LEGAL PULSE NEWSLETTER: FIRST QUARTER 2020

The Legal Pulse Newsletter examines legal liability trends in the real estate industry. This edition reviews recent case decisions and legislative activity in the areas of agency, property condition disclosure, and the Real Estate Settlement Procedures Act (RESPA). In addition, we review employment case decisions and related legislative activity occurring from April 2019 to April 2020.

In the first quarter of 2020, the most common agency issues identified in case decisions included breach of fiduciary duty and buyer representation. In legislation relating to agency, Idaho amended its statutes pertaining to broker representation agreements and designated broker responsibilities.

The property condition disclosure cases reviewed this quarter covered a variety of disclosures. The Connecticut Superior Court addressed two separate cases dealing with sewer/septic systems that were identified after properties were purchased. Disclosure issues also arose in the legislative context, with the Arkansas Legislature requiring closing agents to disclose agricultural operations near real property located in a rural area.

Among the RESPA cases retrieved, claims of unearned fees and kickback schemes were addressed. No statutes or regulations pertaining to RESPA issues were retrieved in the states examined this quarter.

Each quarter we take a closer look at cases and legislative activity in additional areas of interest to real estate professionals. This quarter, we reviewed cases and statutory and regulatory changes relating to employment issues.

For more details, read the summaries below; to learn more about recent trends in legal cases involving the real estate industry, check out the tables showing cases and liability figures.[1]

[1] Except as noted, case reporting reflects the party descriptions used by the courts. Case summaries may omit specific ancillary issues that are not the focus of this newsletter.

I. AGENCY

A. Cases

The agency cases located this quarter predominantly address breach of fiduciary duty and buyer representation. Agency issues were identified in eleven cases.[2]

1. **Blanchard v. Critchfield,** No. A-5928-17T4, 2020 WL 289006 (N.J. Super. App. Div., January 21, 2020)

The equitable doctrine of laches and statute of limitations barred buyers from seeking to reinstate an amended complaint eight years after original consent order.

Buyers purchased a vacant lot in West Wildwood. According to the buyers, their agent informed them that the lot was "buildable" under local zoning requirements and that the New Jersey Department of Environmental Protection (NJDEP) had previously issued a permit pursuant to the Coastal Area Facility Review Act (CAFRA) that allowed the property to be developed. Buyers stated that their agent led them to believe that they would be allowed to construct a single-family dwelling on the lot. Yet, after closing, the buyers learned the NJDEP had not issued a CAFRA permit for the lot; rather, the agency had issued the permit for a single-family dwelling on an adjoining lot.

The buyers made several claims. First, their agent was grossly negligent in advising them regarding their ability to build a home on the property and in drafting the agreement of sale and related documents. Second, they also claim the sellers knew the lot was not "buildable." They alleged that the sellers had knowledge that the prior owner in 2006 had been denied a CAFRA permit for the lot's development and that a CAFRA individual permit would be required. Third, the buyers also alleged that the sellers knew the lot did not meet the criteria for an individual CAFRA permit and that the NJDEP would deny an application for a permit. Last, buyers claimed that seller's agent advertised the property for sale, but did not disclose that an entity called Water's Edge Environmental (Water's Edge) had previously determined the property could not be developed. Buyers alleged that the seller's agent fraudulently failed to disclose the Water's Edge finding and instead advertised the property as suitable for construction of a "dream home."

The trial court referred the matter for mediation. On October 1, 2009, the parties entered a consent order waiving statute of limitations and giving the buyers nine months to make a good faith effort to obtain a CAFRA permit. If they obtained the permit, the parties would agree to dismiss with prejudice. Otherwise, the buyers could reinstate the amended complaint. In August

[2] See tables 1, 2 for a complete list of identified materials.

of 2010, the buyers applied for a CAFRA permit with the NJDEP. They were unsuccessful in obtaining the CAFRA permit.

It was not until March 26, 2018, that the buyers filed a motion to reinstate their amended complaint pursuant to the consent order. The lower court held that the buyers' motion was barred by a six-year statute of limitations for contract claims and also by the equitable doctrine of laches.[3] The appellate court affirmed, explaining that even if the original statute of limitations was waived, the consent order itself was a contract, which has a six-year statute of limitations. Furthermore, because the buyers waited almost eight years to reinstate the amended complaint, without providing sufficient reason, the equitable doctrine of laches did apply.

2. **Edson v. Fogarty,** No. 1-18-1135, 2019 IL App (1st) 181135 (Ill. App., May 14, 2019)

When a buyer cannot through ordinary prudence discover the zoning of a property, his reliance on a broker's misrepresentation is reasonable.

A real estate broker listed a commercial unit for sale on the lower level of a condominium building and decided to label the zoning "B1-3," a nonexistent zone. He later testified that there was no way of determining the zoning because the map showed the zone for the entire building. The space had previously operated as a Stop & Shop convenience grocery store, and the broker advertised it as "perfect for grocery, Medical Clinic, Fitness Center..." After seeing the listing, a buyer expressed interest in purchasing the unit and leasing the space to a grocer or other commercial tenant. On two different occasions touring the property, first with the buyer and his father, and again with the buyer and a potential tenant that the buyer found, the broker represented that the property would be great for a grocery store. In December 2012, the buyer's $600,000 offer for the property was accepted.

After lease negotiations with the buyer's first potential tenant fell through, he began negotiations with another potential tenant. It was not until then that he was told that his property was zoned DR-10, for residential use. After the buyer learned the true zoning, he contacted the alderman's office and discussed rezoning the property, which could only happen if the condominium association approved his tenant. The association never gave its approval, so

[3] Laches is a defense that may be used if there is no statute of limitations that applies. "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right ...."

the buyer eventually stopped paying his condominium assessments. After a judgment of foreclosure, he lost title to the space.

The buyer sued the broker and the broker's employer, for their alleged misrepresentation about the property's zoning. His lawsuit claimed fraud, negligent misrepresentation, and violations of the Illinois Consumer Fraud Act and Real Estate License Act. The trial court granted summary judgment on all claims in favor of the broker, ruling based on the element of reliance, that the buyer had no right to rely on the broker's misrepresentations, since they were misrepresentations of law, not fact. Upon appeal, the appellate court reversed the lower court's holdings.

The fraud and negligent misrepresentation claim turned on whether the broker's statements about zoning were representations of fact or law. Representations of law would mean that both parties had equal ability to know and interpret the zoning, and the buyer had no right to rely on the broker's statements, needing instead to use ordinary prudence to discover the true zoning of the building. Here, however, the court found that the buyer could not have discovered the actual zoning through reasonable prudence. The zoning maps were unclear and the broker himself could not determine the right zoning, choosing instead to assign it a nonexistent zoning designation. Thus, the court found that the broker made misrepresentations of fact that the buyer had a right to rely on; the court reversed and remanded the summary judgment on common law fraud and negligent misrepresentation. Additionally, the court found that neither the Consumer Fraud Act nor the Real Estate License Act required the element of reliance and thus reversed and remanded those decisions as well.

3. **Rosenthal v. JRHBW Realty, Inc.,** No. 1180718, 2020 WL 964322 (Ala., February 28, 2020)

A real estate agent had no duty to a buyer to retain a structural engineer to inspect home.

A buyer retained a brokerage through its "agent" Mr. Valekis to assist him in selling his residence and locating a new house to purchase. Valekis told the buyer about an unlisted property located at 4335 Cliff Road in Birmingham ("the home") that Valekis believed would meet buyer's needs. Valekis was aware that the owners of the home, David and Lori Cooper, had previously listed it for sale, and, when Valekis contacted them on buyer's behalf, the Coopers were still interested in selling the home. Around June 18, 2013, the buyer first viewed the home with Valekis along with his mother and stepfather. During that visit, he noticed a pile of rocks in the basement and some jacks. He "asked Valekis if he knew of any structural problems with the house because the underneath [--] just something didn't look quite right. [Valekis] said no. Then

we asked him about the jacks, and he said the [Coopers] had done work on the foundation of the house and now it's been taken care [of], so there are no longer any issues of structural problems."

The buyer told Valekis that he would not buy the home without having a structural engineer examine it. The buyer testified that on multiple occasions Valekis reassured him that Valekis would "take care of retaining and scheduling the structural engineer." Valekis, however, asserted that the buyer had not specified a structural engineer to inspect the home but had indicated that it was sufficient to have a foundation-repair contractor inspect the home. Valekis asked a foundation-repair contractor, Caudle, to inspect the home. He did not mention to the buyer that Caudle was not a structural engineer, that Caudle had seen problems with the foundation, or that Caudle recommended the home be inspected by a structural engineer. The buyer then placed an offer on the home based on Valekis's representation that a structural engineer had inspected the home and that he had not found any structural issues.

On June 29, 2013, the buyer and the sellers signed a Real Estate Sales Contract. The sales agreement clearly stated that the buyer had the responsibility to inspect the home and that he was purchasing the home in "As Is" condition. The same day, the buyer also executed a Buyer Agency Agreement, which contained a disclosure section stipulating that the buyer had the duty to inspect the home and that Valekis and the brokerage were not responsible or liable for any undetected conditions.

The buyer closed on the home and moved in soon after. After a few months, he concluded that the home was too small and again engaged the services of Valekis and his brokerage, to sell the home. After the home was placed on the market, the buyer began to notice major problems with the structure that also raised concerns with potential buyers such as cracks in the dining room next to the doorway, movement of a pillar on the deck, and the front steps shifting away from the main structure. Valekis subsequently informed the buyer that numerous potential buyers were concerned with the condition of the home. Ultimately, the buyer had the home inspected by a foundation-repair contractor, and that contractor recommended that he hire a structural engineer. The structural engineer concluded that the home was experiencing significant structural distress and settlement, estimating that fixing the issues would cost over $100,000.

The buyer brought action against Valekis and his brokerage based on multiple claims.[4] On appeal, the primary issue was whether Valekis was acting as the buyer's agent at the time he agreed to ask a structural engineer to view the home or if he had voluntarily assumed an entirely separate duty or implied contract with the buyer to find a structural engineer. The court

[4] The buyer brought additional claims not discussed in this summary, negligence and/or wantonness, and violations of the Real Estate Consumer's Agency and Disclosure Act (RECAD), which were claims that arose from dispute about disclosure of problems with the house's foundation.

determined that at the point Valekis agreed to find a structural engineer, was acting as a "transaction broker" under the Real Estate Consumer's Agency and Disclosure Act (RECAD) when he had a foundation-repair contractor, rather than a structural engineer, inspect the home prior to the signing of a written agreement between the home's purchaser and him Furthermore, prior to the signing of a written agreement with the home purchaser, Valekis had no duty to the purchaser to retain a structural engineer to inspect the home, even if the agent had not been either buyer's "transaction broker" under the RECAD or buyer's agent. Therefore, the agency agreement, which stated that Valekis and his brokerage had no duty to inspect could not be a basis for buyer's breach-of-contract action for failure to have a structural engineer inspect the home. The court affirmed summary judgment in favor of Valekis and his brokerage on the basis that their duties did not extend to inspecting the property.

B. Statutes and Regulations

Idaho

The amended statute[5] now requires that sales associates provide copies of signed brokerage agreements to the broker or broker's office prior to the end of the next business day after obtaining the agreement. Additionally, the sales associates must provide copies of any document signed by the buyer or seller to the broker or broker's office prior to the end of the next business day and copies must also be provided to the buyer and the seller.[6]

Designated broker responsibilities were expanded to include that they must maintain adequate, reasonable, and regular contact with sales associate engaged in real estate transactions, per the amended statute.[7] Additionally, designated brokers must be reasonably available to the public during business hours in order to discuss or resolve disputes.[8]

Wyoming

Responsible brokers are required to keep and maintain a full set of records of every real estate transaction for no less than two years. Before the amendment, the statute required keeping records for seven years.[9]

II. PROPERTY CONDITION DISCLOSURE

A. Cases

[5] Idaho Code Ann. § 54-2050 (2020) (as amended by H.B. No. 477)
[6] Idaho Code Ann. § 54-2051 (2020) (as amended by H.B. No. 477)
[7] Idaho Code Ann. § 54-2038 (2020) (as amended by H.B. No. 476)
[8] *Id.*
[9] Wyo. Stat. Ann. § 33–28–123 (2020) (as amended by H.B. 214)

The Property Condition Disclosure cases retrieved this quarter addressed property disclosure statements with regards to plumbing and sewer/septic systems that were identified after the properties were purchased. Property condition disclosure issues were identified in eleven cases.[10]

1. **Bynum v. Sampson,** No. W2019-00188-COA-R3-CV, 2020 WL 290840 (Tenn. App., January 1, 2020)

Sellers argued they were at a disadvantage in entering a contract because an experienced real estate professional drafted it.

Alexander Bynum, partnered with his father, Hal Bynum ("buyers"), to purchase Sharon Food Locker from sellers for $235,000. Sharon Food Locker was a slaughterhouse built in the 1970s. Hal provided the funds for the purchase. The buyers intended to keep the business going under the new name Southern Chop Shop, LLC. Alexander prepared the contract, which was executed on April 24, 2014. One year after the closing, the buyers discovered a pipe on the property that was gushing animal blood straight from the kill floor of the slaughterhouse into a ditch. Buyers contacted sellers who stated that the pipe was an "overflow pipe." The sellers suggested that the buyers pump the septic system and send them the bill. However, the problem proved hard to solve. The State became involved and demanded a halt to the discharge. When remedial efforts proved economically unfeasible, the buyers shut down the slaughterhouse in August 2016. Earlier, in July 2015, buyers sued the sellers alleging sellers breached the contract by certifying "the plumbing systems were in good working order on the day of closing when in fact they were not." In response, the sellers argued that they were at a disadvantage in entering the contract because Alexander was an experienced real estate professional who drafted the contract and used his business letterhead. They argued that the contract was one of "adhesion, a 'take it or leave it' contract."

The courts held that the plumbing system was not in "working order on the day of the closing." The plumbing system violated environmental and regulatory rules such that, if those violations were brought to light, the business would have to shut down. Therefore, the court found the sellers did breach the contract. Additionally, the court did not find that sellers were under any pressure to enter the contract drafted by Alexander. The court affirmed the judgment, awarding buyers rescission of the contract or $193,717, and $29,662.50 in attorney's fees.

2. **Scaramuzzo et al. v. Nutmeg Properties, LLC,** No.CV186014780S, 2020 WL 1028852 (Conn. Super., February 3, 2020)

[10] See Tables 1, 2 for a complete list of identified materials.

The buyers alleged that they were denied the opportunity to inspect septic system as a direct result of the defendants' misrepresentations.

On June 14, 2016, buyers purchased a residential property at 456 Kensington Avenue in Meriden, Connecticut. Buyers claim the property was sold to them based on the representation that it was hooked to public sewer systems in Meriden, but after purchase, they learned that it was not. The buyers alleged that they were denied the opportunity to inspect the existing failing septic system as a direct result of the defendants' misrepresentations. They claim the property was listed and advertised as being connected to the public sewer, and the seller's Residential Property Condition Disclosure represented the same. They brought suit against the seller and the seller's real estate brokerage company ("Defendants").[11] The buyers sought compensatory damages from both defendants including actual and consequential damages including costs, interest, expenses, and reasonable attorney's fees. They claim that they suffered "financial harm" from the defendants' conduct. The seller moved for summary judgment. The court heard oral argument and issued the decision to grant the summary judgment as to the negligent misrepresentation claim. All other counts against both defendants remain pending.

3. **Ramdin v. Israel et al.,** No. UWYCV196048297S, 2020 WL 1231095 (Conn. Super., February 14, 2020)

"A real estate broker shall exercise diligence at all times in obtaining and presenting accurate information in the broker's advertising and representations to the public."

The buyers purchased a residential property located in Watertown, Connecticut. They allege that prior to their purchase of the property, seller provided them with a seller's disclosure form in which he misrepresented that the property had a lead-free water system. As a result, the buyer sued seller along with seller's real estate broker ("Broker"), for breach of contract and negligence. In response to the breach of contract claim, the Broker filed a motion to strike on the grounds that the complaint failed to allege the existence of a contract between the buyers and Broker. As for the negligence claim, Broker also moved to strike for failure to allege that Broker made any specific representations regarding the condition of the water system.

During oral argument, the buyers asserted that Broker's duty and liability to them arose from the misrepresentation made by the seller in his statutorily mandated property disclosure form, which Broker delivered to them. In support of their position, the buyers relied on §20-328-5a of the Regulations of Connecticut State Agencies, entitled "Misrepresentation, disclosure and advertising." That section states, in pertinent part: "[a] real estate broker shall exercise diligence

[11] The buyers asserted several theories of liability against the two named defendants not discussed in this summary.

at all times in obtaining and presenting accurate information in the broker's advertising and representations to the public."

The court held that regardless of whether the regulation relied on by the buyers relates exclusively to the "broker's advertising, or whether the regulation relates more broadly to the broker's general duties to the public," the buyers' breach of contract and negligence claims are legally insufficient because they failed to allege that a contract existed between them and Broker, or that Broker made any specific representations to them regarding the condition of the water system. The court granted Broker's motion to strike.

B. Statutes and Regulations

Arkansas

An amended statute[12] now requires closing agents to disclose agricultural operations near real property located in a rural area.

North Dakota

A new statute was enacted relating to property disclosure requirements.[13]

III. RESPA

A. Cases

The RESPA cases retrieved this quarter examined kickbacks and unearned fees. RESPA issues were identified in four cases.[14]

1. **Baehr v. The Creig Northrop Team,** No. 19-1024, 2020 WL 1224415 (4th Cir., March 13, 2020)

Under RESPA, alleging deprivation of fair and impartial competition from a kickback scheme fails to establish actual damages.

Five years after closing on a home, homebuyers filed a putative class action against a real estate brokerage firm and a title company ("Defendants") alleging a kickback scheme that deprived home buyers of "impartial and fair competition between settlement services providers, in contravention of RESPA." Significantly, the homebuyers did not contend that they were overcharged in fees. The district court awarded Defendants summary judgment on the RESPA

[12] Ark. Code Ann. § 18–11–107 (2019) (as amended by S.B. 408)
[13] N.D.C.C. § 47–10 (2019) (as amended by H.B. 1251)
[14] See Tables 1, 2 for a complete list of identified materials.

issue ruling that the homebuyers lacked Article III standing to sue because they did not state an "injury-in-fact." Homebuyers appealed seeking treble damages and the court of appeals affirmed the lower court's holding.

Article III is the constitutional minimum of standing. At issue, in this case, was whether the homebuyers could properly allege the first element of Article III, injury-in-fact, when the presence of an alleged kickback scheme between a brokerage and a title company did not result in a tangible harm—only a deprivation of impartial and fair competition between settlement service providers. The court reasoned that RESPA's proscription against kickbacks is enforceable by federal agencies, state attorneys general, insurance commissioners, and private citizens; however, for private citizens, to the extent that fees charged were reasonable, the injury was a "statutory violation without a real world effect" and not a harm that congress enacted RESPA to prevent.

In regards to the three novel theories presented by the homebuyers, the court found that (1) the defendants did not have a fiduciary duty to homebuyers, thus there was no duty to return any kickbacks to the homebuyers and no basis for concrete injury, (2) claiming unjust enrichment on the part of the defendants is still insufficient to establish concrete injury, and (3) paying for services "in contravention of RESPA" is not a concrete injury when no clear harm existed other than a statutory violation of RESPA. The court vacated the summary judgment award and remanded with instructions to dismiss.

2. **Concepcion v. Ygrene, Inc.,** No. 19-cv-1465-BAS-MDD, 2020 WL 1493617 (S.D. Cal., March 27, 2020)

The homeowner alleged that the defendants received money for referrals of services related to the financing.

The homeowner, an 83-year-old single, Hispanic male suffering from the early stages of dementia, has a home in Oceanside, California. Because his fixed gross income of $3,034 per month was not enough to pay his mortgage, his mortgage servicer modified his loan to make his mortgage affordable. In 2016, a door-to-door salesperson "from Home Energy Solutions, aka Clearview" came to homeowner's home and "convinced him that he needed roof repairs and that his house needed to be painted, and that a government program would take care of it all." The homeowner agreed to sign up because he was told that the "energy saving improvements would pay for themselves over time" and that he qualified for the government program. In reality, the Property Assessed Clean Energy (PACE) loan raised his monthly mortgage payment to the point where he could not pay his servicer, resulting in a default on his payments. Furthermore, he received no energy savings from the home improvements. The homeowner lost his home to foreclosure and was in the process of being evicted.

The homeowner alleged that the Defendants received money for referrals of services related to financing, charged him for unnecessary services, and conspired to "up sell" him. He alleges Defendants violated RESPA through "the conspiratorial nature of the misdeeds" and "Defendants' general failure to properly advise him as to the roles and identities of the various entities that were handling financing at any given time." Defendants moved for dismissal of the RESPA claim because it was time-barred. The court found that the tolling of the RESPA limitations period until August 2017, when homeowner became aware of the violation, was appropriate. However, the court held that it was not clear whether PACE financing is considered a loan or federally related mortgage for the purpose of compliance with RESPA in the first place. The court dismissed the RESPA cause of action without prejudice.

3. **Rivera v. Bayview Loan Servicing, et al.,** No. 19-877, 2020 WL 1508328 (E.D. Pa., March 30, 2020)

A home buyer's assertions of emotional damages can meet the element of actual damages for a RESPA claim.

A homeowner took out a government-insured mortgage on her house in 2010, but fell behind on payments, leading the bank to begin foreclosure. In April 2015 while foreclosure proceedings were pending, Bayview Loan Servicing, one of the largest purchasers of defaulted government-issued loans, bought the homeowner's mortgage from the bank. Bayview and the homeowner negotiated an adjusted agreement on her mortgage, and Bayview was able to stop the foreclosure on the house. Just a few weeks after the foreclosure proceedings had ended, the homeowner due to unrelated matters had to file for bankruptcy, but she continued to make monthly mortgage payments to Bayview. For a year and a half, the homeowner did not receive any financial statements from Bayview. Then, in April 2018, she received a statement charging her a total of $28,279.60, which included $27,145.69 in "fees and charges."

The homeowner was confused and concerned so she sent Bayview a letter asking for an explanation pursuant to RESPA procedures. The homeowner's concern about these fees and charges aggravated her post-traumatic stress disorder (PTSD) and anxiety. Bayview responded mentioning foreclosure costs but the homeowner still wanted an explanation for $23,000 in "unspecified litigation costs and fees." After a second response that the $23,000 came from extensive bankruptcy litigation, the homeowner still felt unclear about many matters and believed the $23,000 in litigation and $3,000 in foreclosure costs were erroneous because her bankruptcy was largely unrelated to her mortgage and the only thing Bayview did was file one motion. She alleged that Bayview's responses were inadequate and part of a broader pattern of improper behavior.

The homeowner ultimately sued Bayview for several claims including a violation of RESPA.[15] Bayview filed a motion to dismiss for lack of actual damages which the court denied. Under RESPA, a mortgage servicer must respond to qualified written requests from the borrower. The service provider must give requested information and must clarify or correct any charges of error. In order to file a RESPA claim, a plaintiff must plead actual damages, which Bayview argued that the homeowner did not have, reasoning that her anxiety was likely due to the debt itself. However, the court held that the homeowner's claims of emotional distress, anxiety, and PTSD *could* have been due to Bayview's lack of proper explanations or failure to correct errors and was sufficient to establish actual damages in order to survive a motion to dismiss.

B. Statutes and Regulations

No statutory or regulatory changes relating to RESPA were located.

IV. EMPLOYMENT HIGHLIGHTS: YEARLY UPDATE

A. Cases

The employment topics of interest to real estate professionals cover a wide array of topics, such as independent contractors, personal assistants, wage and hour issues, and wrongful termination issues. The employment cases retrieved from April 2019 to April 2020 focused primarily on independent contractors. Over the past twelve months, employment issues were identified in six cases.[16]

1. **Essig v. Lai,** No. 78014-0-I, 444 P.3d 646, (Wash. App., July 8, 2019),

The Wage Rebate Act authorizes exemplary damages against an employer who fails to pay wages pursuant to a contract when the employee has not performed the actual work.

David Essig began working for the Rainier Valley Community Development Fund (CDF) in 2006. He managed the real estate investment portion of the fund to create revolving loans and attract development and funds to the Rainier Valley. Through his work with the CDF, Essig met Michael Lai who managed a real estate brokerage. Essig worked with Lai's firm on two successful loan transactions. Lai spoke to Essig about becoming a real estate agent, but Essig was not interested. In 2014 Essig and Lai began to talk about Essig working for Lai in a development capacity. Essig did not have the financial capacity to partner on large scale developments. Lai

[15] Homeowner also raised claims of the Fair Debt Collection Practices Act (FDCPA), the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). The homeowner also filed vicarious liability claims against Metropolitan Life, who bought the homeowner's mortgage from Bayview. The court ultimately dismissed the claims against Metropolitan Life.

[16] See Tables 3, 4 for a complete list of identified materials.

then asked Essig to consider working as a consultant or independent contractor, but Essig was not interested in working as an independent contractor. Essig stated that his interest was in working as a key employee to build the development organization. Lai asked Essig to draft a proposal for Essig to begin working for him. On May 29, 2015, Essig entered into an employment agreement with Lai and several business entities under Lai's control. Lai agreed to employ Essig for a minimum of two years, with an annual salary of $114,000, health and dental benefits for Essig and his spouse, an expense account, office space, office support, and a $5,000 signing bonus. Lai gave Essig a $5,000 check, which Essig successfully deposited. He resigned from the Rainier Valley Community Development Fund in reliance on the employment agreement.

Essig began performing his duties under the employment agreement on July 13, 2015. Over several weeks, he worked in the field reviewing projects, attending meetings and site visits with Lai, meeting with Lai, and engaging in phone, email, and text message communication with Lai regarding the business. On July 30, Essig emailed Lai requesting medical insurance and benefits for Essig and his wife, as provided in the employment agreement. On August 18, Essig sent Lai a letter demanding payment of his wages and benefits to that date. Essig continued to work for Lai until August 26. Throughout August, Lai suggested changes to the employment agreement, but did not deny the existence of the employment agreement or employment relationship. Lai continued to involve Essig in meetings, phone calls, and communications regarding the business. On August 27, Essig notified Lai that he considered Lai in breach, he was stopping work on Lai's behalf, and would seek other employment. Lai sent a text to Essig that Essig interpreted as an offer to work as an independent contractor. Essig engaged in efforts to find comparable replacement employment.

Essig brought suit against Lai for breach of employment contract. The court entered judgment and awarded damages for Essig, including exemplary damages under the Wage Rebate Act (the Act). Lai appealed. The court noted that the evidence showed that the position Lai offered to Essig was not the position they had agreed to in the employment contract. Furthermore, the court determined that the Essig's salary under the employment contract constituted wages under the Act and he did not fail to mitigate his damages. The Act authorizes exemplary damages against an employer who fails to pay wages pursuant to a contract when the employee has not performed the actual work. Therefore, the court affirmed the awards of $228,000 in lost wages, $228,000 in exemplary damages under the Act, $13,263 in medical benefits, $85,890 in attorney fees, and $708.28 in costs.

2. **Shapiro v. Sankarsingh**, No. 10525, 652282/18, 178 A.D.3d 484 (N.Y. App. Div., December 10, 2019)

Real estate broker allowed to enforce the arbitration provision in a policy manual.

Independent contractor (contractor) brought action against a licensed real estate broker, based on alleged oral agreement concerning commissions. Contractor signed a form acknowledging receipt of the brokerage policy manual and that she was obligated to follow the corporate policies and rules. The policy manual included an arbitration clause requiring "any disputes between [brokerage] Agents relating to commissions" to be resolved through the company's internal arbitration procedures and imposing a six-month limitations period. The real estate broker moved to dismiss the complaint citing those policy manual provisions. The court held that by signing the form, the contractor agreed to be bound by the terms of the brokerage policy manual, including the arbitration provision. Although the real estate broker is not a signatory to the arbitration agreement in the brokerage policy manual, she can enforce it as a third-party beneficiary. The court granted the real estate broker's motion to dismiss and ordered a resolution by arbitration.

3. **Altick v. Hernandez,** No. E069644, 2019 WL 1498210, (Cal. App, April 5, 2019)

The arbitrator examined property sale transactional documents and found that none of the documents identified Altick as the listing agent.

In January 2013, the father of Mary Altick (Altick) died and left in his family trust real property, a residence, in Northern California (the Property). In 2015, Altick was living in the Property. After Altick obtained her real estate license in 2015, she wanted to sell the property and move to Southern California. She was referred to Hernandez, a Southern California licensed real estate broker. On September 1, 2015, Hernandez and Altick entered into an independent contractor agreement, which named Hernandez as broker and Altick as associate licensee. Pursuant to the agreement, Altick agreed to use her best efforts to sell, exchange, lease, or rent properties listed with Hernandez; solicit additional listings, clients, and customers; and otherwise promote the business of serving the public in real estate transactions such that both Hernandez and Altick might derive the greatest benefit possible. Under paragraphs 8.A. and 8.B. of the agreement, if Hernandez's brokerage represented one side of any property sales transaction in which Altick was the procuring cause, Hernandez was entitled to receive one-third of the commission, and Altick was entitled to receive two-thirds of the commission. One week after Altick and Hernandez executed their independent contractor agreement, Altick, as trustor of the family trust, signed an exclusive listing contract to sell the Property with Hernandez's brokerage. The Property was listed in the multiple listing service (MLS) and the listing was paid for by Altick. In February 2016, the Property sold, and escrow closed. When Altick discovered that the entire $32,725 sales commission was to be paid to Hernandez, Altick initiated binding arbitration to resolve the commission dispute.

During the arbitration hearing, Altick testified that Hernandez agreed to mentor her during her first sales transaction, and pursuant to their independent contractor agreement, Altick expected a sales commission. Altick paid for the Property's MLS listing, which initially stated "'owner is co-listing agent.'" At some point after signing the initial listing agreement, Altick's name was removed entirely from the Property's MLS listing information. Altick held numerous open houses and broker tours, made a flyer identifying herself as the sales agent, and paid for the Property's advertising and staging expenses. Hernandez never saw the Property but handled all sales negotiations. When Altick questioned Hernandez about receiving payment of her share of the commission, Hernandez explained that he was being paid the entire sales commission because he had to first pay the taxes on the income. He later tried to convince Altick to change the agreed upon share of the commission.

The arbitrator examined the Property's sale transactional documents and found that none of the documents identified Altick as the listing agent. Nevertheless, the arbitrator considered whether Altick was entitled to receive a commission under paragraph 8 of the independent contractor agreement. The arbitrator concluded that Altick was the "procuring cause," of the transaction and rendered a final binding arbitration award finding that Altick was entitled to her share of the commission for the sale of the property. Altick filed a petition to confirm the binding arbitration award in the trial court. Hernandez opposed and requested the court to issue an order vacating the arbitration award. The Court ruled that the request to vacate the arbitration award was untimely. The court granted Altick's petition to confirm the binding arbitration award and entered judgment in favor of Altick. Hernandez filed a separate petition to vacate the arbitration award and set aside the judgment. The court ruled the petition was untimely, but ultimately considered the merits of Hernandez's petition. However, they denied his petition to vacate the binding arbitration award because he failed to show the arbitration award was procured by fraud. The arbitration award of $51,887 for Altick was upheld.

B. Statutes and Regulations

No statutory or regulatory changes relating to Employment were located.

V. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 3 Agency cases reviewed this quarter, and the real estate professional was not liable in any of those cases (*see* Table 4).

B. Property Condition Disclosure Cases

Liability was determined in 3 Property Condition Disclosure cases reviewed this quarter, and the real estate professional was not liable in any of those cases (*see* Table 4).

C. RESPA Cases

None of the RESPA cases reviewed this quarter determined the liability of a real estate professional. (*see* Table 4).

D. Employment Cases

Liability was determined in two employment case retrieved over the past twelve months; the defendants were held liable in 1[17]of those cases (see Table 5).

VI. TABLES

Table 1.

Volume of Items Retrieved for First Quarter 2020 by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	11	4	0
Property Condition Disclosure	11	2	0
RESPA	4	0	0

Table 2.

Volume of Items Retrieved for First Quarter 2020 by Issue

Issue	Cases	Statutes	Regulations
Agency: Dual Agency	1	0	0
Agency: Buyer Representation	3	0	0
Agency: Designated Agency	0	0	0
Agency: Transactional Agency	0	0	0

[17] *Altick v. Hernandez*, No. E069644, 2019 WL 1498210, (Cal. App, April 5, 2019)($51,887).

Agency: Subagency	0	0	0
Agency: Disclosure of Confidential Info.	0	0	0
Agency: Vicarious Liability	0	0	0
Agency: Breach of Fiduciary Duty	4	0	0
Agency: Disclosure of Financial Ability	0	0	0
Agency: Agency Disclosure	0	0	0
Agency: Minimum Service Agreement	0	0	0
Agency: Pre-listing	0	0	0
Agency: Teams	0	0	0
Agency: Coming Soon Listings	0	0	0
Agency: Other	7	0	0
Property Condition Disclosure: Structural Defects	1	0	0
Property Condition Disclosure: Sewer/Septic	2	0	0
Property Condition Disclosure: Radon	0	0	0
Property Condition Disclosure: Asbestos	0	0	0
Property Condition Disclosure: Lead-based Paint	0	0	0
Property Condition Disclosure: Mold and Water Intrusion	1	0	0
Property Condition Disclosure: Roof	1	0	0
Property Condition Disclosure: Stucco	0	0	0
Property Condition Disclosure: Flooring/Walls	0	0	0
Property Condition Disclosure: Imported Drywall	0	0	0

Property Condition Disclosure: Plumbing	2	0	0
Property Condition Disclosure: HVAC	0	0	0
Property Condition Disclosure: Electrical	0	0	0
Property Condition Disclosure: Valuation	0	0	0
Property Condition Disclosure: Short Sales	0	0	0
Property Condition Disclosure: REOs	0	0	0
Property Condition Disclosure: Insects/Vermin	1	0	0
Property Condition Disclosure: Boundaries	0	0	0
Property Condition Disclosure: Zoning	0	0	0
Property Condition Disclosure: Off-site Adverse Conditions	0	0	0
Property Condition Disclosure: Meth Labs	0	0	0
Property Condition Disclosure: Stigmatized Property	0	0	0
Property Condition Disclosure: Megan's Laws	0	0	0
Property Condition Disclosure: Underground Storage Tank	0	0	0
Property Condition Disclosure: Electromagnetic	0	0	0
Property Condition Disclosure: Pollution/Env't'l Other	0	0	0
Property Condition Disclosure: Other	3	0	0
RESPA: Disclosure of Settlement Costs	0	0	0
RESPA: Kickbacks	3	0	0

RESPA: Affiliated Business Arrangements	0	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	1	0	0

Table 3

Liability Data for First Quarter 2020

Major Topic	Liable	Not Liable	% Liable	% Not Liable
Agency	0	3	N/A	100%
Property Condition Disclosure	0	3	N/A	100%
RESPA	0	0	N/A	N/A

Table 4

Volume of Employment Items Retrieved in Past Twelve Months (April 2019-April 2020)

Major Topic	Cases	Statutes	Regulations
Employment: Wrongful Termination (cases only)	0	N/A	N/A
Employment: Personal Assistants	0	0	0
Employment: Independent Contractors	5	0	0
Employment: Wage and Hour Issues (cases only)	1	N/A	N/A

Table 5

Liability Data for Employment Cases in the Past Twelve Months (April 2019-April 2020)

Topic	Liable	Not Liable	% Liable	% Not Liable
Employment	1	1	50%	50%