



## LEGAL PULSE NEWSLETTER

### First Quarter 2018

Welcome to the *Legal Pulse* Newsletter. The *Legal Pulse* examines legal liability trends affecting real estate professionals. This newsletter reviews recent case decisions and legislative activity from the first quarter of 2018 in the areas of Agency, Property Condition Disclosure, and RESPA. In this edition, we also review Employment case decisions and legislative activity from the past twelve months.

Breach of fiduciary duty was raised in multiple Agency cases this quarter. An interesting theme that runs throughout the Agency cases this quarter is the extent to which a licensee's duties and rights are implicated by the terms of the agreement governing their relationship with the client or the real estate transaction. Although many of a licensee's obligations with respect to a customer are defined by statute, regulation, or common law, contractual duties may also come into play. In the legislative area, the Virginia licensing statutes were amended to require real estate teams to obtain a business entity salesperson's license. Teams were also the subject of amended regulations in Mississippi, which set out rules for team advertising. In Kansas, the official forms regarding agency disclosure were modified.

Only one Property Condition Disclosure case was retrieved this period. In that case, the court determined that a broker and brokerage firm were not liable for allegedly providing incorrect information about the nature of a parking lot sold with a commercial building. The broker had no actual knowledge of incorrect information and the purchaser could not have relied on any false statements because the legal description of the property was attached to the purchase agreement. Regarding legislative and regulatory activity, an amended Virginia statute will require development of a form advising purchasers to review the residential property disclosure statement posted online. An amended Iowa statute will prohibit local governments from imposing additional requirements not found in state law on real estate transactions. Iowa also amended its rules regarding delivery of the property condition disclosure statement.

The RESPA cases address familiar topics. In a series of cases from Maryland, the plaintiffs brought claims based on an alleged referral scheme between various financial institutions and a title company. The court determined that those claims were barred by the one-year statute of limitations. Similarly, a Pennsylvania federal court concluded that a RESPA claim based on a captive reinsurance scheme was also barred by the statute of limitations.

In the first quarter of each year, we review decisions in the Employment context from the past twelve months. Consistent with last year, the cases from this past year predominantly involve independent contractor issues. In all three of the cases, the court or administrative entity was tasked with assessing whether a licensee was an employee or independent contractor of a broker or real estate company.

For the details, read the summaries below, and check out the tables showing cases and liability figures to learn more about recent trends in real estate law.

## I. AGENCY

In all three of the agency cases discussed below, the courts examined the interplay between a broker or licensee's actions, duties, and rights and the duties and rights required or not required under the terms of an agreement governing the parties' relationship and/or the real estate transaction.

### A. Cases

1. **Ross v. Lindley**, No. TJS-17-0115, 2018 WL 950017 (D. Md. Feb. 20, 2018)

***Broker and licensee did not have a duty to conduct a background check on tenant.***

A property owner entered into an agreement with a brokerage firm to lease three residences on the property. After the tenant defaulted on the lease, the property was foreclosed upon. The property owner sued the broker and licensee for failing to conduct a background check on the tenant. The property owner claims that the licensee and broker breached the agreement, were negligent, and withheld information; and that the broker failed to supervise the licensee.

The court determined that the agreements did not require the broker and licensee to conduct a background check, so the defendants did not have a contractual duty to do so. There was also

no negligence because brokers and licensees do not have any legal duty to conduct background checks. Also, because the licensee produced all material information in her possession, there was no constructive fraud. The court granted summary judgment in favor of the broker and licensee.

2. **Weinberger v. Intero Real Estate Services, Inc.**, No. C080462, 2018 WL 476347 (Cal. Ct. App. Jan. 19, 2018)

***Listing broker could be liable for mismanaging the resale list for the resale of time share interests.***

The owners of a Lake Tahoe time share entered into a listing agreement with the defendant broker to sell their time share interest. The sellers claim the broker breached the listing agreement by allowing other owners to sell their interests before the plaintiffs. The sellers and other owners of time share interests were subject to a resale agreement that required the sellers to use the broker for the resale of their interest, and allowed only one fractional interest sale for every four fractional ownership interests in a three-bedroom unit that the owner sold. The sellers also alleged that the broker breached its fiduciary duty to them.

The trial court dismissed the claims on the ground that the broker was not a party to the resale agreement. On appeal, the appellate court found there was evidence that the broker allowed another party to sell an interest ahead of the plaintiff-sellers. The appellate court noted that the listing agreement incorporated the rules of the resale program. There was also evidence of self-dealing and failure to disclose material facts related to the resale and management of the resale list. Accordingly, the appellate court reversed dismissal of the claims.

3. **Brandon v. Marcus & Millichap Real Estate Investment Services, Inc., et al.**, No. B276540, 2018 WL 1324787 (Cal. Ct. App. Mar. 15, 2018)

***Broker and licensee could enforce arbitration clause contained in purchase agreement because agreement identified them as agents of the seller and purchaser.***

After the purchaser of an apartment building was sued for defaulting on the loan, he filed suit against the broker and salesperson who had represented both parties in the transaction. In this decision, the issue was whether the broker and licensee could require the claim to be decided in arbitration pursuant to the arbitration clause in the purchase agreement. The broker and licensee did not sign the agreement.

The trial court determined that the broker and licensee could not enforce the arbitration clause because they were not signatories to the purchase agreement. The appellate court concluded otherwise. According to the appellate court, the broker and licensee could enforce the clause because they were identified in the agreement as agents of the purchaser and seller. The appellate court reversed the trial court's order denying arbitration.

## B. Statutes and Regulations

### *Kansas*

Kansas revised the official forms issued by the Real Estate Commission, including the brochure relating to agency relationships. A brokerage firm may either use the Commission document or design a brochure that contains at least the same information contained in that document.<sup>1</sup> The required addendum to be used by transaction brokers was also amended,<sup>2</sup> as was the official form to obtain consent for direct negotiation.<sup>3</sup>

### *Mississippi*

New rules regulating real estate teams were adopted in Mississippi. The rules state that teams are composed of members who all work under the direct supervision of the same Principal Broker.<sup>4</sup> Teams must appoint one member to be the Team Leader and must be registered with the Mississippi Real Estate Commission.<sup>5</sup>

### *New Mexico*

The New Mexico Real Estate Commission amended the rules regarding the duties of a broker. The amended rules clarify that a broker has a duty to disclose in writing all agency relationships with any party to a transaction.<sup>6</sup>

### *Virginia*

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<sup>1</sup> [K.A.R. 86-3-26](#) (effective March 16, 2018).

<sup>2</sup> [K.A.R. 86-3-27](#) (effective March 16, 2018).

<sup>3</sup> [K.A.R. 86-3-28](#) (effective March 16, 2018).

<sup>4</sup> [Miss. Reg. Part 1601 Ch. 3 Rule 5.5](#) (effective July 1, 2018).

<sup>5</sup> *Id.*

<sup>6</sup> [N.M. Admin. Code tit. 16, § 61.19.8](#) (effective January 1, 2018).

The Virginia Legislature amended the real estate licensing statutes to address real estate teams.<sup>7</sup> The new laws require teams to obtain a business entity salesperson’s license. The amended law also sets out the duties of supervising brokers.

The Legislature also passed a law that states that that it is not a breach of fiduciary duty for a licensee to obtain a translation of real estate documents for a client.<sup>8</sup> No fee may be charged for procuring a translation.

C. Volume of Materials Retrieved

Agency issues were identified 8 times in 7 cases (see Tables 1, 2). Breach of Fiduciary Duty was the most commonly raised issue, while Designated Agency and Other issues were also addressed in cases this quarter. Two Agency statutes and five regulations were retrieved this quarter (see Table 1).

II. **PROPERTY CONDITION DISCLOSURE**

In the Property Condition Disclosure case retrieved this quarter, the court considered whether a broker and brokerage firm could be liable for allegedly providing incorrect information about the nature of a parking lot sold with a commercial building.

A. Cases

1. **H & S Building Investments, LLC v. Irani**, No. 1-17-0614, 2017 IL App. (1<sup>st</sup>) 170614-1 (Dec. 29, 2017)

*Claim dismissed because there was no evidence that broker and his employer knew parking lot was actually two separate tracts of land.*

The purchasers of a commercial building allege that the broker and his brokerage failed to provide correct information about the property and an adjoining vacant lot. Purchaser entered into two separate transactions to purchase the building and the vacant lot. After closing, the purchaser learned that the fenced-in parking lot consisted of two separate tracts of record, and

<sup>7</sup> [Va. Laws Ch. 223](#) (effective January 1, 2019).

<sup>8</sup> [Va. Laws Ch. 39](#) (effective July 1, 2018).

that the purchaser had purchased only one-half of the lot. Purchasers allege that the broker incorrectly indicated the entire lot was for sale.

The complaint did not allege that the broker knew the property was less than the entire fenced-in lot. The broker had no duty to disclose facts about which they had no actual knowledge, and a licensee does not have a duty to undertake an investigation for hidden defects. Furthermore, the legal description of the property was attached to the purchase agreement, so the purchaser could not have relied on any false statement by the broker. The appellate court affirmed dismissal of the claims.

#### B. Statutes and Regulations

##### *Iowa*

The Iowa Legislature passed a law prohibiting local governments from adopting ordinances that require compliance with any action or payment of any fee before property may be refinanced or conveyed.<sup>9</sup>

The Real Estate Commission amended its rule relating to the electronic delivery of a property condition disclosure statement. The delivery will not be deemed complete until the transferor receives written acknowledgment that the statement has been received.<sup>10</sup>

##### *Virginia*

An amended Virginia statute<sup>11</sup> will require the Real Estate Commission to develop a form advising parties to a real estate transaction to review the property condition disclosure form on the Commission's website.

#### C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified in 1 case (*see* Tables 1, 2). The case addressed the issue of boundaries. Two statutes and one regulation regarding Property Condition Disclosure issues were retrieved this quarter (*see* Table 1).

### III. RESPA

This quarter, a number of RESPA cases again addressed claims based on captive reinsurance schemes and a kickback scheme involving referral fees between a title company and various

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<sup>9</sup> [Iowa Laws Ch. 1013](#) (effective July 1, 2018).

<sup>10</sup> [Iowa Admin. Code r. 193E-14.1\(543B\)](#) (effective May 2, 2018)

<sup>11</sup> [Va. Laws Ch.60](#) (effective July 1, 2018).

financial institutions. In many of the cases discussed below, the claims were barred by the one-year statute of limitations.

A. Cases

1. **Menichino v. Citibank, N.A.**, No. 2:12-CV-58, 2018 WL 502728 (W.D. Pa. Jan. 19, 2018)

***RESPA claim alleging improper captive reinsurance scheme barred by the statute of limitations.***

Borrowers claimed that the lender’s participation in a captive reinsurance scheme violated RESPA’s anti-kickback provision. Under the alleged scheme, the lender created a subsidiary company to serve as reinsurer. Borrowers were required to obtain mortgage insurance, and the lenders would refer homeowners to the insurers, who then gave a kickback to the reinsurers, which was owned by the lender. The borrowers allege this scheme was effectively a form of collusion in violation of RESPA.

The trial court noted that disclosures provided to the borrowers at the time of closing indicated that the reinsurance entity could be an affiliate of the lender. As such, the statute of limitations began to run at the time of closing, and equitable tolling did not apply. The court held that the claim was barred by the statute of limitations and entered judgment for the lender.

2. **Dobbins v. Bank of America, N.A.**, No. RDB-17-0540, 2018 WL 620456 (D. Md. Jan. 30, 2018); **Edmondson v. Eagle National Bank**, No. RDB-16-3938, 2018 WL 582514 (D. Md. Jan. 29, 2018); **James v. Acre Mortgage & Financial, Inc.**, No. RDB-17-1734, 2018 WL 638289 (D. Md. Jan. 31, 2018); **Bezek v. First Mariner Bank**, No. RDB-17-2902, 2018 WL 690840 (D. Md. Feb. 2, 2018)

***RESPA claim dismissed because no extraordinary circumstances existed to toll the statute of limitations.***

In these related cases, each of the plaintiff borrowers alleged that various financial institutions engaged in an improper kickback scheme with Genuine Title, LLC. The borrowers allege that the lenders received unearned fees from Genuine Title for referrals made to the title company. The financial institutions argued that the claims were barred by RESPA's one-year statute of limitations, and moved to dismiss the claims.

In response, the borrowers asserted their claims were equitably tolled because they acted diligently to bring the claims, and the financial institutions concealed the kickback scheme. The court noted that borrowers' counsel had already obtained significant awards against Genuine Title and other financial institutions, Genuine Title went bankrupt, and there was no allegation that the lenders continue to receive illegal kickback payments. Thus, the court found that no extraordinary circumstances existed to toll the statute of limitations and granted the lenders' motions to dismiss.

3. **Hutter v. Countrywide Bank, N.A.**, 710 Fed. Appx. 25 (2d Cir. Jan. 29, 2018)

***Claim for alleged violation of anti-kickback provision failed because borrower admitted that broker performed services for the lender.***

The borrower/homeowner alleged that the mortgage lender violated RESPA's anti-kickback provision through improper payments made to the mortgage broker. RESPA's anti-kickback provision does not apply where payments are made for "services actually performed." Therefore, because the borrower admitted that the mortgage broker performed services for the lender, the trial court granted summary judgment for the lender. Summary judgment was affirmed on appeal.

B. **Statutes and Regulations**

No RESPA statutes or regulations were retrieved this quarter.

C. **Volume of Materials Retrieved**

RESPA issues were identified 10 times in 9 cases (see Tables 1, 2).

#### IV. EMPLOYMENT HIGHLIGHTS: YEARLY UPDATE

##### A. Cases

In all three of the cases discussed below, the issue was whether the licensee was an employee or independent contractor of the broker or real estate company. The key factor in this determination is the extent to which the broker or real estate company controls the actions of the licensee. To make this assessment, the courts and administrative bodies carefully examine the details of the working relationship, including which party sets work hours, limits on the licensee's ability to do outside work, and the materials and equipment provided to the licensee.

1. **In the Matter of Slater**, No. 524647, 2017 WL 6612615 (N.Y. App. Div. Nov. 15, 2017)

***Real estate salesperson was an employee of commercial real estate brokerage.***

In this unemployment insurance case, the claimant worked as a leasing broker for a commercial real estate brokerage. After the licensee was terminated, the administrative law judge determined the licensee was eligible for unemployment insurance benefits because there was an employer-employee relationship between the claimant and the real estate brokerage. The brokerage appealed that decision, arguing that the salesperson was not an employee.

Although the licensee signed an independent contractor agreement, the licensee completed an extensive training program and received a mentor from the brokerage, received payment during the probationary/training program, and was expected to maintain regular office hours and to keep a supervisor informed of his whereabouts during the day. The brokerage provided the licensee with an office, office equipment, supplies, a work email address, and reimbursement for some professional expenses. The brokerage also set the commission rates, could request monthly reports from the licensee, provided health insurance, and prohibited the licensee from performing similar services outside the company. In light of this evidence, the court affirmed the determination that the salesperson was an employee for unemployment compensation purposes eligible for unemployment insurance benefits.

2. **In re Link**, 2017 NY Slip Op 06118, 2017 WL 3426858 (N.Y. App. Div. Aug. 10, 2017)

***Real estate salesperson was employee of real estate company for purposes of unemployment insurance.***

Licensee worked for real estate broker that provided sales and rental services for property developers with multiple unit apartment buildings. The licensee showed apartment units to prospective tenants and solicited offers. The Unemployment Insurance Appeal Board concluded that an employment relationship existed between the licensee and the broker, such that the licensee was entitled to unemployment insurance benefits.

The broker appealed the decision in state court. The court found that the Unemployment Insurance Appeal Board's decision was supported by evidence in the record. The licensee was not allowed to choose his own work hours, there were limits on the licensee's ability to do outside work, the broker set the rate of compensation and required the licensee to submit weekly statistical reports, and provided the licensee with contacts for potential customers. The court affirmed the decision of the Unemployment Insurance Appeal Board.

3. **Lee v. www.urban, Inc., et al.**, No. H-16-1841, 2017 WL 3620591 (S.D. Tex. Aug. 23, 2017)

***Evidence showed that licensees could be considered employees, rather than independent contractors, of real estate company.***

Licensees sued the real estate company they worked for, claiming they were entitled to unpaid minimum wage and overtime compensation. The real estate company argued the licensees were independent contractors who were not entitled to the additional compensation. The real estate company moved for summary judgment.

Although the real estate company presented evidence that the licensees made their own decisions regarding which properties to show customers and were allowed to represent customers who purchased from a seller other than Urban Living, the licensees also presented evidence that the real estate company maintained substantial control over the manner in which they performed their work. According to the court, there was a genuine issue of material fact regarding whether the licensees were employees of the real estate company or worked as independent contractors. The court denied the real estate company's motion for summary judgment.

B. Statutes and Regulations

No employment-related statutes or regulations were retrieved this quarter.

C. Volume of Materials Retrieved

Employment issues were identified 4 times in 3 cases over the past twelve months (*see* Table 4). No statutes or regulations regarding Employment issues were retrieved this quarter, but 4 statutes and 5 regulations regarding Employment issues were retrieved in the past twelve months (*see* Table 4).

**V. VERDICT AND LIABILITY INFORMATION**

A. Agency Cases

Liability was determined in 5 Agency cases, and the licensee was not held liable in any of the cases (*see* Table 3).

B. Property Condition Disclosure Cases

Liability was determined in 1 Property Condition Disclosure case, and the licensee was not held liable in that case (*see* Table 3).

C. RESPA Cases

None of the RESPA cases reviewed this quarter determined the liability of a real estate professional (*see* Table 3).

D. Employment Cases

Liability was not determined in the employment case retrieved over the past twelve months. (*see* Table 5).

**VI. TABLES**

**Table 1**  
Volume of Items Retrieved for First Quarter 2018  
by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	9	2	5
Property Condition Disclosure	1	2	1
RESPA	9	0	0

**Table 2**  
Volume of Items Retrieved for First Quarter 2018 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	2	0	0
Agency: Buyer Representation	0	0	0
Agency: Designated Agency	2	0	0
Agency: Transactional/Nonagency	0	0	1
Agency: Subagency	0	0	0
Agency: Disclosure of Confid. Info.	0	0	0
Agency: Vicarious Liability	0	0	0
Agency: Breach of Fiduciary Duty	3	1	0
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	0	0	3
Agency: Minimum Service Agreements	0	0	0

<b>Issue</b>	<b>Cases</b>	<b>Statutes</b>	<b>Regulations</b>
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Teams	0	1	1
Agency: Coming Soon Listings	0	0	0
Agency: Other	4	0	0
PCD: Structural Defects	0	0	0
PCD: Sewer/Septic	0	0	0
PCD: Radon	0	0	0
PCD: Asbestos	0	0	0
PCD: Lead-based Paint	0	0	0
PCD: Mold and Water Intrusion	0	0	0
PCD: Roof	0	0	0
PCD: Synthetic Stucco	0	0	0
PCD: Flooring/Walls	0	0	0
PCD: Imported Drywall	0	0	0
PCD: Plumbing	0	0	0
PCD: HVAC	0	0	0
PCD: Electrical System	0	0	0
PCD: Valuation	0	0	0
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	0	0	0

<b>Issue</b>	<b>Cases</b>	<b>Statutes</b>	<b>Regulations</b>
PCD: Insects/Vermin	0	0	0
PCD: Boundaries	1	0	0
PCD: Zoning	0	0	0
PCD: Off-site Adverse Conditions	0	0	0
PCD: Meth Labs	0	0	0
PCD: Stigmatized Property	0	0	0
PCD: Megan's Laws	0	0	0
PCD: Underground Storage Tanks	0	0	0
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	0	0	0
Property Condition Disclosure: Other	0	0	0
RESPA: Disclosure of Settlement Costs	0	0	0
RESPA: Kickbacks	7	0	0
RESPA: Affiliated Business Arrangements	3	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	0	0	0

**Table 3**

Liability Data for First Quarter 2018

<b>Topic</b>	<b>Liabe</b>	<b>Not Liabe</b>	<b>% Liabe</b>	<b>% Not Liabe</b>
Agency	0	5	0%	100%
Property Condition Disclosure	0	1	0%	100%
RESPA	N/A	N/A	N/A	N/A

**Table 4**

Volume of Employment Items Retrieved in Past Twelve Months (April 2017-March 2018)

<b>Major Topic</b>	<b>Cases</b>	<b>Statutes</b>	<b>Regulations</b>
Employment: Wrongful Termination (cases only)	0	N/A	N/A
Employment: Personal Assistants	0	3	3
Employment: Independent Contractors	3	1	2
Employment: Wage and Hour Issues (cases only)	1	N/A	N/A

**Table 5**

Liability Data for Employment Cases in the Past Twelve Months (April 2017-March 2018)

<b>Topic</b>	<b>Liabe</b>	<b>Not Liabe</b>	<b>% Liabe</b>	<b>% Not Liabe</b>
Employment	N/A	N/A	N/A	N/A