



February 25, 2003

Texas Repeals "Broker Negotiates" Rule, But Continues Reviews

The Texas Real Estate Commission (TREC) has proposed a repeal to its controversial ruling that "protected consumer interests" to "define the minimum level of service to a consumer in a real estate transaction" by requiring all brokers to include helping clients with negotiations as part of their services to consumers. Discount and flat-fee brokers like Texas Discount Realty's Aaron Farmer are celebrating.

However, the controversy isn't over; round two hasn't started yet.

TREC had adopted the new rule in November, 2002, and began to receive comments, as well as an unwelcome lawsuit filed in state district court by Farmer, almost immediately. The commission quickly put together a public meeting, held January 6th, 2003, where persons spoke for and against the rule. After reviewing the responses, the commission proposed the repeal, but that doesn't mean the issues which resulted in the creation of the rule have gone away.

The commission says it enacted the rule because of complaints by others in the industry that consumers weren't being fully informed as to the level of service they could expect from a licensed broker in a real estate transaction. Buyers' agents were complaining that they were being pressed into service by the seller to answer questions and perform other work that the fee-for-service broker wouldn't do without charging a higher fee.

"I understand their complaints," says Farmer. "A lot of buyers' agents feel obligated to do this, and my attorney says he has people coming to him for advice and he says, 'I don't represent you.' People want free advice."

Critics of the rule said that the commission was prohibiting fee-for-service listings, and that there was no provision for waiver by the client. In short, consumers were being required to pay for higher levels of service than they perhaps want or need.

The commission said they "did not intend to prohibit fee-for-service real estate listing agreements or to deny consumers the right to choose the type or level of service they want from a licensed broker." However, it may "propose a replacement provision in the future that addresses all of the concerns raised by interested parties."

"The commission may consider a rule with a disclosure requirement, or a waiver by the client, or exceptions to the general rule," says Loretta DeHay, general counsel for TREC. "They want to take it up again, and get a considered decision from all parties."

Among the suggestions is a disclosure to be given to the client by the discount or flat-fee broker that outlines what services they are getting and not getting for their money, and to inform the client that other services are available for additional fees.

Broker Farmer has already begun using such a "Limited Service Agency Disclosure."

His disclosure to the seller states, "If there is a buyers' agent or buyers representative involved in the transaction; THAT AGENT DOES NOT REPRESENT YOU OR YOUR BEST INTERESTS. Do not ask the buyers agent for help or advise during the transaction.

"If you feel that you do need assistance or advice, you may contract with your Texas Discount Realty agent for the additional price of \$1500 paid at closing and funding, or you may contact the attorney of your choice or ask Texas Discount Realty to refer you to an attorney."

The \$1500 fee charged by Texas Discount Realty includes, but is not limited to the following services or acts:

- Accept, review and negotiate all contracts and addendums necessary to execute an effective contract
- Providing necessary documents and preparing those documents with a buyer found by the seller.
- Taking and presenting any and all offers made by other real estate agents.
- Advise the seller on the offer's merits as it relates to the market.
- Assist the seller and providing necessary documentation to make a counter offer.
- Receipting of any funds and the contract with an escrow agent (title company).
- Make sure any inspections and re-inspections are accomplished under the time frame called for in the contract.
- Negotiate any repairs requested by buyer after inspection period.
- Follow up with buyer's lender to make sure financing is flowing smoothly.
- Work with title company to make sure property is closed within the time called for by the contract.

Editor's note: Spelling, punctuation and grammatical errors are Texas Discount Realty's.

Whether or not such a disclosure will satisfy the commission remains to be seen.

"You could argue that it is a benefit for the consumer because it gives them a choice, but on their side, it clearly tells them what they are getting from the brokers," explains DeHay. "There are valid arguments that can be made for and against the rule; the commission wants to listen to all these statements."

Critics, including Farmer, have said that the rule was enacted to protect full-service brokers from competition. He says he doesn't want to give any brokers a reason not to work with him.

"Our primary focus is consumer protection," says DeHay. "If a client signs a waiver, in combination or alternative with a disclosure, waiving any other services that the licensee would be providing, will all be discussed on April 7, 2003. We will publish this in the Texas Register and we will take comments on that until the commissioners entertain the comments, and if they vote to repeal, then the repeal would be 20 days after it is put in the Register."

How unusual is it to enact a rule, then repeal it and reconsider it for a rule? "Normally the input comes in before the rule is adopted, so that the commission is aware of concerns," says DeHay. "In this case the commission was not aware of concerns until after rule was adopted at the November meeting. We had no idea that the people had these concerns. The compromise is to repeal the provision to stand back and take a closer look."

Written by Blanche Evans

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