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CURRENT TRENDS IN REAL ESTATE LITIGATION

Real Estate Class Actions

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And

Real Estate Related Discrimination Claims

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CURRENT TRENDS IN REAL ESTATE CLASS ACTIONS

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Not only has there been a dramatic increase in the number of class actions in recent years, but the types of cases that have been filed as class actions have shifted from what historically have been products liability, securities violations and catastrophic accidents, to entirely new areas. Moreover, with the extensive press given to major corporate frauds such as what has been recently experienced with Enron, WorldCom, Arthur Anderson, etc., there is a general perception among the public that corporate misconduct is commonplace. As such, plaintiffs' lawyers have pursued class actions in a variety of commercial contexts, expanding their targets and substantive fields dramatically, including the real property field.

FDUTPA

A natural springboard for such actions in Florida has been the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Fla. Stat. ("FDUTPA"). FDUTPA is so loose in describing what conduct might be proscribed that it practically begs creative plaintiffs lawyers to apply their craft and create complaints for activities that otherwise have historically been outside the scope of any recognized cause of action, let alone a class action.

Specifically, FDUTPA makes unlawful "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct or any trade or commerce." This is the only standard set forth in the statute so you can imagine the room for advocacy by plaintiffs' lawyers as to what is "unfair" or "deceptive." The case law does not give much more in the way of specific guidelines. The Florida Supreme Court recently defined an unfair practice, for FDUTPA purposes, as "an act that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantial injurious to consumers. PNR, Inc. v. Beacon Property Management Inc., 842 So.2d 773 (Fla. 2003). Florida courts have also looked to the Federal Trade Commission Act for guidelines as to whether or not a particular act constituted an unfair practice. Crowell v. Morgan Stanley, 87 F. Supp. 2d 1287 (S.D. Fla. 2000). Courts have reduced the question to the simple inquiry of whether or not the act was "likely to mislead consumers?" In re: Crown Auto Dealership, Inc., 187 B.R. 1009 (Bkrtcy. M. D. Fla. 1995). Davis v. Powertel, Inc., 776 So.2d 971 (Fla. 1st DCA 2000).

In 1993, FDUTPA was amended to expand the definition of "trade" or "commerce" to include any property, whether tangible or intangible. Plaintiffs have successfully applied this definition to include real property. Fendrich v. RBS. L. L. C., 842 So.2d 1076 (Fla. 3rd DCA 2003).

Under FDUTPA one simple act of deception or misrepresentation can lead to liability. PNR, Inc. v. Beacon Property Management, supra. No finding of purchaser reliance on the deception or misrepresentation is required. David v. Powertel, Inc., supra, Latman v. Cosda Cruise Lines, NV, 758 So.2d 699 (Fla. 3rd DCA 2000). In fact, Courts have held that a finding of fraud is not necessary to sustain a violation under FDUTPA. Betts v. Advanced America, 213 F.R.D. 466 (M.D. Fla. 2003). This makes many companies and individuals extremely vulnerable to FDUTPA class actions.

The nebulous statutory and judicial guidelines coupled with the minimal essential elements of a FDUTPA claim have caused plaintiffs lawyers to flock to FDUTPA as cottage industry, not necessarily to pursue individual claims for aggrieved consumers, but rather, to create class actions and generate the concomitant large attorney's fees claim.

FDUPTA attracts class action claims since Florida courts have generally refused to allow class actions in common law fraud cases due to the individualistic nature of the plaintiffs' reliance and damages. FDUTPA's lack of a reliance and fraud requirement results in trial courts more readily certifying class actions involving fact patterns that seem to be nothing more than misrepresentation or fraud claims.

Defendants have some arguments to defeat certification of a class in a FDUTPA action. In Hutson v. Rexall Sundown, Inc., 837 So.2d 1090 (Fla. 4th DCA 2003) the defendants successfully defeated an attempt to certify class in the FDUPTA action by establishing that many members of the class actually had knowledge of the facts the plaintiff's counsel argued were deceptively and unfairly omitted from the label of the pharmaceutical. It is intellectually difficult to differentiate a consumer's actual knowledge of the fact from that same consumer's alleged failure to rely on the omission of the fact from the label. This actual knowledge attack is worth pursuing in any attempt to certify a misrepresentation based FDUTPA claim. Similarly, establishing the lack of common facts or documents utilized in the consumer real estate transaction can defeat FDUPTA claim class certification.

Plaintiffs have become increasingly more creative in asserting FDUTPA class actions based on the sale, leasing or financing of real estate. The plaintiffs' lawyers try to find misstatements, errors, omissions, or relatively technical violations of the multitude of state and federal regulations that govern such transactions, and then use these mistakes or violations to construct a FDUTPA class action. Many of these class actions arise out of the forms utilized by sellers, brokers, lenders and others involved in the real estate transaction. The publication of the decision in Fendrich, has advised class action lawyers that FDUTPA applies to consumer real estate transactions and has set them on a search for new clients and lawsuits. Plaintiff lawyers have constructed FDUTPA class action claims out of referral arrangements, marketing fees paid by developers to builders in their communities, discounts or incentives in the pricing of new homes, description of amenities and just

about every line on a HUD form or closing statement. Plaintiffs have studied advertising materials and disclosures that contain statements or assertions with respect to assessments, fees, costs, covenants and restrictions and have then claimed unfair and deceptive trade practices sufficient to warrant the class certification for every consumer who was or could have been mislead by that material. In discovery in the lawsuit they ask the real estate entity to produce every form they have ever used in every real estate transaction and to identify all of the consumers with who the entity has dealt. This is done to expand the class in that case or to establish new classes either for that case or additional cases.

This is not to say that all is lost whenever a plaintiff comes knocking with a FDUTPA claim class action. There are defenses that can be constructed to defeat the claim or at least minimize the claim. The damages available under FDUTPA are relatively limited. Speculative losses, lost profits and other similar types of damages are not available under FDUTPA. Macias v. HBC of Florida, Inc., 694 So.2d 88 (Fla. 3rd DCA 1997). The only damage that is recoverable under FDUTPA is the difference in the value of the consumer product promised minus the value of the product that was actually delivered. H&J Paving of Florida, Inc. v. Nextel, Inc., 849 So.2d 1099 (Fla. 3rd DCA 2003.) FDUPTA class actions are usually about the attorneys fees which are recoverable by the plaintiffs lawyers should they prevail.

Even though the Florida economic loss doctrine has been interpreted to mean that the existence of a contract does not automatically preclude a plaintiff from asserting a FDUTPA claim, Samuels v. King Motor Company of Fort Lauderdale, 782 So.2d 49 (Fla. 4th DCA 2001), and even though attempts to limit liability under FDUTPA by a contract provision have been deemed to be a violation of public policy, Rollins, Inc. v. Heller, 454 So.2d 580 (Fla. 3rd DCA 1984), the recent decisions in Rosa v. Amoco Oil Company, 262 F. Supp.2d 1364 (S.D.Fla.2003), and Agrobin, Inc. vs. Botanica Development Associates, Inc., _____So.2d _____ 28 Fla. L. Weekly D1868a (Fla. 3rd DCA August 13, 2003), offer some hope of a contract defense for the potential class action defendant real estate entity.

In Rosa, supra, the Court ruled that " . . . statements or misrepresentations made to induce an individual to enter a contract, if later contained within the terms of the actual contract, cannot constitute a basis on which to bring a fraud claim." Judge Moore dismissed the plaintiff's FDUTPA claim and ruled "plaintiff's reliance upon all statements which were at variance with the written documents was not reasonable as a matter of law. Accordingly, plaintiff's FDUTPA claim must be dismissed."

Skillful plaintiff's attorneys will attempt to circumvent the Rosa decision by alleging that the advertisements or oral representations which tended to confuse or mislead the consumers were either not in the contract or were different than the statements or covenants promises contained within the contract which was eventually signed. However, a well drafted contract that covers all of the aspects of the benefit of the bargain, together with an integration clause and a disclaimer in which the consumer agrees that she did not rely upon oral representations or statements will go a long way in helping to defeat a FDUTPA class action claim.

In Agrobin, Inc., supra, the Third District revived the doctrine of caveat emptor in the context of the purchase of a condominium unit. There, the Plaintiff purchased a residential condominium apartment unit. The court found that the plaintiff's intent was to rent the condominium. The court found that the purchaser, theoretically a consumer, was a "sophisticated purchaser of commercial property who agreed to and is as purchase contract, had ample opportunity to conduct inspections and could have discovered an alleged defect to the exercise of ordinary diligence, may be disgruntled, but does not have a cause of action for fraud".

In OCE Printing Systems USA, Inc. v. Mailers Data Services, Inc., 760 So.2d 1037 (Fla. 2nd DCA 2003), the Second District Court of Appeals ruled that FDUTPA applies only to in-state Florida consumers. This was a class action and appears to be inconsistent with the Third District's decision in Millennium Communications and Fulfillment, Inc. v. Department of Legal Affairs, 761 So.2d 1256 (Fla. 2000). However, there may be no FDUTPA claim if the class of people suing is not consumers, i.e. investors, speculators or commercial buyers. Additionally if the consumers are not Florida residents a FDUTPA claim may not be available. The Agrobin, supra, decision appears to provide a basis to support a defense against the FDUTPA claim that someone who purchases what is ostensibly a consumer product is using it for non-consumer purposes doesn't satisfy the definition of consumer under FDUTPA and therefore cannot assert a claim.

There are other statutory exemptions in FDUTPA, which can also provide a defense to either an individual or class FDUTPA claims.

RESPA

Another area more traditionally thought of as a haven for real property class actions is the Real Estate Settlement Procedures Act, 12 USC §2601, et. seq. ("RESPA"). This Act, among other things, prohibits kickbacks and referral fees in an effort to eliminate the payment of unearned charges in connection with settlement services in residential real property transactions. In recent years plaintiffs lawyers have also been pushing the envelop to try to expand RESPA's reach, sometimes with HUD's concurrence and sometimes not.

One recent example where a plaintiff's lawyer has successfully broken into making a RESPA claim for charges relating to lien releases is the July 24, 2003, decision by the Seventh Circuit in Weizeorick v ABN Amro Mortgage Group, Inc., 337 F. 3d 827 (7th Cir. 2003). In Weizeorick, the plaintiffs sold their home in Chicago. Amro held their mortgage and submitted a Payoff Statement to the title company that was closing the sale, Attorneys Title Guaranty Fund, Inc. Included in the Payoff Statement was a charge of $10 for a "Recording Discharge/Release of Lien Fee" The plaintiffs were also charged by the Fund a "Release Fee" of $25.60 as part of the settlement charges. The Fund actually performed all the services in recording the release of the mortgage. The District Court dismissed the suit on the grounds that there was no split of any fee as required by the statute and in line with several other decisions from the Seventh Circuit. See Echevarria v Chicago Title and Trust Co, 256 F. 3d 623 (7th Cir. 2001); Mercado v Calumet Fed. Sav. & Loan Ass'n., 763 F. 2d 269 (7th Cir. 1985); Durr v. Intercounty Title Co., 14 F. 3d 1183 (7th Cir. 1994).

The Seventh Circuit reversed, however, holding that the Fund charged a total of $35.60 for the single service of recording the release of lien, and the plaintiffs alleged that of that sum, there was indeed a split under which $10 went to the lender who never in fact performed the service of recording the release. The Seventh Circuit acknowledged that the lender prepared and delivered the release to the title company and that perhaps the $10 fee was only for the preparation of the release and not its recording, but held that this would be a matter for the parties to determine from discovery and was not a basis to dismiss the complaint.

Thus, it will be important for lenders and title companies or others closing residential real estate transactions to be very cognizant of exactly what they label their charges for in settlement statements and not include any duplicative charges that might later be characterized as splits of fees for services in fact only performed by one provider.[1]

On the positive front, the Ninth Circuit recently affirmed a summary judgment for the defendant in a class action in Lane v Residential Funding Corp, 2003 WL 1090181 (9th Cir. March 13, 2003). In Lane, the plaintiff purchased a home in Oakland, California from RFC. RFC required Lane to use Chicago Title as the escrow and title agent. Based on RFC's volume of business with Chicago, RFC was able to negotiate a reduced flat fee on Chicago's services. Thus, the plaintiff paid only $900 for title insurance and escrow fees as opposed to Chicago's standard fee of $1,200. After the closing the plaintiff sued alleging that the discount between RFC and Chicago amounted to the payment of a referral fee.

The case was certified as a class action on behalf of all buyers from RFC who benefited from the discount that had been negotiated with Chicago. [Note any irony here?] The District Court granted summary judgment to the defendant, however, on the ground that the discounts Chicago provided were based on Chicago's lower costs resulting from the economies of scale it enjoyed from the volume of RFC's business – Chicago's familiarity with RFC's standardized forms and procedures and the fact that RFC's sales all involved recent foreclosures that limited the title searches involved - as opposed to discounts for referrals.

On appeal, the Ninth Circuit affirmed the summary judgment based on a slightly different rationale – the test recently adopted in the yield spread premium cases. There has been considerable activity in recent years with respect to the treatment of yield spread premiums under RESPA. Finally the cloud of inconsistency, (at least among the courts and HUD), appears to have been lifted as to what standard governs in those cases. Specifically, while previously some courts held that there must be a determination whether the payment of a yield spread premium is in fact paid for a service or a referral, now the courts appear to have all come in line with HUD's most

[1] It should be noted that the plaintiffs dropped their class action allegations during the course of the proceedings and continued on with the case individually. The reasons for this are not apparent from the decision but the Seventh Circuit gratuitously commented that "Every real estate closing is a unique series of fees, payments and other monetary transactions between at least one lender, a buyer, a seller and a closing company which raises numerous individualized questions just like these." Id. at 833. Thus, despite the concern that this case may otherwise present for lenders and closing agents, at least many potential plaintiffs may be dissuaded from pursuing such claims as class actions, and given the total amount in dispute in such actions (here at most $35.60), perhaps they will be disinclined to pursue them at all.

recent policy statement on the point and ruled that such an inquiry is not necessary. Now there is a two-step process in which courts must simply decide: (1) whether goods are actually furnished or services actually performed for the compensation paid, and (2) whether the discount is reasonably related to the value of the goods furnished or services performed, without inquiry to whether the payment is actually intended as a payment of a referral. Compare RESPA Statement of Policy 2001-1, 66 Fed. Reg. 53052, 53054 (Oct. 18, 2001) and Heimmermann v First Union Mortgage Corp., 305 F. 3d 1257 (11th Cir. 2002) with Culpepper v Irwin Mortgage Corp., 253 F. 3d 1324 (11th Cir. 2001).

Applying that same test to the payments (actually discounts) in Lane, the Ninth Circuit concluded that since $900 was indisputably reasonably related to the value of the services performed, it was not a violation of RESPA to have given the discount as a matter of law. The expansion of this test to a non-yield spread premium context is a first among the courts, but should come as no surprise and perhaps this will become a trend given the difficulty in otherwise reconciling HUD's new policy statement as to yield spread premiums with other payments, or as in this case, discounts.

Another recent decision in which the certification of a class action was reversed is O'Sullivan v Countrywide Home Loans, Inc., 319 F. 3d 732 (5th Cir. 2003). In O'Sullivan, the trial court certified a class of plaintiffs who paid mortgage preparation fees to law firms selected by a mortgage broker, Countrywide. They alleged that Countrywide violated RESPA by accepting kickbacks from the law firms for being given the work to prepare the mortgage documents.

The Fifth Circuit found that a RESPA violation was properly alleged, but under HUD's reasonable relationship test, individualized fact finding would be required for each transaction on the issues of what goods or services the law firms provided to the lender and whether the flat fee charged was reasonably related to their value. While this decision was obviously welcome news for the lender and the law firms: (1) the court did recognize that the plaintiffs stated a claim under RESPA, and (2) it took an appellate court to undue the class that had already been certified below, so you can imagine the cost involved in defending the action until the appellate court reversed.

REAL ESTATE-RELATED DISCRIMINATION CLAIMS

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CLAIMS FOR VIOLATION OF THE FAIR HOUSING LAWS, THE CIVIL RIGHTS ACT OF 1866, AND THE AMERICANS WITH DISABILITIES ACT

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I. What statutes are commonly invoked by plaintiffs in claims of discrimination involving real estate?

A. Fair Housing Act ("FHA"), 42 U.S.C.A. § 3601 *et seq.*, also referred to as Title VIII.

B. Florida Fair Housing Act ("FFHA"), § 760.20 *et seq.*

C. Civil Rights Act of 1866, 42 U.S.C.A. §§ 1981-1982 ("the Civil Rights Act").

D. Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C.A. § 12181, *et seq.*

II. How do these statutes differ, in broadly general terms?

1. The Civil Rights Act, unlike the federal and Florida Fair Housing Acts, applies only to claims of racial discrimination, applies to all types of real estate (and personal property) contracts, and has no exemptions. However, it is necessary to prove "intent" to discriminate under this act.

2. The federal and Florida Fair Housing Acts more broadly apply to the protected categories of race, color, religion, age, sex, handicap, familial status (includes pregnancy and children) and national origin.

3. The federal and Florida Fair Housing Acts more narrowly apply only to transactions involving housing transactions and to persons involved in the lending, selling or brokering of housing transactions.

a. A housing transaction is the proposed sale, rental, or advertising of a dwelling.

b. A dwelling is any building, or portion thereof, which is occupied or intended to be occupied as a residence, or vacant land intended for such purpose. 42 U.S.C.A. § 3602 (b). It includes time-share interests, but excludes hotels or motels. *Louisiana Acorn Fair Housing v. Quarter House*, 952 F. Supp 352 (E.D. La. 1997); *Tara Circle, Inc. v. Bifano*, 173 F.3d 846 (2d Cir. 1999).

4. The Fair Housing Acts prohibit discriminatory practices against members of protected classes, and do not require proof of specific intent to discriminate, except in cases of handicapped discrimination or unlawful coercion or intimidation.

5. There are a number of statutory exemptions to the federal Fair Housing Act, not found in the Civil Rights Act.

6. The ADA applies only to the disabled, as defined by the statute and implementing regulations. However, it very broadly protects their ability to have "full and equal enjoyment of goods, services, facilities, privileges advantages and accommodations" of any "place of public accommodation". The accessibility and reasonable accommodation requirements imposed on property owners by the Fair Housing Act are much more narrow and less onerous on the property owner than the public accommodation accessibility requirements of the ADA. However, unlike the other statutes listed above, the ADA allows only for injunctive relief (and attorneys fees) and not for damages.

III. What types of claims are more typically brought under these statutes?

A. **The Fair Housing Act.** The FHA prohibits certain discriminatory practices directed to members of specified protected classes, in connection with housing transactions. The most common claims are brought under the statutory sections discussed below.

1. Sales or rentals. Section 3604(a) of the FHA prohibits discrimination in the sale or rent of a dwelling to a protected applicant.

a. This includes "racial steering", which impacts the availability of housing to protected classes. This occurs, for example, when a real estate agent gives untruthful information to discourage someone from looking at a given geographical area or housing development. *Leadership Council for Metropolitan Open Communities, Inc. v. Rossi Realty, Inc.*, 2001 WL 289870 (N.D. Ill. 2001).

b. It makes no difference whether the allegedly offending person is him/herself a member of a protected category. *Jordan v. Kahn*, 969 F. Supp. 29 (N.D. Ill. 1997).

c. However, this section does not apply to handicapped individuals, which have separate sections of the statute applicable to them. *See* part A.8 below.

2. Terms and privileges. Section 3604(b) of the FHA prohibits the imposing of discriminatory terms, conditions, or privileges on (potential) tenants or buyers.

   a. This would include charging more, requiring deposits not otherwise required, using different contract terms, failing to convey offers of sale or rent from the customer to the owner/landlord. FHA Regs. § 100.65(b)(1)-100.65(b)(4).

   b. This includes landlords that require tenants to provide sexual favors in exchange for renting or for reduced rent. FHA Regs. § 100.65(b)(5); *Grieger v. Sheets*, 689 F. Supp. 835 (N.D. Ill. 1988) (*See also* part A.10. below re: hostile environment claims.)

   c. This includes charging additional rental to families with children for using pools or health clubs. *Kelly v. Colclasure, No. 05-95-0516-8 (HUDALJ Jan. 5, 1998), 1998 WL 2785.*

   d. Just as was true of section 3604(a) above, this section does not apply to handicapped individuals.

3. Advertising. Section 3604(c) prohibits discrimination in advertising. This is a particularly nuanced provision of the act, and HUD has published special guidelines to assist in nondiscriminatory advertising. *See* 24 C.F.R. Part 109. It is a violation of the act to indicate any impermissible preference or limitation by either written, pictorial or oral means. No proof of intent to discriminate is necessary, and it is not necessary for a plaintiff to actually allege or prove harm for a violation of this section to be actionable.

   a. It is a violation of this section to use catchwords, e.g., "mature person preferred". FHA Regs. § 100.75(c)(1).

   b. Or to select only certain media so that a protected class is denied housing market info. FHA Regs. § 100.75(c)(3);

   c. Or to use pictures, such as all white people in a multi-person ad. *See Ragin v. Harry Macklowe Real Estate Co., Inc.*, 801 F. Supp. 1213 (S.D.N.Y. 1992), *aff'd in part, rev'd in part,* 6 F.3d 898 (2d Cir. 1993).

4. Availability. Section 3604(d) prohibits false representation of (un)availability. *See e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

5. Familial Status. Section 3602(k) prohibits discrimination based on familial status. This section of the statute was added by amendment in 1988, and applies primarily to protect children under age 18. It was not intended to protect any particular marital status. Rather it was intended to eliminate the "adults only" and "no children" rental policies. *See* Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. LJ AM. U. 297 (1995). However, under narrowly worded exemptions, housing for persons over age 55 or over age 62 is permitted to allow for elderly or retirement housing. *See* FHA § 3607(b).

6. Financing. Section 3605 of the FHA prohibits discrimination in real estate-related financing, and applies to both primary and secondary residential mortgage markets. This statute applies to redlining and "reverse redlining". Proof of discrimination under this statute requires only that the plaintiff show he/she is protected, qualified to borrow, denied credit, and that the lender made loans to other similarly situated applicants. NB. These criteria would also support claims under the Equal Credit Opportunity Act, and, in the case of race-based discrimination, Sections 1981 and 1982.

7. Brokerage services. Section 3606 prohibits discrimination in the providing of brokerage services. There are very few cases reported under this section. Examples of such discriminatory conduct include: higher charges for multiple listings, imposing different standards for membership in real estate sales or rental organizations, and redlining.

8. Handicap. Until 1988, most claims under the federal Fair Housing Act involved race discrimination. Since the 1988 amendments to the act, the most common basis for claims was that of handicap. Specifically, § 3604(f)(1) prohibits discrimination in the sale or rental of a dwelling to any buyer or renter because of the handicap of the buyer or renter or anyone associated with him/her. Similarly, § 3604(f)(2) prohibits discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling to the handicapped. Finally, § 3604(f)(3) prohibits the refusal to make a reasonable accommodation to enable a tenant to enjoy the premises and common areas.

    a. It is not easy to summarize the definition of handicapped, but in essence, it is a physical or mental impairment which substantially limits one or more major life activity; *e.g.*, being blind, deaf, mute, "retarded", being wheel chair bound, having cerebral palsy,

Multiple Sclerosis, cancer, HIV-positive, AIDS, or recovering from alcoholism. A person is not handicapped if he/she can mitigate his/her medical condition by glasses, hearing aids, or medication. N.B.: The elderly can be handicapped if they are unable to bath or care for themselves.

b. Most cases under this statute concern a refusal to sell, rent or make a reasonable accommodation prior to the plaintiff's occupancy.

c. The FHA makes it unlawful for a property owner or landlord to refuse to make such modification in rules, policies, or services as will enable a handicapped person to live in the facility, (absent proof by landlord of undue hardship), E.g., inside parking for person with MS; waiver of no pets policy for blind person with seeing eye dog. § 3604(f)(3)(B); FHA Regs. § 100.204(a); *See Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328 (2d Cir. 1995).

d. Discrimination is also defined as any conduct that prevents a handicapped person from reasonably modifying rental facilities at the tenant's expense, provided the tenant agrees to pay to restore the facility to pre-occupancy conditions. § 3604(f)(3)(A); FHA Regs. § 100.203(a).

e. Accessibility requirements: In the case of multi-family dwellings (or more units), built after 1991, there must be at least one, continuous, unobstructed path connecting accessible elements and spaces, that can be used by a person with a severe disability in a wheel chair, or by persons with other disabilities. § 3604(f)(3)(C); FHA Regs. § 100.205.

f. Section 3604(f)(2)(C) prohibits the failure to design and construct such dwellings in such a manner that they are inconsistent with the FHA's accessibility rules.

9. Exemptions to §§ 3602-3606. The following types of housing transactions are exempt from these prohibitions of the FHA:

a. Certain sales of single-family homes. § 3603(b)(1).

b. Certain rentals in buildings of four or fewer units. § 3603(b)(2).

c. Most rentals by private clubs and religious organizations. § 3607(a).

d. Certain housing for older persons. § 3607(b).

10. Coercion, Threats or "Hostile Environment". Section 3617 simply states that it is unlawful to coerce, intimidate, threaten, or interfere with any person in or related to the enjoyment of any rights granted or protected by sections 3603-3606. This section has engendered an increasing number of claims. The defendants in these cases have included not only landlords and property owners, but also property management companies, homeowners associations, and their officers and employees. These cases often allege what have come to be known as "hostile living environment" claims. To prove a claim under this section, it is necessary to show that intentional discrimination motivated the defendant's conduct, at least in part.

    a. For example, claims by blacks for racial intimidation by white neighbors (*Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991)); sexual harassment (*Grieger v. Sheets,* 689 F. Supp. 835 (N.D. Ill. 1988)); written and oral threats of harm, spitting at plaintiff, shouting obscenities and slurs (*Sofarelli v. Pinellas County,* 931 F.2d 718 (11th Cir. 1991)) have all been held to be actionable under this statute.

    b. Interestingly enough, the plaintiffs in such cases do not need to be the person actually bearing the brunt of the intimidating conduct. A landlord can sue his tenant's neighbors for harassing the tenants in violation of this Act. *See Puglisi v. Underhill Park Taxpayer Ass'n,* 947 F. Supp. 673 (S.D.N.Y. 1996), *aff'd* 125 F.3d 844 (2d Cir. 1997).

    c. This statute is not intended to be a civility code. *Sporn v. Ocean Colony Condominium* Ass'n, 173 F.Supp.2d 244, 251 (D.N.J. 2001). For those interested in the interplay between First Amendment free speech rights and discrimination statutes, these cases are fascinating, as there is clearly a continuum of uncivil, hurtful speech that, as it becomes more aggravated and threatening changes from being protected speech to actionable under this statute. *See e.g., Michigan Protection and Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695 (E.D. Mich. 1992), *aff'd* 18 F.3d 337 (6th Cir. 1994); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* 508 U.S. 49 (1993). Farther along the continuum, when conduct becomes sufficiently harmful (cross burning), it can constitute a criminal violation of this statute. 42 U.S.C.A. § 3631. *See e.g., U.S. v. Hayward,* 6 F.3d 1241 (7th Cir. 1993).

B. **The Florida Fair Housing Act.** There are virtually no reported cases under this act. The provisions are so similar to the federal act that it need not be discussed separately.

C. **The Civil Rights Act.** Section 1982 of The Civil Rights Act bars all racial discrimination, private as well as public, in the sale or rental of property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). This statute provides that "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

1. Although The Civil Rights Act applies to all racial discrimination in the sale or rental of property of any kind, it provides specific relief only to direct victims of discrimination, rather than broad categories of individuals not directly affected by discriminatory conduct, as is the case in the Fair Housing Act. *See e.g., Clifton Terrace Associates, Ltd. v. United Technologies Corp.,* 929 F.2d 714 (D.C. Cir. 1991).

    a. By its express terms ("[a]ll citizens of the United States…"), it also applies only in favor of U.S. citizens.

    b. It provides relief only for racial discrimination and does not provide relief for claims of discrimination based on heritage, if the nationality involved is not generally perceived as non-white. *Lee v. Minnock*, 417 F. Supp. 436 (W.D. Pa. 1976); *Petrone v. City of Reading,* 541 F. Supp. 735 (E.D. Pa. 1982) (the act does not cover discrimination against Italians). However, Jews and Arabs were considered different races at the time the statute was enacted and therefore are within its protections. *Shaare Tefila Congregation v. Cobb,* 481 U.S. 615 (1987).

    c. It protects virtually all property rights of whatever form, including, in addition to real property, fishing rights, insurance contracts, and the right to join residential clubs. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp 1399 (W.D. Wis. 1991); *Harary v. Allstate Ins. Co.*, 983 F. Supp. 95 (E.D.N.Y. 1997);Wright *v. Salisbury Club, Ltd*, 632 F. Supp. 309 (4th Cir. 1980).

2. There are no exemptions, such as those under the FHA for dwellings for less than 4 families or for dwellings in which the owner lives, *Mororis v. Cizek*, 503 F.2d 1303 (7th Cir. 1974). The statute also covers hotels and motels, while the FHA does not. *Wieczorek v. Red Roof Inns, Inc.* 3 F.Supp.2d 210 (N.D.N.Y. 1997).

3. Because the FHA is narrower than the Civil Rights Act, and also covers race discrimination, a prima facie claim under the FHA usually states a prima facie claim under the Civil Rights Act. *Steptoe v. Savings of America*, 800 F. Supp. 1542 (N.D. Ohio 1992).

D. **The ADA.** Title III of the ADA prohibits discrimination by private entities in places of public accommodation. Title III provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182(a).

1. In a private action under Title III of the ADA, a court may award injunctive relief to "any person who is being subjected to discrimination on the basis of disability in violation" of the Act by requiring a defendant to make its facility readily accessible to and usable by individuals with disabilities. 42 U.S.C. § 12188(a)(2). Title III does not allow for the recovery of damages but, instead, limits a private plaintiff's recovery to prospective injunctive relief and attorney's fees, where plaintiff is deemed a prevailing party. 42 U.S.C. §§ 12188(a), 12205; 28 C.F.R. §§ 36.501, 36.505.

2. Discrimination prohibited by the ADA includes a private entity's "failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). Where removal is not "readily achievable," then the entity incurs liability if it fails to make those goods, services and facilities "available through alternative methods if such methods are readily achievable" 42 U.S.C. § 12182(b)(2)(A)(v) – that is, "easily accomplishable and able to be carried out without much difficulty or expense." 28 C.F.R. § 36.304(a).

3. In order to establish a prima facie case of discrimination under Title III of the ADA, an individual plaintiff must show the following: (1) the individual plaintiff is disabled; (2) the property is a place of public accommodation; and (3) that plaintiff was denied full and equal treatment because of his or her disability. *See Access Now, Inc., v. South Florida Stadium Corp.*, 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001), *citing, Tugg v. Towey*, 864 F. Supp. 1201, 1205 (S.D. Fla. 1994). *See Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir. 2001); *Louie v. National Football* League, 185 F.Supp.2d 1306, 1308 (S.D. Fla. 2002). *See generally Access Now, Inc. v. Southwest Airlines Co.*, 2002 WL 81360397, *3-4 (S.D. Fla.).

4. Further, when a plaintiff's claim alleges discrimination due to an architectural barrier, then that plaintiff must also show that "the existing

facility presents an architectural barrier that is prohibited under the ADA, the removal of which is readily achievable." *South Florida Stadium Corp.*, 161 F. Supp. 2d at 1363. *See Colorado Cross Disability Coalition v. Hermanson Family L.P.*, 264 F.3d 999 (10th Cir. 2001).

5. Plaintiffs have the burden of establishing that they have standing to raise their claims. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). The elements of standing are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561.

   a. Plaintiffs must demonstrate three things to establish standing under Article III of the United States Constitution. First, Plaintiffs must show that they have suffered an "injury in fact" – "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (international citations and quotations omitted). Second, Plaintiffs must demonstrate a causal connection between the asserted injury-in-fact and the conduct complained of by the defendant. *Id.* And third, Plaintiffs must show that "the injury will be redressed by a favorable decision." *Id.* at 561. *See also Wooden v. Board of Regents of the University System of Georgia,* 247 F.3d 1262, 1273-74 (11th Cir. 2001); *Access for America, Inc. v. Speedway SuperAmerica, LLC,* 01-14262, Order pp. 4-5.

   b. "These requirements are the 'irreducible minimum' required by the Constitution for a plaintiff to proceed in federal court. *Shotz v. Cates*, 256 F.3d at 1081, *quoting, Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 664 (1993) (internal citation omitted). *See also Wooden v. Board of Regents,* 247 F.3d at 1274; *South Florida Stadium Corp.*, 161 F. Supp. 2d at 1363-64.

   c. Some courts have held that associations lack such standing because "any finding of an ADA violation requires proof as to each individual claimant." *Association for Disabled Americans, Inc., v. Concorde Gaming Corporation,* 158 F. Supp. 2d 1353, 1363-64 (S.D. Fla. 2001), *quoting, Concerned Parents to Save Dreher Park v. City of W. Palm Beach*, 884 F. Supp. 487, 488 (S.D. Fla. 1994).

6. In addition, a plaintiff seeking prospective injunctive relief, as opposed to merely monetary damages, must also allege "a real and immediate – as

opposed to a merely conjectural or hypothetical – threat of *future* injury." *Wooden v. Board of Regents,* 247 F.3d at 1284 (emphasis added).

a. A plaintiff may not seek injunctive relief premised solely upon an allegation of past wrong. Instead, the plaintiff must demonstrate a real and immediate threat of repeated *future* harm to satisfy the redressability requirement of standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Lujan v. Defenders of Wildlife*, 504 U.S. at 562. *See Wooden*, 247 F.3d 1262 (applying the principles of *Lyons* and affirming, in pertinent part, the district court's decision granting summary judgment in favor of the defendants on the grounds that the individual Plaintiffs lacked standing to seek prospective injunctive relief under the ADA).

b. Absent a threat of future injury, a plaintiff is unable to demonstrate that he or she would directly benefit from the equitable relief sought – a pre-condition to any standing claim for injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. at 111-12; *Shotz v. Cates*, 256 F.3d at 1081 (because injunctions regulate "*future* conduct, a party has standing to seek injunctive relief *only* if the party alleges . . . threat of *future* injury"), *quoting, Wooden v. Board of Regents*, 247 F.3d at 1284. *See also Hoepfl v. Barlow*, 906 F. Supp. 317, 320-21 (E.D. Va. 1995) ("established standing rules preclude a plaintiff from obtaining injunctive relief based only on events that occurred in the past, even if the past events amounted to a violation of federal law").

c. In ADA cases, courts have repeatedly held that a plaintiff *lacks* standing to seek injunctive relief unless the plaintiff alleges facts giving rise to an inference that he will suffer "<u>future discrimination by the defendant</u>." *Shotz v. Cates*, 256 F.2d at 1081 (emphasis added), *citing, Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 830 (D. Md. 1998); *Aikins v. St. Helena Hosp.*, 843 F. Supp. 1329 (N.D. Cal. 1994); *Hoepfl v. Barlow*, 906 F. Supp. 317 (finding that in suits involving injunctive relief, mandate of a "live dispute" translates into a requirement that plaintiff face threat of present or future harm). *See also Blake v. Southcoast Health System, Inc.*, 145 F. Supp. 2d 126, 136 (D. Mass. 2001) (recognizing that beyond the case law, the text of the ADA also directs that Congress "did not intend private litigants to be able to sue for an injunction in cases in which there was only past injury . . . [Instead], Title III's structure gives rise to the inference that Congress intended that private litigants only be able to seek redress for *future* injuries") (emphasis in original).

d. In fact, "[c]ourts in this Circuit addressing the issue have consistently refused to grant injunctive relief absent evidence that the plaintiff actually suffered – and will again suffer – discrimination in violation of Title III." *South Florida Stadium Corp.*, 161 F. Supp. 2d at 1365, *citing, Association for Disabled Americans v. City of Orlando*, 153 F. Supp. 2d 1310, 1322 (M.D. Fla. 2001)(emphasis added); *Resnick v. Magical Cruise Co.*, 148 F. Supp. 2d 1298, 1301 (M.D. Fla. 2001). *See also Hoepfl v. Barlow*, 906 F. Supp. at 323 (recognizing that the few district courts that have faced the issue of injunctive relief under the ADA have all come to the same conclusion – a plaintiff who cannot demonstrate a likelihood that he will again suffer discrimination *at the hands of the defendant*, does not have standing to obtain an injunction under the ADA); *Blake v. Southcoast Health System, Inc.*, 145 F. Supp. 2d at 132-33 (same) (citing cases).

7. When a defendant, during the pendency of litigation, permanently modifies its Property to ensure full ADA compliance – addressing each and every ADA item at issue – then the Plaintiffs' claim for prospective injunctive relief under the ADA is rendered moot. *See Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir. 2001)(a case is moot when it "no longer presents a live controversy with respect to which the court can give meaningful relief"), *quoting, Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993).

a. A claim for injunctive relief becomes moot if: "'(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations.'" *Dow Jones & Company, Inc. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001), *quoting, County of Los Angeles v. Davis*, 440 U.S. 625 (1979). That is, a case is moot "when events subsequent to the commencement of a lawsuit create a situation in which the court can no longer give the plaintiff meaningful relief." *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998).

b. In the context of a claim brought under Title III of the ADA, a case becomes moot when the defendant has performed the modifications complained of. In *Dowling v. MacMarin, Inc.*, 156 F.3d 1236, 1998 WL 398386 (9th Cir.), for example, the district court granted summary judgment to the defendant / restaurant owner after finding the plaintiff's ADA claims had become moot because of defendant's voluntary conduct in modifying its premises. In *Dowling*, the plaintiff brought Title III ADA claims based upon the defendant's failure to modify policies to accommodate the disabled

and failure to make certain structural changes. The defendant, however, thereafter brought the restaurant into full ADA compliance and, as such, mooted the plaintiff's ADA claims. "Analyzing [plaintiff's] direct claims under the ADA, the most important statutory provision is the act's limitations on remedies. At most, a private plaintiff is entitled only to injunctive relief and attorney's fees." *Id.* at *1. As such, by making its renovations, the defendant was found "fully in compliance with the ADA" and plaintiff's request for injunctive relief unavailable. *Id.*

c. For example, in *Matthews v. National Collegiate Athletic Association*, 179 F. Supp. 2d 1209 (E.D. Wash. 2001), the court also granted defendant's motion for summary judgment on standing and mootness grounds, finding that the plaintiff could no longer seek prospective injunctive relief under the ADA since the allegedly discriminatory conditions originally complained of no longer existed. In granting summary judgment, the court recognized that ". . .a plaintiff who files an ADA claim can at most hope to improve access through an injunction." 179 F. Supp. 2d at 1227, *quoting, Fischer v. SJB-P.D., Inc.,* 214 F.3d 1115, 1120 (9th Cir. 2000). Therefore, when access has been improved or barriers removed during the pendency of the case, the Court cannot award any further relief and the matter is deemed to be moot. *Id* at 1228.

8. One of the primary consequences of proving the mootness of an ADA action is that fact that the plaintiff cannot then recover his or her attorneys' fees.

a. Typically, apart from prospective injunctive relief, ADA Plaintiffs also seek to recover their attorneys' fees, expenses, and costs in bringing the litigation. *See* 42 U.S.C. § 12205 (providing that the Court may allow the prevailing party a reasonable attorney's fee, including litigation expenses, and costs). However, Plaintiffs whose claims become moot, are not entitled to an attorneys' fee award as they are not the "prevailing parties".

b. In *Buckhannon Bd. and Care Home, Inc. v. W. Virginia Dept. of Health and Human Resources,* 532 U.S. 598 (2001), the Supreme Court of the United States held that attorney's fees are not awardable under the ADA absent an enforceable judgment on the merits or a court-ordered consent decree. Petitioners in that case argued they were entitled to their attorney's fees under the "catalyst theory" of recovery. The Supreme Court of the United States disagreed, holding that the fee-shifting provisions of the ADA (and FHAA) require either a judgment on the merits or a court-ordered

consent decree. In so holding, the Court rejected the "catalyst theory" of recovery previously available to prevailing Plaintiffs.

(i) Under the catalyst theory, if a plaintiff's lawsuit brought about the voluntary change in the defendant's conduct, then the plaintiff was a "prevailing party" entitled to an attorney's fee award.

(ii) In rejecting the catalyst theory, the Supreme Court insisted upon court-ordered relief for a party to qualify as a "prevailing party" under the ADA. As such, simply because the remedies Plaintiffs sought may have been achieved, Plaintiffs are not prevailing parties absent some relief awarded by the courts.

c. *See also Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002)(applying *Buckhannon* to claims brought under the Equal Access to Justice Act and holding that, where the INS's voluntary conduct resolved Plaintiffs' claims, that conduct was not compelled by the district court and, therefore, plaintiff was not entitled to prevailing party attorney's fees); *New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Commission*, 272 F.3d 154 (2nd Cir. 2001)(applying *Buckhannon* to claims brought under 42 U.S.C. § 1988 and holding that, where subsequent conduct arguably mooted the controversy, the plaintiff was not a prevailing party entitled to attorney's fees). *See also Race v. Toledo-Davila*, 291 F.3d 857 (1st Cir. 2002)(applying *Buckhannon* to affirm the district court's refusal to award an ADA plaintiff a "prevailing party" fee award where there was no judicial declaration in favor of the plaintiff); *Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Dept. of Energy*, 288 F.3d 452 (D.C. Cir. 2002)(applying *Buckhannon* to the fee-shifting provision of the Freedom of Information Act and holding that absent court-ordered relief in favor of Plaintiffs, Plaintiffs are not eligible for attorneys' fees).

IV. Who can be sued under these statutes?

A. Under the FHA, anyone alleged to have committed the statutory violations may be sued. But also, the employer can be liable for employee misconduct, under the theory of respondeat superior and property owners can be liable for acts of real estate agents. *Holly v. Crank,* 258 F.3d 1127, 1131-1132 (9th Cir. 2001); *Walker v.* Crigler, 976 F.2d 900, 9040905 (4th Cir. 1992). Even the builders and architects of buildings that do not comply with the accessibility requirements of the statute have been held to be proper parties defendant. *See Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661 (D. Md. 1998);

Will-Grundy Ctr. for Indep. Living v. Perland Corp. (HUDALJ Feb. 27, 1998)1998 WL 85858.

B. Under the Civil Rights Act, principals are liable for the acts of their agents if within the scope of the agent's apparent authority. *Izard v. Arndt,* 483 F. Supp. 261 (E.D. Wis. 1980). Therefore, if a property owner knows and acquiesces in his real estate broker's discriminatory acts, which were within the scope of his authority, the owner is jointly liable for the broker's conduct. *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344 (W.D. 1982). However, it has been held that absent any personal involvement, an owner of property is not liable for violation of the Act by others concerning that property. *Hollins v. Kraas,* 369 F. Supp. 1355 (N.D. Ill. 1973)

C. Under the ADA, owners, tenants, or persons who operate places of public accommodation may be liable for violations of the act (§ 12182(a)), as well as the owner, president, or sole director of a corporation that owns and operates a place of public accommodation. *U.S. v. Morvant,* 843 F. Supp. 1092 (E.D. La. 1994). A national hotel licensing corporation that licensed, contributed to the design and planning of a hotel has been held liable under the act. *U.S. v. Days Inns of America, Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998).