LEGAL PULSE NEWSLETTER: SECOND QUARTER 2017

Welcome to the Legal Pulse Newsletter. The Legal Pulse examines legal liability trends affecting real estate professionals. In this edition, we review recent case decisions and legislative activity from the second quarter of 2017 in the areas of Agency, Property Condition Disclosure, and RESPA, as well as Deceptive Trade Practices Act/Fraud case decisions from the past twelve months. In a new section introduced this quarter, we also look at case decisions and liability data from cases involving commercial properties over the past twelve months.

The most commonly addressed Agency issues this quarter were Dual Agency, Buyer Representation, Vicarious Liability, and Other. Although there were relatively few Agency cases this quarter, a significant number of Agency statutes and regulations were retrieved. Many of these statutes and regulations established rules for licensee advertising, teams and team advertising, and escrow responsibilities. A common advertising rule issued in several states this quarter requires licensee advertising to contain the broker name in a prominent manner.

Compared to previous quarters, we retrieved a small number of Property Condition Disclosure cases this period. The cases addressed mold and water intrusion and property access issues. In one case, the court found the licensee could be liable for failing to properly disclose the nature of the beach access on the property. The issue of access to property also arose in the legislative context. Maine now requires sellers to describe the means of accessing the property by a public way and any means other than a public way, if known by the seller.

The RESPA cases continue to consider various alleged kickback and referral fee schemes. As in previous quarters, many of these cases were barred by the statute of limitations. In an interesting contrast, two federal courts in Pennsylvania reached differing conclusions regarding the statute of limitations in two cases alleging RESPA violations based on captive reinsurance schemes.

Each quarter we take a closer look at cases and/or legislative activity in additional areas of interest to real estate professionals. This quarter we examine Deceptive Trade Practices/Fraud cases and cases involving commercial properties from the past twelve months. With respect to DTPA/Fraud, many of the cases involve allegations of undisclosed or misrepresented fees in the real estate transactions. For commercial property cases, the cases frequently address whether the property at issue may be used for the buyer's intended

commercial purpose. Looking at the liability data, the licensees and brokers tend to be found liable in a higher percentage of the cases involving commercial properties.

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

I. AGENCY

As the country's population ages, professionals in all industries must be aware of issues specific to working with elderly clients. Two Agency cases this quarter address issues important to real estate professionals who provide services to elderly clients. In the first case, the estate of the elderly client claimed the licensee should have known the client's mental capabilities were slipping and he was not capable of undertaking a real estate transaction. In the second case, the court concluded that the brokerage firm could be vicariously liable for the licensee's financial exploitation of an elderly client.

A. Cases

1. **Van Heyde v. Miller**, 799 S.E.2d 133 (W. Va. April 20, 2017)

There was no evidence that licensees knew or should have known that elderly client did not understand the real estate transaction.

The seller's estate sued the real estate licensees who acted on seller's behalf in the sale of his property for breach of contract and breach of fiduciary duty. The seller, an elderly man, met with a real estate licensee regarding sale of the property, and decided to sell the property for $90,000. The price included the surface and mineral rights to the property. The licensee's daughter, also a real estate licensee, met with the buyers of the property. In the transaction, the mother and daughter licensees acted as dual agents for both parties. Less than a week after the closing, the client died from a condition believed to be related to Alzheimer's disease. The estate claims the seller did not wish to include mineral rights in the purchase price, and that the licensees knew or should have known that the seller was not mentally capable of legally transferring the property due to a decline in his mental health.

The trial court granted summary judgment for the defendants. The appellate court affirmed summary judgment on the contract claim, finding that the estate did not present any evidence suggesting that the seller failed to understand his decision to convey both surface and mineral rights. Both the closing attorneys and a doctor who treated the client near the closing testified that he appeared to understand his actions. Likewise, there was no breach of fiduciary duty because the property was listed in accordance with the seller's wishes. The dual agency was

consistent with professional standards, and was approved by the seller. The court affirmed summary judgment for the licensees.

2. **Trevarthen v. Wilson**, No. 4D16-2032, 2017 WL 1718814 (Fla. Dist. Ct. App. May 3, 2017)

Broker could be vicariously liable for licensee's alleged financial exploitation of elderly client.

A 93-year-old woman sued a licensee and his brokerage firm, claiming that the licensee exploited and abused her by using her money to pay for his personal expenses, causing her to engage in multiple real estate transactions for his benefit and purchasing a condominium in his own name with her money. Plaintiff alleges the broker is vicariously liable for the licensee. The brokerage firm's principal acted as sales agent for the condominium transaction. The brokerage firm moved for summary judgment, arguing that the acts of the licensee were outside the scope of his work for the broker. The trial court granted summary judgment for the broker on vicarious liability.

The appellate court found that the broker could be vicariously liable for the acts of the licensee. The broker received a commission from the deal and may have had knowledge of the licensee's wrongful use of funds. Accordingly, the appellate court reversed summary judgment, and remanded the case for further proceedings.

3. **Toranji v. Lim**, 2017 WL 2665220 (Cal. App. Ct. June 21, 2017)

Prospective buyers failed to adequately prove damages resulting from licensee's failure to communicate a competing offer.

The prospective buyers of a home sued the real estate licensee and brokerage firm who acted as dual agent in the transaction. The buyers argue that the licensee failed to timely communicate their counteroffer to purchase a home. The buyers made an offer to purchase the property and the bank, which owned the home, responded with a counteroffer. Although the buyer authorized an increased offer and the licensee testified that he orally relayed the offer to the bank's representative who rejected the offer, there was no written denial of the offer. Without a formal response to the buyers' offer, the buyers refused to consider the

bank's next counteroffer. During these negotiations, an offer was made from another prospective buyer. The bank ultimately accepted the competing offer after the buyers did not promptly reply to its counteroffer.

Following a bench trial, the trial court entered judgment that awarded plaintiffs $409,846 in damages for defendants' failure to notify the buyer of competing offer. The court determined that the buyers incurred damages as a result of the licensee's failure to communicate the counteroffer. The court's damages determination was based on the difference between the property's fair market value and the amount the court found plaintiffs would have paid for the property. The buyers submitted a RealtyTrac foreclosure status sheet containing an estimated fair market value of the property as evidence of valuation of the property. The appellate court found that this evidence was insufficient to prove the property's fair market value as a matter of law. Without such evidence, the buyer failed to prove damages resulting from the licensee's conduct, and the judgment was reversed.

B. Statutes and Regulations[1]

Colorado

Colorado issued an amended statute which defines the "standard form" documents that may be used by licensees in real estate transactions. Under the statute, standard form means:

(a) a form promulgated by the Real Estate Commission,
(b) a form drafted by a licensed Colorado attorney representing the broker or brokerage firm,
(c) a form provided by a party to the transaction if the broker is a transaction broker or agent for the party providing the form,
(d) a form prescribed by a government agency or lender regulated by law,
(e) a form issued by the Colorado Bar Association,
(f) a form used for disclosure purposes only,
(g) a form prescribed by a title company, or
(h) a letter of intent created by a broker.[2]

When using the standard form, the broker may only insert transaction-specific information. The broker may explain the circumstances in which the form is used, but should advise the parties that forms have legal consequences and the parties should consult with legal counsel before signing.[3]

Michigan, Nebraska, Rhode Island, Tennessee, Texas - Advertising

[1] This second quarter update reviews legislative activity from the following jurisdictions: Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, Oklahoma, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and Vermont.
[2] Colo. Rev. Stat. § 12-61-803 (2017).
[3] *Id*.

A number of states recently issued new or amended statutes or regulations regarding licensee advertising. As detailed below, four states – Michigan, Nebraska, Tennessee, and Texas – all issued rules that require licensee advertising to include the broker name. Likewise, the Rhode Island Department of Business Regulation issued a notice reminding licensees that advertising must include the broker name.

Michigan's amended statute regarding licensee advertising requires the business name of the employing broker to be equal to or larger than the licensee name, and the advertising must also include the telephone number or address of the employing broker.[4] A licensed broker may advertise property that he or she owns personally in his or her own name if the advertising indicates the seller is a licensee.[5] A licensed salesperson shall not advertise property under his or her own name unless it is the salesperson's principal residence.[6]

Licensee advertising in Nebraska must include the broker name in a prominent, conspicuous, and easily identifiable manner.[7]

In Tennessee, the brokerage firm name must appear in letters the same size or larger than the name of the licensee or team.[8] The amended regulations also add a section regarding social advertising. Social media advertising must include the firm name and telephone number and must not be more than one click away from the viewable page.[9]

The Texas statute also states that the advertising may not imply that the salesperson is responsible for the operation of the real estate brokerage business.[10] In addition, a licensee is prohibited from using all or part of the seal, logo, or name of the Texas Real Estate Commission or another governmental agency in a manner that implies the licensee is a governmental agency, is endorsed by the Commission or other agency, or holds special status that the Commission or another agency has not granted.[11] The Commission's rules regarding advertising may not require licensees to use the term broker or agent, to include the license number, or to reference the Commission.[12]

The Rhode Island Department of Business Regulation Notice states that licensees may not advertise in a way that is misleading, the advertising must include the brokerage name, and the

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[4] Mich. Comp. Laws § 339.2512e (2017).
[5] *Id*.
[6] *Id*.
[7] 299 Neb. Admin. Code, Ch. 2, § 003 (2017); Nebraska Real Estate Commission, Advertising Do's and Don't's (2017).
[8] Tenn. Comp. R. & Regs. 1260-02-.12 (2017).
[9] *Id*.
[10] Tex. Occ. Code Ann. § 1101.652 (2017).
[11] 22 Tex. Admin. Code § 535.45 (2017).
[12] Tex. Occ. Code Ann. § 1101.156 (2017).

advertising may not imply common ownership among licensees.[13] The licensee name must be in print smaller than the brokerage name.

Louisiana, Nebraska, Oklahoma – Teams and Team Advertising

Under an amended regulation in Louisiana, licensees who are part of a team may not receive compensation from other team members.[14]

Nebraska and Oklahoma both issued new rules regarding teams and team advertising. In Nebraska, real estate team names must include the word "team" or "group."[15] Team names may not use the following words: REALTORS®, Company, Corporation, Corp., Inc., LLC, LP, or LLP.[16] Team names may include the words "real estate" or "realty" only if those terms are immediately followed by the word "team" or "group."[17] If a team leader's license is suspended or revoked, the team must designate a new leader.[18] If the team is named after a member whose license is suspended or revoked, the team must designate a new name which does not use the suspended member's name.[19] Team advertising must include the team name and must prominently display the broker's name adjacent to the team name in similar or larger size.[20]

Beginning November 1, 2017, real estate teams in Oklahoma must register with the Oklahoma Real Estate Commission.[21] A team is defined as any two or more licensees who work under the supervision of the same broker, work together on real estate transactions to provide brokerage services, represent themselves to the public as a team, and are designated by a team name.[22] Team advertising must include the broker's name in a prominent, conspicuous, and easily identifiable manner.[23]

Louisiana, Rhode Island – Escrow Deposits and Failed Real Estate Transactions

Both Louisiana and Rhode Island amended their rules regarding the return of escrow deposit money following a failed real estate transaction. Under the rule in Louisiana, if a broker cannot reach the parties to a failed real estate transaction, the broker may return the escrow deposit monies in accordance with the Uniform Unclaimed Property Act.[24] In Rhode Island, brokers,

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[13] Rhode Island Department of Business Regulation, Notice: Real Estate Brokers and Salespersons Advertising (April 20, 2017).
[14] La. Admin. Code tit. 46, § LXVII.1805 (2017).
[15] 299 Neb. Admin. Code, Ch. 2, § 003.08 (2017); Nebraska Real Estate Commission, Advertising Do's and Don't's (2017).
[16] *Id*.
[17] *Id.;* Nebraska Real Estate Commission, Advertising Do's and Don't's (2017).
[18] 299 Neb. Admin. Code, Ch. 2, § 003.014 (2017).
[19] *Id*.
[20] 299 Neb. Admin. Code, Ch. 2, § 003.07 (2017).
[21] Okla. Stat. tit. 59, § 858-305 (2017); Oklahoma Real Estate Commission, SB0266 FAQ (2017).
[22] Okla. Stat. tit. 59, § 858-305 (2017).
[23] Oklahoma Real Estate Commission, SB0266 FAQ (2017).
[24] La. Admin. Code tit. 46, § LXVII.2901 (2017).

licensees, and escrow agents must pay all sums of money held in an escrow account within 10 days of receipt of a written release signed by all parties to a failed real estate transaction.[25]

Louisiana

Louisiana issued a new regulation regarding broker supervision. A supervising broker must provide written notice to licensees of the activities that the broker authorizes for the licensee.[26] The supervising broker must have written policies and procedures regarding recordkeeping and compliance with advertising and team rules.[27] Brokers must maintain disclosures, agreements, contracts, receipts and disbursements of compensation, appraisal and market analyses, and termination paperwork for at least five years.[28]

Nebraska

Nebraska also amended its statute regarding licensee conduct to state that it is an unfair trade practice for a broker or licensee to collect earnest money or other money paid to him or her until the real estate transaction has been consummated or terminated.[29] Payment for goods or services rendered by a third party on behalf of a client is not considered compensation to the broker or licensee as long as the payment does not include profit or compensation for services rendered by the broker/licensee and the broker retains a record of the payment to the third party.[30]

Texas

An amended regulation in Texas requires a licensee to be present at a showing of a property. To "show" a property means causing or permitting the property to be viewed by a prospective buyer or tenant, unlocking or providing access, or hosting an open house.[31] A licensee may permit unescorted access to a prospective tenant only if the property is vacant, the licensee has a method to control access and verify identity, and the property owner signed a written consent.[32]

A new statute and corresponding regulation change addresses equitable interests in property. A person may acquire an option or interest in a contract to purchase real property and then sell or offer to sell the option or assign the contract without holding a license if:

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[25] R.I. Gen. Laws § 5-20.5-26 (2017); R.I. Gen. Laws § 5-20.5-14 (2017).
[26] La. Admin. Code tit. 46, § LXVII.1801 (2017).
[27] *Id*.
[28] La. Admin. Code tit. 46, § LXVII.1803 (2017).
[29] Neb. Rev. Stat. § 81-885.24 (2017).
[30] *Id*.
[31] 22 Tex. Admin. Code § 535.4 (2017).
[32] *Id*.

(1) the person does not use the option or contract to engage in real estate brokerage; and
(2) the person discloses the nature of the equitable interest to any potential buyer.[33]

A person who sells an option or offer to assign without disclosing the nature of that interest to a buyer is engaging in real estate brokerage.[34] A licensee who engages in real estate brokerage must disclose to the seller or buyer that the principal is selling or buying and does not have legal title to the property.[35]

C. Volume of Materials Retrieved

Agency issues were identified 9 times in 6 cases (*see* Tables 1, 2). Dual Agency, Vicarious Liability, Breach of Fiduciary Duty, and Agency: Other issues were each addressed in multiple cases this quarter. Thirteen Agency statutes and twenty regulations were retrieved (*see* Table 1).

II. PROPERTY CONDITION DISCLOSURE

The first Property Condition Disclosure case discussed below covers familiar territory – the failure to disclose water damage on the property. In that case, the sellers were also licensees who handled the real estate transaction. The other case involves the licensee's failure to accurately describe beach access on the property. There, the court originally found in favor of the licensee, finding that the buyer did not justifiably rely on the licensee's statement; but the court reconsidered its determination and reversed the judgment it had entered in favor of the licensee.

A. Cases

1. **Basso v. Campos**, 2017 WL 2291414 (Md. Ct. Spec. App. May 25, 2017)

Testimony of home inspector might establish that licensee-sellers had knowledge of flooding on the property during the time licensee-sellers owned the property.

The home purchaser sued the sellers of the home, who were also real estate licensees with the broker Campos & Associates Realty, for misrepresentation. The licensees bought the home as a

[33] Tex. Occ. Code Ann. § 1101.0045 (2017); 22 Tex. Admin. Code § 535.6 (2017).
[34] *Id*.
[35] *Id*.

foreclosure, remodeled it, and then sold it to the plaintiff. Within weeks of the closing, the purchaser's basement flooded and it continued to flood regularly in the following months and years. The purchaser claimed the licensees had actual knowledge of previous flooding in the home and tried to conceal defects.

The purchaser sued the broker for negligent supervision and vicarious liability. After a jury trial, the court granted the defendant's motion for judgment, finding that the purchaser failed to show the licensees had knowledge of water, flooding conditions, or a wet basement during the time in which they held title to the property.

At trial, the court did not allow a home inspector to testify on the purchaser's behalf regarding his opinion as to whether the house would have flooded previously and during the renovation period. On appeal, the purchaser argued that the trial court wrongly excluded the testimony of the home inspector. The appellate court determined that exclusion of the evidence was prejudicial error. The judgment for the real estate defendants was reversed, and the case was remanded for further proceedings.

2. **9826 LFRCA, LLC v. Hurwitz**, No: 3:13-CV-01042-L-JMA, 2016 WL 8922256 (S.D. Cal. Aug, 10, 2016), modified on reconsideration, **9826 LFRCA, LLC v. Hurwitz**, No.: 3:13-CV-01042-L-JMA, 2017 WL 1885668 (S.D. Cal. May 9, 2017)

Seller's representative could be liable to purchaser for alleged misrepresentation regarding private access to beach.

The seller's representative informed the purchaser that the property included private access to a beach. Upon learning that the access was shared with others, revocable, and located half a mile from the property, the purchaser sued the representative for misrepresentation, fraudulent concealment, and negligence. The trial court originally granted the representative's motion for summary judgment on the misrepresentation claims, finding that the purchaser could not have justifiably relied on the representative's statement because the purchaser was a sophisticated party, had inspected the property, and the title report did not mention beach access. The court denied summary judgment on the negligence claim.

On a motion for reconsideration, the real estate representative argued that the lack of justifiable reliance should also bar the purchaser's claim for negligence. The court denied the representative's motion for reconsideration on the negligence claim. Going further, the trial court reconsidered and reversed its earlier decision that the purchaser could not have justifiably relied on the representative's misrepresentation. Upon reconsideration, the court

found that a reasonable jury could conclude that purchaser's reliance was justified. Thus, the purchaser's claims should proceed to trial.

B. Statutes and Regulations

Maine

The seller's disclosure to purchasers must describe the means of accessing a property by a public way and any means other than a public way, if known by the seller.[36]

Texas

Texas modified the Seller's Disclosure Statement to indicate that property may be located near a military installation and may be affected by high noise or air installation compatible use zones.[37] The Disclosure Statement also states that information regarding air installation compatible use zones can be found online.[38]

Pursuant to a new statute, a person who is selling an option or assigning an interest in a contract to purchase real property must disclose to potential buyers that the person is selling only an option or assigning an interest and does not have legal title to the property.[39]

C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified 3 times in 3 cases (*see* Tables 1, 2). The cases addressed Mold and Water Intrusion and Other Issues. Three statutes and two regulations regarding Property Condition Disclosure issues were retrieved this quarter (*see* Table 1).

III. RESPA

The courts continue to decide cases challenging captive reinsurance schemes. In two cases this quarter, two different federal courts in Pennsylvania reached different conclusions regarding RESPA claims involving such schemes. The issue in both cases was whether the claims were barred by the statute of limitations. The courts disagree as to whether the statute of limitations began to run at the time of closing, or if each payment constituted a new violation.

[36] Me. Rev. Stat. Ann. tit. 33, § 173 (2017).
[37] Tex. Prop. Code § 5.008 (2017).
[38] *Id*.
[39] Tex. Prop. Code § 5.086 (2017).

A. Cases

1. **Kellis v. U.S. Bank, N.A.**, No. 1:16CV395, 2017 WL 1194360 (M.D. N.C. March 30, 2017)

Mortgage servicer's alleged misrepresentations regarding application of principal and interest from monthly mortgage payments did not state a RESPA claim.

Following foreclosure on his home, the homeowner argued that the mortgage servicer "falsely represented" that portions of his monthly mortgage payments would be applied to principal and interest when the payments were actually pooled and disbursed as returns to investors. The homeowner alleges that this misrepresentation violates RESPA. The court concluded that the homeowner failed to state a RESPA claim because the alleged wrongdoing did not relate to kickbacks or unearned fees for real estate settlement services, the servicer's requirement that the homeowner use a title insurer selected by the seller, the servicer's failure to give proper notice of a transfer of servicing rights, or to respond to a QWR for information. The mortgage servicer's motion to dismiss the RESPA claim was granted.

2. **Blake v. JPMorgan Chase Bank, N.A.**, No. 13-6433, 2017 WL 1508995 (E.D. Pa. April 26, 2017)

The continuing violations doctrine applies to RESPA claims so that each improper kickback or referral fee constitutes a RESPA violation.

Homeowners brought a class action alleging RESPA violations based on the defendants' captive reinsurance company. In the alleged scheme, the lenders created subsidiary reinsurance companies that received payments insurers to whom the lenders referred its customers in need of PMI insurance. The homeowners allege that the reinsurers did not assume any risk and never actually performed true reinsurance services. The court previously held that the homeowners' claims were barred by the statute of limitations.

In this decision, the court considered the homeowner's motion to amend their complaint to assert a theory tolling the statute of limitations. The homeowners argued that the continuing violations doctrine applies to their RESPA claim. Under that theory, the statute of limitations

does not run until the last violation has occurred. The homeowners asserted that the defendants violated RESPA each time they paid an illegal kickback, fee, or referral in connection with the mortgage insurance premium payments.

The court concluded that the continuing violations doctrine applies to RESPA claims. Because the RESPA statute defines violations that may occur after the closing process or are unrelated to the closing, the court found that RESPA violations are not limited solely to conduct occurring at the closing. The court determined that each unlawful kickback, fee, or referral violates RESPA. As such, each unlawful fee, kickback, or referral has its own statute of limitations period that does not start to run until the violation occurs. The court granted the homeowners' motion to amend their complaint.

3. **Menichino v. Citibank, N.A.**, No. 2:12-CV-00058, 2017 WL 2455166 (W.D. Pa. June 6, 2017)

Monthly mortgage insurance payments did not constitute new and independent violations of RESPA which would toll the statute of limitations.

Home mortgage borrowers allege that bank, mortgage servicer, and reinsurer created a captive reinsurance scheme whereby they selected mortgage insurers for their customers, and the insurers then paid kickbacks to the Defendants for non-existent reinsurance services in violation of RESPA. The court previously held that Borrowers' claims were barred by the statute of limitations. Borrowers sought to amend their complaint to allege a new theory as to how the statute of limitations was tolled. Under the new theory, Borrowers claimed that each monthly mortgage insurance payment constitutes a new, independent violation of RESPA.

The court rejected Borrower's request to amend the complaint. According to the court, the statute of limitations on RESPA claims begins to run on the date of the closing. The violation occurred when the loans were closed, and the monthly payments were a continuing consequence of the violation, but do not constitute separate and independent violations. Borrower's motion to amend complaint was denied.

B. Statutes and Regulations

Colorado

Colorado amended its statute regarding referral fees to state that a real estate licensee may not pay or receive a referral fee except in accordance with RESPA.[40]

[40] Colo. Rev. Stat. § 12-61-203.5 (2017).

C. Volume of Materials Retrieved

RESPA issues were identified 13 times in 11 cases (*see* Tables 1, 2). One statute regarding RESPA was retrieved this quarter (*see* Table 1).

IV. DECEPTIVE TRADE PRACTICES ACT/FRAUD: YEARLY UPDATE

A. Cases

The Deceptive Trade Practices/Fraud cases touch on a variety of alleged misconduct. Many of these cases, such as the *Nerey* and *Aerovault* cases discussed below, assert that the real estate professionals misrepresented fees or costs associated with the real estate transaction. In a case from Washington, home purchasers successfully alleged a deceptive trade practices claim against listing representatives who failed to provide specific disclosures regarding airport noise as required by a local ordinance.

1. **Nerey v. Greenpoint Mortgage Funding, Inc.**, 144 A.D. 3d 646 (N.Y. App. Div. Nov. 2, 2016)

Seller's representative was not liable for alleged scheme to defraud home purchasers where licensee had no involvement in mortgage and there was no evidence of an intent to deceive.

Home purchasers claimed that seller's real estate representative and the associated broker acted with a mortgage broker in a scheme to defraud the purchasers into purchasing a home they could not afford. The purchasers alleged that the parties made misrepresentations regarding the purchase price, appraisal value of the home, and terms of the mortgage. The court granted summary judgment in favor of the representative and broker, dismissing the claims against them. The purchasers appealed the decision.

On appeal, the court found that the real estate defendants demonstrated that there was no misrepresentation regarding the purchase price of the property or the mortgage terms. Acting as the seller's representative, the licensee had no involvement in setting the mortgage terms. Because the alleged misrepresentation concerns a matter beyond the representative's control and outside of her knowledge, any reliance on alleged misrepresentations is not justifiable. Also, the purchasers failed to present any evidence of an intent to deceive them, offering only suspicion and conjecture to suggest an intent to deceive. In addition, the mortgage documents

signed by the purchasers at closing reflected the mortgage terms. Summary judgment for defendants was affirmed.

2. **Aero Vault Johnson, LLC v. Cushman & Wakefield, Inc.**, No. G051698, 2016 WL 4218712 (Cal. Ct. App. Aug. 5, 2016); **Aero Vault Johnson, LLC v. Cushman & Wakefield, Inc.**, No. G051701, 2016 WL 4218719 (Cal. Ct. App. Aug. 5, 2016)

Seller's broker not liable for alleged scheme to defraud purchasers where there was no evidence of broker's knowledge of the scheme.

In this case, the parties engaged in a series of real estate transactions involving 1031 exchanges (transactions in which the proceeds of a property sale are used to buy "like kind" property to avoid capital gains taxes on the first sale). The plaintiffs invested $750,000 for interests in two different properties. The purchasers alleged that the defendants conspired to mislead and defraud the purchasers regarding the costs of the 1031 transaction, and brought claims for intentional misrepresentation, negligent misrepresentation, fraud, and unfair business practices. Specifically, the purchasers claimed that the defendants set the purchase price of the "like kind" property at a price higher than that negotiated with the seller, and then paid the premium to themselves through hidden costs. The purchasers alleged that the actual costs were more than 15 percent, but the defendants made it look like the costs were approximately 6 percent. In this decision, the court considered the claims against the entities that acted as the seller's broker in the property transaction. The trial court dismissed the claims against the seller's broker entities.

The appellate court noted that the broker was not alleged to have made misrepresentations, but to have aided and abetted the fraud. To be liable, the broker must have had actual knowledge of the wrongful act and participated in the act. The appellate court determined that the complaint only vaguely asserted knowledge on behalf of the broker, and did not state how the broker learned that another defendant was going to conceal the marked up price from the plaintiffs. The court also noted that, generally speaking, the seller's broker is not likely to be informed that the buyer's representatives are going to deceive their clients in a subsequent transaction. Without specific facts showing knowledge on behalf of the broker, the plaintiffs failed to adequately state claims for fraud and deceptive trade practices. The appellate court affirmed dismissal of the claims against the broker.

3. **Deegan v. Windermere Real Estate/Center-Isle, Inc.**, No. 74353-8-I, 2017 WL 685119 (Wash. Ct. App. Feb. 21, 2017)

Home purchasers alleged a deceptive trade practices claim against listing entities who failed to provide specific disclosures regarding airport noise as required by county ordinance.

Purchasers of homes on Whidbey Island brought a class action lawsuit against the real estate firms who listed the properties for sale. A naval air station on the island includes a seaplane base and airfield. A local county ordinance requires sellers and their real estate representatives to provide buyers with warnings about the aircraft facilities and noise. The homeowners alleged that the real estate defendants violated Washington's Consumer Protection Act by failing to provide them with the requisite warnings. According to the homeowners, the defendants provided a generic notice about significant noise from airport operations on the island, but did not provide the specific disclosures required by the ordinance. The trial court granted the listing representatives' motion to dismiss, concluding that the home purchasers had a duty to inquire regarding the noise and that the statute of limitations had run on the claim.

Dismissal of the claims was reversed on appeal. The appellate court determined that the purchasers were not under a duty to inquire that negated their claim. Even though the real estate defendants provided accurate information about airport noise, because the disclosures required by the ordinance were material information, the court or jury could determine that the representation contained an omission that is likely to mislead. As such, the purchasers properly alleged a claim for unfair or deceptive acts in trade. The appellate court also stated that the statute of limitations might have been tolled by the discovery rule until the purchasers knew or reasonably should have learned about the omitted material facts. Thus, the court remanded the case for further proceedings to determine when the homeowners knew or should have known the basis for their claim.

V. COMMERCIAL PROPERTY ISSUES

For the most part, the cases involving commercial properties raise the same legal issues as cases with residential properties, such as breach of fiduciary duty, misrepresentation/fraud, and failure to disclose property conditions. One issue that arises in the context of commercial properties is whether the property is suitable for a particular commercial use. Both of the cases below address this issue. As demonstrated in both of the cases, parties often utilize a contingency clause to protect against uncertainty regarding a particular use of the property.

1. **Hensley v. Duvall**, No. 2911 EDA 2015, No. 2967 EDA 2015, No. 3098 EDA 2015, No. 3099 EDA 2015, 2017 WL 1372759 (Pa. Super. Ct. Apr. 13, 2017)

Broker was negligent in drafting contingency clause indicating that sale was contingent upon change of use approval for the property.

The purchasers sought to buy a property that could be used for an overnight dog kennel and dog day care business. They contracted with a brokerage firm to assist them in locating an appropriate property. After a potentially suitable property was located, the purchasers, sellers, and the real estate representatives measured the property and determined the purchasers' intended use of a barn on the property as a kennel violated the zoning setback requirements by three feet. Thus, the purchasers' representative added a clause to the purchase contract indicating that the sale was contingent upon change of use approval for the property. After receiving a permit to operate the kennel on the property, the purchasers bought the property. Ten months later, the township informed the purchasers that their use of the property violated the setback requirement and it would not issue a permit to use the barn as a kennel.

The purchasers then sued the brokerage firm for negligence in drafting the contingency clause, claiming that the clause improperly indicated that sale was contingent upon the purchasers' ability to operate a kennel anywhere on the property rather than indicating that the purchase was contingent upon the purchasers' ability to use the barn as a kennel. A jury found that the broker and the real estate representative were 75 percent negligent and the purchasers were 25 percent negligent, and awarded damages of $275,000. After deducting the 25 percent due to the purchasers' negligence, the purchasers' received a verdict of $206,250.92. On appeal, the appellate court affirmed the verdict. The court found there was sufficient evidence to support the jury's finding that the broker breached the contract with the purchasers by drafting a deficient contingency clause and allowing a purchase that was not acceptable to the purchasers. The broker did not properly assist the purchasers, did not act in their best interests, and drafted a contingency clause with imprecise language. Judgment was affirmed,

and the case was remanded to calculate attorneys' fees and post-judgment interest to be awarded to the purchasers.

2. **Song v. Macmahon**, 2016 WL 7439245 (Ind. Sup. Ct. May 19, 2016)

Licensee and broker settled claims brought by purchaser for alleged misrepresentations regarding zoning of the property.

The plaintiff, a prospective purchaser, alleges that he told seller's real estate representative that he intended to use the property for a warehouse, light manufacturing and office space, and that he requested a contingency clause in the purchase agreement, making the purchase contingent upon the FAA's determination regarding land use for the property. After the plaintiff terminated the purchase agreement by exercising the contingency clause due to concerns about the effect of FAA restrictions on development of the property, he entered into a second purchase agreement for 16 acres of the property. According to the plaintiff, the sellers and their real estate representative falsely told him there were no FAA restrictions on use of the property. During the property inspection, however, the plaintiff learned that the property was zoned agricultural, which would require a zoning change to be used for industrial purposes. The plaintiff sought to terminate the agreement. When the sellers refused to return his escrow funds, the plaintiff sued the sellers and their representative for fraud, fraud in the inducement, constructive fraud, and breach of contract.

The sellers argued that they disclosed the agricultural zoning to their real estate representative, but he incorrectly advertised the property as industrial. Following a jury trial, the jury returned a verdict for the plaintiff in his claims against the seller, finding that he was entitled to the return of his earnest money. With respect to the claims against the real estate defendants, the real estate representative argued that the plaintiff could not reasonably rely on representations about zoning because the plaintiff failed to check publicly available documents to investigate the property's zoning before executing the purchase agreements. The plaintiff settled his claims against the real estate representative and brokerage firm; therefore, those claims were not considered by the jury.

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 5 Agency cases, and the licensee was liable in only one[41] of those cases (*see* Table 3).

B. Property Condition Disclosure Cases

Liability was not determined in any of the Property Disclosure Cases reviewed this quarter (*see* Table 3).

C. RESPA Cases

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

D. DPTA/Fraud Cases

Liability was determined in 26 DPTA/Fraud cases retrieved over the past twelve months; the defendant was held liable in 6 of those cases[42] (*see* Table 5).

E. Cases Involving Commercial Properties

Liability was determined in 14 cases involving commercial property over the past twelve months; the defendant was held liable in 5 of those cases[43] (*see* Table 6).

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[41] *Hensley v. Duvall*, 2017 WL 1372759 (Pa. Super. Ct. Apr. 13, 2017) (discussed above in Commercial Properties section).

[42] (NOTE: All of the following cases and jury verdicts were retrieved in the past twelve months (3Q 2016, 4Q 2016, 1Q 2017, or 2Q 2017), even though some of the cases were decided in 2015 or early 2016. This is due to a lag in jury verdicts being uploaded into the system and the fact that we retrieve jury verdicts on an annual basis). *Holzerland v. Rightway Development, Inc*., 2015 WL 11121305 (Md. Cir. Ct. Nov. 16, 2015) (jury verdict; judgment for plaintiffs; purchaser alleged real estate representative falsely stated that home had access to parking and that there was another bid on the property); *Bourgoin v. Nabizada*, 2015 WL 10819001 (Fla. Cir. Ct. Dec. 17, 2015) (jury verdict; after discussing property with the plaintiff, defendant secretly purchased property for a lower price and sold to the plaintiff); *Luong v. McMillan*, 2016 WL 3941107 (Tex. Dist. Ct. May 26, 2016) (seller claimed listing representative and broker changed their agreement to receive higher commissions); *Neal v. Smith*, 2015 WL 10684628 (Cal. Super. Ct. May 26, 2015) (Defendant represented that he would oversee construction of Mexican property and sell property for plaintiffs; Defendant thwarted plaintiff's efforts to sell, lived in the property, and kept rental money from the property); *Four S Investments v. Banwait*, 2016 WL 7225214 (Wash. Super. Ct. Feb. 18, 2016) (After seller of blueberry farm sued by purchaser for false information regarding production of the property, seller alleged broker made misrepresentations during trial against seller); *Alhambra Bowling Center Inc. v. Mandarin Realty I Corp*., 2015 WL 10937008 (Cal. Super. Ct. Sept. 8, 2015) (plaintiff alleged that real estate representative forged her signature on escrow addendum).

[43] *3405/3407 Slauson Ave. LLC v. Stinson*, 2015 WL 11233802 (Cal. Super. Ct. Sept. 8, 2015); *Alhambra Bowling Center Inc. v. Mandarin Realty I Corp*., 2015 WL 10937008 (Cal. Super. Ct. Sept. 8, 2015); *Four S Investments v.*

VII. TABLES

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

Major Topic	Cases	Statutes	Regulations
Agency	6	13	20
Property Condition Disclosure	3	3	2
RESPA	11	1	0

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

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

Banwait, 2016 WL 7225214 (Wash. Super. Ct. Feb. 18, 2016); *Hensley v. Duvall*, 2017 WL 1372759 (Pa. Super. Ct. Apr. 13, 2017) (discussed above in Commercial Properties section); *Trinh v. Lee*, 2015 WL 10987082 (Cal. Super. Ct. Apr. 22, 2015).

Issue	Cases	Statutes	Regulations
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Teams	0	1	7
Agency: Coming Soon Listings	0	0	0
Agency: Other	2	12	13
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	0	0	0
PCD: Imported Drywall	0	0	0
PCD: Plumbing	0	0	0
PCD: HVAC	0	0	0
PCD: Electrical System	0	0	0
PCD: Valuation	0	0	0
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	0	0	0
PCD: Insects/Vermin	0	0	0
PCD: Boundaries	0	0	0

Issue	Cases	Statutes	Regulations
PCD: Zoning	0	0	0
PCD: Off-site Adverse Conditions	0	1	0
PCD: Meth Labs	0	0	0
PCD: Stigmatized Property	0	0	0
PCD: Megan's Laws	0	0	0
PCD: Underground Storage Tanks	0	0	0
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	0	0	0
Property Condition Disclosure: Other	2	2	2
RESPA: Disclosure of Settlement Costs	2	0	0
RESPA: Kickbacks	8	1	0
RESPA: Affiliated Business Arrangements	2	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	1	0	0

Table 3

Liability Data for Second Quarter 2017

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	1	4	20%	80%
Property Condition Disclosure	0	0	N/A	N/A
RESPA	0	0	N/A	N/A

Table 4

Volume of Deceptive Trade Practices Act/Fraud Items Retrieved in Past Twelve Months (July 2016-June 2017)

Major Topic	Cases	Statutes	Regulations
DPTA/Fraud	61	N/A	N/A

Table 5

Liability Data for Deceptive Trade Practices Act/Fraud Cases in the Past Twelve Months (July 2016-June 2017)

Topic	Liable	Not Liable	% Liable	% Not Liable
DPTA/Fraud	6	20	23%	77%

Table 6

Liability Data for Cases Involving Commercial Properties in the Past Twelve Months (July 2016-June 2017)

Topic	Liable	Not Liable	% Liable	% Not Liable
Cases Involving Commercial Properties	5	9	35%	65%