

Legislative Analysis



REAL ESTATE BROKER RESPONSIBILITIES

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House Bill 4849 as passed by the House
Sponsor: Rep. Tonya Schuitmaker

House Bill 4850 as passed by the House
Sponsor: Rep. Kevin Green
Committee: Regulatory Reform

First Analysis (10-25-05)

BRIEF SUMMARY: The bills would amend Article 25 of the Occupational Code to require brokers in an exclusive agency relationship to undertake certain minimum services, and require disclosure of those responsibilities.

FISCAL IMPACT: The bills would have no fiscal impact on the state or local governmental units.

THE APPARENT PROBLEM:

Real estate licensees with an agency relationship to their client (either the seller or the buyer in a real estate transaction) have a fiduciary responsibility to that client. While this fiduciary responsibility is not explicitly defined in statute, it is generally understood under the common law of agency to mean a duty to act in the client's best interest at all times even if doing so conflicts with the agent's own interest, and includes the duties of loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting.

The responsibilities of the client and the agent are generally specified in a service provision agreement (an agreement between the broker and client that establishes an agency relationship through a listing agreement when selling real estate or a buyer agency agreement when buying real estate). While the types of services provided in a service provision agreement vary with needs of the client, a seller or buyer may enter into an exclusive agency relationship with an agent to provide the seller or buyer with full representation in a real estate transaction. Under these types of agreements, a seller or buyer is contractually committed to work with one real estate broker for a specified period of time and, in return, should receive the full menu of services provided by the broker, including marketing or locating real estate, presenting offers and counteroffers, negotiating, executing purchase agreements, and closing the transaction.

Earlier this year, the Michigan Association of Realtors undertook a review of the requirements of the Occupational Code (and related administrative rules) imposed on real estate licensees when providing services to a buyer or seller, and found that there were few specific requirements. This, the MAR concluded, presented serious problems as it related to consumer protection and the professionalism of the industry, as some

unscrupulous licensees offer to provide services under an exclusive agency agreement, but avoid specific fiduciary duties (and, perhaps, liability) and, at the same time, collect a full commission. To that end, legislation has been introduced that would real estate licensees provide certain services in certain situations.

THE CONTENT OF THE BILL:

The bills would amend Article 25 (Real Estate Brokers and Salespersons) of the Occupational code to require brokers in an exclusive agency relationship to undertake certain minimum services, and require disclosure of those responsibilities. The bills are tie-barred to each other.

House Bill 4849

The bill would specify that a licensed real estate broker who fails to provide certain minimum services under an exclusive service provision agreement would be subject to the code's penalties. Under the bill, a real estate broker acting under a service provision agreement creating an exclusive agency relationship would, at a minimum, be required to provide the following services to the client.

- Market the client's property in the manner agreed upon in the service provision agreement, when representing a seller or lessor;
- Acceptance of delivery and presentation of offers and counteroffers to buy, sell, or lease the client's property or the property the client seeks to purchase or lease;
- Assistance in developing, communicating, negotiating, and presenting offers, counteroffers, and related notices or documents until a purchase or lease agreement is executed by all parties and all contingencies are satisfied or waived;
- After execution of a purchase agreement, assistance as necessary to complete the transaction under the terms specified in the purchase agreement; and
- Furnishing, or causing to be furnished, a complete and detailed closing statement.

A licensee providing real estate services under an agreement allowed under law that is not a service provision agreement creating an exclusive agency relationship would not be considered in violation of the bill. A "service provision agreement" would mean an agreement between a broker and client that establishes an agency relationship through a listing agreement or a buyer agency agreement. (This is the same definition as provided in the Michigan Administrative Code.)

House Bill 4850

The bill would require the written agency disclosure statement that a real estate broker providing services under an exclusive service provision agreement must provide a client to include the services listed in HB 4849.

MCL 339.2512 (HB 4849) and 339.2517 (HB 4850)

BACKGROUND INFORMATION:

Michigan law requires real estate licensees who are acting as agents of sellers or buyers of real property to advise the potential sellers or buyers with whom they work of the nature of the agency relationship and contains a model of the disclosure form. Under a listing agreement, a seller's agent works solely on behalf of the seller. Similarly, under a buyer's agency agreement, a buyer's agent acts solely on behalf of the buyer. An agent of both the seller and the buyer, known as a "dual agent," may act only as such with the informed consent of both the buyer and the seller. Related to this, the code allows for "designated agency" relationships where, generally speaking, different agents from within the same firm separately represent the buyer and seller. This, too, is allowed only with the informed consent of both the buyer and the seller. (Otherwise, a client is considered to have an agency relationship with the firm and all its agents.) Finally, the code allows for a "transaction coordinator." In this relationship, a licensee merely acts as a middleman of sorts, rather than an agent of the buyer or seller, in completing a transaction. The transaction coordinator has no fiduciary responsibility to either the buyer or seller.

ARGUMENTS:

For:

For many individuals, buying or selling a home is the largest financial transaction they will make in their lifetimes. Additionally, the complex and infrequent nature of real estate transactions leaves many individuals particularly vulnerable to substandard or fraudulent business practices. As such, it is absolutely critical that they be protected from unscrupulous real estate brokers who offer to provide services under an exclusive agency relationship only to abscond from their fiduciary responsibilities as required under the law of agency. The financial costs of such malfeasance can potentially be ruinous.

To that end, the bill provides assurances that when a buyer or seller enters into an exclusive agency relationship with a realtor, he or she will receive the minimum level of services necessary to successfully complete the transaction. The list of services enumerated in the bill has, over time, become an assumed part of any exclusive agency agreement and, in this regard, the bill is not requiring services that are not already provided under such an agreement.

Additionally, by ensuring that certain services are provided, the bill protects the real estate profession from unseemly characters. The entire profession is highly regulated by the state and requires extensive licensing requirements. These regulations ensure that

agents can competently represent a client in a transaction. When a real estate agent offers to provide services, but does not do so, it is a mark against on the entire profession.

Against:

Some contend that the bills are anti-consumer and anti-competitive. In many instances, the bills will require real estate agents to provide unnecessary or unwanted services at an added cost to consumers. Many home buyers and sellers, particularly those in resort towns, are well-versed in the details of a real estate transaction, and do not require the full menu of services required under the bills under an exclusive agency relationship, and want only a limited number of services. Many sellers, for example, prefer to sell their home without the full assistance of a broker, but want their home listed in the local MLS, which is a clearinghouse of information on homes for sale in a particular market. To do this, they have to contract with a local real estate agent who offers to provide that service separately from other services, and which is typically offered at a lower price. However, many local MLS's require an exclusive agency relationship for a home to be listed on the MLS. The bills, however, would effectively require full representation, even when it is not necessary or wanted. This neutralizes any competition from discount or limited service brokers, severely limits consumer choice, and increases costs.

It should be further noted that the U.S. Department of Justice and the Federal Trade Commission have fought similar proposed "minimum service standards" in Oklahoma and Texas, finding that these proposals limit competition and consumer choice without actually protecting consumers.

Response:

House Bill 4849 specifically provides that providing services under an agreement that is not an exclusive agency agreement would not be considered to be a violation of Article 25. Moreover, rules and regulations for listing property on an MLS are determined separately by each local MLS, not by the state or the statewide Realtors association. To the extent that the bills restrict access to the MLS, that is ultimately a matter that should be addressed by the MLS itself.

POSITIONS:

The Michigan Association of Realtors supports the bills. (9-27-05)

Lake Michigan Realty (New Buffalo) testified in opposition to the bills. (9-27-05)

A representative of Help-U-Sell indicated opposition to the bills. (9-27-05)

The Michigan Campaign Finance Network provided a letter of opposition to the bill. (9-27-05)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.