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The Voice for Real Estate®

2011 Legal Scan:

Legal Issues Facing Real-Estate Professionals

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2011 LEGAL SCAN: LEGAL ISSUES FACING
REAL-ESTATE PROFESIONALS

The National Association of REALTORS® has conducted a survey of the current legal environment faced by real estate professionals. NAR undertakes this comprehensive research project, or "Scan," every two years. It analyzes current legal liability issues and identifies emerging legal and risk issues. The *Scan* is based on surveys of key people in the real-estate industry, as well as data obtained from case law and statutory research.

This report discusses developments in several major-topic areas, including the legal research and the survey results, emerging trends, and the need for training. The results of the legal research and the survey data are set forth in tables in Appendix 1. Lists of the cases, statutes, and regulations, organized by issue, are provided in Appendices 2 and 3. The research technique is described in Appendix 4. This last Appendix describes the scope of the project, and how the legal-research and survey data were collected.

The most important issue in the 2011 *Scan* is a new Property Condition Disclosure issue, Short Sales. A closely related issue, also new, REOs and Bank-owned Properties via Foreclosure, is another top issue in the *Scan*. Looking at all issues together, Agency issues are a top area of concern for real estate professionals, along with the other Property Condition Disclosure issues and RESPA. Other issues that seem to be particularly important in the current down market include As-Is Clauses and Commission Disputes.

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I. AGENCY ISSUES REMAIN THE TOP-RANKED ISSUES IN THE *SCAN*.

Agency remains one of most important topics in the *Scan*. While only about 19% of the survey respondents reported that Agency issues were a significant source of current disputes, only 50% reported a moderate or higher level of current disputes involving Agency issues; and 32% believe there is a significant need for training on Agency issues in general. (*See* Tables 11, 14, 16.) Significantly, however, more respondents ranked various Agency issues among their top three current issues than any group of issues in the *Scan* except various Property Condition Disclosure issues. (*See* Tables 17, 19.) In addition to various statutory and regulatory developments, the main issues in this area are breach of fiduciary duty, dual agency, agency disclosure, and buyer representation.

A. State Legislatures and Real-Estate Commissions Have Adopted a Variety of New Provisions Relating to Agency Relationships.

Statutes and regulations relating to the relationship between licensees and the people they serve were abundant. Approximately 108 statutes and regulations were located addressing agency issues, a 33% drop from the number collected for the 2009 *Scan*, but that number is more than double the number of items collected for any other Major Topic for the current *Scan*. (*See* Table 3.)

More states are moving to a designated-agency or transactional-agency model for customer/client relationships, where the agent does not owe the traditional fiduciary

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duties.[1] Several states specify mandatory duties licensees owe their customers or clients. Montana, for example, requires licensees to participate in negotiations and submit all offers and counteroffers up through the closing, unless the principal waives the requirement in writing.[2] After an offer is accepted, unless a writing provides to the contrary, the seller's agent need not continue marketing the property and the buyer's agent need not continue showing properties to the buyer.[3] Wyoming has a statute that defines the line between inquiries and representation.[4] It also requires a licensee to inform a customer that his or her communications with the licensee are not confidential.[5]

In Pennsylvania, a licensee has a duty to advise the principal about the seller's duty to provide a property condition disclosure statement to the buyer and must document any refusal by a buyer to accept the statement.[6] Washington's Real Estate

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[1] *See, e.g.*, La. Rev. Stat. § 9:3891(8), (9) (2010) (designated agency relationship is presumed, absent writing specifically stating otherwise); Utah Admin. Code R162-2f-401a, -401b (2010) (provisions added during commission's reorganization of the rules; waiver of fiduciary duties in favor of neutrality, describes duties of "limited agent"; prohibits disclosure of information that would weaken either party's bargaining position); Wyo. Stat. §§ 33-28-301, -302 (2009) (in a leasing transaction, licensee is deemed to be working for landlord as agent/intermediary and tenant is deemed to be a "customer," to whom only limited duties are owed).

[2] Mont. Admin. R. 24.210.641(m)–(p) (2009).

[3] *Id.* R. 24.210.641(n), (p).

[4] *See* Wyo. Stat. § 33-28-306 (2009).

[5] *Id.*

[6] 49 Pa. Code § 35.284a (2010).

Commission requires its licensees to act "as expeditiously as possible" and may deem intentional or negligent delays to be "detrimental to the public interest."[7]

Kansas has enacted a statute defining "exclusive agency agreement," "written transaction brokerage agreement," and "exclusive right to sell agreement."[8] The principal may not give the licensee authority to sign or initial documents, nor can the licensee act as an attorney-in-fact for the principal. If an exclusive agreement is in place, another licensee must not have any contact with the principal.[9]

At least two states, Alaska and Oklahoma, have addressed rebates. Alaska's regulations require a broker to disclose in writing the dollar or "percentage of the transaction amount" of any rebate, compensation or fee that is to be paid to another broker in the transaction. The disclosure must be made when the listing contract is signed and again when the settlement statement is signed.[10] Oklahoma allows a broker to promote a seller incentive if the broker has the seller's consent to the rebate. The rule also addresses how the incentive may be publicized.[11]

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[7] Wash. Admin. Code 308-124D-210 (2010).

[8] *See* Kan. Stat. Ann. § 58-30,103 (2010).

[9] *Id. Cf.* 201 Ky. Admin. Regs. 11:250(6), (7) (2010) (amendments to rules promulgated in 2009 which address negotiation of subsequent listing with another broker, describe permitted contact between the seller and the new broker and require "Seller Initiated Re-Listing Request Form" to be completed and signed).

[10] *See* Alaska Admin. Code tit. 12, § 64.940(a), (d) (2010).

[11] *See* Okla. Admin. Code § 605:10-9-4(a)(9) (2010).

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Three states, Maryland, Maine and Washington, have addressed brokerage "teams." Maryland passed a new article for its licensing statutes that addresses "Provision of Real Estate Brokerage Services Through a Team."[12] The team, comprised of licensed real-estate salespersons and licensed associate real-estate brokers must designate a qualified leader. The statute defines the duties of the leader, the team members, the real-estate broker and the branch-office manager. It also permits a form of dual agency by "intracompany agents" who each represent one party to a real-estate transaction. The parties to the transaction using intracompany agents must be given written notice and must be advised that the team has a financial stake in the transaction. The statute also restricts the use of certain terms in the team name and regulates team advertising.[13]

Other states have addressed a principal's vicarious liability for the conduct of its agent. Idaho has abolished the doctrine.[14] It also has clarified that the statute setting forth licensees' duties to a client does not support the imputation of one licensee's knowledge of a fact to another licensee of the same broker "when neither has reason to have such knowledge."[15] In Wyoming, in contrast, a licensee must inform the buyer or

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[12] *See* Md. Code Ann., Bus. Occ. & Prof. §§ 17–543 to –548 (2010). *See also* 02-039-410 Me. Code R. §§ 1, 4-A, 13 (2009) (amendments to advertising rules relating to "group or team" advertising); Wash. Admin. Code 308-124B-210 (2010) (addresses "branding" of a brokerage and how to advertise using the "brand" name).

[13] Md. Code Ann., Bus. Occ. & Prof. §§ 17–543 to –548 (2010).

[14] *See* Idaho Code § 54-2093 (2010) (seller or buyer cannot be liable for acts of broker or broker's licensees).

[15] *See* Idaho Code § 54-2087(1) (2009).

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seller that he or she may be liable for the acts of licensees if the buyer or seller somehow directs, approves or ratifies the licensee's acts.[16]

B. Dual Agency Remains an Area of Concern.

Dual agency continues to be an important area of concern for the survey respondents. More than 57% of them stated that the issue is the basis for a moderate or higher number of current disputes, and over 83% placed the issue among their top three current issues. (*See* Tables 18, 19.) Most (59%) respondents believe that the level of disputes will stay the same during the next two years; about 30% believe the number of disputes will increase in importance over the next two years. Eighty percent ranked the issue among their top three potential future issues. Nearly 45% believe there is a significant need for training on Dual Agency. (*See* Tables 21, 22.)

The respondents' comments address several problems. First, several respondents simply object to dual agency on principle. A respondent from Georgia stated:

> I have a firm belief that one person cannot properly represent two people on the opposite side of a transaction. How can you get the 'best' price for the buyer if it's not the 'best' price for the seller? How can you properly have confidential information from a buyer or seller and not disclose it to the other side?"

Second, the survey respondents believe that agents—and some brokers—do not understand dual agency, cannot explain it to their clients, and do not make the required disclosure. A respondent from Ohio noted: "Agents say that they explain it well but as a

[16] *See* Wyo. Stat. §§ 33-28-302, -303(a)(iii)(G) (2009).

manager, I end up hearing 'he/she didn't explain it to me that he/she would be working for both parties and not able to tell me everything the other party said.'" These deficiencies are a disservice to the clients and make licensees more vulnerable to claims and litigation. "Many claims by consumers who feel inadequately represented stem from the issue of 'neutrality' required in dual agency, which is a difficult goal to achieve while 'representing' two clients in a real-estate transaction."

Third, respondents believe there will always be a need for training on this issue. For some the focus should be on providing effective disclosure to the parties. "This is always such a huge issue because agents simply do not make proper disclosure at the proper time with the correct forms." In summary—

> Licensees are not well-enough schooled on what they can and cannot do as dual agents! They don't know well enough what they can say, or must not say between the parties.

While the significant agency legislation is discussed in section A above, note that Wyoming enacted a statute prohibiting dual agency and implemented the concept of an "in-house real estate transaction."[17] The statute sets forth the duties of licensees when two or more licensees with the same broker work for different parties. A licensee for a seller or buyer must inform the seller or buyer that he or she may be vicariously liable for the licensee's acts that the seller or buyer approves, ratifies or directs. This information also must be set forth in the agency disclosure materials.

[17] *See* Wyo. Stat. §§ 33-28-301 to -304, -306, -307, -310, -311 (2009).

Idaho enacted a statute allowing a licensee to represent two or more buyers with respect to the same property if both buyers are advised of the dual representation in writing.[18]

Twenty cases addressed dual agency issues in some manner. Liability was decided in 13 of those cases; nine cases ended in a determination that that licensee was not liable and four ended in a plaintiff's verdict. Three of these verdicts ended with a damage award.

- *George*.[19] The buyers contended the sellers did not disclose that the residence lacked required permits, was not up to code for use as a single-family home and was not legal for occupancy. The parties were represented by the same agent. The plaintiffs and their children had to live in a trailer for one year while the construction and repairs were being done and until the permits, fees and assessments were paid and cleared. The claimed damages ranged from $87,000 to $110,000. The defendants offered $42,000, but the trial court rendered a verdict for $180,000.

- *Gagliardi*.[20] Agents from the same brokerage firm represented both parties. The property-condition disclosure statement represented that the property had no material defects, no building-code violations, and no hazardous waste. The Purchase Agreement required an inspection of the sewage system and escrowed $10,000 to repair any problems. The inspection revealed a problem requiring excavation and a perc test. The perc test took place after the closing and the system failed. The buyers did not know the perc test could not be done until after the closing and assumed the escrowed $10,000 would be sufficient. The test results were provided months later to the seller's agent, who informed the sellers and the buyers' agent. The buyers sued, alleging, among other things, that they relied on the disclosure statement and their agent's representation that the septic

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[18] *See* Idaho Code § 54-2087(10) (2009).

[19] *George v. Tirri*, No. 163993, 2010 WL 2696955 (Cal. Super. Ct. Shasta County Jan. 27, 2010).

[20] *Gagliardi v. J.D.K. Productions*, No. C08517, 2010 WL 1803056 (Md. Cir. Ct. Baltimore County Jan. 22, 2010).

system worked properly or could be repaired for $10,000. The jury concluded that the sellers' agent was negligent and awarded $90,000 to the buyers.

- *Linh.*[21] In a case arising from the sale of a business, the broker delayed opening escrow and misled the plaintiff about the status of the escrow account. The plaintiff contended both that the broker was acting as a dual agent and had breached his fiduciary duty, leading to a verdict of $32,411.

C. Survey Respondents Report that Buyer Representation Is Not Well Understood by Licensees or Well Explained to Clients.

Buyer Representation is not a significant source of current or expected disputes as it was in the 2009 *Scan*. Specifically, only 18% of the survey respondents indicated that Buyer Representation was the source of a significant number of current disputes, and about 54% stated the issue had moderate or higher current significance. Nevertheless, more than 81% of the respondents who ranked the issue placed it among their top three current issues. (*See* Tables 18, 19.) Similarly, only 30% of the respondents believe the issue will increase in importance over the next two years, but nearly 86% of those who ranked it placed the issue in their top three. (*See* Tables 20, 21.) Thirty-seven percent of the respondents indicated that there is a significant need for training on the issue. (*See* Table 22.)

The respondents' comments set forth three key points about buyer representation. First, respondents state that buyer representatives do not always understand their responsibilities to their clients and do not always explain their role. Second, respondents believe that buyer representation may invite a dispute about procuring cause. This point is frequently mentioned in the context of the need to make

[21] *Linh Lai v. Dobrushin*, No. A118686, 2009 WL 132014 (Cal. Ct. App. Jan. 21, 2009).

disclosures, ask questions, and obtain a signed representation agreement.[22] Third, the survey respondents are concerned that this form of representation is becoming a more common issue in litigation.

Case-law research retrieved 24 cases addressing buyer-representation disputes. Thirteen of these cases determined whether the licensee was liable, but only one ended with a judgment favoring the plaintiff. In *Ziegler*,[23] the transaction was pending when Hurricane Katrina struck. The buyer's agent moved the closing date, but the buyer did not attend the rescheduled closing and the seller unilaterally cancelled the contract, even though the property was not damaged. The trial judge determined that the buyer's representative had breached her duty to the buyer, making her 50% responsible for the buyer's default. Specifically, the agent did not notify the title company that the closing date had been moved up, did not get a written agreement to extend the date when the moved-up date became unfeasible, and advised the buyer that she did not have to appear at the closing. The transaction also was contingent on the buyer's closing the sale of her previous home, and that contingency was not spelled out in the purchase

[22] Several states have adopted statutes or regulations that require a written buyer representation agreement. *See, e.g.,* Mont. Admin. R. 24.210.641(ah) (2009); Utah Admin. Code R162-2f-401a (2010). *See also* Idaho Code § 54-2087(11) (2009) (permits licensees to represent more than one buyer with respect to the same property if both buyers are advised of the simultaneous representation in writing; statute may have been inspired by a case discussed in the 2009 *Scan*, *Rivkin v. Century 21 Teran Realty LLC*, 10 N.Y.3d 344, 858 N.Y.S.2d 55 (2008)).

[23] *Ziegler v. Pansano*, No. 2008 CA 1495, 2009 WL 14879355 (La. Ct. App. June 30, 2009).

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agreement. The agent was required to pay $20,000 to the buyer (50% of the seller's verdict) as well as $27,900 for the buyer's attorney fees.[24]

Noteworthy issues are addressed in several of the cases in which liability was not determined.

- *Holmes.*[25] The purchase agreement had a financing contingency, because the buyer had very limited means to pay a mortgage, and a loan, with a monthly payment the buyer could afford, had been arranged. The lender later decided it needed to include mortgage insurance, which increased the buyer's monthly payment beyond what he could afford. The buyer's agent told the buyer that if he did not close he would get sued, so he closed under pressure. The buyer later sued, alleging claims of duress and unconscionability. The court has not yet ruled on the claims against the agent.

- *Jackowski.*[26] An appellate court ruled that a trial court should not have granted summary judgment on the buyers' common-law and statutory claims against their agent. The buyers alleged that the agent should have advised them to consult a "geotechnical expert." The appellate court stated that the state statute on point, Wash. Rev. Stat. § 18.86.050(1)(c), does not abrogate real-estate agents' professional and fiduciary duties.

- *Quieroz.*[27] In a buyer's specific-performance action, the seller defended on basis of the buyer's agent's "inequitable conduct," such as lying about the disposition of the escrow checks and delaying their deposit. This conduct caused the seller to cancel the contract with the buyer. The jury agreed with the seller, and on appeal, the court noted that "[p]rincipals may not benefit from inequitable conduct of their agents."

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[24] *Id.* at *3.

[25] *See Holmes v. Runyan & Assocs., Inc.*, No. 2:09-0679, 2009 WL 5063305 (S.D. W. Va. Dec. 15, 2009) (dismissing claims against mortgage company without prejudice); *Holmes v. Runyan & Assocs., Inc.*, No. 2:09-0679, 2010 WL 2218698 (S.D. W. Va. June 2, 2010) (denying mortgage company's subsequent motion to dismiss)..

[26] *Jackowski v. Borchelt*, 209 P.3d 514 (Wash. Ct. App. 2009), *review granted*, 226 P.3d 780 (Wash. 2010).

[27] *Quieroz v. Harvey*, 205 P.3d 1120 (Ariz. 2009).

D. Survey Respondents Report that Agency Disclosure Is an Area Marred by Sloppy Practices, Causing Concern.

Agency Disclosure is not a significant source of current disputes, and 63% of the respondents believe the number of disputes will stay the same over the next two years. (*See* Table 20.) Nevertheless, the issue is highly ranked. (*See* Tables 19, 21.) More than 33% believe there is a significant need for training about Agency Disclosure. (*See* Table 22.) Several real-estate commissions also thought the issue was important. (*See* Table 10.)

The comments accompanying the respondents' rankings suggest that agents—and brokers—do not take agency-disclosure rules seriously or are afraid to make the required disclosures. A respondent from Minnesota stated, "[disclosure is] done poorly on a routine basis. I travel the country as an instructor and find it to be true that most agents are not educated and afraid to do it. Their brokers condone and in some cases encourage the behavior." Respondents from Virginia and Louisiana also asserted that agents seem to be afraid of even presenting the forms and disclosure materials. The Louisiana respondent stated, "I believe people are very apprehensive of giving the disclosure at first contact due to [the] public's overall negative view of agents and bad experiences. I think the time to present the disclosure should be [changed]."[28]

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[28] Louisiana has a statute broadly defining "substantive contact." The statute provides that "substantive contact" occurs at the point in "any conversation" in which "confidential information is solicited or received," such as a person's finances, motives or objectives. Substantive contact includes electronic contacts, e-mail or any other electronic form of communication. *See* La. Rev. Stat. § 9:3891(14) (2010).

Respondents believe training on agency relationships and agency disclosure this issue is needed, not only to educate agents about when and how to make the required disclosures, but also to impress on them why disclosure is important and what the consequences of not doing it properly are.

The issue arose in sixteen cases, but the agent was found liable in only one. In *Leonard*,[29] a purchase agreement was assigned to a new buyer and the agent did not obtain a new written agency agreement with the new buyer. The state real-estate commission concluded that failing to execute a new agency agreement was unprofessional conduct and fined the agent $1000 and assessed $6177 in costs. The agent was also required to complete six hours of training and a three-hour ethics course. (A two-month suspension was held in abeyance provided he completed the required coursework.) The agent appealed the decision to the state district court, which reversed the ruling on the grounds that the agency agreement was included with the assignment of the purchase agreement to the new buyer.

The South Dakota Supreme Court reinstated the commission's ruling. Although the purchase agreement transferred "all [its] . . . rights, privileges and obligations," the state licensing law required an executed agreement *signed by the parties* to the transaction.[30] The agent's contention that the agency agreement was assigned would mean that he had, in essence, delegated his professional duty to disclose to the first

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[29] *Leonard v. S.D. ex rel. Real Estate Comm'n*, 793 N.W.2d 19 (S.D. 2010).

[30] *Id.* at 22-23 (citing S.D. Codified Laws § 36-21A-130).

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buyer and would ignore the specific requirement that the agency agreement be signed by all parties to the transaction, that is, by the new buyer.

E. Breach of Fiduciary Duty Continues to Be a Common Source of Licensee Liability.

Breach of Fiduciary Duty is among the top issues identified in the survey responses, both by state real-estate commissions and the Key Contacts within the real-estate industry. (*See* Tables 10, 17.) More than 35% of the survey respondents indicated that Breach of Fiduciary Duty was the basis for a significant number of current disputes, and more than 71% ranked the issue among their top three current issues. (*See* Tables 17, 19.) The issue will probably continue to be significant: 40% of the respondents believe that it will increase in importance over the next two years, and it is the top-ranked potential future issue, with nearly 59% of the respondents ranking it among their top-three future issues. (*See* Tables 20, 21.) Forty-seven percent of the respondents believe there is a significant need for training on this issue. (*See* Table 22.)

The problems reported in the respondents' comments range widely. Respondents frequently cited licensees' lack of understanding of what it means to be a fiduciary. "Too many agents forget who they work for and the full bundle of responsibility we owe to the client." Respondents also noted that some agents put their own interests—closing the deal and getting a commission—first. A New Jersey Respondent stated, "Agents put their own interests ahead of clients and do not seem to care about how they get the contract closed. They'll do what it takes." The economy

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also may affect agents' actions. A respondent from Washington noted, "the struggling economy encourages shortcuts," and another noted, "agents are saying whatever is needed just to make a sale and putting the client second."

Other respondents suggest that the public has "unrealistic expectations" for what agents can do while "[n]ew brokerage models provide less service to customers, who expect more." A respondent from Ohio stated:

> Putting another person's interests ahead of your own—the fundamental essence of professionalism—is asking a WHOLE lot. And it's so easy to pick apart an agent's conduct, looking for signs that they failed to put their clients' interests ahead of their own.

For many respondents, however, the issue seems to be a catch-all that is used when a licensee makes a mistake. Several noted that dissatisfied clients need to blame somebody and somebody is usually the agent. "Consumers who are concerned about how a transaction concluded/terminated will often blame the agent involved for inadequate protection or representation."

The survey of case law and jury verdict reports collected 73 items involving breach of fiduciary duty. This number is 46% higher than the number collected for the 2009 *Scan*. (*See* Table 2.) In the 47 cases in which liability was determined, the licensee was found not liable 28% of the time. The large verdicts include the following cases:

- *SJW Properties Commerce*.[31] Brokers for a commercial development sued their clients for unpaid commissions and the clients countersued for breach of fiduciary duty, fraud and tortuous interference with contract. The case involved two development projects. The brokers had an agreement with the developers to find tenants for one project. The brokers also knew that the developers were trying to acquire properties adjoining a parcel one of the developers owned, with the intent of selling all the properties to a single buyer for a similar development. The brokers competed against their client for those properties so they could package them and sell them to one of their longstanding big-box clients. When the developers learned what the brokers were trying to do, they withheld commissions from the first development. Each side recovered verdicts on their principal claims and those verdicts were, for the most part, affirmed on appeal. The jury awarded the defendant/developers $709,587 in actual damages for the plaintiff/brokers' breach of fiduciary duty and fraud. The appellate court reversed a punitive-damage award against one of the brokers but affirmed an award of $2 million in punitive damages against the other broker. (The brokers were awarded commissions totaling $165,303.73.)

- *Markovich.*[32] A real-estate agent in Louisiana accepted a second offer while a counter-offer from the initial party was pending. The agent did not inform the first offeror, his agent or the seller about the later offer. The jury found a breach of fiduciary duty and awarded $744,789.58, split between the seller, the buyer and a third party.

- *Best Fin. Consultants*.[33] A California jury returned a verdict for the sellers of an apartment building against their broker on a theory of elder abuse. The commission clause in the listing agreement was "unique" and acted as a disincentive to list the property on the MLS. The broker listed the property at a below-market price, did not present all offers, and conveyed a right to purchase to a subsequent offeror. The sellers alleged a breach of fiduciary duty and a violation of the state consumer-protection act. The verdict, including the punitive-damage award, totaled $713,000.

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[31] *See SJW Prop. Commerce, Inc. v. S.W. Pinnacle Props.*, 314 S.W.3d 166 (Tex. App.–Corpus Christi), *opinion withdrawn and reissued*, No. 13-08-00268-CV, 2010 WL 3704928 (Tex. App.–Corpus Christi Sept. 23, 2010), *petition for review filed* (Tex. Jan. 11, 2011).

[32] *Markovich v. Prudential Gardner Realtors*, No. 2006-10327, 2010 WL 3480329 (La. Dist. Ct. St. Tammany Parish May 10, 2010).

[33] *Best Fin. Consultants, Inc. v. Chapman*, No. D05522, 2010 WL 5146212 (Cal. Ct. App. Dec. 17, 2010), *review denied* (Cal. Mar. 23, 2011).

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- *V & E Medical Imaging Services.*[34] A Washington jury returned a verdict totaling $1,020,427 in a case in which a real-estate agent recommended a contractor to the buyer without disclosing that he had a financial connection to the contractor. The contractor did poor work and the buyers could not get an occupancy permit. The jury awarded $515,900 on a breach of fiduciary duty claim. An additional $6300 was awarded for a consumer-protection claim. An award of fees totaling $462,985 brought the judgment to $1,030,427.

A federal district court in Nevada was presented with an intriguing issue arising under Nevada's move toward defining licensees' duties in statutes: whether the statutory duties displace common-law fiduciary duties. In *Kim*,[35] the plaintiffs alleged that their agents were advancing the interests of their friend, a mortgage broker. The opinion discusses whether the Nevada licensing statutes abrogate common-law claims of breach of fiduciary duty. The plaintiffs contended that the statutory duties only displace the duty of care and the duty of disclosure and that, in any case, the licensees were contractually bound to act as fiduciaries. The court agreed. In the alternative, the court suggested that the plaintiffs had mislabeled their cause of action and it did, in fact, allege statutory claims. The agents' motion to dismiss was denied.

II. PCD ISSUES AND "AS IS" CLAUSES CONTINUE TO BE SIGNIFICANT, PARTICULARLY WHEN THERE IS A LARGE INVENTORY OF BANK-OWNED PROPERTIES.

Property Condition Disclosure is an ongoing source of disputes. Taken together, 67% of the survey respondents report that disclosure issues are the source of a

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[34] *V & E Med. Imaging Servs., Inc. v. Birgh*, No. 62912-3-I, 2010 WL 4402333 (Wash. Ct. App. Nov. 8, 2010).

[35] *Kim v. Kearney*, No. 2:09-CV-02008-PMP, 2010 WL 3433130 (D. Nev. Aug. 30, 2010).

moderate or higher number of current disputes, and 68% rank disclosure issues among their top-three current issues. (*See* Tables 12, 13.) A majority (59%) believe the topic's importance is likely to stay the same over the next two years, and 34% believe there is a significant need for training about Property Condition Disclosure. (*See* Tables 14, 16.) Over 69% ranked disclosure issues among their top three future issues. (*See* Table 15.) The most significant development in this area is the emergence of disputes arising from foreclosure crisis: Short Sales and REOs and Bank-owned Property via Foreclosure.

A. Short Sales Are the Most Significant Individual Issue Identified in the Survey.

Disclosure issues arising in Short Sales is the top area of concern identified in the survey. Almost 55% of the survey respondents indicated that a Short Sale was the basis of a significant number of current disputes. (*See* Table 17.) Over 74% of the Respondents who ranked this issue placed it among their top three current issues and 76% placed it in their top three future issues. (*See* Tables 17, 19.) The level of disputes is likely to increase over the next two years, according to nearly 63% of the respondents, and nearly 67% believe there is a significant need for training about disclosure issues relating to short sales. (*See* Tables 20, 22.) Several real-estate commissions also believe disputes involving short sales are increasing. (*See* Table 10.)

The respondents' comments on Short Sales were extensive. The comments cover both property condition disclosure issues arising in a short-sale context and the many transactional issues the respondents are encountering. The volume of short-sale

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transactions is increasing and the respondents do not anticipate that short sales will go away any time soon.

With respect to the actual problem of disclosure of property conditions, several survey respondents noted that the seller sees no benefit to disclosing anything about the property. Also, because a short sale can be a long process, the condition of the property can change while the transaction is pending. Respondents note that lenders claim no obligation to disclose anything about the property and both lenders and sellers insist on "as is" sales, which "has resulted in a decline of quality of seller disclosures." One respondent stated, "It's all a mess . . . the banks aren't licensed and they don't even uphold the Federal Lead Paint disclosures."

Respondents believe sellers create other problems as well. For example, respondents state, sellers frequently do not disclose that the transaction will be a short sale, and agents, in turn, do not always disclose that fact to the buyer. A respondent from Connecticut explained:

> Agents believe that if a property is only a possible short sale, it does not need to be disclosed, especially if the seller doesn't want them to. This is causing all sorts of misrepresentation issues. Also, listing agents don't know they need to take thorough measures to discover short-sale issues or how to get the transaction done, yielding chaos and harming everyone in the process.

The overarching problem for real-estate licensees seems to be the banks. The respondents report that banks are "in chaos and continue to cause confusion. They are unresponsive and do not approve transactions in a timely manner. Their employees don't know what they're doing." The lender's or a debt collector's desire to collect the remaining balance on the loan is another problem, respondents report.

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Respondents believe that the complexity of the transaction pushes licensees into roles they are not trained to fill: "Too many agents are dabbling in short sales without training and are not properly advising sellers of options and recommending legal counsel. The agent's lack of knowledge could harm the seller, leading to a dispute."

Another risk for licensees, according to survey respondents, is engaging in the unauthorized practice of law. A Michigan respondent noted, "Agents and brokers get too involved with the financial end of the buyer or the seller [and] give too much advice." An Oregon respondent concurred. "I don't believe we have begun to see the repercussions of uninformed agents who give sellers advice outside their scope, and the agent or broker will ultimately be called on the carpet for it."

Respondents believe agents need to educate their clients, especially buyers, how long a short sale can take. "Consumers don't understand the difference between the typical sale and the short sale. . . ." Also, "buyers need to be informed up front of the time involved and the potential loss of money due to paying for appraisals, inspections, etc. and sellers will not to do repairs."

In sum, according to a Michigan respondent, "short sale transactions and the many issues surrounding them are, hands down, the biggest challenge for our members and their clients today, and the basis for future lawsuits and other legal action."

The tumult described in the comments is not yet reflected in the legal research data. Only one statute and one case on point were found. Colorado has passed a

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statute requiring certain short-sale disclosures.[36] The case, *Rupp*,[37] was tried in bankruptcy court and ended in a $10,728 verdict for the plaintiff.

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[36] *See* Colo. Rev. Stat. § 6-1-1121 (2010) (requires short-sale "equity purchaser" of foreclosed property who intends to resell property quickly at a profit to disclose terms of agreement with subsequent purchaser to foreclosed homeowner, including subsequent purchaser's purchase price; equity purchaser also most disclose price for property and other terms of the agreement between equity purchaser and foreclosed homeowner to subsequent purchaser).

[37] *Rupp v. Ayres (In re Fabbro)*, 411 B.R. 407 (Bankr. D. Utah 2009) (real-estate agent misrepresented description and terms of short sale and listed property on MLS as being "under contract" even though there was no contract; seller sued agent and supervising broker on a common-law fraud claim; agent was found liable and broker was vicariously liable for its agent's acts).

B. <u>REOs and Bank-owned Property via Foreclosure Is Another Highly Significant Issue</u>.

Sales of bank-owned property via foreclosure is closely related to short sales and the survey results indicate that the respondents think the issue is highly significant. Over 48% of the survey respondents indicated that the issue was the basis of a significant number of current disputes, and 58% of the respondents who ranked REO issues placed it among their top three current issues. (*See* Tables 17, 19.) The level of disputes is likely to increase over the next two years, according to nearly 60% of the respondents and 76% placed it in their top three future issues; over 64% believe there is a significant need for training about disclosure issues relating to short sales. (*See* Tables 20-22.)

The survey respondents commented extensively on REO issues. Generally, their comments echo those they made about short sales. Since the property's prior owner is usually not involved in these transactions, the comments focus on the lenders. On issues relating to the actual condition of the property, several respondents noted that banks disclaim disclosure duties. They also do not do anything to prevent damage or destruction to homes during the foreclosure. These disclosure issues are closely related to "as is" clauses. An Idaho respondent explained, "Although folks understand the 'as is' clause, when the property is bank-owned, buyers and agents still expect banks to fix issues that are a threat to health and safety. Banks are not [fixing them], and ugly battles ensue." Also, while the banks will not make repairs, the buyer's lender will not permit the buyer to make repairs, resulting in a stalemate.

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Listing brokers are at risk here, too. Respondents believe listing brokers "do not display responsibility for issues they know but don't disclose. All properties are suspect with regard to the issue." Another person stated, "REO agents do not provide any information regarding the property condition and are limiting access." Also, the broker will be the person left after the transaction closes to blame for undisclosed defects.

The respondents also report problems with completing transactions. For example, banks "refus[e] to sign accepted agreements in a timely fashion, particularly in a multiple-offer scenario, which creates increasing problems for agents." Several respondents remarked on the volume of transactions and banks' inflexibility in negotiating. In addition, "[t]here is no uniform code of conduct or control over the various lending institutions."

The respondents see a need for effective training on the entire REO marketing and contracting process. A survey respondent from Arizona described these needs more fully:

> Generally speaking, excluding those few agents that have become specialists in handling these transactions, designated brokers, brokers and agents are not truly aware of the consequences when handling this type of transaction. Many are unaware that in most cases their role changes from that of a listing broker to that of a property manager, and as a result they may not be covered as such with their E&O carrier. Listing agreements created by REO and bank-owned entities appear to be "one-size-fits-all" and one-sided without regard to local, state and federal requirements.

Thus, respondents believe licensees should be trained to manage the actual role a listing agent plays when working for an asset manager, because an asset manager may well treat a listing agent as a property manager. Respondents also indicated that

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licensees should be reminded that they must follow their state's licensing laws and the Code of Ethics.

C. Structural Defects Will Continue to Cause Disputes.

Disclosure of structural defects is another perennial "catch-all" claim brought against agents and brokers. While 18% of the survey respondents indicated that structural defects formed the basis of a significant number of current disputes, nearly 95% indicated that the issue formed the basis of a moderate or higher number of current disputes. (*See* Table 18.) About 75% of the Respondents who ranked this issue this issue among their top three current and future issues. (*See* Tables 19, 21.) The level of disputes is likely to stay the same over the next two years, according to nearly 76% of the respondents, and nearly 70% believe there is a significant need for training about disclosure of structural defects. (*See* Tables 20, 22.)

Respondents from all over the United States noted that disputes involving structural defects are extremely common. Speaking broadly, the doctrine of "caveat emptor—buyer beware—is gone." Instead, as a Tennessee respondent noted, "disgruntled buyers assume the listing licensee knew of the defects and did not disclose it." Another respondent stated, "Agents volunteer information on houses, even when they don't have specific knowledge." A Colorado respondent noted, "[there is a] public perception that we should know about these . . . [but] many times we are totally unaware. If it's a big-ticket item, the buyer will want to blame someone else."

Case-law research located 18 cases involving structural defects. Liability was determined in 11 of those cases, and nine cases ended in a dismissal, summary

judgment, or defense verdict. The two remaining cases ended in plaintiffs' verdicts with large damage awards:

- *Batishchev.*[38] A broker and agent were sued after they sold the plaintiffs a condo with known "egregious workmanship errors" and the unit the buyers actually purchased was not the unit they believed they had agreed to buy. They unequivocally informed the agent they did not want that unit. The defendants failed to disclose the structural defects and problems with mold and water intrusion. The trial judge awarded $25 in nominal damages, but because the plaintiffs alleged claims under the state consumer-protection statute, they were also entitled to recover fees of $488,829 and $48,264 in costs for a total verdict of $537,118.

- *Regan.*[39] A jury returned a verdict of $282,000 in a case alleging that the sellers failed to disclose that the foundation was sinking, which constituted a breach of a statutory duty to disclose the true condition of a home and to act fairly, honestly and in good faith. The listing broker was 20% liable. The buyer's representative was not aware of the defect and therefore was not liable.

D. Mold and Water Intrusion Claims Can Result in Substantial Legal Exposure.

Mold and Water Intrusion is the source of a significant number of current disputes, according to more than 37% of the survey respondents; approximately 68% of the respondents who ranked the issue placed it among their top three current issues. (*See* Tables 17, 19.) Nearly 32% of the respondents believe the issue is likely to increase in importance over the next two years, and more than 62% ranked it among their top three potential future issues. (*See* Tables 20, 21.) Over 35% believe there is a significant need for training on this issue. (*See* Table 22.)

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[38] *Batishchev v. Cole*, No. 08-P-2015, 2010 WL 652492 (Mass. App. Ct. Feb. 25, 2010).

[39] *Regan v. Altman*, No. 8800/07, 2010 WL 1648456 (N.Y. Sup. Ct. Erie County Mar. 5, 2010).

Several respondents noted that mold is an expensive problem to fix. One noted, "the cost of mold remediation is. . . high and agents and inspectors need to be more knowledgeable." Another pointed out that "companies in the mold-remediation business will continue to advertise how dangerous it is and mold is everywhere. There will be no definitive guidelines on mold." The issue of mold and water intrusion was also linked to the foreclosure crisis. Several respondents noted that water intrusion "has become a larger issue due to the number of homes not being maintained" or sitting empty for long periods of time.

Mold and water intrusion was an issue in 21 cases retrieved for the *Scan*. Of the 15 cases in which liability was determined, 13 were decided in favor of the agent or broker and the other two were decided in the buyer's favor. One case, *Batishchev*, is discussed in the Structural Defects section above (section C). The other case, *Monahan*,[40] arose when a pre-closing inspection report was not provided to buyers. The buyers sued the seller's broker, the inspector and others. The broker was found liable for $18,961.20 of a $92,000 verdict. (The inspector was not in privity with buyers and therefore was not liable.)

E. <u>Disclosure of a Property's Value Is Intertwined with Short Sales and REOs</u>.

While the failure to disclose information affecting the value of property has moderate or higher current significance, according to about 72% of the survey respondents, over 44% of the respondents believe this issue is likely to increase in

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[40] *Monahan v. Coffenberg*, No. MON-L-2166-05, 2009 WL 3125269 (N.J. Super. Ct. Law Div. Monmouth County June 25, 2009).

importance over the next two years. (*See* Tables 18, 20.) Close to 43% believe there is a significant need for additional training on this issue. (*See* Table 22.) About 52% of the respondents who ranked the issue place it in their top three current issues; 57% placed it in their top-three future issues. (*See* Tables 19, 20.)

No statutes or regulations were located for this issue. The case-law research retrieved 16 cases in which information affecting the property's value was not disclosed and allegedly should have been. Liability was determined in eight of those cases, but the licensee was not found liable in any of them. A common situation is a misstatement of the square footage or acreage of the property.[41] Another common situation involves overstatements of how profitable a property is.[42]

F. Disputes Involving "As Is" Clauses May Increase as a Result of the Increase in Short Sales and Sales of Bank-Owned Property.

The issue of "As Is" clauses is closely linked to Property Disclosure issues and the prevalence of bank-owned property. One effect of the foreclosure crisis is that properties are being sold without any disclosure at all, because the prior owners are not part of the transaction. The issue is not as significant to the survey respondents as short sales or REOs, however. Only about 31% of the survey respondents indicate that "As Is" clauses have moderate or higher current significance and about 35% believe the issue will increase in importance over the next two years. (*See* Tables 17, 20.) Just

[41] *E.g.*, *Hu v. Cantwell*, No. 06 C 6589, 2009 WL 1270142 (N.D. Ill. May 6, 2009); *Bowman v. Presley*, 212 P.3d 1210 (Okla. 2009).

[42] *E.g.*, *Lam v. Alpha Realtors, Inc.*, No. H-09-3041, 2010 WL 4569995 (S.D. Tex. Nov. 4, 2010); *Marsh v. Wallace*, 666 F. Supp. 2d 651 (S.D. Miss. 2009).

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over 40% of the respondents indicate there is a significant need for training on this issue. (*See* Table 22.)

Respondents believe that the increase in short sales and REO sales will lead to an increase in disputes involving the meaning and scope of "As-Is" clauses. Several respondents pointed out that lenders insist on "as is" sales. One respondent noted that "[a]gents and consumers alike seem to think the insertion of 'As Is' in a contract absolves them of the duty to disclose known material defects." Another respondent noted, however, that contracts also typically contain an inspection clause, "so issues. . . must be resolved."

Twelve cases involving as-is clauses were retrieved, but none ended in a plaintiff's verdict.

G. <u>A Variety of New and Amended Statutes and Rules Affect Licensees' Duty to Disclose Information about the Condition of Property</u>.

While the survey questionnaire sought information about a limited number of Property Condition Disclosure issues, the legal research followed 23 separate disclosure issues. (*See* Appendix 4.) Many of the new statutes and regulations address the need to disclose information about the following matters:

- Radon[43]
- Meth labs[44]

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[43] Iowa Admin. Code r. 193E.14.1(6) (2009) (requires written acknowledgement that buyer received "Iowa Radon Home-Buyers and Sellers Fact Sheet); Mont. Admin. R. 24.210.641(5)(u)–(y) (2010) (unprofessional conduct includes "as seller's agent" violating radon disclosure requirements).

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- Carbon monoxide detectors[45]
- Woodstoves[46]
- Energy-efficiency ratings for new dwellings[47]
- Groundwater hazards, flooding, water on property[48]

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[44] Colo. Rev. Stat. § 38-35.7-103(2)(a) (2009) (right to test property and cancel purchase agreement based on result); Nev. Rev. Stat. §§ 40.770, 489.776 (2009) (property's meth history is not material to transaction if Board of Health has deemed it "safe for habitation"); Tenn. Code Ann. § 68-212-503(d) (2010) (creating misdemeanor offense if person offers meth property for temporary or indefinite habitation or removes meth quarantine signs or notices from property); Utah Code Ann. §§ 57-27-101, -102, -201 to -203 (2009) (requires disclosure, but real-estate professional not liable unless he or she owns or leases property).

[45] Cal. Civ. Code § 1102.6 (2010); Colo. Rev. Stat. §§ 38-45-101 to -103, -105, -106 (2009); Mont. Code Ann. § 70-20-113 (2009); Or. Rev. Stat. § 105.464 (2009). *See also* Tex. Prop. Code § 5.008(b) (2009) (requires disclosure of smoke detectors; buyer has burden of ascertaining compliance, but seller must bring property into compliance, including provision of detector for hearing-impaired person; cost and choice of detector may be negotiated).

[46] Or. Rev. Stat. § 105.464 (2009) (Wood-Burning Stove Act made changes in disclosure statement); Wash. Rev. Code § 64.06.020 (2009) (disclosure of wood-burning stoves and fireplace inserts).

[47] S.D. Codified Laws §§ 11-10-8 to -10 (2009) (requires "Builder's Energy-Efficiency" disclosure statement and form).

[48] Iowa Code §§ 455B.172(11), 558.69 (2010) (requires "groundwater hazard statement" and disclosure of known private sewage disposal system); Or. Rev. Stat. § 105.464 (2009) (requires disclosure of sump pump); Tenn. Code Ann. § 66-5-212 (2009) (seller must provide written disclosure about presence of "external injection well" and results of any known perc test); Va. Code Ann. § 55-519(8) (2009) (disclosure statement must state that seller "makes no representations" about storm-water detention facilities and buyer must do due diligence before closing); Wash. Rev. Code §§ 64.06.015, .020 (2009) (disclosure required about flooding, standing water, fill dirt, other fill, waste on property and "defects in operation of water system"). *See also* Okla. Admin. Code tit. 605, art. 10 Appx. A (2010) (disclosure form amended to provide information about how to learn if property is in flood zone).

- Special zoning districts and rights of way[49]
- Radio or cellphone interference[50]
- Military bases and installations[51]
- Tax levies[52]
- Mold-related information[53]

Other notable items include: requiring a seller to amend the disclosure statement if he or she later acquires information that makes the statement inaccurate[54] and permitting a seller to attach written reports about a condition rather than writing an explanation for "yes" answers.[55] Three additional states have statutes or regulations that protect licensees from liability. Maine passed a statute providing that a closing agent or lender cannot be sued for claims arising from the operation, maintenance or effectiveness of a carbon-monoxide detector, including those transferred with a single-

[49] Conn. Gen. Stat. § 20-327b(d)(1)(B), (C) (2009) (historic-district designation must be disclosed); Nev. Rev. Stat. § 113.065 (2009) (requiring disclosure of government-held rights of way, including unrecorded rights, ranchers' and hunters' rights). *But see* Iowa Admin. Code r. 193E.14.1(6) (2009) (rescinding required disclosure of "real estate improvement district" designation).

[50] Wash. Rev. Code §§ 64.06.015, .020 (2009).

[51] 21 N.C. Admin. Code 58A.0114 (2010).

[52] N.M. Stat. §§ 47-13-1.1, -4 (2009).

[53] Ky. Rev. Stat. §§ 367.83801c to -83807c (2010) (establishes standards for mold remediation); Or. Rev. Stat. § 105.464 (2009) (disclosure statement requires disclosure of frequency of problems, insurance claims, repairs).

[54] Wash. Rev. Code § 65.06.040 (2009).

[55] 21 N.C. Admin. Code 58A.0114 (2010).

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family dwelling.[56] Colorado passed a similar provision that includes the seller's agent.[57] A Pennsylvania regulation states that a licensee has a separate duty to disclose *known* material defects, but no duty to do an independent investigation.[58] Finally, Wisconsin has passed a statute addressing the tort of intentional misrepresentation in a residential real-estate transaction. The cause of action is against the "transferor"—an undefined term—and the statute does not explicitly mention an agent or broker as being responsible or liable.[59] The failure to mention statute mention agents and brokers may make the statute ambiguous.

III. RESPA ISSUES ARE STILL AN AREA NEEDING TRAINING.

RESPA is no longer the top area of concern for survey respondents, now that concerns about short sales and REOs have become so prominent. Almost 64% of the survey respondents indicated that RESPA issues were the basis for a moderate or higher number of current disputes, but almost 34% believe these issues will increase in importance over the next two years. (*See* Tables 12, 14.) The respondents believe that the RESPA topic is, nevertheless, the second most significant training need. More than 43% of the survey respondents indicated there was a significant need for training on these issues. (*See* Table 16.) Relatively few respondents ranked the individual RESPA

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[56] Me. Rev. Stat. tit. 25, §2464, sub-§10 (2010).

[57] Colo. Rev. Stat. § 38-45-106 (2009).

[58] 49 Pa. Code § 35.284a (2010).

[59] Wis. Stat. § 895.10 (2009).

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issues (Disclosure of Settlement Costs, Kickbacks, and Affiliated Business Arrangements). Those who did tended to place RESPA issues among their top-three areas of concern.

A. Affiliated Business Arrangements Are Likely to Be a Source of Increased Disputes.

Affiliated Business Arrangements were the source of a moderate or higher number of current disputes according to nearly 67% of the survey respondents. Thirty-eight percent believe the issue will increase in importance over the next two years. (*See* Tables 18, 20.) The issue is one of the top training needs, with more than 47% of the respondents indicating there is a significant need for training about Affiliated Business Arrangements. (*See* Table 22.)

Comments on the issue were sparse. One respondent stated, as a follow-up to a comment relating to Kickbacks, "Again, we want to be on the right side of RESPA, but the guidelines are vague and we'd appreciate a 'black and white' set of [guidelines as to] what is and what is not permitted."

In addition to the Final Rule noted above, a few states passed statutes addressing related issues. Utah, for example, passed a statute that permits an associated broker or sales agent to receive payment from an affiliated entity, provided the broker or agent actually performed services.[60] Virginia added a statute giving a buyer or borrower the right to select the settlement agent and prohibiting a seller from

[60] Utah Code § 61-2f-305 (2010).

requiring the use of a particular agent as a condition of the transaction.[61] Further, provisions of the Virginia RESPA cannot be varied by agreement and the statutory rights cannot be waived.[62]

Fifteen cases addressing Affiliated Business Arrangements were located, the same number as counted for the 2009 *Scan*. (*See* Table 2.) Liability was determined in six cases; all were resolved with a finding of no liability on pretrial motions. A key case in this area is *Carter v. Welles-Bowen Realty, Inc.*[63] After the Sixth Circuit Court of Appeals concluded that the plaintiff in a kickback case had standing to sue,[64] the federal trial court ruled on the defendants' contention that their referral arrangement fit within RESPA's exceptions for "goods . . . actually furnished or . . . services actually performed" and affiliated business arrangements. After concluding that the exception for "services actually performed" did not apply, the court considered whether the affiliated title companies were bona fide or "sham" companies. The court decided that a ten-factor test set forth in a HUD policy statement was unconstitutionally vague.[65] (The test is intended to help distinguish between sham and bona fide settlement-service

[61] Va. Code § 6.1-2.21 (2009).

[62] Va. Code § 6.1-2.20 (2009).

[63] *Carter v. Welles-Bowen Realty, Inc.*, 719 F. Supp. 2d 846 (N.D. Ohio 2010).

[64] In earlier proceedings, Sixth Circuit concluded that the plain language of RESPA § 8 allows a plaintiff to bring private cause of action without alleging and proving an overcharge. *See Carter v. Welles-Bowen Realty, Inc. (In re Carter)*, 553 F.3d 979 (6th Cir. 2009). *See also Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (reaching similar conclusion).

[65] 719 F. Supp. 2d at 851-55.

providers.) The district court instead applied the plain language of the statute and concluded that the affiliated title insurers were bona-fide providers of settlement services and earned their fees, granting summary judgment to the defendant. The plaintiff has appealed the ruling and the United States has been granted permission to intervene in the appeal to argue two issues: (1) whether the HUD policy statement is unconstitutionally vague; and (2) whether the statement is entitled to deference.[66]

Three other cases discussed the "safe harbor" provision in RESPA for affiliated businesses.[67] Several cases addressed various other affiliated arrangements and allegedly "sham" entities.[68]

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[66] *See Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790 (6th Cir. 2010). *Cf. Toldy v. Fifth Third Mtge. Co.*, 721 F. Supp. 2d 696 (N.D. Ohio 2010) (court concluded that there was a question of fact as to whether the lender's failure to disclose the affiliation in a particular manner "impaired the effectiveness" of the disclosure and denied defendant's summary-judgment motion pursuant to the safe harbor for affiliated entities). *But see Noall v. Howard Hanna Co.*, Nos. 1:09 CV 2510, 2546, 2010 WL 3749519 (N.D. Ohio Sept. 21, 2010) (applying HUD guidance and concluding that "administrative fee" to affiliated entity might not have been proper, even though it was not split and shared), *stay granted, motion to certify appeal granted*, Nos. 1:09 CV 2510, 2546, 2010 WL 5020914 (N.D. Ohio Dec. 3, 2010).

[67] *See, e.g., Yeatman v. D.R. Horton, Inc.*, 577 F.3d 1329 (11th Cir. 2009) (RESPA not violated by merely offering borrower the option to receive discount on closing costs by using affiliated lender; the lender was apparently affiliated with a seller/homebuilder); *McCullough v. Howard Hanna Co.*, No. 1:09CV2858, 2010 WL 1258112 (N.D. Ohio Mar. 26, 2010) (summary judgment granted on defendants' contention that arrangement was exempt from kickback prohibition because payments made were to defendants' own employees; opinion discusses "safe harbor" requirements); *Wyman v. Park View Fed. Sav. Bank*, No. 1:09 CV 1851, 2010 WL 4868120 (N.D. Ohio Nov. 23, 2010) (court granted summary judgment to defendants, a lender and a title company, who contended they met requirements for the "safe harbor" in RESPA, rejecting plaintiff's contention that he was *required* to use affiliated services for lack of evidence).

[68] *See, e.g., Johnson v. KB Homes*, No. CV-09-00972-PHX-FJM, 2010 WL 1268144 (D. Ariz. Mar. 30, 2010) (denying motion to dismiss case in which plaintiffs alleged

B. Kickbacks May Result in Legal Exposure If No Additional Compensable Services Are Provided for the Fee Charged.

While only about 21% of the survey respondents identified Kickbacks as a significant source of current disputes, almost 63% identified it as an issue with moderate or higher current significance, and more than 34% believe the issue will increase in importance over the next two years. (*See* Tables 18, 20.) More than 42% of the survey respondents believe there is a significant need for training about Kickbacks. (*See* Table 22.)

Here, too, comments were sparse. Respondents referred to "continued confusion over RESPA [and] a lack of clarity." A respondent from Missouri noted, "I do not think there is a will to clarify this issue OR any Government understanding of what it even is or how it should work." The most detailed comment referred to rule interpretations relating to home-warranty companies.

> With the latest HUD interpretation letter, home warranty companies have come up with significantly different programs that each believe meet the RESPA requirements. The scary part is that each warranty company claims that the other guys' programs are in violation. As a broker-owner, I just don't know whom to believe. [69]

Countrywide's appraisal subsidiary colluded with Countrywide in financing purchases of homes from related builder using inflated appraisals); *Minter v. Wells Fargo Bank, N.A.*, 675 F. Supp. 2d 591 (D. Md. 2009) (plaintiffs alleged defendants created sham ABA to facilitate payment of illegal referral fees and kickbacks); *Zaldana v. KB Home*, No. C-08-3399 MMC, 2009 WL 1299082 (N.D. Cal. May 8, 2009) (denying motion to dismiss case alleging a "sham joint venture entity"; opinion discusses HUD guidelines).

[69] This comment refers to an Interpretative Rule HUD issued in June 2010 which addresses how to determine whether a payment from a home warranty company to an agent or broker is a kickback or a permissible fee under RESPA § 8. *See RESPA: Home Warranty Company's Payments to Real Estate Brokers and Agents*, Interpretative Rule, 75 F.R. 36271 (June 25, 2010).

The issue has been frequently litigated during the last two years. The case-law research retrieved 92 cases addressing Kickbacks, a substantial increase over the 2009 *Scan*. (*See* Table 2.) Liability was determined in 33 of these cases, and 31 cases (94%) were decided in the defendants' favor before trial. Only two cases ended in a finding of liability.[70]

A great number of cases involved Kickback claims brought within a homeowner's challenge to foreclosure, frequently as a separate federal-court action. The lawsuits frequently were filed long after the loan closed, too late to bring a viable Kickback claim.[71]

Several courts addressed whether a plaintiff in a kickback case has standing to sue when the plaintiff was not in fact overcharged for settlement services and concluded that the plain language of RESPA § 8 allows a private cause of action without alleging

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[70] *See Busby v. JRHBS Realty, Inc.*, 642 F. Supp. 2d 1283 (N.D. Ala. 2009); *Garcia v. Fidelity Mtge. Co.*, No. C 05-05144 MHP, 2009 WL 1246921 (N.D. Cal. May 5, 2009).

[71] These Kickback cases were not counted for the *Scan* because they did not address the claims on their merits. In some cases, however, the homeowner could support a claim for equitable tolling of the statute of limitations—that fraudulent or deceptive conduct by the defendant "hid" the claim from the plaintiff—such that the plaintiff would have additional time to make the claim. Cases in which the plaintiff was given a chance to amend his or her complaint to allege facts supporting equitable tolling were counted for the *Scan*. *E.g.*, *Bassett v. Ruggles*, No. CV-F-09-528 OWW/SMS, 2009 WL 2982895 (E.D. Cal. Sept. 14, 2009) (trial court discusses of equitable-tolling doctrine in case involving mortgage broker and real-estate agent who helped plaintiff find financing but allegedly misstated material terms of transaction; plaintiff was given leave to amend complaint to allege facts supporting equitable tolling).

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and proving an overcharge.[72] Class-action status was granted in a kickback case alleging a "post-closing fee" and the court granted preliminary approval to a settlement agreement requiring the defendant to refund the fee.[73]

Another court denied a motion to dismiss a case alleging that the collection of a 2.5% yield spread premium was permissible when the broker brought the financier an "above par" loan, such that services were actually provided in exchange for the fee.[74]

"Administrative fees" are another topic being litigated. In addition to *Noall*, discussed above in section A, *Augustein*[75] concluded that a fee could be improper even

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[72] *See Carter v. Welles-Bowen Realty, Inc. (In re Carter)*, 553 F.3d 979 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (trial court concluded that class-action plaintiffs lacked standing because they did not allege an "overcharge"; appellate court addressed whether plain language of RESPA § 8 permits private cause of action without requiring allegation of overcharge). *See also Spears v. Washington Mut. Bank FA*, No. C-08-00868 RMW, 2010 WL 54755 (N.D. Cal. Jan. 8, 2010) (also concluding that an overcharge allegation is not required for kickback claim). For a case examining standing to challenge a referral arrangement between a title insurer and title agencies, *see Edwards v. First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010) (citing and following *Carter* and *Alston* appellate opinions), *petition for cert. filed*, 79 U.S.L.W. 3344 (Nov. 23, 2010). A companion opinion addressed the plaintiff's motion for class-action certification and request for nationwide discovery. *See Edwards v. First Am. Corp.*, 385 Fed. Appx. 629 (9th Cir. 2010).

[73] *See Cohen v. J.P. Morgan Chase*, 262 F.R.D. 153 (E.D.N.Y. 2009). *See also Peters v. Keyes Co.*, No. 10-60162-CIV, 2010 WL 1645095 (S.D. Fla. Apr. 21, 2010) (plaintiff alleged that separate "administrative brokerage fee," to be paid out of closing, violated RESPA and state consumer-protection act), *aff'd*, 402 Fed. Appx. 448 (11th Cir. 2010).

[74] *McCormick v. Exec. Trustee Servs.*, No. 2:09-CV-2331 JCM PAL, 2010 WL 3385359 (D. Nev. Aug. 24, 2010). *But see Ramos v. Mtge. Elec. Regis. Sys., Inc.*, No. 2:08-CV-1089-ECR-RJJ, 2009 WL 5651132 (D. Nev. Mar. 5, 2009) (plaintiffs alleged yield spread premium was "excessive"; court dismissed case).

[75] *Augenstein v. Coldwell Banker Real Estate LLC*, No. 2:10-cv-191, 2010 WL 4537049 (S.D. Ohio Nov. 9, 2010). *Cf. Freeman v. Quicken Loans, Inc.*, 626 F.3d 799 (5th Cir. 2010) (if there is only one service provider, fee is not actually split).

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if it was not split. In *Busby*,[76] the court granted summary judgment to class-action plaintiffs who contended that real-estate company's "administrative brokerage commission fee" was not related to any service performed. The court rejected defendant's contention that fee was justified by the "array of services" the defendant provided.

C. While There May be Disputes About Disclosure of Settlement Costs, They Are Not Likely to Lead to Liability Under RESPA.

The survey results for Disclosure of Settlement Costs follow the pattern for the other two RESPA issues. While more than 61% indicated the issue has moderate or higher current significance, only about 29% believe the issue will increase in importance over the next two years. (*See* Table 18.) Nearly 43% believe additional training about Disclosure of Settlement Costs is needed.

Thirty-five cases were located addressing this issue, but none of them resulted in a finding of liability.

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[76] *Busby v. JRHBS Realty, Inc.*, 642 F. Supp. 2d 1283 (N.D. Ala. 2009).

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IV. FRIVOLOUS LAWSUITS AND CASES ADDRESSING WHETHER THE PREVAILING PARTY HAS A RIGHT TO RECOVER FEES ARE EXPECTED TO INCREASE.

Nearly 62% of the survey respondents report that Frivolous Lawsuits/Prevailing Party's Right to Fees are currently at a moderate or higher level, and almost 64% believe that the level of disputes will stay the same during the next two years. The issue was not often ranked among the top three current or future potential disputes, however. Similarly, it is not on the list of significant training needs, though 64% of the survey respondents believe it is an area requiring some additional training. (*See* Table 23.)

The comments from survey respondents tended to be general, suggesting that Frivolous Lawsuits are a significant problem, with plaintiffs "look[ing] for a deep pocket" with the mentality that "everything is some one else's fault." A few respondents also remarked that consumers are simply frustrated with the mortgage process, implying that frustration is the reason for frivolous claims. A Massachusetts respondent stated, "More buyers are 'stepping into' the shoes of a co-broker, seeking a rebate when a co-broker does not prevail at arbitration or knows they won't."

V. COMMISSION DISPUTES AND PROCURING CAUSE CONTINUE TO BE SIGNIFICANT SOURCES OF DISPUTES, ESPECIALLY AS THE ECONOMY AND THE ROLE OF BANKS IN TRANSACTIONS CONTINUE TO AFFECT SALES.

The issue of commission disputes and procuring cause is a significant source of current disputes, according to 44% of the survey respondents; about 70% of the respondents who ranked the issue placed it among their top three current disputes.

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(*See* Tables 17, 19.) The importance of this issue is likely to increase. Over 47% of the respondents believe that the issue will increase in importance over the next two years, and 74% of those who ranked the issue put it among their top three potential future issues. (*See* Tables 20, 21.) Nearly 54% believe there should be additional training on commission disputes and procuring cause. (*See* Table 22.)

There were over 100 comments about commissions and procuring cause from the survey respondents. As in the 2009 *Scan*, the respondents' comments frequently addressed the effect of the economic downturn and asserted that agents still do not understand procuring cause. Respondents again noted that this issue is an ongoing, and most common, source of disputes between agents, leading to ethics complaints and/or arbitration proceedings. One respondent simply stated, "People can't make a living selling real estate anymore."

Roughly the same number of statutes and regulations were found through legal research as were found in 2009. (*See* Table 4.) A new topic of legislation has emerged. Some states have enacted statutes addressing referral fees and rebates on commissions. In Georgia it is a violation of the licensing statutes to fail to disclose or prevent the disclosure of various fees and commissions.[77] It is also an unfair trade practice to accept or give an undisclosed fee or valuable consideration for a referral. Instead, there must be a written agreement referring a client or customer to another licensee, in which the amount (or an estimated amount) received in exchange for the referral must be disclosed. New Jersey has enacted new provisions relating to how to

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[77] *See* Ga. Code Ann. §§ 43-40-25 (2009).

calculate and document a rebate from a broker to a purchaser, and how rebates should be advertised and disclosed.[78]

Brokers' liens continue to be the topic of legislation and regulation. Colorado amended its rule prohibiting licensees from filing a lien, recording a *lis pendens* (notice of pending litigation), or any other cloud on merchantable title, in order to secure payment of a commission. It now specifically prohibits various remedies for disputes arising in residential real-estate transactions.[79] Colorado has also passed a detailed "Commercial Real Estate Broker Commission Security Act."[80] Michigan, too, has enacted legislation creating a broker's lien for commercial brokers.[81] Virginia permits a Virginia licensee to pay a commission to a non-Virginia licensee when the foreign licensee assists a non-Virginia client or broker in a commercial real estate transaction, with some limitations.[82]

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[78] *See* N.J. Rev. Stat. § 45:15-16a, -16b, -17(k) (2009); N.J. Real Estate Commission, Bull. No. 10-03, *Rebates of Real Estate Commissions* (summarizes Pub. Law 2009, ch. 273 and permits advertising for offered rebates; actual regulations not yet promulgated). *See also* Utah Code §§ 61-2f-305, -409 (2010) (restrictions on commissions; actions for recovery of compensation or limits on cause of action).

[79] 4 Colo. Code Regs. § 725-1, r. E-48 (2010).

[80] *See* Colo. Rev. Stat. §§ 38-22.5-101 to -110 (2010).

[81] Mich. Comp. L. § 570.581–.594 (2010).

[82] Va. Code Ann. § 54.1-2103(1)(A)(10) (2009).

Claims for commissions by unlicensed persons were a frequent subject of litigation; these cases often involve a person licensed in another jurisdiction.[83] Another issue is whether a commission can be collected after a listing agreement expired.[84] Disputes between a broker and a formerly associated agent also were litigated.[85]

In two cases the client tried to escape paying a commission, but did not succeed in either case.[86] Also of note is *Land Man Realty*,[87] in which the court concluded that

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[83] *See LexCin Partners, Ltd. v. Newmark S. Region, LLC*, No. 2008-CA001170-MR, 2009 WL 2341553 (Ky. Ct. App. July 31, 2009) (Kentucky broker refused to pay commission to non-Kentucky broker; broker cited Kentucky's "turf state policy," but exception to policy required payment to non-Kentucky broker); *Rolison v. Sterling*, No. Civ. A. 08-0389-CG-M, 2009 WL 2514294 (S.D. Ala. Aug. 13, 2009) (plaintiff, who was unlicensed in Alabama, sought 40% of commission broker was to receive in exchange for solving broker's and seller's purchase-agreement contingencies; court held agreement was too uncertain to enforce). *See also Byron v. Haas*, 883 N.Y.S.2d 583 (App. Div. 2009) (parties to litigation had a commission-split agreement, but the plaintiff was not licensed when she provided the real-estate services).

[84] *See Ward v. Siebel Living Trust*, 365 Fed. Appx. 984 (10th Cir. 2010) (permitting agent to collect commission after listing period expired); *Burkett & Assocs., Inc. Century 21 v. Teymer*, 767 N.W.2d 623 (Wis. Ct. App. 2009) (sale occurred after listing expired, but buyer was on licensee's "protected list," and licensee was entitled to commission).

[85] *See Branson v. Fitzgerald*, No. E200802775CAR3CV, 2009 WL 4505438 (Tenn. Ct. App. Dec. 4, 2009) (licensee sued former sponsoring broker to recover commissions owed on several specific transactions; evidence was ambiguous as to when independent contractor's relationship ended); *Hini-Szlos v. Carter*, No. B219941, 2010 WL 3704178 (Cal. Ct. App. Sept. 23, 2010) (dispute between agent and broker over right to commission and breach of contract; broker contended that agent did not comply with contract's requirements about submitting documents and obtaining E&O insurance; court held that those breaches did not affect agent's right to the commission, that is, those breaches of contract were not material to the right to commission).

[86] *See Bendheim Enters., Inc. v. Las Vegas Land & Dev. Co.*, No. B214150, 2010 WL 1818391 (Cal. Ct. App. May 7, 2010) (broker was entitled to recover commission because dual agency had been clearly disclosed and acknowledged); *Rogers v. Fukase*, No. 10-00337 ACK-LEK, 2010 WL 4812772 (D. Hawai'i Nov. 16, 2010) (broker

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the broker did not have any duty to evaluate the legal validity of a cooperating broker's claim to a commission pursuant to an oral agreement. The sellers sued the broker after the cooperating broker sued them seeking his share of the commission. The court ruled in the end that the oral agreement was independent from the commission agreement between the seller and the broker, so the cooperating broker was entitled to collect.

VI. TECHNOLOGY ISSUES NEED ADDITIONAL TRAINING.

While technology issues, taken together, are not a significant source of current disputes, over 46% of the survey respondents believe these issues will increase in significance over the next two years, and 47% believe there is a significant need for training about technology issues. (*See* Tables 14, 16.) The principal issue of concern is State Internet Advertising Rules.

A. Respondents Assert that State Internet Advertising Rules Are Not Keeping Up with the Times.

Although survey respondents do not believe state internet advertising rules are a significant source of current disputes, they are concerned that advertising rules are not keeping pace with technological innovation. Disputes involving state internet advertising rules have moderate or higher significance according to almost 68% of the survey respondents. Over 50% believe, however, that the issue is likely to increase in

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was deemed a third-part beneficiary of purchase agreement and could recover commission after transaction fell through).

[87] *See Land Man Realty, Inc. v. Faraone*, 895 N.Y.S.2d 247 (App. Div. 2010).

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importance over the next two years, and over 53% believe additional training on this topic is needed. (*See* Tables 18, 20, 22.)

The new twist on this issue, and the focus of respondents' comments, is the use of social-networking platforms. Respondents refer to "[a]n explosion of violations," such as "not relaying the broker's name, telephone information." They believe "Licensees do not understand that state licensing law applies to all advertising" and predict that, "[a]s more Realtors engage in social media, [there] will be increased issues with compliance with real-estate commission rules on advertising." Several respondents asserted that that state real-estate commissions are not keeping up with the times and are not enforcing rules that do exist. Finally, respondents suggest that brokers and agents simply lack knowledge or understanding of the relevant rules.

Relatively few statutes and regulations on this issue were located. Some address web content for group or team advertising[88] and social-networking services.[89] Washington has an administrative rule stating that all advertising, including internet-based advertising, must include the broker's firm name or assumed name.[90]

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[88] *E.g.*, 02-039-410 Me. Code R. §§ 1, 4-A, 13 (2009) (amendments to advertising rules relating to format of "group or team" advertising, and uploading web pages by affiliated licensees without including acknowledgement of supervising broker). *See also* 02-039-400 Me. Code R. § 1 (2009) (designated broker must establish policies regarding internet domain names and websites).

[89] Okla. Admin. Code § 605:10-9-4(a)(7) (2010) (if licensee engages in licensed activities using social networking sites, he or she must include his or her license status and reference to supervising broker).

[90] Wash. Admin. Code 308-134B-210 (2010).

In *Barlow*, the one case in which a license was found liable, the state licensing authority established that a licensee was using misleading internet domain names and the license was assessed a penalty and a 90-day license suspension.[91]

B. Privacy and Anti-solicitation Laws Are Areas Needing Additional Training.

Although the survey data for Privacy and Anti-solicitation Laws indicate that these issues are not significant sources of current disputes, respondents believe both issues are increasing in importance and need additional training. Specifically, 66% of the respondents indicate that the issue has moderate or higher current significance, and more than 47% believe the issue will increase in importance over the next two years. (*See* Tables 18, 20.) Over 46% believe there is a significant need for training about Privacy issues. (*See* Table 22.)

Legislation addressing privacy issues, as in the 2009 *Scan*, focuses on the protection of personal information on business computer systems and how to react to security breaches.[92]

Similarly, anti-solicitation laws are not a significant source of current disputes, but about 62% of the survey respondents believe the issue has moderate or higher current significance. (*See* Table 18.) Forty percent of the survey respondents believe the issue

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[91] *Barlow v. Ohio Dep't of Commerce*, 2010-Ohio-3842, 2010 WL 3250383 (Ohio Ct. App. Aug. 17, 2010).

[92] *See, e.g.*, Ind. Code § 24-4.9-3-3.5 (2009) (addresses reasonable procedures to protect and dispose of personal information in databases; violation is a deceptive act, subject to penalties and damages provisions of the consumer-protection act); Me. Rev. Stat. Ann. tit. 10, §1347-A (2009) (prohibits release or use of personal information obtained through a security breach).

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will increase in importance over the next two years, and over 40% believe there is a significant need for training on this issue. (*See* Tables 20, 22.)

States continue to enact statutes that address do-not-call registries, and are now extending the protection to cell phones and other, newer technology.[93] Virginia has created a private cause of action for sending commercial electronic mail and spam.[94]

VII. ANTITRUST ISSUES ARE NOT A SIGNIFICANT SOURCE OF DISPUTES, BUT ADDITIONAL TRAINING ON ANTITRUST ISSUES IS NEEDED.

Taken together, the survey responses about Antitrust issues indicate that these issues are not particularly significant to those who took the survey. In fact, 66% of the respondents reported a low frequency of current disputes, and 76% expect the number of disputes to stay the same over the next two years. Few respondents ranked the issues among their top five and none offered any comments. Nevertheless, the respondents believe additional training is needed on all four issues. (*See* Table 23.)

The case-law research retrieved a few relevant items. In *Consolidated Multiple Listing Service*,[95] the court entered a consent decree on conspiracy claims alleged against a multiple-listing service in Columbia, South Carolina. The United States

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[93] *See, e.g.*, Alaska Stat. § 45.50.475(g) (2009) (law now extends to a customer's cell or mobile number); Miss. Code Ann. §§ 77-3-701 to -737 (2010) (reenacts Mississippi Telephone Solicitation Protection Act, but includes exemption for person soliciting sale, exchange, listing or purchase of real-estate in conjunction with real-estate license); Wyo. Stat. §§ 40-12-301, -302 (2010) (law extends to unpublished cell-phone numbers).

[94] *See* Va. Code §§ 18.2-152.2, .3:1, .12 (2010).

[95] *United States v. Consol. Multiple Listing Serv., Inc.*, No. 3:08-CV-01786-SB, 2009 WL 3150388 (D.S.C. Aug. 27, 2009).

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alleged that the MLS rules and practices excluded competitors from the market. The case also addressed restrictions on marketing and advertising "For Sale by Owner" (FSBO) properties. The claims were not actually adjudicated. The MLS agreed not to deny membership to brokers or discriminate against a licensee based on the licensee's office location, pricing or commission rates, the forms it used or services it offered to buyers or sellers. It also was prohibited from restricting truthful advertising of properties, including listings of FSBO properties. The opinion sets forth particular the rules at issue and their required modifications.[96]

VIII. THIRD-PARTY LIABILITY, ESPECIALLY THE LIABILITY OF APPRAISERS, IS BECOMING A PRESSING AREA OF CONCERN.

Taken as a whole, 31% of the survey respondents identified the topic of Third-Party Liability as a significant source of current disputes, and even more (nearly 41%) believe these issues will increase in importance over the next two years. (*See* Tables 11, 14.) While about 15% of the respondents ranked the topic among their top five, approximately half of those who ranked the topic placed it among their top three. (*See* Tables 13, 15.) Of the two issues, Appraisers is the more immediate concern.

A. Appraisers

The survey results indicate that 35% of the respondents believe that the liability of appraisers is currently significant and 47% believe the issue is likely to increase in importance over the next two years. (*See* Tables 17, 20.) Approximately 47% of the respondents believe there is a significant need for additional training on this issue. (*See*

[96] *Id.* at **3-8.

Table 22.)

While the defined issue for the *Scan* is whether an appraiser is liable to a buyer or seller with whom there is no privity of contract, the comments instead reveal respondents' frustration and "confusion and discontent" about appraisers. One common concern is that appraisers are not from the local area and are doing valuations from a distance, or are not sufficiently familiar with relevant, local market factors. This lack of local experience slows down the process, respondents report.

The respondents also discussed the sudden shift from inflated appraisals and an overvalued market to appraisals that are just too conservative and are depressing the market. Some respondents also question appraisers' methods and objectivity: "Appraisals are too much influenced by the market performance at a certain time. They have become too political and less objective."

Another common concern respondents report relates to the use of appraisal management companies (AMCs), the prevalence of non-local appraisers and the Home Valuation Code of Conduct (HVCC). One respondent explained the problem as follows:

> The AMC system is contributing significantly to the devaluation of real property because the AMCs engage whoever is cheapest. They in turn appraise very low to protect themselves with the lenders. These appraisers also use the short sales and the lender sales as 'arms length transactions' when these are really fire sales. This creates a lower valuation base which then precludes home owners from refinancing and buyers from getting loans, because now the properties, which are not fire sales, are being appraised well below their real value."

Sixteen cases addressing liability of appraisers were found, but none ended in a finding that the appraiser was liable. Cases that were not resolved include:

- *Edalatdju.*[97] The court denied a motion to dismiss the buyers' case alleging fraud and conspiracy against an appraiser employed by a financing entity. The buyers were acquiring four condominium units and financing depended on a showing that each unit's market value was equal to or greater than the purchase price set forth in the purchase agreement. Two years later, the buyers tried to refinance and discovered that the amount of rent they had been receiving was much greater than the market rent. In fact, the market rent was less than one-half the monthly debt service and costs for the units. Because the appraiser did not use market rents for the original financing, the property was overvalued, causing foreclosure on the four units.

- *Johnson.*[98] Dismissal was denied in a case in which the plaintiffs alleged Countrywide's appraisal subsidiary colluded with Countrywide in financing the purchase of homes from a related builder using inflated appraisals.

B. Inspectors

While fewer than 27% of the survey respondents indicated that the liability of inspectors is a significant source of current disputes, almost 78% believe the issue has moderate or higher current significance, and more than 34% believe the issue is likely to increase in importance over the next two years. (*See* Tables 18, 20.) Just over 37% of the respondents believe there is a significant need for training on this issue. (*See* Table 22.)

The respondents' comments suggest that inspectors and the way they report the results of their work may be creating disputes because they are unrealistic about what the home's condition should be.

- "Inspectors [are] creating [a] crisis in the mind of [the] Buyer and making unrealistic requirements."

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[97] *Edalatdju v. Guaranteed Rate, Inc.*, 748 F. Supp. 2d 869 (N.D. Ill. 2010).

[98] *Johnson v. KB Home*, 720 F. Supp. 2d 1109 (D. Ariz. 2010).

- "Many of the inspectors are not qualified to render an opinion and are often wrong."
- "Because of the inspectors' huge liability in what they do, they are choosing to point out anything that 'could be' a hazard or hazardous material without knowing whether it is or not. Of course in the buyer's mind it is [a hazard] once these kinds of statements are made."

Case law addressing the liability of inspectors was sparse. In one case, *Anderson*,[99] an inspection revealed problems with the electrical system and the air conditioning, and should have revealed a live infestation of termites. The pest-control company provided reports to the buyer at, rather than before, the closing. The inspector settled the claims against him and a new trial was ordered on the remaining claims. Three other cases were dismissed[100] and one case was unresolved.[101]

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[99] *See Anderson v. Klasek*, 913 N.E.2d 615 (Ill. App. Ct. 2009).

[100] *See Monahan v. Coffenberg*, No. MON-L-2166-05, 2009 WL 3125269 (N.J. Super. Ct. Law Div. Monmouth County June 25, 2009) (inspectors were not in privity with buyers and buyers could not pursue their claims relating to late-discovered mold); *Santana v. Olguin*, 208 P.3d 328 (Kan. Ct. App. 2009) (animal odors and damage, such as dry rot and past water intrusions, were discovered after closing, but because contract with inspector had had clear and unambiguous provision limiting the inspector's liability, buyers could not pursue their claim), *review denied* (Kan. May 18, 2010); *Magill v. Carnes*, No. LACV 060759, 2009 WL 287144 (Iowa Dist. Ct. Linn County July 23, 2009) (window and door casing and sills were soft or rotted; plaintiff did not sue the agent or broker and court granted inspector's motion for dismissal)

[101] *Gray v. Sullivan Real Estate Inc.*, No. CV095012402, 2010 WL 2573820 (Conn. Super. Ct. May 18, 2010) (dismissal denied in case in which agent was present during inspection and contract with buyer required agent to disclose defects; inspector was a person or entity that may have been related to agent).

IX. FAIR-HOUSING ISSUES ARE NOT SEEN AS AREAS OF INCREASED LIABILITY, THOUGH THEY ALL WARRANT ON-GOING TRAINING.

Fair Housing issues, as a whole, do not seem to be significant to the survey respondents, but those who ranked the issues within the topic generally placed them among their top five. (*See* Tables 11-15.) Four issues (Race, National-origin and Sexual-orientation Discrimination and Advertising and Target Marketing) were identified as a source of a moderate number of current disputes. (*See* Table 18.) No Fair Housing issues were identified as likely to increase in importance over the next two years, nevertheless, all nine Fair Housing issues are on the list of issues needing some additional training. (*See* Table 23.)

Several states have addressed various Fair Housing issues. One more state, Delaware, has made sexual orientation a protected class under its human-rights statutes and New Jersey has promulgated a regulation prohibiting real-estate licensees from denying brokerage services based on "civil union" or "domestic-partnership" status.[102] Illinois and Wisconsin have added "order of protection status" or similar language referring to victims of domestic violence, sexual assault or stalking, as a protected class under the states' fair housing laws.[103] Virginia passed a statute requiring that the state Fair Housing Board to require persons "in the business or activity

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[102] *See* Del. Code tit. 6 §§ 4601–4605, 4607, 4619 (2009); N.J. Admin. Code §§ 11:5–6.4 (2009).

[103] *See* 775 Ill. Comp. Stat. 5/1-102, -103 (2009); Wis. Stat. §§ 106.50(1), (1m), (5m)(d), 452.14(3)(n) (2009).

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of selling or leasing dwellings" to provide a signed affidavit stating that the person has "read and understood" educational materials on fair-housing laws.[104]

Two Fair Housing cases are on the list of top-ten verdicts. (*See* Table 8) In *McClandon*,[105] a home-owners' association refused to approve the sale of an unbuilt lot. The seller, an African-American woman, alleged that the defendants did not enforce a build-within-two-years rule against white owners. The Florida Human Rights Commission found probable cause and the case went to trial, ending in a $2,416,000 verdict for the plaintiff.[106]

In *Teen Challenge*,[107] the plaintiffs wanted to use its property to provide "rehabilitative services." The case ended with a $967,995 verdict for the plaintiffs and an award of prejudgment interest, which was a subject of the defendant's new-trial motion, along with the contention that an award of future damages should be set aside. The court denied new-trial motion.

An increasing trend involves zoning issues that are resolved on the basis of public pressure and animosity rather than on the merits of the proposed project. In one

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[104] Va. Code Ann. §§ 54.1-2343, -2344 (2010).

[105] *McClandon v. Heathrow Land Co. Ltd. P'ship*, No. 6:08-cv-35-ORL-28GJK, 2010 WL 336345 (M.D. Fla. Jan. 22, 2010).

[106] *Id.*, 2010 WL 5066146 (M.D. Fla. Jan. 22, 2010).

[107] *Teen Challenge Int'l v. Metro. Gov't of Nashville & Davidson County*, No. 3:07-00668, 2009 WL 2151379 (M.D. Tenn. July 17, 2009).

particularly fraught case, a federal district court judge added a "coda" to his opinion decrying incivility in public discourse.[108]

X. SURVEY RESPONDENTS' CONCERNS ABOUT EMPLOYMENT ISSUES FOCUS ON INDEPENDENT CONTRACTORS AND PERSONAL ASSISTANTS.

Employment issues as a whole did not receive a strong reaction from survey respondents. (*See* Tables 11-16.) Nor did any one particular issue stand out as having current significance. (*See* Tables 17-22.) Six issues have moderate training needs: Personal Assistants, Independent Contractors, Harassment, Employment Discrimination, Defamation and Wrongful Termination: (*See* Table 23.) Two of these issues may be of particular concern: Independent Contractors and Personal Assistants.

A. The Status of Agents as Independent Contractors Is Under Increased Scrutiny.

Fifty-three percent of the respondents report that disputes involving independent contractors are a source of a moderate or higher number of current disputes. (*See*

[108] *See South Middlesex Opp. Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2010 WL 3607481 (D. Mass. Sept. 9, 2010) (denying defense motion for summary judgment in case involving treatment home; zoning authority allegedly was influenced by inflammatory statements regarding the effect the residents would have on neighborhood). *See also Artisan/Am. Corp. v. City of Alvin, Tex.*, 588 F.3d 291 (5th Cir. 2009) (developer contended animus against Hispanics affected a zoning request; appellate court affirmed summary judgment for the defense); *Avenue 6E Inv., LLC v. City of Yuma*, No. 2:09-cv-00297 JWS, 2010 WL 1873090 (D. Ariz. May 10, 2010) (city council challenged rezoning request after zoning authority had approved change to ordinance; council was allegedly swayed by pejorative comments from general public about Hispanics, the expected purchasers); *Human Resource Research & Mgmt. Group, Inc. v. County of Suffolk*, 687 F. Supp. 2d 237 (E.D.N.Y. 2010) (zoning ordinance applicable to recovery houses violated FHA because it was based on sweeping generalizations and anecdotes making it facially discriminatory).

Table 18.) Only 16% of the respondents believe this issue is likely to increase in importance, but it is an area needing some additional training. (*See* Table 23.)

Comments from the respondents suggest that brokers do not understand what an independent-contractor relationship really is. "Many brokers don't recognize 'independent contractors' and see agents as 'employees.'" Other respondents seem to question whether the independent-contractor relationship still works. One commented, "[There is] too much liability and responsibility on the broker for real-estate agents. The brokerage business is becoming less and less a profitable and desirable business. [There is] too much liability and risk." A respondent from New Jersey analyzed the underlying legal issues:

> There is a contradiction between the status of [an] independent contractor as defined by the Tax Code and the requirement that an agent exercises his/her sales profession under the supervision of a broker. There is no such thing as supervision after the facts, and associates' actions jeopardize the license of the supervis[ing] broker. . . . [B]eing proactive and trying to institute training and continuous education programs may conflict with the definition of independent contractor under the IRS guidelines. A real estate salesperson associated with a broker is not quite identical to a plumber who does repairs for the broker.

Independent-contractor issues were addressed in fourteen cases, and liability was determined in eight, evenly split between summary judgments for defendants or favorable outcomes for plaintiffs. One case was among the top-ten verdicts. *Jarvis*[109]

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[109] *Jarvis v. Perfect Props.*, No. 08A98442, 2010 WL 2152013 (Ga. State Ct. Jan. 26, 2010). *Cf. Schwinn v. Long & Foster Real Estate, Inc.*, 362 Fed. Appx. 357 (4th Cir. 2010) (broker was not liable for damages arising from independent contractor's traffic accident); *Armacida v. D.G. Neary Realty Ltd.*, 886 N.Y.S.2d 367 (App. Div. 2009) (plaintiff alleged he was battered by agent/independent contractor and sued broker; office manual provided guidelines about relationship, but did not establish broker would be vicariously liable for independent contractor's acts).

involved a shooting at a real-estate brokerage, when an agent shot his cousin in the back during a dispute about money. The plaintiff was a paraplegic as a result and sued the broker on a theory of vicarious liability. A jury awarded $1,035,000 that was reduced 25% to reflect the plaintiff's percentage of fault.

Another factual situation involving a licensee's employment status involves wage-and-hour claims, discussed in section D below.

B. The Issue of Personal Assistants Is Another Area Where More Training Is Needed.

The issue of Personal Assistants was not identified as particularly significant, either as a source of current disputes or as a source of future disputes; however, more than 62% of the respondents believe this is an area needing some additional training. (*See* Table 23.)

The respondents identified one core problem that gives rise to disputes. They believe that the line between licensed and unlicensed activity is not sufficiently clear. Thus, they believe there needs to be more definitive information about what unlicensed, personal assistants can and cannot do. Some respondents connected the issue to team brokerage and how a personal assistant should function within a "team." One stated, "As assistants grow in number due to more teams, we are seeing issues with non-licensed assistants performing duties requiring a license." Another respondent noted that licensees are working other jobs to supplement their income during the downturn and delegate more activities to unlicensed assistants. One respondent suggested that training is needed "on business and tax issues regarding teams and

assistants."

C. Wage-and-Hour Claims Under the Fair Labor Standards Act Is an Emerging Area of Liability for Brokers.

The case-law research retrieved several cases in which licensees made claims against brokers under the Fair Labor Standards Act (FLSA) or similar state laws. Although none of the cases has ended in a finding that the broker was liable, most have not yet reached final judgment. These cases include:

- *Heidingsfelder*.[110] The plaintiff alleged that the broker violated overtime provisions and the broker defended on the grounds that the plaintiff was an independent contractor. Summary judgment was denied to permit a fact finder to determine whether the plaintiff was an employee or an independent contractor.

- *Krohn*.[111] The plaintiff alleged violations of the FLSA and claimed she was owed overtime. While the plaintiff's work fit the legal definition of "outside sales," she did all her work in the office, so the court rejected the employer's claim that she was exempt. Nevertheless, summary judgment was granted to the employer because it had a good-faith belief that the plaintiff was exempt.

- *Zanes*.[112] The Court granted class-action status for a group of plaintiffs who sold timeshares for the defendant. The issue to be decided is whether the professional-employee exemption to wage and hour laws applied.

D. A Sexual Harassment Claim Resulted in a Top-Ten Verdict.

One additional employment case resulted in a large verdict. In *Myers,*[113] the

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[110] *Heidingsfelder v. Burk Brokerage, LLC*, No. 09-3920, 2010 WL 4364599 (E.D. La. Oct. 25, 2010).

[111] *Krohn v. David Powers Homes, Inc.*, No. H-07-3885, 2009 WL 1883989 (S.D. Tex. June 30, 2009).

[112] *Zanes v. Flagship Resort Dev., LLC*, No. 09-3736 (JEI/JS), 2010 WL 4687814 (D.N.J. Nov. 9, 2010).

plaintiff alleged sexual harassment as well as a common-law battery claim. The harasser was the president of the company. The court concluded that the sexual-harassment claim was untimely under federal law, but the battery claim was properly tried. It affirmed the jury award on the battery claim for $103,622.09 in compensatory damages and $506,847.75 in punitive damages.

XI. DISPUTES INVOLVING STATE DECEPTIVE-PRACTICES AND CONSUMER-PROTECTION STATUTES REMAIN A SOURCE OF LIABILITY.

Nearly 60% of the survey respondents identified DTPA/Fraud as having a moderate level of current disputes (*see* Table 18), and nearly 65% believe the number of disputes will stay the same over the next two years. More than 70% of the respondents think there is a moderate or higher need for training on the issue. (*See* Table 23.) The real-estate commissioners also identified DTPA/Fraud as a significant issue over the last two years. (*See* Table 10.)

The topic ranges widely, and so do the comments from survey respondents. Some comments were general: "our members keep looking for ways to get around the rules." Another stated that "[the] economy and fewer transactions lead to taking shortcuts and outright deception." Respondents specifically mentioned short sales and lending fraud as sources of claims, such as when there is a short sale to a third party who rents or sells the property back to the original owner.

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[113] *Myers v. Central Fla. Inv., Inc.*, 592 F.3d 1201 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 299, 131 S. Ct. 392 (Oct. 4, 2010).

State consumer-protection statutes also provide ammunition to a plaintiffs' attorney. For example, a respondent in Oregon asserted that attorneys use the statutory claim to get around the requirement that each party pay their own fees. Thus, "[a]lmost every claim we see includes this [allegation.]" One respondent stated that these statutory claims are not going to abate.

> I don't see the current situation changing. The cost of defending a claim through arbitration is almost always higher than settling. In my opinion, this leads to more claims, but the [unfair trade practices claim] gives the claimant the advantage of collecting fees without our ability to do the same if we prevail.[114]

The case law research located 100 cases addressing DTPA and Fraud, a marked increase from the 2009 Scan. (*See* Table 2.) Forty-four of these cases ended with a determination of liability. Many of these cases were property-condition disclosure cases in which a DTPA claim was alleged.[115] Several cases included RICO (racketeering) claims, but none ended with a finding of RIOD liability.[116] Some escaped

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[114] For cases illustrating these advantages, see *Batischev v. Cote*, No. 08-P-2015, 2010 WL 652492 (Mass. App. Ct. Feb. 25, 2010) (verdict for plaintiff in case in which broker and agent sold condo with "egregious workmanship errors" and sold a unit different other than the one buyers thought they were buying; court awarded nominal damages, but awarded $488,829 fees and $48,264 in costs under DTPA statute), and *Konczal v. Farmer*, No. 07-P-1987, 2009 WL 321270 (Mass. App. Ct. Feb. 11, 2009) (defendants misrepresented potential development in neighborhood; while plaintiff allegedly did not rely on misrepresentation, statute did not require reliance where defendants "actively misled" plaintiff; court awarded $30,500, which was doubled pursuant to statute, along with fees and costs).

[115] *See, e.g.*, *Anderson v. Klasek*, 913 N.E.2d 615 (Ill. App. Ct. 2009) (new trial ordered in case alleging property was infested with termites and had problems with electrical system and air conditioning).

[116] *See, e.g., Liggon-Redding v. Willingboro Twp.*, Nos. 08-1802, -1803, 2009 WL 3073209 (3d Cir. Sept. 28, 2009) (seller sued real-estate agency and closing agent

pretrial dismissal, however.[117] Other situations giving rise to DTPA/Fraud claims include disputes between brokers and agents[118] and predatory-lending schemes.[119] In all, 33 cases (75%) were resolved in favor of the defendant and 11 (25%) ended in

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alleging RICO claims arising from sale of her home; case dismissed because seller failed to allege "predicate acts" required by statute), *cert. denied*, 130 S. Ct. 1514 (Feb. 22, 2010); *Purchase Real Estate Group Inc. v. Jones*, No. 05 Civ. 10859 (SCR)(LMS), 2010 WL 1837809 (S.D.N.Y. Apr. 30, 2010) (RICO claim dismissed in case alleging scheme relating to overvalued luxury properties; predicate acts alleged, but not required "pattern of racketeering activity"); *Ferri v. Berkowitz*, 678 F. Supp. 2d 66 (E.D.N.Y. 2009) (dismissing RICO claim in case in which lender sued borrower, borrower's agent and appraiser for inflated appraisal).

[117] *See, e.g., Johnson v. KB Home*, 720 F. Supp. 2d 1109 (D. Ariz. 2010) (dismissal denied in case alleging Countrywide's appraisal subsidiary colluded with Countrywide in financing purchases of homes from related builder using inflated appraisals; opinion discusses RICO claims in context of RESPA case, and concludes the claims are not incompatible).

[118] *Allen v. Burnet Realty, LLC*, 784 N.W.2d 84 (Minn. Ct. App. 2010) (granting summary judgment in case in which part-time real-estate sales associate alleged broker unlawfully sold insurance to him and other associates in violation of state insurance law and DTPA; court concluded that brokers indemnification program was not "insurance"), *review granted* (Minn. Sept. 21, 2010); *Gutierrez v. Merritt*, No. 2006-60592, 2009 WL 2030506 (Tex. Dist. Ct. Harris County Jan. 5, 2009) (verdict in case in which broker fraudulently withheld plaintiff's real-estate commission; instead he had title company pay broker directly and threatened to report plaintiff for unspecified federal fraud; claims of slander, tortious interference with contract; damages of $230,741.37).

[119] *See, e.g., Barkley v. Olympia Mtge. Co.*, No. 04-cv-8875 (KAM)(RLM), 2010 WL 3709278 (E.D.N.Y. Sept. 13, 2010) (denying summary judgment in case based on alleged conspiracy to sell overpriced, defective homes using predatory loans; Plaintiffs were targeted as minorities; includes §§ 1981, 1982, 1985, FHA & state-law claims); *M&I Marshall & Ilsley Bank v. Lerner*, No. CV-10-1081-PHX-DGC, 2010 WL 5232970 (D. Ariz. Dec. 16, 2010) (dismissing buyer's counterclaims against lender, seller's broker & appraiser; broker apparently said $2.65 million was a reasonable price and directed buyers as to where to get financing, told appraiser to appraise at contract price, not actual value).

verdicts for the plaintiffs. In fact, three of the top-ten verdicts included claims based on a state deceptive-practices act. (*See* Table 8.)[120]

XII. RESPONDENTS' CONCERNS ABOUT ETHICS RELATE TO ETHICS IN GENERAL RATHER THAN TO HOW COURTS ENFORCE AND RELY ON THE NAR CODE OF ETHICS.

Ethics topics are not a significant source of current disputes and a vast majority (more than 73%) of the survey respondents do not anticipate an increase in the level of disputes over the next two years. Only about 33% of the survey respondents believe there is a significant need for training about ethics. (*See* Table 16.) One issue, Enforcement of NAR's Code of Ethics by Courts, is more pressing to the survey respondents, with nearly 42% stating that there is a significant need for training on Code enforcement. (*See* Table 22.)

The respondents' comments tended to focus on ethics issues generally rather than the precise issues defined for the survey—enforcement of and reliance on the code of ethics *by courts.* Only one person addressed the defined topic. In explaining why he or she ranked "Reliance on NAR's Code of Ethics by Courts," the person stated, "as global transactions increase, the court will look at the INDUSTRY's code of conduct to judge agents' duties and responsibilities to clients and customers."

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[120] *SJW Prop. Commerce, Inc. v. S.W. Pinnacle Props.*, 314 S.W.3d 166 (Tex. App.–Corpus Christi), *opinion withdrawn and reissued*, No. 13-08-00268-CV, 2010 WL 3704928 (Tex. App.–Corpus Christi Sept. 23, 2010), *petition for review filed* (Tex. Jan. 11, 2010); *Best Fin. Consultants v. Chapman*, No. D055522, 2010 WL 5146212 (Cal. Ct. App. Dec. 17, 2010) (breach of fiduciary duty). *See also Akwa Vista, LLC v. NRT, Inc.*, 8 A.3d 97 (N.H. 2010) (breach of contract case).

XIII. LICENSING ISSUES

Licensing issues are the basis of a moderate or higher number of current disputes, according to about 69% of the survey respondents, and 39% believe these issues are likely to increase in importance over the next two years. (*See* Tables 18, 20.) Nearly 40% believe there is a significant need for training about licensing issues. (*See* Table 22.)

It is not clear what such training should involve, however. Non-licensed activity by out-of-state actors was the basis of several respondents' comments. Other comments tied the concern about non-licensed activity to licensing statutes. "[The] internet will increase global transactions, [so] laws need to be changed to protect our agents from losing commissions to [out-of]-state and international representation." Another respondent noted that "some want singular licensure, so as to get a commission anytime."[121] Finally, a respondent from Louisiana wanted licensing laws to be changed to require more stringent pre-licensure education: "[T]oday's licensing requirements need to be improved [to focus] more on education up front while

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[121] Issues relating to non-licensed activity were addressed in several cases retrieved for the *Scan. See, e.g., Ayers Oil Co. v. Am. Business Brokers, Inc.*, No. 2:09 CV 02 DDN, 2010 WL 2990113 (E.D. Mo. July 27, 2010) (Illinois-licensed "business broker" contended it did not need license to put together stock sale that included property in Missouri; plaintiff sought a declaratory judgment on whether it had to pay commission to defendant; summary judgment granted to defendant business broker); *Gruwell v. Ill. Dep't of Fin'l & Prof'l Reg.*, No. 4-09-0495, 2010 WL 4912920 (Ill. App. Ct. Nov. 30, 2010) (non-licensed independent contractor for "real-estate advertiser" received commission for each "For Sale By Owner" ad she sold; licensing authority contended sale of ads required real-estate license; advertiser agreed to obtain necessary license, but state also went after the independent contractor; court reduced her $25,000 fine to $7000), *appeal pending* (Ill. Mar. Term 2011).

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increasing the number of education hours in school by double and removing the post-licensing requirements." Thus, the specific comments from the survey seem to be more concerned about the content of licensing statutes than what, specifically, licensees need to know about those laws.

The case law research retrieved a number of cases addressing whether a real-estate license could be revoked for bad conduct, generally under a moral-turpitude clause.

- The Missouri Court of Appeals vacated a license revocation based on a licensee's 37-year-old plea for second-degree murder. The court concluded that revoking the license was unconstitutional because the licensee had served his time and disclosed the conviction, in complete compliance with the then-current licensing law. The law was subsequently changed to bar licensure, but it could not be applied retroactively to strip licensee of his license.[122]

- Leaving the scene of an accident in which somebody was injured was deemed a crime of moral turpitude supporting a license suspension.[123]

- A broker's license was properly revoked because the broker, who owned and managed three apartment buildings, had three misdemeanor convictions for violating the building code and an extensive list of similar violations.[124]

- A misdemeanor conviction for domestic violence was an insufficient basis for revoking a real-estate licensee on the grounds of moral turpitude.[125]

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[122] *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686 (Mo. Ct. App. 2010).

[123] *Cambas v. Dep't of Bus. & Prof'l Reg.*, 6 So. 3d 668 (Fla. Dist. Ct. App.), *cause dismissed*, 20 So. 3d 848 (Fla. 2009).

[124] *Robbins v. Davi*, 95 Cal. Rptr. 3d 792 (Ct. App. 2009), *review denied* (Cal. Sept. 17, 2009).

[125] *Petropoulos v. Dep't of Real Estate*, No. A119065, 2009 WL 1900391 (Cal. Ct. App. June 30, 2009).

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XIV. MORE TRAINING ON RELATIONSHIPS BETWEEN AFFINITY GROUPS AND REAL-ESTATE BROKERAGES IS SUGGESTED.

Although only 15% of the survey respondents believe that issues relating to Affinity Groups are a significant source of current disputes, 54% indicated that issues relating to Affinity Groups are the source of a moderate or higher number of current disputes, and over 26% believe the issue will increase in importance during the next two years. (*See* Tables 12, 14.) Almost 25% indicate there is a significant need for training on this issue. (*See* Table 16.)

Comments on this issue were sparse, and no cases on point were located.

XV. LICENSING OF RELOCATION COMPANIES IS NOT AN AREA OF CONCERN.

Relocation companies are not a significant source of current disputes, and they are not likely to be significant during the next two years. Only 13% of the survey respondents indicated that this issue was currently significant, and only 22% believe it is likely to increase in significance over the next two years. (*See* Tables 11, 14.) Nobody ranked this issue in their top-three current issues, and of the nine who ranked it as a potential issue, only one (11%) placed it in his or her top three, without comment.

Five cases retrieved in the legal research involved relocation companies, but none ended with a determination of liability.[126]

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[126] *See, e.g., Cedant Mobility Fin. Corp. v. Asuamah*, 684 S.E.2d 617 (Ga. 2009); *Keeler v. GMAC Global Reloc. Servs.*, 223 P.3d 1024 (Okla. Civ. App. 2009), *cert. denied* (Okla. June 25, 2009); *White v. Bowman*, 304 S.W.3d 141 (Mo. Ct. App. 2009).

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Appendices

Appendix 1: Legal Research Data and Survey Data

Appendix 2: Cases

Appendix 3: Statutes and Regulations

Appendix 4: Research Method

Exhibit A Issue Descriptions

Exhibit B Survey Form

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