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Sale of Real Estate by Display of "For Sale" Signs as Protected Commercial Speech: Linmark Associates, Inc. v. Willingboro

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Sale of Real Estate by Display of "For Sale" Signs as Protected Commercial Speech:—*Linmark Associates, Inc. v. Willingboro*[1]—The Township of Willingboro is a residential community of approximately 44,000 people located in southern New Jersey.[2] As its overall rate of population growth slowed to approximately three percent during the early 1970's, the township's racial composition changed significantly.[3] Although this did not cause any section of the Township to become racially identifiable,[4] members of the community became concerned about the changing population.[5] Believing that a major cause of the change was "panic selling"[6] by white residents who feared that Willingboro was becoming all black and that property values would decline, the townspeople concluded that the display of "For Sale" and "Sold" signs significantly exacerbated such fears.[7] Evidence presented during extensive public discussion,[8] however, indicated that the turnover rate of home sales was actually quite low and that the increase in property values was comparatively high.[9] Nonetheless, on March 18, 1974 the Township Council unanimously approved Ordinance 5-1974, which

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[1] 431 U.S. 85 (1977).

[2] *Id.* at 87.

[3] *Id.* Previously, Willingboro had experienced a dramatic population increase during the 1960's when the white population grew nearly 350% and the non-white population rose over 11%. Between 1970 and 1973, however, the white population decreased by almost 2,000 persons (5.3%) as the non-white population increased by more than 3,000 persons (60%). *Id.*

[4] Linmark Associates, Inc. v. Township of Willingboro, 535 F.2d 786, 789 (3d Cir. 1976).

[5] 431 U.S. at 88.

[6] In communities experiencing a change in racial composition, their difficulties may be compounded by the presence of two related but distinct phenomena: "panic selling" and "blockbusting." Because panic selling refers to the sale of property by homeowners who fear the effects of racial transition and blockbusting refers to the practice of real estate brokers in encouraging such sales, it is important to distinguish between the two. In a similar case involving the validity of an ordinance banning the display of "For Sale" signs, Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974), the district court provided a concise explanation of the distinction between the two practices:

> Blockbusting refers to the practice of directly inducing or persuading an individual to sell his home by representations as to the entry into his neighborhood of blacks or other minority groups. Panic selling is a broader problem which, although it may be prompted by blockbusting practices, does not depend upon direct inducements or face-to-face contact between people. Panic selling occurs when a resident who is otherwise disposed to remain in a neighborhood succumbs to any one or more of a number of pressures to move out when it appears that a minority racial group is beginning to enter.

Id. at 134-35. Further, it is important to note that blockbusting activities have been prohibited by the federal government. Fair Housing Chapter of the Civil Rights Act of 1968, §804(e), 42 U.S.C. §3604(e) (Supp. V 1975).

[7] 431 U.S. at 87-88.

[8] *Id.* at 88. Departing from its usual procedure of conducting a public hearing only after the proposed law received initial approval by the Township Council, the Council held public hearings both before and after it considered and approved the ordinance. Further, the Council contacted National Neighbors (a national organization which promotes integrated housing) for advice and the proposed ordinance was endorsed by the Willingboro Human Relations Commission. *Id.*

[9] The Court noted that:

> With respect to the justification for the ordinance, the Council was told (a) that a study of Willingboro home sales in 1973 revealed that the turnover rate was

proscribed the display of "For Sale" and "Sold" signs in residential areas of Willingboro.[10]

Linmark Associates, Inc., a New Jersey corporation, owned property in Willingboro which was placed for sale in March, 1974.[11] During the next four months, William Mellman, the agent with whom Linmark's property was listed, received complaints from Linmark and other property owners of slowness in furnishing buyers and of the absence of "For Sale" signs.[12] As a result, petitioners Linmark and Mellman brought an action in the United States District Court for the District of New Jersey to have the ordinance declared unconstitutional and to enjoin the Township of Willingboro and its building inspector, co-respondent Gerald Daley, from enforcing the ban.[13]

The district court declared the ordinance unconstitutional, holding that the Township's ban on the display of "For Sale" and "Sold" signs violated the petitioners' right of free speech.[14] In the district court's view, the ordinance impermissibly restricted the petitioners' interest in communicating to others that property was for sale by limiting petitioners' ability to express their commercial message.[15] The respondents appealed and, in a di-

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> roughly 11%. . . ; (b) that in February 1974—a typical month—230 "For Sale" signs were posted among the 11,000 houses in the community . . .; and (c) that the Willingboro Tax Assessors had reported that "by and large the increased value of Willingboro properties was way ahead of . . . comparable communities."

Id. at 89. In view of its transient population, *id.* at 90, Willingboro had a suprisingly low turnover rate compared to a national average estimated to be as high as 20%. *See* Molotch, *Racial Change in a Stable Community*, 75 AM. J. OF SOC. 226, 228 (1969-70).

[10] 431 U.S. at 88. Chapter XVII of the Revised General Ordinances of the Township of Willingboro regulates the erection and maintenance of signs. Prior to the enactment of Ordinance 5-1974, the relevant sections of Chapter XVII were as follows:

> 17—2 LEGALITY. Signs may be erected and maintained in the Township of Willingboro only when the same comply with the provisions of this chapter, and it shall be unlawful to erect or maintain any sign at any place within the said Township of Willingboro when the same does not comply with the provisions of this chapter.
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> . . . .
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> 17—6 RESIDENTIAL ZONES. The following signs are permitted in those areas of the Township of Willingboro which have been zoned for residential use.
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> . . . .
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> 17—6.5 RENTAL SIGNS. Signs pertaining to the lease, rental or sale of the premises on which they appear, subject to the following conditions:
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> a. The size of the sign shall not exceed eight square feet in area.
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> b. The sign shall be located upon the premises to which it pertains and shall not project beyond the property line of such premises.
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> c. Such signs shall be removed within five days after the execution of any lease, rental agreement or agreement of sale or the premises in question by the occupant of the premises and/or the owner of the sign.
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> d. Not more than two such signs are to be placed upon any property.

535 F.2d at 805-06. Ordinance 5-1974 repealed section 17—6.5, thereby in effect prohibiting the display of "For Sale" and "Sold" signs in residential areas of Willingboro. *Id.* at 806. However, several categories of signs continued to be permitted under section 17—6. *Id.* at 805 n.1.

[11] 431 U.S. at 86.

[12] 535 F.2d at 792.

[13] Although unreported, the district court opinion was reproduced in the court of appeals decision at 535 F.2d at 792 n.5.

[14] *Id.*

[15] *Id.* In addition, by restricting access to information regarding the sale of houses in Willingboro, the ordinance was held to infringe upon a potential purchaser's right to travel.

vided opinion, the United States Court of Appeals for the Third Circuit reversed the judgment of the district court, holding that the ordinance was "constitutionally acceptable as a reasonable means to halt early panic selling and its incipient segregation effects."[16] The court of appeals characterized the message expressed by "For Sale" and "Sold" signs as commercial speech,[17] and construed the ordinance as a valid regulation of the place and manner of the signs' display.[18] The circuit panel found Willingboro's interest in preventing the destructive effects of panic selling sufficient to justify whatever incidental limitations on freedom of speech might result from the prohibition of "For Sale" and "Sold" signs.[19]

The Supreme Court granted certiorari[20] and reversed. In a unanimous decision,[21] the Court HELD: an ordinance which proscribes the display of "For Sale" and "Sold" signs violates the first amendment where the evidence fails to establish its necessity to further the important governmental interest in stable, integrated neighborhoods.[22]

In reaching its decision, the Supreme Court reasoned that the message inherent in the "For Sale" and "Sold" signs is entitled to constitutional protection for three reasons. First, the individual and societal interests in the communication and receipt of the real estate sales information in *Linmark*[23] rendered the signs indistinguishable from the abortion and drug advertisements held to be protected commercial speech in *Bigelow* v. *Virginia*[24] and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*[25] Second, rather than an acceptable regulation of the place or manner of expression,[26] the ban on the display of "For Sale" and "Sold" signs was

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Id. As explained by the district court, "[t]ravel, in this sense, refers to migration with intent to settle and abide, not mere movement," *citing* Wellford v. Battaglia, 343 F. Supp. 143, 147 n.9 (D. Del. 1972), *aff'd*, 485 F.2d 1151 (3d Cir. 1973).

[16] 535 F.2d at 800.

[17] *Id.* at 796.

[18] *Id.* at 795.

[19] *Id.* at 797. Further, citing the fact that over 70% of the inquiries regarding the purchase of homes in Willingboro resulted from sales techniques other than signs, the court of appeals dismissed the contention that the ordinance impeded a potential purchaser's right to travel. *Id.* at 804.

[20] 429 U.S. 938 (1976).

[21] 431 U.S. at 87. Justice Rehnquist took no part in the consideration or decision of *Linmark*. *Id.* at 98.

[22] *Id.* at 95-97.

[23] *Id.* at 92.

[24] 421 U.S. 809 (1975).

[25] 425 U.S. 748 (1976).

[26] 431 U.S. at 93-4. Governmental limitations on the time, place and manner of communication of protected expression have been upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (regulation of location of theatres showing adult movies); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974) (regulation prohibiting political advertising on city transit system vehicles); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (regulation of amplified sound trucks); Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (regulation of parades). However, such regulations have been found unconstitutional because of their encroachment upon protected speech where: they discriminate on the basis of content, Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 211-12 (1975) (ordinance prohibiting drive-in movie theatre to exhibit films containing nudity) and Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (ordinance prohibiting all picketing within 150 feet of a school, except labor picketing); they are overly broad, Cox v. Louisiana, 379 U.S. 536, 551-52, 557 (1965) (convictions of peaceful protesters for disturbing the peace and obstructing public passages overturned because of vagueness of the statute and the unfettered discretion of officials).

directed impermissibly toward the primary effect of the message of the signs, thereby causing suppression of the content of the message.[27] Third, because the ordinance restricted constitutionally protected expression, it was subjected to close scrutiny.[28] Although conceding that the Township's goal of promoting stable, integrated neighborhoods is a strong governmental interest consistent with national policy,[29] the Court found the ordinance unnecessary to accomplish the objective in view of the factual data presented.[30]

The significance of the decision in *Linmark* is threefold. First, by finding the subject matter of the advertising in *Linmark* indistinguishable for constitutional purposes from that of *Bigelow* and *Virginia Pharmacy*, the Court reaffirms the protection accorded to commercial speech under the first amendment. Second, *Linmark* makes clear that the individual and societal interests in the free flow of truthful and legitimate commercial information may not be impaired where the evidence fails to establish the necessity of regulation to promote a vital and important governmental objective. Third, the decision will have a significant practical impact upon municipal efforts to deal with the social problems of racial transition, panic selling, and white flight.

This casenote will focus on the Supreme Court's application of first amendment protection to the display of "For Sale" and "Sold" signs. The note will discuss *Linmark* in light of the constitutional status of commercial speech subsequent to *Virginia Pharmacy*, the time, place and manner doctrine, and the analysis employed where first amendment interests conflict with an important governmental objective. Last, the impact of *Linmark* on municipal efforts to stem panic selling and white flight by banning the display of "For Sale" and "Sold" signs will be considered from two perspectives: whether evidence of severe community disruption directly attributable to the proliferation of such signs may justify prohibition of their display, and whether a ban on the display of such signs is effective in reducing panic selling and slowing white flight in a community experiencing racial transition.

I. LINMARK AND FIRST AMENDMENT PROTECTION

The Township of Willingboro sought to justify its prohibition of the display of "For Sale" and "Sold" signs on the grounds that the ban was permissible in view of the commercial nature of the speech at issue, was a reasonable limitation on the place and manner of communication, and was

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In Grayned v. City of Rockford, 408 U.S. 104 (1972), involving ordinances prohibiting demonstrations in the vicinity of schools, an antinoise ordinance was upheld, *id.* at 119-21, while an antipicketing ordinance was found unconstitutional. *Id.* at 107. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

[27] 431 U.S. at 94.

[28] *Id.* at 94-96. *See* Elrod v. Burns, 427 U.S. 347, 362 (1976) ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny"); Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("[T]he subordinating interests of the State must survive exacting scrutiny").

[29] 431 U.S. at 94-95.

[30] *Id.* at 95-96. See also note 9 *supra.*

necessary to achieve a subordinating governmental objective. This section will examine the Supreme Court's rejection of these arguments in its holding that the township's ordinance constituted an impermissible obstruction of the free "flow of truthful and legitimate commercial information."[31]

A. *The Commercial Speech Question*

The Township of Willingboro initially attempted to justify the constitutional validity of its ordinance by characterizing the message inherent in "For Sale" and "Sold" signs as a simple commercial proposal not entitled to the same degree of protection accorded other types of expression.[32] However, the Supreme Court rejected this contention, citing its previous decisions in *Bigelow* v. *Virginia*[33] and *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council.*[34] Although in *Virginia Pharmacy* the Court cautioned that differences in the characteristics of commercial speech may give rise to "a different degree of protection,"[35] the holding in that case extended first amendment protection to purely commercial proposals.[36] The

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[31] 431 U.S. at 98.

[32] *Id.* at 91-92. The "commercial speech" exception first was enunciated, with neither citation nor explanation, in Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (ordinance prohibiting the distribution of commercial advertisements in the streets not a violation of the first amendment). There the Supreme Court found no limitation on governmental regulation of commercial speech, implying that it constituted economic activity rather than protected expression. *Id.* at 54. Erosion of the commercial speech exception began in New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964) (otherwise protected political expression not unprotected because of use of medium of commercial newspaper advertisement). The Court noted that the societal interest in the civil rights information expressed in the advertisement distinguished it from the purely commercial message of *Chrestensen. Id.* at 266. In Pittsburgh Press Co. v. Pittsburgh Comm'n. on Human Relations, 413 U.S. 376 (1973) (government regulation prohibiting newspaper employment advertisements classified according to sex not a violation of first amendment), the Court rejected the *Chrestensen* implication of commercial speech as economic activity, holding that the first amendment speech interests of a commercial proposal must be assessed independently of the conduct element. *Id.* at 386. Affirming the *New York Times* view that "speech is not rendered commercial by the mere fact that it relates to an advertisement," *id.* at 384, the Court suggested further erosion of the commercial speech exception—and extension of constitutional protection to an "ordinary commercial proposal"—awaited only a more conducive factual context in which the commercial activity itself was not illegal. *Id.* at 389.

[33] 421 U.S. 809 (1975). In holding unconstitutional the state's prohibition of a newspaper's publication of an advertisement for out-of-state abortion services, the Court in *Bigelow* severely diminished the scope of the commercial speech exception. The *Chrestensen* decision was construed as merely a limitation on the manner of expression, rather than a "sweeping proposition that advertising is unprotected *per se,*" which "has not survived reflection." *Id.* at 820 n.6. However, the Court expressly declined to consider the precise "extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation." *Id.* at 826.

[34] 425 U.S. 748 (1976). It is important to note that the court of appeals' decision in *Linmark* was rendered prior to the Supreme Court's consideration of *Virginia Pharmacy.* 431 U.S. at 92 n.6. As a result, the court of appeals relied upon the vitality of the commercial speech exception remaining after *Bigelow* in agreeing with the township that the commercial message expressed by the "For Sale" and "Sold" signs was entitled to a lesser degree of constitutional protection. 535 F.2d at 796.

[35] 425 U.S. at 771 n.24. In addition, the Court noted that the state retains its traditional power to regulate the time, place and manner of communication, *id.* at 771, false or deceptive advertising, *id.*, advertising of activities themselves illegal, *id.* at 772, and advertising on electronic broadcast media, *id.* at 773.

[36] *Id.* at 771-73.

Court in *Virginia Pharmacy* identified three distinct first amendment interests in considering whether a state constitutionally could be permitted to ban the advertisement of prescription drug prices as a means of ensuring high quality pharmaceutical services: the interest of the advertiser in communicating his message,[37] the strong consumer interest in the receipt of such commercial information,[38] and the general societal interest in the proper allocation of resources through informed private economic decisions.[39] In view of these interests, the *Virginia Pharmacy* Court held that the free flow of "concededly truthful information about entirely lawful activity" in the commercial area may not be suppressed.[40]

This constitutional protection accorded commercial speech was reaffirmed by the decision in *Linmark*. Concluding that there was no meaningful distinction between the Willingboro ordinance and the statutes overturned in *Virginia Pharmacy* and *Bigelow*, the Supreme Court held that the ordinance violated the first amendment by restricting the "flow of truthful and legitimate commercial information."[41] The Court in *Linmark* emphasized that the interests of petitioners in freely communicating their message, of potential purchasers in receiving information regarding the availability of real estate, and of society in general in the free flow of such information were identical to those recognized in *Virigina Pharmacy*.[42] Rejecting the Township's contention that the subject matter of the ban rendered the ordinance constitutionally distinguishable from the advertisements in *Bigelow* and *Virginia Pharmacy*, the Court concluded that the interests in the communication of commercial information are not lessened by such differences in subject matter.[43]

The Supreme Court in *Linmark* properly applied the expanded view of the protection accorded commercial speech set forth in *Virginia Pharmacy*. In effect, the holding indicates that where the goods or services are not in themselves illegal and the commercial message is truthful, differences in the type of services or goods are not significant for constitutional purposes. Accordingly, *Linmark* affirms that in commercial speech cases the first amendment is intended to ensure the free flow of information rather than to protect any particular type of subject matter from governmental regulation.[44]

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[37] *Id.*, at 762-63.

[38] *Id.* at 763-64.

[39] *Id.* at 765. In his dissent, Justice Rehnquist also recognized the consumer and societal interest in commercial information, but argued that these interests were more properly a concern of the legislature than the court. Accordingly, he criticized the majority opinion as a return to substantive due process analysis. *Id.* at 783-84 (Rehnquist, J., dissenting).

[40] *Id.* at 773. *See, e.g.*, Note, *Advertising of Prescription Drug Prices As Protected Commercial Speech*, 18 B.C. IND. & COMM. L. REV. 276 (1977); Note, *Commercial Speech and the First Amendment*, 5 HOFSTRA L. REV. 655 (1977); Note, *Protection of Commercial Speech*, 60 MARQ. L. REV. 138 (1976).

[41] 431 U.S. at 97-98, *quoting Virginia Pharmacy*, 425 U.S. at 771 n.24.

[42] 431 U.S. at 92.

[43] *Id.* at 91-92.

[44] *Id.* Also, the suggestion of a product-services distinction in *Virginia Pharmacy*, 425 U.S. at 773 n.25, has since been rejected by the Court in Bates v. State Bar,___U.S.___, 97 S. Ct. 2691, (1977), in which the constitutional protection previously accorded truthful and legitimate commercial product information was held to apply also to the advertisement of prices for legal services in newspapers. *Id.* at 2700, 2709.

B. *Limitation of the Place or Manner of Expression*

Having determined that the communication at stake in *Linmark* is not disqualified from first amendment protection, the Supreme Court next considered the township's contention that the display of "For Sale" and "Sold" signs could be prohibited as a valid limitation on the place or manner of expression.[45] The township argued that the ordinance merely proscribed one place and manner of commercial advertising of real estate in Willingboro. In addition, it emphasized that most inquiries regarding the purchase of homes were due to sources of information other than signs,[46] implying that effective alternatives existed by which buyers and sellers could communicate commercial information.

Although it affirmed the legitimacy of reasonable time, place or manner restrictions, the Court refused to characterize the Willingboro ordinance as such a restriction for two reasons.[47] First, noting that there were "serious questions" as to whether options such as newspaper advertising and listing with real estate brokers could be considered viable alternate means of communication, the Court concluded that these alternatives were "far from satisfactory."[48] The Court identified three defects which rendered such alternatives unacceptable: they were more expensive and less autonomous; they were less likely to reach those not purposefully seeking sales information; and they were less effective to communicate the message inherent in "For Sale" and "Sold" signs.[49] In view of the lack of satisfactory

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[45] 431 U.S. at 93. As stated succinctly in Cohen v. California, 403 U.S. 15 (1971), "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or whereever he pleases, or to use any form of address in any circumstances that he chooses." *Id.* at 19.

[46] 431 U.S. at 89. Local real estate agents estimated that 30%-35% of the inquiries regarding the purchase of real estate in Willingboro resulted from prospective buyers seeing "For Sale" and "Sold" signs. *Id.*

[47] *Id.* at 93-94.

[48] *Id.* at 93. Although this conclusion reversed the court of appeals finding, 535 F.2d at 795, 797, and adopted that of the district court, *id.* at 792 n.5, the Supreme Court grounded its result upon a different footing. Both lower courts agreed that the ordinance would impair a seller's ability to dispose of his property. *Id.* at 792 n.5, 797. They differed, however, as to the constitutional significance of this impact on the seller's interest in communicating information regarding the sale of his property. Whereas the district court found that the seller's interest merited first amendment protection, *id.* at 792 n.5, the court of appeals viewed the seller's message as the type of commercial proposal characteristic of *Valentine* v. *Chrestensen*. *Id.* at 796. Since its decision was rendered prior to the Supreme Court's holding in *Virginia Pharmacy*, the court of appeals accorded plaintiffs' commercial speech a lesser degree of protection and construed the ordinance as a reasonable limitation on the place and manner of expression. *Id.* at 795.

The lower courts also reached their contrary conclusions because of their different views as to the effect of the ban in racial terms upon prospective purchasers. The district court held that the ordinance, by prohibiting a means by which potential purchasers could identify housing opportunities themselves, would tend to encourage racially discriminatory practices by real estate brokers. *Id.* at 793 n.5. Rejecting this claim, the court of appeals emphasized that no evidence had been offered to substantiate such a conclusion. *Id.* at 803-04. The Supreme Court, however, chose to frame the question of alternate means in terms of their impact upon the free flow of the commercial information. Rather than evaluating the effect of the ban upon potential purchasers in terms of their fundamental right to travel, therefore, the Court considered the ordinance in terms of its impact upon the potential purchasers' first amendment right to receive truthful and legitimate information, as well as upon the seller's right to disseminate such information. 431 U.S. at 92.

[49] 431 U.S. at 93.

alternatives, therefore, rather than merely proscribing one manner of expression, the ban prohibited one of the most effective methods of communicating the message that property was for sale. Second, because the display of signs other than "For Sale" or "Sold" was permitted under the revised ordinance,[50] the township could not attempt to justify the ban on privacy or aesthetic grounds.[51] As a result, the ordinance constituted direct suppression of the content of the message conveyed by "For Sale" and "Sold" signs.[52]

The Court correctly concluded that the ban attempted to suppress the content rather than to regulate the form of the commercial expression. In its effort to reduce white flight by eliminating the appearance of panic selling caused by the display of "For Sale" and "Sold" signs, the township was concerned with the effect or the signs' message upon Willingboro residents. Rather than a content-neutral prohibition of the display of all types of signs in residential neighborhoods, therefore, the ordinance specifically was intended to suppress the particular message expressed by the "For Sale" and "Sold" signs. Such a focus on the content rather than the form of communication clearly placed the ban outside the scope of legitimate place and manner restrictions.

C. *Regulation of Speech to Achieve a Subordinating Governmental Objective*

After finding both that petitioners' signs were not precluded from constitutional protection and that the ban did not constitute an acceptable limitation of the place or manner of expression, the Supreme Court considered the township's contention that its regulation of speech was justified by the importance of the governmental objective it sought to achieve.[53] In effect, this alternative argument conceded that the ordinance encroached upon freedom of expression, but rationalized such infringement by the importance of the governmental interest in preserving stable, integrated neighborhoods.

It is well-established that incidental limitations of freedom of expression may be permitted where necessary to further a compelling interest which is unrelated to the suppression of protected speech and where such limitations employ means narrowly tailored to the governmental objective.[54] In *Linmark*, the Court was asked to determine whether the importance of achieving the township's goal of promoting stable, integrated neighborhoods could justify restraint of petitioners' freedom of expression. The Supreme Court characterized the township's objective as "vital," "important," and consistent with the national policy of encouraging fair housing opportunities.[55] On its face, therefore, Willingboro's goal of preserving stable, in-

[50] See note 10 *supra*.

[51] 431 U.S. at 93-94.

[52] *Id.*

[53] *Id.* at 94.

[54] United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* Elrod v. Burns, 427 U.S. 347, 363 (1976) ("In short, if . . . [the government action] is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive . . .").

[55] 431 U.S. at 94-95.

tegrated neighborhoods would appear to reach that level necessary to justify an impairment of protected speech in its implementation.[56]

Noting that the interest advanced by the state in *Virginia Pharmacy* was similarly important, however, the Court held the Willingboro ordinance constitutionally impermissible for the same two reasons identified in invalidating the drug advertising ban in *Virginia Pharmacy*.[57] First, the township's efforts to achieve its goal resulted in the direct suppression of protected commercial expression. Fearing that panic selling in Willingboro would be exacerbated by the effect upon residents of the message inherent in "For Sale" and "Sold" signs, the township sought to preserve stable, integrated neighborhoods by prohibiting display of the signs.[58] Finding this approach constitutionally defective, the Supreme Court held that the constitutionally acceptable means by which the township can promote the welfare of its residents is "to open the channels of communication rather than to close them."[59] Second, the evidence presented was insufficient to establish the necessity of the ordinance to further the promotion of stable, integrated neighborhoods. Despite the merits of the objective, the evidence did not demonstrate that there was in fact a "substantial incidence of panic selling," that the display of "For Sale" and "Sold" signs was a primary reason for any panic selling, or that proscription of the display of such signs actually would alleviate community fears and reduce white flight.[60] Absent such proof, the Court determined that the Willingboro ordinance was based upon an unfounded fear of the signs' effect.[61]

The Court's holding that the Willingboro ordinance directly suppressed petitioners' commercial message precluded the need to determine whether the ban was drawn sufficiently narrowly. The implication, however, is that the effect of the ordinance may have exceeded the incidental limitation of protected expression which could be justified by the importance of the governmental objective. Furthermore, the Court's determination regarding the deficiencies of evidence of the ban's necessity is particularly significant in view of its refusal to review a 1974 Seventh Circuit Court of Appeals decision upholding a similar ban on the display of "For Sale" and "Sold" signs.[62] In *Barrick Realty, Inc.* v. *City of Gary*, the record indicated that "For Sale" signs were causing an en masse departure of white residents, who were replaced by blacks.[63] By expressing no view on this case, the Supreme Court followed its practice established in previous

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[56] The nature of the required governmental interest has been characterized as "paramount, one of vital importance," Elrod v. Burns, 427 U.S. 347, 362 (1976); "compelling; substantial; subordinating; paramount; cogent; [or] strong," United States v. O'Brien, 391 U.S. at 376-77.

[57] 431 U.S. at 95.

[58] *Id.* at 96-97.

[59] *Id.* at 97, *quoting Virginia Pharmacy*, 925 U.S. at 770.

[60] 431 U.S. at 95-96.

[61] *Id.* at 96. *Cf.* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969) ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); Pennekamp v. Florida, 328 U.S. 331, 347 (1946) ("a solidity of evidence should be required" to justify curtailing freedom of speech).

[62] *Id.* at 95 n.9, leaving intact the holding in Barrick Realty, Inc. v. City of Gary, 491 F.2d 161 (7th Cir. 1974).

[63] Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126, 134 (N.D. Ind. 1973).

commercial speech cases of limiting the holding to the facts of the particular case.[64] This implies, however, that a result contrary to *Linmark* might be reached where the evidence establishes a substantial incidence of panic selling directly attributable to proliferation of "For Sale" and "Sold" signs and susceptible to alleviation by a ban on the display of such signs. In effect, the Court indicates in *Linmark* that the pursuit of an important governmental objective may limit constitutionally protected commercial expression if there is sufficient evidence to establish clearly that: a significant obstacle to furtherance of an important governmental interest exists; the exercise of an individual's freedom of expression is the major cause of that obstacle; and impairment of the protected expression is necessary and effective in achieving the governmental objective.

II. *LINMARK* AND MUNICIPAL EFFORTS TO STEM PANIC SELLING AND WHITE FLIGHT

The primary purpose of Ordinance 5-1974 of the Township of Willingboro was to promote stable, integrated neighborhoods.[65] In proscribing the display of "For Sale" and "Sold" signs, the township sought to stem what it perceived as panic selling and the accompanying flight of white residents from the community. Ever since the promotion of integrated housing has been adopted as national policy, many communities have sought to develop methods consistent with the promotion of racial integration to address problems which threaten their stability.[66] The attempted solution reflected in Ordinance 5-1974 is not unique to the Township of Willingboro. Such ordinances have been enacted with bi-racial support in other communities.[67] Prior to the decision in *Linmark*, the constitutional validity of ordinances proscribing the display of "For Sale" and "Sold" signs had been challenged in several cities.[68] A few ordinances were declared invalid on equal protection grounds under the fourteenth amendment.[69] Most, how-

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[64] *Virginia Pharmacy*, 425 U.S. at 773 n.25; *Bigelow*, 421 U.S. at 826; *Pittsburgh Press Co.*, 413 U.S. at 391.

[65] 431 U.S. at 94.

[66] *See, e.g.*, Laska and Hewitt, *Are Laws Against "For Sale" Signs Constitutional? Substantive Due Process Revisited*, 4 REAL EST. L.J. 153, 154-55 (1975-76); Comment, *Blockbusting: A Novel Statutory Approach to An Increasingly Serious Problem*, 7 COLUM. J. OF L. & SOC. PROB. 538, 558-65 (1971); Comment, *Blockbusting: Judicial and Legislative Responses to Real Estate Dealers' Excesses*, 22 DE PAUL L. REV. 818, 834-36 (1972-73); Comment, *Blockbusting*, 59 GEO. L.J. 170, 171-74 (1970); Comment, The *Constitutionality of a Municipal Ordinance Prohibiting "For Sale", "Sold", or "Open" Signs to Prevent Blockbusting*, 14 ST. LOUIS L.J. 686, 700-08 (1970); Comment, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 URB. L. ANN. 323, 327-28 (1975).

[67] *See* Brief for Amici Curiae The Cities of Shaker Heights, Ohio and Cleveland Heights, Ohio at 7-9 and Brief for Amicus Curiae City of Oak Park, Michigan at 2-3, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 91 (1977).

[68] *See, e.g.*, Howe v. City of St. Louis, 512 S.W. 2d 127, 128-29 (Mo. 1974); Allison v. City of Akron, 45 Ohio App. 2d 227, 228-29, 343 N.E. 2d 128, 129-30 (1974); DeKalb Real Estate Bd., Inc. v. Chairman and Bd. of Comm'rs of Roads and Revenues, 372 F. Supp. 748, 750 (N.D. Ga. 1973); Leet v. City of Eastlake, 7 Ohio App.2d 218, 219-20, 200 N.E. 2d 121, 12 (1967); Burk v. Municipal Court, 299 Cal. App. 2d 696, 698-700, 40 Cal. Rptr. 425, 426-27 (1964).

[69] *See, e.g., Allison*, 45 Ohio App. 2d at 231, 343 N.E.2d at 131 (ban of "For Sale" signs in one geographic area of city denial of equal protection); *DeKalb*, 372 F. Supp. at 754-55 (ban of "For Sale" signs applicable to real estate brokers, while exempting private homeowners, denial of equal protection).

ever, were upheld as reasonable excises of the government's police power to promote the public welfare by regulating economic activity, thereby surviving challenges based upon the due process and equal protection clauses of the fourteenth amendment.[70] Because the cases were decided prior to *Virginia Pharmacy*, challenges to the validity of such ordinances based on first amendment freedom of speech grounds generally were rejected. Adhering to the narrow view of the commercial speech principles then applicable, courts upheld the validity of prohibitions of the display of "For Sale" and "Sold" signs as acceptable regulations of unprotected commercial speech.[71]

The leading case upholding such a ban is *Barrick Realty, Inc.* v. *City of Gary*,[72] upon which the court of appeals in *Linmark* relied heavily in its decision and upon which the Supreme Court in *Linmark* expressed no opinion.[73] In *Barrick*, the validity of an ordinance of the City of Gary, which proscribed the posting of "For Sale" and "Sold" signs in residential areas [74] was challenged by local real estate agents. While adopting as its own a federal district court ruling that the ordinance violated neither the fourteenth amendment nor state and federal fair housing statutes,[75] the Seventh Circuit in *Barrick* considered closely the effect of the ban upon first amendment interests.[76] The court of appeals noted that there was evidence of illegal blockbusting activity in Gary and concluded that the display of "For Sale" and "Sold" signs was part of a "pattern of transactions" which unlawfully urged white homeowners to sell quickly.[77] The court of appeals, therefore, held that there was no need to consider any first amendment interests inherent in the commercial proposal expressed by the signs, because their close relationship to an illegal activity precluded constitutional protection.[78] Although conceding that "the very purpose of the ordinance is censorial," the court found that the signs were not "pure speech . . . [but] a mixture of speech and conduct."[79] Relying upon the vitality of the commercial speech exception which remained at that time, the court of appeals held that the signs could be regulated validly as economic activity.[80]

By deliberately expressing no view on the question whether the Seventh Circuit decision in *Barrick* can survive its recent decision, the Supreme Court implied that a contrary result to that in *Linmark* may be

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[70] *See, e.g., Howe*, 512 S.W. 2d at 132; *Burk*, 229 Cal. App. 2d at 702-03, 40 Cal. Rptr. at 428-29. *Contra, Leet*, 7 Ohio App.2d at 221, 220 N.E. 2d at 124 (ban of "For Sale" signs not reasonable exercise of police power).

[71] *See, e.g., Howe*, 512 S.W. 2d at 130-31. *Contra, DeKalb*, 372 F. Supp. at 755-56.

[72] 491 F.2d 161 (7th Cir. 1974).

[73] 431 U.S. at 95 n.9.

[74] 354 F. Supp. at 128 n.1.

[75] *Id.* at 135-36.

[76] 491 F.2d at 163-64.

[77] *Id.* at 164.

[78] *Id.* at 163-64.

[79] *Id.* at 164. It should be noted that the speech/conduct distinction was not raised in *Linmark*, which instead focused on the appropriate standard of protection applicable to speech of a commercial nature.

[80] *Id.* The court of appeals relied primarily upon the vitality of the commercial speech exception subsequent to the decision in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*. See note 32 *supra*.

reached in a case analogous to *Barrick* if the evidence clearly demonstrates the necessity of a ban on the display of "For Sale" and "Sold" signs. Accordingly, a comparision of the facts in *Barrick* and *Linmark* may be helpful in assessing the precedential effect of both decisions for communities attempting to stem panic selling and white flight.

A comparison of the two cases must address the three facts impliedly required to be supported by evidence sufficient to establish the necessity of employing restrictive ordinances such as those in *Barrick* and in *Linmark*: a significant amount of panic selling, a cause and effect relationship between the display of "For Sale" and "Sold" signs and panic selling, and the effectiveness of the ban in alleviating panic selling and white flight.[81] In *Linmark*, the Supreme Court observed that an annual property turnover rate of approximately eleven percent in Willingboro was an insufficient incidence of panic selling to justify a ban on the display of signs.[82] By contrast, the evidence in *Barrick* demonstrated an en masse departure of white residents from the City of Gary and their replacement by blacks. Between 1960 and 1970, the white population of Gary decreased nearly twenty-five percent while the black population increased almost thirty-five percent.[83] The district court in *Barrick* found this evidence of community disruption so compelling that survival of the ordinance was held necessary for the community to preserve any hope of restoring neighborhood stability.[84]

In considering whether any panic selling in the township was attributable to the display of "For Sale" and "Sold" signs, the Supreme Court in *Linmark* noted that no causal relationship between the proliferation of signs and increased panic selling was established by the presence of such signs in front of two percent of the homes in Willingboro.[85] In *Barrick*, however, there was evidence of illegal blockbusting activities by real estate brokers in connection with the display of "For Sale" signs.[86] The court of appeals de-

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[81] 431 U.S. at 95-96.

[82] *Id.* See note 9 *supra*.

[83] 354 F. Supp. at 134.

[84] *Id.* at 135.

[85] 431 U.S. at 95-96. See note 9 *supra*.

[86] 491 F.2d at 163-64. See note 6 *supra* for a definition of blockbusting. The constitutionality of the federal prohibition against blockbusting activities, Fair Housing Chapter of the Civil Rights Act of 1968, §804(e), 42 U.S.C. §3604(e) (Supp. V 1975), has been upheld as a valid exercise of congressional power under the thirteenth amendment. *E.g.*, Zuch v. Hussey, 394 F. Supp. 1028, 1046-47 (E.D. Mich. 1975); United States v. Mintzes, 304 F. Supp. 1305, 1312-13 (D. Md. 1969); Brown v. State Realty Co., 304 F. Supp. 1236, 1240 (N.D. Ga. 1969). In addition, §3604(e) has been held to be a valid regulation of economic conduct, rather than of speech, so that it does not violate the first amendment. *E.g.*, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 121-22 (5th Cir. 1973); United States v. Mitchell, 327 F. Supp. 476, 486 (N.D. Ga. 1971). The Court of Appeals for the Fifth Circuit in *Bob Lawrence* further held that the government interest in preventing blockbusting outweighed the individual interest in commercial expression. 474 F.2d at 122. State statutes and municipal ordinances prohibiting blockbusting activities have been upheld on first and fourteenth amendment grounds. State v. Wagner, 15 Md. App. 413, 422-24, 291 A.2d 161, 166-67 (1972) (speech aspect of blockbusting activities not entitled to first amendment protection because integrally related to unlawful conduct); Chicago Real Estate Bd. v. City of Chicago, 36 Ill. 2d 530, 541-43, 548-53, 224 N.E.2d 793, 801-02, 805-07 (1967) (municipal ordinance not a denial of due process, equal protection, or free speech).

termined, therefore, that the combination of blockbusting activities and the increasing display of "For Sale" and "Sold" signs constituted a "pattern of transactions" which the municipality properly could prohibit to alleviate panic selling.[87] This comparison of the facts presented in both cases indicates, therefore, that *Barrick* can be distinguished by the presence there of evidence establishing two of the required factors which the Supreme Court found lacking in *Linmark*: a "substantial incidence of panic selling," and a causal relationship between the display of "For Sale" and "Sold" signs and panic selling.[88]

The facts presented in *Barrick* and *Linmark* are similar, however, in that neither case provided evidence to support the third element required to establish the necessity of a ban on the display of "For Sale" and "Sold" signs—the effectiveness of such a ban in alleviating panic selling and white flight. Despite the absence of supporting evidence, this question of effectiveness was accepted as true by the court of appeals in *Barrick*.[89] In *Linmark*, however, the Supreme Court emphasized that, "while this assumption is certainly plausible,"[90] there must be evidence to confirm such an assumption.[91] The implication, therefore, is that subsequent to *Linmark*, whether municipalities may employ ordinances similar to those in *Barrick* and in *Linmark* may turn on the pragmatic consideration of their actual effectiveness.

Two studies which examined communities experiencing racial transition and the impact of the display of "For Sale" and "Sold" signs upon panic selling and white flight tend to establish that sign bans merely provide a temporary calming effect rather than an actual reduction of panic selling. Contrary to the assumption relied upon by the Township of Willingboro and the courts of appeals in *Barrick* and *Linmark*, the studies concluded that racial transition in a community does not necessarily cause higher property turnover rates, a proliferation of "For Sale" signs, or a reduction in property values.[92] Furthermore, ordinances prohibiting the display of "For Sale" and "Sold" signs appear to increase property turnover rates because the lack of knowledge due to the bans often results in more

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[87] 491 F.2d at 164.

[88] 431 U.S. at 95.

[89] 491 F.2d at 163-64.

[90] 431 U.S. at 96 n.10.

[91] *Id.* at 95-96.

[92] In Molotch, *Racial Change in a Stable Community*, 75 AM. J. OF SOC. 226 (1969-70), two Chicago communities with similar demographic characteristics—one experiencing racial transition and one all-white area—were compared to test the assumption that racial transition necessarily is accompanied by white flight and community disruption. *Id.* at 226-27. The study used property turnover rates and the number of "For Sale" signs displayed as indicators of instability, *id.* at 233, as did the courts of appeals in *Linmark* and *Barrick*. Based upon its analysis of the data collected, the study revealed that racial transition in a community does not necessarily give rise to higher turnover rates, *id.* at 230-31, a proliferation of "For Sale" signs, *id.* at 233-34, or a reduction in property values, *id.* at 236. The conclusions of the study strike directly at the validity of the traditional assumption that communities experiencing racial transition are inherently unstable due to white flight. In effect, the study implies that the community fears meant to be alleviated by the ordinance are in fact irrational. Thus, in addition to their impairment of constitutionally protected commercial speech, such ordinances may have the effect of perpetuating racial quotas and freezing in the effects of past discrimination, as suggested by the district court in *Linmark*. *See* 535 F.2d at 792 n.5.

fear and panic than would an absence of such bans.[93] These results support the wisdom of the Supreme Court's admonition in *Linmark* that free flow of commercial information will yield a better informed citizenry.[94]

The empirical data presented by these studies also supports the Supreme Court's finding in *Linmark* that if the evidence fails to establish the potential effectiveness of a sign-ban ordinance, the ordinance cannot be considered necessary to achieve the governmental interest in question. In addition, such data may be significant in interpreting the Court's refusal in *Linmark* to express an opinion on *Barrick*. Leaving the decision in *Barrick* intact suggests that, in the Court's view, more substantial evidence of community disruption directly attributable to the proliferation of "For Sale" signs may be sufficient to tip the scales in favor of the governmental interests, despite the impact of the ordinance on commercial expression. In view of the conclusions of the studies discussed above, however, the Supreme Court may be more concerned with whether a ban on signs actually would be effective.[95] From this latter perspective, a different conclusion may be drawn regarding the future status of ordinances such as those in *Barrick* and *Linmark*. Because these ordinances simply do not appear to be effective, evidence establishing the severity and extent of panic selling and white flight may become immaterial. Despite evidence of the necessity for some type of governmental action to preserve stable, integrated communities, therefore, use of an ordinance which proscribes the display of "For Sale" and "Sold" signs but is ineffective in reducing panic selling could be found unconstitutional because of its impairment of protected commercial expression.

CONCLUSION

In *Linmark*, the Supreme Court affirmed rather than expanded the constitutional principles it set forth in *Virginia Pharmacy*. Because the same individual and societal interests in the communication and receipt of commercial information identified in *Virginia Pharmacy* were found in *Linmark*, the holding makes clear that first amendment protection of commercial advertising can be accorded other types of subject matter.

The decision in *Linmark*, however, will have more significant practical impact upon municipal efforts to preserve stable, integrated neighborhoods during periods of racial transition. The Court found the Willingboro ordinance unconstitutional because of the absence of evidence tending to support its necessity. Whether an ordinance similar to that in *Linmark* could be

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[93] In Hewitt, "An Evaluation of the Effectiveness of a Municipal Ordinance Prohibiting the Use of On-Site Property Signs Within a Major Southeastern Standard Metropolitan Statistical Area" (unpublished Ph.D. dissertation, Georgia State University, 1973), *cited in* Laska & Hewitt, *Are Laws Against "For Sale" Signs Unconstitutional? Substantive Due Process Revisited*, 4 REAL EST. L.J. 153, 160 n.28 (1975), the validity of the corollary assumption—that where a community is experiencing racial transition, panic selling, and white flight, a prohibition of the display of "For Sale" signs will decrease property turnover and alleviate community fears—was tested in Decatur, Georgia. *Id.* at 160. In contrast to the assumption relied upon by the courts of appeals in *Barrick* and *Linmark*, the study concluded that "[t]he ordinance not only failed to stabilize or lower property turnover rates, but in actuality appears to have the effect of increasing them." *Id.* at 161.

[94] 431 U.S. at 97.

[95] *Id.* at 96 n.10.

upheld despite its impairment of protected commercial expression will depend upon whether there is sufficient evidence to demonstrate that the ban on the display of "For Sale" and "Sold" signs is effective in reducing a substantial incidence of panic selling which is attributable to the signs. If such evidence can be established, the ban may be upheld since *Linmark* affirms that common sense differences in commercial speech, based upon the factual context, may give rise to a different constitutional result. However, as appears more likely in view of the difficulty in demonstrating the effectiveness of the ordinances, the holding in *Linmark* that obstructions to the communication of truthful and legitimate commercial information are forbidden by the first amendment suggests that communities will be compelled to develop alternatives that do not abridge constitutionally protected expression.

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Implied Warranty of Habitability in Federal Housing Projects: *Alexander v. United States Department of Housing and Urban Development*[1]— Riverhouse Tower Apartments (Riverhouse) is a housing complex consisting of two twelve-story buildings constructed with a mortgage insured by the Secretary of the Department of Housing and Urban Development (HUD).[2] The mortgagee defaulted on the loan and HUD acquired possession and managed the property after foreclosure.[3]

By the time HUD foreclosed, Riverhouse had fallen into a "deplorable condition":

> The project was infested with roaches and vermin; elevators were often inoperable; security was poor; hot water and heat were inadequate or non-existent; the buildings were often flooded; lighting was poor in the narrow hallways which were often cluttered with garbage; plumbing was deficient, and some tenants had electrical problems.[4]

HUD chose to terminate the project rather than to make repairs.[5] Once the project was vacant, HUD returned security deposits to those tenants who were current in their rent but applied the amount to the balance due from any tenant who was in arrears.[6]

Tenants brought suit for the return of withheld security deposits on the theory that HUD had breached an implied warranty of habitability in

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[1] 555 F.2d 166 (7th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3485 (U.S. Jan. 31, 1978) (No. 77-874).

[2] *Id.* at 167. The mortgage was insured under 12 U.S.C. § 1715l(d)(3) (1970). This section is designed to assist private industry in providing housing for low income families through subsidizing and insuring mortgages made by private lenders.

[3] 555 F.2d at 167. HUD's authority to foreclose property in default and subsequently to manage such property is derived from 12 U.S.C. §§ 1713(k), 1713(l) (1970).

[4] 555 F.2d at 167-68.

[5] *Id.* at 167.

[6] *Id.* at 168-69.