

Risk Mitigation

What is risk mitigation? There are quite a few definitions and varying concepts of what risk mitigation is and how it impacts your daily real estate practice. I prefer a simple approach, risk mitigation is the adoption of business practices that decrease your risk as a real estate practitioner to be involuntarily involved in litigation or run afoul of the laws regulating your industry.

Risk mitigation begins with **education**. What are the laws regulating your industry? What is the potential liability for your action? As a broker, how do you ensure that agents in your brokerage are successfully minimizing potential legal risk? It is vital to be well informed on the current laws regulating your industry and stay abreast of any changes.

Every risk mitigation plan includes **management** of risk. What risk exists and how will my staff and I handle our exposure to that risk?

This class focuses on three federal laws regulating the real estate industry and real estate practitioners in particular and discusses various risk management techniques to ensure compliance.

Title VIII of the Civil Rights Act of 1968

Title VIII of the Civil Rights Act of 1968, which is most commonly referred to as the Fair Housing Act was adopted in 1968. The Fair Housing Act was not implemented without controversy and was amended in 1974, 1988 and 1995. Numerous rules and regulations have been adopted to clarify the implementation of the act. The Fair Housing Act prohibits discrimination based on:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____

in the sale, rental, and financing of dwellings and in other housing related transactions. These seven categories create the basis for alleging a violation of the Fair Housing Act. These are also frequently referred to as “protected classes.”

Many states and municipalities have also adopted laws and codes that forbid discrimination in housing related transactions.

The Montana Human Rights Act also includes

- Creed
- Marital status

- Age

As basis upon which a state complaint may be brought.

It is important to familiarize yourself with the local ordinance or state law that regulates the area that you are practicing in.

The **National Association of REALTORS Code of Ethics** also addresses Fair Housing related issues in Article 10.

REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

In the 2013 Annual Report of the National Fair Housing Alliance the NHFA reports that in 2012 there were 28,519 investigated complaints of discrimination that violated the Fair Housing Act. 69% of those complaints were investigated by private fair housing organizations. This graph demonstrates the basis of complaints that were investigated by HUD.

Basis	2013
	53%
	28%
	14%
National Origin	12%
National Origin- Hispanic or Latino	8%
Sex	12%
Retaliation	11%
Religion	3%
Color	2%

The Fair Housing makes certain actions illegal when they are committed against a person falling into one of the seven basis, the Department of Housing and Urban Development refers to these as “issues”.

Under the Fair Housing Act, it is against the law to:

- Refuse to rent or sell housing
- Refuse to negotiate for housing
- Make housing unavailable or deny that housing is available
- Set different terms, conditions or privileges for the sale or rental of housing
- Advertise in a discriminatory way

Put an Attorney Out of Business

- Blockbust — persuade owners to sell or rent by telling them that minority groups are moving into the neighborhood
- Deny or make different terms or conditions for a mortgage, home loan, home insurance, or other real estate related transaction
- Threaten, coerce or intimidate anyone exercising a fair housing right or assisting others in exercising those rights

What Housing is covered?

All single family homes are covered by the act when they are owned by private persons and a real estate broker is used, and all single family homes owned by corporations or partnerships regardless of whether a broker is used. All Multifamily dwellings are covered by the Act, including townhouse and condominium communities.

Exemptions

“Mrs. Murphy Exemption” If the dwelling has four or less units and the owner lives in one of the units, the transaction is exempt from the Fair Housing Act. If a real estate agent is used, the exemption does not exist. The Civil Rights Act of 1866 makes it illegal to discriminate based on race and would apply to the transaction.

The second is for **qualified senior housing** which is exempt only from the Familial Status provision of the act. To be a qualified senior community you must meet the following standards: Either 100% of the community is 62 or older, or 80% of the households have at least one resident 55 or older.

Religious organizations and private clubs also have an exemption.

None of this housing is exempt from section 804(c) of the Act which states that you cannot make, print or publish a discriminatory statement. Any exempt housing that violates 804(c) has lost that exemption and can be held liable under the Act.

Class Exercise

Schmidt v. Ashbriar

The Schmidt's, long-time residents of three units in the Ashbriar condominium building, are Jewish. As Ashbriar residents, the Schmidt's are subject to the rules and regulations enacted by the Condominium Association's Board of Managers. For approximately three decades, the Schmidt's displayed mezuzot on the doorposts outside of their condo units without objection.

In 2001, the Association's rules and regulations committee enacted a set of rules to govern certain activities taking place outside the units in the common hallways. The rules were properly adopted by the Association and all residents were aware of the rules. The "Hallway Rules," as they have come to be called, stated:

1. Mats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors.
2. Signs or name plates must not be placed on Unit doors.
3. Pets must not be left unattended in the hall. Hallways should not be used as dog/pet runs.
4. No alterations to the common area hallways are allowed.
5. No playing with or riding of bicycles, tricycles, roller blades, etc. is allowed.

In 2004 the hallways of the Ashbriar Condominium building were painted and the mezuzot that Mrs. Schmidt had affixed to her door was removed. A mezuzah is a sacred parchment inscribed by hand with two portions of Torah. It is stored in a protective case and hung on the doorposts of Jewish homes. In the Torah, God commands the Jewish people to hang mezuzot on their doorposts. Two Torah portions, *Shema* and *Vehaya*, include the verse: "And you shall inscribe these words upon the doorposts of your house and upon your gates." Mrs. Schmidt affixed another mezuzot to her door following the painting and the Association had it removed pursuant to the rules. Mrs. Schmidt provided the Association with information explaining the religious significance of the mezuzah and the need for it to be placed in a certain place in the doorway to her unit. Between May 2004 and September of 2005 the building maintenance staff would remove any mezuzot that Mrs. Schmidt placed on her door.

During this time Mrs. Schmidt's husband, Dr. Schmidt, passed away. Mrs. Schmidt retained an attorney to write a letter to the Association requesting that Mrs. Schmidt be allowed to place the mezuzah on her doorway in preparation for Shiva, the seven-day mourning period specified by Jewish law. The Association maintenance staff removed the mezuzot while the family attended the funeral of Dr. Schmidt. Mrs. Schmidt returned home with funeral guests, including her Rabbi, to find the mezuzot had been removed.

Mrs. Schmidt files a complaint contending that as an observant Jew she must have a mezuzah at every entrance, and that by forbidding all mezuzot, the Association is forbidding occupancy to all adherents to Judaism, thus violating the Fair Housing Act.

Does Mrs. Schmidt have a potential claim?

Risk Management and the Fair Housing Act

1. Policy and Procedures Manual

- a. _____
- b. _____

2. Education

a. For Agents

b. For Clients

3. What are my “Miss America’s”?

The Sherman Act

Section 1 of the Sherman Act provides “Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several states, or with foreign nations, is declared to be illegal.” In Standard Oil v. United States, the court opined that the restraint of trade language in the Sherman Act dealt only with those conspiracies that “unreasonably” restrained trade. This is referred to as the Rule of Reason.

The courts have also clarified that a conspiracy exists when “two or more separate business entities participate in a common scheme or plan and that the effect of the scheme is restraint of trade.”

The fines associated with violating the Sherman Act are large, for a corporation the potential fine is a million dollars and for a person the potential fine is \$100,000 and a potential for three years in prison.

United States v. Foley

In September of 1974, John Foley, the President of Jack Foley Realty, Inc. had a dinner party that was attended by nine of the highest producing real estate incenses in Montgomery County

Put an Attorney Out of Business

Maryland. These licensees were with several of the largest real estate brokerages in the area. Following the meal, Foley gave a small speech ending with the comment that his company was raising the commission to 7% and he “didn’t care what anyone else did.”

Was this an anti-trust violation? _____

Why or Why Not? _____

If there was a violation, who is guilty? _____

The other “Final Four”

There are four types of antitrust violations that have played a role in shaping the real estate industry and our risk management techniques:

1. _____
2. _____
3. _____
4. _____

Risk Management and Anti-Trust

1. Policy and Procedures Manual

a. In the office:

b. As a volunteer at the Association:

2. Additional Risk Management Technique to incorporate:

Real Estate Settlement Procedures Act

The Real Estate Settlement Procedures Act was adopted in 1974 with the goal of protecting consumers from high settlement charges and perceived abuses by segments of the real estate industry.

RESPA prohibits you, a real estate licensee, from receiving a “thing of value” for referring business to a mortgage or title company. There are five elements that must be present before a referral fee is considered illegal:

1. _____
2. _____
3. _____
4. _____
5. _____

Penalties for violating RESPA include imprisonment for up to one year, fines of up to \$10,000 per infraction and treble damages.

Risk Reduction and RESPA

1. Policy and Procedures Manual will address:
 - a. _____
 - b. _____
 - c. _____
2. Additional risk management technique to adopt: