



## **LEGAL PULSE NEWSLETTER: SECOND 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 deceptive trade practices/fraud and commercial property case decisions and related legislative activity, from July 2018 to July 2019.

In the second quarter of 2019, the most common agency issues include dual agency, buyer representation, and breach of fiduciary duty. Additionally, a significant number of updated agency statutes and regulations were retrieved, including many that establish or amend requirements for licensee advertising. Teams and team advertising were also popular areas of legislative activity.

Compared to previous quarters, we retrieved a small number of property condition disclosure cases. Among the cases retrieved, mold and water intrusion, and disclosure of meth labs were addressed. Disclosure issues also arose in the legislative context.

The RESPA cases retrieved this quarter examine various alleged kickback and referral fee schemes. As in previous quarters, many of the claims in these cases were barred by the statute of limitations. In one case of interest, the court concluded that the one-year statute of limitations applicable to RESPA may be tolled based on the defendant's fraudulent concealment.

Each quarter we also take a closer look at cases and legislative activity in additional areas of interest to the real estate industry. This quarter, we reviewed cases from the past twelve months involving deceptive trade practices/fraud and commercial properties. With respect to deceptive trade practices/fraud cases, we retrieved a large number of cases compared to previous quarters, with many cases concerning allegations of fraudulent concealment and misrepresentation. 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.

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.<sup>1</sup>

## I. AGENCY

The agency cases this quarter address the scope of real estate brokerage services. In one case, the court found that the broker was not acting in his capacity as a real estate licensee, therefore precluding the buyers' claims. In another case, the court determined that reliance was not an element of a violation of the state real estate licensing laws.

### A. Cases

1. **Vallakalil v. Texas Real Estate Comm'n**, No. 05-18-00702-CV, 2019 WL 2266663 (Tex. App. May 24, 2019)

#### ***Construction activities are not included in the definition of real estate brokerage services.***

The buyers entered into a contract for the construction of a new house with a limited liability company (the "LLC"). The contract was signed on behalf of the LLC by a person who described himself as a real estate agent with experience in home construction. The construction project experienced numerous problems and delays, after which the buyers filed suit against the LLC for breach of contract, negligence, and violations of the Texas Deceptive Trade Practices Act (DTPA). Upon learning the LLC filed for bankruptcy, the buyers also sued the signatory of the contract individually, alleging that he was personally liable for the damages caused by the LLC. Additional claims were added for fraudulent inducement/statutory fraud, civil conspiracy, and unjust enrichment. When the individual failed to file an answer, the trial court entered a default judgment awarding the buyers significant monetary damages. Thereafter, the individual defendant filed for Chapter 7 bankruptcy protection. After failing to collect the judgment against the individual defendant, the buyers filed an application for an order directing payment from the Texas Real Estate Recovery Trust Account (RTA). The defendant Real Estate Commission opposed the buyers' request, contending that while the individual was a licensed real estate agent, he was not acting in his capacity as a real estate licensee when he committed the alleged actions that were the basis of the claims. The trial court agreed, declining to permit recovery from the RTA. Buyers appealed.

The appellate court determined there was no evidence to support a claim that the agent ever acted in his capacity as a real estate licensee in the transaction in question, and that the

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<sup>1</sup> Except as noted, the party descriptions provided reflect the terminology of the court. Case summaries may omit specific ancillary issues that are not the focus of this newsletter.

construction contract did not identify any tasks that must be performed by a real estate licensee. The court further noted that the legislature made it clear that construction activities are not included in the definition of real estate brokerage services. Because the buyers were not aggrieved by the actions of someone acting in the capacity of a real estate licensee, the appellate court affirmed the trial court's order barring recovery from the RTA.

2. **Edson v. Fogarty**, No. 1-18-1135, 2019 IL App (1st) 181135 (Ill. Ct. App. May 14, 2019)

***Reliance is not an element of claim under the Illinois Real Estate License Act.***

A real estate broker listed a space in a condominium building as zoned B1-3, a non-existent classification that was allegedly commercial. The broker informed the purchaser that the space could be used for a grocery store. After the sale, the purchaser learned that the space was zoned residential and not for commercial use. The purchaser brought an action against the listing broker alleging fraud, negligent misrepresentation and violations of both the Illinois Consumer Fraud and Deceptive Business Practices Acts, as well as the Illinois Real Estate License Act, alleging that the broker misrepresented to the purchaser that the property was zoned for commercial use, and that the buyer had relied on this representation in making the purchase. The trial court concluded that "[t]he consumer fraud and the negligent misrepresentation and even the Real Estate Licensing Act all require that there be reasonable reliance" and granted the broker's motion for summary judgment. The purchaser appealed.

The appellate court held that the purchaser was not required to show reliance on the broker's misrepresentations in order to make a claim under either the Deceptive Business Practices Act or the Illinois Real Estate License Act. The appellate court further held that the misrepresentations made to the purchaser were misrepresentations of fact, and not misrepresentations of law. As such, the appellate court reversed the trial court's entry of summary judgment, and remanded the matter back to the trial court to determine whether the purchaser's evidence in support of damages should be barred.<sup>2</sup>

B. **Statutes and Regulations**<sup>3</sup>

*Connecticut*

Connecticut enacted a new law specifying that no person may conduct a real estate closing unless that person is a "Connecticut-licensed attorney who has not been disqualified from

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<sup>2</sup> This case has not yet been resolved.

<sup>3</sup> 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.

the practice of law due to resignation, disbarment, being placed on inactive status, or suspension.” The law defines “real estate closing” as a closing for: (1) a mortgage loan to be secured by real property in Connecticut, other than a home equity line of credit or any other loan transaction that does not involve the issuance of a lender’s or mortgagee’s policy of title insurance; or (2) any transaction in which consideration is paid for a change in the ownership of real property in Connecticut.<sup>4</sup>

### *Alaska*

Alaska real estate regulations were amended to include the definition of “team,” which is defined as two or more licensees within the same brokerage who work together as one unit under a collective name, and who provide services or perform activities that require a professional license in real estate.<sup>5</sup>

Alaska also amended its regulations to require that the guidelines and procedures for the supervision of teams should include a policy covering the usage of the consumer disclosure and how consumers are represented within a team.<sup>6</sup>

### *Illinois*

In Illinois, the regulation defining “advertising” in connection with residential mortgage lending was amended to include business cards as a form of advertising.<sup>7</sup>

In addition, an Illinois regulation relating to disclosures in mortgage lending advertisements was amended to state that advertisements must not be “false, misleading, or deceptive.” The amended regulation further states that the licensee’s Nationwide Mortgage Licensing System (NMLS) unique identifier shall not appear in any advertisement that relates to activities other than residential mortgage lending or brokerage, unless wording relating to the licensee’s residential mortgage services also appears in the advertisements at least as prominently as the language regarding its other activities.<sup>8</sup>

## C. Volume of Materials Retrieved

Agency issues were identified in twenty-three cases (see Tables 1, 2). Breach of fiduciary duty and buyer representation were each addressed in multiple cases this quarter. Three agency

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<sup>4</sup> [Conn. S.B. 320 \(2019\)](#)

<sup>5</sup> [Alaska Admin. Code tit. 12, § 64.990 \(2019\)](#)

<sup>6</sup> [Alaska Admin. Code tit. 12, § 64.117 \(2019\)](#)

<sup>7</sup> [Ill. Admin. Code § 1050.920 \(2019\)](#)

<sup>8</sup> [Ill. Admin. Code § 1050.950 \(2019\)](#)

statutes were retrieved this quarter (see Table 1). Six agency regulations were retrieved this quarter (see Table 1).

## II. PROPERTY CONDITION DISCLOSURE

Property condition disclosure cases were less prevalent this quarter as compared to the prior quarter. The first property condition disclosure case below considers whether a non-reliance provision in a real estate purchase contract barred the purchasers' claims for fraud based upon failure to disclose defects in a home. In the next case, the court held that a buyer or seller must be reasonably justified in the reliance when claiming fraud based on a misrepresentation. In the final case, the buyers alleged that the seller's broker actively concealed a recurring mold-causing condition, but because the contract contained a disclaimers of reliance, the court held the claims failed.

### A. Cases

1. **Smith v. Rodriguez**, No. 5D17-3194, 2019 WL 1868181 (Fla. Dist. Ct. App. Apr. 26, 2019)

#### ***Non-reliance provision in a real estate purchase contract did not bar purchasers' claims for fraud and misrepresentation.***

Buyers brought an action against the seller, the listing broker, and the brokerage firm, alleging the seller and listing broker actively concealed numerous defects in the home purchased by the buyers. The broker and brokerage moved to dismiss, based on a non-reliance provision in the purchase contract that stated that the buyers agreed to rely solely on the "seller, professional inspectors and governmental agencies for verification of property condition . . . and not on the representations . . . of the broker."

The trial court granted the motion to dismiss. Buyers appealed, contending that the non-reliance provision in their real estate purchase contract did not bar their claims for fraud and for violations of the Florida real estate licensing laws. The appellate court agreed with the buyers and reversed as to the fraud and the statutory claims, stating that while the non-reliance provision effectively barred some claims, other language in the contract expressly provided that the non-reliance clause did not bar claims based upon violations of the licensing laws. The appellate court further held that the buyers sufficiently alleged a private cause of action against the broker under the license law.

2. Hildebrandt v. Hukill, No. 2018-CA-000968-MR, 2019 WL 2067366 (Ky. Ct. App. May 10, 2019)

***A buyer claiming fraud cannot prevail by merely asserting that he or she relied on a misrepresentation, as the reliance must be reasonable or justifiable.***

Buyers and sellers executed a purchase contract for a home. Due to the number of issues raised in the inspection report, the buyers contacted their broker and requested that a contractor inspect the property. A letter from the contractor stated that there were no signs of deficiencies in the second floor, the area of concern for the buyers. A subsequent contractor hired to remodel the property stated that there was insufficient support from the basement and an undersized header. The buyers then requested to be released from the purchase contract. After the buyers were informed that the sellers would not release them, they closed on the purchase without protest. Thereafter, the buyers allegedly discovered numerous structural defects (sagging floors, ceilings, and doorways, and sagging joists), none of which were noted on the inspection report. Buyers brought breach of contract and negligence claims against the seller's broker, who then brought a motion for summary judgment. The court granted the motion.

On appeal, the court determined that the trial court correctly held that the buyers had notice of the defects, and failed to ask either the seller's broker or the seller for any information about the alleged floor defects until after the closing. The court found that the buyers did not demonstrate reasonable reliance, which precluded any fraud claim they may have had against the seller's broker. The appellate court further noted that a party who claims fraud cannot merely assert that he or she relied on a misrepresentation and prevail. The claimant's reliance must be shown to have been reasonable or justifiable. In addition, the appellate court held that it could not properly consider the statutory claim made against the broker based on violation of the licensing law, as such claims must be filed with the Kentucky Real Estate Commission. Summary judgment for the broker affirmed.

3. Comora v. Franklin, No. 62604/15, 171 A.D.3d 851 (N.Y. App. Div. Apr. 10, 2019)

***No duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length.***

Buyers brought an action for fraud against the seller and listing broker alleging concealment of a recurring mold-causing condition in the purchased property. The seller and listing broker individually moved to dismiss the complaint. The Supreme Court issued an order in favor of buyers to recover damages for fraud. Seller and listing broker appealed.

On appeal, the court noted that in the context of real estate transactions, “New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller’s agent to disclose any information concerning the premises when the parties deal at arm’s length, unless there is some conduct on the part of the seller or the seller’s agent which constitutes active concealment.” Here, the contract of sale for the subject premises expressly stated that the buyers were fully aware of both the physical condition and the state of repair of the premises based on their own inspection and investigation. The court found the listing broker had no duty to disclose any information concerning the premises where the sales contract contained such a specific disclaimer of reliance by the buyers on representations as to the condition of the property. The appellate court further held that the buyers failed to establish reliance as required to prevail on fraud claims against a broker, and accordingly, held that the fraud claims against the seller and listing broker should have been dismissed.

B. Statutes and Regulations

*Washington*

Washington revised its fire protection statute to state that licensed real estate brokers are not liable in any civil, administrative, or other proceeding for the failure of any seller or other property owner to comply with requirements for installing smoke detectors in residential properties.<sup>9</sup>

*North Dakota*

North Dakota enacted a new statute, Property disclosure – Requirements, which requires the use of a property condition disclosure form in transactions “for the sale, exchange, or purchase of real property when a real estate broker, real estate broker associate, or real estate salesperson who is associated with a real estate brokerage firm represents or assists a party to the transaction” and the real property is an “owner occupied primary residence located in this state being sold or exchanged by the owner.” The written disclosure must include all material facts of which the seller is aware, and which could adversely and significantly affect “an ordinary buyer’s use and enjoyment of the property,” including but not limited to latent defects, general condition, environmental issues, structural systems, and mechanical issues regarding the property.<sup>10</sup>

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<sup>9</sup> Wash. Rev. Code § 43.44.110 (as amended by [2019 Wash. Laws ch. 455, § 1](#))

<sup>10</sup> [N.D. Cent. Code. § 47-10-02.1 \(2019\)](#) (as enacted by [2019 N.D. Laws ch. 378 § 1](#))

## Arizona

Arizona's statute relating to the Affidavit of Disclosure was amended to require the disclosure of water rights and solar energy devices that are leased or owned on a property.<sup>11</sup>

### C. Volume of Materials Retrieved

Property condition disclosure issues were identified in five cases (see Tables 1, 2). The cases addressed mold and water intrusion, as well as disclosure of meth labs. Four statutes regarding property condition disclosure issues were retrieved this quarter (see Table 1).

## III. RESPA

Two cases this quarter addressed a brokerage firm's relationship with lenders and real estate service providers. In one case, the court considered whether a defendant's marketing program which referred homeowners to use a particular affiliated mortgage company was be a violation of RESPA's anti-kickback provisions. In another case, the court examined the requirement that a lender make certain disclosures in connection with a single complete loss mitigation application for a borrower's mortgage.

### A. Cases

1. **In Re Zillow Group, Inc. Securities Litig.**, No. C17-1387-JCC, 2019 WL 1755293 (W.D. Wash. Apr. 19, 2019)

#### ***Co-marketing program allowed agents to provide referrals to lenders in violation of RESPA.***

Plaintiffs filed a putative class action against Zillow on behalf of purchasers of the company's securities, alleging violations of the Securities Exchange Act and RESPA Section 8, which prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person." Plaintiffs claimed that Zillow's "co-marketing program" was designed to allow participating brokers to refer mortgage business to participating lenders in violation of RESPA. The complaint alleged that Zillow made a series of misleading statements regarding the company's legal compliance by failing to disclose the co-marketing program's alleged illegality, particularly after the Consumer Financial Protection Bureau launched an investigation into the program. Zillow moved to dismiss the complaint.

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<sup>11</sup> [Ariz. Rev. Stat. § 33-422 \(2019\)](#) (as enacted by [2019 Ariz. Legis. Serv. ch. 103](#) and [ch. 131](#))



The court determined based on anonymous witness statements and the other allegations raised in the complaint that a reasonable inference may be made that Zillow designed the co-marketing program to allow brokers to provide referrals to lenders in violation of RESPA, and that such unlawful referrals were occurring. In addition, the court noted that there were allegations that a specific mortgage originator admitted to making mortgage referrals to lenders while using what the court could reasonably infer was the real estate company's co-marketing program. As such, the court denied Zillow's motion to dismiss, thus permitting plaintiffs' claim to proceed.<sup>12</sup>

2. **Barron v. Everbank**, No. 1:16-CV-04595-AT-CCB, 2019 WL 1495305 (N.D. Ga. Feb. 7, 2019)

***Lender is only required to comply with the required disclosures for a single complete loss mitigation application for a borrower's mortgage.***

A borrower sued a lender alleging violations of RESPA's disclosure requirements for the lender's alleged failure to provide required disclosures upon denial of a loss-mitigation application, including the failure to state the specific reason(s) for the denial of each loan modification option, and the failure to advise the borrower of investor restrictions that led to the denial of his loss-mitigation application and the subsequent appeals of that denial. The lender sought summary judgment.

Noting that the lender is only required to comply with the required disclosures for a "single complete loss mitigation application for a borrower's mortgage," the court held that only plaintiff's first loss-mitigation application falls within the protections of those required disclosures. As such, the court found that the lender provided the required rationale for its denial in its response to the borrower's first loss-mitigation application. The court granted summary judgment in favor of the lender.

B. **Statutes and Regulations**

No RESPA statutes or regulations were retrieved this quarter.

C. **Volume of Materials Retrieved**

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

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<sup>12</sup> This case has not yet been resolved.

#### IV. DECEPTIVE TRADE PRACTICES ACT/FRAUD

The deceptive trade practices/fraud cases touch on a variety of alleged misconduct, often involving an undisclosed relationship between the real estate licensee and another person. In other instances, the cases arose out of the failure to make a proper disclosure of an important fact, such as the square footage of a home. Once again, the accuracy of the Zillow Group's Zestimate tool came under court scrutiny. In the last case, a real estate company was found liable for the actions of a real estate representative that attempted to secure a profit.

##### A. Cases

1. **Robbins Ranch Subdivision Homeowner's Ass'n v. Partners of Benchmark Properties**, No. 12-18-00317-CV, 2019 WL 2119659 (Tex. App. May 15, 2019)

***Informal fiduciary relationships, sometimes referred to as “confidential relationships,” may give rise to a fiduciary duty where one person trusts in and relies on another.***

Buyers and their homeowners' association (“HOA”) sued the developer-seller Benchmark, a limited partnership with two limited partners for breach of fiduciary duty. Both of Benchmark's limited partners were real estate brokers. The limited partners' real estate firm represented the seller in the transactions. After the buyers purchased the property, a dispute arose as to the questionable condition of the private road in the subdivision. The buyers and the HOA brought suit against the developer-seller for fraud by breach of formal and/or informal fiduciary relationship, and for violations of the Texas Deceptive Trade Practices Act (DTPA). The trial court granted a directed verdict on the fiduciary duty cause of action, and a jury found in favor of the seller on the DTPA claim. Buyers and the HOA appealed.

The core issue in this case was whether a fiduciary relationship existed between the seller and the buyers and HOA. The buyers and HOA contended that because the real estate broker limited partners did not keep their real estate firm completely separate from the seller, they owed a duty to the buyers as if they were acting as their brokers.

In ruling on this issue, the court noted that a broker owes a fiduciary duty to a client while acting on behalf of that client. No formal fiduciary relationship, however, existed between the buyers and seller. Additionally, there was no evidence of a confidential relationship between the buyers and the developer-seller. The buyers argued that a fiduciary relationship was created through the covenants and restrictions governing the subdivision. However, for an informal fiduciary duty to exist in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, any agreement made the basis of the suit. The court found

there was no evidence of any such prior relationship apart from the contract. The court affirmed the directed verdict in favor of the developer-seller.

2. **Ebby Halliday Real Estate, Inc., v. Dugas**, No. 05-17-01028-CV, 2019 WL 1529174 (Tex. App. Apr. 9, 2019)

***Deceptive Trade Practices Act requires actual knowledge of the non-disclosed information.***

Broker listed the seller's condominium on the Multiple Listing Service (MLS). The MLS database contains a drop-down menu from which the listing representative can select "appraisal," "builder," "tax," or "other" as the source of the information about the subject home's square-footage. The broker selected "tax." The MLS database accessed the unit's square footage information from Dallas Central Appraisal District (DCAD) records. The buyers claimed that the listing broker misrepresented the property's square footage by not specifying that the square footage was the "total area" and not the "livable" square footage. Based upon this alleged misrepresentation, the buyers asserted claims for violations of the Deceptive Trade Practices Act (DTPA), statutory fraud, and negligent representation. The broker appealed a jury verdict awarding the buyers \$32,335.48 in damages, plus attorney's fees.

The appellate court determined that the listing must be interpreted as representing the unit's price per square foot and that the listing did not guarantee the accuracy of the DCAD's records. Additionally, it found that no reasonable juror could infer that the broker acted with the intent to deceive the buyers. Failure to disclose a fact is actionable if the seller knew the information that should have been disclosed at the time of the sale, and requires actual knowledge of the non-disclosed information. The appellate court concluded that the evidence was legally insufficient to support the jury's finding that the broker made a misrepresentation or that the broker was aware at the time that DCAD's records were incorrect. Accordingly, the appellate court ruled in favor of the broker, reversing the trial court's judgment.

3. **Frederic & Barbara Rosenberg Living Trust v. MacDonald Highlands Realty, LLC**, No. 69399, No. 70478, 2018 WL 4402363 (Nev. Sept. 13, 2018)

***A duty to disclose imposed by the licensing law is not waived by an as-is clause.***

Buyer purchased a residential lot that adjoined a residential lot and a golf course. The agreement provided that the buyer was purchasing the property "as is," "where is," and "with all faults." The lot included a small parcel of land, which had previously been an out-of-bounds area between the golf course and the lot. After the purchase, the buyer learned that the owner of adjoining property claimed ownership of the out-of-bounds area. The buyer sued the seller's broker and brokerage firm for common-law negligence and intentional misrepresentation of the

boundary and the property's zoning, claiming that the brokerage knew of the other party's claim to the property. The buyer also made a claim for violations of the real estate licensing law based on misrepresentation or failure to disclose information in the purchase process. The brokerage moved for summary judgment on all claims, arguing that the purchase agreement placed the burden on the buyer to investigate boundary and zoning issues. The district court held that the proper disclosures were made and that the buyer waived any claims by signing the purchase agreement. Accordingly, the district court granted the broker and brokerage firm's motions for summary judgment. The buyer appealed.

The Nevada Supreme Court reversed in part, noting that the general rule foreclosing common-law liability for nondisclosure when property is purchased as-is does not apply when the seller knows of facts materially affecting the value or desirability of the property that are known by or accessible only to the seller, and the seller also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer. The record demonstrated that the buyer expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to closing, and that the information regarding the lot lines was reasonably accessible to the buyer. However, the court determined that the buyer did not waive any of real estate broker violations based on statutorily imposed duties. Except for the duty to present all offers to the client, "no duty of a licensee may be waived." The Nevada Supreme Court concluded that the trial court erred in granting summary judgment on the real estate license law claims and reversed the attorney fees and costs awarded.

4. **Patel v. Zillow, Inc.**, No. 18-2130, 915 F. 3d 446, (7th Cir. Feb. 8, 2019)

***A database's estimates of property values were non-actionable opinions.***

Property owners brought an action against Zillow after learning that the Zestimates, which provides an estimated value for real property based on a proprietary algorithm, for their parcels were below the amounts they hoped to realize. The property owners alleged that Zillow's estimates of value of their parcels violated the Illinois Real Estate Appraiser Licensing Act and Illinois Deceptive Trade Practices Act (DTPA). The district court dismissed the complaint in its entirety for failure to state a claim, and the owners appealed.

The appellate court determined that by having labeled Zestimates as estimates (something built into the word "Zestimate"), Zillow is outside the scope of the DTPA. The court concluded that the Illinois Real Estate Appraisers Licensing Act did not create a private right of action and that the database's estimates of property values were opinions, which were not actionable. The Court of Appeals affirmed dismissal of the claims.

5. **Garcia v. Carrington Real Estate**, No. DC16-03227, 2018 WL 4501318, (Tex. July 10, 2018)

***Non-English-speaking seller relied on the representations of the real estate representative to sign documents that allowed the representative to sell her house without her knowledge in order to secure a profit.***

The plaintiff, a non-English speaker, owned a home in foreclosure. The plaintiff alleged that the defendant real estate company knowingly and intentionally defrauded her by having her sign documents which permitted the defendant broker to market her property and to work with another company to sell the house without the plaintiff's knowledge. The plaintiff believed she was entering into an agreement with the defendant real estate company to list and sell her home in order to pay off the bank and keep the equity she had in the property. Plaintiff alleged she relied upon the representations of the real estate representative when executing the paperwork. The plaintiff did not hear from the defendant real estate company until she received a call from someone advising her that her home was sold and she had three days to leave the property. The plaintiff alleged that she unknowingly signed documents included in the listing documentation which transferred the property to a third party. The defendant real estate company denied any wrongdoing and maintained that any fraud that occurred was by a rogue broker. The company also denied knowing that the plaintiff had been tricked into agreeing to participate in the sale. It further disputed that the plaintiff suffered any damages since she sold her home, paying off the bank and retaining \$20,000 in equity.

The matter proceeded to trial. The jury returned its verdict in favor of the plaintiff awarding the plaintiff \$455,485 in compensatory damages and attorney's fees, \$300,000 in punitive damages and \$48,000 in additional attorney fees in the event of an appeal by the defendant.<sup>13</sup>

6. **Novak v. St. Maxent-Wimberly House Condominium, Inc.**, Civ. Action No. 16-6835, 2018 WL 3360957, 2018 WL 3126940 (E.D. La. June 29, 2018)

***Buyers may not seek damages from agent under a negligent misrepresentation theory based on breach of disclosure duty imposed on seller.***

The plaintiffs, school teachers residing in California, who purchased a condo with the intent of using it as a vacation home, by leasing it for nine months of the year, and living in it for the remaining three months of the year.

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<sup>13</sup> Case has not been appealed at this time.

After the purchase, the condo board of directors informed the buyers that the minimum lease length had been increased from six months to one year. Buyers sued their real estate agent and the seller's real estate agent for negligent misrepresentation and civil conspiracy. Defendants filed motions for summary judgment.

The trial court granted the motions for summary judgment, finding that the buyers provided no factual basis other than purely speculative allegations that the defendants did not disclose documents and that they did so willfully in an illicit agreement with the other alleged co-conspirators. The court also held that La. Rev. Stat. § 9:1124.107(A), which relates to the disclosures that must be provided to a buyer on the resale of a condominium unit, imposes a duty on the seller and not on either the purchaser's or seller's real estate agent. Therefore, that law could not be the basis for a claim of conspiracy or negligence for failing to turn over information.

## **V. COMMERCIAL PROPERTY ISSUES**

Cases involving commercial properties continue to raise the same legal issues as cases with residential properties, including breach of fiduciary duty, misrepresentation/fraud, and failure to disclose property conditions. 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 when determining the real estate professional's duties and disclosures.

### **A. Cases**

1. **Cardoza v. Gonsalves**, No. SCV245387, 2019 WL 1771508 (Cal. Ct. App. Apr. 23, 2019)

***Buyers alleged their brokerage firm induced them to purchase and lease back property by misrepresenting seller's financial condition and intentions.***

Buyers sued the seller's broker and brokerage firm following the buyer's purchase of a commercial property, which included a lease-back by the seller's corporation, the primary tenant at the time of the sale. The seller's corporation subsequently failed to pay the required rent. The buyers sued alleging the seller's real estate broker and brokerage firm made misrepresentations and concealed material facts pertaining to the financial condition of the seller's corporation. The buyers further alleged that the brokers participated in the seller's scheme to defraud the buyers, made false representations, and knew or should have known of the true facts concerning the corporation's financial condition and the seller's intentions.

At the conclusion of trial, the jury returned special verdicts, finding that the brokers were negligent and failed to disclose all facts known to them that materially affected the value or desirability of the commercial property. The jury found, however, that the brokers were not liable on theories of intentional misrepresentation, concealment, negligent misrepresentation, and conspiracy. Post-trial, the court found that the two-year statute of limitations had run on the buyers' claims, and granted judgment in favor of the brokers. Buyers appealed.

On appeal, the buyers contended that a three-year statute of limitations period applied to their claims, and therefore judgment in favor of the brokers constituted an error. The Court of Appeals held that the two-year statute of limitations applied to the buyers' claims for negligent nondisclosure of material facts. The court further noted that if an identical claim had been brought in connection with a residential real estate transaction, a two-year statute of limitations would apply. Judgment affirmed.

## **VI. VERDICT AND LIABILITY INFORMATION**

### **A. Agency Cases**

Liability was determined in eight agency cases reviewed this quarter. The real estate professional was not liable in any of those of those cases. (See Table 3).

### **B. Property Condition Disclosure Cases**

Liability was determined in four property condition disclosure cases reviewed this quarter. The real estate professional was not liable in any of those cases. (See Table 3).

### **C. RESPA Cases**

Liability was determined in two RESPA cases reviewed this quarter. The real estate professional was not liable in any of those cases. (See Table 3).

### **D. Deceptive Trade Practices/Fraud Cases**

Liability was determined in twenty-four deceptive trade practices/fraud cases retrieved over the past twelve months; the defendant was held liable in three of those cases.<sup>14</sup> (See Table 5).

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<sup>14</sup> (NOTE: All of the following cases were retrieved in the past twelve months (3Q 2018, 4Q 2018, 1Q 2019, or 2Q 2019), even though some of the cases were decided in early 2018. This is due to the fact that we retrieve these cases on an annual basis). *Saint – Jean v. Emigrant Mortg. Co.*, No. 11 CV 2122 (RLM), 2018 WL 4158307 (E.D.N.Y. Aug. 30, 2018) (remanded to determine sufficiency of damages); *Moskowitz v. Herrmann*, No. SC 731/2018, 2018 WL

E. Cases Involving Commercial Properties

Liability was determined in seventeen cases involving commercial property over the past twelve months; the defendant was held liable in five of those cases.<sup>15</sup> (See Table 7).

VII. TABLES

**Table 1**

Volume of Items Retrieved for Second Quarter 2018 by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	23	3	6
Property Condition Disclosure	5	4	0
RESPA	5	0	0

**Table 2**

Volume of Items Retrieved for Second Quarter 2018 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	0	0	0
Agency: Buyer Representation	8	0	0
Agency: Designated Agency	0	0	0
Agency: Transactional/Nonagency	0	0	0
Agency: Subagency	0	0	0

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4291557, 60 Misc. 3d 1230(A) (City Ct., Middletown, NY Sept. 6, 2018) (\$5,000); *Palombaro v. Emery Fed. Credit Union*, No. 1:15-cv-792, 2018 WL 4635973 (S.D. Ohio Sept. 27, 2018) (\$8,950,000).

<sup>15</sup> *Briggs v. Szydlowski*, No. 2016-105344-NO, 2017 WL 9514318 (Mich. Cir. Ct. Oct. 17, 2017) (\$97,000); *Garcia v. Carrington Real Estate*, No. DC16-03227, 2018 WL 4501318 (Tex. State Ct. July 10, 2018) (\$755,485); *Pellet for Pellet v. Keller Williams Realty Corp.*, No. HHBCV116012338S, 2018 WL 3446642 (Conn. Super. Ct. June 27, 2018) (\$19,000); *Reed v. Ezelle Investment Properties Inc.*, 2018 WL 5786208, No. 3:17-cv-01364-YY (D. Or. November 5, 2018) (\$1500); *Sanzaro v. Ardiente Homeowners Association, LLC et al.*, No. 2:11-cv-01143-RFB-CWH, 2019 WL 918981, (D. Nev., February 25, 2019) (\$635,000).



Issue	Cases	Statutes	Regulations
Agency: Disclosure of Confid. Info.	0	0	0
Agency: Vicarious Liability	0	0	0
Agency: Breach of Fiduciary Duty	7	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	2
Agency: Coming Soon Listings	0	0	0
Agency: Other	14	3	4
PCD: Structural Defects	0	0	0
PCD: Sewer/Septic	0	0	0
PCD: Radon	0	0	0
PCD: Asbestos	0	0	0
PCD: Lead-based Paint	0	0	0
PCD: Mold and Water Intrusion	1	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

Issue	Cases	Statutes	Regulations
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	1	0	0
PCD: Stigmatized Property	0	0	0
PCD: Megan's Laws	0	0	0
PCD: Underground Storage Tanks	0	0	0
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	0	0	0
Property Condition Disclosure: Other	3	4	0
RESPA: Disclosure of Settlement Costs	0	0	0
RESPA: Kickbacks	4	0	0
RESPA: Affiliated Business Arrangements	0	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	2	0	0

**Table 3**

Liability Data for Second Quarter 2018

<b>Topic</b>	<b>Liable</b>	<b>Not Liable</b>	<b>% Liable</b>	<b>% Not Liable</b>
Agency	0	8	0%	100%
Property Condition Disclosure	0	4	0%	100%
RESPA	0	2	0%	100%

**Table 4**

Volume of Deceptive Trade Practices Act/Fraud Items Retrieved in Past Twelve Months  
(July 2018 - June 2019)

<b>Major Topic</b>	<b>Cases</b>	<b>Statutes</b>	<b>Regulations</b>
DPTA/Fraud	50	N/A	N/A

**Table 5**

Liability Data for Deceptive Trade Practices Act/Fraud Cases in the Past Twelve Months  
(July 2018 - June 2019)

<b>Topic</b>	<b>Liable</b>	<b>Not Liable</b>	<b>% Liable</b>	<b>% Not Liable</b>
DPTA/Fraud	3	21	14%	86%

**Table 6**

Volume of Cases Involving Commercial Properties in the Past Twelve Months  
(July 2018 - June 2019)

Major Topic	Cases	Statutes	Regulations
Cases Involving Commercial Properties	21	N/A	N/A

**Table 7**

Liability Data for Cases Involving Commercial Properties in the Past Twelve Months  
(July 2018 - June 2019)

Topic	Liable	Not Liable	% Liable	% Not Liable
Cases Involving Commercial Properties	5	12	42%	58%