



Legal Pulse Newsletter

Year-in-Review 2017

Welcome to the Year-in-Review edition of the *Legal Pulse* newsletter. This edition examines legal authorities in the areas of Agency, Property Condition Disclosure, RESPA, as well as an annual review of Fair Housing cases and legislation from the past year. Along with our standard review of recent authorities from the past quarter, we revisit some of important cases decided this year and analyze trends observed in 2017.

Breach of fiduciary duty was addressed in the largest number of Agency cases. Dual agency, buyer representation, vicarious liability, and other agency issues were also examined in numerous cases. Although a few Agency cases resulted in damage awards against a real estate professional, the damage awards in these cases were relatively small and the real estate professionals fared well in the majority of the cases. In 2017, much of the legislative and regulatory action relating to agency issues involved clarification or modification of existing laws. Real estate commissions issued advisories to licensees over Teams and Coming Soon Listings, while other statutory or regulatory changes involved agency disclosure and licensee advertising that arose from concerns over team advertising.

As in prior years, mold and water intrusion issues continued to be the most commonly addressed topic in the Property Condition Disclosure cases. Interestingly, a number of cases that did not specifically address mold and water intrusion still involved water-related disclosures, such as issues regarding beach or waterfront property, the presence of a pool, and well water contamination. With a smaller number of Property Condition Disclosure cases this year, only a few significant damage awards were issued in these cases. There were few legislative or regulatory changes to property condition disclosure requirements this year. In a few jurisdictions, property condition disclosure forms were modified. Most of the changes were technical ones, concerning matters such as the method of delivery of the form, or opinions that may be relied upon in preparing the disclosure.

Allegations of alleged kickbacks and misleading payments remained the predominant issue in the 2017 RESPA cases. Multiple cases asserted RESPA violations for alleged captive insurance arrangements and table funding schemes. Table funding refers to a party's contemporaneous advance of loan funds coupled with an assignment of the loan to the third party who advanced the funds. In many cases, plaintiffs struggled to state and provide factual detail sufficient to successfully advance their RESPA claims. A number of cases were also dismissed due to the statute of limitations.

In 2017, there was a significant development in the Fair Housing Act claims brought by the City of Miami against various lenders for alleged discriminatory lending in the City. The City of Miami argues that the resulting foreclosures decreased tax revenues and required increased expenditures to address safety issues at the vacant properties. The U.S. Supreme Court issued a decision holding that the City's alleged financial injury was within the zone of interests protected by the Fair Housing Act. The Supreme Court remanded the case back to the lower courts, however, to determine if the lender's conduct proximately caused the City's injury. Several other cases examined whether advertisements for housing improperly indicated a discriminatory preference for a particular group of people, and whether buildings met FHA design and accessibility standards. There was very little legislative and regulatory activity in this area. The only change located was in Missouri. In that state, the Legislature modified the legal standard for housing discrimination cases to require a showing that membership in a protected class was the motivating factor for the alleged discrimination.

Tables at the end of this edition show how many cases, statutes, and regulations appeared for major topic areas for the year, along with statistics regarding how liability was decided in finalized cases. The first three tables present data for the usual three Major Topics and Fair Housing. The remaining tables collect data for all topics we track for the *Legal Pulse*, including some comparisons to 2016 data, and show 2017 data relating to liability, the dollar range of damage awards, the top damage awards, and the top settlements.

I. AGENCY

A. Cases

Two of the Agency cases retrieved this quarter involved a scenario in which the licensee had a relationship with one of the parties involved in the transaction, but acted as dual agent for the real estate transaction. In the first case, the court held the broker did not owe any fiduciary duty because he acted as dual agent, but could potentially be liable on other claims. In the other case, a jury awarded damages to the purchaser who purchased the property from the licensee's company at a price above the actual valuation.

AGENCY CASES FROM EARLIER EDITIONS

Earlier this year, we examined both of the following cases. Interestingly, both cases address the boundaries of a licensee or broker's duty with respect to elderly clients. As the country's population ages, this issue may become an issue of increasing concern for real estate professionals.

Van Heyde v. Miller, 799 S.E.2d 133 (W. Va. April 20, 2017). The seller, an elderly man, met with a real estate licensee regarding sale of his property, and decided to sell the property for \$90,000. The price included the surface and mineral rights to the property. The man's estate claims that he did not wish to include mineral rights in the purchase price, and that the licensees knew or should have known that the seller was not mentally capable of legally transferring the property due to a decline in his mental health. The appellate court affirmed summary judgment for the licensee. The court concluded that the estate did not present any evidence suggesting that the seller failed to understand his decision to convey both surface and mineral rights. There was also no breach of fiduciary duty because the property was listed in accordance with the seller's wishes.

Trevarthen v. Wilson, No. 4D16-2032, 2017 WL 1718814 (Fla. Dist. Ct. App. May 3, 2017) . A 93-year-old woman sued a licensee and his brokerage firm, claiming that the licensee exploited and abused her by using her money to pay for his personal expenses, causing her to engage in multiple real estate transactions for his benefit, and purchasing a condominium in his own name with her money. The appellate court found that the broker could be vicariously liable for the acts of the licensee. The broker received a commission from the sale of a condominium and may have had knowledge of the licensee's wrongful use of funds. Accordingly, the appellate court reversed summary judgment, and remanded the case for further proceedings.

1. **Busch v. Domb**, No. 17-2012, 2017 WL 6525779 (E.D. Pa. Dec. 21, 2017)

Broker who acted as dual agent did not owe fiduciary duties to seller.

A property seller entered into a listing agreement with the defendant real estate brokerage to list and sell her home. The brokerage firm presented the seller with two potential buyers who made offers well below the asking price. The brokerage firm advised the seller to accept one of the offers. The seller accepted an offer significantly below the asking price, and the broker represented both parties in the transaction as a dual agent. Ten days after closing, the seller discovered that the buyers, real estate investors who had worked with the broker on numerous prior occasions, re-listed the home on the broker's website and sold the home for the seller's original asking price shortly thereafter.

The seller brought claims for misrepresentation, breach of fiduciary duty, breach of contract, and consumer fraud against the brokerage firm. The trial court held that the broker did not owe a fiduciary duty to the seller because the broker was acting as a dual agent. The court concluded that dual agents are not fiduciaries because "the relationship between a dual agent and one of its principals does not rise to" the level of a special relationship where one party exerts influence over the other. As such, the broker did not owe any duties beyond that provided in the contract. Therefore, because the fiduciary duty claim was essentially the same as the breach of contract claim, the court granted the broker's motion to dismiss the breach of fiduciary duty claim. The court denied the broker's motion to dismiss all of the other claims.

2. **Samulska v. Machiote**, 13-2015-CA-014064, 2017 WL 2645241 (Fla. Cir. Ct. Mar. 30, 2017)

Buyer's representative liable where he failed to disclose to buyer that his company owned the properties and sold them above their valuation.

A home purchaser hired a licensee to assist her in purchasing two residential properties. After purchasing the properties, the buyer learned that she had purchased them from the licensee's company at a price above the actual valuation. The licensee acted as dual agent in the real estate transaction.

The purchaser sued the licensee and his company for theft, unfair business practices, and fraud in the inducement. The purchaser also alleged that the licensee failed to act as a fiduciary. Following a jury trial, the jury awarded \$10,000 in damages to the purchaser.

3. **Hill v. Hartness**, No. CV-17-283, 2017 Ark. App. 664 (Dec. 6, 2017)

Claim against licensee was barred by statute of limitations and fact that licensee was not a party to the real estate contract.

A licensee and brokerage represented the purchasers in buying a home. The home purchasers allege the licensee failed to provide them with the disclosure provided by the seller, which indicated settling issues on the property, and advised them not to obtain an inspection of the home. The purchasers brought claims for breach of fiduciary duty, breach of contract, negligence, and unfair trade practices. The trial court granted summary judgment for the licensee. The court concluded that (1) the fiduciary duty, negligence, and other tort claims were barred by the three-year statute of limitations, and (2) the breach of contract claim was not viable because the licensee was not a party to the contract.

The appellate court affirmed application of the three-year statute of limitations, holding that the statute of limitations ran from the time of the negligent act, which was prior to closing, rather than from the time of closing. The appellate court also agreed with the trial court that the licensee was not a party to the real estate contract. According to the appellate court, although Arkansas Real Estate Commission regulations required the licensee to sign the real estate contract, the contract clearly stated the parties were the buyer and the seller. The court noted that there may be a professional services contract between the purchaser and the licensee, but that would be separate from the real estate contract. The appellate court affirmed summary judgment for the licensee.

4. **Cabral v. Drouin**, No. 17 MISC 000616(KFS), 2017 WL 5179119 (Mass. Land. Ct. Nov. 8, 2017)

Licensee did not have authority to bind the seller during exchange of text messages with would-be purchaser.

The purchaser of a home sought to hold the seller of the home to a real estate agreement. The would-be purchaser exchanged text messages with the seller's real estate representative, and argues that those messages resulted in a binding agreement to purchase the property. The seller argues the real estate representative was not authorized to accept offers on the seller's behalf.

The court found that no agreement existed between the purchaser and seller. The seller's real estate representative notified the purchaser that she would need to consult with the seller. The court also noted that the text messages exchanged between the parties did not contain the material terms necessary to make an agreement. Furthermore, the text messages were not signed and the real estate representative informed the purchaser that she did not have authorization to bind the seller. The court granted the seller's motion to dismiss the claims.

B. Statutes and Regulations

Connecticut

The existing agency disclosure law was amended to provide that a real estate licensee who represents a seller, lessor, prospective purchaser or lessee in transaction must disclose, in writing, the identity of his or her client to any party to the transaction who is not represented by another real estate licensee.¹

Hawaii

The Hawaii Real Estate Commission issued a Bulletin explaining state laws regarding real estate teams.² The Bulletin notes that Hawaii law requires advertisements to include either the brokerage name or a registered trade name used by the brokerage. The team name may be included in addition to the brokerage name.

Idaho

The Idaho Real Estate Commission published a newsletter article explaining the changes to the state's advertising law. The article notes that the new law states that a broker's name must appear "clearly and conspicuously" on all advertisements.³

Kansas

¹ [Ct. Gen. Stat. § 20-325d, as amended by P.L. 17-169.](#)

² [Hawaii Real Estate Commission Bulletin, November 2017.](#)

³ [Idaho Real Estate Commission, The Real Estate, July 2017.](#)

The Kansas Real Estate Commission revised its sample agency disclosure forms. The forms may be modified by the licensee, provided the modifications do not violate state law.⁴ The Commission also published articles in its newsletter reminding licensees that advertisements must include the supervising broker's name, and another article that reminded licensees of the requirements for "Coming Soon" listings. The reminder states that licensees must have "an effective agreement to market the property" before placing a sign on the property.⁵

Maryland

Maryland modified its licensee agency requirements to provide that it is not a breach of fiduciary duty to discuss other properties with potential buyers or lessees at an open house. The licensee must have the written consent of the seller or lessor to do so.⁶

Missouri

In Missouri, team names need to be registered as trade names with the Missouri Secretary of State and with the Missouri Real Estate Commission.⁷

Nebraska

The Nebraska Real Estate Commission issued a Policy and Interpretation regarding "Coming Soon" listings. Nebraska has no specific rules or laws on such advertising, but the Commission interprets the general advertising rules as requiring an active listing agreement and consent of the owner before property can be advertised.⁸ The Commission's newsletter included articles that discuss the general duties of a real estate licensee, and the specific duties regarding the Seller's Property Disclosure Statement. Licensees are reminded that they have a fiduciary duty towards their clients, and that duty includes the obligation to "promote the interests of the client with the utmost good faith, loyalty, and fidelity."⁹

Nevada

The Nevada Real Estate Division issued an explanation of the use of the official "Duties Owed" disclosure form. The Division recommends that all parties, including unrepresented parties, sign a single copy of the form. Confirmation of the disclosure is required, and a separate consent to dual representation is needed.¹⁰

⁴ [Kansas Real Estate Commission Agency Disclosure Form.](#)

⁵ [Kansas Real Estate Commission Newsletter, October 2017.](#)

⁶ [Md. Code Ann. Bus. Occ. & Prof. § 17-532 \(2017\).](#)

⁷ [Missouri Real Estate Commission News Bulletin, July 2017.](#)

⁸ [Nebraska Real Estate Commission Policy and Interpretation 40.](#)

⁹ [Nebraska Real Estate Commission Comment, Winter 2017.](#)

¹⁰ [Nevada Real Estate Division Bulletin 34.](#)

North Dakota

The North Dakota Real Estate Commission published a newsletter article regarding “Coming Soon” listings. North Dakota law requires a signed listing agreement before an advertisement may be placed. The client should also agree with the advertising approach taken.¹¹

South Dakota

The South Dakota Real Estate Commission reminded licensees of the four types of agency recognized in South Dakota: Single Agency (representation of one client); Appointed Agency (a responsible broker names an agent to represent a client); Limited Agency (representation of both parties to a transaction); and Transaction Brokerage (assisting one or more parties without representing them as an advocate).¹²

Utah

The Real Estate Division newsletter included an article explaining the legal implications of the use of addenda in documents. Addenda are used to change or add detail to standard form contracts. Changes to contracts must be done by use of an addendum, and not by altering the physical document.¹³

Washington

The Washington Department of Licensing issued comprehensive guidelines for advertising by real estate licensees. All advertising must include the firm’s licensed name in a clear and conspicuous manner. “Clear and conspicuous” means that the firm name must be “presented in a manner so as to be readily noticed and understood.” All Internet advertising must include the firm name as well as the broker’s or managing broker’s name. This information must be included on every viewable page of a licensee website. The guidance provides examples of deceptive or misleading advertisements.¹⁴

C. Volume of Materials Retrieved

Agency issues were identified 50 times in 36 cases (see Table 1 and Table 2; note that some cases address multiple issues). Breach of Fiduciary Duty, Dual Agency, Agency: Other, Buyer Representation, and Vicarious Liability were the most frequently addressed topics (see Table 2). Two statutes and fifteen regulations or publications from regulators addressing

¹¹ [North Dakota Real Estate Commission News & Views, Fall 2017.](#)

¹² [South Dakota Real Estate Commission VIEW, Fall 2017.](#)

¹³ [Utah Real Estate Division Newsletter, Fourth Quarter 2017.](#)

¹⁴ [Washington Department of Licensing Real Estate Advertising Guidelines.](#)

Agency issues were retrieved (see Table 1). These items addressed Agency Disclosure, Teams, Coming Soon Listings, Breach of Fiduciary Duty, and Agency: Other.

II. PROPERTY CONDITION DISCLOSURE

A. Cases

The Property Condition Disclosure cases retrieved this quarter involve familiar topics. The first case addresses a licensee's liability for incorrect information obtained from a third-party source. The other case involves a failure to disclose with respect to waterfront property. In that

PROPERTY CONDITION CASE FROM EARLIER EDITIONS

An issue that arises with some frequency in Property Condition Disclosure cases is whether a licensee or broker is liable for incorrect property information obtained from a third party. Last quarter we reviewed a case alleging misrepresentation and failure to disclose correct information regarding property size. The information was pulled from tax assessor records, and the broker was found not liable. In a similar case this quarter (see *Cesso v. Showcase, R.P.* below), a licensee was also not liable for incorrect information obtained from the tax assessor regarding the legal classification of a property.

Orellana v. Homes Plus of Connecticut, CV166015339S, 2017 WL 3000696 (Conn. Super. Ct. June 9, 2017). The purchaser of the property alleged that the broker misrepresented the size of the property lot and that the property included a shed. The broker stated that he told the purchaser to have the property surveyed, but the purchaser elected not to do so. Although the listing was incorrect regarding the size of the property, the listing information was based on assessor records that were incorrect. As a result, the purchaser failed to show that the broker knew or should have known the information was false. The court entered judgment for the broker.

case, the purchaser claimed that the real estate professionals failed to disclose structural problems in the seawall supporting the back of the property.

Licensee was not liable for incorrect information about property obtained from tax assessor records.

1. **Cesso v. Showcase R.P., LLC**, No. 1584CV0008, 2017 WL 2439112 (Mass. Super Ct. Jan. 14, 2017)

The purchaser purchased a property under the belief that it was a three-family property based on the listing for the property, which indicated it was a three-family home. Several months after closing on the home, the purchaser discovered that the property was actually a lawful two-family home. The purchaser then renovated the property into a three-family dwelling. The purchaser brought claims against the seller and seller's listing representative and broker. The seller and purchaser settled the claims against the seller.

The purchaser's claims for misrepresentation, nondisclosure, and violation of the Consumer Protection Act went to a jury trial. At trial, the listing representative argued that the listing information was based on information from the Boston Tax Assessor and the MLS service automatically populated that information in the listing. The licensee also argued that he had no duty to investigate the validity of that information. The jury entered a verdict in favor of the licensee and broker.

2. **Woods v. Kawaguchi**, No. 30-2014-00743477-CM-FR-CJC, 2016 WL 8309237 (Cal. Super. Ct. Dec. 7, 2016)

Real estate professionals not liable for alleged failure to disclose structural problems with seawall on the property.

Purchasers of a residential waterfront property alleged that the seller, and licensees and brokers who represented the parties in the real estate transaction, failed to disclose structural problems in the seawall supporting the back of the residence. The purchaser alleged negligence, fraud, intentional infliction of emotional distress, breach of fiduciary duty, and constructive fraud against the real estate defendants. The real estate defendants cross-complained against the parties hired to inspect the seawall. After a jury trial, the jury found in favor of the real estate professionals.

B. **Statutes and Regulations**

California

California amended its statute regarding disclosures of private transfer fees. Purchasers of property subject to such fees must be notified that the Federal Housing Finance Agency and Federal Housing Administration will not deal in mortgages for such property unless the fee directly benefits the property.¹⁵ The statute relating to the opinions that may be relied upon in preparing a property condition disclosure were amended to allow reliance on statements by a C-39 roofing contractor.¹⁶

Illinois

Illinois amended the Residential Real Property Condition Disclosure Act provisions relating to documents needed for financial counseling.¹⁷

Iowa

The Iowa statutes relating to property condition disclosure were amended to provide that the disclosure statement may be delivered electronically. The statute also now states that transfers to a person within the third-degree of consanguinity or affinity are not subject to disclosure requirements.¹⁸

Nebraska

The Nebraska Real Estate Commission newsletter included an informational article on licensee duties regarding the Seller's Property Disclosure Statement. Disclosure statements must be signed by unrepresented parties at the first practicable opportunity after first substantial contact.¹⁹

Virginia

The Virginia Real Estate Board revised the property condition disclosure form. The new form requires that only the one-page acknowledgement form that directs purchasers to the Real Estate Board website needs to be signed by both parties.²⁰

C. Volume of Materials Retrieved

Property Condition Disclosure Issues were identified 33 times in 23 cases collected during 2017 (see Table 1). Property Condition Disclosure: Other, Mold and Water Intrusion, Structural Defects, Sewer/Septic, and Pollution disclosures were each addressed in multiple

¹⁵ [Cal. Civil Code § 1098.5 \(2017\)](#).

¹⁶ [Cal. Bus. & Prof. Code § 7197 \(2017\)](#).

¹⁷ [765 I.L.C.S. § 77/70 \(2017\)](#).

¹⁸ [Iowa Code § 558A.2 \(2017\)](#).

¹⁹ [Nebraska Real Estate Commission Comment, Winter 2017](#).

²⁰ [Virginia Real Estate Residential Property Disclosure Statement](#).

cases (see Table 2). Several other issues were encountered as well. Four statutes and two documents from regulatory agencies were retrieved.

III. RESPA

A. Cases

Over the past year, the cases have largely addressed two issues: (1) the sufficiency of the allegations asserting a RESPA violation and (2) whether a claim is barred by the statute of

RESPA CASE FROM EARLIER EDITION

With respect to RESPA cases, we revisit the following case from earlier this year, in which the court determined that the relationship between a law firm and several LLCs providing title insurance fell within RESPA’s affiliated business relationship exception

Consumer Financial Protection Bureau v. Borders & Borders, PLC, No. 3:13-CV-01047 CRS-DW, 2017 WL 2989183 (W.D. Ky. July 13, 2017). Borders & Borders, a law firm that performed many real estate closings, created joint ventures (LLCs) with nine real estate services providers to provide title insurance. Under the arrangement between Borders & Borders and the LLCs, when Borders & Borders closed on a real estate transaction, the firm referred the title insurance underwriting to the LLC affiliated with the real estate representative involved in the transaction. This relationship was disclosed to the buyers. The Consumer Financial Protection Bureau argued that this relationship violated RESPA Section 8(a), which prohibits the giving and receiving of fees and kickbacks in connection with mortgages. Because Borders & Borders disclosed the relationship with the LLCs, the court found that the Title LLCs did not receive anything of value beyond their ownership interests, and the arrangement qualified as an “affiliated business relationship.” The court granted summary judgment for Borders & Borders.

limitations. The fourth quarter of 2017 was no exception. As shown below, the cases from last quarter again consider these same two issues.

1. **Alexander v. Nationstar Mortgage, LLC**, No. 16-CV-2607-LTS-JLC, 2017 WL 6568057 (S.D.N.Y. Dec. 22, 2017)

Borrower failed to allege RESPA violation based on table funding of mortgage.

Mortgage borrowers alleged that their loan was table funded and the lender failed to disclose the table funding in violation of RESPA. The court found that the claim was insufficiently pled. To properly allege a claim for improper table funding, the borrower must state that the loan originator was not the real source of the funding and that the loan was not closed in the originator's own name. The borrower failed to allege that the loan was contemporaneously funded by a third party. The court dismissed the RESPA claim.



Update!

Borrower failed to amend complaint regarding date of discovery of alleged RESPA violation.

2. **Masoud v. J.P. Morgan Chase Bank**, No. 15-CV-2523-L-JMA, 2017 WL 6270269 (S.D. Cal. Dec. 8, 2017)

A borrower alleged that the lender and mortgage servicers made payments between them that were misleading and designed to create a windfall in violation of RESPA's anti-kickback provisions. The court found that the alleged facts regarding payments occurred at the time of refinancing, which took place in 2005. In a previous decision (discussed in the 4Q 2016 Legal Pulse), the court found that the claim was barred by the one-year statute of limitations and the court dismissed the claim.

The borrower amended her complaint. In this decision, the court considered the lender and mortgage servicers' motion to dismiss the amended complaint. The court again found the claim was barred by the statute of limitations. The borrower did not discover the facts of the alleged RESPA violation until 2015, but she failed to amend her complaint regarding the date of discovery of the alleged violation. Claim dismissed.

3. **Kerstoff v. PHH Mortgage Services Corp.**, No. 2:16-CV-00262-RWS-AJB, 2017 WL 3597499 (N.D. Ga. June 27, 2017)

Borrower's allegations failed to state a RESPA violation.

A borrower alleged that the lender and mortgage servicer defendants earned “interest and income” in an amount “disproportionate to the situation” because Defendants failed to “disclose that they will gain a financial benefit while Plaintiff suffer[ed] financially as a result of the loan product sold to Plaintiff.” The borrower also argued that the lender and mortgage defendants made misleading payments in violation of RESPA. Because the complaint failed to state that payments were made in exchange for a referral and failed to explain how the borrower suffered damage, the magistrate judge found the complaint was insufficient to state a claim. The magistrate judge recommended that the court dismiss the RESPA claim.

B. Statutes and Regulations

No statutory or regulatory changes relating to RESPA were located.

C. Volume of Materials Retrieved

RESPA issues were identified 34 times in 26 cases (see Table 1). Consistent with last year, the cases overwhelmingly involved kickbacks, but also addressed disclosure of settlement costs and affiliated business arrangements (see Table 2). No statutes or regulations addressing RESPA issues were retrieved this year.

IV. FAIR HOUSING

A. Cases

The Fair Housing topics include a discriminatory advertising, discriminatory lending, and design and build issues. In a significant update, this quarter the U.S. Supreme Court issued an opinion in the *City of Miami v. Bank of America* case, a case which involves discriminatory lending practices. We have discussed prior court decisions in that lawsuit and related lawsuits in prior editions of the *Legal Pulse*. With respect to advertising, three of the cases discussed below consider whether various advertisements indicate a discriminatory preference.

1. Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (May 1, 2017)



Update!

City of Miami's financial injury from discriminatory lending practices in the City was within zone of interests protected by the Fair Housing Act.

The City of Miami brought a lawsuit against various lenders for alleged violations of the Fair Housing Act. The City of Miami argues that the lenders engaged in a pattern of racially discriminatory lending in the residential housing market over an extended period of time that caused economic harm to the City. In prior editions of the Legal Pulse, we have examined court decisions in this case. In these previous opinions, courts were split as to whether or not the City of Miami could properly bring a claim against the lenders under the FHA. In 2017, the U.S. Supreme Court issued a decision with respect to whether or not the City had standing to bring such a claim.

The U.S. Supreme Court determined that the City does qualify as an “aggrieved person” who is authorized to bring suit under the FHA. Under the FHA, an “aggrieved person” is defined as “any person” who either “claims to have been injured by a discriminatory housing practice” or believes that such an injury “is about to occur.” The City argued that the lenders’ actions hindered racial integration and desegregation in the City and caused foreclosures in minority communities. The resulting foreclosures and vacancies resulted in reduced property values and tax revenues for the City, and required the City to spend money on services to address unsafe conditions at the vacant properties. The Supreme Court found that this alleged harm fell within the zone of interests protected by the Fair Housing Act.

In order to be liable under the FHA, however, the lenders’ actions must have been the proximate cause of the alleged harm. According to the Supreme Court, “proximate cause under the FHA requires ‘some direct relation between the injury asserted and the injurious conduct alleged.’” The Court remanded the case to the lower courts to determine the standard for proximate causation.

2. **Inclusive Communities Project, Inc. v. Lincoln Property Co.**, No. 3:17-CV-206-K, 2017 WL 3498335 (N.D. Tex. Aug. 16, 2017); **Inclusive Communities Project, Inc. v. Lincoln Property Co.**, No. 3:17-CV-206-K, 2017 WL 2984048 (N.D. Tex. July 13, 2017)



Advertising indicating that apartment buildings did not accept Section 8 vouchers did not indicate a discriminatory preference.



Inclusive Communities Project (“ICP”) alleged that various property owners violated the Fair Housing Act by refusing to rent to Section 8 voucher holders. ICP alleged that the program was implemented in predominantly non-minority areas in the Dallas, Texas metropolitan area. ICP asserts that this refusal to rent to voucher holders is discriminatory because African American or Black families are the predominant participants in the Section 8 housing voucher program. ICP also alleged that the defendants’ advertising, which indicated that no vouchers were accepted, violated the FHA prohibition on advertisements that show a preference for one race.

The court held that there was no discriminatory treatment or disparate impact in violation of the Fair Housing Act. According to the court, advertising indicating that Section 8 vouchers were not accepted does not imply a racial preference or apply to only one race. The court granted the property owners’ motions to dismiss.

3. **Cross v. HFLP-Dolphin Beach, LLC**, No. 15-CV-2506-MMA(DHB), 2017 WL 2794339 (S.D. Cal. June 28, 2017)

Apartment building advertising did not indicate a preference for individuals without disabilities.

The plaintiff, a wheelchair-bound individual with a service dog, alleged that the defendant apartment building used advertising that violated the Fair Housing Act’s prohibition on advertisements that show a discriminatory preference. According to the plaintiff, the apartment building used words and phrases in its advertising that showed a preference for individuals without disabilities because the advertisements described places within walking distance, described the complex amenities as including off street parking, failed to use models with disabilities, and failed to state that service animals are welcome.

The court concluded that the plaintiff “fail[ed] to delineate a single notice, statement, or advertisement that an ordinary person would conclude conveys a discriminatory preference.” The statements regarding places within walking distance do not indicate any preference, and the plaintiff failed to show any advertisements that included a model at all. Furthermore, the failure to explicitly state that service animals are permitted does not indicate any preference. The court granted the apartment building’s motion to dismiss and dismissed the claim.

4. **Lath v. Oak Brook Condominium Owners' Association**, No. 16-CV-463-LM, 2017 WL 1051001 (D.N.H. March 20, 2017)

Condominium owners' association's statement that it preferred "true service dogs" could be considered an improper statement of preference in violation of the FHA.

The resident of a condominium complex alleges that the condominium owners' association violated several provisions of the Fair Housing Act. With respect to FHA's prohibition against advertising that indicates a discriminatory preference, the resident argues that the condominium owners' association violated the prohibition by advertising in its newsletter that when considering requests for exceptions to its "no dog" policy, it prefers "true service dogs." The resident claims that this statement indicates a preference over emotional support dogs.

The court denied the condominium association's motion to dismiss this claim. Courts have found that published statements published by associations can violate the FHA. The court found that the association's statement "could be construed as a preference for unit owners with handicaps that require service dogs over unit owners with handicaps that require emotional support dogs."

5. **Housing Opportunities Made Equal of Virginia v. Historic Housing, LLC**, No. 2:16CV00218, 2017 WL 2723612 (E.D. Va. Jan. 6, 2017)

Building design and construction failed to meet accessibility standards.

A nonprofit organization discovered that several features of defendant's apartment complex did not include accessible and adaptable features as required by the Fair Housing Act. The apartment complex did not have accessible common areas, and the kitchens and bathrooms in the units were not accessible for individuals in wheelchairs. The parties entered into a Consent

Agreement whereby the owners of the apartment complex agreed to pay \$50,000 to the nonprofit organization and agreed to make alterations to the property.

6. **Collins v. PRG Real Estate**, No. 3:14-CV-647-DJH-DW, 2017 WL 1146952 (W.D. Ky. March 27, 2017)

The former resident of an apartment complex alleges that the building violated the design and accessibility requirements of the Fair Housing Act. The district court dismissed the claims, finding that the apartment building was first occupied prior to March 13, 1991. Relying on

Fair Housing Act design and construction accessibility standards do not apply to buildings occupied prior to 1991.

guidance from other court decisions, the court held that the building was exempt from the accessibility requirements because it was constructed and occupied prior to 1991. The apartment owners' motion to dismiss was granted.

- B. **Statutes and Regulations**

Missouri

The statute in Missouri relating to proof of housing discrimination was changed. A plaintiff in a housing discrimination case must now show that the discrimination was "because of" race, color, religion, national origin, ancestry, sex, disability, or familial status. "Because of" means that the protected criterion was the motivating factor (prior law prohibited discrimination "based on" one of these criteria).²¹

- C. **Volume of Materials Retrieved**

Fair Housing issues were addressed in 19 cases in 2017, which is a small decrease from the number of Fair Housing cases retrieved in 2016 (see Table 3). While Lending issues were addressed in the largest number of cases, Advertising and Design-and-Build issues also arose in numerous cases (see Table 3). One statute was located (see Tables 1, 6).

²¹ [Mo. Rev. Stat. § 213.040 \(2017\)](#).

V. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 27 Agency cases in 2017, and the licensee was found liable in 7²² (see Table 4) of those cases.

B. Property Condition Disclosure Cases

Liability was determined in 15 Property Condition Disclosure cases in 2017, and the licensee was found liable in 5²³ (see Table 4) of those cases.

C. RESPA Cases

Liability was not determined with respect to any real estate professionals in RESPA cases in 2017 (see Table 4).

D. Fair Housing Cases

Liability was determined in 5 Fair Housing cases in 2017, and none of the cases (see Table 4) resulted in liability for the real estate professional.

VI. TABLES

Table 1.
Volume of Items Retrieved for 2017 by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	36*	33	39
Property Condition Disclosure	23**	10	6

²² *Hensley v. Duvall*, 2017 WL 1372759 (Pa. Super. Ct. Apr. 13, 2017) (damages of \$206,250); *Campbell v. Luong*, No. 04-16-00460-CV, 2017 WL 3044591 (Tex. Ct. App. July 19, 2017) (\$1,175 actual damages, \$3,525 treble damages (fraud), and \$14,000 in attorneys' fees); *Samulska v. Machiote*, 13-2015-CA-014064, 2017 WL 2645241 (Fla. Cir. Ct. Mar. 30, 2017) (\$10,000); *Marso v. Godsman*, No. 2011-CV-004626, 2016 WL 8787404 (Colo. Dist. Ct. Apr. 8, 2016) (\$120,000); *Littlejohn v. Davis*, 2015-CA-003607-B, 2017 WL 6723209 (D.C. Super. Ct. Sept. 28, 2017) (\$14,875); *Peters v. Olson*, No. 27-CV-2015-009529, 2016 WL 8258566 (Minn. Dist. Ct. Sept. 19, 2016) (\$115,538); *Cyberex Corp. v. Abbarin*, No. 2014-CA-006094-B, 2017 WL 6539197 (D.C. Super. Ct. Oct. 25, 2017) (\$81,020).

²³ *Bowles v. Grasso*, No. CI-2014-0108, 2016 WL 8578807 (Miss. Cir. Ct. Sept. 15, 2016) (\$122,243); *Hall v. Eagle Rock Development, LLC*, No. E2015-01487-COA-R3-CV, 2017 WL 3233496 (Tenn. Ct. App. July 31, 2017) (\$123,000); *Maryland Real Estate Commission v. Garceau*, No. 1671, Sept. Term 2015, 2017 WL 3816818 (Md. Ct. Spec. App. Sept. 1, 2017) (no damages); *Marso v. Godsman*, No. 2011-CV-004626, 2016 WL 8787404 (Colo. Dist. Ct. Apr. 8, 2016) (\$120,000); *Andersen v. Karahalios*, No. 27-CV-2015-016117, 2016 WL 8231756 (Minn. Dist. Ct. Sept. 2, 2016) (\$3750).

RESPA	26	1	0
-------	----	---	---

*includes 7 Agency jury verdicts from 2016 that were retrieved in 2017

** includes 6 Property Condition Disclosure jury verdicts from 2016 that were retrieved in 2017

Table 2.
Volume of Items Retrieved for 2017 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	8*	0	0
Agency: Buyer Representation	3*	1	0
Agency: Designated Agency	1	0	0
Agency: Transactional Agency	0	2	0
Agency: Subagency	0	0	0
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	3*	0	0
Agency: Breach of Fiduciary Duty	28*	1	1
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	2*	4	3
Agency: Minimum Service Agreement	0	0	0
Agency: Pre-listing	0	0	0
Agency: Teams	0	1	10
Agency: Coming Soon Listings	0	0	2
Agency: Other	6	26	23
Property Condition Disclosure: Structural Defects	3*	1	0
Property Condition Disclosure: Sewer/Septic	2*	0	0
Property Condition Disclosure: Radon	0	0	0

Property Condition Disclosure: Asbestos	1*	0	0
Property Condition Disclosure: Lead-based Paint	0	0	0
Property Condition Disclosure: Mold and Water Intrusion	8*	0	0
Property Condition Disclosure: Roof	1*	1	0
Property Condition Disclosure: Stucco	0	0	0
Property Condition Disclosure: Flooring	1*	0	0
Property Condition Disclosure: Imported Drywall	0	0	0
Property Condition Disclosure: Plumbing	1	0	0
Property Condition Disclosure: HVAC	1*	0	0
Property Condition Disclosure: Electrical	0	0	0
Property Condition Disclosure: Valuation	0	0	0
Property Condition Disclosure: Short Sales	0	0	0
Property Condition Disclosure: REOs	0	0	0
Property Condition Disclosure: Insects	1*	0	0
Property Condition Disclosure: Boundaries	1	0	0
Property Condition Disclosure: Zoning	0	0	0
Property Condition Disclosure: Off-site Adverse Conditions	0	1	0
Property Condition Disclosure: Meth Labs	0	0	0
Property Condition Disclosure: Stigmatized Property	1	0	0
Property Condition Disclosure: Megan's Laws	0	0	0
Property Condition Disclosure: Underground Storage Tank	0	0	0

Property Condition Disclosure: Electromagnetic	0	0	0
Property Condition Disclosure: Pollution	2	0	0
Property Condition Disclosure: Other	10*	7	6
RESPA: Disclosure of Settlement Costs	3	0	0
RESPA: Kickbacks	20	1	0
RESPA: Affiliated Business Arrangements	8	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	2	0	0

*includes one or more jury verdicts decided in 2016, but retrieved in 2017

Table 3.

Volume of Fair Housing Items Retrieved in Past Twelve Months (January 2017-December 2017)

Major Topic	Cases	Statutes	Regulations
Fair Housing: Advertising	5	0	0
Fair Housing: Design/Build	5	0	0
Fair Housing: Lending	7	0	0
Fair Housing: Steering	2	4	0

Table 4.

Liability Data for 2017 by Major Topic

Major Topic	Liabe	Not Liabe	% Liabe	% Not Liabe
Agency	7	20	26%	74%
Property Condition Disclosure	5	10	33%	67%

RESPA	0	0	N/A	N/A
Fair Housing	0	5	0%	100%

Table 5.

Distribution of 2017 Cases by Major Topic with Comparisons to 2016 Data

Major Topic	2016 Count	2017 Count	Δ
Agency	57	36	-21
Property Condition Disclosure	48	23	-25
RESPA	34	26	-8
Employment	5	5	0
Fair Housing	25	19	-6
Technology	8	15	+7
Antitrust	0	0	0
Third Party Liability	20	7	-13
Ethics	0	0	0

Table 6.

Distribution of 2017 Cases by Issue with Comparisons to 2016 Data

Issue	2016 Count	2017 Count	Δ
Agency: Dual Agency	12*	8*	-4
Agency: Buyer Representation	5	4*	-1
Agency: Designated Agency	0	1	+1
Agency: Transactional Agency	2	0	-2
Agency: Subagency	0	0	0
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	14*	3*	-11

Agency: Breach of Fiduciary Duty	25*	26*	+1
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	0	2*	+2
Agency: Minimum Service Agreements	0	0	0
Agency: Pre-listing	0	0	0
Agency: Teams	0	0	0
Agency: Coming Soon Listings	0	0	0
Agency: Other	13	3	-10
Property Condition Disclosure: Structural Defects	7*	3*	-4
Property Condition Disclosure: Sewer/Septic	5	2*	-3
Property Condition Disclosure: Radon	0	0	0
Property Condition Disclosure: Asbestos	0	1*	+1
Property Condition Disclosure: Lead-based Paint	0	0	0
Property Condition Disclosure: Mold and Water Intrusion	13*	8*	-5
Property Condition Disclosure: Roof	0	1*	+1
Property Condition Disclosure: Stucco	0	0	0
Property Condition Disclosure: Flooring	0	1*	+1
Property Condition Disclosure: Imported Drywall	0	0	0
Property Condition Disclosure: Plumbing	1	1	0
Property Condition Disclosure: HVAC	2	1*	-1
Property Condition Disclosure: Electrical	0	0	0

Property Condition Disclosure: Valuation	2*	0	-2
Property Condition Disclosure: Short Sales	0	0	0
Property Condition Disclosure: REOs	0	0	0
Property Condition Disclosure: Insects	3*	1*	-2
Property Condition Disclosure: Boundaries	1	1	0
Property Condition Disclosure: Zoning	4*	0	-4
Property Condition Disclosure: Off-site Adverse Conditions	0	0	0
Property Condition Disclosure: Meth Labs	0	0	0
Property Condition Disclosure: Stigmatized Property	1	1	0
Property Condition Disclosure: Megan's Laws	0	0	0
Property Condition Disclosure: Underground Storage Tank	1	0	-1
Property Condition Disclosure: Electromagnetic	0	0	0
Property Condition Disclosure: Pollution	3	2	-1
Property Condition Disclosure: Other	14*	10*	-4
Employment: Wrongful Termination	0	0	0
Employment: Personal Assistants	0	0	0
Employment: Independent Contractors	3	4	+1
Employment: Wage and Hour	2	1	-1
Fair Housing: Handicap/Design and Build	6	5	-1
Fair Housing: Advertising/Target	2	5	+3
Fair Housing: Steering	1	2	+1

Fair Housing: Lending	17	7	-10
Fair Housing: Coming Soon Listings	0	0	0
Technology: State Internet Advertising	0	0	0
Technology: Social Networks	0	0	0
Technology: Privacy	0	0	0
Technology: Anti-Solicitation	0	0	0
Technology: Data Breaches	0	0	0
Technology: Cyber Fraud	0	0	0
Technology: Drones	0	0	0
Technology: Copyright	2	13	+11
Technology: Other	6	2	-4
Antitrust: Price-Fixing	0	0	0
Antitrust: Group Boycotts	0	0	0
Antitrust: Advertising	0	0	0
Antitrust: Tying Agreements	0	0	0
Antitrust: Other	0	0	0
RESPA: Disclosure of Settlement Costs	4	3	-1
RESPA: Kickbacks	30	20	-10
RESPA: Affiliated Business Arrangements	3	8	+5
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	1	2	+1
Third Party Liability: Appraisers	10	3	-7
Third Party Liability: Inspectors	5	2	-3

Third Party Liability: Other	5	3	-2
Ethics: Reliance on NAR's Code of Ethics	0	0	0
Ethics: Enforcement of NAR's Code of Ethics	0	0	0
DTPA/Fraud	51	30	-21

Table 7.

Distribution of 2017 Statutes and Regulations by Major Topic with Comparisons to 2016 Data

Major Topic	2016 Count	2017 Count	Δ
Agency	83	72	-11
Property Condition Disclosure	9	16	+7
RESPA	2	1	-1
Fair Housing	5	5	0
Technology	7	12	+5
Antitrust	0	0	0
Third Party Liability	0	3	+3

Table 8.

Distribution of 2017 Statutes and Regulations by Issue with Comparisons to 2016 Data

Issue	2016 Count	2017 Count	Δ
Agency: Dual Agency	7	0	-7
Agency: Buyer Representation	5	1	-4
Agency: Designated Agency	3	0	-3

Agency: Transactional Agency	5	2	-3
Agency: Subagency	1	0	-1
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	1	0	-1
Agency: Breach of Fiduciary Duty	1	1	0
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	16	7	-9
Agency: Minimum Service Agreement	0	0	0
Agency: Pre-listing	0	0	0
Agency: Teams	7	12	+5
Agency: Coming Soon Listings	1	3	+2
Agency: Other	55	47	-8
Property Condition Disclosure: Structural Defects	0	1	+1
Property Condition Disclosure: Sewer/Septic	0	0	0
Property Condition Disclosure: Radon	0	0	0
Property Condition Disclosure: Asbestos	0	0	0
Property Condition Disclosure: Lead-based Paint	0	0	0
Property Condition Disclosure: Mold and Water Intrusion	0	0	0
Property Condition Disclosure: Roof	0	1	+1
Property Condition Disclosure: Stucco	0	0	0
Property Condition Disclosure: Flooring	1	0	-1

Property Condition Disclosure: Imported Drywall	0	0	0
Property Condition Disclosure: Plumbing	0	0	0
Property Condition Disclosure: HVAC	0	0	0
Property Condition Disclosure: Electrical	0	0	0
Property Condition Disclosure: Valuation	0	0	0
Property Condition Disclosure: Short Sales	0	0	0
Property Condition Disclosure: REOs	0	0	0
Property Condition Disclosure: Insects	0	0	0
Property Condition Disclosure: Boundaries	0	0	0
Property Condition Disclosure: Zoning	1	0	-1
Property Condition Disclosure: Off-site Adverse Conditions	1	1	0
Property Condition Disclosure: Meth Labs	1	0	-1
Property Condition Disclosure: Stigmatized Property	1	0	-1
Property Condition Disclosure: Megan’s Laws	0	0	0
Property Condition Disclosure: Underground Storage Tank	1	0	-1
Property Condition Disclosure: Electromagnetic	0	0	0
Property Condition Disclosure: Pollution	0	0	0
Property Condition Disclosure: Other	6	13	+7
Fair Housing: Handicap Design/Build	0	0	0
Fair Housing: Advertising	5	1	-4
Fair Housing: Steering	0	4	+4

Fair Housing: Lending	0	0	0
Fair Housing: Coming Soon Listings	0	0	0
Technology: State Internet Advertising	2	1	-1
Technology: Social Networking	0	1	+1
Technology: Anti-Solicitation	0	0	0
Technology: Privacy	0	0	0
Technology: Cyber Fraud	0	0	0
Technology: Drones	4	6	+2
Technology: Copyright	N/A		
Technology: Other	2	2	0
Antitrust: Price-Fixing	0	0	0
Antitrust: Group Boycotts	0	0	0
Antitrust: Advertising	0	0	0
Antitrust: Tying Agreements	0	0	0
Antitrust: Other	0	0	0
RESPA: Disclosure of Settlement Costs	2	0	-2
RESPA: Kickbacks	2	1	-1
RESPA: Affiliated Business Arrangements	0	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	0	0	0
Third Party Liability: Appraisers	0	1	+1
Third Party Liability: Inspectors	0	0	0

Third Party Liability: Other	0	2	+2
------------------------------	---	---	----

Table 9.
Distribution of 2017 Cases by Liability

Determination of Liability	Count	% of Total
Agent/Broker Liable	12	29%
Agent/Broker Not Liable	30	71%

Table 10.
Distribution of 2017 Cases and Jury Verdicts²⁴ Awarding Damages by Amount

Amount	Count	Percentage
\$5 million or more	2	11%
\$1 million to 4,999,999	0	N/A
\$500,000 to 999,999	0	N/A
\$100,000 to 499,999	6	32%
\$50,000 to 99,999	1	5%
\$10,000 to 49,999	4	21%
Under \$10,000	6	32%
Unknown	0	N/A

Table 11.
Largest Damage Awards in 2017

Damage Award	Issue(s)	Case	State
\$8,272,328.92	Technology: Copyright	VHT	WA

²⁴ Includes jury verdicts decided in 2016, but retrieved in 2017.

\$5,494,615	Technology: Copyright	iShow.com	WA
\$206,250	Agency: Buyer Representation	Hensley	PA
\$123,000	Property Condition Disclosure: Sewer/Septic; Deceptive Trade Practices Act/Fraud	Hall	TN
\$33,028	Deceptive Trade Practices Act	Lara	TX
\$25,000	Property Condition Disclosure: Other, Property Condition Disclosure: Mold & Water	Karahalios	MN
\$18,700	Agency: Breach of Fiduciary Duty; Deceptive Trade Practices Act/Fraud	Campbell	TX
\$14,875	Agency: Breach of Fiduciary Duty; Deceptive Trade Practices Act/Fraud	Littlejohn	DC
\$10,000	Agency: Breach of Fiduciary Duty; Agency: Buyer Representation; Agency: Dual Agency; Deceptive Trade Practices Act/Fraud	Samulska	FL
\$2,449	Deceptive Trade Practices Act/Fraud	Ramirez	CA

Table 12.

Largest Damage Awards Reported in Jury Reports Retrieved in 2017, but Decided in 2016

Damage Award	Issue(s)	Case	State
\$317,177; \$337,000	Deceptive Trade Practices Act/Fraud	Racoon Enterprises	NV
\$171,928	Property Condition Disclosure: Asbestos; Property Condition Disclosure: Mold & Water; Property Condition Disclosure: Roof; Property Condition Disclosure: Insects/Vermin; Property Condition Disclosure: Sewer/Septic	Andrews	CA

\$122,243	Property Condition Disclosure: Mold & Water; Deceptive Trade Practices Act	Bowles	MS
\$120,000	Property Condition Disclosure: Pollution; Agency: Vicarious Liability	Marso	CO
\$115,538	Agency: Breach of Fiduciary Duty; Deceptive Trade Practices Act	Peters	MN
\$81,020	Agency: Breach of Fiduciary Duty; Deceptive Trade Practices Act	Cyberex	DC

Table 13.
Top Settlements in 2017

Settlement Amount	Issue	Case	State
\$610,465.96	RESPA: Kickbacks; RESPA: Affiliated Business Arrangements	Edwards ²⁵	CA
\$350,000	Fair Housing: Design and Build	Dawn Properties	MS
\$50,000	Fair Housing: Design and Build	Housing Opportunities Made Equal of Virginia	VA
\$20,000	Property Condition Disclosure: Flooring/Walls, Property Condition Disclosure: HVAC, DPTA/Fraud	Tullos	TX
\$3,500	Property Condition Disclosure: Other, Agency: Breach of Fiduciary Duty	High Country Lumber & Mulch, LLC	TN

²⁵ This case was decided in 2016, but retrieved in 2017.