Third Quarter 2015

Welcome to the *Legal Pulse Newsletter*. The *Legal Pulse* provides a summary of recent court decisions as well as new statutes and regulations. In this issue, we examine the most recent cases on Agency, Property Condition Disclosures, and RESPA. We also present updates on Antitrust, Technology, and Third Party Liability activity over the last twelve months.

Agency liability is an ever-present concern for real estate professionals due to the high volume of breach of fiduciary cases brought against licensees. In most of the 2015 Agency cases so far, licensees won the cases brought against them. These cases continue to define the parties to whom a licensee's fiduciary duty extends, and assess whether particular conduct violates a licensee's duty to clients. Licensees also fared well in Property Condition Disclosure cases during 2015. An issue that has arisen in several cases this year is the extent to which a licensee has knowledge of a property condition, beyond what is disclosed in a disclosure form or inspection report.

RESPA is a thornier area. The courts continue to consider a variety of kickback schemes, with decisions often turning on whether services were actually provided. Another common issue is what constitutes a "thing of value" under RESPA.

In the other topic areas, Third Party Liability appears to be the most frequently litigated; comparatively, Antitrust and Technology decisions were pretty sparse. On the legislative side, Technology was an active issue. Five states made rules on internet advertising, while other new provisions addressed telemarketing calls and retention of so-called "ephemeral" messages such as text messages.

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

A. Cases

The Agency cases reviewed this quarter address a variety of different issues important to real estate professionals. In an Indiana case, the court ruled that an agent breached the fiduciary duty owed to her client by purchasing a property that her client wanted. In other cases, the courts examined whether a licensee's fiduciary duty extends to former clients and tenants of a client.

1. **Bunger v. Demming**, 40 N.E.3d 887 (Ind. Ct. App. 2015)

A licensee breached her fiduciary duty when she purchased a property several years after her client's offer was rejected on that property, thus resulting in an award of $154,000 to the client.

A real estate investor hired a licensee for multiple transactions. The investor was interested in a particular property, but the owner declined the investor's offer. After several years, the property owner's representative informed the licensee that the owner wanted to sell. The licensee did not tell the investor that the property was now available. Instead, she and a partner bought the property. There was no written representation agreement between the investor and the licensee, but the parties had orally discussed a standard commission arrangement for the anticipated transaction. When the investor sued the licensee, the court held that the licensee was in an agency relationship with the investor, despite the lack of a formal written agreement. The licensee's purchase therefore breached her fiduciary duty to the investor. The investor won $154,000 in damages.

2. **Lawson v. Keene**, No. 03-13-00498-CV, 2015 WL 4071561 (Tex. Ct. App. July 1, 2
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A licensee's failure to notify a purchaser of a discrepancy between the appraisal record and the MLS listing was not a breach of fiduciary duty or a misrepresentation.

The seller's representative added the square footage of a sunroom to the house's MLS listing. The sunroom square footage was not included in the county's appraisal record. When the buyers discovered the discrepancy between the county record and the MLS listing, they sued their representative and the seller's representative for fraud, breach of fiduciary duty, and violation of the Texas Deceptive Trade Practices Act. The court held that adding the square footage was not fraud or misrepresentation and did not breach fiduciary duties. There was no reason the sunroom should not have been included, and the county's appraisal was not the definitive record. The buyers were ordered to pay seller's representatives' attorneys' fees.

3. **Hopkins v. Coco**, 174 So.3d 201 (La. Ct. App. 2015)

The buyer's representative's failure to notify a lender of the seller's offer to reduce price did not harm the seller because the lender had already rejected the buyer's loan application.

A sales agreement fell through when the buyer could not secure financing. The sellers claimed fraud, negligent misrepresentation, and breach of fiduciary duty against the buyer and the buyer's representative, arguing that the buyer did not make a good faith effort to secure financing, and that the buyer's representative failed to notify the lender that the sellers had agreed to lower the purchase price. But the buyer's representative

received the price amendment the same day she learned that the buyer's loan was not approved, so sending the new price information would have been pointless. The buyer's representative was therefore not liable.

4. **Kim v. Park**, 332 Ga. App. 349 (2015)

A broker was not liable to a former client for not telling him about a phone call received at the broker's office after their agency relationship ended.

A property owner terminated an agency relationship with a broker. Weeks later, the broker received a call from someone requesting the owner's address. The broker did not provide the address and did not notify the owner of the call. The call was from a process server attempting to serve the property owner with a lawsuit. The owner claimed the broker's failure to inform him of the lawsuit caused the entry of default judgment against him. The court held that the broker was not responsible to notify the former client because there was no agency relationship at the time of the phone call.

5. **Schweitzer v. Salt Lake Homeless Program**, No. 2:15-CV-193-DB-BCW, 2015 WL 5089359 (D. Utah Aug. 27, 2015)

An agent did not owe a fiduciary duty to the tenant of a home seller.

A tenant rented a house from the owner, but the owner later sought to sell the house. The tenant claimed the seller was selling the home to avoid due process obligations under Utah eviction law and the federal HUD Veterans Administrations Subsidized Housing law. The tenant sued the seller's representative in an effort to stop the sale of the house. The court held that a real estate agent owes fiduciary duties to his or her client, but not to a seller's tenant.

6. **Livia Properties, LLC v. Jones Lang LaSalle Americas, Inc.**, No. 5:14-00053, 2015 WL 4711585 (W.D. Va. Aug. 7, 2015)

A broker was not liable for interference or conspiracy because it only acted within the scope of its relationship with its client.

A commercial real estate services firm was hired to negotiate leases as broker for a large cable company. In the course of negotiating a lease renewal with a property owner, the broker informed the owner that it would be required to pay the broker's commissions. The owner later learned that the broker's employee who negotiated the leases in Virginia was not a licensed broker in the state of Virginia, and refused to pay commissions. Ultimately, the cable company did not renew the lease. The owner claimed that the failure to renew the lease was the result of a conspiracy between the broker and the cable company to punish the owner for refusing to pay the commissions. The owner sued for intentional interference with prospective contract and business conspiracy. The court held that the relationship between the broker and its client precluded the broker's liability to the owner. Because the broker was acting on its client's behalf, the broker was not legally considered to be an independent entity from the client, and could not interfere with the contract between the owner and the client.

B. Statutes and Regulations

North Carolina

North Carolina amended a rule relating to brokers selling commercial real estate. Under the amendment, if a commercial real estate broker has an ownership interest of less than 25% in the property, the broker may represent the buyer of that property *if* the buyer consents to the representation after full written disclosure. [1]

[1] N.C. Admin. Code tit. 21, r. 58A.0104 (2015).

North Carolina also amended its regulation on handling of trust money. A broker may accept custody of a check payable to a seller or escrow agent, but only for the purpose of delivering it to the seller or escrow agent.[2]

New York and Colorado regulations addressed the issue of advertising by brokerage teams, and are part of nationwide trend to regulate brokerage teams. Under the New York regulation, advertising of team names must use the term "team" and include the full licensed name of the real estate brokers or state that the team is "at" or "of" [full name of the broker/the brokerage]."[3] In Colorado, teams are prohibited from using terms such as "realty" or "corporation" in their team name, and all team advertising must include the legal name or trade name of the brokerage firm.[4] Similarly, a Louisiana regulation states that the words "team" and "group" may be used in team advertising, but team names cannot contain misleading terms, such as "real estate" or "realty."[5]

C. Volume of Materials Retrieved

Agency issues were addressed twenty times in fourteen cases (*see* Table 1). Breach of Fiduciary Duty was the most commonly raised issue, while Agency: Other and Vicarious Liability issues were considered in many cases as well. Two Agency regulations were retrieved this quarter.[6]

II. PROPERTY CONDITION DISCLOSURES

A. Cases

In the cases discussed below, the buyer sued the real estate professional for failure to disclose a property condition, even though that condition was disclosed in an inspection report or a disclosure form. In all three of these cases, the real estate professionals were found not to have breached their fiduciary duties. In one of the cases, however, the licensee could be liable for fraud based on his own statements, separate from the inspection report, regarding the property condition.

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[2] N.C. Admin. Code tit. 21, r. 58A.0116 (2015).
[3] N.Y. Comp. Codes R. & Regs. tit. 19, §175.25(e) (2014).
[4] 4 Colo. Code Regs. § 725-1, E-8(b) (2014).
[5] La. Admin. Code tit. 46:LXVII, §§ 1901, 1903, 1907, 1909, 1911 (2014).
[6] This update covers the 2015 legislative sessions for the two states in Group III, North Carolina and Oregon.

1. **McNulty v. Chip**, 116 A.3d 173 (R.I. 2015)

A licensee could be liable for fraud if he had knowledge of previous water intrusion, even though agreement contained AS-IS provision.

A seller had purchased her home from her parents. She provided the later buyers of the home with a disclosure form indicating no prior flooding or water intrusion. The seller did not fill in the form herself, but provided the answers to her real estate agent.

The seller's agent became a dual agent for the seller and the new buyers in their transaction. When the new buyers looked at the house, this representative said that there had been "an inch or so" of water in the basement in the past, despite the fact that the disclosure form did not admit any water issues. The buyers ordered an inspection, and the resulting report *did* mention evidence of water intrusion. Despite the inspection and the representative's statement, the buyers purchased the home on an "AS-IS" basis.

Later storms caused flooding at the house, even after the buyers took remedial action. The buyers sued the seller's representative, claiming negligence, negligent misrepresentation, breach of fiduciary duty, and fraud. The trial court dismissed the claims.

On appeal, the court upheld the judgments for the licensee on the negligence and fiduciary duty claims, but reversed the trial court's decision on the fraud argument. The higher court said that the seller's representative might be responsible for fraud, because he had made statements about water penetration in addition to the reports provided. The "AS-IS" disclaimer was not specific enough to bar the fraud claim against the licensee. The case was sent back to the trial court for further proceedings on the fraud issue.

2. **Prejean v. Estate of Monteiro**, No. 2015 CA 0197, 2015 WL 5515763 (La. Ct. App. Sept. 18, 2015)

A licensee was not liable for failing to disclose structural defects when the licensee did not know of problems beyond what was in the disclosure form.

The seller's disclosure form indicated the property had termites and termite damage. The inspection report also noted major defects and moisture issues on the property. The buyers requested repairs from the seller, but did not re-inspect the home. The buyers claimed that the seller's representative concealed or failed to disclose the defects to them. The court decided that the seller's representative was not liable to the buyers because the buyers were aware of the defects. There was also no evidence that the licensee was aware of any termite damage beyond what was disclosed to the buyers. The court affirmed summary judgment in favor of the licensee.

3. **Hall v. Hall**, 380 Mont. 224 (2015)

Brokers were not liable for failing to disclose defects when the defects were noted in the disclosure form, even though the buyer claimed a page was missing from his copy of the form.

A buyer sued an inspector and real estate brokers, arguing that they failed to disclose structural defects and toxic mold. The disclosure form noted these defects, but the buyer claimed that the page with that information was missing from his copy. The trial court decided that the defects were disclosed to the buyer and dismissed his case against the brokers. The appeals court upheld that decision.

B. Statutes and Regulations

North Carolina

North Carolina requires residential real estate sellers to provide buyers with a "Mineral and Oil and Gas Rights Mandatory Disclosure Statement."[7] The broker must inform clients of their rights and obligations under this section.

C. Volume of Materials Retrieved

Property Condition Disclosure issues were raised seven times in five cases (*see* Table 1). Some involved more than one type of property condition disclosure; Structural Defects and Mold/Water Intrusion were each identified twice (*see* Table 2). One regulation regarding Property Condition Disclosure was retrieved this quarter (*see* Table 1).

III. RESPA

A. Cases

As in prior quarters, most of the RESPA cases in this edition deal with possible kickbacks.

1. **Edwards v. The First American Corp.**, 798 F.3d 1172 (9th Cir. 2015)

Suit alleging kickback scheme by which title insurer purchased a minority interest in a title agency and title agency agreed to refer business to the title insurer could proceed as a class action.

Home purchaser sued title insurance company and its wholly owned subsidiary. The title insurance company engaged in transactions with various title agencies in which it paid money to the title agency in exchange for a minority interest of the agency and the title agency's agreement to refer business to the title insurer. Purchaser alleged these agreements constituted a kickback scheme in violation of RESPA. Purchaser sought to

[7] N.C. Admin. Code tit. 21, r. 58A.0119 (2015).

bring a class action on behalf of the home buyers who obtained a mortgage using one of the title agencies where the title insurance company was an investor.

In this decision, the appellate court held purchasers could pursue a class action because the title insurer used the same scheme in various transactions throughout the country. The court also stated that a referral may violate RESPA, even if it is not the main influence on a home buyer's decision to hire the entity. The case was remanded to the lower court to determine class certification.

2. **Hutter v. Countrywide Bank, N.A.**, No. 09-cv-10092 (NSR), 2015 WL 5439086 (S.D.N.Y. Sept. 14, 2015)

Because a mortgage broker performed legitimate services in connection with a loan transaction, there was no kickback under RESPA.

A borrower claimed that kickbacks and unearned fees were paid to a mortgage broker in violation of RESPA. The borrower alleged that the bank paid a fee to the mortgage broker as part of a referral agreement. The borrower also said that the mortgage broker accepted a processing fee for services it did not actually perform. But the evidence showed that the mortgage broker *did* perform services, and the borrower did not prove that the services were not legitimate. The court dismissed the borrower's RESPA claims.

3. **In re Community Bank of Northern Virginia Mortgage Lending Practices Litig.**, 795 F. 3d 380 (3d Cir. 2015)

Because an alleged kickback scheme used consistent documentation for each borrower, the borrowers' lawsuit could become a class action.

A group of borrowers claimed that a mortgage lending scheme violated RESPA's anti-kickback and affiliated business arrangement rules. The lawsuit alleged that a

residential mortgage loan company created a scheme which involved many different entities, including banks, mortgage service companies, guaranty companies, and title companies. In an attempt to avoid regulatory scrutiny, money was funneled from two banks, through the mortgage services companies, to the mortgage lending company. Under this alleged scheme, fees paid for settlement services were received by the mortgage services companies, even though those entities did not provide settlement services. Defendants appeal the district court's certification of a nationwide class action.

Defendants argued that a number of individual issues predominated over the common issues, including a determination of the actions taken by each plaintiff in discovering the alleged scheme. Because defendants engaged in a common scheme with the same documentation, and because the allegations state that the conduct of the entities who received fees was the same with respect to each plaintiff, the court found that the RESPA violations could be proven with common evidence. Therefore, a class action could be appropriate.

4. **Merritt v. Countrywide Financial Corp.**, No. 09-CV-01179, 2015 WL 5542992 (N.D. Cal. Sept. 17, 2015)

An appraiser did not inflate the value of a home, so the borrowers did not have a valid RESPA claim.

The borrowers claimed that various parties, including the appraiser and lender, acted together in a conspiracy to place borrowers in a subprime loan in violation of RESPA. The borrowers obtained a loan for $10,000 more than the agreed-upon price for the home so they could use the $10,000 for flooring. The borrowers hired an appraiser suggested by the seller's representative. The borrowers alleged that the licensee and the appraiser agreed that the licensee would refer future business to the appraiser if he inflated the value of the borrowers' property. The court determined the appraiser did not inflate the value of the home and there was no conspiracy.

5. **White v. JRHBW Realty, Inc.**, No. 2:14-cv-01436-RDP, 2015 WL 5470245 (N.D. Ala. Sept. 16, 2015)

Referrals between a broker and a title insurance company owned by the same parent company did not create an improper kickback scheme.

A broker was owned by the same parent company as the title insurance company for the disputed transaction. The buyer claimed that the seller's broker's referral of business to the title insurer violated RESPA's anti-kickback provision. The buyer also alleged that the broker paid extra commissions when business was referred to the title insurer. The court found no evidence of payment of a "thing of value" to or by the title insurer. The shared corporate parent did not create a connection between a "thing of value" and the referral of business. Buyer also alleged an improper affiliated business arrangement. But the buyer received an ABA Disclosure Form from the broker, which disclosed the affiliated business arrangement with the title insurer. This disclosure put the title insurer in the RESPA safe harbor.

B. Statutes and Regulations

No RESPA statutes or regulations were retrieved this quarter.

C. Volume of Materials Retrieved

RESPA issues were identified fifteen times in twelve cases (*see* Table 1). The majority of the cases addressed alleged kickback schemes, but Affiliated Business Arrangements and other issues were identified (*see* Table 2).

IV. ANTITRUST HIGHLIGHTS: YEARLY UPDATE

A. Cases

In both of the following antitrust cases from the past year, the court said there was no evidence that the real estate professionals were conspiring to fix fees or otherwise harm the market.

1. **Hyland v. HomeServices of Am., Inc.**, 771 F. 3d 310 (6th Cir. 2014)

Brokers did not conspire to fix commissions.

The plaintiffs claimed that brokers colluded to fix commissions at an uncompetitive rate. Some evidence suggested that these brokers charging a lower commission were harassed or mistreated, but that evidence was not enough to prove that they were fixing commission rates. The court also considered other evidence, including consistent commission rates, available rate information, and possible commission-fixing motives. The court determined that this evidence also did not show commission fixing occurred. The court ruled in favor of the brokers against the plaintiffs.

2. **Metropolitan Regional Information Systems, Inc. v. American Home Realty Network**, DKC 12–0954, 2015 WL 4597529 (D. Md. July 6, 2015)

National Association of REALTORS® did not orchestrate a conspiracy to boycott American Home Realty Network.

Metropolitan Regional Information Systems, Inc. ("MRIS") provides an online multiple listing service to agents and brokers. American Home Realty Network ("AHRN") is a real estate brokerage referral service. After MRIS sued AHRN for a copyright violation, AHRN

countersued MRIS and NAR. AHRN claimed that NAR orchestrated a conspiracy with MLSs and licensees to boycott AHRN. AHRN's attempt to present evidence of a conspiracy failed. AHRN could not show any agreement or any communication between NAR and licensees promoting an AHRN boycott. The court granted NAR's motion for summary judgment, finding that there was nothing unlawful about NAR supporting and sharing information with MLSs that were considering legal action against AHRN.

B. Statutes and Regulations

No statutes or regulations regarding antitrust issues were retrieved in the past year.

C. Volume of Materials Retrieved

Three antitrust cases were retrieved this past year, two of which were retrieved this quarter (*see* Table 1). No antitrust statutes or regulations were retrieved this year.

V. TECHNOLOGY HIGHLIGHTS: YEARLY UPDATE

Once a year, we review cases dealing with technology issues in the real estate field. Technology cases include issues such as internet and phone use, intellectual property rights, and privacy concerns. Cases, statutes, and regulations in this area from the last twelve months are detailed below.

A. Cases

The technology cases from this past year address two different issues. The first case involves a copyright infringement claim over a photograph on a broker's website. The second case examines alleged violations of the Telephone Consumer Protection Act by a mortgage broker.

1. **Bell v. Taylor**, No. 1:13–cv–00798–TWP–DKL, 2014 WL 4250110 (S.D. Ind. Aug. 26, 2014)

Licensee did not owe damages to a photographer for use of a copyrighted photo on her website.

A photographer took a photo of the Indianapolis skyline, which he published online and later registered with the copyright office. A licensee hired a web designer to create her website, and the designer used the skyline photo on the licensee's website. The photographer sued the licensee for copyright infringement, civil theft, and other issues. The photographer could not prove that he had suffered any monetary harm from the photograph's use, however, so the court ruled in favor of the licensee.

2. **Roylance v. ALG Real Estate Services, Inc.**, No. 5:14–cv–02445–PSG, 2015 WL 1522244 (N.D. Cal. March 16, 2015)

A mortgage broker might be liable for making prerecorded calls to a residential phone line in violation of the Telephone Consumer Protection Act.

A plaintiff received a prerecorded telephone message from a mortgage broker offering him a 30-year mortgage. After a live phone call with the mortgage broker, the plaintiff sent a certified letter to the broker, asking for his name to be put on the company's do-not-call list. Thereafter, plaintiff received five more identical prerecorded calls. The plaintiff claimed that the mortgage broker violated the federal Telephone Consumer Protection Act, as well as related state laws in California. The mortgage broker did not respond to the complaint. The magistrate judge found that the plaintiff's complaint supported a finding of a violation of the Telephone Consumer Protection Act. The magistrate recommended that the court enter a default judgment against the mortgage broker for the violation because he failed to respond to the lawsuit.

B. Statutes and Regulations

California, Colorado, Georgia, Indiana, Louisiana, and New York

Five states adopted or modified their rules regarding internet advertising in the past year. Four of these states require electronic advertising to include the broker's name.

New York[8] and Georgia also require internet advertising to include the broker's contact information. The Georgia regulation makes clear that this requirement applies to advertising in many forms of media, including websites, blogs, and social media.[9] The Indiana regulation requires advertising to include the broker company's name, but makes an exception for electronic messages with limited information (such as text messages and Tweets). [10] For those types of messages, the broker company's name does not need to be included if the message is linked to the broker's name.

In Colorado, a broker is responsible for ensuring the accuracy of all internet advertising.[11] For websites within the broker's control, each viewable page must include the broker's name and the broker's brokerage firm name. The broker must also remove expired listings from the website within three days of expiration. If a broker uses a third party for advertising on the broker's behalf, the broker must ensure the information provided to the third party is accurate. A new rule in California requires the licensee's name and licensee number to be included on all internet advertising in which a fictitious business name is used.

New Jersey

New Jersey modified its no-call list law. The law formerly prohibited telemarketing calls, but the amendment allows some sales calls to be made to commercial mobile service devices.[12] Calls made in response to an express written request or to an existing customer are allowed, unless the customer has told the telemarketer that he or she does not want to receive such calls. Only unsolicited telemarketing sales calls are now prohibited.

California and Missouri

These two states both adopted rules about "ephemeral" messages—texts and instant messages. In California, licensed brokers must keep copies of documents like listings and deposit receipts, for three years. Now, that requirement has been updated to clarify

[8] N.Y. Comp. Codes R. & Regs. tit. 19, §175.25 (2014).
[9] Ga. Comp. R. & Regs. r. 520-1-.09 (2014).
[10] Ind. Admin. Code tit. 876, r. 8-1-8 (2015).
[11] 4 Colo. Code Regs. §725-1, E-8 (2014).
[12] N.J. Rev. Stat. §56:8-130 (2015).

that the law does *not* require brokers to retain electronic messages of an "ephemeral" nature (text messages and instant messages).[13] Brokers also now cannot be sued by anyone claiming that a text or instant message created a contract to transfer real estate.[14]

Missouri amended its definition of "correspondence" to mean written or electronic communication, but *not* ephemeral messages, such as text messages or another communication that is not designed to be retained or to create a permanent record.[15]

C. Volume of Materials Retrieved

Only one case retrieved this quarter addressed a Technology issue (*see* Table 1). Two additional technology cases, discussed above, were retrieved for the last four Update periods. Ten legislative or administrative authorities dealing with technology issues were collected in the past year.

VI. THIRD PARTY LIABILITY HIGHLIGHTS: YEARLY UPDATE

In this edition, we also review Third Party Liability cases from the past year, as well as new statutes and regulations. This research covers others who are involved in real estate transactions, such as appraisers and inspectors.

A. Cases

Three of the cases discussed below involved claims against appraisers, and in all three, the appraiser won. A common issue arising in the appraiser cases is whether the buyer relied on the appraisal at the time of the transaction. One case dealt with an escrow agent's liability. In that case, the Utah Supreme Court stated that an escrow agent has a fiduciary duty to the beneficiaries of an escrow agreement.

[13] Cal. Bus. & Prof. Code §10148 (2014).
[14] Cal. Civil Code §1624(d) (2014).
[15] Mo. Rev. Stat. §339.010(7) (2015).

1. **Bruning v. Hollowell**, No. 05–13–01033–CV, 2015 WL 1291378 (Tex. Ct. App. May 5, 2015)

A buyer brought a claim for negligence against the appraiser and the court dismissed because buyer had accurate information prior to closing.

An appraiser evaluated a property as a three-bedroom home with 2,278 square feet. Three years after purchasing the home, the buyer determined that it should have been appraised as a smaller, two-bedroom residence. The buyer sued the appraiser for negligence, saying that an addition should have been treated as a separate area, rather than as a bedroom. The court held that the buyer should have discovered the discrepancy sooner. Public records and websites both showed the house had two bedrooms. The court dismissed the case against the appraiser.

2. **Boles v. U.S. Department of Veterans Affairs**, No. 4:14-0634-CV-DGK, 2015 WL 4425797 (W.D. Mo. July 20, 2015)

An appraiser was not responsible for misrepresentation when the buyer did not rely on the appraisal when the buyer decided to borrow money.

The buyer claimed that the Department of Veterans Affairs, a lender, and an appraiser conspired to inflate the appraisal value of the house he purchased. The buyer purchased the home in 2007 at an appraised value of $115,000. Six years later, the buyer hired a new appraiser to perform an appraisal of the home's value as of 2007. The newly-hired appraiser valued the home at $95,000 as of 2007. The buyer sued the original appraiser for intentional and negligent misrepresentation and fraudulent concealment. But the buyer signed the sales contract before the appraisal was prepared, so he could not have relied on the appraisal when he decided to take out the loan. The court dismissed all the claims against the appraiser.

3. **McGee v. Archie Vangorder Custom Homes, Inc.**, No. CV–14–657, 2015 Ark. App. 170 (2015)

An appraiser who never issued a final appraisal was not liable for damages to a buyer who did not see the draft appraisal prior to closing.

The buyer purchased a home. The buyer's agent advised the buyer to hire a contractor to inspect and repair the home, rather than hiring a separate inspector and contractor. The contractor was not a licensed inspector, but looked over the house and made some repairs. The buyer later hired an inspector, who discovered mold from a roof leak. The buyer claimed the contractor should have discovered the mold issue. The court held that the contractor was not liable for failing to discover and repair the mold problem, because he was not a licensed home inspector. The contractor was only hired to perform a visual walk-through, and the buyer could have discovered the mold issue with reasonable diligence at the time of the purchase.

4. **Virginia Oak Venture, LLC v. Fought**, 448 S.W.3d 179 (Tex. Ct. App. Sept. 11, 2014)

A contractor who visually inspected and repaired a home was not responsible for defects that the buyer could have discovered with reasonable diligence.

The buyer of an apartment complex sued several defendants for their role in the transaction, including the real estate agent, the real estate broker, the appraiser, and the seller, among others. The buyer claimed that the complex was overpriced. After the court dismissed the claims against the appraiser and the broker, the buyer appealed those rulings. The appraisal that the buyer complained of was labeled as a draft, a final signed copy was never issued, and the buyer did not see the draft appraisal until after

closing. Therefore, the court ruled that the buyer could not have relied on the appraisal during the transaction, and the appraiser was not liable. A jury later determined that the real estate agent and the broker were also not responsible.

B. Statutes and Regulations

Kentucky

Kentucky amended its regulation regarding home inspector standards of conduct. Under the amended rule, home inspection reports must include a statement that the report does not address environmental hazards, and must state all other exclusions with specificity.[16] The rule also provides a list of environmental hazards which should not be addressed in the inspection report.

C. Volume of Materials Retrieved

Fourteen cases relating to Third Party Liability were retrieved in the past year. Six of these cases were retrieved this quarter (*see* Table 1). One regulation, discussed above, was retrieved in the past year.

VII. VERDICT AND LIABILITY INFORMATION

In this section of the *Pulse*, we present liability information for the cases involving real estate professionals, including jury verdicts. For each topic below, we summarize the number of total cases and how those cases were decided—whether they were in the licensee's favor, or resulted in monetary damages.

A. Agency Cases

Liability was determined in eleven Agency cases, but the licensee was liable in only one of those cases (*see* Table 3). The licensee was responsible to pay damages in that case.[17]

[16] 815 Ky. Admin. Regs. 6:030(3) (2014).

[17] *Bunger v. Demming*, No. 53A01-1409-PL-395, 2015 WL 4468751 (Ind. Ct. App. July 22, 2015) (discussed in Agency section; $154,000 verdict against broker for breaching fiduciary duty by purchasing property for herself after she tried to purchase property on client's behalf).

B. Property Condition Disclosure Cases

Liability was determined in four Property Disclosure Cases, and the licensee was held liable in one case[18] (*see* Table 3).

C. RESPA Cases

Liability was determined in eight RESPA cases; the licensee was not liable in any of those cases (*see* Table 3).

D. Antitrust Cases

Liability was determined in two antitrust cases this quarter; the licensee was not liable in either case (*see* Table 3).

E. Technology Cases

Liability was determined in one technology case this quarter, but the licensee was not liable in the case (*see* Table 3).

F. Third Party Liability Cases

Liability was determined in two third-party liability cases this quarter, but neither of those two held a licensee liable (*see* Table 3).

[18] *Monge v. Rojas*, No. EP-14-CV-385-PRM, 2015 WL 4588960 (W.D. Tex. Jan. 27, 2015) ($717,506 judgment against sellers/brokers for fraud and failure to disclose mold and structural defects in series of real estate transactions between the parties).

VIII. TABLES

Table 1
Volume of Items Retrieved for Third Quarter 2015
by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	14	0	2
Property Condition Disclosure	5	0	1
RESPA	12	0	0
Antitrust	2	0	0
Technology	1	0	0
Third Party Liability	5	0	0

Table 2

Volume of Items Retrieved for Third Quarter 2015 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	0	0	0
Agency: Buyer Representation	1	0	0
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	3	0	0
Agency: Breach of Fiduciary Duty	9	0	0
Agency: Disclosure of Financial Ability	0	0	0

Issue	Cases	Statutes	Regulations
Agency: Agency Disclosure	0	0	1
Agency: Minimum Service Agreements	0	0	0
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Other	7	0	1
PCD: Structural Defects	2	0	0
PCD: Sewer/Septic	1	0	0
PCD; Radon	0	0	0
PCD: Asbestos	0	0	0
PCD: Lead-based Paint	0	0	0
PCD: Mold and Water Intrusion	3	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	1	0	0

Issue	Cases	Statutes	Regulations
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	0	0	1
Property Condition Disclosure: Other	0	0	0
RESPA: Disclosure of Settlement Costs	2	0	0
RESPA: Kickbacks	9	0	0
RESPA: Affiliated Business Arrangements	2	0	0
RESPA: Other	2	0	0
Technology: State Internet Advertising Rules	0	0	0
Technology: Social Networking	0	0	0
Technology: Privacy	0	0	0
Technology: Anti-Solicitation Laws	0	0	0
Technology: Other	1	0	0
Anti-trust: Price-fixing	0	0	0
Anti-trust: Group Boycotts	1	0	0

Issue	Cases	Statutes	Regulations
Anti-trust: Advertising	1	0	0
Anti-trust: Tying Agreements	0	0	0
Anti-trust: Other	0	0	0
Third-Party Liability: Appraisers	2	0	0
Third Party Liability: Inspectors	1	0	0
Third-Party Liability: Other	2	0	0

Table 3

Liability Data for Third Quarter 2015

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	1	10	9%	91%
Property Condition Disclosure	1	3	25%	75%
RESPA	0	8	0%	100%
Anti-trust	0	2	0%	100%
Technology	0	1	0%	100%
Third Party Liability	0	2	0%	100%