The Legal Pulse

Third Quarter 2014

December 2, 2014

Welcome to the *Legal Pulse Newsletter*. The *Legal Pulse* brings legal liability trends to life, so you can understand the risks and focus on what's important in your market. In this edition, we look at the three topics that we examine every quarter where liability is a major concern for real estate professionals: agency, property condition disclosure, and RESPA. In this quarter, we will also review technology, antitrust, and third-party liability.

While agency is a perennial liability worry, this year's agency cases show no clear trend. Several decisions dealt with whether an agent or broker owed duties to someone other than the represented party, such as a buyer or an interested third party. Others involved possible misrepresentations or concealed defects, raising agency issues as well as property condition disclosure questions.

RESPA cases this year show courts focusing on kickback claims. Plaintiffs commonly claim that mortgage insurance premiums are being used to camouflage referral payments. Other techniques also received a hard look—in one case, buyers challenged broker payments to a multiple listing service based on sales commissions and MLS "Patronage Dividend" payments to brokers. In another case, the court looked at whether a broker and a bank used a sham lender to disguise referrals and kickbacks.

This *Pulse* sets forth details for significant new cases and authorities entered during the third quarter of this year. This edition includes a new feature in the case summaries—at the top of each summary, two bullet points provide a brief description of the case and the outcome for the real estate professional involved. As always, tables at the end of this edition show how many overall cases appeared in the major topic areas, along with statistics regarding how liability was decided in finalized cases.

I. AGENCY HIGHLIGHTS: THIRD QUARTER 2014

A. Cases

1. *Getsen Acquisitions, LLC v. Zapf* (California State Court of Appeals, July 31, 2014)

- The court found a seller's agent negligent because the agent knew about a large, unsatisfied prior mortgage on the property and did not inform the buyer.
- The court imposed joint and several liability on the buyer, the agent, and another defendant, for a verdict of $1,027,266.80.

Getsen Acquisitions[1] arose in the context of a mortgage-rescue scam through which the seller left a lien on the property. The buyer of the property sued the sellers, the sellers' real estate agent, Zapf, and an unlicensed individual working with the seller's agent, Strange, alleging the defendants acted negligently and fraudulently in the transaction.

Before plaintiff bought the property, Zapf and Strange told the sellers they could avoid foreclosure and short sale by challenging the validity of the mortgage. Zapf negotiated with the lender directly on behalf of the sellers, and the sellers made a payment using cash provided by Strange. Strange helped the sellers concoct fraudulent documents, including a fake deed of trust and a phony conveyance of the real loan. The sellers signed and recorded the phony documents, which made it appear that the loan had been paid off. Zapf did not disclose any information to the buyer about the outstanding loan, the sellers' purported challenge of the loan's validity, or the documents. After purchasing the property, buyer discovered the existing lien and sued defendants.

The trial court found that Zapf had been negligent and found that the other defendants committed fraud. The court held that all defendants were jointly and severally liable for the $1,027,266.80 verdict. On appeal, the court affirmed the judgment. The court held that a seller's agent or broker has the same duty as the seller to disclose "known facts that materially affect the value or desirability of a property" and the failure to disclose those facts is negligence.[2] The court also stated that Zapf, as the seller's real estate agent, owed the buyer "affirmative duties of care, honesty, good faith, fair dealing and disclosure as reflected in [California] Civil Code section 2079.16."[3]

---

[1] *Getsen Acquisitions, LLC v. Zapf*, No. D062874, 2014 WL 3750021 (Cal. Ct. App. July 31, 2014). (unpublished)

[2] *Id.*, 2014 WL 3750021, at *5.

[3] *Id.*, at *7. *See* Cal. Civ. Code § 2079.16.

2. *Auer v. Paliath* (Ohio Supreme Court 2014)

- The liability of an Ohio real estate broker for the intentionally tortious conduct of the broker's agent is must include a fact-based analysis of whether the agent acted within the scope of her agency.
- The court reversed a $135,200 verdict against the broker, and sent the case back to the trial court to determine whether the agent was acting within the scope of her agency when she committed the fraudulent acts at issue.

In *Auer*,[4] an Ohio real estate agent listed several investment properties on the internet, and a California buyer travelled to Ohio to look at them. During the visit, the agent told the buyer that she owned a business that rehabbed properties and a property-management business. The agent proposed that the buyer hire her to rehab properties, with the buyer covering the agent's rehabbing fees and expenses. The buyer purchased five properties, and the agent's sponsoring broker received a commission on each sale. The buyer hired the agent's rehab and management companies to fix up and rent out the properties. The agent did very little work and failed to make the houses habitable. Four years and $430,000 of the buyer's money later, the buyer found her investment completely worthless.

The buyer sued the agent and her sponsoring broker to recover the money she invested in the properties. She alleged that the agent fraudulently induced her to buy the properties and invest money in them. She argued negligent supervision against the broker. The trial court instructed the jury to consider whether the agent was acting within her scope of employment when committing the acts, but also instructed the jury that if the agent was found to have acted fraudulently it must also find the broker liable for an agent's conduct. The jury concluded that the broker was liable and awarded the buyer $135,200 in damages.

An appeals court affirmed the verdict. It concluded that a broker could be liable for an agent's fraudulent conduct if the broker received a portion of the agent's commission.[5] But the Ohio Supreme Court reversed the ruling and held that the broker could be held liable only if there was also a factual determination that the agent acted within the scope of her employment by facilitating or promoting the broker's business. The Court also noted that the broker could not be held liable based solely on whether the broker received a portion of the agent's commission for the transaction at issue.[6]

---

[4] *Auer v. Paliath*, 2014-Ohio-3632, 17 N.E.3d 561, *rev'g* 2013-Ohio-2785, 988 N.E.2d 578 (Ct. App.).

[5] *Id.*, 2014-Ohio-3632, ¶¶ 17-19.

[6] *Id.* ¶¶ 22-23.

B. Statutes and Regulations

1. *North Carolina*

Two new North Carolina regulations deal with an agent's personal interest in a property or transaction. First, if the agent holds an ownership interest in the property being sold, the agent cannot represent the buyer. The agent's brokerage firm may, however, represent the buyer if it does not have an ownership interest in the property and if the buyer consents to the representation after full disclosure of the agent's interest.[7] Second, a listing agent cannot purchase the listed property unless the seller first receives disclosure of the potential conflict of interest in writing and the agent suggests that the seller seek independent counsel. The agent's firm must either terminate the listing or transfer it to another agent in the firm. If the seller so requests, the firm must terminate the listing.[8]

C. Volume of Materials Retrieved

Eight cases contained ten identified Agency issues (*see* Table 1; note that some cases address multiple issues). Multiple cases contained Breach of Fiduciary Duty and Buyer Representation issues (*see* Table 2). Two regulations addressed multiple Agency concerns (*see* Table 1).[9] These items included Buyer Representation, Breach of Fiduciary Duty, and Agency: Other.

II. PROPERTY CONDITION DISCLOSURE HIGLIGHTS: THIRD QUARTER 2014

A. Cases

1. *McDermott v. Related Assets, LLC* (New York Civil Court, September 2014)

- A New York small-claims court concluded that the seller's agent had a duty to check the accuracy of information a seller provides for a real estate listing.
- The court held the agent liable to buyer for the cost of connecting the house to the city sewer line ($4,200).

In *McDermott*,[10] a listing for a Staten Island home stated it had "city sewers." This detail incorrectly suggested that the property was connected to the city sewer system

[7] 21 N.C. Admin. Code 58A.0104(o) (2014).

[8] 21 N.C. Admin. Code 58A.0104(p) (2014).

[9] This update covers the 2014 legislative sessions for the two states in Group III, North Carolina and Oregon.

[10] *McDermott v. Related Assets, LLC*, 45 Misc. 3d 1205(A), 2014 NY Slip Op. 514654(U), 2014 WL 4977412 (N.Y.C. Civ. Ct. Sept. 16, 2014).

when it actually had a septic tank. The agent who prepared the listing relied on information from the seller. The buyer needed to install a sewer line to the city sewer, which cost him $4,200. He sued the agent and her sponsoring broker in small-claims court.

The court reviewed documents concerning the property. The property's certificate of occupancy showed no connection to the city sewer, but a building department record revealed that the owners had recently applied to install a city sewer line. As certificates of occupancy are public records, a basic search would have revealed this information. The court concluded that the defendant or the buyer could have checked the public records and discovered that there was no city sewer service. The court decided, however, that it was the agent's job to check the records. The court noted that the seller's agent had a statutory duty to use reasonable care and diligence, act honestly, fairly and in good faith, and to disclose all known facts that materially affect the value or desirability of the property.[11] The court stated that the "primary responsibility" for finding inaccurate information falls on the listing broker.[12] The court reasoned that licensees must conform to a higher standard than an untrained buyer or seller.[13] Brokers and salespersons hold the knowledge and responsibility to check public records to confirm any information the broker conveys to potential purchasers.[14] The court held that the listing agent/broker was liable for $4,200, the cost of installing the sewer line.

Keep in mind, though, that many other states enacted laws specifically providing that a real estate licensee does *not* have a duty to investigate whether the seller has provided accurate information for the listing.

---

[11] *Id.*, 2014 WL 4877412, at *2 (citing N.Y. Real Prop. Law § 443).

[12] *Id.*, at *4.

[13] *Id.*

[14] *Id.* (citing *Acquino v. Ballester*, 37 Misc. 3d 705, 953 N.Y.S.2d 818 (N.Y.C. Civ. Ct. 2012); *Olukotun v. Reiff*, N.Y.L.J 8/1/04, p. 19, col. 1). (The judge who decided *McDermott* also wrote these two opinions.)

2. *Milliken v. Jacono* (Pennsylvania Supreme Court 2014)

- A seller's agent does not have a common-law duty to disclose a property's psychological stigma.
- The court affirmed a summary judgment in favor of a broker who did not disclose a notorious murder/suicide at the property sixteen months before the plaintiff bought it.

In *Milliken*,[15] the Pennsylvania Supreme Court settled the question of whether a real estate agent must tell a prospective homebuyer about a crime in the house.[16] The sellers purchased the house from the prior owners' estate after a murder/suicide in the home, renovated the property, and listed it for sale. The sellers informed their listing agents of the murder/suicide. The agents advised disclosing the crime, but the sellers decided against disclosure. The buyer found out about the murder/suicide after she moved in and sued the sellers and their broker.

The buyer argued that the broker committed common-law fraud, negligent misrepresentation, and a violation of the state's consumer protection act. The trial court entered judgment for the defendants, ruling that the murder/suicide was not a material defect that the seller must disclose.

The case reached the state Supreme Court. The court started its analysis with whether the murder/suicide in the house was a material defect that required disclosure. Without a legal disclosure obligation, the defendants would not be liable for fraud, negligent misrepresentation, or statutory fraud. The court declined to find a duty to disclose a property's psychological stigma, stating that it would be too difficult to define what events needed to be disclosed.[17] The court held that traumatizing events do not affect the physical structure of the house, which is the purpose of the seller's duty to disclose. The court also pointed out that the murder/suicide was well-publicized, so the event could not be considered a latent defect. The doctrine of "buyer beware" applied.[18]

---

[15] *Milliken v. Jacono*, 96 A.3d 997 (Pa. 2014). (Westlaw notes that the opinion was withdrawn from the bound volume on October 15, 2014. The docket sheet at the Pennsylvania Supreme Court shows that a friend of the court has asked the court to reconsider the case.)

[16] Pennsylvania, unlike several other states, does not have a statute explicitly providing that there is no duty to disclose a property's psychological stigma.

[17] *Id.* at 1001.

[18] *Id.* at 1002.

B. Statutes and Regulations

1. *Oregon*

An amendment to Oregon's foreclosure statute deals with the uncertainty about whether foreclosed properties being sold by banks are contaminated by methamphetamine manufacturing. The statute now requires the trustee to state in the notice of sale that "some residential property sold at a trustee's sale may have been used in manufacturing methamphetamines, the chemical components of which are known to be toxic. Prospective purchasers of residential property should be aware of this potential danger before deciding to place a bid for this property at the trustee's sale."[19]

2. *North Carolina*

An amendment to the North Carolina Property Condition Disclosure Statement focuses on land-use restrictions. The amended disclosure statement clarifies that the seller must disclose known violations of local zoning ordinances, restrictive covenants, building-code requirements, or other land-use restrictions.[20]

C. Volume of Materials Retrieved

Seven cases collected during Third Quarter included Property Condition Disclosure Issues (*see* Table 1). Two of those cases addressed Valuation, while Sewer/Septic, Stigmatized Property, and Pollution/Environmental Other came up in others (*see* Table 2). Other collected authorities included one statute (addressing two Property Condition Disclosure Issues) and one regulation.

[19] Or. Rev. Stat. § 85.771 (2014).

[20] 21 N.C. Admin. Code 58A.0114 (2014).

III. RESPA HIGHLIGHTS: THIRD QUARTER 2014

A. Cases

1. *Minter v. Wells Fargo Bank* (Fourth Circuit Federal Court of Appeals 2014)

- Making referrals to an affiliated lender and provider of settlement services does not violate RESPA when a borrower shops around and chooses the affiliated entity because it offers the best deal.
- The court held that a real estate broker whose independent agents referred buyer to an affiliated lender was not liable under RESPA; the agents referred the buyers to other lenders as well and did not influence the buyers to use the affiliated lender.

In *Minter*,[21] class action plaintiffs alleged that Long & Foster Real Estate and Wells Fargo set up a "sham" lender called Prosperity Mortgage Company to avoid RESPA's prohibitions on kickbacks and referrals and did not disclose their joint venture to borrowers. Prosperity funded its loans through a line of credit from Wells Fargo. The lawsuit alleged two RESPA violations that the court allowed to proceed: (1) that Prosperity was run by Wells Fargo and Long & Foster as a "sham" lender rather than a real provider of settlement services, and (2) that Long & Foster and Prosperity had an affiliated business arrangement, and did not provide the required disclosures to borrowers.[22]

A jury returned a verdict for the broker and Wells Fargo on both RESPA claims. The jury concluded that the plaintiffs did not prove that the broker referred borrowers or influenced them to use Prosperity; similarly it concluded that the plaintiffs did not prove that Prosperity referred borrowers or influenced them to use Wells Fargo.

The Fourth Circuit affirmed the judgment, holding that there was no evidence that Long & Foster was actually making any referrals at all. Instead, the court determined that the broker's independent contractors worked with the buyers and suggested lenders, including Prosperity. Suggesting other lenders supported the defendants' position that the independent contractors did not influence buyers to finance through Prosperity, a potential RESPA violation. There was also evidence that the plaintiffs shopped around for a lender and chose Prosperity because it offered the best deal.[23]

---

[21] *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339 (4th Cir. 2014), *aff'g* No. WMN-07-3442, 2013 WL 46303006 (D. Md. Aug. 28, 2013).

[22] *Id.*, 2014 WL 3827671, at *1 (4th Cir. Aug. 5, 2014).

[23] *Id.* at *6.

2. *Bolinger v. First Multiple Listing Service, Inc.* (Federal Court for the Northern District of Georgia, September 26, 2014).

- A multiple listing service's payment of "Patronage Dividends" to brokers did not constitute a kickback or a split of an unearned commission.
- The court held that the listing service and the brokers were not liable for alleged RESPA violations.

In *Bollinger*,[24] the plaintiffs' alleged that a multiple listing service and member brokers violated RESPA's kickback and fee-splitting prohibitions. The brokers and their agents referred business to the MLS and the MLS paid the agents back in the form of "Patronage Dividends." Broker members of the MLS who were involved in the sale of a listed property paid a "Sold Fee" to the MLS (0.12% of the sales price). If a different broker represented each side of the transaction, both paid the fee. The MLS then paid the member brokers a monthly dividend. The dividend each member broker received depended on how much the broker contributed to the MLS in Sold Fees. The plaintiffs believed the dividends were kickbacks and a split of unearned commissions, both violations of RESPA. The plaintiffs also asserted that the member brokers and the MLS were an affiliated business arrangement that must be disclosed under RESPA.

The RESPA claims proved to be far-fetched. While the plaintiffs claimed that the brokers were referring business to the MLS in exchange for the Patronage Dividends, the brokers pointed out that RESPA requires that the business be "incident or part of a real estate settlement service involving a federally related mortgage loan[.]"[25] The brokers paid for the MLS's services through a percentage of the purchase price using their general funds. Thus, the plaintiffs did not pay the MLS for any "service" it provided. Several HUD-1 statements reflected that no settlement money was paid to the MLS.

The plaintiffs also argued that, because the Sold Fees exceeded the MLS's operating costs, the Patronage Dividends were a split of unearned fees. The defendants pointed out that the MLS performed a service connecting sellers and buyers.[26] As a result, the Sold Fees secured actual services, and were not an exchange for nothing. In any case, RESPA is not a price-control statute—parties cannot sue on a claim that a payment was excessive.

[24] *Bolinger v. First Multiple Listing Serv., Inc.*, No. 2:10-CV-211-RWS, 2014 WL 4803155 (N.D. Ga. Sept. 26, 2014).

[25] *Id.* at *5 (quoting 12 U.S.C. § 2607(a)).

[26] *Id.* at *8.

Finally, the court rejected the plaintiffs' contention that the brokers and the MLS had an undisclosed affiliated business arrangement. The claim failed because the brokers and agents did not own or control the MLS or have an affiliate relationship with the MLS.[27]

B. Statutes and Regulations

This edition contains no statutes or regulations addressing RESPA issues from Third Quarter.

C. Volume of Materials Retrieved

Fourteen cases collected in Third Quarter contain fifteen RESPA issues (*see* Table 1; one case addressed more than one RESPA issue). The research focused on claims arising as a result of the settlement process, rather than on foreclosure-related claims. Cases mostly involved kickback issues (*see* Table 2). No statutes or regulations dealt with RESPA issues in Third Quarter.

IV. TECHNOLOGY HIGHLIGHTS: 2014 TO DATE

A. Cases

1. *Tylor v. Welch* (Federal District Court for the District of Hawai'i, April 11, 2014)

- Using photographs as illustrations on a website can trigger liability under the Copyright Act and the Digital Millennium Copyright Act.
- A federal court held a real estate broker liable for copyright violations and ordered the broker to pay statutory damages of $80,000 plus costs based on the number of copyrighted photographs he used and the number of times he used them.

In *Tylor*,[28] a real estate broker used five copyrighted photographs on several social media platforms including his Facebook, Twitter, and Google+ commercial pages, as well as on his MySmart.com commercial blog. He did not obtain a license from the copyright owner, the photographer. The broker removed or altered the copyright information on the photographs. The broker did not appear in the case and the district

[27] Note that the payment of dividends by a MLS does not comply with NAR policies.

[28] *Tylor v. Welch*, No. CV13-00458, SOM-KSC, 2014 WL 1415006 (D. Hawai'i Apr. 11, 2014). *Cf. Bell v. Taylor*, No. 1:13-cv-00798-TWP-DKL, 2014 WL 4250110 (S.D. Ind. Aug. 26, 2014) (copyright claim was asserted against real estate agent whose web designer downloaded photo from an "open source website"; real estate agent avoided liability because photographer did not establish actual damages, such as a loss in the photo's fair market value).

court adopted a lower court's finding that the broker willfully violated the photographer's copyrights. The court awarded the photographer statutory damages totaling $80,000 and fees and costs totaling $7,305.75.

2. *Standard Mutual Insurance Co. v. Lay* (Illinois State Court of Appeals 2014)

- Sending "junk faxes" to advertise commercial real estate listings can result in substantial liability.
- A real estate broker settled a class action case involving junk faxes for $1,739,000.

In *Standard Mutual Insurance Co. v. Lay*,[29] a small-town broker hired a "blast fax" service to advertise a property listing. The fax service could send the advertisement to thousands of businesses, and it assured the broker that the businesses consented to receive fax advertisements. In fact, the businesses on the fax list had not consented, and one recipient brought a class action against the broker seeking damages for a willful violation of the Telephone Consumer Protection Act. Willful violations of the Act trigger a statutory penalty of $500 per fax, but triple damages are also possible.

The broker sought coverage under his comprehensive general liability policy. The insurer agreed to defend the case, but reserved its rights to contest coverage. The broker died while the case was proceeding, and his wife settled the case for $1,739,000 plus costs. The court held that the insurer would pay the settlement.

B. Statutes and Regulations

1. *Connecticut, Florida, and Kansas*

In Third Quarter, some states refined their "Do Not Call" statutes to include calls, texts, and media messages to cell phones. In Connecticut, definitions for "marketing sales solicitation" and "telephonic sales call" now include text or media messages.[30] Florida and Kansas made similar changes.[31] In Kansas, businesses must check the Do Not Call list every thirty days and delete names from their call lists which are on the Do Not Call list. Indiana, meanwhile, enacted a statute that prohibits the transfer or sale of telephone numbers on the Do Not Call list for solicitation purposes.[32]

2. *Delaware and Kentucky*

[29] *Standard Mut. Ins. Co. v. Lay*, 2014 IL App (4th) 110527-B, 2 N.E.3d 1253, *appeal denied*, 379 Ill. Dec. 20, 5 N.E.3d 1129 (2014).

[30] Conn. Gen. Stat. § 42-288a (2014).

[31] Fla. Stat. § 501.059 (2014); Kan. Stat. Ann. §§ 50-670, 670a (2014).

[32] Ind. Code § 24-4.7-4-7 (2014).

Two states enacted legislation relating to the management of private customer information. In Delaware, a business entity that possesses private customer information must take reasonable steps to destroy the documents or to make the consumer-identifying information unreadable or indecipherable. Failing to comply with the statute can result in civil liability.[33] Kentucky enacted a statute relating to breaches of a computer's security system which requires the business to notify consumers of the breach when unencrypted, personally identifying information is compromised.[34]

C. Volume of Materials Retrieved

Only one case dealt with Technology issues in the Third Quarter of 2014 (*see* Table 1), although four cases earlier in the year did so. Third Quarter contained no statutes or regulations addressing Technology issues; eight such items arose during earlier quarters of 2014.

V. ANTITRUST HIGHLIGHTS: 2014 TO DATE

A. Cases

1. *Regional Multiple Listing Service of Minnesota, Inc.* (Federal District Court for the District of Minnesota 2014)

- A Counterplaintiff sufficiently alleged an unlawful conspiracy in restraint of trade or a group boycott where it asserted that the real estate broker Counterdefendants participated collectively in a scheme to limit the Counterplaintiff's access to or license of real estate listing data.
- The court denied the broker's motion to dismiss these antitrust and related claims; the counterclaims were later settled.

In *Regional Multiple Listing Service of Minnesota, Inc.*,[35] an MLS sued American Home Realty Network (AHRN), a company that owned and operated an on-line real estate service for homebuyers. The MLS alleged copyright infringement based on AHRN's use of the MLS's photographs and other listing data without permission. AHRN counterclaimed against the MLS alleging an antitrust conspiracy, and later added two real estate brokerage firms as defendants in the counterclaim.[36]

---

[33] Del. Code §§ 50C-101 to -104 (2014).

[34] Ky. Rev. Stat. § 365.732 (2014).

[35] *Regional Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc.*, 9 F. Supp. 3d 1032 (D. Minn. 2014).

[36] *See Regional Multiple Listing Serv. of Minn., Inc. v. Am. Home Realty Network, Inc.*, 960 F. Supp. 3d 953 (D. Minn. 2013).

AHRN contended that the MLS and the its participating brokers, including the Counterdefendants, conspired to suppress competition by causing the MLS to refuse to license MLS data to AHRN. AHRN argued that the restrictions on third-party access to its data promoted an anticompetitive business model by controlling who has access to critical real estate data.[37] AHRN also alleged that the MLS copyright claims were a sham to mask the real estate industry's plan to shut down the defendant's business.

In denying the Counterdefendant brokers motion to dismiss, the court acknowledged that brokers participating in an MLS could be liable for antitrust violations by collectively causing the MLS to enforce restrictions on third party access to the MLS data or to deny AHRN a license to use the data. In this ruling the Court concluded simply that the Counterplaintiff had adequately alleged that the broker Counterdefendants had engaged in such a conspiracy. Following this ruling and a mediated settlement of the principal copyright claims brought by the MLS, the brokers and AHRN settled these antitrust counterclaims.

B. Statutes and Regulations

This edition contains no statutes and regulations addressing Antitrust issues for the year to date.

C. Volume of Materials Retrieved

Third Quarter did not yield any Antitrust materials (*see* Table 1). The *Regional Multiple Listing Service* decision (discussed above) was issued earlier in the year. The *Legal Pulse* encompasses statutes and regulations on Antitrust issues, but we found no such authorities during the first three quarters of 2014.

VI. THIRD-PARTY LIABILITY HIGHLIGHTS: 2014 TO DATE

A. Cases

1. *Rood v. Nelson* (Federal District Court for the District of Nevada, September 15, 2014)

- An appraiser can be liable to persons other than a client when the appraiser knows the appraisal will be presented in materials given to investors in a real estate transaction.
- The trial court awarded the investor $647,000.

---

[37] 9 F. Supp. 3d at 1036.

In *Rood*, [38] an investment company commissioned an appraisal of a property from defendant appraiser. The appraisal set the property's value at almost $5.5 million. The investment company included the appraisal in an offering memorandum, used to solicit investors in the investment company's interest in the mortgage loan. Plaintiff was an investor in the mortgage loan and relied on the offering memorandum when he invested $800,000 in the loan.

The property was sold for $1.6 million at foreclosure to the investors in the loan, including plaintiff. The property later sold for only $330,000, so that the plaintiff recovered only $153,000 of his $800,000 investment. Plainitff sued the appraiser, contending that the appraiser had overvalued the property by $3.23 million, and if he had been presented with an accurate valuation before he made his investment, he would not have invested.

The appraiser argued the plaintiff could not recover for a negligent because the appraisal was prepared for the investment company, not for the plaintiff. Under Nevada law, this defense fails if the appraisal is intended for the guidance of a limited group of people, or if the appraiser knew that the appraisal would be supplied to another person.[39] The court rejected the appraiser's argument because the letter commissioning the appraisal specifically stated that it would be used in the offering memorandum. The court entered judgment against the appraiser defendants for $647,000.

B. Statutes and Regulations

Most of the statutes and regulations collected in 2014 to date address third party liability issues affecting real estate inspectors.

1. *Louisiana*

Inspectors in Louisiana must include in their written reports information about *suspected* mold growth if the inspection "discovers visually observable evidence of suspected mold growth . . . inside the structure."[40]

2. *Indiana*

---

[38] *Rood v. Nelson*, No.2:12-cv-00893-GMN-NJK, 2014 WL 4635585 (D. Nev. Sept. 15, 2014). *Cf. Collective Asset Partners LLC v. Schaumberg*, 432 S.W.3d 435 (Tex. App.–Dallas 2014) (architect that provided information to appraiser relating to 100-year flood plain was not liable to purchaser of property because even if the information were false, architect did not owe professional duty to purchaser), *review denied* (Tex. Oct. 10, 2014).

[39] *Id.*, 2014 WL 4635585 (D. Nev. Sept. 15, 2014).

[40] La. Rev. Stat. Ann. § 37:1478(2) (2014).

Indiana now requires home inspectors to inspect attics, basements, and crawl spaces.[41]

3. *Maryland*

Maryland requires home inspectors to look for and report the presence of corrugated stainless steel tubing (CSST) that is used as flexible piping for gas and fuel lines.[42] If an inspector finds CSST, he or she must recommend that a licensed master electrician review how the CSST is bonded to the electrical system.

[41] Ind. Code § 25-20.2-2-6 (2014).

[42] Code Md. Reg. 09.36.07.01, .07, 08 (2014).

4. *Mississippi*

Mississippi delegated the problem of how residential properties are measured to the Mississippi Real Estate Appraiser Licensing and Certification Board.[43] For properties with up to four dwellings, the Board must require the use of the method promulgated by the American National Standards Institute or the American Measurement Standard Manual. Appraisals must state which standard was used.

C. Volume of Materials Retrieved

Five Third Quarter cases addressed third-party liability (*see* Table 1), while seven additional cases arose during the first two quarters of 2014. Most of the cases involve claims against appraisers. We located no statutes or regulations addressing Third-party Liability issues during this update, although three statutes and one regulation came up during the first two quarters of 2014 (*see* Table 1).

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Three Agency cases determined liability; the court found the licensee liable in two, one of which ended in a substantial award of damages (*see* Table 3).[44]

B. Property Condition Disclosure Cases

Three Property Condition Disclosure cases determined liability, but the court held the licensee liable only in one (*see* Table 3).[45]

C. RESPA Cases

Six RESPA cases addressed liability in Third Quarter. None ended in a finding of liability (*see* Table 3; one case addressed two RESPA issues).

---

[43] Miss. Code Ann. § 73-34-9(p) (2014).

[44] *See* *Getsen Acquisitions, LLC v. Zapf*, No. D062874, 2014 WL 3750021 (Cal. Ct. App. July 31, 2014) (discussed in Agency section above; damages award affirmed); *McDermott v. Related Assets, LLC*, 45 Misc. 3d 1205(A), 2014 NY Slip Op. 514654(U), 2014 WL 4977412 (N.Y.C. Civ. Ct. Sept. 16, 2014) (discussed in Property Condition Disclosure section above).

[45] *See* *McDermott v. Related Assets, LLC*, 45 Misc. 3d 1205(A), 2014 NY Slip Op. 514654(U), 2014 WL 4977412 (N.Y.C. Civ. Ct. Sept. 16, 2014) (discussed in Property Condition Disclosure section above).

D. Technology Cases

Two Technology cases dealt with liability so far in 2014, but only one (decided earlier this year) ended with a finding of liability.[46]

E. Antitrust Cases

None of the Antitrust cases decided so far in 2014 ended with a finding of liability.

F. Third-party Liability Cases

Nine Third-party Liability cases included liability determinations in 2014 to date. The court found the appraiser liable only in one case (*see* Table 3).[47]

[46] *Tylor v. Welch*, No. CV13-00458, SOM-KSC, 2014 WL 1415006 (D. Hawai'i Apr. 11, 2014) (discussed in Technology section above).

[47] *See* *Rood v. Nelson*, No. 2:12-cv-00893-GMN-NJK, 2014 WL 4635585 (D. Nev. Sept. 15, 2014) (discussed in Third-party Liability section above).

Table 1
Volume of Items Retrieved for Third Quarter 2014
by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	10	0	4
Property Condition Disclosure	7	2	1
RESPA	15	0	0
Technology	1	0	0
Antitrust	0	0	0
Third-party Liability	5	0	0

Table 2
Volume of Items Retrieved for Third Quarter 2014 by Issue

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

Issue	Cases	Statutes	Regulations
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Other	5	0	1
PCD: Structural Defects	0	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	0	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	2	0	0
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	0	1	0
PCD: Insects/Vermin	0	0	0
PCD: Boundaries	0	0	0
PCD: Zoning	0	0	1
PCD: Off-site Adverse Conditions	0	0	0

Issue	Cases	Statutes	Regulations
PCD: Meth Labs	0	1	0
PCD: Stigmatized Property	1	0	0
PCD: Megan's Laws	0	0	0
PCD: Underground Storage Tanks	0	0	0
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	1	0	0
Property Condition Disclosure: Other	2	0	0
RESPA: Disclosure of Settlement Costs	3	0	0
RESPA: Kickbacks	11	0	0
RESPA: Affiliated Business Arrangements	1	0	0
RESPA: Other	0	0	0
Technology: State Internet Advertising Issues	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
Antitrust: Price-fixing	0	0	0
Antitrust: Group Boycotts	0	0	0
Antitrust: Advertising	0	0	0
Antitrust: Tying Agreements	0	0	0
Antitrust: Other	0	0	0
Third-party Liability: Appraisers	5	0	0

Issue	Cases	Statutes	Regulations
Third-party Liability: Inspectors	0	0	0
Third-party Liability: Other	0	0	0

Table 3
Liability Data for Third Quarter 2014

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	2	1	67%	33%
Property Condition Disclosure	1	2	33%	67%
RESPA	0	7	0%	100%
Technology	0	1	0%	100%
Antitrust	0	0	0%	0%
Third-party Liability	1	3	25%	75%