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Court Refuses to Dismiss Disability Discrimination Case Against New Orleans

[¶ 1.1] A federal district court has refused to dismiss a disability discrimination lawsuit filed by the Justice Department against the City of New Orleans and the Louisiana State Bond Commission.

The lawsuit alleges that the city violated the Fair Housing Act and the Americans with Disabilities Act when it denied a zoning variance to the Gulf Coast Housing Partnership, which wishes to convert a former nursing home into an apartment complex for low-income tenants. The complex, known as the Esplanade, would include "permanent supportive housing" units for persons with disabilities who were formerly homeless. Gulf Coast intends to fund the Esplanade under Louisiana's "Piggyback Program," which funds housing projects through tax exempt bonds, HUD funding, and low-income housing tax credits.

Gulf Coast initiated the Esplanade project in 2009. According to the government's complaint, since that time New Orleans "has taken a series of actions to prevent the construction of the Esplanade" because of community opposition based on the disabilities of prospective tenants. These actions include denying requests for zoning variances three times. In December 2011, the city finally granted Gulf Cost a variance "permitting the Esplanade property to be redeveloped as low-income housing, with an on-site case management office, and without additional off-street parking

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spaces."

In its lawsuit, the Justice Department also alleges that the city and the Bond Commission have taken actions to prevent funding of the project in response to community opposition to housing for persons with disabilities.

The Justice Department filed its lawsuit in August 2012, seeking injunctive relief and compensatory damages for the harm to the developers caused by the city's delay in granting Gulf Coast the zoning variance. New Orleans moved to dismiss the claims against it. The city argued that the court lacked jurisdiction because it had granted the variances and therefore the claims were either not ripe or were moot. It also argued that the government had not stated claims upon which relief could be granted.

District Court Judge Martin Feldman denied the city's motions. He found that the government's claims were ripe because it had established "a plausible set of facts that were not so abstract or hypothetical to warrant dismissal" and the developers may well have incurred specific economic damages. He ruled that the case was not moot because the government was requesting monetary relief for costs incurred during the time that the city delayed the project. He also found that the allegedly wrongful conduct could recur "given that the Esplanade project has yet to receive approved funding." Judge Feldman concluded that the government's complaint "contains sufficient factual matter, on the present record, which accepted as true, states a claim to relief that is plausible on its face." [*United States v. The City of New Orleans*, No. 12-2011, 2012 U.S. Dist. LEXIS 173177 (E.D. La. Dec. 6, 2012)]

Counsel: Harvey Handley III, Dept. of Justice, Washington, DC (United States); Matthew Lindsay, City Attorney's Office, New Orleans, LA (New Orleans)

Court Awards Prevailing Defendants $100,000 in Attorneys' Fees

[¶ 1.2] The prevailing defendants in a reasonable accommodation case have been awarded more than $100,000 in attorneys' fees.

The fees were awarded in a lawsuit brought by Suzanne Taylor, a resident of Harbour Pointe Common, a private community in Buffalo, New York. Taylor states that she has clinical depression. She sued the Harbour Pointe Homeowners Association (HPHA) and the HPHA president for disability discrimination as a result of a dispute regarding her glass-enclosed patio.

According to the defendants, the patio was "in a state of disarray" and was described by some neighbors as a "pigsty." Taylor gave the HPHA president and some of her neighbors permission to move a grill off the patio and to put up trellises to block the view of the patio but said she pre-

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ferred to clean the patio herself. She filed a disability discrimination complaint with HUD and the New York State Division of Human Rights against the HPHA and the HPHA president after some of the members cleaned the patio and moved some of Taylor's possessions to her garage while she was out of town. The administrative agencies made a finding of no reasonable cause because they found "no evidence of [Taylor's] disability or that the accumulation and/or clearing away of clutter is related to a disability."

Taylor then filed a lawsuit against HPHA and its president, alleging, among other things, that they had failed to accommodate her disability in violation of the Fair Housing Act. The court entered summary judgment for the defendants because it concluded that Taylor had never requested a reasonable accommodation. The defendants moved for attorneys' fees, but the district court denied their application because it found that Taylor's discrimination claim was not entirely unreasonable or without foundation.

In August, the Second Circuit affirmed the entry of judgment for the defendants but reversed the denial of the defendants' motion for attorneys' fees. In an opinion written by Judge Barrington D. Parker, the appeals court found that Taylor's claim was "manifestly without merit." Noting that Taylor was a licensed attorney, the appeals court said that even if the administrative proceedings in which DHR and HUD ruled against Taylor had no preclusive effect, "a plaintiff raising 'substantially the same charges' is aware of the possibility that her claim lacks merit and that an award of counsel fees to her adversary may be warranted." The panel said that "the full extent of legal and factual shortcomings laid bare in the administrative proceedings should have been a powerful clue to Taylor, a licensed attorney, that her case had no merit." It remanded the case to the district court to determine the amount of attorneys' fees.

In December, District Court Judge John Curtin awarded the defendants $107,322.00 in attorneys' fees and costs. [*Taylor v. Harbour Pointe Homeowners Association*, No. 11-951-cv (2nd Cir. Aug. 2, 2012); *Taylor v. Harbour Pointe Homeowners Association*, No. 09-CV0257-JTC, 2012 U.S. Dist. LEXIS 173338 (W.D. N.Y. Dec. 6, 2012)]

Counsel: Lindy Korn, Buffalo, NY (Taylor); Alan Bozer, Buffalo, NY (Harbour Pointe Homeowners Association)

Seventh Circuit Rules that Current Drug User Is Not Disabled under Fair Housing Act

[¶ 1.3] The Seventh Circuit ruled in December that a tenant who was a current cocaine user at the time her lease was terminated was not disabled within the meaning of the Fair Housing Act.

Autumn Oliver lived with her minor son in subsidized housing in

South Bend, Indiana. The South Bend Housing Authority sent Oliver a notice of termination of tenancy after she was arrested for cocaine possession. Several weeks after she received the eviction notice, Oliver pled guilty to cocaine possession and entered a substance abuse program. The housing authority filed an eviction action against her in state court. Her minor child then filed a disability discrimination case in federal court, alleging that the housing authority had evicted Oliver on the basis of disability and had refused to make a reasonable accommodation for her disability.

A federal district court dismissed the complaint. The court ruled that Oliver was not disabled within the meaning of the Fair Housing Act or other laws when the housing authority sent the eviction notice because she was a current drug user, even though she eventually entered a drug treatment program.

In an unsigned opinion, a Seventh Circuit panel affirmed the district court. The Seventh Circuit found that Oliver was a current drug user when the housing authority sent her the eviction notice and therefore was not disabled under the Fair Housing Act, the Americans with Disabilities Act, or the Rehabilitation Act. The court also found that the son's complaint had failed to allege discriminatory intent. [*A.B. v. Housing Authority of South Bend, Indiana*, No. 12-2378, 2012 U.S. App. LEXIS 26012 (7th Cir. Dec. 20, 2012)]

Counsel: Kent Hull, Indiana Legal Services Inc., South Bend, IN (A.B.); Michael Palmer, Barnes & Thornburg LLP, South Bend, IN (Housing Authority of South Bend)

Court Will Not Enforce Settlement Made Without Attorneys' Knowledge

[¶ 1.4] A federal judge in November denied a defendant's motion to enforce a settlement agreement in a housing discrimination case in which the defendants had settled directly with two plaintiffs even though the plaintiffs were represented by counsel.

In May, 2012, the Fair Housing Council of Central California and two individual plaintiffs sued Tylar Property Management, Tylar owner Melvin Wappner, and Tylar employee David Evans. The plaintiffs alleged that the defendants engaged in a "pattern and practice of discrimination and sexual harassment against women renters of their properties." The plaintiffs were represented by Brancart and Brancart and the defendants were represented by Wanger Jones Helsley PC.

Approximately one month after the lawsuit was filed, Evans contacted each of the individual plaintiffs and arranged to meet with them without their attorneys. Although the defense attorneys were also not present, Evans presented the plaintiffs with settlement agreements that had been prepared by those attorneys. In exchange for immediate cash payments, the individual plaintiffs signed the settlement agreements. One plaintiff

agreed to settle her claims for $5,000 and the other plaintiff received $15,000. The defendants then filed a motion to enforce the settlement agreement and dismiss the case.

District Court Judge Anthony Ishii denied the defendants' motion. He found that the circumstance under which the communication took place between the defendants and plaintiffs with regard to the settlement amounted to a "take it or leave it" offer and involved "precisely the kind of circumstances that, given Plaintiffs' situation, might have created a coercive environment." The court also considered that the plaintiffs did not have the benefit of legal counsel during the negotiations and that defendants had never informed the plaintiffs' counsel of the negotiations even though "*Defendants themselves* could not even prepare the settlement agreements without assistance of counsel. . . ."

Judge Ishii rejected the defendants' argument that the plaintiffs should be required to return the cash payments, which they no longer had, as a precondition of maintaining the litigation. He permitted the litigation to go forward, but retained jurisdiction to order the plaintiffs in the future to return the monetary payments or offset them in a potential recovery in the lawsuit. [*Fair Housing Council of Central California v. Tylar Property Management Co., Inc.*, No. 1:12-cv-00794-AWI-GSA, 2012 U.S. Dist. LEXIS 165890 (E.D. Cal. Nov. 19, 2012)]

Counsel: Christopher Brancart, Brancart and Brancart, Pescadero, CA (plaintiffs); Michael Helsley, Wanger Jones Helsley, Fresno, CA (defendants)

HUD May Enforce Administrative Subpoena

[¶ 1.5] A federal district judge refused in March to enjoin HUD from enforcing an investigative subpoena against the developers of an apartment complex in Salem, Oregon.

In 2009, the Fair Housing Council of Oregon (FHCO) filed an administrative complaint with HUD charging that McVick LLC and JDV Corporation had discriminated on the basis of disability by not complying with the design and construction requirements of the Fair Housing Act with regard to a 12-unit apartment complex in Salem, Oregon. HUD subsequently served McVick and JDV with a subpoena so it could inspect the interior of the property, including the common areas and the interiors of the four ground floor units.

In response, McVick and JDV filed a lawsuit, asking the court to enjoin HUD from enforcing its subpoena. They argued that FHCO lacked standing to bring its administrative complaint; that HUD's action was barred by the statute of limitations; that they would suffer irreparable harm if HUD conducted its inspections; and that it was in the public interest to prevent "untimely public enforcement of private complaints against owners of public housing."

District Court Judge Anne Aiken

denied the plaintiffs' motion for a temporary restraining order and a preliminary injunction. She ruled that FHCO had standing to bring its HUD complaint and that it had filed its complaint in a timely manner. She found that the plaintiffs had not raised "any colorable indications of irreparable harm likely to be incurred" as a result of the inspections and held that the public interest did not "tip in plaintiffs' favor." [*McVick, LLC v. United States Department of Housing and Urban Development*, No. 6:12-cv-01664-HO, 2012 U.S. Dist. LEXIS 16100 (D. Ore. Nov. 8, 2012)]

Counsel: James Vick, Salem, OR (McVick); Adrian Brown, Office of U.S. Attorney, Portland, OR (HUD)

African American Woman Ordered to Close Home Daycare States Race Claim

[¶ 1.6] An African American woman who operated a home daycare stated a race discrimination claim against the homeowners association that directed her to close her business.

Elizabeth Fielder lived in the Sterling Park community in Auburn, Washington. The homeowners association's covenants, conditions and restrictions had a no-commercial-business clause; however, the community operated under a guideline that permitted "invisible" businesses. Fielder, who is African American, operated a home daycare pursuant to this guideline for more than ten years.

In 2009, Fielder began taking care of the children of an African American couple. The mother of the children was Muslim and wore a head scarf and non-Western clothing. When Fielder began caring for this family's children, several neighbors started to come outside to watch the mother pick up her children. According to Fielder, neighbors began to congregate when her clients came to her house. She alleged that they blocked her driveway, photographed the clients and children, yelled at them, and engaged in other harassing behavior. In response to a complaint filed by a homeowner, the homeowners association sent Fielder a letter of complaint and a second letter directing her to close the daycare.

Fielder filed a race discrimination complaint with HUD and the King County Office of Civil Rights (OCR). OCR made a finding of reasonable cause. The homeowners association board then changed its regulations to permit only businesses that had fewer than four persons coming to the property each day. Fielder's daycare did not comply with this regulation.

Fielder sued the homeowners association and individual members of the association, alleging violations of the Fair Housing Act, 42 U.S.C. §§ 1981 and 1982, and state law. The individual defendants moved to dismiss, arguing that they enjoyed immunity as individual board members. The defendants also filed a motion to strike pursuant to Washington's anti-SLAPP statute which permits "a special motion to strike any claim that is based on an action involving public participation . . . ."

District Court Judge Ricardo Martinez denied the motions. He ruled that the individual board members did not have immunity from the discrimination claim because Fielder pled "facts sufficient to infer that [they] were personally involved in the alleged discrimination and that they acted with discriminatory intent." He also rejected their argument that Fielder's lawsuit violated Washington's anti-SLAPP statute. This statute prohibits lawsuits "brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress" and may be brought to strike a claim "that is based on an action involving public participation and petition." Judge Martinez ruled that Fielder's lawsuit "did not target protected activity as intended by the statute" and did not involve acts of public participation. [*Fielder v. Sterling Park Homeowners Association*, No. 11-1688RSM, 2012 U.S. Dist. LEXIS 174750 (W.D. Wash. Dec. 10, 2012)]

Counsel: Jesse Wing, MacDonald Hoague & Bayless, Seattle, WA (Fielder); Shellie McGaughey, Gulliford McGaughey & Dunlap, Bellevue, WA (Sterling Park)

Partial Summary Judgment Granted in Reasonable Accommodation Claim

[¶ 1.7] A federal district judge ruled in December that a condominium association constructively denied a resident's request for a reasonable accommodation by continuing to demand additional documentation after the resident provided three letters from his doctor documenting his needs. However, the court ruled that a disputed issue of material fact remained as to whether the resident was disabled within the meaning of the Fair Housing Act.

Ajit Bhogaita, who is a military veteran, has post-traumatic stress disorder, chronic anxiety, and depression. Bhogaita is a resident of Altamonte Heights Condominium in Altamonte Springs, Florida. In 2009, he obtained an emotional support dog that exceeded Altamonte Heights' 25-pound limit for dogs. At the request of the condominium association, he submitted three letters from his treating physician documenting his need for his emotional support dog. However, the association requested additional documentation from his doctor, including the exact nature of his disability, specific details of his treatment, documentation as to how his disabilities limited his major life activities, why a smaller dog would not sufficiently provide him with the equal opportunity to enjoy his unit, and detailed documentation about the dog's training.

Bhogaita filed disability discrimination complaints with HUD and the Florida Commission on Human Relations, which made reasonable cause findings. Bhogaita also filed a lawsuit against the association. Both the association and Bhogaita filed motions for summary judgment.

District Court Judge Gregory Presnell entered partial summary judgment for Bhogaita. He found that the

three letters from Bhogaita's doctor that Bhogaita submitted to the association were sufficient to establish his need for the accommodation he requested and that the fourth request made by the association "clearly went beyond the score of a 'reasonable inquiry.'" However, Judge Presnell also found that a material issue of fact remained as to whether Bhogaita's disability substantially limited the major life activities of working and interacting with others as he alleged. Judge Presnell noted that "[w]ith only sporadic periods of unemployment, Plaintiff worked in various call centers as a technical support person for several different companies from 2000 until August 2010" and "presumably, [he] was required to interact with co-workers and customers at each of these jobs." Judge Presnell concluded that neither party was entitled to summary judgment on this issue. [*Bhogaita v. Altamonte Heights Condominium Association*, No. 6:11-cv-1637, 2012 U.S. Dist. LEXIS 178183 (M.D. Fla. Dec. 17, 2012)]

Counsel: Aaron Bates, the Maher Law Firm, Winter Park, FL (Bhogaita); Gregory Ackerman, Cole, Scott & Kissane, PA, Orlando, FL (Altamonte Heights)

Recent settlements

[¶ 1.8] The following settlements have been reached.

■ The Justice Department announced in January that Community State Bank of St. Charles, Michigan, (Community State Bank) will invest $165,000 in predominantly African American neighborhoods in the Saginaw, Michigan, area as part of a settlement resolving a lawsuit in which the government alleged that the bank had engaged in a pattern or practice of race discrimination in violation of the Fair Housing Act and the Equal Credit Opportunity Act (ECOA).

The United States charged that Community State Bank, which operates eight full service banks serving the Saginaw metropolitan area and the Flint, Michigan, Metropolitan area, as well as adjacent non-metropolitan areas, met the credit needs for residential real estate loans in predominantly white census tracts, but "avoided serving the similar credit needs of census tracts with substantial African-American populations."

Under the terms of the proposed consent order filed with the court on January 15, Community State Bank will invest a minimum of $75,000 in a special financing program that will offer affordable loans to residents of majority African American census tracts. The program will include loan subsidies and closing cost assistance. The bank will also spend a minimum of $75,000 to develop partnerships with one or more community-based or government organizations that provide credit, financial, homeownership, and/or foreclosure prevention services in predominantly African American census tracts and $15,000 for outreach to promote its products in African American areas. Community

State Bank employees and agents will participate in fair lending training.

Community State Bank has not admitted liability. [*United States v. Community State Bank*, No. 1:13-10142 (E.D. Mich. Jan. 15, 2013) (consent order filed)]

Counsel: Daniel Mosteller, Dept. of Justice, Washington, DC (United States)

■ The owner and manager of five Long Island apartment complexes agreed to settle a lawsuit filed by Long Island Housing Services Inc. (LIHS). In the lawsuit LIHS alleged that Main Street L.I. LLC and Bradford Mott violated the Fair Housing Act, the New York State Human Rights Act, and local law by discriminating against persons with disabilities.

The lawsuit, which was the result of a multiyear investigation that included the use of testers, alleged that the defendants steered applicants for housing with disabilities away from apartments, provided false information to applicants with disabilities, and quoted higher rents to apartment seekers with disabilities. According to LIHS, Main Street and Mott also impermissibly denied requests for reasonable accommodations and reasonable modifications and refused to waive pet fees and surcharges for service dogs.

Under the terms of the settlement agreement, Main Street and Mott will pay LIHS a total of $136,000 in damages and attorneys' fees. They have agreed to implement nondiscrimination and reasonable accommodation policies. Employees and agents of the defendants will complete a fair housing training program. Tenants with disabilities who were charged pet deposits, pet fees, or transfer fees will be informed that they may apply for a refund of these fees. [*Long Island Housing Services v. Main Street LI LLC*, No. 2:11-cv-01210 (E.D.N.Y. Jan. 10, 2013) (settlement agreement filed)]

Counsel: Diane Houk, Emery Celli Brinckerhoff & Abady, LLP, New York, NY (Long Island Housing Services); Kevin Mulry, Uniondale, NY (Main Street LI LLC)

Recent filings

[¶ 1.9] The following cases have been filed.

■ The Fair Housing Justice Center (FHJC) and three FHJC testers have sued the NASA Real Estate Corporation and Irfan Bekdemir, alleging that they discriminated on the basis of race in the rental of housing in a building in Queens, New York.

According to the complaint, NASA Real Estate Corporation owns a 107-unit apartment building at 41-41 46th Street in Sunnyside, Queens. Irfan Bekdemir was the building superintendent. FHJC charged that African Americans who inquired about vacancies at the building were told no apartments were available while whites were "welcomed and encouraged to become residents. . . ." FHJC alleges that Bekdemir told black testers that no apartments were available and that he did not handle leasing. He sent black testers to a real estate

agent who told them he could find them apartments elsewhere. On the other hand, Bekdemir told white testers, sometimes within one hour of talking to the black testers, that there were available apartments. He immediately showed them apartments and offered to lower the rent for "nice people" such as the white testers.

FHJC and the individual plaintiffs charge that Bekdemir and NASA have violated the Fair Housing Act and the New York City Human Rights Law. They seek declaratory and injunctive relief, compensatory and punitive damages, and attorneys' fees. [*Fair Housing Justice Center v. NASA Real Estate Corporation*, No. 1:12-cv-04994 (E.D.N.Y. Dec. 5, 2012)]

Counsel: Elizabeth Saylor, Emery Celli Brinckerhoff & Abady LLP (FHJC)

■ The United States has filed a disability discrimination lawsuit against the Rockford Villa Apartments in Rockford, Minnesota. The lawsuit alleges that Rockford Villa; Laurie Holasek, the Rockford Villa owner; and Rachel Stepanek, the manager of Rockford Villa, violated the Fair Housing Act by refusing to make reasonable accommodations for a tenant with an assistance animal.

According to the complaint, Maria Hicks lived at Rockford Villa with her partner, Brian Garity. Hicks has severe heart failure, depression, anxiety disorders, and panic attacks. Hick's doctor prescribed an assistance animal for Hicks, and she obtained a small dog. She requested permission to have her dog in the second floor apartment as a reasonable accommodation for her disabilities; however, Holasek told her that she could not have a dog in her second floor apartment because pets were only allowed on the first floor. Holasek refused to accept a doctor's letter as documentation that the dog was necessary and told Hicks that she had to vacate her apartment.

Hicks and Garity filed a discrimination complaint with HUD, which issued a charge of discrimination. The Rockford Villa respondents elected to have the case resolved judicially and the Justice Department filed a complaint in federal court on behalf of Hicks and Garity. [*United States v. Rockford Villa*, No. 12-cv-02782 –DSD-JSM (D. Minn. Nov. 1, 2012)]

Counsel: Ann Bildsten, Assistant U.S. Attorney, Minneapolis, MN (United States)

■ The Justice Department sued the owners and managers of the Rosewood Park Apartments in Reno, Nevada, alleging that they discriminated on the basis of disability. The lawsuit was filed on behalf of Silver State Fair Housing Council, Inc., and Joyce, Greg, and Josh Ruano.

The government alleges that Rosewood maintains policies that discriminate against persons with disabilities who use assistance animals. According to the complaint, these policies "include but are not limited to: limiting individuals with assistance ani-

mals to a particular section of Rosewood Apartments; subjecting such individuals to pet fees; and barring uncertified service animals altogether." The Justice Department alleges that Rosewood employees told testers from Silver State that service dogs for tenants with disabilities needed to be certified or they would be treated as pets and tenants would have to pay a pet deposit and additional monthly rent. The individual complainants were told that dogs had to be "red coat certified" to live at Rosewood.

The complaint alleges that the respondents failed to make reasonable accommodations and discriminated on the basis of disability in violation of the Fair Housing Act. The government is seeking declaratory and injunctive relief, a civil penalty, and an award of monetary damages for the Ruanos and Silver State Fair Housing Council. [*United States v. Rosewood Park, LLC*, No. 3:12-cv-00605 (D. Nev. Nov. 15, 2012)]

Counsel: Jessica Crockett, Dept. of Justice, Washington, DC (United States)

■ The National Fair Housing Alliance (NFHA) has filed a discrimination complaint with HUD against the Allstate Insurance Company, challenging Allstate's policy of not insuring homes with flat roofs in the Wilmington, Delaware, area. NFHA alleges that Allstate's policy has a disparate impact on African American homeowners and other homeowners of color. According to NFHA, these homeowners are "significantly more likely to live in areas with a concentration of homes with flat roofs." [*National Fair Housing Alliance v. Allstate Corporation*]

Counsel: Stephen Dane, Relman, Dane & Colfax, Washington, DC (National Fair Housing Alliance)

■ The National Fair Housing Alliance (NFHA), The Fair Housing Center of Central Indiana, and HOPE Fair Housing Center (Wheaton, IL) have sued the developers, managers, and owners of four multifamily housing developments in Kentucky, Illinois, and Indiana. According to the complaint, Buckingham Realty and Development Corporation and the other defendants "have engaged in a continuous pattern or practice of discrimination against people with disabilities in violation of the [Fair Housing Act] by designing and/or constructing multifamily dwellings" in violation of the design and construction requirements of the act. The plaintiffs seek injunctive relief and monetary damages. [*National Fair Housing Alliance v. Buckingham Realty and Development Corporation*, No. 1:2012cv01793 (S.D. Ind. Dec. 7, 2012)]

Counsel: Stephen Dane, Relman, Dane & Colfax, Washington, DC (National Fair Housing Alliance)

In This Report

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FILING INSTRUCTIONS

File this report bulletin on top of Bulletin 12, December 2012.

Fair Housing-Fair Lending invites and welcomes submissions from our readers. Please send recent decisions, settlements, other news of interest, and suggestions to Carolyn Bayer, Editor; fairhousing.fairlending@gmail.com; 1101 Vermont Ave., NW, Suite 710, Washington, DC 20005; Fax (202) 371-9744. If possible, please include the case name, number, and court, and the names of the attorneys involved.