

HOUSE BILL REPORT

EHB 1659

As Passed House:

March 14, 1995

Title: An act relating to real estate brokerage relationships.

Brief Description: Regulating real estate brokerage relationships.

Sponsors: Representatives Mielke, Quall, Crouse, Costa, Kremen and Cooke.

Brief History:

Committee Activity:

Commerce & Labor: 2/23/95, 2/28/95 [DP].

Floor Activity:

Passed House: 3/14/95, 69-29.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass. Signed by 6 members: Representatives Lisk, Chairman; Hargrove, Vice Chairman; Thompson, Vice Chairman; Cairnes; Goldsmith and Horn.

Minority Report: Do not pass. Signed by 5 members: Representatives Romero, Ranking Minority Member; Conway, Assistant Ranking Minority Member; Cody; Cole and Fuhrman.

Staff: Pam Madson (786-7166).

Background: The duties owed by a real estate broker or sales agent to a buyer, seller, landlord, or tenant are based on the common law of agency. Agency is a consensual relationship between two persons where one (the principal) empowers the other (the agent) to act and the agent acts based on that authority. Agency relationships can be created expressly in writing or by words or conduct. Conduct that determines an agency relationship in real estate sales and leasing includes who pays the commission.

Duties owed by an agent to a principle in a real estate transaction include loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting. The scope of these duties has evolved through the courts. In any given transaction, the duties owed may be unclear.

In the purchase and sale of real estate, the issue of who an agent represents may also be unclear. Licensed real estate brokers, affiliated brokers and sales people may be involved in a firm that deals with both buyers and sellers or landlords and tenants. It may not be clear to the buyers or sellers who is representing their interests.

Summary of Bill: The duties and the relationship of an agent to the principal (buyer or seller, landlord or tenant) is established in statute and replaces the common law rules applied to real estate licensees. Licensees include a real estate broker and an affiliated broker or salesperson acting as the broker's subagent.

An agent may only represent the buyer or the seller unless otherwise agreed in writing. Absent an agreement, the agent represents the buyer. At the start of a brokerage relationship or when a purchase and sale agreement is signed by a party, duties of the agent must be disclosed to the principal in writing. The agent must provide a separate written disclosure document that contains a bold heading indicating that this form is an optional waiver of the statutory duties of the agent.

Duties and Obligations of the Agent

Where the relationship involves either buyer/agent or seller/agent the duties owed by the agent to the principal are limited to the following:

- (1) Exercise reasonable skill and care for the principal;
- (2) Deal with the principal in good faith;
- (3) Be loyal to the principal after a purchase and sale agreement is signed by taking no action that is adverse or detrimental to the principal's interest in the transaction;
- (4) Abide by the terms of the brokerage agreement;
- (5) Advise seller to get expert advice on matters outside the scope of the agents expertise;
- (6) Disclose all facts the agent has agreed in writing to investigate;
- (7) Seek a buyer acceptable to the terms set by the seller, or in the case of a buyer, seek a seller acceptable to the terms of the buyer. The agent is not obligated to seek additional offers while the property is subject to a purchase and sale agreement in the case of a seller;
- (8) Present all written offers whether or not the property is subject to a purchase and sale agreement;
- (9) Disclose all material facts known by the agent and not reasonably ascertainable by the seller with respect to the buyer's ability to perform and in the case of a buyer, facts regarding the condition of the property;
- (10) Not disclose any confidential information without consent. Confidential information is information acquired during the relationship, information that is not public record, information that if disclosed would be detrimental to the principal, and information not disclosed or not obligated to be disclosed by the principal to third parties;

- (11) Account for all money and property received; and
- (12) Disclose all communication from the other party involving the purchase and sale agreement.

These duties may be changed if the parties agree to the change in writing.

Duties Owed to the Party Who Is Not the Principal

When the seller is the principal, the seller's agent is obligated to disclose to the buyer information actually known by the agent that significantly affects the value of the property. When the buyer is the principal, the buyer's agent is obligated to disclose to the seller information with respect to the buyer's ability to perform the financing terms.

Duties That Are Not Obligations of the Agent

The agent is not obligated to conduct an independent investigation of the property and has no duty to verify any information the agent reasonably believes to be reliable.

It is not a breach of duty to the principal for the agent, in the case of a seller, to show or list competing properties, or, in the case of a buyer, to show properties to competing buyers.

Dual Agency

A real estate broker or the broker's subagent may represent both the buyer and the seller if all parties agree in writing. The consent to this dual agency cannot be waived and must include the duties of the dual agent, the amount of compensation and who is obligated to pay the compensation.

The dual agent owes the same duties and obligations to each principal that are owed in a agent/buyer or agent/seller relationship. In a transaction involving different agents affiliated with the same broker each representing a different party to the transaction, the broker is the dual agent and the affiliated agents represent only the party with whom they have a brokerage relationship.

Termination of Duties and Obligations

Absent a written agreement, once the brokerage relationship is terminated, an agent is obligated to account for all moneys and property received and to keep appropriate information confidential.

Compensation

Payment of compensation is not a factor in determining the existence of an agency relationship. A broker may be paid by any party to the transaction and may be paid by more than one party if the parties consent in writing before or at the time of entering into a purchase and sale agreement. A buyer's agent may be paid based on the purchase price without breaching any duty owed to the buyer.

Vicarious Liability

In the chain of relationships that operate in a real estate transaction, the liability of each party is addressed.

The principal (buyer or seller) is not liable for the conduct of his or her agent or a subagent in a brokerage relationship unless there is express consent.

A licensee is not liable for the conduct of a subagent unless the licensee knew of the subagent's conduct. This does not include affiliated brokers acting under supervision of a broker.

Imputed Knowledge

A principal is not assumed to have knowledge of facts known by an agent or subagent unless the principal has actual knowledge of the facts. However, a principal is assumed to know information communicated to a principal's agent by any party named in a purchase and sale agreement.

The director of the Department of Licensing may impose sanctions on a licensee for violation of the laws governing real estate brokerage relationships.

The provisions of this act apply when an real estate licensee represents a landlord or a tenant in a lease arrangement.

Appropriation: None.

Fiscal Note: Requested on February 14, 1995.

Effective Date: The bill takes effect on January 1, 1996.

Testimony For: The fiduciary laws of agency have never fit the practice of real estate very well. Thirty-eight states have dealt with this problem. A study in the 1980s disclosed that buyers thought the real estate agent represented them. The listing agent represents the seller and the agent working with the buyer is usually the subagent for the seller. No one represented the buyer. Licensed real estate brokers and agents must disclose who they represent. Buyers sought representation by their own agents. There is a need to clarify who represents whom and what duties are

owed to the parties. There are conflicting duties for competing interests. Real estate practice involves the agent putting buyers and sellers together. Having buyers and sellers represented by different and unrelated agents is not what the customer wants. Statutes should provide clearer duties that do reflect the market place in the absence of an agreement between the parties. The approach proposed does away with the principles of common law and discloses duties up front to reduce uncertainty and preserve freedom of contract and avoid added regulatory burdens. It better balances the interests of the consumer and the real estate broker. A reference to the chapter of law that allows for enforcement of consumer complaints regarding real estate agents by the Department of Licensing should be added to the bill.

Testimony Against: The disclosure provisions are an improvement over the current situation. There are problems that need to be fixed. However, the sections dealing with liability create an immunity unknown in any other area of common law. It protects the broker from actions of a subagent. The consumer could not hold the broker liable. The common law is replaced with a list of duties that can be waived in writing. This allows unscrupulous people to put blanket waivers in documents. The consumer is left with no protection if duties are waived.

Testified: Glen Hudson, Bridgette Upton, and David Cantu, Washington Association of Realtors (pro); Larry Shannon, Washington State Trial Lawyers Association (con); Bob Mitchell, Department of Licensing (pro with amendments); and Gordon Tanner, Washington State Bar Association (con).