(f)(3)(C) would be consistent with the view of modern torts law that landlords are often responsible for dangerous conditions on their property.

The issue of who is a proper plaintiff under the FHA received a great deal of attention prior to enactment of the 1988 FHAA. Reflecting the broad standing recognized by pre-1988 Supreme Court decisions and confirmed by Congress in the FHAA, privately initiated cases involving § 3604(f)(3)(C) have been brought not only by homeseekers with disabilities, but also by testers and fair housing organizations. This article argues that the Supreme Court's recognition of tester standing in *Havens* should not be extended to tester standing in § 3604(f)(3)(C) cases, although disabled actual homeseekers should be able to sue, at least for intangible damages, without having to establish their financial ability to live in the defendant's housing. *Havens'* recognition that fair housing organizations can sue on their own behalf for FHA violations does translate to § 3604(f)(3)(C) cases, at least if their injuries are caused by such a violation. Furthermore, a variety of other types of plaintiffs, including non-disabled residents of the defendant's housing, should be able to challenge a building's inaccessibility.

Determining the timeliness of § 3604(f)(3)(C)-based claims has already caused much difficulty among the lower courts. For privately initiated claims, the FHA provides a one-year limitations period for administrative complaints and a two-year period for direct lawsuits. No time limit applies to Department of Justice actions under § 3614 for injunctive relief, but two different limitations periods govern such actions for civil penalties and monetary damages. The key issue in privately initiated claims is whether the time period begins to run when the faulty design-and-construction process is completed. Two doctrines that might extend the limitations period—the discovery rule and the continuing violation theory—have thus far been given a cool reception by the courts.

This article argues that, as in analyzing the proper-defendant issue, the timeliness issue must recognize that the FHA makes

noncompliance with § 3604(f)(3)(C) a violation of § 3604(f)(1) and § 3604(f)(2), and that, consistent with Supreme Court treatment of other federal statutory claims, the statute-of-limitations trigger for § (f)(1)-(2) claims does not occur until a particular plaintiff has a complete and present cause of action. This means that the limitations period would not begin to run for a homeseeker with a disability until he first encounters the defendant's building, no matter how long ago this building was constructed. Such a claim would be timely if brought within the limitations period after this first encounter, even without the benefit of the discovery rule or the continuing violation theory.

For the tens of thousands of developments built in violation of § 3604(f)(3)(C), full repose can never occur, because Department of Justice claims seeking retrofits and other injunctive relief are always possible. Furthermore, litigation brought by individuals with disabilities and some other types of private plaintiffs may also turn out to be appropriate for as long as a building remains inaccessible. Obviously, the better solution for all interested parties would be voluntary compliance with § 3604(f)(3)(C). In the meantime, this article provides a blueprint for analyzing the key litigation issues in § 3604(f)(3)(C) cases.
