



LEGAL PULSE NEWSLETTER

Third Quarter 2017

Welcome to the *Legal Pulse* Newsletter. The *Legal Pulse* examines issues relating to the legal liability of real estate professionals. Each quarter, we review recent case decisions and legislative activity in the areas of Agency, Property Condition Disclosure, and RESPA. In this edition, we also look at court decisions and legislative/regulatory action from the past twelve months relating to Technology issues and Third Party Liability.

Breach of Fiduciary Duty and Dual Agency were the most commonly addressed Agency issues this quarter. An issue that arose in several cases was whether the licensee's failure to disclose information to the client constituted a breach of fiduciary duty. In one case, the court found that the licensee's failure to disclose to his client that he renegotiated the buyer's representative's commission with the buyer, resulting in a higher commission for himself, was a violation of his duty to the client. In the legislative context, Oregon made a number of changes to its statutory scheme governing real estate licensees and brokers. The amendments relate to trust accounts, the association of principal brokers with licensed real estate property managers, and the creation of LLC entities for the purpose of receiving compensation.

The Property Condition Disclosure cases reviewed this quarter covered a wide variety of possible disclosures. Among other issues, the cases considered a licensee's liability for disclosures relating to the availability of sewer access on the property, size of the lot, an empty pool on the property, and the fact that a housing development was named after the member of a hate group. With respect to legislation, Oregon modified its Seller's Property Disclosure Statement to include a disclosure regarding seismic risk.

Consistent with previous quarters, the RESPA cases examined referral fee and kickback schemes. Yet again, a court was presented with allegations of an improper captive reinsurance scheme. Like many similar cases reviewed in recent editions, the case was dismissed due to the statute of limitations. In a Kentucky case, the court determined that a title insurance referral scheme did not violate RESPA because it fell within the affiliated business arrangement exception.

This quarter, we also review cases and statutory/regulatory activity from the past twelve months relating to Technology and Third Party Liability issues. The Technology materials

touch on a range of topics of interest to real estate professionals. While the Technology cases address copyright and trademark disputes involving real estate professionals, the statutory and regulatory materials focus on legislation and/or regulation related to drones, cyber fraud, advertising on electronic media, data breaches, and other relevant issues. With respect to Third Party Liability, most of the cases involve claims against inspectors and appraisers. However, other third parties, such as escrow agents, may be subject to claims as well. In most of the cases over the past year, the third parties were found not to be liable to the sellers or purchasers who brought a claim.

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

The Agency cases discussed below address breach of fiduciary duty and dual agency. In the first case, the court considered whether the licensee's actions constituted a breach of fiduciary duty. In that case, the licensee was found liable for damages and attorneys' fees based on the licensee's failure to fully disclose to the seller the commission he would receive from the sale of the property. In the second case, the court determined that the licensee, who was working with the sellers, did not establish an undisclosed agency relationship with the buyers of the property.

A. Cases

1. **Campbell v. Luong**, No. 04-16-00460-CV, 2017 WL 3044591 (Tex. Ct. App. July 19, 2017)

Licensee liable for fraud and breach of fiduciary duty after failing to inform seller that he renegotiated with the other party to give himself a larger commission.

The seller of property hired the licensee to list two properties that the seller had purchased, remodeled, and sought to re-sell. The seller and licensee disputed the amount of commission given to the licensee. The closing documents indicated a commission 0.5% higher than agreed to between the seller and licensee. After entering the agreement with the seller, the licensee negotiated 0.5% less commission for the buyer's representative, and added that amount to his commission.

Following a bench trial, the trial court found that the licensee violated the Deceptive Trade Practices Act, engaged in fraud, and breached his fiduciary duty to the seller. The evidence supported the finding of a misrepresentation by the licensee regarding the commission

amount. The court awarded \$1,175 in actual damages, \$3,525 in treble damages, and \$14,000 in attorneys' fees. The trial court's award was affirmed on appeal.

2. **White v. Miller**, No. M2016-00888-COA-R3-CV, 2017 WL 3769409 (Tenn. Ct. App. Ct. Aug. 30, 2017)

Licensee did not act as unauthorized representative for buyers in real estate transaction.

The real estate representative acted as designated agent for the sellers of the property. The sellers entered into an agreement with the buyers under which sellers accepted buyers' townhouse property as credit toward the purchase of the property. Sellers claim that the licensee acted as an undisclosed representative for the buyers without the sellers' consent. Sellers asserted claims against the licensee for undisclosed dual agency, breach of fiduciary duty, and violation of the Tennessee Consumer Protection Act ("Act").

The licensee moved for summary judgment on the grounds that no agency relationship was established between the licensee and the buyers and that there was no injury to the sellers. The trial court granted judgment for the licensee on the Act and breach of fiduciary claims, but found in favor of the sellers on the dual agency claim. The appellate court affirmed summary judgment on the dual agency issue and the Act claim. The court of appeals determined there was no dual agency because there was no agreement indicating the real estate representative was an agent for the buyers. The appellate court remanded the case back to the trial court, however, for further proceedings on the breach of fiduciary duty claim.

B. **Statutes and Regulations**¹

Oregon

Oregon made a number of changes to its statutes governing real estate licensees and brokers. With respect to trust accounts, the amended statute provides that real estate brokers and licensed real estate property managers may not commingle funds in a client trust account, with the exception of compensation earned in connection with a real estate sale, purchase, or exchange transaction.² Commingling is defined as "the mixing of funds from any source, including personal funds, with trust funds . . . by a licensed real estate property manager or

¹ This third quarter update reviews legislative activity from the following jurisdictions: North Carolina and Oregon.

² [Or. Rev. Stat. § 696.241 \(2017\)](#).

principal real estate broker.³ Licensees do not need to create a trust account when acting only as a courier conveying a check payable to the seller from the purchaser.⁴

The Oregon statutory amendments also address requirements for brokers who associate with other brokers or with property managers. If two or more principal brokers, or a principal broker and property manager, associate with the same business name, the parties must execute a written supervisory agreement that allocates supervisory control and responsibility for all of the associated parties.⁵ A licensed real estate property manager associated with a real estate broker may have an ownership interest in the business through which the broker conducts professional real estate activity, but the property manager may not control or supervise the professional real estate activity of the broker.⁶ Real estate property managers must also have a property management agreement with the owner of rental real estate under their management.⁷

Real estate brokers may create a corporation, LLC, LLP, or other entity for the purpose of receiving compensation, but no licensee may conduct professional real estate activity under that organization.⁸

With respect to licensee discipline, a “persistent course of dealing” by a real estate licensee who violates a statute or rule “constitutes prima facie evidence that an associated real estate licensee had knowledge of the violation by the real estate licensee.”⁹

C. Volume of Materials Retrieved

Agency issues were identified 9 times in 5 cases (see Tables 1, 2). Breach of Fiduciary Duty was the most commonly raised issue, while Dual Agency and Designated Agency issues were also addressed in cases this quarter. Seven Agency statutes were retrieved this quarter (see Table 1).

³ [Or. Rev. Stat. § 696.010 \(2017\).](#)

⁴ [Or. Rev. Stat. § 696.241 \(2017\).](#)

⁵ [Or. Rev. Stat. § 696.310 \(2017\).](#)

⁶ [Or. Rev. Stat. § 696.026 \(2017\).](#)

⁷ [Or. Rev. Stat. § 696.022 \(2017\).](#)

⁸ [Or. Rev. Stat. § 696.290 \(2017\).](#)

⁹ [Or. Rev. Stat. § 696, Section 2 \(2017\).](#)

II. PROPERTY CONDITION DISCLOSURE

The Property Condition Disclosure cases this quarter involve a variety of interesting legal questions. For example, is a licensee liable for incorrect information contained in a property listing if the listing broker relied upon incorrect information found in the assessor's records? Must a licensee warn purchasers about the dangers of an empty pool on the property? And is a licensee required to disclose that a housing development was named after the founder of a hate group? In all three of those cases, the licensees were found not to be liable. However, in another case, the licensee was liable for failing to disclose the lack of sewer access to the lot and the licensee's relationship to the seller.

A. Cases

1. **Shahbazian Family Trust v. O'Neil**, No. C16-5477BHS, 2017 WL 2964821 (W.D. Wash. July 12, 2017)

Dual agent representative did not make false statement about flood zone designation or erosion on the property.

The purchaser bought a vacant oceanfront property. The defendant real estate representative acted as dual agent for both the seller and purchaser in the transaction. The seller's disclosure form indicated that the seller did not know if the property was in a flood zone and that the property had suffered damage from beach movements. The representative had an aerial photograph showing the changes due to beach erosion and indicating the flood zone designation, but he did not show the photograph to the purchaser. Two years after closing, the purchaser learned of the beach erosion and the property's flood zone designation, and asserted claims of fraud and negligent misrepresentation against the representative and broker. The court concluded that the purchaser failed to exercise due diligence. The information was readily available to the purchaser and identified in the disclosure statement. The MLS listing contained accurate information and there was no evidence that the sellers made a false statement. Also, the purchaser's claim for common law breach of fiduciary duty was abrogated by the Washington statute which prescribes statutory duties that real estate brokers owe to their clients. The court entered summary judgment for the licensee and broker.

2. **Orellana v. Homes Plus of Connecticut**, CV166015339S, 2017 WL 3000696 (Conn. Super. Ct. June 9, 2017)

Broker did not misrepresent lot size and presence of shed on property in property listing, where listing was based on inaccurate assessor records.

The defendant real estate broker acted as dual agent for both parties in a real estate transaction. The purchaser of the property alleged that the broker misrepresented the size of the property lot and that the property included a shed. The broker stated that he told the purchaser to have the property surveyed, but the purchaser elected not to do so.

The court determined that the listing was incorrect regarding the size of the property. However, the listing information was based on inaccurate assessor records. The purchaser failed to show that the broker knew or should have known the information found in the assessor records was false. Therefore, the court concluded that the broker did not make any misrepresentations regarding the property boundaries or that the shed was included with the parcel. The court entered judgment for the broker.

3. **Hall v. Eagle Rock Development, LLC**, No. E2015-01487-COA-R3-CV, 2017 WL 3233496 (Tenn. Ct. App. July 31, 2017)

Real estate defendants liable for failure to disclose lack of sewer access to the lot and representative's failure to disclose relationship to the seller

Purchasers of a lot in a housing development allege that the sellers and sellers' real estate representatives made misrepresentations regarding the availability of public sewer access to the lot. A representative of the seller indicated to the purchasers that the sewer was in place, and the property listing also indicated that the lot had sewer access. Although the disclosure form indicated there was no sewer access, the form was not provided to the purchasers until execution of the contract. The purchasers also alleged an unfair trade practices claim against their representative for failure to disclose that the representative was a member of the entity selling the property.

The trial court determined that the seller and sellers' representatives made misrepresentations regarding sewer access to the property. Accordingly, the court granted rescission of the contract and a refund of \$123,000 to purchasers. The court also found that the purchasers' real estate representative violated the state consumer fraud law in failing to inform the purchasers of his relationship to the seller of the property. The court awarded attorneys' fees under the consumer fraud law to the purchasers on this claim.

4. **Jacobs v. Coldwell Banker Residential Brokerage Co.**, 14 Cal. App. 5th 438 (July 25, 2017)

Broker not liable for injuries suffered by potential purchaser who fell into empty pool while viewing a property.

The potential purchaser of a bank-owned property sued the seller's broker for negligence after the purchaser fell into an empty pool while viewing the property. The purchaser stood on the diving board to look over the fence surrounding the property. The diving board collapsed while the purchaser was standing on it, and he fell into the empty pool. Prior to the incident, the listing representative had the pool inspected and had warned potential visitors via the MLS to exercise care around the empty pool. The trial court granted summary judgment for the broker, finding that the broker had no notice of any defect on the diving board.

The appellate court affirmed judgment in favor of the broker. According to the court, there was no duty to warn or protect the purchaser because the danger of an empty pool was open and obvious. Purchasers could avoid the edge of the pool as they viewed the property and it was not reasonably foreseeable that a purchaser would use the diving board in that manner. Because the broker did not invite purchasers to the edge of the pool, the purchaser voluntarily exposed himself to the danger.

5. **Valente v. Keller Williams Realty, Inc.**, No. 1:17-CV-00218-LJO-JLT, 2017 WL 3953953 (E.D. Cal. Sept. 8, 2017)

Real estate defendant did not owe a duty to inform purchaser that home was in a housing development named after the founder of a hate group.

Home purchaser alleged that he purchased a home in a housing development named for the founder of the KKK, and that the home contained obscene artwork in the fireplace mantle. The purchaser asserted claims for civil rights violations, negligent misrepresentation, fraud, negligence, and infliction of emotional distress against the real estate broker who handled the transaction.

The court concluded the purchaser failed to allege any discriminatory conduct by the broker, as the purchaser failed to present evidence that the transaction was affected by his race.

Furthermore, the alleged statements that the “home was just right” for the purchaser did not satisfy the high standards required to show fraud. Also, the broker had no duty to inform the purchaser that the subdivision was named after the founder of a hate group. The court dismissed all of the claims asserted by the purchaser.

B. Statutes and Regulations

Oregon

Oregon modified its Seller’s Property Disclosure Statement to include a disclosure regarding seismic risk. Specifically, the amended statement includes the following questions: (1) Was the house constructed before 1974? and (2) Has the house been bolted to the foundation?¹⁰

C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified 7 times in 6 cases (see Tables 1, 2). The cases addressed Structural Defects, Sewer/Septic, Boundaries, Stigmatized Property, Pollution, and Other Issues. One statute regarding Property Condition Disclosure was retrieved this quarter (see Table 1).

III. **RESPA**

Over the past few quarters, a number of cases have raised the same issue with respect to captive insurance schemes and the statute of limitations – whether the alleged RESPA violation occurred only at the time of the transaction, or whether each payment of an insurance premium constituted an independent violation. One of the cases below considered this issue. In the other case, the court concluded that a title insurance referral scheme did not violate RESPA because it fit the definition of an affiliated business arrangement.

A. Cases

1. **Consumer Financial Protection Bureau v. Borders & Borders, PLC**, No. 3:13-CV-01047-CRS-DW, 2017 WL 2989183 (W.D. Ky. July 13, 2017)

Relationship between law firm and LLCs providing title insurance fell within RESPA’s affiliated business relationship exception.

Borders & Borders is a law firm that primarily performed real estate closings, and was authorized to issue title insurance policies for several insurance companies. The firm created joint ventures (LLCs) with nine real estate services providers to provide title insurance. When

¹⁰ [Or. Rev. Stat. § 105.464 \(2017\)](#).

Borders & Borders closed on a real estate transaction, the firm referred the title insurance underwriting to the LLC affiliated with the real estate representative involved in the transaction. This relationship between the law firm, real estate representative, and the title insurance LLC was disclosed to the buyers.

The Consumer Financial Protection Bureau argued that this relationship violated RESPA Section 8(a), which prohibits the giving and receiving of fees and kickbacks in connection with mortgages. The court concluded the Bureau established a violation of RESPA because there was an agreement to refer business, referral fees were paid, and the transactions involved federally regulated mortgage loans. However, because Borders & Borders disclosed the relationship with the LLCs, the Bureau did not show that the Title LLCs received anything of value beyond their ownership interests, and the customers could reject the referral, the arrangement qualified as an “affiliated business relationship.” An affiliated business relationship constitutes an exception permitted under RESPA’s safe harbor provisions for relationships disclosed to the consumer. Because the relationship fell within the affiliated business relationship exception, the court granted summary judgment for Borders & Borders.

2. **Illinois ex rel. Hammer v. Twin Rivers Ins. Co.**, No. 16C7371, 2017 WL 2880899 (N.D. Ill. July 5, 2017)

RESPA claim based on captive reinsurance scheme was barred by the statute of limitations.

Triad sold private mortgage insurance (PMI). It had an agreement with Twin Rivers Insurance Company under which Twin Rivers reinsured the PMI policies issued by Triad on mortgages originated by banks affiliated with Twin Rivers. In turn, the banks referred customers to Triad. In rehabilitation proceedings, Triad’s rehabilitator sought a declaration that this captive reinsurance scheme violated the anti-kickback prohibitions of RESPA.

Triad’s claim was barred by the statute of limitations. Triad stopped selling private mortgage insurance in 2008. The court concluded that there was no separate violation for each insurance premium payment paid by Twin Rivers. Rather, there was a single violation of RESPA at the time of the original transaction. The court granted defendant’s motion to dismiss the 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). Kickbacks and Affiliated Business Arrangements were the most frequently addressed issues.

IV. **TECHNOLOGY**

Technological advances impact all industries, including the real estate industry. Technological issues of interest to real estate professionals cover a wide array of topics, such as cyber fraud, data breaches, and copyright and trademark issues. Over the past twelve months, a number of cases and legislative materials have addressed these technology-related issues. The cases retrieved over the past year concentrate on copyright and trademark issues. In the first case discussed below, the court considered whether the licensee's use of the trademarked name of a housing subdivision constituted trademark infringement. The other cases raise similar claims relating to real estate professionals' use of copyrighted photographs in real estate listings.

1. **Alyn v. Southern Land Co., LLC**, No. 3:15-CV-000596, 2016 WL 7451546 (M.D. Tenn. Dec 28, 2016)

Licensee's use of subdivision name infringed trademark registered by the development company.

The licensee, who lives and sells property in a subdivision called Westhaven, promotes her business through domain names and a newsletter that include the word Westhaven. She brought a claim against the company that developed the subdivision, which operates a division of its business called "Westhaven Realty" and has a trademark in the term Westhaven, seeking to cancel trademark registrations on the word Westhaven. The licensee also sought a declaration that her use of the word Westhaven did not infringe the Westhaven trademark, and alleged additional claims for tortious interference, unfair competition, and defamation. The development company raised counterclaims for cybersquatting, trademark infringement, false designation, and violation of the state consumer fraud law.

In this decision, the court considered motions for summary judgment brought by both parties. The court entered judgment for the development company on the trademark-registration claim because there was no evidence that the company engaged in fraud in obtaining the trademark. The court also concluded that there was a likelihood of confusion between the marks, and that the licensee's use of the Westhaven term did not constitute a fair use. Thus, the court granted judgment in favor of the development company on its trademark-infringement claims against

the licensee, and denied the licensee's request for a declaration that her use did not infringe the trademark. Furthermore, the court granted judgment in favor of the development company on the licensee's additional claims against the development company. However, the company's claims against the licensee for cybersquatting and violation of the state consumer fraud law could proceed.

2. **Adams v. Agrusa**, No. 2:15-CV-7270-SVW-RAO, 2016 WL 7665410 (C.D. Cal. July 1, 2016); **Adams v. Agrusa**, No. 2:15-CV-7270-SVW-RAO, 2016 WL 7665411 (C.D. Cal. July 19, 2016); **Adams v. Agrusa**, No. 2:15-CV-7270-SVW-RAO, 2016 WL 7665767 (C.D. Cal. July 20, 2016)

Licensee and broker were liable for infringement of copyrighted photographs included in MLS listing.

The plaintiffs, a licensee and his broker, entered into a listing agreement for a property. The licensee published twenty photographs of the property with the MLS listing. The licensee and broker obtained a copyright for the photographs, and placed a copyright symbol on each of the photographs attached to the listing. Plaintiffs allege that seller transferred the listing to another firm and the other firm displayed sixteen of the copyrighted photographs with the copyright symbol removed. The seller also displayed the photos on its website. Plaintiffs brought claims against the defendants for copyright infringement.

With respect to the claim against the salesperson who input the listing into the MLS, the court determined that the salesperson did infringe the copyright in those photographs but the salesperson was an innocent infringer. Although the salesperson had failed to obtain authorization to use the photographs, the licensee had a good faith belief that authorization was not required. The defendant salesperson had received the cropped photographs from the broker. Plaintiffs were entitled to \$250 in statutory damages for the salesperson's innocent infringement. In the claim against the seller, the court granted default judgment for Plaintiffs and awarded \$2,000 in statutory damages.

3. **Affordable Aerial Photography, Inc. v. Illustrated Properties Real Estate, Inc.**, No. 9:16-CV-80109-Dimitrouleas/Snow, 2016 WL 8786785 (S.D. Fla. May 3, 2016)

Photographer properly stated a claim for copyright infringement against real estate defendants for their use of his copyrighted photographs.

Plaintiff, a professional photographer, provides real estate photography services to real estate licensees and brokers. The photographer alleges that the defendant real estate professionals copied his copyrighted photographs from prior listings and impermissibly used those photographs in their real estate listings. The photographer brought claims for copyright infringement and removal of copyright management information. The defendants brought a motion to dismiss the claims.

The court concluded that the photographer sufficiently stated a claim for copyright infringement. The photographer alleged that he was the owner of the photographs and his complaint indicated which defendants allegedly used which photographs. The complaint also alleged that the photographer applied copyright management information to some of the material at issue in the case. Thus, the court denied the defendants' motion to dismiss the claims.

B. Statutes and Regulations

Drones – Louisiana, Michigan, North Carolina, Oregon, South Dakota, Texas

As more and more individuals own and use drones (also referred to as unmanned aircraft), for both professional and personal purposes, a number of states have passed laws in the past year relating to the use of drones. Some of the laws address general requirements for use of drones. For instance, the North Carolina statute provides that the permit requirements for the use of drones do not apply to model aircraft that are flown solely for hobby or recreational purposes without compensation.¹¹ Likewise, a Michigan statute requires drones used for commercial purposes to be used in accordance with federal law, while drones used for recreational purposes must comply with the law for operation of model aircraft.¹²

Many of these statutes implicate property issues and the rights of property owners. In Oregon, a new statute holds that a person may not operate an unmanned aircraft system over the boundaries of privately owned premises in a manner to intentionally, knowingly, or recklessly harass or annoy the owner or occupant of the premises.¹³ Texas allows licensed real estate brokers to use a drone to capture property images in connection with the marketing, sale, or financing of real property, and insurance company employees or affiliates may capture images using an unmanned aircraft in connection with an insurance policy or claim regarding real property or a structure on property.¹⁴ In Louisiana, the use of a drone for the purpose of spying upon others or otherwise invading the privacy of others is a criminal offense.¹⁵ Use of a drone in the space above property with intent to conduct surveillance constitutes "remaining in or upon property" or "entering upon immovable property" under the offense of criminal trespass.¹⁶ South Dakota passed a law making it a misdemeanor to land a drone on lands or

¹¹ [N.C. Gen. Stat. § 63-94 \(2017\).](#)

¹² [Mich. Comp. Laws § 259.301-259.323 \(2016\).](#)

¹³ [Or. Rev. Stat. § 837.300, Section 4 \(2017\).](#)

¹⁴ [Tex. Gov't Code § 423.002 \(2017\).](#)

¹⁵ [La. Rev. Stat. Ann. § 14:284 \(2016\).](#)

¹⁶ [La. Rev. Stat. Ann. § 14:63 \(2016\).](#)

water of another resident.¹⁷ The owner or lessee of the drone is liable for damage resulting from a forced landing of the drone.¹⁸ In Oregon, a property owner may bring a claim for invasion of privacy against a drone operator who flies over their property without permission (unless the drone operator complied with FAA requirements).¹⁹

Cyber Fraud

In order to assist licensees and brokers, the North Carolina Real Estate Commission posted guidance documents, prepared by another organization, regarding *Best Practices to Prevent Interception of Incoming Wires* and *Best Practices to Avoid Falling Victim to Wire Instruction Fraud*.²⁰ These documents provided advice to parties who engage in wire transactions. For instance, professionals are advised that wiring instructions should be sent only to the buyer or the intended recipient, in as secure a manner as possible, and that all wiring receipts should be verified directly with the bank.

Data Breaches

Oregon recently amended its consumer protection statute regarding use and disclosure of customer data. It is an unlawful trade practice for anyone to make a statement or representation in connection with a consumer transaction asserting that the person will use, disclose, collect, maintain, delete, or dispose of information received from the customer in a particular manner, and then use, disclose, collect, maintain, delete, or dispose of information received from the customer in a manner that is not consistent with that statement or representation.²¹

Electronic Media – South Carolina

Licensee advertising in South Carolina must include the brokerage name. When advertising on the internet or other electronic media, the licensee may include a link to the brokerage firm website in order to satisfy the requirement for identifying the name of the brokerage firm.²²

Electronic Signatures - Kansas

The Kansas Real Estate Commission (KREC) rescinded its prohibition on accepting electronic signatures on KREC forms.²³

¹⁷ [S.D. Codified Laws § 22-21-1 \(2017\)](#).

¹⁸ [Id.](#)

¹⁹ [Or. Rev. Stat. § 837.380 \(2017\)](#).

²⁰ [North Carolina Real Estate Commission, *Best Practices to Prevent Interception of Incoming Wires* \(2017\); *Best Practices to Avoid Falling Victim to Wire Instruction Fraud* \(2017\)](#).

²¹ [Or. Rev. Stat. § 646.607 \(2017\)](#).

²² [S.C. Code Ann. § 40-57-135\(E\)\(2\) \(2016\)](#).

²³ Kansas Real Estate Commission, [Electronic Signatures](#).

C. Volume of Materials Retrieved

Technology issues were identified in 3 cases in this quarter. Over the past twelve months, Technology issues were identified 13 times in 13 cases (see Table 4 and 5). Twelve statutes and 4 regulations regarding Technology issues were retrieved in the past twelve months (see Table 4).

V. **THIRD PARTY LIABILITY**

In this section, we examine the liability of inspectors, appraisers, and other third parties involved in real estate transactions. Many of these cases involve claims against appraisers. As demonstrated in the cases below, courts frequently consider whether the appraiser's duty extends to the purchaser of a property, and whether the complaining party could reasonably rely, and did in fact rely, on the appraisal. In another case, the court examined the duty of an escrow agent to the purchaser of a property.

1. Flores v. Payne, No. 16-CV-0856, 2017 WL 4296403 (W.D. La. July 18, 2017)

Appraiser owes a duty to lender, and that duty does not extend to purchasers of home.

Home purchasers, who lived in California, decided to purchase a home in Louisiana after performing a thirty-minute walk-through of the home. The purchase agreement indicated that the sale was "as-is," and provided "zero" days for inspection. Also, the real estate representative, who served as representative for both buyers and seller, sent a statement to the purchasers indicating that they were waiving any potential claims regarding structural defects against the listing agency, selling representative, and owner of the property. After closing, the purchasers' insurance inspector discovered defects in the porch, railing, and roof of the home. The purchasers sued the seller, listing broker, real estate representative, and appraiser. In this decision, the court considered the appraiser's motion to dismiss the claims against him.

The purchasers argued that the appraiser owed them a duty because they purchased through a VA loan. According to the purchasers, VA appraisal requirements apply to the condition, and not just the value, of the home, and therefore, the appraiser's appraisal represented that the property met the VA's minimum property requirements. The magistrate judge rejected this argument, finding that the appraiser owed a duty to the lender, but that duty did not extend to the buyers. The judge also noted that the buyers knew the difference between an inspection and appraisal, and signed the document stating "zero" days for an inspection. The magistrate judge recommended that the court grant the appraiser's motion to dismiss.

2. **Mitteldorf Mitteldorf v. B & W Appraisal Services, Inc.**, No. B263835, 2017 WL 120905 (Cal. Ct. App. Jan. 12, 2017)

Appraiser could be liable for negligent misrepresentation for statements regarding market value of home stated in appraisal report

Homeowners purchased a multi-million-dollar home in California. During the transaction negotiations, the homeowners' mortgage broker hired the defendant appraiser to perform an appraisal of the property. The appraisal report identified the market value of the home as the amount identical to the agreed-upon purchase price. The Uniform Residential Appraisal Report form included an Appraiser's Certification, under which the appraiser indicated that the appraisal could be distributed to the borrower or another lender, and that those parties could rely on the appraisal in the mortgage transaction. Shortly after closing, the homeowners became concerned that they overpaid for the property. After selling the property for a loss, the homeowners sued the appraiser for fraud. The parties presented evidence during court proceedings. Instead of allowing a jury decision, at the close of the evidence, the trial court granted a directed verdict in favor of the appraiser defendants, finding that the appraised value was an opinion that could not be an actionable misrepresentation. The trial court also determined that the homeowners did not actually rely on the appraisal report.

On appeal, the appellate court affirmed the directed verdict for the appraiser on the intentional misrepresentation claim, but reversed the directed verdict in favor of the appraiser on the negligent misrepresentation claim. With respect to the intentional misrepresentation claim, the court found there was no direct evidence that the appraiser knowingly or recklessly made false statements. On the negligent misrepresentation claim, however, there was evidence to support a claim. The appellate court concluded that a professional appraiser's opinions as stated in a signed appraisal report are professional opinions that are actionable as statements of fact. Furthermore, the certification in the report indicated that the appraiser knew the home buyers could rely on the appraisal. Thus, the appellate court determined there was sufficient evidence for the jury to decide that the home buyer did rely on the appraisal. The case was remanded for a retrial of the negligent misrepresentation claim.

3. **Dufrene v. Murphy Appraisal Services, LLC**, No. 2015CA1351, 2015 WL 4158955 (La. Ct. App. Aug. 5, 2016)

Appraiser was not liable to purchasers where purchasers did not review or rely on the appraisal prior to the purchase.

Business owners purchased a property to be used as a commercial property for storage, maintenance, fueling, and servicing of the business's fleet of trucks. The MLS listing stated that the property was zoned for commercial use. After the purchase, the owners were ordered to stop work on the property because it was zoned for residential use. In addition to suing the real estate entities and individuals involved in the transaction and the seller of the property, the business owners also brought suit against the appraiser for negligent misrepresentation. The appraiser moved for summary judgment on the grounds that the property owners were neither a party nor a third-party beneficiary of the appraisal contract, and that the owners could not have relied on the appraisal because it was not furnished to them until after the sale. The trial court granted summary judgment in favor of the appraiser.

The appellate court concluded that the intended user of the appraisal report case was the bank, not the property owners. The property buyers testified that they had neither received nor reviewed the appraisal prior to the purchase and that they did not rely on the appraisal. The court of appeals also found that the appraiser's duty did not extend to the purchasers of the property. The court affirmed summary judgment for the appraiser.

4. **Eleazer v. First American Title Ins. Co.**, No. 75097-I, 2017 WL 1137215 (Wash. Ct. App. March 27, 2017)

Escrow agent did not owe a duty to investigate and disclose restrictive covenants on the property

Home buyers purchased a home located on one of two adjoining lots owned by the seller. The other lot contained a hotel and restaurant. The home buyers knew that the lot they purchased contained a septic drain field for the hotel/restaurant, and an addendum to the purchase and sale agreement stated that the home buyers agreed to grant an easement for the septic system. Several years later, the backyard septic system for the homebuyers' house failed, and they requested access to the septic system in the front yard. The health district denied the request, saying that restrictive covenants on the property created uncertainty regarding ownership of septic system. Thereafter, the title insurer denied homebuyers' claim for loss on the property. The homebuyers then sued the escrow agent for failing to investigate and disclose restrictive covenants on the property. The trial court granted summary judgment in favor of the escrow agent. The homebuyers also sued the insurance company.

The appellate court affirmed summary judgment for the escrow agent. The court stated that the escrow agent's duty was defined under the terms of the escrow instructions. Pursuant to those terms, the escrow agent had no responsibility for any title defects or encumbrances which were not disclosed in the title report. The escrow agent had no duty to search for and

disclose recorded documents. Therefore, the escrow agent did not breach any contractual or fiduciary duty to the homebuyers. The court also affirmed dismissal of the claims against the insurance company.

B. Statutes and Regulations

Connecticut

Connecticut added the presence of mold to the list of items that a housing inspector is not required to evaluate during his or her inspection of the home.²⁴

C. Volume of Materials Retrieved

Third Party Liability issues were identified in 2 cases this quarter. Over the past twelve months, Third Party Liability issues were identified 9 times in 9 cases (*see* Table 4). One regulation regarding Third Party Liability was retrieved in the past twelve months (*see* Table 4).

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 4 Agency cases, and the licensee was liable in 1 of those cases²⁵ (*see* Table 3).

B. Property Condition Disclosure Cases

Liability was determined in 5 Property Condition Disclosure Cases this quarter, and the licensee was liable in 2 of those cases²⁶ (*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. Technology

Liability was determined in 9 cases involving Technology issues over the past twelve months; the defendant was held liable in 5 of those cases²⁷ (*see* Table 6).

²⁴ [Conn. Agencies Regs. § 20-491-13 \(2017\)](#).

²⁵ *Campbell v. Luong*, No. 04-16-00460-CV, 2017 WL 3044591 (Tex. Ct. App. July 19, 2017) (licensee liable for \$1,175 in actual damages, \$3,525 in treble damages, and \$14,000 in attorneys' fees).

²⁶ *Maryland Real Estate Commission v. Garceau*, No. 1671, Sept. Term 2015, 2017 WL 3816818 (Md. Ct. Spec. App. Sept. 1, 2017) (remanded to modify sanctions); *Hall v. Eagle Rock Development, LLC*, No. E2015-01487-COA-R3-CV, 2017 WL 3233496 (Tenn. Ct. App. July 31, 2017).

²⁷ *Bell v. KB American Real Estate Holdings, LLC*, No. 1:15-CV-01423-JMS-DML, 2016 WL 8669801 (S.D. Ind. July 22, 2016) (\$2000 in statutory damages and \$417.50 in costs for copyright infringement); *Adams v. Agrusa*, No. 2:15-CV-0720-SVW-RAO, 2016 WL 7665411 (C.D. Cal. July 19, 2016), *Adams v. Agrusa*, No. 2:15-CV-07270-SVW-RAO, 2016 WL 7665767 (C.D. Cal. July 20, 2016), *Adams v. Agrusa*, No. 2:15-CV-07270-SVW-RAO, 2016 WL 7665410 (C.D.

E. Third Party Liability

Liability was determined in 4 Third Party Liability cases retrieved over the past twelve months; the defendant was held liable in 1 of those cases²⁸ (see Table 6).

VII. TABLES

Table 1
Volume of Items Retrieved for Third Quarter 2017
by Major Topic

| Major Topic | Cases | Statutes | Regulations |
|-------------------------------|-------|----------|-------------|
| Agency | 5 | 7 | 0 |
| Property Condition Disclosure | 6 | 1 | 0 |
| RESPA | 6 | 0 | 0 |

Table 2
Volume of Items Retrieved for Third Quarter 2017 by Issue

| Issue | Cases | Statutes | Regulations |
|-------------------------------------|-------|----------|-------------|
| Agency: Dual Agency | 3 | 0 | 0 |
| Agency: Buyer Representation | 0 | 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 | 0 | 0 | 0 |
| Agency: Breach of Fiduciary Duty | 5 | 0 | 0 |

Cal. July 1, 2016) (\$2000 and \$250 in statutory damages for copyright infringement); *Vesta Corp. v. Vesta Management Services, LLC*, No. H-15-719, 2016 WL 8710440 (S.D. Tex. Sept. 30, 2016) (injunction granted).

²⁸ *2928 Camino Del Mar LLC v. KCM Group, Inc.*, 2016 WL 7231175 (Cal. Super. Ct. Mar. 16, 2016).

| Issue | Cases | Statutes | Regulations |
|---|-------|----------|-------------|
| Agency: Disclosure of Financial Ability | 0 | 0 | 0 |
| 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 | 0 |
| Agency: Coming Soon Listings | 0 | 0 | 0 |
| Agency: Other | 0 | 7 | 0 |
| PCD: Structural Defects | 1 | 1 | 0 |
| PCD: Sewer/Septic | 1 | 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 |

| Issue | Cases | Statutes | Regulations |
|---|-------|----------|-------------|
| PCD: Valuation | 0 | 0 | 0 |
| PCD: Short Sales | 0 | 0 | 0 |
| PCD: REOs & Bank-owned Property | 0 | 0 | 0 |
| 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 | 1 | 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 | 1 | 0 | 0 |
| Property Condition Disclosure: Other | 2 | 0 | 0 |
| RESPA: Disclosure of Settlement Costs | 0 | 0 | 0 |
| RESPA: Kickbacks | 4 | 0 | 0 |
| RESPA: Affiliated Business Arrangements | 4 | 0 | 0 |
| RESPA: Marketing Service Agreements | 0 | 0 | 0 |
| RESPA: Other | 1 | 0 | 0 |

Table 3

Liability Data for Third Quarter 2017

| Topic | Liabe | Not Liabe | % Liabe | % Not Liabe |
|-------------------------------|-------|-----------|---------|-------------|
| Agency | 1 | 3 | 25% | 75% |
| Property Condition Disclosure | 2 | 3 | 40% | 60% |
| RESPA | 0 | 0 | N/A | N/A |

Table 4

Volume of Third Party Liability and Technology Items Retrieved in Past Twelve Months (October 2016-September 2017)

| Major Topic | Cases | Statutes | Regulations |
|-----------------------|-------|----------|-------------|
| Technology | 13 | 12 | 4 |
| Third Party Liability | 9 | 0 | 1 |

Table 5

Volume of Third Party Liability and Technology Items Retrieved in Past Twelve Months by Issue (October 2016-September 2017)

| Major Topic | Cases | Statutes | Regulations |
|--|-------|----------|-------------|
| Technology: State Internet Advertising Rules | 0 | 1 | 1 |
| Technology: Social Networking | 0 | 0 | 0 |
| Technology: Privacy | 0 | 0 | 0 |
| Technology: Anti-Solicitation Laws | 0 | 0 | 0 |
| Technology: Data Breaches | 0 | 2 | 0 |
| Technology: Cyber Fraud | 0 | 0 | 1 |
| Technology: Drones | 0 | 9 | 0 |

| | | | |
|-----------------------------------|----|---|---|
| Technology: Copyright | 13 | 0 | 0 |
| Technology: Other | 0 | 0 | 2 |
| Third Party Liability: Appraisers | 4 | 0 | 0 |
| Third Party Liability: Inspectors | 2 | 0 | 1 |
| Third Party Liability: Other | 3 | 0 | 0 |

Table 6

Liability Data for Technology and Third Party Liability Cases in the Past Twelve Months (October 2016-September 2017)

| Topic | Liabe | Not Liabe | % Liabe | % Not Liabe |
|-----------------------|--------------|------------------|----------------|--------------------|
| Technology | 5 | 4 | 56% | 44% |
| Third Party Liability | 1 | 3 | 25% | 75% |