

STORAGE NAME: h0339s1.brc

DATE: March 19, 1997

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
BUSINESS REGULATION AND CONSUMER AFFAIRS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 339

RELATING TO: Real Estate Transactions

SPONSOR(S): Committee on Real Property & Probate and Representatives Arnall and Posey

STATUTE(S) AFFECTED: Amending sections 475.01, 475.25, 475.5015, and 468.383, F.S., and creating sections 475.270, 475.272, 475.274, 475.276, 475.278, and 475.280, F.S.

COMPANION BILL(S): CS/SB 82 (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY & PROBATE YEAS 7 NAYS 0
- (2) BUSINESS REGULATION AND CONSUMER AFFAIRS
- (3)
- (4)
- (5)

I. SUMMARY:

CS/HB 339 amends Chapter 475, F.S., to create the "Brokerage Relationship Disclosure Act." This act provides the authorized relationships between real estate brokers and customers and the required disclosures for residential real estate transactions relative to each relationship. In general, agency disclosure is required at the first contact between a licensee and prospective buyer or seller of real property.

Proposed changes within this bill would clarify the duties of single agents and transaction brokers. Further, the bill abrogates dual agency as a form of representation and replaces it with transaction brokerage.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Chapter 475, F.S., provides regulation of real estate brokers, salespersons, and schools in this state.

In 1994, the Legislature amended Chapter 475, F.S., to authorize the transaction broker and disclosed dual agent forms of representation for real estate professionals, in addition to the traditional single agent relationship. Despite current disclosure requirements, considerable confusion remains on the part of licensees and consumers as to the scope and nature of the various types of agency.

During the 1996 interim, representatives of the Florida Association of Realtors, Florida Real Estate Commission, and the Department of Business & Professional Regulation met in the form of the Real Estate Agency Work Group to develop a solution to the problem of the appropriate relationships between real estate professionals and their customers. This bill reflects the proposal developed by the Real Estate Agency Work Group.

According to section 475.01, F.S.:

- ◆ A fiduciary is a broker in a relationship of trust and confidence between that broker as agent and the seller or buyer as principal. The duties of the broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure, and accounting and the duty to use skill, care, and diligence;
- ◆ A single agent is a broker who represents, as a fiduciary, either the buyer or seller but not both in the same transaction;
- ◆ A disclosed dual agent is a broker who works as an agent for both the buyer and seller. The broker must obtain the informed consent in writing of all parties to the transaction to be a disclosed dual agent. The disclosed dual agent has all the duties of a fiduciary except full disclosure between the buyer and seller.
- ◆ A transaction broker is a broker who facilitates a brokerage transaction between a buyer and a seller. The transaction broker does not affirmatively represent either the buyer or seller as an agent, and no fiduciary duties exist except for the duty of accounting and the duty to use skill, care, and diligence. However, the transaction broker must treat the buyer and seller with honesty and fairness and must disclose all known facts materially affecting the value of the property in residential transactions to both the buyer and seller. The broker's role as a transaction broker must be fully disclosed in writing to the buyer and seller.

Section 475.02, F.S., creates the Florida Real Estate Commission (FREC), within the Department of Business & Professional Regulation. Section 475.05, F.S., permits the FREC to enact rules and decide questions of practice arising in the proceedings before it. The FREC has had difficulty in adopting rules to reflect the intent of the statute regarding the obligations of the real estate professionals under the different forms of authorized relationships. See Rules 61J2-10.036 and 10.037, Florida Administrative Code.

Defining the disclosure requirements for real estate professionals has been an ongoing problem. The duties and obligations of real estate professionals are governed by the common law of agency, as well as by statutes and rules. In *Johnson v. Davis*, 480 So.2d 625 (Fla. 1985), the court held that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used. See *id.* at 629.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 339 creates the "Brokerage Relationship Disclosure Act" within Part I of Chapter 475, F.S. The bill provides legislative intent to abrogate disclosed dual agency as an authorized form of representation by a real estate licensee.

The bill provides definitions of terms, and modifies grounds for discipline by the Florida Real Estate Commission.

Finally, the bill provides for notice of nonrepresentation and for disclosure of authorized brokerage relationships and the corresponding duties of real estate licensees. Disclosure documents must be retained as brokerage business records.

See Section-By-Section Analysis for more specificity.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill provides FREC with rulemaking authority, however, FREC has rulemaking authority under the current law. New rules would be necessary to reflect the changes in law.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

There are new responsibilities for real estate brokers since dual agency is revoked and real estate agency relationships are redefined.

(3) any entitlement to a government service or benefit?

No.

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b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

FREC will incur minimal costs to adopt the rules required by the bill.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes; the bill removes the dual agency relationship for real estate transactions, and redefines other real estate agency relationships.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1.

Section 475.01(1), F.S., provides definitions. This section is amended as follows:

A definition of "customer" is added in paragraph (1)(d). Customer means a member of the public who is or may be a buyer or seller of real property and may or may not be represented by a real estate licensee in an authorized brokerage relationship.

A definition of "first contact" is added in paragraph (1)(g). First contact means at the commencement of the initial meeting of, or communication between a licensee and a seller or buyer; however, the term does not include: a bona fide open house or model home showing; unanticipated casual encounters between a licensee and a seller or buyer; responding to general factual questions; and situations in which a licensee's communications with a customer are limited to providing general factual information.

A definition of "principal" is added in paragraph (1)(l). A principal means the party with whom a real estate licensee has entered into a single agent relationship.

The definition of "transaction broker" was revised. A transaction broker means a broker who provides limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent.

The following terms and definitions were not changed: broker, broker salesperson, commission, department, salesperson, fiduciary, involuntarily inactive status, real property or real estate, single agent, and voluntarily inactive status.

The terms and definitions of disclosed dual agent, buyer, and seller are deleted from law.

Section 2.

Section 475.25(1)(h), F.S., is amended to change a reference.

Section 475.25(1), F.S., currently permits the commission to deny an application for licensure, registration, or permit, or renewal thereof; to place a licensee, registrant, or permittee on probation, to suspend a license, registration, or permit for a period not exceeding 10 years, to revoke a license, registration, or permit, to impose an administrative fine not to exceed \$1,000 for each count or separate offense, and to issue a reprimand, and any or all of the foregoing if the commission finds the licensee, registrant, permittee, or applicant has committed certain acts as provided by law. Paragraph (q) is amended to permit these same disciplinary measures for violations of any provision of section 475.276, or 475.278, F.S., relating to notice of nonrepresentation, and required disclosures, respectively.

Section 3.

Section 475.270, F.S., creates the "Brokerage Relationship Disclosure Act."

Section 475.272, F.S., provides that the purpose of this act is to eliminate confusion and provide for a better understanding on the part of customers in real estate transactions. This section expressly revokes disclosed dual agency in Florida, requires certain disclosures, and permits single agency or transactional brokerage as defined.

Section 475.274, F.S., provides the scope of coverage of this act.

Section 475.276, F.S., provides for notice of nonrepresentation.

Subsection (1)(a) of s. 475.276, F.S., provides that the real estate licensee disclosure requirements of this section and section 475.278, F.S., apply to all residential sales, i.e., improved residential property of four units or fewer, the sale of unimproved residential property intended for use of four units or less, or the sale of agricultural property of 10 acres or less.

Subsection (1)(b) of s. 475.276, F.S., provides that the disclosure requirements of this section and section 475.278, F.S., do not apply to nonresidential transactions, the rental or leasing of real property (unless an option to purchase property improved with four or less residential units is given), auctions, appraisals, and dispositions of any interest in business enterprises or business opportunities, except for property with four or less residential units.

Subsection (2) of s. 475.276, F.S., sets out the notice of nonrepresentation requirement at first contact.

Subsection (3) of s. 475.276, F.S., prescribes the contents and format of the notice of nonrepresentation.

Section 475.278, F.S., outlines the authorized brokerage relationships and accompanying disclosure requirements.

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Section 475.278(1), F.S., sets out the authorized brokerage relationships. A real estate licensee may enter into a brokerage relationship as either a single agent or as a transaction broker with potential buyers and sellers. The licensee may not, however, operate as a disclosed or nondisclosed dual agent. A licensee may change from one brokerage relationship to the other as long as the buyer or the seller, or both, gives consent as provided in the statute.

Subsection (2) of s. 475.278, F.S., is created to provide the duties and disclosure requirements of the transaction broker. A transaction broker provides a limited form of representation to a buyer, a seller, or both in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent. The duties of the real estate licensee in this limited form are specified in subparagraphs 1 through 7 of paragraph (a).

Section 475.278(2)(b), F.S., provides disclosure requirements and that the transaction broker must fully describe and disclose the broker's duties in writing. Paragraph (c) of this section specifies the contents of the disclosure.

Section 475.278(3), F.S., is created to provide the duties of the single agent and to provide for the single agent's disclosure requirements.

Section 475.278(3)(a), F.S., provides the single agent's duties in subparagraphs 1 through 8.

Section 475.278(3)(b), F.S., provides the single agent's disclosure requirements, which include the written disclosure of the transaction broker's duties. Subparagraph 2 of paragraph (b) provides the disclosure requirements when a broker is transitioning from a single agent to a transaction broker relationship.

Section 475.278(3)(c)1, F.S., provides the contents of disclosure notice by the single agent.

Section 475.278(3)(c)2, F.S., provides the contents of the disclosure notice required when a transition is occurring from a single agent to a transaction broker relationship.

Section 475.278(4), F.S., provides the duties a real estate licensee owes to an unrepresented customer.

Section 475.280, F.S., provides that the commission may adopt rules establishing disciplinary guidelines, notices of noncompliance, and citations for violations of sections 475.276 and 475.278, F.S.

Section 4.

Section 475.5015, F.S., is amended to require that disclosure documents required under sections 475.276 and 475.278, F.S., must be retained by the real estate licensee in all transactions that result in a written contract to purchase and sell real property.

Section 5.

Section 468.383(7), F.S., is amended to change a reference.

Section 6.

This act will take effect October 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

FREC will incur minimal costs to adopt the rules required by the bill.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

Nominal.

2. Direct Private Sector Benefits:

This bill is intended to avoid the current confusion regarding broker relationships and their appropriate duties and obligations. The bill should benefit both customers and real estate brokers.

3. Effects on Competition, Private Enterprise and Employment Markets:

See 2. above.

D. **FISCAL COMMENTS:**

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. **APPLICABILITY OF THE MANDATES PROVISION:**

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. **REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:**

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Section 475.278(1), F.S., as created in the bill, provides that a licensee may change from one brokerage relationship to the other so long as the "buyer or the seller, or both, gives consent as required by subparagraph (3)(c)2." Subparagraph (3)(c)2. provides for transition disclosure when a licensee changes from a single agent relationship to a transaction brokerage relationship. This does not appear to permit a transition from a seller broker to a buyer broker, or vice versa. However, the statute as drafted, leaves the broker with the option of obtaining the consent of either buyer or seller, or the broker may obtain the consent of both when he or she transitions from a single agent to a transaction broker, representing both parties to a transaction.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

CS/HB 339 corrects a technical error existing in the original bill on page 15, line 2. The bill provides, "7. Any additional duties that are mutually agreed to *by* a party," but should provide "*with* a party." This amendment was adopted in the Senate companion, and was adopted by the Committee on Real Property & Probate to be incorporated into the CS/HB 339.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Legislative Research Director:

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