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PURPOSE OF THE COURSE

This course covers relevant statutes, regulatory actions, recent cases, changes in contracts or other real estate forms, and other relevant legal topics. Also reviewed are issues of recurring importance such as commission rules, fair housing, landlord-tenant laws, and other relevant legal topics.

RELEVANCE OF THE COURSE

This course is relevant as it deals with legal topics that a working broker uses in his or her day to day activity. A knowledge of these topics is invaluable to the licensee and benefits the public that the licensee serves.

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Pre-assessment Explanation

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PRETEST PAGE

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PRETEST PAGE

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Changes in the Real Estate License Act in 2003

Active/ Inactive License

An individual can apply for a real estate sales license without a sponsoring broker and, upon meeting all qualifications, will be issued an “inactive” license. To begin practicing real estate, a new sales licensee must obtain a sponsoring broker. No additional fee is required for a salesperson’s initial move from inactive status to active sponsorship by a broker.

Criminal History

This change reaffirmed the commission’s authority to check an applicant’s criminal history record (Government Code §411.122).
Changes in the Real Estate License Act in 2005

HB 1236

HB 1236 provides an exception for licensing under the Real Estate License Act, Occupations Code Chapter 1101, for persons engaged in foreclosure sales. The bill’s effective date was May 17, 2005.

The exception states that a real estate license is not required for a trustee who conducts a foreclosure sale.

SB 810

Senate Bill 810, effective September 1, 2005, provides several revisions to the Real Estate License Act. The bill

- clarifies that the four-year complaint limitation period also applies to real estate inspectors (persons licensed under Occupations Code Chap. 1102);
- provides for the issuance of a provisional moral character determination under §1101.353;
- revises the salesperson education requirements to require 14 semester hours (210 classroom hours) prior to filing an application;

http://www.capitol.state.tx.us/statutes/gv.toc.htm
http://www.capitol.state.tx.us/statutes/oc.toc.htm
http://www.trec.state.tx.us/formslawspubs/rules_codes/trecrules.asp#TOP

TREC Rules §535.63 Education and Experience Required for a License

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Changes in the Real Estate License Act in 2005

SB 810

- revises the salesperson annual education requirements to require four additional semester hours (60 classroom hours) for the first renewal;
- repeals the salesperson annual education requirements for the subsequent two years with the net requirement of 18 semester hours remaining the same; and
- requires TREC to automatically approve core courses and State Bar of Texas CLE courses as elective credit courses to satisfy the nine hours of non-legal MCE required by §1101.455.

Senate Bill 810 also revises Chapter 1101 of the Occupations Code requiring a broker who represents a party or who lists real property under an exclusive agreement to

- inform the party of material information related to the transaction, including the receipt of an offer by the broker;
- answer the party’s questions; and
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Changes in the Real Estate License Act in 2005

Additionally, Senate Bill 810 prohibits a broker who represents a party from telling another\nbroker to negotiate directly with the broker’s client. It further provides that, for purposes of\n§1101.157, a licensee who has additional authority to bind a party under a power of\nattorney or a property management agreement is considered a party to the lease or sale.

An inquiry to an employee of a builder or developer about contract terms or forms does not\nviolate §1101.652(b)(22) if the person does not have authority to bind the employer to the\ncontract. The delivery of an offer to a party does not violate §1101.652(b)(22) if the party’s\nbroker consents to the delivery and a copy of the offer to a party’s broker.

An exception to the requirement of sending a copy of the offer to a party’s broker is when\nthe party is a governmental agency using a sealed bid process that does not allow a copy to\nbe sent to the broker.

In addition to the above revisions, Senate Bill 810

✓ requires that a broker who agrees to represent both a buyer and a seller must agree\nto act as an intermediary;
✓ provides TREC with enforcement authority over a licensee who engages in\nmisrepresentation, dishonesty or fraud when selling or buying real property in the\nname of the spouse or a first degree relative of the licensee;
✓ requires a licensee to notify TREC within 30 days of the date of a final conviction of a\nfelony or a criminal offense involving fraud; and
✓ modifies the recovery fund provisions under Subchapter M to clarify that a person is\nnot eligible for a license under Chapter 1101 until the person has repaid the full\namount paid on behalf of the person, whether that person’s license was revoked or\nexpired.

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Other Legislative Changes in 2005

ARB Arbitration Appeals

In 2005, the Texas Legislature passed a law that creates an alternative Method for certain\nproperty owners to appeal a determination of value made by an appraisal review board\n(ARB).

If a property owner is not satisfied with the findings of the ARB, the owner has the right to\nfile a lawsuit and may alternatively appeal through binding arbitration (Chapter 41A, Tax\nCode).
This alternative through binding arbitration applies only if the ARB determined that the value of the property is $1 million or less and the owner is appealing only the determination of market value or appraised value. It is not an alternative to appeal on the basis of an unequal appraisal.

A property owner who appeals through binding arbitration pays a $500 deposit. A “loser pays” provision provides that a property owner who wins at arbitration receives a return of the filing fee, less a $50 administrative fee. A property owner who does not prevail does not get the deposit returned. If the arbitrator’s determination of value is closer to the owner’s estimate of value, the owner prevails. If not, the appraisal district prevails.

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Other Legislative Changes in 2005

When an ARB determination is made, the appraisal district notifies the property owner of the ARB’s determination and advises the owner of rights to appeal including, if applicable, binding arbitration. The Texas Comptroller of Public Accounts administers the appointment of the arbitrators and the processing of the arbitration deposits.

The Comptroller drafts rules and forms for the administration of the program and maintains a registry of qualified arbitrators. If the parties cannot agree upon the choice of an arbitrator from the registry, the Comptroller appoints one.

To qualify as an arbitrator, one must be a licensed broker, salesperson or real estate appraiser and have completed 30 hours of arbitration education. Qualified arbitrators may charge a fee not to exceed $450. The arbitrator is paid from the owner’s arbitration deposit or by the appraisal district.

The arbitrator is responsible for arranging and conducting the arbitration hearing. The arbitrator renders an award or decision on a form prescribed by the Comptroller and sends a copy of the award to the parties and the Comptroller.

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Changes in Foreclosure Procedure

Traditionally, foreclosure sales are sold “at the courthouse steps,” a place at the county courthouse designated by the county commissioner’s court in the county where the land is located. The 2005 Legislature provided an alternative, changing the statute so that the commissioner’s court of a county may designate an area other than a location at the courthouse where sales will take place.

Foreclosure sales may be conducted at a public place within a reasonable proximity of the county courthouse. The county commissioner’s court is required to record that designation in the real property records of the county. The other rules for posting the notice of the foreclosure sale have not changed. Note new §51.002(h) of the Property Code.
Personal Information and Records

Fair and Accurate Credit Transactions Act of 2003 (FACT)

FACT requires the proper disposal of consumer information. The Federal Trade Commission adopted a rule (effective June 1, 2005) that requires businesses to use reasonable procedures in the disposal of such information.

The federal rule applies to those who maintain or possess consumer information from a consumer report for a business purpose. Consumer report means any report on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living prepared by or obtained from an agency that collects such information (a credit report, for example).

Destruction of Files with Personal Information

Four new bills regulate treatment of personal records. House Bill 698 amended the Business and Commerce Code and mirrors the FTC rule. However, the House Bill defines personal identifying information as an individual’s first name or initial and last name in combination with any of the following:

- birth date;
- social security number or other government-issued identification number;
- mother’s maiden name;
- unique biometric data (fingerprint, voice print, retina image);
- unique electronic identification number or routing code;
- telecommunication access device including debit or credit card information; or
- financial institution account.

During disposal, the bill requires that the personal identifying information of a customer must be modified by shredding, erasing or other means so that is unreadable or undecipherable. The bill creates a presumption of compliance if the business uses a reputable document-destruction company. Penalties of $500 may be assessed for each record not properly disposed of.

Businesses should adopt policies and procedures for the proper disposal of such information, taking “reasonable measures to protect against unauthorized access.” The federal rule does not require the regular disposal of such information but requires the destruction of that information upon disposal. The key is that the procedure should protect against unauthorized access to or use of the information.
Destruction of Files with Personal Information

The federal rule gives examples of the kinds of reasonable disposal measures:

- burning, pulverizing or shredding papers;
- destroying or erasing electronic media (simply deleting the files is not sufficient); or
- hiring a reputable document disposal company. Privacy Policy (HB 1130) House Bill 1130 amends the Business and Commerce Code and prohibits a business from requiring that a person disclose a social security number to obtain goods or services unless the business
- adopts a privacy policy;
- makes the policy available to the customer; and
- maintains the social security number confidentially under the policy.

The bill mainly affects property managers, but it could have implications for other licensees. Penalties may include $500 for each month during which a violation occurs. The privacy policy must include:

- how the personal information is collected;
- how and when personal information is used;
- how the personal information is protected;
- who has access to the personal information; and
- how personal information is disposed of.

Bad Checks (HB 1855)

House Bill 1855 amends the Business and Commerce Code and requires a business to delete electronic records when a record was established reporting that the customer issued a bad check that is later found to be in error. The bill applies only to businesses that accept checks.

The business must delete any electronic record indicating that the customer issued a bad check not later than 30 days after the business and customer agree that the information in the electronic records is in error or the customer presents a report from a law enforcement agency stating that the dishonored check was not authorized and also presents a written notice from the customer that the dishonored check was not authorized. A civil penalty of $1,000 may apply for any violation.

Identity Theft (SB 99)

Senate Bill 99 amends the Business and Commerce Code by prohibiting the denial of an extension of credit solely because a person was a victim of identity theft. The bill defines a victim of identity theft as someone who has filed the proper criminal complaint alleging the identity theft.
The bill also authorizes insurance companies to sell identity theft insurance in Texas. Such insurance can be a separate policy or made part of a property insurance policy or personal policy.

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Changes in the Texas Timeshare Act (HB 1045)

HB 1045 updates the Texas Timeshare Act, Property Code, Chapter 221 as follows:

The bill

- adds definitions and modifies others to reflect current products in the timeshare industry, including both deeded and non-deeded timeshare interests as well as single and multi-site timeshare plans offering either specific interests or non-specific interests;
- permits a developer to conduct presales prior to completion of registration provided the developer obtains TREC’s permission, the application is administratively complete, and the developer otherwise complies with specific statutory requirements;
- establishes an abbreviated registration process, at the commission’s discretion, for out-of-state developers who are appropriately registered in another U.S. jurisdiction and provide certain documentation to TREC;
- clarifies when amendments to a timeshare plan registration must be filed;
- expands TREC’s powers to conduct hearings, initiate disciplinary actions and assess administrative penalties;
- provides for renewals of registrations under the act;

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Changes in the Texas Timeshare Act (HB 1045)

HB 1045 updates the Texas Timeshare Act, Property Code, Chapter 221 as follows:

The bill

- permits TREC to request copies of a developer’s advertising and requires any advertisement containing a “promotion” to comply with the Contest and Giveaway Act;
- revises the content of the timeshare disclosure statement that a developer must provide to a buyer prior to the sale of a timeshare interest to provide additional disclosures and documentation;
- clarifies required purchase contract provisions, including the buyer’s rescission period, processing of buyer refunds, and disclosure of the rescission period in the purchase contract;
- modifies the escrow and financial assurance provisions to better protect the consumer during the rescission period and when construction of the timeshare unit is not finished at the time of purchase;
✓ adds a violation under the Texas Timeshare Act and the Deceptive Practices Act for a developer to exceed a one-to-one buyer-to-accommodation ratio for a timeshare plan during a 12-month period;
✓ expands the information available to timeshare buyers and owners regarding annual expenses of the association, and requires an independent annual audit of the timeshare’s financial statements;
✓ clarifies how managing entities that manage more than one timeshare plan are to operate; and
✓ adds a requirement that the developer of the managing entity must keep a copy of each purchase contract in its records

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Regulatory Update

New 13 SEER Air Conditioning Regulation

Effective January 13, 2006, a rule adopted by the U.S. Department of Energy will require all air conditioning components to meet a minimum 13 seasonal energy efficiency ratio (SEER) rating. The intent of the regulation is to reduce energy consumption. A higher SEER indicates a more energy efficient unit.

Existing units with lower SEER ratings do not have to be replaced. However, if an existing unit cannot be repaired, the replacement unit must meet a 13 SEER. A property owner may need to make some structural modifications to accommodate a larger more efficient unit. For example, a larger unit may require a larger pad on which to sit outside or additional support if the unit is in an attic or on a roof.

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Corporations and Limited Liability Companies

The Real Estate License Act (the Act) and the Rules of the Commission require a corporation or limited liability company (LLC) to be licensed as a real estate broker if it provides real estate brokerage services or represents to others that it is engaged in the business of real estate brokerage. Corporations and LLCs licensed as brokers have the same authority as individuals licensed as brokers. A corporation or LLC may sponsor persons and is responsible for the acts and conduct of any persons it sponsors.

The general rule is that only a corporation or LLC created under the laws of Texas may obtain a Texas resident broker license. However, a corporation or LLC formed under the laws of another state may be licensed if the corporation or LLC has its principal place of business in Texas; all of its assets are located in Texas; and all of its officers, directors, managers and members are Texas residents. Also, a nonresident corporation or LLC lawfully conducting real estate brokerage in another state may qualify for a broker’s license as a nonresident.
Section 1101.453 of the Act requires a corporation or LLC to designate one of its officers or managers to act for the corporation or LLC. Each designated officer or manager must be licensed as an active real estate broker. The designated officer or manager is the person through which the corporation or LLC applies and qualifies for its broker license. A licensed broker may serve as the designated officer or manager for an unlimited number of corporations or LLCs. A salesperson or unlicensed person may own all or part of a corporation or LLC that holds a real estate broker license.

While the designated person must be an officer of the corporation or manager of the LLC, he or she is not required to own an interest in the corporation or LLC. However, the designated person remains responsible for all real estate activity conducted by or through the corporation or LLC, much as an individual broker is liable for the acts of the persons sponsored by the broker. A complaint filed against a corporation or LLC or any of its sponsored persons is deemed a complaint against the designated person of the corporation or LLC.

If the license status of the designated person changes to inactive, expired, revoked, or suspended; or if he or she dies or leaves, the corporation or LLC must cease conducting its real estate business until a qualified replacement is named. This is done by submitting a change-of-designated officer form and the correct fee to TREC. The corporation or LLC can then resume its real estate activities.

The 2005 Texas legislature recently clarified issues related to Rule P-53 by amending §2502.005 of the Texas Insurance Code. This statute provides that a title insurance company or a title insurance agent is not prohibited from

- engaging in legal, promotional and educational activities that are not conditioned on the referral of title insurance business;
- purchasing advertising that promotes the title insurance company when the title insurance agent purchases the advertising from any person in any publication, event or media at market rates;
- delivering to a party in the transaction, or the party’s representative, legal documents or funds which are directly (or indirectly) related to a transaction closed by the title insurance company or title insurance agent; or
- participating in an association of real estate practitioners, attorneys, builders or developers if participation does not exceed normal participation of a volunteer member of the association and is not activity that would ordinarily be performed by paid staff of that association.

The statute defines market rates as “the price at which a seller, under no obligation or duress to sell, is willing to accept any buyer, under no obligation or duress to buy, is willing to pay in an arm’s-length transaction. The market rate is determined by comparing the rights or items purchased or sold to similar rights or items that have been recently purchased by others or sold to others, including others not in the title insurance business.”

Effective November 1, 2005, TDI amended Rule P-53 to conform to the legislative changes made to §2502.005, Insurance Code. The revised Rule P-53 states that a title company may
not pay or subsidize the business expenses of a Producer, which includes a real estate agent, broker, builder, lender or attorney. The revised rule defines the term “business expense” in a manner that reflects its common definition. Anything that a Producer will deduct on his or her income tax as a business expense is presumed to be a business expense under the revised rule. The revised rule clearly states that the rule does not prohibit any of the activity permitted under §2502.005, Insurance Code (bulleted above). The amended statute and the revised rule more closely mirror standards set forth in RESPA. A broker should not accept, nor should a title company offer to give a broker, anything that is an item of value or that constitutes the payment of a business expense. Title companies may engage in legal promotional activities only.

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TITLE COMPANY RELATIONSHIPS

Background

In May 2003, the U.S. Department of Housing and Urban Development (HUD) sent a letter to several title companies in the Austin market directing the companies to comply with Section 8 of the Real Estate Settlement Procedures Act (RESPA) as it relates to rebates and kickbacks.

HUD investigated several title companies in the Austin market for allegedly violating Section 8 by providing free virtual tour services for brokers. The title companies entered into settlement agreements with HUD as a result of the investigation and began charging brokers their costs for providing virtual tours, brochures, flyers and other materials to real estate agents.

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TITLE COMPANY RELATIONSHIPS

Procedural Rule P-53

The Texas Department of Insurance (TDI) has responded by implementing Procedural Rule 53 (P-53), which prohibits anyone in the title insurance business from directly or indirectly paying for or subsidizing advertisements or promotional materials for any producer or affiliate of a producer in a position to make a referral to a title insurance business. P-53 regulates only the relationship between title companies and producers. It is similar to RESPA’s prohibitions, which apply to the relationship between any settlement service provider in a real estate transaction, such as a lender or surveyor.

Title insurance is completely regulated by TDI. Anyone who receives a rebate from an insurance provider is violating the insurance code, which is a third-degree felony. If title companies are able to supply free goods and services to real estate licensees, TDI’s concern is that the cost of these goods and services will be passed on to the consumer who is purchasing title insurance.
A producer includes a real estate broker or agent, lender, mortgage company, mortgage broker, builder, developer, attorney, or architect or any affiliate.

An affiliate of a producer or an authorized person is an officer, director, agent or employee of such a person, or a member of the immediate family of any of them or a person who owns along with a producer or authorized person.

Items of Value

Because much of the rebating in the past has been in the form of goods and services, TDI has adopted revisions regarding items of value offered to licensees by title companies. Traditionally, title companies have marketed their businesses by offering free items and services to licensees. TDI considers free items and services to be rebates.

With respect to relationships with brokers and salespersons, P-53 provides that a title company may not directly or indirectly pay or subsidize advertising or promotional materials or activities of any producer. Prohibited activities have the effect of subsidizing the business, advertising or promotional activities of a producer.

Prohibited Activity: Title companies cannot provide advertising for a producer

Type of Service or Activity: Signage, Media advertising, Storage of advertising media

Prohibited Items:

- Providing or subsidizing any signs
- Advertising a property or a group of properties for lease or sale
- Providing electronic or hard-copy media describing, promoting, or advertising a property or group of properties
- Providing items designed to store advertising media
Prohibited Activity: Title companies cannot conduct, sponsor, promote or pay for any part of an event benefiting a producer

Type of Service or Activity: Open houses, Receptions, Convention events

Prohibited Items:
- Food, beverages
- Prizes, gifts, decorations
- Entertainment
- Professional services

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TITLE COMPANY RELATIONSHIPS

Procedural Rule P-53

Prohibited Activity: Title companies cannot provide or pay for office space, equipment or supplies for a producer

Type of Service or Activity: Administrative, staffing, facilities

Prohibited Items:
- Furniture
- Computer hardware/software
- Telephones, copiers, fax machines
- Vehicles

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TITLE COMPANY RELATIONSHIPS

Interstate Transactions

In multi-state transactions, P-53 prohibits the use of lower title insurance rates in different states to effect a rebate or kickback to the producer.

Also prohibited is discounting the normal and customary charge of a policy premium in another jurisdiction so that the producer receives a thing of value.

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TITLE COMPANY RELATIONSHIPS

Title Company Advertising
Fair Market Value

Title companies and title agents may advertise their businesses, but TDI will examine the advertising activity to determine compliance with the stated intent and purpose of the rule. Paying a producer an inflated price for advertising, over and above the normal market rate, would be a violation. P-53 does not prohibit a title company from purchasing advertisements in a broker’s publications if the title company pays only a fair market price for the advertisement.

Penalties

The penalties for noncompliance are severe. The commissioner may impose, after a hearing, a single penalty of not more than $10,000 for each act or violation and for each day of violation, unless a greater penalty is specified by the Insurance Code or another insurance law of Texas. The penalties can apply to both the title company and the producer.
National Do-Not-Call Registry

Commercial Solicitation Calls (Cold Calls)

The Federal Trade Commission (FTC) has completed final amendments to its telemarketing rules. Enforced beginning October 1, 2003, these rules prohibit both intrastate and interstate calls to any person on the National Do-Not-Call registry.

Regardless of state law exemptions, real estate licensees must comply with the requirements of the National Do-Not-Call registry. These rules do not apply to charities and tax-exempt nonprofit organizations, political campaigns and callers taking surveys or polls.

National Do-Not-Call Registry

Residential Numbers

The Do-Not-Call Registry is for residential telephone numbers only. All numbers on the list are presumed to be residential numbers. The FCC provides for complaints and a private cause of action. Aggrieved consumers can file a complaint after one call and can sue if they
receive two calls in violation of the regulations by the same company within a 12-month period.

To access the registry, real estate brokers must complete a profile on the FTC’s web site. The FTC will assign the broker an account number, which can be used by all agents in the brokerage. The charges for accessing part or all of the registry are shown below.

Yearly Rate (as of 9/1/04)
First five area codes No Charge
Each additional area code $40
Entire list $11,000

Generally, the no-call rules apply to calls that contain a commercial solicitation (most cold calls).

Do-Not-Call Registry Home Page
https://telemarketing.donotcall.gov/

Q & A: The National Do-Not-Call

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SOLICITATION

National Do-Not-Call Registry

Established Business Relationships

Licensees may call consumers with whom they have an existing business relationship (EBR) even though the consumer’s number is in the do-not-call registry. An established business relationship exists if the person called:

✓ is a party to a transaction with the company within the 18 months immediately preceding the call; or
✓ has made an inquiry with the company within the three months immediately preceding the call.

Licensees also may call if a consumer grants prior written permission.

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SOLICITATION

National Do-Not-Call Registry

Internal Do-Not-Call List
The rules require that the firm maintain an internal do-not-call list. Client requests to be placed on the list are good for five years. The internal no-call list must be honored by everyone in the firm. That is, if Agent A places a name on the internal do-not-call list, Agent B cannot call the individual listed.

The internal do-not-call list takes precedence over the established business relationship exemption and is in effect even if the number is not on the federal do-not-call list.

Updating the DNC List

Effective January 1, 2005, the Telemarketing Sales Rule (TSR) requires telemarketers to use a DNC list that has been updated from the FTC no more than 31 days prior to the date any call is made, rather than three months prior to the date any call is made, as was allowed under the previous TSR.

Safe Harbor

A provision in the FTC and FCC rules helps a business protect itself from an alleged violation, especially when the alleged violation is inadvertent.

To qualify for the safe harbor provision, the company must demonstrate that it:

- has a policy in place to describe how the representatives need to record the information and to whom representatives will give this information;
- has trained its representatives on its written policy for complying with the rules;
- maintains and updates the federal do-not-call list every 90 days;
- maintains an internal do-not-call list;
- does not sell, rent, lease or purchase the list for any purpose except compliance purposes; and
- purchases access from the administrator of the registry, and that it does not share the costs of accessing the registry with any other telemarketers.

Calling Rules

Before making a cold call, the real estate licensee must check the number against the national do-not-call list and check the firm’s internal do-not-call list to determine whether the call is allowed.
On National List | On Internal List | Can Licensee Make Call?
--- | --- | ---
YES | YES | NO
NO | YES | NO
YES | NO | If established business relationship exists

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SOLICITATION

Calling Rules

Calls are restricted to specified times.

Monday – Saturday Call between 9:00 a.m. and 9:00 p.m.

Sunday Call between 12:00 p.m. and 9:00 p.m.

The caller must:

✓ identify self before making the solicitation;
✓ disclose that the call is a solicitation call;
✓ disclose all material information related to the solicited service; and
✓ honor request to be placed on the company’s internal do-not-call list.
✓ The caller may not use caller-ID blocking.

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Frequently Asked Questions

May I call the owner of a for-sale-by-owner (FSBO) property when acting as a buyer’s agent if I believe that my client might be interested in the FSBO property?

Yes, as long as the call is to express interest in the property for the client. However, you may not call to try to obtain a listing if the number is on the registry.

I monitor expired listings and wish to solicit the owner of an expired listing to list with me. Do calls to owners whose listings recently expired fall under the national do-not-call rules?

Yes. The agent making a call to an owner who previously listed property with another brokerage is making an unsolicited telephone call. In this question, the agent does not have an EBR with the property owner. The agent must comply with the do-not-call rules when making a cold call to the owner.

For how long after the expiration of the EBR may I call a client?
The listing agent, as well as other agents from the same company, may contact the seller for up to 18 months after the expiration date. For all other agents, the registry must be consulted prior to calling.

Frequently Asked Questions

May I call someone who has been referred to me by a former client?

You should check the do-not-call registry, but it is not clear whether this sort of indirect inquiry would qualify as a “customer inquiry” within the rules.

May I call someone who signs a visitor book at an open house?

The safest course would be to provide some kind of notice on the sign-in sheet alerting visitors that they are consenting to a follow-up call. Visitors could indicate their consent by checking a box, for example.

May I call consumers who call to listen to my informational message?

Some brokers publish a telephone number that plays an informational message for consumers. If you wish to call those who listen to the message, inform the consumer that there will be a follow-up call and offer the option to cancel.

What are the penalties for calling a number that appears on the do not-call registry?

The fine for calling a number on the do-not-call registry is up to $11,000 per call by the federal government and $500 for a lawsuit by a state attorney general or a consumer.

New Do-Not-Fax Rules

In June 2005, Congress passed amendments to the Junk Fax Prevention Act. The FCC will (before January 9, 2006) adopt more specific rules related to the Act and the amendments passed by Congress. The amendments include a new consumer right to “opt out” of receiving faxes, even from those with whom the recipient has an established business relationship (EBR). To comply, licensees should document fax numbers of those with whom they have an EBR.

The Act prohibits sending unsolicited advertisements to a telephone facsimile machine. An unsolicited advertisement is “any material advertising the commercial availability or quality of any property, goods or services which are transmitted to any person without that person’s prior express invitation or permission.” One may send faxes containing advertisements to individuals who have given their express consent to receive the fax. Penalties are $500 per fax, with treble damages for willful violations. Consumers have a private right of action against violators.
All fax messages, including those not containing advertisements, must contain the date and time that the message is sent as well as the identification of the business entity or individual sending the message and the telephone number of the machine sending the message or of the business entity or individual sending the message. This information must be contained in a margin either at the top or the bottom of each page transmitted or on the first page of the transmission.

There are three requirements that apply to sending faxes that contain advertisements:

1. the sender must have an “established business relationship” with the recipient;
2. the sender must have obtained the customer’s fax number through methods described in the legislation; and
3. the sender must provide an opt-out mechanism that meets the Act’s requirements.

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Established Business Relationship

The FCC will likely clarify that an EBR (for brokerage operations) exists in the same way it does under the “do-not-call rules.” Currently, there is no time restriction for an EBR, but it may be forthcoming in the rules.

A broker may send a fax containing an advertisement to a consumer with whom the broker has an EBR (to be safe, use the 18-month and three-month rules as under the do-not-call rules). A broker will also need an EBR to send faxes about listings (new listings or price reductions) to other brokers.

A broker has an EBR with any broker with whom the broker has participated in a cooperative transaction or with any broker who has made an inquiry to the broker.

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Obtaining Fax Number

The sender of the fax that contains an advertisement may send a fax only to a number that the sender obtained under one of the following scenarios:

- the sender had an EBR with the recipient and also possessed the recipient’s fax number before the Act’s effective date of July 9, 2005;
- the sender has an EBR with the recipient, and the recipient voluntarily communicates the fax number to the sender (for example, letterhead, business card, other communications); or
- the sender has an EBR with the recipient and obtains the recipient’s fax number from a public source, such as a directory advertisement or Internet website.
It is best to obtain a written record of the fax number as protection against a claim.

Opt Out

Any fax that contains unsolicited advertisements must contain an opt-out mechanism. The opt-out mechanism must be included in faxes even if the sender has the recipient’s written consent to send faxes with advertisements. The opt-out mechanism must:

- be clear and conspicuous;
- be on the first page (cover sheet);
- state that the recipient may opt out;
- state that the sender’s failure to comply within a certain period of time (to be determined by FCC rules) is unlawful;
- include specific language that the FCC will provide related to an effective opt-out request; and
- identify a telephone and fax number where recipient can send the opt-out request.

The opt-out mechanism must be available 24 hours a day, seven days a week and must be cost free.

In addition to the foregoing rules, one should:

- not send a fax containing an advertisement unless the sender can document that he or she has permission to do so;
- eliminate cover sheets that contain inadvertent advertisements; and
- eliminate inadvertent advertisements in agent newsletters that are sent to clients or customers.

The newly signed law does not legalize unsolicited fax advertisements or solicitations, but it does allow for an established business relationship exception.

Do-Not-Fax Rules

Enforcement of the new do-not-fax rules created by the FCC were to become effective on January 1, 2005; however, this date has been extended to June 30, 2005. The extension was granted to give Congress more time to act on the Junk Fax Prevention Act. If the FCC rules remain unchanged, the following steps should be observed by licensees:

The rules are:

- A licensee should not send a commercial solicitation by fax unless he or she has the written permission of the recipient.
✓ A licensee should eliminate any cover sheets that contain inadvertent commercial advertisements.
✓ A licensee should eliminate advertisements in faxed newsletters unless the sender has written permission from the receiver.

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SOLICITATION

Texas Anti-Spam Statute

This statute applies to any e-mail that contains advertising. Falsification of routing or sending information is prohibited. Also prohibited are any false, misleading or deceptive statements in the subject line.

Advertisers must precede the subject message with “ADV:” unless there is an existing business relationship (EBR). Under the Texas statute, an EBR is a two-way communication that has not been terminated. This definition is different from the federal definition of an established business relationship.

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SOLICITATION

Texas Anti-Spam Statute

The statute requires that unsubscribe requests be honored no later than three days after the request is received. A violation of the anti-spam statute is considered a violation of the Deceptive Trade Practices Act (DTPA).

The statute offers a safe harbor for e-mail messages sent in error. A sender is not liable if, in good faith, the sender:

✓ contracted with an e-mail provider to send the message; and
✓ had no reason to know that the provider would violate the statute.

Texas Business and Commerce Code, Chapter 46

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SOLICITATION

Federal CAN-SPAM Act

Requirements for Commercial E-mailers
The CAN-SPAM Act of 2003 (Controlling the Assault of Nonsolicited Pornography and Marketing Act) establishes requirements for those who send commercial e-mail.

The law became effective in January 2004 and covers e-mail whose primary purpose is advertising or promoting a commercial product or service, including content on a website. The main provisions of the act are described next.

**False or misleading header information**

The e-mail’s “From,” “To,” and routing information, including the original domain name and e-mail address, must be accurate and identify the person who initiated the e-mail.

**Subject lines**

The subject line cannot mislead the recipient about the contents or subject matter of the message.

**Opt-out method**

The sender must provide a return e-mail address or another Internet-based response mechanism that allows a recipient to ask the sender not to send future e-mail messages to that e-mail address. The sender may create a “menu” of choices to allow a recipient to opt
out of certain types of messages, but the option to end any commercial messages from the sender must be included.

The sender must honor opt-out requests. Any opt-out mechanism offered must be able to process opt-out requests for at least 30 days after the commercial e-mail is sent. When the sender receives an opt-out request, the law allows the sender ten business days to stop sending e-mail to the requestor’s address. The sender cannot help another entity send e-mail to that address or have another entity send e-mail on the sender’s behalf to the address. Additionally, it is illegal to sell or transfer the e-mail addresses of people who choose not to receive e-mail, in the form of a mailing list, unless the transfer is handled in a manner that allows the other entity to comply with the law.
Each violation of the previously mentioned provisions is subject to fines up to $11,000. Deceptive commercial e-mail is subject to laws banning false or misleading advertising as well.

Federal Trade Commission  
http://www.ftc.gov/spam

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**SOLICITATION**

**Federal CAN-SPAM Act**

**Penalties**

The act instructed the FTC to report to Congress in summer 2004 on a national Do Not E-Mail Registry. The FTC will issue reports in the next two years on labeling of all commercial email, the creation of a “bounty system” to promote enforcement of the law, and the effectiveness of enforcement of the CANSPAM Act. Updates on implementation of the act will appear on the FTC’s website.

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**HOME EQUITY LOANS**

**Line of Credit Draw Procedure**

In 2003, the Texas Legislature amended the Constitution, allowing line of credit home equity loans.

The “draw” procedure provides that the lender make the funds available after final loan approval, but the borrower does not have to obtain the full amount at the closing.

The lender makes a line of credit available with a maximum amount and allows the borrower to draw down all or any part of the amount.

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**HOME EQUITY LOANS**

**Line of Credit Draw Procedure**

A number of consumer protections are built into this new loan procedure. The lender may not amend the terms in the line of credit agreement without the borrower’s consent. All owners must receive a final statement of settlement costs not later than one business day before the loan closes. If the closing statement changes before closing, closing will be postponed one business day.
HOME EQUITY LOANS

Line of Credit Draw Procedure

Minimum advance $4,000

To request a draw - borrower must request a draw at the bank (no credit/debit cards, solicitation checks, etc.)

Loan fees - Charged when credit line is established. Lender may not charge fees with subsequent advances.

Loan limit - The maximum principal amount that may be extended for a home equity loan, when added to all other debts secured by the home, may not exceed 80% of the agreed fair market value of the property on the date the line of credit is established.

When draws must cease - If the line-of-credit loan balance exceeds 50 percent of the fair market value of the home (as determined on the date the credit line is established), draws must cease until the balance falls below 50 percent of the fair market value.
A title insurance company may accept an existing survey and not require a new survey if the title insurance company is:

✓ willing to accept evidence of an existing survey; and
✓ willing to accept an affidavit verifying the existing survey.

If the transaction involves Residential Real Property, the affidavit verifying the existing survey shall be the Form T-47 Residential Real Property Affidavit. Buyers and sellers may obtain the form affidavits from the title company closing the transaction.

Existing Surveys

Sellers should be careful to agree to provide an existing survey only if they have the survey readily available. The first sentence of paragraph 6C(3) of the TREC contract states, “Seller shall furnish Seller’s existing survey.” The paragraph does not provide that the seller furnish the existing survey if he has one or if he can find it. The seller is obligated to furnish the survey.

Existing Surveys

For example, the contract has paragraph 6C(3) checked regarding the survey, with the buyer paying for a new survey if the seller’s existing survey is not approved by the title company or the lender. The seller informs the agents that the seller cannot locate his existing survey. The seller argues that the buyer will have to purchase his own survey. The buyer does not think he or she should have to purchase a new survey. Under these circumstances, the buyer could exercise his or her default remedies because any party to the contract who does not perform an obligation under the contract is in breach unless excused from performance by the contract.

A seller who cannot find his existing survey might try to obtain another copy from the surveyor, the prior broker or the prior title company.

Reverse Mortgage Line of Credit

This proposal, subject to a vote by the citizens of the State of Texas in November 2005, provides for line of credit advances on a reverse mortgage loan. Certain safeguards were
built into the statute, similar to those provided under the existing Home Equity Line of Credit loan.

The owner may not use a credit card, debit card, preprinted solicitation check, or other similar device to obtain an advance on the line of credit. No transaction fee can be charged solely in connection with any debit or advance similar to traditional home equity line of credit loans.

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Finance Code Changes

A new amendment to the Finance Code (§341.502) requires that a home equity loan, regulated by the Office of Consumer Credit Commissioner, must be written in plain language and printed in an easily readable font and type style.

If the terms of the agreement for the loan are negotiated in Spanish, a summary of those terms and pertinent information shall be provided to the debtor in Spanish, in a form identical to the disclosures required under federal law.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Establishment

The Texas Residential Construction Commission was established by the Texas Residential Construction Commission Act (the act) by the 78th Legislature. The commission is made up of nine members who are appointed by the Governor. The terms of the commissioners are staggered. The commission includes four builders, three public members, one residential construction engineer and one residential construction inspector.

http://www.trcc.state.tx.us/
1-877-651-TRCC

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Texas Residential Construction Commission

Establishment

The Texas Residential Construction Commission (TRCC) was established by the Texas Residential Construction Commission Act (the Act) by the 78th Legislature. TRCC is made up of nine members who are appointed by the Governor. The terms of the commissioners are staggered. The TRCC includes four builders, three public members, one residential construction engineer and one residential construction inspector.
The Act provides homeowners and builders a forum for resolving differences before they pursue legal action. The Act also provides for the adoption of limited warranties and building and performance standards, management of three task forces, voluntary certification of arbitrators and the filing of arbitration award summaries. The TRCC receives funding from registration and other fees. The Act applies to all home construction disputes, regardless of when the home was built.

Enforcement

The TRCC is committed to protecting both the public and other homebuilders from unscrupulous members of the building profession. The TRCC has the authority to assess administrative penalties and take other disciplinary actions against those who do not comply with the Act. It also has the authority to ask the Attorney General to issue an injunction against a builder to prevent the builder from conducting further business in Texas.

Builder Definition

A builder is one who is compensated for constructing, supervising or managing the construction of

- a new home,
- a material improvement to a home, except a roof; or
- an improvement to the interior of an existing home, if the cost is greater than $20,000.

Basically, new home builders and contractors who perform remodeling or renovation jobs that cost more than $20,000 must register. A broker or manager who arranges or supervises construction for an owner is not required to register.

http://www.trcc.state.tx.us/
1-877-651-TRCC

Title 16 Chapters 401-438, Texas Property Code
http://www.capitol.state.tx.us/statutes/pr.toc.htm

Builder Registration

The Act requires a person conducting business as a builder in Texas to hold a certificate of registration from TRCC. To be registered, a person must be at least 18 years old and a citizen of the United States or a lawfully admitted alien at the time of registration.
Additionally, the person must satisfy the commission that he or she is honest, trustworthy and has integrity.

A directory of registered builders is available TRCC’s website, or consumers can call the TRCC toll free at 1-877-651-TRCC to check on the status of a specific builder.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Construction Services Not Covered By the Act

Construction performed by a person who builds his or her own home (alone or with the assistance of the person’s employees or independent contractors) and uses that home as his or her primary residence for at least one year after the completion or substantial completion of construction of the home. Services provided by a homeowner or a homeowner’s real estate broker, agent or property manager who supervises or arranges for the construction of an improvement to a home owned by the homeowner.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Construction Services Not Covered By the Act

- An improvement solely to replace or repair the roof of an existing home
- An improvement that does not change the square footage of the home’s living space or improvement to the interior of an existing home that costs less than $20,000
- Services provided by a business or person who has been issued a license by the state or an agency or political subdivision of the state to practice a trade or profession related to or affiliated with residential construction if the work being done by the entity or individual is solely for the purpose for which the license was issued.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Registration

Registration began on March 1, 2004. Applicants must complete an application form and submit a fee. Registration forms are available on the commission’s website and upon request from the commission.

Type of Business Designated Agent
Corporation Officer of the Corporation
Limited Liability Company Manager of the Company
Partnership, Limited
Partnership, Limited Liability
Partnership Managing Partner

The builder registration form registers the agent and the business entity at the same time. Unless the agent is acting as a builder outside of the company that he or she is registering for, there would be no need for the agent’s individual registration.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Commercial Construction

Commercial construction, including apartments, does not fall under the commission’s jurisdiction. A builder who is involved only in commercial construction is not required to register with the commission.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Home Registration

The registration form must be filled and the fee paid no later than the 15th day after the agreement evidencing the transaction or the commencement of the work, whichever is earlier. Registration is the first phase in establishing the state-sponsored inspection and dispute resolution process. This step identifies newly constructed homes that are subject to the process. These homes fall under warranty and building performance standards.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Home Registration

Within 30 days after the home registration form is received by the commission, it will mail the homeowner a packet of information describing the commission, the state-sponsored inspection and dispute resolution process, building and performance standards, warranty requirements, and other information. Consumers can use the commission’s website to find out if a home is registered and to research any complaints filed with the commission concerning the home.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION
Exemptions

A home built by an individual (either alone or with the help of the individual’s employees or independent contractors) and used as that individual’s primary residence for at least one year after completion or substantial completion of construction is exempt from registration. Also exempt are home improvement projects that do not change the square footage of the home’s living space or do not cost more than $20,000 during a one-month period.

Townhomes are included in the definition of home, which includes single-family residential dwelling units. Condominiums are not included, are not required to be registered, and are not eligible for the state-sponsored inspection and dispute resolution process.

Texas Real Estate Commission Legal Update MCE | TREC #03-03-127-4294
123MCE.com | TREC #0274 | ©2005 | 713.774.9899 | 1.800.550.5809
Alternative Delivery (Online) Course – Supplemental Manual
The inspection fee for workmanship and materials inspections (plumbing, heating and air conditioning system delivery issues) is $350. The fee for a structural inspection is $450. The commission may reduce or waive fees for those who show financial need.

It is important for a home owner to follow the procedures under the dispute resolution process at TRCC, as following those procedures is a prerequisite for filing a cause of action against a builder for an alleged construction defect. If the property owner is concerned that the statute of limitations may expire soon before suing a builder, the property owner should immediately consult an attorney and proceed to file suit against the builder, pursue the dispute resolutions procedures through TRCC, or both.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Limitations

The dispute resolution process provided by the commission resolves only post-construction disputes. A homeowner should address any concerns with the builder as soon as they arise. The state-sponsored dispute resolution process applies only to construction defects, not to personal injury claims.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Inspectors

Neutral third-party inspectors will perform inspections. These inspectors will work on a contractual basis and will not be state employees. The inspectors must meet certain qualifications including completion of commission-developed training.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Workmanship and Materials.

The inspector must have a minimum of five years of experience in residential construction and be certified as an International Code Counsel “residential combination inspector.” The four certifications required to be eligible are residential building, residential mechanical, residential electrical and residential plumbing.

Structural Issues.

The inspector must be a state-licensed professional engineer or an approved architect and have a minimum of ten years of experience in residential construction.
TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Warranties

House Bill 730 requires that the commission develop limited statutory warranties for residential construction in Texas. Once adopted, these warranties will apply only to residential construction that begins on or after their effective date.

Each period begins on the earlier of occupancy or transfer of title from the builder to the initial homeowner or, if not a new home, the date the improvement is substantially completed.

Warranty Period

- Workmanship and materials 1 year
- Plumbing 2 years
- Heating and air conditioning delivery systems 2 years
- Major structural components 10 years

TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Certified Arbitrators

Experienced arbitrators who submit applications and are approved by the commission will be listed by the commission as certified arbitrators. This will enable the public to identify arbitrators who have experience in disputes involving residential construction.

TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Building Codes and Standards

The commission will develop building and performance standards for residential construction in Texas. Once adopted, these standards will apply only to residential construction that begins on or after their effective date. Standards adopted by the commission are separate from and have no effect on existing codes.

These standards will not be a building code. While codes govern how a builder must construct a home, the building and performance standards spell out how a home must perform after it is built. Once the standards have been set, they will be made available to
the public through the commission’s website. They also will be mailed to homeowners when a home is registered with the commission.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Complaints

The commission is currently researching the best way to make homebuilders’ information available to the public so that consumers can make informed decisions.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Attorney General Opinion Regarding Builder Registration Requirements

TRCC recently requested an attorney general opinion regarding certain provisions of the act. TRCC requested clarification about whether the act excludes from its definition of “builder” businesses and individuals engaged in residential construction and licensed by a municipality. The Attorney General concluded that §401.003(c) of the Texas Residential Construction Commission Act does not exclude any business entities or individuals falling within the general definition of “builder” that have a state or local license to engage in residential construction. Section 401.003(c) does except from the definition of “builder” residential construction-related trades and professions, such as plumbers and electricians.

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TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

Attorney General Opinion Regarding Builder Registration Requirements

Furthermore, §2001.202 of the Administrative Procedure Act allows the Texas Residential Construction Commission to refer names of builders that have failed to register with the commission, a violation of a commission rule, to the attorney general.

The attorney general may seek injunctive relief for those violations. The agency is permitted to do this even though its enabling statute lacks specific language to that effect.

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Mold assessment involves inspection of a building to evaluate whether mold growth is present, and to what extent. The mold assessment licensee will develop a mold remediation plan that will specify the estimated quantities and location of materials to be remediated, appoint methods to use and develop clearance criteria that must be met.

Mold remediators must follow the mold remediation protocol described above and their own mold remediation work plan that provides specific instructions and/or standard operating procedures for how the remediation will be achieved. The mold assessment consultant must conduct a post assessment.

This is an inspection to ensure that the work area is free from all visible mold and wood rot, that the work was completed in compliance with the remediation protocol and the work plan, and that the remediation meets all clearance criteria that were specified in the protocol. The assessor must give the property owner a passed clearance report documenting the results of the inspection.

Mold remediation is the cleanup and removal of mold growth from surfaces and/or contents in a building. It also refers to actions taken to prevent mold growth.

Clearance criteria refers to the levels of cleanliness to be achieved by the persons conducting the mold cleanup.

Avoiding Mold Hazards In Your Flooded Home

http://fcs.tamu.edu/housing/healthy_homes/indoor_air_quality/avoiding_mold_hazards.pdf
http://fcs.tamu.edu/housing/healthy_homes/mold_mini_course/getzip.php
Certificate of Mold Remediation

No later than ten days after a mold remediation has passed a clearance inspection, the remediation contractor will give the property owner a Certificate of Mold Remediation. The licensed mold assessment consultant who conducted the post remediation assessment must also sign the certificate.

The consultant is required to state on the certificate whether the underlying cause of the mold problem has with reasonable certainty been corrected. All certificates of mold remediation issued within the previous five years must be furnished to the buyer when the property owner sells the property.

Texas Administrative Code (25 TAC §§295.301-295.338)
http://www.tdh.state.tx.us/beh/mold/

Texas Cooperative Extension Mold Mini-Course
http://fcs.tamu.edu/housing/iaq/Mold/web/

Insurance

Section 3 under Article 21.21-11, Insurance Code, prohibits an insurer from making an underwriting decision based on previous mold damage or a previous mold claim if:

- the applicant has property eligible for residential property insurance;
- the property has had mold damage;
- mold remediation has been performed; and
- a Certificate of Mold Remediation was issued stating the underlying cause of the mold has been corrected or the property was inspected by an independent assessor or adjustor who determined that the property does not contain evidence of mold damage.

CLUE Reports

Most insurance companies participate in the Comprehensive Loss Underwriting Exchange (CLUE) and obtain a CLUE report to evaluate the claims history of the property and the applicant and to help the insurance company in its underwriting decisions. A CLUE report contains information about the claims history of the applicant and the property. Insurance companies use the CLUE report in different ways.
While CLUE reports are generally accurate, there may be errors in the reports. Most commonly, property owners who have made inquiries about coverage have found that insurance companies have classified such inquiries as claims and reported this information to CLUE. Federal law permits a person to challenge inaccurate information. One may contact the administrator of the CLUE report to correct information in a CLUE report.

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CLUE Reports

Section 551.113 of the Insurance Code prohibits an insurance company from considering an “inquiry” as a basis to decline to insure. An inquiry means a call or communication made to the insurance company that does not result in an investigation or claim and that is in regard to general terms or conditions of coverage under the insurance policy.

The term includes a question concerning the process for filing a claim and whether a policy will cover a loss, unless the question concerns specific damage that has occurred and that has results in an investigation or claim. When is an insurer prohibited from making an underwriting decision based on previous mold damage or a previous mold claim?

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CLUE Reports

If the buyer has the option to terminate the contract, the buyer should make sure that the buyer and the insurance agent have completed these steps before the option expires:

1. contact one or more insurance agents;
2. submit an application for insurance with the insurance agent of the buyer’s choice;
3. ask for written confirmation from the insurance agent that the insurance company will issue a policy; and
4. verify that the insurance coverage the buyer chooses is acceptable to the buyer’s lender.

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ELECTRONIC SIGNATURES

The Uniform Electronic Transactions Act (UETA) was published by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999. It was adopted in Texas in 2001 (effective 1/1/2002) and is codified as Chapter 43, Business and Commerce Code.

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ELECTRONIC SIGNATURES

UETA removes barriers to electronic commerce by establishing electronic records and signatures as being the legal equivalent to paper writings and manual signatures. UETA is purely a procedural law that permits electronic records and signatures without changing existing substantive laws. UETA does not require the use of electronic signatures. UETA defines an electronic signature as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”

Both parties to a transaction must agree to conduct the transaction electronically. UETA also allows a party who has agreed to an electronic transaction to withhold his consent in connection with other transactions. This would apply specifically to a provision in an agreement that required a party to consent to using electronic signatures in future transactions.

Most agents know to obtain the signatures of all sellers, including spouses, partners or corporate officers, who have title or an interest in the property. Not having the appropriate person sign the document can lead to problems and may make the agreement unenforceable.

E-Sign

There is a federal statute, the Electronic Signatures in Global and National Commerce Act (E-Sign), which the U.S. Congress enacted in 2000. E-Sign overlaps with UETA, but it is not identical to UETA.

E-Sign specifies the legal effect and enforceability of electronic contracts and electronic signatures, but it does not address how to establish the authenticity or validity of those signatures. Under E-Sign, if a state has adopted UETA, the state’s law will preempt E-Sign and will govern electronic transactions.

Consumer’s Consent

Both UETA and E-Sign require the consumer’s consent to conduct the transaction electronically, and E-Sign requires that consent itself be communicated electronically. Initial consent may be given in paper or electronically. Since the definition of an electronic signature is broad, it appears that consent could be established by any reasonable means.
A court might hold that “reasonable means” could include the click of a mouse, or it might require a more sophisticated means of establishing consent. Until custom and practice develop electronic transactions involving signatures, most experts are suggesting that secure platforms involving verifiable signatures be employed (for example, VeriSign or Entrust).

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ELECTRONIC SIGNATURES

Consumer’s Consent

Under UETA, the consumer must be able to decline to use electronic means to transact. E-Sign specifically allows a consumer to withdraw his or her consent to the use of electronic records at any point in the transaction. If a consumer who initially gives consent to the use of electronic records withdraws that consent, the parties will need to complete the rest of the transaction in paper and ink format.

Brokers will need to obtain the consent of both the buyer and the seller to conduct the transaction electronically. If only one consents, the broker may continue to have an electronic relationship with him or her; however the relationship with the other party would need to be handled in paper format. Privacy is a critical issue.

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ELECTRONIC SIGNATURES

Consumer’s Consent

Before relying on electronic signatures in a transaction, it seems prudent to:

- obtain the necessary consents to the electronic transaction at the outset (both consent to the receipt of electronic records and consent to the use of electronic signatures);
- disclose to consumers that they have the right to withdraw their consent at any point in the transaction; and
- provide adequate means to withdraw the consent (providing notice of any ramifications, such as additional costs or a delay in the transaction because of switching to a paper system).

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ELECTRONIC SIGNATURES

Technology
The law is technology neutral. The parties must agree on the method for digitally authenticating the documents of the transaction, and the consumer must consent electronically, thereby proving they can access the information that is the subject of the consent.

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ELECTRONIC SIGNATURES

Records Retention

Records can be retained electronically.

The storage method used must ensure that the record can be accurately reproduced for later reference by all parties who are entitled to retain the record.

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QUIZ PAGE

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Proof Page

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Lesson 5 - Title

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Learning Objectives – Lesson 5

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Divorce

What happens when the parties to a divorce wish to sell a property? If a divorce decree has been entered, the decree or a property settlement agreement will establish the respective ownership rights of each of the former spouses. It is not prudent to rely on the oral statements of a divorced spouse concerning rights to sell the property. A better practice is to see a copy of the divorce decree or settlement agreement. If that is not clear as to who is entitled to sell or own the property, seek the guidance of an attorney.
At times, a divorce decree will give one party the right of possession, but will not give full ownership to the one in possession. The former spouses could be co-owners. In that case, both spouses should sign the listing agreement and the earnest money contract. The title company will require both spouses to sign the deed, unless there are separate managing rights given in the decree or property settlement agreement.

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Divorce

Sometimes, the court will appoint a receiver to sell the property for the parties. A real estate broker may be appointed as receiver. The broker acting as receiver must obtain the court’s authorization to accept an offer, as well as an order of the court authorizing the consummation of the sale. A receiver must file an oath and a bond with the court and obtain instructions from the court.

Occasionally, one spouse wants to purchase property while a divorce is pending. In this situation, the spouse should not enter into a contract to buy a property without clear guidance from his or her attorney.

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Foreclosure

If a bank or any corporate entity owns the property, the broker must exercise care to deal with a person or officer who is authorized to sign for the owner. The broker may ask for a copy of certified resolutions of the bank or other entity.

These resolutions authorize the person to bind the property owner. The title company will require evidence of such an authorization at closing. Do not rely on oral statements from an unauthorized bank employee who tells the broker to market the property. If such an employee signs a listing agreement without authority, it may be unenforceable.

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Pending Foreclosures

What happens when the property owner is delinquent in his mortgage payments and the property has been either posted or is likely to be posted for foreclosure? The owner can sell the property until the time he ceases to be the property owner.

A property owner who is behind in his mortgage payment may be “under water” (meaning that the balance of the indebtedness secured by the property is greater than the value of the property), or the owner will be unable to net enough money to sell the property and pay all costs of the transaction. The broker will want to discuss various scenarios with owners in such cases and carefully review available proceeds to cover costs.
Pending Foreclosures

Many times lenders are willing to engage in “short sales” in which the lender will allow the borrower to sell the property for less than the amount owed and either forgive the borrower the deficiency or work out some other arrangement with the borrower. The borrower will need to have discussions with the lender about such possibilities. Offers to purchase such properties will need to be made subject to lender approval.

Brokers should be careful when drafting such clauses in the standard forms and suggest that the parties employ the assistance of an attorney when drafting such contingencies in the standard forms.

Relocation Companies

Many times the relocation company does not take title to the property from the employee who was transferred. If the relocation company operates under power of attorney from the property owner, the broker should have a copy of that power of attorney at the time the listing is taken.

The title company will require the power of attorney to be filed of record at the time the property is sold. The power of attorney should be specific and clearly identify the property by legal description. If a power of attorney is involved in the transaction, send a copy to the title company to see if the form is acceptable.

Bankruptcy

If a broker is taking a listing from owners who have filed bankruptcy, different rules apply depending upon whether the bankruptcy is a Chapter 7, Chapter 11 or Chapter 13 proceeding. In a Chapter 7 proceeding, the broker will want to see a copy of the schedules filed by the debtor to determine whether or not the property is exempt. If the debtor claims it as exempt, listing the property is usually unaffected (barring any unforeseen circumstances).

A creditor could still object to such a claim. In this type of situation, the debtor may be in default under a mortgage which could mean that foreclosure is likely. Ask if the loan is current or delinquent.

If the proceeding is under Chapter 11 or Chapter 13, the debtor should have an order from the court authorizing the debtor to sign the listing agreement. Any offer which is submitted to the debtor should contain a provision making the contract subject to approval by the bankruptcy court. The transaction may not close until the debtor has obtained an order of
the court authorizing the sale. Be prepared for delays as other creditors may object to the sale and request hearings in the bankruptcy court.

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Common Mistakes When Completing Contract Forms

Effective Date

The broker forgets to insert the effective date in the contract. The effective date is critical because it is the date by which most other time periods in the contract are measured. Insert the date of final acceptance as the effective date. At the time final acceptance is communicated to the other party or the other party’s agent, tell the other broker in the transaction that you have inserted the effective date.

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Common Mistakes When Completing Contract Forms

Contract Modifications

The broker fails to have the parties enter into written amendments when the contract is modified. Modifying a contract that has changed since its original preparation is something many parties and broker say they will do, and then they forget.

If the parties agree to modify (for example, extend the closing date), the brokers should suggest that the parties execute an amendment.

Oral agreements to modify or extend time periods have been the subject of litigation and can cause disputes.

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Common Mistakes When Completing Contract Forms

Executory Contracts, Contracts for Deed, & Lease-Purchase Agreements

The 2005 legislature made additional efforts to protect consumers in transactions involving executory contracts. In the statute, an executory contract is a contract involving the sale of a residence in which closing occurs later than 180 days after execution. Contracts for deed and lease-purchase transactions meet this definition.

These contracts were already subject to strong consumer-protection provisions in the Property Code and were sufficiently complex as to require the assistance of an attorney when entering into such a transaction. The recent changes further strengthen consumer protections.
Common Mistakes When Completing Contract Forms

Executory Contracts, Contracts for Deed, & Lease-Purchase Agreements

Perhaps the most dramatic change is that the Property Code now considers lease-purchases to be executory contracts and treats them in much the same way as contracts-for-deed. An option-to-buy that includes, or is combined or executed concurrently with, a residential lease is now an executory contract under the law. The portion of the new law that treats lease-purchases and lease-options like executory contracts will only apply to lease-purchases executed on or after January 1, 2006.

Under an executory contract, there are significant penalties for a seller who does not strictly comply with Subchapter D of Chapter 5 of the Property Code. The best course of action for a real estate licensee is to advise clients not to enter into a contract-for-deed, lease-purchase or lease-option transaction without seeking the assistance of an attorney. Do not attempt to use the TREC forms or other such standard forms to create lease-purchase or lease-option contracts. Do not attempt to write a lease-option clause into a standard residential lease agreement without having the parties seek the assistance of counsel.

The following list highlights some of the more significant changes made to provisions in the Property Code and Local Government Code related to executory contracts. The list does not include requirements that sellers were already required to meet when selling property under executory contracts.

1. The buyer under an executory contract has the right to ask the governing body that approves plats whether the property purchased should have been platted. If a plat is required, the buyer may ask whether such a plat for the property has been approved. The buyer is given right to cancel the contract for improper platting.

2. The changes clarified that lease-option and lease-purchase agreements are executory contracts.
3. An executory contract may not include a provision that
   a) is, as a penalty for a late payment, the forfeiture of the option fee; or
   b) increases the purchase price if the buyer requests repairs or exercises another right under the contract.

4. Penalty provisions against sellers who fail to timely deliver the annual accounting to the buyer under an executory contract have been modified.

5. The buyer has the right to convert his or her interest into legal title at any time without penalty, if the buyer pays the balance owed or executes a promissory note payable to the seller.

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Common Mistakes When Completing Contract Forms

Executory Contracts, Contracts for Deed, & Lease-Purchase Agreements

6. The buyer is allowed to deduct any amounts owed to the buyer against amounts owed to the seller.

7. The changes prohibit the seller from adding additional liens against the property with very narrow exceptions.

Neither TREC nor any real estate trade association in Texas drafts standard forms to be used as executory contracts. Real estate licensees should advise clients and customers to seek the assistance of counsel when entering into or desiring to enter into an executory contract, contract for deed, lease purchase contract, or a lease-option contract.

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Recent Cases

Sherman v. Elkowitz

Background

The buyers brought claims against the seller, the seller’s listing broker, and the broker’s employer for fraud, violation of Deceptive Trade Practices Protection Act (DTPA), negligence, gross negligence, nondisclosure of defects, and seller’s lawsuit against the prior owner for failing to disclose those defects.

The buyers purchased a home. The seller completed a seller’s disclosure notice that was provided to the buyers. After moving into the home, the buyers found defects in the property which they claimed had not been disclosed to them. The buyers learned that in 1994 the seller had sued the previous owner for failing to disclose the same defects.
seller had settled that case with the previous owner and received some compensation in that settlement.

The seller had made some repairs to the defects for which he had sued but had not cured all the defects. The buyer alleged that the seller knew of these defects and failed to disclose the defects. The buyers also alleged that because the listing agent knew of the prior lawsuit, the listing agent also knew that the defects existed. After a jury trial, the buyers received a favorable verdict against the seller. The court granted a directed verdict in favor of the listing broker and listing agent. The court found that there was no evidence that the listing broker or listing agent knew that the seller had failed to cure the prior defects or that the defects existed.

Recent Cases

Sherman v. Elkowitz

Reasoning of the Court

The court of appeals held that no evidence showed the broker or the broker’s employer misrepresented the property or concealed defects. The court held that the broker’s signature on the disclosure form does not indicate that the broker is adopting the representation of the seller. The notice is clear that the disclosure is by the seller only, not the seller and the broker. The disclosure notice warns that no warranties are made by the seller, the seller’s agents or other agents. The only representation the broker makes in acknowledging the notice is that the broker has “...no reason to believe [the disclosure notice] to be false or inaccurate.”

The court held that the prior lawsuit did not have to be disclosed since it was no longer affecting the property and that the seller’s disclosure notice asks only about lawsuits affecting the property (not prior lawsuits). The court held that the seller failed to disclose the known defects, but there was no evidence that the broker or listing agent knew of the defects as the seller had told the listing agent that he had used the settlement money to repair the defects. The Court of Appeals upheld the lower court’s decision.

Recent Cases

Kelo v. City of New London

The U.S. Supreme Court looked at the takings issue in light of city redevelopment plans. In 2000, the City of New London, Connecticut, approved a development plan projected to add 1,000 jobs, increase tax and other revenues and revitalize an economically distressed city, including its downtown and waterfront. In assembling the land needed for this project, the city’s development agent purchased property from willing seller and proposed to use eminent domain to acquire the remainder.
The city council held neighborhood meetings to educate the public about the process. In May, the council authorized the New London Development Corporation (a private nonprofit entity established some years earlier to assist the city in planning and economic development) to formally submit its plans to the relevant state agencies for review. Pfizer had already announced two years before that it would build a $300 million facility adjacent to the redevelopment area.

The Supreme Court of Connecticut held that the city’s proposed takings were valid and authorized by Connecticut’s Municipal Development Statute. The plaintiffs alleged that the city had failed to produce clear and convincing evidence of the economic benefits of the plan. The court, citing Berman v. Parker, held that the economic development qualified as a valid public use under both federal and state constitutions. Further, it cited Hawaii Housing Authority v. Metcalf, noting that the state’s purpose of eliminating the social and economic ills of the land oligopoly qualified as a valid public use.

Recent Cases
Kelo v. City of New London

The Supreme Court said the city was entitled to prevail. The city invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. The court noted that the plan unquestionably serves a public purpose, and the takings satisfied the public-use requirement of the Fifth Amendment. The court further noted that promoting economic development is a traditional and long-accepted function of government and that public ownership is not the sole method of promoting the public purposes of community redevelopment projects. The court declined to second-guess the city’s judgment about the efficacy of the development plan and further declined to address the city’s determinations as to which lands were needed to implement the project.

NOTE:

The U.S. Supreme Court made it clear in the Kelo decision that restricting a city or governmental unit’s ability to exercise its eminent domain power is a state issue. Like several other states, Texas has adopted recent legislation that generally prohibits a city or other governmental unit from exercising its eminent domain power simply for purposes of economic development. However, exceptions apply. In the Summer of 2005, the Texas legislature amended the Government Code by stating that neither a governmental entity or private entity with eminent domain power may use that power if the taking:

- confers a private benefit on a particular private party through the use of the property;
- is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
- is for economic development purposes unless that is a secondary purpose resulting from a city’s community development or urban renewal activities to eliminate slums or blighted areas under existing law.
This new statutory restriction does not affect rights of cities or entities to exercise eminent domain under existing statutes for things such as transportation, railroads, airports, port authorities, navigation districts, conservation districts, water supply, flood control, drainage projects, hospitals, parks, utilities, waste disposal projects, etc.

Recent Cases

Cherry v. McCall

The Cherrys bought a home from the McCalls. After the Cherrys bought the home, they discovered a walled-in room in the basement. The room was filled with trash, which was damp and contaminated with mold.

The Cherrys brought a declaratory judgment action, seeking declaration that (1) the McCalls breached the contract, and (2) the walled-in room constitutes a mutual mistake justifying rescission. The McCalls answered by general denial, asserting the "as is" provision of the contract as an affirmative defense.

Recent Cases

Cherry v. McCall

The Cherrys argued that the "as is" clause is unenforceable under the "totality of the circumstances" test set out by Prudential. The Cherrys did not allege that the McCalls fraudulently induced them to buy the house or concealed knowledge about the hidden room, nor did they allege that they were prevented from making their own inspection.

Rather, they argued that their lack of sophistication, the fact that the "as is" provision was not negotiated but a standard boilerplate provision, the high price the Cherrys paid for the property and the fact that the defect was hidden are all factors indicating that the "as is" clause is unenforceable under the "totality of the circumstances."

The court disagreed. There is some evidence indicating that Mrs. Cherry, who had never handled the details of purchasing a home before, was less sophisticated than the McCalls, who owned rental properties. However, there is no evidence that the Cherrys and the McCalls entered into the contract from unequal bargaining positions or that the transaction was not made at arm’s length.
Additionally, there is no evidence to support the Cherrys’ argument that the “as is” provision was not freely negotiated. In fact, Mrs. Cherry confirmed in her deposition testimony that she “agreed to purchase the property in its current condition” and that she “accepted the risk” that the property might be deficient. Because the Cherrys contracted to accept the property “as is,” they cannot, as a matter of law, prevail on their breach of contract claim.

The Cherrys argued the contract itself is invalid because a mutual mistake prevented the “meeting of the minds” necessary to the formation of a valid contract. The court disagreed, ruling that evidence showed that a meeting of the minds did take place. Although neither party knew of the hidden room when they entered into the agreement, both agreed to place the risk of any unknown defect on the Cherrys.

Recent Cases

1464-Eight, Ltd. v. Joppich

The issue in Joppich was whether an option contract containing a recital of nominal consideration is enforceable if the nominal option fee is not actually tendered. Joppich involved a situation in which the buyer and seller executed a purchase agreement purportedly granting the seller an option to repurchase the property under certain conditions. The language of the option stated that in exchange for the option, the seller gave, and the buyer acknowledged receipt of, $10. In other words, the option was granted “in consideration of “ $10.

There was a dispute between the buyer and seller as to whether the $10 consideration actually changed hands. Therefore, a false recital of consideration (when a contract says consideration was given but actually never was) may have existed. The Texas Supreme Court held (under the specific facts of the case) that the nonpayment of the recited nominal consideration does not preclude enforcement of the parties’ written option agreement.

The TREC One to Four Family Residential Contract (Resale) contains a termination option in paragraph 23. The provision applies only when the blanks are filled in and the option fee has been paid. When paragraph 23 applies, it gives the buyer the right to terminate the contract within a certain amount of days.
contract form states, in bold, that paragraph 23 applies only if the “Buyer has paid Seller” an option fee. The language used in the respective contracts is different.

It appears that the current language in paragraph 23 places more emphasis on the need to strictly comply with the specific terms for paragraph 23 to apply. Reliance on Joppich by a buyer who failed to timely tender the option fee under the TREC contract forms may be difficult.

A best practice is to be sure that the option fee is tendered on or before the time the contract becomes binding. The amount of the option fee is negotiable. Regardless of the amount, the tendering of the option fee should, under the TREC contract form, take place before the contract becomes binding. Trying to argue that Joppich excuses timely payment of the option fee solely because the option fee is nominal is uncertain. The more substantial the option fee, the less likely it is going to be considered nominal.

Recent Cases

1464-Eight, Ltd. v. Joppich

While agreeing with the majority opinion, Justice Jefferson felt that the court should have taken a more aggressive and progressive approach to reach the same conclusion. He felt that there need not have been any consideration required to have a valid option agreement. Jefferson’s view is that an option should be valid as long as the agreement is in writing and both parties sign the agreement. If those requirements are met, he argued that there should be no additional requirement for consideration of any type. He states that the option need not be on fair terms nor occur within a reasonable time frame.

The Supreme Court’s interpretation of the false recital of consideration in option contracts is admittedly the minority view. The opinion points to seven other states that have addressed the issue. Only two of those states held in a similar manner to the Texas court.

The Broker-Lawyer Committee is aware of and is studying the Joppich opinion. The committee may decide to make some policy decisions and look at whether any changes are necessary in paragraph 23.

Recent Cases


Background

A man suffering from AIDS, who was disabled and could not work, was unable to meet the financial qualifications of an apartment complex where he sought to live in order to be near his mother, who could assist in his daily care. The mother, who did meet the financial
qualifications, offered to rent the apartment for her son. This offer was rejected due to a management policy against cosigners. The disabled man sued, contending that the refusal to waive this policy was a violation of the Fair Housing Amendments Act (FHAA). The trial court rendered a summary judgment in favor of the apartment owner and the property manager, but that decision was reversed.

Reasoning of the Court

The FHAA requires a reasonable accommodation of the disability by making an individual assessment of the financial risk of nonpayment posed by the proposed financial arrangement rather than by the invocation of an inflexible policy prohibiting cosigners. The proposal was a request for an accommodation, which was both reasonable and necessary to afford equal opportunity.

Recent Cases

Northborough Corporate LLP v. Cushman and Wakefield

Northborough owns an office building that was the subject of a commission agreement between the broker, Cushman, and the building’s former owner, Alliance. In 1988, Alliance agreed to pay the broker a commission if Texaco or any of its affiliates, subsidiaries, or nominees became a tenant in the office building. Texaco became a tenant. If the lease was renewed or if the tenant leased additional space, the broker was to receive an additional commission. Alliance agreed that if it sold the property, it would ensure that the new owner would agree to assume Alliance’s obligation to pay the broker’s fee. Alliance fully paid the commissions related to the Texaco lease.

In 1993, Texaco assigned its lease of the office building to Star, a joint venture between Texaco and Aramco. The lease was renewed by Star for a ten-year term beginning August 1, 1994 and ending in August of 2004. The broker was involved as a representative for Star and was paid a commission. Four years into the Star lease, Northborough purchased the office building from Alliance. Northborough agreed to assume the obligation to pay the broker on the Star lease. The broker was not involved in the sale of the office building.

Recent Cases

Northborough Corporate LLP v. Cushman and Wakefield

In August of 1999, with five years remaining on the Star lease, Star assigned its lease to Equiva, a joint venture between Texaco and Shell Oil. The broker did not participate in the assignment. Northborough then entered into an amended and restated lease with Equiva. Northborough then stopped paying the broker its commissions.
In 2002, the broker sued Alliance and Northborough for the commissions for the remaining time period on the ten-year Star lease. Alliance was dismissed from the suit because it was dissolved. The trial court found that Northborough was liable to the broker for commissions through August of 2004—when the Star lease would have ended—and also awarded the broker reasonable and necessary attorney’s fees.

On appeal, Northborough argued that the original commission agreement is void, because it lacks a termination date. The broker argued that a termination date is not required, but if it is required, the date is supplied by the underlying lease. The appellate court noted that the Real Estate License Act requires that for a commission agreement to be enforceable it must be “in writing and signed by the party to be charged.” The commission agreement between Alliance and the broker satisfied this requirement.

Recent Cases

Northborough Corporate LLP v. Cushman and Wakefield

The court noted that Northborough was arguing that Section 1101.652(b)(12) of the Real Estate License Act urges the court to find that a broker’s failure to specify a termination date in the commission agreement precludes the broker from suing for commissions. This section allows the Texas Real Estate Commission to suspend or revoke a broker’s license if the broker “fails to specify a definite termination date that is not subject to prior notice in a contract.”

Based on this section, another court of appeals previously held that a broker may not enforce a commission agreement if the agreement lacks a termination date. The court of appeals in this case held that this provision had nothing to do with the enforceability of a broker’s commission agreement. Instead, it relates solely to the suspension or revocation of a broker’s real estate license. The court disagreed with the prior appellate decision on which Northborough relied concluding that the commission agreement between the broker and Alliance met the statutory requirements for an enforceable commission agreement.

Northborough also argued that it was not obligated to pay the commission because it did not assume Alliance’s agreement to pay the fees when it purchased the property. The court noted that the trial court did not hold that Northborough was obligated to pay the broker fees based on the Equiva lease. The trial court held that Northborough was required to pay broker fees based on the original Texaco lease, which was renewed via the Star lease, and that Northborough assumed Alliance’s obligations under the Texaco and Star leases, including the obligation to pay until July 31, 2004.
The real question was whether the broker was still entitled to commissions under the Star lease once Northborough executed the Equiva lease. Northborough claimed that when it purchased the building, it did not expressly assume the obligation to pay the broker fees on the Star lease. Northborough also claimed that even if it did assume an obligation to pay the broker fees under the Star lease, it was not obligated to pay the fees because the Equiva lease was a “new arrangement” between Equiva and Alliance and superseded the Star lease. The court found this argument was flawed.

Northborough did not deny that the Star lease obligated Alliance to pay the broker fees. Instead, it maintained that once it purchased the building and entered into the Equiva lease, the contract was not explicit enough to bind it to assume the obligation to pay the broker fees under the Star lease.

Under Texas law, a buyer must expressly assume the obligation to pay a broker’s fees before the buyer is liable. In this case, Northborough did expressly assume that obligation in connection with the Star lease. There was no express language in the commission agreement that made the commission contingent upon Alliance being the owner nor upon Star being the tenant.

Recent Cases

Northborough Corporate LLP v. Cushman and Wakefield

The court noted that the Equiva lease contained slightly different terms than the Star lease (specifically, additional space and a longer time period). The trial court had awarded commissions only for the space and time period covered by the Star lease; no additional space or time period covered by the Equiva lease was included.

The court held that the Star lease was never canceled. Equiva assumed Star’s position in the lease through an assignment and the premises remained occupied. According to the commission agreement, if the cancellation was by mutual agreement, then the broker was to be paid for the entire lease term. The Star lease’s entire term was ten years, or until August of 2004.

The court noted that the practical result of Northborough’s argument was that it could extinguish its obligation to pay the broker merely by ignoring the current lease agreement, the Star lease, and entering into a new one with its tenant. But the commission agreement was there to provide that the broker would receive its fees even if the lease was renewed, extended, assigned or canceled. For all practical purposes, that happened in this case. Both Northborough and Equiva were successors in interest who agreed to honor the obligations of their assignors; one of the obligations Northborough agreed to assume was the Star lease.
Northborough Corporate LLP v. Cushman and Wakefield

The court held that:

- despite the lack of an express termination date in the original agreement, the broker and the original owner entered into an enforceable commission agreement with respect to the Star lease;
- the new owner expressly assumed the prior owner’s obligation to pay the broker fees for the duration of the Star lease;
- the obligation to pay commissions related to the Star lease extended through its ten-year lease term; and
- the obligation under the Star lease was not terminated by Star’s assignment of the lease to Equiva or by the actions of Equiva and Northborough when they entered into a restated lease agreement.

A concurring opinion notes that the decision addresses only the specific contention that the provision in the Real Estate License Act that requires a definite termination date in a representation agreement precludes recovery of a commission. It does not reach the separate issue (not asserted by Northborough) of whether a commission agreement is unenforceable as against public policy if it does not specify such a date.

The concurring opinion noted that the statute was revised in 1997 and requires a definite termination date in a contract, other than a contract to perform property management services, in which the license holder agrees to perform services for which a license is required. However, the commission agreement was signed in 1988 when the part of the RELA requiring a definite termination date applied only to “listing contracts.”

Recent Cases


On August 1, 2000, the broker and AGP entered into an exclusive right to sell agreement for AGP’s property. The agreement was for 12 months, and it contained a merger clause, which provided that it could be modified only in writing, signed by the parties.

On May 30, 2001, AGP entered into a contract to sell the property. The contract provided for payment of a commission to the listing broker and a cooperating broker. The contract contained a clause prohibiting oral modification of the contract. The cooperating broker received its commission. The seller refused to pay the listing broker its amount, claiming that the parties had orally agreed to reduce the broker’s commission.

In early October 2001, the buyer requested that the seller grant a three-month extension to the closing date. The seller was concerned because any extension would involve incurring over $38,000 per month in carrying costs. The buyer ultimately agreed to pay $25,000 for each month of the closing date extension. According to the seller, the listing broker agreed that any commission to be paid would be reduced by $13,500 per month for each month of the extension.
Recent Cases


The seller, through a staff person, sent a letter to the broker to confirm the purported agreement regarding the reduction in commission in exchange for extending the contract. The memorandum stated:

“Per agreement of October 11, 2001, the following items have been agreed to …:

As additional consideration... to extend the contract..., [the broker] has agreed that the commission... will be reduced by $13,500.00 for each month beyond this date that the sales contract for the...property has not closed.”

The broker asserted that he had not agreed to take such a reduced commission. At the closing, the broker demanded the full broker fee without any reduction. The buyer testified that the broker had told him that he had proposed a reduced commission, but not to the extent of $13,500 per month, as the seller contended.

Recent Cases


In March of 2002, a request was made to the Texas Real Estate Commission requesting an opinion concerning a broker’s failure to abide by an oral agreement with his client to contribute part of the broker’s commission to the client. In its response, the commission stated that "[t]he broker’s actions could be construed as violating Section 15(a)(6)(V) of the Real Estate License Act (RELA), which authorizes disciplinary action against a licensee for dishonesty, bad faith, or untrustworthiness. The commission would ordinarily expect a licensee to abide by an agreement with a client to reduce the amount of a commission, even if the agreement is not in writing.” The commission concluded that it would need to investigate the matter before concluding that the broker violated the Act.

The broker sued the seller for failing to pay the full amount of the commission. The broker prevailed. The trial court granted the broker summary judgment on its claims. On appeal, the seller claimed that fact issues were unresolved and, therefore, the summary judgment should be reversed and the case remanded for trial. The appellate court affirmed the award.

The seller argued that the oral agreement to reduce the commission was effective and, therefore, the trial court erred in granting summary judgment. Specifically, the seller contended that the statute of frauds formerly contained in Section 20(b) of the Texas Real Estate License Act ("RELA"), did not prevent subsequent oral modification of the parties’
agreement because the RELA only imposed the requirement that the agreement be in writing upon the broker, but no such requirement on the public. The court disagreed.

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Recent Cases


The court noted that the contract for the sale of the property provided for the brokers to be paid a certain amount. The contract stated that it could only be amended or terminated by an instrument in writing signed by both the buyer and seller. The general rule in Texas is that an agreement that contains a no oral modification clause can be orally modified if it is not subject to a statute of frauds. The controlling issue in this case was whether the statute of frauds provision in the RELA, requiring real estate commission agreements be in writing, prohibits the seller from arguing that the agreement was orally modified. The RELA states

“A action may not be brought in a court in this state for recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged or signed by a person lawfully authorized by the party to sign it.”

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Recent Cases


Citing the Supreme Court, the court noted that the effect of this statute is to require that contracts by which an agent is employed to buy or sell real estate must be in writing; otherwise they are not enforceable. Its purpose, like that of other sections of the Statute of Frauds, is to prevent fraud. The seller contended that this provision in the RELA applied only against brokers.

The court disagreed. The court held that the language in the RELA did not state that it applies only to brokers. The court noted that under such an interpretation, the parties could mutually agree to orally modify a commission agreement, but the broker would be barred from bringing an action to recover under that modified agreement because it would be an unenforceable agreement under the statute of frauds provision.

The court noted that not every oral modification to a contract within the Statute of Frauds is barred. The critical determination is whether the modification materially affects the obligations of the underlying agreement. Where the character or value of the underlying agreement is unaltered, oral modifications are enforceable, which was not the case here.

The court affirmed the trial court’s judgment.
MORTGAGE FRAUD

Recently government regulators and the FBI have been investigating potential mortgage fraud in real estate transactions. These suspect transactions often involve:

✓ the payment of an inflated price for the property (for example, $290,000 for a house listed for $218,000);

FALSE CONSIDERATION

✓ inflated appraisals (either knowingly by the appraiser or without the appraiser’s knowledge);
✓ false financial statements for borrowers;
✓ contract and loan conditions that provide for purported future improvements to be made to the property;
✓ false and inflated estimates from contractors for the purported improvements;
✓ extraordinarily high fees to the mortgage broker or to the real estate broker or both; or
✓ last-minute amendments to the contract inflating the sales price to a significantly higher amount.
Often in these suspect transactions the listing broker is required to change the original listing price to a higher price to reflect the contract sales price. The seller agrees to accept proceeds only up to the amount of the listing price.

The seller also agrees that the excess sales price over the listing price will be paid to the buyer, another person, or another entity. The purported property improvements are never made, and eventually the property ends up in foreclosure.

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FALSE CONSIDERATION

The listing broker should advise the seller not to enter into a suspect transaction without the assistance of an attorney.

The broker should withdraw from any transaction if he or she has reason to believe that the transaction involves mortgage fraud or is a highly suspect transaction.

Title companies are also more aware of flags that identify these suspect transactions and may refuse to close such transactions.

Trust not the horse, O Trojans. Be it what it may, I fear the Grecians even when they offer gifts. — Virgil

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TREC FORMS

2005 New and Revised Contract Forms

In the fall of 2005, the Broker/Lawyer Committee drafted modifications to the 1-4 Family Contract (TREC 20-7) and the Third Party Financing Conditions Addendum (TREC No. 40-2).

The more substantial changes briefly follow. The same changes in the 1-4 Family Contract form will, most likely, be made in the other TREC contract forms (Condominium, Farm & Ranch, Unimproved Property and New Home).

Note: These changes were mandatory as of May 1, 2006.

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TREC FORMS

2005 New and Revised Contract Forms

TREC 20-7; 1-4 Family Contract
The committee bolded the phrase in Paragraph 2B to further emphasize that the list of items in Paragraph 2B are those items that are permanently installed or built in.

Reformatted Paragraph 4A to clarify that

1. the contract is made subject to the approval of the property (which is a contingency that continues until closing);

2. if Paragraph 4A(2)(a) applies, the contract is also subject to the lender’s approving the buyer’s financial condition pursuant to the Third Party Financing Conditions Addendum.

If Paragraph 4A(2)(b) applies, the contract is not subject to the lender’s approving the buyer’s financial condition, and the Third Party Financing Conditions Addendum should not be attached.

Click here to download the form.

Note: These changes were mandatory as of May 1, 2006.

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TREC FORMS

2005 New and Revised Contract Forms

Paragraph 6C was reformatted by moving the provision related to the existing survey to Paragraph 6C(1).

The revision also added a sentence in Paragraph 6C(1) that clarifies that if the seller fails to deliver the existing survey or an acceptable affidavit to the buyer and title company within the time required, the buyer may obtain a new survey no later than three days before the closing date at the seller’s expense.

If the seller delivers the existing survey and affidavit within the time required, but it is not acceptable to the title company or lender, the parties negotiate (by checking the appropriate box for which party pays for a new, acceptable survey).

Click here to download the form.

Note: These changes were mandatory as of May 1, 2006.
A title insurance company may accept an existing survey and not require a new one if the
title company is willing to accept

✓ evidence of an existing survey;
✓ an affidavit verifying the existing survey.

The affidavit verifying the existing survey is Form T-47, Residential Real Property Affidavit.
One may obtain a T-47 Affidavit Form from a title company or find it in most form-filling
software libraries.

Seller should be careful to agree to provide an existing survey only if they have the survey
readily available. If paragraph 6C(1) applies and the seller does not provide a survey, the
buyer may obtain one at the seller’s expense. A seller who cannot find the existing survey
might try to obtain another copy from the surveyor, the prior broker or the title company.

Click here to download the form.

Note: These changes were mandatory as of May 1, 2006.

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TREC FORMS
2005 New and Revised Contract Forms

The revisions added a sentence in Paragraph 6D that clarifies that if Paragraph 6C(2)
applies, the buyer is deemed to have received the survey on the date specified in Paragraph
6C(2) or the actual day he or she receives it, whichever date is earlier. This eliminates any
purposeful delay by the buyer in obtaining a survey for the purpose of tolling the objection
period under Paragraph 6D.

Two notices were added to Paragraph 6E. The notice under Paragraph 6E(6) is a statutorily
required notice that a seller of property located in a certificated service area of a utility
service provider must give to a buyer. The notice cautions the buyer that the property may
be located in such a district and that special costs to obtain service may apply. The notice
under Paragraph 6E(7) is a statutorily required notice that a seller of property in a public
improvement district (PID) must provide to a buyer. The notice cautions the buyer that a
PID may make special assessments against property in the PID.

Click here to download the form.

Note: These changes were mandatory as of May 1, 2006.

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TREC FORMS
2005 New and Revised Contract Forms
Paragraph 18 was reformatted to clarify obligations of the parties related to the earnest money and to provide for additional incentives for prompt release of the earnest money.

Paragraph 18C provides that upon termination of the contract, either party may send a release to the other party and the escrow agent and that the parties will execute the appropriate documents and return them to the escrow agent. If one party makes demand on the escrow agent for the return of the earnest money, the escrow agent should send the demand to the other party. If the other party does not object within 15 days (shortened from 30 days), the escrow agent may disburse the earnest money to the demanding party.

Paragraph 18D was added to provide that if a party wrongfully refuses or wrongfully fails to sign a release, the party entitled to the earnest money is entitled to liquidated damages of three times the amount of the earnest money.

A line for e-mail addresses was added under Paragraph 21.

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Note: These changes were mandatory as of May 1, 2006.

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Paragraph 23 was modified to provide that the option fee may be paid within two days after the effective date of the contract. If the buyer fails to timely pay the option fee, the buyer will not have an option under the contract. Consideration supporting the option is in two parts: the option fee and nominal consideration, receipt of which is acknowledged. The recitation of the nominal consideration is necessary to support the two-day delay in tendering the option fee.

A box was placed around the effective date to call more attention to the brokers to complete the effective date upon final acceptance of the contract.

The seller’s receipt of the option fee on the last page clarifies that the listing broker may acknowledge receipt of the option fee for a proper tendering of the option fee.

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Note: These changes were mandatory as of May 1, 2006.
TREC 40-2, Third Party Financing Condition Addendum

The addendum now contains a provision concerning availability of the described loan terms to the definition of financing approval. Specifically, financing approval is obtained when the terms of the described loan are available; and the lender determines that the buyer has met the lender’s financial requirements (creditworthiness, assets and income).

This clarifies that the buyer may terminate the contract under the addendum, within the time specified in the addendum, if the described loan terms are not available (for example, interest rate increase over the stated amount).

A note was added to the first paragraph to clarify that financing approval under the addendum does not include approval of the property.

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Note: These changes were mandatory as of May 1, 2006.

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TREC 36-4, Addendum for Property Subject to Mandatory Membership in an Owners’ Association

In Paragraph A, the requirement that the Subdivision Information not be more than three months old was deleted as such is not required by the statute. Old Paragraph A(3), which previously provided that the buyer does not require delivery of the Subdivision Information was deleted.

Paragraph B was modified to change the title to “Fees” rather than “Transfer Fees” and to provide that the buyer will pay a certain amount of any fees resulting from the transfer and the seller will pay the remainder. The revisions clarify that the fees at issue in the paragraph include any Owners’ Association fees resulting from the transfer, which may also include initiation or other fees.

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Note: These changes were mandatory as of May 1, 2006.

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TREC 37-2, Subdivision Information, Including Resale Certificate for Property Subject to Mandatory Membership in an Owners’ Association

This change added a line for an e-mail address for the managing agent of the subdivision.

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Note: These changes were mandatory as of May 1, 2006.

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TREC 39-6, Amendment

In Paragraph 6, struck the word “nonrefundable” before the word “Option.” Added a bold box around the execution date of the amendment to call the licensee’s attention to the need to complete the date.

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Note: These changes were mandatory as of May 1, 2006.

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Acknowledgments

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