

Executive Summary

3Q - 2019



The Legal Pulse examines legal liability trends in the real estate industry. The 3Q edition reviews case decisions and legislative activity in areas of agency, property condition disclosure, RESPA. In addition, the newsletter reviews legal developments relating to technology issues and third-party liability that occurred between October 2018 and October 2019.

Here are highlights of the third quarter of 2019 edition of the Legal Pulse Newsletter.

AGENCY

In a California case ([No. B290819](#)), a buyer sued a brokerage and salesperson regarding a property's living area square footage. The property listing stated that the property consisted of 15,000 square feet of living area and that the owner was the source of the square footage information. At the bottom of the listing an advisement stated, "Broker/Agent does not guarantee the accuracy of the square footage, lot size or other information concerning the conditions or features of the property provided by the seller or obtained from Public Records or other sources. Buyer is advised to independently verify the accuracy of all information through personal inspection and with appropriate professionals." The seller and the buyer both used salespeople from the same brokerage; therefore, the brokerage was a dual agent. After purchasing the property, the buyer learned that public records listed far less square footage for the house, around 11,000 square feet. The buyer's lawsuit alleged misrepresentation, intentional concealment, and breach of fiduciary duty. The courts overall held that:

- A brokerage that is a dual agent owes fiduciary duties to both buyer and seller, and the salespeople who are under the brokerage's license owe equivalent duties. The seller's salesperson therefore owed the same fiduciary duty to the buyer as that of the brokerage to learn and disclose material information affecting the property's price or desirability, including facts the buyer might have reasonably discovered himself.
- There was no evidence that the salesperson breached a fiduciary duty, made a false representation of fact, or intentionally failed to disclose a fact that the buyer could not reasonably have discovered.

PROPERTY CONDITION DISCLOSURE

In a Louisiana case ([No. 2019-CA-0311](#)), the court examined redhibition law in the aftermath of Hurricane Katrina. Redhibition allows a sales contract to be rescinded because the thing purchased was defective. To prevail, the plaintiff must prove that the thing sold contained a hidden defect that was not apparent upon ordinary inspection, which rendered the thing unfit for its intended use or so imperfect that the purchaser would not have bought it had he known of the defect. The sale of the property at issue in the case occurred nine months before Hurricane Katrina. After the property sustained flood damage as a result of the hurricane, the buyer sought rescission of the sale and return of the purchase price. The court found that the record was clear that the property flooded twice in a 10-year period, each occurring at the time of a natural disaster and both bringing extreme rainfall, in addition to the time the levee breached during Hurricane Katrina. On cross-motions by the defendant vendor and real estate agent for summary judgment, the court held that:

- The purchaser failed to present factual support evidencing that the property flooded or experienced water seepage on days not marked by extraordinary rainfall.

- While a house’s susceptibility to flooding is a redhibitory defect, the mere fact that a house flooded under extraordinary rainfall is not a redhibitory defect.
- Grant of summary judgment was affirmed and purchaser’s claim was dismissed with prejudice.

In Oregon, the Seller’s Property Condition Disclosure Form has been amended to include a statement that flood insurance may be required for homes in a designated floodplain. ([2019 Or. Laws ch. 584](#)).

RESPA

In a North Carolina case ([No. 1:17-cv-00345-MR](#)), borrowers claimed the loan closing was part of an undisclosed hidden illegal scheme to issue unregulated securities based upon the negotiation of non-negotiable notes. The court held:

- That the borrowers failed to identify which settlement charges were allegedly improper and that their complaint lacked factual allegations that the defendant split fees with any other persons.
- The court dismissed the borrowers’ RESPA claims with prejudice.

TECHNOLOGY

In a Texas case ([No. 1:17-CV-1093-RP](#)), the court considered a claim for trademark infringement based upon alleged cybersquatting. Real Estate Edge (REE) is a real estate brokerage company providing services under the registered trademark Great Austin Realty. Defendant is the registrant and operator of the Internet domain name “www.greataustinrealty.com.” REE alleged that the defendant’s operation of its domain name was an act of cybersquatting intended to erode the distinctiveness of the Great Austin Realty mark. The defendant failed to respond to REE’s complaint. The court held:

- That the defendant acted knowingly and intentionally in infringing REE’s trademark, and entered default judgment in favor of REE.
- The court granted a permanent injunction and ordered the transfer of the domain name “www.greataustinrealty.com” to REE.
- The court further awarded REE \$12,300 in attorney’s fees and \$1,056 in costs.

THIRD PARTY LIABILITY

In an Oregon case ([No. 3:17-cv-01364-YY](#)), a photographer brought an action against a real estate broker for using a copyrighted image without permission. While a copyright notice did not appear alongside the image when it was downloaded to the broker’s website, the court found that information that a copyright existed was readily discoverable through basic online research. The court ruled:

- Against the real estate broker and awarded the photographer \$1,500 in damages.

In Oregon, state licensed appraisers or state certified appraisers may now include a disclaimer in an evaluation that he or she is not engage in real estate appraisal activity when perform certain functions per an amended statute ([2019 Or. Laws ch. 127](#))