



Second Quarter 2015

September 30, 2015

Welcome again to the *Legal Pulse Newsletter*! In this edition of the *Legal Pulse*, we look back at legal liability trends from earlier this year. As always, we will review the Big Three topics—Agency, Property Condition Disclosures, and RESPA. We will also cover a full year of changes in Ethics and Fraud cases nationwide.

This *Pulse* covers significant new cases and authorities from the second quarter of 2015. To make your review quicker, a short summary is included in brackets for each case—and we've flagged the cases that we've covered in prior editions. Tables at the end of this edition show how many overall cases, statutes, and regulations appeared for major topic areas during second quarter.

There are some trends appearing in the data. After a slow start, both Agency and Property Condition Disclosure decision counts are growing. Agency decisions represented almost 30 cases this time, following only 10 in first quarter. Property Condition Disclosure more than tripled its case count over the same period, going from seven rulings to 24 for second quarter. RESPA stayed closer to level, and all three areas continue to be fairly quiet on the statutory and regulatory fronts. Caselaw was sparse for cases involving the NAR Code of Ethics—only two cases—but there was some notable activity in the Fraud area, with 14 decisions since we last reported.

In liability terms, real estate professionals continue to prevail in a majority of the reported decisions. For new cases in Agency, Property Condition, and RESPA, the real estate professional was held liable in only about 20 percent of the decisions. A full third of Fraud matters resulted in real estate professional liability.

We hope you enjoy this edition of the *Legal Pulse*.

I. AGENCY

A. Cases

The most interesting cases for this update involved buyer representation and dual agency issues. In an Ohio case where the broker seems to have simply ignored the lawsuit, the court made a default judgment of over a million dollars that was affirmed on appeal. The lesson? If you receive court papers, it's a good idea to respond!

1. **D&J Real Estate Servs. v. Perkins**, No. 05-13-01670-CV, 2015 Tex. App. LEXIS 5720 (Tex. Ct. App.–Dallas June 4, 2015)

Buyer's representative did not know a mold test was insufficient, and so could not be held liable for false representation. #

A home inspection report showed damp areas at the garage ceiling and around the water heater. Seller refused to pay for a professional mold test and did his own test by setting petri dishes on the kitchen counter and in an upstairs bathroom. Seller told the buyers that the mold test was negative. After closing, buyers learned that the house was full of mold. Buyers sued the buyer's representative for breach of fiduciary duty and misrepresentation. A jury verdict in favor of the buyers was reversed on appeal, because the buyers did not prove that the buyer's representative knew that the mold test being performed was insufficient or invalid. The representative's lack of knowledge caused the buyers' deceptive trade practice claims to fail as well.

2. **KMM Invs., LLC v. Ritchie**, Nos. 2014-CA-000627-MR, -000739-MR, 2015 Ky. App. Unpub. LEXIS 347 (Ky. Ct. App. May 15, 2015)

Licensing statutes that impose penalties are not used to calculate damages.

Buyer wanted to purchase property that consisted of two lots, one of them unimproved. Agent allegedly told buyer that the property could be subdivided into two lots, and that the unimproved lot could be sold for \$100,000. Buyer bought both lots and planned to sell the unimproved one, but the carport and driveway were on both lots, preventing the sale of the unimproved lot. Buyer sued agent, asking for over \$100,000 in damages in lost profits for not being able to sell the unimproved lot. The court did not allow buyer to pursue the claim for that amount, because those damages are only available where there was an underlying breach of the sales contract, which did not occur in this case. Statutes authorizing the Real Estate Commission to impose monetary sanctions did not authorize a cause of action against agent or an award of civil damages to third parties. The court limited buyer's damages to a \$500 surveyor's fee, based on the agent's offer of judgment for that amount.

3. **Adar Inv., LLC v. Bayview Loan Serv'g, LLC**, 87 Mass. App. Ct. 112, 2015 Mass. App. Unpub. LEXIS 698 (June 26, 2015)



Update!

Seller was not responsible for statements made by the seller's broker because the broker's statements were just sales talk.

We've been following the Adar case for quite a while. You may recall that buyer purchased four properties from the seller. The broker who handled the transaction gave the buyer estimates of the value of the properties that included an estimate of the rental income from the properties. The properties were not as profitable as expected, so buyer sued. In a resolution to an important issue, the court ruled that seller was not liable to buyer for the allegedly false estimates, because the broker was not in an agency relationship with the seller. The broker's statements were just sales talk, and could not seriously be considered as a representation of the property's rental income.

4. **Gartner v. Riffard**, No. A-2920-12T4, 2015 N.J. Super. Unpub. LEXIS 861 (App. Div. Apr. 14, 2015)

Judgment in favor of a dual agent was granted when buyers waived objections to the condition of the property, and could not prove any damages.

A dual agent recommended that the buyers pay full price for a home before it was listed because the home would sell “within a day.” The agent also said that buyers had to use a particular inspector or they would not get the house. The agent recommended an attorney to represent the buyers, and the buyers retained that attorney. The buyers were not permitted to be present during the inspection. After they received a copy of the inspector’s report which indicated a number of items in need of repair, buyers did not ask the sellers to make any repairs.. The house had numerous defects. The buyers brought a lawsuit against the agent, the inspector, and the sellers; the buyers also sued their attorney for malpractice. The buyers’ suit was dismissed. The correct measure of damages would have been the difference in value between the house *as it was* and the price paid, but the buyers did not show any evidence of the current value of the house. The cost of repairing the deficiencies is not the correct way to determine damages. The claim against the attorney was dismissed on a technicality.

5. **Duncan v. Maag**, 2015-Ohio-505, 2015 Ohio App. LEXIS 511 (Ct. App. Feb. 5, 2015)

Judgment against a broker for \$1.2 million was upheld when the broker did not file a timely response to a motion for summary judgment.

Broker arranged for buyer to purchase land, but did not disclose to seller the value of the mineral rights on the property, or that buyer intended to exploit those rights. Seller settled with buyer, and brought suit against broker. Broker did not respond to requests asking him whether he admitted that he breached his fiduciary duty to seller. Because the broker failed to respond to court filings seeking certain factual admissions, the court deemed broker to have admitted the breach of fiduciary duty. Once the admissions were entered against the broker, the seller obtained a judgment for \$1,206,100, the difference between the price paid and the value of the property, less the amount of the settlement paid by the buyer. An appellate court affirmed the award.

6. DeWitt Londre, LLC v. Investment Real Estate Specialists, LLC, No. 2014AP1164, 2015 Wis. App. LEXIS (Wis. Ct. App. June 2, 2015)

Violating subagency laws does not necessarily disqualify the violator from receiving commission.

A salesperson joined an investment group that was interested in buying a property. Later the salesperson withdrew from the group and the group proceeded to purchase the property. In the meantime, another representative from the same brokerage approached the listing broker about co-brokerage. The listing broker verified that he would split the commission with the firm but later declined to split the commission. The listing broker argued that there was not a valid co-brokerage agreement. The brokerage argued that the salesperson acted as a subagent and so was entitled to a portion of the commission. The listing broker countered that the salesperson violated the statutory duties of a subagent by trying to get the best price for buyer, rather than the best price for the seller. The trial court granted the listing broker summary judgment, saying that the Wisconsin statute should be interpreted as disqualifying the salesperson from obtaining a commission. The Court of Appeals reversed, holding that the statute was intended to protect the *clients* of brokers, not to provide a defense to claims for unpaid commissions. The case was returned to the trial court level for further proceedings.

B. Statutes and Regulations

Three states made particularly notable changes to their agency laws during second quarter. Hawaii and Louisiana made their laws slightly more strict, while New Hampshire added a definition for “facilitator” to its law. Louisiana also added a definition for “net listing agreement.”

1. Hawaii

Hawaii added a provision to its statute listing acts that subject real estate licensees to discipline. A licensee “acting on behalf of a seller or purchaser” cannot “act[] in a manner that prohibits a prospective purchaser or a prospective seller of real estate from being able to retain the services of a real estate broker or salesperson.”¹

¹ [Haw. Rev. Stat. § 467-14\(22\) \(2015\)](#).

2. Louisiana

Louisiana enacted a statute regulating net listing agreements. It defines “net listing agreement” as “a listing agreement that authorizes a broker to take as his commission the difference between the higher sale price at which the real estate property is sold and the stipulated net price agreed upon to be received by the seller.”² Licensees are prohibited from advising, encouraging or entering into a net listing agreement for a residential property or for lands described in La. Rev. Stat. § 47:2302, including “bona fide” agricultural, horticultural, and timber land devoted to production “in reasonable commercial quantities,” as well as marshland.³

Louisiana also amended its statute requiring licensees to present all offers to and from the buyer or seller. The statute has been amended so that the licensee may no longer obtain a waiver of that duty from the client.⁴

3. New Hampshire

New Hampshire added a provision to its statute describing the duties of a facilitator. Specifically, a facilitator has a duty to present all offers and agreements in a timely manner.⁵

C. Volume of Materials Retrieved

Agency issues were identified 29 times in 20 cases. (See Table 1.) Some cases addressed more than one Agency issue, but most of the cases addressed Breach of Fiduciary Duty, as seen in prior updates. Dual Agency, Buyer Representation, and Agency: Other showed up multiple times in the case law. (See Table 2.)

Seven statutes and four regulations addressing Agency issues were retrieved⁶ (see Table 1).

² [La. Rev. Stat. §§ 37:1431\(34\) \(2015\)](#).

³ [Id. § 37:1448.3 \(2015\)](#). See [La. Rev. Stat. § 47:2302](#).

⁴ [La. Rev. Stat. § 9:3893\(A\)\(2\)\(b\) \(2015\)](#).

⁵ [N.H. Rev. Stat. § 331-A:25-f \(VIII\) \(2015\)](#).

⁶ This update covers the 2015 legislative sessions for the states in Group II. The Group II states are Alabama, Alaska, Colorado, Connecticut, Delaware, Florida, Hawai'i, Louisiana, Maine, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and Vermont.

II. PROPERTY CONDITION DISCLOSURE

A. Cases

The notable property condition disclosure cases for second quarter involved HVAC, sewer/septic, and boundary disputes, while two of the three also raise issues of fraud and deceptive trade practices.

1. **Pringle v. C.B. Richard Ellis, Inc.**, No. B250304, 2015 Cal. App. Unpub. LEXIS 3463 (May 19, 2015)

Broker did not misrepresent property's location when there was doubt about which municipality it was in. However, one malfunction did not put the buyer on notice that the HVAC system was defective, so that claim was not bound by the statute of limitations and could proceed.

Broker marketed rental property as being in Beverly Hills, and subject to the Beverly Hills rent control ordinances. Broker also advised the buyer that the property was free of defects and had a functioning HVAC system. Buyer found out two years after closing that the property was actually in Los Angeles, and subject to Los Angeles's more restrictive rent control ordinance. Buyer brought suit against the broker for misrepresentation. The court dismissed that claim, and the dismissal was upheld on appeal. At the time the broker made the representation, both cities treated the property as being subject to Beverly Hills's rent control ordinance, a fact the buyer had admitted in a different, earlier litigation. The court also dismissed the buyer's claim for misrepresenting the condition of the HVAC system based on the statute of limitations, but that dismissal was reversed on appeal. The court concluded that a freon leak, detected and repaired two years before buyer learned that one of the air conditioning compressors was missing, did not give notice of the missing compressor.

2. **Laufer v. Fanucci**, No. A-3714-13T4, 2015 N.J. Super. Unpub. LEXIS 1113 (App. Div. May 14, 2015)

Court overturned a judgment in favor of the sellers where one of the sellers was the listing agent and there was a question whether sellers disclosed an unauthorized driveway on the property.

Sellers sold residential property to the buyers. The deed did not disclose that a driveway belonging to a neighbor was built across the property without authorization. Sellers did not tell the buyers that they had settled a lawsuit over the driveway against their title insurer shortly before closing on the sale to the buyers. Summary judgment for the sellers was reversed, because there was an issue of fact regarding whether the sellers had told the buyers about the unauthorized driveway. A claim against the sellers under the Consumer Fraud Act was valid, because one of the sellers was the listing agent for the property.

3. **Glassford v. Dufresne & Assocs. P.C.**, 2015 VT 77, 2015 Vt. LEXIS 67 (June 12, 2015)

Buyers could not recover for deceptive trade practices when they did not contract for services, and they could not recover for negligent misrepresentation where they were not the intended recipient of an inspection certification.

Builder hired an inspector to certify that the sewage disposal system for a home met state requirements. The inspector certified the system. Buyers' attorney requested a copy of the certification before closing, which was provided, but buyers did not see the certification. The sewage system failed, and buyers sued the inspector. The buyers' claim for deceptive trade practices failed, because the buyers did not hire the inspector to provide services. The buyers' claim for negligent misrepresentation also failed because they were not the intended recipients of the certificate. The certificate was intended to be filed with the state, to show compliance with the applicable laws.

B. Statutes and Regulations

Connecticut, New Hampshire, and Tennessee made interesting changes to their disclosure laws. Connecticut added requirements concerning storage tanks and hazardous substances, and changed carbon monoxide detector rules. New Hampshire updated arsenic and radon rules, while Tennessee now requires sinkhole disclosures.

1. Connecticut

Connecticut made several changes to its property condition disclosure statement. Notably, if the property had underground storage tanks at one time, the seller must state whether underground storage tanks have been removed, and if so, who did the removal. Also, the seller is also required to disclose whether there has been prior or pending legal action brought by the government or an agency regarding the release of hazardous substances on the property. The seller also must disclose whether the property is in a common-interest community. Note, however, a seller no longer has to disclose the location of carbon monoxide detectors, but must disclose the number of detectors and whether there have been any problems with them.⁷

2. New Hampshire

New Hampshire amended its statute governing disclosure of radon gas and lead paint to include disclosure about arsenic in groundwater. The seller must provide notice that arsenic may be in the groundwater and that the water in private wells can be tested and any arsenic can be removed from the water with special equipment. The provisions relating to radon also have been amended to require that the seller provide the buyer with notice of the possible presence of radon on the property and the availability of testing.⁸

3. Tennessee

Tennessee requires sellers to tell buyers about sinkholes on the property. A seller must tell a prospective buyer about any known sinkholes before entering into a contract with the buyer. The disclosure must be made in writing with an acknowledgment of receipt from the buyer. The definition of “sinkhole” has two parts. A sinkhole is a “subterranean void created by the dissolution of limestone or dolostone strata resulting from groundwater erosion, causing a surface

⁷ [Conn. Real Estate Comm’n, Property Cdn. Discl. Form \(Oct. 3, 2014\) \(effective 3/23/2015\)](#).

⁸ [N.H. Rev. Stat. § 477:a\(7\)](#).

subsidence of soil, sediment, or rock” and “is indicated through the contour lines on the property’s recorded plat map.”⁹

C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified 24 times in 16 cases, with some cases addressing more than one PCD issue. (See Table 1.)

- Six cases addressed Mold and Water Intrusion.
- Valuation and Boundaries were both addressed three times. (Boundary issues include disputes over square footage, access, easements, and similar situations involving the size of the property or its rights.)
- Additional issues addressed include Structural Defects, Sewer/Septic, Plumbing, HVAC, Insects and Vermin, and Pollution/Environmental Other. (See Table 2.)

Seven statutes and two regulations addressing Property Condition Disclosure issues were retrieved.

III. RESPA

A. Cases

A series of second-quarter RESPA cases dealt with kickbacks, while a Montana court upheld a large judgment against a lender over disclosure issues. A federal court limited a broker’s ability to make a counter-claim in a RESPA case. Two of the cases discussed here are ongoing matters.

⁹ [Tenn. Code § 66-5-212\(c\) \(2015\)](#).

1. **Munoz v. PHH Corp.**, 2015 U.S. Dist. LEXIS 67226 (U.S. District Court, Eastern District of California May 22, 2015); 2015 U.S. Dist. LEXIS 75960 (E.D. Cal. June 11, 2015)



Update!

A class action against a lender for RESPA kickback violations was allowed to proceed, but the court denied a request by other borrowers to join the suit.

In a long-standing case we've looked at before, borrowers claimed that a lender violated RESPA when it required them to buy private mortgage insurance from certain insurers. Those insurers were then required to buy reinsurance from a subsidiary of the lender. The lender objected to the recommendation that the suit be certified as a class action, but those objections were overruled. Since the borrowers' claims had the same factual and legal basis, the borrowers were properly certified as a class.

One borrower requested permission from the court to join the suit, even though she did not bring her claim within one year of obtaining her loan as required by RESPA. The court denied her request, because the court had previously ruled that the disclosures about mortgage insurance in the loan documents gave borrowers notice of their claims.

2. **Wesolowski v. Title Source, Inc.**, 2015 U.S. App. LEXIS 5544 (11th Cir. Apr. 7, 2015)

There is no RESPA violation when services are actually performed, even if the service provider was not authorized by state law to provide those services.

Borrowers sued the company that provided closing services for their home refinance. Borrowers claimed that the company violated the anti-kickback provisions of RESPA, because state law said that only licensed attorneys could perform closing services. The court held that RESPA was not violated if the services were actually performed, even if state law said that the provider was not allowed to perform those services. The court granted the company's motion for summary judgment, and denied a motion for summary judgment brought by the company's in-house counsel, holding that there was a genuine issue as to whether she actually performed services.

3. **Spears v. First American eAppraiseIT**, 2015 U.S. Dist. LEXIS 57530, 2015 U.S. Dist. LEXIS 57257 (U.S. District Court, Northern District of California April 27, 2015)

The court approved a final settlement agreement of over \$10 million in a class action suit for RESPA violations.

Spears is a class action suit brought on behalf of all consumers who obtained mortgages from Washington Mutual on or after June 1, 2006. The borrowers claimed that an appraisal company, eAppraiseIT, used inflated appraisals of their property to support mortgages they were granted by a lender, Washington Mutual. The appraisal company and the borrowers reached a settlement of the claims. The settlement calls for the parent company of the appraisal company to deposit \$9,863,945 into a settlement fund. The borrowers will receive a proportionate share of the settlement fund. Borrowers who paid their own appraisal fees will receive three times their proportionate share. The appraisal company is no longer operating, and the money will be paid into the fund by the appraisal company's parent company. Neither the appraisal company nor its parent admitted any wrongdoing.

4. **McCulley v. U.S. Bank**, 378 Mont. 462, 347 P.3d 247 (2015)

The court upheld a jury verdict of \$1 million in compensatory damages and \$5 million for punitive damages in a fraud case against a lender.

In *McCulley*, the borrower applied for a \$300,000, 30-year mortgage to purchase a residential condominium. The lender noted that the property was built on land zoned commercial, so the lender approved an 18-month commercial mortgage without telling the borrower. The lender knew that borrower would not be able to repay the commercial loan. The Good Faith Estimate prepared by the lender showed a 30-year mortgage, but the borrower ended up signing papers for the 18-month commercial mortgage without understanding what she was signing. The borrower was unable to refinance the property after the commercial loan was due, and she lost the condominium. At trial, the borrower showed evidence of emotional distress caused by

the lender's actions. The jury awarded \$1 million in compensatory damages and \$5 million punitive damages. The damage award was upheld on appeal. A successor bank that had taken over the lender was liable for the verdict because it acquired the original lender's liabilities.

5. **Baehr v. Creig Northrop Team, P.C.**, No. WDQ-13-099, 2015 U.S. Dist. LEXIS 24964 (D. Md. Mar. 2, 2015)



Update!

Brokerage was not allowed to counterclaim for costs and attorney's fees in a RESPA suit, even though the brokerage contract allowed for those costs.

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case has been going on for some time. In it, the buyers sued a brokerage under RESPA's anti-kickback provisions, claiming that the brokerage received disguised kickbacks from a title insurance company for referring buyers to the insurer. The brokerage counterclaimed, requesting attorney's fees and costs unless judgment was entered against it. The brokerage contract called for indemnification of the brokerage's attorney's fees in the event of a lawsuit arising out of the transaction, but the counterclaim was dismissed. RESPA allows a successful defendant to recover attorney's fees only if the plaintiff's suit was frivolous or without foundation. The contractual provision will not be read to allow recovery of fees if a lawsuit was brought in good faith. The buyers' allegations against the brokerage for referral payments violating RESPA was brought in good faith.

B. Statutes and Regulations

One new RESPA provision stood out last quarter. New Hampshire amended its statute listing acts that will subject a licensee to discipline from the Real Estate Commission. The amendment prohibits a real-estate broker from directing a transaction to a lender, escrow company, or title company in a RESPA-prohibited manner. The broker may, however, serve as an agent for a principal "to solicit extensions of credit or to provide other services related to the purchase or sale of real estate in a manner not prohibited

under RESPA, provided that if the services involve an extension of credit or are related to a loan, the agency fee is not paid by the lender.”¹⁰

C. Volume of Materials Retrieved

RESPA issues were identified in the case law nine times in seven cases. (See Table 1.) The research focused on claims arising as a result of the settlement process, rather than claims arising in the context of foreclosure. Most cases addressed Kickback issues. (See Table 2.) One state statute addressing Kickbacks and Affiliated Business Arrangements was retrieved.

IV. CODE OF ETHICS CASES: YEARLY UPDATE

Once a year, we let you know about new decisions interpreting NAR’s Code of Ethics. There was just one case of interest during the period covered.

A. Case

First Weber Group, Inc. v. Synergy Real Estate Group, LLC, 2015 WI 34, 361 Wis. 2d 496, 880 N.W.2d 498 (2015), *rev’g* 363 Wis. 2d 492, 846 N.W.2d 348 (Ct. App. 2014)

The timeliness of an arbitration request for a broker/brokerage dispute under an Association’ ethics rules is determined by the arbitrator.

A broker and a brokerage were both members of a REALTOR® Association and Article 17 requires members to arbitrate certain disputes. The brokerage and the broker had a dispute over an unpaid commission claimed by the brokerage, and an arbitration panel ordered payment of the commission to the brokerage. The broker did not pay, and the brokerage brought a court action for confirmation of the arbitrator’s award. The court ordered payment, but did not order payment of costs and attorney’s fees. The brokerage filed another arbitration request with their REALTOR® association for its costs and attorney’s fees. The broker did not attend the hearing and so the association did not hold the hearing. The brokerage petitioned the court for an order to compel

¹⁰ [N.H. Rev. Stat. § 331-A:26\(XXI\) \(2015\)](#).

arbitration but the petition was denied because it was brought more than 180 days after the dispute arose. The Court of Appeals affirmed the denial. The Supreme Court reversed, saying that the timeliness of an arbitration request was for the arbitrator to decide. The association’s arbitration panel was in a better position to interpret the association’s arbitration requirements than courts.

V. DECEPTIVE TRADE PRACTICE ACT/FRAUD HIGHLIGHTS: YEARLY UPDATE

A. Cases

The second-quarter cases covered below cover non-disclosures and active concealments of relevant facts.

1. **Marchese v. Miller**, 2015 WI App. 52, 2015 Wisc. App. LEXIS 327 (May 5, 2015)

Court upheld jury’s intentional misrepresentation finding and \$133,300 in damages against an agent who told buyers an unbuildable lot was buildable.

Buyers made an offer through an agent to purchase a vacant lot that was marketed as buildable. The offer said that the seller/builder would get permission to move a storm-water retention pond within 10 days of acceptance. When the buyers heard nothing about the pond being moved, they prepared an amendment to the purchase offer that said the pond would have to be moved and the homeowners’ association settlement satisfied before the seller/builder would be paid. The agent said “[t]hat shouldn’t be a problem.” The agent received an executed copy of the amended agreement and sent it to the buyers. The seller/builder did not move the pond before the closing.

At the closing, the buyers were given several documents, and assumed the amended agreement would be honored. The amended agreement was not made a part of the closing documents. The closing documents were never explained to the buyers, and the pond was not moved. Because they could not develop the property, the buyers had to purchase a different property.

At trial, the jury awarded the buyers \$133,300 for the agent’s intentional misrepresentation, unfair trade practices, and negligence. The trial court overturned the

verdict, saying that there was no expert testimony about negligence and that there was no evidence of intentional misrepresentation. But on appeal, the court reinstated the jury's verdict. Expert testimony was not required to show that the agent was negligent for not including the amended agreement in the closing documents. The court also held that the evidence showed that the agent marketed the lot as buildable, knew that it was not buildable due to the presence of the pond, and knew that it was unlikely that permission to move the pond would be granted.

2. **Olague v. Klimenko**, No. B 249230, 2015 Cal. App. Unpub. LEXIS 1205 (Feb. 24, 2015)

Court upheld jury verdict for over \$350,000 plus costs and attorney's fees against broker who enticed family friend into sham transaction in his favor.

Owner placed her house into a trust, and her son was named trustee. After owner developed dementia, trustee negotiated with broker, a family friend, to sell the house to broker. The terms were highly favorable to broker. Trustee was inexperienced in real estate and did not really understand details of the transaction. The agreement called for seller financing with interest-only payments for 30 years or for lifetime of settlor, and no down payment. The principal would be due on the sale of the property to another. Broker made the scheduled payments for a time, then sold property to a third party to help pay off debts he owed on another property. Broker concealed the sale from trustee and continued to make "interest only" payments. The court found that the second buyer was not a bona fide purchaser. The second purchaser eventually defaulted on his mortgage obligations. Trustee then learned he no longer owned the property.

The court held that there was ample evidence to support the conclusion that broker intentionally misled trustee to participate in a sham transaction, and that trustee's reliance on broker's misrepresentations was reasonable under the circumstances. The court also upheld a declaratory judgment that trustee's interest in the property was superior to the buyer's interest.

B. Volume of Materials Retrieved

DTPA/Fraud issues have been identified 14 times in cases retrieved for the second quarter update. (See Table 1.) Thirty-four cases were retrieved over the last four Update periods. Claims under the state deceptive-practices or consumer-fraud acts are typically

brought in conjunction with Agency or Property Condition Disclosure Claims. Also included under this issue are cases in which other kinds of fraud is alleged, such as RICO claims or civil conspiracy. Statutes and regulations addressing DTPA/Fraud are not tracked for the *Legal Pulse*.

VI. VERDICT AND LIABILITY INFORMATION

The Legal Pulse also tracks reported jury verdict information for the topics covered in each quarterly report.

A. Agency Cases

Liability was determined in 12 Agency cases, and the licensee was found liable in three. (See Table 3.) All three cases ended with damage awards.¹¹

B. Property Condition Disclosure Cases

Liability was determined in 10 Property Condition Disclosure cases, and the licensee was found liable in two.¹² (See Table 3.)

C. RESPA Cases

Liability was determined in five RESPA cases; one case ended in a finding of liability.¹³ (See Table 3.)

¹¹ See [Duncan v. Maag](#), 2015-Ohio-505, 2015 Ohio App. LEXIS 511 (Ct. App. Feb. 5, 2015) (discussed in Agency section; trial court awarded \$1,206,100 on plaintiff's summary judgment motion); [Marchese v. Miller](#), 2015 WI App. 52, 2015 Wisc. App. LEXIS 327 (May 5, 2015) (discussed in Fraud section; appellate court reinstated jury verdict of \$119,700); [KMM Invs., LLC v. Ritchie](#), Nos. 2014-CA-00627-MR, -000739-MR, 2015 Ky. App. Unpub. LEXIS 347 (Ky. Ct. App. May 15, 2015) (discussed in Agency section; \$500 damage award represented return of surveyor's fee).

¹² See [Duncan v. Maag](#), 2015-Ohio-505, 2015 Ohio App. LEXIS 511 (Ct. App. Feb. 5, 2015) (discussed in Agency section; trial court awarded \$1,206,100 on plaintiff's summary judgment motion); [KMM Invs., LLC v. Ritchie](#), Nos. 2014-CA-00627-MR, -000739-MR, 2015 Ky. App. Unpub. LEXIS 347 (Ky. Ct. App. May 15, 2015) (discussed in Agency section; \$500 damage award represented return of surveyor's fee).

¹³ See [McCulley v. U.S. Bank](#), 378 Mont. 462, 347 P.3d 247 (2015) (discussed in RESPA section; court affirmed a \$6,000,000 jury verdict for the plaintiff in a fraud case premised on the good-faith estimate requirement in RESPA). Another case, [Spears v. First Am. eAppraisalIT](#), No. 5-08-cv-00868 (RMW), 2015 U.S. Dist. LEXIS 57257 (N.D. Cal. Apr. 27, 2015), was settled, but the district court awarded fees, costs and a "service award" to the lead plaintiff totaling \$4,951,787. The case is discussed in the RESPA section.

D. Ethics Cases

None of the Ethics cases decided so far in this review cycle ended with a finding of liability.

E. DTPA/Fraud Cases

Liability was applied in nine cases, but the licensee owed damages in only three.¹⁴

VIII. TABLES

The following tables detail the amount of courtroom, legislative, and regulatory attention received by the *Legal Pulse* topics.

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

Major Topic	Cases	Statutes	Regulations
Agency	29	5	1
Property Condition Disclosure	24	7	4
RESPA	9	2	0
Ethics	2	N/A	N/A
Deceptive Trade Practices Act/Fraud	14	N/A	N/A

¹⁴ See [McCulley v. U.S. Bank](#), 378 Mont. 462, 347 P.3d 247 (2015) (discussed in RESPA section; court affirmed a \$6,000,000 jury verdict for the plaintiff in a fraud case premised on the good-faith estimate requirement in RESPA); [Olaque v. Klimenko](#), No. B 249230, 2015 U.S. Cal. App. Unpub. LEXIS 2015 (Feb. 24, 2015) (discussed in Fraud section; \$350,534.24 verdict on DTPA/Fraud claim affirmed); [KMM Invs., LLC v. Ritchie](#), Nos. 2014-CA-00627-MR, -000739-MR, 2015 Ky. App. Unpub. LEXIS 347 (Ky. Ct. App. May 15, 2015) (discussed in Agency section; \$500 damage award represented return of surveyor's fee).

Table 2
Volume of Items Retrieved for Second Quarter 2015 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	6	0	0
Agency: Buyer Representation	7	2	0
Agency: Designated Agency	0	0	0
Agency: Transactional/Nonagency	0	1	0
Agency: Subagency	1	0	0
Agency: Disclosure of Confid. Info.	0	0	0
Agency: Vicarious Liability	1	0	0
Agency: Breach of Fiduciary Duty	9	0	0
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	0	0	1
Agency: Minimum Service Agreements	0	0	0
Agency: Pre-listing Marketing of Properties	0	0	0
Agency: Other	5	2	0
PCD: Structural Defects	3	0	0
PCD: Sewer/Septic	2	0	0
PCD; Radon	0	1	0
PCD: Asbestos	0	0	0
PCD: Lead-based Paint	0	0	0
PCD: Mold and Water Intrusion	6	0	0
PCD: Roof	0	0	0
PCD: Synthetic Stucco	0	0	0

Issue	Cases	Statutes	Regulations
PCD: Flooring/Walls	0	0	0
PCD: Imported Drywall	0	0	0
PCD: Plumbing	2	0	0
PCD: HVAC	2	0	0
PCD: Electrical System	0	0	0
PCD: Valuation	3	0	0
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	0	0	0
PCD: Insects/Vermin	1	0	0
PCD: Boundaries	3	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	1
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	1	3	1
Property Condition Disclosure: Other	1	3	2
RESPA: Disclosure of Settlement Costs	1	0	0
RESPA: Kickbacks	6	1	0
RESPA: Affiliated Business Arrangements	0	1	0

Issue	Cases	Statutes	Regulations
RESPA: Other	2	0	0
Ethics: Reliance on NAR's Code of Ethics by Courts	1	N/A	N/A
Employment: Enforcement of NAR's Code of Ethics	1	N/A	N/A
Deceptive Trade Practices Act/Fraud	14	N/A	N/A

Table 3
Liability Data for Second Quarter 2015

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	2	9	18%	82%
Property Condition Disclosure	2	8	20%	80%
RESPA	1	4	20%	80%
Ethics: Reliance on NAR's Code of Ethics by Courts	0	0	0%	0%
Employment: Enforcement of NAR's Code of Ethics	0	0	0%	0%
Deceptive Trade Practices Act/Fraud	3	6	33%	67%