



LEGAL PULSE NEWSLETTER: FIRST QUARTER 2017

Welcome to the Legal Pulse Newsletter, where we examine legal liability trends affecting real estate professionals. We review recent decisions and legislative activity from the first quarter of 2017 in the areas of Agency, Property Condition Disclosure, and RESPA. In this edition, we also review Employment case decisions and legislative activity from the past twelve months.

This quarter, Agency cases raised a variety of issues. The most common issue was breach of fiduciary duty, but dual agency, buyer representation, and other issues were also considered. In one case, the Michigan Court of Appeals reaffirmed that professional malpractice claims against real estate professionals are not recognized in the state of Michigan. On the legislative front, a number of amended statutes and regulations modified requirements for licensee advertising. Several states issued statutes or regulations requiring licensees to include the broker name and/or address on all ads or promotional materials, with two of the states requiring this information to be “clearly and conspicuously” stated. Also, at a time when many states have issued special rules regarding team advertising, Utah modified its rules to eliminate special advertising requirements for teams, stating that teams are subject to the same advertising rules as other licensees.

Structural defects and mold/water intrusion issues continue to be popular topics in the Property Condition Disclosure cases. These cases covered familiar territory, such as the generally recognized rule that, absent an effort to actively conceal known information, a seller’s representative is not under a duty to disclose anything to the buyer when dealing with the buyer at arms-length. A buyer’s representative is also not liable to the buyers unless the buyers can show actual knowledge on behalf of the licensee. With respect to legislative activity, two states adopted new disclosure requirements. In Montana, a new disclosure requirement relates specifically to buyer’s representatives. A buyer’s representative must inform the seller when the representative has no personal knowledge of the veracity of information regarding adverse material facts concerning “the ability of the buyer to perform on any purchase offer.”

On the RESPA front, courts remain interested in alleged kickback schemes. Many of these cases are dismissed at an early stage due to the statute of limitations or the plaintiff’s failure to provide sufficient evidence. In one case this quarter, however, the court allowed the

plaintiffs an opportunity to amend their complaint to allege an ongoing lender violation, which may allow the plaintiffs to stay within the time limit for their case where they are challenging a captive reinsurance scheme created by the lenders.

In the first quarter, we also reviewed decisions in the Employment context from this past year. Most of these cases examined independent contractor issues. In a California case, the court determined that a clause in an independent contractor agreement stating that the broker was licensed in California implied that the broker committed to compliance with state regulations for licensed brokers. Also last quarter, several state regulations dealt with independent contractor and personal assistant issues.

For the details, read the summaries below, and check out the tables showing cases and liability figures to learn more about recent trends in real estate law.

I. AGENCY

Three agency cases from this quarter address several different issues. In the first case, the court considered whether a broker who represented the buyer of the property had also entered into an agency relationship with the seller of a property. In the second case, the court determined that the licensee could be held liable for his refusal to submit a rental listing for a property in direct violation of the client's request. This case also affirmed that Michigan does not recognize a cause of action for professional malpractice against real estate professionals. The third case examined whether a licensee in the same firm as the dual agent can be held liable for an alleged breach of the dual agency agreement even though that licensee was not named in the agreement.

A. Cases

1. **Leonardo Harper LLC v. Landmark Commercial Real Estate Services, Inc.**, No. 329338, 2017 WL 1103534 (Mich. Ct. App. March 21, 2017)

Broker was not liable to the seller because broker did not enter an agency relationship with the seller.

A broker representing a national retail chain entered into an agreement with a landowner indicating that the broker had procured the retailer as a prospective tenant for the land. The

broker also provided the landowner with a copy of the store's typical layout plans. After the landowner's architect concluded that the store could not fit on the land, the broker introduced the landowner to an interested buyer, who ultimately purchased the property.

The landowner claimed that the broker made misrepresentations about the retailer's leasing requirements in order to induce the landowner to sell to the buyer, so that the buyer could benefit from a lease of the property to the retailer. The landowner brought an action against the broker for fraud, breach of fiduciary duty, tortious interference, and civil conspiracy. The broker moved to dismiss the case arguing that he never entered into an agency relationship with the landowner. The trial court granted the motion, finding there was no evidence that the broker held himself out as the landowner's representative.

The appellate court found that the broker acted on behalf of the buyer, and his actions were consistent with his role as a buyer's representative. The commission and purchase agreements stated that the broker and his employer represented the retail store and buyer. There was no evidence that the landowner had control over the broker, that the broker had authority to bind the landowner, or was otherwise acting as the landowner's representative. Judgment for the broker was affirmed.

2. **Schwartz v. Real Estate One, Inc.**, No. 328727, 2017 WL 378749 (Mich. Ct. App. Jan. 26, 2017)

Listing broker could be liable for failing to submit a rental listing for the seller's home, and for failing to inform the seller that the listing had not been made.

A home seller entered into an exclusive listing agreement with the defendant broker. After the home was listed for sale, the seller instructed the broker to post a rental listing for the property in order to receive accelerated rent from the existing, vacating tenants. However, the broker failed to submit a rental listing and failed to tell the seller that he did not do so. The seller brought claims against the broker for breach of fiduciary duty, breach of contract, fraud, violation of the Consumer Protection Act, and negligence. The trial court granted summary judgment in favor of the broker.

On appeal, the appellate court reversed summary judgment on all of the claims except for professional malpractice. The appellate court noted that because the broker was in a fiduciary relationship with the seller, the broker owed duties of disclosure, care, loyalty, and fidelity to the seller. The seller sufficiently alleged claims for negligence and breach of fiduciary duty based on the representative's failure to list the property and the failure to disclose that the representative refused to submit the rental listing. Furthermore, the listing agreement provided for the sale and lease of the property. Therefore, the seller properly stated a claim for breach of contract based on the representative's failure to create the rental listing.

There was also some evidence that the defendants may have made a misrepresentation regarding the fair market rental value of the home, allowing the fraud claim to proceed. With respect to the professional malpractice claim, the appellate court affirmed summary judgment for the broker because malpractice claims against real estate brokers and licensees are not recognized in Michigan.

3. **Szynkowicz v. Bonaiuto-O'Hara**, 170 Conn. App. 213 (Jan. 10, 2017)

Licensee who worked closely with dual agent, but who was not a party to a dual agency agreement, was not liable to purchaser.

The purchaser and seller of a property entered into a dual agency agreement with Hanley, who was a colleague of the defendant licensee. The purchaser and seller entered into a contract for development of the property, which was later cancelled due to the seller's inability to complete construction. The purchaser brought claims for breach of the implied covenant of good faith and fair dealing, fraudulent representations, violation of oral agreement, and violation of the Connecticut Unfair Trade Practices Act against the defendant. The purchaser alleges that the defendant licensee knew or should have known that the seller was having financial difficulties, should have disclosed that information to the purchaser. The trial court granted summary judgment for the defendant licensee.

The appellate court agreed with the trial court's conclusion that there was no contractual relationship between the purchaser and licensee to support liability on the contract-based claims. The agreement named only Hanley as the dual agent; the defendant licensee was not named in the agreement and the defendant did not sign the agreement. Even if the purchaser believed that the defendant licensee represented him, the dual agency agreement did not bind, or even mention, the defendant. The remaining claims were barred by the statute of limitations. The appellate court affirmed summary judgment for the defendant licensee.

B. Statutes and Regulations

Idaho

Idaho added the words “clearly and conspicuously” to its statute regarding licensee advertising. Effective July 1, 2017, all advertising of listed property and all advertising by licensed branch offices must clearly and conspicuously contain the broker’s licensed business name.¹

Montana

Under a statutory amendment, it is considered unprofessional conduct for a salesperson to represent or attempt to represent a real estate broker other than the salesperson’s supervising broker without the knowledge or consent of the employer.² Also, neither a broker nor a salesperson may negotiate a transaction directly with a seller or buyer if they know the seller or buyer has a written listing agreement or buyer broker agreement granting exclusive agency to another broker.³ Under another amendment, the supervising broker’s name and address must be indicated on the salesperson’s license; the statute previously required only the supervising broker’s address.⁴

Utah

Utah amended the statute regarding broker designations. The statute defines a “branch broker” as an associate broker who manages a principal broker’s branch office under the supervision of the principal broker.⁵ A “dual broker” is defined as a principal broker of a real estate sales brokerage who obtains a dual broker license to function as principal broker of a property management company that is separate from the real estate brokerage.⁶ A principal broker may simultaneously supervise one main office and up to two branch offices, and a branch broker may simultaneously supervise up to three branch offices.⁷ A sales representative affiliated with a dual broker may act as a property management sales representative if the dual broker designates the sales representative as a property management sales representative.⁸ A property management sales representative may simultaneously provide both property management services and real estate sales services under the supervision of a dual broker.⁹

The Utah Division of Real Estate issued modified regulations regarding real estate advertising. The regulations amend the definition of advertising to mean a “commercial message” (instead

¹ [Idaho Code § 54-2053 \(2017\)](#) (effective July 1, 2017).

² [Mont. Code Ann. § 37-51-321 \(2017\)](#).

³ *Id.*

⁴ [Mont. Code Ann. § 37-51-308 \(2017\)](#).

⁵ [Utah Code Ann. § 61-2f-102 \(2017\)](#).

⁶ *Id.*

⁷ [Utah Code Ann. § 61-2f-206 \(2017\)](#).

⁸ *Id.*

⁹ *Id.*

of a solicitation) communicated through various forms of media, including electronic communication.¹⁰ The modified regulations maintain the requirement that advertising clearly and conspicuously identify the brokerage firm, but eliminate the previous font size requirements.¹¹ If it is not reasonable for a licensee to identify the name of the brokerage firm in an electronic advertisement, the licensee must ensure the electronic advertisement directly links to a display that clearly and conspicuously identifies the broker.¹² The licensee need not identify the broker if the licensee advertises a property that is not currently listed with the brokerage with which the licensee is affiliated.¹³ The amended regulations also remove the special team advertising rules and state that teams are subject to the same advertising restrictions as individual licensees.¹⁴

Wyoming

Wyoming amended its statute to require licensees, beginning July 1, 2017, to provide the real estate company name under which they are licensed when “promoting” themselves “as a licensee.”¹⁵ All promotional materials must include the real estate company name.¹⁶ Another statutory amendment, also effective July 1, 2017, requires licensees to provide all customers with an agency disclosure.¹⁷ If a buyer or seller refuses to sign the relationship disclosure presented by the licensee, the licensee may document the refusal with an acknowledgement signed by the licensee.¹⁸ The licensee may continue with the transaction and the disclosure and the acknowledgement must be attached to any written agreements with the buyer or seller.¹⁹

Other statutory changes address broker and licensee responsibilities in real estate transactions. An associate broker or salesperson may not engage in a real estate activity representing a real estate company other than the company under which the salesperson is licensed.²⁰ Responsible brokers must disclose, in every real estate transaction, the names of all real estate companies for which the broker holds a license.²¹ If the responsible broker is representing a buyer or seller in a transaction involving two or more companies the responsible broker manages, the broker must appoint a transaction manager for each real estate company, unless the other licensee is an associate broker.²²

¹⁰ [Utah Admin. Code R. 162-2f-102 \(2017\)](#).

¹¹ [Utah Admin. Code R. 162-2f-401h \(2017\)](#).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ [Wyo. Stat. Ann. § 33-28-119 \(2017\)](#).

¹⁶ *Id.*

¹⁷ [Wyo. Stat. Ann. § 33-28-310 \(2017\)](#).

¹⁸ [Wyo. Stat. Ann. § 33-28-306 \(2017\)](#).

¹⁹ *Id.*

²⁰ [Wyo. Stat. Ann. § 33-28-111 \(2017\)](#).

²¹ *Id.*

²² [Wyo. Stat. Ann. § 33-28-302 \(2017\)](#).

C. Volume of Materials Retrieved

Agency issues were identified 8 times in 7 cases (see Tables 1, 2). Breach of Fiduciary Duty was the most commonly raised issue, while Dual Agency and Buyer Representation issues were also addressed in cases this quarter. Eleven Agency statutes and two regulations were retrieved this quarter (see Table 1).

II. **PROPERTY CONDITION DISCLOSURE**

Two of the following cases consider the extent to which the seller's representative may be liable to the purchaser of the property. In both of those cases, the courts concluded that the representative did not owe a duty to the purchaser of the property, absent an effort by the representative to actively conceal or work with the sellers to conceal a problem with the property. Two of these cases also addressed claims against the licensee who assisted the purchasers in the transaction. In all of the cases, the court held that the real estate representatives were not liable to the purchasers.

A. Cases

1. **Gallagher v. Ruzzine**, 147 A.D.3d 1456 (N.Y. App. Div. Feb. 3, 2017)

Neither seller's nor buyer's representative was liable for failing to disclose alleged defects.

After moving into their new home, purchasers discovered cracks in the walls and water leaking into the basement. The house also "popped," which caused cracks in the basement walls, the fireplace to pull away from the wall, and the front porch to pull away from the house. The purchasers sued the seller, seller's representative, purchaser's representative, and the prior owners of the property for various claims, including fraud, breach of contract, gross negligence, and breach of fiduciary duty. The trial court granted summary judgment in favor of the defendants.

On appeal, the court stated that the seller's representative does not represent the interests of the buyer. New York law does not impose a duty on the seller's representative to disclose

anything when dealing with the buyer at arms-length, unless the representative is actively concealing information. The court concluded there was no evidence of concealment or intentional or reckless conduct on behalf of seller's representative. With respect to the purchaser's representative, the court found that the representative did not have a duty to investigate unknown facts, and had no actual knowledge of the alleged defects. The claims against the sellers and prior owners of the property also failed. The appellate court affirmed summary judgment in favor of the defendants.

2. **Haynes v. Lunsford**, No. E2015-01686-COA-R3-CV, 2017 WL 446987 (Tenn. Ct. App. Feb. 2, 2017)

A licensee was not liable for failing to disclose mold or for misrepresenting the age of a cabin when the licensee did not have actual knowledge of these issues.

The purchasers of a cabin sued the seller and the real estate licensee and broker who assisted the purchasers in the transaction for allegedly misrepresenting the age and history of the cabin and failing to disclose a mold problem. The purchasers alleged that the licensee and broker should have known that the property was not new or recently built because the property sat vacant for an extended period of time, a fact which was common knowledge in the community. The purchasers brought claims for fraudulent misrepresentation, breach of the duty to disclose, and violation of the Consumer Protection Act. The trial court entered summary judgment in favor of the licensee and broker.

The appellate court agreed that the real estate licensee and broker were not liable to the purchasers. According to the court, the purchasers had the same information about the property as that provided to the licensee. Although the extended vacantness of the property was common knowledge in the community, that fact did not establish that the licensee had actual knowledge of the vacantness. The licensee does not need to undertake an independent investigation of the property. Therefore, the licensee did not violate the duty to disclose information to the purchaser. The court affirmed summary judgment for the licensee and broker.

3. **Zuberi v. Hirezi**, No. 1:16-CV-1077, 2017 WL 436278 (E.D. Va. Jan. 30, 2017)

Seller's real estate representatives did not owe a duty to the buyer of property under the real estate licensing laws.

Home purchasers claim that the sellers, a contractor hired by the sellers, and the listing broker concealed structural defects with the foundation and plumbing defects in the home. The purchasers asserted claims for fraud, fraudulent concealment, negligence, and civil conspiracy against the real estate defendants. The purchasers allege that the sellers concealed structural problems with cosmetic fixes.

The court determined there was no misrepresentation based on the listing information. The listing described the home as fully renovated and updated. This description did not constitute an actionable misrepresentation that all known defects had been repaired and that no additional repairs were needed, as the purchasers suggested. Also, the buyers inspected the property and the inspection identified a long list of needed repairs. The negligence claim also failed because the seller's real estate representative does not owe an actionable duty to the buyer under the real estate licensing laws. Finally, there was no indication that the real estate representative worked with the sellers to deceive the buyers. The court granted the real estate defendants' motion to dismiss the claims against them.

B. **Statutes and Regulations**

Mississippi

The Mississippi Real Estate Commission issued a revised Property Condition Disclosure Statement.²³

Montana

Montana amended the statute regarding buyer's representative responsibilities. A buyer's representative must disclose to the seller when the representative has no personal knowledge of the veracity of information regarding adverse material facts concerning "the ability of the buyer to perform on any purchase offer."²⁴

²³ Mississippi Real Estate Commission, [Property Condition Disclosure Statement](#).

²⁴ [Mont. Code Ann. § 37-51-313 \(2017\)](#).

Virginia

Virginia amended its statute setting forth the disclosures to be provided by the seller of property. The revised statute notes that sellers must provide a residential property disclosure statement “for the buyer to beware of certain matters that may affect the buyer’s decision to purchase such real property.”²⁵ The statute also clarifies that the seller makes no representations with respect to whether the property is subject to conservation or other easements, or whether the property is subject to a community development authority approved by a local governing body.²⁶ Purchasers are advised to undertake due diligence with respect to these issues, including determining if a resolution or ordinance has been recorded in the land records for the locality.²⁷ A new statute requires property owners to disclose to the purchasers if the owner has actual knowledge of any pending enforcement actions that affect the “safe, decent, sanitary living conditions” of the property of which the owner has been notified in writing.²⁸ A property owner must also disclose any pending violation of a local zoning ordinance that the violator has not abated or remedied.²⁹

C. Volume of Materials Retrieved

Property Condition Disclosure issues were identified 6 times in 3 cases (*see* Tables 1 and 2). The cases addressed Structural Defects, Mold and Water Intrusion, Plumbing, and Other Issues. Two statutes and two regulations regarding Property Condition Disclosure issues were retrieved this quarter (*see* Table 1).

III. RESPA

This quarter, the cases involved allegations of alleged kickback or misleading payment schemes similar to those encountered in previous cases. In one case, the court permitted the plaintiffs to amend their complaint in an effort to avoid the statute of limitations on a claim alleging an improper captive reinsurance scheme.

²⁵ [Va. Code Ann. § 55-519 \(2017\)](#).

²⁶ *Id.*

²⁷ *Id.*

²⁸ [Va. Code Ann. § 55-519.2:1 \(2017\)](#).

²⁹ *Id.*

A. Cases

1. **White v. PNC Financial Services Group, Inc.**, No. 11-7928, 2017 WL 85378 (E.D. Pa. Jan. 10, 2017)

RESPA claim alleging improper captive reinsurance scheme was allowed to proceed.

Homeowners brought a class action suit against insurers, lenders, and reinsurers alleging RESPA violations. The homeowners allege that the defendants engaged in a captive reinsurance scheme by creating subsidiary companies to serve as reinsurers. The lenders refer homeowners to the insurers, who then use the captive reinsurers owned by the lender, whom the homeowners assert are really just an extension of the lenders. The borrowers allege this scheme violated RESPA because the defendants gave kickbacks, the reinsurers did not assume any real risk, and the reinsurers did not actually perform any real services.

In a prior decision, the court granted the defendants' motion to dismiss because the claims were barred by the statute of limitations. In this decision, the court considered the homeowners' motion to amend their complaint to allege continuing violations on behalf of the defendants. Under the continuing violations doctrine, the statute of limitations on a RESPA claim does not run until the date of the most recent RESPA violation. Thus, if the borrowers could establish continuing violations, the borrowers claim could proceed against the lenders. The court granted the borrower's motion to amend their complaint.

2. **Kelmetis v. Federal National Mortgage Association**, No. 1:16-CV-00246, 2017 WL 395120 (N.D.N.Y. Jan. 27, 2017)

Claim alleging that mortgage lender accepted charges for the rendering of services which were not actually performed was brought too late.

The borrower/homeowner alleged that a mortgage lender violated RESPA by accepting charges for the rendering of services which were other than for services actually performed. The claim was barred by the one-year statute of limitations because it was filed more than ten years after origination of the loan. The trial court granted the lender's motion to dismiss.

3. **Lavine v. Aames Funding Corp.**, No. 3:16-CV-01489-MO, 2017 WL 944216 (D. Or. March 9, 2017)

A RESPA claim was dismissed because the complaint did not identify misleading payments.

The borrower alleges that the lenders violated RESPA by making payments between them that were misleading and designed to create a windfall. Because the borrower failed to identify the specific actions by the defendants giving rise to the claim, the borrower failed to properly state a claim against the lender. The court granted the defendants' motion to dismiss.

B. Statutes and Regulations

No RESPA statutes or regulations were retrieved this quarter.

C. Volume of Materials Retrieved

RESPA issues were identified 5 times in 4 cases (see Tables 1, 2).

IV. EMPLOYMENT HIGHLIGHTS: YEARLY UPDATE

A. Cases

All three of the cases discussed below deal with independent contractor issues. This past quarter, a case from Connecticut concluded that a licensee retained to assist in the resale of a foreclosed property was an independent contractor, and not an employee of the broker. In a California case decided late last year, the appellate court concluded that a provision in an independent contractor agreement stating that the broker was licensed in California imposed a duty on the broker to comply with the state's regulatory requirements.

1. **Mendez v. J.P. Morgan Chase Bank, N.A.**, No. X04HHDCV146049524S, 2017 WL 9510321 (Conn. Super. Ct. Feb. 1, 2017)

A licensee who was retained to assist a broker in the resale of foreclosed property was an independent contractor of the broker.

Following foreclosure, the homeowner alleged that various defendants, including the real estate broker retained by Fannie Mae to list the property for resale and the licensee retained to assist the broker, wrongfully removed and disposed of the homeowner's personal property. The homeowner brought claims for negligence, trespass, conversion, civil theft and violation of the Connecticut Unfair Trade Practices Act.

After trial, the jury returned a verdict in favor of the homeowner on its negligence claim against the lender, but otherwise entered verdicts in favor of the defendants, including the real estate broker and licensee. The homeowner moved to set aside the verdict on several grounds. The homeowner argued that the jury's finding that the licensee was an independent contractor, not an employee, of Fannie Mae, was erroneous.

The court declined to set aside the jury's finding that the licensee was an independent contractor. Although there was contradictory evidence regarding the extent to which Fannie Mae controlled the licensee's work, the court found there was sufficient evidence to conclude that the licensee was an independent contractor, rather than an agent, of Fannie Mae. The court denied the plaintiff's motion to set aside the verdict in its entirety.

2. **Thompson v. Asimos**, No. A140096, 2016 WL 7243521 (Cal. Ct. App. Dec. 15, 2016)

Independent contractor agreement stating that a broker was licensed by the state implied a promise to comply with the laws governing licensed real estate brokers in that state.

The plaintiff is the owner of a consulting firm that advises clients regarding colocation (a data center facility in which a business can rent space for servers or other computing hardware or infrastructure). Some of the services provided by the plaintiff's business required his company to have a real estate broker license. Because the plaintiff did not have a broker license, he collaborated with the defendant who was licensed as a real estate broker in California, and the parties entered into an independent contractor agreement. After a dispute arose between the parties, the plaintiff sued the broker for unfair competition, trademark infringement, and breach of contract. Among other things, the plaintiff argued that the defendant failed to register the consulting business with the state real estate commission. Following a bench trial, the trial court found in favor of the plaintiff.

On appeal, the broker challenged several findings made by the trial court on the breach of contract claim. Specifically, the trial court had determined that a statement in the independent contractor agreement indicating that the defendant was licensed as a broker by the state of California implied a promise by the broker that he would comply with the regulations governing real estate brokers in the state. The broker argued that this statement merely required him to maintain his status as a licensed real estate broker, but did not imply any additional duties. The appellate court agreed with the trial court, finding that the broker's interpretation of the contract would give him little to no contractual obligations. Although it found the contract terms to be ambiguous, the appellate court concluded that it was a reasonable interpretation to imply that the broker contractually committed to "comply with the statutes and regulations which regulate the activities of licensed real estate brokers." The appellate court affirmed judgment in favor of the plaintiff, but remanded the case for a new determination of damages.

3. **Kology v. MySpace NYC Corp.**, No. 15-CV-3061, 2016 WL 1402894 (E.D.N.Y. April 11, 2016)

A real estate representative was an employee of real estate brokerage firm, even though her compensation was not paid directly to her, but to a corporation owned by the representative.

The plaintiff was a real estate representative and manager at MySpace NYC, a real estate brokerage firm, for five years. The plaintiff signed a contract detailing her salary, commission, holidays, vacation, and sick leave, and she also signed a non-compete agreement. Two years after commencing employment at MySpace, the plaintiff formed Atlantis 94 Corp., a corporation of which she was the sole shareholder and employee, and which was created for the purpose of receiving payment for the plaintiff's services to MySpace. After Atlantis was created, My Space paid Atlantis for the plaintiff's services. The plaintiff later sued MySpace for employment discrimination. MySpace moved to dismiss the claim on the ground that the plaintiff was not an employee of MySpace because MySpace paid the plaintiff's corporation rather than her.

In this decision, the court concluded that the plaintiff was an employee of MySpace. MySpace set her schedule, dictated her responsibilities, and controlled the manner in which she carried out her duties. When the plaintiff formed the Atlantis business two years into the employment relationship, these features of the relationship did not change; it was a change in form, not substance. The court denied MySpace's motion to dismiss.

B. Statutes and Regulations

New Mexico

Under an amended regulation, a qualifying broker must maintain a written employment or independent contractor agreement with all persons affiliated with the brokerage, including brokers and brokerage owners.³⁰ Under a related rule, all business entities engaged in real estate brokerage in New Mexico (unless excepted by statute), must employ or enter into an independent contractor agreement with a qualifying broker in order to qualify the entity to engage in real estate brokerage in the state.³¹

Oregon

The Oregon Real Estate Agency issued Unlicensed Assistant Guidelines in 2016. Unlicensed assistants may provide information that is contained in advertisements, may follow up on completion of contingency requirements for transactions, check on the status of financing, check with the escrow company, schedule or confirm appointments, and prepare advertising copy for review.³² Unlicensed assistants may not show houses, hold open houses, give instructions to inspectors, appraisers, or repair persons, engage in negotiations, or engage in marketing.³³

Wisconsin

In Wisconsin, a licensee associated with a firm may personally employ or engage licensed persons as independent contractors only to serve as unlicensed personal assistants.³⁴

C. Volume of Materials Retrieved

Employment issues were identified in one case in this quarter. Over the past twelve months, Employment issues were identified 4 times in 4 cases (*see* Table 4). No statutes or regulations regarding Employment issues were retrieved this quarter, but 2 statutes and 2 regulations regarding Employment issues were retrieved in the past twelve months (*see* Table 4).

³⁰ [N.M. Admin. Code § 16.61.16.9 \(2016\)](#).

³¹ [N.M. Admin. Code § 16.61.6.8 \(2016\)](#).

³² Oregon Real Estate Agency, [Unlicensed Assistant Guidelines \(2016\)](#).

³³ *Id.*

³⁴ [Wis. Admin. Code REEB § 17.03 \(2016\)](#).

V. VERDICT AND LIABILITY INFORMATION

A. Agency Cases

Liability was determined in 4 Agency cases, and the licensee was not held liable in any of the cases (*see* Table 3).

B. Property Condition Disclosure Cases

Liability was determined in 3 Property Disclosure Cases, and the licensee was not held liable in any of the cases (*see* Table 3).

C. RESPA Cases

None of the RESPA cases reviewed this quarter determined the liability of a real estate professional (*see* Table 3).

D. Employment Cases

Liability was determined in 2 employment case retrieved over the past twelve months; the defendant was held liable in one of those cases³⁵ (*see* Table 5).

VI. TABLES

Table 1
Volume of Items Retrieved for First Quarter 2017 by Major Topic

Major Topic	Cases	Statutes	Regulations
Agency	7	11	2
Property Condition Disclosure	3	2	2
RESPA	4	0	0

³⁵ *Thompson v. Asimos*, No. A140096, 2016 WL 7243521 (Cal. Ct. App. Dec. 15, 2016) (appellate court affirmed summary judgment in favor of the plaintiff, but remanded the case on the issue of damages; court found that statement in independent contractor agreement indicating that broker was licensed as a broker implied a promise that the broker would comply with the regulations of the profession).

Table 2
Volume of Items Retrieved for First Quarter 2017 by Issue

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

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

Issue	Cases	Statutes	Regulations
RESPA: Kickbacks	4	0	0
RESPA: Affiliated Business Arrangements	1	0	0
RESPA: Marketing Service Agreements	0	0	0
RESPA: Other	0	0	0

Table 3
Liability Data for First Quarter 2017

Topic	Liabe	Not Liabe	% Liabe	% Not Liabe
Agency	0	4	0%	100%
Property Condition Disclosure	0	3	0%	100%
RESPA	0	0	N/A	N/A

Table 4
Volume of Employment Items Retrieved in Past Twelve Months (April 2016-March 2017)

Major Topic	Cases	Statutes	Regulations
Employment: Wrongful Termination (cases only)	0	N/A	N/A
Employment: Personal Assistants	0	0	2
Employment: Independent Contractors	3	0	2
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 2016-March 2017)

Topic	Liabe	Not Liabe	% Liabe	% Not Liabe
Employment	1	1	50%	50%