LEGAL PULSE NEWSLETTER: SECOND QUARTER 2018

Welcome to the *Legal Pulse* Newsletter. The *Legal Pulse* examines legal issues and trends in topics of interest and significance for real estate professionals. As we do each quarter, this edition reviews recent case decisions and legislative activity in the areas of Agency, Property Condition Disclosure, and RESPA. In this quarter, we also take a closer look at Deceptive Trade Practices Act/Fraud cases and issues involving commercial properties over the past twelve months.

Vicarious Liability was a popular topic in the Agency cases retrieved this quarter. These cases presented a variety of scenarios in which a party could potentially be held liable for another's actions. Other cases considered Dual Agency, Buyer Representation, and Breach of Fiduciary Duty issues. The only Agency regulations retrieved this quarter relate to licensee advertising and team names, both of which have been popular topics of legislative activity in the past few years. Texas now requires real estate teams to register with the Texas Real Estate Commission.

While we continue to see several cases involving the disclosure of water damage, several Property Condition Disclosure cases from this period presented interesting questions regarding the duty to disclose information about the property that was particularly significant to the buyers due to their intended use of the property. As described in more detail later in this newsletter, these cases consider whether the specific amount of fill on the property, which precluded the building of a home, and a change in a condominium board's rules, which precluded short-term leasing of the property, required disclosure by the real estate representative. Several states recently modified their required property disclosures. These new disclosure requirements relate to meth labs, electrical systems, and mechanical systems.

The RESPA cases continue to consider whether RESPA applies to the alleged claims raised by a homeowner. As in previous quarters, many courts concluded that a homeowners assertions failed to allege claims to which REPSA applied.

This quarter we also examine Deceptive Trade Practices/Fraud cases and cases involving commercial properties from the past twelve months. With respect to DTPA/Fraud, many of the cases involve allegations of an undisclosed or misrepresented relationship between the real estate professional and another party. In the commercial property cases, the buyer's intended use of a commercial property often factored heavily in the allegations of wrongdoing against the real estate professionals. In terms of liability, the licensees and brokers continued to be found liable in a higher percentage of the cases involving commercial properties.

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 the Agency cases this quarter, the courts considered vicarious liability for another's actions, based on a variety of different factual scenarios. In one case, the seller was not liable for the actions of an appraiser. In another case, however, the real estate broker was found liable for a significant amount of damages based on the negligence of its licensee. In the final case discussed below, the court examined the extent to which a real estate franchisor could be liable for the acts of a licensee/franchisee.

A. Cases

1. **3405/3407 Slauson Avenue, LLC v. Gilleran, et al.**, No. B265290, 2018 WL 2947925 (Cal. Ct. App. June 12, 2018)

Broker was vicariously liable for licensee's negligence in accurately representing square footage of property to the buyer while acting as dual agent in the transaction.

The buyer purchased four commercial and residential units from the seller. The defendant licensee acted as dual agent for the buyer and seller. The buyer also obtained financing for the transaction from the seller. Before escrow closed, the licensee told the buyer the units totaled 4500 square feet. The licensee determined this stated square footage by pacing the exterior perimeters, and using the same footage for two units that looked the same. After closing, the buyer discovered the units actually totaled 3036 square feet. In light of this discovery, the buyer

sought to negotiate a new price, and the seller ultimately foreclosed on the property after the buyer failed to make payments. The buyer brought claims against the licensee and his broker for misrepresentation, constructive fraud, and breach of fiduciary duty. Following a bench trial, the trial court issued a decision against the licensee and broker.

The trial court concluded the licensee was negligent in providing the square feet to the buyer. Although the court believed that the buyer could have acted more diligently to determine the actual square footage before agreeing to purchase the property, the court also decided that the buyer reasonably relied on the licensee's statements regarding the square footage. The court found that the licensee had a duty to disclose to the buyer how she had determined the property's square footage, and because the licensee failed to do so, the buyer could believe the footage provided by the licensee. In addition, the trial court held the brokerage vicariously liable for the licensee's negligence. The court awarded $310,000 in compensatory damages and $261,635.65 in prejudgment interest to the buyer. On appeal, the broker challenged the finding of vicarious liability. According to the appellate court, vicarious liability is established where an agent commits tortious conduct in the course of the relationship of the parties. The appellate court agreed with the trial court that, in this case, the evidence established that the licensee misrepresented the property's square footage in the course of her employment. The appellate court affirmed the judgment.

2. **Tindell v. Murphy**, No. C081424, Cal. Rptr. 3d 448 (Cal. Ct. App. Apr. 6, 2018)

Real estate representative and broker not liable where listing and licensee inspection report correctly indicated home was a manufactured home.

The buyers purchased a manufactured home from the seller. The inspection report of the seller's real representative and listing indicated the home was a manufactured home. At the time of sale, however, the appraiser's report listed the home as a modular home. When the buyers sought refinancing several years later, the appraisal stated the home was a manufactured home, and refinancing was denied. The buyers sued the seller, real estate company, seller's representative, the broker, and the appraiser. Buyers claimed that the real estate defendants and seller failed to disclose the manufactured nature of the home and that the licensee breached its fiduciary duty.

The trial court dismissed the breach of fiduciary duty and fraud claims because the inspection report and property listing showed that the home was a manufactured home, and therefore, the buyers could not demonstrate any justifiable reliance. The trial court also entered summary judgment for the appraiser. In this decision, the appellate court considered the appeal from the seller and appraiser. According to the court, the appraiser made the report for the lender, not the buyers, and there was no duty from the appraiser to the buyers. Because the appraiser was not liable, the court found that the seller also could not be vicariously liable for the appraiser. The judgments for the appraiser and seller were affirmed by the appellate court.

3. **New Star Realty, Inc. v. Jungang PRI-USA, LLC**, No. A18A0777, 2018 WL 3083736 (Ga. Ct. App. June 22, 2018)

Franchisor not vicariously liable for misappropriation of escrow funds by franchisee licensee.

New Star Georgia was a franchisee of New Star Realty, Inc., a residential and commercial real estate and investment business. The owner of New Star Georgia, a licensee, misappropriated escrow funds from a commercial real estate transaction. The victim of the misappropriation sued the franchisor, New Star Realty, under the theory of vicarious liability for the franchisee's actions. A jury found in favor of the plaintiff and the court entered judgment against the franchisor. The franchisor appealed the judgment.

The appellate court found there was no agency relationship between the franchisee and franchisor to hold the franchisor vicariously liable for the licensee's conduct. Although the franchisor could audit the franchisee, the franchisor had no supervisory control over the franchisee's day-to-day operations and was not even aware of the escrow account in question. There was no evidence that the franchisor held the franchisee out as an agent. Furthermore, the licensee acted as dual agent for the parties, and therefore, the licensee's knowledge was imputed to the plaintiff. As a result, the plaintiff knew there was a franchise agreement between the parties, and could not establish that he assumed the parties had an agency relationship. The franchisor was also not directly liable for the licensee's misconduct. Georgia law does not provide for any legal duty on behalf of a franchisor to third parties in the selection of franchisee owners. The appellate court reversed the judgment.

B. Statutes and Regulations[1]

Texas

A recently amended Texas regulation states that alternate and assumed names as well as team names used by license holders must be registered with the Texas Real Estate Commission before they can be used in an advertisement and must also notify the Commission no later than 10 days after they stop using the trade or team name. The regulation also clarifies that team names must end with the word "team" or "group" and cannot mislead or imply that the team offers services independent of the broker[2]

In addition, a companion Texas regulation relating to disclosures in advertisements states that advertisements cannot contain misleading or deceptive statements and must contain the license holder's name or team name and that the broker's name must be at least half the size of the largest contact information for any sales agent, associated broker or team name contained in the ad. When the ad is broadcast via social media or in the form of a text message, required disclosures may be located on a separate page or accessed by a direct link.[3]

C. Volume of Materials Retrieved

Agency issues were identified 18 times in 12 cases (*see* Tables 1, 2). Dual Agency, Vicarious Liability, Breach of Fiduciary Duty, Buyer Representation, and Agency: Other issues were each addressed in multiple cases this quarter. Two Agency regulations were retrieved this quarter (*see* Table 1).

II. PROPERTY CONDITION DISCLOSURE

Two of the Property Condition Disclosure cases discussed below address a licensee's alleged failure to disclose a condition on the property that affects the purchasers' ability to use the property in the manner they intended at the time of purchase. For instance, in one case, the purchasers bought a condominium with the intention of renting the property during the school year. The court found that the licensee was not liable for failing to disclose that the condominium board had changed the minimum lease period, which precluded the purchasers' ability to lease the property as intended. In another case, the purchasers sought to build a home on the property, but learned the property contained too much fill to build a home. There,

[1] This second quarter update reviews legislative activity from the following jurisdictions: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, Oklahoma, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and Vermont.
[2] 22 Tex. Admin. Code § 535.154 (2018)
[3] 22 Tex. Admin. Code § 535.155 (2018)

the purchasers alleged that seller's real estate representative failed to adequately disclose the amount of fill on the property.

A. Cases

1. **Novak v. St. Maxent Wimberly House Condominium, Inc.**, No. 16-6835, 2018 WL 3126940 (E.D. La. June 26, 2018)

Court denied claims against buyer's real representative based on the alleged failure to disclose information regarding condominium board's decision to modify the minimum lease term.

Two teachers purchased a French Quarter condominium for the purpose of using the property in the summers and for leasing during the rest of the year. After purchasers purchased the property, they were informed that the condominium board changed the minimum lease term to one year, which prohibited purchasers from renting the property as they had intended. The purchasers allege their real estate representative and real estate company were negligent in failing to inform them of the condominium board's actions, and that the licensee participated in a civil conspiracy with the board, sellers, and seller's representative. The purchasers also brought claims against sellers, seller's representative, and the condo board.

In this decision, the trial court considered the claims against the buyers' real estate representative and real estate company. The trial court determined that the Louisiana statute regarding property disclosure only imposed a duty on the seller and not the purchaser's real estate representative. A purchaser's real estate representative has a duty only to pass along accurate information about the property, and that applies only to information actually in the real estate representative's possession. Because the purchasers failed to show credible evidence that the real estate defendants withheld information in their possession, the trial court granted summary judgment in favor of the real estate defendants.

2. **Lindstrom v. Moffett Properties**, No. 16-00079DKW-RLP, 2018 WL 1975677 (D. Haw. Apr. 26, 2018)

Purchasers allege seller and dual agent real estate representative failed to adequately disclose the amount of fill on the property.

The purchasers of a parcel of land alleged that the amount of fill on the property was not adequately disclosed before the purchase. The purchasers claim that due to the amount of fill, they are not able to build the home they had intended and would not have purchased the property if they had known the correct amount of fill. Although the seller and real estate representative disclosed there was fill on the property, the purchasers claimed they knew more information about the amount of fill on the property, but failed to disclose the information. The real estate representative acted as dual agent for the transaction. The disclosure form indicated "yes" in response to the question of whether there was filled land on the property.

The court noted that the seller's disclosure did not require the seller or licensee to perform an inspection of the property, but they were required to accurately disclose all material facts about the property. According to the court, there was a question of fact as to whether the seller and licensee disclosed all material facts. Another real estate representative who worked for the same real estate company and had represented seller in a prior transaction for the property had observed hundreds or thousands of cubic yards of fill on the property, but this information was not provided to the purchasers. The court denied the real estate defendants' motion for summary judgment.

3. **Blevins v. Marcheschi**, No. 2-17-0340, 2018 Il. App. 2d 170340 (Ill. Ct. App. Apr. 24, 2018)

Home purchasers sufficiently alleged a claim against seller and seller's real estate company for failure to disclose water damage.

After buyers purchased a home, a contractor discovered water damage in a wall of the home. The buyers then sued the sellers and sellers' real estate company for breach of contract, fraud, and misrepresentation for failing to disclose the water damage. The buyer's complaint included information from an environmental firm which concluded that, based on the amount of damage and contamination, the seller and seller's representative had to be aware of the water damage. The trial court dismissed the action. The trial court applied the one year statute of limitations in the Residential Real Property Disclosure Act to all of the claims, and found the claims barred by the statute of limitations. The trial court also determined there was no breach of contract because the contract did not impose a duty to disclose water damage. In addition, the trial court found that the allegations based on the environmental report did not support a finding of fraud or misrepresentation.

The appellate court concluded otherwise. With respect to the statute of limitations, the appellate court found that the trial court improperly applied the Disclosure Act to the other causes of action. Even though the buyers mentioned the failure to disclose water damage in the disclosure report, the fraud and contract claims were not brought pursuant to the Disclosure Act. Furthermore, the complaint alleged that the sellers and seller's real estate company knew of the water damage. According to the appellate court, the allegations of the complaint were sufficient to state a claim. The trial court's dismissal of the claims was reversed and the case was remanded to the trial court.

4. **Van Duren v. Chife**, No.1-17-00607-CV, 2018 WL 2246213 (Tex. Ct. App. May 17, 2018)

Seller's representative and broker were not liable for alleged failure to disclose structural defects that purchasers claimed were the cause of water damage.

After living in a home for more than two years, the purchasers discovered rotting wood and mold in the home. The purchasers did not have the property inspected, and the contract contained an as-is provision. The purchasers sued the sellers, seller's real estate broker, and his real estate company for negligent misrepresentation, fraud by nondisclosure, statutory fraud in a real estate transaction, and violations of the Deceptive Trade Practices Act. The purchasers claim that the sellers knew about construction defects at the home, failed to disclose them, and those defects caused the water intrusion and mold at the home. With respect to the real estate broker, the purchasers claim the broker failed to disclose a conflict of interest when he

represented them in a sale of property and persuaded them to sell their home for less than it was worth.

The court enforced the as-is provision in the contract. Furthermore, the court noted that the sellers' disclosure law imposes a duty only on the sellers of property, but not on their real estate representatives, unless the real estate representative is aware that the disclosure contains false information. Although the purchasers presented evidence of defects, known to sellers and the real estate representative, which had been previously repaired, the court determined that knowledge of past repairs does not establish knowledge of a present defect. There was also no interference with the purchasers' right to an independent inspection, and the real estate representative did not owe a fiduciary duty to the buyers. The appellate court affirmed summary judgment for the seller, real estate broker, and real estate company.

B. Statutes and Regulations

Connecticut

Connecticut revised its Property Condition Disclosure form to place emphasis on the responsibility of real estate brokers to disclose material facts regarding the property to prospective buyers. The revised property condition disclosure report includes a separate section immediately below the seller's certification captioned: "IMPORTANT INFORMATION (A) RESPONSIBILITIES OF REAL ESTATE BROKERS," and also includes a statement that the report in no way relieves real estate brokers of their legal obligation to disclose any known material facts about the property in question and the potential for punitive action should they fail to do so.[4] The disclosure form also requires the seller to disclose if there have been any problems with electrical systems or mechanical systems at the property.[5]

Louisiana

Louisiana modified its seller's disclosure statement to include a statement of acknowledgment by the seller whether an illegal laboratory for the production or manufacturing of methamphetamine was ever located on the property.[6]

Texas

The Texas Real Estate Commission made several changes to the mandatory forms for residential transactions. The changes relate to clarification of the reservation of mineral rights, the definition of "effective date (final date of acceptance)," and the time for the seller to cure

[4] Conn. Gen. Stat. § 20-327b (2018)
[5] Id.
[6] La. Rev. Stat. § 9:3198 (2018)

objections. There are additional changes that relate to termination of a contract, and to the time for delivery of earnest money. Some formal changes to the documents have also been made.[7]

C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified 7 times in 6 cases (*see* Tables 1, 2). The cases addressed Mold and Water Intrusion, Structural Defects, Flooring/Walls, Lead Paint, and Other Issues. Two statutes and one regulation regarding Property Condition Disclosure issues were retrieved this quarter (*see* Table 1).

III. RESPA

The courts continue to decide cases challenging the existence of a RESPA claim. In two cases this quarter, two different courts concluded that a homeowner's assertions failed to allege claims to which REPSA applied.

A. Cases

1. **Maitland v. Fishbein**, 2017 WL 9485648 (E.D.N.Y. Feb. 28, 2017)

Alleged claims which do not involve the sale of any property or the requirement that title insurance be purchased from a particular title company do not state a RESPA claim.

Homeowners sought to refinance their home. The homeowners claim that the mortgage broker subsequently directed them to sign blank mortgage refinance loan documents. During the course of this refinancing, the homeowners inquired into the amount of their new monthly mortgage payment and their interest rate under the mortgage agreement. The homeowners later learned that they had signed three loan notes with extremely unfavorable terms, which subsequently led to foreclosure.

[7] Texas Real Estate Commission

The homeowners alleged the addition to the loan modification was a deception and misrepresentation, and that the increased payment was a kickback to the mortgage company based on the inflated foreclosure balance. In considering the homeowners' RESPA claims, the court found that because their allegations did not involve the sale of any property or the requirement that title insurance be purchased from a particular title company, RESPA does not apply. Additionally, even if the homeowners had properly alleged a RESPA claim, such claims would likely be time-barred. The trial court dismissed the RESPA claim.

2. **Loughlin v. Amerisave Mortgage Corp.**, 2018 WL 1896409 (N.D. Ga. Feb. 7, 2018); 2018 WL 1887292 (N.D. Ga. Mar. 19, 2018)

Court refused to certify class action based on allegations that mortgage company's requirement that homeowners use an affiliated appraisal company.

In an attempt to certify their action as a class action, the homeowners argued that the mortgage company generally required its customers to use the same appraisal management company. The homeowners further claimed that the mortgage company and appraisal management company were affiliates and owned by the same trusts and that the owners of each respective company received profit distributions, which amounted to a kickback violation. The court declined homeowner's request to certify two classes. The first class would have been composed of the homeowners who did not receive any notice of the affiliated business relationship between the mortgage company and appraisal company. The second class would have been composed of those homeowners who received a disclosure about the affiliated business relationship. Given the depth of the individualized inquiries involved in determining each homeowners' situation, the court denied the homeowners' motion for class certification.

3. **Taylor v. Gorilla Capital, Inc**, 2018 WL 3186946 (D. Or. June 28, 2018)

Completing a substantial amount of business with a single escrow company does not result in a RESPA violation absent the exchange of any fee, kickback, or thing of value.

The homeowners, after receiving a loan backed by a deed of trust on their home, brought suit claiming, in part, that the broker, lender, and escrow agent violated RESPA's prohibition on steering borrowers to an escrow company of the mortgage company's choice. The homeowner's claims were based on the substantial amount of business referred to the escrow company from the mortgage company.

The court found that that the homeowners appeared to conflate "thing of value" with the implicit allegation that the escrow company agreed to act as the escrow agent. The court disagreed, noting that simply doing "a substantial amount of business" with a certain escrow company does not result in a violation of RESPA, as no fee, kickback, or "thing of value" was exchanged. The trial court dismissed the RESPA claim.

B. Statutes and Regulations

No RESPA statutes or regulations were retrieved this quarter.

C. Volume of Materials Retrieved

RESPA issues were identified 9 times in 6 cases (*see* Tables 1, 2). No RESPA legislation was retrieved this quarter.

IV. DECEPTIVE TRADE PRACTICES ACT/FRAUD

As demonstrated below in the summaries, the Deceptive Trade Practices/Fraud cases often involve some type of undisclosed relationship between the real estate representative or broker and another. In other instances, the cases arose because a fact of importance surrounding the sale was not disclosed. Online real estate services are also facing more scrutiny. Recently, and as detailed below, a federal judge in Illinois dismissed a lawsuit against Zillow Group claiming that its Zestimate tool represented an unfair business practice that and makes it harder for people to sell their homes.

1. **Estate of Lynott v. Luckovich**, No. C14-0503RSL, 2018 WL 501577 (W.D. Wash. Jan. 22, 2018)

There was no evidence that designated broker and contractor engaged in fraudulent scheme with licensee.

Mr. Lynott's estate alleged that two defendants, Campbell, a real estate representative and designated broker, and a contractor/project manager, engaged in a scheme with another licensee, Luckovich, to defraud Mr. Lynott by using his money to purchase and remodel eight properties without compensation. Campbell was the designated broker for the investment company owned by the Lukovich. Five of the properties in which Mr. Lynott invested were co-listed by the Campbell and Luckovich. The estate alleged that Luckovich's alleged breach of duties should be imputed to Campbell.

The court found there was no legal authority to hold one real estate representative responsible for another's malfeasance based solely on the fact that they appeared on the same listing. The court also concluded there was no evidence that Campbell knew that Luckovich, who owned and had control over her own company, was deceiving a client. Furthermore, the estate failed to show that Campbell personally breached any of the duties she owed to clients. The court dismissed the claim against Campbell. The court also held that the estate failed to offer any evidence that the project manager knew or must have known that Luckovich was defrauding Mr. Lynott. The court dismissed the claims against the real estate representative and the project manager.

2. **Pellet v. Keller Williams Realty Corp.**, 177 Conn. App. 42 (Oct. 10, 2017)

Real estate representatives could be held liable for alleged failure to disclose divided loyalties and to disclose other offers on the property.

The seller and his brother contacted the defendant real estate licensees, indicating that he wished to sell the property with a net profit of $90,000. The property sold for $100 more than the listing price, with the seller netting almost $89,000. After the purchase, the purchasers performed extensive renovations to the property and subsequently sold the property for a net profit of approximately $16,000. The seller then argued that the licensees wrongfully induced him into listing and selling the property at a price below market value, among other allegations. He brought suit against all of the parties to the transaction, asserting claims for breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, intentional misrepresentation, negligent supervision, conspiracy to defraud, and violation of the Connecticut Unfair Trade Practices Act. The trial court dismissed the complaint against all defendants on a directed verdict. The trial court found that the seller

did not meet the standard of proof to establish professional negligence on behalf of the real estate professionals. The court also found the seller could not establish damages.

The Court of Appeals reversed and ordered a new trial on the grounds that the trial court made improper findings of fact and improperly grounded the entire case on professional negligence. According to the appellate court, the seller could have prevailed on all of the counts in the complaint on the basis of ordinary negligence and breach of contract. Allegations in the complaint, such as allegations that the real estate defendants acted in bad faith, failed to disclose divided loyalties, and failed to disclose other offers on the property, sufficiently stated claims to support causes of action for deceptive trade practices, breach of fiduciary duty, and misrepresentation.

3. **Tullos v. Tumbleson and Cleary**, No. D-1-GN-16-004465, 2017 WL 4398698 (Tex. Dist. Ct. June 13, 2017)

Purchasers claimed sellers engaged in fraud by failing to make repairs and disclosing condition of carpet in the home.

After purchasers moved into their recently-purchased house, they discovered that the carpets were soaked with pet urine and infested with insects and that the air conditioning unit had not been repaired prior to closing, contrary to the sellers' statement in the Seller's Disclosure Notice. The purchasers alleged that sellers and the sellers' real estate representative breached the parties' contract by failing to conduct agreed-upon repairs prior to the closing date, failing to disclose known material conditions of the residence, and failing to promptly repair damage caused by the seller after closing. Additionally, the purchasers filed claims for fraud and violation of the Texas Deceptive Practices Act. The purchasers contended the sellers had intentionally misrepresented the condition of the house by actively concealing the condition of the carpets. Sellers paid a settlement of $20,000 to the purchasers to resolve the matter.

4. **Patel v. Zillow, Inc.**, No. 17 C 4008, 2018 WL 2096453 (N.D. Ill. May 7, 2018)

Online real estate property value estimation tool did not constitute a deceptive trade practice.

Property owners allege that Zillow, an online real estate services website, violated the Illinois Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. The property owners contend that Zillow's "Zestimate" tool is a deceptive trade practice because Zillow promoted it as a reliable valuation resource, when in reality it is "a suspect marketing gimmick" drawing people to its website to solicit advertising revenue from real estate brokers and lenders. Plaintiffs also asserted that Zillow's marketing program called "Seller Boost" is misleading and deceptive. In exchange for an additional advertising payment paid by representatives who are deemed "premier agents," Zillow provides leads. According to the property owners, Zillow provides information without the advance permission of homeowners. Other allegations state that Zillow will list For Sale By Owner properties and provide a low Zestimate, but Zillow then significantly increases the Zestimate if a premier broker lists the FSBO properties.

The court held that Zestimates are not false or misleading representations of fact likely to confuse consumers. More specifically, Zestimates are merely an estimate of the market value of a property, which is supported by Zillow.com's statement on the website that Zestimates may not be accurate. Also, according to the court, Zestimates are nonactionable opinions of value. The court further held that although the property owners allege that Zillow has created some confusion, the allegations do not describe the type of confusion the Deceptive Trade Practices Act prohibits. With respect to the Consumer Fraud Act claims, the court held that the "consumers" for purposes of this ICFA claim are the home buyers, not the property owners, and therefore, the property owners' claim failed to show a consumer nexus. The trial court granted Zillow's motion to dismiss the claims.

V. COMMERCIAL PROPERTY ISSUES

Many of the commercial property cases over the last twelve months represent a theme noted in last year's *Legal Pulse*—that the buyers' intended use of the property is often significant with respect to the real estate professional's duties and disclosures. Blended in this theme, several cases discussed below involve claims that the real estate professional breached a fiduciary duty by failing to disclose facts considered material to the buyer's use of the property, such as liens against property title, property boundaries, or the vacation of tenant leases.

1. **High Country Lumber & Mulch, LLC v. Theiman Enterprises, LLC**, No. 2:14CV00059, 2017 WL 5714571 (E.D. Tenn. Feb. 23, 2017)

Property owner failed to disclose lien on property that affected lumber company's use of timber rights.

A lumber company paid the defendant property owner for timber rights. The lumber company incurred expense to improve access to the property and set up its logging operations. The property owner covenanted that it owned the property and that the property was free and clear of all liens and encumbrances. However, before the lumber company was able to remove any significant timber from the property, the property was foreclosed upon by a bank lien holder because the property owner defaulted on an undisclosed loan.

The lumber company filed suit against the property owner and the broker who assisted in the transaction for breach of contract, fraudulent misrepresentation, negligent misrepresentation, detrimental reliance, promissory estoppel, fraud in the inducement, unjust enrichment, breach of fiduciary duty and professional negligence. The lumber company claimed that the property owner knew or should have known that the property was encumbered at the time the contract was signed and that the property owner had wrongfully failed to disclose that information. Prior to trial, the parties agreed to a settlement with the broker for $3,500 and the entire matter was dismissed.

2. **Grace Chinese Alliance Church of the Christian v. Lin Ma DDS, Inc., et al**, No. B272415, 2018 WL 549836 (Cal. Ct. App. Jan. 25, 2018)

Seller's representative not liable for alleged misrepresentation regarding property boundaries.

Sellers of a commercial property sold property that was adjacent to property owned by the church. The purchaser's fence, along the parties' property line, was actually located 3 feet over onto the church's property. The church asked the purchaser to remove the fence to allow the church to rebuild its parking lot. After initially agreeing to do so, the purchaser then asserted that the fence was in its current location when the seller purchased the property, and he had spent more than $50,000 improving the property in dispute. He argued that his possession and improvement of the property had been open and continuous, and that the disputed property therefore was his property. The church sought an injunction against the purchaser, and purchaser filed a cross-complaint against the church. The purchaser filed a second cross-complaint against the seller and the brokers, alleging that the seller, through the brokers, showed the property to the purchaser and represented that the fence between the properties was the true property line.

The trial court found for the church, the sellers, and the brokers. The court determined that the church had clear title to the land in question. With respect to the claim against the brokers, the court held that the purchaser's claims were barred under the purchase agreement because the purchaser waited over two years after notice of the dispute to bring the claim. The judgment was affirmed by the appellate court.

3. **SM Investments v. Erickson**, No. 14-CV-2014-003557, 2017 WL 136669 (Minn. Dist. Ct. Feb. 16, 2017)

Seller and seller's representative not liable for failure to inform purchaser that tenant was vacating the property at the end of the lease term.

The purchasing company contracted with the seller to purchase two commercial real properties. The agreement included a requirement that if the seller learned any information suggesting that any of the current four long-term tenants were potentially vacating, the seller was to immediately inform the purchaser. The cash flow obtained from the tenants' rents were critical to the purchaser's financing plans. Shortly after the deal closed, one of the long-term tenants informed the purchaser that it would be vacating its leased unit when its lease ended the following month. Further, this tenant informed the purchaser that it had informed the seller of its plans to vacate the properties two months prior to the closing.

The purchaser sued the seller for breach of contract and misrepresentation. The seller brought a third-party claim against the seller's long-time real estate representative and broker. The seller alleged that the representative acted as his agent during the transaction and the seller relied on the representative to inform the purchaser about the tenant's notice to vacate. The representative argued that the seller never informed him that a tenant had planned to vacate the properties and asserted that he did not represent the seller in the subject purchase transaction. After trial, the jury found that the seller did not conceal or suppress material facts and had not caused any damages.

4. **Maljanian v. Big Black Dog, LLC**, No. B277922, 2018 WL 3154590 (Cal. Ct. App. June 28, 2018)

Real estate transaction was not effectuated based on the plain terms of the agreement and was not due to any fault on behalf of real estate representative.

The buyer and seller executed an agreement for the sale of commercial property. The agreement contained several contingencies. After the contract was executed, the buyer sent a list of deficiencies to the seller. The buyer's contingency period expired and the buyer did not waive contingencies. After the seller refused attempts to renegotiate, he nullified the agreement and the transaction did not close. The purchaser brought suit against the seller, seller's representative, and the licensee's employer, alleging breach of the written real estate agreement and breach of fiduciary duty.

The trial court granted summary judgment for the seller and real estate defendants. The court held that the claims were foreclosed as a matter of law because the seller refused to satisfy, waive, or release the buyer's contingencies as set forth in the Agreement. On appeal, the court

noted that the agreement was plain and the failure to close the transaction was the result of the buyer's disapproval, not any breach of duty on behalf of the real estate parties. The Court of Appeal affirmed the trial court's ruling on summary judgment.

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 6 Agency cases, and the licensee was liable in only one[8] of those cases (*see* Table 3).

B. Property Condition Disclosure Cases

Liability was determined in 3 Property Disclosure Cases reviewed this quarter. The real estate professional was not liable in any of those cases. (*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. DPTA/Fraud Cases

Liability was determined in 23 DPTA/Fraud cases retrieved over the past twelve months; the defendant was held liable in 9 of those cases[9] (*see* Table 5).

E. Cases Involving Commercial Properties

Liability was determined in 12 cases involving commercial property over the past twelve months; the defendant was held liable in 4 of those cases[10] (*see* Table 6).

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[8] *3405/3407 Slauson Avenue, LLC v. Gilleran, et al.*, No. B265290, 2018 WL 2947925 (Cal. Ct. App. June 12, 2018) (discussed above in Agency section).

[9] (NOTE: All of the following cases and jury verdicts were retrieved in the past twelve months (3Q 2017, 4Q 2017, 1Q 2018, or 2Q 2018), even though some of the cases were decided in 2016 or early 2017. This is due to a lag in jury verdicts being uploaded into the system and the fact that we retrieve jury verdicts on an annual basis). *Tyler v. Haro*, A148625, 2018 WL 1804869 (Cal. Ct. App. Apr. 17, 2018) ($389,767; $188,871 in damages);*Ramirez v. Ocean Front Capital Investments, LLC*, No. 30-2016-00840956-CV-CO-CJC, 2017 WL 5171058 (Cal. Super. Ct. June 13, 2017) ($2,449); *Littlejohn v. Davis*, 2015-CA-003607-B, 2017 WL 6723209 (D.C. Super. Ct. Sept. 28, 2017) ($14,875); *Bowles v. Gussio*, No. CT-2014-0108, 2016 WL 8578807 (Miss. Cir. Ct. Sept. 15, 2016) ($122,243); *Samulska v. Machiote*, 13-2015-CA-014064, 2017 WL 2645241 (Fla. Cir. Ct. Mar. 30, 2017) ($10,000); *Cyberex Corp. v. Abbarin*, No. 2014-CA-006094-B, 2017 WL 6539197 (D.C. Super. Ct. Oct. 25, 2017) ($81,020);*Racoon Enterprises v. Clark & Sullivan Construction*, No. 12-A-672116-C, 2016 WL 8376963 (Nev. Dist. Ct. Oct. 12, 2016) ($317,177; $337,000); *Campbell v. Luong*, No. 04-16-00460-CV, 2017 WL 3044591 (Tex. Ct. App. July 19, 2017) ($1,175 + $3,525 + $14,000 fees); *Hall v. Eagle Rock Development, LLC*, No. E 2015-01487-COA-R3-CV, 2017 WL 3233496 (Tenn. Ct. App. July 31, 2017) (attorneys fees)

[10] *Racoon Enterprises v. Clark & Sullivan Construction*, No. 12-A-672116-C, 2016 WL 8376963 (Nev. Dist. Ct. Oct. 12, 2016) ($317,177; $337,000)*; Cyberex Corp. v. Abbarin*, No. 2014-CA-006094-B, 2017 WL 6539197 (D.C. Super. Ct.

VII. TABLES

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

Major Topic	Cases	Statutes	Regulations
Agency	12	0	2
Property Condition Disclosure	6	2	1
RESPA	6	0	0

Table 2

Volume of Items Retrieved for Second Quarter 2018 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	3	0	0
Agency: Buyer Representation	2	0	0
Agency: Designated Agency	1	0	0
Agency: Transactional/Nonagency	0	0	0
Agency: Subagency	0	0	0
Agency: Disclosure of Confid. Info.	0	0	0
Agency: Vicarious Liability	4	0	0
Agency: Breach of Fiduciary Duty	6	0	0
Agency: Disclosure of Financial Ability	0	0	0

Oct. 25, 2017) ($81,020); *Littlejohn v. Davis*, 2015-CA-003607-B, 2017 WL 6723209 (D.C. Super. Ct. Sept. 28, 2017) ($14,875); *Peters v. Olson*, No. 27-CV-2015-009529, 2016 WL 8258566 (Minn. Dist. Ct. Sept. 19, 2016) ($115,538).

Issue	Cases	Statutes	Regulations
Agency: Agency Disclosure	0	0	0
Agency: Minimum Service Agreements	0	0	0
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Teams	0	0	1
Agency: Coming Soon Listings	0	0	0
Agency: Other	2	0	2
PCD: Structural Defects	1	0	0
PCD: Sewer/Septic	0	0	0
PCD: Radon	0	0	0
PCD: Asbestos	0	0	0
PCD: Lead-based Paint	1	0	0
PCD: Mold and Water Intrusion	2	0	0
PCD: Roof	0	0	0
PCD: Synthetic Stucco	0	0	0
PCD: Flooring/Walls	1	0	0
PCD: Imported Drywall	0	0	0
PCD: Plumbing	0	0	0
PCD: HVAC	0	1	0
PCD: Electrical System	0	1	0
PCD: Valuation	0	0	0

Issue	Cases	Statutes	Regulations
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	0	0	0
PCD: Insects/Vermin	0	0	0
PCD: Boundaries	0	0	0
PCD: Zoning	0	0	0
PCD: Off-site Adverse Conditions	0	0	0
PCD: Meth Labs	0	1	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	2	2	2
RESPA: Disclosure of Settlement Costs	0	0	0
RESPA: Kickbacks	6	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 Second Quarter 2018

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	1	5	16.7%	83.3%
Property Condition Disclosure	0	3	0%	100%
RESPA	0	0	N/A	N/A

Table 4

Volume of Deceptive Trade Practices Act/Fraud Items Retrieved in Past Twelve Months (July 2017-June 2018)

Major Topic	Cases	Statutes	Regulations
DPTA/Fraud	31	N/A	N/A

Table 5

Liability Data for Deceptive Trade Practices Act/Fraud Cases in the Past Twelve Months (July 2017-June 2018)

Topic	Liable	Not Liable	% Liable	% Not Liable
DPTA/Fraud	9	14	36%	64%

Table 6

Liability Data for Cases Involving Commercial Properties in the Past Twelve Months (July 2017-June 2018)

Topic	Liable	Not Liable	% Liable	% Not Liable
Cases Involving Commercial Properties	4	8	33%	67%