



## Legal Pulse Newsletter

### Year-in-Review 2018

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 the important cases decided this year and analyze trends observed in 2018.

Breach of fiduciary duty continues to be the most common claim seen in Agency cases. Dual agency claims continue to be seen consistently, and there was also an uptick in vicarious liability claims in 2018. The vast majority of the vicarious liability claims resulted in favorable outcomes for the challenged real estate companies, predominantly on the grounds that the real estate representatives were acting as independent contractors and the real estate brokerage had no formal control over their actions and thus no employment relationship existed. As in 2017, the majority of the cases saw real estate professionals faring well against Agency related claims. While there was some legislative movement on the topic of dual agency, most legislative and regulatory updates related to agency issues were clarified or modified existing laws.

Of the combined Agency and Property Condition Disclosure cases from 2018, only about a quarter of those claims were raised on the issue of Property Condition Disclosure. Within those we saw complaints raised over structural defects most often. However, we continue to see a trend in condition issues related to mold, water, and roof damage. Damage awards were down for Property Condition Disclosure cases in 2018, with the majority of claims being dismissed or summarily decided. Legislative action in this area included amendments to valuation and Megan's Law statutes. There was also a revision to the Wisconsin Real Estate Condition Report requiring disclosure of burial sites. Additional legislative and regulatory updates were made to provide clarification or minor modifications of existing laws.

In the 2018 RESPA cases reviewed, most cases considered issues related to kickbacks. We also saw a similar pattern of RESPA claims being dismissed or summarily decided as a result of

plaintiffs failing to provide enough factual detail to advance their claims, and a number of cases were dismissed due to the statute of limitations. Most of these cases are claims brought against lenders allegedly participating in referral/kickback schemes with title companies. All-in-all about two-thirds of the RESPA kickback claims were dismissed, most of them a result of inadequate pleadings and statute of limitation violations.

For Fair Housing Act claims, we saw issues in the areas of handicap discrimination and design-and-build. An Ohio real estate developer was challenged on an FHA claim for numerous design-and-build violations discovered in multiple apartment complexes, and a handicap discrimination claim made by a resident who lost his designated parking space. However, most of the FHA cases from 2018 stemmed from alleged claims of improper lending and steering. The vast majority of these claims were brought against lenders alleged to have targeted minority Buyers and homeowners in a discriminatory manner, including several cases alleging predatory interest rates. Although we did see a favorable verdict for minority homeowners and a handful of other claims that were remanded and allowed to continue in court, more of these FHA claims were dismissed by the courts. In terms of legislation, there was very little movement in this area in 2018.

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 2017 data, and show 2018 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 claims of vicarious liability whereby the plaintiffs sought to hold real estate brokerages liable for damages caused by its associated real estate representatives. In the first case, the real estate brokerage was not liable for the actions of a former real estate representatives because they had opened their own real estate company and the brokerage held no management role or ownership interests. In the second case, the real estate company's motion to dismiss the claim of vicarious liability was denied, with the court finding it reasonable to infer that the real estate licensee was acting on behalf of the real estate company.

## AGENCY CASES FROM EARLIER EDITIONS

Earlier this year, we examined both of the following cases. Interestingly, both cases address the issue of vicarious liability claim but review such claims in different employment contexts. In examining future impacts, both cases bode well for real estate companies and franchisors alike.

**New Star Realty, Inc. v. Jungang PRI-USA, LLC**, No. A18A0777, 2018 WL 3083736 (Ga. Ct. App. June 22, 2018). New Star Georgia was a franchisee of New Star Realty, Inc., a residential and commercial real estate and investment business. The owner of New Star Georgia, a licensee, misappropriated escrow funds from a commercial real estate transaction. The victim of the misappropriation sued the franchisor, New Star Realty, under the theory of vicarious liability for the franchisee's actions. A jury found in favor of the plaintiff and the court entered judgment against the franchisor. The franchisor appealed the judgment. The appellate court found there was no agency relationship between the franchisee and franchisor to hold the franchisor vicariously liable for the licensee's conduct. Although the franchisor could audit the franchisee, the franchisor had no supervisory control over the franchisee's day-to-day operations and was not even aware of the escrow account in question. There was no evidence that the franchisor held the franchisee out as an "agent". The appellate court reversed the judgment.

**Krushke v. Newsome**, No. 2-17-0613, 2018 WL 3957116 (Ill. App. Ct. Aug. 14, 2018). Prospective Buyer was injured when he fell from a ladder while inspecting the roof of a property he was interested in purchasing. The prospective Buyer sued his real estate representative and the real estate corporation that listed the property on negligence and respondeat superior grounds. The trial court granted the real estate corporation's motion for summary judgment finding that the real estate representative was an independent contractor and the listing corporation had no control over how the real estate representative performed his job. On appeal by the prospective Buyer, the court noted that the factors to be considered when distinguishing an employee from an independent contractor are: (1) the right to control the manner in which the work is performed; (2) the method of payment and whether taxes are deducted from the payment; (3) the level of skill required to perform the work; and (4) the furnishing of the necessary tools, materials or equipment. The appellate court affirmed, finding the real estate corporation was not liable for the actions of the real estate professional.

1. **Patel v. Sunvest Realty Corp.**, No. N18C-01-185 AML, 2018 WL 4961392 (Del. Oct. 15, 2018)

***Real estate franchisee’s motion to dismiss claims of vicarious liability denied because questions of fact existed as to a finding of liability.***

Investors alleged that real estate broker embezzled funds entrusted to him for the purpose of investing in real property. The allegations arose when Broker defaulted on the investors’ promissory notes and filed for bankruptcy. Broker “employed by”<sup>1</sup> a franchisee of real estate company for the majority of these investments but was no longer working with the company when the investors discovered Broker had not been investing their money in real property as agreed. Investors brought claims of vicarious liability; common law negligence; negligent hiring, retention, and supervision; breach of contract; and fraud against the franchisee and franchisor.

Regarding vicarious liability, the court concluded that it was reasonable to infer that Broker was the employee or representative of defendant real estate company. The defendant Broker acted as a real estate broker, in accordance with the company’s regular business, and Broker worked out of the company’s office, where the investors signed the promissory notes. Because Broker worked at the company as a real estate broker, and the complaint’s allegations permitted a reasonable inference that Broker’s fraud occurred within the scope of his employment, the court held that the complaint adequately pled the company’s vicarious liability for broker’s conduct. Defendant real estate company’s motions to dismiss were denied.

2. **White v. Miller**, No. M2018-00381-COA-R3-CV, 2018 WL 4847109 (Tenn. Ct. App. Oct. 5, 2018)

Sellers entered into an agreement with Broker for the exclusive right to sell their property. The Broker appointed a licensed real estate agent to act as the designated agent for Sellers. The agreement provided for a commission based on the total sales price and further stated that Sellers consented to Broker receiving compensation from both parties in the event that the buyers property also sold. Upon sales of both properties, commission was received from both parties.

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<sup>1</sup> The court states that Broker had been “employed by” the company, but does not state whether Broker was in fact an employee or an independent contractor.

After closing, Sellers filed suit against both the Broker and the real estate agent, alleging the real estate agent acted as an undisclosed representative for the Buyer, violating his fiduciary duty to the Sellers. These claims were based upon the payment of commission by both parties. The trial court ruled in favor of Sellers, finding that both Broker and the real estate agent acted as undisclosed dual agents necessitating forfeiture of commission. On appeal, the court overturned the finding of dual agency, holding that the real estate agent was designated as the Sellers' representative alone and remanded on the issue of breach of fiduciary duty. On remand, the trial court found no breach of fiduciary duty because the agreement disclosed the fact that payment may be received from both parties. Sellers appealed, with the judgment affirmed.

3. **Stroup v. MRM Mgmt., Inc.**, No. 03-17-00534-CV, 2018 WL 5074692 (Tex. Ct. App. Oct. 18, 2018)

Plaintiff was struck by a car while driving his motorcycle, suffering severe injuries. The driver of the car was a licensed real estate agent. Plaintiff brought suit against the defendant real estate company, alleging that the brokerage was vicariously liable for Plaintiff's injuries because the licensee was engaged in brokerage activities at the time of the accident.

The real estate company filed for summary judgment, maintaining that it was not vicariously liable, because the real estate representative was acting as an independent contractor. Summary judgment was granted, and Plaintiff appealed. The court on appeal found no evidence that the real estate company and representative shared resources, pooled funds, or jointly made monetary investments. Moreover, the real estate company lacked any control over the manner in which the real estate representative managed her listings or sold properties. Summary judgment affirmed.

B. **Statutes and Regulations**

*California*

California amended its real estate disclosure requirements. All disclosures pertaining to the "Real Estate Agency Relationship" include a new section entitled "Seller and Buyer Responsibilities" which clarifies the role of a real estate representative, including whether the real estate representative is acting as a dual agent. The amendment further prohibits a real estate representative acting as a dual agent from sharing "confidential information" from one party with the other party without the express permission of the client. In addition, the amended disclosures include more universally used terms such as "Buyer's Agent" and "Seller's Agent," instead of "Buying Agent" or "Selling Agent."<sup>2</sup>

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<sup>2</sup> Cal. Civ. Code §§ 2079.16, 2079.21 (2018)

C. Volume of Materials Retrieved

Agency issues were identified 66 times in 51 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). Seven statutes and seventeen regulations or publications from regulators addressing Agency issues were retrieved (see Table 1). These items addressed Agency Disclosure, Breach of Fiduciary Duty, and Agency: Other.

II. **PROPERTY CONDITION DISCLOSURE**

A. Cases

In the Property Condition Disclosure cases, real estate representatives were largely successful in defeating liability claims brought against them for failing to disclose certain conditions including mold growth, plumbing issues, and general structural defects. In one case, the Buyer brought a claim against the real estate representative for failing to explain the scope of a conservation easement to which the purchased property was subject. In another case, a Buyer was awarded monetary damages based on a finding that the home inspection and property disclosure statement failed to disclose significant plumbing issues. Real estate representatives on both sides were required to pay damages.


1. **Ferman v. Bogaard & Assocs., LLC**, No. A-4503-16T2. 2018 WL 6683943 (N.J. Sup. Ct. Dec. 20, 2018)

Buyers purchased a newly constructed home which was subject to a conservation easement affecting nearly four acres of the approximately five and one-half acre parcel. Buyers alleged their closing attorney committed legal malpractice, and their real estate representatives were negligent and committed consumer fraud, by failing to explain the scope of, and limitations imposed by, the conservation easement. Buyers claimed they would not have purchased the property had they been properly advised about the easement.


***Real estate representatives not liable for failing to properly inform Buyers of a conservation easement affecting the property where Buyers were aware of the easement prior to purchasing the property.***

Both the attorneys and real estate representatives moved for summary judgment, contending their respective alleged negligence did not proximately cause the damages claimed by Buyers. The trial court granted partial summary judgment, dismissing the majority of Buyers' damage claims based on a lack of proximate causation. Buyers voluntarily dismissed their remaining claims and appealed. The appellate court affirmed the partial summary judgment, which dismissed the negligence claim against the real estate representatives for failing to inform Buyers on the environmental property condition. Buyers were aware of the easement before the purchase, proceeded to build their home, lived in the home for several years, and provided no evidence that the sale price was affected by the conservation easement.

2. **Francis v. Loviscek**, No. 2017-L-167, 2018 WL 5259148 (Ohio Ct. App. Oct. 22, 2018)



***Real estate professional not liable for injuries where no evidence demonstrates knowledge of the condition.***



Seller hired a real estate representative to list his property for sale. On the second viewing of the property, Buyer slipped and fell on the garage floor suffering injury. Buyer claimed negligence on the part of Seller and real estate representative for not disclosing the dangerous property conditions.

The trial court entered judgment against Buyer. The court found that neither Seller nor the real estate representative had a duty to warn Buyer about the entrance to the garage. The court on appeal held that the real estate representative owed no duty of care to the Buyer as the "open and obvious" doctrine only applies to property owners, not real estate representatives. Further, there was no evidence that the real estate representative had knowledge about the alleged danger and as such, did not owe a duty of care under ordinary negligence principles. Summary judgment affirmed.

3. **Pilecki v. City Side Properties**, No. 2016-12-000562, 2018 WL 5405866 (Pa. Feb. 7, 2018).

***Buyers awarded \$50,000 in damages through arbitration against the Seller and the Seller's real estate representative for claims of breach of contract and breach of fiduciary duty.***

Buyers entered into an agreement with City Side Properties to purchase a property at a cost of \$174,000. A professional home inspection found no significant issues. Buyers alleged they received a property disclosure statement during the sales process, which also did not disclose any major issues. After the sale closed, Buyers discovered the house had significant plumbing issues, which were not mentioned on the disclosure statement or found during the home inspection.

Buyers sued City Side Properties, the home inspector, and both parties' real estate representatives, claiming the Seller's disclosure statement was materially false and misleading as it failed to reveal serious issues with the home that made it uninhabitable. Buyers contended Seller and both real estate representatives had deliberately concealed known defects, and engaged in breach of contract, unjust enrichment, misrepresentation, fraud, negligence, breach of fiduciary duty, violation of the Unfair Trade Practices and Consumer Protection Law, and breach of implied warranty. Per the purchase agreement, the matter was arbitrated. The panel found in favor of the home inspector against a claim of negligence but held City Side Properties and the Seller's real estate representative liable for the false and misleading disclosure statement, awarding the Buyer \$50,000 as damages.

4. **Flores v. Payne**, Civ. Action No. 16-0856, 2018 WL 4956814 (W.D. La. Oct. 12, 2018)

***Real estate representative denied judgment in her favor because questions of fact existed as to whether she was aware of undisclosed property conditions at the time of sale.***



Buyers, assisted by their real estate representative, made an offer on a Louisiana residential property. The representative subsequently emailed to Buyers a property disclosure statement by Seller and a dual agency agreement disclosing that she was representing both parties in the transaction. Buyers sent a signed and initialed offer with no modifications to Seller. After closing, Buyers became aware of alleged unsafe conditions of the house that rendered it uninhabitable, including sealed windows that could not be opened, rotting wooden porch floor, mold-covered interior walls, a moist crawl space with a water-stained floor, and uninsulated plumbing under the house. Buyers then hired a professional home inspector who verified the condition issues with the home.

Buyers brought claims against the real estate representative for fraud and negligent misrepresentation. The District Court denied the real estate representative's motion for judgment, finding a genuine fact dispute existed as to whether the real estate representative had actual knowledge of the property conditions. If so determined, there could be a finding of liability against the real estate representative.

B. Statutes and Regulations

*California*

The Department of Justice maintains a registry of sex offenders pursuant to Penal Code section 290.4. Civil Code section 2079.10a currently requires a notice about how to seek information from the sex offender registry to be included in every lease, rental agreement, or sale contract for residential properties with one to four dwelling units. This bill adds "a leasehold interest in real property consisting of a multiunit residential property with more than four dwelling units" to the list of contracts that must contain a specified notice to the Buyer about the state's sex offender website.

*Wisconsin*

The Wisconsin Legislature amended the real estate disclosure statutes to include a new mandate that the Seller of residential real property disclose to a prospective Buyer any known burial sites on the property.<sup>3</sup>

C. Volume of Materials Retrieved

Property Condition Disclosure Issues were identified 24 times in 17 cases collected during 2018 (see Table 1). Property Condition Disclosure: Other, Mold and Water Intrusion, Sewer/Septic, and Plumbing disclosures were each addressed in multiple cases (see Table 2). Several other issues were encountered as well. Eight statutes and three documents from

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<sup>3</sup> Wis. Stat. § 709.03 (2018)

regulatory agencies were retrieved.

### III. RESPA

#### A. Cases

RESPA claims continue to address two issues: (1) the sufficiency of the allegations asserting a RESPA violation; and (2) whether a claim is barred by the statute of limitations. There was an additional RESPA claim against Quicken loans which alleged the company was charging unreasonable attorney fees to file reaffirmation forms. A motion to dismiss the claim by Quicken was denied.

1. **In re Zillow Group, Inc. Securities Litig.**, Fed. Sec. L. Rep. P 100,284, No. C17-1387-JCC, 2018 WL 4735711 (W.D. Wash. Oct. 2, 2018)

***Claim against Zillow for RESPA violation dismissed for failing to establish particularized facts in the complaint.***

In 2013, Zillow created an advertising product known as the “co-marketing program.” Essentially, the program allows participating mortgage lenders to pay a percentage of a real estate representative’s advertising costs directly to Zillow in exchange for appearing on the representative’s listings and receiving some of the representative’s leads. Prior to 2017, an individual lender could pay up to 50% of a co-marketing representative’s advertising costs, while up to five lenders could collectively pay 90% (this percentage decreased to 50% after 2017). When a single lender co-markets with a representative, that lender appears on all of the representative’s listings. However, when multiple lenders co-market with a single real estate representative, each lender is randomly shown on the representative’s listings in accordance with the lender’s pro-rata contribution of the representative’s overall advertising spend.

Plaintiffs allege that Zillow created the co-marketing program to allow real estate representatives to steer prospective home Buyers to mortgage lenders, in exchange for the lenders paying a portion of the advertising costs to Zillow. The District Court granted Zillow’s motion to dismiss the claim as particularized facts were not established demonstrating that co-marketing

representatives were actually providing unlawful referrals to lenders. Dismissed without prejudice allowing opportunity for an amended complaint in the future.

2. **Bakko v. Quicken Loans, Inc.**, No. 18-1566, 2018 WL 6529495 (D. Minn. Dec. 12, 2018)

***Quicken Loans' motion to dismiss RESPA claim denied. Mortgagors contend Quicken charged unreasonable attorney's fees to file reaffirmation agreement.***

Owners filed for Chapter 7 bankruptcy. At the time of the bankruptcy filing, both Owners owed a mortgage loan serviced by Quicken Loans. Owners signed a reaffirmation agreement for the mortgage loan in bankruptcy. Following the filing of this agreement, Quicken charged \$125 in attorney's fees to Owners' loan for what it described as "Bankruptcy – Reaffirmation Agreement." Owners claimed that a reaffirmation agreement is a simple document found online that requires no filing fee and is routinely filed in bankruptcy cases. Because of this, Owners claimed that the \$125 attorney fee that Quicken charges to file the reaffirmation form is unreasonable.

Owners claimed that Quicken violated RESPA, 12 U.S.C. § 2605, by not removing and refunding the \$125 attorney's fee charge for the completion of the reaffirmation agreement. Owners also claimed that Quicken engaged in a pattern or practice of charging unauthorized unreasonable fees by charging other consumers attorney's fees for the preparation of a reaffirmation agreement. Quicken filed a motion to dismiss the claims which the District Court denied.

B. Statutes and Regulations

No statutory or regulatory changes relating to RESPA were located.

C. Volume of Materials Retrieved

RESPA issues were identified 27 times in 19 cases (see Table 1). Consistent with last year, the cases overwhelmingly involved kickbacks, but also addressed affiliated business arrangements (see Table 2). Two statutes addressing RESPA issues were retrieved this year.

#### IV. FAIR HOUSING

##### A. Cases

The Fair Housing topics include cases related to handicap discrimination. In one case, the apartment owner leased out part of the complex's parking lot causing hardship for a senior with mobility issues who had to subsequently walk much farther to his residence. Another case involved a complaint against a zoning board for approving an accommodation for a sober house in the city. In addition, there was a Fair Housing complaint against an Ohio real estate developer who built several complexes which reportedly had a multitude of design and build violations.

1. **City of Oakland v. Wells Fargo Bank, N.A.**, No. 15-CV-04321-EMC, 2018 WL 3008538 (N.D. Cal. June 15, 2018)

***Lender may be held liable to City for property-tax injuries pending statistical analyses supporting a finding that injuries were proximately caused by the lender's actions.***

City of Oakland sued Wells Fargo for racial discrimination in lending, alleging that Wells Fargo offered mortgage loans to Oakland residents on a race-discriminatory basis, constituting both intentional and disparate-impact discrimination. This discrimination allegedly caused high rates of foreclosures which heavily impacted minority borrowers and harmed Oakland in three ways: (1) decreases in property-tax revenues; (2) increases in municipal expenditures, and (3) neutralized spending in Oakland's fair-housing programs.

The court held some injuries were proximately caused by the actions of Wells Fargo but dismissed all claims based on non-economic injuries, finding the City lacked standing to bring such claims. In reaching the conclusion that some injuries were proximately caused by Wells Fargo's actions, the court considered the U.S. Supreme Court's recent decision in *Bank of America v. Miami*, 137 S. Ct. 1296, and found that the statistical analyses proffered by the City were sufficient at this stage of the case. Wells Fargo's Motion to Dismiss was denied as to the claims based on property-

tax injuries and municipal-expenditure injury insofar as they seek declaratory and injunctive relief. The municipal-expenditure claims seeking damages and claims based on non-economic damages were dismissed.

2. **County of Cook v. Bank of America Corp.**, No. 14-C-2280, 2018 WL 1561725 (N.D. Ill. Mar. 30, 2018)

***Lender may be held liable to the County for patterns of predatory lending where disparate treatment and impact on minorities is proximately caused by the actions of the lender.***

Cook County brought suit against Bank of America, alleging it suffered injury due to lender's pattern of targeting minority home Buyers. Specifically, County alleged a number of predatory lending tactics, including claims that Bank targeted African-American and Hispanic/Latino home Buyers for a predatory, "equity stripping scheme" that involved, among other elements: disproportionately steering minority borrowers towards "subprime," higher cost loans, even when they qualified for prime loans; relaxing or departing from underwriting guidelines to approve loans to high-risk borrowers likely to default; including in the loan terms pre-payment penalties that inhibited the borrowers' ability to refinance; servicing predatory loans in a manner designed to maximize defendants' profit while increasing the likelihood of default, such as by securitizing high-risk loans; denying borrower requests for loan modification under the Home Affordable Modification Program ("HAMP") even when the borrowers qualified for HAMP modifications, and forcing them instead into more expensive, proprietary loan modifications or declining to modify the loans in a timely manner or at all; and foreclosing on loans to minority borrowers at a significantly higher rate than they foreclose on loans to non-minorities.

Applying the recent U.S. Supreme Court decision in *Bank of America v. Miami*, 137 S. Ct. 1296, the court found that County alleged some injuries proximately caused by alleged discrimination and that County was entitled to proceed on both its disparate treatment and its disparate impact claims under the FHA. County's potential recovery is limited, however, to its claims for foreclosure-processing related expenses.

3. **Green v. Mercy Housing, Inc.**, No. C 18-04888 WHA, 2018 WL 6704185, (N.D. Cal. Dec. 20, 2018)

***Apartment renter with mobility issues brought Fair Housing Act claim against Apartment owner after losing his assigned parking spot.***

Plaintiff is an apartment renter, who due to diabetes and arthritis, depended on a walking cane for mobility. When plaintiff entered into his lease agreement, the property owners (defendants) assured him that he would receive accessible parking. The property owners also advertised their apartment building as being accessible to individuals with disabilities. Soon after moving in, however, property owners leased the front parking spot next to the apartment renter's unit to a daycare center. Eventually the apartment renter received an assigned parking spot, but that spot was located a considerable distance from his unit and was allegedly partially blocked by a large piece of concrete rendering it difficult to exit the vehicle.

Plaintiff brought several claims including a violation of the Fair Housing Act based on handicap discrimination. Defendant sought to dismiss all claims. Several claims were dismissed, however the request to dismiss the Fair Housing claim was denied by the court.

4. **Miami Valley Fair Housing Ctr., Inc. v. Preferred Living Realty**, No. 2:15-cv-27372018, WL 4690790 (S.D. Ohio Sept. 28, 2018)

***Non-profit organization files Fair Housing Act complaint against Ohio real estate developer who owns several multifamily apartment complexes.***

Plaintiff, a non-profit Ohio organization that aims to eliminate housing discrimination, alleged that real estate developer PREI, Inc. was responsible for violations of the Fair Housing Act at five multifamily apartment complexes located in and around Columbus, Ohio. Plaintiff became aware

of the developments in 2014, after someone saw them on a website and noticed what she thought might be FHAA violations. That person visited several of the developments to confirm her suspicions and then sought assistance in investigating the development. Those investigation efforts included field testing and hiring several professionals, including an accessibility expert, to evaluate the developments. On August 19, 2015, plaintiff filed suit against the current defendants alleging numerous violations of the FHAA’s accessibility requirements. Both parties moved for summary judgment. The court denied both motions.

5. **Spring Glen Civic Ass’n v. Zoning Bd. of Appeals**, 67 Conn. L. Rptr. 357, 2018 WL 6264065 (Conn. Sup. Ct. Oct. 29, 2018)

***Town civic association challenges zoning board’s decision to permit the use of a single-family residence as a sober house.***

Association challenged a decision of the town Zoning Board of Appeals denying its appeal of an accommodation granted pursuant to the zoning regulations and federal law to permit the use of a single-family residence as a sober house with nine unrelated recovering residents and one staff member. The Association challenged the procedure utilized by the Board in granting the accommodation and failing to require a special permit under what it claimed are the applicable sections of the town zoning regulations and the special village overlay zone in which the property is located.

The court concluded that the accommodation and procedure utilized by the town zoning official and upheld by the Board complied with the federal law’s policy to encourage and enable fair housing for those with disabilities. The accommodation made was not unreasonable, arbitrary and capricious and not in violation of the zoning regulations. It reasonably interpreted those regulations in connection with federal law and policy. The appeal was therefore dismissed, and the action of the Board sustained.

B. **Statutes and Regulations**

***Alabama***

The Alabama legislature enacted the Alabama Assistance and Service Animal Integrity in Housing Act providing that if a person with a disability that is not readily apparent or known to the person’s landlord files a request for a policy exception that prohibits animals on the property of

the landlord because the person requires the use of an assistance animal (that qualifies as a reasonable accommodation under the federal Fair Housing Act), the landlord may require the person to produce reasonable documentation of the disability. The Act further imposes penalties for making a false claim about the need for an assistance animal.

C. Volume of Materials Retrieved

Fair Housing issues were addressed 17 times in 13 cases in 2018, which is a small decrease from the number of Fair Housing cases retrieved in 2017 (see Table 5). While lending issues were addressed in the largest number of cases, design-and-build issues also arose in numerous cases (see Table 3). One statute was located (see Table 3).

V. **VERDICT AND LIABILITY INFORMATION**

A. Agency Cases

Liability was determined in 41 Agency cases in 2018, and the licensee was found liable in 3<sup>4</sup> (see Table 4) of those cases.

B. Property Condition Disclosure Cases

Liability was determined in 9 Property Condition Disclosure cases in 2018, and the licensee was not found liable in any of those cases.

C. RESPA Cases

Liability was determined in one RESPA case reviewed this year, and the licensee was found liable.<sup>5</sup> (see Table 4).

D. Fair Housing Cases

Liability was determined in 3 Fair Housing cases in 2018, and one of the cases (see Table 4) resulted in liability for the real estate professional.<sup>6</sup>

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<sup>4</sup> *3405/3407 Slauson Ave., LLC v. Gilleran*, No. B265290, 2018 WL 2947925 (Cal. Ct. App. June 12, 2018) (\$571,635.00); *Briggs v. Kidd & Keavy Real Estate Co.*, No. 340713, 2018 WL 4603900 (Mich. Ct. App. Sept. 25, 2018) (\$97,000.00); *Pellet ex rel. Pellet v. Keller Williams Realty Corp.*, No. HHBCV116012338S, 2018 WL 3446642 (Conn. Super. Ct. June 27, 2018) (\$19,080 in compensatory damages + \$75,000 in punitive damages + \$108,025.60 in attorney's fees).

<sup>5</sup> *Palombaro v. Emery Fed. Credit Union*, No. 1:15-cv-792, 2018 WL 4635973 (S.D. Ohio Sept. 27, 2018) (\$2,700,000).

<sup>6</sup> *Saint – Jean v. Emigrant Mortg. Co.*, No. 11 CV 2122 (RLM), 2018 WL 4158307 (E.D.N.Y. Aug. 30, 2018) (held liable on appeal, remanded to determine sufficiency of damages).



**VI. TABLES**

**Table 1.**

Volume of Items Retrieved for 2018 by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	51*	7	17
Property Condition Disclosure	15**	8	3
RESPA	21***	2	0

\*includes Agency jury verdicts from 2017 that were retrieved in 2018

\*\* includes Property Condition Disclosure jury verdicts from 2017 that were retrieved in 2018

\*\*\* includes Property Condition Disclosure jury verdicts from 2017 that were retrieved in 2018

**Table 2.**

Volume of Items Retrieved for 2018 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	9	1	0
Agency: Buyer Representation	9	0	0
Agency: Designated Agency	3	0	0
Agency: Transactional Agency	0	1	1
Agency: Subagency	0	0	0
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	4	0	0
Agency: Breach of Fiduciary Duty	27	1	0
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	0	4	4
Agency: Minimum Service Agreement	0	0	0
Agency: Pre-listing	0	0	0

Agency: Teams	0	1	2
Agency: Coming Soon Listings	0	0	2
Agency: Other	14*	12	1
Property Condition Disclosure: Structural Defects	4	1	0
Property Condition Disclosure: Sewer/Septic	2*	0	0
Property Condition Disclosure: Radon	0	1	1
Property Condition Disclosure: Asbestos	1*	0	0
Property Condition Disclosure: Lead-based Paint	1	0	0
Property Condition Disclosure: Mold and Water Intrusion	3*	0	0
Property Condition Disclosure: Roof	2*	0	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	2*	0	0
Property Condition Disclosure: HVAC	0	1	0
Property Condition Disclosure: Electrical	1	1	0
Property Condition Disclosure: Valuation	0	1	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	0	0
Property Condition Disclosure: Meth Labs	0	1	0
Property Condition Disclosure: Stigmatized Property	1	0	0
Property Condition Disclosure: Megan's Laws	0	1	0
Property Condition Disclosure: Underground Storage Tank	0	0	0
Property Condition Disclosure: Electromagnetic	0	0	0
Property Condition Disclosure: Pollution	0	0	0
Property Condition Disclosure: Other	4	3	2
RESPA: Disclosure of Settlement Costs	1	0	0
RESPA: Kickbacks	18*	0	0
RESPA: Affiliated Business Arrangements	6*	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	2	1	0

\*includes one or more jury verdicts decided in 2017, but retrieved in 2018

**Table 3.**

Volume of Fair Housing Items Retrieved in Past Twelve Months (January 2018-December 2018)

Major Topic	Cases	Statutes	Regulations
Fair Housing: Advertising	1	0	0
Fair Housing: Design/Build	5	1	0
Fair Housing: Lending	9	0	0
Fair Housing: Steering	2	0	0

**Table 4.**

Liability Data for 2018 by Major Topic

Major Topic	Liabe	Not Liabe	% Liabe	% Not Liabe
Agency	5	39	11%	79%
Property Condition Disclosure	0	15	N/A	100%
RESPA	1	2	33%	66%
Fair Housing	1	2	33%	66%

**Table 5.**

Distribution of 2018 Cases by Major Topic with Comparisons to 2017 Data

Major Topic	2017 Count	2018 Count	$\Delta$
Agency	36	66	+30
Property Condition Disclosure	23	25	+2
RESPA	26	27	+1
Employment	5	1	-4
Fair Housing	19	17	-2
Technology	15	9	-6
Antitrust	0	0	0
Third Party Liability	7	9	+2
Ethics	0	0	0

**Table 6.**

Distribution of 2018 Cases by Issue with Comparisons to 2017 Data

<b>Issue</b>	<b>2017 Count</b>	<b>2018 Count</b>	<b>Δ</b>
Agency: Dual Agency	8	9	+1
Agency: Buyer Representation	4	9	+5
Agency: Designated Agency	1	3	+2
Agency: Transactional Agency	0	0	0
Agency: Subagency	0	0	0
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	3	8	+5
Agency: Breach of Fiduciary Duty	26	28	+2
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	2	0	-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	3	14	+7
Property Condition Disclosure: Structural Defects	3	5	+2
Property Condition Disclosure: Sewer/Septic	2	2	0
Property Condition Disclosure: Radon	0	0	0
Property Condition Disclosure: Asbestos	1	1	0

Property Condition Disclosure: Lead-based Paint	0	1	+1
Property Condition Disclosure: Mold and Water Intrusion	8	3	-5
Property Condition Disclosure: Roof	1	0	-1
Property Condition Disclosure: Stucco	0	0	0
Property Condition Disclosure: Flooring	1	1	0
Property Condition Disclosure: Imported Drywall	0	0	0
Property Condition Disclosure: Plumbing	1	2	+1
Property Condition Disclosure: HVAC	1	0	-1
Property Condition Disclosure: Electrical	0	1	+1
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	1	0
Property Condition Disclosure: Boundaries	1	1	0
Property Condition Disclosure: Zoning	0	1	+1
Property Condition Disclosure: Off-site Adverse Conditions	0	0	0
Property Condition Disclosure: Meth Labs	0	0	0
Property Condition Disclosure: Stigmatized Property	1	0	-1
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	-2
Property Condition Disclosure: Other	10	2	-8
Employment: Wrongful Termination	0	0	0
Employment: Personal Assistants	0	0	0
Employment: Independent Contractors	4	1	-3
Employment: Wage and Hour	1	0	-1
Fair Housing: Handicap/Design and Build	5	5	0
Fair Housing: Advertising/Target	5	1	-4
Fair Housing: Steering	2	2	0
Fair Housing: Lending	7	9	+2
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	2	0
Technology: Drones	0	1	0
Technology: Copyright	13	5	-8
Technology: Other	2	1	-1
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	3	1	-2
RESPA: Kickbacks	20	18	-2
RESPA: Affiliated Business Arrangements	8	6	-2
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	2	2	0
Third Party Liability: Appraisers	3	3	0
Third Party Liability: Inspectors	2	1	-1
Third Party Liability: Other	3	5	+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	30	38	+8

**Table 7.**

Distribution of 2018 Statutes and Regulations by Major Topic with Comparisons to 2017 Data

Major Topic	2017 Count	2018 Count	Δ
Agency	72	35	-37
Property Condition Disclosure	16	13	-3
RESPA	1	1	0
Fair Housing	5	1	-4
Technology	12	6	-6



Antitrust	0	0	0
Third Party Liability	3	2	-1

**Table 8.**

Distribution of 2018 Statutes and Regulations by Issue with Comparisons to 2017 Data

Issue	2017 Count	2018 Count	Δ
Agency: Dual Agency	1	0	-1
Agency: Buyer Representation	1	0	-1
Agency: Designated Agency	0	0	0
Agency: Transactional Agency	2	1	-1
Agency: Subagency	0	0	0
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	0	0	0
Agency: Breach of Fiduciary Duty	1	1	0
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	7	4	-3
Agency: Minimum Service Agreement	0	0	0
Agency: Pre-listing	0	0	0
Agency: Teams	12	0	-12
Agency: Coming Soon Listings	3	0	-3
Agency: Other	47	27	-20
Property Condition Disclosure: Structural Defects	1	0	-1

Property Condition Disclosure: Sewer/Septic	0	0	0
Property Condition Disclosure: Radon	0	2	+2
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	1	0	-1
Property Condition Disclosure: Stucco	0	0	0
Property Condition Disclosure: Flooring	0	0	0
Property Condition Disclosure: Imported Drywall	0	0	0
Property Condition Disclosure: Plumbing	0	0	0
Property Condition Disclosure: HVAC	0	1	+1
Property Condition Disclosure: Electrical	0	1	+1
Property Condition Disclosure: Valuation	0	1	+1
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	0	0	0
Property Condition Disclosure: Off-site Adverse Conditions	1	0	-1
Property Condition Disclosure: Meth Labs	0	1	0
Property Condition Disclosure: Stigmatized Property	0	0	0
Property Condition Disclosure: Megan's Laws	0	1	+1

Property Condition Disclosure: Underground Storage Tank	0	0	0
Property Condition Disclosure: Electromagnetic	0	0	0
Property Condition Disclosure: Pollution	0	0	0
Property Condition Disclosure: Other	13	6	-7
Fair Housing: Handicap Design/Build	0	2	+2
Fair Housing: Advertising	1	0	-1
Fair Housing: Steering	4	0	-4
Fair Housing: Lending	0	0	0
Fair Housing: Coming Soon Listings	0	0	0
Technology: State Internet Advertising	1	0	-1
Technology: Social Networking	1	1	0
Technology: Anti-Solicitation	0	1	+1
Technology: Privacy	0	0	0
Technology: Cyber Fraud	0	0	0
Technology: Drones	6	0	-6
Technology: Copyright	0	0	0
Technology: Data Breach	0	3	+3
Technology: Other	2	0	-2
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	0	1	+1
RESPA: Kickbacks	1	0	-1
RESPA: Affiliated Business Arrangements	0	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	0	0	0
Third Party Liability: Appraisers	1	2	+1
Third Party Liability: Inspectors	0	0	0
Third Party Liability: Other	2	0	-2

**Table 9.**  
Distribution of 2018 Cases by Liability

Determination of Liability	Count	% of Total
Agent/Broker Liable	15	16%
Agent/Broker Not Liable	81	84%

**Table 10.**

Distribution of 2018 Cases and Jury Verdicts Awarding Damages by Amount

Amount	Count	Percentage
\$5 million or more	1	5.6%
\$1 million to 4,999,999	0	N/A
\$500,000 to 999,999	2	11.1%
\$100,000 to 499,999	2	11.1%
\$50,000 to 99,999	2	11.1%
\$10,000 to 49,999	6	33.3%
Under \$10,000	3	16.7%
Unknown	2	11.1%

**Table 11.**

Largest Damage Awards in 2018

Damage Award	Issue(s)	Case	State
\$755,485.00	Deceptive Trade Practices Act and Fraud	Garcia	TX
\$571,635.00	Agency: Dual Agency Agency: Vicarious Liability Agency: Breach of Fiduciary Duty	Slauson	CA
\$231,989.12	Technology: Copyright	Goodman	NY
\$167,129.00	Technology: Cyberfraud	Bain	KS
\$97,000.00	Deceptive Trade Practices Act and Fraud Agency: Breach of Fiduciary Duty	Briggs	MI

\$50,000	Agency: Breach of Fiduciary Duty; Deceptive Trade Practices Act/Fraud	Pilecki	PA
\$43,300	Deceptive Trade Practices Act and Fraud	Ajibola	DC
\$22,001.00	Property Condition Disclosure: Sewer/Septic	Jurbala	CA
\$19,000.00	Agency: Breach of Fiduciary Duty Deceptive Trade Practices Act and Fraud Agency: Dual Agency	Pellet	CT
\$1,500.00	Technology: Other	Reed	OR

**Table 12.**  
Top Settlements in 2018

<b>Settlement Amount</b>	<b>Issue</b>	<b>Case</b>	<b>State</b>
\$8,950,000.00	RESPA: Kickbacks	Palombaro	OH
\$12,500.00	Deceptive Trade Practices Act and Fraud	Fidelity	CA
\$40,000	Deceptive Trade Practices Act and Fraud	Smith	LA