**FACEBOOK REQUIRED TO REFORM ITS ADVERTISING PLATFORM**

In the Spring of 2018, a private nonprofit fair housing organization, the National Fair Housing Alliance (“NFHA”), filed a lawsuit against Facebook claiming that Facebook’s advertising system unlawfully allowed advertisers of homes for sale or lease to exclude people based upon race, gender and other protected classes.

By way of background, Facebook’s business model allows its advertisers to target specific groups of people. Facebook gathers huge amounts of information by tracking its users’ online activity – both on Facebook and elsewhere through the internet. The end result is a consumer profile that reflects each Facebook user’s demographic, location, behaviors and interests. This allows Facebook’s advertisers to focus their ad campaign with great specificity. For example, a company with a new high‑end jogging stroller could advertise only to new parents who have an “affinity” for running and make over $200,000 annually. The model also allows an advertiser to market to, or exclude, particular groups that are protected under federal and state anti‑discrimination laws -- for example, women, young adults, or persons of a particular ethnic group or religious affiliation.

What is said to have caught the NFHA’s attention was an investigative news organization who claimed to have placed a Facebook advertisement that was targeted to people who were house hunting but excluded anyone who had an “affinity for” African‑American, Asian-American or Hispanic people.[[1]](#footnote-1) NFHA then conducted its own investigation by creating a fictitious advertisement for an apartment to be run throughout the entire United States. NFHA used Facebook’s advertising options to customize its ad and its target audience. Specifically, Facebook’s “exclusions” feature allowed NFHA to exclude African‑Americans and Hispanics from the ad’s potential audience by selecting Facebook’s demographic pre-set options.

According to NFHA, it then notified Facebook in writing that its advertising features violated the Fair Housing Act (“FHA”), which prohibits discrimination in housing transactions on the basis of race, color, national origin, religion, sex, disability or familial status (having children under 18 in a household; including pregnant women). NFHA met with Facebook representatives to explain that the FHA and other civil rights laws prohibited any system which exclude certain categories of people from viewing advertisements for housing, employment or credit. NFHA requested that Facebook cease and remedy its discriminatory behavior. In early 2017, Facebook published a statement on its website stating that it was ending the use of “ethnic affinity marketing” for ads offering housing, employment or credit and would require advertisers in these categories to self-certify that their ads complied with all anti-discrimination laws.

Despite Facebook’s promises, no real changes appear to have been made prior to the filing of the lawsuit. The same investigatory news organization that was responsible for the first inquiry published a second report in late 2017. This organization reported that it had published dozens of fictitious rental housing ads on Facebook in which it was allowed to block the ads from certain categories of users, such as African‑Americans, mothers of high school kids, people interested in wheelchair ramps, Jews, expats from Argentina, and Spanish speakers.[[2]](#footnote-2) Based on Facebook’s prior announcement that it would end the use of “ethnic affinity marketing” for housing opportunities, Facebook should have rejected these ads. Other ads should have prompted a screen to pop up asking for self-certification of no discrimination. The news organization reported that Facebook had rejected none of its ads and that it never encountered a self‑certification screen at any time.

In response to this second investigative news story, NFHA itself conducted another investigation. During this second investigation, NFHA was able to create ads and distribute those ads in a manner that excluded individuals based on race, disability, sex and familial status. As a result, NFHA filed its lawsuit in March of 2018.

Five months later, the U.S. Department of Housing and Urban Development (“HUD”) also took action against Facebook. In its Complaint, HUD claimed that Facebook’s advertising targeting tools enable advertisers of housing to discriminate as follows:

* Facebook enabled advertisers to discriminate based on sex by showing ads only to men or only to women.
* Facebook enabled advertisers to discriminate based on disability by not showing ads to users whom Facebook categorizes as interested in “assistance dog,” “mobility scooter,” “accessibility” or “deaf culture.”
* Facebook enabled advertisers to discriminate based on familial status by not showing ads to users whom Facebook categorizes as interested in “childcare” or “parenting.  
   or by showing ads only to users with children above a specified age.
* Facebook enabled advertisers to discriminate based on religion by showing ads only to users whom Facebook categorizes as interested in the “Christian Church,” “Jesus,” “Christ” or the “Bible.”
* Facebook enables advertisers to discriminate based on national origin by not showing ads to users whom Facebook categorizes as interested in “Latin America,” “Southeast Asia,” “China,” “Honduras,” “Somalia,” the “Hispanic National Bar Association” or “Mundo Hispánico.”
* Facebook enabled advertisers to discriminate based on race and color by drawing a red line around majority-minority zip codes and not showing ads to users who live in those zip codes.

In its Complaint, HUD also stated that Facebook promotes its advertising targeting platform for housing purposes with “success stories” for finding “the perfect homeowners.” HUD’s Complaint was an internal complaint that triggered a factfinding investigation separate and apart from the NFHA lawsuit.

HUD’s decision to target online housing discrimination was supported by the National Association of Realtors®. Immediately after HUD filed its complaint against Facebook, NAR’s president issued a statement commending HUD for “taking decisive action to defend fair housing laws, and for working to ensure its intended consumer protections extended to wherever real estate is marketed.”[[3]](#footnote-3)

Meanwhile, in the NFHA lawsuit, Facebook asked the court to throw out the case on the basis that Facebook was merely an “interactive computer service” and therefore was immunized from FHA liability under federal law.[[4]](#footnote-4) This was an argument that had been successfully made by craigslist when it was sued years ago for housing advertisements on its website that said things like “no children” or “no minorities.” Craigslist had argued, and the court had agreed, that craigslist was not responsible for these discriminatory advertisements because it did not have any involvement in the development or creation of the content at issue.[[5]](#footnote-5) As stated by that court:

Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money “cause” bank robbery, because if there were no banks there could be no bank robberies. An interactive computer service “causes” postings only in the sense that of providing a place where people can post. \* \* \* If craigslist “causes” the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for “causing” discriminatory advertisements.

The U.S. Justice Department intervened in the NFHA lawsuit and argued that this situation was very different from the one in *Craigslist* because Facebook had actively collected the pre‑populated list of demographics that its advertisers used to exclude specific types of people. In fact, the government argued, Facebook “actively marketed the availability, ease of use and effect of those classifications to potential advertisers without regard to the possible illegality of those classifications under federal fair housing laws.” In essence, the argument was made that Facebook was not immune from liability because, unlike craigslist, Facebook had actually participated in the making of the discriminatory advertisements.

The hearing on Facebook’s motion to have the case thrown out was adjourned three times, ultimately, allowing for the NFHA case to be settled before the motion could be heard and decided by the New York federal court. The settlement, announced on March 18, 2019, requires Facebook to pay $1,950,000 in damages, attorneys fees and costs.[[6]](#footnote-6) Facebook must also provide a $500,000 credit to NFHA for advertising on Facebook that promotes fair housing rights. The settlement agreement also requires Facebook to implement comprehensive changes to its housing, employment and credit advertising which eliminates the targeting of ads based on, among other things, categories that describe or appear to relate to personal characteristics or classes protected under federal, state, and local fair housing laws, including, race, color, national origin, gender, age, religion, family status, disability, and sexual orientation. And, finally, Facebook must create and maintain a new page for all housing ads and provide fair housing training for its employees.

Despite the settlement of the NFHA lawsuit (and the changes that Facebook agreed to make as part of that settlement), HUD did not give up its pursuit of Facebook. In fact, two weeks after the NFHA settlement, HUD formally announced that it was pursuing its Complaint against Facebook seeking damages on behalf of “any aggrieved person” as well as the “maximum civil penalty” for each of its violations of the Fair Housing Act. This case, which could result in millions of dollars in penalties, remained pending at the time this article was written.

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1. Julia and Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, Propublica.org (Oct. 28, 2016), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>. [↑](#footnote-ref-1)
2. Julia Angwin, Ariana Tobin and Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, Propublica.org (Nov. 21, 2017), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>. [↑](#footnote-ref-2)
3. <https://www.nar.realtor/newsroom/realtors-applaud-hud-decision-to-target-online-housing-discrimination> [↑](#footnote-ref-3)
4. The federal Communications Decency Act (“CDA”) immunizes “interactive computer service providers” against liability arising for content created by third parties. The CDA does not immunize an “information content provider” defined as a website operator that is “responsible, in whole or in part, for the creation or development of” content. 47 USC § 230(f)(3). [↑](#footnote-ref-4)
5. *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc v craigslist, Inc*, 519 F3d 666 (2008). [↑](#footnote-ref-5)
6. According to the NFHA Complaint, in 2017, Facebook generated over $40 billion in revenue (Facebook Investor Relations, <https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=12512043> (Facebook, Inc. Annual Report for the Fiscal Year Ended December 31, 2017). [↑](#footnote-ref-6)