LEGAL PULSE NEWSLETTER

Welcome to the *Legal Pulse* Newsletter. The *Pulse* covers legal developments and liability trends affecting real estate licensees across the country. In this edition, we review recent case decisions and legislative activity in the areas of Agency, Property Condition Disclosure, and RESPA. We also look at Deceptive Trade Practices/Fraud, Section 1031 Exchange, and Ethics case decisions from the past twelve months.

This quarter, we retrieved slightly fewer Agency cases than in recent quarters. Issues of breach of fiduciary duty and dual agency were each addressed in multiple cases, and courts ruled on a third party's liability for the actions of salespeople in several instances this quarter. A large number of new Agency statutes and regulations were retrieved, with changes covering a wide variety of issues including advertising rules, regulation of real estate teams, recordkeeping requirements, and trust account responsibilities.

Consistent with recent trends, the most commonly addressed Property Condition Disclosure issue last quarter was the failure to disclose defects and problems relating to water intrusion and mold. The courts also continued to examine whether licensees had knowledge of alleged defects or problems. Licensees fared well in the majority of these cases. With respect to legislative activity, one state amended its disclosure form to include disclosures regarding the number of carbon monoxide alarms and the presence of noxious weeds.

Second quarter saw a small decline in the number of RESPA cases. These cases continue to allege various kickback schemes or improper fee sharing. In many of the cases, the allegations did not describe an improper transfer of fees in detail, and the claims were dismissed because the complaint was not specific enough, or because the claim was barred by the statute of limitations. None of the defendants were held liable in the RESPA cases this period. One state statute related to RESPA issues was retrieved.

This edition also covers Deceptive Trade Practices Act/Fraud, Section 1031 exchanges, and Ethics case decisions from the past year. While a wide variety of allegations are asserted in DPTA/fraud cases, several issues repeatedly arise in these cases. For instance, the cases often deal with licensee statements regarding the value or prospects of investment property, the effect of as-is clauses, and whether alleged conduct or misrepresentations rise to the level of

fraud or deceptive practices. Licensees were not found liable in any of the DTPA/fraud cases in which liability was determined this quarter. Only one Section 1031 Exchange case and no Ethics cases were pulled in the past year.

For more 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

In several of the cases discussed below, the court considered the extent to which a broker or seller was liable for the acts of a licensee. Generally speaking, a broker is liable for all of the licensee's conduct within the scope of the agency relationship. In two cases this quarter, both from California, a party was found vicariously liable for another's conduct. In one of these cases, the broker was responsible for a damage award of $180,619.22, in addition to interest and costs on appeal.

A. Cases

1. **Maguire v. Burns**, No. D067835, 2016 WL 2936835 (Cal. Ct. App. May 17, 2016)

Broker was responsible for damages resulting from its licensee's breach of fiduciary duty to his client.

Buyers purchased a vacant movie theater with plans to convert the property into a dinner theater. After purchasing the property, the buyers learned the project was not possible, and they sued the brokerage firm and licensee who assisted them with the transaction. The buyers claimed that the licensee did not adequately investigate use of the property, improperly advised them regarding development of the property, and failed to disclose an alternative option agreement offered by the sellers. After a bench trial, the court held that the licensee breached his duty to the buyers. The court found the brokerage firm was also liable, but held that the firm was only responsible for only a portion of the damages.

On appeal, the buyers argued that the brokerage firm should be responsible for all of the damages because the licensee was an agent of the firm. The appellate court reversed the judgment and found the broker liable for all damages plus interest because the licensee was acting with the scope of his employment. The broker was liable for $180,619.22 in damages and interest, as well as the buyers' costs on appeal.

2. **Goodman v. Rose Realty West, Inc.**, No. 4D15-285, 2016 WL 2744975 (Fla. Dist. Ct. App. May 11, 2016)

A broker could be liable for a licensee's conduct in the course of a real estate transaction even if the conduct was fraudulent, because the conduct occurred within the scope of the licensee's agency.

Buyer brought a fraudulent nondisclosure action against the seller, who also acted as his own representative in the transaction, and the seller's real estate broker. The buyer alleged that he discovered a number of defects after closing on the property. The circuit court entered summary judgment for the broker.

On appeal, the court held that the licensee's duty of disclosure extends to the licensee's real estate broker. If the seller/licensee withheld information from the buyers, he did so during his work as a licensee to facilitate a sale. The broker was the licensee's principal, and was liable for the acts of an agent, even if those acts were fraudulent. The seller/licensee was not acting outside the scope of his agency during the transaction, and engaging in fraud does not render the conduct outside the scope of agency. Furthermore, disputed issues of fact precluded summary judgment. The court reversed the judgment and remanded the case for further proceedings.

3. **Folmar v. Harris**, No. 15-1541, 2016 WL 3057669 (4th Cir. May 31, 2016)

Buyers' claim for breach of fiduciary duty against a licensee could go forward, even though the court had already determined that the licensee was not liable for fraud.

Buyers of a home sued their real estate representative (who acted as a dual agent for the buyers and the sellers in the transaction), the representative's real estate company, and the sellers of the property, for fraud, misrepresentation, breach of fiduciary duty, and deceptive trade practices. The buyers claimed the licensee failed to disclose problems with the siding and wood rot.

The buyers originally filed a state court case. The state court granted summary judgment for the sellers, and the buyers then voluntarily dismissed their claims against the licensee and the real estate company.

The buyers subsequently filed suit in federal court. In the federal court case, the licensee and real estate company moved to dismiss the claims on the ground that the issues had already been decided in the state court case. The federal court granted the motion to dismiss, and the dismissal was appealed.

In its decision, the federal appellate court agreed that the fraud and misrepresentation claims had been decided. The issue of breach of fiduciary duty, however, required a determination distinct from the issue of fraud, which had not been addressed in the earlier case. Because the unfair trade practices claim derived from the fiduciary duty claim, that claim also was not precluded. The court reversed dismissal of the fiduciary duty and unfair trade practices claims.

4. **Fong v. Sheridan**, A144286, 2016 WL 1626221 (Cal. Ct. App. Apr. 21, 2016)

A seller was vicariously liable for the licensee's statement regarding a foul odor on the sold property.

After buying a home, the purchasers discovered that a foul odor on the property was due to septic and oil tanks that were buried on the property. The purchasers sued the seller and the seller's representative for breach of contract and misrepresentation. During the transaction, the licensee, who acted as a dual agent for purchasers and sellers in the transaction, told the purchasers that the odor was merely "sea air."

Before trial, the licensee settled with the purchasers. The trial court found that the seller was not liable on the claims, but that he was vicariously liable for the licensee's negligent misrepresentation. However, no damages were awarded against the seller because the purchasers' damages were less than the settlement amount paid by the licensee. Since the seller was not liable on the direct claims against him, the court found him to be the winning party in the suit and awarded him attorneys' fees. On appeal, the court upheld the liability determination, but vacated the damages and attorneys' fees awards. The case was remanded for a clearer statement of decision on damages and attorneys' fees by the lower court.

5. **Falconite v. Daroci**, 2016 WL 1466385 (N.J. Super. Ct. App. Div. Apr. 15, 2016)

Real estate firm could be liable to buyers if the seller was found to have had knowledge of an easement on the property which he did not disclose.

Buyer sued the seller and the seller's real estate firm for the parties' alleged failure to disclose the presence of a drainage easement across the property. Through the course of extended litigation, the court entered summary judgment in favor of the seller and the real estate firm. In this decision, the appellate court reversed judgment in favor of the seller, and remanded the case for a determination of the facts of the case. The evidence presented suggested that the seller might have had knowledge of the easement. Because the real estate firm's liability was derivative of the claim against the seller, the court reversed summary judgment for the firm as well.

B. Statutes and Regulations[1]

Colorado

The Colorado Real Estate Commission recently amended its regulations regarding the use of Commission-approved real estate forms. Specific rules apply where a broker uses transaction-specific clauses drafted by an attorney that are not included in the Commission-approved real estate forms. If new clauses are inserted into or added to the Commission forms, the broker must ensure that he or she understands the clauses and that the clauses are used appropriately.[2] The broker must also maintain a copy of the forms with those newly-inserted or added clauses for four years.[3] Furthermore, a broker may use a preprinted or prepared addendum that modifies or adds terms to a real estate form. However, if such an addendum does not result from negotiations between the parties, the addendum must be prepared by a licensed Colorado attorney representing the broker or a principal party to the transaction.[4] The addendum may not be included in the body or Additional Provisions section of a Commission form.[5] A

[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] 4 Colo. Code Regs. 725-1: F-2 (2016).
[3] *Id*.
[4] 4 Colo. Code Regs. 725-1: F-3 (2016).
[5] *Id*.

broker who is not a principal party to the contract may not insert personal provisions, personal disclaimers, or exculpatory language.[6]

Louisiana

An amended regulation in Louisiana changes the time frame for settling escrow account deposit disputes from 90 days to 60 days.[7]

Nevada

Pursuant to an amended regulation, all brokers must file either (a) a trust account reconciliation, or (b) a declaration informing the Division that the broker is not required to file a reconciliation.[8]

South Carolina

South Carolina recently passed an overhaul of its real estate licensing act, which will take effect on January 1, 2017, and resulted in a number of changes to agency issues in the state. The amended act adds definitions of the terms agent, client, designated agency, dual agency, seller agency, team, and transaction broker.[9] The act modifies the types of available agency relationships to include "designated agency" and "transaction brokerage."[10]

The act provides several new rules regarding electronic documents and recordkeeping. Offers and counteroffers may be communicated by secure electronic means, including the internet.[11] The real estate transaction records required to be maintained by a broker-in-charge may be maintained electronically if a backup copy is stored in a separate, off-site location, which may be cloud-based.[12] However, licensees are not required to maintain records of communications that are not designed to create a permanent record, such as text messages, instant messages, voice mail, voice recordings, or social media posts.[13]

With respect to buyer representation, the revised code provides that the buyer's representation agreement must include an adequate property description of the type of property of interest to the buyer.[14] Furthermore, if a licensee has two competing buyer

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[6] *Id*.
[7] La. Admin. Code tit. 46, § 2901 (2016).
[8] Nev. Admin. Code ch. 645, § 806 (2016).
[9] S.C. Code Ann. § 40-57-30 (2016) (eff. 1/1/17).
[10] S.C. Code Ann. § 40-57-350(L) (2016) (eff. 1/1/17).
[11] S.C. Code Ann. § 40-57-135(I)(6) (2016) (eff. 1/1/17).
[12] S.C. Code Ann. § 40-57-135(D)(2) (2016) (eff. 1/1/17).
[13] S.C. Code Ann. § 40-57-135(L) (2016) (eff. 1/1/17).
[14] S.C. Code Ann. § 40-57-135(I)(2)(1) (2016) (eff. 1/1/17).

clients in a single transaction, the licensee must give written notice to each buyer client that neither will receive the confidential information of the other.[15]

On the issue of agency disclosure, the amended code states that the sales contract must require the buyer and seller to acknowledge their receipt of customer service in the real estate transaction.[16] In addition, both the listing agreement and sales contract must contain an acknowledgement that the party received the Disclosure of Brokerage Relationships document.[17]

The code also requires brokers-in-charge to ensure that licensees prepare all offers and counteroffers in writing, all changes are in writing and initialed, all terms are included, and executed copies are delivered promptly to all parties.[18]

Nebraska, South Carolina, & Tennessee–Teams

Three states recently issued rules with respect to real estate teams. In Nebraska, an amended statutory section defines team and team leader. A team is defined as two or more persons who work under the supervision of the same broker, work together on real estate transactions, represent themselves as a team, and are designated by a team name.[19] The statutory section regarding actions that may result in discipline of licensees was amended to include actions relating to teams. For instance, failing to provide a current list of team members and utilizing advertising which does not prominently display the broker name may result in licensee discipline.[20]

In South Carolina, the amended statutory scheme defines teams ("two or more associated licensees working together as a single unit within an office established with the commission and supervised by a broker-in-charge") and sets forth several rules regarding team advertising.[21] Team advertising must contain the team name and full name of the brokerage, and may not include the terms "realty," "real estate," or similar terms. Also, the team cannot imply that it is separate from the broker.[22]

New Tennessee regulations provide similar guidelines. Licensees who hold themselves out as a team must be affiliated with the same firm and may not establish a separate

[15] S.C. Code Ann. § 40-57-350 (2016) (eff. 1/1/17).
[16] S.C. Code Ann. § 40-57-370 (2016) (eff. 1/1/17).
[17] *Id*.
[18] S.C. Code Ann. § 40-57-135(I)(4) (2016) (eff. 1/1/17).
[19] Neb. Rev. Stat. § 81-885.01 (2016).
[20] Neb. Rev. Stat. § 81-885.24 (2016).
[21] S.C. Code Ann. § 40-57-360 (2016) (eff. 1/1/17).
[22] *Id*.

physical location from the firm.[23] The principal broker remains ultimately responsible for the team, and the team cannot represent itself as an entity separate from the broker.[24]

Tennessee

Tennessee recently adopted amended regulations regarding advertising and recordkeeping. Licensees may not advertise to sell, purchase, exchange, or lease property in a way indicating that the licensee is not in the real estate business, must list the firm name and telephone number, must use the name as they are licensed, and must list the firm name most prominently.[25] The licensee may not advertise a property listed by another licensee without the consent of the owner.[26]

With respect to recordkeeping, licensees must preserve records regarding every real estate transaction for three years.[27] The records must be readily accessible within 24 hours, and be maintained pursuant to a retention schedule that safeguards security, accuracy, and retains documents in a readable format.

Texas

Texas made several changes to its statutes and regulations regarding agency issues. The definition of broker was amended to include a person who "advises or offers advice to an owner of real estate concerning the negotiation or completion of a short sale."[28] An amended statute also sets forth several activities which do not constitute real estate brokerage, such as constructing, remodeling, or repairing a home, and entering into an obligation to pay that is secured by an interest in property.[29] A new statutory section provides that a claim against a business entity licensee is also a claim against the business entity's designated broker.[30] Furthermore, brokers must provide an accounting to each beneficiary of trust money at least monthly if there is any activity in the account.[31]

A number of changes relate to agency disclosure. At the licensee's first substantive communication with a party regarding a specific property, the licensee must provide written notice, in at least 10-point font, which describes the types of broker representation, the licensee's duties and obligations, and the licensee's name and

[23] Tenn. Comp. R. & Regs. 1260-02.41 (2015).
[24] *Id*.
[25] Tenn. Comp. R. & Regs. 1260-02.12 (2015).
[26] *Id*.
[27] Tenn. Comp. R. & Regs. 1260-02.40 (2015).
[28] Tex. Occ. Code Ann. § 1101.002 (2015).
[29] Tex. Occ. Code Ann. § 1101.004 (2015).
[30] Tex. Occ. Code § 1101.6011 (2015).
[31] Tex. Admin. Code tit. 22, § 535.146 (2015).

license number.[32] Licensees must provide the Texas Real Estate Commission Information About Brokerage Services form at the first substantive communication, and the licensee must provide a link to the form on the website.[33] Licensees must also provide a link to the Consumer Information form on the homepage of their business website. The link must be at least 10-point font, in a readily noticeable place on the homepage.[34] The regulation regarding real estate transactions in which the licensee acts on his or her own behalf or on behalf of family members was amended to require a licensee to disclose in writing that they are acting on behalf of themselves or a family member.[35]

C. Volume of Materials Retrieved

Agency issues were identified 13 times in 10 cases (*see* Table 1). Breach of fiduciary duty and dual agency were the most commonly raised issues. Seventeen Agency statutes and 12 regulations were retrieved this quarter.

II. PROPERTY CONDITION DISCLOSURE

A. Cases

Most of the cases below involve allegations of the licensee's failure to disclose water intrusion or damage. In one of those cases, the court found that the licensee could be held liable if he or she had knowledge of the water problems. Interestingly, two of the cases discussed below involve allegations against a seller who was also a licensee.

1. **Li-Conrad v. Curran**, No. 2015-L-085, 2016 WL 1421312 (Ohio Ct. App. Apr. 11, 2016)

Neither licensees nor a real estate firm were held liable for their failure to disclose defects in the property's foundation.

A home purchaser sued the sellers, the sellers' real estate firm, and the licensees who represented the sellers in the transaction for alleged fraud, misrepresentation, and unfair trade practices. At issue was the claimed failure to disclose a crack and dampness in the foundation of the house. The trial court granted summary judgment for the sellers, licensees, and real estate firm.

[32] Tex. Occ. Code § 1101.558 (2015).
[33] Texas Real Estate Commission.
[34] *Id*.
[35] Tex. Admin. Code tit. 22, § 535.144 (2015).

The appellate court affirmed the judgment. According to the court, the negligent misrepresentation claim fails because the real estate defendants did not owe a fiduciary duty to the purchaser as they were on opposite sides of the transaction. With respect to the fraudulent misrepresentation claim, the as-is clause in the real estate contract relieved the seller of the duty to disclose. Furthermore, the purchase agreement contained a clause indicating that the purchaser had three days after inspection to notify sellers of any problems, or the problems would be waived. By accepting the property after inspection without notification of these problems to the sellers, the purchaser accepted the property as-is. There was also no evidence that the sellers were aware of the problems with the foundation. Finally, the unfair trade practices claim failed because the Ohio Consumer Sales Practices Act does not apply to pure real estate transactions.

2. **Kessler v. Schwarzman**, No. FSTCV1450142985, 2016 WL 1728000 (Conn. Super. Ct. Apr. 12, 2016); **Kessler v. Schwarzman**, No. FSTCV1450142985, 2016 WL 1728000 (Conn. Super. Ct. Apr. 12, 2016)

Although the seller-licensee could be liable for failing to disclose defects in home, the buyers' representative had no knowledge of defects and was not under a duty to investigate.

Purchasers were represented by a licensee who worked at the same brokerage firm as the seller of the property, who was a licensee and acted as the listing broker. The purchasers alleged that both licensees made misrepresentations about the property relating to various issues in the home, including cracking and upheaval in the foundation concealed with carpeting and the existence of "all new piping throughout the house." Both licensees filed separate motions for summary judgment.

With respect to the purchasers' representative, the court found that most of the alleged misrepresentations were not statements made by her, and the one statement attributable to her—that she "couldn't imagine that [the other licensee] did anything cheaply"—was an opinion. There was no evidence she had knowledge of any facts that she did not disclose, and she was under no duty to investigate simply because she transmitted the listing to the purchasers. The court granted summary judgment in favor of the purchasers' representative.

The court reached the opposite conclusion with respect to the seller-licensee. The as-is clause did not negate the purchasers' claims, and the allegations of the complaint

suggested statements made by the seller-licensee could be actionable misrepresentations. The seller's motion for summary judgment was denied.

3. **Hoang v. Gilbert**, No. 01-15-00681-CV, 2016 WL 1470036 (Tex. Ct. App. Apr. 14, 2016)

Licensee was not liable for failure to disclose insurance claims related to flooding, but could not recover attorneys' fees for defending against the suit.

After purchasing a home, the buyers discovered extensive water damage and learned that the sellers had made insurance claims for several flooding events which had not been disclosed to them. The buyers sued the sellers and sellers' representative for fraud, conspiracy, and deceptive trade practices. The licensee counterclaimed for breach of contract, alleging that buyers breached a provision in the closing agreement in which the buyers agreed to hold the licensee harmless from any and all liability concerning the condition of the property, and seeking attorneys' fees for her costs in defending the lawsuit.

A jury found the sellers liable for fraud and deceptive trade practices, but rejected the buyers' claims against the licensee. With respect to the licensee's counterclaim against the buyers, the jury found that the buyers breached the hold-harmless provision. Ultimately, however, the court entered a judgment notwithstanding the verdict in favor of the buyers and did not award attorneys' fees to the licensee. On appeal, the court held that the contract provision was a defense to suit, but did not support an affirmative claim for relief. The trial court judgment was affirmed.

4. **Chinniah v. Sheehy**, No. CV146045873, 2016 WL 2956059 (Conn. Super. Ct. May 9, 2016)

Purchaser presented evidence sufficient to suggest that the seller-licensee might have had knowledge of water problems at the property.

Purchaser alleged that the seller, who was also a licensee, failed to disclose water problems in the basement of the property. The licensee moved for summary judgment on the ground that there was no evidence of a water problem, nor any evidence that the licensee had knowledge of a defect or water problem. The court held that the

purchaser presented evidence, such as the proposal by a contractor to install a water drainage system along the perimeter of the basement, which suggested the seller might have had knowledge of the water issues. Summary judgment was therefore denied.

B. Statutes and Regulations

Nebraska

Nebraska amended its Seller Property Disclosure Statement, to be used beginning January 1, 2017. The revised form adds disclosures regarding the number of carbon monoxide alarms and whether the seller has been notified by the Noxious Weed Control Authority of the presence of noxious weeds on the property in the past three years.[36]

C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified 14 times in 12 cases (*see* Table 1). The cases addressed mold and water intrusion, underground storage tanks, structural defects, and other issues. One regulation regarding Property Condition Disclosure was retrieved this quarter.

III. RESPA

A. Cases

Although many RESPA cases this quarter asserted claims based on alleged kickback or payment schemes, the cases failed to describe the schemes in detail and many of the cases were dismissed. In a case from California federal court, the court examined whether an individual who was not a signatory to the promissory note could be considered a "borrower" under RESPA.

1. **Pickens v. J.P Morgan Chase Bank, N.A.**, No. 5:14-CV-00166-RLV-DSC, 2016 WL 2759726 (W.D.N.C. May 12, 2016)

Lender who was not involved in settlement services at original closing on the property is not subject to liability under RESPA.

[36] Neb. Admin. R. & Regs. 302.1.001 (2016), Nebraska Real Estate Commission, Seller Property Condition Disclosure Statement.

Borrowers alleged that the lender accepted charges for real estate services that were charges for "other than services actually performed." The claims related to services provided after the lender became the servicer; the lender was not involved in the original closing on the mortgage. Because the lender was not involved in settlement services, the lender was not subject to liability under RESPA. The court granted the lender's motion to dismiss the RESPA claim.

2. **Frank v. J.P. Morgan Chase Bank**, No. 15-CV-05811-LB, 2016 WL 3055901 (N.D. Cal. May 31, 2016)

Wife was a "borrower" and could bring RESPA claim against the lender, even though she did not sign the promissory note.

The plaintiff and her husband owned property as husband and wife, but only the husband signed the promissory note for the mortgage. After the husband passed away, the plaintiff took steps to assume the loan obligation. She claimed that the lender wrongfully refused to communicate with her, which prevented her from assuming and curing the default on the loan, and asserted RESPA violations and other claims.

The lender argued that the plaintiff did not have standing to bring a RESPA claim. The lender stated that the plaintiff was not a borrower, because she did not sign the promissory note. The court held that the plaintiff was indeed a borrower, because her interest in the property was at stake, the property was owned as husband and wife, and the plaintiff was obligated under the Deed of Trust for the property. The lender's motion to dismiss was denied.

3. **Peters v. Countrywide Home Loans, Inc.**, No. 15-6329, 2016 WL 2869059 (D. N.J. May 17, 2016)

Vague allegations of fraudulent and misleading payments between defendants were insufficient to support a RESPA claim for improper kickbacks.

The homeowner/borrower claimed that the lender and other defendants violated RESPA because "payments between the defendants were misleading and designed to create a windfall," and these actions were "deceptive, fraudulent and self-serving."

According to the court, these allegations did not allege improper referrals or improper splitting of charges for services not performed. Furthermore, the borrower's claim was barred by the statute of limitations. The court dismissed the claim.

B. Statutes and Regulations

Colorado

Colorado amended its statute to state that a mortgage loan originator's disclosures must comply with RESPA and Regulation X, in addition to a number of other federal statutes.[37]

C. Volume of Materials Retrieved

RESPA issues were identified 11 times in 9 cases (*see* Table 1).

IV. DPTA/FRAUD – YEARLY UPDATE

A. Cases

In the fraud/Deceptive Trade Practices Act cases from this quarter, the courts considered a variety of alleged fraudulent misrepresentations by licensees, including the failure to disclose moisture problems and statements regarding the licensee's influence with local public authorities, the valuation and prospects of investment property, and the timing of the earnest money deposit. Similar types of issues and statements arise in the cases from the past three quarters. Common questions involve whether the licensees knew the statements were false at the time they were made, whether the licensee made a statement of fact or opinion, and whether the alleged misconduct supports a Deceptive Trade Practices Act claim.

1. **Everson v. Raymond**, No. CV146051622S, 2016 WL 1578226 (Conn. Super. Ct. Mar. 31, 2016)

Allegations that licensees had failed to disclose water intrusion and related defects and the purchaser relied on licensees' representations to her detriment were sufficient to support a claim for unfair trade practices.

[37] Colo. Rev. Stat. § 12-61-914 (2016).

The purchaser of a home sued the sellers, sellers' representative and her brokerage firm, and purchaser's representative and his brokerage firm for the parties' alleged failure to disclose past water infiltration, mold, mildew, and water leaks in the home. The complaint alleged an unfair trade practices claim against the real estate representatives and brokerage firms.

The real estate defendants argued that the allegations of the complaint do not rise to the level of conduct necessary to sustain a claim under the Connecticut Unfair Trade Practices Act. Because the complaint alleged that the real estate defendants failed to disclose water problems, which they knew about or should have known about, and because the purchaser relied on those representations to her detriment, the complaint alleged negligent misrepresentation on behalf of the real estate defendants. As such, the court held that the allegations were sufficient to support the purchaser's unfair trade practices claim. The court denied the real estate defendants' motion to dismiss.

2. **Bachewicz v. Coldwell Banker Real Estate**, No. 1-14-2798, 2016 Il. App. 142798 (Mar. 31, 2016)

Licensee did not commit fraud when he stated he had a strong relationship with local public officials and could obtain permits for redevelopment.

Purchasers purchased a property for the purpose of development and resale. The purchasers sued the licensee who assisted them in the transaction, claiming that the licensee committed fraud when he stated that he had a strong relationship with the local alderman and could obtain a permit for construction on the property.

Following a trial, the trial court granted a directed verdict in favor of the licensee and his broker. The appellate court found that the statements made by the licensee were not statements of fact, but were statements of mere opinion and puffery, and affirmed the judgment in favor of the licensee and broker.

3. **Adams v. Koch**, No. A15-0761, 2016 WL 1290836 (Minn. Ct. App. Apr. 4, 2016)

Licensees did not commit fraud because their statements were not false at the time they were made.

Purchasers bought investment property units at a golf course and ski resort from the developer, who was represented by a realty company in the transactions. The purchasers alleged that two licensees of the realty company provided them with false information regarding the investment, such as statements about the safe and hands-off nature of the investment, interest rates, rates of return, and leaseback arrangements.

At trial, the court considered claims of fraud and negligent misrepresentation against the licensees. The trial court found that the licensees did not make any misrepresentations because there was no evidence that any statements made by the licensees were false at the time they were made. The appellate court affirmed dismissal of the claims.

4. **Cook v. Pocan**, No. H040945, 2016 WL 2945756 (Cal. Ct. App. May 17, 2016)

Licensee was liable for failing to record an easement on the property.

Purchasers of a property sued the seller's representative for negligent misrepresentation and breach of contract with respect to an easement allowing access to adjacent landlocked property. During escrow, the seller's representative agreed to draft an easement that described the location of the easement away from a pond and other features on the property. The licensee failed to properly document the easement and did not inform the purchasers of his failure. Thirteen years later, the owner of the adjacent property hired a bulldozer operator to grade an access road on the easement over purchasers' property. The operator graded the road next to the pond and damaged some of the property's scenic features.

The trial court found that the licensee was liable for negligent misrepresentation regarding the easement on plaintiffs' property, but did not require licensee to pay damages because the award was completely offset by the amount of purchasers' settlement with the bulldozer operator. However, the licensee was ordered to pay contract damages in the amount of $920 for pre-litigation surveying costs incurred by the purchasers to resolve the issue of the easement's location. Judgment affirmed on appeal.

5. **Fraser v. Purnell**, No. 05–13–01269–CV, 2015 WL 4481702 (Tex. Ct. App. July 23, 2015)

Licensee was not liable for fraud because she did not know the statements she made were false at the time she stated them.

This case arose from a transaction in which the licensee assisted the purchaser in buying a home from the seller. The seller's estate alleged that the licensee made misrepresentations during the closing process. According to seller, the licensee stated that the earnest money and contract would be sent to the title company "today," and later confirmed that message, but never informed the seller that the deposit had not been made that day, even though the licensee knew the deposit had not occurred. The seller also claimed that the licensee made misrepresentations when she stated that the purchaser could close in February and that the purchase was a cash offer. The trial court concluded that the licensee committed fraud because she failed to inform the seller when she discovered new information that made an earlier representation false or misleading.

On appeal, the court determined that, at the time she made the statements, the licensee did not know that the purchaser would not deposit the earnest money, would not be able to close in February, or would need financing for the transaction. The appellate court reversed the judgment, and entered judgment in favor of the licensee on the fraud claims. The appellate court also affirmed the trial court's judgment in favor of the licensee on the other claims stated against her.

6. **Adcock v. Wooten**, 180 So. 3d 473 (La. Ct. App. Sept. 30, 2015)

Claims against licensee and brokerage firm for a transaction in which the spouse of an employee of the brokerage firm purchased and then immediately resold the property for a higher price were not barred by the statute of limitations.

After the seller's home went into foreclosure, she was contacted by a licensee who suggested she list the property with him for a short sale. Several months later, the seller accepted an offer from the spouse of an employee of the broker for whom the licensee

worked. The seller was subsequently approached by another buyer who offered the seller more for the property. The licensee advised her to reject that offer because the original contract was already pending. The seller closed on the property to the original offeror (the broker's employee's spouse). On the same day and at the same attorney's office, the purchaser then sold the property to the second offeror who had made the higher offer to the seller. The seller filed suit against the licensee and his brokerage firm, asserting claims for violation of the Louisiana Unfair Trade Practices Act, fraud, and misrepresentation.

The trial court concluded that the seller's claims were barred by the statute of limitations and granted summary judgment for the licensee and the broker. The appellate court reversed that determination, and remanded the case for further proceedings.

7. **Kahn v. Denison State Bank**, No. 113248, 2016 WL 687728 (Kan. Ct. App. Feb. 19, 2016)

Vague allegations that the licensees might have known about defects and prior litigation involving the property were not specific enough to support a fraud claim against the licensees.

The buyer purchased a home from the seller-bank under a contract by which the buyer waived the right to conduct inspections of the property and accepted the property "as is" without any inspections. The bank provided a disclosure form in which the bank indicated it had no knowledge of a number of property conditions. The buyer brought claims for fraud, fraud by silence, violation of the Kansas Consumer Protection Act, and violation of the UCCC against the bank and its vice president, as well as the licensee who represented the bank in the transaction and her employer.

The trial court determined that the allegations against the real estate defendants—that the bank might argue the licensee "knew about the defects, condition, and prior litigation involving the Property, but failed to disclose"— were not specific enough to support a claim for fraud.

On appeal, the court affirmed the dismissal of claims against the licensee and her employer. But the appellate court reversed the dismissal of the claims against the bank defendants. The bank defendants could be liable for misrepresentations based on their failure to fill out information in the disclosure statement relating to several issues on the property of which they were aware. The as-is clause in the contract did not absolve the

bank defendants of liability. The case against the bank defendants was remanded for further proceedings.

B. Volume of Materials Retrieved

Deceptive Trade Practices Act/Fraud issues were identified 14 times in 14 cases (*see* Table 1) this quarter.

V. SECTION 1031 EXCHANGES AND ETHICS – YEARLY UPDATE

A. Cases

A Section 1031 exchange is a transaction in which a person sells real property and exchanges the original property for a similar replacement property to avoid the immediate tax consequences of that sale. Over the past year, we retrieved only one case involving licensees and Section 1031 exchanges that was previously discussed in an earlier edition of *Legal Pulse*.

No cases involving the NAR Code of Ethics were retrieved in the past 12 months.

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 7 Agency cases, and the licensee was held liable in 2 of the cases[38] (*see* Table 3).

B. Property Condition Disclosure Cases

Liability was determined in 7 Property Condition Disclosure Cases, and the licensee was held liable in only one of the cases[39] (*see* Table 3).

C. RESPA Cases

Liability was determined in 8 RESPA cases; the defendant was not liable in any of those cases (*see* Table 3).

[38] *Fong v. Sheridan*, A144286, 2016 WL 1626221 (Cal. Ct. App. Apr. 21, 2016) (discussed in Agency section above); *Maguire v. Burns*, No. D067835, 2016 WL 2936835 (Cal. Ct. App. May 17, 2016).

[39] *Fong v. Sheridan*, A144286, 2016 WL 1626221 (Cal. Ct. App. Apr. 21, 2016) (discussed in Agency section above).

D. Deceptive Trade Practices/Fraud Cases

Liability was determined in 8 deceptive trade practices/fraud cases retrieved this quarter; the licensees were not held liable in any of those cases (*see* Table 3).

E. 1031 Exchanges

No new Section 1031 exchange cases were retrieved this quarter.

VII. TABLES

Table 1
Volume of Items Retrieved for Second Quarter 2016
by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	10	17	12
Property Condition Disclosure	12	0	1
RESPA	9	1	0
Deceptive Trade Practices Act/Fraud	14	N/A	N/A
Ethics	0	N/A	N/A
Section 1031 Exchanges	0	N/A	N/A

Table 2
Volume of Items Retrieved for Second Quarter 2016
by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	4	1	0
Agency: Buyer Representation	1	2	0
Agency: Designated Agency	0	2	0
Agency: Transactional/Nonagency	0	2	0
Agency: Subagency	0	0	0
Agency: Disclosure of Confid. Info.	0	0	0
Agency: Vicarious Liability	3	1	0
Agency: Breach of Fiduciary Duty	4	0	0
Agency: Disclosure of Financial Ability	0	0	0

Issue	Cases	Statutes	Regulations
Agency: Agency Disclosure	0	2	2
Agency: Minimum Service Agreements	0	0	0
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Teams	0	4	1
Agency: Coming Soon Listings	0	0	0
Agency: Other	1	8	9
PCD: Structural Defects	1	0	0
PCD: Sewer/Septic	0	0	0
PCD: Radon	0	0	0
PCD: Asbestos	0	0	0
PCD: Lead-based Paint	0	0	0
PCD: Mold and Water Intrusion	5	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	1	0	0
PCD: HVAC	0	0	0
PCD: Electrical System	0	0	0
PCD: Valuation	0	0	0
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	0	0	0

Issue	Cases	Statutes	Regulations
PCD: Insects/Vermin	0	0	0
PCD: Boundaries	0	0	0
PCD: Zoning	0	0	0
PCD: Off-site Adverse Conditions	0	0	0
PCD: Meth Labs	0	0	0
PCD: Stigmatized Property	0	0	0
PCD: Megan's Laws	0	0	0
PCD: Underground Storage Tanks	1	0	0
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	0	0	0
Property Condition Disclosure: Other	6	0	1
RESPA: Disclosure of Settlement Costs	0	1	0
RESPA: Kickbacks	8	0	0
RESPA: Affiliated Business Arrangements	2	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	1	0	0
Deceptive Trade Practices Act/Fraud	14	N/A	N/A
Ethics	0	N/A	N/A
Section 1031 Exchanges	0	N/A	N/A

Table 3
Liability Data for Second Quarter 2016

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	2	5	29%	71%
Property Condition Disclosure	1	6	14%	86%
RESPA	0	8	0%	100%
Deceptive Trade Practices Act/Fraud	0	8	0%	100%
Ethics	0	0	0	0
Section 1031 Exchanges	0	0	0	0