LEGAL PULSE NEWSLETTER: THIRD QUARTER 2019

The Legal Pulse Newsletter examines legal liability trends in the real estate industry. This edition reviews recent case decisions and legislative activity in the areas of agency, property condition disclosure, and RESPA. In addition, we review technology issues and third-party liability case decisions and related legislative activity occurring from October 2018 to October 2019.

In the third quarter of 2019, the most common agency issues identified in case decisions include breach of fiduciary duty and dual agency. No statutes or regulations pertaining to agency issues were retrieved for the states examined this quarter.

The property condition disclosure cases reviewed this quarter covered a variety of disclosures. In one case of interest, a Louisiana court examined the state's redhibition law which allows a buyer to rescind a sales contract if the item purchased is defective. Disclosure issues also arose in the legislative context, with the Oregon Legislature revising the state-required Property Disclosure Form to include a statement regarding flood insurance requirements for homes in a designated floodplain.

We retrieved a small number of RESPA cases, compared to the number retrieved in previous quarters. Among the cases retrieved, claims of referral fee and kickback schemes were addressed. No statutes or regulations pertaining to RESPA issues were retrieved for the states examined this quarter.

Each quarter we take a closer look at cases and legislative activity in additional areas of interest to real estate professionals. This quarter, we reviewed cases and statutory and regulatory changes relating to technology and third-party liability issues. The technology cases address copyright and trademark disputes involving real estate professionals. Notably, one Texas court deemed the defendant to have acted knowingly and intentionally when infringing a brokerage company's mark. With respect to third-party liability, most cases involved claims against inspectors and appraisers.

For more details, read the summaries below, and check out the tables showing cases and liability figures to learn more about recent trends in legal cases involving the real estate industry.[1]

I. AGENCY

The agency cases located this quarter predominantly address the scope of real estate brokerage services. Agency issues were identified in eighteen cases.[2]

A. Cases

1. **Horiike v. Coldwell Banker Residential Brokerage Company**, No. B290819, 2019 WL 4668006 (Cal. Ct. App. Sept. 25, 2019)

Salesperson had the same fiduciary duty to the buyer and the seller as the brokerage company to learn and disclose material information.

A salesperson licensed under Coldwell Banker was hired by the seller of a residential property. The salesperson informed the buyer that the property consisted of approximately 15,000 square feet of living area and that the owner was the source of the square footage information. At the bottom of the listing an advisement stated, "Broker/Agent does not guarantee the accuracy of the square footage, lot size or other information concerning the conditions or features of the property provided by the seller or obtained from Public Records or other sources. Buyer is advised to independently verify the accuracy of all information through personal inspection and with appropriate professionals." The seller and the buyer both used salespeople from the same brokerage; therefore, the brokerage was a dual agent. After purchasing the property, the buyer learned that public records listed far less square footage for the house, around 11,000 square feet. The buyer's lawsuit alleged misrepresentation, intentional concealment, and breach of fiduciary duty.

The California Supreme Court held that a brokerage that is a dual agent owes fiduciary duties to both the buyer and seller, and the salespeople who are under the brokerage's license owe equivalent duties. The seller's salesperson thus owed the same fiduciary duty to the buyer as the brokerage did. That duty included a duty to learn and disclose material information affecting the property's price or desirability, including those facts the buyer might have reasonably discovered himself. The case was remanded for a new trial on the claim for breach of fiduciary duty.

[1] Except as noted, case reporting reflects the party descriptions used by the courts. Case summaries may omit specific ancillary issues that are not the focus of this newsletter.

[2] See Tables 1, 2 for a complete list of identified materials.

At trial, the buyer contended that the salesperson was required to disclose documents that listed far lower square footage for the house, but the measurements in those documents were "incomplete, misleading, and not material, considering the property had approximately 15,000 square feet of living area." The jury found that there was no evidence that the salesperson breached a fiduciary duty to the buyer, made a false representation of fact, or intentionally failed to disclose a fact that buyer could not reasonably have discovered.

2. **Jossund v. Heim Plumbing, Inc.**, No. 2018AP209, 2019 WL 2997987 (Wis. Ct. App. July 10, 2019)

A seller may be liable for an agent's representations even if the seller did not know the representations were made.

Buyers purchased a residence in Wisconsin from the bank who was the seller. After moving in, they found defects with the home, including a damaged water tank and broken water pipes, which resulted in sewage in the basement and elevated fungal growth. One of the buyers was rendered ill by these conditions. The buyers sued Heim Plumbing, which had been hired to inspect the house's plumbing system, along with Heim's insurer, the seller's real estate agent, the brokerage firm, and the seller (bank), alleging fraudulent misrepresentation and negligence.

Under Wisconsin law, a seller may be held liable for an agent's misrepresentations even if the seller had no knowledge the misrepresentations were made. In response to the bank's argument that the complaint failed to sufficiently allege an agency relationship, the court stated: "[v]ery generally, if an individual or company hires someone to negotiate a deal for you, subject to your approval, that someone is your agent." The buyers alleged that the seller's real estate agent provided real estate brokerage services for the bank as the seller of the property, which the bank accepted the purchase offer and that the bank was compensated for the purchase price. The court found that the buyers were able to successfully identify the time, place, and content of the alleged affirmative representation the real estate agent made before the sale of the property and ultimately denied the seller's motion to dismiss.

3. **Dubasso v. LQR Resort Desert Real Estate, Inc.**, No. E069952, 2019 WL 4439702 (Cal. Ct. App. Sept. 17, 2019)

Salesperson had an obligation to inform buyers that the golf club might reject their membership application.

Buyers were searching for a retirement home in LaQuinta in 2015. During their visit to the Tradition community, the buyers expressed concern that living in a country club community might be "lonely and isolating." The broker told the buyers that they shouldn't be concerned

because "the social club at Tradition was amazing" and there "would be plenty of people around…" Also, at the broker's suggestion, the buyers visited the Tradition clubhouse and met its general manager. Through the visit, it was expressed that the buyers intended to become members of the club in addition to purchasing the home. At no time, however, did the broker or the club general manager explain that the buyers would need to apply for membership, or undergo a vetting process, or suggest in any way that membership was anything other than automatic upon purchasing. The buyers purchased a home in the Tradition community in LaQuinta with the intention of becoming club members. Following the close of escrow on the purchase of their home, they applied for a membership in Tradition's Golf Club, which was rejected. Subsequently, the buyers said they "felt like pariahs in their own neighborhood" and brought an action for money damages against LQR Resort Desert Real Estate, Inc., and the individual who served as buyers' real estate broker and agent (collectively, Defendants), for failure to disclose that membership to the club was not "automatic" for Tradition homeowners. The complaint alleged that the Defendants intentionally or negligently breached their fiduciary duty to the buyers by failing to learn that they did not wish to purchase their Tradition home unless they could be club members, and by failing to advise them to make their purchase contract contingent on Tradition's approval of their club membership application. The Defendants moved for summary judgment on the sole ground that the covenants, conditions, and restrictions (CC&R) of Tradition's community association "disclosed" to the buyers that the purchase of a Tradition home did not "guarantee" club membership.

In considering the buyers' claims, the court noted that as fiduciaries, a broker and its salespersons or agents have a duty to investigate and discover, and to advise the broker's principal of "all material facts that may bear upon the principal's decision and that will allow the principal to make a well-informed decision in the real estate transaction in question." Therefore, the language in the CC&Rs was not sufficient to relieve the defendants of their obligation to inform buyers "in some manner" of a fact that the defendants were actually aware of; namely, that the club might reject the buyers' membership application. The courts ultimately denied the Defendant's motion for summary judgment.[3]

B. Statutes and Regulations[4]

No statutes or regulations were retrieved.

[3] This case has not yet been fully resolved.

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

II. PROPERTY CONDITION DISCLOSURE

The property condition disclosure cases retrieved this quarter addressed mold and water intrusions, and roof and structural defects. Property condition disclosure issues were identified in seven cases.[5]

A. Cases

1. **Radlauer v. Curtis**, No. 2019-CA-0311, 2019 WL 3818794 (La. Ct. App., Aug. 14, 2019)

A house that has flooded under extraordinary rainfall is not a redhibitory defect.

Purchaser, represented by a real estate agent, made an offer to purchase a house. The purchaser and seller executed an "Agreement to Purchase or Sell" the property. An "As Is Clause" addendum was executed at the sale. The addendum included a waiver of redhibition, stating that the purchasers were not relying upon any representations, statements, or warranties made by the vendor or his agent regarding the condition of the property. Redhibition allows a sales contract to be rescinded because the thing purchased was defective. To prevail in an action for redhibition, the plaintiff must prove that the thing sold contained a hidden defect that was not apparent upon ordinary inspection, which rendered the thing unfit for its intended use or so imperfect that the purchaser would not have bought it had he known of the defect. The sale of the property at issue occurred approximately nine months before Hurricane Katrina. After the property sustained flood damage as a result of the hurricane, the buyer sought rescission of the sale and return of the purchase price.

The court found that the record was clear that the property flooded twice in a 10-year period, each time at the time of a natural disaster that brought extreme rainfall. The property also flooded when the levee was breached during Hurricane Katrina. On cross-motions for summary judgment brought by the defendant vendor and real estate agent, the court held that the purchaser failed to present factual support evidencing that the property flooded or experienced water seepage on days not marked by extraordinary rainfall. Additionally, the court found while that a house's susceptibility to flooding is a redhibitory defect, the mere fact that a house flooded under extraordinary rainfall is not a redhibitory defect. The grant of summary judgement was affirmed and purchaser's claim was dismissed with prejudice.

[5] See Tables 1, 2 for a complete list of identified materials.

2. **Bacovsky v. Fetzer**, No. 2018AP1347, 2019 WL 3211269 (Wis. Ct. App. July 17, 2019)

Buyer's testimony regarding the impact on the value of the property from an alleged misrepresentation about the roof was sufficient to support claim.

Four days after closing on the purchase of a condominium, the buyer discovered ceiling leaks in the upstairs hallway of the unit. The leaks continued throughout the winter. The buyer reported the leaks to the Menomonee River Condominium Association, Inc. (MRCA). MRCA acknowledged that the leaks had been going on for "a while" and advised the buyer to "watch and wait." After the ice had cleared off the roof, MRCA repaired the roof and the ceiling leaks stopped. However, the buyer believed that there was mold in the unit and took steps to remediate it by hiring a company to remove drywall and other materials. Unsatisfied with the results and believing that the mold was affecting her health, the buyer deemed the unit uninhabitable, moved out, and stopped paying the mortgage. The bank foreclosed on the unit. The buyer subsequently filed suit alleging breach of contract, negligence and misrepresentation against the sellers, the sellers' real estate broker and the MRCA (collectively, Defendants).

The court affirmed the dismissal of the claims related to the issue of mold, noting that the buyer would need to provide expert testimony if she wanted to show the leaks caused mold. The court concluded that the failure to provide expert testimony regarding the impact on the condominium's value was not fatal to the misrepresentation claims because the buyer was able to offer testimony regarding the impact the alleged misrepresentation about the condition of the roof had on the value of the property. In addition, the court concluded that the buyer's misrepresentation claims relating to the roof could go forward against the sellers and their real estate broker because the sellers did not disclose a defect in the roof in the real estate condition report that they prepared with their real estate broker prior to the sale. The case was remanded for trial on the buyer's misrepresentation claims relating to the roof.[6]

3. **Morgan v. Cohen**, No. 107955, 2019 WL 4316809 (Ohio Ct. App. Sept. 12, 2019)

Buyers' breach of contract claim was barred by the "as is" clause in the purchase agreement and the doctrine of caveat emptor.

Sellers retained a real estate agent to assist them in selling their condominium unit in the Random Road Lofts. The buyers agreed to purchase one of thirteen units in that complex. During the time the sellers owned the unit, they experienced very few issues with the property. The sellers, however, were aware that owners of certain other units had experienced problems with

[6] This case has not yet been resolved.

water leaking into their units from outside and knew of a defect with a support beam over the driveway of the complex. The sellers denied knowledge of any existing structural problems or any defects affecting common areas or the complex as a whole. Prior to the sale, the sellers completed an Ohio residential property disclosure form (RPDF) for the property, in which they represented that they had no knowledge of any "material defects in or on the property" or "any recent or proposed assessments, fees or abatements, which could affect the property." The sellers also completed a "condominium addendum" and a "condominium, cluster home, or planned unit development information" form. In the condominium addendum, they disclosed that the property was subject to maintenance fees of $1,500 per quarter and warranted that there were no other additional fees, proposed or voted assessments, or maintenance fee increases.

On the same day that they purchased the unit, the buyers received notice of a condominium association meeting regarding the status of negotiations relating to construction defects. At the meeting, the buyers learned about the concerns with the construction of the building, negotiations and a potential lawsuit related to those concerns, and the potential for a special fee assessment to be levied against association members for investigation and litigation related to the construction defects. The buyers filed a complaint asserting breach of contract, fraudulent misrepresentations, and fraudulent inducement against the sellers.

The sellers subsequently filed a third-party complaint against their real estate agent, alleging that their agent had assisted them in the completion of the RPDF, the condominium addendum, and the condominium disclosure form. The trial held that the buyers' breach of contract claim was barred by the "As Is" clause in the purchase agreement and the doctrine of caveat emptor ("buyer beware"). The trial court found that there was no evidence that the sellers' disclosures were false, and that the sellers did not have a duty to disclose conditions in the common areas or other units owned by other parties. It further held that because the buyers had an opportunity to inspect the meeting minutes of prior association meetings but failed to do so, they were charged with knowledge of the conditions that a reasonable inspection would have discovered. In addition, the court held that the buyers could not establish that their reliance on the sellers' alleged misrepresentations and concealment was justified or that the sellers "had a duty to speak." The appellate court held that the trial court properly granted the sellers' motion for summary judgment on the buyers' fraud claims.

Statutes and Regulations

Oregon

The Seller's Property Condition Disclosure Form must now include a statement that flood insurance may be required for homes in a designated floodplain, per an amended statute.[7]

III. RESPA

Consistent with previous quarters, the RESPA cases retrieved this quarter examined unearned fees and windfalls. RESPA issues were identified in two cases.[8]

A. Cases

1. **Willis v. Tritle**, No. 1:17-cv-00345-MR, 1:17-cv-00345-MR, (W.D.N.C. July 12, 2019)

Borrowers failed to identify which settlement charges were allegedly improper, precluding RESPA claims.

Borrowers obtained a loan to purchase real property in North Carolina through Professional Lending. Tritle was the President of Professional Lending. Borrowers brought suit against Tritle and other defendants. Among other claims, the borrowers alleged that their loan closing was part of an undisclosed hidden illegal scheme to issue unregulated securities based upon the negotiation of non-negotiable notes, the terms of which had been changed after the execution by the borrowers. They alleged that defendant Tritle "accepted charges for the rendering of real estate services which were in fact charges for other than services actually performed" in violation of RESPA Section 2607(b), which prohibits any person from giving or accepting unearned fees. The court determined that the borrower's complaint failed to identify which settlement charges were allegedly improper and that it lacked factual allegations that defendant Tritle improperly split a fee with any other persons. The court held the borrower's generic allegations regarding the settlement charges were insufficient to effectively state a RESPA claim and ruled to dismiss with prejudice the borrowers' RESPA claims against Tritle.

[7] 2019 Or. Laws ch. 564

[8] See Tables 1, 2 for a complete list of identified materials.

2. **Lakeview Loan Servicing, LLC v. Mobley**, No. 1:16-cv-04572-MHC-LTW, 2019 WL 3502914 (N.D. Ga. June 4, 2019)

Borrower's contentions did not contain any factual allegations to support a RESPA claim based on alleged windfall.

Lakeview Loan Servicing, LLC (Lakeview) filed a complaint requesting that the court declare its senior title to certain real property, cancel and remove a satisfied security deed from title to the property, judicially foreclose Lakeview's senior interest in the property based on the borrower's breach of the note and security deed, award sole possession of the property to Lakeview, and award damages against the borrower for the amount due on the note and security deed. The borrower counterclaimed, alleging that Lakeview violated RESPA because "alleged payments between Lakeview and an unidentified entity were misleading and designed to create a windfall", contending that Lakeview's actions were "deceptive, fraudulent and self-serving." Additionally, the borrower stated that Lakeview failed to provide "full disclosure" of all matters related to his mortgage loan.[9] Lakeview argued that borrower failed to allege any facts that support his conclusory statements.

The court held that the borrower's contentions did not contain any factual allegations to support a RESPA claim, noting that the borrower did not explain how the alleged payments between Lakeview and an unidentified entity were misleading or designed to create a windfall. The court further held that the borrower failed to explain how such a claim would constitute a violation of RESPA. The court recommended that borrower's RESPA counterclaim be dismissed with prejudice.

B. Statutes and Regulations

No RESPA statutes or regulations were retrieved.

IV. TECHNOLOGY HIGHLIGHTS: YEARLY HIGHLIGHTS

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. The technology cases retrieved from October 2018 to October 2019 focused on copyright, trademark, and cybersquatting violations. Over the past twelve months, technology issues were identified in six cases.[10]

[9] The details of the transaction(s) between Lakeview and the borrower are not set out in the court's opinion.
[10] See Tables 4, 5 for a complete list of identified materials.

A. Cases

1. **Real Estate Edge, LLC v. Campbell**, No. 1:17-CV-1093-RP, 2019 WL 830966 (W.D. Tex. Feb. 21, 2019)

Default judgment held that defendant's operation of a domain name was an act of cybersquatting intended to erode the distinctiveness of brokerage's trademark.

Real Estate Edge (REE) is a real estate brokerage company providing services under the registered trademark, Great Austin Realty. Defendant is the registrant and operator of the Internet domain name "www.greateraustinrealty.com." In its complaint, REE alleged that the defendant's operation of its domain name was an act of cybersquatting intended to erode the distinctiveness of the Great Austin Realty mark. Under the Anti-Cybersquatting Consumer Protection Act (ACPA), a person is liable for "cybersquatting" "if, without regard to the goods or services of the parties that person: (i) has a bad faith intent to profit from that mark, …: and (ii) registers, traffics in, or uses a domain name that –(i) in the case of a mark that is distinctive at the time of registration of the domain, is identical or confusingly similar to that mark." (15 U.S.C. § 1125(d)(1)(A). The defendant failed to respond to REE's complaint. The court found that REE pleaded sufficient facts and held that the defendant acted knowingly and intentionally in infringing REE's trademark, and entered default judgment in favor of REE. The court granted a permanent injunction and ordered the transfer of the domain name "www.greateraustinrealty.com" to REE. The court further awarded REE $12,300 in attorney's fees and $1,056 in costs.

2. **Stross v. River's Edge Realty, LLC.**, No. A-17-CV-391-RP, 2018 WL 5777736, (W.D. Tex., Aug. 3, 2018)[11]

On a copyright infringement claim, a plaintiff must show both the ownership of a valid copyright and unauthorized copying.

A photographer asserted claims against several defendants, including a broker, for using his photographs to market a home for sale on behalf of Centerra Homes in violation of the photographer's copyrights. The broker alleged that the photographer lacked standing to assert the claims because the photographer provided the photographs to his wife, an employee of Centerra Homes. The broker further contended that when the photographer uploaded the photographs to the MLS service for his wife, he granted a license to the MLS service and any other licensee to use the photographs to sell the home. "To prevail on a copyright infringement claim, a plaintiff must show (1) ownership of a valid copyright and (2) unauthorized copying."

[11] Case decisions rendered prior to October 2018 may be reported in this Newsletter because

Since there was no dispute over copyright ownership or the broker's use of the material, the court determined the photographer adequately pleaded the elements of a claim for copyright infringement, and denied the broker's motion to dismiss, thereby permitting the photographer's claims to proceed.[12]

3. **Lake Martin Realty, Inc., v. Lake Martin Real Estate Co.**, No. 3:18cv798-ECM, 2019 WL 1938802 (M.D. Ala. May 1, 2019)

Plaintiffs presented no evidence of actual or imminent injury to their reputation to warrant a preliminary injunction.

Plaintiffs, a realty company, filed a trademark infringement and unfair competition action against another real estate company based upon similarity in the company names. Plaintiffs also moved for a preliminary injunction, arguing that there was a likelihood of confusion between Lake Martin Realty and Lake Martin Real Estate Company, and that the possibility of confusion was sufficient to demonstrate irreparable harm. In ruling on the request for injunction, the court noted that the plaintiffs presented no evidence of actual or imminent injury to their reputation. The court found that the plaintiff's testimony and evidence only pointed to prospective and speculative harm rather than actual, imminent or irreparable harm. Therefore, court concluded that the plaintiffs failed to meet their burden of demonstrating a threat of irreparable injury sufficient to warrant a preliminary injunction, and denied their request for a preliminary injunction.[13]

B. Statutes and Regulations

No data breach, drone, or cyber fraud statutes or regulations were retrieved.

V. THIRD-PARTY LIABILITY HIGHLIGHTS: YEARLY REVIEW

In this section, we examine the liability of inspectors, appraisers, and other third parties involved in real estate transactions. Over the past twelve months, third-party liability issues were identified in three cases.[14]

[12] This case has not yet been resolved.
[13] This case has not yet been resolved.
[14] See Tables 1, 2, 4, and 5 for a complete list of identified materials.

A. Cases

1. **Reed v. Ezelle Inv. Props. Inc.**, No. 3:17-cv-01364-YY, 2018 WL 5786208 (D. Or. Nov. 5, 2018)

Broker's use of photograph constituted copyright infringement.

A professional photographer (the photographer) took a photograph at the Japanese Gardens in Oregon (the image) and displayed it on his website. A broker licensed in Oregon and California searched Google for "free images" to display on his brokerage firm's website. He located the image of the Japanese Gardens through this search and displayed it the firm's website. The broker alleged that he did not see a watermark or any other information that suggested that the image was protected by copyright. Upon discovering the image on the brokerage firm's website, the photographer instructed his attorneys to contact the broker to try to resolve the matter. The broker received a cease-and-desist letter with a Rapid Conditional Release License Agreement containing a Confidentiality Clause, which provided the broker with the option to settle immediately for $5,000. Upon receipt of the letter, broker immediately removed the image and retained counsel. The counsel for both parties agreed to settle the matter for $1,000 but the broker's counsel rejected the confidentiality clause in the photographer's proposed settlement agreement. The broker's counsel expressed that if the deletion of the clause was unacceptable that the photographer could return the $1,000 check. The negotiations failed and the photographer brought action against the broker alleging copyright infringement.

The broker argued that the parties entered into an enforceable settlement agreement. The court determined that there was no binding settlement agreement because the broker's purported acceptance modified a material term of the agreement, by deleting the confidentiality clause, and thus constituted a counteroffer. In examining the merits of the photographer's copyright infringement claim, the court found that the broker could not establish nonliability because although a copyright notice did not appear alongside the image when it was downloaded, information that a copyright existed was readily discoverable through basic online research. The district court granted the photographer's motion for summary judgment and awarded him $1,500 in statutory damages based on infringement of his copyright.

2. **Shaw v. Shand**, No. A-5686-17T1, 2019 WL 3819677 (N.J. Super. App. Div. Aug, 15, 2019)

Home inspectors are not "learned professionals" exempted from the New Jersey Consumer Fraud Act.

Purchasers hired the defendant home inspector to conduct an inspection of a property prior to purchase. The report concluded that the property was in need of only typical maintenance and upgrading. Purchasers proceeded to close on the property in June 2015. Upon occupying the property, they learned that the property was in poor condition and required a great deal of repairs. Purchasers sued the home inspector, alleging claims for negligence, violation of the New Jersey Consumer Fraud Act (CFA), common-law fraud, and breach of contract. At his deposition, the inspector acknowledged he observed problems with the home that he did not report, and that he became licensed in January 2015 after successfully completing the schooling and apprenticeship required and passing the licensing test. The purchaser's home was the inspector's first assignment as a licensed inspector.

The court determined that home inspectors and other licensed semi-professionals are not learned professionals and thereby exempt from liability under the CFA's. The court further held that the purchaser's claims pursuant to CFA and the claims for the problems the inspector allegedly failed to disclose were not expressly preempted by the Home Inspection Licensing Act (HIPLA). Therefore, the partial summary judgment that was ruled in favor of the inspector was reversed and the matter was remanded back down to the trial court.[15]

3. **Boesiger v. Desert Appraisals, LLC**, No. 75198, 444 P.3d 436 (Nev. July 3, 2019)

Homeowners could not establish professional negligence by a real estate appraisal company or appraiser absent expert testimony.

Homeowners purchased a home in Las Vegas for $337,000, financing most of the purchase price through a mortgage on the property. The mortgage company contracted with the real estate appraisal company to perform an appraisal on the property. The appraiser valued the property at $340,000 with 3,000 square feet of gross living area. The appraisal report explicitly noted a discrepancy between the square footage reported by the county assessor's office which estimated 3,553 square feet. The appraiser explained that the added footage appeared to be based on outdated information from when the garage was used as model home office. One year later, after unsuccessfully attempting to refinance their home loan, the homeowners became

[15] This case has not yet been resolved.

aware of the discrepancy in square footage and they filed suit against the real estate appraisal company and the appraiser ("Defendants") alleging professional negligence, negligent misrepresentation, breach of the statutory duty to disclose a material fact, and breach of contract as third-party beneficiaries.

The Nevada Supreme Court held that the homeowners could not establish professional negligence arising from the appraisal of the home without expert testimony. The homeowners initially designated a professional appraiser as an expert witness, but the expert was later withdrawn and was not subsequently replaced. Despite initially designating an expert witness, the homeowners argued that expert testimony was unnecessary to establish the professional standard of care. The court disagreed and found that the homeowners failed to provide the requisite evidence that establishes the defendants' breached a duty of care. The court affirmed the order granting summary judgment.

4. **Iron Shields Inv. Inc. v. Miller**, No. FBTCV166059810S, 2019 WL 3219342 (Conn. Super. Ct. June 5, 2019)

Surveyor liable to purchaser of survey for negligence based upon inaccuracy of boundaries depicted in survey.

While Iron Shields Investment (Iron Shields) was considering purchasing a property from the Millers, it purchased a copy of a survey of the Miller property performed by D'Amico, a licensed surveyor. Iron Shields purchased the property, and D'Amico prepared, issued, and certified a map of the Miller property. Iron Shields then obtained zoning approval for a three-lot subdivision for the whole 9.917-acre property. After the approval, the Weston Gun Club filed a suit against Iron Shields claiming that a portion of the property from which Iron Shield cleared trees was owned by the Gun Club. Iron Shields and Weston Gun Club settled their dispute and entered into a boundary line agreement. Iron Shields then sued the surveyor for professional negligence.

Opposing the claim for professional negligence, the surveyor argued that there was no duty owed to Iron Shields because he was not in privity with Iron Shields. The Superior Court disagreed and found that Iron Shields and the surveyor were in privity when the surveyor sold Iron Shields the survey and when the map was certified. The court held that a surveyor may be held liable in negligence to the party who hired him for failure to make an accurate survey of land and for failure to establish correct boundaries. It further determined that the surveyor was required to depict all five-stone bounds on the survey and the map, and was also required to note the discrepancy between his boundary line and the boundary line depicted in a 1960 map. The court entered judgment in favor of Iron Shields, awarding $41,060.77.

B. Statutes and Regulations

Oregon

State licensed appraisers or state certified appraisers may now include a disclaimer in an evaluation that he or she is not engage in real estate appraisal activity when performing certain functions, per an amended statute.[16] An "evaluation" under this section means an opinion of the market value of real property provided to a financial institution in accord with the Interagency Appraisal and Evaluation Guidelines for real estate-related financial transactions that do not require an appraisal.[17] The disclaimer must state the following: "I am a state licensed appraiser or a state certified appraiser. This evaluation was not prepared in my capacity as a real estate appraiser and might not comply with the uniform standards of professional appraisal practice."[18]

Maryland

A licensed home inspector conducting an inspection of a rental dwelling in Baltimore City may not make a certification as a part of that inspection relating to: (1) the presence or identification of pests, unless the home inspector is certified as a pest control consultant, pest control applicator, or public agency applicator; or (2) the dwelling's electrical system, unless the home inspector has completed a minimum of 8 hours of training in electrical systems certified by the Baltimore City Housing Commissioner, per a newly enacted statute. The training in electrical systems is in addition to the training required for home inspector licensure.[19]

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 7 Agency cases reviewed this quarter. The defendant was not liable in any of those cases. (*See* Table 3).

B. Property Condition Disclosure Cases

Liability was determined in 1 Property Disclosure Cases reviewed this quarter. The defendant was not liable in any of those cases. (*See* Table 3).

[16] 2019 Or. Laws ch. 127
[17] *Id.*
[18] *Id.*
[19] Md. Bus. Occup & Prof. Code § 16–703.2 (2019)

C. RESPA Cases

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

D. Technology

Liability was determined in 1 technology case reviewed over the past twelve months. The defendant was found liable in that case.[20] (S*ee* Table 6).

E. Third-Party Liability

Liability was determined in 2 third-party liability cases reviewed over the past twelve months, and the defendant was found liable in one of those cases.[21] (S*ee* Table 6).

VII. TABLES

Table 1

Volume of Items Retrieved for Third Quarter 2019 by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	18	0	1
Property Condition Disclosure	7	1	0
RESPA	2	0	0

Table 2

Volume of Items Retrieved for Third Quarter 2019 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	4	0	0
Agency: Buyer Representation	1	0	0

[20] *Reed v. Ezelle Investment Properties Inc.*, 2018 WL 5786208, No. 3:17-cv-01364-YY (D. Or. November 5, 2018) ($1500)

[21] *Iron Shields Investment Inc., v. Miller*, No. FBTCV166059810S, 2019 WL 3219342 (Conn. Super., June 5, 2019) ($41,060.77)

Issue	Cases	Statutes	Regulations
Agency: Designated Agency	0	0	0
Agency: Transactional/Nonagency	0	0	0
Agency: Subagency	0	0	0
Agency: Disclosure of Confid. Info.	0	0	0
Agency: Vicarious Liability	1	0	0
Agency: Breach of Fiduciary Duty	6	0	0
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	14	0	1
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	0	0	0
PCD: Mold and Water Intrusion	2	0	0
PCD: Roof	2	0	0
PCD: Synthetic Stucco	0	0	0

Issue	Cases	Statutes	Regulations
PCD: Flooring/Walls	0	0	0
PCD: Imported Drywall	0	0	0
PCD: Plumbing	1	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
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	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	1	0	0
PCD: Other	4	1	0
RESPA: Disclosure of Settlement Costs	0	0	0
RESPA: Kickbacks	2	0	0

Issue	Cases	Statutes	Regulations
RESPA: Affiliated Business Arrangements	0	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	0	0	0

Table 3

Liability Data for Third Quarter 2019

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	0	7	0%	100%
Property Condition Disclosure	0	1	0%	100%
RESPA	0	0	N/A	N/A

Table 4

Volume of Third Party Liability and Technology Items Retrieved in Past Twelve Months
(October 2018 - October 2019)

Major Topic	Cases	Statutes	Regulations
Technology	7	1	0
Third Party Liability	3	15	1

Table 5

Volume of Third Party Liability and Technology Items Retrieved in Past Twelve Months by Issue
(October 2018 - October 2019)

Major Topic	Cases	Statutes	Regulations
Technology: State Internet Advertising Rules	0	0	0
Technology: Social Networking	0	0	0

Technology: Privacy	0	0	0
Technology: Anti-Solicitation Laws	1	1	0
Technology: Data Breaches	0	0	0
Technology: Cyber Fraud	0	0	0
Technology: Drones	0	0	0
Technology: Copyright	0	0	0
Technology: Other	6	0	0
Third Party Liability: Appraisers	1	13	1
Third Party Liability: Inspectors	1	2	0
Third Party Liability: Other	1	0	0

Table 6

Liability Data for Technology and Third Party Liability Cases in the Past Twelve Months
(October 2018 - October 2019)

Topic	Liable	Not Liable	% Liable	% Not Liable
Technology	1	0	100%	0%
Third Party Liability	1	1	50%	50%