Chapter 5
Risk Management

Overview: The real estate agent is a practicing expert in the area of marketing. This skill enables the agent to sell, exchange or lease all types of real property. The public, however, views the agent as being an expert in numerous other fields, such as jurisprudence, termite investigation and structural engineering, to name a few. Risk management is important to the licensee. When risk is properly managed, the agent has limited his liability to the areas of marketing, property representation and fiduciary relationships. It is in these areas that the licensee must present himself accountable. Risk management means exactly what it says. The agent manages his risk by making appropriate disclosures and encouraging the use of others with trained knowledge in contracts, financing, structural engineering, vermin extermination, surveying, title defects, etc.

Learning objectives: As a result of studying this chapter, you should be able to:
- List common causes for legal actions taken against real estate agents.
- Recite several methods used for managing risk.
- Analyze supreme court findings which help understand risk and liability.
- List mistakes made by agents in the area of risk management.

Common Causes for Legal Actions Against Licensees
Nondisclosure of agency.
Numerous Iowa case actions reveal nondisclosure of agency as an issue when working with the public. In Rodenchirch vs. Layton, the broker secretly collected a commission from the buyer and the seller in the same transaction. It would be better stated that the broker "tried" to collect from both parties since he was unsuccessful in his attempts to do so. The Iowa Supreme Court found the broker guilty of dual agency. They ignored the broker's defense that only one party eventually paid commission. This blatant nondisclosure by the broker cost him his commission and damaged his business reputation. The broker learned the hard way to always make full written disclosure of agency relationships to all parties in the transaction.

Misrepresentation.
One of the quick and easy ways to lose your real estate license is to substantially misrepresent a property. The case law is endless of agents who refused to give a clear and accurate picture of the property's condition.
A good risk management lesson could be learned from Lone Star Machinery Corp. vs. Frankel. The agent made numerous inaccurate statements about the property. He said the house was constructed of white stone when it was really constructed of brick. He said the floor was marble when it was terrazzo (a milled, poured and polished marble product). He represented the fireplace screen as having 24 karat gold ornamentation when it did not. He said the ceilings were 16 feet tall when they were 13.5 feet tall. The house contained 4,970 square feet when the broker promised it had 7,180 square feet!
The broker was, however, exonerated since the buyer was allowed free access to the property, viewed the actual blueprints and specifications of the property on five different occasions and was, himself, a builder.
The lesson to be learned from this case is the value of allowing the buyers full access to view the property. Inspections by the buyer can limit a licensee's risk in misrepresentation actions against the agent.

Ask yourself these questions:
- How accurate are the listing cards that you have submitted to the multiple listing service?

- Do I encourage the buyer to view the entire property to secure accurate information about the property?
- What are the chances my prospective purchasers are building contractors who are trained in reading blueprints, plan specifications and understand structural engineering?

In **Easton vs. Strassburger**, the broker was held responsible for failing to inform the buyer of red flag indicators of property defects. The buyers purchased a $200,000 home which later suddenly settled eight (8) feet into the ground. The home was estimated to only be worth $19,000 in salvage value in its sunken condition. The broker did not inform the buyers of cracks in the breezeway floor between the house and the garage and that the green netting in the back yard (and throughout the neighborhood) was used to control erosion. For these reasons, the broker was hit with a judgment for 5% of the purchasers' total loss (the sellers and builder received 95% of the judgment). The court reasoned the broker should have mentioned the reasons for the netting and that the breezeway cracks could be indicators of unstable soil or an improperly engineered and compacted building lot.

Today, in Iowa, much of this risk is placed on purchasers. Read the following Rules and Regulations from Iowa statutes: 543B.56 Duties of Licensees.

1. Duties to all parties in a transaction. In providing brokerage services to all parties to a transaction, a licensee shall do all of the following:
    A. Provide brokerage services to all parties to the transaction honestly and in good faith.
    B. Diligently exercise reasonable skill and care in providing brokerage services to all parties.
    C. Disclose to each party all material adverse facts that the licensee knows except for the following:
        1. Material adverse facts known by the party.
        2. Material adverse facts the party could discover through a reasonably diligent inspection, and which would be discovered by a reasonably prudent person under like or similar circumstances.
        3. Material adverse facts the disclosure of which is prohibited by law.
        4. Material adverse facts that are known to a person who conducts an inspection on behalf of the party. . . (end of Iowa Code 543B)

Red Flags

You should inform purchasers of red flag indicators of property defects.

What would be the red flag indicators of:

Faulty septic systems? Answer: standing water; pools of soapy, perfume-smelling, waste water on surface soils; age of system; solid waste in the distribution box, plus others.

Faulty furnaces? Answer: age of furnace; cracked heat exchanger; discoloration of walls near heat registers; moisture on window surfaces during the heating season (other than bathroom and kitchen windows), plus others.

Carbon monoxide (CO) poisoning ? Answer: recurring headaches and nausea while in the home; death of resident, plus others.

Dangerous swimming pool underwater light? Answer: swimmers complaining of skin sensations but only when swimming, plus others.

Do-it-yourself seller repairs? Answer: there is no evidence of a building permit allowing on-site improvements; non-licensed contractors perform repairs; quality of work, plus others.

Differential settlement in the foundation of the home? Answer: doors falling open or shut; doors unable to shut properly; beds must be shimmed to lay flat; uneven floors; spilled milk running to kitchen table edge, plus others.

Fraud

Fraud means deceit.

The sellers artfully patched and painted a cracked boiler and passed it off as being in excellent condition. This was fraud.

The builder failed to inform the buyers that the house was built on muck. The house separated from the garage and patio and pool. The builder was deceitful in not telling the buyers the truth about the property. (Ramel vs. Chasebrook Construction Co.)

The buyers asked the sellers if their basement flooded during rain storms. The sellers said "no" and mentioned their reason for selling was to take a promotion on the East Coast. The day the buyers relocated to the sellers' property, the basement flooded during a casual rain shower. Neighbors said the property had a history of flooding whenever it rained. The sellers were found to have moved only three blocks away; their reason for selling was to dispose of their defective home. This was fraud.

Negligence

Could the licensee become entangled in the above mentioned web of deceit? Certainly!

The agent handed a well and septic certification to the buyer without comment. The seller had deceitfully altered this certification to indicate that both systems were working properly. Because the agent handed the certification to the buyer without comment (suggesting he get his own experts to verify the information), the broker was held partially responsible for the buyer's loss. Always urge purchasers to substantiate the truthfulness of any information received directly or indirectly from sellers.

Unauthorized Practice of Law

Courts have never compiled a definition for the "unauthorized practice of law." It would appear that, giving advice which an attorney is trained to give, would probably require a law license. Some say that if you don't charge for the legal advice you give, it would not be the unauthorized practice of law. This logic fails since more people would be attracted to one giving free advice. More harm of every sort would injure the public if this loop-hole was sanctioned. Wisely, you should defer clients and customers to lawyers for answers to legal questions.

A real estate broker discouraged a buyer from obtaining an abstract continuation. The property he purchased required additional sums of money to redeem the property from foreclosure; bringing the abstract down to date would have saved the buyer from financial harm. (Riley vs. Bell) It is never wrong to suggest a title search (or appraisal, or title opinion, or additional insurance, or survey, or flood elevation search, or zoning verification, etc.) but always wrong to discourage it.

Certain professionals discouraged their clients from using a lawyer. Punitive damages were awarded a client for numerous wrongful acts, including discouraging the use of a lawyer. (Syester vs. Banta)

A loan was granted between friends. The *lenders* sought help from a real estate broker, asking: "protect our money." The broker had certain mortgages and deeds of trust drawn to secure their interest. The broker was guilty of the unauthorized practice of law since it was a lawyer's job to prescribe the documents which would best protect loaned/borrowed money.

Generally, a real estate licensee may fill in blanks in simplified leases and purchase agreements without coming within the unauthorized practice of law. Thankfully, this is where most money is made in real estate brokerage: obtaining ready, willing and able tenants and purchasers. The real estate professional would be best advised to: 1) let attorneys construct notes, deeds, long term leases, mortgages, options and long term land contracts/installment sales. 2) continue to seek ready, willing and able purchasers/tenants.

Lawyers are trained to protect their clients against all forms of harm. Lawyers are trained to predict the worst case scenario and protect against any legal harm. Should a attorney act wrongfully, they are subject to disciplinary proceedings instituted by the Iowa Supreme Court. Finding a good lawyer may be difficult, but be swift to encourage your clients and customers to use their services.

Chapter Six
Trust Accounts and Property Management

Overview: The trust account is one of the most brilliant inventions of all times. Trust accounts were invented to protect customer/client money from the holder's (agent, lawyer, fiduciary, etc.) creditors. When a broker holds money in a trust account, that money is safe from levy by the creditors of that broker. In the real estate business, a client's money may not be taken from the trust account to satisfy the broker's bills, IRS liens and judgments. Certain rules and laws have been established for the maintenance and protection of this fiduciary account. The breach of these rules could result in discipline, often including license revocation.

Learning objectives: As a result of studying this chapter you should be able to:

- List numerous laws discussing trust accounts.
- Explain numerous rules and regulations pertaining to trust accounts.
- Answer important questions about trust accounts.

The format of this chapter is Question and Answer. I have condensed the most significant laws and rules pertaining to trust account rules and regulations. You are encouraged to view the actual laws and rules on your own. Check out the Iowa Real Estate Commission web-site.

1. What are the locations at which you may maintain a trust account? Answer: Any institution insured by FDIC..
2. Must trust accounts, most ordinarily, be interest bearing? Answer: Most often, trust accounts must be interest bearing.
3. How often should interest be transferred to the state on interest bearing accounts? Answer: Quarterly.
4. What information regarding the trust account must the broker inform the Iowa Real Estate Commission? Answer: The broker must inform the Commission of the name of the account, the name of the financial institution, the address of the financial institution and the account number.
5. Who audits trust accounts? Answer: Commission employees.
6. What farm accounts are exempt from audit? Answer: All property management accounts (farm, multi-family residential, strip shopping centers, etc.) maintained in the name of the owner *and* the broker are exempt from audit.
7. How much of the broker's personal funds may be kept in the trust account? Answer: the broker may keep a sum of money that does not exceed $1,000 in the trust account to cover bank service charges relating to the trust account.
8. Is it true that the Commission may require a special audit or report on some trust accounts? Answer: Yes.
9. What word must be in the title of all trust accounts? Answer: Trust.
10. May the words "trustee" or "escrow" replace the word "trust" in the account's title? No.
11. A non-refundable retainer has been given to the broker. If the broker and the principal agree, may this money be placed in an account separate from the trust account? Answer: Yes.
12. What is the longest waiting period permitted by law before the broker must place the trust funds into the trust account? Answer: No later than five banking days after the date indicated on the document that the last signature of acceptance of the offer, rent, lease, exchange, or option is obtained.
13. If buyer and seller agree in writing, may the broker hold the check for a period of time to exceed the five banking day period? Answer: Yes.
14. May money belonging to others be invested in any type of fixed-term maturity account, security or certificate without the written consent of the party or parties to whom the money belongs? An-

swer: No.

15. A broker does not have sufficient personal funds in the trust account to pay bank service charges. What privilege does the law afford the broker? Answer: Upon notification that the broker's personal funds are not sufficient to cover service charges initiated by the bank, that are above the normal maintenance charges, the broker shall deposit personal funds to correct the deficiency within 15 days of the closing date of that bank statement.

16. At what moment must the broker withdraw his commission from the trust account? Answer: At the moment the transaction closes.

17. What expenses may not be paid from the trust account? Answer: Commissions (other than the listing broker), salaries, related items and normal business expenses shall not be disbursed directly from the trust account.

18. What must the broker include when sending trust account interest directly to the state? (assume the bank is not sending the interest to the state) Answer: The broker must include the applicable bank statement (s) showing the interest paid and service charges attributable to maintaining the account.

19. May the broker receive interest on money held for another person? Answer: No.

20. May the interest be paid to the buyer, seller, landlord or tenant if the transaction documents give written permission to do so? Answer: Yes.

21. If my property management trust account is separate from real estate transaction funds, must it be interest bearing? Answer: No.

22. How often shall the property management broker provide to the client a complete accounting of all monies received and disbursed from the trust account(s)? Answer: no less than annually.

23. A broker may maintain one or more separate trust accounts. What must the broker send to the Commission for each account? Answer: A consent to examine and audit trust account.

24. May an active real estate broker close an account should the broker not have or expect to receive trust funds: Answer: Yes, but if the broker receives trust funds after notifying the Commission of trust account closure, the broker must immediately open a trust account and send pertinent papers to the Commission according to the law.

25. What two(2) divisions must each trust account possess? Answer: Each trust account must have a journal (general ledger) and transaction ledgers (account ledgers).

26. The buyer and seller have given the broker written consent to allow the broker to withdraw her commission several days before the closing. Is this permissible? Answer: No. The commission may only be paid from the trust account at the time of closing.

27. The transaction will never close as the parties have abandoned their sales contract. May the broker withdraw trust funds sufficient to pay the commission? Answer: No. Since there will be no closing and because commissions may only be withdrawn at the time of closing, the commission may not be disbursed from the trust account. The broker must look to the listing agreement/client for compensation.

28. What must the broker possess to pay funds from the trust account after the closing? Answer: Escrow agreements.

29. After what period of time shall unclaimed trust funds be transferred to the State of Iowa in accordance with Iowa Code 556? Answer: Three (3) years.

30. A licensee is buying or selling property personally owned by the licensee. Under what circumstances will the licensee not be required to deposit the transaction monies into the broker's trust account? Answer: When a broker, broker associate, or salesperson is acting as a principal in the sale, rental, lease, or exchange of property owned by the licensee, the use of the broker's trust account is not required if all of the following exist:

A. The sale, rental, or exchange is strictly, clearly and totally a "by owner" transaction;

B. No commission or other compensation is paid to or received by the licensee;

C. The licensee does not function as a real estate licensee in any capacity throughout the transaction.

31. I am still in doubt whether I should deposit transaction monies into the broker's trust account when purchasing, selling or leasing my own property. What should I do? Answer: The safest course of action is to account for those funds through the broker's trust account.

32. For what period of time must the broker keep all trust account records? Answer: Five (5) years.

33. The listing broker has elected to close the transaction. The selling broker (cooperating broker) has accepted cash for earnest money from the buyer on the listed property. What is the proper procedure for the selling broker to follow? Answer: The selling broker must deposit the cash into the selling broker's trust account (according to Commission rule) and immediately transfer those funds on a trust account check to the listing broker.

34. What would the answer be to questions #33. if the selling broker received a check payable to the listing broker's trust account? Answer: The selling broker would simply deliver this check to the listing broker with the offer who would deposit check according to Commission rule; the selling broker would not (neither could he) deposit it into the selling broker's trust account, being made payable to listing broker.

35. May a post-dated check or NSF check be accepted without the seller's permission as earnest money? Answer: Maybe, but two conditions must exist: 1) the broker must verbally *tell* the seller the check status (post-dated; NSF), and 2) the offer must *state* the check status (post-dated; NSF).

36. What if the parties to the transaction prefer that an investment be purchased with the earnest money? Answer: Other forms of investment (e.g., CD's, money market certificates, etc.) are securities and are handled as disbursements prior to the closing. The Commission recommends the earnest money be deposited into the main trust account. The informed written consent should specify: the type of security to be purchased; identify who will hold the security; and identify who will benefit from the interest earned. The funds are then transferred to a separate individual trust account. When the security is cashed, the money should be re-deposited into the main trust account and the closing would then be held in the usual manner.

37. If the buyer and seller decide to go directly to an attorney, and the buyer makes out a check to the seller and hands it directly to the attorney or seller, do I have to maintain any records of the check? Answer: Yes and no. Do not record as "trust funds" into your ledgers. However, you are required to furnish a complete, detailed closing statement to the seller and to the buyer showing an itemized account of the transactions, which would include the check being held by a third party, the attorney.

38. What is the difference between "deposits in transit" and "funds to be deposited?" Answer: Deposits in transit have already been deposited into the trust account, but do not appear on the bank balance statement. Funds to be deposited have not been received by the bank for deposit.

39. What information is known by the bank, as revealed by the bank statement, but not known by the broker? (assume the broker does not have on-line access to the account) Answer: The bank statement reveals: cleared deposits, cleared checks, interest earned, service fees, account balance, check printing charges, over-draft charges, bad check fees and sales tax on the service fees.

40. What information does the broker possess which is unknown to the bank? Answer: The broker knows: the general ledger balance, the individual ledger balances, all deposits (including: funds to be deposited and deposits in transit), and all checks that have been written.

41. How often must the broker complete the monthly reconciliation of the trust account? Answer: Monthly.

42. What is the "3-Way Tie" to be proved by the monthly reconciliation of the trust account? Answer: The general ledger must equal the individual ledgers which must equal the bank balance (plus funds to be deposited plus deposits in transit plus out-standing checks plus irregularities).

43. The broker has taken a diamond ring (title to a boat; elevator receipt for 5,000 bushels of corn, gold or silver bullion, rare coins, etc.) as earnest. How is this handled in Florida? (Florida has procedures for this situation; Iowa does not) Answer: The broker would open a "trust safe-deposit box" for property other than money. The safe-deposit box must indicate the word "trust." Only follow these instructions after verifying this information with your attorney.

Monthly Reconciliation Statement— Three (3) Way Tie

(unofficial form; not approved or adopted by the Iowa Real Estate Commission)

Account Title: _____ Account Number: _____

Date: _____ Bank Statement Date: _____

Broker/Firm Name: _____ Bank Name: _____

Step #1 Inspect Bank Statement for
miscellaneous charges/income
—(make sure your Journal and Individual Ledgers have these items posted to them, if applicable)—
charge: Overdraft charges?
charge: Service charges?
charge: Check printing charges?
charge: Bad check fee?
charge: Sales tax on service charge?
income: Interest earned on account?

Step#2
Journal (General Ledger)
Balance: $_____

Step #3
Individual / Transaction Ledgers
(this will mostly be earnest money and property mgt. money)

1. _____ $_____
2. _____ $_____
3. _____ $_____
4. _____ $_____
5. _____ $_____
6. _____ $_____
7. _____ $_____
8. _____ $_____
9. _____ $_____
10. _____ $_____

Total Individual/ Transaction Ledgers:
$_____

Step #4
Compare Journal with Individual Ledgers

Journal: $ _____

(subtract) **Individual Ledgers**:- $_____

Variance: $_____

Prepared by: _____ date: _____
Reviewed by: _____ date: _____

Step #5
Bank statement balance (last month)
$_____

Step #6
Bank statement balance (current month)
$_____

Step #7
Money to be Deposited (not yet at bank):
$_____
$_____
$_____
Total Money to be Deposited: $_____

Step #8
Deposits in Transit
(at bank but not on current bank statement:
$_____
$_____
$_____
$_____
Total Deposits in Transits: $_____

Step #9
Outstanding Checks (not on bank statements)
Check # _____ Amount: $_____
Check # _____ Amount: $_____
Check # _____ Amount: $_____
Check # _____ Amount: $_____
Check # _____ Amount: $_____
Total Outstanding Checks: Amount: $_____

Step #6 $_____
Add: Step #7 + $_____
Add: Step #8 + $_____
Subt: Step #9 - $_____
= $_____

Compare this number to Steps #2 & #3

Chapter 7
Environmental Legislation

Overview: Numerous state and federal agencies oversee the environment. These agencies have been given authority to enforce laws designed to insure clean water and safe living conditions.

Learning Objectives: As a result of studying this chapter, you should be able to:
- Recall requirements of numerous state and federal agencies which enforce environmental laws.
- Recite numerous types of hazardous substances.
- List essentials of Phase 1, 2 and 3 Studies.

With enactment of state and federal environmental protection laws, an owner of real estate faces the specter of cleanup costs if hazardous substances or waste are found upon the subject property. If the owner is the one who permitted or was, himself, the one responsible for the presence of such material on his property, exaction of cleanup costs seems only right, but if one has purchased property without being aware of, and not having been informed of, the presence of hazardous material on the property, cleanup costs add immeasurably to the initial cost of the property and it may be years, if ever, before the innocent owner can recover such costs from the prior owner or owners. While some purchasers prefer to get out from under the obligation before it attaches, others have sought to recover from their vendors for having foisted upon them, the innocent purchasers, the cost and inconvenience of the cleanup, and the consequent delayed enjoyment and use of the property. (from 12 American Law Reports 5th 630)

Definition: Hazardous Waste/Hazardous Substance.
15 USCS 1261(f): any substance or mixture of substances which is toxic, is corrosive, is an irritant, is a strong sensitizer, is flammable or combustible, or generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use.

Examples of Hazardous Substances.
asbestos asphalt solvents benzene stack emissions ethyl benzene gasoline hydrocarbons kerosene lubricating oil polychlorinated biphenyls (PCBs) toluene turpentine urea-formaldehyde foam insulation xylene

Government Agencies:
CERCLA: Comprehensive Environmental Response, Compensation and Liability Act, 1980 (commonly called: Superfund).

SARA: Super Fund Amendments and Reauthorization Act 1986.

EPA: Environmental Protection Agency.

RCRA: Resource Conservation and Recovery Act 1976.

DNR: Department of Natural Resources.

Wetlands
Wetlands is administered by the U.S. Army Corp. of Engineers; Section 404 of the Clean Water Act. The U.S. Army Corp. of Engineers has defined wetlands as: "those areas that are inundated or saturated by surface or ground water (either fresh or salt) at a frequency and duration sufficient to support vegetation adapted for life in saturated soil conditions. Wetlands include such areas as: swamps, marshes, bogs, estuaries, certain unique pond systems, and inland and coastal shallows." Care should be taken as part of the *due diligence* process to determine whether property is now or has ever been in the past included in regulated wetlands. A purchaser may incur liability for restoration or mitigation of unpermited fill activities by the previous owner, even when the purchaser was

unaware of the unpermitted activities (from Real Estate Law, Concepts and Applications, Theron R. Nelson; Thomas A Potter, West Publishing, Minneapolis, Minnesota)

Case Studies

H.E.P. Dev. Group, Inc. vs. Nelson 606 A2d 774

Purchaser alleged that the vendors, who were aware that the purchasers intended to subdivide the land and sell residential lots, were liable for intentionally failing to disclose the existence of gasoline contamination in well water on the property; the court affirmed the judgment. After purchasing the property, the purchasers discovered that the land across the road had been contaminated 10years earlier by a leaking underground gasoline storage tank located on that neighboring property. The purchasers then drilled a single test well on the portion of its land that lay directly opposite the previously contaminated property, and the state Department of Environmental Protection found that the level of hydrocarbon contamination made the water unsafe for human consumption. The vendors, in an affidavit filed in support of their motion for summary judgment, denied any knowledge of the contamination of their own or their neighbor's groundwater. The neighbor testified only that he assumed the vendors knew his land was contaminated but could not remember ever telling them, and that not even he had known that the contamination had spread to the vendors' land. The court explained that there was no evidence beyond mere speculation that the vendors knew of any contamination on their property, and if they did not know of the contamination, then they certainly could not intentionally fail to disclose that fact, let alone actively conceal it.

McGregor, et al., vs. Industrial Excess Landfill, et al.,

Private plaintiffs who asserted that they had suffered property damage and personal injuries as a result of contamination of the air, ground, and water supply caused by environmental emissions from a landfill brought an action against the operators and several users of the landfill, asserting claims under 7002 and 7003 of the Resource Conservation and Recovery Act and 106 and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, as well as claims under state law. The defendants filed motions to dismiss the actions for failure to state a claim for which the court had federal subject matter jurisdiction.

The United States District Court for the Northern District of Ohio, Eastern Division, Bell, District Judge, granted the defendants' motion to dismiss. The court held that, while 7003 of the RCRA authorizes the Administrator of the Environmental Protection Agency, upon receipt of evidence that the past or present handling of any solid waste or hazardous waste may present an imminent or substantial endangerment to health or the environment, to bring suit on behalf of the United States, there is no provision which expressly creates a private right of action for the public, and there is nothing to indicate that Congress implicitly authorized private suits under 7003, since Congress specifically addressed the role of private actions under RCRA by enacting the private enforcement provisions in 7002. The public role under 7003, the court held, is limited to a right of participation in the public meeting after the Administrator has filed suit and prior to the entry of any settlement or consent decree with the alleged violators. . .there was no legislative intent to provide the public with a right to bring an action under 7003. . .the remaining state claims must be dismissed for lack of subject matter jurisdiction. (12 ALR 5th 654)

Phase Studies

To limit liability when purchasing property possibly contaminated with hazardous waste, buyers should complete one or all of the evaluations listed below.

ROLE OF PHASE I EVALUATION

Phase I is frequently referred to as a preliminary evaluation, or initial screening assessment. This phase involves a review of reasonably available information to determine the need and range of analytical review and testing of a site. Typically a Phase I assessment will consist of a review of public records, a site visit, a review of environmental records maintained by the company operating the site, interviews and questionnaires with personnel familiar with the site on its prior uses and operations, and comparison of past aerial site photographs with current site photographs. The Phase I assessment will also address the potential for contamination occurring from adjacent properties. A typical Phase I investigation will require approximately four weeks and range in cost from $3,000 to $10.000.

ROLE OF PHASE II EVALUATION

If the Phase I review turns up evidence of possible site contamination or violations of environmental laws, then Phase II inves-

tigation is justified. The Phase II investigation would be tailored to the results reported from the Phase I investigation. Although there is no standard definition of what constitutes a Phase II assessment, the courts have ruled that unless the thoroughness of the investigation is appropriate with the level of suspicion caused by the Phase I assessment, an innocent landowner defense is not allowable. The elements of a Phase II investigation include soil sampling, water sampling (including ground and surface water if there is a pond, creek, stream, or lagoon on the property), laboratory analysis of any soil and water samples, and testing of any underground storage tanks. It is not feasible to test for every possible contaminant in every location of a site; thus this phase should sample at the locations suggested for the possible contaminants listed in the Phase I review. This assessment can take from 5 to 15 weeks and can cost from $10,000 to more than $50,000. Deep groundwater monitoring can substantially increase the costs of this investigation.

ROLE OF PHASE III EVALUATION

If, after completing a Phase II investigation and learning a site is contaminated, the purchaser still wants to continue with the acquisition process, provided that the proper terms can be reached, a Phase III evaluation is warranted. A Phase III evaluation involves performing a detailed evaluation of a known contaminated site for purposes of executing a remedial cleanup action. The purchaser and seller can decide to clean up the property before closing the transaction, the seller can pay for the cost of cleanup after the purchaser has taken possession, or the seller can discount the property enough to entice the purchaser to assume the risk of cleanup. The assessment generally takes an extremely long time because the remediation of the contamination usually takes place in accordance with a remedial action plan approved by the lead government agency. (Phase I, II and II information from Real Estate Law, Concepts and Applications, Theron R. Nelson; Thomas A Potter, West Publishing, Minneapolis, Minnesota)

Environment Contingencies

(Ask your lawyer if these contingencies are appropriate for your transactions.)

Conditions for sale—Environmental Concerns

Anything to the contrary in this agreement notwithstanding, the obligation of buyer to consummate the closing of this transaction is subject to and conditioned on the satisfaction at or prior to the closing of the following condition precedent. Buyer shall receive evidence satisfactory to buyer that the property has not been used for the handling, treatment, storage, or disposal of any hazardous or toxic substance, as defined under any applicable state or federal laws or regulations, including, but not limited to the Comprehensive Environmental Response Compensation and Liability Act, as amended, and regulations under this Act, and analogous laws and regulations of _____ (state).
(from: 77 AmJur 2d Vendor and Purchaser |10)

Approval of environmental impact statement as condition to sale—Preparation and Submission

Purchaser shall immediately prepare an environmental impact statement for the construction of the _____ [shopping mall or apartment building or as the case may be] in accordance with the plat, plan, and specifications prepared for purchaser by _____ [name of architect] and shall submit the statement to _____[designate agency or agencies to which statement must, by law, be submitted]. Seller shall at all times cooperate with purchaser in the preparation of the statement, and shall provide access to the property at all reasonable times as may be necessary for collecting data for preparation of the statement. If the statement is not approved, as originally submitted or as amended, on or before _____[date], this contract shall terminate and be of no further effect. (from: 77 Am Jur 2d, Vendor and Purchaser |10)

Chapter 8
Civil Rights Legislation

Overview: A major source of liability for real estate agents lies in the area of illegal discrimination. Not all discrimination is illegal. In this chapter, you will be reminded of numerous laws which prohibit illegal discrimination.

Learning Objectives: After studying this chapter, you should be able to:
- List laws which prohibit illegal discrimination.
- Recite key events in the history of illegal discrimination laws and case law.
- State practical ways to remain innocent of unlawful practices.

It was one of the quickest laws to ever be passed into law by the United States Congress. The Civil Rights Act of 1866 allowed all persons to own and inherit property regardless of their race or color. Unfortunately, this law, once passed, was not enforced and consequently fell dormant in its effectiveness. About 100 years later, a real estate transaction in St. Louis, Missouri, brought renewed attention to this law. A man of Black descent, Jones, was prevented from purchasing a certain home in a neighborhood by its builder, The Alfred H. Mayer Co. The U.S. Supreme Court enforced the 1866 law ignoring arguments that dormant laws could not be enforced. The court responded that badges of slavery still remain in our society. Persons of African-American descent had to go about their lives using separate railway coaches, certain parks, designated cafeterias and differing restrooms and golf courses. A federal court judge had held a certain minority witness in contempt when she refused to answer the judge's questions; he had called her "Mary" even after her request to be called "Miss Jones." Since badges of slavery still existed in America the need for enforcement of the 1866 Civil Rights Act was clear.

Even before the "Jones" case, courts were starting to notice certain unfair housing practices. In Los Angeles, neighbors brought action against a seller who sold to a minority ignoring the deed restrictions against such sales. The court reasoned that to enforce such restrictions would require the seller to name a higher price to minorities as the seller would be liable for a judgment and would need to pay a cash settlement to the neighbors.

State and Federal law soon prohibited discrimination based on race, color, creed, national origin, religion and gender (Title 8, 1968). More recent 1988 amendments to this law included handicap/disabilities and familial status (the presence of anyone under age 18). Municipalities possessed power to add other protected area; some cities have added sexual preference, age and marital status. You should compare federal, state, county and city laws for areas of discrimination in housing. The most restrictive category prevails. For example, if the state of Iowa does not prohibit discrimination in a certain area, but your county or city does identify the area of discrimination as protected, the more restrictive law prevails. Iowa currently identifies the following areas as protected: race; color; creed; sex (gender); sexual orientation; gender identity; religion; national origin; disability; familial status. This list also applies to the friends, guests and visitors of the renter or occupant. I do not see in this list the protected area of: marital status. If Iowa does not protect against marital status discrimination but your county or city does, the more strictly enforced list of protected areas prevails.

The Iowa Civil Rights Commission has "retaliation" as a protected area. (See their Chart of protected areas in housing.) If a tenant has been evicted for making a *valid* complaint about the rental unit being sub-standard compared to building codes, a prospective landlord may not discriminate because the tenant was evicted under an illegal retaliatory eviction. Ask your attorney if this is the proper interpretation of this protected area.

Housing and Urban Development has developed new areas of protection for government insured loans. The initials "L G B T" stand for: lesbian, gay, bi-sexual and transgender. These new protected areas apply to lenders providing government insured loans. Some agencies ad the letter "Q" for "questioning" whether the applicant would be included in the LGBT classifications.

Section 109 of the Housing and Community Development Act of 1974provides that no person shall, on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity supported in whole or in part with funds made available under Title I of the Housing and Community Development Act of 1974. Every locality participating in Community Development Block Grant, Urban Development Action Grant and Section 312 Rehabilitation Programs must provide assurances that it will administer its assisted programs and activities in a manner that will affirmatively further fair housing. In addition, each recipient locality must take action to affirmatively further fair housing in the sale, rental or financing of housing and provision of brokerage services.

Agent conduct that protects against allegations of discrimination
In Seaton vs. Sky Realty, the agent falsified the availability of the home. The real estate agent should never falsify availability of property.

In United States vs. Hunter, the owner of a newspaper allowed illegal ads for rental homes. One ad described the property as a "white" home. When it was verified that the landlord sought white occupants (and that "white" did not describe the color of the home's exterior siding), the newspaper owner maintained the ad was legal because of constitutional guarantees of free speech. The court agreed that newspaper editorials were protected free speech platforms but not the classified advertisement section of the newspaper. The real estate professional should never use illegal advertisements.

It was noticed by State Realty in Atlanta, Georgia, that a minority had purchased a home in a certain white neighborhood. Seizing the opportunity, State Realty sent its agents throughout the neighborhood soliciting listings. These agents said that property values plummeted because of the color change in other areas. Only one family listed and sold their property. State Realty was sued for blockbusting. The real estate company couldn't comprehend how blockbusting could occur when the neighborhood was not busted, besides, " . . .only one neighbor move away." the Federal Court responded that any attempts to break up the neighborhood using such threats were construed blockbusting whether or not the attempts were successful. The professional real estate agent will never attempt to engage in blockbusting.

When practicing real estate the agent should become "color blind" to all protected areas of discrimination. Any customer inquiry into the race, religion or disabilities within a neighborhood should be met with staunch objection from the agent. The agent should seriously reconsider whether a continued business relationship with such a customer might incriminate the agent, hinder the goals and purposes of fair housing laws or violate his own conscience.

When must a complaint be filed?
Housing complaints must be timely file. This means complaints must be filed within 300 days (old law said 180 days) of the alleged incident when filed under 601A Iowa Code with the Iowa Civil Rights Commission, or within one year when filed under Title VIII Federal law with the United States Department of Housing and Urban Development. Complaints filed under the Civil Rights Act of 1866 on the basis of race are filed in civil court with a private attorney and must be filed within two years of the alleged incident.

The Americans with Disabilities Act 1990

The Fair Housing Act applies only to residential real estate. The Americans with Disabilities Act, signed into law on July 26, 1990, prohibits discrimination based on disability in employment, provision of government services, transportation provided by public or private entities, places of public accommodation and commercial facilities, and telephone services available to the public. Title III, which went into effect on January 26, 1992 (and extended to even the smallest companies on January 26, 1993), requires places of public accommodation and commercial facilities to remove architectural barriers where it is "readily achievable."

Alterations begun after January, 1992, must be made accessible to the "maximum extent feasible." Exceptions will be granted only when it is "virtually impossible" to comply with the standards. New construction is held to a higher standard, and exceptions are allowed only when they would be "structurally impossible" in those rare instances when unique features of terrain prevent the incorporation of accessibility features.

The Justice Department regulations established priorities for removing architectural barriers: 1) providing access from sidewalks or parking areas, 2) providing access to those areas where goods or services are offered to the public, 3) providing access to restroom facilities, and 4) other measures necessary to provide full access. The guidelines that implement the act are specific and require, for example, doorways to be of adequate width (generally 36 inches or more); ways provided to circumvent stairs and heavy doors; adequate parking for disabled within short distances of buildings; furniture arrangements that allow clear paths to all service points and restrooms; adequate restroom facilities; and avoiding the use of separate entrances and elevators, which may tend to segregate the disabled. The Act also provides for monetary damages for individual victims of discrimination, including out-of-pocket expenses and pain and suffering. (The above three paragraphs from: Real Estate Law; Concepts and Applications. West Publishing; Nelson and Potter, authors. Pgs. 384,385)

Chapter 9
Other Laws Affecting the Practice of Real Estate

Overview: Numerous other laws affect the practice of real estate in Iowa. The following section gives brief overviews of these laws highlighting aspects critical to professionalism and lawful compliance.

Learning Objectives: As a result of studying this chapter, you should be able to:
- List important finance laws pertaining to credit expenses and loan closing costs.
- Recite key areas of the Iowa Uniform Landlord and Tenant Act.
- State key issues covered by the antitrust laws.

RESPA—Regulation Q
The Real Estate Settlements Procedures Act requires lenders to disclose certain closing costs. Federally insured lenders and makers of FHA and VA loans are required to comply. Loans that are *exempt* include second mortgages, contract sales and loan assumptions for which less than $50 is charged.

Lenders must make full disclosure of settlement costs at the time of closing but allow the purchaser to see actual closing costs at least 24 hours before closing, if they request. Lenders distribute booklets called "Settlement Costs" which describe the law in full. Lenders may not give kickbacks to real estate professionals who refer certain purchasers to the lender for mortgage lending purposes.

Truth-In-Lending Act— Regulation Z
This law provides guidelines for extenders of credit to disclose their true lending rate to prospective borrowers. Certain loan costs must be included in the true rate (called the Annual Percentage Rate) so that borrowers may shop and compare rates at competing lenders. Costs included in the A.P.R. are costs which may benefit the lender, such as: discount points, the interest rate of the loan, credit life insurance, loan origination fees, application fees, and other fees. Fees not included in the A.P.R. calibration are legal fees, abstracting fees, flood insurance, homeowners insurance and others which will not directly benefit the lender.

Claims against lenders are limited by a three year statute. In the famous "Beach vs. Ocwen Federal Bank," the circuit court of the 15 Judicial Circuit of Florida agree that under ~1640 (Code of Federal Regulations) the Beaches were entitled to "off-set the amount owed to Great Western" by $396.00 in actual damages and $1,000.00 in statutory damages because the bank had overstated the monthly mortgage payment by $0.58 and the finance charge by $201.84. But the court rejected the Beaches' effort to rescind the mortgage under ~1635 (C.F.R), holding that the loan at issue was immune to rescission as part of a "residential mortgage transaction" . . .and, in the alternative, that any right to rescind had expired after three years, in 1989.

TRID
Beginning Oct. 1, 2015, "TRID" replaced the customary Truth-In-Lending and RESPA laws. Essentially, TRID was a modified merger of the previous consumer protection laws governing real estate home loans on four or less units. "T" stands for Truth-In-Lending; "R" stands for RESPA ; "I" stands for integrated, and "D" stands for disclosure.

The HUD-1 statement has been replaced by an "integrated" disclosure with goals of helping consumers better understand loan costs and interest rates. Specific time lines for disclosures and rescission rights are prescribed to help in consumer protection. Example: under the old law, the borrower did not always

have 3 days to rescind the loan; under the TRID law it is almost always mandatory the borrower have 3 days to rescind the proposed financing.

Comment #1: in one recent closing, the HUD-1 closing statement was used since no financing was involved in this cash closing.

Comment #2: it was projected that new TRID laws would delay closings for 14 or more days because of the complexity of law compliance. My students have not experienced this delay as bankers have gained proficiency using the law.

Comment #3: a banker friend informed me of costs involved instituting TRID requirements. His initial cost was approximately $16,000 for software plus annual renewal costs. His printed version of the TRID law was about 2,000 pages. He has a designated employee as the TRID expert.

Comment #4: mostly unknown, the old Truth-In-Lending law had a standard printed form allowing borrowers to waive the 3-day rescission period. TRID also allows the borrower to waive the 3-day period but has no standard printed form, must be done using the borrowers' own handwriting and used only in the advent of extenuating circumstances or emergencies.

Equal Credit Opportunity Act

Until the passage of this law, most bankers would only accept the husband's income for loan qualification purposes (even disregarding higher earnings made by the wife). Some gave the wife a lower score than the husband on a gender score card. Some ladies would be asked about family planning practices and birth control techniques. Because of age, it might be assumed by lenders that the wife would drop out of the job market due to child bearing or child nurturing.

This law prohibits the above mentioned practices. Additionally, extenders of credit may not discriminate because of race, sex, creed, national origin, age, disability, marital status or because the applicant's income may be partially generated by welfare assistance. A lender may discriminate if the applicant lacks legal capacity to contract, which would be true of non-emancipated minors. A lender may discriminate because of low credit score, a history of collection problems or lack of job tenure plus others. Lenders may, not *must*, forgive foreclosures or bankruptcies caused by extenuating circumstances.

Uniform Residential Landlord and Tenant Law: Iowa Code 562A

Until the passage of this law, it was said that tenants in Iowa had only one right: *the right to pay rent.* This law provides duties and privileges for both landlords and tenants. The landlord has a duty to provide essential services including water, hot water and heat in reasonable amounts. The tenant has duties to keep the premises as clean as its condition permits (e.g., plumbing fixtures) and must allow the landlord access with at least 24 hours notice but during reasonable hours. The tenant must only use the premises for residential purposes and uses incidental to living. Newer modifications to this law allow the landlord to evict a "clear and present danger" tenant for certain violations of Iowa Code 562A within 1,000 feet of the premises. Please note that Iowa Code 562B is nearly an identical law and focuses on manufactured and mobile homes.

Some topics covered in Iowa Code 562A include:

⇒ Termination notices by landlord and tenant.
⇒ Accelerated termination notices.
⇒ Duty to repair.
⇒ Information on security deposits.
⇒ Illegal/prohibited lease provisions.
⇒ Proof of injury.
⇒ Mitigation of damages by aggrieved parties.
⇒ Exceptions to the law.
⇒ Retaliatory evictions.

Major Antitrust Acts

American business and enterprise are protected by the antitrust laws. Antitrust laws prohibit monopolies, price fixing and boycotts. Having lived in a foreign country, you would immediately notice the business freedom and ease at which you can engage in business in the United States. Listed below are the major antitrust laws, their date of implementation and a brief description of their purpose.

1890 **Sherman Antitrust Act:** outlaws monopolies as well as contracts, combinations and conspiracies that restrain trade.

1914 **Clayton Act:** regulates price discrimination, tying contracts, exclusive dealing arrangements, requirements contracts, reciprocal deals and acquisition of stock of another company.

1915 **Federal Trade Commission Act.** Declares unfair methods of competition to be illegal; establishes the Federal Trade Commission.

1936 **Robinson-Patman Act** prohibits sales that discriminate in price on the sale of goods to equally-situated distributors when the effect of such sales is to reduce competition.

Foreclosures in Iowa

Foreclosure law originated by Iowa statehood in 1846 (probably earlier when Iowa was part of the Wisconsin Territory). Modifications have been made to foreclosure law during difficult economic times, including: the Great Depression (foreclosure actions were delayed 3 years); the 1980's (the Prairie Fire movement allowed foreclosed upon farmers a 5 year right of repurchase; home purchasers a 3 year right of redemption because of mortgage alienation clause violation); the late 1980's (voluntary and involuntary foreclosures/non-judicial foreclosures—similar to contract forfeitures); the present (foreclosures with or without right of redemption. Note: in actuality, the foreclosure without redemption places a 60 day or 180 day or one year "stall" period before the sheriff's sale).

Foreclosures must be done in exact accordance with the law. The foreclosure steps are: Default; Acceleration; Petition; Judgment; Sheriff's Sale; Redemption (sometimes); Sheriff's Deed. The process must comply with state law and established case law. Foreclosures are thrown out of court if even a minor technicality of the law is broken.

Legislation Designed to help Distressed Homeowners

Program (source: Wall Street Journal, 12/12/11)	Launched/ Announced Date:	Goal Amount Allocated:	Results Funds Spent:	Shortcomings
Home Affordable Modification Program (HAMP)	2009	Modify 3 to 4 million home loans to make them more affordable. $19.1 Billion	883,076 modification (as of 12/12/11). $1.64 Billion	Mortgage companies completed twice as many modifications outside of HAMP compared to within HAMP.
Hardest Hit Fund	2010	Help 500,000 unemployed/under-employed in 18 states and D.C. avoid foreclosure with forgivable loan for 6 to 24 months. $7.6 Billion	18,946 homeowners helped through 9/12/11. $660 Million	The program took longer than expected to start.
Home Affordable Foreclosure Alternatives (HAFA)	2010	Encourage short sales and Deeds-in-lieu-of foreclosure. $4.1 Billion	20,701 completed through 10/11; mostly short sales. $70,000	Lender could collect more money and do more outside the government program.
Emergency Homeowners Loan Program (EHLP)	2010	Help 30,000 homeowners facing foreclosures because of lost jobs / reduced income in 32 states plus Puerto Rico. Forgivable loan. $1 Billion	Less than 12,000 homeowners filed by deadline. Half of funding returned to Treasury because of slow allocations. $432 Million	Organizational delays disqualified many applicants.
FHA Short Refinance	2010	Help 500,000 to 1.5 million Homeowners refinance to lower-interest FHA loans. $8.1 Billion	334 refinances through 9/11. $50 million	Loan company unwilling to forgive 10% of principal loan balance as required. Loan holders don't forgive loan balance when loans are current.
Principle Reduction Alternative (PRA)	2010	Encourage mortgage owners to forgive principal with a HAMP modification. $2 Billion	53,323 trial modifications started through 10/11 $0	Mortgage servicers don't have to offer borrowers a principal reduction even if calculations improve loan owner profitability.
Second Lien Modification Program (2MP)	2010	Eliminate 2nd lien if 1st lien modified under HAMP. $100 Million	50,434 modifications started through 10/11. $50 Million	Program started slowly; hard to match 1st lien with 2nd lien; differences in address spelling prevented accurate identification.
Home Affordable Refinance Program (HARP)	2009	4 million to 5 million home loans backed by FNMA or FHLMC to lower interest rates. (No Federal spending involved)	928,570 loan modifications by 9/11. (No Federal spending involved)	Program did not adequately reduce risk to lenders for homeowners with little/no equity.