The Legal Pulse

Second Quarter 2014

August 29, 2014

Welcome to the *Legal Pulse Newsletter*, where law and statistics come together to keep you informed on real estate liability trends. In this edition of the *Legal Pulse*, we look at three topics where liability is a major concern – agency, property condition disclosures, and RESPA. We also review other issues that can cause legal problems, including ethics, the Deceptive Trade Practices Act, and Section 1031 Exchanges.

While agency is a perennial liability concern, no clear theme has emerged in the agency cases we've studied this year. 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 alleged misrepresentations or concealment of defects, raising agency issues as well as problems relating to property condition disclosure.

In RESPA cases this year, the courts have been focusing on kickback claims. A common allegation is that mortgage insurance premiums are being used to camouflage payments for referrals. Other techniques also received scrutiny, as in one case where a "marketing fee" paid to the lender by an overnight express delivery vendor could have been a kickback for using the delivery service. Another trend: courts are giving plaintiffs longer to bring their claims. If a plaintiff could not discover their claim during the time allowed, courts are letting their cases go forward anyway. This type of decision means that cases where liability would have been barred by statute of limitations might now proceed against licensees.

Details for significant new cases and authorities entered during the second quarter of this year are set forth below. In addition, tables at the end of this edition show how many overall cases appeared in major topic areas for this quarter, along with statistics regarding how liability was decided in finalized cases.

I. AGENCY HIGHLIGHTS: SECOND QUARTER 2014

A. Cases

- *Abromovitz Inv. Props., L.L.C.*[1] Galardi was the principal for a company, Red-Eyed Jack (REJ). REJ owned land Galardi purchased with Marchiol. Galardi contributed more money toward the purchase than Marchiol, but promised Marchiol a 50% interest in REJ. Galardi, however, retained a 100% interest in REJ. Two years after the purchase, REJ deeded the property to an entity established for the benefit of Marchiol's children. Galardi contended the deed was fraudulent. Although the county recorder's office rejected the deed, a trial court later quieted title in favor of the trust. Several years later, Galardi listed the property for sale, even though he had previously deeded it away. The purchaser, Abromovitz Investement Properties ("Abromovitz"), made an offer, but the transaction did not close because of the contested deed. REJ's broker told Abromovitz that the deed was fraudulent and it would be "cleared up." The deed was not fixed by the time escrow closed. Abromovitz sued REJ for breach of the purchase agreement and sued the broker for breach of statutory duty. The lower court found for Abromovitz on the claims against the broker, based on the statute's creation of duties to third parties, including the duty to deal fairly and disclose "any information that the seller . . . is or may be unable to perform." The appellate court affirmed this ruling. Abromovitz also alleged a fraud claim against the "owner" and the broker. The lower court found for Abromovitz against both defendants because REJ misrepresented its ownership of the property and could not convey it and the broker owed a statutory duty to Abromovitz. Abromovitz was awarded $2,924,000 in damages and nearly $950,000 in legal fees and costs. The damage award included lost profits, affirmed on appeal.

- *Horiike.*[2] The court addressed whether, when a dual agency is created by the fact that same broker sponsors the agents on both sides of the transaction, the *seller's agent* has a fiduciary duty to the buyer. At issue was the square footage of residential property. The building permit listed the area as 11,050 square feet, with a living space of 9224 square feet. A public record stated the living area was 9434 square feet. The MLS listing the seller's agent created stated that the property "offer[ed] approximately 15,000 square feet of living area." This information was based on a letter from the architect. A potential sale was cancelled when the buyers sought additional time to confirm the square footage. The seller's agent then changed the listing to state the square foot was 0, and to see "other comments." When the plaintiff became interested, the seller's agent provided a flyer stating the living area was 15,000 square feet. Both parties signed an Agency Disclosure specifying that a real estate agent could, "either acting directly or through one or more associate licensees," be the agent of both the buyer and seller, and such a dual agency

[1] *Abromovitz Inv. Props., L.L.C. v. Red Eyed Jack Sports Bar, Inc.*, No. 1 CA-CV 12-869, 2014 WL 1516593 (Ariz. Ct. App. Apr. 17, 2014).

[2] *Horiike v. Coldwell Banker Resid. Brokerage Co.*, 225 Cal. App. 4th 427, 169 Cal. Rptr. 891, *petition for review granted,* 174 Cal. Rptr. 3d 294, 328 P.3d 1035 (2014).

would create a fiduciary duty to both parties. The seller's agent did not disclose that the square footage stated in the MLS had been questioned, and the buyer did not verify it. The buyer later reviewed the building permit and discovered the issue. He sued the broker and the seller's agent. The trial court dismissed a breach of fiduciary duty claim on the grounds that the seller's agent did not owe the buyer a fiduciary duty. A false representation claim was tried to a jury, which concluded that the seller's agent had not misrepresented a material fact and had not intentionally failed to disclose a material fact. The appellate court reversed, noting that agents commonly, but wrongly, believe that if both sides are represented in a transaction, each agent owes fiduciary duties only to his or her principal, even if they both work for the same broker. Although the jury found that the seller's agent did not intentionally provide false information, or provided false information he believed was true, he did not necessarily satisfy his fiduciary duty to the buyer. The California Supreme Court recently granted a petition to review the appellate court decision.

- *DFT Management*[3] A real-estate investment company sued a broker alleging that she breached her fiduciary duty and regulatory obligations to the company when she allegedly used confidential information obtained from the company to broker a transaction knowing the sale would result in a fraudulent payment to a third party, and aided the transaction by providing a fraudulent broker's price opinion stating a below-market value. Although the investment company's principals allegedly contributed funds to the purchase or improvement of the property, they were not in fact owners of the property, and the company's only interest was that it may have been in a joint venture with another party to the transaction. The court concluded that the licensee's fiduciary duty was owed to the investment company, not the plaintiff. As a joint venturer, the plaintiff had an indirect interest, but the defendant licensee did not owe a duty to a third party with such an interest.

- *Keyes*.[4] The former owners of a foreclosed residence sued several private actors under 42 U.S.C. § 1983, including the broker and agent hired by Fannie Mae to sell the property post-foreclosure. The former owners contended that the real-estate licensees had a duty to investigate title before they attempted to resell the property. The court granted summary judgment to all the private actors, including the real-estate licensees, finding that there was no "state action," a basic element of a § 1983 claim, and that the real-estate licensees did not owe any duty to the former owners because they had been hired by Fannie Mae and owed their duties to Fannie Mae, not to the former owners.

[3] *DFT Mgmt., LLC v. Scialpi*, No. FSTCV136017042S, 2014 WL 1647085 (Conn. Super. Ct. Mar. 24, 2014).

[4] *Keyes v. Dean Morris, LLP*, No. 12-049-JJB-SCR, 2014 WL 2515407 (M.D. La. June 6, 2014).

B. Statutes and Regulations

- Colorado issued a position statement on Pre-listing Marketing of Properties.[5] Announcing a "coming soon" listing is allowed if the owner is preparing the property for a sale or lease, but the announcement is not permitted if the broker is trying to broker both sides, or "double end the deal." **"**Double-ending" may violate the broker's duty of reasonable skill and care. Instead, the broker must advise the seller or lessor of the material benefits and risks of making a "coming soon" listing and let the seller or lessor decide whether to pre-list the property. The position statement concludes that "[t]he manner in which the broker and seller or landlord agree to market the property must be memorialized in writing in the listing contract prior to any marketing being performed."

- Iowa passed a new statute addressing elder abuse.[6] The statute includes real-estate brokers and agents within the scope of the term "person in a position of trust and confidence" and elder abuse includes financial exploitation. The statute provides for injunctive relief and the return of money or property to the vulnerable adult.

- Minnesota revised its licensing law.[7] First, the terms "buyer's broker" and "seller's broker" have been defined. The statute provides that these representatives owe fiduciary duties to the buyer or seller, respectively.[8] The terms "override clause" and "protective list" are also defined. An override clause is a clause appearing in a buyer's representation agreement which permits the buyer's representative to get paid after the agreement has expired if the buyer purchases a property the buyer's representative showed before the agreement expired.[9] The override clause is generally limited to six months, but in the case of a purchase or sale of a business, the override clause may now have a term of up to two years.[10] The term "protective list" was amended to include a list of addresses for which a licensee has negotiated a sale or lease before the expiration of a buyer's representation agreement.[11] Finally, the agency disclosure form has been amended to delete provisions relating to subagency.[12]

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[5] Colo. Dep't of Reg. Agencies, Div. of Real Estate, CP-44: Comm'n Position on Coming-Soon Listings (adopted June 3, 2014).

[6] Iowa Code §§ 235F.1–8 (2014) (SF 2239, §§ 1-8).

[7] 2014 Minn. Sess. Law ch. 199; H.F. 2694.

[8] Minn. Stat. §§ 82.55, subds. 3a, 23a (2014) (Ch. 199, §§ 1, 5).

[9] *Id.* § 82.55, subd. 13(2) (2014) (Ch. 199, § 2).

[10] *Id.* § 82.66, subd. 2(d)(2) (Ch. 199, § 23).

[11] *Id.* § 82.55, subd. 16 (2014) (Ch. 199, § 4).

[12] *Id.* § 82.67, subd. 3 (2014) (Ch. 199, § 24).

C. Volume of Materials Retrieved

Agency issues were identified ten times in eight cases (*see* Table 1; note that some cases address multiple issues). As in other updates, most cases addressed Breach of Fiduciary Duty. Dual Agency, Agency Disclosure and Agency: Other were also addressed in the case law (*see* Table 2.) Six statutes and one regulatory guidance on Agency issues were retrieved (*see* Table 2.)[13] These items addressed, among other things, Buyer Representation, Breach of Fiduciary Duty, Pre-listing Marketing of Properties, and Agency: Other.

II. PROPERTY CONDITION DISCLOSURE HIGLIGHTS: SECOND QUARTER 2014

A. Cases

- *Bailey*.[14] The buyers discovered mold and leaks after moving in and sued the seller's real-estate agent and broker for fraudulent and negligent misrepresentation. They also sued the seller for "redhibition," to reduce the purchase price because of an undisclosed defect. The seller purchased the property nine months earlier and paid for two inspections. Both inspections indicated moisture and structural issues. One of the inspectors was certified to inspect for mold, moisture, and problems with EIFS (exterior insulation and finish system, a/k/a synthetic stucco). He stated that the EIFS needed repair, but that the interior was dry; he did not note a need for toxic mold testing. The seller made the recommended repairs, which were supervised by the special inspector. The buyers received the Louisiana Residential Disclosure Form, which provided "No" answers from the sellers to questions about water, mold and other existing damage. The seller's agent also signed the form. Relying on advice from their agent, the buyers decided not to have the property inspected and relied on the seller's inspections. They did not receive one of the inspection reports, and received only parts of the second report. One of sections not provided indicated that there were signs of mold, but that the inspector was not a qualified mold expert. The buyers discovered extensive mold and moisture problems when they

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[13] This update covers the 2014 legislative sessions for the twenty 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, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, and Vermont. Two states, Nevada and Texas, do not meet in even-numbered years. The update also includes items from Group I states that were found after the cut-off date for the first-quarter update. Group I includes Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Montana, New Mexico, North Dakota, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming (Montana and North Dakota, do not meet in even-numbered years).

[14] *Bailey v. Delacruz*, 49,032 (La. App. 2 Cir. 6/16/14), 2014 WL 2702926.

remodeled. The court entered a default judgment against the seller, who failed to appear. It also concluded that the agent and broker breached duties to the buyers because they were aware of the problems but did not provide the relevant information. It limited damages to the $109,891 needed to make the house sound. The agent and broker were only found liable for $66,164.83 of that amount. The buyers appealed the damages. The appellate court concluded that the trial court erred in limiting the agent's and broker's liability, holding that they should have been liable for the whole amount.

- *Islam*.[15] The plaintiff purchased a property out of foreclosure and improved it. When she tried to resell it, she learned that she had actually improved a building on the property next door to the property she purchased. The building on the property she purchased was destroyed before her purchase. She sued the mortgage company's in-house real-estate broker, alleging it had intentionally or recklessly misidentified the property being sold. The trial court granted the defendant's motion to dismiss, relying on evidence outside the pleadings. Because the plaintiff was not given a chance to provide additional evidence, the dismissal was reversed on appeal.

B. Statutes and Regulations

- Colorado enacted a statute requiring sellers of residential property to disclose that mineral rights in the property may exist and be owned separately from the "surface estate."[16] The required notice is set forth in the statute. By January 1, 2016, the Real Estate Division must promulgate a rule requiring that the notice be incorporated into the contract for sale or property condition disclosure statement. Contracts for sale or disclosure statements that are not subject to the Real Estate Division's jurisdiction also must incorporate the notice by January 1, 2016. The duty to disclose does not create a new duty for the seller, a real-estate licensee or title insurer to investigate mineral rights.

- Florida also enacted a requirement that a seller or residential property provide a disclosure of "subsurface rights" at the time the contract of sale is executed, or earlier, if the seller or a related entity "has previously severed or retained or will sever or retain any of the subsurface rights or right of entry."[17] The required disclosure is set forth in the statute. The disclosure may be included in the contract for sale or be incorporated by reference. It must prominently state that the buyer should not sign the contract until he or she has read the disclosure statement.

[15] *Islam v. Wells Fargo Bank, N.A.*, 757 S.E.2d 663 (Ga. Ct. App. 2014).

[16] Colo. Rev. Stat. § 38-35.7-108 (2014) (Ch. 74; SF 14-009).

[17] Fla. Stat. § 686.29 (2014) (Ch. 2014-34; H 489).

C. Volume of Materials Retrieved

Property Condition Disclosure Issues were identified twenty-one times in ten cases (*see* Table 1, noting that some cases addressed multiple issues). Most of the cases addressed Mold and Water Intrusion. Other issues addressed more than once include Valuation and Boundaries, which includes disputes over square footage, easements, and similar situations involving the size of the property or its rights (*see* Table 2). Three statutes addressing Property Condition Disclosure Issues also were retrieved.

III. RESPA HIGHLIGHTS: SECOND QUARTER 2014

A. Cases

- *Henson.*[18] A federal district court in California has issued two more rulings in the *Henson* case, discussed in the First Quarter 2014 update. The plaintiffs alleged that "marketing fees" from overnight express delivery services to a subsidiary of the title defendant were an illegal fee split. The payments varied based on the volume of business referred. The district court permitted a RESPA § 8 claim to proceed.[19] In June, the court denied the plaintiff's motion to certify the case as a class action.[20]

- *Thurmond.*[21] Five plaintiffs alleged that their mortgage company accepted illegal kickbacks through a captive-reinsurance scheme, a violation of RESPA § 8. The plaintiffs were required to obtain private mortgage insurance to cover the amount financed that exceeded 80% of their homes' value. Four plaintiffs decided to have buyer-paid mortgage insurance; the fifth plaintiff decided to have lender-paid insurance. The plaintiffs learned at closing that the private mortgage insurance could be reinsured through an affiliate of the mortgage company. Three to four years later, the plaintiffs discovered facts alerting them of possible RESPA violations and they sued. The defendants brought a motion to dismiss on statute of limitations grounds. The plaintiffs argued that the doctrine of equitable tolling should allow the claim to proceed. The court concluded that it could not determine whether the doctrine should apply and it denied the motion to dismiss so the parties could do discovery on the equitable-tolling issue. The defendants also asked the court to dismiss the plaintiffs' unjust-enrichment claims, but these claims were generally

[18] *Henson v. Fidelity Nat'l Fin. Inc.*, No. 2:14-cv-01240-ODW(RZx), 2014 WL 1682005 (C.D. Cal. Apr. 29, 2014).

[19] *Henson v. Fidelity Nat'l Fin. Inc.*, No. 2:14-cv-01240-ODW(RZx), 2014 WL 1246222 (C.D. Cal. Mar. 21, 2014).

[20] *Henson v. Fidelity Nat'l Fin. Inc.*, No. 2:14-cv-01240-ODW(RZx), 2014 WL 2765136 (C.D. Cal. June 18, 2014).

[21] *Thurmond v. SunTrust Bank, Inc.*, No. 11-1352, 2014 WL 2921623 (E.D. Pa. June 26, 2014).

permitted to go forward. This case is similar to three cases noted in the First Quarter update from other federal district courts in Pennsylvania.[22]

B. Statutes and Regulations

No statutes or regulations addressing RESPA issues were retrieved. However, the Colorado Division of Real Estate issued a bulletin addressing real-estate's licensees' involvement in seller-financed residential transactions.[23] The Bulletin advises that "[r]eal-estate brokers are prohibited by Colorado law from taking a residential mortgage loan application *or* offering or negotiating the terms of a residential mortgage loan, *including a seller-financed loan*." As a result, "[a] real estate broker should not even assist a seller or buyer in any way with the application process or related documentation or engage in any loan term discussions if the seller-financed loan involves residential property." This advice is based on the conclusion that the seller's exemption to the mortgage originators' licensing requirements does not extend to the seller's real-estate broker.

C. Volume of Materials Retrieved

RESPA issues were identified four times in two cases (*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 addressing RESPA issues were found.

IV. ETHICS HIGHLIGHTS: 2014 TO DATE

A. Cases

- *First Weber Group.*[24] In 2009, First Webber (FW) filed a request with a local REALTOR® association to arbitrate a commission dispute it had with Graham, a

[22] *See* *Menichino v. Citibank*, No. 2:12-cv-00058, 2014 WL 462622 (W.D. Pa. Feb. 5, 2014) (raising doctrine of equitable tolling of claims involving alleged captive-reinsurance scheme, in which plaintiffs alleged reinsurance premiums were actually kickbacks for steady referrals); *Manners v. Fifth Third Bank*, No. 2:12-cv-00442, 2014 WL 465701 (W.D. Pa. Feb. 5, 2014) (similar case); *Cunningham v. M&T Bank Corp.*, No. 1:12-cv-1238, 2014 WL 131652 (M.D. Pa. Jan. 14, 2014) (case alleged reinsurance scheme in exchange for referrals and plaintiffs asserted their claims should proceed even if they were filed late; court denied defendants' request for stay while case raising same issue was on appeal).

[23] *See* Colo. Dep't of Reg. Agencies, Div. of Real Estate, Seller-Financed Resid. Real Estate Transaction Bulletin (Spring 2014).

[24] *First Weber Group, Inc. v. Synergy Real Estate Group, LLC*, 353 Wis. 2d 492, 846 N.W.2d 348 (Ct. App. 2014).

REALTOR® affiliated with, working for, or representing the defendant Synergy Real Estate Group.[25] The request was on a form stating that arbitration requests had to be filed within 180 days after the closing of a transaction "or within 180 days after the facts constituting the arbitrable matter could have been known in the exercise of due diligence, whichever is later." This language came from NAR's Ethics Manual. When Graham joined the local REALTOR® association, the application form he signed specified that he agreed to abide by the NAR Code of Ethics and "the Constitution, Bylaws, Rules and Regulations of [the REALTORS® Association of South Central Wisconsin], the State Association and the National Association." The Manual itself provided that arbitration of disputes was a "duty and privilege" of membership and that rather than litigating "disputes between REALTORS . . . associated with different firms, arising out their relationship as REALTORS," disputes "shall" be submitted to arbitration. The 2009 dispute was resolved in FW's favor and FW had the award confirmed in court. FW then sought its fees and costs relating to the confirmation proceeding. Graham opposed the fee petition and the court denied FW's request for fees initially and on reconsideration. FW filed a second request for arbitration, using the same form, again seeking fees and costs arising from the confirmation proceeding. Graham refused to participate and the local association declined to proceed without him without a court order compelling arbitration. FW filed a motion to compel. The trial court, relying on the 180-day time limit set forth in Ethics Manual and the association's form, denied the motion. On appeal, the court first ruled that the trial court had the authority to decide whether the 180-day limit applied. It noted that Graham did not agree to submit all disputes to arbitration. In the only form he signed, the membership application, he agreed to abide by the Code of Ethics, and the Code of Ethics provided that he did not have to arbitrate disputes that were more than 180 days old. The appellate court also agreed that the date Graham filed his letter brief opposing FW's fee petition was the proper "trigger date."

B. Volume of Materials Retrieved

Ethics issues were not encountered in the second quarter of 2014 (*see* Table 1). One case, *First Weber Group*, was located in the first quarter research, and is discussed above. Statutes and regulations addressing Ethics issues are not included in the *Legal Pulse*.

[25] The opinion does not explain who Graham was or his relationship with Synergy, because the parties to the appeal did not do so. *See* 353 Wis. 2d at 494 n.1, 846 N.W.2d at 349 n.1.

IV. DECEPTIVE TRADE PRACTICES ACT/FRAUD HIGHLIGHTS: 2014 TO DATE

A. Cases

- *Etelson*.[26] Top-floor condominiums in a high-rise building overlooking the Hudson River were marketed as having views of the Manhattan skyline. None of the marketing materials or the model or painting in the developer's office disclosed that the developers planned to build an additional high-rise that would block the view. The marketing materials stated that the painting was an "artist's impression" and was not necessarily accurate. The real estate agents who worked for the defendants and showed the properties did not disclose the plan to build another building; they testified at trial that they did not know about the plan. The plaintiffs bought condos on the upper floors for a significantly higher price, then sued the developer and related entities alleging common-law and statutory fraud and other claims. The jury returned a verdict for the plaintiffs. The complaint included a statutory-fraud claim, so the plaintiffs' damages (their purchase prices of $1,253,420) were trebled. The statute also entitled the plaintiffs to recover attorney's fees and prejudgment interest. The total $4,817,638.12 verdict against the developer was affirmed on appeal.

- *Abromovitz Investment Co.*[27] This case is discussed above in the Agency section.

B. Volume of Materials Retrieved

DTPA/Fraud issues have been identified five times in cases retrieved for the Second Quarter update (*see* Table 1). Seven cases were retrieved for the First Quarter Update. 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 included in the *Legal Pulse*.

[26] *Etelson v. Shore Club S. Urban Renewal, L.L.C.*, A-0570-11T4, 2014 WL 901942 (N.J. Super Ct. App. Div. Mar. 10, 2014), *cert. denied* (N.J. July 3, 2014).

[27] *Abromovitz Inv. Props., L.L.C. v. Red Eyed Jack Sports Bar, Inc.*, No. 1 CA-CV 12-869, 2014 WL 1516593 (Ariz. Ct. App. Apr. 17, 2014).

V. SECTION 1031 HIGHLIGHTS: 2014 TO DATE

A. Cases

- *Dillon.*[28] Dillon, the receiver for a qualified intermediary (QI), Vesta Strategies, and its marketing entity, Excalibur 1031 Group, sought coverage from the businesses' insurer for losses suffered in a Ponzi scheme conducted by Vesta and Excalibur's principals and others. The receiver alleged that Vesta's manager routinely used client funds—funds "parked" with Vesta during a like-kind exchange—for his own real estate ventures. Under the scheme, a client's money from a real estate sale would be wired from the title company to a Vesta account for that client, and would then be transferred from that account into a pooled account, from which the manager would transfer funds to other, non-Vesta accounts. Funds from new clients later would be transferred from the pooled account back into previous client's account when the time came for the previous client to purchase the exchange property. The companies collapsed in 2008, leaving Vesta short on client accounts by about $11.5 million. The receiver and the insurance company both moved for summary judgment. The court granted summary judgment in favor of the insurance company, ruling that the manager and Vesta's CEO committed willful wrongdoing—embezzlement—which could not be insured, and that bad conduct could be imputed to Vesta.

- *Ash.*[29] In *Ash*, the closing of the exchange transaction did not occur on the appointed Friday in November 2008, because the seller of the exchange property caused a delay in the closing of escrow. The following Monday, the QI, which was holding the plaintiff's funds from the sale, froze all accounts and filed for bankruptcy. The funds belonging to the purchaser of the exchange property were tied up in the bankruptcy proceeding and were not released until it was too late for the transaction to qualify for section 1031 treatment. The purchaser was unable to defer the capital gain and it became immediately taxable. He sued, alleging that the vendor breached the sales contract and the escrow company was negligent and breached its fiduciary duty to him. A jury returned a verdict for the plaintiff, awarding damages for the seller's breach of contract, and the escrow company's breach of contract, negligence, and breach of fiduciary duty. The contract damages included damages resulting from the delay in closing escrow. The plaintiff and the defendants appealed. The appellate court addressed the breach of contract damages first. At issue was whether the damages arising from the closure of the QI and the freezing of the plaintiff's funds were foreseeable at the time the parties formed their contract. Under traditional principles of contract law in California's Civil Code, consequential damages—those that are not reasonably foreseeable when the contract was formed—cannot be recovered. Because the QI's bankruptcy was unforeseeable, any damages resulting from the bankruptcy could not be recovered. The case was sent back to

[28] *Dillon v. Continental Cas. Co.*, No. 5:10-CV-05238-EJD, 2014 WL 1266124 (N.D. Cal. Mar. 26, 2014).

[29] *Ash v. N. Am. Title Co.*, 223 Cal. App. 4th 1258, 168 Cal. Rptr. 3d 499 (2014).

the trial court to determine what portion of the contract damages was attributable to the QI's bankruptcy and to reduce the award accordingly.

The appellate court also addressed the negligence and breach of fiduciary duty claims against the escrow company. Consequential damages are recoverable for those tort claims, but the escrow company argued that it should not be liable because the QI's unexpected bankruptcy caused the plaintiff's damage. The escrow company argued that, because its conduct came before the bankruptcy, it could not have caused the consequential damage. The appellate court agreed and reversed the verdict. It concluded that the trial court should have instructed the jury on the applicable legal doctrine of causation. The case was sent back for retrial on the issue of the escrow company's liability for negligence and breach of fiduciary duty.

B. Statutes and Regulations

Statues and regulations addressing Section 1031 Exchanges are collected but are rare. None were located during the first two quarters of 2014.

C. Volume of Materials Retrieved

No cases addressing section 1031 were located during the Second Quarter update (*see* Table 1). Two cases were found for the First Quarter update, and they are discussed above. No statutes or regulations addressing section 1031 issues were located during either the First or Second Quarters of 2014.

VI. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in five Agency cases, and the licensee was found liable in one, which ended in a substantial award of damages (*see* Table 3).[30]

B. Property Condition Disclosure Cases

Liability was determined in fifteen Property Condition Disclosure cases, but the licensee was found liable in only three (*see* Table 3.) One of those three cases resulted in an award of damages.[31]

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[30] *See Abromovitz Inv. Props., L.L.C. v. Red Eyed Jack Sports Bar, Inc.*, No. 1 CA-CV 12-869, 2014 WL 1516593 (Ariz. Ct. App. Apr. 17, 2014) (discussed in Agency section above; damages award affirmed).

C. RESPA Cases

None of the RESPA cases found liability (*see* Table 3).

D. Ethics Cases

None of the Ethics cases found liability.

E. Deceptive Trade Practices and Fraud Cases

Liability was determined in nine cases, but the licensee was found liable for damages in only three.[32]

F. Section 1031 Cases

Liability was determined in one of the two Section 1031 cases decided so far in 2014, but the jury verdict was reversed with respect to the proper amount of damages for the breach of contract claim and the verdict against the qualified intermediary was reversed for retrial on the issue of liability.[33]

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[31] *See* *Bailey v. Delacruz*, 49,083 (La. App. 2 Cir. 6/16/14), 2014 WL 2702926 (discussed in Property Condition Disclosure Section above; court concluded that agent and broker were liable for whole $109,891.66 verdict rather than merely discrete part of verdict).

[32] *See* *Etelson v. Shore Club S. Urban Renewal, L.L.C.*, A-0570-11T4, 2014 WL 901942 (N.J. Super Ct. App. Div. Mar. 10, 2014) (discussed in the DTPA/Fraud section above; $4,817,638.12 verdict affirmed); *Cardinale v. Miller*, 222 Cal. App. 4th 1020, 166 Cal. Rptr. 3d 546 (2014) (discussed in the DTPA/Fraud section above; $293,937.50 fee award affirmed; compensatory-damage award reduced on appeal in unpublished portion of opinion); *Abromovitz Inv. Props., L.L.C. v. Red Eyed Jack Sports Bar, Inc.*, No. 1 CA-CV 12-869, 2014 WL 1516593 (Ariz. Ct. App. Apr. 17, 2014) (discussed in Agency section above; damages award of $2,924,000 affirmed; fee award of $947,875.31 affirmed).

[33] *See* *Ash v. N. Am. Title Co.*, 223 Cal. App. 4th 1258, 168 Cal. Rptr. 3d 499 (2014).

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

Major Topic	Cases	Statutes	Regulations
Agency	10	5	1
Property Condition Disclosure	21	3	0
RESPA	4	0	0
Ethics	0	0	0
Deceptive Trade Practices Act/Fraud	5	0	0
Section 1031 Exchanges	0	0	0

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

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

Issue	Cases	Statutes	Regulations
Agency: Pre-listing Marketing of Properties	0	0	1
Agency: Other	2	1	0
PCD: Structural Defects	1	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	4	0	0
PCD: Roof	1	0	0
PCD: Synthetic Stucco	1	0	0
PCD: Flooring/Walls	1	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	2	0	0
PCD: Short Sales	0	0	0
PCD: REOs & Bank-owned Property	2	0	0
PCD: Insects/Vermin	1	0	0
PCD: Boundaries	2	0	0
PCD: Zoning	1	0	0
PCD: Off-site Adverse Conditions	1	0	0

Issue	Cases	Statutes	Regulations
PCD: Meth Labs	0	0	0
PCD: Stigmatized Property	0	0	0
PCD: Megan's Laws	0	0	0
PCD: Underground Storage Tanks	0	0	0
PCD: Electromagnetic Fields	0	0	0
PCD: Pollution/Env't'l Other	1	0	0
Property Condition Disclosure: Other	1	3	0
RESPA: Disclosure of Settlement Costs	1	0	0
RESPA: Kickbacks	3	0	0
RESPA: Affiliated Business Arrangements	0	0	0
RESPA: Other	0	0	0
Ethics: Reliance on NAR's Code of Ethics by Courts	0	N/A	N/A
Employment: Enforcement of NAR's Code of Ethics	0	N/A	N/A
Deceptive Trade Practices Act/Fraud	5	N/A	N/A
Section 1031	0	0	0

Table 3
Liability Data for Second Quarter 2014

Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	1	4	20%	80%
Property Condition Disclosure	3	12	20%	80%
RESPA	0	0	0%	0%
Ethics: Reliance on NAR's Code of Ethics by Courts	0	0	0%	0%

Topic	Liable	Not Liable	% Liable	% Not Liable
Employment: Enforcement of NAR's Code of Ethics	0	0	0%	0%
Deceptive Trade Practices Act/Fraud	1	2	33%	67%
Section 1031	0	0	0%	0%